ON MILITARY STRATEGY AND LITIGATION

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INTRODUCTION

Walk into a bookstore, pick up a copy of Sun Tzu's *The Art of War*, and you will invariably notice on the back cover a statement to the effect that it "[s]hows managers how to be fearless in resolving conflicts."[1] Judging from these statements, the business world appears to recognize that military strategy, as expounded by individuals such as Sun Tzu and Carl Von Clausewitz, can provide inspiration and insight on solving problems. War is one way to solve disputes. In contrast to business, which is designed to provide goods and services to consumers, legal systems were created specifically to resolve disputes, so military strategy is highly relevant to the practice of law.

Civilizations generally feature more sophisticated methods of dispute resolution. For example, "[r]elations between great powers are regulated by a sort of *Code Duello*. . . . [Such conventions are] designed to ritualize the struggle for power, not to end it. Such conventions . . . might be compared to the elaborate rules surrounding the aristocratic duel."[2] The legal process is a convention designed to resolve disputes in a principled manner without resorting to violence. Despite this, the legal process is frequently compared to combat. Commentators state that "[t]he practice of law revolves around conflict."[3] Cases speak of a prosecutor's ability to "strike hard blows,"[4] and of battles and combat between clients.[5] "[C]ourtrooms are usually

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1. SUN TZU, THE ART OF WAR (Samuel B. Griffith trans., Oxford Univ. Press 1971) (1963).

2. ROBERT D. KAPLAN, WARRIOR POLITICS: WHY LEADERSHIP DEMANDS A PAGAN ETHOS 131–32 (2002) (internal quotation marks omitted).

3. Bruce Kahn, *Applying the Principles and Strategies of Asian Martial Arts to the Art of Negotiation*, 58 ALB. L. REV. 223, 223 (1994).

4. State v. Ancona, 854 A.2d 718, 736 (Conn. 2004).

5. Seaboard World Airlines, Inc. v. Tiger Int'l, Inc., 600 F.2d 355, 368 (2d Cir. 1979) (Mansfield, J., dissenting); *see also In re* GMC, 110 F.3d 1003, 1024 n.20 (4th Cir. 1997) (analyzing the reasonableness of parties' actions in a discovery dispute under the maxim that "in battle, force must be met with equal opposing force, and adversaries in combat continuously try to gain advantage over the other by increasing the force or the manner of application"). The statement from *In re* GMC is an endorsement of Carl Von Clausewitz's view of escalation of force. MARTIN VAN CREVELD, THE ART OF WAR: WAR AND MILITARY THOUGHT 114–16 (John Keegan ed., 2000).

thought of as arenas where 'kill or be killed' is the prevailing wisdom."[6] The law is merely another form of combat, albeit ritualized.[7] Although the law seeks to place litigants "on equal footing,"[8] one must remember what the Athenians told the Melians through the Melian Dialogue: "[R]ight, as the world goes, is only a question between equals in power, while the strong do what they can and the weak suffer what they must."[9]

The law does not truly place individuals on equal footing. Large corporations or government entities may, should they so choose, bleed smaller opponents white through litigation practices. A single allegation regarding a dangerous product may severely damage a company's profits, leaving the company with no practical, monetary recourse against the accuser save such scorched-earth litigation tactics. This inequality also exists between individuals; there is no recourse against a reasonable accusation made in the judicial forum, even if that accusation is later disproved.[10] Further, money often plays a large part in the quality and quantity of legal representation. The legal system, therefore, helps to distribute power but does not ensure complete equality or fairness. Even those individuals or companies protected by the current laws are not safe. After all, laws are only competing social policies; they may be modified or changed as circumstances dictate. "Hardly a rule of today but may be matched by its opposite of yesterday. . . . For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing is absolute. All is fluid and changeable. There is an endless 'becoming.' We are back with Heraclitus."[11]

The purpose of this Article is to demonstrate how the study of military strategy and the attendant classical thought will allow attorneys to better serve their clients. With that principle in mind, this Article will analyze the applicability of Sun Tzu's *The Art of War* to legal practice. Where appropriate, it will attempt to provide complementary viewpoints from other military sources. It must proceed by analogy and metaphor because the material was not written about the practice of law. Because of the differences between the subjects, exact analogies should not be expected. This lack of complete precision, however, should not undermine the task

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6. Damian L. Halstad, *The Tao of Litigation*, 19 J. LEGAL PROF. 93, 101 (1995).

7. *See* Kahn, *supra* note 3, at 223 (mentioning that at early English common law, trial by jury was only one of several means of solving disputes); KAPLAN, *supra* note 2, at 131–32.

8. *See* Maturo v. Gerard, 494 A.2d 1199, 1202 (Conn. 1985) (remarking that unequal access to communal information can cause one party to rely on the false representations of the other).

9. KAPLAN, *supra* note 2, at 48.

10. RESTATEMENT (SECOND) OF TORTS § 587 (1977).

11. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 26–28 (Yale Univ. Press 1949) (1921).

because "it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician demonstrative proofs."[12] Unlike math, war "deals with living and with moral forces. Consequently, it cannot attain the absolute, or certainty; it must always leave a margin for uncertainty, in the greatest things as much as in the smallest."[13] Similarly, the law and litigation are influenced by a multitude of factors, some of which are unpredictable.[14] Hopefully, then, this Article *inspires critical thinking about modern legal situations*.

> Inspiration derives from the suggestive quality of the past, which may stimulate, strengthen, and extend our thinking about the present. . . . [I]ntellectual and psychological exercises [inherent to the study of the past afford us] some distance from the strategic problems and solutions of [our] time, which [we] might even . . . come to see in a somewhat different perspective: by being for a time diverted to the past, [our] mind might . . . recognize[] new possibilities in the present, or [find] confirmation for ideas already held.[15]

There is a movement in the law away from full-blown litigation. As Judge Barry R. Schaller recommended:

> Because American society is extremely confrontational and adversarial, law as the ordering force should serve as a model of peaceful, civil, orderly resolution of disputes. Accomplishing this goal may necessitate greater incorporation of mediation, negotiation, and other problem–solving disciplines . . . . Litigation should not become an end in itself, generating new sources of conflict and dispute and extending litigation unreasonably.[16]

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12. ARISTOTLE, THE NICOMACHEAN ETHICS 3 (David Ross trans., Oxford Univ. Press 1980).

13. CARL VON CLAUSEWITZ, ON WAR 86 (Michael Howard & Peter Paret eds. and trans., Princeton Univ. Press 1976) (1832).

14. *See generally* CARDOZO, *supra* note 11, at 28 (describing the law's "perpetual flux" and the many challenges facing lawyers).

15. Peter Paret, *Napoleon and the Revolution in War*, *in* MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE 140–41 (Peter Paret ed. 1986). For an example of a system of critical analysis, see book two, chapter five of Clausewitz's *On War*. CLAUSEWITZ, *supra* note 13, at 156–69.

16. BARRY R. SCHALLER, A VISION OF AMERICAN LAW: JUDGING LAW, LITERATURE, AND THE STORIES WE TELL 84 (1997).

This Article should not be misread to advocate the practice of law without civility, or to encourage violations of the rules of ethics, or even to imply that litigation is primary. Further, going to trial is not necessary in order to practice strategic law; Sun Tzu instructed that "to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill."[17] This is because "[g]enerally in war the best policy is to take [an opponent] state intact,"[18] and "there has never been a protracted war from which a country has benefited."[19] Despite these admonitions, litigation remains the ultimate recourse in civilized dispute resolution, and thus, legal strategy is relevant.

I. THE BACKGROUND OF *THE ART OF WAR* AND SUN TZU

"It has long been claimed that *The Art of War* is China's oldest and most profound military treatise, with all other works relegated to secondary status at best."[20] It is a short work, barely one hundred pages, broken into thirteen chapters and organized by subject. Tremendously influential in Asia, it was introduced to the West when it was translated by a French missionary in the late 1700s.[21] "It was reportedly studied and effectively employed by Napoleon and possibly by certain members of the Nazi High Command."[22] Despite its age, *The Art of War* still receives critical attention from, and analysis by, military theorists, such as Michael I. Handel, professor of strategy at the U.S. Navel War College.[23] Much like Niccolò Machiavelli's *The Prince*, it was subject to criticism both in the West and the East "[b]ecause of its realistic approach" to matters such as "employing spies and deception."[24] Although the "early records relating to [*The Art of War*] are slightly confused," commentators note that "the originality, the consistent style, and the thematic development suggest that [it is] not a compilation [of various authors], but was written by a singularly

17. SUN TZU, *supra* note 1, at 77.

18. *Id.*

19. *Id.* at 73.

20. Ralph D. Sawyer, *Translator's Introduction* to SUN TSU, THE ART OF WAR *reprinted in* THE SEVEN MILITARY CLASSICS OF ANCIENT CHINA 149 (Ralph D. Sawyer & Mei-chün Sawyer eds. and trans., 1993).

21. *Id.*

22. *Id.*

23. For a comparison of *The Art of War* and Clausewitz's *On War*, see MICHAEL I. HANDEL, MASTERS OF WAR 1 (2001).

24. Sawyer, *supra* note 20, at 423 n.11. Clausewitz's *On War* is also noted for its realistic approach that was skeptical of popular ideas. Peter Paret, *The Genesis of* On War, *in* CARL VON CLAUSEWITZ, ON WAR 3 (Michael Howard & Peter Paret eds. and trans., Princeton Univ. Press 1976) (1832).

imaginative individual who had considerable practical experience in war."[25] There are numerous translations. This Article relies on Samuel B. Griffith's excellent translation of the text.

