

2020

Thinking in Circles: Using OODA to Sharpen Legal Analysis

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Recommended Citation

Chestek, Kenneth D. (2020) "Thinking in Circles: Using OODA to Sharpen Legal Analysis," *Wyoming Law Review*. Vol. 20 : No. 2 , Article 5.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol20/iss2/5>

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WYOMING LAW REVIEW

VOLUME 20

2020

NUMBER 2

THINKING IN CIRCLES: USING OODA TO SHARPEN LEGAL ANALYSIS

*Kenneth D. Chestek**

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* Professor of Law and Director of Externships, University of Wyoming College of Law. This Article is based upon a presentation by the author at the 19th Annual Rocky Mountain Legal Writing Conference in March, 2019 at the William S. Boyd School of Law at the University of Las Vegas. The author wishes to thank the members of the Rocky Mountain Legal Writing Scholarship Group, especially Nantiya Ruan, Amy Griffin, Jennifer Cooper, Derek Kiernan-Johnson, Todd Stafford, Robert Anderson and Maikietta Brantley, who provided helpful feedback on an initial draft of this Article. Ruth Anne Robbins and Melissa Weresh also provided valuable insight into early drafts. Finally, many thanks to Todd Jagger of Wolf-PAC for showing me the power of OODA as an analytical tool.

I. INTRODUCTION

January 15, 2009. Three minutes after takeoff from LaGuardia airport, US Airways Flight 1549, with 155 people on board, was climbing routinely, approaching 3,000 feet of altitude. Suddenly the pilot, Captain Chesley Sullenberger, saw some thing up ahead.

“Birds!” he cried out.

One second later, Sullenberger heard the sound of thumps and thuds on the windshield and fuselage of the Airbus A320 he was piloting. That sound was followed immediately by sounds that no pilot, crew member, or passenger ever wants to hear: the sound of both engines “chewing themselves up inside, as the rapidly spinning, finely balanced machinery was being ruined, with broken blades coming loose.”¹ The smell of burning birds was being sucked inside of the aircraft. Sullenberger and his co-pilot, Jeff Skiles, “felt a sudden, complete, and bilaterally symmetrical loss of thrust.”²

Within eight seconds of the bird strike, Sullenberger realized that “this was the worst aviation challenge I’d ever faced. It was the most sickening, pit-of-your-stomach, falling-through-the-floor feeling I had ever experienced.”³ He knew he had to take control of the situation.

“My aircraft,” Sullenberger told his co-pilot. “Your aircraft,” Jeff responded.⁴

The story of US Airways Flight 1549 that midwinter day in 2009 is familiar to many of us. Captain Sullenberger, an Air Force fighter pilot and flight instructor who went on to pilot commercial aircraft for nearly thirty years,⁵ was able to take control of the frightening situation that had come upon him so suddenly. He managed to safely land his aircraft in the Hudson River, where ferry boats were able to spontaneously respond and safely evacuate all 155 passengers and crew.⁶ The incident has come to be known as the “Miracle on the Hudson.”

¹ CHESLEY SULLENBERGER & JEFFREY ZASLOW, HIGHEST DUTY: MY SEARCH FOR WHAT REALLY MATTERS 208–09 (2009).

² *Id.* at 209.

³ *Id.* at 210.

⁴ *Id.*

⁵ *See generally, id.*

⁶ *Id.* The incident was turned into a major motion picture, *Sully*, starring Tom Hanks in the role of Captain Sullenberger. *SULLY* (Warner Bros. 2016).

Because Captain Sullenberger was trained at the Air Force Academy as a fighter pilot, it is likely he was trained in the OODA method of problem-solving (**O**bserve, **O**rient, **D**ecide, **A**ct).⁷ While the OODA process likely helped Captain Sullenberger save 155 lives that day, it also turns out that OODA is a useful paradigm for solving almost any sort of problem, from the mundane to the life-threatening.

Lawyers are nothing if not problem-solvers; the well-being of their clients depends upon good problem-solving skills. This Article proposes OODA as a way of thinking about any legal problem, and working through the problem in a comprehensive and systematic way to get to the best result for the client.

Part II of this Article discusses the origins of the OODA principle, including how OODA works and what can cause it to fail (i.e., when it leads to a poor decision). It also shows how OODA can be employed not only to lead a decision-maker to a good decision, but how it can be weaponized to lead an opponent into a bad decision. Part III then briefly discusses how OODA works in a legal setting, both from a global perspective (using the example of the evolution of the common law) but also in the context of individual cases. It describes how a poor OODA process can lead courts to make poor decisions.

Parts IV and V are more specific. Part IV discusses how OODA can help a lawyer think through a case to provide complete advice to her client. Part V focuses on how OODA might help a legal writer present an argument to a tribunal. Finally, Part VI considers the ethical implications of OODA. While OODA in its original military context is a very useful way of defeating an enemy, in a legal context, very different rules apply.

This Article is primarily a thought experiment. There is a developing body of scholarship on creative problem-solving in legal contexts. In 1992, the MacCrata Report identified problem-solving as a “fundamental lawyering skill.”⁸ It defined problem-solving as “Identifying and Diagnosing the Problem,” “Generating Alternative Solutions and Strategies,” “Developing a Plan of Action,” “Implementing the Plan,” and “Keeping the Planning Process Open to

⁷ In his autobiography, Captain Sullenberger does not identify OODA specifically as his thought process. Instead, he said he fell back on his military training: when confronted with an aircraft emergency, (1) maintain aircraft control, (2) analyze the situation and take proper action, and (3) land as soon as conditions permit. See SULLENBERGER & ZASLOW, *supra* note 1, at 212–13. But that second step—analyze the situation and take proper action—can perhaps be most easily understood as an OODA process.

⁸ SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138 (1992). These steps bear a strong resemblance to the OODA process.

New Information and New Ideas.”⁹ Since then, scholars from clinical, skills, and legal writing disciplines have described what “problem solving” looks like from a lawyer’s perspective.¹⁰

Lawyers, and law professors in particular, are not the only custodians of wisdom and understanding. From time to time we should look outside of our own discipline to see if we can learn something from others. I’m not sure yet where OODA can lead us, but it seems to me there is important insight to be had from studying and understanding the concept. My intent here is to add to the discussion of lawyers as problem solvers by proposing this new tool as a potentially helpful way of structuring a lawyer’s thought process in seeking optimal solutions for her clients.

II. THE ORIGINS OF OODA

Colonel John Boyd was a fighter pilot for the United States Air Force.¹¹ After a combat tour in Korea, he became an instructor at the Fighter Weapons

⁹ *Id.*

¹⁰ See, e.g., Larry O. Natt Gantt, II, *The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving*, 45 CREIGHTON L. REV. 699 (2012); Carolyn Grose, *Uncovering and Deconstructing the Binary: Teaching (and Learning) Critical Reflection in Clinic and Beyond*, 22 CLINICAL L. REV. 301, 308 (2016); Stefan Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 CLINICAL L. REV. 149 (2004); Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405 (2002); Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 382–83 (1998); Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 140 (1994); Kathleen Elliott Vinson, *What’s Your Problem?*, 44 STETSON L. REV. 777 (2015).

