Old School is New School: How Sun-Tzu's Teachings are Resurfacing in the Tactics of the Effective Plaintiff's Bar

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I. Introduction

"Warfare is the greatest affair of the state, the basis of life and death, the Way (Tao) to survival or extinction. It must be thoroughly pondered and analyzed."[1]

Armed conflicts are as old as mankind itself. Approximately 2,000 years ago, the Chinese General Sun Tzu reduced some basic tenets of armed conflict into written form.[2] Since that time, these writings have been used in military strategy and education throughout the globe. In fact, they continue to be required reading in all US Military Academies and for military officers around the world.

A number of commentators have found parallels between litigation and the Art of War.[3] However, these analyses always place far too much emphasis on trial advocacy, and fail to realize most wars are won or lost before the first shots are fired. As my partner Allen Wilson says, they miss the Art by focusing on the War. The purpose of this paper is to explore how these 2,000-year-old tenets are resurfacing in the successful tactics of modern construction litigation, and plaintiff's litigation strategy generally.

The Art of War teaches that warfare is based on deception. However, the text clearly recognizes that tactical deception is different from unscrupulous action. One is a virtue and the other is a weakness, and the virtuous (or artful) warrior can exploit his opponent's weakness. Consistently, lawyers are tasked with, and even encouraged to, aggressively advocate the position of their client. In short, that is the touchstone of the successful Plaintiff's lawyer. This paper will explore at both a macro and a micro level how these theories are re-appearing in the world of the modern Plaintiff's bar.

This article will begin by conducting a brief analysis into the overall themes of Sun Tzu's *Art of War* and how these themes relate to task that a Plaintiff's lawyer must undertake through the lifecycle of litigation. Specifically, it will compare specific chapter from the Art of War to specific activities in Plaintiff's litigation, and how Plaintiffs are redeploying these military strategies into the Art of Litigation.

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[1] SUN TZU, THE ART OF WAR, 167 (Ralph Sawyer trans., Basic Books Ed., 1994) [hereinafter "The Art of War"]. *The Art of War* has been translated a number of times by a number of scholars. The Sawyer version is the version primarily used by the authors. This is the version referred to by the authors of this paper when the term "The Art of War" is used. However, in a few instances, the authors use alternative versions of the text, and in those situations the full citation is used to signify this difference.

[2] *Id.* at 77. Many, including the translator of the text used by the authors of this paper are not convinced that Sun Tzu was a real person; but, rather a collection of authors that all collectively wrote a single text.

[3] *See generally, e.g.*, David C. Nelson, *On Military Strategy and Litigation*, 31 VT. L. REV., 557 (2007); Antonin I. Pribetic, *The "Trial Warrior"; Applying Sun Tzu's* The Art of War *to Trial Advocacy*, 45 ALTA. L. REV., 1 (2008).

II. Why Sun Tzu's Teachings Has Made a Resurgence in Litigation.

"Warfare is the Way (Tao) of deception"[4]

In the opinion of the authors of this article, the overarching theme of Sun Tzu's work can be summed up in one word: Deception. In the *Art of War*, Deception is a term of art. And, when placed in the proper context, it perfectly captures the tightrope every lawyer must walk between aggressively advocating for his or her client while simultaneously defending the practice of law.

For instance, consider the following passage from the Samuel B. Griffith Translation:

> When the Yen army surrounded Chi Mo in Ch'i, they cut off the noses of all the Ch'i prisoners. The men of Ch'i were enraged and conducted a desperate defence. T'ien Tan sent a secret agent to say: "We are terrified that you people of Yen will exhume the bodies of our ancestors from their graves. How this will freeze our hearts!" The Yen army immediately began despoiling the tombs and burning the corpses. The defenders of Chi Mo witnessed this from the city walls and with tears flowing wished to go forth to give battle, for rage had multiplied their strength by ten. T'ien Tan knew then that his troops were ready, and inflicted a ruinous defeat on Yen.[5]

This passage is a good illustration of the difference between deception, as Sun Tzu uses the term, and unscrupulous (and ultimately unsuccessful) tactics in battle. The Yen were unscrupulous and unethical: they cut off the noses of their Ch'i prisoners. However, the Ch'i's leader T'ien Tan used this this unscrupulous behavior to his advantage. He did this by controlling his response to unscrupulous behavior, and by understanding how his opponent and his troops would react. Deception, as used by Sun Tzu, effectively means control over a situation. This passage shows that Deception in tactics does not mean unethical action. Instead, it shows that unethical action can blow up in your face. According to Sun Tzu, a Deceptive warrior accepts the truth in a situation and controls how that truth is revealed. An inartful (and unscrupulous) warrior attempts to conceal or pervert that truth. In short, the authors believe that there is zero room for unethical behavior in the battlefield of litigation, however, litigation is a complex game of chess and not a game of checkers.

The successful plaintiff's lawyer almost always starts with the advantage because they ***usually*** get the initial chance to set the time and place of the battle by determining when and where to file the plaintiff's case. However, the lead up to these actions is far more complex than most lawyers appreciated, and likewise countless opportunities can be missed by failing to appreciate the steps that lead up to filing and selection of the forum for combat.

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[4] The Art of War, 168.
[5] SUN TZU, THE ART OF WAR, 75 (Samuel B. Griffith trans. 1971).

III. The Chapters and How They Apply to Plaintiff's Practice of Law

A Chapter One, Initial Estimations

"Now the general who wins a battle makes many calculations in his temple ere the battle is fought. The general who loses a battle makes but few calculations beforehand. Thus, do many calculations lead to victory, and few calculations to defeat: how much more no calculation at all! It is by attention to this point that I can foresee who is likely to win or lose."[6]

Sun Tzu's foundational chapter teaches that preparation is key to victory. According to Sun Tzu, the general with the greater Tao is ultimately victorious. This means that the general with the better ability, the one who has gained the "advantages of heaven and earth," whose "laws and orders are better implemented," whose forces are stronger, whose officers and troops are better trained, and the one who has made rewards and punishments clearer to his armies is ultimately the one that prevails in battle. According to Sun Tzu, preparation has two components: a right way of living and preparing generally, and a right way of preparation for each battle. A general must always prepare, learn, and train generally because battle is inevitable and the general must be prepared to meet it. Additionally, a general must diligently understand and train for each battle because each specific enemy is unique.

