

“Did You See What Happened?”

BUILD CREDIBILITY BY ESTABLISHING THE WITNESS’S VANTAGE POINT

By Elliott Wilcox

“I saw the defendant sitting at the table. Suddenly, he reached over to the next table, grabbed the salt shaker, and threw it at the stage. The shaker hit the lead singer in the left eye, who screamed and fell off the stage, holding his eye.”

If you were trying to prove that the defendant had hit your client with a salt shaker, would this be enough proof? Or would the jury have some doubts about the testimony? If this were the only testimony the jury heard, consider the questions they might have about the testimony:

- “Why should we believe him?”
- “How do we know he saw what he says he saw?”
- “Where was he located when he saw the shaker thrown?”
- “What is his ability to remember or recollect the events?”
- “Why was he paying attention to the defendant rather than watching the stage?”
- “What was the lighting like? How much could he see?”
- “Is there any history between the witness and the defendant?”
- “Were there any obstructions between the witness and the defendant?”
- “How close or far away was he when the shaker was thrown?”

- “Does he have any interest in the outcome of this trial?”

And that’s *before* he’s even cross-examined! Why do they have so many questions? Because you didn’t take the time to establish the witness’s vantage point - his ability to see, hear, or know the things about which he testified.

Consider a situation where a single event would generate thousands of vantage points:

It’s the playoffs and you’re watching your favorite football team. If they win this game, you’re going to the Super Bowl. Your team is trailing by five points, there are two seconds left, and this is the final play of the game. After hiking the ball, the quarterback dodges a tackler. He scrambles, hoping to find an open receiver. Looking downfield, he lets loose and throws a 60 yard bomb. Your star receiver breaks free into the end zone and leaps higher than he’s ever leaped before. Reaching out while in flight, he makes a perfect, one-handed catch!

But then, you see the referee. He’s waving his arms and signaling that the receiver caught the ball out of bounds. The game is over - your arch



Show them why your witness had a clear view of events

To best tell our witness’s story, we need to show why they have the ability to see, hear, or know the things they’re testifying about.

rivals have won, and they're going to the Super Bowl. You and 65,000 other fans in the stadium erupt with rage. "You're blind, you rotten ref!" is the nicest comment you hear.

But a moment later, watching the replay on the Jumbo-Tron, you see the receiver's left foot land on the white stripe. The referee was right - the receiver *was* out of bounds when he came down with the ball.

Unfortunately, in trial, we never get the benefits of an instant replay. To best tell our witness's story, we need to show why they have the ability to see, hear, or know the things they're testifying about. If you were telling this same story to the jury, you wouldn't start by having the referee describe what he saw to the jury. You'd start by showing that the referee was in the best position and had the best ability to see what happened. Here are some of the things you'd want to establish *before* he told the jury about the catch:

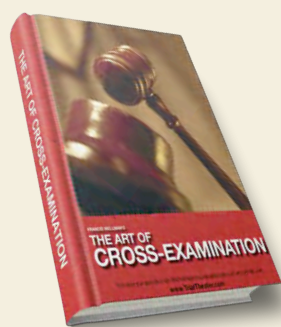
- What is his ability to see? 20/20 vision?
- How close was he to the action?
- Where is he trained to position himself on the playing field?
- What is he trained to look for?

- Why is it important that he follow his training?
- Where was he positioned?
- Were any other players in his way?
- Where was his attention focused?

By highlighting his ability to observe *before* asking him what he saw, the jury can place greater weight on his testimony. In your case, consider the strength of your witness's vantage point. Does the witness have any special skills that helped them view, remember, or interpret the event? Does the witness have any special training, perceptive skills, knowledge, experience, or unique skills that allow them to see these events better than the ordinary person? If so, teach the jury about those skills before you ask him what he saw, and the jurors will understand why they should believe your witness. ■

WANT TO USE THIS ARTICLE IN YOUR NEWSLETTER, WEBSITE, OR BAR ASSOCIATION PUBLICATION?

You can, as long as you include the following blurb with it: "Elliott Wilcox publishes *Trial Tips Newsletter*. Sign up today for your free subscription and a copy of his special reports: "How to Successfully Make & Meet Objections" and "The Ten Critical Mistakes Trial Lawyers Make (and how to avoid them)" at www.TrialTheater.com"



Want more FREE trial practice tips? Go to www.TrialTheater.com right now to get your FREE copies of my special report, "How to Successfully Make & Meet Objections," "The 10 Critical Mistakes Trial Lawyers Make (and how to avoid them)," and Francis Wellman's *The Art of Cross-Examination*. You'll also receive a free subscription to *Trial Tips Newsletter*. If you're serious about improving your trial practice skills, then you'll want to find out without delay if *Trial Tips* can do for you what it's done for thousands of other trial lawyers in every state, every Canadian province, and on every continent around the world (except Antarctica!) So please go to www.TrialTheater.com, and we'll start serving you immediately.