

INDIRECT AND INVISIBLE ORGANIZATIONAL COSTS: MAKING INFORMED DECISIONS ABOUT LITIGATION AND SETTLEMENT

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ABSTRACT

When anticipating litigation costs for organizations, lawyers and clients tend to focus on direct litigation costs, while overlooking the impact of process costs. In making an evaluation whether to litigate or settle, we assert that lawyers should account for indirect organizational costs within any cost-benefit analysis. This article reviews organizational literature and empirical studies in order to present a template of three spheres of impact: business opportunity, reputation, and organizational psychology. With greater awareness, organizational lawyers can identify and weigh these costs, with the objective of helping their clients better understand the financial impact of dispute resolutions for the organization. When the full costs of litigation are clearly projected, lawyers and their clients can more effectively navigate negotiation, mediation, and/or litigation. Transparent conversations empower clients to set realistic goals and make informed decisions that reflect organizational priorities.

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I. INTRODUCTION

Litigation can threaten the daily operations of most organizations—business, non-profit, and community organizations alike.¹ According to Norton Rose Fulbright’s 2017 Litigation Trends Annual Survey, U.S. companies spend on average \$1.7 million USD on disputes per \$1.2 billion USD in revenue.² It is not a surprise that alternatives to litigation are encouraged in today’s justice climate: negotiation, mediation, and other planned early dispute resolution processes are part of many organizations’ repertoires. However, even where resolution is the obvious choice, careful strategies rely on comparisons among processes *and their impact*—comparisons which ought to include any litigation in the backdrop of the dispute. It is here, we suggest, that misconceptions and missed steps impede effective decision-making. Without a complete picture of litigation, even experienced organizations can underestimate the impact of that process, and therefore undervalue settlement options.

Without a systematic way of thinking and communicating about process options, lawyers and their organizational clients may be operating on intuitive judgments, which are out of step with their normal methodical assessments of risk.³ A well-developed lit-

¹ E. Allan Lind, *Litigation and Claiming in Organizations: Antisocial Behavior or Quest for Justice?*, in ROBERT A. GIACALONE & JERALD GREENBERG, *ANTISOCIAL BEHAVIOR IN ORGANIZATIONS* 150 (Sage Publications ed., 1987).

² NORTON ROSE FULBRIGHT, *2017 Litigation Trends Annual Survey* (Oct. 2017), <http://www.nortonrosefulbright.com/files/20171025-2017-litigation-trends-annual-survey-pdf-157870.pdf>. These costs include the direct cost to resolve the dispute and legal fees. Estimates of the incidence of litigation are also high: According to O’Rourke, 90% of companies are currently engaged in litigation of some kind. Morgan O’Rourke, *Trends in Litigation*, 52 RISK MGMT. 8, 8 (2005). See also David M. Trubeck et al., *The Cost of Ordinary Litigation*, 31 UCLA L. REV. 72, 123 (1983). The authors in this article undertook the first large-scale empirical study of litigation costs, considering whether litigation was a good investment for clients. The authors concluded, with some exceptions, that most ordinary litigation was cost-effective. However, this analysis only considered the direct legal costs, and did not take into account costs internal to the organization.

³ See Heather Heavin & Michaela Keet, *The Path of Lawyers: Enhancing Predictive Ability Through Risk Assessment Methods* (Oct. 2016) (paper delivered at the CIAJ 2016 Annual Conference on Oct. 5–7, 2016) (on file with authors). See also John Wade, *Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients to Make Better Decisions*, 13 BOND L. REV. 462 (2002); Jeffrey M. Senger, *Analyzing Risk*, in *THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 445, 452 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006). John Lande’s discussion of early case assessment (“ECA”) as an integral part of planned early dispute resolution (“PEDR”) is also useful; John Lande & Peter W. Benner, *Why and How Businesses Use Planned Early Dispute Resolution*, 13 UNIV. ST. THOMAS L.J. 248, 277 (2017). For discussion about how decision-analysis frameworks are some-

igation risk assessment can indeed ground decision-making inside negotiation, act as a reference point, and help identify the bargaining zone.⁴ A number of methodologies and tools exist to focus the lawyer on thorough evaluations of liability and remedy, and develop projections for the trial outcome. Fewer methodologies exist for the second half of this equation: the assessment of process costs, or the comprehensive impact of getting to trial, viewed from the perspective of the client.⁵ As a result, lawyers and clients tend to focus on direct litigation costs,⁶ overlooking litigation's indirect and yet most pernicious effects.⁷ Such an omission creates cognitive "bias blind spots"⁸ in the planning process and skews the development and analysis of settlement proposals.

II. DISCUSSION

In this article, we focus on potential impacts of litigation on organizational clients,⁹ and argue that a cost-benefit analysis of whether to litigate or settle must account for indirect organizational costs as well as direct legal expenses.¹⁰ While direct monetary payments and legal fees are most easily quantified, the implicit and indirect costs also have monetary value for organizations, and, we argue, should be demystified, identified, and weighed. Drawing from the organizational literature and empirical studies, we review

times used in operational decision-making, see HARVARD BUSINESS REVIEW EXECUTIVE BOOK SERIES, USING LOGICAL TECHNIQUES FOR MAKING BETTER DECISIONS (Douglas N. Dickson ed., 1983); DAVID TARGETT, ANALYTICAL DECISION MAKING (1996); PETER P. WAKKER, PROSPECT THEORY FOR RISK AND AMBIGUITY (2010).

⁴ Michaela Keet, *Litigation Risk Assessment: A Tool to Enhance Negotiation*, 19 CARDOZO J. CONFLICT RESOL. 17 (2017).

⁵ For a general discussion about client financial interests and the idea of offsetting, see John Lande, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 CARDOZO J. CONFLICT RESOL. 63 (2014).

⁶ Tom Watson et al., *Issues Negotiation*TM — *Investing in Stakeholders*, 7 CORP. COMM. 54, 55 (2002).

⁷ Lind, *supra* note 1, at 150.

⁸ JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION-MAKING 26 (2012).

⁹ We have elsewhere examined the potential personal costs of litigation, viewed through the experience of the individual. See Michaela Keet, Heather Heavin & Shawna Sparrow, *Anticipating and Managing the Psychological Cost of Civil Litigation*, 34 WINDSOR Y.B. ACCESS TO JUST. 73 (2018).

¹⁰ GERALDINE AMORI, 9 RISK MANAGEMENT (Lawrence F. Wolper ed., MGMA 2006).

a range of external and internal impacts on organizations¹¹ that may not be immediately visible to their lawyers (or to organizational decision-makers themselves¹²), and we then offer a template of three spheres of impact: business opportunity, reputation, and organizational psychology. In each of these categories, we offer examples of indirect costs.

We have posited above that the quantification of projections is important, yet we avoid recommending a metrics, or formula-driven, approach. We suggest that a “spheres of impact” typology is, on its own, a useful starting point for guiding conversations about litigation cost (or, more generally, process cost), and we attach an appendix of questions to guide such conversations. Our objective is to help organizational lawyers (and even third parties such as mediators) develop a client-centered sensitivity to these factors, leading to a better understanding of the financial impact of dispute resolution decisions for the organization overall and to more transparent planning conversations between lawyers and clients as they navigate negotiation, mediation, and/or litigation.

A. *The First Sphere: Loss of Opportunity for the Organization*

While not reflected in a financial statement—and therefore less visible to the parties and their lawyers—opportunity costs are key side effects of the time, energy, and attention devoted to litigation.¹³ Profit-making and public interest organizations alike can experience an unplanned narrowing of priorities and loss of capac-

¹¹ See METIN COSGEL & BOGAC ERGENE, *THE ECONOMICS OF OTTOMAN JUSTICE: SETTLEMENT AND TRIAL IN THE SHARIA COURTS* 150 (2016); THE HONOURABLE GEORGE W. ADAMS, Q.C., *MEDIATING JUSTICE: LEGAL DISPUTE RESOLUTIONS* 154 (CCH Canadian Ltd., 2d ed. 2011); ALAN K. CHEN & SCOTT L. CUMMINGS, *PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE* 229 (Wolters Kluwer Law & Bus. 2013); MARTIN GRAMATIKOV ET AL., *A HANDBOOK FOR MEASURING THE COSTS AND QUALITY OF ACCESS TO JUSTICE* 32 (Tilburg Inst. for Interdisciplinary Studies of Civil Law and Conflict Resolution Sys. ed., 2009).

