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A Delicate Dance: Minimizing Bloat in Summary Judgment Statements of Fact While Maximizing Preservation of the Record
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A central task for a trial court, and later an appellate court, is to discern not only what facts are material but also whether they are disputed during summary judgment motion practice. This is particularly important at the appellate stage of litigation, as summary judgment records are entirely based on what facts were properly submitted to the trial court on a closed record. The primary way most Arizona state and federal courts perform this function is to carefully look at the parties' respective statements of facts in support of their summary judgment motions.

Specifically, a moving party at summary judgment should craft targeted statements of fact that relate to the material facts at issue. By extension, a non-moving party should craft objections directly attacking the moving party's material facts and why they are either disputed or inconsequential. This practice is codified in both the federal and Arizona rules of civil procedure under Rule 56.

This process is intended to simply, not overcomplicate, the actual summary judgment motion. However, particularly in complex civil cases, summary judgment statements of facts can take on a life of their own, spanning pages upon pages that sometimes become even lengthier than the legal arguments they support. Perhaps this is because a moving party feels the need to support every non-material fact with a separate statement of fact. Maybe it is because a nonmoving party equally perceives the need to object to every moving party's statement of fact regardless of its overall impact on the legal issues before the Court. There is even a growing trend of parties adding more and more detailed argument within the statement of facts, sometimes even including citations to legal authorities, to support a party's fact or objections. Finally, after receiving a non-moving parties' separate objections, the moving party is equally tempted to address each of those objections (both factual and legal) in kind using a separate "reply" statement of facts.[1] This back and forth tug of war over the facts in any given case to ensure a party has preserved their appellate record has led to ever increasing complexity, argument and, frankly, paper "bloat" in what should be a straightforward process.

Indeed, practitioners' zeal during this process can backfire. In *Hunton v. Am. Zurich Ins. Co.*,[2] one Arizona district court went to great lengths in explaining what a proper summary judgment statement of facts and objections should be as well as how the process of briefing summary judgment motions has led to a proliferation of excessive, unhelpful argument. In *Hunton*, the court noted that the parties submitted statements of facts that that were entirely immaterial to the bad faith claim at issue. The court also noted that the parties' voluminous objections were improper, as they repeatedly included inappropriate argument and commentary, even in instances where a party admitted certain facts. As the court perhaps most succinctly put the issue when denying summary judgment and admonishing counsel for statement of fact bloat:

Lawyers are tasked with bringing clarity out of chaos, and voluminous filings rarely do that. Regrettably, the briefing in this case has sown more chaos than it has ordered. As a result, the Court cannot confidently conclude that there are no material factual disputes bearing on the availability of punitive damages.[3]

While the issues involved in *Hunton* may be a unique example of summary judgment bloat, it is representative of the issues facing Arizona state and federal courts. How should they cull the ever-expanding girth of summary judgment statements of fact while at the same time allowing the parties to preserve their record on what facts are truly contested and material? At least from this practitioner's perspective, several trends are now emerging to address statement of

fact bloat.

First, some courts have ordered parties in their scheduling orders to review the court's discussion in *Hunton* prior to filing any summary judgment briefing as a guidepost for how to properly craft statements of fact and related objections. Courts in this instance have typically become more engaged at policing statement of fact bloat during the actual summary judgment process, later refusing to consider certain facts or objections if they devolve into improper or unimportant argument.

Second, some courts have placed a hard cap on the permitted page range of separate statements of fact in support of summary judgment motions. The most common this practitioner has seen is courts imposing a 10-page statement of fact limitation. Imposing such a limitation is an attempt to force parties to be judicious with the facts they choose to introduce in support of their moving and opposing summary judgment motions.

Finally, some courts have elected to eliminate the practice of statement of facts all together. In this scenario parties are prohibited from filing separate statements of fact or separate controverting statements of fact. Instead, they must include all facts in their moving motion, response or reply itself. Those same courts typically further note that all evidence to support a motion or response that is not already part of the record must be attached directly to the motion or response itself and that no evidence may be submitted with a reply. As a result, because no controverting statements of facts are permitted, those courts typically note that the responding party must carefully address all material facts raised in the moving motion. Likewise, the reply must carefully address all material facts raised in the response. Critically, any fact that is ignored may be deemed uncontested by these courts.[4]

It is difficult to crown one trend "better" than the other at reducing summary judgment bloat while also allowing practitioners to preserve their respective appellate record, as each comes with its own benefits and drawbacks.

