

Rommel, you magnificent bastard, I read your book!

By Richard G. Halpern

At a memorable moment in the movie Patton, George C. Scott as the General crows as his tactics foil the North Africa strategy of Rommel, the German "Desert Fox."

"Rommel, you magnificent bastard," he shouts, "I read your book!" For Rommel had published his innovations in the art of war, and Patton, a keen student of military history, possessed the ultimate advantage: he knew his opponents mind. Rommel was defeated before the engagement had begun.

You've written a book, too. It describes your approach to tort cases, your negotiation strategies, the kinds of cases you are willing to take on, and whether you tend to settle or go to trial.

The other side has read it. And while you're not facing General Patton, or even George C. Scott, you've got a big problem.

The first step to a solution to your problem is to recognize what Rommel apparently didn't: your opponent really does have a book on your litigation habits, unless you're just starting out on your legal career. How? Well, the claims community has a very efficient information network. In products liability cases, for example, there are typically two insurers involved, the primary insurer and the excess insurer. Between them, the two claims people share everything they know about plaintiffs counsel, and they supplement that information with calls to their colleagues in other companies. Meanwhile, the defense attorney usually represents many insurance companies. It isn't too hard to envision how your "book" gets circulated to eager readers.

Does your book include a chapter on demanding high so you have plenty of room to come down? Your opponent will be happy to take that into consideration.

Is your book titled, Trial Lawyering Without the Trial? Forget about using the threat of a jury trial as leverage in settlement negotiations.

Are the pages filled with tales of small cases? The defense will have gauged your ability to get the most out of a large one.

Make no mistake: the "book" on plaintiff's counsel is a significant factor in determining defense strategy. On multiple occasions, we have seen insurance companies *raise* their authorized settlement figures by one to two million dollars in response to a change of plaintiff's counsel!

In litigation, as in most pursuits, "Don't tamper with success" is a deadly adage. First of all, what looks like success to you and your client might actually be a victory for the defense, if they had rated the case at a higher value.

The key principle to remember, however, is that predictability makes you vulnerable, just like Rommel. Chess masters routinely discard their most successful openings, because they know that opponents will eventually figure out a way to counter them. If a poker player always bluffs with the same cards, the tactic becomes useless.

To avoid making your adversaries into Pattons, you must avoid being predictable. Include these chapters in your book, however, and you are providing no assistance to the enemy:

- Always make a demand that is fair.
- Let the injury speak for itself.
- Be willing to go to the jury.
- Don't take on dubious cases.

Fortunately, whatever the book on your litigation techniques says, you can adjust, and work it to your advantage. But there's a book to be written on the defense, too, and in your hands it is dynamite... because unlike you, **they realistically can't change their tactics.**

You can change your tactics, and you should, based on the book you have kept on the defense and the defendant's liability carrier. And if you aren't keeping such a book, you are forfeiting one of your greatest weapons.

Lets leave General Patton for a minute and reflect on the technique of Ted Williams, the last man to bat over .400 in the major leagues. Early in his career, Williams began keeping a book on opposing pitchers -- how they pitched to him in various situations, the patterns and strategies they displayed. Did a pitcher throw the same pitch after getting a swinging strike on a fastball, or did he switch to a curve? What pitches were in the pitchers repertoire? What pitch did he like to throw to a tough hitter in a crucial moment in the game? Williams continued to build his book, resisting the ridicule of established veterans who felt that all a good hitter needed to do was to "hit the pitch," not worry about what the pitch would be.

History notes that Williams, more frequently than any other player, was able to predict his home runs, commenting after striking out that "if he throws me that pitch again with two strikes, I'll hit it out of the park." Today, virtually all successful major league hitters keep "books" on opposing pitchers, and hitting has reached such impressive levels that sports analysts talk about pitchers being "an endangered species." It's no coincidence. If enough plaintiff's attorneys keep books on the defense and its allies, baseball pitchers will have some new company on the endangered species list.

But make sure you're putting the right information in your book, because there is some data that the defense wants you to use. Example: databases on jury verdicts and settlements. To a great degree these are controlled by the defense, and they are potentially misleading. With some notable exceptions, the cases that the defense permits to go to the jury are the weakest cases for the plaintiff. Even when the plaintiff prevails, the jury verdict is not going to reflect the proper damages of the stronger cases, which have been settled. And the settlements? Why is it, do you think, that defendants insist upon confidentiality with some settlements and not others? They are writing a book that they want Patton to read, because it will warp his strategy. Not everyone agrees with me on this, but my counsel is, be wary of verdict and settlement databases. They can steer you right into your adversary's clutches. There is much more valuable -- and reliable -- information on which to base your book.

Some members of the defense team are relatively easy to profile. It is certainly a good idea to glean whatever information you can on defense counsel from colleagues who may have opposed him or her. Is defense counsel skilled, experienced, lazy, confrontational, quick to grasp details or dumb as a box of hammers? It doesn't hurt to include this data in your tactical considerations, but defense counsel is usually not your principle adversary. You should also investigate the defense's experts, by checking transcripts of their previous testimony on point in other cases, but this is probably standard operating procedure for most readers. No, the meat of your book on the other side concerns the liability carriers and their claims representatives... how they negotiate, and their predictable patterns.

To appreciate this, it is critical to grasp how the defense gets it marching orders. Your opposing counsel gets them from a claims representative, who is in turn little more than a messenger to and from the shadowy ivory tower figures that make up the claims committee. They are your real adversaries. The claims rep is intentionally isolated from the human aspects of the litigation process, with no contact with the defendant or plaintiff's counsel. His job is to eschew emotion, and make decisions based on pre-determined statistical calculations, calculations determined far away, in that ivory tower.

The weakness of this structure is that it produces a consistent strategy, like the pitcher who always throws a fastball in a tight spot. Keep a book on the patterns, and you'll discover that:

Carrier A's opening offer is always the amount that when averaged with the plaintiff's demand will equal what it is willing to pay, and not a penny more...

Carrier B's opening offer will always be 25% of the reserve (the actuarial estimate on what it will take to cover the likely adverse verdict)...

Carrier C, more concerned about accelerating the process, starts at 50% of the reserve...

And Carrier D will make no offer until the first trial adjournment.

Once you have determined these patterns, you are ready to adjust your own strategy accordingly. "The Release Tactic," for example ["I Love a Petard," Settlement Strategist, Summer 1995], in which a plaintiff's counsel delivers a signed release of liability requiring only a signature and the requested check from the defendant to settle a claim, derives its strength from established patterns of insurance company behavior. Remember that you are placing icebergs in front of a giant ship that is incapable of quick moves or timely adjustments. If you have completed the book that tells you where the carrier is headed, you have the information necessary to gain the upper hand.

So heed the lesson of Patton, and the example of "The Splendid Splinter." Don't write your own book of predictable strategies, for your adversary will read it with glee. Instead, keep a book on the other side's established patterns, and plan your strategy accordingly. You may not have a movie made about you, or get elected to the Hall of Fame, but you'll make a lot of clients very happy.

In my book, that's the best reward of all.