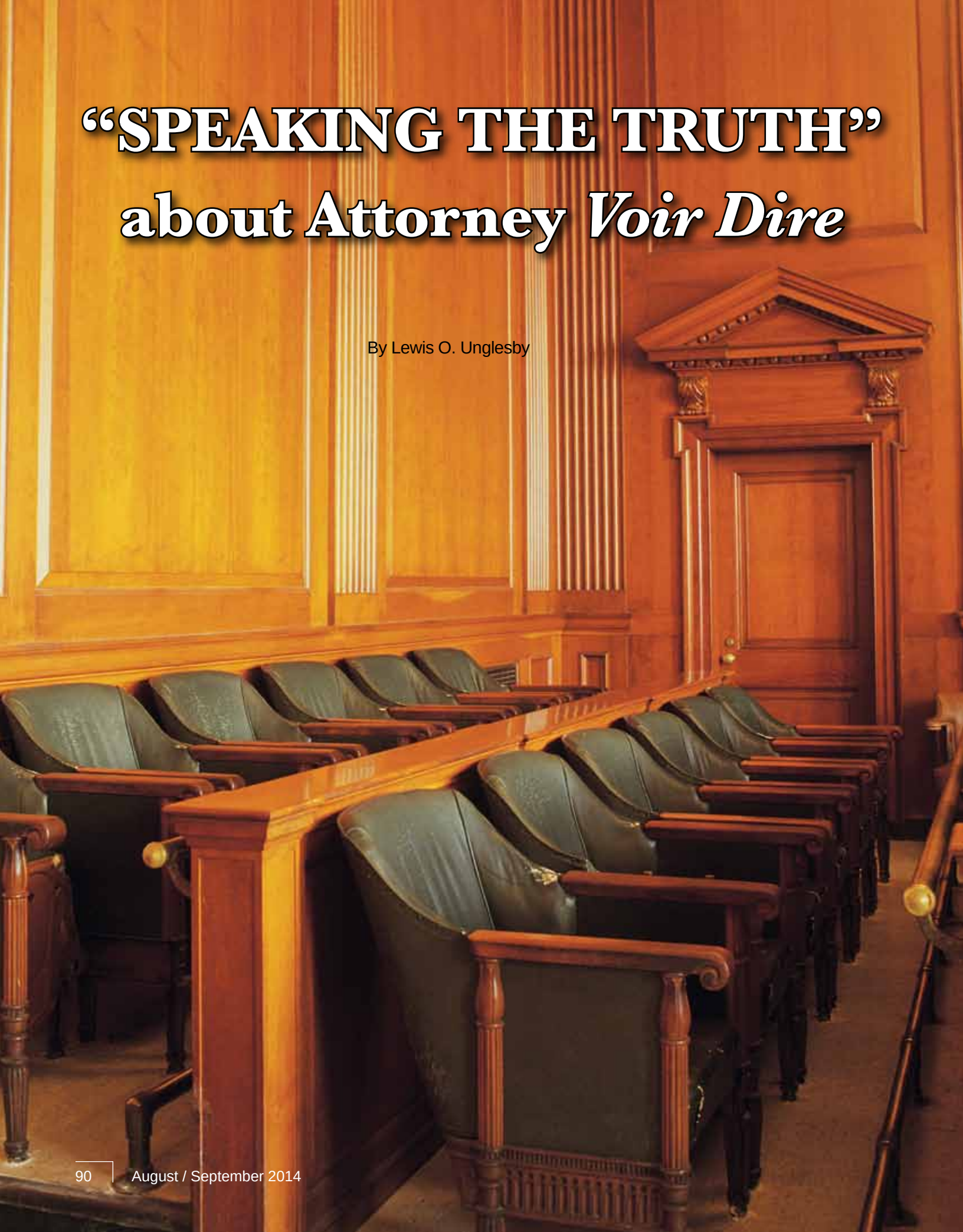
"SPEAKING THE TRUTH" about Attorney *Voir Dire*

By Lewis O. Unglesby



The intersection of juror questioning and jury trials developed over many centuries. The first jury trials took place as early as 500 B.C. in Greece. At that time, the jury, selected by the government, could be composed of between 200 and 1,500 people. In the 1100s, King Henry II forced civil litigants to appear before laymen he selected based on their own personal knowledge of the facts and issues surrounding the litigant's complaint and the rules of the community. In most cases, these laymen had a preconceived knowledge of the actual facts and knew the parties to the suit. By the end of the 15th century, that process was abandoned and the focus was shifted to the requirement of impartiality. It was in that time frame that the first idea of challenges to jurors' qualifications became law.[1]

At the beginning of the American Revolution, the English enacted a jury selection system in the colonies which allowed the sheriff to choose the jurors with no questioning involved. Because the sheriff was the hand of the King in the colonies, rebellion ensued over the process. It is during that time that Jefferson penned his famous line:

> I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.

The right to juries was incorporated into the United States Constitution through the Sixth and Seventh Amendments. In the early days, the judge conducted all of the *voir dire*. The treason trial of Aaron Burr was the first test of the importance of the jury in the new America. Chief Justice Marshall held that an impartial jury was required by the common law and secured by the American Constitution in all criminal matters.

