

# JUDICIAL COUNCIL MEETING

## AGENDA

Friday, August 19, 2016  
Large Conference Room A  
Matheson Courthouse  
Salt Lake City, Utah

*Chief Justice Matthew B. Durrant, Presiding*

1. 1:45 p.m. Welcome & Approval of Minutes . . . . Chief Justice Matthew B. Durrant  
(Tab 1 - Action)
2. 1:50 p.m. Chair's Report. . . . . Chief Justice Matthew B. Durrant
3. 1:55 p.m. Administrator's Report. . . . . Daniel J. Becker
4. 2:05 p.m. Reports: Management Committee. . . . Chief Justice Matthew B. Durrant  
Liaison Committee. . . . .  
Policy and Planning . . . . . Judge Reed Parkin  
Bar Commission. . . . . John Lund, esq.  
(Tab 2 - Information)
5. 2:15 p.m. Civil Justice Initiative Report. . . . . Daniel J. Becker  
(Tab 3 - Information)
6. 2:35 p.m. Executive Session
7. 3:05 p.m. Adjourn

### Consent Calendar

*The consent items in this section are approved without discussion if no objection has been raised with the Admin. Office (578-3806) or with a Council member by the scheduled Council meeting or with the Chair of the Council during the scheduled Council meeting.*

1. Committee Appointments  
(Tab 4) Nancy Sylvester  
Ron Bowmaster

**TAB 1**

# JUDICIAL COUNCIL MEETING

Minutes  
Monday, July 18, 2016  
Judicial Council Room  
Matheson Courthouse  
Salt Lake City, Utah

Chief Justice Matthew B. Durrant, Presiding

## ATTENDEES:

Chief Justice Matthew B. Durrant  
Justice Thomas Lee  
Hon. Marvin Bagley  
Hon. Ann Boyden  
Hon. Mark DeCaria  
Hon. Thomas Higbee  
Hon. David Marx  
Hon. Reed Parkin  
Hon. Derek Pullan  
Hon. Randall Skanchy  
Hon. Kate Toomey  
John Lund, esq.

## EXCUSED:

Hon. Paul Farr  
Hon. Mary Noonan

## STAFF PRESENT:

Daniel J. Becker  
Ray Wahl  
Jody Gonzales  
Debra Moore  
Dawn Marie Rubio  
Rick Schwermer  
Keisa Williams  
Ron Bowmaster

## GUESTS:

Hon. Dennis Fuchs  
Jennifer Yim, JPEC  
Ann Marie McIff Allen, JPEC  
Hon. Paul Lyman  
Hon. Reuben Renstrom

1. **WELCOME AND APPROVAL OF MINUTES: (Chief Justice Matthew B. Durrant)**

Chief Justice Matthew B. Durrant welcomed everyone to the meeting.

**Motion:** Judge Toomey moved to approve the minutes from the June 27, 2016 Judicial Council meeting. Mr. Lund seconded the motion, and it passed unanimously.

2. **CHAIR'S REPORT: (Chief Justice Matthew B. Durrant)**

Chief Justice Durrant provided an update on the work of the newly created ad hoc committee addressing the matter of jury trials in small claims cases. The ad hoc committee has developed interim rules for consideration.

3. **ADMINISTRATOR'S REPORT: (Daniel J. Becker)**

Mr. Becker reported on the following items:

Judge of the Year Award. Judge Dane Nolan was awarded the *Judge of the Year Award* at the Bar's 2016 Summer Convention.

Judicial Retirement. Judge Maughan has announced his upcoming retirement, effective December 1.

Justice Court Administrator. Interviews for the justice court administrator position will be held on July 20.

Case Filing Update. Mr. Becker reviewed the year-end case filings. Overall, district court case filings reflect a 5% decrease, juvenile court referrals reflect a 10% decrease, and justice court case filings reflect a 7% decrease. No data was provided for the Appellate Courts at this time.

Questions were asked regarding the continued decrease in case filings. Mr. Becker mentioned that national studies are currently being conducted regarding case filing trends nationally. Once information from the study becomes available, Mr. Becker will review the report with the Council.

Mr. Becker mentioned that a Civil Justice Reform Initiative Report will be provided later in the week at the Conference of Chief Justice and State Court Administrators Annual Meeting.

Legislative Update. Mr. Schwermer provided a legislative update on the special session held on July 13. He highlighted the following: 1) 6 of 9 bills were considered, 2) SB 3004 – Continuing Care Retirement Community Amendments, 3) SB 3001 – Controlled Substance Database Modifications, 4) HB 3004 – Criminal Justice Reinvestment Amendments, 5) HB 3003 – Unmanned Aircraft Amendments, 6) SB 3003 – Judicial Nominating Commissions – Amendments, and 7) HB 3005 – Grandparent Rights Amendments.

Budget and Planning Session and Judicial Council Meeting. These meetings will be held on August 19 at the Matheson Courthouse.

#### 4. **COMMITTEE REPORTS:**

##### ***Management Committee Report:***

Chief Justice Durrant reported that the Management Committee meeting minutes accurately reflect the issues discussed. The items needing to be addressed by the Council have been placed on today's agenda.

##### ***Liaison Committee Report:***

No meeting was held in June.

##### ***Policy and Planning Meeting:***

Judge Parkin mentioned a rule is on today's agenda for final action.

##### ***Bar Commission Report:***

Mr. Lund provided highlights from the Bar's 2016 Summer Convention to include: 1) attendance was at 360, 2) Professor Erwin Chemerinsky provided a keynote address entitled *How the Supreme Court has Made Your Rights Unenforceable*, 3) Mr. Dean Strang, an attorney in Madison, Wisconsin, provided a keynote address entitled *Beyond Guilt or Innocence in One Case: Larger Questions that Making a Murderer Invites Us to Consider*.

#### 5. **RULES FOR FINAL ACTION: (Keisa Williams)**

Chief Justice Durrant welcomed Ms. Williams to the meeting.

The Policy and Planning Committee recommended Rule 4-401.03 – Notice to public of recording be approved, as proposed, for final action.

Ms. Williams noted that the rule was effective May 10 but was subject to change upon expiration of the public comment period. She mentioned that no comments were received.

**Motion:** Judge Higbee moved to approve Rule 4-401.03 with the May 10 effective date. Judge Toomey seconded the motion, and it passed unanimously.



**6. PROBLEM SOLVING COURT CERTIFICATIONS: (Judge Dennis Fuchs and Rick Schwermer)**

Chief Justice Durrant welcomed Judge Fuchs and Mr. Schwermer to the meeting.

Judge Fuchs reported that all the problem solving courts being considered for certification by the Council are being recommended for certification, with the exception of the Utah County Veteran's Court in the Fourth District, which is being recommended for conditional certification.

Judge Fuchs provided background information on the Utah County Veteran's Court in the Fourth District. He mentioned that the certification is pending, for the next 60 days if conditionally certified, to allow for an acceptable drug and alcohol testing program to be established.

Discussion took place.

**Motion:** Mr. Lund moved to certify the problem solving courts being recommended for full certification and conditionally certify the Utah County Veteran's Court in the Fourth District to allow for an acceptable drug and alcohol testing program to be established. Judge Higbee seconded the motion. The motion passed with Judge Pullan voting no.

**7. JUDICIAL PERFORMANCE EVALUATION COMMISSION UPDATE: (Jennifer Yim and Ann Marie McIff Allen)**

Chief Justice Durrant welcomed Ms. Yim and Ms. McIff Allen to the meeting.

Ms. Yim introduced Ms. McIff Allen to members of the Council and provided her background and work experience.

Ms. McIff Allen shared information regarding her experience on the Judicial Performance Evaluation Commission (JPEC).

Ms. Yim and Ms. McIff Allen highlighted the following in their update to the Council: 1) the commission has only met once since the last update, 2) Ms. Yim has or will meet with the court-level boards to get feedback on the judge's perspectives regarding courtroom observations, 3) Mr. Rick Hoffman has been appointed by the Supreme Court to fill the vacancy created by Mr. Eric de DeRosia's departure, 4) Chief Justice Durrant is scheduled to attend the commission's September meeting, 5) follow-up on the request to exclude attorneys from surveys of any attorneys referred to the Office of Professional Conduct by judges is taking place and will be addressed further by the commission, 6) in the process of hiring a new staff member to conduct the justice court mid-level evaluations, 7) an in-person qualitative survey has been developed for use with the justice court mid-level evaluations, and 8) working to improve the data quality.

Questions were asked of Ms. Yim and Ms. McIff Allen. Responses were provided. Chief Justice Durrant thanked Ms. Yim and Ms. McIff Allen for their update.

**8. BOARD OF JUVENILE COURT JUDGES UPDATE: (Judge Paul Lyman and Dawn Marie Rubio)**

Chief Justice Durrant welcomed Judge Lyman and Ms. Rubio to the meeting.

Judge Lyman highlighted the following in his update to the Council: 1) juvenile court e-filing, 2) issuing delinquency and child welfare orders in court, 3) PEW juvenile justice system review, 4) Bi-annual bench book update, 5) probation initiatives, and 6) repositioning resources to more effectively serve youth.

Chief Justice Durrant thanked Judge Lyman for his update.

9. **STANDING COMMITTEE ON CHILDREN AND FAMILY LAW (SCCFL)**

**UPDATE: (Judge Paul Lyman and Ray Wahl)**

Chief Justice Durrant welcomed Judge Paul Lyman and Ray to the meeting.

Judge Lyman highlighted the following in his update: 1) committee membership, 2) reauthorization of the committee through 2017, 3) work of the divorce procedures subcommittee, 4) work of the custody evaluations subcommittee, 5) work of the domestic case processing improvement subcommittee, and 6) discussion on the use of special masters and potential changes to Rule 53.

Chief Justice Durrant thanked Judge Lyman for his update.

10. **BOARD OF JUSTICE COURT JUDGES UPDATE: (Judge Reuben Renstrom and Rick Schwermer)**

Chief Justice welcomed Judge Renstrom to the meeting.

Judge Renstrom highlighted the following in his update:

- Addressing a suggested reform that would require all justice court judges to hold a juris doctorate degree
- Passing of HB 160 – Justice Court Amendments – requiring in the counties of the first and second class that a justice court judge shall have a degree from a law school that makes one eligible to apply for admission to a bar in any state
- Reviewing the current de novo process
- Addressing matters of judicial independence in justice courts

Chief Justice Durrant thanked Judge Renstrom for his update.

11. **EXECUTIVE SESSION**

An executive session was not held at this time.

12. **ADJOURN**

The meeting was adjourned.

**TAB 2**

**Management Committee  
Minutes**

**JUDICIAL COUNCIL MANAGEMENT COMMITTEE  
MINUTES**

**Tuesday, August 2, 2016  
Matheson Courthouse  
450 South State Street  
Salt Lake City, Utah 84111**

**MEMBERS PRESENT:**

Chief Justice Matthew B. Durrant, Chair  
Hon. Thomas Higbee (by phone)  
Hon. David Marx  
Hon. Kate Toomey

**STAFF PRESENT:**

Daniel J. Becker  
Ray Wahl  
Jeni Wood  
James Ishida  
Debra Moore  
Dawn Marie Rubio  
Rick Schwermer  
Nancy Sylvester  
Brent Johnson

**EXCUSED:**

Hon. Randall Skanchy

**GUESTS:**

Judge Ryan Evershed  
Dawn Hautamaki  
Russ Pearson

**1. WELCOME AND APPROVAL OF MINUTES: (Chief Justice Matthew B. Durrant)**

Chief Justice Durrant welcomed everyone to the meeting. After reviewing the minutes, the following motion was made:

**Motion:** Judge Toomey moved to approve the July 12, 2016 Management Committee meeting minutes. Judge Marx seconded the motion, and it passed unanimously.

**2. ADMINISTRATOR'S REPORT: (Daniel J. Becker)**

Mr. Becker reported on the following items:

Justice Court Administrator. Interviews to fill the justice court administrator position were held last week. Mr. Becker will meet with the Board of Justice Court Judges at their August 4 meeting to seek concurrence for the proposed appointee.

Legislative Audit. A preliminary meeting was held with the legislative audit staff to discuss phase two of the cash bond audit. He anticipates their report to be released in October.

3. **COMMITTEE APPOINTMENTS: (Nancy Sylvester and Ray Wahl)**

Ms. Sylvester was welcomed to the meeting.

A vacancy exists on the Committee on Resources for Self-Represented Parties for an urban clerk of court. Mr. Tyler Cameron, a judicial assistant in the Second District, expressed interest in filling the vacancy.

**Motion:** Judge Marx moved to approve the appointment of Mr. Tyler Cameron to fill the vacancy for an urban clerk of court on the Committee on Resources for Self-Represented Parties. Judge Toomey seconded the motion, and it passed unanimously.

Judge Michael Westfall's first term on the Standing Committee on Technology expired at the end of June. The Board of District Court Judges recommended the reappointment of Judge Michael Westfall to serve a second term on the Standing Committee on Technology.

**Motion:** Judge Marx moved to approve Judge Michael Westfall's reappointment on the Standing Committee on Technology. Judge Toomey seconded the motion, and it passed unanimously.

4. **COUNCIL COMMITTEE APPOINTMENT: (Daniel J. Becker)**

Mr. Becker reported that Judge Derek Pullan was recently appointed to the Policy & Planning Committee.

Judge DeCaria has been asked to fill the vacancy on the Liaison Committee for a district court judge. He has agreed to serve in this capacity, if approved.

**Motion:** Judge Toomey moved to approve Judge DeCaria's appointment to fill the vacancy on the Liaison Committee for a district court judge. Judge Marx seconded the motion, and it passed unanimously.

5. **BUDGET SESSION PREVIEW: (Ray Wahl)**

Mr. Wahl distributed a copy of the 2018 Building Block Summary to members of the Management Committee. He highlighted the following regarding the August 19 budget and planning session: 1) reviewed the budget and planning process, 2) the budget and planning session makeup, and 3) reviewed the 2018 building block requests, noting that the majority of the requests were requests made last year.

6. **APPROVAL OF JUDICIAL COUNCIL AGENDA: (Chief Justice Matthew B. Durrant)**

Chief Justice Durrant reviewed the proposed Judicial Council agenda for the August 19 Council meeting.

**Motion:** Judge Toomey moved to approve the agenda for the August 19 Judicial Council meeting as amended. Judge Marx seconded the motion, and it passed unanimously.

**Motion:** Judge Toomey moved to enter into an executive session to discuss a matter of professional competence. Judge Higbee seconded the motion, and it passed unanimously.

7. **EXECUTIVE SESSION:**

An executive session was held at this time.

8.

**ADJOURN**

The meeting was adjourned.

**Policy and Planning  
Committee Minutes**



**Policy and Planning Committee**  
Matheson Courthouse  
Council room  
450 South State St.  
Salt Lake City, Utah 84111

August 5, 2016  
Draft

**Members Present**

Hon. Marvin Bagley  
Hon. Ann Boyden  
Hon. Mary Noonan  
John Lund - by phone

**Members Excused**

Hon. Reed S. Parkin  
Hon. Mark DeCaria  
Hon. Derek Pullan

**Staff**

Nancy J. Sylvester  
Keisa L. Williams

**Guests**

**(1) Approval of minutes**

Judge Reed Parkin was unable to attend the meeting. Judge Ann Boyden presided and welcomed the members to the meeting. The committee then addressed the June 24 minutes.

Judge Boyden moved to approve the June 24 minutes. Judge Bagley seconded the motion and it passed unanimously.

**(2) CJA 3-104. Presiding Judges.**

**CJA 11-201. Senior Judges.**

Judge Boyden stated that Rules 3-104 and 11-201 were approved by the Policy and Planning Committee, were approved for public comment by the Judicial Council, and the public comment period has now expired and are before the Committee for final approval. Nancy Sylvester noted there were no comments received for either rule.

