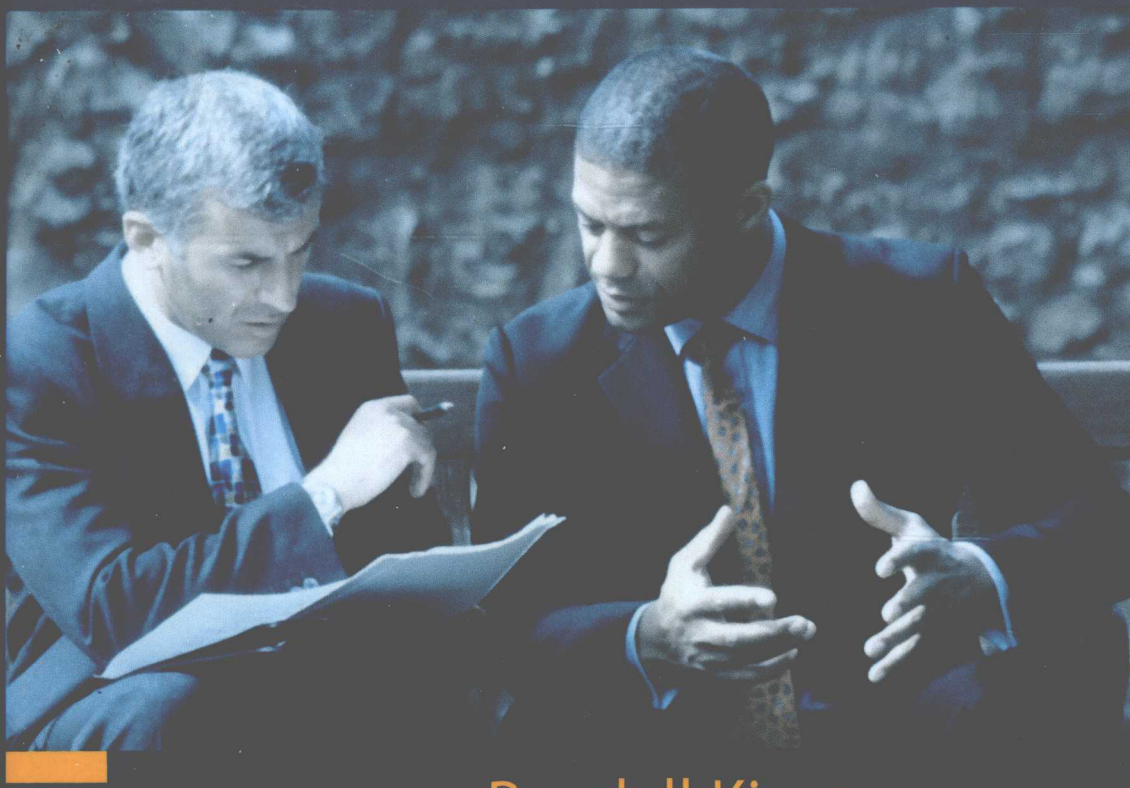

Randall Kiser

Beyond Right and Wrong

The Power of Effective Decision Making for Attorneys and Clients

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Jeffrey Rachlinski expressed an early interest in my empirical research regarding attorney-client decision making, and I recall distinctly his initial, lengthy email sent at dawn on a Sunday morning. His analytical rigor and constructive criticism refined the research later described in my *Journal of Empirical Legal Studies* (JELS) co-authored article, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Negotiations." Some of the key concepts in the JELS article are carried over into Chapter 3 of this book, although I am solely responsible for this substantively different treatment of legal decision making.

The legal community's immediate and broad interest in the JELS article provided fresh impetus to complete this book, a task started in 2004 and completed about a year after the article's publication. I thank each individual who found the article useful, thought the subject of attorney-client decision making deserved more extensive attention, and encouraged me to finish the book.

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My wife, Denise, made a major contribution to this book. Her steadfast and selfless support during the years spent on research and writing turned a daunting endeavor into an enjoyable challenge.

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Chapter 1
Introduction

Let us endeavor to see things as they are, and then enquire whether we ought to complain. Whether to see life as it is, will give us much consolation, I know not; but the consolation which is drawn from truth if any there be, is solid and durable: that which may be derived from errour, must be, like its original, fallacious and fugitive.

