VOIR DIRE DO's AND DON'Ts

Rule of Professional Conduct 4-3.4(b) and (e)	***A lawyer shall not...fabricate evidence...in trial, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or caselaw, allude to any matter that the lawyer does not believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of the accused.***	
Fla. R. Civ. Pro. 1.431 (b)	Rule 1.431(b) of the Florida Rules of Civil Procedure authorizes the judge and the trial lawyers to question the prospective jurors on voir dire. Generally, the trial judge has discretion to decide how the voir dire examination will be conducted, the types of questions that will be permitted, and the extent of the questioning.	
Purpose of Voir Dire	Parties have a right to obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice.	
The "Right Jury"	Personal questions to the jury are extremely important, as they will elicit information about the juror's background and life choices, which will allow the attorneys to better understand the way the juror thinks and what he or she will be receptive to. 1. Educational background, starting with high school. 2. Employment background from high school on, including reasons for career changes and plans for future employment/career changes. 3. Life choices – what the juror likes to do in their free time when they are not working, i.e. family time, travel, reading (what), church, etc. *See* Becker-Avin, Marni, *The Real Purpose of Voir Dire* (a copy of which is attached).	
EXAMPLES	**PROPER**	**IMPROPER**
Inadmissible evidence / credibility of witness	Parties have a right to examine jurors orally on their voir dire, even if the court asks questions.[1]	Voir dire cannot be used to provide inadmissible evidence. For instance, in an auto negligence case, where damages were the only issue, defense counsel questioned the jury on whether or not any of them had read investigative reports in the newspaper regarding the plaintiff's physician expert. The 1st DCA found that line of questioning was improper because those negative reports were not going to be admissible at trial and the defense verdict was overturned.[2]
Improper suggestion re: irrelevant matters / insurance	Where attorney for defendant inquired of prospective juror what his occupation was, and he answered that it was life insurance, and attorney asked whether prospective juror owned stock in any casualty insurance company, plaintiffs' counsel had right to determine whether prospective juror had interest in defendant's liability insurer, and there was not such an "injection of subject of insurance into minds of other jurors" as to unduly prejudice insurer, in absence of anything in record to indicate that plaintiff's counsel intentionally and blatantly injected insurance into trial.	Suggestive comments are improper on voir dire. For example, counsel for the plaintiff cannot blatantly or intentionally inject insurance into a trial or "implant the thought of insurance coverage" in the juror's minds by asking questions ostensibly related to another issue, such as the employment of a juror or their spouse. For example, the 2nd DCA held that plaintiff's counsel's repeated questions regarding the insurance business to a juror who clearly stated he was in real estate and not the insurance business were improper references to insurance.[4]

	The test is whether the sequence of questions are propounded and given in good faith, giving due regard to all the circumstances, and whether such interrogation is fairly and reasonably calculated to satisfy the ultimate purpose of such inquiry.[3]	
Misleading statement	Always be honest (and be yourself) with a jury during voir dire.	Defense counsel's statement, "I'm a consumer justice attorney, and I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate," was improper as it mislead the jury since the defense lawyer had been hired by an insurance company.[5]
Hypothetical questions	Hypothetical questions that correctly state the applicable law are proper. For instance, defense counsel can ask juror about their willingness to accept a particular defense or determine a defendant is not liable if plaintiff has not met all necessary elements of their claim, i.e. causation.[6]	Hypothetical questions which incorporate trial evidence and ask how jurors would rule on that evidence are improper.[7]
Hypothetical questions	Hypothetical questions designed to determine whether the jurors could correctly apply the law are permissible.[8]	It is improper to attempt to extract from a juror during voir dire what the juror's decision would be if there was no particular type of evidence presented by the defense, i.e. scientific evidence or expert testimony, especially when there is no such evidence is in the case. It is not proper to propound a hypothetical question purporting to embody testimony that is intended to be submitted, covering all or any aspects of the case, for the purpose of ascertaining how a juror will vote.[9]
Bias	A party may inquire into bias bearing on a matter that is at the heart of a defendant's case. For example, defense counsel can inquire about possible bias against a defendant for things which are likely to be disfavored by a large segment of the public or any matter critical to the defense, i.e. criminal charges, professional discipline, loss of license, etc.[10]	Do not cross the line and ask it in a manner which attempts to pre-try the facts of the case.[11]
Juror's views on damages	A party may inquire about a juror's views on damages, including non-economic damages.[12]	A jury trial must be focused solely on the merits of the case, and it is not appropriate to appeal to a jury's sympathy; appeals to sympathy and attempts to inject a party's wealth, or lack thereof, are improper.[13]

