LITIGATION

CALIFORNIA LAWYERS ASSOCIATION

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2024 Litigation and Appellate Summit

Navigating the Complex Statement of Decision Process and Effective Use of Post-Trial Motions to Enhance Your Client's Appellate Rights

Friday, April 26, 2024
2:00pm - 3:00pm

Speakers: Hon. Trent Lewis (Ret.), Claudia Ribet, and Kelly Woodruff

Conference Reference Materials

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Navigating the Complex Statement of Decision Process and Effective Use of Post-Trial Motions

2024 Litigation & Appellate Summit
April 26, 2024

Presented by:

Honorable Thomas Trent Lewis (retired), Signature Resolution
Claudia Ribet, Complex Appellate Litigation Group
Kelly Woodruff, Complex Appellate Litigation Group

Statements of Decision

- A statement of decision A statement of decision is the trial court's "factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.)

Statements of Decision

- A SOD serves to pinpoint flaws in the trial court's tentative decision and is "essential to effective appellate review."
  - (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970.)

Doctrine of Implied Findings

- 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; *Lincoln v. Lopez* (2022) 77 Cal.App.5th 922, 928.)

What Must the Statement of Decision Contain?

- A detailed discussion of evidentiary facts is not required. (*In re Marriage of Drapeau* (2001) 93 Cal.App.4th 1086, 1098-1099.)
- The court need only make findings on "ultimate" facts – those facts that are relevant and essential to the Judgment. (*Lynch v. Cook* (1983) 148 Cal.App.3d 1072, 1080.)
- So long as the Statement of Decision disposes of all basic, material issues in the case, it is sufficient. (*Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118.)

When are you entitled to a Statement of Decision?

- A statement of decision is available in non-jury proceedings where *a question of fact* is being determined. (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278.)
- Generally not for motions, even if evidentiary hearing held (*Lien v. Lucky United Props. Investment, Inc.* (2008) 163 Cal.App.4th 620, 623-624)

When are you entitled to a Statement of Decision?

- **But** may be required on a motion or other "specialized proceeding" depending on a balancing of the following factors:

  (1) the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse effect on those rights; and

  (2) whether appellate review can be effectively accomplished even in the absence of express findings.

(*Gruendl v. Owewl Partnership, Inc*. (1997) 55 Cal.App.4th 654, 660.)

Examples

- Bifurcated issue tried to the court (California Rules of Court, rule 3.1591; *Padideh v. Moradi* (2023) 89 Cal.App.5th 418)
- Equitable claims tried in a bench trial (*Anderson v. County of Santa Barbara* (2023) 94 Cal.App.5th 554)
- Child custody determination (FC § 3022.3; *In re Rose G.* (1976) 57 Cal.App.3d 406, 418)

Statement of Decision: the Kafka-esque procedure

- Tentative decision (CRC Rule 3.1590(a))
- Any party "appearing at the trial" may request (CCP § 632, CRC Rule 3.1590(d), (n))
- *Proposed* statement of decision proposed statement of decision. (CCP § 632; CRC Rule 3.1590(f))
- Objections served within 15 days (CCP § 634; CRC Rule 3.1590(g))
- Final SOD and judgment

No Statement of Decision: reversible error?

- Failure to prepare SOD when timely requested = reversible error
  - *Social Serve Union, Local 535 v. County of Monterey* (1989) 208 Cal.App.3d 676, 681
- ***However***, no longer reversible per se but subject to harmless error review.
  - *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108
- ***Except*** in child custody matter → reversible per se
  - *City and County of San Francisco v. H.H.* (2022) 76 Cal.App.5th 531

Post-Trial Motions

- You can also avoid the doctrine of implied findings by bringing an omission or ambiguity in the court's statement of decision to the trial court's attention in a motion under CCP 657 or 663.

  (Code Civ. Proc., § 634.)

Post-Trial Motions

1. Motion for New Trial (CCP § 657)

2. Motion to Vacate (JNOV) (CCP § 663)

New Trial Motion

- Code of Civil Procedure § 657

1) Irregularity in proceedings
2) Misconduct of jury
3) Accident or surprise
4) Newly discovered *material evidence*
5) Excessive or inadequate damages
6) Insufficiency of evidence or decision is “against law”
7) Error in law

Motion to Vacate

- Code of Civil Procedure § 663
  - Incorrect or erroneous legal basis for decision,
  - Inconsistent with or not supported by the facts,
  - That “materially affect[ed] the substantial rights of the party,”
  - And entitled the party to a different judgment

Post-Trial Motion Procedure

- Notice of *intent* to move
- Motion and MP&A
- Hearing optional
- Court order (failure to rule = denial)

THE END

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I. Overview of Program

We are covering two broad topics that are important for every trial lawyer to understand and how they can impact an appeal from a trial court judgment.

