

Business Court Advisory Committee

Meeting Agenda

Thursday, October 2, 2014

9:00 AM to 12:00 PM

State Courts Building * 1501 West Washington * Conference Room 345 * Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 8787

	Call to Order	
Item no. 1	Introductory comments	<i>Mr. Rosenbaum, Chair</i>
Item no. 2 Page 3	Approval of the August 29, 2014 meeting minutes	<i>Mr. Rosenbaum</i>
Item no. 3 Page 7	Review of documents that were revised after the August 29 meeting: proposed Rule 8.1, a civil cover sheet, and a proposed administrative order	<i>All</i>
Item no. 4 Page 39	Report by the workgroup on electronically stored information (“ESI”), and discussion of the workgroup’s proposed ESI protocol	<i>Mr. Rosenbaum All</i>
Item no. 5 Page 43	Update on a repository of commercial court decisions	<i>Mr. Rosenbaum</i>
Item no. 6 Page 47	Review and discussion of a draft report to the Arizona Judicial Council	<i>All</i>
Item no. 7	Roadmap	<i>Mr. Rosenbaum</i>
Item no. 8	Call to the Public	<i>Mr. Rosenbaum</i>
	Adjourn	

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.

Note: *The date of the next meeting is Thursday, November 13, 2014, from 9 a.m. until noon*

Business Court Advisory Committee
State Courts Building, Phoenix
Meeting Minutes: August 29, 2014

Members attending: David Rosenbaum (Chair), Michael Arkfeld, Ray Billotte, Judge Kyle Bryson, Glenn Hamer by his proxy John Ragan, William Klain, Mark Larson, Lisa Loo, Judge Scott Rash, Judge John Rea, Marcus Reinkensmeyer, Mark Rogers, Nicole Stanton, Stephen Tully

Absent: Andrew Federhar, Patricia Refo, Steven Weinberger, Judge Christopher Whitten

Staff: Mark Meltzer, Theresa Barrett, Sabrina Nash, Nick Olm

1. Call to Order. The Chair called the meeting to order at 9:00 a.m. and after preliminary remarks, he requested the members to review draft minutes of the July 11, 2014 meeting.

MOTION: A member moved to approve those minutes. The motion was followed by a second, and it was unanimously passed by the members. **BCAC: 2014-03**

2. Draft Rule 8.1. The Chair then directed the members to the draft of a proposed new rule of civil procedure for commercial cases, denominated as Rule 8.1. The draft rule includes a definition of a “commercial case,” sections describing cases that are eligible for a commercial court, and provisions for management of commercial cases. Staff prepared one version of the draft rule, and Mr. Arkfeld provided another version that contained alternative text primarily dealing with electronically stored information (“ESI”). The Chair invited Mr. Arkfeld to discuss his version.

Mr. Arkfeld first noted that his version would provide a lower threshold for the amount in controversy (\$25,000, versus staff’s proposed \$50,000), which Mr. Arkfeld believes would enhance access to the commercial court by small businesses. The Chair responded that \$50,000 harmonizes with the maximum amount for mandatory arbitration in Maricopa County, and other committee members expressed consensus that \$50,000 was the most appropriate figure.

Mr. Arkfeld continued by observing that ESI should be viewed as a method of enhancing case management rather than as a source of conflict between the parties, and that the focus of a case be on substantive rather than technology issues. He believes that an essential requirement of effective commercial case management is for parties to meet early to discuss ESI issues. He maintained that if attorneys lack the competence to deal with these issues (he added that many lawyers lack technological competence), they need to engage other individuals who are knowledgeable about information technology. His proposed version of Rule 8.1 contains provisions on technological competency modeled on rules adopted in New York and California. He proposed boards of discovery masters composed of IT experts rather than attorneys.

The Chair suggested that certain elements of Mr. Arkfeld’s version, including requirements for an early meet-and-confer and for disclosure of pertinent ESI, were

BCAC draft minutes
08.29.14

included in staff's version of Rule 8.1, and that these provisions would be adequate for the great majority of commercial cases; routine cases require nothing more. Members concurred with some of Mr. Arkfeld's ideas concerning disclosure and discovery of ESI, but they did not believe that pertinent details belong in the proposed rule. Instead, it might be useful if disclosure and discovery of ESI were governed by local protocols. A protocol could be modified as technology changes without the need for formal rule amendments. Other members made these comments:

- Ethical rules already require competency of counsel. Attorneys are not required to certify their skills in substantive areas of the law; why should they be required to certify their technology skills?
- Imposing a duty for technological competence might have undesirable consequences on sole practitioners as well as large firms. Solos may not have the resources to hire IT consultants for a business case. Large firms might feel the proposal requires that they engage an IT consultant in every business case, which would increase rather than mitigate the cost of litigation in commercial court.
- ESI is now discussed to a limited degree in Civil Rule 16(d).

The members proceeded to make substantive and grammatical edits to staff's draft of Rule 8.1. Substantive edits included the following:

- Rule 8.1(a): A sole proprietorship, as well as a political entity involved in a commercial transaction, are within the definition of a "business organization." A "business contract or transaction" includes materials, intellectual property, and funds, among other things. The committee confirmed its intent to exclude consumer transactions from this definition.
- Rule 8.1(b): "Receivership" is added in paragraph (1) following the word "dissolution." "Derivative action" includes an action brought by a "member" (of an LLC) as well as a "shareholder" (of a corporation.)
- Rule 8.1(c): Wording in paragraph (1) is rearranged to state that the case "arises from a contract or transaction governed by the U.C.C." The word "tortious" is added in paragraph (2).
- Rule 8.1(d): "Wrongful termination" is added to the list of ineligible cases.
- Rule 8.1(e): Paragraph (2) is rephrased to require a party to file a motion to transfer within 20 days after the filing of a response to a complaint; allowing a later motion filing could interfere with the meet-and-confer requirement. However, the rule has no time limit for a judge's sua sponte motion to transfer.

The members discussed whether section (c) concerning eligible cases is necessary in light of the definition of a commercial case in section (a). The consensus was that

section (a) indicates whether a case “might” go to the commercial court, but sections (b) and (c) add requisite details for determining if a case “will” go to that court.

3. Revisions to the civil cover sheet. The revised civil cover sheet would permit the court administrator to screen for commercial cases and to automatically assign those cases to a commercial court. The members discussed adding an “other” checkbox to the cover sheet, as well as a space for supporting reasons, for cases that might be appropriate for the commercial court in “other” ways (colloquially referred to as “businessy” cases), and which might avoid the need for a subsequent motion to transfer. The members agreed that those “other” cases would probably be a small percentage of the total, and that they should be transferred to the commercial court only by motion. A judge member added that a degree of laxity in the rule would facilitate the use of judicial discretion to admit appropriate cases. The members also made other changes to the draft cover sheet, including one that would allow a filer to check more than one box for applicable cases.

4. Draft administrative order. The members reviewed a draft Supreme Court administrative order that would authorize the Maricopa County Superior Court to implement a 3-year pilot commercial court. The order authorizing the complex civil litigation program served as the model for this draft, and the members requested to see the earlier complex court order at the next meeting for comparison purposes. Otherwise, the members had no revisions to the draft order. The draft order would require Maricopa County’s presiding judge to enter a companion order to actually establish the commercial court. The Supreme Court’s order would adopt Rule 8.1 as a rule applicable to the pilot. Maricopa’s order could adopt appropriate local processes, such as an ESI protocol. The proposed Supreme Court order would extend the term of this committee and its members for 3 years, which the members did not oppose.

5. Data. The members reviewed additional tables and charts concerning superior court civil filings for the purpose of estimating the volume of cases for a pilot commercial court. This data indicated that a large category of “miscellaneous” or “unclassified” civil cases for which detail was not previously available would produce only a few eligible cases for the pilot court. Mr. Reinkensmeyer noted that a decade ago, the complex civil litigation committee greatly overestimated the volume of complex litigation. He offered to provide an update of pertinent commercial case data at this committee’s next meeting. Another member commented that actual case volumes might require revisions to Rule 8.1 to increase or decrease the flow of cases into the pilot program. On a related subject, Judge Rea observed that assigning judges to a commercial court for more than 3 years could pose challenges to Maricopa’s system of judge rotation, but the court will accommodate these challenges for the pilot period. The Chair pointed out that the tax court judge has a 5-year assignment, and it might be less disruptive to the judges’ rotation if the tax court judge also served as one of the commercial court judges.

6. ESI. The members discussed ESI protocols from the Northern District of California and from the District of Maryland. The members favored those from the Northern District of California, including a checklist for use by the parties at their meet-and-confer session. The members agreed that this committee should prepare ESI protocols for the pilot, rather than requesting that Maricopa County develop them.

ACTION: Judge Rea, Mr. Arkfeld, and the Chair will meet as a workgroup before the next committee meeting to draft protocols, using the Northern District of California's protocols as a model.

While the members agreed that attorneys need to develop technological competence, they also agreed that judges have a similar need. Education of judges on this subject is essential. Judge Rea noted that Mr. Arkfeld will be doing a presentation on technology issues to Maricopa's civil bench later this year. The members should include a recommendation in their report for ongoing judicial education in this area. The report should also include a recommendation that the State Bar's ethics committee consider adding a comment (although not an amendment) to the ethical rules about attorneys having the requisite technological competence for their cases.

7. Repository of commercial court decisions. In preparation for today's meeting, the members reviewed several online repositories of commercial court decisions maintained by other jurisdictions. The members supported the development of a similar repository for Maricopa's commercial court decisions because it would enhance predictability in commercial cases. Ideally, decisions in the repository would be indexed and searchable, and judges might be able to prepare decision summaries or add keywords to assist users in this regard. Maricopa has a repository for lower court appeals, and Mr. Billotte thought it might be feasible, within budgetary constraints, to add a repository for commercial decisions. Another option is utilizing the State Bar's "Fastcase" service as a repository. Mr. Reinkensmeyer also will speak with Westlaw about posting the pilot program's decisions on its website. All options should be considered.

One issue related to the repository is whether judges would have discretion concerning which decisions would be posted. Another issue is the amount of time judges would require for preparing suitably written decisions in each case. A third issue is whether the posted decisions would be citable. A decision on a pending petition concerning Supreme Court Rule 111 may affect this third issue. The committee should follow up on these issues at a subsequent meeting.

8. Roadmap; call to the public; adjourn. The members agreed to the mornings of Thursday, October 2, and Thursday, November 13 for the next meetings.

The members noted the desirability of obtaining input from constituent groups (for example, the business section of the State Bar) before submission of the committee's report to the Arizona Judicial Council. The members might also solicit feedback by publicizing the work of this committee in the State Bar's e-Legal newsletter. The members should discuss these subjects further when the committee has an initial draft of its report.

