

**Business Court Advisory Committee**

**State Courts Building, Phoenix**

**Meeting Minutes: October 2, 2014**

**Members attending:** David Rosenbaum (Chair), Michael Arkfeld, Ray Billotte by his proxy Phil Knox, Andrew Federhar, William Klain, Mark Larson, Lisa Loo, Judge Scott Rash, Judge John Rea, Patricia Refo, Mark Rogers, Stephen Tully, Judge Christopher Whitten

**Absent:** Judge Kyle Bryson, Glenn Hamer, Nicole Stanton, Marcus Reinkensmeyer, Steven Weinberger

**Guests:** Peter Kiefer

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

**1. Call to Order.** The Chair called the meeting to order at 9:05 a.m. After introductions, he requested the members to review draft minutes of the August 29, 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: 2014-04**

**2. Revisions to draft Rule 8.1.** The Chair then directed the members to the most recent revisions to proposed Rule 8.1 of the Arizona Rules of Civil Procedure, which was first presented at the August 29 meeting. The members discussed and resolved the following issues concerning the most recent draft of this rule:

- (a) Section (d) concerns ineligible cases. If the complaint includes causes of action that are eligible for commercial court, does the presence of an ineligible cause of action under section (d) render the entire case ineligible? Judge Rea noted that when such an issue arises, the court may exercise discretion under section (e), and to emphasize this point, the members added a specific reference in section (d) to section (e). Another member suggested, and the members agreed, that the rule include a tangible standard for judges to consider when deciding this issue. Accordingly, the members added to the first sentence of section (d) the phrase, “unless other criteria specified in Rule 8.1(b) and (c) predominate the case.”
- (b) The members made other revisions to section (d), including deletion of paragraph (8), which made ineligible “any matter that a statute or other law requires another court or court division to hear.” The members concurred that this paragraph was jurisdictional in nature and was not the proper subject of a procedural rule. For the same reason, the members agreed that including a requirement in section (d) that parties exhaust administrative remedies was not appropriate.
- (c) The members made revisions to section (e) to conform it to recent revisions to other sections.

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- (d) The members also made organizational and stylistic revisions to section (f) regarding case management. One member indicated that a provision that required parties to consider cost-shifting at a conference regarding ESI (electronically stored information) was ill-conceived, because the generally accepted practice in Arizona now is for the producing party to pay those costs; the provision could create controversy when none currently exists. A member suggested adding the words “if appropriate” to the provision, and the members agreed that this would address their concerns about mentioning cost-shifting.

Staff suggested that the distinction between section (c) cases, where the amount in controversy was not an eligibility factor, and section (d) cases, which require a \$50,000 threshold, was immaterial. Staff reasoned that in Maricopa County, cases under \$50,000 proceed to mandatory arbitration; because they are diverted in this manner, it is self-evident those cases would not be eligible for the commercial court. One member expressed a concern that without this monetary distinction, appeals from arbitration awards could overwhelm the commercial court. Staff responded that section (d) could expressly state an exception for arbitration cases. Some members felt that the committee had previously decided this issue after substantial study, and the members should not revisit it. One member asked whether, after some experience with the pilot and an accumulation of data, the committee could recommend adjustments to Rule 8.1’s eligibility provisions. The members concluded that they could. The committee now can only speculate about the number of cases that might be assigned to the pilot court, and the committee will revisit the issue once the pilot is underway, if necessary.

A member questioned whether section (f) should make scheduling conferences mandatory. These conferences are time consuming (judges typically need to reserve a full 15 minutes for each conference, even if some conferences only take a few minutes), and if the parties have agreed on everything in the proposed scheduling order prior to a conference, the conference might not be meaningful. The Chair recalled that at prior committee meetings, the members had concurred that a mandatory conference was a key feature of the commercial court. A member observed that whether these conferences would consume a substantial amount of a judge’s available time would depend on the actual, and now unknown, volume of commercial cases. The most persuasive reason for making the conference mandatory was that if it was optional, it would probably be omitted in cases where there was a need for one. Moreover, judges should have early involvement in virtually every commercial case. The members’ consensus was to keep the requirement of a mandatory scheduling conference, but to reconsider this requirement based on the experience of the pilot program.

The members also discussed whether section (g), which allows a judge to modify the formal motion requirements of Rule 7.1(a), should also permit a judge to modify formal requirements for a Rule 56 motion. The members agreed that proposed section (g) should not allow judges to do that.

**3. Revisions to the civil cover sheet.** Today’s meeting materials included a revised civil cover sheet. (A civil cover sheet is required under existing Rule 8(h).) The cover sheet presented at the last meeting included a list of Rule 8.1 section numbers on the reverse side of the sheet that would require a plaintiff to indicate the basis of a case’s

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eligibility by checking corresponding boxes. Today's revision eliminated that series of checkboxes, and instead added a single check box on the front side of the cover sheet that states, "Rule 8.1 commercial court pilot program applies." This revision proposed that a plaintiff who checked that box also complete a supplemental cover sheet to specify the applicable eligibility factors. Members' responses to these proposed revisions included the following:

- Counterclaims may trigger commercial court eligibility, but they do not require a cover sheet; by what mechanism would a defendant/counterclaimant request assignment of a case to commercial court?
- If the primary purpose of the cover sheet is to collect relevant data, the BCAC should permit the court administrator to collect data as he determines is appropriate. The BCAC should not try to micromanage this process by a rule or a form.
- The parties should provide in their Rule 16(b) joint report the reasons that the case is eligible for the commercial court.
- A local rule could require the parties to complete a form with necessary data elements and file it with the clerk at the mandatory scheduling conference (with recognition that parties in cases that settle before the scheduling conference would provide no data.)
- A local law school may have interest in assisting the court in compiling data, especially if data compilation requires a review of documents rather than an automated process. A law school could use the data for a research study.
- The court's data collection functions are contingent on its case management system, which is currently being updated. Those functions transcend the scope of this committee, and the committee should defer to the court.

