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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 22, 1995

(MORNING SESSION)

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Taken before D'Lois L. Jones, a  
Certified Shorthand Reporter in Travis County  
for the State of Texas, on the 22nd day of  
July, A.D., 1995, between the hours of 8:00  
o'clock a.m. and 12:45 o'clock noon at the  
Texas Law Center, 1414 Colorado, Room 104,  
Austin, Texas 78701.

ORIGINAL

JULY 22, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright  
Pamela Stanton Baron  
Honorable Scott A. Brister  
Prof. Elaine A. Carlson  
Honorable Sarah B. Duncan  
Michael T. Gallagher  
Anne L. Gardner  
Honorable Clarence A. Guittard  
Michael A. Hatchell  
Charles F. Herring Jr.  
Donald M. Hunt  
David E. Keltner  
Joseph Latting  
John H. Marks Jr.  
Honorable F. Scott McCown  
Russell H. McMains  
Anne McNamara  
Robert E. Meadows  
Honorable David Peeples  
Luther H. Soules III  
Stephen D. Susman  
Stephen Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht  
Hon William Cornelius  
O.C. Hamilton  
David B. Jackson  
Doris Lange  
Michael Prince  
Hon. Paul Heath Till  
Bonnie Wolbrueck

MEMBERS ABSENT:

Alejandro Acosta Jr.  
Charles L. Babcock  
David J. Beck  
Hon. Ann Tyrell Cochran  
Prof. William Dorsaneo  
Tommy Jacks  
Franklin Jones Jr.  
Thomas S. Leatherbury  
Gilbert I. Low  
Harriett E. Miers  
Richard R. Orsinger  
David L. Perry  
Anthony J. Sadberry  
Paula Sweeney

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton  
Paul Gold

JULY 22, 1995 - MORNING SESSION

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1 CHAIRMAN SOULES: It is 8:00  
2 o'clock, and we are on the record for  
3 rule -- where do we want to start? Scott,  
4 you-all were doing some redraft. Why don't we  
5 start with that?

6 HONORABLE F. SCOTT MCCOWN: We  
7 are not ready. We have got to get it printed  
8 out.

9 CHAIRMAN SOULES: All right.  
10 Is anybody ready on any of the sort of  
11 corrective work that we were doing? All  
12 right. Then we will start with Rule 22.  
13 Alex, you want to give us Rule 22?

14 HONORABLE F. SCOTT MCCOWN:  
15 Luke, it might be good if I gave you Rule 22.

16 CHAIRMAN SOULES: Okay. Give  
17 us Rule 22, Judge.

18 HONORABLE F. SCOTT MCCOWN: All  
19 right. Rule 22 is physical and mental  
20 examinations, and I don't think that the  
21 content or form of the rule is the least bit  
22 controversial. What we have, if you will look  
23 behind Tab 22, we have a policy difference  
24 between the committee and Judge Brister, who  
25 is making a suggestion. Judge Brister wants

1 to go to a request and response system for  
2 physical and mental exams because -- and I  
3 will let him explain and tell why, but  
4 basically because they are routine, and it  
5 would be more efficient, and he makes the same  
6 suggestion with regard to entry on property.  
7 So it will be the same issue when we get to  
8 the entry on property rule.

9 The committee considered and rejected  
10 that suggestion because of two reasons. These  
11 rules in part are designed to curtail  
12 discovery and set a standard, and if you go to  
13 a request system, it suggests or sets the  
14 standard that they ought to be pretty  
15 routinely granted, and we thought that when  
16 you are saying that the court is going to  
17 order somebody to go in a room with a doctor  
18 and take off their clothes and be physically  
19 examined or when the court is going to order  
20 somebody to let other people onto their  
21 property to inspect or take a video camera,  
22 that there ought to be a heightened standard,  
23 and so we stayed with the present formulation  
24 of motion, good cause, court order.

25 Even though we recognize that that's

1 often going to be routinely negotiated by the  
2 parties or routinely granted by the court, we  
3 thought that the standard nevertheless ought  
4 to be motion, good cause, and court order.  
5 Once you decide whether you want a request and  
6 response system or whether you want a motion,  
7 good cause, court order system then you have  
8 made all the decisions because I don't  
9 think -- and correct me if I am wrong, Alex --  
10 that really we have made -- I don't see any  
11 redline changes on either of these rules.

12 PROFESSOR ALBRIGHT: No.

13 CHAIRMAN SOULES: So these  
14 redlines that we are looking at on Rule 22 and  
15 Rule 23 are the present rule except for the  
16 changes shown; is that correct?