There was no response to a call to the public. The meeting adjourned at noon.

Rule 8.1: Assignment and management of commercial cases [New]

(a) Application. This rule applies in any county that has established a specialized commercial court. The court administrator of that county will assign to its commercial court any “commercial case,” as defined in Rule 8.1(a)(1), if ~~a commercial case~~ it also meets the criteria of either Rule 8.1(b) or Rule 8.1(c).

1. A “commercial case” is one ~~where~~ in which either
 - A. At least one plaintiff and one defendant are “business organizations;” or
 - B. The primary issues of law and fact concern a “business organization” or a “business contract or transaction.”
2. A “business organization” includes a sole proprietorship, corporation, partnership, limited liability company, limited partnership, master limited partnership, professional association, joint venture, ~~or a business trust, or a political subdivision or government entity concerning a business contract or transaction,~~ and. A “business organization” excludes an individual, ~~a sole proprietorship~~, a family trust, or a political subdivision or a government entity other than concerning a business contract or transaction.
3. A “business contract or transaction” is one in which a business organization sold, purchased, licensed, ~~or transferred,~~ or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations. The term “business contract or transaction” excludes a “consumer contract or transaction.”
4. A “consumer contract or transaction” is one that is primarily for personal, family, or household purposes.

(b) Regardless of the amount in controversy, a commercial case will be assigned to the commercial court if the case:

1. Concerns the internal affairs, governance, dissolution, receivership, or liquidation of a business organization;
2. Arises out of obligations, liabilities, or indemnity claims between or among owners of the same business organization (including shareholders, members, and partners), or which concerns the liability or indemnity of individuals within a business organization (including officers, directors, and trustees);
3. Concerns the sale, merger, or dissolution of a business organization, or the sale of substantially all of the assets of a business organization;

4. Relates to trade secrets or misappropriation of intellectual property, or arises from an agreement not to solicit, ~~complete~~ compete, or disclose;
5. Is a shareholder or member derivative action;
6. Arises from a commercial real estate transaction;
7. Arises from a relationship between a franchisor and a franchisee;
8. Involves the purchase or sale of securities or allegations of securities fraud; or
9. Concerns a claim under state antitrust law.

(c) If the amount in controversy is at least \$50,000, a commercial case will be assigned to the commercial court if the case:

1. Arises from ~~a transaction governed by~~ a contract or transaction governed by the Uniform Commercial Code;
2. Arises out of tortious business activity, such as unfair competition, tortious interference, misrepresentation or fraud;
3. Involves the sale of services by, or to, a business organization;
4. Is a malpractice claim against a professional, other than a medical professional, that arises from services the professional provided to a business organization; or
5. Concerns a surety bond, or arises under any type of commercial insurance policy purchased by a business organization, including an action involving coverage, bad faith, or a third-party indemnity claim against an insurer.

(d) The following cases are not eligible for the commercial court, even if they meet all other criteria specified in Rule 8.1:

1. Eviction actions;
2. Eminent domain or condemnation actions;
3. Civil rights actions;

4. Motor vehicle torts and other tort claims involving physical injury to a plaintiff;
5. Administrative appeals;
6. Actions arising from domestic relations, a protective order, or a criminal matter, except a criminal contempt arising in a commercial court case;
7. Wrongful termination of employment; or
8. Any matter that a statute or other law requires another court or court division to hear.

(e) Miscellaneous provisions regarding assignment.

1. After assignment of a case to the commercial court by the court administrator, a commercial court judge, upon motion of a party or on the judge's own initiative, may determine whether assignment of that case to the commercial court is appropriate under Rules 8.1(a) through (c). Any party filing a motion under this rule must do so not later than 20 days after the defendant files ~~(i)~~ an answer to plaintiff's complaint, ~~or (ii)~~ a motion under Rule 12. If the judge determines that a case is not appropriate for the commercial court, that judge may reassign the case to a general civil court.
2. ~~On motion of a party or on~~ On the court's own initiative or on motion of a party filed within 20 days after a defendant files an answer to plaintiff's complaint or a motion under Rule 12, a judge of a general civil court may order transfer of a case to the commercial court if that judge determines that the matter meets the criteria of Rules 8.1(a) through 8.1(c).
3. Assignment of case to the commercial court does not impair the right of a party to request assignment of the case to a complex civil litigation program pursuant to Rule 8(i).

(f) Case Management. Rules 16(a) through 16(k) apply to cases in the commercial court, except:

9. Scheduling Conferences* under Rule 16(d) are mandatory.
10. The parties' Rule 16(b) Joint Report* must address the following additional items:
 - A. The parties must confer and attempt to reach agreement concerning the disclosure and production of electronically stored information ("ESI"), including (i) requirements and limitations on disclosure and production of ESI; (ii) the form or formats in which the ESI will be disclosed or produced; and (iii) sharing or shifting of costs incurred by the parties for disclosing and producing ESI. The joint report* must state the agreements

reached by the parties with regard to ESI, and those areas on which they were unable to agree.

- B. The joint report* must state whether the parties reached agreements pursuant to Rule 502 of the Rules of Evidence.
- C. The joint report* must state whether any party is requesting the court to enter a protective order pursuant to Rule 26(c), and if so, a brief statement concerning the need for a protective order.
- D. The joint report* must state whether there are any issues concerning claims of privilege or protection of trial preparation materials pursuant to Rule 26.1(f).

*Note to BCAC: Items marked with an asterisk will require preparation of a modified Form 12(a) for use in commercial cases.

(g) Motions. A judge of the commercial court with notice to the parties may modify the formal requirements of Rule 7.1(a) and may adopt a different practice for the efficient and prompt resolution of motions.

**Superior Court of Arizona
In Maricopa County**

Case Number _____

CIVIL COVER SHEET- NEW FILING ONLY
(Please Type or Print)

Plaintiff's Attorney:

Attorney's Bar
Number: _____

Plaintiff's Name(s): (List all)

Plaintiff's Address:

(List additional plaintiffs on page two and/or attach a separate sheet).

Defendant's Name(s): (List all.)

(List additional defendants on page two and/or attach a separate sheet).

EMERGENCY ORDER SOUGHT: (if applicable) Temporary Restraining Order Provisional Remedy
 OSC – Order to Show Cause Election Challenge
 Employer Sanction Other _____

~~RULE 8(i) COMPLEX LITIGATION DOES NOT APPLY. (Mark appropriate box under Nature of Action).~~

RULE 8(i) COMPLEX LITIGATION APPLIES Rule 8(i) of the Rules of Civil Procedure defines a "Complex Case" as civil actions that require continuous judicial management. A typical case involves a large number of witnesses, a substantial amount of documentary evidence, and a large number of separately represented parties. (Mark appropriate box on page two as to complexity, **in addition** to the Nature of Action case category).

RULE 8.1, COMMERCIAL COURT PILOT PROGRAM APPLIES. Mark appropriate box in the Nature of Action case category. In addition, complete the commercial court pilot program supplemental cover sheet.

NATURE OF ACTION

(Place an "X" next to the **one** case category that most accurately describes your primary case.)

100 TORT MOTOR VEHICLE:

- 101 Non-Death/Personal Injury
- 102 Property Damage
- 103 Wrongful Death

110 TORT NON-MOTOR VEHICLE:

- 111 Negligence
- 112 Product Liability – Asbestos
- 112 Product Liability – Tobacco
- 112 Product Liability – Toxic/Other
- 113 Intentional Tort
- 114 Property Damage
- 115 Legal Malpractice
- 115 Malpractice – Other professional
- 117 Premises Liability

- 118 Slander/Libel/Defamation
- 116 Other (Specify) _____

120 MEDICAL MALPRACTICE:

- 121 Physician M.D. 123 Hospital
- 122 Physician D.O. 124 Other

130 CONTRACTS:

- 131 Account (Open or Stated)
- 132 Promissory Note
- 133 Foreclosure
- 138 Buyer-Plaintiff
- 139 Fraud
- 134 Other Contract (i.e. Breach of Contract)
- 135 Excess Proceeds - Sale

Is Interpreter Needed? Yes No
If yes, what language: _____
To the best of my knowledge, all information is true and correct.

Attorney/Pro Per Signature (If no attorney, YOUR signature)

- Construction Defects (Residential/Commercial)
 - 136 Six to Nineteen Structures
 - 137 Twenty or More Structures

(All other tax matters must be filed in the AZ Tax Court)

Case No. _____

150-199 OTHER CIVIL CASE TYPES:

- 156 Eminent Domain/Condemnation
- 151 Eviction Actions (Forcible and Special Detainers)
- 152 Change of Name
- 153 Transcript of Judgment
- 154 Foreign Judgment
- 158 Quiet Title
- 160 Forfeiture
- 175 Election Challenge
- 179 Employer Sanction Action (A.R.S. §23-212)
- 180 Injunction against Workplace Harassment
- 181 Injunction against Harassment
- 182 Civil Penalty
- 186 Water Rights (Not General Stream Adjudication)
- 187 Real Property
- Sexually Violent Persons (A.R.S. §36-3704)
(Except Maricopa County)
- Minor Abortion (See Juvenile in Maricopa County)
- Special Action Against Lower Courts
(See lower court appeal cover sheet in Maricopa)
- 194-Immigration Enforcement Challenge
(§§1-501, 1-502, 11-1051)

- 155 Declaratory Judgment
- 157 Habeas Corpus
- 184 Landlord Tenant Dispute - Other
- 159 Restoration of Civil Rights (Federal)
- 159 Clearance of Records (A.R.S. §13-4051)
- 190 Declaration of Factual Innocence (A.R.S. §12-771)
- 191 Declaration of Factual Improper Party Status
- 193 Vulnerable Adult (A.R.S. §46-451)
- 165 Tribal Judgment
- 167 Structured Settlement (A.R.S. §12-2901)
- 169 Attorney Conservatorships (State Bar)
- 170 Unauthorized Practice of Law (State Bar)
- 171 Out-of-State Deposition for Foreign Jurisdiction
- 172 Secure Attendance of Prisoner
- 173 Assurance of Discontinuance
- 174 In-State Deposition for Foreign Jurisdiction
- 176 Eminent Domain—Light Rail Only
- 177 Interpleader— Automobile Only
- 178 Delayed Birth Certificate (A.R.S. §36-333.03)
- 183 Employment Dispute - Discrimination
- 185 Employment Dispute - Other
- 195(a) Amendment of Marriage License
- 195(b) Amendment of Birth Certificate
- 163 Other

150-199 UNCLASSIFIED CIVIL CASE TYPES:

- Notice of Appeal pursuant to A.R.S. § 12-904
(formerly “Administrative Review”)
(Use lower court appeal cover sheet in Maricopa)
- 150 Tax Appeal

(Specify)

COMPLEXITY OF THE CASE

If you marked the box on page one indicating that Complex Litigation applies, place an “X” in the box of no less than one of the following:

- Antitrust/Trade Regulation
- Construction Defect with many parties or structures
- Mass Tort
- Securities Litigation with many parties
- Environmental Toxic Tort with many parties
- Class Action Claims
- Insurance Coverage Claims arising from the above-listed case types
- A Complex Case as defined by Rule 8(i) ARCP

Additional Plaintiff(s)

Additional Defendant(s)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
)
AUTHORIZING A COMMERCIAL) Administrative Order
COURT PILOT PROGRAM IN THE) **No. 2014-____**
SUPERIOR COURT OF MARICOPA)
COUNTY)
_____)

On May 8, 2014, this Court entered Administrative Order 2014-48, which established the Business Court Advisory Committee. The Order required the committee to submit its recommendations to this Court and to the Arizona Judicial Council by December 11, 2014. The committee has now done so, and the committee’s recommendations have been adopted by the Arizona Judicial Council.

