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# OREGON CRIMINAL LAW REVISION COMMISSION

## Subcommittee No. 3

April 8, 1972

Members Present: Mr. Bruce Spaulding, Acting Chairman
Mr. Donald R. Blensly
Mr. Donald E. Clark

Excused: Judge James M. Burns, Chairman
Representative Norma Paulus

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Bert Gustafson, Research Counsel

Also Present: Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Larry Derr, Secretary, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Willard Fox, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Dave Hattrick, Deputy District Attorney, Multnomah County
Mr. Ray Robinette, Washington County District Attorney
Mr. John Hawkins, Capital Journal

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The meeting was called to order at 10:00 a.m. in Room 315 State Capitol by Mr. Bruce Spaulding serving as Acting Chairman in the absence of Judge Burns who was out of the state.

Approval of Minutes of Meeting of March 16, 1972

Mr. Clark moved that the minutes of the meeting of Subcommittee No. 3 of March 16, 1972, be approved as submitted. Motion carried unanimously.

Pleadings of Defendant; Plea Discussions and Agreements; Preliminary Draft No. 2; February 1972

Mr. Paillette recalled that the Commission at its meeting on March 9 had rereferred sections 10 and 12 of the draft on plea discussions to Subcommittee No. 3 for further study and for the purpose of making recommendations concerning the questions raised at that meeting.

Section 10. Discussion and agreement not admissible. The Commission voted to redraft section 10 in the following form:

> "(1) The fact that the defendant or his counsel and the district attorney engaged in plea discussions or made a plea agreement shall not be received in evidence for or against the defendant in any criminal or civil action or administrative proceeding.
>
> "(2) The provisions of subsection (1) will not apply if the defendant enters a plea of guilty or no contest which is not withdrawn."

Judge Burns had then suggested that the aspect of admissibility of statements was not completely covered by the draft and the Commission voted to rerefer section 10 to Subcommittee No. 3 for a recommendation as to whether the section should be broadened to exclude the disability of statements made during the course of plea negotiations. Mr. Paillette explained that the question, discussed at some length by the Commission, was whether it would really discourage plea negotiations if section 10 were adopted as set forth above. [Note: See Commission minutes, 3/9/72, pp. 26-29.]

Mr. Paillette advised that the Oregon State Bar Committee on Criminal Law and Procedure at its meeting on April 1 had thoroughly discussed section 10.

Mr. Milbank, Chairman of that committee, read from a rough draft of the minutes of the Bar committee meeting:

> "The members agreed that the content of the plea bargaining process including statements made by the defendant should not be admissible in later proceedings. However, the prohibition should be qualified to the extent

that if the defendant later testifies, he should not be allowed to make inconsistent statements unchecked by impeachment. The committee felt that the general rules for suppression and voluntariness of confession-type hearings should apply.

"The following motion was made and unanimously adopted:

"Section 10 should be amended to broaden its prohibition to include statements and admissions made by the defendant and his attorney during plea discussions and as a part of the plea agreement except to the extent that such statements and admissions become relevant for impeachment purposes at a subsequent trial."

Mr. Derr commented that section 10, as presently drafted, was concerned only with the fact that plea bargaining took place and did not go into the content of the bargaining process.

Chairman Spaulding expressed approval of the Bar committee's recommendation to include admissions made by the defendant or his attorney.

In view of the Fifth Amendment and the reasons for excluding statements made by the defendant, Mr. Blensly asked what basic rationale existed for excluding admissions by the defendant made during plea discussions. Chairman Spaulding replied that the procedure would discourage plea discussions. Mr. Paillette pointed out that at the Commission meeting both Judge Burns and Senator Yturri were of the opinion that if negotiations broke down and the trial followed, the district attorney should not be permitted to use the defendant's statements made during the course of those negotiations against him at trial.

Mr. Blensly opposed the Bar committee's recommendation to use the defendant's statements during the course of plea negotiations only for impeachment purposes. He asked why the Bar committee did not go one step further and permit those statements to be used at a perjury trial. Mr. Milbank replied that that aspect was not discussed. Mr. Blensly next asked if, under the Bar proposal, admissions made during plea negotiations could be used as substantive evidence at trial and received a negative reply from Chairman Spaulding and Mr. Paillette.

Mr. Clark was of the opinion that the negotiation process should be carefully protected to insure that it was a secret process where the discussions could be totally candid. He expressed approval of the section as proposed by the Commission.

