Agenda

Utah Supreme Court Advisory Committee
Utah Rules of Appellate Procedure

Paul C. Burke, Chair

Location:	Webex: (click here to join the meeting)
Date:	October 1, 2020
Time:	12:00 to 1:30 p.m.

Action: Welcome and approval of September 3, 2020 minutes	Tab 1	Paul C. Burke, Chair
Action: *Arreguin-Leon v. Hadco Construction* and Rule 11	Tab 2	Larissa Lee, Christopher Ballard
Action: Aligning Rule 15 with statutory language	Tab 3	Paul C. Burke
Action: Rule 23B and deciding issues outside of the remand request	Tab 4	Lisa Collins, Christopher Ballard, Nathalie Skibine
Action: Incorporating Standing Order 11 (Rules 34, 43, 50, 56)	Tab 5	Larissa Lee
Discussion: Old/new business		Paul C. Burke

Committee Webpage: https://www.utcourts.gov/utc/appellate-procedure/

Meeting schedule:

November 5, 2020 December 3, 2020

Tab 1

Minutes

Supreme Court's Advisory Committee on the Utah Rules of Appellate Procedure

Utah Supreme Court
450 South State Street
Salt Lake City, Utah 84114

Via WebEx Videoconference
Thursday, September 3, 2020
12:00 pm to 1:30 pm

PRESENT		EXCUSED
Christopher Ballard	Judge Gregory Orme	Patrick Burt
Troy Booher—Emeritus Member	Rodney Parker	R. Shawn Gunnarson
Paul C. Burke—Chair	Judge Jill Pohlman	Alan Mouritsen
Lisa Collins	Sarah Roberts—Staff	
Tyler Green	Clark Sabey	
Michael Judd—Recording Secretary	Nathalie Skibine	
Larissa Lee—Staff	Scarlet Smith	
	Douglas Thompson—Guest	
	Mary Westby	

1. Welcome and Approval of June 2020 Minutes — Paul C. Burke

The meeting began with an introduction to Sarah Roberts, who will be taking over staffing the committee. Larissa Lee will remain on the committee in an advisory role. Paul C. Burke then invited comments regarding the June 2020

minutes. Clark Sabey noted that the word "production" in Item 2 should be corrected to "productive." There were no objections to that proposed correction.

Mary Westby moved to approve the minutes from the June 2020 meeting with the noted correction. Judge Gregory Orme and Judge Jill Pohlman seconded the motion and it passed by unanimous consent.

2. Discussion: Paul C. Burke
Annual Report

The committee reviewed the 2019–2020 annual report. Mr. Burke remarked on the committee's productivity, and told the committee that the Supreme Court had asked him to pass along its gratitude to the committee for its work and service.

3. Action: Larissa Lee
***Arreguin-Leon* and Rule 11**

The committee's current focus on Rule 11 relates to the ambiguity of the phrase "the record on appeal." Larissa Lee explained the basis for the proposed amendments, as well as the history of the committee's prior consideration of the amendments. Ms. Lee noted that the Supreme Court's *Arreguin-Leon* decision raises a new issue about Rule 11, specifically whether a document filed with the trial court after an action ends becomes part of the record on appeal. The committee discussed how the rule should be limited, and how any such limitation may relate to past practices regarding the introduction of expected testimony by proffer. The committee engaged in an extended discussion about the problem, including the potential policy implications. After that discussion, Christopher Ballard offered to draft and circulate a new version of the rule that seeks to address the issues raised by the committee and by the Supreme Court in the *Arreguin-Leon* case.

Mr. Ballard moved for approval of his offer to draft new Rule 11 language. Ms. Westby seconded the motion and it passed without objection by unanimous consent.

4. Action: Christopher Ballard
Rule 23B and Issues Outside Remand Request Nathalie Skibine

Christopher Ballard explained the concerns prompting the proposed amendment, including the possibility that an appellate court may reach a partial decision on the merits of a case while, at the same time, remanding for reconsideration of issues that could ultimately affect the reasoning in that partial decision. Mr. Ballard and Nathalie Skibine thus proposed an addition to Rule 23B providing that if the court grants a Rule 23B remand, it will not reach a final decision on any other part of the appeal until the Rule 23B remand has been completed. Douglas Thompson, who attended the meeting as a guest to discuss Rule 23B specifically, agreed with Mr. Ballard's appraisal of the challenges associated with Rule 23B for appellate practitioners. Troy Booher suggested that if a Rule 23B motion is granted, the appeal be stayed while remand occurs, but that a Rule 23B motion only be denied at the time the merits panel reaches a decision on the appeal as a whole. Judge Orme suggested that the problem at issue could potentially be addressed by something less formal than a rule amendment.

Judge Orme moved that further consideration of Rule 23B be tabled until the Court of Appeals judges are able to discuss other approaches to resolve the underlying problem without need for an amendment to the rule. Judge Pohlman seconded the motion to table and it passed without objection by unanimous consent.

5. Discussion: Paul C. Burke
Aligning Rule 15 with Statutory Language

The proposed changes to Rule 15 are intended to correct a reference to a statute and to otherwise clean up the rule. Mr. Booher also mentioned that the reference to "Utah Code Ann." be changed to a reference to "Utah Code," to promote consistency with the Utah Supreme Court's style guide. Judge Orme questioned whether, in this rule, a general reference to a statutory concept may suffice, rather than a reference to a specific code provision, to ensure that any future changes to statutory numbering do not render the rule reference obsolete.

The committee considered a motion to strike the reference to "Ann." in this rule, and elsewhere within the rules, to promote consistency with Supreme Court practice. There were no objections.

Judge Orme moved to strike reference to statutory number, and Ms. Westby second that motion. Ms. Westby then moved to adopt the amendments to Rule 15 as they appeared on the screen at the committee meeting. After further discussion, the committee decided to investigate further the proposed stricken reference and the other proposed changes to the rule, in order to ensure that the proposed changes would not cause confusion.

Ms. Westby withdrew her motion to adopt, and Rod Parker moved to table the proposed amendment until it could be considered further. Ms. Westby seconded that motion and it passed without objection by unanimous consent.

6. Discussion: Paul C. Burke
Old/New Business

None.

7. Adjourn

A motion to adjourn was made and there were no objections. The committee is scheduled to meet again on October 1, 2020.

Tab 2

Rule 11. The record on appeal.

