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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

August 22, 1972

Minutes

Members Present: Mr. Robert Chandler, Chairman
Senator John D. Burns
Representative George F. Cole
Mr. Bruce Spaulding

Staff Present: Mr. Donald L. Paillette, Project Director

Others Present: Mr. Jim Hennings, Metropolitan Public Defender
Mr. Keith Kinzman, Clackamas County District Attorney's Office

Agenda: Arraignment and Related Procedures
ARRAIGNMENT PROCEEDINGS; PRELIMINARY DRAFT NO. 1

The meeting was called to order at 9:30 a.m. by Chairman Robert W. Chandler in the offices of Mr. Spaulding, Standard Plaza, Portland.

Mr. Spaulding moved that the minutes of the subcommittee meeting of July 31, 1972 be approved as submitted. Motion carried unanimously.

Arraignment Proceedings; Preliminary Draft No. 1; August 1972.

Mr. Paillette presented to the subcommittee members two separate sections, marked Exhibits A and B, and which are directed to the questions discussed at the last subcommittee meeting with respect to the motion to dismiss the accusatory instruments on the grounds of former jeopardy. He recalled the discussion was whether this was a question of fact or law. The statutes at the present time give the impression it is an issue of fact and is provided for as a type of plea which can be entered either with or without a plea of not guilty. The statutes provide for separate verdict, either for the state or the defendant, on the question of former jeopardy but at the same time the courts are disposing of it as a matter of law because the trial court will enter an order sustaining the plea of former jeopardy, he said. The proposal will necessitate some related changes in other drafts, mainly in the area of pleas, because it will not be necessary to provide for this type of plea or special verdict. If the sections are approved by the subcommittee today, they can then be incorporated into the amended draft on arraignments.

Exhibit A would apply the effect of the section to indictments, informations or complaints and provides that the court shall dismiss the accusatory instrument if, upon motion of the defendant, it appears as a matter of law that a former prosecution bars the prosecution for the offense charged. The term "former prosecution" is used because the draft on Former Jeopardy provides the circumstances under which a former prosecution bars a prosecution.

Subsection (2). Mr. Paillette explained that ORS 135.510 to 135.560 deal with the motion to set aside the indictment. ORS 135.520 provides:

> "The motion to set aside the indictment shall be made and heard at the time of arraignment unless for good cause the court postpones the hearing to a future time. If not so made the defendant is precluded from afterwards taking the objections mentioned in ORS 135.510."

ORS 135.530 reads:

> "If the motion is allowed, the court shall order that the defendant, if in custody, be discharged therefrom or, if he has given bail or deposited money in lieu thereof, that his bail be exonerated or his money refunded to him, unless it directs that the case be resubmitted to the same or another grand jury."

Representative Cole asked if it is being required that the motion to dismiss be made at the time of arraignment and Mr. Paillette answered affirmatively. Representative Cole then asked if "good cause shown" must be shown at the time or arraignment and if it would foreclose the defendant from asking for dismissal at a later time. Mr. Paillette replied that in that respect it would be similar to entering a plea. The plea is entered at the time of arraignment but if the defendant asks for additional time he will receive it.

Representative Cole declared that he did not wish to foreclose the defendant from moving to dismiss on former jeopardy at any time merely because he does not know about it at the time of arraignment. Mr. Paillette responded that at the present time the question of former jeopardy is raised at the time of pleading and the defendant either pleads former conviction or acquittal which is entered along with or without a plea of not guilty, and Representative Cole reiterated that he could elect on his plea but should not be foreclosed from moving for a dismissal at any time. The facts are not always known at the time of arraignment, he said, and may not come to the attorney's attention until a later date.

Under this proposal Mr. Kinzman wondered if there would be more defendants having counsel at arraignments than there are at present.

The defendant would need to be made aware of this rule and it is something he would not think about himself, he said. In answer to Mr. Paillette's question, he said that the defendant on a motion to set aside the indictment would state that he did not have counsel present at the time of arraignment and remarked that it seemed frivolous to make the rule and in 50% of the cases have the exception that the defendant did not have counsel present. He believed the defendant should make these motions at the time of pleading but only after he had conferred with his attorney.

Chairman Chandler observed that if the defendant is represented by counsel at the time of arraignment he can make the motion in the normal course but if he is not represented, he could not foresee the court turning down the motion on the grounds that it was not made in timely fashion. If the court did so, he believed there would be substantial grounds for appeal.

