

Oregon State Bar

# Senate Bill 798 Task Force

## Alternate Jurors in Criminal Cases

**June 27, 2014**

# Report of the SB 798 Task Force

June 2014

## Origin of the task force

During the 2013 legislative session, the legislature considered SB 798. The bill would have modified ORS Chapter 136 to expand the permissible use of alternate jurors in criminal cases. The Senate Judiciary Committee held a hearing on this bill on April 8, 2013, but after hearing from both sides decided not to move the bill out of committee. Instead the chair of the committee asked the Oregon State Bar to convene a task force to look into this issue in more detail, and report back with a recommendation. The task force included judges, representatives for both prosecutors and criminal defense attorneys, and representatives of the Oregon State Bar.

## Purpose of Senate Bill 798

Senate Bill 798, and the -2 amendments to that bill, which were submitted at the April 8, 2013 hearing, were intended to allow judges to use an alternate juror to replace a juror who dies or becomes unable to continue after jury deliberations have begun.

Under current law, the court is generally required to dismiss all alternate jurors when the case is submitted to the jury, meaning that if a juror becomes incapacitated during deliberations, there will no longer be an alternate available. In such a situation, the court will generally be forced to declare a mistrial and the case will have to be retried, or the parties may agree to continue deliberations with fewer jurors.

Proponents of SB 798 felt that, absent the parties agreeing to a smaller jury, declaring a mistrial was a waste of judicial resources, and that judges should be permitted to make use of alternates to avoid having to repeat what could be a weeks-long jury trial.

This proposed change was in part modeled after recent changes to the Oregon Rules of Civil Procedure. Those changes went into effect on January 1, 2014 and allow the use of alternate jurors after deliberations begin in civil cases. Because the ORCP does not apply to criminal cases, separate legislation is required in order to make analogous changes.

## Concerns and Discussion Points

The task force spent considerable time discussing how courts currently handle situations where a juror is unable to continue after deliberations have begun. Existing statutes do not provide any clear guidance on how to proceed and local court practices differ.

On occasion, parties will agree to continue with fewer jurors, but this practice appears to be extremely rare. One reason is that a defendant who is convicted by less than a full jury may have a colorable post-conviction relief claim, even if parties agreed at the time. Another complication is that Oregon permits non-unanimous felony convictions, but the law does not specify how many jurors would need to vote to convict when less than 12 participate in the decision. For these reasons, and since defendants will often fare better in a second trial than a first, proceeding with fewer jurors is rare.

There was also some belief among task force members that courts may have on occasion decided to keep alternate jurors around after deliberations begun so they would continue to be available if needed. It was not known if such a juror has ever participated in a decision, but since the statute appears to explicitly prohibit this practice, a conviction based on the deliberations of such an alternate would appear to be highly suspect.

The task force members agreed that current law provides no satisfactory way for deliberations to continue when a juror dies or becomes incapacitated.

The major concern expressed regarding the original proposal came from attorneys who feared their clients could be prejudiced by the use of an alternate juror inserted after deliberations have begun. Some members felt that such a juror might feel pressure to go along with the prevailing view of jurors who had participated in the full deliberations, and that it would be difficult to get the jury to truly begin deliberations anew.

Under the original proposal, the decision to use alternate jurors would have been made by the judge. While presumably the judge would take the parties' opinions into account in making this decision, the parties had no formal ability to prevent a judge from inserting an alternate if they felt that to do so would be detrimental to their client.

After extensive discussion, the members of the task force agreed to propose an amended bill that would require the consent of the parties before a judge made use of alternate jurors.

This decision was not unanimously agreed to be a preferable approach to the original bill. Some members of the task force believed that as a policy matter, it was preferable to leave the decision to the sole discretion of the judge, because the parties' objections could be based not on whether they believed they would actually be prejudiced by the situation, but rather based on the verdict they anticipated. However, members of the task force did generally agree that a bill that permitted the use of alternates upon agreement of the parties was preferable to the status quo.

