2021

NATIONAL CENTER FOR STATE COURTS

TRENDS IN STATE COURTS

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Trends in State Courts 2021 articles have been through a rigorous review process. The members of the 2021 Review Board and Trends Committee have provided valuable feedback on this edition. The patience and commitment of the Review Board and Trends Committee are greatly appreciated.

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Trends in State Courts is an annual, peer-reviewed publication that highlights innovative practices in critical areas that are of interest to courts, and often serves as a guide for developing new initiatives and programs and informing and supporting policy decisions. *Trends in State Courts* is the only publication of its kind and enjoys a wide circulation among the state court community.

Submissions for the 2022 edition are now being accepted. Please email abstracts of no more than 500 words by October 18, 2021 to John Holtzclaw at jholtzclaw@ncsc.org. Abstracts received after this date are welcome and will be considered for later editions or for our online version of *Trends*.

Visit the *Trends in State Courts* website at ncsc.org/trends for more information and detailed submission guidelines.

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TRENDS IN STATE COURTS 2021

Edited by
Charles Campbell
John Holtzclaw
Dimarie Alicea-Lozada

To promote the rule of law and improve the administration of justice in state courts and courts around the world.

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ACKNOWLEDGMENTS

Trends in State Courts 2021 was truly a team effort. Without the support and dedication of the court community this publication would not have been possible.

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1971-2021

NCSC'S ANNIVERSARY: 50 YEARS AND TRENDING

When Chief Justice Warren Burger called for the creation of "a national center for state courts" at the first National Conference of the Judiciary in 1971, it is safe to assume that no one in attendance knew what form such a "center" would take. But they did know that it was to serve as a "central resource" to improve the operations of state courts—and that establishing such an organization to serve all the courts of the states and territories required "imagination and daring."

Later that year, the National Center for State Courts (NCSC) began operations in the headquarters building of the Federal Judicial Center in Washington, D.C. The idea was for NCSC to act as an "information clearinghouse" through which data and innovations from one state court could be used to benefit all state courts.

Initially, NCSC's work was largely devoted to reducing court case backlogs and delay. This task was complicated due to inconsistencies in data from the state courts. For instance, what constitutes a "criminal case"? Does it begin at the time of arrest? At the first hearing? There was no consensus, as courts counted cases differently.

NCSC built on its initial work with the publication of *Justice Delayed: The Pace of Litigation in Urban Trial Courts*, and the establishment of the Court Statistics Project. This was in 1978, the same year that NCSC's headquarters building opened in Williamsburg, Virginia, next to the William & Mary Law School. In 1979 NCSC created its Knowledge and Information Services (KIS), marshaling the largest collection of court-administration-related materials in the world—the NCSC Library. That library flourishes to this day.

Members of the Conference of Chief Justices gathered in Denver in 1971, discussing, among many things, the formation of the National Center for State Courts

It took a diverse staff representing numerous disciplines, such as statistics, public administration, law, and adult education, to use NCSC's acquired data and knowledge to help courts improve their operations. The organization went beyond its information-clearinghouse mission to perform original research and provide direct technical assistance to the states. This has led to improvements in caseflow management, jury systems, and the adaptation of technology to court operations, to name just a few areas.

While NCSC's work to improve the operations of courts continues, it encompasses much more. Court leadership at all levels is improved via NCSC's work with national and international court associations, as well as through the education provided by the Institute for Court Management (ICM). NCSC also plays a role in how courts confront social problems, such as domestic violence and drug abuse, through support for specialty courts.

It is interesting to look at the evolution of NCSC through the lens of the annual *Trends in State Courts* report. The original "Report on Trends in State Courts" was published in June 1988 at the request of the Conference of State Court Administrators (COSCA). It started as a photocopied typescript, which featured one topic per page and a brief list of sources. Many of the topics in the 1988 report are still relevant in *Trends 2021*, although they have taken on a different form. For example:

1988	"Alternative Dispute Resolution"	"CCTV in Courts"	"Court Specialization"	"Discrimination in the Courts"
2004	"Reaching Out to Self-Represented Litigants Through Virtual Reference and Education"	"Web Logs: Increasing Courts' Abilities to Quickly Communicate with Constituents"	"Therapeutic Jurisprudence: It's Not just for Problem-Solving Courts and Calendars Anymore"	"The Growing Need for Qualified Court Interpreters"
2021	"Usability and Court Dispute Resolution Platforms" (from ADR to self-help to ODR, or "online dispute resolution")	"COVID-19, Zoom, and the Future of Appellate Oral Argument" (from closed-circuit TV to blogs to Zoom and videoconferencing platforms)	"Pathways through the Pandemic: An Application of Family Justice Pathways in Three Courts" (from a general look at specialized courts to application to therapeutic justice principles to special courts in operation)	"A Court System's Guide to Increasing Diversity and Fostering Inclusion" (from problems of fairness in court processes to language access to community outreach)

This selection of articles from *Trends* 1988, 2004, and 2021 illustrate a shift in the work of NCSC from collecting case data to improving internal court processes to improving courts' relationships with the communities they serve. This work continues with issues such as confronting implicit bias; protecting public health, while still hearing cases, during the pandemic; and improving the physical and online security of the courts.

NCSC was fostered by the vision and determination of court leadership 50 years ago. It will continue to work with courts at all levels to improve access to justice for all and protect the rule of law.

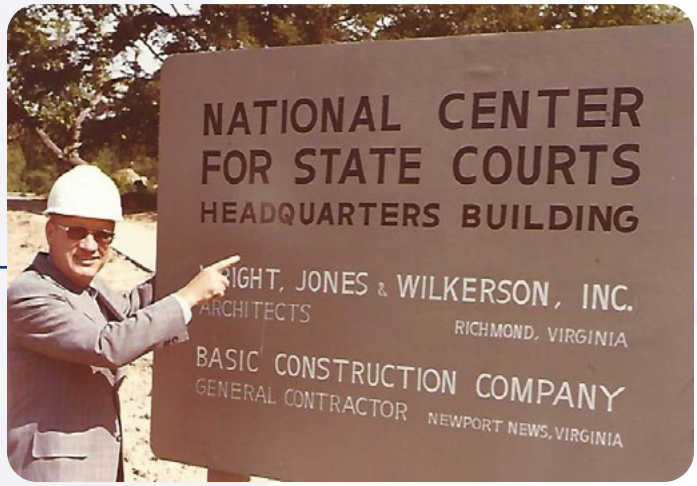
A LOOK BACK

1971

Members of the Conference of Chief Justices gathered in Denver, discussing, among many things, the formation of the National Center for State Courts.

1977

Ed McConnell, NCSC's first president, proudly stands at the future site of NCSC headquarters in Williamsburg, Va.



1982

Linda Caviness became the first woman to serve on NCSC's management team (pictured here in 1987). Front row: Jim James, Ed McConnell, Keith Bumstead. Second row: Geoff Gallas, Harvey Solomon, Caviness, David Steelman, Alex Aikman.

1988

Chief Justice of the United States William H. Rehnquist, center, with William Spong Jr., a U.S. Senator from Virginia and former dean of William & Mary's Law School, and then-Chief Justice of Alabama C.C. Torbert, Jr. at the annual CCJ/COSCA meeting.

1983

Supreme Court Justice Sandra Day O'Connor attends the annual National Association of Women Judges conference.

2005

The William H. Rehnquist Award presentation at the U.S. Supreme Court, with California Judge Len Edwards (center) receiving the award. Left, William Vickery, then-California state court administrator and Supreme Court Justice Anthony Kennedy, retired.

2009

The first women judges from Egypt visit the United States as part of an NCSC program.

2010

President Mary McQueen, former NCSC President Roger Warren, and then-Texas Chief Justice Wallace Jefferson.

2014

Judge Jennifer Bailey of Dade County, Florida, and Sheri Carter of Los Angeles Superior Court, Central District, participate in one of the first meetings of CCJ's Civil Justice Initiative meetings in Arlington, Va.

2015

Chief Justice of the United States John G. Roberts, Jr. addresses guests of NCSC's annual William H. Rehnquist Award dinner.

enter for State

PREFACE

Mary Campbell McQueen
President, National Center for State Courts

For many people, 2021 might seem like a breath of fresh air after 2020. COVID-19 vaccinations are underway; state economies are "opening up"; and after a year of sometimes violent protests and counterprotests, there has been a verdict in the George Floyd case.

But have we come "full circle" from 2020? It is very human to seek closure during a crisis—and to be complacent. After all, vaccinations and face masks remain controversial to some people, as does the guilty verdict in the Derek Chauvin trial. Many people are still working virtually from home.

Can we ever return to what we used to think of as "normal" in both our work and our personal lives? Should we? These questions are still being answered and are an important facet of this year's edition of *Trends in State Courts*.

For example, how do courts increase diversity among their staff? One article discusses what the Kentucky Court of Justice has done to further their own diversity and inclusion policy by reaching out to the communities the court serves.

While the COVID pandemic has kept litigants and staff away from courthouses, courts have remained open, for example, holding virtual proceedings and accelerating the adoption of online dispute resolution. State appellate courts are also holding more oral arguments remotely and have discovered benefits in doing so. Many court activities use technologies we now take for granted, such as video conferencing and text messaging.

Along with its benefits to staff and the public, working from home has also increased the need for vigilance in cybersecurity. Cyberattacks increased during 2020 as compared to 2019. Texas, for example, experienced a ransomware attack that shut down the state's court system. Therefore, some of this year's *Trends* articles focus on the importance of cybersecurity risk management, development of a continuity of operations (COOP) plan to protect court data, and the proper way to use and interpret court data to improve operations.

While 2021 promises a return to a new "normal," the challenges and issues of 2020 linger on. Courts and society will be coping with the fallout from the pandemic and civil unrest for some time. Therefore, we dedicate the 2021 edition of *Trends in State Courts* to the improvement of court operations and the promise of better times to come.

NCSC
TRENDS IN STATE COURTS

A COURT SYSTEM'S GUIDE TO INCREASING DIVERSITY AND FOSTERING INCLUSION

Patrick J. Carrington
Diversity and Inclusion Coordinator,
Kentucky Administrative Office of the Courts

Diversity and inclusion are quite possibly two of the most talked about topics in the workplace today. As the United States continues to become more and more diverse, it is important that organizations take the time to understand the importance of diversity and inclusion and how both subjects impact their workforce. This is true for a variety of agencies and organizations, including our nation's state courts. Over the past few years, through the leadership of Kentucky Chief Justice John D. Minton, Jr., and Kentucky Administrative Office of the Courts Director Laurie K. Dudgeon, the Kentucky Court of Justice has carried out a variety of initiatives to help increase the diversity of its workforce and foster a work environment that is inclusive of all individuals. By sharing a few of the different actions we have taken, my hope is that individuals who read this article will leave both motivated and inspired as they continue their journey in increasing the diversity and inclusion efforts within their respective state courts.

> *One of the most impactful decisions a court system can make is to begin the process of incorporating diversity and inclusion into the fabric of its culture.*

Diversity and inclusion are two of the most popular words in society today, but how do we put them into action? How do we carry them out in today's court systems?

ESTABLISHING POLICY

One of the most impactful decisions a court system can make is to begin the process of incorporating diversity and inclusion into the fabric of its culture. One way of accomplishing this is to create policies that revolve solely around this topic. Creating policies that focus entirely on diversity and inclusion helps show the importance an organization places on the subject. It exemplifies to staff that diversity and inclusion is not just a trend or "topic of the day" but something that an organization plans to uphold and invest in long-term. The impact that this can have on staff within an organization is immeasurable. It can help reinforce the notion that the organization is serious about its efforts to promote diversity, foster inclusion, and create a work environment where all members are equally valued, respected, and included. To the right, you'll find an example of the diversity and inclusion policy that was created by the Kentucky Court of Justice.

RESPONDING IN TIMES OF NEED

2020 was a very challenging year for many. From the pandemic to the numerous instances of racial injustice that took place in the United States, many found themselves in a constant state of confusion, frustration, and restlessness. The state of Kentucky, in particular, was heavily affected by the Breonna Taylor incident that took place in the city of Louisville. This incident had a profound effect upon many of the individuals who serve within our court system, especially those who lived and worked in Louisville. As an organization, we felt it was necessary to create a space for staff members to share how they were feeling and discuss different ways in which we could provide support and encouragement. To accomplish this, we created what we called a virtual dialogue session. This session provided staff members the opportunity to discuss how they felt about the experiences they were having and share different ways in which they were able to cope. In addition, we invited a trainer and specialist on racial trauma to discuss how many of the events that had taken place during that time can affect one's life and what they can do to overcome certain challenges.

This initiative proved to be extremely beneficial. We received very positive feedback, with many individuals stating they appreciated having the opportunity to be heard and express what they were feeling regarding the incidents that occurred throughout the year. Creating opportunities such as this, especially in moments where staff could potentially be experiencing significant amounts of trauma or stress, is a great example of practicing inclusion at a time when it is needed the most. Being willing to respond to situations that could negatively be affecting staff is a key part of actively practicing inclusion.

Kentucky Court of Justice Diversity, Equity, and Inclusion Policy

(1) This section applies with equal force to elected and appointed officials.

(2) A diverse, equitable, and inclusive workplace enhances the public's confidence in the court system and improves the work environment by bringing different viewpoints, skills, backgrounds, and interests to the KCOJ.

(3) The KCOJ is committed to promoting and embracing diversity, equity, and inclusion among its workforce. This includes diversity in race, national origin, color, religion, gender, age, disability, sexual orientation, genetic information, veteran's status, political affiliation, marital or parental status, and socio-economic background.

(4) The KCOJ supports the fair and equitable treatment of all KCOJ employees by prohibiting all forms of unlawful employment discrimination and creating an environment that promotes dignity and respect for everyone.

(5) In support of this mission, the KCOJ will provide training opportunities for employees, elected officials, and appointed officials on matters related to diversity, equity, and inclusion.

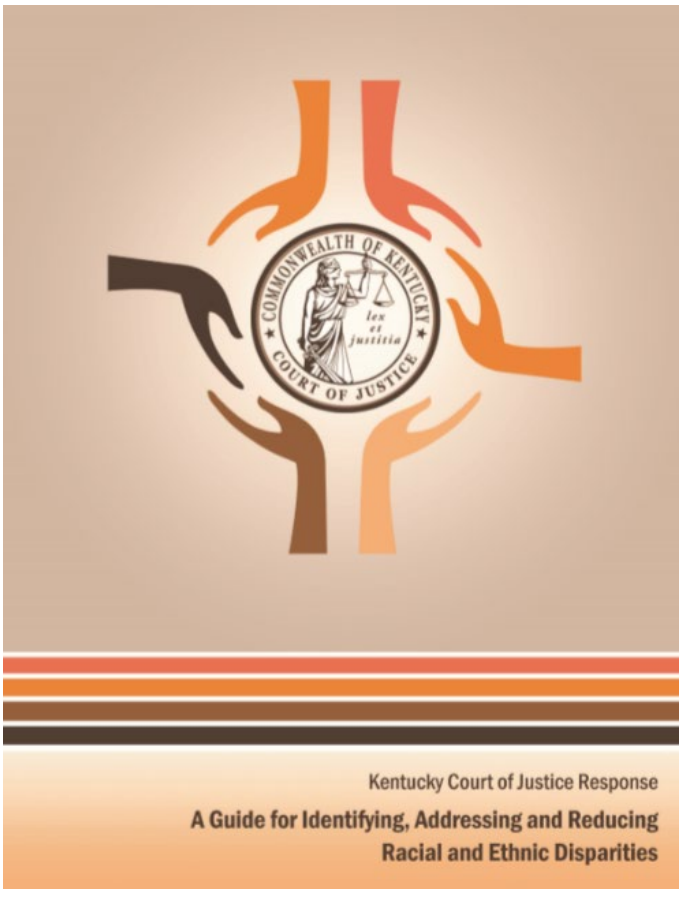
(6) Appointing authorities will work with the AOC Diversity & Inclusion Coordinator to implement employment practices that are consistent with this statement.

ADDRESSING RACIAL AND ETHNIC DISPARITIES

Racial and ethnic disparities can be found within a variety of different organizations and social service systems throughout the world. Unfortunately, the judicial system within the United States of America is not exempt. Many court systems within the U.S. are working diligently to reduce and eliminate racial and ethnic disparities. The Kentucky Court of Justice is a part of said court systems. Over the course of the past few years, the Kentucky Court of Justice has worked meticulously to determine whether racial and ethnic disparities are present within the organization. Much of our focus has been geared toward determining whether these disparities can be found within our three statewide departments (Specialty Courts, Pretrial Services, and Family and Juvenile Services). After carefully reviewing data from each of these three departments, we were able to determine that there are certain cases where racial and ethnic disparities do exist.

To combat these disparities, we have established what we call a Statewide Department Equity Committee. This committee consists of various individuals, including myself, the director and deputy director of the Kentucky Administrative Office of the Courts, and the executive officers of each of our three statewide departments. This committee meets statewide, and the departments are progressing toward reducing existing racial and ethnic disparities. In addition, each of these departments has established their own strategic plan equity committee. These committees consist of the individuals that work face-to-face with the various populations we serve every day. During these committee meetings, staff develop specific plans and strategies to reduce racial and ethnic disparities within their specific departments.