Representative Cole commented that it was his understanding that the defendant does not have to show cause for the delay in making the motion at the time of arraignment, and that any time the motion is made, the defendant can then show cause why it was not made before. Although ORS 135.520 would imply that a postponement is requested at the time of the arraignment he did not believe the defendant should be compelled to either make the motion or ask for a continuance just on the chance that there might be one.

Mr. Paillette referred to ORS 135.410 which reads:

> "If on the arraignment the defendant requires it, he shall be allowed until the next day, or until such further time as the court deems reasonable, to answer the indictment."

Representative Cole reiterated his concern in that if the defendant does not raise the question at the time of arraignment, but does so two days later, he in effect waives his right.

Mr. Spaulding believed that the courts have, as a matter or practice, considered motions to withdraw a plea in order to do something different, but he did not believe this was statutory, and Mr. Paillette reported that the withdrawal of a plea was purely discretionary with the court.

Mr. Spaulding observed that with the plea being part of the arraignment, the defendant, after obtaining his attorney, could move to withdraw the plea and in effect would then be back in the arraignment theatre. Mr. Paillette remarked that it was not his intent to change the time at which the former jeopardy question has to be raised because under existing law, if the jeopardy question is to be raised, the defendant will have to plead it; it cannot be pleaded at any time during the course of the trial but must be entered as a form of a plea.

Chairman Chandler asked if the net effect of this would be taking the grounds of former jeopardy away from the jury. Mr. Paillette said this would be true, and also changing it from a plea procedure to a motion procedure.

Subsection (3), Mr. Paillette advised, specifically spells out that it is a bar to a future prosecution. As far as the state was concerned it would be a bar unless it is reversed on an appeal.

Exhibit B. ORS 138.060. Appeal by state. Mr. Paillette explained that subsection (1) contains the deletion of "indictment" and the insertion of "accusatory instrument" and the existing language in subsection (2) is deleted.

Referring to ORS 135.520, Mr. Spaulding wondered if the meaning might be clarified by inserting the phrase "before the time of entering a plea" in lieu of "at the time of the arraignment."

Representative Cole asked if, in the plea section it is being stipulated that a plea be entered within a certain time. The arraignment procedure, he said, talks about arraignment within the first 24 hours. Mr. Paillette advised that section 4, Pleadings of Defendant, Tentative Draft No. 1 provides:

> "(1) A defendant shall not be required to plead to an offense punishable by imprisonment until he is represented by counsel, unless the defendant knowingly waives his right to counsel.
>
> "(2) A defendant with counsel may plead guilty or no contest on the day of arraignment or any time thereafter. A defendant without counsel shall not be allowed to plead guilty or no contest to a felony on the day of arraignment.
>
> "(3) Upon completion of the arraignment, unless the defendant enters a plea in the manner provided in this Article, he shall be considered to have entered a plea of not guilty.
>
> "(4) A plea of former jeopardy shall be entered within 10 days after arraignment or at such later time, prior to judgment as the court may allow upon good cause shown."

Subsection (4), Mr. Paillette reported, will have to be amended to conform to any changes adopted today.

Representative Cole was of the opinion the motion for dismissal on the basis of former jeopardy should be allowed at any time prior to trial, and Mr. Spaulding concurred, saying he could not see any legitimate reason for not listening to it at any time if he has a good faith motion, sometimes which may not be until shortly before the trial.

Mr. Paillette suggested subsection (2) of the proposed section on the motion to dismiss be amended to contain similar language as that contained in section 4 of the draft on Pleadings of Defendant and treating it as a motion. The subsection would then read:

"A motion to dismiss shall be made within 10 days after arraignment or at such later time as the court may allow."

Mr. Kinzman referred to the time or arraignment and asked if it would also be talking about those continuances from when the defendant is first arraigned. It was his understanding that the defendant could request postponement to enter a plea and then he has 10 days from that time to enter the motion. Mr. Spaulding said that in other words, he could have 30 days in which to enter a plea and then be allowed another 10 days. Representative Cole added that some of the trial dates may commence before the 10 days, but this could be resolved by adding "and before trial."

Mr. Spaulding pointed out the wording could state that there would be 10 days from the time the case is originally called for arraignment or as such further time as the court may allow for good cause. In every case, he said, the defendant should not have the right to stall for one purpose and then for another.

