CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT

SUMMARY OF PRINCIPAL FINDINGS

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CIVIL LITIGATION RESEARCH PROJECT

SUMMARY OF PRINCIPAL FINDINGS

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A. Introduction

This Summary presents some of the major findings of the Civil Litigation Research Project.[1] These findings are derived from a nationwide study of civil cases in five federal district courts, state courts of general jurisdiction and a survey of households. Estimates of the frequency of civil litigation, its costs, and lawyers' activities in the typical civil case are presented, and the resulting picture of "ordinary litigation" contrasted with images of litigation in the literature. Litigation is conceptualized as the investment of time and money to secure a return. Data from interviews with over 1300 lawyers are used to analyze factors which influence lawyers' decisions to spend time in lawsuits. The amount of money involved is important, but moves initiated by the other side are more important in determining hours spent. Lawyers spend more time on cases that advance their own interests, and increased client control does not affect the time invested. Contrary to what theorists predict, contingent fee and hourly lawyers seem to behave similarly. Clients in general secure net monetary gains from litigation: most plaintiffs recover more than they pay in fees, and many defendants can also be said to gain. Plaintiffs do better if their lawyers emphasize settlement. While litigation generally "pays" in monetary terms for the parties, the smaller the case, the less likely that it will be cost-effective for the parties and perhaps for society.

This Summary focuses on those aspects of the Civil Litigation Research Project most relevant to the theme of the costs of litigation. While the Project studied many aspects of the litigation process, and included studies of other ways to process civil disputes, a major concern was to illuminate the question of "costs."

It is widely believed that the costs of litigation are rising and that this is an important problem for the legal profession and the public. In professional and policy discourse, the "costs" discussion focuses on dollar expenditures clients must make to use courts for processing disputes. Rising costs are seen as a barrier to some and a problem for all.[2] The debate over "costs" merges with a broader range of issues about the role of courts in society: in this literature concern is also expressed about problems created by too much litigation or litigation about matters best handled outside the courts. This section of the report summarizes our studies of direct expenditures of time and money on the processing of disputes through litigation.

The study was conducted in five parts of the United States. In each of five federal judicial districts, we studied randomly sampled civil cases from the federal district court and at least one state court. We also surveyed the general population in these districts. These data, including over 1600 cases and many thousands of interviews, form part of the larger data base collected by the Civil Litigation Research Project ("CLRP"). To date, we have used these data to estimate the amounts clients spend on litigation, describe how much time lawyers spend on the typical civil lawsuit and what

they spend their time doing, explain what influences a lawyer to spend more or less time on a case, and assess whether clients get back as much as they spend on lawsuits. These are the analyses reported in this Summary.

B. The Central Theme--Litigation as an Investment Process

One can look at litigation in many ways. We have chosen to conceptualize the process as the investment of scarce resources to achieve a future result. The resources to be invested include time and money: however, as it is frequently possible to monetize the value of time expended on litigation, these may come to the same thing. The results to be achieved include recovering money (plaintiffs) or avoiding paying money (defendants); stopping something from happening, or causing some act to be carried out. In theory, all results could probably be given a monetary value, but in practice this proves extremely difficult. In the empirical investigation of litigation as an investment, we have, therefore, distinguished between expenditures of time and of money, and between monetary and non-monetary results.

We claim no originality in our decision to conceptualize litigation as an investment: this approach has been widely used by economists, from whom we have adapted the conceptual framework that oriented our data collection and analysis.[3] We have, however, been able to translate this approach into specific hypotheses that can be tested empirically using our data. CLRP focused on answering two questions about the litigation investment:

(i) what determines the amount of time and money invested in a case; and

(ii) how "productive" are the investments which clients make in litigation; in other words, does the litigation investment "pay"?

1. Investment Levels

The first question we explore is the level of resources invested. We expect to find significant variation among cases in the resources (time or money) committed. We hypothesize that the value of the expected result will loom large among the determinants of investment levels: that, ceteris paribus, the higher the "stakes" (positive or negative) the more time a party will devote to, or money they will spend on, the case. But if the stakes are a major factor influencing any party's investment decisions, they are not the only ones. The most obvious additional factor is the actual or expected investment by the other side: litigation is an interactive process and one side's investment is likely to be influenced, inter alia, by what the other side spends or is expected to spend. Further, litigation investments like most investments occur under conditions of uncertainty: one cannot be sure of the outcome, the relationship between investment and result, or the expenditures the other side will make. Thus a factor that will influence litigation investment levels is risk-preference: the willingness of a party to risk resources for uncertain outcomes (Cooter, Marks and Mnookin, 1982).

The model set forth above is suggested by the schematic diagram in Figure 1. In this diagram, A's actual investment is influenced by

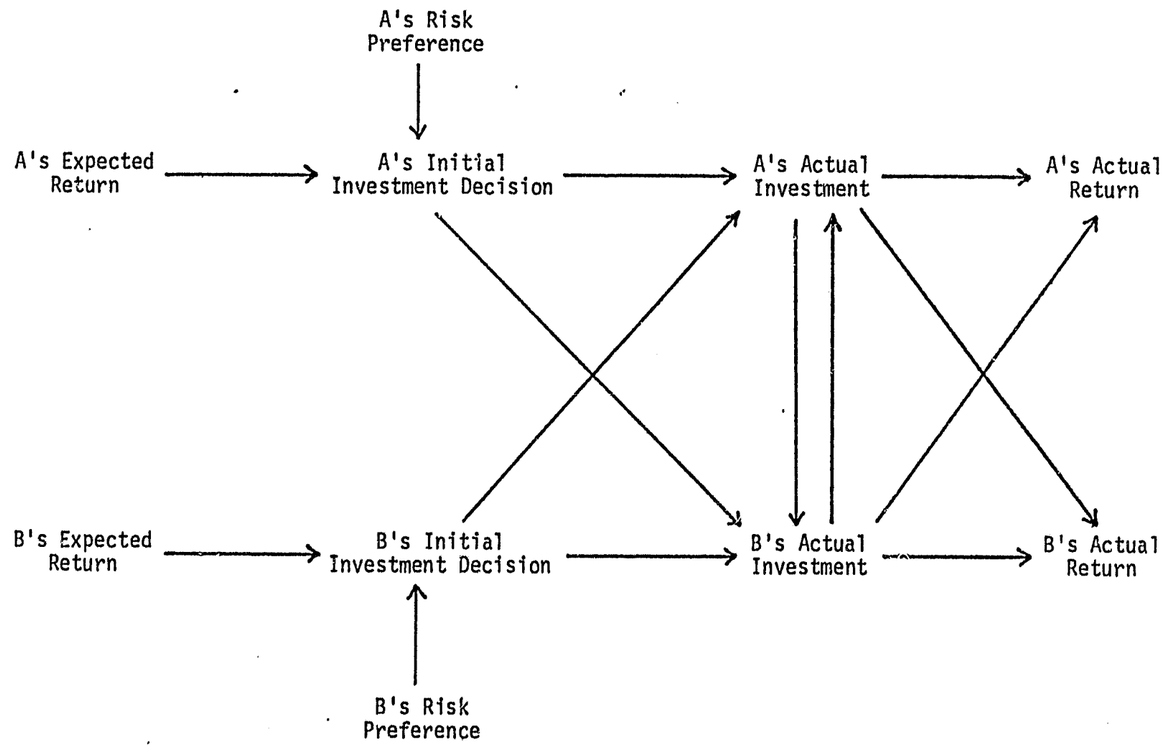
(i) an initial "investment decision" formed by considering the expected return in light of A's risk preferences, and (ii) by B's initial investment decision which results from the same factors as A's. Returns are influenced by the actual investments of both parties.

The model in Figure 1 is highly schematic. It fails to take account of the actual complexity of real cases. And because it incorporates a simultaneous interaction process the model cannot be directly tested unless very stringent conditions are met.[4] To examine the litigation data we collected, we developed an empirical model that is both more complex, because it includes many variables not incorporated in the simplified scheme of Figure 1, and more amenable to statistical analysis, because it approaches the problem of interactive investments in an indirect way which we will describe below. We use this model to explain variation in the time lawyers spend on civil lawsuits. In section D. we explain why we chose to explain expenditures of lawyer time rather than client dollars, and set forth in detail the model and our findings.

[Figure 1 here]

Figure 1

The Investment Decision Model



2. Does Litigation Pay? Assessing Costs and Benefits

If we think of litigation as an investment, we naturally want to know if the investment is a profitable one. Do resources invested in litigation yield comparable benefits? How large are the gains? Do the benefits from litigation exceed the costs? Does litigation yield more, net of costs, than other forms of dispute processing?

At the theoretical level, these questions are complex. In the first place, from whose viewpoint should we assess the "yield" from litigation investments? We have to look separately at whether litigation pays for clients, the lawyers, and society as a whole. As Earl Johnson has suggested, litigation investments that may be highly lucrative for lawyers may not be optimal for clients, and vice versa (Johnson, 1980-1). Moreover, even if both lawyers and clients gain from litigation, it does not follow that litigation is a cost-effective process for society as a whole. The simple fact that taxpayers not litigants pay the cost of operating the courts shows why calculations of social and private costs must diverge.

A second issue is whether you can analyze litigation investments in isolation. If one says, "litigation pays" (or doesn't pay) the question naturally arises: compared to what? The Civil Litigation Research Project was designed, in part, to permit a comparative analysis of the costs of litigation and alternative approaches to resolution of disputes. For this reason, we collected data on cases in "alternative institutions" like arbitration agencies and mediation programs, and from disputes that were "resolved" by negotiation without third party intervention (Trubek, 1980-1; Kritzer, 1980-1;

Trubek, et al., 1983). The aim of collecting all these data was to be able to see if clients did "better," objectively and subjectively, in litigation or in other processes available for dispute resolution.

A third issue is whether monetary indicators of gains and costs are, by themselves, adequate to assess whether litigation "pays." A client might secure a substantial net recovery (i.e. after paying lawyer's fees and other costs) and still be thought worse off if one took account of the non-monetary costs of the litigation experience (Trubek, et al., 1983). In theory, there is nothing inherent in the "investment" approach which limits us to analysis of monetary costs and benefits. But methodological problems, complex as they are when one limits the focus to monetary factors, become formidable when one seeks to go beyond this dimension.

A complete analysis of the costs of litigation would examine private and social costs, study the relative cost of litigation and other dispute processing modes, and try in some way to incorporate non-monetary costs and benefits. We are not, however, able to deal with all these facets of the problem. Although we have collected data from alternative institutions and "bilateral disputes," we have not been able to analyze them as yet, so that we can only report findings on litigation. Further, for methodological reasons, we have restricted our analysis to monetary (or easily monetizable) costs and benefits of litigation. Finally, our focus is on whether litigation, examined in isolation, "pays off" in monetary terms for plaintiffs and defendants. We discuss some of the monetary costs of litigation not borne by litigants, using the limited data available,

but do not reach any overall conclusions from a social, as opposed to a private, point of view.

The two principal analyses summarized here, therefore, are the analysis of investment levels (using lawyer's time as the resource invested) and of whether litigation pays off in monetary terms for the clients. The first is set forth in Section D, the second in Section E. But before we turn to these matters, we present some descriptive information on the sample of cases we have used in the analysis and the lawyers who responded to our survey. These data provide a picture of important parameters of the world of civil litigation in the United States, a picture which we believe may help correct some distortions in the literature on litigation in general and its costs in particular.

C. The World of Litigation--The Cases and the Lawyers

1. Source of Data

Our analysis of litigation investment is based primarily on a survey of lawyers throughout the country. Lawyers participating in selected cases were asked about the case, its costs, and themselves. For the principal analysis reported here, we have added information about the cases from court records. We also draw, to a lesser degree, on data from a parallel survey of the clients and a general household survey.

These sources are part of an even larger data base collected by the Civil Litigation Research Project under its contract from the United States Department of Justice. The primary source of data for CLRP was a sample of civil cases from state and federal courts and from "alternative institutions" like commercial arbitration. (This case sample was supplemented by a set of "bilateral disputes" which never reached third parties.) The case sample was drawn on a random basis in five federal judicial districts: Eastern Wisconsin, Eastern Pennsylvania, Central California, South Carolina and New Mexico. In each district, we sampled terminated cases from the records of the federal district court and one or more representative state courts, and from a series of "alternative" institutions. Data from these institutional records were coded, and then we sought to interview clients and lawyers in each case. In addition, we conducted surveys of households and private organizations in each district to locate "bilateral disputes." Data from these surveys were integrated into our overall base, and some are reported here.[5]

The sampling scheme we used limits our data to what we call the "middle range" of civil disputes. We excluded disputes in which the initial claim was under $1000, and dropped a few "mega-cases," i.e. highly complex civil lawsuits, from the sample.[6] The result is a sample that excludes small claims and slightly underweighs the very large civil lawsuit.

We selected 1649 civil lawsuits from court records: the court sample is about evenly divided between state and federal cases. We then tried to interview parties and attorneys of record in all these cases. Our most successful survey was of the attorneys. We completed 1812 interviews with lawyers from these cases.[7] In the analysis which follows, we rely primarily on a subset of the responses--the 1387 attorneys who took an hour or more to answer our full questionnaire.

