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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 18, 1994

AFTERNOON SESSION

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 Taken before D'Lois Lea Nesbitt,
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 18th day of
March, A.D., 1994, between the hours of 1:30
o'clock p.m. and 5:40 o'clock p.m., at the
Texas Law Center, 1414 Colorado, Austin, Texas
78701.

ORIGINAL

MARCH 18, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta, Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela S. Baron
Honorable Scott A. Brister
Professor Elaine Carlson
Professor William V. Dorsaneo
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Joseph Latting
Gilbert I. Low
John Marks
Russell H. McMains
Harriet E. Miers
Richard R. Orsinger
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

EX OFFICIO MEMBERS:

Honorable Sam Houston Clinton
Honorable Nathan L. Hecht
David B. Jackson
Doris Lange
Honorable Paul Heath Till
Bonnie Wolbrueck

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Carl Hamilton

MEMBERS ABSENT:

David J. Beck
Honorable Ann T. Cochran
Michael T. Gallagher
Anne Gardner
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Thomas S. Leatherbury
Honorable F. Scott McCown
Robert E. Meadows
Honorable David Peeples
David L. Perry

Paul N. Gold
Thomas C. Riney

SUPREME COURT ADVISORY COMMITTEE
MARCH 18, 1994, Afternoon Session

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1 CHAIRMAN SOULES: Both
2 Ms. Lange and Ms. Wolbrueck, the clerks that
3 we have here, are pretty -- they have given
4 some thought to this transcript thing and
5 whether or not it's better to just leave it
6 the way it is and make copies and send the
7 copies. In other words, no change in the
8 present practice as far as the transcript is
9 concerned. Bonnie, why don't you give us your
10 view?

11 MS. WOLBRUECK: Sure.

12 CHAIRMAN SOULES: Doris spoke
13 about it a moment ago.

14 MS. WOLBRUECK: Originally when
15 I heard this I thought this was an excellent
16 idea until I really gave some thought to it;
17 and several reasons. If we send up the
18 original documents, No. 1, if the original
19 judgment has gone up to the appellate court
20 there has been no supersedeas bond filed. The
21 trial court clerk still has the responsibility
22 of issuing executions. We will not have that
23 judgment on file in our office in order to
24 issue an execution on that.

25 HONORABLE C. A. GUITTARD:

1 Don't you have it in your minutes?

2 MS. WOLBRUECK: We could. It
3 depends upon -- yeah. They would probably be
4 kept in the minutes, but even at that the
5 other problem with that being -- is certifying
6 to it. We can certify out of the minutes, but
7 I would think that having the originals would
8 still benefit the trial court clerk and the
9 like. I realize what you are saying, Judge.
10 I had forgotten about the minutes of the
11 Court.

12 Family matters could evolve the same way.
13 Many times we have many people doing research
14 on files. We may have a divorce decree that
15 what is in -- what is going up on appeal is
16 possibly property, and child support matters
17 continue, visitation matters continue. People
18 want to view those files for those matters.
19 We have a lot of title company people and
20 research people into our offices all the time
21 that want to see what has happened in certain
22 documents within the file.

23 The other thing that I realized in
24 looking at this initially, thinking that
25 sending up the original papers would be a good

1 idea, is that actually the time and effort in
2 doing a transcript is not in running the
3 copies through the copy machine. It's
4 actually pulling out whatever documents need
5 to go into the transcript, putting those into
6 transcript form and indexing them. Running
7 them through the copying machine is actually
8 the least of the effort involved in preparing
9 a transcript, and I am concerned that possibly
10 it may evolve into extra work on both clerks,
11 the appellate clerks and the trial clerks, in
12 that whenever they return those originals to
13 us we have to put them back into the file into
14 proper order and the like for continuation of
15 the file.

16 Those are just some of the concerns and
17 the thoughts that I had in regards to the
18 possible originals. Like I said, initially I
19 thought that it may be a good idea until I
20 really put some thought to it as far as the
21 clerk is concerned.

22 MR. HERRING: How is it done
23 now in the Federal system? Don't they send
24 almost everything?

25 MS. DUNCAN: It goes up on the

1 original papers, and the entire file goes.

2 MR. HERRING: What if you kept
3 the judgment decree in the family case? Are
4 there a lot of other documents that people
5 come in to search?

6 MS. WOLBRUECK: You know, I
7 can't even -- occasionally there are. It
8 depends on what has happened, and the problem
9 is that, you know, I can think in a real
10 simplistic matter of just talking about a
11 judgment, but many times there are other
12 orders and the like that have been entered
13 that somebody may want and, you know, other
14 orders that don't pertain to what has gone up
15 on appeal.