¹² Businesses will sometimes resist the adoption of early dispute settlement systems while they are waiting to be “sold” on the benefits of early resolution (as opposed to litigation). See Lande & Benner, *supra* note 3, at 262; see also Michaela Keet, *Settlement Counsel: An Innovative Strategy for the Management and Resolution of Commercial Litigation Files*, 95 CAN. B. REV. 357 (2017).

¹³ COSGEL & ERGENE, *supra* note 11; Anthony Duggan, *Consumer Access to Justice in Common Law Countries: A Survey of the Issues From a Law and Economic Perspective*, in *INTERNATIONAL PERSPECTIVES ON CONSUMERS’ ACCESS TO JUSTICE* 46, 46–49 (Charles E.F. Rickett & Thomas G.W. Telfer eds., Cambridge Univ. Press 2003). THOMAS J. KELLEHER ET AL., *CONSTRUCTION DISPUTES: PRACTICE GUIDE WITH FORMS* 565 (Aspen Publishers 2d ed. 2002). AMORI, *supra* note 10, at 35.

ity to grow and innovate. The discussion below offers examples of how opportunity costs can materialize alongside litigation.

1. The Impact of “Time and Energy Loss” on Organizational Goals

Reports over the past twenty years consistently demonstrate how operational goals can be affected by the direction of internal time and energy toward litigation. A study published in 1998 of six large corporations examines the diverted management costs—or “management distraction”¹⁴—associated with litigation.¹⁵ Rather than spending their time on core business matters¹⁶ and other productive activities, managers expend considerable time assisting lawyers in preparation and acting as witnesses and affiants in the proceedings.¹⁷ A 2002 National Small Business Poll reveals that over 20% of small business owners spend more time on liability issues than on “vital business activities” (described as introducing new technologies, evaluating changes in employee wages and benefits, obtaining or repaying business loans, evaluating the competition, and investigating how to cut costs).¹⁸ A 2014 survey confirms a similar impact: 40% of small technology companies indicated that even the recipient of a patent demand letter had a significant operational impact.¹⁹

Lost time spent on management can eat into a company’s profits.²⁰ In an attempt to explain why the Texaco-Pennzoil litigation resulted in a reduced combined equity value of two billion dollars for both companies, David Cutler and Lawrence Summers attribute losses to management distraction and reduced productivity during litigation.²¹ Opportunity costs are also a critical factor in

¹⁴ In its 2008 quarterly report, the NitroMed company noted this factor as one of the substantial costs of any potential class action litigation. See U.S. SEC. & EXCH. COMM’N, *NitroMed, Inc., Form 10-Q Quarterly Report* (Aug. 5, 2008) WIKINVEST, [http://www.wikinvest.com/stock/NitroMed_\(NTMD\)/Filing/10-Q/2008/F2836806#Item1a_RiskFactors_131536](http://www.wikinvest.com/stock/NitroMed_(NTMD)/Filing/10-Q/2008/F2836806#Item1a_RiskFactors_131536) (last visited July 18, 2018).

¹⁵ Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 1–28 (1998).

¹⁶ *Id.* at 8; Watson et al., *supra* note 6, at 55.

¹⁷ ADAMS, *supra* note 11, at 268; Lind, *supra* note 1, at 150.

¹⁸ William J. Dennis Jr., *Business Insurance*, NFIB NAT’L SMALL BUS. POLL (2002), [http://411sbfacts.com/files/businessinsurance\[1\].pdf](http://411sbfacts.com/files/businessinsurance[1].pdf).

¹⁹ Colleen Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461, 461–75 (2014).

²⁰ McEwen, *supra* note 15, at 8.

²¹ David M. Cutler & Lawrence H. Summers, *The Costs of Conflict Resolution and Financial Distress: Evidence From the Texaco-Pennzoil Litigation* 1, 2, 13 (Nat’l Bureau of Econ. Research, Working Paper No. 2418, 1987).

Simon Vande Walle's assessment of a Japanese oil cartel case in which the defendants settled for nine million yen, even though the plaintiffs had only claimed 363,000 yen.²² He concludes that it is plausibly less costly for a defendant company to settle for twenty-five times more than its liability exposure than to pay the attorney fees and opportunity costs of continuing litigation.²³

As an economist and scientific adviser for the fishery management system, Dr. Susan Hanna has studied the "bundle of costs" associated with litigation.²⁴ She points to litigation between Leatherback Sea Turtle and National Marine Fisheries Service ("NMFS") as a prime example of the opportunity costs of lost personnel.²⁵ Hanna estimates the amount of time dedicated by NMFS scientists to preparing a biological opinion for trial was equivalent to one year of work by eight senior scientists.²⁶ Other important objectives came to a halt as litigation preparation became the organization's top priority.²⁷

2. Opportunity Costs for Public Interest Organizations

A similar diversion of energy can be seen within non-profit public interest groups, even where litigation is closely tied to organizational objectives. Grassroots organizations can be overwhelmed by the resource demands of the process, which can result in neglecting alternative avenues and pertinent goals.²⁸ In unanticipated ways, the structure of litigation can curtail incentives and opportunities for social reform work,²⁹ a form of "legal cooptation."³⁰ The risk is that a focus on legal remedies "narrows the causes, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from more effective and transformative alternatives."³¹ Rather than being directed towards popular mobili-

²² SIMON VANDE WALLE, *PRIVATE ANTITRUST LITIGATION IN THE EUROPEAN UNION AND JAPAN: A COMPARATIVE PERSPECTIVE* 268 (2013).

²³ *Id.*

²⁴ Susan Hanna, *More Than Meets the Eye: The Transaction Costs of Litigation*, 7 OCEAN & COASTAL L.J. 13 (2001).

²⁵ *Leatherback Sea Turtle v. NMFS*, No. 99-00152DAE, 1999 U.S. Dist. LEXIS 23317 (D. Haw. Oct. 18, 1999).

²⁶ Hanna, *supra* note 24, at 15.

²⁷ *Id.*

²⁸ Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 938, 938-49 (2007).

²⁹ CHEN & CUMMINGS, *supra* note 11.

³⁰ Lobel, *supra* note 28, at 939.

³¹ *Id.*

zation, scarce resources are allocated to litigation costs instead.³² The legal process can also marginalize smaller groups within non-profit litigation coalitions, leaving better-resourced organizations to exercise more tactical decision-making power.³³ Organizations' mandates are often neglected as causes are prioritized according to which cases are most winnable.³⁴

These are all features of the "professionalization" of public interest work, which may overwhelm a movement³⁵ and create a dependency on lawyers.³⁶ Even when lawyers are committed to client empowerment, they often struggle to link complex, technical lawsuits to their clients' personal interests.³⁷ A lawyer representing an organization in a grassroots struggle may translate the group's concerns into a distinct, professional language which tends to neutralize the passion fuelling its goals: grievances often become repackaged into legal jargon.³⁸ As a case progresses through appellate courts, it can become more remote from the community.³⁹ Legal action can also reduce the organization's "vision to a limited scope of remedies" thus crowding out alternative paths.⁴⁰

3. Loss of Opportunity to Advance Innovation and Growth

The diversion of organizational time and energy can impede the innovation agenda. For example, Green's analysis of Merrell's Bendectin (product liability) litigation notes the loss of employee time which otherwise would have been devoted to developing and producing new drugs.⁴¹ While litigation is in progress, managers have more difficulty making long-term plans, slipping instead into survival mode and preserving scarce resources to accommodate different litigation outcomes.⁴² Colleen Chien's research involving

³² *Id.* at 950.

³³ *Id.* at 949. See also Martha Gómez, *The Culture of Non-Profit Impact Litigation*, 23 CLINICAL L. REV. 635 (2017).

³⁴ Lobel, *supra* note 28, at 949; Gómez, *supra* note 33, at 651.

³⁵ Lobel, *supra* note 28, at 953.

³⁶ Gómez, *supra* note 33, at 649.

³⁷ Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 17 N.Y.U. REV. L. & SOC. CHANGE 535, 540 (1987-1988).

³⁸ Lobel, *supra* note 28, at 953.

³⁹ White, *supra* note 37, at 541.

⁴⁰ Lobel, *supra* note 28, at 955.

⁴¹ MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 335 (1996).

