

# **WHAT ARE CONTINGENCY FEES REALLY LIKE?**

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1. Paper prepared for presentation at 2002 F. Hodge O'Neal Corporate and Securities Law Symposium, Diplomat Hotel, Hollywood, Florida, March 15-16, 2002., sponsored by the Institute for Law and Economic Policy, University of Pennsylvania Law School, and Washington University School of Law.

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## INTRODUCTION

One of the hallmarks of litigation in the United States is what we call the contingency fee. While no-win, no-pay contingency fee structures are by no means unique to the United States,<sup>2</sup> the dominant form of contingency fee used in the United States, a commission or percentage-of-recovery fee, is found in few other places around the world.<sup>3</sup> Given the supposed litigiousness of the American populace,<sup>4</sup> the contingency fee is a frequent target of attack of proponents of so-

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<sup>2</sup>See See Herbert M. Kritzer, *Rhetoric and Reality ... Uses and Abuses ... Contingencies and Certainties: The American Contingent Fee in Operation 4-7* (University of Wis. Inst. for Legal Studies Disputes Processing Research Program Working Paper No. 12-2, 1996) (available at <http://www.polisci.wisc.edu/~kritzer/research/confee/rhetoric.pdf>).

<sup>3</sup>Percentage fees are permitted in Greece, but are limited to a maximum of 20 percent; see Eleni Skordaki & Danielle Walker, *REGULATING AND CHARGING FOR LEGAL SERVICES: AN INTERNATIONAL COMPARISON* (1994) at 56. In the Dominican Republic, percentage fees (*cuota litis* in Spanish) as high as at least 30 percent can be charged; Santos Pastor & Carmen Vargas, *La Justicia Civil en la República Dominicana* (2000) at 17.

<sup>4</sup>A variety of evidence suggests that the U.S. may not be uniquely litigious; see Christian Wollschläger, *Exploring Global Landscapes of Litigation Rates*, in Brand and Stempel (eds.),

called tort reform who seek to reduce both the exposure to lawsuits and the amounts paid out in damages.<sup>5</sup>

The goals of the supposed reformers were clearly brought home to me in December of 2001. I received a telephone call from an attorney whom I will not name representing a large American corporation that I will not name. The company had produced a product that had caused a significant number of deaths in several countries outside the United States. Importantly, as the lawyer described the situation to me, there was no real question about liability; the concern was to minimize the damages that were going to have to be paid out. This had become important because a number of American attorneys were seeking to sign up clients from these countries to sue the American company in courts in the United States. The lawyer who contacted me was trying to find someone to whom public relations people working on behalf of his client could refer media representatives from the foreign countries; the intention was to get the word out about “how bad contingency fees were for the clients” and “how it was often the case that clients ended up with very little after paying the lawyers their exorbitant fees.” I told the lawyer who

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SOZIOLOGIE DES RECHTS : FESTSCHRIFT FÜR ERHARD BLANKENBURG ZUM 60 GEBURTSTAG (1998); Basil S. Markesinis, *Litigation-Mania in England, Germany and the USA: Are We So Very Different*, 102 *STUDI SENESI* 372 (1990).

<sup>5</sup>See Lester Brickman, *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?* 37 *UCLA L.REV.* 29 (1989); Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 *CARDOZO L. REV.* 1755 (1994); and Lester Brickman, Michael Horowitz, and Jeffrey O'Connell, *RETHINKING CONTINGENCY FEES* (1994). Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *FORDHAM LAW REVIEW* 247 at 269 (1996). A good example can be found in the Republican “Contract with America,” which was the cornerstone of Newt Gingrich’s successful effort to lead Republicans to the control of Congress; the ninth bill on the “we will pass” list was the “Common Sense Legal Reform Act” (found at <http://web.mit.edu/republicans/www/contract.html>, visited February 7, 2002). In 1996, a series of initiatives on the California ballot would have limited contingency fees (Proposition 202), imposed fee shifting in shareholder litigation (Proposition 201), and mandated a no-fault auto insurance (Proposition 200); see Peter Passell, *California Propositions Are Anti-Lawyer, and No Joke*, *NY TIMES* (February 8, 1996), D2.

called me that I would be happy to talk to any media people who contacted me, but I would not be able to convey the message his client wanted to get into circulation.<sup>6</sup>

In the United States, one line of attack frequently used by the supposed reformers, is the claim that contingency fees provide windfall profits to lawyers, who often do little work, face little risk, and take large slices of the recovery.<sup>7</sup> The huge fees received by lawyers representing the states in the health-care cost tobacco litigation might be seen as representing what it is that the critics have been attacking. In fact, one cannot argue with the fact that on occasion lawyers have earned very large fees, whether measured in absolute terms or in terms of an hourly rate. However, if there is a reasonable concern about such fees, they must be placed into perspective by looking at (a) fees lawyers earn in typical contingency fee cases, and (b) what the returns from contingency fee work look like across what might be thought of as a “portfolio” of cases.

To this end, this paper examines the returns lawyers earn on the time they invest in contingency fee cases. The analysis presented here is a refinement and extension of an analysis I have previously published.<sup>8</sup> In the earlier publication, I examined a variety of types of data sources in an effort to get a good fix on the typical returns from contingency fee practice. In addition, that article reported on some data on the structure of fees (i.e., whether the percentage was fixed or variable, and the nature of the percentages in the contingency fee contracts).<sup>9</sup> Here I will focus exclusively on the single question of hourly returns based on a sample of cases.

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<sup>6</sup>There can be cases in which clients receive relatively small portions of the defendant’s payment; however, when this happens in individual cases (i.e., I am not considering class action cases here), it is usually not so much a function of the fees and expenses of the lawyer but rather a function of other claims against the settlement, such as those from medical providers, health insurers, or workers’ compensation insurers.

<sup>7</sup>See, for example, the prepared testimony of Lester Brickman (U.S. Senate Committee on the Judiciary, Hearings on Contingency Fee Abuses, November 7, 1995); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO LAW REVIEW 1819 (1992).

<sup>8</sup>Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL LAW REVIEW 267 (1998) (hereinafter, “Kritzer *Wages of Risk*”).

<sup>9</sup>*Id.*, at 285-290.

## Data and Measures

In the analysis presented below, I will draw on two separate data sources from two different statistical studies containing information on the returns of contingency fee practice.

### *The Wisconsin Contingency Fee Study*

My primary data source is a study of contingency fee practice in Wisconsin. To obtain direct and current information on contingency fees, this study involved a variety of types of data collection:

- a structured survey of contingency fee practitioners to obtain basic descriptive information about the lawyers' practices and information on a sample of cases handled by the lawyers;
- observation of lawyers at work to obtain an in-depth understanding of key processes such as case screening and negotiation; and
- semi-structured interviewing to ascertain whether the observational findings are sui generis.

The survey of contingency fee practitioners, which was carried out during the fall of 1995, relied upon a sampling frame defined by the Litigation Section of the State Bar of Wisconsin.<sup>10</sup> Lawyers provided a total of 511 usable responses representing an estimated response rate of forty-eight percent.<sup>11</sup> To obtain information on a sample of actual cases, the survey requested data on up to three cases: the case closed most recently after a trial had begun,

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<sup>10</sup>After removing government lawyers and others clearly not engaged in contingency fee practice, the sample included a total of 1,850 target respondents.

<sup>11</sup>I say "estimated" because the survey was mailed to a sample that included many lawyers not involved in contingency fee practice. I included with the survey a postcard which respondents could return indicating that they did not do any contingency fee work. Of the 1,850 lawyers who received the questionnaire, 1,192 provided some kind of response. In order to estimate the number of contingency practitioners among the 658 who did not respond, a research assistant called about 200 law offices and asked whether the lawyer handled cases on a contingency fee basis. Putting this all together, I estimate that 1,072 of the 1,850 lawyers receiving the questionnaire did at least some contingency fee work.

the case closed most recently after filing but before the start of trial, and the case closed most recently before filing. The "most recent" strategy provides an approximation to random sampling, and the three different disposition stages provide for stratification along the key dimension of when a case is closed.<sup>12</sup> Overall, lawyers provided information on 989 cases (332 unfiled, 390 filed but not tried, and 267 that went to trial).

My observations in law offices during 1996 involved three different practices.<sup>13</sup> I was excluded from very little that was relevant to my work.<sup>14</sup> The three settings were very different. One was a specialist plaintiffs' firm, one was a contingency fee plaintiffs' specialist in a medium-sized general practice firm, and the other was a "litigation" (broadly defined to include criminal, civil and family) specialist in a small general practice firm.

Finally, I conducted a total of forty-seven semi-structured interviews, twenty-eight with contingency fee practitioners, thirteen with litigation defense lawyers, and six with current or retired insurance claims adjusters. I conducted the interviews between May and October, 1996. I drew the sample of contingency fee practitioners using a combination of legal directories and yellow page advertisements. These interviews averaged about one hour in length, and all were tape recorded and transcribed. I identified the defense side respondents from directories and in

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<sup>12</sup>To further frame the sample of cases, I asked only about cases that the lawyer had closed during the preceding twelve months (or previous fiscal year, if that was easier). I also collected information on the number of cases the lawyer had closed in each of those categories during the time period; this made possible the development of a weighting scheme to adjust for the relative frequency of different types of dispositions and the lawyer's practice volume.

<sup>13</sup>Only one of the four lawyers I approached turned me down. The first two lawyers I contacted said "yes," the third said "no," and the fourth said "yes."

<sup>14</sup>I was excluded from a firm business meeting in one practice, a trip to talk to an expert in another, and a number of non-contingency fee related events in the third.

the course of interviews with other respondents.<sup>15</sup> These interviews were conducted by telephone, and were also, with one exception, tape recorded and transcribed.

### *Civil Justice Reform Act Study*

The second data source I use is a study of federal civil cases conducted by the RAND Corporation. RAND conducted this study under contract with the Administrative Office of the U.S. Courts as an evaluation of the impact of the Civil Justice Reform Act.<sup>16</sup> For my purposes, I have employed data from two separate samples drawn by RAND.<sup>17</sup> The first sample is from cases terminated during 1991 (up until December 15); the second is from cases filed in 1992 (and in some situations 1993). Cases were taken from twenty federal districts around the country, some of which were involved in pilot projects under the CJRA and some which served as comparison districts. Samples were stratified to include adequate numbers of cases for each of the types of case processing interventions adopted in response to the CJRA and to include adequate numbers of in three categories of work burdens placed on federal judges; asbestos cases were specifically omitted from the study. RAND constructed sample weights to allow more comparisons to take into account variations in sampling rates. Each of the two samples (1991 terminations and 1992-93 filings contained approximately 5,000 cases. Surveys of the lawyers involved in each case were then carried out (omitting the 7% of cases from the 1992-93 sample that were still pending as of January 1996 when the final surveys were sent out); the response rate

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<sup>15</sup>In my interviews with contingency fee practitioners, I solicited names of defense lawyers and adjusters with whom I might speak. From the defense lawyers, I solicited names of additional adjusters, focusing on individuals who had recently retired (on the assumption that they would feel less constraint than would individuals currently employed by insurance companies).

<sup>16</sup>The results of the evaluation are reported in James S. Kakalik, et al., AN EVALUATION OF JUDICIAL CASE MANAGEMENT, *supra* note 6.

<sup>17</sup>For details on the complex design employed by RAND, see *id.* at 95-128.

from lawyers was around 50 percent.<sup>18</sup> 742 respondents from the 1991 sample reported being paid on a contingency fee basis, and as did 603 respondents for the 1992-3 sample.

