Annoying things lawyers do over and over

(1) Asking a witness, especially a party witness, to read out loud from a document that is in evidence.

This is an annoying waste of time, and if asked of an adverse party witness, certain to result in evasive, nonresponsive, self-serving and argumentative answers from the witness.

Asking a witness to read out loud from a document in evidence is probative of nothing except that the witness is literate and can read, which is never an issue anyway.

If the document is not in evidence, the witness cannot read out loud from it under any circumstances. The witness can look at it to refresh her memory, for instance, or look at it and read it silently if asked to identify a document, but until the document is in evidence, the witness cannot read out loud from it.

After a document has been admitted into evidence, by stipulation or by authentication and identification and relevance, if an advocate wishes some part of the document to be highlighted to the finder of fact, the jury or the judge in a bench trial, the advocate can publish the significant portions to the finder of fact, which means let the jury or the judge look at it and read it silently to themselves.

This is the correct procedure for photographs and it is also the correct procedure for written documents or portions of written documents: publish the evidence to the finder of fact, which means hand it to the finder of fact and give the jury or the judge a chance to read it. An advocate wants the document in evidence so she goes through the process of admitting it, but it does them no good if the advocate does not also give the jury or the judge as much time during the presentation of the evidence as is needed to read the document. Many lawyers seem to think juries and judges absorb printed matter as fast as a photocopier and comprehend it just as quickly. I assure you, we do not. And it is entirely appropriate to point out to the finder of fact the salient provisions that are relevant to the issues during the presentation of the evidence.

It is not proper to ask a witness to read out loud from some portion of an admitted document, except to prove the witness can read, which is not an issue. The entire document is evidence after it is admitted. It is then appropriate during the presentation of a party's evidence to ask the finder of fact to note this provision or that provision in the document in evidence. It is not appropriate to ask a witness to do this.

For reasons that escape me, many lawyers think it is very effective lawyering to ask an adverse party witness to read from a document in evidence in an attempt to get the adverse party to admit to some fact that suggests he is untruthful or that is contrary to the facts supporting his case.

However, this is very ineffective lawyering. The adverse party is especially on guard to admit nothing and deny everything when questioned by the other party's lawyer. His answers will be defensive, evasive, nonresponsive, self-serving and argumentative. He will not answer the questions. Rather, his answers will underscore and repeat the facts that support his case, over and over.

As a result, the questioner of an adverse party will double down and get more forceful and leading and she will start asking objectionable questions that assume facts that are not in evidence, to the point that the lawyer is testifying and the witness is admitting nothing and both become quite angry. The questioner bores in because, it seems, she is shocked, shocked, I say, to

learn that the adverse party will not happily admit what she wants him to admit. Who could have seen that coming? Well, just about any one. At that point, the finder of fact stops listening because what lawyers say when asking questions is not evidence and nothing probative is coming out of the mouth of the adverse witness.

It is much more effective to not ask the adverse party about the suggestion of untruthfulness in a document in evidence or a provision of a document in evidence that weakens his case, and thereby give him an opportunity to explain it away with a torrent of defensive, unresponsive and argumentative answers. Instead, the better practice is to publish the significant part of the document in evidence to the finder of fact and leave the suggestion of untruthfulness or fact contrary to the other party's case exposed to the finder of fact. Then the other party must either respond with further testimony or they will leave that suggestion of untruthfulness or contradiction in the evidence before the finder of fact. Then in final argument the lawyer should pick up that suggestion and drive it home to the finder of fact: the evidence is contradictory and inconsistent and suggests the adverse party is not credible or the facts supporting his case are not what he claims.

In final argument, the adverse party witness cannot give any more testimony. He cannot try to explain away the inconsistencies and contradictions with a verbose torrent of nonresponsive, evasive and argumentative answers to a series of questions that are more and more heated and less and less effective and less and less probative.

(2) Anticipating the defense.

Many plaintiffs in bench trials make the mistake of anticipating the defense and start their case by proving their reply to the defense, which only serves to highlight the defense while ignoring the evidence of the plaintiff's case in chief. The plaintiff has the advantage of first impression, an advantage that is thrown away by anticipating the defense to their complaint.

Plaintiffs should always prove the allegations of the complaint or petition first, let the defense prove the defense, and then prove the facts of the reply.

