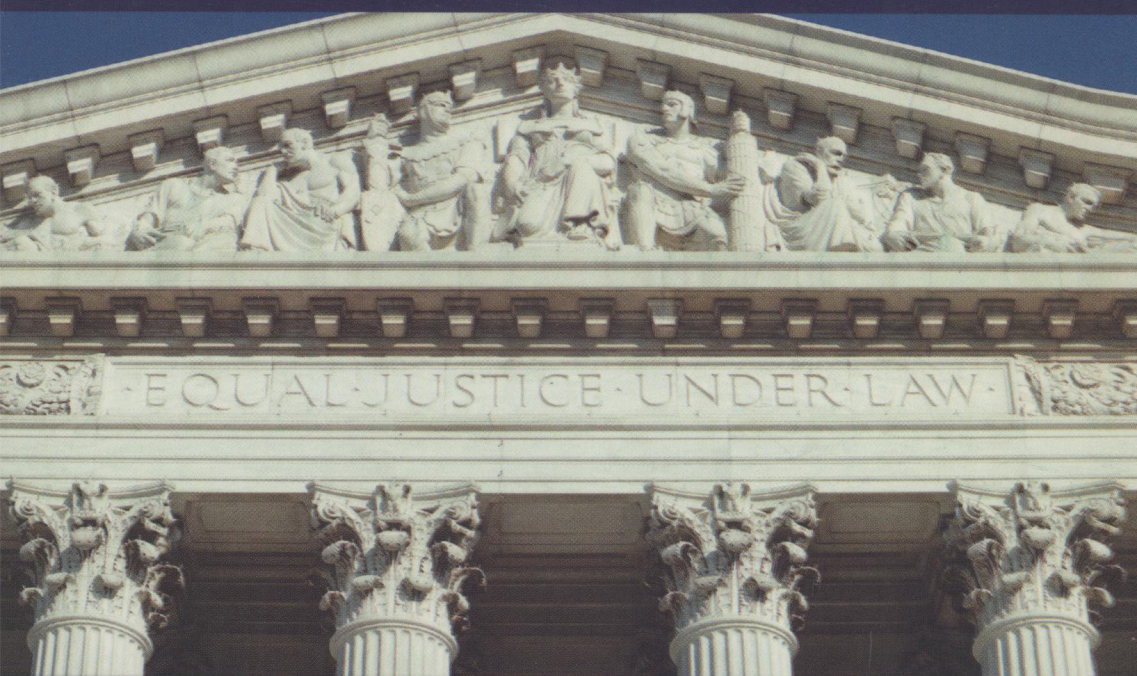




Convincing the Judge

Practical Advice for Litigators

CECIL C. KUHNE III

ABA
Defending Liberty
Pursuing Justice

GP | Solo
ABA General Practice, Solo & Small Firm Division

Convincing the Judge

Practical Advice for Litigators

CECIL C. KUHNE III

Cover design by ABA Publishing.

The materials contained herein represent the opinions and views of the authors and/or the editors, and should not be construed to be the views or opinions of the law firms or companies with whom such persons are in partnership with, associated with, or employed by, nor of the American Bar Association or the General Practice, Solo and Small Firm Division, unless adopted pursuant to the bylaws of the Association.

Nothing contained in this book is to be considered as the rendering of legal advice, either generally or in connection with any specific issue or case; nor do these materials purport to explain or interpret any specific bond or policy, or any provisions thereof, issued by any particular franchise company, or to render franchise or other professional advice. Readers are responsible for obtaining advice from their own lawyers or other professionals. This book and any forms and agreements herein are intended for educational and informational purposes only.

© 2008 American Bar Association. All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. For permission, contact the ABA Copyrights & Contracts Department at copyright@abanet.org or via fax at 312-988-6030.

Printed in the United States of America

12 11 10 09 08 5 4 3 2 1

Library of Congress Cataloging-in-Publication Data

Kuhne, Cecil C., 1952–

Convincing the judge : practical advice for litigators / by Cecil Kuhne.

p. cm.

Includes index.

