

Caseload Highlights

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Estimating the Cost of Civil Litigation

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Civil Litigation Cost Model

The Civil Litigation Cost Model (CLCM) is one component of a larger NCSC civil justice initiative. The primary component of the initiative is a series of evaluations of civil justice reforms enacted to reduce delay and expense, and to increase access to justice in civil litigation. In developing the CLCM, the NCSC seeks to create a tool to measure the impact of civil justice reforms on litigants and on the practicing bar. A third component of the civil justice initiative is a series of case studies of summary jury trial programs in six jurisdictions. The case studies, published in 2012, are available at www.ncsc.org/SJT/.

Complaints about litigation costs have likely existed for as long as the legal profession, but those costs are extremely difficult to measure. Most studies of litigation costs rely on surveys that ask lawyers to report costs in a sample of actual cases filed in court. However, many attorneys decline to respond citing attorney-client confidentiality, which undermines the reliability of study findings. Another source of information about litigation costs are insurance industry reports, but these typically fail to disclose their study methods or the assumptions built into their estimation models.

To obtain reliable estimates of litigation costs, the National Center for State Courts (NCSC) has developed an alternative method of cost estimation: the Civil Litigation Cost Model (CLCM). The NCSC model relies on the amount of time expended by attorneys in various litigation tasks (see Table 1) in a variety of civil cases filed in state courts. This event-based approach to estimating litigation costs is an adaptation of the methods employed by the NCSC for court workload studies. Because these tasks take place sequentially in civil litigation, the use of this approach permits the NCSC to estimate litigation costs for cases that resolve at different stages in the litigation.

The CLCM focuses on the time expended by attorneys to resolve a “typical” automobile tort, premises liability, professional malpractice, breach of

Table 1: Litigation Tasks

Case Initiation	Conduct client intake; initial fact investigation; legal research; draft complaint/answer, cross-claim, counterclaim or third-party claim; motion to dismiss on procedural grounds; defenses to procedural motions; meet and confer regarding case scheduling and discovery.
Discovery	Draft and file mandatory disclosures; draft/answer interrogatories; respond to requests for production of documents; identify and consult with experts; review expert reports; identify and interview non-expert witnesses; depose opponent's witnesses; prepare for and attend opponent's depositions; resolve electronically stored information issues; review discovery/case assessment; resolve discovery disputes.
Settlement	Attend mandatory ADR; settlement negotiations; settlement conferences; draft settlement agreement; draft and file motion to dismiss.
Pretrial Motions	Legal research; draft motions <i>in limine</i> ; draft motions for summary judgment; answer opponent's motions; prepare for motion hearings; argue motions.
Trial	Legal research; prepare witnesses and experts; meet with co-counsel (trial team); prepare for voir dire; motion to sequester; prepare opening and closing statements; prepare for direct (and cross) examination; prepare jury instructions; propose findings of fact and conclusions of law; propose orders; conduct trial.
Post-Disposition	Conduct post-disposition settlement negotiations; draft motions for rehearing, JNOV, additur, remittitur, enforce judgment; any appeal activity.

The CLCM explicitly recognizes that many factors affect the amount of attorney time expended on different litigation tasks. Among the more obvious factors are case complexity, client expectations, and the working relationship with opposing counsel. In addition, law firms have different internal staffing and training priorities, which affects whether certain tasks are undertaken by senior-level attorneys or delegated to more junior attorneys or even paralegal staff. Senior-level attorneys are more experienced and may be able to complete tasks more efficiently than their junior-level colleagues. On the other hand, work performed by senior-level attorneys is invariably billed at higher rates. In the CLCM survey, respondents were asked to estimate the amount of time needed to complete legal tasks for each case type *assuming that the case was appropriately staffed in the context of each law firm*. For example, in a multi-attorney law firm, senior attorneys have a largely supervisory role over the work of more junior attorneys and paralegal staff in case preparation, but take a more direct role in dispositive litigation tasks such as settlement negotiations and trial. To control for natural variation in case-level time expenditures and billing rates, the CLCM examines quartiles from national estimates to identify the mid-range of “typical” cases. A working assumption is that exceptionally easy and exceptionally difficult cases will ultimately balance each other out.

The second issue involved obtaining information about billable hourly rates for senior-level attorneys, junior-level attorneys and paralegal staff given the wide variety of billing practices in the civil bar. Many firms employ separate billing rates for in-court versus out-of-court work. Plaintiff lawyers who work primarily or exclusively under contingency fee agreements often had no basis on which to estimate an hourly rate comparable to the traditional hourly billable rate. In other law firms, billing may vary based on the client relationship with some work performed on a retainer basis, some work performed at a negotiated discount rate for high volume clients, and some work performed on a pro bono basis. Presumably the financial business model employed by each law firm takes these variations into account when setting compensation for its professional employees such that overall receipts are sufficient to cover routine direct and overhead expenses regardless of the billing arrangements for individual clients.

