James D. Smith
No. 016760
101 W. Jefferson St.
Ste. 814
Phoenix, AZ 85003
(602) 372-5945

ARIZONA SUPREME COURT

In the Matter of:	Supreme Court No. R-20-0040
Petition to Amend Arizona Rule of Civil Procedure 56	REPLY IN SUPPORT OF PETITION

The Petition asked to amend Arizona Rule of Civil Procedure 56(c)(3) because lawyers often misuse separate statements of facts. That is, lawyers include facts and arguments in SOFs not found in the substantive briefs, using SOFs to exceed page limits. Originally, SOFs let a judge quickly identify what material facts (if any) the parties disputed. Over time, however, they lost that utility because lawyers began using them as extended briefing. That misuse increases costs and hinders a judge's inquiry.

The State Bar of Arizona opposed the proposed rule change. Its principal argument does not dispute that lawyers misuse SOFs. Instead, the SBA opposed the Petition because . . . lawyers want to continue using SOFs to exceed page limits. The proposed rule amendment eliminates the tactic in summary judgment briefing while also reducing litigation expenses.

I. THE SBA AGREES THAT SOFs ARE TO REDUCE THE BURDEN ON TRIAL COURTS.

All agree that SOFs were intended to help judges decide if disputed material facts exist. Such rules are supposed to "ease the court's task in deciding a motion for summary judgment by highlighting the potential facts at issue." EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 4:2 (Nov. 2020 update) (counting 58 of 94 district courts as having local SOF rules). And the SBA's Response did not suggest that omitting SOFs will make it more difficult for trial courts to handle summary judgment motions. At most, the

Response (at 7:1-6) stated that eliminating SOFs could make "appellate review of summary judgments . . . *Anders* cases in which the court must search the record for any dispute as to a material fact."

But the due process, effective assistance, and equal protection guarantees behind *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), do not apply in civil cases. The lawyers in a civil appeal must present legal arguments with supporting record citations. "[N]either we, the trial court, nor the court of appeals should be required to perform counsel's work by searching the record to attempt to discover facts which establish or defeat the motion. These are tasks which must be left to counsel." *Mast v. Standard Oil Co. of Cal.*, 140 Ariz. 1, 2, 680 P.2d 137, 138 (1984). As always, it will remain the civil lawyer's job to make appellate arguments with record citations.

Real world experience also confirms we need not fear *Anders*-izing summary judgment appeals. The Federal Rules of Civil Procedure do not require SOFs and about 40% of district courts do not have such local rules. Nothing suggests that federal courts have difficulty with those appeals or trial court proceedings. The Northern District of California prohibits separate SOFs. N.D. Cal. Local R. 56-2(a). In Arizona, United States District Court Judges Lanza, Liburdi, and Rayes prohibit SOFs in their standard orders.[1] The Delaware Court of Chancery handles some of the most complex corporate disputes in the country; its rules do not refer to SOFs. Presumably, the Ninth Circuit and Delaware Supreme Court would require SOFs if their absence hindered appeals.

The SBA also opined (at 6:22-24) that SOFs "neatly and quickly show whether there is a genuine issue of material fact . . . ." Used correctly, that could be true. Likewise, that could be true if the rule mandated a table format with nothing but "admitted" or "denied" with record citations. I have reviewed countless SOFs; it is rare for anything about them to be neat or quick. Parties often "dispute" every fact to explain why they believe it is irrelevant (although true) or to add a lengthy paragraph about that party's version of events.

[1] The orders are available online: https://www.azd.uscourts.gov/judges/judges-orders (May 7, 2021, 6:41 a.m.).

SOFs are supposed to streamline summary judgment practice. Lawyers' misuse of them, however, thwarts that goal. And the SBA does not argue that the proposed rule amendment will impede trial judges. In any event, the proposed rule change does not eliminate SOFs; it only lets trial judges opt-out of SOFs if he/she chooses. Any trial judge may keep SOFs if that judge finds them beneficial. Thus, the true opposition to the rule is it eliminates a way to circumvent page limits.

