TRIAL ESSENTIALS: KEYS TO NOT LOSING YOUR JURY TRIAL BEFORE THE FIRST WITNESS IS CALLED

By Scott J. Frank

Sun-Tzu is a well-recognized and oft-quoted Chinese general, military strategist and philosopher. He is also credited as the author of *The Art of War*.[1] While the title clearly identifies that book as having much to do with actual war, Sun-Tzu's philosophy translates to many different fields of application. One such field of application is the preparation for and litigation involved with a jury trial. Most specifically applicable is the Sun-Tzu quote that "every battle is won or lost before it's ever fought." Before your jury trial even begins, the actions that most impact the results obtained are the preparation of the jury instructions, the preparation of the pretrial stipulation, the preparation of motions in limine, and the intricacies involved in the jury selection process.

Jury Instructions

On the first day of my first job out of law school, one of the partners I was working with handed me my first file. We were a general practice firm and we were representing the plaintiff in this particular case. His initial instructions to me were to review the file, *prepare the jury instructions*, and then begin working on the Complaint. Yes, I was quite new to this legal practice thing, but I was still sure that the partner had reversed the directions, and that I should prepare the Complaint first. So, after reviewing the file, I prepared the Complaint and took it to him for his review. He took a look at it and frowned a bit and then asked for the jury instructions. I advised him that I had not prepared them yet because that was surely for use at the end of the case. He curtly advised me that every journey starts by knowing where you are going; jury instructions show you what you need to prove and, therefore, how you should frame your allegations. I have started off every case since that time knowing what my jury instructions will be.

In 2010 the Florida Supreme Court amended the Florida Standard Jury Instructions and extended the power of the trial courts, in their discretion, to instruct a jury prior to the beginning of the case as to substantive jury instructions in addition to the standard preliminary jury instructions. I have been involved in several trials where the judge has employed this procedure. While I prefer the more established method, where the substantive instructions are only delivered at the end of the trial, the new procedure has the benefit of encouraging the parties to focus on jury instructions from the inception of the trial.

Your jury instructions are your playbook to your entire trial. All elements of proof as to the plaintiff's cause(s) of action and all elements of proof as to the defendant's defenses are set forth in the substantive jury instructions. Whether read to the jury at the outset of the trial or at the close of evidence, the jury instructions are the foundation for all of the evidence presented during the trial. Proposed jury instructions need to be well researched, prepared and solidified by the parties and the trial court as early as possible in the trial process.

If you have not yet had the occasion to prepare a set of jury instructions, several variations are included on the website for the Florida Supreme Court.[2] To the extent that you utilize any of these Standard Jury Instructions, you need only refer to the particular instruction when presenting same to the trial court. However, if there is no standard jury instruction that suits your purpose as a plaintiff or a defendant, you can certainly craft a "special jury instruction" based upon controlling or persuasive case law and argue to the trial court the basis for utilizing the special instruction in your case. Because these special instructions are not the norm, they can raise issues that you may not be fully aware of prior to the trial commencing. These issues, to the extent that they are accepted by the trial court when ruling on which jury instructions will be utilized at trial, can affect your presentation of evidence through witnesses and exhibits at trial and your cross-examination of the opposing witnesses.

ABOUT THE AUTHOR...

SCOTT J. FRANK joined the law firm of Butler Weihmuller Katz Craig LLP in 1994 and became a partner in 2001. Scott is a Board Certified Civil Trial Lawyer since 2012. While Scott handles many cases from inception through the completion of trial, Scott's practice is centered on civil trial litigation, specifically in state and federal courts. This includes cases that are referred to Butler during the course of litigation, specifically in order to be brought to trial.

Once the jury instructions have been completed and decided upon by the trial court, you can truly set your presentation of evidence and your strategy on cross-examination into motion, because the issues for trial are now clarified. An exception to this is when an issue presents itself during the trial that mandates the change in a jury instruction or the addition or deletion of a jury instruction. Clearly the deletion of a proposed jury instruction is the most common result, because a lack of evidence supporting a particular position will result in the negation of that jury instruction at the conclusion of the case. Accordingly, whether at the outset of your work on the file, or prior to the trial of the action, the jury instructions need to be agreed to or ruled upon by the trial court to give you a proper view of how the trial will unfold. Knowing the jury instructions before the witnesses start to testify will allow you to prepare for the trial so as to avoid any potential misstep during the presentation of evidence.

Pretrial Stipulations

While I have run into the rare situation where the trial court did not require a Pretrial Stipulation from the parties before a jury trial, the more common practice is that a Pretrial Stipulation will be required. In certain situations, the Pretrial Stipulation will be adopted by a subsequent Trial Order issued by the trial court. The Pretrial Stipulation will generally include, among other things, (1) a statement of agreements and stipulated facts which require no proof at trial; (2) a statement of all issues of law and fact for determination at trial; (3) a specification of the damages and/or relief claimed; (4) the number of peremptory challenges to be exercised during jury selection; (5) a list of all witnesses who may be called at trial; and (6) a list of all exhibits that may be introduced at trial, including specific objections to any opposing exhibits. While most of this would seem to be simple and almost mindless in nature, it is anything but that. The failure to pay proper attention to the issues involved in the Pretrial Stipulation can be fraught with peril if you do not address the issues in a prepared fashion, and if you do not make sure that your opposing party does not seek to take advantage of you in the process.

Florida state courts have consistently held that a pretrial "stipulation that limits the issues to be tried 'amounts to a binding waiver and elimination of all issues not included.'"[3] Courts have held that when the parties have stipulated to certain issues within the pretrial statement, those stipulations should be strictly enforced by the trial court.[4] Florida courts strictly enforce these pretrial stipulations because the use of pretrial stipulations both expedites the resolution of disputes and minimizes litigation.[5] While it is definitely the exception, a party can seek relief from the stipulations contained within a pretrial stipulation.[6] However, extricating yourself from these pretrial stipulations will require a showing of good cause. [7] Additionally, a trial court will generally not grant relief from a pretrial stipulation if it was "voluntarily undertaken and there is no indication that the agreement was obtained by fraud, misrepresentation, or mistake of fact."[8]