(a) **Composition of the record on appeal**. The record on appeal consists of the ~~original papers~~ documents ~~filed~~ and exhibits ~~filed~~ ~~offered, received, or proffered?~~ filed in the trial court, including the presentence report in criminal matters, the transcript of proceedings, if any, and the record index ~~prepared by the clerk of the trial court~~., ~~and the docket sheet, shall constitutes the record on appeal in all cases. A copy of the record certified by the clerk of the trial court to conform to the original may be substituted for the original as the record on appeal. Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.~~ The record must include all of these items, unless the appellate court directs otherwise on its own motion or on granting a party's motion to amend or supplement the record ~~documents in the underlying case as part of the record on appeal~~.

(b) **Preparing, pagination~~on~~ng, and indexing ~~of~~the record**.

(1) Preparing the record. ~~Immediately upon filing of the notice of appeal~~On the appellate court's request, ~~the clerk of~~ the trial court clerk ~~shall~~ will ~~securely fasten the record in a trial court case file, with collation~~prepare the record in the following order:

(A) the index prepared by the clerk;

~~(B) the docket sheet;~~

(~~C~~B) all original ~~papers~~ documents in chronological order;

(~~D~~C) all published depositions in chronological order;

(~~E~~D) all transcripts prepared for appeal in chronological order;

(~~F~~E) a list of all exhibits offered in the proceeding; and

(~~G~~F) in criminal cases, the presentence investigation report.

(2) Pagination.

(A) Using bates numbering, ~~T~~the clerk ~~shall~~will paginate the entire record~~mark the bottom right corner of every page of the collated index, docket sheet, and all original papers~~ except that the clerk need only ~~need only will~~ mark ~~as well as~~ the cover page~~s only~~ of all published depositions and ~~and the cover page only of each~~

~~volume of~~ transcripts prepared for appeal ~~constituting the record with a sequential number using one series of numerals for the entire record~~.

(B) If the appellate court requests a supplemental record ~~is forwarded to the appellate court~~, the clerk ~~shall~~ will ~~collate~~ follow the same procedures as in (b)(2)(A), ~~beginning~~ continuing bates numbering from the last page number of the original record.~~the papers, depositions, and transcripts of the supplemental record in the same order as the original record and mark the bottom right corner of each page of the collated original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the supplemental record with a sequential number beginning with the number next following the number of the last page of the original record.~~

(3) Index. The clerk ~~shall~~ will prepare a chronological index of the record. For each document, deposition, or transcript, ~~T~~the index ~~shall~~ must contain ~~a reference to~~ the date of filing and starting page of the record~~on which the paper, deposition or transcript was filed in the trial court and the starting page of the record on which the paper, deposition or transcript will be found~~.

(4) Examining the record. ~~Clerks of the trial and a~~Appellate court~~s~~ clerks ~~shall~~will establish rules and procedures for parties to check~~ing~~ out the record after pagination. ~~for use by the parties in preparing briefs for an appeal or in preparing or briefing a petition for writ of certiorari.~~

(c) **Duty of appellant**. ~~After filing the notice of appeal, t~~The appellant, or in the event that more than one appeal is taken, each appellant, ~~shall~~ must comply with ~~the provisions of~~ paragraph~~s (d) and~~ (e~~d~~) ~~of this rule~~ and ~~shall~~ must take any other action necessary to enable ~~the clerk of~~ the trial court clerk to assemble and transmit the record. ~~A single record shall be transmitted.~~

~~(d) **Papers on appeal**.~~

~~(1) Criminal cases. All of the papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.~~

~~(2) Civil cases. Unless otherwise directed by the appellate court upon sua sponte motion or motion of a party, the clerk of the trial court shall include all of the papers in a civil case as part of the record on appeal.~~

~~(3) Agency cases. Unless otherwise directed by the appellate court upon sua sponte motion or motion of a party, the agency shall include all papers in the agency file as part of the record.~~

(~~e~~d) **The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered**.

(1) Request for transcript; time for filing. Within 1~~0~~4 days after filing the notice of appeal, the appellant ~~shall~~ must order the transcript(s) online at www.utcourts.gov, specifying the entire proceeding or parts of the proceeding to be transcribed that are not already on file. The appellant ~~shall~~ must serve on the appellee a designation of those parts of the proceeding to be transcribed. ~~If the appellant desires a transcript in a compressed format, appellant shall include the request for a compressed format within the request for transcript.~~ If no such parts of the proceedings are to be requested, within the same period the appellant ~~shall~~ must file a certificate to that effect with the ~~clerk of the~~ appellate court clerk and serve a copy ~~of that certificate~~ on the appellee.

(2) Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to ~~urge~~argue on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant ~~shall~~ must include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

(3) Statement of issues; ~~C~~cross-designation by appellee. If the appellant does not order the entire transcript, the appellee may, within 1~~0~~4 days after the appellant servi~~ce~~es ~~of~~ the designation or certificate described in paragraph (e)(1) ~~of this rule~~, order the transcript(s) in accordance with (e)(1), and ~~file and~~ serve on the appellant a designation of additional parts to be included.

(~~f~~e) **Agreed statement as the record on appeal**. In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it~~,~~ ~~—~~together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal~~,~~ ~~—~~ ~~shall~~will be approved by the trial court. The ~~clerk of the~~ trial court clerk ~~shall~~ will transmit the statement to the ~~clerk of the~~ appellate court clerk within the time prescribed by Rule 12(b)(2). The ~~clerk of the~~ trial court clerk ~~shall~~ will transmit the record index ~~of the record~~ to the ~~clerk of the~~ appellate court clerk ~~up~~on the trial court's approval of the statement ~~by the trial court~~.

(~~g~~f) **Statement of evidence or proceedings when no report was made or when transcript is unavailable**. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, or if the appellant is impecunious and unable to afford a transcript in a civil case, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement ~~shall~~ must be served on the appellee, who may serve objections or propose amendments within 1~~0~~4 days after service. The statement and any objections or proposed amendments ~~shall~~ must be submitted to the trial court for settlement and approval and, as settled and approved, ~~shall~~ will be included by the ~~clerk of the~~ trial court clerk in the record on appeal.

(~~h~~g) **Correcti~~on~~ng or modif~~ication~~ying ~~of~~ the record.** If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference ~~shall~~ must be submitted to and settled by that court and the record made to ~~conform to the truth~~ reflect what occurred in the trial court. If anything material to either party is misstated or is omitted from the record by error of the trial court or court personnel, by accident, or because the appellant did not order a transcript of proceedings that the appellee needs to respond to issues raised in appellant's brief~~the Brief of Appellant~~, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be ~~certified and transmitted~~created. The moving party, or the court if it is acting on its own initiative, ~~shall~~ must serve on the parties a statement of the proposed changes. Within 1~~0~~4 days after service, any party may serve objections

to the proposed changes. All other questions as to the form and content of the record ~~shall~~ must be presented to the appellate court.

