Tape 4 - Side 2 - 428 to end
Tape 5 - Side 1 - 1 to end (Tape begins p. 9)
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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

February 21, 1972

Members Present: Judge James M. Burns, Chairman
Mr. Donald R. Blensly
Representative Norma Paulus

Excused: Mr. Donald E. Clark

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

Also Present: Mr. 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. Ben Swinford, Portland attorney representing American Civil Liberties Union

Agenda: PLEADINGS OF DEFENDANT; PLEA DISCUSSIONS AND AGREEMENTS; Preliminary Draft No. 1; January 1972

The meeting was called to order at 9:30 a.m. by Judge James M. Burns, Chairman of Subcommittee No. 3, in the basement meeting room of the Pioneer Trust Building, Salem.

Mr. Paillette introduced, and the Chairman welcomed, Mr. Donald R. Blensly, Yamhill County District Attorney, the newest member of the Commission, who had been appointed by the Governor to fill the vacancy created by the resignation of Mr. Frank Knight.

Pleadings of Defendant; Plea Discussions and Agreements; Preliminary Draft No. 1; January 1972

Mr. Paillette explained that the primary purpose of the draft on negotiated pleas was to bring the issues involved in the subject before the subcommittee and to serve as a basis for discussion and for policy decisions. As stated in the introduction to the draft, many of the sections were not readily adaptable to statutory law, he said.

Mr. Paillette advised that the Oregon State Bar Committee on Criminal Law and Procedure had met the previous Saturday and had discussed the draft on negotiated pleas in considerable detail. The recommendations resulting from that meeting were distributed to subcommittee members by Mr. Derr. A copy is attached hereto as Appendix A.

Section 1. Pleading by defendant; alternatives. Chairman Burns noted the Bar committee's recommendation that the draft be modified to include some form or type of no contest plea procedure consistent with the philosophy of the United States Supreme Court decision in North Carolina v. Alford, 400 US 25 (1970), which held that the guilty plea

of a defendant assisted by counsel was properly accepted as voluntary, even though coupled with a claim of innocence, where evidence before the court substantially negated that claim and the defendant clearly expressed his desire to enter the plea despite his professed innocence. Mr. Milbank explained that the Bar committee's concern centered around the situation where a defendant wanted to be sentenced for a lesser charge without admitting that he was guilty of the facts alleged against him but was willing to have sentence imposed. Chairman Burns said an Alford plea was in the nature of a guilty plea, and in Multnomah County the order resulting from such a plea would say that the defendant had entered a plea of guilty.

Mr. Paillette advised that according to some of the statements made at the Bar committee meeting, not all judges would accept an Alford plea, and Mr. Milbank confirmed that the judges in Marion County would not. Chairman Burns indicated it was done frequently in Multnomah County, but, even if it were written into the statute, there would still be judges who would not accept that kind of a pleading by a defendant. Mr. Derr said the Bar committee was concerned that the draft would completely block the possibility of a nolo contendere plea. Mr. Paillette confirmed that this possibility was particularly likely when sections 1 and 5 were read together because section 5 required the judge to establish a factual basis for the plea.

Chairman Burns explained how such cases were handled in Multnomah County and asked if it would meet the Bar committee's objectives if appropriate commentary were inserted in sections 1 and 5 pointing out that the Commission was not opposed to no contest pleas in proper cases and that a guilty plea was intended to include a correctly taken Alford plea.

Mr. Paillette commented that the ABA approach and the one incorporated into the draft was to allow a great amount of latitude with respect to pleas so long as the court could establish that the defendant committed an act at least as serious as the one charged and was willing to plead to it. However, there would be instances where the defendant didn't want to admit he had done anything but his defense attorney, in evaluating the case, knew the chances were 99 to 1 that he would be convicted. A means should be provided whereby a lawyer in that instance, without violating his responsibilities to his client, could recommend a guilty plea because that course would really be in the best interests of his client.

In reply to a question by Mr. Blensly, Mr. Paillette explained that he did not mean to say that an attempt was being made to place something in the statute that would permit a defendant to plead guilty to a crime he didn't commit. There would have to be a factual basis for the crime to which he pled and for his involvement in that crime. On the other hand, the statute should not require the defendant to admit to every element of the crime charged.

Chairman Burns gave a number of examples where an Alford plea would be appropriate, one being where a defendant was found in a building that had been broken into, was either drunk or had taken drugs and later denied that he had entered that building with an intent to steal.

Representative Paulus asked if a record was made of Alford pleas and Chairman Burns assured her that a very careful and complete record was made of every step of the proceeding and it was perfectly plain on the record that it was an Alford plea. Mr. Blensly advised that this same procedure was also followed in Yamhill County where the judge made a finding that the defendant was either unable or unwilling to admit his participation in the act charged, but strong evidence of his guilt had been presented in the record. In addition, the officer was called in and put under oath in every such case.

Mr. Paillette expressed the view that the comments of the Bar committee raised valid points and that permitting this type of plea by statute would clearly state that judges had the authority to accept a "no contest" kind of plea. Mr. Derr added that the Bar committee believed the Alford case provided the basis and authority for that type of plea but not all judges would accept it whereas if there were a statutory basis for nolo contendere, they might feel bound to accept such a plea and it might lead to more uniformity between courts.

Chairman Burns said his impression was that the majority of nolo contendere pleas were used in anti-trust cases and renewed his earlier suggestion to place in the commentary a statement that this draft did not bar Alford pleas provided the Alford standards were met.

Mr. Blensly remarked that he had some hesitancy about permitting a person to plead guilty to a crime he did not commit and if it were written into the law, it would give too strong an invitation to that type of approach even though factually it was done under the Alford decision. He agreed, however, that the unequal treatment being given in various courts created a problem and said he would not object to placing a no contest provision in the statute providing clear standards were also set down as to when it could or could not be used and providing further that the statute would say that the same penalties and the same disabilities attaching to a plea of guilty would attach to a no contest plea.

Representative Paulus favored inclusion of the no contest provision in the statute in view of the diverse use being made of the Alford plea throughout the state.

Chairman Burns suggested that a subsection (4) be added to section 1 to include "no contest" with the commentary to state that subsection (4) was intended to provide for the use of Alford pleas. The commentary should specifically describe the standards that must be met before such a plea could be accepted and also state that the disabilities of a guilty plea would attach. Under his proposal the commentary would further state that it had been called to the subcommittee's attention that unfair treatment had occurred because of failure by some courts to accept Alford pleas and that by including no contest pleas in the statute, the members hoped to achieve more standardized use of that type of plea.

Mr. Blensly said he would prefer to put both the standards and the disabilities in the statute rather than the commentary. The plea, he said, should be placed in section 1 but the consequences and the standards should probably be in section 5. Also in section 5 after "plea of guilty," "or no contest" should be inserted to make it consistent with the new subsection (4) of section 1. The members concurred.

Mr. Paillette asked if it was the subcommittee's intention that he should attempt to codify the disabilities that would flow from a no contest plea. Mr. Derr suggested that one subsection of the draft could state that a no contest plea would be treated the same as a guilty plea. The members approved this suggestion.