The committee’s report proposes the establishment of a pilot commercial court in the superior court of Maricopa County. The report suggests establishing this pilot court for three years to permit a reasonable period for its evaluation. The report recommends that at the end of three years, the Supreme Court determine the advisability of adopting a commercial court as a permanent feature of the superior court. The report proposes that an evaluation committee monitor the pilot during its three-year phase, and that the evaluation committee submit annual progress reports to the Arizona Judicial Council. The committee’s report also proposes new rules of civil procedure and forms, including a new form that parties would use to identify cases that are eligible for the pilot program.

Now, therefore, pursuant to Article VI, Section 3, of the Arizona Constitution.

IT IS ORDERED authorizing the superior court of Maricopa County to establish a pilot commercial court as follows:

1. **Pilot Court:** The pilot commercial court shall run for a period of three years, beginning July 1, 2015 and ending June 30, 2018.
2. **Rules of Procedure and Forms:** The Rules appearing in Appendix A attached hereto shall apply to cases in the pilot commercial court.

3. **Authority to Establish Additional Local Rules and Procedures:** In furtherance of the purpose and goals of the pilot commercial court, the presiding judge of the Superior Court in Maricopa County is authorized to establish additional rules and procedures for the pilot commercial court.

IT IS FURTHER ORDERED that the terms of the Business Court Advisory Committee and its members, who were appointed pursuant to Administrative Orders numbered 2014-47 and 2014-58, are extended until December 31, 2018. The Committee will only meet as its chair deems necessary or appropriate. On or before December 1 of calendar years 2016, 2017, and 2018, the committee shall submit a progress report to the Arizona Judicial Council that addresses the following:

- A. An analysis of any superior court data that was collected for the purpose of monitoring cases assigned to the pilot commercial court;
- B. Levels of user satisfaction with the pilot commercial court;
- C. Views of judges concerning the effectiveness and benefits of the pilot commercial court;
- D. Recommendations concerning new eligibility criteria for assignment of cases to a pilot commercial court, adoption of additional measurements to evaluate the performance of this pilot commercial court, and proposed changes to rules and forms; and
- E. Any other matter that the committee wishes to bring to the attention of the Arizona Judicial Council.

DATED this ____ day of December 2014

SCOTT BALES
CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
)
AUTHORIZING A COMPLEX) Administrative Order
CIVIL LITIGATION PILOT PROGRAM) **No. 2002-107**
APPLICABLE IN MARICOPA)
COUNTY)
_____)

On October 17, 2002, the Arizona Judicial Council unanimously approved the final report and recommendations of the Committee to Study Complex Litigation, created by Administrative Order No. 2001-122. That report recommends the establishment of a pilot program to experiment with a Complex Civil Litigation Court in the Superior Court in Maricopa County. It is anticipated that the program will accelerate the time-to-disposition of complex civil disputes, allow for the more effective utilization of court resources, and permit improvements to the processing of civil cases generally. The Honorable Colin F. Campbell, Presiding Judge of the Superior Court in Maricopa County, has indicated his readiness to implement the experimental program in the near future.

The report proposes several new or amended rules of civil procedure and a new form for use in identifying cases eligible for the program and to promote their effective management by the judiciary.

The report suggests the need for an evaluation committee to monitor the program in its pilot phase. The program should be permitted to run for a period of two years to permit a reasonable period of evaluation and adjustment, after which, the Supreme Court can then determine the advisability of adopting Complex Civil Litigation Court rules as part of the Arizona Rules of Court.

Now, therefore, pursuant to Article VI, Section 3, of the Arizona Constitution.

IT IS ORDERED authorizing the establishment of a Complex Litigation Program on an experimental basis in the Superior Court of Maricopa County as follows:

1. **EXPERIMENTAL PROGRAM:** The Superior Court in Maricopa County is designated a pilot site to experiment with a Complex Civil Litigation Court. The experiment shall run for a period not to exceed two years beginning January 1, 2003 and ending December 31, 2004.
2. **RULES OF PROCEDURE APPLICABLE UNDER THIS ORDER:** The Rules appearing in Appendix A attached hereto shall apply to cases in the Complex Civil Litigation Court pilot program.

3. **AUTHORITY TO ESTABLISH ADDITIONAL LOCAL RULES AND PROCEDURES:** In keeping with the purposes and goals of the pilot project and consistent with the requirements of Supreme Court Rule 124, the presiding judge of the Superior Court in Maricopa County is authorized to establish additional rules and procedures for the pilot program to implement electronic filing and management of court documents and other appropriate automated services designed to reduce costs and accelerate case processing times.

IT IS FURTHER ORDERED that the Committee to Study Complex Litigation established on December 20, 2001 by Administrative Order No. 2001-122 is disbanded effective upon entry date of this order.

IT IS FURTHER ORDERED that the Complex Civil Litigation Court Evaluation Committee is established as follows:

1. **PURPOSE:** With the assistance of the Presiding Judge of the Superior Court in Maricopa County, the Evaluation Committee shall:
 - monitor the pilot program,
 - evaluate and report on changes in civil case processing in Maricopa Superior Court attributable to the pilot program,
 - draft recommendations for modifications to applicable procedural rules, staffing and funding parameters as needed, and
 - draft recommendations for implementing the program in other counties and/or on a statewide basis, as the committee deems appropriate.
2. **ORGANIZATION:** The Chief Justice shall appoint the chairperson of the Committee and other members as needed to accomplish the Committee's purpose.
3. **MEMBERSHIP:** The membership of the Committee is attached to this order as Appendix B. The Chief Justice may appoint additional members as may be deemed necessary.
4. **MEETINGS:** Meetings shall be scheduled at the discretion of the Committee Chair. All meetings shall be noticed and open to the public.
5. **REPORTS:** The presiding judge of the Superior Court in Maricopa County and the Committee shall file a joint report on this pilot project to the Supreme Court at its conclusion.

DATED this 22 nd day of November 2002.

CHARLES E. JONES
CHIEF JUSTICE

[revised] Rule 8(h). Classification of Civil Actions

(1) Counsel for plaintiff or petition shall describe in the caption of each complaint or petition filed with the court the nature of the civil action or proceeding, as follows: Tort Motor Vehicle, Tort Non-Motor Vehicle, Contract, Domestic Relations, Eminent Domain or Non-classified Civil, Writ of Garnishment.

(2) Writs of garnishment shall include under the caption whichever of the following notations is applicable:

- (1)A. Federal Exemption.
- (2)B. Enforce order of support.
- (3)C. Enforce order of Bankruptcy Court
- (4)D. Enforce collection of taxes.
- (5)E. Non-earnings.

(3) In those counties in which a complex civil litigation program has been established, in addition to the description required by (1), the caption shall also identify the action as complex if the action meets the criteria listed in Rule 8(i).

[new] Rule 8(i) Complex Civil Litigation Program Designation

(1) **Definition.** In those counties in which a complex civil litigation program has been established, a “complex case” is a civil action that requires continuous judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote an effective decision making process by the court, the parties, and counsel.

(2) **Factors.** In deciding whether a civil action is a complex case under subdivision (a), the court shall consider the following factors:

- (A) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
- (B) Management of a large number of witnesses or a substantial amount of documentary evidence;
- (C) Management of a large number of separately represented parties;
- (D) Coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court;
- (E) Substantial post judgment judicial supervision;
- (F) The case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in a specific area of the law
- (G) Inherently complex legal issues;
- (H) Factors justifying the expeditious resolution of an otherwise complex dispute;
- (I) Any other factor which in the interests of justice warrants a complex designation or as otherwise required to serve the interests of justice.

(3) **Procedure for designating a complex case.** At the time of filing the initial complaint, a plaintiff may designate an action as a complex case by filing a motion and separate certification of complex case identifying the case attributes outlined in (2) justifying the designation. The certification shall be in a form approved by the Supreme Court and must be served on the defendant along with the motion at the time of service of the complaint. Plaintiff's certification, and any controverting certificate of a party represented by an attorney, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign the party's certification of complexity or controverting certification.

The signature of an attorney or party constitutes a certification by the signer that the signer has considered the applicability of Rule 8(i) of the Arizona Rules of Civil Procedure; that the signer has read the certificate of complexity or controverting certificate; that to the best of the signer's knowledge, information and belief, formed after reasonable inquiry, it is warranted; and that the allegation as to complexity is not set forth for any improper purpose. The provisions of Rule 11(a) of these Rules apply to every certification of complexity filed under this Rule.

(4) **Procedure for opposing designation.** If a plaintiff has certified a case complex and the court has not previously declared the action to be a complex case, and the defendant disagrees with the plaintiff's assertion as to complexity, the defendant shall file and serve no later than that party's first responsive pleading a response to plaintiff's motion and a controverting certification that specifies the particular reason for the defendant's disagreement with plaintiff's certificate.

(5) **Designation by defendant or joint designation.** A defendant may designate an action as a complex case if the plaintiff has not done so and if the court has not already made a ruling in this matter by filing a motion and the certification of complex case described in (3) at or before the time of filing defendant's first responsive pleading and serving them upon the plaintiff. The parties may join in designating an action as a complex case by filing a joint motion and certification of complex case with or before the filing of defendant's first responsive pleading.

