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

By Hon. John H. Sugiyama (Ret.)
**Continued from Part 1…*

The Costs

Not casually, Sun Tzu cautioned:

> **"As a rule of thumb, raising 100,000 troops and sending them out on campaign to a location 1,000 leagues away costs 1,000 units of gold per day, including the expenses incurred by the Hundred Families and the upkeep by the ruling house."[1]**

That this admonition may find application in probate litigation is obvious. Like warfare, litigation has costs, both financial and emotional. Like battles, trials increase those costs substantially.

Less appreciated is Master Sun's corresponding observation:

> **"Once you've committed to a campaign, you should know that, if the victory is long in coming, both your soldiers and their weapons will lose their edge. Should you lay siege to a walled city, you may cripple your troop strength. And if your legions are exposed to the elements for too long, the court's outlays will never suffice. . . . [W]e have yet to hear of a single victory gained by clever schemers who let the hostilities drag on. In short, there has never been a single instance where the court has profited from lengthy engagements."[2]**

As previously noted, trials on separate petitions instead of a single trial on all petitions could occur before all facets of a dispute between parties will be decided. Attorneys must assess whether prolonged conflict is probable. Due to an overwhelming caseload, the probate court could be compelled to calendar trials over many months. As also happens, the probate court could suggest the possibility of sequential trials to encourage mediation. Attorneys must prepare for the financial and emotional commitments that a long war with many battles may require.

The Battle

Even with study of the terrain, the enemy, and the costs, thorough or not, probate trials happen. Many reasons lead to that result. The most frequent involve some form of miscalculation: of the merits of the competing positions taken by the attorneys and the parties, of the financial resources the parties will have available to sustain the litigation, and/or of the resolve of the parties. Other causes derive from an attorney or a party's inclination to act, or more probably react, emotionally due to hubris or its counterpart, insecurity. A less frequent cause rests on an attorney's assessment that a particular question must be decided initially as the foundation for resolution of the rest of the dispute.[3]

Regardless of the cause, attorneys and parties, once drawn closer to a trial by design or by default, should continue to analyze two interrelated factors. One is the probability of success. The other is the meaning of success. They cannot assume that all aspects of the conflict consuming the parties will be resolved. They thus should prepare for the aftermath of trial.

Carl von Clausewitz understood from experience that those who lead others into war may suffer from the same failings. To assist others in avoiding such military misadventure, he sought to present a systematic study of war. As the foundation for his work, he deduced:

> **"War is . . . an act of force to compel our enemy to do our will."[4]**

> **"[I]f you are to force the enemy, by making war on him, to do your bidding, you must either make him literally defenseless or at least put him in a position that makes this danger probable."[5]**

Clausewitz also grasped, however, the near impossibility of obtaining total subjugation of the enemy. This realization led him to reflect:

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> **"In war the result is never final. "[E]ven the ultimate outcome of a war is not always to be regarded as final. The defeated state often considers the outcome merely as a transitory evil, for which a remedy may still be found in political conditions at some later date."[6]**

To assess these "political conditions," Clausewitz perceived that "the laws of probability" could be applied to the study of the enemy's situation and condition. The rationale for this kind of analysis was to enable one to make a reasonable estimation of the enemy's likely responsive conduct so that appropriate anticipatory action could be taken.[7] He deemed this process to be an aspect of the "political object" of war, the effort to compel the enemy to do one's will without undertaking the extreme measures dictated by military action.[8]
Clausewitz thus stated one of his most famous maxims in these terms:

> **"War is merely the continuation of policy by other means.**
>
> **"[W]ar is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means."[9]**

This reference to "political intercourse" suggests diplomacy. The connection between diplomacy and negotiation appears self-evident. Thus, to the extent that attorneys and parties in a probate dispute resort to trial to impose their will over their enemy, an analogy between war and litigation holds. Furthermore, to the extent that the probability of a trial bringing finality to a probate dispute is uncertain, an analogy between diplomacy and mediation also holds.
In view of these loose conceptual similarities, attorneys and parties engaged in probate litigation would do well to reflect on certain probable outcomes:

- That the terrain makes it difficult to achieve a final, conclusive result through trial
- That a party could emerge as an enemy at any time depending upon the particular claim or petition at issue, with that enemy capable of shifting the balance of power at trial
- That the cost of trial is substantial, with the cost likely to increase significantly if the result achieved is inconclusive or if multiple, sequential trials must be undertaken

