SUMMARY

A lawyer's critique that author Jesse Blocher received while he was a law clerk many years ago has stuck with him. In short, and not to be taken literally, "To win, you have to hit 'em in the mouth."

On first thought, it might seem that lawyers have nothing to learn from prize-winning fighters, but think again: There are useful parallels between boxing and law that can help lawyers write case-winning briefs.

This article contains several tips for the non-physical-contact activity of creating persuasive arguments in litigation, gleaned from the experiences of boxing greats, including Floyd Mayweather, Manny Pacquiao, and Mike Tyson.

BY JESSE B. BLOCHER

The Pugilist's Guide to Brief Writing

Want to write winning briefs? Here are some suggestions for honing your craft.

Almost 20 years ago, I proudly turned in my first major assignment as a law clerk – a summary-judgment-response brief. Having spent countless hours crafting this masterpiece of legal scholarship, I was given an unexpectedly stern critique: "Your brief is too conciliatory, long, and professorial.... Do you prefer to sound smart or win? *To win, you have to hit 'em in the mouth*."

That advice has stuck with me all these years as a guiding principle to prepare more direct, concise, and persuasive briefs. While it may seem a stretch to analogize boxing and writing, there are some useful parallels that can help your arguments emerge victorious. The following are tips for winning brief-writing bouts.

1) Prepare Thoroughly

Floyd "Money" Mayweather, who ESPN ranks as the best boxer of the last 25 years,[1] backed up his relentless public bluster with a perfect 50-0 record.[2] Mayweather's success was driven by rigorous preparation.[3] A sparring partner described Mayweather's devotion:

"He put the work ethic on top of being talented. ... We'd pull off four or five hour gym sessions, ... leave there and then go for a run for ten miles. ... [H]e'll call you again, like two or three in the morning and say 'Yo, what's up, let's go running.' He outworked everybody."[4]

Preparation is also essential to good brief writing. Preparation starts with development of the record. You must anticipate the potential legal issues to conduct discovery and compile a sufficient record to support your position. Then, tenacious research is crucial. "Tenacity" may seem an awkward descriptor for legal research, but successful researchers continually dig deeper to find winning arguments. Exhaustive research includes understanding the nuances of all relevant statutes, code provisions, case law (potentially even from other jurisdictions), and secondary sources.

Upon reviewing your opponent's submission, you may need to adjust your tactics and find alternative arguments. As Mike Tyson said, "everyone has a plan 'till they get punched in the mouth."[5] Comprehensive research allows you to adapt your position to rebut your opponent's arguments. Unless there is clear controlling authority, you "can find legal support for almost any proposition."[6] Convincing the judge that you should win hinges on whether your arguments are adequately supported by the record and law. Without thorough preparation, your punches will lack power and miss their mark.

2) Enhance Your Style

The greatest boxers relied on different fighting styles.[7] Manny "Pacman" Pacquiao was known as a "pressure fighter," Mohammad Ali used an "outside boxing" style, and "Sugar" Ray Robinson was a "counter puncher."[8]

Like boxers, successful legal writers employ numerous styles. Your natural inclination will dictate much of your phrasing, but within any style, there is room to incorporate some recommended best practices.

First, a well-written brief is clear and concise.[9] Most judges are generalists[10] with high-volume caseloads. Do the judge a favor and make the brief "easy to read"[11] by keeping "it simple and as short as possible."[12]

Weed out unnecessary words, phrases, and sentences.[13] "All that is not necessary should be ruthlessly discarded."[14] Eliminate the

clutter created by buzz words, acronyms, abbreviations, and five-dollar words.[15] Cut exaggerated rhetoric. The same goes for intensifiers like "very" and "extremely,"[16] which, counterintuitively, can make your argument seem weaker. U.S. Supreme Court Chief Justice Roberts has advised, "I have yet to put down a brief, and say, 'I wish that had been longer.' ... Almost every brief I've read could be shorter."[17]

Second, "active voice" is usually better. With active voice, the subject of the sentence performs the verb's action. Here are a few examples:

Active voice: The camp counselor abandoned Jane in the woods.

Passive voice: Jane was abandoned by the camp counselor in the woods.

Active-voice sentences are direct and authoritative.

Third, varied sentence length throughout the brief is good, but discuss only one idea in each sentence. If a sentence contains more than one point, break it down. Also, simplify convoluted sentences. If a sentence is awkward to recite out loud, you can probably make it clearer.

