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“The trial lawyer in the courtroom is a warrior... It’s a war over ideas.” Gerry Spence in “Win Your Case.”

THE PHRASE, “thinking outside the box,” is more than an annoying new-age cliche invoked to dismiss the tried and true. Cognitive psychological research shows that expert and novice problem-solvers differ qualitatively, not simply in the quantity of knowledge they might possess. The expert problem-solver looks outside the parameters of the problem at hand, but not necessarily for solutions. Instead, the bulk of the effort is spent understanding the problem, and in this way more insightful and efficient solutions are devised. The novice, on the other hand, focuses more narrowly. A search for familiar features often leads the novice to concentrate on solving a small circumscribed piece of the overall puzzle and, although a solution of sorts is generated, it is incomplete and off the mark. Rather like the drunk who searches for his keys under the lamppost because the light is brighter there, the novice remains blind to the larger problem space, so his or her solutions ultimately fail.

Expert problem-solvers, then, take a more holistic view, more akin to the Eastern than the Western mode of thinking, and those who would be experts in trial strategy might fruitfully look to the East, especially its approach to military strategy. One entrée to this way of thinking is Sun Tzu’s Art of War, a 6th Century B.C. treatise on psycho-
logical, as well as physical, warfare. This work has been applied to business, marketing, and corporate leadership with considerable success; for example in books like Donald Krause’s, *The Art of War for Executives* and Gerald Michaelson’s, *The Art of War for Managers*. But the courtroom is no less a battlefield than the boardroom and when translated into principles of trial strategy, Sun Tzu’s insights often converge with decades of social scientific research on jury decision-making.

**STRATEGY AND TACTICS**

Strategy encompasses general approaches, while tactics refers to more specific acts or maneuvers. Here, we will focus on strategy, given that the specifics of the case, the claims or charges, the personalities of the attorneys, the fact pattern, and so on, will all dictate myriad differences in the specific tactics you might employ. Further, every litigator would agree with Sun Tzu that the true goal is to win without fighting, realizing that this is an impossibility unless you are fully prepared to fight.

For Sun Tzu that preparation begins with estimation, by which he meant a thoroughgoing evaluation of your own and your opposition’s strengths and weaknesses. To this end, he lays out a five-part framework for conducting this evaluation, consisting of the Tao, Heaven, Earth, the Generals, and Organization. These principles translate most meaningfully into the courtroom if they are recast as:

- The Tao—the psychological side of the case;
- Heaven—the legal side of the case;
- Earth—the facts of the case;
- The Generals—the judge, opposing counsel, and yourself; and
- Organization—the management and logistics of the case.

In Chinese philosophy, the Tao represents an irresistible, but largely unseen force that guides all human endeavors and leads inexorably to their consequences. As it concerns trial strategy, it corresponds most closely to the psychological reactions, to the thoughts and feelings of the jurors who hear your case and which, in turn, exert an invisible, but utterly inescapable influence over your trial’s outcome. Heaven in Eastern thinking is a transcendent sphere that enfolds the lower realms, yet establishes rules for human actions. In this, it recalls the law itself, trial procedures, and the rules of evidence. Next, the Earth comprises a lower, more mundane domain that operates within the framework of the Tao and Heaven. In a trial, this corresponds to the specifics of the fact pattern, which must be analyzed in light of the law and in terms of the impact it might have on jurors’ thoughts and emotions.

Sun Tzu’s final two considerations, the Generals and Organization, translate with little modification into the realm of trial strategy. Knowing the Generals means knowing your adversary and yourself and should also be extended to include the judge. In this sphere, the strengths and weaknesses, habits and traits, the motivations and abilities of those who lead the proceedings are key. Similarly, Sun Tzu’s principle of Organization straightforwardly refers to how you manage the case, the order in which you call witnesses, how you marshal the troops of co-counsel, legal assistants, and support staff.