Throughout our journey of seeking to reduce racial and ethnic disparities, we have developed a few steps that any organization can take to begin the journey of reducing racial and ethnic disparities for themselves. These steps are carefully outlined in the *Kentucky Court of Justice Response: A Guide for Identifying, Addressing and Reducing Racial and Ethnic Disparities.*



This guide provides a four-step model that serves as a road map for helping organizations begin their journey to reducing and eliminating racial and ethnic disparities.

Identify disproportionality and disparities within your organization.

Construct strategies that will aggressively address the challenges and barriers to the desired equitable outcomes.

Institutionalize the effective processes constructed that have proven to be successful.

Reevaluate your efforts to measure progress and ensure continuous quality improvement.

These four steps have tremendously helped our organization identify and combat racial and ethnic disparities. Our hope is that in sharing this resource we can continue to create awareness around this topic and help other organizations address this issue as well.

CONNECTING WITH THE COMMUNITY

Building relationships with individuals and organizations within a community can greatly enhance a court system's ability to increase their diversity and inclusion efforts. In 2019 the Kentucky Court of Justice held a community-engagement listening session called "Court Talks" in the city of Louisville. This session was created to provide the public with an opportunity to express any concerns they may have with the judicial system. Representatives from various departments within the state of Kentucky were present, including the Kentucky Department of Corrections; the Division of Probation and Parole; the Department of Family and Juvenile Services; the Department of Specialty Courts; and the Department of Pretrial Service, to name a few. After the initial "Court Talks" session, five additional sessions were offered to the public that focused on topics such as bail and incarceration, eviction, family court, expungement, and the overall courtroom experience.

Making an effort to connect with groups and organizations within your state that are predominately made up of minorities is one of the best ways to learn how to better assist the populations you serve. Building relationships with organizations like local LGBTQIA+ centers or Historically Black Colleges and Universities (HBCU), to name a few, is an excellent way to learn more about diverse populations and create opportunities to recruit diverse talent.

CELEBRATING DIVERSITY WITHIN THE COURT SYSTEM

Taking the time to recognize and celebrate diversity within an organization can be very rewarding and educational for staff. Celebrating events such as National Women's History Month and Black History Month are excellent ways to help the diverse populations within your organization feel valued, recognized, and appreciated.

Earlier this year, the Kentucky Court of Justice honored Black History Month by celebrating a few of the unsung heroes of the Civil Rights Movement. During each week of the month of February, members of the Kentucky Court of Justice received a small biography of a civil rights leader that made significant contributions during the civil rights movement but may not have received as much recognition as a Martin Luther King, Jr., or Rosa Parks. In addition, on February 23, 2021 the Kentucky Court of Justice held a virtual Black History Month Celebration.

During the celebration, staff were provided a presentation on the importance of continuing to honor the lives of the many African American individuals who fought for equality during the civil rights movement. In addition, a panel discussion consisting of three African American judges from the state of Kentucky was also offered to staff.

During the panel discussion, the judges candidly talked about their journey to becoming a judge, and the many challenges they overcame along the way. Creating opportunities to celebrate the diverse populations within your organization is an excellent way to foster a more inclusive work environment and give employees an opportunity to learn more about cultures that may be different from their own.

CONCLUSION

Going forward, diversity and inclusion will continue to play a pivotal role in court systems being able to provide fair and equitable treatment for staff and the populations they serve. With each year, it will become increasingly important for organizations to prioritize this topic and increase their efforts surrounding it. If you are just beginning your journey into diversity and inclusion as a court system or are a few years into the process, my hope is that the tools within this article have helped aid you in your mission to increase the level of diversity within your organization and establish a much more inclusive work environment.

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TRENDS IN STATE COURTS

COVID-19, ZOOM, AND THE FUTURE OF APPELLATE ORAL ARGUMENT*

Hon. Pierre H. Bergeron
Ohio First District Court of Appeals

*An extended version of this article appears in the *Journal of Appellate Practice and Process* 21 (2021): 193.

When the COVID-19 pandemic descended upon us in early 2020, most courts scrambled to find ways to maintain continuity of operations while also protecting public safety for all who entered the courthouse. Appellate courts gradually gravitated toward video oral arguments on various platforms, with Zoom proving prevalent (and I'll use "Zoom" as a shorthand for these platforms). This radical restructuring of how we conduct oral arguments presents some questions worth pondering—chiefly, with oral argument declining across the country in recent years, can we reverse that decline, and if so, what might the future appellate landscape look like?

The pandemic essentially offers us the chance to reimagine appellate oral argument. In a post-pandemic landscape, I see a path to broadening the importance of oral argument, as well as expanding opportunities for lawyers (particularly junior lawyers) to partake of it. Zoom arguments will enable counsel to present arguments that clients might have vetoed previously for travel and costs reasons, particularly in courts with a broad geographic

With a backdrop of declining oral arguments in appellate courts nationwide, most courts experimented with "Zoom" arguments during the pandemic. This technological innovation can provide broader access to justice, transparency, and training opportunities, and appellate courts should consider how to benefit from this medium even after the pandemic.

reach. I do not mean to suggest that we should allow Zoom arguments to supplant in-person ones, but rather we should be open to the benefits that it can provide. This essay, in short, represents a defense of the continued significance of oral argument while recognizing that we can avail ourselves of new technologies (such as Zoom) to broaden the "appeal" of oral arguments and increase public access to them.

THE DECLINE OF ORAL ARGUMENTS

Years ago, when I served as a law clerk on the U.S. Court of Appeals for the Sixth Circuit, the court permitted every (counseled) party the opportunity for oral argument so long as counsel requested it. Fast-forward to today, and oral argument at the Sixth Circuit, much like most of its sister circuits, is essentially a rarity. And, indeed, in many appellate courts across the country, that same trend holds true.

So why has oral argument declined? Courts justify the decline in oral arguments for various reasons, but I highlight a few of them. First, courts typically cite the demands of their dockets as precluding frequent oral arguments. Time spent preparing for and participating in oral argument, so the reasoning goes, detracts from other matters at hand for a busy appellate judge, such as opinion writing. This is a fair critique—to a point. While time spent on the bench refereeing oral argument could certainly be allocated elsewhere, I'm less convinced that the time spent "preparing" for argument represents a lost cause. Judges should spend time on the case regardless of whether oral argument will occur, and I do not see the harm that comes from some more focused effort on particular cases. After all, if the case is open-and-shut, a judge is unlikely to burn the midnight oil preparing for it.

Second, the appellate judicial mindset has shifted a bit, and I suspect that many judges simply do not find oral argument as helpful as in generations past. A number of factors might explain this trend, but generally, I think it involves the wealth of information that we, as judges, now have at our fingertips before stepping to the bench for argument. In many courts, the practice of circulating bench memos among judges in advance of argument telegraphs how judges are inclined to rule. The caliber of contemporary law clerks and the level of preparation in advance, by clerk and judge alike, often leaves little to debate by the time that argument arrives in many cases.

Third, and tied into the two points above, judges are sensitive to the costs and delays attendant with oral argument. Hence, courts often think they are doing parties a favor by dispensing with argument. I have heard several appellate judges express the notion that argument in a particular case would just subject the clients to needless expense if we (the appellate panel) have already made up our minds. Having spent almost twenty years in private practice, with clients keeping a vigilant eye on billings, I can certainly appreciate that concern. While I am not insensitive to the costs of legal proceedings, I also recognize that a lawyer and client can make an educated choice about whether oral argument—or even pursuing an appeal, for that matter—is worth the cost. And we, as appellate courts, must ask ourselves hard questions, such as are we primarily granting argument in higher-profile cases, or are we allowing low-dollar (but potentially intriguing) cases to be argued as well?

One could offer myriad reasons for why oral argument is declining, and there is probably a kernel of truth to all of them. We can debate the reasons but not the effects: oral argument has declined for years, which raises questions about its future viability.

ENTER COVID-19 AND ZOOM

The COVID-19 pandemic ushered in dramatic changes in our legal system as courts struggled to remain open without jeopardizing public health and safety. For appellate courts, our primary interaction with lawyers and the public occurs during oral argument. As states across the country shut down during the early stages of the pandemic, many courts suspended oral argument for at least a while, but as we began to realize that COVID-19 was not going away anytime soon, courts began considering

> *We can debate the reasons but not the effects: oral argument has declined for years, which raises questions about its future viability.*

various alternatives: telephonic argument, video/Zoom arguments, and socially distanced arguments with masks. While none of these measures proved perfect, Zoom arguments emerged as the consensus choice in federal and state appellate courts. That evolution thus raises a question—how has that worked so far?

Early in the pandemic, I circulated a survey to several federal and state appellate judges and lawyers across the country. While this was not a methodologically sound survey with an appropriate sample, it was designed to gather an impressionistic sense from judges and lawyers as to the efficacy of this new medium of Zoom arguments as all of this unfolded in real time.

With the caveat that just about everyone said that they preferred in-person arguments, appellate judges and lawyers seemed to embrace this new technology with somewhat surprising enthusiasm. Part of the reason for that is that many viewed telephonic arguments as inadequate, and thus not a viable option. But appellate judges found the Zoom technology relatively easy to use and a reasonably adequate substitute for in-person oral arguments. One state supreme court justice remarked, "The video oral arguments have worked well. I'm looking forward to returning to live oral arguments, but I think there may be a place for video oral arguments in the future." A justice from a different state echoed the point: "Zoom has been fantastic."

One state intermediate appellate judge appreciated the increased public access to the proceedings: "the public, other attorneys or out of town attorneys can easily view [the arguments] whereas before the audience was far less." A state supreme court justice from a more rural state echoed the point: "My state is quite large geographically, so it might be a good option for lawyers who have to travel."

On the other side of the lectern, appellate practitioners found the technology reasonably user friendly, and they applauded efforts of bar associations and courts to provide assistance and training to appellate lawyers. Some lawyers appreciated certain "luxuries" allowed by the new format, such as having case files, relevant precedents, and exhibits at the ready on their desk when they typically could not lug all of those materials to the podium. And certainly, despite all efforts to maintain formality, a reduced formality necessarily comes with Zoom, which might be comforting, particularly to more junior lawyers. Technology-related concerns, however, remained top-of-mind for lawyers, as even the most technologically savvy of us cannot guard against everything that could go awry in a Zoom argument—as one lawyer reported, the fire alarm in his building went off during the middle of argument.

While Zoom certainly has its converts, some respondents to the survey questioned the efficacy of Zoom and debated the ongoing role of the platform. Many voiced concern that Zoom arguments are not necessarily a practical solution in many corners of our country without reliable Internet access. And this problem is not confined simply to lawyers, as many courts permit *pro se* litigants to present oral arguments. How can we ensure that *pro se* litigants have adequate access to technology sufficient to present a Zoom oral argument?

Respondents also disagreed on whether Zoom facilitated public and media access to oral argument. Some courts, including many state supreme courts, already provided streaming video access to oral arguments pre-pandemic. Other courts collected audio recordings of oral arguments on their websites. While some appellate judges see a virtue in Zoom as increasing access to argument, such an increase only happens if the courts permit streaming viewing and provide a reliable archive of the arguments (perhaps using YouTube as a repository).

The "jury," as it were, remains out on Zoom, but we are becoming accustomed to the medium and beginning to see how it might play a continuing role for appellate courts.

A DEFENSE OF THE MODERN ORAL ARGUMENT

As we ponder the future of oral argument, it is helpful to remember some of its virtues. The lay public often misunderstands appellate courts because they seem shrouded in mystery. Oral argument puts the decision-making process on display, providing clients and the public alike with a glimpse into that process that (hopefully) cultivates a sense that judges are prepared and care about the cases. Sitting in our ivory towers and never letting the public see our work process firsthand would inevitably erode trust and confidence in the judiciary. The more we chip away at that right and experience, the more we remove that connection and render the lawyers less vested in the appellate process.

Oral argument also leads to enhanced decision making. I recall numerous examples during my time on the bench where oral argument might not have changed the ultimate result, but it certainly impacted how we approached the opinion. Oral argument can enrich our understanding of cases, which directly impacts how we write opinions, and thus the evolution of case law. Cases and record cites often emerge at argument in sharper relief, enabling us to consider those points anew in light of the argument. And argument can, and does, sometimes sway results.

Nor should anyone overlook the value of conference in the overall calculus of the worth of oral argument. Particularly in courts with jurisdiction over numerous counties or states, oral argument may be one of the rare occasions when the judges gather together in person, sometimes even breaking bread afterwards. In a world where many judges communicate regularly through email, the debate back and forth is helpful not only in resolving a particular case, but also in building collegiality between colleagues.

> *... if we want this tradition of oral argument to endure, as I suspect most would readily acknowledge, then we need to be open to some changes and to taking a leadership role to implement them.*

HOW WE INTEGRATE ZOOM

Zoom has the potential to broaden public access and understanding of appellate courts, and even to help improve oral arguments. We therefore should embrace this medium for at least limited use post-pandemic.

Zoom, if properly used, can become a powerful tool to both increase access to justice and to enable courts to modernize. Zoom has already lifted the veil on how appellate courts function. The federal D.C. Circuit reported that around 90,000 people logged in to "attend" two high-profile arguments during the pandemic, and a Michigan Court of Claims hearing garnered 50,000 viewers. This renewed interest in the appellate process by the general public has convinced some that the pandemic actually *increased* court transparency.

And it can continue to do so. We should be flexible and allow for Zoom arguments, post-pandemic, in situations where the parties request it, particularly when the argument would necessitate travel or other expenses that could be avoided. Zoom argument has also shown us that people actually pay attention to livestreamed arguments. Many courts now appreciate what several state supreme courts at the vanguard of this movement have known for a long time: livestream arguments are a valuable resource for lawyers and clients, as well as a transparency tool in this modern age.

As we consider how technological innovations can enhance oral argument, we must also place a renewed focus on oral argument to ensure its long-term vitality. First, we must help cultivate the next generation of appellate lawyers. Right now, it is exceedingly difficult for junior lawyers to obtain meaningful oral argument experience. How can one excel without practice?

So how do we do that? A couple of thoughts come to mind. Appellate courts that restrict oral argument should consider granting it—even if it would otherwise be denied—if a junior lawyer is going to argue. Hand in hand with that, bar associations should focus on appellate mentoring, such as organizing moots for lawyers undertaking their first arguments. Relatedly, courts should consider creating some type of pro bono appointment program that would help provide argument at-bats for aspiring appellate lawyers. One of the chronic problems in the legal profession is matching underprivileged clients with junior advocates who desperately need the experience and are willing to work pro bono.

Now consider how we could overlay Zoom on such efforts—pro bono lawyers without funding might not be able to afford to travel to an oral argument, and Zoom could solve that problem by obviating the need for travel expenses. This creates a win-win-win: junior lawyers get great experience, appellate courts receive better advocacy, and the otherwise *pro se* party secures counsel.

In conjunction with this point, appellate courts should also revisit their court-appointed lists. In most courts, these representations do not pay much, but adding Zoom as an option for oral argument may make these appeals more affordable to counsel (particularly junior lawyers who might not otherwise be on the appointment list). Mandating training for these appointed lawyers, and allowing them to attend remotely, can help expand, diversify, and improve the panel. And we must acknowledge the reality that some arguments may just be better suited for Zoom (for a host of reasons), and perhaps we should evaluate rule changes to allow for that.

Finally, appellate judges need to play an active role in helping educate lawyers about oral arguments and technological changes. During the pandemic, I have seen firsthand a number of appellate judges stepping up in seminars to help educate the bar about Zoom oral arguments, and we must continue that work. If we want better oral arguments, we must be invested in the process.

The bottom line is that appellate courts and appellate lawyers are at a moment where we must reevaluate oral argument and think critically about it (the ABA and others are already undertaking such efforts). Zoom might be the lightning rod to help spark that discussion, and if we want this tradition of oral argument to endure, as I suspect most would readily acknowledge, then we need to be open to some changes and to taking a leadership role to implement them.

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NCSC
TRENDS IN STATE COURTS

USING COURT DATA TO INFORM PANDEMIC PLANNING

Nathan Jensen
Assistant Director-Court Services,
Administrative Office of the Illinois Courts

Monica Allen
Court Services Manager, Special Programs Unit,
Administrative Office of the Illinois Courts

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 empaneling 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.

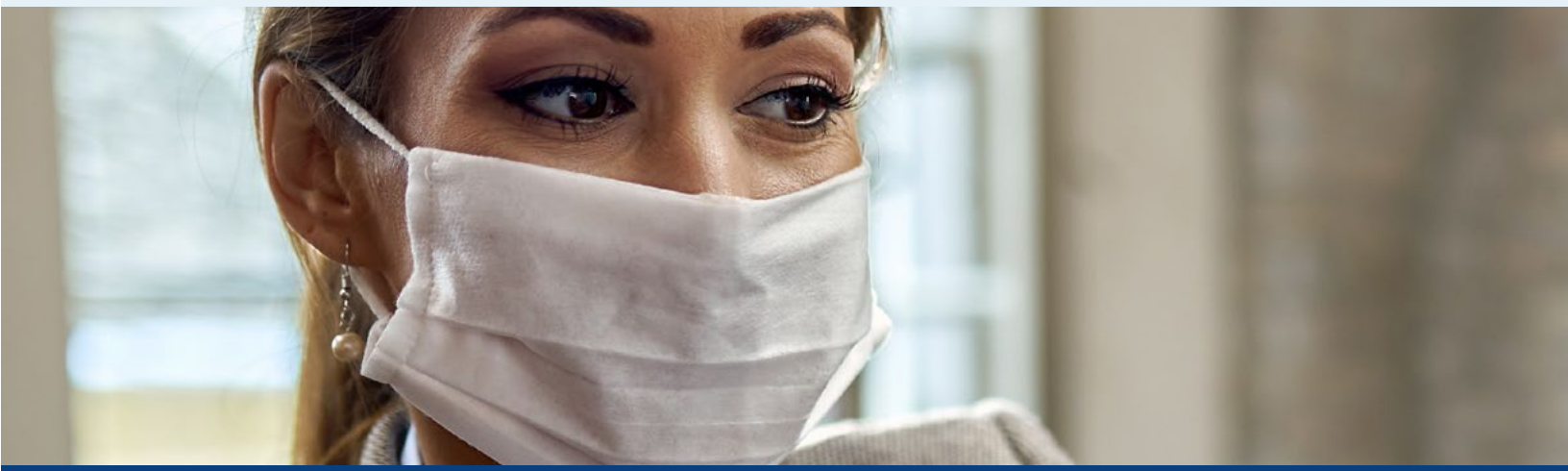
Procedural Fairness

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.