Every competent litigator understands the value of preparation. In the construction context, where the construction litigator must sift through thousands of pages of documents (including pay applications, daily reports, invoices, contracts, notices, emails, and other similar documents), preparation is the difference between success and failure. Consequently, preparation is the foundation of any case. Preparation also goes much further than preparing for each case. A construction litigator must have mastery over this area of the law. For instance, he must know before a battle begins when a statute is likely to conflict with a common contractual provision (for instance, indemnity clauses) or what type of battles are likely to be fought in a given type of litigation (for example, a Daubert/Robinson challenge in a scheduling case). If filing a petition is a first battle, an unprepared construction litigator can lose a case as soon as it begins. For instance, a litigator that has failed to master his practice area might neglect (with no good cause basis to do so) to include a certificate of merit in a lawsuit against a design professional. A prepared opponent might allow the war to go on until the statute of limitations has passed, and raise this certificate of merit issue only when it was fatal to a claim.[7]

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[6] Sun Tzu, The Art of War, Chapter 1, line 26 (Lionel Giles trans. 1910). Giles summarizes this chapter as follows: "Anyone who excels in defeating his enemy's triumphs before his enemy's threats become real."

[7] *See generally, e.g., Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 386 (Tex. 2014).

A prepared attorney must also understand a number of factors as litigation progresses. He must understand who has the most financially capable client. He must have a grasp of: whose expert is more capable and qualified, which witnesses will provide better testimony, which side's trial plan is better suited for a given case, the type of litigation this is for a client (e.g., "bet the company" litigation, nuisance litigation, or something in between), and a multitude of other relevant factors. Each case brings new and unique considerations, and the litigator must be prepared to address each of these.

The plaintiff's lawyer again, has general control over two actions related to commencement of suit – timing of filing (up to the running of limitations) and the venue in which the suit is filed. Both of these are of critical importance.

The plaintiff's lawyer first has control over the timing of filing in almost every instance. This is key, because timing can be used to position the opposing side in multiple positions of weakness, that in turn give strength to the plaintiff. At times, the plaintiff will wish to be "lead" in a multi-party litigation and have the ability to drive the tempo of litigation. At times, the plaintiff may choose to wait until either test cases have been tried on an issue and/or the defendant, and its pendant insurance carriers, are weekend by ongoing litigation of negative results from concluded litigation. Further, the plaintiff's counsel may choose to delay filing suit in an effort to complete non-litigation discovery and generate expert reports, pre-suit, so that it can effectively mount blitzkrieg style litigation that denies defense the opportunity to fully develop its case. This strategy is increasing effective in Federal "rocket-dockets" as the typical timeframe for litigation is greatly compressed.

The second aspect that the Plaintiff typically has control over is the selection of the venue. While this is frequently, tempered by contractually mandated venue, those provisions are often subject to attack under various theories. Further, if the actions sound in pure-tort, or the parties lack privity, the Plaintiff's has a larger menu of options form which to select. The plaintiff will typically select venue based on two key considerations – speed of the docket, and historical bias of the docket to the Plaintiff. However, stopping at those two considerations would be a grave failure of the astute plaintiff. Arbitration, for instance, might produce a faster outcome, but can be offset by massive filing fees in large scale litigation. Likewise, federal court might offer speed, but is offset by a higher risk of dispositive motions be granted against the plaintiff, and higher discovery costs. Finally, the plaintiff has to determine if having all defendants in a unified forum makes more strategic sense, or does separate litigation (arbitration parallel to trial court actions) yield a strategic advantage by forcing aligned defendants to break ranks earlier in the process.

An intelligent plaintiff's lawyer, must also have a thorough understanding of insurance and analyze the policies held by each potential defendant in ***advance*** of filing suit. Historically, plaintiffs were oblivious to this advantage, but by

utilizing this information in advance, a plaintiff can plead a defendant potentially into, or out of, coverage as needed to benefit the strategic goals of the plaintiff. Given that defense is established by the eight corner's rule, four of those corners are 100% within the control of the plaintiff and represent one of great untapped aspects of battlefield control by the plaintiff, as well as setting the stage for ultimately successful collection attempts in the event of a successful hearing on the merits, or settlement with carrier funds.

Further, the ability to "discovery" the weaknesses in the defendant's position is also of key importance, that has only once again begun to be appreciated by the Plaintiff's bar. Every state and the federal government allow open records request to be made. These, especially in the construction context, can yield invaluable information. They can extend from permit and inspection reports on construction, to the entire history of licensure of design professionals. Likewise, where the Owner is the government (be it state or federal), massive amount of highly relevant information can be obtained ***before*** suit, and often without the knowledge of the soon to be defendants. Possessing this information in advance allows a plaintiff to better frame the arguments, and also control the tempo of the litigation by compressing the discovery timeframe, serving more targeted discovery sooner, and potentially setting the defense up for impeachment based on the "hidden" intelligence.

Texas Rule 202 of procedure allows for broad, pre-suit discovery, which can include depositions and production requests. Given the way the request if framed, this can allow additional discovery outside of the purview of the potential defendants, and provides a way to obtain discovery necessary for compliance with certificate of merit and/or threshold pleading requirements necessary to avoid summary disposition. While no state allows as broad of pre-suit discovery as Texas, a number of states do allow for same, and it is an exceptionally powerful tool in the Plaintiff's arsenal. Think of it as a spy-satellite for the plaintiff – untouchable, almost invisible, with incredible resolution of detail.

In short, the plaintiff gets to elect the time and place of battle. The wise plaintiff's lawyer will select a forum upon which to fight that it knows well, and will select the time to commence the fight at which he has the maximum knowledge advantage over the defendant. In turn, the defendant must be prepared to react on short notice, with a strong defense-in-depth and a forceful counter-attack when presented the opportunity for same.

B. Chapter Two, Waging War

"The army values being victorious, it does not value prolonged warfare. Therefore, a general who understands warfare is Master of Fate for the people, rules of the state's security or endangerment."[8]

Sun Tzu teaches that "no country has ever profited from protracted warfare."[9] Consistently, in the opinion of the authors, an attorney's primary responsibility to a client during litigation is to close a file. This is true because clients rarely benefit from the expense involved with protracted litigation. Files are closed by aggressively moving any given matter to settlement, mediation, or resolution by a contested case hearing.