⁴² Hanna, *supra* note 24, at 16. The author makes this observation in the context of fisheries management, where litigation significantly impacts resource allocation as well as prevents experiments with alternative approaches.

patent litigation revealed that 40% of respondents indicated that patent assertion entity demands, which often result in litigation, had an operational impact on the achievement of milestones.⁴³ A 1997 US Senate Commerce Committee study reported that among approximately 2,000 CEOs, product liability systems caused 36% to discontinue products, 15% to lay off workers, and 8% to close their plants.⁴⁴ Thirty percent of firms undergoing litigation decided against introducing new products.⁴⁵ At the time, Secretary of Commerce Robert Mosbacher identified a “fear to innovate” as an indirect cost of product liability litigation.⁴⁶

Organizations not already involved in litigation can be affected by the perceived threat of a lawsuit. Hanna attributes the fear of litigation to an increased unwillingness of organizations to experiment with alternative, solution-based management approaches.⁴⁷ With the threat of litigation in mind, decision-making becomes focused on process rather than outcome, and management styles tend to shift away from participatory toward “command and control” orientations.⁴⁸

B. *The Second Sphere: Impact on the Organization’s Reputation*

Reputational impacts are the most visible side effects of litigation, but are still often underestimated. Reputation helps secure and maintain positive relationships with stakeholders as well as general competitive economic performance.⁴⁹ Reputational assets have been linked to “recruitment pools, community and institutional support,” as well as employee commitment and satisfac-

⁴³ Chien, *supra* note 19, at 474.

⁴⁴ JOHN MCCAIN, PRODUCT LIABILITY REFORM ACT OF 1997: REPORT OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON S. 648 TOGETHER WITH MINORITY VIEWS 8 (1997), <https://www.congress.gov/105/crpt/srpt32/CRPT-105srpt32.pdf>.

⁴⁵ *Id.*

⁴⁶ LARRY PRESSLER, PRODUCT LIABILITY FAIRNESS ACT: REPORT TOGETHER WITH MINORITY VIEWS OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON S. 565 9 (1995), <https://www.congress.gov/104/crpt/srpt69/CRPT-104srpt69.pdf>.

⁴⁷ Hanna, *supra* note 24, at 16.

⁴⁸ *Id.* at 14.

⁴⁹ W. Timothy Coombs & Sherry J. Holladay, *Unpacking the Halo Effect: Reputation and Crisis Management*, 10 J. COMM. MGMT. 123, 123 (2006); Ayla Zehra Öncel & Müge Leyla Yıldız, *The Impact of Ethical Climate on Relationship Between Corporate Reputation and Organizational Identification*, 58 SOC. & BEHAV. SCI. 714, 716 (2012); Petya Puncheva, *The Role of Corporate Reputation in the Stakeholder Decision-Making Process*, 47 BUS. & SOC’Y 272, 272 (2008); Tom Watson, *Reputation and Ethical Behaviour in a Crisis: Predicting Survival*, 11 J. COMM. MGMT. 371, 371 (2007).

tion.⁵⁰ Reputation metrics have become important investment criteria for financial analysts.⁵¹ An organization's reputation is considered a vital factor for all organizations, whether they be commercial, governmental, or non-profit.⁵² Although reputation is an easily recognized factor in litigation, the way that organization's reputation may be altered is less simple, and deserves some analysis.

1. "Brand" as a Distinct Reputational Factor

Although the terms are often used interchangeably, reputation and brand can be distinguished: brand is a "customercentric" concept, while reputation is a more "companycentric" concept.⁵³ A company's brand concerns product image from the customer's perspective, while reputation is concerned with the legitimacy of the organization in the eyes of stakeholders, often viewed over time.⁵⁴ The brand represents the organization within the marketplace⁵⁵ (thereby becoming its public face⁵⁶), differentiating the product or service from others and sometimes justifying higher product prices.⁵⁷ The term *brand personality* "refers to the set of human characteristics associated with a brand."⁵⁸ For example, brands such as Harley-Davidson, Marlboro, and Levi's display the brand personality of "ruggedness" as they glamorize ideals of strength and masculinity.⁵⁹ Brand personality has been shown to increase consumer usage and loyalty,⁶⁰ thus increasing the chance of an emotional bond with the product and the business.⁶¹ Brands have narrative power: they are shaped by the stories an organization

⁵⁰ Erika Hayes James & Lynn Perry Wooten, *Restoring Reputation: Firm Response Strategies for Managing a Discrimination Crisis* 3 (Darden Graduate Sch. of Bus. Admin., Working Paper No. 04-02, 2004); Coombs & Holladay, *supra* note 49, at 123.

⁵¹ Richard Ettenson & Jonathan Knowles, *Don't Confuse Reputation With Brand*, 49 MIT SLOAN MGMT. REV. 19, 19–21 (2008).

⁵² THOMAS BEKE, LITIGATION COMMUNICATION: CRISIS AND REPUTATION MANAGEMENT IN THE LEGAL PROCESS 12 (2014).

⁵³ Ettenson & Knowles, *supra* note 51, at 19.

⁵⁴ *Id.*

⁵⁵ *Id.*; David E. Sprott & Richie L. Liu, *Research Trends on Branding in Consumer Psychology*, 10 CURRENT OPINION PSYCHOLOGY 124, 124 (2016).

⁵⁶ Ying Fan, *Ethical Branding and Corporate Reputation*, 10 CORP. COMM. 341, 342 (2005).

⁵⁷ Sprott & Liu, *supra* note 55, at 124; Fan, *supra* note 56, at 341–42.

⁵⁸ Jennifer L. Aaker, *Dimensions of Brand Personality*, 34 J. MARKETING RES. 347, 347 (1997).

⁵⁹ *Id.* at 353.

⁶⁰ *Id.* at 354.

⁶¹ Fan, *supra* note 56, at 342; Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1631 (2006).

tells about itself,⁶² and create a “set of mental associations that accompany the name.”⁶³

Branding therefore serves as a way for an organization to develop and manage its relationship with the public.⁶⁴ Branding can be strategic, allowing an organization to position itself to exemplify certain qualities, such as family values, safety, and security.⁶⁵ A brand is also an organization’s most vulnerable asset.⁶⁶ Litigation can quickly alter how people perceive a brand, creating an “organizational crisis,”⁶⁷ especially if a lawsuit may adversely impact the value of the brand.⁶⁸

2. Social Licence and Organizational Behavior

In today’s world, brands are increasingly evaluated by moral standards.⁶⁹ Organizations are expected to earn a “social licence to operate” in order to protect their image, securing ongoing acceptance or approval from the community and stakeholders.⁷⁰ Reputation is an essential part of an organization’s social legitimization.⁷¹ Consumer trends support this: 30% of those surveyed in the UK report boycotting a product or company for ethical reasons within the last year.⁷² Brands are expected to contribute to the public good, to be strong both legally and ethically, and to draw on the core values of trust, honesty, and integrity.⁷³

Connected to the concept of social licence is the “halo-effect”—the expectation that an organization with a prior favorable reputation will suffer less and rebound faster after a crisis.⁷⁴ Behavioral psychology, and in particular, expectancy confirmation theory, suggest that people are reluctant to change firm expecta-

⁶² D. Gordon Smith, *The Branding Effect of Contracts*, 12 HARV. NEGOT. L. REV. 189, 189 (2007); Elena B. Langan, *The Elimination of Child Custody Litigation: Using Business Branding Techniques to Transform Social Behavior*, 36 PACE L. REV. 375 (2016).

⁶³ Fleischer, *supra* note 61.

⁶⁴ Fan, *supra* note 56, at 342.

⁶⁵ Smith, *supra* note 62, at 194.

⁶⁶ Fan, *supra* note 56, at 344.

⁶⁷ James & Wooten, *supra* note 50, at 5.

⁶⁸ Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part I: Technique and Corporate Litigation*, 4 AM. L. & ECON. REV. 141, 161 (2002).

⁶⁹ Fan, *supra* note 56, at 343.

⁷⁰ Nina Lansbury Hall & Talia Jeanneret, *Social Licence to Operate: An Opportunity to Enhance CSR for Deeper Communication and Engagement*, 20 CORP. COMM. 213, 213 (2015).

⁷¹ Watson, *supra* note 49, at 372.

⁷² Watson et al., *supra* note 6, at 55.

⁷³ Fan, *supra* note 56, at 343.

