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JUST THE FACTS
by Judith Fabricant, Justice of the Superior Court

Civil litigators devote much time and attention, and much of their clients' money, to motions for summary judgment. In the Superior Court, such a motion requires a "statement of the material facts as to which the moving party contends there is no genuine issue to be tried," with the opposing party's response, pursuant to Superior Court Rule 9A(b)(5). In preparing the statement, counsel would be well advised to keep in mind the phrase made famous by Sergeant Joe Friday on Dragnet: Just the facts.

Rule 9A(b)(5) sets stringent requirements for the statement and response, and prescribes consequences for failure to comply. Unfortunately, statements submitted often depart from both the letter and the spirit of the rule. I have tried a variety of approaches in response to such submissions, including scolding footnotes, orders that motion papers be revised and resubmitted, denial of motions for a moving party's failure to comply and, on rare occasions, deeming facts admitted due to non-compliance by the opposing party. See, e.g., Dziamba v. Warner & Stackpole, 56 Mass. App. Ct. 397, 399-401 (2002). None of these techniques seems to be getting the message across. So, I offer a few words of advice.

An understanding of the purpose of the rule, and of how a judge uses the statement, may assist. The purpose, quite simply, is to help the judge find his or her way around the record, as efficiently as possible. That is its only purpose. Summary judgment motion packages are often voluminous, sometimes filling multiple bankers' boxes. The judge needs a roadmap.

To serve that purpose, the statement must clearly identify the facts that are and are not disputed, and as to the former, must point out the particular evidentiary materials the judge must examine to determine the genuineness of any purported dispute. The judge can then rule as a matter of law, having considered the arguments in the memoranda, on whether any disputed fact is material, and on the legal significance of the undisputed facts. Anything in a statement that does not serve these purposes merely adds clutter, making pertinent evidentiary material difficult to find, and genuine disputes difficult to identify. The credibility of counsel suffers, and with it the persuasive effect of the entire effort.

A well-crafted statement under the rule bears some resemblance to skillful cross-examination. The factual assertions, like good cross-examination questions, are short, direct, and purely factual, phrased in words that have clear and precise meaning, without characterization or conclusion. A party responding to such an assertion, like a witness under effective cross-examination, has no choice but to respond directly. Assertions that do not fit this description invite the kind of response a witness may give to a poorly-framed question: an assertion of a purported dispute based on quibbling over the meaning of words or phrases, or over purportedly misleading selectivity, or over part of a compound assertion. The result

is useless to the Court, and to the party seeking to establish that the material facts are undisputed.

A proper response by the opposing party to a factual assertion consists of the word "undisputed" or "disputed,"and, if the latter, a record reference and/or a statement that the evidence cited by the moving party does not support the assertion. Nothing more. Record references should be precise and specific, identifying the particular paragraph of an affidavit, the page and line of a deposition, or the particular part of a document.

Argument, whether about how or why the record does or does not support the assertion, or about what is or is not material, or about any other topic, belongs only in the memorandum of law. The Rule 9A(a)(5) statement is not an opportunity to circumvent the page limit for memoranda. Qualifying assertions - such as that the factual assertion is not a complete description of the matter referred to, that the party admits the fact for the purpose of summary judgment but reserves the right to contest it at trial, or that the cited portion of a document is not the only portion of significance - accomplish nothing except to add words and pages.

One area where statements and responses often run into trouble is in description of contracts, insurance policies, or other instruments. Often a moving party describes or characterizes the document, or quotes part of it. The responding party then asserts a purported dispute based on disagreement about the description or characterization, or incompleteness of the portion quoted. The exercise is fruitless. A better approach is to say only that "Exhibit 2 is a true copy of a contract executed by John Smith and Jane Jones." Unless the opposing party disputes authenticity, he or she has no choice but to respond, "undisputed." The parties then make their arguments about the meaning or effect of the document, or the significance of its various provisions, in their memoranda, and the Court evaluates those arguments by reference to the document itself.

Rule 9A(b)(5)(iv) authorizes the opposing party to "assert an additional statement of material facts," with record references, as "a continuation of the opposing party's response." This does not mean that the opposing party is free to add facts within its response to the paragraphs of the moving party's statement. That makes the document unintelligible. An opposing party's statement of additional facts should follow after the moving party's entire statement and the opposing party's paragraph by paragraph response to it.

The point of the Rule 9A(b)(5) statement, overall, is to identify each fact that either side considers material, and with respect to each separately, to enable the Court to determine whether a genuine dispute exists. Counsel who prepare their submissions with these purposes in mind will assist the judge, enhance their own credibility, and promote prompt and just resolution of their motions.

Judith Fabricant has been an Associate Justice of the Superior Court since 1996. She has sat in the Business Litigation Session half of each year since 2007, and currently serves as its Administrative Justice. She served as regional administrative justice for Norfolk County from 2005 to 2007, and currently chairs the Court's Education Committee. Before her appointment to the bench she was an Assistant Attorney General and Chief of the Attorney General's Government Bureau. She is a graduate of Yale College and Yale Law School.

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