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Using Military History As A Guide To Successful Defense

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Litigation's adversarial nature can make going to trial feel like going to war. Complex litigation in particular can transform the docket and courtroom into battlefields. The armed services academies steep cadets in military history, illustrating not only the successful use of well-known tactical maneuvers, but also the big-picture strategies behind the greatest battles in history. In contrast, defense attorneys often focus on tactics, such as how to conduct an effective cross-examination, but fail to cultivate the strategic mindset necessary to see a case through to victory.

You don't need a military background to reap the benefits of lessons learned in great military campaigns. Even amateur readings in military history offer strategic lessons from the battlefield that can teach you how to think about trial strategy. This article explores some of the broad themes appearing over and over again in history that can teach defense attorneys much about how to approach their cases.

1. Merely Defending is No Way to Win

Napoleon left his indelible mark on history not only because of his early successes and arguably the most famous defeat in history, but also because of the trove of pithy maxims he gave us on life, love, politics and war. Many on the last subject are worthy guides for successful litigation strategy, including, "The side that stays within its fortifications is beaten." His own countrymen failed to heed this advice from 1939 to 1940, when, having declared war on Nazi Germany, France hunkered down to wait for the Germans' inevitable attack. Relying on the Maginot line defensive fortifications and natural protection of the dense Ardennes forest, French commander General Gamelin focused on preparing to meet the Germans in Belgium once they finally advanced.

Then, in May 1940, the Germans introduced the Western front to blitzkrieg, filling the skies with the Luftwaffe's Messerschmitts and surprising the French by plowing through the Ardennes with Panzer tanks. By June, the Nazi flag desecrated the Arc de Triomphe, the government was forced to accept a humiliating armistice and partial occupation, and General Maurice Gamelin was sacked.

In today's litigious climate, many corporate legal departments invest much time and energy building their own Maginot lines. Internal audits, arbitration clauses, and a heavy focus on compliance dominate their thinking about litigation. This is understandable. Litigation is expensive and risky, and it can bring unwelcome public scrutiny. No amount of corporate diligence, however, can seal off companies from a big-ticket lawsuit. When it happens, too often defense counsel focus on winnowing the case down so that they can settle for a reasonable amount. But by preparing early on to take the case to trial, you can gain the element of surprise, or at least the unexpected, against the other side.

In practice, this means taking the initiative to shape the focus of trial early on. This is especially true in deciding how to approach hot-button issues. For example, if your client has changed its policies after being sued over them, your first reaction may be to hunker down in the litigation trenches and survive summary judgment, then settle. A few years ago at a conference, I listened to an in-house lawyer who had found his company in that exact situation explain that he viewed the situation as a death knell for their case and deciding factor in seeking settlement. To take the case to trial in his mind would have been akin to "going over the top" of the trenches in World War I: sheer folly in the face of overwhelmingly negative odds. But yet that outcome is not inevitable.

Properly explained in a forthcoming manner, trial testimony about a company change in the wake of litigation can be turned into an asset. Instead of preparing witnesses to handle a tough examination by plaintiffs probing the issue, you could get out in front of it and counsel your witnesses to bring up the changes rather than waiting for the other side to explore the topic. A problematic fact thus can be presented as the proactive decision of a company committed to finding solutions to problems and being both responsive and financially responsible. This explanation fits into the larger narrative that your client is a reasonable corporate citizen and can rob the opposing side of the opportunity to paint your client as a bad actor.

2. Don't Fight the Last War You Won

France's other disastrous blunder at the outset of World War II was preparing to fight World War I again. Knowing the Germans would inevitably advance toward their borders, they prepared to fight another war in the trenches instead of figuring out how best to stop the advance of state-of-the-art tanks that completely changed the face of the battlefield. A century earlier, the Crimean War ushered in the era of modern warfare by being the first major war to feature new technologies such as rail support and the telegraph. By harnessing the speed and efficiency of rail transport — and building new lines for the dedicated purpose of rail supply — the British and French were able to gain advantage over the Russians, who still relied on the cumbersome horse-drawn supply lines. As a result, Russia was no longer the daunting foe that bedeviled Napoleon, and the Russians ultimately lost the war.

Once you have logged a few years as a litigator, you begin to think you know the life cycle of a complex lawsuit and how best to achieve a successful result. But your opponent may know your playbook, too, having researched your docket or even attended a prior trial in which you litigated similar issues. Judges and juries, too, are not uniform, and may view similar facts and legal arguments very differently. This does not mean that you must approach every case involving similar issues as a completely blank slate, but it does argue for reevaluating certain strategic decisions on a case-by-case basis.

