



WSBA

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

TO: President Michele Radosevich, President-elect Patrick Palace, Immediate-Past President Steve Crossland, and Board of Governors

FROM: Russ Aoki, Chair of the ECCL Task Force
Jeanne Marie Clavere, Staff Liaison to the ECCL Task Force

DATE: April 10, 2013

RE: The ECCL Task Force Interim Report and Request for Extension of Time

ACTION: Interim report from the Task Force on the Escalating Cost of Civil Litigation (ECCL) and request for one year extension of the charter (**action requested for extension only**).

DISCUSSION: Attached is the interim report by the ECCL Task Force providing an update on work completed since its last report to the Board in October 2012. The current report includes summaries from the subcommittees, information from the recent NCSC/ABOTA survey on the costs of civil litigation, consideration of a membership survey, and the ECCL's future work. Additionally, the report makes a request for a one year extension of the charter.

Attachments:

- ECCL Interim Report and Request for Extension of Time

Working Together to Champion Justice



WSBA

ESCALATING COST OF CIVIL LITIGATION TASK FORCE

Interim Report and Request of Extension of Time April 5, 2013

I. CHARTER

The Task Force's objective is to "assess the current cost of civil litigation in Washington state courts and make recommendations on controlling those costs". The Task Force is to "seek input from affected lawyers, judges, and other entities while developing any recommendations". Attachment A.

II. REQUEST FOR EXTENSION OF CHARTER

For the last two years, the Task Force has been meeting regularly. Presentations were made to the Task Force by WSBA Executive Director Paula Littlewood on the state of our legal profession; King County Superior Court Presiding Judge Richard McDermott on proposals to change the civil judicial system in King County; Jeff Hall, then State Court Administrator, Administrative Office of the Courts, on statistics and trends examined by the AOC; and Task Force member Don Jacobs, who is a former president of the Oregon Trial Lawyers Association, on the expedited civil trial system in Oregon.

The Task Force has organized itself into four subcommittees: Motions and Pleadings Practice, Alternative Dispute Resolution, Discovery, and Trial Procedure. Each subcommittee has been identifying goals to develop recommendations to the Board of Governors. A large volume of literature has been identified for review. Attachment B. However, the project is complex, and it is apparent that we cannot meet the April 2013 goal for a final report to the Board. We therefore ask for an extension of one year.

The National Center for State Courts (NCSC) recently published the results of its own survey on the cost of civil litigation. The Task Force is reviewing the report and needs time to gather additional input from affected lawyers, judges, and other groups on its proposed recommendations. Some subcommittees have already reached out for input, but others are still developing strategies to do so. Recently, the Task Force decided to survey affected WSBA members, which would benefit the work of all the subcommittees. The additional time will be necessary to draft, circulate and analyze the survey results.

III. NATIONAL CENTER FOR STATE COURTS/ABOTA SURVEY

The NCSC developed a method for estimating the cost of litigation, using its Civil Litigation Cost Model (CLCM). The model is “event” based in that it uses lawyer input from a national survey to estimate the time dedicated to certain litigation tasks. The tasks were broken down into six categories: (1) Case Initiation; (2) Discovery; (3) Settlement; (4) Pretrial Motions; (5) Trial; and (6) Post-Disposition. From the hours estimated, reported hourly rates were then applied. A copy of the NCSC survey report accompanies this report as Attachment C.

NCSC worked with the American Board of Trial Advocates (ABOTA) and surveyed its members between July 31 and August 31, 2012. Their responses reflected time spent in general types of litigation in 43 states.

You will find that the single most time-intensive stage of litigation, as reported by ABOTA members, was trial. Discovery was the second most time-intensive stage, taking between one-fifth and one-quarter of total attorney time.

The median costs of litigation as reported are:

1.	Automobile	\$43,000
2.	Premises Liability	\$54,000
3.	Real Property	\$66,000
4.	Employment	\$88,000
5.	Contract	\$91,000
6.	Malpractice	\$122,000

This survey is the only report which estimates costs. The remaining literature speculates the cost of litigation is escalating, and therefore excessive, with no supporting data.

