Measuring the cost of civil litigation: Findings from a survey of trial lawyers

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The economic crisis over the past four years has had as much of an impact on the legal profession and on state courts as it has had on every other segment of American society. The legal profession has experienced dramatic declines in employment for both professional and administrative staff. High-volume corporate clients increasingly demand steep discounts on legal fees and closer controls on litigation costs. The growing sophistication of online legal service companies such as LegalZoom and Nolo, which have developed software to provide routine legal documents (wills, trusts, contracts, lease agreements) directly to consumers, have begun to infringe on traditional legal services markets. State and local governments have cut court budgets by up to 40% in some states, resulting in judicial vacancies being left unfilled, staff layoffs, pay freezes and pay cuts, and even courthouse closures. The responses by both the practicing civil bar and the trial bench to these dire trends have been remarkably similar; both have focused on efforts to streamline case management. For the bar, the primary objectives are two-pronged: first, to maintain cost-effective services to clients that protect their legal rights, and second, to preserve the financial survival of the law firm, its attorneys, and its professional and administrative staff. For courts, the objectives are to maintain access to a fair and impartial justice system for all litigants and to preserve the institutional viability of the courts as a co-equal branch of government. Because the bench and the bar are ultimately in the same boat together, it is critically important that their respective efforts do not work at cross-purposes. The challenge for the bench and the bar will be to identify strategies to reduce costs and increase access overall, rather than adopt strategies that simply outsource or transfer costs elsewhere.

The past two decades of civil justice reform offer myriad examples of unintended consequences of otherwise well-intentioned reform efforts. In the 1990s, for example, many courts implemented mandatory arbitration or ADR programs intended to encourage litigants to settle cases early in the life cycle of the case. For some cases, the programs did result in earlier and less-expensive settlements. For others, however, the requirement

of participating in a mandatory ADR program merely introduced another pretrial procedural hurdle that drove up pretrial costs, forcing some litigants to settle cases because the costs of proceeding further exceeded the settlement costs. In other words, courts were able to clear their dockets more efficiently, but only because some litigants were forced to accept settlements on terms that they deemed substantively unfair. Cases that didn't settle as a result of ADR were placed back on the court docket, albeit after a delay and additional costs imposed on the litigant. In other courts, the business community and the civil bar advocated the creation of complex, commercial or business courts to carve out a specialized calendar dedicated to civil litigation in response to growing encroachment of criminal and domestic law dockets on increasingly scarce court resources. For litigants whose cases were eligible, these programs offered more timely and fair case resolutions, but the programs themselves often reduced courts' flexibility to respond to the changing needs of all litigants (including those of civil litigants who didn't meet the eligibility criteria for the specialized docket). It was precisely these conflicts that prompted the National Center for State Courts (NCSC) to recognize the need for tools to measure the impact of procedural or operational factors on civil litigation costs on both sides of bench-bar divide.

Background of the Civil Litigation Cost Model

The Civil Litigation Cost Model (CLCM) was developed as one component of a larger Civil Justice Initiative by the NCSC. The primary component of that Initiative is a series of empirical evaluations of civil justice reform efforts by state courts. Both the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) have focused increased attention on civil justice reform efforts, but both organizations also realize that competing demands on court resources in an environment of economic scarcity requires courts to assess the effectiveness of proposed programs and procedures. The NCSC Civil Justice Initiative was created to provide courts not only with insights about the effectiveness of various civil justice reform programs, but also information about local legal cultural and court operational factors that contribute to the success or failure of those programs. In its study of summary jury trial programs in six jurisdictions, for example, the NCSC found that the most successful programs were those that were carefully designed, implemented, and maintained to address specific problems in each jurisdiction. But the programmatic details of those programs differed dramatically and in ways that would not necessarily translate well to other courts. For example, the South Carolina summary jury trial program employs highly experienced local attorneys to preside in civil trials, while other programs emphasize the importance of "real judges" in their trials.

