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GONE WITH THE WIND – PRESERVING ISSUES FOR APPEAL

Why Preservation Matters – Because your issues will be "Gone with the Wind."

Issues not properly preserved at trial and those not properly presented for appeal may lose the chance for full appellate review. See Bean v. Red Oak Prop. Mgt., 151 N.H. 248, 250 (2004).

- **Preservation of Issue** – An issue must be properly presented to the judge or agency below to be preserved for appellate review. The issue can be presented to the judge or agency by motion, contemporaneous objection, or an appropriate request for post-trial relief. The appealing party bears the burden of proving he or she properly presented the issue below. The judge or agency also must be given the opportunity to timely correct any alleged error before the issue is presented for appellate review. See State v. McInnis, ___ N.H. ___, ____ (Conboy, J.) (January 13, 2017) (Slip. Op at p. 7); McDonough v. McDonough, ___ N.H. ___ (Dalianis, C.J.) (December 23m 2016 (Slip. Op. at p.7); see also N.H. Sup. Ct. R. 10 (1) (requiring timely request for rehearing before appeal from administrative agency).

- **Presentation of Issue –** To be addressed on appeal an issue must be properly presented to the Supreme Court in the initial appeal document. See, e.g., State v. Blackmer, 149 N.H. 47, 49 (2003). The issue must also be presented in the appellate brief, "expressed in the terms and circumstances of the case, but without unnecessary detail. . . . The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." N.H. Sup. Ct. R. 16(3)(b) and R. 10(1)(c). An issue not properly presented to the Court in the notice of appeal will be deemed waived. See Progressive N. Ins. Co. v Argonaut Ins. Co., 161 N.H. 778, 784 (2014); State v. Belyea, 160 N.H. 298, 309 (2010). If a party wants the Supreme Court to decide an issue of law not contained in its initial appeal document, then the party must file a motion to add the issue at least 20 days before the due date for the moving party's brief. N.H. Sup. Ct. R. 16(3)(b).

Presenting the Record – The appealing party bears the burden of presenting a record sufficient for the Supreme Court to decide an issue presented on appeal. Without a record showing the issue is preserved, the issue may again be waived. Bean, 151 N.H. at 250. "The papers and exhibits filed and considered in the proceedings in the trial court or administrative agency, the transcript of proceedings, if any, and the docket entries of the trial court or administrative agency shall be the record…." N.H. Sup. Ct. 13 (1). The trial court record will not automatically be transferred to the Supreme Court, so the appealing party bears the burden of getting all portions of the record necessary for the Supreme Court to decide all issues presented. N.H. Sup. Ct. R. 13(2). "The supreme court may dismiss the case or decline to address specific questions raised on appeal for failure to comply with this requirement." Id.

Motions and Objections at Trial – Most issues are preserved for appeal through pretrial and post-trial motions or through contemporaneous motions and objections made during trial. "This allows the trial court to consider errors as they occur and remedy them as necessary." Milliken v. Dartmouth-Hitchcock Clinic, 154 N.H. 662, 665-66 (2006).

- **Motions Generally**: "A request for court order must be made by motion which must: (1) be in writing unless made during a hearing or trial; (2) state with particularity the grounds for seeking the order; and (3) state the relief sought." N.H. Super. Ct. R. 11.

- **Motions in Limine**: [a] motion *in limine* is sufficient to preserve an issue for appeal without an objection at trial if the trial court definitively rules on the issue prior to trial. A ruling on a motion *in limine* is definitive when the court is sufficiently alerted to the issue and the court's written order demonstrates that it considered the issue and ruled on it. Klar v. Mitoulas, 145 N.H. 483, 488 (2000) (quotation omitted).

- **Motions for Reconsideration:** A motion for reconsideration must be filed within 10 days of an order or decision and "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended...." N.H. Super. Ct. R. 12(e).

- **Motion for Judgment Not Withstanding the Verdict**: A motion to set aside a jury verdict or judgment must be made within 10 days of its rendition and state all reasons and arguments relied on. N.H. Super. Ct. R. 43.

- **Objections**: "Generally, a [party] must make a specific and contemporaneous objection during trial to preserve an issue for appellate review." Klar, 145 N.H. at 488.

Plain Error – "A plain error that effects substantial rights may be considered even though it was not brought to the attention of the trial court." N.H. Sup. Ct. R. 16-A. In addition to requiring plain error affecting substantial rights, the error must also seriously affect the fairness, integrity or public reputation of judicial proceedings. State v. Guay, 164 N.H. 696, 704 (2013). Examples of plain error that will automatically preserve issues for appeal include violations of fundamental due process rights, see State v. Almodovar, 158 N.H. 548 (2009); granting a motion to dismiss solely for lack of an objection being filed, see Hilario v. Reardon, 158 N.H. 56 (2008).

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CASE SUMMARIES UNDERLYING VIDEO SKITS

I. STATE V. RHETT BUTLER:

***State v. Stanin*, ___ N.H. ___, 145 A.3d 676 (2016).**

Issue: Whether the defendant's decision not to testify renders unreviewable his argument that the trial court erred by failing to restrict the State's cross examination to subjects on which he intended to testify.

Relevant Facts: The defendant was convicted of three crimes in April 2014 and received one sentence of time served and two sentences suspended for good behavior. In June and August 2014, the defendant was arrested on five additional charges. At a hearing to impose the defendant's suspended sentence for his arrests violating his condition of good behavior, the defendant sought to limit his cross examination by testifying only to the June 2014 arrests and invoking his Fifth Amendment privilege to remain silent on his August 2014 arrest. The trial court ruled that the defendant could not selectively testify and if he testified to one incident he waived his Fifth Amendment privilege on the other incident. The defendant did not testify.

Holding: Because the defendant neither testified nor made an offer of proof, "the record renders unreviewable the defendant's argument that the trial court violated his privilege against compelled self-incrimination as protected by the State and Federal Constitutions when it failed to restrict the State's cross-examination to the subject about which he intended to testify."

Preservation Lesson: You have to create a record of the issue you want to appeal by testifying or making an offer of proof as to what the testimony would be, even if the record may be harmful to your position if you lose on appeal. Without a record, the Supreme Court cannot decide an issue in a vacuum. Even one involving constitutional rights.

***People v. James*, 29 Mich. App. 522 (1971).**

Issue: Whether allowing into evidence, a transcript of a criminal Defendant's preliminary examination violates his 5th Amendment right against self-incrimination.

Relevant Facts: The Defendant testified on his own behalf at a preliminary examination. He did so voluntarily and while represented by counsel. He did not claim that his decision to testify was motivated by unlawful evidence presented against him or that it was induced by the State's use of an involuntary confession.

Holding: The appellate court concluded that because the Defendant voluntarily testified and because that testimony was not "motivated by unlawful evidence presented against him," such as testifying at a suppression hearing or in response to the prosecution's use of an involuntary confession, the 5th Amendment does not prohibit the use of his preliminary examination testimony.

Preservation Lesson: As soon as a criminal defendant voluntarily testifies during a preliminary examination hearing, his 5th Amendment right to remain silent is waived as it pertains to the testimony given during the hearing, and will not preclude its use at trial.

***State v. Williams*, 115 N.H. 437 (1975).**

Issue: Whether the transcripts of a Defendant's testimony during a probable cause and bail hearing are admissible at Defendant's trial.

Relevant Facts: Defendant, relying on his attorney's advice, voluntarily testified on his own behalf at his probable cause hearing and at his bail hearing. The probable cause hearing occurred in District Court, and the bail hearing occurred in Superior Court. The District Court did not warn the Defendant of his right to remain silent, but the Superior Court did.

Holdings:

1. The NH Supreme Court determined that in the case of a probable cause hearing, there is "no constitutional compulsion to testify" like there is in a suppression hearing where the Defendant must establish standing to suppress evidence under the fourth amendment. Therefore, it found that Defendant's right to remain silent did not preclude the testimony from the probable cause hearing from being entered in the criminal trial.

2. However, it also held that because public policy favors releasing defendants until guilt or innocence is determined, a defendant should not be punished by having to choose whether to testify during a bail hearing or lose his right to remain silent in the criminal trial. Thus, testimony given during a bail hearing does not result in the loss of one's right to remain silent.

Preservation Lessons:

1. If a criminal defendant testifies at a probable cause hearing, the right to remain silent is waived as to that testimony being used in a future criminal proceeding.

2. If a criminal defendant testifies at a bail hearing, the right to remain silent is *not* waived as to that testimony being used in a future criminal proceeding.

***State v. Flood*, 159 N.H. 353 (2009).**

Issue: Whether denial of a criminal defendant's motion to continue an imposition hearing until after a related criminal proceeding violated Due Process by forcing the defendant to choose between her right to remain silent in the criminal proceeding and her right to testify in the imposition hearing.

Holding: The Court found that there is no constitutional requirement to continue the imposition hearing until after the criminal proceeding. It did consider that there may be a public policy consideration, and referenced *State v. Williams* as an example of allowing the defendant immunity at a bail hearing because of the public policy of insuring the defendant's appearance at court and to avoid unnecessary deprivations of liberty. However, because the defendant did not raise the public policy argument in the trial court, she failed to preserve it for appellate review.

Preservation Lessons:

1. If a criminal defendant testifies at an imposition hearing, the right to remain silent is waived as to that testimony being used in a future criminal proceeding.

2. If an issue is not raised in the trial court, it will not be considered on appeal.

II. <u>O'Hara v. Butler, M.D.:</u>

***Broderick v. Watts*, 136 N.H. 153 (1992).**

Closing argument:

<u>Issue</u>: Whether an objection to a statement made during a closing argument was timely, when the attorney failed to make the objection until after both parties gave closing arguments and the trial court had already instructed the Jury.

<u>Relevant Facts</u>: During Defendant's counsel's closing argument, Defendant's counsel allegedly gave his personal opinion about the case to the Jury. Plaintiff's counsel did not object, (a) immediately, or (b) after Defendant's counsel finished his closing argument, or (c) after Plaintiff's counsel finished his own closing argument. After Plaintiff's counsel's closing argument, the trial court took a 15 minute recess. When the trial court returned, Plaintiff's counsel *still* did not object. Finally, after the trial court fully instructed the Jury, Plaintiff's counsel objected.

<u>Holding</u>: The NH Supreme Court held that, "a party's objection to an opening statement or closing argument must be made *during or immediately after such opening or closing.*" (emphasis added). The Court concluded that Plaintiff's counsel's objection was untimely.

Plaintiff also complained on appeal, about other issues with Defendant's counsel's closing argument. However, because Plaintiff's counsel failed to object during the arguments, failed to raise them in post-trial motions, and failed to raise them in his notice of appeal, the Court refused to consider the issues.

<u>Preservation Lesson</u>:

1. If improper argument is made during closing argument, an objection must be made immediately, or the issue is forever waived.

2. All appealable issues *must* be raised in the trial court, otherwise, the issues are forever waived.

Examination:

<u>Issue</u>: Plaintiff's counsel alleged on appeal that Defendant's counsel asked improper questions of two of Plaintiff's witnesses during cross-examination.

