

# FROM MY SIDE OF THE BENCH

## *Close the Gates*

BY HON. RANDY WILSON

**I'M WATCHING AN INSURANCE FRAUD CASE** and the plaintiff's attorney smells blood. The defense witness has just taken a seemingly outrageous position. The plaintiff's lawyer knows that the defendant has boxed himself into an untenable and indefensible position. You can visibly see the plaintiff's attorney's glee and excitement over the prospect of demolishing the witness. The lawyer knows that the witness' position is inconsistent with a document. The lawyer can't wait to show the jury what a lying cheat the witness really is. The lawyer pounces on the witnesses and confronts him with the inconsistent document. Coolly, however, the witness simply deflects the question and explains how the document was talking about a different situation. The high drama that the cross examining lawyer was hoping for turns into a fizzle.

I've seen this happen many times in my trials. In the excitement of battle the trial lawyer squanders the opportunity to destroy a witness by rushing in too quickly and not, as I call it, closing the gates or escape hatches first. Here's how it works.

Suppose you are trying a fraudulent inducement trial where plaintiff is alleging that defendant entered into a contract with no intention of honoring it. Defendant claims he fully intended to honor the contract, but market forces made it impossible for him to honor the deal. At trial, Defendant testifies that he was hopeful that the deal would work out and was disappointed and surprised when the market turned against him; but he always wanted the deal to succeed. Plaintiff's attorney remembers a memo produced in discovery where defendant predicted this very downturn, perhaps in this very market. The author described the market as the "future derivatives market." Plaintiff's attorney whips out the document, but the witness coolly answers that he was talking about a similar but different market, not this particular market. The witness escapes.

How do you keep that from happening? Simple. Close the gates first. When you're preparing for trial, or even in the heat of battle in the middle of a trial, and you have a potentially flammable document to impeach the other side, think of all possible ways that the witness might try to squirm out of the document. For example, there may be ambiguity in the document about what time period it was referring to, what parties it involved, whether it was applicable to this situation, etc. After you've thought of all possible escape routes, then systematically close them off before the witness realizes what you are doing. This requires patience and perseverance, but the rewards are tremendous. Thus, before you hit the witness with the document, and before you connect the dots to his trial testimony, ask seemingly innocuous questions. So in my example, ask him to define the future derivatives market; what it is and how it operates. Establish that it involved this same time period and this market. Now you've closed all possible escape routes. Now confront the witness with the document. Now display the document on the screen. Now remind him of his prior testimony and how it's totally inconsistent with the document.

Being a good trial lawyer is sometimes like being a good hunter. It requires patience. You must wait for the right opportunity. You wouldn't think of shooting that fourteen point buck at 500 yards. Similarly, don't pounce on the witness with an inconsistency too soon. Wait until all possible explanations and escapes are eliminated. Close the gates first. Then pounce.

*Judge Randy Wilson is judge of the 157<sup>th</sup> District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective.★*