Statements of decision: Vital to appeal

Without a statement of decision, your appeal may be doomed

By Jay-Allen Eisen

This morning's mail ruined your whole day. You were excited at first when you saw the envelope from superior court. You knew it was the judge's decision in that bench trial you just knew you'd won. But when you read the decision, you'd lost.

There's still hope, however. You think you've got a good appeal. As you're mulling it over, your assistant says, "I'll calendar the date to request a statement of decision." "Why bother?" you reply. "It'll just give the judge a chance to bullet proof her decision."

It may seem counter-intuitive, but that's the wrong decision. If you're going to appeal, you want a statement of decision. Without one, your appeal may be doomed. The reason is the first rule of appellate review: "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Applying that presumption if there's no statement of decision, the appellate court "will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267; *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 649, review denied.) The court will, therefore, imply any findings required to uphold the judgment that the evidence will support, which may effectively insulate the judgment from appellate review. (*Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 168.)

For that reason, the winning party at trial does not usually need a statement of decision to show how the judge reached his or her decision and protect the judgment on appeal. Without a statement of decision, not only will the appellate court imply all findings the evidence will support in favor of the judgment, the court must affirm the judgment if it is correct on any legal theory, even if that was not the theory the trial judge relied on and even if the judge erred in his or her reasoning. "If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329.)

There are other reasons to request a statement of decision. Occasionally, a judge makes findings that actually defeat the judgment. (E.g., *Fogarty v. Saathoff* (1982) 128 Cal.App.3d 780.) Although it doesn't happen often, a judge may make findings unsupported by evidence or reasonable inferences. If the judge misapplied the law to the findings, the statement of decision will show the appellate court how he or she erred. The statement of decision may also be inadequate in failing to explain the factual and legal basis for the judgment. (See *Miramar Hotel Corp.*, 163 Cal.App.3d 1126, 1129 (three conclusionary sentences).) The court may fail to issue a statement of decision altogether, which is reversible error. (*Id.*; *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 127.)

Obtaining a statement of decision

How does one obtain a statement of decision? Code of Civil Procedure section 632 and Cal. Rule of Court. rule 3.1590 set out the procedures. Too often, however, attorneys fail to follow them. That can be fatal to an appeal. Non-compliance with the statute or rule generally waives the right to a statement of decision. So, the appellate court will imply any finding supported by substantial evidence necessary to sustain the judgment. (*Shaw*, 170 Cal.App.4th at 267; *Ditto*, 206 Cal.App.3d at 649.)

Avoid failing to obtain a statement of decision

• ***When a statement of decision is available***

A statement of decision is available only after a trial on disputed facts. (Code Civ. Proc. § 632.) There's no right to a statement of decision on determination of a motion, even if it involves an evidentiary hearing and results in an appealable order. (*Gruendl v. Owewl Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660; but see *People v. Landlords Professional Services* (1985) 178 Cal.App.3d 1019, 1026 (statement of decision not required for order on motion for preliminary injunction).)

Even when a statute requires the court to state the reasons for its ruling on a motion, a statement of decision is ordinarily not required. For instance, Family Code section 3011 requires the court on the request of a party to "state . . . the reasons" for granting or denying joint child custody. That does not require the court to issue a formal statement of

decision, only to explain why the court is granting the order. (*In re Marriage of Buser* (1987) 190 Cal.App.3d 639, 642-643; but see Fam. Code, § 3654 (statement of decision required at party's request when court grants motion to modify, terminate or set aside support).)

•The tentative decision

After trial, the judge first issues a tentative decision. (Rule 3.1590(a).) It may be oral in open court or written. (*Ibid*.) Unless the parties stipulate otherwise, the tentative decision "does not constitute a judgment and is not binding on the court." (*Id*., subs. (b).) Thus, a tentative decision cannot support a judgment. (*Armstrong v. Picquelle* (1994) 157 Cal.App.3d 122, 127-128 (trial judge rendered tentative decision, then retired; judgment entered by presiding judge on tentative decision invalid).)

