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VOIR DIRE EXAMINATION OF JURORS
IN FEDERAL CIVIL CASES

ANTHONY C. VANCE†

It was Cambyses II, King of Persia . . . who inaugurated the "twelve-man-jury" 500 years before Christ.

He contended it was necessary for all twelve—good men and true—serving on jury duty, each to have been born under one of the 12 Zodiacal Signs, thereby according each member a different planetary influence enabling them to render a just verdict.¹

IN OUR FEDERAL COURTS, it is not required that the jurors selected be born under different Zodiacal Signs, but the requirement does exist that a jury be fair and impartial, and, as a means of insuring this, the law provides for the examination of prospective jurors either by court, counsel, or both. Most successful trial lawyers will agree that the selection of a jury represents one of the most important phases of the trial of a case. At a minimum, this process should be utilized to eliminate those prospective jurors who, because of their environment, inheritance, or peculiar experience, would be inexorably prejudiced or unfair. For the astute advocate, more than this bare minimum is devoutly desired. Thus, the voir dire examination may afford the trial lawyer an opportunity to introduce both himself and the justiciableness of his case; to engender the feeling of friendship, understanding, and respect; and, to lay an important tactical foundation for any adverse features of his case. The purpose of this article will be to explore the statutes and rules concerning jury selection in federal civil cases, the scope of permitted areas of jury examination, challenges, and the manner of exercising the same, and the effect of false or erroneous juror answers on voir dire.⁰

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EXAMINATION OF JURORS

A Federal Right

The seventh amendment to the federal constitution embodies the basis of the right to a trial by jury in a federal civil case. Unlike the sixth amendment, which applies to criminal cases, the seventh amendment does not expressly provide for an impartial jury. But it is clear that the common law had previously incorporated the requirement of impartiality into its fabric and it is, of course, implicit in the fifth amendment's requirement of "due process of law." The provisions of the seventh amendment have been preserved in Rule 38 of the Federal Rules of Civil Procedure.

Rule 47 vests the trial judge with the choice of personally examining prospective jurors on voir dire, or permitting counsel to conduct the same, or to combine the two methods. Thus, it is readily seen that much discretion is placed in the trial judge with regard to the manner in which voir dire will be conducted and the exercise of this discretion has been the topic of considerable controversy. Those in favor of abolishing interrogation by counsel argue that the interests of fairness and trial expediency require that the court, and not counsel, propound questions to the entire panel, deviating only on occasion to query an

2. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U. S. CONST. amend VII.
7. E.g., NIZER, My Life in Court 35 (1961) ("I consider this a serious setback. I like to question jurors myself."); Holtzoff, How Courtroom Procedure May Be Expedited, 14 F.R.D. 323, 325-26 (1954); Flaherty, 4 District of Columbia Practice 358 (1949) ("The majority of judges appear to favor the method whereby the attorneys . . . conduct the . . . voir dire. This method is probably superior because it is more convenient, saves time, and permits a more thorough inquiry into the disqualifications of jurors."); Goodman, The New Spirit in Federal Court Procedure, 7 F.R.D. 449, 451 (1947) ("There can be no doubt that simplicity, fairness and speed result from the judge's examination of prospective jurors."); Brewster, Twelve Men in a Box 46 (1934) ("This not only saves time, but protects the juror from some . . . disagreeable experiences . . ."); Note that Judge Kerr, Empaneling of a Jury, 28 F.R.D. 185, 188 (1961), cites statistics revealing that in Fifty-one districts the judges conduct all examinations, in twenty-two districts the judge and counsel both ask questions, and in twelve districts the examination is conducted entirely by counsel.

Villanova Law Review, Vol. 8, Iss. 1 [1962], Art. 5
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individual panelist where the exigencies of clarification so demand. In this author's opinion, any such exercise of discretion which completely precludes counsel's personal examination of prospective jurors loses sight of the fundamental purpose of voir dire, viz., to perceptibly evaluate a juror's leanings or prejudices in order to form a rationale basis for the exercise of challenge. Moreover, it is only logical that he who must exercise the challenge be permitted to probe for the bias he regards most detrimental to his case. Mr. Nizer's succinct comments in this regard quite aptly express the justification for this position:

By speaking individually to each juror, one can get behind the face's mask. . . . The voice and diction are always revealing. During personal questioning one may sense a sympathetic bond or conversely, resistance. . . . But when a number of jurors merely shake their collective heads in answer to the Judge's formal questions, observation gives very limited clues.

