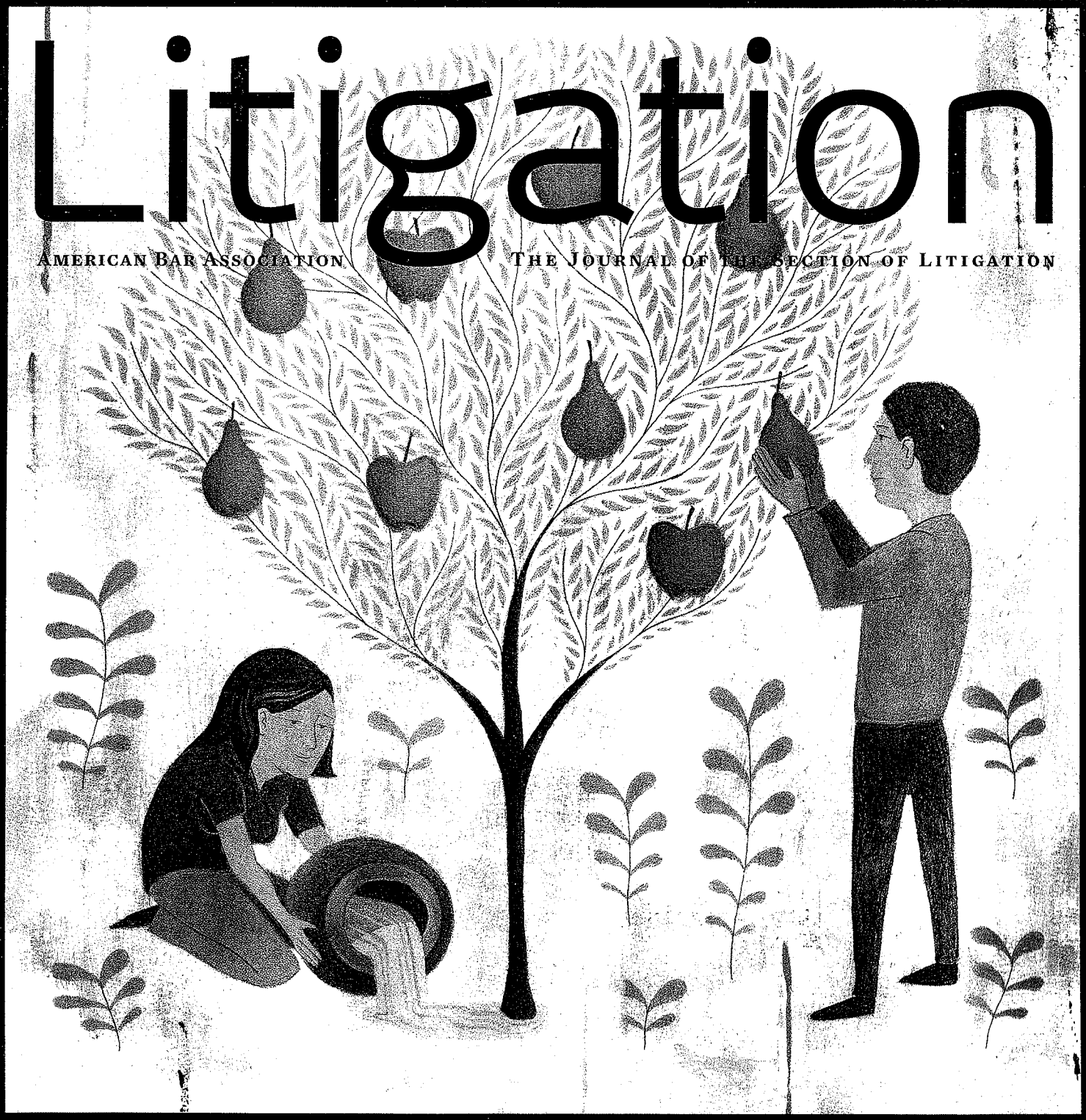
Vol. 39 No 1 Winter 2013

Litigation

American Bar Association | The Journal of the Section of Litigation



Good Deeds

Interview with Judge Jack Weinstein

Professional Courtesy Advances Your Cause

Transnational Crimes

Sun Tzu
and the Art of Trial

BY WILLIAM N. SHEPHERD AND THOMAS D. SMITH

William N. Shepherd, former statewide prosecutor for the state of Florida, is a partner with Holland & Knight LLP.

Thomas D. Smith, former chief assistant statewide prosecutor in Tampa, is a retired colonel in the U.S. Army Infantry.

