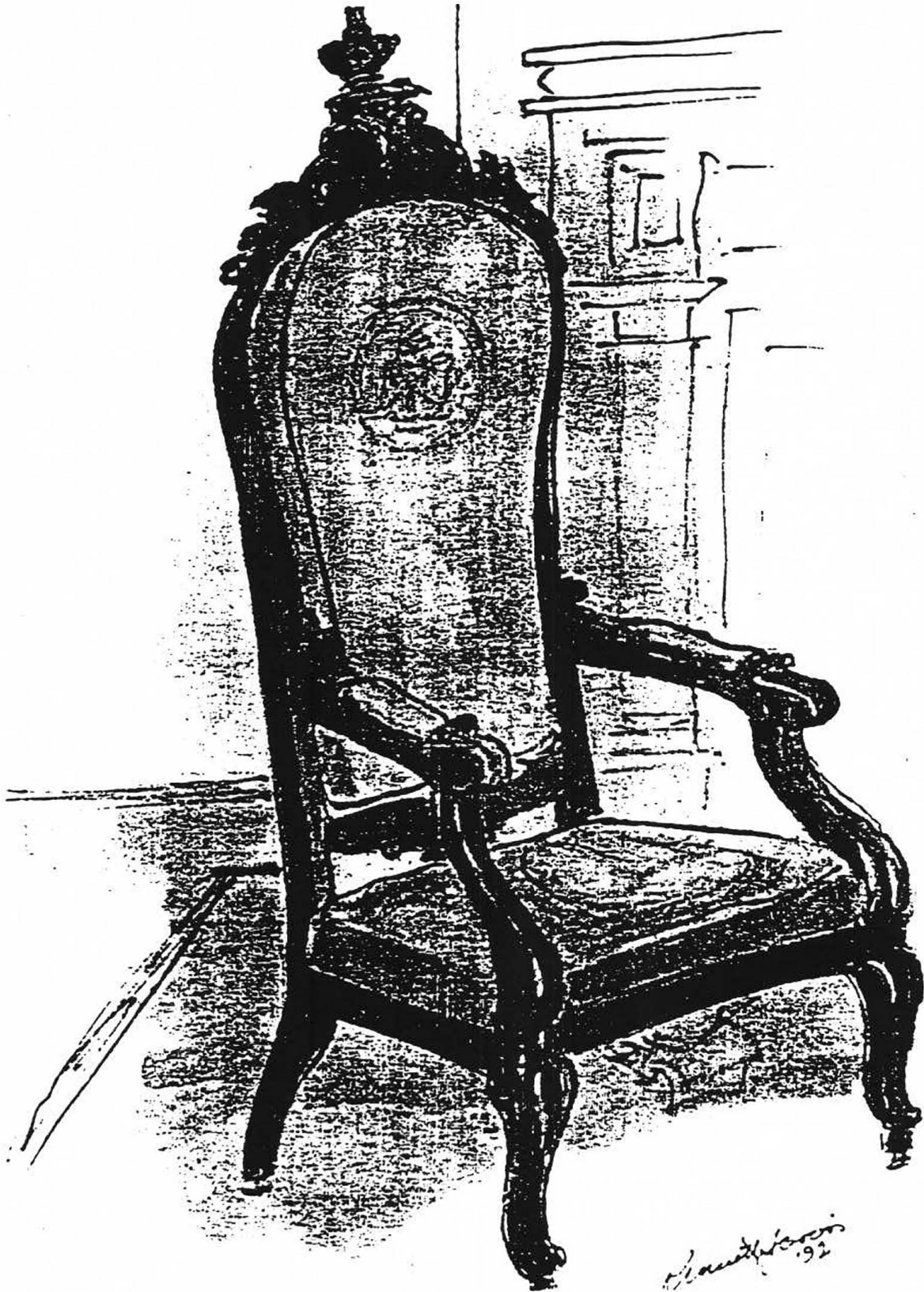


The Law Society of Upper Canada

Gazette



Advocacy, War, and the Art of Strategy

Marvin Joel Huberman*

"For by wise counsel thou shalt make thy war"
Proverbs 24, 6

The Advocate

Our system of adversarial litigation generally involves two advocates who investigate and present their cases to an impartial decision-maker which considers the evidence and arguments submitted to it by the parties and proclaims one party victorious.¹

This system requires a lawyer when acting as an advocate to be openly partisan of the client's legal interests, represent the client zealously within the bounds of the law, and use his or her utmost skill for

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The author would like to thank Master C.K. Choi, a gentleman warrior, whose martial arts teachings inspired the writing of this paper.