⁷⁴ Coombs & Holladay, *supra* note 49, at 123.

tions when confronted with contradictory evidence.⁷⁵ In this way, pre-existing positive perceptions—or labels⁷⁶—can lend a halo, preserving reputation and maintaining investor support even during a crisis such as litigation.⁷⁷ While litigation may carry reputational risks, a well-established social licence may therefore offer some protection for the organization.

Further examples show the inter-relationship between social licence, haloes, and litigation. Coombs and Holladay studied public reaction to accidents involving Disney and Walmart, two corporations with extremely high ratings on the Media Reputation Index (“MRI”)⁷⁸: Study participants were presented with news stories involving an accident on a Disneyland ride, and an accident involving falling merchandise at Walmart.⁷⁹ The results revealed that the halo-effect acted as a shield to the reputation of both companies.⁸⁰ On the other hand, companies that have not secured social licences are described as suffering more significant reputation losses.⁸¹

The risk calculation is still not simple. Notwithstanding the halo effect, Fitzpatrick warns that past goodwill alone cannot protect an organization accused of wrongdoing.⁸² At times, the more high profile the brand, the higher the public expectation of socially responsible behaviour.⁸³ A study by Shandwick International reveals that 59% of those surveyed believe a company is “probably guilty” if it is being sued.⁸⁴ Corporate reputation extends beyond the public’s associations with an individual product to the organization’s value system.⁸⁵ An organization’s survival is related to its fulfillment of economic, ethical, and social responsibilities as defined by public consensus.⁸⁶ James Hardie Industries was not able to recover from reputation losses resulting from asbestos litiga-

⁷⁵ *Id.* at 125.

⁷⁶ Puncheva, *supra* note 49, at 276.

⁷⁷ Coombs & Holladay, *supra* note 49, at 123; Steven H. Appelbaum et al., *Organizational Crisis: Lessons From Lehman Brothers and Paulson & Company*, 22 INT’L J. COM. & MGMT. 286, 291 (2012). *See also* Puncheva, *supra* note 49, at 276.

⁷⁸ Coombs & Holladay, *supra* note 49, at 128, 131.

⁷⁹ *Id.*

⁸⁰ *Id.* at 134.

⁸¹ Brian Wynne, *Creating Public Alienation: Expert Cultures of Risk and Ethics on GMOs*, 10 SCI. AS CULTURE 445, 457 (2001); Peter J. Firestein, *Building and Protecting Corporate Reputation*, 34 STRATEGY & LEADERSHIP 25, 26 (2006).

⁸² Kathy Fitzpatrick, *Managing Legal Crises: Strategic Communication in the Court of Public Opinion*, 4 J. COMM. MGMT. 385, 394 (2000).

⁸³ Fan, *supra* note 56, at 348.

⁸⁴ Watson et al., *supra* note 6, at 60.

⁸⁵ Fan, *supra* note 56, at 345.

⁸⁶ Puncheva, *supra* note 49, at 278.

tion.⁸⁷ A large-scale boycott of the firm resulted in massive financial losses and a plummeting share price.⁸⁸ Fan describes the interplay between a brand and the public as a long-term relationship developed and maintained on the basis of trust.⁸⁹ Any perceived corporate wrongdoing can destroy that trust, dooming the brand to failure.⁹⁰

Generally, this shows how an organization's behavior (or the perception of its behavior) can affect its reputation and brand—with public consumers, and with stakeholders or negotiating partners as well. In an attempt to understand why 90% of complainants are successful in litigation at the World Trade Organization (“WTO”), Matthew Turk focused on reputational effects.⁹¹ He examined the critical role reputation plays in one WTO member country's ability to trade with another. Member countries face both costs and benefits due to reputational changes associated with their repeated interaction with one another.⁹² Member countries can more readily enter into agreements when they have a reputation for cooperating and complying with agreements.⁹³ Turk maintains that the reputational effect of a decision has more impact in WTO litigation than monetary damages, an injunction, or a legal order.⁹⁴

3. Litigation as a Public Relations Strategy

Concerns about brand can also motivate litigation, rather than deter it. Amori contends that organizations feel compelled to litigate when the potential reputational damage of concessions in a settlement exceeds the benefit of an early resolution.⁹⁵ However, a victory in court will not always protect an organization from reputational damage, as demonstrated in the *Monsanto v. Schmeiser* litigation.⁹⁶ Seed company Monsanto sued Saskatchewan farmer Percy Schmeiser after its patented Roundup Ready

⁸⁷ *Id.* at 283.

⁸⁸ *Id.* at 285.

⁸⁹ Fan, *supra* note 56, at 345.

⁹⁰ *Id.*

⁹¹ Matthew C. Turk, *Why Does the Complainant Always Win at the WTO?: A Reputation-Based Theory of Litigation at the World Trade Organization*, 31 NW. J. INT'L L. & BUS. 385, 415 (2011).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ AMORI, *supra* note 10, at 36.

⁹⁶ *Monsanto Canada Inc. v. Schmeiser*, [2004] 1 S.C.R. 902 (Can.).

(“RR”) canola was found in his fields.⁹⁷ Although the Supreme Court of Canada upheld Monsanto’s patent, the ruling alienated farmers, who feared they could also be sued if RR genes happen to drift into their crops.⁹⁸ Some would argue that Monsanto’s patent infringement suits against farmers have damaged the company’s social legitimacy.⁹⁹ Likewise, although the accounting firm Arthur Andersen was ultimately vindicated on federal charges concerning their involvement in the Enron scandal, by the time the U.S. Supreme Court rendered its verdict, the company had declared bankruptcy.¹⁰⁰ Factors that may exonerate an organization in court may not release the organization in the eyes of the public, where technical legal compliance is not enough.¹⁰¹

The situation is further complicated by the tension between legal strategy and public relations. Lawyers are generally oriented towards recognizing problems and minimizing risks, while public relations professionals are focused on meaningful communication with the public.¹⁰² While communication with the public can build an organization’s credibility, pending litigation may limit public relations opportunities.¹⁰³ Public statements may be used against the organization in a lawsuit as an admission of liability.¹⁰⁴ The very openness and honesty that can favorably affect public opinion can also be highly damaging in subsequent litigation.¹⁰⁵ O’Connell therefore recommends that public relations and legal teams collaborate in crafting messages to the public.¹⁰⁶ An organization may also need to invest in a strategy to manage public perceptions during litigation—a form of “litigation communication” to address the special sensitivities and dynamics of the process.¹⁰⁷

⁹⁷ Peter Andr  e, *Civil Society and the Political Economy of GMO Failures in Canada: A Neo-Gramscian Analysis*, 20 ENVTL. POL. 173, 181 (2011).

⁹⁸ *Id.*

⁹⁹ Rebecca K. Stewart, *Weeds, Seeds & Deeds Redux: Natural and Legal Evolution in the U.S Seed Wars*, 18 STAN. TECH. L. REV. 79, 89 (2014) (stating that Monsanto has litigated close to 150 infringement suits against farmers and settled 700).

¹⁰⁰ W. Scott O’Connell, *Winning in the Court of Public Opinion: Brand Protection in High Exposure Litigation*, IN-HOUSE DEF. Q., Winter 2011, at 46, 46.

¹⁰¹ Fitzpatrick, *supra* note 82, at 388.

¹⁰² O’Connell, *supra* note 100, at 47.

¹⁰³ Appelbaum et al., *supra* note 77, at 291.

¹⁰⁴ Kathy R. Fitzpatrick & Maureen Shubow Rubin, *Public Relations vs. Legal Strategies in Organizational Crisis Decisions*, 21 PUB. REL. REV. 21, 22 (1995).

¹⁰⁵ Kathleen A. Martinelli & William Briggs, *Integrating Public Relations and Legal Responses During a Crisis: The Case of Odwalla, Inc.*, 24 PUB. REL. REV. 443, 448 (1998).

¹⁰⁶ O’Connell, *supra* note 100, at 47.

¹⁰⁷ BEKE, *supra* note 52, at 21.

