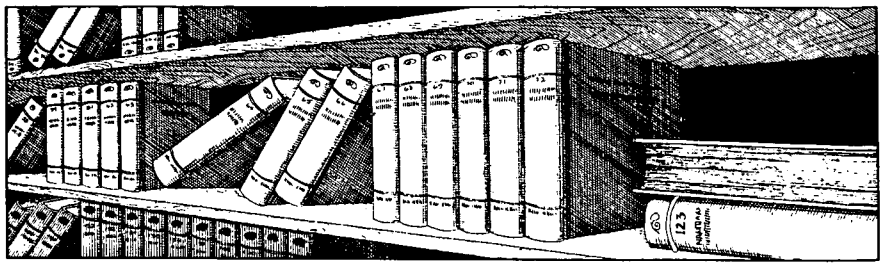
Litigator's Bookshelf



What Makes Juries Listen

Talk-Show Advocacy

What Makes Juries Listen
by Sonya Hamlin
(Law & Business, Inc., Harcourt Brace Jovanovich, Clifton, New Jersey. $55.00)

Television has come to define reality for most Americans. We get most of our news from the electronic media. Our children mimic the commercials and demand sugary cereals. As Ben Stein ably shows in *The View From Sunset Boulevard: America As Brought To You By The People Who Make Television,* our perceptions of lawyers, politicians, oil barons, workers, blacks, women, and all other categories of humans are shaped by the way television portrays them.

So it had to happen: One day, you are watching television and minding your own business when a talk-show host comes off the screen and starts telling you how to practice law.

That is this book and the key to its strengths and weaknesses. It has plenty of both. Sonya Hamlin, the author, has lectured at countless American Bar Association and National Institute for Trial Advocacy sessions and other continuing legal education programs. She understands a great deal about communication and about how most people receive and interpret information. She does not evidence, in this book, a grasp of the mission and craft of advocacy.

Ms. Hamlin is best at telling lawyers how mannerisms get in the way of communication. She reminds us that the era of television has influenced the ways that people get, and are ready to receive, information. She might help your courtroom demeanor, so that you look a little more human and a little less like an overeducated, arrogant prig (yes, I can spell) or a hesitant uncommunicative waif who does not believe in your side of the case.

You will probably derive most of the benefit from this book in the first two chapters. After that, two problems arise. First, the book is repetitious. If you go past chapter two, you will be told at least three times that standing with your weight more on one foot than on the other makes you look more relaxed and confident. You will endure several versions of the useful lesson about how close to stand to a witness or juror to create a particular effect or to cause a particular reaction. I do not deride these insights. Every trial lawyer has them or should strive to have them. For some human endeavors, however, once is enough.

My second quarrel is that the book promises much more than it can possibly deliver. There are chapters on voir dire, opening statement, direct examination, cross-examination, closing argument, and so on. This chapter organization not only exacerbates the problem of repetition but carries the author into realms beyond her expertise. For example, the chapter on voir dire strays beyond communication skills — which are essential — into pop psychology. You will derive far more insight into jury selection by reading the National Jury Project's *Jurywork: Systematic Techniques* (Clark Boardman Co., Ltd. 1984), reviewed in 11 LITIGATION, No. 3 at 65 (Spring 1985), or Ann Fagan Ginger's pioneering work, *Jury Selection in Civil and Criminal Trials* (Lawpress Corp., 1975). The Jury Project people will help you to see that juror reaction to your case is as varied as the sorts and conditions of people. Ann Ginger will help you to translate these insights into tactics. This combination is much more powerful than Ms. Hamlin's book, because it combines communication skills with a deep understanding of the legal issues involved in jury selection.

I like Ms. Hamlin's observations about the importance of the opening statement and some of her suggestions about manner of presentation. I was, however, surprised to read that "In opening statement, you are in total

control of what is said and how you say it. You have infinite choices." You aren't and you don't, at least not in any of the several dozen jurisdictions where I have practiced. The advocate who gets too argumentative in opening is likely to receive a brisk judicial rebuff, which, because opening is so early and so important, can do substantial damage.

Other examples: The chapters on examining witnesses make assertions about tactics that find no basis in my experience trying cases. Contrary to Ms. Hamlin's advice, there are emphatically times when your witness should look directly at the jury while testifying, rather than at you. And her suggestions about training witnesses to "fight back" during cross-examination could be a recipe for disaster.

Direct and cross-examination are, after all, a blend of style, technique, limits imposed by rules of evidence, and – above all – a thorough mastery of the facts and law. The novice would be better served by buying and working through a work such as T. Mauet, *Fundamentals of Trial Techniques* (Little, Brown and Co., 1980).