1. Fleming James J.R., Civil Procedure, and Charles P. Curtis, "Its Your Law", and Jerome Frank, "Courts On Trial", in Garry D. Watson, Stephen Borins, and Neil J. Williams, *Canadian Civil Procedure, Cases and Materials* (Toronto: Butterworths, 1973), pp. 50-67; Neil Brooks, "The Judge and the Adversary System", in *The Canadian Judiciary* (ed. A. Linden, 1976), pp. 90-116; Carrie Menkel-Meadow, "Portia in a Different Voice: Speculation on a Women's Lawyering Process", *Berkeley Women's L.J.* (1985), 39; Fuller and Randall, "Professional Responsibility: Report of the Joint Conference", 44 *A.B.A.J.* (1958), pp. 1159, 1160-1161; Riskin, "Mediation and Lawyers", (1982) 43 *Ohio St. L.J.* 29; James W. Jeans, *Trial Advocacy* (St. Paul, Minn: West Publishing Co., 1975), pp. 1-3; W.B. Williston and R.J. Rolls, *The Conduct of an Action*, (Toronto: Butterworths, 1982), pp. 179-202; Thomas A. Mauet, Donald G. Casswell and Gordon P. MacDonald, *Fundamentals of Trial Techniques, Canadian Edition*, (Boston and Toronto: Little Brown & Company, 1984), pp. ix-xi; John Sopinka, *The Trial of an Action*, (Toronto: Butterworths, 1981), pp. 58-132; Robert E. Keeton, *Trial Tactics and Methods*, 2nd ed. (Boston and Toronto: Little, Brown & Company, 1973), pp. ix-xii; Alexander H. Robbins, *A Treatise on American Advocacy*, 2nd. ed. (St. Louis: Central Law Journal Company, 1913), pp. 1-11; O.C. Mazengarb, *Advocacy in our Time* (London: Sweet & Maxwell Ltd., 1964), pp. 1-14; Joseph R. Nolan, *Trial Practice, Cases and Materials*, (St. Paul, Minn: West Publishing Co., 1981), pp. 1-4.

the client.² Lord Brougham, in his representation of Queen Caroline, aptly described this duty as follows:

...An advocate, by the sacred duty which he owes his client, knows in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means - to protect that client at all hazards and costs to all others, and amongst others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm; the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client's protection.³

Lord Reid, in *Rondel v. Worsley*⁴, stated:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public...

The advocate's duty is to prepare the client's case to win. As an officer of the court, however, he or she must act with the utmost

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2. John deP. Wright, "The Duty of an Advocate", *The Law Society of Upper Canada, Gazette*, Volume XVII (1983), p. 327; C.P. Curtis, "The Ethics of Advocacy" (1951), 4 *Stan. L. Rev.* 3; C. Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976), 85 *Yale L.J.* 1060; William H. Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978), *Wisc. L. Rev.* 29; I. Nelson Rose, "Litigator's Fallacy", *Litigation*, Volume 11, No. 3, Spring 1985, p. 3; Fuller and Randall, "Professional Responsibility: Report of the Joint Conference", 44 *A.B.A.J.* 1159; Jonathan M. Hyman, "Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?", (1987), 34 *U.C.L.A. L. Rev.* 863; M. Swartz, (1984), "The Zeal of the Civil Advocate", in *The Good Lawyer*, ed. D. Luban, Totowa, N.J.: Rowman & Allenheld; Jonathan M. Hyman, "Trial Advocacy as an Impediment to Wise Negotiation", *Negotiation Journal*, Volume 5, Number 3, July 1989, p.237; Rule 10 of the Professional Conduct Handbook of the Law Society of Upper Canada; B. Finlay, "The Conduct of Lawyers in the Litigation Process: Some Thoughts", in *Studies in Civil Procedure* (Toronto: Butterworths, 1979), p. 15; Showell Rogers, "The Ethics of Advocacy", (1899), 15 *L.Q.R.* 259.
 3. *The Queen's Case* (1820), 2 *Brod. & Bing* 284, at p. 311.
 4. [1969] 1 *A.C.* 191, at pp. 227-28. [1967] 3 *W.L.R.* 1666 (H.L.), at pp. 1673-74; cf. 3(1) *Halsbury's Laws of England*, 4th ed., para 467; Rules 1, 11, 13 and 14 of the Professional Conduct Handbook of the Law Society of Upper Canada.

courtesy, honour, fairness, and integrity in presenting the client's case to its best advantage.⁵

The arms which the advocate wields, said Lord Chief Justice, Sir Alexander Cockburn, "are to be the arms of the warrior and not of the assassin"⁶; and "the tongue of the advocate should be the sword of the honourable soldier and not the poisoned dagger of the assassin"⁷.

Victory for the advocate, in the words of Mr. Justice Middleton, "must be obtained by the Sword of the Knight and not by the Dagger of the Assassin"⁸. This idea was well-expressed by Judge J.W. Donovan when he said:

The true victory, after all, is the honest verdict of a fairly tried, well-managed contest - one in which neither adversary nor Court nor jury have been fooled, flattered, or overreached, but, when all has been shown as in midday sunlight and the core of the controversy explained, has led to a just judgment.⁹

The conduct of litigation has been likened to warfare, and many principles of legal strategy and tactics are analogous to those of the art of war.¹⁰ Indeed, the conventional model of adversarial litigation is