Furthermore, it is believed that the questionable objection of "trial expediency" is not of sufficient import to merit the conclusion that the court should decide, and quite frequently on a collective basis, the leanings or prejudices of the panelists. Thus, it is believed that the only veritable objection to counsel's conducting the voir dire—fairness—can be surmounted by ardent court scrutiny, as such similar objections are overcome in other phases of the trial of a case. It should also be kept in mind that empaneling a jury is the first important portion of the persuasive process and if our commitment to the adversary system, as the best available method of determining truth, is valid, it would appear to be inconsistent to remove this phase of the case from the immediate control of the advocates.

Qualifications and Summoning of Federal Jurors

Prior to 1948, the law provided that jurors summoned to serve in the federal courts "shall have the same qualifications . . . and be

8. Holtzoff, How Courtroom Procedure May Be Expedited, supra note 7; see also, Peck, Do Juries Delay Justice, 18 F.R.D. 455 (1956); but see, Comment, 56 Mich. L. Rev. 954, 956-57 (1960), wherein the author suggests legislation for an effective form of prior juror screening to remedy the time deficiencies complained of.

9. My Life In Court, supra note 7, at 35-36. Note that another leading trial lawyer goes even further and supports personal examination by counsel because he would otherwise be denied "the opportunity to meet and impress those who will become the 'triers of the facts' with the justiciableness of one's cause." BELLI, 1 MODERN TRIALS 796 (1954).

10. In one recent criminal case in the District of Columbia, a Municipal Court Judge disqualified himself from conducting a jury trial because, among other irritations, the twenty minute length of the voir dire examination was excessive. Washington Post, Apr. 13, 1962, § B, p. 6, col. 1.

entitled to the same exemptions, as jurors of the highest court of law in such state. . . ."\textsuperscript{12} The Judicial Code of 1948,\textsuperscript{13} though abandoning the conformity requirement of qualifications and exemptions, retained the restriction that a person who is incompetent to serve as a juror by the law of the state in which the federal district court was held, shall also be incompetent to serve as a juror in that district court. In 1957 the mandatory use of state standards as to juror competency was abolished. Thus, today the sole minimum qualifying standards of federal jurors are: (a) United States citizenship; (b) twenty-one years of age; (c) have resided in the particular judicial district for one year; (d) not be convicted of a crime punishable by imprisonment for more than one year, unless his civil rights have been restored by pardon or amnesty; (e) be able to read, write, understand, and speak the English language; and (f) not be incapable, by reason of mental or physical informity, to render efficient jury service.\textsuperscript{14}

The federal district court clerks and court appointed jury commissioners are responsible\textsuperscript{15} for the selection of federal jurors and the methods of selection so utilized are left to their sole discretion.\textsuperscript{16} Thus, it is in this manner and upon these minimal qualifications that federal jurors are "selected," and as the \textit{voir dire} examination is commenced, those who are unsuitable or partial will be "rejected" by challenge.\textsuperscript{17}

**CHALLENGES AND METHODS OF EXCLUSION**

As at common law, the method of eliminating prejudiced jurors and of achieving an impartial jury is by challenge.\textsuperscript{18} Challenges "for

\textsuperscript{12} This provision originated in Section 29 of the Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, 88 and was incorporated in Section 275 of the Judicial Code of 1911, 36 Stat. 1164.


\textsuperscript{17} Hayes v. Missouri, 120 U.S. 68, 71 (1887) ("The right to challenge is the right to reject, not to select a juror."); Hall v. United States, 168 F.2d 161, 164 (D.C. Cir. 1948), cert. denied, 334 U.S. 853. See Note, 58 Yale L.J. 638, 639 (1949).

\textsuperscript{18} \textit{Voir dire} is unquestionably the least expensive method of acquiring information to form a basis for the exercise of challenge. A more expensive manner of acquiring such information is by independent and private investigation, conducted prior to trial. Even assuming that this method is within the bounds of one's right to privacy, it is doubtful that many cases would justify this process of educating counsel. See MOSCHZISKER, TRIAL BY JURY, § 120 (2d ed. 1930).
cause" must be upon grounds of absolute disqualification and will lie if legally cognizable evidence of partiality is submitted, and, of course, such challenges are unlimited in number. Unlike the early common law, each party to a civil suit is entitled to three peremptory challenges, and in cases involving more than one plaintiff or defendant, the court may, in its discretion, allow additional peremptory challenges and permit them to be exercised jointly or separately. Thus, peremptories permit further rejection of jurors for a real or imagined partiality that is less easily designated and proved than challenges for cause. In passing, it should be noted that the grounds for challenge and the methods utilized for exercising the same in state courts need not be followed in the respective federal courts, and a contrary practice is quite often found.

