

“THE ART OF LISTENING”

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Listen.

Listening is one of an attorney’s most important skills, but rarely do we consciously cultivate this ability. Instead, we let the nature of our work shape it. We listen for weaknesses in our opponent’s case. We hear the stories of clients or witnesses with our ears keyed to the elements of a cause of action or a defense. We listen to insurance representatives and others because we must. Too often we listen with the ear of impatience, with the mind of a fixed idea. Sometimes our minds are so firmly fixed on formulating a response that we do not even hear what is being said.

When we listen in these ways, we may not hear what we need to hear. As a result we may be less effective advocates and experience unnecessary stress. If we can learn to really hear what is being said to us, we may glean useful information. When we simply listen, with nothing extra—and that’s the key—we hear with a relaxed mind and body. I call it simple listening.

Simple listening can be used in many different contexts, such interviewing or questioning people, handling difficult exchanges, or listening to oneself. Preparing for trial, we interview clients, witnesses, and jurors, and during trial we interview witnesses or watch them being interviewed. Then we cross-examine witnesses. The prerequisite for simple listening is to be prepared. If you are constantly thinking of the elements of the case or a person’s testimony, you cannot really follow people as they speak. You may miss vital information. I think of the example of concert musicians. They practice and practice to learn a piece of music. When it is time for the concert, they simply play and do not think of the next note or chord. The musician simply allows the music to flow, while of course being completely aware of what is going on.

The basic practice of simple listening is to pay attention. I am suggesting paying attention without having a predetermined, fixed idea of where the questioning is supposed to go. This does not mean that one engages in questioning without focus or without knowledge of the elements of the cause of action or defense. It does mean holding those ideas lightly so you are aware when something new or useful emerges from the exchange.

I took a deposition once in a case against the City and County of San Francisco arising out of a fall at the tennis courts in Golden Gate Park. I was an associate at the firm, and I was simply assigned the case, which I thought was a real dog. Our client had fallen over some chunks of concrete at the back of a tennis court that was being repaired. The court had no net. The client was using the court to volley with her partner while waiting for a court. It seemed to me that she had assumed the risk, since the construction was very obvious. I took the deposition of the groundskeeper responsible for the courts. As he described the debris and the lack of a net, I noticed that he seemed irritated and defensive. I

could have interpreted his defensiveness as a refusal to cooperate with me. Instead, I just listened to him and encouraged him to develop his thoughts. Suddenly he erupted and vehemently asserted that he had warned his supervisors that the court should be locked; otherwise people were sure to use it. He was angry because no one had listened to him, and someone had been hurt just as he predicted. He opened up to me, I believe, because, he felt heard. We settled the case on favorable terms. By noticing the tone of the groundskeeper's voice and his body language, I obtained favorable testimony from him. My idea about the case did not limit me because I did not hold on to it. And I had a wide focus: I noticed not only his words but also the tone of voice, the pitch, the volume, the body and facial language, and the choice of words.

Simple listening involves also hearing what is not said. One may "listen" to the response of a prospective juror or witness to a third person or to evidence by paying attention to both verbal or nonverbal responses.

Simply listening also means setting aside the ego. This does not mean disappearing or not thinking. It does mean letting go of our habit of self-protection. We all have an idea of who we think we are. We want to believe we are good people, but at least some of the time we may believe we are not such good people and fear being exposed. If we allow ourselves to be absorbed in such notions of ourselves, we can get lost and not hear what is being said. We can easily become too bound up in defending our ideas of ourselves. This defensiveness gets in the way regardless of whether our idea of ourselves is good or bad. When you fixate on yourself, you cannot see clearly, and you certainly can't hear.

I recently participated in mediation training. During a role-playing exercise, I interviewed a party in a domestic dispute, and during the interview, I had the feeling she was not getting at what was really bothering her. She was in the process of separating from her husband, and there was nothing but blame and finger pointing. I thought I could see what she needed to express on a deeper level, but she would not go there. As a result, I could not get a clear idea of what she wanted in a settlement. Later she told me that she had felt I was angry with her. I thought about it and realized that I had been irritated. I felt like a failure because I could not elicit a deeper response from her. I had an idea of myself as being good at helping people express what was really going on inside. Also, I had an idea of how she should behave and what she should say. After the interview, I realized I had been protecting my idea of myself as good at this process and protecting myself from my fear of failure. When I told her a little about my process, the whole relationship became much easier. The settlement process opened up, many possibilities appeared, and we arrived at an agreement that worked for both parties.

