



« Back to Full Story

PRODUCT LIABILITY LAW & STRATEGY

AUGUST 2015

Online Extra:

The Key to Trying a Product Liability Case Effectively: Listening Well

By George W. Soule and Melissa R. Stull

In preparing for trial, it is natural to focus on what you will say when you address the judge or jury, and when you question witnesses. While it is important to say the right things in the right way at the right time, it is equally or more important to *listen attentively* to the judge, jurors, lawyers, witnesses and others in the courtroom. This will help you address the judge and jurors' questions and concerns, maximize the effectiveness of witness presentations, and make better trial strategy decisions.

Not As Simple As It Sounds

Listening is essential to being a successful trial lawyer, but doesn't always come naturally in the heat of trial. Listening can "feel too passive, like the opposite of action. It is much faster to move to a decision based on the information you already have. But in doing so, you miss important considerations" Ram Charan, The Discipline of Listening, *The Harvard Business Review* (June 21, 2012), <http://bit.ly/1KP4HEt>. No matter how entrenched you are in the litigation, you are bound to learn new facts and insights at trial. This learning cannot take place without actively listening during all aspects of trial.

Everyone on your trial team should be engaged in the listening. Get together during breaks or at the end of the trial day to assess the day's testimony and other developments. You likely will not be able to maintain your focus 100% of the time — most people's listening efficiency is around 25% — so comparing notes may help you fill the gaps or adjust your thinking about the trial. Neil Hamilton, How Listening Builds Relationships, Success in Law Practice, *Minnesota Lawyer* (Aug. 21, 2006). When specific words are critically important, you might order a transcript of arguments or testimony from the court reporter.

How to Increase Your Effectiveness at Trial

The following are some of the ways in which you can increase your effectiveness at trial by listening well.

1. Most judges have unwritten rules about courtroom procedures and methods of presentation. Listen to the judge's rulings on objections and suggestions to counsel on how to operate in the courtroom. For example, in a recent trial, a particular judge was not keen on traditional methods of impeachment by prior testimony. Typically, the examiner identifies the prior testimony, reads it to the witness, and asks whether the witness had given the testimony. This judge preferred that the lawyers refresh the witness's recollection by giving the witness a copy of the prior testimony, then asking whether the witness had previously given the answer contained in the prior testimony.
2. Listen to court personnel about courtroom procedures and how the trial is going. The judge's clerks, court reporter, and bailiff will have invaluable information on how to function in the courtroom. They may also give you feedback on the trial. Their reactions may mirror those of the judge or jury. Treat them well and listen to their insights.
3. Listen to the judge's questions. This will help guide your presentation. The judge's questions will let you know how much he or she knows about your case. They will also indicate what the judge perceives to be the critical or complicated issues in the case. Questions from the judge are sometimes asked to distinguish your case from unfavorable law, or to clarify that your facts fall under existing precedent, and can, therefore, provide insight into how your judge might rule. Edward Romero, Ask a Mentor: The Importance of Listening, *Minority Trial Lawyer, ABA Section of Litigation* (Jan. 15, 2013), <http://bit.ly/1KP4HWt>. Avoid politician-like stock answers. Listen to the questions and give a direct and honest response addressing the judge's concerns. "A good trial judge will ask good questions. Listen to them carefully." *Id.*
4. Listen to your opponent's arguments in pretrial proceedings. Arguments made during hearings on summary judgment, Daubert motions, motions in limine, and other pretrial proceedings will give you a preview of your opponent's evidence at trial. Listen carefully to these arguments to help you respond, but also to assist you in planning your trial presentation.
5. Ensure that you are physiologically capable of listening in the courtroom. Once you are seated in the courtroom and trial is set to begin, assess your surroundings. Some courtrooms have poor acoustics. Some witnesses are soft-spoken, speak fast, or have a dialect unfamiliar to you. Some opposing counsel loudly move papers, talk to their co-counsel, or otherwise are distracting. Do not let these barriers hamper your ability to track what is being said in

the courtroom. Speak up and request changes or accommodations to ensure you are able to hear, and therefore listen, to what is being said in your trial. If you are unable to overcome these obstacles with changes in the courtroom, inquire about obtaining a real-time transcription of the trial — an instant visual display of the court reporter's transcript.