Samuel Johnson, Letter to Bennet Langton (1758)

Attorneys and clients make hundreds of decisions in every litigation case. From initially deciding which attorney to retain to deciding which witnesses to call at trial, from deciding whether to file a complaint to deciding whether to appeal a verdict, attorneys and clients make multiple, critical decisions about strategies, costs, arguments, valuations, evidence and negotiations. Once made, these decisions are scrutinized by an opponent intent on exploiting the consequences of any mistake. In this intense and adversarial arena, decision-making errors often are transparent, irreversible and dispositive, wielding the power to bankrupt clients and dissolve law firms.

Although attorneys and clients may regard sound decision making as incidental to effective lawyering, sound decision making actually is the essence of effective lawyering. An attorney's knowledge, intelligence and experience are inert resources until the attorney decides how to deploy those skills to serve the client's interests. Those decisions, in turn, largely determine a case's course and outcome. Very few cases are lost because attorneys and clients do not understand the law; losses are more often traceable to poor quality decisions than poor quality research. The unfortunate consequence is that legally meritorious claims and defenses, advanced by technically competent attorneys, can be lost through bad decision making. As one major law firm declares in its *Wall Street Journal* advertisement, "Being a good lawyer takes more than being a good lawyer."[1]

In most cases with disappointing results, there is a point where an effective decision could have averted an adverse financial outcome. The ability to identify and seize that pivotal opportunity separates novice decision makers from experts.

[1](2007, December 3). *The Wall Street Journal*, p. A8.

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An effective decision's capacity to circumvent a financial disaster, in litigation phases ranging from pre-trial settlement negotiations to new trials in remanded cases, is illustrated in the actual cases briefly described below.[2] Each case presented at least one opportunity to insert a protective decision in front of a startling outcome:

- A plaintiff demands $13 million to settle a breach of contract case and refuses to accept the defendant's settlement offer of $500,000. At trial, the plaintiff recovers nothing and the defendant is awarded $22 million under its cross-complaint against the plaintiff.
- An arbitrator issues an award against a defendant in the amount of $175,000. The defendant rejects the award and exercises its right to a new trial before a jury. The jury returns a verdict of $2,025,000 against the defendant, an amount nearly 12 times larger than the arbitration award that the defendant rejected.
- A plaintiff declines a defense settlement offer of $100 million in a securities class action case. After a four-week trial, the jury takes less than two days to render a verdict in favor of the defendant.
- A defendant employer rejects the plaintiff employee's offer to settle a sexual harassment case for $75,000 and a job transfer. Five years later, an appellate court upholds a $2 million award in favor of the plaintiff employee.
- In a legal malpractice action, the plaintiff demands $325,000 to settle. The defendant law firm does not make an offer to the plaintiff until the day of trial, at which time it offers $50,000. The plaintiff declines the $50,000 offer and the jury later renders a verdict of $7 million against the law firm. Including interest, the amount ultimately paid by the law firm to satisfy the judgment is $10 million.
- A defendant successfully appeals from a $675,000 award entered against it. As the defendant requested, the appellate court reverses the lower court's award and remands the case for a new trial. Upon retrial, the jury finds against the defendant and awards the plaintiff $2.2 million, roughly triple the amount of the original award from which the defendant appealed.[3]

In each of these cases, attorneys and their clients passed a decision inflection point and proceeded to a major, yet entirely avoidable, adverse outcome. Looking back on cases that went awry, clients have claimed "our lawyers did not do what they were supposed to do," attorneys have blamed "stupid jurors" and "runaway juries," and both clients and attorneys bemoan the apparent vagaries of the civil justice system. For readers whose reaction to these adverse outcomes is anything other than "tough luck," this book presents compelling data, concepts and

[2]Many decisions, of course, are high quality decisions with bad outcomes, i.e., good processes accompanied by bad results. The emphasis here on effectiveness promotes closer scrutiny of both poor quality decision making and arguably good quality decision making with adverse outcomes. This emphasis also shifts attention from fault-finding to improvement.

[3]Each case scenario is based on an actual case on file with the author. The outcome of subsequent appeals, motions, and settlement negotiations, if any, and the existence and importance of non-economic factors are unknown.

correctives that could prevent their own cases from becoming exemplars of catastrophic decision making.