For example, while you may have found it beneficial in the past to seek bifurcation of liability and damages issues at trial, a new case may call for considering whether there are benefits to trying the issues together, as evidence regarding damages may have persuasive value with respect to the question of liability. And while a previous jury may have found your expert's testimony helpful and convincing, a new fact pattern may suggest foregoing a hired expert in favor of an articulate in-house witness who can explain data in a way that gives the jury helpful context regarding the way in which your client conducts business. Viewing each case as an opportunity to design a new strategy for success can keep your opponents guessing and help you gain the initiative rather than merely reacting to the plaintiffs' prosecution of their case.

3. Fighting a Losing Battle Can Help You Win the War

The Crimean War is an unfamiliar historical episode for most Americans, although in many ways it ushered in the era of modern warfare. In addition to bringing us Florence Nightingale, the war's most famous battle served as the inspiration for Tennyson's poem, "The Charge of the Light Brigade." The

poem celebrates the heroics of a lightly armed British cavalry brigade which, due to poor communication and disarray among commanders, led an ill-fated and mistaken charge up a hill defended by heavy artillery. Not surprisingly, they were repelled by the Russian artillery in short order, and British casualties were heavy.

For many years, the episode was accepted as a brave but embarrassing defeat of British forces. More recently, some historians have concluded that in the overall context of the Crimean War, the attack was effective, if ill-conceived. One of the purposes of a cavalry charge is to cause disarray and frighten the enemy, and in that respect the light brigade succeeded. Indeed, Britain and its allies ultimately claimed victory in the war.

In litigation, sometimes it seems like the deck is stacked against you. An unfavorable summary judgment decision, for example, can leave you feeling boxed in by rejecting your best arguments and defenses before trial. Indeed, even before dispositive motions, an unfavorable forum or judge assignment may extinguish any hope of a good trial outcome. In such situations, settlement may seem like the only reasonable option. But taking a long-term view of the case can change these considerations.

Advancing your best arguments, even in the face of certain defeat, can build the record for an ultimate appeal. Any district court decision reviewable de novo or clear error is vulnerable to appellate reversal, especially if the district court deviates from precedent or otherwise charts a course not supported by the greater weight of authorities. By keeping track of such points for appeal and preserving your challenges in motions practice, you can live to fight another day on a more favorable appellate battlefield. A favorable appellate decision, in turn, not only moves you closer to your ultimate goal of a good result, but also sets a precedent that can help you avoid future similar litigation, a prospect you abandon when you settle before trial or appeal.

4. Your Reputation is Not Defined Solely by Your Results

Trial lawyers tend to measure success in terms of the results achieved in the courtroom, much like a general counts victories on the battlefield as proof of strategic prowess. But while military leaders are often protected from the sway of public opinion, trial lawyers are not. We have to answer to our clients, and the spiraling costs of litigation are always on their minds. And while the successful battle strategies of legendary commanders are a gold mine of principles for use in any adversarial proceeding, they also provide a few examples of mindsets to avoid emulating.

Take, for example, Britain's hero of World War II: Field Marshall Bernard Montgomery. The general undoubtedly earned his place in the pantheon of great modern war commanders, but he also holds the dubious honor of being the namesake of the Montgomery cocktail, a potent martini that is 15 parts gin to one part vermouth. It supposedly earned its name because its ratio represents the numerical advantage of forces Montgomery insisted on to go to battle. In other words, he would not fight unless he could outnumber the enemy by an overwhelming margin.

Especially in large cases, trial lawyers often take a similar approach, enlisting huge teams of associates and paralegals to churn out motions, pocket briefs, demonstrative exhibits, outlines and every variation of summary, chart or digest imaginable. At a trial a few years ago, our technical support assistant told me about the last time she had worked on a trial in the same courthouse and how her team had a revolving door of fresh attorney recruits each week. You can imagine the client's consternation at continually seeing new names on the bill. An adequate-sized team is undoubtedly an ideal part of a successful trial strategy, but overkill is no way to prove your mettle. Instead, a skillful trial lawyer can chart the course to a good outcome with a lean team and sound judgment about how many resources are really necessary. Good strategic decisions and well-honed skills, not sheer brute force, are the keys to building a reputation as a talented trial lawyer.

This concern is not just for lawyers in complex cases. A recent article reported a judge chastising lawyers from a top firm that successfully litigated a small landlord-tenant case because they submitted a fee application showing a staggering amount of hours devoted to simple briefing that any attorney worth his salt could have completed in a fraction of the time. Thanks to an abundance of legal news blogs, such embarrassing dressing-downs will live on forever in the cybersphere. To quote Napoleon again, “The more I study the world, the more I am convinced of the inability of brute force to create anything durable.” As it goes with geopolitics, so it is goes with your reputation. When it comes to strategy, a little finesse goes a long way.

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