THE "TRIAL WARRIOR": APPLYING SUN TZU'S *THE ART OF WAR* TO TRIAL ADVOCACY

ANTONIN I. PRIBETIC*

The author uses Sun Tzu's The Art of War *to determine whether the theory of strategic functionalism can integrate the client-centric, justice-centric, and science-centric conceptual models into a coherent, unified trial advocacy paradigm. The author finds that the Taoist philosophy, military strategy, and tactics explained in* The Art of War *applied to trial advocacy is an example of structural functionalism at work.*

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* B.A. (Hons.), LL.B., LL.M., MCIArb. Litigation Counsel at Steinberg Morton Hope & Israel LLP, Toronto, Ontario. I wish to express my thanks to the editorial board of the *Alberta Law Review* for providing very able editorial assistance throughout. I also wish to thank the Honourable Justice Todd L. Archibald of the Ontario Superior Court of Justice and three anonymous peer reviewers for reviewing and providing helpful comments to an earlier draft. The opinions expressed and any errors or omissions, however, remain solely mine.

"The gem cannot be polished without friction, nor man perfected without trials."
~ Chinese Proverb

"In war, then, let your great object be victory, not lengthy campaigns."
~ Sun Tzu, *The Art of War*[1]

I. INTRODUCTION

In his address to the Ontario Psychiatric Association in 1973, the late Honourable Justice Edson Haines of the Ontario Supreme Court posited, "Law is not justice and a trial is not a scientific inquiry into truth. A trial is the resolution of a dispute."[2] The fact that the adversarial legal system, as a bulwark of popular culture,[3] developed from the medieval antecedents of trial by ordeal, trial by fire, and trial by combat,[4] is well-known, but it also resonates as a strong, militaristic metaphor[5] for the modern civil trial.

Moreover, *jurisprudence* (i.e. the "philosophy of law"),[6] continues to adapt or integrate existing or new theoretical or conceptual models from other disciplines, such as psychology,[7] international relations,[8] political economy,[9] economics,[10] and the humanities.[11] An interdisciplinary approach thus lends heuristic value through an analysis of the Western

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1 Sun Tzu *The Art of War*, trans. by Lionel Giles (London: Luzac, 1910) [Giles Translation].

2 Address (Ontario Psychiatric Association, Toronto, 27 January 1973). **[Author Q: please provide copy so we can verify quote]**

3 Michael Asimow, "Popular Culture and the Adversarial System" 40 Loy. L.A. L. Rev. 653.

4 See Sadakat Kadri, *The Trial: A History from Socrates to O.J. Simpson* (London: HarperCollins, 2005); Ian C. Pilarczyk, "Between a Rock and a Hot Place: The Role of Subjectivity and Rationality in the Medieval Ordeal by Hot Iron" (1996) 25 Anglo-Am. L. Rev. 87; Vickie L. Ziegler, *Trial by Fire and Battle in Medieval German Literature* (Rochester, N.Y: Camden House, 2004); Donald J. Evans, "Forgotten Trial Techniques: The Wager of Battle" (1985) 71:5 A.B.A. J. 66.

5 On law and metaphors, see Elizabeth G. Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10 Wis. Women's L.J. 225.

6 Defined as "the study, knowledge, or science of law" (*Wex, s.v.* "Jurisprudence," online: Cornell University Law School <http://www.law.cornell.edu/wex/index.php/Jurisprudence>).

7 In addition to a variety of undergraduate and post-graduate academic programs (both specialized and interdisciplinary) in the areas of legal psychology, criminological psychology, and forensic psychology, there are a number of specialized law and psychology organizations, including, *inter alia*: The American Board of Forensic Psychology (ABFP), online: ABFP <http://www.abfp.com/>; The European Association of Psychology and Law (EAPL), online: EAPL <http://www.law.kuleuven.be/eapl/>; The American Psychology-Law Society (AP-LS), online: AP-LS <http://www.ap-ls.org/>.

8 For example, the Journal of International Law & International Relations (JILIR) is a student-run journal administered by students from the Faculty of Law and the Munk Centre for International Studies at the University of Toronto, online: JILIR <http://www.jilir.org/>.

9 For example, the Comparative Research in Law and Political Economy Network (CLPE) was founded in 2004 by Peer Zumbansen at Osgoode Hall Law School and is dedicated to the interdisciplinary exploration of the intersection between law and political economy, online: CLPE <http://www.comparativeresearch.net/>.

10 The Social Science Research Network (SSRN) includes as a sub-category, Law and Economics (Law-Econ) which contains nearly 28,000 abstracts of articles dealing with "research in the field of 'law and economics', broadly defined with respect to methodology (theoretical, empirical, experimental)," online: SSRN <http://hq.ssrn.com/submissions/BoilerInfo.cfm?jour=257>.

11 This also includes the interdisciplinary categories of law and society, law and culture, law and literature. See e.g. Social Science Research Network, online: SSRN <http://papers.ssrn.com/sol3/displayjournal browse.cfm>; The Law & Humanities Blog sponsored by The Law and Humanities Institute, online: Law & Humanities Blog <http://lawlit.blogspot.com>.

(common law) adversarial system based upon the following theory of "*strategic functionalism*": the *form* (tactics based upon procedural and evidentiary rules) is a function of the *content* (strategy based upon legal principles and policies, and client-based remedies).[12] The following three factors underscore the importance of formulating and deploying an effective trial advocacy strategy based upon *strategic functionalism*:

1. The general decline of jury trials in Canada, thereby heightening the importance of a trial lawyer's oral and written advocacy skills in trials by judge alone;[13]

2. the increasing scientific and technical complexity of legal and evidentiary issues, highlighted by the reliance on expert opinion evidence;[14] and

3. the private and public cost-driven and systemic (i.e. mandatory mediation/alternative dispute resolution and case management) biases militating towards settlement, but not mitigating against strategy-based negotiation.[15]

While many trial advocacy writers approach the subject matter as an "art,"[16] or as both an "art and science,"[17] they tend to focus on descriptive or ascriptive, rather than prescriptive, categories.

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[12] Strategic functionalism is the author's descriptive neologism. An analysis of the philosophical debate between analytical and normative jurisprudence is beyond the scope of this article. See generally John Austin, *The Province of Jurisprudence Determined*, 2d ed. (London: John Murray, 1861); H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Toronto: Oxford University Press, 1979) 28-33; Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986); Frederick Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. by Abraham Hayward (New York: Arno Press, 1975). See also Michael Steven Green, "Legal Realism as Theory of Law" (2005) 46 Wm. & Mary L. Rev. 1915.