There would appear to be little variation in the method of excluding jurors for cause, since here, after grounds are established, counsel merely discreetly requests the court to excuse the juror challenged. It is in the area of the peremptory challenge that variations appear. Perhaps in most instances peremptory challenges are exercised alternatively by counsel. This method has the advantage of avoiding any loss of challenges by duplication; the possible disadvantage is that it may work to the challenger's detriment in that it does not prevent prospective jurors from discovering which party challenged a particular venireman. Another method utilized is for counsel to simultaneously strike, from a list, the names peremptorily challenged and the remaining names are submitted to the court and constitute the panel from which the jury is selected. The possible advantage in

19. United States v. Wood, 299 U.S. 123, 135 (1936); Kempe v. United States, 160 F.2d 406, 409 (8th Cir. 1947). "... A challenge 'for favor' means for bias or prejudice." Ibid. In 3 BI. Comm. 363 (Lewis' ed. 1902) Blackstone stated that: "A principal challenge is such where the cause assigned carries with it prima facie evident marks of suspicion either of malice or favour; as ... that he has an interest in the cause ... that he is the party's master, servant ... or of the same ... corporation ... all these are principal causes of challenge; which if true cannot be overruled, for jurors must be omni exceptione majores."

20. Note that the exercise of this discretion is reviewable where the record discloses an improper or unreasonable exercise of the same. Globe Indemnity Co. v. Stringer, 190 F.2d 1017, 1018 (5th Cir. 1951).

21. 73 Stat. 565 (1959), 28 U.S.C. § 1870 (1961). In Signal Mountain Portland Cement Co. v. Brown, 141 F.2d 471, 476 (6th Cir. 1944), it was held that limiting the defendants to three peremptory challenges was reversible error where five cases, brought by separate plaintiffs, were tried together and not consolidated. See also, Matanuska Val. Lines v. Neal, 255 F.2d 632, 635-636 (9th Cir. 1957), where three separate actions, against two defendants, were consolidated, held, no error in refusing defendants more than three peremptory challenges.


utilizing this method is that the remaining jurors are unaware of which advocate “struck” which juror, or at least so attempted; the disadvantage is that by simultaneous striking, there may be duplication and hence squandered challenges.24

In passing, it should be noted that, whatever the order of challenge, most courts agree that it is waived if not timely invoked,25 and similarly, a party cannot object to the overruling of a challenge for cause so long as the objection could be removed by the exercise of a remaining peremptory challenge.26

PERMITTED AREAS OF EXAMINATION

It is axiomatic that the scope of the voir dire examination is entrusted to the sound discretion of the trial court and any decision touching upon these matters will be undisturbed in the absence of an abuse of discretion.27 Notwithstanding that the permitted area of examination continues to develop on a case-by-case basis, there are generally well settled topics which may be explored.28

Prior Knowledge Of The Facts

"Impartiality," the United States Supreme Court has said,29 means that a juror must be indifferent as he stands unsworn. It is not required, however, that jurors be totally ignorant of the facts and issues involved.30 Thus, a prospective juror is not per se disqualified from service merely because he has acquired an outside knowledge of such matters,31 but such prior knowledge, whether its source be a

24. This method does not appear to be in conflict with Section 1870 of the Judicial Code, supra note 21. Ibid.
27. Connors v. United States, 158 U.S. 408, 413 (1895); Spells v. United States, 263 F.2d 609, 612 (5th Cir. 1959); Smedra v. Stanek, 187 F.2d 892, 895 (10th Cir. 1951).
28. See also 49 Thoughts On Jury Selection, 17 THE YOUNG LAWYER No. 3 at 2, 7 (ABA, 1961), for some recommended “tips” in conducting the voir dire.
29. Reynolds v. United States, 98 U.S. 145, 154 (1878); Beck v. United States, 298 F.2d 622, 628 (9th Cir. 1962).
newspaper account\textsuperscript{32} or conversation,\textsuperscript{33} furnishes counsel with an opportunity to interrogate as to the prejudicial effect that such knowledge might have on a prospective juror's verdict. And if he expresses an “entire willingness as well as an ability” to accept the facts as developed by the evidence, and to render a verdict accordingly, a challenge for cause will not lie.\textsuperscript{34} A juror’s mere possession of prior knowledge should be distinguished from the situation where he has both “formed and expressed” an opinion about the issues of a case, because in this posture he is ordinarily regarded as disqualified.\textsuperscript{35}

