A Litigation Tip a Minute
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WITNESS STATEMENTS

Take witness statements before a lawsuit is filed. If you have witnesses to a car crash, co-employees in an employment discrimination case, or other customers or other employees in a fraud case as plaintiff, take their statements. If you are the defendant, call the other employees, witnesses to an incident, people knowledgeable about the incident and take their statements. Rule 4.2 prohibits communication with a represented person. Read the comment to the rule on whether a person is a manager or a can bind a corporation with admission. Former employees are no longer represented by the organization. Rule 4.2 comment 7.

When you take a witness statement, interview the witness before you turn on the recorder about everything you want them to say. Then turn on the tape recorder and tell them you are going to take a statement. Keep the actual recording of the statement as the transcription of the recording isn’t worth the paper it is printed on.

WITNESS PREP

I have witness preparation videos on my website for my clients. (http://cantorburger.com/deposition-preparation/) Before we prep them we send them a letter/email to watch the preparation videos. So, when we meet to get ready they have seen the videos, know the basic rules and have thought about the deposition. Basically a client must (1). Understand the question, (2). Listen, and answer that question and (3). ‘I don’t know’ is a good answer. It is that witness’ obligation to tell the truth and not just not lie, but ensure the picture they paint with their testimony is as accurate as they can paint it. It is their depo and they have to stand up and have a spine in the deposition. Do role play- start asking questions and try to trick your client. See how they do. Have them get their game face on and get ready to face the other side. Have them read their answers to interrogatories, review the petition, and take them through the medical treatment. For a defendant in a tort case, have them review the investigation in your file and your defenses in the case. Go directly to the key hardest questions, either the best stuff for you or the most challenging stuff for you and get those answers down. Make sure the answers are fully accurate so that they don’t ring false in any way.

Take a client through timelines, dates of events, when things were said, and what was said. In contract negotiations what letters were sent when, what positions were taken when, what drafts of documents were done, and when specific activities occurred. For injured plaintiffs- medical care, when and what treatment was done. Go through documents, photos, petition, interrogatory answers, and or medical records. Or they need to see a summary of these. The more prep you do with witnesses, even though none of us have time for this, certainly the better they will perform. It is often difficult to tell what a client will do with a short preparation. However, a good, thorough preparation will inform you.
Everything may be possible in real life but everything is not possible in a deposition. Isn’t it possible that you could avoid this accident had you stayed a little further back? Isn’t it possible that your injuries and problems are from your back injury 3 years before this? Answer-No.

**DEPOSITIONS**

Video tape your depositions of opposing parties and key witnesses. Under Rule 57.03, you don’t have to be a certified videographer. Buy a cheap camera and tripod. Watch them and see how they sound. You will change the way you ask questions and get rid of your “uh?”. When you go to trial call Midwest Litigation or someone else and have them sync the e-tran to the video (after you edit it). Buy or rent a digital projector and play the video-taped deposition at trial (but not after lunch). You can do this relatively cheaply and after a few trials charge back the cost of the AV equipment as expenses over a number of clients and a number of trials.

Anyone can be at a deposition. Rules of Civil Procedure 57.03 does not inform us as to who can attend the procedure. The idea that only a party can attend the deposition is not found in any rules or case law of which I am aware.

Call out the other side on form objections. If counsel is making form objections that don’t seem well-taken, stop your questions, turn to the lawyer and ask them what their form objections are. Many times they cannot articulate them and will not. Then, you point out that they have to articulate their form objection otherwise they are sandbagging you.

For the overly instructing and answering lawyer, keep calling them out on trying to answer for their witness. If it gets too burdensome stop the deposition. You can do an oral motion to limit or take action in the deposition. Rule 57.03(e). Keep the transcript and go to the judge to see what happens. Balance the judges not wanting to deal with it with the counsel who is trying to play games that may permanently affect that witness’s testimony—or take out a second camera and point it at the attorney.
Take breaks and coach clients if a deposition is going south. If a client is being bullied by a lawyer, is just saying yes and no or, is not really listening to the questions or answering truthfully then, stop the deposition, bring them in the other room and talk to them. You need to think about how to get people’s minds on depositions. You can have the easily persuaded witness and the aggressive lawyer who steers them down a bad path and ruins the case. You can have a client who doesn’t think or listen to the questions. For the first few breaks you should be nice in trying to explain to the client why they are screwing up. After that you may need to woodshed them and be more aggressive with them when asking why they are doing this, i.e. ruining a perfectly good case.