¹¹ See generally ROBERT CORAM, *BOYD: THE FIGHTER PILOT WHO CHANGED THE ART OF WAR* (2002). Coram describes Colonel Boyd as “one of the most important unknown men of his time But much of what he did, or the impact of what he did, was either highly classified or of primary concern to the military.” *Id.* at 7. The beauty of OODA, however, is that it describes virtually every decision-making process, and therefore can be applied to virtually any situation. *Id.* at 334.

This is not the first law review article to discuss the OODA loop. See, e.g., Thompson Chengeta, *Defining the Emerging Notion of “Meaningful Human Control” in Weapon Systems*, 49 N.Y.U. J. INT’L L. & POL. 833 (2017) (discussing the relative roles of humans and machines in the OODA cycle); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211 (2017) (discussing the OODA loop in the context of police tactics); Alan L. Schuller, *At the Crossroads of Control: The Intersection of Artificial Intelligence in Autonomous Weapon Systems With International Humanitarian Law*, 8 HARV. NAT’L SEC. J. 379 (2017) (discussing problems when some phase of the OODA process is given to machines); Jeffrey L. Vagle, *Tightening the OODA Loop: Police Militarization, Race, and Algorithmic Surveillance*, 22 MICH. J. RACE & L. 101 (2016) (discussing OODA in the context of military automated surveillance systems and techniques by civilian police departments). One practitioner has also written a book explaining in some detail how OODA can help a trial lawyer make quick decisions in the crucible of a trial. A.S. DREIER, *STRATEGY, PLANNING & LITIGATING TO WIN: ORCHESTRATING TRIAL OUTCOMES WITH SYSTEMS THEORY, PSYCHOLOGY, MILITARY SCIENCE AND UTILITY THEORY* (2012). This Article is, however, one of the first articles to extend the OODA principle beyond the law of war or military- or police-related decision processes, or to legal analysis more generally than in a trial setting.

School—the premiere Air Force flight school for fighter pilots—where he earned the nickname “Forty-Second Boyd” because he could defeat any opponent in simulated air-to-air combat in less than forty seconds.¹² His biographer Robert Coram described him as “that rarest of creatures—a thinking fighter pilot.”¹³ More significantly, however, he was also a deep thinker about military strategy and decision-making in life-or-death situations.¹⁴ In that context, he discovered that good decisions depend upon a good OODA process.

OODA stands for:

Observe (detect the problem to be solved)

Orient (gather relevant data needed to solve the problem)

Decide (process the data, leading to a conclusion)

Act (implement the answer which results from the Decide process)

This formulation is similar to the analytical frameworks for case preparation proposed by several clinical education scholars. Some of those frameworks seem to stop at the “act” phase,¹⁵ while others take the next step and re-evaluate the

¹² CORAM, *supra* note 11, at 5.

¹³ *Id.* (“Anyone familiar with the Air Force can tell you two things with confidence: one, fighter pilots are known for testosterone, not gray matter, and two, military doctrine is dictated by people with stars on their shoulders.”).

¹⁴ *Id.* (“[I]n 1959, when he was just a young captain, John Boyd became the first man to codify the elusive and mysterious ways of air-to-air combat. He developed and wrote the ‘Aerial Attack Study,’ a document that became official Air Force doctrine, the bible of air combat . . . Put another way, while still a junior officer, John Boyd changed the way every air force in the world flies and fights.”).

¹⁵ For example, clinician Carolyn Grose describes as “Client Rounds,” a process which “contain[s] four distinct phases: fact gathering, diagnosis, problem-solving, and evaluation.” Grose, *supra* note 10, at 308 (2016). Professors Kurt M. Saunders and Linda Levine also described a similar process:

The objective of problem solving is to make the implicit explicit: given a problem, the task is to construct a path to its solution. Problem solving begins when a person recognizes that a problem exists and then forms a representation of the problem by understanding the nature of the gap to be crossed. Next, he or she plans a solution by choosing a path or strategy for crossing the gap, and then implements that strategy. Finally, he or she evaluates the solution as to how effectively it solves the problem, and thereby learns from the experience of solving the problem. The success of problem solving depends on how effectively a person carries out these processes.

Saunders & Levine, *supra* note 10, at 140 (1994). The end of the cycle described by Saunders and Levine, however, is only student learning; like Professor Grose’s “client rounds” method, it does not require re-evaluation of any new problems created by the proposed solution.

new situation in light of the chosen action.¹⁶ But all of these processes seem to deal only with the front end of the client representation: evaluation of alternative solutions and selection of strategies. The OODA loop, however, is scalable: it can not only help a lawyer choose from available strategies at the outset of the representation, but can also guide subsequent decisions as the case develops and unexpected things happen.

A. *How OODA Works*

This process works for *any* sort of decision, from the mundane to life-or-death problems.¹⁷ Let us start with the life-or-death example that every fighter pilot must face:

You are a fighter pilot on a routine mission. Suddenly, your radar detects an unidentified object rapidly approaching you from behind. If the object is a friendly plane, you are okay. But if it is hostile (a plane or a missile), you are in very grave danger. Here's how your OODA process would work:

Observe: There is an unidentified object rapidly closing on me from behind.

Orient: Where am I in the sky? Over what territory am I flying? Have enemy fighters been flying in this space? Are there hostile ground forces with surface-to-air missiles in the area? Has there been any communication from the approaching object? At what rate and by what vector is the object closing? Is it an airplane or a missile? What countermeasures do I have available to

¹⁶ Professor Linda Morton has also proposed a similar six-phase process for problem solving, the sixth step of which does require re-evaluation:

Does our solution solve the problem? (If not, the problem may need further analysis, or alternative solutions. In other words, we must return to some phase on the wheel.) Are we better off than before? What other problems might the solution create? Can any of those additional problems be prevented now? If so, how and by whom? If not, should we still implement the solution chosen?

Morton, *supra* note 10, at 382–83. Likewise, Professor Kruse includes re-evaluation as her final step:

Although people divide and name the stages of problem-solving differently, all provide the same basic sequence of steps or phases to describe the process of problem-solving, which can be generalized into four basic stages: (1) identifying the problem; (2) exploring alternative solutions; (3) developing and implementing a strategy for solving the problem; and (4) revising and modifying the strategy in light of new information.

Kruse, *supra* note 10 at 422–23.

¹⁷ This discussion is an oversimplification of what was, for Colonel Boyd, a highly complex and nuanced process. For an excellent, if bewildering, chart of the process, see CORAM, *supra* note 11, at 344.

distract or confuse the other pilot, or the missile? What evasive measures are available to me? Are there friendly aircraft flying near me to give me assistance? And on and on.

Decide: Friend or foe? If foe, evade or distract? Or both?

