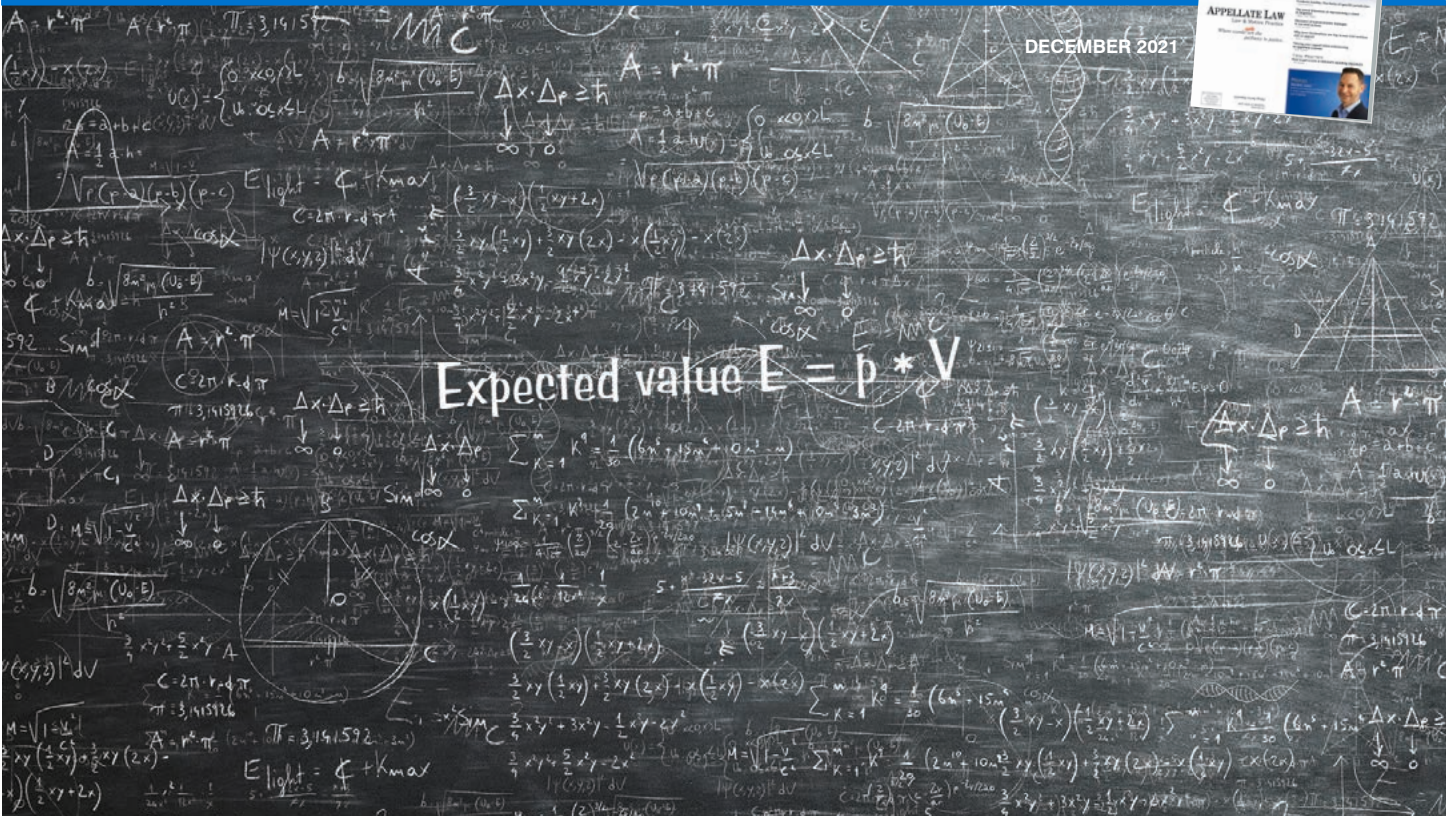




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Valuing your appeal

A formulaic way of deciding when outsourcing the appeal to appellate counsel makes sense