Arrayed against these outcomes of indeterminate probability, mediation, the litigation counterpart to Clausewitz's diplomacy, merits invocation. By engaging in mediation, attorneys and parties could achieve certain outcomes not readily achievable, if at all, through trial. The process would enable them to do the following:

- Maintain control of the outcome
- Be creative in crafting an outcome
- Achieve certainty of the outcome
- Fashion a comprehensive outcome
- Bring closure to the dispute
- Assure confidentiality throughout

Upon reflecting on these matters, attorneys and parties may find mediation to be a preferable, more effective means of resolving their disputes. They may ideally come to this realization well before costs associated with trial preparation have been substantially incurred and definitely before trial has commenced. Alternatively, even with a trial decision, they may necessarily seek mediation thereafter to achieve a more comprehensive, conclusive outcome.

The Goal

Once a commitment to mediation has been made, attorneys and parties should engage in an evaluative process, which many neglect. They must determine what they hope to achieve and why. In business management and public administration terminology, the "what" of that determination is sometimes called the "goal," and the "why" is the "purpose." The term "objective" is also associated with this process, denoting a lesser measure that, once accomplished, may support or facilitate achievement of the goal. The concept of purpose additionally applies to an objective.

In his inimitable style, albeit for a different kind of stage, Henry Kissinger comprehended this process at a profound level. He grasped opportunities for diplomacy in even the most trying circumstances, drawing inspiration from many sources, including the Chinese, for whom the same character denotes both "crisis" and "opportunity."[10]

As the foundation for his own thought, Kissinger acknowledged:

> **"We didn't enter government with a precise theory of negotiations, but I would say the following: One, we always began every diplomatic effort with a question: 'What are we trying to do here? What is the purpose of this exercise?'"[11]**

Kissinger further observed:

> **"[W]e made serious efforts to understand the thinking of the other side, so that we did not go in with a fixed notion of a permanent enemy as an abstract. So we tried to understand what the other side was trying to accomplish because, at the end of a negotiation, you must have parties that are willing to support it. Otherwise, you're just negotiating an armistice. When we encountered irreconcilable hostility or unbridgeable conflict, we strove for a strategy to overcome it."[12]**

These core precepts led to Kissinger's disdain for the conventional approach to negotiation, which **"is to state your maximum objective, and then slice away at it and give up a little bit at a time until you come to a final conclusion."[13]** Kissinger expressed his dismay in these evocative terms:

> **"[W]hen you engage in these so-called salami tactics, you never know when you have reached the end, and everything becomes a test of strength and endurance."[14]**

This admonition thus flanked Kissinger's overriding thought:

> **"The lack of an overall strategy makes one a prisoner of events. . . . While continually assessing tactics, [one must] focus[ ] on where [one is] headed for the long run."[15]**

That this long view, one based on strategic insights, has application to probate litigation should be obvious. At trial, attorneys and parties are limited by the specific relief set forth in the prayer in the petition. Yet by the time of trial, attorneys

and parties may have changed their perspectives, realizing that other outcomes may better serve their interests. In mediation, the prayer need not be a constraint. An accord may be fashioned that meets interests beyond and apart from the relief originally stated in the prayer.

To benefit from the latter opportunity, attorneys and parties, as a refrain, should be guided by the interrelated principles of strategically ascertaining their goals and the purposes supportive of those goals. Not all attorneys guide parties adequately in that pursuit.

A relatively simple, frequently occurring situation illustrates this point. Parties often have amorphous, imprecise apprehensions about the administration of a trust of which they are beneficiaries. An attorney, to obtain basic information about the trust that may allay, or confirm, the concerns of the parties, files a petition seeking an accounting from the trustee. After several hearings, the trustee agrees to provide an accounting. After several more hearings, the trustee files an accounting with a supporting petition seeking its approval. After even more hearings, the attorney on behalf of the contesting parties accepts the validity of many of the entries in the accounting. All the while, the costs for the parties continue to increase.

The attorneys and the parties eventually agree to mediate their dispute. What are their goals? What are their purposes? What are the possible outcomes at trial if settlement is not reached?

If the goal of the petitioning party is a general summary of developments over several years, what more, if anything, should be sought? If the goal is a fully supported, comprehensive explanation for all entries, what purpose, and at what cost, would total reconciliation serve? For the responding trustee, if the goal is approval of all aspects of the accounting, can that outcome be achieved at trial? If the goal is the deflection of a possible petition for sanctions, how may that outcome be achieved and at what cost? Of course, there may be other goals.