Based upon the NCSC survey and the Task Force’s Charter to “seek input from affected lawyers, judges, and other entities while developing any recommendations”, it is believed a survey would be helpful in seeking similar information, along with obtaining input on any preliminary recommendations from each subcommittee.

IV. ECCL TASK FORCE SURVEY

The Task Force has assembled a Survey Committee, chaired by Eric De Los Santos. The Committee has already met several times to determine the value of a survey to the Task Force, and if one was pursued, what questions to pose. The committee determined, after contacting all the Task Force subcommittee chairs, that a survey would add value. Now, it is working with the subcommittees on questions for a comprehensive member survey to be sent to the WSBA litigation-related Sections.

V. SUBCOMMITTEE SUMMARY REPORTS

There are four Task Force Subcommittees. All engaged experienced litigators to assist with their work. Below is a summary of each Subcommittee's work since our last report in the fall of 2012.

Alternative Dispute Resolution Subcommittee

Jerry McNaul (Chair)
Lincoln Beauregard
Cynthia Buhr

Non-Task Force members: Honorable Robert H. Alsdorf (retired), Gregg Bertram, David Lenci, Rina Goodman, Alan Alhadeff

The subcommittee has been considering how to make ADR (mediations and arbitrations) more cost effective. The subcommittee benefited from work of Andre Chevalier (a recent Seattle University law grad) on this subcommittee. His work was in collaboration with the WSBA ADR Section. Mr. Chevalier interviewed over fifty providers and consumers of ADR.

With this information and his own experiences, Judge Robert A. Alsdorf (ret.) took the laboring oar in doing a first draft of "best practices" as they relate to arbitrations. Attorney Alan Alhadeff did the same regarding mediations. Those reports have been now circulated to the subcommittee which is scheduled to meet on April 4th to discuss them. The subcommittee hopes within four weeks thereafter it should have a draft to present to the Task Force for further review.

Discovery Subcommittee

Todd Nunn (Chair)
Don Jacobs
Honorable Debra Stephens
Honorable Marcine Anderson
William Hyslop

Non-Task Force members: Tom McBride, Thomas Breen, Milton Rowland, Kinnon Williams, Miquette Karnan, Breean Beggs, Luke LaRiviere, Gregory Lucas, Leslie S. Johnson, J.M. Bouffard, M. Edward Taylor, Adam Rosenberg

The subcommittee organized into five sub-subcommittees:

- Empirical evidence collection – collecting actual evidence of discovery cost escalation in Washington, what causes issues, and potential solutions;
- Literature review – gather and review existing literature for discussion on discovery cost and recommended solutions;
- Federal court review – gather and review methods used in federal courts to reduce discovery costs;

- State court review – gather and review methods used by other states to reduce discovery costs; and
- Practice review – gather and review methods used by particular practices to reduce discovery costs.

All sub-subcommittees have finished their reports and a draft of recommendations is being prepared. Now that the Task Force has decided to conduct a survey, the regular subcommittee will vote on which recommendations to be included in the survey. Chair Todd Nunn noted a brief review of the initial findings indicated little empirical evidence to suggest whether any specific measures work, but many initiatives are being tried by federal, state, and lower courts. The subcommittee will be working with the survey committee to craft applicable questions for a member survey.

Pleadings and Motion Practice Subcommittee

Eric de los Santos (Chair)
Honorable Ronald Cox
Jessica Goldman

Non-Task Force members: David Black, Jr., Leslie Hagin, Steve Winterbauer, Andrea Smith, Katherine Cameron, Melissa Anderson, Chrystina Solum

The subcommittee has finished a draft report and is still gathering other anecdotal data from interviews with judges and attorneys. Their report will have two parts: 1) a discussion on diversity and the public perception by diverse communities who are adversely affected and 2) recommended solutions (e.g., case management, limiting court rules, and presumptive limits). The subcommittee also plans to look into smaller counties.