[13] See W.A. Bogart, "'Guardian of Civil Rights … Medieval Relic': the Civil Jury in Canada" (1999) 62:2 Law & Contemp. Probs. 305 at 312 (citing Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases* (Toronto: Ontario Law Reform Commission, 1996), noting a decline in the use of civil juries in Ontario in recent decades, albeit with a modest 7 percent increase between 1988-89 to 1994-95); See also Justice John C. Bouck, "The future of civil jury trials," online: The Continuing Legal Education Society of British Columbia <http://www.cle.bc.ca/CLE/Analysis/Collection/03-civiljurytrials.htm>. **[Author Q: please provide updated link]**

[14] See Justice Todd L. Archibald & Heather L. Davies, "Law, Science and Advocacy: Moving Towards a Better Understanding of Expert Scientific Evidence in the Courtroom" in *Annual Review of Civil Litigation, 2006* (Toronto: Thomson Carswell, 2007) 1; David E. Bernstein, "Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the *Daubert* Revolution" (2008) 93 Iowa L. Rev. 451.

[15] See Russell Korobkin, *Negotiation Theory and Strategy* (New York: Aspen Law & Business, 2002).

[16] See Robert B. White, *The Art of Trial* (Aurora, Ont.: Canada Law Book, 1993); The Honourable Roger E. Salhany, *Cross-Examination: The Art of the Advocate* (Markham, Ont.: LexisNexis Canada, 2006); Gary Fidel & Linda Cantoni, *The Art of Argument* (New York: Xlibris, 2001); Francis L. Wellman, *The Art of Cross-Examination: With the Cross-Examinations of Important Witnesses in Some Celebrated Cases*, 4th ed. (New York: Simon & Schuster, 1997).

[17] See John A. Olah, *The Art and Science of Advocacy* (Scarborough, Ont.: Carswell, 1990); L. Timothy Perrin, H. Mitchell Caldwell & Carol A. Chase, *The Art & Science of Trial Advocacy* (Cincinnati, Ohio: Anderson, 2003); James J. Gobert & Walter E. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury*, 2d ed. (Toronto: McGraw-Hill, 1990); Frederick J. Schaefer, *Aristotle in the Courtroom: The Art and Science of the Rhetoric in Modern Trial Practice*, (J.D. Thesis, University of Denver, Sturm College of Law, 2002) [unpublished]. **[Author Q: is this unpublished? Please provide copy of cover page**]

As a descriptive category, trial advocacy combines behavioural and role-specific characteristics to describe *what* the trial lawyer is within an adversarial system based upon application of procedures (rules) to achieve client goals (remedies).

As an ascriptive category, trial advocacy is an element of the legal system's symbolic culture: the combination of perceived social norms, mores, ideas, and beliefs about *how* a trial lawyer acts and identifies a trial advocate's attributes.

As a prescriptive category, trial advocacy is the normative analysis of *why* a trial lawyer should act a certain way, which implies the use of an *archetype*: generally understood as "a generic, idealized model of a person, object or concept from which similar instances are derived, copied, patterned or emulated."[18] As Carl Jung, the founder of analytical psychology noted, archetypes exist within the deeper recesses of individual and collective human psyches. They are primordial and universal, residing in the collective unconscious. Archetypes carry a full range of positive and negative potential. They do not manifest themselves solely through intellect but rather shape and define our attitudes through art, literature, myths, symbols, dreams, and story-telling.[19]

Applying Jungian analysis, the following three conceptual models and corresponding lawyer archetypes emerge:

1. The *client-centric model* (e.g. the "Warrior"/the "zealous advocate");

2. the *justice-centric model* (e.g. the "Lover/Medial"/ the "ethical professional");[20] and

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[18] *Wikipedia, The Free Encyclopedia*, *s.v.* "Archetype," online: Wikipedia <http://en.wikipedia.org/wiki/archetype/ index.php?title=Archetype&oldid=122930684>. [**Author Q: definitions provided by Wikipedia are not ideal. Is the following substitution from COD appropriate? "an original model: a prototype". If not, please provide definition from a print dictionary]**

[19] C.G. Jung, *The Archetypes and the Collective Unconscious*, 2d ed., trans. by R.F.C. Hull (Princeton, N.J.: Princeton University Press, 1980). See James Howard, "The Archetypal Lawyer," online: The Missouri Bar <http://www.mobar.org/a153e714-b58f-49e3-8712-aaa71559354c.aspx>, where the author identifies and applies the four main Jungian archetypes: "The Sovereign (King or Queen)"; "The Warrior or Amazon"; "The Magician or Hetaira"; and "The Lover or Medial". See also Shannon E. French, *The Code of the Warrior: Exploring Warrior Values Past and Present* (Lanham, Md.: Rowman & Littlefield, 2003); Robert Moore & Douglas Gillette, *King, Warrior, Magician, Lover: Rediscovering the Archetypes of the Mature Masculine* (San Francisco: HarperCollins, 1990); Caroline Myss, *Sacred Contracts: Awakening Your Divine Potential* (New York: Harmony Books, 2001).

[20] See The Law Society of Upper Canada (LSUC), *Rules of Professional Conduct*, online: LSUC <http://www.lsuc.on.ca/regulation/a/profconduct/rule4/> r. 4 and cmt. [LSUC, *Rules*] which reads:

> 4.01 (1) When acting as an advocate, a lawyer shall represent the client *resolutely and honourably within the limits of the law* while treating the tribunal with *candour, fairness, courtesy, and respect.*
>
> Commentary
>
> The lawyer has a duty to the client to *raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law*. The lawyer must discharge this duty by *fair and honourable means*, without *illegality* and in a manner that is consistent with the lawyer's duty to treat the tribunal with *candour, fairness, courtesy and respect* and in a way that promotes the parties' right to a *fair hearing* where *justice can be done*. Maintaining dignity, decorum, and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

3. the *science-centric model* (e.g. the "Sovereign" or the "Magician/Trickster"/ the "knowledge technocrat").[21]

United States Supreme Court Chief Justice Warren Burger once made the following entreaty:

> The entire legal profession — lawyers, judges, law teachers — has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers — healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?[22]

Similarly, Carrie Menkel-Meadow suggests that the "zealous advocate" archetype is less effective in the context of mediation:

> The zealous advocate who jealously guards (and does not share) information, who does not reveal adverse facts (and in some cases, adverse law) to the other side, who seeks to maximize gain for his client, may be successful in arbitrations and some forms of mini-trials and summary jury trials.
>
> However, the zealous advocate will likely prove a failure in mediation, where creativity, focus on the opposing sides' interests, and a broadening, not narrowing of issues, may be more valued skills.[23]

A discourse on legal ethics is beyond the scope of this article. However, one may argue that a "zealous advocate" need not literally act as a "zealot": for example, "an uncompromising or extreme partisan."[24] Rather, the "ethical professional" archetype tempers the "(over) zealous advocate," insofar as any improper conduct is restrained by the concept of fiduciary law and various codes of professional ethics.[25]

> This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators, and others who resolve disputes, regardless of their function or the informality of their procedures [emphasis added].

