Strategic Opportunities in the Statement of Decision Process

One of the most arcane and misunderstood procedures in California civil trial practice is the statement of decision.

By Robert A. Olson and Anne W. Braveman

That is the procedure by which the court provides its specific findings where a case (or issue) is tried to the court rather than a jury. The statement of decision procedure affords counsel a great opportunity to act strategically, yet that opportunity is often lost because counsel does not understand the procedure or its objective.

The strategic opportunity arises out of the effect of a statement of decision. A statement of decision resolves factual issues fairly decided under its scope. Just as with a jury verdict, on appeal the facts and the evidence will be construed in favor of the facts found in the statement of decision. That same presumption will apply to all other facts that support the court's ruling, i.e., implied factual findings, *except* if (1) the statement of decision does not resolve or is ambiguous in resolving a material fact, *and* (2) that failure to resolve or ambiguity in resolution is brought to the trial court's attention and the trial court does not act to clarify its findings.

That is where the strategic opportunity arises. If the losing party can identify unresolved or ambiguously resolved material facts and bring those to the court's attention without the court making further adverse findings on those facts, the losing party can undermine the presumption in favor of the court's decision. By the same token, the prevailing party faced with such a challenge can act to shore up a decision by urging the trial court to resolve omitted or ambiguous factual determinations in a favorable fashion.

In this article we will first discuss when a statement of decision is available and how one is requested. We will then discuss the process of "objecting" to and revising the statement of decision. Finally, we will discuss some of the strategic considerations by both the losing and prevailing parties in objecting to and responding to objections to a statement of decision.

When a Statement of Decision Is Available.

A statement of decision is available in non-jury proceedings where a question of fact is being determined. (Code Civ. Proc., § 632.) Statements of decision are rendered somewhat flexibly and do not require that the trial be exhaustive of all issues. (See, e.g., *Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 167 [statement of decision granted in trial limited solely to issue of damages].) Statements of decision are appropriate for both

traditional issues at law and equitable issues; e.g., a petition for writ of administrative mandamus is an appropriate proceeding in which to request a statement of decision. (Code Civ. Proc., § 632; see, e.g., *Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1326, fn. 3 [petition for writ of administrative mandamus "requires a statement of decision"].) Generally, courts do not require or provide a statement of decision upon deciding a motion. An exception may apply if the motion involves a factual finding, the parties' rights will be adversely affected, and appellate review could not be accomplished without express findings. (See *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660.)

A statement of decision is not automatic. The court need not volunteer one. Rather, one is available only "upon the request of any party appearing at the trial." (Code Civ. Proc., § 632.) If no statement of decision is requested, the trial court's decision is treated just like a general verdict on appeal; all inferences and facts are taken in favor of the verdict. (See *In re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, 1159 [since parties did not request a statement of decision, appellate court infers findings in favor of trial court verdict].)

The first procedural requirement for requesting a statement of decision is that the request be "timely." When the request should be made depends on the length of trial. If the trial concludes within one day - defined as within eight hours - the request "must be made prior to the submission of the matter for decision." (Code Civ. Proc., § 632.) That requires foresight. Counsel needs to remember to request a statement of decision, even before knowing whether that decision will be favorable or not.

In trials longer than eight hours, a request for a statement of decision "must be made within 10 days after the court announces a tentative decision" in open court. (Code Civ. Proc., § 632.) If the trial court's decision is announced via mail within the state, the time to request is extended by five days, so that a party has 15 days after the announcement to make a request. (Code Civ. Proc., §1013(a); *Kroupa v. Sunrise Ford* (1999) 77 Cal.App.4th 835, 841 fn. 6.) (Courts unfamiliar with the process sometimes just issue a decision, not realizing that their decision is necessarily a tentative decision, subject to the statement of decision process.) Failure to request within the specified deadline waives the right to request a statement of decision and it is left to the court's discretion to determine if it is appropriate to issue a decision regardless of such a waiver. (Cal. Rules of Court, rule 232(g); see *In re Marriage of Steinberg* (1977) 66 Cal.App.3d 815, 822.)

Substantively, the request not only must ask for a statement of decision, it must also specifically identify the issues of fact in controversy for which a statement of decision is requested. (Code Civ. Proc., § 632.) The statement of decision need only provide a factual and legal explanation for "each of the principal controverted [material] issues at trial." (Code Civ. Proc., § 632.) A "material issue of fact" is one that is "relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case." (*Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d 555, 565.) It is *not* the trial court's role "to make findings with regard to detailed evidentiary facts or to make minute findings as to individual items of evidence;" instead the trial court is ruling on the ultimate facts. (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 67.)