The first trial manual was written thousands of years ago by a military strategist responsible for training his king's troops during the Warring States period in sixth century B.C. China. Although Sun Tzu wrote *The Art of War* as a manual for training warriors, its lessons and principles apply equally to preparing for the conflict of trial in the adversary system. The good deed at trial is receiving the asked-for verdict. The good deed for Sun Tzu was preparing for war so that victory was assured or, better yet, war was averted.

Sun Tzu's principles have been taught in military academies around the world for decades and more recently have seen themselves applied to the fields of business and sales. But the lessons of defeating an adversary are equally applicable to the "us versus them" and "good versus evil" confrontations that make up modern litigation. A good trial plan must be well conceived, properly investigated, strategically charged, well rehearsed, and precisely executed. The veteran trial lawyer is prepared for eventualities and is able to adapt nimbly as his adversary changes the conditions. If you prepare your case for trial as a wise general prepares troops for battle, you can have the success Sun Tzu delivered his trained commander.

Some of Sun Tzu's principles follow.

"If you know the enemy and you know yourself, you need not fear the result of a hundred battles." You have to know your case to plan your trial effectively. If you have not taken the steps to evaluate your case properly, you will, in Sun Tzu's words, "succumb in every battle." As a commander would routinely evaluate his troops, you must assess the claims and simultaneously assess the evidence. Fact evidence must be gathered just as a commander would gather munitions. Witnesses must be prepared as troops would be drilled.

A thorough vetting of your claims and evaluation of evidence will prepare you for the conflict ahead. As a threshold matter, you must, of course, have done the legal research to support your work and must have examined your case from all sides and without a bias for your position.

"In war, then, let your great object be victory, not lengthy campaigns." When you enter into the foray of trial, you must define your goal or goals at the outset. While some use the courts to hinder a competitor's business progress or challenge a competitive advantage, a true trial lawyer begins his or her planning with an eye toward jury deliberations. The ultimate goal of the practitioner steeped in the adversary trial system, after all, is the absolute resolution of claims with a favorable verdict.

Siege of an enemy teaches you nothing about the enemy's skill and serves to dull your own troops. A long, protracted discovery process leading to trial likewise offers little value to the plaintiff, who must be ready to engage from the filing of the ini-

tial complaint, or the prosecutor upon indictment. Delay becomes the strategy of defense.

For a defense lawyer, however, delay is a tactic that can reap some very real benefits. If resources permit, delaying attack on the other party may create opportunity for defense victory. A delay fogs witness memory and provides a greater chance for miscalculation and missteps. Taken to the extreme, however, this tactic will also result in a challenge to morale, reputation, and the willingness to continue the litigation fight. It is not a tactic that should form the basis of your overall strategy; instead, it should be employed in discrete situations where its benefits are tangible.

"Military tactics are like unto water; for water in its natural course runs away from high places and hastens downwards. So in war the way is to avoid what is strong and to strike at what is weak." The authors believe this has come down to us from 3,000 years to mean "Keep it simple, stupid." This familiar notion reminds us of the one goal or one objective that is the sine qua non of all legal matters: What is the one thing we want ultimately to achieve? Civil War historians tell us that in the early morning of July 3, 1861, at Gettysburg, Pennsylvania, after two days of bloody battle, General Lee and his corps commanders debated whether an attack on the Union center would be advisable. This had been Lee's conviction, but he was becoming irritated with the pushback of his commanders. Finally, Lee, tired and impatient, pointed to the center of the Union line and said, "Attack those people." Union General U.S. Grant was of a similar mind, for upon investing the Confederate positions at Fort Donelson, Tennessee, he was asked by the opposing general about his terms of surrender. Grant answered simply, "No other terms than unconditional and immediate surrender. I propose to move immediately upon your works." Always keep in mind the one outcome-determinative goal you want and need to accomplish.

"Bring war material with you from home, but forage on the enemy." When you know your case and your opponent's case, you will see opportunities to forage. The most clear-cut of these opportunities comes in the criminal context, where an active forfeiture practice goes hand in hand with criminal prosecution. The government agency that does not strengthen public safety by decreasing criminal resources is missing an important strategic advantage it owes the public. More specifically, a seizure of critical assets that may be used by the government in future investigations against the same criminal enterprise or its rivals is at the heart of the admonition that a "cart of your enemy's goods is worth twenty of your own."

In the civil context, a court's order freezing assets is a powerful moment that shifts momentum. The amount itself may not be as significant as the early court ruling in favor of your case and prejudgment seizure.

SUA SPONTE

A Judge Comments

HON. M. MARGARET MCKEOWN

The author is a circuit judge on the Ninth Circuit Court of Appeals.