First, we're going to discuss the Statement of Decision process for bench trials in California courts. As anyone who has ever dealt with the rules governing Statements of Decision knows, the process is exacting and the rules are confusing and in some ways contradictory. We'll walk you through it.

Second, we're going to discuss the strategic use of post-trial motions. Post-trial motions can be effective tools to get a correct judgment in the first place in the trial court. But it is also essential that trial lawyers have at least a generalized understanding of how they are used to preserve issues on appeal.

II. Statements of Decision

A statement of decision is the trial court's "factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.) A statement of decision is to a bench trial what a verdict is to a jury trial. If there is any chance that one side will appeal, it is essential that you get one.

The purpose of the statement of decision process is to bring errors to the trial court's attention *before* judgment is entered so the errors can be corrected, and to provide a road map of the trial court's reasoning for the appellate courts on appeal.

A. Why do you need a statement of decision?

A statement of decision serves to pinpoint flaws in the trial court's tentative decision and is "essential to effective appellate review." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970.) This quote is often cited in appellate briefs.

- Doctrine of Implied Findings
  - 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; *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643.)
  - **"**Where [the] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*Lincoln v. Lopez* (2022) 77 Cal.App.5th 922, 928.)

B. What must the statement of decision contain?

- The court is not required to make express findings of fact on every controverted factual issue in the case. So long as the Statement of Decision disposes of all basic, material issues in the case, it is sufficient. (*Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118; *McAdams v. McElroy* (1976) 62 Cal.App.3d 985, 995.)
- The court need only provide an explanation of the factual and legal basis for its decision on the

principal, material controverted issues for which findings are requested. (*Akins v. State of California* (1998) 61 Cal.App.4th 1; *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224.)

- That is, the court need only make findings on "ultimate" facts – those facts that are relevant and essential to the Judgment, and which are closely and directly related to court's determination of the ultimate issues in case. (*Lynch v. Cook* (1983) 148 Cal.App.3d 1072, 1080; *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 599; *Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d 555, 565.)

- A detailed discussion of evidentiary facts is not required. (*In re Marriage of Drapeau* (2001) 93 Cal.App.4th 1086, 1098-1099.) However, the court's findings may not be so "ultimate" that they are simply legal conclusions, and must "be set forth with a degree of specificity which fairly discloses the court's determination on all issues of fact material to the judgment." (*Guardianship of Brown* (1976) 16 Cal.3d 326, 332-333; *Employers Cas. Co. v. Northwestern Nat'l Ins. Group* (1980) 109 Cal.App.3d 462, 473.)

C. When are you entitled to a statement of decision?

- A statement of decision is available in non-jury proceedings where *a question of fact* is being determined.

- Obviously in a bench trial with a final judgment, that would require a statement of decision if one is

requested. (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278.)

- You are not entitled to a statement of decision every time the court hears a motion, *even* if there is an evidentiary hearing. (*Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620, 523-624.)

    - For example, a motion for summary judgment or summary adjudication.

    - Or a motion in limine to exclude expert testimony that has a multi-day evidentiary hearing.

    - However, it ***never*** hurts to ask for a statement of decision; no court would ever be reversed for issuing a statement of decision when one is not required. Ask yourself, however, as a strategy matter, if you want the statement of decision if you've won the matter.

- Although you are not necessarily entitled to a statement of decision for a ruling on a motion, a statement of decision ***may be required*** on a motion or other "specialized proceeding" depending on a balancing of the following factors: (1) the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse effect on those rights; and (2) whether appellate review can be effectively accomplished even in the absence of express findings. (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660.)