This listing follows from only a simple example. Myriad outcomes may be conceived for any dispute, depending upon its nature and complexity. For each conflict, attorneys must ascertain goals and purposes through an evaluative process that is thoughtful and strategically directed before engaging in any semblance of meaningful mediation. For them to do less would make attorneys prisoners of their own ineptitude, consigned to slicing innumerable pieces of salami for an indeterminate number of sandwiches.[16]

The Process

Those charged with preparing others for battle acknowledge that the most elaborate plan may be rendered obsolete the moment the first shot is fired. That same truism applies to probate mediation. Exacerbated by stress, personal compulsions can lead people to behave in inexplicable ways. Unanticipated demands from opposing counsel may be proposed. Unforeseen intransigence by parties may surface. Attorneys must be capable of responding to problems of increasing complexity that themselves are changing over time.[17]

So long as they adhere to their fundamental goal and purpose, attorneys may find it advantageous to make tactical adjustments during any mediation. They must be ever agile and possessive of a nimble and creative intellect.[18]

In one of his most memorable passages, Sun Tzu captured the essence of this quality:

> **"The formation of the troops is like water. Just as water's flow avoids the high ground and rushes to the low, so, too, the victor avoids the enemy's strong points and strikes where he is weak. As water's flow follows the form of the land, so, too, the winning army varies its tactics, adjusting to the enemy's formations."[19]**

Writing in the seventeenth century, Miyamoto Musashi, perhaps the most revered swordsman in Japanese history, expressed the same thought:

> **"It is difficult to realise the true Way just through sword-fencing. Know the smallest things and the biggest things, the shallowest things and the deepest things.**
> **". . . With water as the basis, the spirit becomes like water. Water adopts the shape of its receptacle, it is sometimes a trickle and sometimes a wild sea."[20]**

More recently, in the century just past, the iconic film star Bruce Lee described his form of martial arts, Jeet Kune Do, in the same way:

> **"Empty your mind, be formless, shapeless—like water. Now you put water in a cup, it becomes the cup. You put water into a bottle it becomes the bottle. You put it in a teapot it becomes the teapot. Now water can flow or it can crash. Be water, my friend."[21]**

For most attorneys, certain questions may follow. What do these passages mean in practical terms? What guidance do the passages offer for mediation? The passages themselves provide the answers.

The foundation upon which the passages rest is to **"know the enemy."[22]** Attorneys must ascertain the enemy's goals and purpose. They must determine whether those goals may be accommodated while remaining true to their own goals. If so, settlement will be probable with mutual goals capable of being respected. If not, parties must change or modify their goals.

How such modification may be forced or facilitated follows from **"adjusting to the enemy's formations."[23]** Attorneys will know the enemy's ostensible goals through the prayer of a petition or the response in an objection. They may be less aware, however, about the enemy's actual commitment to the goals. Moreover, they may not even be cognizant of the purpose supportive of the goals. To discern whether the enemy's resolve may be swayed, attorneys may wish to engage in deceptively difficult tasks: to talk to each other and to listen. Often during status conferences, attorneys may express in subtle ways what they are truly seeking. More so during mediation, attorneys may be forthright about the true interests of the parties. By talking and listening, appropriate adjustments may be conceived.[24]

This process of communication at times may be direct and at others subtle. **"[A]void[ing] the enemy's strong points"[25]** does not mean entirely ignoring them. Nor does **"strik[ing] where he is weak"[26]** mean continually declining to offer concessions. Attorneys must know when to avoid and when

to strike. Attorneys must **"be like water."**[27]

The mediation of probate disputes involves elements of deception as well as coercion, with parties perhaps allowed to remain unaware of the practice of either. Parties at times must be given the opportunity to act gracefully; at others, they must be forced to act, albeit with compelled grace. Ultimately, for any settlement to hold, the parties must be willing to support it.[28] Otherwise, as Henry Kissinger astutely observed, **"you're just negotiating an armistice."**[29]

The mischief that could follow from only a temporary cessation of hostilities is particularly acute in the probate realm. As often happens, estates and trusts have the potential of affecting generations of families. The resolution of a single petition may not foreclose all potential future disputes. For mediation to be worthwhile, the desire to achieve long-term, comprehensive strategic goals must guide attorneys and parties alike. The pursuit of that endeavor may find guidance in the wisdom from times past.

