FIVE NON-LEGAL BOOKS EVERY YOUNG LITIGATOR SHOULD READ

Written by Steven B. Katz*

Some 90 years ago, Jerome Frank, former Second Circuit judge and one of the leading lights of Legal Realism, wrote the "tasks of the lawyer do not pivot around those rules and principles" taught in law school. "The work of the lawyer revolves about specific decisions in definite pieces of litigation." (Frank, *Why Not A Clinical Lawyer-School?* (1933) 81 Univ. Penn. L.Rev. 907, 910.)

In the spirit of Judge Frank, let me suggest five books that will teach young lawyers as much about litigation as any casebook. And unlike any casebook or treatise, the lessons in these books will apply in every single case.

The first is Sun-Tzu (that's SOON-tzuh, not son-SOO), *The Art of War.*

When I was a young associate, I worked for a partner fond of stepping into the doorway of an associate's office, flinging their research memo across the room, and saying: "If I wanted to know what the law was, I would have asked a cop. I asked a lawyer instead because I wanted to know what to *do*." Law school does a great job of teaching what the law is (or, at least, how to figure out what the law is). But it doesn't often teach what to do.

The Art of War is not a book about soldering; it is a book about *strategy.* About how to think critically about the resources at hand, the difficulty of the terrain, what are your actual goals, and what must happen to achieve them.

About separating the achievable from the impossible and weighing outcomes against costs. Wars are not waged for the sake of fighting. War has a *purpose*; it is waged to achieve *a goal*. Fighting, using soldiers on a battlefield, may be one way to reach that goal. There may be others. And sometimes, soldiering is too costly a means to reach it; or may be downright counterproductive. The strategic commander will understand the difference. Sun-Tzu says: "He will win who knows when to fight and when not to fight."

So too with litigation. Law school puts you in the mindset of thinking that litigation is about arguing. Good lawyers win arguments, and poor lawyers lose. But our clients do not pay us to win arguments. Law firms are not professional debate teams, with sponsors who pay us to win tournaments. Rather, our clients have concrete goals (win money; not pay; reduce liability; persuade another to act). One way we often meet those goals is to win arguments (motions, trials). But there can be other ways as well. Good litigators convince judges their arguments are correct. *Great* litigators find a position that, win or lose, their client meets its goals.

It takes more than a winning argument to be a great lawyer; it takes a winning strategy.

The next book every young litigator should read is Sir Arthur Conan Doyle's *The Adventures of Sherlock Holmes*.

Yes, you read that right.

The Sherlock Holmes of movies and television is an intellectual magician: He somehow pulls out of thin air astounding conclusions about people and events that are always correct. Dr. Watson stands slack-jawed in amazement, and so do we. But the real Holmes in Sir Arthur's stories is not a magician. The inferences that at first seem clairvoyant are always explained: Holmes reasons cogently from careful observation, fact-finding, or experimentation. He methodically rules out alternatives until only one explanation remains. And he wields Occam's Razor like a surgeon. (It is no accident that Dr. Watson and Sherlock Holmes first meet at a hospital.)

Conan Doyle didn't create Sherlock Holmes out of whole cloth. The character was based on Dr. Joseph Bell, under whom Sir Arthur studied in medical school in Edinburgh. Bell is considered the "father of forensic science." He taught his students (including Conan Doyle) to diagnose from close observation of the patient and the patient's lifestyle. Bell often consulted with police, helping them with crime scene investigation, and was even rumored to have consulted with Scotland Yard about the Ripper murders.

Underneath these Victorian detective stories is a master class in *factual reasoning*; something law schools teach fitfully. Law school is great for learning syllogistic logic — the stuff of case analysis. But facts have a logic all their own, based on possibility, plausibility, personality, and common sense. Sherlock Holmes is all about sound reasoning with facts.

A lot of litigators treat facts as the 'red-headed stepchild' of legal analysis. They get them out of the way quickly (in a short section at the front of the brief) so they can devote most of the brief to the 'important stuff' (that is, the stuff with which they are most comfortable). Don't be that litigator. Facts are law's *raison d'etre*. They determine what law applies, and how that application goes. They deserve more attention than they usually get.

The Sherlock Holmes stories will hone your skills for giving that attention — and they're a great read.

