

Remembering An Underappreciated Legal Skill — Listening

By **James Flynn** (April 14, 2022)

Recently I was going back and forth with a colleague about training programs for our developing lawyers. This colleague, a respected friend, looked at the list I proudly provided of the various advocacy, writing, presentation and positioning lessons filling our firm's educational schedule, and he responded with the pith of true perception, "Not a word about listening."



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I immediately saw the gap that I had not seen only moments before. And, I knew the truth of which Oliver Wendell Holmes — not the former U.S. Supreme Court justice but his father — referenced when he wrote, "It is the province of knowledge to speak and it is the privilege of wisdom to listen." [1]

What a great lesson for lawyers, especially trial lawyers, to remember.

Look, in this day and age, the art of listening is disrespected, or at least neglected.

As one astute law professor, Jennifer Murphy Romig at Emory University School of Law, noted in a blog post, "listening skills are deteriorating among lawyers and the general public. Distractions and the dominance of visual media and written communication are sapping our attention and our strength at gleaning auditory information." [2]

And a 2021 study, published by the Texas A&M University School of Law and forthcoming in the Santa Clara Law Review, noted that, "[d]espite the importance of active listening for lawyers, legal education has not prioritized the development of this skill," further noting "the silent treatment that legal education has given to listening." [3]

There are many reasons why we lawyers must work to reverse that deterioration, prioritize that skill, and end that silent treatment.

Why is this an issue for trial lawyers? It is an issue because trial lawyers have to communicate with, through and to clients, fact witnesses, experts, judges, jurors, and all manner of other participants in our system to fulfill the lawyers' duties. One must listen to each to understand them and make them understand you.

As Gerry Spence wrote in his 1995 book "How to Argue and Win Every Time," "[i]f I were required to choose the single essential skill from the many that make up the art of argument, it would be the ability to listen." [4]

Likewise, in a 2014 parer, then-U.S. District Judge Mark W. Bennett gave direct focus to being a great listener, noting that "[a]n attribute of all great trial lawyers is their ability to stay out of the way of their witnesses, who are the ones telling the client's story. This is impossible to accomplish without honing one's listening skills." [5]

As that judge further notes, "To be sure, developing enhanced listening skills is important even if you are not a trial lawyer. For example, these skills are crucial to developing trusting relationships with clients, regardless of your practice area."

Thus, a lawyer's success is often defined by the border between effective and ineffective communication.

Failed communication as failed lawyering often comes down to an inability to listen accurately. Whether a lawyer is looking at another person to understand them or a mirror to understand themselves, the title of Alan Alda's 2017 book on listening rings true: "If I Understood You, Would I Have This Look on My Face?"

As law professor Anne Ralph at Ohio State University's Moritz College of Law wrote in a blog post, there are "very real costs of failed communication: '[D]isengagement from the person we hope will understand us' This disengagement can 'stand in the way of all kinds of happiness and success' ..., including, I think Alda would agree, success in the practice of law." [6]

So, let's move beyond the failure and inattention.

One can start with five reasons why active listening skills can make you a better lawyer. [7]

First, active listening enhances trust and rapport.

Second, it helps all become comfortable with silence — an apt result because "listen" and "silent," as pianist Alfred Brendel observed, contain the same letters.

Third, it can allow for validation and affirmation.

Fourth, appropriately practiced, active listening invites clarity through repetition and paraphrase.

And, fifth, such listening importantly promotes the focus of maintained interest by removing distractions, including those passing through the mind of a previously less than fully engaged listener. Such communication is central to effective client communications, throughout the relationship from initial retention, through case preparation, case presentation, and even post-matter critique. On such communications, relationships are built.