- Some examples of when you are entitled to one:
    - Ruling on a bifurcated issue tried to the court, such as existence of probable cause in a malicious prosecution action (California Rules of Court, rule 3.1591; *Padideh v. Moradi* (2023) 89 Cal.App.5th 418.)
    - Equitable claims tried in a bench trial, such as restraining orders, injunctive relief, or declaratory relief (*Anderson v. County of Santa Barbara* (2023) 94 Cal.App.5th 554.)
    - A child custody determination (FC § 3022.3; *In re Rose G.* (1976) 57 Cal.App.3d 406, 418; *In re Marriage of Benjamin S.* (1985) 171 Cal.App.3d 738, 747.)
    - A trial court's ruling on a capital habeas corpus petition (Pen. Code, § 1509; *In re Seumanu* (Cal. Ct. App., Mar. 11, 2024, No. A169146) 2024 WL 1047743, at *3, as modified (Mar. 27, 2024).)

D. How do you do it right and get trial judges to do it right?

The statement of decision process really is Kafka-esque. Without fault, attorneys and judges often skip steps, and it's no wonder because the rules themselves are far from clear. But, the way it's ***supposed*** to work is as follows:

Court must announce a tentative decision on a trial of fact. (CRC Rule 3.1590(a).)

- Tentative decisions should not be confused with statements of decision. This is where the confusion sets in, for both courts and litigants!

- Theoretically, the tentative decision could be as simple as: I'm awarding physical custody to mom and joint legal custody to both parties.
    - However, courts generally provide their findings and conclusions in the tentative decision.

- The rule doesn't say *when* this must happen, but it must be in open court on the record or in a written statement filed and given to the parties.

- The tentative decision can say that it is the proposed statement of decision, subject to a party's objections. (CRC 3.1590(c)(1).)

    - ***However***, this deprives the parties of the opportunity to specify additional controverted issues to be resolved in the statement of decision.

- The court can state that its tentative decision will become the proposed statement of decision unless, within 10 days, a party specifies additional controverted issues to include or makes additional proposed findings. (CRC 3.1590(c)(4).)

1) **The party "appearing at the trial" who wants a statement of decision must request it. (CCP § 632, CRC Rule 3.1590(d), (n).)**

- A request for a statement of decision (or additional findings) should be in writing and ***must*** be specific. It is not enough to simply state you want a statement of decision; you must identify the principal controverted issues. (Code Civ. Proc., § 632.)

- *BEWARE strict timelines:*

    - For trials in one day *or in 8 hours or less over multiple days,* one must request before submission of the matter.

    - Within 10 days after announcement of the tentative decision for trials greater than one day or 8 hours.

    - If one side requests a statement of decision, the other party has 10 days to identify additional issues to be resolved.

2) **Court must prepare and serve a proposed statement of decision and proposed judgment. (CCP § 632; CRC Rule 3.1590(f).)**

- The court must "prepare and serve" a proposed statement of decision and a proposed judgment within 30 days of announcement or service of the tentative decision.

    - This rule doesn't take into account that a party is allowed 10 days to request a statement of decision or specify additional findings, ***and*** the other side is given 10 days after that to make additional proposals for the statement of decision – leaving the court only 10 days to prepare the proposed SOD.

    - ***Note*** the rule does not say the proposed SOD needs to be filed; but courts often do file them.

- The court can (and very often does) ask a party to prepare the proposed statement of decision.

- If the court stated that its tentative decision is the proposed statement of decision unless a party requests additional findings, and no party makes such a request, then the tentative ruling becomes the *proposed* statement of decision.

3) **Any party may submit objections within 15 days after service of the proposed statement of decision and/or judgment. (CCP § 634; CRC Rule 3.1590(g).)**

- The failure to timely file proper objections to the proposed statement of decision can result in waiver on appeal of issues relating to the sufficiency of the statement of decision and gives rise to the doctrine of implied findings.

- The objections should be limited to pointing out *omissions* and *ambiguities* in the court's *factual* findings on ultimate facts (i.e. those facts necessary to the court's decision on the issue).

- Do not reargue the law or even reargue the factual findings; that is for appeal or post-trial motions.

- Objections to incorrect findings are necessary! (See *Destiny and Justin C.* (2003) 87 Cal.App.5th 763 [having failed to object to the finding in the statement of decision that there was no domestic violence within five years of the custody order, Mother could not complain the trial court "overlooked" certain testimony].)

4) **Trial court issues its final SOD and judgment.**

- The court must sign and file the judgment and final statement of decision "within 50 days after the announcement or service of the tentative decision," or, if a hearing is held on objections, within 10 days of the hearing.

