Statements of Material Facts In Summary Judgment Motions Require Careful Draftsmanship

By Joseph N. Campolo and Eric W. Penzer

Among the key steps in bringing or responding to a summary judgment motion pursuant to Federal Rule of Civil Procedure 56 is compliance with the local rules of all four district courts in New York State that require the moving party to submit a separate, short, and concise statement of material facts about which there are no genuine issues to be tried (a "Rule 56.1 statement").[1] The Commercial Division of the Supreme Court in both New York and Nassau Counties have similar rules.[2]

These rules were adopted to facilitate the "careful analysis of the evidence" on summary judgment motions,[3] and to streamline the consideration of such motions, by "freeing district courts from the need to hunt through voluminous records without guidance from the parties."[4] While a proper Rule 56.1 statement may assist the court in reaching the merits of the party's position, an improper statement may result in the denial of the motion based solely on the party's noncompliance with the rule.

Movant's Obligations – More Than "Cut-and-Paste"

Each statement of fact in the Rule 56.1 statement, which "will be deemed to be admitted unless controverted by the statement required to be served by the opposing party,"[5] must be followed by a citation to admissible evidence.[6]

Rule 56.1 statements are not argument.[7] Rather, the Rule 56.1 statement (1) should contain factual assertions, with citations to the record; (2) should not contain conclusions; and (3) "should neither be the source nor the result of 'cut-and-paste' efforts with the memorandum of law."[8]

The Rule 56.1 statement "is not itself a vehicle for making factual assertions that are otherwise unsupported by the record."[9] Movants should not submit additional statements of facts, such as appendices, compendia, or the like,[10] nor should they substitute affidavits or verified complaints for the Rule 56.1 statement.[11]

Lawyers who fail to cite supporting material after each assertion in the statement do so at their peril. Courts may disregard assertions contained in a Rule 56.1 statement if there are no citations, or if the cited materials do not support the factual assertions and statements.[12] Although courts have "broad discretion" to overlook a party's failure to comply with this or any other local rule, they have found a moving party's failure to comply with Rule 56.1 to be "particularly troubling," for "the moving party bears the burden of demonstrating that there is no genuine issue of material fact."[13] Accordingly, a district court may deny the motion based solely on a movant's failure to comply with Rule 56.1.[14]

When drafting a Rule 56.1 statement, attorneys should consult the judge's individual rules of practice. For example, the individual rules of at least one judge in the Southern District require a party moving for summary judgment to "present each asserted fact in an individually numbered paragraph that details and cites the documentary support for the assertion (*e.g.*, deposition, affidavit, letter, etc.)."[15]

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Non-Movant's Obligations – More Than an Answer

A party opposing a motion for summary judgment must "come forward with specific facts showing that there is a genuine issue for trial."[16] The papers opposing a motion for summary judgment should include a "separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried."[17] Thus, "[a] proper 56.1 statement submitted by a non-movant should consist of a paragraph-by-paragraph response to the movant's 56.1 statement, much like an answer to a complaint."[18]

There are two main differences between a non-movant's Rule 56.1 statement and an answer to a complaint. First, unlike an answer, each statement of "contested" material fact by the non-movant must be supported by a citation to admissible evidence.[19] A non-movant that fails to comply with this requirement runs the risk of having the movant's statements accepted by the court as undisputed.

Although Rule 56.1 does not explicitly permit the responsive party to object to a statement, such objections are not uncommon in practice.

The other difference between an answer and a responsive Rule 56.1 statement is that some responses commonly asserted in an answer are unavailable in Rule 56.1 statements. The non-movant must either assert in its Rule 56.1 statement that a particular statement of fact is contested *and* provide evidentiary support for that assertion, or concede that it is uncontested. The non-movant cannot, for example, state that it lacks knowledge or information sufficient to either admit or deny a statement of fact. In one case where the non-movants' Rule 56.1 statement was "replete with responses of 'lack of knowledge or information sufficient to either admit or deny,'" the court found the non-movants did not create "any issues of fact through this artifice."[20] In another case, a court found that "an answer that 'Plaintiff can neither admit nor deny this statement based upon the factual record' was insufficient to establish a disputed fact."[21]

Although Rule 56.1 does not explicitly permit the responsive party to object to a statement (if, for example, the movant includes statements of opinion, legal arguments, or unsupported statements), such objections are not uncommon in practice.[22] However, a better approach might be to cross-move to strike the improper portions of the Rule 56.1 statement. For example, in *Ofudu v. Barr Laboratories, Inc.*,[23] the court granted the defendant's motion for summary judgment and simultaneously granted, in part, its motion to strike parts of the plaintiff's Rule 56.1 statement. It noted that the plaintiff's Rule 56.1 statement "appears to be the statement of counsel, as it is argumentative without demonstrating any personal knowledge of the matters set forth therein." Among the statements stricken were those for which evidentiary material was not provided, those for which the evidence cited did not support the particular statement, and those supported only by unsworn conclusory statements.[24]

Effect of Failure to Contest

What effect, if any, do courts give to a movant's statement of fact that is not properly contested by the non-movant? Does the court have an obligation to search the record to confirm that the statement of fact is undisputed, or may it assume the existence of the fact solely because it was not properly contested? Courts have taken varying approaches in this situation, some adhering to the letter of the rule and deeming the statements of fact admitted with no further analysis, and some electing to perform their own review of the record.