<u>Relevant Facts</u>: Plaintiff's counsel failed to object contemporaneously with the questioning, instead raising the objections for the first time in post-trial motions.

Holding: The NH Supreme Court concluded that the Plaintiff failed to timely object, and therefore, Plaintiff did not preserve the issues for appellate review.

Preservation Lesson: Objections to questions during examinations must be made contemporaneously or the issue of whether a question was improper is forever waived.

Jury Instructions:

Issue: Whether Plaintiff's counsel's confirmation of the trial court's statement that there were no additional instructions requested besides those "already in the record," was sufficient to preserve Counsel's objection to the Jury instructions given.

Relevant Facts: Immediately after the Judge instructed the Jury, the trial court held a bench conference in which it specifically confirmed with both attorneys that no additional instructions were requested, "other than what was already in the record." Plaintiff's counsel argued that "other than what was already in the record" referred to an in-chambers discussion regarding Jury instructions. However, in chambers, Plaintiff's counsel had only argued that the Court erred in denying his requested jury instructions, not that he objected to the substance of the instructions the Court gave. Plaintiff raised a specific objection to the substance of the instructions for the first time in post-trial motions.

Holding: The Court concluded that the first time Plaintiff's counsel actually objected was in post-trial motions, and therefore, counsel did not preserve the issue for appeal.

Preservation Lesson: Objections to jury instructions must be clear and specific, and must be made prior to the Jury being instructed. Otherwise, the issue is forever waived.

***Walton v. City of Manchester*, 140 N.H. 403 (1995).**

Issue: Whether the trial court should have issued an immediate curative instruction when the Defendant's counsel, during his closing argument, made a "golden rule" argument.

Relevant Facts: During the Defendant's closing argument, it argued that "if you find against the City ... and in essence against Mr. Danielson (who had not been sued), and you find that what he did was wrong, you are going to be sending a message to every teacher and volunteer who helps with sports at any level, because they could be responsible, if a child gets hurt while in their care or while they are coaching." Plaintiff's counsel objected that the Defendant's counsel was appealing to the jury's sympathy. The trial court overruled the objection. The Defendant's counsel went on to argue that "lawsuits in this county have become so widespread that even ma and pa's are afraid to coach little league." Plaintiff's counsel renewed his objection. The trial court overruled the objection. Defendant's counsel continued with his closing, stating, "if you return a verdict in favor of Julie and you send a message to the community that what Mr. Danielson did in this case was wrong and if you volunteer and if a kid gets injured you could be spending the next couple of days just

where he has been spending it." He continued to provide more examples of how a verdict against the Defendant would affect the Jury in their every day lives. Plaintiff's counsel objected again. The trial court noted the objection. After the closing arguments, the trial court issued a standard jury instruction, "you must not decide facts on the basis of any sympathy, prejudice, bias or fear or favor," and that the jury has the "responsibility to decide what the facts are and to reach a verdict on the evidence and the law without sympathy, prejudice, fear or favor for or against any party."

Holding: The NH Supreme Court determined that the standard instruction was not enough to cure the prejudice caused by the "golden rule" argument, and that because an immediate curative instructive may have, but was not given, the Plaintiff was given a new trial.

Preservation Lesson: Objections made contemporaneously with the improper statements during argument preserve the issue for appeal.

***State v. Roubo*, 140 N.H. 409 (1995).**

Issue: Whether the failure of the Defendant to accept a curative jury instruction from the trial court waives the Defendant's right to argue that the State's improper statement caused him unfair prejudice.

Relevant Facts: The trial court instructed the Jury that the unavailability of a particular witness was neither the State's nor the Defendant's fault, and that the Jury should neither hold it against either Party nor speculate as to why the witness is unavailable. The Court further instructed the Jury that the burden of proving guilt is entirely upon the State. In its closing argument, the State suggested that the Defendant purposefully did not call a certain witness, and that he did not do so because it would be detrimental to his case. The Defendant objected stating that the State's argument shifted the burden and that "the missing witness instructions does not invite the State to absolutely speculate on anything that the witness would have said." The trial court overruled the objection, stating that it did not think it was improper, and that if it mentions the instruction again, it will just emphasize the issue, and in fairness to the Defendant, it did not want to "be bringing out more of the State's argument again ... unless you want me to." The Defendant did not ask the court to reissue the instruction.

Holding: The NH Supreme Court characterized the Defendant's failure to respond to "unless you want me to" as refusing the trial court's offer of a curative instruction, and therefore waived his right to argue that the State's argument caused him unfair prejudice.

Preservation Lesson: If a party declines a court's offer for a curative instruction, the issue of the effect of the improper statement is forever waived.

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A GUIDE TO APPELLATE ADVOCACY IN NEW HAMPSHIRE

LISA WOLFORD, ESQ., NEW HAMPSHIRE DEPARTMENT OF JUSTICE
&
STEPHANIE HAUSMAN, ESQ., NEW HAMPSHIRE PUBLIC DEFENDER

NOVEMBER 2014

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APPENDIX TO THIS GUIDE

INTRODUCTION

This guide is intended to be a reference for lawyers and non-lawyers who do not routinely practice before the New Hampshire Supreme Court. It is our hope that the guide will simplify the process of writing and assembling briefs and take some of the anxiety out of preparing for and appearing at oral argument.

We refer to the Rules of the Supreme Court of the State of New Hampshire throughout this guide. Those references appear here in bold, as in, for example, "**Rule 16(3)**." The guide is not a substitute for the Rules themselves, though, so practitioners should be sure to familiarize themselves with the Rules, which are found on the New Hampshire Judicial Branch website.

The appendix has a number of useful resources, including references that provide in-depth analyses of writing and argument strategies.

Appellate advocacy can be daunting, but the New Hampshire Supreme Court is a wonderful court in which to practice law. We hope that this guide helps to make the experience of litigating there a productive and fulfilling one.

Lisa Wolford
New Hampshire Department of Justice
Criminal Justice Bureau

Stephanie Hausman
Appellate Defender Program
New Hampshire Public Defender

THE BRIEF

I. OVERVIEW OF THE BRIEF AND APPENDIX

This guide addresses four types of "briefs": the opening brief, or "brief of the moving party on the merits," see **Rule 16(3)**; the opposing brief, see **Rule 16(4)(a)**; the memorandum of law, which may be filed instead of an opposing brief, see **Rule 16(4)(b)**; and the reply brief, see **Rule 16(5)**. With some exceptions, see **Rule 16(4)(a)**, the rules governing the opening brief and opposing brief are the same, and this guide therefore does not distinguish between the two. The memorandum of law and the reply brief are discussed in separate chapters below.

The brief consists of all the component sections listed in **Rule 16**, as explained further in **Section V** of this guide.

You may need to file an appendix with your brief. The appendix typically contains copies of the pleadings and other types of documents that are relevant to the appeal and are a part of the record.

The appendix and the "record" are discussed in **Section III**. So long as the appendix is not too long, it may be bound with the brief. Appendices bound with the brief must still follow **Rule 17(4)**, which requires that the appendix begin with a table of contents and that the pages of the appendix be numbered.

II. THE DECISION(S) BEING APPEALED

Broadly characterized, the Supreme Court's responsibility is to determine whether decisions made by the trial court and other tribunals are correct. Since these decisions therefore constitute the crux of most appeals, the Supreme Court justices will often read the order(s) at issue before starting to read the opening brief.

It is therefore critical that the appealing (and cross-appealing) party include with her brief a copy of the order, if it is in writing, which is being appealed. This means that the order must be bound with the brief.

If more than one written order is being appealed, then each of those orders must be bound with the brief. See **Rule 16(3)(i)** ("The brief of the moving party on the merits shall contain . . . . [a] copy of the decision(s) below that are being appealed or reviewed. If the appealed decision is in writing, a copy of that decision shall be included with the

brief, and shall not be included in a separate appendix."). In cases in which the litigation over an issue resulted in more than one order relevant to the appeal, be sure to include all of the relevant orders, not just the last one issued.

Rule 16(3)(i) directs that the order "shall be included with the brief, and shall not be included in a separate appendix." The rule requires the appealing party to certify that "the appealed decision is in writing and is appended to the brief." The failure to comply with the rule may have serious consequences. See **Section VI, D** ("Certification Requirements").

If the appendix is bound with the brief because there is no separate appendix (see **Section III**): place the order(s) in the appendix at the beginning of the appendix. In other words, the order or orders being appealed must be the first material in the appendix that is bound with the brief.

If there is a separate appendix that is not bound with the brief: bind the order(s) with the brief, placing them immediately after the signature and certification page. Number the pages of the order(s) beginning at page "1" rather than continuing pagination from the last page of the brief. Refer to this portion of the brief as the "Supplement" and use an appropriate abbreviation, such as "Supp.," when referring to the order page in the text of the brief. See **Section III ("The 'Supplement': a note about documents critical to the appeal"**). For more on abbreviations, see **Section IV.**

If, as discussed in **Section III**, you decide to include other documents in the Supplement, they must follow the copy of the decision(s) being appealed.

III. THE APPENDIX

The appendix should not be treated as an afterthought. Although not every appeal requires an appendix, in the cases that do, the appendix will be critical to the Supreme Court's consideration of the issues being appealed. In these cases, it is often useful to assemble and number the appendix pages before starting to write the brief, because your brief will inevitably refer to documents in the appendix and you will want to note the appropriate appendix pages as you write.

The record

The New Hampshire Supreme Court's review of a case on appeal is limited to the case record. If there was a hearing or trial in the matter, and if any party ordered a transcript in accordance with **Rule 15**, then the transcript of the hearing or trial is a part

of the "record" in the case. See **Rule 13**. But other material that is relevant to the appeal may also be a part of the case "record." Most often, a litigant will provide that material to the Supreme Court in an appendix. See **Rules 13(3)** and **17(1)**.

Under **Rule 13(1)**, the "record" consists of "[t]he papers and exhibits filed and considered in the proceedings in the trial court or administrative agency, the transcript of proceedings, if any, and the docket entries of the trial court or administrative agency."

It is the responsibility of the person who brings the appeal to ensure that the Supreme Court has all the parts of the record that are relevant to the appeal. See **Rules 13(2), 13(3), Rule 14(1),** and **17(1)**. If the person who initiates the appeal fails to provide the Court with this information, the Court "may dismiss the case or decline to address specific questions raised." **Rule 13(2)**.

These rules are important for two reasons. First, since the Supreme Court does not automatically receive the record on which the appeal is based, the rules make clear that the only way in which the Supreme Court will consider documents and exhibits is if copies of those documents and exhibits are provided to the Court by the litigants.

Second, the rules limit the types of information that are relevant to the Supreme Court's task of deciding the appeal. The only information that is relevant to the appeal is information that was filed by the parties and considered by the judge or agency that made the decision being appealed. See Flaherty v. Dixey, 158 N.H. 385, 387 (2009) ("On appeal, [the New Hampshire Supreme Court] consider[s] only evidence and documents presented to the trial court.").