Questions on the lawyer survey captured information on the amount of time spent by lawyers on the case (Question 9A), legal fees paid by the lawyer's client excluding expenses (Question 27A), the amount at stake ("the best likely monetary outcome"—Question 16B), the numbers of years the lawyer had been practicing law (Question 28), the percentage of the lawyer's practice devoted to federal district court litigation during the previous five years (Question 29), and the size of the lawyer's firm (Question 30).<sup>19</sup> The ways some of the questions were asked would tend to provide underestimates of the amount of lawyer effort involved (some respondents could not provide estimates of the hours worked by *all* attorneys for their client, and hence provided only partial estimates of lawyer effort *and* lawyers were instructed to exclude the number of hours devoted to proceedings before administrative agencies or in state courts involving the dispute in the federal court case) and overestimates of the fees they received (the fee question asked for the fees paid for all lawyers for their client); the result is that effective hourly rates and mean hourly returns may be *overestimated* in the analysis based on the CJRA data that I report below. The information on hours and fees required for analysis was available for 392 (weighted) respondents from the 1991 sample and 297 (weighted) respondents for the 1992-93 sample.<sup>20</sup>

In addition to the data from the lawyer survey, I was able to draw on data RAND researchers coded from the court records. The key variables from the court records are the type

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<sup>18</sup>There are differing ways to compute the response rate; hence the somewhat ambiguous figure provided above; see *id.* at 117.

<sup>19</sup>The full questionnaire can be found in James S. Kakalik, et al., AN EVALUATION OF JUDICIAL CASE MANAGEMENT, *supra* note 6.

<sup>20</sup>The results reported in this section all employ the sampling weights prepared by the RAND staff; see *id.*

of case as indicated by the plaintiff's lawyer at the time of filing and the stage of processing when the case was terminated.

### *Measurement*

The central measure that I will employ is the “effective hourly rate” (EHR): the fee received by the lawyer divided by the amount of time the lawyer had to expend to obtain that fee. This measure captures the various elements of the contingencies facing the lawyer. The numerator, the fee received, is a function of the percentage rate plus both the amount of damages and whether the lawyer obtains any recovery for the client. The denominator is the amount of time the case actually took.

$$EHR = \frac{\textit{percentage * damages * recovery}}{\textit{hours}}$$

Across a number of similar cases, the variation in the numerators and denominators reflect the risks and uncertainties of those cases.

This measure is useful because it is precisely this that some critics of contingency fees have attacked, suggesting that lawyers are frequently able to obtain “effective hourly rates of thousands and even tens of thousands of dollars.”<sup>21</sup> While there are some cases that do earn lawyers fees that translate into rates of \$1,000 or more per hour, we know little or nothing about the frequency of such cases, or, *more importantly*, what the typical effective hourly rates look like. Economists would argue that the economically rational lawyer would demand to do better, on average, from contingency fees than from hourly (or flat) fees because the contingency fee

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<sup>21</sup>See citations in *supra* note 2.

lawyer is providing additional services to the client which merit compensation.<sup>22</sup> However, this type of economic rationality presumes an opportunity cost analysis in which the contingency fee lawyer has alternative uses of his or her time which will provide a known level of compensation; in situations where a lawyer has otherwise unused time, the lawyer may be willing to accept cases where the lawyer expects the compensation to be less than what the lawyer would like to believe is the value of the time involved.<sup>23</sup>

One problem with the “effectively hourly rate” measure is that it measures return at the level of the individual investment, not at the level of the overall portfolio. Short of a complete audit of a lawyer’s cases over a period of time, there is no ready way to measure the overall performance, or “yield,” on a portfolio. One might be tempted to view the mean effectively hourly rate, or the median effective hourly rate, as a measure of portfolio performance, but even that is somewhat flawed. Using such a measure would presume that all cases should be treated equally. It is a bit like the situation where a stock investor with \$25,000 to invest puts \$1,000 into a penny stock, and the remaining \$24,000 into three stocks (\$8,000 each). If the investor sells all of the stock a year later receiving \$5,000 for the penny stock, and \$9,000 for each of the mainstream stocks, the total received on the \$24,000 is \$32,000 for a yield of \$8,000 or 33⅓ percent of the original \$24,000. However, the individual returns are 400 percent on the penny stock and 12½ percent on each of the mainstream stocks. If one were to average these returns, the average would be 109.375 percent. Which measure makes more sense as an overall indicator of yield on the portfolio?

While I do not have the data needed to look at the portfolio return for individual lawyers, I can obtain estimates of the yield from what I will label the “meta-portfolio.” By this I mean

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<sup>22</sup>See Murray L. Schwartz and Daniel J.B. Mitchell, “An Economic Analysis of the Contingent Fee in Personal-Injury Litigation,” 22 *Stanford Law Review* 1125 at 1153-54; Richard A. Posner, *Economic Analysis of Law* [2<sup>nd</sup> edition] (Boston: Little, Brown and Company, 1977) at 448-49.

<sup>23</sup>See Jerome E. Carlin, *Lawyers on Their Own: A Study of Individual Practitioners in Chicago* (New Brunswick: Rutgers University Press, 1962).

returns across sets of cases using information from sets of respondents. This would be something like taking all of the stocks listed on the New York Stock Exchange, the total dividends paid out by the companies for these shares (i.e., multiplying the dividend by number of shares for each company, and adding these up), computing the total capitalization of each company's listed stock

$$MHR = \frac{\sum fees}{\sum hours}$$

(the selling price times the number of shares, and adding these up), and then dividing the total dividends by the total capitalization. The same operation can be done for definable subsets of stocks (e.g., the 30 industrial companies in the Dow Jones Index, banks, technology companies, insurance companies, etc.) as a way of getting an average return for the subset.<sup>24</sup>

In the case of yields for contingency fee portfolios, I compute the meta-portfolio returns by adding up the fees received across the sampled cases and adding up the hours worked; the resulting total fees and total hours can be divided to produce a "mean hourly return" (MHR) which is a measure of the yield for the "meta-portfolio":

As with the stock example, this procedure can be applied to meta-portfolios defined along various dimensions (e.g., unfiled cases, filed cases, tried cases, auto accident cases, etc.). The advantage of the mean hourly return figure is that a very high return for a relatively small case will not dominate the calculation because the computation is effectively weighted to reflect the size of a case.

Before turning to the results based on the Wisconsin and CJRA data, let me first briefly describe what we can discern from earlier studies that permit the computation of effective hourly rates and mean hourly returns.

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<sup>24</sup>In fact, there is an investment trust, DIAMONDS, traded on the American Stock Exchange that is intended to produce a yield that mirrors the Dow Jones 30 Industrials. See <http://www.amex.com/asp/indexshares.asp?symbol=DIA>.

## PREVIOUS EFFECTIVE HOURLY RATE STUDIES

In fact, there is surprisingly little prior research on the kinds of fees and incomes lawyers earn from contingency fee work. Some of the most successful practitioners make no effort to hide their financial success, but these lawyers, persons like John Jamail or John O'Quinn, are not typical contingency fee practitioners. And publications targeted at the profession often trumpet the names of the members of the profession with the highest incomes, usually contingency fee practitioners.<sup>25</sup> I could find only two published studies predating the Wisconsin contingency fee study that provide systematic information on effective hourly rates earned from contingency fee cases.

The first study is from the early 1970s considers only medical malpractice cases.<sup>26</sup> This study, based on a survey of 671 lawyers,<sup>27</sup> reported mean effective hourly rates for plaintiffs' lawyers somewhere in the range \$61 to \$84; this range primarily reflects uncertainty about and the treatment of co-counsel or referral fees. The authors of the study compared these figures to the mean hourly rate charged by medical malpractice defense lawyers, \$47, and concluded that the "'effective hourly fee' is not excessively large ... [and that] plaintiff and defense fees are in the

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<sup>25</sup>See See Brigid McMenamin, *The Best-Paid Lawyers*, FORBES, Nov. 6, 1995, at 145 (reviewing the 25 top paid corporate and trial lawyers).

<sup>26</sup>Stephen Dietz, C. Bruce Baird, and Lawrence Berul, *The Medical Malpractice Legal System*, in APPENDIX: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE [DHEW Publication No. (OS) 73-89] (Washington, DC: Department of Health Education and Welfare, 1973), pp. 113-16.

<sup>27</sup>The sample design for this study combined a national mail survey of lawyers selected from Martindale-Hubbell with a "selective" mail and in-person survey of lawyers known to do medical malpractice cases (*id.*, at. 89-91). In the original sample, about two-thirds of the targeted respondents were from the national sample, with the remaining from the selective sample, but in the final sample only 23% were from the selective survey; however, if one eliminates from the national survey those who had had no contact with medical malpractice cases during the time frame covered in the questionnaire, 59% were from the selective survey. Most of the respondents, 80-90% were plaintiffs' lawyers.

same general ballpark."<sup>28</sup> It is worth noting that the use of mean hourly rates here would have tended to skew the figures upward; more typically one finds information on median rates.<sup>29</sup>

The second published study on effective hourly rates is from the Civil Litigation Research Project (CLRP), a large federally financed study conducted around 1980. This study focused on a sample of federal and state cases selected from courts in five federal judicial districts around the country: Eastern Pennsylvania (Philadelphia), Central California (Los Angeles), South Carolina, New Mexico, and Eastern Wisconsin (Milwaukee). The analysis of effective hourly rates from this study is reported in the Project's Final Report and in my book based on the CLRP data, *The Justice Broker*.<sup>30</sup> The overall median effective hourly rate for contingency fee lawyers is \$43 (the mean is \$89), the first quartile is \$6 (i.e., in 25% of the cases, contingency fee lawyers earn \$6 per hour or less), the third quartile is \$98 (25% of the lawyers earn \$98 or more), and the 90th percentile is \$200 (the maximum is \$2,500).<sup>31</sup> These figures show that very large

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<sup>28</sup> *Id.*, at 116.

<sup>29</sup> My guess is that Dietz and his colleagues chose to present the mean effective hourly rate for contingency fee lawyers because that figure was substantially higher than the median, and using the higher figure would undercut criticisms that their figures seemed too low. In a telephone conversation (September 22, 1994), Stephen Dietz told me that he could not remember the exact reason they had used the mean rather than the median. He did say, however, that he recalled that even using the mean, the effective hourly rate of contingency fee lawyers was only about 20% above what the typical hourly fee defense lawyer charged; this is correct if one uses the lowest of the various figures (after adjusting for co-counsel and referral fees). Dietz also informed me that the data from the 1973 study are no longer available; consequently, it is not possible to reanalyze those data to obtain the median figure.

<sup>30</sup> The numbers reported in Table 1 differ slightly from those in my earlier book Herbert M. Kritzer, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* (1990) because here I have used somewhat more refined information on fee arrangement and different rounding procedures.