ISBN 978-1-60442-103-3

1. Judicial process—United States. 2. Judges—United States. I. Title.

KF380.K84 2008

347.73'14—dc22

2008013089

Discounts are available for books ordered in bulk. Special consideration is given to state bars, CLE programs, and other bar-related organizations. Inquire at Book Publishing, ABA Publishing, American Bar Association, 321 North Clark Street, Chicago, Illinois 60610-4714.

www.ababooks.org

Introduction

The judge enters the courtroom, the gavel comes down, and the battle begins. The rough-and-tumble world known as litigation is, and always has been, a fiercely adversarial one. Within the bounds of honesty and professional ethics, a litigator is expected to battle away *mano-a-mano* for the best interests of his client, and in return he anticipates that the litigator on the other side will do exactly the same.

As it turns out, this adversarial process is a grand way to resolve disputes. Properly done, it has a measure of style and grace, ensuring that the fates of the parties are duly considered since each has an advocate passionately arguing for its interests. One reason the system works so well is because it gives the litigants an opportunity to fully air their points of contention.

Conscientious preparation of the case, rigorous cross-examination, and thorough methods of discovery allow the lawyers to clarify the facts, expose deception, and, hopefully, reach the truth in the end. Sometimes slow and inefficient, the adversarial system is still superior to any other method of resolving complex disputes.

Positioned squarely between the forces of competing litigators is, of course, the judge. The judge by necessity has significant discretionary influence over the parties; the effectiveness of the litigators' appeals to the bench thus has considerable consequences for their clients. Most judges say they look forward to presiding over a trial, no matter how laborious that task may ultimately be. They are no doubt pleased if a settlement can be reached in the meantime, but their job is not to force consensus on unwilling parties.

This is, after all, a contentious proceeding. The quest for cooperation is not a call for abandonment of the attorneys' roles as advocates. There will of course be occasions when the lawyers are cantankerous and even obstreperous. Judges recognize that all of this is a natural part of the process, and that lawyers must remain partisans if the adversarial system is to work.

Nothing in private practice, report those individuals who assume the duties of the judiciary, prepared them for the magnitude of the task they face on the bench. Judges will invariably tell you that their work is at times not only daunting, but overwhelming. Many wake up in the middle of the night, wrestling with thoughts of their cases.

Judges spend so much of their time in the courtroom, whether in trial, status conferences, or other hearings, that they worry how they will have time to attend to the steady stream of motions flowing in. In short, they often feel besieged. Yet in spite of their workload, most judges say they thoroughly enjoy their work.

Like a lot of lawyers, I had been practicing for years before I came upon that most amazing of revelations—you know, the one that judges are human beings too. Reminding oneself of that fact, and the realization that judges suffer from the usual failings of us all, will aid you immensely in your dealings with the bench. You will also become more empathetic toward the judicial plight, and in the process, you will no doubt grow more respectful of the important function judges serve in society.

The book before you is an attempt to distill the advice of judges to practitioners appearing in their courtrooms. After all,

judges have seen just about everything, and frankly, they know what works. There are many gems of practical wisdom emanating from the bench, and I have attempted to collect some of them here in the hope that you will find them beneficial in your practice.

