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### Lessons from Art of War

The Art of War is an ancient military treatise dating from the 5th century BC. The work, which is attributed to the ancient Chinese military strategist Sun Tzu, is composed of 13 chapters.<sup>1</sup> Each one is devoted to a distinct aspect of warfare and how that applies to military strategy and tactics. This presentation focuses on the Five Constant Factors covered in Chapter 1.

#### I. Explanation of the Five Constant Factors from “Art of War”

##### a. The Moral Law

**“The Moral Law causes the people to be in complete accord with their ruler, so that they will follow him regardless of their lives, undismayed by any danger.”**

The first of the five constant factors in the Art of War is the moral law. Sun Tzu describes the moral law as the law that causes people to be in complete accord with their ruler, so that they will follow him regardless of any danger. In applying the moral law to litigation, the analysis turns to whether the finder of fact, your jury, judge, or arbitrator, will prefer your position to that of Plaintiff.

In considering your position, consider who has the higher or better moral superiority. Framing the lessons from the Art of War to litigation the preferred question is: with whom will the audience be in accord? Considerations for the analysis will largely be fact dependent. Other important considerations will be the parties or potential parties who may be involved in the lawsuit, the treatment or care the defendant showed others, and whether there is a “good” or “bad” actor. Many cases can be won or lost based upon post-incident conduct. For example, the kind and good-natured physician who shows high-character and good bed-side manner or who went above and beyond to care for her or his patient is rarely a target defendant. Conversely, a physician who is disinterested or unengaged makes the defense far more challenging. Likewise, corporate culture and reputation can heavily influence the moral superiority analysis.

In analyzing claims and litigation, it is important to remember to be wary of the “technically correct” trap. Being technically correct, but morally wrong can increase risk. Winning a motion for summary

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<sup>1</sup> The book is public domain and can be downloaded at this link:  
[https://en.wikisource.org/wiki/The\\_Art\\_of\\_War\\_\(Sun\)](https://en.wikisource.org/wiki/The_Art_of_War_(Sun))

judgement based upon the law is great result but arguing a technicality to a fact-finder seldom is a position of moral superiority.

**b. Heaven – Night and Day, Cold and Heat, Times and Seasons**

**“Heaven signifies day and night, cold and heat, times and seasons.”**

The second of the five constant factors in the Art of War is Heaven. Sun Tzu describes Heaven as day and night, cold and heat, times and seasons. The second constant factor addresses contrasting ideas. Those contrasting ideas can be time, seasons, or momentum. Applying Heaven to litigation, the lesson is that litigation or claims resolution will have highs and lows over the duration of each matter and will not stay constant.

The lesson from the second constant factor to apply to litigation and claims resolution is to remember that there will necessarily be highs and lows depending upon how witnesses present/testify, facts are discovered, and how the matter proceeds. Remembering that there will be highs and lows over the life of a matter helps maintain perspective.

In keeping a proper perspective, it is important to avoid single-track thinking. In other words, it is important to avoid thinking that because the matter appears to be a “winner” early don’t equate that with believing everything will go in your favor. Things will go wrong, but it is important to put every piece of information in its proper perspective. When evaluating new pieces of information, it is important to not overweight a new fact and underweight helpful, but old, information. For example, in a trucking case where the investigating officer and witnesses attribute the fault of an accident to the driver of the other vehicle, the fact that your driver may have been using his cell phone against company policy earlier in the trip is a problematic fact. However, the significance of that fact does not outweigh independent testimony of witnesses or police.

**c. Earth – Distances, Danger, Security, Open Ground, Narrow Passes**

**“Earth comprises distances, great and small; danger and security; open ground and narrow passes; the chances of life and death.”**

The third of the five constant factors in the Art of War is Earth. Sun Tzu describes Earth as the terrain where war will be fought. The constant factor of Earth applies to litigation or claims resolution in analyzing the venue where the lawsuit is or will be filed.