(6) **Action by court.** The presiding judge of the court or designee shall decide, with or without a hearing, whether the action is a complex case within 30 days after the filing of the response to the designating party's motion. The court may decide on its own motion, or on a noticed motion by any party, that a civil action is a complex case or that an action previously declared to be a complex case is not a complex case. This ruling may be made at any time during the pendency of an action, for good cause shown. If the court finds that an attorney or party has made an allegation as to complexity which was not made in good faith, the court, upon motion or upon its own initiative, shall make such orders with regard to such conduct as are just, including, among others, any action authorized under Rule 11(a) of these Rules.

(7) **Not Appealable.** Parties shall not have the right to appeal the court's decision regarding the designation of an action as complex or noncomplex.

COMMENT

Proposed Rule 8(i) is intended to establish a process by which the parties can alert the court to the complex nature of their dispute. However, the determination that a case is, in fact, eligible for the complex litigation program is to be made by the presiding judge or designee. The parties are not to self-select in the absence of a determination by the court on good cause shown.

Proposed Rule 8(i) sets the standard for determining whether a case is eligible for participation in the complex case program. It also sets out a process for designating a case as complex and for contesting the designation. A ruling on whether a case is eligible for the complex case program is not appealable to promote early final resolution of the issue of eligibility for participation in the program. This is in keeping with one of the overall goals of the program: to achieve finality for complex cases in an expedited manner.

Rule 8(i) Program Designation Certification Form

IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF _____

_____ ,	)	Case No. _____
Plaintiff)	
	)	9 Certification of Complexity
vs.	)	9 Joint Certification of Complexity
	)	9 Controvening Certification
_____ ,)	
Defendant)	
_____)	

The (undersigned certifies) (parties certify) that this action is a complex case for the following reasons:

- 9 Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve.
- 9 Management of a large number of witnesses or a substantial amount of documentary evidence.
- 9 Management of a large number of separately represented parties;
- 9 Coordination with the following related actions pending in one or more courts in other counties, states or countries, or in a federal court: _____
- 9 Substantial post judgment judicial supervision
- 9 The case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in a specific area of the law.
- 9 Inherently complex legal issues.
- 9 Factors justifying the expeditious resolution of an otherwise complex dispute
- 9 The following other factor(s) warranting designation as a complex case, in the interest of justice:

The (undersigned certifies) (parties certify) that this action is not a complex case for the following reasons:

Dated this _____ day of _____, 200_.

(Attorney for) (Plaintiff) (Defendant)

(Attorney for) (Plaintiff) (Defendant)

[This Certification must be accompanied by a motion]

[new] Rule 16.3. Initial Case Management Conference in Cases Assigned to the Complex Civil Litigation Program

(a) **Subjects for Consideration.** Once a case is determined to be a complex civil case, an initial case management conference with all parties represented shall be conducted at the earliest practical date, and a Case Management Order issued by the court promptly thereafter. Among the subjects that should be considered at such a conference are:

- (1) Status of parties and pleadings
- (2) Determining whether severance, consolidation, or coordination with other actions is desirable
- (3) Scheduling motions to dismiss or other preliminary motions
- (4) Scheduling class certification motions, if applicable
- (5) Scheduling discovery proceedings, setting limits on discovery and determining whether to appoint a discovery master
- (6) Issuing protective orders
- (7) Appointing liaison counsel and admission of non-resident counsel
- (8) Scheduling settlement conferences
- (9) Notwithstanding Rule 26.1, the establishment and timing of disclosure requirements
- (10) Scheduling expert disclosures and whether sequencing of expert disclosures is warranted
- (11) Scheduling dispositive motions
- (12) Adopting a uniform numbering system for documents and establishing a document depository
- (13) Determining whether electronic service of discovery materials and pleadings is warranted
- (14) Organizing a master list of contact information for counsel
- (15) Determining whether expedited trial proceedings are desired or appropriate

- (16) Scheduling further conferences as necessary
- (17) Use of technology, videoconferencing and/or teleconferencing
- (18) Determination of whether the issues can be resolved by summary judgment, summary trial, trial to the court, jury trial, or some combination thereof
- (19) Such other matters as the court or the parties deem appropriate to manage or expedite the case

(b) Meeting of Parties Before Conference. Before the date set by the court for the initial case management conference, all parties who have appeared in the action, or their attorneys, shall meet and confer concerning the matters to be raised at the conference, shall attempt in good faith to reach agreement on as many case management issues as possible, and shall submit a joint report to the court no later than seven (7) days before the initial case management conference. A party who fails to participate in good faith shall be subject to sanctions.

(c) Purpose of Conference. The purpose of the initial case management conference is to identify the essential issues in the litigation and to avoid unnecessary, burdensome or duplicative discovery and other pretrial procedures in the course of preparing for trial of those issues.

(d) Establishing Time Limits. Time limits should be regularly used to expedite major phases of complex civil cases. Time limits should be established early, tailored to the circumstances of each case, firmly and fairly maintained, and accompanied by other methods of sound judicial management. The date of the final pre-trial conference shall be set by the court as early as possible with a trial date to follow within 60 days of the final pre-trial conference.

(e) Commencement of Discovery. Absent an order of the court, or by stipulation of the parties filed with the court, no party may initiate discovery or disclosure in a complex civil case until the court has issued a Case Management Order following the initial case management conference.

COMMENT

Justification for this rule: Rule 16.3 is intended to supplement the Arizona Rules of Civil Procedure in a manner that will provide judges and litigants with appropriate procedural mechanisms for the fair, efficient and expeditious management of discovery, disclosures, motions, service of documents and pleadings, communications between and among counsel and the court, trial, and other aspects of complex civil litigation. Other than as specifically set forth, cases assigned to the complex litigation program are not exempt from any normally applicable rule of procedure, except to the extent the trial

judge may order otherwise. Proposed Rule 16.3 should be available to any trial judge who wishes to follow it, in whole or in part, in managing a civil dispute, even in cases that are not formally assigned to a complex litigation program.

Case Management Resources. In considering procedures for management of a complex civil case, the court, in its discretion, may look for guidance to the Manual for Complex Litigation published by the Federal Judicial Center and to similar complex litigation manuals used by courts in other jurisdictions.

[new] Rule 39.1. Trial of Cases Assigned to the Complex Civil Litigation Program

The court should employ trial procedures as are deemed necessary or appropriate to facilitate a just, speedy and efficient resolution of the case, including, but not limited to, time limits and allocation of trial time, sequencing of evidence and arguments, bifurcation of issues or claims, advance scheduling of witnesses and other evidence, pre-trial admission of exhibits or other evidence, electronic presentation of evidence, jury selection and juror participation issues and other means of managing or expediting the trial of a complex case.

COMMENT

Justification for this rule: See 16.3.

Complex Civil Litigation Court Evaluation Committee

Membership List

Hon. Robert J. Corcoran
Arizona Supreme Court Justice, Retired

Rep. Henry Camarot, Esq.
Arizona House of Representatives

Hon. Margaret H. Downie
Superior Court Judge, Maricopa County

Andrew M. Federhar, Esq.
Fennemore Craig

Mark J. Larson, Esq., Chief Litigation Counsel
Honeywell Aerospace

William J. Maledon, Esq.
Osborn Maledon PA

Tracy Nuckolls, Esq., Vice President and General Counsel
TMC Healthcare

Marcus Reinkensmeyer, Chief Deputy Court Administrator
Superior Court in Maricopa County

**SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY**

IN RE THE MATTER OF THE)	
ESTABLISHMENT OF A PILOT	)	Administrative Order
PROGRAM FOR A COMPLEX	)	No. 2002-127
CIVIL LITIGATION COURT)	
<hr/>		

BACKGROUND INFORMATION:

On October 17, 2002, the Arizona Judicial Council unanimously approved the final report and recommendations of the Committee to Study Complex Litigation, created by Supreme Court Administrative Order No. 2001-122. That report recommends the establishment of a pilot program for a Complex Civil Litigation Court in the Superior Court in Maricopa County. It is anticipated that the program will accelerate the time-to-disposition of complex civil disputes, allow for more effective utilization of court resources, and permit improvements to civil case processing.

On November 22, 2002, the Arizona Supreme Court authorized the establishment of a Complex Civil Litigation Program on a pilot basis in the Superior Court in Maricopa County in Administrative Order No. 2002-107.

IT IS THEREFORE ORDERED establishing a Complex Civil Litigation Program in Superior Court in Maricopa County on a pilot basis to run for a period not to exceed two years beginning January 1, 2003 and ending December 31, 2004 as follows:

1. **AUTHORITY TO DESIGNATE CASE COMPLEX.** The Presiding Judge of Superior Court has authority to decide whether a case is complex and should be assigned to the Complex Civil Litigation Court. The Presiding Judge delegates that authority to the Presiding Judge of the Civil Department.
2. **GOVERNED BY THIS ADMINISTRATIVE ORDER.** Any civil case designated by the Civil Department Presiding Judge as a complex civil case and assigned to the Complex Civil Litigation Court shall be governed by this Administrative Order.
3. **RULES OF PROCEDURE APPLICABLE UNDER THIS ORDER.** The rules appearing in Appendix A attached hereto shall apply to cases in the Complex Civil Litigation Court program. (Exhibit A: Rule 8(h), Classification of Civil Actions; Rule 8(i), Complex Civil Litigation Program Designation and Certification Form; Rule 16.3, Initial Case Management

Conference in Cases Assigned to the Complex Civil Litigation Program; Rule 39.1, Trial of Cases Assigned to the Complex Civil Litigation Program.)

4. **JUDGES AUTHORIZED TO HEAR COMPLEX CIVIL LITIGATION COURT CASES.** The Presiding Judge will appoint a panel of judges, the “Complex Civil Litigation Panel,” for handling Complex Civil Litigation Court Cases.

❖ **Complex Civil Litigation Panel.** Judges Gaines, Albrecht and Fields are designated as Complex Civil Litigation Court Judges authorized to hear complex civil litigation cases. Cases assigned to them by the Presiding Judge of the Civil Department shall remain assigned to them for a period of five years unless the case is dismissed or terminated, and barring any unforeseen circumstances. The Presiding Judge of the Superior Court reserves the right to change judges authorized to hear complex civil litigation cases.

If a civil case is assigned to one of the Complex Civil Litigation Court Judges by the random case assignment process, and it is a Complex Civil Litigation Case, the parties must still follow the procedures in the rules by filing a motion and certificate to designate the case complex with the Presiding Judge of the Civil Department.

❖ **Full Civil Calendars.** The Complex Civil Litigation Court Judges will maintain a full civil calendar in addition to hearing Complex Civil Litigation Court Cases, although their caseload will be adjusted based on their case assignments.

❖ **Notices of Change of Judge.** If a party files a Notice of Change of Judge, the case will be reassigned to a judge designated as a Complex Civil Litigation Court Judge.

