LAWYERS' POKER

♣♦♥♠ 52 LESSONS THAT LAWYERS CAN LEARN FROM CARD PLAYERS

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LAWYERS' POKER ♣

To Natan and Sarah ♥

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Introduction

A young lawyer moved from the Indian Territories (now Oklahoma) to Texas, in the early spring of 1888. Eager to get started, he rented a small office and put his shingle on the door, but he still had to be admitted to practice. There were few law schools in those days, and there was no formal bar exam. Instead, each aspiring lawyer, whether a youngster or a newcomer, had to appear for a personal interview before the Texas Supreme Court.

Our young man made his way to Austin, apprehensive but ready for what he expected to be a rigorous examination by the notoriously hard-nosed justices. Surprisingly, however, they asked him only four questions: Had he studied Blackstone? Did he read the Bible? Did he know his Shakespeare? And could he play poker?

The first three questions were easy to understand. Blackstone's *Commentaries* was the basic reference book for lawyers everywhere; and on the frontier it was often just about the only source available. The Bible and Shakespeare, of course, were essential to understanding human nature, a

necessary quality for successful law practice (then as now). But the poker question made him nervous. Gambling was a vice, so he was worried that the justices were accusing him of immoral conduct.

Still, he had to answer honestly. The lawyer reluctantly admitted that he was a more-than-occasional seven-card stud player, fearful that this might disqualify him in the eyes of the Texas justices. To his relief, however, they admitted him to practice on the spot.

Once he was safely sworn in, the young lawyer got up the nerve to ask the court about the poker question. "Your Honors," he said, "I know why you inquired about Blackstone, Shakespeare, and the Bible, but what on earth does poker have to do with the practice of law?"

The chief justice looked down from the bench and sternly replied, "Young man, how else do you expect to make a living during your first three years as a lawyer?"

The chief had a good point. Lawyering could be an uncertain enterprise in the thinly settled West, with paying clients few and far between. Most attorneys could not survive without a sideline, whether it was ranching, journalism, or dishwashing. There was no way to know whether this particular young lawyer was any good at running cattle or cleaning plates, so the justices helpfully suggested that he turn to poker—figuring that anyone tough enough to practice law in Texas would also be pretty sharp at the card table.

That assumption was right on the money. As we will see throughout this book, there is a deep symmetry between litigation and poker, both of which involve competitive decision making with incomplete information. The theory and practice of poker will be immediately recognizable by every

attorney who has ever made a strategic choice in the face of uncertainty.

Lawyers must make a constant series of decisions based upon a mix of available and unknown facts. The most obvious decision is whether to settle or to proceed to trial, but there are also many other, smaller decisions along the way—which depositions to take, which motions to file, which theories to pursue, which questions to ask—each one influenced to one degree or another by opposing counsel's behavior.

Poker games are much the same. Each player must continually decide whether to raise, call, or fold without seeing some or all of the other players' cards. There is a certain amount of public information in the form of exposed cards (except in draw poker) and, more important, in the betting behavior and physical demeanor of the other players. The key strategy in poker is almost always to deceive the other players by misrepresenting your own cards—often by showing strength when your cards are weak (thus bluffing them into folding their hands) or by showing weakness when your cards are strong (thus encouraging them to keep betting when they cannot win). Even honesty in poker is deceptive. A strong hand played strongly allows you to bluff more easily later in the game. The best card players, like the best lawyers, have a knack for getting their adversaries to react exactly as they want, and that talent tends to separate the winners from the losers.

In poker, every mistake costs money. A card player of even moderate skill usually knows instantly when he has misplayed a hand. What's more, he is immediately able to calculate the exact cost of the mistake. Because poker involves a relatively small number of variables—there are only 52 cards

in the deck and only three possible moves in each round of betting—a player can assess every aspect of his game ruthlessly and with considerable accuracy. It is hard to keep kidding yourself in serious poker. You either win or lose.