Contents

Introduction.....	xvii
-------------------	------

CHAPTER 1

The Judicial Role	1
-------------------------	---

The Ideal Judge	2
-----------------------	---

The Realities.....	2
--------------------	---

Relating to the Jury	3
----------------------------	---

Moving Toward Settlement	3
--------------------------------	---

A Common Source of Contention	4
-------------------------------------	---

Cooperation Between Judge and Counsel.....	4
--	---

CHAPTER 2

What Judges Like	5
------------------------	---

Trading Places with the Court	5
-------------------------------------	---

Approaching the Court	6
-----------------------------	---

Knowing the Judge	6
-------------------------	---

Personal Data.....	7
--------------------	---

Professional Background	7
-------------------------------	---

Prior Opinions	7
----------------------	---

Work Habits	8
-------------------	---

Finding the Information	8
-------------------------------	---

Heeding Court Procedures	8
The Importance of Initial Impressions.....	10
Recognizing That Civility Counts	10
Remembering Common Courtesies.....	10
Effective Courtroom Methodology.....	11
Remember: Be Prepared	11
Remember: The Jury Is Always Watching	12
Avoid Distracting Mannerisms	12
Control Your Emotions	12
Show Respect for the Judge	12
Know When to Stop	12
Aiding Case Management	13
Avoiding Discovery Disputes	13
Promoting the Disposition of Motions	13
Furthering Settlement Discussions	14
Proper Behavior at Trial.....	14
Cross-Examination	15
Closing Arguments.....	15
A Court's Decree of Conduct	16
What Trial Judges Ultimately Want.....	16
Judges Want Informed Lawyers	16
Judges Want Respect.....	17
Judges Want the Law.....	17
Judges Want Valid Objections	18
Judges Want the Exhibits.....	18
Judges Want Trial Notebooks	18
Judges Want Well-Crafted Jury Instructions	19
Judges Want the Judgment.....	19
Judges Want to Be Affirmed on Appeal	19
What Appellate Judges Ultimately Want in a Brief	19
Judges Want Good Organization.....	20
Judges Want Brevity.....	20
Judges Want Precision and Clarity.....	20
What Appellate Judges Ultimately Want in Oral Argument.....	21
Judges Want a Dialogue	21
Judges Want Good Preparation	21
Judges Want Visual Aids	22

CHAPTER 3**What Judges Don't Like23****Lack of Courtroom Decorum 23****A Misunderstanding of the Process 24****Case Management..... 25****Discovery Issues 25****Arguing Motions 25****Settlement Conferences 26****Sure-Fire Ways to Alienate the Trial Judge 26****Ignore the Rules of Court..... 27****Fail to Prepare 27****Arrive Late 27****Repeat Themselves..... 27****Act Rudely..... 27****Make Frivolous Arguments..... 28****Mislead the Court..... 28****Argue with the Judge..... 28****Refuse to Talk Settlement..... 29****Request a Last-Minute Continuance..... 29****Sure-Fire Ways to Alienate an Appellate Judge 29****Cover Every Issue Imaginable 29****Slant the Facts 30****Misstate the Law 30****Use Complex or Obtuse Language..... 30****Are Verbose 30****Ignore the Court's Questions 31****CHAPTER 4****The Difficult Judge.....33****The Problem of Unfair Judges 33****Encountering Discovery Disputes 34****Dealing with Pre-Trial Motions 35****Issues Related to Settlement Conferences..... 35****A Judge Advocating Against You..... 35****Do Not Overreact 35****Do Not Argue 36**

Be Prepared	36
Be Honest	36
Ask for a Continuance or Short Recess	36
Always Make a Record	36
Consider Substitute Counsel	37
Consider Filing a Motion for Recusal	37
A Judge Advocating for You.....	37

CHAPTER 5

Case Management	39
-----------------------	----

Importance of Good Management.....	40
Moving the Case Along	41
Effective Judicial Oversight.....	41
Foreseeing Problems.....	42
Status Conferences.....	42
Legal Issues.....	43
Discovery	43
Settlement	43
Continued Discussions.....	43
Witness Lists	44
Discovery Issues	44
Motion Practice.....	45
Settlement Discussions.....	46
How Attorneys Can Help Judges Manage Cases	46
Agree on a Discovery Plan.....	46
Serve Discovery Promptly	46
Analyze the Case Early.....	47
Keep Discovery Simple.....	47
Consider Reasonable Settlement Options	47

CHAPTER 6

Discovery Disputes	49
--------------------------	----

Trench Warfare.....	50
An Unreasonable Obsession	50
The Issue of Judicial Discretion.....	51
Judicial Oversight.....	51

Involvement of the Judge	51
Significant Discovery Issues.....	52
The Art of Advocacy	52
The Lawyer's Role	53
Protective Orders and Privilege	53
Issues of Contentiousness	54
Aiding the Judge	54
A Well-Oiled Machine.....	55
The Use of Sanctions.....	55

