Litigating Like the Viet Cong:
How to Win Against an Opponent with Superior Resources

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The Vietnam War saw the United States – the world's mightiest military power – attempt to prevent communists from controlling South Vietnam. Many battles pitted U.S. forces against the North Vietnamese Army (NVA), but the U.S. also fought the National Liberation Front – a political organization and fighting force commonly known as the Viet Cong. The U.S. lost the war. The Viet Cong and its allies prevailed.

As an Air Force officer, I studied the history of airpower and learned that during Vietnam our intelligence indicated U.S. bombing efforts were extremely effective in limiting the Viet Cong's ability to move supplies to the south. So why did we lose? Many factors played a role, but with regard to the success of U.S. bombing efforts the Viet Cong simply did not require much in the way of supplies. They lived on rice and slept in tunnels, so even if only one percent of their shipments made it to the south, that was enough.

Like war, litigation involves conflict. What can the Viet Cong teach sole practitioners and small firm lawyers about litigating against an opponent with vastly superior resources? I'm talking about cases where you're up against firms with dozens or hundreds of lawyers and offices in many cities. I've been there, done that, and prevailed. I believe we can learn much from the Viet Cong.

First, don't let the enemy's strength intimidate you. The U.S. spent $173 billion on the war. The Viet Cong lived a subsistence existence and fought with hand-me-down Soviet and Chinese weapons. But they won. Believe in your cause. Believe you can and will win. Believe in yourself. If you don't believe in yourself, you've already lost.

Second, don't believe the hype. Your opponent may not be as strong as you think. There are large, reputable law firms that are surprisingly average in terms of the quality of services they provide. Some are like balloon fish that gulp seawater to make themselves appear larger than they are. Even those that truly have tremendous resources have all the associated problems – higher costs, a larger caseload, communications issues, and numerous internal management problems and turf battles. These large, well-funded firms are in some ways analogous to the U.S. military/diplomatic bureaucracy that tried to coordinate U.S. military efforts in Vietnam. The Viet Cong were lean and mean. The Viet Cong had focus.

Third, don't believe the hype about specific lawyers either. Some are more successful in marketing than in court. I once represented a client in a case where opposing counsel was a "Super Lawyer" with a firm that advertised that it had "offices in Denver and Washington, D.C." Every time opposing counsel offered some complex legal argument to the Court, my response would begin with something like "Well, your honor, I'm just a small-town lawyer and I don't have an office in Washington, D.C., but I read the statute and I think opposing counsel is making this more complicated than it really is…" The judge almost always ruled in my favor. In another case long ago, I was up against an older lawyer that proudly had "Fellow of the American College of Matrimonial Lawyers" emblazoned across the top of his letterhead. During the trial, I made repeated objections while he was questioning a witness, and the judge sustained my objections. Exasperated, the lawyer looked at the judge and asked, "Your honor, I don't understand why you are sustaining his objections." The judge replied, "Have Mr. Cohen explain it to you at the break." Don't believe the hype. You know the substantive law, the rules of procedure, and the rules of evidence just as well as they do, maybe better.

Fourth, simplify. During Vietnam, the U.S. fought the war on many fronts. Different branches of our armed forces played different roles and different opinions on strategy and tactics. A cumbersome bureaucracy developed to coordinate American efforts. The Viet Cong were lean and focused. Keep your theory of the case simple. Judges and juries love simplicity, and most disputes are far simpler than your well-funded opponent will claim. Large firms get paid big money to complicate simple things. Don't let them. For example, in a contract case, the plaintiff's theory should be simple: the parties had an agreement; the defendant breached the agreement; and the defendant's breach damaged the Plaintiff. Hammer that theme at every opportunity. When opposing counsel files a motion, begin your response by explaining, "This is a simple breach of contract case." When you file a motion, begin with, "This is a simple breach of contract case." Repeat that at every opportunity. Repeat it in jury selection. Repeat it in your opening statement. Repeat it when you object. Repeat it in your closing argument.

Keep your direct and cross examinations short. On direct examination, get your witnesses to say what they need to say, and then confidently announce, "No further questions." If it takes only fifteen minutes, that's fine. This short duration of your direct examination will reinforce your assertion that it is a simple case. If opposing counsel cross examines your witness for many hours, that's fine; that will only give credence to your assertion that your opponent is making the case more complicated than it is. If your witness gave an opinion on direct examination and opposing counsel then cross examined the witness *ad nauseam*, when it is time for re-direct you need only ask one question: "Did any question counsel asked you during the past four hours change the opinion you gave to the jury when you testified on direct examination?" Your witness will say, "No." Then sit down.