<sup>31</sup> These results on effective hourly rate can be found in *id.*, at 137-146; and in Herbert M. Kritzer, William L.F. Felstiner, Austin Sarat, and David M. Trubek, *Winners and Losers in Litigation: Does Anyone Come Out Ahead?* in David M. Trubek, Joel B. Grossman, William L.F. Felstiner, Herbert M. Kritzer, and Austin Sarat, *CIVIL LITIGATION RESEARCH PROJECT FINAL REPORT: PART C* (Madison: University of Wisconsin Law School, 1987), pp. 52-59, 78. The mean is not reported; I have computed that from the original data.

effective hourly rates are possible, but typical effective hourly rates are not extreme.<sup>32</sup> For comparison, the median hourly rate reported by hourly fee lawyers in the same study was \$50.<sup>33</sup> The information on effective hourly rates from the CLRP study is quite rich, albeit quite dated by the passage of time. Table 1 shows information broken down a variety of ways.<sup>34</sup> Two items are particularly interesting. Effective hourly rates tend to go down for small cases (under \$10,000) with a median of \$38, rising to \$62 for cases in the \$10,000-\$50,000 range but dropping off slightly to \$58 for cases over \$50,000. Also, it appears that contingency fees in cases other than contracts and torts are very risky; in noncontract, nontort cases, the median is only \$7 (38% of the cases yield no fee at all).

When I turn to look at the mean hourly return, which I defined above, I obtain a figure of \$47 across all of the contingency fee cases in the sample. Looking only at tort cases, the mean hourly return is \$52, compared to \$45 for contract cases, and \$23 for cases involving neither tort nor contract. Taking only cases under \$10,000, which constitute almost half of the sample,<sup>35</sup> the mean hourly return is only \$22, rising to \$49 for cases in the \$10,000-\$50,000 range and \$73 for cases over \$50,000. Table 1 also shows breakdowns for state and federal cases, and breakdowns by area of law controlling for venue; it is useful to keep in mind that most cases are actually in

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<sup>32</sup>It would be nice to be able to compare these figures to those from Dietz *et al.*; however, data from only six contingency fee lawyers handling medical malpractice cases were available. Interestingly, the mean was \$52; for 3 cases the effective hourly rate was \$0, and the other three were \$47, \$77, and \$267. One thing my data do show is that Dietz *et al.*'s use of means most likely overstated the difference between hourly and contingency fee lawyers; there is a significant possibility that the median hourly rate in the earlier study was actually less than the median hourly rate charged by defense lawyers.

<sup>33</sup>Kritzer, *supra* note 1, at 138.

<sup>34</sup>Most of these figures are from Table 9-2 in Kritzer, *supra* note 1, at 139; I have added to the information in the book, means and maximums.

<sup>35</sup>The only reason these smaller cases do not constitute much more of the sample is because the study was designed to have equal numbers of state and federal cases; the median case in state court involved only \$4,500 in stakes.see Kritzer, *supra* note 1, at 31.

**Table 1: Effective Hourly Rate Estimates, Circa 1980<sup>a</sup>**

Group	Mean	Median	First Quartile	Third Quartile	90th Percentile	Maximum	Mean Hourly Rate	n
All Cases	\$89	\$43	\$6	\$98	\$200	\$2,500	\$47	343
By stakes								
<\$10,000	\$59	\$38	\$12	\$70	\$155	\$590	\$27	127
\$10,000 - \$50,000	\$96	\$62	\$9	\$114	\$237	\$614	\$49	118
>\$50,000	\$203	\$58	\$6	\$189	\$332	\$2,167	\$73	29
By court								
Federal	\$91	\$40	\$0	\$99	\$201	\$2,167	\$51	161
State	\$88	\$45	\$16	\$99	\$200	\$2,500	\$40	182
By area of law								
Torts								
All	\$92	\$49	\$15	\$101	\$216	\$2,167	\$52	232
Federal	\$113	\$56	\$0	\$102	\$272	\$2,167	\$61	90
State	\$79	\$45	\$19	\$100	\$200	\$590	\$39	142
Contracts								
All	\$118	\$47	\$19	\$117	\$206	\$2,500	\$45	71
Federal	\$101	\$56	\$27	\$138	\$224	\$614	\$44	35
State	\$135	\$45	\$4	\$94	\$223	\$2,500	\$47	36
Neither torts nor contracts								
All	\$29	\$7	\$0	\$45	\$75	\$255	\$23	50
Federal	\$28	\$5	\$0	\$45	\$82	\$255	\$23	40
State	\$30	\$25	-- <sup>b</sup>	--	--	\$65	\$20	10

<sup>a</sup>SOURCE: Civil Litigation Research Project data.

<sup>b</sup>Number of cases insufficient for meaningful statistic.

the state courts, and that the mean hourly rate for most of the state subsets shown in the table are on the order of \$40 per hour.

These two existing studies do not show a large proportion of contingency fee cases yielding extremely high hourly returns for lawyers.<sup>36</sup> The CLRP data show that occasional high

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<sup>36</sup>It is possible to try to estimate typical effective hourly rates using aggregate income data from economic surveys of lawyers. When I do that, I obtain results consistent with the patterns I will report below from the Wisconsin contingency fee survey; if anything, the aggregate data yield lower estimates of the hourly returns than what I find from my survey data Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL LAW REVIEW

hourly returns do occur in individual cases. The situation may have changed in the 15-25 years since these studies were completed. It may also be that the frequent high hourly rates come not in cases that get filed in court (which is true of all the cases in the CLRP study, and probably most or all of the cases in the medical malpractice study), but those that are settled quickly before formal litigation begins.

### **RETURNS ON CONTINGENCY FEE CASES**

Let me now turn to estimating returns on contingency fee cases using data from the Wisconsin contingency fee study and the RAND CJRA study. One preliminary issues is to establish some baseline against which to compare the patterns I will report below.

#### **Establishing an Appropriate Basis for Comparison and Other Estimation Issues**

To understand and assess the returns lawyers earn for contingency fee work requires some base for comparison. There are many possible comparisons that one could make. For example, what types of effective hourly rates do various types of physicians earn? About the time of the data collection, I had a minor dermatological procedure carried out. The fees by the physician came to \$195 for 10 to 15 minutes of his time (and the clinic billed another \$112 for the use of its facilities); the hourly rate then was something between \$800 and \$1,200. More recently, one of my adult children had a three hour surgical procedure for which the surgeon billed over \$12,000, or more than \$4,000 per hour.

Alternatively, one might compare to the effective hourly rate charged by a good automotive service operation. There the stated hourly rate for the mechanic might be \$45; however, the billing is based on the “book time” and a good mechanic can beat the book time by 25-50%; to that, one needs to add the markup on the parts that the shop sells to its customers.

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267 (1998).

All together, a good auto mechanic shop might generate \$75-\$100 per mechanic hour excluding the wholesale value of the replacement parts.

One good potential comparison is to the hourly rates charged by lawyers with comparable training and experience. An examination of the hourly rates reported by insurance defense lawyers in the economic surveys of state bars during the mid-1990s showed that these rates tended to be in the \$80-\$100 per hour range . If anything this is probably a low-end estimate of comparable hourly rates because insurance companies have sufficient purchasing power that they are able to keep the hourly rates paid to outside counsel at the low end of market rates. In a sense, the insurance companies are able to buy outside legal services wholesale and pay wholesale rather than retail rates.<sup>37</sup>

Probably the best comparison would be to the hourly rates actually charged by the lawyers who responded to my survey. As it turns out, most of the lawyers (85%) had done at least some work on an hourly basis during the previous year. In my survey, I asked them what was the hourly rate quoted for the most recent matter they accepted on an hourly basis. A total of 389 lawyers provided information on that hourly rate; the median hourly rate was \$125 per hour and the mean was \$124. This then provides one baseline for comparison in the discussion that follows.

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<sup>37</sup>See Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers*, 4 CONNECTICUT INSURANCE LAW JOURNAL 205 (1998). The above figures may be less comparable that they appear to be at first glance. Insurance defense lawyers bill for everything at the full rate, including things that they might be inclined to discount for clients paying “retail” rather than “wholesale” rates. As one defense lawyer described this to me, for a “retail” client he might decide to discount his charges for a trip to take a deposition out-of-town, particularly if the deposition proved to be unproductive; however, he would not discount this for an insurance company client paying “wholesale” rates. This same lawyer pointed out that with insurance defense work, time is more productive in that relatively little effort needs to be devoted to acquiring business unlike other areas of practice (particularly plaintiffs’ work).

A second baseline comes from the RAND CJRA data. While the focus of my analysis is on the returns from contingency fee work, a much larger proportion of the lawyers who responded to the RAND survey were working on an hourly fee basis. These lawyers were asked to report their hourly rate they were charging for the sample case.<sup>38</sup> Information on hourly rate was requested from those lawyers handling cases on an hourly basis; 41.5 percent and 43.3 percent of the respondents provided that information for the 1991 and 1992-3 surveys respectively. Based on a frequency distribution published by RAND,<sup>39</sup> I estimate the mean hourly rates for the two sets of cases (1991 and 1992-93) as \$136 and \$144; the corresponding medians are 125 and \$133.<sup>40</sup> These figures represent a second baseline for comparison.

In making comparisons between the contingency fee lawyers' fees and the rates charged by lawyers billing on an hourly basis, it is necessary to be careful to exclude from the fees obtained by contingency fee lawyers components that hourly fee lawyers would typically bill separately. Under both fee arrangements expenses such as copying, travel, witness fees, and filing fees are normally handled as separate billable expenses. In contrast, while most hourly fee lawyers also bill separately for paralegal time, this is an expense absorbed within the typical contingency fee. Consequently, to estimate the effective hourly rate of contingency fee lawyers, it is necessary to deduct from the gross fee the equivalent of what would be charged for any paralegal time devoted to the case.

A second issue is that many lawyers do not maintain time records for their work on contingency fee cases. Interestingly, the majority of the lawyers who responded to my survey

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<sup>38</sup>For cases extending over a period of years, the hourly rates may have changed over the course of the case. If more than one lawyer worked on the case, the respondent was directed to provide the average rate.

<sup>39</sup>See James S. Kakalik, et al., AN EVALUATION OF JUDICIAL CASE MANAGEMENT, *supra* note 6 at 283; The RAND survey used a closed-ended question in which the respondents were asked to choose from among the following categories: \$75 or less, \$76-\$125, \$126-\$175, \$176-\$250, or more than \$250.

<sup>40</sup>I estimated the means and medians using standard methods described in H.M. Blalock, Jr. SOCIAL STATISTICS [2<sup>nd</sup> Revised Edition] (1979) at 61-66.

reported that they did keep time records, but only about a quarter of the respondents actually consulted those records. Even if all of the lawyers did keep time records, and did consult those records, my observations of the lawyers at work (two of whom did keep time records) made clear that the nature of contingency fee practice (i.e., constant shifting from one case to another) makes tracking time at best an effort at approximation. This same problem may apply to many hourly fee lawyers as well. The result is that it is typically necessary to rely upon estimates of effort; this means that a specific figure for an individual case might involve some significant error, but if the errors are essentially random, they will cancel out across a set of cases.

### **Effective Hourly Rates and Mean Hourly Returns in Wisconsin**

How do contingency fee lawyers do in terms of the effective hourly rates they earn from contingency fee legal practice? I was able to compute an effective hourly rate for 878 cases. About 4% of these exceeded \$1,000, and 1% exceeded \$2,000; in three of the cases, the rate exceeded \$3,000 with the highest single rate at \$4,473. In contrast, in about 11% of the cases the effective hourly rate was negative or zero. One lawyer had an effective hourly rate of -\$2,617 and another's rate was -\$1,225; these negative figures arise because of the costs of paralegal time spent on the case. Thus, if one uses \$1,000 as the "jackpot," lawyers were 2½ times as likely to be total losers than they were to win the jackpot.<sup>41</sup> A final indicator of the variability is that the standard deviation for effective hourly rate is extremely high, 430, reflecting the fact that the distribution in effective hourly rates is highly skewed toward a small number of very large figures.