Some concerns were raised with this approach during discussions. One concern was that defendants might only rarely agree to the use of alternate jurors, since refusing and forcing a mistrial could serve as an opportunity to delay a conviction. Other task force members argued that there were many reasons the defense might agree to the substitution, and that it should not be assumed that it is always in the defendant's interest to retry cases. Many defendants do not want to go through a trial a second time and an attorney who feels that the case is going well might advise the client to precede with the alternate.

One important issue on which the task force did not reach a consensus regarded the timing of when parties must agree to permit the use of alternate jurors after deliberations begin.

One task force member strongly argued that the court should be required to get consent at the time of jury selection, because after the trial begins the parties' decisions will be clouded by how they believe the trial has been going, and whether a mistrial would be favorable to their client.

Other task force members have argued that while it is fine for the judge to seek consent at the time of jury selection, it should not be required too early because attorneys may be unwilling to provide it at that time. Arguably, a lawyer cannot be certain at the time of jury selection whether it would be prejudicial to their case to allow substitution during deliberations, as many factors weigh into that calculation, including the amount of time a jury had been deliberating before the need for substitution arose. For this reason some task force members argued that the judge should be able to seek this consent at any time.

Therefore the two alternate recommendations on this point are:

- Permit the judge to seek, at the time of jury selection, the consent of the parties to make use of alternate jurors after deliberations begin if a juror is unable to continue, or
- Permit the judge to seek consent of the parties at any time to make use of alternate jurors after deliberations begin if a juror is unable to continue.

## **Proposed -2 amendments**

Prior to the hearing on SB 798 before the Senate Judiciary Committee, a set of amendments, SB 798-2, were drafted and distributed. These amendments included two changes to the Introduced version of the bill. The first was an explicit clarification to ORS 136.280, that the court may retain the alternates (which is not permitted under current law), and that those alternates may not attend or participate in deliberations. The original bill did not address the issue of whether alternates should sit in on deliberations.

These changes were agreed to by the task force at an early stage, since they represented the proponents' original intentions, and made the statute more clear.

The other change proposed in -2 amendments was a change to ORS 136.260, that would eliminate the distinction between preemptory challenges used against alternates and ones used against the original jury panel. These changes would give judges additional flexibility to structure the selection of alternates in the way that they deem best. For example, some judges have expressed concerns that when a juror knows they are an alternate, rather than an original juror, they may pay less attention during the proceedings. These changes would permit judges to select a larger jury pool, and not reveal to the jurors who among them are alternates until deliberations begin.

The task force did not discuss this part of the proposal in great detail, as it was not the source of concern with the original bill. However, task force members expressed no objections to this proposed change. This part of the proposal is only indirectly related to the rest of the bill, and could be included or removed from any future legislation without impacting the rest of the bill. However, it was the general understanding of the task force that the -2 amendments should be thought of as the proponents' proposal, and that they should form the basis for discussion.

## **Task Force Recommendations**

After discussion, the task force agreed that allowing alternate jurors to be used after deliberations have begun is a positive change – with the concession that parties must agree to the use of alternates. The proposal has the potential to make the courts more efficient by eliminating the need for some cases to be retried.

The majority of the task force<sup>1</sup> recommends that SB 798 be redrafted, as modified by the -2 amendments to that bill (dated 3/28/2013), and with the additional amendments below requiring that both parties must agree to the use of an alternate juror after deliberations have begun.

On page one of the -2 amendments, after line 18 insert:

**(b) Both parties have consented to the substitution of the alternate juror, either at the time of the substitution, or at some earlier point during the proceedings; and**

On page one of the amendments, on line 19 strike (b) and insert (c).

On page two of the -2 amendments, on line 11, strike “as described in” and insert “in accordance with”.

The Oregon State Bar's Board of Governors encourages the Judiciary Committee adopt the task force's recommendation to redraft SB 798 with the modifications discussed above.

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<sup>1</sup> One task force member disagreed with this recommendation, and proposes that consent to the substitution be required at the time of jury selection.