Finally, avoid snarky comments and mudslinging. The Wisconsin Supreme Court's rules require the opposite: "Maintain a cordial and respectful demeanor.... Abstain from making disparaging, demeaning or sarcastic remarks or comments about one another."[18] Litigators tend to view clients' causes as righteous and can become incensed with opponents' tactics. The indignation you feel is unlikely to be reciprocated by the judge except in the most extreme circumstances. Take the high road by accurately describing the issue, while avoiding language that could seem uncivil.

Incorporating these suggestions can make for punchier, more persuasive briefs.

3) Tell a Good Story

Ron Howard's underrated boxing epic, *Cinderella Man*,[19] covers the career of Depression-era heavyweight champion, James J. Braddock, the "Bulldog of Bergen." The movie begins by quoting journalist Damon Runyon: "In all the history of the boxing game you find no human-interest story to compare with the life narrative of James J. Braddock...." The film delivers on that promise by taking the audience on a visceral, emotional ride through Braddock's life. The film's portrayal of Braddock's rise from desolation is riveting. The audience can't help but root for Braddock to prevail against the odds.

Exhaustive research includes understanding the nuances of all relevant statutes, code provisions, case law (potentially even from other jurisdictions), and secondary sources.

Although a client's case might not be as captivating as an injured, destitute, over-the-hill boxer's improbable career rejuvenation, creating a compelling picture of the facts can influence the reader to feel connected to the client's plight. The late Judge Ralph Adam Fine emphasized that in "framing your issues and shaping your statement of facts ... you *must* have already made the ... court *want* to decide in your favor."[20]

Facts sections are not supposed to include argument, but there is no rule that they must be dull. Describing vital facts with appropriate detail, context, and perspective can persuade the reader that the client's position is just. However, you should not overstate facts for dramatic effect. Being accurate is crucial to maintaining your credibility with the court. Contrast the following two examples:

Example 1: Jane Smith, a minor, died on June 13, 2021, in a hiking accident. Plaintiff's expert, Dr. Jones, will testify that defendant, ACME Day Care, was negligent and caused the accident.

Example 2: On June 13, 2021, every parent's nightmare became reality for James and Mary Smith: a police officer informed them that their precious 9-year-old daughter, Jane, had been killed. According to plaintiff's expert, Dr. Jones, defendant ACME Day Care should have prevented this tragedy by

ensuring that the vulnerable children it was charged with protecting were properly supervised. Dr. Jones testified that ACME's "incompetence, intransigence, and gross negligence" in leaving a frightened child alone in the woods led to her falling off a rocky cliff.

Example 2 is more likely to capture the reader's attention and align the reader with your position.[21] Also, "incorporating photographs, maps, graphs, and the like … can be extremely effective."[22] Bear in mind that the goal is not merely to spin a good yarn – the facts should be tailored to the issues you need to win. Blatant appeals to the judge's emotions detached from the issues will appear manipulative.

Be aware of the procedural posture and standard of review. For example, if you are responding to a summary-judgment motion, you have more flexibility in how you interpret the record because "all reasonable inferences" must be drawn in your client's favor.[23]

As for structure, the facts section is not a Quentin Tarantino movie. It is almost always best to structure facts in chronological order.[24] Sometimes, it may be appropriate to provide a set of basic facts sequentially followed by subsections related to specific issues. Either way, it is beneficial to begin paragraphs and sections with summary-like sentences so the reader can contextualize what follows.

4) Strategize for Maximum Impact

Setting aside his penchant for controversy, "Iron" Mike Tyson was a phenomenal boxer.[25] While many remember Tyson for his relentless, aggressive style, he was also an outstanding strategist who overcame significant disadvantages. Because Tyson was shorter than other fighters, he learned to use speed, footwork, and angles of attack to "fight low" and strike opponents from unorthodox positions.[26] This led to a higher probability of his punches landing and his opponents' counterattacks failing. Tyson once said "[e]verybody thinks this is a tough man's sport. This is not a tough man's sport. This is a thinking man's sport. A tough man is gonna get hurt real bad in this sport."[27]

Strategic thinking and well-structured arguments can also produce winning briefs. Some suggestions follow:

1) **Don't bury the lede.** Come out strong. Usually, advance your best argument first.[28] Rope-a-dope might have worked for Mohammad Ali, but in the legal arena, burying your best points at the end of a brief is not good strategy.

