



## UTAH SUPREME COURT ADVISORY COMMITTEE RULES OF BUSINESS AND CHANCERY PROCEDURE

### MEETING MINUTES

**LOCATION:** Meeting held through Webex

**DATE:** July 13, 2023

**TIME:** 12:00 to 1:00 p.m.

MEMBERS:	PRESENT	EXCUSED	GUESTS:
Evan S. Strassberg, <i>chair</i>	•		Nick Stiles
Gregory L. Watts, <i>vice chair</i>	•		
Beau R. Burbidge	•		STAFF:
Kade N. Olsen	•		Michael Drechsel
Jennifer Fraser Parrish	•		
Judge Kara L. Pettit	•	•	
Tyson J. Prisbrey	•		
Judge Derek P. Pullan	•		
Lauren A. Shurman	•		

#### (1) WELCOME AND INTRODUCTIONS:

Chair Strassberg welcomed the committee to the first meeting of the Utah Supreme Court's Advisory Committee on the Rules of Business and Chancery Procedure. Because this was the first meeting, there were no minutes to review. The chair asked each member to make an introduction to the other members of the committee. The chair explained that Judge Pettit was presiding over a jury trial during the meeting, which resulted in her inability to attend.

## **(2) OVERVIEW OF COMMITTEE ASSIGNMENTS, PROCESS, & WORKING DEADLINES:**

Chair Strassberg explained that the committee was tasked with assembling – and submitting to the Supreme Court – a proposed set of rules to govern procedures in the newly created Business and Chancery Court (“the business court”). The court will begin operations in October 2024 and so the advisory committee chair and vice chair are aiming to have a package of proposed rule that could be delivered to the Supreme Court for review by the end of the current year. The chair noted that if legislative changes are needed prior to the business court’s opening, those would need to be accomplished in the 2024 general session, which starts in January 2024. Quickly identifying any needed statutory revisions is therefore of critical importance. The chair noted that there would be further discussion on this topic later in the agenda.

## **(3) HB0216 – DISCUSSION OF STATUTORY ISSUES:**

The chair and vice chair had previously reviewed the statutes created by HB0216 (<https://le.utah.gov/~2023/bills/static/HB0216.html>) and had identified the following statutory issues that might benefit from legislative attention / modification:

- **78A-5a-103(2)** – Supplemental jurisdiction of the business court:
  - What happens if the case involves – for instance – counterclaims that would fall into statutorily excepted case / claim types? There are a number of procedures related to counterclaims, joinder of parties, etc. that are implicated here. Would the entire case have to be removed from the business court? Would only the excepted claims be bifurcated out to the district court?
- **78A-1-103.5** – Single judge and conflicts / disqualifications / recusals:
  - The legislature chose to only fund a single judge for the business court (for fiscal and workload issues). Having a single judge will create significant hurdles for the business court in terms of conflicts and disqualification right from the outset. Where the business court judge has a conflict, will the case always have to be transferred back to the district court? Could there be a certain number of district court judges who could preside over a case in the business court if the single business court judge had a conflict? Would having a temporarily assigned judge serve the purposes of this court and meet the needs of parties litigating in the business court? If a judge is appointed to the bench from a particular firm, how would that judge adjudicate any case involving that firm?
- **78A-5a-104(2)** – Jury trial demand requires that the case be transferred:
  - Because anyone can demand a jury trial – even where they may not be entitled to one due to waiver, etc. – this may result in gamesmanship if there is no provision to bring case back into the business court (i.e., if the case isn’t going well for a party, they could strategically make a claim for a jury demand in order to get the case in front of a different judge in the district court). A possible fix could be the following: once a jury demand is made, the business court could be authorized to make a review of the matter to determine whether there is a right to jury (i.e., what if jury was waived by contract and that waiver is enforceable?). If the business court determines the jury demand is ineffectual / unenforceable, the case could remain in

the business court. This isn't possible under the current statutory language. Another possible solution could be that, in order to litigate in the business court, the parties will need to collectively waive the right to demand a jury early in the business court litigation process. Staff explained that Rep. Brammer would likely be willing to make a change to this provision; the real concept being express in this statute is that there be no jury trials in the business court. Staff noted that the specifics for the procedures here were intentionally left out of the statute so that the rules of procedure could be crafted to address these situations. Staff pointed the committee's attention to the language in the statute that says "in accordance with the Utah Rules of Civil Procedure" and explained that the only reason this didn't say "the Utah Rules of Business and Chancery Procedure" is that no such rules existed at the time the statute was created. Staff felt confident Rep. Brammer would be willing to craft language here that would allow the rules of procedure to function well.

Committee members provided comments as the chair presented each of these items (incorporated into the minutes above). The intention is to connect with Rep. Brammer and see if he is willing to address these issues with legislature during the 2024 general legislative session.

#### **(4) DIVISION INTO GROUPS / GROUP ASSIGNMENTS:**

Chair Strassberg explained that he and Vice Chair Watts had discussed the path forward and agreed that it made the most sense:

- to look to the existing rules of civil procedure as the starting point for business and chancery rules of procedure; and
- to divide the committee into two subgroups, each led by either the chair or vice chair, to review specifically assigned rules of civil procedure.

Those subgroups were outlined as follows:

- Chair Strassberg's subgroup:
  - Assignment = Rules 7 and 12-21
  - Members = Mr. Burbidge, Ms. Parrish, Mr. Prisbrey, and Judge Pettit
- Vice Chair Watts' subgroup:
  - Assignment = Rules 22-26
  - Members = Ms. Shurman, Mr. Olsen, and Judge Pullan

Judge Pettit was able to join the meeting at the 42-minute mark. The chair provided Judge Pettit with a quick overview of the path forward that the committee had been discussing leading up to her joining the meeting. Judge Pettit stated it sounded like the contemplated approach was similar to the relationship between the rules of civil and rules of criminal procedure, where there is provision (in Rule 81(e) of the Utah Rules of Civil Procedure) that makes clear that the rules of civil procedure where there is no other applicable statute or rule.

Judge Pullan raised a concern that the committee may miss other rules of procedure used by business courts around the country. Judge Pettit agreed with this concern. Judge Pullan suggested that staff should be assigned to review rules from other courts / states to assess

whether there are specialized rules of procedure that could be helpful in Utah. Chair Strassberg asked Mr. Prisbrey if he was comfortable taking on that task, given his experience in crafting the white paper that was used during the exploratory workgroup meetings that occurred during the summer of 2022 and which resulted in creation of HB0216. Mr. Prisbrey accepted the assignment. He explained that the white paper examined New York , Delaware, South Carolina, and Arizona. He would like to expand that to additional states, including Wyoming. Ms. Parrish noted that the federal courts have rules specifically tailored to patent cases and perhaps that is a model that could be used.

Judge Pullan also suggested that the committee may need to take a look at the applicability of Rule 65A in the business court, where certain litigation (i.e., trade secrets, etc.) may necessarily implicate injunctive relief that may be impossible to obtain now that the “serious issues on the merits which should be the subject of further litigation” language has been removed from the rule. Staff shared his sense that Rep. Brammer would be likely be unwilling to walk back the changes that were made to Rule 65A via his House Joint Resolution 002 during the 2023 session. Several committee members explained that if the broader business community desired to have restored to the rules of procedure language similar to what was removed in HJR002 (even if just for certain business court litigation), that should be a topic of conversation that is explored through open dialog with interested legislators.

#### **(6) ADJOURN**

The meeting adjourned at approximately 1:00 p.m. The committee did not schedule a next meeting, but agreed to first complete subgroup efforts before calendaring another meeting (likely in six to seven weeks).