At this point in the meeting Senator Burns arrived.

Mr. Paillette recapitulated the situation in that under subsection (4), section 4, Pleadings of Defendant, a plea of former jeopardy shall be entered within 10 days after arraignment or at such later time as the court may allow upon good cause shown. He said that Representative Cole's concern was that under the proposed subsection (2) of Exhibit A the defendant would not be allowed ample time to raise the question of jeopardy. The proposed motion to dismiss section would be the same type of provision that is now applied to the motion to set aside the indictment, and in effect would limit it to the same time span as the plea.

Representative Cole contended that it is easy to ask the court for a postponement for entering a plea but there is not always advance notice that he may have a motion on the basis of former jeopardy to which Senator Burns concurred, saying that the problem is that the attorney might not know of the possible jeopardy problem and therefore it would not be raised at that time. Mr. Paillette was of the opinion that this situation would be good cause for not making the motion at the time, just as it is now.

The Chairman then explained that it was suggested that subsection (2) be written to change the time so the motion can be entered at the time of pleading or 10 days thereafter, or a later time if there is good cause shown.

Mr. Hennings commented that as a practical matter a plea of not guilty is automatically entered, however by court rule in Multnomah County all motions may be raised up to the point of pre-trial which may be within 10 days but possibly longer. If a 10 day rule is established,

he said, the counties will be limited in setting up their own procedure. Mr. Paillette indicated that by stating: "or such other time as the court may allow" may resolve this problem.

Senator Burns moved that subsection (2) of Appendix A be amended to state that the motion to dismiss on grounds of former jeopardy shall be made at the time of pleading or within 10 days thereafter unless the court sees fit to grant extra time.

Motion carried.

With respect to ORS 138.060 (Appendix B), Mr. Paillette asked if there was any question as to the proposed amendment with respect to appeal by the state. The amendment would delete the existing subsection (2), and the double jeopardy motion would be dealt with as an order made prior to trial dismissing the accusatory instrument.

Senator Burns asked Mr. Paillette if subsection (1) as amended would be construed to encompass a dismissal on the basis of a demurrer and if presently the state could appeal if the defendant successfully demurs and received an affirmative reply.

Representative Cole moved the adoption of the proposed amendment to ORS 138.060, Exhibit B. The motion carried unanimously.

Section 1. ORS 135.010. Time and place. Mr. Paillette explained that the first amendment is a conforming amendment and uses the term "accusatory instrument" in place of "indictment" and new language is proposed with respect to the time of arraignment. If the defendant is in custody he must be arraigned within 24 hours except for holidays and although the need for a speedy arraignment is not as urgent if the defendant is not in custody, he felt it desirable to provide for some type of time limitation in the section.

It was the Chairman's interpretation of the section that if a man was arrested anytime between 5 p.m. and midnight on a Thursday, it would not be necessary to have him arraigned on Friday, consequently holding him until the following Monday.

Using the Chairman's example, Senator Burns asked how this would fit in with the U. S. Supreme Court cases with respect to prompt arraignment. This would go beyond the requirements of case law, Mr. Paillette reported. Senator Burns asked what the consequences would be if the defendant was in custody and not arraigned during the first 24 hours. He asked if the defendant would be released and the state precluded from pursuing it further. It is a violation of statutory due process, he added, and expressed concern as to the reason for this specific language being placed in the draft without any sanction or showing what the effect would be.

Representative Cole stated that if a violation of this 24 hour arraignment rule would be a basis for dismissal of the charge he would consider the 24 hour period to be too short. It was the Chairman's

interpretation that the wording shows this is a basis for dismissal and Mr. Paillette reported that this was not his intention, anymore than failure of a speedy arraignment under case law now is a basis for dismissal and that he would personally be opposed to writing in this type of a sanction.

Mr. Spaulding said that under existing law if the man were not arraigned within a reasonable time, he may move to dismiss. This would be a statutory definition of a reasonable time, he said.

Chairman Chandler wondered if the 24 hour time period were changed to 48 hours and the 72 hours to 96, would it then be considered a reasonable time. It was Senator Burns' belief that even 72 hours may be unreasonable in that an individual may be hunting in eastern Oregon and picked up for a hunting violation - it may work a hardship on him to get back within 72 hours for the arraignment.