Mr. Blensly said that the purpose of the criminal justice system was to present evidence to determine whether a person was guilty or innocent. He objected to throwing a cloak over plea negotiations by saying that anything that took place during that process was secret. If facts indicating guilt were found during negotiations and those facts could not be used, it was not accomplishing the ultimate goal of the criminal justice system. If the fact that the defendant's statements were to be admissible had some effect on plea negotiations, perhaps this was as it should be, he said.

Mr. Derr stated that from the defense attorney's standpoint, he would find no problem with a limited use of those statements. It would not be detrimental, he said, for the client to know that if he was not completely honest, his statements could come back to haunt him. Chairman Spaulding commented that a reputable defense counsel would not permit his client to testify differently than that counsel knew the facts to be and expressed the view that the Bar proposal was a good compromise.

Chairman Spaulding then asked if the reasons for keeping statements out of a civil action were the same as those applicable to a criminal action inasmuch as section 10 referred to both. Mr. Paillette replied that the section as originally drafted was limited to the fact that a discussion had taken place. Mr. Blensly said he believed the same reasoning would apply to civil and administrative proceedings as to a criminal action.

After further discussion, Mr. Clark moved that the staff be directed to draft language to accomplish the recommendation of the Bar committee with respect to section 10 as set forth on page 3 of these minutes. Motion carried. Voting for the motion: Clark, Chairman Spaulding. Voting no: Blensly.

Section 11. Withdrawn plea not admissible. Mr. Paillette pointed out that the Bar committee had proposed to break section 11 into two subsections. The first would retain the language of the original section 11 and subsection (2) would incorporate the amendment just adopted in section 10. Under section 11, he said, there could be a guilty plea where no negotiations had taken place and the section would also be applicable to an Alford type hearing.

Mr. Milbank explained that the Bar committee believed that the provisions of section 10 should also be applicable in cases where there had been no plea negotiation prior to the time the defendant entered a plea of guilty; in other words, the provisions of section 10 should extend to and be treated in the same manner as the situations covered by section 11.

Mr. Clark moved that section 11 be amended in accordance with the Bar committee's recommendations, i.e., that it should contain two

subsections: subsection (1) to retain the language of the original section 11; subsection (2) to incorporate the amendment to section 10 adopted by the subcommittee with regard to the inadmissibility of statements and admissions made by the defendant or his attorney during any proceedings relating to the entry of a plea of guilty, including the impeachment exception. Motion carried unanimously.

Section 12. Pleading to other offenses. Mr. Paillette explained that the purpose of section 12 was to allow the defendant to plead to several offenses committed or alleged to have been committed outside the county in which he was pleading. The Commission had raised a number of questions with respect to this procedure and had ultimately rereferred it to subcommittee. One question was concerned with waiver of venue, but the Commission members apparently did not feel that venue created a problem. It was also pointed out at that meeting that unless formal charges had been made against the defendant, a number of problems would be created when the provisions of the section were invoked. The Bar committee had discussed this point and agreed with the Commission. He read from the minutes of the Bar committee:

> "There was a strong unanimous feeling among the committee members that the section 12 procedure would be a very valuable one to have in the Criminal Procedure Code, but the committee felt that the procedure should be spelled out more carefully . . . . It was decided that a formal charge should exist in every case under this section. The following motion was unanimously adopted after discussion.
>
> "Section 12 should be amended as follows:
>
> "(1) Upon entry of a plea of guilty or no contest, or after conviction on a plea of not guilty, the defendant's counsel may request permission for the defendant to enter a plea of guilty or no contest as to any other crime [~~he has committed~~] with which he has been charged which is within the jurisdiction of coordinate courts of this state.
>
> "(2) With consent of the district attorney of the county in which the plea is to be entered, and upon written approval of the district attorney of the county in which the crime is charged [~~or could be charged~~], the court may allow the defendant to enter the plea.
>
> "(3) Entry of a plea as provided in this section constitutes a waiver of [~~:--(1)~~] venue, as to crimes committed in other counties of the state[~~;--and~~].
>
> "[~~(2) Formal charge as to offenses not yet charged.~~]"

Mr. Clark said he was in favor of keeping the procedure as simple as possible and a requirement that the defendant be formally charged only complicated the matter. Mr. Blensly explained that a formal charge was a necessity for several reasons, one being to protect the defendant's right of double jeopardy. Furthermore, almost any offense could be charged in several different forms, and a formal charge was needed so the person would know precisely what he was pleading to.