> *During extraordinary times, the courts need to use data to keep the wheels of justice turning effectively.*

CONCLUSION

During normal times, courts use data to improve caseflow 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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PATHWAYS THROUGH THE PANDEMIC: AN APPLICATION OF FAMILY JUSTICE PATHWAYS IN THREE COURTS

Alicia Davis
Project Director, Cady Initiative for Family Justice Reform; Principal Court Management Consultant, National Center for State Courts

Michael Saini
Co-Director, Combined J.D. and M.S.W Program, Law Faculty, University of Toronto

As 2021 begins, vaccines are slowly circulating the country, bringing hope for a renaissance. As courts look toward the light at the end of the tunnel, our collective comeback will require adaptation. "Non-essential proceedings" have been suspended in many cases for months. Staffing has been reduced due to temporary absences, changed positions, or budgetary concerns. Backlogs are common, even for courts that were early adopters of remote hearings and technologies.

As described in greater detail in "The Family Justice Initiative: A Work in Progress" (*Trends in State Courts 2020*), Pathways approaches have been applied in civil and family cases with demonstrated effectiveness. The Cady Initiative for Family Justice Reform recommends that courts "aggressively triage cases at the earliest opportunity" to determine which "pathway" is most likely to provide the services and case management that a family needs to resolve their case. This approach has been endorsed by the Conference of Chief Justices and the Conference of State Court Administrators, the highest authorities in state court leadership.

COVID-19 has demonstrated the need for adaptable, flexible court initiatives to respond to changing demands, pressures, and climates. More courts are focusing on differential approaches, proportionality of services, and the use of "Pathways" to enhance the timing, individualization, and efficiency of court services.

This article profiles three courts that have succeeded in providing responsive, adaptive services to families in the middle of the pandemic by implementing Pathways approaches. The leaders in these courts have even leveraged opportunities occasioned by the disruption. Connecticut reformed a motions calendar that parties had previously criticized. Marion County, Indiana unified a court and streamlined processes while they planned a move into a new facility. Making decisive use of available funding, Johnson County, Kansas blazed the way into automation of triage to put family filings on Pathways and piloted a protection order portal. Their successes provide a path for other courts in the recovery efforts ahead.

UNIVERSAL COURT CHALLENGES RELATED TO THE PANDEMIC

Courts across the country are experiencing limited staffing and calendar time. In child and family law, courts are reporting that the actions filed represent higher degrees of potential risk and acrimony than before.

All courts in the country are experiencing staff shortages. Jamie Perry is the family law manager in King County, Washington, a court that receives almost 9,000 domestic relations petitions each year. She reported that they have had significant challenges keeping family law frontline workers because of cuts or illness, or because workers did not want to be exposed to the virus.

Absences and vacancies related to COVID may soon go away, but some positions and functions have had to be repurposed to retrofit court processes to a virtual environment. For example, in the Marion County Superior Court, as in many courts across the country, staff that previously processed filings are working virtually with parties to assist them in responding to procedural steps.

Courts are experiencing limited calendar time. Even courts that have accessed all available technologies have experienced delays in the disposition of cases. Since fall 2020, the National Center for State Courts (NCSC) has monitored case filings and disposition data from a small national data sample. When courts suspended in-person hearings in March 2020, filings for many cases temporarily plummeted but soon returned to previous levels. Tyler Technologies reported in December that divorces were trending 15 percent higher. Disposition rates, on the other hand, have not caught up. Does this indicate a dampening in court functioning related to staffing or other circumstances? While courts are ramping up operations, reports are emerging documenting higher rates of mental health problems, financial strains, domestic violence, and child maltreatment and neglect. The cases coming in will require more careful consideration.

Courts must adapt to overcome these challenges. Judge Jennifer Bailey of Miami recounts what it was like to oversee cases after the mortgage crisis of 2008 that hit southern Florida especially hard. Case filings continued to outpace dispositions, accumulating for some time: "You can't judge your way out of a backlog, you can only manage your way out."

We begin with consideration of the State of Connecticut, Family Division, which has worked within the current disruptions to transform a litigious motions calendar into a triaging system that is highly responsive to the needs of parties.

STATE OF CONNECTICUT, FAMILY DIVISION

Through strong judicial leadership, a dedicated cross-divisional team and collaboration within court and community partners, Connecticut has successfully implemented a Pathways case management approach mid-pandemic.

The family division within the Connecticut Judicial Branch addresses some 40,000 matters annually involving child custody, child access, financial matters, property disputes, and restraining orders with 30 full-time family court judges statewide; 70 to 80 percent of parties are self-represented. The family division provides a wide array of services overseen by experienced court employees with a background in working with families. In 2015 Connecticut conducted a public perception survey as part of continuous improvement. While 73.6 percent of family court customers reported satisfaction, areas of dissatisfaction were the time it took to resolve cases and the cost. This spurred Connecticut forward in reengineering with an eye on the short calendar.

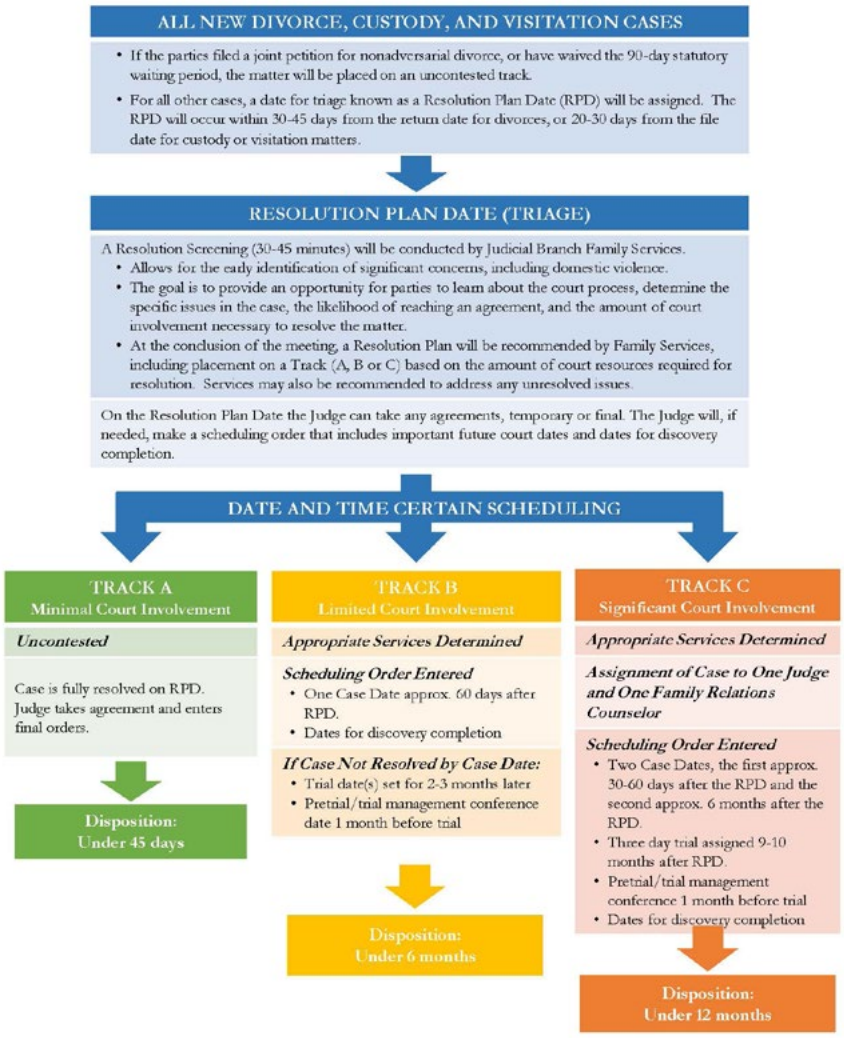
The short calendar was a motions calendar that gave parties speedy access to the court within two to three weeks of filing a motion, but a culture of repetitive motions soon developed around it. The often-crowded court calendars could not allow for meaningful consideration of the matters asserted. It cost parties time and money in

court. Under the leadership of the presiding judge of the family division, Michael Albis, and the family team (Joe DiTunno, Danielle Sanquedolce, Johanna Greenfield, and Damon Goldstein), Connecticut studied the feasibility of a Pathways case management approach.

Connecticut designed three Pathways, from light to more intense court involvement (see Figure 1). Family services meets with parties within 30-45 days of the filing of the return pleading to ascertain party needs and establish a Pathway for resolution. The Pathways match cases and parties to appropriate resources and services both within and outside the court. The Pathways are flexible, and cases can move between tracks if more information would indicate a greater or lesser need for services or court oversight.

Once the new processes were designed, Connecticut reached out widely to local jurisdictions to present an overview of the contemplated processes, request input, and troubleshoot challenges. The judicial branch originally planned to discuss the new processes broadly with all stakeholders with a view toward the intended January 2021 rollout. The pandemic prevented the broader outreach from happening as planned but necessitated the earlier commencement of the proposed new scheduling methods, which are more conducive to remote proceedings than the short calendar. The outreach effort has now resumed, with an eye toward adjusting and refining with the benefit of practical experience.

FIGURE 1: PATHWAYS TO RESOLUTION



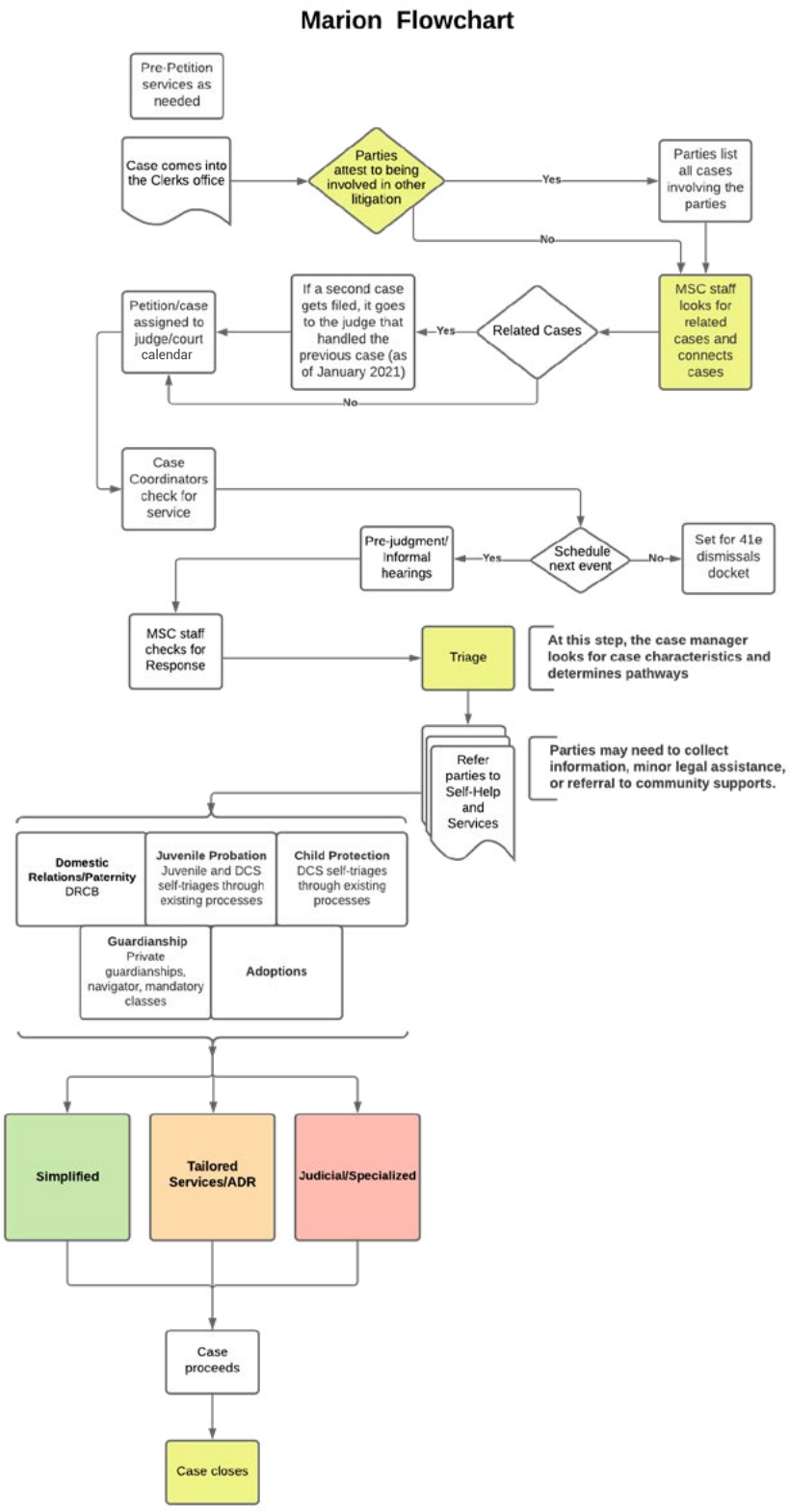
During a virtual statewide meeting to review the Pathways case management approach, the family team emphasized the opportunity to resume stronger by putting in place more agile and responsive practices. The impressive combination of leadership, a strong history of services for families, and cross-departmental coordination allowed Connecticut to implement Pathways case management according to the original launch date of January 2021. Connecticut continues forward and is collecting data on impacts. They have also influenced other states. Marion County, Indiana is forging a path for implementation of Family Justice Pathways, with the support of the Indiana Supreme Court.

THE INTEGRATED FAMILY DIVISION OF THE MARION SUPERIOR COURT IN INDIANAPOLIS

Leadership of the Marion Superior Court has been planning to move to a new Community Justice Center in January 2022. Court leadership saw the move to a new, unified facility as a timely opportunity for the implementation of best practices that can better serve families facing legal challenges in court. The integrated family court within the Marion Superior Court will oversee approximately 8,500 cases involving juvenile case types, dissolutions, paternity, guardianships, and adoption. In preparation for that move, the superior court has continued work on reform efforts that would be impressive under ordinary circumstances. Under pandemic circumstances, their efforts are incredible.

In contemplation of a world-class, integrated family division, the Marion Superior Court began writing a caseflow management plan in 2019 to "provide a uniform procedure for resolution of all issues in child, youth, family, and guardianship cases in the family division." The plan was intended to reduce the negative impact of adversarial litigation and promote the satisfaction and well-being of family participants and court representatives. As the pandemic raged across the country, forcing the court to suspend some proceedings, the superior court studied its case management data with greater urgency, calling upon Jeff Hall, a court administrator in Oregon and IAALS advisor, to help them consider various methods to prevent a backlog of cases from growing. Case clean-up, reasoned Associate Presiding Judge Alicia Gooden, would assist the court in being responsive

FIGURE 2:
FAMILY TRIAGE AND PATHWAYS PROCESS



and agile once full operations resumed. The court is also working to adopt informal domestic relations trials, a relaxed procedure that helps unrepresented parties to better engage in their dissolution processes. Finally, the court has envisioned this triage and Pathways process for all families to be served (see Figure 2).

