

The Five Rs Of Listening

Gisela M. Munoz

When listening works, so do negotiations.

NOT TOO LONG AGO, I was listening to a contract negotiation on a conference call. (It was about an issue that did not affect or involve my firm's client, so I wasn't a participant, just a listener.) The attorneys on one side were explaining their client's situation in the hope of justifying a request they had made in contract negotiations. But the attorneys on the receiving end of the description didn't seem to compre-

hend what the other attorneys were talking about, and worse still, did not realize that they were missing the point. Likewise, the attorneys who were trying to make the client's case didn't seem to notice that the other side wasn't following what they had to say; hence, they were becoming increasingly frustrated that the other side seemed to be obstinately refusing to consider a reasonable position.

Gisela M. Munoz obtained her J.D. from Yale Law School and is currently an associate at Hughes Hubbard & Reed LLP in Miami, practicing in the area of commercial real estate and corporate transactions.

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As I sat there, it was obvious to me what was going on: Neither side was truly listening to the other, so they were like ships passing in the night. Yes, because I was an observer and not a participant in the discussion, this was easier for me to spot than it might have been for the other attorneys involved. But effective listening skills can be learned. This article discusses a few tips that will improve your listening skills and, consequently, your negotiation skills. These tips are the five Rs of listening in negotiations:

- Relinquish old habits;
- Review and set aside preconceived assumptions;
- Respect;
- Reflect; and
- Request clarification.

1. RELINQUISH OLD HABITS • Although it is a key element to achieving positive results for our clients in negotiations, attorneys often listen poorly because of certain habits we have developed. We have been trained to think on our feet and multi-task, and are thus in the habit of not giving our full attention to the process at hand.

Tune Out The Distractions

The first step to being a good listener in negotiations is to be conscious of the fact that you need to actively listen to the person on the other side of the table, which requires your full attention. You should be focused only on the meeting at hand, and not on other matters, such as thinking about a phone call that you are expecting or checking emails on your Blackberry. In fact, unless absolutely necessary, you should not have your cell phone or Blackberry turned on during the meeting, and if you are conducting the negotiation from your office, you should ask your secretary to hold all calls (barring emergencies). In short, to listen effectively in the negotiation meeting, you should be solely and completely

engaged in the negotiation. See Len Serafino, *Sales Talk: How To Power Up Sales Through Verbal Mastery*, 74 (Adams Media Corp. 2003); see also Richard Anstruther, An Interview with High-Gain's Founder, *Sssh! Listen Up!: How to Bring the Critical Skill of Listening into Your Business*, at <http://www.highgain.com/newsletter/back-issues/back-issues-main.html> (April-June 2005) (stating that one of four core listening skills is to choose to be focused on the here and now).

Judicious Note Taking

In addition, you may need to take notes during negotiation meetings, but first try to listen to the crux of the other side's requests in full. Otherwise, you may miss parts of what the other party is communicating orally, if you are feverishly taking notes, because we cannot write as quickly as we speak. Moreover, if you have your head buried in your notepad as you are zealously taking notes, you may miss important nonverbal cues being communicated by the attorney sitting across the table through his facial expressions and body language.

Listen Now, Respond Later

Similarly, many attorneys tend to be thinking of how to reply to the other attorney before he or she has finished speaking. This shift of attention to concocting a response has the effect of making the listener tune out and fail to hear what the other person is saying—which can, in turn, cause the listener to miss opportunities that the other side is willing to grant or to miss potential resolutions of stalemates in negotiations. See Robert Heller, *Communicating Clearly* 17 (DK Pub. 1998); Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 33 (Houghton Mifflin 2d ed. 1991). In addition, rushing ahead to the response sometimes causes the listener to interrupt the speaker, preventing him from completing his thought. If the speaker has not even finished ex-

plaining himself, the attorney who interrupts cannot have fully understood his proposal, and her response may actually be irrelevant to what is being proposed—not to mention that interrupting someone can be disrespectful. Thus, it is better to listen to the other side’s full request or proposal without interrupting and before deciding how to reply. This brings us to the next tip for effective listening in negotiations.