One problem with the figures above is that they do not adjust for the characteristics of my sample, whereby cases handled by high volume lawyers are underrepresented, cases handled by general practitioners are unrepresented, and cases going to trial are overrepresented. If I weight

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<sup>41</sup>If one uses \$500 per hour as the "jackpot" figure, then the chances of being complete losers and winning the jackpot are about equal.

my sample to try to approximate the population of cases in Wisconsin the figures shift somewhat: just under eight percent exceed \$1,000 and about two percent exceeded \$2,000; only about seven percent were zero or negative. With the weighting, the variability of effective hourly rates is even greater, with a standard deviation of 631.

The variability, and the potential of “jackpots,” is not surprising. That is, in one sense, the essence of the contingency fee. However, how do lawyers do in the “typical” case? How we define typical becomes important. The presence of a small number of very high hourly rates leads to the result that we will see very different things depending on whether we look at the median (the middle case) or the arithmetic mean (the common average). In fact, as I will argue below the gap between the median and the mean tells us important things about the nature of contingency fee practice. If I simply take all of the cases in my sample, without considering the lawyer’s caseloads or the way I designed the sample (i.e., oversampling cases that went to trial, undersampling general practitioners), I find that the median effective hourly rate is \$132, which is almost the same as the mean/median hourly rate that these same lawyers report charging for their hourly fee work; in fact, \$125 falls at the 49<sup>th</sup> percentile. Thus, in about half the cases in my sample, lawyers did better than the median hourly rate for hourly fee work and in about half the cases they did worse.

If this were the end of the story, an economist would probably conclude that contingency fee lawyers were not pursuing an economically rational course of action given that the economist expects the contingency fee lawyer to extract higher fees to reflect the risks the lawyer bears and the financing services the lawyer provides. These higher fees appear in the mean effective hourly rate, which is considerably higher: \$242, which corresponds to the 72<sup>nd</sup> percentile. That is, in the typical case, the contingency fee lawyer does not do better than the median hourly rate, but across a set of cases, the lawyer will do better. This was best expressed by one lawyer I interviewed who had a very high volume practice. He told me that 60-70% of his gross fees came from perhaps a dozen of the cases he closes each year; in most of his cases, he was lucky if he met the

costs of running his practice. Eliminating the top 10% of the cases from the sample, leaves a the mean effective hourly rate for the remaining 90% of \$136 which is virtually the same as the overall median.<sup>42</sup>

We need to refine the picture by looking at what happens after adjusting the results to take into account the sample structure. With the appropriate weighting, the median rises to \$167, and the mean goes up to \$345, reflecting the fact that it is the upper tail that is pushing the mean up. Eliminating the top 10% of cases reduces the weighted mean effective hourly rate is \$181.

What type of overall picture emerges focusing on the “mean hourly return” (estimated by adding up all of the hours reported on the cases in the sample and all of the fees received, adjusted for the costs of paralegal time, and dividing these two figures)? The result, unadjusted for the sampling structure, is \$169. As with the mean effective hourly rate, this estimate is greatly influenced by relatively small numbers of extremely profitable cases. Dropping the 10% most profitable cases from the sample leaves a 10% trimmed sample-wide mean hourly return of \$104; dropping only the top 5% most profitable cases the mean hourly return is \$137, virtually identical to the median. This pattern reemphasizes the role of a relatively small portion of cases as generating the “profits” across a portfolio of contingency fee cases. Again, the pattern is a different if we rely on the weighted data. The 10% trimmed sample-wide mean hourly return is \$147.

#### *Variations in Effective Hourly Rates*

One would expect the returns lawyers earn from contingency fee work to vary systematically based on either case or lawyer factors. Tables 2a and 2b show a variety of easurs of return broken down by the following variables:

- Nature of disposition

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<sup>42</sup>The median for this “right-trimmed” sample is \$113. Because the medians are not generally affected greatly by the “trimming,” I will not report trimmed medians in the tables or discussion.

- Amount at stake
- Area of law
- Gender of lawyer
- Lawyer's advertising practices
- Type of firm
- Lawyer's position
- Lawyer's years of experience
- Geographic location of practice
- Nature of lawyer's practice
- Lawyer's income from the practice of law
- Lawyer's caseload

Table 2a shows the measures without applying weighting to adjust for the sample structure, and Table 2b shows measures applying weights. Both weighted and unweighted results are shown because of the complexity of the weighting problem. Some of the variables listed above are the factors involved in the sample design (type of disposition, type of practice, and caseload), which necessitates applying modified weights to the breakdowns for those categories. As with the overall measures, the weighted versions of most the measures are higher for the weighted results than for the unweighted results

These tables are dense with information. In addition to simple summary measures (mean and median), they show the mean hourly return and trimmed figures for mean effective hourly rate and mean hourly return. In addition, to give an indication of variability, they show several additional positional measures—the first and third quartiles (the 25<sup>th</sup> and 75<sup>th</sup> percentiles), and the 90<sup>th</sup> percentile, plus a statistic called the midspread which is the difference between the third and

**Table 2a: Effective Hourly Rate Estimates, Wisconsin Data  
(unweighted)**

Group	Mean EHR <sup>a</sup>	Median EHR	First Quartile EHR	Third Quartile EHR	EHR Mid-spread	90th Percentile EHR	Mean Hourly Return	10% Trimmed Mean EHR	10% Trimmed Mean Hourly Return	n
All Cases	\$242	\$132	\$61	\$269	\$208	\$552	\$169	\$137	\$104	878
By disposition										
Unfiled	\$286	\$166	\$78	\$333	\$255	\$600	\$186	\$163	\$127	304
Filed, not tried	\$251	\$144	\$73	\$383	\$310	\$549	\$220	\$153	\$127	343
Tried	\$170	\$89	\$12	\$181	\$169	\$363	\$134	\$81	\$85	231
By stakes										
<\$20,000	\$163	\$109	\$59	\$193	\$134	\$378	\$104	\$127	\$95	348
\$10,000 - \$50,000	\$214	\$148	\$72	\$273	\$201	\$465	\$119	\$153	\$96	264
>\$50,000	\$392	\$200	\$54	\$390	\$336	\$1,188	\$199	\$136	\$108	237
By area of law										
Auto Accident	\$286	\$163	\$84	\$310	\$226	\$624	\$161	\$161	\$120	525
Medical Malpractice	\$314	\$36	-\$25	\$368	\$393	\$1,185	\$316	\$60	\$134	39
Other Personal Injury	\$190	\$122	\$33	\$255	\$222	\$413	\$149	\$120	\$86	152
Wrkers Comp/Soc Sec	\$124	\$100	\$38	\$186	\$148	\$325	\$103	\$116	\$103	60
Contracts	\$127	\$64	\$21	\$170	\$149	\$410	\$92	\$103	\$90	33
Other	\$169	\$100	\$26	\$191	\$165	\$382	\$128	\$111	\$60	87
Gender of Lawyer										
Male	\$252	\$135	\$63	\$276	\$213	\$560	\$184	\$141	\$115	756
Female	\$208	\$100	\$56	\$239	\$183	\$424	\$122	\$132	\$70	105
Lawyer's Advertising Practices										
Uses media or direct mail	\$326	\$182	\$76	\$272	\$196	\$683	\$243	\$157	\$128	185
Does not use media	\$220	\$122	\$60	\$243	\$183	\$457	\$158	\$133	\$102	685
Type of Firm										
Plaintiffs' Personal Injury Firm	\$293	\$153	\$63	\$333	\$270	\$723	\$248	\$141	\$103	336
Other type of firm	\$215	\$122	\$60	\$239	\$179	\$429	\$126	\$135	\$102	493
Lawyer's Position										
Partner in firm	\$275	\$140	\$66	\$280	\$214	\$594	\$205	\$146	\$120	580
Solo practitioner	\$164	\$116	\$50	\$213	\$163	\$383	\$114	\$128	\$97	123
Associate or firm employee	\$181	\$105	\$52	\$255	\$203	\$533	\$102	\$106	\$67	163
Years of Experience										
Five or less	\$163	\$88	\$36	\$228	\$192	\$491	\$141	\$102	\$59	79
Six to ten	\$216	\$104	\$58	\$238	\$180	\$390	\$119	\$129	\$105	748
Eleven to twenty	\$213	\$135	\$64	\$268	\$204	\$460	\$123	\$141	\$97	349
More than twenty	\$310	\$156	\$63	\$326	\$263	\$792	\$279	\$147	\$130	300
Location of Practice										
Milwaukee area	\$246	\$137	\$58	\$281	\$223	\$552	\$255	\$146	\$121	278
Other community over 100,000	\$245	\$114	\$64	\$262	\$198	\$568	\$118	\$137	\$95	170
100,000-50,000	\$230	\$125	\$64	\$228	\$164	\$460	\$128	\$139	\$108	199
Under 50,000	\$244	\$148	\$60	\$291	\$231	\$625	\$148	\$125	\$96	221
Lawyer's practice area										
Personal injury plaintiffs	\$309	\$157	\$63	\$334	\$271	\$734	\$212	\$144	\$112	368
Other litigation	\$208	\$118	\$62	\$242	\$180	\$451	\$129	\$138	\$91	273
General practice	\$179	\$118	\$60	\$194	\$134	\$327	\$110	\$122	\$92	166
Other type of practice	\$140	\$114	\$78	\$154	\$76	\$298	\$101	\$115	\$96	37

Group	Mean EHR <sup>a</sup>	Median EHR	First Quartile EHR	Third Quartile EHR	EHR Mid-spread	90th Percentile EHR	Mean Hourly Return	10% Trimmed Mean EHR	10% Trimmed Mean Hourly Return	n
Lawyer's income										
under \$50,000	\$130	\$75	\$26	\$164	\$138	\$360	\$115	\$91	\$64	109
\$50,000 to \$74,999	\$171	\$107	\$59	\$213	\$154	\$375	\$88	\$134	\$74	172
\$75,000 to \$99,999	\$193	\$118	\$54	\$208	\$154	\$414	\$152	\$134	\$125	185
\$100,000 to \$199,999	\$312	\$153	\$74	\$306	\$232	\$531	\$134	\$142	\$90	229
\$200,000 or more	\$405	\$215	\$106	\$426	\$320	\$932	\$360	\$189	\$161	127
Caseload										
1-5	\$186	\$113	\$59	\$200	\$141	\$402	\$108	\$126	\$80	175
6-10	\$206	\$112	\$55	\$206	\$151	\$410	\$185	\$127	\$79	173
11-25	\$198	\$140	\$62	\$252	\$190	\$387	\$157	\$139	\$133	181
26-100	\$286	\$155	\$64	\$329	\$265	\$657	\$212	\$147	\$126	274
more than 100	\$397	\$155	\$58	\$455	\$397	\$1,078	\$294	\$145	\$142	75

<sup>a</sup>Effective Hourly Rate

first quartiles.<sup>43</sup> In the following discussion, I will not attempt to explicate in detail everything that the tables show. Rather, I will focus on broad patterns.

