

Criminal Law



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New Court Procedures In Washington County Court

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As of last fall, a new docketing scheme was put into place in Washington County. The new docketing system has two main changes. 1) A "call" and 2) all cases except for Measure 11 and Domestic violence cases receive pre-trial conferences. The "Call" system is similar to systems used in some other jurisdictions. Defendants scheduled for court or jury trials must appear on the Friday morning before the week in which the trial is scheduled to take place. After everyone has checked in, the Court reviews all the settings for the following week, and assigns some cases to specific judges, resets other cases, and places the remaining cases on "call-back" for the following week. Cases on call-back status will proceed to trial if a judge becomes available. It seems like cases on call-back status stand a good chance of getting sent out, at least so far. A few points to remember:

(1) Defendants and counsel should make an extra effort to be on time. It is necessary for attorneys to sign in for themselves and their clients before 9:00 a.m. at the call appearance. Presiding Judge Marco Hernandez employs a bright line rule; those defendants who show up late are taken into custody and must proceed to arraignment and get new trial and call dates. No one can count on an exception to this rule. Pro se defendants must sign themselves in upon arrival.

(2) When signing in, counsel should place a check mark next to their name on the provided docket. A separate check mark must be entered for the defendant if they are present. There is a column for counsel to indicate the status of the case, i.e. "Ready; One day; Jury Trial."

(3) Requests for a continuance are not well received at the call appearance. If you need a set over, file the Motion and Affidavit at least a few days prior to the call date if at all possible. The same holds true if you are filing an Affidavit of Prejudice against any judges.

(4) As the Court must review and evaluate all the cases set for trial the following week, and then make priority assignments, the entire docket usually takes two or three hours. Reset dates are announced at the end of the whole proceeding. Expect to be there for the duration.

(5) If your case will be resolved by a plea bargain, you can sometimes enter a plea on the call date, either in front of Judge Hernandez, or elsewhere if a judge is available. You can also ask to do the plea on the day of trial, or even on another day the following week. The Court is quite accommodating with regards to scheduling plea hearings.

As for the second major change, Pre-Trial Conferences (PTC), all cases other than Measure 11 cases and Domestic Violence cases are given a PTC date at the time of arraignment. Measure 11 cases and Domestic Violence cases are set for trial at the time of arraignment. This is a change in that prior to last fall only misdemeanor cases received a PTC date. The goal of the PTC is to try and ensure that all cases actually set for trial are going to go to trial. Defense attorneys should be receiving a plea offer in advance of the pretrial conference. All negotiations with the Deputy District Attorney should be done in advance of the PTC. However, if a negotiation is not reached prior to the PTC, come prepared to do business. The PTC provides all parties the opportunity to discuss with the judge the strengths or weaknesses of the case and to use the judge to help resolve your case. If a resolution is not reached the case will be set for trial at the PTC.

Section Members Comment On Juror Contact Issues

By Lindsay Partridge

The last issue of the Criminal Law Section Newsletter requested that section members provide comments regarding trial attorneys having contact with jurors after their trial. We received many comments and the opinions varied greatly. The comments were submitted by judges, prosecutors and defense attorneys. At this time the executive committee is still soliciting input from members about this issue. Those in favor of allowing attorney-juror contact post-trial gave two reasons. First, to improve trial performance by allowing attorneys to receive meaningful feedback from jurors. Second, to be able to gather evidence necessary to determine whether or not juror misconduct occurred during deliberations. Those in opposition to allowing post-trial contact pointed to the well-recognized principle in Oregon law of preserving the integrity of jury deliberations and protecting jury verdicts from attack. Many felt that expanding post-trial contact is counterproductive to that principle. Below is a summary of the comments received to date.

Jurors Feedback Regarding Attorney Trial Performance

Some section members felt that the current system significantly restricts the ability of attorneys to receive feedback about their performance at trial. Under the current rules, the only practical way to receive feedback is to request the trial judge inform the jurors that the attorneys would appreciate comments about the attorneys' performance and to feel free to contact the attorney if they wish. However, often trial judges are reluctant to pass along the request. Even when the request is passed on only a few jurors actually initiate such contact. Additionally, many attorneys (and at least one judge) thought it was at least arguable that even if the juror initiated the contact the attorney could only listen and not ask questions. This is due to Oregon Formal Ethics Opinion No. 1995-143 which states that attorneys practicing in Oregon state courts and U.S. District Court may not initiate contact with jurors and may not interview jurors.

Many attorneys commented that other states do allow attorneys to have contact with jurors regarding the issue of attorney performance. In some states jurors are provided with a questionnaire after the verdict is rendered and are given the option of returning the questionnaire with comments. Often these questionnaires come with precautionary instructions not to discuss deliberations or the merits of the case. The idea is to comment on things the attorneys did that were distracting or helpful.