(3) A plaintiff calling the adverse witness as the plaintiff's first witness.

This is a variation on (2) above that is very common in dissolution of marriage and paternity cases. This is always a mistake.

Again, the petitioner has the advantage of the first impression. The petitioner should prove her case in chief first: the petitioner wants alimony, which requires proof of financial need for support and an ability of the respondent to pay. Prove those facts first and then let the respondent attempt to prove he has no financial need or he does not have the ability to pay.

Many petitioner's lawyers seeking alimony call the respondent opposed to alimony as the petitioner's first witness in order to prove he has the ability to pay, which overlooks she must first prove financial need before the decision moves to a determination of his ability to pay. This also throws away the petitioner's advantage of the first impression.

When questioned about his ability to pay, the respondent adverse party witness will answer all of the petitioner's lawyer's questions concerning his income and ability to pay by proving his case, which is that he cannot pay, that he does not have the ability to pay. His answers will all be evasive, nonresponsive, argumentative and vague. The petitioner's lawyer will double down as if she is shocked, shocked, I say, to learn that the respondent does not

readily agree that he has the ability to pay. It is most shocking of an adverse party to decline to admit the other party's facts. Who would not be indignant at such an afront? Who could have seen that coming?

Well, just about anyone who has spent any time in a courtroom. The better practice is for the petitioner to prove her case. First, prove financial need. Then prove the respondent's ability to pay from evidence that does not require calling the respondent as a witness or that requires him only to identify certain documents: his pay stubs, his W-2 forms, his 1040 forms, his financial affidavits, his loan applications for his new bass boat, etc. Then let him try to prove he does not have the financial ability to pay. Do not let him try to prove it during the petitioner's case in chief by nonresponsive answers, which will be the inevitable result of calling him as an adverse party witness and asking him to do more than just identify financial documents that the petitioner needs to have admitted to prove an ability to pay. The least effective way for a petitioner to prove the respondent's income is to call the respondent as an adverse witness and ask him what his income is, yet lawyers do this over and over and over in dissolution cases.

(4) Over broad requests to produce under Rule 1.350.

I deny motions to compel over broad requests to produce under Rule 1.350. I sustain objections to over broad requests to produce, although a surprising number of lawyers fail to object to over broad requests within 30 days of service. I do not know why. Such requests are improper and they are not authorized by the rule.

Over broad requests to produce are very popular with lawyers. I see them often. I saw them often when I was a lawyer. I always objected to them. As a judge, I see far too many of them.

Such a request consists of a standard, boilerplate paragraphs usually attached as "Schedule A," running on for many pages that request "all documents" or "all records" within categories, such as, bank accounts, tax returns, financial statements, correspondence, etc. These boilerplate paragraphs are written so that they ask for every conceivable record of the other party within the broad categories. These paragraphs do not ask for any "designated documents," which is what the rule requires.

A "designated document" is a document that is identified with sufficient particularity to suggest that it exists. *E.g.*, the plaintiff's complete Form 1040 for calendar year 2013. A request for "all documents" within categories does not demonstrate that any of the requested documents actually exist.

A request for "all documents" just to look into the pages and see what might be there is a "fishing expedition," which is not allowed by the discovery rules. Therefore, such a request is over broad, unduly burdensome and improper.

In a family case, a request is also duplicative and redundant to the extent that it asks for documents that are required to be disclosed under Rule 12.285, and so it is improper because it asks for the same document twice. *E.g.* the petitioner's complete Form 1040 for calendar year 2013, which Rule 12.285 requires both parties to exchange without being asked. These duplications are unnecessary litigation. A request for the same documents twice is a duplication of effort, a waste of time, and needless litigation. Trial courts in family cases are obligated to reduce unnecessary litigation at every opportunity. *See, e.g., Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991). So, I deny over broad requests to produce to limit needless litigation

expense to the family.

If the argument is made that "All he has to do is file a response saying he has already disclosed some of these under Rule 12.285," this begs the question, which is, why did a party request these duplications in the first place? The court should not require a party to respond to duplicative and unnecessary discovery requests because that would encourage unnecessary litigation. On the other hand, if the a party has failed to comply with the disclosure requirements of Rule 12.285, then the other party should have brought a motion to compel under Rule 12.285(f).