Under the first trend, the least number of restrictions exist on crafting a factual record for the trial court and later appellate review. But with that comes all the potential abuse that *Hunton* discussed. The second trend places some guardrails that may prevent statements of fact from getting out of hand – but not every case is created equal. Some dispositive motions are truly simple, easily fitting into a 10-page requirement. Some are extremely complex, requiring much more than 10 pages to explain to the court what the material facts are and why they are (or are not) contested. If a trial court is inflexible on amending this limitation when appropriate, it could put practitioners in a bind when they need to submit facts beyond 10 pages to support a summary judgment motion with a complex record.

On the opposite end of the spectrum, eliminating statements of fact altogether eliminates any potential for bloat but raises a host of other potential issues. With no statements of fact and associated objections, the trial court and any appellate court is forced to wade through the factual background sections of summary judgment motions and spend an inordinate amount of time attempting to compare one sentence to another to ascertain if facts truly are disputed or not. And if a sentence does not squarely address one fact or another in the moving motion, response or reply, there is a potential trap for the unwary practitioner to be accused of waiving an objection to that fact if they fail to squarely object to it. At a minimum it invites the parties to engage on side litigation for waiver issues that did not exist before.

Finally, if all facts and objections must be preserved in the moving motion, response or reply, then practitioners likely will need to seek page extension requests in support of their summary judgment pleadings to now include facts and objections not normally raised in the body of their summary judgment motions.

While practitioners have little say in how courts impose these kinds of restrictions, there are some common tips to help you wade your way through each scenario to achieve the best preservation of your record as possible.

- Trend 1: Follow the advice set forth in *Hunton*. The discussion in that matter is well stated and serves as a good refresher for all practitioners experienced and new. Craft summary judgment statements of fact that are direct and focus on addressing the facts material to your summary judgment legal argument. Outside supporting information can be included in the fact section of the moving motion, but if it is not material, consider avoiding using a statement of fact to support it. When responding to summary judgment facts, object only to facts that are truly contested. And when crafting objections, only include the specific objection, and avoid excessive argument.
- Trend 2: If there is a specific page limitation to support or oppose a summary judgment motion, make sure you follow this requirement. Always check your court's scheduling order before starting work on a summary judgment pleading to know what rules the court is following. There is nothing worse than asking a judge to grant or deny a summary judgment motion after breaking their rules on briefing it. Again, following the advice given in *Hunton* can assist in keeping statements of facts within page limits. But because not all cases are the same, if you truly need more pages to preserve your record regarding material facts or objections, request a page extension for the statement of facts in advance of filing them with the court. This practitioner has had to make this request numerous times in complex litigation, which has been approved on multiple occasions.
- Trend 3: When no separate statement of facts is permitted and you are a nonmoving party, structure your summary judgment response in the same vein as you would a statement of fact objections. Make sure each material fact from the moving motion is squarely addressed in your factual background section of your opposition, dropping footnotes if a more direct attack on a specific sentence is needed. If you are a moving party, structure the reply in a way that squarely addresses any new fact raised in the response or any fact contested by the response so it is crystal clear to the trial court and any reviewing court what the material facts are and why they are not disputed (or why the opposing party's objection should be disregarded).

This issue continues to evolve as the courts and parties experiment with the best methods to judiciously brief, assess and dispose of summary judgment motions. As a result of this shifting landscape, practitioners should remain vigilant in carefully screening a judge's scheduling order and any information provided on a judge's respective website to ensure they are properly complying with any special rules imposed by a court when briefing summary judgment motions. This becomes particularly important if any appeal is taken from a summary judgment ruling and a practitioner wants the appellate court to affirm or reverse a summary judgment ruling based on the material facts properly in the record (or objected thereto).

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1. Several Arizona District Court judges have granted motions to strike a party's attempt to separately file such objections at the reply stage. *See e.g., EEOC v. AutoZone Inc.*, No. 06-CV- 0926-PHX-SMM, 2008 WL 2509302, at *1 (D. Ariz. June 19, 2008). To this practitioner's knowledge, however, no published Arizona state court decision has approved or rejected this practice.
2. CV-16-00539-PHX-DLR, 2018 WL 1182552, at *6 (D. Ariz. Mar. 7, 2018).
3. *See also Marceau v. Int'l Broth. of Elec. Workers*, 618 F. Supp. 2d 1127, 1141-42 (D. Ariz. 2009) (internal quotations and citation omitted) ("The parties' voluminous objections are sadly representative of a growing trend where attorneys … raise every objection imaginable without regard to whether the objections are necessary, or even useful, given the nature of summary judgment motions in general, and the facts of their cases in particular.").
4. In this practitioner's experience, this trend has largely been limited to the federal district courts within Arizona – though the author has observed at least one Arizona Superior Court Judge express interest in pursuing this practice.

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