The impetus for the CLCM arose as NCSC researchers increasingly recognized that case-level data extracted from court case management systems (CMS) do not provide a complete picture of the impact of civil justice reform efforts. Although the NCSC has a great deal of experience in managing and interpreting CMS data, much (even most) of civil litigation takes place out of the shadow of the courthouse and is not routinely documented in court files. Absent the need to seek a court intervention in a pretrial dispute, routine documentation of discovery and case structuring conference agreements, settlement negotiations, and pretrial stipulations are rarely filed with the court. Indeed, it is even difficult to determine from court records how most cases are ultimately disposed. Often the only entry to the court record is a notation that the matter has been "dismissed."

To provide meaningful information to court policymakers about the effectiveness of civil justice reform proposals, the NCSC needed to develop a tool with which to measure these "out of court" activities and to estimate their respective costs on the bar. The traditional approach was to survey the attorneys of record who had filed civil cases, requesting disclosure of the attorneys' fees, expert witness fees, and other litigation costs in those cases. But this approach is extremely time- and labor-intensive for researchers, and often suffers from low response rates due to attorney concerns about client confidentiality. Other estimates, such as those by insurance industry representatives, often fail to disclose the assumptions built into their economic models, making it difficult for others to assess the reliability of those estimates. In developing the CLCM, the NCSC sought to create a tool to estimate litigation costs that could be used broadly and adapted easily to local situations.

CLCM Methods and Caveats

The CLCM is an adaptation of a methodology that the NCSC has used repeatedly in court workload studies. But rather than estimating the amount of time expended by judges and court staff to conduct arraignments, evidentiary hearings, case reviews, or other routine court events, the CLCM focuses on the amount of time expended by professional and paraprofessional legal staff in routine litigation tasks. The CLCM has a number of

different components that make it possible to estimate time and costs for different types of cases and at different stages of litigation. For example, the initial CLCM focused on six of the most common types of civil cases filed in state courts: automobile tort, professional malpractice, premises liability, breach of contract, employment disputes, and real property disputes. Collectively, these cases comprise approximately 60% of state court civil dockets.

To generate the CLCM estimates, the NCSC was fortunate to obtain the cooperation of the ABOTA Executive Committee, which agreed to disseminate the CLCM survey to its members. From July 31 to August 31, 2012, 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 case types. Although 86 state or regional chapters in 43 states were represented in the survey, over half of the respondents were members in the California, Florida, or Texas chapters of ABOTA. More than one-third of the respondents were Advocate or Diplomate-level members. Thus, the study findings provide a very well-informed, national baseline of litigation time and costs for the six case types surveyed. It is important to recognize, however, that these are national estimates and that individual states or localities are likely to vary considerably — based on local procedure, court operations, and legal culture.

For each case type, the CLCM survey asked ABOTA members to estimate the amount of time expended at various stages of litigation. Table 1 summarizes routine tasks associated with each stage of litigation. For example, at the case initiation stage, routine tasks include client intake and investigation, perhaps some preliminary legal research to identify possible claims or defenses that litigants might raise, drafting and filing Complaints or Answers including cross-claims or third-party claims, and negotiating a case management order with opposing counsel. Routine tasks during discovery include drafting and responding to interrogatories, identifying fact and expert witnesses, preparing for and conducting depositions of opposing fact and expert witnesses, attending the deposition of the client's fact and expert witnesses, negotiating the scope of discovery for electronically stored information (ESI), and resolving discovery disputes (with or without court involvement).

Table 1: Specific tasks involved in various stages of litigation

Case Initiation	Conduct client intake, initial fact investigation, legal research; draft complaint/answer, cross-claim, counterclaim or third-party claim; draft 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	Conduct legal research; draft motions *in limine;* draft motions for summary judgment; answer opponent's motions; prepare for motion hearings; argue motions.
Trial	Conduct legal research; prepare witnesses and experts; meet with co-counsel (trial team); prepare for *voir dire*; draft motion to sequester; prepare opening and closing statements; prepare for direct and cross examination; prepare jury instructions; draft proposed findings of fact and conclusions of law, proposed orders; conduct trial.
Post-Disposition	Conduct post-disposition settlement negotiations; draft motions for rehearing; JNOV; additur; remittitur; enforce judgment; any appeal activity.