Further, Rule 12.285 requires the disclosure of certain financial documents and information. The documents and information required by that Rule are a sufficient record for nearly every financial issue in family litigation. The relevance and materiality for the production of further specific, designated documents under Rule 1.350 is not presumed and must be demonstrated.

Boilerplate, "Schedule A" over broad requests are not tailor-made requests to inspect designated documents likely to exist and in the possession and control of the party and within the scope of the pleadings and relevant to the scope of discovery. These over broad requests are equivalent to a search warrant to secure every conceivable financial document that the party might have just to see what might turn up. The state attorney and law enforcement officers cannot obtain such a broad, sweeping search warrant in the course of an investigation and neither can parties in civil litigation.

Rules 1.350, Rule 1.351, and Rule 1.410 do not grant a party the right to a search warrant for everything a party or witness may have just to see what might be there. Such a request is not "discovery" of the opponent's relevant documents; rather, such a request is a "fishing expedition." The discovery rules do not permit "fishing expeditions." All of the requested documents are not related to a pending claim or issue or likely to lead to admissible evidence at trial, which is the proper scope of discovery**. Some of them might be, but all of them cannot be. So, these discovery requests are over broad.** They go beyond the scope of discovery allowed by law. Over broad discovery requests delay litigation and unreasonably and unnecessarily drive up fees and costs.

Just as a request for broad general categories of documents is not permitted by Rule 1.350 or Rule 1.351, it is also not permitted in a subpoena under Rule 1.410 or a request to a party to produce at trial under Rule 1.410(c). **Requests under all of these rules must seek a document designated with sufficient particularity to suggest that it exists**.

A "fishing expedition," on the other hand, looks for nothing in particular and everything in general, which describes the over broad requests in "Schedule A." A fishing expedition is a dragnet sweeping every fish into the net to see what might turn up. It is like a blindfolded hunter firing his shotgun into the sky to see if something falls down. It is not a rifle aimed at a known target or a fishing line baited and cast to hook a particular species of fish calculated to be where the bait is cast.

See, e.g., Devereux Florida Treatment Network, Inc., v McIntosh, 940 So.2d 1202, 1204 - 1205 (Fla. 5th DCA 2006): "...McIntosh's broad subpoena was a 'fishing expedition.' In fact, McIntosh never even attempted to articulate why the subpoenaed documents were needed for trial. Instead, he argued that the documents might ultimately lead to the discovery of admissible evidence. ...Since McIntosh admitted that he could not even assess whether the documents would

be relevant to any issue in the litigation unless they were first produced for review, he certainly could not demonstrate their necessity for trial."

So, "to see what might be there" or "just to see what is there" or "maybe" = "fishing expedition," which is *per se* over broad and is beyond the scope of discovery.

Discovery requests must (1) be "related to any pending claim or defense", *Walter v. Page*, 638 So.2d 1030, 1031 (Fla. 2d DCA 1994), and **(2) must be "reasonably calculated to lead to the discovery of admissible evidence."** *American Honda Motor Company, Inc., v. Votour*, 435 So.2d 368 (Fla. 4th DCA 1983).

Further, requests for documents or papers **must be directed at specific documents that are likely to be in the possession of the other party**. General, sweeping requests are improper. As the Second District Court of Appeal said in *Walter v. Page*, 638 So.2d 1030 (Fla. 2d DCA 1994):

> "We agree with the appellant that the subpoena duces tecum was too broad. The rule authorizing a subpoena duces tecum requires some degree of specificity, and *the documents or papers sought should be designated with sufficient particularity to suggest their existence and materiality*. *Palmer v. Servis*, 393 So.2d 653 (Fla. 5th DCA 1981); Fla.R.Civ.P. 1.350(a). ***The subpoena in the instant case was too broad in seeking virtually all of appellant's personal financial documents. The subpoena duces tecum is not the equivalent of a search warrant, and should not be used as a fishing expedition to require a witness to produce broad categories of documents which the party can search to find what may be wanted***. *Palmer*." *Id.* at 1031. (***Emphasis supplied***).

