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# COMMERCIAL COURT REVIEW COMMITTEE

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## REPORT TO THE ARIZONA JUDICIAL COUNCIL



June 18, 2018



ADVANCING JUSTICE TOGETHER | 2014-2019

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# Members of the Committee

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# THE COMMERCIAL COURT PILOT PROGRAM IN MARICOPA COUNTY

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## Executive Summary.

[Supreme Court Administrative Order No. 2018-17](#) established the Commercial Court Review Committee (“the Committee”) and requested its recommendations concerning a pilot commercial court program in the Superior Court in Maricopa County. Committee members met and discussed the items identified in the Order, and obtained input from the Honorable Janet Barton, Presiding Judge of the Superior Court in Maricopa County, from two of the four commercial court judges, and from Paula Hannaford, Esq., at the National Center for State Courts. Judge Barton has overseen the pilot commercial court since its inception in 2015. The two commercial court judges, Judge Dawn Bergin and Judge Roger Brodman, have served on the commercial court since its establishment. Ms. Hannaford assisted with litigant focus groups and data reviews that were described in the 2016 and 2017 commercial court progress reports to the Arizona Judicial Council.

Two factors predominate and inform the recommendations in the Committee’s report.

First, attorneys who have cases in the program overwhelmingly support it. Moreover, the commercial court judges support the program and favor its retention.

Second, commercial cases generally require more of a judge’s time than other civil cases, especially at the cases’ front-end. This circumstance necessitated resource adjustments during the pilot program, and going forward, the program would benefit from further adjustments shown in the proposed amendments to Rule 8.1 and discussed elsewhere in this report.

## Recommendations

The Committee makes the following seven recommendations.

- **To the Supreme Court:**

- (1) Experimental Rule 8.1, with certain revisions suggested by the Committee, should become a permanent rule within the Arizona Rules of Civil

Procedure, and the commercial court should become a permanent feature of the Superior Court in Arizona.

- (2) Although the Committee does not recommend expansion of Maricopa's commercial court to the other 14 counties at this time, the Court by an amendment to Rule 8.1 should permit any judge to use the case management principles in Rule 8.1(e) for appropriate commercial cases.
- (3) The Committee's report should satisfy the provision in Administrative Order No. 2015-15 that requires a December 2018 progress report to the Arizona Judicial Council concerning the pilot commercial court.
  - **To the Arizona Judicial Council:**
    - (4) The Arizona Judicial Council should authorize the Committee to file a rule petition seeking permanent adoption of Rule 8.1, with amendments.
  - **To the Superior Court in Maricopa County:**
    - (5) The Superior Court should consider a new fee for commercial cases that would generate revenue for one or more staff attorneys to assist the commercial court judges.
    - (6) The Superior Court should adopt a policy of assigning judges to the commercial court in a manner designed to maintain a small group of judges with terms that last longer than the typical three-year rotation employed in recent years for most other assignments.
  - **To the Supreme Court and the Superior Court in Maricopa County:**
    - (7) The Supreme Court should extend the application of Rule 8.1 until it becomes permanently adopted under the process established by Supreme Court Rule 28; and the Supreme Court and the Superior Court should permanently extend the commercial court beyond the termination dates specified in Supreme Court Administrative Order No. 2015-15 and Superior Court Administrative Order No. 2015-055.

The following pages provide the Committee's reasons for each of these recommendations. But first is a brief history of the commercial court and a summary of commercial court data.

## Brief History.

(a) **A.O. 2015-15:** The Arizona Supreme Court established a Business Court Advisory Committee in 2014. In December 2014, that committee reported to the Arizona Judicial Council 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.

The Arizona Judicial Council approved the recommendations of that committee, which included the establishment of a pilot commercial court in the Superior Court in Maricopa County, and the adoption of an experimental Civil Rule 8.1 governing procedures in the pilot court, as well as two Rule 84 forms, Forms 14(a) and 14(b). The pilot commercial court authorized by [Supreme Court Administrative Order No. 2015-15](#) was designed to run for three years, beginning July 1, 2015. The objectives of the pilot court, as specified in that order, included measuring litigant satisfaction with the pilot, obtaining views of judges and attorneys concerning the effectiveness and benefits of the pilot, and making recommendations concerning eligibility criteria for assignment of cases to the commercial court, including proposed rule changes. The order required the submission of three progress reports to the Arizona Judicial Council in December of calendar years 2016, 2017, and 2018.