Trial Procedure Subcommittee

Honorable Richard McDermott (Co-Chair)
Gail Nunn (Co-Chair)
Amit Ranade

Non-Task Force members: Thomas Fain, Jeffrey Tilden, Kathleen Garvin, Lish Whitson, Simeon Osborn

The goal of the subcommittee is to recommend ways to minimize the escalating cost of civil litigation, while maintaining the integrity of the adversarial system. A variety of methods will be studied to accomplish this, including but not limited to, investigating regulating cases based upon criteria such as the amount in controversy, the type of case, and the complexity of the issues to be tried. Recognizing a more efficient system benefits not only the parties, the bench and the bar, but jurors as well, attention will also be paid to recommendations geared toward reinvigorating the role of the jury trial in our system of civil justice.

The subcommittee has done a review of the work of other organizations nationwide who have studied this issue including information from ABOTA. It is further believed the

information gathered is accurate and applicable to the State of Washington but that a survey would benefit the subcommittee's work as it would with the other subcommittees.

VI. FUTURE WORK

The Task Force subcommittees will continue working on drafting suitable survey questions. The Task Force will work with the WSBA staff to further review and revise the questions. It is the Task Force's intention to target only litigation members and, therefore, will be surveying members of the several litigation-related WSBA Sections.

Upon receiving results of the survey, each subcommittee will use the information to further its final recommendations. All the recommendations will be compiled and discussed among the Task Force for a final report to the Board of Governors.



WSBA

WASHINGTON STATE BAR ASSOCIATION

**WSBA TASK FORCE ON
ESCALATING COST OF CIVIL LITIGATION
CHARTER**

(Adopted by the WSBA Board of Governors January 27, 2011)

(Amended by WSBA Board of Governors April 29, 2011)

In 2007, the American Bar Association released a report titled "Pulse of the Legal Profession," reporting on a nation-wide survey of 800 lawyers on what they thought about their lives, their careers and the state of the profession. 80% of those surveyed responded that civil litigation costs have become prohibitive.

In 2009, the WSBA surveyed its members and received 2,309 responses. 75% of those responding "agreed" (39%) or "strongly agreed" (36%) that the cost of litigation has become prohibitive in recent years.

The Task Force on Escalating Cost of Civil Litigation shall:

- Assess the current cost of civil litigation in Washington State Courts and make recommendations on controlling those costs. "Costs" shall include attorney time, as well as out-of-pocket expenses advanced for the purpose of litigation. The Task Force will focus on the types of litigation that are typically filed in the Superior and District Courts of Washington.
- In determining its recommendation, the Task Force shall survey neighboring and similarly situated states to compare the cost of litigation in Washington and review reports and recommendations from other organizations such as the Institute for the Advancement of the American Legal System, the American College of Trial Lawyers, the Public Law Research Institute.

Membership:

The Task Force will include the following:

- 10 WSBA members, at least two of which practice in the federal courts
- 1 member who is also licensed and practices in Oregon
- One judge from each level of court (limited jurisdiction, superior, appellate, and Supreme Court)
- One representative from the Clerks' Association

The Task Force shall seek input from affected lawyers, judges, and other entities while developing any recommendations. The Task Force shall report back to the Board of Governors every six months regarding its progress, and shall attempt to complete its charter within 18-24 months of formation of the Task Force.

ATTACHMENT B

Literature Reviewed by the ECCL Task Force

Order Establishing the Managing Panel of the Oregon Complex Litigation Court and Appointing Members to the Panel, Chief Justice Order No. 10-067 (Or. Dec. 2, 2010)

2010 order of Oregon's Chief Justice establishing the managing panel of the Oregon Complex Litigation Court (OCLC), and appointing the Hon. Richard L. Barron, the Hon. Mary Ann Bearden, and the Hon. Jean Kerr Maurer as panel members.

Order Establishing the Oregon Complex Litigation Court and Adopting New UTCR 23.010, 23.020, 23.030, 23.050, and 23.060 Out-of-Cycle, Chief Justice Order No. 10-066 (Or. Dec. 2, 2010)

2010 order of Oregon's Chief Justice establishing the Oregon Complex Litigation Court and adopting new court rules.

Order of Out-of-Cycle Adoption of New UTCR 5.150, UTCR Form 5.150.1a, and UTCR Form 5.150.1b, Chief Justice Order No. 10-025 (Or. May 6, 2010)

2010 order of Oregon's Chief Justice adopting the new Expedited Civil Jury Case rule, Uniform Trial Court Rule 5.150, a form joint motion for parties seeking admission to the expedited case program, and a form order designating an expedited civil jury case.