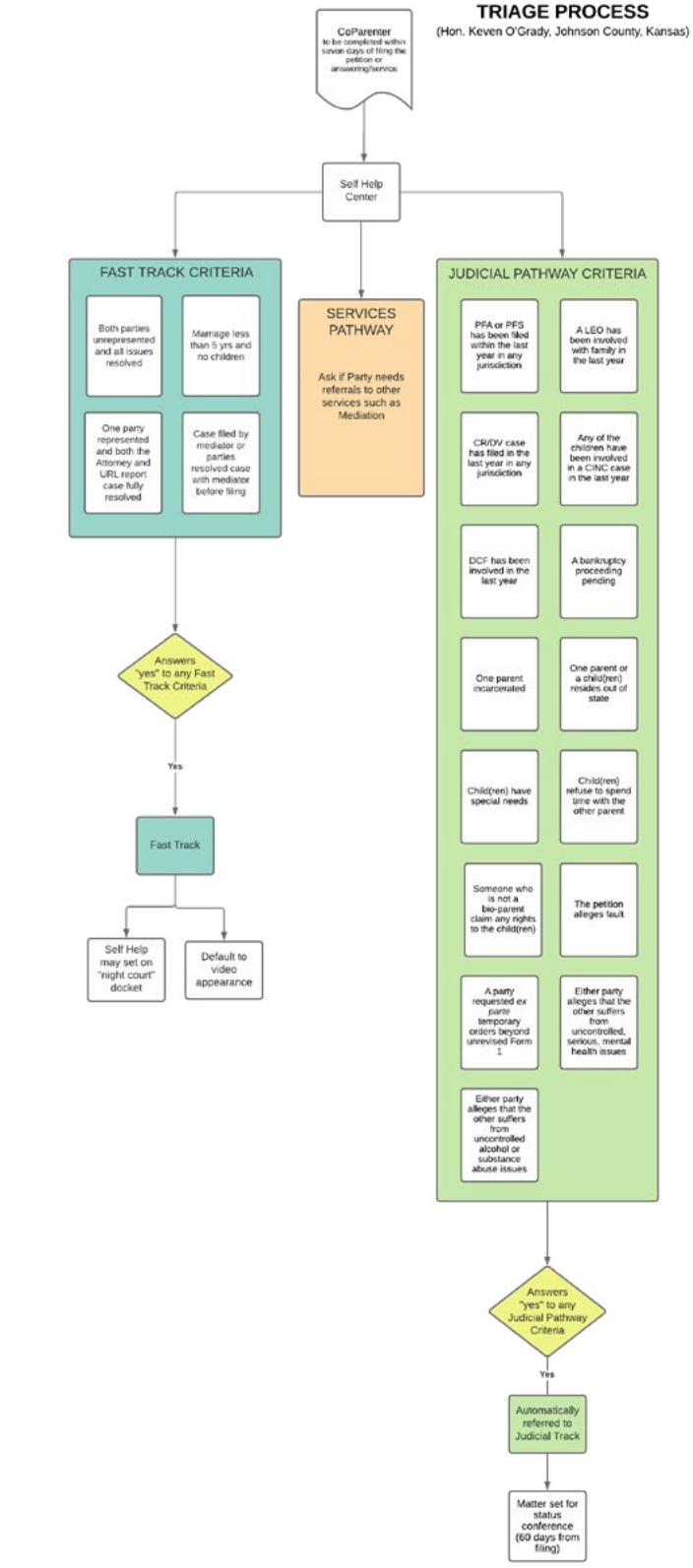
Finally, the superior court is expanding self-help and dispute resolution services. John Greacen provided a court-wide training on the difference between legal advice and legal information on behalf of IAALS. Working to expand upon dispute resolution, court administration has reached out to community partners to allow more parties to access mediation services through experienced mediators trained in trauma responsiveness and conflict. To provide the opportunity for peers to share information, Term Manager Polly Beeson is overseeing a full training curriculum designed to support the integration, addressing topics for each case type. The Marion Superior Court is a court to look to now and in the future.

JOHNSON COUNTY DISTRICT COURT, KANSAS

The family division within the Johnson County District Court may present the most stunning example of thinking quickly on their feet during the pandemic. They accessed available pandemic funding to contract for use of dispute resolution software and quickly designed a triage process that could be built into the software. They did so in the middle of a pandemic, and in the middle of a move to a new facility, similar to the Marion Superior Court.

There has been recent focus on the effectiveness of the court case management teams (CCMT) to provide higher quality justice with existing staffing. Johnson County participated in an October 2020 virtual CCMT workshop along with other jurisdictions throughout Iowa and Kansas. The five judges within the Johnson County Family Court hear a wide variety of

FIGURE 3: JOHNSON COUNTY TRIAGE PROCESS



cases, including divorces with children, parentage and support cases, and civil protection from abuse/stalking cases. During the workshop, the Johnson County executive team consisting of Keven O'Grady, presiding judge of the family division; Katherine Stocks, court administrator; Vannessa Rockers, self-help manager; and Nicolette Bennett, district court trustee, analyzed court data, identified elements for simplification, and established a case management plan.

Within three meetings, this group had established a triage and Pathways process. The executive team agreed that new staffing to apply the triage model was not feasible under current staffing limitations. Recognizing this limitation, Judge O'Grady investigated all possible means of service provision, including automation of processes. Having applied for CARES act funding due to COVID disruptions, Judge O'Grady reached out to CoParenter.org to consider how the application could be used for all dissolution or parentage cases and negotiated a process within the space of weeks. After looking at the Alaska Early Resolution factors, Judge O'Grady's team designed an instrument for determining Pathways (see Figure 3). In this model, the parties will respond to a guided interview, which will be reviewed by self-help personnel who determine the Pathway. As the first example of the automation of the Family Justice Initiative Pathways process, the potential is tremendously exciting. Given its potential to maximize staff ability to assist parties through the Pathways approach, it is hoped that this will serve as a template for other states to follow, especially at a time when staff are stretched thin.

This is not Johnson County's only innovation. With a projected go live date of April 1, 2021, Johnson County is currently testing a protection order portal in collaboration with the Kansas Office of Judicial Administration and the University of Missouri, Kansas City School of Law. Used in Arizona, Utah, and elsewhere, protection order portals allow parties to obtain an Order of Protection quickly and virtually, without cost or the risk of appearing in court physically. The University of Missouri, Kansas City School of Law has offered to share the backend of the portal with other interested jurisdictions, which may be viewed at www.kspop.org. The portal will be included in the 2021 Implementation Labs, a national learning community that will share resources, experiences, and challenges. This lab, like the others, will synthesize and document implementation plans, progress, challenges, and sustainability strategies for the national court community.

CONCLUSION

These court leaders implemented creative adaptations based on differential approaches for early and individualized attention to the unique needs of families, while finding the most efficient ways to address pandemic-related conditions. These courts have used Family Justice Pathways to establish processes that will assist with incoming and existing cases, while providing parties the services they need. Early indications are that they have better poised themselves to respond to future needs.

It can be daunting to consider the path ahead. In the short term, we need creative and innovative approaches to address the backlog of court filings to preserve public trust and confidence. We must remain vigilant to find the most effective approaches to address the administration of justice while being flexible to respond to the ever-changing realities, as have these three courts. Stacey Marz, Alaska's state court administrator and a leader in access-to-justice initiatives, encourages courts to be bold, despite the current challenges: "In some ways, it has never been as acceptable to make change as it is now."

These courts have taken advantage of a moment of uncertainty to try new practices that are showing the first indications of positive adaptation. They have shown that through effective leadership and *esprit de corps*, implementation of Pathways not only is possible but can also rebuild case management practices to be stronger, more robust, and progressive.

> *We must remain vigilant to find the most effective approaches to address the administration of justice while being flexible to respond to the ever-changing realities ...*

NCSC
TRENDS IN STATE COURTS

A WHOLE OF SOCIETY APPROACH (WOSA): LOOKING OUTWARD BEYOND THE COURTHOUSE

Ingo Keilitz

Principal, CourtMetrics; Visiting Scholar, Public Policy Program, and Research Scholar, Global Research Institute, College of William & Mary

How should courts respond to the existential crises facing our society today—not only the global pandemic and deepening inequality, but also economic collapse, domestic terrorism, institutional dysfunction, and political turmoil? Court leaders and their justice system partners should focus both inward to courts' practices and outward to the community and society. They should not only speak out, but also act now with urgency. Management philosopher Peter Drucker once said, "The important thing is to identify the future that has already happened and face the realities immediately and decisively" (Drucker, 1989: 3).

Every hundred years or so, we experience a sharp transformation. We come to an inflection point and must cross a divide, writes Drucker in *The New Realities* (1989). "Within a few short decades, society rearranges itself—its worldview, its basic values, its social and political structure, its arts, its key institutions. Fifty years later, there is a new world. And the people born then cannot even imagine the world in which their grandparents lived and into which their own parents were born."

In addition to the COVID-19 pandemic, society and the courts face an array of existential challenges, such as inequality and economic turmoil. If courts are to face these challenges, they much look both outward at the community and inward at their own practices.

We are currently experiencing such a transformation with separate existential crises combining with each other, rapidly forging new realities where the impacts are felt today. These realities underlie the necessary reinvention of our courts and other public institutions, a rethinking of our basic values, and what is likely a permanent reorganization of everything we do.

> *The important thing is to identify the future that has already happened and face the realities immediately and decisively.*

FULFILL PRIMARY MISSION BUT LOOK BEYOND BORDERS

The future is inherently uncertain. The new realities we face in this transformation are fundamentally different from the issues on which we tend to fix our professional attention. Drucker's urgent message for court administration scholars and practitioners alike is clear. We need to wake up to the new realities of this transformation—to face the future that has already happened.

Drucker believed that public and private organizations should be responsible and accountable for their own performance guided by their unique and limited mission. But that is not enough. They should also take social responsibility and lead beyond the borders of their institutions for the sake of their community and society (Drucker,1995:196-97).

Accordingly, courts should concentrate their efforts on dispute resolution and related judicial services. But they should also lead beyond their boundaries in their community and in society and take care of the common good. For example, to fight for racial justice, courts should identify practices that breed racism then actively mitigate future negative effects caused by past injustices in which courts were complicit.

A WHOLE-OF-SOCIETY APPROACH (WOSA)

In an August 2020 article, "Racial Inequality and Systemic Injustice, the Coronavirus Pandemic, and the Courts," my colleagues and I urged that judicial leaders, both judges and court administrators, should not only continue providing critical justice services, but also take a much broader perspective and participate in a whole-of-society approach (WOSA) to respond to racial injustice and the pandemic.

The concept of WOSA is rooted in common sense, most notably that complex threats to our national and transnational safety, security, and well-being defy solutions by the actions of just a few government entities, such as the military and intelligence communities. Rather, WOSA stresses unity of action and a wide range of viewpoints. WOSA includes perspectives on threats and risks in an increasingly complex and uncertain world that demand coordinated and rapid responses by many diverse actors in and out of government, including ethicists, moral philosophers, and scientists (Keilitz, 2020a).

The argument for courts' participation in WOSA is simple. The threats we face include the "known unknowns," threats we know exist, but about which little or no information is available. We might know, for example, that domestic terrorism exists today, but not where, what, how much, and when. More frightening and difficult are the "unknown unknowns," threats about which we are neither aware nor understand and that are impossible to anticipate. One or more actors in WOSA may recognize something not seen by others that staves off a catastrophe, thwarts a threat, or mitigates damage. It is far better for such agents to be available and prepared as part of WOSA, than to face catastrophe with a deficit in personnel, preparation, and training.

> *Judges and court administrators should not only continue providing critical justice services, but also take a much broader perspective and participate in a whole-of-society approach (WOSA) to respond to racial injustice and the pandemic.*

Dozens of leading jurists in the highest state courts issued public statements condemning police violence and racial inequities in the wake of the brutal killing of George Floyd, an unarmed Black man, while in police custody in Minneapolis on May 25, 2020. Their speaking out publicly about racial justice and police violence, beyond the routine judicial practice of not commenting on social issues except in published opinions, seemed to signal that the judiciary has an important, active role to play in rooting out racial biases (Keilitz et al., 2020: 3-4).

LOOKING BOTH OUTWARD AND INWARD

While important, it is not sufficient for courts to simply embrace WOSA and orient themselves toward the greater society beyond the courthouse doors. They should, at the same time, look inward, rigorously examining and fundamentally changing their policies, programs, and operations to eliminate conscious and unconscious bias. Examples include how court security personnel treat visitors as they enter the courthouse; how courts handle their judicial calendaring and hear cases; and how courts handle pretrial detention.

COURTESY, DIGNITY, AND RESPECT AT THE COURTHOUSE DOOR

"I know from experience," wrote Thomas Chatteron Williams (2020: C1), "that when people are able to meet as equals—or at the very least as equals with a certain floor of dignity—plenty of other tensions resolve themselves." Court leaders and administrators should ask themselves whether individuals' first encounters with the court involve discriminatory practices and, if so, remedy those practices. Are the encounters consistent with Standard 1.4 of the *Trial Court Performance Standards* (Commission on Trial Court Performance Standards, 1997: 9), which requires judges and trial court personnel to be courteous and responsive to the public and accord respect and dignity to all with whom they come into contact? The commentary of the standard states that the requirements "are particularly important in the understanding shown and assistance offered by court personnel to members of minority groups and those unfamiliar with the trial court and its procedures."

When entering most courthouses in the United States, one must go through a metal detector and put personal items through an x-ray machine operated by court security personnel. We are required to empty our pockets and place the contents in a container for further inspection. This first encounter either leaves an impression of dignity, courtesy, and respect, or instead signals its opposite—unfair treatment and lack of agency.

Several years ago, I led a delegation of Kenyan judges and senior court administrators focused on trial court performance on a tour of state courts. On a visit to the District of Columbia courts, as they stood in a long line joining others waiting in the rain to enter the busy Moultrie Courthouse, they remarked with approval at how everyone waiting to go through the security check was accorded the same courtesy and respect by court staff. Several expressed surprise and approval that the delegation was not given VIP treatment and ushered past the security check ahead of everyone in line.

> *The first encounter people have with the court at the courthouse door either leaves an impression of dignity, courtesy, and respect, or signals its opposite—unfair treatment, and lack of agency.*

JUDICIAL HEARINGS

Another, seemingly mundane, practice is the conduct of judicial hearings, or what court administrators call "judicial calendaring." One former court administrator, Edwin Bell, now the Director of Racial Equity, Fairness, and Inclusion at the National Center for State Courts, recounted an example for tackling injustice. For years he has seen judges, who may have more than 50 cases on their morning calendar, separate litigants into two groups, those who have attorneys and those who do not. Cases of litigants with attorneys are heard first; lower-income and self-represented litigants are left waiting, sometimes for hours. While this is not intended as a racial decision, Bell said "it can have a disproportionate impact on the economically disadvantaged, who are often minorities. . . . There has to be a way ahead of time to separate these groups" that does not leave one group missing work and suffering other potential personal and economic impacts not experienced by the other group (Keilitz, 2020b).

PRETRIAL DETENTION: STATE-IMPOSED RACIAL DISCRIMINATION

Individuals in pretrial custody account for roughly one-third of all incarcerated individuals. In many U.S. jurisdictions, especially in states with a cash-bail system like Virginia, when a defendant is jailed before trial and then acquitted or charges dismissed, the indefensible result is that an innocent defendant may spend more time in jail than if he or she had been found guilty. A disproportionate number of these pretrial detainees belong to poor and marginalized groups that are politically, economically, and socially discriminated against.

Because detention of people not convicted violates the presumption of innocence, prolonged pretrial detention punishes criminal defendants before they are tried and should be used only when release poses a likely threat to community safety. "Few rights are so broadly accepted in theory, but so commonly abused in practice," writes Martin Schönteich, in *Presumption of Guilt: The Global Overuse of Pretrial Detention* (2014: 1). Civil-rights veteran Clarence Dunnaville, Jr., writing in the *Virginia Lawyer*, opined that Virginia's antiquated cash-bail system frequently "imposes severe suffering on the indigent, who, solely because they are impecunious, must linger in jail, often for months, while awaiting trial." This "bail or jail" practice is "state-imposed racial discrimination" against Blacks and other minorities, he writes (Dunnaville, 2021: 32-33).

> *A disproportionate number of pretrial detainees belong to poor and marginalized groups that are politically, economically, and socially discriminated against.*

Measure 5, "Duration of Pretrial Custody," of the *Global Measures of Court Performance* (International Consortium for Court Excellence, 2020: 54) prescribes for courts the performance measure of the average elapsed time not-yet-convicted criminal defendants are detained awaiting trial. The commentary for this measure states:

> *Duration of Pretrial Custody* is an easily understood measure that resonates with ordinary citizens and policy reformers alike who worry about the injustices, as well as the attendant financial burdens and societal costs, of prolonged and unjust pretrial detention. It brings people together for joint work on improvements across institutional boundaries—the courts, law enforcement, jails, prosecution, and defense services.

This measure can be taken by courts and their justice system partners immediately, and on their own without legislation or formal approval of a state's highest court. In addition to performance measurement and management using this measure, courts should foster a culture of release to mitigate the discriminatory effects of the draconian dichotomy of "bail or jail."

These three examples are just a few practices courts can target to remove barriers to fairness and address racial disparities and biases. All lie within the power of courts and their justice partners to implement administratively and unilaterally. They are race-neutral and focused on fixing inequities of access and fairness for everyone who has business with courts. They are a shortcut to immediate implementation that sidesteps ideological and politically fraught debates over terms such as "institutional" or "systemic" racism, terms that are rarely defined accurately in the debates (Anderson, 2021: A13).

CONCLUSION

Circling back to the admonition of Peter Drucker noted at the beginning of this article, what is needed in response to the confluence of existential crises we face today, in my view, is a transformation of our courts and other justice institutions and their place and role in our society. Like Drucker, I suspect our grandchildren will contrast the courts in the future with courts today and barely imagine the world in which their grandparents lived.

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zoom

DELIVERING COURT TRAININGS VIRTUALLY

Matthew Estes
Education Services Division, Arizona Supreme Court

The pandemic has caused an overhaul and reevaluation of nearly every court practice and procedure. Court training is not exempt from this process, as many educational events have been canceled, and those that remain on the books have gone virtual through various videoconference platforms. Once court educators received their charge to take court education virtual, they encountered a related, but distinct challenge: Long before "Zoom fatigue" became a buzzword for court professionals, there was "Zoom resistance." In this article, the process of diagnosing, alleviating, and evaluating resistance to virtual training will be discussed, using the qualitative and quantitative data acquired by the Court Leadership Institute of Arizona on the Zoom platform (most of the procedures described in this article can also be accomplished on other virtual meeting platforms). Anonymous quotes from Arizona court employees will help illustrate the change that has occurred.

