



**Tuesday, October 20**  
**4:30 pm–6:00 pm**

**208 How To Thrive and Win in a Risky  
World: What You Can Learn from the Poker  
Pros, Card-counters and Academics About  
Risk Management, Litigation Strategy and  
Negotiation**

**Laura Besvinick**  
*Partner*  
Hogan & Hartson LLP

**Fred Choi**  
*Senior Corporate Counsel*  
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**Charles Nesson**  
*Weld Professor of Law*  
Harvard Law School

**Lee Robert Schreiber**  
*Author, "Poker as Life"*

## Faculty Biographies

### **Laura Besvinick**

Laura Besvinick is a partner in the Miami office of Hogan & Hartson. Her practice focuses on the defense of insurance companies in bad faith litigation, complex coverage disputes, and class actions, and the defense of lawyers and accountants in malpractice and securities class actions and before the SEC.

Prior to joining Hogan & Hartson, Ms. Besvinick was a partner in the law firm of Davis Scott Weber & Edwards.

She is currently a member of the board of trustees of the Lawyer's Committee for Civil Rights Under Law.

Ms. Besvinick received an AB from Harvard College and is a graduate of the Harvard University Law School where she served as an editor of the *Harvard Law Review*.

### **Fred Choi**

Fred Choi is senior corporate counsel at TeleNav, Inc., in Sunnyvale, CA. He is responsible for drafting and negotiating intellectual property related agreements, including in-/out-bound technology transactions, content licensing, distribution, OEM relationships, technology development, and professional services.

Prior to joining TeleNav, Mr. Choi was with Paragon Legal, providing corporate counsel services for such clients as VMware, Google, and LeapFrog. He also has worked as a licensing attorney for Mercury Interactive, Adobe, and Avant!

He received his BA from the University of California, Berkeley and is a graduate of the Santa Clara University School of Law.

### **Charles Nesson**

Weld Professor of Law  
Harvard Law School

### **Lee Robert Schreiber**

Author, *Poker as Life*

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**Excerpts from *Poker as Life: 101 Lessons from the World's Greatest Game***

Reprinted with the permission of author Lee Robert Schreiber

**Excerpts from *Lawyers' Poker: 52 Lessons that Lawyers Can Learn from Card Players***

Reprinted with the permission of author Steven Lubet

**References and Bibliography**

# Poker as Life

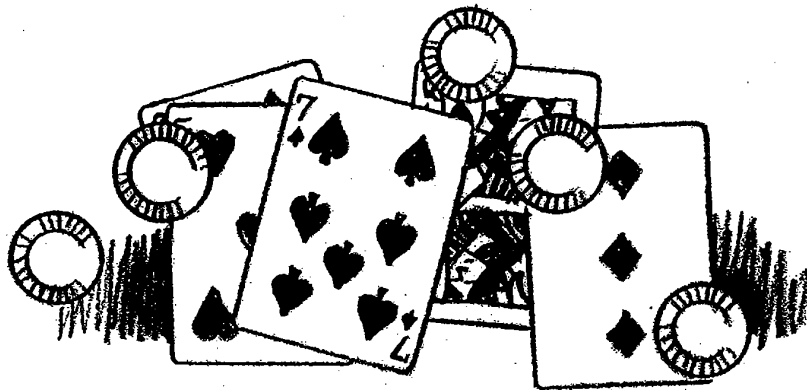
101  
LESSONS  
FROM THE  
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GAME

LEE ROBERT SCHREIBER

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AN *Esquire* BOOK



## 7. You can observe a lot by watching

Everyone's got habits and you've got to recognize them. You know how cows always take the same path to the watering hole, one behind the other. Hell, even the beasts of the jungle, them elephants, take the exact same path when they go to die. Poker players are just the same. —Walter Clyde "Pug" "Puggy" Pierson, old-school card player, and World Series of Poker champion

**B**aseball legend Yogi Berra was a naturally friendly and guileless ballplayer. As soon as he'd reach first base, he'd start chatting with the opposing player about family, home, chewing tobacco, whatever . . . until he got the hit-and-run or steal sign. From that moment on, Berra would clam up and concentrate. Ralph Houk, his Yankee manager, wondered why Yogi was always being thrown out on pitchouts. (It didn't take long for opponents to pick up on Yogi's silence.) Finally, the Yankee

skipper told Yogi to just keep talking at all times, no matter the situation.



Smart players always keep their eyes (and ears) open to the opposition's tendencies—any verbal tics or mute manifestations of body language—that might emerge during the heat of battle.

What is he saying?

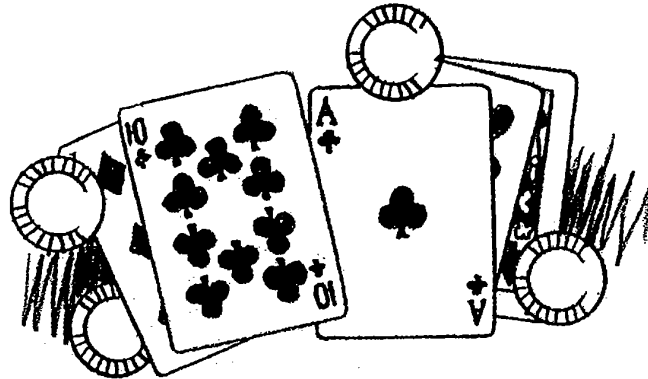
Even better, what is she thinking?

These priceless clues are called “tells,” those telltale signs that unconsciously reveal the contents of someone's hand(s). Learn to look and listen beyond the bad acting and bullshit chatter to find the unadulterated truth.

