

The Art of War in the Kingdom of Probate (Part 1 of 2)

By Hon. John H. Sugiyama (Ret.)

One percent. Ninety-nine percent. Of the contested matters pending in the probate courts in California, perhaps one in a hundred will be decided through a trial. The rest will be decided through alternative dispute resolution (ADR) processes.¹

As reflected by these figures, going to trial has become the alternative, and ADR, with its many facets, has become the norm.²

Yet attorneys reflexively pursue the 1% outcome. They prepare as if they were engaged in a military campaign, with a trial serving as a set-piece battle that will end the war. Bound by the formalities of such warfare, they initiate measures dictated by generations of predecessors that must be undertaken before the battlefield may be arranged and the battle commenced. Unrelenting discovery and multipronged motions are the long-favored weapons of

choice. The purpose of both, if not the disclosure of relevant evidence and the clarification of issues for trial, is the depletion of the opposition's financial resources.

By thus committing themselves as adherents, if not proponents, of this process, attorneys necessarily must ascribe to the following assumptions:

- A trial has sufficient intrinsic value to support its pursuit regardless of its possible outcome.
- The value of the trial will be enhanced through a decision by a judge sitting in equity, or in rare instance by a jury, rather than by the attorneys and the parties.³
- The outcome will be favorable, acceptable, or tolerable to the attorneys and the parties insistent on the trial.
- The outcome will compel a termination or abeyance of the conflict between the parties.

Of these assumptions, the first merely serves as a rationalization by attorneys that is not subject to objective verification. The second ratifies a transfer of control of any outcome from the attorneys and the parties to a judge or a jury. The third concedes a loss of certainty in the achievement of any outcome that may be desired by the attorneys and the parties. The fourth constitutes a hope, not a promise, of a cessation of the conflict between the parties after completion of the trial.

Attorneys may perceive that a judge or a jury will be compelled by law, fact, or both to reach a decision at trial. Probability and predictability, however, are amorphous constructs in the trial calculus. The amount of compensation that will be awarded will be unpredictable. The array of issues that will be resolved will be indeterminate.

Confronted with these game theoretical calculations that are not easily quantifiable, attorneys may eventually consider

ADR. They may do so perhaps as an afterthought just before the commencement of trial. Their motivating perception may be that trial preparation subsumes readiness for ADR. Mediation, however, requires elements of reflection and action different from those employed during trial.

This is not to say that trial preparation is misdirected. Meaningful mediation requires an awareness of evidence that may be acquired from formal discovery. Complementing the acquisition of relevant evidence, however, mediation may be enhanced through a comprehension of certain principles that may seem self-evident but nonetheless are often ignored. The principles may appear to be matters of common sense derived from intuition without the necessity of formal expression. Yet the principles merit systematic attention despite their apparent simplicity.

Many have written about these principles, not in the context of mediation, but in the realm of conflicts between



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entities having seemingly irreconcilable interests. The literary heritage of these keen observers of human struggle is varied. Solely as a matter of preference for this article, the discussion will draw from the works of Sun Tzu,⁴ Miyamoto Musashi, Carl von Clausewitz, and Henry Kissinger.⁵ The article, however, is not meant to be a study of the tactical elements of mediation. *Getting to Yes* by Roger Fisher and William Ury remains the classic source for guidance about negotiation in its several forms.⁶ Nor will the article provide a recitation of principles to be followed in mediation. Instead, the article will cover only a few strategic concepts that attorneys may wish to consider before engaging in mediation.

As a further introductory note, the next three sections are less a statement of principles associated with mediation than an overview of some of the reasons why trial is typically an unsatisfactory alternative for the resolution of probate disputes. The section thereafter provides a transition from the trial landscape to the mediation setting, with an acknowledgement that trial on rare occasions may be effective, not as a distinct effort, but as an extension of mediation. The final sections present a broad strategic conceptualization of important facets of mediation.

The Terrain

Sun Tzu wrote:

“Given that [the arts of the terrain] are the commander’s ultimate responsibility, he must investigate them thoroughly.”⁷

The meaning of “terrain” is not mysterious. Whether valleys, forests, rivers, or hills, prominent features of the land-

scape must be incorporated into military plans. Their significance will vary from battle to battle. They influence the movement of troops and provisions for offensive operations. They dictate the contours of defensive deployments and fortifications. They thus have the potential to affect the outcomes of offensive and defensive actions.

Like elements of terrain that must be assessed in planning for battle, settled rules of procedure must be followed assiduously in preparing for trial. Both terrain and rules may be conceptualized as established and settled, whether in nature or in law. Both set boundaries that constrain battle and trial. Advantages accrue to those who grasp their significance in influencing the ensuing engagement. Those who remain cavalier about their possible import do so at their own peril.

