ESSENTIAL LAWYERING SKILLS

INTERVIEWING, COUNSELING,
NEGOTIATION, AND PERSUASIVE
FACT ANALYSIS

Fourth Edition

STEFAN H. KRIEGER RICHARD K. NEUMANN, JR.



ESSENTIAL LAWYERING SKILLS

Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis

FOURTH EDITION

STEFAN H. KRIEGER

Professor of Law Hofstra University

RICHARD K. NEUMANN, JR.

Professor of Law Hofstra University



© 2011 Stefan H. Krieger and Richard K. Neumann, Jr.

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers Attn: Permissions Department 76 Ninth Avenue, 7th Floor New York, NY 10011-5201

To contact Customer Care, e-mail customer.care@aspenpublishers.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Aspen Publishers Attn: Order Department PO Box 990 Frederick, MD 21705

Printed in the United States of America.

1234567890

ISBN 978-0-7355-9996-3

Library of Congress Cataloging-in-Publication Data

Krieger, Stefan H., 1946-

Essential lawyering skills: interviewing, counseling, negotiation, and persuasive fact analysis / Stefan H. Krieger, Richard K. Neumann, Jr. — 4th ed.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-7355-9996-3

1. Practice of law—United States. I. Neumann, Richard K., 1947- II. Title.

KF300.E84 2011

347.73'504—dc22

2011003995

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and work-flow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

For Mary—My Fellow Traveller And Gary Palm—My Mentor and Friend S.H.K.

For Deborah with love R.K.N.Jr

You know more than think you do. Benjamin Spock

The lyf so short, the craft so long to lerne. Chaucer

ACKNOWLEDGMENTS

We are grateful to many people who contributed their thoughts to this book. Among them are Kathleen Beckett, J. Herbie DiFonzo, Deborah A. Ezbitski, Monroe Freedman, Steven D. Jamar, Lawrence W. Kessler, Kathleen H. McManus, Roy Simon, and Kathryn E. Stein, the anonymous reviewers who examined the manuscript at Aspen's request, and the children at Fellowes Athenaeum, Roxbury, MA, 1970-72. Research assistance was provided by Robin Chadwick, Michelle Chin Que, Brian Bender, Jennifer Goody, Eric Burgos, Dayna Shillet, Shiry Gaash, Richard Soleymanzadeh, Lisa Brabant, Randi Fensterer, Karen Nielson, Jason Parpas, Teresa Staples, Frances Zemel, George Pleasant-Jones, Daniel Rossi, Emily Rothenberg, and Michelle McGreal. We are also grateful for research grants provided by Deans Stuart Rabinowitz, David Yellen, Aaron Twerski, and Nora Demleitner.

Copyright Acknowledgments

Permission to reprint copyrighted excerpts from the following is gratefully acknowledged:

ABA Model Rules of Professional Conduct, 2006 Edition. © 2006 by the American Bar Association. Reprinted with permission. Copies of ABA Model Rules of Professional Conduct, 2006 Edition are available from Service Center, American Bar Association, 321 North Clark Street, Chicago, IL 60610, 1-800-285-2221.

Richard Birke, "Decision Trees—Made Easy." Reprinted by permission of the author.

Monroe H. Freedman and Abbe Smith, *Understanding Lawyers' Ethics*, pp. 205–210. Reprinted with permission. Copyright 2004 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

Steven Keeva, What Clients Want, ABA Journal, June 2002. Reprinted by permission, © 2006. ABA Journal and ABA Journal eReport are published by the American Bar Association.

Agata Szypszak, Where in the World is Dr. Detchakandi? A Story of Fact Investigation. From an article that originally appeared in 6 Clinical L. Rev. 517, 518–529 (2000).

Deborah Tannen, You Just Don't Understand: Women and Men in Coversation, pp. 14–17, 49–50, 297–298. Copyright © 1990 by Deborah Tannen.

Reprinted by permission of HarperCollins Publishers Inc.

Twentieth Century Fox Film Corporation, a division of Fox Entertainment Group, Inc., *The Simpsons*™, from the episode "Blood Feud," © 1991. Reprinted by permission of Twentieth Century Fox Film Corporation.

Richard C. Wydick, *The Ethics of Witness Coaching*. From an article that originally appeared in 17 Cardozo L. Rev. 1 (1995).