Sun Tzu is the reported author of *The Art of War*, but some Chinese scholars debate his very existence.[26] "Traditionalists attribute the book to the historical Sun Wu" who was "active in the last years of the sixth century B.C., beginning about 512 B.C."[27] There is some evidence that Sun Wu did exist and successfully took part in several wars subduing the enemies of the state of Wu for King Ho-lü.[28] There is general agreement that the "author of [The Art of War] lived at a time when large armies were effectively organized, well trained, and commanded by professional generals," not hereditary aristocrats.[29]

Sun Tzu's writings addressed warfare in a different culture and a different time, but they are relevant today.[30] Sun Tzu's time period featured many aspects of war that we would be familiar with, but warfare in his time period focused on "set-piece battles." His writings are relevant because litigation and trials are similar to set-piece battles.[31] A set-piece battle may be defined as "[c]onventional warfare in which both sides go at each other on a symmetrical battlefield."[32] Set-piece battles have beginnings and endings; they feature well-defined combatants; they generally involve a relatively stable number of combatants, i.e., the opportunity for dynamic reinforcements generally does not exist because the combatants that may be involved in the fight are identified; and victory is usually achieved by generating superior firepower and manpower at decisive points. Set-piece battles are completely different than fighting a counterinsurgency, a war on terror, or conducting reconnaissance.[33]

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25. SUN TZU, *supra* note 1, at 12–13.

26. *Id.* at 2–3.

27. Sawyer, *supra* note 20, at 149.

28. *See* SUN TZU, *supra* note 1, at 2–3 (comparing various critics' opinions regarding Sun Wu's existence).

29. *Id.* at 7.

30. This Article expresses no opinion on the question of whether war has or has not changed from ancient times to now. This is a debated point in military literature. *Compare* Victor Davis Hanson, *Battles Change, Wars Don't*, L.A. TIMES, Oct. 23, 2005, *available at* http://www.victorhanson.com/articles/hanson102305PF.html (arguing that the fundamental character of war has remained the same to this day), *with* THOMAS X. HAMMES, THE SLING AND THE STONE: ON WAR IN THE 21ST CENTURY viii–xiv (2004) (arguing that war has entered a fourth generation). Whether warfare has changed or not does not matter; what does matter is that the law is analytically closer to set-piece battles than asymmetrical or counterinsurgency warfare.

31. *See, e.g.*, Stephen Lynch, *M'soft Faces Off with New Foe–EU*, N.Y. POST, Nov. 10, 2003, at 30 (comparing the European Union's antitrust action against Microsoft to a set-piece battle).

32. Fred Brown, *Words of War*, KNOXVILLE NEWS-SENTINEL, Apr. 19, 2003, at A8.

33. The difference between the current war on terror and set-piece battles was noted by the

One example of a set-piece battle is when Scipio Africanus faced Hasdrubal Barca near the town of Bæcula. Both commanders were aware of each other's forces, the general disposition of the forces, and the terrain upon which they fought.[34] They had the opportunity to change the tactical deployment of their forces, but not the opportunity to call for wholesale reinforcements.[35] Wellington's battle with Napoleon at Waterloo is another example. In the Vietnam War, the Tet offensive was a set-piece battle, but nearly all of the rest of the fighting in that war was not. Litigation, because of the diverse and complex rules, is similar to a set-piece battle, which tends to feature a myriad of protocols.[36]

II. THE ANALYTICAL CONSTRUCT

Sun Tzu did not write about the law; he wrote about terrain, commanders, strategies, nations, and armies. Attorneys, however, deal with witnesses, facts, juries, legal arguments, and the law. To make Sun Tzu relevant to the lawyer's experience, legal concepts must be analogized to military concepts.

The substantive law of a case is similar to terrain. Military lawyers have recognized that "[i]n war, commanders attempt to shape the battlefield to their advantage by electing to fight on terrain of their own choosing. In trial practice, the government possesses the initial advantage . . . to shape the battlefield through the charging decision."[37] Although the authors were speaking about criminal cases from a prosecutor's perspective, the principle holds true for both sides. Both plaintiffs and defendants may choose the terrain (law) on which they fight by choosing which causes of action to pursue, which special defenses to raise, and on which issues to focus.

The substantive law of the case may make a wide range of facts relevant or it may hone the issues to the point where only a few facts are

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Fourth Circuit in *Hamdi v. Rumsfeld*: "[N]either the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches." Hamdi v. Rumsfeld, 316 F.3d 450, 464 (4th Cir. 2003), *vacated*, 542 U.S. 507, 539 (2004).

34. B.H. LIDDELL HART, SCIPIO AFRICANUS: GREATER THAN NAPOLEON 44–50 (Da Capo Press 1994) (1926).

35. *Id.*

36. *See* VICTOR DAVIS HANSON, THE SOUL OF BATTLE 39 (1999) (noting that Greek hoplite warfare that preceded the Spartan-Athenian conflict in the Peloponnesian War consisted of set-piece battles and myriad protocols).

37. Faculty, The Judge Advocate General's School, U.S. Army, *The Art of Trial Advocacy: Tactical Charging: Choosing Wisely the Terrain on Which You Want to Fight!*, ARMY LAW., Sept. 2002, at 54. Some commentators have incorrectly compared the concept of terrain to the facts of the case. Fred T. Ashley, *The Art of War, Litigation and Mediation*, 38 ORANGE COUNTY L. 38, 38 (1996).

necessary. As a result, legal facts are similar to armies. The Spartans and the Thespians of ancient Greece, for example, checked the advance of the Persians at the mountain pass of Thermopylae because the terrain was so choked and narrow that Xerxes, the commander of the Persians, could not bring the full weight of his might to bear upon the Greek forces.[38] Although the Persians overcame the Greeks, it was at a high cost, and the Greek sacrifice succeeded in buying other Greek forces crucial time.[39] Because of the legal terrain, few factual armies may be necessary. In employment law, for example, many summary judgment motions hinge on the issue of whether the employee-plaintiff suffered an "adverse employment action."[40] The field of employment law has developed to the point where there are numerous opinions on what constitutes an adverse employment action. A defendant, therefore, may defeat a plaintiff's case with a small factual "army" by meeting the plaintiff at the legal equivalent of Thermopylae, where the plaintiff's overwhelming other facts are irrelevant.

Facts do not present themselves to the court or jury. Witnesses present facts. Through their actions, facts may become more or less powerful. Witnesses are, therefore, similar to military commanders serving under a supreme commander. In World War II, there were myriad American battlefield commanders serving in the European theater, such as George Patton and Omar Bradley, all of whom reported to Dwight Eisenhower. Armies fight better, or worse, depending on the subordinate commander. Similarly, facts are presented more or less forcefully depending on the witness.

Subordinate commanders need, by definition, a superior commander. The superior commander is the attorney. Attorneys choose which witnesses testify in an attempt to dictate which facts are presented and in what manner. Common wisdom, however, tells us that when a witness is testifying, facts may be presented differently than planned. Military commanders have the same issue. Terry Allen, serving under Omar Bradley in the Battle of Tunisia in World War II, "ordered his division into a completely unauthorized attack and was thrown back with heavy losses."[41] Attorneys, therefore, are similar to superior commanders, possessing the power to select witnesses, organize facts, and *guide* the presentation of those facts.

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38. JOHN WARRY, WARFARE IN THE CLASSICAL WORLD 39–40 (Barnes & Noble Books 2000) (1980).

39. *Id.*

40. Wanamaker v. Columbian Rope Co., 108 F.3d 462, 465 (2d Cir. 1997).

41. OMAR N. BRADLEY & CLAY BLAIR, A GENERAL'S LIFE 158 (1983).

Attorneys do not ultimately rule the case. Attorneys serve clients.[42] Clients are akin to nations. Clients ultimately suffer the results of the case. An attorney may wish to settle or continue fighting, but the client's decisions are what matter. This principle applies to military matters as well; Clausewitz stated famously that:

> War is merely the continuation of policy by other means. . . . War in general, and the commander *in any specific instance*, is entitled to require that the trend and designs of policy shall not be inconsistent with these means. That, of course, is no small demand; but however much it may affect political aims in a given case, it will never do more than modify them. *The political object is the goal, war the means of reaching it, and means can never be considered in isolation from their purpose.*[43]

The client's goals and policies, therefore, may be appropriately bent to the attorney's will. For example, whether to consent to a continuance to accommodate the opposing counsel's schedule in a rancorous divorce proceeding is properly the providence of the attorney and not the angry client. The overall conduct of the litigation, however, must be conducted in light of the client's goals. This is especially true in contract disputes that involve parties likely to do business again, or when the goal of defense counsel is not to try the case, but merely to develop facts to drive down the settlement value.

Even if attorneys do not control the entire case, they are responsible for deciding legal arguments. Legal arguments and the associated motions are analogous to operational plans and tactics employed by the military. Military action is generally divided into three levels: strategy, operations, and tactics. Strategy is defined as "[a] prudent idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater, national, and/or multinational objectives."[44] Operations are "[t]he process of carrying on combat, including movement, supply, attack, defense, and maneuvers needed to gain the objectives of any battle or campaign."[45] Tactics are "[t]he employment and ordered arrangement of forces in relation to each other."[46] Although these definitions are dense, one need only understand that strategy attempts

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42. CONN. R. PROF'L CONDUCT R. 1.2 (a) (2007).

43. CLAUSEWITZ, *supra* note 13, at 87 (emphasis added).

44. DEP'T OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 511 (2001) (as amended through Jan. 7, 2007), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf.

45. *Id.* at 392.