The ABOTA Survey

The NCSC pilot tested the CLCM methodology with a sample of experienced civil litigation attorneys in New Hampshire in the fall of 2011. In a focus group setting, those attorneys confirmed that the estimates derived from the CLCM were reasonable based on their experience with civil cases filed in the New Hampshire Superior Courts. After making some minor adjustments based on feedback from the working group of New Hampshire attorneys and NCSC colleagues, the NCSC used the CLCM to undertake a national study in cooperation with the American Board of Trial Advocates (ABOTA).

The cooperation of ABOTA offered the NCSC an ideal sample from which to collect data for the CLCM. Founded in 1958, ABOTA is a national organization comprised of experienced attorneys representing both plaintiffs and defendants in civil litigation. Its mission is to defend the American civil justice system, especially the Seventh Amendment right to trial by jury. ABOTA has approximately 6,500 members who are organized into 96 state and local chapters in 49 states and the District of Columbia. Qualifications for membership are quite high. Applicants for the lowest tier of membership (Member) must be nominated by an existing ABOTA member, have completed a minimum of 10 jury trials to verdict as lead counsel, and are expected to achieve the qualifications for Associate level membership within a reasonable period of time. Qualifications for more senior membership tiers are described in Table 2. In an age in which many lawyers will not try even one case to a jury over their entire careers, the qualifications for ABOTA membership ensure that its membership reflects the most highly experienced civil trial attorneys, and presumably the most knowledgeable in the country about the amount of effort involved in litigating these cases.

The CLCM survey was disseminated online to the entire ABOTA membership from July 31 through August 31, 2012. During that time, 202 ABOTA members submitted complete survey responses and an additional 110 ABOTA

[illegible]

Minimum Years of Experience		Minimum Number of Civil Jury Trials	
Level	Experience	Number	Percent
Diplomate	12	100	30
Advocate	8	50	82
Associate	5	20	152
Member	n/a	10*	44
Other**	Based on previous ABOTA membership achieved	4	1%
Total		312	

** Other includes judges, public sector attorneys, and emeritus members.

[illegible]

To illustrate the CLCM methodology, Table 3 presents the quartile breakdown of attorney and paralegal time, prevailing billable rates, and expert witness fees in a typical automobile tort case. At the 25th percentile, senior and junior attorneys each spend 2 hours on case initiation tasks while paralegal staff spend one hour for a total of 5 hours of professional time. The total amount of professional time engaged in case initiation increases to 12.5 hours at the 50th percentile, or median (4.5 and 5 hours, respectively, by senior and junior-level attorneys and 3 hours by paralegal staff), and to 30 hours at the 75th percentile (10 hours each by senior-level attorneys, junior-level attorneys, and paralegal staff). Depending on how far through the litigation process the case progresses before it is ultimately resolved, ABOTA respondents report

16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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Complete Litigation Tasks in Automobile Tort Cases*

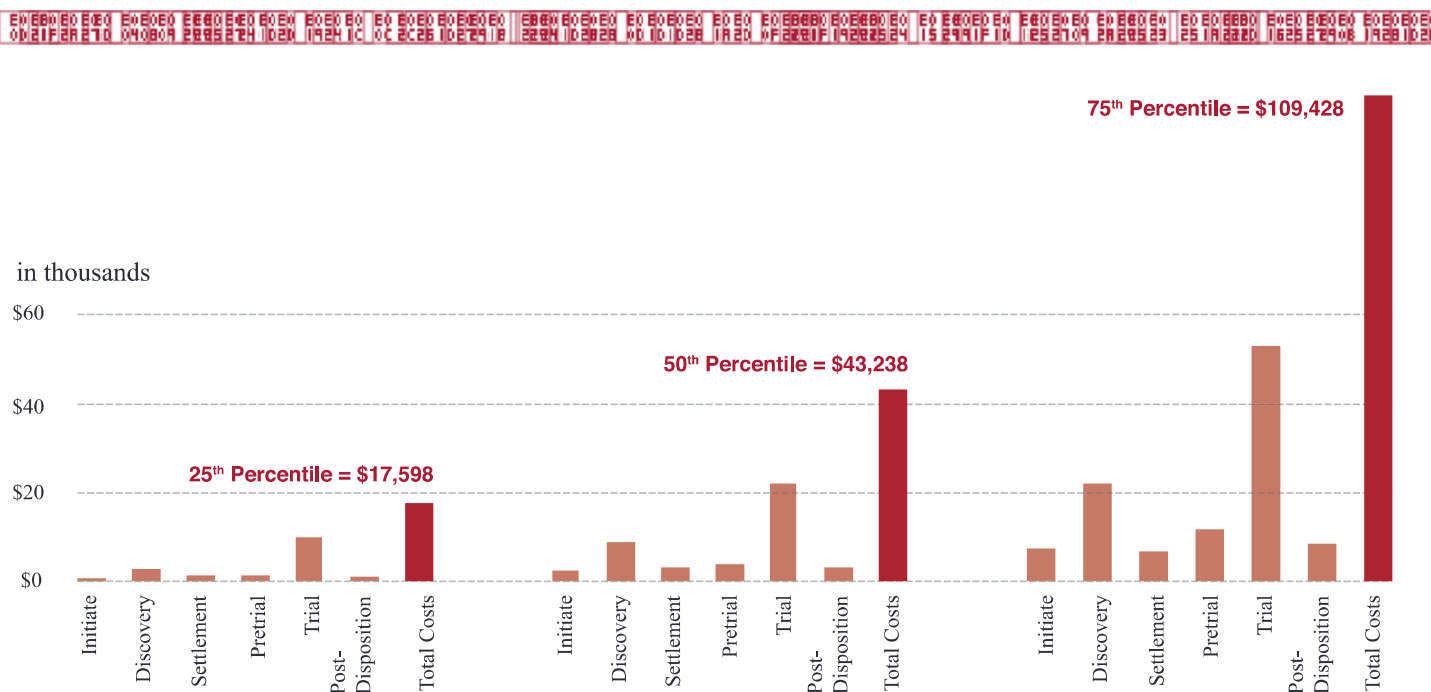
Percentile	Senior Attorney			Junior Attorney			Paralegal		
	25 th	50 th	75 th	25 th	50 th	75 th	25 th	50 th	75 th
Case Initiation	2.0	4.5	10.0	2.0	5.0	10.0	1.0	3.0	10.0
Discovery	5.0	12.0	25.0	6.8	20.0	30.0	5.0	10.0	20.0
Settlement	5.0	8.0	10.0	2.0	5.0	10.0	0.5	2.0	5.0
Pre-trial	3.0	6.0	15.0	4.0	10.0	20.0	2.0	4.0	10.0
Trial	25.0	40.0	65.0	15.0	30.0	50.0	10.0	20.0	38.8
Post-disposition	2.8	5.0	10.0	3.5	8.0	15.5	1.0	3.5	6.5
Subtotal of Time	42.8	75.5	135.0	33.3	78.0	135.5	19.5	42.5	90.3
Prevailing Hourly Rates X	\$200	\$275	\$375	\$150	\$175	\$250	\$ 80	\$ 90	\$110
Billable Costs	\$ 8,550	\$20,763	\$50,625	\$ 4,988	\$13,650	\$33,875	\$ 1,560	\$ 3,825	\$ 9,928

