Lisa M. Panahi, Bar No. 023421
General Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, AZ 85016-6288
(602) 340-7236

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-23-
PETITION TO AMEND RULE 56(c) OF THE ARIZONA RULES OF CIVIL PROCEDURE	**PETITION**

Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby petitions the Court to amend Rule 56(c) of the Arizona Rules of Civil Procedure regarding statements of fact that are submitted with motions for summary judgment. The proposed amendments are designed to improve and streamline statements of fact by addressing perceived problems, including the criticisms that statements of fact are often excessively long, refer to facts that are unnecessary to the briefing or judicial resolution of the claims at issue, raise boilerplate objections, and generally fail to distill the motion and its core facts for the reader.

Seeking to improve practice under Rule 56, these proposed changes impose qualitative limitations in all cases and presumptive page limitations in Tier 1 and

Tier 2 cases for statements of fact so that judges and parties can more easily identify the material facts and determine whether a genuine issue of fact exists, which is the *sine qua non* of summary judgment practice. By clarifying what should and should not be included in a separate statement of facts and setting presumptive page limitations for the same, the proposed amendments are intended to discourage practitioners from misusing statements of fact as vehicles for legal argument or to evade page limitations applicable to the motions and responses. The State Bar believes that the proposed amendments will result in more streamlined and concise statements of fact, with accompanying reductions in litigation costs and reduced judicial burdens.

The proposed amendments: (1) expressly set forth the substance of what to include and not to include in a separate statement of fact; (2) establish presumptive page limitations for statements of fact in Tier 1 and Tier 2 cases only; (3) clarify the procedure for replying to new facts raised in a response; (4) encourage parties to meet and confer on a joint statement of facts, and requiring a meeting upon request by one party; and (5) allow for objections to the admissibility of evidence cited by a responding party in the reply brief.

Appendix A is a blackline of the proposed amendments to Rule 56. Appendix B is the clean version.

I. PROBLEMS WITH CURRENT RULE 56(c) AND PAST PETITIONS DIRECTED TO THOSE PROBLEMS.

There have been ongoing discussions among the bench and bar about the efficacy of separate statements of facts in connection with motions for summary judgment, and whether and to what extent the rules governing them should be amended or abrogated completely. At one end of the spectrum, abrogation advocates point out that many courts do not require separate statements and argue that the current requirement creates needless and duplicative work that increases client costs and wastes judicial resources. At the other end, defenders of the present system argue that separate statements promote efficiency by clarifying disputes and providing specific parts of the record on which parties, trial courts, and appellate courts can focus in resolving summary judgment issues.

The most recent manifestation of this debate was Petition R-20-0040 filed by Judge James Smith, which proposed amending Arizona Rule of Civil Procedure 56(c)(3) to give the trial court discretion to eliminate separate statements of fact. Judge Smith's petition argued that practitioners often misuse statements of fact as supplemental briefing beyond the presumptive page limitations for the substantive motions and responses.

The State Bar opposed Judge Smith's petition on the ground that the benefits of a uniform substantive statement of facts requirement substantially outweigh the

benefits of allowing trial courts to eliminate it at their discretion. As explained by the State Bar, the current rule results in a relatively simple, straightforward record; reduces the need to enlarge briefing page limits; promotes uniform practice; and might actually result in reduced judicial time to read briefing materials, compared to practice without a separate statement of facts.

In August 2021, this Court denied Judge Smith's petition.

But declining to enact that proposed solution did not end the debate. To say that separate statements of fact should not be abrogated, whether entirely or at the discretion of the judge in a given case, is not to say that they cannot be improved. For example, some of the misuse of the statements of fact cited by Judge Smith may be inadvertent and due to a misinterpretation or misapplication of the current Rule 56(c). Indeed, the current rule provides that the moving party must set forth "the specific facts relied on in support of the motion" and that the opposing party must file a statement specifying which facts of the moving party are disputed and "those facts that establish a genuine dispute or otherwise preclude summary judgment." Rule 56(c)(A) & (B). Though Rule 56 keys on whether there are disputes as to material fact, Rule 56(c) does not explicitly state that the statements of fact are limited to the presentation of the material facts, as opposed to immaterial or background facts or legal argument.

