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What Lawyers Can Learn from Poker Players

By [Laura Besvinick](#)

Litigation is often compared to chess. The image is evoked of a lawyer strategically developing evidence and making arguments the same way a chess player moves and sacrifices pieces on a chessboard, to defeat an opponent. But ask any trial lawyer, and he or she will tell you that litigation is nothing like chess. In chess, both players have the same pieces and start from the same squares on the board — in effect, their cases are equally strong. Moreover, in chess, both players have an unobstructed view of the board; in other words, they both possess full knowledge of the facts. In litigation, neither of these fundamental premises is true.

The better analogy and, more importantly, the better place to turn for useful practice pointers, is poker. In poker, each player starts with the cards as they are dealt; a hand may be good or bad, depending on the luck of the draw. Likewise, in litigation, the lawyer is presented with his client's case, whatever its strengths or weaknesses may be. Almost by definition, the two sides in litigation will not be equally matched at the outset as occurs in chess. In poker, each player's knowledge is limited; she can see her cards, and any common cards, but not the cards of her opponent. So, too, in litigation, the lawyer's knowledge is limited to what he can learn from his client or through discovery; he does not know privileged information known only to his adversary. As a result, lawyers, like poker players, in order to win, must constantly make the best decisions they can base on imperfect information.

So what do winning poker players know that you don't? (Notice I said "winning poker players" — that is because there are "winning poker players" just like there are winning lawyers, and it is not because they are always dealt better cards or superior cases; it is because they are better at what they do.)

Understand the Odds

Winning poker players understand everything — and not just poker — in terms of the odds. What does this mean? Poker players speak in terms of "pot odds." If there is \$50 in the pot and you need to bet \$10 to stay in the game, the pot odds are 5-to-1. If the pot odds are 5-to-1, and

your chance of having a winning hand is better than 5-to-1 — even if your chance of winning is only 4-to-1 — you should bet. If your chance of winning is less than 5-to-1, you should fold. Winning poker players bet when the “expected return” is positive — that is, when the odds of winning are better than the pot odds, even if the odds do not take into account the amount of the pot are actually “against” them, because, in the long run, it is the strategy most likely to maximize their return.

The concept of “pot odds” is critical, because it consciously rests decision-making on both the likelihood of winning or losing (the risk) and the amount to be won or lost (the reward). In short, if the upside is small, there is no point in taking a big risk. Alternatively, if the upside is big, taking a big risk, even though it is likely that the outcome will be adverse, is actually the right thing to do because the amount you stand to gain makes the risk a good “bet.” In my experience, most lawyers don’t think this way. The fact is, we hate to lose at all. And we hate to lose so much, we often don’t take risks that are objectively worth taking. Thinking about decisions the way that winning poker players think about bets helps combat this deep-seated (and irrational) risk aversion, leading to better decisions and, in the long term, better results.

Understand the Other Players

Winning poker players also understand how to communicate their message to other players. They send signals to each other with their bets and other actions at the table. As children, we learn the “Golden Rule” — to treat others the way that we would want to be treated. In contrast, winning poker players follow the “Platinum Rule” — they treat other players at the table the way that those players would want to be treated. Put another way, they think about how the other players are likely to interpret their message, not how they would interpret the same message if they were in the other players’ shoes.

Applying the “Platinum Rule” means thinking like your opponent. For example, a player may raise (increase his bet) to communicate that he has a strong hand. The player may have a strong hand or he may be bluffing. How the other players interpret the message being sent will depend in substantial part on those players. A player who usually plays “tight,” that is, a player who is inclined not to take risks, will be more likely to fold, because he believes the raise indicates a strong hand. A player who plays “loose,” that is, a player who is more willing to take risks, is more likely to call the bet, because she believes the raise is a bluff. In effect, the meaning of the message depends on the other players, not on the message itself (or the betting player who is sending it).

The same principle holds true in negotiation and litigation. A defense lawyer may make what she believes to be a “reasonable” settlement offer to a plaintiff’s lawyer. The defense lawyer calculates that \$1 million appropriately takes into account the potential damages, the risk of

loss and the cost of going forward, so he offers the plaintiff's lawyer \$500,000, believing that a settlement in the \$1 million range is achievable. But in our example the plaintiff's lawyer does not approach risk the same way that the defense lawyer does. Hearing an offer of \$500,000, the plaintiff's lawyer concludes that the defendant is running scared, and demands \$10 million.

The defense lawyer cannot understand why the plaintiff's lawyer is being so unrealistic, and refuses to counter. Negotiations are over before they begin, and the parties are unable to reach a settlement. Why? Both lawyers have failed to apply the "Platinum Rule." Each lawyer has made the fundamental mistake of assuming that the other lawyer's approach to risk is the same as his, so each inadvertently communicates a different message than the one he intended. Likewise, in litigation, it is critical for the lawyer to understand his audience, whether judge or jury, in formulating his message and determining how best to deliver it.