1.1 Purposes and Premises of this Book

This book is written for attorneys who aspire to become better decision makers, clients who seek realistic guidance in making legal decisions and law students who wish to spare clients the ordeal of trial and error training. Its objective is to teach attorneys, clients and law students to make effective decisions in resolving civil litigation cases. Its underlying premises are that ample room exists for improvement in attorney-litigant decision making, trial outcomes can be predicted with greater accuracy than is presently achieved, decision-making errors about case strategies and pre-trial settlements can be reduced, and tough decisions about cases are best made within an analytical framework rather than behind a courtroom counsel table cornered by intuition, hunch, instinct, and hope.

To obtain maximum benefit from this book, attorneys may need to recognize that their experience in decision making is not equivalent to expertise in decision making, clients may need to acknowledge that their confidence in decision making is different from proficiency in decision making, and law students may need to discover that their knowledge of the law does not automatically impart competence in decision making. Effective decision making, in short, is a distinct skill. Contrary to popular perceptions, effective decision-making skill has little relation to experience, intelligence, education and professional reputation. As Oliver Wendell Holmes observed, "some of the sharpest men in argument are notoriously unsound in judgment. I should not trust the counsel of a smart debater, any more than that of a good chess-player."[4] Technically competent attorneys, therefore, are not necessarily effective decision makers, and many effective decision makers are not recognized as experts in any particular practice area. Knowing "what" and selecting "how" are independent yet complementary skills.

In endeavoring to become expert decision makers, attorneys, clients and law students inevitably will shift their focus from how to prevail in a trial to how to resolve a case through settlement. This shift follows from the fact that about 95% of all civil litigation cases are resolved without a trial. Making decisions about whether to settle and the terms on which to settle, consequently, is more important in the vast majority of cases than an attorney's trial skills. Although many clients initially resist the idea of settling a case and prefer to vindicate their positions at trial, the reality is that nearly every case is involuntarily dismissed or eventually settled. In the vast majority of cases, clients have a greater likelihood of making a devastating settlement decision in a mediation session than watching their attorney

[4]Holmes, Oliver Wendell. (1858). *The autocrat of the breakfast-table* (pp. 16–17). New York: Dutton, Everyman's Library.

conduct a devastating cross-examination at trial. Because a settlement is the most likely result in civil litigation, the critical factor that separates successful litigants from unsuccessful litigants often is the quality of their decision making. Contrary to legal stereotypes, the party most likely to win a case is not the one that can afford the best trial attorney but rather the party that forms the best attorney-client decision-making team.

This book's emphasis on decision-making skills also promotes the ethical practice of law and enables attorneys to fulfill their professional obligations, as envisioned by the American Bar Association (ABA). In its Model Rules of Professional Conduct, the ABA demarcates four roles attorneys assume when representing clients: advisor, advocate, negotiator and evaluator.[5] Only one of those roles (advocate) requires conventional courtroom skills and tactics, while the other three roles (advisor, negotiator and evaluator) mandate proficiency in the broader skill set that underpins decision-making acumen.

1.2 Organization and Philosophy of this Book

Like any distinct skill, decision-making acumen is acquired by objectively assessing one's performance, identifying the impediments to superior performance, evaluating the consequences of continued suboptimal performance and improving performance through a rigorous and testable regimen. This book, accordingly, is organized to address four questions critical to developing expert skills in legal decision making:

- Do attorneys and their clients make financially sound decisions about pre-trial settlement offers in civil litigation cases?
- What psychological and institutional factors affect decision making in civil litigation cases?
- What are the legal and professional consequences of making ineffective decisions about the settlement or trial of civil cases?
- How can attorneys and clients improve their decision-making skills in all phases of civil litigation?

Stated differently, this book examines the quality of decisions made by attorneys and clients, explains why attorneys and clients make both effective and ineffective decisions, outlines the legal malpractice and ethical implications of ineffective decisions and shows how to make better decisions.

Part One of this book reviews prior research on attorney-litigant decision making and the disparities between the predictions of attorneys and clients and their actual case outcomes. It then summarizes recent research results regarding nearly 11,000

[5]Center for Professional Responsibility. (2007). *Model rules of professional conduct* (p. 1). Chicago, Illinois: American Bar Association.

pre-trial settlement decisions made by attorneys and clients in California and New York. Part Two examines psychological factors that contribute to the decision-making shortcomings described in Part One and considers how institutional factors (law school education, law firm culture, and the judicial system) may affect attorneys' forecasting and problem-solving skills. Part Three explains the legal and ethical consequences of inadequate or inaccurate legal advice, showing how poor quality counseling about settlement prospects can become actionable malpractice and a breach of professional ethics. Lastly, Part Four describes why attorneys find it difficult to learn better decision-making skills, how individual attorneys and clients can improve these skills, what techniques groups employ to develop superior decision-making skills, and how law firms can utilize peer review, evaluations and audits to enhance their attorneys' decision-making capabilities.