5. H. Montgomery Hyde, *Lord Birkett*, (London: Hamish Hamilton, 1964), p. 551; Sir David Napley, *The Technique of Persuasion* 4th ed. (London: Sweet & Maxwell, 1991), pp. 52-54; John Phillips, *Advocacy with Honour*, (Sydney: The Law Book Company Limited, 1985), pp. 1-7; *Re G. Mayor Cooke* (1889) 5 T.L.R. 407 (C.A.), at p. 408 per Lord Esher; Schroeder J.A., "Some Ethical Problems in Criminal Law" (1963), Law Society of Upper Canada Special Lectures 87, at p. 102; John Mathew, Q.C., "Counsel's Duties to the Court and to the Client - Is There a Conflict?", *The Advocate's Society Journal*, August 1984, p. 3; Sol M. Linowitz, "The Law as a Human Profession", *The Law Society of Upper Canada, Gazette*, Volume XXII, Number 3; (September 1988), p. 242; Gordon D. Lewis and Emilius J. Kyrou, *Handy Hints on Legal Practice* (Sydney: The Law Book Company Limited, 1985), pp. 89-94; Viscount Simon, "The Vocation of an Advocate", 25 *Can. Bar Rev.* 153 (1947); Lord MacMillan, "Some Observations on the Art of Advocacy", 13 *Can Bar Rev.* 22 (1935); *R. v. Paine* (1792), 22 St. Tr. 357, at 412; Earl A. Chemiak, Q.C., "The Ethics of Advocacy", in *Advocacy In Court, A Tribute to Arthur Maloney*, Q.C., (Toronto: Canada Law Book Inc., 1986), p. 101, ed. Franklin R. Moscoff, Q.C.; Arthur Maloney, "Advocacy", *The Law Society of Upper Canada, Gazette*, Volume XII (1978), p. 144.
6. Rogers, pp. 270-71; Wright, p. 328.
7. Quoted with approval in *Stow v. Currie* (1909) 13 O.W.R. 591, at p. 594.
8. From an address given to students called to the Bar on January 20, 1927, quoted in Williston and Rolls, pp. 182-83.
9. Judge J.W. Donovan, *Tact In Court*, (London: Sweet & Maxwell, Ltd., 1915), pp. 93 and 94.
10. Napley, p. 74; John H. Munkman, *The Technique of Advocacy*, (London: Butterworths, 1991), pp. 163-168; Byron K. Elliot and William F. Elliot, *The Work of the Advocate*, (Indianapolis: the Bobbs - Merrill Company, 1911), pp. 63, 91 and 92; Lloyd Paul Stryker, *The Art of Advocacy*, (Simon & Shuster, 1954), pp. 26 - 27; Curtis in Watson, Borins, and Williams, p. 53; Nelson Rose, p. 4; Richard Du Cann, *The Art of the Advocate*, (MacGibbon & Kee, 1965), p. 51; Great Courtroom Battles 6 (R. Rubenstein, ed., 1973), cited in Jeffrey L. Kestler, *Questioning Techniques and Tactics*, (Colorado: McGraw-Hill Book Co., 1982), at p. 290.

founded on the 'fight' theory which derives from the origin of trials as substitutes for battles.¹¹ To quote James W. Jeans:

Several hundred years have passed and, though time has brought some modest modifications, the trial lawyer remains essentially the same. He is a substitute samurai, a free swinging surrogate, an alter-ego for a pusillanimous patron. He is called upon to fight for his client, to use his skills in his service, to advance those arguments which the client, if given the training and talents, would make on his own behalf. He is, in essence, a hired gun.¹²

It is in the courts of law where truth and falsehood are engaged in deadly combat; where truth will emerge; and where justice will be dispensed thereby benefitting society at large.¹³ For the adversarial mechanism to yield these results, however, the advocate must effectively perform the role as the modern descendant of the medieval champion in ordeal by battle. The advocate must, declares Sir David Napley, "learn then from the Generals"¹⁴ how to approach the contest, conduct the campaign, and achieve success in his or her theatre of war - the courtroom.

The Principles Of War

History's greatest military commanders, theorists, and teachers, focused their attention on the art of war and carefully analyzed the subject. Throughout the ages, attempts were made to understand war and to distil from its theory and the long history of military experience simple but comprehensive principles or truths - lists and explanations of the most important considerations in the general planning and operations of war. These are the "Principles of War".¹⁵

Sun Tzu (500 B.C.), a Chinese military scholar, whose essays on

11. Jerome Frank, in Watson, Borins, and Williams, p. 57; Brooks, pp. 90-116.

12. *Trial Advocacy*, (St. Paul, Minn: West Publishing Co. 1975), p.2.

13. Report of the Joint Conference on Professional Responsibility, 44 A.B.A.J. 1159 (1958), p. 1160.

14. Napley, p. 74.

15. D.K. Palit, *The Essentials of Military Knowledge*, (Dehradun, India: EBD Publishing and Distributing Co., 1968), p. 125 et seq; E.J. Kingston McCloughry, *The Direction of War*, (New York: Frederick A. Praeger, 1955); Theodore Ropp, *War In the Modern World*, (New York: Collier Books, 1973), p. 12; James F. Dunnigan, *How To Make War, A Comprehensive Guide to Modern Warfare*, (New York: Quill, William Morrow, 1988), pp. 15 and 16; Gwynne Dyer, *War*, (Toronto, Stoddart Publishing Co. Limited, 1985), pp. 133 and 134; B.H. Liddell Hart, *Strategy*, 2nd rev. ed., (New York: Meridian, 1991), p. 334; John I. Alger, *The Quest For Victory, The History of The Principles of War*, (Westport, Connecticut: Greenwood Press, 1982); B.H. Liddell Hart, *The British Way in Warfare: Adaptability and Mobility*, rev. ed., (New York: Penguin Books, 1942).