Mr. Kinzman indicated that the draft talks about arrests and in this situation the man would not have to be there as this would be a misdemeanor. In answer to Senator Burns' inquiry as to when a person would be placed under arrest under the citation provisions, Mr. Paillette reported he did not believe they are ever arrested. ORS 133.055 states "A peace officer in lieu of taking the person into custody, may issue or serve a citation for the person to appear at the court . . . . " This is the reason why it was attempted to redefine "arrests" in the Arrest draft, as to whether it means custody or something else. The draft on Release of Defendants, he said, is tied in indirectly to this draft, in that it presupposes that a defendant who is not otherwise released prior to arraignment will have the opportunity for a release decision to be made by the magistrate at the time of the arraignment. This will not help the defendant much, he indicated, unless he can get to the arraignment with all practicable speed which is the intention of section 1. It is probably a rare case where the defendant who is arrested during a week day is not arraigned within 24 hours and he felt that to state that "the defendant should be arraigned within 24 hours if it is practicable" would be futile.

The Chairman suggested that perhaps the commentary should contain a further explanation that this is a guideline and that if the person is in the hospital or the district attorney is not available, it is not expected that the arraignment take place within the 24 hours.

Mr. Paillette referred to the previous discussion with respect to sanctions and stated that he was not proposing to impose any sanctions that are not now imposed. In lieu of this, he suggested the draft state that "except for good cause shown by the state, the arraignment shallbe held . . . . "

Senator Burns was of the opinion that it should be made clear that if the defendant is represented by counsel there could be an extension of the 24 or 72 hours, and Representative Cole concurred. Mr. Spaulding suggested the wording state "or good cause shown by the state or the request of the defendant."

Representative Cole moved the adoption of section 1, to be amended to state that upon good cause shown by the state or at the request of the defendant the arraignment may be held after 24 hours of custody . . . or after 72 hours following arrest.

Motion carried unanimously.

Section 2. ORS 135.020. Scope of proceedings. This section again uses the words "accusatory instrument" Mr. Paillette explained, but the language with respect to indorsements must be dealt with separately so as not to imply that these items have to be on other accusatory instruments, therefore the new language "if the accusatory instrument is an indictment."

Representative Cole moved the adoption of section 2 as amended. Motion carried.

Section 3. ORS 135.110. When presence of defendant is required; appearance by counsel. Mr. Paillette said the section is consistent in using the accusatory instrument language rather than indictment.

Senator Burns moved the adoption of section 3. Motion carried.

Section 4. ORS 135.120. Bringing in defendant who is in custody. Mr. Paillette explained that this is a restatement of the existing language.

Senator Burns was of the opinion this was surplus language and moved the deletion of section 4. Motion carried.

ORS 135.130. This statute would be repealed by the draft on Release of Defendants, Mr. Paillette advised.

Section 5. ORS 135.140. Bringing in defendant not yet arrested or held to answer. Mr. Paillette explained that pages 6, 7 and 8 of the draft contain a number of statutes dealing with bench warrants and all are directed towards indictments. He was of the opinion that all the sections on bench warrants are unnecessary in view of the Article on Arrests and which provides for warrants of arrest to be issued by the court. The court, he said, can issue a warrant if satisfied that reasonable cause exists. The draft proposes to amend section 5 to delete the reference to a bench warrant and issue an arrest warrant as provided in ORS chapter 133, and repeal ORS 135.150 to 135.180.

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Representative Cole moved that section 5 be renumbered as section 4 and the adoption of the section as amended. Motion carried.

Representative Cole moved ORS 135.150 to 135.180 be repealed. Motion carried.

ORS 135.190 to 135.210. These sections, Mr. Paillette pointed out, would be repealed by the draft on Release of Defendants.

Senator Burns moved ORS 135.190 to 135.210 be repealed as recommended. The motion carried.

ORS 135.310. Right of counsel. The section is set out for the information of the subcommittee and is not affected by the draft, Mr. Paillette explained.

Section 6. ORS 135.320. Court appointment of counsel; waiver. The amendment, Mr. Paillette pointed out, takes out the reference to the circuit court. He said the subcommittee may wish to reserve judgment on the section until section 7 is examined.

Section 7. ORS 133.625. Court appointment of counsel. The section is an important one with respect to counsel and extensive changes are being recommended in this area, largely based on the ABA Standards with respect to whether or not a defendant is unable to obtain counsel. ORS 133.625 is amended to delete the reference to circuit court and this would then apply the provisions of these sections to any magistrate with respect to appointment of counsel, rather than having it all geared into the circuit court as is now the case.

