CHANNELING YOUR INNER NAPOLEON -

APPLYING THE PRINCIPLES OF WAR TO YOUR LITIGATION CAMPAIGNS

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In the late 1980s, in the course of embracing a philosophy known as *Maneuver Warfare*, the United States Marine Corps formalized a policy of educating its junior officers not only with respect to leadership and small unit tactics, but also in what can be loosely termed "the art of war." No longer would such lofty ground be reserved to War College curriculums designed for senior officers. Consequently, irrespective of their future operational specialties, all lieutenants attending the Marine Corp's Basic School in Quantico, VA (including the author) were exposed to a course of study that included an extensive reading list and a curriculum involving certain largely universal strategic maxims known as "the principles of war." Most people associate the principles of war with the French general and emperor Napoleon, and make the further assumption that he was the father of such principles.

In actuality, Napoleon was the father of only one tactical innovation (the divisional square). His greatness stemmed not from the development of any strategic concepts, but from his unique ability to compile, understand and apply in the course of his campaigns the principles he learned from exhaustive study of such masters as Julius Caesar, Hannibal and Alexander. He had an unequaled ability to apply those strategic tools to the particular enemy, terrain and disposition of forces he was facing to conceive and execute a winning strategy. Napoleon fought over sixty major battles in his career, and only near the end of his reign when his physical, spiritual and mental powers began to wane would he experience major defeats. He was ultimately deposed (for a second time) after being eclipsed at Waterloo by Great Britain's Duke of Wellington. There Wellington, at the height of his powers, had to some extent deciphered Napoleon's tendencies and developed his own tactical innovation (the use of reverse slopes to reduce the impact of artillery bombardment) which contributed greatly to his success at Waterloo.

The principles of war Napoleon so expertly employed in battle are in many cases applicable to civil actions and business. What follows below is a listing of each principle of war as adopted by the

United States military (as other nations collate and categorize them differently), a brief synopsis of its military meaning, and some suggestions on how that strategic concept may apply to civil litigation. These principles are taught to Marines using the acronym MOOSE MUSS: *Mass, Objective, Offensive, Surprise, Economy of Force, Maneuver, Unity of Command, Security and Simplicity*.

Mass involves the concentration of a decisive amount of combat power at a critical time and location. In the age of the Napoleonic wars, that typically involved the massing of actual troops, cavalry and artillery at the critical juncture. Today this concept is spoken of in terms of massing effects (and not troops), given the lethality of modern weapon systems and the need for dispersement to minimize the danger to massed troops. Either way, the concept involves bringing as much decisive force to bear as possible, in the right spot and at the key moment. In litigation matters, very often the trial date or start of arbitration is the critical point in time. Examples of how counsel can mass his assets for employment at that juncture include a) ensuring that one has engaged and prepared all necessary experts; b) staffing the case with sufficient attorneys and paralegals; c) arranging for specialists needed to prepare or present animations or demonstrative aids; and d) coordinating the efforts of all these players to ensure their work product or assistance is ready and available at that critical moment. *Mass* can also be achieved by being fully and completely prepared for all phases of trial on the first day.

Objective is the need to direct all of one's operations toward a well-defined and dispositive goal. The military no longer thinks in linear terms of strictly gaining geographical objectives, but rather of destroying an enemy's ability and will to fight. Napoleon fully understood that destruction of the enemy force was always his main purpose, while his Austrian and Prussian opponents were in many cases blinded by the perceived need to hold and defend strategically meaningless fortresses or other ground. In similar fashion, it behooves litigation counsel to avoid linear focus on merely obtaining a judgment or no cause verdict. The ultimate objective may be more akin to obtaining a certain amount of money (by

whatever means), or of resolving the defense of a matter in a way that lowers the transaction costs to the client well below that of obtaining a summary judgment or no cause verdict. Irrespective of what that goal is, lead counsel must ensure that his efforts (and those of his team) are strictly focused on meeting the objective and not on tangential or ethereal benefits that prove to be a distraction of effort and manpower. During the early stages of a case it may also be helpful to confer with the client to form a consensus on what the objective is, and to then plan backwards from the trial date by identifying the tasks and intermediate objectives that need to be accomplished along the way and when those need to be done.

