

# Trial Law TIPS

Roy D. Wasson's  
TIP #44

**ROY D. WASSON** is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

## Reflections of a Trial Lawyer— The Image Is Not Always Clear

### Introduction

How often during trial have you made a statement intending to clarify proceedings for a possible appeal by stating something like: “Let the record reflect that the witness is pointing to his left knee”? Many of us do it all the time, announcing that a witness is estimating a measurement of so many inches, by holding his hands apart; announcing that the witness is nodding in agreement with what we have said; or articulating the results of some experiment or demonstration which has just occurred in the courtroom. It’s time to change the way we do things.

## Get Judge or Opposing Counsel to Signify Agreement

Most of the time, our announcements of what the record “will reflect” are non-controversial and pass without objection from our opponents. However, do not count on the silence of your opponent as assuring that on appeal you will be able to assert that the fact you represented was clearly established. The mirror of the appellate record does not always reflect so clearly that which trial counsel announce that it would.

The proper procedure to follow when attempting to establish a non-verbal facts in the courtroom is to ask the trial judge to confirm that the record establishes that fact. It is somewhat presumptuous for those of us who are not wearing the black robes to cavalierly announce what the record “will” reflect. Instead, we should respectfully request that the court acknowledge the fact: “*May* the record reflect ...?” Is the appropriate way to get such matters before the appellate tribunal.

But do not stop with just that question when an important non-verbal fact occurs in the courtroom. Make sure the judge responds to it. “The record will so reflect,” is a suitable pronouncement by the trial court to make sure that the fact you deem important is contained in the appellate record. A silent nod by the judge will not reflect in the record. Failing an unambiguous acknowledgment by the trial court that the record supports your proposition of fact, ask your opponent to agree on the record that the fact has been established. Make sure the court reporter takes down the fact that the judge or opposing counsel agrees.

## Conclusion

The time will come when you need to inform the appellate court that an expert positioned model cars in a certain way (on the expensive mock-up you bought), or that your client was pointing to her left arm (when describing the pain), rather than her right one. Don’t count on your announcement

that “the record *will* reflect” these important facts. Reflect on this reminder, and the image before the appellate court will be crystal clear.

As always, if at first you don’t succeed, just . . .

*Keep Tryin!*

*Roy*