



Litigating to Win in the Insurance Defense Industry - Episode #117

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Hosted by: John Czuba, Managing Editor

Guest Attorney: Irwin Kramer of Kramer & Connolly

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John Czuba: Welcome to the "Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Directory of Recommended Insurance Attorneys*.

We're pleased to have with us today attorney Irwin Kramer from the law firm of Kramer and Connolly in Baltimore, Maryland. Irwin is the managing partner with the firm. He has served as lead counsel on behalf of Fortune 500 companies and insurance carriers throughout the world.

He's a former law school professor who taught at some of the most prestigious law schools in the country and also co-founded the Legal Television Network, which is designed to enhance public access to legal information.

In 2014 he was honored by, "The Daily Record" as innovator of the year for his contribution to the public's understanding of legal issues. Irwin, we're very pleased to have you with us again today.

Irwin Kramer: I'm also very pleased to be with you.

John: Today's topic is on litigating to win in the insurance defense industry. Irwin, in today's climate how important is it for an attorney or defense firm to demonstrate win potential or demonstrating win totals to a claims department?

Irwin: I don't know how important it ever was, frankly. No one has ever asked me, for example, for some kind of win percentage or track record. A lot of times people in the public think that we keep statistics in much the way a baseball player does in terms of getting on base percentage and that sort, how many home runs you've hit, and that type of thing. But the real world, at least outside of the baseball diamond and the gridiron in football, works very differently.

Cases have their degrees of complexity, and what defines a win is not as easy as it is in the sports world and those types of statistics. It's hard to even determine. If someone were to represent that, "Oh, I win 90 percent of my cases," what does that even mean? In many instances you're trying cases where your client is liable. You do own some money. You will "Lose," but maybe you'll lose less than you could have settled for.

That, to many people, are wins. So a win is in the eye of the beholder. A lawyer who says, "I've won a certain percentage of my cases," is probably not a lawyer you even want to hire, because the question then becomes, "Well, what are you not telling me?"

John: Are there any means or metrics an attorney can use to help predict outcomes to a risk manager?

Irwin: It's interesting. I, at one time was given the task, and it was a difficult task, but I was given the task by a claims manager who loved my work and that of my firm, but was having difficulty justifying the legal expense to certain bean counters upstairs, if you will, the accountants and financial people who didn't really have an appreciation of claims.

The way I went about it was to look at each and every case. It was tedious work, by the way. It took me a long time to create this report.

I looked over cases within a three year period, and what the reserves were by the carrier, what our evaluated exposure was, and then what the settlement went for or whether there was a defense verdict, or summary judgment, or things of that sort in order to either curb the exposure or eliminate it all together.

I was able to quantify it to some degree. But one also has to be wary because you could certainly take a look at that and say, "Well, maybe you were overestimating the value of the case to begin with."

Yes, you can use metrics. But remember: Figures don't lie, but liars can figure. I don't mean that to suggest that lawyers are going to misrepresent what they say. But let's face it, we argue with facts, and you can argue with facts that a given result is a win, or just mediocre, or perhaps even a loss.

The reality is it's very difficult to precisely quantify this. I do believe that I was able in that instance to provide a report that said, "Yes, I curbed exposure to X amount of dollars over a three year period," and I believe that I did so in a very straightforward way. But can I absolutely guarantee the accuracy of that? Was I making some assumptions that may or may not have been true, may or may not have been reliable?

That's why it's very difficult when you ask for numbers, and why lawyers are, frankly, admittedly very reluctant to give numbers, and percentages, and odds of winning, and things of that kind, because the real world is way too complex for that kind of quantification.

John: How about statistics such as cases gone to trial? Are those beneficial?

Irwin: That you definitely can provide. We know what's gone to trial. We know what has settled. We can also get metrics on the duration of time from the start of an assignment until resolution.

Those types of statistics may be of greater interest to carriers these days, because what I'm finding, and this is anecdotal. I haven't found a statistical survey of everyone in the country, and so forth. But what I've at least observed over recent years at least is that in many instances claims professionals are being graded, are being judged. Some even have bonuses dependent upon how quickly they can close files, in certain companies, that is.