By JANET GUSDORFF

As an appellate lawyer who makes her living from trial attorneys outsourcing their appeals, I understand if you conclude I am biased on the topic of outsourcing appeals to appellate counsel. But please, stay with me; I do not always recommend outsourcing! Over the years of evaluating cases, I've adopted a helpful formula to assist trial lawyers evaluate the economics of appealing a given case, as well as whether to handle the case in-house or to retain appellate counsel.

Before addressing the economics, we start with the pros and cons of handling appellate matters "in-house" and why many attorneys prefer to outsource their appeals.

The "appeal" of handling an appeal in-house

The most obvious benefits of handling appeals in-house are cost-savings

from institutional knowledge. Some trial firms have the luxury of employing an appellate attorney who works exclusively on the firm's law and motion, as well as appellate needs. There is also an added bonus of trust, having previously vetted the team and their work product.

The trial team (hopefully) knows the case intimately. Having conducted the discovery and drafted oppositions to the defendant's demurrer, MSJ, etc., they may already have at their disposal a well-reasoned argument on the key law and facts of the case.

Assigning appellate work in-house also falls within the law firm's existing budget. The firm already pays its employees, and rather than incur an additional investment, may simply re-allocate its assets when tasking an employee with appellate work. This can be an especially attractive option for trial lawyers handling cases on contingency and seeking

to keep their out-of-pocket expenditures to a minimum.

Another reason why trial lawyers choose to handle their own appeals is the challenge of finding outside counsel willing or interested in associating in to the case post-judgment. The case might have too much risk for an appellate lawyer to handle on contingency, and the client may lack the resources to hire the lawyer on an alternative fee arrangement.

The "appeal" of hiring outside counsel

There are countless reasons why trial attorneys choose to outsource their appeals. Some prefer using their own firm's time and resources differently. Some may strongly dislike researching and writing and the thought of devoting countless hours to both makes them queasy. Some are too busy. Or perhaps



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they're uncertain where to begin and want to avoid potential malpractice exposure if they inadvertently miss key deadlines.

The foremost advantage, however, of hiring a competent appellate attorney is that it often increases the odds of winning. Admittedly, there are limits to what an appellate attorney can do; we can't alter bad facts in the case. We might try to change the law, but more commonly work within existing legal frameworks. Yet, as experts in appellate advocacy, our value is exploring and navigating the grey areas of the case and the law. It is in those "close calls" that an appellate expert can increase the odds of success.

It may seem that the trial counsel, who have intimate and comprehensive knowledge of their cases, would be the most efficient and logical choice to prosecute their own appeals. But this extensive insider knowledge can backfire on appeal. "Trial lawyers who prosecute their own appeals...may have 'tunnel vision.' Having tried the case themselves, they become convinced of the merits of their cause. They may lose objectivity and would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice." (*Estate of Gilkson* (1998) 65 Cal.App.4th 1443, 1449-1450.)

In its famous decision, *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 408-412, the Fourth District Court of Appeal famously differentiated the expertise needed for trial work from that required for appellate work. There, appellant challenged the amount of an appellate attorney fee award, arguing the amount was excessive because "most of the work that would have to be done by appellate counsel on appeal had already been done in connection with the trial." (*Id.* at p. 408.) The Court comprehensively and emphatically rejected that notion.

"Appellate work is most assuredly not the recycling of trial level points and authorities." (*Shaban, supra*, 88

Cal.App.4th at p. 408.) "The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product." (*Id.* at p. 410.) Because of additional pages permitted in appellate briefs, "appellate counsel will have much more freedom to explore the contours and implications of the respective legal positions of the parties. Part of that exploration may mean additional research that trial counsel simply will not have had the time to do." (*Id.* at p. 409.) Unlike a rehash of trial level points and authorities, "the appellate brief offers counsel probably their best opportunity to craft work of original, professional, and, on occasion, literary value." (*Id.* at p. 410.)

