

The Art of Litigation: Deception and Settlement

The Application of Sun Tzu's Ancient Strategies of War to the Law

A lawsuit, like any competition, is essentially a form of warfare. The strategies of prosecuting or defending a suit are much the same as those mustered on the battlefield. Victory often goes not to the party with the stronger case, but to the party that makes the best use of the process, understanding tactics and strategy.

There can be few better sources of the basic strategies of litigation than Sun Tzu and his treatise, The Art of War. Written more than 2,400 years ago, The Art of War touches on the essence of conflict and, by extension, litigation. To illustrate this point, I cite other two fundamental truths revealed by Sun Tzu: 1) lawsuits are based on deception; and 2) the better goal in a lawsuit is an early settlement.

Litigation and Deception

Key among Sun Tzu's observations, and often quoted in the business community, is the statement that "All warfare is based on deception." This can be doubly true for litigation. Deception is fundamental to the litigation process.

An attorney is expected to deceive because our legal system is adversarial, powered by an engine that requires each attorney to act as a partisan advocate for the client. The attorney is not expected to be an impartial truth-seeker. The attorney champions the client's case by emphasizing the positive, not the negative.

This does not mean that attorneys or witnesses are free to lie and mislead. The process requires uncompromising adherence to rules prohibiting perjury and dishonest or unethical advocacy. A client should certainly demand complete candor and honesty from his attorney. But the truth remains that the attorneys for both sides will put their best case forward. And experience tells us each party will invariably believe that the opposing counsel is lying.

Deception also invades witness testimony. A witness will try to deceive because each side has its "version of the truth." Even the most honest witnesses will shade the truth. Less scrupulous witnesses will consciously shade, hide, and dissemble the truth. The skillful attorney will devise ways to hunt out these falsehoods in the opponent's witnesses and expose them at the optimal moment for the greatest impact.

It should be both a liberating and a sobering realization that the legal process achieves its ends through deception. Virtually every step in the process is susceptible to shading and manipulation. The true

measure of a litigator, like an ancient warrior, is to learn to master his trade by understanding the art of deception.

Victory in Settlement

Sun Tzu said, "Generally in war the best policy is to take a state intact; to ruin it is inferior to this. . . . For 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." As in war, the essence of litigation is not a bellicose drive to destroy the opposition. Beware the lawyer who advises you to engage in all-out war without purpose or effect. Skillful litigation is positioning the case for early resolution. Indeed, experience tells us that only a small fraction of lawsuits are not settled before trial.

Settlement driven by common sense and efficiency will achieve the best results for the client. This is best seen in personal injury litigation, where the more time invested in a case often means a lower recovery for the attorney, with little additional benefit for the client.

Many business litigators forget this point, in part, because in business lawsuits the parties do not limit themselves to the pursuit of compensation. Businesses also seek justice, punishment and a leg-up over their competitor. Generally speaking, business litigators also do not depend on settlement for compensation. They are paid hourly, often at premium rates. The motivation of some attorneys might be to keep the case going and avoid settlement.

This leads to the all too common situation where settlement is motivated as much by an attempt to cut one's losses as it is to enjoy potential gains. Thus, business litigation has been apocryphally described (purportedly by an addled transactional attorney) as two parties vigorously throwing money at one another, with the loser being the one that first runs out of money, patience or passion.

Sun Tzu advises against this purposeless destruction. Each of the steps taken in a lawsuit should have a goal of encouraging settlement, albeit on your terms. This goal should be at the forefront whenever discovery is taken, motions are filed, and meetings with the opposition are held. This may not assure that fees and costs will be limited. Rather, it means that when money must be spent, it should be to encourage resolution of the matter. If it does not, then one should consider choosing a more effective course.

This strategy should be pursued even when it appears that your opponent has failed to appreciate the benefits of settlement. If your opponent is bent on the destruction of your business at any cost, the skillful course is to encourage the opponent to spend frivolously. But even this is with the goal of exhausting the opponent and encouraging settlement. The important lesson to be learned from Sun Tzu, is that a mindless push for victory at any cost can destroy not only your opponent, but your business as well.