Offensive is arguably the most important of the principles discussed here. It can be summarized as the process of seizing and maintaining the initiative in a way that disrupts the enemy's ability to engage in effective operations. For example, often through the speed of his advances and the unusually quick tempo of his operations, Napoleon was able to surprise and confuse his enemy, and thereby gain and maintain the initiative. By gaining the initiative he was able to impose his will on the enemy, and correspondingly deny the enemy the time and clarity needed to effectively execute operations which could interfere with the achievement of his objective. Having identified and communicated the objective for the civil action, and drafted a plan or work list to achieve that end, how can counsel seize and maintain the initiative? One method is to begin dropping proverbial bombs (provided there is a need for them and they are not advanced for some improper purpose). The determined, methodical and timely execution of the tasks on the work list will serve this purpose. If serving a pleading in state court, perhaps one attaches requests to admit, interrogatories and discovery requests to the service package. If required to wait until the meet and confer as required by the federal rules of civil procedure, those papers can go out immediately after the meet and confer is concluded. Depositions are requested to immediately follow the deadlines for the discovery responses. Third party witnesses are contacted, interviewed and favorable affidavits are obtained. Motions in limine are prepared well in advance. In all,

the whirlwind of your execution makes it difficult for opposing counsel to effectively formulate his own plans and meet his own objectives. If executed correctly, an up tempo offensive breeds rewards disproportionate to its substantive merits.

A related concept is getting "inside" your opponent's "OODA Loop." The OODA loop is the moniker for a conceptual decision making sequence consisting of the following steps: Observe, Orient, Decide, and Act. The OODA Loop concept was developed by Air Force Colonel and strategist John Boyd to help war fighters understand the ways their decision making process can help them win and survive in combat situations. Originally designed to explain the thought process of a single actor, such as a fighter pilot engaged in a dog fight, the OODA concept has been expanded to tactical and strategic level military decision making, and is now applied to the civilian world's commercial operations and learning processes. The OODA is actually a recurring decision making cycle, or a series of loops, that is generated with each new changing factor or development.

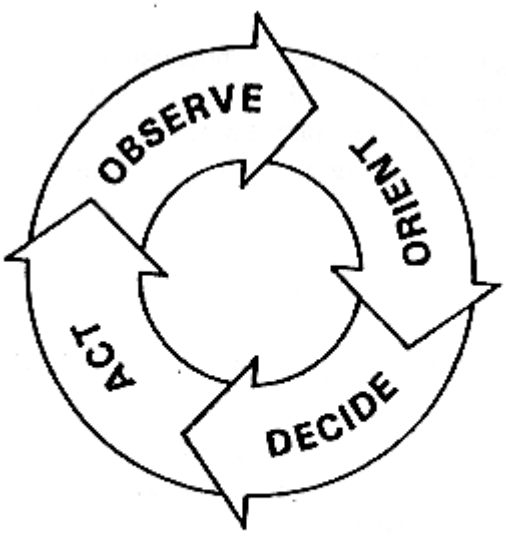

Figure 2. The command and control process: The OODA loop.

"Getting inside" your opponent's loop means that you are processing and reacting to information at a pace faster than he will ultimately be able to respond to. Stated another way, if you maintain a rapid decision making tempo (which is faster than your opponent's), you will ultimately defeat your opponent's ability to effectively react to your actions. The inherent chaos and confusion of a situation is effectively embraced and funneled toward the opponent while you continue to take actions which are designed to achieve your objective. Applying this concept to litigation, one can see how an offensive mind set and aggressive tempo are critical elements to keep in mind when designing and prosecuting the campaign.