In considering the results we report, the reader must appreciate the strengths and weaknesses of the data we have. Our original selection of cases from five districts was designed to be as representative of civil cases in the U.S. as possible--but no sample limited to only five of the 95 federal judicial districts can be fully representative. The cases were selected at random from all cases that had terminated in 1978. Certain types of civil cases were excluded (e.g., if they did not involve disputes, as we defined this term), but for the types of cases included, our sample is basically representative of civil litigation in each district.[8] By including an equal number of federal and state cases in the sample, we substantially oversampled federal cases. The latter probably make up

less than 3% of all civil cases filed in courts of general jurisdiction in the United States, so any sample that tried to reflect the overall universe of civil cases should include no more than 3 federal cases out of 100.[9] For this reason, we usually report federal and state court data separately: readers concerned with a statistical profile of all middle range civil cases in the U.S. should treat our state data as most representative. Also bear in mind that we have not included cases from small claims courts or other specialized courts: this is a sample of cases that involve genuine disputes in state courts of general jurisdiction and the federal courts.

The main source for the data reported here was a telephone interview with attorneys. Conducted in 1981, these interviews lasted about an hour, and covered all aspects of the case. Attorneys were contacted in advance and asked to review their records prior to the call. However, in many cases the events in question might have occurred some years before. It is inevitable that there will be problems with selective memory ("recall bias") in a survey like this. Nonetheless, our data base is the best (indeed, probably the only) source of information on litigation costs and their effects currently available. The reader, aware of its limits, will have to assess for herself the plausibility of the conclusions we draw from it and the policy results our findings suggest.

2. Extraordinary and Ordinary Litigation

One advantage of our data base is that it allows us to focus on what might be called the "typical" civil lawsuit. Much of the

discussion of litigation in general and the "costs of litigation" in particular deals with the extreme ends of the range of litigation phenomena, not with what statisticians would call the central tendencies. If we examine the literature, we find three questions predominate. First, attention is drawn to the very large, complex case, usually involving major businesses. We hear a lot about the "mega-case," in which legal titans clash in forests thick with briefs, motions, discovery and endless trials (Brigham Young U. L. Rev., 1981; Galanter, 1983). Secondly, we hear a good deal about unusual or problematic subjects for litigation, with commentators questioning if the courts are not unwisely intruding into complex public policy issues (Glazer, 1975) or privileged spheres of private life (Galanter, 1983). Finally, a good deal of attention is paid to the minor dispute; the conflict too small to justify the investment of lawyer time and for which the existing court system may be either too costly or ineffective or both (McGillis and Mullin, 1977; Nader, 1980).

Large cases and small claims are important policy issues. But the large case is a rare phenomenon in our civil courts of general jurisdiction, and small claims do not reach these courts. While there may be an occasional case which litigation has been used for inappropriate purposes, these like the "mega-cases" are numerically insignificant. Before we seek to assess the "costs" of litigation in America or discuss the need for reform, it is important to examine the ordinary and typical cases. The CLRP data reflect what is going on in the courts. The "middle range" civil disputes we studied

mostly involve routine legal business: many are standard tort and contract suits.[10] Our statistics describe what happens in the ordinary world of litigation, so familiar to the litigating bar and the bench, yet rarely discussed in the media or by proponents of reform.

The picture that emerges from these data is at variance with the image of litigation projected in much popular and some professional discussions of the dispute resolution "problem." A casual reader of the literature on courts and court reform in America might conclude that Americans litigate with great frequency, and that the typical lawsuit is complex, costly, and time-consuming. Further, she might think that litigation involves the unconstrained exercise of adversarial skills by legions of lawyers who devote many hours to such "lawyerly" activities as preparing motions, conducting discovery, writing briefs and conducting trials. It might appear that all this effort imposes a vast burden on judges who must rule on numerous motions, supervise extended discovery and lengthy trials and render difficult verdicts. Finally, it might seem that clients pay an exorbitant cost for services rendered in litigation and that fees eat up a substantial portion of recoveries.[11] While all this occurs, and probably occurs frequently, the typical case, as we observed it, is very different.

It is hard to reduce our data to a single, composite case that might be considered typical. But if we were to do this, we would have to describe the "modal" case as follows: First, the very fact that a dispute has reached the court, rather than being settled

without litigation, makes it unusual. Viewed against the baseline of potential lawsuits, litigation is not frequent: for every dispute in the court records, there are nine others that never even reach the filing stage. Secondly, the cases in courts of general jurisdiction are modest: the parties are usually fighting over money, and the amounts at stake are $10,000 or less. Thirdly, the typical case is procedurally simple and will be settled voluntarily without a verdict or judgment on the merits. This case will involve some pretrial activity, but no trial. Each side's lawyer spends about 30 hours on the case, mostly gathering facts and negotiating a settlement. Judicial involvement, either ruling on motions or rendering judgment, will be rare. The typical case is a "paying" proposition for the parties. The average plaintiff will recover some portion of the amount claimed, and the amount recovered will significantly exceed the money and the value of time spent on the case. Even the defendants can be said to have "gained" from the litigation, at least in the sense that their litigation expenditures are less than the amount by which plaintiff's claim was reduced during litigation.

This composite picture of ordinary litigation helps correct biases in discussions which focus on the extraorindary lawsuit or the very small claim. But this does not mean we question the need for reform in the civil justice system: quite the contrary. In the first place, even if ordinary litigation is less problematic than the extraordinary case, cost-related problems still exist in this area, especially in the smaller of middle range claims where costs may exceed benefits. Secondly, even if the typical case is less

problematic than the statistically unusual ones, there are at least 6 million civil cases filed in America so that, even if only 5% are "extraordinary," these cases could consume substantial resources. Thirdly, while our data do not deal with the small claim, what data we have confirm the view that litigation is not a cost effective way to deal with many minor disputes.[12] Fourthly, we show that litigation "pays" in the sense of yielding net monetary benefits. But we can't say if these gains are wiped out by negative non-monetary features of the litigation experience. Moreover, we are not saying litigation clients do as well as they might if the system were charged. In the first place, our data provide some support for the view that lawyers appropriate some of the gains that might otherwise accrue to clients under more competitive market conditions (Johnson, 1980-1). Secondly, we cannot say whether or not the clients of the lawyers we studied would have been even better off if their disputes had been handled in some other way.

3. Some Dimensions of Litigation

In this section we describe five "dimensions" of litigation: frequency, stakes, activities, lawyer time and costs. Within the limits of our sample of middle range civil disputes from five parts of the U.S., we seek to give some idea of how often people in disputes actually use the courts, how much money is involved in those cases in which the basic dispute can be treated as a conflict over money, what actually occurs once a lawsuit is filed, what lawyers spend their time doing, and how much money is spent by litigants.

(a) The frequency of litigation. -- Is litigation a frequent response to the disputes that arise in society? Some would say yes, arguing that Americans are unusually prone to resort to the courts when problems arise (Manning, 1977; Barton, 1975; Glazer, 1975). Marc Galanter has analyzed this view, which he calls "hyperlexology," and demonstrates that the view that we are an unusually litigation-prone is based more on popular myth than careful analysis of the data (Galanter, 1983). Our contribution to this debate is based on the survey we conducted of over 5000 households in the five judicial districts studied. Our data cannot answer the question of whether we are litigating too much, but it can suggest how frequently litigation occurs.[13]

Any empirical discussion of the frequency of litigation must employ a baseline--some measure of the number of opportunities to use the courts against which actual filing rates can be compared (Lempert, 1978). The litigation baseline is a measure of the number of transactions of a particular type which might lead, ultimately, to lawsuits. If one were concerned with medical malpractice litigation, for example, it would be inadequate merely to note an increase in the number of cases filed. One would want to relate this to rates of professional contacts which might generate lawsuits. Thus one might employ the number of visits to doctors, the number which result in injury or the number which result in perceived grievances. The frequency of malpractice litigation would then be a percentage of the number of visits, injuries or grievances.

Our baseline was provided by the incidence of disputes which occurred in eight general areas which we selected--tort, consumer, debt, discrimination, property, government, post-divorce and landlord-tenant. A "dispute," for our purposes, occurs when an individual perceives a grievance, seeks redress and is at least initially rebuffed by the other party. To determine litigation frequency, we compared the number of "disputes" in this sense with the number of complaints filed in federal or state courts by disputants. (Note that by using filing as our measure of litigation, rather than some index of substantial court activity, we are overstating the rate at which disputes lead to real third party intervention at the judicial level.) The incidence of both disputes and litigation was reported by a random sample of the general population in each of five geographic areas. This study provides a rough estimate of the frequency of litigation involving <u>individuals</u> in the U.S.[14]

Overall, we found that 71.8% of individuals with grievances complained to the offending party, and that a dispute arose in 63% of these situations. Of these disputes, 11.2% went to court. Figure 2 shows the overall disputing pyramid that emerges.

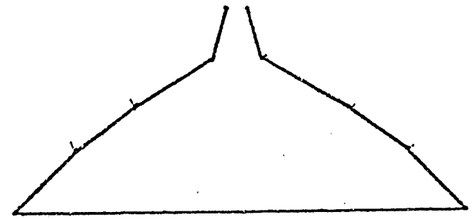
[<u>Figure 2 here</u>]

Figure 2

<u>A Dispute Pyramid: The General Pattern</u>

<u>No. per 1000 Grievances</u>

Court Filings	50
Lawyers	103
Disputes	449
Claims	718
Grievances	1000



These figures show that lawsuits are filed in just over 10% of the disputes involving individuals where $1000 or more is at issue: in almost 90% settlement was reached or the matter abandoned without a court filing. When one realizes that in many lawsuits little or nothing occurs except filing the complaint, an 11.2% litigation rate does not seem particularly high compared to the potential baseline. Of course, even at such a rate there will be numerous lawsuits in a country as large as ours, and these will involve substantial judicial activity. Nevertheless, litigation, even in the limited sense of starting a lawsuit, is by no means the most common response to disputes. As Table 1 shows, the lowest litigation rate is in the consumer area, a field in which the amount at stake is often very small. The highest is in post-divorce (e.g. adjustments in custody and support). The extremely high post-divorce rate in part reflects the fact that many times even consensual arrangements must be ratified by the court (see Friedman and Percival, 1976).

Table 1

Litigation as a Percentage of Disputes*

All Disputes	11.2%
Post-Divorce	59.0%
Torts	18.7%
Property	13.4%
Government	11.9%
Debt	7.6%
Landlord	7.3%
Discrimination	3.9%
Consumer	3.0%

* Detailed description of these categories can be found in Miller and Sarat, 1980-81:566.

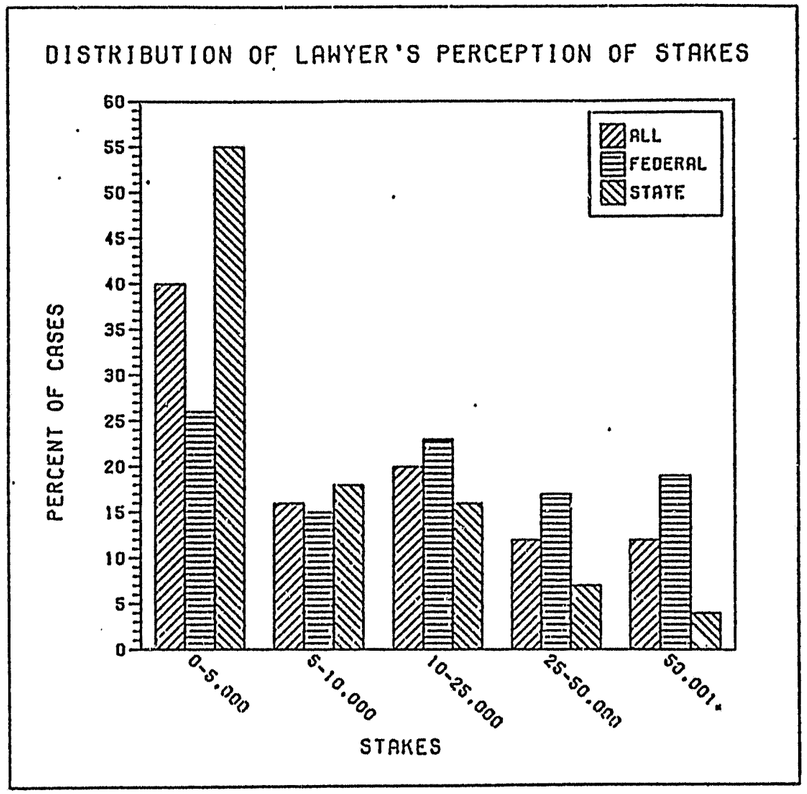
We now turn to an effort to describe what goes on in the ordinary lawsuit once it is filed. These data are from two sources: the lawyer survey and the court records.

(b) Stakes. -- The first dimension of litigation we sought to estimate was the amount of money the litigants thought was in dispute during the life of the lawsuit. To measure this, we used the lawyers' estimate of how much their client would have accepted or paid to settle the case. This figure gives us the best estimate we have, from each party's point of view, of what plaintiffs expected to secure and defendants thought they might be liable for. We call this measure the "stakes" in the case, and report the highest figure if the attorney's view changed during the case.[15] In some of our cases the attorneys could not give a monetary estimate of the stakes, but we did get monetary figures in 859 of our attorney interviews.