The advent of the Internet and social media has had serious repercussions for organizations involved in litigation, through the emergence of a “public super-consciousness.”¹⁰⁸ Now that an organization’s past conduct is observable and identifiable, information is an essential element of reputation.¹⁰⁹ Members of the public are independently capable of measuring an organization’s ethical and organizational behavior,¹¹⁰ and as they engage in such research, they are not bound by the same legal regulations and judicial restrictions as participants within the legal process.¹¹¹ Leaked internal documents have become more common during corporate litigation, especially when the corporation is accused of malfeasance.¹¹² Once damaging information is disseminated through the internet, attempts to limit access can further damage the organization’s reputation.¹¹³ Garcia and Ewing observe that the party that can most quickly and broadly communicate its “expert” opinions is most likely to gain an advantage on the public relations front, regardless of how dubious the expert’s credentials may be.¹¹⁴ These authors warn organizations to expect and prepare for exaggeration, error, misstatement, and misdirection from their opponents during litigation.¹¹⁵

When a corporate lawsuit becomes a media event, the harm to an organization’s brand and social licence can be magnified.¹¹⁶ Journalists covering litigation often use narrative devices to craft a story, typically casting the corporate defendant as a villain with deep pockets, and the plaintiff as “the little guy” fighting against power and privilege.¹¹⁷ Informal media devices—blogs, websites, social networking sites, and mass e-mails—increasingly influence public perception.¹¹⁸ While companies have some control of their messaging through press releases within the mainstream media, customers control the message in the broader sphere.¹¹⁹ Pikas re-

¹⁰⁸ Firestein, *supra* note 81, at 25.

¹⁰⁹ Turk, *supra* note 91, at 415.

¹¹⁰ Watson, *supra* note 49, at 381.

¹¹¹ BEKE, *supra* note 52, at 21.

¹¹² Helio Fred Garcia & Anthony Ewing, *Defending Corporate Reputation From Litigation Threats*, 36 STRATEGY & LEADERSHIP 41, 42 (2008).

¹¹³ *Id.* at 43.

¹¹⁴ *Id.* at 42.

¹¹⁵ *Id.* at 44.

¹¹⁶ *Id.* at 42.

¹¹⁷ *Id.* at 42.

¹¹⁸ Garcia & Ewing, *supra* note 112, at 43.

¹¹⁹ Christina K. Pikas, *Blog Searching for Competitive Intelligence, Brand Image, and Reputation Management*, ONLINE MAG., July–Aug. 2005, at 16, 16.

fers to the Kryptonite bike lock litigation as an example of the shifting landscape of public engagement.¹²⁰ As early as 1992, bicycling magazines had reported that Kryptonite bike locks could be picked with a Bic pen.¹²¹ Magazine articles had little consumer impact, and Kryptonite declined to make any improvements to the lock design.¹²² Approximately ten years later, a blog featuring a video demonstration of how to pick a Kryptonite lock in thirty seconds went viral, prompting several lawsuits against the company.¹²³ Corporate litigation can be viewed as “a battle for the hearts and minds of its stakeholders,”¹²⁴ and members of the public are quick to decide which side is right.¹²⁵ As a result, stockholders are more likely to exit from the decision-making process when they perceive that institutional actions do not align with social values.¹²⁶

4. Mitigating Reputational Loss

Once reputational losses are anticipated, their valuation ought to include the resources required to rehabilitate the organization’s image and make any necessary behavioural changes.¹²⁷ Organizations may find it necessary to engage in rebranding, with both external and internal dimensions. Externally, organizations may identify a new name or logo, or find ways to build a more positive perception of the organization.¹²⁸ Internally, rebranding may involve recasting the organization’s core mission and values.¹²⁹

Any rehabilitation that involves a review of corporate ethics is likely to take time. When a lawsuit against Nike revealed that some of the company’s Asian subcontractors were forcing children to work in poor conditions, the corporation re-examined its entire supply chain and published a list of their suppliers.¹³⁰ Nike moved toward transparency, but the press surrounding the litigation still left the company’s reputation severely damaged. The ignition

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*; Kathryn Masterson, *Kryptonite to Offer Bikers Lock Exchange*, CHI. TRIB. (Sept. 23, 2004), http://articles.chicagotribune.com/2004-09-23/business/0409230302_1_kryptonite-lock-refund.

¹²⁴ Garcia & Ewing, *supra* note 112, at 43.

¹²⁵ BEKE, *supra* note 52, at 22.

¹²⁶ Pucheva, *supra* note 49, at 274.

¹²⁷ Appelbaum et al., *supra* note 77, at 294; James & Wooten, *supra* note 50, at 17.

¹²⁸ Elena B. Langan, *The Elimination of Child “Custody” Litigation: Using Business Branding Techniques to Transform Social Behavior*, 36 PACE L. REV. 375, 380 (2016).

¹²⁹ *Id.*

¹³⁰ Firestein, *supra* note 81, at 27.

switch safety scandal experienced by General Motors (“GM”) is another example of the long-term reputational cost, where litigation reveals a breach of social trust.¹³¹ Information concerning problems with the ignition switches had been circulated within the company for years, but due to cost considerations, GM made the decision not to recall or repair any cars already sold. In the years after the litigation, GM became known as one of the “most damaged brands.” These examples demonstrate the complex inter-relationship between corporate ethics, brand, and litigation strategies. The management of corporate reputation may go far beyond legal strategies, needing to be pro-actively shaped in the boardroom—with thought to shifting social customs, organizational ethics, and conceptions of public responsibility.¹³²

Transparency can be part of a communication strategy, with some experts arguing that brand damage is minimized when organizations communicate both good and bad news.¹³³ O’Connell recommends that organizations take a proactive approach to protecting their brand. He emphasizes the importance of identifying brand attributes the organization most wants to preserve during a potential crisis, which includes admitting to mistakes if that will bolster the organization’s credibility in delivering a solution.¹³⁴ While O’Connell acknowledges there are concerns about admissions of liability before all the facts are known, efforts to conceal liability are extremely damaging in the court of public opinion.¹³⁵ When an organization decides to defend itself in litigation, O’Connell advises that the litigation strategy should not undermine the objective of insulating the brand from long-term damage.¹³⁶

A lawsuit may be treated as an opportunity to correct problems within the organization, and this sometimes happens in the context of public health and safety issues.¹³⁷ In the 1980s, tainted Tylenol caused the deaths of several consumers. The company settled the wrongful death lawsuits that resulted, and used the

¹³¹ Curtis C. Verschoor, *Ethics Missteps Damage Brand Value*, STRATEGIC FIN., July 2014, at 11, 11. Verschoor maintaining that organizations with open and ethical cultures resolve problems in the short-term, allowing stronger financial performance in the long-term. Research from the Ethisphere Institute correlates. Nicole Farideh Church, *Impact of Culture on Retail Industry Compliance*, 9 J. BUS. & RETAIL MGMT. RES. 89, 94 (2014).

¹³² Fan, *supra* note 56, at 348.

¹³³ Verschoor, *supra* note 131, at 12.

¹³⁴ O’Connell, *supra* note 100, at 48.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Martinelli & Briggs, *supra* note 105, at 445.

surrounding press as a chance to demonstrate its commitment to the rapid development of a tamper-resistant product.¹³⁸ After a 2.9 million-dollar award against McDonald's in the 1990s (to a plaintiff who suffered third-degree burns when coffee spilled in her lap) the company reportedly lowered the coffee's serving temperature. Other companies such as Starbucks and Dunkin' Donuts also publicly reported they were re-evaluating how they serve coffee.¹³⁹ However, improvements in the product were not enough to fully counter the negative impact of the event. After the poisoning scandal, Tylenol suffered a 14.3% decline in its stock price relative to its forecast value.¹⁴⁰ Even after Tylenol's stock price recovered, it never reached the level forecast before the tampering event.¹⁴¹ Although the McDonald's coffee-spill case is over twenty years old, it continues to receive media attention whenever the topic of inflated punitive damages is discussed.¹⁴² Even when the organization handles the crisis as best it can, fallout from a public conflict may be considerable, and ought to be taken into account.

Again, that is not to say that a public airing of conflict is necessarily a "cost." Organizations may use a lawsuit to publicly defend themselves against false claims. In 2010, Taco Bell faced a class action lawsuit over the content of their taco filling. The plaintiffs alleged that because the filling did not meet the minimum requirements to qualify as "beef," Taco Bell was engaging in false advertising when referring to the taco filling as "seasoned beef."¹⁴³ Four days after the litigation was announced, Taco Bell took out a full-page advertisement in the Wall Street Journal, USA Today, and the New York Times.¹⁴⁴ The ad was entitled: "Thank You for Suing Us," and went on to rebut the allegations.¹⁴⁵ When the lawsuit was eventually dropped, Taco Bell took out another full-page ad in several newspapers with the headline, "Would it kill you to say you're

¹³⁸ Firestein, *supra* note 81, at 28.

