The purpose of voir dire is to "obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice." *Pope v. State*, 94 So. 865, 869 (Fla. 1922)

I. GETTING THE PROCESS STARTED

In most Circuits, prospective jurors are placed under oath and examined in a preliminary manner by a Circuit Judge who makes an initial determination on the competency of those summoned for jury duty. When the panel comes to your courtroom attention must be paid to insure that court official that brings the prospective jurors to your courtroom announces on the record that they have been venire has been deemed competent to serve. In addition, before the lawyers start their voir dire, the trial Judge must swear the venire again. If the Judge fails to automatically swear the jurors then you have the right under Rule 1.431 to insist that they be sworn before the actual start of any questioning pertinent to your case. The failure to have the jury sworn probably acts as a waiver of any later irregularities that might occur during the jury selection process.

When do you actually make your challenge for cause?

Before the start of jury selection, it is appropriate to discuss the "timing" of challenges for cause with the trial judge. Some judges may expect the attorney conducting the questioning to approach the bench before the completion of voir dire in order to exercise a challenge for cause. Others expect all challenges for cause to be made at the conclusion of jury selection. The decision about whether to exercise challenges for cause at the bench or in the chambers is an important one and should be discussed with the judge before you are required to make your first challenge for cause.

II. CHALLENGES FOR CAUSE

Rule 1.431(c) the Florida Rules of Civil Procedure

1. On motion of any party the court shall examine any prospective juror on oath to determine whether that person is related to any party or to the attorney of any party within the third degree or is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called or has any interest in the action or has formed or expressed any opinion or is sensible of any bias or prejudice concerning it or is an employee or has been an employee of any party within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand indifferent to the action or any of the foregoing grounds of objection exists or that the juror is otherwise incompetent, another shall be called in that juror's place (emphasis supplied).

2. The fact that any person selected for jury duty from bystanders or the body of the county and not from a jury list lawfully selected has served as a juror in the court in which that

person is called at any other time within 1 year is a ground of challenge for cause.

3. When the nature of any civil action requires knowledge of reading, writing, and arithmetic, or any of them, to enable a juror to understand the evidence to be offered, the fact that any prospective juror does not possess the qualifications is a ground of challenge for cause.

III. THE TESTS FOR DETERMINING JUROR COMPETENCY

1. Trial courts have broad discretion in determining whether to grant or deny a challenge for cause based on juror incompetency and the decision in general will not be overturned on appeal, absent manifest error. *VanPoyck, v. Singletary,* 715 So. 2d 930,931 (Fla. 1998).

2. The test to determine a juror's competency is whether that juror can set aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *Kearse v. State,* 770 So. 2d 1119, 1128 (Fla. 2000). Further, prospective jurors must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *Bryant v. State,* 656 So. 2d 426, 428 (Fla. 1995); *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.").

3. In *Gore v. State of Florida,* 706 So. 2d 1328 (Fla. 1997), the Florida Supreme Court held "we conclude that the trial court did not abuse its discretion in declining to excuse the challenged venire members. We have carefully examined the voir dire of each of these jurors. Although they expressed certain biases and prejudices, each of them also stated that they could set aside their personal views and follow the law via the evidence presented. The trial court was in a better position to assess the credibility of these venire members. Consequently we will not substitute our judgment for that of the trial court."

4. In *Ferrell v. State of Florida,* 697 So. 2d 198 (Fla. 2d DCA 1997), the 2d District Court of Appeal stated "the test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions of the law given by the court. The juror should be excused if there is any reasonable doubt about the juror's ability to render an impartial verdict. See also *Vega v. State of Florida,* 781 So. 2d 1165 (Fla. 3d DCA 2001).

5. The 4th District Court of Appeal in *Longshore v. Fronrath Chevrolet, Inc.,* 527 So. 2d 922 (Fla. 4th DCA 1998), held "close cases involving challenge to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality." In the *Longshore* case, the appellate court looked to the prospective jurors' actual statements in response to the questioning. The court found that her initial response that "she would try to be impartial" was the primary reason for

excusing her rather than looking to her subsequent statements that she could be fair. *See also Kochalka v. Burgeois*, 162 So. 3d 1122 (Fla. 2d DCA 2015); *Williams v. State*, 638 So. 2d 976 (Fla. 4th DCA 1994).

6. It is error to deny a challenge for cause to a juror who indicated that she had a preconceived opinion about the Defendant's guilt even though the juror ultimately stated that she would base her verdict on the evidence and the law. *Hamilton v. State*, 547 So. 2d 630 (Fla. 1989).

7. In the case of *Imbimbo v. State*, 555 So. 2d 954 (Fla. 4th DCA 1990) the Fourth District Court of Appeal decided that where a juror who first stated that she "probably" would be prejudiced but later on further questioning stated that she "probably" could follow the judge's instructions on the law, created enough reasonable doubt to warrant being excused for cause.

8. Where a prospective juror's responses to questions were sufficiently equivocal to cast any doubt about their ability to be impartial and fair, it is error to deny a challenge for cause by the *Bryant v. State*, 656 So. 2d 426 (Fla. 1995).

9. In the case of *Somerville v. Ahuja*, 902 So. 2d 930 (Fla. 5th DCA 2005). The Fifth District stated:

> The right to have a case decided by an impartial jury has been equated to the constitutional right to a fair trial. Use of peremptory challenges and challenges for cause are two of the tools afforded parties and judges, in the context of a jury trial, to obtain a fair and impartial panel of jurors. 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.

10. A "reasonable doubt" standard should be applied in the attempt to resolve the question of a prospective juror's ability to be fair and impartial. *Goldenberg v. Reg'l Import & Export Trucking Co.*, 674 So. 2d 761 (Fla. 4th DCA 1996).

11. Where the trial court denies a challenge for cause based on a potential jurors equivocal or conditional responses that are not rehabilitated and where a reasonable doubt exists as to whether the juror possessed the requisite state of mind necessary to render an impartial decision, a new trial is required. *Salgado v. State*, 829 So. 2d 342 (Fla. 3d DCA 2002).

12. A prospective juror is not impartial where one side must overcome a pre-conceived opinion in order to prevail. *Hill v. State*, 839 So. 2d 883 (Fla.3d DCA 2003).

13. Where a potential juror responds that "I'd try not to" and "I would give it my best shot" referencing a previously announced bias, it is error not to excuse that potential juror on a challenge for cause. *Bell v. State*, 870 So. 2d 893 (Fla. 4th DCA 2004).

14. It is error to deny a challenge for cause where the potential juror stated that although he brought certain preconceived feelings to court about negligence claims in general, that he "would try to keep an open mind, but I am definitely of the opinion that [damage awards] need[s] to be capped and it has gone [sic] detrimental to the healthcare system". He further declared that his beliefs would "probably" interfere with his obligations as a juror. In response to an attempt to rehabilitate him, he also stated that "I would do what I believe is the fair thing, yes..." and that his decision would be based on his "personal beliefs". *Bell v Greissman*, 902 So. 2d (Fla. 4th DCA 2005).