Often judges and "experienced" attorneys criticize the inept performance of attorneys at trial. Receiving feedback from the jury is an excellent tool to improve trial skills in the future. If such comments were provided in a setting supervised by the trial judge, then the fear of new trials based on misconduct during deliberations is effectively negated.

Jurors have a wealth of information to provide regarding attorney performance. Jurors should only be asked once if they wish to provide the feedback. Judicial supervision over the contact would protect the integrity of verdicts and ensure that attorney do not ask questions of jurors by which jurors would feel harassed or intimidated.

One section member felt it was ironic that if we seek to prohibit contact between attorneys and jurors to save the jurors from harassment for their verdicts, then the current system provides no protection from those most likely to harass jurors (unhappy parties and the media) but forbids contact by those least likely to harass (the lawyers).

Juror Contact To Determine If Misconduct Occurred

In *State v. Cheney*, 171 Or App 401 (2001), the Court of Appeals reinforced the rule from *Koennecke v. Oregon*, 122 Or App 100 (1993), regarding a defendant's motion for a new trial based juror misconduct. The defendants in each case presented affidavits of non-jurors who reported that jurors had considered inappropriate information during deliberations. In both cases the Court of Appeals affirmed the convictions principally on the basis that "no direct statements or testimony from jurors were present." *Cheney*, 171 Or App at 415-416.

One section member pointed out that under present rules defense attorneys are left in a Catch-22 position: in order for a criminal defendant to obtain a new trial based on juror misconduct the defense attorney must obtain a direct statement from a juror about the misconduct. However, to obtain such a statement the attorney would probably violate UTCR 3.120 and other ethical rules. Rules regarding juror contact and rules regarding zealous advocacy of a client seemingly conflict. The appellate courts have established a standard by which to a defendant may exercise the right to seek a new trial, but the current rules seem to make that impossible to gather the evidence necessary to prevail on such a motion.

Opposition To Expending Attorney Contact With Jurors

In *State v. Miller*, 167 Or App 72, 77, 1 P3d 1047 (2000), the court noted that "[t]here is a strong policy in Oregon to protect jury verdicts from attack. Only limited kinds of juror misconduct justify a new trial." Many members expressed the view that while it might be interesting or instructive to contact jurors post trial, any benefit to the current system would be outweighed by the potential damage. We must live with a jury's decision, otherwise we open the floodgates for additional litigation and an abuse of judicial resources.

One member reflected that often there are cases where the media will contact a juror weeks, months or years after the verdict. Human nature is to forget details including the actual testimony and the evidence presented. In these cases the jurors often get the actual facts wrong as their memory dims and it leads to unwarranted and meritless litigation – particularly at the post-conviction stage.

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Proposed UTCR 3.120 Changes

Included with this article are two proposed changes to UTCR 3.120 that would modify the rules regarding juror contact. The first is from Judge Edward Jones, Multnomah County Circuit Court. The second is from the Department of Justice, Corrections Litigation Section.

The Current Rule

UTCR 3.120 Communication With Juror

(1) Except as necessary during trial, and except as provided in subsection (2), parties, witnesses or court employee must not initiate contact with any juror concerning any case which that juror was sworn to try.

(2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when: (a) there is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict, or (b) there is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment.

Proposed Amendment To UTCR 3.120

Offered by Edward J. Jones, Circuit Court Judge,
Multnomah County Circuit Court

UTCR 3.120 Communication With Juror

(1) Except as necessary during the trial of a case, parties, witnesses or court employee must not initiate contact with any juror or member of the panel from which jurors may be selected concerning any case the juror has been sworn to try or may be selected to try until such juror or potential juror has been discharged from further service on that case.

Commentary: The current rule, apparently intended to prevent harassment of jurors, fails to serve that purpose since only lawyers and other participants in the trial process are forbidden post-trial contacts with jurors. Contacts by the press and others are not forbidden and, to this writer's knowledge, have not been a problem. There is no reason to believe that post-trial contacts by lawyers would be a problem for jurors, and the courts already have sufficient authority to deal with any such problems that might arise. Most other jurisdictions allow post-trial contact by lawyers and do so without problem.

Proposed Amendment To UTCR 3.120

Offered by Department of Justice Corrections Litigation Section, Assistant Attorney General Carolyn Alexander

(1) Except as necessary during trial, and except as provided in subsection (2), parties or their agents, attorneys or their agents, witnesses or court employee must not initiate or maintain contact with any juror concerning any case which that juror was sworn to try.

