

## ADVOCACY AND THE ART OF WAR

### Tips based on Sun Tzu's The Art of War

Written more than 2,000 years ago by Sun Tzu, a mysterious Chinese general in the state of Wu, *The Art of War* is viewed by some as the most important work on the subject of military strategy today. Other disciplines have not been immune to its application. Works on Sun Tzu and business and Sun Tzu on investment abound. The principles set out by Sun Tzu are as applicable in a forensic context - particularly in the adversarial environment of the courtroom or Master's chambers.

Although *The Art of War* is often no more than an expression of common sense, its precepts are easily forgotten, particularly where the complexities of legal argument intervene. Of the many principles set out by Sun Tzu, the following seem most relevant to the advocate:

1. **“If you know the enemy and know yourself you will never be defeated”**, which also links to **“to win you must plan your victory and know the tactics of your enemy before doing battle”** - One of the things that makes advocacy more difficult than military strategy is that relationships in the courtroom are tri-partite, not bi-partite. When you cross-examine a witness, your questions are chosen with a view to procuring an answer which will influence the judge or jury. The view taken by your opponent of the shrewdness of your questioning is immaterial if it causes the judge to favour your client's case. So, as well as reflecting on your opponent's strengths and weaknesses, take time to think of what the judge's concerns will be. The most obvious example is where your opponent is a litigant in person - the judge may be a far more formidable obstacle to success than your opponent himself. Generally, tailoring arguments to meet concerns which the judge may raise is just as important as preparing arguments to counter those of your opponent, even if your opponent's skeleton argument indicates that he has not picked up on what you believe the judge's concerns will be. In a civil case which is being conducted without Livenote or similar transcription, taking an accurate note of the judge's observations is almost as important as taking an accurate note of the evidence - it provides a map of the judge's thinking and the meticulous advocate will respond accordingly. In all of this, an honest and objective appreciation of the strengths and weaknesses of your own case and that of your opponent is invaluable.

2. **“To win without fighting is best”** - Any keen advocate will be disappointed if they are not called on (“all that work and I never got the chance to develop my submissions...!”), but clients rarely complain that you won too easily. It is worth making sure that the court is placed in the best position possible to assess the strengths of your case without your actually having to advance lengthy oral submissions. In civil cases, make sure that you have a comprehensive skeleton argument - and chronology - lodged with the bundle, which takes the judge to those parts of the evidence that support your case and deals with those parts of the evidence which may damage your case. This is particularly important in applications for interim relief where the judge is faced with a thick bundle and there is little time for him to read in. In an ideal world, you will be greeted by a “I do not need to hear you Miss Bloggs, your order is granted”. Of course, some explaining may be required and the fighting may be unavoidable. Even if that is the case, a strong skeleton will ensure that you begin on a strong footing. Indeed, one of the most challenging experiences in modern advocacy is to have the members of the Court of Appeal indicate that they are against you at 10:33, and then for you to spend the rest of the day trying to persuade them to take a different view!

3. **“Do not act if there is nothing to gain and do not fight if you are not in danger”**, which links to **“a quick victory is best”** - There are times when silence is golden. The purpose of advocacy is to win the case for the client and not to provide a showcase for the advocate’s erudition. If the door is open, walk through it. Don’t keep knocking just for the sake of it!

4. **“Your skill must be one of making your enemy act by creating a situation upon which he is forced to act”**, which links to **“in battle use orthodox tactics to draw your enemy to you and use unorthodox tactics to defeat him”** - As claimant or applicant, consider whether a point can be raised in such a way which forces your opponent to deal with it, thus leaving you to shoot down his or her argument in reply. You will need to ensure that you are indeed replying to what your opponent has said and not raising any new issues. Ask yourself whether you can oblige your opponent to open (especially if he is not expecting to have to), although this needs to be balanced against the fact that having the last word is a powerful

weapon. As a defendant/respondent you should seek to put your point in a way that (a) highlights the fact that your opponent has not dealt with it in his submissions or has dealt with it insufficiently because it is a weak point, and (b) forces him to deal with it in his reply on terms of your choosing. In this way much of the force is taken out of your opponent having the final word.

5. **“Avoid your enemy when he is alert and strike him when he is unaware”**

- While the ability to think on one's feet is a critical skill, there are times when developments such as an unexpected question from the judge or an unanticipated legal submission from an opponent demand a considered response rather than an impulsive one. Never be afraid to “consider the matter over the short adjournment”. And while the CPRs discourage “trial by ambush”, there is no harm in keeping something up one's sleeve. If, however, you promise the judge that you will come back to a point, always remember to find *some* way of dealing with it. When it arises for a second time, your prevarication will be received with much less patience!

6. **“Never completely destroy your enemy and when he is trapped allow him a way out”**

- This may be more relevant to relations with the judge. One of the central purposes of any argument by an advocate is to present the judge with an answer to the tricky issue of law or fact that confronts him. Argument which simply records the competing possible conclusions assists neither the judge nor the client. Always give the judge a “way out”, and try to make it *easy* to decide in your favour. It is far easier for a judge to reject an expert's view because that expert never inspected the site of the accident than to master the discipline in question, and the facts of the case, and reach his own conclusion that your expert's opinion is preferable.

8. **“Genius is the ability to win by being flexible according to the tactics of your enemy”**

- Despite the vital importance of planning and the execution of plans, the best advocates are those who are prepared to change in response to an opponent or judge. In particular, any unexpected point or issue which the judge raises must become the focus of your argument if you sense that his decision may turn on the point or issue. The response may be to steer him back onto the course of your choosing. However, if he is set on pursuing a particular route, you will need to

follow him and have the flexibility to ensure that this new route is one that still leads to a victory for your client.

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