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Out of the Boxing Ring, Into the Courtroom

LITIGATION

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Boxing is a contact sport, just like litigation. That's why the boxing ring has a lot to teach trial counsel and in-house litigation managers about the courtroom.

I've duked it out in a lot of courtrooms, but I only recently took up boxing, and it has changed my take on litigation. Here are a few things I've learned.

• *Respect the opponent.* The quickest path to defeat in the boxing ring is to underestimate an opponent. That leads to slouching in training and bad-mouthing the other fighter. Next thing the contender knows, he's on the mat wondering what hit him.

Humility wins bouts and trials. I always consider myself the underdog to avoid complacency.

Besides carrying a big stick, it's important to speak softly. In most cases, I offer to have lunch with opposing counsel up front. That can save lots of time on petty misunderstandings.

• *All fights are different.* No two opponents fight with the same style, so no two bouts are the same. A fighter sometimes aims for a win in Round 2, other times in Round 9. Each scenario calls for different tactics.

That holds true in litigation. Noncompete enforcement actions often are quick and brutal. Defending against a retaliation claim, however, may require taking the long view. Recognizing this, trial counsel can apply the appropriate pressure at the right times.

• *Conceal strength.* Before a bout, my ego wants me to rub my opponent's nose in my strengths. I'd love to think I could scare him off. But that's a fantasy. The reality is that nobody's backing down — not me, not the other guy. My better bet is to encourage my opponent to underestimate me, then catch him off guard. There's no reason to show off my best punches during practice sparring sessions. I save them for the bout.

Take that insight into the courthouse. Standard pleadings, such as petitions and answers, may not be the place to reveal a case's juiciest facts or the details of the most brilliant argument. An attorney

wastes show-stopping points by highlighting them in interrogatory answers.

Instead, trial counsel can minimize or, if possible, omit strong points from initial pleadings and written discovery. Flying under the radar, counsel can take an early deposition to nail down key admissions. The goal is to covertly turn a strong position into an unassailable one.

• *Stick and move.* The boxer who keeps his feet firmly planted soon will find himself relieved of them. A static target is an early mark. Yet, by throwing a few punches and immediately moving, a boxer keeps his opponent off balance and tires him. This opens the door to landing a surprise punch.

This works in litigation, too. A lawyer can follow a flurry of activity with a second attack on a different point. Depositions, hearings and mediation all make great launching points for a new attack. Opposing counsel may hope for a break after exerting himself in a pitched contest. Don't give him one.

Opposing counsel once pulled this on me. My team had just convinced the judge to deny a TRO enforcing a noncompete, and we returned to our office. One hour later, the opposing party's extensive written discovery requests rolled across our fax machine. From then on, we called the lawyer "RoboCop." I liked the guy. He just wouldn't quit attacking no matter how hard we hit him. I wonder if opposing counsel has ever nicknamed me?

• *Keep the opponent off balance.* Predictability undermines the element of surprise. If a boxer constantly throws the same combo of punches, his opponent will anticipate it. The result can be a knockout.

Just as boxers mix up their punches, a litigator can get mileage out of taking different tacks, varying the oblique approach with a direct attack. Instead of directly asking a deposition witness about a damning email he sent, counsel might dance around it. The questions would probe for testimony that makes the email look more damaging. At trial, counsel can catch the witness in the crossfire, trapped between his email and deposition testimony.

Here's an example: A lawyer is defending a company against an ex-manager's wrongful-termination suit. The ex-manager says the company fired him because of his race, not to lower costs. But in an email, the ex-manager had endorsed downsizing another department in an effort to cut costs. The deposition questions could include: "Is downsizing a hard decision that managers must sometimes make? When you hear news about layoffs, do you think that management's decision was personal or just business?" With the right answers, the trial theme quickly takes shape: The ex-manager's termination was not personal but "just business."

• *Listen to the coach.* Good coaching changes everything. I can't easily see when I drop my right glove, exposing myself to an opponent's heavy left hook, but a coach can.

The same is true in the practice of law. A seasoned mentor molds a lawyer's technique. I've been lucky enough to have a few good ones. Sometimes, they tell me what I don't want to hear, but they always make me better.

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