

or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.

C.(2) through H.(5) unchanged.

* * *

RULE 57

JURORS

A. through B. unchanged.

C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. [The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.] The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant.

D. through F. unchanged.

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Rule 57(D)(2), with respect to peremptory challenges, states that each party shall be entitled to three peremptory challenges and no more. (Emphasis added.) Thereafter, the last sentence of the rule allows the court, in its discretion and in the interest of justice, to give any of the parties, single or multiple, additional peremptory challenges, and to permit them to be exercised separately or jointly.

The present statute (ORS 17.155) is specific in relation to cases where there are two or more parties, plaintiff or defendant. It states that they must join in the challenge, or the challenge cannot be taken. It further states that each party shall be entitled to three peremptory challenges and no more.

The proposed rule is vague, as well as being contradictory. As written, the proposed rule could give a party a great advantage if the trial court allowed additional peremptory challenges and permitted them to be exercised separately or jointly. Rule 57(D)(2) should be reviewed by the committee.

RULE 57

X

JURORS

C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.

COMMENT: New language is added to the present statute (ORS 17.160) by Rule 57 C., but the authors claim they intend no change in Oregon's present practice of jury selection. To avoid the suggestion that a change is intended by the language of Rule 57 C. that new language should be deleted. Rule 57 C. should read as follows:

"C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant."

Disent

The language appears to suggest, and undoubtedly will be taken to mean by some judges, that the federal practice of having the judge almost exclusively conduct jury selection is the intent of the language.

The second (new) sentence of 57 C. should be deleted as it appears to give the court unlimited discretion in

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questioning potential jurors itself, and the power to arbitrarily limit jury selection questioning by attorneys. The language may be interpreted to allow the judge to do all the examining via questions submitted for asking by the attorneys. This, of course, is the current federal practice.

The federal practice has resulted in a significant erosion of the quality and effectiveness of jury questioning. There is no reason to hazard its arrival in state court practice by a loosely drafted rule.

D.(2) Peremptory challenges: number. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party shall be entitled to three peremptory challenges, and no more. Where there are multiple parties, plaintiff or defendant in the case or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of three peremptory challenges; except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

COMMENT: Without acknowledging the fact, the authors have substantially changed present law to give an unfair advantage to multiple parties in exercising

peremptory challenges.

ORS 17.155 now states:

"A peremptory challenge or a challenge for cause may be taken by either party. When there are two or more parties plaintiff or defendant, they must join in the challenge or it cannot be taken. Either party shall be entitled to three peremptory challenges, and no more."

It is likewise a substantial change from the original text which, in its relevant part, reads as follows:

"Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to a total of three peremptory challenges."

The present language of Rule 57D(2) is fundamentally unfair. The language would allow multiple parties of plaintiff or defendant to exercise more than three peremptory challenges. The effect of this rule would be most noticeable in a case where there were multiple defendants and only one plaintiff. (Not an atypical situation.) The plaintiff would be limited to its three peremptory challenges. The multiple defendants, at the court's discretion, would have additional peremptory challenges, potentially far in excess of the three the plaintiff's counsel was limited to.

There should be no place for such fundamentally

unfair rule in Oregon procedure. The rule should be changed to reflect that the parties plaintiff and defendant are entitled to three peremptory challenges, and no more.

Rule 57(D)(2), with respect to peremptory challenges, states that each party shall be entitled to three peremptory challenges and no more. (Emphasis added.) Thereafter, the last sentence of the rule allows the court, in its discretion and in the interest of justice, to give any of the parties, single or multiple, additional peremptory challenges, and to permit them to be exercised separately or jointly.

The present statute (ORS 17.155) is specific in relation to cases where there are two or more parties, plaintiff or defendant. It states that they must join in the challenge, or the challenge cannot be taken. It further states that each party shall be entitled to three peremptory challenges and no more.

The proposed rule is vague, as well as being contradictory. As written, the proposed rule could give a party a great advantage if the trial court allowed additional peremptory challenges and permitted them to be exercised separately or jointly. Rule 57(D)(2) should be reviewed by the committee. ✓

Rule 57

JURORE

Whether the additional peremptory challenges are allowed is a policy issue which the Council has already decided. The subcommittee offers no new considerations. It simply restates the old law and says it is better. I do not agree that the rule as drafted is "vague, as well as being contradictory."

Rule 57

C. Examination of jurors. The full number of jurors having been called shall thereupon be examined as to their qualifications. [The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.] The court may examine the prospective jurors to the extent it deems appropriate, and thereupon the court shall permit the parties to examine each juror, first by the plaintiff, and then by the defendant.

Rule 57

*F. Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retired to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged as the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by [law] these rules or other rule or statute if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by [law] these rules or other rule or statute shall not be used against an alternate juror.