

[LETTER to a young trial lawyer]

THREE AREAS WHERE LISTENING PAYS

by DAVID BISSINGER

Trial lawyers like to talk. We tend to be extroverted and work hard on figuring out how to talk in trial. We read books on conducting jury selection, cross-examining witnesses and making arguments.

Over time, however, our talking can begin to interfere with an equally important skill: listening. Three areas where listening pays especially large dividends include listening to the client, to the witness, and to the jurors, judge or arbitrators.

• *Listening to the client.* Listening begins with the lawyer's first meeting with the client. Famed New York trial lawyer Louis Nizer observes in his classic, "My Life in Court," that the initial meeting "is the first step toward legal victory. . . . Not infrequently the lawyer must win the battle inside his own client before he can cope with his adversary."

But listening to the client may not include following a client's trial strategy. To the contrary, this often is a mistake, even when the ideas come from a well-educated client. An example of this distinction can be found in the book "History on Trial: My Day in Court



With David Irving," in which Emory University professor Deborah Lipstadt describes being a defendant in a British libel suit. The suit was brought by historian Irving, who sued Lipstadt for her statements in an earlier book.

During her trial, Lipstadt questioned her lawyer, a distinguished English bar-

rist, for his refusal to pursue a variety of matters. But Lipstadt's barrister knew that the British judge hearing the case would have little interest. Lipstadt won the case.

• *Listening to the witness.* Effective cross-examination requires carefully listening to the witness' testimony on direct and in response to each question on cross. But listening takes effort. Nizer describes becoming "highly sensitized" to the testimony, listening with "stereophonic" hearing. Apart from the words of the witness, Nizer says the voice itself gives the "truest impression." For example, is the witness' voice strong or weak? A weak voice suggests uncertainty, timidity and possibly lack of veracity. A strong voice suggests the opposite.

Nizer also reminds lawyers to listen for what the witness fails to say. As he puts it, "keep an eye out for threads that are missing. They have meaning too." One variation of this occurs in what Nizer calls the "negative pregnant," when a witness denies "a fact simply because the phrasing of the question included an adjective or adverb to which he did not subscribe."

A famous "negative pregnant" occurred in *Pennzoil v. Texaco* in the 151st District Court of Harris County in the mid-1980s, when Houston trial lawyer Joe Jamail

EFFECTIVE CROSS-EXAMINATION REQUIRES CAREFULLY LISTENING TO THE WITNESS' TESTIMONY, ON DIRECT AND IN RESPONSE TO EACH QUESTION ON CROSS.

cross-examined Laurence Tisch, one of the board members of Getty Oil Co. According to legal scholar Robert Lloyd in his chapter about *Pennzoil* in the book "Trial Stories," Tisch testified on direct examination that Getty Oil's board of directors never voted on Pennzoil's Memorandum of Agreement to acquire Getty Oil. (Jamail's client, Pennzoil, contended that the Getty board had agreed and that a binding contract existed.) The exchange went as follows:

Jamail: You're not friends with Gordon Getty?

Tisch: No, sir.

Jamail: Did Gordon Getty think you were his friend?

Tisch: Define friend and I'll answer the question.

With decades of trial experience, Jamail was able to listen and react to Tisch's "negative pregnant." He exploited it with maximum effect:

Jamail: Sir, I can't define the New York friendship.

Tisch: There's no difference between a friend in Texas and a friend in New York, sir. . . . Mr. Getty is an acquaintance of mine.


Jamail listened and accepted Tisch's invitation to talk about the meaning of friendship in a way that captured Jamail's case theme of Main Street against Wall Street.

• *Listening to the jurors.* Listen to the jurors in voir dire. A shift in voir dire strategy has occurred over the past generation from F. Lee Bailey's advice in "Successful Techniques for Criminal Trials" (1970) of "selling" the case to Lisa Blue and Robert Hirschhorn's advice in "Blue's Guide to Jury Selection" (2004) to encourage witnesses to talk about the negative issues in the case.

But the listening does not stop with voir dire. The trial lawyer must continue to listen to the jurors throughout the

trial. For example, as Nizer puts it, during cross-examination, "the lawyer must have lateral vision. He must observe the jury's reaction at all times." On the one hand, the lawyer should know when aggressive questioning succeeds, by looking for "grimaces, snickers, or smiles in gratification as the cross-examiner scores." On the other hand, this also includes the lawyer's knowing when the questioning has failed and the jurors "identify themselves with the witness, suffer with him, understand his confusion, and exhibit relief when he has momentarily extricated himself."

Finally, listen to the jurors after the trial whenever the rules permit. Most Texas state courts allow lawyers to interview jurors after trials. By contrast, federal courts and arbitration tribunals often forbid such interviews. When permitted, post-trial interviews of jurors provide priceless criticism of a trial lawyer's handling of a case.

In short, success depends upon careful listening — from the beginning of a case to the end. 



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