In *Universal Calgary Church v. City of New York*,[25] the court detailed the deficiencies of the plaintiffs' response to the defendants' Rule 56.1 statement, concluding that "any of the Defendants' Rule 56.1 Statements that Plaintiffs do not specifically deny and support such denial with specific evidence, and any of Plaintiffs' 56.1 Statements not supported by reference to specific evidence, will be deemed admitted for purposes of this summary judgment motion."

In *Baker v. Dorfman, P.L.L.C.*, the court noted the deficiencies in the defendant's Rule 56.1 statement, which consisted almost entirely of admissions or denials without evidentiary support, and held that "[a]s a consequence, nearly all of the material facts set forth in plaintiff's Rule 56.1 statement are deemed admitted."[26] Nonetheless, the court went on to perform its independent review of the defendant's evidence, finding no basis to dispute the majority of the plaintiff's assertions.[27]

Similarly, in *Fernandez v. DeLeno*,[28] the court noted that the third-party plaintiff's counsel had blatantly disregarded the rule by failing to provide citations to evidence in its Rule 56.1 statement. It further noted that in two prior unrelated cases it had returned to counsel its Rule 56.1 statement with an opportunity to comply with the rule.[29] The court declined to overlook counsel's noncompliance on this third occasion, however, "deem[ing]

it improper to again refrain from applying a Rule counsel has systematically chosen to ignore."[30] Although the court deemed the assertions contained in the defendant's Rule 56.1 statement admitted for the purposes of the motion, it nonetheless reviewed the record, noting that the third-party plaintiff's claims were without merit.[31]

The Second Circuit has affirmed the grant of summary judgment based upon uncontested assertions in the moving party's Rule 56.1 statement.[32] However, in one recent case, *Holtz v. Rockefeller & Co.*, it held that a court cannot grant summary judgment to the movant based upon uncontested material statements of fact unless those statements are supported by evidence in the record.[33] The Second Circuit expressed concern that construing Rule 56.1 to authorize summary judgment to a movant "by default" would create tension between the local rule and Federal Rule of Civil Procedure 56.[34] It noted that, under Federal Rule of Civil Procedure 56, summary judgment is appropriate only when the movant meets its burden of demonstrating the absence of material issues of fact.[35] This burden remains with the movant even if no opposing evidentiary matter is presented.[36] Thus, permitting a movant to rely upon uncontested assertions contained in a Rule 56.1 statement in order to side-step Rule 56 would "be tantamount to the tail wagging the dog."[37] Accordingly, the Second Circuit stated that where "the record does not support the assertions in a Rule 56.1 statement, those assertions should be disregarded and the record reviewed independently."[38]

The Second Circuit's language in *Holtz* would appear to require the district court to confirm that each uncontested statement of fact is supported by evidence contained in the record. However, the court's actual *holding* in the case is permissive, not mandatory: "Thus, we have previously indicated, and now hold, that while a court 'is not required to consider what the parties fail to point out' in their Local Rule 56.1 statements, it may in its discretion opt to 'conduct an assiduous review of the record' even where one of the parties has failed to file such a statement."[39]

In a subsequently decided case, *Travelers Indemnity Co. of Illinois v. Hunter Fan Co., Inc.*,[40] a third-party defendant argued that the assertions contained in its Rule 56.1 statement should be deemed admitted because of the plaintiff's failure to submit a responsive statement. The court disagreed, however, noting that the third-party defendant itself failed to comply with the rule. It noted that the movant failed to cite admissible evidence in its Rule 56.1 statement, and "some of the statements of 'fact' are actually not facts at all, but are rather conclusions of law."[41] The court then cited *Holtz* for the proposition that the court has "broad discretion" to overlook a party's failure to comply with the rule and, under the circumstances, declined to deem the statements admitted.[42]

Conclusion

Rule 56.1 and its counterparts were designed to facilitate courts' analysis of the evidence on summary judgment motions. Improperly drafted statements may frustrate counsel's purpose in making the motion. To avoid the grant or denial of summary judgment on "technical" grounds, and to facilitate the court's resolution of a dispute on the merits, a practitioner should exercise diligence and caution in preparing and responding to a Rule 56.1 statement.

A movant's statement should contain only factual assertions, not legal arguments, which should be supported by citations to admissible evidence. The non-movant's statement should respond to each of the movant's factual assertions, stating whether they are contested or uncontested. In light of the Second Circuit's recent pronouncements concerning Rule 56.1 and other similar local rules, it remains to be seen what effect courts will give to assertions contained in a movant's Rule 56.1 statement where those assertions are not properly contested by the non-movant. To avoid the issue altogether, the non-movant should be sure to cite to admissible evidence demonstrating that a particular fact is in dispute, as required by the rule.