¹³⁹ Alfonso González-Herrero & Cornelius B. Pratt, *How to Manage a Crisis Before—or Whenever—it Hits*, 40 PUB. REL. Q. 25, 25–28 (1995).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 29.

¹⁴³ DAVID SILVER, *MANAGING CORPORATE COMMUNICATIONS IN THE AGE OF RESTRUCTURING, CRISIS AND LITIGATION: REVISITING GROUPTHINK IN THE BOARDROOM* 50 (2013).

¹⁴⁴ Maureen Morrison, *Taco Bell Counters 'Meat Filling' Charges in Lawsuit With Print, Web Effort*, ADVERT. AGE (Jan. 28, 2011), <http://adage.com/article/news/taco-bell-launches-ad-campaign-response-lawsuit/148552/>.

¹⁴⁵ *Id.* An effective rebuttal may include or require verification from a neutral third party. See Fleischer, *supra* note 61, at 1635.

sorry?”¹⁴⁶ Corporate communications expert David Silver attributes the successful outcome for Taco Bell to the cooperation between the communications team and legal department in developing an effective response.¹⁴⁷ Taco Bell was able to use the litigation as a basis for crafting a narrative with a beginning, middle, and ending.¹⁴⁸

In some instances, there may also be reputational benefits for the organization initiating the litigation. In the early 1980s, Ben & Jerry's brought an anti-trust claim against the Pillsbury owned company Häagen-Dazs.¹⁴⁹ Ben & Jerry's used the lawsuit to emphasize its brand image as a counterculture company.¹⁵⁰ Throughout the litigation, Ben & Jerry's positioned itself as the “little guy,” mounting a media-campaign that included T-shirts and bumper stickers with the slogan, “WHAT'S THE DOUGHBOY AFRAID OF?”¹⁵¹ The promotional campaign included classified ads in *Rolling Stone* magazine and late-night television commercials.¹⁵² The campaign provided Ben & Jerry's with positive media attention which created widespread public support for the company.¹⁵³ The anti-trust claim was eventually settled out of court. Despite being the party to initiate the lawsuit, the company was able to cast itself as the underdog, with Häagen-Dazs as the corporate bully.

While litigation may have reputational benefits, a valuation must still factor in the expense of a publicity campaign to support the lawsuit. Re-casting the litigation in a positive light or attacking litigants through social and traditional media may yield net reputational benefits. However, organizations must recognize and quantify the expenditures necessary to achieve these positive results, and factor them into the litigation's overall cost assessment.

¹⁴⁶ ‘Mystery Meat’ Lawsuit Dropped: A Victory for Taco Bell?, WEEK (Apr. 21, 2011), <http://theweek.com/articles/485391/mystery-meat-lawsuit-dropped-victory-taco-bell>.

¹⁴⁷ SILVER, *supra* note 143, at 48.

¹⁴⁸ *Id.*

¹⁴⁹ Fleischer, *supra* note 61, at 1613.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1612.

¹⁵² *Id.*

¹⁵³ *Id.* at 1613.

C. *The Third Sphere: Impact on Psychological Health of the Organization*

While litigation is underway, the organization's internal network of relationships may also be suffering. Research on the psychological impact of litigation shows how *difficult* litigation can feel for those involved. Although levels of psychological stress vary according to personality type and personal circumstances, stress has been described as inevitable for all clients¹⁵⁴ in any lawsuit in which the stakes *feel* significant to the litigant.¹⁵⁵ The same can be said for the organizational client.¹⁵⁶ In the face of litigation, psychological stresses can be manifested as vulnerabilities in the corporate decision-making process, and threats to the internal identity of an organization, which impact particularly its employees.

1. Organizational Decision-Making

According to a growing body of literature on the psychology of decision-making, cognitive biases normally at work in the human brain are likely to cloud judgment as clients—and their lawyers—make decisions against a backdrop of litigation and conflict.¹⁵⁷ Given the focus of this discussion on the “organizational experience,” it is important to consider how people across the organization may be psychologically affected: executives, managers, board members, and employees alike. The intense, direct pressure of a lawsuit can create a potentially high level of instability within organizations.¹⁵⁸ In response to higher levels of uncertainty, emo-

¹⁵⁴ Larry H. Strasburger, *The Litigant-Patient: Mental Health Consequences of Civil Litigation*, 27 J. AM. ACAD. PSYCHIATRY L. 203, 204 (1999).

¹⁵⁵ Paul R. Lees-Haley, *Litigation Response Syndrome: How Stress Confuses the Issues*, 56 DEF. COUNS. J. 110, 112 (1989).

¹⁵⁶ The field of “organizational psychology” emphasizes the importance of understanding human behavior and social processes within organizations, and their relationship to organizational health; MICHAEL G. AAMODT, *INDUSTRIAL/ORGANIZATIONAL PSYCHOLOGY: AN APPLIED APPROACH* (8th ed. 2016).

¹⁵⁷ See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (Doubleday Can. 2011); HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551 (2008); RANDALL KISER, *BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS* (1st ed. 2010); Charles W. Murdock & Barry Sullivan, *What Kahneman Means for Lawyers: Some Reflections on Thinking, Fast and Slow*, 44 LOY. U. CHI. L.J. 1377, 1396 (2013); Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 101 (2013).

¹⁵⁸ Sheryl Skaggs, *Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management*, 113 AM. J. SOCIOLOGY 1148, 1152 (2008). See

tion, and pressure, managers and other decision-makers may misperceive the crisis and make decisions that put the organization at greater risk.¹⁵⁹ Managers may fall victim to cognitive biases, which hamper decision-making during litigation: attribution biases, planning fallacy, or an escalation of commitment.¹⁶⁰ Attribution bias can lead managers to attribute success to internal factors, such as their personal abilities, and failures to external factors, such as bad luck.¹⁶¹ Attribution bias results in overconfidence, which in turn, impairs strategic and legal decision-making.¹⁶² Considering the research that suggests overconfident CEOs tend to overinvest in projects and overpay for acquisitions, it is likely they also overestimate their chances of success in litigation.¹⁶³

“Planning fallacy” occurs when managers make decisions based on misplaced optimism.¹⁶⁴ Kahneman and Lovallo explain that planning fallacy is more common within organizations where optimism is typically encouraged and pessimism interpreted as disloyalty.¹⁶⁵ Critical thinking becomes undermined within an organization as mutually reinforcing optimistic biases are validated by the group.¹⁶⁶ Decision-makers can allow imagined gossip and criticism at the water cooler to override their own good judgment,¹⁶⁷ and “strong emotions may cause decision-makers to act impulsively, focusing on short-term rather than longer-term goals.”¹⁶⁸

also Michael C. Withers et al., *Stay or Leave: Director Identities and Voluntary Exit From the Board During Organizational Crisis*, 23 ORG. SCI. 835, 839 (2012).

¹⁵⁹ Appelbaum et al., *supra* note 77, at 295; Withers et al., *supra* note 158, at 839.

¹⁶⁰ Withers et al., *supra* note 158, at 839. See Harold H. Kelley, *The Processes of Causal Attribution*, 28 AM. PSYCHOLOGIST 107 (1973); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 27 (1976).

¹⁶¹ Y. Han Kim, *Self Attribution Bias of the CEO: Evidence From CEO Interviews on CNBC*, 37 J. BANKING & FIN. 2472, 2472 (2013).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Dan Lovallo & Daniel Kahneman, *Delusions of Success: How Optimism Undermines Executives' Decisions*, HARV. BUS. REV., July 2003, at 56, 58 (2003). See also ROBBENNOLT & STERNLIGHT, *supra* note 8, at 23.

¹⁶⁵ Lovallo & Kahneman, *supra* note 164, at 60. See also KAHNEMAN, *supra* note 157, at 418.

¹⁶⁶ Lovallo & Kahneman, *supra* note 164, at 60.

¹⁶⁷ KAHNEMAN, *supra* note 157, at 418.