Of course, while you are trying to evaluate your adversary’s strengths and weaknesses, he or she is evaluating yours; thus, says Sun Tzu, the essence of warfare is deception. One who knows one’s own strengths and weaknesses, along with the adversary’s, and uses this intelligence to deceive the opposition will always be successful according to *The Art of War*. One who knows one’s own strengths and weaknesses, but not the adversary’s, will sometimes prevail, but he who knows neither his own nor the opposition’s strengths and weaknesses will never be victorious. Use estimation to understand the conditions of victory first, Sun Tzu advises, then engage the battle. He who engages first, then seeks the means to prevail will always fail.

While much more could be drawn from *The Art of War* to guide the modern American litigator, we
concentrate here on how this five-fold framework can help you understand the conditions for success, addressing them in reverse order, beginning with Organization.

Organization

Organization encompasses the “nuts and bolts” of your courtroom logistics, as well as how you organize your case—your witnesses, your evidence, your arguments. Organization and planning are critical to preventing mistakes. In The Trial Lawyers, a series of 10 professional biographies of successful litigators, Emily Couric quotes Chicago attorney, Fred H. Bartlit, Jr.: “These big cases are like D day… they really have to be planned. There are too many ways to make mistakes if you’re not absolutely organized…it’s a war, and in a war there are overall strategy and day-by-day tactics.” Sun Tzu would agree: Victory requires avoiding errors yourself and exploiting your adversary’s.

In organizing your case, and evaluating your adversary’s case organization, there is much to take into account, but two general strategies stand out: The expected and the unexpected. Sun Tzu said that battles are engaged with expected tactics, but won with unexpected ones. Michaelson in The Art of War for Managers cites a study of 300 battles that concluded only six of them attained victory via direct frontal attacks. The other 294 were won by feints, maneuvers, or surprise attacks. Along with mixing surprise and conventional attacks, military victory requires timing and what Sun Tzu called the “strategic disposition of force.” In the opening salvo, this will ideally take the form of a swift and overpowering attack, which Sun Tzu describes as a torrent flooding down a mountain ravine, sweeping up everything in its path. Trial attorneys are cognizant of this principle: Always lead with your strongest evidence. For example, against a corporate defendant, plaintiff’s attorneys will often call a corporate representative as an adverse witness first: Nothing is more effective than getting the other side to admit some shortcoming relevant to the tort at hand. For their part, defense attorneys know that bringing the plaintiff’s actions under the jury’s scrutiny, in other words a good offense, can often be the best defense. With the best defense, Sun Tzu said, the enemy does not know where to attack; with the best attack, he does not know where to defend.

The Generals

Broadening Sun Tzu’s concept of “The Generals” a bit, we include the judge, who, along with yourself and your opposing counsel, control the proceedings. Judges, as you know, come in many stripes. Some possess a judicial temperament, while others regard litigators with unconcealed contempt. Some work hard, but others work their clerks instead. Some may restrict your tactics or rhetoric, from voir dire to closing arguments, while others are more laissez faire. It is essential that you understand the judge, his or her preferences and customs, so as to anticipate the court’s demands. One general piece of guidance: The more you do the judge’s work for him or her, in the manner he or she prefers to see it, the better off you will be. If you have not argued before a particular judge, gather intelligence from those who have. Obtain trial transcripts and study how that particular judge conducts voir dire and what objections or motions are accepted or denied. The advice of Francis L. Wellman, offered in his classic work, The Art of Cross-Examination, is as true today as it was over a hundred years ago when he wrote it: “…the trial lawyer who knows his judge starts with an advantage that the inexperienced practitioner little appreciates.”

Opposing counsel, however, is ultimately the greater concern. Some general, albeit esoteric, guidance on this score comes from a Western psychologist who was steeped in Eastern thinking and psychological, if not military, conflict—C. G. Jung. Jung delineated several aspects of the human personality, but one primarily concerns us here: the Shadow. The Shadow is one’s antithesis or “dark