



REPORT OF THE
COMPLEX CIVIL
LITIGATION COURT
EVALUATION COMMITTEE
TO THE ARIZONA
SUPREME COURT

January, 2009

***COMPLEX CIVIL LITIGATION COURT
EVALUATION COMMITTEE***

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Executive Summary. “If you build it, they will come.” That was the expectation of a 2002 committee which, after thorough study, recommended to the Arizona Supreme Court that a pilot program for complex civil litigation be established in Maricopa County. The committee’s confidence that this experimental program would benefit Arizona litigants led it to project that hundreds of cases annually would be certified for admission.

Now that the program is in its seventh year, the number of cases admitted into this program has been far below that projection. Since the inception of the program through the end of 2008, only 101 cases have been designated as complex. For 2006 and 2007, the number of new cases admitted annually into the program was in the single digits. However, during 2008, the number of new cases has re-established an encouraging upward trend: sixteen cases were admitted to the program during the 2008 calendar year.

Were the original projections of triple digit complex case volumes unduly optimistic, or are there actions that could increase program admissions closer to the committee’s preliminary expectations?

The Evaluation Committee believes that by implementing a few straightforward recommendations, the program could make further progress towards those original projections of case volumes. Notably, in an era of tight budgets and limited resources, this Committee’s recommendations can be, and are being, implemented without cost.

The concept of a specialized court for complex case management is one whose time has come, not just in Arizona, but nationally. Arizona is in the forefront of states which have implemented a program which is open to any type of complex case; the sole requirement is complexity.¹ The quality of Arizona’s judiciary is distinguished by its leadership in implementing innovative and specialized programs such as this complex civil litigation initiative. The business community within Arizona, and out-of-state enterprises which are considering a move to Arizona, look to the quality and reputation of Arizona’s courts, including this complex civil litigation program, as an incentive to doing business in Arizona.

Accordingly, the Evaluation Committee unanimously supports the continued existence of the complex civil litigation program.

¹ Four states have complex litigation courts: Arizona, California, Connecticut, and Florida. Additionally, four cities have complex litigation courts within their civil court structure: Philadelphia, Pittsburgh, Chicago, and Las Vegas. Thirteen states have business courts: Colorado, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Nevada, New York, North Carolina, Oklahoma, Pennsylvania, and Rhode Island. See Florida’s Task Force on the Management of Cases Involving Complex Litigation (April 30, 2008), at page 18. The report may be found at http://www.flcourts.org/gen_public/news/bin/ComplexLitigation.pdf

Introduction. The Supreme Court established the Complex Civil Litigation Court Evaluation Committee (the “Evaluation Committee”) in November, 2002, Administrative Order No. 2002-107. This Administrative Order followed the final report and recommendations of the Committee to Study Complex Litigation (the “Study Committee”).²

The Study Committee recommended the establishment of a pilot program in the Superior Court as an experimental forum for resolving complex civil disputes. Pursuant to the recommendation of the Study Committee, Arizona Supreme Court A.O. 2002-107 authorized the pilot program in Maricopa County. Administrative Order No. 2002-107 also adopted rules of civil procedure which had been recommended by the Study Committee to define complex cases, and to create a process for designating a case as complex. A complementary administrative order, Maricopa County Superior Court A.O. No. 2002-127, implemented the program in the Superior Court in December, 2002.

Supreme Court Administrative Order No. 2002-107 authorized the pilot program for a period of two years. In April, 2004, Administrative Order No. 2004-27, extended the evaluation period for two additional years. And in December, 2006, Administrative Order No. 2006-123 authorized an extension of the program until December 31, 2008.³

A report jointly prepared by the Evaluation Committee and the Maricopa County Superior Court (the “Joint Report”), was provided to the Arizona Supreme Court in December, 2006.⁴ The report concluded:

“Over the past four years, the committee has had the pleasure of watching this program grow from a concept into a reality of recognizable value to the legal community....The committee urges the court to continue the program with the eventual goal of making it a permanent part of the judicial landscape in Arizona.”⁵

Six years have passed since the implementation of the complex civil litigation program. The Evaluation Committee, as well as the judges who have sat on the complex bench, remain fast to the concepts that the program has “recognizable value” and that it should be made “a permanent part of the judicial landscape in Arizona.”