Figure 3 shows the distribution of stakes for the cases in our sample. Overall, 56% involve $10,000 or less. Only 12% of our cases involved stakes of $50,000 or more. Not surprisingly state court cases tend to be "smaller" than cases filed in the federal courts. For state cases the median stakes is $4,500; for federal cases, $15,000. Most of the time courts are not asked to manage cases in which vast amounts of money hang in the balance. While the prospect of transferring 5, 10, 15, or 20 thousand dollars is by no means trivial, those figures do not convey an image of a court system overwhelmed with blockbuster, mega-cases.

[Figure 3 here]

Figure 3



(c) Activities. -- What happens in ordinary litigation? There is a popular image that litigation involves extensive pretrial and protracted trials.[16] Our data suggest the contrary. Trials are rare, pretrial activity modest, and most cases terminate through settlement negotiations.

Less than 8% of the cases in our sample went to trial. In another 22.5%, the judge dismissed the complaint or rendered judgment on the merits without a trial.[17] The most frequent mode of termination is voluntary agreement of the parties, which accounts for over 50% of the cases. Our data suggest civil judges and juries provide final, authoritative third party dispute processing in less than a third of the cases. More frequently, the courts serve as the background for bargaining between the parties, bargaining which occurs "in the shadow of the law," but which is conducted primarily if not exclusively by the parties and their lawyers (Mnookin and Kornhauser, 1979).

Pretrial activity is much more common than trials, but modest nonetheless. Take discovery, widely thought to be a cause of delay and spiraling costs.[18] Our data suggest there may be relatively little discovery in the ordinary lawsuit. A search of court records revealed no evidence of discovery in over half our cases. Rarely did the records reveal more than 5 separate discovery events. While our data are limited to the court records, these findings confirm earlier studies that show that even in federal courts discovery is used intensively only in a small fraction of civil lawsuits (Connolly, Holleman and Kuhlman, 1978).

(d) Lawyer time. -- The third dimension of litigated cases we measured was the time lawyers spent on cases and the way they allocate that time. Once again, these data demonstrate the differences between ordinary and extraordinary litigation. Our data show that a typical case involves relatively few lawyer hours and that attorneys spend almost half of this time in conferences with clients, factual investigation other than discovery, and settlement negotiation: less than 10% of the time spent by lawyers in our sample was spent in trials and hearings.

Each lawyer was asked to estimate the number of hours they and other lawyers in their firm spent working on the cases which we were studying. The number of hours spent per case by each attorney varies from 8 or less (our lowest category) to 2,200 hours. In the median case the lawyer spent 30.4 hours, while the mean for all cases (total hours in all cases divided by the number of cases) is 72.9. The distribution is set forth in Table 2.[19]

Table 2

Distribution of Lawyer Hours Per Case
(All Lawyers)

Total Hours	Percent of Cases
0 - 8	13
9 - 24	28
25 - 40	19
41 - 80	19
81 -120	9
over 120	12
	100
Median: 30.4	N = 719

Sixty percent of the lawyers (or firms) spent less than one person-week on the cases we asked them about; in 13% of the cases they devoted eight hours or less to the case.

In addition to asking for the total number of hours lawyers spent, we sought to determine how time was allocated among a series of different litigation activities. Table 3 sets forth the mean response to this question.

Table 3

Mean Hours Devoted to Activities

Activity	% of Time Spent
Conferring with Client	16.0
Discovery	16.7
Factual Investigation	12.8
Settlement Discussions	15.1
Pleadings	14.3
Legal Research	10.1
Trials and Hearings	8.6
Appeals and Enforcement	.9
Other	5.5
	100.0

n = 704

Lawyers spend a relatively small portion of their time on legal research and formal procedural matters. Trials and hearings take up less than 10% of the time, and more time is devoted to settlement negotiation than to legal research.

(e) Monetary costs. -- We secured information from clients and lawyers about the expenditures of time and money the clients make on litigation. Clients reported that the bulk of their expenditures

were payments made to lawyers to cover fees and expenses. Payments to lawyers constituted 99% of out-of-pocket litigation expenditures for individual clients and 98% for organizations. Even when we add in the monetary value of the time clients spend on cases, fees and related expenses equal 88% of the median individual's costs. (For organizations, the comparable figure is 72%.) We found that expenses, as distinguished from fees, make up a very small percentage of the total bill for most lawyers, and probably are closely correlated to the fees. We chose, therefore, to concentrate description and analysis on legal fees, as a reasonable proxy for total monetary cost.

The data reveal that legal fees in the world of ordinary litigation are modest (Table 4). In almost half the cases we studied the fees were under $1000. In only 8% of the cases were fees over $10,000. Not surprisingly, fees are lower in state cases than in the federal courts. Twenty-five percent of the lawyers in our federal sample reported fees over $5000, while lawyers in only 6% of the state cases received this level of compensation.

Table 4

Total Legal Fees
(Percentages)

	All Cases	Federal	State
$0-1000	46	34	59
1001-2500	24	23	25
2501-5000	14	18	10
5001-10,000	8	12	4
10,000+	8	13	2

(f) The litigators. -- In addition to examining these dimensions of litigation activity, we sought information on the litigators. We wanted to get some idea of the settings in which they practice, their experience, specialization, and income. We report data only on private attorneys, house counsel and legal services lawyers. Government attorneys were surveyed separately, and this data has not yet been analyzed.

Seventy-eight percent of the lawyers practice with firms (2 or more lawyers); the modal size firm is 5-9 lawyers. The distribution by firm size is shown in Table 5.

Table 5

Size of Firms for Lawyers Practicing in Firms

Number of Lawyers	N	Percent	Cumulative Percent
2	132	12.4	12
3-4	261	24.5	37
5-9	312	29.3	66
10-19	170	16.0	82
20-49	129	12.1	94
50+	61	5.7	100
	1065	100.0	

In addition, 17% of the sample are solo practitioners, 3% are house counsel and 2% work for a legal services or legal aid program.

There were lawyers in our sample who had practiced less than one year, and some who had been at the bar over fifty years. Thirty-four percent had practiced less than five years, and well over half (58%) had been in practice ten years or less.

Our indicators point to a young but specialized litigating bar. The lawyers surveyed spent most of their time on litigation. The average time devoted to litigation was 75%: Twenty percent (274) of the lawyers devoted 95% or more of their time to litigation and only 2% reported spending less than 10% of their professional time litigating. The lawyers also tend to specialize in one area of law. The average lawyer reported spending half their time on the type of case we were interviewing them about, and over half reported having already handled at least 200 such cases before. When asked to evaluate their own expertise in the field in question, 78% said they were "expert" or "somewhat expert."

Lawyers in the sample were asked about their average annual income from practicing law for the three years preceding the 1980 interview. The median lawyer's income from practice was $45,000. Most lawyers (60%) earned between $25 and $75,000. Only 5% reported incomes above $100,000 and only 3% made $15,000 or less.

Table 6

Income from Practicing Law

Amount	N	Percent	Cumulative Percent
0-$15,000	32	3	3
$16-25,000	201	17	20
$26-40,000	313	28	48
$41-50,000	175	15	63
$51-75,000	221	19	82
$76-100,000	143	13	95
$100,000+	61	5	100
	1146	100	
Mean $53,000			
Median $45,000			

D. Investment Levels: Explaining the Expenditure of Lawyer Time

What explains the amount of resources invested in lawsuits? We focused on the number of hours the lawyer spends, rather than the dollars the client pays. We had three reasons for this choice. First, we accepted Johnson's (1980-1) theory that the lawyers are principal decision makers in litigation investment decisions, and the decisions they make is one of how much time to spend on the case. Secondly, the patterns of our data dictated a focus on hours. Seventy-one percent of all our plaintiff lawyers and 41% of all lawyers surveyed were paid on a contingent fee basis: since fees in these cases were determined exclusively by the amount recovered, they were not a good measure of the resource investment decisions we wanted to study. Finally, in a national study like this it is easier to compare hours than fees, as fees vary on a regional basis.

1. The Model of Lawyer Time Investment

To explain lawyer time investment, we used standard social science techniques. Our goal was to investigate the variation in lawyer hours: the number of hours spent per case ranged from less than 8 to over 2000. This figure served as our dependent variable, that is, the factor to be explained. The explanation involved constructing an model of the investment process. This model consists of a number of independent variables: factors we thought should increase or decrease the number of hours a lawyer will spend on any case. It can be seen as a series of related hypotheses about what will influence investments. These hypotheses were tested against our data by a statistical technique called multiple regression analysis,

which allows us both to determine how well the whole model (all the independent variables) explains variation in hours, and to assess the relative importance of specific variables.

(a) Factors and variables. -- The dependent variable in the model is the number of hours the lawyers reported they or their firm spent on the case in question. To explain variation in hours, we selected 29 independent variables which we could measure and which we had reason to believe would explain variation in time spent on the case. For exposition and analysis we have grouped these variables into five major factors. These factors are: characteristics of the "case" itself, e.g. stakes, complexity and duration; the procedural events which occur; the participants; the goals of the participants, including the lawyers; and certain strategic choices made in case processing and management. The factors and the detailed indicators used to measure them are explained below.

CASE CHARACTERISTICS

We reasoned that the amount of money (or monetary equivalent) involved in the case, its overall complexity, and the length of time it took to process would have a significant impact on hours spent. These factors seemed to relate more to the nature of the "case" itself than to choices made in processing it (procedural events and management decisions) or to aspects of the participants in it (e.g. client motivation, lawyer's goals, abilities and background).

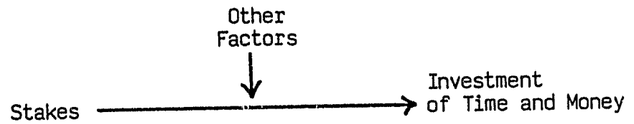
We considered that stakes would be one of the most important determinants of time investment. The importance of the "stakes" variable was derived from the investment approach. If litigation was

the process of investing time to secure an expected "return," "stakes" was the measure, for plaintiffs, of what could realistically be gained by litigation expenditures, and for defendants, of what they expected they might lose from an adverse outcome. We reasoned that the higher the stakes, the more time would be invested in the case.

When we began our work we expected that stakes would be the primary factor that would determine the amount of time spent on cases. At the same time, we recognized that factors other than stakes were likely to influence litigation investment decisions. These were conceived of as modifying an investment of time or money that would primarily be determined by stakes (Trubek, 1980-1). Some of these modifying factors, like those which measured lawyer expertise and planning, would reduce the time needed because they increased the productivity of the service: others like the legal complexity of the case would increase the amount of time. But as Figure 4 suggests, in our original conception the modifying factors would increase or reduce an investment amount primarily determined by estimates of stakes.

Figure 4

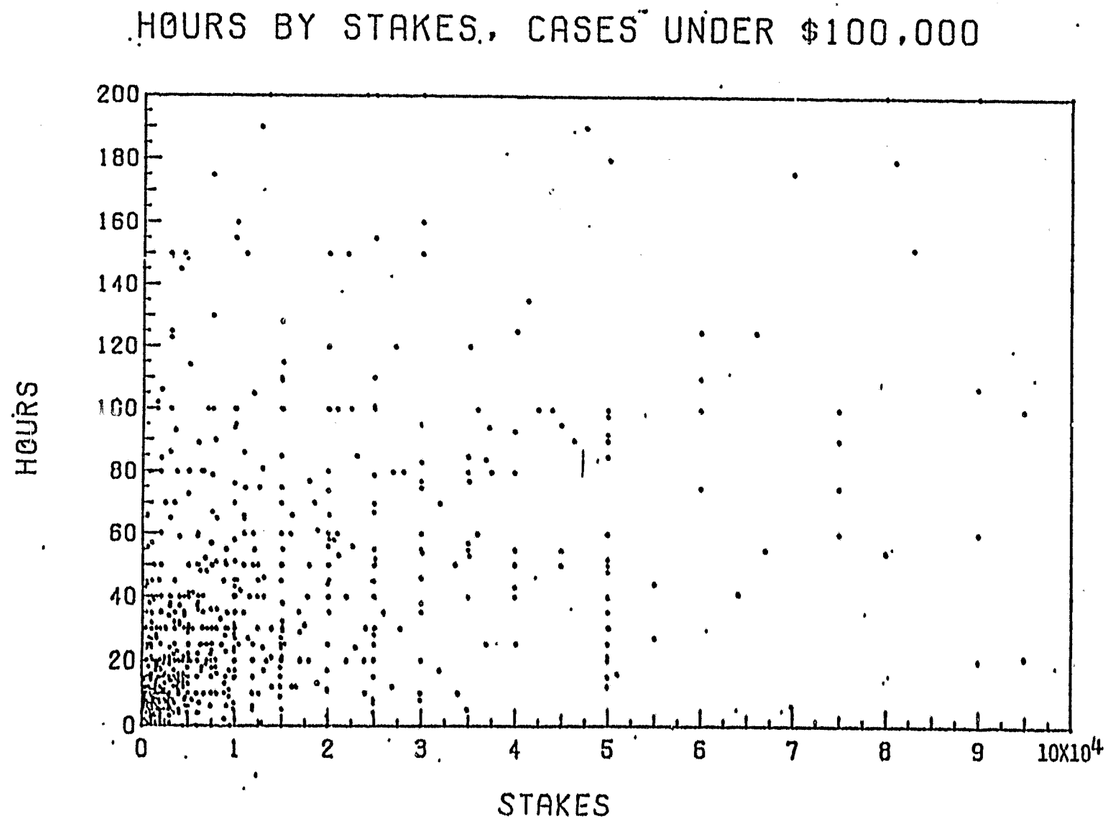
Initial
Stakes Model of Investment



Early analyses of our data, however, made clear that the stakes model, at least in the simple form that we had envisioned it, was an inaccurate picture of the litigation investment process. In the model shown in Figure 4, stakes can be thought of as "driving" the investment process. We quickly realized that this image of the role of stakes was incorrect. Stakes does not drive the investment process: they merely put a "cap" on the level of investment that will occur. This can be seen in the information displayed in Figure 5; this is a "scatterplot" of lawyers' hours and stakes. The vertical axis of the figure shows the number of hours spent on a case and the horizontal axis shows the stakes; each point represents the hours-stakes combination for one case in our sample of lawyers. (Figure 5 includes all cases in which stakes were less than $100,000 and hours were less than 200.) While the figure shows a general rise in the level of investment as the stakes increase, the rise is primarily in terms of the upper limits of time spent on the case; that is, the range of investment level increases as stakes rise, but there are still many cases with high stakes for which the level of investment is very low. The stakes set the upper limit on the hours a lawyer will spend, but other variables are more important in determining the actual hours that are invested.[20]

[Figure 5 here]

Figure 5


HOURS BY STAKES, CASES UNDER $100,000
HOURS
200
180
160
140
120
100
80
60
40
20
0
0
1
2
3
4
5
6
7
8
9
10X10^4
STAKES

Some cases involve simple and clearcut issues of law and easy questions of proof. In others, the law or facts may be complicated or unclear. The more complex the law involved, or the more difficult the problems of proof, the more time it should take to conduct the litigation. Our measure of complexity was based on the lawyer's evaluation.