For probate litigation, a study of the terrain, so to speak, must encompass familiarity with two sets of procedural rules. In California, the rules of civil procedure apply if specific probate rules are not otherwise applicable. Civil trials and probate trials thus may be different enough that critical features of the former are not always operative in the latter. These differences have significant practical consequences at trial.

As a fundamental distinction, the jurisdictional foundation for civil practice is *in personam*; in probate practice, it is *in rem*. This difference finds expression in the primacy of the complaint in civil litigation and the petition in probate.⁸

A complaint with substantive causes of action, and perhaps a cross-complaint with its own causes of action, with both the complaint and the cross-complaint directed to the same par-

ties, informs a civil trial. Trial is directed toward the determination of all causes of action in a judgment. The single final judgment rule is the manifestation of this purpose.

A petition, stating a distinct claim, provides the foundation for a probate trial. Multiple discrete claims may be alleged in a petition or in separate petitions. Responding parties may be different for each petition, and those among them desiring affirmative relief must file their own petitions. The order in which petitions may be tried rests within the discretion of the probate court sitting in equity. All petitions may be decided through one or more trials. The single final judgment rule does not restrict the discretion of the probate court.

For example, a party could file a petition seeking an interpretation of a purportedly ambiguous estate or trust instrument. The party, perhaps anticipating the possibility of an unfavorable interpretation, could also file a separate petition seeking reformation of the instrument on the ground that the applicable text is the result of a mistake. Separately, the responding party could file a petition seeking to preclude the initial petitioning party from obtaining any relief on the ground of some prohibition, either due to misconduct of some sort or through violation of some provision in the instrument at issue. The probate court could decide the petitions in a single trial or direct the determination of petitions in any discretionary sequence through any combination of trials.

The analysis of these possibilities could be made more difficult if other petitions are filed just before the commencement, or right after the conclusion, of the initially set trial. In

attempting to make use of these petitions, attorneys may be constrained by the doctrine of issue preclusion. Nevertheless, the tactical rationale for filing any additional petitions could be to prolong the litigation for as long as necessary until some adequate level of relief is obtained.

Thus, attorneys must account for the possibility that the terrain, the applicable rules of procedure, may permit prolonged conflict beyond a solitary trial. The rules could allow for the progression of trial in an order unhelpful to attorneys and parties. Moreover, the rules could permit multiple trials in a sequence adverse to the interests of attorneys and parties.

The Enemy

Sun Tzu discussed knowledge of the terrain and the enemy together in this commonly recognized aphorism:

**“Know the enemy and your own,
And victory is in sight.
Know the terrain and timing,
And victory will be total.”⁹**

In civil litigation, a plaintiff sues a defendant. Except in the instance of a default, the adversarial foundation for the process forces each to view the other as the “enemy.”

In probate litigation, the variables are different. A petitioning party may not be opposed by every possible responding party. Among the latter, some may file an objection, some may decline to object, and some may object to the objections filed by others.

The array of possible alliances between the parties thus could impose ever-changing complexities in ascertaining the “enemy,” and more so the

“enemy of enemies.” Especially when inherited wealth is at issue, multiple sets of parties could emerge, including the deceased parents, the ones who accumulated the wealth held in an estate or a trust; the administrator of the parents’ estate or trust; and the children of the parents, the beneficiaries of the parents’ estate or trust.¹⁰

At times, the administrator or the beneficiaries may purport to speak for or on behalf of the parents. Memories of the parents will have a direct effect on everyone claiming an interest in their wealth. In a non-probate setting, memories would be based on recollections and stories of what the parents accomplished in life and how they lived their life. When inherited wealth clouds that setting, those memories could be tarnished within a single generation. They could be overshadowed by the question of how and to whom the parents intended to distribute their wealth.

Attorneys must account for the emotional effect of memories on the attitudes of the parties, directing their attention both to the past and to the future. In civil litigation, attorneys principally address the past, reconstructing what happened, reinterpreting what happened, or obscuring what happened. In probate litigation,

attorneys must include a fourth temporal dimension to their work, preserving or deconstructing the memories of the parents held by the parties. In that effort, the parents could be cast as the benefactors of subsequent generations or their enemies.

As for the administrator, on occasion financial institutions or professional fiduciaries may assume that role. More frequently, family members or close friends are the ones so entrusted. The latter usually find themselves thrust into the position. Most will not have had any formal training to prepare them for the role. Nor will they have even aspired to define their lives, professional and private, around the role.

Although untrained, they often perform their duties surprisingly well. In fulfilling the intent of the parents, they marshal assets and routinely keep beneficiaries informed about actions taken on their behalf. They provide accountings with appropriate supporting documentation and make distributions to beneficiaries in the way contemplated by the parents. Yet, apart from the situation in which they may have defrauded the estate or trust, they through no fault of their own could still be drawn into litigation. If confronted by com-

peting demands, they could become the enemy of some or all beneficiaries.