Whatever Sun Tzu may have been thinking in the sixth century B.C., he surely was not considering legal ethics and professionalism. And for good reason—the battlefields of war do not parallel the front lines of litigation. War is armed conflict; litigation is civilized dispute resolution, or at least it should be. But endless discovery disputes, years of Rambo tactics, and a blizzard of filings may cause some to disagree. Indeed, the war analogy has spawned "war rooms" for trial preparation, the divorce battle in the movie *The War of the Roses*, and briefs spouting "warring" legal arguments.

The authors of the article "Sun Tzu and the Art of Trial" persuasively demonstrate that a strategic plan is essential in both trial and warfare. To be sure, war is cloaked in a legal regime under various Geneva and Hague conventions. But these

(Continued on page 27)

Illustration by Tim Foley

The corollary to the forage instruction is that when the opportunity arises, you must seek additional fronts on which to challenge your opponent. ***"If the enemy is taking his ease, harass him; if quietly encamped, force him to move. Appear at points which the enemy must hasten to defend; march swiftly to places where you are not expected."*** A parallel civil investigation is a troubling and complicated matter for a criminal defendant whose counsel is not versed in both fields. Likewise, copycat suits or suits filed in multiple venues challenge the civil defendant to split his or her resources and remain consistent in his or her defense. But seasoned counsel on the attacking side are careful not to allow hubris to extend beyond available resources or beyond the theory of the case solely for the purpose of maximizing the opponent's challenge, lest such efforts prove to be their undoing.

Trial lawyers must pore over the maps of their battlefield to protect against weaknesses and exploit advantages.

Sun Tzu tells us the clever general ***"avoids an army when its spirit is keen, but attacks it when it is sluggish and inclined to return to camp. It is a military axiom not to advance uphill against an enemy, nor to oppose him when he comes downhill—camp in high places, facing the sun."*** To the prosecutor or plaintiff's counsel, these principles offer great wisdom about the selection of "terrain," made up of the nooks and crannies of precedent, the steep incline of the jury pool, and the soft marsh of state or federal rules.

Starting at the beginning, the selection of venue is perhaps the most critical decision you make in filing your case. If there is not a choice, then you fight on the ground you are given. But if there is a choice to be had, you must make it wisely. As a commander would pore over the maps of his battlefield to protect against weaknesses and exploit advantages, so, too, must the trial lawyer. This is not a decision to be rushed or dictated by the client. A past practice of venue selection, moreover, does not dictate an automatic renewal of that strategy every time you are charged with a new case to command. Think through the discovery and the trial as you choose your terrain. Each phase may carry an advantage or disadvantage, but don't rush to embrace an initial decision. An innovative choice at this stage may make all the difference as the battle progresses.

"The opportunity of defeating the enemy is provided by the enemy himself." Great military victories have come at the expense of adversaries who made a costly misstep. Anyone who has seen the movie *Patton* remembers U.S. Army General George Patton saying, "Rommel, you magnificent bastard, I have read your book." *Infanterie Greift An* (published in English translation as *Infantry Attacks*) was based on Erwin Rommel's experiences as a German captain of infantry in World War I and is a classic tutorial of infantry tactics that was required reading at Fort Benning's U.S. Army Infantry School at a time when instructors and students included George Patton, Dwight Eisenhower, Matthew Ridgway, Omar Bradley, Joseph Stillwell, and George C. Marshall. In a sense, then, Rommel was the victim of his own (publishing) success.

"Use of spies—'divine manipulation of the threads'—is the sovereign's most precious faculty." Sun Tzu sees wise sovereigns and good generals enabled to greatness by knowledge of the enemy's dispositions that can only be obtained from others familiar with the subject. These others are spies. Sun Tzu's five classes of spies able to aid the sovereign are local spies, inward spies, converted spies, doomed spies, and surviving spies. It is in the interpretation of the gathered intelligence from these classes of spies that the sovereign and his general are able to best plan their strategy.

Every criminal prosecution should engage spies. Undercover agents, cooperating informants, and cooperating witnesses provide a level of insight into operations that cannot be garnered merely from a historic recitation of facts. Wire intercept orders that record conspirators' conversations and emails and texts are invaluable sources of information that secure conviction of the guilty and can serve to exonerate the falsely accused. But an over-reliance on spies ignores Sun Tzu's admonition that it is in the "divine manipulation" of the spies that the truth is uncovered.

If the prosecution can make use of spies, so too must the defense. Obviously there are legal limitations on how this can be accomplished. The temporal challenges of post-arrest investigation are formidable, but the overarching concept of gathering intelligence about your opponent is true in any context.