21 See Richard Moorhead, "Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism" (1998) 25 J.L. & Soc'y 365; John W. Teeter Jr., "Into the Thicket: Pursuing Moral and Political Visions in Labor Law" (1996) 46 J. Legal Educ. 252 at 255-60, where Teeter outlines the following: "Visions of Lawyering"; "Lawyer as Agnostic"; Lawyer as Friend"; "Feminist 'Ethic of Care'"; "'You Are What You Do'; "Lawyer as Statesman"; "Lawyer as Rebel from Principle"; "Rebellious Lawyering"; and "The Visionless Vision." See also Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* (St. Paul, Minn.: West, 1994), identifying the following archetypes: lawyer as godfather (at 7); lawyer as hired-gun (at 29); lawyer as guru (at 32); and lawyer as friend (at 44-47).

22 Chief Justice Warren E. Burger, "The State of Justice" (1984) 70:4 A.B.A. J. 62 at 66.

23 Carrie Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" (1997) 38 S. Tex. L. Rev. 407 at 427.

24 *Canadian Oxford Dictionary*, *s.v.* "zealot."

25 For example, see *American Bar Association (ABA) Model Code of Professional Responsibility* (1983), online: Cornell University Law School <http://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM>; Canadian Bar Association (CBA), *CBA Code of Professional Conduct*, online: CBA <http://www.cba.org/CBA/activities/code/>.

Additionally, the "knowledge technocrat" archetype has potential application, particularly in light of the emergent issues in electronic discovery and document management, as well as growing reliance on the Internet, e-mail, personal digital assistants (PDAs), and the like.[26] However, while a computer programmer may be able to create a legal software program to conduct legal research or even rudimentary legal analysis (presuming correct algorithms are inputted), there is no substitute for advocacy skills and applied legal reasoning honed by years of courtroom experience and collegial mentoring.

The objective here is to determine whether *strategic functionalism* can integrate the client-centric, justice-centric, and science-centric conceptual models into a coherent, unified trial advocacy paradigm. The argument is that Sun Tzu's *The Art of War* serves this purpose well.[27] The key element is that one can easily transpose the Taoist philosophy, military strategy, and tactics in Sun Tzu's *The Art of War* to trial advocacy, irrespective of which conceptual model and corresponding lawyer archetype one identifies with. Most trial lawyers will likely identify themselves as a combination of two, or all three conceptual models offered; however, the term "Trial Warrior" has a degree of verisimilitude and will be used to analyze Sun Tzu's *The Art of War*.

II. APPLYING SUN TZU'S MILITARY THEORY AND TAOIST PHILOSOPHY TO TRIAL ADVOCACY

If, as the great military theorist, Carl von Clausewitz observed, "War is a mere continuation of policy by other means,"[28] then by analogy, "a trial is a mere continuation of social conflict by other means."[29] Unquestionably, von Clausewitz had a major impact on Western military strategy. However, as Sir Basil Henry Liddell Hart, the noted British military strategist and historian, notes in his foreword to a 1963 edition of Sun Tzu's *The Art of War*:

> Civilization might have been spared much of the damage suffered in the world wars of this century if the influence of Clausewitz's monumental tomes *On War*, which moulded European military thought in the era preceding the First World War, had been blended with and balanced by a knowledge of Sun Tzu's exposition on 'The Art of War'. Sun Tzu's realism and moderation form a contrast to Clausewitz's tendency to emphasize the logical ideal and 'the absolute', which his disciples caught on to in developing the theory and practice of 'total war' beyond all bounds of sense.
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> …

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26 See discussion of Tactical Dispositions, Part II. D.

27 The application of military theory to Trial Advocacy was a major theme in a recent Ontario Bar Association-Civil Litigation Section Conference, entitled "Sharpening the Sword: Tactics and Strategies for Lock n' Load Litigation. Tips from the Top – Lessons of Mass Instruction" (30 March 2006), online: Ontario Bar Association <http://www.softconference.com/oba/publication.aspx?code=06CIV0330C>.

28 General Carl von Clausewitz, *On War*, trans. by Colonel J.J. Graham, new & rev. ed. (New York: Barnes & Noble, 1968) vol. 1 at 23. See also Niccolò Machiavelli, *Art of War*, ed. and trans. by Christopher Lynch (Chicago: University of Chicago Press, 2003). **[Author Q: could not obtain this source. Please provide documentation.**]

29 **[Author Q: please provide source and pinpoint]**

> In brief, Sun Tzu was the best short introduction to the study of warfare, and no less valuable for constant reference in extending study of the subject.[30]

The Art of War, written during the fifth to the third century B.C.E. in the Warring States Period of ancient China, has been attributed to a legendary ancient Chinese philosopher-warrior named Sun Tzu.

As one of the most famous treatises on military strategy, *The Art of War* has had a profound influence on Eastern and Western military planning.[31] It has also gained currency within Japanese and Western corporate culture, particularly in the context of business negotiation tactics.[32] The *Art of War* has also been the subject of various law books and legal articles on the trial process, including negotiation tactics[33] and trial strategy.[34]

While *The Art of War* is an authoritative treatise on military strategies and tactics, it is not exclusively a book on military theory. The teachings of Taoism,[35] most notably the *I Ching (The Book of Changes)* and the *Tao-te Ching (The Way and Its Power)*[36] imbue *The Art of War*: "Its aim is invincibility, victory without battle, and unassailable strength through understanding of the physics, politics, and psychology of conflict."[37] It adopts a rationalist/minimalist approach to conflict resolution and offers insight on how understanding the psychology of conflict leads to its resolution, or ideally, to its avoidance altogether.