Thus, all other types of material and information—for example, conversations or letters between a client and his or her attorney of which the judge or agency had no knowledge, discovery that was not submitted or otherwise made known to the judge or agency, and matters occurring before or after a hearing that were not made known to the judge or agency—are not a part of the record and are therefore not relevant to an appeal.

What should I include in the appendix?

A good rule of thumb is the following:

- If your brief refers directly or indirectly to an exhibit, such as a contract or a letter; an argument in a motion; or information in any other documentation contained in the record, then that exhibit, motion, or other documentation should be included in the appendix.

- If a motion shows that an issue presented on appeal was raised in the forum below—that is, was "preserved," see **Section IV(A)**—then the motion should be included in the appendix.

- In civil cases involving the appeal of the court's decision on a motion for summary judgment, the motion, the objection, and a copy of the complaint should be included in the appendix.

Remember that the exhibit, motion, or other documentation that you include in the appendix must be a part of the record. See **Rule 13(1)**. Information not contained in the record ordinarily will not be considered, and should therefore not be referred to or included in the brief or appendix.

Exceptions to this limitation may be granted, but only by motion. See **Rule 13(3)** and **Rule 21**. You must obtain your opponent's position on your motion and indicate that position in the motion. See **Rule 21(5)**.

What about material that will not fit in the appendix?

It may not be possible to include certain parts of the record in the appendix. For example, the record may include an audio or video recording, a large map, a photograph that may not reproduce well, or a piece of physical evidence.

In order for the Supreme Court to consider this material, you must make arrangements to have it transferred to the Court. See **Rule 14(1)** ("The moving party shall . . . take any other action permitted under these rules to assemble and transmit the record of proceedings in the trial court or administrative agency.").

Rule 13(4) explains that this must be done by motion. The motion must be filed before the deadline for the brief. It should identify with specificity the materials at issue, explain why they cannot be included in an appendix, and ask the Supreme Court to order the trial court or administrative agency to transmit the materials in question to the Supreme Court.

Note, however, that this rule applies only to material that cannot reasonably be contained in an appendix. If the document can reasonably be included in the appendix, then do that rather than requesting that it be transferred.

Remember that you must obtain your opponent's position on your motion and state that position in the motion. See **Rule 21(5)**.

Appendix formatting

An appendix may either be bound with the brief, or, if the documents to be included in the appendix are "voluminous," bound as a separate pamphlet. **Rule 17(1).**

The rules do not define "voluminous." A good rule of thumb, however, is the following: If the appendix consists of no more than 40 individual sheets of paper, not including the table of contents, it may be bound with the brief.

Whether or not the appendix is bound with the brief, the appendix must begin with a table of contents. See **Rule 17(4)** ("At the beginning of the appendix there shall be inserted a table of contents with references to the page of the appendix at which each item listed in the table of contents begins."). The table of contents page is not numbered, but each of the pages of the appendix must be numbered, starting with page "1." See **Rule 17(2).**

By convention but not rule, the pages of the separately-bound appendix may be printed on both sides of the page. The separately-bound appendix must have its own front and back cover, and the front cover must be **white**. See **Rule 17(2)**. The appendix cover should indicate its title: for example, "APPENDIX TO THE DEFENDANT'S BRIEF." See **Rule 16(2)(d)**. Otherwise, the appendix cover is identical to the brief cover and must contain the same information that the brief cover contains. That information can be found in **Rule 16(2)** and is also listed in **Section VII**, below.

If your separately-bound appendix is so voluminous that it makes sense to divide it into separate volumes, do that. The rules do not address separate appendix volumes, but the following is recommended: Provide a table of contents and cover for each volume as noted above. Identify the volume number on each cover. Number the pages sequentially through all of the volumes—that is, do not start at page "1" for each volume; instead, pick up the numbering from the last page of the preceding volume.

The "Supplement": a note about documents critical to the appeal

As discussed in **Section II**, **Rule 16(3)(i)** requires the appealing and cross-appealing parties to bind with the brief the written order being appealed. The convention, as discussed above, is to bind no more than a 40-page appendix with the brief. This means that in some cases, when the appendix is voluminous enough to be bound separately, the written order will be bound with the brief in a section called the "Supplement."

There are other documents that, like a written decision that is being appealed, may be central to the legal issues raised on appeal. For ease of reference, the justices prefer that these documents also be bound with the brief, rather than compiled in a separately-bound appendix. In a case involving a separately-bound appendix, this means that these documents may be included in the supplement section.

The use of a supplement section is favored by the justices but is not addressed by the Supreme Court rules. Thus, the recommendations discussed here are merely advisory.

Examples of documents that may be critical to the appeal are:

- **Contracts and insurance policies**. The interpretation of language in these documents is often central to an issue raised on appeal.

- **Diagrams, maps, or photos**. In a land dispute, for example, a plat may be crucial to the consideration of the legal question. In a criminal case, the presentation of a photo array may determine whether an eyewitness identification of the defendant is admissible at trial. Or, a photograph showing the locations of a driveway and outbuilding may be key to the determination of whether an unconstitutional search has occurred.

- **Statutes**. In appeals concerning statutory interpretation, the language of one or more statutory provisions will be determinative of the appeal. This language may be included in the "Text of Relevant Authority" section of the brief discussed in **Section V(B)**. However, since the pages of the Text of Relevant Authority section count toward the 35-page brief limit, appellate litigants often prefer to include statutory text in an appendix. This is perfectly acceptable, though the justices prefer that, when the appendix is bound separately, the critical statutory text be included in the supplement rather than the appendix.

Other than the order being appealed, which must be included, deciding what to include in the supplement is up to you. These considerations may be helpful:

- **Page limit**. The supplement should contain no more than 40 individual sheets of paper, which may be printed on both sides. The pages should be numbered, starting at page 1.

- **What documents *must* the justices see in order to decide the appeal?** Include only those documents in the supplement. In a criminal case, for example, copies of the indictments or sentencing orders should not be included in the supplement

unless the indictments or sentencing order pertain directly to the legal question raised by the appeal.

- **Less is more: Include only critical portions of lengthy documents.** A critical document such as an insurance contract might be very lengthy, but often only certain sections of the document will be directly relevant to the legal arguments. If this is the case, and you are filing a separately-bound appendix, include important sections of the document at the end of the brief, but include the entire document in the separately-bound appendix.

Other considerations:

- **Rule 16(3)(i) priority**. The written order(s) being appealed or reviewed must be the first documents in the supplement section.

- **Table of contents.** If you include more than the written order(s) required under **Rule 16(3)(i),** you will want to create a table of contents for the supplement section.

- **Citation.** In your brief, use an appropriate abbreviation, such as "Supp.," and a page number, when citing material in the supplement section.

- **The use of a supplement section—like the use of the term "supplement" itself—is simply a means to distinguish material in the supplement from material in a separately-bound appendix.** If you do not have "voluminous" documents, and therefore are not filing a separately-bound appendix, then you don't need to worry about the supplement-versus-appendix distinction: just include your documents, starting with the **Rule 16(3)(i)** order(s), in an appendix bound with your brief. The supplement is something that is intended to afford the justices quick and easy access to critical material in cases in which there are so many documents relevant to the appeal that a separately-bound appendix must be submitted apart from the brief.

Ultimately, determining which documents to bind with the brief, and how to organize them, is a matter of common sense.

IV. CITATIONS

Citations to the record

Briefs typically refer to many sources of information other than case law, statutes, and the like. For example, a brief may refer to information in a trial transcript or in the appendix, or, if the brief is that of the responding party, to the opponent's brief or the opponent's appendix.

The Supreme Court requires you to identify the sources from which you obtain the information that you present in your brief. **Rule 16(3)(d)** says that the statement of the case and the statement of the facts must have "appropriate references to the appendix or to the record," and **Rule 16(9)** directs that "[a]ll references in a brief or memorandum of law to the appendix or to the record must be accompanied by the appropriate page number."

Citations should be abbreviated so that they do not distract unduly from the text. The Supreme Court does not require any particular form of abbreviation. The following are examples of some commonly-used abbreviations: "A" or "App." for appendix; "DB" for defendant's brief; and "T" or "Tr." for transcript.

The meaning of the abbreviations should be identified the first time that they are used, so that the reader knows immediately what source the abbreviations refer to. This is commonly done by inserting a footnote immediately after the first use of an abbreviation.

Example:

[1] Citations to the records are as follows:
"App." refers to the appendix filed with this brief;
"MH" refers to transcript of the motion hearing, held January 15, 2012;
"PB" refers to the petitioner's brief; and
"T" refers to the consecutively-paginated transcript of the trial, held February 1-3, 2012.

Only page numbers need to be identified. You do not need to identify the line or paragraph number on which the text cited appears.

Legal citations

Citations to the law—for example, case law, statutes, and administrative regulations—are frequently used in legal writing. The Supreme Court Rules refer only to the manner in which decisions of the federal and state courts, including the New Hampshire Supreme Court, must be cited. See **Rule 16(9)**.

The consistent use of commonly-accepted legal citations for all other authorities is preferred. The Bluebook is a suitable reference in this regard. See the **Appendix To This Guide.**

V. THE CONTENT OF THE BRIEF

This section addresses the substantive sections of the brief: the question(s) presented, the statement of the case, the statement of the facts, the summary of the argument, the argument, the conclusion, and the request for oral argument. See **Rule 16(3)(b), (d), (e), (f), (g),** and **(h)**. It also addresses the section of the brief concerning the text of relevant authorities. See **Rule 16(3)(c)**.

The brief table of contents (**Rule 16(3)(a)**), tables of authorities (**Rule 16(3)(a)**), signature and name requirements (**Rule 16(10)**), certification requirements (**Rule 16(3)(i)** and **Rule 16(10)**), and formatting requirements such as page limit, margins, and font size (**Rule 16(1)** and **(11)**), are discussed in **Sections VI** and **VII** below.

The goal of brief-writing.

Clarity! Legal writing aims to persuade the reader that the argument being advanced is the right, or best, one. The most persuasive legal writing is writing that does not confuse the reader. To avoid confusing the reader, legal writing must be precise, concise, and direct.

Rule 16(6) is instructive in this regard. It says: "Briefs and memoranda of law must be compact, logically arranged with proper headings, concise and free from burdensome, irrelevant, and immaterial matter. Briefs and memoranda of law not complying with this section may be disregarded and stricken by the supreme court."

