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Sun Tzu's Art of War, for Lawyers

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Sun Tzu indicated warfare is governed by five factors: the moral law, heaven, earth, the commander, and methods and discipline. These analogize well into what we know govern litigation: the *justness of the cause, court, facts of the case, attorneys on the case*, and the *systems and discipline* in place to ensure the path laid is the path followed. Sun Tzu indicated that studying and weighing the strengths and weaknesses of each of these factors will enable anyone to determine the matter's outcome.

The Art of War is a 2,500 year old manual about strategy and conflict. It is not a book about beating your opponent into pulp, but rather about careful consideration of human nature, conflict, and strategy. Sun Tzu writes about the wisdom of the person leading the campaign, what kind of situations fare well, what kinds of situations to avoid, and how to use good positioning and strategy to affect the matter's outcome.

The first step suggested by Sun Tzu before engaging in conflict is to acquire foundational knowledge about the matter, yourself, the opponent party, who will be representing the opponent, the court, and any co-parties. He famously wrote, "If you know your opponent and you know yourself, you need not fear the result of one hundred battles." Sun Tzu comes back to this theme throughout his manual, instilling how important it is to know all of the facts on the ground (and how they interact) before taking action.

In determining the facts on the ground, Sun Tzu starts with the five factors described above. His analysis begins by weighing whether each individual factor favors you, or whether it favors your opponent. For example, the first factor can be analogized in litigation to the *justness of the cause*, which roughly means whether the outcome sought by each side "feels right." If the outcome you seek would lead the fact finder to feel good about finding for your client, then that factor weighs in your favor. However, if you could see the fact finder feeling better about the outcome sought by the other side, then that factor weighs in favor of your opponent. You should think carefully about each factor and weigh each independently.

Once you weigh each factor, then rank them according to how important they are to the outcome of the case. If the *justness of the cause* and the *facts of the case* are so compelling that no judge or jury would ever rule against your client, then those two factors are ranked most important, and likely provide you a good sense of the outcome. If, however, the *justness of the cause* is less compelling and the judge is hostile to you or your client, then you may find that another factor (*the court*) is ranked more important in determining the case's outcome.

Once you have weighed each factor and have ranked them according to their importance to the outcome of the case, you will have an excellent sense of which side is likely to win. You will also have an excellent foundation in which to plan your strategy to try to shift factors to your favor. You will also be able to see which factors are weak and can be bolstered, and which factors are strong and need protected or expanded. This analytical process helps the litigator plan a winning course of action.

Planning a winning course of action takes root once the factors are clearly understood. Planning is the stage where you establish what is necessary to create favorable situations for your client during the litigation. Sun Tzu suggests that masters of conflict will create situations where their opponent not only follows the path laid for them, but where that path leads to their defeat without realizing it. He suggests "holding out bait" when advantageous, and spends some time talking about the various personality types and how to provoke them into acting. He also talks about how and when to display weakness, as well as how and when to display strength.

Showing weakness to your opponent can be a great source of strength for your case, and Sun Tzu recognized that showing weakness can lead to victory. For example, if you focus on one particularly minor issue that you are likely to lose, you may find that your opponent becomes so content with having beat you that he misses a key issue somewhere else. Another example of showing weakness could be in demonstrating your ignorance during a deposition about a particular topic so that the witness feels they need to teach you, leading to more information than had you appeared to understand everything being said.

The Art of War is an amazing manual because it focuses primarily on rules, and those rules can be applied to any conflict. Due to this, the reader is able to think about how each rule could be applied to any number of situations without being constrained to a particular set of facts. In battle, the variations in tactics and strategy are so numerous that they are like a stream running across stones – while the nature of the water remains constant, the manner in which it flows over each rock varies infinitely.

The Art of War contains thirteen chapters of remarkable information for anyone engaged in conflict. It discusses the use of five kinds of spies, which can be analogized to five kinds of witnesses; six different kinds of terrain, like the six categories of evidence; and attacking by fire, which is similar to scorched earth litigation techniques. *The Art of War* also makes suggestions for how rewards and punishments help manage staff, how to control messaging, how to employ experts, and what kinds of opponents you should avoid attacking. It is a powerful resource for any attorney engaged in conflict, and well worth a very careful read.

Troy Doucet authored The Art of War for Lawyers, which is an adaptation of Sun Tzu's manual on warfare. He is the principal of Doucet & Associates Co., L.P.A. and practices in the area of foreclosure defense and consumer litigation. The Art of War for Lawyers is available on Amazon.com.