As Yogi himself said: “You can observe a lot by watching.”

#### Pokerese

advertise (v) to make a point of showing cards after a bluff (indicating that you are capable of bluffing . . . or to relay some other piece of information), usually to set up players for a future misdirection play



## 11. Eliminate guesswork

Guessers are losers. —Amarillo Slim

**E**xperts can often become dismissive when describing non-experts. Mr. Slim has been at the top of his chosen field for close to fifty years—he's played with poets, paupers, princes, presidents (LBJ and Nixon), and drug lords (Pablo Escobar)—so he's entitled to mouth off in overstated bites of bombast now and then. What the stellar self-promoter, and a damned fine player in his own day, meant to say (above) is that most successful people know their stuff so thoroughly, they're rarely in a position where they have to try to presume, hypothesize, or randomly surmise. Their educated "guesses"—informed by experience, instinct, practice, and skill—are usually right.

It stands to reason, then: In any mind-dominated game where an expert is pitted against an inexperienced, uninformed individual (a lesser guesser), the outcome is predictable.

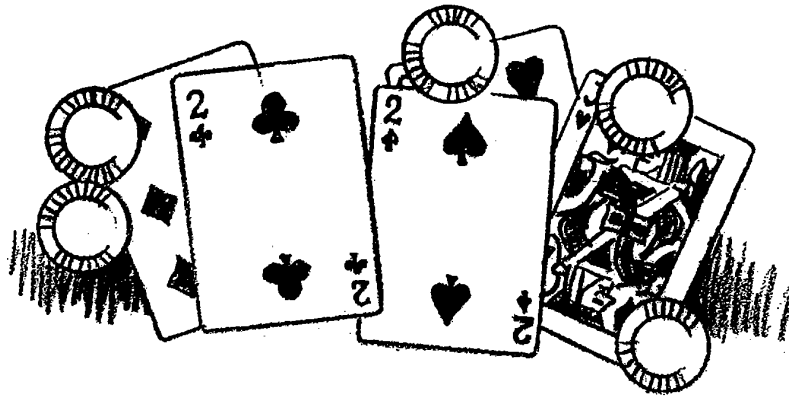


The following poker-specific predictors—gleaned from the work(s) of old pros like Slim, Mike Caro, Andy Bellin, and yours truly—are not always, absolutely, 100 percent correct, but when applied to a roomful of speculators they're pretty damned close.

Tells	Says
Throwing chips into the pot with an exaggerated motion, as if to say, "I'll see any bet you toss in there."	As with the "loud" call/raise the hand is likely a weak one; don't be fooled or intimidated.
Chip stacking.	Let me count the ways: When a player stacks the chips neatly and puts them into the pot, he's optimistic about winning them back; if he tosses them in willy-nilly, he's less certain of getting them back.
Betting hand.	A player might subtly give away his cards with the hand (the one with five fingers) he uses to bet: dominant hand when solid; other hand, when more speculative. Speaking of fingers, what does he do when he's not handling the cards? Is he drumming them nervously? Covering his mouth? Stroking his thighs? Pay close attention.
The quiet call/raise. Gently sliding chips into the pot, trying to slip them under the radar.	Good hand. Doesn't want to scare out the chasers.
Avoiding eye contact with opponents.	Trying to be nonthreatening—to downplay a strong hand, and to encourage a raise.



Tells	Says
Acting overly cool or blasé.	Anything that has "overly" attached to it is bad acting of one form or another; you must determine if it's a lousy, forced performance of an unhappy camper or a real portrayal of a bluffing fool.
Reaching for chips during an opponent's play.	Tricky one this: could be fake strength trying to scare; or genuine, unguarded enthusiasm chomping to bet/raise.
Covering your mouth during a bet.	Usually hides a poor hand, probably trying to avoid closer examination (psychological experts are divided over whether or not bad liars instinctively cover their mouths).
Staring intensely (or defiantly).	When a player looks directly at an opponent, he's usually trying to intimidate or threaten so you won't call his weak cards.



## 22. Emphasize empathy

I believe it is probably true that women on the whole are not inclined to discipline their playing according to a scientific law of averages. Speaking only for myself, I find that the incomparable advantage of playing by instinct is that no one else has the slightest idea what I am likely to do or why. —Barbara Tuchman

**L**et's take the feminization of poker even further—beyond science, beyond probability—into the realm of instinct. In order to make educated guesses about an individual of whom you have little or no prior knowledge, you have to rely on your ability to understand, be aware of, be sensitive to, and vicariously experience the feelings, thoughts, and experience of another individual without having the feelings, thoughts, and experiences fully communicated to you in an objectively explicit manner by that individual.

**In lay terms:** You have to identify with your subject.

**In even layer terms:** You have to get inside someone else's head

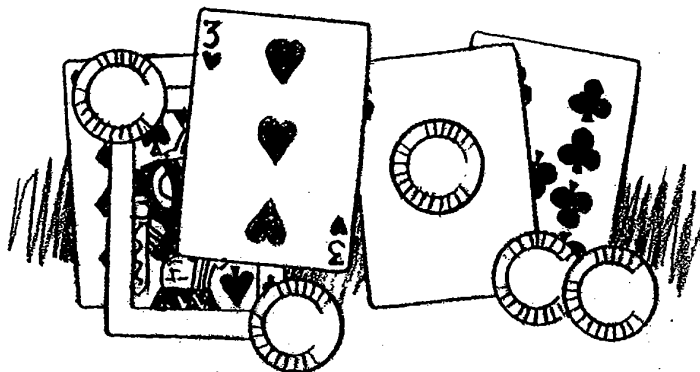
(even if it's nothing like your own) and imagine what makes him or her tick.