46. *Id.* at 534.

to answer the questions of how to reach the overall goal; operations deal with reaching the sub-goals necessary to achieve the overall goal; and tactics are concerned with the specific actions. In the law, the client's objective, for instance, in a personal injury action, is to obtain recovery for injuries sustained. The plaintiff's strategy includes determinations of who to sue and what causes of action to plead. The attorney's operational plans focus on how to prove each element of each cause of action. The tactics employed refer to the specific facts used to prove each element and the presentation of these facts. Legal arguments, therefore, are similar to operations and tactics.[47]

The last crucial legal concept is the ultimate decision maker: the judge, jury, arbitration panel, mediator, or similar trier of fact. In military matters, things are decided ultimately by the clash of arms at the individual level. In the law, the facts and witness credibility clash in the minds of the ultimate decision makers. The attorney and the military commander share the same difficultly; after arranging and unleashing the facts or armies and committing them to the conflict, there is little either can do. Of course, a commander may make tactical adjustments in the middle of a battle, and an attorney can alter the presentation of evidence and witnesses in the middle of a trial. In a battle, however, there is always a decisive point at which the armies perform their duties and win, and this is outside the instant control of the commander. The commander's control is exerted prior to this decisive point, the same as an attorney's control is exerted before the case is given over to the ultimate decision maker.

There are some ancient commanders who committed themselves to the fight at the crucial moments; Alexander the Great was famous for his personal bravery, nearly dying very early in his career because of it.[48] This personal bravery may be compared, perhaps, to a heroic closing argument. At some point, however, attorneys must realize that facts matter and, to a large extent, control the case. For this reason, military theory does not help attorneys in this area. Litigators, therefore, may be well served by the words of the Roman Emperor Marcus Aurelius: "Ambition means tying your well-being to what other people say or do. Self-indulgence means tying it to the things that happen to you. *Sanity means tying it to your own actions*."[49]

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47. *See* HANDEL, *supra* note 23, at 33–39 (noting that Sun Tzu's analysis discusses the events preceding war and that Clausewitz's analysis begins where diplomacy has failed).

48. Josiah Ober, *Conquest Denied*: *The Premature Death of Alexander the Great*, *in* WHAT IF?: THE WORLD'S FOREMOST MILITARY HISTORIANS IMAGINE WHAT MIGHT HAVE BEEN 37, 43 (Robert Crowley ed., 1999).

49. MARCUS AURELIUS, MEDIATIONS 81 (Gregory Hays trans., The Modern Library 2002) (emphasis added).

III. APPLICATION OF THE ART OF WAR TO LITIGATION

As set forth earlier, the analogies are not perfect, and the goal of this Article is to inspire critical thinking. Although the following selections of Sun Tzu's writings are grouped by the legal concept to which they most readily apply, an astute reader will likely find that many of the following points apply to other areas of the law. The following groupings, therefore, are merely the *suggested* application of Sun Tzu's writings.

A. Lawyers

The majority of Sun Tzu's maxims apply to the lawyer–commander concept. This is probably because *The Art of War* is, at its heart, an instruction manual for commanders. The following passages were selected because they are either crucial points in *The Art of War* or they are especially relevant to the practice of law.

A key belief of Sun Tzu was that "[a]ll warfare is based on deception."[50] Echoing this sentiment at a later point in the book, the following episode is described:

> When the Yen army surrounded Chi Mo in Ch'i, they cut off the noses of all the Ch'i prisoners. The men of Ch'i were enraged and conducted a desperate defence. T'ien Tan sent a secret agent to say: "We are terrified that you people of Yen will exhume the bodies of our ancestors from their graves. How this will freeze our hearts!"
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> The Yen army immediately began despoiling the tombs and burning the corpses. The defenders of Chi Mo witnessed this from the city walls and with tears flowing wished to go forth to give battle, for rage had multiplied their strength by ten. T'ien Tan knew then that his troops were ready, and inflicted a ruinous defeat on Yen.[51]

This episode illustrates how Sun Tzu viewed the importance of deception. T'ien Tan managed to trick the Yen army into motivating T'ien Tan's troops, thereby triggering its own defeat. This must be considered the height of deceptive behavior. Attorneys may recoil from the idea that litigation is based on deception because the rules of ethics prohibit deceptive behavior. But this should not lead to the outright rejection of Sun

50. SUN TZU, *supra* note 1, at 66.
51. *Id.* at 75.

Tzu's principle. There is a place, albeit smaller, in the law for deception. A properly prepared cross-examination may involve deception because an attorney may guide a witness to an answer through a series of oblique questions. Similarly, if a case is definitely going to trial, some attorneys will take much "softer" depositions so as to preserve the best questions for trial. The key point to remember is that ethical deception should be employed.

At a different point, Sun Tzu provided a specific example of deception, stating that a general should "[p]retend inferiority and encourage his [opponent's] arrogance."[52] Encouraging your opponent's arrogance is generally good; attorneys who are arrogant about their abilities or the strength of their case may fail to prepare carefully. Plaintiffs' attorneys recognize that arrogant defendants anger juries, which leads to bigger awards. Some attorneys, at the end of a successful trial, will routinely tell their opponents how it was a "tough case" and that they thought the opponent was "going to win." In the last example, the worst that can happen from being deceptive ethically is that one acts polite; the best result is that one's opponent begins to doubt his judgment and becomes reluctant to take risks, making future settlements easier.

Achieving deception is not a panacea, however, as action must still be taken against the enemy. Sun Tzu ranked potential actions against the enemy by importance. "[W]hat is of supreme importance in war is to attack the enemy's strategy. . . . Next best is to disrupt his alliances. . . . The next best is to attack his army."[53] Attacking the enemy's strategy involves determining what one's enemy hopes to achieve and how the enemy plans to achieve those goals. In straightforward litigation, one can easily determine what one's opponent hopes to achieve: victory at trial. In this type of situation, an attorney can attack the opponent's strategy by twisting the opponent's themes to hurt the opponent and help the attorney. An attorney also attacks the opponent's strategy when clearly, even if the opponent can prove its causes of action, affirmative defenses will ultimately decide the case in the attorney's favor.

Determining those strategies becomes more complex in situations with multiple parties and divergent interests. Believing that one's opponents seek victory in the courts is not enough. Victory in the court system certainly did nothing for the plaintiffs in *Youngstown Sheet & Tube Co. v.*

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52. *Id.* at 67.

53. *Id.* at 77–78; *see also* B.H. LIDDELL HART, STRATEGY 338 (2nd rev. ed., Praeger 1967) (1929) [hereinafter HART, STRATEGY] ("[t]he perfection of strategy would be . . . to produce a decision without any serious fighting").

Sawyer;[54] President Truman had already accomplished his goal by means of his strategy. That the Court later declared the President's order unconstitutional did not matter; his opponents did not attack his strategy, and he was successful.

Sun Tzu stated that the second best approach is to disrupt alliances. This is applicable in a variety of situations; for example, when litigating a case against multiple parties, the opportunity to settle with one opposing party early in the case may create doubts and dissention among the opponents about proceeding with their cases. This idea is even more applicable when there are multiple parties represented by different lawyers. Similarly, whenever a party "turns" an employee of a corporate opponent, the results are usually excellent.

Sun Tzu's final approach was to attack the opponent's armies. In the context of the law, this means contesting the facts of the case, meeting allegations with denials, and proving credibility. Although a valid strategy, especially if you possess good facts and witnesses and your opponent does not, it leaves the ultimate decision in the hands of the fact-finder. Leaving the decision to a fact-finder may lead to an unanticipated conclusion because the attorney is not in control. Further, attacking facts generally involves increased litigation costs. Sun Tzu cautioned that "[w]hen the army engages in protracted campaigns the resources of the state will not suffice."[55] Attacking strategy or alliances is, therefore, preferred because the risks and costs are fewer.

Sun Tzu ranked attacking armies as a weaker option, so he would have probably recognized the value of settling cases. He believed that "[h]e who knows when he can fight and when he cannot will be victorious."[56] Although this is a truism, Sun Tzu also stated that "the victories won by a master of war gain him neither reputation for wisdom nor merit for valour."[57] Here is where Sun Tzu's views may bear on the question of resolving cases without trial. Sun Tzu believed that a gifted general could place the enemy in a situation where the enemy would capitulate or victory would be inevitable. General William Sherman's March to the Sea was an example of this.

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54. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583–84 (1952). In *Youngstown Sheet & Tube Co.*, President Truman ordered the Secretary of Commerce to take possession of steel mills to avert a pending strike. *Id.* at 583. The steel mills complied with the order but pursued a lawsuit that led to the order being held unconstitutional, albeit too late to have any effect because during the pendency of the litigation, the crisis had been avoided. *Id.* at 583–84.

55. SUN TZU, *supra* note 1, at 73.

56. *Id.* at 82.

57. *Id.* at 87.

> In Sherman's way of thinking, a competent general and a good army could march and maneuver themselves into such a position that the enemy forces in the field could not fight without being annihilated and the enemy civilian population not resist without bringing on the end of their very culture.[58]

Because this sort of attorney would make victory appear inevitable even to his opponent and hopefully force settlement, it would look like an "easy case" to everyone else. The real work is done behind the scenes to make the case appear hopeless to your opponent. This is part of the reason why Sun Tzu wrote:

> To foresee a victory which the ordinary man can foresee is not the acme of skill . . . [and] [t]o triumph in battle and be universally acclaimed 'Expert' is not the acme of skill, for to lift an autumn down requires no great strength; to distinguish between the sun and moon is no test of vision; to hear the thunderclap is no indication of acute hearing.[59]

Settlement may also be appropriate when there is an ongoing relationship. As Sun Tzu wrote, generally "the best policy is to take a state intact; to ruin it is inferior to this."[60] A ruined relationship may be of little use to the victor.

The previous comments have led some commentators to believe that Sun Tzu was adverse to battle or failed to recognize its importance in war.[61] Representing an opposing viewpoint, Clausewitz stated that "[t]he destruction of the enemy's forces is . . . the purpose of all engagements."[62] Nonetheless, Sun Tzu recognized the importance of combat, and he stated that "[h]e who intimidates his neighbors does so by inflicting injury upon them."[63] Sun Tzu took this position because he likely realized that "the power to cause pain is the only power that matters, the power to kill and destroy, because if you can't kill then you are always subject to those who

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58. HANSON, *supra* note 36, at 223. B.H. Liddell Hart, a proponent of Sherman's style of warfare, wrote that the "true aim is not so much to seek battle as to seek a strategic situation so advantageous that if it does not of itself produce the decision, its continuation by a battle is sure to achieve this." HART, STRATEGY, *supra* note 53, at 339 (emphasis omitted).

