

Help Parties Consider Intangible Consequences of Litigation

Theory-of-Change Symposium

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[Michaela Keet](#), [Heather Heavin](#), and [John Lande](#) describe intangible consequences that parties often experience in litigation but fail to anticipate or value adequately. They suggest techniques to help them make better litigation decisions by explicitly incorporating and valuing these consequences. Michaela is a Professor at the University of Saskatchewan College of Law. Heather is Associate Dean of Research and Graduate Studies and Associate Professor at the University of Saskatchewan College of Law. John is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law.

Conflict can be a royal pain in the neck. And lots of other body parts too. Even when conflict is constructive, people usually find it very stressful. Indeed, people often avoid conflict precisely because of the unpleasant consequences.

But when people engage in conflict (or seriously consider doing so), they often ignore the intangible consequences as they focus on the subject of the conflict. This can be especially problematic in litigation, which can cause many different problems over a long period of time.

Intangible Consequences of Litigation

Individual litigants often suffer “litigation stress” which can disrupt their normal physical, mental, and emotional lives, especially when they have pre-existing physical or mental conditions. It can cause gastrointestinal disturbances, teeth grinding, binge eating, headaches, inability to sleep, nausea, weight loss, and crying spells.

Some parties cut off relationships due to embarrassment. When litigation involves key relationships in their everyday lives – such as a divorce or business dissolution – the strain of litigation can be particularly intense.

Some parties can’t think about anything but their lawsuits. Litigation often requires them to repeat detailed accounts of traumatic events. This forces them to focus on the past,

reaffirming dysfunction and undermining attempts to move forward. The litigation process can impair their memory and judgment, which can interfere with their ability to litigate effectively.

Anything related to a lawsuit, such as a television program or movie, can trigger thoughts about their cases, resulting in headaches, nausea, sweats, and anxiety.

Organizational litigants also incur substantial intangible costs. Board members, executives, managers, and other employees may worry about their future. Litigation can increase employee absenteeism, harm employees' physical health, productivity, and decision-making, and stimulate conflict within the organization. Decision-makers can experience a lot of uncertainty, emotion, and pressure, causing them to make bad decisions. Litigation can divert energy away from organizational goals and impede innovation.

We describe these and many other intangible consequences in our new ABA book, [*Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*](#).

How Lawyers and Mediators Can Help Parties

Litigants settle most lawsuits. Lawyers and litigants generally estimate the likely outcome of a trial and use that estimate in developing negotiation strategies. They may adjust their expectations based on their estimates of the probability of getting various outcomes and the tangible costs of litigation (legal fees and litigation expenses). Using these calculations, they set their bottom line – the least they would accept or most they would pay in settlement.

In making these calculations, lawyers and litigants often completely ignore the intangible costs of litigation or don't factor them into the calculations of their bottom line.

Big mistake.

Intangible consequences can be tremendously costly to litigants, rivaling the value of the litigation itself. Failing to consider these costs means that litigants' interests aren't properly valued, resulting in sub-optimal decisions.

Empirical research shows that in most cases going to trial, one side gets a worse result than the other side's last offer. If the statistics reflected the tangible and intangible costs of going to trial, an even larger percentage of parties would do worse at trial than the value of a settlement offer.

Lawyers should ask clients about intangible interests starting early in litigation and whenever the clients need to make decisions such as filing a complaint, responding to the other side, or negotiating. In addition to asking about clients' interests and goals in the subject of the case, lawyers should ask specifically about their interests related to

the litigation process such as timing, effect on reputation and relationships, possible physical or emotional consequences, and organizations' consequences for internal functioning and diversion of energy.

When clients need to make decisions, lawyers should hone in on how much particular interests are worth to the client. For example, if a plaintiff could receive a payment soon instead of waiting a year, how much less would she be willing to accept? How much more would a defendant be willing to pay to settle a case and avoid the risk of an unfavorable trial result? How much would it be worth to avoid the publicity of a trial – or gain the publicity of a trial? Lawyers and clients should discuss these questions in advance rather than waiting until they are in the heat of negotiation or mediation.

Mediators can ask similar questions, though they typically can't delve into them in as much depth.

This client counseling can help clients develop realistic expectations and prepare them for the challenges they are likely to face in litigation. This should strengthen their resolve so that they don't give up in the middle of a case because of unrealistic expectations. And it should help them make better decisions in negotiation and mediation. Our book provides detailed guidance and checklists for having these conversations with clients.