

Sun Tzu's Tips on Effective Mediation

By Joe Epstein, Esq. and Eileen Siskel, M.P.H.

Sun Tzu wrote *The Art of War*¹ two and a half thousand years ago. James Clavell, an esteemed writer, has expressed the opinion that the war in Vietnam could not have happened, the war in Korea would not have been lost and the Bay of Pigs could have been avoided if our political and military leaders had studied this book. We recommend this book, written by a Chinese philosopher/general, to you with more modest expectations. We believe that the *The Art of War* will serve you as a helpful guide to successful mediation. We have chosen the format of selecting quotations from Sun Tzu's *The Art of War* and added some brief commentary to put his cogent and insightful observations into the modern context of effective mediation. It is our belief that it makes sense to apply the General's revered philosophy to the mediation process. After all, in order to accomplish effective dispute resolution, people in conflict must prepare not only to cooperate in mediation but also to contest in litigation at the very same time.² Disputants must be successful advocates in order to give others a reason to engage in *principled negotiation*. In our lexicon, *principled negotiation* occurs when parties engage in a fair and open discussion of the facts and applicable

law. Ideally, *principled negotiation* enables closure and provides the opportunity for the tapping of transformative opportunities and the addressing of underlying interests.

Objective of Mediation:

"*The true objective of war is peace.*"
Sun Tzu (p. 7)

Litigators are trained warriors. Effective warriors and litigators must equally be prepared for battle and be ready to fight ferociously or litigate vigorously. Such preparation may cause the opponent to sue for peace. Within the context of civil litigation, this means thorough case preparation, thoughtful discovery and effective depositions are key ingredients for success. Style and reputation for fearlessness are also important ingredients in the pre-mediation process. During the mediation, the subtle skill of the effective peacemaker takes precedence over the skills of the warrior. In order to achieve the full promise of mediation, the effective warrior must devise a strategy that reflects the type of case she is handling, the wishes and needs of the client, and the likely goals, objectives and strategy of her opponent.

Our mediation experience indicates that many attorneys have a tendency, due to their experience and training and the expectations of their clients, to engage in *distributive negotiation* during mediation. This technique is often thought of as drawing a line in the sand and standing firm, going for the win and avoiding the loss at all costs.⁴ The *distributive negotiation* style is most prominently evidenced when it is unlikely that the parties will have any ongoing relationship following mediation (e.g. personal injury cases). *Interest-based negotiations* often occur when there is a continuing relationship (e.g. joint ventures). The focus of *interest-based mediation* is on the needs of the participants that underlie the conflict.⁵ *Transformative mediation* may be used when parties want to make a fundamental change in an on-going relationship (e.g. employment cases). In the *transformative approach* the emphasis is on fostering the empowerment and the recognition of the participants.⁶ Quite simply, the mediator facilitates the opportunities for growth.⁷ In any event, it is often useful to consider whether there is any "currency" that exists in addition to money that may be important to the parties. In a wrongful death case it may be important that the prac-

tices and procedure that led to the death be changed and that the loss be acknowledged in some meaningful and special way. As one example of the power of acknowledgment, we recall a particularly intense medical malpractice case where the mediator, the patient and the physician met alone. The physician relayed a sincere apology to the patient and the patient expressed forgiveness. The impasse to settlement was dissolved. We thus encourage you to break the mold, go outside the box, and be as creative in mediation as you would be in trial.

Preparation before the Mediation:

“ . . . 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.” Sun Tzu (p. 55)

“He will win who, prepared himself, waits to take the enemy unprepared.” Sun Tzu (p. 17)

“He who exercises no forethought but makes light of his opponents is sure to be captured by them.” Sun Tzu (p. 41)

“If you know the enemy and know yourself you need not fear the results of a hundred battles.” Sun Tzu (p. 18)

Assuming you have been persistent in your discovery and thorough in your preparation, you will know your “enemy” and “yourself.” This knowledge should enable “victory.” The power of knowledge, the power of information, the power stemming from the exercise of advocacy skills all create respect for and appreciation of your case. Never underestimate your opponent and anticipate, as best you can, her moves before and at the mediation table.⁸

The insightful attorney role-plays with her client, anticipates the mediation moves of her opponent and considers the mediator’s style and techniques beforehand. This will enable greater

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flexibility and maneuverability during the mediation. If the clever advocate would not “wing it” at trial, why risk “winging it” at a mediation? Thorough knowledge of the facts of your case and the law are paramount in the preparation for mediation. We suggest that you try to go a step further and attempt to analyze your client’s needs, interests and conflict resolution style. Additionally, analyze your own needs, interests and conflict resolution style and those of the opposing party and the opposing attorney. Preparation, anticipation and creativity are undoubtedly the keys to successful mediations. If you have conducted sufficient discovery to know the forces lined up against you, if you have carefully taken stock of your own troops (witnesses) and supplies (documentary evidence), and if you have carefully considered how to align your side during mediation, you will be ready to make “peace” at the mediation.

