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ARTICLES

Lawyers' Poker

STEVEN LUBET*

I. INTRODUCTION

Neither history nor anthropology can tell us with certainty whether trials resemble games or games resemble trials. The similarities are often noted and beyond question. Both games and trials are contests in which winners are declared. Both depend upon formal rules and set procedures, and both occur in separate, designated spaces where these special rules apply. Trials, of course, are deadly serious (for the participants, if not the observers), while games are, well, games—a combination these days of fun and commerce, but focused always on an irreducible core of entertainment (someone has to enjoy it or it isn't really a game).

The Dutch cultural historian Johan Huizinga believed that games came first; indeed, that play actually precedes humanity:

Play is older than culture, for culture, however inadequately defined, always presupposes human society, and animals have not waited for man to teach them their playing. We can safely assert, even that human civilization has added no essential features to the general idea of play. Animals play just like men.¹

Whatever the accuracy of this zoological observation, it is surely the case that human play has taken on cultural attributes that are discontinuous with the tussling of, say, bear cubs. Huizinga identified numerous attributes of such play, most of which—though not all—apply also

* Professor of Law, Northwestern University. Please note that this essay uses female pronouns for all card players, game players, and athletes; it uses male pronouns for lawyers and witnesses. Copyright Steven Lubet 2003.

1. JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE* 1 (1950).

to trials. "First and foremost," according to Huizinga, "play is a voluntary activity. Play to order is no longer play: it could at best be but a forcible imitation of it."² This is in sharp distinction to trials, where at least one party is always a coerced participant. But this one difference—forcible imitation—simply emphasizes the salience of Huizinga's other factors to both games and trials.

Neither activity is "ordinary," since both involve "a stepping out of 'real' life into a temporary sphere of activity with a disposition of its own."³ Both have defined beginnings and conclusions—"at a certain moment it is 'over.'"⁴ Both occur within "sacred" spaces that are "marked off beforehand." These are "forbidden spots, isolated, hedged round, hallowed, within which special rules obtain."⁵ Moreover, both games and trials bring order to an imperfect world. Indeed, Huizinga posits that play "is order," in that it creates "a temporary, limited perfection" that may be spoiled by deviation from the rules.⁶ The rules themselves create "fairness," which is essential to both games and trials.⁷

Writing a decade after Huizinga, the French philosopher Roger Callois identified one type of play as *agon* (Greek for contest), comprising that group of competitive games,

in which equality of chances is artificially created, in order that the adversaries should confront each other under ideal conditions, susceptible of giving precise and incontestable value to the winner's triumph. It is therefore always a question of a rivalry which hinges on a single quality . . . exercised, within defined limits and without outside assistance, in such a way that the winner appears to be better than the loser in a certain category of exploits.⁸

A trial fits almost perfectly into Callois's definition of *agon*, with its emphasis on confrontation in an idealized setting. In theory, at least, a trial seeks a precise outcome, in which the better, and hopefully more deserving, side always wins.

Callois's theories of play make the comparison to trials even stronger. For example, Callois points out the importance of "doubt" in the structure of games: "Doubt must remain until the end An outcome known in advance, with no possibility of error or surprise,

2. *Id.* at 7.

3. *Id.* at 8.

4. *Id.* at 9.

5. *Id.* at 10.

6. *Id.*

7. *Id.* at 11.

8. ROGER CALLOIS, *MAN, PLAY, AND GAMES* 14 (1961). "In principle, it would seem that *agon* is unknown among animals, which have no conception of limits or rules" *Id.* at 15. Callois's other fundamental categories of play are *alea* (games of chance), *mimicry* (illusion and play-acting), and *ilinx* (vertigo, from swings to roller coasters). *Id.* at 19-23.

clearly leading to an inescapable result, is incompatible with the nature of play."⁹ Games, then, depend on the creation of "doubt," and rules allow "the powers of the contestants [to] be equated."¹⁰

Trials likewise depend on doubt, lest they become mere (tyrannical) formalities. The concept of justice itself depends upon the perception that a trial is not a foregone conclusion, but rather a forum for the determination of disputed facts by an open-minded—that is, doubting—trier or judge.¹¹

A. *The Language of Games and Trials*

For all that, analogies between games and trials are inevitable. An easy case is a slam dunk, and a perfect cross examination really scores points. An overbroad document request is a fishing expedition, while a fortunate discovery hits the daily double. An inscrutable judge hides the ball, but if you complain to the court you might find yourself skating on thin ice, when all you really want is a level playing field. Alas, sometimes your opponent stoops to dirty pool, which might sorely tempt you to follow suit. The language of games seems to inform almost everything we do in law practice: preparation (coming up with a game plan); negotiation (jockeying for position); witness examination (putting the ball in play); oral argument (fielding a question); refusing to settle (rolling the dice); winning (scoring a knock out); and losing (striking out).

Interestingly, the analogies almost all run in one direction—perhaps because games are more primal, more accessible, and more popular than trials. Whatever the reason, there are few, if any, legal metaphors in sports or games. We don't speak of pitchers cross-examining hitters or bridge players delivering arguments. An angry coach might read "chapter and verse" to her underperforming players, but she would not "file a motion" or "cite precedent." True, an umpire's "verdict" may sometimes be "reversed on appeal," but those tropes are not metaphors at all. Rather, they reflect the reality that some sports are, in fact, judged.

9. *Id.* at 7.

10. *Id.*

11. Like Huizinga, but in a more organized fashion, Callois identifies the necessary qualities of play, of which he concludes there are six in number. Only the first—its non-obligatory nature—fails to apply to trials as well. According to Callois, play is separate; circumscribed within limits of space and time. It is uncertain, in that its course and result cannot be determined beforehand. Play is also uncertain, in that it creates neither goods nor wealth, other than the exchange of property among the players. It is governed by rules. Finally, play is make-believe, accompanied by a special awareness of a second reality that is different from real life. This last feature may strike some as inapplicable to trials, which are part of real life and have real life consequences. But they are nonetheless make believe in Callois's sense, since they reconstruct reality as though on a stage. *Id.* at 9-10. In sum, Callois's analysis leads to the conclusion that trials resemble play, except that trials are obligatory, thus rendering them a sort of forced play.

This linguistic observation leads to the ultimate question. Recognizing the impact that the language of games has had on the language of trials, to what extent might games themselves provide useful lessons for trial strategy?

This is not a question about the academic study of “game theory.” Scholars in that field have long posited that their models can predict behavior in all sorts of human activities, from business¹² to international relations¹³ to tort litigation.¹⁴ Almost none of it, however, has filtered down to actual courtrooms, at least in any advertent sense. While the argument can be made that litigators naturally employ game theory (after all, where does the theory come from, if not practice?), there is virtually no professional literature urging lawyers to run computer simulations or engage game theory consultants for even the biggest trials. Nor do practicing attorneys make a habit of speaking in the language of economic modeling. You will never hear real lawyers bemoaning a prisoner’s dilemma or worrying about the tragedy of the commons. But you will hear them complain when the court moves the goal posts, thus leaving them stuck behind the eight ball (and perhaps forcing them to punt).

In truth, most games, especially sports, have little relevance to trial strategy. Apart from a few universal bromides—keep your eye on the ball; run to daylight; hit ‘em where they ain’t—there are very few practical lessons that are transferrable from recreation to advocacy, since advocacy is primarily intellectual rather than physical.

There is one game, however, that definitely provides a useful template for law practice.

And that game, of course, is poker.

B. *Poker Playing and Poker Theory*

There is an undeniable, though imperfect, symmetry between litigation and poker, in that each involves competitive decision making with incomplete information. In poker, a player must continually decide whether to raise, call, or fold without seeing some or all of the other

12. See, e.g., KALYAN CHATTERJEE & WILLIAM SAMUELSON, *GAME THEORY AND BUSINESS APPLICATIONS* 1 (2002) (“Provided the game-theoretic description faithfully captures the real-world competitive situation at hand, game theory provides a compelling guide for business strategy.”).