With respect to section 1 generally, Mr. Paillette explained that it was basically the same as existing law and provided for three kinds of plea, but differed from ORS 135.820 in that it referred not only to an indictment but also to an information and complaint to make it consistent with other provisions in the procedure code having reference to a charging document.

Mr. Paillette indicated that at the Bar committee meeting he had brought up the question of whether it might be advisable to include in section 1 a provision to permit a plea to part of an indictment or complaint. Their recommendation was that the statute should state that a defendant could plead separately to individual counts of an indictment or complaint. To accomplish this purpose, the subcommittee unanimously agreed to amend the first sentence of section 1 by inserting between "complaint" and "are": ", or each count thereof,".

Section 2. Time of entering plea; aid of counsel. Mr. Paillette gave a general explanation of section 2 and said he had indicated to the Bar committee that the Chairman had some concern about the 48 hour waiting period in subsection (3) of section 2. The Bar committee was of the opinion that the first sentence of subsection (3) could be deleted. That committee also raised a question as to whether the language in subsection (1) might bring about the peculiar situation where a defendant might never plead at all, and a suggestion was made to clarify that subsection to eliminate the possibility of a defendant

not entering a plea by saying that in the event the defendant refused to plead, a not guilty plea would be entered by the court. The subcommittee agreed to adopt this concept, to be phrased in the language of ORS 135.440.

With respect to subsection (2), Chairman Burns said that to permit a defendant with counsel to enter a plea on the day following arraignment would completely upset the court schedule in Multnomah County. The defendant's right to file motions and demurrers should be protected, he said, and that could be done by providing that if local court rules require entry of a plea on the day of arraignment, they must necessarily also require suitable additional time for the filing of motions, demurrers, etc.

Chairman Burns said it was not a bad idea to require a waiting period in subsection (3) in cases where the defendant had no lawyer and wanted to enter a guilty plea. In the rare case where the defendant refused to accept a lawyer, he should have some time for reflection so that he at least could not enter a plea of guilty on arraignment day. As a policy matter, if a defendant had no lawyer, he believed that defendant should be required to wait at least 24 hours before a guilty plea would be accepted. On the other hand, it would do him no harm to enter a not guilty plea without benefit of counsel so long as his motion rights were protected.

Representative Paulus expressed objection to placing the 48 hour waiting period in the statute. In eastern Oregon, where the judge might not be back in that particular community for a month or six weeks, it would cause serious problems, she said. Mr. Paillette advised that the ABA standards suggested a "reasonable time" be set by statute and he had arbitrarily chosen 48 hours.

Chairman Burns suggested the problem be solved by stating in subsection (3) that if a defendant does not have counsel in a felony case, he cannot plead guilty on the same day he is arraigned. That would mean he would have to wait at least 24 hours to enter his plea. It would be a very, very rare case, he said, where a person would want to plead guilty to a felony and at the same time flatly refuse to be represented by counsel. The members agreed to this proposal.

Chairman Burns next suggested that subsections (2) and (3) be amended to read:

> "(2) All pleas of not guilty must be entered on the day of arraignment, except, for good cause shown, the court may allow additional time.
>
> "(3) An unrepresented defendant may not enter a plea of guilty to a felony on the same day as the day of arraignment."

If this proposal were adopted, Mr. Blensly asked if it would then follow that when a defendant failed to plead not guilty on the day of arraignment, he would be required to plead guilty later on. He suggested that subsection (2) should say that the defendant must enter a plea on the day of arraignment instead of saying that he must plead not guilty. Mr. Paillette agreed that a defendant with counsel should be able to plead guilty on the day of arraignment if he wanted to do so and the members concurred.

Chairman Burns said that former jeopardy should not be overlooked in amending this section because situations could arise where the defense lawyer wouldn't know about his client's jeopardy status until later, and some extra time should be allowed for that contingency. To resolve the question raised by Mr. Blensly, Chairman Burns suggested the following revisions to section 3:

> "(3) Guilty pleas may be entered on the day of arraignment, or any time thereafter, for represented defendants. Unrepresented defendants may not enter a plea of guilty to a felony on the day of arraignment.
>
> "(4) Pleas of former jeopardy may be entered 10 days after arraignment or within such further time as the court allows."

Chairman Burns further proposed that the motion and demurrer sections of ORS should be amended to provide that entering a plea under subsection (2) of section 2 of this Article would not prevent the defendant from making the motion to which that particular section had reference.

Mr. Paillette asked if the subcommittee wanted to provide a set time -- for example, 24 hours -- for the defendant who wanted to plead guilty without counsel. Judge Burns replied that if the statute said he could not plead on the same day as arraignment, in effect he was being given 24 hours. He thought this was a better approach than setting a specific time. Mr. Blensly said such a provision was really a minimum of less than 24 hours because the defendant's appearance at the arraignment might be at 4:30 p.m. and his next appearance at 8:00 a.m. the following morning. He nevertheless thought this was preferable to establishing a definite time.

With respect to subsection (3), the Chairman noted that the requirement for plea reaffirmance had not yet been discussed. Mr. Blensly was of the opinion that the provision raised numerous questions as to how the reaffirmance would be accomplished, what would be required, etc.

Mr. Paillette read a portion of section 1.3 (b) of the ABA standards: " . . . the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation . . . . " He had arbitrarily chosen 48 hours as a "reasonable time," he said.

Mr. Blensly commented that a defendant could not be unrepresented unless he freely, voluntarily and knowingly waived counsel. If he was then prohibited from pleading guilty on the day of arraignment, the "railroad" situation was thereby prevented. He was not in favor of drawing too many artificial distinctions between defendants without counsel and those with counsel and therefore opposed retention of that portion of subsection (3) requiring that the plea be reaffirmed. The subcommittee unanimously agreed to the deletion of that requirement.

Chairman Burns said that to his way of thinking, arraignment was utter nonsense when the defendant was represented. It was a complete waste of time, he said, to go through the motions of reading the indictment to the defendant out loud, and one of his dreams was that arraignments in circuit court would one day be eliminated except in very special circumstances. The practice in Multnomah County was that no one was arraigned unless he had a lawyer.

Mr. Blensly said in Yamhill County, defendants were arraigned even though they were not represented, and he believed the arraignment procedure was important because it eliminated all question as to whether the defendant had been properly advised of his rights.

Chairman Burns said it was obvious that arraignment did not have the same meaning in all counties, and it would be necessary to define the word by statute. Mr. Paillette explained that the part of the code dealing with arraignment was meant to be a separate Article from the one being considered today. Chairman Burns asked what the definition of "arraignment" was in the present code. Mr. Milbank read ORS 135.020:

> "The arraignment shall be made by the court, or by the clerk or the district attorney under its direction, and consists of reading the indictment to the defendant, delivering to him a copy thereof and the indorsements thereon, including the list of witnesses indorsed on it or appended thereto, and asking him whether he pleads guilty or not guilty to the indictment."

Chairman Burns commented that presumably if all those steps were not carried out on the day of arraignment, it would then be necessary to have two different arraignment days for that particular individual.