Surprise, which in military terms goes hand in hand with deception, is a force multiplying concept. Achieving surprise, either with respect to tempo, direction or location of main effort, timing, or the size of force, can result in success which is disproportionate to the amount of effort expended. Napoleon's troops, for example, though weary from long and repeated forced marches, marveled at his ability to win battles with their feet instead of by force of arms. Confounding his enemies on many occasions by seemingly appearing out of nowhere well in their rear or astride their lines of communications, Napoleon won as many battles through unexpected maneuver, deception and surprise as he did through application of fire power. In the litigation context, counsel should make every effort to keep his opponent off balance. Consider how you can best surprise opposing counsel with the focus of your proofs or argument. It is often said that by the time of trial, it is clear to both sides exactly what the opposing line of attack will be. If true with respect to your presentation, that is a disservice to your client. This is not advocating "trial by surprise," but rather the maintenance of confidentiality about the focus of one's main effort at trial. As an example, surprise can be achieved by allowing opposing counsel to believe your focus it will be subject A when in fact it will be subject B. One can ethnically and appropriately disclose all facts and exhibits to opposing counsel without revealing one's strategy.

Powerful demonstrative exhibits may also be useful to achieve surprise though one must satisfy any disclosure obligations and err on the side of disclosure to ensure such visual aids are not excluded.

Economy of Force is the counterbalance to the principle of *Mass.* If one is to concentrate critical resources at a decisive place and time, there must be a corresponding drawing of assets from other, non-critical areas. Combat power should not be wasted on secondary or non-essential efforts. Napoleon once allowed a junior staff officer to suggest the allocation of forces at the outset of a campaign. The staff officer aligned the troops in carefully equal measures at equal distances along the boundary of the frontier. Commenting on the disposition, Napoleon stated: "Very pretty, but what do you expect them to do? Collect customs duties?" As crunch time approaches in a case, should lead be engaged in typing up voluminous deposition designation submissions or other ministerial tasks? Applying *Economy of Force* would dictate that such tasks be assigned to legal assistants or paralegals. To the extent lead counsel has the support of second or third chair attorneys, she may be able to delegate the laborious review of voluminous deposition transcripts used in the preparation of cross examination outlines. Lead counsel could instead be focused on the coordination and marshalling of all his litigation support assets, and of crafting and fine tuning the delivery of his central message at trial through his direct examinations and opening and closing statements.

Maneuver in its most basic form refers to the movement of forces in relation to the position of the enemy. Effective tactics often involve the employment of "fire and maneuver." With fire and maneuver enemy forces are fixed (prevented from moving) and mentally occupied by fire (such as artillery or machine gun fire), while one's own forces approach the enemy from an unexpected direction to deliver the decisive blow in close quarters. One of Napoleon's two favorite strategies was known as the *manoeuvre sur les derrieres,* and that involved the above mentioned method of positioning his main force behind the enemy or across his lines of communication.

The other successful strategy employed by Napoleon time and again was the "central position." That strategy was designed to allow French forces to be moved along interior lines so that they were able to concentrate superior forces at the critical place and time to defeat a divided enemy, even though they were outnumbered overall in the theater of operations. Napoleon's First Italian campaign (1796-97) and the opening phases of the Waterloo Campaign (Ligny and Quatre Bras) are good examples of his employment of this line of thinking. One can easily see how the central position philosophy could be used to focus on and sequentially dispose of two or more opponents in the same civil action.

As mentioned in the opening above, the concept of *Maneuver* has more globally come to represent an arguably "new" way of thinking about the prosecution of strategic campaigns. However, because (as Napoleon shows us) it is factually incorrect to suggest that the concept of maneuver is in any sense "new," it is more accurate to describe the philosophy of maneuver as one which is the antithesis to the "old" tired, bloody and largely ineffective practice of making frontal assaults. It is in that sense that litigators can embrace this somewhat nebulous concept. Do what is unexpected and do not make your approach where your opponent expects you to. Use permissible surprise and deception to make your points in an unexpected manner, with new or unrevealed technology or in some other method that your opponent is not expecting. The possibilities for application of this principle are limited only by one's imagination.