Much of the discussion of the "costs" of litigation is in terms of "delay." We hypothesized that the length of time a case takes from filing to termination would have an independent effect on the number of hours lawyers would put in; i.e., if the case stretched over a long period of time, the lawyer would periodically refresh her memory of the case, or will "find" things to do. We measured duration simply as the number of days elapsed from filing the case to its termination, through settlement, adjudication or abandonment.

EVENTS IN THE CASE

A lawyer's time will be influenced by the "events" that occur in a case. Is there substantial pretrial activity? Does the case go to trial? Our cluster of "events" variables sought to measure the relationship between the presence of several "events" and the number of hours attorneys spend on cases.[21] The cluster includes (i) the number of pleadings, (ii) the number of non-discovery motions and briefs and (iii) the number of discovery related events, including depositions, interrogatories, requests for admissions, medical exams and the like, plus discovery related motions. In addition, we examined whether there was a trial and whether there were settlement negotiations.

NATURE OF PARTICIPANTS

The participants in the case are the lawyers and the clients. We classified clients as individuals or organizations because the literature suggested (Galanter, 1974) that organizations would devote more resources to litigation than individuals.

With respect to lawyers, our classification was more complex. We created six separate indicators designed to measure variation in lawyer characteristics. Specialization measures whether the case in our sample fell within the lawyer's speciality or not. Law school performance is the lawyer's self-report of performance as a law student. Amount of general experience is the number of years the lawyer had been practicing law. Litigation experience is the proportion of the lawyer's time devoted to litigation. Personal capacity is a measure of the lawyer's feelings of efficacy based on a standard measure. Lastly, craftsmanship is the likelihood (self-reported) of spending extra time to make marginal improvements on legal documents: the more likely this was, the higher the "craftsmanship" score.

We expected that the first five variables, which measured ability and self-confidence, would be inversely related to the amount of time lawyers spend on cases; the idea is simply that a more experienced, specialized, and confident lawyer would not have to spend as much time on a case as would an attorney who was newer to the field of law, to the courtroom, or to practice in general. The craftsmanship variable was expected to work the other way, that is, lawyers who were more oriented toward "craftsmanship" would spend more time on their cases, other things equal.

PARTICIPANT GOALS

Participant goals were measured for both lawyers and clients using data from the lawyers. We asked lawyers what they thought their client's goals were in the case. The "goals" variable, in a sense, modifies the "stakes" variable. Lawyers were asked if they thought their clients were out to get as much money as possible, or just a "fair amount" (for defendants, to pay the least or pay a fair amount). We expected the lawyer whose clients wanted to get the most (or pay the least) to put in more time on a case than the lawyer in an otherwise identical case whose client only wanted "fairness." We assumed that those clients (about 24% of our respondents' clients) who wanted to neither "get most/pay least" nor "get fair/pay fair" were primarily concerned with goals other than money.

To get information on lawyer goals, we asked our respondents why they had taken the case in question. We reasoned that lawyers may have motives independent of their clients' which would affect the amount of time they spend on cases. From the answers, we constructed five lawyer goal variables designed to measure the predominance of different factors in the lawyer's decision to take the case. These are:

challenge - did the case present a challenge; was it intellectually interesting?

public service - did it provide an opportunity for service to the public; was it taken because of sympathy for the client?

professional visibility - would the case increase the attorney's community standing, improve her position in the firm, create publicity for the firm?

making money - was the case taken primarily for the amount of money the lawyer would earn?

service to regular client - did the lawyer take the case simply to service a regular client?

While we felt variations in these goals were likely to affect hours, we did not have strong expectations concerning the nature of all these effects. For example, we thought that the professional visibility and challenge goals might lead to more hours than the making money goal, but we were not sure what effect "public service" would have.

PROCESSING AND MANAGEMENT

Since we thought that differences in procedures, judges, administration, etc., between state and federal courts might have an independent effect on the amount of time lawyers would spend, we included a court type (federal or state) variable. We did not have prior expectations about the direction of this effect. We thought lawyers might vary in the case management techniques used and this would affect hours. We used three indicators: standard operating procedures, plans, and client control. We thought that the lawyers who developed standard operating procedures (SOPs) for estimating case worth and pretrial activity would be able to reduce the number of hours spent on a case, other things equal. Explicit planning should also increase lawyer efficiency and thus decrease time spent:

the variables plans for motions, plans for settlement, and plans for discovery measure if planning occurred or not.

We thought client control and participation would influence hours spent, but the effect would differ for hourly fee lawyers and non-hourly fee lawyers. We felt fee arrangements would affect the incentives of lawyers. Hourly fee lawyers, who can pass their time costs on to the client, would be more likely to spend time than would contingent fee lawyers. Further, following Johnson (1980-1) we thought that it would often be in the client's interest to reduce the hours spent by the hourly fee lawyers and try to increase the time spent by those on contingent fees. For these reasons we expected that a high level of client control for hourly fee lawyers would reduce the number of hours those lawyers worked on a case, other things equal. In contrast, we expected that for non-hourly fee lawyers (most of whom were paid by contingent fees) high client control would lead to an increase in the number of hours the lawyer would work in the case (see Rosenthal, 1974). The client control variable was measured using (1) reporting procedures to the client and (2) the client's participation in the key decisions in the case.

(b) Expected results. -- Our complete model includes the dependent variable "hours" and the five major factors we expected would explain variation in hours. These factors were measured by 29 independent variables organized in eight clusters. We have suggested the reasons these variables were included and the nature of the effects we expected. The process of constructing this model relied on "empirical feel" as well as on existing theory. And the theory we

had was partial and largely untested. Thus we were prepared to find--as we did--that some of our variables had no effect, and others had effects opposite to the ones we anticipated.

Table 7 sets forth the complete model, including all the individual variables. We expected all these variables to have an effect on hours: the signs in the table show the expected direction (0 designates variables we thought would have an effect, but for which we could not in advance predict if the effect on hours would be positive or negative). For analytic purposes, we divided some of the factors into "clusters" of related individual variables, and tested the relative importance of the cluster. Thus Factors I and II were each treated as a cluster, but Factors III-V were each subdivided into two clusters. Thus there are eight clusters: these are underlined in the table.

[Table 7 here]

Table 7

Complete Model-Variables, Clusters, Expected Direction

Factor	Cluster	Individual Variables	Expected Effect on Hours
I	CASE CHARACTERISTICS		
		Stakes	+
		Complexity	+
		Duration	+
II	EVENTS IN THE CASE		
		Pleadings Factor	+
		Motions Factor	+
		Discovery Factor	+
		Presence of Trial	+
		Presence of Settlement Discussion	-
III	NATURE OF PARTICIPANTS		
	Client Type	Organization	+
	Lawyer Characteristics		
		Specialization	-
		Law School Performance	-
		General Experience	-
		Litigation Experience	-
		Personal Capacity	-
		Craftsmanship	+
IV	PARTICIPANT GOALS		
	Client Goals	Get Most/Pay Least	+
		Get Fair/Pay Fair	-
	Lawyer Goals	Challenge	+
		Public Service	0
		Professional Visibility	+
		Make Money	-
		Service to Regular Client	0
V	PROCESSING AND MANAGEMENT		
	Court Type	State/Federal	0
	Case Management	Pretrial Events SOP	-
		Estimating Case Value SOP	-
		Plan for Motions	-
		Plan for Settlement	-
		Plan for Discovery	-
		Client Control and Participation	+ (contingent fee) (hourly fee)

(c) Fee arrangements. -- A key variable is excluded from the model as we presented it: fee arrangements. One would expect fee arrangements to influence lawyer hours--why then is this variable excluded?

The answer is empirical. There were theoretical reasons to include fee arrangements as a variable in our model. The economic incentives for hourly fee lawyers, who charge fixed sums per hour, win, lose or draw, are very different than those for contingent fee lawyers who are paid a stated proportion of the recovery if they win, and nothing except expenses if they lose. Because economic incentives appear to differ, theorists argue that in comparable cases the hourly lawyer will spend more time than the contingent fee lawyer (Rowe, 1983; Johnson, 1980-1, Rosenthal, 1974). These considerations would suggest including fee arrangements among the variables which influence hours. But we saw at an early stage that our model "worked" differently for non-hourly (contingent fee) and hourly lawyers. That is, early tests showed that the factors that explain hourly fee lawyer investment are, overall, very different than those that seem to govern the contingent fee attorney's decisions. The patterns were so different that we chose to analyze these categories separately.

2. Findings

We tested the model against our data, using techniques which permit us to measure three things:

- the extent to which the model, as a whole, explains variations in lawyer time spent:

- whether any individual variable, taken alone, had an effect on hours, and the direction (+ or -) of such effect; and
- the relative importance of the eight variable clusters.

(a) Overall. -- The measure for overall explanatory power is the R^2 statistic. It tells what percentage of the actual variation in hours is explained by the variable included in our model. The relevant R^2 statistics we report are .45 for hourly and .35 for non-hourly lawyers. This means that we have succeeded in identifying and measuring factors that account for about half of the differences in hourly lawyer investment, and a third of the differences in non-lawyer time decisions. By social science standards, R^2s of .35 to .45 are quite respectable. The difference between the R^2s suggests that we have been more successful in modelling the hourly lawyer investment process.

Which variables have an effect and which are most important? This information is set forth in Table 8. This table contains several key items of information. First, it shows if the variables have a statistically significant effect on hours. Significance tests are used to measure the degree of confidence one has in inferring that data from a sample reflects actual patterns in the underlying population: where our results for this analysis fell below the 95% confidence level we show a 0. Secondly, where the variable has an effect, we show whether the presence of the variable increases (+) or decreases (-) hours spent. Finally, the table shows which clusters of variables were most important; that is, had the largest overall effect on hours, plus or minus. The table separates hourly and

non-hourly lawyers: almost all the latter are paid on a contingent fee basis. (The regression statistics on which Table 8 is based are set forth in Volume II.)

Several things stand out. The first is the difference between hourly and non-hourly lawyers. Not only are the overall R^2 statistics different: many more of our variables have a measurable influence on the hourly lawyer's time investment than the non-hourly lawyer, and the relative importance of the several variable clusters is quite different. The second notable feature of the table is that many variables we thought would affect hours do not. Finally, some variables had an effect, but in the opposite direction than the one we had expected: these are indicated by an asterisk.

[Table 8 here]

Table 8

Findings: Effect of Independent Variables and Clusters

Cluster	Actual Effect of Variable		Relative Importance of Cluster	
	Hourly	Non-Hourly	Hourly	Non-Hourly
CASE CHARACTERISTICS				
Stakes	+	+	5	2
Complexity	+	+		
Duration	0	0		
EVENTS IN THE CASE			1	1
Pleadings Factor	0	+		
Motions Factor	+	+		
Discovery Factor	+	+		
Presence of Trial	0	0		
Presence of Settlement Discussion	0	0		
NATURE OF PARTICIPANTS				
Client Type			8	0
Organization	0	-*		
Lawyer Characteristics			7	0
Specialization	0	0		
Law School Performance	0	0		
General Experience	0	0		
Litigation Experience	0	0		
Personal Capacity	0	0		
Craftsmanship	+	0		
PARTICIPANT GOALS				
Client Goals			3	0
Get Most/Pay Least	-*	0		
Get Fair/Pay Fair	-	0		
Lawyer Goals			4	0
Challenge	0	0		
Public Service	-	0		
Professional Visibility	+	0		
Make Money	0	0		
Service to Regular Client	0	0		
PROCESSING AND MANAGEMENT				
Court Type			2	0
Federal	+	0		
Case Management			6	0
Pretrial Events SOP	+*	0		
Estimating Case Value SOP	0	0		
Plan for Motions	0	0		
Plan for Settlement	-	0		
Plan for Discovery	+*	0		
Client Control and Participation	0	0		

(b) Hourly lawyers. -- Some things are not surprising. Case characteristics and events have a significant effect on hours. The higher the stakes, and the more complex the case (as reported by the lawyer) the more hours it takes. But note that the relative importance of the case characteristics cluster is low (fifth out of eight). This confirms our initial finding that stakes do not "drive" investments. Moreover, contrary to our expectations, duration does not have a substantial effect on hours.