<u>The organization of the brief.</u>

The sections of the brief should be organized in the order in which they are listed in **Rules 16** and **17**. See **Rule 16(3)** ("So far as possible, the brief of the moving party on the merits shall contain in the order here indicated...."). Based on **Rules 16(3)(a)** through **(i)**, **Rule 16(10)**, and **Rule 17**, that order is as follows:

- The table of contents. **Rule 16(3)(a)**.
- The table of cases, and table of statutes and other authorities. **Rule 16(3)(a)**.
- The question(s) presented, with preservation citation(s). **Rule 16(3)(b)**.
- The text of relevant authorities, if not lengthy. **Rule 16(3)(c)**.
- The statement of the case. **Rule 16(3)(d)**.
- The statement of the facts. **Rule 16(3)(d)**.
- The summary of the argument. **Rule 16(3)(e)**.
- The argument. **Rule 16(3)(f)**.
- The conclusion. **Rule 16(3)(g)**.
- The statement concerning oral argument. **Rule 16(3)(h)**.
- The certification concerning the order being appealed. **Rule 16(3)(i)**.
- The name of the party filing the brief. **Rule 16(10)**.
- The name of the lawyer, if any, who represents the party. **Rule 16(10)**.
- The signature of the party if unrepresented; or, if represented by a lawyer, the signature of the lawyer. **Rule 16(10)** and **33(2)**.
- If the party prepared the brief with the assistance of a lawyer providing limited representation, the statement, "This pleading was prepared with the assistance of a New Hampshire attorney." **Rules 16(10)** and **33(3)**.
- The certification concerning delivery of the brief to the opposing party. **Rule 16(10)**.
- The copy of the order(s) being appealed. **Rule 16(3)(i)**.
- The text of relevant authorities, if lengthy, in an appendix. **Rule 16(3)(c)** and **17**.
- The appendix, if bound with the brief. **Rule 17(1)**.

A. QUESTIONS PRESENTED

<u>Was the appeal issue presented in the notice of appeal?</u>

The "questions presented" section of the brief identifies and enumerates the legal issues that are being presented to the New Hampshire Supreme Court for review. Typically, these issues would have been first identified in the notice of appeal.

The Supreme Court may decline to review any issue of law presented in a brief that was not first presented in the notice of appeal or added by motion. See State v. Blackmer, 149 N.H. 47, 49 (2003) ("An argument that is not raised in a party's notice of appeal is not preserved for appellate review."); **Rule 16(3)(b)**.

Rule 16(3)(b) says that "the statement of a question presented [in the notice of appeal] will be deemed to include every subsidiary question fairly comprised therein." This means that the wording of the issue in the brief does not have to be exactly the same as it was in the notice of appeal, but the substance of the legal question presented must be the same.

If the issue was not in the notice of appeal, file a motion to add it

If you are the appealing or cross-appealing party and you decide to brief an issue that was not presented in the notice of appeal, you must first file a motion requesting permission to do so. See **Rule 16(3)(b)**.

In the motion, you should (1) provide a statement of the issue as you intend it to appear in the brief; (2) state how the issue is preserved; and (3) state your opponent's position on the request to add issues. (Preservation is discussed below.) **Rule 16(3)(b)** requires you to file the motion "at least 20 days prior to the due date of the moving party's brief."

If you are concerned that the issue you wish to present in your appeal is similar to the issue presented in the notice of appeal but perhaps not similar enough, it is wise to file a motion to add the issue.

Present the strongest issues

The Supreme Court does not limit the number of issues that you may present in an appeal, but the court does limit the number of pages in which you may present those issues. See **Rule 16(11)** (setting a 35-page limit). Thus, it is wise to focus on issues that, in light of the applicable law and standards of review, have the greatest chance of succeeding.

It is the exceedingly rare case in which every issue that was litigated before a judge or agency is a suitable issue to raise on appeal. Presenting numerous issues in an appeal often signals a lack of confidence in all of them.

State the issue in a manner which best conveys its strength

Rule 16(3)(b) advises you to express the questions presented using the "terms and circumstances of the case but without unnecessary detail." It is helpful to state issues concisely, but in a manner that also informs the reader of more than the basic questions of law at hand.

For example, rather than simply writing, "Did the trial court err by denying the motion to suppress?" which could describe any number of cases that involve the denial of a motion to suppress, you may want to frame the question as suggested in one of the examples below.

Examples:

Did the trial court err by concluding that the arresting officer had reasonable suspicion that the defendant had committed a crime, when the officer's sole observation of the defendant's driving was a momentary fog-line crossing?

The arresting officer observed the defendant cross the fog line once. She made no other observations of erratic driving. Was it error for the trial court to conclude that the officer had reasonable suspicion that the defendant had committed a crime?

The point is to provide the reader with an immediate context in which to consider the issue. The context, however, should be factual, not argumentative, since argument is reserved for the argument section. Thus, if you word the issue presented in this way, it should be worded objectively, relying on facts that are not in dispute.

State the issue concisely

Avoid issue statements that exceed 75 words. The longer the statement of the issue, the more difficulty the reader will have understanding it and identifying its merit.

Preservation: identify the manner in which the issue is preserved

The Supreme Court's role as an appellate court is to review decisions made by judges and agencies, not to decide questions of law in the first instance. Therefore, the court may decline to review a legal issue that was not first presented to the judge or

agency before which the case was litigated. Issues that were not first presented to the judge or agency before which the case was litigated are not "preserved" for appeal.

A party generally "preserves" a legal argument by filing a motion that argues that issue, or by objecting during a hearing or trial and arguing the point then. In order to demonstrate to the Supreme Court that an issue has been preserved for appeal, the Court requires you to identify the place in the record at which you raised the issue.

Thus, **Rule 16(3)(b)** says, "After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue."

Example:

Did the trial court unsustainably exercise its discretion by failing to balance the prejudice and probative worth of evidence of prior acts of harassment under New Hampshire Rule of Evidence 404(b)?

Issue preserved by motion in limine, argument at trial, and the trial court's decision on the record. See App. 3; Tr. 203-05.

In this example, "App. 3" refers to the page of the motion that is included in the appendix and "Tr. 203-05" to the pages of the trial transcript at which the argument was made orally in court, and at which the judge ruled on the argument.

Neglecting **Rule 16(3)(b)**'s preservation citation requirement can have dire consequences. The rule provides that the "[f]ailure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part, and opposing counsel may so move within ten days of the filing of a brief not in compliance with this rule."

The plain error rule

Even if an issue is not preserved, however, it may still be presented in a brief under the plain error rule. See **Rule 16-A** ("A plain error that affects substantial rights may be considered even though it was not brought to the attention of the trial court ...."). To comply with **Rule 16(3)(b)**, it is good practice to identify the issue as being raised under the plain error rule.

Example:

Issue raised pursuant to this Court's plain error rule. *See Sup. Ct. R.* 16-A.

The party claiming the benefit of the plain error rule bears the burden of showing that (1) there is in fact error; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. See, for example, State v. Guay, 164 N.H. 696, 704 (2013). In order to understand what you must show to demonstrate plain error, it is helpful to read the opinions of the New Hampshire Supreme Court that address the plain error rule.

B. TEXT OF RELEVANT AUTHORITIES

Some appeals hinge on the interpretation of the language of one or more statutes or other legal provisions. It is strongly recommended in these cases that you provide the language of the provision **in full**—that is, provide the parts of the statute that are relevant to both parties, not just those that are helpful only to you—at a convenient place in the brief. That way, the reader will be able to refer to the provision in its entirety without having to take the time to locate the text in a book or other resource. Be sure that you reprint the text of the provisions verbatim. See **Rule 16(3)(c).**

Rule 16(3)(c) provides two placement options for this material. If the provisions are not lengthy, they may be placed within the brief, in a section entitled "Text of Relevant Authorities." A good rule of thumb is to dedicate no more than a few pages of the brief to this section. These pages will count toward the brief page limit discussed in **Section VII** below.

If the provisions take up more than a few pages, then their text should be relegated to an appendix. See **Rule 16(3)(c)**. In this case, the pages will not count toward the brief page limit. **But note**: the justices prefer that the language of the relevant legal provisions be readily accessible. Thus, to the extent practicable, attempt to include the text of relevant authority with the brief rather than in a separately-bound appendix. See **Section III** ("**The 'Supplement': A note about documents critical to the appeal**").

It is usually only useful to dedicate pages in the brief or appendix to the text of relevant authorities when these authorities are central to the legal issues being appealed. Thus, a mere citation in the brief to Part I, Article 15 of the New Hampshire Constitution, for example, should not lead to the conclusion that the text of Part I, Article 15 must be set apart in the brief. But if an appeal issue involves the interpretation of the language of that constitutional provision, then it will be helpful to the reader to have that language at the ready.

C. STATEMENT OF THE CASE

Rule 16(3)(d) says only that the statement of the case must be "concise," and shall have "appropriate references to the appendix or to the record."

The statement of the case is typically a brief explanation of how the case began and how it concluded, with references to the dates on which certain events occurred. In other words, it is a concise summary of the procedural history of the case.

The only events in the case that are relevant to the statement of the case, however, are those that are relevant to the appeal. Thus, in a case in which many motions were filed and many legal arguments were made, the statement of the case should refer only to the motions and arguments that bear on the questions presented in the appeal.

In a criminal appeal, the statement of the case might include the nature of the charges, the fact that an issue relevant to the appeal was litigated, the date of trial, the verdict, and the defendant's sentence.

In a civil appeal, the statement of the case might include a description of the suit, how the issues on appeal were litigated, the decision maker's ruling on the issues, and the outcome of the case. In an appeal from an administrative hearing, you should include a reference to the motion for rehearing.

If both are brief, or if it otherwise makes sense to do so, the statement of the case may be combined with the statement of facts. The usual convention in this instance is to title the section "Statement of the Case and Facts."

D. STATEMENT OF THE FACTS

The statement of the facts must include the facts that are "material to the consideration of the questions presented" and must have "appropriate references to the appendix or to the record." **Rule 16(3)(d).**

Composition

The statement of the facts provides the reader with a bird's-eye view of the facts of the case. See **Rule 16(3)(d)**. It is a narrative account of the facts that are taken, in most cases, from the transcript of the trial or hearing in the case. The narrative should not overwhelm the reader with unnecessary details. Rather, it should focus the reader on the facts that are of particular importance to the legal questions raised in the brief.

While there is no rule directing how the statement of facts should be presented, the general directive of legal writing is to avoid confusing the reader. For the purposes of the statement of facts, the structure that most effectively adheres to this rule is the chronological narrative. This means that in a case in which several witnesses testified, the statement of the facts will summarize the events as they occurred in time, not on a witness-by-witness basis.

Each sentence in the statement of facts typically consists of one or more facts taken directly from the record. However, in cases with more complicated narratives, it is sometimes helpful to summarize key factual disputes in a sentence or two.

For example, in a case in which many witnesses testified about a singular event, thereby providing many different accounts of that event, it may be useful to orient the reader by saying, "A central dispute at trial concerned who brought the knife to the fight. Witnesses provided conflicting testimony about this, but were generally divided into two camps. For example, …." The witnesses' conflicting testimony may then be briefly described.

<u>Section headings</u>

The best course of action in legal writing is to be succinct. Some cases, however, have particularly complicated histories that make a lengthy recitation of facts unavoidable.

In these cases, break the statement of facts into subsections arranged with logical headings. In a wrongful discharge case, for example, sections might have titles such as "The 2007 Annual Performance Review," "Smith's Absenteeism in 2009," and "Events Leading to Termination in 2011."

<u>Which facts to include</u>

Because your goal is to focus the reader on the facts that are relevant to the issues raised on appeal, it is not necessary to include every fact in the statement of facts.