² The Study Committee was established by Administrative Order 2001-122.

³ There were correlative extensions by Maricopa County Superior Court administrative orders.

⁴ Find the report: <http://www.supreme.state.az.us/courtserv/ComplexLit/JointRptFinal.pdf> Pursuant to A.O. 2002-107, the pilot program was to run until December 31, 2004, and the report was to be submitted at the conclusion of the pilot period. However, A.O. 2004-27 extended the deadline for the report until December, 2006.

⁵ Joint Report, at page 7.

The Evaluation Committee has continued to meet quarterly, and during that time the Maricopa County Court Administrator has provided updates on volumes of cases that have been admitted into the complex civil litigation pilot program since its start in December, 2002.

From the inception of the program in December, 2002, through the end of 2003, **37** cases entered the program.⁶ In the calendar years which followed, the number of admitted cases were:

2004: **20** cases

2005: **12** cases

2006: **9** cases⁷

2007: **7** cases

2008: **16** cases⁸

Maricopa County is the fourth most populous county in the United States⁹, with substantial population growth annually. It is home to large businesses, the site of major construction activity, and the locus of proliferating tort claims. The volume of civil filings in Maricopa County continues to rise each successive year, yet the complex case admissions have been modest in number.¹⁰ Complex cases do exist, and they are still being filed, albeit not in the complex program.¹¹ The Evaluation Committee set out to assess why complex cases were

⁶ The Evaluation Committee believes that a high percentage of the cases that entered the program during the first year had been pending for a year or two prior to the inception of the program; that is, they were not cases which had been filed during the program's first year, but instead were older cases that were transferred into the program during that first year.

⁷ The December, 2006, Joint Report indicated that **91 cases** had been admitted as of that time. The numbers shown above on this page, which were provided by the Court Administrator, show that through 2006, **78 cases** had been admitted into the complex program. Attempts to reconcile the two numbers have been unsuccessful.

⁸ One case was admitted in February, 2008; the other 2008 cases were admitted in and after May, 2008.

⁹ Los Angeles County, California, is the most populous county, followed by Cook County, Illinois, and Harris County, Texas.

¹⁰ The Maricopa County Superior Court's Civil Department produced a 2006-2010 Strategic Plan in September, 2005. That document reported that annual civil case filings were as follows: for 2002, 31,188 cases; for 2003, 35,956 cases; for 2004, 37,810 cases; and for 2005, 38,016 cases. The document also reported that the population of Maricopa County increased from 3.3 million in 2002 to 3.6 million in 2005. That is about a 9% population increase in just four years.

¹¹ It is plausible that some complex cases which might have been filed in the Superior Court were instead going to private arbitration, or to federal court; but this alone would not account for the scarcity of cases being designated into Maricopa County's complex program.

not being captured by the complex civil litigation program. This is the Evaluation Committee's report of that assessment.

Summary of conclusions.

1. The opportunity to utilize electronic filing, which at one time was exclusively for complex cases, was a significant incentive for attorneys to file motions to have their cases designated for admission to the complex civil program. Now that electronic filing is widely used throughout the civil courts, e-filing is no longer a special attraction of the complex program.

2. There appears to be a general lack of awareness of the complex civil program among members of the civil bar.

3. Not all complex cases are captured by the program through motions to designate and certifications of complexity.

Discussion of conclusions.

(1) Parity of electronic incentives in the civil courts. Electronic document filing made its debut in the Maricopa County Superior Court on December 8, 2003, about a year after the complex program began. When electronic filing was implemented through LexisNexis, it was exclusively for cases in the complex civil program. Electronic filing was an overwhelming success; the Joint Report noted that the stack of documents filed in the program during the initial years of e-filing would have reached the height of a 103 story building.¹²

The popularity of electronic filing soon spread to civil cases outside the complex case program. A 2005 Maricopa County Superior Court Administrative Order implemented electronic document filing in the general civil courts, with a phase-in beginning in June, 2005.¹³ In October, 2007, the Superior Court promulgated Electronic Filing Guidelines which further promoted the modern efficiency of electronic filing.¹⁴ Arizona Supreme Court Administrative Order number 2008-89, effective December 1, 2008, permits electronic filing in the Maricopa County Superior Court for all civil case types in accordance with the Superior Court's electronic filing guidelines.