These are not simply supposed benefits — they have actually been validated in academic studies, such as the Texas A&M paper mentioned above, [8] which notes the clear benefits of active listening for lawyers:

- "Active listeners assess and accurately allocate resources necessary to the conversation;"
- "Active listeners work to create a shared understanding with the speaker by considering both the speaker's and the listener's lenses and how they may differ;"
- "Active listeners work to increase shared understanding with the verbal and nonverbal cues;" and
- "Active listeners move to a response only after fully exploring and understanding the speaker's meaning."

Bringing this active listening to legal forums, especially the lawyer-client relationship, drives

home the important point that most legal interactions are not supposed to be about the lawyer or the lawyer's interest, but about the client and the client's interest, as some have importantly observed.[9]

Active listening helps keep that focus where it belongs, and can even enhance perceptions of law firms and not just lawyers.[10] Indeed, when one looks at Roy Bennett's seven effective ways to make others feel important, prescribed in his 2020 book "The Light in the Heart" and something lawyers probably aim to do with clients, judges and colleagues, at least three of them involve listening or its aftermath, i.e., doing more listening than talking; talking more about them than about you; and being authentically interested.[11]

Of course, what is written above has extolled the benefits of active listening without really telling one how to practice it. While it takes more discipline and commitment than just a few steps, the following active listening exercise is a good start.

Step 1: Listen to the speaker's description of the matter.

Step 2: Restate his or her premise as you understand it and ask for confirmation.

Step 3: Ask open-ended follow-up questions.

Step 4: If the speaker, especially a client, expresses emotions, either directly or indirectly, acknowledge the feelings.

Step 5: At the end of the appointment or other discussion, ask if there is anything else he or she would like to say.[12]

Individual lawyers can start with these steps.

But to really make this work, law schools and law firms need to incorporate active listening into their curricula and training programs. The Texas A&M paper recommends educators "approach active listening as they do analytical thinking, oral communication, and legal writing — as a competency that should be introduced early, practiced over time, and developed to at least a minimum standard" by law students and developing lawyers.[13]

That means that moot courts for students and mock trials at law firms need to include scores for active listening;[14] they should also involve selecting "best oralist" and "best brief in the Ames." [15] This means, according to the Texas A&M paper, not only assessing "how the listener attends to, understands, receives, and interprets the speaker's message — but also how the listener motivates and meets the speaker to create a shared understanding through verbal and nonverbal feedback." [16]

Consequently, this means that training of lawyers as listeners must go beyond teaching concentration, memory enhancements and the like to teaching body language perception, cultural sensitivity and empathy, which are all part of listening in an engaged way.[17]

Interesting legal workshops with clever mnemonic outlines already exist to teach active listening to lawyers and can be adapted to numerous settings.[18] Ultimately, law schools and law firms need to understand, teach and test for the progress milestones that mark the path from novice listener to exceptional listener.[19]

In the end, there are many ways to phrase this advice to listen.

One could say as Ralph stated: "Listening is an essential part, a necessary precondition, of communicating well. Effective listening requires close attention to another person, thoughtful observation not only of words but of body language, withholding jumping to conclusions, and curiosity." [20]

Or, one could say, as Spence did, that "[l]istening is the ability to hear what people are saying, or not saying as distinguished from the words they enunciate," and that is a vital skill.

Or one could very tersely but truly end the top 10 advice points for a developing lawyer heading to trial just as the American Bar Association did — "10. Watch and listen." [21]

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[1] Oliver Wendell Holmes, Sr., *The Poet At The Breakfast Table* (1872), Chapter X, available here: <https://www.gutenberg.org/files/2666/2666-h/2666-h.htm>.

[2] Professor Jennifer Murphy Romig, Emory University School of Law is noted as saying this at *Indisputably Linking Dispute Resolution Scholarship, Education, and Practice*, in a October 27, 2016 post by Art Hinshaw entitled *Listen Like A Lawyer*, available here: <http://indisputably.org/2016/10/listen-like-a-lawyer/#:~:text=First%2C%20good%20listening%20is%20a,all%20aspects%20of%20their%20practice>.