17 PROFESSOR ALBRIGHT: No. I  
18 think that's not correct.

19 HONORABLE F. SCOTT MCCOWN: No.  
20 They are the rules as we approved them last  
21 time.

22 CHAIRMAN SOULES: Oh.

23 PROFESSOR ALBRIGHT: We did not  
24 talk about these rules last time, and I think  
25 that's a redlined draft from -- yeah. That's

1 a redlined draft from the last meeting. At  
2 the last meeting in the main meeting you got a  
3 redlined draft from the current rule, and I  
4 have it in front of me right now, and there  
5 are virtually no changes except adding the "at  
6 no time later than 30 days before the end of  
7 the applicable discovery period" at the very  
8 beginning and then just changes to the numbers  
9 and letters.

10 CHAIRMAN SOULES: Same on 23?

11 In other words, the alterations of the  
12 existing rule are really timing so that they  
13 fit the discovery window?

14 HONORABLE F. SCOTT MCCOWN:

15 Right.

16 PROFESSOR ALBRIGHT: That's  
17 exactly right. That's the only change that  
18 this has from the current rule.

19 CHAIRMAN SOULES: From the  
20 current rule. Okay. Judge Brister, response?

21 HONORABLE SCOTT BRISTER: Well,  
22 I think Scott said it fairly. I mean, these  
23 are routine. At least they are in Houston. I  
24 mean, an IME is an IME, and they do it in  
25 every case. Entry on property just doesn't

1           come up that often, but when you say, well, we  
2           think it ought to be more difficult, what  
3           you're really saying is we think it ought to  
4           be more expensive and time consuming. Why  
5           should we make something more expensive and  
6           time consuming? If somebody has a problem  
7           with it, you just object.

8           The problem with -- I would assume most  
9           people in this room on most of your cases do  
10          it in exactly the form. A request and  
11          response system would be involved or maybe  
12          even less formally where you just call up and  
13          say, "When can we come out and look at it?"  
14          But as we all know, there is 25 percent of the  
15          Bar who have an office policy they don't  
16          return phone calls, period.

17          Now, you can call them up and try to set  
18          the deposition and an IME up 'til you are blue  
19          in the face. You can send them the motion.  
20          They will not respond, and you will not find  
21          out if they have a problem until you go down  
22          to the court to get the order and then they  
23          will say something like, "That's fine. We  
24          will be happy to do it," and you have just  
25          spent hours and thousands of dollars, and

1 there is no reason to do that when you can  
2 simply send them a request. If they don't  
3 respond, then you do it.

4 CHAIRMAN SOULES: Anything  
5 else, Judge Brister?

6 HONORABLE SCOTT BRISTER: No.

7 CHAIRMAN SOULES: Okay. Joe.

8 MR. LATTING: Scott McCown, I  
9 have a question for you based on something  
10 that Judge Brister said. I think that in my  
11 practice that a motion and an order costs \$500  
12 at least by the time you get -- and I can  
13 defend that. It probably costs more than  
14 that, but my question is could we put -- would  
15 it satisfy your concern if we put a footnote  
16 or a comment that said that this ought to be a  
17 serious matter, and because I am concerned  
18 about having to go to court if you don't have  
19 to go to court.

20 HONORABLE F. SCOTT MCCOWN:  
21 Well, maybe the motions and orders you are  
22 filing cost \$500, but it wouldn't cost \$500 to  
23 file this kind of motion.

24 MR. LATTING: Not to file it,  
25 but to set it, to talk to Robert, to find out

1 when you can find a judge, to go over there to  
2 wait 'til a court's available to order it, to  
3 get back to your office. By the time you have  
4 done that you have burned up a lot of time.

5 HONORABLE F. SCOTT MCCOWN:

6 Okay. Well, I think my response to that would  
7 be, though, that most of these, either IME's  
8 or entries on property, most of these are  
9 negotiated now. Part of what makes it  
10 possible to negotiate those is that the  
11 requesting party knows that they have got to  
12 cut the responding party some pretty good  
13 terms as in who the doctor is going to be or  
14 when we are going to go on your property,  
15 because if they can't get a deal then they  
16 have to go to court to get an order.

17 When you shift to a request system you  
18 lose that nuclear deterrent, if you want to  
19 call it that, that helps negotiate those  
20 deals; and part of what this committee has  
21 been about is cutting costs, and so I  
22 recognize that maybe there is a little extra  
23 cost here, but a big part of what we are also  
24 about is that the public has felt that  
25 discovery is too intrusive; and in this day of

1 property rights to say that we are going to  
2 have a new rule that to go on a person's  
3 property all you have got to do basically is  
4 request and then they have got the burden, and  
5 this applies to nonparties, too, by the way.

