

To: Texas Supreme Court Advisory Committee  
From: William V. Dorsaneo, III  
Date: April 16, 2009  
Re: Proposed Civil Procedure Rule 301

Proposed Civil Procedure Rule 301 makes several significant modifications of current law. Subdivisions (a) and (b) 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. Under current law only motions for new trial and motions to modify the trial court's judgment are overruled by operation of law.

Subdivision (c) clarifies the relationship between prejudgment motions for judgment, motions for judgment nov or to disregard particular jury findings and postjudgment motions to modify a judgment by specifically stating 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. In addition, subdivision (c) 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.

Second, by providing that a trial judge has discretion to rule on a tardy motion for new trial 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."

Third, in *In re Brookshire Grocery Co.*, 250 S.W.3d 66 (Tex. 2008), a bare majority of the Court determined that the current Rule 329 (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 complained of is signed. The basis for this holding is the text of the current rules. Justice Hecht's spirited dissent would have interpreted the text differently because "[t]ricky" procedural rules threaten substantive rights.

Similar changes are proposed for subdivision (d).