

The Art of War and Victory in Litigation:
Winning Strategies

THE 5TH ANNUAL CURRENT ISSUES IN
COMMERCIAL LITIGATION

presented at

The Hamilton Law Association

March 3, 2010

Prepared by: Joseph Groia

And: David LeDrew
Student-at-Law

Groia & Company
Professional Corporation
365 Bay Street, Suite 1100
Toronto, ON M5H 2V1
Tel: 416-203-2115
Fax: 416-203-9231

"A nation that makes a great distinction between its scholars and its warriors will have its laws made by cowards and its wars fought by fools."

Thucydides

Introduction

Dispute resolution in the Canadian legal system is adversarial in nature and traces its roots to medieval trial by conflict. Notwithstanding the new and somewhat debatable emphasis on civility, the system pits lawyers against one another in a contest to advocate the merits of their case and to win a result in their client's favour. When a lawyer steps into the courtroom, they rely on their knowledge, skill, training and experience in an all out effort to win on behalf of their client. "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."¹ Although this quote is far removed in time (1821) and place (the United Kingdom), the lawyer's duty of loyalty to the client remains.

Litigation has been likened to all out warfare.² In our view there is perhaps no better text that encapsulates the essence of the strategy for war than Sun Tzu's *The Art of War*.³ The 2,500 year-old principles by Sun Tzu have been relied on by lawyers⁴ and business

¹ *R. v. Neil*, [2002] 3 S.C.R. 631 at para. 12 in reference to the *Trial of Queen Caroline*, by J. Nightingale, vol. II, the Defence, Part I (1821), at p. 8.

² In the words of the Rt. Hon. The Lord Woolf, (1997) Vol. 19(1) *Liverpool Law Review* 3.

³ Ralph D. Sawyer, *Sun Tzu, The Art of War* (New York: MetroBooks, 2001) ("*The Art of War*").

⁴ This is not the first time that litigation has been compared to Sun Tzu's principles. For further reading on *Art of War* and litigation comparisons, please read the following, *inter alia*, demonstrative articles: Martin D. Beirne and Scott D. Marrs, "Art of War and Public Relations: Strategies for Successful Litigation PR" (2006) *Houston Business Journal – Business Survival Guide*. Fred T. Ashley, "The Art of War – Litigation and Business Mediation" accessed online February 4, 2010 at <<http://www.socialmediator.com/art-of-war/>> Antonin I. Pribetic, "The "Trial Warrior": Applying Sun Tzu's The Art of War to Trial Advocacy" (2008) *Alberta Law Review*.

people⁵ alike as a guide to follow for the roads leading to victory. Even in the 21st century Sun Tzu's principles still provide useful guidance for litigation strategies and tactics.

Strategy represents the planning and overall execution of a plan designed for victory. As Farley, J. has written “[s]trategy will win the battle, indeed strategy will win the war.”⁶ Tactics, on the other hand, play an integral role in an overall strategy to win. This short paper will discuss some practical strategies, explore tactics related to examinations and cross-examinations, and discuss a few specific litigation opportunities, such as requests to admit and settlements.

At the outset, the simple answer to winning losing cases and not losing winning ones is this: Understand your opponents strengths and weaknesses, then develop a simple battleplan that your client can afford, execute it swiftly and effectively. Do not be lured into skirmishes that simply waste resources and try the case (or settle it) before your resources run out. Sun Tzu would approve.

⁵ A “Google” internet search of “art of war & business strategy” yielded approximately 2,000,000 hits.

⁶ The Honourable Justice James Farley, “Parlay Under Truce and Phantom Menaces: Strategies in Mediation and Settlements” p. 1 in *Sharpening the Sword. Tactics and Strategies for Lock n’ Load Litigation* (2006) Ontario Bar Association, Continuing Legal Education (“Farley, J.”)

1) STRATEGY

Advance knowledge cannot be gained from ghosts and spirits, inferred from phenomena, or projected from the measures of Heaven, but must be gained from men for it is the knowledge of the enemy's true situation.⁷

People

Knowledge of human nature is an essential part of being a successful strategy.