Footnotes:

1 *The Art of War, supra,* p. 131.

2 *Id.,* p. 18.

3 Another possible cause arises in the presumably infrequent situation when an attorney, at the direction of a party, seeks to deplete the financial resources of the opposition in order to force the latter to disengage from the dispute. That kind of effort could perhaps be effective if the opposition has not been adequately prepared from the outset to accept the costs of litigation. But that effort necessarily could only be made if the initiating party is willing to absorb a substantial corresponding cost.
Some of these causes may on occasion be influenced by the economic underpinning of probate litigation. For financial institutions that function as fiduciaries for estates and trusts, general counsel may control the flow of referrals to litigators. Apart from those kinds of institutions, most other parties may not be sufficiently knowledgeable about litigation to direct the work of attorneys. Attorneys may be keenly aware of the number of five-star reviews needed to offset a one-star review. But attorneys otherwise are not constrained by the prospect of a further retainer controlled by general counsel.

4 Carl von Clausewitz, *On War.* Translation by Michael Howard and Peter Paret. (Princeton: Princeton University Press, 1984) p. 75. Different translations such as those by J. J Graham and by O. J. Matthijs Jolles are still available. The translation by Howard and Paret appears to be the preferred source in academic coursework.

5 *Id.*, p. 77.

6 *Id.*, p. 80.

7 *Ibid.*

8 *Loc cit.*

9 *Id.*, p. 87.

10 Winston Lord, *Kissinger on Kissinger.* (New York: All Points Books, 2018) p. 88.

11 *Id.*, p. 102.

12 *Id.*, p. 103.

13 *Loc cit.*

14 *Loc cit.*

15 *Id.*, p. 130.

16 *Id.*, p. 103.

17 Writing in the eleventh century, Su Shi observed: "if the heavens conformed so perfectly to a measure, then even an untutored . . . child could calculate its movements over a thousand years with ease. But due to inconsistencies and what doesn't fit the measurements, even the most clever reckoner cannot fully grasp its operations." (See Introduction by Michael Nylan, *The Art of War*, *supra,* pp. 21-22.)

18 Alonzo Smith "Jake" Gaither, the renowned head football coach at Florida A&M University, is said to have preferred players who are "agile, mobile, and hostile." (See https://en.wikipedia.org?w/index.php?title=Jake_Gaither&oldid=9295000454.)
For attorneys, less would seem to be desirable. Of the three attributes noted by Coach Gaither, one would appear to be counterproductive in trial as well as in mediation.

19 *The Art of War*, *supra,* p. 75.

20 Miyamoto Musashi, *A Book of Five Rings.* Translation by Victor Harris. (Woodstock: The Overlook Press, 1974) p. 43. As with the other sources, several translations are available of *A Book of Five Rings.* A relatively recent one, by Alexander Bennett, includes Musashi's other major written pieces. The translation by Harris includes photographs of some of Musashi's more artistic work.

21 See https://en.wikiquote.org/w/index.php?title=Bruce_Lee&oldid=2805381.

22 *The Art of War, supra,* p. 107.

23 *Id.,* p. 75.

24 In December 1950, upon taking command of the United States Eighth Army during the Korean War, General Matthew Ridgway comprehended immediately that the strategic goals were political, beyond his control. Guided by that basic realization, he directed his attention toward military objectives that could support the political goals. He discerned, however, that the land itself had no cities, industrial centers, or other areas of strategic value. He thus concluded that his objectives should center on the minimization of cost to his forces and the infliction of maximum cost to his enemy. (See Roy E. Appleman, *Ridgway Dues for Korea.* (College Station: Texas A&M University Press, 1990.)
Attorneys on occasion may be placed in a similar situation. Some opposing counsel, lacking agility, may in all their cases follow without deviation a settled script in which they pursue all pretrial measures and draw on the financial resources of their clients to the extent sustainable before agreeing to consider mediation. In response, attorneys regrettably should recognize from the outset that a war of attrition is probable and that mediation will not be accepted until they have caused opposing counsel to deplete the financial resources of their clients. In this unfortunate scenario, attorneys must comprehend that the otherwise needless expenditure of client money is still "a continuation of political intercourse, carried on with other means." (*On War, supra,* p. 87.)

25 *The Art of War, supra,* p. 75.

26 *Loc cit.*

27 *Ibid.*

28 See *Kissinger on Kissinger, supra,* p. 103.

29 *Loc cit.*

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