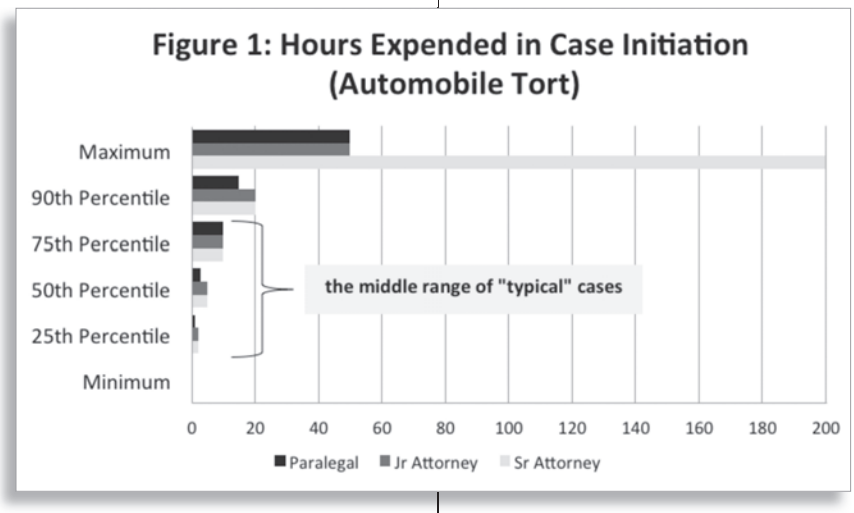
Case types and litigation stages are the most basic parameters of the CLCM. However, the survey also documented additional factors that anecdotally have been reported to affect time and costs. One of these factors was the organizational size and structure of the law firm providing legal services. Larger law firms typically have sufficient in-house expertise to allow some lawyers to specialize in discrete areas of law, which may provide increased efficiencies as senior lawyers are able to delegate routine legal work to more junior colleagues and paralegal staff. Nevertheless, large law firms also typically have increased overhead. Smaller firms, in contrast, have less ability to delegate routine tasks to junior-level attorneys or paralegals, but also have decreased overhead costs.

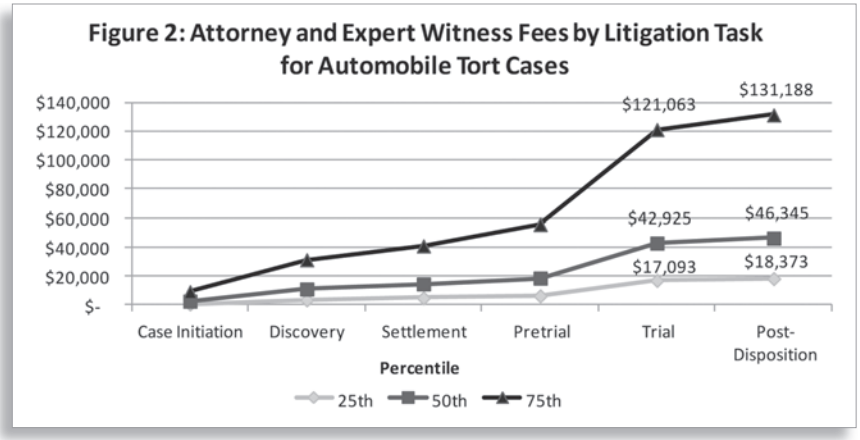
The CLCM estimate of costs was derived by asking lawyers about the billable hourly rates for senior-level and junior-level attorneys and paralegals. NCSC staff recognized

that billing arrangements can vary dramatically from law firm to law firm, and even from client to client. For example, many lawyers that represent plaintiffs primarily operate under contingency fee arrangements in which the legal fees are based on the amount of damages recovered for the plaintiff. Even these arrangements can vary based on the stage of litigation at which the case was resolved. For more traditional firms, fees may vary based on the client relationship—some paying the full hourly rate, some paying a negotiated discounted rate for high-volume clients, or even some pro bono work as part of the firms' charitable contribution. But given that the CLCM survey was directed to experienced trial lawyers, NCSC researchers restricted the questions concerning lawyer fees to the "hourly billable rate" as the most universally recognizable (if not universally employed) basis for law firm compensation. Finally, the NCSC incorporated the impact of expert witness on civil litigation by asking for the number of expert witnesses retained per side and the fees typically paid to these expert witnesses for their testimony.