Mr. Blensly called attention to the phrase in subsection (1), "within the jurisdiction of coordinate courts." He asked if "jurisdiction" referred to an indictment placing the crime within the jurisdiction of the circuit court or to an information in district court. Unless there was a constitutional amendment, he said, this could create a problem on the constitutional indictment requirement. Mr. Paillette replied that if jurisdiction could be waived in County A, it could also be waived in County B. It was venue, not jurisdiction, that created the problem, he said, and clearly venue could be waived.

Mr. Derr explained that the Bar committee had discussed two entirely different approaches to the procedure under section 12. One was to change the venue requirement under existing law and transfer the entire case to the court where the plea was going to be entered. The other was to leave the case in each of the originating counties for record purposes and when the judge in the county in which the defendant was being held acted on each of the individual charges, he would be acting as a judge of the court where that charge originated. The Bar committee believed this latter proposal was the most reasonable way to handle the matter, and, if adopted, there would be no problem when the defendant waived indictment in the county in which he was found before a judge who was in effect acting as a judge of the other court.

Mr. Clark commented that the proposed procedure was less complex and less expensive than the present system. Mr. Paillette agreed and pointed out also that section 12 was permissive. Probably the most widespread use of the section would be in connection with check cases where a defendant had written a number of bad checks throughout the state. Mr. Clark remarked that it would probably be useful also where an individual had committed a number of house burglaries.

Mr. Paillette then read from the minutes further recommendations of the Bar committee:

> "Section 12 should be amended to include additional subsections describing procedure conforming to the following principles. Every criminal case will continue to originate in the county with the proper venue by formal charging document. At the request of the defendant and with the

approval of the various district attorneys as provided in the existing section 12, the entry of a guilty plea or plea of no contest and sentencing upon those pleas for several crimes committed in different counties may be consolidated in one county. Each participating originating county would forward a certified copy of the charging document together with the written consent of the local district attorney to the county in which the defendant is found. The case would retain the heading and all records would indicate that the case remained in the court of the originating county. If the judge in the county in which the defendant is found accepts the plea and imposes sentence, his original judgment order will be forwarded to the originating county for filing.

"The attorneys noted that under the present law a defendant cannot plead to an information without formally waiving indictment by the grand jury. This restriction could create practical difficulties in the operation of section 12. The committee felt that it would be consistent with the theory of procedure which it proposes for section 12 that the defendant should be allowed to appear in the county in which he is found to formally waive indictment by the grand jury in the county in which the crime is committed. In view of the fact that the court in the county in which the defendant is found is actually operating as an extension of the originating court this should not create a problem.

"The following motion was unanimously adopted:

"Section 12 should be amended to add a subsection providing that a defendant may appear in the county in which he is found to waive indictment by the grand jury of any county in which formal charges are filed or are to be filed.

"The committee discussed various ramifications of charges pending but not formally filed in connection with section 12. It was the consensus of opinion that such matters are not conducive to legislation."

Chairman Spaulding stated that apparently their conclusion was that there was no practical way to clean up charges on a wholesale basis unless the district attorney in the originating county filed a charge.

Mr. Blensly asked if there was a difference between "formal charge" and "charge" and questioned the necessity of including "formal" in the statute. Mr. Paillette replied that the term would probably ultimately be defined as a written accusatory instrument filed against

the defendant and whatever term was decided upon would then be made uniform throughout the code.

Mr. Blensly said the proposed section 12 directed that the judgment order be forwarded to the county where the crime occurred. He believed that all orders entered in that particular case -- arraignment, pleading order, etc. -- should be forwarded to the originating county. Mr. Derr indicated that this was the intent of the Bar committee.

Mr. Clark then moved that the recommendations of the Bar committee be adopted with respect to section 12, i.e., the amendments to subsections (1), (2) and (3) of section 12 set forth on page 5 of these minutes; the addition of a subsection describing a procedure whereby every criminal case will continue to originate in the county where the crime was committed as described in the first paragraph of the Bar minutes set forth on pages 6 and 7 of these minutes; and the addition of a subsection providing that a defendant may appear in the county in which he is found, to waive indictment by the grand jury of any county in which formal charges are filed or are to be filed. Motion carried unanimously.

