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RULE 34—DISCOVERY AND PRODUCTION OF DOCUMENTS

This Rule has been amended by three clauses tying it to the provisions of Rule 30(b) and the scope of the examination in Rule 26(b).

This Rule should be reread before moving for documents.

RULE 35—PHYSICAL AND MENTAL EXAMINATION

This Rule is very helpful in cases where there will be expert Medical testimony.

RULE 36—ADMISSION OF FACTS AND DOCUMENTS

This Rule will save a lot of trial time. Many of the judges require all documents to be produced at pre-trial.

RULE 37—REFUSAL TO MAKE DISCOVERY

This Rule contains penalties which the Courts are reluctant to assess, but in most cases should do so.

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# JURY SELECTION AND OPENING STATEMENTS

By DARWIN D. COIT
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First consideration should be given to the advisability of demanding a jury. This depends on many factors including amount involved, whether problems presented are more legal than factual, and predisposition by the particular trial Judge as disclosed by the Judge's rulings in similar cases decided by him. A jury trial takes longer than a trial to the Court and is more costly. There are more chances for reversible error in jury trials. In most Courts, trials to the Court can be obtained faster than jury trials. On disputed facts and where the quantum of damages is involved, trial Judges generally prefer jury trials and often order a jury trial although the parties do not desire one under the Rules, this being discretionary under Rule 39. Where a conflict in the facts is anticipated, it is important to determine, if possible, whether the factual ideas of your client and his witnesses can be more readily "sold" to a Judge or to a jury of persons from different walks of life.

Jurors are put on the panel in Denver by the Jury Commissioner and in other Counties by the County Commissioners. Courts still have the power under the Statute to select persons for jury service on an open venire.

1935 C.S.A., Chapter 95, Section 1, as amended in 1945, states that jurors must be citizens, male or female, age 21 years or over, who have not been convicted of a felony and who are able to speak and understand the English language. Theoretically at least, any person who is put on the panel has the statutory qualifications, but may be otherwise disqualified.

Any litigant may have six jurors or twelve jurors to decide the civil matter. If six jurors have been demanded, more than fourteen prospective jurors are sent to the courtroom and fourteen are called by the Clerk to the jury box. Where twelve jurors have been demanded, more than twenty jurors are sent to the Court, and intitially the Clerk calls twenty jurors into the box. The reason for the additional prospective jurors over the fourteen or the twenty, as the case may be, is that some of the jurors called into the box may be challenged for cause, and hence replacements will be necessary. If none of those called into the box are challenged for cause, each side would exercise its four peremptory challenges, thus reducing the number in the one case to six and in the other case to twelve.

SIX JURORS OR TWELVE?

A jury of twelve costs more. It has been argued that the defense should ask for twelve because it is more difficult for a plaintiff to prove his case by a preponderance of the evidence to twelve than to six. However, since only four peremptory challenges are allowed to each side where a jury of twelve is demanded, there is always a possibility that one side or the other may, after exercising the peremptory challenges, find that there are acquaintances of the opposition left unchallenged. Because of the limited challenges, generally speaking it is better for each side to have a jury of six, and a jury of six is by far the more prevalent.

After the initial fourteen or twenty, as the case may be, are called into the box, each side is allowed to make a preliminary statement, which must not be confused with the opening statement hereinafter mentioned. The purpose of the preliminary statement is to advise the prospective jury generally of the controversy, the time and place where the events are supposed to have occurred and to identify the parties, prospective witnesses, and the attorneys or former attorneys involved. Sometimes the particular trial Judge will make a preliminary statement and ask some preliminary questions. The purpose of any preliminary statement, whether made by the Judge or by counsel, is that it may act as a basis for questions to be propounded to the jurors touching upon their qualifications.

QUESTIONING PROSPECTIVE JURORS

It should be stressed that an attorney in questioning has a splendid opportunity to engage in "idea selling." He can best achieve the maximum result for himself and his client's cause by assuming a proper demeanor and by the use of questions proper both in substance and form. Generally speaking the lawyer should as briefly as possible interrogate on any subject touching the juror's probable interest, bias, or prejudice. Any question propounded should be in such form as not to embarass any prospective juror. Any questioning should be reasonably rapid and care must

be taken not to bore the jury. The number of questions, whether given to the entire jury or to one individually, will depend largely upon the probable facts in controversy, the participants therein, upon answers to previous questions, and upon the astuteness of counsel.

