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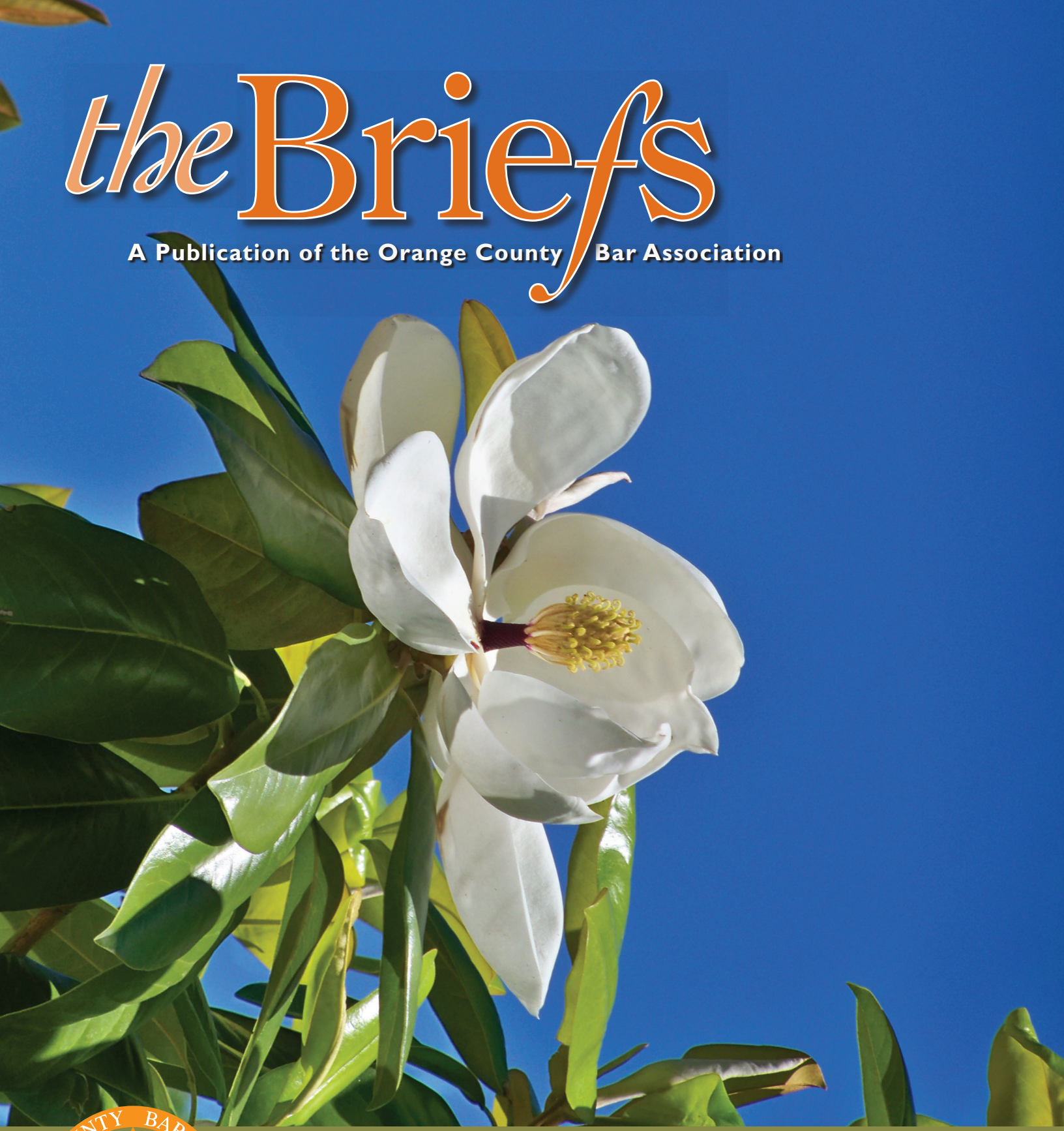

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Preservation of Error for Appeal: Jury Selection

This article is the third in a series by the Appellate Practice Committee of the Orange County Bar Association on preservation of error at various stages of trial court proceedings. Jury selection presents unique preservation issues because of the procedure that must be followed to properly preserve objections for review. As explained below, preservation of a challenge to a prospective juror requires more than a contemporaneous objection. Furthermore, even if a reviewing court concludes that a juror who actually served on a jury should have been stricken for cause or that a peremptory challenge was improperly used, the court will not reverse for a new trial if the error was not preserved.