Acquaintanceship And Family Relationship

The rule appears to be that a juror is not per se disqualified because of extended acquaintanceship with the attorney advocating a cause, and the striking of such a juror is held improper.\textsuperscript{36} Even the fact that a prospective juror was previously involved with counsel in litigation has been stated as being insufficient to challenge for cause.\textsuperscript{37} It was similarly ruled in \textit{Kelly v. Gulf Oil Co.}\textsuperscript{38} that a juror was not disqualified because of acquaintanceship, or even a professional relationship with a witness for a party litigant. But the rule is contra if a juror is related to an employee of a party litigant for here the policy of an “uncompromising atmosphere of impartiality” is pursued and jurors should be removed for cause if “any possible cloud of bias might arise due to the intimacies of family relationship.”\textsuperscript{39}

\begin{itemize}
    \item \textsuperscript{32} Rizzo v. United States, 304 F.2d 810, 815-16 (8th Cir. 1962); Tallant Transfer Co. v. Bingham, 216 F.2d 245, 247 (4th Cir. 1954); See also United States v. Smith, 306 F.2d 596, 604 (2d Cir. 1962).
    \item \textsuperscript{33} Union Gold Mining Co. v. Rocky Mountain Nat'l Bank, 98 U.S. 640, 642 (1877).
    \item \textsuperscript{34} \textit{Ibid.}
    \item \textsuperscript{35} United States v. Wallace, 201 F.2d 65, 67 (10th Cir. 1952); Union Elec. L. & P. Co. v. Snyder Estate Co., \textit{supra} Note 25; Horsley, \textit{The Jury Voir Dire}, 26 \textit{Ins. Counsel J.} 284, 285-286 (1959) (“... where a juror states he has such an opinion, and that it is an qualified or fixed opinion ... it is generally recognized that such is a valid ground of challenge for cause.”); cf., Reynolds v. United States, \textit{supra} Note 29, at 157. \textit{But see United States v. Milanovich, \textit{supra} note 31 (“If the publication is shown to have reached the prospective juries, they should be excused if there is any doubt about their partiality.””).
    \item \textsuperscript{36} Peerless Ins. Co. v. Schnauder, 290 F.2d 607, 610 (5th Cir. 1961); Chicago B. & Q. R.R. Co. v. Conway, 29 F.2d 551, 552 (8th Cir. 1928); See also United States v. Smith, note 32 \textit{supra} (defense counsel).
    \item \textsuperscript{37} Carpenter v. United States, 100 F.2d 716, 717 (D.C. Cir. 1938).
    \item \textsuperscript{38} 28 F. Supp. 205, 207 (E.D. Pa. 1938) (“... such knowledge would assist the juror in appraising the credibility of the witness.”) \textit{aff'd}, 105 F.2d 1018 (3d Cir. 1939). See also United States v. Smith, note 32 \textit{supra} (“It has never been supposed that mere acquaintance with those involved [the deceased or the defendant] in a criminal case was by itself a disqualification for jury duty.”); Swallow v. United States, 307 F.2d 81, 84 (10th Cir. 1962).
    \item \textsuperscript{39} Dotson v. Penna. RR Co., 142 F. Supp. 809, 811 (W.D. Pa. 1956).
\end{itemize}
Business Relationship With The Parties

There is, of course, a firm impression that a juror who has a business relationship with one of the parties (including the real party in interest), or a pecuniary interest in the outcome of the suit, will be biased. The general rule in this regard is illustrated by the statement enunciated in *Eppinger & Russell Co. v. Sheely*:

A party litigant has the right to inquire in good faith whether a prospective juror is interested in the result of the suit by reason of business relations with the adversary party, in order that he may exercise intelligently his privilege of peremptory challenge, or disclose such interest as would afford ground of challenge for cause.

There seems to be little question concerning the right to challenge for cause a prospective juror who is in the private employ of a party, or of the real party in interest, because such a juror is per se thought incompetent to sit. In *D. C. Transit System, Inc. v. Slingland*, where the United States was a party defendant, it was held that error was not committed in denying defendant Transit's request for a new jury panel because of the presence of sixteen government employees among the twenty-four prospective jurors. Here, the court cited *United States v. Wood*:

"We think the imputation of bias simply by virtue of government employment, without regard to any actual partiality . . . rests on an assumption without any rational foundation." It was held that this proposition was applicable to civil as well as criminal cases. Thus, the rule appears to be that disqualification only lies in nongovernmental employment situations, but query, if the rationale of *Wood* is sound, should bias be ipso facto imputed in all private employment situations, including large corporations?