6 They have got the burden of going to  
7 court if they have the objection, is to me to  
8 shift the cost in the wrong area, the wrong  
9 way, that when you are talking about searching  
10 property, when you are talking about searching  
11 a body, that you ought to have to file a  
12 motion and get an order. If you can't work it  
13 out, you ought to have to go to court.

14 HONORABLE SCOTT BRISTER: Let  
15 me just --

16 CHAIRMAN SOULES: Since we are  
17 on a -- the system today requires court  
18 invention absent agreement. You have to go  
19 get an order from the court. Could we hear  
20 from the district judges and maybe the lawyers  
21 who actually are in the personal injury field,  
22 how often is one of these motions denied  
23 outright? Does it ever happen?

24 HONORABLE DAVID PEEPLES:  
25 Seldom.

1 HONORABLE F. SCOTT MCCOWN:  
2 They are seldom denied, but they are  
3 often -- you often pick between what kind of  
4 doctor, which doctor; or with entry on  
5 property, the judge often is making decisions  
6 about when, where, what kind of cameras, who's  
7 going to be there. Entry on property --

8 CHAIRMAN SOULES: I asked about  
9 personal injury.

10 HONORABLE F. SCOTT MCCOWN:  
11 Well, it's true with both. It's the same with  
12 both.

13 CHAIRMAN SOULES: Okay. Could  
14 I get a response on personal injury first?  
15 John, what's your experience, Marks, on IME's?  
16 Are they generally granted even though you  
17 resist or granted in your favor even though  
18 the plaintiff --

19 MR. MARKS: Usually I get one  
20 when I want one.

21 CHAIRMAN SOULES: Judge  
22 Peeples, what's your experience?

23 HONORABLE DAVID PEEPLES:  
24 Almost always granted but there is almost  
25 always an issue about who the doctor is going

1 to be. That's the reason they are there.

2 CHAIRMAN SOULES: Now, that  
3 issue, if that's driving the court hearing  
4 process, we would at least by a notice  
5 provision get rid of those hearings where who  
6 the doctor is going to be is not an issue. Or  
7 not?

8 HONORABLE F. SCOTT MCCOWN:  
9 Well, if who the doctor isn't going to be is  
10 not an issue, they send in an agreed order.

11 CHAIRMAN SOULES: Whether there  
12 is going to be an IME is never an issue. It's  
13 always who the doctor is. Is that what you're  
14 saying?

15 HONORABLE SCOTT BRISTER: I  
16 think that's right.

17 HONORABLE F. SCOTT MCCOWN:  
18 Well, I wouldn't quite go that far.

19 CHAIRMAN SOULES: Mike  
20 Gallagher.

21 MR. GALLAGHER: I want to say  
22 that that's not my experience at all. The  
23 only time that I have found that trial judges  
24 will grant an IME is in a circumstance in  
25 which the plaintiff has in effect had an IME

1 by the plaintiff's -- by a doctor to whom the  
2 plaintiff was referred by the plaintiff  
3 lawyer; and in the circumstance in which I  
4 have treating doctors that I did not refer the  
5 plaintiff to, I resist strongly any -- because  
6 it's not an IME to begin with, but and my  
7 experience has been that the trial judges in  
8 Harris County do not routinely grant them  
9 unless they feel, well, okay, the plaintiff  
10 got examined by the plaintiff's doctor, and  
11 now they need to be examined by the  
12 defendant's doctor.

13 HONORABLE DAVID PEEPLES: Luke,  
14 I find that the issue of good cause is  
15 asserted by the plaintiff a lot of the time.  
16 I mean, what's the good cause for this  
17 request? I mean, it's just an ordinary case,  
18 and why do they want to examine my client? So  
19 that's an issue in addition to who the doctor  
20 is going to be.

21 CHAIRMAN SOULES: Okay. Judge  
22 Brister.

23 HONORABLE SCOTT BRISTER: To me  
24 this -- I mean, it used to be you had to do  
25 that for depositions. You had to have good

1 cause and a court order. I am just suggesting  
2 we bring this out of the Forties into the  
3 Eighties and Nineties. Then you may want to  
4 put other limitations eventually on it, but I  
5 mean, it used to be all discovery was that  
6 way, and yes, it's intrusive, the IME or the  
7 entry on property. A lot of people don't like  
8 oral depositions either, where you have got to  
9 sit there and be grilled for hours and days,  
10 but we don't allow them to just say, "Oh,  
11 well, I don't want to." It's discovery, and  
12 if we want to go back to court order only,  
13 yeah, we could cut a lot of discovery if you  
14 have to get my order on all depositions and on  
15 all interrogatories, but that's all I am going  
16 to be able to do.