It is impossible in detail to set forth every specific subject to be explored in questioning a prospective jury. Many times new questions not anticipated in advance are suggested by the answers of the prospective juror to previous questions. Specifically, however, the following matters among others should be explored in jury questioning:

*Acquaintanceship or relationship, directly or indirectly, with the attorneys, parties, or witnesses involved, or any members of their respective families or close friends thereof.* A juror may truthfully answer that he does not know the attorney, but on further questioning it may be determined that while he does not know the attorney, he has some good friend or relative who has used the attorney and who thinks highly of him.

*Occupation and prior occupations of the juror and of members of his family and of relatives by marriage.* Very often the matter of occupation is important. For example, a housewife may be on the jury panel in a case where a truck driver or a trucking company is involved. Her husband may not work for any truck line, but may have previously driven trucks; and if so, the husband may be sympathetic to truck drivers and may have conveyed his notions thereon to his wife. Under the circumstances she may have an inclination to favor a truck driver. As an illustration, in a recent case in Denver a prospective female juror was married to a man not involved in any trucking operations, but it developed in questioning that her brother-in-law was a trucker and had, through family contact, sold her on the idea that truck drivers were so well trained that if involved in an accident, someone else was always to blame.

*Participation of the prospective juror or members of his family or close friends in litigation of any kind, but especially in litigation of the type on trial.*

*Former jury service of the particular juror.* If a prospective juror has previously acted as a juror on some case involving an automobile accident, he may be undesirable for either side in another automobile case because of the differences in the factual situations and the differences in the instructions.

*Prior legal training.* It sometimes develops in questioning that a juror, though not a lawyer, has studied some legal subjects. A little knowledge is dangerous. A juror with a smattering of legal knowledge might find it more difficult to follow the Court's instructions than a juror who had no prior legal training. In the

same connection it is probably undesirable to select a juror who has worked for any law office or been in close association therewith.

*Juror's connection, directly or indirectly, with any investigation agencies.* Inquiry under this heading is important in cases involving tort suits. Persons working for investigation agencies may have an inclination to look beyond the evidence because of prior experiences.

*Family Status where important.*

*Insurance.* In a suit for damages growing out of an automobile accident question are often asked of a juror as to his connection with or interest in any liability insurance company. The subject matter here has been treated under various factual situations by the courts of last resort in the various states, including Colorado. The Colorado Supreme Court, in the writer's opinion, has not in its decisions on the facts before it covered many of the factual situations which can arise on the questions involved. In practice the interrogator asks of the jury or a particular juror the so-called general question or the specific question. The general question is one to inquire of a particular juror or of the jury as a whole of his or their connection with any insurance company. The general question is usually phrased about as follows: "Are you, or is any member of your family an agent, stockholder, director, or employee of any insurance company?" The specific question is the one in which the interrogator inquires about the juror's interest in a particular named insurance company. Both types of questions have been used, and the use thereof permitted by appellate courts on facts before the appellate courts.

Theoretically at least, the Court and all counsel should be interested in a fair trial. The appellate courts in their probe into whether certain questions propounded of a jury were proper or not have been guided probably generally by the ultimate question as to whether, under all the circumstances, there was a fair trial. In jurisdictions where the question on insurance interest is allowed in some form, the underlying purpose is not to advise the jury or the particular juror that the defendant is insured, but rather to ascertain from the particular juror his connection with an insurance company on the theory that if he is so connected, or has been so connected, or if close members of his family have been so connected, he might be prejudiced in the case one way or the other. Certainly, no question should be permitted by the Court which would in effect advise the jury directly or indirectly that a particular defendant in the case on trial is insured for liability. Any question which gets that result is improper and should lead to a mis-trial.

In fairness to all sides, the general question on insurance is the one that should be asked and not the specific. Only if a particular juror answers the general question in the affirmative

should he be asked the name of the insurance company with which he had or has connections. Certainly, if the general question does not reveal any interest of the juror in any insurance company, there would be no reason to interrogate concerning any named insurance company.