"The Art of War" have influenced military analysts down the centuries. Sun Tzu was the first to formulate a rational basis for the planning and conduct of military operations. He developed a set of principles which have been termed "the concentrated essence of wisdom on the conduct of war"¹⁶, to guide rulers and generals to victory over opposition. He believed that triumph should ensue only with a strategy of tactical positioning whereby a skillful strategist could subdue his adversary without conflict and destruction.

Sun Tzu stated that war should be appraised in terms of five fundamental factors - moral influence, weather, terrain, command, and doctrine - and seven elements, enunciated in the form of questions, by which victory or defeat may be predicted. He realized that the successful conduct of war involves careful consideration of the moral, intellectual, and circumstantial factors of war, as well as the physical elements which he considered to be less important.

Sun Tzu was convinced that a speedy military victory was assured by use of special techniques such as organization, camouflage, illusion, maneuver, control, spontaneity, mobility, and the use of intelligence. He wrote: "And as water has no constant form, there are in war no constant conditions. Thus one able to gain the victory by modifying his tactics in accordance with the enemy situation may be said to be divine."¹⁷

Napoleon Bonaparte (1769-1821), the great general and strategist of the French Revolution, brilliantly demonstrated the application of the principles of war on the battlefield and recorded them in his Military Maxims.

Napoleon's strategic objective was clear - the destruction of the enemy on the battlefield. He stressed formulating and modifying plans of action, an undivided command, and concentrating his striking power at one critical point. "Remember always three things," he wrote, "unity of forces, urgency, and a firm resolution to perish with glory. These are the three great principles of the military art that have brought me success in all my operations."¹⁸

Napoleon emphasized audacity, speed of movement, launching vigorous surprise attacks, and intelligent improvisation. He believed

16. Sun Tzu, *The Art of War*, Translated and with an introduction by Samuel B. Griffith, (Oxford: Oxford University Press, 1971), p. v., forward by B.H. Liddell Hart.

17. Sun Tzu, pp. 63-71, x and xi, and 101; Tau Hanzhang, *Sun Tzu's Art of War: The Modern Chinese Interpretation*, (New York, New York: Sterling Publishing Company, 1987); R.L. Wing, *The Art of Strategy, a New Translation of Sun Tzu's Classic The Art of War*, (New York, New York: Doubleday, 1988); Thomas R. Phillips, ed. *Roots of Strategy: A Collection of Military Classics*, (Harrisburg, Pa.: Military Service Publishing, 1985).

18. Napoleon I, *Correspondence*, x, No. 8209 (Au général LaRESTON, Paris, 21 frimaire an xiii) from Ernest Picard, ed., *Précepts et jugements de Napoleon*, p. 209.

that "Genius acts by inspiration. That which is good in one circumstance is bad in another, but it is necessary to consider the principles like the axes that give reference to the graph."¹⁹

Napoleon's aim was to confuse and demoralize the enemy, to cut them off from their communications, and to defeat them by decisive battle before they could unite their forces.

Napoleon's military operations and maxims greatly influenced the military writers and theorists of the last century to deduce from them fundamental lessons or underlying principles to guide others in the art of strategy and the successful conduct of battle.²⁰

Carl von Clausewitz (1780-1831), the Prussian army general and military philosopher, famous for his classic treatise *On War*, sought to define the real nature of war and extract from its theory, practice, and historical experience adaptable principles that apply to all phases of warfare.²¹

To Clausewitz, absolute war as an ideal was an act of violence, and not a game or a sport, to compel the enemy to do one's will by completely disarming or destroying its armed forces in a decisive battle.

Real war, Clausewitz asserted, was a complex and individual process consisting of a number of "modifications", including the intermingling of war and politics, and the factors of uncertainty and chance. He believed that the primary military aim of disarming or destroying the enemy could be modified by the prevailing circumstances to a more limited form of warfare, such as the threat of combat or the conquest of territory, which may accomplish the desired end without any actual combat occurring. The enemy, convinced that battle is too costly or success unlikely, will be psychologically disarmed and thereby defeated.

Clausewitz emphasized the primary importance of personality.

19. Gaspard Gourgaud, *Sainte-Hélène: Journal Inédit de 1815 à 1818*, I, p. 20.

20. Edward Mead Earle, ed., *Makers of Modern Strategy. Military Thought from Machiavelli to Hitler*. (Princeton, N.J.: Princeton University Press, 1973); Peter Paret, ed., *Makers of Modern Strategy from Machiavelli to the Nuclear Age*. (Princeton, N.J.: Princeton University Press, 1986), pp. 123-142; Martin Windrow and Francis K. Mason, *A Concise Dictionary of Military Biography*. (New York, New York: John Wiley & Sons, Inc., 1991), pp. 212-221; John Keegan and Richard Holmes, *Soldiers. A History of Men in Battle*. (London: Hamish Hamilton Ltd., 1985); Palit, pp. 126-129; Justin Wintle, ed., *The Dictionary of War Quotations*. (London: Hodder & Stoughton, 1989), pp. 69-73, and 445-447; Ropp, pp. 98-139; Alger, pp. 16-18.

