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The American Law School and Nine Elements of “Thinking Like a Lawyer”

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The idea of “thinking like a lawyer” represents a form that combines strategic analysis, assessment and action. At this point my analysis takes an unusual step and seeks to enhance our understanding through use of a seemingly “exotic” framework.¹ In A Book of Five Rings, Miyamoto Musashi describes nine points a strategist must master. I have long thought these points represent the true meaning and composition of what it means when we say “thinking like a lawyer” and am offering them here as a focusing device. Musashi’s nine elements are: 1). Do not think dishonestly; 2). Become acquainted with every art; 3). Know the ways of all professions; 4). Distinguish between gain and loss in worldly transactions; 5). Develop intuitive judgment and understanding for everything; 6). The Way is in Training; 7). Perceive those things which cannot be seen; 8). Pay attention even to trifles; 9). Do nothing that is of no use.

These nine elements are useful as the foundation of an integrated system reflecting the lawyer’s approach to knowledge, awareness, and action. They represent the range of knowledge a lawyer needs and give meaning to the concept of “thinking like a lawyer” as not simply a technique or method but a quality that includes substance and knowledge. They offer a template for much of the knowledge and technique that we ought to be teaching in law schools. Nor is this knowledge limited to external information or hard data but includes extensive understanding of human nature and self. This strategic knowledge is gained by increasing the quality, nature and complexity of the information being processed by law students and lawyers. The elements involved in thinking like a lawyer include not only the acquisition of information but the ability to recognize and discriminate among pieces of information, set priorities about a client’s goals, discern the significance and utility of information, identify the implications of knowledge and action essential to achieve the desired goals, and learning how to take action of a kind that represents the increased likelihood of achieving the desired goals.

1. Do Not Think Dishonestly

The inherent paradox in “do not think dishonestly” is that strategy is inevitably dishonest. A lawyer’s strategy is often premised on deception, trickery, taking advantage of others, fooling people and masking your intentions. If, for example, your client gives instructions to the effect, “come back with a settlement on these terms or don’t come back,” there are important strategic constraints you don’t want your opponent to discover. Or what if your client tells you: “we can’t afford the exposure of taking this case to trial. Fifty other cases hang on the outcome of this one. We can’t afford the publicity because it would hurt our

sales too much. So whatever strategy you use, I want this case settled but I don’t want to pay more than $3.5 million.” These actual positions are ones that cannot be admitted to someone with whom you are attempting to negotiate a settlement because you will lose leverage if the opponent knows your limits, authority or real goals.

This means that deception as to your intentions, authority and goals is an inevitable and necessary part of strategy. If your opponents are able to determine the real conditions under which you are operating they will have the knowledge needed to control you and shift the probable outcome in their favor. Access to the secret knowledge of your case gives them greater leverage. Do not think dishonestly therefore doesn’t mean you should not deceive your opponent. The key principle is don’t deceive yourself, and don’t think dishonestly. Don’t become caught up in the illusions. See clearly into things and perceive their essence. Have no illusions about yourself, people, justice, your client, or your opponent.

This definition of dishonesty and honesty is quite different from what we would generally consider moral or ethical. Manipulating and deceiving other people is involved in much of what lawyers do. An ordinary person would consider this behavior dishonest, ethically questionable or amoral. The lawyer must address this dilemma because the approach clashes with our beliefs about truth, honesty and openness. This behavior must be relegated to the “arena” within which lawyers compete because while it can be troubling even then, it is morally corrosive if allowed to seep outside its legitimate context.

2. Become Acquainted with Every Art

The lawyer must learn the insights and methods of a wide range of other disciplines. The practice of law demands an understanding of humans and human nature. This includes being able to recognize what people think, know, desire, fear and want. Achieving this level of knowledge involves substantial experience as well as being able to learn from that experience. But while experience is vital so is extracting meaning from the knowledge base that humans have created throughout their history. This base is represented in our works on literature, religion, ethics, history, science, philosophy, psychology, sociology, strife, economics, and so forth. Such analyses seek to capture what humans are about and to understand the nature of the universe we inhabit and our place and responsibilities within it. These areas of knowledge are relevant to a great deal of law practice but dealt with inadequately [or not at all] in many law schools.