Then you **Act** on whatever you decide.

For this situation, obviously, the OODA process must be extremely fast; in fact, the faster you run through the process, the greater your chances of surviving.¹⁸ But also note that the process depends not only on fast thinking, but good **O**rientation. The information you gather must be as complete and accurate as possible, so that the correct decision can be made. For a fighter pilot, your life may literally depend on it.

Let us return to Captain Sullenberger and the “Miracle on the Hudson” incident described at the beginning of this Article. His OODA process may have gone something like this:

Observe: We’ve hit birds and lost thrust in both engines.

Orient: What is working?

Electrical still good.

Hydraulics still good.

Decide: I’m piloting a glider.

Act: Continue flying.

OODA analysis is constantly adjusting to changing circumstances. The situation that a problem-solver finds herself in is constantly changing; an effective OODA analysis takes that fact into consideration and allows the problem-solver to adjust to rapidly changing circumstances—even if those circumstances change before you get to the **Decide** and **Act** steps. Captain Sullenberger’s conclusion in the first loop of his OODA process forced him to change tactics quickly:

Observe: I’m piloting a glider.

Orient: I am flying at just under 300 MPH.

I’m at 3,000 feet altitude.

The plane is descending at a rate of 1,000 feet per minute.

¹⁸ For military applications, speed in processing OODA is of the essence. “The military believes *speed* is the most important element of the cycle, that whoever can go through the cycle the fastest will prevail.” *Id.* at 334–35. Obviously, in the calm of a lawyer’s office, speed is usually not of as much concern.

I have less than three minutes of unpowered flight left.

I need to buy more time in the air to make it back to the airport.

Decide: I need to lower the plane's nose to achieve the best glide speed.

Act: Adjust the flaps and lower the plane's nose.

Every Act taken at the end of an OODA process changes the world in some way, large or small. The actor must then re-**Observe** the changed world: has the problem been solved? If not, then what? Or has the **Action** created a new problem?

Captain Sullenberger needed another iteration of OODA:

Observe: My rate of descent has slowed. What airport is now in range?

Orient: LaGuardia: behind me and to my left.

Newark: a little farther out to my right.

Teterboro: closer to my right but much shorter runway.

Hudson River is under me.

ATC is clearing runways at LaGuardia and Newark to let me land.

At current rate of descent, I can't make any of those airports.

Decide: I need to ditch in the Hudson. The plane will be lost but maybe we can save some lives.

Act: Lands plane in the Hudson River.¹⁹

Colonel Boyd, who first described the OODA process, recognized that the process is so iterative that he called it an "OODA loop." Let's examine the looping by returning to the fighter pilot example. Suppose the pilot in our example concludes (correctly) after his initial OODA process that there is a hostile missile chasing him. Suppose further that the Action he chooses is to deploy chaff to confuse the incoming missile's radar guidance system. Having done so, the pilot makes a new **Observation**, starting the next iteration of the OODA loop. Did deploying chaff solve his problem?

¹⁹ Although he does not explicitly describe this thought process in terms of OODA, these are the steps Captain Sullenberger described in his autobiography of how he made the decision to ditch the plane in the Hudson River. SULLENBERGER & ZASLOW, *supra* note 1, at 215–39.

- Observe:** The missile flew right through the chaff and is still following me.
- Orient:** The chaff did not distract the missile's guidance system; therefore, the missile must be a heat-seeker rather than radar-guided, and it is following my engine. I need to get it to seek a different heat signature. I have other countermeasures to deploy against heat-seeking missiles.
- Decide:** I will attempt to confuse the missile by deploying flares, then radically throttle back so my engine cools quickly and the missile then follows one of the hot flares.
- Act:** I deploy the flares, radically throttle back, and immediately change direction.

Upon taking this Action, the pilot must now evaluate the changed circumstances and engage in yet another loop of the OODA process:

- Observe:** The missile followed a flare and is no longer chasing me. Problem solved.
- [or]
- Observe:** The missile is still chasing me.
- Orient:** What other countermeasures do I have available?

...and on and on until the problem is solved.

B. How OODA Can Fail

Note that a successful OODA process depends on both the **Observe** and **Orient** phases being complete and as accurate as possible. For example, in his first iteration of OODA, Captain Sullenberger was able to correctly **Orient** himself to determine that his plane had lost all engine power and was unlikely to ever regain it. Had he failed to understand that the bird strike had destroyed both of his engines, he might have spent too much time trying to restart them and lost the ability to safely land the plane in the river.²⁰

²⁰ Captain Sullenberger engaged in what Professor Grose might call "critical reflection . . . the process of asking questions before seeking answers, and then evaluating what we have learned, and what more we need to know before moving forward." Grose, *supra* note 10 at 315.

C. *The Dark Side of OODA*²¹

The example in section B above shows how OODA can be used defensively to insure a good decision-making process. But it can also be used offensively. Boyd described how one could attack an enemy by intentionally disrupting the enemy's OODA processes, thereby leading the enemy to an inaccurate or fatal decision and action.²² Two ways to disrupt the enemy's OODA process is to lead the enemy to fail to detect your presence or your intentions (hiding to prevent **O**bservation) or to provide false inputs to his **O**rientation process (by deception or sowing confusion so that the enemy's decisions do not respond to the real threat).²³

Let's return briefly to the example of a heat-seeking missile closing in on the fighter pilot. The pilot is executing his own OODA processes to respond to the threat, but the missile (as an automated agent of the hostile force) is working OODA too:

Observe: I have been assigned to chase down that airplane and blow it up.

Orient: I have detected a heat signature from the plane's engine. It has just veered to the left.

Decide: I must veer to the left to follow it.

Act: I adjust my flaps to change course and follow it.

²¹ This section describes how OODA can be used either as a shield or a sword. There is some criticism of OODA as a military or police tactic, primarily concerns that over-reliance on mechanical application of OODA principles in automated warfare might lead to significant unintended consequences when human judgment is removed from combat situations. *See, e.g.*, Chengeta, *supra* note 10; Garrett & Stoughton, *supra* note 10; Schuller, *supra* note 10; Vagle, *supra* note 10. Those concerns are beyond the scope of this Article, however, since this Article is intended to show how OODA can be a useful tool in non-combat contexts.

²² *See* CORAM, *supra* note 11, at 334–35. Generating a rapidly changing environment—that is, engaging in activity that is so quick it is disorienting and appears uncertain or ambiguous to the enemy—inhibits the adversary's ability to adapt and causes confusion and disorder that, in turn, causes an adversary to overreact or underreact. *Id.* at 328. Coram goes on to say that “[t]he key thing to understand . . . [is] the need to execute the cycle in such fashion as to get *inside* the mind and the decision cycle of the adversary. This means the adversary is dealing with outdated or irrelevant information and thus becomes confused and disoriented and can't function.” *Id.* at 335.

