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LIRA IN CRIMINAL CASES

DECEMBER 15, 2020 | JOHN LANDE | LEAVE A COMMENT

The [LIRA book](#) – *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions* – focuses on civil litigation. It describes three elements that practitioners and parties should consider when assessing litigation interests and risks: (1) the expected court outcome, (2) future [tangible](#) costs of continuing to litigate, and (3) future [intangible](#) costs of continuing to litigate. This assessment is important to develop [bottom lines](#) for negotiation and, more generally, strategies for litigation and negotiation.

This post describes how this three-part structure can be adapted in criminal cases and used in plea bargaining.

Expected Court Outcome

Whereas the outcome in many civil cases involves lump-sum payments, the outcomes in criminal cases may involve several issues that aren't as easy to calculate. For example, if defendants are convicted, in addition to the length of their sentences or amounts of any fines, the decisions may address issues such as whether sentences for multiple counts will be served consecutively or concurrently, whether defendants will be put on probation, and conditions such as participation in substance abuse treatment programs.

Many factors can affect court outcomes including admissible evidence, jury instructions, sentencing guidelines, mandatory minimum sentences, “enhancements” for factors such as use of a gun, defendants’ prior records, whether defendants admit guilt and express remorse, judges’ and prosecutors’ attitudes and relationships with defense counsel, social attitudes in the community, harm to victims, racial bias, and publicity about the case, among others. Prosecutors generally have much more bargaining power than defendants, so the outcomes are likely to be what prosecutors offer or something close to that.

Lawyers can estimate probabilities of possible court outcomes, including acquittal. Unlike civil cases, however, it doesn't make sense to multiply these probabilities by dollar amounts to yield the expected value of court outcomes. Even so, in developing litigation and negotiation strategies, it is useful for lawyers and defendants to carefully consider the likelihood

of plausible court outcomes. This process is difficult because of the lack of data at all levels in the criminal legal system, and lawyers generally have to rely on their own experiences and those of other lawyers in their area.

Tangible Costs

The tangible costs also may be important considerations but differ from civil cases. In particular, these considerations differ for people in different situations.

Most similar to parties in civil cases are defendants who hire private counsel and pay fees that increase as the case progresses. Defense counsel may charge hourly fees or fees for specified stages of the case. These defendants presumably consider whether the benefit of continuing to litigate (as opposed to accepting a plea bargain) is worth the additional legal fees. If parties pay a fixed fee up front, they don't have to worry about additional costs for continuing to litigate. It is common for defendants to pay one fee for lawyers to handle a case up to trial and an additional fee if they go to trial.

The overwhelming majority of defendants are indigent. They are represented by public defenders and do not pay up front for their legal services. However, after the case is over, many will be charged for administrative fees, court costs, probation services, a portion of their legal services, and even for their time in jail.

Prosecutors don't have clients and no one pays fees for their work in particular cases, but they have some resource concerns about continuing litigation. Prosecutors' offices don't have enough lawyers to go to trial in all their cases, so investment of attorney time and resources in any case means that there is less available for other cases.

Intangible Costs and Interests

Criminal defendants often suffer similar kinds of [litigation stress as litigants in civil cases](#). Indeed, considering the potential criminal penalties, their stress may be much greater. They may worry about the consequences for their family members of continuing prosecution. They may lose their jobs while their cases are pending or convicted and even if they accept certain plea deals. The disposition of their cases may have numerous [collateral consequences](#) for future employment, access to public benefits, immigration status, and other opportunities.

Criminal defendants who are innocent often struggle with a serious dilemma about whether to accept a plea bargain. They may be tempted to seek a trial to be vindicated and avoid consequences of conviction. But many defendants feel great pressure to accept plea bar-

gains to quickly end the uncertainty and the risk of getting greater sentences if convicted at trial than if they plead out. The pressure is especially intense for defendants who are in jail awaiting trial.

Prosecutors also consider various intangible interests in making decisions about prosecution and plea bargaining. Prosecutors often have to comply with internal office policies. They may also be concerned about consistency with similar cases, feelings of justice considering the defendants' acts and motivations, impact on victims, reputation within the criminal law community, potential for positive or negative publicity, and effect on their "win rates," among other factors. Also, at a state level, the head of office is elected, adding electoral politics to the list of factors in deciding how to handle both individual cases and certain categories of cases (such as drug cases).

Developing and Using Bottom Lines

Although lawyers in criminal cases generally don't use the term "bottom line," when both sides are open to plea bargaining and trial is a real possibility, lawyers and defendants generally consider the threshold of what would be acceptable to avoid trial. I use the term "bottom line" here, consistent with common usage and the LIRA framework.

Plea bargains may involve factors such as the length of sentences, amounts of fines, which crimes are admitted, whether the crimes are felonies or misdemeanors, whether defendants are put on probation, and conditions of probation, among others.

As in civil cases, each side may adjust its bottom line during the case as it gets new information and changes its assessment of the likely court outcome, the tangible and intangible costs of continuing to litigate, and the other side's posture.

Plea bargaining in routine cases involves what I have called "[ordinary legal negotiation](#)" or norm-based negotiation. Prosecutors and defense counsel generally have shared understandings about the "standard deals" or "going rates" in their localities for particular offenses. The plea bargaining process focuses on these norms, with negotiation about adjustments reflecting aggravating or mitigating circumstances and the relative strength of the evidence. In many cases, the defendants accept the prosecutors' first offers, without making counteroffers.

In relatively rare cases, the negotiation may be similar to the counteroffer process in civil cases, where each side starts with extreme positions and makes a series of counteroffers.

As in civil cases, lawyers should have careful conversations with clients about all these matters to help them make the best possible decisions. Lawyers should pay particular attention to intangible costs, including collateral consequences of conviction, which are easy to overlook but may be extremely important to clients.

Thanks so much to Cynthia Alkon for very helpful comments and suggestions about this post.

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