17 CHAIRMAN SOULES: Rusty.

18 MR. MCMAINS: Well, the  
19 assumption it seems is that because you have a  
20 motion practice that you are going to have  
21 hearings. That's not my experience either.

22 MR. GALLAGHER: No.

23 MR. MCMAINS: A lot of times  
24 they are just submitted in writing anyway. I  
25 mean, the judge will not give you a hearing on

1 such things. So if you don't have any genuine  
2 basis for contesting it, it's kind of  
3 routinely granted anyway. So I don't know  
4 that it saves that much to go through request.  
5 You don't have oral hearings on all of these,  
6 do you?

7 HONORABLE SCOTT BRISTER: Sure.

8 MR. MCMAINS: Oh, do you?

9 HONORABLE SCOTT BRISTER: Sure.

10 And the reason I do is because the judges that  
11 don't have a submission docket that they have  
12 to wait a month to make sure they have got all  
13 the responses up from downstairs in the  
14 clerk's office, or they are not playing with a  
15 full deck; and my experience is if you want me  
16 to rule one something within a week or ten  
17 days of when you filed it, you have to have an  
18 oral hearing because submission I have to wait  
19 a couple of weeks to make sure I have got all  
20 the papers.

21 MR. MCMAINS: Well, that just  
22 may depend on the particular county that you  
23 are in. I mean, in the smaller counties in  
24 South Texas we don't have that.

25 CHAIRMAN SOULES: Well, we

1 looked at this ten years ago, or I guess  
2 before because these rules became effective in  
3 '84, when we changed -- see, document request  
4 used to be on court order only, and that was  
5 changed in the mid-Eighties, and these were  
6 not changed for the very reasons that Scott  
7 McCown is talking about, but that doesn't mean  
8 it's not time to change them now, but this  
9 very issue has come up before, and it's an  
10 important issue. Which is less costly, which  
11 is less offensive, I think is probably the  
12 issue. Scott McCown.

13 HONORABLE F. SCOTT MCCOWN:

14 Well, keep in mind that with IME's we have  
15 included now already in the present rules  
16 psychiatrists and psychologists. So you are  
17 talking about getting inside people's heads as  
18 well as getting inside their bodies, and I  
19 agree with Judge Brister that we have a  
20 general policy of open cheap discovery, but  
21 any policy carried to its complete logical  
22 conclusion begins to cut against other  
23 important policies, and you have to balance;  
24 and when you are talking about getting in a  
25 body, getting in a head with the shrink,

1 coming onto property, I think the public would  
2 be shocked to know that we had abandoned the  
3 motion, good cause, order practice.

4 CHAIRMAN SOULES: Rusty  
5 McMains.

6 MR. MCMAINS: Well, the other  
7 problem is that I don't think, as Scott points  
8 out, certainly the entry on property motion is  
9 one that can be done to nonparty, and there  
10 just isn't any way in the world we could have  
11 it noncourt intervention in trying to go on  
12 somebody else's property. I don't see how  
13 that's an acceptable procedure.

14 CHAIRMAN SOULES: Just give  
15 notice you are going to trespass.

16 MR. MCMAINS: Yeah. Notice to  
17 trespass.

18 CHAIRMAN SOULES: Judge  
19 Cornelius.

20 JUSTICE CORNELIUS: With  
21 respect to mental and physical examinations, I  
22 don't know if you want to address this problem  
23 or not, but you might want to consider it. We  
24 recently had an application for writ of  
25 mandamus seeking to require the trial judge to

1 allow the plaintiff to take her lawyer with  
2 her to the examination, and the trial judge  
3 refused to so order, and we refused to change  
4 his order, but it's a matter that is not  
5 addressed in the rules, and it's probably  
6 something that's going to be more frequent,  
7 you know. So I don't know if you want to  
8 consider that in connection with that rule or  
9 not.

10 CHAIRMAN SOULES: Okay. Anyone  
11 else? Let's get a show of hands. Those who  
12 feel that we should go to -- stated either  
13 way, that we should retain motion and order on  
14 one hand and just talking about -- let's take  
15 them one at a time, on the IME rule first, or  
16 go to a notice.

17 HONORABLE F. SCOTT MCCOWN:  
18 Luke, if it would be more official, why don't  
19 I just move the adoption of the committee's  
20 Rule 22?

21 CHAIRMAN SOULES: All right.

22 MR. MCMAINS: Second.

23 CHAIRMAN SOULES: Moved and  
24 seconded. Any further discussion on this?

25 HONORABLE DAVID PEEPLES: Luke,

1 I might want to talk about the good cause  
2 requirement. I'm inclined to vote for the  
3 proposal, but I think maybe good cause is a  
4 little more than you ought to have to show,  
5 but I do think going to court is a good idea  
6 on this, and I will just tell you, I am  
7 concerned about the idea that you can just  
8 send out a request for a "jillion" documents  
9 going back to the year one, and the burden is  
10 on the other side to come in and whittle it  
11 down, but we have got a different regime on  
12 this and property.