[1] *Sisto v. Aetna Cas. & Sur. Co.*, 689 So. 2d 438 (Fla. 4th DCA 1997).

[2] *Carroll v. Dodsworth*, 565 So. 2d 346 (Fla. 1st DCA 1990).

[3] *Sutton v. Gomez*, 234 So. 2d 725 (Fla. 2d DCA 1970).

[4] *Johnny Roberts, Inc. v. Owens*, 168 So. 2d 89 (Fla. 2d DCA 1964).

[5] *Hollenback v. Hooks*, 993 So. 2d 50 (Fla. 1st DCA 2008).

[6] *Franqui v. State*, 699 So. 2d 1312, 1322 (Fla. 1997); Pait *v. State*, 112 So. 2d 380 (Fla. 1959).

[7] *Jackson v. State*, 881 So. 2d 711 (Fla. 3d DCA 2004).

[8] *Moore v. State*, 939 So. 2d 1116, 1118 (Fla. 3d DCA 2006).

[9] *Jackson,* 881 So. 2d 711.

[10] *Ingrassia v. State*, 902 So. 2d 357 (Fla. 4th DCA 2005).

[11] *Ingrassia*, 902 So. 2d 357.

[12] *Sisto v. Aetna Cas. & Sur. Co.*, 689 So. 2d 438 (Fla. 4th DCA 1997). If a prospective juror expresses a definite bias against awarding intangible damages, plaintiffs have a basis for requesting that the prospective juror be excused for cause, depending on the exact questions asked and answers given. *See Goldenberg v. Regional Import & Export Trucking Co.,* 674 So.2d 761 (Fla. 4th DCA 1996); *cf. Fazzolari v. City of West Palm Beach,* 608 So.2d 927 (Fla. 4th DCA 1992), *review denied,* 620 So.2d 760 (Fla.1993). At the very least, plaintiffs have the opportunity to explore the depth of the bias or the basis for the attitude in order to make a determination whether to exercise a peremptory or for cause challenge. *See Skiles v. Ryder Truck Lines, Inc.,* 267 So.2d 379 (Fla. 2d DCA 1972), *cert. denied,* 275 So.2d 253 (Fla.1973).

[13] *Batlemento v. Dove Fountain, Inc.*, 593 So.2d 234, 242 (Fla. 5th DCA 1991).