Percentile	25 th	50 th	75 th
Number	1	1	2
Prevailing Fees X	\$ 2,500	\$ 5,000	\$ 7,500
Billable Costs	\$ 2,500	\$ 5,000	\$15,000

*Based on: 255 experienced attorneys

As Table 3 shows, the range of professional time expended on the various litigation tasks for a typical automobile tort case is surprisingly large. The ratio of time expended from the 25th percentile to the 50th percentile to the 75th percentile appears remarkably stable across each litigation task and for each type of legal professional. The hours expended at the 50th percentile are consistently 2 to 2.5 times more than the hours expended at the 25th percentile; at the 75th percentile the number of hours is approximately 4 times more than those at the 25th percentile. The ratios are somewhat larger for junior attorneys and paralegals compared to senior attorneys, but the general pattern of doubling the amount of time at the 50th percentile and doubling it again at the 75th percentile remains the same.

Applying the hourly billable rates to the time estimates in Table 3 provides estimates of the costs associated with a typical automobile tort case. See Figure 1. Cases that resolve shortly after case initiation range from less than \$1,000 at the 25th percentile to \$7,350 at the 75th percentile per side for attorney fees. As the case progresses, those costs continue to accumulate. A case that settles after discovery is complete through formal settlement negotiations or ADR will range from \$5,000 to \$36,000 in attorney fees. If the case goes to trial, the total costs including expert witness fees can range from



Other Types of Civil Cases

In addition to automobile tort cases, the NCSC modeled litigation time and costs for professional malpractice, premises liability, breach of contract, employment dispute, and real estate dispute cases. Detailed tables showing results for each case type are available at www.ncsc.org/clcm. Table 4 shows the proportion of the total attorney hours expended on each stage of litigation for these case types at the 50th percentile as well as the total number of attorney hours that might be expended in a case that progressed all way through trial and post-disposition proceedings. Across virtually every stage of litigation, professional malpractice cases expend the most amount of legal time and automobile tort cases expend the least amount of time.

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Litigation Task	Auto	Premises Liability	Real Property	Contract	Employment	Malpractice
Initiate	6%	8%	12%	10%	11%	8%

For all case types, a trial is the single most time-intensive stage of litigation, encompassing between one-third and one-half of total litigation time in cases that progress all the way through trial. Discovery is the second most time-intensive stage, encompassing between one-fifth and one-quarter of total attorney hours. The remaining litigation stages each required less than 15 percent of total attorney time. Current civil justice reform efforts often focus on reducing the amount of time expended on trial and discovery tasks during litigation. To be effective, these efforts must not only decrease the amount of time involved in these litigation stages, but do so without shifting that time to other litigation tasks. Successful civil justice reform along these lines would not only reduce the litigation costs associated with each case type (see Figure 2), but may also reduce the time to disposition, providing litigants with speedier, as well as less expensive, justice.



Future uses of the CLCM



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