

Trusts & Estates

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

Case Management Lessons From 'The Art of War' Part 2: Substance and Application

BY TIMOTHY S. MIDURA AND COLLEEN L. SAHLAS

This is the second in a three-part series of articles which extrapolates case management lessons from military principles taught in *The Art of War* by Sun Tzu.¹ We hope to inspire you to think creatively, strategically, and tactically in your case planning and implementation (whether litigation, administration, business or everyday) with timely adaptation as circumstances change.

This article is not purporting the idea of lawyering as war. Rather, we discussed in part one the concept of being peacemakers over war-makers. Because conflict is inevitable and unavoidable, developing conflict and case management skills are paramount in our profession. The chief end of *The Art of War* and its principles is the avoidance of war, the promotion of peace, and the best interests of the people. It is important to be knowledgeable and conversant in the Rules of Professional Conduct and also be true to your personal morals and ethics.

In part one, we introduced the main themes, defined pertinent terms and asked fundamental questions based on *The Art of War*. Now, let's delve into the first six chapters of *The Art of War* and its principles which provide relevant, case management applications for the trusts and estates attorney.

CHAPTER I -- Laying Plans:

Calculations, Initial Estimations, Detail Assessment and Planning

The chapter on Laying Plans explores five constant factors and seven military conditions that are determinative of military outcomes.

The five constant factors are:

(1) **The Moral Law.** The Moral Law can be a symbol of how well you command your client's trust and readiness to follow your lead.

(2) **Heaven.** Heaven signifies natural, scientific limitations or advantages such as day and night, time and seasons.

(3) **Earth.** Earth signifies challenges or opportunities in "ground" to be covered, such as procedures, venues, circumstances; danger and security; and chances for winning or losing.

(4) **The Commander.** The commander stands for the virtues of wisdom, sincerity, benevolence, courage and strictness.

(5) Method and discipline.

The seven (7) constant factors have been modified to apply to a trusts and estates attorney. Which side – you or opposing counsel – has:

- (1) the Moral Law on their side?
- (2) greater ability?
- (3) more favorable circumstances (i.e. "heaven" and "earth")?
- (4) greater discipline?

(5) Greater strength?

(6) More training?

(7) Consistency in merit being rewarded and misdeeds being punished?

Victory or defeat can be predicted by how the leader processes and adheres to these factors and conditions.

- **Do you have a proper purpose to the case? Only accept cases which have legitimate purposes in which you believe.** Having a legitimate issue to pursue motivates people from whom support is necessary, i.e. your client, third parties and even opposing parties. Do not buy into, deceive others, or deceive yourself with "Madison Avenue" type sales story hype.
- **Calculate, recalculate and then adjust and adapt your approach.** All cases are not the same; there are natural differences in facts and circumstances that need to be evaluated and require varying approaches and adaptations. Importantly, evaluations and the preliminary plan need to be constantly revisited and enhanced.
- **Properly order and inventory the required resources you need to persevere and finally 'win' (as defined by you and your client).**

- **Have you discovered the true facts and circumstances?**
- Do your homework and discover the facts. Expect misinformation and bias even from your own client.
- Look for indirect sources of information.
- Use various communications with the opponent to draw out information while perhaps being elusive on your own perspectives and strategies.
- Does the creation of a feigned appearance aid in positioning?
- Be a student of human nature and personalities and play to or off of it.
- Know the nature of the practice (specialized planner, generalist, or litigator) of the opponent and his/her or her reputation, character, and practice style.

CHAPTER II -- Waging War

The chapter on Waging War explores the economy of warfare. Quicker, decisive winning engagements mark success.

- **Make realistic calculations of expected costs of the conflict resolution.** Clearly inventory the process, costs, and potential contingencies to the client. Discuss the financial as well as time, energy, emotional, and relationship aspects of the process. Warfare is expensive. Make sure your client and you can afford and resource it. Make sure you have your commitment to basic underwriting. There are detrimental costs to prolonged engagements, competition, and conflict. Too costly a conflict will lead to disaffection of your support base.
- **Coming up short in a “winning” strategy and resources may very well lead to defeat.** The enemy will exploit your weaknesses, for example, one of which is the inability to sustain the conflict. An inability to sustain the conflict will likely lead to defeat.
- **Always try to be efficient, yet**

effective. Analyze the most practical effective and efficient manner and strategies of prevailing, along with probable contingencies. The true goal is to be victorious in the most efficient manner. Look for ways to make your opponent or others to pay and provide, such as getting him/her to do work for you.

- **Can the client’s practical goals be achieved without sewing a destructive path?** Are there settlement options for the other side or interim players? Knowing the bad of warfare is a perspective that leads to better positioning.

CHAPTER III -- Attack by Stratagem

The Plan of Attack, Planning Offensives, Strategic Attack

The chapter on Attack by Stratagem explores the importance of proper strategies that adjust to various circumstances. It presents various levels of better strategies. The highest form of military victory is breaking the enemy without fighting, then capturing without destroying, and then overthrowing without lengthy field operations. Know the circumstances and capabilities of your own forces and those of the enemy. Know the enemy and know yourself.

- **The client should not be directing the case contrary to the better judgment and practices of you as the lawyer.**
- **Seek the most effective and efficient way to achieve the client’s true practical outcome.**
- **Be wary of fighting a losing cause . . .** develop evaluation processes and skills to know when success and defeat are most likely.
- Sometimes the better strategy is to wait and continue to explore and evaluate.