One challenge for trial lawyers who participated in the CLCM survey was the inherent difficulty of envisioning a "typical" auto tort, or medical malpractice, or employment discrimination case. Part of that difficulty is that "non-typical" cases tend to be more memorable while "typical" cases just fade away after awhile. But even typical cases are unique not only with respect to the litigants and the circumstances that prompted the litigation, but also a myriad of other factors. The inherent complexity of an auto tort case is necessarily greater for both sides when the defendant is both the allegedly negligent driver and the driver's employer under a theory of respondeat superior. Client expectations and the relationship with opposing counsel also play a role. The client who just wants the case over and done as quickly and painlessly as possible may be much easier to accommodate than the client who insists on litigating each and every possible point of law. Lawyers who have worked on opposite sides of cases for many years often develop cordial and cooperative working relationships that facilitate an amicable resolution of the case. However, a less familiar relationship may encourage lawyers to be more cautious or to test each other's boundaries for strategic weaknesses in negotiating skills. The NCSC expected to see these factors illustrated in the variation in survey responses.

The findings for the study are reported as quartiles with the 25th to 75th percentiles reflecting the middle half of the full range of litigation time and costs for the case types surveyed. Thus, cases falling below the 25th percentile reflect relatively easy cases such as those with straightforward facts and law and reasonable clients and lawyers on both sides of the case. On the other hand, cases falling above the 75th percentile reflect much more complex cases such as those involving multiple claims or defenses, mixed evidence or less well-established law, and less reasonable clients or lawyers. The use of percentiles has two advantages: *(1)* cost estimates are displayed more accurately as the likely range of costs for each type of case rather than a single estimate (e.g., the mean) that doesn't ordinarily reflect the variation in similar cases; *(2)* it mutes the effect of extreme outliers and missing data. Figure 1, for example, shows the number of professional and paraprofessional hours expended in case initiation for automobile tort cases at the minimum, 25th, 50th, 75th and 90th percentiles, and the maximum. In the ABOTA survey, one respondent estimated that a senior attorney would spend 200 hours engaged in case initiation for an automobile tort case. Most likely, this was a typographical error and the respondent intended to enter a "2" or even a "20", which would have placed the response at the 25th or 90th percentile, respectively. Or, it could have been an accurate response by an extraordinarily thorough attorney. Nevertheless, reporting the mean (8.25) and standard deviation (±16.7) would skew the findings upward and with a very large margin of error.