2. REVIEW AND SET ASIDE PRECONCEIVED ASSUMPTIONS • An open mind is critical to listening, but as attorneys we often enter negotiations with preconceived notions about what the other side is going to propose and its lack of value to our client. If we have already judged and discarded the other side’s proposal before they have even started much less finished making it, we are not truly listening to them. See Kathleen Reardon, *The Skilled Negotiator: Mastering the Language of Engagement* 8-13 (Jossey-Bass 2004); Serafino, *supra*, at 74; Anstruther, *supra*. In addition, although it is acceptable to have a particular position when entering into a negotiation (after all, if we do not know what our clients are willing to give and take, we cannot effectively negotiate for them), taking an immutable position on issues before discussions with the other side can result in tunnel vision during negotiations. See, e.g., Deborah M. Kolb & Judith Williams, *Everyday Negotiation: Navigating the Hidden Agendas in Bargaining* 175 (Jossey-Bass 2003) (stating that having a “fixed script” is detrimental to negotiations).

Keep An Open Mind

Avoiding tunnel vision requires that you mentally prepare yourself in advance to have an open mind by reviewing your assumptions deliberately, because these pre-conceived valuations are sometimes judgments made without even being consciously aware of them. “For a negotiator to achieve versatility [i.e. an open

mind] requires a clear understanding of the primary obstacles to successful negotiation... faulty assumptions.” Reardon, *supra* at 10; see also Fisher & Ury, *supra* at 25. Even if you think you know what the other side is going to request, prepare yourself to listen carefully to what they actually say in the meeting or on the conference call without applying your preconceived judgments about the desirability of what they are proposing. In doing so, you may realize that there may be some additional value to your client that can result from what the other party is proposing. Exploring alternatives can sometimes create added value and yield better results for your client. This open-mindedness helps in your application of the next listening tip—being respectful to the other attorney, who deserves an attentive and responsive audience, not an inattentive and dismissive one.

3. RESPECT • According to the ABA Model Rules of Professional Conduct, attorneys “should demonstrate respect for the legal system and for those who serve it, including... other lawyers.” Model Rules of Prof’l Conduct Preamble (2004). We as attorneys should always treat everyone with respect, as a matter of professional conduct, but treating the people across the negotiation table with respect can lead to better listening and more effective and efficient negotiations as well.

The Value Of A Positive Tone

First, being respectful sets a positive tone for the negotiations. Moreover, if you do not respect the person on the other side, you are less likely to listen to what that person has to say, because you will be operating under an unstated assumption that whatever the other person has to say has little or no value. If this is your starting point, all the listening skills in the world will be useless. “Active listening...helps. But although techniques like these are useful, they re-

main only techniques unless you genuinely believe that there is something to be gained from hearing more about the other person's point of view." Kolb & Williams, *supra*, at 201. Conversely, if you believe that the person with whom you are communicating deserves your respect and has something of value to add and you treat that person accordingly, you are likely to listen more carefully to what that person has to say.

Furthermore, conducting your client's negotiations with a lack of respect will most likely impede the efficiency of your negotiations. When respect breaks down in a negotiation, the other side may dig in their heels, reasonableness may deteriorate, and stalemates may develop, causing delays in coming to an agreement or even causing a deal-breaker.

A negotiation by its very nature requires not only your side's participation, but also the participation of the other side, and, as the age-old refrain states, communication is a two-way street. Accordingly, the objective of contract negotiations is not necessarily to prove that you are right or that you know more than the person across from you at the negotiation table or for you to engage in a monologue or give a speech. See generally Ann McGee-Cooper, *Dialogue: The Power of Understanding*, at <http://www.amca.com/articles/article-dialogue.html> (n.d.), (last visited January 20, 2006). Rather, the goal is most likely to help your clients reach an agreement that is mutually acceptable and as beneficial as possible, while ensuring that your client is legally protected. This requires both sides to participate and to listen without interrupting one another.