Appellate briefs receive greater judicial scrutiny than trial level points and authorities: Three judges (or seven) will read them; because of the comparatively less time pressure, the judges will be able to study the attorney's work product more closely; more staff help them identify errors in counsel's reasoning and perform original research to uncover ideas or authorities that counsel may have missed or decided to refrain from citing. (*Shaban, supra*, 88 Cal.App.4th at pp. 408-409.)

Appellate advocacy also requires consideration of the greater context and impact of the arguments. Because "orientation in appellate courts is on whether the trial court committed a prejudicial error of law, the appellate practitioner is on occasion likely to stumble into areas implicating some of the great ideas of jurisprudence, with the concomitant need for additional research and analysis that takes a broader view of the relevant legal authorities." (*Shaban, supra*, 88 Cal.App.4th at pp. 409-410.) Where appellate court precedent is open for reexamination and critical analysis, "appellate counsel must necessarily be

more acutely aware of how a given case fits within the overall framework of a given area of law, so as to be able to anticipate whether any resulting opinion will be published, and what effect counsel's position will have on the common law as it is continuously developed." (*Id.* at p. 409.)

Using expected value analysis

Analyzing the economics of pursuing an appeal is a necessary part of every case that results in a final judgment in court. I recommend conducting an expected value analysis to determine the financial reasonableness of appealing any given case. *Disclaimer: much of my understanding and analysis come from Chapter 10 from Law and Economics (6th Ed.), by Robert Cooter and Thomas Ullen. The common refrain of lawyers goes something like this: "Had I wanted to do math or science, I would have gone to med school" or "I went to law school to avoid doing math." But bear with me; this analysis applies directly to your cases.

How can you calculate the potential value of an appeal when the result is binary: You will either win or lose? Economists use a formula to determine the "expected value" of the financial outcome of a case. What is the expected value of an appeal? Roughly, it's the average financial award resulting from the success of that appeal. Financially speaking, unless the expected value of the appeal exceeds its cost, appealing a case is risky. However, when the expected value of the appeal exceeds its cost, appealing makes financial sense and further inquiry is necessary. The expected value of an appeal is high (meaning the financial return from appeal is greater than the cost of pursuing the appeal) when the appellate court is likely to reverse a lower court's error.

The expected value of an appeal may be represented by the following formula: Expected value E = p * V

Where E is the expected monetary outcome, p is the probability of winning



the appeal and V is the desired (albeit realistic) financial judgment if successful (after subtracting any costs associated with the appeal).

In other words, the expected value of the appeal is the sum of the following: the probability of winning (represented by p) multiplied by the net value associated with winning (represented by V).

Of course, neither the probability of winning nor the value of the financial judgment can be known in advance of the appeal. The utility of this equation, therefore, depends on the accuracy of the projections. Once we discuss how to calculate those figures, we'll run through some real-world examples to demonstrate how this formula can assist in evaluating the appeal economics.

How do you calculate the probability of winning the appeal?

Calculating “ p ” is an art that an experienced appellate attorney may help you estimate. But, assuming you do not have a case-specific estimate, here are some general “rules of thumb” to assist you.

The Judicial Council of California publishes its annual court statistics. The most current available as I write this article is the 2021 Court Statistics Report, covering 2010-11 through 2019-20. (<https://www.courts.ca.gov/627.htm> <last accessed October 12, 2021>.) Based on an analysis of those statistics, over the past three years the average California state civil appeal resulted in a reversal 17% of the time. Hence, we can estimate the probability of success of an average California civil appeal is 0.17.

