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# Michigan Appellate Practice Journal

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# From the Chair

*By Nancy Vayda Dembinski*

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## In this Issue



Looking back at the 2013-2014 session of the Appellate Practice Section Council, it began and ended with a flurry of activity. This was based, in large part, on the new Court of Claims legislation following SB0652, and the introduction of SB0743 and the State Bar of Michigan Task Force recommendations. Our outgoing Chairperson, Jill Wheaton, did an excellent job of staying on top of these fast-moving issues. As a result, the Council was able to engage in meaningful discussions about these issues, and take policy positions on them. Thank you, Jill!

Looking ahead, we recently kicked off the 2014-2015 session at the State Bar of Michigan annual meeting on September 18, 2014, by hosting a program entitled, "Preserving and Presenting the Record on Appeal." The panelists included Michigan Court of Appeals Judge Elizabeth Gleicher, Michigan Court of Appeals Chief Clerk Jerome W. Zimmer, Jr., Michigan Court of Appeals District Clerk Angela P. DiSessa, and our Section's Chair-Elect, Beth A. Wittmann of the Kitch firm. The panelists discussed, among other things: the logistics of how the Court of Appeals handles paper versus electronic trial court records; the use of bookmarks in electronically filed appeal briefs; the proposed use of appendices to appeal briefs; the Section's recent proposed amended court rule on the use of video depositions at trial; and the much anticipated e-filing in the Michigan Supreme Court.

Additionally, the Section's Economics of Appellate Practice Committee is hosting a program entitled "The Virtual Law Office," on Friday, October 17, 2014, from 9:00 a.m. to 1:00 p.m., at Hyatt Place at the Suburban Collection Showplace in Novi.

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# Suggestions for Improving Your Chances when Applying for Leave to Appeal to the Michigan Supreme Court

*By Frederick M. Baker, Jr*

As one who has practiced before the Michigan Supreme Court, and who for eight years was privileged to serve the Court as a Commissioner, I have observed (and probably myself committed) some fundamental errors by appellate counsel, both experienced and inexperienced, at the critical application stage. Apart from mistakes that can be ascribed to lack of ability or effort, which no advice can remedy,[1] most can be traced to a failure to follow the two most basic rules of persuasive writing: Know your audience, and write for your audience.

When you apply for leave to appeal, your audience obviously is the Court, as well as the commissioner who will prepare a report on which the Court relies in its initial review of applications for leave to appeal.[2] Because the Court and its staff are fully capable of extracting from the record what is required to perform its reviewing function, the inevitable errors and oversights of advocates usually are not fatal. But even with the best will, the Court cannot remedy all deficiencies in the applications it reviews. It simply does not have the time. In 2012, the most recent year for which complete statistics are available, the Court received 1,978 case filings, and disposed of 2,048 cases.[3] Of these, only about 5% were grants of leave.[4] To improve your chances of being among that tiny fraction of successful applicants, or, if you are the respondent, of persuading the Court that the application should be denied, you must establish a relationship of trust and confidence with your reader. This article is intended to provide concrete suggestions for accomplishing that goal.

## Stating the Issue

The best guides to advocacy are the rules governing it.[5] For an application, the rule that *should* guide every word you utter is MCR 7.302(A). Yet it is not an exaggeration to say that many applications seem to be written by advocates who think the rule does not apply to them.

The first subsection of that rule that an astonishing number of advocates disregard in multiple ways is 7.302(A)(1)(b). It requires the application to include "the questions presented for review related in concise terms to the facts of the case." This requirement has three discrete components.

### *"The questions presented."*

First, you must determine what questions are presented for review. Yet most advocates fail to realize that not every claim of error that was presented in the Court of Appeals is necessarily grant-worthy. Many applications are written with seeming obliviousness to how to identify and properly state the question presented. This often stems from the advocate's failure to grasp a fundamental principle: *the Supreme Court does not exist to correct error.* You cannot state the question presented correctly without keeping this elemental fact in mind. You are appealing *from* the *only* Court in our system designed to correct error, the Court of Appeals,[6] to a Court whose only concern normally is whether, any error below notwithstanding, the question presented is sufficiently important to warrant a *discretionary* grant of leave to appeal.[7] You simply cannot correctly frame the question presented in an application for leave to appeal to the Supreme Court without referring to the *grounds for granting leave* enumerated in MCR 7.302(B)(1)-(6). Yet a substantial proportion of applications contain statements of the issue merely asserting that one or both of the courts below "erred."

