

# The Art of War Adapted to U.S. Medicine 2011

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## The Art of War

In his classic treatise, *The Art of War*,<sup>1</sup> Sun Tzu, a Chinese general in the 5<sup>th</sup> or 6<sup>th</sup> century B.C. in the Kingdom of Wu in eastern China wrote:

Thus we may know that there are five essentials for victory:

1. He will win who knows when to fight and when not to fight.
2. He will win who knows how to handle both superior and inferior forces.
3. He will win whose army is animated by the same spirit throughout all its ranks.
4. He will win who, prepared himself, waits to take the enemy unprepared.
5. He will win who has military capacity and is not interfered with by the sovereign.

Under the Health Care Quality Improvement Act (HCQIA) of 1986, U.S. doctors, despite U.S. citizenship, are denied due process of law in peer review and are plagued with the effects of a statute that, on the one hand outlines appropriate peer review, but in the real world creates immunity for misconduct by the hospital.

Recent growth of corporate employment of doctors has created more difficult burdens for the physician responding to peer review challenges and disciplinary threats.

Career safety and the normal protections of law in a contract or professional relationship situation have become increasingly tenuous, despite the commitment of American law in theory to the concept of “the land of the free.” Doctors should anticipate the problems of peer review in corporate/hospital settings, including the disadvantages placed upon accused physicians, and should make choices and develop strategies adapted to difficult circumstances.

Recall that Sun Tzu does not eschew retreat, but recommends strategic retreat in circumstances when opposing forces are overwhelming. Sun Tzu would recommend that proper assessment of the situation and the forces deployed, with the arguments and advantages assessed, allow a proper strategy, including decisions to engage with the hope of concessions, to engage with the hope of victory, or to refuse engagement and make a proper compromised retreat.<sup>5</sup>

## Choosing a Hospital and Applying for Privileges

When choosing a site for practice, particularly for specialists who are hospital dependent, as surgeons are, assess the needs of the hospital and apply at one that wants and needs you. Join and engage only with a group of allies, or as a member of an established group. In the event of any untoward or hostile development, particularly in your first few years without an established presence, you will need allies.

In the probationary year, be risk-averse and conscious of the social and professional environments. The hospital is a social enterprise; it is not necessarily an environment that is friendly—in fact it may be somewhat or very competitive. Control yourself and be aware of the hospital disruptive conduct policy. Avoid conduct in all circumstances that might be considered disruptive. Treat nurses, clerks, and administrative people well, since they are believed to be the easy objects of abuse by high-flying professionals.

Serve on committees, and be a low-maintenance and a constructive positive player. Do not be a prima donna. Always be above reproach.

Save some money. Be judicious and mature in your lifestyle. Rent or lease with an option to buy. Always have at least two hospital appointments in case one hospital becomes less attractive or friendly.

Have money in reserve for security; the best recommendation is at least three months of reserve income. Avoid excessive debt or ostentatious style. Most physicians I have assisted in peer review matters were quickly short of funds for litigation. Attorneys are expensive. You must have practice and income backup. Live within your means.

## You Are Always on Probation

After your probationary year, act as though you are still on probation, because you are. We all are.

You want to avoid battle, so do things in the hospital setting that reduce risk to your practice and professional status. Be especially conscientious and professional. Respond in writing to complaints

and inquiries, particularly in bad-outcome cases, realizing that outcome bias is unavoidable. Be prompt, polite, professional, and complete in your responses.

Avoid or fix conflicts. Do not allow conflicts with administration, other medical staff, or nursing staff to fester. Be especially friendly and cooperative with the medical staff secretary.

When re-credentialing approaches, do it early and carefully. Decide whether you work enough at a particular hospital to justify re-credentialing. Assess your situation at every hospital where you might be re-credentialing—but keep appointments at least two hospitals whenever possible.

Any decision not to re-credential, or to resign, should be made with a preliminary letter of inquiry about whether your resignation would be compromised by an investigation or pending disciplinary action. If there is some investigation, or disciplinary action pending or continuing, do not resign or fail to re-credential, since HCQIA would require a National Practitioner Data Bank (NPDB) report.

### **How to Avoid Being a Target of Peer Review**

Follow the advice above.

Make a decent record on patient care, particularly the tough cases with difficult or unhappy outcomes. Be attentive to nursing or patient problems, and explain your decisions to concerned nurses. Be professional and avoid reflex defensiveness. Understand that medical care is often subject to more than one opinion, and you are not immune from criticism. Failure to be perceived as cooperative and active in medical staff affairs is an invitation to vulnerability.

When you are the subject of investigation or inquiry, provide professional, careful, objective, and well-researched written responses with personal availability for discussion. Document events so you can recall them, and discuss case inquiries openly. If you detect a hostile attitude from a committee, raise the energy of your effort and be careful to keep a written record of all communications, written and oral.

Save the correspondence and the case information. Be careful about how outside evaluations are done—make sure the reviewers are reputable and that their qualifications are on record. Review any outside report for objectivity. The peer review law does not require due process of the normal kind, but a reasonable effort to investigate and a reasonable assessment and action.<sup>1</sup>

In the fashion of Sun Tzu, be strategic in your dealings with the opposition, investigators, or enemy. For example, if you detect a

hostile attitude from a committee chairman, engage the whole committee. Make the discussion a recorded discussion with proper attention to fairness and impartiality. Be alert and don't duck if someone is hostile to your position.