CHAPTER 7

Pre-Trial Motions.....	57
First Impressions	58
Frivolous Motions.....	58
Dismissal	58
Summary Judgment	58
Discovery	59
Sanctions	59
Matters of Attorney Conduct	59
Unwillingness to Grant Extensions of Time	60
Resisting Service of Process.....	60
Impeding the Initial Conference.....	60
Unreasonable Discovery Disputes.....	60
Evading Page Limits.....	61
Lack of Courtroom Decorum.....	61
Common Problems	61
A Matter of Credibility	62
A Matter of Brevity.....	62
The Well-Written Motion	63
Verbal Excess.....	64
The Importance of Oral Argument.....	65
Tips for Oral Argument.....	65
Keep It Simple	66
Answering the Judge's Questions	66
The Importance of Civility.....	67
Dealing with the Court.....	69
Imagine Yourself in Their Place.....	69

CHAPTER 8

Settlement Negotiations	71
The Judge's Role.....	72
Being Realistic.....	72
Arriving at the Right Figure.....	73
Necessary Flexibility	74
Other Factors	74
Psychological Aspects	75
Solid Advice about Settling	75
The Development of the Case	76
The Nature of Damages.....	76
The Economic Positions	76
The Point in Negotiations	76
Your Strengths and Weaknesses as a Negotiator.....	77
The Personalities Involved	77
Your Opponent's Need to Feel Victorious.....	77
The Settlement Conference.....	78
Risk Evaluation.....	79
Settlement Authority from the Client	79
Unreasonable Expectations of the Lawyer	80
Achieving Success in a Settlement Conference.....	80
Analyze Your Case Beforehand.....	80
Level with Your Client.....	81
Keep the Client Informed.....	81
Respect Your Opponent's Case	81
Discuss Settlement with Your Client Early On	81
Prepare a Settlement Statement	82
Be Flexible with Your Offers.....	82
Leave Room for Further Negotiations.....	82
Alternative Dispute Resolution.....	82
Realize That Settlement Discussions Were Not Time Wasted	83

CHAPTER 9

Trial: General Considerations.....	85
Importance of Discernment	86
The Value of Checklists	86

Bench or Jury Trial.....	86
The Key Differences	87
Bench Trials from the Judge's Perspective.....	88
Settlement Talks in a Bench Trial.....	88
Resolution of Bench Trials	89
The Jury's Level of Understanding	90
Preparing a Witness for Direct Examination	91
Refreshing Your Knowledge of Basic Hearsay Objections	91
Party Opponent.....	92
Emergency Room Statements.....	92
Business Records.....	92
Remembering to Memorialize Nonverbal Aspects.....	92
Making Your Point.....	93
Exhibits.....	93
Bias.....	94
Attorney Conferences.....	94
Suggestions for Effective Trial Advocacy.....	95
Organization Is the Key.....	95
Prepare Your Witnesses.....	95
Keep Your Opening Statements and Closing Arguments	
Concise	95
Speak Up.....	95
Do Not Talk Over Your Opponent or the Judge.....	95
Know Your Rules of Evidence.....	95
Maintain Your Professionalism.....	96
The Power of Non-Aggression	97
Preserving the Record for Appeal.....	98
Succeeding at Trial.....	99
Make a Meaningful Opening Statement.....	99
Be Careful with Promises in Opening Statements.....	99
Don't Ask Leading Questions of Your Own Witness	99
Never Prove Your Case Through Adverse Witnesses	100
Carefully Devise Each Question on Cross-Examination.....	100
Listen Closely to a Witness's Answers	
to Your Own Questions	100
Never Surprise the Court with New Issues	101
Respect All Stipulations	101
Cite Only Relevant Cases	101

Heed Opinions the Judge Has Written	101
Know When to Stop	101

CHAPTER 10

Trial: Relating to the Jury	103
-----------------------------------	-----

The Key to Communication	103
Showing Rather Than Telling	104
Helping the Jury to Understand	104
Organize Your Case Carefully	105
Don't Hide the Ball	105
Use Voir Dire to Learn	105
Consider Your Exhibits	106
Obtain Pre-Instructions When Feasible	106
Streamline Witness Presentation	106
Limit Deposition Testimony	107
Do Not Repeat Too Much	107
Beware of Courtroom Tests	107
Expedite the Trial	108
Other Aids to Jury Understanding	108
Try Your Case to the Jury	108
Avoid Technical Terms and Legalese	108
Keep the Evidence Flowing	108
Use Restraint	109
Avoid Sidebars	109
Object to Argument in the Guise of Objections	109
Help Jurors with Important Exhibits	109
Consider Sequential Summations	110
Write Jury Instructions in Plain English	110
The Relationship Between Judge and Jury	110
The Rural Trial	111
Fairness Issues	111
Pace	111
Jurors	112
Voir Dire	112
Settlement	112