IOWA CIVIL JUSTICE REFORM TASK FORCE, REFORMING THE IOWA CIVIL JUSTICE SYSTEM (2012)

The recommendations of the Iowa Civil Justice Reform Task Force based on a survey of state lawyers and judges, as well as the results of the survey. Recommendations include: (1) instituting a two-tiered civil litigation system with streamlined procedures for small cases; (2) adopting "one case/one judge" rules and certain trial dates; (3) discovery reforms; (4) revisiting statutory limits on expert fees; (5) improving juror questionnaires and training material, and making reforms to juror selection; (6) exploring video and teleconferencing options; (7) exploring court-annexed ADR; (8) authorizing parties to waive or stipulate to findings of fact and conclusions of law in bench trials; and (9) instituting a system of specialized business courts.

MARC GALANTER & ANGELA FROZENA, POUND CIVIL JUSTICE INST.: 2011 FORUM FOR STATE APPELLATE COURT JUDGES, THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS (2011)

The authors look at trends of decline in the portion of civil cases that have ended in trials, changes in the types of civil cases, changes across the two court systems, the

shift in ideology in which judges function increasingly as managers of dispute resolution, not as courtroom judges conducting trials before the public.

INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER (IAALS) & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE (ACTL), A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS (2012)

A joint report based on a National Center for State Court study of expedited civil trial programs. Describes Short, Summary, and Expedited (SSE) programs and their potential benefits, advises jurisdictions considering SSE programs on designing, implementing, and sustaining an appropriate program. Provides a set of best practices for participants of an SSE program.

IAALS, CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY (2010)

The third stage of an extended study of civil litigation in Oregon. This particular study focuses on the processing of contract and tort cases and examine Oregon civil pretrial practice such as scheduling, motion practice, time between events, and time from filing to disposition.

IAALS, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010)

A report on a survey of a diverse group of companies whose legal departments have been involved in litigating at least five U.S. state or federal civil cases. The survey's goal is to achieve a better understanding of the litigant's perspective.

IAALS & ACTL, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2009)

Phase two of the IAALS and ACTL joint initiative. Proposed 29 principles that would shape solutions to problems discovered through the survey conducted.

IAALS & ACTL, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: PILOT PROJECT RULES (2009)

Phase three of the IAALS and ACTL joint initiative. This article provides a set of pilot project rules to be applied to a set of principles that suggest changes to the civil justice system that would simplify and expedite the system.

IAALS & ACTL, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: CIVIL CASEFLOW MANAGEMENT GUIDELINES (2009)

The report offers nine guidelines aimed towards effective caseflow management and that each event is a meaningful one. Each guideline is discussed with background information and its corresponding benefits.

STACEY KEARE, PUBLIC LAW RESEARCH INST. (PLRI), REDUCING THE COST OF CIVIL LITIGATION: ALTERNATIVE DISPUTE RESOLUTION (1995)

An overview of ADR- the goals of ADR, evidence of cost savings of ADR, types of ADR most commonly practiced in CA, and addresses important questions of ADR.

THAN N. LUU, PLRI, REDUCING THE COST OF CIVIL LITIGATION: WHAT ARE THE COSTS OF LITIGATION? (1995)

Discusses the possible public misperception on a litigation “explosion” trend which could be attributed to an increase of “extreme and high stake cases, ” and examines a Wisconsin empirical study on the cost to litigate an average or typical suit.

JAVAD MOSTOFIZADEH, PLRI, REDUCING THE COST OF CIVIL LITIGATION: USING NEW TECHNOLOGY (1995)

Discusses two categories of technologies with significant cost and time saving potential: those that can aid the judiciary in management and administration, and those that can be implemented in the litigation process itself.

WASH. STATE BAR ASS’N (WSBA), PULSE OF THE WASHINGTON STATE LEGAL PROFESSION (2009)

Results of a WSBA survey of its members and their personal and professional satisfaction with practicing law in Washington.

