

Win From Losing

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Everyone who is deeply involved in the Subrogation Industry eventually loses a case. In fact, many people say that if you are not losing any cases, you must not be taking enough risk. Losing is a difficult part of our highly competitive business that all of us experience from time to time. I have heard it said that you should probably expect to lose at least as often as you win when your cases go to arbitration or trial. That is because you are generally not trying the easy cases. Those are all being settled. Instead, you are most often trying difficult cases where there is a known significant risk of an adverse verdict. The purpose of this article is to explore how you can learn the most from these difficult setbacks.

Here is my list of suggested exercises to follow when your case ends with an adverse verdict:

1. Start with the decision. What did the finder of fact decide? Did you lose because your theory was rejected? Lack of proof? The opponent's arguments were accepted? The jury could not decide what happened? The Judge made some errors of law?

All of these questions need to be posed to begin the process of dissecting what went wrong. There may have been more you could have done, or perhaps you realize that nothing you did, or could have done, would have made any difference. It is important to figure that out. Talking to jurors may provide some insight into the outcome. The real goal is to figure out

what happened so you can apply these lessons to your next case.

2. Did you make a mistake in analyzing the case?

This applies to the lawyers and insurance subrogation professionals. Were you too optimistic about your chances of success? Did you ignore the problems with your case or the strength of the defense arguments? Once you know the basis for the decision, ask yourself, "Why didn't I see that happening?" The answer may be that you undervalued the risk of something happening that you could have foreseen. The answer may also be that no one could have reasonably seen this outcome. An objective view of what happened needs to be pursued.

3. How did your experts perform?

Did the finder of fact find them to be believable and convincing? Did they do what you expected them to do at trial? Could they defend their theories and conclusions? If they had weaknesses, can they be fixed? Would you use them again? If they are retained on other cases, do you stay with them?

4. Have you reassured all staff who worked on the case that it is ok to lose and that every loss is a learning experience?

After a loss, everyone who worked so hard on the case will be demoralized. It is human nature. Good leaders buck up their staffs who were involved in the case. We want them to feel like they can get back on that horse and ride again. We want them to feel like they learned a lot in the process and that any loss should not be an excuse to be gun shy in the future.

Losing is part of the subrogation process. If you are part of the industry, you will experience the pain of defeat. The key is to win from losing by using the experience to hone your skills for the next case.

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