15. "A juror who initially expresses bias may be rehabilitated during the course of questioning. Nevertheless, doubts raised by initial statements are not necessarily dispelled simply because a juror later acquiesces and states that he can be fair." *Lewis v State*, 931 So. 2d (Fla. 4th DCA 2006), *Carratelli v State*, 832 So. 2d 850, 854 (Fla. 4th DCA 2002).

16. A review of the law on "rehabilitation" of a prospective juror is found in *Algie v Lennar Corporation*, 969 So. 2d 1135 (Fla. 4th DCA 2007). Once again, the court emphasizes how doubts raised by initial expressions of bias are not necessarily dispelled simply because the prospective juror later states that he can be fair. Any ambiguity or uncertainty must be resolved in favor of excluding the juror. See also *Kopsho v. State*, 959 So. 2d 168 (Fla. 2007).

17. In *Reyes vs. State*, 56 So. 3d 814 (Fla. 2d DCA 2011), the 2d District Court of Appeal stated that in order to avoid reasonable doubt about a prospective juror's impartiality, they must state their opinions must have a "final, neutral, and detached determination to sit as a fair and impartial juror".

18. Jurors are not required to be devoid of feelings, opinions or even preconceived notions about particular kinds of cases, as long as they can set aside those feelings, opinions or preconceived notions and render their verdict based on the evidence. *Embleton v Senatus*, 993 So. 2d 593 (4th DCA 2008).

19. Where the trial judge brought a single juror back into the courtroom by himself and proceeded to ask leading and compound questions about his ability to set aside his previously announced views, and where the juror finally relented and agreed with the judge that he could be fair, the trial court committed reversible error in denying the challenge for cause. The juror's responses to the courts questing were insufficient to erase the reasonable doubt created by his earlier answers. *Rimes v State*, 993 So. 2d 1132 (5th DCA 2008.)

20. In a criminal case where a prospective juror repeatedly stated that he felt that there was a presumption that the defendant was guilty until proven innocent, even though he stated that he could be fair and make his decision based on the evidence, it was an abuse of discretion not to excuse that juror for cause. *Joseph v. State*, 983 So. 2d 781 (4th DCA 2008.)

21. The Florida Supreme Court in *Matarranz v. State*, 133 So. 3d 473 (Fla. 2013), reviewed the decisional law on challenges for cause. In that case, a prospective juror told the Court multiple times that she did not think that she could be fair in the case because of past personal experiences. Repeated "rehabilitation of the juror over two days resulted in the trial court allowing her to sit. The Supreme Court reversed.

22. The Third District, in *Gonzalez v. State*, 143 So. 3d 1171 (3d DCA 2014) (reviewed *Matarranz v. State,)* and concluded that the *Matarranz* decision did not establish a "Bright Line" test for juror competency regarding past experiences. Unlike in *Matarranz,* in *Gonzalez,* the prospective juror raised her hand and volunteered to the court that she had been a victim of child abuse (the case involved similar claims). On questioning, she made it clear that she could be fair and impartial. After his conviction, the defendant challenged it by arguing that the Supreme Court in *Matarranz* had established a clear test and that jurors who had had similar past experiences needed to be excused for cause. The *Gonzalez* court reasoned: "*Matarranz* does not establish a bright line rule that a juror who has had a personal experience relating to the case must necessarily be stricken for cause…" The recent case of *Gonzalez v. State*, 143 So. 3d 1171 (Fla. 3d DCA 2014) stands for the same proposition.

23. In the recent case of *Kochalka v. Bourgeois*, 162 So. 3rd 1122 (2nd DCA 2015) the positive response to the question "who feels like one side or the other starts out ahead because of your life experiences" even though the prospective juror did not identify which side they favored should have been enough to cause disqualification. The Court cited the case of *Four Woods Consulting, LLC v. Fyne*, 981 So. 2nd 2 (4th DCA 2007) where it was held that "the mere implication of bias should have led to dismissal." Further, an expressed negative attitude towards the jury system, or an expression of "no faith" in the jury system should also lead to disqualification. *Levy v. Hawk's Cay, Inc.* 543 So. 2nd 1299 (3rd. DCA 1989).

24. Most of the instructive Florida cases on jury selection arise from criminal cases, and it makes sense to consider Fla. Stat. 913.03 titled "Grounds for challenge to individual jurors for cause." Among the "Grounds" listed in the statute:

    (1) The juror doesn't have the necessary qualifications
    (2) The juror has an "unsound mind" or bodily defect (but not deafness).
    (3) The juror has conscientious beliefs (that would prevent him from finding guilt)

    (The other 9 statutory provisions arguably only pertain to criminal cases).

IV. PRESERVING YOUR CAUSE OBJECTIONS

The manner in which you exercise challenges for cause is critical. Simply put, if you fail to adhere to the following rules, you will not preserve your cause objections for later appellate review.

1. The case which establishes the procedure for challenges for cause is *Joiner v. State,* 618 So. 2d 174 (Fla. 1993). The Florida Supreme Court in *Joiner* held that you must:

    a. Make your challenge for cause.
    b. The trial court refuses to strike the juror.
    c. You use a peremptory challenge against the juror.
    d. After exhausting all remaining peremptory challenges, you request an additional peremptory challenge to strike a specifically named juror.
    e. Your request for an additional peremptory challenge is refused.
    f. Prior to the actual swearing of the jury, you must again renew your objection so that the trial court will have one last clear opportunity to take the appropriate corrective action. See also *Milstein v. Mutual Security Life Insurance Co.,* 705 So. 2d 639 (Fla. 3d DCA 1998).

2. In other words, "[t]o preserve for appellate review the denial of a for-cause challenge of a juror, [a party] must "object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible." *Gonzalez v. State,* 143 So. 3d 1171, 1174 n.1 (Fla. 3d DCA 2014) (internal quotations omitted) (quoting *Kearse v. State,* 770 So.2d 1119, 1128 (Fla.2000)).

3. In addition, you must be able to demonstrate to the appellate court that the objectionable juror actually was seated on the jury, and not merely as an alternate. *Frazier v. Welch,* 913 So. 2d 1216 (Fla. 4th DCA 2005)*; Jenkins v. State,* 824 So 2d. 977 (Fla. 4th DCA 2002); *Joseph v. State,* 983 So. 2d 781 (Fla.4th DCA 2008).

