Appellate Tips for Trial Lawyers

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California civil and criminal litigation overlap in a crucial area: preserving your record for appeal. Although this series of short articles is mainly designed for civil trial lawyers, some "best practices" apply in every trial. Keep an eye on what our appellate-lawyer writers have to say about how to preserve your trial court victory or how to lay the groundwork for a successful challenge when you have lost.

Part 1: Getting It Right—Obtaining A Statement Of Decision

by Robert Olson

A statement of decision is the bench trial equivalent of a special verdict. Without one, the California Court of Appeal will imply that all findings are in favor of the decision, just as it would with a jury's general verdict (***In re Marriage of Dancy*** (2000) 82 Cal. App. 4th 1142, 1159).

A properly requested statement of decision can nail down what the trial court actually found. The result is focused appellate briefing and a review that will avoid implied findings. For example, suppose two grounds are advanced to support a judgment—one valid and one not. If the statement of decision declares that the court relies only on the invalid ground, the judgment can be overturned on appeal. But if the statement of decision is ambiguous or does not address the other ground —or there is no statement of decision—the appellate court will presume that the trial court relied on the valid ground. Likewise, if the trial court relies on an invalid ground even though a valid alternative ground exists but the trial court never expressly reached it, and the statement of decision is ambiguous or does not address the alternative ground—or there is no statement of decision—the appellate court will infer that the trial court reached the alternative ground and decided in favor of the prevailing party. Thus, the statement of decision can be critical to the fate of a judgment on appeal.

The process of requesting a statement of decision is poorly understood and fraught with traps for the unwary. The most important of these traps involves the losing party. Unless the losing party 1) properly requests a statement of decision and 2) objects to any omissions or ambiguities in that statement, the appellate court will imply that all factual determinations support the trial court's decision.

This Appellate Tip will address whether and how to request a statement of decision. Next month, Part 2 will address the process of objecting to such a statement.

Court Trial, Fact Issue

A statement of decision is available in nonjury proceedings determining fact questions (Code Civ. Proc. §632; see ***Gordon v. Wolfe*** (1986) 179 Cal. App. 3d 162, 167 (trial limited to damages); ***Giuffre v. Sparks*** (1999) 76 Cal. App. 4th 1322, 1326, n. 3 (administrative mandamus petition)). The procedure also applies to motions involving a factual finding that adversely affects the parties' rights and appellate review cannot be accomplished without express findings (***Gruendl v. Oewel Partnership, Inc.*** (1997) 55 Cal. App. 4th 654, 660); ***Metro Traffic Control, Inc. v. Shadow Traffic Network*** (1994) 22 Cal. App. 4th 853, 858 (no

statement of decision required in denying preliminary injunction); ***City of Los Altos v. Barnes*** (1992) 3 Cal. App. 4th 1193, 1198 (same re granting preliminary injunction).

Certain statutes authorize statements of decision for rulings on particular motions (compare Fam. Code §3654 ("At the request of either party, an order modifying, terminating, or setting aside a support order shall include a statement of decision.") with ***In re Marriage of Askmo*** (2000) 85 Cal. App. 4th 1032, 1040 (No statement of decision was required in a temporary support proceeding because it is just a motion and affords only temporary entitlement to funds and a limited evidentiary hearing; not discussing §3654.)).

Ask

A party must request a statement of decision (Code Civ. Proc. §632; see Fam. Code §3654). The only exception is when the trial court issues an intended decision that "direct[s] that the tentative decision will be the statement of decision unless within 10 days either party specifies controverted issues or makes proposals not covered in the tentative decision." (Cal. Rules of Court, Rule 3.1590(c)).

In trials lasting over eight hours, the prevailing party ordinarily should not ask for a statement of decision, given that without one, all the appellate presumptions will be in its favor. The losing party–or both parties in a split decision–should always ask for one. In these longer trials, the request "must be made within 10 days after the court announces a tentative decision," with an additional five days for mailing (Code Civ. Proc. §632 1013(a); ***Kroupa v. Sunrise Ford*** (1999) 77 Cal. App. 4th 835, 841 n. 6).

For trials that take less than eight hours, counsel must make the request before "submission of the matter for decision" (Code Civ. Proc. §632). Thus, the tactical decision whether to request a statement of decision must be made before knowing the outcome. The conservative approach in such a circumstance is to request a statement of decision absent a clear indication that the trial court is going to rule favorably on all issues.

In either case, the request must be timely, or the right to a statement of decision is waived (***Tusher v. Gabrielsen*** (1998) 68 Cal. App. 4th 131, 140).

Specify

Any request must specify controverted fact issues to be addressed (Code Civ. Proc. §632). Within ten days after the request, other parties may propose additional issues to be addressed (Code Civ. Proc. §632; Cal. Rules of Court, rule 3.1590(d)).

The strategies for presenting a proposed statement of decision and for objecting to such a proposal will be addressed in Part 2.

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