

Considerations for High-Volume Dockets During the Pandemic



A Pandemic Resource from CCJ/COSCA

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COVID-19 has presented many challenges for courts, who are working hard to be responsive to the conditions that they find themselves in; however, this moment is also an opportunity for courts to adopt lasting, transformative changes from which they and the communities they serve can reap long-term benefits. As many national studies have made clear, state court caseloads have become dominated by traffic, lower-value contract cases, landlord/tenant and debt collection cases. Only a minority of cases involve attorneys representing both parties with an even smaller percentage of cases adjudicated on the merits. The large anticipated number of “high-volume” dockets—focused here on traffic, certain civil cases and family motion practice—presents challenges to litigants, judges and court administrators, especially during COVID-19.

Cases filed in high-volume court dockets tend to share a number of common characteristics:

- The factual and legal issues alleged in the pleadings tend to be highly repetitive.
- In criminal cases, most cases are minor offenses where jail is not a possible sentence. Most are disposed by agreement and without trial, and defendants often appear without counsel.
- In civil cases:
 - plaintiffs are likely to be represented by an attorney who often handles a high-volume of similar cases. As a result, plaintiffs are likely to have significantly greater knowledge of formal and informal court practices and access to case-specific and general legal information; and
 - defendants are likely to be self-represented, often of low- or modest-income, and are likely to be ill-equipped to handle formal court-proceedings, rules of evidence and procedure or laws/rules relating to standing, burdens of proof, available defenses, mitigating circumstances or opportunities for negotiation or settlement.
- In dissolution and child support cases, courts likely hold high volume dockets to accommodate a large number of first-appearances or motions on a particular day. 70% or more of these parties may be self-represented and as above, ill-equipped to respond under the circumstances.

As it relates to these traditionally high-volume dockets, and while keeping in mind hallmarks of procedural fairness, the CCJ/COSCA Post-Pandemic Planning Technology Working Group offers several proposed considerations to assist courts in balancing court operations, judicial efficiency in handling of anticipated large case backlogs, the needs of court users and public health demands.

(1) Hold Telephonic and Virtual Hearings

The imperative to reduce courthouse and courtroom occupancy to permit adequate social distancing to reduce the risk of infection has forced courts to substantially limit in-person hearings and the physical presence of people in courthouses to file paperwork. As a result of these precautions, courts should—as much as practicable—move court processes online, including video and telephonic hearings. In addition, remote hearings may remediate demands court users traditionally faced coming to the courthouse, including loss of income or taking unpaid time off of court to come to court, arranging for childcare or enduring a long commute via public transit or paying for parking (which can be expensive in urban areas). Due to the nature of cases in high-volume dockets, the cases are generally good candidates for fully virtual hearings. Courts may need to relax or suspend certain rules to allow for telephonic or virtual appearances in lieu of in-person appearances.

For those court users who do not have meaningful access to the internet, courts should consider providing access to technology in courthouses, community centers, public libraries, or other community locations to permit those court users to participate virtually. In the alternative, courts should permit lower-technology options, such as telephone services, to ensure everyone is able to participate in court proceedings.

In addition, regardless of the chosen platform or venue for these hearings, courts should use case management to prescreen each case file to ensure that all essential information is presented to the court in advance of the hearing. With both virtual hearings and electronic court files, judicial officers may need additional preparation time to review all pleadings in advance of the hearing; the issues to review may include: whether there has been adequate service, an answer on file, whether a continuance has been requested, whether there has been an action between the parties filed in a different county, and in the case of child support hearings specifically, whether the DNA results are in the file.

(2) Allow for Digital Alternatives for In-Person Procedural Requirements

Courts should modify or suspend procedural rules to allow for social distancing, including allowing for electronic signatures on official documents, facilitating digital notice and service, waiving or simplifying notarization requirements, providing for the remote filing of documents (either through an existing e-filing system or via other means, like email or secure file-sharing platform) and identifying alternative means for screening litigants for indigent defense eligibility or civil filing fee waivers. Where possible, courts should explore waiving fees that are typically paid in person, allow for electronic or telephone-based electronic payment of fees, allow remote payment of fees at locations within the community

(e.g., department or grocery store) and reduce convenience fees where practicable (e.g., e-filing fees, credit card processing fees, secure drop boxes at community centers or the courthouse).

(3) Calendaring Cases in Smaller Batches

Traditionally, in-person high-volume dockets schedule large numbers of cases for the same block of time. This leads to courtrooms that became very crowded and often results in many parties experiencing long wait times before their case was called. The practice of mass calendaring should not be continued in-person or virtually. Instead, high-volume cases should be scheduled to be heard in ten to 30-minute increments, with a small number of cases set for each time block.