3. Know the Ways of All Professions

Not only is it necessary to seek voraciously after knowledge in the general sense, it is essential that the lawyer know the "ways" of all professions. This means that we should know the mission, the method, the secrets, the flaws, the assumptions, the techniques, the values of the various professions, including how they work and why. If we know this, we can identify strengths and weaknesses and be able to attack or defend critical points. Think about the importance of knowing the methods and underlying principles relied upon by
economists, doctors, psychologists, statisticians, pathologists, chemists, police, etc. We must know them in order to be able to "use or abuse" them.

This knowledge of the ways (methods, assumptions, limits) of other professions is something we synthesize and integrate into our own knowledge base. Consider a lesson from the OJ Simpson criminal case. The trial lawyers needed to understand statistics, chemistry, forensics, medicine, DNA methodology and its limits. They also needed to know about police procedures, the psychology of spousal abuse, intricacies of human nature, and much more that was never mentioned in law school. Lawyers on each side had to master the inner details, assumptions, and outer limits of these disciplines in order to deal with witnesses, create themes and strategies, and evaluate the truth and falsity of all aspects of the case.

4. Distinguish Between Gain and Loss in Worldly Transactions

This principle has to do with being able to know the nature of what is a realistic victory. It also involves being able to discern what is valued highly enough by an opponent or even an ally that it will enhance the probability of obtaining agreement and concessions either by your offering that outcome or conversely being able to threaten what the opponent values most. While it is important to know what people value as individuals it is often even more critical to understand what they value as representative parts of institutions because institutions are powerful actors that often dictate the “marching orders” or “terms of engagement” and others, including lawyers, are instruments whose purpose is to achieve what the institutional powers desire.

As a lawyer you are in a competition to win and to gain advantages for your clients in worldly matters. This means you must be able to define the nature of victory in a specific situation and create strategies that help you achieve it. We are manipulating people to achieve victory and avoid loss. This is generally defined in terms of achieving tangible outcomes that are measurable in concrete terms. But understanding gain and loss is not simply an all or nothing, “in your face” zero-sum game. Often, more can be gained by allowing opponents to share in the gains. Otherwise, the short and longer-term costs of the process can end up exceeding the gains from the financial or non-financial perspective. Again, understanding human nature is an integral element of achieving “good” outcomes because making people feel good and allowing them to save face has a great deal to do with winning. It is relevant to winning in the specific interaction, and being able to win (even by avoiding loss) in the future by not having made enemies who are intent on revenging themselves on us or on our clients.

5. Develop Intuitive Judgment and Understanding for Everything

Not everything is neatly rational. Such things as guts, instincts, subliminal perception and the distillation of experience allow you to anticipate, recognize and react to stimuli seemingly without thought. These perceptual phenomena all describe real human abilities that operate on the edges of our conscious rationality. Being able to adapt almost instantaneously and making quick decisions are integral skills. The most effective people
in terms of the ability to gain an edge and succeed in conflicts are able to make quick decisions without having to think about them on an explicit level before acting.

These perceptual skills can be learned—at least to some extent. A simple example of this process is a dancer beginning to learn a new dance. In the beginning the person has to go through a conscious thought process that might sound something like: “Darn, my feet are supposed to go here, and my partner over there. But we keep bumping into each other.” A dancer who has to go through a conscious mental dialogue of the kind described above has not yet mastered the intricacy of the dance. A dancer needs instantaneous recognition of cues and the ability to make virtually simultaneous reactions in time with the music. If you have to think about what is happening and how you should respond, your timing, rhythm, and positioning are already flawed. While the dancer is thinking about what he or she is going to do, the body’s movements get out of synch with the music because the timing and rhythm is off.

The master lawyer is like the dancer who has fully internalized his/her art form. Such a dancer knows the depth, characteristics and parameters of the stage on which he/she works. The dancer knows where others involved in the performance will be at what time. The dancer knows the lighting and music, and can feel and respond to the audience and play to that source of energy. The dancer knows the air, surrounding and underfoot, feels the time between beats, and uses the power of expression and presence. Such awareness is part of mastery, regardless of the specific discipline.