5. **COMPLEX CIVIL LITIGATION COURT CASE FEE.** The Clerk of the Superior Court, pending approval and authorization by the Maricopa County Board of Supervisors, shall charge each plaintiff and each defendant in a designated complex case¹, a complex case fee in the amount of \$500.00. After an action has been designated as a Complex Civil Litigation Court Case, the Clerk shall not file any paper or record, electronically or otherwise, for any proceeding under these rules until the required fees have been paid. The fees shall be subject to the provisions

¹ Plaintiffs that are husband/wife, parent corporation/subsidiary corporation, or are part of a certified class in a class action lawsuit shall not each be charged. They shall only be charged a one-time fee of \$500.00. For example: (Husband/wife shall be charged \$500.00; parent corporation/subsidiary corporation shall be charged \$500.00; Plaintiffs that are part of a certified class in a class action shall be charged a total of \$500.00)

relating to taxing of costs. The Complex Civil Litigation Court fee is in addition to the filing and response fees currently required to be charged by statute.

6. PROCEDURE TO DESIGNATE CASE COMPLEX.

A. **Procedures and Factors:** Rule 8(i) Complex Civil Litigation Program Designation attached as Exhibit A contains the procedures required to designate a case complex. Rule 8(i) also lists the factors in deciding whether a civil action is a complex case. In addition to these factors, the Presiding Judge of the Civil Department may consider factors including, without limitation, the following: 1) need for special judicial management from inception of the action; and, 2) timeliness of the motion or request with regard to potential for effective complex case management in the action.

B. **Complex Cases in Probate, Juvenile or Family Court.** If a Motion and Certificate to Designate a Case Complex is from a department other than the Civil Department, the Presiding Civil Judge shall consult with the Presiding Judge of the department from which the case originated before making a decision regarding whether the case is complex. The Court on its own Motion may also request that the case be designated complex by sending a motion to the Presiding Judge of the Civil Department.

C. **ORIGINAL FILED/COPIES TO:** The original Motion and Certificate to Designate the Case Complex shall be filed with the Clerk of the Superior Court with copies mailed or delivered to the following individuals:

- ❖ Presiding Judge of the Civil Department, currently Judge Margaret Downie;
- ❖ Presiding Judge of the Superior Court, currently Judge Colin Campbell;
- ❖ Judge assigned to the case at the time the Motion to Designate Case Complex is filed.
- ❖ Civil Court Administrator, currently Karen Westover.

D. Complex case designation may be granted or rescinded at any time by the Presiding Judge or that judge's designee.

7. STATISTICAL TRACKING. Civil Court Administration is responsible for tracking and monitoring the status of all complex litigation court cases.

8. ELECTRONIC FILING. The Superior Court is in the process of publishing a request for proposals to outside vendors to establish an electronic filing (e-filing) system for Complex Civil Litigation Court Cases. It is anticipated that this system will be implemented by spring of 2003. At that time, all complex civil litigation cases filed after that date will be required to be electronically filed. There will not be a paper file. Pending mandatory e-filing, judges designated as Complex Civil Litigation Court Judges may require: 1) the parties to submit the judges copy of papers by electronic mail; and, 2) submit the judge's copy of the briefs on CD ROM disks with hyper-links for access to cited articles and texts. Pending mandatory e-filing, originals of these documents are required to be filed with the Clerk of the Superior Court.

DATED: December 19th, 2002.

Colin Campbell
Presiding Judge, Superior Court

Original: Clerk of the Superior Court

Copies: Chief Justice Charles E. Jones
Vice-Chief Ruth V. Gregory
David K. Byers, Administrative Office of the Courts
Michael K. Jeanes, Clerk of the Superior Court
Hon. Margaret H. Downie
Hon. Kenneth Fields
Hon. Pendleton Gaines
J.W. Brown, Superior Court Communications Director

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	
)	
AUTHORIZING A COMPLEX	)	Administrative Order
CIVIL LITIGATION PILOT PROGRAM	)	No. 2002-_____
APPLICABLE IN MARICOPA)	
COUNTY)	
_____)	

On October 17, 2002, the Arizona Judicial Council unanimously approved the final report and recommendations of the Committee to Study Complex Litigation, created by Administrative Order No. 2001-122. That report recommends the establishment of a pilot program for a Complex Civil Litigation Court in the Superior Court in Maricopa County. It is anticipated that the program will accelerate the time-to-disposition of complex civil disputes and permit improvements to the processing of civil cases generally. The Honorable Colin F. Campbell, Presiding Judge of the Superior Court in Maricopa County, has indicated his readiness to implement the program in the near future.

The report proposes several new or amended rules of civil procedure and a new form for use in identifying cases eligible for the program and to promote their effective management by the judiciary.

The report suggests the need for an oversight committee to monitor the program in its pilot phase. The program should be permitted to run for a period of two years to permit a reasonable period of evaluation and adjustment, after which, the Supreme Court can then determine the appropriateness of making the program a permanent feature of civil litigation in Arizona's trial courts.

Now, therefore, pursuant to Article VI, Section 3, of the Arizona Constitution.

IT IS ORDERED authorizing the establishment of a Complex Litigation Program on an experimental basis in the Superior Court of Maricopa County as follows:

1. RULES OF PROCEDURE APPLICABLE UNDER THIS ORDER.

The Rules appearing in Exhibit A attached hereto shall apply to cases in the complex litigation pilot program.

2. REPORTS.

The presiding judge of the Superior Court in Maricopa County and the Complex Litigation Oversight Committee shall file a joint report on this pilot project to the Supreme Court at its conclusion.

DATED this _____ day of October, 2002.

CHARLES E. JONES
Chief Justice

[revised] Rule 8(h). Classification of Civil Actions

(1) Counsel for plaintiff or petition shall describe in the caption of each complaint or petition filed with the court the nature of the civil action or proceeding, as follows: Tort Motor Vehicle, Tort Non-Motor Vehicle, Contract, Domestic Relations, Eminent Domain or Non-classified Civil, Writ of Garnishment.

(2) Writs of garnishment shall include under the caption whichever of the following notations is applicable:

- (1)A. Federal Exemption.
- (2)B. Enforce order of support.
- (3)C. Enforce order of Bankruptcy Court
- (4)D. Enforce collection of taxes.
- (5)E. Non-earnings.

(3) In those counties in which a complex civil litigation program has been established, in addition to the description required by (1), the caption shall also identify the action as complex if the action meets the criteria listed in Rule 8(i).

[new] Rule 8(i) Complex Civil Litigation Program Designation

(1) **Definition.** In those counties in which a complex civil litigation program has been established, a “complex case” is a civil action that requires continuous judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote an effective decision making process by the court, the parties, and counsel.

(2) **Factors.** In deciding whether a civil action is a complex case under subdivision (a), the court shall consider the following factors:

- (A) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
- (B) Management of a large number of witnesses or a substantial amount of documentary evidence;
- (C) Management of a large number of separately represented parties;
- (D) Coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court;
- (E) Substantial post judgment judicial supervision;
- (F) The case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in a specific area of the law
- (G) Inherently complex legal issues;
- (H) Factors justifying the expeditious resolution of an otherwise complex dispute;

(I) Any other factor which in the interests of justice warrants a complex designation or as otherwise required to serve the interests of justice.

(3) **Procedure for designating a complex case.** At the time of filing the initial complaint, a plaintiff may designate an action as a complex case by filing a motion and separate certification of complex case identifying the case attributes outlined in (2) justifying the designation. The certification shall be in a form approved by the Supreme Court and must be served on the defendant along with the motion at the time of service of the complaint. Plaintiff's certification, and any controverting certificate of a party represented by an attorney, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign the party's certification of complexity or controverting certification.

The signature of an attorney or party constitutes a certification by the signer that the signer has considered the applicability of Rule 8(i) of the Arizona Rules of Civil Procedure; that the signer has read the certificate of complexity or controverting certificate; that to the best of the signer's knowledge, information and belief, formed after reasonable inquiry, it is warranted; and that the allegation as to complexity is not set forth for any improper purpose. The provisions of Rule 11(a) of these Rules apply to every certification of complexity filed under this Rule.

(4) **Procedure for opposing designation.** If a plaintiff has certified a case complex and the court has not previously declared the action to be a complex case, and the defendant disagrees with the plaintiff's assertion as to complexity, the defendant shall file and serve no later than that party's first responsive pleading a response to plaintiff's motion and a controverting certification that specifies the particular reason for the defendant's disagreement with plaintiff's certificate.

(5) **Designation by defendant or joint designation.** A defendant may designate an action as a complex case if the plaintiff has not done so and if the court has not already made a ruling in this matter by filing a motion and the certification of complex case described in (3) at or before the time of filing defendant's first responsive pleading and serving them upon the plaintiff. The parties may join in designating an action as a complex case by filing a joint motion and certification of complex case with or before the filing of defendant's first responsive pleading.

(6) **Action by court.** The presiding judge of the court or designee shall decide, with or without a hearing, whether the action is a complex case within 30 days after the filing of the response to the designating party's motion. The court may decide on its own motion, or on a noticed motion by any party, that a civil action is a complex case or that an action previously declared to be a complex case is not a complex case. This ruling may be made at any time during the pendency of an action, for good cause shown. If the court finds that an attorney or party has made an allegation as to complexity which was not made in good faith, the court, upon motion or upon its own initiative, shall make such orders with regard to such

conduct as are just, including, among others, any action authorized under Rule 11(a) of these Rules.

(7) **Not Appealable.** Parties shall not have the right to appeal the court's decision regarding the designation of an action as complex or noncomplex.

COMMENT

Proposed Rule 8(i) is intended to establish a process by which the parties can alert the court to the complex nature of their dispute. However, the determination that a case is, in fact, eligible for the complex litigation program is to be made by the presiding judge or designee. The parties are not to self-select in the absence of a determination by the court on good cause shown.

Proposed Rule 8(i) sets the standard for determining whether a case is eligible for participation in the complex case program. It also sets out a process for designating a case as complex and for contesting the designation. A ruling on whether a case is eligible for the complex case program is not appealable to promote early final resolution of the issue of eligibility for participation in the program. This is in keeping with one of the overall goals of the program: to achieve finality for complex cases in an expedited manner.