Judge Mary Noonan moved to recommend CJA 3-104 and CJA 11-201 as written to the Judicial Council. John Lund seconded the motion and it passed unanimously.

**(3) CJA 4-403. Electronic Signature and Signature Stamp Use.**

Keisa Williams reviewed the discussion the committee had about this rule at the June 24<sup>th</sup> meeting. Brent Johnson made an edit based on the committee's feedback and has resubmitted the rule for consideration. Mr. Johnson suggested when clerks are using a judge's e-signature they should always use their first and last name, but when using a judge's wet signature (stamp) a clerk can use full name or initials. Judge Boyden

wanted further confirmation as to how the clerks are signing for a judge electronically. Judge Marvin Bagley noted it was not a uniform system if there are full names required on one and initials on another.

Judge Noonan said she believes CARE allows the same signature each time once it has been established. Ms. Sylvester stated this has been a problem for several departments and Kim Allard and her department raised the issue with Brent. Judge Noonan and Judge Boyden would like clarification from Brent and the court clerks about the exact issue and need for this rule change, including how it looks in each system: justice courts, juvenile courts, district courts, and appellate courts (if applicable).

The committee agreed to table this issue until a future meeting where Brent Johnson and perhaps Kim Allard can attend to discuss this further.

**(4) CJA 9-301. Record of Enhancement Warning.**

Nancy Sylvester stated she spoke with Brent Johnson who believes Rule 9-301 should be repealed because the more important consideration is what is in Criminal Procedure Rule 11. Rule 9-301 contains much of the same language and also some unnecessary and onerous requirements. The committee discussed the fact that justice courts are not a court of record. Judge Bagley noted rule 11 conflicts with this rule; therefore he is in favor of repealing this rule.

Judge Boyden said she believes this should be addressed by Judge Parkin with the Justice Court Board. The committee agreed to table CJA 9-301 until the next meeting.

**(5) CJA 4-503. Pro-se e-filing.**

Regarding Rule 4-503, Ms. Sylvester noted that a pro-se litigant received special permission to file electronically and has now asked that permission be expanded to all pro se litigants. Ms. Sylvester said the system is not ready for this to happen on a regular basis. Ms. Sylvester said Ron Bowmaster (IT Director) had discussed this issue with her and had said that pro se e-filing would be part of the CORIS re-write, but that it could be mandated by rule as long as the Council did so with a 1 year to 18 months time frame. Ms. Sylvester noted that part of the CORIS rewrite would include a process to walk pro-se litigants through the judicial system and e-filing. Judge Noonan expressed concern that this will have a ripple-type effect with the other courts since CORIS is only used in district courts. Judge Boyden said there are several reasons at this time why pro-se litigants are not required to efile. The committee discussed concerns about pro-se litigants attempting to speed up or circumvent the implementation of the system. Judge Boyden opined that there is no need to create a rule now when the system is not set to accommodate this.

Judge Noonan asked how pro-se litigants are filing in juvenile and justice courts. Ms. Sylvester stated only attorneys are e-filing in the juvenile courts and the justice courts

are just barely starting e-filing. Judge Boyden stated she thinks this request should start with a different level, not Policy & Planning because there needs to be more discussion with other committees on this issue. Ms. Sylvester will contact others to get their input.

The committee agreed to move this issue to a future meeting after contact is made with other committees and departments.

**(7) Other business**

Judge Boyden noted September 9 is the next meeting. Judge Boyden said any new members to this committee would start October 14. Judge Noonan moved to adjourn the meeting. Judge Bagley seconded the motion and it passed unanimously.

There was no other business and the meeting was adjourned at 1:30 pm.

**TAB 3**

CALL TO ACTION:

# Achieving Civil Justice for All

*Recommendations to the Conference of Chief Justices  
by the Civil Justice Improvements Committee*

CALL TO ACTION:

# Achieving Civil Justice for All

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*Recommendations to the Conference of Chief Justices  
by the Civil Justice Improvements Committee*

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# The Call

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Civil justice touches every aspect of our lives and society, from public safety to fair housing to the smooth transaction of business.

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Americans deserve a civil legal process that can fairly and promptly resolve disputes for everyone—rich or poor, individuals or businesses, in matters large or small. Yet our civil justice system often fails to meet this standard. Runaway costs, delays, and complexity are undermining public confidence and denying people the justice they seek. This has to change.

Navigating civil courts, as they operate now, can be daunting. Those who enter the system confront a maze-like process that costs too much and takes too long. While three-quarters of judgments are smaller than \$5,200, the expense of litigation often greatly exceeds that amount. Small, uncomplicated matters that make up the overwhelming majority of cases can take years to resolve. Fearing the process is futile, many give up on pursuing justice altogether.

We've come to expect the services we use to steadily improve in step with our needs and new technologies. But in our civil justice system, these changes have largely not arrived. Many courts lack any of the user-friendly support we rely on in other sectors. To the extent technology is used, it simply digitizes a cumbersome process without making it easier. If our civil courts don't change how they work, they will meet the fate of travel agents or hometown newspapers, entities undone by new competition and customer expectations—but never adequately replaced.

Meanwhile, private entities are filling the void. Individuals and businesses today have many options for resolving disputes outside of court, including private judges for hire, arbitration and online legal services, most of which do not require an attorney to navigate. But these alternatives can't guarantee a transparent and impartial process. These alternative forums are not necessarily bound by existing law nor do they contribute to creating new law and shaping 21st century justice. In short, they are not sufficiently democratic.

Civil justice touches every aspect of our lives and society, from public safety to fair housing to the smooth transaction of business. For centuries, Americans have relied on an impartial judge or jury to resolve conflicts according to a set of rules that govern everyone equally. This framework is still the most reliable and democratic path to justice—and a vital affirmation that we live in a society where our rights are recognized and protected. Which is why our legal community has a responsibility to fix the system while preserving the best of our 200-year tradition.

Restoring public confidence means rethinking how our courts work in fundamental ways. Citizens must be placed at the center of the system. They must be heard, respected, and capable of getting a just result, not just in theory but also in everyday practice. Courts need to embrace new procedures and technologies. They must give each matter the resources it needs—no more, no less—and prudently shepherd the cases our system faces now.

It's time for our system to evolve. Our citizens deserve it. Our democracy depends on it.

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For centuries, Americans have relied on an impartial judge or jury to resolve conflicts according to a set of rules that govern everyone equally.

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# A Strategic Response


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This Report of the Civil Justice Improvements (CJI) Committee provides a roadmap for restoring function and faith in a system that is too important to lose.

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Our legal system promises the just, speedy, and inexpensive resolution of civil cases. Too often, however, it does not live up to that promise. This Report of the Civil Justice Improvements (CJI) Committee provides a roadmap for restoring function and faith in a system that is too important to lose. The Recommendations contained in this report are premised on the belief that courts can again be the best choice for every citizen: affordable for all, efficient for all, and fair for all.

## WHY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE AND THIS REPORT?



The impetus for the CJI Committee and this Report is twofold. First, state courts are well aware of the cost, delay, and unpredictability of civil litigation. Such complaints have been raised repeatedly, and legitimately, for more than a century. Yet efforts at reform have fallen short, and over the last several decades the dramatic rise in self-represented litigants and strained court budgets from two severe recessions have further hampered our ability to promptly and efficiently resolve cases. The lack of coherent attempts to address problems in the civil justice system has prompted many litigants to seek solutions outside of the courts and, in some instances, to forgo legal remedies entirely. As a result, public trust and confidence in the courts have decreased.

Second, on a more positive note, dedicated and inventive court leaders from a handful of states recently have taken concrete steps toward change. They are updating court rules and procedures, using technology to empower litigants and court staff, and rethinking longstanding orthodoxies about the process for resolving civil cases. States (including Arizona, Colorado, New Hampshire, Minnesota, and Utah) have changed their civil rules and procedures to require

mandatory disclosure of relevant documents, to curb excessive discovery, and to streamline the process for resolving discovery disputes and other routine motions. A dozen other states have implemented civil justice reforms over the past five years, either on a “pilot” or statewide basis. Many of those reforms have now received in-depth evaluations to assess their impact on cost, disposition time, and litigant satisfaction. Most of those efforts, however, have focused on discrete stages of litigation (pleading, discovery) or on specific types of cases (business, complex litigation), rather than on the civil justice process overall.

The Conference of Chief Justices (CCJ) determined that, given the profound challenges facing the civil justice system and the recent spate of reform efforts, the time was right to examine the civil justice system holistically, consider the impact and outside assessments of the recent pilot projects, and develop a comprehensive set of recommendations for civil justice reform to meet the needs of the 21st century. At its 2013 Midyear Meeting, the CCJ adopted a resolution authorizing the creation of the CJI Committee. The Committee was charged with “developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input; and making recommendations as necessary in the area of caseflow management for the purpose of improving the civil justice system in state courts.”

## THE CJI COMMITTEE MEMBERS AND GUIDING PRINCIPLES

With the assistance of the National Center for State Courts (NCSC) and IAALS, the Institute for the Advancement of the American Legal System, the CCJ named a diverse 23-member Committee to research and prepare the recommendations contained in this Report. Committee members included a broad cross-section of key players in the civil litigation process, including trial and appellate court judges, trial and state court administrators, experienced civil lawyers representing the plaintiff and defense bars and legal aid, representatives of corporate legal departments, and legal academics.

The Committee followed a set of eight fundamental principles aimed at achieving demonstrable civil justice improvements that are consistent with each state’s existing substantive law.

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The time was right to examine the civil justice system ... and develop a comprehensive set of recommendations for civil justice reform to meet the needs of the 21st century.

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## THE WORK OF THE COMMITTEE, SUBCOMMITTEES, AND STAFF

The Committee worked tirelessly over more than 18 months to examine and incorporate relevant insight from courts around the country. Committee members reviewed existing research on the state of the civil justice system in American courts and extensive additional fieldwork by NCSC on the current civil docket; recent reform efforts, including evaluations of a number of state pilot projects; and technology, process, and organizational innovations. The Committee members thoughtfully debated the pros and cons of many reform proposals and the institutional challenges to implementing change in the civil justice system, bringing the lessons learned from their own experience as lawyers, judges, and administrators.



**Strong leadership and bold action are needed to transform our system for the 21st century. With this Report, we have worked to provide the necessary insight, guidance, and impetus to achieve that goal.**

Two subcommittees undertook the bulk of the Committee's work. Judge Jerome Abrams, an experienced civil litigator and now trial court judge in Minnesota, led the Rules & Litigation Subcommittee. That subcommittee focused on the role of court rules and procedures in achieving a just and efficient civil process, including development of recommendations regarding court and judicial management of cases; right sizing the process to meet the needs of cases; early identification of issues for resolution; the role of discovery; and civil case resolution whether by way of settlement or trial.

Judge Jennifer Bailey, the Administrative Judge of the Circuit Civil Division in Miami with 24 years of experience as a trial judge, chaired the Court Operations Subcommittee. That subcommittee examined the role of the internal infrastructure of the courts—including routine business practices, staffing and staff training, and technology—in moving cases toward resolution, so that trial judges can focus their attention on ensuring fair and cost-effective justice for litigants. The subcommittee also considered the special issues of procedural fairness that often arise in “high-volume” civil cases, such as debt collection, landlord-tenant, and foreclosure matters, where one party often is not represented by a lawyer. And the subcommittee looked at innovative programs based on technology interfaces that some courts are using to assist self-represented litigants in a variety of civil cases.

The subcommittees held monthly conference calls to discuss discrete issues related to their respective work. Individual committee members circulated white papers, suggestions, and discussion documents. Spirited conversations led members to reexamine long-held views about the civil justice system, in light of the changing nature of the civil justice caseload, innovations in procedures and operations from around the country, the rise of self-represented litigants, and the challenge and promise of technology. The full CJI Committee met in four

plenary sessions to share insights and preliminary proposals. Gradually, Committee members reached a solid consensus on the Recommendations set out in this Report.

In presenting this Report, the Committee is indebted to the State Justice Institute, which supported the Committee's work with a generous grant. Likewise, the Committee is grateful for substantive expertise and logistical support from NCSC and IAALS, without whose help this project could never have been started, much less completed. The President of the NCSC, Mary McQueen, and the Executive Director of IAALS, Rebecca Love Kourlis, served as ex-officio members of the Committee and provided invaluable guidance and assistance throughout the project. The Committee is most deeply indebted to the Committee staff, whose excellent work, tenacity, and good spirits brought the preparation of this Report to a successful conclusion: the Committee Reporter, Senior Judge Gregory E. Mize (D.C. Superior Court); Brittany K.T. Kauffman and Corina D. Gerety of IAALS; and Paula Hannaford-Agor, Shelley Spacek Miller, Scott Graves, and Brenda Otto of the NCSC.

Strong leadership and bold action are needed to transform our system for the 21st century. With this Report, we have worked to provide the necessary insight, guidance, and impetus to achieve that goal. The Recommendations identify steps that state courts can take now—and in the months and years ahead—to make the civil justice system more accessible, affordable, and fair for all. To empower courts to meet the needs of Americans in all jurisdictions, the Recommendations are crafted to work across local legal cultures and overcome the significant financial and operational roadblocks to change. With concerted action, we can realize the promise of civil justice for all.

*Respectfully submitted by the Civil Justice Improvements Committee, July 2016*

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## FUNDAMENTAL FRAMEWORK/PRINCIPLES FOR CJI COMMITTEE RECOMMENDATIONS

1. Recommendations should aim to achieve demonstrable improvements with respect to the expenditure of time and costs to resolve civil cases.
  2. Outcomes from recommendations should be consistent with existing substantive law.
  3. Recommendations should protect, support, and preserve litigants' constitutional right to a civil jury trial and honor procedural due process.
  4. Recommendations should be capable of implementation within a broad range of local legal cultures and practices.
  5. Recommendations should be supported by data, experiences of Committee members, and/or "extreme common sense."
  6. Recommendations should not systematically favor plaintiffs or defendants, types of litigants, or represented or unrepresented litigants.
  7. Recommendations should promote effective and economic utilization of resources while maintaining basic fairness.
  8. Recommendations should enhance public confidence in the courts and the perception of justice.
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# Underlying Realities

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The reality of litigation costs routinely exceeding the value of cases explains the relatively low rate of dispositions involving any form of formal adjudication.



## THE CIVIL LITIGATION LANDSCAPE

Successful solutions only arise from clear-eyed understanding of the problem. To inform the deliberations of the CCJ Civil Justice Improvements Committee, the NCSC undertook a multijurisdictional study of civil caseloads in state courts. *The Landscape of Civil Litigation in State Courts* focused on non-domestic civil cases disposed between July 1, 2012, and June 30, 2013, in state courts exercising civil jurisdiction in 10 urban counties. The dataset, encompassing nearly one million cases, reflects approximately 5 percent of civil cases nationally.

The *Landscape* findings presented a very different picture of civil litigation than most lawyers and judges envisioned based on their own experiences and on common criticisms of the American civil justice system. Although high-value tort and commercial contract disputes are the predominant focus of contemporary debates, collectively they comprised only a small proportion of the *Landscape* caseload. Nearly two-thirds (64 percent) of the caseload was contract cases. The vast majority of those were debt collection, landlord/tenant, and mortgage foreclosure cases (39 percent, 27 percent, and 17 percent, respectively). An additional 16 percent of civil caseloads were small claims cases involving disputes valued at \$12,000 or less, and 9 percent were characterized as “other civil” cases involving agency appeals and domestic or criminal-related cases. Only 7 percent were tort cases, and 1 percent were real property cases.