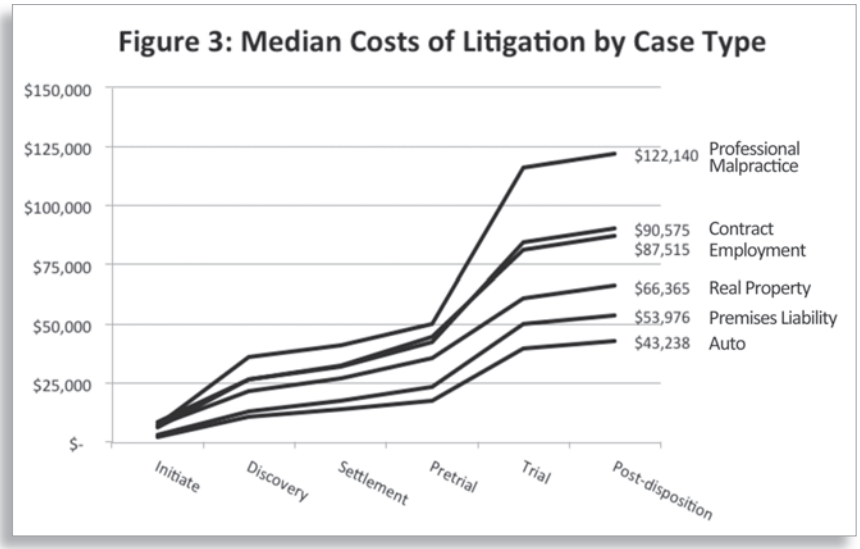


Table 2: Proportion of Attorney and Paralegal Hours per Stage of Litigation

Litigation Task	Auto			Premises Liability			Real Property		
Percentile	25th	50th	75th	25th	50th	75th	25th	50th	75th
Initiate	5%	6%	8%	7%	8%	10%	11%	12%	10%
Discovery	18%	21%	21%	18%	19%	21%	22%	22%	21%
Settlement	8%	8%	7%	8%	9%	7%	9%	8%	7%
Pretrial	9%	10%	12%	11%	14%	12%	15%	15%	16%
Trial	52%	46%	43%	50%	41%	41%	34%	34%	31%
Post-disposition	8%	8%	9%	8%	8%	9%	10%	9%	14%
Total Hours	95.6	196	361	120	218	364	162	284	493
	Contract			Employment			Malpractice		
Percentile	25th	50th	75th	25th	50th	75th	25th	50th	75th
Initiate	8%	10%	11%	8%	11%	9%	6%	8%	9%
Discovery	24%	24%	24%	20%	21%	21%	23%	25%	25%
Settlement	8%	7%	7%	8%	7%	7%	7%	6%	6%
Pretrial	14%	14%	13%	14%	15%	15%	9%	11%	10%
Trial	38%	39%	36%	42%	39%	40%	49%	42%	42%
Post-disposition	8%	8%	9%	8%	7%	9%	6%	7%	8%
Total Hours	187	367	623	201	374	625	256	472	786.4

Findings

Figure 2 illustrates the litigation costs for automobile tort cases for each stage of litigation based on the reported billable hourly rate, the estimate of attorney and paralegal hours, and the number of experts per side and their estimated fees. Figure 3 illustrates the median costs for all of the case types surveyed. These graphs show just how broad the range of litigation costs is from the 25th to the 75th percentile. As a general matter, the cost tends to double from the 25th to the 50th percentile for each stage of litigation, and then double again from the 50th to the 75th percentile.

A closer examination of the data reveals some fascinating nuances, however. Although the amount of time expended on each stage of litigation should increase from the 25th percentile to the 50th and the 75th, it would be reasonable to assume that the proportion of time expended would remain relatively constant. In fact, however, the proportion of time expended in some stages of litigation actually decreases while others increase. See Table 2. For example, the proportion of time expended on tasks associated with settlement negotiations and trials decreases fairly consistently for most case types. On the other hand, the proportion of time expended on tasks associated with case initiation, discovery pretrial preparation and post-disposition activity tends to increase for most case types. It is possible that the amount of time allocated to settlement and trials for most types of cases is comparatively rigid. In most jurisdictions, for example, an automobile tort case would ordinarily take only 1 to 2 days to try, regardless of its comparative complexity. As a result, the additional amount of time expended in other litigation stages would increase relative to those stages.

Table 3: Proportion of Total Litigation Time Expended by Senior Attorneys, Junior Attorneys and Paralegals

	25th Percentile			50th Percentile			75th Percentile		
	Senior Attorney	Junior Attorney	Paralegal	Senior Attorney	Junior Attorney	Paralegal	Senior Attorney	Junior Attorney	Paralegal
Automobile Tort	45%	35%	20%	39%	40%	22%	37%	38%	25%
Premises Liability	43%	39%	18%	38%	41%	21%	36%	38%	26%
Real Property	36%	46%	18%	36%	42%	22%	35%	44%	21%
Employment	42%	41%	18%	41%	39%	20%	42%	40%	18%
Contract	43%	40%	17%	38%	40%	22%	36%	41%	24%
Malpractice	46%	34%	20%	43%	35%	22%	41%	36%	23%