    - This is obviously so cases don't languish, but again, the 50 days does not take into account the 10 days for requesting a SOD, 10 more days for other side to make proposals, 10 more days for the proposed SOD, 15 more days for objections (that's 45 days total), leaving the court only 5 days to resolve all objections and revise and issue its final SOD.

    - The rules do not provide for responses to the other side's objections, but courts will often allow that as well.

5) **Possible further objections**

- It is possible that the final SOD resolves some but not all of your objections, or contains new ambiguities or omissions.

- In that case, you should consider raising those objections in conjunction with a motion for new trial. (Code Civ. Proc., § 634.)

E. What if the court doesn't issue a statement of decision?

- A long line of cases held that "[w]here counsel makes a timely request for a statement of decision upon the trial of a question of fact by the court, that court's failure to prepare such a statement is reversible error." (*Social Serve Union, Local 535 v. County of Monterey* (1989) 208 Cal.App.3d 676, 681.)

- ***However***, the Supreme Court has held that "a trial court's error in failing to issue a requested statement of decision is not reversible per se, but is subject to harmless error review." (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108.)
  - This means that you will not be able to get a reversal on appeal without demonstrating ***both*** that you were entitled to a statement of decision ***and*** "prejudice occasioned by the error," meaning prejudice from the denial of the statement of decision. (*TriCoast Builders, Inc. v. Fonnegra* (2024) 15 Cal.5th 766.)

- *How does one show the error is not harmless?* *Monier* instructs that the more issues specified in a request for a statement of decision and left unaddressed by a court's failure to issue one, the "more difficult, as a practical matter, [it may be] to establish harmlessness." (*People v. Mil* (2012) 53 Cal.4th 400, 412 [adopting prejudice test and rejecting per se reversal for instructions that omit multiple elements of a criminal offense].) The one exception is the failure to issue a statement of decision in a child custody matter is always

prejudicial and reversible. (*City and County of San Francisco v. H.H.* (2022) 76 Cal.App.5th 531.)

III. Post-trial motions

You can also avoid the doctrine of implied findings by bringing an omission or ambiguity in the court's statement of decision to the trial court's attention in a motion under CCP § 657 or § 663. (Code Civ. Proc., § 634.)

Post-trial motions can also be useful to actually correct an error or to clarify your record or your argument on appeal.

In other words, don't assume your trial judge won't change her mind or correct an erroneous order. If it seems she missed some important evidence or made a mistake of law, then point it out.

- The best strategy for appeal is to win in the trial court!

There are basically two general types of post-trial motions: a motion for a new trial, and a motion for judgment (also sometimes called a JNOV).

A. New trial motion

- CCP § 657 provides that a court's decision (even in a bench trial) "may be vacated and any other decision may be modified or vacated, in whole or in part, and a *new or further trial* granted on all or part of the issues…"

- Permits court to reexamine an issue of law or fact, reweigh evidence, assess or reassess credibility and find new or different facts.

- **There are 7 grounds for NTM:**

  1) Irregularity in the proceedings of the court … or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

     - For example, if your client wasn't permitted to testify, or relevant witnesses excluded
     - This ground requires declarations.
     - You could cite Family Code § 217 and *Elkins* and tell the court what the testimony would have been.
     - Then, even if the court denies the motion, you have that offer of proof in the record.

  2) Misconduct of the jury [not a factor in a bench trial, obviously];

  3) Accident or surprise, which ordinary prudence could not have guarded against;

  4) Newly discovered *material* evidence, which could not, with reasonable diligence, have been discovered and produced at the trial;

     - This is very narrow – it must be *both* new, material evidence *and* there must be a reason it couldn't have been discovered earlier.
     - Requires declarations.
     - With the deadlines applicable to new trial motions, this would be a tough ground to assert.

5) Excessive or inadequate damages;

- Must be raised in NTM or it's forfeited on appeal.

6) Insufficiency of the evidence or the decision is "against law";

- This ground would probably only be asserted in connection with another ground – this is essentially an appellate argument.

7) Error in law, occurring at the trial and excepted to by the party making the application;

- Also an appellate argument, but worth making if you think you can convince the court of the error!