Historically (anthropologically?) women have had a leg up in this area; presumably their instinctual wiring enables them to plug into other people's feelings, thoughts, and experiences with far greater accuracy than, say, men. This intuitive disposition can be leveraged to great advantage in numerous quarters, poker being one.

If you are not, by nature, an empathetic individual, you must be willing to work on this deficiency either on your own or with the help of a proven professional. You must summon more than trash talking and macho posturing when digging deep into your duffel of tricks. (If not, find a new bag.) Somehow, and soon, you must discover a way to interpersonally connect with others (or come up with a foolproof method on how to convincingly fake it).

In short: When the chips are down, you must learn to think and feel like a woman.



## 30. Don't throw good money after bad

It is well always to remember the words of the philosopher: "It isn't whether you win or lose, but how you play the game." I would like to meet that philosopher. I would like to invite him to our game. I would like to hold, say, three queens against his three jacks. And I would like to make him a bet that he would quit being a philosopher. —Russell Crouse, playwright, *State Of The Union*

**Y**ou can't control the precise amount you win in a poker session; the cards, the streaks, the trends, the breaks, and your overall level of play will collectively arrive at a specific number. You can, however, control the exact amount you lose. Well before you arrive at the game, you determine a figure. It can be based on numerous factors, but the most important ones should be: How flush you are? How much can you afford to lose?



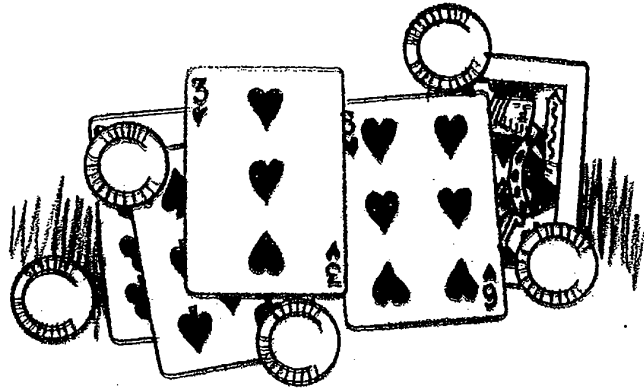
Once you've established the loss limit, it's final. You reach it, you walk. Period. End of discussion. No amount of cajoling, kibitzing, whining, or "guilting" by others (and no rationales offered by any inner voice) will convince you otherwise. There's no point wondering what might, could, or should happen if you stick around. It's very possible that your terrible luck will reverse (or that Lenny's will), but you absolutely should not be there to find out. And no, you don't want to stay and watch—a player wants to play.

Minimizing losses is a constant in any solid, disciplined game plan. In business, you don't waste valuable time or money trying to fix equipment or manpower that is irrevocably broken (and you don't look back unless it's to learn from your mistakes). Similarly, in relationships, you're advised to invest your time and effort, not your ego. If you're doing all the work, move on.

In any and all events, cut your losses as soon as reason, not emotion, dictates.

#### Pokerese

bracelet (n): the coveted piece of jewelry awarded (along with the prize money) to the winners of every event in the annual World Series of Poker held at Binions in Las Vegas.



## 36. There's no such thing as luck

In the long run there's no luck in poker, but the short run is longer than most people know. —Rick Bennet, author, *King of a Small World*

**T**he notion of luck, per se, is for losers. It's the easiest thing to blame when things go poorly.

"You dropped a bundle, Hoss. What happened?"

"Bad luck."

The mathematical and philosophical facts indicate otherwise: There is no such thing as luck (bad or good). Shit happens (see No. 12). That's life. Deal with it. By the end of your mortal run, unless you've been specifically targeted by some higher power (see the Bible: Book of Job), your stuff should break about even, give or take.



Streaks, on the other hand, definitely do exist. They run good and bad, hot and cold, "lucky" and "unlucky" (for lack of better terminol-

ogy). Your job is simple: maximize the hot streaks; minimize the cold ones. How you do that is up to your discipline, your nerve, and your Maker. It is the choices you—and only you—make that will ultimately determine your fate.

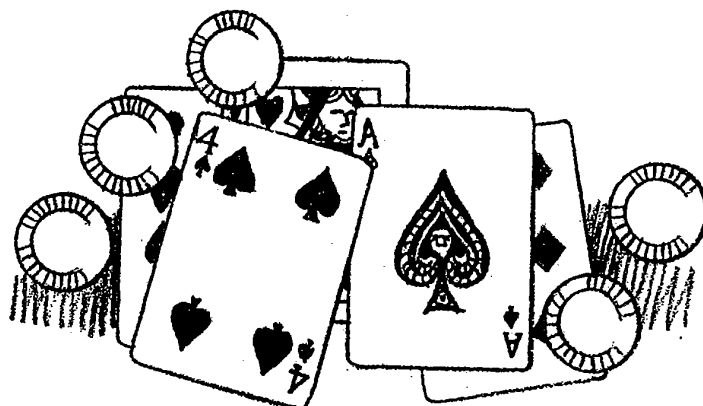
You make your own luck.

#### Pokerese

case card (n): the one remaining card (say the fourth ace) that has not been exposed to a single player or to all players

chase (v): to play loosely and buck the odds (possible originator: to chase rainbows)

check (v): to eschew a bet; if everyone checks, you get the next card(s) for free



## 41. Go with your gut

Have you ever felt you had ESP (extrasensory perception) when calling a player's hand? —Phil Hellmuth, Jr.