DIAGNOSING RESISTANCE TO VIRTUAL TRAINING

Part of the resistance stems from an unverified, yet strongly felt belief that virtual training is inferior to live, in-person training. This belief seems to arise from the common (but also unverified) intuition that virtual training is less engaging than its in-person equivalent, fostering an essential passivity among the atomized participants in a virtual training room.

> *"Having never been terribly fond of online learning, and having never spent a great deal of time engaging in it, to say that I am skeptical is very much an understatement."*

In addition to the practical challenges of taking in-person instruction virtual, court educators have encountered some resistance to the virtual classroom. In this article, the process of diagnosing, alleviating, and evaluating resistance to virtual training will be discussed using data acquired by the Court Leadership Institute of Arizona.

In the worst-case scenario, this sentiment undermines the project of virtual training. It takes significant effort to test and acquire virtual-meeting licenses, train faculty and staff in virtual best practices, and modify long-established curricula for the virtual environment. If the virtual classroom is filled with gridded rows and columns of faces multitasking through a seminar, or worse, faceless usernames lectured by a host struggling to give life to the feeble bullets of a PowerPoint slide, virtual education might not be worth the effort.

ALLEVIATING RESISTANCE TO VIRTUAL TRAINING

Fortunately, court educators can apply new lessons from the theoretical cornerstones that underpin national certification programs for judicial employees. In particular, court educators connected to the National Center for State Courts' Institute for Court Management (ICM) have been encouraged to adopt several elements of David Kolb's experiential learning cycle. Kolb emphasized "the central role that experiences play in the learning process" (Kolb, 1984: 20), such that "learning is a continuous process grounded in experiences" (p. 27), rather than serial episodes of fact acquisition and recitation. Experiences are the raw material of education, formed into knowledge by various methods of reflection upon and consideration of personal experience. Pragmatist educator and reformer John Dewey summarized it in this way: "Reflection upon experience gives rise to a distinction of what we experience (the experienced) and the experiencing—the how" (1983: 173). The experiential learning cycle increases the opportunity and frequency of getting to that vital "how."

Long before the robust virtual trainings of the present day were even possible, thoughtful in-person trainings used the techniques of the experiential learning cycle. The learning experience for participants and faculty has been improved over time by introducing audio or video clips to enhance lectures, group activities that encourage broader participation, and scenarios for practical application of newly learned material. The challenge for court educators was to use the novel tools available to similarly deepen the experience of the virtual format. I will describe Arizona's attempts to do this, using the four components of Kolb's experiential learning cycle, and evaluation feedback that spoke directly to each attempt.

1) ***Concrete Experience:*** Modern court trainings rarely involve the sort of direct, tactile experience that was unquestionably foreclosed by the pandemic. Despite this, Leadership Institute faculty and curriculum developers worked to include hands-on interactions with court forms and web tools whenever possible. The annotation tool in one virtual classroom allowed participants discussing workforce management to highlight portions of a sample job description that were outdated, vague, or poorly worded, and write suggestions in the margins, with immediate feedback available from faculty and other participants. More recently, participants learning about caseflow processes were able to see a statistical reporting module on a faculty's shared screen, as the faculty walked the participants through the module and showed how different variables interacted with each other. While these interactions were possible in pre-pandemic, in-person classrooms, it would have required individual worksheets and rather large projection screens with the clarity to display readable text to all in the room. The immediacy and clarity afforded in the virtual classroom was noted in Leadership Institute evaluations in a way it had never been for in-person training evaluations.

> *"I have asked a few times for the stats to be explained but it hasn't happened yet. So this will help immensely at our next supervisor meeting. Appreciated the caseflow percentages and time frame in writing so it can be referred back to."*

2) ***Reflective Observation:*** Court educators know that silence in a physical room is not necessarily a bad thing. It can be used to emphasize a key point, or to allow for assimilation of a complex or controversial idea. However, in the virtual environment, silence is confusing. Ever-present fears about technical troubles make every silent second more agonizing, with participants and faculty scrambling to check their Internet speed and connection. Therefore, virtual Leadership Institute classes avoided pregnant pauses and reflection exercises during the virtual class day, and broke multiday ICM certification classes into more and shorter class days. Among the benefits of this revision was the chance to craft homework reflection assignments out of exercises that were previously contemplated individually when in-person. For example, participants were assigned to review their court's statement of values to see how it aligned with samples provided in class, and they researched recent mentions of courts in local media in the lead-up to a class debate on public perceptions of courts. These assignments helped participants to carry the momentum of one class day into the next, and assisted faculty and curriculum developers by allowing them to preserve and expand virtual class time in a creative way.

> *"It was a great class, I feel like I have retained and soaked in the information like I did when we were in person, and quite honestly, thought about the material between class days in a way that I never did when I went straight from the class building to the hotel."*

3) ***Abstract Conceptualization:*** The material in ICM trainings can be dense, theoretical, and challenging. Many Arizona participants have noted to Leadership Institute staff that they sometimes have difficulty applying it to their jobs when they return to their respective courts. Previously, selected ICM courses in Arizona concluded with a multiple-choice assessment, to be completed before the participant returned to work. Because such an assessment would be logistically nightmarish to complete virtually, a short-answer essay assessment was introduced. One essay question was assigned to participants for every module covered in the virtual class, with an eye toward helping participants consolidate the knowledge they had acquired, and practically apply it to their past, present, and future

work. For example, an essay question in caseflow management (a course that discusses court innovation in significant depth) asks participants to take what they learned and apply it to Arizona's recently announced legal paraprofessional program, which provides licensure to nonlawyers to provide legal services in limited practice areas. The high quality of work produced by participants, as well as the positive feedback Leadership Institute staff has received from participants about the new assessment, has led the Leadership Institute to further study the possibility of converting all multiple-choice assessments to essay assessments.

> *"I really enjoyed the class and doing the assessment this way! It was kind of stressful doing it right after class, when all I wanted to do was get on the road."*

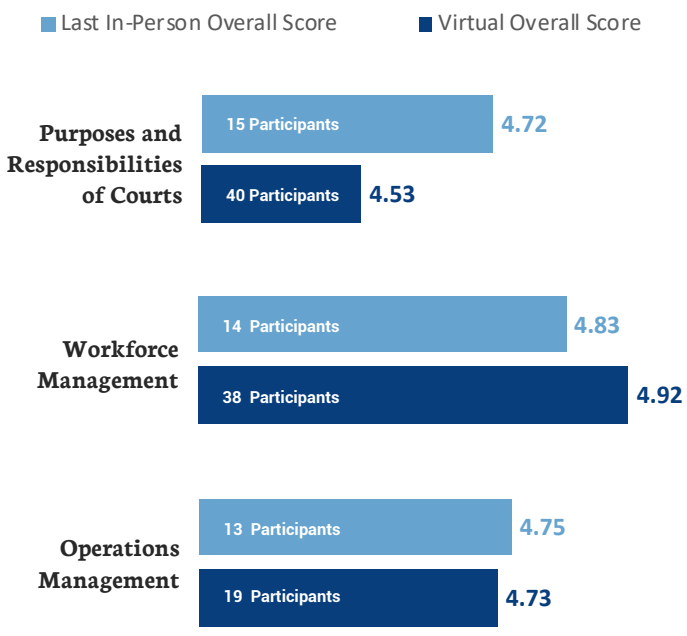
4) ***Active Experimentation:*** Effective adult education is not merely a passing of information from the learned to the learner. If that was the case, how-to manuals and videos would have long ago replaced the in-person training session. When trainings are effective, they allow participants to consider new possibilities, and discuss those possibilities with their fellow participants, shepherded by faculty subject-matter experts. Virtual breakout rooms enabled this type of rich discussion, and even allowed for possibilities that in-person table groups typically do not. The virtual breakout rooms can be randomized, so that participants were consistently interacting with new peers from different courts with varied experiences. Notes can also be shared in the breakout room, so that the group does not lose time and focus asking the designated recorder to restate points previously made. Last, the separation from faculty (unless faculty assistance is requested) allows participants additional freedom, which can lead to more varied and creative responses to questions posed to the participant groups.

> *"I enjoyed the training very much. It was insightful and I enjoyed the breakout sessions with the group. I was able to meet new people and got a chance to get to know their position."*

EVALUATING RESISTANCE TO VIRTUAL TRAINING

While Leadership Institute staff were confident of the theoretical rigor of the innovations and adaptations made in preparation for virtual instruction, the evaluation scores were ultimately going to be more telling of the overall success of the migration from in-person to virtual training.

FIGURE 1: IN-PERSON V. VIRTUAL TRAINING (OVERALL EVALUATION SCORES)



The measures in Figure 1 are based on a 5-point Likert scale.

Early results indicate that there is no statistical drop-off in overall evaluation feedback for virtual coursework (see Figure 1). Qualitative feedback, which has been sprinkled throughout this article, was similarly positive. Even the constructive criticism focused more on ways to improve the virtual experience, indicating that participants were not merely "waiting out" the pandemic for a return to in-person instruction.

The main concern that arose out of Arizona's first six months of virtual training was not the quality of instruction achieved through virtual training. Rather, it was recruiting a sufficient number of participants to justify the increased amount of work required to design, schedule, execute, and evaluate virtual trainings. Certainly, some of the drop can be attributed to the increased workload that the court managers, directors, and administrators who participate in Leadership Institute trainings have experienced. As we proceed with virtual court training into calendar year 2021, the Leadership Institute is more aggressively promoting its strong early results to potential participants, so that the full potential of virtual court training can be evaluated.

FINAL THOUGHTS

In retrospect, perhaps the initial resistance is not so surprising. Change management is a frequent topic in Leadership Institute trainings, as courts have grown and innovated at an incredible pace over the past few decades. Perhaps the court classroom was one of the few places outside of the courtroom that retained a similar character over the past several decades. There was continuity in the podium emblazoned with the court seal, in the well-worn tables and chairs, perhaps even in the smudged sign-in sheet and stale coffee on offer. The court classroom was a safe and familiar space, and court employees could calibrate accordingly when they entered it. The pandemic took that familiarity away from us, and an adjustment period was necessary. In Arizona, we have adjusted with a virtual course plan based in sound educational theory, whose effectiveness is measured through rigorous evaluation standards. In this way, we hope to convince skeptics to give the virtual classroom a fresh look in the short term and to leverage this powerful new tool to enhance the development of court education in the long term.

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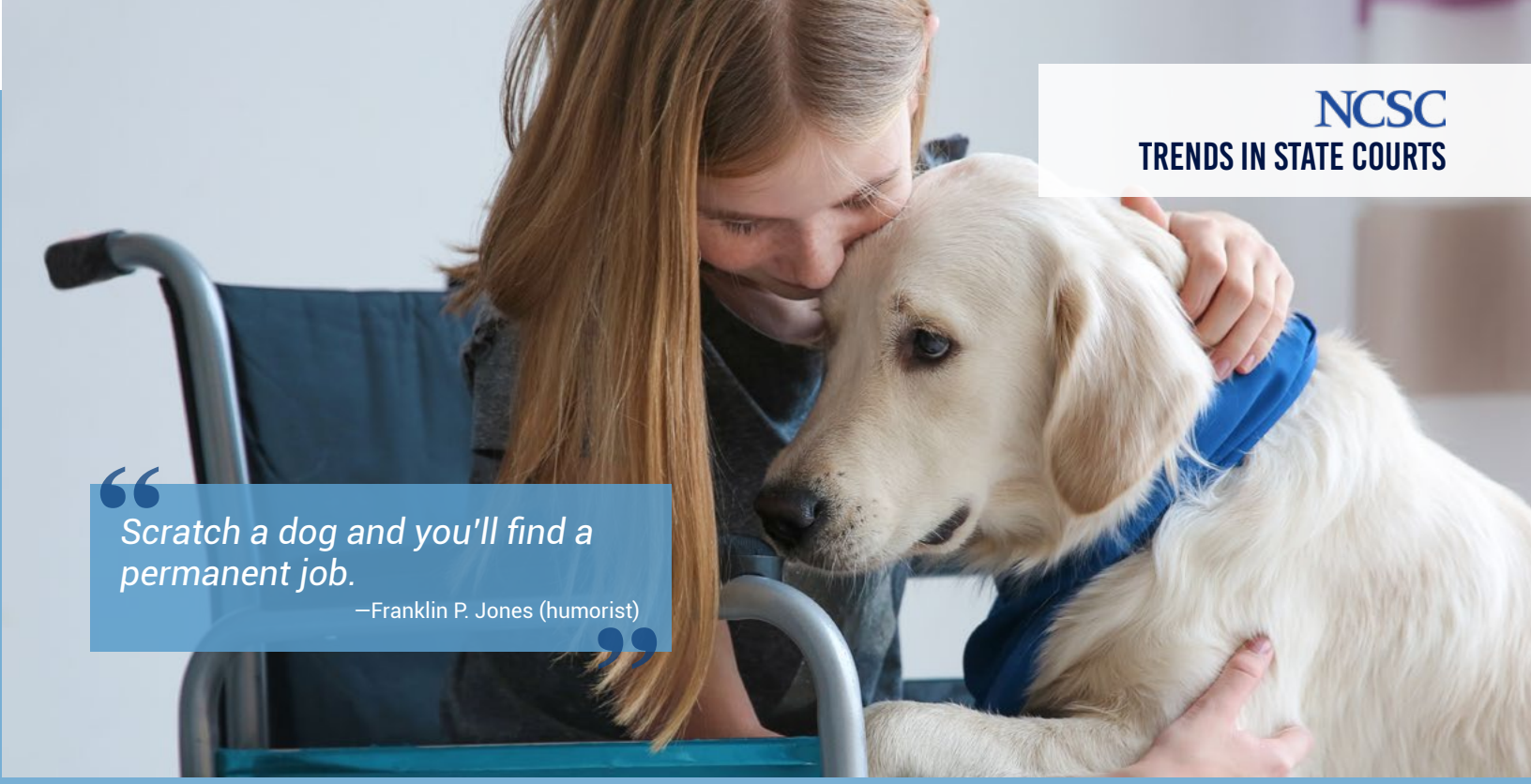
TRENDS IN STATE COURTS



> *Scratch a dog and you'll find a permanent job.*
>
> —Franklin P. Jones (humorist)

FROM THE DOGHOUSE TO THE COURTHOUSE: FACILITY DOGS AS TRIAL AIDS FOR VULNERABLE WITNESSES

Christine M. McDermott
Interdisciplinary Social Psychology PhD Program, University of Nevada, Reno

Shawn C. Marsh
Director of Judicial Studies and Associate Professor of Communication Studies and Social Psychology, University of Nevada, Reno

Monica K. Miller
Foundation Professor, Criminal Justice Department and Interdisciplinary Social Psychology PhD Program, University of Nevada, Reno

Taylor Forte
Criminal Justice Department, University of Nevada, Reno

In 1989 a seeing-eye dog named Sheba was used to comfort abused children in the Special Victims Bureau in Queens, New York. Largely believed to be the first "facility dog," the practice did not gain traction until 2003, when Ellen O'Neill-Stephens began using her dog to comfort witnesses in courtrooms. She established the Courthouse Dog Foundation, which provided training for facility dogs and education for judges (Mariani, 2020). Today, 262 facility dogs are used in 41 states, formally or informally, to comfort witnesses (https://courthousedogs.org/).

Though courtroom proceedings are stressful for most people, children and other vulnerable witnesses might find testifying in court to be especially stressful. For example, many cases involving child abuse never go to trial, as children are often too stressed, anxious, or otherwise unable to provide effective testimony of their experiences. Due to the special challenges associated with prosecuting cases involving vulnerable complainants, special accommodations are sometimes made to lessen the stress of testifying and to aid cases in going to trial, thereby improving outcomes for victims (Caprioli and Crenshaw, 2017).

Different types of support dogs are becoming a common sight in courtrooms. What do judges and court staff need to know about using support animals to aid witnesses during trials?

These accommodations, also known as trial aids, include screens, support persons, and video testimony. Unfortunately, many established trial aids lead jurors to doubt the credibility of the witness (Chong and Connolly, 2015). The consequence of such effects (e.g., biased verdicts) makes understanding the effects of trial aids on all parties important. An increasingly popular trial aid involves facility dogs, also known as therapy dogs or courthouse dogs. Currently, more than 40 states allow facility dogs in courtrooms during some portion of a legal process.[1] How dogs are used also varies greatly (whether the witness is able to interact with the dog, whether the jury is allowed to see the dog), as does the dog's ownership (if the dog belongs to the judge or prosecutor or to a community member).

This article reviews the current state of dogs as trial aids. Specifically, we discuss why dogs are so popular as trial aids; describe the different types of support dogs and their respective rights; present current research, practice, and caselaw/legal precedent involving facility dogs; and offer considerations for judges who are contemplating using dogs.