2) **Break up issues and sub-issues into different sections with ordered point headings.** Use introductory paragraphs at the beginning of the brief and argument section to give the reader a map of the major points to follow. "Nothing is more discouraging to the judicial reader … than a great expanse of print with no guideposts and little paragraphing."[29]

Within each section, the well-known "CREAC" format provides an easy-to-follow structure that legal readers expect.[30] CREAC stands for conclusion, rule, explanation, application, and conclusion. Each section begins with a conclusion, summarizing the argument to follow. Next, state your synthesized rule of law, followed by an explanation of how you arrived at that rule. Then apply the law to the facts of your case. Last, provide another brief conclusion.

Within this format, begin each paragraph and section with a strong thesis sentence. These thesis sentences should capture what you will argue in the paragraph or section that follows. Each subsequent sentence in the paragraph advances the thesis. Limit each paragraph's focus to one main idea.[31]

Structure your discussion of the authority around the rule of law for which you are advocating. Do not simply recite the facts and holdings of each case. Instead, synthesize the authority into your rule, as in the following example:

"The ministerial duty exception to governmental immunity applies when there is a mandatory duty to act but does not require a total absence of discretion.[32] For example, in *Cavanaugh*,[33] the court held that Wis. Stat. § 346.03(6) creates a ministerial duty for police officers to exercise 'due care' during a chase, even though it does not detail exactly how to comply with that standard. Similarly, the *Pries*[34] court determined that an instruction manual created a ministerial duty to hold structural pieces of a horse stall in place during disassembly, despite the manual's omission of any specific procedure for doing so."

The discussion of the case law should prove that your rule is correct.

3) **Rebut, but do not unnecessarily highlight your opponent's arguments.** Avoid the temptation to structure the entire argument as "point-counterpoint." Instead, explain how the law and facts support your position and not your adversary's. If restating your opponent's position is necessary for context, you can focus the court's attention on the argument's flaws, as in the following:

"Defendant's incorrect assertion that a ministerial duty must specify every aspect of performance is contrary to *Legue*,[35] which held 'a duty need not dictate each precise undertaking that the government actor must implement in order to be ministerial.'"

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4) **Maintain credibility with the court.** Do not misrepresent the facts or law.[36] You have a duty of zealous advocacy, not a license to ignore reality. Quoting critical portions of the record and authority can bolster your credibility. Your brief should not be a string of block quotations, but crucial quotations confirm the veracity of your position. Of course, that only works if you portray the quoted material accurately without truncating language to alter meaning. Remember, your reputation follows you from case to case. Lawyers who are straight shooters are more likely to prevail.

Likewise, making as many arguments as you can think of, regardless of quality, is a bad strategy. Federal District Court Judge William Griesbach has advised, "[p]ick your good arguments, and throw out the ones that distract from the better points."[37] In a case in which it declined to address excessive, underdeveloped issues, the Wisconsin Supreme Court stated, "[a]n appellate court is not a performing bear, required to dance to each and every tune played on an appeal."[38] When the only available arguments are longshots, your client might be better served by changing course rather than clinging to a losing position. Picking your battles helps to maintain your credibility.

Conclusion

Your writing will be more persuasive if you carefully research, structure, and edit your brief. To "hit 'em in the mouth," get to the point quickly, use strong thesis sentences, and write in active voice. Take it from Rocky Balboa: "The mind is your best muscle. Big arms can move rocks, but big words can move mountains."[39] **WL**

ENDNOTES

[1]ESPN, *Mayweather No. 1 of Past 25 Years* (May 14, 2016), https://www.espn.com/boxing/story/_/id/14970037/ranking-top-25-pound-pound-boxers-25-years.

[2]Wikipedia, *Floyd Mayweather Jr.*, https://en.wikipedia.org/wiki/Floyd_Mayweather_Jr.#Filmography (last visited Jan. 27, 2023).

[3]Boxing Life, *Floyd Mayweather's Dedicated Training Routine*, https://myboxinglife.com/floyd-mayweather-dedicated-training-routine-and-methods/ (last visited Jan. 27, 2023).

[4]Balance the Grind, *Floyd Mayweather: Daily Routine* (Aug. 5, 2020), https://balancethegrind.co/daily-routines/floyd-mayweather-daily-routine/.

[5]*Mike Tyson*, Twitter, http://twitter.com/miketyson/status/1052665864401633299?lang=en (last visited Jan. 29, 2023).

[6]Ralph Adam Fine, *How to Win Appeal Manual* at v, 17 (Juris Publishing Inc. 4th ed. 2015).

[7]*Five Different Fighting Styles in Boxing*, Evolve MMA, http://evolve-mma.com/blog/5-different-fighting-styles-in-boxing/ (last visited Jan. 27, 2023).