Understanding how people think, react and avoid truth are important attributes. Lawyers should be curious, suspicious and understanding,⁸ particularly in their interactions with other people; whether on a routine fact-finding mission or examining a witness during a trial, possessing these traits can serve to enhance your reputation and contribute to your successes. The qualities of effective salesmanship – honesty, trustworthiness, openness and empathy – apply as much to a courtroom as they do to a car dealership. Knowledge of the enemy's true situation, to predict their future course of action, can prove invaluable on a litigation battlefield.

One who is free from errors directs his measures toward [certain] victory, conquering those who are already defeated.⁹

Precision

Precision ties into many elements of legal practice as precision leads to excellence.

While every lawyer strives for excellence, it can often be a challenge to achieve.¹⁰ If a mistake is made and recognized, it should be addressed and remedied in an expedient

⁷ *The Art of War*, p. 231.

⁸ James W. McElhaney, *McElhaney's Trial Notebook*, 2nd ed. (Winter Park, Florida: American Bar Association, 1987), p. 14.

⁹ *The Art of War*, p. 183.

¹⁰ Milton A. Davis, "Trial Tactics and Techniques" p. 9 from *Sharpening the Sword Tactics and Strategies for Lock n' Load Litigation* (2006) Ontario Bar Association, Continuing Legal Education.

manner. This will not only enhance credibility,¹¹ but it will also prevent any undue future delay that may arise in the future. Whether the objective is to achieve excellence in written or in oral advocacy (and every great litigator should strive for both), lawyers must be meticulous. One glaring mistake in a factum can and likely will negate 1,000 words.

Law and litigation is about careful planning, drafting and execution. You should guard against submitting rushed and imprecise pleadings. If the pleadings have been reviewed extensively and no imperfections are found, let the draft rest for a day and return to it with fresh eyes.¹² Be especially careful spelling names.

Examples of imprecision that will take a toll on a trial lawyer's chances of success are the following:

- overwhelming the judge with facts and figures;
- reading extensively from your factum;
- not following a linear timeline; and
- evading strong points in submissions, to name a few.¹³

¹¹ One of the six aspects of oral persuasion described by John I. Laskin, J.A., "Forget the Wind Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums" accessed online on February 5, 2010 at < <http://www.ontariocourts.on.ca/coa/en/ps/speeches/forget.htm>>. The other five aspects are conviction, cognitive clarity, persuasive burden = distance x resistance, appeals to emotion and leeways and concreteness

¹² John I. Laskin, J.A. "Forget the Wind Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums" accessed online on February 5, 2010 at < <http://www.ontariocourts.on.ca/coa/en/ps/speeches/forget.htm>>

¹³ For more examples of what not to do, please read the late Honourable Mr. Justice Marvin Catzman, "The wrong stuff: How to lose appeals in the Court of Appeal" (August 2000) *The Advocate's Society Journal*, p. 3.

*Thus the army values being victorious, it does not value prolonged warfare.*¹⁴

Process - Expediency

Litigation is a costly and burdensome venture, which can, for better or for worse, be made more costly by savvy counsel. You must not exhaust your client's resources or willingness to use them. The *Rules of Civil Procedure*¹⁵ and common sense provide opportunities to shorten battles and avoid useless litigation skirmishes altogether. In one recent class action, the defendants brought 20 "hard fought" motions before the certification motion.¹⁶ Examples of shortening battles are motions for summary judgment,¹⁷ requests to admit and the new discovery plans under the *Rules*.¹⁸

2) TACTICS

*One who, fully prepared, awaits the unprepared will be victorious.*¹⁹

Examinations

Examination-in-chief "is the process of drawing the relevant story from the witness in an orderly and illuminating way."²⁰ In examinations, adaptability to both the individual and the situation is essential. For example, if there is an oppression application at issue, preliminary questions should focus on establishing the claim – determining that the claimant has standing is a start, then flushing out the real or threatened acts or omissions

¹⁴ *The Art of War*, p 174.

¹⁵ R.R.O. 1990, Reg. 194 ("Rules").