Events are obviously important: this cluster has the highest relative score. Looking at the individual variables, we find, not surprisingly, that the more motions are filed and discovery conducted, the more hours are spent. But the trial variable did not have a statistically significant influence on hours. This seems counter-intuitive. What this finding seems to suggest is that trials are rare, and that when a trial occurs it typically takes a short time. Our data suggest that a trial will add, on average, 6.7 hours to the time lawyers spend on a case. Given the way our tests of statistical significance work, the combination of a small number of trials (8% of cases) and the relatively small increment in hours associated with the average trial could explain why this variable was not significant in a statistical sense. Note that the finding that even when a trial occurs, it only adds a modest number of hours, confirms the picture we have drawn of ordinary litigation: it tends to be relatively routine and simple, and even the rare trial typically involves less than a full day's extra effort.

None of the lawyer characteristic variables, with the exception of craftsmanship, has any statistically significant effect on hours. The other five lawyer variables were introduced into the model to test lawyer "productivity." We thought that more specialized, qualified and experienced lawyers would be able to do a task more quickly, and that if all other aspects of a case were held constant, these variables would reduce hours. Our expectation was not confirmed: these variables have no significant effect on hours, one way or the other. One explanation of this result is that increased capacity can cut two ways: better lawyers do things faster, but can also think of more to do. Another is purely statistical--that there is not enough variation in our sample to catch the effect which lawyer experience and specialization actually have on hours.[22]

The impact of the lawyer's own goals is interesting. We found that two of the lawyers' goals had an effect on hours. If the lawyer said he or she took the case for public service reasons, we found fewer hours would be put in, other things equal. In contrast, where lawyers included among their goals increasing their own or their firm's reputation, they put in more hours than they would have in an otherwise similar case. Moreover, this cluster was one of the more important ones in explaining overall variation in hours. Full assessment of these findings would require us to compare billings in these cases with the amount charged clients in other cases. But if the hourly lawyer who spends more time on cases that advance the lawyer's own career also charges the client for these hours, our findings would confirm Johnson's theories about the divergence of

lawyer and client interests in the litigation situation, and his view that lawyers are able to charge for time that provides little benefit to the client (Johnson, 1980-1).

A related finding, albeit a negative one, is that client control and participation in the case seems to have no effect, one way or the other, on the amount of time the lawyer spends. Contrary to our hypothesis that the more control the client exercised on decisions, the fewer hours the hourly lawyer, and the more the non-hourly lawyer, would spend on the case, the data show that client control and participation, at least as we measure it, has no effect whatsoever on the number of hours invested in a case.[23]

A noteworthy element in Table 8 is the independent significance of court type. We found that after controlling for all the other variables in the model, including stakes, the complexity of the case, and type and number of events, hourly fee lawyers spend about 13 more hours on a case litigated in federal court than on an "essentially similar" case in the state courts.[24]

We sought to determine if this effect can be explained by the formal rules of procedure in the two types of courts. We found, however, that cases in state courts which use the Federal Rules of Civil Procedure take less time than similar federal cases. This led us to wonder if there are variations in practice rather than the formal rules which account for the court effect. Perhaps systematic variation in what the judges expect from the lawyers, or how lawyers treat their federal as opposed to state cases, explain why federal cases take more time. Do federal judges demand more work from

lawyers? Do lawyers look at the federal case as the "big time" and invest more time in case preparation? We have not yet tested this statistically, but there is anecdotal information to support these suppositions. Our field coding staff reported that not only were the federal courts more likely to require briefs (or, in New Mexico, a written statement that a brief was not to be filed), but that federal court cases were generally more complex. "Reading a federal court file was like reading a story," one coder reported; "there was a discernible 'plot' and a conclusion." Reading a state court file, on the other hand, "was like reading a recipe."[25]

We have already noted that the events cluster is the most important in explaining the number of hours lawyers invest in a case. While this finding may seem tautological, since an "event" is something that takes time, we think it has an independent meaning, and is quite important. In the first place, no more than half the time lawyers spend on cases can be attributed to these procedural "events." Secondly, detailed analysis of the data shows that the amount of time per "event" varies significantly among our cases.[26] Thus there is no one-to-one correlation between events and hours. Rather than seeing events as a reflection of hours, we view this variable as a surrogate for the effect of strategic interaction in litigation. It seems obvious that one of the factors that influences how much time a lawyer spends on a case is what the other side chooses to do in the case. If one side takes a deposition, the other may wish to attend and cross examine. If one side moves for summary judgment, the other will have to respond or risk an adverse ruling on

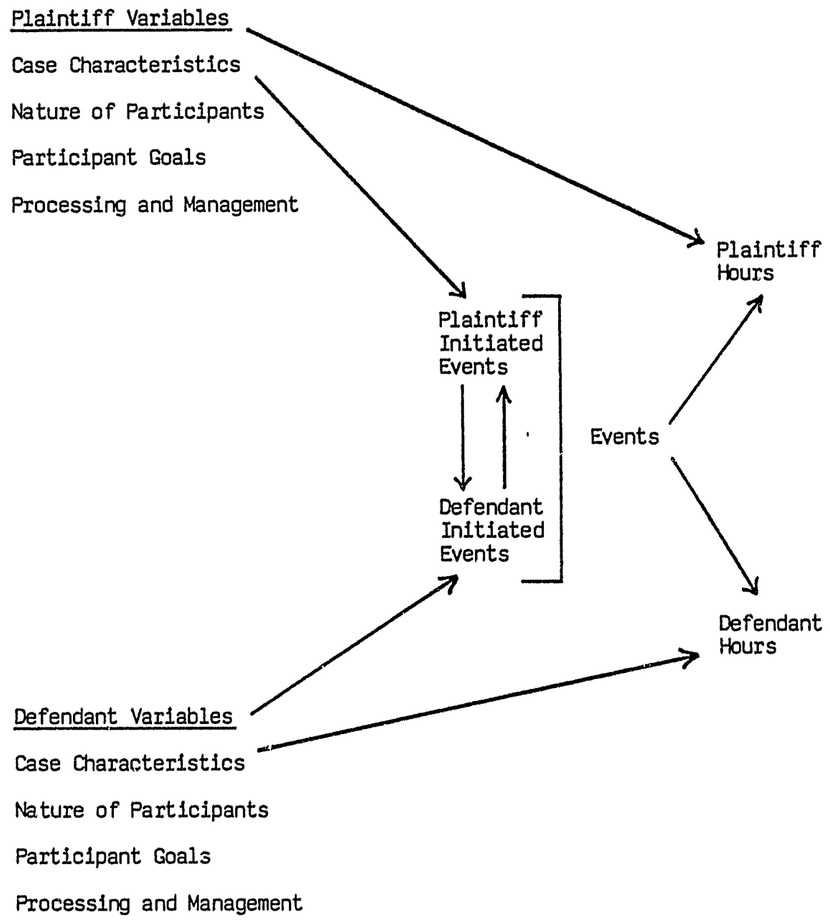
the merits. Our events variables come from the court records, so they include events initiated by either party. We see the relative strength the events cluster has in the explanation of hours as reflecting, in part, the effect on the lawyer of strategic moves taken by the other side.[27]

This understanding of the dynamics of litigation is reflected in Figure 6, which summarizes the causal model of litigation investment which emerges from our analysis. Causal relations are shown by arrows. Note that we show two types of causal influence. For each party, the general variables directly affect the hours invested, and influence the events initiated by that side. But the events initiated by the other side also influence the other's events and thus total hours.

[Figure 6 here]

Figure 6

A Causal Model of Litigation Investment



(c) Non-hourly lawyers. -- We have already stated that the factors that explain non-hourly lawyer decisions seem to be quite different from those which influence the hourly lawyer. (Only our case characteristic and events clusters were statistically significant for the non-hourly lawyer.) Since Johnson (1980-1) and others have hypothesized that the non-hourly lawyer would spend less time on a case, others things equal, we conducted independent tests to see if non-hourly lawyers spend less time on cases. To the extent we could test this proposition, our findings did not confirm this theory. We found that the median hourly lawyer spent slightly more time on a case than the median non-hourly lawyer, but the difference is not statistically significant. We calculated ratios of hours per event, and hours per dollar of the stakes in the case. In both cases the results were higher, not lower, for the non-hourly lawyer. That is, the hourly lawyer spent fewer hours per event, and less time per dollar of stakes. Since these findings are not statistically significant all we can say is that we did not find the investment differentials Johnson predicted.[28] These data are summarized in Table 9.

Table 9

Hours by Fee Arrangement

	Hourly	Non-Hourly
Median Hours	37 (123)	35.1 (300)
Hours/Events Ratio	2.00	2.38
Hours/Stakes Ratio	.002	.003

(None of the hourly/non-hourly differences are statistically significant.)

The negative result of our test of the proposition that fee arrangements will affect hours spent suggests the possibility that some of the assumptions in the theory about fee arrangements and lawyers' time investment decisions may be erroneous. While this theory models these decisions differently, depending on the fee structure, our data suggest that the contingent fee lawyers invest time at rates similar to those paid on an hourly basis. If our findings are correct, they indicate a need to reexamine the models. These models assume that non-hourly lawyers are highly rational profit maximizers unaffected by norms of professional responsibility and able to calculate the precise point at which further time investments fail to increase their (as opposed to their client's) net return from litigation. In any reappraisal, these assumptions should be carefully scrutinized.

E. Does Litigation Pay? Assessing Costs and Benefits

The second question which is generated by the investment approach to civil litigation is: do the litigation investments pay off? We have already discussed the broad issues which this question raises. In this section we report on the analyses we have completed. We focused on a relatively narrow issue: do the monetary returns from litigation exceed the time and money which clients invest in the process? While we recognize that an answer to this question will not resolve the debate over the cost-effectiveness of litigation as a social process for resolving disputes, it is obvious that an understanding of the economics of litigation from the parties perspective is central to the whole issue. We also include a very limited analysis of the monetary costs of litigation from a social perspective, but our data are too sparse to permit us to reach any final conclusions on this matter.

Overall, we conclude that litigation "pays" for the parties who engage in it. By and large, plaintiffs recover more than they invest in litigation. Further, we can say that in a certain sense the same results hold for defendants. Naturally, the question of assessing the "returns" to defendants of litigation investments, even in money cases, is more complex than for plaintiffs. But the measures we use show positive net returns for defendants as well.

1. Methodological Issues

We encountered a series of methodological problems. To permit any calculations of net results, we had to restrict our measures of benefits and costs to monetary factors. For reasons already

discussed, we used the fees paid to lawyers as our primary estimate of the monetary costs of litigation.[29] Measuring monetary benefits proved more complex. We use the dollar amount plaintiffs recover as their gross benefits. But what measure should we use for defendants? We conceived of the defendant's benefits as the reduction of a potential cost. Measuring the true "exposure" of a defendant in a case, and thus the difference between what was paid and what might have been paid, proved extremely difficult. We explain below how we dealt with these issues.

2. Plaintiffs

Plaintiffs usually recover something in a lawsuit, but in the world of ordinary litigation recoveries are modest. In the total sample for which we have monetized figures for recoveries (N = 398), plaintiffs received something in 89% of the cases, but in 59% of the cases recoveries are less than $10,000.

(a) Recovery to fees ratios. -- To assess the relationship between costs and benefits for plaintiffs, we use two measures. The first is the ratio of recovery to fees. This measure gives an overall picture of whether the dollars plaintiffs recovered in lawsuits exceed the dollars they paid out. We use fees alone as our cost indicator. However, as we shall show, the results would not change substantially if we used more complete data on plaintiff costs.

(i) Overall results. -- The amounts plaintiffs receive usually exceed the fees they pay. Since 71% of the plaintiffs in our sample were represented by lawyers paid on a contingent fee, this is hardly surprising: those contingent fee lawyers who secure no

recovery receive no fee at all, and contingent fees when paid usually equal a preestablished fraction (usually 1/3) of the amount recovered. Since most contingent fee cases lead to some recovery, the overall results are quite positive: plaintiffs secured net benefits in 89% of all our cases, and in 86% of the cases in federal courts. Even if we look only at plaintiffs who paid their lawyers on an hourly basis, we find they secure recoveries at least equal to fees in 78% of the cases.

Table 10 provides more detailed data. We report the recovery ratio for three percentiles--the 25th, 50th, and 75th. These are the ratios at those points in the overall distribution of fees to recovery ratios. The range of ratios is quite large. For plaintiffs who were represented by hourly lawyers and recovered less than $10,000, 25% had recovery to fees ratios of 0 or less (fees greater than recovery), 25% had ratios of 6.00 or higher, and the median ratio was 2.15. Table 10 breaks down the ratios by the amount recovered, the court, and the fee arrangement.