Another subtle difference occurs in the proportion of senior attorney, junior attorney, and paralegal time allocated to each of the six case types. At the 50th percentile, paralegal staff consistently account for 20% to 22% of the total hours expended in litigation for all case types. The remaining 78% to 80% of total hours are allocated almost equally between senior and junior attorneys in automobile tort, premises liability, employment, and contract cases. Senior attorneys played a larger role (46%) in professional malpractice cases, but a lesser role in real property cases (36%). See Table 3. These proportions shift at the 25th and 75th percentiles, however. At the 25th percentile, senior attorneys tend to dominate the litigation; with the exception of real property cases, which appear to be the purview of more junior attorneys, senior attorneys averaged 42% to 46% of the total litigation hours compared to 34% to 41% for junior attorneys and 17% to 21% for paralegals. At the 75th percentile, however, junior attorneys and paralegals play a much-larger role in litigation. With the exception of professional malpractice cases, in which senior attorneys continue to dominate (41%), the proportion of total time expended by junior attorneys ranged from 38% to 44% and by paralegals ranged from 18% to 26%. The proportion of time expended by senior attorneys ranged from 36% to 42%.

The general trend of a decreased proportion of senior attorney time and increased junior attorney and paralegal time from the 25th to the 75th percentiles for most case types appears to be a reflection of law firm size and resources, at least for some types of cases. In professional malpractice, premises liability, and contract cases, for example, the survey data revealed significant differences in the number of hours expended for discrete stages of litigation based on law firm size. See Table 4. Firms with 2 to 5 attorneys reported significantly fewer hours expended in professional malpractice cases for case initiation, settlement negotiations, pretrial preparation, and post-disposition activities. Interestingly, solo practitioners in professional malpractice cases reported similar number of hours compared to law firms with 6 or more attorneys. Although there were several "boutique" law firms specializing in professional malpractice cases represented in the ABOTA survey, practice area specialization was not a significant predictor of the amount of time expended on litigation tasks. Firms

Table 4: Median Time Expended in Litigation Tasks by Law Firm Size

	Solo Practitioner	2 to 5 Attorneys	6 to 20 Attorneys	More than 20 Attorneys	*Kruskal-Wallis Test*
Professional Malpractice					*ns*
Case Initiation	50	20	45	22	*p* = .029
Discovery	120	78	110	110	*ns*
Settlement	29	15	30	20	*p* = .018
Pretrial	45	25	40	48	*ns*
Trial	190	150	190	200	*ns*
Post-Disposition	40	19	30	32	*p* = .009
Total	471	313	475	464	*p* = .024
Premises Liability					
Case Initiation	9	11	16	10	*ns*
Discovery	20	26	40	40	*p* = .017
Settlement	10	12	17	12	*p* = .021
Pretrial	10	15	19	21	*p* = .048
Trial	50	80	85	70	*ns*
Post-Disposition	10	12	15	12	*ns*
Total	112	175	198	175	*ns*
Contract					
Case Initiation	25	21	25	44	*ns*
Discovery	60	40	50	95	*p* = .005
Settlement	12	15	20	25	*p* = .049
Pretrial	30	31	30	55	*ns*
Trial	100	90	101	155	*ns*
Post-Disposition	25	16	17.5	30	*ns*
Total	270	272	234	440	*p* = .029

* Shading indicates statistically signficant differences by law firm size.

with fewer than 6 attorneys reported significantly fewer hours expended in premises liability cases for discovery, settlement negotiations, and pretrial preparation. For contract cases, firms with more than 20 attorneys reported significantly more hours expended in discovery and settlement activities. It is not clear whether these differences are the result of comparatively more time expended on these tasks for similar cases or whether the cases accepted by larger law firms are significantly more complex, requiring more time to complete those tasks.