Meanwhile, effective September 8, 2008, the electronic filing feature of the LexisNexis system was no longer available for filing documents in complex civil litigation cases. The electronic playing field had been leveled for cases within and outside of the complex civil program.

¹² Joint Report, footnote 4.

¹³ Maricopa County Superior Court Administrative Order number 2005-072, June 1, 2005.

¹⁴ Maricopa County Superior Court Administrative Order number 2007-140, October 25, 2007.

“Electronic courtrooms” were also once a hallmark of the judges assigned to complex cases.¹⁵ The ongoing proliferation of these courtrooms, while of enormous benefit to civil cases generally, has removed this second technological advantage of having a case in the complex program.

(2) Lack of awareness of the program. The Joint Report noted that Committee members had arranged and conducted a February, 2005, continuing legal education session that attracted more than 70 participants, and that “on-going collaboration between practitioners and the superior court will play a critical role in ensuring accountability.”¹⁶

Little has occurred since that time to promote general awareness of the program. Anecdotally, many civil practitioners, some in the midst of an apparently complex case, admit to having no knowledge of the existence of the complex civil program.

(3) Limitations of the motion to designate and certification of complexity for capturing complex cases. The September, 2002, Study Committee Report recommended an amendment to Rule 8(h), Ariz. R. Civ. P., to provide a “complex” classification for civil actions; and enumerated criteria for complexity and a process for complex designation in a new Rule 8(i).¹⁷ The amended Rule 8(i) included a form entitled “Certification of Complexity”. This form required the certifying attorney to mark any of the generic criteria, adopted from Rule 8(i), which warranted a conclusion of complexity, and to file an accompanying motion requesting complex designation. Civil filings which were accompanied by a certification of complexity and a motion to designate the case as complex were routed to the presiding civil judge¹⁸, who ruled on the motion.

As time went on, fewer and fewer motions requesting complex designation were being filed, and the number of cases being admitted into the complex program dwindled. Additionally, and in hindsight, the parties’ lack of initiative in motioning cases into the program suggested that motions to designate might not be the only mode of complex case identification. More information, derived from a source other than the motion to designate, was needed upon receipt of the initial filings to channel complex cases into the program.

¹⁵ The Joint Report noted that “each program judge presided over an e-courtroom equipped with the most up-to-date electronic technology for evidence presentation, electronic recording and computer-enhanced judicial management of the courtroom.” [Joint Report at pages 2-3] Currently, 18 of the 24 civil judges in Maricopa County Superior Court have electronic courtrooms.

¹⁶ Joint Report at page 6.

¹⁷ Rules 8(h) and 8(i) were approved by A.O. 2002-107. The comment to Rule 8(h) noted that the rule was “intended to establish a process by which the parties can alert the court to the complex nature of their dispute.”

¹⁸ Maricopa County Superior Court A.O. 2002-127 granted to the presiding civil judge the authority to determine if a case warrants a complex designation.

Summary of recommendations.

1. Promote the complex program to attorneys and increase their awareness of its existence.
2. Support use of the new civil cover sheet.
3. Continue the recently developed program of having the court staff screen potentially complex cases.
4. Encourage non-panel judges to refer complex cases to the complex program.
5. Extend the term of the pilot program for two years.

Discussion of recommendations.

(1) Increase awareness of the program. The Study Committee envisioned that a complex program in both Maricopa and Pima counties would absorb between 1 to 3% of the civil filings – that is, between 400 to 1,000 cases per year.¹⁹ Maricopa County, which over the past five years has had between 30,000 and 40,000 case filings annually, has fallen far short of that mark with regard to complex case designations.

The user survey appended to the 2006 Joint Report detailed 83 responses from attorneys who had appeared in the program.²⁰ The largest number of responses (36%) was from attorneys from large (51+ attorneys) firms. Sixty percent of the responses came from attorneys at firms with more than 21 lawyers.

