

1 Lisa M. Panahi, Bar No. 023421  
2 General Counsel  
3 State Bar of Arizona  
4 4201 N. 24th Street, Suite 100  
5 Phoenix, AZ 85016-6288  
6 (602) 340-7236

7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-20-0040

10 **PETITION TO AMEND RULE 56**  
11 **OF THE ARIZONA RULES OF**  
12 **CIVIL PROCEDURE**

**COMMENT OF**  
13 **THE STATE BAR OF ARIZONA**

14 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar  
15 of Arizona (the “State Bar”) hereby submits the following as its comment to the  
16 above-captioned Petition.

17 The State Bar of Arizona opposes this Petition to allow individual trial court  
18 judges to eliminate separate statements of facts as part of motion for summary  
19 judgment briefing.

20 **I. The history and purpose of separate statements of facts.**

21 Summary judgment has been a feature of Arizona practice since at least the  
22 Code of 1939. A.C.A. §§ 21-1210–21-1216. The burden of the moving party to  
23 show there is no genuine issue as to any material fact has been a constant. That  
24 burden was implicit in § 21-1212, recognized in early case law, *see e.g., Corporation*  
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1 *Comm'n v. Southern Pac. Co.*, 67 Ariz. 87, 94 (1948), and ultimately made explicit  
2 in Rule 56.

3  
4 How the facts are “stated” has evolved over time. Under the 1939 Code, the  
5 trial court looked to “the pleadings, depositions, and admissions on file, together  
6 with the affidavits, if any.” A.C.A. § 21-1212. Separate statements of facts were  
7 first required in 1985 by Rule 4 of the Uniform Rules of Practice for the Superior  
8 Court. That rule was repealed effective December 1, 2000 when Rule 56 was  
9 amended to require separate statements of facts.  
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11 It may be assumed that a need for change was perceived when the Uniform  
12 Rule was adopted. The apparent objectives of the Uniform Rule and Rule 56 were  
13 to standardize the practice of presenting the facts, impose requirements on their  
14 presentation (*i.e.*, concise, numbered paragraphs), and facilitate the determination of  
15 whether a fact dispute exists. As the petitioner observes, “separate SOFs could help  
16 a judge to quickly determine if the parties disputed material facts because the  
17 response would be a simple 'admit' or 'deny' (or words to that effect).”  
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## 20 **II. The proposed amendment.**

21 The petition would return Arizona practice, at least before some judges, to the  
22 pre-1985 practice. The reasons for doing so are two perceived problems with the  
23 current rule and two supposed benefits of the amendment.  
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1           The petition asserts that two problems are associated with statements of fact.  
2 First, lawyers misuse statements of facts. Specifically, lawyers are said to use the  
3 statements of facts for supplemental briefing beyond the presumptive page limits,  
4 fail to state the facts concisely, and misplace the statement of additional facts when  
5 disputing a movant's facts.  
6

7           Second, separate statements of facts are reported to make the process more  
8 cumbersome for judges using TurboCourt and viewing exhibits on a monitor  
9 because the typical structure of memoranda and statements of facts creates a  
10 multistep process that does not make it easy to locate a particular exhibit.  
11 Specifically, a party's memorandum refers to a paragraph in the statement of facts,  
12 which paragraph in turn refers to an exhibit. In the petitioner's experience, the  
13 exhibits are often not numbered or bookmarked to facilitate their location.  
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16           The petition contends that the proposed amendment will also benefit lawyers  
17 and clients. Lawyers will not need to create a separate statement or respond to one,  
18 and need not worry about overlooking an argument buried in the facts. And clients  
19 will be spared the expense associated with statements of facts.  
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### 21 **III. Reasons for denying the petition.**

#### 22 **A. There are other solutions to the perceived problems.**

23           Judges can address the misuse of statements of facts in the following ways  
24 without going to the extreme of eliminating them.  
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1           Judicial action. Judges can enforce compliance with the rule. They can strike  
2 a noncompliant statement of facts and order the offending party to resubmit it.

3           Judicial inaction. Judges can ignore argument in statements of facts. As  
4 Judge Rayes wrote in the case cited by petitioner, "[w]hen reviewing the non-  
5 movant's separate controverting statement of facts, the Court therefore may  
6 disregard everything but the word 'admitted' or 'disputed,' and the corresponding  
7 references to the record." *Hunton v. American Zurich Ins. Co.*, 2018 WL 1182552,  
8 \*3 (D. Ariz. Mar. 7, 2018).

9           Education. On a broader scale, lawyers can be educated regarding proper  
10 practice. Judges can emphasize the rule's requirements and warn of the  
11 consequences of noncompliance in their individual online protocols and in minute  
12 entries in individual cases. And CLE providers can conduct seminars featuring  
13 judge faculty members.

14           Regulating exhibit references. Statements of facts and attachments can be  
15 made more user friendly by amending the rule to require that the attachments be  
16 sequentially numbered and bookmarked or hyperlinked, and referred to in the motion  
17 and statements of fact by page number. Precedent is found in the rule regarding  
18 appendices to appellate briefs. Its concepts could be borrowed from and adapted to  
19 statements of facts.  
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1 (d) Appendix Filed Electronically. A party that files a brief  
2 electronically may file a separate appendix or may file a combined brief  
3 and appendix as a single document, with the appendix following the  
4 brief.