This opinion is subject to revision before final publication in the Pacific Reporter

2020 UT 59

IN THE

SUPREME COURT OF THE STATE OF UTAH

NOE ARREGUIN-LEON,
Petitioner,

v.

HADCO CONSTRUCTION, LLC,
Respondent.

No. 20190121
Heard February 10, 2020
Filed August 17, 2020

On Certiorari to the Utah Court of Appeals

Fourth District, Provo
The Honorable Fred D. Howard
No. 130400816

Attorneys:

Troy L. Booher, Beth E. Kennedy, Salt Lake City, Leonard McGee, Peter Mifflin, Sandy, for petitioner

Robert L. Janicki, Michael L. Ford, Sandy, Harry Lee, Shannen W. Coffin, Mark C. Savignac, Washington D.C., for respondent

JUSTICE PETERSEN authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, and JUSTICE PEARCE joined.

JUSTICE PETERSEN, opinion of the Court:

INTRODUCTION

¶1 Noe Arreguin[1] was injured while working on a highway construction site. He sued Hadco Construction, LLC, the general

[1] Although the plaintiff's last name in the case caption is Arreguin-Leon, we refer to him in this opinion as Arreguin because that is how he refers to himself in his briefing.

contractor, for failing to take necessary safety measures to protect workers from highway traffic. Arreguin prevailed at trial. But during trial, he elicited undisclosed testimony from his expert witness. The court of appeals found this error to be harmful and reversed and remanded for a new trial. We affirm.

BACKGROUND

¶2 Noe Arreguin was injured while installing an exit sign on the shoulder of I-15. A driver fell asleep at the wheel and veered off the road and into the ladder on which Arreguin was standing.

¶3 Arreguin worked for a company called Highway Striping & Signs. The company had been hired by Hadco to install signage for a Utah Department of Transportation roadway project in Utah County. In its role as general contractor, Hadco was responsible for implementing a "traffic control plan" composed of various safety measures to protect workers from traffic and drivers from the construction site. Hadco did not do so. At the time of the accident, there were no traffic control measures in place at the accident site, such as barrels or barriers.

¶4 As a result of the accident, Arreguin sustained significant injuries. He sued the driver and Hadco (along with others who are not relevant to this appeal).

¶5 Arreguin retained Bruce Reading as an expert witness on traffic control standards. Hadco's counsel elected to depose Reading rather than receive an expert report.

¶6 The case proceeded to a jury trial, at which Arreguin called Reading to testify. Reading opined that Hadco or its subcontractor had violated five specific engineering practices, regulatory standards, and contractual provisions and that there was no traffic control plan in place at the accident site.

¶7 During direct examination, Arreguin's counsel asked Reading, "If [200 yards from the construction project is] where [the driver] started to exit the roadway, what effect would a correctly installed buffer zone have had on his driving?" Hadco's counsel objected and asked to approach the bench. The following sidebar ensued:

> [DEFENSE COUNSEL]: Seems to me like this testimony is going toward causation—would traffic control have prevented the accident—and it goes beyond any opinion that he's ever disclosed in this

> case. There's a list of his items of testimony, and he doesn't touch on that at all.
>
> [PLAINTIFF COUNSEL]: Your Honor, Mr. Reading was deposed in this case. [Defense counsel] had every opportunity to ask any question he wanted, and—and he's not limited to the initial disclosure. If he had—if [defense counsel] had elected a report, he would be limited to the contents of the report, but because a deposition has been elected, Mr. Reading is not so limited.
>
> [DEFENSE COUNSEL]: That's not correct, your Honor.
>
> [PLAINTIFF COUNSEL]: And—and there were documents provided to Mr. Reading after (inaudible).
>
> [DEFENSE COUNSEL]: Then he needs to supplement his disclosure.
>
> THE COURT: Your objection is noted and is, frankly, overruled.
>
> [DEFENSE COUNSEL]: Can I make a record—a record on this? I think it's very important.
>
> THE COURT: This record is the record here now.
>
> [DEFENSE COUNSEL]: Okay. Thank you.

¶8 Reading then testified about the effect that a proper traffic control plan would have had, including that if the accident occurred where Hadco's "safety person"[2] suggested it did, it would have been within a 900-foot area where the driver would have hit "at least one, if not more, of th[e] plastic barrels" that would have been in place. He explained that after hitting at least one of the plastic barrels, the driver "would have had close to six seconds to wake up and take corrective action." And he concluded that if traffic control had been in place, "[t]here might have been an accident still," but it would not have taken place where it did.

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[2] At trial, Reading referred to Hadco's "safety person." From the context, we understand this person to be the Hadco employee who completed Hadco's incident report about the accident.

¶9 The trial continued and the jury ultimately found that Hadco was partially liable for Arreguin's injury. The jury allocated 60 percent of the fault to the driver and 40 percent to Hadco. Hadco appealed.

¶10 Approximately four months after filing its notice of appeal, Hadco filed Reading's deposition transcript and Arreguin's expert disclosures in the district court. They were included in the record that was certified to the court of appeals.

¶11 One of Hadco's arguments on appeal was that the district court erred under Utah Rule of Civil Procedure 26 when it allowed Reading to offer an undisclosed opinion on causation. Arreguin argued that Hadco could not prevail on this argument without relying on his expert disclosures and Reading's deposition transcript. But he asserted it was improper for the court of appeals to consider these documents because they were not actually part of the trial record.

¶12 The court of appeals decided to consider the disclosures and the deposition transcript. It "acknowledge[d] that [Reading's] deposition was filed after the judgment was entered in this matter, but before the record was prepared" and that "such filings normally would not put the deposition before [the court of appeals] for consideration." *Arreguin-Leon v. Hadco Constr. LLC*, 2018 UT App 225, ¶ 6 n.2, 438 P.3d 25. But it decided that "under the unique facts of this case" it would "exercise [its] discretion and consider the deposition." *Id.*

¶13 The court of appeals concluded that the district court abused its discretion in allowing Reading to testify about causation at trial. *Id.* ¶ 20. And it determined that the error was "harmful enough to warrant reversal and a new trial." *Id.* ¶ 32.

¶14 Arreguin petitioned this court for certiorari, which we granted to address three questions: (1) "[w]hether the Court of Appeals erred in considering a deposition transcript that was not included in the record prior to the filing of the appeal"; (2) "[w]hether the Court of Appeals erred in construing [Hadco's] arguments on appeal to present a sufficient basis for its conclusion that [Arreguin's] expert testimony should have been excluded"; and (3) "[w]hether the Court of Appeals erred in its construction and application of the standard for demonstrating harmful error on appeal."

¶15 We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(a).