Other than employment, it is also desirable to exclude prospective jurors who have a pecuniary interest in or a business relationship with one of the real parties in interest. Pursuing such a desirable objective, however, may collide with the right of an opposing party not to have prospective jurors prejudiced against him. An illustration of this conflict occurs in personal injury cases wherein the defendant is protected by liability insurance. The legality and the tactical advantage of injecting insurance into such a case have given rise to a number of decisions on this point, in addition to conflicting comments from the

40. 24 F.2d 153, 154 (5th Cir. 1928); cf., Spells v. United States, 263 F.2d 609, 611 (5th Cir. 1959).


43. 266 F.2d 465, 469 (D.C. Cir. 1959).

44. 299 U.S. 123, 149 (1936).
trial bar. Thus, notwithstanding that a juror's relationship in this regard may be too remote to challenge for cause, counsel may desire to exclude the juror by the exercise of peremptory challenge. The general rule seems to be that provided counsel acts in good faith, he may, in one form or another, question prospective jurors on *voir dire* respecting their interest in, or connection with, liability insurance companies.

In *Eppinger & Russell Co. v. Sheely*, plaintiff's counsel, on *voir dire*, asked whether any of the jurors were engaged in the casualty insurance business. Whether or not the defendant was in fact protected by liability insurance was not previously disclosed. After a verdict for the plaintiff, the defendant appealed, citing this question as a ground therefor. In affirming the judgment, the Sixth Circuit treated this question as one asked in good faith and for the purpose of inquiring into the business relationship with one of the real parties in interest. With regard to the fact that the question might have prejudiced the defendant, who may or may not have been insured, the court stated that the defendant had the burden of proving that no surety was involved in order to avoid possible injury or prejudice. The court apparently overlooked the fact that if no juror was acquainted with either of the parties it would be virtually impossible to know whether insurance was involved, and a priori, absent an assumption in this respect, there appeared to be no need to propound such a question.

The Tenth Circuit in *Smedra v. Stanek*, and the Ninth Circuit in *Duff v. Page*, apparently took this approach, for both stated that the refusal to interrogate the jurors with respect to a specified insurance company was not error since there was no showing on the record that any juror was cognizant of the fact that the specified insurance company was interested in the suit. The Fourth Circuit apparently agreed in *Hebron v. Brown*, for here it was stated that interrogation of jurors as to their indebtedness to a bank was properly excluded since the bank president, even though a senior partner of the law firm representing a party litigant, did not personally appear in court.

With respect to interrogating counsel to determine whether an insurance company was interested in the case, the Tenth Circuit, in *Bass v. Dehner*, stated that though it was proper to interrogate the jurors with respect to their interest in or connection with indemnity

45. *Supra* Note 40, at 154-155.
46. 187 F.2d 892, 895 (10th Cir. 1951).
47. 249 F.2d 137, 140 (9th Cir. 1959); In the District of Columbia, interrogation on *voir dire* as to matters of insurance is stated to be grounds for a mistrial. *Barron & Holtzoff, 2 B. Federal Practice and Procedure 321, n. 1* (1961).
48. 248 F.2d 798, 799 (4th Cir. 1957).
49. 103 F.2d 28, 36 (10th Cir. 1939); *cert. denied*, 308 U.S. 580.
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insurance companies, it was improper to interrogate defendant’s counsel for the purpose of obtaining a basis for questioning jurors as to their connection with such insurance companies. But the Eighth Circuit in Wagner Electric Co. v. Snowden stated that such an inquiry of counsel was permissible and if the question was declined by him, then “certainly the jurors could not have been prejudiced” by interrogation as to a specified insurance company.

In Martin v. Burgess, the Fifth Circuit stated that the question of whether an insurance company would be affected by the result of the trial should be privately ascertained, without needlessly publishing the fact of insurance. It further stated that, upon plaintiff’s request, jurors “interested” in the insured should be excluded. The court did not reveal or expound upon the method to be utilized in eliminating such jurors without “publishing the fact” of insurance.