59. SUN TZU, *supra* note 1, at 86.

60. *Id.* at 77.

61. *See* HANDEL, *supra* note 23, at 150–53 (analyzing and, to a degree, defending Sun Tzu's approach).

62. CLAUSEWITZ, *supra* note 13, at 236.

63. SUN TZU, *supra* note 1, at 113.

can."[64] To this extent, there is a need to try cases and be an aggressive litigator, if for no other reason than to foster settlement in later cases. The recognition of this principle should also guide case selection; the ultimate recourse in the law is litigation and a trial. A plaintiff's attorney should not take a case that cannot be litigated. Further, the failure to inflict injury upon one's opponents in one battle only leads to trouble in later battles. Taking bad cases or positions leads to lost credibility, and your opponents will not fear or respect you. This makes settlement of future cases much more difficult.

Sun Tzu thus believed in the necessity of fighting. To ensure success in combat he explained:

> Know the enemy and know yourself; in a hundred battles you will never be in peril. When you are ignorant of the enemy but know yourself, your chances of winning and losing are equal. If ignorant both of your enemy and of yourself, you are certain in every battle to be in peril.[65]

Sun Tzu's statement sounds simple: understand one's strengths and weaknesses and the strengths and weaknesses of one's case and the same for one's opponents and their cases. Of course, "[e]verything in war is very simple, but the simplest thing is difficult."[66] Putting Sun Tzu's concept into practice is difficult because of the "fog of war." The concept of the fog of war arises from Clausewitz's concept of friction:

> Action in war is like movement in a resistant element. Just as the simplest and most natural of movements, walking, cannot easily be performed in water, so in war it is difficult for normal efforts to achieve even moderate results. . . . Moreover, every war is rich in unique episodes. Each is an uncharted sea, full of reefs. The commander may suspect the reefs' existence without having ever seen them; now he has to steer past them in the dark.[67]

For these reasons, Sun Tzu's statements should be understood to mean that careful deliberation of both sides of the case is crucial.

If one approaches the task set down by Sun Tzu with recognition of the friction inherent in litigation, for example, the potential of a hostile judge, a

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64. ORSON SCOTT CARD, ENDER'S GAME 212 (Tor 1991) (1977). *Ender's Game*, although a work of fiction, has been used in leadership classes at the Marine University at Quantico. *Id.* at xxv.

65. SUN TZU, *supra* note 1, at 84 (internal quotations omitted).

66. CLAUSEWITZ, *supra* note 13, at 119.

67. *Id.* at 120.

poor jury pool, or of one's car breaking down on the way to court, one has a better chance of success. This is because

> If we base our concept of [litigation] on complexity and uncertainty, we will train and equip to deal with the fog and friction. Then, if we are extraordinarily lucky and have perfect knowledge, we are simply more effective. However, if we base our concept of [litigation] on perfect knowledge and then cannot attain that perfection in every [case], we will lose.[68]

To achieve any knowledge, objectivity about the weaknesses and strengths of one's case and one's abilities is paramount. Evaluate one's weaknesses because one should never make plans based on enthusiasm or excitement. Recognizing one's strengths, however, can be difficult because "[a]s a rule most [people] would rather believe bad news than good . . . [which is why a commander] had better make it a rule to . . . give his hopes and not his fears the benefit of the doubt."[69] All of this is easier said than done.

Sun Tzu advised, perhaps due to the nature of fear and hope, that "[i]t is the business of a general to be serene and inscrutable, impartial and self-controlled."[70] Generals should have the "qualities of wisdom, sincerity, humanity, courage, and strictness."[71] The explanation for the requirements of wisdom and courage are directly applicable to the practice of law. "If wise, a commander is able to recognize changing circumstances and to act expediently. . . . If courageous, he gains victory by seizing opportunity without hesitation."[72] Sun Tzu's reasons for requiring sincerity, humanity and strictness do not apply to the law. However, sincerity and humanity are clearly relevant to practice of law because relating to people (humanity) and being believable (sincerity) are an attorney's stock-in-trade.

Serenity, inscrutability, impartiality and self-control are also all laudable traits, but Sun Tzu said nothing about the development of these traits. Miyamoto Musashi, recognized as one of the best swordsmen in the history of Japan, provided guidance:

> In [combat] your spiritual bearing must not be any different from normal. *Both in fighting and in everyday life you should be determined though calm.* Meet the situation without tenseness

68. HAMMES, *supra* note 30, at 286–87.
69. CLAUSEWITZ, *supra* note 13, at 117.
70. SUN TZU, *supra* note 1, at 136.
71. *Id.* at 65.
72. *Id.*

> yet not recklessly, your spirit settled yet unbiased. Even when your spirit is calm do not let your body relax, and when your body is relaxed do not let your spirit slacken. Do not let your spirit be influenced by your body, or your body be influenced by your spirit. Be neither insufficiently spirited nor over spirited. *An elevated spirit is weak and a low spirit is weak.*[73]

Musashi's advice is sound. If a person could maintain equilibrium with dynamic potential while in life and in litigation, he or she would probably achieve the traits that Sun Tzu admired. Such a person would be like water in a dam; completely calm, but with forceful energy awaiting the opening of the floodgates. Although achieving such a state is beyond the scope of this Article, something worth noting is that chess "[s]uperstar Bobby Fischer's preparations for World Championship [chess] matches included weight lifting, hitting the heavy bag, tennis, swimming, and healthy eating. . . . World Champion Garry Kasparov, the [chess] player with the highest Elo rating of all time, is also a devotee of weight lifting, boxing, and aerobic conditioning."[74] Chess masters appear to possess many of the qualities set forth above and must constantly prove themselves in set-piece battles. Therefore, basic physical conditioning, along with the appropriate mindset, may be helpful to achieve this state and provide better service to clients.

Sun Tzu also provided advice that was more practical. For example, he stated that "he who occupies the field of battle first and awaits his enemy is at ease; he who comes later to the scene and rushes into the fight is weary."[75] Sun Tzu's message is that we should leave the office a little earlier, get to the courthouse a little earlier, and use the time to compose ourselves prior to the day's events. Assuming that we are not delayed by any "friction," which is another reason to leave early, we may thus use the time to focus on the upcoming event and "live in the present. . . . By living in the present [we] are in full contact with [ourselves] and [our] environment [and] [our] energy is not dissipated" by thinking of the regrets of the past or allowing the future to "dilute the present."[76] This is similar to the Japanese concept of *kime*. "When you apply *kime*, there is nothing else in your world but the task at hand, nothing but destroying the target, defeating the enemy."[77] Attorneys live in a very time-conscious culture,

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73. MIYAMOTO MUSASHI, A BOOK OF FIVE RINGS 53 (Victor Harris trans., Overlook Press 1974) (1645).

74. MICHAEL J. GELB & RAYMOND KEENE, SAMURAI CHESS 156–57 (1998).

75. SUN TZU, *supra* note 1, at 96.

76. JOE HYAMS, ZEN IN THE MARTIAL ARTS 27 (1979).

77. FORREST E. MORGAN, LIVING THE MARTIAL WAY 119 (1992).

and there is an ethical obligation to bill the client only for the work done. An attorney's services should not be limited to active work, however, as a client may benefit just as much from an attorney who takes time to reflect on the nature of the case and the claims. Taking the time to reflect quietly on the case and to prepare ourselves mentally for the task at hand is a service to our clients. After all, who would want to be operated on by a doctor who had not thought about the crucial medical issues, did not mentally prepare for the operation, and arrived at the operating room in a harried state. If we shortchange ourselves by not giving ourselves a chance to reflect and focus, we ultimately shortchange our clients.

Continuing the theme of practicality, Sun Tzu advised that "[t]hose who do not use local guides are unable to obtain the advantages of the ground."[78] This is applicable when an attorney appears *pro hac vice* in a different jurisdiction. Quite obviously, if an attorney from a different jurisdiction does not utilize local counsel, the attorney will be at a disadvantage. Similarly, when dealing with an organizational client, it is important for an attorney to seek assistance from people who are both knowledgeable about the organization and willing to share their knowledge.

Sun Tzu also recognized the necessity of money in battle.

> One who confronts his enemy for many years in order to struggle for victory in a decisive battle yet who, because he begrudges rank, honours and a few hundred pieces of gold, remains ignorant of his enemy's situation, is completely devoid of humanity. Such a man is no general; no support to his sovereign; no master of victory.[79]

Sun Tzu was speaking about the employment of spies, but his point is applicable to litigation in general. Sun Tzu would argue that an attorney who spends years getting a case to trial but then is hesitant to spend the money to enlarge exhibits, bring in witnesses from out-of-state, have a second counsel assist in the trial, etc. is not a good attorney. The same point is equally applicable to attorneys who want to do everything themselves to take a greater share of glory.

B. Clients

Sun Tzu was blunt when he discussed the importance of war and the state: "War is a matter of vital importance to the State; the province of life

78. SUN TZU, *supra* note 1, at 104.
79. *Id.* at 144.

or death; the road to survival or ruin. It is mandatory that it be thoroughly studied."[80] The consequences of litigation may also be crucial. Lawsuits may ruin companies, and criminal prosecutions may put a person in prison for years. Not all legal cases will have so much at stake, but they should be litigated in a careful manner nonetheless, because even limited wars or cases may have great repercussions. The wars in Vietnam and Afghanistan, originally limited in scope, had vast impacts on the United States and the former Soviet Union, respectively. In the law, there is always precedent; its potential long term effect is a reason to litigate cases seriously. Further, because most attorneys have access to Lexis or Westlaw, a poorly litigated reported decision with one's name on it is easy to locate. Sun Tzu would argue that any case is an opportunity to practice one's skills because "[g]enerally, management of many is the same as management of few. . . . [T]o control many is the same as to control few."[81] Musashi made the same point when he stated that "[t]he Way of battles is the same for man to man fights and for ten thousand a side battles."[82] A small case, therefore, is the same as a big case. They are both opportunities to practice the strategy of litigation.