Do not leave it to the reader to tease out whether your application presents an issue that presents one of the grounds that warrant a grant of leave! *State* the issue, and *argue* the issue, in such a way that you *relate whatever error occurred below to one of the grounds for granting leave to appeal.*[8] This may seem obvious, but many applications do not even allude to the grounds for granting leave, let alone argue that one or more exists. The reason for this is often obvious: through the miracle of modern word processing, the application is often nothing more than a recaptioned and slightly revised version of the applicant's Court of Appeals brief. That was an appeal by right, so, of course, it contained no discussion of the grounds for granting leave to appeal to the Supreme Court.

Always bear in mind that the application's argument and analysis must be presented in terms of the rule prescribing the grounds for granting leave. If you have not even addressed those grounds, you have greatly reduced the already long odds of obtaining leave. In the absence of any guidance from you, it may not be readily discernible why your case is an appropriate one for the Court to devote its scarce time

and resources to deciding. Bear in mind, too, that the "default" disposition is to deny leave: By the time a case comes to the Supreme Court, at least four judges have done their best to decide it correctly. Certainly, the Court is unlikely to search for grounds that the applicant has not advanced. The effective advocate must argue the case in terms of the requirements that the Court will apply in deciding the application.

### *Related in concise terms.*

The issue statement is to be "concise," a term that appears three times in MCR 7.302(A)(1) because the Court is jealous of its time. Yet issue statements commonly run on for two or three hundred words, forcing the reader to analyze the case to distill and correctly frame the issue. It is foolish to state the issue at such length that the reader is lost before completing it. Usually a disorganized issue statement reflects a mind that has not refined the question sufficiently to present a "concise" statement of the material facts and proceedings or a "concise" argument. See MCR 7.302(A)(1)(d) and (e). When the advocate considers every fact "material," and so includes them all in the issue statement, the *material* facts are likely to be obscured in the resulting word thicket, and the first opportunity to make an ally of the reader is lost.

One understands the advocate's dilemma, because, at least in some sense, a great many facts may be more or less material. At least two approaches can be used to resolve this dilemma.

The first is to state the issue in terms of the facts, but not to include so much factual detail that the facts obscure the issue.[9] This approach probably will require several attempts, and much critical revision. The effort is worth it, though, not only because it is an effective way to present the question so that an (as yet) uninformed reader can understand it readily, but also because the process of refining the issue statement to conform to this model forces the advocate to identify the few truly material, potentially dispositive facts. Eliminate adjectives, being sure to excise anything that criticizes the other party or the courts below.[10] Revise and refine the issue to its essence as nearly as possible.

If you find that you cannot bear to leave out potentially significant facts, or believe that the issue truly cannot be stated without reference to a lengthy and complicated cluster of facts, consider the alternative model of prefacing a brief statement of the issue with an introductory factual statement, rather than attempting to include every fact in a run-on issue statement. Be considerate of your reader, who, unlike you, has not been living in the case for years, comes to it with no knowledge of its facts, and has none of your deep-seated conviction about its merits. Thus, rather than presenting your reader with a run-on monstrosity of subordinate clauses peppered with semicolons (or, worse, not even peppered with semicolons), use the opportunity to state the issue to inform the reader by tightly organizing and concisely stating the foundational facts in a brief paragraph that will be comprehensible to the uninitiated reader *before* then providing a concise statement of the issue that comprises the most material facts.[11] This alternate issue template can be highly effective when the issue arises in a truly complex factual setting.