13. See, e.g., PIERRE ALLAN & CHRISTIAN SCHMIDT, *GAME THEORY AND INTERNATIONAL RELATIONS: PREFERENCES, INFORMATION, AND EMPIRICAL EVIDENCE* 1 (1994) (“There is no question today that the class of non-cooperative games provides a simple and elegant framework for depicting situations where there exists a combination of conflict and cooperation among countries.”).

14. See, e.g., DOUGLAS BAIRD ET AL., *GAME THEORY AND THE LAW* 7 (1998) (“We model the interaction between the motorist and the pedestrian by using a traditional game theory model called a *normal form game*, sometimes referred to as the *strategic form* of the game.”).

players' cards. There is always a certain amount of public information in the form of exposed cards (except in draw poker) and, more importantly, in the betting behavior and physical demeanor of one's adversaries. The main objective 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 the others into folding their hands), or by showing weakness when your cards are strong (thus encouraging others to keep betting when they cannot win). Even honesty in poker is deceptive. A strong hand played strongly allows one to bluff more easily later in the game.

Nonetheless, there are underlying poker ethics, summed up by the phrase “cards speak.”¹⁵ In other words, the best cards always win for those who remain in the game through the final round of betting. Thanks to the laws of probability, every player has an identical chance of drawing winning cards. The decision about whether to stay in the game is freely made by each player, as all have equal access to precisely the same information. While deception is at the heart of the game, some shady tricks, such as “string betting,”¹⁶ are prohibited. Absent cheating, there are no alliances or side deals, and no secret swapping of information.

Law practice, and litigation in particular, shares many of these characteristics. Most importantly, lawyers must make a constant series of decisions based upon a mix of available and unknown facts. The most obvious such decision is whether to settle or 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. The best lawyers, like the best poker players, 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—which makes it a terrific

15. RICHARD HARROCH & LOU KRIEGER, *POKER FOR DUMMIES* 228 (2000). Anthony Holden tells this story about a player nicknamed after a good luck charm:

When I showed my straight, Rabbit's Foot threw away his cards; but they flipped over just short of the muck to reveal a pair of jacks. The dealer took a long, slow look at them while the loser shrugged his shoulders, picked up his rabbit's foot and prepared to leave. He thought he had a pair of jacks. In fact, he had wound up with a straight higher than mine. At this game, as they say, “cards speak,” so the dealer did his duty and pointed out to the departing stranger that he had just won a pot . . .

ANTHONY HOLDEN, *BIG DEAL: ONE YEAR AS A PROFESSIONAL POKER PLAYER* 216-17 (2002).

16. In a string bet, a player throws chips into the pot in installments—thus allowing her to observe reactions before completing her play. This is illegal; the player's bet is therefore limited to the initial amount thrown into the pot. A. ALVAREZ, *POKER: BETS, BLUFFS, AND BAD BEATS* 125 (2002) [hereinafter ALVAREZ, *POKER*].

heuristic.¹⁷ A poker player of even moderate skill knows instantly when she has misplayed a hand. Moreover, she is immediately able to calculate the exact cost of the mistake. Because poker involves a relatively small number of variables—there are only fifty-two cards in the deck, and only three possible moves in each round of betting—a player can assess every aspect of her game ruthlessly and with considerable accuracy.¹⁸ There is no kidding yourself in poker; you either win or lose.

Lawyers have more trouble with self-assessment, and not only because of ego involvement and self-delusion. Every lawsuit has thousands of factors, and no case exactly duplicates any other. What's more, most litigation comes to a fairly indeterminate end via settlement, while ultimate negotiating positions remain unrevealed. It is therefore difficult to say whether, and to what extent, one has won or lost. Even in those few cases that go to trial, thus 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 can neither be validated nor 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?

In contrast, poker maxims are constantly being tested and retested. Many of them are based on clear mathematical calculations, and others have been validated in practice. Capable poker players know the precise odds of filling an inside straight (they're crappy, don't try it)¹⁹ or completing a flush when you draw three suited cards in seven card stud (pretty good, worth betting).²⁰

In short, poker wisdom represents real insight into the workings of the game, including the all-important techniques of "representing" your

17. HOLDEN, *supra* note 15, at 96.

18. There are 2,598,960 different possible five-card combinations in a fifty-two card deck, which might at first make the game seem exceptionally complicated. JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* 186, 187 (1953). In reality, however, the overwhelming majority of those hands are unplayable "rags," consisting of unpaired, unsuited, nonsequential cards that must be folded at the first opportunity—and that occurs long before all the cards are dealt. In Texas Hold 'Em, for example, only two cards are dealt before the initial round of betting, so that there are only 169 meaningfully different combinations (a draw containing the jack of diamonds and four of hearts, say, is functionally identical to the jack of clubs and the four of spades). KEN WARREN, *WINNER'S GUIDE TO TEXAS HOLD 'EM POKER* 43 (1995). Moreover, only about eleven combinations are considered "premium hands," meaning that they have a strong positive expectation of winning, and only forty are even considered "playable." ANDY BELLIN, *POKER NATION* 122-23 (2002).

19. DAVID SKLANSKY, *SKLANSKY ON POKER* 64-65 (1999).

20. WARREN, *supra* note 18, at 199.

hand to maximize its value. Poker is extremely popular, played by as many as sixty million Americans,²¹ and every player has a cash incentive to improve the quality of her play. Consequently, it is no surprise that there are scores of books devoted to poker strategy and technique.²² Most of them are of the standard how-to-do-it variety,²³ but there is also a substantial amount of poker journalism,²⁴ and even a category that might be called poker literature.²⁵

The practical theoretics of poker will be immediately recognizable by every lawyer who has ever made a strategic decision in the face of uncertainty. And, as it turns out, there are indeed many poker tactics that can be applied to comparable situations in law practice.

II. MAXIMIZING VALUE

Poker, like litigation, is all about winning. Naturally, then, the most important lessons from poker are the ones that focus on maximizing gains, both long run and short. Some of these lessons may seem fairly obvious once explained, but several are significant because they are counter-intuitive.

A. *Saving Bets*

The first and potentially most difficult lesson for novice poker players is that the bets you don't make are at least as important as the ones you do. Maybe more. Since you cannot possibly win every hand, or even a large plurality of hands, a major key to success lies in minimizing your losses when you are dealt weak cards. As Andy Bellin puts it, "The biggest mistake inexperienced poker players make is thinking that the only way to make money at poker is to win more hands. They have not recognized that the best way to make money is by minimizing your losses by folding more frequently."²⁶

21. ALVAREZ, POKER, *supra* note 16, at 22.

22. Amazon.com lists 129 poker books, and there are many others on card games in general.

23. DAVID SKLANSKY, THE THEORY OF POKER (2001); WARREN, *supra* note 18; MIKE CARO, CARO'S BOOK OF TELLS: THE BODY LANGUAGE OF POKER (2000); HARROCH & KRIEGER, *supra* note 15. The last, *Poker for Dummies*, suggests an interesting question. Notwithstanding the popularity of the series, shouldn't dummies do everything they can to avoid poker?

24. A. ALVAREZ, THE BIGGEST GAME IN TOWN (1983) [hereinafter ALVAREZ, THE BIGGEST GAME]; LARRY PHILLIPS, ZEN AND THE ART OF POKER (1999); MASON MALMUTH, POKER ESSAYS (2000); SKLANSKY, SKLANSKY ON POKER, *supra* note 19.