4. Assuming the above procedure is followed, the appellate court then undertakes the task of determining whether or not the trial court made an error. in failing to excuse the challenged juror. Interestingly, there is no requirement that the objecting party demonstrate any prejudice in the failure to excuse the challenged juror. See *Gootee v. Clevinger,* 778 So. 2d 1005 (Fla. 5th DCA 2000) (dissenting opinion by Judge Harris). For additional cases supporting this same proposition, see *Johnson v. State of Florida,* 763 So. 2d 1214 (Fla. 2d DCA 2000)*; Kerestesy v. State,* 760 So. 2d 989 (Fla. 2d DCA 2000)*; Geibel v. State,* 795 So. 2d 285 (Fla. 3d DCA 2001)*; Shannon v. State,* 770 So. 2d 714 (Fla. 4th DCA 2000).

5. After all challenges for cause and all peremptory challenges are used, and assuming the above process has been followed, when the additional requested challenge is once again refused, there is no requirement that a proffer be made of the reason for the additional

peremptory challenge. In other words, there is no requirement that the objecting party state the basis for his desire to exercise an additional peremptory challenge. *Trotter v. State,* 576 So. 2d 691 (Fla.1990)*; Shannon v. State of Florida,* 770 So. 2d 714 (Fla. 4th DCA 2000).

6. The case of *Coe v. State of Florida*, 100 So. 3d 1152, (Fla. 3d DCA 2012) emphasized just how hard it is to overturn the trial court's decision to deny a challenge for cause:

> "There is hardly any area of the law in which the trial judge is given more discretion than in ruing on challenges of jurors for cause"
> "A trial judge has a unique vantage point from which to evaluate potential juror bias and make observations of the juror's voir dire responses, which cannot be discerned by this court's review of a cold record."
> "It is within the trial court's province to determine whether a challenge for cause should be granted…and such a determination will not be disturbed on appeal absent manifest error."
> "A finding of manifest error is possible only when the record shows no basis for the decision".

V. PEREMPTORY CHALLENGES

1. Rule 1.430(d) of the Florida Rules of Civil Procedure, provides "Each party is entitled to three peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties is 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. The additional peremptory challenges accruing to multiple parties on the opposite side shall be divided equally among them. Any additional peremptory challenges not capable of equal division shall be exercised separately or jointly as determined by the court."

2. Although the above quoted provision is the only time in the civil procedure rules that peremptory challenges are mentioned, suffice it to say that use and misuse of peremptory challenges has recently have been examined by a number of appellate courts on race, gender and ethnicity issues. Most of the law on jury selection arises from criminal cases but the same principles apply equally to civil and criminal jury trials.

3. Historically, use of peremptory challenges was something not controlled by the court. Reasons for the challenge were not required, and literally for any reason or for no reason, the challenge was just that, an unfettered challenge.

4. Happily, times changed and the evolution was such that "It is now...impermissible to exercise challenges on the basis of race, gender, or ethnicity." *Abshire v State*, 642 So. 2d. 542, 543-44 (Fla. 1994).

5. As the Florida Supreme Court stated in *State v. Neil*, 457 So. 2d 481 (Fla. 1984): **"The**

primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury."

6. In 1996, the Florida Supreme Court in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996) created what the Court would later describe as **" a simple, precise, and easy-to-administer procedure for challenging a litigant's suspected use of a peremptory challenge to discriminate based on race, or other impermissible factors.."** *Hayes v. State*, 94 So. 3d 452 (Fla. 2012). The test is: [step 1] "A party objecting to the other side's use of 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's reason for the strike." [Step 2] "At this point the burden shifts to the proponent of the strike to come forward with a race neutral explanation." [Step 3] "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 1: Even though the original language in *Melbourne* had to do with a challenge on the basis of race, it is fair to say that the appellate decisions since 1996 have vastly expanded the issue. Therefore, whenever a peremptory challenge is contested whether it is the basis of race, gender, ethnicity, or anything else, the Step 1, 2 and 3 analyses all come into play. *See, e.g., Guevara v. State*, 164 So. 3d 1254 (Fla. 2d DCA 2015) (reversing because prosecutor erroneously convinced trial court that the *Melbourne* steps did not apply to peremptories used to strike male jurors). However, a juror's surname, without more, is insufficient to trigger an inquiry into whether a peremptory strike was exercised in a discriminatory manner. *Smith v. State*, 59 So. 3d 1107, 1111 (Fla. 2011).

a) Timely and proper objection: The objection may be made at any point prior to the jury being sworn. If the objection is not sustained, it must be made again prior to the jury's being impaneled. *See Watson v. Gulf Power*, 695 So. 2d 904 (Fla. 1st DCA 1997). Further, the Florida Supreme Court in *Mitchell v. State*, 620 So. 2d 1008 (Fla. 1993) stated "... in order to preserve a Neil issue for review it is necessary to call to the court's attention before the jury is sworn, by renewed motion or by accepting the jury subject to the earlier objection, the desire to preserve the issue."

By failing to renew the objection, trial courts have uniformly held that the objections were waived. *Joiner v. State*, 618 So. 2d 174 (Fla. 1993). *See also Couch v. Shell*, 803 So. 2d 803 (Fla. 1st DCA

2001).

The objection must be a specific objection and not a general objection in order to put the trial court on notice of the reason you are making the objection. In *Mobely v. State of Florida,* 37, FLW D384 (Fla. 1st DCA 2012) the court held that "The opponent of the strike cannot generally object to the trial court's determination that the reason is race-neutral without an request or other notice to the court that it seeks a more specific determination of genuineness, and then appeal the trial court's ruling for failure to further specify its ruling".

Further, in order to preserve the matter for appellate review, the objection must be an appropriate objection. In the case of *Schummer v. State of Florida*, 654 So. 2d 1215 (Fla. 1st DCA 1995), when counsel was asked to state a race neutral reason for striking a potential member of the jury, he responded by stating that the prospective jury person had not looked him in the eye; that he did not care for the person; and because the person was a retired military person, that they were typically more conservative than others. After listening to the response by the State, the defense attorney replied "That's ridiculous. I mean you're following the law, but I think that is ridiculous." The appellate court determined that saying "that's ridiculous" did not constitute an objection to the judge's ruling but merely amounted to an exclamation of the attorney's opinion that the law on this particular subject was "ridiculous." The court specifically found that such a response was not sufficient to put the trial judge on notice that defense counsel believed that reversible error had occurred in the denial of his use of a peremptory challenge and therefore the matter was waived on appeal.

There are no magic words that need to be used as long as the party making the objection timely communicates to the court and to opposing counsel an objection to the alleged improper use of a peremptory challenge. *Harrison v. Emanuel,* 694 So. 2d 759 (Fla. 4th DCA 1997).

b) The second part of Step 1 is the requirement that the record reflect that the venire person is a member of a distinct group. Obviously no testimony needs to be given on this issue, but the lawyer making the challenge or trial court must identify either by <u>race, gender or ethnicity</u> the prospective juror that is the subject of the inquiry.