The over broad "Schedule A" request seeks "virtually all of [a party's] personal financial records." The appellate court's citation to Rule 1.350(a) is instructive, because it makes no difference whether the documents are sought by a subpoena duces tecum or a request to produce documents under Rule 1.350. The same standards apply.

The Second District gave further instruction in *Palmer v. Servis*, *supra*:

> "The rule[3] authorizing a subpoena duces tecum provides that the subpoena may command the witness to produce books, papers, documents or tangible things designated" therein. *The word "designated" is also the qualifying word used to describe the documents a party can be required to produce*.[4] Petitioners are mere third persons subpoenaed as witnesses in this dissolution action. *Designation requires some degree of specification.*[5] *A blanket request for a general category is insufficient. The subpoena duces tecum should not become a search warrant, requiring a witness to produce broad categories of items which the party can search to find what may be wanted*. The desired documents, books or papers should be designated with sufficient particularity as to affirmatively suggest their existence and materiality and so describe them that any reasonable person can identify them.
>
> [3] Fla.R.Civ.P. 1.410(b).
>
> [4] Fla. R.Civ.P. 1.350(a).
>
> [5] See Annotation: Necessity and sufficiency ... of "designation" of documents, etc., in applications or motions, 8 A.L.R.2d 1134 (1949). "

Id. at 654, 655. (*Emphasis supplied.*)

That ruling by the appellate court bears repeating: **"A blanket request for a general category is insufficient. The subpoena duces tecum should not become a search warrant, requiring a witness to produce broad categories of items which the party can search to find what may be wanted. The desired documents, books or papers should be designated with sufficient particularity as to affirmatively suggest their existence and materiality and so describe them that any reasonable person can identify them."**

The "Schedule A" request violates this limitation on discovery. A request for all conceivable financial records that a party may possess is not permitted by Rule 1.350 or Rule 1.351 or Rule 1.410. These rules do not grant a party a search warrant for everything a party or witness may have. All of the documents requested are not related to a pending claim or issue or likely to lead to admissible evidence at trial, which is the proper scope of discovery. Some of them might be, but all of them cannot be. Therefore, these requests are over broad.

Further, there is no rule or case law requiring a party to make copies of requested documents, even if that is a local custom for the convenience of the lawyers and their experts. Rule 1.350(a)(1) allows a party "*to inspect and copy any designated documents*..." (*Emphasis supplied.*) The rule does not require the recipient of the request to make copies of the documents. *See, e.g., Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So.2d 887 (Fla. 4th DCA 2006), in which the court said: "Florida Rule of Civil Procedure 1.350(b) requires that a response under the rule only produce items 'as they are kept in the usual course of business or ... identify them to correspond with the categories in the request.' " *Id.* at 895. *Compare* Rule 1.410(e)(1): "... the person to whom the subpoena is directed may serve written objection to inspection or copying of any of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court..." So, inspection and copying by the requester is what these rules allow. And, the requester has to pay for any copies, at reasonable cost, if the recipient provides the copier at the place designated. If the recipient chooses to send copies in order to avoid an inspection, that is an effort that is not required by the rules.

A further question is whether any request is a reasonable and necessary expenditure of a lawyer's time and effort for which the lawyer may ask to be paid. There is a cost and benefit analysis in all litigation. There is also a law of diminishing returns when the object is to find income or assets and other financial information. The cost and the effort may far exceed the benefit and the return may diminish to nothing, which draws into question whether the effort was a worthwhile effort in the first place. The intelligent, thoughtful, and efficient use of the discovery rules to locate relevant and material evidence are what make a lawyer worth the fee. Anyone with a computer can turn out routine documents that accomplish little or nothing. A lawyer is not needed for this. Such an effort is not worth a fee.

(5) Arguing a witness is a "liar;" accusing a witness of "lying."

We live in a dark age. Every week I hear lawyers arguing that a witness "lied" in his testimony, and I hear lawyers directly accusing a witness of "lying" while they are questioning the witness.

Arguing a witness "lied."

When I started work as a young lawyer in 1974, the older lawyers I worked with taught me to never argue to a jury or a judge that a witness was "lying." They taught me to point out in final argument the specific contradictions and inconsistencies in the evidence that demonstrated that a witness or a party was not credible. Yet every week I hear lawyers arguing to me that a witness or a party "lied" in his testimony, instead of pointing out in final argument the inconsistencies and contradictions in the evidence that suggest a witness or a party is not credible.