Lawyers have considerably more trouble with self-assessment, however, and not only because of ego involvement and self-delusion. Every lawsuit has thousands of factors, and no case exactly duplicates any other. Most litigation comes to a fairly indeterminate end via settlement, while ultimate negotiating positions remain unrevealed. Often it is difficult to say whether, and to what extent, you have truly won or lost. Even in those cases that go to verdict, producing a clear winner, there is no easy way to identify which decisions worked and which failed.

In law practice, the many, many dependent variables defy isolation. Consequently, even the most well-recognized truisms cannot be completely validated or falsified. Never ask a question unless you know the answer. Sounds right, of course, but can it be proven? Save your strongest argument for rebuttal. Makes sense again, but aren't there exceptions? The opening statement is the most important part of the trial. This one has become a legend, but is it really true?

Unlike lawyers' assumptions, poker maxims are constantly being tested and refined, which makes poker wisdom a great strategic guide for litigators. Many poker principles are based on clear mathematical calculations, and others have been validated in practice. Poker is played by as many as 60 million Americans (many of them lawyers), and every player has a cash incentive to improve the quality of his play. Thus, capable card players know the precise odds of filling an inside straight (they're crappy, better use caution) or completing a flush when you get three suited

cards in seven-card stud (pretty good, often worth betting). In other words, poker wisdom rests on real insight into the workings of a game that exploits hidden assets and strategic disclosure.

And, just like litigation, poker is all about winning.

There are many poker tactics that can be applied to comparable situations in law practice. In fact, we frequently borrow the language of poker to describe litigation.

Almost every case begins with negotiation, when you really have to "keep your cards close to your vest." Of course, you will make a reasonable offer "for openers," realizing that you might eventually have to "sweeten the pot." Your opponent, however, might try to "raise the stakes" by implying that she has an "ace in the hole." Still, you will probably be willing to "ante up," figuring that you can "buck the odds" if you "play your cards right." After all, a "four flusher" like your opponent might well be "drawing to an inside straight," in which case you will just have to "call her bluff."

If no one "folds," you will eventually end up in court. That's okay with you, as long as you can get a "square deal" (but heaven help you if the judge is taking something "under the table"). Anyhow, you'll have to "play the hand you're dealt," even if your star witness is a "joker." You can handle the cross-examination of the opposing party, though she might turn out to be a "wild card," just so long as your opponent doesn't have "something up her sleeve." It's too late to "pass the buck," so you'd better hope you have a "winning hand" (and that you aren't playing with a "stacked deck"). Even if you are tempted to "bet the farm," it's probably better to keep your "poker face" and "stand pat." Just make sure that everything is "above board" and that no one is "dealing from the bottom of the deck." But however much money

there is "on the table," there is no reason to "tip your hand" until the "showdown."

Of all the many variations on poker—five-card draw, seven-card stud, high-low split, and countless others—it is probably Texas Hold'em that most closely resembles litigation, because it is based upon a combination of concealed information and publicly shared evidence. Hold'em is a popular and challenging game in which each player must make the best possible five-card hand by using any combination of his own two hole cards and another five communal cards that are dealt face up for use by everyone. The hole cards are dealt first, followed by an initial round of betting. Then the first three community cards—called "the flop"—are dealt face up, followed by another betting round. Next comes another community card ("the turn" or "fourth street"), more betting, then the final face-up card ("the river" or "fifth street"), and one last betting round. As in litigation, most of the information (represented by the flop, the turn, and the river) is shared, and it is also equally available for common use. The most important facts (the "hole" or "pocket" cards), however, remain privately held, to be revealed (or withheld) as each player determines best.

As novelist and poker player James McManus put it, Texas Hold'em is a game of optimal strategies with imperfect information, requiring educated guesses under conditions of extreme uncertainty. It is a "distilled competition" in which the "best strategy involves probability, psychology, luck and budgetary acumen, but is never transparent." No trial lawyer could have said it better, and most of the examples in this book will be based on Texas Hold'em.

As the subtitle explains, this is primarily a book about law and law practice, drawing upon the accumulated experi-