Discovery:

“Spies are a most important element in war, because upon them depends an army’s ability to move.” Sun Tzu (p. 82)

“ . . . to remain in ignorance of the enemy’s condition, simply because one begrudges the outlay of a hundred ounces of silver in honors and emoluments, is the height of inhumanity.” Sun Tzu (p. 77)

Discovery cannot be ignored. It is essential to “scout” behind “enemy” lines before the mediation in order to be properly prepared. It is not enough to know your own “troop” strength and your own cache of ammunition. In order to be effective at mediation you need to

conduct sufficient discovery to know the strengths and weaknesses of your opponent. If your probing has gained you insight and created some fear and concern in the “enemy” camp, you are all the more ready for making “peace” at the mediation. For example, in the typical medical malpractice case, it generally does not make sense to mediate unless the plaintiff, the defendant and the key experts have been deposed. In personal injury cases, liability must be established, the medical situation clarified and the “specials” (medical bills) verified beforehand if you want a productive mediation.

Timing of Mediation:

“In war, then, let your great object be victory, not lengthy campaigns.” Sun Tzu (p. 14)

Effective mediation requires that sufficient discovery or scouting be done beforehand. Too much bloodletting may entrench one or both sides and may make “suing for peace” too painful. Approach the mediation with a peace mission in mind while the parties are still communicating and the opportunity for the inclusion of more creative options in the final “peace treaty” is still viable. In some employment cases, pre-filing mediation with limited or informal discovery without position hardening publicity may allow for creative resolutions that are not available later in the process.

Tactics at the Mediation:

“To fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy’s resistance without fighting.”

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Sun Tzu (p. 15)

"The skillful leader subdues the enemy's troops without any fighting."

Sun Tzu (p. 16)

"For you should not press a desperate foe too hard." Sun Tzu (p. 35)

"Ponder and deliberate before you make a move." Sun Tzu (p. 32)

"Concentrate your energy and hoard your strength." Sun Tzu (p. 60)

According to Sun Tzu, if you have the superior forces why force a desperate opponent into battle. Why not give your "worthy" opponent the opportunity to leave the battlefield gracefully? Your client may have to deal with this person again and you may litigate against opposing counsel again. Just as some generals make hasty ill considered moves in battle, Sun Tzu would urge that the thoughtful negotiator ponder and carefully contemplate her moves.⁹ In negotiating with the other side, too many negotiators lose credibility and dissipate their strength when they argue everything rather than concentrate on their truly strong issues. With reduced credibility they lose strength and come to the final battle weakened. Husband your strength and acknowledge your weaknesses if you want to be effective in your mediations. Just as you would "pull – the – punch" in voir dire or opening statement, consider doing the same approach in mediation. Consider also, the possibility of embracing your "enemy." In the medical malpractice case noted previously, the physician and the patient actually physically embraced. This honest expression of emotions and feelings ended, for all practical purposes, the fighting and the case settled.

Strategy at the Mediation:

"The general who wins a battle makes many calculations in his temple before the battle is fought." Sun Tzu (p. 11)

"To secure ourselves against defeat

lies in our own hands, but the opportunity of defeating the enemy is provided by the enemy himself." Sun Tzu (p. 19)

"Force him to reveal himself, so as to find out his vulnerable spots. Carefully compare the opposing army with your own, so that you may know where strength is superabundant and where it is deficient." Sun Tzu (p. 28)

Successful mediation requires the exercise of patience, considered moves and the avoidance of intemperate action. The secret to success at mediation invariably lies in the lost art of listening. Listen to the other side.¹⁰ Listen for what is not said as well as what is said. Listen for how things are said. Watch your opponent. Probe with open-ended questions. Use thoughtful questions and careful listening rather than the blow-torch as your key tools in mediation.

Consider the use of negotiation jujitsu and the gambit of "Br'er Rabbit."¹¹ Question the mediator in order to gather insight and to test your own observations. To some degree the mediator serves as a scout and reality check for all parties—use this individual effectively.

Conclusion:

"In peace prepare for war, in war prepare for peace. The art of war is of vital importance to the state. It is a matter of life and death, a road to safety or to ruin. Hence under no circumstances can it be neglected. . . ." Sun Tzu (Page 83)

If you are careful in your case selection, if you are clever, concise and concentrated in your discovery and if you have developed a reputation for advocacy, a mediator can help you win without war. On the other hand, if you have not chosen a strong case, if you have failed to prepare adequately, a mediator cannot "balance-the-power" and present you a "win". Successful mediations are achieved only with preparation and skillful negotiation. The mediator must be the

creative facilitator; the advocate must be the skillful and flexible negotiator.

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ENDNOTES

¹ *The Art of War* - Sun Tzu (Edited by James Clavell) 1983 (hereinafter referred to as "Sun Tzu").

² See, Bernard Meyer, *The Dynamics of Conflict Resolution*, (Jossey-Bass 2000), p. 61 (hereinafter "Meyer").

³ See, Leonard J Marcus, et al, *Renegotiating Health Care*, (Jossey-Bass 1995), p. 418.

⁴ See generally, Meyer at p. 17.

⁵ See, Robert A. Bush and Joseph P. Folger, *The Promise of Mediation*, (Jossey-Bass 1994), p. 12.

⁶ *Id.*

⁷ See generally, Howard Raiffa, *The Art and Science of Negotiation* (1982).

⁸ See generally, Tom Arnold, *Twenty Common Errors in Mediation Advocacy*, ADR Today, Spring 1995.

⁹ *Id.*

¹⁰ Charles B. Craver, *Negotiation Techniques: How to keep Br'er Rabbit Out of the Brier Patch*, Trial (June 1988) p. 72.