REPORT OF THE SUBCOMMITTEE ON
Texas Rules of Civil Procedure 300-330[1]

The Subcommittee was asked to consider issues relating to the finality of judgments, motions for new trial, and extensions of plenary power and the appellate timetable. This report discusses these issues and the Subcommittee's recommendations for amendments to the appropriate rules in the Recodification Draft.

[1]Chair: Sarah B. Duncan. Members: John Cayce, Ralph Duggins, Wendell Hall, Mike Hatchell, and Steven Tipps. Frank Gilstrap joined the Subcommittee after its work was concluded; thus, his views may not be reflected in the Subcommittee's recommendations.

Final Judgments

a. Issue–Many lawyers are not familiar with the finality rules established by case law, even in the context of a conventional trial on the merits. *See, e.g., North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex.1966). But the finality problem is particularly acute in the summary judgment context. *See, e.g., Bandera Elec. Co-op., Inc. v. Gilchrist*, 946 S.W.2d 336 (Tex. 1997); *Inglish v. Union State Bank*, 945 S.W.2d 810 (Tex. 1997); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508 (Tex. 1995); *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311 (Tex. 1994); *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993). The issue continues to plague the courts of appeals and the supreme court. *See, e.g., Lehmann, et al. v. Har-Con Corp.*, 988 S.W.2d 415 (Tex. App.–Houston [14th Dist.] 1999, pet. granted); *Harris v. Harbour Title Co.*, No. 14-99-00034-CV, 1999 WL 211859 (Tex. App.–Houston [14th Dist.] April 8, 1999, pet. granted) (not designated for publication).

b. Subcommittee Recommendation–In light of the disarray in the case law, the Subcommittee recommends an amendment to Rule 100(b) of the Recodification Draft to prescribe when a judgment is final and appealable. Although the Subcommittee considered defining when a judgment is final, it rejected this approach because the contexts in which the issue arises are too varied and complex. Ultimately, the Subcommittee decided the best approach to the problem was a "final judgment clause" similar to that proposed by Douglas K. Norman, the chief staff attorney at the Thirteenth Court of Appeals.

Rule 100. Judgments, Decrees and Orders

Final Judgment.

Final Judgment Clause. An order or judgment is final for purposes of appeal if and only if it contains the following language: This is a final, appealable order or judgment. Unless expressly granted by signed order, any relief sought in this cause by any party or claimant is denied.

If this final judgment clause is to be included, it should be set apart as a separate paragraph at the end of the judgment or order immediately before the date and signature of the trial judge. However, a final judgment clause placed elsewhere in a judgment or order is nonetheless valid.

Separate Orders, Conflicts. A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order. If any provision of an earlier order incorporated by reference conflicts with the final judgment, the final judgment controls.

2. Reasons for Granting a New Trial

a. Issue–Rule 320 permits a trial court to grant a new trial for good cause. TEX. R. CIV. P. 320. For all practical purposes, such an order is unreviewable. *See In re Bayerische Motoren Werke,* 8 S.W.3d 326 (Tex. 2000) (Hecht, J., joined by Owen, J., dissenting from denial of motion for rehearing of petition for mandamus). The Court Rules Committee has proposed requiring the trial court to state good cause for granting a new trial and subjecting the court's order to review by mandamus. *See* July 8, 1999 Letter From O.C. Hamilton to Chief Justice Phillips. The SCAC has also proposed, in Rule 102 of the Recodification Draft, listing situations in which a trial court may grant a new trial.

b. Recommendation–The Subcommittee recommends implementing the Court Rules Committee's recommendation to require a trial court to give reasons for granting a new trial. Whether to review such an order by mandamus would then be possible but within the courts' discretion. However, the Subcommittee also believes the reasons for granting a new trial are too numerous and varied to be codified.

Rule 102. Motions for New Trial

Grounds. For good cause, a new trial, or partial new trial under paragraph (f), may be granted and a judgment may be set aside on motion of a party or on the judge's own motion~~, in the following instances, among others.~~.

[delete (a)(1)-11)]

Order. If a court grants a new trial, in whole or in part, it must state in the order granting the new trial or otherwise on the record the reasons for its finding that good cause exists.

3. TRCP 306a/Procedure

a. Issue–Rule 306a permits a litigant who has not been given notice or acquired actual knowledge of the signing of a judgment to restart the appellate timetable in certain circumstances. *See* TEX. R. CIV. P. 306a; TEX. R. APP. P. 4.2(d). However, as pointed out by Pam Baron in her amicus letter in *Grondona v. State*, "Rule 306a is functioning as one big 'Gotcha!'" The courts of appeals differ on when a Rule 306a motion must be filed; the effect of an unverified, untimely, or incomplete motion; the date the movant must establish; and the date by which the trial court must rule on the motion.

b. Recommendation–The Subcommittee discussed these issues at length and agreed upon the following:

(1) **Time Limit**–The rule should not require that a Rule 306a motion be filed within a set period of time after learning of the judgment or order. There may be instances in which a party will not know it needs to do so. Consider, for example, the plaintiffs in *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267 (Tex. 1996) (per curiam), who received notice of the June 16 judgment, but the notice erroneously stated the judgment had been signed on June 19. *Id.* at 267. The plaintiffs did not learn of the error until the Austin Court of Appeals notified them their motion for new trial was untimely. *Stokes v. Aberdeen Ins. Co.*, 918 S.W.2d 528, 529 (Tex. App.–Austin 1995), *rev'd*, *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267 (Tex. 1996) (per curiam).