²³ *Id.* at 335. This is actually the theory behind every terrorist attack: disrupt your enemy's normal **O**bservation and **O**rientation processes in hope that it will respond disproportionately or irrationally. *Cf.* YUVAL NOAH HARARI, 21 LESSONS FOR THE 21ST CENTURY (2018), at 166–68 (“Since the material damage caused by terrorists is negligible, the state could theoretically do nothing about it, or take strong but discreet measures far from the cameras and microphones. In fact, states often do exactly that. But every now and then a state loses its temper and reacts far too forcefully and publicly, thus playing into the hands of the terrorists [I]nstead of acting quietly and efficiently, the state unleashes a mighty storm, which not infrequently fulfills the terrorists' most cherished dreams.”).

And each time the plane changes course to evade the missile, a new OODA process allows the missile to make compensating course corrections and stay on target.

The only way for the pilot to shake this missile, then, is to disrupt the missile's OODA process. He does so by deploying hot flares, firing off in different directions, while simultaneously spinning down his own engine to reduce its heat signature. The missile's OODA look then looks like this:

- Observe:** There are many heat signatures suddenly diverging from the one I've been following.
- Orient:** Which heat signature is the plane's engine? They are all very hot. One of them might be the afterburners as the plane tries to outrun me.
- Decide:** The hottest signature is probably the engine's afterburner. I will follow it.
- Act:** I change my flaps to change course and follow the hottest heat signature.

And since the pilot has suddenly reduced the engine's heat signature by throttling back, the missile flies off course and tries to kill a flare.

The pilot saved himself by disrupting the OODA process of the incoming missile. By deploying countermeasures, he interfered with the missile's ability to **Observe** and **Orient** to the new condition, leading it to make a bad **Decision**.²⁴

All of these principles have direct application in legal reasoning and the formation of litigation strategy.

III. OODA AND THE LAW

Lawyers, like fighter pilots, are problem-solvers, too. Every legal problem requires a series of OODA sequences to resolve them. A judge working on a case goes through this process:

- Observe:** The defendant has filed a 12(b)(6) motion to dismiss the case, and I must decide it.

²⁴ While disrupting the enemy's OODA process might make good military strategy, I am not advocating that a lawyer try this. It is not a good idea to hide the real issue from the court or the jury, or seek to confuse it. And using such tactics against opposing counsel might result in an uncomfortable meeting with the attorney disciplinary authorities of your jurisdiction. However, as we shall see below, disrupting an opponent's OODA process might be tempting to an advocate. *See infra* notes 45–52 and accompanying text.

- Orient:** The judge reads the complaint, the motion to dismiss, the briefs filed by the parties; does independent research to fill in any gaps or to check the veracity of the claims made by the parties; and other activities.
- Decide:** Motion denied.
- Act:** Write an order and opinion explaining the decision.

And that act affects the lawsuit by allowing it to go forward. It creates a series of new problems to be solved: the parties will now engage in discovery, which could lead to more disputes for the court to decide. There could be a motion for summary judgment after discovery is complete; there could be motions in limine or other motions to decide before trial. There could be a trial. Every stage of the proceeding will require another OODA process, and the decision in each step will affect future behavior of the parties or create new problems to be solved.²⁵

It isn't just lawsuits that use an OODA loop process. The law itself develops via an endless OODA loop; this is how the common law grows. Appellate Court A must decide an appeal. It **O**bserves the issue or issues presented. It **O**rients itself by reading the record, reading the briefs of the parties, and conducting its own research. It **D**ecides the case by applying the rules it has discovered during the orientation phase; critically, the rule of stare decisis guides the court to decide this case consistently with precedent cases. It then **A**cts by issuing an opinion and order.

Now come to the crux of the problem: the decision of Appellate Court A changes the world by becoming part of the body of law that Appellate Court B must take account of when the next case presenting the same or similar issues arrives. Appellate Court B uses a new OODA process to decide that case, which then itself changes the world by becoming part of the body of law that Appellate Court C must take account of. This is how the common law (or interpretations of Constitutional or statutory law) grows and changes incrementally.

But if Appellate Courts B, C, and beyond do not adequately **O**bserve the new problems created by the **A**ct of the previous court, then the new OODA cycle goes off course, and each new **D**ecision and **A**ct compound the undetected problem of the preceding courts. By this I mean that courts need to **O**bserve not just the way the law has changed after the previous decisions, but how *the world* (i.e., society at large) has changed as a result of the previous decisions. A court needs to consider: did the previous decision(s) solve a problem, or just create new problems to be solved?

²⁵ Of course, a decision to grant the motion affects the world in a different way and sets off a series of alternative decisions by the plaintiff: do I re-plead? Do I appeal? Do I walk away? And OODA restarts from this new condition.

A failure by a court to completely and objectively **O**bserve the new condition created by its decision can lead to surprising results. Take the example of the much-maligned decision in *Citizens United v. FEC*, which endowed corporations with the right of political speech in direct advocacy for political candidates.²⁶ The origin of this surprising result began innocently enough when the Supreme Court recognized that corporations possessed some rights possessed by natural humans, like the ownership of property,²⁷ in order to allow them to serve the functions for which they were created. Then, through a long series of decisions spanning more than two hundred years, corporations gradually gained more and more rights, small increment by small increment, leading to the *Citizens United* case which expressly grants corporations the right of political speech.²⁸ No court along that chain seemed to notice the inexorable accumulation of political power in already-powerful institutions, and how that power has diminished the voices of average human beings.

To some extent, this short-sightedness is inherent in the doctrine of *stare decisis*. Under this doctrine, courts are supposed to decide each new case consistently with previous cases, deciding no more than necessary to resolve the immediate case before it.²⁹ Departures from precedent are supposed to be rare.³⁰ But at some point, a court should take a step back, re-observe the world, and notice that the chain of decisions has led to an untenable public policy outcome: already-wealthy corporations and individuals can use their power to virtually silence the voices of individuals in the political marketplace. In other words, a more robust **O**bserve step would lead to better outcomes for society.³¹

²⁶ See *Citizens United v. FEC*, 558 U.S. 310 (2010). For a discussion of how this case results from a failed OODA process, see Kenneth D. Chestek, *Of Metaphors and Magic Wands*, 89 MISS. L. REV. 1 (2019). One could easily come up with many other examples of how the slow evolution of common, interpretive, or Constitutional law has led to poor results.

²⁷ See *Santa Clara v. S. Pac. R.R.*, 118 U.S. 394 (1886).

²⁸ For an excellent and well-documented examination of the entire 200-year process through which corporations gained their “civil rights,” see generally, ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018).

²⁹ See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (“[C]ourts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”) (internal quotation marks omitted). But note that the majority in *Citizens United* arguably did not adhere to that principle. See *Citizens United*, 558 U.S.405–06 (2010) (Stevens, J., concurring in part and dissenting in part) (citing *PKD Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (“[I]f it is not necessary to decide more, it is necessary not to decide more.”) (Roberts, J., concurring in part and concurring in the judgment)).