Sharon S. Armstrong & Barbara Miner, *New KCSC Civil Case Schedule Will Reduce Time to Trial* (publication & date missing)

The article discusses King County Superior Court’s implementation of plan to reduce time from filing to trial on the case schedule issued in most civil cases. It also provides reasons to shorten the general civil case schedule.

Shelly M. Damore, *The Fast Track: Oregon’s Expedited Civil Jury Trial Program*, OR. ASS’N OF DEF. COUNSEL, Summer 2010, at 8

The article looks at the adoption of Uniform Trial Court Rule 5.150 “Expedited Civil Jury Cases” and its purpose.

Joseph Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 RUTGERS L. REV. 337 (1985)

The article suggests a method for evaluating cost reduction proposals according to their implications for justice within the legal system and extent to which these theories can be applied. It also examines rhetoric of reducing litigation cost.

Rebecca L. Kourlis, Jordan M. Singer, & Paul Saunders, *Survey of Experienced Litigators Finds Serious Cracks in U.S. Civil Justice System*, JUDICATURE, Sept.–Oct. 2008, at 78 (2008)

Discusses results found from a survey conducted by IAALS and ACTL Task Force on Discovery which examined problems associated with discovery. Some of the themes discussed are cost, discovery abuse, E-discovery, notice pleading, and judicial involvement.⁸⁰ Tex. L. Rev. 2073 (2002)

The article attempts to survey the exact problem with civil litigation, but argue that it is not simply that “litigation is too expensive.” The authors find that costs appear to be proportionate to the monetary stakes, and propose that more empirical research is needed before making further amendments to discovery rules.

Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010)

The article attempts to survey the exact problem with civil litigation, but argue that it is not simply that “litigation is too expensive.” The authors find that costs appear to be proportionate to the monetary stakes, and propose that more empirical research is needed before making further amendments to discovery rules.

Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985)

The article discusses the evolution of case management to incorporate a two-stage discovery and judicially supervised use of ADR techniques. The author discusses various ADR techniques and their benefits in dispute resolution.

A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219 (1984)

The article looks at empirical data of cost of litigation, judicial response, and alternative methods of dispute resolution that are more efficient.

John V. Tunney, Foreword, *Financing the Cost of Enforcing Legal Rights*, 122 U. PA. L. REV. 632 (1973–1974)

The article discusses fee shifting as a great promise to both providers and consumers of legal services as a device for financing the enforcement of legal rights and closing the gap in representation of citizen interest.

Comment, *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 OKLA. L. REV. 115 (2006)

The comment looks into guidelines for cost-shifting in electronic discovery cases, gives a general overview of electronic data, and places cost-shifting against backdrop of federal rules and how case law has applied these rules.

How Much Will My Business Case Cost? Analyzing Discovery in Civil Litigation, THE CASTLMAN LAW FIRM, P.C., <http://www.castlelaw.com/cost.htm> (accessed May 3, 2011)

Brief explanation on the discovery process and factors to consider that can affect the litigation cost.

Vincent DiCarlo, *How to Reduce to High Cost of Litigation*, FORMER LAW OFFICE OF VINCENT DICARLO, <http://www.dicarlolaw.com/NetscapeHTRHCL.html> (accessed May 3, 2011)

Discusses different techniques for both lawyers and clients to lower cost of litigation (i.e. focusing on customized arbitration clauses).

Ann G. Fort, *Rising Costs of E-Discovery Requirements Impacting Litigants*, DEPO.COM, http://www.depo.com/resources/aa_thediscoveryupdate/rising_costs_ediscovery.html (accessed Apr. 29, 2011)

Discusses use of Optical Character Recognition software to make TIFF images to create searchable text, entering basic descriptive coding for each document which is argued to be cheaper than electronic discovery.

Rees Morrison, *The Four Killer B's that Drive Litigation Costs, According to a Fifth B*, Baer, LAW DEP'T MGMT. (Dec. 21, 2010), http://www.lawdepartmentmanagementblog.com/law_department_management/2010/12/the-four-killer-bs-that-drive-litigation-costs-according-to-a-fifth-b-baer.html (accessed May 3, 2011)

Discusses factors that drive up litigation costs (i.e. (1) the amount of megabytes of e-discovery, (2) the number of witnesses, (3) the number of pleadings, and (4) the aggressiveness of the other side)).