SUMMARY OF CONTENTS

Table of Contents xi Acknowledgments xix

PART I BECOMING A LAWYER I

| | | What This Book Is About 3 |
|---------|---|--------------------------------------|
| Chapter | 2 | Professionalism 7 |
| Chapter | 3 | Lawyering for and with the Client 21 |
| Chapter | 4 | Lawyering as Problem-Solving 33 |
| Chapter | 5 | Communications Skills 47 |
| Chapter | 6 | Multicultural Lawyering 59 |

PART II INTERVIEWING 69

| Chapter | 7 | Observation, Memory, | Facts, and Evidence | 71 |
|---------|---|-------------------------|---------------------|----|
| Chapter | 8 | Interviewing the Client | 89 | |
| Chapter | 9 | Interviewing Witnesses | 117 | |

PART III PERSUASIVE FACT ANALYSIS 137

| Chapter 10 | How We Organize and Think about Facts 139 |
|------------|--|
| Chapter 11 | The Legal Elements Model of Organizing Facts 149 |
| Chapter 12 | The Chronology Model of Organizing Facts 159 |
| Chapter 13 | The Story Model of Organizing Facts 169 |
| Chapter 14 | Selecting a Model for Presentation of the Case 187 |
| Chapter 15 | Strengthening the Persuasiveness of Your Facts 191 |
| Chapter 16 | Investigating the Facts 209 |
| Chapter 17 | Responding to Your Adversary's Facts 225 |
| | |

PART IV COUNSELING 231

| Chapter 18 | What Happens When a Lawyer Counsels a Client | 233 |
|------------|---|-----|
| Chapter 19 | An Example of Counseling: The Plant Closing 24. | 3 |
| Chapter 20 | Preparing for Counseling: Structuring the Options | 249 |

Summary of Contents

| PARTV | NEGOTIATION 295 | |
|------------|---|-----|
| Chapter 24 | How Negotiation Works 297 Negotiation Preparation: Assessing the Parties | 309 |
| Chapter 26 | Developing a Negotiation Strategy 327 Styles and Rituals 347 Following Through on Your Plan 355 | |
| | Negotiation Tactics 369 | |

Chapter 21 The Counseling Meeting with the Client 273 Chapter 22 Overcoming Special Problems in Counseling 285

Index 387

X

TABLE OF CONTENTS

Acknowledgments xix

| PART I | BEC | OMII | NGA | LAW | /YER |
|--------|-----|------|-----|-----|------|
| | | | | | |

| Chapter I | What | This Book | Is About 3 |
|-----------|----------------|----------------------------------|---|
| Chapter 2 | Profes | sionalism | 7 |
| | \$2.1 \$2.2 | | ctive Practitioner of Law 7 ngs Effective Lawyers Know 8 The Most Important Thing a Lawyer Can Bring to Any Situation Is Good |
| | | \$2.2.2 | Judgment 9 A Lawyer's Job Is to Find a Way—to the Extent Possible—for the Client to Gain |
| | | \$2.2.3 | Control over a Situation 10 Effective Lawyers Work to Achieve Specific Goals 10 |
| | | \$2.2.4 | Success in the Practice of Law Depends on Efficient Work Habits 10 |
| | | §2.2.5 §2.2.6 | Thorough Preparation Is Essential 11 Everything Revolves Around Facts 11 |
| | | \$2.2.7 | Assumptions Can Sabotage Good Lawyering 12 |
| | | §2.2.8 | Representing Clients in Disputes Is Only Part of What Lawyers Do—the Rest Is Transactional 12 |
| | | \$2.2.9 | To Be Effective, a Lawyer Must Know How—and When—to Function in Inquiring Mode as Well as in Persuasion Mode 13 |
| | | \$2.2.10 \$2.2.11 \$2.2.12 | Numbers Matter 15 Taxes Matter 16 Overlawyering Can Be as Damaging as Underlawyering 16 |