(b) **The 2016 Report:** Three experienced judges were initially assigned to the commercial court. [The 2016 Report](#) summarized initial case flows into the commercial court and noted significant developments during the pilot's first year that affected the commercial court judges' workloads:

At its inception in July 2015, we did not know how many cases would be in the Program. There was no historical data because "Commercial Court" as a category did not exist before July 2015. Nor did we know what percentage of eligible cases would be designated as commercial by the parties. Although we expected the time judges would spend on commercial cases to ramp up as

more cases came into the Program, and as those cases matured, we did not fully appreciate the impact the Program would have on the workload of these judges.

We noticed one impact almost immediately: a sharp increase in emergency matters handled by Commercial Court judges. Most requests for temporary restraining orders, preliminary injunctions, and receivers are in commercial cases. Thus, emergency matters that had been spread among 21 civil judges became funneled to the three Commercial Court judges.

Once the Program was underway for several months, a second impact occurred: the Commercial Court judges began noticing a substantial increase in the number of motions they needed to hear and decide. These included motions to dismiss and motions for summary judgment, which are more common in commercial cases than in personal injury and other non-commercial cases. And, as might be expected in commercial cases, these motions were often factually and legally complex. The high volume of motion practice in commercial cases has made it challenging for the judges to promptly hear and resolve motions.

An additional factor compounded this challenge. Under Rule 8.1(e)(4), any civil judge who encounters a case that should be designated commercial can transfer that case to Commercial Court. Judges typically become aware that a case could be in the Program when they receive a substantive motion. Consequently, several cases were transferred to Commercial Court at the very stage at which they required prompt judicial attention.

The Superior Court addressed these challenges by, among other things, assigning a fourth judge to the commercial court. And with amendments to Experimental Rule 8.1 implemented by [Supreme Court Administrative Order No. 2017-17](#) in February 2017, the Court limited the time within which a case could be transferred to the pilot court.

(c) ***The 2017 Report:*** [The 2017 Report](#) confirmed the successful progression of the pilot court. It observed:

The number of pending commercial cases currently hovers around 600. There are now roughly equal numbers of new and terminated cases. Based on our assessment to date, we believe two conclusions can be drawn about the program.

First, those who have cases in the Program overwhelmingly like it. The largest benefit for those who use the Program is having judges with commercial litigation experience and expertise who actively manage these cases.

Second, these commercial cases generally require much higher amounts of a judge's time than other civil cases. Because these cases are labor-intensive for the judges, this aspect of the Program will probably require further resource adjustments.

**(d) *The R-17-0010 Amendments:*** In December 2015, the Court established a Committee on Civil Justice Reform. In October 2016, that committee submitted a report that recommended reforms to civil case management and discovery. In January 2017, that committee filed [rule petition number R-17-0010](#) requesting codification of those recommendations. An essential component of those recommendations was the establishment of a system of tiered civil discovery. Under this system, Tier 1 cases would be simple, Tier 2 cases would be of intermediate complexity, and Tier 3 cases would be the most logistically or legally complex. To effectuate its recommendations across all civil case types, that committee recommended certain modifications to experimental Rule 8.1(e) (“assignment of cases to commercial courts”) and Rule 8.1(f) (“case management”). The proposed amendments to Rule 8.1(f) provided, among other things, that “cases in the commercial court are deemed assigned to Tier 3.”

In September 2017, the Court adopted the proposed amendments to Rule 8.1(e) and (f), and amendments to Rule 84, Forms 14(a) and 14(b), and established an effective date for those amendments of July 1, 2018. [The Court's Order Number R-17-0010](#) made no amendments to the other sections of Rule 8.1.

## Data Summary.

From July 1, 2015 through March 31, 2018 (33 months), **1,590 cases were assigned** to the Pilot Program.