25. JAMES McMANUS, POSITIVELY FIFTH STREET: MURDERERS, CHEETAHS, AND BINION'S WORLD SERIES OF POKER (2003); BELLIN, *supra* note 18; MICHAEL KONIK, TELLING LIES AND GETTING PAID (2001); ALVAREZ, POKER, *supra* note 16; HOLDEN, *supra* note 15. Yet another genre uses poker as a metaphor for, say, urban romance (JILL DAVIS, GIRLS' POKER NIGHT (2002)) or high finance (MICHAEL LEWIS, LIAR'S POKER: RISING THROUGH THE WRECKAGE ON WALL STREET (1990)), but with no real discussion of the game itself.

26. BELLIN, *supra* note 18, at 84.

It costs money to play a hand, and more money the longer you stay in it. Consequently, it saves money to fold a bad hand as early as possible, and it saves the most money if you fold before calling a single bet. A common strategy, therefore, is to play only “premium hands,” meaning those that you have the best chance of winning.

This approach is called “tight” play, and it is not without some problems (discussed later), but it is far better than the frequently seen alternative of calling a few early bets and then folding when the action becomes more intense. Those first few futile bets are virtually wasted money, and they can add up significantly over the course of a game.²⁷ It is usually (though not always—again, more later) far better to select a few potential winners and then play them through to the end, while sitting out all the rest.

On one level, of course, it is easy to see that lawyers may prosper if they avoid losers in their case selection. Personal injury attorneys, who work for contingent fees, have been employing this sort of triage for years. On the other hand, large firm lawyers, who bill big clients by the hour, have little personal incentive to fold a losing hand so long as the meter is running—though their clients might see things differently.

In any event, the value of minimizing losses is less apparent, and therefore more important, at the micro level in an individual case. Although they will seldom admit it, many lawyers are insecure about their choice of tactics. Rather than draft a sturdy, single count complaint, a lawyer will freight it up with multiple counts, many just repeating the same basic allegations, simply out of fear of waiving a valid claim. The same insecurity leads counsel to overload appellate briefs with numerous trivial arguments, rather than concentrate on a few good ones.

Of course, all sorts of handbooks caution against this sort of “loose play,” warning that unnecessary claims and arguments inevitably detract from the good ones. Still, lawyers keep doing it, no doubt because the cost is inappreciable. No court would explicitly base its judgment on the inclusion of a trivial or futile argument in the losing party’s brief. Though the wasted pages in an age of strict limits would have been better spent on more salient points, there is little way to reckon the direct price of flabby drafting.

As one poker maven observed, complex events (such as Texas Hold ‘Em and, though he didn’t say it, judicial decisions) are highly sensitive to initial conditions.²⁸ Using a sort of applied chaos theory, he noted that “tiny differences or defects occurring at the beginning of [an]

27. WARREN, *supra* note 18, at 72.

28. PHILLIPS, *supra* note 24, at 25.

event become exaggerated as the event goes along,"²⁹ and therefore can spin rapidly out of control. His conclusion, equally applicable to poker and law, is that "the best way to control chaos is at the beginning of the event."³⁰ Folding a bad hand, or eliminating a pointless argument, will invariably limit future losses. It is therefore an "invisible form of winning."³¹

Nonetheless, lawyers continue to ignore the sage advice of their elders and the exasperated entreaties of the courts, larding their briefs and pleadings with repetitive and feckless verbiage. A few hours of seven card stud, however, might better drive home the virtues of tighter play.

B. *Positive Expectations*

If poker's first lesson is to reduce betting on bad hands, the second lesson must be how to recognize good ones. There are relatively few true premium hands, i.e., guaranteed winners that should be exploited for all they are worth (that is also a subtle art, discussed below). Then there are the "playable hands," good enough for betting in some situations but not in others, depending on the competition. How do you decide whether to bet—and how much to bet—on a playable hand?

As prolific writer David Sklansky explains, "To achieve the desired results, it is necessary that most of your poker plays have what is called a positive expectation," meaning that it will "show a profit in the long run."³²

An expectation is the mathematical likelihood that a bet will be successful. An expectation is positive when the potential payoff exceeds the size of the bet; similarly, it is negative when the probable return is smaller than the bet itself.

In even the simplest case, you need to consider three variables in order to determine the relevant "pot odds": the amount of the raise, the likelihood of success, and the size of the pot. For example, imagine that you are holding four cards to an open-ended straight, with one card yet to be dealt. Your chance of completing the straight is 17.4%, or slightly better than six to one.³³ Now assume that there has been a bet to you of ten dollars, and you must decide whether to call or fold. Are you willing to risk ten dollars on a six to one shot? It depends on the payoff—in this case, the size of the pot. Only if the pot is larger than sixty dollars, does

29. *Id.*

30. *Id.*

31. *Id.* at 14.

32. SKLANSKY, SKLANSKY ON POKER, *supra* note 19, at 39.

33. BELLIN, *supra* note 18, at 31.

the bet have a positive expected value, in which case you should call (or perhaps even raise, as we will discuss later). Otherwise, it has a negative expectation and you should fold.³⁴

Note that the expected value of a bet is not dependent on winning or losing the specific hand. In the example above, the odds are that you will lose the hand five out of six times, with a total cost of fifty dollars. Winning the sixth time, however, brings in sixty dollars, for a net gain of ten dollars. Consequently, the bet is worth making because it has a positive expectation—and the bigger the pot, the greater the expected value. The crucial calculation is whether the play will win quite a bit more when it works than it will lose when it fails.³⁵

Of course, the equation is often more complicated, since you have to factor in the odds that your opponent's hand might also improve (or conversely that she is bluffing). What are the chances that you can fill your straight and still lose,³⁶ or that you can miss your straight and still win?³⁷

The concept of expected value has enormous utility for lawyers, because it can help us see beyond some timeworn axioms, finding opportunity where it might have eluded us.

For example, everyone recognizes the ancient admonition to cross-examiners: Don't ask a question unless you know the answer. This fits right in with the first rule of poker, which is to minimize your bets. Playing only premium hands is the equivalent of asking only surefire questions. But just as the idea of expected value expands the universe of playable hands, it also increases the number of viable questions.

Imagine, for example, that you represent the plaintiff in an intersection accident case, and that you have called the defendant driver to testify as an adverse witness. Assume also that—for whatever reason—the defendant's deposition was never taken, so you do not know the answers to many important questions. Following the usual principles of cross

34. Based on their ability to calculate precise odds and bet only on positive expectations, many successful poker players claim that they are not "gamblers" since they do not wager on unpredictable outcomes. As Anthony Holden puts it, "Poker, I had always argued, was not a form of gambling; on the contrary, gambling was a *style* of playing poker—a loose and losing style at that." HOLDEN, *supra* note 15, at 180. The fabled Amarillo Slim put it more colorfully, "I don't bet on hunches because I don't believe in hunches. Hunches are for dogs making love." *Id.* at 253.

35. SKLANSKY, SKLANSKY ON POKER, *supra* note 19, at 39.

36. This can happen if your opponent fills a flush (about a five to one shot) or draws a full house (nearly eleven to one) on the last card. BELLIN, *supra* note 18, at 31.

37. This can actually happen any of three ways: (1) you might draw a high pair that is good enough to win; (2) your opponent might be bluffing, holding a rag hand worse than yours; or (3) you could raise on your four card straight, causing your opponent to fold a better hand. The last possibility, called semi-bluffing, will be discussed later *infra*.

examination, you would not ask whether the defendant had his brakes checked in the previous twelve months, because you cannot control the answer.

Following poker theory, however, you would quickly see that the question has a positive expectation. Perhaps nine out of ten times the defendant will reply that his brakes were recently checked, meaning that your bet failed. Nonetheless, the loss is minimal, since the driver might still have been negligent in many other ways. In the tenth case, where the witness admits lax maintenance, the gain is substantial. It was a good question because of its positive expected value.

