

WARFARE

Lawyers can develop a winning courtroom strategy by effectively applying military principles when they prepare to battle a formidable adversary.

In February 1991, the U.S. military dismembered the fourth largest Army in the world just 100 hours after the Persian Gulf War began in January 1991. What was the secret of that stunning victory over Iraq? Battered by the disaster of the Vietnam War, the military had spent the previous 20 years relearning the ancient art of warfare. Many of those lessons apply in the courtroom as well as on the battlefield.

At the threshold, it is important to distinguish the legal lessons of the military art from the scourge sometimes known as "Rambo litigation." Rambo litigation is simply an attempt to substitute noxious behavior for legal skills. Applying the military art to litigation is simply a way to take advantage of hard truths mankind has learned through thousand of conflicts.

Those lessons are conveniently distilled in an Army field manual called FM 100-5. But before locking and loading for combat, remember Chinese philosopher Sun Tzu's observation that the greatest victory is the battle that one avoids. In litigation, this means that a good settlement is better than a bad victory. If everyone can walk away from the battlefield satisfied without a shot being fired, so much the better. But, of course, if things always worked out that way, we would need neither soldiers nor attorneys.

Thus, to be successful in litigation, consider using the following tactics:

Seize the Initiative. A successful commander takes charge of the battle, sets the pace, decides how it will be fought and turns the situation to his or her advantage. A prime example is the Israeli pre-emptive strike in the first hours of 1967's Six Day War. Before the massing Arab forces could strike, Israel seized the initiative. Israeli jets wiped out the Arab air forces on the ground. For the next six days, the Arab forces did nothing but react until they began begging for peace.

In litigation, take the offensive from the very beginning. Make your opponent react to you. This applies equally to the defense; remember that the best defense is a good offense. Be the first to start discovery. Get the opposing party's story

down first and lock it in early. In opening statements, do not start by reacting to what your opponent has, or may, argue. Present your story at the outset. Hammer home your key points and let the other side react to your evidence — that tells the jury that your evidence is what is important. And when the jurors start reacting to point one, that is your cue to hit them with point two.

Remain agile. In combat, you must be ready to exploit any advantage that presents itself. For example, during the Civil War's battle of Gettysburg, Union forces defending the wavering Northern flank say an opportunity and went on the attack. The Confederates, stunned by Col. Joshua L. Chamberlain's audacity, disintegrated. The South was decisively defeated and never regained the initiative up to its eventual surrender.

To be agile in litigation, one must be prepared to seize opportunities, particularly the opposition's mistakes. The O.J. Simpson criminal case provides a perfect example. When the prosecution handed Simpson the chance to show the glove did not fit, the defense seized the opportunity to make an unforgettable point instead of raising a slew of objections. As Napoleon Bonaparte advised, "Never interrupt your enemy while he is making a mistake." Remember, agility sometimes means not acting at all.

A trial call can turn into a mandatory settlement conference at the drop of a hat. Discovery can reveal that the real wrongdoer is a co-plaintiff, not the defendant. To be agile means to be thoroughly prepared so that you can instantly see how a new situation affects your case.

Synchronize your case. Everything needs to work together, both in battle and court. Synchronization is the process of assuring that all parts of your litigation plan work together to achieve the objective. When synchronization is absent, the result can be disastrous. For example, during World War II the British paratroopers who dropped into Arnheim, Holland, were supposed to be relieved within 48 hours by a column of tanks. The tanks never came, and the paratroopers were wiped out.

In litigation as in war, synchronization requires preparation. Every friendly wit-

ness must be adequately prepared and must be fully conscious of the objective of his or her testimony. For example, a defense safety expert in a slip-and-fall case should understand your theory is that the sidewalk had adequate drainage; the last thing you want is a flippant comment about how water pools at the very spot where the plaintiff fell.

Similarly, review all documents you propose to put into evidence. The jury surely will. Make sure each document supports your theory and if one does not, either do not submit it or explain it. In every case, ensure everything you present is in synch with your objective.

Outmaneuver your opponent. A military general moves his or her forces to put them into a position where victory is inevitable. Gen. Douglas Mac Arthur's Korean war campaign provides a fine example. He ordered a surprise landing far behind North Korean lines at Inchon and seized the key supply routes to the advance forces. The unstoppable North Korean onslaught turned into a rout overnight.

A litigator maneuvers procedurally. Gen. George S. Patton used tanks; you use the California Code of Civil Procedure. Understand its provisions and you have a powerful weapon. A stunning number of attorneys know as much about the CCP as Saddam Hussein knew about maneuvering his army. By knowing the restrictions and the opportunities the CCP and Rules of Court provide, you can shape the litigation your way.

Mass your firepower. There is a word for armies that hold their fire — "losers." Victory often means beating the enemy into submission with massive firepower. The Christmas Bombing of Hanoi in 1972 is a prime example. After 15 days of pounding by B-52s, the North Vietnamese returned to the Paris peace talks and concluded a treaty that ended the Vietnam War.

A litigator's firepower is evidence. Frontload your presentation with the most damning evidence you have, and emphasize it repeatedly. Start during discovery. Drive at the weaknesses with interrogatories and deposition questions. Drive them home in your opening. Shake your opponent's confidence in his or her

position. Morale is as important in law as in combat. There is nothing harder than representing a position in which you do not believe. Firepower, correctly applied, leaves an opponent disoriented and demoralized. Do not hold back waiting for "the right time." The right time is now.

Protect your position. While you should always be angling to take the offensive, you must protect your base. During the Civil War, the Confederate forces struck at the North. Gen. William T. Sherman took it upon himself to take advantage of their absence to march through Georgia and cut the heart out of the Confederacy.

You must be prepared to meet the opposition attack in litigation. Do what soldiers call an intelligence preparation of the battlefield. Analyze your opponent's combat forces. Who are the firm and the attorney? What is their track record on these types of cases? Check the index of *Verdicts & Settlements* (a Daily Journal Corp. publication) and call opposing counsel; you never know what you might find.

Next, consider the opposition's possible courses of action. What are their possible arguments? War-game each one with another attorney. What will the opposition do at each critical juncture? What can you do to be ready? Remember to fight deep by denying your opponent the ability to use the courses of action you most fear and to force it into choosing the course you want it to take. Protect your case by understanding the opposition.

Humankind has been fighting wars for thousands of years. While the tools have evolved from spears to smart bombs, the underlying principles are the same today as they were when Hannibal crossed the Alps. Litigation is simply war with arguments as the weapon. Understand the lessons of the past to win in the future.

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