The lower court in Bramen v. Wiley overruled defendant’s motion that any juror’s connection with an insurance company be first ascertained by inquiring if any juror was connected with any corporation, and if an affirmative response, then to determine if it be an insurance company, then the name of the company, and then the juror’s connection therewith. Instead, the court proceeded to interrogate each juror as to whether or not he had automobile insurance and if so the name of the company. The defendant ululated error! The Seventh Circuit, in affirming the lower court’s ruling, innocuously retorted “we do not believe that its import is as serious as claimed by the defendant.”

It is submitted that the rulings in Smedra and Duff are indeed questionable since in this day and age, even conceding that all defendants are not protected by indemnity insurance companies, the fact of the matter is that most jurors lean toward the assumption of defendant insurance coverage. Thus, the specious dialectics of the Ninth and Tenth Circuits appear to exalt idealism over reality. The ruling of Bass is equally questionable, for notwithstanding the impropriety of interrogating defendant’s counsel as to insurance matters, it appears that if “good faith” is present, counsel may interrogate the jurors in any event. What can the defendant lose by making such a disclosure? He can gain the preclusion of possible jury prejudice by avoiding the injection of insurance if he is not in fact insured! The ruling of

50. Ibid. (E.g., “[D]o you own any of the stock or bonds of American Mutual Liability Company of Boston?”)
51. 38 F.2d 599, 600 (8th Cir. 1930).
52. 82 F.2d 321, 324 (5th Cir. 1936).
53. 119 F.2d 991, 993 (7th Cir. 1941); but see, Andrews v. Hotel Sherman, 138 F.2d 524, 527 (7th Cir. 1943) (“... it all depends upon good faith of counsel and the fair requirements of the case.”)
Bramen is illustrative of the opposite extreme and indicates the need for a rational procedure at the trial level to better ascertain the existence of "good faith."

Lentner v. Lieberstein\textsuperscript{54} alluded to such a procedure. Here, plaintiff's counsel inquired of four female jurors whether their husbands were in any way connected with any insurance company. The question was negatively answered and defendant's objection to further pursuit of questions along such lines was sustained. In affirming this ruling the rejuvenated Seventh Circuit stated:

\ldots voir dire \ldots must be undertaken in good faith, and not merely to convey "to the jury information that an insurance company was standing in the background" \ldots \ldots [Wheeler v. Rudek, 397 Ill. 438, 442, 74 N.E.2d 601, 603 (1947).]

Here plaintiff made no showing of cause why the excluded line of voir dire interrogation was necessary.\textsuperscript{55}

The court also noted the procedure followed in Illinois to ascertain whether such good cause existed. The procedure is essentially that followed in the Rudek case,\textsuperscript{56} as the court observes. Before empanelment of the jury, plaintiff should request and the court should conduct a hearing and rule whether plaintiff might ask each juror whether he is interested in any insurance company. This ruling is to be based upon an affidavit submitted by plaintiff which states that the defendant's insurer has a large number of agents and employees in the particular area and that the plaintiff has reason to believe that persons who might have an interest in the insurance company might be among the panel of jurors called to try the case and that the plaintiff fears that he would not have a fair trial unless he were able to examine each juror on voir dire as to his connection with any insurance company.

This procedure is, of course, an improvement over none at all, if merely because some common thread of consistency is afforded at the trial level. But the "good cause" standard, in affidavit form, could possibly impose an additional investigative burden on counsel desiring to so interrogate. Thus, one of the outstanding advantages of the voir dire examination—the preclusion of time-consuming and expensive private investigation to procure information for challenge—would be forfeited if such an adopted standard were strictly construed. On the other hand, a liberal construction of such a standard might open

\textsuperscript{54} 279 F.2d 385 (7th Cir. 1960).
\textsuperscript{55} Id. at 387.
\textsuperscript{57} For an excellent annotation dealing with conduct by counsel which has been held to constitute good faith see Annot., 4 A.L.R.2d 761, 798 (1949).
the flood-gates, and counsel, under the guise of "fear and belief," might have an avenue available for the speculative injection of insurance matters. This author does not pretend to offer a solution, but he does feel that more recognition should be given to the problem. And, while more thought is given to furnishing a paragon of procedure in this regard, the practice of placing the burden on counsel to reveal, in court, whether or not indemnity insurance is involved, as followed in Eppinger, might at least minimize the problem to some extent, for if no indemnity insurance is in fact protecting the defendant, he can lose nothing by so stating and in this manner can at least obviate "good faith" fishing expeditions in this area.