Peremptory Challenges DO'S AND DON'TS

Rule of Professional Conduct 4-8.4(d)	***A lawyer shall not "engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against…jurors…on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic." (Rule of Prof. Conduct 4-8.4(d))[1]*** ***It is…impermissible to exercise challenges on the basis of race, gender, or ethnicity.[2]***
Equal Protection Clause	"In Florida, potential jurors, as well as litigants, have an equal protection right to jury selection procedures free from discrimination based on gender, race, or ethnicity." *Welch v. State*, 992 So.2d 206, 211 (Fla.2008). Founded on the protection afforded by the Equal Protection Clauses of the United States and Florida Constitutions, litigants are entitled to a jury selection process free of discrimination. *See U.S. Const. amend. XIV, § 1; art. I, § 2, Fla. Const.*
***Melbourne's* three step analysis**	In *Melbourne v. State*, 679 So.2d 759 (Fla. 1996), the Florida Supreme Court created the following analysis which must be used by Florida courts to determine the appropriateness of peremptory challenges (the analysis is used whenever a challenge is contested whether it is the basis of race, gender, ethnicity, or anything else): Step 1: A party objecting to the other side's use of peremptory challenge on racial grounds must: a) make a timely[3] and proper[4] 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 to 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.[5] The party exercising the challenge must come forward with a neutral reason for making the strike.[6] 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. (This step focuses on the genuineness of the explanation.)[7]
***Slappy's* non-exclusive list of factors**	In *State v. Slappy*, 522 So. 2d 18 (Fla. 1988), the Florida Supreme Court set forth a "non-exclusive" list of factors to guide trial judges in evaluating whether or not a proffered reason is nothing more than a pretext, and therefore inappropriate: 1. Alleged group bias not actually shown to be shared by juror in question; 2. Either failure to examine, or a perfunctory examination of the juror (where the juror was not questioned by either the court or opposing counsel) 3. Singling the juror out for special questioning designed to evoke a particular response; 4. The claimed reason for the challenge is not related to the particular case; or 5. The challenge is equally applicable to other jurors who are not challenged.

EXAMPLES	PROPER	IMPROPER
Sufficiency of	"Your Honor, I object, he's a man. She's	"That's ridiculous! I mean, you're following the law,

objection	trying to get more women on the jury."[8]	but that's ridiculous!"[9]
Timing of objection	In order to preserve a *Neil* issue for review, it is necessary to call the court's attention to it before the jury is sworn, by renewed motion or by accepting the jury subject to the earlier objection.[10]	Only making the objection once and failing to renew it before the jury is empanelled.
Gender	You must use a completely gender-neutral reason for striking a woman, i.e. she is employed at a plaintiff's firm, she sued her prior boss, etc.	Attorney's comment that women were more emotional is not a gender-neutral reason for striking women.[11]
Ethnicity	Strike against Hispanic juror was sustained where the person did not appear to speak or understand English very well.[12]	Striking Jewish juror based solely on his ethnicity in community where Jewish people make up 10% of population was impermissible discrimination based on ethnicity.[13] It is improper to strike someone who practices the Muslim religions and/or is Pakistani.[14]
Occupation as gender neutral reason	Peremptory challenge of Hispanic female because she had just completed law school and sat for the Florida Bar exam was gender and ethnically neutral.[15]	Prospective juror's occupation is not a valid reason for challenge unless there is some connection between the occupation and the underlying facts of the case.[16] However, since *Melbourne*, several courts have allowed occupation alone (in the absence of connection with underlying facts), i.e. that as a lawyer, to present as a neutral reason for exercising a challenge.
Race	Explanation for a strike must be truly non-racial, but it *does not* have to be objectively reasonable. For example, race-neutral reasons for striking a juror can include a heavy accent and being too quiet.[17]	"I don't like the way [the juror] responded to my questions...and [the juror] doesn't appear to be interested in this case or sitting on this jury" were not clear and reasonably specific racially neutral explanations.[18]
Race	In a medical malpractice case, race-neutral reason for striking jurors included that one juror was hospital employee and her relative was a doctor and another juror had been married to a neurologist.[19]	State's explanation that it was striking sole remaining African American member of the venire because she read the Bible was not racially neutral because the juror was never questioned about her religious beliefs and their effect on her ability to serve as a juror.[20]
Race	A juror's past involvement in similar incidents as the one being tried may constitute a race neutral explanation.[21] For example, a prospective juror's past involvement in car accidents has been determined to be race neutral to exclude him in an auto accident case.[22]	Allowing the prosecutor's strike of an African American juror because the prosecutor did not want an African American to evaluate a black-on-black crime was ineffective assistance of counsel.[23]
Race	<u>Facially</u> neutral reasons can include an attorney's perception that a juror was unwilling to look the attorney in the eye while answering questions, was not paying attention, was unable to stay awake, and seemed to have a hostile or unfriendly tone.	Strike of African American prospective juror because she appeared "disinterested" was not supported by the record and therefore not racially neutral. 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