Whether intended or inadvertent, the misuse or misapplication of the rule has resulted in many practitioners submitting hundreds of "facts" that are either legal argument or are not material to the court's decision on the motion. These hundreds of largely immaterial facts are often accompanied by thousands of pages of exhibits, which the opposing party is expected to respond or reply to, and the judge is expected to review. This creates an undue burden on practitioners and judges, substantially increases the cost of litigation, and is a waste of both judicial and party resources.

Further, the misuse or misapplication of the rule undermines its objective, which is to provide the opposing party and the Court with easily identifiable material facts and supporting citations to specific parts of the record. The statements of fact should isolate those facts material to the motion and include the admissible evidence in support so that an opposing party can easily admit or deny such facts, which in turn assists the Court in easily determining whether there is a genuine issue of material fact precluding summary judgment. *See* Ariz. R. Civ. P. 56(a) ("The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact. . .").

The proposed amendments, discussed in detail below, aim to rectify the misuse and misapplication of Rule 56(c) in order to reduce the cost of litigation and the burden on the judiciary, while taking a middle course in the continuing debate about the utility of fact statements, and critiques of their use.

II. PROPOSED RULE 56(c).

A. Proposed Rule 56(c)(3)(A) – Supporting Statement of Facts

Proposed Rule 56(c)(3)(A) sets both qualitative and presumptive page limitations on the moving party's statement of facts. The proposed rule states that only "specific material facts" in support of the motion must be set forth in the separate statement of fact, as opposed to only "specific facts" which is the language used in the current rule. To further support the requirement that separate statements of fact contain only material facts and to discourage the inclusion of extraneous or immaterial facts, the proposed rule requires the facts in the statement to be cited in the memorandum itself. The proposed rule also makes it clear that the statements of fact should not include legal argument.

Moreover, in an effort to clarify what should and should not be cited and attached to a separate statement of facts, the proposed rule requires that only potentially admissible parts of the records may be cited.

The proposed rule includes a structural change as well, enumerating the requirements by subsection so that practitioners can easily identify and follow the qualitative changes to the rule.

Finally, the proposed rule sets a presumptive page limitation for a statement of fact, in Tier 1 and Tier 2 cases only, of 11 pages (exclusive of attachments), unless the court orders otherwise. This means that if the parties have a particularly complex

case or a case that has multiple counts that need to be addressed, they can seek leave from the court for an extension.

The State Bar is not proposing a presumptive page limitation for Tier 3 cases because they are, by definition, "logistically or legally complex" and include cases with "voluminous documentary evidence, or with numerous pretrial motions raising difficult or novel legal issues." Ariz. R. Civ. P. 26.2(b)(3). The lack of any such limitation likewise makes Commercial Court cases presumptively exempt from the page limitation, as they are presumptively Tier 3 cases to begin with. *See* Ariz. R. Civ. P. 8.1(e) ("From the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3…").

B. Proposed Rule 56(c)(3)(B) – Opposing Statement of Facts

The proposed rule regarding an opposing statement of facts references the form of the supporting statement, and generally mirrors the proposed rule regarding the supporting statement of facts, explicitly establishing that only material facts that are cited in the response memorandum should be included and should be supported by admissible parts of the record. It clarifies that admissible parts of the record must be cited if any of the material facts in the supporting statement of fact are disputed.

Finally, as with the supporting statement of fact, the proposed rule sets a presumptive page limitation for an opposing statement of fact for Tier 1 and Tier 2

cases only, at 17 pages (exclusive of attachments), and allows the parties to seek leave from the Court if more pages are necessary. The page limit for the opposing party's statement of facts is greater than for the moving party's statement because the opposing party must both respond to the moving party's statement of facts and include any additional facts the opposing party believes are material to the motion.

C. Proposed Rule 56(c)(3)(C) – No Reply Statement of Facts

There is some confusion over whether a reply statement of facts is permissible, especially when the opposing party's statement of fact raises new facts in opposition to the motion. Judges and practitioners alike have seen reply statements of fact submitted in these instances.

The current rule does not discuss or expressly authorize a reply statement specifically, and as such, it is presumably not allowed. The current Rule 56(c)(2) indicates that supporting materials may be included with a reply memorandum but does not explain how those materials must be submitted.

As such, the State Bar believes the rules should provide litigants with guidance as to how new facts should be addressed, as set forth in proposed Rule 56(c)(3)(C). The proposed rule reinforces what is already implicit in the rule. Specifically, proposed Rule 56(c)(3)(C) states that while a reply statement of fact is not permissible, if new facts are raised in a response, then admissible evidence may be attached to the reply memorandum as permitted by Rule 56(c)(2).