- **New factual matters** can be introduced for new trial motions based on the first four grounds of CCP § 657(1)-(4); but new trial motions based on the remaining three grounds, CCP § 657(5)-(7), must be based solely on the trial record, with no additional evidence. (*Wall Street Network, Ltd. v. New York Times Company* (2008) 164 Cal.App.4th 1171, 1192.)

- **CCP section 662. Powers of court in case tried without jury**

  - In a bench trial, a court may be inclined to summarily reject a new trial motion, having just concluded the trial and issued its decision.

  - However, in ruling on a NTM after a bench trial, "the court may, on such terms as may be just, ***change or add to the statement of***

decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may ***vacate and set aside the statement of decision*** and judgment and reopen the case for further proceedings and the introduction of additional evidence ….” (Code Civ. Proc., § 662.)

B. Motion to vacate

- CCP § 663 allows the court to vacate the order and enter a new and different judgment or order (as opposed to getting a new or further trial).
- Grounds to JNOV
    - there was an “incorrect or erroneous legal basis for the decision,
    - not consistent with or not supported by the facts,”
    - that “materially affect[ed] the substantial rights of the party”; and
    - entitled the party to a different judgment.
- It’s not entirely clear what the difference between this and the last two grounds of a new trial motion is, so if this is the issue, you might want to make both.

C. Procedure for new trial motions and motion to vacate

We don’t have time to go into detail on the procedures for making a new trial motion or motion to vacate.

But at a high level, it's a two-step process for the movant, although the steps can be combined.

1) Notice

First, within 15 days of service of the judgment by the clerk or service of notice of entry of judgment by a party, you must file a notice of intent to move for new trial or to set aside and vacate.

- It's a jurisdictional deadline!
    - ***Note:*** the time is not extended for service by mail; it starts to run from the date the judgment is mailed.
    - *If you are the prevailing party, serve the notice of entry of order right away to start the clock running.*
    - If the clerk doesn't serve the judgment and no party serves a notice of entry, the deadline is 180 days (i.e. six months!).
- Must identify grounds within the motion. (*Fong Chuck v. Chin Po Foon* (1947) 29 Cal.2d 552, 553-554.)

2) MP&A

- Within 10 days of the notice of intent
- Can include affidavits in a new trial motion!
    - And *must* include for some grounds

3) Court order

- No hearing required, but allowed
- Court must rule within 75 days of service of the judgment (by clerk or party) or w/in 75 days of notice of intent to move if judgment not served.
    - Failure to rule by then = deemed denial.

D. Appeal

Under CRC 8.108, a new trial motion or a motion to vacate extends the deadline for filing notice of appeal, as does a "valid" motion for reconsideration under CCP 1008.

Hon. T. Trent Lewis

Judge Lewis is a member of Signature Resolution providing mediation, arbitration, and privately compensated judge pro tem services. From 2016 to 2019, he served as the Supervising Judge for the Los Angeles County Family Law Division overseeing the operations of over 70 family law departments in the county. Judge Lewis was also active in judicial teaching through the CJER program. Judge Lewis was appointed by the Chief Justice of California as a judicial liaison on matters involving child abduction and relocation.

Until 2023, he served as contributing author of The Rutter Group's California Practice Guide: Family Law and serves as Program Director for CFLR for the update program, the advanced family law program, the basic training program, the evidence programs, and the expert series programs.

Claudia Ribet

Claudia Ribet is one of only about six lawyers certified by the California State Bar as both a family law and an appellate specialist. She is a Fellow of both the American Association of Marital Lawyers and the International Association of Family Lawyers. Claudia is an appellate lawyer with the Complex Appellate Litigation Group and spends the great bulk of her time on appellate matters. She often assists law firms at statement of decision or pre-appellate stage of their cases and has taught at numerous appellate law seminars. (Claudia.Ribet@calg.com)

Kelly Woodruff

Kelly is certified by the State Bar as an appellate law specialist and has more than 30 years of experience handling significant appeals and writs in state and federal appellate courts and consulting with trial lawyers to best prepare a case for eventual appeal. She regularly presents on appellate law and procedure. Kelly is a member of the Complex Appellate Litigation Group, is the immediate past Chair of the CLA Litigation Section's Committee on Appellate Courts, on the Executive Committee of the CLA Litigation Section and the Bar Association of San Francisco's Appellate Law Section, and is the President Elect of the U.C. Law San Francisco Board of Governors. (Kelly.Woodruff@calg.com)