Sun Tzu teaches that while war is inevitable, it is not to be celebrated. Victory is celebrated, but war itself should be avoided and minimized wherever possible. "[T]he army values being victorious; it does not value prolonged warfare."[10] As Sun Tzu teaches, "a victory that is long in coming will blunt [an army's] weapons and dampen [its] ardor." [11]A general must be scrupulous and efficient. The general must only bring the supplies he needs and avoid long delays. The general can do this by, for example, maintaining efficient supply lines and foraging for supplies as a war or campaign progresses.

This chapter contemplates a very important conflict between the role of a general and the responsibilities of a general. A general's entire existence is war. A general thrives in war, his job is to wage war, and a good general enjoys the war. However, the general is responsible to the state, not to the war. The conflict, then, is between a general's responsibilities towards the state in minimizing the impact of war and the general's enjoyment of his profession. War is a means to an end; but the end is the proliferation and protection of the state. War is inevitable. It is a necessary evil. Victory for a state is to be celebrated and achieved as quickly and as efficiently as possible. Prolonged war drains a state's coffers and leaches the talents of its citizenry. Consequently, the artful general strives always to diminish the impact of the means (war) to the end (victory for the state).

The tempo of conflict is one of the most key elements of control. Both sides will seek to control the tempo, but generally the plaintiff is in the best position to utilize that, if he is prepared properly to do so. Conversely, the defense should also seek to control the tempo, which frequently involves slowing the tempo of conflict down to allow a more throughout defense to be built, and/or make the plaintiff weary of a protracted and expensive fight.

The reasons the plaintiff should seek to control the speed of the conflict

[8] The Art of War, 174.
[9] *Id.* at 173.
[10] *Id.* at 174.
[11] *Id.* at 173.

are multiple. First, the faster the matter moves towards mediator or trial, the less opportunity for excessive expenses to occur. Less time for discovery, generally means less discovery. Many DCO's limit the amount and type of written discovery, along with capping the total number and hours of deposition. Secondly, control of the tempo by the plaintiff allows selection of a pace that weakens the defense. Some defendants grow weak of litigation because of having to report same on bid applications, audited financially, or to surety partners, such that slower litigation advances the plaintiff's goals. Other defendants, cannot keep pace with blitzkrieg litigation because they lack the resources to run their company and assist defense counsel. The wise plaintiff's lawyer seizes on this, and dictates the pace of litigation accordingly. In all cases, the party who control the tempo of the case holds a distinct advantage over the opposing party.

Sun Tzu teaches that victory is not defined by how many battles a general win. Victory is defined by the effects a general's victories have on the state. A general might win every battle, but bankrupt the state. In other words, endless battle (regardless of individual success during any given battle) is not victory for the state. The same is true for the ultimate fee that is charged to a client. An attorney who engages in an endless parade of hearings and motion practice and discovery disputes is not necessarily benefitting his client. That attorney might prevail on every single motion, but that would not make the fees the attorney charges reasonable. The client's individual needs would be central to whether that fee was reasonable.

In conclusion, it is the plaintiff's goal to exert enough force, at a fast enough pace, to break the will of the defense and create the maximum opportunity for settlement. As I was taught early on, the best way to settle a case is to have a case you are prepared to try in short order. This is consistent with the plaintiff's controlling the tempo of action such that the plaintiff can seek to extract a mediated settlement when the defense is weakest and/or try the case when the defense is the least prepared.

C. Chapter Three, Planning Offenses

The highest realization in warfare is to attack the enemy's plans; next is to attack their alliances, next to attack their army; and the lowest is to attack their fortified cities . . .. Thus, one who excels at employing the military subjugates other people's armies without engaging in battle, captures other people's fortified cities without attacking them, and destroys other people's states without prolonged fighting. He must fight under Heaven with paramount aim of 'preservation.' Thus, his weapons will not become dull, and the gains and be preserved. This is the strategy for planning offenses.[12]

During a trial advocacy class in law school, one of the mantras espoused by the senior author of this paper's teacher was that a good attorney has won his

[12] The Art of War, 177.

or her case long before that attorney ever gets to trial. This mantra is consistent with Sun Tzu's teachings, and specifically with this chapter. As Sun Tzu teaches: "attaining one hundred victories in one hundred battles is not the pinnacle of excellence. Subjugating the enemy's army without fighting is the true pinnacle of excellence."[13] As the above quote indicates, a truly great general is instructed to fight "with the paramount aim of preservation."[14]

In a sense, this chapter combines the two lessons of the previous chapters: a truly skilled general must "know the enemy," which is done through preparation, and "know himself," which is done through understanding the resources the state he represents can field. The general "who knows the enemy and knows himself will not be endangered in a hundred engagements."[15]

A skilled litigator knows the value of winning without litigating. In the construction context, a skilled construction litigator drafts contracts for his clients with an eye towards avoiding or minimizing litigation. The skilled construction litigator might be willing to push for an early round of mediation as a way to minimize costs. The skilled litigator will know to lay down aces rather than sandbag his or her best cards. As Sun Tzu states, "[i]f your strength is ten times theirs, surround them."[16] In other words, there is no need to hide the fact that your army is ten times the size of theirs.

As part of planning the offense, the opportunity of the plaintiff's lawyer to engage before litigation is commence can be of massive value. For instance, in construction cases the ability of plaintiff's counsel to assist – from the shadows – in the review and negotiation of contracts can be exceptionally powerful. The plaintiff's lawyer can select venue, limit the rights of counter-claims, and dictate the amount of insurance that a potential defendant will have available to resolve a claim. Likewise, the plaintiff's lawyer can create coverage issues through the application of additional insured provisions and one-sided indemnity provisions in a contract.

Once the contract is signed, the plaintiff's counsel continues to have a great pre-conflict power if employed correctly. Plaintiff's counsel and fashion correspondence to reserve rights and "create" a narrative which will be more persuasive in litigation than might otherwise be created by a project team simply focused on completion of the Project. Likewise, plaintiff's counsel – having knowledge of relevant law – might be able to fashion claims and argument beyond the project team such that recovery is more likely and large in quantum than the project team could do individually.

