

Inside Counsel

Technology: What Sun Tzu Can Teach Us About E-Discovery

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Sun Tzu, an ancient [Chinese](#) philosopher, strategist and general, wrote “The Art of War” in the fifth or sixth century B.C. “The Art of War” is accepted as one of the greatest works in history on strategy. The KGB studied it during the Cold War. The CIA makes all of its officers study it. Mao used its precepts to establish communist China. Even Tony Soprano relied on it to control his “family.”

So what does a book used by Mao and Tony Soprano have to do with electronically stored information (ESI)? A lot. In almost every type of trial work, ESI is a key strategic element. “The Art of War” is a bible on strategy and can help any lawyer strategically deal with ESI.

“The Art of War” is broken down into several lessons. We don’t have enough room to discuss them all, so we’ll focus on the first one—the value of being prepared:

“The art of war teaches us to rely not on the likelihood of the enemy’s not coming, but on our own readiness to receive him; not on the chance of his not attacking, but rather on the fact that we have made our position unassailable.”

A lot has already been written and said about the importance of clients being proactive with ESI, so I won’t focus on that here, but that is an obvious key for being prepared.

Additionally, I often hear about lawyers who brag that they don’t deal with ESI in their cases, like that is some kind of red badge of courage. This attitude violates Sun Tzu’s first lesson. The

key for dealing with ESI strategically is to assume that it will be an issue. Assume your adversary will ask for it and, as Sun Tzu advised, make your position unassailable. This is done not by making ESI the focus of every case, but by accepting that it is a core competency for all litigators and trial lawyers that must be studied and mastered like all other litigation and trial tactics.

Also, it's not enough for the trial lawyer to appoint an attorney ESI expert to run that part of the case and abdicate that aspect of strategy to the "local techie" in the firm. Any great trial lawyer will tell you that key to winning is becoming an expert in the subject matter at issue. If you try aviation cases, then you should know aviation like the back of your hand. If you represent a business at trial, then you should know your client's business, the industry and your adversary's business better than anyone else in that courtroom. The same is true for the science behind patent cases. ESI is no different.

Because technology dominates every aspect of litigation and our client's businesses, great trial lawyers in the future will know technology better than their adversaries. They won't punt the tech part of a case to someone else in the firm or a vendor. They will heed Sun Tzu's lesson and do what it takes to learn ESI, assume that technology issues will be involved in their cases and deal with these issues head-on. They will work to make their client's positions unassailable, so that ESI does not dominate their case, unless it's to their advantage.

Centuries ago, Sun Tzu instructed, "Be prepared." Litigation and trial lawyers who live in a society that is dominated by technology, and becoming more so every day, would be wise to heed his lesson and embrace, learn and master technology and ESI.

About the Author

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