A current program judge has offered to make a lunch hour presentation to the twenty largest law firms in the area about the complex civil program. Large law firms are the biggest filers of complex cases. The panel of complex judges knows the program better than anyone. The complex judges can enumerate for those potential participants the advantages of the program like no one else can.

¹⁹ See the Study Committee's Report, at page 5. Florida's 2008 Task Force Report (see footnote 1) estimated that if a complex case program was established in that state, 2,000 to 3,000 complex cases might be filed annually. (Florida Report, at page 16.) Counsel for the Judicial Council of California has reported to the Evaluation Committee's staff that California's complex program, which operates in six populous counties, currently utilizes 17 judges. Each judge has about 100 cases, although a judge may have fewer cases if some are unusually complex. These judges are dedicated program judges; they do not handle standard track cases. Therefore, California currently has approximately 1,700 cases in its complex program.

²⁰ The survey reported that over 500 attorneys had entered appearances in the complex program cases.

As complex case volumes accelerate, additional promotions could follow, such as articles in periodicals, including the *Arizona Attorney* and *Maricopa Lawyer*; inclusion of complex case considerations in continuing legal education courses, for example, construction litigation seminars; and ongoing informative programs.

2. Support the use of the new civil cover sheet. In October, 2007, this Evaluation Committee recommended adding elements to the Maricopa County civil cover sheet to identify whether the claim was cognizable under one of California's provisional complex case categories.²¹ By February, 2008, a revised civil cover sheet had been developed by the Maricopa County Superior Court, and this form was promulgated for use by the legal community. This form specifically inquired whether the case was complex, and if so, whether it fell into one of the provisional complex case categories.

For several reasons, use of the revised cover sheet was not mandated. As a result, new case filings were not rejected if the revised form was not submitted with the initial filing. Cases continued to be accepted even with an old form that had no complex case information. It also appeared, especially for cases filed at the night drop, that the cover sheet was sometimes completed by court runners rather than by counsel.

A rule petition was filed in January, 2008, by the Administrative Office of the Courts which proposed that a cover sheet approved by the Supreme Court be filed in all civil cases.²² Although a single page form for the cover sheet was initially proposed, a subsequent reply revised the cover sheet by adding a second page to the form. Pursuant to this petition, an amendment to Arizona Rules of Civil Procedure Rule 8(h)(1) was adopted by the Supreme Court on September 8, 2008.

The front page of the new cover sheet has a specific box to check if the action is complex. If the complex box is checked, then on the reverse of the form, the filer will be asked to identify one of the following applicable categories of complexity:

1. antitrust/trade regulation
2. construction defect with many parties or structures
3. mass tort
4. securities litigation with many parties
5. environmental toxic tort with many parties
6. class action claims
7. insurance coverage claims arising from the above-listed case types
8. a complex case as defined by Rule 8(i)

²¹ Committee minutes, October 23, 2007. California's provisional categories were included in the civil cover sheet proposed by R-08-0008, *infra*, pages 10-11.

²² The rule petition was R-08-0008.

The amendment to Rule 8(h)(1) became effective in January, 2009. The rule mandates use of the new statewide cover sheet.²³ This new civil cover sheet should assist the Court in screening cases that are appropriate for the complex program, and the Evaluation Committee unanimously supports its use.

(3) Continue the existing process of using the court staff to screen complex cases. An alternative process has developed for funneling cases into the complex program. The process starts when the court clerk segregates cases in which the box indicating complexity has been checked on the civil cover sheet which is currently in use.

The clerk then sends these cases, in batches of 25 cases, to the court administrator for further review. The court administrator typically concludes that a few cases per batch are potentially complex.²⁴ Those cases which are felt to be potentially complex are brought to the attention of the presiding civil judge. If the presiding civil judge determines that a case is not complex, it stays on its existing track. If, however, it appears that a case is complex, the court issues a minute entry advising the attorneys of a “presumptive” designation of complexity.²⁵

This method of screening cases has proven to be a positive way of identifying complex cases and for effectively transmitting those cases to the civil presiding judge for potential designation. In addition, because the cover sheet will occasionally be inaccurate, incomplete, or misleading,²⁶ potentially complex cases should have a preliminary, pre-judicial evaluation such as the one currently in use.