Mr. Derr was of the opinion that the draft was consistent with ORS 135.020 because if the defendant came back on the following day after retaining an attorney, it would be a continuance and would constitute one proceeding within the meaning of the statute.

Mr. Blensly said the judge in his county was lenient about letting arraignments drag out and the more the statute could force the necessary steps to be taken promptly, the more it would expedite the process.

Chairman Burns asked if there were any cases that said arraignment was a critical stage with respect to right to counsel. Mr. Milbank said he believed there were. In addition, Article I, section 11, of the Constitution gave the defendant, among his other rights, the right to "demand the nature and cause of the accusation against him, and to have a copy thereof." That to him was arraignment, he said, and since it was constitutional, it was therefore a critical stage.

Mr. Derr pointed out that in some states a plea could be entered at a preliminary hearing, and there were cases holding that the hearing was a critical stage because of the fact that the defendant could enter a plea at that time.

Chairman Burns then asked if, in view of this discussion, the defendant could be required to enter a plea of not guilty when he was unrepresented on the day of arraignment. Mr. Derr said he understood that the proposed statute would only require a not guilty plea when the defendant had knowingly waived his right to counsel. Subsection (1) said that he could not be required to enter any plea until he was represented.

Chairman Burns commented that under the procedure in Multnomah County, before the unrepresented defendant would be arraigned in the sense of having the indictment read to him, he would have had to knowingly waive counsel and that would all be on the record. Under the procedure described by Mr. Blensly in Yamhill County where defendants were arraigned and advised of their rights before counsel was appointed, the proposed statute might cause trouble. On the other hand, he said he could not see how entering a plea of not guilty could prejudice the defendant in any way so long as his other rights to move against the charge were protected. Where arraignment took place solely to get the not guilty plea entered, it might not be considered a critical stage in terms of its being invalid in the absence of a knowing waiver of counsel.

Mr. Blensly said something should be done to expedite the process. Sometimes a defendant was permitted to wait 30 days to six weeks to

enter a plea after he had been charged and advised of his rights, and a trial date could not be set for that individual until such time as he entered his plea. If he had been required to enter a plea of not guilty, a trial date could then be set and the case could be taken care of within the required 60 day period. Forcing the defendant to enter a plea of not guilty would expedite those situations, he said.

After further discussion, Chairman Burns suggested that the proposed statute be rewritten to require that unless the defendant pleads guilty, nolo contendere or former jeopardy in compliance with this Article, he is deemed to have entered a plea of not guilty upon the completion of the arraignment. Mr. Blensly said that would probably be all right providing "arraignment" were specifically defined.

Chairman Burns explained that under his proposal when the defendant was represented or had knowingly waived his right to counsel, yet refused to enter a plea, upon arraignment a plea of not guilty would be entered automatically. In the situation described by Mr. Blensly where the indictment is read to the defendant and he is advised of his rights before he has an attorney, the judge could then give him two or three days to get an attorney. When he came back to court with his attorney, it would be a continuation of the arraignment, under the statute a plea of not guilty would be deemed to have been entered and the arraignment would be complete. Thus the automatic not guilty plea would take care of both types of situations, he said.

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Mr. Blensly commented that psychologically speaking, the automatic guilty plea might result in more trials. If the defendant were required to affirmatively plead one way or the other, he would be more apt to plead guilty in cases where he knew he was guilty. He said he would prefer to have the defendant himself enter the plea one way or the other.

Chairman Burns said that perhaps the problems the subcommittee was having with section 2 were caused by trying to do too much in one section. They had been discussing the entry of a plea in the light of its triggering other events such as a pre-trial date and a trial date and trying to avoid the situation where the lawyer requests seven days to examine the indictment.

After further discussion, the Chairman asked Mr. Paillette to redraft section 2 along the lines discussed by the subcommittee.

Because it was necessary for Mr. Swinford to return to Portland at noon, he asked to have his comments regarding section 7 and the subject of plea withdrawals inserted in the record at this point in the meeting. For ease of reference, his criticisms of section 7 begin on page 22 of these minutes.

<u>Plea withdrawal</u>. Mr. Swinford advised that he had discussed this draft with Mr. William Snouffer, Chairman of the American Civil Liberties Union, and had been asked to relate to the subcommittee certain criticisms on behalf of the ACLU. One of their objections was that the draft contained no provision for plea withdrawal such as that in section 2.1 of the ABA standards. Mr. Paillette noted that he had mentioned in the draft commentary on page 33 that ABA section 2.1, criteria for the court to follow in allowing plea withdrawals, was not included. Mr. Swinford said he and Mr. Snouffer were of the opinion that the criteria should be added to avoid appeals on grounds of due process.

Mr. Paillette observed that in drafting this Article, it seemed to him that plea withdrawal was implicit in the draft. Chairman Burns said he was of the opinion that provision should be made for plea withdrawal and the criteria would undoubtedly be covered somewhere in the procedure code.

The subcommittee recessed for lunch and reconvened at 1:15 p.m.

<u>Section 3. Defendant to be advised by court</u>. Mr. Paillette explained that section 3 was taken from the ABA standards and outlined the advice that the court would be required by statute to give to the defendant with respect to a guilty plea. They were, he said, minimal standards and probably most courts in the state were presently advising the defendant beyond the requirements in the proposed statute. He noted that pages 7 and 8 of the draft cited some of the more recent Oregon cases with respect to the advice that a judge is required to give the defendant. One of the most important parts of section 3, he said, was the requirement that the defendant be advised of all the possible consequences of a guilty plea, and whenever there would be a possibility of an enhanced penalty, that would be part of the advice the court would give him.

Mr. Milbank asked if section 3 would apply to district courts and municipal courts as well as circuit courts. Mr. Paillette replied that section 3 would apply to circuit and district courts but not to municipal courts. If any of the provisions in the criminal procedure code were to be applicable to municipal courts, they would have to be dealt with separately.

Mr. Milbank pointed out that certain traffic offenses carried penalties of up to six months imprisonment and a $500 fine and in those cases the current practice of advising the defendant of the charge was to have him sign the citation. An oral charge from the bench was appropriate in a felony situation, he said, as opposed to signing a form, but it would pose a real problem if every defendant who received a traffic citation were required to appear before the judge to be personally charged. He asked if section 3 would apply to traffic cases and was told by Mr. Paillette that it would apply in any

case, including a traffic citation in a district court. Mr. Blensly commented that the provision would thereby preclude a defendant from signing a traffic citation, sending in his money and forfeiting bail. The traffic courts, he added, would grind to a screeching halt if every defendant had to appear personally before the judge to be charged.

Mr. Milbank pointed out that the overriding criteria was the first sentence in section 2 which said that a defendant shall not be required to plead to an offense punishable by imprisonment until he is represented by counsel or has waived his right to counsel. Chairman Burns added that pleas to an indictment, information and complaint would even include violations.

Mr. Milbank observed that on misdemeanor charges the attorney could appear in lieu of the defendant. Mr. Blensly suggested that in that event one way of resolving the traffic citation problem would be to insert after "defendant" in subsection (1) of section 3 the words "who is required to appear personally before the court". Chairman Burns said if that approach were adopted, it would then be necessary to define specifically those who would be required to appear personally.