The relative efficiency of smaller law firms in terms of number of hours does not necessarily translate as lower legal bills for clients, however. Although there was no significant difference in the billable hourly rate for junior attorneys based on law firm size, the billable rate for senior attorneys was significantly higher for solo practitioners ($385 per hour at the 50th percentile) and firms of 2 to 5 attorneys ($350 per hour at the 50th percentile) compared to larger firms ($250 per hour for firms of 6 to 20 attorneys and $285 per hour for firms with more than 20 attorneys). Paralegal rates also differed based on law firm size, but in the opposite direction. Paralegals working in law firms with more than 20 attorneys billed at $110 per hour at the 50th percentile compared to $95 to $100 per hour in smaller firms.

The ABOTA survey was intended to produce national estimates of litigation costs, but the number of respondents from the California, Florida, and Texas chapters of ABOTA allowed the NCSC to investigate jurisdictional differences for those three states. Surprisingly, there were no statistical differences for the median time by state for most case types. However, the median amount of time expended in discovery activity in employment cases in Texas (55 hours) was significantly less than in California (138) or Florida (128). Texas also has an advantage in terms of expert witness costs in automobile tort, professional malpractice, and employment cases because lawyers in Texas typically retain fewer experts (1 per side in automobile tort cases, 2 per side in professional malpractice, 1 per side in employment cases) than in California (2 per side in automobile tort cases, 3 per side in professional malpractice, 2 per side in employment) or Florida (2 per side in automobile tort cases, 4 per side in professional malpractice). In premises liability cases, the median is the same for all three states (2 expert witnesses per side), but Texas had less variation (range from 0 to 3 experts per side) than in California (range from 1 to 5 experts per side) or Florida (range from 1 to 4 experts per side).

Implications for Practitioners

The CLCM is a new approach to estimating civil litigation costs, but initial reactions from practitioners suggest that these are reasonable based on their own professional experience. What was most surprising to the NCSC was just how large the range of time and costs was, and how uniformly those estimates increased, between the 25th and 75th percentiles for each case type. These case categories serve as broad umbrella categories in state court case management systems, and are quite useful to state courts for organizing caseloads. But it is clear from the ABOTA study that discrete case-level factors such as litigant type, injury severity, and the number and organizational sophistication of litigants play a much greater role in the amount of time expended for litigation tasks.

The NCSC intends to continue to refine the CLCM to explore and tease out some of these factors. We are particularly interested in exploring the plaintiff versus defendant differential as well as differentials based on lawyer or law firm expertise, on litigant characteristics (e.g., individual versus business litigant), and especially on local procedural or operational factors. For example, do fact versus notice pleadings really have an effect on overall costs? Or do they merely shift time and costs between case initiation and discovery? Do local court operations make a difference for practitioners such as the use of a master calendar system versus an individual calendar system? As courts continue to experiment with different types of civil justice reforms, the ability to generate reliable time and cost estimates must be included in the assessment to ensure that civil justice reforms benefit both sides, or at the very least, do not benefit one side to the detriment of the other and do not benefit the bench at the expense of the bar (and its clients). Going forward, this information needs to be part of an explicit conversation between the bench and bar. ■

[1] National Center for State Courts, short, Summary & Expedited: the Evolution of Civil Jury Trials (2012).

[2] Although many other categories of civil cases including products liability, intellectual property, defamation (libel/slander) are cited as some of the most time-consuming and expensive types of civil litigation, individually they comprise a very small proportion of civil cases. It would be exceedingly difficult to collect data on all of these case types, in part due to the very small number of lawyers who routinely practice in those areas.

[3] 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). The remaining 40% include small claims, probate, mental health, agency appeals, and the ubiquitous "other civil."

[4] Detailed tables showing the estimate of attorney and paralegal hours, the number of expert witnesses, the expert witness fees, and the reported billable hourly rates for automobile tort cases were published in *Paula Hannaford-Agor & Nicole L. Waters, Estimating the Cost of Civil Litigation*, 20(1) CASELOAD HIGHLIGHTS (January 2013) (available at www.courtstatistics.org). Detailed tables for the other five case types are posted at www.ncsc.org/CLCM/.

[5] Although respondents to the ABOTA survey represented 43 states, there were too few respondents in most states to permit meaningful comparisons.