

Opinion No. 44-4600

October 16, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. David W. Carmody, District Attorney, Santa Fe, New Mexico

I am sorry to have so long neglected the response to your inquiry of October 7, 1944. In your letter of that date you state that during the recent term of the district court, five parties, either plaintiff or defendant, deposited the sum of \$ 36.00 and requested jury trials; that a jury was drawn and the cases set for trial; and that subsequently four of these cases were tried directly to the court. In view of this situation, you ask our opinion as to whether or not the four persons depositing these fees who did not use the jury may demand the refund of such sums.

Your attention is directed to Rule 38 (d) of the Supreme Court rules which is compiled as Section 19-101 (38) (d). This section is as follows:

"WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. Provided, however, that if a demand for jury is made by either party and thereafter one jury term is passed, the party demanding a jury may, provided he give notice to the other party, withdraw his demand for a jury and upon such withdrawal of such demand the deposit so made by such party shall be refunded to him and thereafter the parties shall be in the same situation, having the same right to demand a jury trial under the provisions of this rule as if no such demand and withdrawal had been made."

It will be observed that under this rule the court made specific provision for the refunding of the jury fees in one particular circumstance and made no provision whatsoever for the refunding of the jury fees under any other conditions. It therefore would appear that the court intended to prohibit the refunding of jury fees except in the one situation set forth. The reasons why the court would see fit to prohibit the refunding of jury fees under circumstances other than those set forth in the rule are readily apparent when it is considered that many parties may deposit jury fees and demand a jury merely for the purpose of postponing trial or gaining a settlement when, in fact, they have no desire or intention of having a jury trial.

In view of this rule it is my opinion that under the circumstances related in your letter the parties would have no right to demand a refund of the jury fees deposited.

I want to call your attention, however, to the fact that the question is a very close one since under the statutes in force prior to the promulgation of this rule, the deposit of jury fees was made merely an advance and since no provision was made for the disposition of the jury fees except by payment to the jury for per diem.

Trusting the foregoing will be of some assistance to you, I am

By ROBERT W. WARD,

Asst. Atty. General