The table shows that for hourly lawyers, the larger the case, the higher the ratio of recovery to fees: for cases under $10,000 the median ratio is 2.15; for cases from $10-50,000, it is 7.03. Overall, plaintiffs with hourly lawyers did better in state courts than in federal courts: the median ratio for federal cases is 3.65 compared with 4.94 in state courts. The patterns for contingent fee lawyers are what one would expect: recovery to fee ratios are about 3 to 1. It is interesting to note that even for contingent fee lawyers the ratios increase as the amount recovered goes up, although the change is small.

Table 10

Ratio of Recovery to Fees - Plaintiffs by Fee Type

Hourly Lawyers

	Recovery			Source		
Percentiles	<10	10-50	50+	Federal	State	All
25	0.00	3.75	10.50	.31	2.15	1.75
50	2.15	7.03	18.00	3.65	4.94	4.19
75	6.00	26.01	82.30	18.65	14.40	18.00
(N)	(44)	(18)	(14)	(42)	(34)	(76)

Contingent Fee Lawyers

	Recovery			Source		
Percentiles	<10	10-50	50+	Federal	State	All
25	2.27	2.82	2.92	2.32	2.50	2.48
50	2.80	3.04	3.10	2.99	2.88	2.93
75	3.18	4.29	3.72	3.60	3.55	3.56
(N)	(181)	(86)	(24)	(124)	(167)	(291)

There are some cases in which plaintiffs pay their lawyers more than they recover. Twenty-two percent of all plaintiffs with hourly fee lawyers fell in this category. If we look at the first line in Table 10 (25th percentile for hourly lawyers) we see this is most likely to occur when the recovery is under $10,000. Nonetheless, taking plaintiffs as a whole, most are net gainers. Even when we add to fees the other monetary costs of litigation (i.e., out-of-pocket costs plus the monetary value of the plaintiff's time) we estimate that 88% of all our plaintiffs recovered more than they paid out.[30]

(ii) Measuring the "yield" of litigation investments: other factors influencing recovery/fee ratios. -- Our data can be read as indicating that the average dollar invested in a large claim yields

more than the dollars spent on smaller claims. We find that the larger the recovery, the higher the ratio of dollars recovered to fees paid the lawyer. Especially in light of the fact that plaintiff recoveries and stakes are closely correlated (plaintiffs' stakes as reported are about 120% of their recovery), this finding suggests that "investors" get more for their money in the larger cases. Following this same line of reasoning, we used recovery to fees ratio to test the effect of other factors on the relative yield of dollars invested in litigation. Some of the results are striking.

We first examined the effect of case and processing factors. Using our duration variable, we found that the longer a case lasts, the lower the ratio of recovery to fees. Remember that we already found that the duration of the case has little or no effect on the number of hours a lawyer spends on it. Therefore, it seems either that hourly fee lawyers will charge more in cases that last a long time, or recoveries are relatively lower in such cases. We also found that plaintiffs who settled before trial had somewhat higher recovery to fee ratios than those who went to trial: the median recovery to fees ratio for cases that were settled was 2.99 while that for cases tried was 2.73.

We also examined the effect of various lawyer activities on the recovery to fees ratios. Recall that we asked the lawyers to indicate how they allocated their time among six different activities: client conferences, discovery, other fact investigation, settlement discussion, pleadings and motions and legal research. For each activity we then divided the lawyers into two groups: those who

spent more than the median amount of time on the activity, and those who spent less. For each of these two groups we calculated the recovery to fee ratios for their cases.

The results strengthen the impression that plaintiffs get a higher return from a settlement-oriented strategy than from emphasis on formal adjudication. Thus the recovery to fee ratio is higher when the attorney spends relatively more time on settlement discussions, but is lower when relatively more time is devoted to legal research. Spending relatively more time on discovery also decreases the ratio of recovery to fees.

We also looked at the effect of some of our lawyer productivity variables. Recall that we found that factors like lawyer experience and specialization did not affect the number of hours the lawyers spent on cases.[31] We have already noted that this finding, by itself, did not prove that clients do not secure productivity gains in litigation. We reasoned that more experienced and expert lawyers could provide benefits to clients even if they spent the same number of hours on the case as the novice, since the specialist might think of more things to do to further the client's cause. If this were the case, however, we would expect that clients with more specialized lawyers would secure higher recoveries, in relation to fees paid. When we tested our experience and specialization variables against recovery to fee ratios, we found no evidence that these factors increase the client's "yield": neither greater experience nor higher degrees of specialization had a statistically significant effect on the recovery to fee ratio. We recognize that this negative finding

may be a statistical artifact, since the range of experience and specialization in our sample is modest. But the finding may also suggest that whatever gains that do accrue from greater specialization are not passed on to the clients, but are absorbed by the higher fees which older and more specialized lawyers tend to charge (Trubek, et al., 1983).

(b) Plaintiff "success"--net recovery to stakes ratios. -- Recovery to fee ratios provide one way to assess the relationship between the costs and the benefits of litigation for plaintiffs. There are other ways to measure this that may yield additional insights. One such measure is the ratio of net recovery (actual recovery less fees) to stakes. We thought that the use of the recovery to fee ratio could overestimate net benefits in some cases (because the client recovered much less than predicted) and underestimate them in others (because the lawyer managed to secure a recovery higher than predicted). As a consequence, we also analyzed net recovery to stakes ratios. Since it assessed net returns in light of an expected goal (stakes), we call this measure "success." The formula used is:

$$\text{Plaintiff success} = \frac{\text{Recovery} - \text{Fees}}{\text{Plaintiff's Highest Stakes Estimate}}$$

The higher this ratio, the better the plaintiff has done in relation to expectations. Since the stakes question elicited gross figures (amount the case should settle for, not what the client should get after paying the attorney) success ratios above 1.0 would be exceptional. In a contingent fee case where the lawyer's fees

equalled 33% of the recovery, and the recovery was exactly the same as the stakes estimate, the ratio would be two-thirds.

(i) Overall analysis. -- Overall, the analysis of success confirms much of what we learned using recovery to fee ratios. Success increases as the size of recoveries go up. In some of the smaller cases the ratio is zero: this suggests that in these cases, which fall in or below the 25th percentile of cases involving recoveries under $10,000, fees exceed recovery so there is no net recovery. The data also show that there is a sort of threshold effect; in all cases certain costs must be incurred regardless of the stakes. This effect can be seen from the fact that success ratios increase dramatically as we move from cases under $10,000 to those in the $10,000-50,000 range, and then increase only modestly above $50,000. This occurs because for cases under $10,000, fees are much higher, relative to recoveries, than they are above that threshold.

These patterns can be seen clearly in Table 11. For hourly lawyers, the median success ratio is .400 for cases where recovery is less than $10,000. The ratio shoots up dramatically to .800 in the cases between $10,000 and 50,000, and then rises to .934 in the cases over $50,000.

Table 11

Net Recovery/Stakes Ratios - Plaintiffs

A) Hourly Lawyers

	Recoveries ($000s)			Court		
Percentiles	< 10	10-50	50+	Federal	State	All
25	.00	.733	.682	.057	.310	.190
50	.400	.800	.934	.709	.536	.600
75	.537	.955	.998	.944	.955	.945

Table 11 continued

B) Non-Hourly Lawyers

	Recoveries ($000s)			Court		
Percentiles	< 10	10-50	50+	Federal	State	All
25	.127	.305	.368	.142	.330	.231
50	.442	.580	.538	.400	.564	.493
75	.642	.724	.760	.665	.682	.668
N	164	75	23	119	143	262

(ii) Other factors. -- We repeated the tests of other factors using the success ratio. The results of these bivariate correlations show the same patterns we found for recovery/fee ratios. Thus, the longer the case, the lower the success ratio. Going to trial rather than settling lowers the ratio. We also found that the more events in the case, the lower the success ratio (Table 12).

Table 12

Effect of Selected Case + Processing Factors on Plaintiff Success

Factor	Effect of Factor on Net Recovery/Stakes Ratio
1. Duration of Case	Decreases *
2. Number of Events	Decreases *
3. Going to Trial	Decreases *

* Significant at least at the .05 level

Lawyer activity patterns are the same as we found before: above average legal research and discovery reduce the success ratio; above average time spent on settlement increases "success." The results for all activities are summarized in Table 13.

Table 13

Effect of Lawyer Activity on Plaintiff Success

Above Average Time Devoted to:	Will Have the Following Effect on the Net Recovery/Stakes Ratio:
1. Conferring with client	Increases
2. Factual investigation other than discovery	Increases
3. Settlement discussions	Increases *
4. Pleading + Motions	Increases
5. Discovery	Decreases *
6. Legal Research	Decreases *

* Significant at least at the .05 level

Once again, we failed to find any relationship between greater lawyer experience and specialization on the one hand, and increased success, on the other. No matter how we measure the yield from litigation investment, it is not increased by using more experienced and specialized counsel.

3. Defendants

The problem of assessing whether litigation "pays" for defendants is more complex. In the first place, for this purpose it makes little sense to compare the fees defendants pay their lawyers to the amount they must pay plaintiffs (recoveries). These ratios could be (and often are) very high and yet defendants could (and do) still consider that their litigation investment "paid off" handsomely. Assume a case in which plaintiff expects to recover $100,000 but in the end defendant only pays $10,000 and the defendant's lawyer receives a fee of $8,000. In that situation the recovery to fee ratio would be very low (1.25). Yet as long as there was some merit

in the original claim and some real risk that plaintiff would have recovered a substantial portion of the claim, defendant's lawyer has been quite effective. Thus, the only sensible way to assess whether and to what extent litigation "pays" for defendants is to use the success approach. In this approach, defendant's investment in litigation is thought of as intended to reduce (or eliminate) an expenditure the defendant would otherwise have to incur. When presented with a claim, a defendant sees the expenditure on lawyers fees as a way to avoid paying some or all of the amount claimed. If the lawyer's work reduced the claim by an amount greater than his fees, the defendant's investment has been successful.

The next problem is: How do we measure defendant success? We know what defendants pay plaintiffs, if they do. But how are we to fix the amount of the "claim" in order to measure the result of the lawyer's work? We have two possible measures--(i) the defendant's estimate of stakes and (ii) the plaintiff's estimate in the same case. Thus, there are two possible formulae for calculating results for defendants: the difference between the recovery, that is, the amount defendant paid to plaintiff, and either

(i) what plaintiffs thought they should get (P's stakes), or

(ii) what defendants thought they might have to pay (D's stakes).

The first formula is preferable because, otherwise, those cases (21% of our sample) in which defendants pay more than they thought they should, but less than the plaintiff's lawyer initially estimated plaintiff should settle for, would be portrayed as unsuccessful. Such cases are, by definition, cases in which defendants' lawyers

have convinced plaintiffs to lower their expectations. Therefore, if that reduction is greater than the fees paid the defendants' lawyers in order to achieve the reduction, these cases are appropriately regarded as successful. On this argument, the best measure of success for defendants would be the ratio of the difference between the plaintiff's expectations (P's stakes) and the amount defendant had to pay (recovery) to defendant's lawyers fees. The formula for this measure (DS_1) is:

$$\text{Defendant Success}_1 = \frac{\text{P's Stakes - P's Recovery}}{\text{D's Fees}}$$

We were unable to conduct an analysis of defendant's success using this formula, however, because we did not have the necessary data (i.e., defendants' fees, recoveries, and plaintiffs' stakes) from both sides of the same case for enough cases. To provide some idea about this aspect of the costs and benefits of litigation, therefore, we decided to use the defendants' stakes, for which we did have enough data. The formula for this meaure (DS_2) is:

$$\text{Defendant Success}_2 = \frac{\text{D's Stakes - P's Recovery}}{\text{D's Fees}}$$

In assessing the results of the analysis we present below, it is important to bear in mind the limitations imposed by the particular measure that we must use. Given the way that we measured stakes (which was described earlier), it is likely that the defendant's estimate of stakes would be lower than the plaintiff's perception of stakes. This in turn means the DS_2 will tend to underestimate the level of success achieved by defendants; in effect, DS_2 represents a lower bound of success (i.e., if a defendant is successful

according to the DS_2 measure, it is almost certain that he was successful according to DS_1 or any similar measure that one might consider using.[32] In our discussion below we will not seek to assess the degree of success as indicated by DS_2, but will simply focus on the likelihood of success (i.e., the likelihood that the defendant succeeded in reducing the amount recovered from the defendant's perception of stakes more than was paid to the defendant's lawyer in fees).

(a) Overall results. -- Table 14 shows the likelihood of defendant success for all cases and broken down first by amount recovered and second by court.

Table 14

Likelihood of Success - Defendants[a]

		By Recovery[b]			By Court	
	All Cases	<10	10-50	>50	Federal	State
Percent Successful	23.6	21.5	24.4	45.5	27.5	18.3
(N)	(191)	(135)	(45)	(11)	(109)	(82)

[a] As measured by the DS_2 formula.

[b] In $1,000's.

The first column shows that about a quarter of the defendants who invested in litigation were successful according to the very conservative measure we are using. It is perhaps more interesting to look at the variations by outcome and court. While the variations are not statistically significant (which is not surprising given the

weakness of the measure we are using), they do suggest that defendants are more successful in "big" cases, and in cases taken to federal courts; however, a better indicator than we have is needed to determine if either of these effects do in fact exist.