The composition of contemporary civil caseloads stands in marked contrast to caseloads of two decades ago. The NCSC undertook secondary analysis comparing the the *Landscape* data with civil cases disposed in 1992 in 45 urban general jurisdiction courts. the *1992 Civil Justice Survey of State Courts*, the ratio of tort to contract cases was approximately 1 to 1. In the *Landscape* dataset, this ratio had increased to 1 to 7. While population-adjusted contract filings fluctuate somewhat due to economic conditions, they have generally



remained fairly flat over the past 30 years. Tort cases, in contrast, have largely evaporated.

To the extent that damage awards recorded in final judgments are a reliable measure of the monetary value of civil cases, the cases in the *Landscape* dataset involved relatively modest sums. In contrast to widespread perceptions that much civil litigation involves high-value commercial and tort cases, only 0.2 percent had judgments that exceeded \$500,000 and only 165 cases (less than 0.1 percent) had judgments that exceeded \$1 million. Instead, 90 percent of all judgments entered were less than \$25,000; 75 percent were less than \$5,200.<sup>1</sup>

Hence, for most litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case. The reality of litigation costs routinely exceeding the value of cases explains the relatively low rate of dispositions involving any form of formal adjudication. Only 4 percent of cases were disposed by bench or jury trial, summary judgment, or binding arbitration. The overwhelming majority (97 percent) of these were bench trials, almost half of which (46 percent) took place in small claims or other civil cases. Three-quarters of judgments entered in contract cases following a bench trial were less than \$1,800. This is not to say these cases are insignificant to the parties. Indeed, the stakes in many cases involve fundamentals like employment and shelter. However, the judgment data contradicts

the assumption that many bench trials involve adjudication of complex, high-stakes cases.

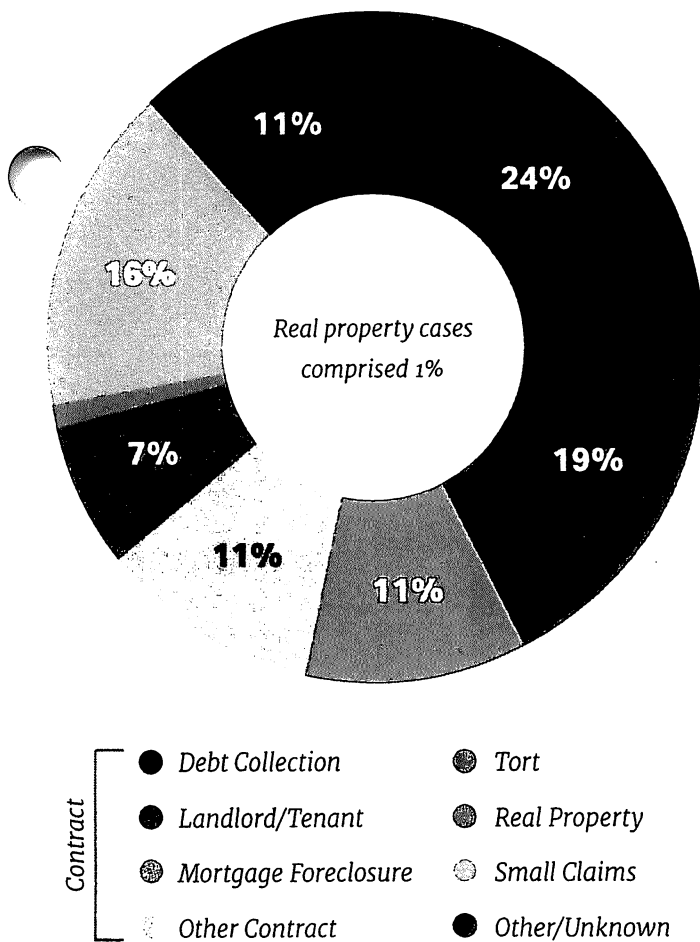
Most cases were disposed through a non-adjudicative process. A judgment was entered in nearly half (46 percent) of the *Landscape* cases, most of which were likely default judgments. One-third of cases were dismissed (possibly following a settlement, although only 10 percent were explicitly coded by the courts as settlements). Summary judgment is a much less favored disposition in state courts compared to federal courts. Only 1 percent were disposed by summary judgment. Most of these would have been default judgments in debt collection cases, but the plaintiff instead chose to pursue summary judgment, presumably to minimize the risk of post-disposition challenges.

The traditional view of the adversarial system assumes the presence of competent attorneys zealously representing both parties. One of the most striking findings in the *Landscape* dataset, therefore, was the relatively large proportion of cases (76 percent) in which at least one party was unrepresented, usually the defendant. Tort cases were the only case type in which attorneys represented both parties in a majority (64 percent) of cases. Surprisingly, small claims dockets in the *Landscape* courts had an unexpectedly high proportion (76 percent) of plaintiffs who were represented by attorneys. This suggests that small claims courts, which were originally developed as a forum for self-represented litigants to access courts through simplified procedures, have become the

forum of choice for attorney-represented plaintiffs in debt collection cases.

Approximately three-quarters of cases were disposed in just over one year (372 days), and half were disposed in just under four months (113 days). Nevertheless, small claims were the only case type that came close to complying with the *Model Time Standards for State Trial Courts*. Tort cases were the worst case category in terms of compliance with the *Standards*. On average, tort cases took 16 months (486 days) to resolve and only 69 percent were disposed within 540 days of filing compared to 98 percent recommended by the *Standards*.

## CASELOAD COMPOSITION



Source: NCSC *Landscape of Civil Litigation in State Courts* (2015).

## IMPLICATIONS FOR STATE COURTS

The picture of civil litigation that emerges from the *Landscape* dataset confirms the longstanding criticism that the civil justice system takes too long and costs too much. Some litigants with meritorious claims and defenses are effectively denied access to justice in state courts because it is beyond their financial means to litigate. Others, who have the resources and legal sophistication to do so, are opting for alternatives to the civil justice system either preemptively through contract provisions (e.g., for consumer products and services, employment, and health care) or, after filing a case in court, through private ADR services. In response to these realities, courts must improve in terms of efficiency, cost, and convenience to the public so that those we serve have confidence that the court system is an attractive option to achieve justice in civil cases.

The vast majority of civil cases that remain in state courts are debt collection, landlord/tenant, foreclosure, and small claims cases. State courts are the preferred forums for plaintiffs in these cases for the simple reason that state courts still hold a monopoly on procedures to enforce judgments in most jurisdictions. Securing a judgment from a court of competent jurisdiction is the mandatory first step to being able to initiate garnishment or asset seizure proceedings. The majority of defendants in these cases are unrepresented. Even if defendants might have the financial resources to hire a lawyer, many would not because the cost of the lawyer exceeds the potential judgment. The idealized picture of the adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is, more often than not, an illusion.

State court budgets experienced dramatic cuts during the economic recessions both in 2001–2003 and in 2008–2009, and there is no expectation among state court policymakers that state court

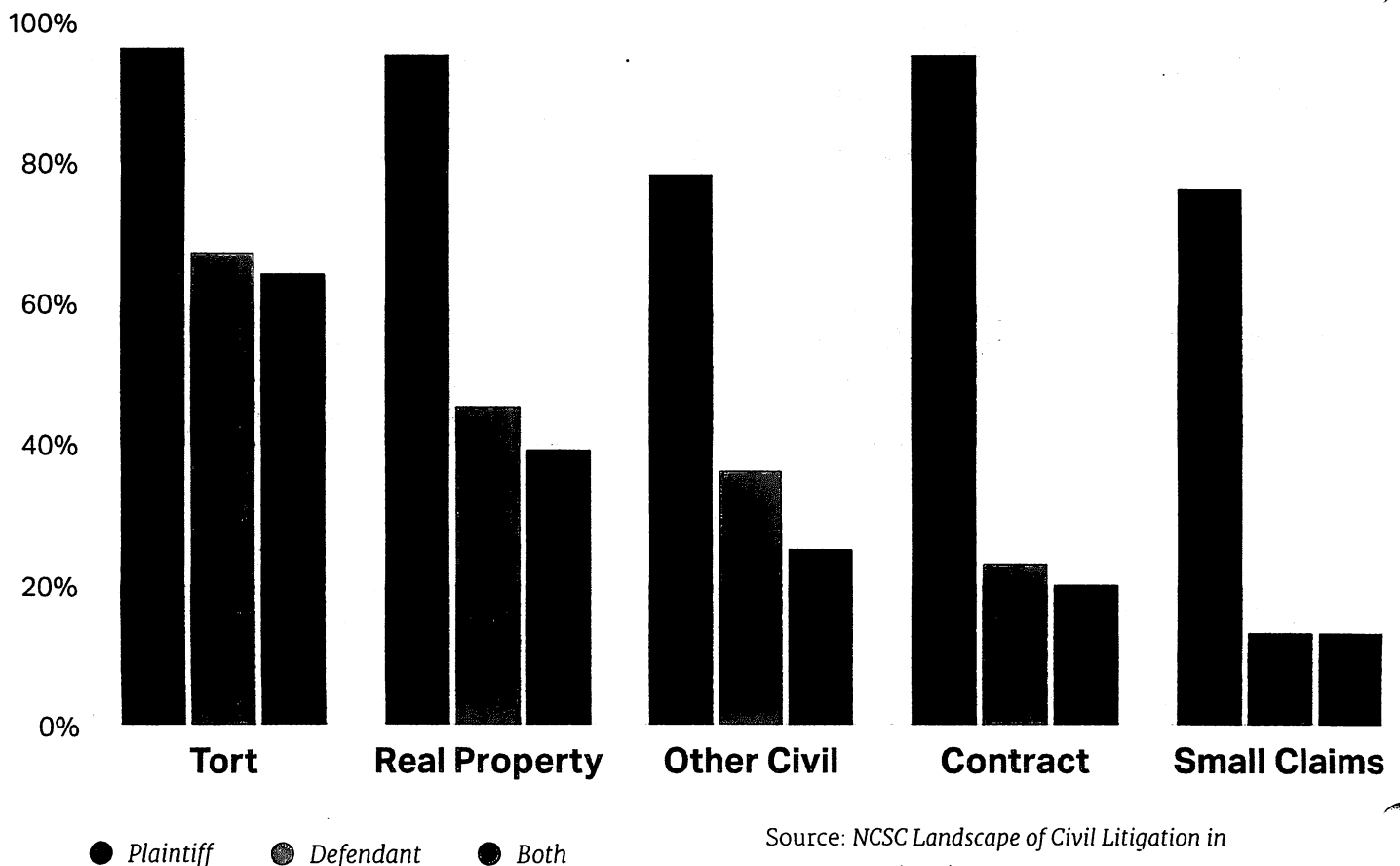
budgets will return to pre-2008 recession levels. These budget cuts, combined with constitutional and statutory provisions that prioritize criminal and domestic cases over civil dockets, have undermined courts' discretion to allocate resources to improved civil case management. As both the quantity and quality of adjudicatory services provided by state courts decline, it is unlikely that state legislators will be persuaded to augment budgets to support civil caseloads.

These trends have severe implications for the future of the civil justice system and for public trust and confidence in state courts. The cost and delays of civil litigation effectively deny access to justice for many members of our society, undermining the legitimacy of the courts as a fair and effective forum to resolve disputes. Reductions in the proportion of civil cases resolved through formal adjudica-

tion threaten to erode a publicly accessible body of precedents governing civil cases. Diminished common law will leave future litigants without clear standards for negotiating civil transactions, settling cases, or conforming their conduct to clear legal rules. The privatization of civil litigation likewise undermines the ability of the legislative and executive branches of government to respond effectively to changing societal circumstances that become apparent through claims filed in state courts.

Because the civil justice system directly touches everyone in contemporary American society—through cases involving housing, food, education, employment, household services, consumer products, personal finance, and other commercial transactions—ineffective civil case management has an even more pervasive effect on public trust and confidence than the criminal justice system.

## PERCENTAGE OF CASES WITH ATTORNEY REPRESENTATION



Source: NCSC *Landscape of Civil Litigation in State Courts* (2015).

If state court policymakers aim to restore the role of state courts as the primary forum for dispute resolution, civil justice reform can no longer be delayed or merely implemented incrementally through changes in rules of civil procedure. Instead, dramatic changes in court operations now must involve considerably greater court oversight of caseflow management to control costs, reduce delays, and ensure fairness for litigants.

## IMPERATIVE RESPONSES

The Recommendations in this report spring from the realities made clear by the *Landscape* data as well as the experiences of pilot projects and rule changes around the country. They are founded on the premise that current civil justice processes are largely not working for litigants. A core contributing factor is that lawyers too often control the pace of litigation. This has led to unnecessary delays in case resolution. Thus, the leading Recommendation advocates that *courts* take definitive responsibility for managing civil cases from filing to disposition. This includes effective enforcement of rules and administrative orders designed to promote the just, prompt, and inexpensive resolution of civil cases. That Recommendation is the lynchpin for all that follow.

### THE ENTIRE COURT MUST LEAD CASE MANAGEMENT

The concept of effective civil caseflow management is not new. It has been a hallmark of court administration for nearly half a century, but it has not been solidly institutionalized in most jurisdictions. Instead, a common trajectory for implementation of civil caseflow reform is an initial period of education and adoption, followed by predictable improvements in civil case processing. However, as new judges rotate into civil calendar assignments, the lessons previously learned tend to be forgotten and the court reverts to its previous practices. One of the primary reasons for this backsliding is the heavy reliance on the trial judge to

ensure the forward momentum of civil cases toward resolution. For judges faced with heavy caseloads, the prospect is just too daunting. Unless litigants are clamoring for attention, most judges are willing to assume that the case will resolve itself without additional interference.

Recognizing that few judges have the luxury of a caseload small enough to permit individual judicial attention in every case, the Recommendations promote the expansion of responsibility for managing civil cases from the judge as an individual to the court as a collective institution. The term “court” encompasses the entire complement of courthouse personnel—judges, staff, and infrastructure resources including information technology. The Recommendations envision a civil justice system in which civil case automation plays a large role in supporting teams of court personnel as they triage cases to experienced court staff and/or judicial officers as needed to address the needs of each case. Routine case activity, such as scheduling and monitoring compliance with deadlines, can be automated, permitting specially trained court staff to perform basic case management responsibilities under the guidance of legally trained case managers. This in turn will free the judge to focus on tasks that require the unique expertise of a judicial officer, such as issuing decisions on dispositive motions and conducting evidentiary hearings, including bench and jury trials.

### ONE-SIZE-FITS-ALL IS NOT WORKING

The Recommendations also recognize that uniform rules that apply to all civil cases are not optimally designed for most civil cases. They provide too much process for the vast majority of cases, including uncontested cases. And they provide too little management for complex cases that comprise a small proportion of civil caseloads, but which inevitably require a disproportionate amount of attention from the court.<sup>2</sup> Instead, cases should be “right-sized” and triaged into appropriate pathways at filing. However, those pathways should be flexible enough to permit reassignment if the needs of the case change over time.

## TRADITIONAL DIFFERENTIATED CASE MANAGEMENT IS NOT ENOUGH

The pathway approach described in the Recommendations improves existing court structures and differentiated case management (DCM) systems. Many court systems are currently characterized by a tiered structure of general and limited jurisdiction courts that limit where civil cases can be filed based on case type or amount-in-controversy or both. DCM is a rule-based system that, at varying times after filing, assigns civil cases to case-processing tracks, usually based on case type or amount-in-controversy. Each DCM track features its own case-processing rules concerning presumptive deadlines for case events.