³⁰ *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.”).

³¹ One might argue, of course, that a court’s job is only to decide cases, and not to be a tool for social engineering. A full discussion of this topic is beyond the scope of this Article. I would, however, observe that a court cannot reasonably blind itself to the social consequences of its decisions for very long before it begins to lose legitimacy.

IV. OODA AS A TOOL FOR CASE ANALYSIS AND STRATEGY SELECTION

As noted above, OODA is scalable and iterative.³² It can serve not only as a tool to guide case development and strategy selection at the beginning of the case, but can assist the lawyer in making subsequent decisions as the case moves forward.

Let's examine a hypothetical case to see how thinking about a client's case as a problem to be solved through the OODA loop process works.

Three years ago, the National Organization of Libertarian Librarians (NALL) purchased a building in downtown Osage, State of Absaroka, from the Osage chapter of the International Order of Weird People (IOWP). The IOWP had used the building as its lodge and in support of its social welfare objectives and had, therefore, been classified as exempt from real estate taxes under the State of Absaroka's Real Estate Tax Exemption statute. NALL is currently using the building as its national office headquarters in which it houses an extensive and unique collection of books, monographs, and historical records relating to libertarian thought in the United States. While NALL receives about sixty percent of its funding through a fee-for-service arrangement with the national Libertarian Party, it is an independent organization with its own board of directors and direct donations and fee-for-service arrangements to make up the remaining forty percent of its budget.

A few months ago, one of the Osage County Commissioners, a Democrat, inquired as to whether NALL was paying real estate taxes on its new headquarters building. A quick review of the tax records revealed that the tax status of the building had not been changed upon the sale, and that it was still listed as tax exempt. The commissioner then requested that the Absaroka County Assessor conduct an investigation to determine whether NALL's use of the building qualified for continued tax exemption under the state's tax exemption law.

You represent the County Assessor. How do you answer this question?³³

³² See *supra* notes 17–19 and accompanying text.

³³ Since this hypothetical is set in a fictional jurisdiction, please assume that the legal research and the law set forth below is accurate and complete.

A. Issue Identification and Selection

The first step in the OODA process is to **O**bserve: what is your problem?

The simple answer might be, “Does the NALL headquarters building satisfy the statutory requirement to be exempt from real estate taxation?” That seems like a perfectly reasonable research problem.³⁴ But remember Captain Sullenberger, who observed that he was not only flying without working engines, but also that he was too far away from any airport to be able to reach it given his rate of descent. Taking that lesson to heart, perhaps the better place to start would be to ask, *how many problems do you have?*

Stepping back to that broader inquiry, you might identify at least the following problems:

1. Is there an administrative process available to raise and resolve this issue, or must there be a lawsuit?
2. Does the current use of the property meet the standards of the State of Absaroka Real Estate Exemption Law?
3. The building’s use changed three years ago and was not questioned at the time; can it be challenged now? And if so, can the tax status be changed retroactively to three years ago?
4. Can a single member of the Board of Commissioners, a member of a political party who might have his own reasons to oppose an organization affiliated with a different political party, use his office to make life difficult for that organization?

The second question is the one that presented itself immediately. But, the other three questions turn out to be critically important, too. The Democratic commissioner who asked that second question might not have thought about the other three questions, but the lawyer representing the County Assessor needs to think about and propose answers to all four questions.

Having **O**bserved that there are at least four problems to solve, the next step in the process is to identify in which order the questions should logically be addressed. Here you might ask: are there threshold or procedural questions

³⁴ It also might be called a “premature diagnosis.” See, e.g., Becky L. Jacobs, *Cultivating Purposeful Curiosity in a Clinical Setting: Extrapolating from Case to Social Justice*, 21 CLINICAL L. REV. 371, 375 (2015).

that need to be answered before you can address the substantive issue? In our hypothetical, it appears that there are. For example, the question of standing (number four on the list above) might need to be resolved first, since if there is nobody around who has the right to raise the issue, the merits will never be reached.

In selecting the order in which to address the four problems, it might help to back up one level of generalization and think about the dispute resolution process. The journalist's list of standard questions to ask might be useful here: who, what, where, when, and how?³⁵ Asking those questions in this context might go something like this: (1) **Who** is allowed to raise the issue? (2) Who or **what** body will resolve the issue, and **where** will that decision-making process occur? (3) **When** is the correct time to resolve the issue? That is, has the issue been raised too early (*e.g.*, no case or controversy yet) or too late (*e.g.*, statute of limitations has expired)? And (4) **how** should the issue be resolved on the merits? Looking at that structure, the four questions we identified previously could be logically addressed in the following order:

1. Who gets to ask this kind of a question? Can a single member of the Board of Commissioners, a member of a political party who might have his own reasons to oppose an organization affiliated with a different political party, use his office to make life difficult for that organization?
2. What body gets to answer this kind of a question? Is there an administrative process available to raise and resolve it, or must there be a lawsuit?
3. When can this kind of a question be asked? The building's use changed three years ago and was not questioned at the time; can it be challenged now? And if so, can the tax status be changed retroactively to three years ago?
4. How is this question likely to be resolved on the merits? That is, does the current use of the property meet the standards of the Absaroka Real Estate Tax Exemption Law?³⁶

³⁵ Jeremy Porter, *Five Ws and One H: The Secret to Complete News Stories*, JOURNALISTICS (Aug. 5, 2010), http://scienceclass3000.weebly.com/uploads/5/4/5/9/5459088/five_ws_and_one_h_the_secret_to_complete_news_stories_-_journalistics.pdf [<https://perma.cc/24M2-342Q>]. The fifth "W", "why," is more a decision for the client to make, with input from the lawyer as needed.

³⁶ Professor Linda Morton has proposed a similar set of questions to be asked at the problem-identification phase:

B. *Resolving the Issues*

Having completed a thorough **O**bservation process, we have now identified four problems to solve, and a logical sequence in which to address them. Each one of them will require its own iteration of OODA to resolve.

1. *Loop 1: Solve the First Problem*

Let's take the first problem identified above: Can a single member of the Board of Commissioners, a member of a political party who might have his own reasons to oppose an organization affiliated with a different political party, use his office to make life difficult for that organization? Having **O**bserved that problem, the lawyer now moves on to **O**rienting herself in the issue. This involves both critical thinking about what legal or moral issues might be implicated by the problem, and then conducting research into how those issues might be resolved. She might ask herself:

- ▶ Who has the authority to direct the County Assessor to undertake this investigation? Since under Absaroka state statute the County Assessor is an independently elected officer of the county, does he have to do what the County Commissioners tell him to do?
- ▶ If the assessor is subject to the direction of the County Commissioners, how do the Commissioners exercise that authority? Can a single member of the three-member board exercise that authority, or must it be done by a vote of the full board at a public meeting?
- ▶ If a single Commissioner cannot act on behalf of the Board in directing the Assessor to conduct this investigation, does that Commissioner, acting in his private capacity as a taxpayer of Osage County, have a right to demand the investigation?
- ▶ Alternatively, if the County Assessor does not conduct an investigation, would a private taxpayer of the County have a right to appeal the classification of the NALL headquarters building as exempt, on the theory that his taxes are marginally higher because NALL is improperly excused from paying real estate tax? That is, does a private citizen have standing to appeal NALL's tax status?