### *"To the facts of the case."*

Finally, do remember that the issue must be stated in such a way that it is related in concise terms to the facts of the case. To follow this rule, you must identify and convey to your reader what facts of the case give rise to the (grant-worthy) issue presented. An issue stated without reference to the facts, such as, "did the courts below err in concluding that plaintiff was not entitled to relief under all of the circumstances presented," is certainly stated in a way that is "*related* to the facts of the case," but it does not *identify* those facts for the reader. Take the time to identify, and then properly state the issue in terms of, *the material facts*. It not only will improve your reader's understanding of the case, it will improve your own analysis, and thus your argument.

## Stating the Facts

Again stressing the word "concise," MCR 7.306(A)(1)(d) requires the advocate to provide a "*concise* statement of the *material* proceedings and facts *conforming to MCR 7.212(C)(6)*." That rule, in turn contains a detailed list of requirements that will reward study and observance.[12]

Despite these clear directives, many applicants simply summarize seriatim the testimony of every witness, leaving it to the reader to glean from a disorganized and indiscriminate welter of information what is significant. That approach not only obscures the *material* facts and proceedings in a thicket of peripheral and immaterial information, it also automatically violates the requirement that your statement of facts be "chronological."[13] It also makes it less probable that you will note the points on which the parties and witnesses disagree, as the rule also requires.[14] More importantly, it foolishly alienates the reader at the beginning, when the statement of facts should be establishing a rapport and a bond of trust.[15]

Perhaps some advocates fail to observe these requirements because they fear that leaving anything out will open them to criticism on the ground that they have omitted some unfavorable fact.[16] The solution to that is *not* to violate the rule by including every fact, regardless of whether it is material.[17] Although the impulse to be over-inclusive is understandable, it should be resisted. If you know your case, you know which facts are material. You should confine your statement of facts to those that have a bearing on the issues presented and contribute to understanding the case. Do the work necessary to organize the facts chronologically, being sure to provide *accurate* references to the record, transcript, and exhibits,[18] and noting the points on which the witnesses did not agree.

If the proceedings are at all complex, and especially if the procedural posture of the case has a bearing on the issues presented, consider summarizing the proceedings separately from the summary of the material facts.[19] Sometimes the procedural summary will be most helpful if it precedes the statement of material facts, and sometimes it will be more effective if it follows them. Consider carefully and choose the order that works best for presenting your case.

A well organized and concise statement of the material facts and proceedings that complies with both MCR 7.302(A)(1)(d) and 7.212(C)(6) will greatly enhance an application's chances of success. Conversely, one that does not comply presents a golden opportunity that a respondent should always exploit: the chance (indeed, the obligation) to weaken any bond the application has forged with the reader by impairing the credibility of its statement of the facts. The respondent can do so and, at the same time, both forge a bond with the reader and shape the reader's understanding of the case, by providing "a counter-statement of facts, pointing out the inaccuracies and deficiencies in the appellant's statement of facts...."[20] If you are the respondent, don't waste this opportunity. If you are the applicant, do not give the respondent this opportunity. An applicant's first tactical victory comes from providing a statement of facts and proceedings so accurate and complete that the respondent is obliged to accept it.[21]

## Finding and Citing the Law Really Helps

An argument must conform to MCR 7.302(A)(1)(e) by including citation to authority.[22] If you fail to provide authority to support a point in your argument that is critical to the success of your application or response, the Court may, but certainly is not obligated to, do your work for you. As Justice Voelker famously observed, in an opinion frequently cited to this day, "[t]he appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v Detroit*, 355 Mich. 182, 203 (1959). Though the Court seldom invokes its power under MCR 7.302(F) to strike a nonconforming brief, it often applies the rule in *Mitcham* that an argument unsupported by authority is unbriefed, and thus abandoned, and leaves the neglectful party where it found it.

In an age of computerized research, no one has any excuse for leaving a critical point unsupported by authority. Do the work, or risk losing because you did not. Though the Court and its staff may choose to research a point or assertion that a party fails to support with authority as the application goes through the review process, an argument that consists of nothing but unsupported assertions is unlikely to win the day. Yet such arguments are disturbingly common, which is especially surprising when one considers that the advocate has, by hypothesis, already had two opportunities to research and brief any issue that has been preserved for appeal. Indeed, if it has not been briefed, it is not preserved for appeal.[23] Those who do not learn from history truly are doomed to repeat it. This is your client's last chance; don't sacrifice it out of sloth.