Tiered court systems and DCM offer little flexibility once the initial decision has been made concerning the court in which to file or the assigned DCM track. A case filed in the general jurisdiction court cannot gain access to procedures or programs offered to cases in the limited jurisdiction court and vice versa. A case assigned to one DCM track usually cannot be reassigned later to another track. The rules and procedures for each court or DCM track typically apply to all cases within that court or track, even if a case would benefit from management under rules or procedures from another court or track.

DCM's traditional three-track system often falters in application because, in some courts, tracking does not happen unless or until there is a case management conference. Thus, the benefits of early, tailored case management occur only in the small percentage of cases where such a conference is held. And if a properly tagged case does not receive corresponding staff and infrastructure support, the fruits of non-judicial case management are lost.

Furthermore, experience has found that case type and amount-in-controversy—the two factors most often used to define the jurisdiction of courts in tiered systems or DCM procedures—do not reliably forecast the amount of judicial management that each case demands. In Utah, for example, an an-

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It is imperative that courts develop rules and procedures for promptly assigning all cases to pathways designed to give each case the amount of attention that properly fits the case's needs.

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swer was filed in less than half of cases in which the amount-in-controversy exceeded \$300,000; the remaining cases were uncontested and thus did not require a great deal of court involvement.<sup>3</sup> Although case type and amount-in-controversy were both significant predictors of the likelihood of future discovery disputes during the litigation (often cited as time-consuming case events for judges), other factors, including the representation status of the litigants, were stronger predictors of the need for court involvement in the case.

For these reasons it is imperative that courts develop rules and procedures for promptly assigning all cases to pathways designed to give each case the amount of attention that properly fits the case's needs. As importantly, courts must implement business practices that ensure that rules and procedures are enforced. Rules and procedures for each pathway should move each case toward resolution in an expeditious manner. For example, empirical research shows that fact-pleading standards and robust mandatory disclosures induce litigants to identify key issues in dispute more promptly and help inform litigants about the merits of their respective claims and defenses.<sup>4</sup> Other rules and procedures that have been shown to be effective

are presumptive restrictions on the scope of necessary discovery and strictly enforced deadlines.

These promote completion of key stages of litigation up to and including trials.<sup>5</sup>

## **CLOSE ATTENTION TO HIGH-VOLUME DOCKETS**

It is axiomatic that court rules, procedures, and business practices are critical for maintaining forward momentum in cases where all litigants are fully engaged in the adversarial process to resolve their disputed issues. These rubrics are even more critical in the substantial proportion of civil caseloads comprised of uncontested cases and cases involving large asymmetries in legal expertise.

While most of these cases resolve relatively quickly, the *Landscape* study makes clear that significant numbers of cases languish on civil calendars for long periods of time for no apparent reason.

Research shows that poor management of high-volume dockets can especially affect unrepresented parties.<sup>6</sup> The Recommendations advocate improved

rules, procedures, and business practices that trigger closer and more effective review of the adequacy of claims in high-volume dockets.

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Court rules, procedures, and business practices are critical for maintaining forward momentum in cases.

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# Recommendations

These realities illustrate the urgent need for change. It is imperative that court leaders move promptly to improve caseflow management to control costs, reduce delays, and ensure fairness for litigants, and embrace tools and methods that align with the realities of modern civil dockets. Toward those ends, these Recommendations present a broad range of practices that each state can embrace in ways that fit local legal culture and resources. The Recommendations are set forth under these topical headings:

- Exercise Ultimate Responsibility
- Triage Case Filings with Mandatory Pathway Assignments
- Strategically Deploy Court Personnel and Resources
- Use Technology Wisely
- Focus Attention on High-Volume and Uncontested Cases
- Provide Superior Access for Litigants

The Recommendations aim to create a future where:

- Each case receives the court attention necessary for efficient and just resolution;
- Teams of judges, court attorneys, and professionally trained staff manage the case from filing to disposition;
- Litigants understand the process and make informed decisions about their cases;
- Justice is not only fair but convenient, timely, and less costly;
- Modern technology replaces paper and redundancy; and
- Civil justice is not considered an insider's game fraught with outdated rules and procedures.

In sum, the recommendations provide courts with a roadmap to make justice for all a reality.

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These Recommendations intentionally use the verbs "must" and "should." "Must" is used to convey an action that is essential and compelling in response to contemporary issues confronting civil case managers. "Should" is used to convey an action that is important and advisable to undertake. Hence "must-do" Recommendations are immediately necessary because they go to the heart of improving caseflow and reducing unnecessary cost and delay. "Should-do" Recommendations are also necessary but may have to await the availability of such things as enabling authority or additional resources.

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# EXERCISE ULTIMATE RESPONSIBILITY

## RECOMMENDATION 1

Courts must take responsibility for managing civil cases from time of filing to disposition.

- 1.1 Throughout the life of each case, courts must effectively communicate to litigants all requirements for reaching just and prompt case resolution. These requirements, whether mandated by rule or administrative order, should at a minimum include a firm date for commencing trial and mandatory disclosures of essential information.
- 1.2 Courts must enforce rules and administrative orders that are designed to promote the just, prompt, and inexpensive resolution of civil cases.
- 1.3 To effectively achieve case management responsibility, courts should undertake a thorough statewide civil docket inventory.

## COMMENTARY

Our civil justice system has historically expected litigants to drive the pace of civil litigation by requesting court involvement as issues arise. This often results in delay as litigants wait in line for attention from a passive court—be it for rulings on motions, a requested hearing, or even setting a trial date. The wait-for-a-problem paradigm effectively shields courts from responsibility for the pace of litigation. It also presents a special challenge for self-represented litigants who are trying to understand and navigate the system. The party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their cli-

ents may favor delay rather than efficiency. In short, adversarial strategizing can undermine the achievement of fair, economical, and timely outcomes.

It is time to shift this paradigm. *The Landscape of Civil Litigation* makes clear that relying on parties to self-manage litigation is often inadequate. At the core of the Committee's Recommendations is the premise that the courts ultimately must be responsible for ensuring access to civil justice. Once a case is filed in court, it becomes the **court's** responsibility to manage the case toward a just and timely resolution. When we say "courts" must take responsibility, we mean judges, court managers, and indeed the whole judicial branch, because the factors producing unnecessary costs and delays have become deeply imbedded in our legal system. Primary case responsibility means active and continuing court oversight that is proportionate to case needs. This right-sized case management involves having the most appropriate court official perform the task at hand and supporting that person with the necessary technology and training to manage the case toward resolution. At every point in the life of a case, the right person in the court should have responsibility for the case.

## RE: 1.1

The court, including its personnel and IT systems, must work in conjunction with individual judges to manage each case toward resolution. Progress in resolving each case is generally tied both to court events and to judicial decisions. Effective caseflow management involves establishing presumptive deadlines for key case stages, including a firm trial date. In overseeing civil cases, relevant court personnel should be accessible, responsive to case needs, and engaged with the parties—emphasizing efficiency and timely resolution.



**RE: 1.2**

During numerous meetings, Committee members voiced strong concern (and every participating trial lawyer expressed frustration) that, despite the existence of well-conceived rules of civil procedure in every jurisdiction, judges too often do not enforce the rules. These perceptions are supported by empirical studies showing that attorneys want judges to hold practitioners accountable to the expectations of the rules. For example, the chart below summarizes results of a 2009 survey of the Arizona trial bar about court enforcement of mandatory disclosure rules.

Surely, whenever it is customary to ignore compliance with rules “designed to secure the just, speedy, and inexpensive determination of every action and proceeding,” cost and delay in civil litigation will continue.

**RE: 1.3**

Courts cannot meaningfully address an issue without first knowing its contours. Analyzing the existing civil caseload provides these contours and gives court leaders a basis for informed decisions about what needs to be done to ensure civil docket progression.

**KEY RESOURCES FOR RECOMMENDATION 1**

*Task Force on the Escalating Costs of Civil Litigation, Washington State Bar Ass’n, Final Report to the Board of Governors (2015).*

*Inst. for Advancement of the Am. Legal Sys., Survey of the Arizona Bench & Bar on the Arizona Rules of Civil Procedure (2010).*

**COURT ENFORCEMENT OF DISCLOSURE RULES (N=691\*)**



- Almost Always
- Often
- Half the Time
- Occasionally
- Almost Never

\*Responses for judges and lawyers with experience with the Rules. Source: IAALS Survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure (2010).

## RECOMMENDATION 2

Beginning at the time each civil case is filed, courts must match resources with the needs of the case.

### COMMENTARY

Virtually all states have followed the federal model and adopted a single set of rules, usually similar and often identical to the federal rules, to govern procedure in civil cases. Unfortunately, this pervasive one-size-fits-all approach too often fails to recognize and respond effectively to individual case needs.

The one-size-fits-all mentality exhibits itself at multiple levels. Even where innovative rules are implemented with the best of intentions, judges often continue to apply the same set of rules and mindset to the cases before them. When the same approach is used in every case, judicial and staff resources are misdirected toward cases that do not need that kind of attention. Conversely, cases requiring more assistance may not get the attention they require because they are lumped in with the rest of the cases and receive the same level of treatment. Hence, the civil justice system repeatedly imposes unnecessary, time-consuming steps, making it inaccessible for many litigants.

Courts need to move beyond monolithic methods and recognize the importance of adapting court process to case needs. The Committee calls for a “right sizing” of court resources. Right sizing aligns rules, procedures, and court personnel with the needs and characteristics of similarly situated cases. As a result, cases get the amount of process needed—no more, no less. With right sizing, judges tailor their oversight to the specific needs of cases. Administrators align court resources to case requirements—coordinating the roles of judges, staff, and infrastructure.

With the advent of e-filing, civil cover sheets, and electronic case management systems, courts can use technology to begin to right size case management at the time of filing. Technology can also help identify later changes in a case’s characteristics that may justify management adjustments.

This recommendation, together with Recommendation 1, add up to an imperative: Every case must have an appropriate plan beginning at the time of filing, and the entire court system must execute the plan until the case is resolved.

### KEY RESOURCES FOR RECOMMENDATION 2

*Victor E. Flango & Thomas M. Clarke, Reimagining Courts: A Design for the Twenty-First Century (2015).*

*Inst. for Advancement of the Am. Legal Sys. & Am. Coll. of Trial Lawyers, Reforming our Civil Justice System: A Report on Progress and Promise (2015).*

*Brian Ostrom & Roger Hanson, National Center for State Courts, Achieving High Performance: A Framework for Courts (2010).*

*Corina D. Gerety & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Momentum for Change: The Impact of the Colorado Civil Access Pilot Project (2014).*

*Paula Hannaford-Agor & Cynthia G. Lee, Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts, Final Report (2015).*

# TRIAGE CASE FILINGS WITH MANDATORY PATHWAY ASSIGNMENTS

## RECOMMENDATION 3

Courts should use a mandatory pathway-assignment system to achieve right-sized case management.

- 3.1 To best align court management practices and resources, courts should utilize a three-pathway approach: Streamlined, Complex, and General.
- 3.2 To ensure that court practices and resources are aligned for all cases throughout the life of the case, courts must triage cases at the time of filing based on case characteristics and issues.
- 3.3 Courts should make the pathway assignments mandatory upon filing.
- 3.4 Courts must include flexibility in the pathway approach so that a case can be transferred to a more appropriate pathway if significant needs arise or circumstances change.
- 3.5 Alternative dispute resolution mechanisms can be useful on any of the pathways provided that they facilitate the just, prompt, and inexpensive disposition of civil cases.

## COMMENTARY

The premise behind the pathway approach is that different types of cases need different levels of case management and different rules-driven processes. Data and experience tell us that cases can be grouped by their characteristics and needs. Tailoring the involvement of judges and professional staff to

those characteristics and needs will lead to efficiencies in time, scale, and structure. To achieve these efficiencies, it is critical that the pathway approach be implemented at the individual case level and consistently managed on a systemwide basis from the time of filing.

Implementing this right-size approach is similar to, but distinct from, differentiated case management. DCM is a longstanding case management technique that applies different rules and procedures to different cases based on established criteria. In some jurisdictions the track determination is made by the judge at the initial case management conference. Where assignment to a track is more automatic or administratively determined at the time of filing, it is usually based merely on case type or amount-in-controversy. There has been a general assumption that a majority of cases will fall in a middle track, and it is the exceptional case that needs more or less process.

While the tracks and their definitions may be in the rules, it commonly falls upon the judges to assign cases to an appropriate track. Case automation or staff systems are rarely in place to ensure assignment and right-sized management, or to evaluate use of the tracking system. Thus, while DCM is an important concept upon which these Recommendations build, in practice it has fallen short of its potential. The right-sized case management approach recommended here embodies a more modern approach than DCM by (1) using case characteristics beyond case type and amount-in-controversy, (2) requiring case triaging at time of filing, (3) recognizing that the great majority of civil filings present uncomplicated facts and legal issues, and (4) requiring utilization of court resources at all levels, including non-judicial staff and technology, to manage cases from the time of filing until disposition.

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## THE PATHWAY APPROACH

The pathway approach differs from and improves upon DCM in several fundamental respects. The pathway approach:

- Relies on case characteristics other than just case type and amount-in-controversy to triage cases onto a presumptive pathway at the time of filing.
- Provides flexibility and continuity by relying on automated case monitoring to assure cases remain on the appropriate pathway as indicated by the need for more or less judicial involvement in moving toward resolution.
- Enables judges to do more substantive case work by relying on trained court staff and technology to assign all cases promptly at filing.

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### RE: 3.2

Right-sized case management emphasizes transparent application of case triaging early and throughout the process with a focus on case characteristics all along the way. Pathway assignment **at filing** provides the opportunity for improved efficiencies because assignment does not turn on designation by the judge at a case management conference, which may not occur or be needed in every case. Entry point triage can be accomplished by non-judicial personnel, based upon the identified case characteristics and through the use of more advanced technology and training. Triage is done more effectively early in the process, with a focus on case issues and not only on case type or monetary value.

### RE: 3.3

There has been much experimentation around the country with different processes for case designation upon filing, particularly for cases with simpler issues. Courts and parties invariably underutilize (and sometimes ignore) innovations

that are voluntary. Hence, the Committee recommends mandatory application of a triage-to-pathway system. When all civil cases are subject to this right-sized treatment, courts can achieve maximum cost-saving and timesaving benefits.

### RE: 3.4

While mandatory assignment is critical, the Committee recognizes that right sizing is dynamic. It contemplates that a case may take an off ramp to another pathway as a case unfolds and issues change. This flexibility comes from active participation of the court and litigants in assessing case needs and ensuring those needs are met.

### RE: 3.5

In some jurisdictions, the availability of alternative dispute resolution (ADR) mechanisms is viewed as an invaluable tool for litigants to resolve civil cases quickly and less expensively than traditional court procedures. In others, it is viewed as an expensive barrier that impedes access to a fair resolution of the case. To the extent that ADR provides litigants with additional options for resolving cases, it can be employed on any of the pathways, but it is imperative that it not be an opportunity for additional cost and delay.

## KEY RESOURCES FOR RECOMMENDATION 3

*Victor E. Flango & Thomas M. Clarke, Reimagining Courts: A Design for the Twenty-First Century (2015).*

*Inst. for the Adv. of the Am. Legal Sys. & American College of Trial Lawyers, Reforming Our Civil Justice System: A Report on Progress and Promise (2015).*

*Corina D. Gerety & Logan Cornett, Inst. for the Adv. of the Am. Legal Sys., Momentum for Change: The Impact of the Colorado Civil Access Pilot Project (2014).*

## RECOMMENDATION 4

Courts should implement a Streamlined Pathway for cases that present uncomplicated facts and legal issues and require minimal judicial intervention but close court supervision.