What is the problem? Is there more than one? Is it part of a larger problem? If so, what should be addressed first? What interests are involved? Whose are they? Client's? Lawyer's? Opposing Party's? Society's? Is the problem big or small? Long-term or Short-term? Who are the stakeholders? What/whom does it harm? What are our objectives? Whose/what help do we need to identify the problem?

Morton, *supra* note 10, at 382.

- ▶ If a private citizen could file a challenge to NALL's tax status, does the Democratic County Commissioner also have that right, or might he be disqualified on a theory that he is using his office to harass a potential political adversary?

The next step in **O**rienting is to do the research needed to solve all of the sub-issues identified above. Some of them may be easy to resolve by simple reference to a statutory provision or other mandatory authority. Other sub-issues may require more detailed analysis using an IRAC-type analysis.

Once the research is finished, the **O**rient phase is complete, and the attorney moves to the **D**ecide phase. Applying the law to the facts presented, what answer presents itself? This may vary depending on whether you are doing objective/predictive writing or advocacy, as we will discuss below. The lawyer for the County Assessor then **A**cts by writing a memo or a brief conveying to the client the conclusion drawn in the **D**ecide phase.

2. *Addressing the Remaining Issues with Additional OODA Processes*

The decision the author reaches at the end of the first OODA loop may change the universe that the author is dealing with. Suppose, for example, the author concludes at the end of Loop 1 that the County Assessor has independent judgment and cannot be instructed by the County Commissioners to perform his duties in a particular manner, but that private citizens likely have standing to raise the issue of the propriety of any determination that a particular property does not meet the requirements for tax exemption. That conclusion likely changes the way the author views and resolves Loop 2: Is there an administrative process available to raise and resolve the exemption question, or must there be a lawsuit? And if a lawsuit, what is the proper forum and venue for that lawsuit?

The author now engages in the **O**rient, **D**ecide, and **A**ct phases of resolving Loop 2. Upon resolving Loop 2, the author then looks at Loop 3 to analyze whether the resolutions of loops 1 and 2 change the universe in a material way for those issues. And on through Loop 4.

C. *Handling Contingent or Alternative Resolutions*

Attorneys rarely have the luxury of absolute certainty.³⁷ Despite their most thorough research and careful analysis, they can never be certain that any court or other tribunal, when faced with the same facts and legal precedents, will reach the same conclusion they did. Thus, the attorney trying to give sound legal advice based upon predicting how some future court would likely resolve a particular

³⁷ At the least, attorneys who profess certainty (and act upon that belief) are more prone to malpractice suits than attorneys who embrace uncertainty.

dispute is well advised to couch their conclusions in terms of probabilities, not certainties. And, more importantly, to play out several alternative resolutions “just in case.”

The OODA process can accommodate this need. Just as the fighter pilot needs a backup plan (deploying flares) in case his first plan (deploying chaff) fails, the legal advocate must plan for alternative resolutions of a problem in case the first resolution does not happen. The only difference is that the lawyer may not know the outcome of one iteration of the loop. The fighter pilot can **O**bserve that the chaff did not distract the pursuing missile, so his decision to deploy flares is made with more complete knowledge of the situation he faces; the attorney rarely has that luxury. Instead, the lawyer must pre-plan her options: “if theory A fails, then theory B might work instead.”

Note that the OODA process is fundamentally different from “decision tree” analysis that has become popular in practitioner literature.³⁸ Decision tree analysis is a useful tool for determining the potential value of any case for settlement purposes. It can help you determine the probable value of any strategy you and the client may choose; it does not help you develop those strategies.

D. How the Lens of Advocacy Affects the Resolution

Thus far, I have been dealing with OODA in the generalized context of “resolving legal problems.” But, of course, there is a difference in practice depending on whether the lawyer is doing predictive (a/k/a “objective”) analysis, or is advocating for a result. In the predictive context, the author is not seeking a particular result; she is trying to find the “right” answer regardless of whether that result favors or harms her client’s preferred outcome (or whether she has a client at all). In the latter context, of course, the author is trying to persuade a tribunal to reach a specific result favorable to her client.

This makes a difference at every stage of the OODA loop.

1. Objective/Predictive Analysis

Let’s return to the example of the tax exemption case for the NALL headquarters building in Osage County. Suppose on Loop 1, the lawyer representing the

³⁸ See, e.g., Brian Daley, *Using Decision-Tree Analysis Effectively to Manage Litigation*, ACC DOCKET, Jan./Feb. 2009, at S1; Carlos Lapuerta et al., *Controlling Costs and Improving Performance: Strategic Analysis of Litigation*, ACCA DOCKET, Summer 1994, at 66; David M. Madden, *To Sue or Not to Sue: a Hypothetical Case Study in the Use of Decision Trees in Developing Litigation Strategy*, DCBA BRIEF, Nov. 2007, at 16; R. Stephen McNeill, *Applying Decision Tree Analysis to Expedite Preference Settlements*, AM. BANKR. INST. J., Dec. 2015, at 32; Marc B. Victor, *Resolving a Dispute by Getting a Neutral to Provide Probability Assessments*, ALT. TO HIGH COST LITIG., Mar. 2013, at 36; Marc B. Victor, *Decision Tree Analysis: A Means of Reducing Litigation Uncertainty and Facilitating Good Settlements*, 31 GA. ST. U. L. REV. 715 (2015).

County Assessor concludes that a taxpayer does have standing to challenge the tax exemption granted to another taxpayer, if certain conditions are met (*e.g.*, the plaintiff is a real estate taxpayer in Osage County).

On Loop 2, the lawyer concludes that a taxing authority (such as the County Commissioners) could have challenged the designation of the property as exempt each year upon publication by the Assessor of that year's tax roll by filing an appeal of that designation. However, since no taxing body filed such an appeal, the time for appeal has now passed and any further challenge would be untimely, and any derivative appeal for previous years that a private taxpayer might bring would likewise be untimely. Prospectively, the proper procedure would be for a taxing body to file an appeal of the assessment upon publication of next year's tax roll, or for a taxpayer to file an action in mandamus in the state trial court, seeking an order directing the assessor to properly apply the state tax exemption laws by placing the property on the tax roll where it legally belongs.³⁹

On Loop 3, the lawyer concludes that such an action can be prospective only, because the previous three years of exemption could only have been reviewed through an appeal by a taxing body to that year's assessment roll, and cannot be challenged in a forward-looking action in mandamus.

The resolution of Loop 4 cannot be completed at this time in the absence of notice and a hearing on the current use of the property to determine whether it meets the definitions in the Absaroka Real Estate Tax Exemption law.