The federal courts have a similar opinion as the Florida state courts when addressing the binding nature and enforcement of pretrial stipulations.[9] The federal courts have actually ruled that where the pretrial stipulation clearly sets forth the claims to be tried, they can supersede the allegations contained within the operative complaint.[10] Accordingly, parties are generally not permitted to raise issues during trial that are outside of those stipulated to in the pretrial stipulation.[11] Much like the state courts, the federal courts also have the discretion to disregard certain stipulations of fact or as to issues presented for trial contained within a pretrial stipulation.[12] However, in order to obtain this relief, there must be a finding that providing the relief is reasonable, the relief is necessary to prevent a manifest injustice and there would be no unfair prejudice to the other party.[13]

The careful nature and proper utilization of pretrial stipulations cannot be underestimated when proceeding to trial. The very nature of what you will litigate is dependent on the content of the pretrial stipulation. I am aware of a case where the plaintiff's counsel failed to carefully review the underlying pleadings, including the Complaint and the Answer and Affirmative Defenses, when preparing and agreeing to the pretrial statement in a federal cause of action. A defense that had not been raised in the operative Answer and Affirmative Defenses, and had not been litigated, was included within the pretrial stipulation as one of the issues for trial. The defense, while not raised in the pleadings, was included within those that could have been raised previously. Once the mistake was realized, after the filing of the pretrial stipulation, the trial court refused to grant any relief because of the voluntary nature of the pretrial stipulation and because all parties had the opportunity to review the stipulation before signing it. In short, there was no good cause shown for why the pretrial stipulation should be set aside as to this defense.

Motions in Limine

While the trial counsel will generally have an idea of those motions in limine that need to be filed before the preparation of the pretrial stipulation, the identification of the necessary motions in limine will take place by the time the pretrial stipulation is agreed upon or at the time that the witness lists and exhibit lists are exchanged, whichever comes first. Motions in limine are directed towards testimony of witnesses or exhibits that the opposing party may attempt to place into evidence before the jury. The purpose of a motion in limine is to preclude a jury from hearing or seeing unduly prejudicial or inadmissible evidence at trial. Addressing these issues before they come up during trial is the best way to preclude any prejudicial effect of the evidence during the trial of the action. These motions will generally be considered by the trial court at the pretrial conference, but

should always be considered before the witness who will present the subject testimony or exhibit takes the stand.[14]

When a trial court rules on a motion in limine, the parties do not have to continually preserve the issue during the course of the trial. Florida Rule of Evidence 90.104 provides, in pertinent part, that:

> If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

However, a prior ruling by the court on a motion in limine does not prevent the trial court from revisiting that ruling during the course of the trial. As a case is presented during trial, the testimony of the witnesses and the documentary evidence that is placed into the record can provide the court with a greater understanding of the case then that presented during the argument of the motions in limine. Accordingly, a trial court can change its ruling based upon the totality of the facts adduced at trial and revisit a ruling on a motion in limine and change that ruling.[15]

If a motion in limine that excludes evidence from being presented during trial is granted by the trial court, then all counsel are tasked with advising all of their respective witnesses as to this ruling, so as not to violate the Order in Limine.[16] If a witness does testify in violation of the Order in Limine, or if opposing counsel improperly comments on excluded evidentiary matters, then the proper procedure is for the counsel that secured the Order in Limine to move for an admonition of the witness/opposing counsel and seek a curative instruction from the trial court.[17] If the motion in limine is granted over the objection of the opposing party, then that opposing party needs to proffer the excluded evidence, whether testimony or documentary, in order to preserve the issue for any subsequent appeal.[18] Conversely, if a motion in limine is denied by the court, then the party that sought the Order in Limine should raise the objection again during the trial, prior to the subject testimony or evidence being offered into the record, so that the introduction of this evidence is not seen as a waiver of the prior objection.[19] Finally, if the motion is limine is partially granted, the party opposing the motion in limine should proffer that testimony that has been excluded by the court so as to specifically identify that evidence excluded and to properly preserve the issue for appeal.[20]

Common Motions in Limine

1. A party's or witness's past alcohol or drug use is inadmissible unless it has direct bearing on the causation or damages that are at issue in the case.[21]

2. Prior arrests or charges that do not result in any conviction are inadmissible for the purposes of impeaching a witness.[22] Similar to prior arrests, prior bad acts are also inadmissible for the purposes of impeaching the character of a witness, even if those prior bad acts bear of the truthfulness of the witness.[23] However, this same conduct may be admissible in order to establish bias or interest of the witness or when the direct testimony of the witness has opened the door.[24]

3. The Florida Rules of Evidence generally prohibit using similar fact evidence from prior convictions of a witness in an effort to prove the bad character or propensity of that witness.[25] However, the Florida Rules of Evidence do allow for a party to attack the credibility of a witness based upon certain crimes (punishable by death or imprisonment of more than 1 year) or if the crime involved dishonesty or the utterance of a false statement.[26]

4. The Florida Rules of Evidence specifically prohibit the admission of character evidence of a witness to prove that the witness (or party) acted in conformity with that character trait, subject to limited exceptions.[27]

5. Florida Rules of Evidence specifically prohibit the introduction of a witness/party's religious beliefs in order to enhance or impeach the credibility of the witness/party.[28]

6. Evidence of collateral matters, solely for the purposes of impeaching a lay or expert witness, is generally inadmissible.[29] Collateral matters are those issues generally defined as not being "relevant to prove an independent fact or issue nor would discredit a witness by establishing bias, corruption, or lack of competency on the part of the witness."[30]

7. The Florida Rules of Evidence prohibit the introduction of evidence that a former party to the action has been dismissed by the court or entered into a settlement agreement regarding the action — even to the extent that the information would be used to attack the former defendant's credibility.[31]

8. Generally, the existence of any insurance coverage and/or the amount of that insurance is not admissible in evidence, unless it is directly relevant to the cause of action being tried and is a matter at issue in that cause of action.[32]

9. The Florida Rules of Evidence preclude the introduction of cumulative evidence, even if it is relevant, with the determination of cumulative being within the sound discretion of the trial court.[33]

The Jury Selection Process

In my 29 years of practice, I have found that the jury selection process is one of the most fluid and uncertain processes involved with conducting a trial. The federal courts handle the process differently from the state courts. Different judges within the respective court systems handle things differently. Generally speaking, most judges will ask preliminary questions to the jury, with the federal court judges usually asking more than the state court judges. As a result of this, the state court judges usually allow more time for the attorneys to question the potential jurors than in the federal court system. However, as soon as I think I have seen it all, along comes a case where all the rules go out the window. In 2015 I tried a case, with a partner of mine, in South Carolina. In that particular case, the attorneys were not permitted to ask any questions — only the judge. The attorneys for the respective sides were allowed to submit questions, which were then ruled upon by the court during the pretrial conference. Additionally, the final questions were not posed to a 12-person panel, but to all potential jurors (numbering more than 100) at the same time. This obviously made keeping track of the responses a slightly difficult process. While no back-striking was permitted by the South Carolina judge, peremptory challenges were afforded to each party. Our confusion came when we had accepted a panel and we were advised that we had not exercised our peremptory strikes, which we were advised we had to do. This was despite the fact that we were okay with the current make-up of the jury. Suffice it to say that many unforeseen issues can arise during the jury selection process.