Take police officers’ and physical therapists’ depositions. Don’t forget the little people. They often have little nuggets of information that you can use. You may only read a part of their deposition but it comes from another witnesses. We have some amazing police officer depositions where they remember the exact part of a case and exactly what the defendant said. I played a physical therapist video in a trial in Jefferson County recently where my client had not missed one in 52 visits and he really worked hard to try to get better. Often the therapists are the ones with the boots on the ground that do the work with these people-however it can be a double edged sword so read the records- they do like to say that the pain is minimum because the client can have a good day (however, defendants can read that in a medical record anyway). Defense lawyers are going to get into the medical records to point out inconsistency of pain complaints and areas of the body.

TRIAL

A client has to be truthful about everything in a trial. If the jury gets a whiff that they are not telling the truth they won’t believe anything they say. This is more true with plaintiffs than defendants.

The simpler and short case usually wins. Always. If you can’t put your trial on quickly, figure out why. You are there for a specific purpose- either to win your client’s case, win the motion or injunction, win an injury verdict, or defeat an injury verdict. That is your sole purpose. Narrow and filter your evidence to that purpose. Every time you are talking put a document, witness, or a video up. Why are you doing that? Question the question. Any time you read or see about a long case, you can see that case is going to lose. (eg., St. Louis County Metro Link case and OJ Simpson criminal case).

Make sure a Plaintiff in a personal injury case is not malingering, whining or exaggerating their symptoms. It will be discovered, affect credibility, and their testimony will be severely undermined. A jury will not award much to a liar and it fits into the greedy plaintiff stereotype.

Similarly, Defendants should take responsibility more, especially when negligence, rule violations, or contract violations are obvious. Either you did or you did not follow too closely or hit someone with the car. Either you did or you did not have a hole in your property or ice on your parking lot. In a breach of contract case either you did or you did not fulfill your obligation. Or if you kinda did say you kinda did. Either you had a good reason not to pay the contract price or fulfill your obligations or you did not. Jurors and judges see through the wiggle room so much. Especially defendants who have insurance to defend them. I never understand why a defendant will insist that they didn’t do anything wrong and avoid responsibility. Just because you are a little bit negligent does not mean the damages were caused
by that or mean that you are a bad person or mean anything else other than what happened that day. Taking responsibility obviates much unnecessary litigation.

At trial, splice deposition parts to help you and jump around. This does not mean you take things out of context or mislead. And take parts of the deposition to show inconsistencies or changes in stories. You just run it right down the screen and read it straight to the jury—but cite it. There is no reason if you are presenting evidence that you need to do in the page order within the deposition. Because depositions can be used for any purpose (Rule 57.07) the need to call hostile witnesses in your case in chief is ameliorated. It can be more effective and you exert more control reading portions of depositions.

Read important medical straight to the jury. Plaintiffs go through and highlight the parts you want to read about complaints, consistency of them, the facts and circumstances of the incident, and causation, procedures, pain complained of, pain ratings, time period when this occurred, diagnosis and prognosis, and future medical relating to the incident. This can sometimes be duplicative of the videotape depositions you have already played, but that is ok. Defendant: prior symptoms/treatment, inconsistent pain, degenerative conditions, MRI radiologist saying degenerative conditions occurred, delays in treatment, or insistence of trauma following the incident.

Always let jurors use notes.

No time period to subpoena a witness for trial. If you are trying to put in documents and other objects on hearsay, tell them you are going to subpoena a records custodian and you are going to need to delay that evidence. In a trial in February, we did not have an original tape of a statement and subpoenaed an investigator during the trial (we took over the case from other counsel). We couldn’t get the tape into evidence because we only had the transcript. However, we went and found the investigator and brought him in. He testified that he had recorded the conversation with the witness and had verified the accuracy of the statement, then it was an admission of a party opponent that he could testify about directly.

Plaintiff is saddled with the burden to bring jury instructions. Rule of Civil Procedure 70.02

Take the time to know your client and take them through all aspects of the case. Defendants will have reasons why conduct was done, why the decision was rational and appropriate at the time, or why the damages did not come from the breach and provide balance to a case. This makes the conduct of the defendant much more reasonable and measured and not in a vacuum. For the Plaintiff, you always find out more parts about damages, the why and how, to improve liability and negligence. You can also see where your client may be pushing the envelope or exaggerating. They may need to be brought into line and grounded in reality a little bit more.