The lawyer representing the County Assessor in this case, hopefully, is doing objective legal analysis, trying to get the "right" answer regardless of what the County Assessor might prefer to do. But notice how the OODA process might differ for the attorney for the private citizen who thinks NALL should be paying taxes on that building.

2. *Persuasive Analysis*

Let's look at the same OODA process from the point of view of the lawyer for the taxpayer/prospective plaintiff:

Issue 1:⁴⁰ just like the lawyer for the County Assessor, the lawyer for the taxpayer concludes that a taxpayer does have standing to challenge the tax exemption granted to another property owner. The OODA process revealed a

³⁹ This analysis of the hypothetical case is merely to illustrate the lawyer's analytical process, and is not intended to be a comprehensive analysis of the case. For example, there could an issue about whether mandamus is a possible remedy here.

⁴⁰ Note that each issue requires its own OODA process to resolve.

potential pitfall, so the lawyer double-checks to be sure that his client does pay real estate taxes in Osage County. Finding that he does, the resolution of Issue 1 favors his client, so he can move on to Issue 2.

Issue 2: the lawyer for the taxpayer also concludes that the law requires taxing bodies to file appeals of assessments, including a determination of tax-exempt status, within a certain time period after the annual assessment rolls are published, and that failure to appeal constitutes a waiver of the right to later contest that status. Further, the lawyer also concludes that a prospective appeal by a taxing body could be made for future tax years, and that the taxpayer could file an action in mandamus should the County Assessor not, on his own, list the property as taxable for the next tax year.

These decisions have several consequences for the taxpayer's attorney. At a minimum, they influence the **Act** phase: he should advise his client to wait for the publication of next year's tax rolls. If the NALL property remains listed as exempt for the next tax year, he should advise his client to either (a) petition the taxing bodies to appeal the tax-exempt designation; or (b) if they do not, consider filing an action in mandamus to force the County Assessor to list the property as taxable.

But those actions still let NALL off the hook for three years' worth of property taxes that his client believes NALL should have paid. In other words, the **Decide** phase of the Loop 2 OODA process came up with an answer that did not favor the client's interest.

The OODA process accounts for such things. Recall that, at the end of each OODA iteration, the decision-maker needs to make a new **Observation**: did the **Act** (or in this case, the possible action) solve the problem? And even if it solved the immediate problem, did it create a new problem? In this case, from the point of view of the taxpayer's attorney, the resolution of Loop 2 created a new problem: it has revealed that the County Commissioners (as well as potentially other taxing entities such as the school district or local government) may have been negligent in failing to file an appeal in the previous years. This opens up new research questions about whether a taxpayer might have a legal remedy against the commissioners (as opposed to a political one, such as voting them out of office at the next election). The OODA process resulting from that **Observation** may lead to a new **Act**: a decision to sue the County Commissioners for damages for failing to previously appeal the tax-exempt status of the NALL headquarters building.⁴¹

⁴¹ And OODA would continue from there. The **Act** to sue the commissioners could result in a new **Observation**: public officials are often immune from suit for their discretionary acts. Another OODA iteration would then follow to decide whether governmental immunity would preclude a suit for damages.

Issue 3 also may proceed differently from the point of view of the taxpayer's attorney. The lawyer for the County Assessor concluded that the mandamus action could be prospective only. Because the previous three years of exemption could only have been reviewed through an appeal by a taxing body to that year's assessment roll, it could not be challenged in a forward-looking action in mandamus. If the lawyer for the taxpayer comes out of Loop 2 with a different (or supplemental) Act (suing the County Commissioners for damages for negligently failing to appeal prior assessments of the NALL headquarters building), the Observation entering Loop 3 will look different from the perspective of the attorney for the County Assessor. Starting from a different Observation will greatly influence the progression of the remaining OODA steps, potentially leading to a very different Decision and Action.

This chart summarizes the differences between the OODA processes for the counsel for the County Assessor and counsel for the taxpayer:

	OODA Process for County Assessor (objective analysis)	OODA Process for Taxpayer (advocacy focus)
Loop 1 (standing)	Assessor is an independently elected official and cannot be directed by Commissioners to take any action. Commissioners can appeal prospective assessments, however, as can other taxpayers.	Taxpayer has standing to challenge exempt status. Lawyer's client is a taxpayer, so proceed to Loop 2.
Loop 2 (forum)	Past years cannot be reviewed. Future years can be challenged through administrative appeal. Other taxpayers may have the right to seek court order in mandamus.	Current law suggests that past years cannot be reviewed. This is the fault of the commissioners for not filing timely appeals in previous years. What are possible remedies for this failure? (a) Political remedy (vote commissioners out of office); (b) Legal remedy (action for damages for neglect of duty to properly review tax rolls); (c) Mandamus action against Assessor to prospectively change assessment.

	OODA Process for County Assessor (objective analysis)	OODA Process for Taxpayer (advocacy focus)
Loop 3 (timing)	Past three years cannot be reviewed. Appeals and mandamus are prospective remedies only.	<ul style="list-style-type: none"> (a) Taxpayer will handle, no legal intervention needed. (b) Is decision to appeal or not a discretionary action that can be tested in an action for damages? Who would pay damages if action is successful (<i>i.e.</i>, commissioners or insurance)? (c) Prerequisites for filing prospective mandamus action? Joinder of NALL in order to gather information needed to resolve Loop 4?
Loop 4 (merits)	Unable to resolve in the absence of evidence to be gathered during formal appeal process.	<ul style="list-style-type: none"> (a) Campaign to vote commissioners out of office will be resolved at next election. (b) Unable to resolve in the absence of evidence regarding possible insurance coverage available to satisfy judgment. (c) Unable to resolve in the absence of evidence regarding use of the property to be gathered during mandamus action.

In the case of the County Assessor, the attorney asked only the question “What is the correct answer?” The attorney for the taxpayer asked a different question: “How can my client achieve what he perceives to be justice?” While both attorneys reached the same conclusion at Loop 1, by asking the different questions on Loop 2 the OODA processes began to quickly diverge, and the possible range of results for the taxpayer became far more complex.

Note, too, that the lawyer will need to consider alternative paths to a resolution (as discussed in section II-D above). The advocate may propose one series of OODA processes leading to the client’s preferred outcome. But the good advocate will recognize that the decisionmaker (judge, jury, or some administrative tribunal) might disagree with her rationale, find the other side’s rationale more persuasive, or even come up with an entirely new rationale. The advocate needs to prepare a contingency plan to deal with that, to the extent possible, by proposing alternative resolutions based on alternative **D**ecisions in any OODA loop.