5 (1) *Page Numbering*. The pages in an appendix must be numbered  
6 sequentially. If a party files a combined brief and appendix, the first  
7 page of the appendix must include a number sequential to the last page  
8 of the brief. For a separately filed appendix, the numbers should start  
9 with the cover page of the appendix.

10 (2) *Multiple Volumes*. If a separate appendix is more than one volume,  
11 page numbering should restart for each volume and include an identifier  
12 that distinguishes each volume (*e.g.*, APPV1-001, APPV2-001).

13 (3) *Bookmarks and Hyperlinks*. Each item in the appendix table of  
14 contents must include a bookmark or hyperlink to the item in the  
15 appendix. If feasible, a combined brief and appendix must contain  
16 bookmarks or hyperlinks to items in the appendix whenever these items  
17 are cited in the brief.

18 ARCAP Rule 13.1.

19 **B. Elimination of statements of facts is not a cure-all.**

20 Eliminating separate statements of facts will not eliminate various  
21 troublesome practices. As Judge Rayes observed:

22 Movants too often include immaterial, expositional facts in their  
23 separate statements, or take liberties in their characterization or  
24 paraphrasing. In turn, non-movants too often use their separate  
25 controverting statements to argue over the legal significance of facts –  
or even semantics – and flood the pages with additional information  
that is immaterial to the specific issue presented by the motion.

*Hunton v. American Zurich Ins. Co.*, supra at \*4. Changing where lawyers are  
required to state the facts will not prevent bad practices in the manner of their  
statement. It will merely move those practices into the memoranda. If a lawyer

1 cannot state the facts concisely in a separate statement of facts, that lawyer will do  
2 no better in stating the facts in a memorandum.

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4 **C. Elimination of statements of facts will not be beneficial.**

5 If lawyers do not have to file separate statements of facts, the moving party  
6 will still have to present the same facts in the motion, and the opposing party will  
7 still have to present any controverting facts in the response. No appreciable cost  
8 savings will result.

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10 Although not mentioned as a benefit in the petition, eliminating separate  
11 statements of facts will not reduce a trial judge's reading burden. Instead, doing so  
12 may increase that burden because the facts will be incorporated in the necessarily  
13 longer memoranda read by judges. When separate statements of facts are used, trial  
14 judges need not read them in every case. Only when the response asserts a genuine  
15 issue of material fact must the trial judge look to the statements, and then only to the  
16 pertinent paragraphs.

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19 **D. Elimination of statements of facts causes other problems.**

20 Lack of a clear, simple record. Without separate statements of facts, the work  
21 of both the trial court and appellate court is adversely affected. Separate statements  
22 of facts, through side-by-side comparison, serve to neatly and quickly show whether  
23 there is a genuine issue of material fact supported by admissible evidence. Requiring  
24 separate statements of facts in concise, numbered paragraphs is more likely to  
25

1 produce a useful set of facts than will unregulated narratives in the memoranda. One  
2 appellate judge on the State Bar's Civil Practice and Procedure Committee observed  
3 that appellate review of summary judgments without statements of facts could  
4 effectively become *Anders* cases in which the court must search the record for any  
5 dispute as to a material fact.  
6

7       Lack of uniform practice. The proposed rule gives individual judges  
8 discretion to order parties to forego separate statements of facts. Consequently,  
9 practice could vary from one division to another, which is generally not desirable.  
10 Absent a compelling need for variance, the rules and practices should be uniform,  
11 especially for such a significant procedure as a motion for summary judgment.  
12


13       Page limits. Elimination of separate statements of facts requires the facts to  
14 be included in the memoranda supporting and opposing the motion. That will either  
15 affect the ability to comply with the page limits or require modification of the page  
16 limits. Increasing page limits is an imperfect solution. The number of pages  
17 necessary to show that there is no genuine issue of fact varies from case to case. A  
18 statement might be as short as two pages in a collection action on an account or a  
19 promissory note. A motion for summary judgment on a more complex claim, or on  
20 a number of claims, will necessarily require more pages. Currently, there is no page  
21 limit on separate statements of facts; nor should there be. If the motion's page limit  
22 is increased from 17 pages as would be necessary, the movant in a case in which the  
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1 facts can be stated in less than the number of additional pages will have more than  
2 17 pages to use for argument. Conversely, a movant in a complex case requiring  
3 more than the additional number of pages allowed for inclusion of the facts in the  
4 memorandum will have less than 17 pages for argument. Neither consequence is  
5 desirable. A party's ability in a complex case to seek leave to exceed the page limit  
6 is not an ideal solution. Such permission is never assured, and seeking permission  
7 involves another procedural step with attendant delay and expense.  
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10 **CONCLUSION**

11 The State Bar of Arizona respectfully requests that the Court deny the  
12 Petition for the foregoing reasons.  
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15 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of April 2021.

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17 \_\_\_\_\_  
18 Lisa M. Panahi  
19 General Counsel  
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21 Electronic copy filed with the  
22 Clerk of the Supreme Court of Arizona  
23 this 30<sup>th</sup> day of April 2021.

24 by: PSeguin  
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