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30 Sun Tzu, *The Illustrated Art of War*, trans. by Samuel B. Griffith (Toronto: Oxford University Press, 1963) 6 at 6, 9.

31 *Ibid.* at 6.

32 Gerald A. Michaelson, *Sun Tzu: The Art of War for Managers: 50 Strategic Rules* (Avon, Mass.: Adams Media, 2001); Gerald A. Michaelson & Steven Michaelson, *Sun Tzu for Success: How to Use* The Art of War *to Master Challenges and Accomplish the Important Goals in Your Life* (Avon, Mass.: Adams Media, 2003).

33 Ashley Mediation Centers, "The Art of War, Litigation and Mediation," online: FindLaw for Legal Professionals <http://library.findlaw.com/1996/May/1/130483.html>.

34 See David Barnhizer, *The Warrior Lawyer: Powerful Strategies for Winning Legal Battles* (Irvington-on-Hudson, N.Y.: Bridge Street Books, 1997); Paul Harris, *Warrior-Lawyer* (San Francisco: Paul Harris, 1991) **[Author Q: unable to obtain this source please provide copy of jacket]**; William E. Wallo, "Rambo in the Courtroom: Sometimes It Pays to be Confrontational," online: Wallo World <http://www.walloworld.com/pdf/rambo_courtroom.pdf>; Christopher D. Balch, "The Art of War and the Art of Trial Advocacy: Is There Common Ground?" Comment, (1991) 42 Mercer L. Rev. 861; Gary J. Gordon, "Slaying the Dragon: The Cross Examination of Expert Witnesses," online: Rider Bennett LLP <http://75.100.99.194/news_pubs/article_detail.cfm?ARTICLE_ID=3894&ARTICLE_TYPE_ID=2> **[Author Q: please provide updated link]**; Martin D. Beirne & Scott D. Marrs, "The Art of War and Public Relations: Strategies for Successful Litigation," online: FindLaw for Legal Professionals <http://library.findlaw.com/2005/Dec/28/231115.html>; Chan Law Group, "The Art of Litigation: Deception and Settlement," online: Chan Law Group <http://chanlaw.com/pdf/articles/The%20Art%20of%20Litigation-%20Deception%20%20Settlement.pdf>.

35 See Ontario Consultants on Religious Tolerance, "Taosim (a.k.a. Daoism)," online: Religious Tolerance.org <http://www.religioustolerance.org/taoism.htm>.

36 **[Author Q: please provide citation for which translated version you would refer to]**

37 Thomas Cleary, "Translator's Preface" in Sun Tzu, *The Art of War: Complete Texts and Commentaries*, trans. by Thomas Cleary (Boston & London: Shambhala, 2003) 3 at 3 [Cleary Translation].

The following analysis adopts the structure of *The Art of War* which is comprised of the following 13 chapters:

(1) Laying Plans
(2) Waging War
(3) Attack by Stratagem
(4) Tactical Dispositions
(5) Energy
(6) Weak Points and Strong
(7) Manoeuvring
(8) Variation of Tactics
(9) The Army on the March
(10) Terrain
(11) The Nine Situations
(12) The Attack by Fire
(13) The Use of Spies[38]

A. LAYING PLANS

The Art of War is the art of deception, preparation, and skillful knowledge: to know one's opponent and yet be unknown; to have superior intelligence while appearing ignorant; to be fully prepared while not seemingly so; to expect the unexpected; and to feign predictability while maintaining the element of surprise. Therefore, secrecy and misdirection are the key weapons in the warrior's art:

> 18. All warfare is based on deception.
>
> 19. Hence, when able to attack, we must seem unable; when using our forces, we must seem inactive; when we are near, we must make the enemy believe we are far away; when far away, we must make him believe we are near.
>
> 20. Hold out baits to entice the enemy. Feign disorder, and crush him.
>
> 21. If he is secure at all points, be prepared for him. If he is in superior strength, evade him.
>
> 22. If your opponent is of choleric temper, seek to irritate him. Pretend to be weak, that he may grow arrogant.
>
> 23. If he is taking his ease, give him no rest. If his forces are united, separate them.

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[38] It should be noted that other translations utilize different chapter headings. This article uses the headings employed in the Giles Translation, *supra* note 1. See also Chow-Hou Wee, *Sun Zi Art of War: An Illustrated Translation with Asian Perspectives and Insights* (Toronto: Pearson Prentice-Hall, 2003); Thomas Cleary, "Translator's Introduction" in Cleary Translation, *ibid.*, 5-39 [Cleary, "Translator's Introduction"]. A number of translations include annotations and historical extracts from contemporary Chinese commentators. See also Sun Tzu II, *The Lost Art of War*, trans. by Thomas Cleary (San Francisco: HarperCollins, 1996); Sun Pin, *Military Methods of the Art of War*, trans. by Ralph D. Sawyer (New York: Barnes & Noble, 1995).

24. Attack him where he is unprepared, appear where you are not expected.

25. These military devices, leading to victory, must not be divulged beforehand.[39]

The first chapter highlights the importance of creating a strategy founded upon *Five Constants*:

1. THE MORAL LAW

The key to case analysis involves developing both a legal theory and a moral theme. Sun Tzu's Taoist philosophy is similar to Aristotle's *Rhetoric*[40]; the art of persuasion involves not only the logic of one's legal arguments (*logos*), it also requires personal credibility (*ethos*) and emotional impact (*pathos*). The truly effective Trial Warrior must establish the client's "moral high ground"; how and why the arguments relied upon lead the trier of fact to a just, fair, and reasonable result.[41]

2. HEAVEN AND EARTH

It is essential to analyze the client's and the opposing party's respective financial and psychological capacities to sustain the litigation campaign. The best resource is usually the client, and a thorough client interview will elicit preliminary background information. However, the investigative process does not end there; one should not overlook the Internet, private investigative services, public records, and individual and/or corporate searches (for example, property sub-searches, *Personal Property Security Acts*, bankruptcy, and so forth), which often yield vital information.