V. OODA AS A LARGE-SCALE ORGANIZATION PARADIGM FOR LEGAL WRITING

We don’t yet have a good paradigm for large-scale organization of a complex bit of legal writing (either an analytical memorandum or a persuasive brief to a decisionmaker). Most textbooks simply advise the writer to “organize the issues in a logical fashion” or to “deal with threshold issues first.”⁴² Professor Linda Edwards goes a little farther, suggesting that there are at least four different choices a writer can make: “(1) ordering by strength on the law, (2) ordering by strength on the equities, (3) ordering by the reader’s priorities, and (4) ordering by familiarity.”⁴³ But she does not suggest how a writer should choose among those options.

Perhaps a good OODA analysis can help the legal writer decide how to present the issues. The same who/what/when/where/why/how process described above⁴⁴ might also suggest the most logical sequence in which to present the issues to your reader.

VI. THE ETHICS OF OODA IN LEGAL ADVOCACY

As noted above, OODA can be used either as a sword or a shield.⁴⁵ While using OODA defensively can help somebody—a fighter pilot or a legal writer—

⁴² JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 158 (5th ed. 2013); *accord* CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 217 (5th ed. 2006); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 118 (6th ed. 2009); LAUREL OATES ET AL., JUST BRIEFS 25 (2d Ed. 2008).

⁴³ LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 321 (5th ed. 2010).

⁴⁴ *See supra* note 35 and accompanying text.

⁴⁵ *See supra* notes 21–24 and accompanying text.

reach a good decision through an orderly process, a lawyer may be tempted to use OODA as a sword to disrupt the adversary's decision-making process. And while using OODA as a sword may save the fighter pilot's life in a time of war, the rules of engagement in legal problem-solving⁴⁶ are a little different.⁴⁷

The previous discussion established how two advocates, approaching the same problem from different perspectives (the attorney objectively representing the County Assessor and the attorney representing an allegedly aggrieved taxpayer), can use the OODA process to legitimately reach differing conclusions. But in that discussion, each attorney independently used OODA as the basis for his or her own decision. Would it be fair, or ethical, for either attorney to attempt to disrupt the other's OODA process in order to achieve a better result for his or her client?

While some advocates tend to analyze litigation as a form of warfare,⁴⁸ the Model Rules of Professional Conduct put constraints on that sort of behavior. In particular, Model Rule 3.3 seems to clearly prohibit an advocate from deliberately trying to disrupt the OODA process of the judge, or even of opposing counsel:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

⁴⁶ This Article has focused on using OODA in a litigation context to resolve disputes between parties. However, a transactional lawyer could also successfully deploy OODA in just about any context. In particular, the requirement to re-Observe the changed conditions after each Action is implemented can be a valuable exercise for the forward-thinking transactional attorney trying to anticipate what might go wrong in the future, so that she can draft a contract or other transactional document to avoid that future problem.

⁴⁷ See M. Margaret McKeown, *A Judge Comments*, LITIG., Winter 2013, at 25, 27 ("Sun Tzu's advice that 'all warfare is based on deception,' designed to win at all costs, is anathema to the courts. Unfortunately, discovery disputes are a fertile battleground. Any trial strategy must account for the consequences of bloody discovery battles and their long-term implications. Deceit, hiding the ball, and unnecessary delay are tantamount to shooting yourself in the foot.").

⁴⁸ William N. Shepherd and Thomas D. Smith, *Sun Tzu and the Art of Trial*, LITIG., Winter 2013, at 24 ("The first trial manual was written thousands of years ago by a military strategist responsible for training his king's troops during the Warring States period in sixth century B.C. China. Although Sun Tzu wrote *The Art of War* as a manual for training warriors, its lessons and principles apply equally to preparing for the conflict of trial in the adversary system."). Indeed, it is common for law firms to set up "war rooms" to manage major litigation. Walter G. Sutton, *The War Room: A Case Study*, PRAC. LAW., June 1992, at 15.

- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.⁴⁹

An ethical lawyer thus cannot make “a false statement of fact or law, . . . fail to correct [previous false statements], fail to disclose . . . legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client . . . , [or] offer evidence that the lawyer knows to be false,” in order to disrupt the OODA process of either a tribunal or opposing counsel.

The application of Model Rule 3.1 is less clear:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.⁵⁰

Suppose Plaintiff's lawyer believes his client has a good cause of action against Defendant on legal theory A. There is also a remote, but still non-zero chance that Plaintiff could also prevail against Defendant on legal theory B. The legal question raised by Model Rule 3.1 would be whether or not legal theory B is “frivolous.”

Suppose further that Plaintiff's lawyer concludes legal theory B is not frivolous, and he therefore files a two-count complaint against Defendant alleging both theories A and B. Suppose further that he hopes (secretly or even openly) that Defendant will spend a great deal of time and effort defending against theory B. This is a form of disrupting the opponent's OODA process (*e.g.*, by distracting the defendant), especially if the Plaintiff expects to drop theory B prior to trial in order to not distract the trier of fact from the sounder theory A. According to the rules of engagement for warfare, for which OODA was designed, the multi-count complaint is perfectly fine. In the world of legal ethics, however, the issue is much more complex, and the resolution much less certain.

⁴⁹ MODEL RULE OF PROF'L CONDUCT r. 3.3 (Am. Bar Ass'n, 2019).

⁵⁰ MODEL RULE OF PROF'L CONDUCT r. 3.1 (Am. Bar Ass'n, 2019).

A lawyer might be tempted to use OODA to attack the opposing side during discovery. So-called “hardball discovery tactics,” especially in high-stakes litigation, can degenerate into efforts to distract and disrupt the other side’s OODA process.⁵¹ But it doesn’t necessarily need to go that far. There is a difference between playing within the rules and deliberately obfuscating, delaying, or making litigation as expensive as possible for the other side.⁵²

Note also that just because the Model Rules prohibit unethical behavior, that does not mean a lawyer might not encounter unethical conduct by an opposing party. Being aware of the OODA process, and most importantly, how it can be weaponized, may help a lawyer get back on track when faced with misleading or distracting inputs from the other side.

VII. CONCLUDING THOUGHTS

OODA is a simple idea that is actually brilliant when applied to any form of problem-solving. It helps enable the problem-solver to think about the process of solving the problem, and when done consciously and patiently, can help a problem solver avoid common pitfalls.

In a legal context, OODA forces the lawyer to think critically and creatively. It also helps a lawyer to focus on counter-analysis. By forcing oneself to **O**bserve the result of one’s **D**ecision before moving on to the next iteration, hopefully the lawyer will be more attuned to potential flaws in the decision-making process—or unintended consequences flowing from the **D**ecision—and address them on the next loop.

⁵¹ See, e.g., Steve Weinberg, *Hardball Discovery*, A.B.A. J., Nov. 1995, at 66.

⁵² Stephanie B. Goldberg, *Playing Hardball*, A.B.A. J., July 1987, at 49 (“Hardball is playing with a baseball, not a softball; it’s faster and harder hitting and implies a high level of professionalism and the major leagues.’ But, says [Monroe] Freedman, it doesn’t mean spitball or sleazeball. ‘It’s a game where winning within the bounds of the rules is the most important thing.’”).