This book differs from other books and articles on settlement negotiations in that it places greater weight on scientific evidence than the war stories of attorneys, mediators and judges; it assumes that empirical studies are more instructive than anecdotes and statistics are more dependable than surmise. The overall philosophy of the book is to bump, when possible, the legal field from the narrative to the empirical, from qualitative conjecture to quantitative proof. As a result, this book may be less entertaining than popular books on negotiation and litigation and actually will require considerably more work on the reader's part. For the determined reader, the additional cognitive effort, hopefully, will be rewarded by a more durable understanding of what really happens in litigation decision making and what has proven effective in improving its quality.

This book defers to the time demands placed on busy, hyper-scheduled attorneys, clients and law students. Each chapter may be read without reading the prior chapter, and the summary at the end of each chapter can be used as a snapshot of that chapter. Attorneys who want to read only about improving their decision-making skills, for example, may move directly to Chapter 9. Reading the book in a piecemeal or abbreviated manner conveys the key points to readers with very limited time, but it is not recommended. Nevertheless, some readers have less than an hour to read the material most pertinent to their needs, and this book is structured to accommodate the narrowly focused as well as the broadly inquisitive reader.

Two important clarifications are necessary. First, the term "decision making" used throughout this book is a compact substitute for the more expansive set of cognitive skills identified by psychologists as judgment, decision making and problem solving.[6] Non-psychologists might call these skills "good sense,"

[6] "Decision making has been defined as 'the ability to gather and integrate information, use sound judgment, identify alternatives, select the best solution and evaluate the consequences.'" Salas, Edward, *et al.* The making of a dream team: When expert teams do best. In Ericsson, K. Anders, *et al.* (Eds.). (2006). *The Cambridge handbook of expertise and expert performance* (p. 441). New York: Cambridge University Press. Cf. Tichy, Noel M., and Bennis, Warren G. (2007). *Judgment* (p. 287). New York: Penguin Group. ("We make a distinction between judgment and decision making").

"practical," "good judgment," or simply "wisdom." Second, although this book emphasizes empiricism over anecdotes, readers do not need a background in statistics, mathematics or psychology to understand it. This book deliberately excludes decision-making models, tables and charts that require familiarity with probability theory, regression analysis, game theory, decision tree algorithms, t-tests, p-values and Bayesian analysis. These complex methods and tests are highly valuable tools for decision makers, but they are excluded here for a simple reason: attorneys generally don't like them, don't understand them and won't use them. Readers seeking a more scientific or statistical analysis of attorney-litigant decision making may wish to review the author's article, "Let's Not Make A Deal: An Empirical Study Of Decision Making In Unsuccessful Settlement Negotiations," co-authored with Martin A. Asher and Blakeley B. McShane of The Wharton School, and published in the *Journal of Empirical Legal Studies*, Vol. 5, No. 3, pp. 551–591 (September 2008).

1.3 What Attorneys Think About Other Attorneys' Decision-Making Skills

If attorneys question the importance of decision making to clients or doubt that the quality of decision making varies among attorneys, they may be surprised to see what their colleagues say about the profession's decision-making capabilities. Recent advertisements in *The Wall Street Journal*, placed by the nation's leading law firms, appear to capitalize on the perceived inadequacy of their competitors' decision-making skills:

- "We believe that what separates us from the pack is not what we do, but how we do it – aggressive not conservative, team players not one-man-bands, problem solvers not just legal practitioners."
- "I don't need theories from my lawyers. I need answers. Ever get a three page memo from your lawyer when you're looking for quick, to-the-point advice? At Nixon, Peabody LLP, we know that you prefer simple, clear and practical to rambling and theoretical. Your world is complicated enough."
- "Major litigation is rarely straightforward. Working with your law firm should be."
- "The best attorneys know how to balance aggression with delicate handling."
- "I don't need lawyers who win at all costs. I need them to win, but calculate the costs."
- "You need lawyers who will simplify the process – not complicate it further. At Winston & Strawn we're committed to helping our clients find the most direct route to a successful outcome. When you're faced with complex litigation, choose a law firm that will help you chart the right course."
- "If your lawyers seem more concerned about enumerating your options than helping you choose among them, you might wonder whose interests are really