

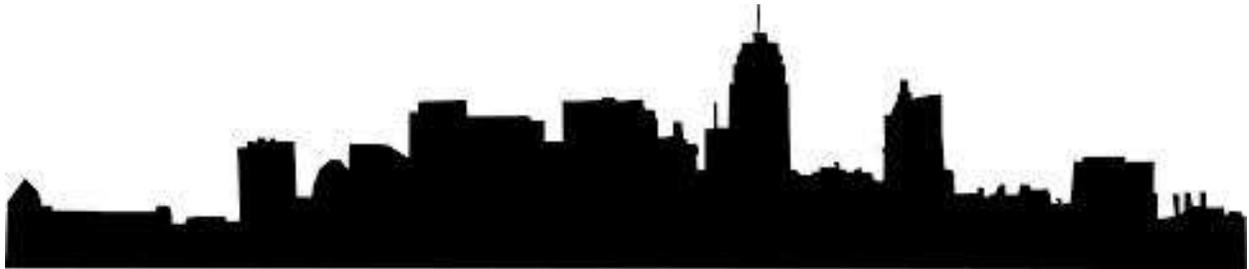
Business Court Advisory Committee

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Report to the Arizona Judicial Council



December 11, 2014



ADVANCING JUSTICE TOGETHER | 2014-2019

Business Court Advisory Committee

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2. *The Superior Court of Arizona in Maricopa County should enter a corresponding administrative order to actually establish the pilot commercial court.*
3. *The foregoing Supreme Court administrative order should adopt for the pilot commercial court a proposed experimental Rule 8.1 of the Arizona Rules of Civil Procedure, and two new forms in Rule 84.*
4. *The Superior Court of Maricopa County should (a) modify its civil cover sheet, and (b) adopt a proposed checklist and model order concerning disclosure and discovery of electronically stored information in a commercial case.*
5. *The commercial court should establish a repository of its decisions.*
6. *The Supreme Court should extend the term of the Business Court Advisory Committee and its members for four years.*

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Executive Summary and Recommendations

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 its 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. Entry of a corresponding administrative order by the Superior Court of Arizona in Maricopa County that would actually establish the pilot commercial court.
3. Adoption by the foregoing Supreme Court administrative order of amendments to the Arizona Rules of Civil Procedure. An experimental Rule 8.1 would define a “commercial case,” specify the types of cases that would be eligible for assignment to the commercial court, and provide procedures for judicial management of commercial cases. Amendments to Rule 84 would add Forms 14(a) and 14(b), a joint report and scheduling order for use in commercial cases.
4. Adoption by the Superior Court of Maricopa County of (a) modifications to its civil cover sheet; and (b) a checklist and model order concerning disclosure and discovery of electronically stored information in a commercial case.
5. Creation of a repository of the decisions of the commercial court judges.
6. 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, and adding as members 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 court, 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 a member from the office of general counsel for 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 members of the former Complex Civil Litigation Court Evaluation Committee that was established by Supreme Court Administrative Order number 2002-107.

The BCAC met five times, usually for three hours, over the course of six months. In addition, it established workgroups to study 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 materials from other jurisdictions that established commercial courts, including 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. Committee members noted a variety of reasons why Arizona should have a business court, including:

- 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 (1) process commercial cases efficiently, (2) help to reduce the cost of commercial litigation, and (3) provide businesses with access to judges who are knowledgeable about commercial transactions and business issues. There was unanimity among 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 system 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 the Superior Court of Arizona as a venue for resolving business controversies.

Reasons to establish a pilot court in Maricopa County. The BCAC believes that while a business court will prove to be a valuable and effective component of the superior court in the long-term, a "test" program could empirically demonstrate its usefulness in the immediate future, and help to identify improvements before the commercial court achieves a permanent or statewide 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 a 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 pilot court commence on July 1, 2015. The BCAC believes this date would be appropriate for commencing a commercial court because it is when the annual judicial rotation occurs in the Maricopa County Superior Court, and a number of Maricopa County 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 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 determination of which cases should be assigned to the pilot commercial court depends on multiple factors, and the BCAC discussed case scenarios at length.