(b) Other factors. -- We can continue the analysis of relative degrees of success by looking at some of the other factors we examined in our discussion of plaintiffs. There is some evidence that it pays for defendants to go to trial--24.4% of defendants who went to trial were successful according to our indicator, compared with only 18.5% of those who did not go to trial. This finding is not statistically significant, but it is opposite to what we found for plaintiffs.

The suggestion that what is successful for plaintiffs may not be for defendants is further confirmed by the analysis of the effect of variations in lawyer activity on the likelihood of success, shown in Table 15. The pattern is very different from what was found for plaintiffs.

Table 15

Effect of Lawyer Activity on Defendant Success

Above average time devoted to:	Will have the following effect on likelihood of success
1) Conferring with client	increases
2) Factual investigation other than discovery	increases
3) Settlement discussions	decreases*
4) Pleadings and motions	--
5) Discovery	increases
6) Legal research	increases

* Statistically significant at the .05 level

If the defendant's lawyer spends more than the average time in settlement negotiations, defendant's success goes down, while if the lawyer devotes more than average time to conferring with her client, factual investigation, discovery, and legal research, though these findings are not statistically significant. The other factors have no effect. One could interpret these figures as suggesting that a defendant's lawyer secures a higher return for the client on the client's investment by a vigorous motions practice, extensive discovery and legal research and (perhaps) by insisting on going to trial. Thus, the overall pattern for the effect of defendants' time allocation on success is almost the mirror image of that for plaintiffs.

4. Social Costs and Benefits

The analysis so far has assessed the monetary costs and benefits of litigation from the parties' perspective. When we say that litigation "pays," we only mean that the parties often secure monetary results that exceed the fees they pay lawyers, and that these results would not change if we added in the value of the client's time and out-of-pocket expenditures. In our assessment we have focused exclusively on private costs and benefits. And even there we have not tried to factor in non-pecuniary costs and benefits, nor determine if litigation is more or less cost-effective for the parties than some other way of processing disputes, either now in existence or which could be imagined.

Many of the questions raised by the debate over the costs of litigation deal with dimensions of the cost question we have not

analyzed. Some of the criticism of litigation stresses the non-monetary costs associated with this form of dispute processing and the non-monetary benefits which other modes promise. For example, some proponents of "alternative" modes of dispute processing believe that arbitration, mediation and bargaining may both reduce some of the pain and aggravation associated with litigation and lead to results which will be more satisfactory to the parties. Our data are limited to monetary costs and benefits, so that when we say litigation "pays" we only mean that parties frequently secure monetary results greater than their out-of-pocket costs and the monetary value of their time. We have data on the monetary costs of alternative institutions which have not yet been analyzed. But we have no way of assessing the non-monetary dimensions of the problem.

Not only are we unable at this time to speak to whether litigation is more cost-effective for parties than other dispute processing modes: we are also limited in our ability to translate the private cost calculations we have made to a social benefit/cost analysis. Naturally, when commentators express concern about the litigation "cost" problem they are often concerned with the efficacy of litigation from a social point of view. To secure such information, it is necessary to go beyond the strictly private, monetary cost/benefit analysis we have conducted. A simple point illustrates this need: since the "court costs" assessed to parties usually are far less than the actual cost of operating the courts, the taxpayers are paying part of the cost of litigation.[33] Even the most narrow effort to assess litigation from a social point of

view would have to incorporate these expenditures. Further, it would make little sense to analyze litigation from a social point of view and restrict the analysis, as we have done, to monetary factors. Whatever benefits litigation may bring to society--and there are many--they are not likely to be measurable in dollar terms. How do we set a dollar figure on the right to a jury trial? How do we cost-out the social benefits of peaceful resolution of disputes?

Questions like this suggest to us that benefit/cost analysis is of relatively limited utility for policymaking in judicial administration. This technique has severe limits as a policy tool in areas more amenable to quantification than litigation: in this area it seems impossible to develop any form of benefit/cost analysis that would answer the dilemmas now facing us.

With these caveats, what if anything might this form of analysis contribute to the policy debate? One possibility is to use the available techniques and data to narrow the range of issues. Thus, while recognizing that no benefit/cost analysis could resolve some of the judicial policy issues that face us, we might be able to pinpoint areas where problems are more serious, and to identify the questions which must be resolved by non-quantitative techniques. Let us illustrate this with a simple example. Assume a case in which the parties are exclusively concerned with money (no private non-monetary benefits) and there are no private non-monetary costs. Assume that the plaintiff might realistically recover as much as $20,000 but that the case goes to a jury and the verdict is $10,000. Assume further that each party pays their attorney $5,000, and that the trial costs

society $11,000. (The latter figure is not unrealistic: see Kakalik and Robyn, 1982). This would permit us to construct the analysis in Table 16.

Table 16

Hypothetical Social Benefit/Cost Analysis
(Thousands)

	Monetary Benefit	Monetary Cost	Net Monetary Benefit (Loss)	Net Non-Monetary Benefit (Loss)
Plaintiff	10 (recovery)	5	5	0
Defendant	10 (cost-reduction)	5	5	0
Public	0	11	(-11)	?
			-1	

On these assumptions, the trial of a case like this would be cost-justified, from a social point of view, only if there are some monetary benefits to society, and/or the non-monetary benefits to society exceed $1000. Since the first is unlikely, we would have to examine the non-monetary benefits to society to see if they might be greater than $1000. Of course, we might say that the value of a trial by jury is unlimited, and stop there. Or we might explore the general benefits to society from peaceful dispute resolution, or more specifically from having verdicts which set a parameter for future bargaining, thus reducing the trend for trials. At least we would know what to look for and what questions to ask.

It would be nice if we could provide actual figures to use in an analysis of this type, but we cannot. We can estimate net monetary benefits for plaintiffs, but cannot do the same for defendants for

reasons already explained. There are some estimates of court costs for tort cases only. In a study for the Rand Corporation Kakalik and Robyn (1982) analyzed the court costs in tort cases in federal courts and several state courts, including California. They show that the average public cost of a tort case in the federal courts is $1740 and the comparable figure for the Superior Court in Los Angeles is $331 (1982: 92). Further, they show that expenditure varies tremendously depending on the stage at which a case is terminated. Tort cases that are filed and then settled without further attention by court personnel may cost as little as $50; those which proceed through hearings, a conference, and jury trial cost up to $9,000 in the California court and up to $15,000 in the federal courts (1982: v-vi). These data are suggestive, but we have no way to relate them to our sample.

For these reasons, we can only report some overall impressions which arise from the data we do have. We know that the lower the amount recovered the lower the ratio of plaintiff recoveries to lawyer fees. If we look at hourly fee lawyers only, we find that in federal courts plaintiff's lawyers fees equalled over 40% of the amount recovered in cases with recoveries uinder $10,000, and only 5% of the recovery in case over $50,000. (The comparable state figures are 19% and 5%, respectively.) This means that for plaintiffs, the net monetary gain will be much lower in the smaller cases. Our data do not permit us to say with confidence what pattern prevails for defendants, but if we merely assume that defendant ratios are uniform among case sizes, then the plaintiff results would determine relative

net gains. This means that whatever level of court costs are incurred, the smaller case is, everything else equal, less likely to be cost-justified socially than the larger case. Moreover, if Kakalik and Robyn's tort figures are representative, it follows that the further the case proceeds, the less likely the social cost benefit calculus will be positive, excluding non-monetary social benefits. It also follows that the jury trial in a federal case involving less than $10,000 will have the lowest net monetary benefit, and is most likely to show negative benefits before non-monetary social factors are incorporated in the analysis.

There is another way to look at the cost-effectiveness of the small case. This analysis cannot incorporate gains from cost reduction by defendants' lawyers, and thus their importance must be qualified. But the results are striking. Table 17 shows the ratio of hourly lawyer fees to recovery broken down by case size. This shows that in small cases in federal courts the total fees paid to both lawyers (plaintiff and defendant) can well exceed the amount recovered.

[Table 17 here]

Table 17

Ratio of Lawyers Fees to Recovery
(Hourly Cases Only)

	Amount Recovered		
	<$10,000	$10,000-50,000	$50,000+
Plaintiff			
Federal	.4059 (11)	.1423 (11)	.0546 (12)
State	.1850 (22)	.0550 (7)	.0473 (2)
Defendant			
Federal	.8500 (77)	.1667 (41)	.0832 (11)
State	.3277 (73)	.0948 (18)	.0313 (3)

This sample is too small to draw any final conclusions and is limited to hourly lawyers only. To illustrate our point, let us construct a "typical" case using our overall data. These figures show that both clients, together, pay a substantial amount to lawyers in relation to the amount plaintiffs recover. For this purpose, we will use a case in state court in which the plaintiff recovered $10,000. In such a case, it is likely that the plaintiff's lawyer will be paid on a contingent fee basis, so that the lawyer receives $3,300 and the client gets a net return of $6,700. In the same case, the defendant will have paid the plaintiff $10,000 and the attorney $3,300, for a total of $13,300. In this case the total paid to both lawyers ($6,600) is just about equal to the plaitiff's net recovery.

A similar analysis for the federal courts yields even more discouraging results. Plaintiff's fees would be the same, but defendants pay more to their attorneys relative to outcomes, so that defendant's legal fees will equal 85% of the outcome and the total fees paid for lawyers will equal $11,800 in a case in which the net recovery is $6,700.

One must proceed with great caution in interpreting these data. As we have indicated, they do not mean that litigation is not cost-effective for the parties even in the smaller cases. Further, we do not suggest that these figures can be interpreted as showing that litigation in cases when outcomes are less than $10,000 is not socially efficient. In fact, the data we have suggest that most plaintiffs, even in small cases, usually recover much more than they pay in lawyers fees, defendants score positively on our success measure, and court costs are modest since trials and other judge-intensive activities are rare. Nevertheless, we can say that the costs of litigation, in the smaller cases, both from the clients' and society's point of view, are relatively higher than in the larger cases, and the differences are significant. Since according to our data most cases in civil courts in the U.S. involve stakes and recoveries of less than $10,000, this conclusion is quite important. It suggests why there has been concern about the costs of litigation and points to the need for further research on the economics of the "small" case.

F. Conclusion: Rhetoric, Reality and the Reform Agenda

We have reported on the first large-scale empirical study of litigation and its costs. We have described a world of ordinary litigation that seems often at odds with the image held by many in the public and some in the profession. This conclusion is supported by Galanter's (1983) careful juxtaposition of the rhetoric of court reform with available data. Because our picture of what occurs and where the problems lie is somewhat different than views commonly held, we tend to look at the question of reform in a different fashion as well. At this stage, we have neither a clear set of "problems" to be dealt with nor a list of reforms we wish to propose. Rather, what we can contribute is a new set of questions to be asked, and perhaps some new directions for the reform-minded to follow.

The questions we want to raise deal both with disputes processing and the way it is discussed. One of the most striking things about our study is that when we observed litigation, what we found was that bargaining and settlement are the prevalent and for plaintiffs perhaps the most cost-effective mode of activity that occurs when cases are filed. This will come as no surprise to litigators, but it is remarkable how little this fact is taken account of in the discussions of the litigation crisis, the costs of litigation, and the needs for "alternatives to litigation."

Much of the literature advocating alternatives to litigation naively assumes that what occurs in courts is adjudication, in the classical sense. Since "adjudication" by definition uses judicial

time heavily, it is assumed that increased litigation will increase court budgets dramatically. Since adjudication presents an imposed, rather than a bargained or mediated solution, it is believed to be ineffective for the resolution of certain kinds of disputes. Finally, if adjudication is expensive and intrusive, then what is needed, so it is argued, are cheaper, more flexible "alternatives." But if it is the case that in the world of ordinary litigation judges rarely reach formal decisions on the merits, the parties negotiate, albeit "in the shadow of the law," judges actively intervene to encourage settlement (Kritzer, 1982), and settlement is the rule, not the exception, then perhaps the whole reform debate falls wide of the mark. Perhaps the right approach is not to reach for wholly new institutional alternatives to a hypothetical process of adjudication, but to understand the non-adjudicative dimensions of litigation first, see how and why they work, and seek to make this dimension of the litigation process even more central and effective.

A similar set of questions emerges when we juxtapose our analysis of costs and the cost problem with the conventional definition. The literature on costs suggests that litigation may be too costly for litigants and society, and finds the causes of such excessive costs in the complexity of procedures, the unchecked adversarial zeal of attorneys, and the biases of existing fee structures. Our data suggest, however, that at least from the litigant's point of view, most ordinary litigation is cost-effective, although we agree that there are problems in the smaller cases that come before our courts of general jurisdiction. We are unable fully to assess the costs and

benefits of litigation from a social point of view. We recognize that some classes of cases may raise problems that require further attention, but we have doubts whether the system is in crisis. Where we part company most pointedly with the conventional approach, however, is in our analysis of the factors that determine costs, whether they are seen as excessive or not. In the world of ordinary litigation lawyers spend relatively little time on problems created by the complexities of procedural rules, and engage as much in negotiation as in "legal" warfare. At the same time, we see that factors never mentioned in the reform literature, like the lawyer's own goals, tend to increase cost, while things which should increase the return from litigation investment such as specialization and experience, do not. As a result, we are drawn to ask ourselves whether, if and when costs are indeed excessive (and that is a judgment we have carefully avoided making), the causes lie in the way the market for legal services is organized, and in the failure of lawyers either to improve the productivity of the services the bar provides in both the adjudicative and non-adjudicative aspects of litigation or to pass productivity gains on to clients. Perhaps we should spend more time figuring out how legal fees are set, how lawyers can improve the product they deliver, and how the market for lawyers works, and less tinkering with rules of procedure and techniques of court management.