How do you determine whether your odds of appellate success are better than the average? The answer is nuanced, but a broad-strokes rule of thumb is to determine the applicable standard(s) of appellate review, and specifically, which standard(s) apply to the arguments you're raising or challenging. Generally, the greater

deference the reviewing court applies to the trial court's rulings, the worse your odds are for reversal. So, an issue reviewed for an abuse of discretion (such as challenging a discovery violation, evidentiary ruling, or amount of fee award) will have lower odds of success than one reviewed de novo (such as reviewing the grant of summary judgment or determining whether a special jury instruction misrepresented applicable law). Mixed legal and factual determinations, such as whether there was substantial evidence to support a finding, falls somewhere in the middle, and thus, more akin to the odds for an average appeal.

How do you calculate the value associated with winning the appeal?

I typically calculate this value after discussing with trial attorneys what they have estimated the value of the case to be if they were to win or settle, and subtract from that amount the new costs related to the appeal (including attorney fees and appellate-related costs such as filing fees and transcript preparation). Some previous costs are “sunk” (i.e., already spent and unrecoverable, thus having no impact on future-oriented decision making), and normally are not included in the expected value associated with the appeal. Other costs may be recoverable if the case is salvaged, and can be quite significant to the contingency attorney who has already poured substantial resources into the case. If you fall within that category, feel free to deduct the recoverable amount from the amount you subtract from the overall case value.

Huh?

Let's illustrate using a few hypothetical appeals using completely random numbers.

Using expected value analysis to help determine when to appeal

Hypothetical #1: (Low reward, low risk)

You evaluated your case as worth \$150,000. However, unfortunately, the defense convinced the court to skewer your case by excluding your key evidence, and you were “defensed” at trial. The wholesale exclusion of your key evidence was based on the judge's misreading of applicable law, and you have determined that an appellate court will have to determine a legal issue de novo. You have assessed your probability of success at 0.7. Does it make financial sense to appeal?

Expected value $E = p * V$

Here, $p = 0.7$. The value associated with winning the appeal is \$150,000 (we are ignoring appellate-related costs for this hypothetical).

Expected value $E = 0.7 \times \$150,000$

Expected value of the appeal (E) = \$105,000. In other words, although the value of the case is not great, because the probability of success is high, it makes financial sense to appeal.

Hypothetical #2: (High reward, high risk)

Let's say that your case is worth \$5,000,000 but you only have a 5% chance of success on appeal. The expected value of the appeal would be the sum of $0.05 \times \$5,000,000$, or \$250,000. Despite the risk and low likelihood of success, the large value of the case still may make the appeal financially attractive.

Using expected value analysis to help determine when to outsource the appeal

Expected value analyses can help inform the decision on which cases to outsource. Trial lawyers often focus on the difference between the investment to retain an appellate attorney as opposed to handling the appeal in-house. But, as the hypotheticals below demonstrate, that delta is not nearly as significant as might be expected.

Hypothetical #3

Let's play with the attorney fees. In this example, the appellate attorney has estimated attorney fees at \$150,000



and you have estimated the case is worth \$1,500,000. Unfortunately, you have unpromising odds of success (probability of 0.1). The appellate attorney fees factor into the analysis by reducing your value associated with winning the appeal (i.e., the “V” in the equation) from \$1,500,000 to \$1,350,000.

Expected value $E = 0.1 \times \$1,350,000$

Expected value of the appeal (E) = \$135,000.

Bizarrely, if we significantly reduce the amount of attorney fees, the expected value of the appeal does not significantly change. For instance, if the attorney charges \$25,000, the value associated with winning the appeal would be \$1,475,000 rather than \$1,350,000, and the expected value would be \$147,500. The low odds of success, combined with the high case value, make the attorney fee expenditure analytically negligible.