16 HONORABLE SCOTT A. BRISTER: A
17 lot of times when they are split mandamuses I
18 keep going on this while a mandamus goes up,
19 interlocutory appeals of government official
20 summary judgments, or media defendant summary
21 judgments on first amendment. We have got a
22 growing number of interlocutory appeals. Who
23 gets the file if I don't have the file or
24 copies of the file?

25 MS. DUNCAN: On an original

1 proceeding you are not going to go up on a
2 transcript from the clerk's office anyway
3 generally. You are either going to go up on
4 certified copies that were later put together
5 or on sworn copies, copies that have been
6 sworn to by an attorney. In Federal Court, I
7 mean, it seems to me if the burden if you want
8 to get a writ of execution on a judgment and
9 no supersedeas bond is on file it seems to me
10 that the burden should be on the applying
11 party to get the certified copy from the Court
12 of Appeals and take it to the trial court or
13 the clerk to have whatever process or have
14 whatever dispute resolved that they want to
15 get resolved. I mean, that seems to me to be
16 fairly simple.

17 HONORABLE SCOTT A. BRISTER: Is
18 the reason for this just cost-saving? We are
19 spending too much making copies?

20 MS. DUNCAN: Legibility.

21 MS. WOLBRUECK: I would suggest
22 in the Rule possibly to make sure that -- and
23 possibly in the order on the form of the
24 transcript or something to make sure that the
25 copies are legible.

1 MS. DUNCAN: It's said that for
2 years, and it hasn't helped.

3 MS. WOLBRUECK: Yeah. It needs
4 to be -- well, sometime the originals aren't
5 either. That's the problem.

6 MS. LANGE: I was going to say
7 sometimes the originals we can't read.

8 MS. DUNCAN: Well, and
9 sometimes they are just difficult to copy.

10 MS. LANGE: Especially on field
11 notes. The attorneys keep making copies, and
12 we get almost daily instruments that we put a
13 clerk's note on it's not legible when it came
14 to us.

15 CHAIRMAN SOULES: Of course,
16 the clerks charge the appellant for the
17 transcript, right, and they pay for it? So to
18 that extent you get some of your cost back
19 directly from the party you are performing
20 services for.

21 MR. ORSINGER: Well, what would
22 you charge for it? You used to charge a
23 dollar a page to copy it or whatever the
24 charge was, but if you are not copying
25 anything now, you still would charge a dollar

1 a page to bind it?

2 MS. WOLBRUECK: No. But I'm
3 sure --

4 CHAIRMAN SOULES: But the point
5 is they are getting some of their --

6 MS. WOLBRUECK: Yeah. I'm sure
7 that there will be some fee because actually
8 the labor cost is not in the actual copying.
9 It's in preparing the transcript, pulling the
10 documents out, doing the index, and putting
11 it -- bounding it and the like. That's where
12 the labor cost actually is.

13 CHAIRMAN SOULES: But you are
14 recovering some of that now at least by
15 getting fees for the copies.

16 MS. WOLBRUECK: That's right.

17 CHAIRMAN SOULES: There is some
18 revenue in the clerk's office coming from this
19 to help offset the cost of their work in
20 support of an appellant's appeal.

21 MS. WOLBRUECK: And I feel that
22 there would probably be somewhere a cost for
23 preparation of a transcript or something, if
24 there was not a copying cost.

25 CHAIRMAN SOULES: Okay.

1 HONORABLE SCOTT A. BRISTER:

2 And so on post-judgment --

3 CHAIRMAN SOULES: Judge

4 Brister.

5 HONORABLE SCOTT A. BRISTER:

6 Post-judgment motions where the file has gone
7 up then you would get a copy and send a copy
8 back down?

9 MS. DUNCAN: You just attach --

10 MR. ORSINGER: Would you need
11 anything more than the judgment ever?

12 HONORABLE SCOTT A. BRISTER:

13 Well, I am trying to think. I don't know.

14 MS. DUNCAN: Well, let's say
15 you --

16 HONORABLE SCOTT A. BRISTER:

17 All I know is there are a lot of times after
18 the appeal has started when I am still in
19 there messing with the file.

20 MS. WOLBRUECK: And that seems
21 to happen a great deal, I mean, actually. I
22 realize that also, and I can't think of a
23 particular incident. But what would you do on
24 temporary orders or summary judgment or
25 something? There seems to be a great deal

1 that continues in the trial.