Some general patterns shown in the tables reflect the skew involved in a small number of highly profitable cases. This shows up in the much higher figures for the overall mean effective hourly rate than for either the median effective hourly rate or the mean hourly return. It also shows up by the very sharp drop in the mean effectively hourly rate and the mean hourly return when I trim the ten percent of cases with the highest effectively hourly rates.<sup>44</sup> For example, looking at cases involving less than \$20,000, the unweighted mean effective hourly rate is \$163 (weighted mean \$244<sup>45</sup>) compared to a median of \$109 (\$138) and a mean hourly return of \$104 (\$139). Applying a 10% trim to the data, the mean effective hourly rate drops to \$127 (\$171) and the mean hourly return drops to \$95 (\$125). Note that the impact of “trimming” for this category of cases is relatively minor because relatively few cases get trimmed out. In contrast, if

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<sup>43</sup>I employ the midspread as a measure of variability because the more common measure, the standard deviation, is greatly inflated when the data are highly skewed as is the case here.

<sup>44</sup>In computing the trimmed figures for the weighted data, I used differing cut points depending the specific weight employed.

<sup>45</sup>In the remainder of this section I will show weighted figures in parentheses.

**Table 2b: Effective Hourly Rate Estimates, Wisconsin Data  
(weighted)**

Group	Mean EHR <sup>a</sup>	Median EHR	First Quartile EHR	Third Quartile EHR	EHR Mid- spread	90th Percen- tile EHR	Mean Hourly Return	10% Trimmed Mean EHR	10% Trimmed Mean Hourly Return	Weigh- ted n
All Cases	\$365	\$167	\$84	\$356	\$272	\$728	\$207	\$184	\$147	852
By disposition										
Unfiled	\$387	\$180	\$80	\$356	\$276	\$600	\$189	\$174	\$130	287
Filed, not tried	\$296	\$155	\$86	\$387	\$301	\$549	\$239	\$176	\$149	335
Tried	\$148	\$104	\$41	\$167	\$126	\$363	\$113	\$98	\$82	224
By stakes										
<\$20,000	\$244	\$138	\$76	\$303	\$227	\$462	\$139	\$171	\$125	433
\$10,000 - \$50,000	\$230	\$175	\$85	\$295	\$210	\$432	\$150	\$187	\$133	208
>\$50,000	\$739	\$285	\$103	\$922	\$819	\$2,026	\$261	\$196	\$162	177
By area of law										
Auto Accident	\$417	\$200	\$102	\$375	\$273	\$1,004	\$221	\$204	\$155	553
Medical Malpractice	\$132	-\$12	-\$19	\$154	\$173	\$616	\$260	\$76	\$156	31
Other Personal Injury	\$281	\$160	\$58	\$381	\$323	\$705	\$216	\$174	\$166	135
Wrkers Comp/Soc Sec	\$133	\$103	\$63	\$210	\$147	\$353	\$110	\$133	\$110	49
Contracts	\$188	\$64	\$42	\$417	\$375	\$417	\$96	\$186	\$95	48
Other	\$185	\$155	\$94	\$208	\$114	\$478	\$102	\$138	\$96	46
Gender of Lawyer										
Male	\$378	\$160	\$84	\$334	\$250	\$791	\$226	\$181	\$155	722
Female	\$317	\$203	\$104	\$394	\$290	\$728	\$132	\$201	\$121	87
Lawyer's Advertising Practices										
Uses media or direct	\$513	\$182	\$124	\$423	\$299	\$1,611	\$284	\$218	\$201	265
Does not use media	\$269	\$165	\$70	\$314	\$244	\$645	\$184	\$170	\$137	583
Type of Firm										
Plaintiffs' Personal	\$446	\$192	\$109	\$394	\$285	\$1,200	\$277	\$201	\$167	433
Other type of firm	\$251	\$155	\$65	\$303	\$238	\$428	\$156	\$171	\$136	377
Lawyer's Position										
Partner in firm	\$395	\$171	\$100	\$314	\$214	\$987	\$226	\$179	\$158	568
Solo practitioner	\$188	\$118	\$42	\$334	\$292	\$417	\$129	\$175	\$109	129
Associate or firm	\$290	\$192	\$77	\$400	\$323	\$757	\$168	\$205	\$119	149
Years of Experience										
Five or less	\$201	\$195	\$81	\$297	\$216	\$491	\$106	\$194	\$104	63
Six to ten	\$672	\$189	\$77	\$668	\$591	\$1,250	\$253	\$178	\$160	139

Group	Mean EHR <sup>a</sup>	Median EHR	First Quartile EHR	Third Quartile EHR	EHR Mid-spread	90th Percentile EHR	Mean Hourly Return	10% Trimmed Mean EHR	10% Trimmed Mean Hourly Return	Weighted n
Eleven to twenty	\$230	\$153	\$84	\$303	\$219	\$417	\$162	\$179	\$136	341
More than twenty	\$356	\$181	\$85	\$394	\$309	\$1,008	\$273	\$190	\$169	309
Location of Practice										
Milwaukee area	\$291	\$168	\$91	\$327	\$236	\$652	\$234	\$202	\$164	283
Other community over 100,000-50,000	\$230	\$154	\$62	\$313	\$251	\$420	\$153	\$174	\$123	173
Under 50,000	\$559	\$194	\$100	\$394	\$294	\$1,275	\$242	\$186	\$160	185
	\$324	\$167	\$69	\$400	\$331	\$1,076	\$199	\$163	\$141	207
Lawyer's practice area										
Personal injury	\$309	\$202	\$109	\$394	\$285	\$1,157	\$263	\$212	\$195	515
Other litigation	\$208	\$155	\$63	\$370	\$307	\$800	\$143	\$201	\$129	134
General practice	\$179	\$149	\$64	\$275	\$211	\$17	\$134	\$161	\$111	66
Other type of practice	\$140	\$128	\$86	\$155	\$69	\$155	\$84	\$120	\$84	38
Lawyer's income										
under \$50,000	\$236	\$131	\$34	\$241	\$207	\$827	\$93	\$114	\$84	60
\$50,000 to \$74,999	\$215	\$188	\$88	\$303	\$215	\$482	\$170	\$197	\$159	160
\$75,000 to \$99,999	\$252	\$132	\$64	\$383	\$319	\$677	\$157	\$173	\$121	161
\$100,000 to \$199,999	\$480	\$155	\$76	\$357	\$281	\$1,275	\$195	\$176	\$121	246
\$200,000 or more	\$424	\$232	\$138	\$394	\$256	\$1,289	\$370	\$229	\$250	183
Caseload										
1-5	\$149	\$100	\$40	\$180	\$140	\$327	\$106	\$109	\$84	186
6-10	\$204	\$128	\$61	\$205	\$144	\$377	\$129	\$131	\$77	213
11-25	\$197	\$115	\$67	\$216	\$149	\$385	\$146	\$102	\$122	205
26-100	\$269	\$175	\$64	\$314	\$250	\$590	\$203	\$137	\$119	146
more than 100	\$366	\$164	\$56	\$420	\$364	\$994	\$293	\$104	\$75	32

<sup>a</sup>Effective Hourly Rate

one looks at the cases involve more than \$50,000, the impacts are dramatic. The mean effectively hourly rate is \$392 (\$739) and the mean hourly return is \$199 (\$261); trimming the top 10 percent, leaves a mean of \$136 (\$196) and a mean hourly return of \$108 (\$162).

Given this skew, it is not surprising that the returns from contingency fee work, on a case by case basis, are highly variable. For the overall data, the midspread is \$208 (\$272). The role of skew in the midspread can be seen in the fact that the distance between the median and the third quartile is about double that between the median and the first quartile. Generally, the variability is higher with the weighted data than with the unweighted data; the average midspread shown for the unweighted data is \$209 compared to \$266 for the weighted data (the respective medians of the midspreads are \$197 and \$262).

Let me now turn to the variations shown in Tables 2a and 2b.

***Disposition:*** Returns tend to be lowest for cases that go to trial. This is not surprising given that cases that go to trial take more time on the part of the lawyer and are more likely to produce a zero return. The pattern between unfiled and filed-untried cases is less clear. Overall, unfiled cases seem to produce a slightly better return, but this is not true when the 10%-trimmed statistics are examined.

***Stakes:*** Overall returns tend to improve as stakes go up, and this is true regardless of whether one looks at the mean effective hourly rate, the median effective hourly rate, or the mean hourly return. However, this is clearly a function of the results from the highest return cases; the 10%-trimmed statistics show less variation based on stakes.

***Area of Law:*** There is a lot of inconsistency in the patterns when controlling for area of law. There is some indication that returns for tort cases are higher than for nontort cases. Perhaps of most interest is medical malpractice, where the mean actually goes down with the weighted data; this may reflect the relatively small number of medical malpractice cases in the data set, but it also be reflective of the higher

level of uncertainty in these cases.<sup>46</sup> Leaving aside medical malpractice, auto injury cases appear to produce the best typical returns.

***Type of Practice:*** Personal injury plaintiffs specialists tend to do somewhat better than other lawyers. This probably reflects a combination of expertise and efficiencies that these lawyers are able to obtain.

***Type of Law Firm:*** Consistent with type of practice, lawyers in firms specializing in personal injury plaintiffs work produce higher returns. It may also be the case that lawyers in specialized personal injury firms get better cases.

***Advertising Practices:*** Lawyers in firms that employ media or direct mail advertising produce higher returns. This reflects, at least in part, that those employing this type of advertising tend to be in firms that specialize in personal injury work.

***Geographic Location of Practice:*** There are no clear relationship between typical returns and the kind of community where the law firm is based.

***Lawyer's Position in the Firm:*** Somewhat different patterns appear depending on whether one looks at the weighted or unweighted data. With the unweighted data, the ordering of returns consistently puts partners first, then solo practitioners, and finally nonpartners in firms (associates and employees). With the weighted data, the ordering of solo practitioners and nonpartners reverses.

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<sup>46</sup>One of the lawyers I observed was working on a large medical malpractice case, and at one point I worked through with him the likely outcomes of the case and their probabilities (these ranged from a 50% chance of getting nothing to a 10% chance of getting \$8 million). We estimated that his "expected" fee was \$500,000 (although his actual fee could range as high as \$1.7 million under the rules governing legal fees in medical malpractice cases in Wisconsin); given the amount of time the lawyer had devoted to the case, and what was yet to come, I estimated that while he might end up making as much as \$1,100 per hour, his expected effective hourly rate was \$330. When I later examined the medical malpractice cases in the sample from my survey; I had information on 39 cases. The median effective hourly rate was only \$36, which is what is shown in Table 2a. However, this reflected in part that 45% resulted in no payment at all. The maximum effective hourly rate reported was \$2,900, and 10% of the cases had effective hourly rates of \$1,000 or more. The mean effective hourly rate was \$314, and the mean hourly return across the 39 cases was \$316 per hour.

***Year's of Experience:*** Looking at the unweighted data, there is a consistent pattern that more experienced lawyers produce better returns. However, with the weighted data, the pattern is more ambiguous.

***Lawyer's Caseload:*** Looking at the overall results, higher caseloads are associated with better returns. However, looking at the 10%-trimmed results, the pattern is less clear. Undoubtedly this reflects that those with larger caseloads are more likely to get some of the highly profitable cases.

***Lawyer's Income:*** Not surprisingly, lawyers with higher incomes produce higher returns; perhaps it would be better to say, those lawyers who produce higher returns have higher incomes.

***Lawyer's Gender:*** The evidence on the impact of gender is ambiguous. Looking at the unweighted data, males appear to produce higher returns than females; however, looking at the weighted data, the pattern is reversed.