¹⁶⁸ ROBBENNOLT & STERNLIGHT, *supra* note 8, at 46. For example, studies show that certain emotional responses can increase the chances a client will choose to sue rather than settle; anger and pride generally lead to a higher frequency of trials even when the case has a “nonpositive expected wealth value for the litigants.” Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 INT’L REV. L. & ECON. 31, 33 (1992). See also Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 43 U. ILL. L. REV. 43, 83 (1999).

The tendency to maintain or intensify commitment to a losing course of action is known as “escalation of commitment.”¹⁶⁹ Managers tend to escalate when faced with negative feedback about a course of action for which they feel responsible.¹⁷⁰ In an attempt to protect reputation and justify past actions, organizational decision-makers may commit to a failing course of action.¹⁷¹ This explains why decision-makers could favor litigation, even when the cost-benefit analysis suggests settlement.

2. Employee Identity and Belonging, and Organizational Morale

A lawsuit can also become an internal crisis if it threatens the organization’s image in the eyes of its employees.¹⁷² Research affirms that identity is a core human need,¹⁷³ likely to impact relationships inside as well as outside the organization. Potential stakeholders, customers, and employees alike evaluate their encounters with an organization through their individual values, and then choose to interact with organizations that affirm their sense of identity.¹⁷⁴ This sense of identity can become threatened by “any overt action by another party that challenges, calls into question, or diminishes a person’s sense of competence, dignity, or self-worth.”¹⁷⁵ All of these events can occur during the process of litigation. For example, product liability litigation often leads to scrutiny of the organization’s work and research.¹⁷⁶ Employees can feel increasingly alienated and undermined as the quality of their work is attacked.¹⁷⁷

Business administration experts contend that organizations experience identity crises similar to those experienced by individu-

¹⁶⁹ Dustin J. Sleesman et al., *Cleaning Up the Big Muddy: A Meta-Analytic Review of the Determinants of Escalation of Commitment*, 55 ACAD. MGMT. J. 541, 541 (2012).

¹⁷⁰ *Id.* at 547.

¹⁷¹ *Id.* at 554; AMORI, *supra* note 10, at 36.

¹⁷² James & Wooten, *supra* note 50, at 7.

¹⁷³ Puncheva, *supra* note 49, at 277.

¹⁷⁴ Watson, *supra* note 49, at 372; Puncheva, *supra* note 49, at 276.

¹⁷⁵ Karl Aquino & Scott Douglas, *Identity Threat and Antisocial Behavior in Organizations: The Moderating Effects of Individual Differences, Aggressive Modeling, and Hierarchical Status*, 90 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 195, 196 (2003). *See also* Richard P. Larrick, *Motivational Factors in Decision Theories: The Role of Self-Protection*, 113 PSYCHOL. BULL. 440, 444 (1993) (addressing the impact of threats to self-image on decision-making).

¹⁷⁶ Hanna, *supra* note 24, at 17.

¹⁷⁷ *Id.*

als.¹⁷⁸ For those within the organization, corporate reputation reaches beyond superficial appearances to include integrity, accountability, and fundamental purpose¹⁷⁹: the organization's "internal brand."¹⁸⁰ Like human beings, corporations seek to preserve their self-esteem and avoid psychological pain and discomfort.¹⁸¹ The negative press of litigation—and changing external perception of an organization—eventually become internalized, creating pressure on the organization to adjust.

Associated with this is the "organizational identification" factor: the individual's sense of belonging within an organization.¹⁸² Organizational identification correlates with positive outcomes such as increased motivation, job satisfaction, and a willingness to cooperate with others within the organization.¹⁸³ Those who identify strongly with the organization can actually experience an effective and cognitive bond with the organization as a social entity.¹⁸⁴ At the same time, individuals may internalize the organization's failures as their own.¹⁸⁵ The tendency to closely identify with the organization is magnified as employees are expected to be "front-line ambassadors" for the organization during the crisis.¹⁸⁶ Some may choose to exit the organization as a form of escape and disassociation.¹⁸⁷

The identity threat of litigation can result in antisocial workplace behavior in the form of displaced aggression.¹⁸⁸ The adversarial nature of litigation affects the workplace environment as employees face a "win or lose" situation.¹⁸⁹ Research suggests that there are social and psychological consequences resulting from being perceived as a "loser."¹⁹⁰ Those at a lower end of a hierarchy

¹⁷⁸ Sungjoon Cho, *An International Organization's Identity Crisis*, 34 NW. J. INT'L L. & BUS. 359 (2014). See also Öncel & Yildiz, *supra* note 49.

¹⁷⁹ Öncel & Yildiz, *supra* note 49, at 715.

¹⁸⁰ Fleischer, *supra* note 61, at 1604.

¹⁸¹ Cho, *supra* note 178, at 378.

¹⁸² Öncel & Yildiz, *supra* note 49, at 717.

¹⁸³ *Id.*

¹⁸⁴ *Id.*; Withers et al., *supra* note 158, at 841.

¹⁸⁵ Withers et al., *supra* note 158, at 841.

¹⁸⁶ David Weiner, *Crisis Communications: Managing Corporate Reputation in the Court of Public Opinion*, 70 IVEY BUS. J. (March 2006), <https://iveybusinessjournal.com/publication/crisis-communications-managing-corporate-reputation-in-the-court-of-public-opinion/>.

¹⁸⁷ Sheldene Simola, *Concepts of Care in Organizational Crisis Prevention*, 62 J. BUS. ETHICS 341 (2005); Withers et al., *supra* note 158, at 844.

¹⁸⁸ Aquino & Douglas, *supra* note 175, at 196.

¹⁸⁹ Karen Danna & Ricky W. Griffin, *Health and Well-Being in the Workplace: A Review and Synthesis of the Literature*, 25 J. MANAGEMENT 357 (1999).

¹⁹⁰ Aquino & Douglas, *supra* note 175, at 199.

can react aggressively when they perceive their social positions are being threatened.¹⁹¹ This dynamic can easily be imagined in a company that has “fallen from grace” during the course of publicly humiliating litigation.

Litigation therefore has the potential to erode organizational morale.¹⁹² Stress within the workplace can affect employee productivity, decision-making, and absenteeism.¹⁹³ When well-being in the workplace is adversely affected, employee contributions diminish, and physical health repercussions¹⁹⁴ and antisocial behavior¹⁹⁵ begin to materialize. Groups can become fractured by an “us versus them” mentality and the assignment of blame.¹⁹⁶ As litigation changes the social atmosphere of an organization and leads to conflict in the organization’s internal image, it may destabilize the organization’s internal culture in multiple ways.¹⁹⁷

III. VALUING INDIRECT COSTS IN EACH SPHERE

The indirect effects of litigation in the above three “spheres of impact” can be difficult to measure. The literature—and even the examples above—offer little guidance for developing a metric. As a first step, assigning value to indirect costs in a risk assessment requires making a distinction between sunk costs and anticipated costs.¹⁹⁸ Risk assessment involves a comparison of process options, “from this moment on.” Sunk costs, already incurred, are not factored into strategies about how to move forward, unless recoverable through litigation or other avenues. Another dimension of cost, which is important to factor out, is the cost of unresolved conflict, as distinct from the litigation itself. But this is difficult to do. In some of the examples above, an indirect cost (for example, reputational or brand damage) is ascribed to litigation, when the cost has actually occurred as a result of the events surrounding the original dispute. If the harm pre-exists the process being used to

¹⁹¹ *Id.* at 199.

¹⁹² Hanna, *supra* note 24, at 16.

¹⁹³ Danna & Griffin, *supra* note 189, at 358.

¹⁹⁴ *Id.*; *see also id.* at 370 (explaining that health impacts include heart disease, mental breakdown, poor health behaviors, job dissatisfaction, accidents, and certain types of cancer).

¹⁹⁵ *Id.* at 369.

¹⁹⁶ Withers et al., *supra* note 158, at 841.

¹⁹⁷ Appelbaum et al., *supra* note 77, at 294 (warning of the negative impact of “change overload,” and the increased tension that it creates in the employee’s sense of role identity).

¹⁹⁸ COSGEL & ERGENE, *supra* note 11, at 150.

resolve it, then it is more accurately a sunk cost—except to the extent that the process exacerbates or mitigates the harm.