21. Earle, ch.5, by H. Rothfels; Paret, ch. 7, pp. 186-213; Windrow and Mason, pp. 52 and 53; Ropp, pp. 159 and 160; Michael Howard and Peter Paret, eds. *Carl von Clausewitz. On War*. (Princeton, N.J.: Princeton University Press, 1984); Alger, pp. 28-31; *The Journal of Strategic Studies*, Special Issue: On Clausewitz and Modern Strategy, ed. Michael I. Handel, v. 9, Numbers 2 and 3, June/September 1986.

human spirit, moral, psychological, and other intangible dimensions of war; mathematical, topographical, and other scientific factors were secondary. To achieve success in a military campaign, he advocated the use of discriminating judgment, force at the decisive point, surprise, swift and vigorous defensive initiatives, and flexibility.

Clausewitz expounded on and codified Napoleonic methods of warfare. His theories, often too subtle, difficult to interpret, and carried to an extreme, have profoundly influenced world leaders, military thinkers, and practitioners to study and develop the art of war.²²

Antoine Henri Jomini (1799-1869), the Swiss military theorist and general in the service of Napoleon, focused on practical issues and attempted to codify immutable principles derived from an analysis of successful military operations. These principles were to "serve in general as a compass for the commander-in-chief of an army to guide him" in the art of war.²³

Jomini, a contemporary of Clausewitz was opposed to "systems of war" which purport to deal with all contingencies. Recognizing the role of "moral and physical complications" in war, he believed that the application of a small number of fundamental principles, maxims, or truths of war should direct and preside over the conduct of war, so that success will likely ensue.²⁴

To Jomini, the fundamental principle of war is:

1. Bringing by strategic measures, the major part of an army's forces successively to bear upon the decisive areas of a theater of war and as far as possible upon the enemy's communications, without compromising one's own;
2. Maneuvering in such a manner as to engage one's major forces against parts only of those of the enemy;
3. Furthermore, in battle, by tactical maneuvers, bringing one's major forces to bear on the decisive area of the battle-field or on that part of the enemy's lines which it is important to overwhelm;
4. Arranging matters in such fashion that these masses of men be

22. Earle, pp. 92-113; Paret, ch. 7; Windrow and Mason, pp. 52 and 53; Keegan and Holmes, pp. 39 and 214; Palit, pp. 127 and 135; Wintle, pp. 78-82, 265, 269, and 408; Ropp, pp. 12-13, 158-160, 196, 286, 351, and 390; Liddell Hart, *Strategy* pp. 146, 319, 338-352; *The Journal of Strategic Studies*, Special Issue: Decisive Campaigns of the Second World War, v. 13, No. 1, March 1990.

23. *Précis de l'art de la guerre* (Paris, 1838), I, 26-27, and 157-158; Earle, p. 85, ch. 4 by Crane Brinton, Gordon A. Craig and Felix Gilbert; Paret, ch. 6, by John Shy; Alger, pp. 18-28, 31-33, and 176-178.

24. *Précis*, I, 26-27; *Traité des grandes opérations militaires*, III, 333 and 335; Earl, pp. 84 and 85; Wintle, pp. 77 and 78; Ropp, p. 150; Palit, p. 127.

not only brought to bear at the decisive place but that they be put into action speedily and together, so that they may make a simultaneous effort.²⁵

At the core of Jomini's theory is the campaign, the primary purpose of which is to occupy the enemy's territory, rather than destroying its army. Jomini was convinced that by careful analysis and planning - the task of strategy - choice of the correct line of operations, and the progressive domination of zones of operations, such occupation is achieved.²⁶

Jomini emphasized planning, mobility, concentration of force, continuous offensive initiatives, surprise, and the critical importance of intelligence in warfare.

Although some of his work has become over systematized and antiquated, much of Jomini's definitions, terminology, and concepts are still widely used by military theorists and in military education. This great interpreter of Napoleonic warfare continues to influence the development of the modern principles of war.

The principles of war, framed by the masters of old, were interpreted and elaborated by their students and successors. To keep pace with momentous changes in society and with economic, industrial, scientific, and technological advances, new approaches to strategic theory and practice were accentuated and codified. Nonmilitary factors - political, economic, psychological, moral, and technological (instruments of higher or grand strategy) - were brought into greater prominence, as civilization developed and warfare became increasingly intricate, perilous, and total.²⁷

Compelled to face the challenges presented by modern times, armies focused on and adopted basic principles or general rules to govern the effective planning and conduct of war. Expressed as fundamental or central truths, precepts, aphorisms, axioms, maxims of war, even platitudes, today's "principles of war" vary in number and import from army to army. Many lists, however, include the following princi-

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25. Précis, I, 158; Traité, III, ch. 25; Earle, p. 85; Ropp, p. 150.
26. Précis, I, 154, 254, 259; Traité, I, 413-419, 272, 279; Earle, pp. 84-92; Ropp, pp. 151, 158 and 159; Wintle, pp. 77, 78 and 446.
27. Earle, pp. vii-xi; Paret, pp. 3-8, and 863-871, ch. 28 by Gordon A. Craig and Felix Gilbert; Keegan and Holmes, pp. 11-18, 31-38; Palit, pp. 17-20, and 125-129; Ropp, pp. 11-15, and 393-404; Kingston McCloughry, pp. 13-25; Liddell Hart, *Strategy*, pp. 319-324, and 344-360; Edward N. Luttwak, *Strategy, The Logic of War and Peace*, (Cambridge, Massachusetts: The Belnap Press of Harvard University, 1987), pp. 69-71, and 239-241; Aiger, pp. 50, 56 and 175; John Baylis, Ken Booth, John Garnett and Phil Williams, *Contemporary Strategy, Theories and Policies* (New York, New York: Holmes & Meier Publishing Inc., 1975); Marc Trachtenberg, *History and Strategy*, (Princeton, New Jersey: Princeton University Press, 1991).