It is not wise, however, to omit facts that are relevant but not helpful to your case, because your opponent will invariably expose the omission. Similarly, it will not help your case to mischaracterize or misstate the facts by presenting them in a manner that unfairly favors your case or unfairly disfavors your opponent's. To do so compromises

your credibility before the Court. Seasoned practitioners handle "bad" facts directly relevant to the appeal by pointing them out, putting them in context, and moving on.

Remember that the statement of facts may only present facts that actually appear in the record. As discussed further later in this section, **Rule 16(3)(d)** requires the writer to attribute facts to the record. Thus, facts which occurred outside of the record—that is, which were not known to the judge or agency deciding the case—may not be included in the statement of facts.

Note, though, that parties wishing to refer to material outside the record may consider filing a motion to expand the record. While they do not explicitly address it, the Rules do not prohibit this course of action. See, for example, **Rule 13(3), Rule 17(1),** and **Rule 21**. Such a pleading should be filed well in advance of the brief, and should explain why the justices should consider the material. And, of course, the other party's position on the motion should be sought. **Rule 21(5).**

Identifying the parties and witnesses

Rule 28 clarifies the manner in which parties are formally "designated" on appeal: that is, whether a party is a petitioner, plaintiff, or defendant; and how State divisions and officials are referred to.

In cases entered by a petition asking the Supreme Court to exercise its original jurisdiction, the party filing the petition will be known that the "petitioner" on appeal, even if he or she was "the defendant" in the trial court or other forum. See **Rule 28(1)(a)**.

But in all other cases, once a defendant, always a defendant, so to speak: in New Hampshire, the roles of the parties do not change on appeal. So, if you were the defendant (or the plaintiff) in the trial court, and you appeal to the New Hampshire Supreme Court, you keep your defendant designation (or your plaintiff designation) on appeal. You do not take on a different appellation.

That said, in civil cases, these designations—plaintiff, defendant, petitioner, respondent—can confuse the reader. It is difficult enough for a reader to keep track of the various individuals who populate a case, let alone to keep track of them according to the legal designations provided to them by a court or other forum.

Avoid using these designations. Instead, provide the reader with the simplest way of remembering who the witnesses and parties are. The justices prefer that witnesses be identified according to their function or role in the case: as "the neighbor," "the friend," or "the seller," for example. In a domestic case, consider using familial identifiers like

"mother," "father," "wife," "husband," or "grandparent." In other cases, the use of "landlord," "tenant," "employer," or "Town," for example, may provide clarity.

Note that in some cases, often those involving children, a statute or court rule may require the name of a party to be kept confidential. See **Rule 28(1)(b)**. If this is true in your case, and you wish to identify the person by name in the body of your brief, use their first name and last-name initial.

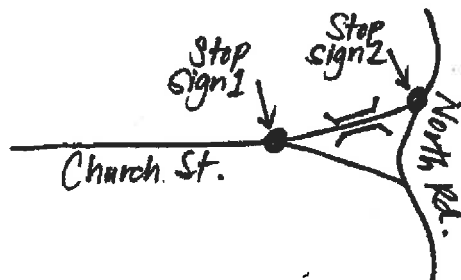
Diagrams, illustrations, and other visuals

Some cases hinge on the location of key events.

If you are describing such a location in your statement of facts, and a diagram, photograph, or other visual was used to depict the location in the trial court or other forum—that is, one or more of these visuals is a part of the record—the Court recommends that you insert it within the text of the statement of facts. (You may also consider placing it the argument section of your brief, if appropriate.) This will enable the reader to immediately understand an issue that is critical to the determination of the appeal but would be challenging to comprehend through a written description alone.

For example, in a tort case or land dispute involving a particular intersection or property boundary, the intersection or boundary may be best understood if it is depicted in a diagram contained within the statement of facts. The diagram need not be a replica of the original, so long as it fairly represents the location at issue.

> **Example**: To introduce the diagram, you might say, "This case is about the intersection of Church Street and North Road. Below is a rough schematic of that intersection. A copy of the map introduced at trial is found in the appendix. See App. 3."



Of course, if the visual is a part of the record and is significant to the appeal, it should be included in the appendix or supplement, or transferred to the Supreme Court. See **Section III and Rules 13, 14, 17,** and **21**.

<u>**Citation to the record**</u>

The facts that you present in the statement of facts must be attributed to the record. See **Rule 16(3)(d)**. These citations assure the reader that the facts about which you have written are indeed present in the record, and they enable the opposing party and the reader to locate and verify the facts as necessary.

Often, the facts are taken only from the trial or hearing transcript. However, other sources of facts may include, for example, exhibits and stipulations. These sources are attributed by the system of abbreviations that you have established for your brief. See **Section IV**.

Although **Rule 16(3)(d)** does not require attribution to the record after each sentence, seasoned appellate practitioners typically do provide citations in this manner.

E. SUMMARY OF THE ARGUMENT

Rule 16(3)(e) calls for "[a] summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged."

The importance of the summary of the argument cannot be overstated. The justices read the briefs in advance of oral argument but often refer to the summary just before argument to ensure a proper understanding of the issues. Thus, it is critical that the summary be succinct, organized, and well thought-out.

The summary should not be a thinly veiled restatement of the argument section of the brief. A good summary highlights for the reader the primary reasons that the writer should prevail on appeal and that her opponent should not. It does not go into undue detail.

Although there is no page limit defined for the summary of the argument, it is meant to be a concise reference, and accordingly should be short. Summaries frequently take up no more than a page, and should not exceed two pages.

Quotations from case law are generally not useful in the summary of the argument. Similarly, unless a case is pivotal, legal citations are unnecessary.

If more than one issue is presented, the summary of the argument should be divided into numbered sections that correspond to the issues.

F. THE ARGUMENT

Rule 16(3)(f) calls for an argument section "exhibiting clearly the points of fact and of law being presented."

Preparing the argument

• **Identifying the issues to brief.** It is exceedingly rare that a case will involve multiple errors that are each so egregious that each requires reversal. Limit the issues presented to the ones that have the best likelihood of success on appeal.

The strength of an issue is generally dictated by the law: that is, how the New Hampshire Supreme Court, and sometimes other courts, have treated similar issues. An issue is not a suitable candidate for appeal merely because the issue was raised at trial or a hearing.

• **Research.** Because New Hampshire's jurisprudence—that is, the decisions issued by the New Hampshire Supreme Court—is not impossibly vast, it is possible, and advisable, to read every New Hampshire case relevant to a given legal issue before beginning to write the brief.

Case law from other appellate courts may also be persuasive, particularly if a given issue has not been decided or extensively addressed by the New Hampshire Supreme Court. Orders from trial courts are generally not persuasive but may in some cases be illustrative.

In some cases, a legal issue that New Hampshire has not yet decided may have been addressed in other jurisdictions, but the outcome across jurisdictions may vary. In this instance, it is helpful to survey the law in these jurisdictions and, if possible, identify a majority and minority view. Whether your preferred outcome falls in the majority or minority approach to the issue, explain why New Hampshire ought to adopt that approach.

Organizing the argument section

• **The main argument sections correspond to the questions presented.** The argument section should be subdivided according to the number of issues presented. If you have two issues in your "questions presented" section, you should have two main argument sections that correspond to those issues.

The text of the title of the main argument is typically the question presented, phrased as a statement. In other words, the title states the answer to the question presented to which it corresponds. See Example, below.

The text should not exceed 30-40 words, or about four lines. Titles lengthier than this are generally difficult to read and are thus not useful.

A common formatting convention is as follows: The main arguments are identified by Roman numerals (I, II, III, etc.) and a title. The text of the title is presented in bold capital letters.

• **Divide the main argument sections into subsections.** It is often helpful to organize primary legal arguments into one or more subsections, particularly if the discussion of the issue is lengthy and the analysis is complicated. For example, a legal issue may consist of a multi-pronged test or set of factors. Organizing the argument according to the prongs of the test will help the reader focus on the various points being made.

Subdivisions of the main arguments are often identified by capital letters (A, B, C, etc.), and the text in the section heading is bolded and the first letter of each word is capitalized. The subsection in the next level down is often identified by ordinal numbers (1, 2, 3, etc.), and the text in the section heading is bolded. Only the first letter of the first word is capitalized. See Example, below.

The text that is used in these headings should consist of a short sentence that tells readers exactly what conclusion they should come to after reading the particular section. The headings should be truly concise; otherwise, they will not be effective.

Example: In this example, the title answers the question presented by the first issue, which is: "Did the trial court err in concluding that the road on which the defendant drove while impaired was a 'privately owned and maintained way open for public use' under RSA 259:125, II, thereby enabling the defendant's prosecution and conviction under RSA 265-A:2,

the driving-under-the-influence statute?" The subsections divide the argument into discrete parts.

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT LAKEVIEW DRIVE IS A "PRIVATELY OWNED AND MAINTAINED WAY OPEN FOR PUBLIC USE" FOR THE PURPOSES OF THE DWI STATUTE.

A. Because The Language Of RSA 259:125, II Is Plain And Unambiguous, This Court Need Not Refer To Legislative History To Discern Intent.

1. The word "open" has a commonly-used dictionary definition.

Although not reflected in this example, the title of the main argument section— that is, section I— is usually flush-left and subdivision titles are indented accordingly.

• **Use IRAC (and include the standard of review).** IRAC is an acronym for Issue, Rule, Analysis, and Conclusion. Although it need not be followed inflexibly, IRAC can be a useful method to organize legal writing.

Issue. Using the IRAC methodology, each argument section in a brief will begin with a concise explanation of how the particular issue arose—that is, what it is that the parties disputed in the trial court or other forum, how they disputed it, and how the judge or other decision maker ruled.

Rule. The "rule" is the rule of law that applies to the particular issue. For example, in a First Amendment case, the applicable rule may be, "symbolic conduct constitutes protected speech when an intent to convey a particularized message was present."

Legal rules tell the reader—and the writer—how a legal question is analyzed. They provide the analytical framework that should be utilized in order to resolve the question presented.

Standard of review. The standard of review is a type of legal rule. It dictates how an appellate court may consider appeal issues: that is, whether the court can decide the issue of its own accord ("de novo"), or whether it must defer to some degree to the lower court's or tribunal's discretion to decide certain issues.

It is not a mere formality to cite the standard of review in a brief. Rather, the standard tells the parties who has the burden of persuasion, what that burden is, and what types of arguments about the issue should be made. It thus gives the parties a sense of how difficult it might be to prevail.

Examples:

This Court reviews the trial court's decisions on the admissibility of evidence under an unsustainable exercise of discretion standard. It is thus the defendant's burden to demonstrate that the trial court's rulings were clearly untenable or unreasonable to the prejudice of its case. Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 832 (2005).

The issue raised is one of constitutional law. Therefore, this Court will conduct de novo review of the issue. State v. Hollenbeck, 164 N.H. 154, 157 (2012).

