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Tips for Managing Expedited Litigation From History's Great Strategists

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Now the reason the enlightened prince and the wise general conquer the enemy whenever they move and their achievements surpass those of ordinary men is foreknowledge.

— Sun Tzu, *The Art of War*¹

Managing litigation is like managing a protracted war — it requires careful planning, attention to the critical components of your case (the documents, the witnesses, and the experts), and, above all else, an obsessive focus on the primary objective. This is particularly true in expedited litigation, in which time is the ultimate enemy and the tight schedule magnifies mistakes. In this context, here are seven tips to managing expedited litigation, pulled from some of the most influential military strategists in history.

A. Develop Your Objectives Early — and Maintain Your Focus on Them

According to General Colin Powell, one critical component of good planning is to “[f]igure out what is crucial ... then stay focused on that. Never allow side issues ... to knock you off track.”² Similarly, in any litigation, it is important to know *why* you are litigating, and to stay focused on that reason or those reasons. In the ordinary case, you can afford to get distracted — typically, you have time to get back on track. But in expedited litigation, where you may be preparing an entire case for trial in a matter of a month or two, a distracting discovery foray or dispute can prevent you from adequately preparing a critical issue in the case.

1. Sun Tzu, *The Art of War* 144 (Samuel B. Griffith trans., Oxford Univ. Press 1971) (1963).

2. Oren Harari, *The Leadership Secrets of Colin Powell* (McGraw-Hill Professional 2003) (2002) (quoting General Powell).

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By setting your objectives early, you define the mission for the entire team. Everyone — from the client to the most junior team member — will have the high goals firmly in mind and, thus, will distinguish between the fact that contributes to the objectives and the side-show that does not. Furthermore, assuming you have multiple objectives depending on the outcome of various issues in the case, an unwavering focus on these objectives will help you optimize your outcome, regardless of the risks.

Your objectives can help control costs, too. Clear case objectives allow each member of your team to perform a real-time cost-benefit analysis by answering the simple question: does this help us achieve our objective directly or only tangentially? This can help save money by cutting down on either paralysis-by-analysis or the well-intentioned, but costly, sense that every project is of critical importance (and, thus, worth spending countless hours on).

B. Know the Facts and the Law Early

“Those who do not know the conditions of the mountains and forests, hazardous defiles, marshes and swamps, cannot conduct the march of an army.”³ In addition to this wisdom, Sun Tzu admonishes the strategist to have “foreknowledge,” or knowledge of the enemy.⁴ Although these concepts may not have a direct parallel in litigation, advance knowledge of your opponent and the terrain on which the litigation will be conducted (*i.e.*, the facts and law) is critical to success, because such knowledge can help define the entire case.

As a practical matter, one cannot and should not define objectives without having some understanding of each. Objectives defined without reference to what one can actually achieve are nothing more than dreams. By learning the case quickly, you can begin planning the path to victory — whether through mediation, in summary judgment, or trial. Such knowledge also can help you decide whether to stay on the expedited path to a decision by the court, or to seriously explore other options.

This, of course, counsels in favor of identifying and interviewing key witnesses, collecting and reviewing their documents, and even retaining a consulting expert, as soon as possible. Having a brain-trust — lawyers, client contacts, and experts — who can quickly and efficiently separate the wheat from the chaff will make you more efficient and focused in the early days. This team can help a lawyer not steeped in a particular business to understand its nuances. In turn, the legal team can more efficiently pinpoint problems or hurdles (the “hazardous defiles” of which Sun Tzu warns) and chart a course around them.

C. Get Out in Front

“He who occupies the field of battle first and awaits his enemy is at ease; he who comes later to the scene and rushes into the fight is weary.”⁵ This additional piece of Sun Tzu wisdom is a corollary to the previous two points. It is critical that, once armed with clear objectives and foreknowledge, the litigator occupy the field of battle first.

3. Tzu, *supra* note 1, at 104.

4. *Id.* at 144.

5. *Id.* at 96.

In the litigation context, this means several things. First, it means appearing at the initial discovery planning conference under Rule 26(f) with a clear sense (whether plaintiff or defendant) about what the case is and is not about. In a case in which a plaintiff alleges that a board of directors failed to disclose material information in a proxy statement, for example, the case is about what the board knew or reasonably could have known — not about what low-level sales people knew or believed about product sales at the time of the disclosure. Advance preparation should allow the litigator to clearly articulate how many witnesses are at issue — those with reporting responsibility to the board and perhaps the next layer of employees below them, in this example, and what types of documents those employees are likely to have, the reports they present to the board, and so on. With advance preparation, the litigator can set the battlefield in the way that maximizes the strengths of his or her case, rather than reacting to the other party's case.