But not every unpredictable question is worth asking; some have negative expected value. Assume that you ask the driver a more controversial question—was he speeding on the way to an illicit affair? His negative reply will no doubt be delivered with a good deal of appropriate indignation, and the judge might even rebuke you for your lack of a good faith basis for the question. The damage to your credibility will be considerably greater than the expected gain from such a stab in the dark. True, the occasional positive answer would hurt the defense, but that would not be nearly enough to outweigh the damage from the many times when you come up empty.

A poker player would characterize the difference between these two questions—auto maintenance versus adultery—as a distinction between betting for value and betting for action.³⁸ The first question is tightly controlled; the only possible answers are yes and no, either one of which can be accommodated. Its expected value is both positive and predictable. In contrast, the second question is highly volatile. It unleashes a host of possibilities, most of them unfavorable. It is audacious, but not valuable.³⁹

Sklansky summarizes the theory of expected value this way. Anytime you make a bet “where the odds are in your favor, you have earned something on that bet, whether you actually win or lose the bet,” but by the same token, when you make a bet “where the odds are not in your favor, you have lost something, whether you actually win or lose the bet.”⁴⁰

38. KONIK, *supra* note 25, at 79.

39. The theory of expected long-term value raises an additional problem for lawyers because they are not “playing with their own money.” This difference between law practice and poker—which an economist would characterize as an agency problem or moral hazard—is discussed *infra*. See *infra* text accompanying notes 75-78.

40. SKLANSKY, *THE THEORY OF POKER*, *supra* note 23, at 10.

III. INFLUENCING OTHERS

It is important to control your own conduct, making only wise bets and folding when the odds are not in your favor. The other key to success lies in influencing the behavior of your opponents, causing them to fold when they might beat you and to keep betting when they are sure to lose. This ability separates the adequate players from the truly skillful.

David Sklansky expands on this idea at some length. Recall that a player strives to bet only in situations that offer a positive expectation. While she may precisely figure the odds of filling or improving her own hand, her opponents' complete hand remains unknown. If she knew all the cards, of course, she could always make the mathematically correct play. Any player who deviated from the correct play would reduce her mathematical expectation and increase the expectation of her opponent.⁴¹ The art of poker, therefore, lies in filling the gaps in the incomplete information, to allow you to make the correct play, while simultaneously preventing your opponents from learning any more than you want them to know about your hand.

This leads to Sklansky's perceptive "fundamental theorem of poker":

Every time you play a hand differently from the way you would have played it if you could see all your opponent's cards, they gain; and every time you play your hand the same way you would have played it if you could see all their cards, they lose. Conversely, every time opponents play their hands differently from the way they would have if they could see all your cards, you gain; and every time they play their hands the same way they would have played if they could see all your cards, you lose.⁴²

Thus, you want to base your own decisions on valid information about your adversaries, while depriving them of any opportunity to do the same. The key to this process is the interpretation of betting behavior. You want to read your opponents' bets as accurately as possible and, perhaps more important, you want to make your own betting behavior inscrutable.

In poker, a bet is both an action and a signal. The action consists of adding, matching, or declining to match the addition of a certain amount of money to the pot. That act also provides information about your level of confidence in your hand—a signal about your strength and intentions. Ideally, following Sklansky's fundamental theorem, you would want to accomplish two objectives with each bet. First, you would want to make the "correct" move in light of your opponent's cards—folding if she has

41. *Id.* at 17.

42. *Id.* at 17-18.

you beaten, increasing the pot if you are likely to win. Equally important, you would want your bet, in its “signaling” capacity, to induce your opponent to make an incorrect move—calling when she is sure to lose, folding if she holds winners.

In litigation, each “play” has a similar dual character. A litigation move has an instrumental purpose—presenting a motion to the court, objecting to a document demand, asking a deposition question. Unavoidably, each act also includes a signal. For example, resistance to a document request has the performative effect of denying (or at least delaying) discovery to the other side. As a signal, it also conveys information, however ambiguously or unintentionally. Perhaps the resistance means that you are planning to play hardball, whatever the cost. Perhaps you are hiding a smoking gun. Perhaps you are exploiting access to an unlimited litigation budget by running up the tab. No matter what the case, it is inevitable that your opponent will attach an extrinsic meaning to some or all of your maneuvers. Consequently, you will be most successful if you can influence and predict your opponent’s interpretation, and therefore reaction, to each signal.

This phenomenon can be seen most clearly in negotiation and settlement. Every offer, including the first, is an act of independent legal significance. It can be accepted, creating a binding contract and thereby ending the negotiation. More realistically, early offers act as signals, partially revealing but not fully disclosing your true bottom line. The art of negotiation lies in correctly reading your adversary’s intentions (“I can tell he will go higher”) while obscuring your own (“final offer”). More complex negotiations will include throwaways and sweeteners, terms of little importance to you that are either withheld or proffered to gain concessions from the other side. Again, success depends upon creating the impression that you hold these items dearly, even if you do not. Thus, you will give away the least while influencing your adversary to offer the most.

A. *Know Why You Are Betting (and Why You Are Not)*

It may seem obvious that you bet in poker, or anywhere else, because you think you will win. That is the functional role of betting, putting up a stake to be matched by your opponents in a wager that you expect to win. But it is not nearly that simple. As we have seen, each bet also has a secondary purpose as a motivator, intentionally conveying a fragment of information to the opposition, in the hope that they will respond to your benefit. According to Bellin,

To simplify a very complicated concept, there are basically two purposes to betting. The first is fairly self-evident. You want other peo-

ple's money. Therefore, if you genuinely believe that your hand is the best, you want to bet and raise so you can increase the amount of money contained within the pot.

The other reason you bet—and raise—is to narrow the field. You eliminate some, or all, of the competition and therefore have a better chance of winning. It's important to remember that these two concepts are often counterproductive. The more people you play against, the more money there is at stake. But at the same time, the more people participating in a hand, the less likely it is that you'll hold the winning hand.

Expanding on this concept, Sklansky identifies four basic reasons for betting, only the first of which ("to get more money in the pot when you have the best hand"⁴³) is instrumental. The other reasons, to varying degrees, are meant to influence the opposition: driving out other players, bluffing, and gaining information from the others' responses.⁴⁴

In other words, you bet for the purpose of influencing the other players. Your bets can either bring money into the pot (when other players call), or keep money out of the pot (when other players fold). Players who fold do not pay you, but they cannot beat you. Players contribute money to the pot when they call, but they may end up outdrawing you and taking it for themselves.

How does one resolve the betting dilemma? Should you bet aggressively and drive players out, even at the cost of a much smaller pot? Or is it preferable to bet cautiously, or not at all, thereby encouraging others to stick around and raise the stakes? As you might guess, there is no single correct answer. Rather, the best approach depends upon an intricate assessment of both the cards and your opponents' attitudes.

In brief, the optimum strategy is to misrepresent your hand, thereby causing your opponents to play their hands incorrectly. The better your cards, the less aggressively you bet. If your hand is unbeatable ("the nuts," in poker slang), you do everything you can to indicate weakness, "slow playing," in the hope that the second best hand will begin raising aggressively. When you do bet or raise, you will want it to look like a bluff, encouraging inferior, though perhaps pretty good, hands to raise back. If you hold a weaker hand—good enough to keep playing, but not a sure winner—you will probably show strength, betting and raising to drive out the competition. This is especially true when your hand is incomplete but potentially powerful, say four cards to a flush or an open-ended straight. The chances of filling your hand may be pretty

43. *Id.* at 121.

44. *Id.* Warren adds a fifth reason, disguising your hand. WARREN, *supra* note 18, at 100.

good (usually between thirty to fifty percent odds if there are two cards yet to be dealt⁴⁵), but there are never any guarantees. Consequently, you may play as though you have already made your hand, encouraging the competition to fold. This is called semi-bluffing, since you can win either by forcing everyone else out, or by actually drawing the winning card.