II. THE OPPOSITION RESTS ON LAWYERS USING SOFs AS IMPROPER SUPPLEMENTAL BRIEFING TO CIRCUMVENT PAGE LIMITS.

No one disputes that lawyers and judges sometimes write too much or try to include more information than necessary. But that shouldn't stop us from trying to correct chronic abuse of a device intended to simplify litigation. We all should want summary judgment proceedings to be efficient.

A presumptive 17-page limit applies to motions and responses, including summary judgment. Ariz. R. Civ. P. 7.1(a)(2). Every argument and material fact should appear there. A reader should not have to consult the SOF to find other legal authority or facts. But the SBA's Response tacitly conceded that it wants to preserve SOFs so lawyers may shoehorn arguments and facts in SOFs rather than in the briefs.

The Response warned (at 5:23-6:2) that the rule amendment will lead to lawyers using "bad practices" in the briefs rather than SOFs. If lawyers want to use their limited pages to make irrelevant arguments, that is their choice. But poor tactics and strategy are not a reason to forgo a sound rule amendment.

The SBA also argued (at 7:14-15) that "[e]limination of separate statements of facts requires the facts to be included in the memoranda supporting or opposing the motion." Not so. The existing rule requires those facts appear in the briefs. Nothing has ever permitted a lawyer to put facts in the SOF instead of the briefs.

The SBA continued by arguing (at 7:22-24) that eliminating SOFs will "require modification of page limits" because, "[c]urrently, there is no page limit on separate statements of facts; nor should there be." And that is the Response's key concession—lawyers use

unlimited-length SOFs to add facts and arguments that they omit from a 17-page brief. Under that rationale, a lawyer could write in the motion, "Smith, Jones, and Doe formed and controlled a RICO enterprise that injured Plaintiff's business or property under A.R.S. § 13-2314.04. [SOF ¶ 43.]" It would be permissible to put the crucial facts in a pages-long paragraph 43 in the SOF. No reasonable interpretation of the rules tolerates using SOFs as the "real" location for facts and argument that way.

We can look to federal court practice to know that our existing page limits don't prevent lawyers from effective advocacy. The federal court here also limits motions to 17 pages. D. Ariz. LRCiv 7.2(e)(1). Judges Lanza, Liburdi, and Rayes prohibit SOFs, so lawyers must include everything in those 17 pages; Judges Bolton, Campbell, Fine, Logan, Snow, and Tuchi allow SOFs of 10 pages or fewer. Arizona lawyers' summary judgment advocacy in federal court with 17-page limits and those SOF limits is just as good as the lawyers' advocacy in state court.

In appropriate cases, parties may seek leave to exceed the presumptive page limits. It is an everyday request that is not burdensome. The proposed rule amendment does not foreclose that option.

III. THE SBA'S COST ARGUMENT IS UNTENABLE.

The SBA suggested (at 6:5-18) that eliminating SOFs—separate documents that lawyers create and bill for—will not reduce expenses. First, it argued that the lawyers will have to "include the same facts" in their brief, so no cost savings will occur. But that supposes that lawyers may include facts in the SOF that are not in the briefs. They can't. Again, proper SOFs are not vehicles for supplemental arguments.

Unless lawyers are not billing for SOFs, the costs are greater. Anecdotally, I know from 19 years of practice in several jurisdictions that creating SOFs has a cost. And reviewing innumerable fee applications as a trial judge confirms that reality. One treatise summarized this commonsense conclusion: "[L]ocal rules that require the movant to file separate statements of uncontested facts have a cost that counsel must assess before filing a Rule 56 motion." EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 4:1 (Nov.

2020 update). Judge Holland has explained that he "found the dueling separate statements of fact and motions to strike with respect to summary judgment papers to be unhelpful and wasteful of everyone's time." *Stilwell v. City of Williams*, 2013 WL 12188576, *1 (D. Ariz. July 25, 2013) (quotation marks omitted). When it comes to billed hours, wasting time *is* wasting money.