ples for success in warfare: selection and maintenance of the aim, the offensive, concentration of force, economy of effort, security, surprise, simplicity, flexibility, cooperation, initiative, and mobility.²⁸

The United States Army adopted the following nine principles of war:

1. Objective. Every military operation should be directed towards a clearly defined, decisive, and attainable objective. The ultimate military objective of war is the defeat of the enemy's armed forces. Correspondingly, each operation must contribute to the ultimate objective. Intermediate objectives must directly, quickly, and economically contribute to the purpose of the ultimate objective. The selection of objectives is based on consideration of the mission, the means and time available, the enemy, and the operational area. Every commander must understand and clearly define his objective and consider each contemplated action in light thereof.
2. Offensive. Offensive action is necessary to achieve decisive results and to maintain freedom of action. It permits the commander to exercise initiative and impose his will on the enemy, to set the terms and select the place of battle, to exploit enemy weaknesses and rapidly changing situations, and to react to unexpected developments. The defensive may be forced on the commander as a temporary expedient while awaiting an opportunity for offensive action or may be adopted deliberately for the purpose of economizing forces on a front where a decision is not sought. Even on the defensive, the commander seeks opportunities to seize the initiative and achieve decisive results by offensive action.
3. Mass. Superior combat power must be concentrated at the critical time and place for decisive results. Superiority results from the proper combination of the elements of combat power. Proper application of this principle, in conjunction with other principles of war, may permit numerically inferior forces to achieve decisive combat superiority at the point of decision.
4. Economy of Force. This principle is the reciprocal of the

28. Alger, pp. 94, 173, 180-186, 191, and appendixes; Palit, pp. 125-130; Dunnigan, pp. 15-17; David Miller and Christopher F. Foss, *Modern Land Combat*, (New York, New York: Portland House, 1987), pp. 176 and 177; Ropp, pp. 11-13; Dyer, pp. 133-136; Michael I. Handel, "Intelligence and the Problem of Strategic Surprise", *The Journal of Strategic Studies*, v. 7, Number 3, September, 1984, p. 229; *The Journal of Strategic Studies*, Special Issue: On Military Deception and Strategic Surprise, eds. John Gooch and Amos Perlmutter, v. 5, Number 1, March, 1982; Ephraim Kam, *Surprise Attack, The Victim's Perspective*, (Cambridge Massachusetts: Harvard University Press, 1988).

principle of mass. Minimum essential means must be employed at points other than that of the main effort. Economy of force requires the acceptance of prudent risks in selected areas to achieve superiority at the point of decision. Economy of force missions may require limited attack, defence, cover and deception, or retrograde action.

5. Maneuver. Maneuver is an essential ingredient of combat power. It contributes materially in exploiting success and in preserving freedom of action and reducing vulnerability. The object of maneuver is to concentrate (or disperse) forces in a manner to place the enemy in a position of disadvantage and thus achieve results that would otherwise be more costly in men and material.
6. Unity of Command. The decisive application of full combat power requires unity of command. Unity of command results in unity of effort by coordinating the action of all forces towards a common goal. While coordination may be achieved by cooperation, it is best achieved by vesting a single commander with requisite authority.
7. Security. Security is essential to the preservation of combat power. Security results from the measures taken by a command to protect itself from espionage, observation, sabotage, annoyance, or surprise. It is a condition that results from the establishment and maintenance of protective measures against hostile acts or influences. Since risk is inherent in war, application of the principle of security does not imply undue caution and the avoidance of calculated risk.
8. Surprise. Surprise can decisively shift the balance of combat power. With surprise, success out of proportion to the effort expended may be obtained. Surprise results from striking the enemy at a time and/or place and in a manner for which he is unprepared. It is not essential that the enemy be taken unaware, but only that he become aware too late to react effectively. Factors contributing to surprise include speed, cover and deception, application of unexpected combat power, effective intelligence, variations of tactics and methods of operation, and operations security (OPSEC). OPSEC consists of signals and electronic security, physical security, and counterintelligence to deny enemy forces knowledge or forewarning of intent.
9. Simplicity. Simplicity contributes to successful operations. Direct, simple plans and clear, concise orders reduce misunder-

standing and confusion. Other factors being equal, the simplest plan is preferred.²⁹

"The principles of war, not merely one principle", wrote Captain B.H. Liddell Hart, one of the foremost military figures of the twentieth century, "can be condensed into a single word - 'concentration'. But for truth this needs to be amplified as the 'concentration of strength against weakness' ..."³⁰

Archer Jones, a military historian, put it this way:

Because of the predominance of the tactical defensive, the offensive version of this rule - concentrate against weakness - has received more frequent statement than the defensive formulation - concentrate against strength. But often the concept has appeared in a general statement in the simple injunction to concentrate. This affirmation has the virtue of general applicability but fails to specify against what, and sometimes commanders have taken it to mean the enemy's main force when such a concentration would violate the doctrine to attack weakness when on the offensive. The principles of war used today in many armies provide an example of this more general rule to concentrate... One may view all of these principles as the means to secure an appropriate concentration.³¹