## Articulating How Your Case Fits Harmoniously within Current Doctrine is Essential to Successful Advocacy

Unless you have been sleeping under a tree for the last fifteen years, you know that great changes in Michigan law have occurred since 1999. Among other things, that is when the Court began to embrace and employ a textualist approach to analyzing issues of constitutional, legislative, and contractual intent and meaning. This analytical approach has produced significant changes in both substantive and appellate procedural law. This article is not a primer on all changes that have occurred, but this particular change in the Court's analytical approach to deciding cases provides an example to illustrate my point.

The Court's focus on the text of a constitutional, statutory, or contract provision affects not only the standard of review,[24] but also has changed the tools of interpretation, such as legislative bill analyses, formerly used to ascertain legislative intent.[25] I once observed an oral argument in which the advocate urged that the meaning of the statute at issue was apparent from the discussion of the law's purpose contained in a House Legislative Analysis. That advocate had not done his homework. As a result, he not only missed an opportunity to persuade the Court to his position by relying on indications of legislative intent that *are* deemed permissible and persuasive guides to textualist interpretation,[26] but almost certainly actually alienated, and deterred a majority of the Court from embracing, the argument he advanced by basing it on authority that the Court deems untrustworthy.

Examples could be multiplied, because the Court's decisions of the past decade and a half have transformed many substantive and procedural areas of the law. The point is simply that an applicant who seeks the Court's intervention must do the research necessary to be aware of and sensitive to the rules the Court will apply in analyzing the merits of the argument advanced. An advocate always must be at pains to formulate any argument in terms, and support it with *current* authorities, that comport with the rules and modes of analysis that the Court has made it plain it will henceforth apply.

## Every Word is *Not* a Pearl

Brevity is the soul of wit. We all know it, yet too many advocates make the mistake of regarding the 50-page limit of MCR 7.302(A)(1) and 7.212(B) as a *goal*, rather than a *maximum*. Remember that the Court has 2,000 applications to consider, and that yours is no more or less important than the rest. Assist the Court to do right by your case in

the limited time available by making your brief as short, plain, and simple as possible. That brevity will be appreciated. Although 50 pages may be required in a case that has unusually complicated facts, an unusually large record, or an unusually large number of appealable issues, most applications can be presented – and would be *better* presented – in half as many pages. An advocate should strive to confine the application to the fewest pages consistent with a fair statement of the facts and the "concise" statement of the argument that is both required by MCR 7.302(A)(1)(e) and necessary to demonstrate that the case satisfies the criteria for granting leave to appeal. The Court will not benefit from, or be receptive to, unnecessarily lengthy argument. The more concisely the argument is presented, the more persuasive and effective it is likely to be. Once you complete a draft of your argument, edit it ruthlessly and repeatedly to improve organization, eliminate repetition, delete excess words, recast passive sentences in the active voice, and so on.[27] Shorten it as much as possible.

## Avoid Personality

Appellate work can be a monastic occupation. Imagine that you are alone in a room with the record and the briefs. You may hear little else all day except the subvocalized voices of the advocates who wrote those briefs. Imagine what it is like when those briefs contain mean-spirited bickering and name-calling by counsel who have such low regard for each other (or, worse, the courts below) that they cannot resist infecting their arguments with these feelings, inflicting them on the reader. Insults, accusations, sarcasm, and ad hominem attacks have no place in an application. They are unpersuasive. They are also unprofessional. Rise above your feelings. Exclude them from your brief. Remember the passage of the Lawyer's Oath in which you promised to "abstain from all offensive personality," and your ethical obligation under RPC 3.5(d) to refrain from undignified or discourteous conduct toward the Court. Finally, remember that a reader who is forced to "listen" to these obnoxious, angry voices, rather than to the reasoned argument of professionals that the rules require, may well be unsympathetic to your cause. Behave yourself. You are practicing an honorable profession at the apex of the Michigan court system. Set aside personal animosity and comport yourself as the professional you are lucky to be. You owe that to your client, who is counting on you to present the best case possible.