Advance preparation also allows the litigator to arrive first on the battlefield with the court, in the initial Rule 16(a) conference. Federal Rule of Civil Procedure 16(a) allows the court to schedule an initial conference to discuss a number of topics, all designed to streamline and manage a case, including “expediting disposition of the action.” The party who appears at this conference prepared to discuss what the case is and is not about and to articulate a sensible discovery plan will have instant credibility and a leg up on counsel who is not as conversant with the issues and needs of the case.

Similarly, carefully tailored Rule 26(a) disclosures allow the litigator to provide the court with a roadmap of the necessary discovery — providing further credibility and operational “ease” of the type to which Sun Tzu refers.⁶ Often, litigators who have not yet taken the time to learn the case follow the “kitchen sink” approach to drafting initial disclosures. This, of course, gives the court a clear choice between the course charted by the party that has done its homework and appears to have a good sense of the journey ahead and the party that has not. In short, the prepared litigator who occupies the battlefield first, with a clear plan, has set the stage for victory early.

D. Simple and Direct

“An active, courageous, and resolute adversary will not leave us time for long-range intricate schemes ... It seems to us that this is proof enough of the superiority of the simple and direct over the complex.”⁷ According to Carl von Clausewitz, author of the well-respected treatise *On War*, simple is always better. For those of us in the practice of law, it often seems that “clever” is better. We should defer to von Clausewitz.

Recently, one of my colleagues and I were asked to take over a case that was in the middle of an arbitration. We had to prepare for “expedited litigation,” in a sense, as we had only a week before the next round of hearings. Applying some of the principles above, we hit the ground to learn the facts, interview key witnesses, consult with experts, and test (and in some instances set) objectives.

6. Rule 26(f) requires an initial planning meeting 21 days before the court's first scheduling order, and Rule 26(a) requires initial disclosures 14 days thereafter. Accordingly, a litigator should appear in court for an initial scheduling conference with Rule 26(a) disclosures in hand.

7. Carl Von Clausewitz, *On War* 228-29 (Michael Howard & Peter Paret eds. and trans., Princeton Univ. Press 1976) (1832).

Once we waded into the case, we were struck by the number of things our client's former counsel was trying to accomplish in the case. In effect, this lawyer — who had been steeped in several, related cases for this company over a period of years — was trying to win all of the related cases in one action, rather than focusing on the simple and direct route to winning the battle at hand. While it is important to take consistent positions, it also is essential to win the case in front of you, rather than presenting so many themes or facts that you lose the judge, jury or arbitrator.

E. Don't Let Your Technology Overwhelm Your Focus.

According to the seminal treatise on the role of technology in conflict, *The Strategy of Technology*, technological “capability combines with ideology to produce a powerful effect on intentions, which, be they ever so pure before the advantage was obtained, cannot fail to change with the increasing capabilities: if capabilities grow, intentions become more ambitious.”⁸ In other words, our tendency is to take on ever-larger projects (*i.e.*, greater ambitions) when technology allows us to do so. In this day and age, litigators think nothing of collecting documents from hundreds of corporate employees — even when the information in the hands of low-level employees never reached key decision-makers in the company. Even though technology makes it possible to download and search terabytes of data with relative ease, expedited litigation demands a targeted, disciplined collection, review and production of data — or, as the authors of *The Strategy of Technology* insist, the strategist has a critical role in balancing real-world challenges against technological promises.⁹

In a recent case, for instance, we had about a week to collect, review and produce documents. Our electronic discovery vendor told us it would take at least three days to load our data onto their system and then three days to process the data for production. In other words, we would have had about a day to review everything we collected. Accordingly, we did not download all e-mails and documents from all employees in select departments, as a project of that magnitude would have derailed our entire effort. Instead, we used our time to interview the central custodians, whom we had identified earlier in our process, about the types of documents they created in the course of their business and, based on those interviews, to collect only those documents that appeared responsive or supportive of our case. We also ran e-mail searches and harvested e-mails restricted by dates and limited to specific custodians. With that said, it is critical to hire vendors that understand your time constraints and can leverage technology, like virtual servers and quad-core data processors, to speed up data processing.¹⁰

Similarly, in order to avoid being overwhelmed by the technological options for trial presentation, it is important to plan for trial from the beginning of the case. If a litigation team intends to use TrialDirector by InData Corporation, for example, to present evidence at trial, load data into that program immediately, rather than converting LiveNote deposition transcripts into the InData's Case Library in the days before trial (while the programs are compatible, the conversion is not effortless). Request that opposing counsel produce data in a compatible format, too. Task lawyers on the team with reading deposition transcripts for admissions and impeachment *the first time* they review the transcripts, not

8. Stefan T. Possony, Jerry E. Pournelle & Francis X. Kane, *The Strategy of Technology* (Electronic Version 1997) (1970).