In analyzing the venue, it is important to consider local knowledge and local issues throughout the life of the claim or case. Knowing the venue is a critical analysis. Crucial factors in your analysis will include demographic profiles of the parties, the jury pool, the judges, the anticipated duration of the case, and the permissible scope of discovery.

Knowing your venue will assist in attaining a superior result. Consider hiring or engaging local counsel if your panel doesn’t have counsel familiar with the venue. If you are evaluating a pre-suit claim, rely upon your local panel counsel for input into the venue even if it is just for an informal opinion.

#### **d. The Commander – Good Decisions Require Humanity, Sincerity, and Good Faith**

**“The Commander stands for the virtues of wisdom, sincerity, benevolence, courage, and strictness.”**

The fourth factor of the five constant factors in the Art of War is the Commander. Sun Tzu describes the Commander as one who stands for the virtues of wisdom, sincerity, benevolence, courage and strictness. In claims evaluation, sometimes it is necessary to draw a line in the sand, but at other times it is necessary to recognize the bigger picture. From a company perspective, sometimes it is necessary to send a message to the Plaintiff’s bar. However, other times it is necessary to recognize when a claim should be settled in the best interest of the company.

This section also requires analysis of opposing counsel. A frequent problem in properly managing and resolving matters is an inexperienced opposing counsel. Some of the most difficult cases we see are due to inexperienced opposing counsel who needlessly drives up costs or prolongs litigation because of inexperience. Fortunately, there are tactics to address inexperience. If you are fortunate, defense counsel will be able to develop a relationship of trust and succeed in re-directing opposing counsel’s efforts. Understanding the adversarial nature of litigation or claims resolution, engaging a respected mediator, or a mediator that opposing counsel respects, frequently goes a long way towards resolving difficult matters. If the case warrants resolution and is a significant matter, engaging defense counsel and/or a mediator pre-suit shows good faith and both a sincere interest in resolution and defense, if necessary.

#### **e. Methods of Discipline – Proper Marshalling of Forces and Control of Expenditure**

**“In which army is there greater constancy, both in reward and punishment?”**

The fifth of the five constant factors In the Art of War addresses methods of discipline. This section addresses both managing logistics and people. Sun Tzu describes an organization to effectively marshal an army and troops. The fifth factor can be applied to claims resolution and litigation, through clearly defined roles to manage litigation and efforts to manage litigation resources effectively.

Concerning logistics of claims resolution and litigation, considerations include when to retain outside counsel and to what extent should counsel be involved in pre-suit matters. Analyzing the advantages of outside counsel in claims investigation, knowledge of venue, experience with opposing counsel and an analysis of defenses versus the cost associated with counsel and whether the matter can be better managed without counsel. It is equally important, if outside counsel is engaged, to clarify the role and limit the scope, if need be, to the role of outside counsel.

The fifth constant factor also implicates the analysis of people on both sides of the matter. Knowing opposing counsel and your own defense counsel is critical. Understanding who tries cases is important. Properly gauging opposing counsel early in suit analysis can predict future success or failure. Understanding if your opposing counsel always settles cases, moving a case towards resolution early may yield more favorable results through savings in defense costs. Conversely, understanding that opposing counsel frequently tries cases to verdict should cause the matter to be flagged and defended or settled accordingly.

## II. Examples of Lessons That Were Leveraged, Why They Worked, and How to Use Them in the Future

- a. **Bollea V. Gawker Media, LLC, No. 8:12-cv-02348-T-27TBM, 2012, WL 5509624, at \*3 (M.D. Fla. Nov. 14, 2012).**

### **The Hulk Hogan v. Gawker.com case**

This case was brought by Terry Bellea, a/k/a Hulk Hogan, against Gawker Media, LLC for an invasion of privacy and intentional infliction of emotional distress tort claim. The genesis of the lawsuit was Gawker Media publishing on [www.gawker.com](http://www.gawker.com) a portion of a privately recorded sex tape involving Hulk Hogan and the wife of a friend of Hogan. The case resulted in a \$140 million verdict against Gawker Media and forced the company into Chapter 11. During the course of the litigation, unknown to Defendants, the lawsuit was funded by Peter Thiel who is a Silicon Valley billionaire.