If you are going to use a picture or video make sure they fully help you. All pictures and videos can be double-edged swords. Why did you take that picture of your injury in the hospital?

Don’t cross examine a witness too long. Get what you can, talk about it but don’t delay. Sometimes you don’t care what the answer is, you just want to make the point with the question. Sometimes with a
defendant who is too squirrely or you catch in a lie, you really want to put the screws to him and make him sit up there and talk their way through it, because it will only get worse for them. But even if you are doing that and have someone really departing from prior testimony or really not making sense, at some point (usually a lot quicker than you think), the jury sees you as a bully against the poor guy. He knows he is lying why don’t you just let him go.

Use the statute for Voir Dire strikes for cause R.S.M § 494.470.1 which provides in part: no person who has formed or expressed an opinion concerning the matter or any material fact in the controversy in any case that may influence the judgment of such person... shall be sworn as a juror in the same cause.. Use that in voir dire.

Under promise and over perform to the jury. Actions speak louder than words and the more you prove with your evidence and less with your voir dire, opening and close, the better.

**QUESTION TECHNIQUES**

Go to the essential questions for the witness right away. What are the best and worst questions they need to be prepared for?

On cross examination, witnesses need to be prepared to admit every clear principle in short answers. Did you see the doctor on this day and not complain about back pain? Did you send this letter? Is that your signature? Did you say such and such and so and so? Note the difference between complaints about your back pain on this day to the doctor? So that means you did not have back pain during this time? (No that is not true I did but I just wasn’t talking about that to my primary care doctor.) So they have to admit basic obvious things- but they need to stick to their guns on their story.

For the defendant, so you were 30 feet behind the car in front you going 50 miles per hour? Yes. So doesn’t that mean that you were following too close for the circumstances? No, I thought I had enough room: all the cars were traveling at that same distance and I didn’t not anticipate the sudden stop by your client for the small rabbit that ran across the road.

Double down on preposterous positions at any time. So you didn’t do anything wrong in this car crash is that correct? Yes. So you are going to drive this way when you go home from the trial/deposition today? You are always going to drive this way because that is the right way to do it and there is nothing wrong with driving like that?

So you haven’t looked for work really since the accident, is that fair? And so you are probably not going to continue to do that in the future? Is that right? You didn’t think you needed to look where you were going when you were walking through that store on that person’s property is that right? So you are not going to look where you are going at any time and you just don’t have to because it is everybody else’s fault is that right? Do you have to look where you’re going to make sure it’s safe?
SOCIAL MEDIA

Tell clients to stay off social media about her case, remind them, and prepare for when they do not.

The internet is very powerful. Jurors will research issues in your case, look on case.net, look at the medical issues, go to your website, Google the lawyers, Google the parties, research issues about the case, look at Facebook pages of people. So, make sure you do that and you know what is out there in your case, the parties and issues.

Get the Facebook and social media information about your client and the other side. Cases are legion with the injured plaintiff who has pictures on their Facebook of cliff jumping or drinking.
If you are in a jurisdiction where you get the juror list the week before Google, Facebook, and case.net them. See what pages they “like” and the types of things they do. This may clue you into the kind of person they are.

Facebook Objection. In discovery: Plaintiff objects to this interrogatory in that it is overly broad, not limited in scope, time or to the pleadings, and as it is not reasonably calculated to lead to the discovery of admissible evidence. Recent court decisions addressing such requests have disallowed them. See Davids v. Novartis Pharmaceuticals Corp., U.S. Dist. EDNY, Case No. 06-cv-00431, Feb. 24, 2012 Order. Further, it seeks information that is protected by the Stored Communications Act, 8 U.S.C. 121 §§ 2701-2712, which extends Fourth Amendment privacy protection to email and other digital communications stored on the internet. Plaintiff’s Facebook page was/is a "restricted access" "private" page from which disclosure of such information would be a violation of his privacy as well as that of the privacy of other individuals identifiable on the page who have not given their express consent to the disclosure of their private information. Further, disclosure of such information would be a violation of Facebook’s Terms of Service. Facebook’s Chief Privacy Officer, Erin Egan, in a March 23, 2012 letter has publicly stated that Facebook would not respond to third-party requests seeking users’ private information, and would possibly take legal action to protect the privacy of its users.