Additionally, the plaintiff's counsel can serve as a "counselor" during this

[13] *Id.*
[14] *Id.*
[15] *Id.* at 179.
[16] *Id.* at 177.

time frame to assist the plaintiff in selecting the best and most likely to succeed contractual position. This requires the plaintiff's counsel to be far more than just a litigator, but a master of strategy. At this stage, the industry knowledge of the plaintiff's lawyer, in addition to knowledge of the relevant law are key. By applying both, in advance of the conflict, the plaintiff's lawyer can yet again force conflict to occur at the best location on the battlefield, under the most favorable terms, and with a degree of ability to control the "facts" before they even occur. In short, plaintiff's counsel can to some degree shape the battlespace in advance to facilitate a more favorable outcome. Further, this allows the plaintiff to develop key, contemporaneous documentation that is the most persuasive type of evidence, while the defendant has limited opportunity for same unless they have in-house or personal counsel on retainer.

As any lawyer will tell you, using delay tactics in a reasonable fashion can be a difficult task. And it illustrates why the *Planning Offenses* chapter is a good analogy for this rule. An attorney must know their enemy and themselves before they can properly use delay tactics. For instance, a lawyer might defensively wait to plead affirmative defenses so as not to reveal defenses to an opponent. However, that same lawyer might misjudge deadlines, or fail to understand that a case is governed by a different statutory discovery plan. Consequently, in seeking to use delay and avoidance tactics, the lawyer might actually prejudice his or her client. Instead of using defensive or delay tactics automatically, a lawyer must seek to understand a battle. He or she must be flexible in litigation because "a small enemy that acts inflexibly will become [the] captive[] of a large enemy."[17] Consequently, as Sun Tzu teaches, a tactic must always have a purpose. It must suit a particular piece of litigation. Otherwise, the tactic might be unreasonable in a given context.

D. Chapter Four, Military Disposition

One who cannot be victorious assumes a defensive position; one who can be victorious attacks. In these circumstances by assuming a defensive posture, strength will be more than adequate, whereas in offensive actions it would be inadequate.[18]

According to Sun Tzu, "[b]eing unconquerable lies with yourself; being conquerable lies with the enemy. Thus, one who excels in warfare is able to make himself unconquerable, but cannot necessarily cause the enemy to be conquerable."[19] In other words, it is important to understand the context of the battle you are fighting: you might be the most astute general in the world, but if you are outnumbered ten to one, brilliant plans of attack will do you little good.

Some might say that victory is uncertain in war. However, according to

[17] The Art of War, 178.
[18] *Id.* at 183.
[19] *Id.*

Sun Tzu, "the victorious army first realizes the conditions for victory, and then seeks to engage in battle. The vanquished army fights first, and then seeks victory."[20] In a sense, this is an extension of the initial estimates teachings, and it is consistent with the theme that one can see developing in the Art of War: a general must be competent, prepared, disciplined, and he must keep his state's interests ahead of his own.

Sun Tzu goes on to provide some more specific guidelines for the type of military preparation/estimation that must occur for a general to be "the regulator of victory and defeat."[21] First, the general must measure the terrain. Second, he or she must estimate the strength of forces involved in a dispute. Third, the general should calculate the number of men that make up those forces. Finally, the general should weigh the relative strength, which "gives birth to victory."[22] These obligations are easily translatable to a litigation context. For instance, a construction litigator should always be prepared to understand the underlying construction project (measure the terrain), to size up opposing counsel (estimate the strength of forces), evaluate the resources of a client, the ability of an expert, and evaluate the same considerations in an opponent (calculating forces), and weigh all of these factors against one another.

In other words, a good general must be candid with him or herself, and must understand the type of battle the general is preparing to engage in. The general must be prepared to be defensive when a candid assessment of the situation calls for a defensive position, and vice-versa.

A wise plaintiff and plaintiff's lawyer first evaluates their own position. However, this evaluation is far more than just the classic strength of the case. In the modern litigation battlefield, far more concerns must be evaluated by the plaintiff in order to gain the advantage towards a successful outcome.

First the plaintiff counsel must recognize and understand the resources of the plaintiff. If the plaintiff is a Fortune 500 company, premium hourly rates may be acceptable. However, if this is a residential home-owners case, a contingency fee arrangement might be more common. Additionally, does a hybrid fee arrangement make sense. All of these are critical, in the event that a defense in depth is mounted and the plaintiff loses control of the tempo of the conflict.

Second, plaintiff's counsel has to assess his own capabilities. Is his firm big enough, with enough depth-of-bench and available capacity to properly and aggressively advance the case. If the case is a contingency case, does the plaintiff have enough capital to support the cost and expensive of the counsel if it takes longer than expected. What ability does the firm have to handle ESI and other

[20] *Id.* at 184.
[21] *Id.*
[22] *Id.*

complex discovery? Does this need to be served by an outside provider, and if so, what are the costs associated with same. Does plaintiff's counsel have the needed expertise to handle the case, or does plaintiff's counsel need to associate with a specialist (or multiple specialist) as co-counsel depending on the subject matter. Finally, does plaintiff has the needed trial and appellate expertise to see the matter to conclusion. A wise plaintiff's lawyer examines all of these facets before starting a suit to ensure that he doesn't start the battle with clear vulnerabilities that can be readily exploited by the defense.

Along with this approach, it is important that plaintiff's counsel budget for the cost of litigation, as well as plan for the availability of resources to conduct litigation as his chosen tempo with contingency resources available if the litigation moves differently than expected. Failing to do these steps creates vulnerability that can be exploited. Likewise, failure of the defense to plan the defense in a similar fashion creates an opportunity for the plaintiff. This type of planning is especially key for a plaintiff when pursuing a defendant with an eroding policy or in evaluating the impact of a large SIR.

E. Chapter Five, Military Disposition

One who excels at warfare seeks victory through strategic configuration of power, not from reliance on men. Thus, he is able to select men and employ strategic power.[23]

According to Sun Tzu, a successful army is much more than the sum of its parts. This is true because "[f]ighting with a large number is like fighting with a few. It is a question of configuration and designation."[24] Or, in the words of Major Jim Gant USASF, a good general should "Fight Tactically – Think Strategically."[25]

According to Sun Tzu, successful military disposition depends on the use of both conventional and unconventional tactics and configurations. Power should be displayed "like the onrush of a bird of prey breaking the bones of its target."[26] However, in addition to this conventional display of strength, a general must be prepared to navigate "turbulent . . . fighting that appears chaotic."[27] He or she must feign weakness when necessary and take control over "simulated chaos." In other words, a general must be able to navigate a chaotic and shifting landscape. He or she must be equally adept at ordering a small company of men as a large collection of troops. The general must be able to fight the day-to-day battles while focusing on the big picture goals. Organizing men to employ strategic power

