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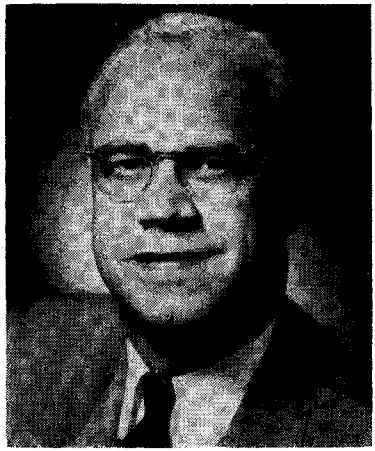

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After having tried jury cases for 30 years, primarily on the defense of damage suits, I have come to the conclusion that anyone who has the temerity to attempt to suggest to another attorney how to select a jury should be a fit subject for a psychiatrist. There is no standard form or rule to follow in the selection of a jury. Selecting a jury is like selecting a wife. You just don't know what you are getting until it's too late. Seriously, there are many problems involved in the selection of a jury.

While most attorneys are familiar with our Colorado statutes regarding juries, no harm will be done by refreshing our memories regarding these statutes. Under Colorado statutes, the jury consists of six persons unless the parties agree to a smaller number but no less than three. A jury of twelve persons can be had, but if either party desires a jury of twelve, then the party requesting the extra jurors must deposit with the clerk an additional jury fee sufficient to pay additional jurors for one day's service and a like sum must be deposited every day thereafter consumed in such trial. These additional jury fees are taxed as costs.

I have never tried a case in which there was a jury of less than six persons and have tried quite a few where there were twelve jurors. The question arises in each case as to whether a jury of six or twelve is desired. In my early practice of the law, I would demand twelve jurors when on the defense on the theory that I was more apt to get a compromise verdict or defense verdict with twelve jurors than with six. The theory being that because the verdict had to be unanimous, it would be more difficult for twelve people to agree than six people. After several years, I came to the conclusion that it was the exceptional case where a jury of twelve should be demanded, that under our present jury system and certainly under the theory that I use in selecting juries, which theory I will go into later in this article, it was a

waste of money and of time to ask for the six additional jurors.

Something that is oftentimes overlooked by counsel, particularly those who do not try too many cases, is Rule 38 of the Colorado Rules of Civil Procedure which provides that any party may demand a trial by jury by serving upon the other party a demand therefore in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to the tryable issue of fact. Such a demand may be endorsed upon a pleading of the party. The rule further provides that the failure to demand a jury within the time provided in the rule constitutes a waiver by that party for trial by jury. Due to this rule, it becomes extremely important to determine early in the case whether you are going to demand a jury or are willing to try the case to the Court.

Various courts vary as to the enforcement of this rule. The Federal rule is exactly the same and we know of no case where the Federal Court has allowed a jury trial where the parties have failed to request a jury within the ten-day period. Some of our State District judges insist upon a strict adherence to the rule while other District judges will grant a jury trial even though the demand is not made in accordance with the rules. In order to be safe, you should be sure to file the request in accordance with the rules. In this respect, you should remember that if you do request a jury, you cannot later withdraw such request without the consent of all of the parties. (Rule 38 (d)).

As this article has to do with the selection of the jury, I will not go into all of the questions involved in determining when to request a jury. Generally, it is considered that if it is a strict matter of law then the trial should be to the court. As a general rule, plaintiffs' attorneys request juries on the theory that the jury will be more sympathetic to an injured plaintiff than the court would be, and would also award greater damages. Originally, this was my feeling, but I have come to the conclusion that oftentimes the trial judge can be even more sympathetic than a jury and often awards larger damages than a jury. The reason for this may be that the judge is dealing with large figures most of the time and is not as conservative as some jurors. There are, of course, exceptions to the rule. I have come to the conclusion that in most

cases, I would rather try a damage suit to a jury than to the court.

In the first place, in the trial to the jury, if the plaintiff fails to prove his case, then the defendant is entitled to a judgment of dismissal and he would be entitled to a judgment of dismissal whether it was to the court or to the jury. In the second place, if the plaintiff does sustain the burden of proof so as to have the issues submitted to a jury, then it has been my experience that generally the juries are not far wrong in determining the issues of liability and the amount of damages. Here again, there are always exceptions to the rule.