The point is that winning players evaluate the consequences of each bet, measuring it against a complex matrix of possible results. They are betting not only on the value of the cards, but also on their opponents' predicted reactions. Better players engage in the further calculation of "pot odds," assigning a long-range expected value to each bet. The best players are able to vary their technique to avoid predictability—sometimes they play strong hands strongly (which makes their subsequent bluffs more convincing); sometimes they intentionally fold winners (to encourage other players to bluff with weak hands, planning to call them later, in larger pots).

With that in mind, let us now turn to cross examination. Again, the handbooks caution brevity, advising lawyers to cross examine only on sure points, and as few of those as feasible. And again, too many lawyers persist in conducting long, searching, counterproductive cross examinations. Why do they do this? Because they haven't followed Bellin's rule. They don't know why they are betting.

As lawyers know, the purpose of cross examination is not to gather information, but rather to tell a story. The goal of a good cross examination is to extract useful answers from a (usually) uncooperative or unwilling witness. In essence, the lawyer wants to be the narrator, explaining his client's case, with the witness merely providing the necessary affirmation of the lawyer's points. Witnesses resist. Having been called by the opposing party, they are often resentful or wary of the cross examiner, if not genuinely biased or hostile.

In essence, every cross examination question actually represents a bet. The lawyer wagers his control of the witness (and personal credibility) against the chance of a favorable answer. Some questions are low-risk, designed to encourage cooperation and keep the witness in play. Aggressive questioning raises the stakes, increasing the possibility that the examination will backfire. The witness may become recalcitrant or uncooperative, or the jury may be alienated by the attorney's browbeating.

As in poker, success depends upon an accurate assessment of the likely response. Some witnesses are naturally cooperative, and can eas-

45. BELLIN, *supra* note 18, at 31-32.

ily be led wherever counsel wants to take them. Some witnesses have to be “disciplined” by tough questioning, while others will simply be intimidated into sympathy-engendering silence.

Thus, every question has both a potential positive value (in terms of getting an answer), as well as a potential negative cost (clamping up the witness, incurring the judge’s or jury’s anger). The values, however, are not constant, varying from witness to witness, and even within the progression of a single cross examination.

This underscores the utility of Bellin’s insight. All raises are not the same. Just as there are multiple *contradictory purposes* for betting, there are multiple *contradictory techniques* for cross examination. The lawyer’s challenge is to match the technique to the occasion.

Imagine, for example, that a witness’s direct examination has changed a small but relatively important detail from her deposition testimony. Does the lawyer want to impeach her? And if so, when? This decision can be approached by recalling the default rule in poker betting: Show strength when holding a weak hand, bet slowly when holding great cards.

Thus, if the lawyer believes he has little to gain in the cross examination (weak cards), he may want to impeach the witness sharply and immediately. On the other hand, if the witness is likely to be useful to the lawyer’s own case (strong cards), the impeachment may cost more than it delivers, by essentially driving the witness out of the game.

Even when the impeachment is absolutely essential, counsel must still decide where to situate it in the cross examination. An early impeachment, like a large opening bet, is likely to have the most powerful impact. It might succeed brilliantly, disciplining the witness into eager compliance. But it is also more likely to boomerang, in any of several ways: It might generate sympathy for a witness who, at the outset of the examination, does not yet seem to deserve harsh treatment. It might provoke an otherwise tractable witness to become unnecessarily contentious. Worst, it might fail with a thud, putting the lawyer on the defensive and tipping the scales in favor of the witness for the balance of the cross examination.

The trial advocacy books (mine included) caution against impeaching witnesses unnecessarily.⁴⁶ Poker theory provides an additional way to quantify the decision. You do not impeach a witness just because you can, in the same way that you do not bet strongly simply because you hold good cards. Sometimes “slow playing” is the right way to go—

46. See, e.g., STEVEN LUBET, MODERN TRIAL ADVOCACY 153-58 (2d ed. 1997).

allow the witness to remain uncontradicted, the better to keep him in play.

B. *Bluffing and Misdirection*

Bluffing may well be the most misunderstood aspect of poker. The popular image of the bluffer is someone who makes a practice of betting massively on rag hands, using bluster and braggadocio to bully other players—who are fearful of calling the bluff—out of the pot. In this scenario, bluffing is the signature style of certain players, who invariably attempt to win by domination.

Nearly every aspect of that description, however, is inaccurate. In fact, the most artful bluffing is a means of distraction, not domination. It is part of a comprehensive, long-term strategy employed as a means of preventing other players from ever accurately gauging the strength of any particular hand. It is fairly evident that bluffing is most successful when it is indistinguishable from betting for value. The corollary is less obvious; betting for value is most effective when it is indistinguishable from bluffing.

The surest way to win money in poker is to convince other players to bet against you when you hold the better hand, the precise opposite of bluffing. Not being idiots, most players will not do this intentionally; they have to be lured into it. Bellin explains it this way:

In its most rudimentary form, poker is a game where one player says, I am willing to bet that my hand is better than yours. It takes another player to doubt that, to assume that *his* hand is actually the best, for the game to continue. If you play . . . very mechanically, where the amount you are willing to wager increases proportionately with the strength of your hand—then as a player, you become extremely predictable. Other players would be able to accurately guess the strength of your hand as soon as you made a wager. The only time you would ever have a bet called (and possibly make more money than the ante) is when you actually hold the weaker hand, which makes for a really long night.⁴⁷

Players who raise only on “the nuts” will quickly find themselves with no callers, resulting in the paradox that the very best cards will win the smallest pots. Effective play, therefore, requires that opposing players always doubt your intentions. They have to wonder whether you are betting from strength or from weakness. When you play your cards right, they will guess wrong—folding when they should call and calling when they should fold.

The necessity of varying your play virtually requires occasional

47. BELLIN, *supra* note 18, at 76-77.

bluffing, or representing much greater strength than your actual cards justify. Game theorists John von Neumann and Oskar Morganstern, in their classic academic analysis of poker, conclude that bluffing is an essential component of optimum strategy because it conveys “confusing information” to the opposition.⁴⁸

In fact, the creation of doubt results in four possible outcomes, three of which produce positive profits. If you are betting from strength and your opponent folds, you will win a relatively small pot. If you are betting from strength and your opponent calls, you will win even more. If you are bluffing and your opponent folds, you win. Finally, if you are bluffing and your opponent calls, you lose. Or do you?

Bellin’s insight is that there is a great strategic value to occasionally getting caught—it demonstrates that “you have the capacity to bluff. It’s like an advertising budget.”⁴⁹ Since you always want other players to believe that you might be bluffing, they have to see you actually do it once in awhile. And the more often you are caught, the more often they will call your bets, and even raise them. The trick, of course, is to strike the right balance, so that your play will always come as a surprise and the opposing players will always be off guard.⁵⁰

In litigation, there is no precise parallel to bluffing, since the opposing side rarely simply folds. What’s more, there is seldom an advantage to be gained by inducing the opposition to continue playing—it is usually much better to obtain their maximum offer as early as possible.