Challenges for Cause

The test for determining juror competency is whether a potential juror can set aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.[1] When a party seeks to strike a potential juror for cause, the trial court must allow the strike when there is any reasonable doubt the juror would be able to render an impartial verdict based solely on the evidence and the law.[2] Uncertainties should be resolved in favor of excusing the juror.[3]

The Florida Supreme Court has established that the improper denial of a motion to excuse a juror for cause is a reversible error, *provided the error is properly preserved* (emphasis added).[4] The standard of review is manifest error.[5] To obtain reversal on appeal, however, a party who has preserved a cause challenge must demonstrate both that the trial court erred in determining the juror's competency and that the denial of the challenge caused prejudice.[6] Where the record demonstrates a reasonable doubt about a juror's ability to be impartial, there is an abuse of discretion by the trial court in denying the cause challenge.[7] To establish that this error caused prejudice, however, the party must show that he exhausted all peremptory challenges and that an objectionable juror served on the jury. The juror who served need not be legally objectionable (excusable for cause); rather, a party need only show the same type of harm that peremptory challenges are intended to cure (a juror whom the party suspects, but cannot prove, is biased).[8] Stated another way, when the trial court improperly denies a cause challenge, thus requiring a party to use a peremptory challenge to strike the potential juror, the harm arises when another juror is seated whom the party would have stricken had he not "wasted" his peremptory challenge. Therefore, if the trial court grants the same number of additional peremptory challenges as cause challenges erroneously denied, there is no prejudice.[9]

The elements required to preserve challenges for cause can be summarized as follows: (1) a timely motion to strike the juror for cause; (2) the improper denial of the motion; (3) the exhaustion of all peremptory challenges during the jury selection process; (4) a request for additional peremptory challenges; (5) an identification of the juror(s) to be stricken with the additional challenges; (6) denial of the request for additional challenges; and, (7) service by the objectionable juror on the jury.[10]

Even if all the above criteria are met, yet another step is required to preserve cause challenges for appellate review. Jury selection objections must be renewed before the jury is sworn.[11] Acceptance of the panel without objection will waive any error that may exist. Typically, a judge will ask both sides if they accept the jury. If a judge fails to do so, however, it is incumbent upon the trial attorney to renew his objection; otherwise it will be presumed that the objecting party abandoned any prior objection and was satisfied with the jury.[12]

The requirement that objections be renewed prior to the jury being sworn is not a mere technicality designed to place onerous burdens on overstressed trial counsel. The Florida Supreme Court has explained the purpose of the rule as follows:

> [R]enewing an objection before the jury is sworn gives the trial court one last chance to correct a potential error and avoid a possible reversal on appeal. It also allows counsel to reconsider the prior objection once a jury panel has been selected. Without such a requirement, the defendant "could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial."[13]

Thus, if the trial judge asks whether the jury is accepted, any such acceptance must be qualified as subject to prior-stated objections. If the judge does not pose the question, trial counsel must affirmatively renew any objections to preserve those issues for appeal.

Peremptory Challenges

Generally, peremptory challenges may be used for any reason. However, they cannot be used

in a discriminatory manner to exclude potential jurors based on race, ethnicity or gender.[14] Such discriminatory use of peremptory challenges violates the right to trial by an impartial jury under the Florida Constitution.[15]

If a litigant suspects an opposing party is using a peremptory challenge to improperly discriminate, he must follow the procedure set out by the Florida Supreme Court: (a) make a timely objection stating that the challenge is being used in a discriminatory manner; (b) show that the venire person is a member of a distinct racial or ethnic group; and (c) request that the court ask the striking party its reason for the strike.[16] If these initial requirements are met, the court must ask the proponent of the strike to explain the reason for the strike. (This is commonly referred to as a *Neil* inquiry.) If the proponent of the strike gives a "race-neutral" explanation and if the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike should be sustained.[17] In considering the explanation given, the trial court should focus on its genuineness rather than its reasonableness.[18] The burden of persuasion throughout the process is on the opponent of the strike who must prove purposeful discrimination against a protected class.[19] There is a presumption that peremptories will be exercised in a nondiscriminatory manner.