Having decided to try your case to a jury, the next question is what type of jurors do you desire. While the theory of selecting a jury is to obtain a jury that is impartial, and that is what the attorneys try to obtain, still we cannot lose sight of the fact that all people have prejudices and no matter how long an examination of a jury is conducted, you are bound to get jurors who may be swayed one way or the other by reason of their own experiences. Consequently, counsel on both sides of the case are attempting to get jurors as favorable to their side of the case as possible.

Under our Colorado statutes, the number of challenges for cause is unlimited but each side is limited to four peremptory challenges. Our Colorado statutes set out certain grounds for challenges of cause and I am not going into those in this article. Otherwise than the specified grounds enumerated in the statute for challenges of cause, the trial court is vested with a sound discretion in ruling upon challenges and unless that discretion is abused, there is no ground of appeal from the ruling of the court.[1]

An example of this situation came forcibly to me recently in a jury trial in the southern part of Colorado. I was defending a damage action under the Guest Statute. Upon interrogating the jury upon the voir dire examination, I elicited from one of the women jurors that she had gone to the scene of the accident about ten minutes after the accident occurred, had examined the car and had seen the plaintiff before he had been taken to the hospital. It further developed that she was a second cousin of the plaintiff but she was very insistent that this would in no way

[1] Kelly vs. People, 121 Colo. 243, 215 Pac. 2nd 336.

affect her verdict and that she could be fair and impartial in the matter. Naturally, I challenged this juror for cause. Opposing counsel resisted the challenge, stating that the prospective juror had stated unequivocally that this relationship to the plaintiff and having been at the scene of the accident would in no way affect her decision in the matter. The trial court, in our opinion, very correctly held that my challenge for cause was good. It seems to me that if the court had ruled otherwise, it would certainly have been an abuse of discretion.

While there are no set rules to be followed in the selection of a jury, some attorneys follow a general rule as to class. For instance, some attorneys feel that in defending a damage suit, they do not want to have an auditor on the jury as an auditor is used to dealing with large figures and would be more apt to give larger damages. Others take the position that a person of Irish extraction is a dangerous person for the defense as they are generally sympathetic and liberal, whereas, a person of German extraction is inclined to be frugal and would be inclined to hold down the damages. My own feeling on the question is that generally speaking, I prefer businessmen and women rather than the laboring class. While it is true that businessmen deal with money, they know the problems and in my opinion, are much more apt to be conservative in directing a defendant to pay damages to another person than the laboring class who oftentimes seem to enjoy spending other people's money. Women are generally more conservative than men.

There are several general rules which I follow regarding jurors. One of these is to find out whether or not the person has had prior jury service, and if he has had prior jury service, when and what type of cases he has sat on. It has been my experience that oftentimes the party that has sat on several juries, particularly if it has been in the same jury term, has got to the point where he has become somewhat liberal minded and is more apt to be for the plaintiff than for the defendant.

Another question to be determined is whether you desire men or women jurors. While, here again, there are always exceptions to the rule, it has been my experience that I have had better success on the defense with women jurors than with men

jurors. One of the reasons for this is that while women are generally more sympathetic than men, they also seem to take their jury duty more seriously and attempt to follow the court's instructions as to the law. Certainly, a defendant cannot ask for more than to have the jury conscientiously apply the court's instructions to the facts in the case. I certainly want the majority of women jurors if possible in any case where the plaintiff is a woman. The old days prior to women jurors in Colorado when the woman plaintiff could display her charms to the jury are gone. A woman plaintiff just doesn't get away with that with women on the jury.

I had that example brought very forcibly to me a few years ago, although it was in the converse from displaying her charms. I was defending an assault and battery case brought by a woman against a storekeeper. The jury consisted of three women and three men. The plaintiff appeared in court rather shabbily dressed even though her husband and she owned and operated a garage, without makeup and made rather a pitiful looking sight. While the jury returned a verdict for the plaintiff, the verdict was for only $30.00 which was just $1.00 over and above her doctor bill. In talking to one of the men jurors after the verdict had been returned, he advised me that it was fortunate that I had had some women on the jury. That after the jury went to the jury room and had determined there was liability, the men wanted to give substantial damages as they felt sorry for this woman, but the women jurors pointed out to them that they did not believe that the woman was badly injured and that she was "putting on" when she appeared in court as she did; that no woman, however badly injured, was going to appear in public without attempting to make herself as attractive as possible.