**S**ome experts call poker a counterintuitive game, citing as proof the vast majority of brilliant minds who cannot grasp even the most basic concepts, while pointing to the unschooled, grammatically challenged country boys who here consistently topped the tournament heap for years.

Yo, eggheads: It don't take a genius to figure out that shit ain't shi-nola and book-smart ain't necessarily card-smart. And: If you lack intuition, you can't win at poker.



You either have it or you don't (a talent for drawing, writing, calculus, and cards). You can improve your game, whatever it may be, but you can't make a top-shelf bird from chickenshit.

For those of you with the gift: nurture it, develop it, hone it, and heed it. Listen to your instincts; they're usually right.



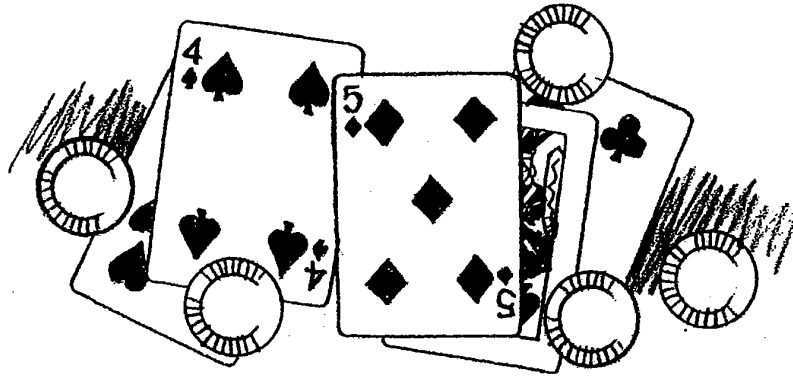
For those of you who're not sure if you have it, see what happens when you analyze less and intuit (ascertain stuff relying on direct knowledge or cognition without evident rational thought and inference) more. Sniff around a subject, rather than take it head-on. (Again, women may have an advantage here, experienced as they are in accessing unfiltered, unintellectualized feelings and emotions.)

For those of you who don't have it, and never will, you might want to think about a different pastime—like bowling, tiddlywinks, or whist.

#### Pokerese

community cards (n) face-up cards shared by all players

dead man's hand (n) aces and eights, all black (the cards that James Butler "Wild Bill" Hickock was holding when he was shot in the back of the head by Jack McCall on August 2, 1876, in a Deadwood, Dakota Territory, saloon)



## 45. Perception is reality

Poker is the game closest to the Western conception of life, where life and thought are recognized as intimately combined, where free will prevails over philosophies of fate or of chance, where men are considered moral agents and where—at least in the short run—the important thing is not what happens but what people think happens. —John Luckacs, author, *Poker and the American Character*

**I**mage isn't everything, but it usually counts for plenty. In terms of table image, the adjectives tight, loose, good, or poor become almost quantifiable when applied to a player's chances to succeed at a bluff. All things being equal, a tight, conservative "rock" (who rarely bluffs) has better bluffing odds than a loose, hyper-aggressive type that bets on anything. On a given night, however, images can be somewhat altered by success or failure. If you're raking in every other pot, your "image" is considered good; other players tend to give you more respect and will probably

be less inclined to call your bluff or semibluff. On the other hand, if you're known as someone who rarely folds (and usually loses), you should have no shortage of takers when you bet/bluff.



*A bluff is likelier to succeed when:*

- you're known as a tight player;
- you're in a game with fairly tight players;
- your image is burnished by a spate of good fortune;
- you play your bluffing hand the same exact way as you play your winning hand(s);
- you're in late position;
- you're in late position, and everyone else has checked;
- there are few (no more than two) other players left in the hand;
- the stakes are significant enough to make it "hurt" to call;
- you can successfully (mis)represent a particular hand based on "scare" tactics, in which you bet or raise on a scare card, typically something that appears intimidating (you bet on the ace as if it paired you up or bet another card in a series of numbers for the straight, etc.).

*A bluff is less likely to succeed when:*

- you're in a game with mostly loose players;
- you bet big and tell your opponents to "save your money" (if you're genuinely interested in their financial portfolio, you wouldn't be playing poker with them; there are no guaranteed talking tells, but if there were, this would be at the top of the list);
- you bluff too frequently;
- the stakes are too low;
- more than two players are still in the hand;

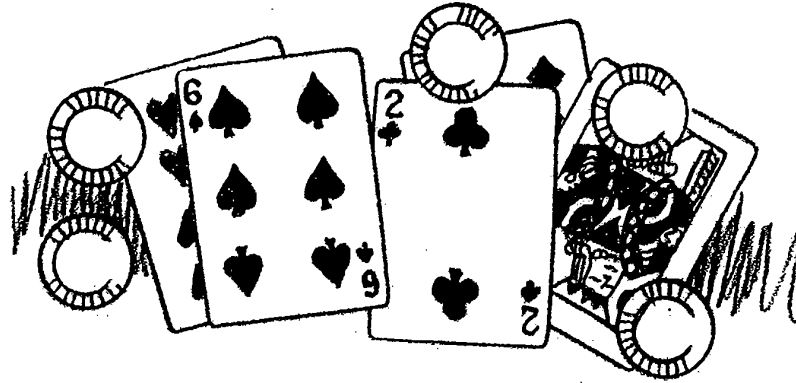
- more than two players are still in the hand;
- the pot is huge;
- patterns emerge—like Stinky's criteria for the old college try: He will always try to steal a pot on the river against one other player (whoever you are, call him);
- you've recently been caught in a bluff (build up your table image before trying again);
- you're head to head with a loose, lousy player.