[8]*Id.*

[9]U.S. Seventh Circuit Court of Appeals, *Practitioner's Handbook for Appeals* 153 (2020), https://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf.

[10]*Id.* at 152.

[11]Fine, *supra* note 6, at 132.

[12]*Practitioner's Handbook for Appeals*, *supra* note 9, at 152.

[13]For example, eliminate introductory phrases such as "it is clear" or "it is obvious." These are almost always unnecessary. Also, a contested issue is rarely "clear" or "obvious." When possible, set aside a few days to correct typos and citations. Cleaner briefs appear more professional.

[14]*Practitioner's Handbook for Appeals*, *supra* note 9, at 160.

[15]*Id.*

[16]Linda Holdeman Edwards, *Legal Writing and Analysis* 277 (Aspen Publishers 2003).

[17]Douglas E. Abrams, *10 Tips for Effective Brief Writing*, Wis. Law. (Feb. 2015), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=88&Issue=2&ArticleID=23864 (*quoting* Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts, Jr., 13 Scribes J. Leg. Writing 5, 35 (2010) (*quoting* Chief Justice Roberts)).

[18]Wis. SCR 62.02.

[19](Universal Pictures 2005).

[20]Fine, *supra* note 6, at 17.

[21]This discussion assumes you represent the plaintiff. If your client was the defendant, you would prefer something more like Example 1 to avoid drawing unnecessary attention to the case's tragic circumstances. There is often a tension between brevity and persuasiveness. Sometimes more detail is necessary to be effective. Use your judgment to strike the appropriate balance. The goal is to make the brief as concise as possible without excluding substance that is necessary to prevail.

[22]*Practitioner's Handbook for Appeals, supra* note 9, at 153.

[23]*Pum v. Wisconsin Physicians Serv. Ins. Corp.,* 2007 WI App 10, ¶ 6, 298 Wis. 2d 497, 727 N.W.2d 346.

[24]*Practitioner's Handbook for Appeals, supra* note 9, at 158.

[25]Evolve Daily, *Breaking Down Mike Tyson's Style of Boxing*, https://evolve-mma.com/blog/breaking-down-mike-tysons-style-of-boxing/ (last visited Jan. 27, 2023).

[26]*Id.*

[27]Goodreads, *Mike Tyson: Quotes*, https://www.goodreads.com/author/quotes/6583167.Mike_Tyson (last visited Jan. 27, 2023).

[28]However, there will be occasions when you will need to order the arguments differently to provide context. In an appellate response brief, courts prefer that you follow the order of issues raised by the appellant, but within each issue, you can lead with your best argument. Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 11.22 (9th ed. 2022).

[29]*Practitioner's Handbook for Appeals*, *supra* note 9, at 158.

[30]Edwards, *supra* note 16, at 89-107. This book is an excellent resource on the CREAC format and brief structure.

[31]A good exercise is to separate your headings and the first sentence of each paragraph into a separate document. It should read like an assertive but logical outline of your arguments. Many legal "readers" are really legal "skimmers." Starting paragraphs and sections with thesis sentences strengthens the argument while allowing legal skimmers to easily follow along.

[32]*Legue v. City of Racine*, 2014 WI 92, ¶ 54, 357 Wis. 2d 250, 849 N.W.2d 837.

[33]*Estate of Cavanaugh v. Andrade*, 202 Wis. 2d 290, 319, 550 N.W.2d 103 (1996).

[34]*Pries v. McMillon*, 2010 WI 63, ¶¶ 33-37, 326 Wis. 2d 37, 784 N.W.2d 648.

[35]*Legue*, 2014 WI 92, ¶ 54, 357 Wis. 2d 250.

[36]According to a 2011 article, appellate judges' top pet peeve "was conduct related to misrepresentation": "[m]isrepresenting what the trial court did or said" or "citing a case for something it can't be reasonably interpreted as holding." Joe Forward, *Pet Peeves 101: How to Impress or Annoy a Judge in the Courtroom*, InsideTrack (March 30, 2011), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=3&Issue=7&ArticleID=7886.

[37]*Id.*

[38]*State v. Waste Mgmt. of Wis. Inc.,* 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

[39]Rocky Quotes, Dilara Avlupinar, *18 Quotes From the Rocky Movie Most of Us Can't Get Over For Days*, CEOtudent, https://ceotudent.com/en/18-quotes-from-the-rocky-movie-most-of-us-cant-get-over-for-days (last visited Jan. 28, 2023). **WL**