RULES

In any case establish the legal obligations and breaches of them or the rules and violations of them. Establish what the contract or the custom and practice required and show how the defendant or plaintiff violated it. Establish the rules of conduct the defendant should have complied with and how they violated them, eg., ran a red light. Establish the plaintiff’s rules and how they violated them-have to mitigate your damages and can’t exaggerate your symptoms.
Rules for Hotels and Ice:

Q: Okay. So does the, uh -- does the -- any of the branch standards from the Days Inn talk about, um, having a safe walking environment?
A: Yes.
Q: Okay. What do they say? What do they say?
A: That it would be the responsibility of the company to keep the property safe for the arriving and departing guests.

Q: Do they talk about how to train your housekeepers to mop up spills or managers or anything?
A: Yes.
Q: And do they talk about how to keep the, um -- do they talk about that you need to have safe walking surfaces?
A: Yes.
Q: All right. And do you agree that you need to have safe walking surfaces?
A: Yes.
Q: And let me restate that because I stopped talking. I got tongue-tied.
A: Do you agree that you need to have safe walking surfaces --
Q: -- for your guests?
A: Yes.
Q: Why?
A: It's liability for the hotel, and we have to care for the guests' health, too.
Q: Someone could get hurt if you don't --
A: Sure.
Q: -- right?

Rules from Insurance companies:

Q: EMC puts out risk assessments and how to help your business reduce risk of slips, trips and falls. Have you ever seen any of that?
A: No.
Q: Have you ever inquired with anyone in the company whether they got any of that stuff?
A: No, I have not.
Rules in Auto crash:

16 Q. So you looked away from in front of you and you
17 knew there was a car in front of you. You moved the
18 bucket of keys away from your foot, and you drove your
19 van into the back of my client's car?
20 A. I thought I had enough time, yes, sir.
21 Normally I would have if it wouldn't have stopped.
22 Q. Okay. So is the answer to my question yes?
23 A. Yes, sorry.

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22 Q. (By Mr. Burger) And you know that when you're
23 traveling, vehicles in front of you can stop at any time?
24 A. Yes.
25 Q. Vehicles stop -- and you've driven in your

1 life. Vehicles stop for stalled cars in the roadway?
2 A. Yes.
3 Q. Vehicles stop for pedestrians crossing the
4 roadway?
5 A. Yes.
6 Q. Bicycles, right?
7 A. Yes.
8 Q. Aren't you counseled in driving for Hoppy's to
9 be a very careful and prudent driver?
10 A. Absolutely.
11 Q. And that's what you try to do?
12 A. Yes, sir.

Rules in Auto crash(2):

16 Q. The only reason was the not looking in front
17 of you, fair?
18 A. Right. Yes.
Rules in trip and fall:

Would you agree with me that cart in that area in a pathway used by customers and two, a tripping hazard?
Get to the simple truth of every proposition you’re establishing for the plaintiff or the defendant, think about it, and synthesize it. Don’t overly complicate very simple ideas.

Ask the defendant in a tort case or in a breach of contract case what they could do differently.

INVESTIGATION

Did you investigate this? Yes-great what did you do and what did you find? No- Let me get this straight- You are a property manager and your company has been managing properties for 20 years and this is the only deck collapse you ever had and you never investigated to see whether or not you guys were supposed to be inspecting, maintaining, or repairing that deck? So you have never had a slip and fall on your property you never had any injury there whatsoever and this person comes slips on your property and breaks their hip and you never did anything to look and see whether you guys knew about an ice patch there or had re salted or whether ice was thawing and refreezing? Never a sexual harassment complaint-first one ever-but you did not investigate it?

• In 1994 “The garden unit decks were in horrific condition. The wood was rotting-it was rotting out”.

• “The Association didn’t repair or maintain any of the town home decks for the 20 years”.
Always investigate and thoroughly discover subsequent remedial measures. As a Plaintiff they are all discoverable. As a Defendant if your client did do a subsequent remedial measure make sure that you admit it and do it and say it was a subsequent remedial measure—(firing the bus driver case). As a Defendant don’t deny that the firing of the driver or the filling of the hole or the change in the policy about sponge counts or redoing the policy about how to check for arterial bleeding or nicked bladders after a surgery is because the surgery or incident in this case because if it was then it doesn’t come into evidence.