As a third set of parties, beneficiaries may be prompted to initiate litigation if they perceive that they have been treated unfairly, either by the parents in their stated disposition of their wealth or by the administrator in the execution of the parents’ plan.¹¹ This motivating sense of fairness is subjective, with its contours roughly equated with a proportional distribution of the wealth to be inherited. The level of grievance felt is variable, with its extent perhaps either substantial when one beneficiary receives a disproportionately high percentage of estate or trust assets and the others the meager remainder, or considerably less when the distribution roughly approximates an equal percentage for each.

The parents may have had valid reasons for directing either kind of disposition of their wealth, disproportionately favoring one or treating all equally. They may or may not have had the requisite mental capacity to execute their plan. They may or may not have been subjected to undue influence in the execution of their plan. The attitude of the beneficiaries toward these matters could differ, depending upon their

perception of the underlying fairness of the distribution of wealth proposed by the parents and implemented by the administrator. Considering their likely divergent views, beneficiaries could align themselves as enemies of each other in any number of sets.¹²

Attorneys must account for the potential for a dizzying array of enemies in preparing for trial.¹³ Concerns about how the parents will be remembered may remain unspoken by parties, and assuredly may not always be disclosed through discovery. Other concerns may or may not be held about the questions of actual intent, capacity, and undue influence. The positions taken on these matters may be different between the administrator and the beneficiaries.¹⁴

Attorneys are averse to surprise at trial. Given the many factors influencing the dynamic relationships between parties fighting over inherited wealth, trial would be an inopportune time to get to know one’s enemy. Those factors may be better explored in a forum in which confidentiality is assured. Otherwise, attorneys may be left to ponder Pogo’s sublimely inspired observation: **“We have met the enemy and he is us.”**¹⁵

**Continued in Part 2... (stay tuned)*

Footnotes:

1 In this article, the terms “ADR,” “negotiation” (which may include attorneys meeting and conferring), “mediation” (which may involve attorneys obtaining the assistance of a neutral party), and “negotiation through mediation” will be used interchangeably. Arbitration, due to statutory and decisional constraints, is seldom used in probate litigation.

2 Richard Birke and Deidre McCarthy Gallagher, Lecture Delivered at JAMS Institute in Irvine, California, February 11, 2020.

3 Although not always subject to precise definition in every probate context, the terms “party” and “parties” will be used as a matter of convenience without elaboration. Also, even though parties may be represented by attorneys and hence in those instances will be the “clients” of the attorneys, the term “parties” will still be used without qualification.

4 Sun Tzu is a romanization of Sunzi. In this article, the older usage will be maintained.

5 Homage will also be paid to Pogo and Bruce Lee.

6 Roger Fisher and William Ury, *Getting to Yes*. (New York: Penguin Books, 2011)

7 Sun Tzu, *The Art of War*. Translation by Michael Nylan. (New York: W. W. Norton & Company, 2020), p. 104. —As a note on sources, several translations are available. One by Brigadier General Samuel P. Griffith is widely read. The elegance of Nylan’s translation prompts the selection of her work here.

8 Another important difference, the roles of the jury in civil litigation and of the court sitting in equity in probate, will not be covered in this article.

9 *Id.*, p. 107.

10 The terms “parents” and “administrator” are used in this discussion solely as a matter of convenience. In practice, they may be designated by other terms of art. Parents in the estate context may be “testators”; in the trust context, they may be “settlers” or “trustees.” Administrators in the estate context may be “executors,” “administrators,” or “personal representatives”; in the trust context, they may be “successor trustees.”

11 The administrator could also be a beneficiary of the parents’ estate or trust.

12 In this example, the beneficiaries all have the same parents. More complexity is introduced when the beneficiaries are the children of different parents.

13 To maintain the simplicity of the example, the role of attorneys in shaping the attitudes of the parties has not been included in the discussion. Some parties may be fully engaged in the litigation, and others may defer substantially to the decisions of the attorneys.

14 Another easily described example of evolving alliances occurs in conservatorships. In those proceedings, at least two questions must be decided: whether a person such as a parent should be conserved and, if so, who the conservator should be. At times, a child of the parent may object, not because she thinks the conservatorship is unnecessary, but because she opposes the proposed conservator. If a different conservator is nominated, the objecting child often may withdraw her initial objection.

15 Pogo was a swamp “critter” of sorts appearing in a daily comic strip of that same name created by Walt Kelly. The panel featuring the quotation appeared on April 22, 1970.

(See https://en.wikipedia.org/w/index.php?title=We_have_met_the_enemy&oldid=941187648.)