Paragraph (c) of subsection (1) deletes the reference to lack of ability to obtain counsel. Senator Burns was of the opinion the new language in the paragraph should state "financial inability" and "substantial financial hardship." He believed this particular area is greatly abused by the courts and Multnomah County has been too lax in this respect.

Mr. Hennings observed that this is true at the misdemeanor area and not necessarily at the felony level. Senator Burns remarked that the working man with a steady job and earning $10,000 yearly will be the one caught in the squeeze, and would be the one who must hire the attorney. He inquired as to the definition of "substantial hardship."

Mr. Hennings reported that the words "adequate representation" are taken direction from the ABA Standards and used for the purpose of avoiding the "5th Street lawyer" shopping type of situation. "Substantial hardship," he believed, would mean any kind of hardship, not necessarily financial, although this would basically be the case. It would be his observation that it meant that it would be unnecessary to require anyone to become a pauper in order to afford an attorney and meets the standards of James v. Strange.

Mr. Paillette said that subsection (6) would be a constitutional means through civil process for the state to attempt to recover the costs. Mr. Hennings reported that in Multnomah County most of his clients who are put on probation are required to repay the county for the attorney fees over a three to nine month period of time. This is set up as a bill through the county and is working voluntarily, he said. On a criminal matter, basically no attorney will walk into the court unless he has some money, so this means the defendant must come up with a large amount very quickly.

Mr. Kinzman referred to the situation regarding the financial statement under oath in a non-support case. Mr. Paillette stated that the draft does not respond to this problem; it deals only with eligibility for appointment of counsel and for recoupment through civil proceedings by the state. The main issue is whether the subcommittee believes the ABA Standards are too broad and whether it expands the eligibility for court appointed counsel too far, or whether the present eligibility criteria is better. This seems to him a reasonable approach and is realistic as to what it costs to defend a case, particularly a serious felony case. This is a problem recognized by the ABA and the Uniform Commissioners Act on Defense of Needy Persons.

It is also a public problem, Chairman Chandler stated, in that there is a great deal of public dissatisfaction in it where neighbor A goes into court and pays his own bills and neighbor B, who works at a similar type job, tells the court he is unable to pay his bills and the court accepts his statement.

Representative Cole referred to subsection (7) and asked if the words "The civil proceeding shall be the exclusive remedy" would foreclose the court from imposing this payment as part of probation. Mr. Paillette answered in the affirmative.

The subcommittee again returned to its discussion of section 6.

Representative Cole moved the word "crime" be deleted and "offense" inserted in lieu thereof. Mr. Paillette reported that "offense" as defined in the Criminal Code includes violations as well as crimes, and violations are punishable only by fines.

Mr. Kinzman disagreed with the proposed amendment as he did not believe the draft should go as far as appointing counsel for a violation where there is no jail term.

Representative Cole withdrew his motion.

Mr. Spaulding moved the adoption of section 6 as amended. Motion carried.

Section 7. Subsection (1) changes "circuit court" to "magistrate"; paragraph (c) contains the inability statement discussed earlier.

Subsection (2). Mr. Paillette advised that merely because the defendant can obtain money from another source or because he is able to post bail, it will not be grounds to deny appointment of counsel.

Senator Burns spoke with reservation to this subsection. Somehow, he said, the message has to be made clear to those judges who are less than protective to the public pocketbook, and for this reason he did not particularly agree with the language.

Chairman Chandler commented that judges now have to defend themselves between April 15 and July 1 when they submit their budgets to the county courts and county commissioners and there is a great variety of difference as to how county courts and commissions look upon this.

Mr. Hennings reported the cost of $400,000 in Multnomah County for court appointed attorneys and the Chairman referred to one case in his county costing approximately $50,000. Mr. Hennings pointed out the results of a New York study wherein it was found that the cost of the investigation of financial statements was greater than the amount they would have made by not appointing counsel in those few cases.

In Multnomah County, Mr. Hennings said, and especially at the district court level, the judges are not appointing attorneys if the defendant can make bail. He reported that a large number of emancipated children are also being denied counsel if the parents have funds. Once this gets to the circuit court level they quite often are allowed the appointed counsel, he said.

The Chairman asked what the effect would be if the judge would not allow appointed counsel if the defendant was able to post bail in the amount of $500,000, and was told by Mr. Hennings that this would undoubtedly require a hearing.

