

MEMORANDUM

TO: Sarah Duncan October 5, 2007

FROM: Jody Hughes

RE: Revised Version of SBOT Rules Committee Proposals on TRCP 301, TRAP 26.1

The draft below reflects my attempt to re-tool the substance of the State Bar Rules Committee proposal on TRCP 301 and TRAP 26.1 (attached) using the modernized concepts and language from the Recodification draft. Bill has reviewed this draft and we discussed his suggested edits, and with those included he is comfortable with the draft. He mentioned your work on the Recodification drafting and thought would also be interested in this issue, which I believe will be referred to your SCAC subcommittee if Chip has not done so already. I had asked Bill to review this draft initially with the thought that your subcommittee could use it as a starting point if you want.

The most significant changes are to Rule 301, particularly the addition of new rules 301a-c, which mostly are taken verbatim (except for the rule numbering) from the Recodification provisions. I inserted Recodification rule references in brackets for tracking the origins of particular rule provisions. I also eliminated references to motions to correct and reform in Rule 329b, and have tried to make changes to other rules (300, 306a) as required by the changes to Rules 301 and 329b, and minor style edits. Other than TRAP 38.2(b) below, I don't think these changes would require any amendments to the existing TRAPs, as Rule 26.1 refers only to motions to modify the judgment.

Bill and I discussed whether a motion to vacate the judgment should be added as a separate subspecies of motion to modify under Rule 301c, or instead simply subsumed within the motion to modify as motions to correct or reform are in the current draft. I had observed that the modify/vacate dichotomy appears in the TRAPs, both with respect to trial-court judgments, *see, e.g.*, TRAP 27.3 ("If Appealed Order Modified or Vacated"), and appellate-court judgments, *see* TRAP 19.2 (court of appeals retains plenary power to vacate or modify its judgment during periods prescribed in Rule 19.1 even after PFR filed in supreme court). However, Bill noted Judge Guittard's view that the rules should not provide for a party to file a motion to vacate, although a trial court would have the power to vacate its own judgments. Accordingly, I have left rule 301c as drafted, with no separate provision for a motion to vacate the judgment.

We also discussed whether Rule 316's language that refers to correcting the *record of a judgment* should be revised to match TRAP 4.3(b), which refers to the nunc pro tunc action under Rule 316 simply as correcting or reforming the judgment. This discrepancy caused me some confusion in light of existing Rule 329b(g), which refers to both substantive motions to correct or reform the judgments as well as nunc pro tunc motions under Rule 316. TRCP 329b(g) ("motion to modify, correct, or reform a judgment (as distinguished from [a] motion to correct the record of a judgment under Rule 316...."). However, as Bill and I discussed today, the Recodification language used below largely solves this problem by collapsing substantive (non-316) motions to correct or reform into the motion to modify under new Rule 301c. Existing Rule 329b(f) clearly provides that the trial court can make nunc pro tunc corrections to the record "at any time," so I don't think that eliminating the other "correct or reform" references elsewhere in 329b will cause any substantive changes.

Rule 300. Court to Render Judgment

Where a special verdict is rendered, or the conclusions of fact found by the judge are separately stated the court shall render judgment thereon unless the court renders judgment as a matter of law, grants a motion to disregard a jury finding, or grants a new trial ~~set aside or a new trial is granted, or judgment is rendered notwithstanding verdict or jury finding~~ under these rules.

Comment to 2007 change: Consistent with the contemporaneous amendments to Rule 301, the reference in former Rule 300 to judgment notwithstanding the verdict is replaced with the motion for judgment as a matter of law, described in new Rule 301b.

Rule 301. Judgments

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. ~~Provided, that upon motion and reasonable notice the court may render judgment non obstante verdicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence.~~ Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

Comment to 2007 change: the former rule's provisions for seeking judgment non obstante verdicto, also known as judgment NOV or judgment notwithstanding the verdict, are deleted and replaced with the motion for judgment as a matter of law in new Rule 301b and the motion to modify the judgment under new Rule 301c. No substantive change is intended; the terminology is revised to eliminate confusion resulting from the interplay between Rule 301 and Rule 329b. Under former rule 301, a JNOV motion could be filed either post-verdict and pre-judgment or post-judgment, but only a post-judgment JNOV motion could constitute a motion to modify the judgment that extended a trial court's plenary power and the time to perfect appeal under Rule 329b. Under the amended rules, what was formerly styled a JNOV motion is now, if filed pre-judgment, a motion for judgment as a matter of law under new Rule 301b; any post-judgment motion that seeks to modify the judgment (other than a motion to correct a clerical mistake under Rule 316), including what was formerly a post-judgment JNOV motion, is now a motion to modify the judgment under Rule 301c. Similarly, a request to disregard jury findings can be included in a motion for judgment as a matter of law under Rule 301b, if the request is made prior to the entry of judgment, or, if the request is made post-judgment, in a motion to modify the judgment under Rule 301c.