3. THE COMMANDER

It is equally important to research opposing counsel's litigation tactics and prior trial experience. The best thing to do is to ask colleagues who might know your opponent, their opinions on your opponent's ability, reputation, personality traits, and the like. Alternatively, legal research databases, such as Quicklaw™ from Lexis/Nexis, Litigator™ from WestlaweCARSWELL, and CanLII (Canadian Legal Information Institute), have customized features to search lawyer's litigation records for their reported (and sometimes unreported) cases.

4. METHOD AND DISCIPLINE

Method and discipline refer to organizational efficiency and logistical coherence. As Sun Tzu observes:

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39 Giles Translation, *ibid.* at 6-7.

40 **[Author Q: please provide citation for version/translation used]**

41 See generally Lawrence D. Rosenberg & Jones Day, "Using The Lessons Of Aristotle To Present Outstanding Oral Arguments" *ABA Section of Litigation Newsletter*, 21:2 (Winter/Spring 2007), online: ABA <http://www.abanet.org/litigation/members/docs/sac2006.pdf>. [**Author Q: we were unable to find any reference to volume, issue numbers, or dates – please provide]**

> **26.** 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.[42]

Early preparation entails the efficient procurement of all professional resources, including firm partners, associates, students-at-law, and law clerks. Particularly in the context of complex litigation or class actions, structure and organization, and the marshalling of all available resources — administrative, technological, investigative, and expert — into a cohesive, unified trial advocacy strategy is essential.[43]

To secure victory, the Trial Warrior must consider the following questions:

> 13. (1) Which of the two [clients] is imbued with the Moral law? (2) Which of the two [trial lawyers] has most ability? (3) With whom lie the advantages derived from [financial and psychological resources]? (4) On which side is discipline most rigorously enforced? (5) Which [litigant] is stronger? (6) On which side are [law firms or lawyers] more highly trained? (7) In which [side] is there the greater constancy both in [financial and psychological motivation]?[44]

B. WAGING WAR

Sun Tzu said: "In war, then, let your great object be victory, not lengthy campaigns."[45]

The emphasis here is on early settlement. If settlement is not possible, then speed and efficiency, as opposed to prolonged or dilatory tactics, is favoured:

> 2. When you engage in actual fighting, if victory is long in coming, then men's weapons will grow dull and their ardor will be damped. If you lay siege to a town, you will exhaust your strength.
>
> 3. Again, if the campaign is protracted, the resources of the State will not be equal to the strain.
>
> 4. Now, when your weapons are dulled, your ardour damped, your strength exhausted and your treasure spent, other chieftains will spring up to take advantage of your extremity. Then no man, however wise, will be able to avert the consequences that must ensue.
>
> 5. Thus, though we have heard of stupid haste in war, cleverness has never been seen associated with long delays.
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> 6. There is no instance of a country having benefited from prolonged warfare.
>
> 7. It is only one who is thoroughly acquainted with the evils of war that can thoroughly understand the profitable way of carrying it on.[46]

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42 Giles Translation, *supra* note 1 at 7-8.
43 This includes the use of litigation software, such as Summation™, CaseMap™, and Alchemy™.
44 Giles Translation, *supra* note 1 at 4.
45 *Ibid.* at 16.
46 *Ibid.* at 10-12.

C. ATTACK BY STRATAGEM

Sun Tzu said: "…to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting."[47]

Achieving mastery of procedural and evidentiary rules is not simply an exercise of recitation and rote memorization, but having the insight for when (and when not) to use them to strategic advantage. Interlocutory and pre-trial motions are tactics which should be used sparingly and only if one can predict how the opposition will react and whether it advances the overall objective:

> **18.** Hence the saying: If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.[48]

If the other side's pleadings are open to attack,[49] one should weigh the costs and benefits of bringing a motion, as opposed to using this pleading deficiency to greater advantage at trial or eliminating any avenues of appeal.[50] If, however, the factual and evidentiary record strongly supports a motion for summary judgment, then moving sooner, rather than later, is advisable, particularly where time and money are at a premium, and where the local procedural rules restrict a motion for summary judgment after the action has been set down for trial.[51]

The Trial Warrior must know the five essentials for victory, which according to Sun Tzu are:

(1) He will win who knows when to fight and when not to fight.
(2) He will win who knows how to handle both superior and inferior forces.
(3) He will win whose army is animated by the same spirit throughout all its ranks.
(4) He will win who, prepared himself, waits to take the enemy unprepared.
(5) He will win who has military capacity and is not interfered with by the sovereign.[52]

In summary, the Trial Warrior asserts and maintains control over the litigation by complete knowledge of not only the facts and the law, but also of the relative strengths and weaknesses of both protagonists and antagonists, including his or her own limitations.

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47 *Ibid.* at 17.
48 *Ibid.* at 24-25.
49 In Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 21 or r. 26 [Ontario, *Rules*].
50 The theory of liability ultimately relied upon by the trial judge must be pleaded or developed and addressed at trial: see *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada* (1998), 41 O.R. (3d) 528 (C.A.) at 533-34, leave to appeal to S.C.C. refused, 27309 (20 May 1999); *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at 93-94; *Grass (Litigation Guardian of) v. Women's College Hospital* (2005), 75 O.R. (3d) 85 (C.A.) at 99-101, leave to appeal to S.C.C. refused, 31015 (11 July 2005); *TSP-INTL Ltd. v. Mills* (2006), 81 O.R. (3d) 266 (C.A.) at paras. 29-35; see Ontario, *Rules*, *ibid.*, r. 25.06.
51 See Ontario, *Rules*, *ibid.* r. 48.04(1).
52 Giles Translation, *supra* note 1 at 24.

D. TACTICAL DISPOSITIONS

The fourth chapter emphasizes adaptability and inscrutability.[53] As Sun Tzu said:

> 1. …The good fighters of old first put themselves beyond the possibility of defeat, and then waited for an opportunity of defeating the enemy.
>
> 2. To secure ourselves against defeat lies in our own hands, but the opportunity of defeating the enemy is provided by the enemy himself.
>
> 3. Thus the good fighter is able to secure himself against defeat, but cannot make certain of defeating the enemy.
>
> 4. Hence the saying: One may *know* how to conquer without being able to *do* it.
>
> 5. Security against defeat implies defensive tactics; ability to defeat the enemy means taking the offensive.
>
> 6. Standing on the defensive indicates insufficient strength; attacking, a superabundance of strength.[54]

Trial advocacy involves the effective use of discovery techniques to gain tactical advantages at trial, including:

- To enable the examining party to know the case they have to meet;
- to allow for admissions and dispensing of formal proof of non-contentious matters; and
- to procure admissions on contentious matters.[55]

The advent of computer-generated electronic information has created the need for new rules to address technological advances. In 2005, the U.S. Judicial Conference, which governs American federal courts, made amendments to the Federal Rules of Civil Procedure regarding discovery of electronic evidence based upon the *Sedona Principles*,[56] which were guidelines for electronic discovery established by the *Sedona Conference*, a non-profit legal research institute based in Sedona, Arizona.[57] In 2004, a sub-committee of the Task Force on the Discovery Process in Ontario, chaired by the Honourable Justice Colin Campbell, issued a Report which recommended the development of a "best practices" manual to address

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53 Cleary, "Translator's Introduction," *supra* note 38 at 23.