Always be aware of when your temper or personal feelings are clouding your writing or statements. Be disciplined. Leave important letters on your desk for a day or two. Don't call people when you are irritated. Assess what you say, demand, or declare in writing: Will it be perceived by others as professional and appropriate? Then reassess it.

Find and nurture powerful allies, and avoid the lone ranger, commando role.

Be very careful not to antagonize administrators at any level. They have the power, the staff, and the political capital that makes them almost invincible. They have an abundance of time and resources, and you have to care for your patients.

Be particularly attentive if the administration is "lawyered-up." Lawyers relish conflict. They are dangerous for inattentive, inexperienced, or busy and unprepared physicians.

The successful professional knows when to hold 'em and when to fold 'em. If the hospital becomes an unfriendly place, make a strategic retreat and get on with your life elsewhere, and leave no investigations or other loose details.

Departure from a hostile environment is often the best choice for you and your family—before a reportable event. For this reason, recognize that if you become a doctor in America under HCQIA of 1986, you do not have career security. Avoid debt, and avoid working in hospitals that have medical staffs that are inclined to be petty or vicious. Be particularly aware of hospitals that use the disruptive physician accusation to disable a member of the medical staff.

### **If You Are the Subject of a Proposed Disciplinary or Privileges Action**

Read the bylaws and investigation/discipline/fair hearing plan sections carefully. Read carefully the statute (HCQIA), 42 United States Code 11111 and what follows.

Get advice and counsel. Peer review is serious. During the preliminary investigation stages, insist on outside impartial experts, of impeccable reputation, who are free of conflicts of interest related to the hospital, and who are available for interview. Use no anonymous reviews or reviewers. Payment should be through a third party, not a direct payment from the hospital.

Engage your own experts of repute, and test them for assertiveness and fortitude. It is essential that you have credible and articulate experts who do not equivocate.

Everything important must be in writing, including good notes and good minutes during the preliminary stages. Insist on written statements from the hospital and the peer reviewers. Keep files of all correspondence.

Avoid defensiveness, poorly prepared arguments, and *ad hominem* attacks.

Read Marcus Aurelius and Epictetus, stoic philosophers who give you perspective. Remember the advice given to Ben Hur: "There are no rules in the arena."

Appeal to a sense of fairness and collegiality; be cordial and cooperative. Never be antagonistic or hostile.

Do not miss meetings. Make sure you don't allow Star Chamber, closed-door deliberations. Your chance for success is best when you can be there. Your presence keeps people civil and more reasonable. Be a cooperative and constructive participant.

### **The Disruptive Physician and Wellness/Psychiatric Gambit**

Behavioral or mental health allegations are disabling and difficult to defend. Psychiatrists presented with a fait accompli—doctor the hospital claims is disruptive—tend to agree, and overdiagnose. Conflict with the hospital tends to make anyone less "cooperative" than some might consider appropriate.

Psychiatric evaluations are a treacherous area—think of how the Communists misused psychiatry.

### **Hearings**

Most physicians do not like conflict. Hearings create anxieties on both sides. Take advantage of this, and be highly self-disciplined. If the issue goes to notice and "fair hearing," you are in trouble, but make the best of it and re-dedicate yourself. Know the opponent's position and strategy. Know and engage their experts. Prepare your own experts to anticipate the opposition. Insist on proper notice of allegations and proposed discipline. Nail the opposition down to specific issues and demand that those issues be in writing before the hearing so that you can prepare. It is important to make your best possible effort at this level.

Appeal to fairness and impartiality. Make articulate arguments for a fair panel or hearing officer. Do not irritate the panel or hearing officer. Get competent legal advice and assistance. Promote an

impartial and collegial environment. Properly evaluate the panel and the hearing officer for bias and previous associations that may cause bias or conflict. Direct competitors are out, but there are other relationships that create conflicts. Try to get an objective and impartial panel of doctors who do what you do. Then put on a good case and look for opportunities to push for less-than-reportable dispositions of the dispute.

If possible, find a way to leave or dissociate with as little damage as possible, if that is preferable to staying. It is difficult to recover from a full-blown attempt to discipline or terminate.

### **Rules for Peer Reviewers**

If you are a peer reviewer yourself, be aware of the four elements for immunized peer review, and follow your instincts on fairness, impartiality, and justice. Do not accept conflicts, bias, anonymity, or prejudice. Insist on fairness, collegiality, reasonable conduct and review, and a proportionate remedy built on the bylaws, which are meant to assure proper professional treatment for any medical staff member.

Collegial, respectful, constructive review is the goal. Understand the use of the words "reasonable" and "fair" in the statute as they pertain to investigative efforts and corrective action. Do not forget the controlling element—that the professional review action must be taken in the furtherance of good patient care.

Be aware of overly intrusive lawyers or administration. Demand sound medical analysis and look at the physician's performance globally and find proportionality in the remedies and corrective actions. Avoid psychiatric and wellness arguments since they are sometimes contrived and cruel. Understand the consequences of a reportable action. Know that the actions taken can end a career or a life.

As a peer reviewer, hearing panel officer, or hearing officer, you must demonstrate wisdom, justice, courage, and discipline in your actions. Power over others is an awesome responsibility. Act as though your mother or father were watching.

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### **REFERENCE**

1 Sun Tzu. *The Art of War*. Mineola, NY: Dover Publications.