Joseph F. Speelman, *Avoid Quick Fixes and Control the True Cost of Litigation*, LAW.COM (Jun. 5, 2008), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202421924909> (accessed May 3, 2011)

Looks at reducing litigation costs via a holistic approach (i.e. calculating true cost of litigation, pay company's attorney first and not the other side, don't compartmentalize litigation).

Vice President Joseph Biden, Remarks at the Conference of Chief Justices (Jan. 30, 2012)

Compared our commitment to the rule of law with other countries. commitment to their rule of law.

Letter from Rebecca L. Kourlis, Exec. Dir., IAALS, & Paul C. Saunders, Chairman, ACTL, to Paula Littlewood, Exec. Dir. Wash. State. Bar Ass'n (Nov. 3, 2009)

Letter to Paula Littlewood regarding the joint initiative project undertaken by IAALS and ACTL.

Lord Peter Goldsmith QC, Remarks at Midyear Meeting of the Conference of Chief Justices (Jan. 31, 2011)

Discusses three procedures which have become a regular part of English litigation (dealing with expert witnesses, use of written expert statements, and preliminary determinations).

Theodore N. Mirvis, Slide Presentation at the Midyear Meeting of the Conference of Chief Justices (Jan. 31, 2011)

Discusses multi-jurisdictional issues in stockholder/deal-litigation.

William T. Robinson III, Pres. Am. Bar Ass'n, Remarks at the Midyear Meeting of the Conference of Chief Justices (Jan. 29, 2011)

Speaks of the ABA's continuous collective effort towards the goal of sustainable funding for the Courts, and what still needs to be accomplished in order to strengthen our judiciaries.

Oregon's Expedited Civil Jury Trials Program

Brief description of Oregon's Expedited Civil Jury Trials Program and its important features

2011 Oregon Court Fee Schedule

Chart showing Court administration fees, filing fees, and proceedings fees, along with escalators for large-stakes cases

Caseload Highlights

www.courtstatistics.org

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/.

Estimating the Cost of Civil Litigation

Paula Hannaford-Agor, Director, Center for Jury Studies

Nicole L. Waters, Principal Court Research Consultant

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 contract, employment dispute, and real property dispute. The NCSC then uses the hourly billing rates reported by attorneys to estimate litigation costs associated with each type of case. The CLCM also documents the number of expert witnesses retained in these cases and the fees paid for their testimony. Collectively, these case types comprise nearly 60 percent of non-domestic relations civil cases filed in state courts, so establishing reliable estimates of the costs associated with these cases fills a significant gap in our current understanding of civil litigation.¹

¹ Based on the incoming civil caseload in 16 general jurisdiction courts in 2009 (excludes small claims cases). ROBERT LAFOUNTAIN et al., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 11 (2011).

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.

Two caveats about the CLCM are necessary. First, the NCSC staff that developed the CLCM were surprised by the difficulty that most attorneys, even highly experienced attorneys, encountered when they were asked to visualize a “typical” automobile tort or other type of civil case. While state courts have become more acclimated to employing performance measures to assess both quantitative and qualitative aspects of court operations, it appears that most segments of the practicing civil bar approach legal representation on a case-by-case basis. Consequently, many attorneys who participated in the project found it challenging to estimate the number of hours involved in drafting a complaint, preparing for and conducting depositions, or trying a “typical” case even when case scenarios included generalized “facts” to help illustrate case parameters.

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 members submitted partial survey responses with time estimates for one or more of the practice areas. Although respondents practice law in 43 states, over half practiced in California, Texas, or Florida (three of the largest, most active ABOTA statewide chapters, representing 26% of the U.S. population). More than one-third of the respondents were Advocate or Diplomat-level members, the two most highly experienced levels of ABOTA.