13 And maybe, you know, the exam of a person  
14 and property is different from the right to  
15 just rummage through documents, but I am not  
16 sure it was a good decision that was made 10  
17 or 15 years ago to go from a motion and order  
18 practice to just request and response on  
19 documents. We may need to revisit that  
20 sometime, but this right here I think is good.

21 CHAIRMAN SOULES: Okay. Well,  
22 if the current rule is on motion for good  
23 cause shown, make a different motion. Let's  
24 take this a piece at a time, Scott, because  
25 apparently there is some other issues, and we

1 are not ready to pass on the rule yet.

2 HONORABLE F. SCOTT MCCOWN: I  
3 think with maybe the exception of Judge  
4 Peeples' comment if I could just address it  
5 and see if I could satisfy his concerns. We  
6 have got a body of jurisprudence about what  
7 good cause is, and so it's pretty clear. I  
8 don't think we need to change the standard,  
9 and if we change the standard, we might create  
10 unintended consequences with that  
11 jurisprudence.

12 HONORABLE DAVID PEEPLES: I  
13 think you're right.

14 CHAIRMAN SOULES: Okay. Here  
15 is the question. Here is the question.  
16 Motion and order or notice only? Those in  
17 favor of motion and order show your hands.  
18 14. That's 14. Those in favor of notice,  
19 show of hands. Four. 13 to 4 to retain the  
20 motion and order practice.

21 MR. SUSMAN: We have a motion  
22 on the floor. There is a motion on the floor  
23 seconded, to adopt the rule now.

24 CHAIRMAN SOULES: That's right.

25 MR. MEADOWS: But we were

1 discussing it, and I think the vote would be  
2 different if there was some sort of -- if  
3 there was a distinction between the issue as  
4 it relates to parties and as it relates to  
5 nonparties. I mean, I think it's a very good  
6 point about not being able to go onto  
7 someone's property without jumping through  
8 some hoops.

9 CHAIRMAN SOULES: We are only  
10 talking about 22, physical and mental  
11 examination at this point.

12 MR. SUSMAN: Of parties.

13 MR. MEADOWS: Of parties. I am  
14 wrong then. The vote would not be different.

15 CHAIRMAN SOULES: Now, Judge  
16 Peeples' question about good cause and  
17 retaining the standard of good cause --

18 HONORABLE DAVID PEEPLES: Luke,  
19 you know, Scott McCown makes a good point.  
20 There is a lot of discretion there, and there  
21 is jurisprudence on it, and in the final  
22 analysis courts are going to decide if they  
23 think it's right or not if we change the  
24 standard, and I take back what I said. I am  
25 not for changing it.

1 CHAIRMAN SOULES: Okay. Any  
2 other discussion on Rule 22? Judge Brister.

3 HONORABLE SCOTT BRISTER: Yes.  
4 The subcommittee rule says you can only  
5 request a psychologist IME if the other side  
6 has designated a psychologist, and I have had  
7 folks who don't designate a psychologist but  
8 are going to admit the psychiatric records  
9 from the doctor saying whatever they are going  
10 to say about the emotional anguish and trauma.  
11 Do we mean to say you can't -- you're, in  
12 effect, admitting the testimony of a  
13 psychologist, but you are not designating him  
14 as an expert. The other side can't respond to  
15 that? It seems to me it ought to be if you  
16 are presenting psychological expert opinions,  
17 whether by records or by designation, the  
18 other side ought to be entitled to rebuttal.

19 MR. MARKS: Or alleging a  
20 psychological injury.

21 HONORABLE SCOTT BRISTER: Well,  
22 I am not ready to go that far just every time  
23 you say emotional anguish you ought to --

24 HONORABLE F. SCOTT MCCOWN:  
25 Judge, which provision of the rule is that?

1 HONORABLE SCOTT BRISTER: Last  
2 sentence of the first paragraph.

3 CHAIRMAN SOULES: We are  
4 looking at the last paragraph of sentence one.  
5 This is the Franklin Jones sentence.

6 HONORABLE SCOTT BRISTER: It  
7 just seems unfair to -- okay, I am not going  
8 to call the expert, but I am going to admit 40  
9 pages of narrative reports and et cetera from  
10 the expert, and the other side can't rebut it.