Chairman Burns next asked how under the standards of Boykin v. Alabama, 395 US 238 (1969), it would be possible to give a defendant four months in jail when the judge had not personally advised him of the consequences of a guilty plea. Boykin, he said, was applicable whether the sentence was for four months or forty years.

Mr. Blensly asked if section 3 could be limited only to those whose offense was punishable by imprisonment. Mr. Milbank remarked that might be all right if the corollary ruling of recent Supreme Court decisions were also incorporated that a person could not be imprisoned for nonpayment of a fine. Mr. Paillette said he would hate to see a statute that endeavored to exclude a certain class because that would get into an equal protection problem under the Constitution. He noted that Federal Rule 11 was set out on page 6 of the draft and that the ABA standard, from which section 3 was taken, was very similar to that rule.

Mr. Paillette commented that Mr. Blensly's suggestion to say that the court shall not accept a plea of guilty from a defendant to a charge on which the defendant is required by law to appear might be a possible solution to the problem. However, it was an oblique approach that was somewhat ambiguous. Mr. Blensly added that if the defendant appeared on a misdemeanor charge, he could be sentenced to a jail sentence without being advised of his rights so that it was not a complete solution.

Mr. Derr stated that it would create a serious problem if the statute were to provide that if the defendant pleaded guilty on the citation and forfeited bail, he could not receive a prison sentence. That would mean a defendant could receive a different penalty if he chose that route rather than to appear in court because if he wanted to appear in court, he would subject himself to the chance of going to jail.

Mr. Milbank proposed to amend subsection (1) to read: " . . . shall not accept a plea of guilty from a defendant without determining that the defendant understands the nature of the charge." Subsection (2) could then provide that the advice could be given either by writing or by a form of some type and further provide that in felony cases the court shall make the determinations by addressing the defendant personally.

Mr. Paillette pointed out that the Boykin decision could not be circumvented by writing out of the statute the requirement that the court personally address the defendant.

Chairman Burns suggested that one possible solution to the problem under discussion would be to provide that when the defendant entered a plea to a misdemeanor, he would have to sign a form that informed him of his waiver of right to trial by jury, maximum sentence, etc. The language of the statute would then have to say that the court had determined that the defendant had been informed of his rights rather than that the court had informed him personally. That, he said, would take care of the misdemeanor cases.

The Chairman asked if the Boykin case was restricted to felonies or serious crimes and Mr. Paillette said, as he read it, it was not. After further discussion, Mr. Paillette indicated he would research the question further and try to draft a section that would meet the guidelines of the Boykin decision. Toward the end of the meeting, the Chairman directed that Mr. Paillette's redraft should be submitted directly to the Commission rather than rereferring it to the subcommittee.

Chairman Burns asked if section 3 was clear that it was referring to a personal defendant as opposed to a corporate defendant. He said that if the draft said "address the defendant personally" it might be a sufficient exclusion of corporate defendants, but he asked Mr. Paillette to give some thought to this question when redrafting the section.

Chairman Burns then explained that in Multnomah County a form had been prepared which was given to each defendant outlining his rights. In every case the judge then asked him if his lawyer had explained the

form to him carefully and if he believed he understood its meaning. The deal he had made with the district attorney was put on record and the defendant was asked if he had in fact committed the crime charged. He asked if that procedure would constitute a sufficient personal address to comply with Boykin.

Mr. Milbank commented that if a hurried attorney were to shove a form in front of his client and ask him to sign it, it might well be that the defendant could be totally unaware of the information contained in the form.

Mr. Paillette indicated that section 3 was not meant to set down any definite, firm procedure but was supposed to be flexible enough to give the judge considerable latitude as to how he implemented it. The procedure outlined by the Chairman, he said, would probably meet the requirements of the section.

Chairman Burns suggested it would be wise to include in subsection (2) (a) the fact that the defendant waived his right to confrontation and his right to remain silent which were constitutional provisions equal in importance with waiver of trial by jury.

Mr. Milbank said it was difficult to determine where to stop in listing rights in the statute. Mr. Blensly expressed agreement and said the further the statute went, the more problems would be created. Chairman Burns commented that if an unwary judge complied with this statute and limited his advice to that in section 3, the plea would be worthless because he would have omitted confrontation and self-incrimination. He believed it was unwise to omit the constitutional imperatives from the statute. Mr. Paillette commented that, surprisingly, the ABA standards referred only to the waiver of jury trial and added that the standards were drafted before the Boykin opinion was rendered which may have been the reason for the omission.

After further discussion, the committee agreed to amend subsection (2) (a) to meet the requirements of the Boykin decision. Chairman Burns remarked that future court decisions were unlikely to require less than Boykin and if they required more, it would not create a problem in the courts or with the statute.

Subsection (2) (a) of section 3 was approved in the following form:

"(a) That by his plea of guilty he waives his right:

"(A) To trial by jury;

"(B) Of confrontation; and

"(C) To privilege against self-incrimination."

Section 4. Determining voluntariness of plea. Mr. Paillette advised that section 4 was based partly on Boykin and partly on the ABA standards. One reason for using "voluntarily and intelligently" in the draft, he added, was that the Boykin opinion said it was error for the judge to accept the petitioner's guilty plea "without an affirmative showing that it was intelligent and voluntary."

Chairman Burns pointed out that the same problem as that discussed in connection with section 3 concerning the scope of the section was inherent in section 4, and whatever revisions were made to section 3 would have to be carried over into section 4.

In reply to Mr. Blensly's question regarding the meaning of "plea agreement" as used in subsection (2), Mr. Paillette explained that the term referred to an agreement between the defendant and the district attorney as opposed to those cases in which a defendant just wanted to plead guilty. Mr. Blensly said the district attorney had the option of recommending probation or recommending a certain sentence or making no recommendation at all and asked if it would constitute a plea agreement if the district attorney told the court that he was following his usual procedure and making no recommendation. Mr. Paillette replied that when drafting the section, he was not contemplating an implied agreement. Mr. Blensly said the question could arise on a post-conviction case where the defendant could say there was an agreement that was not discussed at his trial, the agreement being that the district attorney had told him he would make no recommendation. Mr. Derr pointed out that subsection (3) of section 6 in effect defined a plea agreement.

Chairman Burns said Mr. Blensly's question would be covered by subsection (3) (a) which said, "To seek or not to oppose favorable recommendations as to the sentence . . . . " Whether or not the plea discussion was entered on the record, the prior proclivities of the district attorney to some extent affected every plea bargain, he said, even those where the defense knew ahead of time that the district attorney intended to make no recommendation which included the fact that he would not make an unfavorable recommendation. He thought it would not accomplish anything to require that in every case the district attorney would have to say that he was going to follow his usual procedure of remaining silent at the time of sentencing.

Representative Paulus was of the opinion that the statute should require the court to inquire of the district attorney in open court whether he had entered into any agreement with the defendant. The defendant was asked that question, she said, and the district attorney should be asked the same question. Mr. Paillette replied that this was the purpose of subsection (2) of section 4.