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1. Local Civil Rules of the United States District Court for the Southern and Eastern Districts, Rule 56.1 ("Rule 56.1"); Local Civil Rules of the United States District Court for the Western District of New York (Rule 56); Local Civil Rules of the United States District Court for the Northern District of New York, Rule 7.1(a)(3).
2. Commercial Division Rule 19-a.
3. *Rodriguez v. Schneider*, No. 95 Civ. 4083 (RPP), 1999 WL 459813, at *1 n.3 (S.D.N.Y. June 29, 1999).
4. *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001).
5. Rule 56.1(c).
6. Rule 56.1(d).
7. *Rodriguez*, 1999 WL 459813, at *1 n.3.
8. *Id.*
9. *See Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001).
10. *See id.*
11. *See Monahan v. N.Y. City Dep't of Corrections*, 214 F.3d 275, 292 (2d Cir. 2000).
12. *See Holtz*, 238 F.3d at 74 (quoting *Watt v. N.Y. Botanical Garden*, No. 98 Civ. 1095 (BSJ), 2000 WL 193626, at *1 n.1 (S.D.N.Y. Feb. 16, 2000)).
13. *See Travelers Indem. Co. of Ill. v. Hunter Fan Co., Inc.*, No. 99 Civ. 4863 (JFK), 2002 WL 109567, at *6 (S.D.N.Y. Jan. 28, 2002).
14. *See MTV Networks v. Lane*, 998 F. Supp. 390, 393 (S.D.N.Y. 1998); *Rossi v. N.Y.C. Police Dep't*, No. 94 Civ. 5113 (JFK), 1998 WL 65999, at *4 (S.D.N.Y. Feb. 17, 1998).

15. *See, e.g.*, Individual Rules of Sheindlin, J. (cited in *Union Carbide Corp. v. Montell*, 179 F.R.D. 425, 428 (S.D.N.Y. 1998)).
16. *McCarthy v. American Int'l Group, Inc.*, 283 F.3d 121, 124 (2d Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)).
17. Rule 56.1(b).
18. *Rodriguez v. Schneider*, No. 95 Civ. 4083 (RPP), 1999 WL 459813, at *1 n.3 (S.D.N.Y. June 29, 1999).
19. Local Rule 56.1(d) provides as follows: "Each statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)."
20. *Aztar Corp. v. N.Y. Entertainment, LLC*, 15 F. Supp. 2d 252, 254 n.1 (E.D.N.Y. 1998).
21. *Universal Calvary Church v. City of N.Y.*, No. 96 Civ. 4606 (RPP), 2000 WL 1745048, at *2 n.5 (S.D.N.Y. Nov. 28, 2000).
22. *See, e.g., Building Serv. 32B-J Pension Fund v. Vanderveer Estates Holding, LLC*, 121 F. Supp. 2d 750, 754 n. 1 (S.D.N.Y. 2000) (noting that the defendant's objections to the plaintiffs' Rule 56.1 statement were either to immaterial facts or on the basis that the statement in question was an issue of law to be decided by the court); *Knoeffler v. Town of Mamakating*, 87 F. Supp. 2d 322, 326 n.2 (S.D.N.Y. 2000). *See also Brovarski v. Local 1205, Int'l Bhd. of Teamsters Union, Pension Plan*, No. 97-CV-489, 1998 WL 765141, at *1 n. 1 (E.D.N.Y. Feb. 23, 1998) (discussing the plaintiff's legal objections to various assertions made by the defendants).
23. 98 F. Supp. 2d 510 (S.D.N.Y. 2000).
24. *See id.*
25. 2000 WL 1745048, at *2 n.5. 99 Civ. 9385 (DLC), 2000 U.S. Dist. LEXIS 10142, at *2 (S.D.N.Y. July 21, 2000).
26. *Id.*
27. *See id.*
28. 71 F. Supp. 2d 224 (S.D.N.Y. 1999).
29. *See id.* at 227–28.
30. *Id.* at 228.
31. *See id.*
32. *Millus v. D'Angelo*, 224 F.3d 137, 138 (2d Cir. 2000).
33. 258 F.3d 62, 74 (2d Cir. 2001).
34. *See id.* at 74 n.1.
35. *See id.*
36. *See id.* (quoting Fed. R. Civ. P. 56(e), Advisory Committee note to 1963 Amendment); *accord Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970).
37. *Holtz*, 258 F.3d at 73 (quoting *Rivera v. Nat'l R.R. Passenger Corp.*, 152 F.R.D. 479, 484 (S.D.N.Y. 1993)).
38. *Id.* at 74.
39. *Id.* at 73 (quoting *Monahan v. N.Y. City Dep't of Corrections*, 214 F.3d 275, 292 (2d Cir. 2000)).
40. No. 99 Civ. 4863 (JFK), 2001 WL 1035146 (S.D.N.Y. Sept. 10, 2001).
41. *Id.* at *3.
42. *Id.*