Sun Tzu recognized that performing well in war was crucial to the survival of the state. He also recognized the draining effect that war has on the state. He noted that "[w]hen the army engages in protracted campaigns the resources of the state will not suffice."[83] In addition, "there has never been a protracted war from which a country has benefited."[84] "Hence what is essential in war is victory, not prolonged operations. And therefore the general who understands war is the Minister of the people's fate and the arbiter of the nation's destiny."[85] This concept is directly applicable to clients paying hourly fees in litigation, but its importance should not be overlooked in contingency fee arrangements. Most clients find the process of litigation emotionally draining and time consuming. Further, even if the client appears to weather the demands of litigation well, there may be untold effects on the spouse and family.[86]

Despite the importance of the state, Sun Tzu believed that when war came, civilian leadership should cede control of the action to the military leadership. He wrote that:

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80. *Id.* at 63.
81. *Id.* at 90.
82. MUSASHI, *supra* note 73, at 44.
83. SUN TZU, *supra* note 1, at 73.
84. *Id.*
85. *Id.* at 76.
86. *See generally* Thomas H. Holmes & Richard H. Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RES. 213, 213–18 (1967) (discussing the impact of "life stress" on health).

> there are three ways in which a ruler can bring misfortune upon his army: When ignorant that the army should not advance, to order and advance or ignorant that it should not retire, to order a retirement. . . . When ignorant of military affairs, to participate in their administration. . . . When ignorant of command problems to share in the exercise of responsibilities.[87]

Sun Tzu did not believe that military leadership should dictate the beginning of the conflict, however, because "[n]ormally, when the army is employed, the general first receives his commands from the sovereign."[88] Sun Tzu certainly would not have countenanced the situation in Germany in World War I, when German civilian leaders attempted to stop the mobilization of troops only to be told by the military leaders that the mobilization could not be stopped because it would disrupt the railway time schedule.[89]

Sun Tzu's statements about civilian leadership are applicable to the practice of law. First, an attorney must listen to his client before initiating litigation. Second, once litigation has commenced, the attorney must be wary of letting clients dictate the strategy and tactics employed. Sun Tzu notes that "[t]here are occasions when the commands of the sovereign need not be obeyed."[90] This is certainly true when the client's desires conflict with the rules of ethics, but it is also true of most strategic and tactical decisions. As the Supreme Court held, "strategic and tactical decisions are the exclusive province of . . . counsel, after consultation with the client."[91] An example of this principle balanced alongside the constitutional needs of the client is the *Anders* brief.[92] Sun Tzu would be in almost perfect accord with the Supreme Court based on his belief that: "[i]f the situation is one of victory but the sovereign has issued orders not to engage, the general may decide to fight. *If the situation is such that he cannot win, but the sovereign has issued orders to engage, he need not do so*."[93]

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87. SUN TZU, *supra* note 1, at 81.

88. *Id.* at 102.

89. *See* BARBARA W. TUCHMAN, THE GUNS OF AUGUST 78–80 (Ballatine Books 1994) (explaining how General Helmuth von Moltke convinced the Kaiser that the complexity of deploying the German military along the Russian front prevented the deployment from being undone).

90. SUN TZU, *supra* note 1, at 112.

91. Jones v. Barnes, 463 U.S. 745, 753 n.6 (1983).

92. For the case giving rise to the *Anders* brief, see Anders v. California, 386 U.S. 738, 744 (1967) ("[I]f counsel finds his case to be wholly frivolous, after conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.").

93. SUN TZU, *supra* note 1, at 128 (emphasis added).

The attorney who routinely ignores the client's wishes, however, runs the danger of having to face an ethics board and losing the client. Sun Tzu's insistence on the independence of the attorney must be balanced against Clausewitz's crucial observation that "[t]he political object is the goal, war the means of reaching it, and means can never be considered in isolation from their purpose."[94] The attorney may modify the method to reach a client's wishes, but the attorney should not act counter to them. A careful balance, therefore, must be struck. As the attorney strikes this balance, she must remember that "[a] critic [having the benefit of hindsight] should . . . not check a great commander's solution to a problem as if it were a sum in arithmetic."[95]

Sun Tzu also cautioned against indulging a client's anger:

> A sovereign cannot raise an army because he is enraged, nor can a general fight because he is resentful. For while an angered man may again be happy, a resentful man again pleased, a state that has perished cannot be restored, nor can the dead be brought back to life.[96]

Sun Tzu, therefore, would advise attorneys not to allow the client's emotions to sway the decision whether or not to litigate. A lawsuit brought in anger rather than on the facts and law leaves the client open to vexatious litigation and abuse-of-process claims, to say nothing of the time and expense wasted.

C. Facts

In this analysis the facts are the armies that the generals (lawyers) use to fight. One of the most important points that Sun Tzu made about the employment of armies is that "[i]n battle there are only the normal and extraordinary forces, but their combinations are limitless; none can comprehend them all. For these two forces are mutually reproductive; their interaction as endless as that of interlocked rings. Who can determine where one ends and the other begins?"[97] Thus, "[g]enerally, in a battle, use the normal force to engage; use the extraordinary to win."[98] The concept of normal and extraordinary forces follows from Sun Tzu's emphasis that warfare is based on deception:

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94. CLAUSEWITZ, *supra* note 13, at 87 (emphasis added).
95. *Id.* at 165.
96. SUN TZU, *supra* note 1, at 142–43.
97. *Id.* at 92.
98. *Id.* at 91.

> The elegance of this scheme lies in the fact that even when the distraction or diversion has been exposed (which is rare in any case), it can still remain effective if quickly reversed. In other words, if the object of the deception discovers that the forces he is engaging in the first phase of the battle have been intended as a distraction (the [ordinary] force) and that the decisive attack (the [extraordinary] force) is actually directed at his flank, he will switch his main force to protect his flank. Having observed this reaction, the deceiver can exploit the new situation to his advantage by changing the center of gravity—by changing his [ordinary] forces into [extraordinary], and his [extraordinary] into [ordinary]. The 'discovery' of the deception plan thus causes the deceived party to change his plans, but in doing so, he still falls into a similar trap.
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> This is a brilliant scheme if it can be implemented. As always in war, this is easier said than done. Much depends on the deceiver's flexibility and capacity for improvisation, coordination, and good timing—and upon the deceived opponent's intelligence, caution, calculations, and improvised reactions. Should the adversary remain calm and level-headed despite being surprised, he could, through a balanced response, upset the deceiver's plans.[99]

This concept is central to Sun Tzu's employment of forces. He stated that the general "who knows the art of the direct and the indirect approach will be victorious."[100]

Admittedly, the ordinary–extraordinary force idea is abstract. This concept, at its most basic level, is similar to the idea of the "double attack" in chess when "two different attacking pieces . . . simultaneously threaten to capture two different defending pieces."[101] Putting it into practice involves pursuing a strategy that offers "alternative objectives" because it puts "your opponent on the horns of a dilemma, which goes far to assure the chance of gaining one objective at least—whichever [your opponent] guards least."[102]

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99. HANDEL, *supra* note 23, at 222.

100. SUN TZU, *supra* note 1, at 106.

101. I.M. JEREMY SILMAN, THE COMPLETE BOOK OF CHESS STRATEGY 126–27 (1998). It also resembles a "pins and skewers" attack in chess. *Id.* at 128.

102. HART, STRATEGY, *supra* note 53, at 348 (emphasis omitted). The "horns of a dilemma" phrase was coined by Sherman in the Civil War. *Id.* at 343. The concept of placing your opponent on the horns of a dilemma is a fundamental part of Hart's view of the indirect approach to strategy. *Id.* at 347–48. Notably, Hart's view of this is somewhat different than Sun Tzu's, as Hart often refers to one force threatening alternative objectives. This would be similar to a "fork" attack in chess when "one

Opponents placed on the horns of a dilemma have historically struggled with inaction and paralysis.

The application of the interchangeability of the ordinary–extraordinary forces concept is limitless and truly goes beyond facts or armies. For example, an attorney who receives discovery requests generally treats them as the opponent's opportunity to learn about the case. The attorney receiving the discovery, however, can use the interrogatories in an "extraordinary" way to flesh out most of the client's answers for a deposition. Used in this manner, the answers to the opponent's discovery requests become a script for the witness to follow in the deposition.

The development of ordinary–extraordinary forces in plans of attack, however, should not become overly complex. As Clausewitz stated:

> The question of whether a simple attack or a more complex one will be the more effective will certainly be answered in favor of the latter if one assumes the enemy to be passive. But every complex operation takes time; and this time must be available without counterattack on one of its parts interfering with the development of the whole. If the enemy decides on a simpler attack, one that can be carried out quickly, he will gain the advantage and wreck the grand design. So, in the evaluation of a complex attack, every risk that may be run during its preparatory stages must be weighed. The scheme should only be adopted if there is no danger that the enemy can wreck it by more rapid action. Wherever this is possible we ourselves must choose the shorter path. We must further simplify it to whatever extent the character and situation of the enemy and any other circumstances make necessary. . . . [A]n active, courageous, and resolute adversary will not leave us time for long-range intricate schemes . . . . It seems to us that this is proof enough of the *superiority* of the simple and direct over the complex.[103]

Applying Sun Tzu's idea of ordinary–extraordinary forces and Clausewitz's preference for simple and direct action, imagine a plaintiff's desire to settle

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piece attacks two or more enemy units at the same time." SILMAN, *supra* note 101, at 127.