Section 5. Determining accuracy of plea. Mr. Paillette indicated that the Commission had adopted section 5 and rejected alternate section 5 as set forth on page 7 of Preliminary Draft No. 2 because the majority felt that the alternate proposal gave too much latitude and that the defendant could enter a guilty plea to a crime that bore little, if any, relationship to the crime committed. The Bar committee discussed the Commission's decision and voted to continue to express support for the alternate section 5.

Mr. Blensly asked if the subcommittee had authority to reconsider section 5 in view of the Commission's decision to approve it and was told by Mr. Paillette that the authority existed and there was precedent for doing so, but the decision was up to the subcommittee as to whether they wished to reconsider the section.

Following an explanation by members of the Bar committee as to their reasons for supporting the broader latitude allowed by the alternate section 5, Mr. Clark moved that it be called to the attention of the Commission that the Bar committee had again raised the issue. Motion carried. Mr. Blensly abstained from voting.

Grand Jury and Indictments; Preliminary Draft No. 1; April 1972

Mr. Paillette explained that Preliminary Draft No. 1 contained amendments to ORS chapter 132. In addition, two proposed constitutional amendments had been prepared for the subcommittee's consideration, copies of which are attached hereto as Appendix A and Appendix B. He recapitulated the Commission's directive to the subcommittee

with respect to grand juries as set forth on pages 43 and 44 of the Commission minutes of March 10, 1972, and on page 12 of Preliminary Draft No. 1.

Mr. Paillette advised that if the Commission's recommendations were ultimately adopted, there would be some changes necessary in ORS chapter 132 in addition to those contained in the draft.

Section 1. ORS 132.030. Qualification; acceptance; excuse from service. ORS 132.040. Challenge to panel or individual juror. Mr. Gustafson advised that the amendments in ORS 132.030 modified the provisions of that section and incorporated ORS 132.040 because the two sections related to the same subject matter. The section was intended to make clear that it was the court that made the decision as to whether a grand juror was qualified to serve.

Chairman Spaulding inquired if this provision would eliminate the court's ability to challenge a grand juror after he had been sworn. Mr. Gustafson replied affirmatively and added that the provision made no change in existing law.

Section 2. ORS 132.050. Foreman. Mr. Gustafson explained that section 2 added provision for appointment of an alternate foreman inasmuch as the draft later provided that under certain circumstances a grand jury may be composed of five or six members. If the foreman were absent, this proposal would provide for appointment of an alternate foreman to act in his stead.

The subcommittee decided to study the entire draft before voting on approval or disapproval of individual sections.

Section 3. ORS 132.060. Oath or affirmation of jurors. Mr. Gustafson advised that the amendment to section 3 made clear that it was the court who administered the oath to the grand jurors.

Mr. Clark was of the opinion that the oath administered to grand jurors as set forth in the statute failed to recognize reality. Grand juries, he said, operated with a great deal of discretion and many times, although there was ample evidence to indicate that a crime had been committed, they made the judgment that it was not socially desirable to indict. The clause in the oath, "that you will indict upon the evidence before you according to the truth and the laws of this state, so help you God," made it mandatory that the grand jury return a true bill in such cases, he said.

Chairman Spaulding pointed out that section 10 on page 17 of the draft stated when a grand jury was required to indict.

Section 10. ORS 132.390. When the grand jury should indict. ORS 132.380. Whom the grand jury may indict or present. Mr. Gustafson explained that the draft contemplated repeal of ORS 132.380 because it contained essentially the same test as ORS 132.390. In ORS 132.390 "ought to" was changed to "shall" to indicate that the grand jury had no alternative to indictment once the evidence test had been fulfilled.

Mr. Gustafson disagreed with Mr. Clark's contention that the grand jury should not be forced to indict if for some reason they believed they should not. That purpose, he said, was served by the trial jury and they were the ones who should serve as the conscience of society. Mr. Clark replied that he was not necessarily advocating that the grand jury not be required to indict if the facts supported indictment but was saying that the oath did not recognize the realities of the system because the grand jury did exercise discretion. Chairman Spaulding agreed and added that most district attorneys so instructed the grand jury.

Mr. Fox asked if it was Mr. Gustafson's position that section 10 established a probable cause test and was told that ORS 132.380 appeared to be a probable cause test while ORS 132.390 set an evidence type test which made 132.380 unnecessary. Mr. Paillette commented that ORS 132.380 and 132.390 contained inconsistent tests, although 132.380 apparently was placed in the statutes for another purpose, namely, to indicate that whether or not there was a bind over, the grand jury could indict the individual.