6. Listen to potential jurors talk about themselves. You will gain more in jury selection by listening than by talking. If you get potential jurors talking, you will learn much about their background, experiences, and attitudes. Almost every potential juror will nod affirmatively to a question like, "you can be fair to corporations, can't you?" You may have to pose that question to remind jurors of that principle, but you will learn nothing from their responses. Ask open-ended questions so jurors can talk about themselves — and then listen carefully to their answers. "In *voir dire*, jurors want to talk, especially ... if the attorneys asking the questions actually listen to their answers. Jurors won't comfortably talk if they feel that an attorney is being argumentative, trying to pin down an answer, or worst of all, not listening to their responses." Alan Tuerkheimer, *Making Up Minds Early and Not Keeping Them Open: A Study in Juror Psychology*, *For the Defense* (March 2012). The answers will also give you an opportunity to follow up with more questions. Some people do not like to talk about themselves, so you will have to draw them out with specific questions.
7. Listen to your opponent's opening statement. Discovery and pre-trial proceedings will give you a good idea of the substance of your opponent's case. But his or her opening statement will likely summarize the case best. Listen carefully for unexpected topics, new twists on old facts, and other new issues. Your opponent's opening statement will give you a checklist of issues you will have to address during trial. Also listen for your opponent's theme, key phrases, or words that you might use in your case and for your benefit. It can be effective to stand up after your opponent's opening statement and use the same phrases and terminology or even agree with something she said, and then explain to the jury why it actually favors your client's position.
8. Listen to your witnesses to make sure they understand your presentation. In preparing your witnesses, listen to the feedback you receive from them. You and your witnesses need to be on the same page before asking questions and giving answers in the courtroom. While preparing a witness, "a trial lawyer needs to listen to a witness, both to ensure that the witness is prepared to answer particular questions and to become familiar with the witness's speaking style." Lori E. Iwan, *Turning Chaos into Trial Preparation*, *For the Defense* (September 2010). Your witness's reaction and feedback during preparation may reveal a disconnect — the witness is confused or in disagreement with your plan and/or you do not understand your witness. The witness may also suggest points to add to or subtract from the presentation. Adapt your outlines to the feedback you receive from witnesses. Be patient in reviewing the evidence and explaining the points you hope to achieve.
9. Listen to the witness's answers on your direct examination. When conducting direct examination, it is tempting to think about how you will ask the next question while the witness is giving an answer. But diverting your attention from the witness's answer may prove costly. The witness may not have understood the question, or may not have answered it adequately, thus giving an answer that is not accurate or helpful. Listen to answers so that you are assured the witness is presenting your case fully and effectively, before you move to the next topic or question. Ask follow-up questions if necessary.
10. Listen to your opponent's questions. You must think quickly to decide whether the question is objectionable (and whether the question is important enough to object) and to frame the proper objection.
11. Listen to the witness's answers on your cross-examination. The witness's answer may be evasive or misleading. You want to make sure the witness answers your question. The answer may open the door for impeachment. The witness's answer may also provide you an opportunity to score points with additional questions. Words matter — listen to them carefully.
12. Listen to the witness's answers when your opponent is questioning the witness. These answers will give you fertile ground for examination when it is your turn. It will help you ask questions beyond those you have prepared in your outline. If you are cross-examining the witness, the responses to direct examination will give you a starting point for several avenues of examination. Sometimes, specific words will give you opportunities to make points.
13. Listen to your opponent's questions and the witness's answers on cross-examination. Your opponent may ask unfair or misleading questions on cross. You must listen to be able to object and form your follow-up questions effectively. On redirect, you can raise the heat, correct the record, and refute your opponent's points. You may choose to repeat your opponent's exact words in your examination. You may also have to fix or clarify issues created by your witness's answers.
14. Listen to expert testimony. Numerous expert witnesses could be called at trial, and the expert testimony is likely to weigh heavily on the jury's decision. Listen to whether the opposing experts use the correct terminology, meet the *Daubert* factors, and properly testify to their qualifications such that they can give expert opinions. During direct examination, listen to your experts' testimony for the same issues, while also making sure your expert is making all of your key points while speaking in language and terminology the jury will understand.
15. Listen for what you do not understand. It is easy to focus on information that is familiar and testimony that comports with your understanding of the case. However, you will not learn anything new at trial if you focus only on what is comfortable. Be open to learning new information, even at this late stage in the litigation. Carefully listen for things you do not know, new information, and discontinuities so that you may learn from new information to better your position. Margaret Heffernan, *Have you Mastered the Art of Listening?* *Money Watch* (June 12, 2013), <http://cbsn.ws/1KPf6A8>.
16. Listen to the jurors' questions. In many jurisdictions, jurors are able to ask questions of witnesses, typically in writing. The questions are important for the witness to whom they are addressed, but they also may shed light on what is on the jurors' minds. Take the questions into account in making the rest of your trial presentation. In our recent trial, one of the jurors raised a question about an alternative product design that was abandoned by our opponent before trial because his expert did not support the theory. Nevertheless, it was a logical question for a lay person to ask, and we needed to respond to it during the course of the trial.
17. Watch trial participants' body language. Okay, this is not technically listening, but it requires being perceptive to people's reactions to what is happening at trial. Jurors do not like to be watched persistently, but you will have to gauge their responses to trial presentations. If they are rolling their eyes, crying, or falling asleep, you will receive important feedback. Similarly, the non-verbal communications of the judge or other courtroom participants may speak volumes.
18. Listen to your opponent's entire case to assess whether it is legally sufficient. As your opponent's case proceeds, you must consider whether he or she has proven all of the elements of the claims or defenses asserted. If the plaintiff has proven defect, but evidence that the defect caused the accident is

lacking, move for dismissal as a matter of law. Similarly, a plaintiff may show that the defendant's evidence does not support an affirmative defense.

19. Listen to the entire trial before finalizing your closing argument. You need to start trial with a strong theme and a good plan for presenting your evidence and arguments. But there will be many twists and turns and unexpected developments during trial. Take all of those developments into account as you prepare your closing argument. Weave into your argument specific words used during the trial. If your argument follows your opponent's, listen to that argument and make sure that you answer it effectively. You may choose not to answer point by point, but make sure that you have effectively addressed all of your opponent's strongest arguments.

Conclusion

Crafting compelling prose for opening statement and pointed leading questions for cross-examination are important aspects of trial. But listening carefully is an equally important trial skill. Listening well will make you more effective in all aspects of trial.

George W. Soule, a member of this newsletter's Board of Editors, and **Melissa R. Stull** are partners in Soule & Stull LLC in Minneapolis. They try product liability, personal injury and commercial litigation cases in Minnesota and nationwide.