One thing that is a certainty in Florida is that all parties at trial are entitled to a fair and impartial jury, which is a crucial element to the administration of justice.[34] In allowing for this proper administration of justice, parties are permitted to challenge any potential juror for cause when there exists reasonable doubt that the juror will be able to be fair to all concerned.[35] In the case of *Williams v. State*, the Fourth District Court of Appeal stated that:

> Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor-of excusing the juror rather than leaving doubt as to impartiality.[36]

Rule 1.431(c) of the Florida Rules of Civil Procedure[37] provides the basis for challenging an individual juror for cause based upon bias or prejudice. The juror's voir dire responses are the primary and fundamental evidence for challenging a juror's impartiality. The testimony or opinions derived from the potential juror are relevant, competent, and primary evidence on the issue of impartiality.[38]

From a procedural standpoint, the trial court should always afford the parties certain safeguards. The first matter of procedure is that each party has the right "to conduct a reasonable examination of each juror," as prescribed by Florida Rule of Civil Procedure 1.431(b) — such that counsel must be given adequate time to conduct the voir dire:

> The purpose of voir dire is to obtain a "fair and impartial jury to try the issues in the cause." Time restriction or limits on number of questions can result in the loss of this fundamental right. They do not flex with the circumstances, such as when a response to one question evokes follow-up questions.[39]

Florida courts are also not permitted to preclude or limit the practice of backstriking, thereby allowing every party the full use of its peremptory challenges.[40] Trial courts are not permitted to circumvent this practice by individually swearing in jurors.[41] As for the appropriate number of peremptory challenges, the Florida Rules of Civil Procedure state as follows:

> Peremptory Challenges. Each party is entitled to three peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of three peremptory challenges to each party on the side with the greater number of parties[.][42]

When the number of peremptory challenges afforded to parties in a case is not properly calculated by the trial court, then there exists grounds for reversal.[43] Finally, in civil and criminal cases, the use of peremptory challenges based on the juror's race, ethnicity, or gender is prohibited.[44] However, it is presumed that peremptory challenges will be exercised in a nondiscriminatory manner.[45] The Florida Supreme Court has set for the procedure for objecting to a pretextual peremptory strike as follows:

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group and c) request that the court ask the striking party its reason for the

> strike. If these initial requirements are met (step 1), the court must ask the proponent the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.[46]

The *Melbourne* court emphasized that the trial court must evaluate the "genuineness" of the explanation for striking a juror and determine whether the proffered explanation for a challenge is a pretext (*i.e.*, whether it conceals an intent to discriminate based on race).[47] The *Melbourne* analysis also applies in gender-based challenges. When addressing the reasons for the preemptory challenge, "Florida law does not require the explanation for a strike to be objectively reasonable, only that it be truly nonracial."[48] Finally, the trial court's ruling "turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous."[49]

Florida case law also seems to recognize that parties have wide latitude to examine potential jurors, including using hypothetical questions and questions as to preconceived opinions to determine whether a potential juror is impartial.[50] Therefore, the "length and extensiveness" of jury selection "should be controlled by the circumstances surrounding the jurors' attitudes in order to assure a fair and impartial trial by persons whose minds are free from all interest, bias or prejudice."[51] The Florida Supreme Court has held that it was improper for the trial court to refuse the defendant's request to ask prospective jurors about their willingness to accept one of the defenses.[52] Accordingly, hypothetical questions that correctly state the applicable law are proper.[53] However, hypothetical questions incorporating evidence at trial and asking how jurors would rule or render a verdict, under a given set of circumstances, are not proper.[54]

The simple fact that a potential juror states that he or she "could be fair" or will "try to be fair" does not control whether that juror is, in fact, qualified to be on the jury. Courts have recognized that while "most everyone considers themselves to be a 'fair person'," such statements, even if sincere, do not control the analysis of determining whether reasonable doubt exists as to the juror's claimed impartiality.[55] Accordingly, if there is a chance that, because of feelings or opinions that a juror carries, he or she may not be totally fair and impartial, that juror should be excused for cause.[56] Moreover, "[A] close case should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality."[57] Thus, if a juror makes a statement sufficient to cause doubt as to his/her ability to render an impartial verdict, the fact that the trial judge or opposing counsel extracts a commitment that the juror will be fair or will try to be fair is insufficient.[58]

One of the most important tools for use during jury selection is the challenge for cause. As one can imagine, there exists a myriad of cases that involve various bases for challenging a juror for cause. Included with this article is a *Guideline to Voir Dire Issues and Challenges for Cause*. Much of what is written above is contained within the *Guideline*. However, many bases for challenges for cause, and the supporting case law, are also included. I have started submitting to the trial court in advance of trial a memorandum of law regarding voir dire and challenges for cause, if only to have it in the record, and refer the court to that law in the event that such a situation arises during the jury selection. I hope that you use it well. It is also my fervent hope that the information in this article provides you with the information and insight necessary to avoid any pitfalls prior to trial that could negatively impact your case.

1 Sun Tzu, *The Art of War* (Oxford: Clarendon Press, Samuel B. Griffith trans., 1964).

2 Links to Florida Standard Jury Instructions are located at www.floridasupremecourt.org/ jury_instructions.shtml.

3 *LPI/Key West Associates, Ltd. v. Beachcomber Jewelers, Inc.,* 77 So. 3d 852 (Fla. 3d DCA 2012); *Central Square Tarragon, LLC v. Great Divide Ins. Co.*, 82 So. 2d 911 (Fla. 4th DCA 2011); *Broche v. Cohn*, 987 So. 2d 124 (Fla. 4th DCA 2008) (citing to *Esch v. Forster*, 168 So. 229 (Fla. 1936)).