STANDARD OF REVIEW

¶16 "On certiorari, we review the court of appeals' decision for correctness, without according any deference to its analysis." *Vander Veur v. Groove Entm't Techs.*, 2019 UT 64, ¶ 7, 452 P.3d 1173 (citation omitted) (internal quotation marks omitted).

ANALYSIS

I. CONSIDERATION OF ARREGUIN'S EXPERT DISCLOSURES AND THE EXPERT'S DEPOSITION TRANSCRIPT

¶17 The first question before us is whether the court of appeals erred in considering Arreguin's expert disclosures and Reading's deposition transcript. Arreguin argues that the court of appeals should not have considered these documents because they were not truly part of the trial record, in that neither party submitted either document for the district court's consideration at any point. Rather, Arreguin notes that Hadco filed the documents five months after the district court entered the final judgment in the case and four months after Hadco filed its notice of appeal.

¶18 We take Arreguin's point. When the district court ruled on Hadco's objection, it did not actually have these documents before it. The court of appeals decided to consider this extra-record evidence because it determined Hadco's counsel had attempted to make a further record during the sidebar but had been prevented from doing so by the district court. *See Arreguin-Leon v. Hadco Constr. LLC*, 2018 UT App 225, ¶ 6 n.2, 438 P.3d 25. The court of appeals analogized this situation to one in which a party is prevented from objecting, and thereafter should not be prejudiced by the lack of an objection. *See id.*; *see also* UTAH R. CIV. P. 46. Arreguin rejects this as a valid basis for considering the extra-record materials.

¶19 We conclude that we do not need to resolve this dispute. We can affirm the court of appeals' ruling on the disputed expert testimony without resort to the expert disclosures or deposition transcript. Arreguin's premise is that the content of these documents is essential to Hadco's argument—in other words, that Hadco cannot successfully argue that the district court erred in permitting Reading to testify about causation without relying on the content of (1) the expert disclosures to prove that Arreguin did not in fact disclose a causation opinion and (2) the deposition transcript to prove that Hadco had "locked in" Reading to only those opinions he offered during his deposition. But as we will discuss, Arreguin never put the content of these documents at

issue in the district court. Arreguin essentially contends that Hadco must refute arguments he never made.

¶20 The court of appeals did rely upon the documents in its reasoning, *Arreguin-Leon*, 2018 UT App 225, ¶ 23. But we disagree with the premise that they are necessary to Hadco's argument or the court of appeals' holding. As Hadco has argued, we can resolve the rule 26 issue based solely on the transcript of the sidebar between counsel and the district court at trial.

¶21 Looking only at the sidebar, we agree with the court of appeals that the district court committed legal error in overruling Hadco's objection. During the sidebar, Hadco argued that Arreguin's question to Reading elicited a causation opinion, which went "beyond any opinion that [Arreguin had] ever disclosed in this case." It is important to note Arreguin's response. He did not dispute Hadco's assertion that his question would elicit causation testimony. He did not assert that he had in fact disclosed that Reading would offer a causation opinion or that Reading had discussed causation in his deposition. And he did not argue that Hadco had failed to "lock in" Reading to only the opinions he had given at the deposition and therefore Reading was free to offer additional opinions.

¶22 Instead, Arreguin asserted broadly that the expert was not limited at all because Hadco had opted for a deposition rather than an expert report. Arreguin's counsel stated,

> Your Honor, Mr. Reading was deposed in this case. [Defense counsel] had every opportunity to ask any question he wanted, and—and he's not limited to the initial disclosure. If he had—if [defense counsel] had elected a report, he would be limited to the contents of the report, *but because a deposition has been elected, Mr. Reading is not so limited*.

Hadco's counsel responded, "That's not correct, your Honor." With these arguments before it, the court overruled Hadco's objection and permitted the expert to offer the disputed testimony.[3]

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[3] After this back-and-forth but before the court ruled, Arreguin interjected that Hadco had provided documents to Reading after the deposition. And Hadco countered, "[t]hen he needs to (continued . . .)

¶23 As the court of appeals correctly concluded, the district court's ruling was legally incorrect. *Id.* ¶ 26. Just because a party opponent selects a deposition rather than an expert report does not mean an expert's subsequent trial testimony can be a "free-for-all." *Id.* ¶ 21.

¶24 In general, rule 26 provides that "discovery may be obtained from an expert witness either by deposition or by written report." UTAH R. CIV. P. 26(a)(4)(B). With respect to a written report, the rule makes clear that an expert is limited to opinions disclosed in the report. *Id.* ("A report shall . . . contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report."). The rule itself does not make a similar statement with regard to an expert's deposition. We generally agree with the relevant advisory committee note, which explains that "[i]f a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to 'lock in' the expert's testimony." *Id.* advisory committee note. In a case where an opposing party fails to "lock in" an expert witness during the deposition, the opposing party runs the risk of surprise testimony at trial.

¶25 However, this does not equate to the blanket assertion advanced at trial by Arreguin that if Hadco "had elected a report,

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supplement his disclosure." Hadco's response was legally correct. *See* UTAH R. CIV. P. 26(d)(3)–(4); *see also Arreguin-Leon v. Hadco Constr. LLC*, 2018 UT App 225, ¶ 23, 438 P.3d 25. And we do not think that this additional exchange requires a review of the content of the disclosures. Here too, Arreguin did not respond that he had supplemented his disclosures or otherwise provided a causation opinion at some point before trial. So he did not put the content of his disclosures at issue.

Arreguin asserts in his briefing to us that Hadco forfeited its argument that Arreguin failed to supplement his disclosures. Arreguin argues that although Hadco preserved this argument during the sidebar, it did not raise the same argument in its briefing to the court of appeals, so the argument has been waived. However, Hadco has consistently asserted that Arreguin never disclosed or produced, in any form or at any time before trial, a causation opinion from Reading. Accordingly, we reject Arreguin's preservation argument.

[Reading] would be limited to the contents of the report, but because a deposition has been elected, Mr. Reading is not so limited." Arreguin's counsel did not put the contents of the disclosures or deposition at issue by asserting that a causation opinion had in fact been disclosed at some point or that Hadco had not properly "locked in" Reading at his deposition and therefore he was free to offer new opinions at trial. Rather, Arreguin made a very broad assertion to the district court that if a party opponent elects to depose an expert witness, then the expert witness is not limited during trial testimony. This is an incorrect interpretation of rule 26(a)(4)(B), which the district court should have rejected.