11 CHAIRMAN SOULES: This is just  
12 talking about independent medical examination  
13 by a psychologist.

14 HONORABLE SCOTT BRISTER:  
15 That's right.

16 CHAIRMAN SOULES: You can still  
17 call your psychologist to testify about what  
18 the records say.

19 HONORABLE SCOTT BRISTER: And  
20 what's the first problem with that witness  
21 going to be? You never even talked -- you  
22 couldn't point to who they are in the  
23 courtroom, could you? That's not going to be  
24 very effective.

25 CHAIRMAN SOULES: Just as long

1 as we have got it said. John Marks.

2 MR. MARKS: I would move we  
3 delete the sentence. Is that in the rule now?  
4 That's not in the rule now, is it?

5 CHAIRMAN SOULES: Yes.

6 HONORABLE SCOTT BRISTER: Yes.  
7 It's there.

8 MR. MARKS: I think it ought to  
9 be taken out because I think any time that a  
10 psychological injury of any kind is alleged I  
11 think it becomes fair game, and you ought to  
12 be entitled to get an examination by a  
13 psychologist under the same terms that you can  
14 get a physical examination.

15 CHAIRMAN SOULES: Well, there  
16 is the debate, and we have had it before, and  
17 that's why it's in here because it was voted  
18 to -- John Marks' position was voted down  
19 years ago, and this was put in to protect  
20 against that very thing, but we have got a  
21 different -- our committee is differently  
22 constituted now, and it may be time to make a  
23 change, but that's exactly the debate we had,  
24 and John, are you making a motion?

25 MR. MARKS: I move that we

1 delete that sentence.

2 CHAIRMAN SOULES: Is there a  
3 second?

4 MR. LATTING: Second.

5 CHAIRMAN SOULES: Moved and  
6 seconded. Okay. Discussion. Judge McCown.

7 HONORABLE F. SCOTT MCCOWN: I  
8 disagree with John Marks, and I think this is  
9 a very important cost issue in family law in  
10 particular, that in every family law case, you  
11 know, you could be asking for a psychological  
12 examination, and this was put in there to say  
13 only if the other side is making that an  
14 issue. I do, however, agree with Judge  
15 Brister and think that we could modify it, and  
16 instead of saying "as an expert who will  
17 testify," change it to "who has identified a  
18 psychologist whose opinions may be offered  
19 into evidence," so that whether they come in  
20 through testimony or come in through report,  
21 if you are offering their opinions into  
22 evidence. So I'd like to vote down John Marks  
23 and vote up Judge Brister.

24 CHAIRMAN SOULES: Further  
25 discussion? Steve Susman.

1 MR. SUSMAN: You know, I mean,  
2 there is -- I mean, I think we have kind of a  
3 due process issue here because these rules  
4 have not -- the last few rules we did not  
5 change because we didn't see anything wrong  
6 with them basically. There has been very  
7 little publicity about even talking about  
8 changing them and very little opportunity for  
9 people to comment on them. I mean, I don't  
10 know what the family lawyers would say about  
11 that rule or personal injury lawyers or anyone  
12 would say about that rule because no one has  
13 known anyone is trying to change it until this  
14 very moment.

15 In fact, there were no comments received  
16 on that rule in connection with your  
17 procedure. So I am just reluctant to see us  
18 go change these rules where obviously there  
19 was a debate at some other time. I don't  
20 really care. I never get involved in this  
21 practice. It's just someone is going to say  
22 this wasn't a fair process.

23 CHAIRMAN SOULES: Rusty, and I  
24 will go around the table.

25 MR. MCMAINS: Well, I think

1 that there is a significant difference to me  
2 between the intrusion that a psychologist does  
3 into the head of an individual just because  
4 they have alleged mental anguish or something,  
5 as distinguished from when somebody is trying  
6 to offer evidence of a psychological injury,  
7 and I believe that you get into the judge's  
8 comments about, you know, when the  
9 psychologists who want to put somebody on the  
10 couch and ask them a lot of questions and then  
11 share that with their -- share their  
12 observations with the opposing lawyers that  
13 they are going to say, "I want a lawyer  
14 there."

15 Now, that's one thing about having a  
16 lawyer there when somebody is taking their  
17 clothes off or when they are doing some kind  
18 of objective physical testing, but when all  
19 you are doing is getting a hired gun to ask  
20 questions of the other side outside the  
21 presence of their lawyer, that to me  
22 implicates a lot of things that unless the  
23 person has essentially voluntarily put that in  
24 issue in terms of the issue of psychological  
25 injury or psychiatric injury and to the point

1 where they have expert opinion on it, I don't  
2 think it's appropriate, and that's why we  
3 rejected it before. In addition to which  
4 there was a lot of questions about whether  
5 psychologists ought to be in there at all. I  
6 mean, this was actually moved -- psychologists  
7 were never in there before, per se. People  
8 primarily were using psychiatrists only and  
9 then they moved to psychologists, but they had  
10 this limitation.