9. *Id.* at Ch. 4. The strategist “must be able to judge the engineers and decide which ones are giving him correct advice on what can be done now and which ones simply do not understand the situation.”

10. See, *e.g.*, Marco S. Nasca, *Virtual Machines Processing Data for Electronic Discovery*, IRIS EYES, June, 2008, <http://www.irisds.com/June-2008-Edition-IRIS-Eyes.pdf>.

in the days leading up to trial. Again, because the technology exists, it is highly likely the trial team will want to use it — or risk looking under-prepared against an opponent using such technology — but do not allow the technology to overwhelm a focus on the case objectives.

F. Communicate With Your Team

According to Sun Tzu, “[h]e [or she] whose ranks are united in purpose will be victorious.”¹¹ In a fast moving battle, or case, it can be difficult to maintain unity among the ranks. Once a team has divided and is on the field of battle (an offensive team preparing to take depositions, a defensive team preparing executive management to be deposed, and an expert team, for example), each group is discovering different things about the opposition — and about the case. Sometimes, these facts and perspectives lead different members to conclude that wholly disparate issues are of critical importance. Similarly, the foot soldiers — the young associates who bear the brunt of document review — must have up-to-date information, or the litigation team may miss vital facts.

Accordingly, it is critical to set a clear course of action from the beginning of the case. Then, it is equally important that the team communicate regularly. Often, this may mean crowding everyone into a conference room at the end of a long day or scheduling a regular conference call. However accomplished, knowledge must be shared in both directions — from the top down and the bottom up — to ensure that everyone is acting of one accord. During a rapidly evolving expedited case, consider having such meetings daily to avoid a mission-impairing informational disconnect.

Furthermore, it is not enough to define the team as the lawyers on the litigation team. Consider having a regularly scheduled conference with members of the client’s senior management. In-house lawyers typically appreciate this — it allows them to keep management in the loop and to manage corporate expectations, without having to nag senior people for time in the midst of a hectic process. Also, consider including consulting experts and, in limited circumstances, testifying experts, in such meetings and calls (members of the “brain trust” discussed above). This gives experts the opportunity to issue-spot in real time, which can sharpen discovery efforts or prevent a disaster, and to understand management objectives in the case (which can help control expert costs).

G. Be Flexible

Captain Sir Basil Liddell-Hart, a modern-day founder of the strategy of armored warfare, developed eight strategic maxims, the second of which is to “keep your objective always in mind, while adapting your plans to circumstances.”¹² Put simply: be flexible, but always focused on your objectives. Often in litigation, new facts come to light that appear to merit a change in course or require effort down a new path. It is important to be flexible to — capitalize on opportunities or adapt to problems — but to avoid wasting time that does not contribute to an objective or, worse yet, leads to a dead-end.

11. Tzu, *supra* note 1, at 83.

12. Sir Basil H. Liddell-Hart, *Strategy* 348-49 (2d ed. rev., Praeger 1968).

This article is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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A corollary to Liddell-Hart's second maxim is that "[n]o battle plan survives contact with the enemy."¹³ This piece of strategic wisdom comes from Helmuth von Moltke, one of the greatest warfare strategists of the 19th Century. Von Moltke regarded strategy as a practical art of adapting means to ends. He considered the main task of military leaders to be the extensive preparation and focus on possible outcomes. According to von Moltke, the leader who has prepared sufficiently and can adapt when circumstances disrupt a well-laid battle is most likely to succeed.

Of course, the need for flexibility simply reinforces each of the lessons above. These lessons provide the discipline needed to quickly assimilate to changed facts or circumstances. They also help prevent a team from being so overwhelmed with one particular issue (for instance, preparing exhibits and depositions for trial) that it cannot make course-corrections in other parts of the case.

There is some tension between the initial lesson — that of unwavering focus on an objective and the maxim of flexibility. The optimal approach seems to be to treat the "objective" like a beacon on the horizon. Circumstances may dictate an indirect course to the beacon (flexibility) but, without an unwavering focus on the beacon, the traveler may end up at an entirely undesired destination.

Conclusion

There is no secret to success, whether in warfare or litigation. Effective litigation, particularly expedited litigation, requires hard work, dedication, and legal acumen. Beyond that, strategic discipline — setting objectives, learning the facts and law early, occupying the battlefield first and setting the terms of engagement, crafting a simple and direct message, managing the technology, maintaining good communication, and staying flexible — can provide the winning edge.

13. Paul Lemberg, *Be Unreasonable: The Unconventional Way to Extraordinary Business Results* 40 (McGraw-Hill 2007).