The next book every young litigator should read: David Allen, *Getting Things Done*.

It's been almost 30 years since the late Jim Mcelhaney, a pioneer in teaching trial advocacy, published his famous essay *Composting Files* in the ABA Journal. In it, he lampooned lawyers who manage their cases by letting them "compost" in a pile, directing their attention only to those files most needing immediate attention due to "spontaneous combustion." Echoing the Wizard of Oz ("You're a very bad man!" "No, I'm a very good man. I'm just a bad wizard") he concluded most good lawyers are "very bad businesspeople."

He's a got a point. Know what's the leading cause of legal malpractice? Missed deadlines. Following closely behind: failing to communicate with clients. And they have a common cause: *failure to keep up with the shifting and many demands of litigation*. Or, in earthier terms, "not having your s%&t together."

It all boils down to a simple principle: your brain is a better CPU than a hard drive. The key is to create what David Allen calls a "distributed mind": "getting things out of your head and into objective, reviewable formats." And then reviewing them. Habitually.

How do you do that? You must master your workflow: First, *capture* your stuff — emails, phone messages, conversations, letters, court documents, assignments, ideas, assignments, and whatever requires some response. If stuff doesn't require a response, read it, and put it away (file, square or round). Second, *clarify* exactly what you need to do with it. Third, *organize* your clarified stuff in a way that keeps it organized so that you will always see it where and when you have time to respond. Fourth, *reflect* on your organized stuff, so you know what is most urgent when (and where). And then, fifth, *engage* with each item to give it the response it needs. Wash, rinse, repeat: develop a workflow that keeps your mind as a clear as possible, and maximizes your control.

Allen's book is chock-full of all kinds of ideas about how, concretely, to take each step. But the biggest value is getting you to understand the overarching structure of how to take control over your work; instead of your work taking control over you.

Getting Things Done is, hands down, the best book I have ever read about how to "get your s%&t together," and a must-read for every young litigator. (And a lot of old ones, too.)

Next, Strunk & White, *The Elements of Style*.

Ask most people to imagine the high art of litigating a case and they picture Perry Mason breaking down a lying witness on the stand; or Daniel Webster holding a jury of demons spellbound; or Atticus Finch, summing up with gentle eloquence; or even Vinny Gambini leading Mona Lisa Vito (on direct!) to outwit the state's expert witness. But they would be wrong. Relatively few litigators try cases; and those that do, are rarely in trial. Litigation is overwhelmingly about motion practice. So litigators live and die on their writing.

Strunk & White's *The Elements of Style* is simply the most important book on writing style in the English language. If you haven't read it, you should. At once. (But more than once.)

Strunk & White exhort: "Omit needless words!" "Use the active voice." "Do not break sentences in two." "One paragraph to each topic." Their mantra is simplicity, clarity, and brevity.

Why is this important to a litigator? Because you are constantly writing for the chronically late. I once heard a trial court judge break down exactly how much time he (and he was a "he") has for each summary judgment motion on his docket: 15 minutes. You want him to stick his neck out for you and risk reversal? You better make your case in your allotted 15 minutes.

Still skeptical about this recommendation? I'll let the 11th Circuit have the last word: it sends a copy to every new admittee.

Last (but not least): Fisher and Ury, *Getting to Yes*.

Litigation is all about negotiation — with opponents, allies, and even judges. But far too many lawyers negotiate like they are playing poker; it's all about reading your opponent's tells and controlling your own. But any professional poker player will tell you that the art of poker is not in the 'head games' but in the head: the skill and experience to calculate the odds with only imperfect information in an instant. Always understanding the odds, the stakes, and most likely payoffs.

Fisher and Ury teach one, fundamental powerful idea: all negotiation takes place in the shadow of your BATNA — "Best Alternative to a Negotiated Agreement." The BATNA for each party in a negotiation need not be the same (actually, it is rarely the same). If the BATNAs of each party in a negotiation 'overlap' so a range of outcomes are better than all BATNAs, then the negotiation is likely to succeed. If not, then not.

The art of negotiation is reaching as much *reciprocal* clarity and accuracy about each party's BATNA as possible. Negotiation is not nearly as much head-to-head competition (like a poker game) as it is dialog.

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