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7 ARIZONA SUPREME COURT

8 In the Matter of:
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Petition to Amend Arizona Rule of
Civil Procedure 56

Supreme Court No. R-19-_____

PETITION

Arizona Rule of Civil Procedure 56(c)(3) requires separate statements of facts as part of summary judgment. However well intentioned, those SOFs became impediments to the speedy and inexpensive summary judgment determinations. The proposed amendment would allow trial judges to eliminate separate SOFs as part of summary judgment. If a trial judge opted for this protocol, parties would attach the supporting materials to the motion, response, or reply and sequentially paginate the materials. They will cite those sequential pages in the motion, response, or reply. Arizona courts follow a similar protocol for appendices accompanying appellate briefs. *See* ARCAP 13.1(d)(1). Exhibit 1 is a clean version of the proposed amended rule. Exhibit 2 is a redlined version showing the proposed amendments. Petitioner is a trial judge for the Arizona Superior Court in Maricopa County and respectfully asks this Court to modify Arizona Rule of Civil Procedure 56. *See* Ariz. R. Sup. Ct. 28.

Originally, separate SOFs could help a judge to quickly determine if the parties disputed material facts because the response would be a simple “admit” or “deny” (or words to that effect). SOFs are not tools for argument or facts outside the briefs. They are “to relieve the district court of any responsibility to ferret through the record to discern whether any material fact is genuinely in dispute.” *Colón–Fontáñez v. Municipality of San Juan*, 660 F.3d 17, 28 (1st Cir. 2011) (describing local rule in that circuit) (quotations omitted). So a trial judge should be able to forgo reading the SOFs if she prefers. She would not miss any arguments or

1 facts but would only make more work for herself by having to scour the record.

2 Unfortunately, however, lawyers now often use SOFs for supplemental briefing beyond
3 the presumptive 17-page limit for motions/responses and 11-page limit for replies. For
4 example, a factual assertion that takes two lines in a motion may span 15 or greater lines in the
5 SOF. Petitioner often received separate statements of facts greater than 30 pages (excluding
6 attachments) before adopting standing orders imposing page limits. This approach is akin to
7 including arguments or record citations in an appellate appendix instead of the briefs.

8 Responses to opponents' facts likewise may stretch for dozens of lines despite the rule's
9 command that "[a]ny objection presented in the party's response to the separate statement of
10 facts must be stated concisely." Ariz. R. Civ. P. 56(c)(4). Responses often add new facts
11 rather than place any new facts in an opposing party's statement. United States District Judge
12 Doug Rayes—an Arizona Superior Court judge from 2000 until 2014—described such misuse
13 of separate statements of facts. *Hunton v. Am. Zurich Ins. Co.*, 2018 WL 1182552 (D. Ariz.
14 Mar. 7, 2018). Judge Rayes' observations apply to SOF misuse in the Arizona Superior Court,
15 too. This misuse apparently prompted several federal judges in Arizona to eliminate separate
16 statements of facts.¹

17 Also, separate SOFs make the process more cumbersome, but with no concomitant
18 benefit. For example, a summary judgment motion may refer to "SOF ¶ 27." The reader then
19 moves to a separate document—the SOF—to find paragraph 27. That paragraph then refers to
20 an exhibit, such as "Exhibit 18." Trial courts using the TurboCourt system, however, do not
21 receive tabbed exhibits and cannot order parties to provide hardcopy versions. Thus, the trial
22 judge often receives several hundred pages of exhibits without page numbers or any way to
23 easily locate a particular exhibit. It is like to trying to find a specific chapter in a lengthy book
24 without page numbers. That multistep process is unnecessary when a reader only wants to see
25 the underlying information for a factual assertion.

26 ¹See, e.g., Hon. Dominic Lanza, *Case Management Order* (at 5:25-6:18),
27 [http://www.azd.uscourts.gov/sites/default/files/judge-orders/DWL%20Case%
28 20Management%20Order.pdf](http://www.azd.uscourts.gov/sites/default/files/judge-orders/DWL%20Case%20Management%20Order.pdf) (suspending LRCiv 56.1).

1 The same problems occur in responsive SOFs. Parties responding to summary
2 judgment motions often use their SOFs to explain that, although a fact is undisputed, it is
3 irrelevant for a host of reasons that require a full page to explain. And moving parties often
4 including controverting “reply” SOFs even though Arizona Rule of Civil Procedure 56(c)(3)
5 mentions only one SOF from the moving party (with its motion) and one from the opposing
6 party (with its response).

7 The proposed amendment benefits lawyers, too. They will not need to create a separate
8 document or respond to their opponents’ separate documents. They need not worry that an
9 argument buried in a SOF will slip by them. Clients paying hourly rates may benefit the most
10 from the amendment. They no longer will pay for creating documents that do not help resolve
11 summary judgment motions.

12 The proposed amendment to Arizona Rule of Civil Procedure 56 would allow trial
13 judges to opt out of separate SOFs. Instead, lawyers would attach the relevant materials
14 as sequentially paginated exhibits to the motion, response, or reply. Of course, trial judges
15 who prefer separate statements may continue using them.

16 Respectfully submitted this 19th day of July, 2020.

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21 Electronically filed with the
22 Clerk of the Arizona Supreme Court
23 on July 19, 2020.

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By: /s/ James D. Smith