The patterns described above are somewhat inconsistent, and some of the apparent differences may reflect confounding between variables rather than effects of the specific variables (i.e., the apparent effect of position in the law firm may reflect the characteristics of cases that are assigned to nonpartners). To sort out which variables are and are not related to the lawyer's return, I turned to multivariate methods. One advantage of this method is that it helps avoid some of the problems arising from the sample design; including as predictors the variables along which the sample was stratified (i.e., caseload, type of practice, how cases terminated) eliminates the need to weight the data to reflect these variables.

However, applying multivariate estimation techniques to these data raises some problems that necessitate doing something more than standard multiple regression. The first problem is that the dependent variable, effective hourly rate, is highly skewed, and this gives undue

influence to observations with very high effective hourly rates.<sup>47</sup> A standard solution for this type of skew is to apply a logarithmic transformation to the dependent variable before estimating the regression equation.<sup>48</sup> Applying a logarithmic transformation produces a second problem: in about ten percent of the observations, the effective hourly rate is zero or negative, and one cannot take logarithms of negative numbers or zero. To solve this problem, I employ an estimation technique that essentially estimates two equations simultaneously; one equation is a probit model for whether an effective hourly rate greater than zero is observed (the “selection” equation) and the second is a normal regression equation predicting the log of the effective hourly rate for those cases where the effective hourly rate is greater than zero (the “rate” equation).<sup>49</sup> As predictor variables, I use all of the variables shown in Tables 2a and 2b except geographic location; I set up all predictors up as one or more dummy variables because I have no reason to assume that the impact of variables such as years of experience or caseload would be neatly linear. I use the same predictors for both of the equations.

The results of this analysis are shown in Tables 3 and 4. Table 3 presents the estimates of the coefficients for the two equations. What is most relevant in this table are the variables that do and do not show significant relationships with the two equations predicting effective hourly rates. Those that show no significant relationships are:

- type of firm
- lawyer’s position in firm
- lawyer’s practice area

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<sup>47</sup>The skew also violates the normality assumption, although this is not all that important for large samples when least squares methods are used.

<sup>48</sup>The log transformation will also often produce a distribution of residuals that is approximately normal.

<sup>49</sup>The estimation was done using the Heckman procedure in STATA 6.0; I used the maximum likelihood estimator rather than the original two-step Heckman model. Note that this procedure requires an assumption that the disturbance term for the normal regression model be normally distributed; examining the residuals shows that they do nicely approximate a normal distribution.

**Table 3: Multivariate Analysis of Effective Hourly Rates**

	Rate Equation				"Selection" Equation			
	b	se/df	z/Wald	prob	b	se/df	z/Wald	prob
By disposition		2	14.87	0.001		2	32.30	0.000
Unfiled	0.428	0.120	3.57	0.000	0.619	0.193	3.21	0.001
Filed, not tried	0.168	0.123	1.37	0.170	1.264	0.215	5.89	0.000
Tried	base				base			
By stakes		2	54.51	0.000		2	0.79	0.680
<\$20,000	-0.782	0.106	-7.38	0.000	0.101	0.218	0.46	0.643
\$10,000 - \$50,000	-0.481	0.108	-4.46	0.000	-0.076	0.225	-0.34	0.734
>\$50,000	base				base			
By area of law		5	12.08	0.034		5	52.99	0.000
Auto Accident	0.213	0.153	1.39	0.165	0.734	0.268	2.74	0.006
Medical Malpractice	0.673	0.283	2.38	0.017	-1.198	0.353	-3.39	0.001
Other Personal Injury	0.204	0.170	1.21	0.228	-0.469	0.268	-1.75	0.080
Workers Comp/Soc Sec	-0.183	0.220	-0.83	0.405	0.506	0.381	1.33	0.184
Contracts	-0.132	0.256	-0.52	0.606	-0.451	0.359	-1.26	0.209
Other	base				base			
Gender of Lawyer								
Male	0.160	0.127	1.26	0.207	-0.471	0.264	-1.79	0.074
Female	base				base			
Advertising Practices								
Uses media or direct mail	0.191	0.118	1.62	0.105	-0.427	0.225	-1.90	0.058
Does not use media	base				base			
Type of Firm								
Plaintiffs' Personal Injury	-0.033	0.109	-0.31	0.758	0.030	0.211	0.14	0.888
Other type of firm	base				base			
Lawyer's Position		2	0.53	0.768		2	0.45	0.797
Partner in firm	-0.069	0.122	-0.57	0.569	0.071	0.234	0.30	0.762
Solo practitioner	-0.118	0.172	-0.68	0.495	0.245	0.364	0.67	0.500
Associate or employee	base				base			
Years of Experience		3	4.62	0.202		3	2.22	0.528
Five or less	0.063	0.188	0.34	0.736	-0.122	0.350	-0.35	0.727
Six to ten	-0.146	0.131	-1.11	0.265	0.302	0.271	0.52	0.605
Eleven to twenty	-0.174	0.096	-1.81	0.070	0.102	0.196	1.12	0.264
More than twenty	base				base			
Lawyer's practice area		3	2.11	0.550		3	1.50	0.683
Personal injury plaintiffs	-0.162	0.214	-0.76	0.449	0.218	0.420	0.52	0.604
Other litigation	-0.102	0.207	-0.49	0.623	0.013	0.392	0.03	0.974
General practice	-0.247	0.217	-1.14	0.255	-0.124	0.422	-0.30	0.768
Other type of practice	base				base			

	Rate Equation				"Selection" Equation			
	b	se/df	z/Wald	prob	b	se/df	z/Wald	prob
Lawyer's income		4	13.65	0.009		4	10.96	0.027
under \$50,000	-0.644	0.184	-3.49	0.000	-1.024	0.373	-2.75	0.006
\$50,000 to \$74,999	-0.424	0.151	-2.80	0.005	-0.739	0.355	-2.08	0.038
\$75,000 to \$99,999	-0.292	0.143	-2.04	0.042	-0.761	0.320	-2.38	0.018
\$100,000 to \$199,999	-0.185	0.126	-1.47	0.143	-0.231	0.295	-0.78	0.434
\$200,000 or more	base				base			
Caseload		4	7.01	0.135		4	3.74	0.442
1-5	-0.470	0.195	-2.40	0.016	0.425	0.378	1.13	0.261
6-10	-0.459	0.187	-2.45	0.014	0.591	0.370	1.60	0.111
11-25	-0.304	0.179	-1.70	0.089	0.329	0.339	0.97	0.331
26-100	-0.244	0.157	-1.56	0.120	0.516	0.305	1.69	0.091
more than 100	base				base			
Constant	5.962	0.346	17.24	0.000	1.058	0.626	1.69	0.091

- lawyer's years of experience

Several variables show ambiguous or possibly weak relationships:

- gender: no relationship with the rate itself, but possibly a relationship with whether a positive return is obtained (men slightly less likely to obtain a positive return than women).
- advertising practice: no relationship with the rate itself, but a weak relationship with whether a positive return is obtained (users of media advertising less likely to obtain a positive return).
- caseload: some indication that the effective hourly rate itself may decrease as caseload decreases.

There are clear relationships with:

- disposition: higher rates for unfiled cases; higher likelihood of positive return for cases not tried.
- stakes: effective hourly rate increases with stakes, but likelihood of a positive return is not related to stakes.

- area of law, effective hourly rate higher for personal injury cases, particularly for medical malpractice cases; likelihood of a positive return higher for auto accident cases, but lower for other personal injury cases, particularly medical malpractice cases.
- income: effective hourly rate and likelihood of a positive return both increase as income increases.<sup>50</sup>

In Table 4 I present results that try to put these effects into clearer perspective.

Combining the results for the selection and rate equations, I obtained estimates of the change in the effective hourly rate associated with each of the variables, controlling for the other variables. Because both the selection and rate equations use transformed variables (the “probit” for the selection equation and the natural logarithm for the rate equation), these effects vary depending upon what values one selects as the base. The results shown in Table 4 employ a constant base for each equation: the probit transformation of the proportion (.901) of cases that produced positive, non-zero effective hourly rates, and the mean of the natural logarithm of the effective hourly rate for the cases with a positive non-zero effective hourly rate.<sup>51</sup> The value of interest in the table is in the column labeled “impact.” This is the estimate of how much the effective hourly rate will change for a case that was otherwise average in terms of the likelihood of producing a positive return and average in terms of what that return would be. For example, compared to a tried case, an untried case would produce an average effective hourly rate \$93 higher; a case involving less than \$20,000 would produce an average effective hourly \$76 lower. A particular interesting example is medical malpractice, which has an increased average effective hourly rate only \$23 higher than the “other” category and \$26 lower than auto accident cases;

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<sup>50</sup>The absence of relationships with measures of experience or position may be somewhat surprising. Is this because these variables are confounded with income? To test this, I reestimated the model omitting the income variable. With this change, years of experience shows a significant relationship with the effective hourly rate, but not with the likelihood of a positive return. *However*, the largest negative coefficient is for those with 6-10 years experience, not for those with the least experience.

<sup>51</sup>This mean is 5.058 which when transformed back to the linear scale is \$157.

**Table 4: Estimated Differences from the Multivariate Analysis of Effective Hourly Rates**

	Rate Equation		"Selection" Equation		Combined	
	b	est. rate	b	est. prob.	Estimate	Impact
<b>By disposition</b>						
Unfiled	0.428	\$241	0.619	0.972	\$234	\$93
Filed, not tried	0.168	\$186	1.264	0.995	\$185	\$43
Tried	0.000	\$157	0.000	0.901	\$142	\$0
<b>By stakes</b>						
<\$20,000	-0.782	\$72	0.101	0.917	\$66	-\$76
\$10,000 - \$50,000	-0.481	\$97	-0.076	0.887	\$86	-\$55
>\$50,000	0.000	\$157	0.000	0.901	\$142	\$0
<b>By area of law</b>						
Auto Accident	0.213	\$195	0.734	0.978	\$190	\$49
Medical Malpractice	0.673	\$308	-1.198	0.535	\$165	\$23
Other Personal Injury	0.204	\$193	-0.469	0.793	\$153	\$11
Workers Comp/Soc Sec	-0.183	\$131	0.506	0.963	\$126	-\$16
Contracts	-0.132	\$138	-0.451	0.798	\$110	-\$32
Other	0.000	\$157	0.000	0.901	\$142	\$0
<b>Gender of Lawyer</b>						
Male	0.160	\$184	-0.471	0.793	\$146	\$5
Female	0.000	\$157	0.000	0.901	\$142	\$0
<b>Lawyer's Advertising Practices</b>						
Uses media or direct mail	0.191	\$190	-0.427	0.805	\$153	\$12
Does not use media	0.000	\$157	0.000	0.901	\$142	\$0
<b>Type of Firm</b>						
Plaintiffs' Personal Injury Firm	-0.033	\$152	0.030	0.906	\$138	-\$4
Other type of firm	0.000	\$157	0.000	0.901	\$142	\$0
<b>Lawyer's Position</b>						
Partner in firm	-0.069	\$147	0.071	0.913	\$134	-\$8
Solo practitioner	-0.118	\$140	0.245	0.937	\$131	-\$11
Associate or firm employee	0.000	\$157	0.000	0.901	\$142	\$0
<b>Years of Experience</b>						
Five or less	0.063	\$168	-0.122	0.878	\$147	\$5
Six to ten	-0.146	\$136	0.302	0.944	\$128	-\$13
Eleven to twenty	-0.174	\$132	0.102	0.917	\$121	-\$20
More than twenty	0.000	\$157	0.000	0.901	\$142	\$0
<b>Lawyer's practice area</b>						
Personal injury plaintiffs	-0.162	\$134	0.218	0.934	\$125	-\$17
Other litigation	-0.102	\$142	0.013	0.903	\$128	-\$13
General practice	-0.247	\$123	-0.124	0.877	\$108	-\$34
Other type of practice	0.000	\$157	0.000	0.901	\$142	\$0

	Rate Equation		"Selection" Equation		Combined	
	b	est. rate	b	est. prob.	Estimate	Impact
Lawyer's income						
under \$50,000	-0.644	\$83	-1.024	0.603	\$50	-\$92
\$50,000 to \$74,999	-0.424	\$103	-0.739	0.708	\$73	-\$69
\$75,000 to \$99,999	-0.292	\$117	-0.761	0.700	\$82	-\$59
\$100,000 to \$199,999	-0.185	\$131	-0.231	0.854	\$112	-\$30
\$200,000 or more	0.000	\$157	0.000	0.901	\$142	\$0
Caseload						
1-5	-0.470	\$98	0.425	0.957	\$94	-\$48
6-10	-0.459	\$99	0.591	0.970	\$96	-\$45
11-25	-0.304	\$116	0.329	0.947	\$110	-\$32
26-100	-0.244	\$123	0.516	0.964	\$119	-\$23
more than 100	0.000	\$157	0.000	0.901	\$142	\$0
Base	5.058	\$157	1.286	0.901	\$142	\$0

however, this reflects a combination of a low “win” rate and a high effective hourly rate for those cases that are successful (\$151 higher than “other” cases and \$114 higher than auto accident cases).