WHY DOGS PROVIDE COMFORT

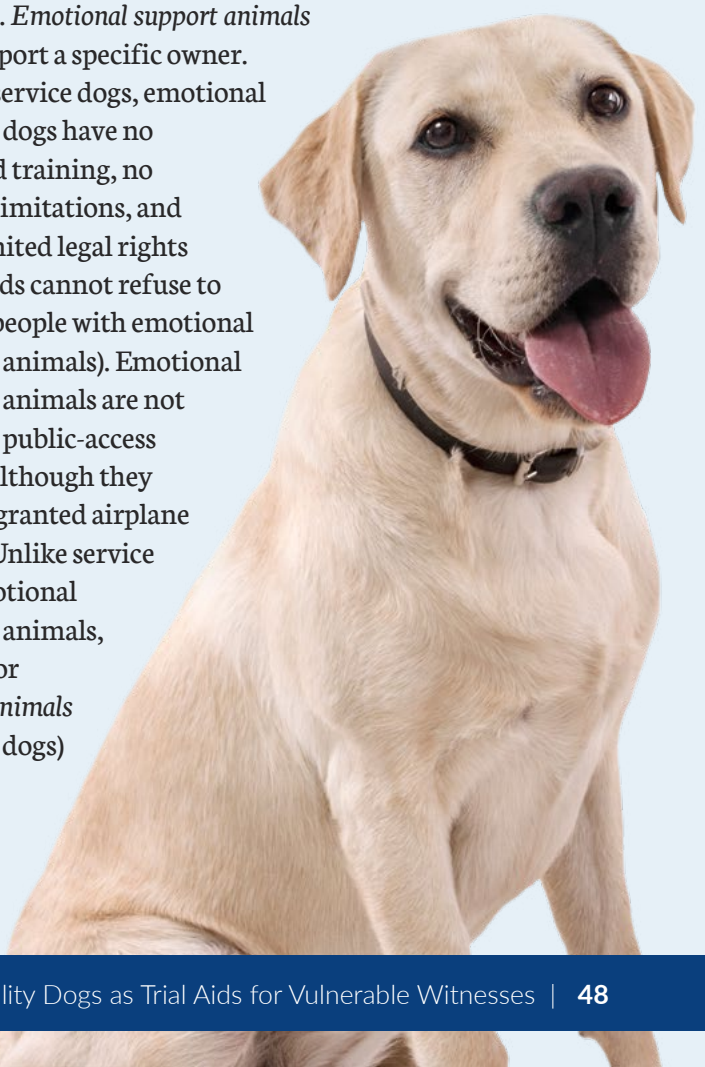
MacLean and Hare (2015) asked: "Why do we feel genuine friendship, love, and social attachment . . . with *dogs*?" (p. 281, emphasis added). The answer is complex, emerging, and beyond this article's scope. However, efforts to understand the form, function, and trajectory of human-animal bonds have engaged fields such as philosophy, evolutionary psychology, biology, genetics, and public health. Although more research is needed and some findings are mixed (e.g., mere dog ownership is not *universally* associated with lower levels of depression or increased exercise; Mueller et al., 2018), evidence is accumulating that the human-dog relationship is unique and beneficial to the well-being of both across myriad domains (Menna et al., 2019).

Specifically, various health benefits of human-dog interactions include lower blood pressure, fewer depression symptoms, and improved functioning after social loss (such as divorce or the death of a loved one). Petting a dog reduces anxiety and enhances mood, perhaps due to release of "feel good" hormones in *both* human and dog. Human-dog encounters provide comfort, calm, and reciprocal bonding (Powell et al., 2019). This effect provides rationale for use of appropriately selected dogs to promote well-being in various stressful settings (e.g., universities, airports, or hospitals).

TYPES OF DOGS USED TO PROMOTE WELL-BEING

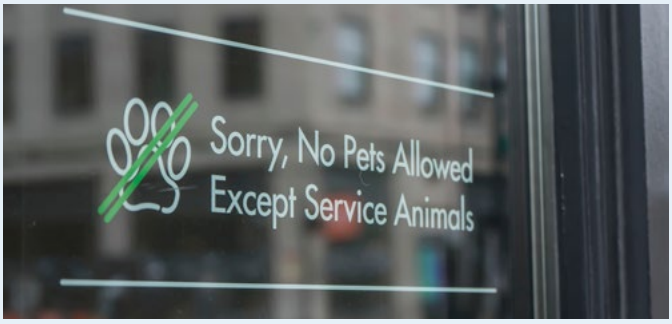
Although it is becoming more common to use animals to support well-being in public spheres, their presence remains somewhat controversial (see news stories of emotional support peacocks and other exotic animals brought onto airplanes). Contributing to this controversy is a misunderstanding of the differences in training and legal-access rights between types of assistive animals. Officially, there are four recognized classes of dogs that aid humans: working dogs (excluded from this discussion, as they do not work in courtrooms), service dogs, therapy dogs (which includes facility dogs), and emotional support dogs. Each differ in their training and legal rights.

Service animals are individually trained to help a specific person with a disability and have full public-access rights under the Americans with Disabilities Act. Currently, only dogs and miniature horses can be certified as service animals. *Emotional support animals* also support a specific owner. Unlike service dogs, emotional support dogs have no required training, no species limitations, and have limited legal rights (landlords cannot refuse to rent to people with emotional support animals). Emotional support animals are not granted public-access rights, although they may be granted airplane access. Unlike service and emotional support animals, *therapy* or *facility animals* (mainly dogs)



1 See Courthouse Dogs Foundation. Perma link: https://perma.cc/P948-SENW.

are not trained to work with a specific human. Instead, they are trained to be comfortable in new environments and interact with strangers (e.g., patients, witnesses, or students). Therapy dogs must complete a certification-training program, the contents of which differ among organizations. These dogs generally do not have public-access rights but are increasingly accepted in courtrooms and other stressful environments, such as post-disaster crisis intervention.



FACILITY DOGS IN THE COURTROOM

Although the use of facility dogs is increasingly popular, some concerns include:

- the visual appeal of dogs might cause jurors to perceive witnesses as more vulnerable, likeable, or sympathetic;
- some labels applied to facility dogs ("therapy dog" or "advocate dog") imply the child needs therapy and endorse his or her status as a victim;
- dogs might distract jurors or witnesses;
- jurors might transfer their feelings toward dogs (good or bad) onto the witness;
- a dog in the courtroom limits access to people who are allergic to or afraid of dogs; and
- the calming effect of a dog could lead jurors to believe the witness was not severely harmed or was coached.

The overarching concern is that the dog's presence could bias the jury; for example, the dog could lead the jury to think the victim must be *really* injured if she needs a dog to testify, or that the dog is a ploy to trick the jury into thinking her injuries are severe. There is less controversy about using dogs at hearings without juries, although judges could also be influenced by the dog's presence.

Research indicates that the presence of a facility dog does not bias jurors (Burd and McQuiston, 2019). In the two known studies, participants read a detailed case summary and a partial trial transcript in which a child testifies with either a teddy bear, a facility dog, or no trial aid. In both studies, the facility dog did not affect mock jurors' perceptions of the defendant or witness. Even so, the written nature of the manipulations lacks verisimilitude and, therefore, such findings should be interpreted with caution.

Based on this research and the general fund of knowledge regarding human-animal interaction, proponents of facility dogs believe that facility dogs calm children, improve testimony, and aid witnesses who would otherwise not be emotionally capable of testifying (Caprioli and Crenshaw, 2017). Legal experts tend to view facility dog use as an improvement over other trial aids, as they do not interfere with the defendant's right to confront their accuser (as has been said of CCTV and other video testimony; *Crawford v. Washington*, 2004). Nor do they offer the potential distraction of nonverbal cues from a support person through unconscious reactions of disgust toward the defendant or empathy for the child. Judges have generally recognized that the benefits outweigh the potential drawbacks, with nearly 90 percent of judges surveyed indicating that they would welcome the presence of a facility dog in their courtroom (Firth, 2020). However, most of these benefits and drawbacks have not been tested empirically, and there is a need for continued research on dogs as trial aids.

LEGAL CONSIDERATIONS

Although research suggests that dogs have little negative effect, there have been a small number of legal challenges to the use of dogs in the courtroom, especially during trials. Most of these appeals include claims that the presence of a facility dog enhanced the perceived victimhood of the witness (e.g., *California v. Chenault*, 2014; *California v. Spence*, 2012; *Jones v. State*, 2020; *New York v. Tohom*, 2013; *State v. Hasenyager*, 2016). In all these cases, the courts ruled that facility dogs do not bias the jury's decisions. Another case admitted the possibility of some bias stemming from facility dog use but found that the court's attempt to minimize the stressful impact of testifying for witnesses outweighs the defendant's objection to the facility dog (*State v. Lacey*, 2018).

An additional claim is that facility dogs violate due-process rights (*Michigan v. Johnson*, 2016; *Smith v. Texas*, 2016; *Washington v. Moore*, 2014) and the confrontation clause (*California v. Spence*, 2012). These claims were also rejected, citing the discretion of the court and other rulings making trial aids admissible (*California v. Chenault*, 2014; *New York v. Tohom*, 2013; *Washington v. Dye*, 2013).

While most cases involved the use of facility dogs for children, two cases also approved their use for adults with a mental disability (*State v. Dye*, 2013) or post-traumatic stress disorder (*Jones v. State*, 2020). Many judges have allowed the use of facility dogs, citing the Victims of Child Abuse Act of 1990 and the Uniform Child Witness Testimony by Alternative Methods Act, which allow the use of a teddy bear or support person.

In sum, every appellate decision we could find upheld the use of facility dogs. This paves the way for their use in courtrooms nationwide.

CONSIDERATIONS FOR JUDGES

A 2020 survey of judges by the National Judicial College indicated that the vast majority are in favor of using facility dogs (88.65 percent of 881 respondents; Firth, 2020). Supporting the use of facility dogs and using facility dogs in court, however, are different issues. Specifically, what *are* the practical considerations for judges who want to use facility dogs in court?[2] As judges are ultimately responsible for the practices and climates of their courtrooms, we offer some common considerations for both the human and dog elements of the interaction.

First, not all people like dogs, and some people are extremely fearful of dogs, possibly because of traumatic histories. Thus, introducing a facility dog to the court will require strong communication with both staff and litigants about the procedure—and their ability to decline direct contact with the dog. Perhaps a more difficult situation arises when someone is allergic to dogs, whereby residual hair or dander can trigger itching, eye watering, or even breathing difficulties (approximately 30 percent of the U.S. population has allergies to cats and dogs; www.aafa.org/pet-dog-cat-allergies). Nonetheless, precautions can limit these issues (e.g., avoiding contact, routine cleaning, use of hypo-allergenic breeds, or strong grooming practices). Awareness of potential health challenges related to actual human-animal contact is important to acknowledge and plan for *before* introducing a facility dog to court.

Handlers should obtain any required certifications for their dogs, which vary by jurisdiction. Dogs should have a specified job description, which identifies their responsibilities, limitations, evaluations, and day-to-day duties—and the human responsible for the dog. This ensures everyone in the courtroom understands the dog's role.

Trainers and handlers of facility dogs are excellent sources for suggestions for mitigating potential contact challenges, as are organizations such as Courthouse Dogs. These sources are also well situated to advise on the overall care of the dog to ensure its health and safety. This includes feeding, grooming, regular exercise, a bed, a place to urinate/defecate, stimulation/recreation, and other day-to-day considerations of good pet guardianship. In some cases, facility dogs might be trained and handled by a court employee, external guardians, or specialized organizations, such as the Courthouse Dogs Foundation.

Finally, judges can take steps to mitigate the dogs' effects. The dog's handler can bring the dog in when the jury is out of the courtroom, and the dog can be placed outside of the jury's view. Judges can issue special instructions to juries to ignore the dog and any feelings it might evoke. Such instruction has been upheld (e.g., *People v. Chenault*, 2014; *State v. Dye*, 2013). These steps mitigate potential biases.

SUMMARY

Engaging appropriately trained dogs to support humans during stressful court proceedings is increasingly popular, but certainly neither universally practiced nor even accepted.[3] Education and research on the legal and ethical use of dogs in this capacity—as well as benefits and risks—is an important endeavor. Judges largely appear supportive of this growing trend of adopting "human's best friend" to serve as a partner in the administration of justice.

2 People interested in beginning a facility dog program should consult Jones and Miller (2021) and Courthouse Dogs Foundation for a discussion of best practices. Perma link: https://perma.cc/E953-533Q.

3 This article discusses facility dog use during normal operating conditions; however, the COVID-19 pandemic has forced many trials to occur virtually. During virtual trials, a witness could potentially use their own well-behaved pet at the judge's discretion.

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NCSC
TRENDS IN STATE COURTS

IMPROVING COURT STATISTICS BY EXPLORING THE SHAPE OF DATA

Adam S. Cohen
Planning and Program Evaluation Division,
Hawai'i State Judiciary

Wesley Nakamoto
Planning and Program Evaluation Division,
Hawai'i State Judiciary

Each year, millions of dollars in restitution are owed to victims of crime. Reports suggest that about 80 percent of that money is uncollected (e.g., Colorado Judicial Branch, 2020; Minnesota Restitution Working Group, 2015; Rex and Boyce, 2011). Based on this data, it would appear that the majority of victims are not restored, offenders are derelict in their responsibilities to victims, and court staff are unsuccessful at collecting restitution. But most of the unpaid restitution in a jurisdiction traces back to a small percentage of offenders who owe large sums of money. Most offenders, who typically owe far less restitution, pay victims in full. A deeper understanding of the data offers a more accurate and complete picture and leads to a substantially different conclusion: the majority of victims are restored, most offenders fulfill their responsibility, and court staff are largely effective at collecting restitution.

Instead of a bell curve, restitution and many other data sets follow a "power law." With power-law curves, large values are less common than small ones but frequent enough and large enough relative to the rest of the data that they account for a disproportionate share of the total. Examples

Courts rely on data to make well-informed decisions, but the shape of that data can vary, dramatically changing their interpretation. Distinguishing bell-shaped curves from "power law" curves can improve statistics and assist judges and court administrators grappling with important questions in need of evidence-based answers.

across a range of fields abound: 20 percent of customers generate 70 percent of sales (McCarthy and Winer, 2019); 10 percent of Twitter users produce over 95 percent of all political tweets (Pew Research Center, 2019); and 10 percent of Americans own 80 percent of the wealth in the United States (Saez and Zucman, 2016).

Failing to distinguish between bell curves and power laws can have implications for interpreting court data. If undetected, power laws can mask patterns that are essential to the questions that judges, court administrators, and researchers want to answer. Overlooking power laws can lead to invalid data analyses, unsound interpretations of those analyses, and ultimately suboptimal decision making among court leadership. By identifying data that follow power laws, courts can detect patterns that may better inform decision making.

Here we explain how to leverage power laws to learn from court data. First, we explain differences between bell-shaped and power-law distributions. Next, we show how data can be analyzed and interpreted when it is power-law distributed so that important patterns are not missed. Finally, we show how these analyses can help evaluate programs and inform decisions about allocating limited resources in state courts.

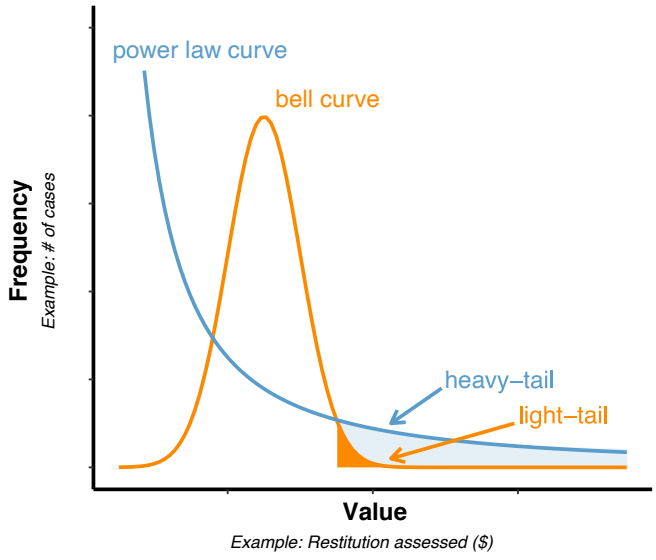
WHY IS IT IMPORTANT TO KNOW THE "SHAPE" OF COURT DATA?

The bell-curve shape of the normal distribution is the most familiar display of data on a graph (see Figure 1). Many variables measured both outside and inside the courtroom are bell shaped. Height, IQ, and the number of hearings in felony cases (Ostrom et al., 2020), for instance, are bell shaped. When data are bell shaped, the mean can be calculated to summarize the data, reducing it to a single number that is most representative of the entire data set. As one moves away from the mean at the peak of the bell curve and into the tails, the probability of extreme values rapidly approaches 0, creating thin or "light tails." Bell curves also tend to have a characteristic scale, spanning no more than a few orders of magnitude. For example, felony defendants have on average 6 hearings with most ranging between 1 to 12 hearings (Ostrom et al., 2020). This is just two orders of magnitude (10^0 to 10^1), and the probability of 100, 1,000, or 10,000 hearings is phenomenally low.

But sometimes data follow a power law, not a bell curve. Data obeying a power law contain many small values and fewer large ones (Figure 1). But these large values out in the tail are more common than in a bell curve, creating "heavy tails." These heavy tails can dominate summary statistics. For instance, many power-law distributions have a mean that goes to infinity, and even when finite, the mean is nowhere near most of the data. Unlike bell curves, power-law data is "scale free," spanning many orders of magnitude, often from 10^0 to 10^7 if not higher.

Besides restitution, examples inside the courtroom include case filings, in which a minority of districts account for most filings across time and case types (Bak, 2006); violent crime, in which a small number of people commit a disproportionate amount of crime (Cook et al., 2004; Falk et al., 2014); and even case citations, in which a small percentage of cases receive the majority of citations in court decisions at state and federal levels, including the Supreme Court (Fowler et al., 2007; Post and Eisen, 2000; Smith, 2007).

FIGURE 1.
NORMAL BELL CURVE VS POWER LAW CURVE



NOTE: Normal "bell curve" distribution (orange) vs power-law distribution (blue) showing number of cases vs. restitution assessed. Restitution appears to follow a power law, not a bell-curve.