In terms of law firm characteristics, half of the respondents work in modest size firms (2 to 10 attorneys) and 13 percent were solo practitioners. One-third work in somewhat larger firms (19% in 11 to 25-lawyer firms, 15% in 26 to 100-lawyer firms), and only 3 percent in very large law firms (more than 100 lawyers). The vast majority (82%) of respondents work in general civil practice firms in which lawyers routinely take cases in at least 4 of the practice areas covered in the survey. Thirty-one respondents practice in boutique firms concentrating on a single practice area (21 in professional malpractice; 10 in automobile tort). The 312 respondents collectively reflect the professional characteristics of ABOTA’s members.

Table 2: ABOTA Membership Levels, Qualifications, and Respondents to the CLCM Survey

Level	Minimum Years Experience	Minimum Number of Civil Jury Trials to Verdict	ABOTA Respondents	
			Number	Percent
Diplomate	12	100	30	10%
Advocate	8	50	82	26%
Associate	5	20	152	49%
Member	n/a	10*	44	14%
Other**	Based on previous ABOTA membership achieved		4	1%
Total			312	

* Member level requires a minimum of 10 cases tried to verdict as lead counsel, but the cases do not have to be exclusively civil cases.

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

Attorney Time and Costs in Automobile Tort Cases

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 that typical automobile tort cases require up to 95.6 hours of professional time at the 25th percentile, 196 hours at the 50th percentile, and up to 360.8 hours at the 75th percentile. Billable rates ranged from \$200 to \$375 per hour for senior attorneys, \$150 to \$250 per hour for junior attorneys, and \$80 to \$110 per hour for paralegal support. If the case progressed to the point of retaining an expert witness, which generally takes place during discovery, each side typically hires one expert witness at the 25th and 50th percentile, and two expert witnesses at the 75th percentile at a cost of \$2,500 to \$7,500 per expert.

Table 3: Hours Expended by Attorneys, Paralegals and Expert Witnesses to 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	Expert Witnesses		
	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