D. Proposed Rule 56(c)(3)(D) – Joint Statement of Facts

A joint statement of facts is rarely used. This may be, in part, because there has been no incentive for the parties to work together on a joint statement, even though it likely would reduce the cost of litigation and assist the Court to identify the undisputed material facts. It may be that one party wants to come up with a joint statement, while the other refuses.

Proposed Rule 56(c)(3)(D) encourages the use of a joint statement by placing any jointly agreed material outside the presumptive page limitation for each party's statements of fact. It also requires that if one party wants to discuss whether a joint statement is possible, then the other party or parties must confer in good faith no later than 7 calendar days after the request is made. This will force parties that might not otherwise consider a joint statement to at least pause to consider and discuss the possibility of one.

E. Proposed Rule 56(c)(4) – Objections to Evidence

The current Rule 56(c)(4) seems to limit the ability to object to the admissibility of evidence in a response only. The proposed rule expands the ability to object to the admissibility of evidence to the reply memorandum as well. Indeed, new facts and citations to the record may be raised in an opposing statement of fact, so that the moving party should have an opportunity to object to these new facts and the admissibility of the evidence cited in support.

F. Proposed Rule 56(c)(6) – Other Materials

The proposed change to this portion of the rule is not substantive, but merely meant to more concisely and clearly state the rule as to what other materials may be cited and attached to a separate statement of fact in support.

CONCLUSION

The State Bar of Arizona believes the proposed amendments to Rule 56(c) will better guide practitioners in summary judgment briefing and lead to the submission of more streamlined and concise statements of fact. This will, in turn, help reduce the cost of litigation for the parties, make summary judgment motion practice more efficient, and reduce the burden on the judiciary. The State Bar respectfully requests Rule 56(c) be amended as set forth above.

RESPECTFULLY SUBMITTED this 9th day of January 2023.

/s/ Lisa M. Panahi
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 9th day of January 2023.

by: P Seguin

APPENDIX A

(Please note: deletions are reflected by strikethrough and additions are reflected by underline.)

Rule 56. Summary Judgment

(a) – (b) [No change.]

(c) Procedures.

(1) *Hearings*. On timely request by any party, the court must set oral argument, unless it determines that the motion should be denied or the motion is uncontested. The court may set oral argument even if not requested.

(2) *Opposition and Reply*. An opposing party must file its response and any supporting materials within 30 days after the motion is served. The moving party must serve any reply memorandum and supporting materials within 15 days after the response is served.

(3) *Supporting and Opposing Statements of Fact*.

(A) Moving Party's Statement. The moving party must set forth, in a statement separate from the supporting memorandum, the specific material facts relied on in support of the motion. The separate statement must: ~~The facts must be stated in concise, numbered paragraphs~~.

(i) state each fact concisely in separately numbered paragraphs;~~. The statement must~~

(ii) cite only the specific, admissible parts of the record where support for each fact may be found;

(iii) state only facts that are cited in the moving party's memorandum;

(iv) not make legal argument; and

(v) in Tier 1 and 2 cases, not exceed 11 pages, exclusive of attachments, unless the court orders otherwise.

(B) Opposing Party's Statement. An opposing party must file a statement in the form prescribed by Rule 56(c)(3)(A).~~,~~ ~~specifying~~ This statement must:

(i) identify the numbered paragraphs in the moving party's statement that are disputed, citing for each disputed material fact the specific, admissible parts of the record that establish the dispute; ~~and~~

(ii) state concisely in separately numbered paragraphs those facts cited in the nonmoving party's memorandum that establish a genuine dispute or otherwise preclude summary judgment in favor of the moving party, citing as support for each such fact only specific, admissible parts of the record; and

(iii) in Tier 1 and 2 cases, not exceed 17 pages, exclusive of attachments, unless the court orders otherwise.

(C) No Reply Statement. The moving party may not file a Reply Statement of Fact. But if the nonmoving party raises new facts in their response, the moving party may attach admissible evidence to the reply memorandum to show that the new facts raised in response do not create a material issue of fact, as permitted by Rule 56(c)(2).