### *Comments*

Clearly there are profits to be made from contingency fee work. While it is the top 10% of cases that tend to produce the significant profits, the typical contingency fee practitioner can expect even the remaining 90% of cases produces a fee premium over a portfolio of cases amounting to 25-30% of what hourly fee work generates. Contingency fee work can be very lucrative, particularly for those lawyers who develop expertise and processes for handling large numbers of cases. The high profitability comes from locating a small segment of the cases that produce extremely good returns on the lawyers’ investment of time. Some lawyers are able to “cherry pick” the good cases; others handle large volumes of cases in order to find the occasional very profitable case. Relatively few lawyers ever see “the really big one.” One of the lawyers I

observed had been doing plaintiffs' contingent fee work for 20 years, had a very successful practice, and had never collected a fee of over \$100,000 on a case.<sup>52</sup>

### *The Record Keeping Issue*

One of the possible problems with the estimates above is that, even though many of the attorneys in the sample did keep time records, only a small fraction of those who had such records referred to their records in responding to the survey. One might expect that attorneys over estimate their time, either remembering it incorrectly or responding strategically in order to make their per hour return look more acceptable.

When I was first thinking about doing the current study, I had the impression that virtually no lawyers working on a contingency fee basis maintained time records. In conversations with several local attorneys, I became aware that there were at least some lawyers who did keep track of their time while doing work on a contingency fee basis. Drawing upon a list of attorneys who were likely to be in practices where this was true (provided to me by several local persons knowledgeable about various practices), I conducted an unscientific survey where I asked these attorneys to provide me with information on contingency fee cases closed over a recent time period.<sup>53</sup> These lawyers provided me with information on a total of 92 cases (with gross fees received ranging from \$0 to \$910,000 and lawyer effort ranging from 3 hours to 7,000

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<sup>52</sup>A conversation with this lawyer more than five years after I had observed in his practice revealed that the "big one" had finally come in, and he had settled a case that generated a fee excess \$250,000.

<sup>53</sup>The time frame varied from lawyer to lawyer depending upon his or her case volume.

hours.<sup>54</sup> Dividing net fee by lawyer hours produced an estimate of the effective hourly rate. The median was \$125,<sup>55</sup> the mean effective hourly rate was \$189.<sup>56</sup>

In the sample from the systematic Wisconsin survey, there were 151 cases with information on effective hourly rate for which the lawyers reported having consulted their case files and that those files contained time records;<sup>57</sup> this is only 17% of the entire sample and consequently the data need to be treated with caution. For these 151 cases, the median effective hourly rate was \$111 and the mean was \$170. Looking separately at the unfiled, filed, and tried cases, the respective medians/means are \$146/\$224 (n=51), \$109/\$170 (n=61), and \$95/\$99 (n=39).

Taken together, both the earlier unscientific sample and the subsample from the 1995 survey show that, if anything, the absence of time records may have lead to an overestimation of the effective hourly rates that lawyers are earning from contingency fee work.

### **Effective Hourly Rates in Federal Cases: The CJRA Data**

One obvious question from the analysis above is whether the patterns I report are peculiar to Wisconsin and Wisconsin practitioners. Ideally, one would like to have closely comparable data drawn from a nation-wide sample. I do not have such data, but CJRA evaluation conducted

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<sup>54</sup>In addition to attorney hours, I asked each respondent to provide information on paralegal hours. Many cases involved no paralegal time, but others consumed substantial quantities. To adjust for this, I subtracted an estimate of the cost of paralegal time (I assumed that the gross cost was \$30 per hour). With this adjustment, two of the cases actually yielded negative net fees; the median adjusted fee was \$6,550, with the first and third quartiles at \$2,600 and \$15,000.

<sup>55</sup>The first and third quartiles are \$61 to \$250, yielding a midspread of \$189.

<sup>56</sup>The mean hourly return—obtained in the usual way by summing all of the hours reported, summing all of the fees (after adjusting for paralegal time), and dividing these two sums to get the per hour fee—was \$160.

<sup>57</sup>The questionnaire did not specifically ask the lawyers if they consulted their time records, only if they consulted their case files and if those files contained time records.

by the RAND Corporation provide information for a sample of cases handled in the federal district courts in the early to mid 1990s.

Before turning to the results from the CJRA data, there are two key differences between the cases represented in the CJRA data and the Wisconsin cases discussed above. First, all of the cases in the CJRA sample were filed in court; unlike the Wisconsin data there are no cases that were resolved prior to court filing. Second, the federal cases involving substantially more money at stake. Specifically, slightly less than 30 percent of the CJRA cases involved a potential recovery of \$50,000 or less compared to 73 percent of the Wisconsin cases; only 17 percent of the Wisconsin cases involved potential recoveries of over \$100,000 compared to more than 50 percent of the CJRA cases; and only 5 percent of the Wisconsin cases involved potential recoveries of over \$300,000 compared to over 20 percent of the CJRA cases.

Tables 5a and 5b show the returns contingency fee lawyers report for cases in the CJRA sample for the 1991 and 1992-93 samples respectively. One striking feature of these tables is the generally much higher values shown for 1991 compared to 1992-93. Recall that the 1991 sample is of cases terminated in 1991 while the 1992-93 is of cases filed in 1992 or 1993 and terminated by January 1996; approximately seven percent of the cases originally included in the 1992-93 sample had not terminated by January 1996 and were excluded from the final surveys. One possible explanation for the difference between the two samples is that the high return cases are those that are in the last seven percent of cases terminated. This does not explain the difference in results for the two samples; excluding the slowest seven percent of cases from the 1991 sample does not bring the figures for that sample into line with the figures for the 1992-93 sample. In the following discussion I will reference both figures, showing the lower 1992-93 figures in parentheses.

Overall, I assess the patterns for the CJRA data as quite consistent with the Wisconsin data. In terms of overall level, the median effective hourly rate, mean effective hourly rate, and mean hourly return for the CJRA data are \$127 (\$108), \$425 (\$236), and \$215 (\$157). If one

compares these to the overall (weighted) figures for Wisconsin—\$167, \$365, and \$207 for the three statistics respectively (from the top line of Table 2b)—the differences cut both ways, with Wisconsin higher for some and the CJRA data (from the 1991 sample) higher for others. If one limits the comparison to the Wisconsin cases with \$50,000 or more at stake—\$285, \$739, and \$261—the Wisconsin data show considerably higher returns than do the federal cases from around the country. One can further refine the comparison by limiting the Wisconsin cases to those that were filed in court. For this subset of cases, the median effective hourly rate, mean effective hourly rate, and mean hourly return for Wisconsin are \$155, \$281, and \$218; further limiting this subset to only those cases involving \$50,000 or more the comparable figures are \$310, \$497, and \$274 respectively. The general conclusion from this overall analysis is that the figures from the Wisconsin survey are not significantly out of line with patterns that one would expect to find from national studies.

Tables 5a and 5b also show that some of the general patterns discussed for Wisconsin hold up with the national CJRA data. The returns lawyers receive are highly skewed. Median effective hourly rates are much, much lower than mean effectively hourly rates, as are mean hourly returns; applying a 10 percent trim to the upper tail of effectively hourly rates greatly reduces both the mean effective hourly rate and the mean hourly return. Other patterns that appear again here include:

- returns tend to go up with the size of case, with larger cases yielding better returns for the lawyer;
- returns tend to be higher when cases are resolved early;
- tort cases tend to produce better returns than other types of cases (e.g., contract, civil rights)
- solo practitioners tend to get somewhat lower returns than lawyers in firms (although whether that is a function of the types of cases solo practitioners get or something else about solo practice, I cannot say).

**Table 5a: Effective Hourly Rate Estimates, 1991 CJRA Data**

	Mean EHR <sup>a</sup>	Median EHR	First Quartile EHR	Third Quartile EHR	EHR Mid-spread	90th Percentile EHR	Mean Hourly Return	10% Trimmed Mean EHR	10% Trimmed Mean Hourly Return	n
All Cases	\$425	\$127	\$20	\$348	\$328	\$907	\$215	\$209	\$160	392
By Area of law										
auto	\$1,031	\$345	\$103	\$686	\$584	\$2,071	\$480	\$313	\$259	64
product liability	\$371	\$156	\$62	\$369	\$307	\$884	\$245	\$203	\$235	42
other tort	\$484	\$165	\$32	\$415	\$383	\$1,109	\$240	\$181	\$155	83
contract	\$276	\$92	\$23	\$211	\$189	\$1,106	\$160	\$117	\$111	65
civil rights	\$143	\$49	\$0	\$143	\$143	\$522	\$118	\$103	\$95	52
soc sec	\$95	\$0	\$0	\$92	\$92	\$488	\$55	\$95	\$55	21
other	\$257	\$153	\$18	\$330	\$312	\$697	\$107	\$173	\$100	60
By Nature of Disposition										
before ct act	\$589	\$138	\$54	\$369	\$315	\$835	\$288	\$206	\$188	97
ct act before pretrial	\$422	\$122	\$18	\$363	\$345	\$1,106	\$204	\$165	\$163	186
after pretrial	\$342	\$155	\$55	\$380	\$325	\$1,125	\$231	\$191	\$158	77
during/after trial	\$141	\$0	\$0	\$147	\$147	\$645	\$137	\$102	\$123	27
By Stakes										
\$50,000 or less	\$161	\$79	\$25	\$209	\$184	\$461	\$80	\$139	\$79	93
\$50,001-\$100,000	\$226	\$138	\$27	\$208	\$181	\$692	\$113	\$169	\$105	60
\$100,001-\$300,000	\$265	\$119	\$10	\$354	\$344	\$605	\$161	\$175	\$140	87
over \$300,000	\$1,021	\$265	\$58	\$829	\$771	\$1,697	\$271	\$257	\$195	89
By Years of Experience										
less than 10	\$318	\$74	\$17	\$254	\$237	\$715	\$127	\$150	\$118	66
10-19 years	\$337	\$155	\$26	\$539	\$512	\$1,297	\$233	\$217	\$181	21
20 or more	\$639	\$171	\$69	\$543	\$474	\$1,577	\$300	\$199	\$187	120
By % Federal Practice										
less than 10%	\$353	\$96	\$35	\$544	\$509	\$1,106	\$181	\$163	\$142	69
10--24%	\$392	\$166	\$26	\$404	\$379	\$1,001	\$200	\$189	\$157	74
25% or more	\$541	\$162	\$66	\$379	\$314	\$1,588	\$245	\$174	\$171	64
By Size of Firm										
solo	\$202	\$98	\$48	\$231	\$183	\$703	\$149	\$159	\$130	41
2-4 lawyers	\$336	\$156	\$40	\$500	\$460	\$1,444	\$236	\$200	\$183	85
5-9 lawyers	\$901	\$173	\$54	\$645	\$591	\$7,829	\$285	\$148	\$172	40
10 or more	\$297	\$157	\$28	\$415	\$387	\$1,106	\$169	\$176	\$140	40