**DOCTOR**

Always talk about the money the other side makes if they testify a lot. See impeachment too.
Q. Okay. And you have made from medical-legal work, IMEs and testifying, you've made $550,000 in the three years prior to July of 2014; is that correct?
A. Well, I don't know where you're getting that figure from, but maybe okay, I mean, I told you, we can go through the math, if I do three a week, the charge for an independent medical evaluation is $900, if we do three a week, that's $150 a year, so what was your figure again?
Q. Let me ask you this.
A. Okay.
Q. In this case, how much -- you didn't mention this in direct exam, how much were you paid by defense counsel in this case?
A. I was paid for this case, for a record review in total, the total bill was $4,675.

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Q. All right. So can you keep that Exhibit 1, can you please turn to page 106?
A. Okay.
Q. And 105 and I asked you on line 17 of page 105 and so that's right at $550,000 in the last three years, do you see that on line 17?
A. Yes.
Q. And then, and then we were going back and forth, but then on page line, page 106 line 2 I say yeah, $550,000 I was doing last the three years, and your answer was over three years, yes, I think that would add up, do you see that?
A. Yes.
Q. Okay. Well let me get back to my question though, of the $550,000 you made, and I say it here, I can quote it to you again.
A. Okay.
Q. In all that money, 75 to 80 percent of the time you're hired by defense, employer or insurance company; is that correct?
A. Yes.
Q. So, the way I did the math, that’s an extra $183,000 if you take $550 divided by three, that’s $183,000 and we’re almost up to a year since I took that deposition, do you think you made that much again?
   A. I haven’t done the math, but yes, my practice has really not changed.

Q. So we’re talking about the last four years, you’re talking about over $700,000 for medical-legal work like we’re doing today; is that fair?
   A. Again, I’m not sitting down doing the math, but yes, I think if we’re taking it by the chronology you’re giving, yes.

Q. All right. And you’ve made $3 million or so in your career doing this medical-legal testifying work; is that fair?
   A. No, I wouldn’t say that, because I don’t know where you’re getting the figure $3 million.

Q. Turn to page 112 of the deposition transcript.
   A. Okay.

Q. And do you see on line 9 where I ask you, add that to last year as we’re talking $3 million or so and your answer was, yes, yes; is that correct?
   A. Well, that’s what this says, but I’m not sure what the question what exactly, the reason whether I didn’t understand you at that time or I’m not reading this whole transcript right now, but a figure of $3 million as far as medical-legal, the

Q. Doctor, is it correct that you testified under oath on July 3, 2013 you said yes twice, when I asked you about this $3 million figure; is that correct?
   A. Okay.

whole point, the figure you’re using $3 million I think isn’t fair, is that the amount of income that I’ve generated over the past 30 years, certainly I’ve generated income over the past 30 years.

Q. In medical-legal matters or you want to change your testimony?
   MR. WICKER: Objection, form.
   A. So what is your question exactly?

Q. (By Mr. Burger) It is exactly that I asked you, would you agree that I asked you, when you were sworn under oath.
   A. Okay.
A. So you’re saying have I generated $3 million over 34 years doing medical-legal activities?

Q. Yes.

A. I don’t know, to be honest. I mean, I don’t know, we’ve already been through what I’ve done the last three to four years as far as I don’t know what I’ve done as far as medical-legal in the last 34 years.

Q. Did you testify that you’ve done $3 million in that type of work on page 112 of this deposition?

A. Well, again I haven’t re-read all this now, well, I’ll read it now if you want me to.

Q. I don’t want you to, I’m just trying to get you to answer the question.

MR. WICKER: Objection to form.

A. I’m trying to answer your question Mr. Burger, I’ve said yes, yes there, and I’m wondering if I really understood your question at that time, to be honest.

Q. Are you changing your testimony today?

A. No, I’m not changing my testimony, I’m trying to realize where this came from, let me read this.

Q. (By Mr. Burger) You’ve had a chance, is it fact, to review that deposition transcript, isn’t it accurate that ballpark you’ve made $3 million in your career from medical-legal work as -- the type of which we’ve been discussing here?