#### Pokerese

**flop** (*v* or *n*): the first three community cards simultaneously displayed on the board in games such as Texas Hold'em and Omaha.

**flushing** (*v*): when a player is drawing cards in the hopes of pulling a flush.

**fold out of turn** (*v*, *phrase*): when a player folds before his or her turn. This is technically against the rules of poker and looked down upon in any serious game.



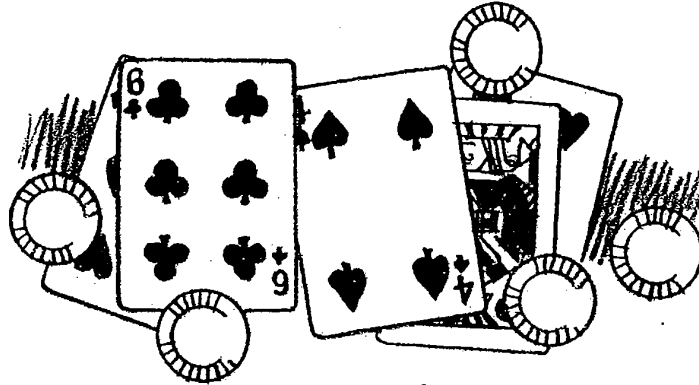
## 62. Do your homework

It will not always be summer. Build barns. —Hesiod, 8th-century (B.C.) Greek poet, *Theogony, Works and Days*

**R**ight now, someone somewhere is putting in the extra time and effort. She may be getting up at 5 A.M. to practice with her coach before making it to middle school; or she may be online, diligently poring through the bloggers for some esoteric but effective tips; or she may be laying out sample hands while reading Doyle Brunson's *Super System*.



What are you doing to keep up? Oh, yeah, you're reading this book. Smart, forward thinking. Keep up the good work. Keep practicing, poring, and reading. It *will* all pay off.



## 64. It's a marathon, not a sprint

Poker is a combination of luck and skill. People think mastering the skill part is hard, but they're wrong. The trick to poker is mastering the luck. That's philosophy. Understanding luck is philosophy, and there are some people who aren't ever gonna fade it. That's what sets poker apart. And that's what keeps everyone coming back for more. —Jesse May, author, *Shut Up and Deal*

**T**hink of poker as one very, very, long game. Trends will come and go. Streaks will run their course. Losers will lose; winners will win.

Each session is an incremental step in a vast, incredible process. You never stop moving forward. You never stop learning. Each time out, your job is to maximize winnings, minimize losses. You don't look back other than to savor your triumphs (briefly) and/or figure out how to improve your play.



Tomorrow is another day. And another. Pace yourself. And another. And another.

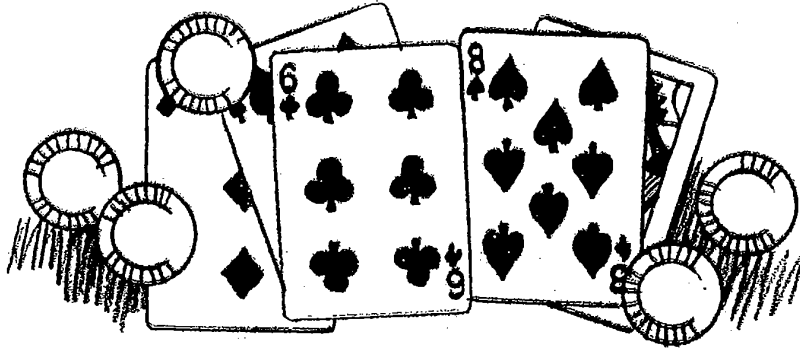
**Pokerese**

jack it up (v-phrase) slang for raise

joker (n) a card (or two) that comes in every deck (but should never be used)

judith (n) the queen of hearts

juice (n) 1. marking on the cards, but there by a cheat 2. the percentage of each pot that is kept by the house



## 68. Take control

When the good player achieves self-control through discipline and understands his opponents through thinking, he then can seize control of the game. —Frank R. Wallace

**T**he key to control—gaining it, holding onto it, expanding it—is in your ability to master emotions, circumstances, and people.



*Emotions:* You don't want to become too high or too low, win or lose. Getting caught up in the hype and hoopla is, in the end, a sucker's game. Keep your mind free and clear of any residual emotions—anger, envy, even joy—that can divert attention from your game plan.

*Circumstances:* This is probably the toughest of the three areas to manage and regulate because, by definition, exigent conditions are beyond your control. You can, however, predict with some accuracy their likely patterns.

*People:* If you've done your homework, know the players inside



and out, and have the charm and force of personality to influence their decision-making (and the salesmanship to close the deal), you can greatly influence—and, to some degree, hold sway over—the thoughts and behavior of small to large groups. It will probably surprise you to discover how easily and happily some people will cede control over huge chunks of their lives to charismatic individuals who seem to know what they're doing.

