

USING COURT DATA TO INFORM PANDEMIC PLANNING

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The judge or court administrator of 2019 would have a difficult time believing all the changes that 2020 would bring to the courts, including many administrative precedents done away with in a very short period of time. A large percentage of court response to the pandemic has been policy based (for example, the move to remote hearings, expansion of remote access to documents, use of orders/rules to curtail speedy trial timelines, in-person access issues, or jury trial considerations). As with any policy decision, the impetus, implementation, and evaluation should involve the gathering and analysis of data to make the policy successful. The courts need to be ready with data to evaluate these decisions to improve continuity of operations (COOP) planning.

It is not lost on the authors that this type of information would be much more helpful in advance of such an event. This pandemic has provided the courts with not only new ways of working, but also new ways in which to think about the work of the courts. Courts have asked hard questions about what it truly means to provide access to justice, who the essential workers in the court are, and, most importantly, why things are done the way the courts



Using data available to the courts is essential to planning for continuity of operations (COOP) during a pandemic. Courts have an opportunity to lead by creating a data-driven approach to what has been described as a "crisis in slow motion."

have been doing them. Some specific data points can give greater clarity on the work of the courts amid all this change and can aid in determining for what exigencies COOP plans should prepare. This article discusses six areas in which the courts can use data to better understand and plan for pandemics. These six areas reflect on the lessons learned from the pandemic, quantify the impact of the pandemic, and plan for the next pandemic. Individual data recommendations are boldfaced for reference.

WHAT REALLY IS COOP PLANNING?

The purpose of continuity of operations (COOP) planning is to ensure the continuous performance of the court's mission-essential functions during an emergency by protecting essential facilities, equipment, records, and other assets; reducing or mitigating disruptions to operations; minimizing injury, loss of life, and property damage; and achieving a timely and orderly recovery from an emergency to resume full service to customers.

Just as having a COOP plan is important, the plan must be reviewed and tested regularly to ensure readiness. Through regular testing and review, agency personnel can evaluate for any preparedness gaps and implement new procedures as necessary to have an effective COOP plan. Part of that testing is analyzing data to measure whether plans are achievable in their existing context or whether adjustments need to be made.

DATA TO GUIDE PANDEMIC PLANNING



Time

Any court that takes a serious look at their effectiveness has looked at time. So vital are these measurements that they show up twice in *CourTools*: [Time to Disposition](#) and [Age of Active Pending Caseload](#) (National Center for State Courts, 2005b, c). It could be said that time is the real currency of the judicial officer, not cases.

Why is measuring time important in planning for a pandemic? The short answer is because it is already important before a pandemic. With courts and clerk's offices potentially closed due to illness, and the number of cases diminished to the bare essentials, the court has to have an honest self-assessment regarding the length

of time a case should remain open. The majority of states have adopted time standards for felony cases, with slightly fewer having some type of time standards for general civil cases (see Van Duizend, Steelman, and Suskin, 2011). Part of pandemic planning can be acknowledging that these time standards are even more difficult to attain in a pandemic situation, and that we should be measuring the gap between the standard and the reality to gauge the full effect of the health crisis on judicial workload.

Many judicial COOP plans differentiate between "essential" and "non-essential" case types to prioritize cases that must absolutely go forward during an emergency. Typically, these essential case types are given special emphasis through statutory timelines, the potential consequences of judicial inaction, or both. Additional cases may be classified as locally essential but for which there is no statutory timeline. In any respect, **calculating time to disposition and age of active pending cases should be done to separate essential from nonessential cases** to enforce the acceptable time standards that should apply to one or the other.



Jury Trial Considerations

Despite the relatively minute number of cases that are disposed via a jury trial, the right to such a trial remains intact, even during a pandemic. Courts across the country have strained during the COVID-19 pandemic with ways of safely empanelling a jury, or even going to the lengths of conducting a jury trial via videoconferencing. There is no doubt that the constitutional right remains; how best to tackle planning for disruptions in the flow of jury trials is the question at hand.

There are two significant data points to consider in planning for continuation of jury trials during a pandemic. The first is the cancellation of jury trials. The second is jury yield.

Jury trial cancellation. Canceling a jury trial, and having several jury trials on the calendar, can be disappointing. So much energy goes into conducting one, with efforts expended by not only the court, but also the plaintiff, the state (in a criminal case), the defendant, witnesses, and experts, that halting the process is like trying to stop a train. Setting cases for trial is used as a

preemptive strategy by the court to encourage both sides to come to an agreement. Canceling these jury trials is akin to throwing a glass of cold water in the system's face. However, **knowing how far trials are set out, and the number of trial dates needing to be canceled,** can provide the court with useful information on backlog and how much judicial time will be necessary not just when full operations resume, but also when slowing down the train during the initial phase of the pandemic.

Jury yield. Upon returning to full operations, one of the biggest decisions is how many jurors to summon for any particular trial. **Pre-pandemic jury yield numbers offer a meaningful comparison similar to measuring time gaps in the duration of a case.** Many courts have created public relations campaigns for the work done to ensure safe jury service or required jurors to fill out questionnaires before reporting to service. However, there still may be a drop in overall response to jury summonses issued associated with pandemic conditions. While doubling or tripling the number of summonses may be necessary under such conditions, gathering those numbers now can absolutely aid in planning for later.