¶26 Accordingly, we agree with the court of appeals that the district court should not have permitted Reading to offer the disputed testimony based on the arguments before it. *See id.* 26(d)(4) ("If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure."). And we conclude that although the court of appeals reviewed the disclosures and deposition and determined that Arreguin had not disclosed a causation opinion and that Hadco did in fact "lock in" Reading to the opinions he provided at the deposition, this was not necessary to reach the correct legal result because Arreguin had never argued otherwise.[4]

II. UTAH RULE OF APPELLATE PROCEDURE 11

¶27 Although we do not need to reach the issue of whether the court of appeals erred in considering the deposition transcript, the parties' briefing and oral argument did elucidate certain ambiguities in Utah Rule of Appellate Procedure 11 that we flag for our appellate rules advisory committee. The relevant portions of rule 11 state,

> (a) **Composition of the record on appeal**. The original papers and exhibits filed in the trial court,

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[4] Arreguin also argues in his briefing to us that "because Hadco did not make the documents part of the record, Hadco could not show prejudice on appeal." We are unsure how to interpret this argument, and we are unable to resolve it because Arreguin does not explain the argument further.

> . . . the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and the docket sheet, shall constitute the record on appeal in all cases. . . . Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.
>
> . . .
>
> (d)(2) Civil cases. Unless otherwise directed by the appellate court upon sua sponte motion or motion of a party, the clerk of the trial court shall include all of the papers in a civil case as part of the record on appeal.
>
> . . .
>
> (h) **Correction or modification of the record**. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is misstated or is omitted from the record by error, by accident, or because the appellant did not order a transcript of proceedings that the appellee needs to respond to issues raised in the Brief of Appellant, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be certified and transmitted.

UTAH R. APP. P. 11.

¶28 First, rule 11 references "the record" throughout, but it does not define it. Rule 11(a) states that the "original papers and exhibits filed in the trial court, . . . the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and the docket sheet, shall constitute *the record* on appeal in all cases." *Id.* 11(a) (emphasis added). It goes on to say that "only those papers prescribed under paragraph (d) . . . shall be transmitted to the appellate court." *Id.* Rule 11(d)(2), which relates specifically to civil cases, is quite broad. It states that the clerk "shall include all of the papers in a civil case as part of the record." *Id.* 11(d)(2). But as illuminated here, there is ambiguity as to what "all of the papers in a civil case" includes. Arreguin asserts that the record

should include only those items that were actually presented in court in some manner. However, the rule does not make explicit that this is the case.

¶29 Next, rule 11(h) provides a mechanism for parties to correct or modify the record. It states that, "[i]f any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth." *Id.* 11(h). This has a clear meaning in some contexts—for example, if a transcript inaccurately documents a witness's testimony and can be corrected by comparing the transcript to the audio recording of the testimony, that would seem to make the record conform to the truth. But in other contexts, the scope of what is meant by making the record "conform to the truth" may not be entirely clear.

¶30 Finally, rule (11)(h) also permits modification of the record "[i]f anything material to either party is misstated or is omitted from the record by error" or "by accident." But the rule does not define either of these terms, and the scope of what might be encompassed within them is not entirely clear.[5]

III. HARMLESS ERROR

¶31 Next, we must determine whether the court of appeals erred in its construction and application of the standard for demonstrating harmful error on appeal. We conclude it did not.

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[5] We also flag for our civil rules advisory committee a concern raised by Arreguin's counsel at oral argument regarding the court of appeals' treatment of Utah Rule of Civil Procedure 50(b). By way of background, Arreguin argued in the court of appeals that Hadco's claims on appeal were unpreserved because Hadco had not renewed its motion for directed verdict after trial, and therefore had failed to meet the procedural requirements of rule 50(b). The court of appeals ultimately did not need to resolve this argument but briefly addressed it in a footnote. *See Arreguin-Leon v. Hadco Constr. LLC*, 2018 UT App 225, ¶ 29 n.9, 438 P.3d 25. At oral argument before this court, counsel for Arreguin raised a concern with this footnote. Because this issue is not before us, we do not address it or opine one way or the other on the court of appeals' take on the rule. But we refer counsel's concern to our civil rules advisory committee for consideration.

¶32 Arreguin argues that the court of appeals misapplied the harmlessness standard, citing to the court of appeals' statement that it could not conclude "that the jury would have inevitably reached the same result without Expert's testimony." *Arreguin-Leon v. Hadco Constr. LLC*, 2018 UT App 225, ¶ 28, 438 P.3d 25. He contends that this is the incorrect standard.

¶33 Arreguin is correct that the cited sentence is not the correct harmlessness standard. Rather, "[h]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." *H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 44, 203 P.3d 943 (citation omitted). However, although the court of appeals used the language Arreguin identifies, it does not appear to us that it mistakenly thought this was the applicable legal standard. In the preceding paragraph, the court of appeals correctly stated that "[a]n error is harmful 'only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict.'" *Arreguin-Leon*, 2018 UT App 225, ¶ 27 (citation omitted). This is substantively similar to the legal standard we identify above. When the court used the disputed language, we agree with Hadco that it was merely a shorthand reference to the legal standard it had already identified. We see no legal error in the court of appeals' application of the law.

¶34 Arreguin also argues that the court of appeals erred when it found the district court's error to be harmful. He argues that "expert testimony is not required to establish [the] obvious proposition" that "if Hadco had set out the barrels to block traffic, the driver would have hit at least one of them, woken up, and taken corrective action" and "the barrels with sand in the bottom likely would have prevented the driver from crashing into [Arreguin]." Accordingly, he asserts that any error was harmless because Reading's testimony was "unnecessary and cumulative of common sense" and "stated the obvious."

¶35 We are not convinced. After the district court overruled Hadco's objection, Reading went beyond his testimony about the components of a proper traffic safety plan and gave his opinion of how such a safety plan would have changed the events that led to Arreguin's injury. Reading testified that if the driver drifted off the road 200 yards back, he would have hit a barrel and "would have been aware immediately upon impact" of the barrel. He estimated that based on a two-and-a-half second reaction time, the driver would have had "six seconds to wake up and take

corrective action." He then would have "jerk[ed] hard left." Ultimately, Reading opined that "[t]here might have been an accident still. There's no question about that. I don't think the accident would have taken place where this happened."

¶36 We think this testimony goes beyond common sense. A lay juror could be expected to understand the gist of Reading's causation opinion—that the sleeping driver might hit a barrel, wake up, and attempt a correction. But a layperson would not necessarily understand with such precision the effect of a traffic safety plan upon the events in question. And even if a layperson might have assumed that "the accident would [not] have taken place where this happened," this opinion carried extra weight because it came from an expert. We agree with the court of appeals' observation that Reading's testimony "carried the imprimatur of coming from an 'expert,'" and it "provided a logical roadmap that the jury could—and likely did—follow in deciding the issues of liability and in apportioning fault." *Id.* ¶ 28.