Race and gender are easy to determine as protected. Ethnicity seems a little more complex but is ever expanding in scope. In *Olibrices v State*, 929 So. 2d 1176 (Fla. 4th DCA 2006), it was determined that people who practice the Muslim religion and who are Pakistani are within the protection afforded by this line of decisional authority.

c) The last part of Step 1 is simply that the person challenging the strike must ask that the court make inquiry of the striking party about the basis for the strike.

Step 2: Once the requirements outlined in Step 1 are met, the burden of stating either a race, gender or ethnically neutral reason now shifts to the party making the strike. It is reversible error for the trial court not to require a Step 2 inquiry once the requirements of Step 1 are met. *Streeter v. State*, 979 So. 2d 428 (Fla. 3d DCA 2008).

a) The party seeking to exercise the challenge must state on the record, a neutral reason for making the strike. The race, gender, or ethnically neutral explanation must be one where there is no predominant discriminatory intent which is apparent from the given explanation, taken at its face value. *State v. Slappy*, 522 So. 2d 18 (Fla. 1988).

b) "A facially race-neutral reason is one that is not based on race at all." *Russell v State*, 879 So. 2d 1261 (Fla. 3d DCA 2004).

c) For example, a prospective juror's past involvement in car accidents has been determined to be a race neutral basis to exclude him in a car accident case. *Smellie v. Torres*, 570 So. 2d 314 (Fla. 3d DCA 1990). Similarly, a juror's past involvement in "similar incidents" as the one which was being tried may constitute a neutral explanation. *Adams v. State*, 559 So. 2d 1293 (Fla. 3d DCA 1990). In the case of *State of Florida v. Mitchel*, 768 So. 2d 1223 (Fla. 3d DCA 2000), a Hispanic female was the subject of a peremptory challenge. It was apparent through the questioning that she was a paralegal who had just completed law school and who had sat for the Florida Bar examination. Citing the latter matters as a reason for being gender and ethnically neutral, the trial court agreed to the challenge. However, it has been held that a prospective juror's occupation is not a valid reason for a challenge unless there is some connection between the occupation and the underlying facts of the case. *Johnson v. State*, 600 So. 2d 32 (Fla. 3d DCA 1992).

d) The issue before the trial court in the step two analysis is the facial neutrality of the proponent's reason for the strike. Courts should presume the reason for a peremptory strike is facially neutral and

nondiscriminatory, and the opponent of a peremptory strike always bears the burden of persuasion to show discriminatory intent by the party exercising the strike. *Hayes v. State*, 94 So. 3d 452, 461 (Fla. 2012); *Harris v. State*, __ So. 3d __,No. 4D13-4741, 2015 WL 3388047, at *3 (May 27, 2015). .

e) In *Soto v. State*, 786 So. 2d 1218 (Fla. 4th DCA 2001), a strike against a Hispanic juror was sustained where the State's explanation for striking the juror was that the person did not appear to speak or understand English very well. *But see Despio v. State*, 895 So. 2d 1124, 1126 (Fla. 3d DCA 2005) (suggesting that an objection based solely on the fact that a jury speaks a certain language, without reference to why this fact matters, could be a proxy for a racial objection and thus not permissible). *Cf. Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859 (1991) (upholding strike of Spanish-speaking jurors because prosecutor expressed concern such jurors would not defer to the official translation)

f) The fact the prospective jurors have been victims of a crime has regularly been determined to be a valid, race neutral and gender neutral reason for a peremptory strike. *Porter v. State*, 708 So. 2d 338 (Fla. 3d DCA 1998) and *Symonette v. State*, 778 So. 2d 500 (Fla. 3d DCA 2001).

g) An equivocal response to a prosecutor's questioning regarding views on the death penalty was determined to be a race neutral reason in *Floyd v. State*, 850 So. 2d 383 (Fla. 2002).

h) Further, when a black church pastor indicated to the prosecutor that he might have difficulty setting aside feelings of sympathy when he listened to the evidence, the court in *Rodriguez v. State*, 826 So. 2d 494 (Fla. 4th DCA 2002) found that that was a race neutral explanation for excusing the pastor.

i) Where a juror according to the attorney, was unwilling to look the attorney in the eye while answering questions; or while it seemed to the attorney that a particular juror was not paying attention to the proceedings; or where it seemed to the attorney that a prospective juror was unable to stay awake during the voir dire examination, or the prospective juror even seemed to have an unfriendly or hostile tone while answering questions, all of those reasons have been determined, at least facially, to be neutral reasons. *Dean v. State*, 703 So. 2d 1180 (Fla. 3d DCA 1997).

j) Concern for the young age of the potential juror, or concern that

potential loss of income during jury service, might cause a lack of attention during the trial, were deemed to be race neutral reasons for using a peremptory challenge in *Saffold v. State,* 911 So. 2d 255 (Fla. 3d DCA 2005).

k) A juror's "non-verbal" actions which are disputed, and not observed by the Judge or otherwise supported in the record are an insufficient race-neutral reason for a peremptory challenge. *Brown v. State*, 995 So. 2d 1099 (3d DCA 2008); *see also Denis v. State*, 137 So. 3d 583 (Fla. DCA 2014) (reversing where trial court merely accepted the prosecutor's word that juror had been falling asleep and had not observed such conduct)

l) For the most recent review of the case law on "race neutral" reasons, see: *Guevara v. State*, 164 So. 3rd 1254 (2nd DCA 2015), and *Harris v. State*, 40 FLWD 1235, (4th DCA 2015).

Step 3: Once the trial court has completed inquiry into Steps 1 and 2, the last portion of the process is to determine whether or not the circumstances given by the proponent of the strike are "pretextual." That is to say, that the judge actually is required to determine the genuineness of the reason given for the strike.

a) In *Hayes v. State*, 94 So. 3d 452 (Fla. 2012) the Florida Supreme Court reviewed the Step 3 analysis from *Melbourne*. "The proper test under *Melbourne* requires the trial court's decision on the ultimate issue of pretext to turn on a judicial assessment of the credibility of the proffered reasons and the attorney or party proffering them, both of which "must be weighed in light of the circumstances of the case and the total course of the voir dire in question as reflected in the record**"…"Identifying the true nature of an attorney's motive behind a peremptory strike turns primarily on an assessment of the attorney's credibility".**

b) There have been a number of decisions on the Step 3 analysis: *Garcia v. State of Florida*, 75 So. 3d 871 (Fla. 3d DCA 2011); *Jones v. State of Florida*, 93 So. 3d 1189 (Fla. 1st DCA 2012); *Wimberly v. State of Florida*, 118 So. 3d 816 (Fla. 4th DCA 2012); *Victor v. State of Florida*, 126 So. 3d 1171 (Fla. 4th DCA 2012); *Wynn v. State of Florida*, 99 So. 3d 986 (Fla. 3d DCA 2012).

c) "A trial court's genuineness inquiry involves consideration of factors which tend to show whether the proffered reason is pre-textual." Braggs *v. State*, 13 So. 3d 505 (Fla. 3d DCA 2012).