The principles of war, rationally deduced from experience, serve as practical techniques or tools to be applied (or ignored) according to circumstances to attain the desired result in the conduct of war. "We must, on the one hand", wrote General Y. Yadin, Chief of the General Staff, Israel Forces, "strive by all means to prevent the enemy from acting on sound principles; on the other hand, a supreme planning effort must be made to enable our forces to exploit those principles, in order to facilitate the achievement of our aims and objectives."³²

The primary aim of strategy is not the destruction of the enemy's forces, or its social structure, or combat. Rather, it is to compel the enemy to give up its plans and comply with one's will in such circumstances that destruction or combat is unnecessary or will proceed with the greatest possible chance of success to oneself. "Supreme excellence", Sun Tzu tells us, "consists in breaking the enemy's resistance

29. United States Army, FM 100-1, *The Army*, 29 September 1978, pp. 14-16; Alger, pp. 268-270; Jay M. Shafritz, *The Facts On File, Dictionary of Military Science*, (New York, New York: Facts On File, Inc., 1989), pp. 364-365; Archer Jones, *The Art of War In The Western World*, (New York, New York: Oxford University Press, 1989), pp. 669-670.

30. Liddell Hart, *Strategy*, p. 334.

31. Jones, pp. 669 and 670.

32. Liddell Hart, *Strategy*, appendix II, p. 386, condensed translation of Article by General Yigael Yadin, published in *Bamachane* (The Israel Forces' Journal), September, 1949.

without fighting".³³ As Captain Liddell Hart asserts: The "true aim is not so much to seek battle as to seek a strategic situation so advantageous that if it does not of itself produce the decision, its continuation by a battle is sure to achieve this".³⁴

The principles of war are the means required to achieve this goal and to maximize the probability of victory in warfare. They are an integral part of the art of strategy and have secured a firm foothold in the art of war, never to be surrendered.

The Application of Principles Of War To Advocacy

The principles of war are as relevant and fundamental to the art of advocacy as they are to the art of war. Whether we accept them as immutable principles of eternal validity, logical and natural laws, or as the most critical considerations in warfare; whether we view them as adaptable precepts, practical techniques, or as common-sense procedures to guide commanders and govern military planning and operations - we can use the principles of war as the means to attain the goals of advocacy.³⁵

The primary objective of advocacy is "to persuade the judge", the Greek grammarian Appollodorus tells us, "and lead his mind to the conclusions desired by the speaker"³⁶.

The essential task of the advocate (the "good litigator"), as succinctly described by Jonathan M. Hyman³⁷, consists in:

1. Developing single, "ironclad" sets of facts.
2. Firmly tying disputes to objective and general legal theories.
3. Asserting maximum control over the procedure and the parties in order to capture the tactical and strategic opportunities available in the litigation.

33. Liddell Hart, *Strategy*, p. xi; f.n. 16.

34. Liddell Hart, *Strategy*, pp. 325, 386, and 387; Earle, p. viii; Michael Howard, *The Causes of War*, (Cambridge, Massachusetts: Harvard University Press, 1984), pp. 85-87.

35. F.N. 9; Alger, pp. 94 and 178; Earle, ch. 17, pp. 415-445. "Mahan: Evangelist of Sea Power", By Margaret Tuttle Sprout; Miyamoto Musashi, *A Book of Five Rings*, trans. by Victor Harris, (Woodstock: New York, The Overlook Press, 1982); Thomas Cleary, *The Japanese Art of War, Understanding The Culture of Strategy*, (Boston & London: Shambhala Publications, Inc., 1992).

36. Quintillian, II, xv, 12, quoted by Lord Macmillan, Can. Bar Rev., p. 22; William C. Costopoulos, "Persuasion in the Courtroom", (1972) 10 Duquesne L.R. 384; Theodore I. Koskoff, "The Psychology of Persuasion", in *Essays on Advocacy*, ed. Arnett J. Holloway, The Association of Trial Lawyers of America, 1988, p. 13; Robert F. Reid and Richard E. Holland, *Advocacy: Views From the Bench*, (Aurora, Ontario: Canada Law Book Inc., 1984), ch. 6, pp. 26-30.

37. *Negotiation Journal*, pp. 238-245; *UCLA Law Review*, pp. 863-923.

4. Combining maximum loyalty to the client with disregard for others.

The six factors that are involved in the work of the advocate, according to Chief Justice Arthur T. Vanderbilt, are:

1. The capacity for grasping all the facts of a case in all of their interrelations and implications quickly and comprehensively.
2. A thorough understanding of the fundamental principles and rules of law and the ability to apply them to the facts of a case.
3. Knowledge of human nature in all of its manifestations and an ability to get along with people generally.
4. A comprehension of the economic, political, social, and intellectual environments of modern litigation - for cases are never tried in a vacuum.
5. The ability to reason concerning the facts, the law, the personalities involved in litigation, and the environment of a case in such a way as to solve the pending problem in the most satisfactory way possible.
6. The art of expressing one's self clearly and cogently, orally and in writing.³⁸

Success in advocacy is achieved through careful preparation and painstaking concentration on the advocate's work. "You win by preparation and drudgery", says John J. Robinette, Q.C. "You do research and you read. The actual appearance in court is often like the tip of an iceberg. (You) try to be succinct. (You) formulate your argument as concisely yet as effectively as possible, getting down to the point of the case, avoiding red herrings. Sometimes it means weeks of preparation."³⁹

The principles of war are the means needed to achieve the requisite concentration and to synthesize the pre-eminent qualities of preparation and presentation in advocacy. By effectively employing the principles of war in carrying out his or her tasks, the advocate will gain a clear understanding of the situation and the objective. A simple yet flexible plan of action will be formulated. The maximum essential force will be

38. Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, *Forensic Persuasion*. The 1950 John Randolph Tucker Memorial Lectures delivered at Washington and Lee University, pp. 7 and 8.