¶37 Arreguin also argues that the error was harmless because Reading's testimony was cumulative of testimony given by other witnesses. But we do not view the testimony from the other witnesses to be equivalent to Reading's causation testimony.

¶38 Arreguin argues that Reading's testimony that the sleeping driver would have hit a barrel was duplicative of testimony from Hadco's expert. But this is not so clear. Reading testified that given the parameters suggested by Hadco's "safety person," the driver "would have [hit][6] at least one, if not more, of these plastic barrels." In comparison, Hadco's expert testified about calculating tapers and spacing of traffic control devices, but he did not say that the sleeping driver would have hit a barrel. The closest Hadco's expert came to saying this was noting that a traffic control device is an "indicator" and that barrels are "not going to stop a vehicle from departing the roadway," while agreeing that they would "notify." Reading's testimony was more specific and certain, and it was not cumulative of the testimony from Hadco's expert.

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[6] The transcript says this word was inaudible. From the context of the sentence, it appears that the word was "hit" or another synonymous word.

¶39 Arreguin also argues that Reading's testimony that hitting the barrel would have awakened the driver was cumulative of testimony from Hadco's expert, Hadco's project manager, and the driver. Reading opined that hitting a barrel would lead to a "hellacious sound" that is "going to wake him up." In contrast, when asked "if striking a barrel can be a jolting, noisy experience," Hadco's expert responded, "Well, yes." He then commented, "I can't say, if someone is already asleep, though, if that would be something that would necessarily wake them up." When asked, "Would you agree that it is possible that there was a barrel on the side of the road and [the driver] hit it as he was going off the road, that it may have alerted him," Hadco's expert responded, "It could have. I mean, I—I would be speculating, but yeah. I couldn't say specifically that it would, but it may have." Hadco's project manager agreed that barrels need to be "crashworthy." And the driver testified that he woke up when he heard "the grids in the road." Arreguin argues that based on this testimony, the jury could infer that if a rumble strip awakened the driver, hitting a barrel also would have awakened him. While that might be a fair inference, we disagree with Arreguin's assertion that Reading's testimony is merely duplicative of the other witnesses' testimony. Again, Reading's testimony was specific and certain, while the testimony of the other witnesses was equivocal or required an inferential leap.

¶40 Arreguin next argues that Reading's testimony that the driver would have taken corrective action also came from Hadco's expert and the driver. Again, Hadco's expert testified about calculating tapers and spacing of traffic control devices. He did not clearly state that the driver would have taken corrective action. Similarly, the driver testified that upon waking up and seeing a flatbed truck in front of him he "swerved off to the side to avoid it." Neither is equivalent to Reading's testimony that the driver "would have had close to six seconds to wake up and take corrective action," that "the normal experience is you jerk hard left to get back on," and finally that "[t]here might have been an accident still," but he did not "think the accident would have taken place where this happened."

¶41 Reading's disputed testimony related to the important questions of whether and to what extent Hadco's failure to implement a proper traffic control plan on the day of the accident caused Arreguin's injuries. While other witnesses made statements from which the jury could possibly have inferred the disputed facts and opinions Reading provided, none of them gave

testimony that was equivalent to Reading's. None of the other witnesses' testimony on the disputed points was as clear, specific, and emphatic as Reading's. We agree with the court of appeals that the district court's error was not harmless. The erroneously admitted testimony was not "sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." *See H.U.F.*, 2009 UT 10, ¶ 44 (citation omitted).

CONCLUSION

¶42 We agree with the court of appeals that the district court abused its discretion in allowing Reading to offer causation testimony. This error was harmful. We affirm the court of appeals' decision, and we remand to the district court for a new trial.

Tab 3

Rule 15. Petitions for review in tax cases.

(a) If a petition for judicial review of a State Tax Commission decision is filed ~~pursuant to~~under Utah Code ~~Ann.~~ § 59-1-602 by one party in the district court and by another party in the ~~supreme Court~~ appellate court through a direct appeal, the direct appeal ~~shall~~will be, absent compelling circumstances~~,~~:

(1) stayed pending the district court proceeding's resolution ~~of the proceeding before the district court,~~; and

(2) dismissed when the district court issues~~upon the issuance of~~ a final appealable order ~~by the district court~~.

(b) Assuming an absence of compelling circumstances under ~~subsection~~paragraph (a), all issues appealed in the direct appeal may be raised by any party in the district court proceeding, and if not raised in the district court proceeding, the direct appeal issues will be waived and subject to dismissal with the direct appeal when the district court issues~~upon the issuance of~~ a final appealable order ~~by the district court~~.

(c) A party may not appeal ~~pursuant to~~under Utah Code ~~Ann.~~ § 59-1-602 to both the district court and ~~to~~ the ~~Supreme Court~~appellate court through appeal. However, a party who has appealed to either the district court or the ~~Supreme Court~~appellate court may join an appeal filed by another party in the separate court through filing a cross-appeal at the ~~Supreme Court~~appellate court or by intervening in the district court appeal.

Tab 4

Rule 23B. Motion to remand for findings necessary to determination of ineffective assistance of counsel claim.

(a) **Grounds for motion; time**. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion will be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion must be filed before or at the time of the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. After the appeal is taken under advisement, a remand pursuant to this rule is available only on the court's own motion and only if the claim has been raised and the motion would have been available to a party.

(b) **Content of motion**. The content of the motion must conform to the requirements of Rule 23. The motion must include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits must also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. The motion must also be accompanied by a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.

(c) **Orders of the court; response; reply**. If a motion under this rule is filed at the same time as appellant's principal brief, any response and reply must be filed within the time for the filing of the parties' respective briefs on the merits, unless otherwise specified by the court. If a motion is filed before appellant's brief, the court may elect to defer ruling on the motion or decide the motion prior to briefing.

(1) If the court defers the motion, the time for filing any response or reply will be the same as for a motion filed at the same time as appellant's brief, unless otherwise specified by the court.

(2) If the court elects to decide the motion prior to briefing, it will issue a notice that any response must be filed within 30 days of the notice or within such other time as the court

may specify. Any reply in support of the motion must be filed within 20 days after the response is served or within such other time as the court may specify.

(3) If the requirements of parts (a) and (b) of this rule have been met, the court may order that the case be temporarily remanded to the trial court to enter findings of fact relevant to a claim of ineffective assistance of counsel. The order of remand will identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed by the trial court. The order will also direct the trial court to complete the proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.

(4) If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court will direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) **Effect on appeal**. If a motion is filed at the same time as appellant's brief, the briefing schedule will not be stayed unless ordered by the court. If a motion is filed before appellant's brief, the briefing schedule will be automatically stayed until the court issues notice of whether it will defer the motion or decide the motion before briefing.