d) The party opposing the explanation as pretextual MUST make a specific objection on that basis or it will be determined to be waived. *Hall v. State*, 768 So. 2d 1212 (Fla. 4th DCA 2000).

e) A pretextual and/or disingenuous reason for striking a prospective juror may be revealed where: there has been only a perfunctory examination of the juror; or the proffered explanation to strike a black juror is equally applicable to a white juror. *Overstreet v. State*, 712 So. 2d 1174 (Fla. 3d DCA 1998).

f) The analysis that must take place by the trial court under Step 3 is to determine whether the proffered explanation for the challenge is a pretext designed to conceal the attempt to discriminate on the basis of race, gender or ethnicity. In other words, the trial court is obligated to make an effort at identifying the true nature of the challenging attorney's motive behind the peremptory strike and this of course means that the trial court must make a determination of the attorney's credibility. *Young v. State of Florida*, 744 So. 2d 1077 (Fla. 4th DCA 1999). It is reversible error for the court to make a determination about the juror's credibility as opposed to the credibility of the attorney exercising the strike. *Allstate v. Thornton*, 781 So. 2d 416 (Fla. 4th DCA 2001).

g) While there are no magic words that must be utilized, it must be clear on the record that step number three as to the actual genuineness of the challenge was actually considered. *Simmons v State*, 940 So. 2d. 580 (Fla.1st DCA 2006).

h) The trial court must make its findings of genuineness in an explicit way or the findings must be implicit from the record. Burgess v. State, 117 So. 3d. 889 (Fla. 4th DCA 2013); *Smith v State*, 143 So. 3d 1194 (Fla. 1st DCA 2014). The Florida Supreme Court makes it clear in *Poole v. State*, 151 So. 3d 402 (Fla. 2014) by stating that "The trial court must make an indication on the record that it not only accepted the race-neutral explanation, but actually engaged in a 'genuineness' analysis." This concept was just re-affirmed in the case of *Ellis v. State*, 152 So. 3d 683 (Fla. 3d DCA 2014). "Thus, the trial court in this case erred in stating that the genuineness of the proffered reason for the challenge is not part of the analysis, contrary to the dictates of *Melbourne* and its progeny."

i) "Circumstances relevant to the 'genuineness' inquiry include the gender or racial make-up of the venire, prior strikes exercised against the same gender or racial group, or singling the juror out for special treatment." *Norona v. State*, 137 So. 3d 1096 (Fla. 3d DCA 2014).

j) Where the basis for the strike was the lawyers feeling that a prospective jurors "non-verbal indications" in response to some questions, "might" suggest that the juror would have certain expectations, during the trial, the lawyers explanation was appropriately determined to be disingenuous and the strike was not allowed. *Dorsey v. State*, 868 So. 2d 1192 (Fla. 2003).

k) In order to preserve the issue for appellate review, the objecting party must clearly state the basis for their objection–that the proffered reason is pretextual and is not race neutral. Failure to do so waives the courts error on appeal. *Brown v. State*, 994 So. 2d 1191 (4th DCA 2008).

7. Knowing that lawyers will try to constantly push the envelope to try and accomplish their goals, the Florida Supreme Court, in *State v. Slappy*, 522 So. 2d 18 (Fla. 1988), set forth a "non-exclusive" list of factors to guide trial judges in evaluating whether a proffered reason is nothing more than a pretext, and therefore inappropriate. The Court held: "…the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext:

   a. Alleged group bias not shown to be shared by the juror in question,
   b. Failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror,
   c. Singling the juror out for special questioning designed to evoke a certain response,
   d. The prosecutor's reason is unrelated to the facts of the case, and a challenge based on reasons equally applicable to juror's who were not challenged."

   The presence of one or more of these factors will tend to demonstrate that the proffered reason for the challenge is nothing more than an impermissible pretext. For a good review case on peremptory challenges, see*: Welch v. State*, 33 FLWS 713 (Fla. 2008); *Harrison v. Bob Dean Supply*, 694 So. 2d 759 (Fla. 4th DCA 197).The decisions from the Florida Supreme Court mandate that <u>whenever</u> there is an objection to a peremptory challenge, where the objecting party identifies the prospective juror to be a member of a distinct racial or ethnic group, and requests an inquiry, that even if there is no claim that the use of the challenge is racially

8. In the decision by the Florida Supreme Court in *King v. State*, 89 So. 3d 209 (Fla. 2012), the Court re-emphasized that the race of the challenged juror must be clearly identified on the record. "…King failed to identify the race of the similarly situated jurors who were seated on King's jury. Since the race of the seated juror's is unclear, King cannot show that the strike of juror 111 was racially motivated."

9. As the appellate court pointed out in the case of *King v. Bird*, 716 So. 2d 831 (Fla. 4th DCA 1998), it's no longer the law where in the exercise of peremptory challenges you

can strike anybody for any reason.

10. When the party striking a juror gives a factually erroneous reason for striking a juror, the appellate court will closely scrutinize the scope of the trial court's genuineness inquiry. *See West v. State*, 168 So. 3d 1282 (Fla. 4th DCA 2015). In *West*, the prosecutor initially stated he was striking a "Spanish" juror because she was unemployed. When defense counsel pointed out the juror was employed as a housekeeper and only her children were unemployed, the prosecutor then changed his reason for the strike, saying "we don't want any housekeepers on the jury." The trial court accepted both the original "unemployed" reason and the new "housekeeper" reason as being race-neutral without engaging in any genuineness inquiry. The appellate court reversed.

11. It should be noted however that not every exercise of a peremptory challenge requires an explanation. In *Roberts v State*, 937 So. 2d 781 (Fla. 2d 2006) the accused chose to represent himself at trial. The trial judge, seemingly frustrated with the process, considered that the courts time was being wasted, instructed the accused that he needed to have a "good reason" to challenge a prospective juror, and that it must be "supported by the record". Since there had been no "challenge to the challenge", the Second District disagreed with the trial court. The court stated, "[t]hus, the essence of the peremptory challenge is that it may be used for any reason, and ordinarily the trial court may not require a party to provide a reason for the use of a peremptory challenge. Rather, in order to effectuate the right to be tried by an impartial jury, the defendant may use his peremptory challenges against potential jurors "without giving his reason for not wishing them to pass upon his guilt or innocence."

12. Comments made during Voir Dire that serve no purpose other than to ingratiate an attorney to the potential jurors and "focus their attention on irrelevant matters" (such as mentioning that the attorney has a child the same age as the decedent) are clearly improper. *Bocher v. Glass*, 874 So. 2d 701 (Fla. 1st DCA 2004).