The civil context lends itself to the use of spies as well. What cannot be underestimated, since the time of Sun Tzu, is how our emails, voice mails, search histories, GPS locations, text messages, and electronic calendars all turn us into unwitting spies on ourselves. Government public records are a treasure trove of spied information there for the avid investigator. Obtaining court records, no longer an inordinate challenge now that they are stored online, has become routine in a full investigation of

the facts, as you gather your army to prepare for the coming courtroom battle.

"He who can modify his tactics in relation to his opponent and thereby succeed in winning, may be called a heaven-born captain." Of course, the best stratagems are subject to change and improvement as battle develops. And all who practice law know even the best-laid plan generally does not survive the first bullet fired.

Modification of tactics in the middle of a court case is not the best way to build your client's confidence. A useful example of the challenge faced when changing tactics, and the moral courage needed to do so, can be found in the early stages of World War II. Even before France fell to the Germans, British Prime Minister Winston Churchill was concerned that the Germans would seize the French fleet and critically damage the British effort to control the seas. He made numerous flights to France to determine what the British could do assist the French, and he sent infantry, tanks, and fighter squadrons to their aid in exchange for the promise that if the Germans defeated it, France would turn over its naval fleet to the British before the Germans could seize it.

As negotiations between these allies continued, the French fleet moved to the port of Mers el Kebir in French Algeria. In July 1940, it became clear the French efforts were doomed to failure. The German-sponsored Vichy French government would in the end seize the French fleet in Algeria for the German fleet. Churchill had spent months and precious British forces and, at the end, had nothing. But Churchill was not about to give up. Then and there, he decided to adapt his plan to his opponent's maneuver.

With great secrecy, Churchill ordered the British Navy attack to destroy the French Navy at its port in Algeria. This new course of action was an abrupt and extreme change in plans, but this ability to apply flexible thinking to a situation was the key to Churchill's success in this instance (and more generally). On July 3, 1940, the British fleet, in a surprise attack, destroyed the French fleet in the Algerian port with the attendant loss of 1,500 French sailors. The British, in stark contrast, suffered no causalities. The decision must have been a difficult one, but as Churchill saw the battlefield changing right before him, he knew he had to change his tactics radically to meet his objective and protect Britain.

Although the power of military strategy is a useful tool in the practice of law, the two do not compare in severity or sacrifice. But adversarial conflicts do have certain universals. Those who understand the dynamics will be well served. Sun Tzu was an artful tactician, and his skills can be used to help us all—whether in battle or trial. ■

SUA SPONTE

A Judge Comments

(Continued from page 25)

rules do not elevate ethical conduct over victory. The regime governing lawyers—the rules of professional conduct and extensive discovery rules—does exactly that. Any trial plan should be supported by three principles: fair disclosure, professionalism, and candor to the court.

Sun Tzu's advice that "all warfare is based on deception," designed to win at all costs, is anathema to the courts. Unfortunately, discovery disputes are a fertile battleground. These disputes are the bane of a trial judge's existence and fare no better on appeal. Any trial strategy must account for the consequences of bloody discovery battles and their long-term implications. Deceit, hiding the ball, and unnecessary delay are tantamount to shooting yourself in the foot. Failure to curb these practices leads to another Sun Tzu truism: "The opportunity of defeating the enemy is provided by the enemy himself." Diplomatic discovery is not an oxymoron. Sincere professionalism brings along respect from the court and may even pay off with an amicable resolution of the litigation.

Absent a negotiated resolution, there is a postscript for fans of Sun Tzu. Sun Tzu was well aware of the hazard of winning the battle but losing the war. So, too, should trial lawyers treat the trial as a precursor to appeal. The result of winning at trial but losing on appeal is, no matter how you put it, losing. The specter of appellate proceedings should serve as a shadow consideration throughout trial, and special thought should be given to these common pitfalls:

- endeavoring to win every mini-skirmish during trial, critical or not, only to undermine the judgment on appeal;
- pushing for the admission of unnecessary evidence that may unravel on appeal;
- failing to make clear objections or leaving murky continuing objections in limbo by failing to tie up loose ends;
- ignoring motions in limine that are never ruled on;
- holding off-the-record conferences that are unreviewable;
- pushing for legal rulings on close calls that may net a reversal;
- offering surprise evidence without justification;
- acquiescing in confusing jury instructions or verdict forms; and
- fudging facts and not offering complete candor to the court.

Legal conflict resolution cannot live by trial strategy alone, nor solely by principles of war; rather, legal conflicts by their very nature require us to invoke, and ultimately rely on, the rules, principles, and higher values that we share as legal professionals. ■