Of those cases, **1,040 were terminated** (including voluntary dismissals, dismissals for lack of service or prosecution, default judgments, stipulated dismissals and judgments, and judgments on the merits.)

As of March 31, 2018, there were **563 pending cases**. This is an average of **141 commercial cases** for each of the four commercial court judges.

Since October 2017, there have been on average **43 new cases** each month, and **46 terminated cases**. The Program is now at or near equilibrium because the number of new and terminated cases is roughly the same.

## Discussion of Recommendations.

**Recommendation 1. Experimental Rule 8.1, with certain revisions suggested by the Committee, should become a permanent rule within the Arizona Rules of Civil Procedure, and the Commercial Court should become a permanent feature of the Superior Court of Arizona.**

As shown by the Court Administrator's surveys and Ms. Hannaford's focus groups (*see* the 2017 Report for both), as well as anecdotally, attorneys and members of the business community like and support the commercial court. They believe the court handles commercial cases in a timelier and less costly manner. They like the mandatory Rule 16 conferences. Most of all, they prefer having judges with commercial litigation backgrounds. The pilot program has established the commercial court's success quantitatively, by case volumes, and qualitatively, by user satisfaction.

The pilot and the accompanying rule of procedure should therefore become permanent components of the Superior Court.

**Recommendation 2. Although the Committee does not recommend expansion of Maricopa's commercial court to the other 14 counties at this time, the Court by an amendment to Rule 8.1 should permit any judge to use the case management principles in proposed Rule 8.1(e) for appropriate commercial cases.**

As the first recommendation indicates, the Committee envisions Rule 8.1 as a statewide rule, even though only one of Arizona's 15 counties currently has a commercial court program. As a practical matter, most Arizona counties currently lack the volume of Tier 3 commercial cases that would justify the establishment of a

specialized commercial court. However, the Committee also recommends that the case management principles in Rule 8.1(e) be available for any judge statewide who might find those principles beneficial in managing a commercial case.

The Committee therefore proposes a new Rule 8.1(g) that codifies this recommendation. This new section is modeled on a similar principle contained in a comment to Civil Rule 16.3—which was recently abrogated by R-17-0010—regarding the management of complex civil litigation. The section would allow judges in any county, including any Maricopa County judge, to use Rule 8.1(e) in appropriate commercial cases.

**Recommendation 3. The Committee’s report should satisfy the provision in Administrative Order No. 2015-15 that requires a December 2018 progress report to the Arizona Judicial Council concerning the pilot commercial court.**

The first report required under Supreme Court Administrative Order No. 2015-15 was submitted in December 2016 and covered the first 15 months of the program. The second report was submitted in December 2017 and covered the first 27 months of the program. The third report, which is due in December 2018, would cover the last 9 months of the program. However, this Committee’s report covers most of that 9-month period. Submitting another report in December might have only marginal value. The Committee accordingly recommends that the Court accept this report in lieu of a final report later this year.

**Recommendation 4. The Arizona Judicial Council should authorize the Committee to file a rule petition seeking permanent adoption of Rule 8.1, with amendments.**

The commercial court pilot program has been successful, but in some situations, including this one, too much success may not be a good thing. As noted in the 2016 Report,

At its inception in July 2015, we did not know how many cases would be in the Program. There was no historical data because “Commercial Court” as a category did not exist before July 2015. Nor did we know what percentage of eligible cases would be designated as commercial by the parties.

After 33 months of existence, we now know that almost 1600 cases have been assigned to the pilot program. We also know that commercial court judges have heavy workloads at the front-end of their cases. Requests for emergency relief in commercial cases, e.g., temporary restraining orders or preliminary injunctions, were previously allocated to about twenty civil judges, but a large percentage of these requests are now funneled to the commercial court judges, increasing each commercial judge's emergency matter volume by a factor of about five. Requests for emergency relief require immediate attention and often require evidentiary hearings that cannot be postponed. We also know now that more than other civil case types, commercial cases are laden with motions, especially Rule 12 motions to dismiss, which are also heard at the inception of a case, and Rule 56 motions for summary judgment. Many commercial court cases involve multiple parties, or multiple causes of action and claims, and these motions can be complex and require a considerable amount of the commercial court judges' time.