103. CLAUSEWITZ, *supra* note 13, at 228–29. Elsewhere Clausewitz notes that:

> [t]o prepare a sham action with sufficient thoroughness to impress an enemy requires a considerable expenditure of time and effort, and the costs increase with the scale of the deception. Normally they call for more than can be spared, and consequently so-called strategic feints rarely have the desired effect. It is dangerous, in fact, to use substantial forces over any length of time merely to create an illusion; there is always the risk that nothing will be gained and that the troops deployed will not be available when they are really needed.

Id. at 203.

a strong case against a small company. The small company may suggest arbitration or mediation to keep the plaintiff from the jury and resolve the case. The plaintiff may go along, but prepare an action for a prejudgment remedy to tie up the company's assets. The plaintiff may then proceed to arbitration, knowing that the company's position is weaker, and perhaps obtain a favorable settlement without litigation. The plaintiff's willingness to go along in the beginning is the ordinary force, providing a distraction, while the simple and direct but extraordinary act of filing the prejudgment remedy improves his position. Once the prejudgment remedy is successfully filed, it becomes the ordinary force, distracting the company from its business, while the arbitration or mediation is now the extraordinary force that provides the victory for the client.

In addition to setting forth the ordinary–extraordinary force paradigm, Sun Tzu also addressed the number of troops necessary:

> Consequently, the art of using troops is this: When ten to the enemy's one, surround him . . . [w]hen five times his strength, attack him . . . [i]f double his strength, divide him . . . [i]f equally matched, you may engage him . . . [i]f weaker numerically, be capable of withdrawing . . . [a]nd if in all respects unequal, be capable of eluding him, for a small force is but booty for one more powerful.[104]

Sun Tzu advised the attorney to guide the conduct of litigation on the number of facts that favor the attorney's side. A military or legal mastermind is not needed in order to realize that when there are many favorable facts and few unfavorable facts, litigation is a respectable choice. People recall that David beat Goliath precisely because David had such poor odds. If the attorney does not possess the greater number of good facts, remember that Clausewitz believed that "[t]he weaker the forces that are at the disposal of the supreme commander, the more appealing the use of cunning becomes."[105]

Sun Tzu did not consider superior numbers to be a panacea: "[i]n war, numbers alone confer no advantage. Do not advance relying on sheer military power. It is sufficient to estimate the enemy situation correctly and to concentrate your strength to capture him. There is no more to it than this."[106] In contrast to Sun Tzu, Clausewitz took a more numerical position:

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104. SUN TZU, *supra* note 1, at 79–80.
105. CLAUSEWITZ, *supra* note 13, at 203.
106. SUN TZU, *supra* note 1, at 122.

> [S]uperiority of numbers in a given engagement is only one of the factors that determines victory. Superior numbers, far from contributing everything, or even a substantial part, to victory, may actually be contributing very little, depending on the circumstances.
>
> But superiority varies in degree. . . . [I]t can obviously reach a point where it is overwhelming.
>
> . . . *It thus follows that as many troops as possible should be brought into the engagement at the decisive point.*[107]

Other western thinkers have followed Sun Tzu's approach. B.H. Liddell Hart, a noted 20th century theorist, wrote:

> The end must be proportioned to the total means, and the means used in gaining each intermediate end which contributes to the ultimate must be proportioned to the value and needs of that intermediate end—whether it be to gain an objective or to fulfill a contributory purpose. *An excess may be as harmful as a deficiency*.[108]

Where do these conflicting military theories leave the attorney? Too many facts and witnesses may bore a jury or distract them from the crucial facts. The opposite—presenting too few facts—is certainly very risky. Attorneys are left to find an almost Aristotelian "mean" of facts and witnesses that is appropriate for the case. Sun Tzu noted that the commander needs to estimate the situation correctly and wrote that "[w]ith many calculations [regarding the strength of forces], one can win; with few one cannot."[109] Sun Tzu's concept of calculations applied here could suggest that when determining what is necessary, mock juries can guide the attorney's decision. Even if an attorney does not have this luxury, a good talk with an objective non-lawyer friend or relative about the case may provide the attorney with the insight necessary to determine how much is

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107. CLAUSEWITZ, *supra* note 13, at 194–95 (emphasis added).

108. HART, STRATEGY, *supra* note 53, at 336 (emphasis added); *see also* Flavius Vegetius Renatus, *The Military Institutions of the Romans*, *in* ROOTS OF STRATEGY 164 (Brig. Gen. Thomas R. Phillips ed., Lt. John Clarke trans., Stackpole Books 1985) (1940) ("Victory in general is gained by a small number of men. Therefore the wisdom of a general appears in nothing more than in such choice of disposition of his men as is most consonant with reason and service."). Hart argued that an overly large force lacks the mobility necessary to place an opponent on the horns of a dilemma. *See* HART, STRATEGY, *supra* note 53, at 346 ("Fluidity of force may succeed where concentration of force merely entails a perilous rigidity.").

109. SUN TZU, *supra* note 1, at 71.

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D. Law

Sun Tzu wrote frequently about terrain, and most of his observations on this subject do not fit neatly into the analytical construct set forth above. There are, however, some statements regarding terrain that can be applied to the law. Classifying the state of the law as a type of terrain may seem terribly abstract and unimportant, but it has value. In a different context, military authors have argued that "[t]he first step in knowing your enemy is deciding what to call him. . . . From this initial classification we tend to apply a set of assumptions about the groups for our analysis and response."[110] Engaging in the reasoning process necessary to analogize the state of the law to Sun Tzu's concept of terrain, therefore provides two benefits. First, the very act of making the analogy forces the attorney to think critically about the law—something useful in itself—and to make sure that the attorney understands the claims and defenses. Second, assuming that a valid analogy is possible, Sun Tzu's principles give the attorney insight into how the law may affect the course of litigation.

Understanding the law of evidence is crucial for an attorney. Sun Tzu advised that "[t]hose who do not know the conditions of the mountains and forests, hazardous defiles, marshes and swamps, cannot conduct the march of an army."[111] Just as an army cannot be maneuvered without knowledge of terrain, facts and witnesses cannot be employed without knowledge of the law of evidence. Sun Tzu's statement also applies to the other fundamental area of law for a litigator: the rules of procedure. Thus, Sun Tzu would likely argue that an attorney who lacks working knowledge of the rules of procedure and the law of evidence should not litigate cases.

There are times when the legal process is insufficient. When the law is incapable of either achieving the goal of the client or fully restoring a right that is violated, Sun Tzu would classify it as "focal." "When a state is enclosed by three other states its territory is focal. He who first gets control of it will gain the support of [the rest of the Empire]."[112] According to Sun Tzu's logic, when in focal territory, the client should form alliances with

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110. Anthony Vinci, *The "Problems on Mobilization" and the Analysis of Armed Groups*, PARAMETERS, SPRING 2006, at 49, *available at* http://www.carlisle.army.mil/usawc/Parameters/06spring/vinci.htm. The author suggests an alternative way of classifying hostile non-state actors. Interestingly, he relies on Sun Tzu for the importance of the act of classification. *Id.* at 49–50.

111. SUN TZU, *supra* note 1, at 104.

112. *Id.* at 130.

other individuals.[113] In focal territory, rapidity of action is valued. Therefore, the attorney should advise the client to take whatever action is necessary and allow the courts to unravel the situation later. A perfect example of this is *Youngstown Sheet & Tube Co. v. Sawyer* because the law was insufficient to remedy the wrong.[114] Had the unions and the steel companies considered that the individual first gaining control would succeed, perhaps they would have heeded Sun Tzu's advice to form alliances and joined together. President Truman, although probably not thinking in terms of Sun Tzu, acted first and achieved his goal.

In contrast to focal ground, Sun Tzu recognized that the terrain sometimes supports neither side. He labeled this type of terrain "communicating:" "[g]round [that is] equally accessible to both the enemy and me is communicating" in that "one may come and go."[115] Here, "not allow[ing] your formations to become separated"[116] and "pay[ing] strict attention to . . . defences" is important.[117] Maintaining formations and defenses is meant to prevent surprise and sudden rout. An attorney is on communicating ground when the substantive law favors neither party and there is little chance of ending the case through motion practice. The suggestion to maintain formations, when applied to litigation, means that an attorney should make a greater effort to ensure that favorable witnesses stick to their stories and understand the themes and goals of the case. Because the law favors neither side, the case will be decided by the facts and witnesses. If the legal terrain is classified as "communicating," settlement should be considered because neither party has a clear advantage.

"When the army has penetrated deep into hostile territory, leaving far behind many enemy cities and towns, it is in serious ground," which is "difficult to return from."[118] In "serious ground [Sun Tzu] would ensure a continuous flow of provisions."[119] When an attorney relies on law that commits the attorney to a position, the attorney is on "serious ground." A motion to recuse a judge or a motion to compel, for example, places the attorney in "serious ground"—after making either motion, the attorney may generally not retreat. A motion to recuse commits an attorney to a position that questions the partiality of a judge. Similarly, a motion to compel commits an attorney to a position because it usually signals the end of

113. *Id.* at 131.
114. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583–84 (1952).
115. SUN TZU, *supra* note 1, at 130.
116. *Id.* at 131.
117. *Id.* at 132.
118. *Id.* at 131.
119. *Id.* at 132.

discovery negotiations. Both motions have their places and are valuable, but Sun Tzu would likely say that the attorney employing them must be aware of the commitment involved and the sacrifice of other options. For these reasons, Sun Tzu would likely advise a steady flow of provisions, which means that the client and witnesses must be ready to encounter further litigation, absent a sudden settlement.