Nonetheless, there is a reasonable analogy in the process of pre-trial negotiation, especially as it is played out in the course of discovery. While the ostensible purpose of discovery is to exchange information in preparation for trial, in reality it is much more a “settlement dance,” where the parties bluff and posture about the strength of their respective cases (and witnesses) in order to extract the maximum offer from the other side. Discovery tactics can be either aggressive (resisting disclosure) or accommodating (volunteering information). Lawyers who inva-

48. VON NEUMANN & MORGANSTERN, *supra* note 18, at 188-89.

49. BELLIN, *supra* note 18, at 80.

50. The poker authorities disagree regarding the optimum situations for bluffing. Warren advises more active bluffing on large pots and at high stakes, presumably because the bigger payoff justifies the risk of failure. WARREN, *supra* note 18, at 138-39. Harroch and Krieger, however, suggest bluffing when the pot is relatively small, since your opponents’ pot odds will then favor folding. HARROCH & KRIEGER, *supra* note 15, at 76. More analytically, Alvarez points out that a bluff is most effective when it changes the pot odds for your opponent, thereby making it disadvantageous to call your bet. ALVAREZ, POKER, *supra* note 16, at 76. Thus, bluffing would work better earlier in the hand, when the pot is smaller in relation to the betting limit. This tactic, sometimes called stealing the ante or stealing the pot, does not really have an exact analog in law practice.

riably follow a single approach become predictable, and therefore lose the ability to influence their opponents' settlement position.

For example, some attorneys are vigorous, nearly to the point of obstructionism, in defending depositions. Lawyers who invariably follow this approach quickly develop reputations as blusterers, and no one takes them seriously. Thus, their own constancy renders the technique ineffective. But what happens when such a lawyer uncharacteristically encourages his own witness to begin volunteering during a deposition? The departure from the norm may become freighted with meaning, suggesting that the lawyer has exceptional confidence in both the witness and the case, which might in turn cause the opposing side to reconsider its view of settlement.

Then again, the unexpected turn toward cooperation might be, in effect, a bluff—intended only to convey a contrived attitude of confidence. Opposing counsel, however, will have no way of measuring the true meaning of counsel's move, but will surely have to wonder what he is up to. Sometimes that uncertainty may lead to reevaluation and even self-doubt.

Bellin draws the poker player's conclusion that there is no such thing as an unsuccessful bluff. "If it works, fantastic, you win the pot."⁵¹ And if it doesn't, you have at least laid the groundwork for enhancing your winnings in the future.

This principle has to be amended for lawyers. Let's say, there are no unsuccessful surprises.

C. *Truth*

Despite all the talk of bluffing, deception, and misdirection, poker is ultimately a game of objective truth. The cards speak; they are what they are. A full house always beats a flush, with no additional interpretation or subjectivity. Any player is always free to call any raise, requiring the bettor to show her hand. And while bets may be intended to induce insecurity or intimidation (or the opposite), they are also truthful, in the sense that each bet is physical—chips into the pot. In poker, you put your money where your mouth is. No threats, no contingent promises, no secret deals.⁵² You may disguise your intentions, but you cannot change the facts.

51. BELLIN, *supra* note 18, at 80.

52. As is always the case when significant amounts of money change hands, there is substantial cheating in poker, as there is in law, politics, business, and even religion. See BELLIN, *supra* note 18, at 139-58 (describing various means of cheating); ALVAREZ, POKER, *supra* note 16, at 34-37 (explaining that cheating was synonymous with poker from its earliest days); KONIK, *supra* note 25, at 90 (quoting W.C. Fields, that "anything worth having is worth cheating for").

In a manner familiar to all lawyers, poker players engage in the artful manipulation of truth. Perhaps the greatest example of this was a famous play by the legendary Jack "Treetop" Straus, winner of the 1982 World Series of Poker.⁵³

The play came in a round of Texas Hold 'Em, a challenging game in which each player must make the best possible five-card hand by using any combination of their own two hole cards and another five communal cards that are dealt face up for use by everyone. The hole cards are dealt first. After the hole cards are dealt, there is an initial round of betting. Then the first three communal cards are dealt face up (the "flop"), followed by another betting round. Next a single communal card (the "turn") is dealt, then betting, then the last face-up card (the "river"), then the last betting round.

In this particular game, Straus was dealt the worst possible hole cards—a deuce and seven of different suits.⁵⁴ Ordinarily, a good player would fold such a hand, but Straus kept playing. The three card flop consisted of a seven and two threes, giving Straus two pair (sevens and threes), but also giving everyone else a pair of threes to work with. Anyone with even a moderate pair in the hole (higher than sevens) would beat Straus's hand. That clearly appeared to be the case, when another player aggressively raised \$5,000, indicating a very good hand. Straus nonetheless called, even though he was virtually certain that he was up against a better hand (in fact, the other player was holding jacks and threes). The next up card (the turn) was a deuce—that gave Straus three pair, though it did not improve his hand, since only five cards can be used.

At that point, Straus bet \$18,000, more than triple the amount of any previous bet in the no-limit game. The other player, who had been betting assertively, suddenly paused. How could a deuce have helped Straus so much? While the other player was thinking it over, Straus leaned over the table, smiling. "I'll tell you what," he said, "You give me one of those little old \$25 chips of yours and you can see either one of my hole cards, whichever you choose."

The other player hesitated, then tossed Straus a chip, as he pointed to one of the hole cards. Straus turned it over, revealing a deuce. The conclusion seemed obvious. Straus must have a pair of deuces in the hole (why else would he offer to show either card?), giving him a full

53. This story was first told by A. Alvarez in *The Biggest Game in Town*, and has since been repeated in many other poker books. This version is taken from Alvarez's more recent text. ALVAREZ, POKER, *supra* note 16, at 83.

54. The deuce and seven are the two lowest cards that cannot possibly be combined into a five-card sequential "straight."

house, deuces over threes. His opponent folded and Straus won the pot with an inferior hand. Note that he would have achieved the same outcome if his opponent had selected the other card, a seven, since that also would have indicated that Straus was holding a full house, sevens over threes.

The point of this story, in case it isn't obvious to non-card players, is that Jack Straus won the hand (and became a poker immortal) by voluntarily revealing information, not by concealing it. Showing his hole card was an aggressive show of strength that forced the other player out of the game.

But there was even more to the strategy than that. Good players seldom show their hole cards, so why didn't the other player recognize Straus's move as a bluff? That was due to another masterful bit of reverse psychology. The opposing player reasoned that Straus wanted him to think he was bluffing, in order to get him to dump another \$18,000 into the pot. "If Straus wants me to believe he's bluffing," the loser's thinking went, "then he must really have the cards." Folding, therefore, was the only rational decision.

This parable might actually cause lawyers to rethink the standard strategy for deposition defense, which typically emphasizes withholding, rather than revealing, information. Lawyers who litigate "by the book" usually caution their witnesses to give short, spare responses—preferably in monosyllables—rather than educate the opposition. As one leading handbook puts it, "[t]here is no sense sharing information with the other side when there is no requirement of doing so."⁵⁵

But the effectiveness of Straus's strategy—aggressively disclosing information—suggests that you might well want the other side to know about your quality of your witnesses, the better to influence their settlement posture.⁵⁶ According to negotiation theory, the strength of one's position is a major determinant (perhaps *the* major determinant) of the

55. DAVID MALONE & PETER HOFFMAN, *THE EFFECTIVE DEPOSITION* 198 (2d ed. 1996). See also HENRY HECHT, *EFFECTIVE DEPOSITIONS* 157 (1997) (advising, "motivate the witness to keep the answers short"); BRADLEY CLARY ET AL., *SUCCESSFUL FIRST DEPOSITIONS* 73 (2001) (stating that one should "[a]dvise deponents to keep their answers as short as possible and to avoid volunteering information not requested in the question"); L.J. CHRIS MARTINIAK, *HOW TO TAKE AND DEFEND DEPOSITIONS* 338 (2d ed. 1999) (advising one to "give the truthful, responsive answer that is the minimum answer consistent with credibility").