Chairman Burns outlined that in Multnomah County the district attorney recited the agreement to the judge and the judge then said to the defendant, "Is that right?" If the defendant answered affirmatively, the judge then questioned the defendant further to determine whether any other promises had been made to him to get him to plead guilty. He felt that little would be achieved by then turning to the district attorney for further confirmation.

Chairman Burns questioned the need for the term "prior plea discussions" in subsection (2). The subcommittee unanimously agreed to delete "prior plea discussions and" from subsection (2).

With respect to subsection (3) of section 4, Chairman Burns asked if there were other considerations amounting to concessions that were neither charge nor sentence concessions. Mr. Paillette said there were other concessions that would not involve the court such as a charge that the district attorney had in his pocket and had not yet filed.

In a typical case where the defendant agreed to plead to Count 1 if the district attorney dismissed Count 2, Chairman Burns asked if the language of subsection (3) meant that the court must tell the defendant that the motion to dismiss Count 2 was not binding upon the court. If so, he said it would destroy a great many guilty pleas. Mr. Paillette answered affirmatively and added that under the existing statute the district attorney cannot dismiss a charge or an indictment; the court must do so. He called attention to subsection (2) of section 9 which said that the judge "may then advise the district attorney and the defense counsel whether he will concur in the proposed disposition . . . . " At the time the plea is given, the court may order a presentence investigation and if something derogatory to the defendant turns up in that report, the judge may decide he doesn't want to go along with the terms of the plea agreement.

Mr. Paillette said that somewhere along the line the defendant was almost certain to be told that it was not the district attorney who would impose sentence; that the ultimate decision was up to the court. On the other hand, if the defendant was going to be permitted to withdraw his plea, it made little difference whether the record showed that he was aware that it would be the court that would impose sentence.

Representative Paulus favored retention of subsection (3) because it placed the burden on the attorney to advise his client that the ultimate decision was up to the judge.

The subcommittee decided to make no change in subsection (3) of section 4.

Section 5. Determining accuracy of plea. Chairman Burns pointed out that section 5 would also need to be amended to conform to whatever drafting revisions Mr. Paillette made in sections 3 (1) and 4 (1).

Mr. Paillette noted that the Bar committee recommended that section 5 should be amended to provide, as the test of accuracy of a plea, that there is a factual basis to believe that the defendant has committed "a crime." He said the gist of the Bar committee's discussion was that it was not so much whether there was a factual basis for the particular plea, because there had to be some latitude for the "cop-out" agreements, as it was a question as to whether the defendant had committed "a crime." The section was concerned with whether or not he had committed a crime that was at least as serious as the one to which he was pleading and was not intended to imply that every element of the crime had to be present. An example would be a shoplifting case where the court determined that the defendant up to that time had been a law abiding citizen who was attending college with a view to becoming a school teacher. The court would then let him plead to disorderly conduct, for instance, instead of theft so that his record would not show a theft conviction.

Mr. Blensly objected to a provision that would permit plea bargaining to go to the extent that a person could plead guilty to a crime he did not commit. Chairman Burns commented that section 5 would be governed also by the nolo contendere pleas under section 1, and Mr. Blensly remarked that in the Alford pleas it was necessary to show there was strong evidence that the defendant was guilty of the crime to which he was pleading.

Mr. Paillette said he was not suggesting that if a person was charged with arson, he should plead guilty to a charge that bore no relationship to that crime. However, so many of the overlapping statutes of the old criminal code had been removed that it might be necessary to have him plead to a crime with a different name under the new criminal code, but it should still fit the general description of the crime he committed.

Mr. Derr pointed out that subsection (3) (b) of section 6 provided that the defendant would plead guilty to another offense "reasonably related" to the offense charged.

Mr. Paillette recalled that the consensus at the Bar committee meeting was that it shouldn't be necessary to find that the facts fit every element of that crime precisely in order for the court to accept the plea.

Mr. Milbank said section 5 acknowledged that the practice was widespread under the old criminal code of charging defendants with crimes other than those originally charged but there was always a

rational connection between the two. Under the new code there were fewer crimes from which to pick and choose.

Chairman Burns said he would take issue with the statement that there was less leverage room in the new code. The defendant could always be charged with attempt, solicitation or conspiracy on every crime, and each one except conspiracy reduced the penalty one step.

Chairman Burns then inquired as to the meaning of "enter a judgment" as used in section 5. Mr. Paillette replied that it meant pronouncing sentence. Chairman Burns noted that the language was taken from the ABA standard, but under the Oregon terminology the judgment was in fact the sentence.

Mr. Paillette said that section 5 could be incorporated as a part of section 4 or, as an alternative, section 5 could be reworded in language corresponding to section 4, i.e., "The court shall not accept a plea of guilty without first determining there is a factual basis that the defendant has committed a crime . . . . " Chairman Burns expressed approval of the latter proposal.

Mr. Milbank asked why the provisions of section 5 were singled out for special emphasis. If the defendant knowingly and intelligently entered his plea, the requirements of section 5 were met.

Representative Paulus pointed out that the ABA commentary, set forth in the second paragraph of the commentary to the draft on page 11, gave a number of good reasons for inclusion of this standard in the draft. She expressed approval of the provision.

Mr. Blensly also advocated retention of section 5 for the reason that after acceptance of a plea by the court, there had to be a valid reason for withdrawal of that plea.

Chairman Burns asked Mr. Blensly what he meant by "acceptance of a plea" and was told that the plea was not accepted until the judge had made an inquiry and determined whether that person had intelligently and voluntarily decided on the plea. Mr. Paillette added that once the plea was entered under present law, it was discretionary with the court whether to allow the defendant to withdraw it. What was troubling Mr. Blensly, he said, was that he objected to requiring the state to tell everything behind the charge and then have the defense say, "I don't want to plead guilty after all." That would put the state at a disadvantage when they went to trial. Under section 5 the prosecutor would have the guilty plea on record and if a reason later arose for withdrawal of the plea, the judge would make the determination as to the validity of that reason. However, plea withdrawal should not be possible at the arbitrary discretion of the defendant.

Chairman Burns again inquired into the meaning of "acceptance of a plea." Mr. Blensly said that to him the term meant that the plea of guilty had been entered, the court had made the factual determination required under the statute and the record at that point would show that he had pleaded guilty to the charge.

Chairman Burns said that since there were 60 circuit judges in Oregon, probably there were 60 different practices followed throughout the state in accepting a plea. To enter a judgment upon a plea, he said, meant sentencing to him and this was apparently not what section 5 intended. In Multnomah County the usual practice following acceptance of a plea was to enter an order stating, "It is ordered that defendant's plea of guilty be and it is hereby entered of record." He said he did not believe that order to be a judgment; the judgment was entered when the judge imposed sentence. His concern was to make certain that the language in section 5 was not inconsistent with the language of other sections of the statute.

Representative Paulus suggested that section 5 be amended to read:

> "The court shall not enter a judgment upon a guilty plea without making such inquiry as may satisfy the court that there is a factual basis for the plea."

