

Trusts & Estates

The newsletter of the Illinois State Bar Association's Section on Trusts & Estates

Case Management Lessons From 'The Art of War'—Part 1: Introduction

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What possible correlation exists between a 2,500-year-old, Chinese military treatise and a trusts and estates attorney's practice?

Timeless, case management principles.

Some say *The Art of War* is the definitive work on military strategies and warfare tactics which have stood the test of time. But it has also been heralded for its enduring, relevant philosophies and principles of conflict management and winning battles. *The Art of War* was written around 500 B.C., and is attributed to Sun Tzu, a high-ranking, Chinese military general and strategist.¹ History's renowned and notorious world leaders as diverse as Napoleon, Ho Chi Minh, General Douglas MacArthur and numerous others have drawn inspiration from the work. General Norman Schwarzkopf, Jr. and General Colin Powell practiced Sun Tzu's principles during the Persian Gulf War. It is also popular amongst modern day executives and political leaders.

This series of articles will challenge you to use *The Art of War* by Sun Tzu as inspiration to think creatively, strategically, and tactically in your case (whether litigation, administration, business or everyday) planning and implementation, with timely adaptation as circumstances change.

Conflict Management and Overcoming Adversaries

Maybe you've never handled a contested

matter and are not a litigator. Regardless, lawyers and the legal profession itself inherently deals in and with adversaries, controversy and conflict. Conflict is inevitable and unavoidable. Behind most of your case matters' road blocks and disasters is a person who caused them. Controversies arise often when we are the least prepared. Developing conflict and case management skills are paramount in our profession.

Sun Tzu says he can confidently predict the likelihood of victory or defeat by applying the *Art of War* principles to the facts and circumstances of a matter. **The chief end of its principles is the avoidance of war, the promotion of peace, and the best interests of the people.** These same principles can also determine whether your trusts and estates case management skills will lead to success or failure in a particular matter.

Before we explore the main principles of *The Art of War*, let's define its pertinent terms and ask some fundamental questions.

Who Are Your Opponents in Your Trusts and Estates Legal Practice?

There are obvious adversaries in the practice of trusts and estates law, such as opposing counsel and litigants. Then there very well may be the unexpected opponents – our colleagues, collaborators or even our own clients and their family members. But the most surprising opponent of all could

be the person in your mirror.

While we as attorneys are restrained by our Rules of Professional Conduct, the majority of our opponents are not bound by an ethical code. Accordingly, be on your guard, be vigilant, and appropriately respond to the wide range of unconstrained tactics and strategies of those opponents.

Opponents could include:

- Litigants and respondents.
- Opposing counsel.
- Judges, mediators or arbitrators.
- **Meddling, third parties.** For example, family members of our clients.
- **Amicus Curiae (Friends of the court) or Court appointed Special Advocates.** Some may have unrealistic ideologies, ignorance of the legal system or an area of law which interfere with our legal strategy and desired outcome.
- **Professional, third parties.** Those we usually consider collaborators or neutral third parties -- such as our clients' financial planners, CPAs or real estate agents -- can become adversaries when they "play lawyer" or mislead our clients.
- **Other beneficiary(ies) (or spouses/partners)** with differing interests, disappointments, or difficult personalities (Narcissist, Borderline Personality or Bipolar Disorders).

- The Client:
 - Our own client may try to entreat or enlist us to do irrational, imprudent, impossible, unethical, or illegal acts.
 - They may change their own mind or memory, often looking for someone else to blame.
 - Clients come with decades of personal and family history that they often believe should be fixed (or ignored with detrimental consequences) by the attorney in the estate plan.
 - They may first view you as a hero and later turn on you. This can happen if you can't deliver what they want, or if you meet their goals and then they quickly raise the standard.
 - **PRACTICE POINTER:** Do your due diligence to discover and verify the facts. Expect misinformation (even if by inaccuracy or omission) from the client. Be in control of the case. Research and seek advisers. Don't just follow what the client wants. Draft a retainer agreement that outlines the scope of your services, including your advice and warnings, under which circumstances you may have to withdraw, and the situation's inherent risks. Have them sign off on the letter stating they understand and agree.
- Ourselves:
 - We as the attorneys can, at times, be our own enemy. Sun Tzu says, "It is said that if you know your enemies and know yourself, you will not be imperiled in a hundred battles; if you do not know your enemies but do know yourself, you will win one and lose one; if you do not know your enemies nor yourself, you will be imperiled in every single battle." **PRACTICE POINTER:** Don't just know your enemy, but also know yourself. Knowing yourself includes: capabilities, capacity, disposition,

and boundaries.

