By DENNIS R. SUPLEE

Playing Poker and Trying Cases: Getting Better?

Practical Skills Translated From the Poker Table to Courtroom

The client, who for a time made a living as a professional poker player, sent an email telling me to attend a presentation by Annie Duke: "You'll learn in 40 minutes what I've been trying to teach you the last three years."

As evidenced by her victories in the World Series of Poker Tournament of Champions and the National Heads-Up Poker Championship, Annie is a world-class poker player. She also has a Masters in psychology (and reached ABD status on her doctorate work) that helps her to apply to the business world her insights as to how poker players learn, or do not, from feedback. Here's what Annie had to say, followed by how it might apply to trial lawyers.

ANNIE DUKE – PART 1: SKILL (YOURS) VERSUS LUCK

Because in poker the feedback comes fast, it is a particularly appropriate game for an examination of how well one learns from feedback when there is uncertainty as to the cause of the outcome (that is, where luck is at play). You can play more than 30 hands in an hour and can see almost immediately how your decisions, and those of others, worked out, as you win or lose chips.

But in spite of the rapid feedback, most players reach a level somewhere in the intermediate range and then stop improving. Why? When you talk to these players, a pattern emerges: when they won, it was because the hand was well played; when they lost, it was because they had bad luck. Conversely, when their opponents won, it was because their opponents had good luck; and when they lost, it was because the hand was badly played. If you look at the world that way, there is nothing to be learned: you win every time except when bad luck snatches away victory; and your opponents would never win but for their good luck. My thesis is that people are inclined to see the world that way in part because it protects them from a harsh self-evaluation.

Playing poker is an intensely personal experience. You sit at the same table with your adversary and can look him directly in the eye. At the end of each hand, and at the end of the night, you won or you lost. It is entirely understandable that if you lost, you would not be looking for an unsparing self-critical review of what you might have done differently. Better to blame it on bad luck. But when you do that, you stop learning. You stop getting better.

DRS - PART 1: LUCK IN TRIAL PRACTICE?

Do trial lawyers have anything to learn from Annie's critique of poker players? I think so.

The feedback loop is a not as fast but there is a constant flow. You won or lost that motion. The deposition went well or badly. The process of self-assessment should start early and continue throughout.

At first glance, it may appear that the role of luck is greater in poker than in trial practice. There are many quotes about luck in poker, but trial practice is typically treated as a craft, a skill, the product of hard work, not luck. As Louis Nizer observed, "You'll still find me in the library looking for luck at 3 o'clock in the morning." Many trial lawyers are loath to acknowledge the role of luck – until they lose. Then they behave just like Annie's poker players who blame their loss on bad luck – bad luck that the judge screwed up the charge, bad luck that the jurors did not "get" the technology, bad luck that their expert inexplicably went south, bad luck that ***.

A sign that trial lawyers are not learning is that they slip into doing things the same way over and over. For example, they follow the same format at every deposition: give the deponent his civil Miranda warnings (re: speaking up if he does not hear, etc.), then ask about his education and employment, then elicit the facts in chronological order. Similarly, if you read their last three closing speeches in other cases, you can predict quite reliably what they will say in yours.

Do trial lawyers tend to see the world like Annie's poker players (winning when skill determines the outcome and losing only when bad luck snatches victory away) to protect themselves from a harsh self-evaluation?

Trying a case, too, is an intensely personal experience. You are involved in a grueling mano-a-mano exercise that is the culmination of weeks, months, perhaps years of hard work. It is a highly competitive exercise in which you try to persuade the judge to accept your version of the law, and the jurors to accept your version of the facts. Meanwhile your opponent is attempting to do just the opposite.

Like the typical poker player, when we lose, we are not looking for a brutally honest post-mortem assessment of our performance. Perhaps that explains why the losing trial lawyer will sometimes pass on the opportunity to talk to jurors about why they decided the case against him. His self-image cannot stand it. It was just bad luck. But, if we take that view, the result is that we stop learning. We stop getting better.

Even when we've won, we're not looking for a neutral critique; we are looking for accolades. The last thing we want to hear is that the jurors decided the case for our client in spite of our performance, not because of it.

It is important to understand that these comments apply not just to the lawyer with intermediate trial skills, but with equal force to the excellent trial lawyer who is regularly achieving excellent results. Success should not make us resistant to improvement.

ANNIE DUKE – PART 2: FREE FEEDBACK

After scanning the hand dealt to me, I fold 80 percent of the time. But even then, there is an opportunity to learn. Rather than paying no attention after you have folded, you can follow the play of those still in the game and see, to some extent, what decisions they made and how they worked out. And because you are not in the hand, it costs no chips to learn.

DRS - PART 2: FREE FEEDBACK IN TRIAL PRACTICE

There are opportunities for litigators, like poker players, to learn even when they are "not in the hand." The question is whether we will take advantage of them. Take the last year: how many times have you walked to the courthouse to watch the openings or closings in a significant case? To watch an argument involving a controversial question? If the answer is none, do you have nothing to learn from the area's leading trial and appellate lawyers (even if you count yourself among them)?