The Chair suggested that the committee go forward with the simpler cover sheet, and let the court determine how to capture detailed case data; the members agreed with his suggestion.

Mr. Klain raised a related issue. If a case is designated as a commercial case solely by a cover sheet that is filed but not served, how would a defendant be aware of the designation and know when to timely file an objection? He suggested adding the words "commercial court assignment requested" to the caption of the complaint, and the members supported this idea. Mr. Kiefer, who is Maricopa County's civil court administrator, said he presumed that a judge would designate a case as commercial by a minute entry, as is done with complex civil cases, and that neither a party nor the court administrator would determine the assignment of a case to the commercial court. This led to a series of comments, including whether a case should be presumptively assigned to the commercial court by the administrator unless and until it is declined by a judge; whether using a distinctive case number prefix could alert a defendant of a

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request for assignment to the commercial court; and whether a judge's determination of a case as commercial should be deferred as an issue to be addressed at the mandatory scheduling conference. Mr. Kiefer also informed the members that the court administrator assigns a judge to a specific case by a complex algorithm, and today's discussion might require either modifications to the algorithm, or creation of a process that requires the court administrator to assign a commercial case to a judge manually.

**Action:** With the concurrence of the members, the Chair directed committee staff to have further conversations with the court administrator on these issues, and to propose the best solutions at the next committee meeting.

**4. Revisions to the draft Administrative Order.** The members concurred with revisions that had been made to the draft Administrative Order after the August 29 meeting, with one exception: should the order add the judges who are assigned to the commercial court as members of this committee? The Chair believed that the Court has inherent authority to add members to the committee, but he agreed that the draft order should include express language to this effect.

**5. A proposed ESI protocol.** As noted in the minutes, the Chair established a workgroup at the August 29 meeting (composed of the Chair, Judge Rea, and Mr. Arkfeld) to develop an ESI protocol based on the one used in the Northern District of California. The workgroup thereafter developed, and presented at today's meeting, a proposal that includes a two-page ESI checklist. The intent of the checklist is to make the parties' preliminary meet-and-confer conference concerning ESI productive and comprehensive. The workgroup also presented a two-page explanation sheet that accompanies the checklist, and a proposed, three-page stipulated order regarding ESI.

The members began by discussing the proposed requirement of an ESI liaison. One member felt it was inefficient for the liaison to "be able to learn about" electronic systems after a conference, and suggested that a liaison should be knowledgeable beforehand. Another member responded that a liaison should not be expected to know everything about electronic systems at the initial conference, but should have an opportunity thereafter to acquire that knowledge. While this was the prevailing view, a member expressed concern about the need for a liaison in every commercial case, especially smaller cases. The members exchanged anecdotes about using or not using liaisons that both favored and opposed the liaison practice. The Chair noted that in a simple case, it might be practical if an attorney for a party, or a paralegal, served as a liaison. Another member questioned whether an attorney should be present during the liaisons' discussions; or, if one of the liaisons was an attorney and the other was not, whether this circumstance raised ethical considerations. Mr. Arkfeld observed that the parties should utilize the liaisons in whatever way is most effective, with or without the attorneys present, and in a manner in which the parties are comfortable. In some cases, use of a liaison may be inappropriate. But Mr. Arkfeld emphasized that in other cases, especially those where ESI becomes a procedural bottleneck, costs could be significantly reduced if each side utilized a liaison who understood the relevant nomenclature and technology.

The members agreed to these changes to the protocol documents:

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- In the stipulated order, removing that liaisons are mandatory, and making the parties' use of liaisons optional and only if appropriate.
- In the explanations, rather than saying a liaison might assist in "many" cases, changing it to "some" cases.
- In the checklist, requiring a liaison to be knowledgeable about "terminology" as well as systems; and adding the word "media" in the paragraph concerning "location and types of IT systems."

The members also agreed to add to section (f) of Rule 8.1 this phrase: whether in their joint report the parties would request the trial court to enter an ESI order.

**6. A repository of commercial court decisions.** The Chair informed members that following the August 29 meeting, Mr. Reinkensmeyer contacted Westlaw and Fastcase representatives concerning creation of a repository for the pilot commercial court's decisions, and was advised that both companies were interested in posting the rulings. The Westlaw representative was going to confer with senior management, and the Fastcase representative asked for data on the projected volume of court rulings. Neither representative anticipated any obstacles. The Chair expressed appreciation for Mr. Reinkensmeyer's inquiry, and he looks forward to a follow-up report from Mr. Reinkensmeyer at the next committee meeting.

**7. A draft report to the AJC.** In light of the amount of time the members spent on previous items on today's agenda, and the expectation that today's changes to Rule 8.1 and other proposed documents will require revisions to staff's draft report, the Chair deferred consideration of the committee's draft report to the Arizona Judicial Council ("AJC") until the next committee meeting.

**8. Roadmap; call to the public; adjourn.** The members have set their final 2014 meeting for Thursday, November 13. At that time, the members will review and finalize their report and supporting documents for the AJC's consideration. The Chair will present the committee's report to the AJC on December 11, 2014. The Chair added that he would also present on the status of this committee to the Business Law Section of the State Bar in late October, and he encouraged other committee members to conduct outreach to stakeholders regarding the work of this committee. Judge Rea and Mr. Klain agreed to make a presentation to the Committee on Superior Court, which is an AJC standing committee, when it meets on November 7, 2014.

There was no response to a call to the public. The meeting adjourned at 11:40 a.m.