13. For a nice, current review of the entire process, see *Landis v. State*, 143 So. 3d 974 (Fla. 4th DCA 2014).

VI. PRESERVING YOUR PEREMPTORY OBJECTIONS

1. As with challenges for cause, potential errors concerning improper use of peremptory challenges may be waived if not properly preserved. To preserve the point on appeal, **the objecting party must not accept the jury without renewing the objection to the challenged juror**. *Disla v. Blanco*, 129 So. 3d 398 (Fla. 4th DCA 2013); *Boswell v. State of Florida*, 92 So. 3d 883, (Fla. 4th DCA 2012); *Joiner v. State*, 618 So. 2d 174 (Fla. 1993). See also, *Baccari v. State*, 145 So. 3d 958 (Fla. 4th DCA 2014) holding: "We find that appellant abandoned his earlier objection when he affirmatively accepted the jury at the time the jury was sworn and impaneled without reference to his prior objection". Further one cannot later argue that to renew the objection before accepting the jury would have been "futile". As the court pointed out in *USAA Cas. Ins. Co. v. Allen*, 17 So. 3d (Fla. 4th DCA

2009), "Without restating the objection to the trial court, the court cannot know that the party still maintains the previously voiced objection." However, if the objection is made in close proximity to the end of jury selection, "it could" be considered preserved without renewing the objection. *Gootee v. Clevinger*, 778 So. 2d 1005 (Fla. 5th DCA 2000). *But see Spencer v. State*, 162 So. 3d 224 (Fla. 4th DCA 2015) (distinguishing *Gootee* and limiting its application).

2. In the recent case of *McNeil v. State*, 158 So. 3d 626 (Fla. 5th DCA 2014), after the trial started, a juror informed the court that he recognized the defendant's son. He had not disclosed this during jury selection despite the jury being asked if they were acquainted with any of the potential witnesses. The juror indicated that while he did not know the son personally, he did recognize him, and assured the court that he could still be fair and impartial. The State's motion to strike the juror was denied, but the State was allowed to use a preemptory challenge on the juror. In deciding that the trial court had overstepped its bounds, the appellate court held: "Allowing the exercise of preemptory challenges to continue into a trial would encourage tactical gamesmanship, a result that we are unwilling to condone and one for which we feel compelled to provide a remedy."

3. The timeliness of the objection is critical in a criminal case, and apparently it may be less critical in a civil case. In *Baccari v. State*, 145 So. 3d 958 (Fla. 4th DCA 2014) objections were made timely but not renewed before the jury was sworn. After the jury was sworn, they were discharged for the evening and the next morning, the objecting party renewed his objections before taking any testimony. Although the trial court did not find the objections untimely, the appellate court did emphasizing the jeopardy attaches in a criminal case at the time the jury is sworn. The defendant relied on a civil case to argue the timeliness of the objection to the jury. The case referenced was *Sparks v. Allstate Construction, Inc.*, 16 So. 3d 161 (Fla. 3d DCA 2009). In the *Sparks* case the plaintiff did not renew his objection before the jury was sworn, but waited until the jury had returned from lunch and before there were any further proceedings. The appellate court allowed the late objection to stand because in that particular case, "there was no affirmative acceptance of the jury." This is a thin line and the better practice is to make your objections again before the jury is sworn.

VII. ALTERNATE JURORS

1. Rule 1.431 (g) of the Florida Rules of Civil Procedure provide for the selection of one to two alternate jurors. By rule they are subject to the same selection process as the main panel of jurors and of course serve only in the event of the incapacity or disqualification of one of the main jurors.

2. The order in which they are selected dictates the order in which they come to the main jury. That is to say that alternate juror number one is the first alternate to replace a member of the main jury, etc.

3. Rule 1.431 (g) (2) provides that each party has one peremptory challenge per "alternate juror or jurors". However if the number of the parties is unequal, then the plaintiff gets the same

number of peremptory challenges as the aggregate number of defendant parties. Of note, the alternate challenges can only be used against prospective alternate jurors. Remaining peremptory challenges remaining from selection of the main jury cannot by rule, be used to challenge alternate jurors.

4. Alternate jurors should be dismissed before the jury retires for their deliberations. In *Boblitt v. State,* 40 FLWD 2093, (1st DCA 2015), an alternate started deliberations after one of the main jurors was wrongfully dismissed by mistake. When the error was noted the jury was instructed to stop deliberations and on questioning the alternate jury indicated that the jury had just started to discuss the case but had not gotten very far into it. Mistrial motions were denied and the case was reversed on appeal.

VIII. <u>BACK STRIKING</u>

1. Rule of Civil Procedure 1.431(f) provides, "No one shall be sworn as a juror until the jury has been accepted by the parties or until all challenges have been exhausted."

2. Can there ever be a time, prior to a jury being sworn, that a litigant could not exercise a "back strike"? The answer is no.

3. The Florida Supreme Court in *Gilliam v. State*, 514 So. 2d 1098 (Fla.1987) determined that a trial judge cannot infringe upon a party's right to challenge any juror, whether it's for cause or a peremptory challenge, before the time that the jury is sworn. The Supreme Court went on to say that the denial of this right to challenge a juror at any time is reversible error per se. Although the *Gilliam* case is a criminal case, it has been adopted in several civil cases. *See Peacher v. Cohn*, 786 So. 2d 1282 (Fla. 5th DCA 2001). In the *Peacher* case, the Fifth District Court of Appeal held "We conclude that the right to exercise peremptory challenges is a fundamental part of a right to a fair trial and that the denial of that right should be treated as reversible error and the cause remanded for a new trial." In that case, the jury selection process took place without problem until the first six jurors were selected. The trial court asked if there were any more challenges and when none were voiced, then proceeded to select alternate jurors. At the time that the alternate jurors were being selected, the plaintiff attempted to exercise a strike against one of the original six. That was denied by the trial court and as mentioned, the appellate court reversed on that basis.

4. In a more recent case, *Van Sickle v. Zimmer*, 807 So. 2d 182 (Fla. 2d DCA 2002), the Second District Court of Appeal reiterated that while trial courts have discretion in determining the time and manner of challenging jurors and even the swearing of jurors, that nonetheless, a party may exercise a peremptory challenge at any time until the juror is sworn.

5. The Fourth District Court of Appeal recently reiterated the principle that back striking is permitted any time before the jury as a whole is sworn and the trial court may not circumvent this principle by swearing jurors in on an individual basis:

In *Tedder v. Video Electronics, Inc.*, 491 So.2d 533 (Fla.1986), the supreme court

> clearly held that the right to the unfettered exercise of a peremptory challenge includes *the right to view the panel as a whole before the jury was sworn.* "[A] trial judge may not selectively swear individual jurors *prior* to the opportunity of counsel to view as a whole the entire panel from which challenges are to be made." *Id.* at 535. *See also Lottimer v. N. Broward Hosp. Dist.*, 889 So.2d 165, 167 (Fla. 4th DCA 2004) (a party may exercise an unused peremptory challenge at any time prior to the jury being sworn; this is so even if the main panel has been accepted, the parties are selecting alternates, and one party chooses to exercise an unused peremptory to a juror on the main panel).