(D) Joint Statement; Conference. In addition or as an alternative to submitting separate statements under Rule 56(c)(3)(A) and (B), the ~~moving and opposing~~ parties may file a joint statement in the form prescribed by this rule, setting forth those facts that are undisputed, including those established by the pleadings or previously admitted under Rule 36. The joint statement may provide that any stipulation of fact is not binding for any purpose other than the summary judgment motion. The joint statement does not count against the page limits in Rule 56(c)(3)(A)(v) or Rule 56(c)(3)(B)(iii). If a party requests a conference to determine if a joint statement of any length is possible, the parties must confer in good faith pursuant to Rule 7.1(h) within seven calendar days of the request.

(4) *Objections to Evidence*. Rule 7.1(f)(3) governs objections to the admissibility of evidence on summary judgment motions, but an objection may be stated ~~included~~ in either an opposing party's statement of facts or ~~response to another party's separate statement of facts in place of, or in addition to, including it in~~ the party's response or reply ~~responsive~~ memorandum. Any objection ~~presented in the party's response to the separate statement of facts~~ must be stated concisely and must identify the legal basis for the objection.

(5) *Affidavits*. An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If an affidavit refers to a document or part of a document, a properly authenticated copy must be attached to or served with the affidavit.

(6) *Other Materials*. Affidavits may be supplemented or opposed by ~~deposition excerpts, interrogatory responses, admissions, additional affidavits, or other~~ materials that would be admissible in evidence, including deposition excerpts, interrogatory responses, admissions, and additional affidavits.

APPENDIX B

(c) Procedures.

(1) *Hearings*. On timely request by any party, the court must set oral argument, unless it determines that the motion should be denied or the motion is uncontested. The court may set oral argument even if not requested.

(2) *Opposition and Reply*. An opposing party must file its response and any supporting materials within 30 days after the motion is served. The moving party must serve any reply memorandum and supporting materials within 15 days after the response is served.

(3) *Supporting and Opposing Statements of Fact*.

(A) Moving Party's Statement. The moving party must set forth, in a statement separate from the supporting memorandum, the specific material facts relied on in support of the motion. The separate statement must:

(i) state each fact concisely in separately numbered paragraphs;

(ii) cite only the specific, admissible parts of the record where support for each fact may be found;

(iii) state only facts that are cited in the moving party's memorandum;

(iv) not make legal argument; and

(v) in Tier 1 and 2 cases, not exceed 11 pages, exclusive of attachments, unless the court orders otherwise.

(B) Opposing Party's Statement. An opposing party must file a statement in the form prescribed by Rule 56(c)(3)(A). This statement must:

(i) identify the numbered paragraphs in the moving party's statement that are disputed, citing for each disputed material fact the specific, admissible parts of the record that establish the dispute;

(ii) state concisely in separately numbered paragraphs those facts cited in the nonmoving party's memorandum that establish a genuine dispute or

otherwise preclude summary judgment in favor of the moving party, citing as support for each such fact only specific, admissible parts of the record; and

(iii) in Tier 1 and 2 cases, not exceed 17 pages, exclusive of attachments, unless the court orders otherwise.

(C) No Reply Statement. The moving party may not file a Reply Statement of Fact. But if the nonmoving party raises new facts in their response, the moving party may attach admissible evidence to the reply memorandum to show that the new facts raised in response do not create a material issue of fact, as permitted by Rule 56(c)(2).

(D) Joint Statement; Conference. In addition or as an alternative to submitting separate statements under Rule 56(c)(3)(A) and (B), the parties may file a joint statement in the form prescribed by this rule, setting forth those facts that are undisputed, including those established by the pleadings or previously admitted under Rule 36. The joint statement may provide that any stipulation of fact is not binding for any purpose other than the summary judgment motion. The joint statement does not count against the page limits in Rule 56(c)(3)(A)(v) or Rule 56(c)(3)(B)(iii). If a party requests a conference to determine if a joint statement of any length is possible, the parties must confer in good faith pursuant to Rule 7.1(h) within seven calendar days of the request.

(4) *Objections to Evidence*. Rule 7.1(f)(3) governs objections to the admissibility of evidence on summary judgment motions, but an objection may be stated in either an opposing party's statement of facts or the party's response or reply memorandum. Any objection must be stated concisely and must identify the legal basis for the objection.

(5) *Affidavits*. An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If an affidavit refers to a document or part of a document, a properly authenticated copy must be attached to or served with the affidavit.

(6) *Other Materials*. Affidavits may be supplemented or opposed by materials that would be admissible in evidence, including deposition excerpts, interrogatory responses, admissions, and additional affidavits.