They're very concerned about the length of pendency of a case of the claim, because the adage is the longer the case lasts the more expensive it gets. I don't know if I prescribe to that philosophy. But I will tell you that is a philosophy that is growing among claims professionals and claims managers. That's a statistic that might be of greater interest to a carrier.

John: What's potentially more marketable for a law firm, referencing the cases that have gone to trial or cases that have been settled before going to trial?

Irwin: That is interesting, because I don't believe that an insurance company claims manager wants to hire an attorney that is afraid of going to trial. At the same time more and more they're afraid of going to trial.

While it used to be that I felt, "Well, I'm the warrior. I want to hit a home run for you, and the way to do it is to win at trial," a lot of times winning a trial isn't regarded as a win inside the claims department.

It may well be that establishing how effective one is in settling cases could be more important than going to trial, but at the same time carriers don't want trial lawyers who don't take cases the whole way, because they recognize the importance and value and persuasive power of an attorney who's very capable of going to trial and can win in the courtroom.

That's what they want in terms of hiring an attorney, but they don't always want that attorney to use that skill.

John: What do you see as having changed the most in recent years between claims carriers and law firms?

Irwin: I do believe that carriers have become much more risk adverse. There are carriers and claims professionals that used to feel, "If we don't owe it we don't pay it. We'll try the case. If you don't lose...if you haven't lost any cases you haven't tried enough cases." That was the philosophy. It was millions for defense and not a penny for tribute type of philosophy.

Now it seems the prevailing philosophy inside of many claims departments is that every case has a value. I will have cases that I think are extremely defensible, indeed cases where I don't evaluate us as having any exposure, but there is such a concern over legalspend, which is a new term that I and many of my colleagues have been introduced to by the insurance industry. Legalspend. One word, actually.

Carriers are very concerned about how much they spend on legal. The reason they're concerned about that and not as concerned, evidently, on cost of indemnification, is that one can readily quantify legal expense. One cannot readily quantify how much you have saved on a case as we discussed before.

Things we can measure we tend to overvalue, things that are harder to measure we tend to undervalue. That's something that the insurance industry as a whole has to really take a good look at and examine, because in the long run it's what you save on indemnification that will really affect your bottom line far more than what you spend on defense costs.

It's evident that with the proliferation of not only defense counsel litigation guidelines, which I think are very helpful and important as guides, but the proliferation of cost containment firms, third party billing auditors, who after you have settled a case for maybe \$100,000 more than you thought it was ever worth then trying to nickel and dime the defense attorney for what you can save on the legal bill that might be a few thousand dollars, that I think is something that the industry in the long run will have to take into question.

Irwin: I'm not suggesting that it's not important to maintain and control defense costs. It is, but it's all important. It's important to control defense costs, to the extent you can, but also to see it not as an expense but rather as an investment.

Sometimes it takes money to save money, and that's a philosophy that the industry used to have which I think they're now starting to forget. Of course I think we all know, John, the pendulum swings in one direction, but it swings back, and frankly lawyers like me are looking forward to that time.

John: Irwin, what do you see as future trends impacting relationships with claims departments and law firms?



Irwin: Lawyers have to understand that at least for the foreseeable future scrutiny of bills will happen. The lawyers have to start getting used to the notion that, look, we may be warriors, but we're also soldiers, and it's the generals in home office that dictate what our job really is, and that perhaps satisfying a client isn't always a win at trial.

I will say this. I can't predict the future. My crystal ball broke actually many, many years ago.

I would have to think that at some point when carriers examine their true indemnification costs, as opposed to their legal expense, that at some point they've got to boil down to some degree of metric on the notion that it really is costing them far more to question what is done on a given case, on a given point one or point two in terms of the time sheet.

What are you really spending on a case overall? The total cost of the claim is really important, and my hope is that carriers will look at that, because that frankly is really what makes the difference between a profitable year and an unprofitable one.

John: Irwin, thanks so much for joining us today.

Irwin: Thank you.

John: That was Irwin Kramer from the law firm of Kramer and Connolly in Baltimore, Maryland, and special thanks to today's producer, Frank Vowinkel. Thank you all for joining us for the Insurance Law Podcast.

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