Whether a dancer, musician, athlete, martial arts master, or lawyer, the only way we will be able to act quickly enough is to have developed intuitive judgment for the type of situation with which we are dealing. We must have trained constantly to make quick decisions, and must “teach our bodies strategy.” The lawyer’s task is often more complex than that of dancers or musicians following a choreographed sequence or musical score which they have practiced or performed many times. Close parallels are musical jam sessions in which the musicians take inspiration from each other, improvisational theater, or the Flamenco dance form with a symbiotic relationship between dancer and guitarist and singer where each creates rhythm, tone, mood, inspiration, and variation for the other. Whether artist or lawyer, functioning on that improvisational and reactive level requires the substantial knowledge base already described as being essential to strategic mastery, but the knowledge base must be extended through experience, creativity, and a commitment to continued learning. All this is still not enough. The lawyer, like the dancer, must train continually and constantly practice, visualize, and evaluate what he/she is doing and needs to do.

6. The Way is in Training

Experience is essential to the lawyer’s development but many people don’t learn from their experience. They repeat the same mistakes again and again. Continual training is vital because you can’t learn legal strategy by only reading, talking, or thinking about strategy. You must act and apply and think about what you have done and apply it some more and evaluate what you’ve done and gain from that experience. Becoming a lawyer at the higher
levels is not simply about acquiring experience but having the ability to learn from that experience. This involves a process of filtering, interpreting, critiquing and refining worked out through a constant commitment to drawing out the fullest meaning from what has occurred. You can't learn the intricacies involved in "thinking like a lawyer" without constant practice and action, but practice itself is not enough and experience without insight is insufficient.

Training and intuitive judgment are intimately related. Much of your training is intended to internalize your knowledge and experience in such a way that you are able to perceive and act intuitively. Intuitive perception, judgment, and corresponding action are not entirely mysterious processes. In many ways they are learned and rational. The rationality, however, operates on more subtle levels, and with a richer complex of our intellectual and emotional resources than does conscious reason. This requires that we train ourselves to experience the reality with which we are dealing frequently enough so that we can recognize it as it unfolds and react to it intuitively in a way that seems instinctive but really isn't. What it means is that we have already seen the situation before or something sufficiently similar that it fits closely enough into the intuitive patterns of perception we are continually creating, refining, and extending into analogous contexts.

The essence of effective strategic action is in being able to anticipate and then respond quickly even to the point of interrupting another's maneuver before it builds momentum. Becoming proficient at timing requires that you put yourself into situations where speed and intensity are heightened, and practice functioning effectively in those situations. There is no substitute for testing yourself under equivalent situations, and then evaluating why you were able to function with the proper skill and timing, or why you failed. Simulations, no matter how real they are made to seem, aren't enough in themselves. They can help but no one can be a truly effective strategist until he or she has had the opportunity to apply his or her ability to real situations where there are serious consequences for being wrong. In the fire of battle we have only ourselves to rely on. No simulation can create the same pressures like those involved in situations where the consequences of failure or the rewards of success are real, and substantial. But simulating strategic situations is still extremely important and enables one to better evaluate strengths and weaknesses.

As a lawyer engaging in trials and negotiations, you strive to reach the point where you don't have to consciously think about what you are doing. The goal is to no longer have to go through a process of conscious linear logic in which, like the beginning dancer who thinks too much you have to say, “I see that he made an offer here and I think he's doing this, and his strategy is probably this, and so on and so forth.” By the time the lawyer has figured all that out analytically, the movement has become out-of-time and with a corrupted rhythm. Intuitive judgment is the key concept because the strategist must respond quickly enough to avoid loss, or to take advantage of opportunities.

7. Perceive Those Things that cannot be Seen

Related to the idea of intuitive judgment are the principles of developing understanding for everything and learning how to perceive those things that cannot be seen. Such perception
is easy to describe and hard to do. When you know humans, what they value, how they act and why, and are able to function intuitively then you can see past other's masks and illusions. When you have studied in the way required of the strategist you can perceive the structure, rhythm and timing of the strategic context. Things that confuse others will be clear to you.