TABLE 1.
BELL CURVES VS POWER-LAW CURVES

	Normal Distributions ("Bell Curve")	Power-Law Distributions
Mean/ Median	Meaningful (finite and representative)	Not meaningful
Tails	Light tail (extreme values are rare)	Heavy tail (extreme values more frequent than in the bell-shaped normal distribution)
Scale	Few orders of magnitude Example: felony hearings range from 10^0 to 10^1	Many orders of magnitude Example: restitution ranges from 10^0 to 10^7, if not higher

When data are assumed to be bell shaped but in fact obey a power law, problems arise. The mean, which fails to represent the data, can mistakenly be used to summarize it, and even worse, entered into inferential statistics to test hypotheses. Although the median is an effective substitute for the mean when data are skewed, it is of little match for the heavy tail of power-law curves, where data live nowhere near the median, extending for many orders of magnitude beyond it. But awareness of power-law behavior can remind us to put means and medians aside and look to other statistics. Large values in the "heavy tails" are also problematic, skewing percentages, masking other informative patterns, and producing at best incomplete and at worst misleading answers to the questions we want addressed.

DETECTING COURT DATA THAT FOLLOW A POWER LAW

Since our goal here is to provide a nontechnical overview, we describe statistical approaches for detecting whether court data follow a power law in an Appendix. Judges and court administrators are encouraged to draw on the expertise of court researchers and statisticians at this step because detecting the shape of court data will ultimately help them to better understand the implications and limitations of their data.

ANALYZING AND INTERPRETING COURT DATA THAT FOLLOW A POWER LAW

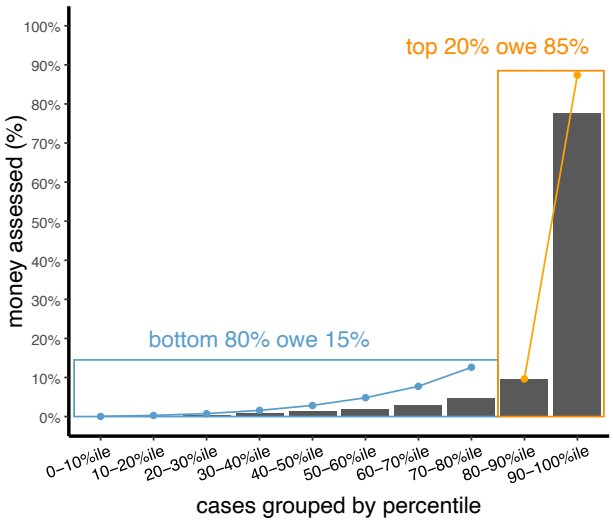
We have already seen the perils of analyzing restitution data while blind to its shape. But if data conform to a power law, how do we analyze it to best evaluate court performance? We can only offer general guidance because the specifics of an analysis will depend on the questions that need to be answered, but whatever form that analysis takes, it must respect the shape of the data. We propose two general approaches to analysis that may be useful for different data sets.

One option is to split data. Even though 80 percent or more of restitution might go uncollected in a jurisdiction, we now know this will be driven by a small number of individuals owing huge sums of restitution. How should the data be partitioned? There are more and less principled ways to do it. Sometimes, the data might have structure that suggests ways to divide it. In the case of restitution, we could consider offense severity, which is related to size of restitution. Felonies typically involve larger restitution amounts than misdemeanors and infractions, and this can be leveraged to disaggregate data. Simulated data disaggregated by severity suggest that even when only 20 percent of restitution money is collected overall, as much as 60 percent is collected from misdemeanants.

Another option is to look at multiple variables. For restitution, we can look at not just the percentage of money collected, which is distorted due to the heavy tails of the power law, but also the percentage of cases that are paid in full, or case-completion rate. The case-completion rate, which *CourTools* Measure 7b also recommends calculating (Schauffler and Ostrom, 2017), can range from 50 percent to 70 percent even when only 20 percent of restitution money has been collected (Colorado Judicial Branch, 2020; Minnesota Restitution Working Group, 2015). To put it another way, if *everyone* in the bottom 80 percent paid their restitution in full, and the top 20 percent paid nothing, monetary collection rates typically will only reach 15 percent, and often lower than that, even though the case completion rate is 80 percent. How much money is collected offers an incomplete and potentially misleading picture of victim restoration, offender rehabilitation, and the collection efforts of court staff. Other variables like the case-completion rate serve as a corrective lens, revealing a more complete picture of restitution.

A power-law analysis highlights the two sides of restitution data. For restitution, high case completion coexists with low monetary collection. This seems like a contradiction, but it is not. It is to be expected when you have "heavy-tailed" data that conform to a power law. The sooner we appreciate power laws and their presence in court data, the sooner an intuition will develop for this type of data.

FIGURE 2.
PERCENT OF RESTITUTION MONEY ASSESSED AMONG BOTTOM 80% AND TOP 20% OF CASES



NOTE: Graphs showing a theoretical sample of restitution assessed broken down by the bottom 80 percent (blue) and top 20 percent (orange). Bars represent amount owed within each decile. Lines represent cumulative amount owed within the bottom 80 percent and top 20 percent. Even if everyone in the bottom 80 percent—by definition, 80 percent of people owing restitution—paid in full, only 15 percent of restitution or less would be collected.

These options are not an excuse to present only part of the data. As misleading as it is to focus on only the low monetary-collection rates, it is equally misleading to focus on only the higher monetary-collection rates of a subgroup or only the higher case-completion rates. Power laws justify partitioning the data but also require presenting each as part of the whole. They justify looking at multiple variables but not selectively ignoring any. Also these analysis options do not indiscriminately lead to "better looking" court statistics; they lead to more accurate ones, whichever way the data fall. The overarching point is that knowing what kind of data you have—bell shaped vs. power law—improves data analysis, leading to more valid performance measures and the discovery of patterns that would otherwise be missed.

More broadly, how do analyses for power-law data fit into the larger toolbox of court statistics, especially *CourTools*, a set of court performance measures developed by the National Center for State Courts? They can be thought of as a complement to *CourTools*, extending the toolbox to an important class of data that traditional statistics are not designed to handle.

EMPLOYING POWER-LAW DATA IN PROGRAM EVALUATION AND DECISION MAKING

Accurately interpreting court data that behave according to a power law can help evaluate programs and inform decisions about allocating limited resources in state courts.

Responsive courts seek meaningful feedback from data on how well they are doing and then adapt based on this feedback (Ostrom and Hanson, 2010). All decisions that flow from this feedback depend on court statistics that are valid and comprehensive. To this end, distinguishing power-law data from bell-shaped and other distributions is critical, and several tools for helping with this determination have been provided (see Appendix). Once detected, state courts can leverage this knowledge to analyze and interpret data more carefully and in ways that allow researchers, judges, and court administrators to evaluate programs with a more accurate and complete set of performance measures.

Power laws can also reveal different courses of action available to courts. If courts are focused on improving monetary collection for restitution, knowing the data are power-law distributed suggests putting resources toward collecting from the infrequent big-dollar cases, focusing on the 85 percent or more of restitution owed by the top 20 percent. If courts are interested in restoring as many victims as possible, then courts could put more resources toward collecting from the more common small-dollar cases, focusing on the bottom 80 percent who owe 15 percent or less of the total restitution. Courts can then use this information alongside their goals and priorities to decide how best to allocate limited resources among these multiple courses of actions.

CONCLUSION

Courts increasingly rely on data to make decisions. We hope that by drawing attention to power laws, state courts can move closer to developing statistics that not only are valid but also provide deeper, more complete answers to questions of importance for decision making. State courts clearly stand to benefit, but so does the public. As the Conference of State Court Administrators observes, "State courts must be proactive in the measurement of their performance with empirical, credible tools. . . . State court leaders are in a position to provide empirical data on which the public can make judgments about the effectiveness of state court systems, rather than judgments based on inaccurate or anecdotal information" (COSCA, 2008).

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APPENDIX: DETECTING POWER-LAW DATA

DETECTING COURT DATA THAT FOLLOW A POWER LAW

This Appendix is a guide to detecting power-law curves in court data and is intended for court researchers, statisticians, and anyone else working directly with the data.

We describe two approaches to detecting power-law distributions: the visualization and the fit-test-compare approach. Which one to use depends on weighing a tradeoff. The visualization approach is simple but more error prone and susceptible to diagnosing a power law where none exists. The fit-test-compare approach is more complex but more rigorous, requiring stronger evidence to establish a power law.

The Visualization Approach

The visualization approach involves little more than replotting the data on a log-log plot. If the data fail to form a straight line, it does not follow a power law. Assuming we have already measured our variable of interest (e.g., restitution assessed) and graphed the frequency distribution, we take the logarithm of the values on the x and y axes to create a log-log plot. Why do this? A power law is described by,

$$p(x) \propto \frac{C}{x^{\alpha}}.$$

Letting y = p(x), taking the logarithm of each side, and using the power rule of logarithms, we get

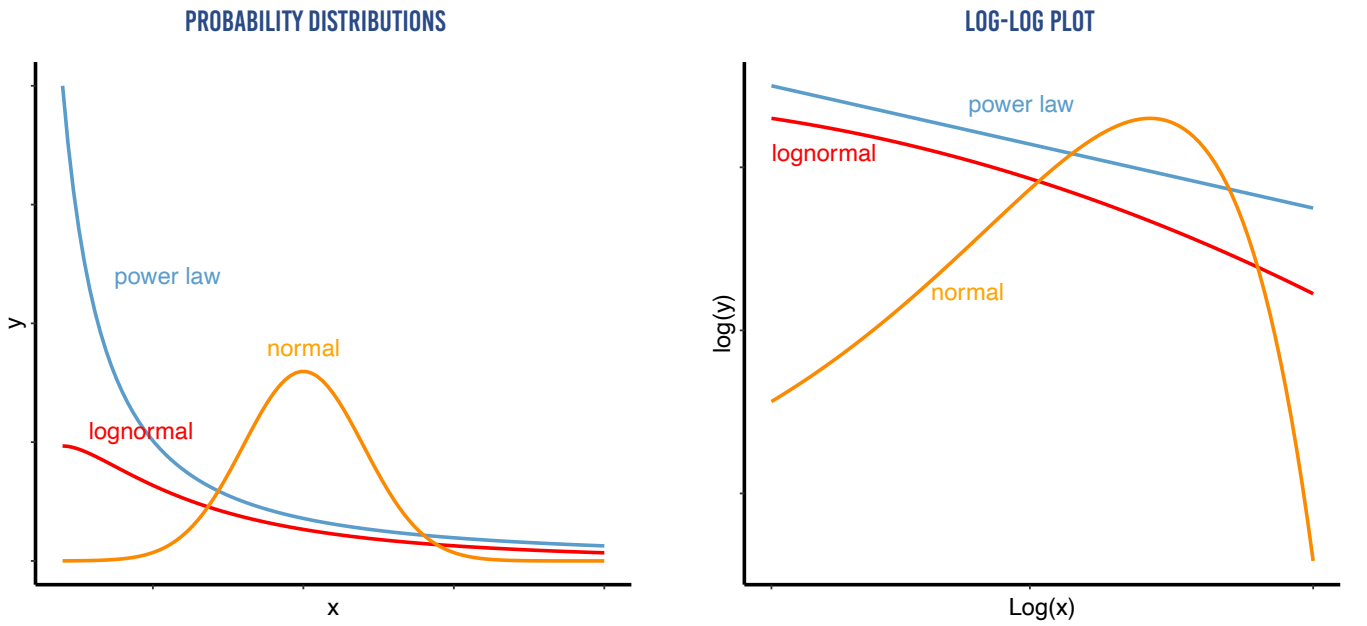
$$\log(y) = -\alpha \log(x) + \log C.$$

But notice that this has the same form as the equation of a line, y = mx + b, where m is the slope and b is the y-intercept:

$$\underbrace{\log(y)}_{y} = \underbrace{-\alpha}_{m}\underbrace{\log(x)}_{x} + \underbrace{\log C}_{b}$$

This tells us that if the data follows a power law, plotting log(y) on the y-axis against log(x) on the x-axis—a log-log plot—should yield a straight line with slope -α. If the data do not obey a power law, then the data will not follow a straight line.

SUPPLEMENTAL FIGURE 1.



Probability distributions for the normal, lognormal, and power law (left panel). Log-log plots of the same distributions (right panel). The orange curve on the log-log plot is inconsistent with a power law. The blue and red lines are consistent with a power law, but only the blue line comes from an actual power-law distribution.

This approach is simple but not without drawbacks. First, it involves a subjective judgment about how well the data form a straight line. Some distributions suspected to follow a power law based on visualization do not in fact obey a power law when examined with quantitative, statistical tests (Broido and Clauset, 2019; Clauset, Shalizi, and Newman, 2009; Stumpf and Porter, 2012). Additionally, few empirical data sets follow a power law for all values of x, and a visualization provides no clear way of deciding where power-law behavior begins and ends in a data set. Not only that, one can easily be misled in their judgment about a straight line by confirmation bias, the tendency to see what one wants or expects to see.

Second, a straight line on a log-log plot does not uniquely identify power laws. Other models besides power laws generate straight lines in a log-log plot (see Supplemental Figure 1, right panel). A more objective approach is no help here: statistically analyzing the log-log plot (e.g., with least squares linear regression) would also fail to rule out other models that follow a straight line. A straight line is necessary but not sufficient for a power law. In other words, if the data do not fall on a straight line, we can assert with confidence that the data are not power-law abiding. However, if the data do fall on a straight line, we can only say the data are consistent with a power law, as well as with other distributions. The visualization approach allows us to reject but not confirm a power law.

Another visualization approach, the Pareto Q-Q plot, is not covered here but is a variation on the normal Q-Q plot. Software packages are available that help generate various Q-Q plots (e.g., Reynkens, 2020). The Q-Q plot can be used to visually compare power laws to different models, but, like the log-log plot, does not involve any formal quantitative tests.

The Fit-Test-Compare Approach

For those who dream about fitting power-law distributions to court data, testing the "goodness" of the fit, and comparing the fit of power laws to other probability distribution models, there is the fit-test-compare approach (Clauset, Shalizi, and Newman, 2009). The first step involves estimating parameters. For example, if we wanted to fit a straight line, $y = mx + b$, to a set of data, we would need to estimate the parameter values, m and b. In the same way, the power-law probability function is a general equation with its own parameters to be estimated. The first step asks the question, if the data followed a power law, what parameter values would produce the best fit to the data?

Although the power-law model is fit to the data in step one, it does not tell us whether the model provides a good fit. Step two asks, how plausible is the power-law model for the data? Statistical tests can answer how likely the data came from a power-law distribution compared to chance.

Even if the power law provides a plausible match for the data at step two, the power law might not be the only good match for the data. Step three asks, does the power-law model fit the data better than other models? The logic is that if the best-fit power-law model at step one is a plausible fit for the data at step two and if it also fits the data better than other models at step three, we would have strong quantitative evidence for a power law.

Although the fit-test-compare approach is more rigorous than the visualization approach, it is more complex. Fortunately, computer code (including packages for Matlab, Python, and R) for the fit-test-compare approach is available. To get started, see the following:

Matlab: https://aaronclauset.github.io/powerlaws/
(Perma link: https://perma.cc/Q3B9-PJ58)

Python: https://github.com/jeffalstott/powerlaw
(Perma link: https://perma.cc/35VL-YWEB)

R: https://github.com/csgillespie/poweRlaw
(Perma link: https://perma.cc/Z7Y5-YXZF)

Does It Matter Whether Court Data Follow a Power-Law Distribution vs. Other Heavy-Tailed Distributions?

For the practical purposes of the courts, often it will not matter whether data follow a power-law or other heavy-tailed distribution. After all, power laws are interesting to courts *because of their heavy-tails* and the alternative analyses they invite. Under these looser conditions, the log-log plot from the visualization approach may be sufficient for diagnosing "power law-like" behavior, even if it cannot guarantee the data obey a power law. In contrast, researchers working with formal theories and others needing more accurate diagnostics will likely benefit from the fit-test-compare approach, which can better distinguish between power laws and related distributions.

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NCSC
TRENDS IN STATE COURTS

JUSTICE IN THE NEW DIGITAL ERA: THE PITFALLS AND BENEFITS OF RAPID TECHNOLOGY ADOPTION BY COURTS

Anne Skove
Support Lead, eCourtDate

Colleen M. Berryessa
Assistant Professor, School of Criminal Justice, Rutgers University

Lonnie Schaible
Associate Professor and Director of the Criminal Justice Research Initiative, University of Colorado, Denver

Ibrahim Aissam
Founder and CEO, eCourtDate

Courts occupy a unique position in the justice system that is steeped in tradition and formality. Likewise, any changes from established procedure are likely to invite challenges to decisions and outcomes based on their legal and constitutional implications. As such, it should be no surprise that courts have been slow to embrace technological advances. The reasons for their hesitancy have included valid worries about keeping procedural safeguards intact and privacy/security concerns, as well as (perhaps less valid) concerns about tradition and the skills required to be a good judge or advocate.[1] Although there is hesitancy, technology can be useful in many ways. Here, we examine three innovations—video conferencing, text messaging, and cloud storage.

VIDEO CONFERENCING

While remote hearings save much time and money, and may be safer because inmates do not need to be transported, they can have adverse effects on defendants.

1 For a comprehensive review of technological innovations, see Jackson et al., 2016; Hart, 2017.

The pandemic forced courts to quickly adapt and adopt new technologies. Courts and other governmental entities are overcoming hurdles to meet this challenge.

