

From the Judge's Side of the Bench: The Value of Listening

by Hon. Jesse G. Reyes

"To listen well is as powerful a means of communication and influence as to talk well." ~ John Marshall

Society as a Whole

Ask almost anyone and they most likely will tell you that they always listen effectively. As a result, very few people believe they need to develop their listening skills. In fact, listening effectively is something that very few of us do well. Experts claim that we spend 60% percent of our communication time listening and yet retain little of what we hear.¹ In 2019, according to a study which was conducted by Harvard Business School, researchers found that 30% of the time, listeners tune out during a conversation.² The blame for this dilemma is usually placed on the shoulders of the listener. They are either distracted in the smartphone era by multiple screens or they are multitasking.³ Our present-day culture of listening also seems to be fragmented and reliant on millisecond bits of information, which requires a limited effort of concentration. In today's society, the solution to addressing this lack of communication seems to be putting down our iPhones and iPads. Given this fact, it appears we are doomed to never listen to one another.

One comforting thought is that this concern with listening appears not only to be a modern dilemma, but one which people have had since the earliest days of Western civilization. Zeno of Citium (334-262 B.C.), the founder of Stoicism, proclaimed, "We have two ears and one mouth, so we should listen more than we say." A few centuries later, his philosophical descendant Epictetus taught, "Whoever is going to listen to the philosophers needs considerable practice in listening." Thus, it appears as a society we have not always been very good at listening.⁴

Listening as a Profession

*"Like breathing, listening is something we all do, but by doing it consciously, we can make a tremendous difference in...the lives of others."*⁵

Given the vast number of professional journals, articles, and treatises analyzing this conundrum, it is evident that this issue has plagued a number of professions, including the legal one. While the subject of listening is not necessarily offered in law school curriculums, many a law student enters the legal profession without any specific training in the area. Students of the law and lawyers spend years learning how to read and write in order to become effective communicators. Yet, they spend very little time learning how to listen, which is an essential communication tool that lawyers, regardless of their area of practice, need in order to succeed.

Listening is often called an "art," but this is a misconception. Listening is a skill that can be developed with practice, the development of which will entail a great deal of work and even more concentration – a skill which is more fundamental to a lawyer's education than knowing how to write a brief or cross-examine a witness. This skill can make a difference in the outcome of a client's case or a judge's determination in a matter, which may set precedent for years to come. Poor listening skills, on the other hand, could have dire consequences for the lawyer and their client. While listening seems so basic, it is not. In fact, it is difficult to master, for it is a multilevel skill with nuances that are applicable to a variety of different circumstances and situations, which this article will attempt to address.

First, We Learn to Listen

*"When people talk, listen completely. Most people never listen."*⁶

The first step is building a self-awareness of how we listen and learning the benefits and drawbacks of listening in particular ways.⁷ As an attorney, listening is not only an attempt to hear, it is also a means by which we process feedback. Thus, we not only listen with our ears, but with our eyes. We listen by being aware of our surroundings and focusing on all that is around us. In this profession, we must listen with an open mind and without judgment or bias. Listening without bias is essential as you want to make sure that you are not allowing inaccurate assumptions to dilute or distort what you hear. While doing this, we must, at the same time, filter out our expectations, attitudes, beliefs, and

intentions as they, too, influence what we want to hear. We must always focus and concentrate on what we listen to and not just what we prefer to hear.

Listen with Empathy

*"Most people do not listen with the intent to understand; they listen with the intent to reply."*⁸

Clients want respect and problem-solving abilities from their lawyers. Having the capability to listen with empathy will go a long way in meeting these objectives. In order to be effective counselors of law, we will need to learn to listen first. Often, we think in terms of how we are going to advise our client. Instead, we first need to listen for what we are going to advise them on.

One means by which we can accomplish this feat is through silence. Silence goes hand-in-hand with striving to listen empathically. The key here is to truly understand what the person is saying. This requires that you stay open-minded and listen. You might think that you know what your client is about to say and drift off in thought. This could lead you to miss essential pieces of information or may prevent you from understanding your client's true motivations or concerns. Once the client has voiced their opinions or concerns, let them know that you listened by allowing their voice to be heard and relate their perspective back to them. This way you have confirmed that you truly listened and have understood them. In the process, you will be in sync with what your client needs.

When dealing with others, such as opposing counsel during negotiations, empathic listening can also be productive in resolving conflicts or miscommunications. It can also avoid counterproductive results. By being empathetic to the other side, you can be more open to other possible creative solutions to the problem. To be sure, this can be very challenging when we, as lawyers, are expected to be forceful advocates. At the same time, proceeding this way can serve to foster a level of professionalism that allows for collaborative problem solving and may save your client from enduring unnecessary litigation. In listening with empathy, we should strive for the goal expressed by noted trial lawyer Gerry Spence, "Listening is the ability to hear what people are saying, or not saying as distinguished from the words enunciated."⁹

Perceptive Listening

*"Let the wise listen and add to their learning."*¹⁰

Counsel should seek to develop the skill of learning to listen not only to what people say, but how they say it. Equally important is to listen for what is not said since much of what we communicate is conveyed through posture, facial expressions, gestures, eye contact, tone, inflection, and even the speed of our speech. An attorney, therefore, needs to be able to listen with their eyes.

Listening with our eyes during a trial is essential. We need to watch our witness, the judge, the jury, and opposing counsel. What impression is the witness giving? How are the judge and jury reacting to our witness? Are they listening or are they bored? Are they taking notes? By noting their reactions to our witness, we can alter our proof and questioning, if necessary.