4 *LPI/Key West Associates, Ltd. v. Beachcomber Jewelers, Inc.,* 77 So. 3d 852 (Fla. 3d DCA 2012); *Central Square Tarragon, LLC v. Great Divide Ins. Co*, 82 So. 2d 911 (Fla. 4th DCA 2011); *Broche v. Cohn*, 987 So. 2d 124 (Fla. 4th DCA 2008); *see also S&M Transp., Inc. v. Northland Ins. Co.*, 208 So. 3d 230 (Fla. 5th DCA 2016).

5 *Central Square Tarragon*, 82 So. 2d 911; *Broche*, 987 So. 2d 124.

6 *LPI/Key West Assocs.,* 77 So. 3d 852.

7 *Id.*

8 *Id.*(citing to *Henrion v. New Era Realty IV, Inc.* 586 So. 2d 1295 (Fla. 4th DCA 1991)).

9 *G.I.C. Corp. v. United States*, 121 F.3d 1447 (11th Cir. 1997); *Gaztambide Barbosa v. Torres Gaztembide*, 776 F. Supp. 52 (D. Puerto Rico 1991).

10 *DPC General Contractors, Inc. v. Cobo Co.,* (715 F. Supp. 367 (S.D. Fla. 1989).

11 *Tomlinson v. Lefkowitz* 334 F.2d 262 (5th Cir. 1964).

12 *G.I.C. Corp.*, 121 F.3d 1447 ; *Gaztambide Barbosa*, 776 F.Supp. 52; *Sam Galloway Ford, Inc. v. Universal Underwriters Ins. Co.*, 793 F. Supp. 1079 (M.D. Fla. 1992).

13 *G.I.C. Corp.*, 121 F.3d 1447; *Sam Galloway Ford, Inc.*, 793 F. Supp. 1079.

14 Some judges actually require a special set hearing even before the pretrial conference in order to consier all pending motions in limine. Make sure to know the preference of your trial judge on this issue.

15 *Hawker v. State*, 951 So. 2d 945 (Fla. 4th DCA 2007); *State v. Zenobia*, 614 So. 2d 1139 (Fla. 4th DCA 1993); *State v. Gaines*, 770 So. 2d 1221 n.7 (Fla. 2000).

16 *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156 (Fla. 5th DCA 1994).

17 *Gonzalez v. Largen*, 790 So. 2d 497 (Fla. 5th DCA 2001); *see also Fleurimond v. State*, 10 So. 3d 1140 (Fla. 3d DCA 2009); *Ocwen Financial Corp. v. Kidder*, 950 So. 2d 480 (Fla. 4th DCA 2007).

18 *Spindler v. Brito-Deforge*, 762 So. 2d 963 (Fla. 5th DCA 2000); *see also Clark v. State*, 969 So. 2d 573 (Fla. 1st DCA 2007).

19 *Phillip Morris, Inc. v. French*, 897 So. 2d 480 (Fla. 3d DCA 2004); *Horne v. Hudson*, 772 So. 2d 556 (Fla. 1st DCA 2000); *Fredricson v. Levinson*, 495 So. 2d 842 (Fla. 3d DCA 1986).

[20] *Adamo v. Manatee Condo., Inc.*, 548 So. 2d 287 (Fla. 3d DCA 1989).

[21] *Shaw v. Jain*, 914 So. 2d 458 (Fla. 1st DCA 2005); E*dwards v. Orkin Exterminating Co.*, 718 So. 2d 881 (Fla. 3d DCA 1998); *Browning v. Lewis*, 582 So. 2d 101 (Fla. 2d DCA 1991); *Tacy v. Kellner*, 697 So. 2d 932 (Fla. 2d DCA 1997); *Botte v. Pomeroy*, 497 So. 2d 1275 (Fla. 4th DCA 1986).

[22] § 90.610, Fla. Stat.; *see also Torres-Arboledo v. State*, 524 So. 2d 403 (Fla 1988); *Fulton v. State*, 335 So. 2d 280 (Fla. 1976).

[23] *Fischman v. Suen*, 672 So. 2d 644 (Fla. 4th DCA 1996); *MCI Express, Inc. v. Ford Motor Co.*, 832 So. 2d 795 (Fla. 3d DCA 2002); *Jackson v. State*, 545 So. 2d 260 (Fla. 1989).

[24] *Coolen v. State*, 696 So. 2d 738 (Fla. 1997); *Butler v. State*, 842 So. 2d 817 (Fla. 2003).

[25] § 90.404(2)(a), Flat. Stat.

[26] § 90.610(1), Flat. Stat.

[27] § 90.404(1), Flat. Stat.

[28] § 90.611, Flat. Stat.

[29] *Nationwide Mutual Fire Ins. Co. v. Bruscarino*, 982 So. 2d 753 (Fla. 4th DCA 2008); *Strasser v. Yalamanchi*, 783 So. 2d 1087 (Fla. 4th DCa 2001); *Doremus v. Fla. Energy Sys. Of S. Fla., Inc.*, 634 So. 2d 1106 (Fla. 4th DCA 1994); *Dempsey v. Shell Oil co.*, 589 So. 2d 373 (Fla. 4th DCA 1991).

[30] *Strasser v. Yalamanchi*, 783 So. 2d 1087 (Fla. 4th DCA 2001) (citing to *Correia v. State*, 654 So. 2d 952 (Fla. 4th DCA 1995).

[31] *Hernandez v. State Farm Fire & Cas. Co.*, 700 So. 2d 451 (Fla. 4th DCA 1997); *Webb v. Priest*, 413 So. 2d 43 (Fla. 3d DCA 1984); *Ashby Div. of Consol. Aluminum v. Dobkin*, 458 So. 2d 335 (Fla. 3d DCA 1984); *Ellis v. Weisbrot*, 550 So. 2d 15 (Fla. 3d DCA 1989).

[32] *South Motor Co. of Dade County v. Accountable Constr. Co.*, 707 So. 2d 909 (Fla. 1998).

[33] § 90.403, Fla. Stat.

[34] *Singer v. State*, 109 So. 2d 7 (Fla. 1959).

[35] *Williams v. State*, 638 So. 2d 976, 978 (Fla. 4th DCA 1994) (emphasis added) (citing *Hill v. State*, 477 So. 2d 553 (Fla. 1985), *cert. denied*, 485 U.S. 993 (1988); *Singer v. State*, 109 So. 2d at 23).

[36] *Williams*, 638 So. 2d at 978.

[37] § 913.03, Fla. Stat. governs cause challenges in criminal actions.