| | | §2.2.13 For Most Lawyers, It's a Struggle to Lead a Balanced Life, but It's a Struggle You Can Win 17 |
|----------------------|---|--|
| | | \$2.2.14 Integrity Is Your Most Valuable Asset as a Lawyer 17 |
| | \$2.3 | What Is Happening to You 18 |
| Chapter 3 | Lawye | ring for and with the Client 21 |
| | | Who Decides What 25 What Clients Dislike in a Lawyer 27 |
| Chapter 4 | Lawye | ering as Problem-Solving 33 |
| | §4.1 | Solving Professional Problems 33 §4.1.1 How Diagnosis, Prediction, and Strategy Are Intertwined in the Practice of Law 33 §4.1.2 How Lawyers Diagnose, Predict, and |
| | §4.2 | Strategize 35 Strategic Styles 39 §4.2.1 What Weak Strategy Looks Like 39 §4.2.2 How to Start Developing Your Own Strategic Style 39 |
| | | Strategie Style 37 |
| | §4.3 | The Inclusive Solution 43 |
| Chapter 5 | | |
| Chapter 5 | | The Inclusive Solution 43 munications Skills 47 Why Communication Through the Spoken Word Is a |
| Chapter 5 | Comr | The Inclusive Solution 43 munications Skills 47 |
| Chapter 5 Chapter 6 | \$5.1 \$5.2 | The Inclusive Solution 43 munications Skills 47 Why Communication Through the Spoken Word Is a Core Lawyerly Skill 47 Eight Oral Communication Skills 49 \$5.2.1 Listening 49 \$5.2.2 Empathizing 50 \$5.2.3 Asking Questions 51 \$5.2.4 Finding and Telling Stories 53 \$5.2.5 Painting a Picture 54 \$5.2.6 Giving Information 55 \$5.2.7 Implying Through Tone of Voice and Body Language 56 |
| | \$5.1 \$5.2 | The Inclusive Solution 43 munications Skills 47 Why Communication Through the Spoken Word Is a Core Lawyerly Skill 47 Eight Oral Communication Skills 49 \$5.2.1 Listening 49 \$5.2.2 Empathizing 50 \$5.2.3 Asking Questions 51 \$5.2.4 Finding and Telling Stories 53 \$5.2.5 Painting a Picture 54 \$5.2.6 Giving Information 55 \$5.2.7 Implying Through Tone of Voice and Body Language 56 \$5.2.8 Making Arguments 56 cultural Lawyering 59 How Culture Matters in Lawyering 59 How Cultural Differences Can Matter in |
| | \$5.1 \$5.2 Multi \$6.1 | The Inclusive Solution 43 munications Skills 47 Why Communication Through the Spoken Word Is a Core Lawyerly Skill 47 Eight Oral Communication Skills 49 \$5.2.1 Listening 49 \$5.2.2 Empathizing 50 \$5.2.3 Asking Questions 51 \$5.2.4 Finding and Telling Stories 53 \$5.2.5 Painting a Picture 54 \$5.2.6 Giving Information 55 \$5.2.7 Implying Through Tone of Voice and Body Language 56 \$5.2.8 Making Arguments 56 cultural Lawyering 59 How Culture Matters in Lawyering 59 |

Do Men and Women Practice Law Differently? 65

| PART II | INTER | RVIEWING 69 |
|-----------|--------|--|
| Chapter 7 | Obser | vation, Memory, Facts, and Evidence 71 |
| | §7.1 | The Differences Between Facts, Inferences, and Evidence 71 |
| | §7.2 | The Myths 72 |
| | §7.3 | What Science Knows about Observation and Memory 77 |
| | | \$7.3.1 What Affects Observation 77 \$7.3.2 What Affects Retention in Memory 79 \$7.3.3 What Affects Retrieval from Memory 80 |
| | §7.4 | How Courts Treat Observation and Memory 81 |
| | §7.5 | The Problem of States of Mind 83 |
| | \$7.6 | How to Explore Memory Accurately in an Interview 84 |
| Chapter 8 | Interv | iewing the Client 89 |
| | \$8.1 | Client Interviewing as Problem-Solving 89 §8.1.1 Your Purposes in Interviewing Clients 90 §8.1.2 Active Listening and Other Interviewing |
| | \$8.2 | Dynamics 91 Organizing the Interview 95 |
| | 30.2 | §8.2.1 Preparing 96 |
| | | §8.2.2 Beginning the Interview 96 |
| | | §8.2.3 Information Gathering 97 |
| | | §8.2.4 Ascertaining the Client's Goals 99 |
| | | §8.2.5 Considering a Strategy During the Interview 101 |
| | | §8.2.6 Closing 103 |
| | §8.3 | Questions 104 |
| | | §8.3.1 What to Ask About 104 |
| | | §8.3.2 Organizing and Formulating |
| | §8.4 | Questions 108 Special Problems in Client Interviewing 110 |
| | 30.4 | §8.4.1 Ethics in Client Interviewing 111 |
| | | §8.4.2 Handling Private or Embarrassing Material 112 |
| | | §8.4.3 When the Client Is Distraught 112 |
| | | §8.4.4 Handling Possible Client Fabrication 11. |
| | | §8.4.5 When the Client Wants a Prediction on th Spot 114 |
| | | §8.4.6 Negotiating a Fee Agreement 115 |
| | | |