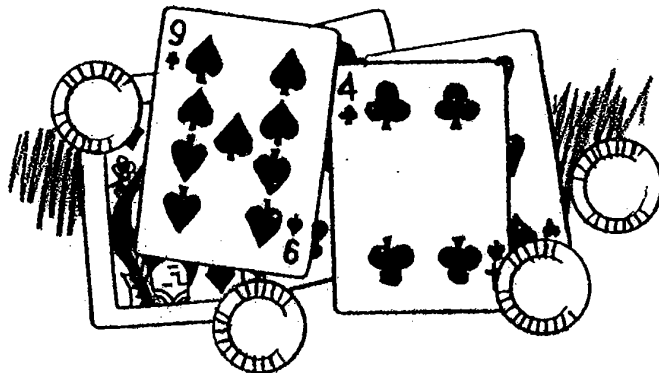
Scary, but true. Better you, than them, to have that control.

#### Pokerese

**Limit (adj):** a game that has fixed betting amounts (as opposed to no-limit or pot-limit).

**Jump to (v. phrase):** in any no-limit game, to just barely call, or call reluctantly. This tactic can be used by a player with a good hand to appear weak.

**Limetop (n):** the people playing in a game.



## 94. Defeat is a better teacher than victory

Every defeat, every heartbreak, every loss, contains its own seed, its own lesson on how to improve your performance the next time. —Og Mandino, self-improvement autho, (25 million books, in 18 languages, sold)

**Y**ou don't dwell on defeat, but you do well to study it. Consider every angle from every perspective. School yourself on how or why you failed and what you can do to prevent the same conclusion from recurring.

If not?

**"Those who do not learn from history are doomed to repeat it."**

—George Santayana, philosopher



Think only of Wily Coyote.

Cartoon after cartoon, afternoon after afternoon, doom after doom. First runs and repeats make no difference. *Wily Coyote?* The

poor dense critter inevitably meets the same disheartening fate. What a waste for a cat who has such energy, such imagination, such . . . a learning disability. How else to explain his oh-so-close defeat time and again, time and again? You think the Roadrunner is such a genius? He's a big beeping turd. He's fast, you gotta give him that. But he would've been stomped, crushed, or eaten long ago if the doomed-fool Coyote had learned and applied just one damned thing from his mistakes.

#### Pokerese

*tight (ad)* characterizes players who are cautious (some might say overly so) and usually stay in a hand only when they have excellent cards.

*loose (ad)* to play wildly or recklessly, often after a bad beat, or when another player's needling hits its mark. An out-of-control player is said to be "on tilt."

STEVEN LUBET

# LAWYERS' POKER

*52 Lessons  
That Lawyers  
Can Learn  
from Card  
Players*

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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

- 4 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

#### LAWYERS' POKER

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

5

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

*Introduction*

- 6 ■ 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

LAWYERS' POKER



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

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- 8 ■ 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-

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ence and insights of masterful card players to demonstrate ways that lawyers can refine their tactics and techniques. Perhaps someday another writer will show that the exchange can also run the other way (“how cross-examination can improve your poker skills”), but that seems both doubtful and unnecessary. Unlike litigation, poker provides its own laboratory conditions—including the possibility of computer simulation—so there would be little reason for card players to study lawyers’ tactics. Attorneys, on the other hand, have always had to be intellectually omnivorous, borrowing freely from disciplines as diverse as literature and economics. So it should be no surprise that proven poker strategies can be extremely useful to courtroom advocates, with the following 52 lessons divided into four broad categories: “Diamonds” (maximizing your winnings), “Clubs” (controlling the opposition), “Spades” (digging for information), and “Hearts” (ethics and character).

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### LESSON 1: *Saving Bets*

The first, and potentially most difficult, lesson for every poker player 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, it is essential to minimize your losses when you are dealt weak cards.

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

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16 fold before calling a single bet. A common strategy, there-  
◆ fore, 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, 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. It is usually far better to select a few potential winners and then play them through to the end, while sitting out all of the rest.

Many lawyers have the same sort of difficulty restricting themselves to premium hands, usually out of insecurity. Rather than draft a sturdy, single-count complaint, for example, a lawyer will freight it up with multiple counts, many of which simply repeat the same basic allegations, primarily for 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 of the 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 invisible. 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 words, in an age of increasingly strict page 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. His conclusion, equally applicable to poker and law, is that “the best

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way to control chaos is at the beginning of the event.” Folding a bad hand, or eliminating a pointless argument, will invariably limit future losses. It is therefore an “invisible form of winning.”

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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 at the card table, however, might better drive home the virtues of tighter play.

### LESSON 2: *Expected Value*

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, guaranteed winners that should be exploited for all they are worth (a subtle art). 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?

Poker players rely on the concepts of “pot odds” and “expected value,” which define the relationship between risk and gain. In even the simplest situation, you need to consider three variables in order to determine the relevant 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%, roughly five to one. Now assume that there has been a bet to you of \$10, and you must decide whether to call or fold. Are you willing to risk \$10 on a five-to-one shot? It depends on

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◆ the payoff—in this case, the size of the pot. Only if the pot is larger than \$60 does the bet have a positive expected value, in which case you should call (or perhaps even raise). Otherwise, it has a negative expectation, and you should fold.

The expected value of a bet is not dependent on winning or losing the specific hand. In the example above, the odds are that such a hand will lose five out of six times, with a total cost of \$50. Winning the sixth time, however, brings in \$60, for a net gain of \$10. 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 sufficiently more when it works than it will lose when it fails.

The concepts of pot odds and expected value are also tremendously useful for lawyers. They can help us to see beyond some timeworn axioms, finding opportunity where it might otherwise 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 and 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 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. Applying the usual principles of cross-examination, you would not ask whether the defendant had his

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brakes checked in the previous 12 months, because you cannot control the answer.