[38] 33 Fla. Jur. 2d *Juries* § 68.

[39] *Williams v. State*, 424 So. 2d 148 (Fla. 5th DCA 1982); *Barker v. Randolph*, 239 So. 2d 110,112 (Fla. 1st DCA 1970); *Cohn v. Julien*, 574 So. 2d 1202 (Fla. 3d DCA 1991).

[40] *Tedder v. Video Elec. Inc.,* 491 So. 2d 533 (Fla. 1986); *Van Sickle v. Zimmer*, 807 So. 2d 182 (Fla. 2d DCA 2002).

[41] *Id.*

[42] Fla. R. Civ. P. 1.431(d).

[43] *St. Paul Fire and Marine Ins. Co. v. Welsh*, 501 So. 2d 54 (Fla. 4th DCA 1987).

[44] *Dorsey v. State*, 868 So. 2d 1192, 1202 n.8 (Fla. 2003); *Abshire v. State*, 642 So. 2d 542, 544 (Fla. 1994); *Joseph v. State*, 636 So. 2d 777 (Fla. d DCA 1994).

[45] *Melbourne v. State,* 679 So. 2d 759, 764 (Fla. 1996).

[46] *Id.*

[47] *Young v. State*, 744 So. 2d 1077, 1082 (Fla. 4th DCA 1999).

[48] *Id.* at 1084.

[49] *Kina v. Byrd*, 716 So. 2d 831 (Fla. 4th DCA 1999), *rsee also Dorsey v. State*, 868 So. 2d 1192 (Fla. 2003).

[50] *See* Fla. R. Civ. P. 1.431(b) (1999); *Cross v. State*, 89 Fla. 212, 216 (Fla. 1925).

[51] *Barker v. Randolph*, 239 So. 2d 110, 112 (Fla. 1st DCA 1970); *see also Gibbs v. State*, 193 So. 2d 460, 462 (Fla. 2d DCA 1967).

[52] *Lavado v. State*, 492 So. 2d 1322 (Fla. 1986).

[53] *Pait v. State*, 112 So. 2d 380, 383 (Fla. 1959).

[54] *Tampa Elec. Co. v. Bazemore*, 85 Fla. 164, 96 So. 297 (Fla. 1932).

[55] *Nash v. General Motors Corp.*, 734 So. 2d 437, 440 (Fla. 3d DCA 1999); *Sikes v. Seaboard Coast Line R.R.*, 487 So. 2d 1118 (Fla. 1st DCA 1986); *Leon v. State*, 396 So. 2d 203, 205 (Fla. 3d DCA 1981).

[56] *Club West v. Tropigas of Fla., Inc.,* 514 So. 2d 426 (Fla. 3d DCA 1987).

[57] *Sydleman v. Benson,* 463 So. 2d 533 (Fla. 4th DCA 1985).

[58] *Price v. State*, 538 So. 2d 486, 488-89 (Fla. 3d DCA 1989).

TRIAL ESSENTIALS: GUIDELINE TO VOIR DIRE ISSUES AND CHALLENGES FOR CAUSE

Compiled by Scott J. Frank

I. *All Parties are Entitled to a Fair and Impartial Jury; if Reasonable Doubt Exists About a Juror's Ability to be Fair, the Juror Should be Stricken for Cause.*

The right to a fair and impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and Section 11 of the Florida Constitution, and is crucial to the administration of justice. *Singer v. State*, 109 So. 2d 7 (Fla. 1959).

Early Florida Supreme Court decisions recognized the necessity of a fair and impartial jury as a safeguard to the integrity of the jury trial. *O'Connor v. State*, 9 Fla. 215, 222 (Fla. 1860) ("Jurors should, if possible, be not only impartial, but beyond even the suspicion of partiality.").

"To render the right to an impartial jury meaningful, cause challenges must be granted if there is a basis for **any reasonable doubt** as to the juror's ability to be fair." *Williams v. State*, 638 So. 2d 976, 978 (Fla. 4th DCA 1994) (emphasis added) (citing *Hill v. State*, 477 So. 2d 553 (Fla. 1985), *cert. denied*, 485 U.S. 993 (1988); *Singer v. State*, 109 So. 2d at 23)). In close cases, the court should err on the side of caution:

> Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality.

Williams, 638 So. 2d at 978; *see also, e.g.*, *Nash v. General Motors Corp*., 734 So. 2d 437, 439 (Fla. 3d DCA 1999) (applying reasonable doubt standard in civil case; stating, "When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the instructions on the law given to her by the court, she should be excused."); *Sydleman v. Benson,* 463 So. 2d 533 (Fla. 4th DCA 1985) ("[A] close case should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality.").

To ensure a juror's impartiality, Rule 1.431(c) of the Florida Rules of Civil Procedure[1] provides the basis for challenging an individual juror for cause based upon bias or prejudice. The juror's voir dire responses are the primary and fundamental evidence for challenging a juror's impartiality. The testimony or opinions derived from the potential juror are relevant, competent, and primary evidence on the issue of impartiality. 33 Fla. Jur.2d Juries § 68.

A. A juror's assurance that he or she "could be fair" or would "try to be fair" does not control.

A juror's sincere belief that he is "a fair person" or the juror's assurance that he or she is able to be impartial does not control. The court, not the individual juror, is the judge of the juror's freedom from bias. *See Gibbs v. State*, 193 So. 2d 460, 462 (Fla. 2d DCA 1967). Courts have recognized that while "most everyone considers themselves to be a 'fair person'," such statements, even if sincere, do not control the analysis of determining whether reasonable doubt exists as to the juror's claimed impartiality. *Nash*, 734 So. 2d at 440 (reversing refusal to grant strike for cause); *see also Sikes v. Seaboard Coast Line R.R.*, 487 So. 2d 1118 (Fla. 1st DCA 1986) (prospective juror who admitted that she didn't think she would be fair but who promised the trial judge that she would "try to be fair" should be dismissed for cause); *Leon v. State*, 396 So. 2d 203, 205 (Fla. 3d DCA 1981) (juror who did not know if she could be fair should have been excused for cause).

If there is a chance that, because of feelings or opinions that a juror carries, he or she may not be totally fair and impartial, that juror should be excused for cause. *Club West v. Tropigas of Fla., Inc.,* 514 So. 2d 426 (Fla. 3d DCA 1987) (juror who had preconceived opinion about a defendant in a civil case should have been excused for cause), *cert. denied*, 523 So. 2d 579 (Fla. 1988).