§6.5 Multicultural Skills 64 §6.6 Do Men and Women Pra

| Chapter 9 | Interviewing Witnesses 117 | | | |
|------------|--|--|--|--|
| | \$9.1 How Witness Interviewing Is Different from Client Interviewing 117 \$9.2 Handling Yourself Ethically 118 \$9.3 Getting Cooperation from Neutral and Hostile Witnesses 126 \$9.4 Finding Out Everything the Witness Knows 128 \$9.5 Handling Yourself Ethically (Revisited)—Who Should Interview the Witness? 134 | | | |
| PART III | PERSUASIVE FACT ANALYSIS 137 | | | |
| Chapter 10 | How We Organize and Think about Facts 139 | | | |
| | \$10.1 Facts in the Lawyering Process 139 \$10.2 Schemas and the Processing of Information 140 \$10.3 Different Modes of Thinking about Facts 142 | | | |
| Chapter II | The Legal Elements Model of Organizing Facts 149 | | | |
| | CHART 11A Sources of Legal Elements 152 CHART 11B Legal Elements→Factual Propositions 152 CHART 11C Ransom Legal Elements Chart 153 | | | |
| Chapter 12 | The Chronology Model of Organizing Facts 159 | | | |
| | CHART 12A Chronology Template 160 CHART 12B Ransom Chronology 163 | | | |
| Chapter 13 | The Story Model of Organizing Facts 169 | | | |
| | \$13.1 Introduction 169 \$13.2 Identifying Uncontested Facts 170 \$13.3 Identifying Your Audience 172 \$13.4 Developing a Unifying Theme 174 \$13.5 Choosing Persuasive Images 178 \$13.6 Selecting a Story Genre 180 \$13.7 Finding the Story in the Facts 183 \$13.8 Ethical Storytelling 186 | | | |
| Chapter 14 | Selecting a Model for Presentation of the Case 187 | | | |
| Chapter 15 | Strengthening the Persuasiveness of Your Facts 191 | | | |
| | \$15.1 Assessing the Legal Sufficiency of Your Facts 191 \$15.2 Assessing the Sources of Your Facts 194 \$15.2.1 Tangible and Oral Sources of Facts 194 \$15.2.2 Credibility of Oral Sources of Facts 195 \$15.3 Assessing Your Contextual Facts 197 \$15.3.1 Focus on Facts, Not Conclusions 197 \$15.3.2 Setting the Scene 198 | | | |
| | §15.3.3 Identifying the Stage Directions 200 | | | |

| | §15.3.4 Explanatory Facts 200 §15.3.5 Personal Facts 201 §15.3.6 Developing Additional Contextual Facts 202 §15.4 Assessing Your Circumstantial Evidence 202 CHART 15A Assessment of Circumstantial Evidence Template 203 CHART 15B Drawing the Inference 203 CHART 15C The Landlord's Inference 204 CHART 15D Ransom's Inference 205 §15.5 Assessing the Structural Integrity of Your Story 205 |
|------------|---|
| Chapter 16 | Investigating the Facts 209 |
| | \$16.1 A Fact Investigation Case Study 209 \$16.2 Developing Additional Sources of Proof 215 \$16.3 Tracking Down Additional Sources 216 \$16.3.1 Following the People Trail 216 \$16.3.2 Following the Paper and Electronic Trails 217 \$16.3.3 Probing the Institutional Context 220 \$16.3.4 Exploring Organizational Relationships 221 \$16.3.5 Understanding an Organization's Operations 221 \$16.3.6 Vehicles for Tracking Down Additional Facts 222 |
| | §16.4 Ethics in Fact Investigation 222 |
| Chapter 17 | Responding to Your Adversary's Facts 225 |
| | \$17.1 Imagining Your Adversary's Facts 225 \$17.2 Attacking Your Adversary's Sources of Fact 226 \$17.3 Attacking Your Adversary's Inferences 227 CHART 17A Attacking Dusak's Inference 228 \$17.4 Attacking Your Adversary's Contextual Facts 228 \$17.5 Attacking Your Adversary's Story 229 |
| PART IV | COUNSELING 231 |
| Chapter 18 | What Happens When a Lawyer Counsels a Client 233 |
| | \$18.1 Counseling and Advice in Legal Work 233 \$18.2 Transactional Counseling 235 \$18.3 Dispute Resolution Counseling 236 \$18.4 "Decision Making Is an Art" 238 \$18.5 The Process of Helping Another Person Make a Decision 239 \$18.6 The Four Challenges in Counseling 240 |
| | |