Preparation of and Objections to a Statement of Decision

As soon as a party requests a statement of decision, the other parties are free to propose additional issues to be considered by the court. Such additional issues, however, must be identified within 10 days of the date of the initial request. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 232(b).) For trials concluding in less than eight hours, the proposals must be made at the hearing before the matter is submitted. (Code Civ. Proc., § 632.) Once a statement of decision is requested, a proposed statement must be prepared within 15 days after the deadline to propose changes has expired. (Cal. Rules of Court, rule 232(c).) The court can prepare the proposed statement itself, or more typically, assign that task to counsel for one of the parties, typically the prevailing party. If for some reason the pro-

posed statement is not served and submitted within the specified time, any party at trial can either prepare and submit its own proposed statement of decision or move that the statement of decision be considered waived. (Cal. Rules of Court, rule 232(c).)

In the event that the statement of decision "does not resolve a controverted issue," any party who is affected by the judgment may object to the statement on that basis. (Code Civ. Proc., § 634; Cal. Rules of Court, rule 232(d).) Such an objection must be made to the trial court within 15 days after the proposed statement and judgment have been served. (Cal. Rules of Court, rule 232(d).) Alternatively, ambiguities and omissions may be brought to the trial court's attention by way of motion for new trial or a Code of Civil Procedure section 663 motion to vacate. (Code Civ. Proc., § 634.)

The term "objection" is somewhat misleading. The statement of decision process is not a vehicle for parties to challenge the court's findings or reasoning. Rather, it is a tool that allows parties to put the trial court on notice of omissions or ambiguities in the statement of decision, and thereby avoid an implied finding on appeal favorable to the statement. (Code Civ. Proc., § 634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132-1133.)

There might be less confusion if the "objection" document were entitled "Objections to Omissions and Ambiguities in the Proposed Statement of Decision." To simply reargue the merits of the case does not accomplish the purpose of objecting to a statement of decision.

Rather, for the statement of decision to be disregarded, objections must specially call the court's attention to failures to resolve - whether by omission or ambiguity - material issues. A party's general disagreement with how that case was decided does not suffice. Nor does a proposed alternative statement of decision. (See *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380 [party's proposed alternative statement of decision is not an objection because it fails to identify the defects of the trial court's statement].)

The court may order a hearing regarding proposals and objections to the proposed statement of decision, *but is not required to do so.* (Cal. Rules of Court, rule 232(f).) In response to any objections or simply on its motion, the trial court, before final judgment has been entered, may amend the statement of decision. (*Bay World Trading, Ltd. v. Nebraska Beef, Inc.* (2002) 101 Cal.App.4th 135, 140-141.)

After the final judgment has been entered, omissions and ambiguities in the statement of decision can still be raised in either a motion for new trial (Code Civ. Proc., § 657) or a motion to set aside judgment (Code Civ. Proc., § 663). In ruling on either motion, the trial court may amend the statement of decision. (Code Civ. Proc., §§ 662, 663.)

Effect of Statement of Decision on Appeal

The trial judge's statement of decision greatly shapes the appellate process as it is "presumed to be correct on appeal." (*In re Marriage of Arceneaux, supra,* 51 Cal.3d at p. 1133, citations omitted.) It is crucial for parties to keep in mind that if they fail to timely object in the trial court to deficiencies in the statement of decision - e.g., unresolved issues - they waive the right to challenge those deficiencies on appeal. (*Id.* at pp. 1133-1134.) In that event, all facts, even those not expressly decided, will be construed against the appealing party. This rule prevents a party from raising the failure to resolve a particular issue for the first time on appeal. (*Id.* at p. 1138.) Instead, the trial court must be provided with an opportunity to cure any defects and to address every material issue. (*Ibid.*.) If a party properly objects, though, and the trial court still issues a statement of decision that is ambiguous or omits material holdings without explanation, such a failure to resolve a material issue, alone, may suffice as a basis to reverse a judgment. (*Id.*. at p. 1133-1134.)

Strategic Considerations For The Losing Party

Unlike most objections, it is to the losing party's advantage *not* to have its objections to a statement of decision ruled upon. That is because if the trial court does not resolve the omissions and ambiguities that are

identified, those omissions and ambiguities will not be construed against the losing party.

This leads to several considerations. First, the losing party should make sure that its objections to a statement of decision identify ambiguities and omissions regarding material facts and do not just reargue the case. Counsel should take care to also identify alternative theories that the trial court may not have reached and request either a finding or an explicit statement that the trial court has not reached those issues.

Second, appellate courts are not especially receptive to objections to statements of decision that read like interrogatories or depositions, asking the trial court to respond to scores of supposedly material issues. (See *Golden Eagle Ins. Co., supra*, 20 Cal.App.4th at p. 1380 [in preparing statement of decision, trial court need not "respond point by point to the issues posed in a request for statement of decision"].) Counsel should focus on the broad issues that the statement of decision does not resolve: E.g., "defendant objects to the proposed statement of decision in that it fails to resolve how the breaches of duty found caused the damages found or which identified breach caused which identified damages."