The program after one year required the addition of a fourth judge, and although this mitigated the workload of each judge, their workloads remained high. Limitations on the transfer of cases into commercial court by the rule amendments in A.O. No. 2017-17 had only a marginal effect on case volumes. Although not yet quantifiable, the judges' high workloads may be contributing to longer times-to-dispositions. Delay is a barrier to justice, and the Committee accordingly perceived a need to further limit the workloads of commercial judges. It recommends doing so by narrowing the scope of eligible cases based on the cases' value.

The Committee proposes a new provision in Rule 8.1(c) that would render cases no longer eligible for the commercial court where the plaintiff seeks only monetary damages of less than \$300,000. This provision would align the eligibility requirements of Rule 8.1 with the R-17-0010 amendment that deems commercial court cases as assigned to Tier 3. (Under Rule 26.2(c)(3)(C), actions claiming \$300,000 or more in damages are generally assigned to Tier 3.) Unfortunately, the Committee did not have data that would quantify the number of Tier 2 cases that would no longer be eligible for the commercial court. But the Committee's newly proposed provision should reduce the workloads of commercial court judges in a meaningful way. The Committee emphasizes the propitious timing of this proposed change because the new rules on tiering become effective on July 1, 2018.

The Committee considered the drawbacks of this recommendation. Access to justice is an essential factor in the calculus. However, the Committee believes there

are too many cases in commercial court given the available resources, and it's necessary to decide how those resources should be allocated. The proposed modifications to case eligibility should help to assure that cases most in need of judges with business backgrounds will be assigned to the commercial court.

Current Rule 8.1(e), which the Committee would renumber as Rule 8.1(d), concerns assignment of cases. The proposed revisions simplify and clarify the procedure for assignment. The current rule is ambiguous and creates an impression that the program is mandatory for eligible cases. The proposed amendments would clarify that parties have the option to request assignment of a case to commercial court. The amendments would provide a process for a commercial court judge to determine that an assigned case was ineligible. The proposed amendments would also give the presiding judge authority to reassign certain commercial cases, notwithstanding their eligibility, to general civil judges, which could provide a tool to help relieve the workload of the commercial judges and distribute commercial cases not requiring specialized attention to those general civil judges.

As discussed further in recommendation 7, the Committee requests authorization to file a rule petition as soon as possible to allow the provisions of Rule 8.1 to become effective later this year.

**Recommendation 5. The Superior Court should consider a new fee for commercial cases that would generate revenue for one or more staff attorneys for the commercial court judges.**

In both the 2016 and 2017 Reports, the commercial court judges expressed the benefits law clerks or staff attorneys would have for the program. These individuals could assist judges with legal research in complex areas of the law and with drafting what are sometimes lengthy rulings. The complex civil litigation program in Maricopa County has a staff attorney and because three of the four commercial judges also serve on the complex civil bench, they have some access to the assistance of that individual, but it's divided among them and secondary to the needs of the complex program.

The complex case admission fee of \$500 per party was established by [Maricopa Administrative Order No. 2002-127](#). It reportedly was not a disincentive for participation in the program. (See the December 2006 [Joint Report on the Complex Civil Litigation Program to the Arizona Supreme Court](#), at page 3, which is embedded in this link after the 2009 report.) The Committee believes that the complex

admission fee does not fully cover the cost of the staff attorney because the court occasionally reduces or waives the fee.

There currently is no corresponding fee for the commercial court, and it has no specific funding source for a staff attorney. However, if there was a fee of \$500 per side, and at the rate of 40 cases per month—which is slightly less than the current level of admitted cases—the fee could generate \$40,000 monthly (40 cases x 2 sides/case x \$500/side). The Superior Court should consider requesting approval from the Maricopa County Board of Supervisors for a dedicated fee as a revenue source for one or more staff attorneys for the commercial court judges.

**Recommendation 6. The Superior Court should adopt a policy of assigning judges to the commercial court in a manner designed to maintain a small group of judges with terms that last longer than the typical three-year rotation employed in recent years for most other assignments.**

The Superior Court of Arizona in Maricopa County has a well-established process for rotating judges through its various judicial divisions. This Committee wants to make recommendations that fit within that process.