[23] The Art of War, 188.
[24] *Id.* at 187.
[25] Jim Gant, *A Strategy for Success in Afghanistan, One Tribe at a Time*, Nine Sisters Imports, 4 (2009) *available at http://www.stevenpressfield.com/wp-content/uploads/2009/10/one_tribe_at_a_time_ed2.pdf*
[26] The Art of War, 187.
[27] *Id*. at 188.

takes an ability to "mov[e] the enemy [and] deploy [a] configuration to which the enemy must respond."[28]

In construction litigation, focusing on the big picture goal is essential. For instance, a litigator must keep tabs on the economic resources of a client and an opponent. Typically, construction cases involve multiple parties and claims. Claims typically go up and down tiers, and sometimes jump tiers entirely. Consequently, from the start of litigation, an attorney needs to be aware of the client's ultimate goal and be able to achieve that goal. As an example, a gigantic (and non-recoverable) judgment is useless to a client. At the same time, a much smaller negotiated settlement that is ultimately fulfilled can be much more valuable.

In a complex piece of construction litigation, a good attorney knows that navigating the complex and seemingly chaotic waters of litigation involves navigating through the relationships of people that are involved. An attorney must navigate relationships with opposing counsel, judges, court coordinators, clerks, non-parties, unrepresented parties, third parties, witnesses, co-workers, paralegals, legal assistants, and any number of other individuals. A skilled attorney navigates relationships the way a general uses troops and battle tactics. Relationships in litigation must be cultivated over time and understood in detail. Each relationship is a resource. A relationship with opposing counsel in one case can lead to a future referral or an extension of a professional courtesy. A lawyer should view every relationship as a sort of battle, and think about that relationship strategically and tactically.

Assessment of the battlespace requires more than just looking at abstract claims and positions, it requires the knowledge of the personalities and individuals on the defense side of the fight. A prepared plaintiff's lawyer is aware of these unique facts, and prepares in advance to counter and defeat same, or when possible, leverage same to achieve the plaintiff's result with as little conflict as necessary. This key step in the plaintiff's pre-suit analysis begins with two areas of analysis – 1) who is on the defense side of the fight, and 2) what is the status of potential coverage on the defense side.

In assessing the defendant, it is key to understand who will conduct the defense, and how they will conduct same. Both sides to the conflict are well served to understand the style and approach of the opposing litigator. Do they take a scorched earth approach to the fight, do they drag things out or move in blitzkrieg fashion, are they knowledgeable and can they be trusted to honor what they say? Multiple other inquires and questions can and should be asked. If counsel does not know the opposing lawyer, they are well served to consult their piers and professional organizations to gain as much insight as possible into the approach of opposing counsel. By understanding the personality, plans can be made to mitigate certain tactics or to lay traps if questionable strategies are

[28] *Id.*

employed in defense. For instance, in a recent matter, a plaintiff was able to force one of the defendants to admit to liability in an effort to prevent settlement by a co-defendant. In that case, hubris overrode logic, and one of the defendants made a massive error resulting in substantial exposure to their client. Likewise, what is the defendants pass-history in litigation. Does the defendant ever settle, and if so when and on what type of terms? Do they typically solve their own issues, or attempt to force liability at all costs on third-parties? All of these questions must be explored in advance of litigation to maximize the potential recovery for the plaintiff by implementing the appropriate strategies to deal with each discrete complication posed by same.

The second item of concern is evaluation of coverage. As mentioned, prior, it is exceptionally important for the plaintiff to understand the scope and size of coverage. It the policy stack and eroding stack such that speed is key to prevent the defense from consuming the policy limits? When did the occurrence occur, so that it can be alleged to span across multiple policy periods to create a wider "horizontal" stack of coverage? What is the relevant excess cover, during certain timeframes, so that coverage can be maximized in a "vertical" fashion? Even more importantly, who are the carriers and what exclusions/inclusions exists in those policies that may frustrate attempts to plead claims into coverage. When in doubt, plaintiff's counsel is well served to retain coverage counsel prior to filing suit to review the pleading to maximize the chances to plead into coverage under the eight-corners rule.

As the case progresses, it is important for the plaintiff to seek out as much intelligence regarding coverage as possible. If reservation of rights letters has been issued, it is important to obtain copies of same, and to explore those issue. Likewise, if new or additional coverage appears through discovery, it is important to take every step possible to trigger same to maximize available funds to settle the litigation. Contemporaneously, plaintiff's counsel must be cautious to not generate facts through the litigation that could undermine the indemnity obligations, post-verdict, of the respective policies. In short, the plaintiff must play a complex game of chess and not a simple game of tic-tac-toe, or the plaintiff could suffer disastrous results via a judgment that lacks coverage to pay same.

An army is made up of squads, platoons, companies and so forth. A good general takes these troops and uses them tactically. In litigation, each relationship can serve as a platoon or squad in your army. Consequently, each relationship must be configured in a way that serves your client's ultimate goals. The best way to do this is through candor and professionalism.

F. Chapter Six, Vacuity and Substance

The location where we will engage the enemy must not become known to them. If it is known, then the positions they must prepare to defend will be numerous. If the positions the enemy prepares to defend are numerous, then the forces we will

engage will be few.[29]

Effectively, this chapter deals with secrets. In essence, Sun Tzu teaches that a good general must preserve his army's secrets while simultaneously uncovering the secrets of his enemy. This control over information allows a general to "cause the enemy to come of their own volition" or "prevent the enemy from coming forth."[30] This control over information allows a general to "concentrate [his army's] forces while the enemy is fragmented."[31] Keeping your own stratagems secret forces an opponent to plan for all eventualities. Conversely, discovering your opponent's strategy allows you to attack where your army is "many and the enemy is few."[32]

The benefits of this advice are clear in litigation, and there are many practical strategies a construction litigator can use to uncover an opponent's hidden stratagems. The litigator might pay close attention to both what is included and what is excluded from a pleading. The litigator might follow up with his network of construction litigators to see if anyone in that network has tried a case against that particular opposing counsel. The litigator might find out about the relative strength of the opponent contractor itself. For instance, the litigator might try to determine whether the opponent contractor's bonding line is secure.