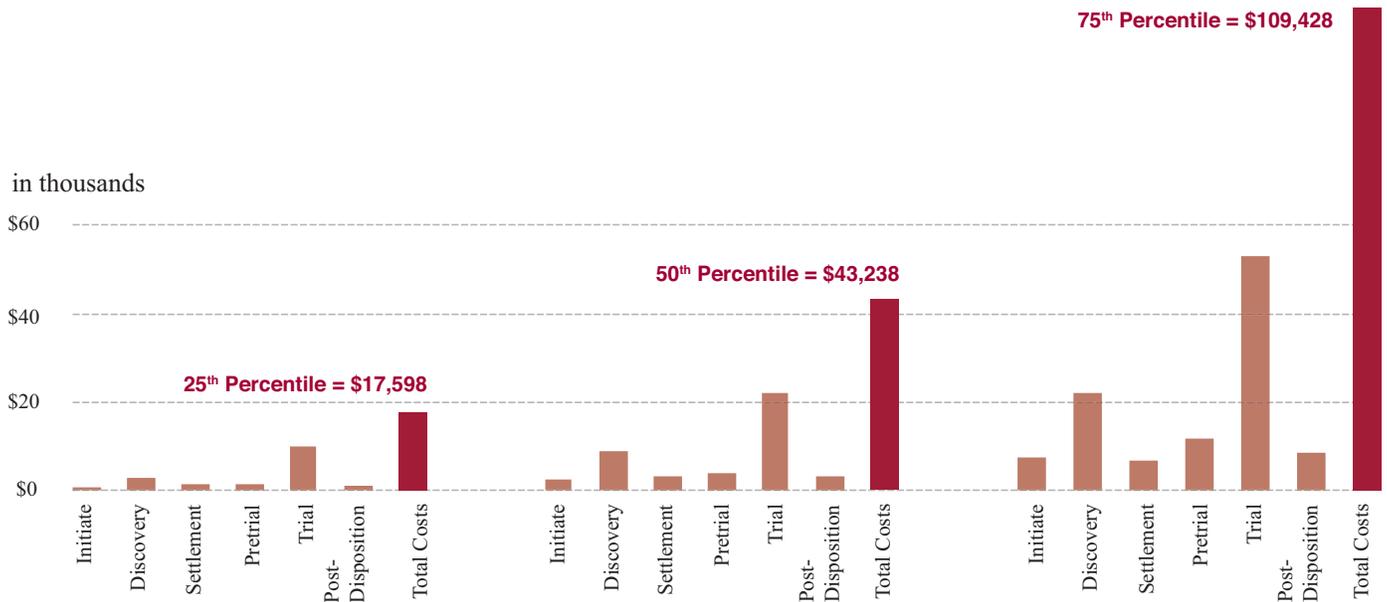
*Based on: 255 experienced attorneys

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 \$18,000 to \$109,000 per side.² Based on these estimates, it becomes easy to see how litigation costs might affect a litigant’s access to the civil justice system. Few litigants would be willing to risk incurring such costs unless the expected return – damages awarded for plaintiffs or damages avoided for defendants – greatly exceed those costs. Most litigants would prefer to settle the case well before costs rose to that level. Even attorneys who ordinarily represent plaintiffs under a contingency fee agreement would naturally evaluate the case based on the likelihood that the resulting fee from the settlement value of the case will exceed the expected investment of attorney time and law firm resources before accepting the case.

2. Expert witnesses are identified and retained during discovery, but fee agreements generally specify a certain amount or percentage of the fee for drafting a report, participating in a deposition, and testifying at trial. The expert witness expenses reflected in Figure 1 allocate 20 percent of the total expert witness fees to the discovery stage for preparation of an expert witness report and deposition, and 80 percent to the trial stage for expert testimony at trial. This split is based on reports by trial attorneys of the impact of restrictions on live expert witness testimony in summary jury trial programs. See SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF SUMMARY JURY TRIALS (NCSC 2012).

Figure 1: Attorney and Expert Witness Fees by Litigation Stage for Automobile Tort Cases



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.

Table 4: Proportion of Litigation per Stage (Total Median Hours)

Litigation Task	Auto	Premises Liability	Real Property	Contract	Employment	Malpractice
Initiate	6%	8%	12%	10%	11%	8%
Discovery	21%	19%	22%	24%	21%	25%
Settlement	8%	9%	8%	7%	7%	6%
Pretrial	10%	14%	15%	14%	15%	11%
Trial	46%	41%	34%	39%	39%	42%
Post-disposition	8%	8%	9%	8%	7%	7%
Total Attorney Hours (Median)	196	218	284	367	374	472

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.

Figure 2: Median Costs of Litigation by Case Type



Future uses of the CLCM

The NCSC plans to conduct further testing with experienced lawyers to confirm the reliability of the cost estimates and to further differentiate factors that affect the model. The NCSC will also continue surveying highly experienced attorneys to adjust these national estimates for state and local jurisdictions. The results of these highly focused surveys will provide bench and bar leaders with tools (1) to conduct local assessments; (2) to focus civil justice reform efforts on litigation stages that require more attorney time ; and (3) to assess the impact of those reforms on access to justice.



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Court Statistics Project

Since 1975, the Court Statistics Project (CSP) has provided a comprehensive analysis of the work of state courts by gathering caseload data and creating meaningful comparisons for identifying trends, comparing caseloads, and highlighting policy issues. The CSP is supported by the Bureau of Justice Statistics and obtains policy direction from the Conference of State Court Administrators. A complete annual analysis of the work of the state trial and appellate courts will be found in *Examining the Work: An Analysis of 2010 State Court Caseloads*.

Visit the CSP Website at
www.courtstatistics.org

The screenshot shows the CSP website interface. At the top, there is a navigation bar with tabs for OVERVIEW, CIVIL, DOMESTIC RELATIONS, CRIMINAL, APPELLATE, TRAFFIC, and CONTACT US. The main banner features the title 'EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS' and a map of the United States. Below the banner, there are several featured articles with thumbnails and titles: 'MANAGING DATA QUALITY IN TRIAL COURTS', 'IMPLEMENTING A CIVIL COVER SHEET', and 'MEDICAL MALPRACTICE LITIGATION IN STATE COURTS'. On the right side, there are vertical sections for 'COURT STRUCTURE CHARTS', 'GUIDE TO STATISTICAL REPORTING', 'REPORTING EXCELLENCE AWARDS', and 'CSP RESOURCES'. The footer contains a disclaimer and the CSP logo.