2 MR. ORSINGER: Actually the
3 trial court's preliminary power goes until the
4 105th day, and if you have a transcript going
5 up sooner than that it's not due until the
6 120th day if there is a motion for new trial
7 made. You just have to request it back.

8 MR. LOWE: What's broke about
9 what we have? Wasn't it that we just thought
10 we could simplify it like the Federal people
11 do and just send the original record? That
12 was the reason, but there are probably not
13 many Federal divorces, so they have a little
14 different type practice. So wasn't that the
15 main reason we wanted to do it?

16 CHAIRMAN SOULES: I think so.

17 MR. LOWE: And she has already
18 stated reasons why it wouldn't work, so why
19 isn't it working -- why don't we leave it like
20 it is?

21 CHAIRMAN SOULES: Okay. Motion
22 to leave it like it is. Those in favor show
23 hands.

24 HONORABLE SAM HOUSTON CLINTON:
25 You are talking now about the transcript?

1 CHAIRMAN SOULES: Yes, sir.

2 Those opposed? Okay. We will leave that
3 like it is. That's unanimous in favor of
4 leaving it like it is. Next?

5 PROFESSOR DORSANEO: Please
6 turn to page 40.

7 HONORABLE C. A. GUITTARD:
8 In the ancient English practice you had law of
9 equity. You had the review of trial court
10 judgment, and common law you had a writ of
11 error in equity after you had appeal. That
12 archaic distinction still persists to some
13 extent in our present Rule 45 which has to do
14 with appeal by writ of error, which is now
15 limited to the parties that did not
16 participate in the appeal. The problem with
17 it is that the courts keep saying that a writ
18 of error is limited to error apparent on the
19 face of the record. Now, what in thunder is
20 the face of the record?

21 Some courts say, well, you can consider
22 the statements of facts. Well, then if you
23 consider the statement of facts, well, how is
24 that different from any other appeal? In a
25 different context in McKenna against Edgar the

1 Supreme Court held that the jurisdiction of
2 the non-resident defendant must appear from
3 the face of the record, and that does not
4 include oral testimony, the statement of
5 facts. So it seems very odd the face of the
6 record means something in one context and
7 something different in another.

8 So the proposal is that if there is no
9 real difference in the review and in order to
10 avoid confusion and in order to simplify the
11 process that we simply provide that as we do
12 here in proposed Rule 41(a)(3) on the top of
13 page 40 that "A party to the final judgment
14 who did not participate in person or by
15 attorney in the actual trial of the case shall
16 file a notice of appeal within six months
17 after the judgment is signed, whether or not a
18 motion for new trial is" -- or "a motion to
19 modify, correct, or reform the judgment is
20 made." In other words, just give them the
21 same kind of six months appeal as he would
22 have by a writ of error. "Such a notice shall
23 contain a certificate by the attorney that the
24 appellant did not participate in person or by
25 attorney in the actual trial of the case." So

1 that would considerably simplify our practice
2 in those cases. So, Mr. Chairman, I move that
3 that be adopted.

4 MR. LOWE: I would second that.

5 CHAIRMAN SOULES: Motion has
6 been made and seconded. Is this just a writ
7 of error by a different name?

8 MR. LOWE: Yeah.

9 HONORABLE C. A. GUITTARD:

10 Well, except that it doesn't come within those
11 decisions which talk about the face of the
12 record, which I think originally meant in a
13 common law review that the judgment ruled and
14 the old clerk wrote out as distinguished from
15 the testimony, but now since the confusion
16 comes in when the Supreme Court has said and
17 other courts have said you do consider the
18 oral testimony. So although they say it's the
19 face of the record, it's not the face of the
20 record in that sense.

21 MR. ORSINGER: Luke, I'm sorry.
22 From a procedural standpoint -- I'm sorry.

23 CHAIRMAN SOULES: Rusty, you
24 have had your hand up, then I will get to
25 Richard.

1 MR. MCMAINS: Well, one of the
2 questions I have, if you basically are, quote,
3 abolishing the writ of error practice and
4 substituting a notice of appeal where are
5 the -- where do you have any rights to attack
6 that you haven't preserved? I mean, if you
7 weren't at the trial you obviously didn't make
8 an objection and you obviously most likely did
9 not file a motion for new trial. You didn't
10 do any of these other things by definition.
11 So if you haven't done any of those things,
12 you haven't presented any complaints for
13 review.