If this proposal were adopted, she said, the section would then mean that before the judge sentenced the defendant, he would have to establish a factual basis for the plea, and it would eliminate the problem of determining the exact point at which the plea was accepted. The subcommittee unanimously agreed to approve section 5 as set forth above.

Chairman Burns then asked if the members wished to adopt the Bar committee's recommendation to add "to believe that the defendant had committed a crime" to section 5. Representative Paulus opposed the recommendation and commented that it went against the purposes of section 5 set out in the ABA commentary, i.e., that inquiry ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead.

Chairman Burns said the recommendation presented a policy question that might best be decided by the full Commission. After further discussion, Mr. Paillette was directed to draft section 5 in two alternatives: (1) as approved by the subcommittee; and (2) in the language recommended by the Bar committee. The Commission would then make the final decision as to which version would be given final approval.

Section 6. Plea discussions and plea agreements. Mr. Paillette summarized section 6 setting forth the concessions the state may make in reaching a plea agreement. Subsection (2), he said, corresponded to Bar ethics and stated that district attorneys would not deal directly with the defendant. Subsection (4) was in effect a policy statement. He remarked that provisions such as those in section 6 were not ordinarily found in the statutes, but they were consistent with the purposes of the ABA standards and also generally went along with the recommendations based on the Klonoski study in 50 Oregon Law Review, a portion of which was set forth on pages 15 and 16 of the commentary to this draft. The section was desirable to make plea bargaining more visible and to make the process more respectable so the public would know more about the reasons for plea discussions and why they were important to the criminal justice system.

In a situation where a defendant waived his right to counsel and refused counsel but the judge appointed counsel for him anyway, not to represent him but simply to advise him, Mr. Blensly asked if the defendant under subsection (2) of section 6 would be cut off from any plea negotiation with the district attorney simply because he wanted to do the negotiating himself.

Chairman Burns said it should be borne in mind that there were very few defendants who insisted on going to trial without an attorney and in almost every case they were indigent. Mr. Blensly replied that nevertheless, if the defendant knowingly refused counsel, he should be in a position to bargain with the prosecutor.

Chairman Burns suggested that the commentary be written to establish that the intention of subsection (2) was that where counsel was appointed by the court to advise the defendant, even though the defendant was going to try his own case, the attorney could be with the defendant during the negotiation process to answer any questions the defendant might have. For purposes of this section, that would mean that the defendant had not effectively waived his right to counsel. It would wreak no harm on a defendant merely to bring in counsel in an advisory capacity, he said, even though the person had refused counsel. Mr. Paillette added that if the district attorney wanted to offer a lesser charge or some other plea concessions, he would go to the defense counsel and it would be incumbent upon counsel to convey that information to the defendant. He pointed out that section 8 set forth the responsibilities of the defense counsel.

Chairman Burns asked if subsection (2) was intended to prevent plea discussions when the defendant was present and was told by Mr. Paillette that it was not nor did the ABA standard recommend that the defendant should not be present during the negotiation process. In reply to a question by Representative Paulus, Chairman Burns further explained that the defendant was not necessarily required to be present during the discussions, but the subsection was not intended to bar his presence.

With respect to subsection (3) (c), Mr. Blensly said the usual circumstance was not a dismissal of a potential charge but was an agreement not to bring other potential charges. Chairman Burns said Mr. Blensly's criticism could be corrected by revising subsection (3) (c) to read:

> "To seek or not to oppose dismissal of other charges or <u>to refrain from bringing</u> potential charges against the defendant if the defendant enters a plea of guilty to the offense charged."

The subcommittee approved the above revision.

Mr. Milbank pointed out that the Bar committee wanted to insert at this point in the draft section 1.2 of the ABA standards relating to pleas of guilty with an addition requiring the consent of the district attorney of the county in which the pleas are to be entered. Chairman Burns explained that ABA section 1.2 would permit, with the consent of the district attorney, all the pleadings to take place in Marion County, for example, even though some of the crimes were committed in Yamhill County and some in Multnomah County. To illustrate, Mr. Milbank said it would cover a situation where a person had written bad checks all over the state and would permit all the charges to be tried in one county.

Mr. Blensly asked if that provision would present a constitutional question with respect to indictment by grand jury. Mr. Paillette read a portion of section 1.2 of the ABA standard:

> "Entry of such a plea constitutes a waiver of the following: (i) venue, as to crimes committed in other governmental units of the state; and (ii) formal charge, as to offenses not yet charged."

Representative Paulus read Article I, section 11, of the Constitution:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed."

In view of that provision, Mr. Blensly said the defendant would have to waive that constitutional right if the Bar committee's recommendation were to be placed in the statute. He suggested the statute could say that entry of a plea constituted a waiver but merely entering a plea would not be sufficient. It would therefore be necessary to reword the ABA standard because to accomplish the purpose would take both legislative action and personal waiver.

In reply to a question by Chairman Burns, Mr. Paillette said the commentary to the draft on page 33 mentioned that section 1.2 of the ABA standards was not incorporated into this draft because he believed there would be little enthusiasm for such a provision, but he wanted the subcommittee to be aware of it.

Mr. Blensly said he would favor such a provision and Mr. Milbank asserted that it would be especially useful in check cases. He believed the prosecutors would be in favor of it as were the defense lawyers. Mr. Paillette added that the provision would be purely discretionary for both the defense and the prosecution.

The subcommittee unanimously agreed that section 1.2 of the ABA standards should be incorporated into the draft in accordance with the Bar committee's recommendation.

Chairman Burns then pointed out that paragraphs (a) and (b) of subsection (3) contemplated that someone other than the district attorney could move for dismissal. He asked if the defense attorney had any standing to move for dismissal except under the compromise section and was told by Mr. Paillette that he did not. The Chairman then commented that the one who moved for dismissal was therefore the district attorney and questioned the need for such language in the proposed statute. After further discussion, it was determined that ORS 134.150 provided:

> "The court may, either of its own motion or upon the application of the district attorney . . . order an action, after indictment, to be dismissed."

The subcommittee decided no change was necessary in the draft in view of the fact that the above statute permitted the court to move for dismissal.

Mr. Blensly was of the opinion that the first three words in subsection (4), "Similarly situated defendants," might create numerous problems. A defendant could say that Multnomah County treated someone in a certain manner when he committed a similar crime and the equal protection clause required that Yamhill County do the same for him. Mr. Paillette read from the commentary to the ABA standard requiring that similarly situated defendants should be afforded equal plea agreement opportunities, and one of the arguments in favor of the standard was to provide more equal sentencing results.

Chairman Burns asked how grievances would be redressed by a similarly situated defendant who felt he was not offered an equal plea bargaining opportunity. Mr. Blensly said it would probably be done through a post-conviction proceeding. He questioned the need for subsection (4) inasmuch as the due process clause offered much the

same protection. Representative Paulus agreed with Mr. Blensly that the provision would create a great many problems.

Mr. Blensly moved to delete subsection (4) of section 6 and the motion carried.

