Using "Expected Value" to Help the Client Determine Whether to Appeal

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Damon Runyan once wrote: "I long ago came to the conclusion that all life is six to five against." Like life, civil appeals are a gamble – only the odds are worse. Year after year, statistics collected by the Judicial Council of California consistently show that only about 20% of civil appeals result in complete reversals. Another 10% result in affirmance with some modification and 70% of all civil appeals fail completely. (See, e.g., the Judicial Council of California's 2007 Court Statistics Report, p. 26, available at www.courtinfo.ca.gov/reference/documents/csr2007.pdf.)

How can you help a client decide whether to buck these odds? The "expected value" calculation is a useful tool when only money is at stake.

The expected value is the sum of the probability of each possible outcome multiplied by the outcome value (payoff). This concept sounds more complicated than it is and can be easily explained by using an example. Let's assume that you have been invited to purchase a ticket in a lottery. The prize is $100.00 and the (honest) organizers have assured you that you have a 10% chance of winning if you buy a ticket. The expected value of the lottery is arrived at by multiplying 10% (the probability that you will win) by $100.00, the payoff. The "expected value" is therefore $10.00. If the lottery organizers offer to sell you a ticket for $1.00, you should jump at the chance because you are paying only $1.00 to have a 10% chance of winning $100.00. This situation is referred to as having a "positive" expected value. If the organizers were generous (or stupid) enough to repeat the lottery hundreds of times while permitting you to purchase a ticket for $1.00 on each occasion, your profit could easily run into the thousands of dollars.

How does this relate to a prospective appellant's decision? Let's assume that you analyze the case and conclude that your client has a 30% chance of reversing a $200,000 judgment against her because the trial court misinterpreted the hearsay rule by excluding important evidence that should have been admitted. The expected value is therefore obtained by multiplying 30% (the probability that the client will get the judgment reversed) by $200,000, the payoff. (For purposes of simplicity, we'll assume that, if the excluded evidence was admitted at a retrial, your client would win.) Your fee for prosecuting the appeal would be $70,000. Because the client's cost of playing the appellate "lottery" ($70,000) is greater than the client's expected value of winning ($60,000), the client has a "negative" expected value. In other words, the client is paying $10,000 more than she would, on average, recover and therefore, simply as a matter of mathematical logical, should not prosecute the appeal.

Of course, the expected value calculation is simply a decision making tool; it does not provide a definitive answer, especially because the client gets only one appeal, so that (unlike the lottery example) there is no opportunity to average outcomes over a large number of tries. Whether your client is "risk-seeking" or "risk-avoiding" will also play a part in her decision. A risk-seeker is more likely to proceed even if the expected value is negative; a risk-avoider might well hesitate even if the expected value is positive. Moreover, your client's marginal value of money will also play a role. For example, she might be wealthy enough that sums below $100,000 are not that significant to her. If so, she might well value the possibility of winning $200,000 more than she values the $70,000 that she will spend to prosecute the appeal.

Ultimately, the client has to decide whether it is in her best interest to pursue an appeal. But it is in everyone's best interest for her to fully understand the potential risks and benefits of taking the appeal. The expected value calculation can be used to make those risks and benefits more transparent and therefore more easily understandable. ■

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