Defense counsel is always prejudiced by objecting to plaintiff's improper interrogation concerning insurance if he makes his objection in the presence of the jury. Where there are apparent grounds for objection or a motion for a mis-trial, a recess should be declared and the matter taken up in chambers. It seems proper and highly desirable for the Court at a pretrial conference or at least immediately before the trial to outline to counsel the general questions that will be permitted on the insurance matter and the scope of said questions. If counsel then in questioning transgresses that scope, it would seem that the Court should immediately grant a mis-trial without objection from the defense. Actually, the Courts do not properly supervise the questioning pertaining to insurance. In many Federal Courts where the Judge himself asks the questions, the Judge will not ask any questions on the subject of insurance in damage suits. There is no real reason why any question should be asked concerning insurance. In questioning a juror as to his occupation or prior occupations, it can generally be determined whether he has had any connection with insurance companies which would make him prejudiced in any case, without reference by the interrogator to the word "insurance." A different situation, of course, is presented where an insurance company is directly sued. Notwithstanding the above, the courts, as aforementioned, have (probably improperly) tolerated questions of different kinds on the insurance phase.

CHALLENGES FOR CAUSE

Challenges for cause are set forth in Rule 47 of the Rules and in substance are as follows:

a. Lack of qualifications to sit. This would mean that the juror did not have the statutory qualifications in that he was not old enough, was not a citizen, or could not speak or understand English.

b. Consanguinity or affinity within the third degree of any party.

c. Standing in relationship of guardian and ward, master and servant, employer and clerk, principal or agent of either party, or being a member of the family of any party, or a business partner with any party, or being a surety on a bond or obligation of any party.

d. Where the prospective juror has been a juror or a witness in a previous trial between the same parties on the same cause of action.

e. Where a juror has an interest in the event of the action or in the main question involved in the action.

f. Where the juror has formed or expressed an unqualified opinion or belief as to the merits of the action.

g. The existence of a state of mind in the juror evincing enmity or bias to either party. Frequently a juror states that he is well acquainted with a lawyer involved, plays golf with him, and attends social functions with him, but claims that this would not influence his decision. His opinion in that regard is generally accepted by the Court, and the Court will not allow a challenge for cause. It is necessary in such case to use a peremptory challenge.

PEREMPTORY CHALLENGES

Each side has four peremptory challenges which may be exercised at will, and it is not necessary to assign any ground for such a challenge. Under the Rules, however, if there be more than one party to a side, the parties on the same side must join in the peremptory challenges. This creates a dilemma, and the Rules should be corrected. Prior to the new Rules, generally speaking there was one plaintiff and one defendant to a side; however, under the present Rules of Procedure numerous parties get involved in a suit and some of them on the defense side of the table have claims absolutely adverse to one another. Simply put, one defendant may have a cross-claim against another defendant. As to the cross-claim, the defendant asserting it is in the same position as a plaintiff as against his co-defendant. If the plaintiff sues two defendants, the plaintiff gets four peremptory challenges under the Rule, but the defendants with hostile positions to one another are given only four which must be exercised jointly between them. Where the defendants are adverse to one another, which is often the case, they are unable to agree on the exercise of the peremptory challenges. Since the Rule states "they must join," if they refuse to join there seems to be no power in the Court to compel them. If one defendant has an adverse position to another defendant and refuses to join in peremptory challenges, there would be no way for the trial to proceed because the jury never could be selected, in which instance the plaintiff could not try his case. The Rule on jury challenges should be studied and completely modified. It often happens in a damage suit that a defendant who might have a cross-claim against the other defendant does not insert it in that action, but it may be that defendant's contention at the trial is that he was not negligent and that the other defendant was solely responsible. The other defendant may take a similar position as applied to him. In such a situation it would seem that each defendant should be entitled to as many peremptory challenges as the plaintiff.

