

Trying Cases to Win in One Volume¹

Reviewed by Dwight H. Sullivan*

I. Introduction

Every now and then, a book changes the way we think about its subject. A baseball fan who was not already a sabermetrician² will see the game differently after reading *Moneyball*.³ *Thinking About Crime*,⁴ as its title suggests, influenced the way its readers thought about crime. What *Moneyball* did for baseball and *Thinking About Crime* did for criminology, *Trying Cases to Win in One Volume* does for trial advocacy.

Trying Cases to Win is a collaborative effort between practicing attorney and former U.S. District Judge Herbert J. Stern, and George Washington University Professor and National Trial Advocacy College Director Stephen A. Saltzburg. Judge Stern had previously authored a five-volume series of *Trying Cases to Win* books.⁵ *Trying Cases to Win in One Volume* is a new, consolidated, and abridged version of that series, published by the American Bar Association in September 2013.

II. Challenging Trial Advocacy Conventional Wisdom

The book advances three central “rules” for effective advocacy: (1) personal advocacy, (2) one central theme, and (3) make the case bigger than the facts. These are supported by four advocacy “laws”: (1) primacy, (2) recency, (3) frequency, and (4) vividness. But more fundamentally, the authors offer an approach to advocacy built on persuasion

theory and confirmation bias,⁶ leading to an emphasis on primacy.⁷ This is reflected by the book’s heavy emphasis on opening statements—or, as the authors prefer, “opening arguments”⁸—which they view as far more important than closing arguments.⁹

Trying Cases to Win is far more than an introductory textbook for trial advocacy—though it serves that function well.¹⁰ The book may be best appreciated by experienced trial advocates. More than a reminder of important trial advocacy lessons, the book challenges some of trial lawyers’ most ingrained beliefs and practices.

The book is iconoclastic, challenging not only longtime trial advocacy conventional wisdom, but also such trial advocacy paragons as Irving Younger¹¹ and Thomas Mauet.¹² The authors also aggressively refute advice from

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¹ HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN IN ONE VOLUME (2013).

² Bill James “coined the word *sabermetrics*, a general term that refers to the use of statistics in the quest for truly objective knowledge about baseball.” SETH MNOOKIN, FEEDING THE MONSTER 161 (2006). The word “derives from SABR, the acronym for the Society for American Baseball Research.” MICHAEL LEWIS, MONEYBALL 82 n.* (2004).

³ LEWIS, *supra* note 2.

⁴ JAMES Q. WILSON, THINKING ABOUT CRIME (1975).

⁵ HERBERT J. STERN, TRYING CASES TO WIN: OPENING ARGUMENTS AND VOIR DIRE (1991); HERBERT J. STERN, TRYING CASES TO WIN: DIRECT EXAMINATION (1992); HERBERT J. STERN, TRYING CASES TO WIN: CROSS EXAMINATION (1993); HERBERT J. STERN, TRYING CASES TO WIN: SUMMATION (1995); HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN: ANATOMY OF A TRIAL (1999).

⁶ “Confirmation bias’ refers to our tendency to seek out evidence that confirms an existing belief, notion, theory, or hypothesis, and to neglect contradictory evidence.” Michael Palmer, *Which Is Better? The Deal or the Ordeal? An Examination of Some Challenges of Case Valuation*, VT. B. J., Fall 2010, at 1, 2.

⁷ “Primacy is the notion that what we hear first is important because it colors our thinking, commits us to positions, and will heavily determine the way we will view what comes later.” STERN & SALTZBURG, *supra* note 1, at 59.

⁸ “Of course an opening is an argument. It argues what you expect the evidence will be and what the evidence will prove, just as a closing argument argues what the evidence has been and what the evidence has proven.” *Id.* at 75.

⁹ See *id.* at 69–70, 372.

¹⁰ The author of this review used the book when team teaching an introductory trial advocacy class during the Fall 2013 semester at George Washington University Law School.