The credibility of any witness including a party witness is the exclusive province of the finder of fact to determine from the evidence. The lawyer's personal opinion about the truthfulness of a witness is irrelevant, just as his personal opinion about any other conclusion he may draw from the evidence is irrelevant. Lawyers may not argue "I think" or "I believe." Their personal beliefs about a witness or the evidence are irrelevant.

Accusing a witness of "lying."

The older lawyers also taught me that I must never directly accuse a witness or a party of "lying" while I was questioning them. Yet every week I hear lawyers doing this. This is usually done by the lawyer asking the accusative rhetorical question: "Sir, you do know that you are under oath now, don't you?" Or: "Is that your signature on that financial affidavit?" A rhetorical question is one to which no answer is needed or expected, one that is its own answer.

Rhetorical questions are, by definition, argumentative questions and argumentative questions are improper, objectionable questions. A lawyer can argue to the court at the conclusion of the evidence, but a lawyer cannot argue with a witness.

So, this question is improper because it is an argumentative question. It is also unethical to directly accuse a witness of lying because it injects the lawyer's personal opinion into the questioning. It is also out of order because it presents argument on the credibility of a witness during presentation of evidence and not during final argument.

It is also very ineffective lawyering. It makes me think the lawyer resorting to such improper behavior has no merit to his case because he is obscuring the issues by making unethical accusations directly to a witness instead of admitting evidence that supports his case.

It also makes the witness so defensive that nothing probative will be obtained from that witness. Effective questioning is subtle and appears to be misdirected so that the witness does not realize he is giving information helpful to the questioner. Basketball players who cannot feint will have their passes intercepted, and lawyers who are obvious in the line of their questioning will have the witness anticipating the next the question. Accusative, hostile, blundering questioning puts the witness on guard and clues him to the path the lawyer is taking. It also proves nothing, except that the lawyer is very ineffective.

Case law about arguing a witness is "lying."

Concerning arguments that a witness is "lying," in *Kaas v. Atlas Chemical Co.*, 623 So.2d 525, (Fla. 3d DCA 1993) the plaintiff's lawyer said in final argument that a witness was a "liar." The defendant's lawyer did not object but later moved for a new trial. The appellate court affirmed the trial court order granting a new trial and quoted the trial judge's order:

" ' Counsel's feelings and beliefs concerning the credibility of a witness are neither relevant nor permitted. Additionally, it is fundamentally incorrect for counsel to attempt to impugn the integrity of a witness by calling him a liar.

In *Hernandez v. State,* [156 Fla. 356], 22 So.2d 781 (Fla.1945), the Florida Supreme Court held that it was improper for an attorney to suggest to a jury that a witness was committing perjury.

In *Moore v. Taylor Concrete & Supply Co., Inc*., 553 So.2d 787 (Fla. 1st DCA 1989), the Court stated, "It is axiomatic that a lawyer's expression of his personal opinion as to the credibility of a witness, or of his personal knowledge of facts in the case, is fundamentally improper ... [E]xpressions by a lawyer of his personal opinion are in derogation of the Code of Professional Responsibility and will not be condoned." Importantly, such impropriety does not require a contemporaneous objection. *Stokes v. Wet 'N Wild, Inc*., 523 So.2d 181 (Fla. 5th DCA 1988); *Moore, supra*., p. 793; *Kendall Skating Centers, Inc. v. Martin*, 448 So.2d 1137 (Fla. 3d DCA 1984).

There is no question but that counsel is permitted to demonstrate inconsistencies between witnesses' testimony and within a witness's own testimony. But lines have been drawn as to what constitutes proper comment and what is egregious. The statements in the instant case were egregious. For this reason, defendant's motion for a new trial must be granted.'

We entirely agree with this order.