¹⁶ Jim Middlemiss, "NovaGold settlement set at \$28M" *The National Post* (17 February 2010) accessed February 19, 2010 online at <<http://www.financialpost.com/news-sectors/legal/class-actions/story.html?id=2573702>>.

¹⁷ Rule 20.

¹⁸ Rules 29.1.01-05.

¹⁹ *The Art of War*, p. 179.

²⁰ Geoffrey D.E. Adair, *On Trial Advocacy Skills Law and Practice* (Toronto: LexisNexis Canada Inc., 2004) p. 167.

and their related effects is necessary. Efforts should be made to ensure that the story is told in a logical progression.

*Warfare is the way of Deception.*²¹

In cross-examinations lawyers and witnesses alike generally anticipate aggressive fact-finding with prodding or confrontational questions. However, a cross-examination prepared in advance can be a second examination-in-chief. Cross-examinations can be a chance to use your opponent's witnesses as your own; they present an opportunity for another - possibly adverse - party to advance the theory of your case. As such, there is no need to treat every opposing witness as hostile unless and until they clearly demonstrate hostility.

Changes to the *Rules* in Ontario in effect as of January 1, 2010 stipulate that no party on oral examinations for discovery shall exceed a total of seven hours of examination, with certain exceptions.²² Based on this limitation, the discovery process cannot be used for fishing expeditions or as exercises to wear down your opponent. Lawyers must now be more precise and direct with their examinations for discovery than ever before.

*Thus it is said that one who knows the enemy and knows himself will not be endangered in a hundred engagements*²³

If all witnesses held to their oath to tell the truth and all lawyers had the experience, knowledge and honesty to develop the truth, there would be no need for confrontational

²¹ *The Art of War*, p. 168.

²² *Rule* 31.05.1.

²³ *The Art of War*, p. 179.

cross-examination.²⁴ Knowledge of one's enemy plays an important role in cross-examinations. "Know the answers sought to the questions posed" and "keep control of the witness" are examples of advice easily given but the effects of such advice are not acquired without effort.²⁵ Do not let the witness control the direction of examinations, particularly in light of the limited time available. Correspondingly, do not speak over the witness and listen carefully to their answers. Adapt your questions to them.

*If objectives cannot be obtained, do not employ the army.*²⁶

If there is no need to cross-examine the witness, then don't. The purpose of cross-examination is to discredit the testimony of a witness or provide a more favourable interpretation of events. If a witness does not pose any viable threat to the case at hand and cannot help bolster your case, then move on to more important matters.

Cross-examinations are not only about interactions with a witness; successful litigators need to know how to conduct themselves appropriately with opposing counsel. Below are excerpts of two lawyers' interactions with one another during a cross-examination:

- "Please stop your theatrical swaying of your glasses and trying to influence this witness"
- "Huff and puff a little more. Did you go to huff-and-puff school..."
- "This really is amateur hour"²⁷

²⁴ Francis L. Wellman, *The Art of Cross-Examination*, 4th ed. (New York: Colliers Books, 1962) p. 27.

²⁵ Thomas A. Mauet, *Fundamentals of Trial Techniques* (Toronto: Little, Brown and Company, 1980) p. 242.

²⁶ *The Art of War*, p. 228.

²⁷ Brent Jang, "One airline's fair play is another's favouritism" accessed online February 5, 2010 at <<https://secure.globeadvisor.com/servlet/ArticleNews/story/gam/20091202/RLAWMAIN02ART1859>>

If these quotations are an indication of anything, it could be that out of court examinations and cross-examinations can be as much about posturing as they are about seeking the truth from a witness. The successful litigator should keep their emotions in check rather than rise to the bait. Always remember that the record will reflect all of the words spoken, but not the tone of one's voice. Videotaping of examinations would resolve some issues of this nature.

*Thus one who excels at warfare compels men and is not compelled by other men.*²⁸

Basic Rules of Cross-Examination

Pozner and Dodd, two American attorneys attributed with revolutionizing the field of cross-examination, emphasize three common but sometimes overlooked rules of cross-examination:

- i) Use leading questions;
- ii) Introduce one new fact or point per question; and
- iii) Ensure that the questions follow a logical path.