A. Yes, sir, I think that’s correct.

Q. And we’ve had that number in the last four years of over $700,000, we already did that math?

A. We went through that math, yes.

Q. All right. Now, and that’s -- you do two or three IMEs a week?

A. Yes.

Q. And you do three or four depositions a month?

A. Yes.

Q. So in this case, and an IME is when you actually see someone; is that correct?

A. Yes.

Q. You did not see Mr. Thomason in this case?

A. No, I did not.
When deposing doctors in personal injury and medical malpractice cases always establish before you go through any of the records what they recall apart from the records. Often there is very little recollection. They don’t know the level of informed consent, they don’t know whether or not they did such and such, don’t know anything in addition to what’s in records or don’t know whether or not they consulted with a partner or another doctor. Then they are boxed into the records.

Did the lawyer provide the doctor his opinions?

Q: Dr. Rahman, my name is Gary Burger. I represent the women that you were just talking about. I am going to mark Exhibit 1—for the last four or five questions when counsel was asking you questions, you were literally looking at this document and following along as he was reading it. Is that correct?

A: No.

Q: You didn’t have this out in front of you and were following along on the way he was asking the questions? Did I miss that?

A: It’s been in front of me, but I was actually thinking about something else.

Q: What were you thinking about?

A: Just the other parts of the case. I actually was thinking about Dr. Gormen’s record here.

Q: Gornet’s?

A: Gornet—Gornet’s record here.

Q: Weren’t the last questions about what your opinions were weren’t they exactly what is written in that documents that you just marked as Exhibit 1?

A: Yes.

Q: Word for word, right?

A: Pretty close.

Q: And that’s a documents the Mr. Walsh wrote, not you; right?

A: Yes.

Q: All right. He wrote this document about what your opinions were; fair?

A: Right.

Q: All right. And when he’s asking you what your opinions were, he was literally reading out of the document that he wrote?

A: Yes.

MISCELLANEOUS

Write letters immediately demanding that videotapes and photographs be saved and not destroyed as a Plaintiff in a case. If you are defending a case, immediately ask client if there are surveillance videos, photographs, and who the witnesses are so that evidence can be destroyed (jk).

Even if you have a he said-she said incident with a witness, you need to look beyond the incident and conversation and examine what other conduct would naturally flow from the false story. For instance, so after the accident did you tell the plaintiff it was her fault? Did you insist that the witnesses stay there? Did you tell the police that not only did the person stop suddenly but the other traffic wasn’t there? Or in an employment case- So why did you send the person to HR if they didn’t complain about any type of discrimination? Or the opposite- you were told derogatory comments based on your sex/race/age- did you go home and tell them to your family, did you tell them to your friends, were their
contemporaneous recordings of you about this or complaints you made about this? It can be harmful if
the persons notes or diaries or Facebook does not contain the allegations that they are now
remembering occurred, or if they go to a doctor and don’t mention terrible back pain.

Use Focus Groups because you are too enmeshed in your case and you are not a normal person-you are
a lawyer.

Fraud cases and employment cases- keep deposing fact witnesses just keep deposing these people. You
are going to get more and more nuggets as you go along.

ERISA is not a lien but a subrogation interest. Use the MO lien statute if you have to settle a case on the
cheap. You cannot promise to pay a lien out of your trust account. Formal opinion 125. You can agree
that your client will protect and indemnify but you as a lawyer cannot protect and indemnify. This is
because it maybe in your client’s best interest to take the money and run, not pay the liens, and have
further litigation down the road.

Confidentiality provisions are bogus. They are becoming all the rage and more people agree to them,
but can results in have subsequent litigation relating to them.

Why would witnesses say you ran the red light or were driving too close? Did you run the red light-well I
couldn’t have run the red light because I was on my way to this and I was following this other car and
blah blah blah. The answer is no. Broaden admissions before you drill down. What else could have been
done different? Other documents? Other safety rules? Then get into the details. "OJ - is there any
reason any of the neighbors will tell us that they saw you in Nicole’s neighborhood last night?" Is there
any reason that any of the witnesses will tell us that ... You ran the red light. You cut the bladder. That
you didn't check to see the position of the peg tube. That you never said the lights were not on my
clients car? "Is there any reason ....." And broader is better. eg., to think any of the other witnesses will
contradict your story.