"Whether a breach of contract is material is a question of fact." Ellis v. Candia Trailers & Snow Equip., 164 N.H. 457, 466 (2012). Thus, this Court will uphold the trial court's findings of fact and rulings of law unless they lack evidentiary support or constitute a clear error of law. Id. This Court defers to the lower court's judgment on such issues as resolving conflicts in testimony, assessing the credibility of witnesses, and determining the weight of the evidence. Id. The standard of review is whether a reasonable person could have reached the same decision as the trial court based upon the same evidence. Id.

"On appeal, questions of statutory interpretation are reviewed de novo." State v. Guay, 164 N.H. 696, 699 (2013). This Court "will first examine the language of the statute, and, where possible, give the words used their plain and ordinary meanings." Id. When a statute's language is plain and unambiguous, this Court will look no further for indications of legislative intent, and will not add language that the legislature did not see fit to use. Id."

Analysis. Most of the argument section in a brief focuses on analysis: that is, how the law applies to the particular facts of the case.

Conclusion. Each main argument section should contain a conclusion consisting of a few sentences. The conclusion is a summary statement of why the application of a particular legal rule will result in the outcome that you desire.

The argument conclusion, which is a part of the legal analysis, should not be confused with the conclusion section of the brief, which states the relief requested and is a component of the brief required by **Rule 16(3)(g).** See **Section V(G)**, below.

<u>Writing</u>

• **Outline.** Before you begin to write, create an outline of your argument. Structure the outline according to the legal rule or test at issue in your case and the primary points you wish to convey.

• **Use well-constructed, short sentences.** Because the law is often complicated and sometimes opaque, legal writing must be precise in order to be convincing. Precision cannot be achieved in sentences that ramble.

Vary the length of sentences, but strive for sentences with an average length of twenty words. Use simple language. Do not use legalese. Cut unnecessary words and phrases.

• **Develop well-constructed paragraphs.** Begin each paragraph with a concise topic sentence that tells the reader what the paragraph is about. All other sentences in the paragraph should support that topic sentence. Eliminate sentences that do not support the topic sentence.

Be mindful of paragraph length. A paragraph should never take up a full page; if it does, divide it into two or more paragraphs. Readers have a difficult time wading through lengthy paragraphs. The goal of the argument section is to persuade the reader that the law favors your argument. The more of a chore it is to read a brief, the less persuasive it will be.

Paragraphs should transition smoothly. Relocate or restructure paragraphs that do not flow logically from the paragraph that precedes or follows.

• **Adhere to the analytical framework.** It is good to bear in mind that most legal analysis follows a specific framework. That is, for almost every legal issue, the law has already defined the legal rule or criteria necessary to the analysis of the issue, and the manner in which that rule or criteria should be applied.

Thus, while creativity has a place in legal writing, free-form extemporaneity does not. Be sure to tie what you write to the analytical framework with which your issues are concerned.

That said, you may want to argue that a different analytical framework should be followed in your case, or that the law ought to be different than what it is. This is perfectly acceptable. It is usually most effective in this instance to identify the usual framework and then explain why you believe another type of analysis is preferable.

• **Do not repeat your arguments.** Once you have made a point, move on. Do not repeat the point. Do not cloak the same point in different clothing. A brief should progress through its arguments, and it is tiresome for readers to find that they have been led back to a point already made.

• **Beware of over-personalizing or overstating the argument.** Attack the law, not the opposing party or the judge who decided the issue against you. See, for example, In re Estate of Bourassa, 157 N.H. 356, 361 (2008) ("Practitioners would be wise to raise … accusations in the future only when they are warranted, and not merely where they result from dissatisfaction with the trial court's decision.").

In a related vein, the use of words such as "clearly," "obviously," and "patently" in legal writing is rarely meaningful and often incorrect. The law is seldom truly clear; when it is, its clarity will be self-evident.

• **Use footnotes judiciously.** Many readers dislike footnotes because they require the reader to stop reading what is important and start reading something that either is not important or is less so. In this way, footnotes may interfere with the reader's comprehension of the brief.

If you must use footnotes, use them well. Do not hide adverse facts or law in footnotes. Do not bury substantive argument in footnotes. If what is in a footnote advances the argument, then relocate the content of the footnote to the text of the argument.

• **Bear oral argument in mind**. If the Court schedules oral argument in your case, you will have to defend, in open court, the arguments you make in your brief. As you write, ask yourself how the factual and legal assertions you make in your brief will stand up to questioning by the justices. If the prospect of explaining or defending a proposition feels uncomfortable, consider eliminating that proposition, rephrasing it, or doing additional research to ensure that there is adequate authority for it.

G. CONCLUSION

Rule 16(3)(g) requires that the brief end with "[a] conclusion, specifying the relief to which the party believes himself entitled." The convention here is to state in a single sentence the action that you wish the Supreme Court to take.

Examples:

For the foregoing reasons, Mr. Smith respectfully requests that this Court remand to the trial court for resentencing on a misdemeanor criminal threatening conviction.

Lorena D. respectfully requests that this Court reverse her delinquency adjudication.

Wherefore, Acme Builders respectfully requests that this Court affirm the decision of the superior court upholding the Deerfield Zoning Board determination.

Be sure to be specific, however. For example, don't just ask the Court to "remand" when what you really want the Court to do is "remand for an evidentiary hearing on the definition of 'commercial motor vehicle.'" Your statement of the relief to which you say you are entitled must be explicit. It should not leave room for speculation.

H. REQUEST FOR ORAL ARGUMENT

Overview

The New Hampshire Supreme Court may decide an appeal on the basis of the briefs alone—that is, without oral argument—or may require that the parties appear for oral argument. If oral argument is deemed necessary, the Court will determine whether to allow the parties five minutes or fifteen minutes each in which to argue their case.

Rule 16(3)(h) requires that briefs include "[a] statement that the party waives oral argument or that the party requests oral argument." "A party requesting oral argument may designate whether the party requests oral argument before a 3JX panel or the full court, and may set forth reasons why the party believes oral argument is necessary or will be helpful to the court in deciding the case."

As is evident from **Rule 16(3)(h)**, the request for oral argument tells the Supreme Court the amount of time that a party believes is necessary to effectively present the issues.

Example:

Ms. Garcia requests 15 minutes of oral argument before the full Court.

<u>**Waiving argument**</u>

When the parties appear at oral argument, they are subject to questioning by the justices. If you believe that your position will not be aided by such questioning, you may decide to waive oral argument. Note, however, that the justices have commented that they find oral argument helpful and, at least in some cases, dispositive.

Rule 18(1) provides some guidance on the types of appeals for which the Court is unlikely to schedule oral argument. The rule may be useful in deciding whether or not to request argument.

The rule says: "Oral argument will probably not be held if the questions of law are not novel, and the briefs adequately cover the arguments; if the questions of law involve no more than an application of settled rules of law to a recurring fact situation; if the sole question of law is the sufficiency of the evidence, the adequacy of instructions to the jury or rulings on the admissibility of evidence, and the briefs refer to the record, which will determine the outcome."

<u>**Five-minute argument (3JX panel)**</u>

Typically, five-minute arguments are scheduled to take place in front of a 3JX panel. A 3JX panel is a panel of three Supreme Court Justices, rather than the full panel of all five Justices. See **Rule 12-D(1)(a)**.

To aid in the determination of which appeals are best suited for five-minute 3JX argument, the Court has identified the following 3JX criteria: these appeals involve claims of error in the application of settled law; or claims that a judge has unsustainably exercised her discretion, when the law governing that discretion is settled; or claims that the evidence is insufficient or the verdict was against the weight of the evidence. **Rule 12-D(5)**.

As a point of interest, orders issued by a 3JX panel are not published in the New Hampshire Reports and have no precedential value, which means they may not be cited in pleadings or rulings. See **Rule 12-D(3),** and **Rule 20(2)**. Also, cases heard by a 3JX panel must be decided unanimously. If the panel cannot reach a unanimous decision, the case will be referred to the full Court for decision. **Rule 12-D(2)**.

Fifteen-minute argument (full panel)

Appeals that involve areas in which the law is unsettled are best served by 15-minute argument.

Opinions issued by the full Court are published in the New Hampshire Reports.

VI. TABLES, SIGNATURE, & CERTIFICATIONS

A. TABLE OF CONTENTS

The brief must open with a table of contents. **Rule 16(3)(a)**. Like the table of contents in a book, the table of contents in the brief identifies the sections of the brief, including the argument section titles and subsections, if any, and provides page references for each section.

The table of contents is considered prefatory material. Page numbering for this material uses lower-case Roman numerals, or "romanettes" (i, ii, iii, iv...). These page numbers are not counted toward the brief page limit. **Rule 16(11)**.

B. TABLE OF AUTHORITIES

"Authorities" are the resources on which litigants rely to build their arguments. For example, the authorities relied on in a brief might be case law, statutes, constitutional provisions, and law review articles.

Rule 16(3)(a) requires that the table of authorities section be divided into "Cases" and "Statutes and Other Authorities." The cases must be listed alphabetically. A page reference must be provided for each authority, indicating the page or pages on which the authority is cited in your brief.

As with the table of contents, the table of authorities is prefatory material and its contents are numbered using lower-case Roman numerals (i, ii, iii, iv...). These page numbers are not counted toward the brief page limit. **Rule 16(11).**

C. NAME(S) & SIGNATURE

Unlike the tables of contents and authorities, the signature and certifications appear on the final page of the brief, typically just below the one-sentence statement of the relief requested (that is, just below the conclusion section of the brief).

Rule 16(10) requires that "[t]he name of the party filing the brief or memorandum of law and the name of the lawyer representing the party shall appear in type at the conclusion of the pleading, and the lawyer shall sign the pleading." Parties who represent themselves must sign their briefs.

The names of persons who are not New Hampshire lawyers and are also not parties may not appear on the brief or memorandum of law, unless the person receives prior written approval from the Court. See **Rule 16(10)** and **Rule 33.**

Non-lawyers who were assisted by an attorney providing only limited representation must include the statement "This pleading was prepared with the assistance of a New Hampshire attorney." See **Rule 16(10)** and **Rule 33(3).**

D. CERTIFICATION REQUIREMENTS

There are two certification requirements: 1, the certification concerning the decision being appealed; and 2, the certification concerning delivery of the brief to the opposing party.

Although litigants in the Supreme Court must comply with all of the Court's rules, these certifications are your assurance to the Court that you have complied with particular Court rules.

Thus, **Rule 16(3)(i)** requires the appealing party to "certify either that the appealed decision is in writing and is appended to the brief, or that the appealed decision was not in writing and therefore is not appended to the brief." This certification must appear immediately before the signature line on the brief. Any brief not conforming with this rule may be rejected.

Examples: After the brief's conclusion (see **Section V**), and before the signature line, state:

"Counsel certifies that the appealed decisions were not in writing and therefore are not appended to the brief."

Or,

"Counsel certifies that the written orders concerning the right to counsel and New Hampshire Rule of Evidence 404(b) issues are included with this brief. See App. 1-3."