When our opponent's witness is testifying, we listen for inconsistencies, for impeachable material, for weakness in the witness' observations. How is the witness testifying? What is their body language? How did the witness walk into the courtroom? Did they slump their shoulders down as they walked, or did they enter with a swagger? Are they projecting confidence and boldness, or are they appearing meek? Throughout, we should always be concentrating and listening with our eyes.

By listening, we will know whether to proceed with our prepared cross-examination or be ready to modify our plans to add new questions or explore new areas. Listening is also key in assessing when and whether to question a witness. Inexperienced lawyers sometimes believe that just because they have the opportunity to question a witness, they should proceed. By listening with our eyes and ears, counsel may be able to gage the pulse of the courtroom to assess whether to question a witness. In other words, do not cross just to cross. This is a decision that both the judge and jury might well appreciate.

Listen for Others

*"You never really understand a person until you consider things from his point of view"*¹¹

When listening, be sure that you listen for the different viewpoints in the courtroom. A good time to listen for others is during the examination of an expert witness. During a jury trial, try to listen to your expert's testimony with the jury's ears. On direct examination, listen to your expert witness to determine if he or she has testified as anticipated. Did your expert use the correct language – "probability" vs. "possibility?" Is the jury understanding the testimony? Are they interested? If not, how do you make it interesting for them? Be prepared to interrupt your expert if they go off track. Stop your expert whenever the terminology used is too complex, when the concepts get too involved, or when the testimony has gone into too much unnecessary detail. Go over the points that may not be clear as if you were a juror listening to it for the first time. Keep in mind that verdicts and judgments are based upon answers. Therefore, counsel must be sure the answers provided by the expert can be understood by the jury. This can only be accomplished if we listen to the responses as a member of the jury would.

Judicial View on Listening

*"To Speak is to Sow; To listen is to reap"*¹²

While I do not speak for all, I would like to relate some views that judges have regarding the topic of listening. One common complaint that judges have about lawyers is that they become so engrossed in their prepared remarks while arguing before the bench, they then fail to listen. They do not listen to the questions posed to opposing counsel, to opposing counsel's responses, and sometimes they do not even listen to the questions posed to them. They do not listen carefully to the judge and wait for the judge to finish speaking before interrupting the jurist sometimes in mid-sentence. If you find yourself so focused on your argument or wanting to interject into what the judge is saying, you may be missing important information that could help your case as well. When reflecting on how to implement better listening skills in our practice, we need to be sure that we listen to everyone in the courtroom.

Conclusion

*"It is the province of knowledge to speak and it is the privilege of wisdom to listen."*¹³

Listening is not easy. Truly listening is not something that comes naturally to all of us. Lawyers, however, must learn to listen if they are to be effective and successful communicators. In the endeavor of seeking to master the skill of listening, what better role to follow and emulate than Abraham Lincoln. This great communicator was also known as a great listener. "In conversation, he was a patient, attentive listener, rather looking for the opinion of others, than hazarding his own, and trying to view a matter in all of its phases before coming to a conclusion."¹⁴ This was a skill Lincoln first fine-tuned as a country lawyer traveling the circuit on the backwood roads of Illinois. Keep in mind that great lawyers, like Lincoln, were also great listeners. As lawyers, we must remember to take in all relevant information, analyze it, and create a plan of action. As I hope this article imparts, this can all be accomplished just from utilizing the skill of listening.

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¹ Julian Treasure, TED Talk: 5 ways to listen better (July 29, 2011), https://www.ted.com/talks/julian_treasure_5_ways_to_listen_better?language=en.

² Elizabeth Bernstein, No One Listening? Maybe You're the Problem, *Wall Street J.* (Feb. 25, 2019), <https://www.wsj.com/articles/no-one-listening-maybe-youre-the-problem-11551105839>.

³ Id.

⁴ Gordon Marino, Are You Listening?, *NY Times* (Dec. 17, 2019), <https://www.nytimes.com/2019/12/17/opinion/art-of-listening.html>.

⁵ <https://www.nclap.org/become-better-listener-better-lawyer/>.

⁶ Malcolm Cowley, "A Portrait of Mister Papa" *Life Magazine*, Jan. 10, 1949, at 90 (quoting from a letter of advice from Ernest Hemingway to a young writer).

⁷ Jim Lovelace, Learning to Listen, *Law Practice Today* (Sept. 14, 2016), <https://www.lawpracticetoday.org/article/learning-to-listen/>.

⁸ Stephen Covey, *The Seven Habits Of Highly Effective People* 239 (Simon & Schuster 1989).

⁹ Jerry Spence, *How To Argue And Win Every Time* 67 (St. Martin's Press 1995).

¹⁰ Proverbs 1:5.

¹¹ *To Kill A Mockingbird*, by Harper Lee, published by Harper & Row Publishers, Inc. (1960) p.30

¹² <http://cogweb.ucla.edu/Discourse/Proverbs/Kurdish.html>

¹³ Oliver Wendell Holmes, Sr., https://todayinsci.com/H/Holmes_Oliver/HolmesOliver-Quotations.htm

¹⁴ Speeches & Writings, ABRAHAM LINCOLN ONLINE, <http://www.abrahamlincolnonline.org/lincoln/speeches/quoteabout.htm> (last accessed Mar. 4, 2021).