- 4.1 A well-established Streamlined Pathway conserves resources by automatically calendaring core case processes. This approach should include the flexibility to allow court involvement and/or management as necessary.
- 4.2 At an early point in each case, the court should establish deadlines to complete key case stages including a firm trial date. The recommended time to disposition for the Streamlined Pathway is 6 to 8 months.
- 4.3 To keep the discovery process proportional to the needs of the case, courts should require mandatory disclosures as an early opportunity to clarify issues, with enumerated and limited discovery thereafter.
- 4.4 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

### COMMENTARY

Streamlined civil cases are those with a limited number of parties, routine issues related to liability and damages, few anticipated pretrial motions, limited need for discovery, few witnesses, minimal documentary evidence and anticipated trial length of one to two days. Streamlined pathway cases would likely include these case types: automobile tort, intentional tort, premises liability, tort-other, insurance coverage claims arising out of claims listed above, landlord/tenant, buyer plaintiff, seller plaintiff, consumer debt, other contract, and

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## STREAMLINED PATHWAY CASE CHARACTERISTICS

- Limited number of parties
  - Routine issues related to liability and damages
  - Few anticipated pretrial motions
  - Limited need for discovery
  - Few witnesses
  - Minimal documentary evidence
  - Anticipated trial length of one to two days
- 

appeals from small claims decisions. For these simpler cases, it is critical that the process not add costs for the parties, particularly when a large percentage of cases end early in the pretrial process. Significantly, the *Landscape of Civil Litigation* informs us that 85 percent of all civil case filings fit within this category.

### RE: 4.1

The Streamlined Pathway approach recognizes resource limits. Resource intensive processes like case management conferences are rarely necessary in simple cases. Instead, the court should establish by rule presumptive deadlines for the completion of key case stages and monitor compliance through a management system powered by technology. At the same time, the process should be flexible and allow court involvement, including judges, as necessary. For example, a case manager or judge can schedule a management conference to address critical issues that might crop up in an initially simple case.

### RE: 4.2

Too many simple cases languish on state court dockets, without forward momentum or resolution. At or soon after filing, the court should send the parties notice of the presumptive deadlines for key case stages, including a firm trial date. The parties

may always come to the court to fashion a different schedule if there is good cause. This pathway contemplates conventional fact finding by either the court or a jury, with a judgment on the record and the ability to appeal. Because this process is intended for the vast majority of cases in the state courts, it is important that the process ensure a final judgment and right to appeal to safeguard the rights of litigants and to gain buy-in from attorneys.

#### **RE: 4.3**

Mandatory disclosures provide an important opportunity in streamlined cases to focus the parties and discovery early in the case. With robust, meaningful initial disclosures, the parties can then decide what additional discovery, if any, is necessary. The attributes of streamlined cases put them in this pathway for the very reason that the nature of the dispute is not factually complex. Thus, streamlined rules should include presumptive discovery limits, because such limits build in proportionality. Where additional information is needed to make decisions about trial or settlement, the parties can obtain additional discovery with a showing of good cause. Presumptive discovery maximums have worked well in various states, including Utah and Texas, where there are enumerated limits on deposition hours, interrogatories, requests for production, and requests for admission.

Because this process is intended for the vast majority of cases in the state courts, it is important that the process ensure a final judgment and right to appeal to safeguard the rights of litigants and to gain buy-in from attorneys.

#### **RE: 4.4**

While the vast majority of cases are resolved without trial, if parties in a Streamlined Pathway case want to go to trial, the court should ensure that option is accessible. Because trial is a costly event in litigation, it is critical that trials be managed in a time-sensitive manner. Once a trial begins in a case, the trial judge should give top priority to trial matters, making presentation of evidence and juror time fit into full and consecutive days of business. A thorough pretrial conference can address outstanding motions and evidentiary issues so that time is not wasted and a verdict can be reached in one or two days.

### **KEY RESOURCES FOR RECOMMENDATION 4**

*Paula Hannaford-Agor & Cynthia G. Lee, Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts, Final Report (2015).*

*Corina D. Gerety & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Momentum for Change: The Impact of the Colorado Civil Access Pilot Project (2014).*

*Paula Hannaford-Agor, et al., Nat'l Ctr. for State Courts, Civil Justice Initiative, New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules (2013).*

## RECOMMENDATION 5

Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.

- 5.1 Courts should assign a single judge to complex cases for the life of the case, so they can be actively managed from filing through resolution.
- 5.2 The judge should hold an early case management conference, followed by continuing periodic conferences or other informal monitoring.
- 5.3 At an early point in each case, the judge should establish deadlines for the completion of key case stages, including a firm trial date.
- 5.4 At the case management conference, the judge should also require the parties to develop a detailed discovery plan that responds to the needs of the case, including mandatory disclosures, staged discovery, plans for the preservation and production of electronically stored information, identification of custodians, and search parameters.
- 5.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.
- 5.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

## COMMENTARY

The Complex Pathway provides right-sized process for those cases that are complicated in a variety of ways. Such cases may be legally complex or logistically complex, or they may involve complex evidence, numerous witnesses, and/or high interpersonal conflict. Cases in this pathway may include multi-party medical malpractice, class actions, antitrust, multi-party commercial cases, securities, environmental torts, construction defect, product liability, and mass torts. While these cases comprise a very small percentage (generally no more than 3%) of most civil dockets, they tend to utilize the highest percentage of court resources.

Some jurisdictions have developed a variety of specialized courts, such as business courts, commercial courts, and complex litigation courts. They often employ case management techniques recommended for the Complex Pathway in response to longstanding recognition of the problems complex cases can pose for effective civil case processing. While implementation of a mandatory pathway assignment system may not necessarily replace a specialized court with the Complex Pathway, courts should align their case assignment criteria for the specialized court to those for the Complex Pathway. As many business and commercial court judges have discovered, not all cases featuring business-to-business litigants or issues related to commercial transactions require intensive case management. Conversely, some cases that do not meet the assignment criteria for a business or commercial court do involve one or more indicators of complexity and should receive close individual attention.

### RE: 5.1

To ensure proportionality for complex cases, a single judge should be assigned for the life of these cases. Judges can do much to prevent undue cost and delay. A one-judge-from-filing-through-resolution policy preserves judicial resources by avoiding the need for a fresh learning curve whenever a complex case

returns to court for a judicial ruling. The parties are also better served if a single judge is engaged on a regular basis. During the course of the case, attorneys can build upon prior communications rather than repeat them.

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## COMPLEX PATHWAY CASE CHARACTERISTICS

- Complex law
  - Numerous parties
  - Numerous witnesses
  - Voluminous documentary evidence
  - High interpersonal conflict
- 

### RE: 5.2

Research and experience confirms the importance of having a mandatory case management conference early in the life of complex cases. Case conferences provide an ideal opportunity to narrow the issues, discuss and focus dispositive motions prior to filing, and identify and address discovery issues before they grow into disputes. Periodic communications with the court create the opportunity for settlement momentum and reassessment of pathway designation if complexities are eliminated. For the Colorado Civil Access Pilot Project, the focus on early, active, and ongoing judicial management of complex cases was essential and received more positive feedback than any other part of the project.

### RE: 5.3

Cases in which the parties are held accountable for completing necessary pretrial tasks tend to resolve more quickly. The longer a case goes on, the more it costs. Effective oversight and enforcement of deadlines by a vigilant civil case management team can significantly reduce cost and delay.

### RE: 5.4

Once a discovery plan is determined, the court must continue to monitor progress over the course of discovery. Everyone involved in the litigation, and particularly the court, has a continuing responsibility to move the case forward according to established plans and proportionality principles. Litigation expense in complex lawsuits, especially discovery costs, easily can spin out of control absent a shepherding hand and guiding principles. Thus, proportionality must be a guiding standard in discovery and the entire pretrial process to ensure that the case does not result in undue cost and delay.

While proportionality is a theme that runs across all of the pathways, in the complex pathway this concept is more surgical. Given the complexities inherent in these cases, proportionality standards should be applied to rein in time and expense while still recognizing that some legal and evidentiary issues require time to sort out.

Mandatory disclosures can also play a critical role in identifying the issues in the litigation early, so that additional discovery can be tailored and proportional, although it is possible that the disclosures, like some discovery, will need to occur in phases.

### RE: 5.5

Courts should utilize informal processes, such as conference calls with counsel, to encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court.

### RE: 5.6

Judges must lead the effort to avoid unnecessary time consumption during trials. A robust pretrial conference should address outstanding motions and evidentiary issues so that the trial itself is conducted as efficiently as possible. The court and the parties should consider agreeing to time limits for



trial segments. Once a trial begins, the trial judge should give top priority to trial matters, making presentation of evidence and juror time fit into full and consecutive days of business.

## **KEY RESOURCES FOR RECOMMENDATION 5**

*Nat'l Ctr. for State Courts, Dimensions of Complexity, Civil Action, Vol. 3, No. 1 (Winter 2004).*

*Jordan Singer, Suffolk Superior Court Business Litigation Session Pilot Project: Final Report on the 2012 Attorney Survey (2012).*

*Natalie Anne Knowlton & Richard P. Holme, Inst. for Advancement of the Am. Legal Sys. & Am. Coll. of Trial Lawyers, Working Smarter, Not Harder: How Excellent Judges Manage Cases (2014).*

*Corina D. Gerety & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Momentum for Change: The Impact of the Colorado Civil Access Pilot Project (2014).*

To ensure proportionality for complex cases, a single judge should be assigned for the life of these cases. Judges can do much to prevent undue cost and delay.

## RECOMMENDATION 6

Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.

- 6.1 At an early point in each case, the court should establish deadlines for the completion of key case stages including a firm trial date. The recommended time to disposition for the General Pathway is 12 to 18 months.
- 6.2 The judge should hold an early case management conference upon request of the parties. The court and the parties must work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.
- 6.3 Courts should require mandatory disclosures and tailored additional discovery.
- 6.4 Courts should utilize expedited approaches to resolving discovery disputes to ensure cases in this pathway do not become more complex than they need to be.
- 6.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.
- 6.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

## COMMENTARY

Like the other pathways, the goal of the General Pathway is to determine and provide “right-sized” resources for timely disposition. The General Pathway provides the right amount of process for the cases that are not simple, but also are not complex. Thus, General Pathway cases are those cases that are principally identified by what they are not, as they do not fit into either the Streamlined Pathway or the Complex Pathway. Nevertheless, the General Pathway is not another route to “litigation as we know it.” Like the streamlined cases, discovery and motions for these cases can become disproportionate, with efforts to discover more than what is needed to support claims and defenses. The goal for this pathway is to provide right-sized process with increased judicial involvement as needed to ensure that cases progress toward efficient resolution.

As with the other case pathways, at an early point in each case courts should set a firm trial date. Proportional discovery, initial disclosures, and tailored additional discovery are also essential for keeping General Pathway cases on track.

### RE: 6.1 to 6.3

The cases in the General Pathway may need more active management than streamlined cases. A judge may need to be involved from the beginning to understand unusual issues in the case, discuss the anticipated pretrial path, set initial parameters for discovery, and be available to resolve disputes as they arise. The court and the parties can then work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.

A court’s consistent and clear application of proportionality principles early in cases can have a leavening affect on discovery decisions made in law offices. Parties and attorneys typically make their decisions about what discovery to do next without court involvement. A steady court policy with respect to proportionality provides deliberating parties and attorneys with guidance.

## RE: 6.4 to 6.5

As in the Complex Pathway, courts should utilize informal processes, such as conference calls with counsel, to encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court. In addition, an in-person case management conference can play a critical role in reducing cost and delay by affording the judge and parties the opportunity to have an in-depth discussion regarding the issues and case needs.

Without doubt, alternative dispute resolution (ADR) is an important development in modern civil practice. However, to avoid it becoming an unnecessary hurdle or cost escalator, its appropriateness should be considered on a case-by-case basis. That said, settlement discussions are a critical aspect of case management, and the court should ensure that there is a discussion of settlement at an appropriate time, tailored to the needs of the case.

## RE: 6.6

As with the other pathways, trial judges play a crucial role in containing litigation costs and conserving juror time by making time management a high priority once a trial begins.

### KEY RESOURCES FOR RECOMMENDATION 6

*Paula Hannaford-Agor & Cynthia G. Lee, Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts, Final Report (2015).*

*Steven S. Gensler & Lee H. Rosenthal, The Reappearing Judge, 61 U. Kan. L. Rev. 849 (2013).*

# STRATEGICALLY DEPLOY COURT PERSONNEL AND RESOURCES

## RECOMMENDATION 7

Courts should develop civil case management teams consisting of a responsible judge supported by appropriately trained staff.

7.1 Courts should conduct a thorough examination of their civil case business practices to determine the degree of discretion required for each management task. These tasks should be performed by persons whose experience and skills correspond with the task requirements.

7.2 Courts should delegate administrative authority to specially trained staff to make routine case management decisions.

## COMMENTARY

Recommendation 1 sets forth the fundamental premise that courts are primarily responsible for the fair and prompt resolution of each case. This is not the responsibility of the judge alone. Active case management at its best is a team effort aided by technology and appropriately trained and supervised staff. The Committee rejects the proposition that a judge must manage every aspect of a case after its filing. Instead, the Committee endorses the proposition that court personnel, from court staff to judge, be utilized to act at the “top of their skill set.”

Team case management works. Utah’s implementation of team case management resulted in a 54 percent reduction in the average age of pending civil cases from 335 days to 192 days (and a 54 percent reduction for all case types over that same period) despite considerably higher caseloads. In Miami,

team case management resulted in a 25 percent increase in resolved foreclosure cases compared consistently at six months, twelve months, and eighteen months during the foreclosure crisis, and the successful resolution of a 50,000 case backlog. Specialized business courts across the country use team case management with similar success. In Atlanta, business court efforts resulted in a 65 percent faster disposition time for complex contract cases and a 56 percent faster time for complex business tort cases.

#### **RE: 7.1**

Using court management teams effectively requires that the court conduct a thorough examination of civil case business practices to determine the degree of discretion required for each. Based upon that examination, courts can develop policies and practices to identify case management responsibilities appropriately assignable to professional court staff or automated processes. Matching management tasks to the skill level of the personnel allows administrators to execute protocols and deadlines and judges to focus on matters that require judicial discretion. Evaluating what is needed and who should do it brings organization to the system and minimizes complexities and redundancies in court structure and personnel.

#### **RE: 7.2**

Delegation and automation of routine case management responsibilities will generate time for judges to make decisions that require their unique authority, expertise, and discretion.

## **KEY RESOURCES FOR RECOMMENDATION 7**

*Lee Suskin & Daniel Hall, A Case Study: Reengineering Utah's Courts Through the Lens of the Principles of Judicial Administration (2012).*

*Fulton County Superior Court, Business Court: 2014 Annual Report (2014).*

The fair and prompt resolution of each case... is not the responsibility of the judge alone. Active case management at its best is a team effort aided by technology and appropriately trained and supervised staff.

## RECOMMENDATION 8

For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.

### COMMENTARY

Judicial training is not a regular practice in every jurisdiction. To improve, and in some instances reengineer, civil case management, jurisdictions should establish a comprehensive judicial training program. The Committee advocates a civil case management-training program that includes web-based training modules, regular training of new judges and sitting judges, and a system for identifying judges who could benefit from additional training.

Accumulated learning from the private sector suggests that the skill sets required for staff will change rapidly and radically over the next several years. Staff training must keep up with the impact of technology improvements and consumer expectations. For example, court staff should be trained to provide appropriate help to self-represented litigants. Related to that, litigants should be given an opportunity to perform many court transactions online. Even with well-designed websites and interfaces, users can become confused or lost while trying to complete these transactions. Staff training should include instruction on answering user questions and solving user process problems.