14 The writ of error practice by and large,
15 you know, historically was the reason I always
16 viewed the term "on the face of the record" as
17 being a good thing rather than a bad thing in
18 your view; that is, it allowed you to attack,
19 for instance, defects in service, et cetera,
20 which is what it is primarily designed to do,
21 but there weren't any preservation
22 requirements. If you convert this to an
23 ordinary appeal, how do you immunize it from
24 the preservation requirements that are
25 throughout the rest of our Rules?

1 HONORABLE C. A. GUITTARD:

2 Well, isn't it immunized now since the courts
3 have said the standards of review are the
4 same? At least that's confusing. Whether or
5 not you have different preservation
6 requirements with respect to a party that
7 didn't participate in the appeal -- in the
8 trial is a question we need to talk about. If
9 we think that the party that didn't
10 participate ought to have different
11 preservation rights or different standard
12 review or ought not to be subject to the same
13 preservation requirements as one that did,
14 then we ought to say that expressly and not
15 have some confusing other procedure called a
16 writ of error that would allow you to get
17 around the regular preservation rules. We
18 ought to write that expressly.

19 PROFESSOR DORSANEO: We did
20 make an attempt to revise Appellate Rule 52
21 partially in response to Justice Hecht's memos
22 and what I will refer to as the Wilson vs.
23 Dunn problem, which is the problem of the
24 default judgment appellant seeking to
25 challenge the default judgment on some basis

1 of the type you mentioned.

2 Frankly, that drafting may not be
3 finished, but I agree with Judge Guittard that
4 that's the proper place to deal with the
5 issues that you raise such that regardless of
6 whether it's an ordinary appeal or what
7 previously had been referred to as a writ of
8 error appeal, you either do or don't have to
9 move for a new trial or otherwise preserve a
10 complaint about service or evidence
11 sufficiency or whatever.

12 HONORABLE C. A. GUITTARD: Now,
13 most writ of error appeals are default
14 judgment cases, and it has -- the face of the
15 record thing has certain and some probability
16 there because you don't have any -- you may
17 not have a statement of facts. You are just
18 looking at whether the service, the record of
19 service, is complete and that sort of thing,
20 but you could still do that with a six months
21 appeal under our proposed Rule 41(a)(3). It
22 would have the same effect in that respect.

23 MR. LOWE: Judge, there is no
24 rule now, appellate rule, that speaks of writ
25 of error anyway, is it?

1 HONORABLE C. A. GUITTARD: Oh,
2 yeah. Rule 45.

3 PROFESSOR DORSANEO: 45.

4 MR. LOWE: 45 now is?

5 HONORABLE C. A. GUITTARD: Rule
6 45.

7 MR. LOWE: So in other words,
8 all that would be changed would be the time
9 limit, but other requirements of ordinary
10 appeal wouldn't be changed, just as would be
11 followed if you had participated, is what you
12 are saying.

13 HONORABLE C. A. GUITTARD:
14 Right.

15 PROFESSOR DORSANEO: Right.

16 HONORABLE C. A. GUITTARD: Rule
17 45 requires you to file a petition and then a
18 bond.

19 MR. LOWE: Okay.

20 CHAIRMAN SOULES: Richard
21 Orsinger.

22 PROFESSOR DORSANEO: It's kind
23 of like a notice of appeal frankly.

24 MR. LOWE: Right.

25 MR. ORSINGER: Is there not

1 mention of the writ of error appeal in the
2 Civil Practice and Remedies Code?

3 PROFESSOR DORSANEO: Yes.

4 MR. ORSINGER: I have looked at
5 it briefly. We are going to have some
6 dangling legislation I think.

7 HONORABLE C. A. GUITTARD:
8 That's another point that I note here. If we
9 repeal the writ of error practice then perhaps
10 the Supreme Court ought to list that
11 particular provision of the code as repealed.

12 PROFESSOR ALBRIGHT: I didn't
13 understand --

14 CHAIRMAN SOULES: Alex
15 Albright.

16 PROFESSOR ALBRIGHT: I did not
17 understand Bill's answer to the question about
18 the preservation of error problem, or was
19 there an answer?

20 PROFESSOR DORSANEO: Well, my
21 technical answer would be that -- all right.
22 The Supreme Court two years ago in DSC vs.
23 Moffitt held, I think quite correctly --
24 that's presumptuous to say, but I think quite
25 reasonably that the face of the record in a

1 writ of error appeal includes the statement of
2 facts as well as the transcript. I was the
3 petitioner's counsel, so I find that a
4 particularly favorable decision.