- We sabotage ourselves and our goals in case management when we:
 - Take ownership of the client's problems.
 - Become emotionally embroiled in a matter. **PRACTICE POINTER:** Do not get personally involved, driven by subjective personal motivations and feelings.
 - Try to solve the unsolvable. **PRACTICE POINTER:** If you have a losing case, then do not proceed.
 - Assume risk that should never be assumed. **PRACTICE POINTER:** Take cases in which you believe and which are legitimate.

Definitions of 'War' and 'Peace'

"War" might also be defined as an organized, armed, and often *prolonged conflict* that is carried on between states, nations, or other parties typified by extreme aggressions, social disruption, and usually high mortality. **It is a state of active hostility, conflict, contention, or antagonism.**

"Peace" might be defined as a state of harmony and tranquility characterized by the lack of violent conflict or disturbance. It is the absence of hostility, but also the **presence of understanding and unity.** Peace suggests the existence of healthy or newly healed relationships, prosperous social and economic welfare, equality, and working order that serves the interests of all. Peace is often maintained by the vigilant and guarded ready capacity to wage war.

Fundamental questions an attorney should ask in actual or potential conflict:

1. "Is my fundamental approach to conflict management as a war maker or peace maker?"

Consider Sun Tzu's distinction between warmakers and peacemakers:

Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win."

"He will win who knows when to fight and when not to fight."

War maker: Winston Churchill said,

"You will never reach your destination if you stop and throw stones at every dog that barks." **War makers fight first and then try to figure out how to win.** It is said that an angry person who is ready to fight is "on the warpath." A war maker may approach case matters by "going in with all guns blazing." They utilize aggression before intelligence, persuasion or collaboration. They may resort to bullying tactics to achieve their goals and their client's goals (which may be different – even at odds with one another). This person may find these tactics backfire and create walls to communication and obstacles where none previously existed.

Peacemaker: Theodore Roosevelt's political ideology, accredited to a West African proverb, was to "speak softly and carry a big stick, you will go far." He subscribed to the approach of speaking respectfully but being prepared to defend the nation with force if necessary.

Consider the wisdom of Sun Tzu:

"The greatest victory is that which requires no battle."

"The wise warrior avoids the battle."

"Hence to fight and conquer in all your battles is not supreme excellence; **supreme excellence consists in breaking the enemy's resistance without fighting.** . . . The best victory is when the opponent surrenders of its own accord before there are any actual hostilities... It is best to win without fighting."

Peace makers know when to fight and when not to fight. They first try to win without fighting. They pick their battles. Rather than being on the warpath, peacemakers "take the high road." They may take the path of least resistance and still achieve their goals. They may be successful by avoiding or going around their opponent rather than going against them. They "bite their tongue," "keep their cool," and seek to "catch more flies with honey than vinegar."

PRACTICE POINTER: Make a plan. Do not start acting until you have a plan based on solid information, evaluation, and, if necessary, seek advice.

2. "Is the cause worthy of legal war?"

A cost-benefit analysis is critical. You may have a legitimate issue to pursue, but is it worth the cost of a legal battle? If cost is not an issue, is the cause is a worthy one?

Are you or your client making a mountain out of a molehill? Throwing good money after bad? What is the return on investment? Is this a frivolous matter? Is it moral-ethical, without patent ideology?

At a recent event featuring a Judge's panel in DuPage County, the Judges reported a significant increase on their court call involving sibling litigation in trusts and estates administration. Interestingly, many of the disputes were not about trusts or estates with large sums of assets, but were fueled by emotionally-heated sibling rivalry after their parent had passed away. When a parent passes away (like mortar disintegrating from a wall of bricks), it can create a rift between siblings which has been brewing for years. Dormant emotions such as long-held resentment, or family dysfunction rise to the surface. You've probably had cases with families arguing over seemingly worthless items such as an old washer and dryer. The real motivation for today's fight is rooted in a dispute over a tricycle from 40-years prior. These litigants were able to convince attorneys to represent their unworthy causes,

revealing that the attorneys who represented them may not have first implemented less aggressive methods.

PRACTICE POINTER: If litigation is necessary, make sure it is strategically part of a larger plan.

3. "Is my approach to win at any cost and crush my opponent? Or is it to prevail as effectively and efficiently as possible even though my opponent is left standing?"

Sun Tzu says, "What the ancients called a clever fighter is one who not only wins, but excels in winning with ease."

Practice Pointers

- Use the least amount of force, aggression, resources, and costs to achieve the same outcome.
- Determine from the client and yourself what is the "goal" or "win." Then evaluate for yourself whether it is doable and in what most efficient and effect manner.
- Look for ways of earlier settlement that achieves the essential goal.

- Is there are "win-win" or an optimal utilization or marginal return "win?"

Stay Tuned for part two of *Case Management Lessons from 'The Art of War'* to be published in upcoming issues of the ISBA Trusts and Estates newsletters. ■

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1. While there are various translations, this article draws from the translation of Lionel Giles (1910).