In questioning the jury on the voir dire examination, I try to bear in mind that not only am I trying to select a fair and impartial jury but at the same time am trying to sell my client's cause to the jury. A trial involves a great deal of salesmanship and that salesmanship should start as soon as court opens. Consequently, in addressing the jury, I try to let the jury know the defendant's theory of the case and, of course, try to be very courteous and considerate to the jurors in the examination. Little

things can often hurt one and certainly an attorney does not want to have any juror sit in trial of the case who has any resentment toward the client or the attorney himself. An example of this was a case where opposing counsel inadvertently addressed a maiden lady as "Mrs. ....." This maiden lady promptly advised him that she was unmarried but the harm had been done. You could see that she resented having been referred to as a married woman, and the attorney was smart enough to exercise one of his peremptory challenges as to that lady.

In questioning jurors, I believe that you should attempt wherever possible to frame your questions so that you receive either a simple "yes" or "no" reply. It is quite dangerous to ask jurors questions that call for an explanatory answer from them. Here again, let me give you an example. I was defending a malpractice case against a doctor. The attorney for the plaintiff asked the general question if any of the jurors had any feeling one way or the other about a party suing a doctor for malpractice. One juror raised her hand. The attorney then inquired, "What are your feelings?" and before counsel or the court could stop the juror, she gave about a three-minute discourse to the fact that she was violently opposed to anyone who would go to a doctor for treatment and then after that doctor had done the best that he could, sue him for damages for alleged malpractice. She gave a wonderful speech for the defense with all the jurors listening to it. This attorney could have prevented such a discourse if his question had been, "Do you have any prejudices against a person bringing a suit for malpractice?" This question would have called for a simple "yes" or "no" answer.

I do not want it to be understood that I haven't made mistakes myself on this type question. Sometime ago in defending a case, I inquired of the jury if any of them had any personal knowledge of the accident and one juror raised his hand. I then asked him what were those facts, and believe me, he proceeded to tell us in no uncertain terms that he had been a witness to the accident, that in his opinion our client was entirely to blame and that he believed he should be called as a witness in the case instead of being called as a juror. I immediately asked for a mistrial but the court in its discretion denied my motion but did sustain my challenge for cause, but unfortunately, the damage had been done.

When my late partner, William T. Wolvington, and I first started trying cases, we would talk with various jurors after the termination of the case to attempt to correct our errors both on the voir dire examination and on the trial itself. We especially did this in cases which we had lost. We soon decided that such interrogation of the jurors was practically useless. The juror we talked to was always for us and it was the other jurors that had finally forced him to vote against our client. We soon decided that we could discover our errors in other ways.

Regardless of what else you do in the selection of the jury, you should keep in mind three cardinal points, which are

1. Always be courteous to the Court, jury and opposing counsel.

2. Have your questions well in mind before beginning the voir dire examination.

3. Be as concise and as brief as possible. Jurors are apt to become hostile if you question them too much.

I appreciate that this article is rambling but as I pointed out in the beginning, there are no set rules on how to pick a jury and no matter what any other attorney or I may suggest, the best way to find out how to select a jury is to do it yourself. It really becomes a trial and error situation.

While there is a difference of opinion among attorneys on the point, my own feeling is that the average jury verdict is a one man verdict. By that, I mean that generally there will be one man or woman on the jury who has a stronger character or personality than the other jurors. This party generally becomes foreman and his ideas and thoughts will greatly influence the jury in its verdict. This, of course, is not always true and sometimes you get two or three strong characters on a jury. When I am selecting a jury, I try to get on that jury at least one person who I feel is somewhat defense minded and who appears to be a person of strong will and character. And while this has nothing to do with the selection of the jury, if I get such a person on the jury, I always remember that person during the trial and direct my opening and closing arguments to that juror.