Subsection (3). The subsection contains existing language with the felony reference deleted in paragraph (a).

Subsection (5). The language relating to partial payment is deleted.

Subsection (6). Mr. Paillette advised that this is an attempt to provide for recovery of the funds and still meet the constitutional requirements set out in James v. Strange which was based on a Kansas statute providing for recovery of expenses incurred by the state which provided counsel for indigents.

Representative Cole asked why the court is being excluded from imposing this as a term of probation. He believed this could be an alternative remedy.

Chairman Chandler asked if paragraph (b) would prevent the state from only recovering the full amount or if a partial amount could be paid. Representative Cole believed this would be speaking about a negotiated settlement which could be made by the district attorney and would not prevent the state from recovering less than the full amount.

Senator Burns was of the opinion that in appropriate circumstances it would not be out of line to have it as a condition of probation, although Mr. Hennings expressed objection to any kind of conditions on probation. On the repayment of fees, he said, it may make the distinction between those who make probation and those who go to jail.

Senator Burns recalled the legislature permitting the court to impose time in the county jail as a condition for probation. The theory was that since the state was going more towards probation it had to give the courts more flexibility and a wider range of options in the imposition in this kind of sentence. He believed any attempt to narrow the range of options that a judge has would probably be resisted by them and if it spoke to the area of money, it would be resisted by the legislature.

Mr. Hennings wondered if the repayment of the attorney's fee should be part of the punishment or should it be something that is applied uniformly to everyone with an appointed attorney, whether he is found guilty or not. This, he believed, would apply even to a person who is acquitted and Mr. Paillette reported that it would apply either way.

Representative Cole said that in the smaller counties there will not be any recovery as the district attorney will not have time to be involved in civil suits to recover the money.

Senator Burns believed this to be a very extensive policy departure and that it will be a volatile political issue in the legislature. He moved that section 7 be sent to the Commission without recommendation.

The Chairman suggested that rather than sending the entire section to the Commission, the subcommittee vote on which subsections it wished to retain.

Mr. Paillette remarked it should be specifically spelled out in the statute to allow any magistrate to appoint counsel.

Senator Burns declared that his main objections to this section are the "exclusive remedy" concept in subsection (7) and the word "currently" in paragraph (b) of subsection (6). Deletion of this word would allow for less ambiguity, he said.

Senator Burns withdrew his motion to send the section to the Commission without recommendation.

Representative Cole moved the adoption of subsection (1). Motion carried.

Subsection (2). Mr. Paillette reported that the ABA was trying to show that these should be independent considerations. The fact that a man is able to post bail should not be considered grounds for denying him the appointment of counsel.

Mr. Spaulding said that he is in favor of the concept behind subsection (2) but did not feel it to be a proper subject of legislation.

The Chairman said that the subsection says that it might be one of the grounds but if the judge wants to use it as the sole grounds he

may have to conduct a hearing on the matter. If he does have a hearing and this appears to be the only grounds, he is not going to be able to deny the appointment of counsel under the subsection, Mr. Paillette pointed out.

Chairman Chandler moved the adoption of subsection (2). Voting for the motion: Cole, Spaulding, Mr. Chairman; Voting no, Burns. Motion carried.

Subsection (3). Mr. Spaulding moved the adoption of subsection (3) as amended. Motion carried.

Subsection (4). Representative Cole moved the adoption of subsection (4). Motion carried.

Subsection (5). Representative Cole moved the adoption of subsection (5) as amended. Motion carried.

Subsection (6). Representative Cole asked if the subsection would include city attorneys and was told by Mr. Paillette that if there was a case where there had been an appointment of counsel and paid for by the city, the city attorney may initiate a civil proceeding. The words "district attorney" need not be changed as the Code will contain a definition of district attorney which includes city attorneys, he said.

Senator Burns left the meeting at this point but indicated he wished to support Representative Cole's motion on subsection (7).

The subcommittee recessed for lunch, reconvening at 1 p.m.

The subcommittee returned to its discussion of subsection (6) and Representative Cole moved the deletion of "currently" in paragraph (b). The requirements set up in (a) and (b) are merely the requirements for a suit to be initiated, he said, and believed it to be unnecessary language. The motion, he said, was made in response to Senator Burns' request. Motion carried.

