

THE  
AM LAW LITIGATION DAILYFive Objectives for Success as a Litigator:  
Be Bold. Be Present. Be Kind. Be Reasonable.  
And Be Honest.

By David Cross

March 14, 2023

A career is a journey without a destination. It's the relentless effort to do better and be better. Because none of us will ever be perfect, that effort never ends. To help junior lawyers with that effort, supervisors will identify specific objectives for them, such as taking a deposition or arguing a motion. But I see several much more fundamental objectives that are often left unsaid and are critical for long-term success—five, to be precise.

**Be bold**

It can be all too easy to wait for assignments from more senior lawyers. But that takes your career out of your own hands and leaves you at the mercy of chance and individuals who may not yet fully recognize your talent. Cases can linger for years without important opportunities arising for junior lawyers. Taking a deposition, for example, shouldn't be like winning the lottery. The opportunities are there; seek them out and ask for them, even if you don't feel ready. The worst that happens is the decision-maker says no, but I bet they'll respect your eagerness and think of you for future opportunities sooner

than they otherwise might have.

And don't let fear of failure or embarrassment hold you back. Frank Herbert famously wrote: "Fear is the mind-killer." It's also the career-killer. After earning a starting position on my high

school basketball team, I was back on the bench a few games later. I was so afraid of making a mistake that I often made the safe pass to a teammate rather than take the open shot I feared I might miss. I didn't contribute what the team needed.

Take some risks, including with your voice. Speak up if you have something to say. Don't be afraid of looking foolish. Sometimes the most novel ideas come from those who think outside the box because they're too junior to be inside the box yet. Take the initiative and embrace the pains that come with growth.



David Cross of Morrison & Foerster.

Courtesy photo

**Be present**

Videoconferences have become the norm. Teleworking has its benefits, such as more time with family. But it also can deprive us of those critical moments of human connection and individual growth that come only when we're together in person. During my clerkship, my co-clerks and I regularly would follow the judge into his robing room when he left the bench. I learned many of my most valuable professional lessons in those impromptu conversations that could only really happen in that room in the immediacy of those moments. The same goes for chatting with many wonderful mentors and colleagues as we walked out of conference rooms, ran into each other in hallways, grabbed coffee or a drink, or played a game of speed chess in the office. There's no remote substitute for those spontaneous face-to-face interactions and dynamic discussions, as hard as that might be to believe for younger generations who are accustomed to communicating electronically.

While I fully embrace the benefits of a hybrid work environment, I encourage you to view time in the office as an investment in your professional growth that will pay dividends worth exponentially more than the minutes lost in transit. Show up as often as you can to walk the halls and drop into senior attorneys' offices, not simply to be seen, but to connect, engage and grow. If you're an introvert like me, that can feel difficult and even scary. But the effort will pay off, not just for your career but for your happiness and mental health.

**Be kind**

A career is not a competition and professional success is not a zero-sum game. The

continuing effort to grow and excel is much more pleasant and productive when we take that journey together as a team—or better yet, as a family. Practicing law can be really stressful at times, especially as you get more senior. That stress can lead to frustration, impatience, and a tone that can hurt others, often inadvertently. Email can be an especially poor means of communicating. Tone can be perceived in unintended ways. A succinct message sent in a hurry can be perceived as terse or harsh, especially given the power differential between a senior lawyer and an associate or staff. Make the extra effort to be thoughtful, generous and patient with others.

The same goes with opposing counsel. I've learned an important lesson over two decades of practice: My adversary is not necessarily my enemy. Boxers can fight ferociously in the ring within the limits of the rules and still be cordial when the bell rings. It's no different for lawyers. It's all too easy to view opposing counsel as villains, to assume malintent. But most are simply doing what's required of them: zealously representing their clients. Let your advocacy dictate your work, but let your empathy dictate how you treat the people you work with, including those across the aisle.

**Be reasonable**

As a young associate, I relished a fight, from a full-blown trial to a discrete discovery dispute. Every battle was important and losing was not an option. Then I became a parent and my kids put my life in a new perspective. Many disputes need not be disputes at all, and most are far from outcome-determinative. Every minute I spend needlessly fighting with the other side over discovery protocols and

the like is a wasted minute. I'm increasingly baffled at the extraordinary time many lawyers routinely waste writing lengthy, detailed discovery letters that purport to "memorialize" negotiations. Those letters rarely serve any purpose apart from wasting valuable time and clients' money, because very few judges want to read them. Each of us has something in our lives we value the way I value time with my children. So be reasonable. Don't fight just to win, even—or perhaps especially—when you face a vexatious adversary. Let them waste their own time and energy. Let them celebrate their small victories while you focus on winning the war and balancing that effort with the many other important things in your life. Figure out what really matters for your clients, and let the rest go. You'll be a better advocate and a better person.

### **Be honest**

Perhaps nothing matters more than our integrity. If you make a mistake—which invariably we all do—own it. Nobody expects perfection. But we all should expect candor and accountability when mistakes occur. Clients and judges certainly will. I had a case many years ago where our team missed the deadline to serve discovery objections. The associate tasked with that responsibility readily owned the error. The other side asked the court to deem all our objections waived. In the hearing, I admitted our mistake and took responsibility for it personally as the team leader. The judge was gracious (in part because the other side overreached in seeking

severe sanctions for a good-faith mistake that was not prejudicial to them in a fast-paced, complex case). It was a miserably scary moment in my career. In that same case, when the other side confronted their own discovery failings, they offered excuses and inaccurate representations. They were sanctioned hundreds of thousands of dollars. More recently, a party we faced in litigation was sanctioned over \$2 million for conduct the court found showed bad faith.

Being honest means never compromising your principles or giving your duties short shrift for the sake of your advocacy. Be sure that whatever you say is true and supported by evidence. When relying on others, including clients and colleagues, trust but verify. And get comfortable with the words "I don't know but I can try to find out." Credibility once lost can be very hard to rebuild.

I'd like to say that I achieve these important objectives every day. I don't, unfortunately. The journey to do better and be better is ongoing and isn't easy. I don't know what lies ahead on that journey, but I'm trying to find out.

*David Cross is a partner and chair of Morrison Foerster's antitrust litigation practice in the firm's global antitrust law group. He is a trial lawyer based in Washington, D.C. with extensive experience representing both plaintiffs and defendants in antitrust and complex business litigation, including intellectual property and general commercial matters.*