## Conclusion

I have tried to follow my own admonition, and keep this article reasonably short, so I have confined myself to the most important lessons gleaned from my experience as an advocate and the eight years I enjoyed the privilege of assisting the Court to perform its singular mission in Michigan's one court of justice. If anyone reads this, and I have succeeded in imparting even one useful suggestion to each person who does, I will have assisted not only the readers, but also the Court and its staff in performing their endless, and endlessly satisfying, tasks. Good luck.

***Editor's Note:*** *This article originally appeared in the May 2014* Insurance and Indemnity Law Journal *and is reprinted with their permission and our appreciation.*

## About the Author

*The author served as a Michigan Supreme Court Commissioner from January 2005 through May 2013. Before that, he was a partner for 19 years in the Honigman firm's Lansing office, in a litigation practice that included extensive appellate work. The over three dozen published decisions of state and federal courts in cases in which the author was counsel of record can be found at* www.fbakerlaw.com. *As an adjunct professor, he taught insurance law and conflict of laws at Cooley Law School, and both insurance and no-fault law at MSU Law School. He served on the full-time faculty of both Wayne Law School (as an instructor of legal writing, research and advocacy) and Cooley Law School (as an assistant professor, teaching contracts, civil procedure, and legal writing and research). He is now of counsel at Willingham & Cote, P.C., the firm where he began private practice after serving as a research attorney and law clerk to the late Chief Judge of the Court of Appeals, Hon. Robert J. Danhof.* *The author thanks Chief Commissioner Daniel Brubaker and John Yeager, Esq., for offering constructive comments and suggestions, but the opinions expressed are solely his own.*

## Endnotes

1 Except, perhaps, the motto of Boxer, the tireless and stalwart draft horse in George Orwell's *Animal Farm*, "I will work harder." Hard work and preparation will beat unprepared brilliance every time.

2 The commissioner's report summarizes the case and performs a sort of analytical triage on the often imposing body of briefs, motions, exhibits, and transcripts that, like Marley's chain, is forged below and follows a case as it wends its way up to the Court. It is used to decide which cases need the more thorough monthly conference review by the full Court that is required in the roughly one-quarter to one-third of the applications not disposed of under the Court's "order to enter" (OTE) procedure.

For a detailed description of the process the Court follows between the circulation of the commissioner's report and the ultimate disposition of applications not disposed of under the OTE procedure, during which the Justices typically circulate memoranda and request additional information and supplemental reports, see Oberg and Brubaker, *Insights on the Michigan Supreme Court's Consideration of Applications*

*for Leave to Appeal,* 87 Mich Bar J 30 (February 2008) (the authors are the Court's current Deputy Chief Commissioner and Chief Commissioner, respectively).

3 Michigan Supreme Court, Annual Report, 2012, at p 4. See *http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Statistics/2012/2012MSCAnnualReport.pdf* (Last accessed on March 3, 2014).

4 According to the Court's website, "[t]he Supreme Court receives about 2,000 applications each year and 'grants leave' in about 100 cases." *http://courts.mi.gov/education/learning-center/Pages/Michigan's-Current-Court-System.aspxn* (Last accessed March 3, 2014).

5 Although intended primarily for use by counsel in preparing their briefs and arguing their case after leave has been granted, useful information can be found in the "Guide for Counsel In Cases To Be Argued In The Michigan Supreme Court," which can be found on the Court's website, at *http://courts.mi.gov/Courts/MichiganSupremeCourt/Documents/MSC%20Guide%20for%20Counsel.pdf* (last accessed March 11, 2014).

In addition, an article that was included among the materials provided at the 2013 Michigan Appellate Bench Bar Conference, Chief Justice Robert P. Young, Jr., *Effective Supreme Court Advocacy: Advice from the Chief Justice, Institute of Continuing Legal Education,* contains information, insights, and suggestions sure to be useful to advocates in the Supreme Court, including several that apply at the application stage.