5 But it could be the case that once upon a
6 time that that language "on the face of the
7 record" also spoke to the issue of
8 preservation. I think Rusty is probably
9 right, but my answer would be that whatever
10 the preservation rules are for people who are
11 defaulted they ought to be the same whether
12 those people appeal in one month or six
13 months, whether it's a writ of error appeal or
14 an ordinary appeal, and that's not how the
15 problem should be handled about whether they
16 should get some ruling from the trial court
17 about anything.

18 PROFESSOR ALBRIGHT: So it just
19 needs to be that when a defaulter is appealing
20 it's clear that they couldn't have preserved
21 error so you are looking for these --

22 PROFESSOR DORSANEO: Right.

23 PROFESSOR ALBRIGHT:
24 -- jurisdictional type errors.

25 PROFESSOR DORSANEO: I wouldn't

1 require them to do anything to make the
2 complaint about service or insufficiency of
3 the evidence to support an unliquidated, you
4 know, damage claim.

5 PROFESSOR ALBRIGHT: Well,
6 would you have the same review, like new trial
7 review, like you would in Craddock vs.
8 Sunshine?

9 PROFESSOR DORSANEO: Yes. And
10 you would miss that boat if you waited.

11 PROFESSOR ALBRIGHT: Okay. But
12 you have gone beyond the 30 days. So you
13 haven't filed your motion for new trial.

14 PROFESSOR DORSANEO: So you
15 don't have an equitable motion for new trial.

16 PROFESSOR ALBRIGHT: So you are
17 saying there is no error in failing to grant
18 the motion for new trial, but now it's
19 after -- it's between 30 days and six months,
20 and I am appealing because it's not that it
21 was --

22 PROFESSOR DORSANEO: They
23 served some kind of gas station.

24 PROFESSOR ALBRIGHT: Yeah. Not
25 that it wasn't abuse in discretion but there

1 is some kind of jurisdictional problem here.
2 There was some gross error that appears from
3 these records.

4 HONORABLE SCOTT A. BRISTER:
5 Fundamental error.

6 PROFESSOR DORSANEO: Well, it
7 could be a service problem, typically a
8 service problem. In many default judgment
9 cases it's a problem of the sufficiency of the
10 evidence to support the damages.

11 PROFESSOR ALBRIGHT: Right.
12 Okay. But it will be something that appears
13 in the entire record?

14 PROFESSOR DORSANEO: Yes,
15 ma'am.

16 HONORABLE C. A. GUITTARD: Now,
17 if as Rusty suggests the term "face of the
18 record" gives a broader review than an
19 ordinary appeal would, which is contrary to
20 what the cases have said, but if that's true,
21 then we ought to say that in connection with
22 our Rule concerning preservation of appellate
23 complaints.

24 MR. MCMAINS: Well, basically
25 it's --

1 CHAIRMAN SOULES: Rusty.

2 MR. MCMAINS: I am not
3 advocating particularly either way. I guess
4 one of the things I am curious about is we now
5 have Supreme Court law, U.S. Supreme Court
6 law, that basically says if it's a no service
7 case they are going to win on a bill of review
8 anyway, and we have law that says if you don't
9 get notice of a judgment within a certain time
10 then you don't have any obligation to do
11 anything up to a period virtually -- what is
12 it? 180 days? Is that our max now? As long
13 as this is double it I am just wondering why
14 if you are going to do away with the writ of
15 error practice why do we keep it at all, and
16 why do you need six months, a six-month writ
17 of error, anyway if you are going to subject
18 everything back to what the Rules are that are
19 applicable to everybody?

20 HONORABLE C. A. GUITTARD:

21 Well, that's just one provision of a current
22 law that we didn't propose to change. I guess
23 it's based on the idea that if a person has
24 a -- say, is a default defendant then he ought
25 to have more time to have an opportunity to

1 know what's happened to him, and he ought to
2 not be held to the strict time requirements
3 that an ordinary appellant would.

4 MR. MCMAINS: Okay. If you are
5 talking about a default judgment, then that's
6 a particular carved out deal, but this is not
7 limited to default judgments.

8 HONORABLE C. A. GUITTARD: And
9 it would apply to anybody who didn't
10 participate in the trial.

11 PROFESSOR DORSANEO: The
12 Lawyers/Lloyds case takes the position -- I
13 mean, the logic is that if you didn't
14 participate in the trial you need more time to
15 find out what happened than the time allotted
16 by the ordinary Rules. I frankly think that
17 that's a peculiar solicitude for defaulted
18 defendants that is represented in our Rules in
19 several places, and I would like to see it
20 abolished.