CHAPTER IV -- Tactical Dispositions

Positioning, Military Disposition, and Disposition of the Army

Is the best defense a good offense? **No, the best defense is a good defense.**

- **The best strategists place themselves into a position which makes defeat impossible.** The

client should create the facts and circumstances which are inherently unassailable, making the client beyond reproach. Build an early defense by adhering to quality process and highest standards and duties. For example, in a fiduciary sense this includes always adhering to proper fiduciary duties and timely preparing and disseminating accounts, reports, and other suitable communications.

- **Offensive tactics require a superabundance of strength.** The victorious strategist only seeks battle after the victory has been won through strategic devices, evaluation, and vigilantly sought opportunity.
- **Offensive tactics may be premature and may needlessly lead to counter claims.** For example, filing a Petition for an Accounting may be premature during the first year of an administration. But, periodically requesting information can strategically build the case for when an offensive tactic is timely.
- **Distinguish offensive tactics and attacks with offensive willingness, readiness, and capabilities.** The latter may deter attack, create a good defense and maintain peace.
- **Wait for, but do not miss, the momentary opportunity for defeating the enemy.** Assailing a party may take time and collecting information – watching and waiting for the proper or better opportunity. Conquer an enemy that is already defeated. Wait for the opportunity to defeat the enemy by the enemy providing for their own defeat. Only seek battle after the victory has already been won. The truly clever fighter not only wins, but wins with ease.

CHAPTER V -- Energy

Directing, Strategic Military Power, and Forces

The chapter on Energy explores the use of organization, creativity, implementation,

disciplined uses of appearances, and momentum.

- **Control large projects through division and delegation of responsibilities.** Larger forces can be controlled with the same ease as smaller forces if they are organized into divided teams.
- **Establish communication protocols for effective coordination.** Communication protocols are important to control the whole.
- **Ponder quality tactics and strategies; be decisive and timely in decisions and execution.** Create useable energy and then release it to usable and sustainable momentum, like bending a crossbow creates energy and the decision is a trigger release.
- **Look for indirect methods of achieving outcomes.** Be creative! There are direct tactics and indirect tactics. Indirect tactics are inexhaustible (just as musical notes create melodies, primary colors create hues, cardinal tastes yield flavors, and letters and words create expressions). Be creative!
- **Evaluate whether use of appearances advances the cause.** Even in seeming disorder there is order and virtue. Simulated disorder postulates perfect discipline, simulated fear postulates courage, and simulated weakness postulates strength. There is art and science to creating appearances that lure and entice to the enemy's detriment.
- **Look for alliances that effect larger advances.** These may include experts and other persons with like interests. Look for combinations of resources that are greater together than their individual parts and use their disproportionate energy and momentum.

CHAPTER VI -- Weak Points and Strong

Illusion and Reality, Vacuity and Substance, Weaknesses and Strengths

The chapter on Weak Points and Strong explores how to constantly change and adapt for circumstances, including discerning the enemy's strengths to avoid and undermine and weaknesses to exploit.

- **Seek to know the enemy's plans in order to thwart them.** Carefully inventory the enemy's strengths and weaknesses. Use conferences and other communications (directly and indirectly) to lure and discern information. Use others to gain information and intelligence.
- **Keep your plans hidden.** To the extent possible, keep your opponent confused and off guard by various tactics while keeping your strategy hidden. Tactics can be seen more easily than strategy.
- **Be discrete in what you disclose. Use candor when warranted.** It may be counterproductive to give complete disclosure of all of your client's facts and circumstances, not to mention a breach of confidentiality which is ethically mandated. Deceptive tactics are important to warfare: feigning, using the unexpected, baiting, enticing, playing on personalities, keeping the foe off balance, secrecy (even from one's own "troops" that might give away strategy and tactics – but keep in mind the attorney has an ethical duty to inform the client).
- **Take the initiative. Set the tone and the pace.** Choose the battles (when and where) you want. Making first strike and taking first position is advantageous. Seek to out maneuver the enemy.
- **Use strategy to undermine your opponent's positions of strength:**
 - **Pick at little wins.**
 - **Lure the enemy from position of strength** (find ways to weaken them).

- Do what you can to **divide and conquer the enemy.**
- **Capitalize on the enemy's mistakes and weaknesses.**
- **Make the enemy protect broadly** (spread thin) while you choose specifically when and where to attack.
- **Choose battles in which your opponent must engage but he cannot win.** Force him/her from his/her position of strength to defend something too valuable not to defend. Ask and answer, "What must he defend?" Make him/her react to your unexpected and surprises. Keep him/her guessing, confused, and dispersed.
- Continue to evaluate the circumstances and change and adapt to them.

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

Timothy S. Midura, C.P.A., J.D., LL.M., is an attorney and director with the firm Huck Bouma, P.C. His specialties include: estate planning, estate and trust administration, conflicted estate matters, and not-for-profit organizations. Tim can be reached at tmidura@HuckBouma.com.

Colleen L. Sahlas a law partner at The Law Offices of Hoy & Sahlas, LLC, in Oak Brook, Illinois, and has focused her practice in estate planning, decedent's estates, real estate, and business since 2000. She serves on the Illinois State Bar Association's Trusts and Estates Council and is managing editor of its newsletter. Colleen can be reached at Colleen@hoyweb.com.

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