	(Will still be subject to an evaluation of pretext.)[24] Concern for the young age of the juror, or concern that potential loss of income during jury service, might cause lack of attention during the trial, were race neutral reasons to use a peremptory challenge.[25]	peremptory challenge.[26]
Race	Where an African American juror indicated he might have difficulty setting aside sympathy when he listened to the evidence.[27]	

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[1] In both civil and criminal cases, peremptory challenges based on the juror's race, ethnicity, or gender is prohibited. *Dorsey v. State* 868 So. 2d 1192, 1202 (Fla. 2003); *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

[2] *Abshire v. State*, 642 So. 2d 542, 543-44 (Fla. 1994).

[3] The objection has to be made at any point prior to the acceptance of the jury. Objections must be renewed prior to the jury's empanelment. *Watson v. Gulf Power*, 695 So. 2d 904 (Fla. 1st DCA 1997). 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).

[4] There are no magic words that need to be used to convey an objection to the court as long as the attorney making the objection timely communicates to the court the alleged improper use of a peremptory challenge. *Harrison v. Emanuel*, 694 So. 2d 759 (Fla. 4th DCA 1997). For example, after hearing the State use challenge a juror for not looking him in the eye, being former military, and appearing to be conservative, the defense attorney replied, "That's ridiculous. I mean you're following the law, but I think that is ridiculous." The 1st DCA held that the defense attorney's response was not sufficient to put the trial judge on notice that defense counsel was objecting to the State's use of a peremptory challenge. *Schummer v. State of Florida*, 654 So. 2d 1215 (Fla. 1st DCA 1995).

[5] It is reversible error for the court not to require a Step 2 inquiry. *Streeter v. State*, 979 So. 2d 428 (Fla. 3d DCA 2008).

[6] *State v. Slappy*, 522 So. 2d 19 (Fla. 1988).

[7] *Braggs v. State*, 13 So. 3d 505 (Fla. 3d DCA 2008).

[8] *Carrillo v. State,* 962 So. 2d 1013, 1015–16 (Fla. 3d DCA 2007); *Sabine v. State*, 58 So. 3d 943 (Fla. 2d DCA 2011).

[9] *Schummer,* 654 So. 2d 1215.

[10] *Mitchell v. State*, 620 So. 2d 1008 (Fla, 1993).

[11] *Abshire,* 642 So. 2d at 544.

[12] *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000).

[13] *Joseph v. State*, 636 So. 2d 777 (Fla. 3d DCA 1994).

[14] *Olibrices v. State*, 929 So. 2d 1176 (4th DCA 2006).

[15] *James v. State*, 768 So.2d 1221 (Fla. 3d DCA 2000).

[16] *Johnson v. State*, 600 So. 2d 32 (Fla. 3d DCA 1992).

[17] *Young v. State*, 744 So. 2d 1077, 1084 (Fla. 4th DCA 1999).

[18] *American Security v. Hettel*, 572 So. 2d 1020 (Fla. 2d DCA 1991).

[19] *Mitchell v. CAC-Ramsey Health Plans, Inc.*, 719 So. 2d 930 (Fla. 3d DCA 1998).

[20] *Haile v. State*, 672 So. 2d 555 (Fla. 2d DCA 1996).

[21] *Adams v. State*, 559 So. 2d 1293 (Fla. 3d DCA 1990), superseded by statute on other grounds.

[22] *Smellie v. Torres*, 570 So. 2d 314 (Fla. 3d DCA 1990).

[23] *Baber v. State*, 776 So. 2d 309 (Fla. 4th DCA 2000).

[24] *Dean v. State*, 703 So. 2d 1180 (Fla. 3d DCA 1997).

[25] *Safford v. State*, 911 So. 2d 253 (Fla. 3d DCA 2005).

[26] *Dorsey,* 868 So. 2d 1192 (Fla. 2003); *Brown v. State*, 995 So. 2d 1099 (Fla. 3d DCA 2008).

[27] *Rodriguez v. State*, 826 So. 2d 494 (Fla. 4th DCA 2002).