Hypothetical #4

Let’s assume you assessed your case was worth \$250,000 rather than \$1,500,000. Let’s assume as well, that the odds of success remain 0.1 and the appellate attorney quotes \$50,000 (fees and costs). The value associated with winning the appeal is now \$200,000 (\$250,000 - \$50,000 (fees)). The expected value of the appeal is $0.1 \times \$200,000$ is now \$20,000. The appeal may still be financially feasible, but the delta between the value and the time/frustration of outsourcing may convince you to handle the case in-house. Even if you choose not to outsource the appeal, and “save” the \$50,000 attorney fees, the expected value of the appeal would only be \$25,000 ($0.1 \times \$250,000$).

There is another way of looking at the financial aspect of outsourcing versus handling the appeal in-house.

Hypothetical #5

You have a case that will require your associate to spend 120 hours working up the appeal. Assuming, for ease of this hypothetical, you pay your

associate \$75 per hour, you can expect to spend \$9,000 to handle the case in-house. You have spoken to an experienced appellate attorney who can handle the appeal much more efficiently, and has calculated 50 hours for the appeal at \$500 per hour (\$25,000). Your case is worth \$1,500,000 and the attorney has calculated the probability of success at 0.2 (just slightly more than the average civil appeal’s successful reversal rate). Your expected value of the appeal if your associate handles the appeal will be: $E = (0.2 \times \$1,500,000) - (\$9,000)$, or \$291,000. Your expected value of the appeal if you retain the appellate counsel will be: $E = (0.2 \times \$1,500,000) - (\$25,000)$, or \$275,000. Financially, assuming your associate’s work will yield identical odds as the appellate counsel’s work, it would make financial sense to handle the appeal in-house.

However, the greatest advantage of hiring outside appellate counsel is to *increase* your probability of winning your appeal. Appellate counsel has specialized skills and knowledge that, although cannot salvage awful facts or law, can tip the odds where there is ambiguity and/or close legal disputes. (See section above on advantages of hiring outside appellate counsel). Let’s assume then, that if you pay \$25,000 to outsource your appeal to appellate counsel, that your probability of success increases by 0.1, so you now have a 0.3 probability of success. Now, your expected value of the appeal if you retain appellate counsel will be: $E = (0.3 \times \$1,500,000) - (\$25,000)$, or \$425,000. So, although hiring the appellate counsel in this hypothetical case will cost you \$16,000 more than assigning an associate to the appeal, the decision to do so actually increases the expected value of your appeal by \$134,000 (\$425,000 - \$291,000). That \$16,000 investment is a mathematical no-brainer. And, by outsourcing, you can also redirect the 120 hours that your associate does not spend on this case to an alternative, ideally lucrative matter.

How does the analysis change when you represent the respondent?

Good news; you received a \$5,000,000 verdict! Unfortunately, defendants have decided to appeal and you are weighing your options for retaining appellate counsel. One attorney you have thoroughly vetted and decided to hire has offered you three attorney fee options for handling your appeal. Option 1: 10% contingent interest in post-judgment interest; Option 2: 5% contingent interest in the total recovery; Option 3: \$250,000 flat fee. Assuming you have the cash to pay the flat fee, how do you decide which option is most financially attractive?

The expected value analysis can help you determine under which scenario your appeal is most valuable to you. For ease of this analysis, we use the following assumptions: We will exclude sunk costs from the analysis, we will ignore the recoverable costs award, and we will assume the appellant has an average likelihood of success (17%) and your probability of success is 0.83.

Option 1: Assuming the lifespan of the appeal from the notice of appeal through finality in the Court of Appeal is two years, and you did not sue a public entity, interest has accrued on the judgment at 10% for two years (simple interest). In this scenario, the value associated with winning the appeal would be \$5,900,000 (i.e., the total amount of the verdict (\$5,000,000) plus two year’s interest (\$1,000,000) minus attorney fees \$100,000 (10% of \$1,000,000).) The expected value of your appeal would be $0.83 \times 5,900,000 = \$4,897,000$.