And, **Rule 16(10)** requires all parties filing a brief or memorandum of law to "conclude the pleading with a certification that the party has hand-delivered or has sent by first class mail two copies of the pleading to the other counsel in the case."

VII. FORMATTING

The brief cover

The brief must have front and back covers that are of "durable quality"—that is, of a heavier stock than the paper on which the content of the brief is printed. **Rule 16(1).**

The front cover of the brief must be one of the following colors, "if available": "the cover of the brief of the appealing party should be **blue**; that of the opposing party, **red**; that of an intervenor or amicus curiae, **green**; and that of any reply brief, including the answering brief in accordance with Rule 16(8), **gray**." **Rule 16(1).** As noted above, the cover of the appendix, if separately-bound, must be **white**.

Rule 16(2) requires that brief covers contain the following information:

- The name of the court ("The State of New Hampshire Supreme Court") and the docket number of the case;
- The title of the case (for example, "Carl Chang v. Joan Smith");
- The nature of the proceeding (for example, "Appeal By Petition Pursuant To RSA 541:6") and the name of the court or agency below;
- The title of the document (for example, "Brief For Plaintiff");

– The names, addresses, and New Hampshire Bar identification numbers of counsel representing the party on whose behalf the document is filed; and

– The name of counsel who is to argue the case.

Binding

Rule 16(1) says: "Each brief shall have a minimum margin of one inch on the binding side and shall be firmly bound at the left margin. Any metal or plastic spines, fasteners or staples shall be flush with the covers and shall be covered by tape. The covers shall be flush with the pages of the case."

"The court will not accept any other method of binding unless prior approval has been obtained from the clerk of the Supreme Court." **Rule 16(1)**.

Page limit

Briefs may not be longer than 35 pages, "exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." **Rule 16(11)**. As noted in **Section VI** above, lower-case Roman numerals (romanettes) are used to number the tables pages, which are considered prefatory material. These pages do not count toward the brief page limit.

Brief pages may not be double-sided. **Rule 16(11)**.

"If a cross-appeal is filed, the opening brief and answering brief of the moving party shall not exceed 35 pages, and the opposing brief of the cross-appellant shall not exceed 50 pages, exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters. The cross-appellant may file a reply brief, which shall not exceed 10 pages." **Rule 16(11).**

Requests for page-limit extensions must be filed in advance of the brief and should note the position of the opposing party. **Rule 21(5)**. Briefs may not exceed the above page limits except by permission of the Court, which is rarely granted.

Page size, color, and margins

Use "good quality" white paper that is standard letter size—that is, 8½ by 11 inches. See **Rule 16(1).**

Font size and line spacing

"Each brief and memorandum of law shall consist of standard sized typewriter characters or size 12 font .... The text shall be double spaced." **Rule 16(11).**

Do not vary the font size. For example, section headings should not be presented in a font larger than the 12-point font used in the text of the brief.

The Court does not prescribe a typeface. The Court's slip opinions use Bookman Old Style, but there is no requirement that appellate litigants adopt that typeface.

Legibility and text color

Rule 16(1) says: "Briefs may be prepared using a printing, duplicating or copying process capable of producing a clear letter quality black image on white paper, but shall not include ordinary carbon copies. If briefs timely filed do not conform to this rule or are not clearly legible, the clerk of the supreme court may require that new copies be substituted, but the filing shall not thereby be deemed untimely."

THE MEMORANDUM IN LIEU OF BRIEF

Contents

Instead of a brief, the opposing party in a mandatory appeal may respond to the opening brief with a memorandum of law. See **Rule 16(4)(b)**. A memo of law must be short—no more than 15 pages. Filing a memo of law automatically waives oral argument. **Rule 16(4)(b)**.

The format of the memo of law is far simpler than that of the brief, since there are far fewer requirements governing its contents. In fact, there are only two. See **Rule 16(4)(b)**. The memo of law must contain:

- The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon; and
- A conclusion, specifying the relief to which the party believes himself entitled.

This means that the memo of law does not need to include the components of the brief that are identified in **Rules 16(3)(a)-(e)**. (Those components are discussed in **Sections V(A)-(E)**, above).

However, like briefs, memorandums of law "must be compact, logically arranged with proper headings, concise and free from burdensome, irrelevant, and immaterial matter." **Rule 16(6)**. The Supreme Court may disregard or strike a memorandum of law that does not comply with these requirements. **Rule 16(6)**.

For tips on how to write an effective legal argument, see **Section V(F)**, above.

Appendix to the memorandum of law

No rule prohibits including an appendix with a memo of law. The usual practice is to staple the appendix to the memorandum of law. Create a table of contents for the appendix, see **Rule 17(4),** and number the appendix pages separately: that is, start the appendix pages at page 1.

Should I file a memorandum in lieu of a brief?

Yes, if:

- The argument you intend to make is simple and straightforward.
- You are confident that the arguments made in the opening brief are weak and that extensive legal analysis is not necessary to effectively rebut them.
- You do not think that oral argument is necessary in the case. "A party who files a memorandum of law shall be deemed to have consented to the waiver of oral argument." **Rule 16(4)(b).** So, if you don't think that oral argument will be a useful means of either rebutting the arguments in the opening brief or defending your arguments, you might opt for a memorandum of law.

Formatting

A memorandum of law may not be more than 15 pages long, including the conclusion and signature page. See **Rule 16(4)(b).**

Unlike the brief, a memo of law does not need to be bound in pamphlet form and does not require front and back covers. See **Rule 16(4)(b).** The usual practice is to staple the pages of the memo together at the upper left-hand corner of the first page, as you would a motion.

Typically, the top third of the first page of the memo displays the case caption. The text of the memo begins immediately thereafter.

Example:

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2014-0737

Widgets, Inc. v. Transcorp. USA

DEFENDANT'S MEMORANDUM IN LIEU OF BRIEF
PURSUANT TO SUPREME COURT RULE 16(4)(b)

The court's standard formatting rules, like those concerning page size and color, margins, font, and line spacing, must also be followed. See **Rules 16(1)** and **16(11),** discussed in **Section VII**.

Name and signature

As with briefs, **Rule 16(10)** requires that "[t]he name of the party filing the brief or memorandum of law and the name of the lawyer representing the party shall appear in type at the conclusion of the pleading, and the lawyer shall sign the pleading." Parties who represent themselves must sign their memorandums.

The names of persons who are not New Hampshire lawyers and are not parties may not appear on the memorandum of law, unless the person receives prior written approval from the Court. See **Rule 16(10)** and **Rule 33.**

Statement of assistance

Non-lawyers who were assisted by an attorney providing only limited representation must include the statement, "This pleading was prepared with the assistance of a New Hampshire attorney." See **Rule 16(10)** and **Rule 33(3)**.

Certification

Rule 16(10) requires all parties filing a memorandum of law to "conclude the pleading with a certification that the party has hand-delivered or has sent by first class mail two copies of the pleading to the other counsel in the case."

THE REPLY BRIEF

What must I know about filing a reply brief?

Reply briefs must conform to the rules regarding opposing briefs, but do not need to contain a summary of the argument. See **Rule 16(5)**.

Reply briefs must generally be filed 20 days after the date the opposing brief was filed. See **Rule 16(7)**. In the event argument is scheduled quickly, the deadline may be 10 days before argument, if that date is sooner than the 20-days-after-opposing-brief deadline.

Get right to the point. A reply brief must be no longer than 10 pages, see **Rule 16(11)**, but rarely does an effective reply brief come close to that limit. Identify the argument you are addressing and cite the facts and/or law that addresses that argument. There is no shame in filing a well-reasoned three-page reply brief.

Should I file a reply brief?

File a reply brief if you have something to say that has not been said in the opening brief or opposing brief. Filing a reply brief should be the exception rather than the rule.

Consider filing a reply if:

- The opposing brief raises lack of preservation, harmless error, or argues a new basis to affirm the trial court or agency's ruling.
- You realize there are errors in your opening brief.
- The opposing brief cites a case or fact that you did not address and you have something to add to the discussion of that case or fact
- The fault in your opponent's argument can only be understood by reference to facts or cases not previously cited.
- There is a significant development in the law or the circumstances of the case, such as the death of a party, or facts related to standing or jurisdiction. If these issues arise after your deadline for filing a reply brief, consider alerting the Court and opposing counsel by way of a motion.

ORAL ARGUMENT

I. PREPARATION

Rule 18(4) provides that "oral argument shall emphasize and clarify the written argument appearing in the briefs." The Court "does not favor any oral argument that is read from briefs or from a prepared text." This does not mean, however, that you should not prepare for oral argument.

You will receive notice about a month before your case is scheduled for argument. The notice will advise you of the amount of time you have been afforded in which to argue.

If there is more than one lawyer on the case, you will need to decide who will present the argument. Generally, only one lawyer per side will be allowed to argue and you must ask the Court for permission before the date of the argument if you intend to have more than one lawyer argue. See **Rule 18(3)**. Splitting time is not recommended.

Watching oral argument

It is very helpful to watch other Supreme Court arguments. Except in confidential cases, arguments are open to the public, and can also be viewed online on the New Hampshire Judicial System website. See http://www.courts.nh.gov/cstream/index.asp. The dates and times of oral arguments are posted on the Supreme Court website.

Oral arguments from the last several years are also archived and available to watch on the website. If you can find arguments that raise issues similar to your case, watching these arguments may help you prepare for the kinds of questions you may receive.

Deciding which issues to argue

In a multi-issue case, you may need to decide which issue(s) to focus on at oral argument. It is hard to cover more than two issues during a 15-minute argument or more than one issue in a 5-minute argument. Bear in mind, however, that you must be prepared to answer questions on any issue.

Some lawyers find it helpful to write out every potential question about their argument that they can envision, and then to write out the answers to those questions. This process not only will help you to identify and address weaknesses in your arguments, but will also force you to resolve the legal conundrums that are often the subject of questions at oral argument. If you can write out an answer to a difficult question, chances are good that you will be able to answer related questions on the spot at oral argument.

Know how you will begin your argument

It is customary to begin your argument by saying, "May it please the Court," your name and the party you represent. For example: "May it please the Court, Roberta Jones on behalf of Smith Corporation."

Do not squander your time by starting with an explanation of "what the case is about" or reciting the facts or procedural history. The Court has read the briefs and is aware of this background.

It is helpful to let the Court know upfront which issues you plan to address and what points within those issues you want to make. If you let the Court know what your plan is, the justices will often let you get your primary points out before they begin asking questions that may take you off your course. Note that, given the justices' questions and the limitations of time, it is seldom possible to reach more than three substantive arguments.

You will generally have a minute or two to speak uninterrupted before the Court begins asking questions. This is a critical time to frame the issues and say one or two points you consider critical.

Example:

"I intend to address the second issue in the brief, and there are three points I'd like to make about that issue: First, the officer did not have reasonable suspicion to stop the car; second, the officer improperly exceeded the scope of the stop; and third, admission of the resulting evidence was not harmless error."

Know how you will end your argument

Make sure you know what relief you are asking for: remand for reconsideration of an issue; reversal; a new trial; or remand for the determination of a limited issue, such as a criminal sentence or an amount of damages.