6 Obviously, the circuit court serves that function in appeals from the district courts, but I am speaking of the basic appellate model, of which the district/circuit/Court of Appeals appellate system is an analog.

7 For an excellent explication of why that distinction matters, see *Halbert v Michigan*, 545 U.S. 605, 617-618; 125 S. Ct. 2582; 162 L. Ed. 2d 552 (2005).

Because that distinction is so important, and because even the presence of some error may not warrant a grant of leave to appeal if your case does not present any of the grounds that prompt the Court to grant leave in such a tiny fraction of cases, you should analyze your case sensitively, realistically, and imaginatively, not only as you decide whether to seek leave to appeal, but also in deciding on what issues to seek leave to appeal, and what relief to request. If you think the Court may conclude that "mere error" not meriting a grant of leave has occurred in your case, consider whether you should suggest alternative relief in case the Court decides to deny leave to appeal.

For example, in a case in which the Court of Appeals has exercised its discretion to deny a delayed application for leave to appeal, thereby leaving uncorrected the very sort of error that it exists and is designed to correct, would it be sufficient to obtain a remand for consideration as on leave granted? Remember that the Court is reluctant to grant leave in any case in which the Court of Appeals has not already fully considered the issue presented. The alternative of a remand to the Court of Appeals is a form of "error correction" in which the Court can and often does engage, because it does not entail the commitment of its limited resources that the requirements for granting leave are designed to husband.

Similarly, consider whether a remand for reconsideration in light of a decision of the Supreme Court (either one issued after the Court of Appeals decision or one the Court of Appeals did not consider), or another decision of the Court of Appeals that is controlling under MCR 7.215(C)(2) *and* 7.215(J)(1), would serve your client's interests better than an unsuccessful application for leave to appeal. And so on.

In short, if you are concerned that the error in your case may not present the grounds for granting leave prescribed by MCR 7.302(B), consider whether grounds exist to request alternative relief that will get your case back before the Court of Appeals, which exists to correct error. Consider whether such relief should be requested in the alternative. And consider whether, and if so, how, to include or suggest that alternative in stating the issue. *Do not rely on the Court to think of these possibilities – or make these judgments and decisions – for you, but do bear in mind that the commissioner's report can – and often does – include alternative proposed orders. In an appropriate case, your application should include reasoned alternative requests for relief that the Court can consider in lieu of granting leave.*

8 You must explain why the claim presented does (or, if you are the respondent, does not) (1) involve a substantial question as to the validity of a legislative act; (2) involve a question of substantial public interest and is against the state (or its agency/subdivision/officer); (3) involve a legal principle of major significance to the state's jurisprudence; (4) satisfy the special grounds that must be shown in an appeal before a decision by the Court of Appeals; (5) involve a clearly erroneous decision that "will cause material injustice" or that "conflicts with a Supreme Court decision or another decision of the Court of Appeals;" or (6) is an appeal from an erroneous decision of the Attorney Discipline Board that will cause a material injustice. MCR 7.302(B)(1)-(6).

9 For example, this issue statement, drawn from the facts of *Bronson Methodist Hospital v Allstate Insurance Company*, 286 Mich App 219 (2009), lv gtd 488 Mich 918 (2010), lv vacated 489 Mich 925 (2011), distills to a manageable length a complex question of statutory interpretation, leaving for the statement of the facts and the argument the factual development and statutory analysis necessary to unpack the issue in detail and fully explain its jurisprudential significance:

> When the claimant hospital satisfied the timing requirements of MCL 500.3174 by filing its claim with the Assigned Claims Facility within a year of the first and last dates of service, and timely filing its "action" after the Facility appointed a servicing insurer, does the one year back rule of MCL 500.3145 bar recovery, in this case of first impression,

because claimant rendered all of the services for which it seeks payment slightly more than a year before the "action" was filed, owing to the short delay that occurred before the Facility appointed the servicing insurer?

