LITIGATING LIKE THE VIET CONG:

HOW TO WIN AGAINST AN OPPONENT WITH SUPERIOR RESOURCES

BY MARK COHEN

The Vietnam War played witness to the United States' attempt to prevent communists from taking South Vietnam. Many battles pitted the world's "mightiest" military power against the Viet Cong. In the end, the United States lost the war.

As an Air Force officer, I learned that during the Vietnam War, U.S. bombing efforts were highly effective in limiting the Viet Cong's ability to move supplies. So, why did we lose? While many factors were involved, the Viet Cong, unlike the United States, did not require many supplies; they lived on rice and slept in tunnels. Even if only one percent of the Viet Cong's supplies made it to the south, that was enough.

Like war, litigation involves conflict. What can the Viet Cong teach us about litigating against an opponent with vastly superior resources? Given my experience in litigation and in studying armed conflict, I believe there is much to learn from the Viet Cong.

1. DON'T LET THE ENEMY'S STRENGTH INTIMIDATE YOU. The United States spent $173 billion on the war. The Viet Cong lived in survival mode and fought with hand-me-down weapons. But they won. In other words, believe in your cause. You analyzed the case and took it because you felt it had merit. Your adversary's size does not change the facts or the law. If you don't believe you can win, you've already lost.

2. DON'T BELIEVE THE HYPE. Your opponent might not be as strong as you think. There are large firms that are surprisingly average in terms of the quality of services that they provide. Some are like balloon fish that gulp seawater to make themselves appear larger than life. Even those that truly have tremendous resources have all of the associated problems: higher costs, larger caseloads, communications issues and internal management problems. These firms are analogous to the vast U.S. bureaucracy that coordinated U.S. military efforts in Vietnam.

3. 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 boasted "offices in Denver and New York City." Every time opposing counsel offered some complex legal argument, 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 New York City, but I read the statute and opposing counsel is making this more complicated than it really is." The judge usually ruled in my favor. You know the law, the rules of procedure and the rules of evidence just as well as they do — maybe better.

4. DON'T BELIEVE THE OFFICE SPACE HYPE. Large firms pay big money for fancy offices to impress clients and intimidate you. Don't fall for it. For sole practitioners and small-firm lawyers, stress increases in proportion to overhead. If the Viet Cong could defeat the U.S. military, how much do you really need? I love visiting large firms. I enjoy their artwork, drink their coffee and take in the view. Then I go home, where my desk is a sheet of plywood laid across two sawhorses, and I thank God I no longer have to pay for that kind of overhead. Very little stress and much more fun. Life is good when you only have to bill two or three hours a day to earn a nice income.

5. SIMPLIFY. During Vietnam, the United States fought the war on many fronts. Different branches of our armed forces played different roles and had different opinions on strategy and tactics. A cumbersome bureaucracy developed to coordinate American efforts. The Viet Cong were, in contrast, lean and focused. Keep your theory of the case simple. Judges and juries love simplicity, and most disputes are far simpler than your opponent will claim. Large firms receive big money to complicate things. Don't let them. For example, in a contract case where you represent the plaintiff, your theory should be simple: The parties had an agreement; the defendant breached the agreement; and the defendant's breach damaged your client. Hammer that 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 it in jury selection. Repeat it in your opening statement. Repeat it when you object. Repeat it in closing argument.

"LIKE WAR, LITIGATION INVOLVES CONFLICT."

Keep your examinations short. On direct examinations, get your witnesses to say what they need to say, and then confidently announce, "No further questions." If it takes only 15 minutes, that's great. The short duration of your direct examination will reinforce your assertion that it is a simple case. If opposing counsel cross-examines your witness for 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 and opposing counsel then cross-examines the witness ad nauseam, when it is time for re-direct, you need only ask one question: "Did any question that 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.

6. DON'T FIGHT STRENGTH WITH STRENGTH. Large firms can generate more paper than you. Don't try to match them. Large firms make money fighting every possible issue, flooding both you and the court with hundreds or thousands of pages of mostly cornstarch while billing for all of 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 citing the relevant statute and call it a day. Most judges know B.S. 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 relevant information and documents when they hired you, and then you received the opposing party's disclosures. Your opponent will hit you with

pattern interrogatories, non-pattern interrogatories, requests for production, requests for admissions, motions for leave to exceed the discovery limits and God knows what else. They bill for all of it. Don't waste time objecting to their 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. If you do, what you will get back will start with five pages of boilerplate objections. They will depose many witnesses. No law says you have to depose anyone. Why give the opposing party or opposing expert a practice run?

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 sur-reply to any reply you file; and (4) sap your resources and demoralize you. 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?

7. DON'T FIGHT UNNECESSARY BATTLES. Your resources are limited. If opposing counsel wants extra time to respond to a discovery request, give it to them, even though you responded to their requests on time. The court will grant their request anyhow, and your objection will make you look petty and diminish your credibility.

8. ADAPT. I once litigated a trade secret case that had become hopelessly bogged down in a battle over source code. 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.

9. USE PINPOINT ATTACKS. Large firms often include as many causes of action as possible when representing plaintiffs, and they always include dozens of boilerplate defenses in their answers when representing defendants. 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 is their equivalent of American aerial bombardment during Vietnam. If you have the resources, you can launch dozens of B-52s and drop thousands of bombs. Maybe some will hit their target. No law says you must employ this approach. Doing so creates more work for you and diminishes your credibility. Keep it simple. Focus like a laser on the strong claims and defenses.

10. BE PATIENT AND PERSISTENT. The Viet Cong simply outlasted the Americans. If you are still standing when the court has ruled on your opponent's dozens of motions, you have the advantage because you know jungle warfare and they don't. Many "litigators" have filed hundreds 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 highly intelligent lawyers don't know how to communicate with the average folks likely to be called for jury duty. Think like 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.

11. SIZE DOESN'T MATTER. The Viet Cong were not intimidated when they saw America's awesome arsenal. When you arrive at the courtroom on the morning of trial and look across the room, you will see a multitude of lawyers and paralegals and God knows how many boxes filled with paper. It looks impressive, but it can't destroy you if the facts and law are on your side. The jurors will look at that spectacle and then look at you sitting quietly by yourself with your slim three-ring binder and legal pad. Who do you think they will be rooting for?

CLOSING THOUGHTS

Obviously, litigation differs from war. The Code of Professional Responsibility prohibits some Viet Cong tactics, such as deception. 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. D

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