¹¹ STERN & SALTZBURG, *supra* note 1, at 5–6 (repudiating Younger’s analysis of asking one question too many on cross-examination); *id.* at 281 (same); *id.* at 252 (“reject the commandments”). Younger “served as prosecutor, judge, and law professor during his distinguished career.” Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 268 (2010). He has been called “the preeminent authority on cross-examination.” Sara Whitaker & Steven Lubet, *Clarence Darrow, Neuroscientist: What Trial Lawyers Can Learn from Decision Science*, 36 AM. J. TRIAL ADVOC. 61, 70 (2012). Younger’s Ten Commandments of Cross-Examination, “[f]irst presented at a 1975 National Institute of Trial Advocacy conference in Colorado, . . . have become the baseline of modern cross-examination theory.” *Id.*; see generally IRVING YOUNGER, THE ART OF CROSS-EXAMINATION (1976).

¹² See, e.g., STERN & SALTZBURG, *supra* note 1 (disagreeing with Mauet concerning reservation of opening statement); 75–76, 80–81 (disagreeing with Mauet concerning how to distinguish permissible opening statement from impressive argument during the opening); 112–13 (disagreeing with Mauet regarding opening statements); 205 (describing Mauet’s advice concerning preparation of witnesses for direct examination as “the worst way to prepare the witness to testify”). Professor Mauet is the Director of the Trial Advocacy Program at the University of Arizona James E. Rogers College of Law. He is the author of, among many other publications, *Trial Techniques and Trials* (9th ed. 2013).

less hallowed trial advocacy authors, firing broadsides at, among others, jury consultant Sonia Hamlin¹³ and *Trial Advocacy in a Nutshell* author Paul Bergman.¹⁴ The book even rejects some approaches that judge advocates may have learned during military trial advocacy training, such as framing an opening statement in the present tense.¹⁵

Should a defense counsel “assume the burden” during opening statement in a criminal case and tell the jury (or members) that she will “prove” her case? Is it sometimes appropriate for a counsel to ask a question on cross-examination when she does not know what the witness’s answer will be? Is opening statement a better opportunity to persuade the factfinder than closing argument? If you answered no to any of those questions, you disagree with *Trying Cases to Win*’s authors.¹⁶

But while vigorously advocating the authors’ preferred approaches, the book acknowledges and presents alternative trial advocacy views.¹⁷ Few will agree with all of the

authors’ recommendations. But even a reader who disagrees with some—or most—will be a better litigator for having thought about their recommended approach before concluding that an alternate course is better.

Not everything in the book is controversial. The book’s compelling guidance for how to deal with a nonresponsive answer on cross-examination,¹⁸ testimony about conversations,¹⁹ and the dangers of building arguments on “even if” themes,²⁰ for example, will garner near universal agreement.

Co-authored by a former federal judge, the book’s analysis of trial advocacy in bench trials is particularly important.²¹ Beginning a lecture on appellate advocacy, renowned Supreme Court advocate John W. Davis famously asked, “[S]upposing fishes had the gift of speech, who would listen to a fisherman’s weary discourse on fly-casting . . . and all the other tiresome stuff that fishermen talk about, if the fish himself could be induced to give his views on the most effective methods of approach[?]”²² Here we have a former fish—and a big fish at that—telling us how to hook his former colleagues.

The volume is not only informative, but also a pleasure to read. The writing is clear, engaging, and sometimes unexpectedly funny. For example, during a discussion of the prohibition against expressing personal opinions during argument to the jury, the authors write: “This rule has been in existence since the first ethical canon went off in 1855.”²³ And a discussion of introducing exhibits includes the observation, “Lengthy, detailed ‘foundations’ are boring, turgid, and dull (the name of America’s largest law firm) and form arteriosclerosis in the aorta of advocacy.”²⁴

III. Using *Trying Cases to Win* for Professional Military Education

Military lawyers will find the book particularly worthwhile. Many of the book’s lessons are reinforced by analyses of leading trial litigators’ performances during mock trials of the *United States v. Calley* case²⁵ arising from