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Following poker theory, however, you would quickly see that the question might have 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 sketchier 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 you will 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. 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 exciting possibilities, but nearly all of them are unfavorable. It is audacious, but not valuable.

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### LESSON I: *Fundamentalism*

Before he ever tried to lure Christopher Darden to disaster, Johnnie Cochran assured himself that the bloody gloves could never be slipped successfully onto his client's hands. Paying close attention to the fundamentals of advocacy, he had actually examined the necessary latex liners during an earlier recess, and his cross-examination of the Bloomingdale's buyer confirmed that the gloves "ran small." With all of the pieces in place, he was in a good position to take full advantage of the prosecutor's rash decision.

A winning card player strives to do the same thing, betting only in situations that offer positive expectations. But while she can precisely figure the odds of filling or improving her own hand, her opponent's hand remains partially, and

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78 ♣ therefore crucially, unknown. If she knew all of his cards, of course, she could always make the mathematically correct play, ensuring a profit at the end of the game (and by concealing her own hand, she could force her opponent into errors by keeping him in the dark). The art of poker, therefore, lies in filling the gaps in the incomplete information to allow you to make good decisions, while simultaneously preventing your opponents from learning any more than you want them to know about your own hand.

This leads to David 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 opponents' 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.

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 to, matching, or declining to match the addition of a certain amount of money to the pot. That act

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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 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. 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



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- 80 ♣ 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, items 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.

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### LESSON 1: *Knowledge Is Power*

In both poker and law, the types of information fall into three rough categories. The “up” cards in poker are always public knowledge, equally available to everyone, never to be hidden or changed. In that regard, they correspond to documents produced on discovery and to deposition testimony. Once disclosed, this information is no longer private. It can be used by anyone to seek out more information, to influence negotiation, or (consistent with the rules of evidence) for introduction at trial. The “hole” cards, in contrast, are secret and proprietary. Each player controls access to her own pocket cards, exposing them, if at all, only if her final bet has been called. The legal analogue is confidential information, which a party never needs to reveal unless she herself “opens the door,” that being the litigation equivalent of raising a bet. Finally, there is the broad middle ground of information—the bets, calls, feints, and ploys that are neither fully disclosed (because they are often disguised and must be interpreted) nor fully privileged (because they occur in plain view).

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Skillful players, and lawyers, must master all three categories of information. You must know how to exploit the up cards, whether (and how) to reveal your hole cards, and, most intriguingly, how to read your opponents' signals, whether intentional or unintentional, while camouflaging your own.

In poker, this is done by betting—throwing chips of varying value into the pot while gauging the reactions of everyone else at the table. According to Alvarez:

Chips are not just a way of keeping score; they combine with the cards to form the very language of the game. What you do with your chips—how and when you bet or check or raise—is a way of communicating with your opponents. . . . The questions you ask and the answers you receive may be misleading—a gigantic bet may be a sign of weakness, an attempt to drive the other players out of the pot because you do not have the hand you purport to have—but the combination of cards and money and position at the table creates a complex pattern of information (or illusion) that controls the flow of the game.

Instead of chips, lawyers use questions, requests, demands, arguments, claims, and motions when attempting to outmaneuver their opponents. With each side doing its best to intertwine candid, ambiguous, and illusory information, the winner is usually the lawyer who is best able to untangle the knotty facts. This is never more true than in negotiation, where “puffery” is explicitly permitted by the *Model Rules of Professional Conduct*, and no good lawyer would ever willingly reveal his true bottom line.

Whether they are openly negotiating or just exploring the possibility, opposing attorneys often expend consider-

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136 ♠ able time and energy attempting to maneuver each other into making the first offer. Neither one wants to make the opening move, for fear that it will be interpreted as a sign of weakness. Even worse, each lawyer inevitably worries that she has miscalculated the value of her case and may end up giving away the store if she cannot get the other side's offer first. Indeed, "never make the first offer" has practically become a mantra in some quarters, and there is a substantial professional literature devoted to techniques for squeezing an initial offer out of opposing counsel.

As always, there is considerable wisdom behind the conventional approach, although the fear of going first is usually exaggerated. An initial offer does not need to be a sign of weakness, and the likelihood of a disastrous miscalculation can be virtually eliminated with research and planning. The real benefit from delaying your offer is that it allows you to gather some additional information about your adversary's negotiating posture.

In poker, betting always proceeds in a clockwise direction. Depending on the particular game, the initial bettor might be the person seated to the left of the dealer, or it might be the player with the highest cards showing. In Texas Hold'em, the most popular casino game, a "button" passes from right to left on each hand, indicating the nominal dealer, who is "on the button." The player to the immediate left of the button—said to be "under the gun"—has to act first on every betting round (except the initial round, when the mandatory big and little blinds are posted by the first two players, and the third player starts the betting).

It is a general disadvantage to be seated in the first few seats to the left of the button, called "early position," since you will have to make a decision about betting without get-

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ting any information from the other players. You might bet too much, only to be raised by a player to your left who is holding even stronger cards. Or you might bet too little, failing to draw sufficient money into a pot that you are likely to win. In contrast, players in “late position” can get a free preview of your strategy before ever having to make or call a bet. The player on the button is in the best spot of all, able to assess everyone else’s possible strengths and weaknesses before making a move.

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The early positions simply rotate in poker, so they cannot be avoided. Consequently, skillful players have developed effective strategies when they have to bet first. One approach is to open with a large bet, aimed at causing borderline hands to fold. Bluffing can be particularly effective in early position, since few players would risk making a large bet on anything other than exceptionally strong cards. The reverse technique—called slow playing—involves checking without betting even when holding a good hand. That may embolden others to bet, perhaps foolishly, which will increase the size of the pot.