54 Giles Translation, *supra* note 1 at 26-27 [emphasis in original].

55 James C. Morton, *Advanced Trial Adovicacy and Evidence Issues Lecture Notes: Controlling Discovery* (Osgoode Hall Law School Professional Development Program, 8 January 2007) [unpublished], citing *Modriski v. Arnold*, [1947] O.W.N. 483 (C.A.) at ___. [**Author Q: if Morton provided written notes of this lecture, please provide a copy to us]**

56 The Sedona Conference Working Group 7, *The Sedona Canada Principles: Addressing Electronic Discovery*, online: The Sedona Conference <http://www.thesedonaconference.org/content/miscFiles/canada_pincpls_FINAL_108.pdf>.

57 See The Sedona Conference, online: The Sedona Conference <http://www.thesedonaconference.org>. See also Ken Withers *et al.*, "Judges, lawyers, and the new rules" *TRIAL Magazine* (April 2007) 20.

the discovery of electronic documents, and established Electronic Discovery (e-discovery) Guidelines based upon the *Sedona Principles*, which addressed the following concerns:

> E-discovery is already widely used as an integral part of the discovery process in complex cases and, increasingly, in many types of litigation that are less complex. In part, this is because of the inclusive definition of "document" referred to above. In addition, however, as the available technology matures, lawyers have begun to recognize its capacity, in some cases, to manage document production more efficiently, and to support the discovery process more effectively, than traditional paper-based methods permit.
>
> However, many lawyers have yet to fully recognize the impact of this technology on the discovery process. The overall orientation of the profession remains towards printed documents. This, combined with the absence of clear guidelines on the scope and manner of e-discovery, means that many lawyers remain unfamiliar with their clients' obligations to preserve and produce electronic documents, and with the technology available to retrieve, search and produce them in a cost-effective manner.[58]

Clearly, trial advocacy is becoming increasingly complex, technically challenging, and time-consuming. The resourceful Trial Warrior will anticipate the use of computer experts specializing in e-discovery as either an offensive or a defensive tactic, depending on the circumstances of the case.[59]

E. ENERGY

Sun Tzu focuses in his fifth chapter on the use of force, that is, using direct and indirect methods to achieve tactical advantages: "In all fighting, the direct method may be used for joining battle, but indirect methods will be needed in order to secure victory."[60]

Sun Tzu adds:

> **10.** In battle, there are not more than two methods of attack — the direct and the indirect; yet these two in combination give rise to an endless series of manoeuvres.
>
> …
>
> **17.** Simulated disorder postulates perfect discipline; simulated fear postulates courage; simulated weakness postulates strength.[61]

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58 Ontario Discovery Task Force Sub-Committee, *Guidelines for the Discovery of Electronic Documents in Ontario*, online: Ontario Bar Association <http://www.oba.org/en/pdf_newsletter/E-Discovery Guidelines.pdf> at 1. See also Court of Queen's Bench of Alberta, Civil Practice Note, 14, "Guidelines for the Use of Technology in Any Civil Litigation Matter" (30 May 2007), online: Alberta Courts <http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn14technology.pdf>.

59 See also Samuel H. Solomon, "The Art of War: Pursuing Electronic Evidence as Your Corporate Opportunity" (January 2002), online: Doar Litigation Consulting <http://www.doar.com/apps/uploads/literature13_art_of_war.pdf>.

60 Giles Translation, *supra* note 1 at 35.

61 *Ibid.* at 37, 39.

The importance of organizational skills, particularly in complex litigation, manifested in the assembly of a litigation team, requires collaboration among colleagues, staff, investigators, expert, and lay witnesses. Sun Tzu also emphasizes the need for change in tactics and surprise manoeuvres, using opponents' psychological predispositions to draw them into vulnerable positions.

This approach relies upon a group dynamic whose unity, coherence, and momentum propels the litigation team, rather than relying upon individual qualities and talents: "The clever combatant looks to the effect of combined energy, and does not require too much from individuals. Hence his ability to pick out the right men and utilise combined energy."[62]

F. WEAK POINTS AND STRONG

The sixth chapter deals with the Taoist concept of "emptiness and fullness," which is commonly adapted to martial arts. Sun Tzu said:

> **27.** All men can see the tactics whereby I conquer, but what none can see is the strategy out of which victory is evolved.
>
> **28.** Do not repeat the tactics which have gained you one victory, but let your methods be regulated by the infinite variety of circumstances.[63]

In the context of trial advocacy, Sun Tzu's admonition against repeating the same tactics gained in one victory to a new and different set of facts is essentially a reaffirmation of the recent psychological literature on cognitive biases and illusions, particularly the hindsight bias[64] and egocentric bias.[65] Instead, the Trial Warrior approaches each brief mindful of the idiosyncrasies of the human mind, aware that clients, judges, and even the Trial Warrior are prone to such cognitive illusions. Hence, the Trial Warrior approaches trial advocacy with intellectual vigour and professional aplomb. Rather than relying on boilerplate precedents, outdated legal principles, or unpersuasive case law, the Trial Warrior actively participates in trial lawyer associations,[66] professional development, and continuing legal education.

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62 *Ibid.* at 41.

63 *Ibid.* at 52.

64 Hindsight bias is the natural tendency of people to:

> [O]verstate their own ability to have predicted the past and believe that other should have been able to predict events better than was possible. Psychologists call this tendency for people to overestimate the predictability of past events the "hindsight bias." It occurs because learning an outcome causes people to update their beliefs about the world. People then rely on these new beliefs to generate estimates of what was predictable, but they ignore the change in their beliefs that learning the outcome inspired.

Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, "Inside the Judicial Mind" (2001) 86 Cornell L. Rev. 777 at 799 [citations omitted].

65 Egocentric biases occur when "[p]eople tend to make judgments about themselves and their abilities that are 'egocentric' or 'self-serving'. People routinely estimate, for example, that they are above average on a variety of desirable characteristics, including … professional skills" (*ibid.* at 811-12).

66 For example, Ontario Trial Lawyers Association, The Advocate's Society, American Association for Justice, American Bar Association, Alberta Civil Trial Lawyers Association, Atlantic Provinces Trial Lawyers Association, Saskatchewan Trial Lawyers Association, Trial Lawyers Association of British Columbia, Association of Personal Injury Lawyers, and Australian Lawyers Alliance.

G. MANOEUVRING

Sun Tzu's seventh chapter reiterates the main themes of gathering information and preparation in the context of battlefield organization and combat manoeuvres:

> **21.** Ponder and deliberate before you make a move.
>
> **22.** He will conquer who has learnt the artifice of deviation. Such is the art of manoeuvring.[67]

Sun Tzu also said: "On the field of battle, the spoken word does not carry far enough: hence the institution of gongs and drums. Nor can ordinary objects be seen clearly enough: hence the institution of banners and flags."[68]

By analogy, a demonstrative exhibit, like a picture, is worth a thousand words.[69] Subject to issues of admissibility and relevance,[70] judicious use of demonstrative evidence to highlight, or simplify complex or technical expert evidence (for example, medical, accounting, or engineering), is a highly effective advocacy tool.

Sun Tzu also offers the following sage advice, which echoes the justice-centred model and "ethical professional" archetype:

> 34. Do not pursue an enemy who simulates flight; do not attack soldiers whose temper is keen.
>
> 35. Do not swallow bait offered by the enemy. Do not interfere with an army that is returning home.
>
> 36. When you surround an army, leave an outlet free. Do not press a desperate foe too hard.
>
> 37. Such is the art of warfare.[71]

H. VARIATION OF TACTICS

The eighth chapter of *The Art of War* deals with adaptation, which Thomas Cleary notes "naturally depends on readiness … [but] does not just mean material preparedness; without a suitable mental state, sheer physical power is not enough to guarantee victory."[72] Sun Tzu identifies five dangerous roads and psychological dangers which the Trial Warrior must avoid in order to be victorious:

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67 Giles Translation, *supra* note 1 at 63.

68 *Ibid.* at 64.

69 See Geoffrey D.E. Adair, "The Uses and Abuses of Demonstrative Evidence" in Alan W. Bryant, Marie Henein & Janet A. Leiper, eds., *Law Society of Upper Canada Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004) 365; Roger G. Oatley, "Demonstrative Evidence: Uses and Abuses" in Bryant, Henein & Leiper, 379.

70 See Archibald & Davies, *supra* note 14.

71 Giles Translation, *supra* note 1 at 68-70.

72 Cleary, "Translator's Introduction," *supra* note 38 at 25.

3. There are roads which must not be followed, armies which must be not attacked, towns which must be besieged, positions which must not be contested, commands of the sovereign which must not be obeyed.[73]

…

12. There are five dangerous faults which may affect a general: (1) Recklessness, which leads to destruction; (2) cowardice, which leads to capture; (3) a hasty temper, which can be provoked by insults; (4) a delicacy of honour which is sensitive to shame; (5) over-solicitude for his men, which exposes him to worry and trouble.[74]

Thus, a Trial Warrior must maintain not only professional objectivity throughout, but also exhibit professional collegiality and civility as a means of fostering settlement:

13. These are the five besetting sins of a general, ruinous to the conduct of war.

14. When an army is overthrown and its leader slain, the cause will surely be found among these five dangerous faults. Let them be a subject of meditation.[75]

I. THE ARMY ON THE MARCH

Sun Tzu devotes the ninth chapter to manoeuvring armies, emphasizing the physical, social, and psychological factors which prevail. It recapitulates the theme of preparedness, organization, and versatility in the midst of battle: "He who exercises no forethought but makes light of his opponents is sure to be captured by them."[76] Similarly, Sun Tzu provides the following psychological insights:

18. When the enemy is close at hand and remains quiet, he is relying on the natural strength of his position.

19. When he keeps aloof and tries to provoke a battle, he is anxious for the other side to advance.

…

24. Humble words and increased preparations are signs that the enemy is about to advance. Violent language and driving forward as if to the attack are signs that he will retreat.

25. When the light chariots come out first and take up a position on the wings, it is a sign that the enemy is forming for battle.

26. Peace proposals unaccompanied by a sworn covenant indicate a plot.[77]

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73 Giles Translation, *supra* note 1 at 73.
74 *Ibid.* at 77-79.
75 *Ibid.* at 79.
76 *Ibid.* at 97.
77 *Ibid.* at 87-88, 90-91.

J. TERRAIN

In the tenth chapter of *The Art of War*, Sun Tzu advances the concepts of tactical manoeuvring and adaptability to different types of terrain. Intelligence, in the form of preparation and foreknowledge, of the relative strengths and weaknesses of one's forces and those of one's opponents is relative to surveying the battlefield. Extending the metaphor, thorough case analysis and continuous witness preparation is the fulcrum between victory and defeat: "If you know the enemy and know yourself, your victory will not stand in doubt; if you know Heaven and know Earth, you may make your victory complete."[78]

Therefore, trial preparation is a dynamic, rather than static process. The trial brief, trial book, exhibit book, and various evidentiary proof checklists must be continuously revised and updated. So, too, must preparation of lay and expert witnesses. Once the trial date has been set, the exercise of redrafting and editing the opening statement and closing argument, and refining, or sometimes discarding trial themes continues in earnest, as does the need to draft and revise written trial arguments and briefs of authorities, which should be provided to the trial judge at the beginning of trial.[79]

K. THE NINE SITUATIONS AND THE ATTACK BY FIRE

The next two chapters of *The Art of War* are helpful metaphors for cross-examination strategy. In chapter eleven, Sun Tzu expands upon the analysis of the physical, social, and psychological tactics appropriate to the terrain and outlines nine situations:

> 1. Sun Tzu said: The art of war recognises nine varieties of ground: (1) Dispersive ground [civil war]; (2) facile ground [shallow incursion]; (3) contentious ground [advantageous to either side]; (4) open ground [free travel]; (5) ground of intersecting highways [controlled territory vital to communications]; (6) serious ground [deep incursion]; (7) difficult ground [barren land]; (8) hemmed-in ground [limited access subject to ambush]; (9) desperate ground [decisive battleground].[80]

Sun Tzu stresses not only the physical, but also the social and psychological tactical approach: "The different measures suited to the nine varieties of ground; the expediency of aggressive or defensive tactics; and the fundamental laws of human nature: these are things that must most certainly be studied."[81]

When outlining a cross-examination plan of the opposition's expert, take into account the following fertile terrain for attack:

- Questionable credentials;
- weak foundation for the expert opinion;

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78 *Ibid.* at 112-13.