The understanding and cooperation of lawyers can significantly influence the effectiveness of any pilot projects, rule changes, or case management processes that court leaders launch. Judges and court

administrators must partner with the bar to create CLE programs and bench/bar conferences that help practitioners understand why changes are being undertaken and what will be expected of lawyers. Bar organizations, like the judicial branch, must design and offer education programs to inform their members about important aspects of the new practices being implemented in the courts.

## KEY RESOURCES FOR RECOMMENDATION 8

*Lee Suskin & Daniel Hall, A Case Study: Reengineering Utah's Courts Through the Lens of the Principles of Judicial Administration (2012).*

*Report of the Iowa Civil Justice Reform Task Force: Reforming the Iowa Civil Justice System (2012).*

## RECOMMENDATION 9

Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge's experience in effective case management.

### COMMENTARY

The Committee recognizes the variety of legal cultures and customs that exist across the breadth of our country. Given the case management imperatives described in these Recommendations, the Committee trusts that all court leaders will make judicial competence a high priority. Court leaders should consider a judge's particular skill sets when assigning judges to preside over civil cases. For many years, in most jurisdictions, the sole criterion for judicial assignment was seniority and a judge's request for an assignment. The judge's experience or training were not top priorities.

To build public trust in the courts and improve case management effectiveness, it is incumbent upon court leaders to avoid politicization of the assignment process. In assigning judges to various civil case dockets, court leaders should consider a composite of factors including (1) demonstrated case management skills, (2) litigation experience, (3) previous training, (4) specialized knowledge, (5) interest, (6) reputation with respect to neutrality, and (6) professional standing within the trial bar.

### KEY RESOURCE FOR RECOMMENDATION 9

*Lee Suskin & Daniel Hall, A Case Study: Reengineering Utah's Courts Through the Lens of the Principles of Judicial Administration (2012).*

## FACTORS TO CONSIDER IN JUDICIAL ASSIGNMENT CRITERIA

- Demonstrated case management skills
- Civil case litigation experience
- Previous civil litigation training
- Specialized knowledge
- Interest in civil litigation
- Reputation with respect to neutrality
- Professional standing with the trial bar

# USE TECHNOLOGY WISELY

## RECOMMENDATION 10

Courts must take full advantage of technology to implement right-sized case management and achieve useful litigant-court interaction.

- 10.1 Courts must use technology to support a court-wide, teamwork approach to case management.
- 10.2 Courts must use technology to establish business processes that ensure forward momentum of civil cases.
- 10.3 To measure progress in reducing unnecessary cost and delay, courts must regularly collect and use standardized, real-time information about civil case management.
- 10.4 Courts should use information technology to inventory and analyze their existing civil dockets.
- 10.5 Courts should publish measurement data as a way to increase transparency and accountability, thereby encouraging trust and confidence in the courts.

### COMMENTARY

This recommendation is fundamental to achieving effective case management. To implement right-sized case management, courts must have refined capacities to organize case data, notify interested persons of requirements and events, monitor rules compliance, expand litigant understanding, and prompt judges to take necessary actions. To meet these urgent needs, courts must fully employ information technologies to manage data and business processes. It is time for courts to catch up with the private sector. The expanding use of

online case filing and electronic case management is an important beginning, but just a beginning. Enterprises as diverse as commercial air carriers, online retailers, and motor vehicle registrars have demonstrated ways to manage hundreds of thousands of transactions and communications. What stands in the way of courts following suit? If it involves lack of leadership, the Committee trusts that this Report and these Recommendations will embolden chief justices and state court administrators to fill that void.

### RE: 10.1

Modern data management systems and court-oriented innovations, such as e-filing, e-scheduling, e-service, and e-courtesy, provide opportunities for personnel coordination not only within courthouses but also across entire jurisdictions.

### RE: 10.2

To move cases efficiently towards resolution, case management automation should, at a minimum, (1) generate deadlines for case action based on court rules, (2) alert judges and court staff to missed deadlines, (3) provide digital data and searchable options for scheduled events, and (4) trigger appropriate compliance orders. Courts should seek to upgrade their current software to achieve that functionality and include those requirements when they acquire new software.

### RE: 10.3

Experience and research tell us that one cannot manage what is unknown. Smart data collection is central to the effective administration of justice and can significantly improve decision making.

Although court administrators appreciate the importance of recordkeeping and performance measurement, few judges routinely collect or use data measurements or analytical reports. As made clear in previous Recommendations, the entire court system acting as a team must collect and use data to improve civil caseflow management

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## KEY FUNCTIONS OF CASE MANAGEMENT AUTOMATION

- Generate deadlines for case action based on court rules
- Alert judges and court staff to missed deadlines
- Provide digital data and searchable options for scheduled events
- Trigger appropriate compliance orders

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and reduce unnecessary costs and delay. This can be accomplished by enlisting court system actors at different levels and positions in developing the measurement program, by communicating the purpose and importance of the information to all court staff, and by appointing a responsible oversight officer to ensure accuracy and consistency.

Courts must systematically collect data on two types of measures. The first is descriptive information about the court's cases, processes, and people. The second is court performance information, dictated by defined goals and desired outcomes.

To promote comparability and analytical capacity, courts must use standardized performance measures, such as CourTools, as the presumptive measures, departing from them only where there is good reason to do so. Consistency—in terms of what data are collected, how they are collected, and when they are collected—is essential for obtaining valid measures upon which the court and its stakeholders can rely.

### RE: 10.4

As mentioned above, one cannot manage what is unknown. This is true at both the macro the micro levels. A “30,000 foot” view allows court personnel to consider the reality of their caseload when making management decisions. As the *Landscape of Civil Litigation* provided the CJI Committee a

representative picture of civil caseloads nationally, each court system should gain a firm understanding of its current civil case landscape. Using technology for this purpose will increase the ability of courts to take an active, even a proactive, approach to managing for efficiency and effectiveness.

An inventory should not be a one-time effort. Courts can regularly use inventories to gauge the effectiveness of previous management efforts and “get ahead” of upcoming caseload trends.

### RE: 10.5

The NCSC and the Justice at Stake consortium commissioned a national opinion survey to identify what citizens around the country think about courts and court funding. The ultimate purpose of the project, entitled *Funding Justice: Strategies and Messages for Restoring Court Funding*, was to create a messaging guide to help court leaders craft more effective communications to state policymakers and the general public about the functions and resource needs of courts. Citizen focus groups indicated that certain narratives tend to generate more positive public attitudes to courts. These include (1) courts are effective stewards of resources, (2) the courts' core mission is delivery of fair and timely justice, and (3) courts are transparent about how their funding is spent. In light of these findings, the Committee believes that smart civil case management, demonstrated by published caseflow data, can lead to increased public trust in the courts.



## KEY RESOURCES FOR RECOMMENDATION 10

*John Matthias & Larry Webster, Business Process Case Automation Studies (2013).*

*James Cabral et al., Using Technology to Enhance Access to Justice, 26 Harv. J.L. & Tech. 241 (2012).*

*Lee Suskin & Daniel Hall, A Case Study: Reengineering Utah's Courts Through the Lens of the Principles of Judicial Administration (2012).*

*Dan Becker, Reengineering: Utah's Experience in Centralized Transcript Management, Future Trends (2012).*

*Nat'l Center for St. Cts., Why Measure Performance? (2005).*

*Danielle Fox, Hisashi Yamagata & Pamela Harris, From Performance Measurement to Performance Management: Lessons From a Maryland Circuit Court, 35 Just. Sys. J. 87 (2014).*

*John Greacen, Backlog Performance Measurement—A Success Story in New Jersey, 46 Judges J. (2007).*

*Nat'l Center for St. Cts. & Just. at Stake, Funding Justice: Strategies and Messages for Restoring Court Funding (2013).*

## FOCUS ATTENTION ON HIGH-VOLUME AND UNCONTESTED CASES

### RECOMMENDATION 11

Courts must devote special attention to high-volume civil dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.

- 11.1 Courts must implement systems to ensure that the entry of final judgments complies with basic procedural requirements for notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.
- 11.2 Courts must ensure that litigants have access to accurate and understandable information about court processes and appropriate tools such as standardized court forms and checklists for pleadings and discovery requests.
- 11.3 Courts should ensure that the courtroom environment for proceedings on high-volume dockets minimizes the risk that litigants will be confused or distracted by over-crowding, excessive noise, or inadequate case calls.
- 11.4 Courts should, to the extent feasible, prevent opportunities for self-represented persons to become confused about the roles of the court and opposing counsel.

### COMMENTARY

State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial or tort cases. Many courts assign these cases to specialized court calendars such as landlord/tenant, consumer debt collection, mortgage

foreclosure, and small claims dockets. Many of these cases exhibit similar characteristics. For example, few cases are adjudicated on the merits, and almost all of those are bench trials. Although plaintiffs are generally represented by attorneys, defendants in these cases are overwhelmingly self-represented, creating an asymmetry in legal expertise that, without effective court oversight, can easily result in unjust case outcomes. Although most cases would be assigned to the Streamlined Pathway under these Recommendations, courts should attend to signs that suggest a case might benefit from additional court involvement. Indicators can include the raising of novel claims or defenses that merit closer scrutiny.

#### **RE: 11.1**

Recent federal investigations and agency studies have found widespread instances of judgments entered in cases in which the defendant did not receive notice of the complaint or the plaintiff failed to demonstrate standing to bring suit or adequate documentation of compliance with statutory requirements for timeliness or the basis for the relief sought. Courts have an obligation to implement practices that prevent such abuse.

#### **RE: 11.2**

This recommendation complements Recommendation 13 with respect to making court services more accessible to litigants. Self-represented litigants need access to accurate information about court processes, including trained court staff that can help them navigate the civil justice system. This information should be available electronically or in person at the courthouse, and at other sites where litigants can receive free assistance. Standardized forms should use plain English and include check-off lists for basic claim elements, potential common defenses, and the ability to assert counter-claims.

#### **RE: 11.3**

Courts often employ block calendaring on high-volume dockets in which large numbers of cases are scheduled for the same period of time. The result is often overcrowded, noisy, and potentially chaotic environments in which litigants may not hear their case when it is called or may become distracted by competing activities in the courtroom. Frequently, courts sequence cases after the initial call to benefit attorneys, resulting in long wait times for self-represented litigants. The use of electronic sign-in systems can help ensure that litigants are not mistakenly overlooked and that their cases are heard in a timely manner.

#### **RE: 11.4**

Self-represented litigants often lack understanding about the respective roles of the court and opposing counsel. They may acquiesce to opposing counsel demands because they mistakenly assume that the opposing counsel is connected to the court. As a result, judges may not obtain complete information from both sides to ensure a legally correct judgment on the facts and the law. Self-represented litigants also may not appreciate the far-reaching implications of agreeing to settle a case (e.g., dismissal, entry of judgment). To curb misunderstandings, courts should provide clear physical separation of counsel from court personnel and services, and standardized guidelines to all litigants and counsel concerning how settlement negotiations are conducted and the consequences of settlement. Before accepting settlements, judges should ascertain that both parties understand the agreement and its implications.

## KEY RESOURCES FOR RECOMMENDATION 11

*Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation (2010).*

*Mary Spector, Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts, 6 Va. L. & Bus. Rev. 257 (2011).*

*Paris R. Baldacci, Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigation in Litigating Their Cases in New York City's Housing Court, 3 Cardozo Pub. Pol'y & Ethics J. 659 (2006).*

*New York County Law. Ass'n., The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It? (2005).*

*Russell Engler, Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiation with Self-represented Poor Persons, 85 Cal. L. Rev. 79 (1997).*

## RECOMMENDATION 12

Courts must manage uncontested cases to assure steady, timely progress toward resolution.

12.1 To prevent uncontested cases from languishing on the docket, courts should monitor case activity and identify uncontested cases in a timely manner. Once uncontested status is confirmed, courts should prompt plaintiffs to move for dismissal or final judgment.

12.2 Final judgments must meet the same standards for due process and proof as contested cases.

## COMMENTARY

Uncontested cases comprise a substantial proportion of civil caseloads. In the *Landscape of Civil Litigation in State Courts*, the NCSC was able to confirm that default judgments comprised 20 percent of dispositions, and an additional 35 percent of cases were dismissed without prejudice. Many of these cases were abandoned by the plaintiff, or the parties reached a settlement but failed to notify the court. Other studies of civil caseloads also suggest that uncontested cases comprise a substantial portion of civil cases (e.g., 45 percent of civil cases subject to the New Hampshire Proportional Discovery/Automatic Disclosure (PAD) Rules, 84 percent of civil cases subject to Utah Rule 26). Without effective oversight, these cases can languish on court dockets indefinitely. For example, more than one-quarter of the *Landscape* cases that were dismissed without prejudice were pending at least 18 months before they were dismissed.

### RE 12.1

To resolve uncontested matters promptly yet fairly requires focused court action. Case management systems should be configured to identify uncon-

tested cases shortly after the deadline for filing an answer or appearance has elapsed. If the plaintiff fails to file a timely motion for default or summary judgment, the court should order the plaintiff to file such a motion within a specified period of time. If such a motion is not filed, the court should dismiss the case for lack of prosecution. The court should monitor compliance with the order and carry out enforcement as needed.

## **RE 12.2**

Recent studies of consumer debt collection, mortgage foreclosure, and other cases that are frequently managed on high-volume dockets found that judgments entered in uncontested cases were often invalid. In many instances, the plaintiff failed to provide sufficient notice of the suit to the defendant. Other investigations found that plaintiffs could not prove ownership of the debt or provide accurate information about the amount owed. To prevent abuses, courts should implement rules to require or incentivize process servers to use smart technology to document service location and time. Courts should also require plaintiffs to provide an affidavit and supporting documentation of the legitimacy of the claim with the motion for default or summary judgment. Before issuing a final judgment, the court should review those materials to ensure that the plaintiff is entitled to the relief sought.

## **KEY RESOURCES FOR RECOMMENDATION 12**

*Fed. Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation (2010).*

*Mary Spector, Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts, 6 Va. L. & Bus. Rev. 257 (2011).*

*Press Release, The Office [Minnesota] Attorney General Lori Swanson, Attorney General Swanson Sues Legal Process Server for Engaging in "Sewer Service" (Nov. 6, 2014).*

*Press Release, Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court (Apr. 14, 2009).*

*Press Release, New York State Unified Court System, Chief Judge Announces Comprehensive Reforms to Promote Equal Justice for New York Consumers in Debt Cases (April 30, 2014).*

*Fairfax County [Virginia] General District, Court Best Practices: Default Judgments/Debt Buyers (2009).*

# PROVIDE SUPERIOR ACCESS FOR LITIGANTS

## RECOMMENDATION 13

Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.

- 13.1 Courts must simplify court-litigant interfaces and screen out unnecessary technical complexities to the greatest extent possible.
- 13.2 Courts should establish Internet portals and stand-alone kiosks to facilitate litigant access to court services.
- 13.3 Courts should provide real-time assistance for navigating the litigation process.
- 13.4 Judges should promote the use of remote audio and video services for case hearings and case management meetings.

## COMMENTARY

The importance of “access to substantive justice” is inherent in the mission of the CJI Committee and underpins all of these Recommendations. Recommendation 13 addresses “access” in terms of making the civil justice system less expensive and more convenient to the public.

To mitigate access problems, we must know what they are. We also need to know how the public wants us to fix them. A national poll by NCSJ in 2014 found that a high percentage of responders thought courts were not doing enough to help self-represented litigants, were out of touch, and were not using technology effectively. Responders frequently cited the time required to interact with the courts, lack of available ADR, and apprehensiveness in dealing with court processes. The poll found strong sup-

port for a wide array of online services, including a capacity for citizens to ask questions online about court processes.