10 See "Avoid Personality," *infra*.

11 Consider this example, drawn from the facts in Majestic Golf, LLC, v Walden Lake Country Club, Inc, 297 Mich App 305 (2012), rev'd and remanded ___ Mich ____; 840 N.W.2d 305; 2013 Mich. LEXIS 2045 (December 20, 2013):

> The Court of Appeals held, in a published opinion following a decision of this Court holding that a lease must be construed "as written," that, under the strict wording of the lease, the landlord may terminate the lease even for a non-material default. The Court of Appeals did not consider, however: (1) whether the landlord gave notice of default by registered mail, return receipt requested, as the lease required; and (2) whether, in light of extended negotiations while the default existed, during which the landlord did not invoke the power to terminate the lease, a question of fact existed whether the landlord's notice of default adequately conveyed the landlord's intent to terminate the lease, and thereby cause a forfeiture of the tenant's several million dollars of leasehold improvements if the default was not cured. Under these circumstances:
>
> Did the Court of Appeals clearly err in failing to consider whether, under *all* terms of the lease, and not just the term authorizing termination for any default, allowing the landlord to declare the lease terminated will result in a forfeiture so disproportionate to the materiality of the default that a material injustice to the tenant will result?

12 MCR &.212(C)(6) requires:

> (6) A statement of facts that must be a clear, concise, and chronological narrative. All material facts, both favorable and unfavorable, must be fairly stated without argument or bias. The statement must contain, with specific page references to the transcript, the pleadings, or other document or paper filed with the trial court,
>
> (a) the nature of the action;
>
> (b) the character of pleadings and proceedings;
>
> (c) the substance of proof in sufficient detail to make it intelligible, indicating the facts that are in controversy and those that are not;
>
> (d) the dates of important instruments and events;
>
> (e) the rulings and orders of the trial court;
>
> (f) the verdict and judgment; and
>
> (g) any other matters necessary to an understanding of the controversy and the questions involved;...

13 7.212(C)(6)("A statement of facts that must be clear, concise, *and chronological*...").

14 See MCR 7.212(C)(6)(c).

15 Remember that the commissioner's report, which is used to dispose of most cases under the OTE system, also must state the facts. Most advocates are unaware that the Clerk currently will accept for filing a disk containing an electronic version of the application or response. Also, you should be aware that, probably by the time you read this, the Clerk's office will have implemented e-filing. E-filed documents will be available system-wide to the entire Court and its staff, making it possible for all to go directly to the application, response, and any reply at will. This will mark a sea-change, in my opinion, in how the Court functions, by giving Justices and their clerks instant access to the entire application file.

You also should be aware that, once e-filing is implemented (it will be optional in the beginning, with the goal of eventually being mandatory in most cases, probably excepting prisoners and other in pro per parties), all hard copy application filings will be scanned into a searchable pdf format that will be available system-wide to the entire Court and its staff, even if the case was not e-filed.

16 See 7.212(C)(6) ("All material facts, *both favorable and unfavorable*, must be stated without argument or bias.").

17 Black's Law Dictionary (Online) (2d ed) defines "material" thusly: "Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. An allegation is said to be material when it forms a substantive part of the case presented by the pleading. *Evidence offered in a cause, or a question propounded, is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.*" (Emphasis added).

18 See MCR 7.212(C)(6) ("The statement must contain, with specific page references to the transcript, the pleadings, or other document or paper filed with the trial court" the facts and proceedings listed in the rule).

19 Prepare your statement with one finger on the rule; doing so will ensure that you include what the Court needs, and save the Court and commissioner the trouble of searching an unfamiliar record to find what you could and should have included in your application: "The nature of the action;" "the character of pleadings and proceedings;" "the substance of proof in sufficient detail to make it intelligible, indicating that facts that are in controversy and those that are not;" "the dates of important instruments and events;" "the rulings and orders of the trial court [and, in the Supreme Court, those of the Court of Appeals];" "the verdict and judgment;" and "any other matters necessary to an understanding of the controversy and the questions involved." MCR 7.212(C)(6)(a)-(g).