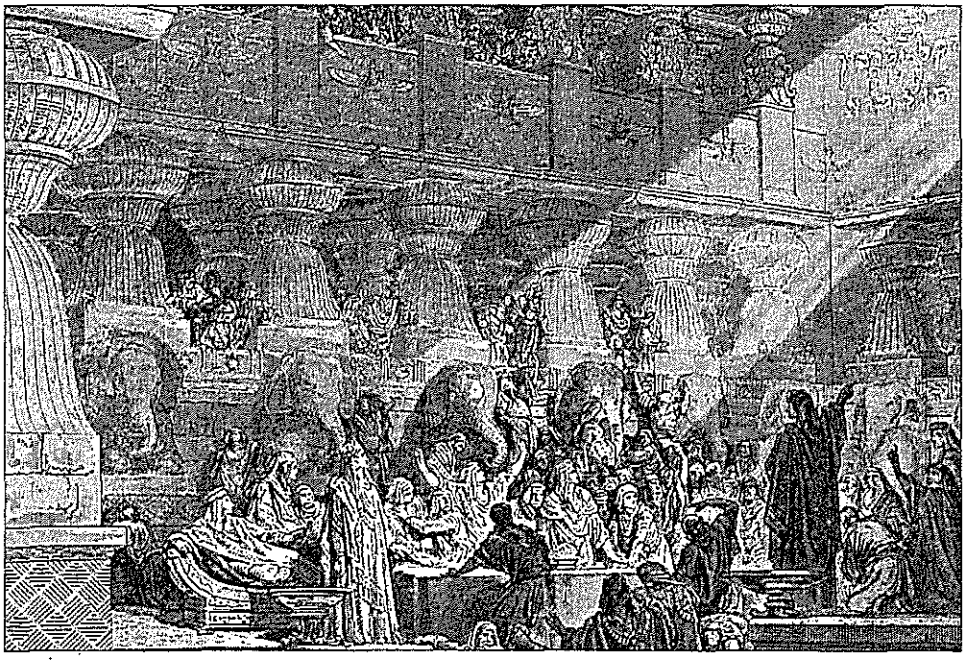
Third, when it comes time for a hearing on the objections, typically, the less said by the objecting party the better. Unless the trial court is prepared to rule in the objecting party's favor on some omitted or ambiguous issue, the best result for the objecting party is that the trial court disregard its objections. In that way, the objecting party has preserved for appeal its position that some material issue was not decided against it.

Strategic Considerations For The Prevailing Party

The strategic considerations for the objecting party also inform what the prevailing party's approach should be. First, if, as typically is the case, the prevailing party is assigned the task of preparing the proposed statement of decision, it should do so timely and completely. Consistent with what the trial court has tentatively expressed, the prevailing party should draft a statement of decision that unambiguously resolves all material issues in its favor.

Alternative theories that the trial court may not have reached pose a dilemma. Express findings on such theories can provide a backstop on appeal. But faced with such findings a court may expressly decline to reach such issues. By not addressing those theories, findings in favor of the prevailing party will be implied if no objection is raised. In the usual case it is probably better not to address issues not reached by the court, and await any objection on that ground.

Second, if the losing party objects to the statement of decision, the prevailing party should take those objections seriously. This is the prevailing party's opportunity to fix the statement of decision. Counsel's knee-jerk reaction is often to urge the court to simply ignore the opposing party's objections. But that may play into the objecting party's hands. The more logical approach is to evaluate the objections. If any address omissions or ambiguities in arguably material facts (including the failure to find on alternative theories), the prevailing party should urge the court to resolve the omission or ambiguity by amending the statement of decision, suggesting a precise manner in



which the court may do so favorably to the prevailing party. Certainly the prevailing party need not respond to every evidentiary or minor factual controversy or quibble an objecting party may raise. But it does make sense to respond to the major claimed omissions and ambiguities and to suggest a means to the trial court to resolve those favorably, while explaining why the remaining supposed omissions or ambiguities deal with disputes that are not material or are encompassed within broader material facts on which there already has been an express finding.

Conclusion

The statement of decision process is a subtle dance. Counsel who are unaware of its objective can easily stumble, directing their efforts at the wrong object. But counsel who keep the true object in mind - identifying omitted and ambiguous findings on material facts - can profitably limit the damage done by an adverse factual decision or protect a favorable decision from attack on appeal.

Robert A. Olson is a partner in Greines, Martin, Stein & Richland LLP and certified by the California State Bar Board of Legal Specialization as an appellate specialist. He and his firm specialize in civil appeals and post-trial proceedings. His is co-chair of the Association of Southern California Defense Counsel's amicus committee.

Anne W. Braveman is a third year law student at Loyola Law School in Los Angeles, California.

Time Line

DEADLINE	REQUIRED ACTION
Submission of matter to the court for decision.	Last moment to request and to propose content of Statement of Decision for trials concluding in less than 8 hours
10 days after court announces [tentative] decision. [Add five days under Code Civ. Proc., § 1013, if decision is served by mail].	Last day to request and to propose content of Statement of Decision for trials lasting more than 8 hours
15 days after the time to request Statement of Decision.	Last day to serve proposed Statement of Decision and Proposed Judgment.
15 days after service of proposed Statement of Decision and Proposed Judgment.	Last day to object to proposed Statement of Decision