Mr. Paillette referred to Representative Cole's earlier question with regard to city attorneys. He believed the subsection should be rewritten inasmuch as it refers to monies expended by the county and Mr. Hennings commented that it is possible that the state may expend monies also.

Mr. Spaulding suggested the language be changed to read: "A bill of receipt may be initiated by any public body which has expended money for a defendant's legal assistance for recovery of the same within two years."

The subcommittee voted the adoption of Mr. Spaulding's proposal and directed Mr. Paillette to insert the language in the subsection in proper form.

Representative Cole moved the adoption of subsection (6) as amended. Motion carried.

Subsection (7). Representative Cole moved to delete all language referring to the exclusive remedy concept. Voting for the motion: Burns, Cole; voting no: Spaulding, Mr. Chairman.

Speaking on his motion, Representative Cole stated that in a small county such as his, and where there is little money appropriated by the County Commission for legal appointed attorneys, any recovery they can make at all is a great deal of assistance to the county and also works as a good lever to get the county commission to budget more money.

Mr. Spaulding moved that section 7 be sent to the Commission with the notation that there was a tie vote on subsection (7) and should be considered in light of that tie vote. Motion carried.

Section 8. ORS 135.340. Communication to defendant as to use of name in accusatory instrument. Mr. Paillette reported that the section deletes reference to indictments and inserts "accusatory instrument" language.

The subcommittee approved the adoption of the section as amended.

Section 9. ORS 135.350. Name used in further proceedings. Mr. Paillette explained that all the sections are written about indictment and the words "indictment" and "information" are used for circuit court proceedings and also with respect to the journal entry.

Mr. Spaulding favored a statutory prohibition against including in the accusatory documents aliases and the words "also known as." Representative Cole was of the opinion that once the true name was established there should not be added on all the aliases. Mr. Spaulding agreed but said there was no provision for doing this and the section would use both.

Mr. Hennings commented that there is no valid way to require the defendant to give his true name and Mr. Kinzman said the court can always order the document retyped and omit all the prejudicial material in it although Mr. Paillette was not certain the court could be required to do so - there must be room left for discretion on the part of the court, he said.

Mr. Paillette asked how the state would be able to strike the aliases if it did not know the defendant's true name and Mr. Spaulding responded that it might be resolved by stating "John Doe whose true name is unknown."

The real damage, Mr. Hennings reported, is when the document goes to the jury. He said that perhaps just the charging part should go to them without the heading and name.

Mr. Paillette referred to ORS 132.720 and which was not changed in the Grand Jury draft which reads:

"When a defendant is indicted by a fictitious or erroneous name and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment."

Mr. Spaulding questioned the need for section 9 and believed it was covered in section 8. Mr. Paillette responded that section 9 continues to give more specific directions as to what the court should do to ensure that a record reflects accurately who is being proceeded against. Section 8, he said, states that the court tells the defendant to give his true name and section 9 continues that if he does not do so the court proceeds accordingly, but if he does give a different name, then the court makes the appropriate entry into the journal and subsequent proceedings are held against him in the name he has provided the court, also referring to the original name used in the charge. Here, "accusatory instrument" is used to leave some flexibility in the statute with respect to action taken now or in the future.

Representative Cole moved that language be added to the section to give the court discretion to cause the instrument to be amended to strike the aliases and merely to show the true name or the name under which he was tried. The motion carried.

Representative Cole moved to approve section 9 as amended. The motion carried.

ORS 135.410. The statute would be repealed by section 4 of the draft on Plea Discussions and Agreements.

Mr. Spaulding moved ORS 135.410 be repealed as recommended. Motion carried.

Section 10. ORS 135.420. Types of answer. Section 10 makes the draft consistent with the provisions of section 4, Plea Discussions and Agreements.

Mr. Paillette explained that instead of stating the defendant may "move the court to set aside the indictment" which is the only statutory motion now in the Code, the draft states the defendant may move "against the accusatory instrument or demur or plead thereto."

Mr. Hennings inquired if the section is being opened for any new motions a defense attorney may bring up against the accusatory instrument and if this gives the court further discretion to entertain an equity motion, if necessary. Mr. Paillette responded that he had considered writing in statutes providing for what is already taking place, i.e., motions to dismiss or quash, but he did not feel it accomplished anything by placing them in the draft. The two statutory motions which will be provided for in the Code will be to retain the motion to set aside and the new motion to dismiss on former jeopardy and the other motions would continue to be handled just as they are. There is rarely a motion to