20 See MCR 7.302(D)(1) and 7.212(D)(3)(a).

21 Sometimes a respondent confronted with an accurate statement of facts and proceedings may try to blunt the impact of accepting it by adding a vague qualification along the following lines: "Respondent accepts applicant's statement of facts, subject to the additional facts noted in the following arguments." This is both unpersuasive and contrary to the rule; this is the respondent's time to put up. If you believe that the applicant's statement is incomplete, "point[] out [its] inaccuracies or deficiencies." If not, be grateful for the brevity the applicant's accurate statement allows you to achieve and present your argument.

22 The application must include "a concise argument, conforming to MCR 7.212(C)(7), in support of the appellant's position on each of the stated questions." MCR 7.212(C)(7), in turn, requires that the argument include "a statement of the applicable standard or standards of review and supporting authorities," and "if a statute, ordinance, rule, judgment, or constitutional provision is involved, it must be reproduced in the brief or an addendum to it."

23 *Mitcham*, supra. Though the Court has discretion to consider an issue that was not preserved below, if necessary to prevent a miscarriage of justice, "[m]ore than the fact of the loss of [a money judgment in a civil case] is needed to show a miscarriage of justice or manifest injustice, [and] such inherent power is to be exercised only under what appear to be compelling circumstances...." *Napier v Jacobs*, 429 Mich 222, 232-234 (1987). In short, do not count on the Court to remedy the deficiencies of your brief, or your failure to preserve an issue for appeal.

24 *Whitman v City of Burton*, 493 Mich 303, 311-312 (2013), contains a typical statement of the standard of review reflecting this analysis:

> This case involves the interpretation and application of a statute, which is a question of law that this Court reviews de novo. When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. *Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent.* [Footnotes omitted, emphasis added.]

25 Compare the references twenty years ago, in *People v Fields*, 448 Mich 58, 67-68 (1995), to "legislative history," and citing a House Legislative Analysis as a source of such history, to the Court's discussion two years ago, in *People v Williams*, 491 Mich 164, 178 (2012), of the proper approach to statutory analysis and determining legislative intent. The *Williams* majority criticized the dissent because it "would have this Court interpret the robbery statutes in accordance with an unstated legislative intent rather than the plain meaning of the words chosen. This approach to statutory interpretation has been consistently criticized and rejected. *So too has this Court rejected the dissent's resort to unauthoritative legislative analyses in order to displace statutory language.*" (Footnotes omitted).

Among the authorities cited in the *Williams* Court's discussion were *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 (2001) (stating that "*in Michigan a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction*"), and *In re Certified Question from the United States Court of Appeals for the Sixth Circuit (Kenneth Henes v Continental Biomass)*, 468 Mich 109, 115 n 5 (2003) (discussing why a *legislative analysis, as opposed to other forms of legislative history, is a poor aid in statutory interpretation and thus "should be accorded very little significance by courts when construing a statute.*"). [Emphasis added.]

26 See, e.g., *People v Gardner*, 482 Mich 41, 57-58 (2008), where the Court said:

> As we have stated, construing an unambiguous statute by relying on legislative history "'[a]t the very most . . . allows the reader, with equal plausibility, to pose a conclusion of his own that differs from that of the majority.'" (citations omitted) Further, 'not all legislative history is of equal value . . . .' In re Certified Question, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). *Some historical facts may allow courts to draw reasonable inferences about the Legislature's intent because the facts shed light on the Legislature's affirmative acts. For instance, we may consider that an enactment was intended to repudiate the judicial construction of a statute, or we may find it helpful to compare multiple drafts debated by the Legislature before settling on the language actually enacted. Other facts, however, such as staff analyses of legislation, are significantly less useful because they do not necessarily reflect the intent of the Legislature as a body.* [Emphasis added.]

27 This article is not intended to provide instruction on matters of style, but for the reader who desires an excellent summary of the rules for plain and effective persuasive writing, I recommend Joseph Kimble, Writing for Dollars, Writing to Please, Carolina Academic Press (2012), which distills the author's over 30 years of labor in the vineyard of plain language and effective writing.