(e) **Proceedings before the trial court.** Upon remand the trial court will promptly conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness not identified in the order of remand will not be considered by the trial court on remand, unless the trial court determines that the interests of justice or judicial efficiency require consideration of issues not specifically identified in the order of remand. Evidentiary hearings will be conducted without a jury and as soon as practicable after remand. The burden of proving a fact will be upon the proponent of the fact. The standard of proof will be a preponderance of the evidence. The trial court will enter written findings of fact concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand. Proceedings on remand must be completed within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

(f) **Preparation and transmittal of the record**. At the conclusion of all proceedings before the trial court, the clerk of the trial court will immediately prepare the record of the supplemental

proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court will immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court will transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) **Appellate court determination**. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.

Tab 5

Rule 34. ~~Award of c~~Costs.

(a) ~~**To whom allowed**~~**Against whom assessed**. Costs are only allowed or taxed in civil cases. Except as otherwise provided by law or court order:~~,~~

(1) if an appeal is dismissed, costs ~~shall~~must be taxed against the appellant unless the parties agree otherwise ~~agreed by the parties or ordered by the court~~;

(2) if a judgment or order is affirmed, costs ~~shall~~must be taxed against appellant ~~unless otherwise ordered~~;

(3) if a judgment or order is reversed, costs ~~shall~~must be taxed against the appellee ~~unless otherwise ordered~~;

(4) if a judgment or order is affirmed or reversed in part, or is vacated, costs ~~shall~~ are taxed only as the court orders~~be allowed as ordered by the court~~. ~~Costs shall not be allowed or taxed in a criminal case.~~

(b) **Costs for and against the ~~s~~State of Utah**. In cases involving the ~~s~~State of Utah or an agency or officer thereof, an award of costs for or against the ~~s~~State ~~shall~~will be at the court's discretion ~~of the court~~ unless specifically required or prohibited by law.

(c) ~~**Costs of briefs and attachments, record, bonds and other e**~~**Expenses on appeal**. The following expenses may be ~~taxed as costs~~awarded in favor of the prevailing party in the appeal:

(1) the actual costs of a printed ~~or typewritten~~ brief ~~or memoranda~~ and attachments not to exceed $3.00 ~~for each~~ per page;

(2) actual costs incurred in ~~the preparation and transmission of~~preparing and transmitting the record, including costs of the reporter's transcript unless the court orders otherwise ~~ordered by the court~~;

(3) premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and

(4) the fees for filing and docketing the appeal.

(d) **Bill of costs taxed after remittitur**. A party claiming costs ~~shall~~must, within 1~~5~~4 days after the remittitur is filed with the trial court clerk ~~of the trial court~~, serve ~~up~~on the adverse party and file with the trial court clerk ~~of the trial court~~ an itemized and verified bill of costs. The adverse party may, within seven~~5~~ days of service of the bill of costs, serve and file a notice of objection,

together with a motion to have the costs taxed by the trial court. If there is no objection to the cost bill within the allotted time, the trial court clerk ~~of the trial court shall~~must tax the costs as filed and enter judgment for the party entitled thereto, which judgment ~~shall~~must be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and hearing, ~~shall~~must tax the costs and enter a final determination and judgment which ~~shall~~must thereupon be entered in the judgment docket with the same force and effect as in the case of other judgments of record. The clerk's determination ~~of the clerk shall~~ will be reviewable by the trial court upon the request of either party made within seven~~5~~ days of the entry of the judgment.

(e) **Costs in other proceedings and agency appeals**. In all other matters before the court, including appeals from an agency, costs may be allowed as in cases on appeal from a trial court. Within 1~~5~~4 days after the ~~expiration of the time in which~~time to file a petition for rehearing ~~may be filed~~expires or within 1~~5~~4 days after an order denying such a petition, the party to whom costs have been awarded may file with the appellate clerk ~~of the appellate court~~ and serve ~~up~~on the adverse party an itemized and verified bill of costs. The adverse party may, within seven~~5~~ days after ~~the service of~~ the bill of costs is served, file a notice of objection and a motion to have the costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the clerk ~~shall~~must thereupon tax the costs and enter judgment against the adverse party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, ~~shall~~will determine and settle the costs, tax the same, and a judgment ~~shallm~~will be entered thereon against the adverse party. The clerk's determination ~~by the clerk shall~~will be reviewable by the court upon either party's ~~the~~ request ~~of either party~~ made within seven~~5~~ days ~~of the entry of judgment~~after judgement is entered.~~;~~ U~~u~~nless otherwise ordered, oral argument ~~shall~~will not be permitted. A judgment under this ~~section~~ paragraph may be filed with the clerk of any district court in the state, who ~~shall~~must docket ~~a certified copy of the same~~the judgment in the same manner and with the same force and effect as district court judgments ~~of the district court~~.

Rule 43. Certification by the Court of Appeals to the Supreme Court.

(a) **Transfer**. In any case over which the Court of Appeals has original appellate jurisdiction, the court may, upon the affirmative vote of at least four judges of the court, certify a case for immediate transfer to the Supreme Court for determination.

(b) **Procedure for transfer**.

(1) The Court of Appeals may, on its own motion, decide whether a case should be certified. Any party to a case may, however, file ~~and serve an original and eight copies of~~ a suggestion for certification not exceeding five pages, ~~setting forth the reasons~~explaining why the party believes that the case should be certified. The suggestion may not be filed ~~prior to the filing of~~before a docketing statement is filed. Within ~~ten~~10 days of service, an adverse party may file and serve a~~n original and eight copies of a~~ statement not ~~in excess of~~exceeding five pages either supporting or opposing the suggestion for certification.

(2) Upon ~~entry of~~entering the certification order ~~of certification~~, the Court of Appeals Clerk ~~of the Court of Appeals shall~~must immediately transfer the case, including the record and file of the case from the trial court, all papers filed in the Court of Appeals, and a written statement of all docket entries in the case up to and including the certification order, to the Supreme Court Clerk ~~of the Supreme Court~~. The Court of Appeals Clerk ~~of the Court of Appeals shall~~must promptly notify all parties and the trial court clerk ~~of the trial court~~ that the case has been transferred.

(3) Upon ~~receipt of~~receiving the certification order ~~of certification~~, the Supreme Court Clerk ~~of the Supreme Court shall~~must enter the appeal ~~up~~on the Supreme Court's docket ~~of the Supreme Court~~. The ~~clerk of the~~ Supreme Court Clerk ~~shall~~must immediately send notices to all parties and to the trial court clerk ~~of the trial court~~ that the case has been docketed and that all further filings will be made with the Supreme Court Clerk ~~of the Supreme Court~~. The notice ~~shall~~must state the docket number assigned to the case in the Supreme Court. The case ~~shall~~will proceed before the Supreme Court to final decision and disposition as in other appellate cases ~~pursuant to~~under these rules.