Rule 8(i) Program Designation Certification Form

IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF _____

_____ ,	)	Case No. _____
Plaintiff)	
vs.	) 9	Certification of Complexity
	) 9	Joint Certification of Complexity
	) 9	Controvening Certification
_____ ,)	
Defendant)	
_____)	

The (undersigned certifies) (parties certify) that this action is a complex case for the following reasons:

- 9 Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve.
- 9 Management of a large number of witnesses or a substantial amount of documentary evidence.
- 9 Management of a large number of separately represented parties;
- 9 Coordination with the following related actions pending in one or more courts in other counties, states or countries, or in a federal court: _____
- 9 Substantial post judgment judicial supervision
- 9 The case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in a specific area of the law.
- 9 Inherently complex legal issues.
- 9 Factors justifying the expeditious resolution of an otherwise complex dispute
- 9 The following other factor(s) warranting designation as a complex case, in the interest of justice:

The (undersigned certifies) (parties certify) that this action is not a complex case for the following reasons:

Dated this _____ day of _____, 200_.

(Attorney for) (Plaintiff) (Defendant)

(Attorney for) (Plaintiff) (Defendant)

[This Certification must be accompanied by a motion]

[new] Rule 16.3. Initial Case Management Conference in Cases Assigned to the Complex Civil Litigation Program

(a) **Subjects for Consideration.** Once a case is determined to be a complex civil case, an initial case management conference with all parties represented shall be conducted at the earliest practical date, and a Case Management Order issued by the court promptly thereafter. Among the subjects that should be considered at such a conference are:

- (1) Status of parties and pleadings
- (2) Determining whether severance, consolidation, or coordination with other actions is desirable
- (3) Scheduling motions to dismiss or other preliminary motions
- (4) Scheduling class certification motions, if applicable
- (5) Scheduling discovery proceedings, setting limits on discovery and determining whether to appoint a discovery master
- (6) Issuing protective orders
- (7) Appointing liaison counsel and admission of non-resident counsel
- (8) Scheduling settlement conferences
- (9) Notwithstanding Rule 26.1, the establishment and timing of disclosure requirements
- (10) Scheduling expert disclosures and whether sequencing of expert disclosures is warranted
- (11) Scheduling dispositive motions
- (12) Adopting a uniform numbering system for documents and establishing a document depository
- (13) Determining whether electronic service of discovery materials and pleadings is warranted
- (14) Organizing a master list of contact information for counsel

- (15) Determining whether expedited trial proceedings are desired or appropriate
- (16) Scheduling further conferences as necessary
- (17) Use of technology, videoconferencing and/or teleconferencing
- (18) Determination of whether the issues can be resolved by summary judgment, summary trial, trial to the court, jury trial, or some combination thereof
- (19) Such other matters as the court or the parties deem appropriate to manage or expedite the case

(b) Meeting of Parties Before Conference. Before the date set by the court for the initial case management conference, all parties who have appeared in the action, or their attorneys, shall meet and confer concerning the matters to be raised at the conference, shall attempt in good faith to reach agreement on as many case management issues as possible, and shall submit a joint report to the court no later than seven (7) days before the initial case management conference. A party who fails to participate in good faith shall be subject to sanctions.

(c) Purpose of Conference. The purpose of the initial case management conference is to identify the essential issues in the litigation and to avoid unnecessary, burdensome or duplicative discovery and other pretrial procedures in the course of preparing for trial of those issues.

(d) Establishing Time Limits. Time limits should be regularly used to expedite major phases of complex civil cases. Time limits should be established early, tailored to the circumstances of each case, firmly and fairly maintained, and accompanied by other methods of sound judicial management. The date of the final pre-trial conference shall be set by the court as early as possible with a trial date to follow within 60 days of the final pre-trial conference.

(e) Commencement of Discovery. Absent an order of the court, or by stipulation of the parties filed with the court, no party may initiate discovery or disclosure in a complex civil case until the court has issued a Case Management Order following the initial case management conference.

COMMENT

Justification for this rule: Rule 16.3 is intended to supplement the Arizona Rules of Civil Procedure in a manner that will provide

judges and litigants with appropriate procedural mechanisms for the fair, efficient and expeditious management of discovery, disclosures, motions, service of documents and pleadings, communications between and among counsel and the court, trial, and other aspects of complex civil litigation. Other than as specifically set forth, cases assigned to the complex litigation program are not exempt from any normally applicable rule of procedure, except to the extent the trial judge may order otherwise. Proposed Rule 16.3 should be available to any trial judge who wishes to follow it, in whole or in part, in managing a civil dispute, even in cases that are not formally assigned to a complex litigation program.

Case Management Resources. In considering procedures for management of a complex civil case, the court, in its discretion, may look for guidance to the Manual for Complex Litigation published by the Federal Judicial Center and to similar complex litigation manuals used by courts in other jurisdictions.

[new] Rule 39.1. Trial of Cases Assigned to the Complex Civil Litigation Program

The court should employ trial procedures as are deemed necessary or appropriate to facilitate a just, speedy and efficient resolution of the case, including, but not limited to, time limits and allocation of trial time, sequencing of evidence and arguments, bifurcation of issues or claims, advance scheduling of witnesses and other evidence, pre-trial admission of exhibits or other evidence, electronic presentation of evidence, jury selection and juror participation issues and other means of managing or expediting the trial of a complex case.

COMMENT

Justification for this rule: See 16.3.

**Superior Court in Maricopa County: Commercial Court
Checklist for Rule 16(b) Joint Report Discussions Regarding ESI**

The court requires the parties to have a meet-and-confer discussion concerning electronically stored information (“ESI”) at the earliest possible time in the litigation, and followed by ongoing discussions as necessary. The parties’ discussions should occur in the context of the claims and defenses in their particular case. The parties should use this checklist on some of the most common ESI topics to guide their conversations. The applicability of specific topics in this checklist, the sequence in which the parties discuss these topics, and whether the parties should defer discussion of certain topics, often depend on the nature and complexity of the litigation.

1. Liaison: (See the explanation that follows.)

The identification by each party of a person who is knowledgeable about a party’s IT system (also known as an “e-discovery liaison.”)

2. Location and Types of IT Systems:

- Description of systems that store potentially discoverable information
- Location of systems that store potentially discoverable information
- How those systems store potentially discoverable information
- How discoverable ESI can be collected from systems, and the media in which systems store ESI
- Identification of the systems from which the parties will prioritize discovery (e.g., email, finance, HR systems)

3. Preservation of ESI: (See the explanation that follows.)

- The ranges of creation dates, or receipt dates, for ESI that the parties will agree to preserve
- The names, general job titles, or descriptions of custodians for whom the parties will preserve ESI (e.g., “HR head,” “scientist,” “marketing manager,” etc.)
- A list of systems, if any, that contain ESI not associated with individual custodians, such as enterprise databases, that the parties will preserve
- The existence and status of any document destruction policies or activities, such as on-going erasures of e-mails, voicemails, and other electronically-recorded material
- A description of data from sources that are not reasonably accessible and that the parties will not produce or review for responsiveness, but which the parties will nonetheless preserve
- A description of data from sources that (a) a party believes could contain relevant information, but (b) has determined under the proportionality factors in Part 8 will not be preserved
- Any other issues related to the scope of preservation, or the manner of preservation, of ESI

4. Phased Discovery of ESI:

- Whether it is appropriate to conduct discovery of ESI in phases
- Sources of ESI most likely to contain discoverable information and, if there is phased production, that the parties will include in the first phase
- Custodians (by name or role) who are most likely to have discoverable information, and whose ESI will be included in the first phase of document discovery
- Sources of ESI that are less likely to contain discoverable information, and from which the parties will postpone or avoid discovery
- Custodians (by name or role) who are less likely to have discoverable information, and from

whom the parties will postpone or avoid discovery

The interaction between document requests under Rule 34, and the ESI methods or protocols of production agreed upon by the parties

5. Search for ESI:

The time period during which discoverable information was most likely created or received

The search protocols or methods, including specific words or phrases – or other methodology – that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery

Whether the parties should use Technology Assisted Review (“TAR”), such as predictive coding, to reduce the costs and time for filtering and reviewing ESI

The quality control method that the producing party will use to evaluate whether production is missing relevant ESI or contains substantial amounts of irrelevant ESI

6. Production of ESI:

The formats (for example, PDF-searchable, TIFF, native, Load Files, paper, or combinations of the foregoing) in which the parties will produce structured ESI (database, collaboration sites, etc.)

The formats (see the preceding checkbox) in which the parties will produce unstructured ESI (email, word processing, presentations, etc.)

The extent, if any, to which the parties will produce metadata, and if so, the fields of metadata the parties will produce

The production format(s) that will ensure that when ESI is produced, any of its inherent searchability is not degraded

Whether to engage in deduplication, denisting, or other filtering methods

7. Privilege Considerations: (See the explanation that follows.)

How the parties will handle the production of privileged or work product protected information

Whether the parties can agree upon alternative ways to identify documents that are withheld on grounds of privilege or work product, such as identification by category, to reduce the burdens of identification

Whether the parties will enter into a stipulation and order under Rule 502(d) of the Arizona Rules of Evidence that addresses inadvertent or agreed production, or whether a party will file a motion to address these issues

8. Proportionality and Costs under Rule 26(b)(1)(C):

The nature and the amount of the claims made by the parties

The nature and scope of burdens associated with proposed discovery and preservation of ESI

The importance of particular issues at stake in the litigation as they relate to ESI

The likely benefit of the proposed discovery

Limitations on the parties’ resources

Placing limits on the scope of preservation, or other cost-saving measures

Costs that the parties agree to share, or will shift, to reduce overall ESI discovery expenses, such as using a common electronic discovery vendor, a shared document repository, or other cost-saving measures

The Court's Explanations Regarding the Checklist

Generally: The court requires the parties to meet and confer about discovery of ESI at the earliest reasonable stage of litigation. Early discussion will assist the parties in efficiently requesting and responding to ESI discovery, it will reduce costs and delay, and it will assist the court in the event the parties are unable to resolve a dispute concerning ESI. ESI discovery as used in this checklist encompasses affirmative obligations of the parties to disclose ESI even in the absence of a specific discovery request.

Cooperation: The court requires the parties to cooperate on issues relating to the preservation, collection, search, review, and production of ESI. Conducting discovery in a cooperative manner is compatible with zealous representation. Note also that Rule 1 of the Rules of Civil Procedure requires construction of the rules "to secure the just, speedy, and inexpensive determination of every action." The court may impose sanctions for a failure to cooperate.

Liaison: In many cases, the parties' meet and confer sessions will be aided by the participation of e-discovery liaisons. Each party in those cases must designate an e-discovery liaison who is knowledgeable about, and responsible for discussing, ESI. The e-discovery liaison could be an attorney (either in-house or outside counsel), an employee of a party, or a third-party consultant. "Knowledgeable" means that this liaison will:

- (a) Be familiar with the technical aspects of e-discovery in the case, including electronic document storage, organization, retrieval technology, and search methodology;
- (b) Know about the location, nature, accessibility, and format of ESI in the case, and the collection, search for, and production of that ESI, or have access to others who know;
- (c) Be familiar with, or be able to learn about, the party's electronic systems and capabilities in order to explain those systems and to answer related questions;
- (d) Be familiar with the party's e-discovery requests;
- (e) Be prepared to participate in e-discovery dispute resolution in order to limit the need for court intervention.