Rule 301a. Motion for Judgment on the Jury Verdict

(a) A motion for judgment on the jury verdict may be presented at any time before a final judgment has been signed. A motion for judgment on the jury verdict is overruled by operation of law when a final judgment is signed that does not grant the motion. [Recod R. 101(b)]

(b) A motion for judgment can be made without waiving objections to the verdict if the movant's objections are clearly stated in a motion for judgment as a matter of law or otherwise brought to the trial court's attention in a timely and proper manner. [Roger Hughes proposal]

Comment to 2007 change: this is a new rule adopted in conjunction with the contemporaneous amendments to Rule 301, as discussed in the comment following that rule.

Rule 301b. Motion for Judgment as a Matter of Law

(a) A party may move for judgment as a matter of law, and include a request to disregard a jury finding as a matter of law, on a claim or defense:

- (1) if the evidence, after the adverse party rests its evidence, or at the close of all the evidence, or after the verdict in a jury case and before judgment,**
 - (i) is legally insufficient for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor, and**
 - (ii), if, under the controlling law, a judgment cannot properly be rendered against the movant on that claim or defense without a finding adverse to the movant on an issue that has been disregarded, and a judgment as a matter of law should be rendered for the movant as to that claim or defense; or**
- (2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge affirmatively misstates controlling law. [Recod R. 101(b)]**

(b) A motion for judgment as a matter of law may be presented after the adverse party rests its evidence, or at the close of all the evidence, or after the verdict in a jury trial and before judgment, and shall not be considered waived if not presented earlier. A motion for judgment as a matter of law shall not be presented after a final judgment has been signed. A ground in a motion for judgment as a matter of law is overruled as a matter of law when a final judgment is signed that does not grant that ground. [Recod R. 104(b)]

(c) A party moving for judgment as a matter of law may move in the alternative, in the same or a separate pleading, for judgment on the jury verdict without waiving objections to the verdict if the movant's objections are clearly stated in the motion for judgment as a matter of law or otherwise brought to the trial court's attention in a timely and proper manner. [Roger Hughes proposal]

Comment to 2007 change: this is a new rule adopted in conjunction with the contemporaneous amendments to Rule 301, as discussed in the comment following that rule.

Rule 301c. Motion to Modify Judgment

(a) A party may move to modify a judgment as a matter of law, including a request to disregard a jury finding as a matter of law, after a judgment has been rendered:

- (1) if the evidence is legally insufficient for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor;**
- (2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge**

- affirmatively misstates controlling law; or
(3) if the judgment should be vacated, modified, reformed, or corrected in any respect for any reason. [Recod. R. 101(c)]

(b) A motion to modify a judgment must be in writing, must be signed by the filing party or attorney, and must specify the respects in which the judgment should be modified. The time periods for a party to file, and for a trial court to rule on, a motion to modify a judgment are stated in Rule 329b. A motion for judgment as a matter of law is not a prerequisite to a motion to modify a judgment. [source: first sentence is derived from existing R. 329b(g); the second sentence is new; and the third sentence is the last sentence of Recod. R. 101(c)]

Comment to 2007 change: this is a new rule adopted in conjunction with the contemporaneous amendments to Rule 301, as discussed in the comment following that rule. Although the time periods for a party to file, and for the court to rule on, a motion to modify the judgment remain the same under Rule 329b(g), new Rule 301c more clearly delineates the reasons for filing a motion to modify.

Rule 306a. Periods to Run from Signing of Judgment

1. **Beginning of Periods.** The date of judgment or the date an order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate; or modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.

Comment to 2007 change: rule 306a is amended consistent with the contemporaneous amendments to Rule 329b, which eliminates motions to correct or reform judgments; any request to alter a judgment (other than a motion to correct the record under Rule 316) should now be made as a motion to modify the judgment under new Rule 301c. Other non-substantive changes are made.

Rule 324. Prerequisites of Appeal

- (c) **Judgment Notwithstanding Findings as a Matter of Law; Cross-Points.** When judgment is rendered ~~non obstante verdicto or notwithstanding the findings of a jury~~ as a matter of law under Rule 301b on one or more questions, the appellee may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.

N.B.: Bill notes that this rule is misplaced in the TRCP and questions whether it is necessary at all, in light of TRAP 38.2. It could probably be deleted altogether.

Rule 329b. Time for Filing Motions

The following rules shall be applicable to motions for new trial and motions to modify, ~~correct, or reform~~ judgments (other than motions to correct the record of a judgment under Rule 316) in all district and county courts:

- (a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.
- (b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.
- (c) In the event an original or amended motion for new trial or a motion to modify; ~~correct or reform~~ a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.
- (d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate; or modify; ~~correct, or reform~~ the judgment within thirty days after the judgment is signed.
- (e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate; or modify; ~~correct, or reform~~ the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.
- (f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.
- (g) A motion to modify; ~~correct, or reform~~ a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. ~~Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed.~~ The overruling of ~~such a~~ motion to modify the judgment shall not preclude the filing of a motion for new trial,

nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, ~~correct, or reform.~~

- (h) If a judgment is modified, ~~corrected or reformed~~ in any respect, the time for appeal shall run from the time the modified, ~~corrected, or reformed~~ judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

Rules of Appellate Procedure

38.2 Appellee's Brief.

- (b) ***Cross-points.***

- (1) *Judgment ~~notwithstanding the verdict~~ as a matter of law.* When the trial court renders judgment ~~notwithstanding the verdict~~ as a matter of law on one or more questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an affirmance of the judgment waives that complaint.