Judicial assignments in Maricopa County are customarily for two or three years. Many Committee members have expressed the view that judges should be assigned *permanently* to commercial court and cited the example of the Delaware Court of Chancery. They believe that judges who are most suited for commercial court have strong backgrounds in business litigation, and that the highest and best use of those specialized backgrounds warrants permanent assignments. But the Committee recognizes that in the context of Maricopa County’s long-established judicial rotation system, permanent assignments would create administrative and cultural burdens.

The Committee therefore makes no specific recommendation on the length of term but urges that the terms be longer than the typical term employed with other assignments. As the 2017 Report noted, “There is a lengthy learning curve in commercial court, issues reappear, and judges develop a valuable base of experience over time. Longer assignments would leverage that experience.”

In addition to this recommendation, the Committee recommends that Maricopa County keep the number of judges assigned to the commercial court relatively small. The current number of judges assigned (four) could certainly be

expanded slightly, by one or two, without diluting the benefits of having a small and identifiable group of commercial court judges.

**Recommendation 7. The Supreme Court should extend the application of Rule 8.1 until it becomes permanently adopted under the process established by Supreme Court Rule 28; and the Supreme Court and the Superior Court should permanently extend the commercial court beyond the termination dates specified in Supreme Court Administrative Order No. 2015-15 and Superior Court Administrative Order No. 2015-055.**

Supreme Court Administrative Order No. 2015-15 adopted Rule 8.1 and Rule 84, Forms 14(a) and 14(b) for use in the pilot commercial court. The order also provided that “the pilot commercial court shall run for a period of three years, beginning July 1, 2015, and ending June 30, 2018.” The Court’s R-17-0010 Order adopted Rule 8.1, sections (e), (f), and (g), and Rule 84, Forms 14(a) and 14(b), effective July 1, 2018.

The [Superior Court’s Administrative Order No. 2015-055](#), as amended, ordered the establishment of the commercial court pilot in Maricopa County “as part of the court’s civil division effective July 1, 2016. The program will end June 30, 2018 unless extended by order of the Presiding Judge.”

The Committee recommends that the Supreme Court and the Superior Court enter further orders making the program permanent. The Committee further recommends that a Supreme Court administrative order extend Rule 8.1 until the rule become permanently adopted under the process established by Supreme Court Rule 28.

## APPENDIX A – Proposed Amendments to Rule 8.1.

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### **Rule 8.1. Assignment and Management of Commercial Cases [Clean Version].**

**(a) Application; Definitions.** This rule applies in counties that have established specialized programs for commercial cases, which are referred to in this rule as “the commercial court.” The commercial court will hear eligible “commercial cases” assigned to it in accordance with this rule. To be eligible for the commercial court, a commercial case must meet the requirements of Rule 8.1(b).

**(1)** A “commercial case” is one in which:

- (A)** at least one plaintiff and one defendant are “business organizations;”
- (B)** the primary issues of law and fact concern a “business organization;” or
- (C)** the primary issues of law and fact concern 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, business trust, or a political subdivision or government entity that is a party to a business contract or transaction. A “business organization” excludes an individual, a family trust, or a political subdivision or government entity that is not a party to a business contract or transaction.

**(3)** A “business contract or transaction” is one in which a business organization sold, purchased, licensed, transferred, or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations.

**(b) Eligible Case Types.** A commercial case is generally eligible for the commercial court if it meets one of the following descriptions:

- (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, managers, member managers, general partners, 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, 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;
- (9) concerns a claim under state antitrust law;
- (10) arises from a business contract or transaction governed by the Uniform Commercial Code;
- (11) is a malpractice claim against a professional, other than a medical professional, that arises from services the professional provided to a business organization;
- (12) arises out of tortious or statutorily prohibited business activity, such as unfair competition, tortious interference, misrepresentation or fraud; or
- (13) arises from any dispute between a business organization and an insurer under a commercial insurance policy, including an action by either the business or the insurer related to coverage or bad faith.