21 MR. MCMAINS: Well, the problem
22 I have is the way the Rule is read now as
23 proposed to be amended is basically it says if
24 you didn't participate in the trial. It
25 doesn't say that it wasn't your fault that you

1 didn't participate. The point is if it's not
2 your fault, you have all the remedies in the
3 world under a bill of review practice. There
4 is no real reason for a six-month writ of
5 error to correct a default that ain't your
6 fault, but you can walk away. You can get
7 notice of the trial setting and not come and
8 be entitled to appeal under this Rule, and I
9 am saying I don't think that makes any sense.

10 HONORABLE C. A. GUITTARD:

11 Well, if the committee wants to abolish the
12 six-months appeal, well, that's a question
13 that our committee didn't really address. So
14 if you want to make that decision, that's
15 fine. I mean, that's not contrary to what we
16 have said, but if you want to preserve that,
17 well, this is not quite as radical a proposal
18 as Rusty is suggesting.

19 CHAIRMAN SOULES: Well, it's
20 used. There are half a dozen cases in the
21 last year in the advance sheets on writ of
22 error, so if we start taking this away, it's
23 something that's active in the current
24 practice. There are half a dozen reported
25 decisions in the last year.

1 MR. MCMAINS: But look, if I
2 can respond to that, the reason that's there
3 is because the caselaw right now on bill of
4 review is if you don't take a six-month writ
5 of error then you are going to be barred from
6 doing a bill of review. If you take the
7 six-month writ of error away, every single
8 problem that you have with regards to no
9 notice in terms of notice of the entry of the
10 judgment or whatever is taken care of in our
11 Rules up to 180 days, and if you are outside
12 the 180 days, then you could do a bill of
13 review, and the only thing you lose is another
14 three months. That's all I am getting at. If
15 you have got a -- it's only a three-month
16 difference.

17 HONORABLE C. A. GUITTARD: But
18 you can complain, for instance, on a six-month
19 appeal on a writ of error since the face of
20 the record just means the whole record you can
21 complain of the sufficiency of the evidence to
22 support the damages, for instance, and some of
23 those cases do that, and well, perhaps you
24 shouldn't have the right to do that, but if
25 so, let's be sure what we are deciding here

1 about that.

2 MR. LOWE: Judge, I have one
3 question.

4 CHAIRMAN SOULES: Buddy Lowe.

5 MR. LOWE: I think that on bill
6 of review the burden is on you showing that it
7 wasn't your fault.

8 HONORABLE C. A. GUITTARD:
9 Right.

10 MR. LOWE: Under this six
11 months you don't have to prove. You have no
12 burden of proving that.

13 HONORABLE C. A. GUITTARD:
14 That's right.

15 MR. LOWE: You just prove
16 records, so I am not saying that's a big step,
17 but that is a difference. I mean, you know,
18 maybe that is a burden that's in this six
19 months. That's why they had to rule like
20 that. In the six months you just have to
21 prove by the face of the record, but they
22 thought then on the bill of review you ought
23 to go further and have to put the burden of
24 proof on that person that it wasn't their
25 fault, and sometimes that becomes an issue.

1 So they are not -- that might be a difference.
2 It doesn't make a difference, but there is a
3 difference.

4 PROFESSOR DORSANEO: Buddy,
5 probably in a no service case you make your
6 proof of, no, it wasn't my fault by proving no
7 service, no duty, no obligation, no fault. So
8 probably in a no service case not only do you
9 not need to show a meritorious defense, and
10 you don't have to show extrinsic fraud in no
11 service case because the Supreme Court has
12 already held that, our Supreme Court.
13 Probably all you have to show is no service in
14 a bill of review case when it's no service.

15 MR. LOWE: But there might be
16 other situations. I don't know. Plus the
17 fact that even in those, what if you you get
18 into the question, well, you know, you knew
19 they were looking for you. Was it your fault
20 that you didn't appear when the sheriff was
21 supposed to come, and therefore, the sheriff
22 has called you? Do you have to do that? Do
23 you get into those issues? I am saying you
24 get into more issues in a bill of review than
25 you do the writ of error.

1 CHAIRMAN SOULES: Shelby.

2 MR. SHARPE: Did the committee
3 find some glaring problem with the current
4 writ of error practice that spawned this rule?
5 If it did, I would like for you to articulate
6 that. Otherwise, I recommend that this writ
7 of error practice does not seem to be broken,
8 so therefore, I don't think it needs fixing,
9 and I would, as we did on the transcript,
10 recommend we just leave writ of error practice
11 alone unless there was something that you saw
12 as a bad deficiency in writ of error practice.