Before I implemented page limits for SOFs and controverting SOFs, I would receive some that spanned several dozen pages with hundreds of paragraphs of lengthy arguments. Lawyers and legal assistants prepared those documents and presumably billed for their work. Some colleagues have mentioned that they continue receiving such submissions now. Those types of SOFs are so lengthy and convoluted that it is nearly impossible to tell if there is a real fact dispute. They do not "neatly and quickly" identify the issues.

And it is not just preparing the moving party's SOF that creates these costs. The non-moving party also prepares a controverting SOF plus objects to the moving party's SOF. In each, lawyers often include improper argument or supplemental briefing. What is more, lawyers frequently object to any fact, no matter how banal, as if conceding anything is case-dispositive. Lawyers commonly respond to a fact by writing it is "admitted but irrelevant because . . . ." That leads to a lengthy argument about why that undisputed fact doesn't matter under the opposing party's theory.

Even more wasteful are reply SOFs that moving parties sometimes file. Of course, Rule 56 does not refer to the moving party filing such a document. Nonetheless, lawyers file them and argue why they dispute the non-moving party's controverting facts, the controverting facts are not material, or the controverting facts are inadmissible. This all increases the cost to the client. And each submission burdens court staff without advancing the summary judgment process.

IV. THE SBA'S PROPOSED SOLUTIONS WILL NOT SOLVE THE PROBLEMS.

The SBA's first solution (at 4:1-2) is for judges to "strike a noncompliant statement of facts and order the offending party to resubmit it." This will increase costs and burdens for all involved. First, the judge must review the offending submission. Then she will prepare (or

have her clerk prepare) an order striking it. Next, the submitting party must prepare a compliant SOF; if that lawyer bills the client, we just magnified the legal expense. The responding party then must wait to receive the complying SOF. This will delay the briefing schedule and resolution.

The SBA next proposed (at 4:4-10) that judges "ignore argument in statements of facts." But commingling arguments with proper facts means the SOF lost any utility for a "side-by-side comparison" that the SBA touted (at 6:22-23). Again, we should remember the point of SOFs; they were "to relieve the district court of any responsibility to ferret through the record to discern whether any material fact is genuinely in dispute." *Colón–Fontánez v. Municipality of San Juan*, 660 F.3d 17, 28 (1st Cir. 2011) (quotations omitted).

The SBA also proposed education (Response at 4:11-16), which is always good. No one could reasonably oppose CLE programs about effective advocacy. But the existing rule is clear and lawyers routinely disregard it. Besides that, the SBA wrote (at 7:23-24) that it wants SOFs of unlimited length. That reinforces the misunderstanding of proper and improper uses of SOFs. Rather than creating CLE programs to "educate" lawyers about the rule's plain language, the better practice is to amend the rule to preclude misuse.

The SBA's last proposal (at 4:17-24) would require sequential pagination of SOF exhibits and citing those pages in the briefs. This is a good idea. The Petition proposed that method to present facts efficiently without the need for SOFs. But there is no need to keep costly SOFs if we sequentially paginate exhibits and cite those pages in the brief. The only reason to keep SOFs in that instance is so lawyers may use them for extended briefing beyond the page limits.

Conclusion

Summary judgment practice is not working as intended. Lawyers frequently misuse SOFs as extended briefing; indeed, the SBA's Response did not dispute this reality. SOFs no longer serve their intended purpose. Instead, they increase legal expenses. Amending the rule as proposed will allow, but not require, Arizona judges to eliminate SOFs and use a streamlined procedure.

Petitioner respectfully asks the Court to amend Arizona Rule of Civil Procedure 56(c) as proposed.

Respectfully submitted this 7th day of May, 2021.

/s/ James D. Smith
James D. Smith
No. 016760

Electronically filed with the
Clerk of the Arizona Supreme Court
on May 7, 2021.

By: */s/ James D. Smith*