<sup>a</sup>Effective Hourly Rate

**Table 6.5b: Effective Hourly Rate Estimates, 1992-93 CJRA Data**

	Mean EHR <sup>a</sup>	Median EHR	First Quartile EHR	Third Quartile EHR	EHR Mid-spread	90th Percentile EHR	Mean Hourly Return	10% Trimmed Mean EHR	10% Trimmed Mean Hourly Return	n
All Cases	\$236	\$108	\$11	\$253	\$242	\$531	\$157	\$125	\$110	297
By Area of Law										
auto	\$288	\$181	\$107	\$341	\$235	\$708	\$226	\$178	\$201	32
product liability	\$516	\$233	\$40	\$668	\$628	\$1,159	\$232	\$149	\$138	25
other tort	\$230	\$92	\$0	\$299	\$299	\$816	\$215	\$100	\$104	47
contract	\$332	\$113	\$24	\$267	\$243	\$528	\$205	\$145	\$122	51
civil rights	\$104	\$58	\$0	\$143	\$143	\$282	\$80	\$83	\$67	69
social security	\$150	\$174	\$0	\$228	\$228	\$368	\$116	\$150	\$116	15
other	\$174	\$123	\$13	\$296	\$283	\$432	\$103	\$138	\$99	48
By Disposition										
before ct act	\$258	\$144	\$51	\$301	\$250	\$767	\$271	\$138	\$122	93
ct act before pretrial	\$214	\$106	\$0	\$253	\$253	\$491	\$113	\$129	\$91	60
after pretrial	\$340	\$126	\$40	\$270	\$230	\$594	\$195	\$126	\$134	87
during/after trial	\$105	\$10	\$0	\$148	\$148	\$534	\$144	\$68	\$110	89
By Stakes										
\$50,000 or less	\$158	\$105	\$13	\$228	\$215	\$366	\$66	\$129	\$63	74
\$50,001-\$100,000	\$179	\$107	\$42	\$249	\$207	\$672	\$113	\$115	\$90	48
\$100,001-\$300,000	\$355	\$120	\$0	\$271	\$271	\$703	\$132	\$124	\$87	79
over \$300,000	\$283	\$164	\$13	\$342	\$328	\$817	\$167	\$135	\$122	51
By Years of Experience										
less than 10	\$248	\$84	\$0	\$267	\$267	\$502	\$179	\$118	\$136	61
10-19 years	\$220	\$105	\$49	\$398	\$348	\$708	\$150	\$141	\$132	16
20 or more	\$235	\$89	\$1	\$229	\$228	\$455	\$104	\$114	\$94	115
By % Federal Practice										
less than 10%	\$203	\$111	\$0	\$302	\$302	\$560	\$160	\$129	\$103	68
10--24%	\$287	\$106	\$39	\$248	\$209	\$650	\$150	\$149	\$108	47
25% or more	\$236	\$66	\$0	\$192	\$192	\$385	\$160	\$107	\$114	76
By Size of Firm										
solo	\$172	\$81	\$31	\$220	\$189	\$259	\$126	\$113	\$87	40
2-4 lawyers	\$275	\$86	\$0	\$253	\$253	\$425	\$138	\$120	\$118	74
5-9 lawyers	\$201	\$87	\$6	\$255	\$249	\$708	\$204	\$117	\$82	38
10 or more	\$272	\$120	\$29	\$267	\$238	\$821	\$166	\$159	\$128	40

<sup>a</sup>Effective Hourly Rate

The patterns relating returns to years of experience and concentration on federal court practice are not consistent between the two sample years; the 1991 sample produces a pattern indicating that there are relationships (with returns going up with experience and concentration on federal court work) while the 1992-93 sample does not show such patterns.

Finally, there are some hints in Tables 5a and 5b as to why the returns for the 1991 sample appear to be much higher than those for the 1992-93 sample. The large differences appear for tort cases, with much higher returns in 1991 for auto cases and “other torts” (1992-92 is actually higher for product liability cases). Perhaps more important is that the comparisons controlling for stakes: the 1991 sample shows a mean effective hourly rate of over \$1,000 for cases with more than \$300,000 at stake compared to only \$283 for the 1992-93 samples, and the other summary statistics for this group of cases show figures on the order of 50 percent higher for 1991 than for 1992-93. Moreover, only 20 percent of the 1992-93 sample is in the over \$300,000 category compared to 27 percent of the 1991 sample.

## **CONCLUSION**

In discussing the economics of the contingency fee, it is crucial to think about sets of cases rather than individual cases. What this analysis shows is that how one defines “typical” return is very important for the picture that emerges. Most contingency fee practitioners realize that a significant proportion of their cases lose money. The cases lose money not because the lawyers fail to obtain recoveries for the clients in those cases but because the time and effort required to obtain the recovery is out of proportion to the recovery obtained. In fact, for both the lawyer and the client in a contingency fee case, the most significant contingency is the cost of handling the claim not whether a recovery will be obtained, and the second most significant contingency is the amount of the recovery; whether or not there will be a recovery is a distant third among the uncertainties facing a lawyer and a client in a personal injury case. Just imagine

a lawyer telling a client, “There is a 100 percent chance that I will get some money for you; however, it may take 5 hours of my time or it may take as much as 100 hours of my time, and while I know I will get you something, it could be as little as \$5,000 or as much as \$25,000 depending on your recovery and whether we discover any complications in connection with the claim.” Thus, assuming a lawyer charging \$125 per hour, the client is looking at a possibility of recovering \$25,000 at a cost as little as \$625, or recovering as little as \$5,000 at a cost of as much as \$12,500. It is obvious why a one-shot, risk averse client presented with this kind of uncertainty would prefer to pay a lawyer a percentage of the recovered amount even if the client was guaranteed a recovery of at least \$5,000.

The repeat player contingency fee attorney is able to act as a risk neutral agent on behalf of the client, essentially providing a kind of insurance against the range of contingencies involved in the case. Just as for the client, the most important contingencies concern not whether the lawyer will be paid, but rather how much the lawyer will be paid and how much time and other resources the lawyer will have to invest to obtain that fee. That uncertainty has relatively little to do with the nature of the case, or even the clarity of the case, but rather with the actions of the opposing side.

The purpose of this analysis is not to show that contingency fees always produce reasonable returns to lawyers. Rather, it seeks to provide a perspective on what contingency fees look like in typical cases. This is important because proposals for change do not try to single out in any way the small tale of cases where returns are extremely high—“excessive” or “windfall” in the words of advocates of reform. The types of proposals advanced would affect contingency fee practice in general without regard for whether the kinds of cases impacted are the types that raise problems, and without regard to the realities of contingency fee practice.

One oft-cited proposal advanced during the 1990s would have limited the fees that could be collected for “early” settlements to 10 percent of the damages recovered up to \$100,000 and 5 percent of any amounts over \$100,000. An early settlement offer is any offer made within 60

days from receipt of a demand for settlement from plaintiffs' council.<sup>58</sup> The proposal failed to take into account that a significant proportion of cases handled on a contingency basis are quite small; data collected from automobile claims closed in 1997 show that the median case involving a represented claimant produced a bodily injury payout of \$7,500; 25 percent of the cases involved a payout of \$4,000 or less. Assuming an hourly rate of \$125 and a 10 percent cap, the median case could never cover more than six hours of a lawyer's opportunity cost. Moreover, such proposals reflect a lack of understanding of what representation of injured parties entails. From my observation, the lawyers move reasonably promptly to settle routine cases as soon as the client's medical condition has reached a suitable state; through that time, the lawyer has been monitoring the client's medical situation, collecting documentation related to expenses and other losses, and counseling the client to be sure that there is documentation and that the client has obtained appropriate treatment. By the time the case is ripe for settlement, the lawyer will have put in a nontrivial amount of time; adding to this the time required to prepare a demand letter with the relevant documentation of loss and to negotiate the actual settlement will, for a large proportion of cases, represent a time investment worth considerably more than 10 percent of the recovery.

While some might assert that insurers would have settled the case without the lawyer's involvement for more than claimant will net after paying a lawyer's fee, I find the claim highly dubious. Insurers may happily pay a claimant based on the expenses the claimant documents, but the typical claimant does not know what is compensable nor how to document all the expenses that a lawyer would present to an insurer (for many cases, this is in fact the lawyer's most important contribution). Insurance claims adjusters are not paid to help personal injury claimants identify all compensable elements of their claims; they are paid to dispose of claims quickly and economically, and this means a claims adjuster will not tell a claimant to wait to settle in case the injury does not fully heal nor will an adjuster tell a claimant when some obvious element of

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<sup>58</sup>See Brickman *et al.*, RETHINKING CONTINGENCY FEES, *supra* note 2 at 27.

damages is overlooked by the claimant. Turning again to the data on closed automobile accident injury claims, I isolated all cases in which the most serious injury was a fracture of a weight bearing bone. There is no obvious reason to assume that there are systematic differences in these cases based on whether there was or was not attorney representation. However, with lawyer representation, the insurer paid the limits of the policy in significantly more cases: 43 percent compared to only 31 percent when there was no lawyer representation (chi square = 7.297,  $p=.026$ ).

If lawyers are in fact systematically overcompensated in personal injury cases, the alternative to restricting contingency fees is to modify the market for representation of personal injury claimants. Insurance claims adjusters handle claims just fine for insurance companies. Why should not there be “claimants adjusters” available to represent injured parties in negotiating settlements? There are independent adjusters who work with persons and companies who have sustained a casualty loss in assessing the amount of the loss, and negotiate on behalf of their clients with the casualty insurer. Is there any reason to suppose that an individual with significant experience as a claims adjuster handling personal injury claims would not be able to document and present a claim on behalf of clients? The plaintiffs’ bar would argue that nonlawyers would not be able to bring suit if an insurer balked at making a reasonable settlement; in such cases, a lawyer could be hired to handle the case. More importantly, if there are cases that do not merit paying a lawyer a one third contingency fee because they can be easily settled, then such cases could be handled by nonlawyers; nonlawyers who handled only such cases, would be able to charge fees considerably less than those charged by lawyers.

In other words, if the real goal is to protect the injured parties from greedy, overcharging lawyers, then the route is not to restrict contingency fees. Rather, the route is to let the market find the appropriate level for such fees by removing artificial controls that allow lawyers to overcharge in a clearly identifiable subset of cases.