One other topic deserves mention when we speak of simplifying – overhead. For sole practitioners and small firm lawyers, stress increases in proportion to overhead. Rent, wages, unemployment taxes, worker's compensation coverage, business property taxes, copier leases, and vendors calling you every day to try to sell you something you don't need. How much do you really need? When your overhead is high, you must take on many new matters each month just to pay your overhead. These minor matters distract you from working the big cases and doing the legal work you really enjoy. I once had a big office with lots of diplomas and

expensive art on my walls. I had paralegals and legal assistants. Today I work out of my home. My desk is a sheet of plywood laid across two saw horses. I meet clients in coffee shops across Colorado. I have my laptop and an inexpensive printer/copier/fax/scanner. That's all I need. Very little stress, much more fun.

Fifth, don't fight strength with strength. Large firms can generate far more discovery and motions than you. Don't get sucked into trying to match the amount of paper they generate. Large firms make their money fighting every possible issue, flooding both you and the Court with hundreds or thousands of pages of mostly garbage, and billing their clients for every second spent on it. It's an annoyance you must tolerate to get your case to trial, but why burden yourself trying to match their efforts? When opposing counsel files a 40-page motion, file a two-page response. Mock opposing counsel for attempting to complicate a simple case. Most judges know BS when they see it. They will find your approach refreshing.

Discovery is one area where you definitely should not try to match your opponent stride for stride. You probably already know 95% of what you need to know to try the case because your client provided you with all the information and documents available when they hired you, and then you received the opposing party's mandatory disclosures. Your opponent will hit you with pattern interrogatories, non-pattern interrogatories, requests for production of documents, requests for admissions, motions for leave to exceed the discovery limits, and God know what else. They bill their client for all it. Don't waste precious time objecting to their discovery requests unless they are clearly out of bounds. Just give them straightforward answers so they know you're ready for trial. No law says you have to hit them with the same types of discovery requests. They will depose a lot of witnesses. No law says you have to depose anyone. I have tried a number of cases where I chose not to depose an opposing party or an opposing expert because I did not want to give the witness an opportunity to practice their answers prior to trial. If you depose them, they will see their deposition transcript and will be prepared to explain away all deposition testimony that may hurt them. They will claim they misunderstood your deposition questions or that they thought about the matter after the deposition and remembered new details.

The goals of a large firm during discovery are to (1) evaluate the strength of your case, the credibility of your witnesses, and your competency; (2) make your witnesses commit to a story they won't be able to change at trial; (3) gather information they will use when they file their seemingly endless stream of motions for summary judgment, motions to strike, motions *in limine*, motions for sanctions, motions for leave to conduct additional discovery, motions to continue the trial, motions for extension of deadlines, motions to exceed page limits, and motions for leave to file a response to any reply you file; and (4) sap your resources and demoralize you. This is what their clients pay them to do. Sure, you could take the same approach and engage in extensive discovery, but frequently the result will be that you find yourself immersed in battles over objections to your discovery requests, motions to compel, and motions for sanctions. They can generate more paper than you. Why play their game if you don't have to?

One other thought on discovery. If you engage in discovery, don't just focus on the claims and defenses in the pleadings. Be like the Viet Cong: probe, attack when and where it is not expected. Remember, you likely already know 95% of what you need to know about those

issues anyhow. Why devote time and resources to that? I'm interested in the other 5%. I'm also interested in learning things that may be completely irrelevant to the pending suit. Maybe you can uncover facts that would support an additional cause of action, or a separate lawsuit, or that might embarrass the opposing party. I once defended a trade association in a trademark infringement suit filed by a rival association. When we deposed the director of the plaintiff association I did not focus on the alleged trademark infringement because the relevant facts were largely uncontested. Instead, I asked a series of unexpected questions about the plaintiff's communications with various government agencies and industry leaders concerning my client. The more I probed, the more apparent it became that we might have grounds to counterclaim for defamation and unfair competition. The case settled that afternoon and my client paid nothing.

Sixth, don't fight unnecessary battles. Your resources are limited. If opposing counsel wants a few extra days to respond to a discovery request, give it to them. Give it to them even though you responded to their discovery requests on time. The Court will grant them an extension anyhow, and any attempt to object will make you look petty and diminish your credibility.

Seventh, adapt. I once litigated a trade secret case that had become hopelessly bogged down in a battle over source code that went on for years. We finally asked the court to allow us to drop our trade secret claim and decided to move forward only on our breach of contract and interference with contract claims, thus making the source code issues irrelevant. We won a $4.2 million judgment.