²³ The new rule permits cover sheet addendums to be adopted by Local Rule. Maricopa’s version of the new civil cover sheet may require the signature of Plaintiff’s attorney.

²⁴ A case may be complex because of sophisticated **legal** issues; it may be complex because of **evidentiary** issues (including areas of expert testimony); or it may be **logistically** complex, with multiple parties or large volumes of evidence. A case may also have two or three of these dimensions of complexity.

²⁵ The form minute entry used for this process was created in June, 2008. The minute entry reads: “The Court has presumptively determined that the above-captioned matter meets the criteria for inclusion in the complex Civil Litigation program as set forth in Ariz.R.Civ.P. 8(i) and Maricopa County Superior Court Administrative Order No. 2008-59. Unless a formal objection is filed with the Presiding Civil Court Judge within twenty (20) days of the issuance of this order, the matter will be designated as a Complex Civil Litigation case and assigned to one of the Complex Civil Litigation Judges. Pursuant to Administrative Order No. 2008-059, the complex case fee will then be assessed.”

²⁶ Cover sheets indicating complexity are on occasion entirely misleading. The complex box indicating “insurance coverage claim” is checked in a number of garden variety insurance coverage cases. One “mass tort” indicated on a cover sheet was apparently based on a supposition that because the plaintiff was injured by an allegedly defective product, other Arizonans were probably injured too. Another “mass tort” involved multiple claimants injured in a single auto accident.

The court staff should continue to screen cases for potential admission into the complex program. The court staff has shown initiative and efficiency in screening cases. A number of potentially complex cases are, and should continue to be, routed to the presiding civil judge not only by the filing of a motion to designate and certificate of complexity, as set out in Rule 8(i); but also by manual screening of batches of cases by the court staff. As a screening aid, the following algorithm may be used:

1. Filings by **self-represented litigants** are screened out as being non-complex cases.

2. Cases in which a **complex certification and motion to designate** have been filed are **referred directly** to the presiding civil judge for a ruling, as provided in Rule 8(i).

3. Cases in which a complex certification and motion to designate have not been filed, but where **the box for complexity has been checked on the front side of the civil cover sheet**, are treated as follows:

a. if there is a designation checked on the reverse side of the cover sheet for construction defect with multiple parties or structures, securities litigation with multiple parties, environmental toxic tort with multiple parties, antitrust/trade regulation, or class action claims, the case **will** be routed to the presiding civil judge; and after a review of the file, a minute entry designating the case as complex may be issued by the presiding civil judge;

b. if there is a case type checked on the reverse side for mass tort, insurance coverage claims, or other, the case is screened by the court staff for complexity and **may** be referred to the presiding civil judge for judicial review and complex designation;

c. if there is no designation checked on the reverse side, the case is screened by the court staff for other indicia of complexity for **possible** referral to the presiding civil judge for judicial review and complex designation.

The Evaluation Committee notes parenthetically that the concept that a case may only come into the program if it is completely “voluntary”, while initially embedded in the Maricopa County pilot program, is no longer viable as a necessary condition of admission. Much as the court can make a determination either *sua sponte* or by motion about whether a case is suitable for the arbitration track²⁷, the court must also exercise its authority to direct complex cases to the appropriate track. The court must have the ability to transfer to the complex track those cases requiring complex case management, not only in those situations where a complex determination has been requested by a party, but also in those cases where no request has been made.

²⁷ Ariz. R. Civ. P. Rule 72(e)(5).

(4) Non-panel judges should be encouraged to refer their complex cases to the complex program. The expectation from the onset of this pilot was that the non-program judges would refer their complex cases to the program.