ANNIE DUKE – PART 3: EVALUATING JUNIORS

[Relying on her background in psychology, Annie then stepped beyond the world of poker to comment on how senior members of organizations evaluate juniors:]

Curiously, we tend to evaluate juniors as if the only variable is skill: if it was a good outcome, it was because of the junior's good play; if it was a bad outcome, it was because of the junior's bad play. This view takes luck completely out of the equation – which is wrong (wrong because it is inaccurate). This view promotes overall disappointing performance because, to avoid being blamed for a bad outcome, the junior will likely make the most conservative decision, rather than taking a bigger risk that might produce a much bigger payoff.

DRS - PART 3: EVALUATING JUNIOR LAWYERS

If we evaluate junior lawyers that way, they may become reluctant to try cases for fear that, if they lose, the senior lawyer will attribute the loss to poor performance (even though the senior lawyer would attribute his own loss of the same case to bad luck). The result is a cadre of junior lawyers on the defense side who believe that the appropriate model is to prepare the case thoroughly, and then move for

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summary judgment. If you win, great; if you lose that motion, settle. And a cadre on the plaintiffs' side who believe that you take the case to the brink of trial and then accept defendant's final offer. A settlement can always be characterized as a win – by both sides. The last thing the junior wants to do is try the case, even if a win might produce, or save, big dollars, because you might lose. Which, of course, is unthinkable.

ANNIE DUKE – PART 4: LEARNING, GETTING BETTER, TAKING RISKS

How does one avoid this culture of failing to learn, failing to get better and always taking the conservative approach? Some suggestions:

- Follow the "no moaning" rule. Instead of moaning that you had three aces but lost, ask what is to be learned from that hand?
- Recognize that decisions and outcomes are not perfectly correlated. You might do everything right and lose, or everything wrong and win.
- Admit mistakes. A good place to start is with a situation that had a happy outcome. Review each of your intermediate decisions leading to that outcome. It's easier to be self-critical about your decisions when the ultimate outcome was a good one.
- Convey that message to others in your firm. If the result was disappointing, ask, "Is there a lesson to be learned?" Or, if somebody had a nice win, congratulate them but then ask, "Was there a way to get an even bigger win?"
- Talk through your bad decisions and ask yourself what lessons might be learned.

DRS - PART 4: LEARNING, GETTING BETTER, TAKING RISKS

The litigator who steps back to ask: "What am I doing and why?" and "Are there better ways?" will learn and become better.

Take the lawyer who follows the same questioning format with every deponent. The self-critical litigator may decide not to give the deponent her civil Miranda warnings if she is a well-educated successful CEO. Is there any real chance that she will be able to wriggle out of a damaging answer at trial by saying that she did not understand the question at her deposition but was afraid to ask for clarification?

The result of such a self-assessment may be a decision to postpone questions about the deponent's education and employment history – why do things exactly as the witness is expecting? – and, instead, start with the key event, e.g., the happening of the accident, the key meeting.

Similarly, if you have honestly assessed your past performances and have looked to learn from others, you will make a better closing. Consider varying the natural order of topics by talking first about damages and then liability. Consider whether rhetorical questions will work. Look for key snippets of testimony. In one case, counsel for plaintiff juxtaposed testimony that, earlier on the day of the accident, plaintiff was "running back and forth," with her post-accident paraplegia to highlight the impact of the accident on her life. Such rhetorical flourishes are more often the product of careful forethought than of spontaneous inspiration.

After the trial is over, how should you go about a self-critical evaluation? A week or so after the verdict is returned, conduct a post-mortem with others on the trial team. You need time to assimilate things, but want to confer while thoughts are still fresh.

Don't talk in terms of what you and your colleagues did right and what wrong. It is not supposed to be a search-for-the-guilty exercise; it is supposed to be a what-have-we-learned session. So, as you review what happened during the trial, don't ask, "What did we do wrong in cross-examining that expert?" There will be natural inclination by all to deny that they did anything wrong. Rather, ask, "If we were going to try the case all over again, would we take the same approach in cross-examining Dr. Spock? What other approaches would we consider? Why?"

Use that self-analytical approach on every aspect of the trial from A to Z.

And, keep in mind that in trial practice, as in poker, you can learn a lot from your opponent. It can, of course, be terribly difficult to learn from an opponent whom you have been battling day after day, especially if you see him as an unprofessional jerk. But don't be tempted, like Annie's losing poker players, to attribute your opponent's success solely to luck. (As Jean Cocteau put it, "I believe in luck. How else can you explain the success of those you dislike?")

After the discussion is rolling and there's agreement that, yes, we should have taken a different approach, ask whether there was a way to figure that out in advance. That gets close to the fault question but it's important to ask because if the answer is "Yes," you have improved the chances that if you see the same kind of thing developing in the future, you will remember the lesson learned and act accordingly.

Often your partners will force you to make an honest assessment of your performance. Jerry (now Judge) McHugh tells of the day he won his first million-dollar verdict. When he told his mentor, Jerry Litvin, the news, Litvin asked, "Was it a million-dollar case?" "Yes," replied McHugh. "Then," said Litvin, "what did you add?"

In a sense, the message is don't be afraid to make mistakes. Former Secretary of the Navy John Lehman made this observation about great naval leaders:

> "All great leaders have made bad decisions and miscalculated risk at times in their careers. A leader cannot achieve success without failures along the way . . . but they learn from them."

The same is true of all great trial lawyers. ■

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