B. Rehabilitation is often insufficient once a juror has expressed partiality.

Florida appellate decisions consistently state that "a juror is not impartial when one side must overcome preconceived opinions in order to prevail." *Price v State*, 538 So. 2d 486, 489 (Fla. 3d DCA 1989). The simple statement of a juror he can set aside his feelings or opinions and render a verdict based solely on the law and the evidence is not conclusive if the juror has made other statements the evidence his state of mind is such that he will not be able to do so. *Somerville v. Ahuia*, 902 So. 2d 930 (Fla. 5th DCA 2005); *see also Longshore v. Fronrath Chevrolet, Inc.*, 527 So. 2d 922, 924 (Fla. 4th DCA 1988); *Singer*, 109 So. 2d 7; *Ortiz v. State*, 543 So. 2d 377 (Fla. 3d DCA 1989). In *Johnson v. Reynolds*, 97 Fla. 591, 121 So. 793, (Fla. 1929), the Florida Supreme Court stated:

> It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Id. at 796.

Thus, if a juror makes a statement sufficient to cause doubt as to his/her ability to render an impartial verdict, the fact that the trial judge or opposing counsel extracts a commitment that the juror will be fair or will try to be fair is insufficient. *See Price*, 538 So. 2d at 488-89 (holding it was error for trial court not to excuse a juror for cause because of uncertainty surrounding her impartiality). "A juror's later statement that she can be fair does not erase a doubt as to impartiality[.]" *Peters v. State*, 874 So. 2d 677, 679 (Fla. 4th DCA 2004) (juror's rehabilitation was insufficient when, in response to court's leading question about whether she could set aside her prior experiences and be fair, juror said "I think I could"). In *Fazzalan v. City of West Palm Beach*, the court held:

> The jurors' subsequent change in their answers, arrived at after further questioning by appellee's counsel, must be reviewed with some skepticism. The assurance of a prospective juror that the juror can decide the case on the facts and the law is not determinative of the issue of a challenge for cause[.]

608 So. 2d 927, 929 (Fla. 4th DCA 1992), *rev. denied*, 620 So. 2d 760 (Fla. 1993), *disapproved on other grounds*, *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89 (Fla.1995). The court in *Somerville* elaborated:

> The ultimate test is whether a juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions on the law given by the court. A juror should be able to set aside any bias or prejudice and assure the court and the parties that they can render an impartial verdict based on the evidence submitted and the law announced by the court.

902 So. 2d at 935. As discussed above, a simple statement that the juror will be fair or try to be fair is not enough. Additionally, a juror's silence to a question asked of the entire panel is insufficient rehabilitation. *See Bell v. State*, 870 So. 2d 893, 895 (Fla. 4th DCA 2004).

Thus, in summary, any appearance of partiality by a juror is generally sufficient to strike a prospective juror for cause. Rehabilitation efforts are fraught with difficulty. *Carratelli v. State*, 832 So. 2d 850 (Fla. 4th DCA 2002) ("The rehabilitation of prospective juror is a tricky business that often leads to reversal.").

II. *Parties Have Wide Latitude to Examine Jurors, Including Using Hypothetical Questions and Questions Relating to Preconceived Opinions.*

Florida law has long recognized the wide latitude accorded a party to examine jurors in order to determine the qualifications of jurors and whether they could be absolutely impartial. *See* Fla. R. Civ. P. 1.431(b); *Cross v. State*, 89 Fla. 212, 216 (Fla. 1925) ("a very wide latitude of examination ... is allowable and indeed often necessary to bring to light the mental attitude of the proposed juror[.]"). Therefore, the "length and extensiveness" of jury selection "should be controlled by the circumstances surrounding the jurors' attitudes in order to assure a fair and impartial

trial by persons whose minds are free from all interest, bias or prejudice." *Barker v. Randolph*, 239 So. 2d 110, 112 (Fla. 1st DCA 1970); *see also Gibbs*, 193 So. 2d at 462 (stating that voir dire should be "so varied and elaborated as the circumstances surrounding" the potential jurors); *Cross*, 89 Fla. at 216 (stating that jurors should be "absolutely impartial in their judgment."). In *Lavado v. State*, 492 So. 2d 1322 (Fla. 1986), the Florida Supreme Court held that it was improper for the trial court to refuse the defendant's request to ask prospective jurors about their willingness to accept one of the defenses.

Accordingly, hypothetical questions that correctly state the applicable law are proper. *See, e.g.*, *Pait v. State*, 112 So. 2d 380, 383 (Fla. 1959) ("A hypothetical question making a correct reference to the law of the case to aid in determining the qualifications or acceptability of a prospective juror may be permitted[.]"). However, hypothetical questions incorporating evidence at trial and asking how jurors would rule or render a verdict, under a given set of circumstances, are not proper. *Tampa Elec. Co. v. Bazemore*, 85 Fla. 164, 96 So. 297 (Fla. 1932).

In addition to the areas of questioning specifically enumerated in Florida Rule of Civil Procedure 1.431, jurors can be questioned about the following areas and challenged for cause when appropriate:

1. Whether a juror has **negative attitudes toward lawyers or the legal system**. *Levy v. Hawk's Cay, Inc.*, 543 So. 2d 1299 (Fla. 3d DCA 1989), *rev. denied*, 553 So. 2d 1165 (Fla. 1989); *Frazier v. Wesch*, 913 So. 2d 1216 (Fla. 4th DCA 2005).

2. Whether a juror has a **friendship or economic relationship with a party or its counsel**. *Johnson v. Reynolds*, 97 Fla. 591, 121 So. 793, (Fla. 1929); *Canty v. State*, 597 So. 2d 927, 928 (Fla. 3d DCA 1992); *Sikes*, 487 So. 2d at 1119; *Longshore v. Fronrath Chevrolet*, 527 So. 2d 922 (Fla. 4th DCA 1988); *Mitchell v. CAC-Ramsey Health Plans. Inc.*, 719 So. 2d 930 (Fla. 3d DCA 1998).

3. Whether a juror is or was an **employee of one of the parties or works for the same employer** as one of the parties. *Boca Teeca Corp., v. 1 Palm Beach County,* 291 So. 2d 110 (Fla. 4th DCA 1974); *Martin v. State Farm*, 392 So. 2d 11 (Fla. 5th DCA 1980); *Hagerman v. State*, 613 So. 2d 552 (Fla. 4th DCA 1993).