¹³ STERN & SALTZBURG, *supra* note 1 (disagreeing with Hamlin’s analysis of “humanizing” the counsel during opening statement); 111–12 (disagreeing with Hamlin’s recommendation to begin opening statements with a description of the trial process). Sonya Hamlin’s book *What Makes Juries Listen: A Communications Expert Looks at the Trial* (1985), has been called “one of the seminal texts for lawyers that comes from the jury consultant community.” Robert A. Mead, “Suggestions of Substantial Value”: A Selected, Annotated Bibliography of American Trial Practice Guides, 51 U. KAN. L. REV. 543, 550 (2003). “Sonya Hamlin is a communications expert who works both as a jury consultant and a communications trainer for attorneys.” *Id.*

¹⁴ STERN & SALTZBURG, *supra* note 1, at 81–82, 100–01 (disagreeing with Bergman’s analysis of what distinguishes permissible opening statement from impermissible argument). Paul Bergman is a professor at the UCLA School of Law.

¹⁵ Compare *id.* at 117 (“The present tense confines the speaker to the chronological mode. It does not permit you to *argue*.”), with Major Martin Sittler, *The Art of Storytelling*, ARMY LAW., Oct. 1999, at 30, 30.

A subtle, yet extremely effective, way to tell a story is to use the present tense. This is a difficult technique that requires practice. When we think of a prior event, it is only natural to talk about the event in the past tense. The goal, however, is to place the panel members at the scene and have the event unfold before their eyes. To do this, the story must be told in the present tense By using the present tense, the listener lives the story as it unfolds. Try it; you will see the results. The members will lean forward and really listen to what you are saying.

Id.

¹⁶ STERN & SALTZBURG, *supra* note 1, at 86–88 (“Whether the law gives you the burden or it doesn’t, always assume the burden before the jury.” (italics omitted)) (“What, then, should you say if you represent the criminal or civil defendant? Exactly the same thing that the civil plaintiff should say: ‘I will provide to you’”); 262 (rejecting cross-examination “commandment” to not ask a question unless the cross-examiner knows the answer); 371 (rejecting view “that closing argument is the advocate’s best opportunity to persuade and to bring jurors over to his side”).

¹⁷ See, e.g., *id.* at 355–36 (presenting competing visions of closing argument).

¹⁸ *Id.* at 266–69.

¹⁹ *Id.* at 225–27.

²⁰ *Id.* at 38–40.

²¹ See *id.* at 133–35.

²² John W. Davis, *The Argument of an Appeal*, 3 J. APP. PRAC. & PROCESS 745, 745 (2001), reprinting 26 A.B.A. J. 895 (1940).

²³ STERN & SALTZBURG, *supra* note 1, at 380.

²⁴ *Id.* at 233.

²⁵ See generally *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff’d*, 48 C.M.R. 19 (1973).

war crimes during the Vietnam conflict.²⁶ Judge advocates will find those examples particularly relevant and engrossing.

Military justice practitioners will find the book valuable for another reason as well: most will have sufficient trial experience to compare the book's advice to their own experience litigating cases. While reading the book, I constantly thought about how its guidance might have changed the way I litigated some particular case. Judge advocates in trial litigation billets will have an immediate opportunity to employ the lessons that the book teaches.

The book is a useful tool for supervisory judge advocates. One of the most important roles of supervisory judge advocates in the military justice field is improving their subordinates' trial advocacy skills.²⁷ *Trying Cases to Win* can both help guide supervisors' critiques of their subordinates' trial performance and serve as the focal point for an office trial advocacy training program.

IV. Conclusion

Perhaps the best reason for a trial advocate to read *Trying Cases* is the danger that opposing counsel will. Just as more-traditional baseball general managers were once at a competitive disadvantage when negotiating trades with sabermetrics' early adopters, trial advocates who do not understand *Trying Cases to Win*'s lessons will be vulnerable when litigating against those who do.

²⁶ STERN & SALTZBURG, *supra* note 1, at 137–59, 191–200, 216–18, 315–31, 385–86.

²⁷ See generally Major Jay Thoman, *Advancing Advocacy*, ARMY LAW., Sept. 2011, at 35, 35 (“Teaching trial advocacy is one of the most critical duties of a supervising attorney in the trial arena.”).