4. REFLECT • One of the most useful tools for effective listening is reflecting. Reflecting, which in communication literature is also referred to as reframing, rephrasing, paraphrasing, and confirming, consists of repeating in your own

words what the other side has said to you. When you do this, the attorney on the other side can hear what you understand to be her proposal and can either confirm that you have correctly interpreted her proposal or clarify further if you have not fully comprehended the proposal. See, e.g., Serafino, *supra* at 75 (urging the listener to "play it back" to the speaker); Heller, at 17 (stating that the listener should check to make sure she has understood); William Ury, *Getting Past No: Negotiating with Difficult People* (Bantam Books 1991), at 57-58 (stating that the listener should paraphrase the speaker's message); Fisher & Ury, *supra* at 34 (suggesting that the listener reiterate what she has heard); Anstruther *supra* (stating that one of four core listening skills is to reflect the message back to confirm it). Furthermore, when you reflect, your initial paraphrase to the other side may be correct, but may also alert the other side that there are still certain aspects of her proposal that have not been explored. Thus, sometimes reflecting prompts the other side to expand on her request, elucidating aspects of the particular request that had previously not been discussed. In short, reflecting in negotiations ensures that you have fully understood what has been proposed by the person on the other side of the table or telephone line during a negotiation.

For instance, the stalled negotiation I described at the beginning of this article, in which neither side was listening to the other, finally progressed because one attorney finally heard what was being said and exclaimed, "So you're saying that your client...!" In essence, he reflected back to the other side what they had been explaining. Although the exclamatory tone that was brought on by the mounting frustration in this case was unusual and is certainly not necessary to reflection, the words this attorney used can be employed in your day-to-day negotiations as a lead-in phrase to reflecting what the other side has proposed. Other such

phrases include, “Let me see if I understand what you’re saying...” and “If I understand correctly, your client would like to....”

In the negotiation that I was observing, once the attorney reflected, and the other side confirmed that he had finally understood their situation, the negotiation proceeded and the issues were resolved to the satisfaction of both sides. But the attorneys had spent half an hour spinning their wheels because neither side was listening to the other. Thus, reflecting what you have heard improves your listening, thereby increasing not only the effectiveness, but also the efficiency, of your negotiations on your client’s behalf.

5. REQUEST CLARIFICATION • Aside from reflecting what you have heard from the other side in your own words, seek clarification when you are unsure. Ask questions to find out exactly what the other side is proposing, to flesh out problem spots, and to explore all the possibilities available to your client.

The Right Time For Open-Ended Questions

First of all, just like reflecting, asking questions can help you realize that you have not understood the other side’s request. If you ask open-ended questions, such as “why” and “how,” that allow the person across the table to elaborate and expand upon what they have already preliminarily proposed, you might realize that you are missing an important part of what is being proposed. *See Serafino, supra, at 75.*

Furthermore, in asking questions and making the other side expand upon what they are proposing, you can identify problems in a transaction that neither party had previously recognized. Consider the following example in the context of a commercial lease negotiation.

Upon request from a prospective tenant’s attorney for modification in the HVAC provisions of a lease, the landlord’s attorney on the other

side of the table states that the standard HVAC provisions in the lease are non-negotiable. (The unstated reason for the denial is that these provisions set forth the standards that are applied throughout the building with the exception of large tenants, who have the leverage to bargain for changes in such provisions; the prospective tenant in question does not have enough leverage for the landlord to make the accommodation. Because the standard temperatures are acceptable to all other tenants, the landlord’s attorney assumes that this prospective tenant does not really need the reduced temperature and that the tenant’s request is not of primary concern to the tenant, but rather just one more request made as a negotiating tactic). Later in the negotiation, the prospective tenant’s attorney again requests a reduction in the range of temperatures at which the premises would be maintained according to the standard HVAC provision, but she does not explain why she was making the request.

Finally, the landlord’s attorney, tired of hearing the repeated request, asks “Why?” and unearths a major problem. The prospective tenant intends to use certain specialized equipment in the premises, and although the equipment would function at the higher temperatures, it optimally should be maintained at a lower temperature than that set forth in the standard lease. As it turns out, however, this type of equipment produces an unreasonable amount of noise such that it would disturb neighboring tenants in the building. If the landlord’s attorney had not asked why the tenant was requesting a reduction in temperature and the tenant had ultimately accepted the less-than-optimal, but functional, higher temperatures under the standard lease provisions, the landlord might not have discovered that the tenant planned to install noisy equipment in the premises. Thus, the landlord would not have thought to require the tenant to install above-standard sound-

proofing in the premises, and he would have had complaints from and problems with his other tenants because of the noise.