Preservation: A party is not required to use a preservation letter to notify another party of the preservation obligation. However, if a party uses a preservation letter, the court discourages the use of overbroad letters. Instead, such a letter should provide as much detail as possible, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the sending party knows or believes are likely to contain relevant information, and any other information that might assist the receiving party in determining what information to preserve.

Privilege: When discussing privilege and work product, the parties should consider Rule 25.1(f)(2), which provides:

- (1) *Information Withheld.* When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of

the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

- (2) *Information Produced.* If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Proportionality: The proportionality standard in Rule 26(b)(1)(C) should provide direction to the parties in preparing their discovery plan, including the preservation, collection, search, review, and production of ESI. This Rule provides:

The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

Disputes: Before bringing a dispute concerning the preservation or discovery of ESI to the court, the parties and their liaisons should fully discuss the issue, and should consider bringing the issue to a special master or to an agreed-upon expert for resolution. If notwithstanding these efforts the parties are unable to resolve the dispute, they should present it to the court at the earliest possible opportunity

Superior Court of the State of Arizona

Maricopa County

)	
	)	Case Number: CV-20xx-xxxxxx
)	
Plaintiff(s),	)	[MODEL] STIPULATED ORDER RE:
	)	DISCOVERY OF ELECTRONICALLY
vs.	)	STORED INFORMATION FOR
	)	STANDARD LITIGATION
)	
)	
Defendant(s).)	
<hr style="border: 0.5px solid black;"/>		

1. PURPOSE

This Order will govern discovery of electronically stored information (“ESI”) in this case as a supplement to the Arizona Rules of Civil Procedure, this Court’s protocol for the Discovery of Electronically Stored Information, and any other applicable orders and rules.

2. COOPERATION

The parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with this Court’s protocol for the Discovery of ESI.

3. LIAISON

The parties have identified liaisons to each other who are and will be knowledgeable about and responsible for discussing their respective ESI. Each e-discovery liaison will be, or have access to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI in this matter. The parties will rely on the liaisons, as needed, to confer about ESI and to help resolve disputes without court intervention.

4. PRESERVATION

The parties have discussed their preservation obligations and needs and agree that preservation of potentially relevant ESI will be reasonable and proportionate. To reduce the

costs and burdens of preservation and to ensure proper ESI is preserved, the parties agree that:

- a) Only ESI created or received between _____ and _____ will be preserved;
- b) The parties have exchanged a list of the types of ESI they believe should be preserved and the custodians, or general job titles or descriptions of custodians, for whom they believe ESI should be preserved, e.g., “HR head,” “scientist,” and “marketing manager.” The parties shall add or remove custodians as reasonably necessary;
- c) The parties have agreed/will agree on the number of custodians per party for whom ESI will be preserved;
- d) These data sources are not reasonably accessible because of undue burden or cost pursuant to Ariz. R. Civ. P. 26(b)(2)(B) and ESI from these sources will be preserved but not searched, reviewed, or produced: [e.g., backup media of [named] system, systems no longer in use that cannot be accessed];
- e) Among the sources of data the parties agree are not reasonably accessible, the parties agree not to preserve the following: [e.g., backup media created before _____, digital voicemail, instant messaging, automatically saved versions of documents];
- f) In addition to the agreements above, the parties agree data from these sources (a) could contain relevant information but (b) under the proportionality factors, should not be preserved: _____.

5. SEARCH

The parties agree that in responding to an initial Ariz. R. Civ. P. 34 request, or earlier if appropriate, they will meet and confer about methods to search ESI in order to identify ESI that is subject to production in discovery and filter out ESI that is not subject to discovery.

6. PRODUCTION FORMATS

The parties agree to produce documents in PDF, TIFF, native and/or paper or a combination thereof (check all that apply)] file formats. If particular documents warrant a different format, the parties will cooperate to arrange for the mutually acceptable production of such documents. The parties agree not to degrade the searchability of documents as part of the document production process.

7. PHASING

When a party propounds discovery requests pursuant to Ariz. R. Civ. P. 34, the parties agree to phase the production of ESI and the initial production will be from the following sources and custodians: _____.

Following the initial production, the parties will continue to prioritize the order of subsequent productions.

8. DOCUMENTS PROTECTED FROM DISCOVERY

- a) Pursuant to Ariz. R. Evid. 502(d), the production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or protection from discovery in this case or in any other federal or state proceeding. For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case or in any other federal or state proceeding.
- b) The parties have agreed upon a “quick peek” process pursuant to Ariz. R. Civ. P. 26(b)(5) and reserve rights to assert privilege as follows _____
_____.
- c) Communications involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

9. MODIFICATION

This Stipulated Order may be modified by a Stipulated Order of the parties or by the Court for good cause shown.

IT IS SO STIPULATED, through Counsel of Record.

Dated: _____
Counsel for Plaintiff

Dated: _____
Counsel for Defendant

IT IS ORDERED that the forgoing Agreement is approved.

Dated: _____
Judge of the Superior Court

Add:

Cover page

List of members

Table of Contents

Executive Summary

The Supreme Court established the Business Court Advisory Committee (“BCAC”) on May 8, 2014 by the entry of Administrative Order number 2014-48. The Order directed the committee, after a period of study, to make recommendations on court rules, discovery (including electronic discovery), alternative dispute resolution, judicial staffing, resources, and other elements of a business court model and, if appropriate, to make recommendations for potential pilot projects to evaluate the efficacy of a business court model in the Superior Court of Arizona.

The Order required the committee to submit its recommendations by December 11, 2014. This is the committee’s report and recommendations.

The committee recommends:

1. Entry of a Supreme Court administrative order that would permit the Superior Court of Arizona in Maricopa County to establish a three-year pilot commercial court.
2. Adoption by the foregoing Supreme Court administrative order of a proposed Rule 8.1 of the Arizona Rules of Civil Procedure that would (a) define a “commercial case;” (b) specify the types of cases that would be assigned to the commercial court; and (c) provide procedures for judicial management of commercial cases.
3. Inclusion of a provision in the Supreme Court administrative order of a four-year extension of the term of the Business Court Advisory Committee and its members.
4. Entry of a corresponding administrative order by the Superior Court of Arizona in Maricopa County. This administrative order would actually establish the pilot commercial court, and assign judges to the pilot.
5. Adoption by the Maricopa County administrative order of a protocol concerning disclosure and discovery of electronically stored information in a commercial case, and modifying its civil cover sheet.
6. Creation of a repository of the decisions of the commercial court judges.

This report further explains these recommendations.

Background. Business courts were established in New York and Illinois in 1993. In the years to follow, North Carolina (1995), New Jersey (1996), Pennsylvania (2000), Massachusetts (2000), Nevada (2000), Rhode Island (2001), Maryland (2003), Florida (2004), Georgia (2005), Oregon (2006), Colorado (2006), South Carolina (2007), Maine (2008), New Hampshire (2008), Alabama (2009), Ohio (2009), and Delaware (2010) created similar courts, [*See*, John F. Coyle, “Business Courts and Interstate Competition,” 53 William and Mary Law Review, page 1915, 1918 (2012).] Some local jurisdictions also established commercial court dockets.

The Superior Court in Arizona has established several specialty courts in the twenty-first century. These include a drug court, a veterans courts, a mental health court, and a complex civil litigation court. However, and notwithstanding the complex civil litigation program, the Superior Court in Arizona lags other jurisdictions in the creation of a general business or commercial court. Pursuant to Administrative Order 2014-48, the BCAC recommends that Arizona now establish such a court.

The BCAC has eighteen members. The committee’s membership includes four judges of the Superior Court (two from Maricopa County and two from Pima County), four in-house counsel (including general counsel from Arizona State University), the court administrator for Maricopa County, the director of the Court Services Division of the Administrative Office of the Courts, the president of the Arizona Chamber of Commerce and Industry (who is also a member of the State Bar of Arizona), and seven attorneys in private practice. Five of those attorneys are members of large law firms, one is a member of a small firm, and one is a sole practitioner and a nationally recognized expert on law office technology. Three members of the BCAC were formerly members of the Complex Civil Litigation Court Evaluation Committee established by Supreme Court Administrative Order number 2002-107.

The BCAC met five times, typically for three hours, over the course of six months. In addition, it established three workgroups that studied specific issues related to business courts: case eligibility; rules, procedures, and forms; and judge assignment and rotation. Midway through its tenure the committee established a fourth workgroup to address issues involving electronically stored information. Each workgroup reported its conclusions to the full committee.

The BCAC considered a plethora of materials from a number of other jurisdictions that established commercial courts. These included materials from Delaware, Florida (Ninth and Eleventh Judicial Circuits), Georgia (Fulton County), Iowa, Maine, Maryland, Massachusetts (Suffolk County), Michigan (Wayne County), New York, North Carolina, Ohio, Oregon, Pennsylvania (Allegheny County and the Philadelphia Commerce Court), Rhode Island, South Carolina, and West Virginia. The BCAC also reviewed materials from several federal district courts.

Reasons for Arizona to establish a business court. During the committee’s initial meeting, members offered a variety of reasons why Arizona should have a business court. These reasons included the following:

- To make Arizona a more favorable forum for resolving business disputes
- To improve the business community's access to justice
- To expeditiously resolve business cases and reduce litigation costs
- To improve the quality of justice
- To gain the business community's support for the State of Arizona's dispute resolution system

The members shared expectations that a business court in Arizona could (a) process commercial cases efficiently, (b) help to reduce the cost of commercial litigation, and (c) provide businesses with access to judges who are knowledgeable about commercial transactions and business issues. There was unanimity among the committee members that the success of a business court is ultimately dependent first, on the quality of the judges who are assigned to the court, and second, on early and active judicial case management. Committee members agreed that Arizona's merit selection was already an attractive feature to the business community because it has generated confidence in judicial independence, especially compared to some other states. A business court populated with judges especially familiar with commercial disputes would further enhance confidence in Arizona courts as a venue for resolving business controversies.

Reasons why a pilot court should be established in Maricopa County. Although the BCAC believes that time will show the business court to be a valuable and effective component of the superior court, a "test" program could empirically demonstrate its usefulness and help identify improvements before the commercial court achieves a permanent or state-wide status. Therefore, the committee recommends establishing the commercial court as a pilot program, as was done in 2002 with the complex civil litigation court. The committee believes that three years is an appropriate length of time to determine if the pilot commercial court meets expectations.

