



## Summary Judgment Motions

# Drafting an Effective Statement of Undisputed Facts

By James M. Sullivan

**W**hile court filings may differ in form, each filing presents an opportunity to advance the client's case. See also Kirby Griffis, *Use Every Opportunity to Argue the Case*, Brief Right blog (Feb. 5, 2013), <http://briefright.com/everything-is-an-opportunity-to-argue-your-case/> (last visited Oct. 15, 2015). One of the important court filings that I often thought as a law clerk did not receive the attention that it deserved was the statement of undisputed or material facts that many courts require accompany a motion for summary judgment. Counsel does not know the sequence in which a judge or a law clerk will read summary judgment filings. An effective, separately filed statement of facts will typically allow the judge without reading the briefs to (1) conclude that the filing was carefully drafted and edited (building credibility); (2) recognize that the asserted facts are beyond dispute and easily confirmed (e.g., by review of highlighted record excerpts included as exhibits); (3) understand the grounds on which the defendant seeks summary judgment; and (4) understand which assertions of fact relate to each dispositive ground.

I share below some of my views on an effective way to draft a separately filed statement of facts that achieves these objectives.

**Before drafting, check the local rules and any practice guidelines of the judge.** These rules may determine whether a separately filed statement of facts is required, establish a page or word count, or require specific formatting. If a court does not require a separately filed statement of facts, unless prohibited, I recommend placing the record citations in the brief in footnotes to avoid disrupting the flow and effect of the factual statement.

**Organize statements of fact with issue-based headings.** Many separately filed statements of fact follow a chronological approach that is not tied to the grounds for the summary judgment. That approach makes it difficult for a judge to evaluate the merits of a motion while reading the document, can create the appearance that all of the facts are material to each issue, and can raise

questions about why certain facts were included at all. To avoid suggesting that a statement of facts contains legal argument, the headings can simply identify the issue to which the facts relate. When certain facts may relate to more than one issue, do not include them twice; address that possibility in the headings. For example, in a summary judgment motion raising two dispositive grounds, a defendant might organize the separately filed statement of facts with the following headings: "Undisputed Facts Included Principally in Support of Defendant's Motion for Summary Judgment on the Statute of Limitations" and "Undisputed Facts Included Principally in Support of Defendant's Motion for Summary Judgment on Proximate Causation." Below these main level headings, if there are a lot of facts, grouping facts under topical subheadings such as "Product Warnings" or "Plaintiff's Medical History" may assist a reader.

**Lead with the facts that relate to the strongest summary judgment ground, or if multiple grounds have a similar chance of success, lead with the ground that requires fewer facts.** People have short attention spans so generally put the issues with the best facts first. Beyond that, organize headings based on which issue has fewer facts.

**The summary judgment ground will determine the number of facts required to support it.** For example, a statute of limitations motion generally requires few facts; in a product liability action, a court may only need strong evidence of the date on which a plaintiff was told that his or her injury may be related to the product at issue and the date that the plaintiff filed his or her complaint. Similarly, a motion for summary judgment based on lack of admissible expert testimony requires few supporting facts because the motion will be determined by the outcome of a separate motion to exclude the proffered expert's testimony. In contrast, persuading a judge to grant summary judgment based on insufficient evidence of proximate causation or the adequacy of warnings usually follows a substantially more extensive statement of facts.

**Structure individual statements of fact to avoid factual disputes, but organize them so that they tell a powerful narrative.** Opposing counsel will have an opportunity to respond on whether each asserted fact is disputed or undisputed. Avoiding unnecessary descriptions and characterizations of deposition testimony and other



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parts of a record will greatly reduce the appearance of factual disputes that reduce the likelihood of summary judgment. Save those fair descriptions of a record for the accompanying legal brief. Deposition testimony can be introduced as a statement of fact with a lead-in phrase that identifies the witness, such as “Plaintiff’s case-specific expert, Dr. Smith, testified as follows;” followed by a block quote containing the full “Question and Answer” and transcript citation. The opposing party will typically respond “Undisputed,” or “Undisputed, but the witness also testified...,” either of which is fine. The reply brief can then call attention to the number of undisputed facts on the central issues. Include enough contextual facts and organize the quotes so that a court can follow the narrative. Pick the best one or couple of quotes that support a particular assertion. A series of related short “Questions and Answers” is fine, but do not use this approach to include lengthy transcript excerpts. If there is a particularly important statement within a long answer or if page limits require it, use a snip-it quote or a partial quote. When citing other parts of a record, exercise judgment on whether to quote the document or describe it. If a fact is one that the opposing party would like to dispute, try to use a quote. For example, quote a product label’s warnings with no characterizations. 