Undue Faith in Testimony of Certain Witnesses

Another permitted area of examination is the reliance that jurors may place upon the testimony of particular witnesses simply because of the status of the occupation of such a witness. Most of these cases have developed in the criminal area but the principles are equally applicable to civil actions whenever a cause for one of the parties hinges to a large extent upon such testimony.

In Sellers v. United States, the trial judge, who conducted the voir dire, refused to ask whether any of the jurors were inclined to give more weight to the testimony of a police officer, merely because of his occupation, than to that of other appearing witnesses. The prosecution's case rested almost entirely upon the testimony of the officer and on appeal from a conviction, the Court of Appeals for the District of Columbia held that the refusal to ask the question on voir dire was reversible error. The court recognized the broad discretion a trial judge possesses in this regard, but stated that this discretion was subject to the essential demands of fairness.

The limitation imposed in this area was articulated in the case of Chavez v. United States, in which the Tenth Circuit affirmed the refusal of the trial judge to ask whether the jury would give more weight to the testimony of law officers than the testimony of the defendant. The court stated that the jury would be justified in believing the word of an officer over the self-serving testimony of the defendant and that "voir dire . . . cannot search the result of the case in advance." This Court agreed that it would have been proper for the trial court, if requested, to have interrogated as to whether the

58. 271 F.2d 475 (D.C. Cir. 1959).
60. Id. at 819.
jury would give greater or less weight to the testimony of a law enforcement officer, simply because of the witness' official character, than to that of other appearing witnesses. In the words of the court: "A defendant cannot be fairly tried by a juror who would be inclined to give unqualified credence to a law enforcement officer simply because he is an officer."

Thus, if in any civil case it appears that one's case rests heavily upon the testimony of an officer or any other person of similar status, it would seem that a tactical advantage could be gained by posing such a question to the jurors in the aspiration that they would do their utmost to render a fair verdict, after affirming their disinclination to give undue weight to such testimony.

Other Areas of Inquiry

In addition to the above permitted areas of inquiry, it is also proper to interrogate as to whether any panelists, or members of their family, ever sustained injuries of the type in issue, or ever filed claims or previously instituted or defended an action for personal injuries. It is also permissible to inquire into their occupations and whether any have served on a petit jury at any term held within one year of the instant trial. In at least one case, Evening Star Newspaper Co. v. Gray, it was held that the mentioning of the ad damnum, in the course of interrogating a female panelist on voir dire as to the occupation of her husband, was not grounds for a mistrial. In proper cases, racial, religious, economic, social, or political prejudices of the prospective jurors are also allowable subjects of inquiry. Other available areas are dependent upon the subject matter of the suit and the parties litigant, keeping in mind that the scope of examination should be broad enough to permit intelligent exercise of the peremptory challenge.

61. Ibid.
64. Stanczak v. Penn. RR. Co., 174 F.2d 43 (7th Cir. 1949); Orenberg v. Thecker, 143 F.2d 375 (D.C. Cir. 1944).
65. Consolidated Gas & Equipment Co. v. Carver, 257 F.2d 111 (10th Cir. 1958); For further amplification of the reasoning behind the course of these cases, see 4 SCHWEITZER, CYCLOPEDIA OF TRIAL PRACTICE, 2024 (1954).
66. Howser v. Pearson, 95 F. Supp. 936 (D.D.C. 1951). It is generally agreed that law enforcers, claim adjusters, credit and insurance men, etc. are poor prospective jurors from a plaintiff's point of view. GOLDSTEIN, TRIAL TACTICS at 157 (1935).
EXAMINATION OF JURORS

FAILURE TO RESPOND

The right of rejection of jurors would indeed be illusory unless the jurors responded to the interrogation submitted, and in responding, answered truthfully and not erroneously to the questions propounded.70 As a rule, knowledge of concealment or falsity is not obtained by counsel for the losing party until after an adverse verdict has been rendered. The question then arises as to the remedy counsel has available.

Usually, a motion for a new trial is made and it is then necessary to determine whether the failure of the juror to disclose fully the information sought warrants setting aside the verdict.71 The general rule is that the complaining party must show that such conduct was prejudicial.72 Moreover, prejudicial conduct cannot be claimed where counsel, at the time of voir dire,73 or before verdict,74 had possession of the information which a correct answer to the question propounded would have disclosed.