### RE: 13.1

Courts should simplify court forms and develop online “intelligent forms” that enable litigants to create pleadings and other documents in a manner that resembles a Turbo Tax interactive dialogue. Forms should be available in languages commonly spoken in the jurisdiction. Processes associated with the forms (attaching documents, making payments, etc.) should be simplified as much as possible.

### RE: 13.2

To improve citizen understanding of court services, courts should install information stations inside and outside of courthouses as well as online. To expand the availability of important court information, courts might partner with private enterprises and public service providers, such as libraries and senior centers, to install interactive, web-based, court business portals at the host locations.

### RE: 13.3

Courts should create online, real-time court assistance services, such as online chat services, and 800-number help lines. Litigant assistance should also include clear signage at court facilities to guide litigants to any on-site navigator personnel. Online resolution programs also offer opportunities for remote and real-time case resolution.

### RE: 13.4

Vast numbers of self-represented litigants navigate the civil justice system every year. However, travel costs and work absences associated with attending a court hearing can deter self-represented litigants from effectively pursuing or defending their legal rights. The use of remote hearings has the potential to increase access to justice for low-income individuals who have to miss work to be at the courthouse on every court date. Audio or videoconferencing

can mitigate these obstacles, offering significant cost savings for litigants and generally resulting in increased access to justice through courts that “extend beyond courthouse walls.”

The growing prevalence of smart phones enables participants to join audio or videoconferences from any location. To the extent possible and appropriate, courts should expand the use of telephone communication for civil case conferences, appearances, and other straightforward case events.

If a hearing or case event presents a variety of complexities, remote communication capacities should expand to accommodate those circumstances. In such instances video conferencing may be more fitting than telephone conferencing. The visual component may facilitate reference to documents and items under discussion, foster more natural conversation among the participants, and enable the court to “read” unspoken messages. For example the video may reveal that a litigant is confused or that a party would like an opportunity to talk but is having trouble getting into the conversation.

## KEY RESOURCES FOR RECOMMENDATION 13

*Tom Clarke, Building a Litigant Portal: Business and Technical Requirements (2015).*

*Legal Services Corporation, Report of the Summit on the Use of Technology to Expand Access to Justice (2013).*

*James Cabral et al., Using Technology to Enhance Access to Justice, 26 Harv. J.L. & Tech. 241 (2012).*

*World Bank Index, Doing Business 2015: Going Beyond Efficiency (2015).*

*United Kingdom Civil Justice Council, Online Dispute Resolution for Low Value Civil Claims (2015).*

*Oregon Judicial Department, 2011–2014 Oregon Judicial Branch: A Four-Year Report (2014).*

*Administrative Conference of the United States, Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings (2015).*

# Bench and Bar Leaders Hold the Key

This Report makes clear that state courts cannot simply use comfortable old methods to administer justice in the millions of civil cases now pending. These Recommendations tell state courts “what” they must do to address the challenges they face now. While many of the Recommendations to reduce delay and improve access to justice can be implemented within existing budgets and under current rules of procedure, others will require steadfast, strong leadership to achieve these goals. The next step is to develop a strategy for “how” court leaders can overcome barriers to needed changes and actually deliver better civil justice.

A key to implementing these Recommendations is to persuade civil justice actors that there is a problem and it belongs to all of us. As Chief Justice Roberts stated in his most recent year-end report on the federal judiciary, it is “the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation.” The Committee is confident that when a critical mass of judges and lawyers honestly confront the unvarnished facts about the civil justice system, bench and bar members will be moved to become problem solvers.

We know that successful problem solving is preceded by careful problem definition. The CJI Committee began its work with a comprehensive empirical study of the current state of civil litigation across the country. The national snapshot of civil litigation undertaken in the NCSC’s *Landscape of Civil Litigation* provides a model for problem identification, big-picture visioning, and strategic planning by state and local courts. The Committee urges state courts to undertake their own landscape study. Such a study will not only enable court leaders to diagnose the volume and characteristics of civil case dockets across the state, but will also help identify major barriers to reducing cost, delay, and inefficiency in civil litigation. Leaders can then sequence and execute strategies to surmount those barriers.

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“We like comfortable old shoes out of style and worn through as they may be and dread having a new pair.... None of us like to learn new ways of doing things (but) the convulsive change in society confronts our profession with the urgent challenge to get our house in order if we are to renew the public’s confidence in the American Justice system that safeguards and protects individual rights and liberties.”

—Justice William J. Brennan, Jr.

*Improving the Administration of Justice Today, address to the Section of Judicial Administration, American Bar Association, 1958.*

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## COURT STRATEGIES

Initially, the Committee urges court leaders to build internal support for change. This advice derives from the experience of the Committee during its two years of work. Thanks to the *Landscape of Civil Litigation*, this diverse group of judges, court managers, trial practitioners, and organization leaders started their work with an accurate picture of the civil litigation system. Simultaneously, from across the country, we collected a sampling of best practices that demonstrate smart case management and superior citizen access to justice. We then closely analyzed and discussed the data over the course of several in-person, plenary meetings and innumerable conference calls and email exchanges. What resulted? Unanimous and enthusiastic support for major civil justice improvements. And, for each participant, there arose intense convictions: The quality and vitality of the civil justice system is severely threatened. Now is the time for strong leadership by all chief justices and court administrators.

Behind this report, there stands a fundamental tenet: frontline judges and administrators must have the opportunity to ponder facts about the civil justice system in their state and strategize about the recommendations here. Once that opportunity and those deliberations occur, a wellspring of support for civil justice improvement will take shape within the judiciary. With a supportive judicial branch, tough issues will not only be faced and courthouse improvements undertaken, a unified judiciary will also facilitate external stakeholder participation.

## STAKEHOLDER STRATEGIES

As the Chief Justice suggested, court improvement efforts must involve the bar. The Washington State Bar provides a prime example of lawyers, sobered by evidence of growing civil litigation costs, taking bold actions to improve the fair resolution of cases. After four years of labor, the Bar's Task Force on the Escalating Costs of Civil Litigation last year issued a

series of recommendations to make courts affordable and accessible. The principles of proportionality and cooperation infuse the recommendations. Significantly, the report closes by saying, "The Task Force urges the Board [of Governors] not only to adopt these recommendations, but to help educate the **judges and lawyers** who will be responsible for making the recommendations a reality."<sup>8</sup>

In addition to state and local bar associations, national organizations have a role in promoting the recommendations contained here. For example, during the years spent producing this Report, several respected lawyer groups provided significant input to CJI Committee members and staff. These include the American Board of Trial Advocates, the American Civil Trial Roundtable, the American College of Trial Lawyers, the National Creditors Bar Association, IAALS Advisory Groups, the Association of General Counsel, and the NCSC's General Counsel Committee, Lawyers' Committee, and Young Lawyers' Committee. Some of these groups have state counterparts that can collaborate with court leaders to implement recommendations that fit their state or locality. Those alliances can also lead to focus groups that educate key constituencies about the state's civil justice needs, and the demonstrated effectiveness of the recommendations collected here. Advocates for any recommendations can use the findings, proposals, and evidence-based resources in this report to build trust among legislators, executive branch leaders, and the general public.

Since the civil justice system serves large segments of society, these Recommendations have constituencies beyond the legal community. Households, businesses, civic institutions, vendors, and consumers are key stakeholders. Thought leaders and respected voices within those larger communities must be educated about the Recommendations and encouraged to join our call to action.



## FUTURE ASSISTANCE

Recognizing that organizational change is a process, not an event, the NCSC and IAALS will collaborate to assist court leaders who want to implement civil justice change. They are taking steps to help move the Recommendations into action. During the planned implementation phase, they hope to:

- Develop a directory of experts (judges, administrators, lawyers, and national experts) with proven experience in successfully implementing change in the civil justice system.
- Provide technical assistance to jurisdictions wishing to adopt any CJI recommendations.
- Create an Implementation Roadmap for court leaders to use in developing a strategy for implementing civil justice improvements.
- Launch an online “community” for users to communicate with experienced court leaders who have successfully implemented change.
- Maintain a directory of successful projects for court leaders to use in initiating change.
- Identify technologies that support civil justice improvement and work with the court technology industry to develop new applications to support civil justice improvement.
- Continue to evaluate and document efforts to improve the civil justice system.
- Identify and coordinate with other national groups committed to improving efficient and accessible civil justice.

### KEY RESOURCES FOR TAKING NEXT STEPS

*Brittany K.T. Kauffman, Change the Culture, Change the System: Top Ten Cultural Shifts Needed to Create the Courts of Tomorrow (2015).*

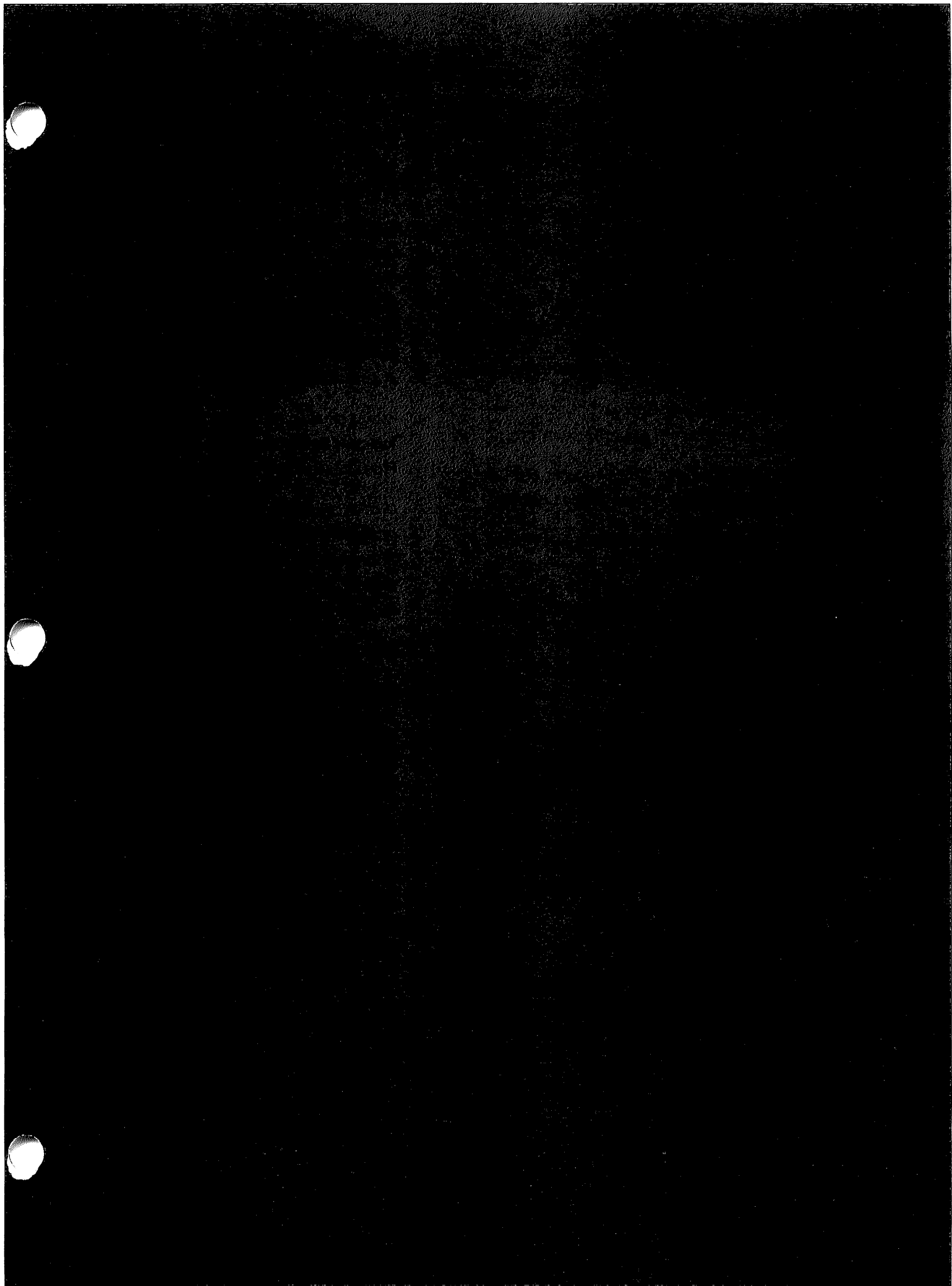
*Brian Ostron, Roger Hanson & Kevin Burke, Becoming a High Performance Court, 26(4) Court Manager 35-43.*

*Eric T. Washington & Lisa R. VanDeVeer, Court Governance—The Critical Role of Strategic Management (2013).*

*Mary McQueen, Governance: The Final Frontier, Harvard Executive Session for Court Leaders in the 21st Century (2013).*

*John P. Kotter, Leading Change—Why Transformation Efforts Fail, Harv. Bus. Rev. (Jan. 2007).*

*Nat’l Center for St. Cts. & Just. at Stake, Funding Justice: Strategies and Messages for Restoring Court Funding (2013).*



## APPENDICES

Over the course of its deliberations, the CJI Committee developed a number of working papers and internal discussion briefs, which provide further background and context in support of the Recommendations. These materials and other resources are available as appendices to this report at: [ncsc.org/civil](http://ncsc.org/civil).

**Appendix A:** A Day in the Life of a Judge: Descriptions of Judicial Tasks under each Pathway

**Appendix B:** NCSC Business Rules Visualization Tool

**Appendix C:** The Pathway Approach: Draft Rules and Example Rules from Around the Country

**Appendix D:** Pilot Projects, Rule Changes, and Other Innovations in State Courts Around the Country

**Appendix E:** Best Practices for Courts and Parties Regarding Electronic Discovery in State Courts

**Appendix F:** The Role of Proportionality in Reducing the Cost of Civil Litigation

**Appendix G:** Remote Conferencing—Findings and Recommendations

**Appendix H:** Judicial Assignment Criteria for Pathway Dockets

**Appendix I:** Problems and Recommendations for High-Volume Dockets

**Appendix J:** Best Practices for Trial Management

## NOTES

1. These values varied somewhat based on case type; three-quarters of real property judgments, for example, were less than \$106,000 and three-quarters of torts were less than \$12,200.
2. Based on the *Landscape of Civil Litigation in State Courts*, NCSC staff estimate that 85 percent or more of civil cases could be more effectively managed using streamlined or simplified procedures. Complex cases, in contrast, generally consisted of no more than 3 percent of civil caseloads.
3. Paula Hannaford-Agor & Cynthia G. Lee, Utah: *Impact of the Revisions to Rule 26 on the Discovery Practice in the Utah District Courts* 9 (April 2015).
4. *Id.* at 24-25, 36-38, 53-56; Paula Hannaford-Agor et al., *New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules* 17-18 (Aug. 19, 2013); Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform* 29-46
5. *Hannaford-Agor & Lee, supra* note 3, at 14-21.
6. Hannah E. M. Lieberman, Linda Sandstrom Simard & Ed Marks, *Problems and Recommendations for High Volume Dockets: A Report of the High Volume Case Subcommittee to the CCJ Civil Justice Improvements Committee* (2016).
7. *Rule 1, Federal Rules of Civil Procedure*.
8. *Task Force on the Escalating Costs of Civil Litigation, Final Report to the Board of Governors* 45 (June 15, 2015) (*emphasis added*).

# ACKNOWLEDGEMENTS

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## FUTURE ASSISTANCE

The NCSC and IAALS are committed to assisting court leaders in implementing the Recommendations in this report. For more information, please visit [ncsc.org/civil](http://ncsc.org/civil).

## DISCLAIMER

This project was supported by a grant from the State Justice Institute (SJI-13-P-201). Points of view or opinions in this document are those of the authors and do not necessarily reflect the official position or policies of the State Justice Institute, the Conference of Chief Justices, the National Center for State Courts, or IAALS.