Aquila v. Brisk Transp., L.P., 170 So. 3d 924, 925-26 (Fla. 4th DCA 2015).

6. If a trial court improperly denies a litigant her right to back strike, the litigant must identify a specific juror on the panel whom she would have struck had she been given the opportunity to back strike; otherwise her objection is not preserved for appeal. *Id.* at 926.

IX. STRIKING THE ENTIRE VENIRE

1. When voir dire is conducted of a group, as opposed to questioning individual jurors out of the presence of the others, there is always a chance that the entire venire hears an answer that taints the entire group. The case of *Reppert v. State of Florida*, 86 So. 3d 525 (Fla. 2d DCA 2012) is illustrative. During voir dire one prospective juror responding to the court's questioning stated: "Most likely these individuals who go through the system have been doing some kind of criminal activity for a long time." Further questioning by the trial judge made clear that the juror had no personal knowledge of the defendant, but rather was just expressing a personal opinion. The motion to disqualify the entire panel was denied and on appeal, the district court made clear that, "When a prospective juror comments on a defendant's criminal history and expresses some knowledge of the defendant himself, it is an abuse of discretion not to strike the venire. However, when a prospective juror simply expresses a personal opinion of the criminal justice system, that opinion, without more, is usually insufficient to taint the remainder of the venire."

2. In order to preserve your Motion to Strike the entire Venire Panel, you must make the objection twice. Initially when the issue comes up for the first time, and again before the jury is sworn. The failure to do so, waive your right to later complain about the court's denial of your motion. See *Johnson v. State*, 141 So. 3d 698 (1st DCA Fla. 2014).

X. RESTRICTIONS ON VOIR DIRE

1. Florida Rules of Civil Procedure 1.430(b) provides "The parties have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The court may ask such questions of the jurors as it deems necessary, but the right of the parties to conduct a reasonable examination of each juror orally shall be preserved."

2. The obvious intent of Rule 1.430(b) is to afford the trial court some discretion in asking

questions of perspective jury members. The trial court's right to do so, however, is tempered by the right of each party to conduct a complete voir dire examination of each prospective juror and the failure of the trial court to permit such an examination is reversible error.

3. While a trial judge has the right to question prospective jurors, the judge's role in jury selection must not impair a counsel's right and duty to question prospective jurors. *Farrer v. State*, 718 So. 2d 822 (Fla. 4th DCA 1998). Even if the trial court questions prospective jurors on fundamental issues like burden of proof, presumption of interest, etc., it is error to prevent counsel from making similar inquiries on the basis that such an inquiry would be repetitive. *Sanders v. State*, 707 So. 2d 664 (Fla. 1998). The purpose of *voir dire* is to obtain a fair and impartial jury. *Hillsman v. State,* 159 So.3d 415, 420 (Fla. 4th DCA 2015). Although a trial court "has considerable discretion in determining the extent of counsel's examination of prospective jurors," it "must allow counsel the opportunity to ascertain latent or concealed prejudgments by prospective jurors." *Id.* at 419 (internal citations omitted). A trial court should also allow "questions on jurors' attitudes about issues where those attitudes are 'essential to a determination of whether challenges for cause or peremptory challenges are to be made...." *Id.* at 420.

4. Some courts have tried to impose arbitrary time limitations on voir dire examination and it has been widely held that such time limitations are inappropriate. *O'Hara v. State*, 642 So. 2d 592 (Fla. 4th DCA 1994); *Zitnick v. State*, 576 So. 2d 1381 (Fla. 3d DCA 1991).In the Second District case *Watson v. State*, 693 So. 2d (Fla. 2d DCA 1997) the trial court announced at the start of jury selection that each side would be limited to thirty minutes for jury selection. Importantly, neither side objected to the time limitation. The court held that there was no abuse of discretion. However the dissent by *Jd*. Schoonover, gives an exhaustive, and excellent review of the law on why the arbitrary time limit was an abuse of discretion. In *Rodriguez v State*, 675 So. 2d 189 (Fla. 3d DCA 1996) determined that the trial court had the discretion to set a time limitation on voir dire but reversed the trial court in this case since the time restriction was not announced before the start of the questioning. In the same vein, in *Roberts v State*, 937 So. 2d 781 (Fla. 2d 2006), the trial judge before trial, set no time limit on voir dire. The State took about an hour for its questioning. After the defendant, who was representing himself took about an hour, the State objected. The court proceeded to allow the defendant an additional ten minutes to complete his questioning. Because there was no announcement by the court of any intention to limit questioning to a certain amount of time, the Second District reversed the conviction.

5. In a civil case, *Carver v. Niedermayer*, 920 So. 2d 123 (4th DCA 2006), at the start of the trial, the judge announced for the first time that once he completed his preliminary questions of the prospective jurors, that each side would be limited to thirty minutes each for their questions. After objection, the Judge increased the time limit to 45 minutes. There was further objection and counsel pointed out that the court was limiting each party to approximately two to three minutes per juror. The trial judge was reversed for an abuse of discretion in that although a reasonable time limit for questions would be appropriate, such a limitation must be announced in advance of trial so that each party can be adequately

prepared.

6. The trial court does have the right of course to prevent inquiry which is repetitive, improper, or argumentative. *Stano v. State*, 473 So. 2d 1282 (Fla. 1985).

7. It is error to force trial counsel to start jury selection for the first time at 7:30 p.m. especially where the attorney represents that he got up early; has been in court all day; and that he is so exhausted, that his client will not be receiving competent representation, because of his fatigue. *Ferrer v. State,* 718 So2d 822 (Fla. 4th DCA 1998).

8. The trial court has the power to prevent the use of hypothetical questions during voir dire that attempt to extract commitments from prospective jurors on conclusions they would reach on certain "facts" in the case. *Jackson v. State,* 881 So. 2d 711 (Fla. 3d DCA 2004). However, it is perfectly appropriate for counsel to question the prospective jurors about their attitudes on particular legal theories which may be presented in the course of the trial. *Morris v State*, 951 So. 2d 1 (Fla. 3d DCA 2006) *Moore v State,* 939 So. 2d 1116 (Fla. 3d DCA 2006); *Williams v. State,* 931 So. 2d 999 (Fla. 3d DCA 2006); *Mosley v. State,* 842 So2d 279 (Fla. 3d DCA 2003).

9. It is error to deny a party the "right" to question prospective jurors individually, rather than as a group. *Francis v. State,* 579 So. 2d 286 (Fla. 3d DCA 1991).