(4) If the record on appeal has not been filed with the Court of Appeals Clerk ~~of the Court of Appeals~~ as of the date of the certification order ~~of transfer~~, the Court of Appeals Clerk ~~of the Court of Appeals shall~~must notify the trial court clerk ~~of the trial court~~ that upon

~~completion of~~completing the conditions for filing the record by that court, the clerk ~~shall~~must transmit the record on appeal to the Supreme Court Clerk ~~of the Supreme Court~~. If, however, the record on appeal has already been transmitted to and filed with the Court of Appeals Clerk ~~of the Court of Appeals~~ as of the date the certification order is entered~~of the entry of the order of transfer~~, the Court of Appeals Clerk ~~of the Court of Appeals~~ ~~shall~~must transmit the record on appeal to the Supreme Court Clerk ~~of the Supreme Court~~ within five days ~~of the date of the entry of the order of transfer~~after the certification order is entered.

(c) **Criteria for transfer**. The Court of Appeals ~~shall~~must consider certification only in the following cases:

(1) Cases ~~which are of such a nature that~~where it is apparent that the case should be decided by the Supreme Court and that the Supreme Court would ~~probably~~ likely grant a petition for a writ of certiorari in the case if decided by the Court of Appeals, irrespective of how the Court of Appeals might rule~~,~~; and

(2) Cases ~~which~~ that will govern a number of other cases involving the same legal issue or issues pending in the district courts, juvenile courts, or the Court of Appeals, or ~~which are~~ cases of first impression under state or federal law ~~which~~ that will have wide applicability.

Rule 50. Response; reply; brief of amicus curiae.

(a) **Response**. Within ~~30~~28 days after ~~service of a~~a petition for a writ of certiorari is served, any other party may file a response ~~to the petition~~. Or, ~~I~~if the ~~satisfaction of a~~ petitioner~~'s obligation to~~ pays ~~a~~the required filing fee or ~~to~~ obtains a waiver of that fee ~~is accomplished~~ after service, then the time for response ~~shall~~ will run from the date that obligation is satisfied~~of satisfaction of that obligation~~. The response ~~shall~~ must comply with Rule 27 and, as applicable, Rule 49. ~~Seven copies of the response, one of which shall contain an original signature, shall be filed with the Clerk of the Supreme Court.~~ A party opposing a petition may so indicate by letter in lieu of a formal response, but the letter ~~shall~~ may not include any argument or analysis.

(b) **Page limitation**. A response ~~shall~~ must be as short as possible and may not~~, in any single case,~~ exceed 20 pages, excluding the subject index, the table of authorities, and the appendix.

(c) **Objections to jurisdiction**. The court will not accept a~~No~~ motion ~~by a respondent~~ to dismiss a petition for a writ of certiorari ~~will be received~~. Objections to the Supreme Court's jurisdiction ~~of the Supreme Court~~ to grant the petition may be included in the response.

(d) **Reply**. A petitioner may file a reply addressed to arguments first raised in the response ~~may be filed by any petitioner~~ within ~~fourteen~~ 14 days after ~~service of~~ the response is served, but distribution of the petition and response to the court ordinarily will not be delayed pending the filing of any such reply unless the response includes a new request for relief, such as an award of attorney fees for the response. The reply ~~shall~~ must be as short as possible~~,~~ and ~~but~~ may not exceed five pages, and ~~shall~~ must comply with Rule 27. ~~The number of copies to be filed shall be as described in Rule 50(a).~~

(e) **Brief of amicus curiae**. Amicus curiae may only file a brief ~~of an amicus curiae~~ concerning a petition for certiorari ~~may be filed only~~ if the ~~by leave of the~~ Supreme Court grants~~ed~~ a~~on~~ motion for leave to file an amicus curiae brief or if the Supreme Court ~~at the~~ requests it ~~of the Supreme Court~~. A~~The~~ motion for leave ~~shall~~must be accompanied by a proposed amicus brief, not to exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by Rule 49(a)(7), and the appendix. The proposed amicus brief ~~shall~~ must comply with Rule 27, and, as applicable, Rule 49. ~~The number of copies of the proposed amicus brief submitted to the Supreme Court shall be the same as dictated by Rule 48(f).~~ A motion for leave ~~shall~~ must identify the applicant's interest ~~of the applicant~~ and ~~shall~~ state the reasons why an

amicus curiae brief ~~of an amicus curiae~~ is desirable. The motion for leave ~~shall~~ must be filed on or before the date ~~of the filing of~~ the timely petition or response of the party whose position the amicus curiae will support is filed, unless the Supreme Court for good cause shown otherwise orders. Parties to the proceeding in the Court of Appeals may indicate their support for, or opposition to, the motion. Any party's response ~~of a party~~ to a motion for leave ~~shall~~ must be filed within seven days ~~of service of~~after the motion is served. If leave is granted, the proposed amicus brief will be accepted as filed and, unless the order granting leave otherwise ~~indicates~~directs, amicus curiae also will be permitted to submit a brief on the merits, provided it ~~is submitted in compliance~~complies with the briefing schedule of the party the amicus curiae supports. Denial of a motion for leave to file brief of an amicus curiae concerning a petition for certiorari ~~shall~~ will not preclude a subsequent amicus motion relating to the merits after a grant of certiorari. All motions for leave to file brief of an amicus curiae on the merits after a grant of certiorari are governed by Rule 25.

Rule 56. Response to petition on appeal.

(a) **Filing**. Any appellee, including the Guardian ad Litem, may file a response to the petition on appeal with the appellate clerk~~. An original and four copies of the response must be filed with the clerk of the Court of Appeals~~ within 1~~5~~4 days after service of the appellant's petition on appeal. The response ~~It shall~~must be accompanied by proof of service to ~~. The response shall be deemed filed on the date of the postmark if first-class mail is utilized. The appellee shall serve a copy on~~ counsel of record of each party, including the Guardian ad Litem, or~~,~~ on the party if the party is not represented by counsel.~~, then on the party at the party's last known address, in the manner prescribed in Rule 21(c).~~

(b) **Format**. A response ~~shall~~must substantially comply with the Response to Petition on Appeal form that accompanies these rules. The response ~~shall~~may not exceed 15 pages, excluding any attachments, and ~~shall~~must comply with Rule 27~~(a) and (b), except that it may be printed or duplicated on one side of the sheet~~.