[3] Gustafson, Lindsey P., Short, Aric and Hamilton, Neil W., *Teaching and Assessing Active Listening as a Foundational Skill for Lawyers as Leaders, Counselors, Negotiators, and Advocates* (April 19, 2021). *Santa Clara Law Review*, Forthcoming, Texas A&M University School of Law Legal Studies Research Paper No. 21-19, at page 3. Available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830107.

[4] Gerry Spence, *How To Argue And Win Every Time* (1995), at 67.

[5] Hon. Mark W. Bennett (U.S.D.J., N.D. Iowa.), *Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker "I am a Litigator"*, 33 *The Review Of Litigation* 1 (Winter 2013). Available here: https://www.mow.uscourts.gov/sites/mow/files/1_Judge_Bennett_8_Traits.pdf.

[6] *Listen Like A Lawyer* blog, available here: <https://listenlikealawyer.com/>.

[7] Katherine Bishop, *5 Active Listening Skills That Make Better Lawyers*, *Attorney At Law Magazine*, November 29, 2019, available here: <https://attorneyatlawmagazine.com/5-active-listening-skills-better-lawyers>.

[8] Gustafson et al., *supra*, at 1.

[9] Annie Little, *Listening Skills—Lawyers Suck At Listening: Three Ways To Turn It Around*,

August 27, 2020 at Attorney At Work blog, available here: <https://www.attorneyatwork.com/lawyers-suck-listening-better-listening/>.

[10] Law Firm Suites, The 6 Benefits Lawyers will Gain by Becoming Better Listeners, November 5, 2020. Available here: <https://lawfirmsuites.com/2020/11/the-6-benefits-lawyers-will-gain-by-becoming-better-listeners/>.

[11] Roy Bennett, The Light In The Heart: Inspirational Thoughts For Living Your Best Life (2020), at 239.

[12] Leota Embleton, Better Listening Skills Make Better Lawyers, reprinted December 8, 2014 at North Carolina Lawyer Assistance Program website. Available here: <https://www.nclap.org/become-better-listener-better-lawyer/>. See also Rachel Casper, Active Listening Skills: Essential Tips for Lawyers + Law Students, February 20, 2020, LCL. Available here: <https://www.lclma.org/2020/02/20/active-listening-soft-skills-lawyers/>. And see L. Ali Khan, Reflections on Teaching Law - Cultivating Listening Skills, October 30, 2015, Huffington Post. Available here: https://www.huffpost.com/entry/reflections-on-teaching-l_b_8431232.

[13] Gustafson et al., *supra*, at 4.

[14] Jim Lovelace, Learning To Listen, September 14, 2016, Law Practice Today. Available here: <https://www.lawpracticetoday.org/article/learning-to-listen/>.

[15] Rachel Reed, The point is moot: The 2021 Ames Moot Court Competition saw a return to in-person arguments and a spirited debate, November 18, 2021, Harvard Law Today. Available here: <https://today.law.harvard.edu/the-point-is-moot/>.

[16] Gustafson et al., *supra*, at 11.

[17] *Id.* at 26-37.

[18] Emily Barney, Legal Skills Workshop: Effective Listening, November 17, 2017, IIT Chicago-Kent Law Library Blog, available here: <http://blogs.kentlaw.iit.edu/library/2017/11/legal-skills-workshop-effective-listening/>. The workshop is built around PACK (Prepare, Assure Acoustics, Concentrate, and Keep an Open Mind) and CARE (Comprehend, Analyze, Reassure and Execute Your Response) concepts.

[19] Gustafson et al., *supra*, at 44-48 (Milestone Rubric: Active Listening).

[20] See end note 6.

[21] Mark A. Romance, 10 Tips for Young Lawyers Going to Trial: Learn a few successful trial strategies not found in textbooks, February 5, 2018, ABA Practice Points. Available here: <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2018/10-tips-for-young-lawyers-going-to-trial/>.