**(c) Ineligible Case Types.** A case that seeks only monetary relief in an amount less than \$300,000 is not eligible for the commercial court. The following case types are generally not commercial cases unless business issues predominate:

- (1) evictions;
- (2) eminent domain or condemnation;
- (3) civil rights;
- (4) motor vehicle torts and other torts involving personal injury to a plaintiff;
- (5) administrative appeals;
- (6) domestic relations, protective orders, or criminal matters, except a criminal contempt arising in a commercial court case; or
- (7) wrongful termination of employment and statutory employment claims; or

- (8) disputes concerning consumer contracts or transactions. A “consumer contract or transaction” is one that is primarily for personal, family, or household purposes.

**(d) Assignment of Cases to the Commercial Court.**

- (1) **Request.** A party to an eligible commercial case may request assignment of the case to the commercial court.
- (2) **By Plaintiff.** A plaintiff seeking assignment of an eligible case to the commercial court must do so at the time of filing the complaint by (A) including in the initial complaint’s caption the words “commercial court assignment requested,” and (B) completing a civil cover sheet that indicates the action is an eligible commercial case.
- (3) **By Other Parties.** If a plaintiff has not sought assignment to the commercial court, another party, within 20 days after that party’s appearance, may file a separate notice stating that the case is eligible for, and requesting assignment of the case to, the commercial court.
- (4) **Assignment.** Upon the filing of a complaint by a plaintiff requesting assignment to the commercial court under (e)(2), or the filing by another party of a Notice Requesting Assignment to the Commercial Court under (e)(3), the case will be assigned to the commercial court.
- (5) **Transfer out of Commercial Court by a Commercial Court Judge.** After assignment of a case to the commercial court, a commercial court judge, on the judge’s own initiative, may transfer the case out of commercial court if the judge determines the matter is not an eligible commercial case.
- (6) **Discretion of Presiding Judge.** The presiding judge or designee may reassign any case that qualifies under Rule 8.1(b)(6), (7), (10), or (11) to a general civil court.
- (7) **Judicial Request to Transfer to the Commercial Court.** Within 20 days after the filing of the first responsive pleading or Rule 12 motion, a judge of a general civil court may request the presiding judge or designee to transfer a case to the commercial court if that judge determines the matter is an eligible commercial case.
- (8) **Complex Cases.** Assignment of a case to the commercial court does not impair the right of a party to request reassignment of the case to the

Maricopa County complex civil litigation program under applicable local rules.

**(e) Case Management.** Notwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3. Rules 16(a) through 16(j) apply to cases in the commercial court, except:

- (1) Scheduling Conference.** Scheduling conferences under Rule 16(d) are mandatory.
- (2) Early Meeting.** Before filing a Rule 16(c) Joint Report, and in addition to conferring about the subjects in Rule 16(b)(1), the parties must confer, as set forth in the commercial court's checklist governing the production of electronically stored information, and attempt to reach agreements that may be appropriate in the case concerning the disclosure and production of such information, including:
  - (A)** requirements and limits on disclosure and production of electronically stored information;
  - (B)** the form or formats in which the electronically stored information will be disclosed or produced; and
  - (C)** if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing electronically stored information.
- (3) Joint Report and Proposed Scheduling Order.** The parties' Rule 16(b) Joint Report and Proposed Scheduling Order must address the items specified in Forms 14(a) and 14(b), including:
  - (A)** whether the parties expect electronically stored information to be an issue in the case and, if so, whether they have reached an agreement regarding the discovery of electronically stored information, have filed a stipulated order, and have or anticipate disputes concerning electronically stored information;
  - (B)** whether the parties have reached an agreement regarding the inadvertent production of privileged material pursuant to Arizona Rule of Evidence 502, and, if so, whether they have filed a stipulated order;

- (C) whether any issues have arisen or are expected to arise regarding claims of privilege or protection of trial preparation materials under Rules 26(b)(6) and 26.1(h);
  - (D) whether the parties believe that a protective order is necessary and, if so, whether they have filed a stipulated protective order; and
  - (E) whether the commercial court should assign the case to a tier other than Tier 3 after the Rule 16(d) scheduling conference, and, if so, why.
- (4) **Motions to Dismiss.** Any motion to dismiss pursuant to Rule 12(b)(6) must attach a good faith consultation certificate complying with Rule 7.1(h) certifying that the parties have been unable to agree that the pleading is curable by a permissible amendment.
- (f) **Motions.** With notice to the parties, a commercial court judge may modify the formal requirements of Rule 7.1(a) and may adopt a different practice for the efficient and prompt resolution of motions.
- (g) **Cases Not in the Commercial Court.** The case management procedures in Rule 8.1(e) are available to any judge who finds those procedures beneficial, wholly or partially, in managing a commercial case that is not assigned to the commercial court, or that is pending in a county that has not established a commercial court.