Asking open-ended questions can also help you reveal alternative solutions and possibilities. "Why?" is often the best query for fleshing out requests from the other side. For instance, consider the power of asking why in the following example, a variant of which was described to me during the negotiation portion of a dispute resolution course. Suppose that one day you find your 10-year-old and seven-year-old fighting over the last orange in the fruit bowl. You tell them to split the orange and stop arguing, but each complains that she wants the whole orange. If one girl concedes the orange to the other, they face an absolute win-lose result. But what if your five-year-old walks in and (being an inquisitive five-year-old) asks them why they each want the whole orange? You might discover that, although your seven-year-old wants to eat the orange, your 10-year-old wants to peel the orange in order to measure its length for a science project. Asking why leads to an understanding of each child's interest, which, in turn, facilitates the discovery of an alternative solution that better suits both of them: Your 10-year-old can take the orange first to extract the entire peel, and your seven-year-old can then eat the whole orange without having to go to the trouble of peeling it. (Unless, of course, your five-year-old now wants the orange, too, in which case a trip to the grocery store might be the only solution!)

All joking aside, however, asking questions can lead to many discoveries: The discovery that you have not understood the situation being described to you; the discovery of a problem that remains dormant until you ask the right question; and the discovery of an alternative path or solution that neither of the parties has previously considered and that will meet

the needs of each of the parties to a greater extent than the original plan.

Furthermore, when you start drafting a contract to reflect the deal that was negotiated, you may find that certain aspects of a deal point require further clarification. Rather than guessing what the parties wanted, which could be detrimental not only to both sides but also to the personal capital you have developed with the other attorney and to the positive tone of negotiations that you have already set up, call the other attorney and request clarification before drafting the wrong deal.

CONCLUSION • Negotiating for our clients requires that we communicate well, and effective listening is half the battle. It takes hard work to acquire good listening skills, and once you've acquired them, using these skills in negotiations is hard work in itself. You first need to prepare yourself mentally to give your full attention to the negotiation at hand, to open your mind to alternatives, and to realize that the people on the other side of the table probably have something of value to add to the negotiation. Then, during negotiations, active listening requires that you treat the other side with respect, that you listen without interrupting, taking notes, or preparing a response before the other side has finished explaining its proposal, that you reflect what you have heard, and that you ask for clarification when you are not sure that you have fully understood what has been said.

Applying the five Rs of listening to your negotiations will not be a piece of cake. But all the hard work is worth it, because the more effective your listening in a negotiation, the better the results you obtain for your client. In the words of Chief Justice John Marshall, "To listen well is as powerful a means of communication and influence as to talk well."

PRACTICE CHECKLIST FOR The Five Rs Of Listening

Negotiations seldom work well if the parties don't know how to listen well. The following checklist will help to ensure that you are using good listening skills and habits in negotiations.

- 1. Relinquish old habits:

- Make sure you are completely focused on the negotiation at hand and are not thinking about other deals or things you have to do;
- Turn off your cell phone and Blackberry (unless it's absolutely necessary to have them on) or, if you are in your office for the negotiation, have your secretary hold your calls (except emergencies);
- Do not take notes until you have heard the whole idea being proposed;
- Remember to listen to the other attorney rather than developing a retort to the other side's proposals before they've been fully explained; and
- Do not interrupt the other side.

- 2. Review and set aside pre-conceived assumptions:

- Have you taken an inflexible position on any issues (other than those which your client has specifically instructed you are non-negotiable)? If so, open your mind to alternatives;
- Are you going into negotiations with a pre-conceived notion of what the other side will be proposing and its value or lack thereof to your client? If so, set those notions aside until you hear what the other side has to say.

- 3. Respect:

- Respect the people on the other side of the negotiating table;
- Listen to the other side's proposals with the mindset that what they are saying is of value;
- Remember that your being right or being the better debater is not necessarily your client's objective in the negotiation (and the pursuit of same may even impede your client's objective).

- 4. Reflect:

- Repeat in your own words what you have heard;
- Make sure that the other side confirms that you have reflected their proposal accurately before you move on to another topic.

- 5. Request clarification:

- Ask open-ended questions, like "Why?" and "How?"
- When drafting the contract for the deal at hand, follow up with counsel for the other side if aspects of certain deal points turn out to be unclear when you try drafting them.