10. To preserve your objection to a restriction on voir dire you must object to the panel before they are sworn or the objection is waived. See *Blanco v. State,* 89 So. 3rd 933, (3rd DCA 2015), and *Wallace v. Holliday Isle Resort & Marina*, 706 So. 2d 346 (3rd DCA 1998)

XI. JUROR'S FAILURE TO DISCLOSE LITIGATION HISTORY

1. On occasion, despite all genuine attempts to have potential juror's honestly answer questions about their background, (especially their litigation background,) honesty sometimes eludes them for some reason. The Florida Supreme Court in *De La Rosa v. Zequeira,* 659 So. 2d 239 (Fla. 1995), and again in *Roberts ex rel. Estate of Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002); the Third District Court of Appeal in *Pereda v. Parajon,* 957 So. 2d 1194 (Fla. 3d DCA 2007); the Fourth District Court of Appeal in *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 417 (Fla. 4th DCA 2014) set the following test to set aside a jury verdict based on juror non-disclosure: "Entitlement to a new trial on the basis of a juror's non-disclosure requires the complaining party to demonstrate that: (1) the information is relevant and material to jury service in the case; (2) the juror concealed the information during questioning; and (3) the failure to disclose the information was not attributable to the complaining party's lack of diligence".

2. A case from the Third District Court of Appeal demonstrates how the trial lawyer's lack of diligence in asking questions, and doing a public records search on potential juror's, may lead to trial lawyer liability to his client and certainly won't lead to a new trial in the underlying case. In *Tricam Industries, Inc. v. Coba*, 100 So. 3d 105 (Fla. 3d DCA 2012),

the trial court conducted part of the voir dire and questioned the venire and generally elicited responses about whether they had been sued. The responses to the questions were all in the personal injury context. There were no real follow-up questions by the plaintiff's attorney about non-personal injury litigation, such as collections, foreclosures, divorces, etc. Additionally, before the jury was sent out to deliberate, the trial judge suggested that the lawyers conduct a public records search on the juror's litigation history while the alternate juror was still available.

3. After an unfavorable verdict, the plaintiff's attorney conducted a search of the juror's litigation history and found that one juror had not disclosed information about his divorce, foreclosure, and collection history. The Third District Court of Appeal held that while, under the *Roberts* decision, trial attorneys are not categorically required to obtain litigation histories on the venire, trial lawyers are "permitted" to do so, and because in this case, the lawyer was given the opportunity to do so by the trial court, but refused, it was determined that the plaintiff's attorney did not meet the "due diligence" component of *Roberts.* The court also found that the plaintiff's attorney did not exercise due diligence in his questioning of the jurors as he made no effort to ask litigation questions relating to matters other than personal injury lawsuits.

4. Other decisions on the same topic are: *Borroto v. Garcia* 103 So. 3d 186 (Fla. 3d DCA 2012), holding that the trial court abused its discretion in not permitting a jury interview when a juror failed to disclose his car accident litigation history when asked a direct question by the judge. Also, *Morgan v. Milton*, 105 So. 3d 545 (Fla. 1st DCA 2012), holding that although there was non-disclosure by a juror in response to a direct question by the judge, a new trial was not appropriate since defense counsel did not strike other jurors who were involved in the same type of litigation.

5. Recently in another juror non-disclosure case, Villalobos *v. State*, 143 So. 3d 1042 (Fla. 3d DCA 2014) the court reviews the law on the subject and finds that the issues that need to be addressed are: is the information that was not disclosed, relevant and material to the jury service; whether the juror concealed the information during questioning; and whether the failure to disclose was the result of the complaining parties lack of due diligence?

6. The court in a recent medical malpractice case, *Weissman vs. Radiology Associates of Ocala, P.A.*, 152 So. 3d 754 (Fla. 5th DCA 2014) went out of its way to preserve a Plaintiff's verdict on the non-disclosure issue. There, the defendant's counsel asks the venire about lawsuits involving "credit issues." The appellate court held this was not precise enough to alert jurors to disclose bankruptcy filings. Clearly, from this opinion, unless precise questions are asked on very precise topics, appellate courts are not going to take away a jury's verdict pointing to the importance of discovering and reporting the data on non-disclosure prior to the completion of the trial.

7. The United States Supreme Court in a decision published in December, 2014 also weighed in on the non-disclosure issue. The Court in *Warger v. Shauers*, 135 S. Ct. 52 (2014) discussed Federal Rule of Evidence, 606 (b). In the *Warger* case, a juror had apparently lied during

jury selection and ultimately was elected foreperson for the jury's deliberations. After a verdict in the case, another juror contacted one of the attorneys and provided an affidavit detailing disclosures made by the foreperson during deliberations. The Supreme Court explained that since the disclosure of the foreperson's misconduct occurred (and was therefore discovered) only during jury deliberations, that because this was "intrinsic" to the jury deliberations and not extrinsic to the deliberations, the verdict would not be disturbed.

XII. EXTENSIVE PRE-TRIAL PUBLICITY

1. Extensive and prejudicial pre-trial publicity is most commonly a problem in criminal cases, but with some regularity now it seems in vogue to raise the specter of pre-trial publicity in civil cases as well. It is clear that where the venire has been exposed to prejudicial, inadmissible information in the press, that individual voir dire of the venire is the preferred way for the parties to discover if the publicity tainted the panel. The denial of a request for individual voir dire is likely to be reversed on appeal. The most important cases are: *Boggs v. State* 667 So. 2d. 765 (Fla. 2d DCA 1996); *Bolin v. State*, 736 So. 2d 1160 (Fla. 1999); and *Kessler. v. State*, 752 So. 2d 545, (Fla. 1999). For a recent review of the applicable law, see: *Dippolito v. State*, 143 So. 3d 1080(Fla. 4th DCA 2014).

XIII. PREMATURE DELIBERATIONS

1. During a criminal trial an alternate juror reportedly spoke with a regular juror and told the juror how she would vote. The trial Judge made inquiry and the regular juror denied the conversation took place. The trial at that point had not been completed. The question for the trial court is whether there has been juror misconduct in the form of premature deliberations?

2. Where premature deliberations are shown, the burden shifts to the non-moving party to show that the moving party was not prejudiced. The first issue for the trial court is whether there has been enough of a showing to allow for an interview of the jury.

3. In *Williams v. State*, 793 So. 2d 1104 (Fla. 1st DCA 2001) and in *Ramirez v. State*, 992 So. 2d 386 (Fla. 1st DCA 2001) the court held that there must be a showing that multiple jurors were not only discussing the case, but discussing what would be a proper verdict, before the court should allow the jury to be interviewed. In *Reaves v. State*, 823 So. 2d 932 (Fla. 2002) and again in *Gray v. State*, 72 So. 3d 336 (Fla. 4th DCA 2011), it is clear that the efforts by one juror to discuss his opinions with other jurors is insufficient to require an interview of the jury.

4. The Florida Supreme Court in *Sheppard v. State*, 151 So. 3d 1154 (Fla. 2014) makes it clear that objections regarding premature deliberations are waived if not specifically raised with the trial court.