In ruling on whether to grant a new trial, the courts will look to the prejudicial nature of the questions answered wrongfully,75 whether innocently or inadvertently given or withheld,76 whether the questions were propounded to the array or directed to an individual venireman,77 and the technicality of the language used in addressing the interrogatories to the panelists. In Orenberg v. Thecker,78 the questions propounded contained the words "claim" and "personal injuries" and the District of Columbia Court of Appeals, in ruling that inappropriate juror silence to questions utilizing such words was not concealment of material information, stated:

74. Stanczak v. Penn. R.R. Co., supra note 72. ("... the law is well established that a party cannot gamble with the possibility of verdict and thereafter, when the verdict proves unfavorable, raise a question that might, have been raised before." Id. at 49.)
75. Johnson v. Hill, supra note 72 (Juror's prior involvement in an accident was not of such magnitude to affect substantial rights.); Truitt v. Travelers Ins. Co., supra note 62 (juror's prior back injuries).
77. Orenberg v. Thecker, supra note 72, at 377-378.
It can be too easily assumed that laymen... will understand words and terms of art customarily used by lawyers and judges... many such words are not well understood by lawyers and judges themselves. It would be a violent assumption that such laymen will be alert to give considered answers to questions containing several such words or terms... Many lawyers... will understand the trepidation of a layman who, for perhaps the first time in his life, occupies the spotlighted position of the jury box; and his reluctance to discuss with able counsel, abstract legal issues such as those implicit in the questions propounded in the present case.

The leading case in the area where a new trial was granted for juror concealment of information is *Consolidated Gas & Equip. Co. v. Carver.* In this case, counsel inquired whether any members of the jury had ever instituted or defended against a law suit for personal injuries, and a juror who had an action pending at the time for injuries similar to those sustained by the plaintiff remained silent and ultimately served as foreman. The Tenth Circuit held that the possibility that the juror would be subject, in some degree, to the extraneous influence of his own injury, coupled with the pendency of his own action, rendered him incompetent and the effect of his silence was to deceive and mislead the court and the litigants in respect to his competency. Thus, upon discovery of this incompetency, a party litigant was entitled to relief from a judgment entered against him. It is also worthy to note that notwithstanding that additional inquiries would have revealed facts which would have eliminated this juror for cause, the court stated that the juror’s silence “had the effect of nullifying the right of peremptory challenge.”

In a subsequent case, *Lay v. J. M. McDonald,* the holding in *Carver* was restrictively interpreted as meaning that per se prejudice is established where there is “similarity” in “circumstances which are not remote in time.” As to the right of peremptory challenge, *Lay* summarily dismissed any notion of prejudice in this regard with the ingenuous remark that it was not manifest that such a challenge would have been exercised.

It is submitted that the right of peremptory challenge should not be viewed too lightly by the courts. The ruling in *Orenberg* apparently overlooks this right and places the intolerable burden on counsel of phrasing his questions in language that clearly may be earmarked as non-legalistic and within the realm of understanding of each of the

79. Supra note 72.
80. Id. at 115.
81. Supra note 72, at 40. Note that a recommended procedure is set forth herein to establish whether or not a false answer was given.
panelists. But, if, as that court credently signifies, each panelist is so pervaded with "trepidation," is it not improbable that a panelist will respond to such a query in any event? The burden is properly placed, not on counsel, but on the panel to speak out if the phraseology is unclear, and if not there, then on the courts to at least scrutinize the questions propounded for probable jury understanding. To hold that counsel acts at his peril in this regard, nullifies the right to peremptory challenge that Carver speaks of and ultimately leads to a derogation of the rights afforded by the Judicial Code and inherent in the seventh amendment.

In a similar vein, it is further submitted that counsel's explanation should be limited to a showing that he had no knowledge at the trial level of the information later disclosed; that a juror failed in his duty to make full and truthful answers to the questions propounded; and that a truthful answer might have established prejudice or redounded to the disqualification of the juror. To require a showing of an unjust verdict or of actual bias would substantially curtail the right of the parties to reject jurors for prejudice, actual or imagined.

Conclusion

The desirability of trial by jury has been constantly debated with relatively little direct attention being afforded to its component parts, among which is the voir dire examination. This author is in agreement with those who feel that the jury system is far from inefficient and is of the firm opinion that it continues to remain the best available method for determining truth in a controversy. It is further felt that less displeasure, and more esteem, would be voiced toward the jury system if more time and attention were devoted to improving the caliber, the process of selection, and the substantive and procedural area of rejection of jurors. Without such improvement from within, an incessant dissatisfaction with the whole will continue to affect the smooth and proper operation of its integral parts.