Since the tentative decision is not binding, the judge can change it as he or she deems necessary. (*Miramar Hotel Corp. v. Frank B. Hall & Co*. (1985) 163 Cal.App.3d 1126, 1129.) Indeed, the trial judge is free to reverse the tentative decision altogether and enter a wholly different judgment. (*Canal-Randolph Anaheim, Inc. v. Willkoski* (1978) 78 Cal.App.3d 477, 494.)

On appeal, the tentative decision may not be used to impeach the final statement of decision or judgment. (*In re: Marriage of Ditto*, 206 Cal.App.3d at 646.) Nor may it be used to fill gaps in the findings. (*Id*. at 647.)

Unfortunately, judges often seem to think that their tentative decisions are anything but. The author has seen tentative decisions entitled, among other things, "Statement of Decision," "Final Decision After Trial," even "Judgment." But, however the judge labels it, absent agreement of the parties otherwise, the initial decision is tentative. (See, *In re Marriage of Hafferkamp*, 61 Cal.App.4th 789, 791 ("Decision" after trial was only tentative).)

•Requesting the statement of decision: time to request

Rule 3.1590 prescribes the steps to obtain a statement of decision and the times in which each step is to be taken. The court, however, may extend any time for good cause on terms the court deems just. (Rule 3.1590(m).)

The first step is to request a statement of decision, and failure to make a timely request waives the right to one. (Code Civ. Proc., § 632; *University of San Francisco Faculty Assn. v. University of San Francisco* (1983) 142 Cal.App.3d 942, 946.)

The court, however, may eliminate the need for a request by providing in the intended decision that:

a. the intended decision is the proposed statement of decision subject to a party's objection;
b. the court will prepare a statement of decision;
c. designated party is to prepare a statement of decision.

(Rule 3.1590(c).)

If the intended decision does not include one of those provisions, then a statement of decision must be requested and failure to make a timely request waives the right to a statement of decision. (Code Civ. Proc., § 632; *University of San Francisco Faculty Assn. v. University of San Francisco* (1983) 142 Cal.App.3d 942, 946.)

If the trial is eight hours or less, the request must be made *prior to the submission of the matter for decision*. (§ 632; rule 3.1590(n).) If the trial takes more than eight hours and the court announces its tentative decision orally with all parties present, the request must be made within 10 days after. If the tentative decision is written, the request may be made within 10 days after service. (Rule 3.1590(d). If service is by mail, the time is extended under Code of Civil Procedure sections 1013(a).) (*Injectronics, Inc., v. Commodore Bus. Machines, Inc*. (1979) 100 Cal.App.3d 185, 187.)

Presumably, fax service would also extend the time under section 1013(e), as would electronic service under sections 1013(g) and 1010.6 (a)(4).

• Requesting the statement of decision: content of request

A common error in requests for statements of decision is that they are too general or too specific. In either case, the request will be ignored. A general request, such as "[Party] requests a statement of decision," is inadequate. (*City of Coachella v. Riverside County Airport Land Use Com*. (1989) 210 Cal.App.3d 1277, 1293.) But a request that is too specific, asking for detailed *evidentiary* findings – e.g., what evidence the court relied on, why it believed or didn't believe one witness or another, and so forth – is considered an "inquisition" of the trial judge and invalid. (*People v. Casa Blanca Convalescent Homes, Inc*. (1984) 159 Cal.App.3d 509, 524.)

A proper request for statement asks the court "to address the principal controverted issues," which "must be specified in the request." (Rule 3.1590(d); see also Code Civ.Proc., § 632.) The "principal" issues are the ultimate facts and legal rules on which the court rests its decision, "those on which the outcome of the case turns." (*Vukovich v. Radulovich* (1991) 235 Cal.App.3d 285, 295.)

A proper request is similar to a special verdict. A party may request that the court, for example, state whether the defendant was negligent; whether that negligence was a legal cause of the plaintiff's injuries; whether the fault of plaintiff or others also contributed to plaintiff's injuries and, if so, the percentage fault of each.