Plan something to say to wrap up: the relief you are asking for, or any other critical points that didn't come out during questioning.

Practice

Rehearse your prepared remarks many times and try to pare down the remarks each time. Time yourself reciting your remarks, mindful of the amount of time you have for argument and the possibility that at least half of that time will be used answering the Court's questions.

Make sure you know which parts of your presentation are critical, so if they don't come out during questioning, you can get back to them during a lull or to wrap up.

Rehearse your argument in front of one or more people familiar with the legal issues in your case. Invite members of this audience to ask you questions about your argument as if they were the Supreme Court Justices deciding your case. Answer the questions as you would at oral argument. Ask for feedback on the strength of your argument and your performance.

The goal of rehearsal is not to memorize an entire argument with the expectation that you will deliver it as written. Remember, **Rule 18(4)** makes clear that the justices disfavor oral argument that is read from a prepared text. Your goal is to gain familiarity and ease with your subject matter and its presentation so that you can be flexible during questioning and can follow the course of most interest to the Court. For example, if you are asked a question that you had planned to address later in your argument, you can deliver that portion of your remarks in response.

That said, you should memorize your opening points.

Know what you will need at the lectern

Prepare what you will bring to the podium. Less is more here, as you do not want to flip through legal pads or shuffle documents while you are there. Plan to bring only

one or two sheets of paper or a binder with critical information that is easy for you to access.

Note that the lectern will not accommodate legal-size papers, notepads, or folders.

Demonstrative aids

Consider the judicious use of demonstrative aids. Some arguments can be better understood with visual aids: for example, by showing the justices a piece of physical evidence that is at issue, or a blow-up of the key portion of a contract with the language that is in dispute.

When deciding whether to use a demonstrative aid at oral argument, consider this: You may not leave the lectern with the demonstrative aid to give the justices a better look. If the justices will not be able to clearly see or read the aid from where they sit, then it will not aid them (or you) and should not be used. To make this determination, assess the layout of the courtroom well in advance of oral argument.

If you decide to use a demonstrative aid, let opposing counsel know in advance and give him or her a chance to see it. Call the court and let the clerk's office know your plans. If the demonstrative aid is something best placed on an easel, check with the clerk's office about your plan to use an easel.

If the thing you plan to use has been transferred to the court, you will have to ask the clerk's office to have it brought to the courtroom on the appointed day.

Attendance by clients and others

Talk to your client about oral argument. Clients are neither required nor expected to be at the argument, but if they do plan to attend, let them know what to anticipate. Clients do not sit at counsel table for oral argument, and they do not address the Court.

Clients often think that their presence will influence the outcome of the appeal. The solemn presence of an interested party may occasionally be noted, but that should not be an overriding concern of the lawyer preparing for argument.

As a sign outside the courtroom advises, those planning to attend should dress in a way that reflects the dignity of the Court.

II. THE ARGUMENT

The Court will send you a notice that tells you the date and time of your argument. The notice will include a check-in time, which is the time by which you must be at the Court. Check in with the clerk's office when you arrive.

Before your argument, check the Court's argument schedule again, so you know if any cases will be argued before yours. The first case being argued after a break can set up at counsel tables before the justices enter the courtroom.

The appealing party sits on the right as you enter the courtroom, and the non-appealing party on the left.

Rebuttal argument and splitting time

If you are the appealing party, you can reserve time for rebuttal. See **Rule 18(5)**. But keep in mind that it is rare that something said in rebuttal will change the outcome of the case.

If you do reserve time, you should only rarely use it, and only then to clarify the record or make a quick but substantive point that has not already been covered. Do not use rebuttal time to repeat yourself.

If you want to reserve time or you have received permission from the Court to split your time with another lawyer, tell the court monitor this before the justices enter the courtroom. Then, begin your argument by telling the Court that you plan to use reserved time or to split time.

Argument

The monitor will announce the case, at which point the appealing party, who argues first, will stand at the podium. If you are the appealing party, do not begin your argument until the monitor has announced the case.

The Court typically will give you one or two minutes to speak without interruption. If it is critical that you have some uninterrupted time to make important points, you may gently suggest this to the Court. For example, you might say, "I have two quick points to make before I take the Court's questions."

If you are not the appealing party, listen to the questions asked of your opponent and the answers she gives. Jot down one- or two-word notes about the most significant points of discussion. You may also want to note the name of the particular justice who asked a question that you would like to address. When it is your turn at the podium, you can remind the justices of these points and provide them with responses that you feel better address their questions.

Example:

"Justice Bassett, you asked opposing counsel whether the jury heard evidence about the defendant's intoxication around the time in question. The trial transcript makes clear that they did. I'd like to draw the Court's attention to page 106 of the transcript …."

<u>Answering questions</u>

Done well, oral argument is a conversation between you and justices about the legal issues in your case. Questions from the bench give you the opportunity to address the Court's concerns about your case; thus, you should welcome them.

Nonetheless, questions can be a tricky part of oral argument and the part that makes litigants the most anxious. To reduce your anxiety about questions during argument, don't spend time trying to figure out why a justice is asking you a particular question. A question that seems hostile may be from the justice who is most swayed by your argument but who wants to be sure that the argument holds up.

Instead of over-thinking the question, follow these steps:

- Don't panic, and don't react emotionally.
- Focus on the question. Do not try to anticipate the viewpoint of the justice asking the question or fear that the justice is setting a trap for you.
- If you are confused by the question, by all means ask for clarification. Don't answer a question you don't understand.
- Take a moment to collect your thoughts before you answer. A part of your prepared presentation, or the single-sentence legal rule you formulated in preparation, may provide answers to the question.

- Recall the analytical framework which the Court must use to analyze the issue. This can be helpful for two reasons: First, the justice asking the question may not have considered that framework, which gives you the opportunity to remind the Court of it and to frame your response accordingly. Second, the standard of review may inform your response. For example, if your argument is that the trial judge unsustainably exercised his or her discretion, you will want to bear this in mind if you are asked whether a judge could reasonably rule the same way on a similar issue, since an affirmative response might defeat your claim.

- Answer the question. Begin your answer with the most direct response, usually "yes" or "no," and then explain. Do not answer questions evasively and do not blow off questions: the justices will not allow you to escape without answering. Similarly, do not say, "I'll get to that later"—the justice who asked the question is interested in knowing the answer now.

- If the answer is, "I don't know," say that.

It is important not to be unnerved or put off by the Court's questions. Your default assumption must be that questioning by the justices is intended to allow them to explore the reach and application of the legal issues involved in your case, not to attack you or your client.

Handling multiple questions at once

If you get multiple questions at the same time, answer one at a time, in a way that indicates you intend to reach each question. For example: "To start with Justice Lynn's question…" or "I'll start by answering your last question." If, by the time you get to answering the other question, you have forgotten it, ask if the justice could repeat it.

Handling silence

It is important not to be unnerved by an *absence* of questions from the justices. There are some cases in which the justices may have scheduled oral argument to enable the parties to clarify the claims made in the briefs, but do not feel the need to do much probing.

If you are met by silence at any point during your argument, never fear: make the few final points that you have not yet covered, or, if you have covered as much as you think is necessary, simply offer your concluding remarks and sit down.

Hypothetical questions

The Court sometimes uses hypothetical questions to gain a better understanding of the legal arguments. A "hypothetical" is some variation on the factual scenario presented by your case. For example, if the facts in your case are that the landlord gave the tenant fifteen days' notice before beginning an eviction proceeding, the hypothetical question might be what a court should do if the landlord only gives seven days' notice.

Do not respond by telling the justice what he or she already knows: "That is not this case." The Court is wondering about the limits of the ruling you are proposing: if they rule in your favor in this case, how will that play out in other cases?

Concessions are sometimes appropriate. For example, if you are arguing that the trial court should have admitted evidence very prejudicial to the opposing party because he opened the door to that evidence, the Court may be hesitant to adopt a broad "opening the door" position that could allow in such damaging evidence in a lot of other cases. When given a hypothetical, you could respond, "Assuming fact X, then I would agree that the door would not be opened in that situation. Here, however...."

Referring to your opponent and the justices

It is appropriate to refer to the other attorney or to the justices, such as when you are responding to a question (for example, "No, Justice Conboy, I do not believe that that is the case."), referring to a question from which you were sidetracked ("To get back to Justice Hicks's question..."), or referring to something opposing counsel said ("I agree with my opponent on that point.").

The justices should be referred to as Chief Justice Dalianis, Justice Hicks, Justice Conboy, Justice Lynn, and Justice Bassett. Your opponent may be referred to as "my opponent," or, if relevant, "opposing counsel" or "the State." Any respectful denomination will do, though the use of "Brother" and "Sister" has fallen out of fashion.

The lectern lights

There are two lights on the lectern: one yellow and one red.

When the yellow light goes on, you have four minutes remaining (in a full 15-minute argument) or one minute remaining (in a 5-minute 3JX argument). Take this time to finish answering questions, check to make sure you have made your critical points, and say some closing words.

When the red light goes on, your time is up. If you are being asked a question or are in the middle of answering a question, note the red light and ask the Chief Justice whether you may answer or finish answering (for example, "I see that my red light is on. May I answer the question?"). If you are saying your prepared closing remarks, stop at the end of the sentence.

You might not need to use all of your time. Do not continue to talk just for the sake of talking.

After your argument

Unless you are the appealing party and have reserved time, you should not take the lectern again once you have concluded your argument. There is one exception to this rule: if you realize you misstated something during your argument, you may quickly correct the misstatement.

More oral argument etiquette

Do not interrupt or speak over the justices.

Do not respond to the justices' questions with a question.

Suppress the urge to make faces or gestures, like rolling your eyes or shaking your head, when your opponent is speaking—and at all other times.

Don't be angry or argumentative. Never raise your voice at the justices. They don't see oral argument as a chance to spar, and neither should you.

It is never appropriate to be overly familiar with the Court. You should resist personal references such as, "When I clerked for Justice Conboy…." Likewise, be cautious about attempts at humor. You are not at the lectern to entertain.

Nor is it appropriate (or at all persuasive) to use terminology that suggests vitriol toward opposing counsel, the opposing party, or the judge or agency that decided the issue being appealed, no matter how galling you might find them. For example, you should not say, "Attorney Smith speciously argued in the brief that…." Uncharitable characterizations such as "ridiculous," "preposterous," and the like are similarly unwelcome.

APPENDIX TO THIS GUIDE

A. Sources of New Hampshire Authority

New Hampshire Statutes, available at http://www.gencourt.state.nh.us/rsa/html/nhtoc.htm

New Hampshire Administrative Law, available at
http://www.gencourt.state.nh.us/rules/default.htm

New Hampshire Supreme Court Jurisprudence, 1995-present, available at
http://www.courts.state.nh.us/supreme/opinions/index.htm

B. Suggested References

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Strunk Jr., William, and E.B. White. *The Elements of Style.* 4th ed. New York: Pearson Education, Inc., 2009.