The point, of course, is that early position comes with a drawback (you have to reveal something to the other players), but even that can be turned to your advantage (you have an opportunity either to bluff or entrap them). While it is always important to obtain information, it can sometimes be just as powerful to dispense it.

### LESSON 2: *Taking Their Measure*

What is the most important information in a poker game? You might think it would be the cards—are they rags or the nuts, or somewhere in between? But that would be wrong. In

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138 ♠ fact, the cards are strictly secondary, really little more than the tableaux against which the game is played. The more important information concerns the players themselves. Are they tight or loose? Can they be bluffed into folding or, better yet, drawn deeply into a hopeless pot? Will they overplay their hands, or are they too timid to go all in? Are they greedy, gullible, patient, or slick? With that sort of information, you can usually win even with bad hands and beat your opponents (in the long run) no matter what they hold—which is why Yardley was fond of saying that he played his opponents, not the cards. Or, to paraphrase Shakespeare, the key is not in our cards, but in ourselves.

You have to understand your opponents—indeed, you have to be able to see through them—in order to win consistently at either poker or law. In his book *Total Poker*, the British journalist David Spanier used a vignette from a film to illustrate why sizing up your adversary is crucial to success. As Spanier explained, “[T]he best film about poker, curiously enough, isn’t about poker at all. It’s *The Hustler* (1961), which is about pool playing.” Evaluating the opposition is a universal skill.

Based on a novel by Walter Tevis, *The Hustler* is the story of Fast Eddie Felson (played by Paul Newman), a young pool player on the make. Eddie is determined to establish his reputation by beating the famed Minnesota Fats, but first he needs to raise a stake by winning some money in a small-town dive. As the film opens, we see Eddie and his pal Charlie entering a slummy bar. The two men begin drinking and playing pool, loudly pretending to be drunk. Eddie loses game after game, attracting attention with his ostentatious complaints, until he somehow manages an impossible three-

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cushion shot that ends when the ball runs the length of the table and into the corner pocket.

"You couldn't play that shot again in a million years," says Charlie.

"I couldn't?" sneers Eddie. "Set 'em up again the way they were before . . . bet ya twenty bucks." Eddie tries the shot again, but he misses badly. In fact, the cue ball flies off the table, as the locals get a good laugh. "Set 'em up again," insists Eddie, but Charlie will have none of it. Stumbling a bit, Eddie angrily slams his money down on the table, demanding to play again. He seems to be challenging Charlie, but of course he is looking around the bar for a mark.

Eddie notices something in the bartender's eye and realizes that he's found his man. He takes out \$100, and the barkeep eagerly announces that he will take the bet if no one else will.

"Don't bet any more money on the damn fool shot," warns Charlie, heading for the door. But Eddie is stubborn and overconfident as only a drunk can be. No one can tell him different; he's going to make the shot. The bartender doesn't want to miss his opportunity, so he quickly pulls \$100 from the till and lays it on the rail.

With the balls set up and the money in sight, Eddie raises his cue and drops the pretense. With one sinuous motion, he slams home the shot and scoops up the money. Then he races out the door with Charlie, to make their getaway before the stunned barman realizes how thoroughly he has been hustled.

It was nice work, observed Spanier. "Accurate too, because it is the *greed* of the sucker that makes the hustler's skill pay. Without the victim's desire to get rich quick, the hustler couldn't con him along."

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140 ♠ In other words, Eddie's fantastic shot was only incidental. He had to get someone to bet against him if the con were going to work. That required attracting attention and feigning a shaky hand. But most of all, he had to identify a likely mark who could be tempted to bet against him. Recognizing the barman's greed, therefore, was the true heart of the hustle. Without that information, Eddie would have gone home empty-handed no matter how many great shots he made.

The only difference in poker is that everyone knows about the deception. Nonetheless, you still win the most when you can get someone else to smell easy money. You've got the winning hand, but no one can see it—maybe suited face cards in the hole, giving you the nut flush—just as no one in the bar knew that Eddie Felson could make the tricky shot. Now you need someone to bet against you, mistakenly confident that he's got you beaten. You demur a bit; he raises big time on the turn. You just call, setting the hook. He raises again on the river, and this time you go all in. Voila! Just like Fast Eddie, you made someone else's greed work for you.

Now let's revisit Abraham Lincoln's great cross-examination, discussed at some length in the "Diamonds" section. Could it be that Honest Abe and Fast Eddie actually have something in common? Well, they do. Both men knew how to take advantage of an overreaching adversary.

Recall that the key prosecution witness testified that Lincoln's client bit off the victim's nose. But the witness had been birdwatching and was pretty obviously looking the other way during the fight.

"So how can you say that my client bit off his nose?" asked Lincoln, rather bumblingly (though not drunk, like Felson).

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"Because I saw him spit it out," retorted the too-eager witness.

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But Lincoln was not bumbling at all. He was taking the witness's measure. Finding him greedy and willing to exaggerate, Lincoln moved in for the kill.

"How could you see so clearly at night?" he challenged.

"By the light of the full moon," said the witness. There it was, the equivalent of \$100 on the rail, as the witness took the bait.

Just as Fast Eddie slammed home the winning shot, Lincoln produced the *Farmers' Almanac*, proving that it had been a moonless night. Greed observed. Bet won. Case closed.

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Risk and Control Self-Assessment (RCSA).

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Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.