Beyond these criticisms lies, for me, a deeper problem with this and all works in its genre. I tremble for my profession when I see it inundated by suggestions that advocacy can be reduced to a series of formulae about lawyer behavior, divorced from the merits of one's cases and from the ideology of the adversary system. I tremble because such suggestions trivialize the role and social responsibility of lawyers and because the great advocates of this and every other time in recorded history have been students of society and not carnival barkers.

If you are a young lawyer or law student, you will surely benefit from books on technique and from law school, National Institute for Trial Advocacy, or bar association advocacy programs. If you stop there, however, you risk falling into the belief that your job consists of routine bits of social engineering at society's edges, without even the plumber's occupational satisfaction that at the end of a workday you have done practical good, such as making sure that more people's toilets flush.

To grasp the meaning of an advocate's profession, what should be on your bookshelf? You might begin with *Attorney for the Damned* (Simon and Schuster, 1957) the collection of Darrow's jury speeches. Francis Wellman's *The Art of Cross-Examination* (Macmillan Co., 4th ed., 1936) is marred by the author's ethnic stereotypes but reproduces some classic courtroom moments. The British publishers, William Hodge & Co., have done several dozen volumes, the *Notable British Trials Series;* in these books, you will see that the craft of advocacy has constant themes worthy of mastering. Ephraim London's two-volume anthology, *The World of Law* (Simon and Schuster, 1960) is excellent.

From such works you gain insight into your profession and your craft. You will learn to stop looking in the *Popular Mechanics* classifieds for the ultimate book on how to be a trial lawyer and build a birdhouse. You will probably deepen your appreciation of what advocates do – or can do, that having been touched by the plight of another being, we seek to convey that plight to others.

You will begin to see that an advocate must learn what "drives" a case. She must understand her jury and her client and make the difficult choice between an appeal based upon who the client is and one based upon fidelity to the rules. These may not be mutually exclusive appeals in a particular case, but this decision cannot be made as a matter of style.

There is more. Having read of your ancestors' deeds, you may find a role model, or two or three. Why is this important? Because we are today under a systematic attack that simultaneously berates us for fulfilling our highest ideals and trivializes what we do. Powerful voices in the judiciary attack lawyers as time-wasters, as obstructors of the orderly mechanism for rendering judgments. Some of this rhetoric betrays impatience with the process that is due everyone before judgment. Much of it derides us for being vigorous advocates in the tradition of Erskine, Brougham, Darrow, and Williams.

Those who advocate and those who purport to teach advocacy must beware of giving tacit credence to these attacks by seeming to say that mastery of style and tricks is more important than human concern.

The trivialization of our work is reflected in such cases as *United States v. Cronic,* 104 S. Ct. 2039 (1984), holding that the defendant in a complex mail-fraud case was not deprived of the effective assistance of counsel when a real-estate lawyer who had never tried a jury case was appointed to defend him and given only 25 days to prepare. If you read deeply, you will see that mastery of facts and law and the lessons of experience are important ingredients of adequate advocacy.

There is a broader question lurking here, and it deserves mention. If you are skilled and committed and prepared, can you do any good? Or is our complex society so arranged that the most you can hope to accomplish is some marginal adjustments in distributional equality or, worse yet, legitimating the ways in which the powerful prey upon the weak?

Two recent articles have, to my mind, brilliantly explored this question. David Trubek and others, in *The Costs of Ordinary Litigation,* 31 U.C.L.A. L. REV. 72 (1983), have studied the problems of access to counsel and the impact of lawyer activity on obtaining justice. Richard Abel, in *Law Without Politics: Legal Aid Under Advanced Capitalism,* 32 U.C.L.A. L. REV. 474 (1985), has brought together empirical evidence and brilliant analysis to show that even the most overworked sector of our profession – the legal-aid lawyers – can make some significant differences in redeeming the promises that the system of legal rules indisputably makes.

Consideration of such work is not beyond the proper scope of this review. Ms. Hamlin's book has evident value, but that value is diminished if her insights are not taken into a broader context.

The style of advocacy does not exist for its own sake. It exists to serve good or bad objectives. I am reminded of Thomas More's advice to his successor as Lord Chancellor, Thomas Cromwell. Speaking of Henry VIII,

More said:

> Master Cromwell, you are now entered into the service of a most noble, wise and liberal Prince; if you follow my poor advice, you shall, in your counsel giving to His Grace, ever tell him what he ought to do, but never what he is able to do; so shall you show yourself a true, faithful servant and a right worthy Councillor; but if a lion knew his own strength, hard were it for any man to rule him.

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