Mr. Robinette remarked that it would make no difference in the grand jury room whether the verb was "ought to" or "shall" so long as the words "would warrant a conviction by the trial jury" were retained in the statute. That phrase, he said, left the grand jury discretion to bend with the social trend.

Mr. Clark said the oath seemed pretty clear to him when it said, "you will indict upon the evidence before you according to the truth and the laws of this state." Mr. Paillette explained that the oath was modified by the other provisions of ORS chapter 132. The jurors were sworn to follow the law, including the provisions of that chapter.

There followed a lengthy discussion of the policies followed by various district attorneys in presenting cases to the grand jury.

Mr. Paillette indicated that section 10 embodied a policy matter as to the kind of test the subcommittee wanted to place in the statute and the members might want to suggest an amendment later. Additional discussion on section 10 begins on page 25 of these minutes.

Section 4. ORS 132.090. Presence of persons at sittings or deliberations of jury. Mr. Gustafson explained that the first

amendment in section 4 changed "interrogation" to "examination" and the second deleted "a woman" and inserted "or other special attendant" which would include a woman. The amendment in subsection (2) would avoid the absurd result of barring women during deliberations or voting of the grand jury.

Mr. Gustafson said section 4 involved a basic policy decision as to the right of the accused and/or his counsel to appear at grand juries. He and Mr. Paillette had discussed that question and decided against including such a provision in this draft but agreed it should be discussed as a policy matter. If that course were adopted, section 4 would have to be amended to allow the presence of the accused and/or his counsel, and ORS 132.320 regarding consideration of evidence would also need to be amended.

Chairman Spaulding asked that the subcommittee bear that suggestion in mind and discuss it later.

Section 5. ORS 132.100. Oath to witness before grand jury. Mr. Gustafson noted that section 5 allowed the foreman or the clerk to administer an oath to the witness. If both the foreman and the clerk were absent, the revision to the section would permit any other grand juror to administer the oath.

Mr. Blensly commented that the phrase "may administer an oath" implied that the grand jury could hear unsworn testimony and asked if the subcommittee felt this should be permitted. Chairman Spaulding said he read the section to mean that someone was going to administer the oath and it may be someone other than the foreman.

Mr. Blensly maintained that the section, as drafted, left enough leeway that the grand jury would not be required to swear every witness. He questioned the necessity of administering an oath to every witness, particularly when they were conducting, for example, an investigation of prisons. Mr. Clark stated he had appeared before grand juries conducting that type of investigation and had not been sworn.

After further discussion, all three members of the subcommittee agreed that witnesses before the grand jury should be sworn in all cases.

Mr. Blensly moved to amend section 5 to read:

> "The foreman of the grand jury or, in his absence, any other grand juror shall administer an oath to any witness appearing before the grand jury."

The motion carried unanimously.

Section 6. ORS 132.110. Absence, disqualification or inability of juror. Mr. Gustafson explained that the amendment to section 6

would permit a grand jury to operate with less than seven members under "exigent circumstances" and eliminated an ambiguity between this section and ORS 132.100 where it was implied that less than seven jurors could hear testimony and indict.

Mr. Blensly asked if section 6 would require the absent juror to be discharged. Mr. Paillette replied that it did not change the original language "to take the place of a discharged juror" and was not meant to take care of the situation where a grand juror failed to show up for one day only. It was intended to apply to discharged jurors, he said.

Mr. Blensly next noted the amendment said that "the court may allow them to hear testimony" but it did not say they could act. He suggested it would eliminate an ambiguity to state that "the court may allow them to proceed."

Mr. Robinette commented that section 6 limited exigent circumstances only to those instances that prevented the drawing of a substitute grand juror. There might well be other exigent circumstances that would not necessarily prevent the drawing of a substitute grand juror. Mr. Blensly said that under this section a grand juror who was ill would have to be discharged before the grand jury could proceed with less than seven members. If a trial jury were sitting in the courthouse at the time, he observed that there was no reason why another grand juror should not be drawn to bring the grand jury back to seven members.

Mr. Robinette said he would rather work with an experienced grand juror than discharge one and bring in a new member. He wanted to change the statute to permit a temporary substitution when, for example, one juror became ill. It would be helpful, he said, to allow the experienced juror to return as soon as he was able to do so rather than to discharge him permanently. He would prefer, he said, to work with a six man grand jury for a short time and revert back to the original juror rather than to discharge him and appoint a substitute juror. In a long investigation, he said, it had sometimes been necessary to begin a case over again because the substitute juror was not present to hear all the testimony. Mr. Blensly stated that under section 6, in that situation it might be preferable to continue the investigation with a six member jury rather than to start again.