79 See Justice Todd Archibald, "Tips for an Effective Closing Address in a Judge Alone Trial" *Annual Review of Civil Litigation, 2002*, Chapter J (Toronto: Thomson Carswell, 2005). [**Author Q: could not obtain. Please provide cover page and first page of article]**

80 Giles Translation, *supra* note 1 at 114.

81 *Ibid.* at 134.

- erroneous assumptions;
- faulty science or lack of reproducible analysis; and
- situational or cognitive biases.[82]

While each trial lawyer develops a cross-examination style reflecting his or her personality traits, an effective cross-examination should reflect the dual objectives of aim deception and rapidity: "Rapidity is the essence of war: take advantage of the enemy's unreadiness, make your way by unexpected routes, and attack unguarded spots."[83]

In chapter twelve, Sun Tzu focuses on incendiary attacks, discussing the technical and strategic considerations for follow-up:[84]

> 1. Sun Tzu said: There are five ways of attacking with fire. The first is to burn soldiers in their camp; the second is to burn stores; the third is to burn baggage-trains; the fourth is to burn arsenals and magazines; the fifth is to hurl dropping fire amongst the enemy.[85]

Sun Tzu also says:

> 15. Unhappy is the fate of one who tries to win his battles and succeed in his attacks without cultivating the spirit of enterprise; for the result is waste of time and general stagnation.[86]

Therefore, the Trial Warrior must establish and maintain control of the expert witness by the following means:

- Keeping the expert guessing;
- keeping the expert on the defensive;
- limiting opportunities for "lecturing," "pontificating," or "proselytizing";
- limiting or eschewing open-ended questions;
- buttressing your expert's opinion through the opposing expert's acceptance of your expert's:
    - Professional credentials,
    - Factual analysis,
    - Reasonableness of assumptions,
    - Lack of bias and professional neutrality, and
    - Scientifically rigorous use of methods, testing, protocols and procedures.[87]

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82 Archibald & Davies, *supra*, note 14 at **____. [Author Q: please provide pinpoint]**.

83 Giles Translation, *supra* note 1 at 122-23.

84 Cleary, "Translator's Introduction," *supra* note 38 at 28.

85 Giles Translation, *supra* note 1 at 150-51.

86 *Ibid.* at 157.

87 See also Justice Todd Archibald & Kenneth Jull, "An Empirical Approach Towards a New Methodology of Impeachment" *Annual Review of Civil Litigation, 2004*, (Toronto: Thomson Carswell, 2005) 1. See also Irving Younger, *The Section of Litigation Monograph Series No. 1: The Art of Cross-Examination: Proceedings of a speech delivered at the ABA Annual Meeting, Montreal, 1975* (New York: ABA, Section of Litigation, 1976). Younger's Ten Commandments are: "(1) Be Brief; (2) Use Plain Words; (3) Use Only Leading Questions; (4) Be Prepared; (5) Listen; (6) Do Not Quarrel; (7) Avoid Repetition; (8) Disallow Witness Explanation; (9) Limit Questioning; and (10) Save [the ultimate point] for Summation" (at 21-32).

Often, the difference between a failed and successful cross-examination will depend upon the exercise of balanced judgment and modest goals: "Move not unless you see an advantage; use not your troops unless there is something to be gained; fight not unless the position is critical."[88]

L. THE USE OF SPIES

The final chapter discusses espionage and subterfuge. It reinforces the primacy of intelligence:

> **4.** Thus, what enables the wise sovereign and the good general to strike and conquer, and achieve things beyond the reach of ordinary men, is *foreknowledge*.
>
> **5.** Now this foreknowledge cannot be elicited from spirits; it cannot be obtained inductively from experience, nor by any deductive calculation.
>
> **6.** Knowledge of the enemy's dispositions can only be obtained from other men.
>
> **7.** Hence the use of spies, of whom there are five classes: (1) Local spies; (2) inward spies; (3) converted spies; (4) doomed spies; (5) surviving spies.[89]

In addition to the various intelligence-gathering methods discussed in the first and fourth chapters above, the Trial Warrior should not overlook the long-established maxim that there is no property in a witness.[90] This is subject to professional rules of conduct which may restrict direct communication with corporate representatives, such as directors, officers, or employees, unless consent from opposing counsel is given or is otherwise authorized by law.[91]

III. CONCLUSION

Sun Tzu's *The Art of War* is "strategic functionalism" at work. The *form* (i.e. tactics based upon the art of deception, preparation, and skillful knowledge) is a function of the *content* (strategy based upon stated objectives). Sun Tzu's *The Art of War* is an invaluable source of inspiration for any trial lawyer. For the "zealous advocate," *The Art of War* provides a blueprint for developing and executing a comprehensive client-focused litigation strategy. For the "ethical professional," the Taoist philosophy permeates the text, raising awareness of the need to avoid conflict, yet illuminating the balance of achieving victory without destroying the enemy. For the "knowledge technocrat," the rationalist minimalist approach places greater emphasis on organizational strength over individual talents and skills, particularly useful in the context of complex litigation management. To paraphrase Sun Tzu: "The art of war is of vital importance to [trial advocacy].… It is a matter of [victory] and

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88 Giles Translation, *supra* note 1 at 158.

89 *Ibid.* at 163-64 [emphasis in original].

90 *Smith v. Jones*, [1999] 1 S.C.R. 455, Major J., dissenting at para. 15. See also *R. v. Gibbons* (1946), O.R. 464 at 472 (C.A.). [**Author Q: please verify *Gibbons* pinpoint]**

91 See LSUC, *Rules*, *supra* note 20, r. 4.03.

[defeat], a road either to safety or to ruin. Hence it is a subject of inquiry which can on no account be neglected."[92]

[92] Giles Translation, *supra* note 1 at 1.