With respect to damages, the request can ask the court to state the amount awarded for each element, but cannot require the court to state how it calculated the amounts. (*Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 167-168.)

Note, however, that in family cases where support is ordered, greater detail is required regarding the marital standard of living and the basis for the award. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 49.)

If your judge entitled his or her tentative decision something other than "Tentative Decision" – for example, "Final Decision"– your request should courteously point out the error. The author has seen more than one request for

statement of decision that begins, for instance, "On [date] the Court issued a document entitled 'Final Ruling After Trial.' Pursuant to California Rules of Court, rules 3.1590(a) and (b), the ruling is a tentative decision and not binding. Accordingly, [party] requests a statement of decision pursuant to Code of Civil Procedure section 632 and rule 3.1590(d) as follows:"

• ***Proposals as to content.*** When a party requests a statement of decision, any other party may "make proposals as to the content of the statement of decision within 10 days after the date of request." (Rule 3.1590(e).) Again, since Code of Civil Procedure section 1013(a) applies to times provided in the rule, service of the request by mail extends the time to make proposals five days. (*Injectronics, Inc*., 100 Cal.App.3d at 187.)

• ***Proposed statement of decision.*** Unless the tentative decision includes one of the orders provided under rule 3.1590(c) (see item 3 above), the court must either prepare a proposed statement of decision itself or designate a party to prepare it. In either case, the proposed statement of decision must be filed and served within 30 days of the announcement or service of the tentative decision.

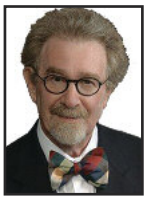
• ***Objections to proposed statement of decision and judgment.*** Within 15 days after service of the proposed statement of decision and judgment, any party may serve and file objections. (Rule 3.1590(g).) This is an important right, critical to preserving defects in the statement of decision as an issue for appeal. Failure to object waives the issue. (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380, review denied. The objections must be specific. *Bay World Trading, Ltd. v. Nebraska Beef, Inc*. (2002) 101 Cal.App.4th 135, 140.)

NOTE: If the statement of decision fails to address particular issues specified in the request, or is ambiguous or unclear as to any issues, *the omission or ambiguity must be brought to the trial court's attention* either prior to the entry of judgment or by motion for new trial or to vacate the judgment. (Code Civ. Proc., § 634.) If the omission or ambiguity is not timely brought to the trial court's attention, the right to a statement of decision on those issues is waived and the appellate court will imply findings on those issues in favor of the judgment. (*Arceneaux*, 51 Cal.3d at 1133-1134; *Fladeboe v. American Isuzu Motors Inc*. (2007) 150 Cal.App.4th 42, 59-60.) If the omission or ambiguity is brought to the court's attention and the court fails to cure it, the appellate court will not imply findings that support the judgment as to those issues. (Code Civ. Proc., § 634.)

• ***That may not be the end***

Once the court has rendered the statement of decision, does that complete the process? Maybe not.

A statement of decision is not final and binding until the judgment is entered. (*Bay World Trading*, 101 Cal.App.4th at 141.) The court may amend or change its findings or legal conclusions at any time before entry of judgment, and even enter a judgment different from the one first announced. (*Ibid*.) So, if the court has not yet entered judgment, a party may again object that the statement of decision fails to address an issue or is ambiguous and afford the court the opportunity to modify the statement of decision accordingly. (*Ibid*.)


Eisen

Jay-Allen Eisen is listed in The Best Lawyers in America and Northern California Super Lawyers. He has received the highest rating, AV, from the Martindale-Hubbell Directory *and is listed in the* Bar Registry of Preeminent Lawyers. *He is a Fellow of the American Academy of Appellate Lawyers and a Past President of the California Academy of Appellate Lawyers.*

Eisen is a Certified Appellate Law Specialist, certified by the State Bar of California, Board of Legal Specialization. He has been counsel in more than 400 appeals and appellate writs, over 130 of which have resulted in published, precedent decisions.