Section 7. Criteria to be considered in plea discussions and plea agreements. Before Mr. Swinford left the meeting at noon he advised that Mr. Snouffer had asked him to relate on behalf of the ACLU the opinion that it was unnecessary to set forth all the criteria listed in section 7. They were concerned that it might require the district attorney to make a record in every case stating that he had complied with each and every criteria listed therein. He said Judge Allen in the Oregon Criminal Law Handbook set forth three main reasons for plea bargaining from the district attorney's viewpoint and the only one he listed which appeared in the draft was the matter of clearing court dockets. He expressed the view that the reason for plea bargaining should not be required to be a part of the record.

Mr. Paillette said he recognized that this was a difficult area to codify, but the purpose of the ABA standard was to set forth minimum provisions with respect to the things the district attorney and the court could take into account in deciding whether to accept a plea. If one of the purposes of codification of plea bargaining was to give more visibility to the guilty plea process, he could see nothing wrong with including in the statute those things that the district attorney may take into account in deciding whether to engage in plea discussions.

Chairman Burns asked if a district attorney who violated some part of section 7 would be prosecuted. Mr. Paillette said he would not and added that the criteria set forth were not at odds with what the district attorneys wanted nor with what actually happened under existing law. One of the things that seemed to disturb the ABA and others concerned with this problem was the notion that there was something underhanded about the plea bargaining process. If the draft was trying to give credibility to the process, section 7 would put it on the table and say that these were the kinds of things that justify reduction of a charge or a plea bargaining agreement. So long as the district attorney is not bound only to the criteria in section 7 and so long as he is free to consider other things, he did not see how a defendant could be damaged by having the criteria in the statute.

Chairman Burns commented that two different points were being discussed. One was what was really in the district attorney's and the defense attorney's minds when they made a deal. The second was to what extent was it necessary or appropriate that the deal itself as opposed to the underlying reasons given, be put on the table. To

illustrate, he said that in the standard kind of plea bargain the charge of burglary not in a dwelling is reduced to larceny in a building. The real reason for that kind of a bargain is twofold: (1) from the district attorney's standpoint, there are too many cases to try; and (2) from the defense attorney's standpoint it gives his client a felony-misdemeanor option and, all things being equal, the judge will probably reach a misdemeanor rather than a felony result. Those reasons for that sort of bargain were never recited on the record, and he said he could see no reason why they should be. In that type of situation there may be a number of section 7 criteria actually present plus some other criteria, but the only thing that goes on the record is what the deal is, i.e., the defendant will plead to larceny in a building if the state will dismiss the burglary charge.

Mr. Blensly said that a few years ago the district attorneys met with the Department of Justice and attempted to develop a statement of policy regarding negotiated pleas. That statement asserted that "the prosecutor shall make full disclosure to the court of the process of negotiation." Included therein was the requirement that the prosecutor would disclose the reasons for his agreement to a plea of a lesser charge. That, he said, was probably the most objectionable part of the whole document so far as the prosecutors were concerned. If the criteria in section 7 were set forth, even though the section was discretionary, it could cause problems on appeal if some courts were to say that the statute automatically excluded those things not on the list from the district attorney's consideration or if a record were not made showing that all of the criteria had been met.

Mr. Paillette pointed out that section 7 did not require the district attorney to give his reasons for entering into an agreement but merely set forth the standards for him to follow. Mr. Blensly responded that he could nevertheless foresee a lot of judges requiring the criteria if they were set out in the statute.

Chairman Burns pointed out that the local deviations were so great in this area that it was going to be difficult to write a statute that would apply to every situation. If the district attorney, as a part of the bargain, was going to make a recommendation as to sentence reduction or dismissal of a charge or some other type of concession, it should be carefully spelled out so that the defendant was well aware that it was a recommendation only and was not binding in any way upon the judge.

Representative Paulus commented that it would give protection to the defendant if the judge were required by statute to ask the prosecutor the same thing he asked the defendant, namely, whether any threats, promises, etc. had been made in reaching the agreement.

Chairman Burns said this practice was in fact followed at the present time in many jurisdictions, or at least its equivalent, when the judge, on the record, asked what agreement had been made between the defense lawyer and the district attorney.

At this point Mr. Swinford left the meeting and the subcommittee turned to consideration of sections 3 through 6. When they reached section 7, Mr. Paillette called attention to the commentary on page 19 where it was stated that the Klonoski study on plea bargaining listed the criteria to be considered by district attorneys in order of importance as: strength of case, nature of crime, past record of defendant, personal impression of defendant and caseload. He reiterated that the proposed statute said the district attorney _may_ take the criteria in section 7 into account but did not require that he do so and expressed the opinion that if the guilty plea process was to be codified, the statute should contain a section such as this if for no other reason than to clearly set forth some of the reasons why a prosecutor should agree to plea negotiations. When the Commission's proposed draft on the procedure code was made public, critics of the plea bargaining process could then see why the Commission believed the guilty plea process was desirable, that plea negotiations were not sneaky or underhanded and these were some of the reasons the process aided not only law enforcement but corrections and the criminal justice system as well.

Representative Paulus said that to keep plea negotiations behind closed doors merely created public distrust of the criminal justice system and said she favored retention of section 7 even though she did not completely agree with the concept philosophically.

Mr. Blensly said it was desirable to have the system as uniform as possible and since uniformity obviously would not come about voluntarily, it would help to set out some guidelines by statute. The standards in section 7, he said, were broad enough so that a district attorney could fit any plea into at least one of the criteria.

After further discussion, the subcommittee unanimously approved section 7.

Section 8. Responsibilities of defense counsel. Mr. Paillette advised that basically section 8 embodied established professional ethics regarding the responsibilities of a defense counsel. Inasmuch as the draft was setting down desirable standards to be followed, he believed a section such as this was necessary to a comprehensive statute on negotiated pleas.

Mr. Blensly recalled one case where a conviction was overturned because the defense counsel failed to transmit to the defendant any

offers of plea bargaining by the prosecutor. He believed it would be advisable to place an affirmative duty on the defense counsel to transmit to his client any offers made by the district attorney. Representative Paulus pointed out that subsection (2) said "shall advise the defendant of the alternatives available." Mr. Blensly said it didn't say he shall be advised of the offer itself, and Representative Paulus maintained that to her "alternatives" meant "offers." Mr. Milbank and Chairman Burns expressed agreement that the language of subsection (2) was applicable to plea bargaining offers or concessions made by the prosecutor.

Mr. Blensly called attention to the wording of subsection (2): " . . . shall advise the defendant of the alternatives available and of factors considered important by him or the defendant in reaching a decision." He asked how the defense counsel was going to advise the defendant of the factors considered important by the defendant.

The subcommittee unanimously agreed to delete "or by the defendant" from subsection (2). With that amendment, section 8 was approved.

<u>Section 9. Responsibilities of trial judge.</u> Mr. Paillette advised that the ABA standards recommended barring judges from participation in plea discussions but probably not all judges would agree with that view. Chairman Burns commented that there were some judges who took part in plea discussions at the present time and some who did not.