Voir dire (translated: speak the truth) developed because society became disconnected from the old English village traditions due to changes caused by the expansion of the population. As people migrated to the West and South, a litigant had to secure some direct information about the jurors and could not be expected to rely on general community knowledge.

In 1911, New Jersey passed the first statute allowing *voir dire*. Other states followed suit and, at that time, attorney-conducted *voir dire* was the rule in federal courts.

Development of the jury trial concept in Louisiana was slow to reach fruition. The most radical change in the civil procedure of Louisiana was the Practice Act of 1805, which established the right to trial by jury and a requirement that the testimony of available witnesses be taken in open court rather than by depositions as was the civil law tradition in France and Spain.

After Louisiana's admission to the Union, the Louisiana Supreme Court held, under the Constitution of 1812, that there could be no retrial of a factual issue before a new jury. That edict was followed shortly by a decision holding that the appellate court could review the transcript of the evidence presented in the trial and determine the correctness of the jury's findings. The principle of appellate review of the facts was adopted and repeatedly affirmed by the court and confirmed in subsequent constitutions of the state. Since the appellate courts were free to substitute their findings on factual issues, and frequently did so, the civil jury trial case became a rarity. When the Code of Civil Procedure was enacted in 1960, provisions for jury trials allowed examination by attorneys. That rule continued throughout the revisions in 1983 to the present form in 1990. The restrictive federal rule was rejected, and the grant of *voir dire* was given to the litigants.

A more modern respect for the decision of the fact-finder developed. Trial jurors were to be given the benefit of their fact finding in the absence of manifest error. Jury trials became more common. The populist tradition and prevailing legal scholarship found that the federal practice of court-conducted *voir dire* was not effective for the Louisiana citizenry, and the law favored *voir dire* administered by attorneys.

Federal vs. State *Voir Dire* Rules

The immediate differences in *voir dire* between federal and state law, and between criminal and civil cases, appear in the rules.

Article I, Section 17 of the Louisiana Constitution provides:

> The accused shall have a right to full *voir dire* examination of prospective jurors and to challenge jurors peremptorily.

Article 786 of the Louisiana Code of Criminal Procedure reads:

> The court, the state, and the defendant shall have a right to examine prospective jurors. The scope of the examination shall be within the discretion of the court . . . .

Article 1763 of the Louisiana Code of Civil Procedure states:

> A. The court shall examine prospective jurors as to their qualifications and may conduct such further exam as it deems appropriate.
>
> B. The parties or their attorneys shall individually conduct such exam of prospective jurors as each party deems necessary, but the court may control the scope of that examination to be conducted by the parties or their attorneys.

Rule 24 of the Federal Rules of Criminal Procedure states:

> (1) *In general*. The court may examine prospective jurors or may permit the attorneys for the parties to do so.
>
> (2) *Court examination*. If the court examines the jurors, it must permit the attorneys for the parties to:
>
> (A) Ask further questions that the court considers proper; or
>
> (B) Submit further questions that the court may ask if it considers them proper.

Rule 47 of the Federal Rules of Civil Procedure provides:

> (a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the

court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

Thus, in Louisiana state courts, the *voir dire* by attorneys is a matter of right. The presumption is in favor of lawyer questioning and recognizes the necessity of the lawyer's involvement:

> While the method for selecting petit juries is within the court's discretion, the procedure cannot be such as to deny the accused his constitutional right to full *voir dire* examination of prospective jurors.

State v. St. Amant, 413 So.2d 1312 (La. 1981).

Importance of Attorney-Conducted *Voir Dire*

The purpose of the *voir dire* examination is to develop the prospective juror's state of mind. This enables the trial judge to determine actual bias and allows counsel to exercise his intuitive judgment concerning the prospective juror's possible bias or prejudice. The trial judge is granted broad discretion in regulating and supervising *voir dire* and ruling on challenges and rarely will rulings governing the selection of a civil jury be reversed.

In 1924, the Federal Court Conference of Senior Judges decided that the judge alone should do the questioning. In 1928, this became Rule 47(a) of the Federal Rules of Civil Procedure and Rule 24 of the Federal Rules of Criminal Procedure. Although the rules stated that the court *may* permit the attorneys to examine jurors, by 1960, almost all federal court judges performed the *voir dire*. In 1960, the Federal Judicial Conference found that "the judge alone should conduct *voir dire*, as this resulted in a 'great savings of time.'"

The practical results between a lawyer-conducted *voir dire* versus a judge-controlled selection process are a source of ongoing controversy.

Arguments consistently given for advocating judge-conducted *voir dire* are:

1) Efficiency of selection.
2) Attorney-conducted *voir dire* allows the lawyer to disqualify the most impartial jurors.
3) There is no constitutional right to *voir dire* (except under certain state laws, including the Louisiana Constitution, Article I, Section 17).
4) Jurors are more likely to be honest when questioned by an authoritative figure such as the judge.