The Evaluation Committee agrees that most civil judges are capable of handling complex cases by virtue of their training, experience and expertise prior to appoint to the bench. But the benefit of the complex litigation program is that the structure of the complex program offers special capacities for complex case management:

1. The complex case judges have longer assignments. (Complex judges have a five year assignment versus a normal two year rotation through the civil department.) One judge who has sat on the complex bench cited the five year assignments as the *raison d'etre* of the program. Each time a new judge assumes a complex case which has not been designated into the complex program, there is going to be a process of re-education, which is costly to the court as well as to the litigants. There may be inconsistency in rulings between non-program judges following a transition. The value-added benefit of the complex program is that a case will remain with a single judge during the entire course of the case.
2. The complex judges' calendars are better adapted to meet the requirements of complex case scheduling than are the calendars of other judges. Pretrial conferences in complex cases, for example, are not limited to 30 minutes, as in a typical civil proceeding. More time can also be allocated to complex motions. Pretrial conferences can be scheduled multiple times during the course of a case, compared to once or twice in a routine civil matter.
3. The complex case judges also have a full time staff attorney to assist them in the legal issues that arise from complex cases.²⁸ Other members of the civil bench often do their own legal research, without the assistance of law-trained staff.
4. The complex judges have more tools for managing complex cases. The complex case requires not just a different process in dealing with discovery issues, calendaring, settlement, and deadlines; but it also has a distinctive pace, guided by specific complex case management practices.

The recommendation that civil judges be encouraged to refer their complex cases to the program is one that should be implemented by judicial education. The civil bench should be cognizant about the benefits provided by this specialized complex case program.

(5) Extend the term of the pilot program for two years. Although the pilot program has existed for six years, more time is required to fairly evaluate its progress. The volume of cases admitted into the program over the next two years may determine whether the program should be made a "permanent part of the judicial landscape in Arizona."

²⁸

A staff attorney for the complex civil litigation judges was hired in November, 2007.

As noted in the introduction to this report, the complex civil litigation program was established by administrative orders issued in 2002 by the Chief Justice of the Arizona Supreme Court, and by the presiding judge of the Maricopa County Superior Court. Although the term of the pilot program expired on December 31, 2008,²⁹ Administrative Order 2009-11, entered on January 22, 2009, extended the term of the pilot program until December 31, 2009. The Evaluation Committee recommends the continuation of the pilot program and the Evaluation Committee for two additional years, that is, until December 31, 2010, to monitor the effectiveness of the program and the recommendations made in this report. The Committee further recommends that it make annual reports to the Administrative Office of the Courts on the status of the pilot program. At the end of that two year period, the Supreme Court can reconsider whether it should make the complex program a permanent feature of the Superior Court.

²⁹ Four of the five members of the Evaluation Committee have served on the two complex civil case committees since the formation of the Study Committee in December, 2001.

PROPOSED ADMINISTRATIVE ORDER:

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: _____)
)
) Administrative Order
 EXTENSION OF AUTHORIZATION) No. _____
 FOR THE COMPLEX CIVIL) (Amending Administrative Orders
 LITIGATION PILOT PROGRAM) No. 2006-123 and 2009-11)
 APPLICABLE IN MARICOPA COUNTY)
 _____)

On November 22, 2002, Administrative Order No. 2002-107 was entered establishing a two-year Complex Litigation Program in the Superior Court in Maricopa County and the Complex Civil Litigation Court Evaluation Committee. Under Administrative Order No. 2002-107 and No. 2003-52, members were appointed to the Committee. By Administrative Order No. 2004-27, the program was extended to December 31, 2006, and the Committee members' terms were extended for the duration of the program. By Administrative Order No. 2006-123, the program and Committee were extended to December 31, 2008. By Administrative Order 2009-11, the term of the pilot program was extended to December 31, 2009.

The January, 2009, report of the Evaluation Committee has been received and reviewed. The Committee has requested a two-year extension of the pilot program to monitor the effectiveness of the program and the Committee's recommendations. The Committee has also recommended that periodic reports be provided to the Administrative Office of the Courts regarding the status of the pilot program. After due consideration,

IT IS ORDERED that the Complex Civil Litigation Pilot Program in the Maricopa County Superior Court and the Complex Civil Litigation Court Evaluation Committee are extended to December 31, 2010.

IT IS FURTHER ORDERED that the Evaluation Committee shall provide to the Administrative Office of the Courts periodic reports, as directed, on the status of the complex civil litigation pilot program. The reports shall be furnished annually, on December 1, 2009, and December 1, 2010.

Dated this ___ day of _____, 2009.

RUTH V. MCGREGOR
Chief Justice