Little things oftentimes influence a juror and while jurors should not choose sides or try the attorneys rather than the issue involved, still that sometimes happens. Because of this, an attorney should watch all of the little things. By little things, I mean such items as calling the jurors by his or her correct name when addressing them, by showing every courtesy to the juror, by being extremely careful not to ask any questions which may embarrass the juror in any way. Also, if it is possible, do not take too much time in exercising your peremptory challenges. Oftentimes, if an attorney takes a great deal of time pondering over the jury list at the time of the peremptory challenges, the jurors who are selected as the jury may get the opinion that that attorney was doubtful as to some of them and resent this fact. I try to make it a practice

that by the time I am through questioning the jurors, I have so marked my jury sheet that I generally know every juror that I want to strike from the jury. Sometimes that number is more than the peremptory challenges and then I attempt to very quickly choose the lesser of the presumed evils.

Probably one of the biggest problems that a defense attorney has had on the voir dire examination is what to do regarding the insurance question. By insurance question, we, of course, refer to the right of the plaintiff's counsel to inquire of the jurors either individually or collectively as to their interest in, or connection with the insurance company that is indirectly involved in the defense of the case. In the case of Rains vs. Rains,[2] our Colorado Supreme Court approved of this insurance question. In fact, the Court in that case properly held that an attorney must be allowed considerable latitude in examining jurors on voir dire so as to enable him to properly exercise not only challenges for cause but also peremptory challenges. The Court stated:

> "When back of the defendant stands an indemnity company, actively conducting the defense and having a direct financial interest in the result—in a sense, a loose sense perhaps, a real party in interest—justice demands an equally wide latitude in the examination of jurors on voir dire."

In a still later case, Kath vs. Brodie[3], the trial court sustained the objection of the defense counsel to a question which read:

> "You are familiar with some of the workings of mutual insurance companies, that if the losses become too large the policy holders may be assessed?"

and the Supreme Court affirmed the action of the lower court holding that while it was proper to inquire as to whether or not a juror was a policyholder of the insurance company, it was "wholly immaterial what the policy or 'workings' of another mutual insurance company might be."

It now being the established rule in Colorado that jurors may be interrogated regarding their interest in an insurance company, defense counsel have to face the situation and decide in each case how they want to combat the problem. I have come to the conclu-

[2] 97 Colo. 19, 46 Pac. 2nd 741.
[3] ..... Colo. ....., 287 Pac. 2nd 957.

sion that most jurors are attempting to be fair and honest and while subconsciously they might let the matter influence them in their verdict, if the matter is put to them in a straightforward way by defense counsel, they are moré apt to disregard the insurance angle in arriving at their verdict. In this day of financial responsibility laws and of widespread advertising in magazines by insurance companies, it is indeed the exceptional juror who does not know or realize that the defendant is probably insured.

Because of this, I have taken the position in most of my recent trials of calling the attention of the jury panel on voir dire that plaintiff's counsel have inquired regarding insurance and then ask the jurors how many of them carry insurance on their automobile. Generally you receive an affirmative answer from all jurors in the box. The next question to the jurors is, "Would the fact that the defendant did or did not carry insurance on his automobile make any difference to you in arriving at your verdict in this case?" I then ask them if they will arrive at their verdict solely on the evidence introduced in the case and on the law as given to them by the court, and will they completely disregard the question of insurance. In this way, you put the jury strictly on their honor. In the cases where I have done this, the results have generally been satisfactory although you can't expect a perfect "batting average."

Oftentimes in interrogating the jury as indicated above, you can get across to the jury some of the facts that you want them to be considering during the trial of the case. A good example of this was a case being tried before the late Judge Henry Lindsley. It was an action by a guest against her host in which, of course, she was alleging negligence consisting of a wilful and wanton disregard of the rights of others. The wilful and wanton negligence complained of was the fact that the host driver proceeded through a red signal light, colliding with a car that was crossing the intersection with the green light. When interrogating the jury, I asked the simple question, "How many of you have sometime during your driving experience driven through a red signal light?" To my surprise, and I might state to my gratification, all fourteen jurors in the box held up their hands and Judge Lindsley smiled and held up his hand.

Oliver Wendell Holmes once said that "many ideas grow better when transplanted into another mind than in the one where they sprung up." And so I trust it will be in this case. Further, this writer saith not.