The worst type of terrain is considered "death." "Ground in which the army survives only if it fights with the courage of desperation is called 'death.'"[120] Sun Tzu stated that in "death" ground, it is necessary to fight.[121] Only when occupying death ground did Sun Tzu require fighting.[122] This point should not be overlooked—only when the state of the law is similar to "death" ground would Sun Tzu require litigation. Sun Tzu noted that "it is in the nature of soldiers to resist when surrounded; to fight to the death when there is no alternative, and when desperate to follow commands implicitly."[123] Putting aside the grim tone, Sun Tzu's point is well taken; when there is no chance of settlement and the law or the facts are not overwhelmingly on your side, an attorney must make clients and witnesses aware that the case requires litigation, that their commitment to the theme must be complete, and that they must be extremely prepared. Of course, the same must be said of the attorney.

E. Witnesses

Witnesses are similar to subordinate leaders; attorneys have control over witnesses but not complete control. Since there is a fundamental lack of control over the people presenting the facts, anything that can make witnesses testify in accordance with the attorney's plan is important. Various parts of *The Art of War* provide guidance on this matter.

Sun Tzu stated that "[h]e whose ranks are united in purpose will be victorious."[124] Aside from the obvious point that in-fighting between one's witnesses should be avoided, there is a deeper meaning to the above statement. Almost every book on trial practice discusses the need for a theme in each case. A theme helps to ensure that your "ranks are united in purpose." Attorneys should explain and emphasize the theme of the case to the witnesses so that they understand where their testimony fits in. This technique works best if the attorney can get the witnesses to truly believe in

120. *Id.* at 131.
121. *Id.*
122. *Id.*
123. *Id.* at 133.
124. *Id.* at 83.

the theme and see themselves in light of the theme.[125] If witnesses later improvise when testifying, it will hopefully be within the context of the overarching theme and not hurt the case.

The idea of fostering an understanding of the bigger picture, or in a legal sense, the theme, appears throughout the history of warfare. Given the complexity and uncertainty of war, modern theorists advocate that "we should use the tremendous potential of networked systems [, as opposed to hierarchical systems controlled from the top down,] *to ensure a common understanding of the commander's intent and his concept of operations*."[126] This is a reference to an older idea. In World War II, the German army used a concept called *Auftragstaktik*, now sometimes referred to as "mission-oriented tactics" or "mission-type orders."[127] It involves

> teaching subordinates mastery of their individual jobs and collective tactics, trusting them to act responsibly and with initiative, telling them *what result is intended* (usually defined as the condition or position you want the enemy to be in after the engagement), then leaving them with the freedom and confidence to determine how best to attain it.[128]

"In short, a commander would specify to subordinates *what* to do, not *how* to do it."[129] A crucial part of what made *Auftragstaktik* successful in the German army was the trust built between subordinate and commander and the subordinates' intimate understanding of the commander's *intent*. Further back in history, Vice Admiral Horatio Nelson's leadership style embodied this principle.[130] Nelson met frequently with his subordinate commanders to impart his vision and discuss potential actions.[131] "Effective exercise of this command style . . . is largely determined by the commander's willingness to let subordinates depart from orders if tactical or operational circumstances make this absolutely necessary. Slavish adherence to written instructions . . . prevent[s] subordinates from following

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125. *See generally* HANSON, *supra* note 36, at 148–68 (describing how Sherman's army was culled into a cohesive unit with similar knowledge of the political underpinnings of the Civil War).

126. HAMMES, *supra* note 30, at 285 (emphasis added).

127. David M. Keithly & Stephen P. Ferris, *Auftragstaktik, or Directive Control, in Joint and Combined Operations*, 29 PARAMETERS 118 (1999), *available at* http://www.carlisle.army.mil/USAWC/parameters/99autumn/keithly.htm (internal quotations omitted).

128. JOEL HAYWARD, FOR GOD AND GLORY 109 (2003).

129. Keithly & Ferris, *supra* note 127.

130. HAYWARD, *supra* note 128, at 109. There is, sadly, no relation yet discovered between the author and the great admiral.

131. *Id.* at 112.

their reconnaissance or using their initiative."[132] Attorneys can implement this military concept by preparing their witnesses carefully. This sort of preparation involves discussing the overall theme of the case, the elements to be proved, the role that each specific witness will play, and explaining the reasons why certain actions will be taken. By preparing in this manner, an attorney may unite the ranks, as Sun Tzu instructed.

Sun Tzu would have approved of *Auftragstaktik* given his statement that a commander "selects his men and *they* exploit the situation."[133] The commentary to this statement explains that "the method of employing men is to use the avaricious and the stupid, the wise and the brave, and to give responsibility *to each in situations that suit him*. Do not charge people to do what they cannot do. Select them and give them responsibilities commensurate with their abilities."[134] This idea also appears in classical writings by samurai:

> A man who would have a gardener do a carpenter's job, or a carpenter do a gardener's job, is no judge of men and is highly incompetent. No matter how bright a person is, he will have his strong and weak points. If one will comply with men's various abilities and use them appropriately, all matters will be assigned correctly and the master will be without trouble.[135]

So long as an attorney picks the right witness for each role and provides the witnesses with a comprehensive overview of the themes and goals in the case, the loss of control over witnesses is not bad—and may even be a good thing if they are able to show proper initiative. Given Sun Tzu's approach, the attorney should maintain control because "a skilled commander seeks victory from the situation *and does not demand it from his subordinates*."[136]

To achieve this principle, there must be trust between the attorney and the witnesses. Further, the witnesses must embrace the attorney's view of the case. Although the psychology underlying relationships is beyond the scope of this Article, Sun Tzu observed:

> If troops are punished before their loyalty is secured they will be disobedient. If not obedient, it is difficult to employ them. If troops are loyal, but punishments are not enforced, you cannot

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132. *Id.* at 116.

133. SUN TZU, *supra* note 1, at 93 (emphasis added).

134. *Id.* at 94 (emphasis added).

135. Asakura Norikage, *The Recorded Words of Asakura Soteki*, *in* IDEALS OF THE SAMURAI: WRITINGS OF JAPANESE WARRIORS 81, 86 (Gregory N. Lee ed., William Scott Wilson trans., 1982).

136. SUN TZU, *supra* note 1, at 93 (emphasis added).

> employ them.
>
> Thus, command them with civility and imbue them uniformly with martial ardour and it may be said that victory is certain.
>
> . . . .
>
> When orders are consistently trustworthy and observed, the relationship of a commander with his troops is satisfactory.[137]

A general principle, therefore, may be that friendly witnesses should be treated with civility, consistency, and firmness.

Not all witnesses are friendly, of course, and Sun Tzu provided guidance in dealing with hostile witnesses. When dealing with hostile witnesses, one must remember that "[t]o a surrounded enemy you must leave a way of escape."[138]

Conventional military wisdom suggests that when you surround an enemy but leave a means of escape, the enemy will seize the opportunity to flee and you can kill them in greater numbers because the enemy will not be concentrating on fighting but on fleeing. Conversely, conventional military wisdom also suggests that when an enemy is completely surrounded with no means of escape, that enemy will show fierce resistance as it recognizes that death is the only option; the enemy will try to take as many opponents as it can with it to the grave.

The same principle applies to witnesses. If an attorney wants a witness to take a certain position, the attorney must, through questioning, get the witness to a point where the witness will either appear to be foolish, to be a liar, *or* the witness must take the attorney's position. The witness, in order to avoid being made a fool, will hopefully "flee" to the position the attorney wanted the witness to adopt all along. If the witness does not flee, at least the attorney can still make the witness look foolish. An example of this is classic impeachment, such as when a witness says "X" in a deposition, which helps your case, and then says "Y" at trial, which hurts your case. If X and Y cannot be reconciled, then you can surround the enemy and leave a means of escape: adopt the statement made during the deposition again or appear as a liar.

Sun Tzu also noted that people have certain characteristics that can be used against them:

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137. *Id.* at 122–23.
138. *Id.* at 109.

> There are five qualities which are dangerous in the character of a general.
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> If reckless, he can be killed; . . .
>
> If cowardly, captured; . . .
>
> If quick-tempered you can make a fool of him; . . .
>
> If he has too delicate a sense of honour you can calumniate him; . . .
>
> If he is of a compassionate nature you can harass him.[139]

In litigation, reckless people often say too much or speak without knowledge; cowardly people often refuse to take a position; people with too much honor can be angered by an attorney's suggestion that their behavior was unfair; and overly compassionate people often refuse to believe that their actions could hurt anyone else, so they ignore the consequences of their acts. Quick-tempered people are dealt with identically in litigation and in warfare.

According to Sun Tzu, all witnesses have certain qualities, regardless of whether a witness is hostile or friendly. "During the early morning spirits are keen, during the day they flag, and in the evening thoughts turn toward home."[140] Likewise, "[c]lose to the field of battle, [our forces] await an enemy coming from afar; at rest, an exhausted enemy; with well-fed troops, hungry ones. This is control of the physical factor."[141] Attorneys heeding Sun Tzu, therefore, will avoid exhausting friendly witnesses through undue travel, preparations, or fear. Witnesses get tired and perform poorly when fatigued or overly afraid. Attorneys should pay close attention to the respective physical states of friendly and hostile witnesses.

F. Legal Arguments

Operational and tactical military plans are analogous to legal arguments. Sun Tzu had one overriding concern when generating such

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139. *Id.* at 114–15. In this context, the term "general" is interpreted to mean hostile witness. It applies equally to opposing counsel.

140. *Id.* at 108.