Mr. Paillette indicated that the purpose of the amendment in section 6 was to clear up the question raised by Mr. Wallace at the Commission meeting on March 10 concerning the course that should be taken when one or two members were absent and a replacement was not available. The section was intended to indicate that, if possible, there should be seven members, but five or six members could indict under exigent circumstances. It was not intended to go as far as Mr. Robinette suggested.

Mr. Blensly was of the opinion that if a substitute juror were readily available, the seventh member should be drawn. Mr. Clark said one reason for not drawing the seventh member would be to avoid the situation posed by Mr. Robinette where the case would have to be started over again. Mr. Blensly replied that he believed the court would construe that situation to be an "exigent circumstance" that would permit the case to be continued with less than seven members.

Mr. Paillette pointed out that the amendment was intended to say that the grand jury could indict with five members as long as the five who were voting had heard all the evidence. Whether or not a substitute juror was brought in, the case could be continued, but only the five who had heard all the evidence could vote.

Mr. Blensly suggested that the amended portion of section 6 be revised to read, " . . . prevent the drawing and attendance of a substitute grand juror . . . . " In his county, he said, the juror could be drawn but it might not be possible to have him in attendance on that day.

Mr. Derr commented that as section 6 was originally worded, the qualifications on the power of the judge to discharge a grand juror and draw a substitute were listed in subsections (1), (2) and (3). As presently worded, the section said that the judge may discharge the grand juror and draw another one provided those five continued under the exigent circumstances and provided the subsections (1), (2) and (3) situations existed. In other words, the three subsections modified the "provided, however," clause instead of the first clause.

At this point the subcommittee recessed for lunch and reconvened at 1:15 p.m. with the same members present. Also present for the afternoon session were Mr. Milbank, Mr. Derr, Mr. Robinette and Mr. Hattrick.

Mr. Blensly restated his previous motion and moved to revise the amended portion of section 6 to read:

> " . . . the court may allow them to proceed if exigent circumstances exist that prevent the drawing and attendance of a substitute grand juror . . . . "

Motion carried.

Chairman Spaulding asked if "discharge" should be deleted in the third line of the section. Mr. Blensly said he disagreed with Mr. Robinette that the juror should not be discharged and would oppose that amendment.

Mr. Blensly next commented that Mr. Derr's objection merited consideration. It was, he said, difficult to relate the wording on

the discharge of the grand juror to the requirements in the three subsections. Those requirements appeared to modify the proceeding with less than seven members. Mr. Paillette indicated that if that ambiguity existed, the section should be redrafted because subsections (1), (2) and (3) were intended to relate back to the power of the court to discharge a juror. It was not meant to say that the judge would have the power to discharge under any circumstances but only under the limitations of subsections (1), (2) and (3).

Mr. Blensly moved that the staff be directed to redraft section 6 to clarify the ambiguity discussed by Mr. Derr. Motion carried.

Mr. Clark was critical of the language in subsection (2), "Is related, by affinity or consanguinity within the third degree." Those words, he said, were not commonly used and were not likely to be readily understood by laymen reading the statute.

Following a discussion, Mr. Clark moved to amend subsection (2) to strike "affinity or consanguinity" and insert "marriage or blood". Motion failed. Voting for the motion: Clark. Voting no: Blensly and Chairman Spaulding.

ORS 132.120. Duration of session. Mr. Blensly disapproved of the opening sentence of ORS 132.120, "When the business of the grand jury is completed it must be discharged by the court." That could be construed, he said, to mean that when their business was completed at the end of the day, they were to be discharged. He indicated that some counties follow the practice of picking the grand jury on the last day of a jury session from the trial jurors in attendance and hold them over for the next session so that experienced jurors were acting as grand jurors. Question had been raised as to whether this was a proper procedure under the wording of ORS 132.120 which could be read to mean that grand jurors had to be picked from the jury then sitting and they could not be continued unless some particular piece of business was being held over; as soon as they had completed what they were working on, they must be discharged. That language should be clarified, he said, and probably should be tied to the term of the court.

