

SECOND CHAIR

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Poker Strategy for the Litigator

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Steven Lubet, professor of law at Northwestern University and an expert and author on trial advocacy, has written a book illustrating the parallels of high-level poker and lawyering. Entitled *Lawyers' Poker: 52 Lessons That Lawyers Can Learn From Card Players*, the book shows how the tactics of the poker table can be adapted to litigation and negotiation.

According to poker author Andy Bellin, as quoted by Lubet, "One of the great mistakes you can make in poker is playing in a game where the stakes are over your head. If you start thinking about the actual worth of all those clay chips, it knocks you off your game." As Lubet explains, correct poker strategy (and, in particular, the theory of expected value) requires you to play potentially losing hands, as long as the pot odds justify the bet. It is difficult to come over the top with a re-raise, however, when you view that particular bet as the month's grocery money—even when it might be the correct strategic play.

Lubet makes this point to argue that clients suffer when attorneys overestimate their skills or underestimate the competition, and move to "the big time" on particular engagements before they are ready. True enough, but there is another, perhaps deeper, lesson here. Just as poker players should avoid games where the stakes are "over their head," so too should clients avoid litigation when the costs to litigate are over the client's head.

Many clients do not appreciate the resources that must be committed to litigate a commercial case—especially a complex one with multiple issues, multiple witnesses, and voluminous documents. If the client initiates litigation (sits down at the table) without the ability or willingness to see it through to the end, it is inherently difficult to litigate the case in strategically appropriate ways (i.e., play correct strategy).

For example, although clients can often be emphatic about litigating aggressively at the inception of a case, they will sometimes lose steam after several months of funding the litigation. At that point, the client may inquire about forgoing certain motions that might otherwise have been brought, dropping otherwise important issues or claims to the case, conceding certain discovery disputes that could be contested, etc. In so doing, the client is sitting in on a game where it will not be able to use an optimal strategy. And just as in poker, in the long-term, this compromised strategy will be problematic.

Certain companies, however, should not immediately assume litigation is an inappropriate response to a particular problem. Some cases require more resources than others, and the definition of "high stakes" is relative to the client. There may be exceptions in particular cases: A litigator might try to tailor the case to a client's budget by skipping long-shot (though viable) causes of action if the anticipated discovery on those particular claims will be expensive—the equivalent of playing only premium hands. But litigators should counsel their clients about the true stakes of the game immediately after (or even prior to) being engaged and help the client decide whether to sit down at the table in the first place.

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