While this is an overly simplified deconstruction of cross-examination, the sagacity of these points should always be remembered – the rules below provide further guidance but can often be broken with beneficial results.

²⁸ *The Art of War*, p. 191.

*Cast them into positions from which there is nowhere to go and they will die without retreating.*²⁹

i) Leading Questions

The use of leading questions is a fundamental element of cross-examination. In cross-examination, the lawyer is the star of the show. It is a chance for the lawyer to testify and tell their version of the story,³⁰ as opposed to drawing the relevant story out of the witness in examination-in-chief.³¹ As such, the litigator's questions posed to the witness in cross-examination must be carefully crafted to elicit favourable responses or have the witness appear to be agreeing with the lawyer's statements. When posing leading questions, there should only be one answer that can be reasonably given, and that answer should err on the side of logic.

ii) One New Fact of Point per Question

The purpose of this "rule" of cross-examination is to ensure that the information that you are presenting to the witness is understood by the witness, the judge and, if present, the jury. Keeping questions as concise as possible not only assists the audience in following along, but it allows the litigator to follow a formulaic approach to the heart of the matter. The bottom line is to be clear and concise. Ensure that the point is delivered with precision and is not shrouded in vagueness and generalities.³²

²⁹ *The Art of War*, p. 221.

³⁰ James W. McElhaney, "Cross Examination Lecture Outline" p. 118 from *Planning to Win The Heart of the Case* (2006) The Advocate's Society, Continuing Legal Education.

³¹ However, as mentioned, there are no definitive roles for lawyers in cross-examination and examination-in-chief are not always the same.

³² John I. Laskin, J.A. "What persuades (or, What's going on inside the judge's mind) at paras. 18 and 42 in *Compelling Advocacy – A View from the Bench* (2005) Ontario Bar Association – Continuing Legal Education.

*Do not encamp on entrapping terrain.*³³

iii) Follow a Logical Path

In following a logical path, you should start at the beginning, follow through to the middle and have a well-defined ending. The end of questioning on cross-examination should be on a high-note; the litigator's narrative should be told. As such, it is important to avoid the "one question too many" phenomenon, as succinctly described by Paul Bergman in the classic "nose" example,³⁴ wherein the eyewitness testified that he knew that the defendant bit off the victim's nose. The cross-examiner elicited circumstantial evidence that indicated that the eyewitness could not have seen the victim's nose being bitten off. The one question too many was posed to the witness when the examiner asked "so, how is it that you believe you know that the defendant bit off the victim's nose?" To which the witness replied "because I saw him spit it out."

This example also represents a marked departure from the rule on leading questions. In asking questions involving the words "how" and "why", the litigator abandons control over the witness and opens the door to potentially adverse information.³⁵ Never, ever use them.

³³ *The Art of War*, p. 203

³⁴ Paul Bergman, *Trial Advocacy in a Nutshell*, 4th ed., (St. Paul, MN: Thomson West, 2006) p. 298.

³⁵ Keith Evans, *The Common Sense Rules of Trial Advocacy* (St. Paul, MN: West Publishing Co., 1994) p. 143.

3) WEAPONS/TOOLS

*Subjugating the enemy's army without fighting is the true pinnacle of excellence.*³⁶

Motions litter the courts and contribute to the current backlog of cases.³⁷ Motions serve many diverse and only occasionally helpful purposes. Exactly what is an appropriate use of a motion can be a matter of interpretation. A far too common example of a contentious use of motions is where a client with deep pockets is able to use motions to drive the opposing party to the brink of financial ruin, or at least out of the court system.³⁸ Courts may look unfavourably upon motions perceived to be brought for purely tactical/delay measures and their displeasure may be reflected with cost consequences but almost never will costs fully indemnify the motion winner.³⁹

*Thus the wise general will concentrate on securing provisions from the enemy.*⁴⁰

Request to Admit

Request to admit⁴¹ is an effective, but underutilized tool.⁴² The purpose of using this tool is to gather facts which might otherwise not make it on record. Requests to admit can be met with cost consequences if denied but proven at trial. In drafting a request to admit,

³⁶ *The Art of War*, p. 177.