11 CHAIRMAN SOULES: Steve  
12 Yelenosky.

13 MR. YELENOSKY: I agree with  
14 Rusty, and I guess the only other thing I have  
15 to say is, why do we make the distinction here  
16 between psychiatrist and psychologist? Up  
17 above we say "physician or psychologist," and  
18 physician, M.D., would include psychiatrist.  
19 Down here we say that you can't get a  
20 psychologist except when they have designated  
21 that expert, and I am unclear on why that  
22 doesn't also say "psychiatrist" and why the  
23 next section also doesn't say "psychiatrist."

24 CHAIRMAN SOULES: Well, I think  
25 Rusty's statement is the real response to

1 that. Psychologists were put in. It had to  
2 be a physician before putting in psychologist,  
3 and there is -- the committee has not regarded  
4 psychologists as equivalents to psychiatrists  
5 in terms of examinations historically in the  
6 past. So they put more strings on getting a  
7 psychologist IME.

8 MR. YELENOSKY: Well, I guess  
9 what I'm asking, if we are protecting and  
10 making it harder to get an examination by a  
11 psychologist does somewhere in the rule make  
12 it equally hard to get an examination by a  
13 psychiatrist?

14 CHAIRMAN SOULES: No.

15 MR. MCMAINS: No. There is  
16 still a good cause requirement.

17 CHAIRMAN SOULES: Mike  
18 Gallagher, did you have your hand up?

19 MR. GALLAGHER: I think Rusty  
20 has already said what I wanted to say.

21 CHAIRMAN SOULES: Judge McCown.

22 HONORABLE F. SCOTT MCCOWN: The  
23 rule draws a distinction between psychiatrist  
24 and psychologist for a reason, because  
25 psychiatrists -- and this won't be true in

1 every case, but generally speaking  
2 psychiatrists make true diagnoses of true  
3 mental illnesses, and psychologists talk about  
4 personality and feelings, and so the thought  
5 was that, you know, good cause for a  
6 psychiatrist, you are getting somebody to talk  
7 about whether a person is schizophrenic is  
8 different than a psychologist to talk about  
9 whether they are a good person or a bad  
10 person.

11 MR. YELENOSKY: Yeah. But you  
12 could ask a psychiatrist to examine somebody  
13 and talk to them about their emotional life.

14 HONORABLE F. SCOTT MCCOWN:  
15 Right. But the reason --

16 CHAIRMAN SOULES: Just a  
17 minute.

18 MR. YELENOSKY: How do you  
19 protect against that?

20 HONORABLE F. SCOTT MCCOWN: The  
21 reason that's not a problem is because  
22 psychiatrists cost an incredible amount of  
23 money, and psychologists are a dime a dozen,  
24 and so it doesn't matter.

25 CHAIRMAN SOULES: Okay. Judge

1 Brister.

2 HONORABLE SCOTT BRISTER: Yeah,  
3 a couple of things. No. 1, I am not  
4 convinced -- at least most of the  
5 psychological IME's I order are this couch  
6 thing. I mean, most of the ones I see are,  
7 "We want to give them the MMPI test."  
8 Basically we want to sit them down, do a bunch  
9 of fill in the blanks, the kind of tests you  
10 took in seventh grade to see whether you got  
11 in accelerated classes or not, and then they  
12 are going use a computer to read and say, "Oh,  
13 well, you are a depressive" or you are  
14 whatever.

15 It is by no means routinely that  
16 invasive. "Tell me about your childhood and  
17 your sex life." Now, that's not to say  
18 somebody might not misuse it at that, but I do  
19 think this needs to be addressed. This is a  
20 growing area, and correct me if I am wrong,  
21 Mike, but I think the plaintiffs Bar more and  
22 more designates these people because of the  
23 cases out there that are seeming to say  
24 emotional anguish is more than just being  
25 embarrassed or something like that. You have

1 got to do more than that, which then puts the  
2 pressure on the plaintiffs attorneys to have  
3 somebody with a license say, "This is more  
4 than mere embarrassment," et cetera, but then  
5 the defendant is -- you can't let one side  
6 call a psychologist and not the other.

7 To say this person has been terribly  
8 injured emotionally and tell the defendant,  
9 "No, sorry. You can look at the records and  
10 make a few guesses." I think it's got to be  
11 addressed. It's going to be a growing  
12 problem, and you know, I mean, I knew this  
13 rule was in play. I read the rule. If you  
14 want to just flush it out of the subcommittee  
15 report completely, that's one thing, but if we  
16 are going to discuss it and pass it, we need  
17 to address this issue.

