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COMMENTARY

The Case for Compassion as a Litigation Strategy

Small acts of compassion send a message to the opponent that the attorney is not litigating because of their ego or out of a sense of superiority.

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Litigation

By Deborah Stambaugh | August 28, 2024 at 11:54 AM



Sun Tzu's ancient writing, "The Art of War," teaches that warfare is psychological, that the greatest strategist wins battles without shedding blood, and that "the supreme art of war is to subdue the enemy without fighting." One way to win without fighting is by striking fear into the heart of the opponent while building for them Sun Tzu's golden bridge on which to retreat. I believe the golden bridge is paved with understanding, and we've all heard the adage, "compassion breeds understanding."

Modern trial attorneys extrapolate principles of the Art of War for our litigation and trial strategies. The principal consideration of the ancient treatise still applies. To achieve our clients' desired result, we must make our opponent want to retreat. They must understand they have more to lose than to gain by proceeding with their fight.

Trial lawyers understand that they must be perceived as sharp and courageous and that our opponent must fear that we will take them by surprise, be quicker, more prepared, stronger or more agile. The endeavor to be perceived as a formidable opponent may tempt the attorney to be loud, stern, demanding, and unwilling to cave on any point. To those who are more calculating, such characteristics are akin to the demeanor of warrior brutes who lose their heads in the heat of battle and are unlike a calculating general who is always prepared with multiple strategies. I prefer to let my opponent know that I am calculating, that I know when to retreat, and that I have no intention of retreating on their matter because my case is poised for success.

How does compassion fit into this warrior-like strategy, however?

Some would say that compassion is weakness, and that all signs of weakness should be avoided. There are two responses to this position. First, Sun Tzu advises to appear weak when you are strong, and appear strong when you are weak. Thus, one should not fear displaying weakness.

Second, and more importantly, the presumption that compassion is a display of weakness is a false presumption. Compassion is an evolved state of emotion that requires overriding animal instincts and actuating one's capacity to consider factors other than their own ego. It shows the attorney does not allow anger to restrict their thinking.

Small acts of compassion send a message to the opponent that the attorney is not litigating because of their ego or out of a sense of superiority. Rather they are litigating because they are right and because their analysis predicts a high likelihood of success. Compassion says, "I have considered your arguments and positions so well that I have even guessed how you may be feeling, yet I still plan to win, and I still think my client deserves to win."

My first experience implementing compassion in litigation was in a fraught corporate dissolution case. I brought a foot-tall stack of papers to the Defendant's deposition and had let him know in the notice that it would continue "day-after-day until complete."

In exploring whether he was fit to testify, I learned that the defendant did not want to cancel his deposition, but that he had a health concern. I promised him frequent breaks and as much water as he needed.

The situation reminded me of a time when someone showed me compassion and of my personal commitment to treat all humans with dignity and respect even while delivering justice. Faced with a frail human in front of me, adherence to that commitment required me to rethink my deposition strategy.

Without losing track of my goal to ask calculated questions that would hold the witness accountable, I doubled down on my effort to be civil and to maintain a kind tone of voice. He had not expected water breaks, much less a compassionate interaction with opposing counsel. The deposition proved more fruitful than any I had taken before it.

My experience that day was later affirmed in reading John Morgenstern's book, "The Interrogators' Guide to Depositions, Investigations & Discovery." He teaches that while effective interrogators are prepared, and capable of introducing information strategically, they also maintain rapport with the witness and awareness of both the interrogator's and the subject's positive and negative interpersonal behaviors.

Small acts of compassion conveyed a message of strength and fortitude of will to the other side. It helped them take their own pride out of the question of whether they continue hurting themselves in a losing battle or take their first step on the golden bridge of retreat.

Compassion, properly placed, manifests the highest tenet of Sun Tzu's teachings, "to subdue the enemy without fighting."

Deborah Stambaugh is an associate at Wisler Pearlstine in Blue Bell, Pennsylvania. She is an experienced litigator who focuses on contract and insurance disputes, corporate dissolution, complex employment matters, and internal investigations. Ms. Stambaugh provides general counsel and litigation services to public, commercial, and nonprofit clients. Learn more at www.wislerpearlstine.com.

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