Finally, we are compelled to ask: just how does the legal profession define problems and provide solutions in an area like litigation and dispute processing? Why does there seem to be such a

wide gap between the world described in the reform rhetoric and the world we observed? This question, which takes us far beyond our data or topic, nevertheless may be the most important one to arise from our study of the world of ordinary litigation. What we have tried to do is demonstrate the value, indeed the necessity, of extensive empirical research and careful data analysis, as a prerequisite to any serious debate about how the lawyer's role in disputes processing should be changed.

Notes

1) The Summary deals only with some of the major substantive findings of the Project. Other findings and a discussion of the design and conduct of the surveys are contained in Volumes I-III of the Report.

2) The most visible discussion of costs at present concerns its relation to delay. Delay, viewed as the result of excessive resort to procedural technicalities (Weller, et al., 1982), is thought to raise the dollar cost of using the system. Economic costs breed other costs: "There is solid evidence that the expense of litigating--for both defendants and plaintiffs--warps the substantive law, contorts the face of justice, and, in small cases, essentially bars the courthouse door" (Rosenberg, et al., 1981: 17). Or again: "The sad fact is that the twin demons of cost and delay are asphyxiating our courts, both state and federal. This has pernicious effects on the quality of justice rendered by these courts" (Kastenmeier and Remington, 1979: 303, see also 336).

   The expressed concern is with what are assumed to be deleterious effects of costs. This concern led, in 1979, to the formation of the A.B.A. Action Commission to Reduce Court Costs and Delay, which assumed a direct relationship between the amount of time a case takes and the amount of money a party must pay. Proceeding from this, the Action Commission together with other national and state organizations experimented with methods to reduce the amount of time required to litigate a case (Janofsky, 1979; Hufstedler, 1980; Hufstedler and Nejelski, 1980). While many of these programs appear to have some success in reducing the time to a final outcome, there is no corresponding evidence that they significantly cheapen the process (see, for example, McDermott, 1981).

   Some writers focus the blame for high costs on a particular part of litigation. More often than not, discovery is made the principal culprit (Brazil, 1981). Liberal discovery is thought to make litigation more adversarial, fostering throughout the legal profession a desire "to leave no stone unturned" (Brigham Young U. L. Rev., 1981). Other writers look at overall costs or the public costs, and recommend that entire classes of cases could be removed from the courts. This would produce savings for the parties through a speedier process as well as for the civil court system (Heher, 1978).

3) Two economic models of litigation are current in the literature. In the "optimism" model, trial ensues when both plaintiff and defendant are excessively optimistic about their expected returns from trial. Expressed as a formula: Trial occurs when P's estimate of the expected judgment exceeds D's estimate by at

least the sum of their legal costs (transaction costs) (Gould, 1973; Shavell, 1982). The second model employs concepts from games theory and focuses on when the bargaining process is likely to falter and trial to follow. In this "recursive" model, parties are likely to continue bargaining so long as their objective knowledge of what the other side is thinking is not overwhelmed by attempts at second-guessing. Once both parties indulge in excessive second-guessing, the likelihood of mistaking the other side's intentions becomes so great that the chances for reaching a mutually agreed upon settlement fall off dramatically (Cooter, Marks and Mnookin, 1982).

CLRP began with the "optimism" model, recognizing nevertheless that it would not fully predict disputant decisions. What was needed was an analysis that included not only costs and stakes but also a series of other variables likely to influence dispute decision making such as suggested in the recursive model. To do this, CLRP added to the simple cost-benefit model a series of factors which could cause disputants to deviate from the dispute trajectories predicted by the economic model. These included such variables as (a) the existence and nature of past and expected future relationships between the parties; (b) "party capability"--i.e., personal and psychological characteristics of individual disputants and variation in the size and structure of organizational parties; (c) the type of lawyer used and the nature of fee arrangements and lawyer-client relations; and (d) a series of factors related to the type of dispute itself, including areas of law, legal complexity, forum, etc. In its surveys, CLRP attempted to elicit information relevant to these factors.

4) Statisticians describe this problem as one of "identification." As the term suggests, one must have the right types of information in order to "identify" (i.e., be able to get estimates of) the coefficients of the model. The kind of information required involves important substantive assumptions about the nature of the process underlying the model; we do not believe that such assumptions are warranted in this context, and hence we do not believe that the model is readily identifiable. For technical discussions of the identification problem, see Johnston (1972: 341-375).

5) For a complete description of the data base, see Volume I and Kritzer, 1980-1.

6) Overall, 37 cases initially included in our sample were excluded as "too big" to be handled within the scope of the research.

7) We completed an additional 270 lawyer interviews involving cases that were not taken to federal or state courts (these cases were processed by institutions like the American Arbitration Association). Only 17.4% of the lawyers we contacted declined to

be interviewed, though a number professed to have had little or no involvement with the case (even though their names appeared in the court file as the attorney of record). We believe that most of these cases involved minimal lawyer effort, so that the data that we report tends to overestimate the level of lawyer involvement in court cases.

8) For specifics on which kinds of cases were excluded, see Volume I and Kritzer (1980-81: 512); in addition to exclusions, we specifically limited divorce cases to a maximum of 20% of the cases from any general jurisdiction court that handled such cases.

9) While accurate figures exist on the number of federal court cases, comparable figures for state courts are hard to come by. Jethro Lieberman suggests that there may be as many as 350 to 500 times as many state court cases as federal court cases. This figure includes both courts of general and limited jurisdiction. He feels that about 20 percent of state cases are in courts of general jurisdiction. This would mean, then, that about 70 to 100 times as many state general jurisdiction cases as federal cases are filed each year (Lieberman, 1983).

10) Over two-thirds of the cases about which we interviewed lawyers involved either a tort or a contract issue (or both). Over 80% of the state court cases fell in this category. Because we deliberately undersampled divorce cases, these appear less frequently in our sample than might be expected (see Volume I).

11) For a complete review of the literature on the excesses of litigation, see Galanter, 1983.

12) There is substantial evidence that many minor disputes cost less than the time a lawyer would need to process the claim. See, e.g., Macaulay, 1979; Nader, 1980; Silbey, 1980-81.

13) Comparative disputing data, when available, could help us assess our own litigation rate. Jeffrey FitzGerald, a legal sociologist at LaTrobe University in Australia, recently completed the first phase of a comparative study of disputing in Australia and the United States. Using data from the CLRP household survey and a parallel survey in Australia, FitzGerald found that overall levels of disputing are remarkably similar for the two countries. However, although Australians appear more likely to recognize a grievance and to complain to a responsible party, they are somewhat less likely than are Americans to invoke the courts (FitzGerald, 1982).

14) For a full description of the methodology used to measure the frequency of litigation by individuals, and the overall results of the household survey, see Miller and Sarat (1980-1). We also conducted a survey of organizations. A full account of the organizations survey is found in Trubek, et al. (1983).

15) Our operational definition of stakes was obtained by asking the lawyers involved in the cases we studied the following question:

> Now I'd like to ask some questions about what you thought your client(s) should take or do to settle the case. In these questions we are interested in your view of the stakes in the case, not in actual negotiations. . .Did you ever form an opinion about what the case was worth in terms of what your client(s) would be willing to take or do to settle the case?

If so, we asked:

> Based on that opinion, what did you think at that time should have been done to settle the problem?

Lawyers who mentioned something other than money were asked:

> Suppose there could have been a settlement. . .which involved only a lump sum payment of money. What would you think it should have been?

If lawyers reported that their view of the stakes changed during the case, we used the highest figure.

16) See footnote 12.

17) In the 1795 court cases whose records we studied, there were 91 trials by the court and 43 jury trials. Less than 10% of the cases terminated by a summary or default judgment. The judge dismissed the complaint in 12.2% of the cases and ordered the cases removed or remanded in .6%.

18) See, for example, Brazil, 1978 and 1981; Lacy, 1978; Ellington, 1979.

19) The figures shown in Tables 2 and 3 are based on the subsample of lawyer respondents we used in the explanatory analysis of lawyer time discussed below; this subsample was limited to lawyers who were paid on an hourly, flat or contingent fee basis, and who provided monetized stakes information.

20) If we look only at cases under $10,000, the pattern is even clearer--these figures show almost no direct relation between stakes and hours.

21) The inclusion of events in the model is meant, in large part, to take into account the interaction process in litigation. That is, events can be looked upon as an indicator of the level of the action-reaction process that is the heart of litigation. See text at footnote 26, infra.

22) Most of the cases in our sample are small, rather routine, and involve a relatively small amount of "lawyering." On the other hand, most of the lawyers in our sample are relatively specialized and experienced. Thus there may not be any room for the small differences in our lawyer characteristics variables to show up on reduction of hours (see Volume II).

23) It is important to recognize that for this analysis we used the lawyer's evaluation of the degree of client control, not the client's. For further analysis of this question, see footnote 27, infra.

24) We thought that the court effect might be the result of the fact that federal cases involve, on the average, higher stakes. We tested this hypothesis and found that the "court effect" remains even after controlled for this difference.

25) One last explanation for the court effect which we can advance at this time concerns differences between the state and federal bars. In our analysis of the impact of the Federal Rules we observed that the smallest difference between a state and federal court was in South Carolina, our smallest district with, at least arguably, the least differentiated bar. Could it be that there are very different groups of lawyers who practice in state and federal courts, respectively, and that the federal group has different work habits which increase the time they spend on cases? We do find that there are some differences between lawyers in our state and federal cases--primarily that federal court lawyers are more likely to practice in large firms. But this difference is not adequate fully to explain the court effect. A more detailed analysis of the court effect can be found in Kritzer, et al. (1983a).

26) For example, in looking at cases where there was one or more discovery event (i.e., a deposition, interrogatories, a discovery related motion, etc.), we found that lawyers who reported using a plan for discovery spent an average of 2 hours per discovery event while those lawyers who said that they did not have a plan for discovery spent an average of only 20 minutes per discovery event.

27) A somewhat revised analysis of our data that was completed as the finishing touches were being completed on this manuscript adds further support to the argument that the events variables represent the strategic interaction in the litigation process. The revised model included as predictors of lawyer time only those pleadings, motions, briefs, and discovery related events that were filed by the opposing side. All other variables in the model were unchanged. The results of the revised analysis were virtually identical to the analysis reported above. The revised analysis did find that duration had a statistically significant effect on hours but the effect was so small (about 4 hours for every year that the case went on) that it is not of substantive importance. The other change was that we found that client control did reduce, in a

statistically significant way, the amount of time that hourly fee lawyers spent on a case. For details of the revised analysis, see Kritzer, et al. (1983b).

28) One important question to ask is what happens if one moves away from the median case to look at other situations. The problem this question presents is what variables should we shift off the median. Elsewhere (Kritzer, et al., 1983c) we have explored the implications of the stakes involved in the case for hypothesis that hourly fee lawyers will overinvest while the contingent fee lawyers will underinvest. That analysis does find that for the relatively modest case (i.e., involving $6,000 or less) the contingent fee lawyer spends significantly less time than the hourly fee lawyer, though neither lawyer would spend very much time on a case of this size; the differential ranges between seven and twelve hours. In the balance of the range we looked at ($7,000 through $100,000), we find no statistically significant differences in the amount of time lawyers paid on contingent and hourly fee bases devote to cases, though the evidence suggests that, if anything, as the case gets larger, the contingent fee lawyer will spend more time than the hourly fee lawyer (this switch occurs around $15,000).

29) Section C.3.(e) supra.

30) As we have indicated, these figures use fees instead of total costs, since we do not have total cost figures on a case-by-case basis. However, we do have estimates of total costs (i.e., fees and out-of-pocket costs plus monetary value of plaintiff's time) for all our plaintiffs, and these can be used to adjust the findings derived from the fee data. The median ratio of lawyers fees to total costs for individual plaintiffs is .88 and for organization plaintiffs is .72. If we use these medians to estimate total cost, it follows that in a case in which an individual's recovery to fee ratio is above 1.14, and an organization's ratio is above 1.39, the litigant has secured a net economic gain from litigation. Applying these ratios to the distribution of recovery to fee ratios, we find 88.3% of our plaintiffs were likely net gainers.

31) See Section D.(2)(b) and (c) supra

32) An "upper bound figure" that one could obtain from the defendant lawyer data we have is the highest amount demanded by the plaintiff during actual negotiations, though even this might underestimate the amount a jury might award if the plaintiff includes a discount for uncertainty in his demand.

33) The assessment of what a "case" costs the public is notoriously difficult. The extent to which various indirect costs can be charged against parties when benefits to them are uncertain has been avoided by limiting assessed court costs. On the problems

faced in calculating court costs and court financing, see Robert W. Tobin, The Transition to State Financing of Courts (1981) and Harry O. Lawson and Barbara J. Gletne, Workload Measures in the Court (1980).

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