Eighth, use pinpoint attacks. Large firms often include as many causes of action as possible when they represent the plaintiff, and they always include dozens of boilerplate defenses in their Answers when they represent the Defendant. I can't count the number of times I've seen defense lawyers plead contributory negligence in a breach of contract case. The shotgun approach to claims and defenses is their equivalent of American aerial bombardment during Vietnam. No law says you must employ this approach. Doing so diminishes your credibility with the judge and jurors. Keep it simple. Weak claims and defenses detract from the strong claims and defenses your client has. Focus like a laser on the strong claims and defenses.

The End Game

Here's the good news. If you are still standing when the Court has ruled on your opponent's dozens or hundreds of motions, you have the advantage because you know jungle warfare and they don't. Many of these "litigators" have filed hundreds or thousands of motions for summary judgment, but seldom tried a case to a jury. There is a difference between "litigators" and "trial lawyers." Large firms have the resources to be great litigators. They recruit smart people, but often these lawyers don't communicate well. They write poorly because they believe legal writing must employ the verbose style they learned in law school. They move in some impressive social circles, but often don't know how to communicate with the average folks likely to be called for jury duty. You are a trial lawyer. The jurors will like you because you're going to keep it simple and get right to the point every time you speak. The jury will look at the multitude of lawyers, paralegals, and boxes your opponent has on their side of the courtroom and instantly start rooting for you because of the David versus Goliath effect. Because many of these litigators are much better at generating lengthy motions than they are at simplifying complex

concepts for a jury, they want to make things complicated. They hope to confuse the jurors or persuade them to decide in their favor because of some technical legal argument. They frequently provide the jurors with thousands of pages of exhibits, hoping the jurors will assume that somewhere in those documents there must be something that supports your opponent's claims or defenses. These large firm litigators excel at technical legal argument and some are actually more focused on making a good record for a possible appeal than they are on explaining the reasons the jurors should rule in favor of their client. But that's like using high-tech bombers against the Viet Cong. You are good at keeping it simple, so take advantage of that. Win the case at trial by giving the jury a simple way to find in favor of your client.

Obviously, litigation differs from war. Some Viet Cong tactics, such as deception, are prohibited by the Code of Professional Responsibility. Some Viet Cong tactics were morally reprehensible, and many would argue some U.S. tactics were as well. My purpose is not to encourage litigators to adopt such tactics, but rather to inspire solo lawyers and small firms, and help them see how they can prevail over an opponent with far greater resources.

Finally, I do not intend to denigrate the Vietnamese people or those who fought on any side in that war.

Mark Cohen has 32 years of experience as a lawyer. He earned a B.A.in Economics at Whitman College and earned his law degree at the University of Colorado in Boulder. He earned an LL.M. Agricultural and Food Law from the University of Arkansas, where he also taught advanced legal writing. His diverse legal career includes service as an Air Force JAG, a Special Assistant U.S. Attorney, a prosecutor, a municipal judge for Boulder, six years on the Advisory Board of The Colorado Lawyer (including one as chairperson), and service on the Executive Board of the Colorado Municipal League.

Mark wrote six articles in the Am.Jur. Proof of Facts series, including the seminal article on piercing the corporate veil. He wrote several articles and book reviews for The Colorado Lawyer. In 2004, he won 2nd prize in the SEAK National Legal Fiction Writing Competition. He wrote two mysteries published by Time Warner, and his first mystery, The Fractal Murders, became a Book Sense ® mystery pick and was a finalist for the Colorado Book of the Year. His non-legal articles have appeared in magazines such as *Inside Kung Fu*, *Camping & RV*, and *Modern Dad*. He is a member of the Institute of General Semantics and the Mystery Writers of America.

Mark's practice focuses on drafting and reviewing all types of legal documents including contracts, corporate documents, real estate documents, employment documents, intellectual property documents, motions, pleadings, and briefs. He also litigates cases arising out of poorly drafted documents. He enjoys helping businesses and other lawyers improve their legal and non-legal documents by translating them from Legalese into plain English. Learn more at Plain English Consulting.

Mark also serves as an arbitrator by agreement of the parties. He devised a set of Arbitration Rules he believes are simpler and more flexible than the AAA's rules. He also offers arbitration services online or via Skype by agreement of the parties. Learn more at Colorado Arbitration.

Mark lives in Nederland, Colorado. (Elevation 8,236 feet). He holds a black belt in karate and serves on the board of directors of non-profit that offers training in personal safety, violence prevention, and appropriate dating relationships.