It is undisputed that the plaintiff's bar, because of technology has access to more information pre-suit than ever before. From the ability to pull every suit that the defendant has been involved in for the last few years, to mining financial data on the viability of the defendant, to list-serve databases on defense counsel, vast information exists that when I started practice nearly twenty years ago was the stuff of dreams. This creates a huge ability for the plaintiff to gain knowledge and plan their attack before the first filing is ever made. Nothing is novel about that point.

Where the smart plaintiff's lawyer takes that a step further, is using that information to define what they "know they don't know". This is a crucial step in being able to assess the case and pre-suit frame the first volley of discovery to the defendant, to third-parties, and to successfully employee external discovery (open records requests, etc.). Often this analysis starts with the construction of the trial jury charge or with a list of elements needed to prove each cause of action and the associated damages. Effectively, the plaintiff marshals what it knows into each of the subcategories to determine what they know, what they don't know, and where they need to know more. By taking this step, the plaintiff gains a massive advantage in the ability to control the speed of the litigation by making efficient, surgically precise movements vs. scorched earth tactics which are inefficient and generally create more problems than they solve.

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[29] The Art of War, 192.
[30] *Id.* at 191.
[31] *Id.* at 192.
[32] *Id.*

The plaintiff's bar must also conduct the same approach as to the defense. They must seek to discovery what the defense knows, what they don't know, and what they "don't know they don't know." Knowledge of gaps in the other side's knowledge provide huge, invisible leverage over the defense. Additionally, these create the ability for the plaintiff to argue waiver to avoid summary disposition and create fact issues. Defendants know that the settlement value of a case increase after failed summary motion practice.

Likewise, the plaintiff must use discovery to effectively bring bad facts that the defense is trying to hide to light. This begins, logically, with use of the basic discovery tools. However, one of the most powerful items in discovery is the LACK of documents and responses on given topics. Did the defense fail to keep contemporaneous records, such that the defense will have difficult challenging plaintiff's records? Did the defense have bad facts that they seek to hide, subjecting the defense to spoliation arguments. Did the defense counsel fail to recognize the relevance of certain documents and fail to produce same, thereby preventing their use as a final hearing on the matter. In general, discovery games are inconsistent with successful litigation strategy and often hurt versus foster early resolution of matters.

G. Chapter Seven, Military Combat

[O]ne who does not know the plans of the feudal lords cannot prepare alliances beforehand. Someone unfamiliar with the mountains and forests, gorges and defiles, the shape of marshes and wetland cannot advance the army. One who does not employ local guides cannot gain advantage of terrain.[33]

Sun Tzu understood that an army could not bring "baggage and heavy equipment" to a battlefield would be lost.[34] In other words, Sun Tzu understood that an army must arrive at a battle with provisions and support. As Sun Tzu explained, racing to a battlefield without equipment or supplies just so your army would be at an ideal location first would ultimately lead to heavy casualties. While the army that left behind its heavy armor would be able to move much faster to a strategic location, it would ultimately be at a huge disadvantage to the better equipped army that moved more slowly.[35]

Instead, Sun Tzu recognized that there were ways to improve an army's ability to deploy troops that did not require sacrificing supply lines or equipment. These alternative methods require a good general to make alliances, become familiar with "mountains and forests" and other geographic information, and improve troop morale by sharing spoils with troops.[36] According to Sun Tzu,

[33] The Art of War, 197.
[34] *Id.*
[35] *Id.* at 197-98.
[36] *Id.*

troop morale can be maintained by not approaching high mountains, or confronting those with hills behind them, or refusing to pursue feigned retreats.[37]

These kinds of tactics also apply in a construction litigation context. A litigator might have the best facts in the world, but a marshy venue might slow this attorney's advancement to a standstill. Or, a choice of law provision that selects the law of an unfavorable forum might wipe out the advantage created by a favorable set of facts. Consequently, an attorney must know the lay of the land. He or she must be prepared to navigate through a thorny venue or arbitration clause. Additionally, he or she must be prepared to build the support of the "tribal leaders" and build alliances with non-parties and witnesses.

As unusual as it might appear to the defense, one of the key tasks of plaintiff's counsel is evaluating when it isn't time to fight. This is where the counselor role of the attorney becomes of critical importance and cannot be understated. A litigator, who is also an exceptional counsel is both rare and of exceptional danger to the defense. The joining of these two skill sets is the culmination of the ideal general under an "Art of War" model attorney. In short, the ability to see the battlefield for what it really is, based on the limited information available, and advise the client as to the most proper course of action, with the highest degree of success while minimizing the risks of counter-action.

Electing to engage in a litigated fight is far more complex than simply a review of the applicable causes of actions and associated facts. Does the plaintiff/defense have resources to sustain the conflict. Does filing suit against a public owner result in disclosure requirements on future bids that might render a contractor unable to bid on other work. Does filing suit revive a potential counter-claim that was otherwise barred by limitations. The number of factors that a plaintiff must review before deciding to file an action could be a potential stand-alone paper in and of itself.

As a constant tone in this paper suggests, coverage cannot be overlooked in this analysis. Does the defendant have eroding policy, such that protracted litigation would exhaust same? Does the defendant have policies that fail to provide coverage for the potential damages? Does plaintiff need to creatively characterize damages to plead into coverage? Coverage itself is complicated enough to warrant a stand-alone paper, and many attorneys specialize in coverage on both the plaintiff and defense side of the bar. An intelligent and proactive plaintiff analyzes the concerns before commencement of litigation.

From a strategic perspective, these rules make good sense. As Sun Tzu teaches, a good general should become familiar with local tribal leaders. He or she should seek to forge alliances. The general should learn how to navigate difficult terrain quickly and with minimal troop impact. Similarly, a good attorney can use honesty and full disclosure to cultivate relationships with nonparties and

[37] *Id.* at 199.

unrepresented individuals. While tricking a nonparty may work in a single isolated instance, it will burn your bridge with that person. If that person is a "supply line" for information in your case, burning your bridges through deceptive action will ultimately harm your case.