Bets are just one way that players communicate at the table (although probably the most important one). Players also communicate through their behaviors at the table, even when they don't mean to. These behaviors are called "tells," because they "tell" other players what a player is really thinking, rather than what he wants them to believe. Some well-known poker tells are:

- A player who covers his mouth with his hand is usually bluffing.
- A genuine smile usually means a genuine hand; a forced smile is a bluff.
- The friendlier a player is when betting, the more apt he is to be bluffing.
- Players staring at you are usually less of a threat than players staring away.
- Players staring at their cards are usually weak.
- A forceful or exaggerated bet usually means weakness.

Of course, even tells can be faked. This leads to what is sometimes referred to as Caro's Great Law of Tells (after poker great Mike Caro): Players are either acting or they aren't. If they are acting, then decide what they want you to do and disappoint them.

And what if tells conflict? Generally speaking, when tells conflict, the player is acting. In that case, you should determine what the player is trying to make you do by his most blatant mannerism (because that is the one most likely to be fake), and do the opposite.

Good lawyers also need to be aware of tells. Watching the non-verbal cues of a lawyer with whom you are negotiating may tell you more about the lawyer's real position than what she actually says. When a settlement offer is made, how quickly does the other side respond? How forcefully? If the settlement negotiation is face-to-face, does the other side make eye contact or look away? A lawyer who tries to stare you down is just as likely to be bluffing as a poker player who does.

Understand Yourself

In poker, it is just as important to understand yourself as it is to understand the other players. While this point may seem less obvious, it is equally important. We all suffer from what social psychologists call “ownership bias.” We tend to overvalue what we have simply because it is ours. This is one of the reasons that investors hold on to losing stocks when, as a rational matter, they should sell them and cut their losses. Winning poker players apply the concept of “pot odds” to avoid “ownership bias.” They will fold hand after hand until they are dealt a hand that is worth playing.

Lawyers also need to be on the lookout for “ownership bias.” Lawyers need to consider their cases dispassionately, aware of the fact that their natural inclination may be to overvalue the strength of their case. Like winning poker players, lawyers need to know when to fold and when to tell their clients to do so. On the flip side, lawyers need to be aware of their own appetite for risk (or lack thereof) and how it colors their approach to negotiation and litigation.

Adjust to Changing Information

In Texas hold’em, a popular version of poker, each player is dealt two cards face down, a round of betting ensues, three additional cards are dealt face up (the “flop”), another round of betting ensues, an additional card is dealt face up (the “turn”), another round of betting ensues, a final card is dealt face up (the “river”), and there is a final round of betting. Each time additional cards are dealt, the player has more information and must re-evaluate the strength or weakness of his hand in light of it. Similarly, each round of betting provides additional information about the strength or weakness of his opponents’ hands that must be considered in deciding whether to bet or fold and how much to bet.

The same need to constantly re-evaluate in light of changing information characterizes negotiation and litigation. A case that seems weak at the start may grow stronger in discovery, or it may fall apart completely, the same way a pair of sixes may turn into a full house or nothing at all. Likewise, an opponent who projects strength at the outset may signal weakness as negotiations progress. Lawyers need to be prepared to adjust their own “pot odds” calculations accordingly.

Be Outcome-Blind

As counterintuitive as it may sound, winning poker players know that what matters is that they play each hand properly (according to the rules outlined above), not whether they ultimately win or lose depending on how the cards happen to fall. In any single hand, the odds may be in a player’s favor and he may still lose (sometimes called a “bad beat”). But, in the long run, if a

player plays properly, he will come out on top. It's the reason why the same poker players routinely wind up at the final table in the World Series of Poker and why many people argue that poker is a game of skill, not chance. In effect, winning poker players are "outcome-blind."

After the fact, when they analyze their play, they focus on the process — Did I bet when I should have? Did I raise the right amount? Should I have folded based on what I knew? — rather than the win-lose result. Amateurs talk about their luck; winning poker players don't.

Lawyers and clients can learn a lot from this approach. Poker players can't control what cards are dealt; they can only make the best bets they can based on the limited information known to them. The same is true for lawyers and clients. There will always be facts and circumstances beyond your control that may affect the outcome of any given case. A witness may crumble; a judge may retire; or a law may change. But, as long as your process is sound and you make the best arguments and decisions you can based on the information you are able to develop, in the long run, you, too, should come out on top.

Laura Besvinick is a partner in the Miami office of Stroock & Stroock & Lavan LLP and has more than 30 years of experience litigating complex cases in state and federal trial and appellate courts. She focuses her practice on representing insurers in bad-faith actions, complex coverage disputes, and consumer class actions. She can be reached at lbesvinick@stroock.com.

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