4. Whether a juror believes that a rendition of a **verdict for one of the parties would have any influence on his/her personal life**, especially with regard to insurance and the premiums he/she has to pay. *Purdy v. Gulf Breeze Enter., Inc.*, 403 So. 2d 1325, 1330 (Fla. 1981).

5. Whether a juror **owned stock** in a defendant corporation. *Club West. Inc.*, 514 So. 2d 426.

6. Whether something about the juror's **employment "may" affect her decision** in the case. *Ortiz v. State*, 543 So. 2d 377 (Fla. 3d DCA 1989).

7. Whether a juror has **life experiences that would influence his/her decision**. See *Tizon v. Royal Caribbean Cruise Line*, 645 So. 2d 504 (Fla. 3d DCA 1994).

8. Whether a juror has **already formed or expressed an opinion on issues** involved in a case based on newspaper articles, hearsay, or other previous experience or information. *See Singer*, 109 So. 2d at 19; *see also Ortiz*, 543 So. 2d at 378; *Club West, Inc.*, 514 So. 2d 426, *cert. denied*, 523 So. 2d 579 (Fla. 1988); *Hill*, 477 So. 2d 553; *Smith v. State*, 463 So. 2d 542, 543 (Fla. 5th DCA 1985); *Somerville*, 902 So. 2d at 933.

9. Whether a juror knows about claims concerning the **"insurance crisis" or "lawsuit crisis."** *Bell v. Greissman*, 902 So. 2d 846 (Fla. 4th DCA 2005); *see also Sutherlin v. Fenenga*, 810 P.2d 353,361-62 (N.M. Ct. App. 1991); *Babcock v. Northwest Memorial Hosp.,* 767 S.W.2d 705 (Tex. 1989).

III. *It is Reversible Error to Force a Party to use a Peremptory Challenge on a Person Who Should Have Been Excused for Cause.*

Florida follows the general rule that "[I]t is reversible error to force a party to use a peremptory challenge on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." *Gootee v. Clevinge,* 778 So. 2d 1005, 1009 (Fla. 5th DCA 2000). In *Hill*, the Florida Supreme Court held that failing to dismiss a juror for cause when appropriate violates a party's right to peremptory challenges by reducing the number of those challenges available to that party. 477 So. 2d 553.

In order to preserve the refusal to grant a challenge for cause for appeal, a party must do all of the following: (a) exhaust all remaining peremptory challenges; (b) make a request for additional peremptory challenges that is denied; and (c) identify to the trial court a particular juror who is ultimately empaneled whom the party would have also struck had peremptory challenges not been exhausted.[2]

IV. *Certain Responses Require a Strike for Cause.*

The following cases illustrate statements by members of the venire which courts have held require they be excused for cause:

1. A venire person who **admits a party would start out with a strike or half strike against him** should be excused for cause. *Club West, Inc.*, 514 So. 2d at 428; *Jaffe v. Applebaum*, 830 So. 2d 136 (Fla. 4th DCA 2002).

2. A venireman who **admits a potential bias**, or who admits he **probably would be prejudiced** or would probably **give a bit more weight to what opposing counselor certain witnesses say** should be excused for cause. *Bell v State*; 870 So. 2d 893 (Fla. 4th DCA 2004); *Sikes*, 487 So. 2d 1118; *Imbimbo v. State*, 555 So. 2d 954 (Fla. 4th DCA 1990); *Somerville*, 902 So. 2d at 933-34; *Slater v. State*, 910 So. 2d 347 (Fla. 4th DCA 2005).

3. A venire person who states she could not say she would be strictly impartial, is not a hundred percent sure she could be fair, or cannot affirmatively say she would follow the court's instructions should be excused for cause. *Gootee*, 778 So. 2d 1005; *Willams v. State*, 638 So. 2d 976 (Fla. 4th DCA 1994); *Brown v. State*, 728 So. 2d 758, 759 (Fla. 3d DCA 1999); *Marquez v. State*, 721 So. 2d 1206, 1207 (Fla. 3d DCA 1998); *Blye v. State*, 566 So. 2d 877, 878 (Fla. 3d DCA 1990).

4. A venire person who states he/she would have **"difficulty" or "a problem" or "trouble" in following the law** regarding compensation for pain and suffering should be dismissed for cause. *Pacot v. Wheeler*, 758 So. 2d 1141, 1142 (Fla. 4th DCA 2000); *see also Howard v. State*, 698 So. 2d 923 (Fla. 4th DCA 1997).

5. A venire person who admitted a bias against some personal injury claimants by admitting that the **Plaintiff would "have to overcome a burden and not be starting off even with the defense,"** that she would "**have a little difficulty in being impartial** in this case," and that she felt that personal injury plaintiffs are "dishonest" should be excused for cause. *Goldenburg v. Regional Import & Export Trucking Co.*, 674 So. 2d 761 (Fla. 4th DCA 1996).

6. A venire person who has prior experiences that could **cloud his judgment or influence his verdict** should be excused for cause. *Hall v. State,* 682 So. 2d 208, 209 (Fla. 3d DCA 1996); *Wilkins v. State*, 607 So. 2d 500 (Fla. 3d DCA 1992); *Gill v. State*, 683 So. 2d. 158 (Fla. 3d DCA 1996); *Ferguson v. State*, 693 So. 2d 596 (Fla. 2d DCA 1997).

Moreover, while a juror's individual comments may not give individual bases for a cause challenge, the cumulative effect of the juror's comments may raise reasonable doubt sufficient to justify a cause challenge. *See James v. State*,

731 So. 2d 781 (Fla. 3d DCA 1999) (reversing denial of cause challenge); *Jaffe v. Applebaum*, 830 So. 2d 136 (Fla. 4th DCA 2002) (reversing a trial court's denial of a cause strike).

V. *Procedural Matters*

A. Counsel must be given adequate time to conduct voir dire.

Counsel must directly and thoroughly question any juror suspected of prejudice; basing a cause challenge solely on a juror raising his hand in response to questions or on a series of "do you agree with what another juror said" questions is not enough. *Somerville*, 902 So. 2d 930.