H. Chapter Eight, The Nine Changes

In general, the strategy for employing the military is this. After the general has received his commands from the ruler, united the armies, and assembled the masses:

- Do not camp on entrapping terrain;
- Unite with your allies on focal terrain;
- Do not remain on isolated terrain;
- Make strategic plans for encircled terrain;
- On fatal terrain you must do battle;
- There are roads that are not followed;
- There are armies that are not attacked;
- There are fortified cities that are not assaulted;
- There is terrain for which does not contend;
- There are commands from the ruler which are not accepted.[38]

Sun Tzu recognized that a general's emotions could be harmful to an army. According to Sun Tzu, generals have five dangerous character traits, being in love with death, being in love with living, being too quick to anger, being obsessed with purity, and loving the troops too much.[39] In other words, a general who is too focused on self can be dangerous for an army. A general who is too focused on self is a general that can be manipulated or killed. Instead of a general focusing on his or her own desires, Sun Tzu understood that a general should receive "his commands from the ruler."[40] While Sun Tzu recognized that some commands from a ruler should be disregarded, unnecessary conflicts should be avoided at all cost.

In breaking the list above, specific guidance applies to the plaintiff case and handling of same. Those items will be touched upon in the following paragraphs,

- **Unite with your allies on focal terrain;**
  This is a classic situation, that the wise plaintiff lawyer seeks at every opportunity, but at the same time, seeks to avoid the obviousness of this action. If a plaintiff can "co-opt" multiple defendants into cross-fighting, they can make the defendants do the plaintiffs' job. Additionally, plaintiffs may seek to exchange information between different cases when that exchange of

[38] The Art of War, 203.
[39] *Id.* at 204.
[40] *Id.* at 203.

information, via list serves or otherwise, establishes extensive information in the form of intelligence or increased pressure on select defendants or defense counsel.

- **Do not remain on isolated terrain;**
  A plaintiff must observe the ever-developing litigation space, and be aware not to become isolated. This form of isolate can be a case of pushing too hard for settlement, and missing the opportunity to participate in a settlement out of an eroded insurance policy. Further, this can be the result of pressing litigation that is subject to being legislated out of existence. Even more common is pressing a case after a high court rules that the cause of action is not viable or available to a given fact pattern.

- **On fatal terrain you must do battle;**
  A plaintiff's counsel must recognize as early as possible when settlement is impossible, and press the case to trial. A classic military defense strategy is the "defense in depth". This approach trades territory for extracting losses and injury to the attacking party. In similar fashion, legal defense is often mounted by trading time for the loss of will and resources by which the Plaintiff pushes forward the attack. A successful plaintiff's counsel will recognize this, and accelerate the attack to overwhelm the defense and prevent the employment of this type of defense.

- **There are armies that are not attacked;**
  A plaintiff must recognize for various reasons certain parties are not subject or worth litigating against. Certain governmental units are immune from suit. Certain types of damages are not recovered. Other parties lack sufficient insurance to cover the potential damages and are almost certain to file bankruptcy. The plaintiff must look to mitigate these issues by ensuring that it pursues parties that are not immune, focuses on damages that are recoverable and explores the financial viability of potential defendants before filing suit.

- **There are commands from the ruler which are not accepted.**
  This is the classic component of ethics that the modern plaintiff lawyer must obey. A plaintiff's lawyer who employees the guidance of the Art of War, will recognize that all forms of conflict are controlled by rules of engagement. In the context of litigation, that is the disciplinary rules. Every state has unique disciplinary rules, in addition to the ABA model rules of ethics. In short, a plaintiff's lawyer must advise a client against unethical content, and refused to be co-opted into unethical behavior.

I. Chapter Nine, Maneuvering the Army

One whose troops repeatedly congregate in small groups here and there, whispering together, has lost the masses. One who frequently grants rewards is in deep distress. One who frequently imposes punishments is in great difficulty. One

who is at first excessively brutal then fears the masses is the pinnacle of stupidity.[41]

In this chapter, Sun Tzu focuses on messages. He talks about how a general must be familiar with military deployment tactics because these will indicate the type of strategy an opponent is preparing. Additionally, Sun Tzu indicates that a good general must be familiar with the signs that both the general's own army and that an opposing army are sending. For instance, he teaches that "[o]ne who speaks deferentially but increases his preparations will advance. One who speaks belligerently and advances hastily will retreat.[42]" He goes on to talk about how "[t]hose who stand about leaning on their weapons are hungry."[43] He discusses how an army's unspoken actions can indicate that it is exhausted or undisciplined.

These teachings relate to a general's obligation to both receive and send out information. A general must know when his army is sending a message of weakness (by, for instance, failing to break down a war camp before scouting), and use troop discipline to control the message a general's army is sending. In other words, this chapter is about how an army's message is of pivotal importance. For instance, a general must be prepared to understand the message that a "large number of trees mov[ing]" sends.[44] The general must understand that this means that troops are approaching.[45] Further, the general must be prepared to send messages to an opposing army through strategic troop deployments and the occupation of key terrains.

It is a classic statement of modern military combat that the goal is to defeat the enemy through the application of maneuver and firepower. The same concept applies directly in litigation, although the tools and methods of conflict differ. It is crucial that the successful plaintiff lawyer effectively be able to read the position of the opposing defendants. Does an early settlement offer telegraph strength or weakness? Does the speed, or lack thereof, indicate strength of weakness? Does the rhetoric of the opposing party telegraph strength of weakness? Having faced the opposing lawyer prior, does the conduct track their manner in handling litigation, and if not does that suggest a position of strength or weakness?

Likewise, the plaintiff's lawyer must understand what signals are provided by the actions taken in support of the plaintiff's case. In almost every situation control of the tempo by the plaintiff is crucial, but this must be tempered at the available resources to support the pace of litigation. Further, what are the consequences of the actions by creating reactions from the defense? Does hyper-

[41] The Art of War, 209.
[42] *Id.* at 208.
[43] *Id.* at 209.
[44] *Id.* at 208.
[45] *Id.*

aggression actual prevent resolution? Does too rapid of a pace prevent a defense from providing reporting to the carrier to allow mediation to succeed? Does fully committing all resources to rapidly (discovery, depositions, trial prep, etc.) create a situation in which litigation costs and no longer the merits drive resolution in the matter, such that the plaintiff's counsel has effectively lost control of the conflict?