**~~Experimental~~ Rule 8.1. Assignment and Management of Commercial Cases**  
[Redlines to Sections (a)-(c) and (g) show comparisons with the corresponding sections of the rule appended to A.O. No. 2017-17. Redlines to Sections (d)-(f) show comparisons with sections adopted by Order No. R-17-0010.]

(a) **Application; Definitions.** This rule applies in counties that have established specialized courts programs for commercial cases, which are referred to in this rule as “the commercial court.” The commercial court will hear eligible “commercial cases” as defined in this Rule except as provided in Rule 8.1(d) assigned to it in accordance with this rule. To be eligible for the commercial court, a commercial case must meet the requirements of Rule 8.1(b).

(1) A “commercial case” is one in which:

(A) At least one plaintiff and one defendant are “business organizations;”

(B) The primary issues of law and fact concern a “business organization;” or

(C) The primary issues of law and fact concern 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, business trust, or a political subdivision or government entity that is a party to a business contract or transaction. A “business organization” excludes an individual, a family trust, or a political subdivision or government entity that is not a party to a business contract or transaction.

(3) A “business contract or transaction” is one in which a business organization sold, purchased, licensed, transferred, or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations.

(b) **Eligible Case Types.** A commercial case ~~that meets one of the following descriptions~~ is generally eligible for the commercial court if it meets one of the following descriptions ~~a commercial 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, managers, member managers, general partners, 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, 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;
- (10) Arises from a business contract or transaction governed by the Uniform Commercial Code;
- (11) Is a malpractice claim against a professional, other than a medical professional, that arises from services the professional provided to a business organization;
- (12) Arises out of tortious or statutorily prohibited business activity, such as unfair competition, tortious interference, misrepresentation or fraud; or
- (13) ~~Concerns a surety bond, or arises under any type of~~ Arises from any dispute between a business organization and an insurer under a commercial insurance policy purchased by a business organization, including an action by either the business or the insurer related to involving coverage, or bad faith, or a third-party indemnity claim against an insurer.

(c) **Ineligible Case Types.** A case that seeks only monetary relief in an amount less than \$300,000 is not eligible for the commercial court. The following case types are generally not commercial cases unless business issues predominate:

- (1) Evictions;
- (2) Eminent domain or condemnation;
- (3) Civil rights;

- (4) Motor vehicle torts and other torts involving personal injury to a plaintiff;
- (5) Administrative appeals;
- (6) Domestic relations, protective orders, or criminal matters, except a criminal contempt arising in a commercial court case; or
- (7) Wrongful termination of employment and statutory employment claims; or
- (8) Disputes concerning consumer contracts or transactions. A “consumer contract or transaction” is one that is primarily for personal, family, or household purposes.

~~(d) **Compulsory Arbitration.** A commercial case that is subject to compulsory arbitration is not eligible for assignment to commercial court.~~

~~⊖(d) **Assignment of Cases to the Commercial Courts.**~~

~~(1) **Request.** A party to an eligible commercial case may request assignment of the case to the commercial court.~~

~~(2) **Plaintiff’s Duties By Plaintiff.** A plaintiff seeking assignment of an eligible case to the commercial court must do so at the time of filing the complaint by (A) ~~include including~~ in the initial complaint’s caption the words “~~eligible for~~ commercial court assignment requested,” and (B) ~~complete~~ completing a civil cover sheet that indicates the action is an eligible commercial case.~~

~~⊖(3) **By Other Parties.** If a plaintiff has not sought assignment to the commercial court, another party, within 20 days after that party’s appearance, may file a separate notice stating that the case is eligible for, and requesting assignment of the case to, the commercial court.~~