Determining whether a prospective juror is a member of a cognizable class is a matter of fact and the trial court has discretion in making such a determination.[20] However, a court should not conduct a *Neil* inquiry based solely on a juror's surname. It is error for a trial court to deny the use of a peremptory challenge following such an inquiry where there is no support in the record showing that the juror is in fact a member of a cognizable class.[21] While a request for a *Neil* inquiry may be sufficient without identifying the particular protected class if it is "obvious" to the trial court which minority group is in question, the proponent of the strike (the one seeking to use a peremptory challenge) should demand that the class be identified if it is unclear. Also, if it is questionable whether the class identified is a "distinct racial or ethnic group" or whether the juror falls within it, the proponent of the strike should object to the *Neil* inquiry to preserve error on this issue.[22]

Also, if the race-neutral explanation given by a litigant in support of a peremptory strike is based upon erroneous facts, any challenge to the striking of that juror based on the factual inaccuracy will be waived unless the error is brought to the attention of the trial court.[23]

For example, in a recent Florida Supreme Court case, the defendant claimed the trial court erroneously accepted the state's race-neutral explanation for striking a prospective juror. The reason given by the prosecutor was that, according to the juror's questionnaire, the juror's brother had a pending drug charge. In fact, the questionnaire stated her brother was facing only the possibility of a disorderly conduct charge. However, because the defense failed to call the trial court's attention to the inaccuracy, the defense waived its challenge on appeal to the state's peremptory strike of the juror.[24]

As with challenges for cause, any *Neil* objections must be renewed before the jury is sworn.[25] If a litigant affirmatively accepts the jury without reservation of earlier-made objections or fails to renew those objections, they will be waived. Renewing a *Neil* objection apprises the trial court that the litigant still believes a reversible error has occurred. The trial court then has the opportunity to either recall the challenged juror for service on the panel (a proper remedy for a *Neil* violation), strike the entire panel and begin anew, or stand by its earlier ruling.[26]

Similarly, any objections to the overall method of jury selection, such as a court's refusal to allow the use of all peremptory challenges, must be renewed prior to the jury being sworn. A party must object to the jury as finally composed in order to preserve jury selection issues for appeal.[27]

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[1] *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007) (citations omitted).

[2] *Id.*

[3] *Id.*

[4] *Hill v. State*, 477 So. 2d 553 (Fla.), cert. denied, 485 U.S. 993 (1988).

[5] *Carratelli*, 961 So. 2d at 319.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 319 n.4.

[10] *Milstein v. Mutual Security Life Insurance Company*, 705 So. 2d 639 (Fla. 3d DCA 1998) (Sorondo, J., specially concurring) (*citing Trotter v. State,* 576 So. 2d 691 (Fla. 1990); *Jones v. State*, 660 So. 2d 291 (Fla. 2d DCA 1995)).

[11] *Carratelli*, 961 at 319 n.3 (Fla. 2007); *Joiner v. State*, 618 So. 2d 174, 176 (Fla. 1993).

[12] *Milstein*, 705 So. 2d at 641.

[13] *Carratelli*, 961at 319 (*quoting Joiner*, 618 So. 2d at 176 n.2).

[14] *Smith v. State*, 59 So. 3d 1107, 1111 (Fla. 2011).

[15] *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984); *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d DCA) (upholding right to an impartial jury in a civil case), cause dismissed, 469 So. 2d 748 (Fla. 1985).

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

[17] *Id.*

[18] *Id.* Statements such as "I preferred other jurors" and "I don't like him" or "I have a bad feeling about him" have been determined to be "insufficient to rebut [a party's] assertion that the exercise of a peremptory challenge was racially motivated." *Joiner*, 618 So 2d at 175; *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997) (noting that the trial court's determination turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous).

[19] *Id.*; *Smith*, 59 So. 3d at 1112-13.

[20] *Smith*, 59 So. 3d at 1115.

[21] *Id.*

[22] *Smith*, 59 So. 3d at 1114-15 (distinguishing *Franqui v. State*, 699 So. 2d 1332, 1335 which held that the trial court properly conducted a *Neil* inquiry, particularly since there was never any contention made to the trial court that the prospective juror was not a member of a cognizable minority or that there should not be a *Neil* inquiry).

[23] *King v. State*, No. SC09-2421, 2012 Fla. Lexis 302 (Fla. Feb. 9, 2012).

[24] *Id.* at *50-51.

[25] *Joiner*, 618 So. 2d at 176.

[26] *Id.*

[27] *Ter Keurst v. Miami Elevator Co.*, 486 So. 2d 547, 550 (Fla. 1986).