39. John J. Robinette, Q.C., "*The Toronto Globe and Mail*", Monday, November 26, 1979, quoted in Stockwood, p. vii; Reid and Holland, pp. 14-36; Elliot, p. 96; Napley, pp. 7-15; Viscount Simon, pp. 153-159; Louis B. Heller, *Do You Solemnly Swear?*, (Garden City, New York: Doubleday & Company, Inc., 1968), pp. 461-465; W. David Griffiths, "Effective Trial Advocacy From the Court's Perspective", The Canadian Bar Association - Ontario, 1984 Annual Institute On Continuing Legal Education, *Tactics for Success in Civil Litigation*, pp. 1-9; F. Lee Bailey, *To Be A Trial Lawyer*, (New York: John Wiley & Sons, Inc., 1985), pp. 79-96; Williston and Rolls, pp. 1-25.

coordinated and concentrated at the decisive point. The initiative will be taken to place the opponent in a disadvantageous position, to protect against weakness, and to attain decisive results by offensive action, preferably under conditions achieving strategic surprise. The adversary, persuaded that further resistance is too costly or victory unlikely, will be psychologically defeated. The case will be settled on more favourable terms, or will proceed with increased chances of obtaining the best result for oneself.

Intelligent use of the principles of war, applied with ingenuity, and adapted to circumstances, will help the advocate to accomplish the aims and objectives of advocacy. It will improve the advocate's performance as the heir to the champion in armed "trial by combat". In short, it will produce effective advocacy.

The Conclusion

The principles of war cannot guarantee victory. The results of battles - whether in the courtroom or on the battlefield - will invariably be affected by a multitude of unpredictable factors and by the "realities of war".⁴⁰ As Clausewitz wrote:

War is the province of uncertainty: three - fourths of those things upon which action in War must be calculated, are hidden more or less in the clouds of great uncertainty. Here, then, above all a fine and penetrating mind is called for, to search out the truth by the tact of its judgment.⁴¹

Success in advocacy and war is most likely to ensue from persistent study and careful preparation guided by common sense. "Wisdom", the Bible tells us, "is better than weapons of war".⁴² To quote John Munkman:

There is little or no technique in the conduct of a case as a whole: this is primarily an exercise of practical judgment, which has at its service the special techniques of speaking and of questioning witnesses... Such overall technique as there is

40. Alger, pp. 190 and 191; Ropp, p. 15; Palit, pp. 129, 153 and 154; Dyer, pp. 133-141; Dunnigan, pp. 16-19; Liddell Hart, *Strategy*, p. 337; Jay M. Shafritz, *Words On War, Military Quotations From Ancient Times To The Present*, (New York, New York: Simon & Schuster, Inc., 1990), pp. 136, 137, 147 and 233; Major General Howard M. Estes, Jr. USAF (Ret.), "On Strategic Uncertainty", *Strategic Review*, v. xi, No. 1, Winter 1983, United States Strategic Institute, Wash., D.C., p. 36; Lloyd Paul Stryker, *The Art of Advocacy*, reprinted in Milton D. Green, *Alternatives and Preliminaries To The Trial of a Civil Action*, American Law Institute, 1961, pp. 119 and 120.

41. On War, 1832, I. iii, quoted in Wintle, p. 79.

42. Ecclesiastes 9:18.

displays a marked analogy to the principles of strategy and tactics in warfare...⁴³

The principles of war can be studied to gain clear insights into the fundamental nature of man and to enhance the development of practical judgment.⁴⁴ They can be applied in all ages as a guide to approaching and conducting a contest between two opposing wills; and they can increase the probability of victory.

"If you want peace", says Captain Liddell Hart, "understand war"⁴⁵; and so it may be said of the art of persuasion, if you want justice, understand advocacy. When the nature, aims, and process of advocacy and war are apprehended, the goals held out by them can be attained.

As honourable soldiers, it is our duty to persevere to understand advocacy and war, especially how and when to use the principles of these arts in carrying out our tasks. The reward for the effort is the hope to achieve calculated victory, a better peace, and justice.

43. Munkman, p. 163; Robbins, pp. 1 and 2.

44. Alger, pp. 190 and 191; Felix Gilbert, *To the Farewell Address: Ideas of Early American Foreign Policy*, p. 92, and Peter Paret, "Clausewitz and the Nineteenth Century", in Michael Howard, ed., *The Theory and Practice of War: Essays Presented to Captain B.H. Liddell Hart on His Seventieth Birthday*, p. 29, cited in Alger, pp. 190-192; Joseph Agostino, "Reflections On Advocacy", *The Law Society of Upper Canada, Gazette*, Volume XXII, (1988), p. 81.

45. Liddell Hart, *Strategy*, p. 361.