The BCAC concluded that some cases are inherently "commercial" and belong in the commercial court, regardless of the amount in controversy. An example is litigation concerning corporate governance. For cases that are not inherently business in nature, the BCAC discussed monetary floors and ceilings as eligibility factors. The members decided that the floor for eligible cases should be the superior court arbitration limit in Maricopa County, which currently is set at \$50,000. A threshold higher than \$50,000 would exclude a number of otherwise suitable 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

should not preclude subsequent transfer of an eligible case to the complex civil litigation court.

The committee's conclusions were codified in an experimental Rule 8.1 (see Appendix 2). In summary, Rule 8.1 provides as follows:

- To request assignment of a case to the commercial court, a plaintiff must include in the caption of the initial complaint the words "commercial court assignment requested." The plaintiff must also complete a cover sheet, as modified, that indicates the action is an eligible commercial case. (See Appendix 6.) The court administrator will review cover sheets and complaints that are identified in this manner and, if appropriate, will then refer the case to a commercial court judge. The judge has discretion to enter an order assigning, or declining to assign, a referred case to the commercial court.
- A "commercial case" is one 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." 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" are eligible for assignment 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" are eligible for assignment to the commercial court if the amount in controversy is at least \$50,000. These cases include transactions governed by the Uniform Commercial Code, tortious business activity, 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, wrongful termination claims, and condemnation proceedings.
- After assignment of a case to the commercial court, proposed Rule 8.1 allows a commercial court judge, upon motion of a party or on the judge's own initiative, to reconsider whether assignment of the case to the commercial court is appropriate under the factors enumerated in the proposed rule. Another provision allows a judge on a general civil calendar, on the judge's initiative or on a party's motion, to order transfer of a case to the commercial court.

Management of commercial cases. Case management would be generally governed under existing Rules 16(a) through 16(k) of the Arizona Rules of Civil Procedure. But proposed Rule 8.1 adopts for commercial cases two specific refinements that are specifically designed to meet the commercial court's core objectives.

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 to the amount in controversy.

Second, to guide the parties and to assist the court, proposed Rule 8.1 adds several other items to the current Rule 16 list that the parties must include in their joint report to the court. 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. The committee prepared modified forms for a joint report and a proposed scheduling order that incorporate these additions. (See Appendix 3.)

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 that are 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 parameters.

Proposed Rule 8.1 requires the parties early in the case to confer and attempt to reach agreements concerning ESI. To facilitate productive discussions, the committee prepared a detailed and comprehensive two-page checklist. (See Appendix 4.) The checklist was modeled on one used by the United States District Court for the Northern District of California, and includes 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 of electronically stored information, the checklist provides an option for each party to designate an “e-discovery liaison” who is “knowledgeable” about the party’s IT system. The protocol also includes a model court order concerning disclosure and discovery of ESI, which the court in most circumstances will enter upon stipulation of the parties. (See Appendix 5.)

The committee 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 that the Maricopa County Superior Court adopt the protocol (Appendices 4 and 5) for the pilot program.

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 similarly 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. One BCAC member spoke with representatives of Westlaw and Fastcase. (Fastcase maintains a comprehensive research database that provides desktop, online access to a variety of case law and other legal authorities; the State Bar of Arizona provides Fastcase access at no cost to members of the Bar.) Westlaw and Fastcase both are interested in publishing the Maricopa County rulings, and neither anticipates any obstacles in doing so. The Maricopa County Superior Court also might 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 might be little different than 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) judicial assignments 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, as set forth in a draft administrative order. (See Appendix 1.)

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 (1) that data collection be an ongoing element of the commercial court pilot program; and (2) 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 proposed Rule 8.1, the committee was unable to accurately estimate the volume of cases that might be assigned to the pilot commercial court.) An extension of its term would allow the committee to monitor data, and also would provide the committee an opportunity to propose modifications to rules or 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 expressed their willingness to serve during an extension of its term. The committee further recommends that the Court appoint to the BCAC the judges who are assigned to the pilot commercial court program.

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 express their deep gratitude to the Chief Justice for the extraordinary opportunity to serve on this committee, and to further the Strategic Agenda's vision of Advancing Justice Together.

Appendices

1. Proposed Supreme Court Administrative Order
2. Proposed experimental Rule 8.1, Arizona Rules of Civil Procedure
3. Proposed forms: joint report and proposed scheduling order
4. Proposed ESI checklist
5. Proposed model order regarding ESI
6. Proposed modifications to Maricopa's civil cover sheet