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EXECUTIVE SUMMARY

CALL TO ACTION:  
**Achieving Civil  
Justice for All**

*Recommendations to the Conference of Chief Justices  
by the Civil Justice Improvements Committee*

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# The Call and a Strategic Response

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Americans deserve a civil legal process that can fairly and promptly resolve disputes for everyone—rich or poor, individuals or businesses, in matters large or small. Yet our civil justice system often fails to meet this standard. Runaway costs, delays, and complexity are undermining public confidence in our system and denying people the justice they seek. This has to change. The Conference of Chief Justices (CCJ) is leading the charge to evolve this pillar of our democracy for the 21st century. Informed by data and proven experience, our Recommendations are a roadmap for restoring function and faith in a system that is too important to lose. We can again be the best choice for every citizen: affordable, efficient, and fair for all.

Restoring public confidence means rethinking how we work in fundamental ways. We need to put citizens back at the center of our system. We must ensure they are heard, respected, and capable of getting a just result, not just in theory, but in everyday practice. We have to harmonize the fairness of our process with the modern, flexible experience people expect. These Recommendations empower courts to embrace new procedures and technologies, to give each matter the resources it needs—no more, no less—and to prudently shepherd the cases we face now.

Given the profound challenges facing the civil justice system and the recent spate of reform efforts, the time was right to take a step back and examine the civil justice system holistically, consider the impact and outside assessments of the recent pilot projects, and develop a comprehensive set of recommendations for civil justice reform to meet the needs of the 21st century. The CCJ created the Civil Justice Improvements (CJI) Committee to develop the Recommendations that follow. They are grounded in research and supported by the experience of state court innovators who are challenging the status quo on behalf of citizens and succeeding. The Recommendations are crafted to work across local legal cultures and overcome the significant financial and operational roadblocks to change. With concerted action, we can realize the promise of justice for all. Our citizens deserve it. Our democracy depends on it.

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With concerted action, we can realize the promise of justice for all. Our citizens deserve it. Our democracy depends on it.

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# Underlying Realities

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Recent empirical research tells us the contemporary civil justice system is very different from the picture generally imagined by most judges and lawyers. High-value tort and commercial contract disputes are only a small proportion of civil caseloads. Instead, the vast majority of civil cases are debt collection, landlord/tenant, mortgage foreclosure, and small claims cases involving relatively modest monetary claims. Very little formal adjudication takes place in these cases. Most cases are disposed by default judgment or dismissal. At least one party, usually the defendant, is unrepresented in more than three-quarters of the cases.

Research also shows that some litigants with meritorious claims and defenses are effectively denied access to justice because it is beyond their financial means to litigate. Others, who have the resources and legal sophistication to do so, are opting for private alternatives to the civil justice system. Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of case law and undermine the ability of other branches of government to respond effectively to changing societal circumstances that become apparent through claims filed in state courts.

In response to these realities, courts must improve how they serve citizens in terms of efficiency, cost, and convenience and make the court system a more attractive option to achieve justice in civil cases.

The Recommendations are founded on several core premises:

- The court, not lawyers or the parties, must control the pace of litigation.
- The “court” is not solely the trial judge. The term encompasses the entire judicial branch including its staff and technological resources.
- Civil cases should be triaged immediately at filing to determine the amount of judicial attention needed to resolve all disputed issues in a just, timely, and cost-effective way.
- Based on the initial assessment, cases should be assigned to a pathway with procedural rules that provide a presumptively sufficient process to meet the needs of the case.
- Effective rules, procedures, and business practices are especially critical to ensure just, speedy, and inexpensive resolutions in uncontested cases and cases involving large asymmetries in legal expertise.

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...courts must improve how they serve citizens  
in terms of efficiency, cost, and convenience...

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# Recommendations

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## RECOMMENDATION 1

**Courts must take responsibility for managing civil cases from time of filing to disposition.**

- 1.1 Throughout the life of each case, courts must effectively communicate to litigants all requirements for reaching just and prompt case resolution. These requirements, whether mandated by rule or administrative order, should at a minimum include a firm date for commencing trial and mandatory disclosures of essential information.
- 1.2 Courts must enforce rules and administrative orders that are designed to promote the just, prompt, and inexpensive resolution of civil cases.
- 1.3 To effectively achieve case management responsibility, courts should undertake a thorough statewide civil docket inventory.

## RECOMMENDATION 2

**Beginning at the time each civil case is filed, courts must match resources with the needs of the case.**

**Courts must take responsibility for managing civil cases from time of filing to disposition.**

## RECOMMENDATION 3

**Courts should use a mandatory pathway-assignment system to achieve right-sized case management.**

- 3.1 To best align court management practices and resources, courts should utilize a three-pathway approach: Streamlined, Complex, and General.
- 3.2 To ensure that court practices and resources are aligned for all cases throughout the life of the case, courts must triage cases at the time of filing based on case characteristics and issues.
- 3.3 Courts should make the pathway assignments mandatory upon filing.
- 3.4 Courts must include flexibility in the pathway approach so that a case can be transferred to a more appropriate pathway if significant needs arise or circumstances change.
- 3.5 Alternative dispute resolution mechanisms can be useful on any of the pathways provided that they facilitate the just, prompt, and inexpensive disposition of civil cases.

## RECOMMENDATION 4

**Courts should implement a Streamlined Pathway for cases that present uncomplicated facts and legal issues and require minimal judicial intervention but close court supervision.**

- 4.1 A well-established Streamlined Pathway conserves resources by automatically calendaring core case processes. This approach should include the flexibility to allow court involvement and/or management as necessary.
- 4.2 At an early point in each case, the court should establish deadlines to complete key case stages, including a firm trial date. The recommended time to disposition for the Streamlined Pathway is 6 to 8 months.
- 4.3 To keep the discovery process proportional to the needs of the case, courts should require mandatory disclosures as an early opportunity to clarify issues, with enumerated and limited discovery thereafter.
- 4.4 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

## RECOMMENDATION 5

**Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.**

- 5.1 Courts should assign a single judge to complex cases for the life of the case, so they can be actively managed from filing through resolution.
- 5.2 The judge should hold an early case management conference, followed by continuing periodic conferences or other informal monitoring.
- 5.3 At an early point in each case, the judge should establish deadlines for the completion of key case stages, including a firm trial date.
- 5.4 At the case management conference, the judge should also require the parties to develop a detailed discovery plan that responds to the needs of the case, including mandatory disclosures, staged discovery, plans for the preservation and production of electronically stored information, identification of custodians, and search parameters.
- 5.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.
- 5.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

**Judges must manage trials in an efficient and time-sensitive manner...**

## RECOMMENDATION 6

**Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.**

- 6.1 At an early point in each case, the court should establish deadlines for the completion of key case stages, including a firm trial date. The recommended time to disposition for the General Pathway is 12 to 18 months.
- 6.2 The judge should hold an early case management conference upon request of the parties. The court and the parties must work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.
- 6.3 Courts should require mandatory disclosures and tailored additional discovery.
- 6.4 Courts should utilize expedited approaches to resolving discovery disputes to ensure cases in this pathway do not become more complex than they need to be.
- 6.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.
- 6.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

## RECOMMENDATION 7

**Courts should develop civil case management teams consisting of a responsible judge supported by appropriately trained staff.**

- 7.1 Courts should conduct a thorough examination of their civil case business practices to determine the degree of discretion required for each management task. These tasks should be performed by persons whose experience and skills correspond with the task requirements.
- 7.2 Courts should delegate administrative authority to specially trained staff to make routine case management decisions.

## RECOMMENDATION 8

**For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.**

**Courts should conduct a thorough examination of their civil case business practices...**

## RECOMMENDATION 9

**Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge's experience in effective case management.**

## RECOMMENDATION 10

**Courts must take full advantage of technology to implement right-size case management and achieve useful litigant-court interaction.**

- 10.1** Courts must use technology to support a court-wide, teamwork approach to case management.
- 10.2** Courts must use technology to establish business processes that ensure forward momentum of civil cases.
- 10.3** To measure progress in reducing unnecessary cost and delay, courts must regularly collect and use standardized, real-time information about civil case management.
- 10.4** Courts should use information technology to inventory and analyze their existing civil dockets.
- 10.5** Courts should publish measurement data as a way to increase transparency and accountability, thereby encouraging trust and confidence in the courts.

## RECOMMENDATION 11

**Courts must devote special attention to high-volume civil dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.**

- 11.1** Courts must implement systems to ensure that the entry of final judgments complies with basic procedural requirements for notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.
- 11.2** Courts must ensure that litigants have access to accurate and understandable information about court processes and appropriate tools such as standardized court forms and checklists for pleadings and discovery requests.
- 11.3** Courts should ensure that the courtroom environment for proceedings on high-volume dockets minimizes the risk that litigants will be confused or distracted by over-crowding, excessive noise, or inadequate case calls.
- 11.4** Courts should, to the extent feasible, prevent opportunities for self-represented persons to become confused about the roles of the court and opposing counsel.

**Courts should publish measurement data as a way to increase transparency and accountability...**

## RECOMMENDATION 12

**Courts must manage uncontested cases to assure steady, timely progress toward resolution.**

- 12.1 To prevent uncontested cases from languishing on the docket, courts should monitor case activity and identify uncontested cases in a timely manner. Once uncontested status is confirmed, courts should prompt plaintiffs to move for dismissal or final judgment.
- 12.2 Final judgments must meet the same standards for due process and proof as contested cases.

## RECOMMENDATION 13

**Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.**

- 13.1 Courts must simplify court-litigant interfaces and screen out unnecessary technical complexities to the greatest extent possible.
- 13.2 Courts should establish Internet portals and stand-alone kiosks to facilitate litigant access to court services.
- 13.3 Courts should provide real-time assistance for navigating the litigation process.
- 13.4 Judges should promote the use of remote audio and video services for case hearings and case management meetings.

**Final judgments must meet the same standards for due process and proof as contested cases.**

# Next Steps

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These Recommendations advocate “what” state courts must do to address the evident urgencies in the civil justice system. While many of the Recommendations can be implemented within existing budgets and under current rules of procedure, others will require significant change and steadfast, strong leadership to achieve that change. The next step is to develop strategies for “how” court leaders can overcome barriers to needed changes and actually deliver better civil justice.

## COURT AND STAKEHOLDER STRATEGIES

We know that successful problem solving is preceded by careful problem definition. The CJI Committee began its work with a comprehensive empirical study of the current state of civil litigation across the country. The Committee urges state courts to undertake their own study to enable court leaders to diagnose the volume and characteristics of civil case dockets across the state and identify major barriers to reducing cost, delay, and inefficiency in civil litigation. Leaders can then sequence and execute strategies to surmount those barriers.

Initially the Committee urges court leaders to build internal support for change. This suggestion derives from the experience of the Committee during its two years of work. This diverse group of judges, court managers, trial practitioners, and organization leaders started their work with an accurate picture of the civil litigation system. Simultaneously, from across the country, they collected a sampling of best practices that demonstrate smart case management and superior citizen access to justice. They then closely analyzed and discussed the data over the course of several in-person, plenary meetings and innumerable conference calls and email exchanges. What resulted?

Unanimous and enthusiastic support for major civil justice improvements. And, for each participant, there

arose intense convictions: The quality and vitality of the civil justice system is severely threatened. Now is the time for strong leadership by all chief justices and court administrators.

Behind these Recommendations is the fundamental tenet that frontline judges and administrators must have the opportunity to ponder facts about the civil justice system in their state and strategize about the Recommendations here. Once that opportunity and those deliberations occur, a wellspring of support for civil justice improvement will take shape within the judiciary. With a supportive judicial branch, courts can face down tough issues and undertake needed improvements.

Court improvement efforts must involve the bar. The Washington State Bar provides a prime example of lawyers, sobered by evidence of growing civil litigation costs, taking bold actions to improve the fair resolution of cases. After four years of labor, the Bar’s Task Force on the Escalating Costs of Civil Litigation last year issued a series of recommendations to make courts affordable and accessible, including a call to “educate the **judges and lawyers** who will be responsible for making the recommendations a reality.”

Likewise, national organizations such as the American Board of Trial Advocates, the American Civil Trial Roundtable, the American College of Trial Lawyers, and the National Creditors Bar Association have contributed to the framing of these Recommendations. Such groups can have a continuing role in promoting them. Some of them have state counterparts that can collaborate with court leaders to educate key constituencies about the state’s top civil justice needs and help develop strategies to implement recommendations that fit their state or locality.



# Future Assistance

Recognizing that organizational change is a process, not an event, the NCSC and IAALS will collaborate to assist court leaders who desire to implement civil justice change. Steps are underway to put the Recommendations into action. For more information and access to implementation tools, go to: [ncsc.org/civil](http://ncsc.org/civil)

## ACKNOWLEDGEMENTS

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## DISCLAIMER

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[ncsc.org/civil](http://ncsc.org/civil)

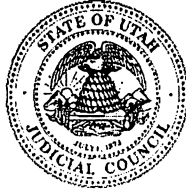
**NCSC**  
National Center for State Courts

**IAALS**  
INSTITUTE for the ADVANCEMENT  
of the AMERICAN LEGAL SYSTEM



**SJI**  
State Justice Institute

**TAB 4**



# Administrative Office of the Courts

Chief Justice Matthew B. Durrant  
Utah Supreme Court  
Chair, Utah Judicial Council

Daniel J. Becker  
State Court Administrator  
Raymond H. Wahl  
Deputy Court Administrator

## MEMORANDUM

**To:** Judicial Council  
**From:** Nancy Sylvester  
**Date:** August 2, 2016  
**Re:** One vacancy to fill on the Committee on Resources for Self-represented Parties

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We have one vacancy to fill on the Committee on Resources for Self-represented Parties.

### **Urban clerk of court**

At some point, when the request for urban and rural clerks of court was sent out, an urban clerk of court could not be found, nor was a rural clerk of court available. So two rural clerk of court designees were added to the committee to fill those positions. Barbara Procarione, who retired recently from the 7<sup>th</sup> district, occupied the committee's "urban" clerk of court position. Upon notice of her retirement, I sent out a request for an urban clerk of court and Alyson Brown, the Farmington and Ogden clerk of court, responded that she was interested but would likely retire before the term was up. She offered a designee in her stead: Tyler Cameron.

According to Ms. Brown, Mr. Cameron is a judicial assistant in the Farmington District Court with a well-rounded background in all case types. He has worked for the Matheson Courthouse Law Library and has spent a significant amount of time working the counter in Farmington. He has a desire to make a contribution to the court and assist self-represented parties with court processes.

On August 2, the Management Committee recommended Mr. Cameron's appointment. The committee would be pleased to welcome him.

**The mission of the Utah judiciary is to provide the people an open, fair,  
efficient, and independent system for the advancement of justice under the law.**



Chambers of  
Justice John A. Pearce

## Supreme Court State of Utah

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PO Box 140210  
Salt Lake City, Utah 84114-0210  
Telephone: (801) 238-7935  
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July 18, 2016

Chief Justice Matthew B. Durrant  
Utah State Courts  
450 South State Street  
Salt Lake City, UT 84114

Re: Reappointment to the Standing Committee on Technology

To Chief Justice Durrant:

The Technology Committee develops and makes recommendations to the Judicial Council relating to the plans, priorities, and strategies that guide and govern technology as applied to Utah's courts and management structure.

The appointment of Judge Michael Westfall's term concluded on June 23, 2016. The Board of District Court Judges recommends Judge Westfall be reappointed to a second term.

I would ask that you act favorably on the nomination of Judge Michale Westfall to the Technology Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "John A. Pearce".

John A. Pearce  
Chair, Standing Committee on Technology

cc: Ron Bowmaster