E-filing Usage

Once the wave of the future, e-filing has become the accepted mode of business for most of the state courts and is rapidly being adopted on the criminal side as much as on the civil side. Such ability to send, file, receive, and view official documents has been a major tool in avoiding in-person contact during the pandemic. With the boon that such technology provides, **judging e-filing's adoption and usage** is important in planning for the court's health crisis response. Such information can be gleaned regularly from the various e-filing service providers (EFSP). **One important consideration in gathering this data is to attempt to gauge self-represented litigant (SRL) adoption of e-filing.** Access to justice is still a concern and having one electronic system for attorneys and one in-person system for SRLs is not serving the best needs of those seeking equitable access to the courts. Having e-filing usage data is important; drilling down into who is using it even more so.



Measuring In-Person (and Remote) Proceedings

The debate over whether to hold certain judicial proceedings in person or remotely contains a lot of nuance, including whether remote hearings protect constitutional rights to confront witnesses and to be tried by a jury of your peers. These considerations should certainly be a part of planning. While the legal arguments supporting or opposing remote hearings are often the first to be made, the administrative arguments are often the ones that wind up in COOP plans.

The first step in gathering data for effective planning in this regard is **to count the number of remote hearings conducted during the existing pandemic and display them both as a number and as an overall percentage of hearings held.** Breaking this down into case categories and case types will make a difference, as certain case classifications will appear more apt to hold remote hearings naturally (i.e., without planning for such), and such instinctive judicial preferences should be recorded. This gathering effort may involve an intensive historical look at calendars and dockets due to the length of the pandemic, but such information will aid the second step in measuring these proceedings.

Second, **courtroom and courthouse loads should be calculated.** This can be done by:

- Multiplying in-person/socially distanced court capacity (such as in a courtroom with a maximum capacity of 14 individuals socially distanced) by available average time (7 minutes average hearing time) gives a courtroom load.
- Courtroom load can be multiplied by the number of courtrooms in a courthouse to achieve the overall courthouse load.
- Other areas of the courthouse will need to be taken into consideration, such as a clerk's office, corridors, other offices, etc.

Courthouse load equals the total number of individuals that can safely conduct business in the courthouse during any given day. This information can be incredibly useful in planning for how to direct in-person resources vs. remote resources during a time where cases are being (or can be) heard in both ways.



Online Document Access

If there is anything that attorneys and parties need when it comes to litigating their case in the courts, it is access to the case file. In a virtual world, that means online access 24 hours a day, 7 days a week. In many places, gone are the days when if one wished to view the case file, they needed to show up between 8am and 5pm, Monday through Friday. Scanning efforts on the part of clerks and a multitude of case management system (CMS) vendors able to provide online access have been a great benefit for those who have such resources available to them.

Information that would be useful for pandemic planning includes:

- How many unique case portal logins occurred during set periods of time (per month, per quarter, etc.)?
- Are there pre-pandemic vs. post-pandemic numbers available?
- Were these users licensed attorneys, SRLs, or members of the public?
- If documents are available to be viewed as opposed to simply case information, how many documents were accessed?

Making sure that online access to case information and documents is sufficient keeps the number of clerk's office patrons down when it most counts and is generally good business, both during and after a pandemic.



Procedural Fairness

With the socioeconomic upheaval that a pandemic response may usher in, it is no surprise that courts will be dealing with more indigent persons and self-represented litigants in the aftermath. Many resources before the pandemic addressed more subjects directly related to a health crisis, such as how to conduct a hearing where an individual is challenging their quarantine or isolation. While these resources are helpful, we have learned they are a generally small consideration.

Procedural fairness considerations should include their own cadre of measures, such as:

- contrasting average remote hearing time to in-person hearing time;
- comparing age of active one- or two-party self-represented cases during the pandemic with age of active pending cases generally (necessary resources may differ for a single pro se party vs. a case with both parties pro se);
- contrasting the number of fee-waiver applications and hearings both before and during the pandemic;
- comparing default judgment and dismissals for want of prosecution numbers with their pre-pandemic counterparts (especially in SRL-heavy case types, such as small claims); and
- measuring the court customer experience with an [Access and Fairness](#) survey such as developed under *CourTools*, ideally pre- and post-pandemic (National Center for State Courts, 2005a).

This list is certainly not exhaustive but gathering and analyzing such data can begin to give the court an idea of its performance when it comes to procedural fairness.



HOW DO THE COURTS USE THIS DATA?

COOP planning has often focused on chain of authority, redundancy, and lines of communication. This works when the emergency occurs and recovery immediately begins. Pandemic planning requires viewing contingencies as a disaster in slow motion. Accordingly, some of the data points presented here highlight the long-term strategy that this type of planning requires.

Some examples:

- Using e-filing data to draft plans for what to do when in-person e-filing assistance (either through a clerk, navigator, or similar) is not available.
- Combining infrastructure information with hearing data can help courts better plan for allowing the proper amount of courtroom traffic.
- Determining the effects of the pandemic on jury yield can more finely ascertain how large a jury pool needs to be summoned.
- Analyzing the age of specific case types, or cases with similar circumstances (such as those involving one or two SRL parties), can exhibit trends that may help the court shift policies and procedures to better serve litigants during the crisis.

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CONCLUSION

During normal times, courts use data to improve caseload management. During extraordinary times, the courts need to use data to keep the wheels of justice turning effectively. The data points discussed here touch each stakeholder in vital ways, from keeping access to the casefile and the court open through e-filing and document exchange, to determining the availability of a trial by jury to preserve constitutional rights. COOP planning went on before the pandemic, and it will go on afterward. Just as judges answered the call at the beginning of this worldwide health crisis to continue their service in new and intriguing ways, the courts should use data not only to inform their plans for the next time (hoping that there will not be a next time), but also to structure the new world in which they find themselves.

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