13 HONORABLE C. A. GUITTARD:

14 Well, as I suggested before, and I have this
15 more fully discussed in the memorandum, No. 3
16 I think it is, attached to the explanation.
17 The problem is using the term "face of the
18 record" in two different senses and the
19 confusion that that causes, and there is still
20 some cases that hold that in a writ of error
21 you can't go into the oral testimony, and
22 there will be that kind of confusion
23 continuing if we continue the writ of error
24 practice with this face of the record
25 requirement.

1 MR. SHARPE: Well, it would
2 seem to me, Judge, that the best thing to do
3 would be to take our current writ of error
4 practice and just make that one minor
5 clarification and just leave writ of error
6 practice alone as it currently stands.

7 CHAIRMAN SOULES: Okay.
8 Richard and then Sarah.

9 MR. ORSINGER: Another
10 distinction between the bill of review and the
11 writ of error is that there is no right to
12 supersedeas in the final court of review. The
13 only possible relief you have of execution of
14 judgment as I understand it would be to get a
15 writ of injunction issued by the Court that
16 issued the judgment against the execution of
17 the writ.

18 MS. DUNCAN: There is caselaw,
19 however, you can't get that if you did not
20 supersede the writ of error.

21 MR. ORSINGER: There is? I
22 will have to get that. I have got that in a
23 case right now. So there is a big difference.
24 You can supersede this judgment by filing a
25 supersedeas bond, but you can't supersede a

1 bill of review. That's a distinction that
2 would make a real difference to some
3 defendants, and I would also say that I have
4 done some research in the area. There are
5 some courts of appeals that say if you don't
6 preserve error by failing to show up, you
7 cannot complain on appeal. There is others
8 that say if you weren't at trial, you can't be
9 held to the preservation requirement.

10 Whereas most defense to me is where you
11 have incompetent evidence that comes in
12 without an objection in a prove-up on a
13 default such as rank hearsay or even
14 speculation, no objection to it or anything
15 else. Can you bring in written statements of
16 people, hearsay, inadmissible, no hearsay
17 objection? If it comes in without an
18 objection of substantive evidence, we have the
19 potential for the real abuse of proving up the
20 damages on a default if we don't let defaulted
21 defendants raise complaints about the
22 sufficiency of the evidence without having
23 weighed at least their hearsay complaint, that
24 the hearsay is incompetent. So I think that
25 if we do move from the writ of error practice

1 into the appellate practice I would want to
2 say something about the preservation so that
3 we don't lose the favorable caselaw that we do
4 have. As Rusty said, I think we run the risk
5 of losing it if we move it from writ of error
6 to appeal and say nothing about preservation
7 requirements.

8 HONORABLE C. A. GUITTARD: You
9 want it to say something about the
10 preservation requirements?

11 CHAIRMAN SOULES: Sarah.

12 MS. DUNCAN: Just a note that I
13 think one of the other reasons that this was
14 done, if you will look at Rule 45 on pages 41
15 and 42, the Rule as it now stands says how you
16 perfect an appeal by writ of error and no
17 more, and it doesn't tie in with any of the
18 rest of the Rules on briefing schedules or
19 brief contents or anything else. So that was
20 part of as I remember the motivation for
21 incorporating the writ of error practice into
22 the regular appellate practice.

23 CHAIRMAN SOULES: I'm sorry. I
24 didn't understand what you said. There is no
25 briefing schedule on the --

1 PROFESSOR DORSANEO: You jump
2 over, jump back into the regular rules as soon
3 as you get the writ of error perfected.

4 MS. DUNCAN: Maybe you do.

5 PROFESSOR DORSANEO: Well, the
6 other rules talk about appeal or writ of
7 error, appeal or writ of error, appeal or writ
8 of error.

9 MS. DUNCAN: Now they do.

10 PROFESSOR DORSANEO: I don't
11 like the writ of error practice because I
12 don't think somebody should get this extra
13 time. It's as simple as that. Now, I have
14 used the writ of error appeals successfully.
15 Almost every time I have used it I was very
16 happy to have the extra time, but it always
17 was the result of somebody not doing what they
18 otherwise should have done that I really
19 couldn't have justified on any kind of a fair
20 basis, I mean, not showing up for the trial
21 and also not perfecting the appeal after
22 getting notice of the judgment. If the time
23 is long enough for ordinary defendants who are
24 diligent in protecting their rights to perfect
25 an appeal, why give these other people,

1 assuming they have been served and everything
2 else, why give them extra time? I don't see
3 the point in it from the standpoint of the way
4 our system operates.