| Chapter 19 | An Example of Counseling: The Plant Closing 243 | | | | |
|------------|---|--|--|--|--|
| | | Preparing to Counsel the Employees 243 Meeting with the Steering Committee 247 | | | |
| Chapter 20 | Preparing for Counseling: Structuring the Options 249 | | | | |
| | \$20.1 \$20.2 \$20.3 \$20.4 \$20.5 | Focusing on Client Goals and Preferences 249 Developing Potential Solutions 251 Predicting What Each Potential Solution Would Cause 251 \$20.3.1 The Potential Solution's Chances of Achieving the Client's Goals 253 \$20.3.2 Transaction Costs, Expected Value, the Time Value of Money, and Tax 256 \$20.3.3 Side-Effects—Desirable and Undesirable 260 \$20.3.4 Decision Trees 261 Adapting to the Client's Tolerance for Risk 267 Why Do Some Clients Exclude Their Lawyers from Inportant Decisions? 268 | | | |
| Chapter 21 | The Counseling Meeting with the Client 273 | | | | |
| | \$21.3 \$21.4 \$21.5 \$21.6 | Beginning the Meeting 276 Discussing the Choices and What They Would Do 277 If the Client Asks for a Recommendation, Should You Give One? 278 Asking the Client to Decide 280 | | | |
| Chapter 22 | Overc | oming Special Problems in Counseling 285 | | | |
| | | When the Client's Goals Cannot Be Accomplished 285 When the Lawyer Suspects that the Client's Stated Goal Might Not Represent What the Client Really Wants 287 When the Client Makes a Decision the Lawyer Considers Extremely Unwise 288 | | | |
| PARTV | §22.4 | Ethical Issues in Counseling 290 TIATION 295 | | | |

Chapter 23 How Negotiation Works 297

§23.1 Aims of Negotiation 297

| | §23.3 §23.4 | Context of Negotiation: Interests, Rights, and Power 298 §23.2.1 Interests of the Parties 299 §23.2.2 Rights of the Parties 299 §23.2.3 Power of the Parties 300 Approaches to Negotiation 301 §23.3.1 Adversarial Approach to Negotiation 301 §23.3.2 Problem-Solving Approach to Negotiation 302 §23.3.3 Use of the Different Approaches 304 Roles of the Lawyer in Negotiation 305 Discharging Your Ethical and Legal Responsibilities 306 |
|------------|--|---|
| Chapter 24 | Negoti | iation Preparation: Assessing the Parties 309 |
| | | Interests, Rights, and Power 309 Assessing the Parties' Interests 309 \$24.2.1 Types of Interests 309 \$24.2.2 Identification of Parties' Interests 311 |
| | CHAR | T 24A Assessment of Parties' Interests 313 |
| | CHAR | \$24.2.3 Prioritizing Interests 313 Assessing the Parties' Rights 313 T 24B Assessment of Parties' Rights—Dispute 314 T 24C Assessment of Parties' Rights—Transaction 316 |
| | CHAR §24.5 | Assessing the Parties' Power 316 §24.4.1 Types of Power 317 T 24D Assessment of Parties' Power 317 §24.4.2 Shifting the Power Relationship 320 Obtaining Your Client's Authority 322 Is a Structured Settlement in Your Client's Interest? 323 |
| Chapter 25 | Develo | oping a Negotiation Strategy 327 |
| | \$25.2 \$25.3 \$25.4 CHAR CHAR \$25.5 | Determining Your Client's BATNA 327 Determining the Other Party's BATNA 329 Selecting an Approach to the Negotiation 330 Crafting a Plan: Adversarial Approach 332 CT 25A Your Own Bargaining Range 334 CT 25B Both Parties' Bargaining Range 334 Crafting a Plan: Problem-Solving Approach 335 §25.5.1 Brainstorming Process 335 §25.5.2 A Case Study of the Brainstorming Process 337 |
| | \$25.6 | Information Gathering, Disclosing, and Concealing 339 |