Because risk assessments are intended to increase transparency, values may also have to be adjusted for the different reference points of stakeholders. David Kershaw explores a hypothetical from the view of a 2% shareholder contemplating a ten million-dollar lawsuit that has a 75% chance of success.¹⁹⁹ The positive expected value (“PEV”) of the claim would be \$7.5 million, or for the individual shareholder, \$150,000.²⁰⁰ If the direct legal expenses, divided, are \$100,000, the shareholder would have a PEV of \$50,000,²⁰¹ with “the cost of employee distraction” subtracted from that.²⁰²

At a base level, opportunity costs can be calculated as the price tag associated with “employee time.” A straightforward example can be found in Robert Lande’s 1993 analysis of anti-trust litigation. Lande calculated the cost of lost executive time by placing a monetary value on one hour of executive time (in 1993, \$100 per hour), and then multiplying that figure by the number of hours corporate officials claimed to have spent pursuing litigation (an average of 203 hours per case).²⁰³ He then doubled and tripled that amount to account for other indirect expenses such as administrative time, corporate overhead, directors’ time, in-house counsel time, and time wasted due to disrupted routines.²⁰⁴ After comparing those totals (\$40,600 and \$60,900) to the average litigation cost for the sample of cases (\$77,000), Lande concluded that opportunity costs resulting from a typical U.S. anti-trust case were approximately 53% to 79% of attorney fees.²⁰⁵ Over 20 years later, Walle applied Lande’s formula in his analysis of three costly oil cartel cases, estimating the opportunity costs as half of the attorney fees.²⁰⁶

Some analysts have also valued reputational loss with a formulaic approach. For example, Watson reports that on average, reputational losses associated with crises amount to 8% to 15% of

¹⁹⁹ DAVID KERSHAW, *COMPANY LAW IN CONTEXT: TEXT AND MATERIALS* 569 (1st ed. 2009).

²⁰⁰ *Id.* at 569.

²⁰¹ *Id.*

²⁰² *Id.* at 570.

²⁰³ Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 143 (1993).

²⁰⁴ *Id.* at 142–43.

²⁰⁵ *Id.* at 143.

²⁰⁶ WALLE, *supra* note 22, at 268.

the market values of affected companies.²⁰⁷ In their study of firms facing legal penalties for financial misrepresentation, Karpoff, Lee, and Martin devised a formula to isolate losses flowing from damaged reputation.²⁰⁸

Moving through the above three spheres of impact, it is evident how complex—and client-specific—each calculation could be. In our view, a fully informed litigation decision is not mathematical or formulaic, but depends on a careful process of identifying and weighing potential impacts in each case. We suggest that what clients need most is the opportunity for guided and critical reflection about priorities and risks. The examples provided in this article ought to help an organizational lawyer identify questions that will lead to a better understanding of what is at stake. Using the above three categories as touchstones, we argue that it is possible—and perhaps essential—to inventory the areas of potential indirect cost for an organization.²⁰⁹

We also posit that the values assigned to indirect costs can be subjectively derived.²¹⁰ By asking an organizational client to place a value on its own time, priorities, and relationships, the lawyer can work with the client to construct a template of process costs, and ensure that the value of each is not forgotten or ignored. An effective client-centered way to frame the valuation would be to ask, “What would you pay to avoid the possibility of this impact?”²¹¹

As the American Bar Association’s Planned Early Dispute Resolution Task Force emphasizes, simply put, “[P]arties . . . do best when they and their lawyers jointly determine what is needed to resolve a dispute at the earliest reasonable time and in the most

²⁰⁷ Watson, *supra* note 49, at 373.

²⁰⁸ Where ΔV_i represents the abnormal loss in firm value, Reputation Loss = $\Delta V_i - (\text{Fine Effect} + \text{Class Action Effect} + \text{Readjustment Effect})$. Jonathan M. Karpoff et al., *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 607 (2008). By using this formula, they concluded that for every dollar of inflated value, the firm value decreases by \$2.71 due to lost reputation.

²⁰⁹ Some clients, especially those who engage in repeat litigation, have this capacity in-house. Companies engaged in repeat litigation, such as insurance companies or litigation-funding businesses, may also use internal data bases to create coded systems for the projection and management of risk; see Keet, Heavin & Sparrow, *supra* note 9. In arguing for a risk assessment methodology it is noteworthy that organizations are generally better able to avoid decision-making errors than individuals, in that they are more likely to value orderly and evidence-based decision-making procedures. KAHNEMAN, *supra* note 157, at 418.

²¹⁰ See also DOUGLAS W. HUBBARD, *HOW TO MEASURE ANYTHING: FINDING THE VALUE OF “INTANGIBLES” IN BUSINESS* (3d ed. 2014).

²¹¹ *Id.* at 295. This approach has also been described as the assignment of a “risk premium”: an amount over the expected value of the litigation that an organization would pay to avoid all of the risks that go along with the process. ADAMS, *supra* note 11, at 158.

efficient manner.”²¹² To guide this type of conversation, we attach an appendix of questions at the conclusion of this paper that should trigger a deeper analysis of indirect costs. Ideally, an assessment of the potential risks and costs would occur in the context of a broader planning process—a systematic and preventative approach for anticipating, avoiding, assessing, and managing the organization’s disputes.²¹³

IV. CONCLUSION

At first glance, the corporate stories recounted above present a discouraging narrative of the litigation experience for organizations. Our message is not, however, “do not litigate” or “settle at all costs.” We argue simply that clear projections of the impact of litigation are vital. A lawyer with a solid grasp of organizational priorities, who has explored the full costs—direct and indirect—of litigation, can better manage both the settlement dialogue and the strategic direction of the litigation itself.²¹⁴ Clients who have had the opportunity to set realistic goals can maintain more stability through a commonly destabilizing process, and can better measure potential gains while negotiating toward resolution.²¹⁵

Risk assessment dialogue can also be used by mediators “to unlock or redirect participants’ emotional and professional investment in litigation and to remove personal and organizational incentives for entrenchment in adversarial and costly disputes.”²¹⁶ Such tools can be viewed as helping the mediator level asymmetric information, dampen the impact of posturing and psychological bias,²¹⁷ and shift the parties’ focus from the past to the future. Even facilitative mediators who favor interest-based dialogue can guide the parties with open, elicitive questions and critical thinking about

²¹² John Lande et al., *User Guide: Planned Early Dispute Resolution*, A.B.A. SEC. DISP. RESOL. 1, 1 (2013), https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/PEDR/abadr_pedr_guide.authcheckdam.pdf.

²¹³ *Id.*

²¹⁴ GORDON JOHNSON, *LITIGATING FOR SOLICITORS: MANAGING LITIGATION COSTS* (2012).

²¹⁵ Keet, Heavin & Sparrow, *supra* note 9.

²¹⁶ Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 NEGOT. J. 123, 126–27 (1995).

²¹⁷ *Id.* at 121–28.

the impact of prolonged litigation processes, or invite the parties to separately catalogue the cost and impact.²¹⁸

The key in all of these settings, we suggest, is informed and structured decision-making. To that end, we have offered a typology of three potential spheres of impact, with examples and questions to help frame transparent conversations among lawyers, clients, and mediators. With the right opportunity, clients can help weigh the less direct and visible costs of litigation—a step which will enhance the evaluation of dispute resolution processes and the construction of settlement options within them.

²¹⁸ Michaela Keet, *Informed Decision-Making in Judicial Mediation and the Assessment of Litigation Risk*, 33 OHIO ST. J. ON DISP. RESOL. 65, 86 (2018).

APPENDIX: QUESTIONS TO EXPLORE INDIRECT LITIGATION
COSTS FOR AN ORGANIZATION

A. *In the First Sphere of Impact: Loss of Opportunity
for the Organization*

What time and energy will be required of executives and employees, and how might this affect the organization's ability to focus on other goals and opportunities?

How might litigation's time and energy requirements affect the organization if its "business" is community-building, public interest, or advocacy work?

In particular, how might litigation affect plans for future growth and innovation?

B. *In the Second Sphere of Impact: Reputation*

How might litigation affect the organization's brand—the public face of the organization and its relationship with the public?

How might litigation affect its reputation, level of credibility and respect, and relationship with stakeholders?

Are there reputational benefits to litigation?

C. *In the Third Sphere of Impact: Psychological Health
of the Organization*

How might litigation affect organizational decision-making?

How may litigation affect employee identity and belonging, or organizational morale?

Mitigation: If negative effects in the above three spheres are anticipated, what *resources* would be required to counteract each impact?