The BCAC further concluded that Maricopa County is the most suitable venue for the pilot. The members reasoned that the pilot court must have a sufficient case volume to justify its existence. It also concluded that the bench in the county where the pilot is established must be large enough to accommodate the assignment of two or three judges to the program. Given these practical considerations, the BCAC recommends establishment of the pilot commercial court in Maricopa County, which has more civil filings and more judicial officers than any other county. In addition, Maricopa County serves as the location of the complex civil litigation court, and it has developed experience over the past decade with the operation of a specialty civil court.

The committee further recommends that the program commence on July 1, 2015. The BCAC believes this date would be appropriate for commencing a commercial court docket because it is when the annual judicial rotation occurs in the Maricopa County Superior Court, and a number of its judges will be assuming new calendars.

Selection of commercial cases. The BCAC reached consensus that a business court was not an appropriate forum to resolve consumer cases or individual tort cases brought against businesses. The court's expertise and focus should be on resolving intra- and inter-company

controversies, and it should not be viewed as a “pro-business” court. To reinforce that point and avoid misperceptions, the members decided to refer to the program as a “commercial court” rather than a “business court.” Several other jurisdictions, such as New York, have adopted a “commercial” court descriptor.

The BCAC concluded that some cases should be assigned to the commercial court regardless of the amount in controversy, such as disputes regarding corporate governance. For other categories of disputes, the BCAC concluded that a \$50,000 minimum amount in controversy was appropriate – the same amount as the arbitration limit in Maricopa County. A threshold higher than \$50,000 would exclude a number of otherwise eligible cases, and committee members did not want to deprive parties in those cases of the benefits of the commercial court. Cases under \$50,000 would proceed, like any other civil litigation, through mandatory arbitration under the supervision of a judge assigned to a general civil calendar. The members also agreed that there should be no monetary ceiling for commercial cases; however, an assignment to the commercial court would not preclude subsequent transfer of an eligible case to the complex civil litigation court.

The committee discussed these and other case scenarios at length. The committee’s conclusions were then codified in a proposed Rule 8.1. In summary, Rule 8.1 provides as follows:

- A plaintiff will self-identify a complaint as a “commercial case” on a revised civil cover sheet that plaintiff will file with the complaint. The court administration will assign cases that are identified in this manner to a commercial court.
- A “commercial case” is one in which either (a) at least one plaintiff and one defendant is a “business organization,” or (b) the primary issues of law and fact concern a business organization or a “business contract or transaction.” A “business organization” and a “business contract or transaction” are both further defined in the rule.
- The term “consumer contract or transaction” is also defined in the rule. The definition of “business contract or transaction” excludes a “consumer contract or transaction.”
- Certain types of commercial cases that plaintiffs will identify on the civil cover sheet are assigned to the commercial court regardless of the amount in controversy. These case types include those concerning the internal affairs or governance of a business organization, receiverships, and cases involving the sale or dissolution of a business organization, or the sale of substantially all of an organization’s assets. They also include shareholder derivative actions, commercial real estate transactions, and cases concerning franchise relationships, securities, or antitrust claims.
- Other types of “commercial cases” that plaintiffs identify on the civil cover sheet are assigned to the commercial court if the amount in controversy is at least \$50,000. These

cases include transactions governed by the Uniform Commercial Code, business torts, the sale of services by or to a business organization, and malpractice claims other than one against a medical professional.

- Proposed Rule 8.1 identifies certain case types that are not eligible for the commercial court. Examples are evictions, actions for wrongful termination, and condemnation proceedings.
- After assignment of a case to commercial court by the court administrator, the proposed rule allows a commercial court judge, upon motion of a party or on the judge's own initiative, to determine whether assignment of the case to the commercial court is appropriate under the factors enumerated in the proposed rule.

Management of commercial cases. Case management would be governed, in general, under Rules 16(a) through 16(k) of the Arizona Rules of Civil Procedure. But proposed Rule 8.1 adopts for commercial cases refinements that are designed to meet core objectives of the commercial court. It does this in two specific ways.

First, proposed Rule 8.1 would make mandatory in-person or telephonic initial scheduling conferences under Rule 16(d). The committee feels strongly that early judicial management of commercial cases is essential to promote cost-effective and efficient processing of commercial disputes. An early conference will help identify factual and legal issues and focus the parties on discovery that is needed and proportionate to the issues and amount in controversy.

Second, to guide the parties and the court, proposed Rule 8.1 adds to the existing Rule 16 specific items that must be included in the parties' Rule 16(b) joint report. Those additional items include electronically stored information (see the next section of this report), agreements pursuant to Rule 502 of the Arizona Rules of Evidence, protective orders, and privilege claims.

Commercial court judges may wish to adopt an abbreviated type of motion practice, such as "letter motions," to manage commercial cases efficiently. However, there are a variety of motion practices, and the committee recognizes that each judge may want to use his or her preferred method rather than a uniform practice established by rule. Proposed Rule 8.1 therefore provides that a commercial court judge, with notice to the parties, may modify the formal requirements of Rule 7.1(a) and adopt a different practice to efficiently and promptly resolve motions.

Electronically stored information. BCAC members observed that potential burdens associated with preservation, collection, review and production of electronically stored information ("ESI"), in many cases, create costs disproportionate to the dollars and issues at stake,

especially in smaller business disputes. A \$50,000 UCC article 2 dispute should not generate \$75,000 in ESI discovery costs by each side. Early attention to ESI issues by the parties and the court will help produce an understanding of each side's obligations and establish expectations and guidelines.

To force these discussions early in the case proposed Rule 8.1 requires the parties to confer and attempt to reach agreements concerning ESI. To facilitate a productive discussion, the committee prepared a four-page conference protocol. The protocol, which was modeled on one issued by the United States District Court for the Northern District of California, includes a detailed, comprehensive two-page checklist, and a two-page explanation of specific features of the checklist. Because some attorneys may not be familiar with their clients' electronic document management systems, or with methods of collection and production, the checklist requires each party to designate an "e-discovery liaison" who is "knowledgeable" about the party's IT system. The draft protocol also includes a template for a court order concerning disclosure and discovery of ESI, which the court in most circumstances will enter upon stipulation of the parties.

The committee's believes that the proposed ESI protocol will benefit the parties, save them time and expense, and allow them to reach agreements on discovery issues without the need for judicial micromanagement of those issues. The committee recommends adoption of the protocol for the pilot program by entry of an administrative order by the Maricopa County Superior Court.

Repository of decisions. Appellate court opinions provide the community with some measure of certainty concerning applicable legal rules and principles. This helps guide the community in the day-to-day conduct of business, helps parties and their counsel better assess risks and likely outcomes when disputes arise and, consequently, also helps facilitate settlement. The BCAC believes that publication of trial court decisions issued by judges on the commercial court, while not controlling precedent, would serve a similar helpful role. Several jurisdictions with business courts post their commercial case decisions on-line to serve these purposes. (These jurisdictions include Maryland, Maine, Michigan, New Hampshire, New Jersey, New York, Philadelphia, and South Carolina.)

The committee recommends that the Arizona commercial court pilot program develop a similar repository of decisions. A BCAC member spoke with representatives of Westlaw and Fastcase. Both companies are interested in publishing the rulings and neither anticipates any obstacles. (Fastcase maintains a comprehensive legal research database that provides desktop, online access to a variety of authorities; the State Bar of Arizona provides Fastcase access at no cost to members of the bar.) The Maricopa County Superior Court may also be able to post commercial court decisions on a new page of its existing website.

Selection of commercial court judges. This report previously noted that there was unanimity among committee members that the success of a business court is ultimately dependent on the quality of judges who are assigned to the court. Without judges who have strong business law backgrounds and knowledge of commercial transactions, the pilot program would differ little

from a general civil calendar. Assignment of the right judges to the pilot program is crucial for its acceptance by the legal and business communities.

The committee also believes that long-term (and even permanent) assignment to the business court would improve its function. While not relevant to the pilot project, if a permanent commercial court is established the committee sees no reason why, in larger counties, the tradition of judicial rotation could not be broken, with new vacancies on the commercial court filled by the Governor for permanent assignment. Among other benefits, this procedure would help attract well-qualified commercial litigators who, at present, may be reluctant to seek appointment to the bench. At a minimum the committee believes that judges should sit on the commercial court for rotations of at least five years,

The committee is mindful that the creation of a pilot court creates challenges to judicial rotations in the Maricopa County Superior Court as that system now exists. The committee therefore suggests that it might be appropriate to assign a commercial docket to one of the complex civil litigation judges, who could manage it simultaneously with a complex case load. It might also be appropriate to assign one of the special assignment judges, or the tax court judge, to the commercial court, because one of those judges might have more flexibility in accommodating a commercial case calendar.

The committee also recommends that those judges assigned to the commercial court have the benefit of continuing education. Continuing education would ideally encompass not only commercial law, but it would also hone the judges' skills in technology and issues concerning electronically stored information. It is uncontroverted that attorneys with commercial practices should do likewise, with special emphasis on increasing competence concerning ever-evolving technology.

Extend the term of the committee. By virtue of Administrative Order number 2014-48, the terms of the members of this committee expire on December 31, 2014. The members request that the Court extend their terms and the term of this committee until December 31, 2018.

A decade ago, the complex civil litigation committee overestimated the volume of complex litigation. To avoid a similar misstep, the members of the BCAC believe that it is desirable (a) that data collection be an ongoing element of the commercial court pilot program; and (b) that the BCAC monitor the data on an ongoing basis. (The BCAC reviewed a substantial amount of Maricopa and statewide data. However, because of the specific case type eligibility requirements of Rule 8.1, the committee was unable to estimate the volume of cases that might be assigned to the pilot commercial court.) Extending the term of the committee would allow it to propose modifications to rules, forms, or methods of data collection as may be necessary or appropriate during the three-year term of the pilot program. The members of this committee all expressed their willingness to serve during an extension of its term.

Conclusion. The recommendations in this report are the unanimous consensus of the committee members, and the committee urges the Supreme Court and the Arizona Judicial Council to adopt these recommendations.

The committee members also expresses deep gratitude to the Chief Justice for the extraordinary opportunity to serve on this committee and to further the vision of the Strategic Agenda of Advancing Justice Together.

Appendices

1. Proposed Rule 8.1, Arizona Rules of Civil Procedure
2. Proposed ESI protocol
3. Proposed Supreme Court Administrative Order
4. Proposed modifications to Maricopa civil cover sheet
5. Proposed modifications to joint report
6. Resources consulted by the BCAC