Hildebrandt Conversations

A Call for Data-Driven Law Practice

April 2010

Randall ("Randy") Kiser is a former litigator who is currently the principal analyst at DecisionSet®, a decision services and professional development firm. In his recent book, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, he argues that the legal profession has fallen behind other industries in the use of data-driven research techniques and approaches for decision-making, strategy development and operations. We spoke to him from his office in Palo Alto, California.

Randy Kiser

> ## How did you go from litigator to decision-making researcher?

Randy: *I was a commercial litigation attorney for 20 years. I retired from the field in 1999 but was still thinking about why more cases don't settle and why the cases that do take so long to settle. In 2002, I had a very unique opportunity to study at the Peter F. Drucker Graduate School of Management at Claremont Graduate University under Peter Drucker, the father of modern management theory, and Mihaly Csikszentmihalyi, one of the founders of the positive psychology discipline. I was determined to discover whether modern management theory and cognitive psychology principles could be used to improve decision-making in law firms.*

Through my studies I realized that legal decision making had not been subjected to rigorous empirical research or extensive quantitative

analysis. I was very curious in particular about whether behavioral economics theories applied to risk assessments in litigation. When I attempted to find an answer, I found little empirical research. At a fundamental level, there was very little research telling us if parties get better results at trial, compared to the pretrial settlement offers they rejected. So I then embarked on a major research project, where I put together a dataset of 5,000 cases in California and New York where the parties had exchanged settlement offers but proceeded to trial. Working with two colleagues at the Wharton School at the University of Pennsylvania, I attempted to determine how often adverse financial outcomes occurred at trial and what was the actual cost of those adverse outcomes. When I say "adverse outcomes," what I mean is that a party's financial result at trial was the same or worse than the settlement offer it rejected before the trial. At the start of this research, we had no reason to think that plaintiffs or defendants were more likely to experience

adverse outcomes after walking away from the negotiation table.

What were the results?

Randy: *I found that the theories do indeed apply. Generally behavioral economics states that parties are risk averse when facing gains and risk taking when facing losses. Applying this to litigation, we would expect plaintiffs to be risk averse, because they are anticipating gains, and defendants to be more risk-taking, because they are contemplating a risk of loss. When we analyzed the data, we found that plaintiffs experienced more adverse outcomes at trial than defendants but the cost of an adverse outcome was dramatically higher for defendants. Looking at more than 40 years of litigation history, we found that the cost of settlement decision errors by plaintiffs was consistently lower than defendants' cost of error. Defendants placed bigger bets than plaintiffs and sustained major losses when their gambles did not pay off. The plaintiffs were facing potential gains and they tended to risk less.*

A lot of your work concerns the decision of whether or not to go to trial in litigation, but can you talk more broadly about the role of decision-making in law practice?

Randy: *The essence of being a good lawyer is judgment and decision-making. Those are the missing links in legal education and often legal practice. I think of judgment and decision making as being the links between substantive legal knowledge and the tangible product delivered to the client – whether it's a settlement agreement, a verdict or a prospectus. A major step in providing any legal service is making an intelligent judgment about what should be done based on the attorney's subject matter expertise and the client's particular objectives. We have probably overemphasized subject matter expertise and underemphasized judgment and decision-making skills. We tend to think we acquire*

judgment automatically as a result of experience and education, but that is not supported by empirical evidence. Decision-making is a skill that is actually independent of experience.

And in fact in the first few pages of your book, you note that "effective decision-making skill has little relation to experience, intelligence, education and professional reputation." How do attorneys react when you tell them this?

Randy: *It makes sense to many managing partners because they have worked with some technically brilliant, academically accomplished associates whose judgment they did not trust. From other attorneys there has been a lot of pushback on this research issue. But I wanted to present a lot of research of which attorneys are unaware because we can't improve decision-making unless we understand what the research tells us about the attributes and impediments of effective decision-making. The business model that requires attorneys to bill at higher hourly rates as they get more experience doesn't reflect empirical research regarding the acquisition of judgment and expertise.*

The data on this subject is very similar in the medical field. A few years ago, the Annals of Internal Medicine published a review of 62 studies examining the correlation between clinical performance and age. Only 2% showed a positive correlation for all outcomes. My own research shows that the experience level of the attorney was not strongly predictive of whether their client obtained a better financial result at trial than could have been achieved by accepting an adversary's settlement offer. I think this suggests that our evaluation of attorney performance needs to be more refined and we need to come up with better metrics than law school grades, rankings and years of experience in practice. The research regarding expert performance tells us that we should shift our attention from experience to what psychologists call "deliberate practice." Deliberate practice requires systematic, objective measurement of

professional performance, prompt and unfettered feedback, and increasingly difficult and complex challenges. Whether you're an Olympic athlete or a great attorney, you have to continually push, test, evaluate and compare yourself.

How then would you recommend we gauge attorney performance?

Randy: *It depends on the type of practice. Take litigation, for instance. Law firm litigation departments have a huge amount of data regarding case outcomes, strategies, costs, and attorney performance. That data has not been systematically converted into information. If we are to improve attorney judgment in litigation matters, we need to start measuring outcomes. Going back to the medical field, a few decades ago, there was much more resistance in medicine because patient medical conditions were seen as idiosyncratic. But since then statisticians have come up with complex models to account and adjust for the idiosyncrasies. Eventually we'll need to do the same thing in law practice. A major issue is whether that type of data is collected and maintained by the courts or if law firms will take the initiative for their own purposes to start measuring their own attorneys on outcomes. There's a huge amount of data, such as trial outcomes, summary judgment motions, number of depositions, discovery motions, attorney characteristics, etc. that we could begin to compile to determine whether we are making the right decisions for clients.*

Are there other opportunities to use data to drive understanding of effective legal practice?

Randy: *To the extent that data is collected across the industry, in the courts, law firms and insurance companies, we can use predictive analytics to model potential outcomes in cases. Lawyers traditionally are more oriented toward narratives than statistics, but there is much more we can learn by looking quantitatively at what*

factors drive a successful legal relationship.

I believe that clients will start to demand more data-driven approaches to legal practice, and a lot of this will come at least initially from insurance and re-insurance companies. Many of the advances in the medical field did not come from physicians but came from chemists, geneticists and other scientists. It's very hard for any field to have a perspective on itself and discover and implement changes and reforms. For similar reasons, I imagine that many changes in the legal field will come from pressure from clients. Insurance companies have an enormous amount of data and some very sophisticated statisticians working for them. This is creating some tension between insurance companies' evaluation of cases vs. counsels' evaluation of cases. Generally speaking, the attorneys feel that the insurers' evaluation may not be sufficiently nuanced and the insurance companies feel that the attorneys' judgment is not sufficiently objective. To some extent, it's a clash between System 1 and System 2 thinking – between a data-driven analysis and the more intuitive legal judgment. That's a very interesting development to follow. As a profession, we need to understand better when intuitive judgment is an asset versus an impediment to sound decision-making and effective lawyering on behalf of our clients.

Randy Kiser's new book, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* is available through *Springer Science + Business Media*. For more information on Kiser's research, visit his website at www.decisionset.com.