³⁷ The Honourable Coulter A. Osborne, Q.C., "The Civil Justice Reform Project: Summary of Findings & Recommendations" (2007) Attorney General of Ontario, p. 110. Accessed online on February 9, 2010 at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf>. In Toronto a long motion can take anywhere from 4-6 months to schedule.

³⁸ For more commentary on such a tactic, read The Honourable Justice James Farley, "Parlay Under Truce and Phantom Menaces: Strategies in Mediation and Settlements" in *Sharpening the Sword: Tactics and Strategies for Lock n' Load Litigation* (2006) Ontario Bar Association, Continuing Legal Education.

³⁹ For example *Rule 20.06* provides for cost sanctions for unsuccessful summary judgment motions and those brought in bad faith for the purpose of delay. In *Smyth v. Waterfall* (2000), 50 O.R. (3d) 481 (C.A.), solicitor-client costs were awarded when it should have been obvious to the moving party that the motion stood virtually no chance of success.

⁴⁰ *The Art of War*, p. 174.

⁴¹ As per *Rule 51*.

⁴² Ashley S. Lipson, *Guerilla Discovery* (Costa Mesa California: James Publishing, Inc., 2003) at 4-3 ("*Guerilla Discovery*").

take care to create your questions so that the enemy cannot, straight-faced, deny – both as to facts and as to documents.⁴³

Defensively, upon careful review of the facts and circumstances, a response to a request to admit can be relatively straight-forward. There are three responses available:

- 1) deny the request;
- 2) refuse to admit the request with reasons; or
- 3) make no response whatsoever and be deemed to admit the veracity of the request.⁴⁴

*In order to cause the enemy to come of their own volition, extend some [apparent] profit. In order to prevent the enemy from coming forth, show them [the potential] harm.*⁴⁵

Settlement

“The high stakes in complex cases increase the incentive to avoid the risk of trial, and the burgeoning cost of pretrial activity places a premium on settling early in the litigation.”⁴⁶

Settlement offers under *Rule 49* as well as the common law are invaluable litigation tools when used effectively. If accepted, a conflict is resolved. Making calculated settlement offers is important and fortunately, if time permits, there is flexibility to the process.

They can be amended and altered, increased or decreased, in reaction to events as they transpire and information received. Settlements can be hard fought battles of negotiation or they can plainly be agreed upon. The bottom line is to make an offer or accept an offer that works for your client.

⁴³ *Guerilla Discovery*, at 5-8.

⁴⁴ *Rule 51.03(2)*.

⁴⁵ *The Art of War*, p 191

⁴⁶ Judge Stanley Marcus, ed et al. *Manual for Complex Litigation, Fourth* (Federal Judicial Center 2004) p. 167 (“*Manual for Complex Litigation*”).

Settlement offers should be considered at all stages of a legal proceeding but the gravitas of such offers generally increases as more information is revealed to each side, permitting a wider focus of the merits of the case. As such, the momentum of litigation and trial preparation can create a powerful impetus for settlement.⁴⁷ One potent method for applying settlement pressure is a firm commitment to a trial date.⁴⁸ With battle looming on the horizon, the prudent warrior inevitably will need to re-evaluate their options.

Although settlement is not always going to be the optimal process in all cases (particularly those cases with difficult counsel or when areas of public policy are in dispute),⁴⁹ based on the fact that only one percent of cases filed actually go to trial, it is a significant and necessary element of the practice of law to excel at.

*If you besiege an army, you must leave an outlet.*⁵⁰

THE FINAL AND GOLDEN RULE

If you surround your enemy, always give them a chance to escape. If the only option the enemy sees is death, they will fight until their strength is abandoned. Providing a way out, especially by saving face, is the most important rule of all for it ensures that parties are aware that litigation is not the only means for dispute settlement – viable alternatives exist and should be considered.

⁴⁷ *Manual for Complex Litigation*, p. 169.

⁴⁸ *Ibid.*

⁴⁹ Farley, J., p. 4.

⁵⁰ *The Art of War*, p. 199.