This case is an example of where knowing your enemy is important in claims resolution or litigation. According to reports, Peter Thiel was upset with Gawker Media due to a 2007 story Gawker Media published about Mr. Thiel which disclosed his sexual orientation. In a May 25, 2016, *New York Times* interview, Peter Thiel stated that he spent roughly \$10 million bankrolling lawsuits against Gawker and described his litigation funding as one of his “greater” philanthropic endeavors.<sup>2</sup> A detailed account of the background and genesis of the lawsuit can be found in “Conspiracy: Peter Thiel, Hulk Hogan, Gawker, and the Anatomy of Intrigue” by Ryan Holiday.<sup>3</sup>

While it is unlikely that any of us will defend a lawsuit funded by a Silicon Valley billionaire, understanding the identity of our opponent is a critical piece of information for case evaluation. Knowing if opposing counsel has complete control over his client or if the plaintiff is driving the claim is important. Frequently, early mediation reveals information concerning who controls the settlement decision. In claims or cases that don’t warrant early mediation, frequently control can be fleshed out through either knowing opposing counsel or having a frank discussion with opposing counsel.

### **b. There Is No Benefit to Prolonged War**

**Even the finest sword plunged into salt water will eventually rust.**

**The supreme art of war is to subdue the enemy without fighting.**

Neither side wins with prolonged litigation. A compromised result is the best result. From the first contact with either the claimant or claimant attorney it is important to begin to work towards a compromised resolution. It is helpful to have a practiced speech where you describe the fight in such a way that no one wants to engage in the fight. Stressing at every opportunity that compromise is in the best interest of all parties helps to speed matters to closure.

### **c. Do Not Let Opposing Counsel Rouse Juries to Anger**

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<sup>2</sup> See <https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html>

<sup>3</sup> Holiday, Ryan. *Conspiracy: Peter Thiel, Hulk Hogan, Gawker, and the Anatomy of Intrigue*. Portfolio/Penguin, 2018.

**To defeat the enemy, our men must be roused to anger.**

Approximately 2,000 years before the “reptile theory,” Sun Tzu understood that the surest way to promote action is by rousing individuals through anger. The full quote from the Art of War is: [n]ow in order to kill the enemy, our men must be roused to anger; that there may be advantage from defeating the enemy, they must have their rewards. From Sun Tzu’s perspective, he understood that emotions and rewards were motivating factors. The reptile theory plays on the same understanding as discussed by Sun Tzu. In the reptile theory, the emotion is anger and/or fear that a company is permitting dangerous conduct to occur which negatively impacts the community. The reptile theory “rewards” the jury by permitting it to punish the company defendant for failing to protect the community with the hope of “sending a message” that the company needs to change its ways.

Entire courses have and will continue to be devoted to combatting the “reptile theory,” but it is important to consider in claim handling whether, and to what extent, the “reptile theory” may be implicated by the claim.

**d. Forage on the Enemy**

**Bring war material with you from home, but forage on the enemy.**

Sun Tsu’s message was to pack light and take what you can from the enemy. Applying this concept to litigation, the lesson can be translated to mean: take what plaintiff gives you and decide if you can turn it into an advantage. Regardless of what stage the litigation is in, consider using what is given to you. Always analyze new theories/facts and apply them to the strategy towards resolution or trial. Consider each new fact and how consider how it can be used both for and against the defense.

Frequently, if adequate information is elicited on cross of plaintiff’s experts we don’t need to call our own experts. This is especially true of life-care planners and economic experts. Shortening trials through the elimination of unnecessary or redundant expert testimony often buys good will from jurors.