*Perception* and *sight* are two methods of seeing. *Perception* is strong while *sight* by itself is weak because it is too specific and narrow. *Sight* in essence is seeing the individual trees as separate things while perception is the totality that includes the interactive ecosystem of the forest and the specific characteristics of individual trees. When you become accustomed to something on the richest levels of perception you are not limited to seeing only through the use of your eyes but perceive through the totality of your sensory and intellectual capabilities. People such as master musicians have the music score in front of their nose when they play but this does not mean that they fixate on these things specifically. It means that they can *see* or *perceive* naturally.

Part of the ability to “see naturally” is derived from having obtained a great deal of experience. Through the combination of experience, practice, and reflection, the lawyer develops the ability to more accurately perceive an opponent’s essence and the dynamic context of the environment within which events are taking place. Heightened levels of perception require a combination of intensity, focus, knowledge, experience, and method because the lawyer needs to hear more, understand more, and see more. It takes considerable training and commitment to achieve this kind of perception. Knowledge is essential to heightened perception because when we know the significance of things we can see them more clearly and recognize when something that ought to be present is absent. Although the logic sounds circular we don’t perceive the meaning of things because we don’t know what they mean. Once we know what things mean and what to look for, we will *see* them.

Much of the lawyer’s strategic perception is derived from understanding the special language of non-verbal communication. Non-verbal language involves such things as posture, how you react to stimuli, as well as how quickly or slowly you react, how and when you tilt your head, how you use your eyes, when you move back or forward, when you take notes, your nervousness and displays of anxiety, your lack of anxiety, inattention, when you underline something or take notes, and much more. Tone of voice, amount and direction of eye contact, how unsure or certain we seem when problems suddenly arise, whether we become upset or angry, and what triggers those reactions, are all part of non-verbal language which can be perceived.

A skilled lawyer can read the meaning of these non-verbal cues. This awareness is fundamental to litigation and negotiation. Many people are skilled verbal liars who are able to control the intonations of their voice and seem sincere and believable. But even if a person is adept on verbal levels of communication, they can give themselves away non-verbally. It is more difficult to deceive people on non-verbal levels, particularly if they are looking at you. If what is being said on the verbal level is incongruent with what you perceive on the non-verbal level, then the incongruence can be translated into terms useful
for your strategy. Is someone speaking words that communicate confidence, while the posture, position or movements of their body, or their tone of voice is signaling hesitance and fear? What does the lack of “fit” mean between verbal and non-verbal cues, and between inconsistent non-verbal responses?

Interpreting the meaning of non-verbal language is only part of the lawyer’s task. The lawyer also uses non-verbal language to send messages to clients, opponents, witnesses, judges, and juries. Because we tend to believe the impressions we obtained from others’ non-verbal cues the strategist who communicates effectively on non-verbal levels can be persuasive. This insight is also important in terms of determining the meaning of an opponent’s non-verbal communication. All information must be cross-checked and evaluated. Nothing can be taken as true. A lawyer is quite capable of sending false messages that are taken as being more likely true precisely because they are being transmitted on the non-verbal level. The likely truth must be put in context, and everything an opponent does mistrusted.

Our ability to perceive is easily disrupted in particularly threatening, or accelerated and intense situations in which instantaneous perception and action are required. This can occur even if we are otherwise good observers in non-threatening situations, or in contexts with evenly paced and predictable rhythms, even if they are intense. Stress and the tendency toward overreliance on a plan of action often inhibit our ability to perceive clearly. What military strategists call the “fog of war” blocks our ability to perceive accurately and prevents us from making the instantaneous decisions needed to function effectively in conflicts. A combination of stress, fear, emotion, uncertainty and chaos is generated by intense conflict, including trials and negotiations.

Many people function well in intense situations as long as the rhythms are predictable. But much of strategy involves surprise, and creating deliberately altered conditions by which the opponent intends to throw you off balance, and then gain an advantage when you are startled. The lawyer must anticipate the unexpected and be able to overcome being surprised. Anticipation and focus are keys to strategy. The perception of timing, rhythm and flow is essential. The strategist’s perception is a total awareness, one highly concentrated on specifics and details, while encompassing everything going on around you, within others, and within you. Trials demand a level of concentration probably not achieved in anything else a lawyer does. They involve total focus. In what seems to be a paradox, this total focus allows you to see the forest and the trees simultaneously, as well as what they have been and will become.