Option 2: Assuming the appeal takes exactly two years (as assumed in Option 1), then after earning 10% interest during that time, the total amount of the judgment would be \$6,000,000. Attorney fees of 5% of the \$6,000,000 total recovery equals \$300,000. In this scenario, the value associated with winning the appeal would be the \$6,000,000 -



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\$300,000 attorney fees, or \$5,700,000. The expected value of your appeal would be $0.83 \times \$5,700,000 = \$4,731,000$.

Option 3: Again, the appeal takes exactly two years, and adding interest to the judgment, your total recovery is \$6,000,000. You previously paid \$250,000 in attorney fees. In this scenario, the value associated with winning the appeal would be \$6,000,000 - \$250,000 attorney fees, or \$5,750,000. The expected value of your appeal would be $0.83 \times \$5,750,000 = \$4,772,500$.

Based on the expected value of your appeal of the three options, Option 1 is the most financially advantageous arrangement for you. However, as any of the variables change (i.e., flat fee is \$100,000 rather than \$250,000; or the appeal takes more or less time than the two-year period), the relative financial benefits of the various options will significantly change.

Should your client drop her appeal if defendant will waive costs?

It is common for prevailing defendants to offer to waive costs against the plaintiffs in exchange for a waiver of appellate remedies. It is important to note that the analysis of how to proceed in such a circumstance depends more upon your client's risk tolerance and other motivations for pursuing the claims on appeal, than on the pure economics of the decision.

However, you are your client's counselor and advisor, and you can use the expected value analysis as one of several criteria to help you analyze the pros and cons of waiver/settlement.

For instance, assume your client lost a summary judgment and plans to appeal, and owes defendant \$15,000. You estimated the value of your case to be \$150,000, and you spoke with an appellate attorney who thinks you have a probability of success on appeal at 0.4.

Given the amount of recovery, you have decided to handle the appeal yourself, and expect to pay \$3,000 in appellate-related costs. Using the expected value analysis, the value associated with winning the appeal would be \$147,000 (\$150,000 - \$3,000). The expected value of your appeal would be $0.4 \times \$147,000 = \$58,800$. Because the expected value of your appeal greatly exceeds the costs owed to defendant, it makes financial sense to proceed with the appeal.

Other considerations

Understanding the economics of any given appeal is only *part* of the analysis. Although the probability of winning can affect the expected value of an appeal, ultimately, the formula is only part of the overall decision process.

Risk tolerance (yours and your client's) is also an important consideration. The appeal, like trial, is typically winner-takes-all. Unless your client is dragged into the appellate process as the respondent, wagering more time and money into a case that may ultimately result in net loss is not for the faint of heart. Understanding and explaining to your client the realistic pros and cons of any given case can help your client manage their expectations and make an informed decision. The appellate process does not guarantee fair results, despite the parties' and judges' best intentions.

For some clients, the decision to appeal has very little to do with money or likelihood of success. Despite long odds, they may want to show the defendant that they will not back down or run from an important fight. They may seek to clear their names or reputations. They may seek to trailblaze on the behalf of other individuals who might undergo similar harm from the defendant.

Similarly, it can be important for trial lawyers who repeatedly litigate cases against the same entities to show that they will go the distance in prosecuting their

clients' cases. Trial lawyers often consider the delta between settlement offers made to lawyers that rarely try cases versus offers to those who routinely do so. Similarly, if an insurance company knows that you are willing to, and routinely appeal losses, that knowledge should affect their valuation of the case from the outset.

Conclusion

Case valuation is extremely important when assessing whether to accept a case and, assuming you do, whether to settle or try the case. It is equally important in determining how to proceed post-trial (or post-judgment) and whether, if you decide to appeal, it makes financial sense to outsource the matter or handle it in-house. Although numerous non-economic considerations affect the decision to appeal, using the "expected value" formula can help you assess the economic advantages of appealing. An appellate attorney may help you accurately assess the likelihood of success on appeal; the information in this article can empower you to leverage the odds to determine your best course of action for any case.

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