141. *Id.* at 109.

plans: "With many calculations [regarding the strength of forces], one can win; with few one cannot. How much less chance of victory has one who makes none at all!"[142] An attorney following Sun Tzu, therefore, should think through all of the arguments and counter-arguments for each point. Although this admonition is elementary, its importance cannot be overstated. Working through each argument and counterargument allows the attorney to pick successful arguments and be prepared for any points raised by the opponent. Part of being successful is having a back-up argument should each primary argument fail. Through the use of back-up arguments, an attorney can "[k]eep [the opponent] under a strain and wear him down."[143]

When responding to opposing counsel's arguments, an attorney should remember that "[a]ll warfare is based on deception,"[144] and so the attorney should "not gobble proffered baits."[145] Sun Tzu would, therefore, warn against conceding points to opposing counsel or the judge unless such a concession is clearly warranted and fully evaluated. Sun Tzu would also warn against interpreting opposing counsel's arguments in an overly simplistic, optimistic, or pessimistic fashion. To avoid this, an attorney must think like the opposing counsel. Musashi noted that "becom[ing] the enemy" is important:

> To "become the enemy" means to think yourself into the enemy's position. In the world people tend to think of a robber trapped in house as a fortified enemy. However, if we think of "becoming the enemy," we feel that the whole world is against us and that there is no escape. He who is shut inside is a pheasant. He who enters to arrest is a hawk.[146]

When thinking like your opponent, "[y]ou can't rule out the impossible, because you never know which of your assumptions about what was possible might turn out, [in reality] to be false."[147] An attorney should consider every argument from both sides.

Thinking like the opponent is critical at the beginning of cases. When an attorney first receives a complaint or the response to a complaint, the attorney should consider the case from the opponent's point of view. If, after considering the case from the opponent's point of view, the opponent

142. *Id.* at 71.
143. *Id.* at 68.
144. *Id.* at 66.
145. *Id.* at 109.
146. MUSASHI, *supra* note 73, at 75.
147. ORSON SCOTT CARD, ENDER'S SHADOW 417 (Tor 1999).

appears to have omitted a logical cause of action or affirmative defense, the attorney should conduct discovery as though that cause of action or affirmative defense will be asserted later. The omission may have been an oversight or the opponent may be practicing deception. The opponent hopes that by omitting the cause of action or affirmative defense, the attorney will fail to properly prepare the witnesses for deposition questions or will respond inappropriately to written discovery. Once the attorney makes such a mistake and the opponent obtains the omissions, the opponent will move to amend and claim that as the case developed, this "new" information required a change in strategy.

Thinking like the opponent also allows the attorney to anticipate those issues or facts the opponent will likely attack or defend. When an attorney understands the issues or facts the opponent will attack or defend, the attorney can put Sun Tzu's next principle into practice: "To be certain to take what you attack is to attack a place the enemy does not protect. To be certain to hold what you defend is to defend a place the enemy does not attack."[148] B.H. Liddell Hart, who advocated that the indirect approach to strategy is the most successful, endorsed this concept.[149] In litigation, this means an attorney should emphasize any issue or fact that the opponent cannot dispute. In a whistleblower trial, for example, a plaintiff may need to prove that the complaint about the illegal practice was in good faith.[150] Defendant–employers will, on occasion, concede that the complaint was in good faith to prevent the plaintiff from presenting evidence that the defendant–employer was actually violating the law. The defendant's concession, although perhaps necessary, should be exploited by the plaintiff by emphasizing repeatedly that it is undisputed that the plaintiff had a valid reason to blow the whistle. If the whistleblower's complaint was written, the attorney should enlarge it for the jury to see and display it frequently. Of course, while emphasizing the facts that the opponent cannot refute, the attorney must remember to contest those crucial facts that would allow the opponent to win. If the opponent presents facts that are not crucial, they should not be disputed, because if the jury disbelieves the attorney's presentation regarding a non-crucial fact, the jury may carry this disbelief into a critical area of the case.

Many attorneys, particularly those who specialize in an area, may develop typical strategies and recycle arguments from prior cases. Sun Tzu advised against rote actions, however, and recommended analyzing each

148. SUN TZU, *supra* note 1, at 96.

149. *See* HART, STRATEGY, *supra* note 53, at 350 ("[T]he unexpected cannot guarantee success. But it guarantees the best chance of success.").

150. Arnone v. Town of Enfield, 831 A.2d 260, 266 (Conn. App. Ct. 2003).

situation afresh: "[W]hen I have won a victory I do not repeat my tactics but respond to circumstances in an infinite variety of ways. . . . [A]s water shapes its flow in accordance with the ground, so an army manages its victory in accordance with the situation of the enemy."[151] This kind of flexibility is what made the Roman Army successful.

> Rome had come into conflict with a wide assortment of enemies, variously equipped and accustomed . . . . [The Romans] were ready to improve and to adopt such tactics as suited the terrain and were most likely to prove effective against the type of enemy with whom they had to deal in any particular battle. There were no . . . routine tactics.[152]

Clausewitz, in contrast, recognized the value of the routine and innovation: "[r]outine will be more frequent and indispensable, the lower level the action. As the level rises, its use will decrease to the point where, at the summit, it disappears completely. Consequently, it is more appropriate to tactics than to strategy."[153] Applying all of this to the law, a few principles may be elucidated. Brief banks are useful resources, and standardized discovery requests save time. However, an attorney should approach each case with an open mind and try to understand the nuances of the facts and relevant law. Noting Clausewitz's point, an attorney may rely on standardized questions when setting forth certain background points in an examination. An attorney's ability to think critically about the relationship of the method to the goal, however, is still crucial if the attorney is to seize every opportunity a situation presents.

Lawyers must also be aware of the "tacticization of strategy" as they formulate their legal arguments.[154] This pitfall was not addressed by Sun Tzu because his work focused on the highest operational and strategic levels of warfare, but it is important.[155] The tacticization of strategy occurs when

> outstanding performance on the tactical or operational level causes political and military leaders to emphasize short-run

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151. SUN TZU, *supra* note 1, at 100–01.

152. WARRY, *supra* note 38, at 178. The adaptability of the Roman Army did not stop at tactics. Roman legionaries were increasingly used as combat engineers as time wore on, and auxiliaries were increasingly employed for hand-to-hand fighting, suggesting an adaptation to the far-flung nature of the empire. J.E. Lendon, *Roman Siege of Jerusalem*, MILITARY HIST. Q., Summer 2005, at 6, 10–12.

153. CLAUSEWITZ, *supra* note 13, at 153.

154. HANDEL, *supra* note 23, at 355.

155. *Id.* at 35.

> success on the battlefield while neglecting the development of a coherent long-range strategy. Yet when a strategy is not consciously formulated, it emerges by default. Instead of being the driving force in a war, strategy becomes a mere by-product or afterthought. In prolonged wars, this is a recipe for disaster, since even extraordinary tactical and operational successes may not add up to a winning strategy.[156]

This happens frequently in the law; attorneys will make motions or advance arguments that may be successful but have little or no effect on the overall strategy. This type of pointless litigation hurts the bar because it wastes judicial resources, harms the client, and prolongs the case.[157] Worse still, clients often want attorneys to focus on certain factual issues that, even if proven, make no difference in the overall litigation. These issues distract attorneys' focus and waste their efforts. Attorneys must avoid these pitfalls and look constantly at "the situation as a whole."[158] *Where does this motion, question, or argument fit into the overall theme of the case and the goal?* If it does not fit in, it is a waste of energy and a potentially dangerous distraction. An argument, motion, or line of questioning is only great vis-à-vis the goals and themes of the case. "[T]o wander down a side-track is bad, but to reach a dead end is worse."[159]

CONCLUSION: "IGITUR QUI DESIDERAT PACEM, PRAEPARET BELLUM"[160]

Just as there is no great chess move in the abstract, there is no secret winning strategy in litigation. As Sun Tzu stated, "[t]hese are the strategist's keys to victory. It is not possible to discuss them beforehand."[161] *The Art of War* provides confirmation of some well-held litigation ideas, such as encircling the enemy and classic impeachment, and it offers new perspectives on other ideas, such as using the theme of the case to guide your witnesses.

The ultimate goal in any case is to achieve your client's goals. Because

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156. *Id.* at 354.

157. *See* SUN TZU, *supra* note 1, at 73 ("When the army engages in protracted campaigns the resources of the state will not suffice.").

158. *See* HANDEL, *supra* note 23, at 356 (noting Mao Tse Tung's recognition of the importance of this principle).

159. HART, STRATEGY, *supra* note 53, at 348. Hart believed that keeping the objectives in line with the goal was one of the eight fundamental principles of strategy. *Id.*

160. "Therefore, whoever wishes for peace, let him prepare for war." FLAVIUS VEGETIUS RANATUS, THE MILITARY INSTITUTIONS OF THE ROMANS (Mads Brevik, trans. 2001) (390), *available at* http://www.pvv.ntnu.no/~madsb/home/war/vegetius.

161. SUN TZU, *supra* note 1, at 70.

the client's goals are at stake, *attorneys do not win or lose*; winning and losing are reserved for clients. Attorneys should remove their egos from the case. "[T]he general who in advancing does not seek personal fame, and in withdrawing is not concerned with avoiding punishment, but whose only purpose is to protect the people and promote the best interests of his sovereign, is the precious jewel of the state."[162]

The real enemy of an attorney is time. With unlimited time, any attorney could carefully and critically think through all of the various arguments and angles of a case and produce a cogent and successful litigation strategy. With unlimited time, witnesses could receive a complete education about the law of the case and understand where their testimony fits relative to the various elements of the pleadings. Likewise, an attorney could review the facts of the case with a diverse population of people and have a true sense of how a jury would rule. Time is not unlimited, however; it is the most precious and rare item. Because of the lack of time, many decisions have to be made quickly, without full information or consideration. For this reason, whoever wishes for peace should prepare for war, because preparation today is useful even if the case settles tomorrow. The preparation is never wasted because knowledge and experience remain with the attorney even as the file is closed. This knowledge and experience allows the attorney to make the right decision when there is not enough time or information to consider the situation fully.

Although *The Art of War* and other books on strategy or litigation practice suggest a variety of rules and principles, an attorney should remember that in the end, strategic rules and principles must give way to reality. When to implement or ignore the various legal and military maxims is a question that cannot be answered by this Article. Each case must be considered separately.

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162. *Id.* at 128.