(2) After a sufficient showing to the court and only on order of the court, a party or attorney may have contact with a juror in the presence of the court and opposing parties when: (a) there is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict, or (b) there is a reason-

able ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment

Commentary

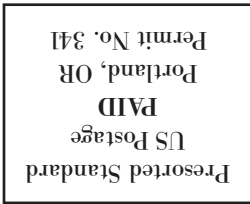
The rules allowing juror contact should be clarified, making it more clear that contact with jurors is prohibited in all situations without court order. The problem lies more, however, in the ethics opinion by the Oregon State Bar. Formal Ethics Opinion No. 1995-143 states, that, unless an attorney acts with "an improper purpose," DR 7-108(B) does not prohibit an attorney from interviewing jurors. But the opinion notes that both state and federal rules prohibit an attorney from "initiating" such contact. Citing DR 7-106(C)(7), the opinion concludes that "[c]onsequently, attorneys practicing in Oregon state courts and in the U.S. District Court may not interview jurors." The ethics opinion should be consistent with the rule. Both should make it clear that no party or attorney, or their agents, may contact a juror for any purpose without court order, nor may they maintain contact if the contact is initiated by the juror.

The Criminal Law Section executive committee still is asking members to submit comments about these issues. The annual CLE on April 11, 2003, will feature a panel discussion on the topic. Please submit comments to Lindsay Partridge via e-mail at partridgelaw@msn.com.

Mark Your Calendars *NOW!*

APRIL 11, 2003, 16th Annual Contemporary Issues in Criminal Justice at Spirit Mountain Casino

The Criminal Law Section's Annual CLE has moved locations to the Spirit Mountain Casino. Hey — we know it's a little different, but we thought we'd try something new! Look for more details in the future but save the date today. The full day seminar will feature the always popular appellate update and an update regarding pending legislation in the 2003 Oregon Legislature. Additionally, if you need a CLE credits for diversity or child abuse reporting the CLE will offer programs on those topics. Other topics are still in the discussion stage — but hopefully will include a segment on evidence - both legal and forensic issues. Lastly, the CLE will feature a lively panel discussion regarding contact of jurors post-trial.



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Update on *Apprendi v. New Jersey*

By Tim Sylwester, Assistant Attorney General

At the very end of last term, the United States Supreme Court issued several opinions clarifying the scope of *Apprendi*. In *United States v. Cotton*, 535 US ___, 122 S Ct 1781, 152 L Ed 2d 860 (2002), the Court unanimously rejected a defendant's *Apprendi*-based challenge to an enhanced sentence imposed under the federal sentencing guidelines, concluding that he had failed to preserve that objection at trial or sentencing. The Court held that the alleged error was neither a "jurisdictional" defect nor plain error under federal appellate practice. The Oregon Court of Appeals came to the same conclusion in *State v. Crain*, 177 Or App 627, 33 P3d 1050 (2001), rev den 334 Or 76 (2002).

In *Ring v. Arizona*, 536 US ___, 122 S Ct ___, 153 L Ed 2d 556 (2002), the Court held that that the right-to-jury rule in *Apprendi* applies the findings of aggravating factors that are necessary under state law to render a defendant convicted of murder eligible for the death penalty. In that respect, the holding in *Ring* is almost identical to the rule the Oregon Supreme Court adopted almost 21 years ago in *State v. Quinn*, 290 Or 383, 623 P2d 630 (1981). Under Oregon law, the jury must answer the four penalty-phase questions. One of the issues left open by *Ring* is whether the state is required to allege those factors in the indictment. The Oregon Supreme Court held in *State v. Terry*, 333 Or 163, 37 P3d 157, cert den 122 S Ct 368 (2001), that those factors need not be alleged.

Finally, in *Harris v. United States*, 536 US ___, 122 S Ct ___, 153 L Ed 2d 524 (2002), the Court rejected the argument that *Apprendi* had overruled *McMillan v. Pennsylvania*, and it reaffirmed that it is permissible to impose a minimum sentence based on a finding made by the sentencing court, rather than by the jury. The Oregon Court of Appeals came to the same conclusion in *State v. Dilts*, 179 Or App 238, 39 P3d 276, rev allowed (2002), when it held that a departure was proper even though that factor was not alleged in the indictment or proved to the jury. The court held that the rule announced in *Apprendi v. New Jersey*, 530 US 466 (2000), does not apply to departures within the statutory maximum. As noted, the Oregon Supreme Court has allowed review on that issue.

Meanwhile, the Ninth Circuit Court of Appeals recently held in *United States v. Sanchez-Cervantes*, 282 F3d 664 (9th Cir. 2002), that the rule in *Apprendi* does not apply retroactively to cases on collateral review (i.e., in a post-conviction proceeding). The Oregon Court of Appeals very recently followed that holding in *Teague v. Palmateer*, 184 Or App ___, ___ P3d ___ (October 30, 2002) (in banc). The court also held in *Teague* that the petitioner's trial counsel did not provide constitutionally inadequate assistance by failing to anticipate *Apprendi*.