56. A negotiator should "assess the available information to judge the likely goals the other side may have, as well as the options they are likely to have identified as meeting these goals." THOMAS GUERNSEY, *A PRACTICAL GUIDE TO NEGOTIATION* 35 (1996). "Negotiators must similarly attempt to understand the strengths and weaknesses possessed by their own clients and by their adversaries." CHARLES CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 52 (2d ed. 1993). "You should also think about the alternatives to a negotiated agreement available to the other side." ROGER FISHER & WILLIAM URY, *GETTING TO YES* 105 (2d ed. 1991).

outcome. The shorthand term for this concept is BATNA—best alternative to a negotiated agreement.⁵⁷ The better your perceived BATNA, the better your negotiated result.⁵⁸ Of course, the opposing party cannot be intimidated by your BATNA unless they know about it. Thus, a good deal of any negotiation must be devoted to a detailed description of your powerful case (without details, it would just be unpersuasive bragging).⁵⁹ And what is it that makes your case so compelling? One factor would certainly have to be the strength of your witnesses and the quality of their expected testimony, and therefore the likelihood that you will prevail at trial. There may be no better way to educate the opposition than by showcasing your witnesses at their own depositions. Rather than preparing your witnesses to give short, obtuse answers, you might accomplish more, a la Jack Straus, by encouraging them to tell what they know, explaining why you represent the winning side.

In other words, good things can happen when you show your hand.

D. Tells

Lawyers, judges, and jurors all think they can read body language, correctly separating the reliable witnesses from the lying scoundrels. There is a near absolute faith, both professional and popular, that one need only “look the witness in the eye” in order to distinguish honesty from mendacity.⁶⁰ Indeed, this notion is enshrined in the law of the appellate process, where it is a truism that a trial court’s determination of credibility lies beyond all review.

In fact, however, most research shows that people have only random success at recognizing falsehoods on the basis of demeanor.⁶¹ Studies have consistently found an extremely high error rate in recognizing deception. Observers are wrong between thirty and sixty percent of the time, and no profession does better than any other. Judges, police officers, social workers, and psychiatrists all tend to score in the same overall range as the general public.⁶² Nonetheless, people continue to

57. FISHER & URY, *supra* note 56, at 97-106.

58. “The better your BATNA, the greater your power.” *Id.* at 102.

59. “The more detail you provide to support you position, the more persuasive it will usually be.” GUERNSEY, *supra* note 56, at 101.

60. This claim was repeated over and over, for example, in the impeachment trial of President Clinton as the House managers sought permission to bring witnesses to the well of the Senate. “Wouldn’t you want to observe the demeanor of Miss Lewinsky and test her credibility[?],” urged House Manager Ed Bryant, “Look into her eyes[?]” *Senate Expected to Allow Questioning of 3 Witnesses*, L.A. TIMES, Jan. 27, 1999, at 1.

61. Erica Goode, *To Tell the Truth, It’s Awfully Hard to Spot a Liar*, N.Y. TIMES, May 11, 1999, at D1.

62. One set of tests has been given to police officers, customs examiners, judges, trial lawyers, and psychotherapists, as well as agents of the Federal Bureau of Investigation, Central

express great confidence that they can identify verbal and nonverbal conduct that will reveal another's true intentions.

As far as I know, there has been no study of truth detection that specifically included poker players in its sample. Such a survey would be interesting indeed, since poker players are adamant about their proficiency in "reading hands," meaning that they can figure out another player's cards and betting strategy on the basis of unintentional "tells." As Sklansky confidently explains, "The ability to read hands is the most important weapon a poker player can have."⁶³

Mike Caro, the self-described "mad genius of poker," puts it this way:

Once you've mastered the basic elements of a winning poker formula, psychology becomes the key ingredient separating break-even players from world-class superstars. The most profitable kind of poker psychology is the ability to read your opponents. Look closely and you'll see opponents giving away the strength of their hands just by their mannerisms. Any mannerism that helps you determine the secrets of an opponent's hand is called a *tell*.⁶⁴

There is no doubt that capable poker players can, in fact, read their opponents.⁶⁵ They can deduce what cards you are holding, figure out whether you are bluffing, and determine the exact move that will cause you to fold (or raise). The stories are legion of poker masters who used three levels of logic and reverse logic to pull off an unlikely bluff or to call, correctly, when the odds seemed disastrous.⁶⁶

What is their secret? Is there really a psychic gift, or perhaps finely honed intuition, that allows poker wizards to see through bluffs and detect deception, exercising a talent that eludes ordinary judges and jurors? And if there is such a skill, how might a trial lawyer acquire it?

In fact, champion poker players are able to read their opponents with considerable accuracy. This skill comes with years of experience, reflection, and insight—not to mention the talent necessary to take

Intelligence Agency, Drug Enforcement Administration, and Bureau of Alcohol, Tobacco, and Firearms. On average, the subjects—all of whom are expected to be able to weed out deceit in their professional lives—were able to distinguish lying at a rate of fifty percent, exactly what they would have achieved through random guessing. Malcolm Gladwell, *The Naked Face*, NEW YORKER, Aug. 5, 2002, at 38.

63. SKLANSKY, *THE THEORY OF POKER*, *supra* note 23, at 221.

64. CARO, *supra* note 23, at 17.

65. Michael Konik, who considers himself a proficient but not great player, tells a story in which he correctly read an opposing player's hand and successfully inveigled him into calling bets when he should have folded. KONIK, *supra* note 25, at 199-202.

66. See ALVAREZ, *POKER*, *supra* note 16, at 90 (telling the story of champion Doyle Brunson folding a full house when he correctly deduced that his opponent had quad deuces; and quoting Amarillo Slim Preston that "if you can't fold the winning hand, you can't play poker").

advantage of experience, reflection, and insight.⁶⁷ Additionally, there are four aspects to the game of poker that allow this ability to develop. Unfortunately for lawyers, however, only one of these elements has anything approaching a corresponding component in law practice.

The first poker-specific factor is certainty. At the card table, everyone is behaving deceptively, or at least trying to, all of the time. Thus, you never have to determine *whether* someone is attempting to mislead you, but only *how* and in *what* manner. Even the most cynical lawyer, however, would have to agree that most witnesses tell the truth most of the time. Different factual accounts are usually the result of failed memories, poor observation, or honest differences of opinion—none of which exist in poker. Thus, distinguishing truth from treachery is immeasurably more difficult in law practice, because you are regularly confronted with both. In poker, there is only treachery, which makes matters considerably easier.⁶⁸

The second factor is simplicity. Although there are over 2.5 million conceivable hands in poker, only three or four will be even remotely possible in any given play. Moreover, the actual question will usually boil down to a simple yes or no. Does your opponent have the cards, or is she bluffing? Thus, the choices are relatively narrow, making them that much easier to read. At trial, in contrast, the scope of possible deception is nearly limitless, and hardly ever black and white. Witnesses may testify in various shades of gray about timing, intention, emotion, location, sequence, and other matters of interpretation. The testimony may be a complex jumble of truth, wishful thinking, artful construction, and outright prevarication. Alas, there is nothing binary about it.

Moreover, poker allows nearly instant validation of one's suspicions. If you think someone is bluffing, based on a "tell" or some other factor, call her bet and find out. She will have to show her cards, so you can determine immediately whether your suspicion was accurate.⁶⁹ In law, there is no reliably similar method of external verification (if there were, we would use it instead of holding a trial). The fact finder will either trust or discount the witness's testimony, in what becomes a self-fulfilling analysis. Witnesses are untrustworthy because no one believes them. Yes, witnesses are sometimes caught in lies, or are successfully

67. According to Malcolm Gladwell, certain individuals do seem to be gifted at reading facial expressions, scoring "off the charts" on various tests. "Most of us aren't very good at spotting it," says Gladwell. "But a handful of people are virtuosos." Gladwell, *supra* note 62, at 38.

68. "Poker is the ultimate monument to the anti-Musketeer code: Every Man For Himself (and be sure, while you're at it, to kick the other guy when he's down)." HOLDEN, *supra* note 15, at 71.

69. CARO, *supra* note 23, at 13.

impeached, but that is usually because of inherent inconsistencies in their testimony, not because a lawyer or judge has identified a valid "tell."