In a military sense *Unity of Command* addresses the need for an effective campaign to be led by one individual with the authority to direct all aspects of the operation. *Unity of Command* is the antithesis of rule by committee. It has proven true over the ages that forces which are led by one person who can exercise a singular and cohesive concept will fare better than campaigns which are subject to divided command. The advantage of a unified command is that it allows the commander to direct operations toward a singular purpose without the demoralizing and potentially disastrous effect of having conflicting directives issued to the command. It is no less important for a legal campaign to be

directed toward a well defined goal by a single designated leader. Exercising unity of command, lead counsel can ensure that what is contained in the trial brief is consistent with what is in the proofs. She may synchronize the arguments to be made on opening with the arguments and demands being made in the closing. The proofs and damages sought must be consistent with the expert conclusions. The motions in limine must be advanced to shape and focus the presentation of evidence at trial in a way that maximizes the chances of achieving the overall objective. All of these pieces must be coordinated to support the message and theme being communicated to the fact finder. The best way to present these elements harmoniously is to have one person clearly in charge.

The principle of *Simplicity* applies in warfare in much the same way it applies in other contexts. One must understand that no plan survives first contact with the enemy in its entirety. Effective commanders anticipate that in the heat of battle there will be a certain level confusion and misunderstanding – commonly referred to as the "fog of war." Accordingly, one's orders must be simple and precise. Once the plan of attack is revealed and committed to, it should be aggressively pursued without distraction. With regard to planning, one need not take a frontal approach in order to keep things relatively simple. For example, one can employ a simple plan of fire and maneuver with two elements, a base of fire and a maneuver element, without overly complicating matters with intricate movements or delicate timing. Napoleon's opponents in his early campaigns, particularly the Austrians, Russians and Prussians, were repeatedly guilty of foolishly attempting to execute extremely complicated plans with many moving parts in the face of a comparably singular mind and purpose.

Similarly, on a case, tangential and secondary points and arguments should be avoided. There is only so much that a fact finder can be expected to grasp in the heat of the trial, and counsel should focus on how to bring all his assets to bear to hammer home those key facts and arguments. To the extent you are working with second or third chairs, or are managing a staff while on trial, attempt to

make your instructions and assignments clear and understandable. Communicate the intent underlying your instructions to allow for improvisation and independent thinking by subordinates as necessary. Finally, do your best to anticipate the unexpected by, for example, allocating resources and time to respond to motions in limine and by generally being completely prepared for trial in advance of the trial date. When you are engaged in the relatively simple act of executing a prepared and well-rehearsed plan, trial is less stressful and you will be in a much better position to react to the inevitable surprises and unanticipated challenges which will arise during trial.

Lastly, the principle of *security* is a counterpart to the principle of *surprise.* It involves taking measures to deny the enemy knowledge and information about your own forces. Napoleon regularly concealed the disposition and line of march of his forces through the employment of an extensive cavalry screen. From the outset of a civil action lead counsel can set the tone for establishing the security of one's own strategies. Consider enforcing a policy of allowing only one point of contact for communications and negotiations with opposing counsel. Communicate the need for your team to keep your plan, strategy, anticipated motions, and even the nature of your demonstrative exhibits confidential within the bounds of ethics and local rules/practice. There is little purpose served in revealing such matters prematurely to opposing counsel, even if asked. The time for unveiling one's massed attack is at the point in time when your opponent can no longer effectively respond - not so early that he can shore up his proofs, demonstrative evidence or witness line up.

In sum, the principles outlined here are tools which can be fitted to the circumstances and challenges of each individual case. They may not all be brought to bear in one civil action, and their application must be tailored to fit the nature of the case. In addition, application of strategic thinking does not suggest the need for discourtesy or unpleasantness. Rather, one can employ the principles of war while exercising the utmost courtesy to opposing counsel and the closest adherence to the rules of

procedure and professional conduct. Take the time upon receiving a new litigation file to identify your client's objective. Formulate a plan which puts the pieces together that will achieve that goal. Execute the plan with vigor. Be bold and aggressive, and keep your trial strategy confidential. Try to anticipate your opponent's moves and keep him off balance. Whatever you do, do it with elan and be decisive - seize your day in court.

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