Mr. Derr commented that to tie the jurors' term to the term of court would eliminate the practice Mr. Blensly had just described. Mr. Blensly answered that the court had the option to continue the jury for any reason it deemed desirable under the last portion of the section. If the judge deemed it desirable to have experienced grand jurors, he could draw the jurors from the previous term.

Various methods of wording the section were discussed to make it clear that the business of the grand jury was to run concurrently with the term of the court. Mr. Clark moved to amend ORS 132.120 to read:

"When the term of the [~~grand-jury~~] court is completed, [~~it~~] the grand jury must be discharged by the court; . . . . "

The motion carried unanimously.

ORS 132.130. Commission of crime after discharge of jury. Mr. Clark inquired if ORS 132.130 referred to small counties without a continuing grand jury. Mr. Blensly responded that he knew of no county that did not have a grand jury and observed that he could see no purpose in retaining the section.

Mr. Clark moved to delete ORS 132.130. Motion carried unanimously.

ORS 132.210. Immunity of jurors as to official conduct. Mr. Blensly asked whether ORS 132.210 would make a grand juror liable for a charge of contempt of court if he discussed something that happened in the grand jury room. The section said "while acting as such," and his question applied to the time that he was a member of the grand jury but was away from the jury room at the time he was discussing a matter that took place inside. Chairman Spaulding commented that the section didn't say he could not talk about the proceedings; it said he could not be questioned about them. Mr. Blensly replied that the oath he took as a grand juror said he shall not disclose that information. That situation could be handled as a contempt and he would be required to show cause. The show cause proceeding would necessitate making inquiry into something the juror said while acting as a grand juror. Perhaps, he said, he was not acting as a grand juror when he was outside the jury room.

Mr. Paillette stated he believed the intent of the section was to give the grand juror immunity so that he would not need to be concerned about having to answer later for something he did as a grand juror unless he lied while appearing as a witness before the grand jury.

Mr. Paillette then commented that the rationale would apply equally to both perjury and false swearing and suggested that the section be amended to include false swearing.

Mr. Clark suggested that the section be amended to read " . . . for perjury, false swearing or violation of oath . . . . " Mr. Blensly objected to including "violation of oath."

Mr. Blensly, after further discussion, said that the section could be interpreted to mean that the person was not acting as a grand juror when he made statements outside the jury room because that was not part of his official function as a grand juror. Mr. Milbank concurred that as soon as the indictment was out, there was no longer a need for secrecy.

Mr. Blensly then moved to amend ORS 132.210 to read:

" . . . except for [a] perjury or false swearing of which he may have been guilty . . . . "

Motion carried unanimously.

ORS 132.220. Disclosure by juror of testimony of witness examined by jury. Mr. Derr commented that subsection (1) of ORS 132.220 allowed a grand juror to testify for impeachment purposes at a trial but as a practical matter the only person who could make use of that provision was the district attorney because the defense had no way of knowing what was said at the grand jury session.

Mr. Milbank stated that, as a defense attorney, he had been tempted to subpena the foreman of the grand jury to sit in on the trial to determine if the testimony was the same as that heard by the grand jury, but he had never actually done so.

Mr. Derr commented that if that information were going to be made available either to the public generally or only when requested under certain circumstances, question then arose as to whether there should be a transcript made of the proceedings.

Mr. Paillette indicated that he and Mr. Gustafson had discussed this matter and Mr. Gustafson felt the court should be required to appoint a reporter. Mr. Paillette said he disagreed with that position because it flew in the face of the secrecy concept of the grand jury and the protection of the identity of innocent people. In the reporter system, he said, there was no half-way mark; either everything would have to be in the record or nothing. One possible alternative might be to give discretionary authority to someone to pick and choose what was going to be included.

Mr. Milbank asked Mr. Blensly under what circumstances he asked the circuit court for permission to make a record of grand jury proceedings and was told that in the usual case it was when the defendant appeared before the grand jury or occasionally when making a broad inquiry into a complicated case involving a large number of witnesses. Mr. Milbank asked if the grand jury then received a copy of the transcript and was told by Mr. Blensly that they did in some instances.

Mr. Paillette suggested that subsection (2) of ORS 132.220 be amended to add "or false swearing" after "perjury" to coincide with the amendment made to the previous section. Mr. Clark so moved and the motion carried unanimously.

ORS 132.310. Inquiry into crimes; presentation to court. Mr. Clark noted that ORS 132.310 failed to follow reality when it said,