The peremptory challenges are very important to any party, and that point has been recognized by trial courts. Recently, when the problem has been presented to the trial courts, some trial courts have encouraged stipulations by the parties giving more

peremptory challenges to each defendant than called for by the Rule. Certainly, if two hostile defendants cannot agree and thus join in the exercise of the peremptory challenges, the plaintiff would either be forced to consent to give each defendant more peremptory challenges or be prevented from trying his case, because it would be impossible under the present Rule to select a jury unless the hostile defendants agreed on the peremptory challenges.

This subject has not been treated in the recent amendments and revisions to the Rules. Much time is lost during a trial by a trial court because of the strong positions that can be taken by the parties under Rule 47-(h). The writer expresses no final viewpoint on how the Rules of Civil Procedure should be amended, but certainly something should be done to clarify the various situations that can occur because of the numerous parties, claims, cross-claims, counter-claims, etc., allowed under the Rules of Civil Procedure.

OPENING STATEMENTS OF COUNSEL

The purpose of an opening statement is to advise the jury of the client's theory of the case and of the anticipated evidence to support that theory. In an opening statement counsel has a further opportunity at that stage to "sell" to the fact-finding body the factual ideas to be supported by the evidence later. The opening statement is an important step in the jury trial. If a lawyer uses the opening statement for the purpose for which it was intended, the statement can be of great value to the jury as well as to his client's cause. It is meaningless to make an opening statement which in effect gives to the jury a digest of the issues made by the "postcard" pleadings now allowed under the Rules of Procedure. It would seem proper and highly beneficial to advise the jury in an opening statement in some reasonable detail what the case is about and what the evidence will show to support the theories.

It is highly improper for counsel in an opening statement to advise the jury in substance as to what some particular witness is going to say when he knows, or ought to know, that the witness will not be available or where there is doubt as to the availability. It is improper to mention any evidence to be revealed later where counsel knows, or ought to know, that said evidence if offered will be inadmissible, or to mention it where he knows, or ought to know, that there is extreme doubt as to its admissibility. It is improper for any counsel in an opening statement to indicate to the jury that he is going to ask for certain rulings by the Court where he knows that the request to be made by him, if he in fact so intends, would have to be made in the absence of the jury. It is improper for any lawyer in an opening statement to give his private opinions as to the merits. There have been instances where a lawyer with a weak case has in an opening statement made complete statements of fact when later as it turned out there was

no evidence in the record to support such statements. In many of those instances the lawyer should have known that he would have no such evidence. Such practice should not be tolerated, because the counsel involved is not behaving with candor and fairness. Undoubtedly it is true that a fact-finding body often gets confused about what it hears in the statements of counsel as distinguished from what it hears from the witness stand.

Astute trial counsel often has the Court Reporter transcribe the opening statement of the opposition. This can be of material benefit later on a closing argument where the oposing counsel has made wild assertions in his opening statement. Many Reporters do not record the opening statements unless specifically asked. Why this is true is not known, because an opening statement is a part of a trial to the same extent as any part, and cases have been reversed because of improper opening statements.

It must always be remembered that an improper opening statement, as well as any other improper conduct in a trial on the part of counsel, might lead to a mis-trial, a nullification of any verdict obtained, and in some cases disclipinary action for unethical conduct.

A good rule for an attorney to follow in making an opening statement, or in handling any other phase of a jury trial, is never to resort to any means or conduct which he would not honestly expect and desire the opposition to employ against him under the same circumstances.

## CURRENT DEVELOPMENTS IN TAXATION

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INVOLUNTARY CONVERSION OF PROPERTY

On August 20, H. R. 3590 was passed by the Senate amending Section 112(f) relieving owners of property involuntarily converted of the troublesome requirement of tracing the proceeds from the converted property into the replacement property. The pending bill will make it possible for taxpayers to purchase replacement property before receiving the proceeds from the converted property. The bill will also relieve the hardship caused by the holding in the *Ovider Realty Co.* (Dicta, August, 1951) in which part of the proceeds from converted property used to pay off indebtedness on the converted property was taxed.

SPLITTING A BUSINESS INTO TWO OR MORE CORPORATIONS

In view of the modern tendency of splitting a business into various corporations, resulting in an excess profit tax credit for each corporation, the application of Section 45 is significant.