(2) **Verification**–The seriousness of substituting a new judgment date should dictate that a Rule 306a motion be verified. However, the lack of a verification should require a prompt objection.

(3) **Amendments**–The trial court should have discretion to permit amendments at any time before the motion is determined.

(4) **Date**–The movant should be required to establish the dates required by the current rule.

(5) **Deadline for Ruling**–There should be a deadline for ruling on the motion.

(6) **Procedure in the Appellate Court**–The Subcommittee discussed adding a paragraph regarding the procedure to be followed in the appellate court if it appears an initial or additional Rule 306a proceeding is needed. But, upon reflection, there appear to be too many "ifs" to draft the paragraph. However, the Subcommittee does recommend an addition to TRAP 4.5 (modeled

after TRAP 24.3) to clarify the trial court's continuing jurisdiction to entertain Rule 306a proceedings.

Rule 104. Timetables

Effective Dates and Beginning of Periods

(3) Notice of Judgment. When ~~the~~ a final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the date upon which the judgement or order was signed ~~signing~~ to each party or the party's attorney by first-class mail. Failure to comply with this rule shall not affect the periods mentioned in paragraph (e)(1), except under paragraph (e)(4).

(4) No change.

(5) Procedure to Gain Additional Time. ~~To establish the application of paragraph (e)(4), the party adversely affected must file a motion in the trial court stating the date on which the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and that this date was more than twenty days after the final judgment or appealable order was signed. The trial judge shall promptly set the motion for hearing, and after conducting a hearing on the motion, shall find the date the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and include this finding in a written order.~~

(a) Requisites of Motion. To establish the application of paragraph (e)(4), the party adversely affected must file a verified motion in the trial court setting forth:

(1) The date the judgment or appealable order was signed;

(2) That neither the party nor its attorney received the notice required by paragraph (e)(3) of this rule nor acquired actual knowledge of the judgment or order within twenty days after the date the judgment or appealable order was signed; and

(3) the date upon which either the party or its attorney first

(a) received the notice required by paragraph (e)(3) of this rule; or

(a) acquired actual knowledge that the judgment or appealable order had been signed.

If an unverified motion is filed and the respondent does not object to the lack of a verification at any time before the hearing on the motion commences, the absence of a verification is waived. If an objection is timely made, the court must afford the movant a reasonable opportunity to cure the defect. In all other respects, a motion that is filed pursuant to but not in compliance with this paragraph may be amended with permission of the court at any time before an order determining the motion is signed.

(b) **Time to File Motion, Amendments.** A motion seeking to establish the application of paragraph (e)(4) may be filed at any time.

(c) **Hearing.** Within ten days of the filing of its motion, the movant must request a hearing on its motion, and the court must hear the motion as soon as practicable. The court shall determine the motion on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

(d) **Order.** After hearing the motion, the court must sign a written order expressly finding:

(1) whether the movant or its attorney received the notice required by paragraph (e)(3) of this rule or acquired actual knowledge of the signing of the judgment or appealable order within twenty days after the date the judgment or appealable order was signed; and

(1) the date upon which the party or its attorney first either received the notice required by paragraph (e)(3) or acquired actual knowledge that the judgment or order was signed.

TRAP 4.2(d)

(d) *Continuing Trial Court Jurisdiction.* Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to hear and determine motions filed pursuant to Texas Rule of Civil Procedure 306.a.5.

5. Motions That Extend Plenary Power

a. Issue–In 1988, the supreme court held "that 'any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power' restarts the appellate timetable." *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308 (Tex. 2000) (quoting *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988)). More recently, however, the court held that "only a motion seeking a substantive change will extend the appellate deadlines and the court's plenary power under Rule 329(g)." *Lane Bank*, 10 S.W.3d at 313. Accordingly, a motion for sanctions will qualify as a Rule 329b(g) motion only "if it seeks a substantive change in an existing judgment." *Id.* at 314. Concurring in the judgment, Justice Hecht would have held "that under Rule 329b(g), a post-judgment motion requesting any relief that could be included in the judgment extends the trial court's plenary power over the judgment and the deadline for perfecting appeal." *Id.* at 314, 316 (Hecht, J., concurring).

b. Recommendation–The Subcommittee shares the concern that the *Lane Bank* construction of Rule 329b(g) may create a trap for the unwary. Accordingly, the Subcommittee recommends the rule be amended to clarify the types of motions that will extend the trial court's plenary power and the appellate timetable. The Subcommittee also recommends a parallel amendment to TRAP 26.1(a)(2).

Rule 105. Plenary Power of the Trial Court

I. **Duration.** Regardless of whether an appeal has been perfected, the trial court has plenary power to modify or vacate a judgment or grant a new trial:

1. within thirty days after the judgment is signed, or

1. if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment or any other motion that requests relief that could be included in the judgment, (iii) motion to reinstate a judgment after dismissal for want of prosecution, or (iv) request for findings of fact and conclusions of law, within on[e] hundred and five days after the judgment is signed.

TRAP 26.1(a)(2)

a motion to modify the judgment or any other motion that requests relief that could be included in the judgment;