When these cases are set for hearing, court dates should be issued with both a date and a specific time assigned (e.g., 9:15 a.m.) together with clear and specific directions about the modes of available participation, ideally including the link to the videoconference platform, plain language directions as to how to use the chosen platform, teleconferencing number and courtroom number if participation is still available in person. If there are additional specific instructions for those joining via videoconference as it relates to virtually checking in with the court clerk in advance of the hearing, those instructions should be offered in plain language in the same court communication. When calendaring many cases, court clerks should account for time for parties to enter the videoconference, take advantage of virtual “waiting rooms” to manage online participation, and to acclimate to the platform.

The reason for changing from mass calendaring is grounded in judicial efficiency as well as in consideration of court users limited available cellular minutes and data. In addition to digital divide concerns, setting a smaller number of cases per time block will avoid confusion. Because some litigants will participate via phone (without access to the judge’s visual, non-verbal communication), setting too many cases for the same time will cause a cacophony of court users joining throughout the proceeding, resulting in confusion and frustration.

At the start of each time block, the judge, hearing officer or courtroom clerk should explain the process to all participants. For example, the judge or clerk should mention that “there are three cases scheduled for this 30-minute period,” and then, name the three cases and explain that “we will take each case in turn.” In addition, court staff can provide assistance and direction to court users in virtual waiting rooms before their cases have been called.

Another consideration when setting court calendars for these traditionally high-volume cases is for courts to try, as much as practicable, to calendar cases with the same plaintiff for the same time period so that the plaintiff’s attorney does not have to keep joining into the platform with different links.

Since law enforcement typically sets the time for the court appearance in traffic cases in particular when issuing the ticket, courts will have to work with law enforcement partners to schedule staggered court times.

(4) Technology May Increase Participation Rate

Several states that have been early adopters for remote hearings have noticed a marked increase in participation rates for all case types. For example, in both Arizona and Texas, courts have seen a manifold increase in self-represented litigant participation in cases.

As the response rate increases, each case may take longer to resolve. This has important implications for calendaring. As such, courts should begin with the assumption that all cases calendared will be litigated and make the determination of the number of cases to schedule for any time block on that basis. So, for example, if a case normally takes seven minutes to adjudicate, courts should only realistically schedule four cases in a 30-minute block. Over time, courts can recalibrate once they have a better sense of the appearance rates in a given case type or geographic area.

(5) Develop “Diversion” Programs for Pre-Hearing Resolution of Disputes

Develop online systems for pre-litigant or pre-hearing resolution of disputes. Examples of such programs include Online Dispute Resolution (e.g., small claims ODR pilot in the West Valley City Justice Court, Utah or traffic ODR programs in Michigan, Connecticut or Arizona) or a partnership with civil legal aid to assist with mortgage foreclosure, landlord/tenant or debt collection cases (e.g., Michigan Eviction Diversion Programs with Temporary Rental Assistance) or adding a pre-trial court event for the court and parties via remote means to see whether they can agree to an early resolution to avoid trial (e.g., Florida). Some courts hold “pre-hearings”: informal proceedings conducted by court navigators, mediators or other staff to allow parties that are unfamiliar with the processes to walk through expectations.

(6) Consider Reassigning Judges or Engaging Special Prosecutors, Retired Judges or *Pro Tem* Judges to Hear High-Volume Cases Remotely

Most states permit the assignment of active judges to hear cases in a specific jurisdiction or case type. At least two jurisdictions have already explored this solution, Michigan and Arizona. During this crisis, state court leaders should explore whether to assign active judges in more rural or less busy courts or whether to engage special prosecutors, retired judges or *pro tem* to assist remotely with cases from traditionally high-volume case types. There may be business cases for pairing active judges together with assigned retired judges or *pro tem* judges to handle the same docket, having the active local judge handle all of the cases, assigning the defaults and agreed cases to the retired or *pro tem* judges. In states where statutes may limit the assignment of active or retired judges, state court leaders should consider the ability to waive those statutes by supreme court order.

(7) Assist Parties with New Procedures

Judges, quasi-judicial officers (such as hearing officers), court staff and court users are starting to use new technology tools for the first time. Because court proceedings may be handled differently to accommodate for social distancing, courts should work to set court user expectations, provide clear guidance for litigant participation and maintain procedural justice principles (voice, respect, understanding and neutrality).