~~⊖(4) **Assignment to Commercial Court.** The court administrator will review a complaint and civil cover sheet filed in accordance with Rule 8.1(e)(1) and will assign an eligible case to a commercial court judge. Upon the filing of a complaint by a plaintiff requesting assignment to the commercial court under (e)(2), or the filing by another party of a Notice Requesting Assignment to the Commercial Court under (e)(3), the case will be assigned to the commercial court.~~

~~(5) **Motion to Transfer out of Commercial Court by a Commercial Court Judge.** After assignment of a case to the commercial court, a commercial court judge, ~~upon motion of a party or~~ on the judge’s own initiative, may transfer the case out of commercial court if the judge determines the matter is not an eligible “commercial case” ~~as defined in this Rule.~~~~

~~○ Any party filing a motion under this Rule must do so no later than 20 days after that party's appearance in the case.~~

(6) Discretion of Presiding Judge. The presiding judge or designee may reassign any case that qualifies under Rule 8.1(b)(6), (7), (10), or (11) to a general civil court.

~~(7) Motion Judicial Request to Transfer to the Commercial Court. On motion of a party filed within 20 days after that party's appearance in the case, or the court's own initiative w~~Within 20 days after the filing of the first responsive pleading or Rule 12 motion, a judge of a general civil court may ~~order~~ request the presiding judge or designee to the transfer of a case to the commercial court if that judge determines the matter is a "eligible commercial case," as defined in this Rule.

○ (8) Complex Cases. Assignment of a case to the commercial court does not impair the right of a party to request reassignment of the case to a the Maricopa County complex civil litigation program under applicable local rules. ~~Rule 8(i).~~

(e) Case Management. Notwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3. Rules 16(a) through 16(j) apply to cases in the commercial court, except:

(1) Scheduling Conference. Scheduling conferences under Rule 16(d) are mandatory.

(2) Early Meeting. Before filing a Rule 16(c) Joint Report, and in addition to conferring about the subjects in Rule 16(b)(1), the parties must confer, as set forth in the commercial court's checklist governing the production of electronically stored information, and attempt to reach agreements that may be appropriate in the case concerning the disclosure and production of such information, including:

(A) requirements and limits on disclosure and production of electronically stored information;

(B) The form or formats in which the electronically stored information will be disclosed or produced; and

(C) If appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing electronically stored information.

**(3) *Joint Report and Proposed Scheduling Order.*** The parties' Rule 16(b) Joint Report and Proposed Scheduling Order must address the items specified in Forms 14(a) and 14(b), including:

**(A)** whether the parties expect electronically stored information to be an issue in the case and, if so, whether they have reached an agreement regarding the discovery of electronically stored information, have filed a stipulated order, and have or anticipate disputes concerning electronically stored information;

**(B)** whether the parties have reached an agreement regarding the inadvertent production of privileged material pursuant to Arizona Rule of Evidence 502, and, if so, whether they have filed a stipulated order;

**(C)** whether any issues have arisen or are expected to arise regarding claims of privilege or protection of trial preparation materials under Rules 26(b)(6) and 26.1(h);

**(D)** whether the parties believe that a protective order is necessary and, if so, whether they have filed a stipulated protective order; and

**(E)** whether the commercial court should assign the case to a tier other than Tier 3 after the Rule 16(d) scheduling conference, and, if so, why.

**(4) *Motions to Dismiss.*** Any motion to dismiss pursuant to Rule 12(b)(6) must attach a good faith consultation certificate complying with Rule 7.1(h) certifying that the parties have been unable to agree that the pleading is curable by a permissible amendment.

**(f) *Motions.*** With notice to the parties, a commercial court judge may modify the formal requirements of Rule 7.1(a),<sup>5</sup> and may adopt a different practice for the efficient and prompt resolution of motions.

**(g) Cases Not in the Commercial Court.** The case management procedures in Rule 8.1(e) are available to any judge who finds those procedures beneficial, wholly or partially, in managing a commercial case that is not assigned to the commercial court, or that is pending in a county that has not established a commercial court.