Tape 5 - Side 2

Mr. Blensly indicated that the policy decisions embodied in section 9 were basic ones and recommended that the full Commission be given an opportunity to make the decision as to whether the section should be retained or deleted.

Mr. Paillette explained that subsection (2) provided that the court could allow the parties to permit disclosure of a tentative agreement and the judge would then be free to advise the district attorney and the defense attorney whether he would concur in the agreement.

Mr. Blensly, referring to the final clause in subsection (2), suggested it might be advisable to include a statement as to when the representations should be made.

Mr. Milbank pointed out that subsection (1) said "trial judge" and asked if that phrase would limit the section to cases assigned for trial. Chairman Burns said that problem would be resolved by striking "trial" and referring only to "the judge." The members approved that revision.

Representative Paulus said she would be in favor of retaining subsection (1) of section 9 and striking the balance of the section.

She requested an explanation of the rationale behind subsections (2), (3) and (4).

Chairman Burns advised that the draft contemplated a situation where a defendant said, "I will plead to larceny in a building, the district attorney will dismiss the burglary charge and will recommend probation." The judge accepted the plea and later received a pre-sentence investigation report showing that the defendant had a long record, the information on the report was totally inconsistent with the plea bargain and decided it would be ridiculous to place that defendant on probation under the circumstances. The defendant at that point would be permitted to withdraw his plea. This procedure, he said, made sense in those situations where in effect the judge agreed to take the sentence recommendation of the district attorney. However, there was no real reason for it if the judge had previously made it clear that none of the recommendations of the district attorney were binding upon the court.

Chairman Burns said his personal opinion was that the charge concession should be the only function of the district attorney and that the district attorney should not get into sentence concessions at all. The ABA standards were written to take care of areas where the district attorney and the defense lawyer worked out the sentence as well as the charge concessions and where the judge went along with those concessions.

That being the case, Mr. Blensly said every defense counsel would try to come under section 9. He said he would not object to subsection (4) but recommended that the decision to retain or reject subsections (2) and (3) be left to the full Commission.

Chairman Burns remarked that in view of other provisions in the draft requiring the judge to tell the defendant that the district attorney's recommendations were not binding upon him, the provision in subsection (3) of section 9 was senseless because if it was really a sentence concession, the judge was the one who made the concession.

Representative Paulus was of the opinion that subsections (2), (3) and (4) of section 9 were making inroads into the traditional functions of the district attorney, the defense counsel and the court by permitting all of them to decide what the sentence should be. Mr. Paillette did not agree and explained that those provisions merely recognized their traditional functions. The judge's independence was maintained and the district attorneys were given the traditional amount of latitude, he said, but the ultimate sentence decision was up to the judge.

Judge Burns said that Multnomah County took care of 600 cases between September 1971 and January 1972 and in a sizeable number of those instances the judge took part in the plea bargaining process. He said he personally refused to say what sentence he intended to give the defendant; he would tell him only what the maximum was for the crime charged. The problem of sentence concessions did not arise in Multnomah County, he said, because the district attorney made no recommendations and the sentence was left entirely to the judge. In other parts of the state there were undoubtedly judges who got into the plea process in the sense of indicating sentence concessions in advance of trial. In those cases, when the judge said he would give the defendant probation and then received a presentence report that caused him to change his mind, it was absolutely necessary that the defendant be given an opportunity to withdraw his plea.

Mr. Paillette pointed out that subsection (2) said " . . . the trial judge, upon request of the parties, _may_ permit the disclosure . . . . " He also noted that section 9 had reference to a time prior to the actual entry of the plea in open court. Chairman Burns agreed that section 9 contemplated a situation ahead of the formal plea and noted that the section did not say whether the process was or was not on the record, but he was of the opinion that, even at this stage, the judge should have the proceeding on the record.

Mr. Paillette called attention to the original language of the ABA standard as set forth on page 41, section 3.3, of the draft. Mr. Blensly asked Mr. Paillette why subsection (3) differed from the ABA standard in that it omitted "charge concessions" and made reference only to "sentence concessions." Mr. Paillette said the phrase was omitted because he believed the charge concessions really didn't involve the judge. Chairman Burns stated they would involve the judge if the defendant wanted to plead to Count 1 and dismiss Count 2 and the judge said he would not agree to dismissal of Count 2. This, he said, went back to his basic belief that the charge concessions should be the function of the district attorney but the sentencing should be left solely to the judge.

Mr. Blensly proposed to insert "charge concession" in subsection (3) and the subcommittee agreed to the following amendment to section 9, subsection (3):

> " . . . should not include the _charge or_ sentence concessions contemplated by the plea agreement . . . . "

The subcommittee further agreed to delete "trial" before "judge" throughout the entire section and to refer subsections (2), (3) and (4) of section 9 to the full Commission without recommendation.

Section 10. Discussion and agreement not admissible. Mr. Blensly noted that section 10 said "the fact that the defendant . . . engaged in plea discussions or made a plea agreement . . . . " He asked if that language would mean that any admissions he made during the course of the discussions would not be admissible in court. Chairman Burns said it could create a problem if, during the course of the pre-trial conference, the defendant made a factual statement and later said something different while on the witness stand. Mr. Blensly asked if the witness could be impeached in such a circumstance.

Mr. Paillette replied that he did not interpret section 10 to go that far.

Section 10 was unanimously approved.

Section 11. Withdrawn plea not admissible. The subcommittee approved section 11 as drafted.

Next Meeting

Mr. Paillette advised that Subcommittee No. 3 would subsequently be taking up the subjects of pre-trial discovery and grand juries and asked in what order the committee wished to consider them. The subcommittee decided to hold a general discussion on the policy questions involved with the grand jury statutes and, because of the constitutional considerations, to make broad policy decisions before an actual draft was prepared. Mr. Paillette said he would distribute background material to the members covering some of the problems in the area with alternative solutions set forth.

The next meeting date was set for Tuesday, March 7, at 7:00 p.m.

The meeting was adjourned at 5:15 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission

Appendix A
Criminal Law Revision Commission
Subcommittee No. 3
February 21, 1972

The Criminal Law and Procedure Committee of the Oregon State Bar recommends the following changes and additions to Preliminary Draft No. 1 of Part III, Article 6, relating to pleadings of defendant and plea discussions and agreements:

(1) The draft should be modified to include some form or type of no contest plea procedure consistent with the philosophy of North Carolina v. Alford.

(2) The first sentence of section 1 should be amended to read: The kinds of plea to an indictment, information, [or] complaint, or each count thereof are:

(3) Section 2, subsection (1), should be amended to include language which will provide for the situation in which a defendant refuses to obtain counsel and refuses to waive his right to counsel.

(4) The first sentence of section 2, subsection (3), should be omitted.

The Committee discussed and reached general agreement on the following two matters without a vote:

(1) Section 5 should be amended to provide as the test of accuracy of a plea that there is a factual basis to believe that the defendant has committed a crime.

(2) The Committee approves of section 1.2 of the ABA Standards Relating to Pleas of Guilty with an addition requiring the consent of the district attorney of the county in which the pleas are to be entered.