To be afforded the right "to conduct a reasonable examination of each juror," as prescribed by Florida Rule of Civil Procedure 1.431(b), counsel must be given adequate time to conduct the voir dire. The general rule was stated in *Williams v. State*, 424 So. 2d 148 (Fla. 5th DCA 1982):

> The purpose of voir dire is to obtain a "fair and impartial jury to try the issues in the cause." Time restriction or limits on number of questions can result in the loss of this fundamental right. They do not flex with the circumstances, such as when a response to one question evokes follow-up questions.

Id. at 149 (internal citations omitted); *see also Barker v. Randolph*, 239 So. 2d 110, 112 (Fla. 1st DCA 1970); *Cohn v. Julien*, 574 So. 2d 1202 (Fla. 3d DCA 1991).[3]

In *Somervill*e, 902 So. 2d 930, the court chastised the trial judge for rushing to pick a jury. The court noted that, because the trial judge was frustrated with having to bring in a second panel of jurors and insisted on completing voir dire that day, the trial judge "did not accurately recall what [two jurors who should have been dismissed for cause] said on *voir dir*e, nor did the court allow the court reporter to read back their testimony." *Id.* at 936. The court stated that, because the trial court improperly refused to grant the cause challenges, plaintiff was improperly deprived of a "needed peremptory challenge[.]" *Id.* at 937. Accordingly, the court reversed the verdict and remanded the case for a new trial.

B. Courts cannot limit or prohibit backstriking.

The trial court cannot limit or prohibit the use of backstriking and a party can use its peremptory challenges until the jury has been sworn. This process cannot be circumvented by the trial court's swearing of individual jurors. *Tedder v. Video Elec. Inc.,* 491 So. 2d 533 (Fla. 1986); *Van Sickle v. Zimmer*, 807 So. 2d 182 (Fla. 2nd DCA 2002) ("the trial court's failure to allow a party to exercise a remaining peremptory challenge before the jury is sworn constitutes reversible error").

C. Errors in allotting the number of peremptory challenges are grounds for reversal.

Rule 1.431(d) allocates three peremptory challenges to each party. The rule states, in pertinent part:

> Peremptory Challenges. Each party is entitled to three peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of three peremptory challenges to each party on the side with the greater number of parties[.]

Id. In *St. Paul Fire and Marine Ins. Co. v. Welsh*, 501 So. 2d 54 (Fla. 4th DCA 1987) the Fourth District held that the trial court committed reversible error when it allotted six peremptory challenges to the plaintiffs and three peremptory challenges to the intervenors, while only allowing three peremptory challenges to the defendant. *See id.* at 55-56. The court noted that the plaintiffs and defendant "should have had at least an equal number of challenges." *Id.* at 56.

D. Peremptory challenges based on race, ethnicity, or gender are prohibited.

In civil and criminal cases, the use of peremptory challenges based on the juror's race, ethnicity, or gender is prohibited. *Dorsey v. State*, 868 So. 2d 1192, 1202 n.8 (Fla. 2003); *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 146 (1994); *Abshire v. State*, 642 So. 2d 542, 544 (Fla. 1994); *Joseph v. State*, 636 So. 2d 777 (Fla. 3d DCA 1994). However, it is presumed that peremptory challenges will be exercised in a nondiscriminatory manner. *Melbourne v. State,* 679 So. 2d 759, 764 (Fla. 1996). In *Melbourne*, the Florida Supreme Court set forth the procedure for objecting to a peremptory strike based on race:

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

Id. at 764 (internal citations omitted) (following *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny); *Johnson v. California,* 125 S. Ct. 2410, 2417 (2005). The *Melbourne* court emphasized that the trial court must evaluate the "genuineness" of the explanation for striking a juror and determine whether the proffered explanation for a challenge is a pretext (*i.e.*, whether it conceals an intent to discriminate based on race). *Young v. State*, 744 So. 2d 1077, 1082 (Fla. 4th DCA 1999). The *Melbourne* analysis also applies in gender-based challenges.

"Florida law does not require the explanation for a strike to be objectively reasonable, only that it be truly nonracial." *Young*, 744 So. 2d at 1084; *see also American Security v. Hettel*, 572 So. 2d 1020 (Fla. 2d DCA 1991); *Mitchell v. CAC-Ramsey Health Plans, Inc.*, 719 So. 2d 930 (Fla. 3rd DCA 1998); *Baber v. State*, 776 So. 2d 309 (Fla. 4th DCA 2000); *Haile v. State*, 672 So. 2d 555 (Fla. 2nd DCA 1996). The trial court's ruling "turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." *Kina v. Byrd*, 716 So. 2d 831 (Fla. 4th DCA 1999), *review denied*, 779 So. 2d 271 (Fla. 2000); *see also Dorsey v. State*, 868 So. 2d 1192 (Fla. 2003).

To preserve the issue for appeal, counsel should renew an objection to a race or gender-based challenge before the jury is sworn. *See Melbourne,* 679 So. 2d at 765 (holding that counsel did not preserve the race-based use of a peremptory challenge for review, because counsel did not renew her objection before the jury was sworn; noting that counsel never requested that the court ask the State for its reason for the strike); *Mazzouccolo v. Gardner, McLain & Perlman, M.D., PA*, 714 So. 2d 534 (Fla. 4th DCA 1998) (where plaintiffs' counsel makes a timely, gender-based objection to the defendant having stricken three female jurors and the defendant refuses to supply a gender-neutral reason for the strikes, to preserve error, plaintiffs' counsel must not accept the jury and must renew the gender-based objection or condition acceptance of the jury on their previous objection).

[1] § 913.03, Fla. Stat., governs cause challenges in criminal actions.

[2] *See, e.g.*, *Griefer v. DePietro*, 625 So. 2d 1226, 1228 (Fla. 4th DCA 1993); *Hill*, 477 So. 2d 553; *Dardar v. Southard Distrib. of Tampa*, 563 So. 2d 1112 (Fla. 2d DCA 1990); *Metro. Dade County v. Sims Paving Corp.,* 576 So. 2d 766, 767 (Fla. 3d DCA 1991); *Taylor v. Pub. Health Trust*, 546 So. 2d 733 (Fla. 3d DCA 1989).

[3] *But see Anderson v. State*, 739 So. 2d 642 (Fla. 4th DCA 1999) (holding that the trial judge did not abuse his discretion in trial for grand theft by limiting voir dire to 30 minutes for each party, where counsel were informed of limitation before commencement of voir dire, no objections were made at the time, trial judge asked background questions of each prospective juror and posed general questions to panel, defense counsel's line of questioning during allotted time was somewhat repetitious, and the charged offenses were not severe).