"Advanced" listening is necessary when we are engaged in difficult communications, such as when dealing with opposing counsel. I used to find myself having angry telephone conversations over an interrogatory. When I got off the phone, my stomach was in a knot. I have heard my colleagues in similar

situations, their voices raised in indignation. We can also experience difficult exchanges with clients, witnesses, insurance representatives, experts, judges (or in the case of judges, counsel) bosses, subordinates, and colleagues. In addition to being prepared and to paying close attention, in difficult exchanges you must grapple with the self-protective instinct.

When you are being criticized or thwarted, it's difficult not to be self-protective. Perhaps the best you can hope for in these situations is to confess to yourself that you feel self-protective and defensive. It is natural to feel anger in such situations. However, anger is not useful and makes hearing very difficult. A simple practice of kindness is very helpful in such situations, and the first recipient of kindness must be yourself. Noticing the self-protective impulse is itself a kindness. Remembering that you are a member of the human race and not a saint is helpful. A sense of humor about the human condition, including your own, is extremely useful in situations in which communication is difficult. The next step is more difficult. It is advanced kindness. We tend to demonize those who give us grief. If we can remember that they, too, belong to the human race and that they, too, do not want to suffer, we may be able to hear them and see them more clearly.

I am not suggesting that a strong response is never appropriate. Sometimes a strong response is the only appropriate one. But a reactive posture is not helpful. Anger is a loss of control and expresses an impulse for revenge. Usually, fear underlies anger. We are not in a strong position to respond, and we do not hear well when we feel cornered and defensive. A strong response that does not come from an angry place, might be described as a fierce response. This distinction between anger and fierceness has been a useful one for me.

I once negotiated a collective bargaining contract with an employer on behalf of a union local that represented blue collar and technical employees. I found communicating with the management attorney very difficult at the bargaining table. I spoke of this with a Zen teacher. I was joking about it, and I said the attorney was evil—a liar and a cheat. She suggested that I look at my language, as it told me something even if I thought I was joking. She said, “Look how much of your power you’re giving up to him by seeing him this way.” I realized this was true. I stopped demonizing him and began to remind myself that he did not want to suffer. I could see the pressure he was under from management to be hard on the union and the employees. As the bargaining continued, I felt much more powerful. There were occasions when I was fierce and raised my voice or made a point in a strong manner. But I no longer came from a place of anger and hatred. I am convinced we got a better contract than we otherwise would have done. And I experienced much less stress in the process.

This example leads to the final category of simple listening: listening to oneself. Being aware of one's own process is key to hearing others. It is not simply our choice of words that tells us about ourselves, it is also the tone of voice, the volume, speed of speech, and pitch. It is also useful to listen to one's own body.

What are you doing with your hands and arms? Are you wringing your hands? Are your arms crossed self-protectively in front of your chest? Is your body relaxed? Are you slumped in your chair? Is your chest out in an arrogant position? What is going on in your stomach? Is it in a knot? What about your upper back or neck?

When our language or speech or body indicates that we feel out of control or defensive, and we are paying attention and notice it, we can work with these difficulties. The reminder to be kind to oneself is useful. When you notice yourself becoming upset and reactive, simply breathe deeply, with a slow exhalation. Try it and see what happens.

When we see ourselves clearly, when we can really feel what is going on inside, we have much more freedom to respond. We are not victims of our reactivity. Often, simply seeing our own defensiveness or seeing that we are being caught by our ideas is enough to free ourselves from these traps.

We can train ourselves to listen with mindful attention. We can simply listen, without our ego getting in the way, with nothing extra. Communication becomes less stressful and more effective. Listening is not easy. It requires training yourself to pay attention and learning to be kind to yourself and others deep in the middle of the adversary process. Surely a less stressful and more civil experience of practicing the law makes this effort worthwhile.

c: Mary H. Mocine
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