Think about Mark Fuhrman’s original testimony on cross examination in the OJ Simpson case. Given the nature of the police culture in major U.S. cities, the harshness of the task facing street cops, statements by several people about Fuhrman’s prior use of racially derogatory statements, and his request for disability retirement due to job-related stresses produced by working in the ghettos and barrios of Los Angeles, it was pretty close to impossible that Fuhrman had never used racial epithets. His denials were not likely to be true. He and the prosecution would have been better off to have admitted on direct examination that there were occasions when he had used what has come to be referred to
as the “N” word. It was easy for defense lawyers to see past the illusion because they knew his denials almost had to be false. Prosecutors apparently thought they could get away with accepting Fuhrman’s version because their prior experience in trying the average criminal case would lead them to think all they had to do was put a police officer on the stand, have him testify with the standard “copspeak” that characterizes a police witness, and that the jury would buy the story.

What was rarely mentioned in the various assessments of the trial was that the prosecutors were very inexperienced trial attorneys, not because of the numbers of trials they had under their belts, but because the typical criminal case is a “gimme” for the prosecution, a “slam dunk” or a “piece of cake”. Urban prosecutors rarely go up against really good, well-funded and prepared attorneys so prosecutors such as Marsha Clark and Christopher Darden may have tried and won 100 jury trials but that doesn't matter. Their experience is roughly equivalent to Olympian Usain Bolt running 100 meters against a paraplegic. When such prosecutors with their “vast” experience have to try a case against sophisticated defense lawyers with substantial resources they often lose because they really don't know what they are doing and the “push button” cases they typically try have not prepared them for sophisticated “combat”.

8. Pay Attention Even to Trifles

If you observe everything and make sure all your loose ends are taken care of you are far less likely to be surprised. “Trifles”, or seemingly small things, are surprisingly often pieces of the signals or data we need in order to understand what is going on. An opponent may have control of his or her illusions but there can be small, seemingly insignificant things that allow us to see the hidden truths. Remember that most of what we do as legal strategists involves reconstructing a past reality to make it seem favorable to our client’s interests. Or we are projecting a future reality (the deal) that appears to be beneficial to the negotiating parties. In either situation there is an element of illusion.

The problem is that it is almost impossible to make the illusion perfect. Our job is to perceive the imperfections and know what they mean. Consider the OJ Simpson criminal case again. Only a totally thorough analysis of every piece of evidence in the case revealed the tiny strands of imperfection that could be added up to create arguments of reasonable doubt. One expert witness was forced by the defense to admit a statistical error. Another noted that a video of evidence in Simpson’s home was not in the proper time sequence, suggesting something devious in the record-keeping. In most criminal cases these details would be overlooked, as well as others that surfaced in the Simpson case concerning factors such as dryness of blood samples on swabs, defects in evidence gathering techniques, and much more. Because everything in that case was examined with intensity, it offered a paradigm of how defense counsel should approach trial evidence but rarely do. Virtually no criminal defendants have the resources needed to prepare a case with such thoroughness, nor do they have an extraordinarily cooperative judge such as Lance Ito, who essentially allowed the defense to say or do whatever they wished, often based on the most tenuous foundations.
9. Do Nothing that is of No Use

Everything you do should be for a reason that advances your case. Your opponents will be attempting to divert you into tangential activities that waste your time and resources, and keep you from focusing on how to win your case. Don’t waste time, be inefficient, dither around or fritter. You may choose to seem to be doing these things, but be sure it is only because of the impression you have chosen to make, and that there is a reason for your actions. The corollary is that the lawyer seeks to suppress the opponent’s useful actions while encouraging, provoking or allowing his or her useless actions. Of course, this simple statement belies an extremely complex process involving anticipation, recognition, assessment, judgment, decision, action and reaction. It also requires the strategist to be able to distinguish between useful and useless actions, and to react in an appropriate and timely way.