18 CHAIRMAN SOULES: Mike  
19 Gallagher.

20 MR. GALLAGHER: It seems like  
21 the fix has been suggested, that being one in  
22 which if one side is going to call a  
23 psychologist, the other side has the right to  
24 have an examination of that nature inquiring  
25 as to those matters is appropriate, and I do

1 not believe -- I agree with Rusty, and I said  
2 I wasn't going to echo what he had said, but  
3 in every case in which someone claims mental  
4 anguish as a component of a personal injury  
5 claim that you are entitled to a psychological  
6 examination, but if you do claim some  
7 psychological injury of a specific nature or  
8 even of a general nature, if it goes beyond  
9 that in your allegation, then one is called  
10 for.

11 But unfortunately my experience has been  
12 when someone is submitted for a psychological  
13 examination, the psychologists generally go  
14 far beyond just an inquiry as to the  
15 relationship, say, between an injury and a  
16 psychological response, and it does get to be  
17 sort of a very broad type of examination, but  
18 I think the fix that we have been talking  
19 about is far better than what my friend,  
20 Mr. Marks, has suggested.

21 CHAIRMAN SOULES: John Marks.

22 MR. MARKS: Well, thank you, my  
23 friend Gallagher. Okay. What if you have got  
24 a bunch of medical records and you have got a  
25 physician saying Mr. Jones came in highly

1 distraught today, very angry, very upset, you  
2 know, and something -- I think this all goes  
3 in with his injury and the problems he's  
4 having. Well, this is not a psychologist  
5 saying it. It's not a psychiatrist saying it,  
6 but it is evidence of a psychological injury,  
7 and that happens a lot. I mean, that is not  
8 just out of the air. That happens quite a  
9 bit, and what happens then?

10           You have got these medical records. You  
11 have got a physician testifying about this in  
12 the medical records, and yet, you have no  
13 recourse. Also, I think that a psychologist  
14 needs to go into background. I think a  
15 defendant -- if somebody is alleging a  
16 psychological injury and psychological mental  
17 emotional problems arising out of an accident,  
18 you need to know what his background is; you  
19 know, was he molested as a child, you know,  
20 that sort of thing. All of that stuff you  
21 need to know because that goes into his  
22 psychological makeup, and if you are not  
23 entitled to get that evidence then you are  
24 left bare, and the plaintiff is just going to  
25 have a field day with you.

1 CHAIRMAN SOULES: Joe Latting.

2 MR. LATTING: I was going to  
3 ask, does everybody agree that if  
4 psychological records are coming into evidence  
5 that the party against whom they are coming in  
6 ought to have the recourse that Scott Brister  
7 asked for; that is, are we all at Scott  
8 Brister's point? Scott McCown said he was  
9 against John Marks, but he was for Brister.  
10 Is everybody in agreement with that?

11 MR. KELTNER: Yes, I am in  
12 agreement with that.

13 MR. SUSMAN: Could we have  
14 Judge Brister state it again?

15 MR. LATTING: Yeah. Brister,  
16 could you state that again so we could see  
17 what --

18 HONORABLE SCOTT BRISTER: Well,  
19 McCown had it correctly.

20 HONORABLE F. SCOTT MCCOWN: In  
21 paragraph (1) where it says "as an expert who  
22 will testify," the last words, "as an expert  
23 who will testify," delete those words and  
24 instead have it read, "identified a  
25 psychologist whose opinions may be offered

1 into evidence."

2 CHAIRMAN SOULES: Okay. Well,  
3 anything else?

4 MR. GALLAGHER: "Whose opinions  
5 or records."

6 CHAIRMAN SOULES: Okay.  
7 Anything else on Marks' motion? John Marks'  
8 motion is to delete the last sentence. Those  
9 in favor show by hands. Five. Those opposed?  
10 16 to 5 it fails. Okay. Now, is there --

11 MR. SUSMAN: Second Scott's  
12 motion.

13 CHAIRMAN SOULES: State your  
14 motion, please, Judge McCown, in the form of a  
15 motion.

16 HONORABLE F. SCOTT MCCOWN:  
17 Okay. I would move that on paragraph (1) we  
18 delete "as an expert who will testify" and add  
19 "a psychologist whose opinions may be offered  
20 into evidence," and I wouldn't want to go any  
21 farther than "opinions maybe offered into  
22 evidence" because I don't want to get in a  
23 fight about what is or isn't a record, what is  
24 or isn't psychological. If there is some  
25 psychologist whose opinions are somehow going