J. Chapters Ten and Eleven, Configurations of Terrain and the Nine Terrains
Configuration of terrain is an aid to the Army. Analyzing the enemy, taking control of victory, estimating ravines and defiles, the distant and near, is the Tao of the superior general. One who knows these and employs them in combat will certainly be victorious. One who does not know these or employ them in combat will surely be defeated.[46]

According to Sun Tzu, a general's errors cause an army to be "lax, crumbling, chaotic, and routed."[47] For a general to prevent these errors, the general must understand that the terrain on which a general moved is of pivotal importance.[48] Consistently, if a general "knows [his] troops can attack, but [does] not know an enemy cannot be attacked, it is only half way to victory."[49] Additionally, a general must know more than whether his troops can attack and whether an enemy's troops can be attacked. He must know whether the terrain on which battle will be fought is suitable for attack.[50]

The strategy for employing the military is this: There is dispersive terrain, light terrain, contentious terrain, traversable terrain, focal terrain, heavy terrain, entrapping terrain, encircled terrain and fatal terrain.[51]

Additionally, Sun Tzu indicates that there are specific types of terrain, and a general must have an understanding of each possible type of terrain. And, a general must be prepared to properly react to each type of terrain. For instance, a general is instructed not to allow his forces to become isolated on traversable terrain.[52] A deep understanding of terrain, and how to react to terrain, will allow a general to "[c]ast [the enemy] into positions from which there is nowhere to go."[53] A cornered enemy will then "die without retreating."[54]

Further, according to Sun Tzu, understanding the terrain goes much deeper than understanding the geography that an army must traverse. It is also important to understand the metaphorical terrain of an army's spirit. A good general must be able to motivate his soldiers and encourage actions through the "appropriate

[46] The Art of War, 214.
[47] *See id.*
[48] *Id.*
[49] *Id.* at 215.
[50] *Id.*
[51] *Id.* at 219.
[52] *Id.*
[53] *Id.* at 221.
[54] *Id.*

employment of the hard and soft through the patterns of terrain."[55] Through this mastery of both the physical and metaphorical terrain, a general "alters the management of affairs and changes his strategies to keep other people from recognizing them. He shifts his positions and traverses indirect routes to keep other people from being able to anticipate him."[56]

In litigation, terrain is mastered through discovery. Every litigator knows the most common tools: production requests, depositions, interrogatories, and requests for admission. As the Texas Supreme Court has indicated, "the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed."[57] As the Court has repeatedly recognized, the world of discovery is open to all relevant evidence, not just all evidence that might be admissible at trial.[58] However, there are limits on this ability. Requests should not be designed to harass or fish.[59] There are also ethical considerations that are particularly critical to the world of construction litigation. In addition to previously discussed limitations on lying and similar deceitful actions, one of the most frequently litigated ethical issues with respect to discovery can be summed up in one word: spoliation.

K. Chapters Twelve and Thirteen, Incendiary Attacks and the Use of Spies

There are five types of incendiary attack: the first is to incinerate men, the second to incinerate provisions, the third to incinerate supply changes, the four to incinerate armories, and the fifth to incinerate formations.[60]
In general, as for the armies you want to strike, the cities you want to attack, and the men you want to assassinate, you must first know the names of the defensive commander, his assistants, staff, door guards, and attendants. You must have spies search out and learn them all.[61]

Sun Tzu concludes the *Art of War* by discussing two methods of attack. First, he discusses physical incendiary attacks.[62] The purpose of this chapter is to show that you should be prepared to conduct an overwhelming offensive attack that shatters an opponent. The final chapter is devoted to a more metaphorical type of attack: an attack on an enemy's secrets through the use of spies.[63]

As with so much else in the *Art of War*, a general should be cautious in the way that he employs incendiary attacks. After an attack, "if fires are ignited

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[55] *Id.* at 222.
[56] *Id.*
[57] *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984) *disapp'd on other grounds of by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992).
[58] *Id.*
[59] *Id.*
[60] The Art of War, 227.
[61] *Id.* at 232.
[62] *Id.* at 227-28.
[63] *Id.* at 231-33.

upwind" a general is instructed not to attack downwind.[64] Additionally, Sun Tzu concludes the chapter with general advice on the use of both this tactic, and attacking in general: "[i]f it is not advantageous, do not move. If objectives cannot be attained, do not employ the army. . .. The general cannot engage in battle because of personal frustration."[65]

Finally (in chapter 13), Sun Tzu finishes with advice that is consistent with the way he began: War is expensive and burdensome for the state, no matter how necessary the war might be.[66] Sun Tzu goes on to discuss how a general who is in it for personal enrichment and pride "is not a general for the people, an assistant for a rule, or the arbiter of victory."[67] Spies, Sun Tzu, goes on to conclude, are an ideal solution to a never-ending war. "Unless [a general] is benevolent and righteous, he cannot employ spies."[68] Consequently, subtlety is key in the words of Sun Tzu. Thus, armed with these methods of both physical and intellectual attack, a general is prepared for any eventuality.

In a litigation context, there are many forms of "spies." The most obvious information gathering tool is discovery. However, there are other excellent sources of information. Freedom of Information Act requests and Open Records requests can be the difference between winning and losing in a case. Additionally, a litigant can take advantage of non-party discovery tools and even pre-trial discovery tools (like Texas Rule 202 depositions). And a good litigator knows that employing these "spies" can help build excellent ammunition for a catastrophic attack. Well conducted discovery can arm a winning Daubert motion. Discovery is essential for a quality Summary Judgment motion. There are a number of different procedural mechanisms that can effectively determine the outcome of a case, and discovery is essential to many of them.

IV. Conclusion

In the *Art of War*, it is clear that there is a correct way to wage war. In fact, while waging war, the war itself is a secondary consideration, and the most important consideration must always be the welfare of the state. The state must always come first, and war is simply a tool to ensure the welfare of the state. A general can fulfill his or her obligations to the state through warfare by being disciplined, prepared, organized, and by employing all of the tools available to him. A general should never seek endless war, and he or she should keep his loyalties ahead of all other considerations. These lessons are incredibly applicable in a litigation context. A litigator should always strive to litigate cases in the right way, and pursuant to his or her ethical obligations. For instance, the client's

[64] *Id.* at 227.
[65] *Id.* at 228.
[66] *Id.* at 231 ("When you send forth an army of a hundred thousand on a campaign, marching them out a thousand *li*, the expenditures of the common people and the contributions of the feudal house will be one thousand pieces of gold per day.").
[67] *Id.*
[68] *Id.* at 232.

interests should be placed ahead of the attorneys. An attorney should always keep long term goals ahead of short-term gains, and should treat those he or she interacts with professionally, courteously, and honestly. And, a construction litigator must always be prepared, organized, and disciplined. The ethical practitioner is the artful practitioner, and ethics can serve as the art in litigation.