The American Bar Association (ABA) determined in 2005 that attorneys should be given a liberal opportunity to question jurors individually on prior knowledge and preconceptions about a case. The ABA found through empirical research that jurors would be more candid responding to an attorney who they see as more of a "co-equal" rather than the authoritarian figure represented by the judge. The overriding reason, and the only reason consistently given by the federal judiciary, is time savings, which was first suggested in 1928 by Judge Learned Hand of the United States 2nd Circuit Court of Appeals.

Let's explore the statistics. In 1938, 20 percent of federal civil cases went to trial. In 1962, the percentage fell to 12 percent. By 2000, the number dropped to 1 percent. Correspondingly, 15 percent of federal criminal cases went to trial in 1962; by 2002, that number plunged to 5 percent.

At the same time, various studies reflected that, in the last 30 years, the number of cases dismissed by federal courts on summary judgment has risen by 300 percent. The ultimate average number of trials by federal courts has decreased by 67 percent since 1962. The number of cases filed, or removed, to federal courts is less than 10 percent of those in 1962, and the absolute number of federal civil jury trials in the United States decreased from 12,000 in 1985 to 3,271 in 2009.

No matter how one interprets these statistics, it appears federal courts have more time to allow *voir dire* by lawyers than they did when Rule 47 was created. In 1984, the Federal 2nd Circuit Judicial Council found that the greatest number of successful cause challenges occurred when attorneys were allowed effective *voir dire*. The 2nd Circuit study further concluded that attorney interaction with the juror resulted in the greatest amount

of information necessary for the trial court to properly rule on challenges for cause.

The findings included the following:

> 1) Jurors respond better to the equality of status between lawyer and juror rather than judge.
>
> 2) The judge has already instructed the entire panel that it is required and expected to be open- minded, fair, impartial, and follow the law. Human nature does not permit a belief that the normal juror seated amongst his peers will voluntarily stand up and identify himself as outside that norm.

Numerous human behavioral studies in jury research have found that:

> 1) Jurors are more likely to tell their true attitudes about the justice system when questioned by an attorney.
>
> 2) The way a juror responds to a question may be more reflective of an innate prejudice than the actual words he speaks.
>
> 3) Judge *voir dire*, based on the instruction to be impartial and fair, negates the opportunity for the juror to express his own innate opinions and/or prejudices.[2]

In evaluating judge versus attorney *voir dire*, the different goals and roles must be recognized. The judge must balance the need to maintain the court's position as the ascendant authority in the courtroom and the desire for efficiency in jury selection.

Attorney-conducted *voir dire* provides more information about a juror's thought processes. Quite naturally, the court will rarely understand the particular nuances of a case that require follow-up questions to certain answers. General questions by the court, collectively or individually, are often closed-ended questions, which produce silence or general affirmation. Lawyers, on the other hand, asking open-ended questions, can elicit individual responses leading to interaction among the jurors, as well as follow-up questions that identify the capacity of the juror to be fair. Modern behavioral studies recognize that there is built-in juror bias from the media, the Internet, politics and other methods of communication, and that the lawyers who know their case are in the best position to recognize the problems.[3]

A judge performs no task that is more important than presiding over a case tried before a jury. The lawyers know their cases, the issues that cause them concern, and the areas relevant to the ultimate decision-making process. Fairly posed, open-ended questions designed to achieve that goal do not burden the system.

Trial practitioners recognize the essential inconsistency between a desire for a fair and impartial jury and a restriction on the opportunity to discern the psychological and mental impressions the individual jurors bring from their life experiences as they sit in judgment.

The Louisiana courts give meaning to the language of the United States Supreme Court:

> *Voir dire* examination preserves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the response to questions on *voir dire* may result in the jurors being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors, if this process is to serve its purpose, is obvious.

McDonough Power Equipment v. Greenwood, 464 U.S. 548, 104 S.Ct. 845 (1983).

Conclusion

The importance of a fair and full jury trial cannot be overstated:

> If citizens lose interest and ability to do justice in court, a general loss of democratic government will follow. If the trial dies, it would not be by the tyrant's ax, but by a long and scarcely noted process of decay. Indifference, in the long run, is deadlier than any coup, and democratic institutions are easily lost through neglect, followed by decline and abandonment.[4]

A jury trial is the most important part of the legal system. Only in open court are the citizens the ultimate authority. The courthouse is the community's church. Everyone is equal. It is the place an average guy gets his say, where everyone takes an oath, where nobody's power can overcome the facts. All of this rests on the foundation that a group of citizens will fairly apply the law and facts. With such essential truths at stake in every case, allowing the litigants enough time to select the decision makers is only fair.

FOOTNOTES

1. Michael L. Neff, "Legal History and Social Science Demand Appropriate *Voir Dire*," Georgia Bar Journal, August 2011.

2. "Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?," Reid Hastie, 40 Am. U.L. Rev. 703, 703-04 (1991).

3. *Distorting the Law: Politics, Media and the Litigation Crisis*, William Haltom and Michael McCann, University of Chicago Press (2004).

4. *In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy*, Judge William L. Dwyer, Thomas Dunne Books, 2002.

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