CHAPTER 11

Trial: Voir Dire	115
------------------------	-----

Employing Charisma	116
--------------------------	-----

Using Voir Dire to Learn	116
--------------------------------	-----

Suggestions for Effective Voir Dire	116
---	-----

Know Your Judge	116
-----------------------	-----

Keep It Simple.....	117
---------------------	-----

Establish a Dialogue	117
----------------------------	-----

Avoid Embarrassing the Jurors	118
-------------------------------------	-----

Humanize Your Client.....	118
---------------------------	-----

Divulge Your Weaknesses	118
-------------------------------	-----

Always Be Civil	119
-----------------------	-----

Humanize Yourself.....	119
------------------------	-----

Avoid Focusing on Yourself.....	119
---------------------------------	-----

Choose Like-Minded Jurors.....	120
--------------------------------	-----

CHAPTER 12

Trial: Opening Statements.....	121
--------------------------------	-----

Generating Enthusiasm.....	122
----------------------------	-----

Planning Your Case	122
--------------------------	-----

Making the Best Opening Statement.....	123
--	-----

Prepare Carefully	123
-------------------------	-----

Keep It Simple.....	123
---------------------	-----

Maintain Your Credibility	124
---------------------------------	-----

Do Not Be Argumentative	124
-------------------------------	-----

How <i>Not</i> to Make an Opening Statement.....	124
--	-----

CHAPTER 13

Trial: Evidence	127
-----------------------	-----

Keeping It Basic	128
------------------------	-----

Planning the Order of Presentation	128
--	-----

Keeping the Evidence Flowing.....	128
-----------------------------------	-----

Presenting Orders of Proof	129
----------------------------------	-----

Questioning the Witness.....	129
------------------------------	-----

Keeping Witnesses Straight.....	130
Presenting Deposition Evidence.....	130
Dramatic Interpretations	131
Considerations for Bench Trials.....	131
Visual Learning	131
Tactics for Physical Evidence.....	132
Considerations in Commercial Cases	132
Presenting Exhibits.....	133
Using Modern Presentation Technology.....	133
The Many Challenges of Exhibits	135
Identification.....	135
Revelation	136
Display	136
Helping Jurors with Important Exhibits	136
Using Video-Presentation Devices	136
Employing Narrative Videos	137
The Controversy	138
Applying Evidentiary Rules	139
Prejudicial Nature	139
Dealing with Distortion	140
Setting Ground Rules.....	140

CHAPTER 14

Trial: Closing Statements	143
---------------------------------	-----

The Power of Persuasion.....	143
Remember the Basics	144
Sticking to the Point	144
An Effective Closing Argument	145
Be Prepared	145
Tie the Evidence Together	145
Use Exhibits	145
Use Stories That Have a Point.....	146
Avoid Theatrics	146
Don't Wax Philosophical.....	146

CHAPTER 15	
Trial: Jury Instructions.....	147
The Root of the Problem	148
Pattern Jury Instructions.....	149
The Art of Drafting Good Jury Instructions	149
Instructions in Plain English	150
Pre-Instructions	150
Conditional Instructions	151
 CHAPTER 16	
Appeals: General Considerations	153
The Changing Scene	154
Inform and Persuade.....	154
Changing Places	154
Know Your Judge.....	155
The Importance of the Judge's Legal Background.....	155
Experience Shapes Attitudes	156
Complying with Internal Procedures	156
Trial Lawyer Versus Appellate Specialist.....	157
The Matter of Error at Trial	158
 CHAPTER 17	
Appeals: Briefs.....	159
Finding the Proper Approach	159
The Payoff of Your Efforts	160
Failing to Filter the Issues	161
Clear and Simple.....	161
Pointless Jargon.....	162
Telling the Whole Truth	162
Professional Courtesies	163
Working on the Reader's Mind	163
Conveying a Sense of Justice	163
Choosing Your Words Wisely	164