

To: Texas Supreme Court Advisory Committee
From: William V. Dorsaneo, III
Date: June 3, 2009
Re: Proposed Civil Procedure Rule 301

Proposed Civil Procedure Rule 301 makes several significant modifications of current law. Under current law, unlike motions for new trial and motions to modify the trial court's judgment, motions for judgment nov and to disregard particular jury findings are not overruled by operation of law. Thus, the failure to obtain an express ruling waives the complaint made in the Rule 301 motion. Subdivisions (a) and (b) of the proposed rule provide that motions for judgment on the verdict and motions for judgment nov or to disregard particular jury findings are overruled by operation of law.

Proposed subdivision (c) clarifies and simplifies the relationship between prejudgment motions for judgment, motions for judgment nov or to disregard particular jury findings and postjudgment motions to modify a judgment. Proposed subdivision (c) specifically provides that motions to modify may be used to make the same requests for relief as the prejudgment motions which are not a prerequisite for filing postjudgment motions to modify the trial court's judgment. Thus, the proposed subdivision's treatment of the relationship between prejudgment and postjudgment motions is roughly analogous to the current relationship between prejudgment motions for mistrial and postjudgment motions for new trial.

Subdivision (c) also makes three significant changes in current law.

First, by using the term "in any respect" the proposed subdivision expands the scope of motions to modify. Although the procedural rules are silent on this issue, under current case law a motion to modify must seek a "substantive change in an existing judgment." *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 314 (Tex. 2000) (per Phillips, C.J.); *see also Hecht, J.*, concurring in the judgment but criticizing the majority opinion. Justice Hecht's opinion "would hold that any requested change, however slight, other than a merely clerical change expressly excluded from Rule 329b(g), extends the trial court's plenary power and the appellate timetable." 10 S.W.3d at 321. The proposed subdivision also eliminates the clerical change limitation currently contained within 329b(g) to avoid all arguments about whether the motion is sufficient to extend the trial court's plenary power and appellate timetables. Accordingly,

under proposed subdivision (c) it is not necessary to decide whether the requested change is “substantive” in some sense or a mere clerical change in order to extend trial and appellate timetables or to preserve complaints made in the motion.

Second, proposed subdivision (c)’s second unnumbered paragraph eliminates a technical requirement in current Rule 329b, which precludes a party from preserving a complaint in a postjudgment motion filed within 30 days after the final judgment is signed, if the party has filed a prior motion, which did not include the complaint, and the prior motion has been overruled by the trial court. In the case of *In re Brookshire Grocery Co.*, 250 S.W.3d 66 (Tex. 2008), a bare majority of the Court determined that under current Rule 329b (b) and (e) an amended motion for new trial filed after a preceding motion has been overruled is not timely, even if it is filed within thirty days after the judgment or other order is signed. The basis for this holding is the text of the current rules, which unnecessarily penalize litigants who do not include all assignments of error in an original postjudgment motion. Justice Hecht’s spirited dissent would have interpreted the text differently because “[t]ricky” procedural rules threaten substantive rights.

Third, by providing that a trial judge has discretion to rule on a tardy motion and that the ruling is subject to review on appeal, subdivision (c) is drafted to overrule *Moritz v. Preiss*, 121 S.W.3d 715 (Tex. 2003). In *Moritz*, the Court held that a tardy motion “is a nullity for purposes of preserving issues for appellate review.” Although the Court did acknowledge an earlier opinion (*Jackson v. Van Winkle*, 660 S.W.2d 807, 808 (Tex. 1983)) allowing appellate review of issues raised and ruled upon before expiration of the court’s plenary power, it concluded that “to give full effect to our procedural rules that limit the time to file new trial motions, today we hold that an untimely amended motion for new trial does not preserve issues for appellate review, even if the trial court considers and denies the untimely motion within its plenary power period.” “Thus, *Moritz* eliminated the ability of the trial judge to permit a party to preserve a complaint about the trial court’s judgment by ruling on the complaint, merely because the complaint should have been included in the party’s earlier motion. The subcommittee believes that if a trial judge considers a complaint while the court has plenary power over its judgment, the trial court’s ruling should be subject to review on appeal.