On appeal, the plaintiffs make no real defense of their trial counsel's remarks. It would be impossible fairly to do so. (*Footnote omitted*) See Rule 4-3.4, Rules of Professional Conduct; *Venning v. Roe*, 616 So.2d 604, 605 (Fla. 2d DCA 1993) ("We believe the improper comments made by defense counsel essentially accuse the medical expert of perjury and accuse opposing counsel of unethically committing a fraud upon the court. Such comments have not been condoned by other district courts and will not be condoned by this court."); *Schubert v. Allstate Ins. Co.*, 603 So.2d 554 (Fla. 5th DCA 1992), review dismissed, 606 So.2d 1164 (Fla.1992); *Moore v. Taylor Concrete & Supply Co.*, 553 So.2d 787 (Fla. 1st DCA 1989); *Carnival Cruise Lines, Inc. v. Rosania*, 546 So.2d 736 (Fla. 3d DCA 1989); *Schreier v. Parker*, 415 So.2d 794 (Fla. 3d DCA 1982); *Hillson v. Deeson*, 383 So.2d 732 (Fla. 3d DCA 1980).

Instead, they claim that reversal is required because defense counsel did not object during the trial. This contention is incorrect. As we have repeatedly held, arguments like these fall squarely within that category of fundamental error-requiring no preservation below-in which the basic right to a fair and legitimate trial has been fatally compromised. See *Bloch v. Addis*, 493 So.2d 539 (Fla. 3d DCA 1986); *Borden, Inc. v. Young*, 479 So.2d 850 (Fla. 3d DCA 1985), review denied, 488 So.2d 832 (Fla.1986); *Maercks v. Birchansky*, 549 So.2d 199 (Fla. 3d DCA 1989); *Schreier*, 415 So.2d at 795 (Such arguments "will not be

> condoned in this court, nor should they be condoned by the trial court, *even absent objection.*" [e.o.]). Even were the issue presented on a defense appeal from a plaintiffs' verdict and judgment, we would likely not "supinely" approve the result of a proceeding which was not, in any meaningful sense, a trial at all but a thoroughly unseemly name-calling contest, reflecting a personal vendetta between a lawyer and an expert witness, in which the jury was essentially asked to choose between the combatants. See *Borden*, 479 So.2d at 851-52 ("We demean ourselves and the system of justice we serve when we permit this to occur."). We surely cannot hold that the trial court abused its broad discretion in granting the required new trial itself. See *Cloud v. Fallis*, 110 So.2d 669 (Fla.1959)."

You can find cases that were not reversed after counsel argued that a witness was a "liar," *see, e.g., Forman v. Wallshein*, 671 So.2d 872 (Fla. 3d DCA 1996), but even in *Forman* the appellate court cites and quotes treatises on trial practice that condemn such behavior, saying it is "improper and unethical," and the court held in a footnote:

> "In so ruling we do not mean to preclude a trial court from taking a stricter view, sustaining the objection, and directing counsel to rephrase the argument."

In passing, I must note that the treatises such as those cited in *Forman* should be read and reread by lawyers who enter into trial practice. When I started trial practice in 1974, I was given similar, older books on trial practice by the lawyers I worked with, books that were well worn and well read.

Case law about accusing a witness of "lying."

Accusing a witness of "lying" while questioning the witness should never be done. As pointed out above, it should not be done because this is very ineffective lawyering. Accusative questioning makes the witness so defensive that nothing probative will be had from that witness. Accusative questioning is not subtle. It tells the witness where the lawyer is going with his questions.

Accusing a witness of lying is also improper and unethical. *Forman, supra*. In *St. Azile v. King Motor Center, Inc.*,407 So.2d 1096 (Fla. 4th DCA 1982) the appellate court reversed a trial judge's denial of a motion for mistrial after the defendant's lawyer accused a plaintiff's witness of lying on the stand and said to the trial judge in the presence of the jury: "I'd like this witness advised of perjury at this time. I have a sworn statement to the contrary. I'd like the State Attorney brought in here." The court said:

> " ... [E]very lawyer, as an officer of the court, has a duty of basic fairness. To accuse a witness of lying, demand a warning as to perjury, and request the state attorney be brought in, all in the presence of the jury is totally improper." *Id*. at 1097-1098.

See also Murphy v. Murphy, 622 So.2d 99 (Fla. 2d DCA 1993) and the cases cited there. For reasons I will never understand, lawyers in family cases and civil bench trials seem to think

that these authorities do not apply to bench trials or that such improper and unethical behavior is acceptable in a bench trial.

It is not and if they think so, they are mistaken.

Respectfully submitted:

R. Thomas Corbin
Circuit Judge