5 CHAIRMAN SOULES: Rusty.

6 MR. MCMAINS: Well, the other
7 problem I have is that everybody's
8 justification thus far for the preservation of
9 the writ of error assumes that you are talking
10 about a default case. There is no such
11 limitation, and therefore, what this says is
12 that when you have a trial setting and the
13 other side doesn't show up, even if you have
14 conclusively proved they had notice, even if
15 they are at the courthouse and they just don't
16 come, that they are going to have extra time
17 to appeal and perhaps even if you want to
18 change the Preservation Rule to make it easier
19 not even have to object to evidence that is
20 otherwise incompetent. They just don't have
21 to show up.

22 Why should a person who doesn't show up
23 be improved in their appellate position? That
24 makes no sense at all to me. Particularly in
25 a non-default context. Now, that's -- and I

1 guess that's the biggest problem that I have
2 with it right now, is it just says "didn't
3 participate." It doesn't have anything to do
4 with whose responsibility it was for not
5 participating.

6 MR. LOWE: But Rusty, don't you
7 think that most people who, I mean, you know,
8 have a lawyer and so forth are not going to
9 just say, "Well, you know, I am not going to
10 participate," and they have taken a big
11 disadvantage because certainly I have seen
12 trials that Mike tried just as well with me
13 not being there, but that's not ordinarily the
14 thing I would brag about. So I think that as
15 a practical matter if that person has made
16 that choice, he's made such a bad choice we
17 ought to give him some advantages.

18 CHAIRMAN SOULES: Alex
19 Albright.

20 PROFESSOR ALBRIGHT: Well,
21 doing away with writ of error procedure
22 completely seems to be a pretty big issue that
23 would require some more study. Can we kick it
24 back to the committee to look at the bill of
25 review and see if it represents a viable

1 alternative if we did get rid of writ of
2 error? I just don't think it's the kind of
3 thing that we should decide right now.

4 HONORABLE C. A. GUITTARD:

5 Well, we're willing to consider the question
6 that hasn't been before us before as to
7 whether there ought to be a six-month review
8 anyway. We hadn't considered that. If that's
9 something that you think ought to be
10 abolished, well, well and good.

11 MR. ORSINGER: That's not
12 anything the committee -- the committee needs
13 to write the language, but the committee is
14 just going to get together and vote for or
15 against six months. We really ought to know
16 right here whether six months is something
17 that's desired or not. If we want the six
18 months, we can rewrite it at the committee
19 level, and if not, there is really no point in
20 taking the policy question back to the
21 committee.

22 CHAIRMAN SOULES: Judge
23 Brister.

24 HONORABLE SCOTT A. BRISTER: It
25 seems to me there is nothing wrong with study.

1 I mean, I am having trouble thinking of
2 anything other than defaults that applies to
3 writ of error. An SMU law student could look
4 that up in 30 minutes on Westlaw and find out
5 how many writ of errors other than default
6 judgment situations there have been. There
7 might be some situation we are not thinking
8 about.

9 PROFESSOR DORSANEO: Well, one
10 very common one is a divorce case that's
11 proved up where the trial is the presentation
12 of the agreements to the trial judge and only
13 one of the spouses is there.

14 HONORABLE SCOTT A. BRISTER:
15 It's a post-answer default.

16 PROFESSOR DORSANEO: No, no.
17 This is service, everything is fine. It's
18 settled. There are agreements incident to
19 divorce and only one of the spouses goes to
20 the prove-up. Okay. Well, now people who
21 know about writ of error appeal know that you
22 must get the one who doesn't go to sign the
23 draft of the judgment, that signing the
24 agreement and incident to divorce is not
25 participation in the actual trial. So either

1 you have the wife go to the prove-up and stand
2 there or you have her sign the agreement
3 incident to divorce if your husband,
4 ex-spouse, wants to get married again before
5 six months. I mean, and that's the reality of
6 it because otherwise you may have a writ of
7 error appeal. It may not be successful, but
8 that's one of the things that I don't like
9 about it. Why does it take so long to get
10 this over with? When it's over, it should be
11 over.

12 MR. ORSINGER: I would say as a
13 family lawyer that there is only one case that
14 I know about where that has happened, and
15 that's a published case where the courts have
16 ruled on that, but in my experience in the
17 family law practice if you have a deal if it's
18 going to fall apart, it falls apart before the
19 final judgment is signed. Once the final
20 judgment is signed then most people won't
21 appeal, can't even find a lawyer that would
22 appeal, because you have waived all error
23 except for lack of jurisdiction in the Court;
24 isn't that right, if you have entered into an
25 agreed judgment?