Finally, we come to a factor that can be useful to lawyers, although not as might be expected. For all the talk of reading hands and watching tells, it turns out that the single most important determinant is familiarity with your opponent's playing style. According to Caro,

Through the analysis of tells we are trying to understand how players behave and what this reveals about their motivation. One of the first steps in discovering tells is for a player to develop a sense of the *baseline behavioral repertoire* of one's opponents.⁷⁰

The baseline, he continues, needs to be observed over time so that meaning can be attached to repeated anomalies:

Again, by cataloging the baseline behavioral repertoire of individual players, one can begin to recognize "deviations" from normal patterns and develop a second sense, a "feel" for something not being entirely correct. In any case a novice poker player, or an experienced poker player who enters a new game with unknown opponents, should use his calls as a kind of behavioral experiment. You have paid not only to see a hand, but you have paid to see the *quality* of the hand and how it was played.⁷¹

Bellin explains that he has compiled his own player-specific "book of tells" over a period of twenty years, cataloging the tics and giveaways of everyone with whom he has ever played.⁷² "Obviously," he says, "the more familiar you are with a player, the longer you play against them [sic], the easier they are to read. Over time, you make notes about their play, and eventually you will be able to predict their actions."⁷³

Since poker games move quickly, with as many as thirty-five hands per hour,⁷⁴ there is ample opportunity to observe one's opponents. Familiarity with playing style can build rapidly, especially in "regular games" with the same players every week.

Lawyers seldom have this luxury with witnesses, most of whom are not repeat players. Only in fairly unusual circumstances will an attorney have the opportunity to establish a witness's baseline behavioral repertoire. Thus, the interpretation of a witness's mannerisms and demeanor inevitably remain at the level of supposition, if not outright guesswork.

There is a lesson for lawyers in the art of reading poker tells, but it is an ironic one. Lacking the advantages of certainty, simplicity, and

70. *Id.* at 12 (emphasis added).

71. *Id.* at 13-14.

72. BELLIN, *supra* note 18, at 98.

73. *Id.* at 104.

74. WARREN, *supra* note 18, at 48.

validation, lawyers should rely on tells primarily in situations of significant familiarity—rare as those might be.

IV. LIFE AIN'T POKER

Despite the many strategic similarities between poker and law practice, there are many equally important—probably more important!—unbridgeable differences.

A. *Clients and Moral Hazard*

In poker, there is a single “right play” for every situation, based on the concept of expected value. The right play optimizes your eventual return, even if it fails in a given situation, because the odds imply that eventual gains will outweigh losses.

This works because poker success is measured in the long run, not in a single game, and certainly not on the basis of a single hand. Daily performance is inconsequential.⁷⁵ In fact, professional poker players view their careers as a single, unending game, in which they are either ahead or behind. As one championship player explained to Alvarez,

I mean, how long is a poker game? If you play for a living, there is no end to it. Just because it breaks up doesn't mean it ends. The players go away, but they are still thinking about it And they'll be there again the next day. Them or someone else.⁷⁶

Poker players can take the long view, absorbing losses in the name of expected value, because they play with their own money. The long run for them is continuous because the profits and losses are all from the same pocket.⁷⁷

Lawyers, on the other hand, have clients, most of whom are not repeat players. Clients' interests are completely episodic. The client wants to win the current case, and doesn't care if your calculated tactic will succeed fabulously for some other client down the road. Therefore, most clients only recognize current value, not expectations.

This does not mean that the concept of positive expectation is useless to lawyers, but rather that it must be measured on a shorter time frame, in the context of a single case. As an agent, the lawyer must pursue his client's interests, being careful not to sacrifice them for his own gain or the gain of another. This requires lawyers to be far more conservative than poker players when it comes to banking on the odds.⁷⁸

75. BELLIN, *supra* note 18, at 129.

76. ALVAREZ, *THE BIGGEST GAME*, *supra* note 24, at 75.

77. SKLANSKY, *THE THEORY OF POKER*, *supra* note 23, at 6.

78. Certain high volume personal injury lawyers, of course, are known to take dozens of marginal cases on the theory that a small fraction of them will pay off. This is a fairly close

B. *Zero Sum*

Poker is the classic zero sum game. There is only so much money on the table, to be divided by skill in the course of play. Every player's gain comes at the expense of another player, with no room for compromise or negotiation. The sole purpose of a poker game is ruthlessly to take your adversaries' money.⁷⁹ You win or lose. Period.

While some lawyers approach litigation as trench warfare, wise counselors understand that their clients may be better served by settlement, if only to eliminate moral, emotional, and economic transaction costs. Litigation may spiral downward into a negative sum game (making zero sum look pretty good) in which even the technical winners come out behind. Decent lawyers strive to avoid these results (even if being paid by the hour).

Apart from litigation, much law practice is devoted to structuring transactions for mutual gain, in which the competitive strategies of poker would be disastrously out of place.

C. *Lying*

Michael Konik's book, *Telling Lies and Getting Paid*, emphasizes the surreal nature of the gambling life, in which the ordinary rules of human interaction are suspended if not obliterated. Once the cards are fairly dealt, poker values deception, concealment, subterfuge, trickery, and outright lying. Even peeking is not prohibited,⁸⁰ so long as you have not stacked the deck⁸¹ or shorted the pot.⁸² Some writers claim that poker's elemental competition strips bare "a man's character" by revealing "makeshift metaphors for the human condition."⁸³

But no matter what anyone says, poker requires duplicity, and therefore can never be a model for life or law. Poker writer Mike Caro touts himself as the founder of the "Mike Caro University of Poker, Gaming, and Life Strategy."⁸⁴ I have never examined the course catalogue, but we can only hope that latter part of the title is tongue in

analog to the poker player's concept of expected value. Note, however, that in accepting a case the lawyer is acting on his own behalf, thus there is no moral hazard. Once a case has been accepted, the lawyer must handle it advantageously to the client without regard to future expectations in other cases.

79. ALVAREZ, *THE BIGGEST GAME*, *supra* note 24, at 16.

80. MALMUTH, *supra* note 24, at 163; BELLIN, *supra* note 18, at 156.

81. BELLIN, *supra* note 18, at 139.

82. You short the pot when you intentionally throw in fewer chips than called for by the bet. *Id.* at 149.

83. HOLDEN, *supra* note 15, at 91-92.

84. CARO, *supra* note 23, at 5.

cheek. A life strategy, or law practice, based on poker skills would be a disaster.

Andy Bellin is far more candid, admitting that poker has ruined nearly “every relationship I’ve ever had in my life” because “coming home at four in the morning smelling of booze and cigarettes, with a couple of thousand dollars less in my pocket than I left the house with, just ain’t good for a relationship.”⁸⁵ He goes on in that vein for pages, debunking the romantic myths of the gambling life. Michael Konik says the same thing, more bluntly: “In poker you have to lie to win; in life telling lies will only make you lose.”⁸⁶

And in law practice, that will also get you disbarred.

V. CONCLUSION

Is there a final useful lesson to be drawn from the theories of poker? Perhaps it would be “maximize your winning by minimizing losses,” or “avoid predictability,” or even “study the odds.” In each case, the principle is that luck is ephemeral, eventually favoring no one. Some situations, however, can be recognized and evaluated on the basis of expected value, especially when you consider your opponent’s likely response. In these circumstances, at the raw intersection of game theory and human psychology, there are often identifiably preferable—even if counterintuitive—courses of action.

Or you could put it this way: “Depend on the rabbit’s foot if you will. But remember, it didn’t work for the rabbit.”⁸⁷

85. BELLIN, *supra* note 18, at 206.

86. KONIK, *supra* note 25, at 174.

87. BELLIN, *supra* note 18, at 188.