For example:

- Defendants' Sixth Amendment right to confront witnesses may be at stake.[2]
- Face-to-face, defendants take great pains to manage their image and present themselves in court in the way they choose; remotely from jail, they lose this ability.
- Defendants or other parties with disabilities may find it difficult to understand and participate in remote proceedings.

> *... courts have not only risen to the challenge of conducting video hearings during the pandemic, but also improved their processes and services while doing so.*

However, remote court work, including hearings, has become a way of doing business, particularly during the pandemic. In the early days of cameras in the courts, logistical problems related to bulky video equipment were almost as much of an issue as privacy versus public access. Today's video equipment is as easy to use as a cell phone or a laptop. At the same time, courts have increasingly begun to try to protect defendants' rights while protecting the health of the public.[3]

As a result, courts have not only risen to the challenge of conducting video hearings during the pandemic, but also improved their processes and services while doing so. Virtual court sessions have allowed more people to attend hearings. For example, rural areas that may have previously had little or no access to justice now need only basic technology to gain such access. Jurors, who have often needed to take time off work, find childcare, commute to the courthouse, find parking, and wait for hours or sometimes days, can now serve from the convenience of their homes.

As the National Association of Criminal Defense Lawyers (NACDL) notes, "[t]he fact that hearings and trials can be conducted via videoconference platforms does not make these proceedings legal" (Ettinger, Gerger, and Pollack, 2020). Defense lawyers have urged the abandonment of video; however, seeing that videoconferencing is perhaps unavoidable, they have at least called for better technology and training (Poulin, 2004).

In a perfect world, "[t]he introduction of videoconferencing should be gradual—allowing time for law enforcement, judges, attorneys, and court administrators to adjust to the new technology and to implement fair and effective procedures" (Bellone, 2015: 45). In a pandemic world, where (to date) over 600,000 deaths in the United States are attributed to COVID-19, time is a luxury. Courts have moved quickly to video. Remote hearings have become a necessity for public health reasons. Bailiffs have become conference hosts, IT departments have become rock stars, and judges have become talking heads. Accordingly, success stories have abounded. Among the positive implications of remote video hearings have been the following:

- better access to screening and services
- fewer failures to appear
- greater efficiency
- easier supervision
- increased participation[4]

Thus, the rapid adoption of technology has been difficult, but exceedingly successful in many ways.

TEXT MESSAGING

Text message reminders have also provided a useful lesson. As with video technology, early on the prevailing view was that cell phones were too new and that texts were unlikely to have much of an effect. However, the prevalence of cell phones, plus the increase in e-filing (by which courts can easily obtain contact information), have made the innovation not only more acceptable, but perhaps even expected by the public. Accustomed to receiving text messages from their pharmacies, doctors, and grocery stores, a text from court or a probation officer is no longer surprising.

2 See *Crawford v. Washington,* 541 U.S. 36 (2004).

3 "Absent extraordinary circumstances, criminal defendants must waive their right to face-to-face confrontation before remote testimony may lawfully be introduced against them" (Mance and Rubin, 2020).

4 As discussed during the National Center for State Courts' eCourts Webinar in December 2020.

As many are packaged in software-as-a-service (SaaS) form, courts can seamlessly implement text reminders from providers, such as eCourtDate, without installing any equipment or purchasing a new case management system. eCourtDate provides AI-empowered, Web-based messaging and scheduling management services. All demos, training, and support are done remotely.

By using text reminders, courts, prosecutors, and community corrections can enhance the experiences of clients while saving resources. Whether it be jurors receiving better guidance from the jury administrator, or defendants being more likely to remember their case events, simple text reminders will continue to be a key innovation in reducing the failure to appear.

Years ago, jury administration experts feted reminders—texting as we know it had not yet caught on—as a way to reduce costly and time-consuming failures to appear. A report by the National Center for State Courts notes, "as many as one-third of state courts have no mechanism to tell jurors not to report for service in the event that scheduled trials are cancelled before the trial date. Jurors simply arrive at the courthouse only to be sent home" (Hannaford-Agor, 2009: 6). The report suggests "[a] dedicated telephone line and answering machine that permits jurors to call and find out" as a solution. The "dedicated answering machine" was a huge technological advance over the postcard, which is still used widely.[5] Today, text messaging is an obvious choice over the quaint postcard method. According to one study, over 65 percent of people in the United States check their phones 160 times a day (Abbott, 2020).

The consequences for failing to appear can be catastrophic, involving fines and loss of freedom. However, "failure to appear" is often merely a "failure to remember." Electronic notifications provide substantial benefits with minimal costs and threats to procedural or legal issues because people are more likely to be aware of and participate in the process. Thus, a tech solution that helps defendants remember court dates represents a positive step (Fishbane, Ouss, and Shah, 2020).

CLOUD STORAGE

Security has become another threat to the adoption of court technology. An important function of courts is creating and maintaining public records. Storing all records in one physical location, however, is not advisable. What if the building catches fire or floods during a storm, and records are damaged or lost?

Cloud or hybrid-cloud architecture has been touted for years as a sensible safeguard in the event of a disaster. In 2017 court technology expert Jim McMillan recommended: "to enable court portability, the e-filing servers, CMS, and electronic document servers shouldn't be in the courthouse. They should be located either in 'the cloud' or in both the court's local data center and the cloud in a 'hybrid-cloud' architecture" (McMillan, 2017). McMillan was writing in the wake of a particularly bad hurricane season that had threatened Gulf Coast courts. Yet the same lesson has applied today during the pandemic.

As with SaaS, the cloud has become invaluable when trying to do court business remotely. Those court systems that already used the cloud have found it far easier to switch to remote work, especially during the pandemic (Stone, 2020).

Cloud storage is being adopted not only by larger areas, but also by many smaller governmental entities (Towns, 2021). The innovation is ranked as a high priority by city, county, and state governments, growing particularly quickly in midsized cities, who may not have been pursuing cloud solutions previously. Moreover, even where cloud solutions are not explicitly sought after, they may be part of an overall trend toward disaster recovery preparation and planning.

CONCLUSION

A worldwide pandemic may not be the ideal time to test new technologies, yet this is what has happened. What we have learned thus far is that courts are not as shackled to tradition as once thought; rather, they are resilient and accommodating. Technologies may have been limited in the past, but they are rapidly improving because of both want and need. Challenges posed by court technology are not insurmountable. Indeed, these technologies can be beneficial for work during the pandemic and into the future.

5 As they do in Kentucky; *see* AP II, Sec. 15, KY ST ADMIN P AP II, Sec. 15(a), Perma link: https://perma.cc/7FMB-CKB5.

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NCSC
TRENDS IN STATE COURTS

HOW TO MITIGATE CYBERSECURITY RISKS WHEN YOU DON'T FULLY CONTROL YOUR IT ENVIRONMENT

Paul Embley

Technology Services Director, Court Consulting Services, National Center for State Courts

Many government, court, and court-related offices have experienced cybersecurity incidents in the past year, and the number is projected to increase with the evolution of ransomware as a service and other innovative ways for hackers to work together. A common problem within court-related entities is lack of control over the IT environment. Often, the court is sharing the city or county network, email services, and other aspects of IT. Sharing resources can save money, but it also means a lack of control over cybersecurity detection, prevention, and amelioration. The old adage "trust but validate" is appropriate here in that many courts trust that the IT provider has everything under control, but have no idea how cybersecurity has been implemented.

If a city or county is attacked, there are sometimes no safeguards in place to isolate other agencies they are supporting. These may include county or city health departments, hospitals, transportation providers, and city/county offices and courts. For this reason, courts may not be prioritized when remedies are applied to protect other vital services. And, depending on what agencies experienced the intrusion, the city/county may have multiple fronts on which to try to stop the attack.

The time to assess your court's cybersecurity position within a larger state, county, or municipal IT ecosystem is before an attack occurs. What you don't know CAN hurt you.

There are some primary strategies for addressing cybersecurity risks. These include avoiding the risk through preventative strategies, such as isolating a network, detecting an intrusion through signature-based or behavioral patterns, and reacting to an identified security incident, for example, through isolation of the affected equipment. It is important for courts to know the measures their service provider has put in place for each of these categories.

So, what should court leaders do to protect themselves when relying on another government entity for IT services? Here are a few tips:

CATALOG, CLASSIFY, AND PRIORITIZE

- Ensure the IT staff has a complete inventory of software, applications, and servers that are used by the court. Lack of knowledge about resources can result in an inability to prioritize protection and restoration after a cyber-attack occurs. Failure to inventory can can result in limited or no access to an application that is critical to a user's job. In one court, users were left with no access to important forms and records for probation supervision, for example.
- Assist the IT staff in understanding and classifying data so that they are aware of how secure data resources are. For example, using *public*, *sensitive*, and *secure* classifications of data helps them understand the importance of protection. Often, the IT staff is distanced from business processes and does not realize where sensitive data resides to prioritize protection of it. In coordination with IT, the court's IT governance group should ideally go through a data-categorization process.
- Document the IT group's backup and restoration approach and include the backup location in the IT inventory. Once the priorities of the business applications are established, IT will have a better idea of how critical those are. This allows staff, with the assistance of IT governance, to determine how often data must be backed up, and what amount of data can be lost without harming the business. Most court data will need at least nightly backups. A best cybersecurity practice is to store backups off the primary network. Hackers are increasingly looking specifically for backup files that they can encrypt to cause further damage to restoration efforts. This is particularly true on Windows workstations and servers. An often-missed process is regularly testing the restoration of backup files to ensure they are capturing critical data correctly. Because IT staff are often under-resourced, they may miss this important step.

OPEN UP COMMUNICATION BETWEEN THE COURT AND THE IT PROVIDER

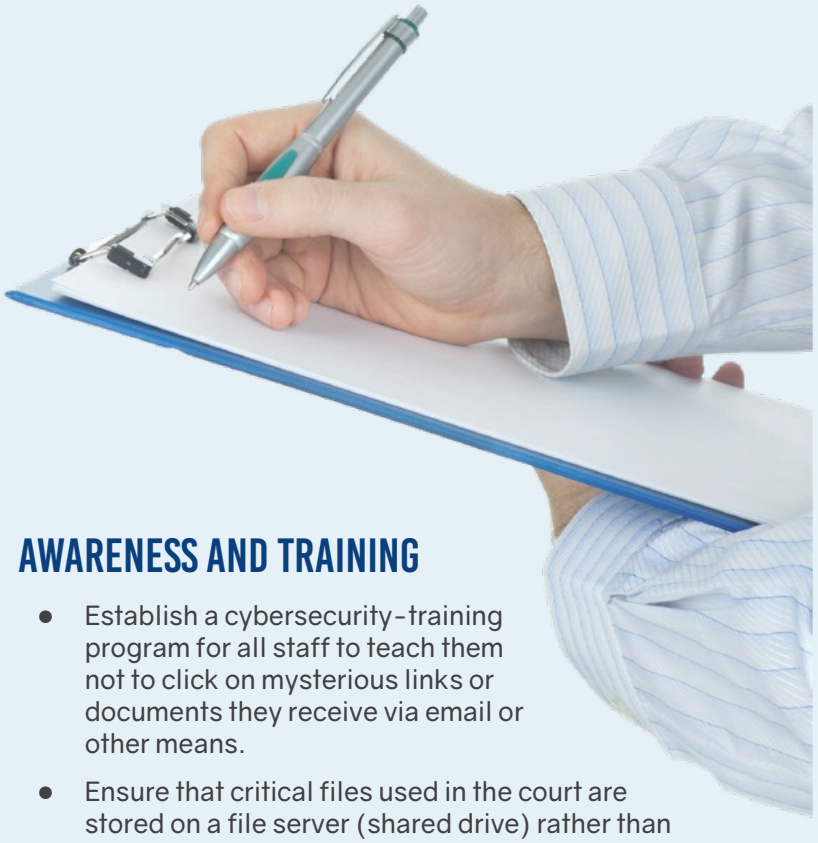
- If there is a lack of communication between the court and the IT provider, court staff may not be aware of where they should establish internal protections or ways to address cyber-attacks. Request that the IT provider establish a governance group so that all agencies can understand what is going on in the IT environment. Include your chief information officer/IT director (CIO) and primary business liaison in these group meetings. As part of this process, agencies can request information about the cybersecurity structure that has been put in place to understand what prevention, detection, or remedies would be present for an intrusion.
- Court staff and provider technical staff sometimes don't speak the same language. It is wise to find the individual in your organization that can bridge that communication gap, even if they are nontechnical. Identify a sponsor who is powerful enough to influence the situation and advocate for the courts. This may be a judge or a chief executive.
- Courts that lack internal technical staff should consider contracting with a vendor to act as the court's liaison to the IT provider. If communication with the provider is difficult, this might be done as part of an initial risk assessment performed by a neutral third-party.

Have an agreement in place that clearly defines the roles of the court's IT staff and the role of the service provider. This agreement can identify priorities and how cybersecurity events will be managed. It is better to have the response planned in advance rather than trying to figure it out in the middle of a cyber-event.

> *While establishing a court-based security program can be daunting, recovering from an incident will undoubtedly be much worse.*

ESTABLISH CONTROLS AND MAINTENANCE PROCEDURES

- Assist your IT staff in evaluating the current environment and establishing the appropriate controls. These may be data or file encryption, a firewall between the court's node of the network and the provider, network segmentation from other agencies, logging tools, or other mechanisms for detecting, protecting or mitigating an intrusion.
- Ensure that all servers and applications that are under the court's control are updated regularly and have up-to-date patching. Older versions of software have vulnerabilities that are well-known to hackers who look for low-hanging fruit that are easy to infiltrate. Patches are updates to software that are often designed to fix a security vulnerability. For those servers not under your control, have a regular report on any outstanding patches.
- If there is in-house software development/ maintenance in place, ensure that developer files are stored within a server-based configuration management tool like Team Foundation Server (TFS) so that their work is not lost in an attack. In one court, all of a developer's application updates were lost and his hard drive was stolen or misplaced during a ransomware attack. Keep in mind, physical security is just as important, if not more important than electronic remedies.
- The court should be on its own network segment. This allows for court specific security requirements to be applied without impacting other organizations in a shared environment. This separation also creates additional barriers to intrusion.
- Use multifactor authentication methods for access to high-value assets. Although having to type in a PIN that is sent upon initiating a login is an additional step and slightly inconvenient, the inconvenience of cyber-event recovery is far worse. It is far more difficult for hackers to circumvent passwords and PINs sent to external devices. Multifactor authentication would likely have prevented the most recent court attacks.



AWARENESS AND TRAINING

- Establish a cybersecurity-training program for all staff to teach them not to click on mysterious links or documents they receive via email or other means.
- Ensure that critical files used in the court are stored on a file server (shared drive) rather than on workstations that are not backed up. This is a difficult sell to end users that need a greater awareness about cybersecurity. Making them understand that workstation files are the most likely to be encrypted in a ransomware attack is an important aspect of an overall cybersecurity awareness program.

You may want to further protect yourself through an IT and cybersecurity audit conducted by a third party, such as NCSC or another certified entity. This provides an objective look into the vulnerabilities and controls that have been put into place in the IT environment. As an independent entity, the auditor can often act as a "go-between" if there are difficulties interacting with the IT provider and can better document and explain the risks and remedies to business leaders.

While establishing a court-based security program can be daunting, recovering from an incident will undoubtedly be much worse. It is worth the effort to understand your cybersecurity position before an attack occurs. Even small, incremental steps forward can make a tremendous difference.

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ACTIONABLE CYBERSECURITY RISK MANAGEMENT

Sajed Naseem
Chief Information Security Officer, New Jersey Judiciary

Ian Conklin
Court Executive 1B, New Jersey Judiciary

According to the National Institute of Standards and Technology (NIST), risk management is "the process of managing risks to organizational operations (including mission, functions, image, or reputation), organizational assets, or individuals resulting from the operation of an information system, and includes: (i) the conduct of a risk assessment; (ii) the implementation of a risk mitigation strategy; and (iii) employment of techniques and procedures for the continuous monitoring of the security state of the information system."

Within courts, some processes or technologies may be considered "secured" or "hardened," and others may be considered to have risk that is "mitigated" or "acceptable." The ability to distinguish when to secure systems and when to mitigate risks is critical for courts.

Cybersecurity risk management is especially critical during the current global pandemic as many court staff are working remotely, and courts face additional stressors in providing justice remotely.

Cyberattacks have become increasingly common in the public sector, including in courts. Actionable cybersecurity risk management is increasingly relevant to courts due to the nexus between the global pandemic, a remote workforce, and increasing vulnerabilities in technology.

CREATING AN ACTIONABLE CYBERSECURITY RISK MANAGEMENT PROGRAM

State courts rely on information technology for processing millions of cases across many docket types. With an increasing reliance on information technology, there are increased risks to confidential court information and overall risk to court business functions. In a 2020 interview concerning the global pandemic and leadership, former President Obama stated the global pandemic has "torn back the curtain," revealing significant issues with leadership in organizations that showed lack of preparation for such a crisis (Burch, 2020).

The following steps may be important in building an actionable cybersecurity risk management program within a court system.

- Senior judicial and technology leadership should be incorporated into a risk management committee (RMC).
- The risk management program should cover all judicial functions (e.g., appellate, supreme, superior), administrative areas (e.g., business, information technology, or information security), and business partners (e.g., intergovernmental partners or vendors).
- Leadership should communicate the creation of a cybersecurity risk management program courtwide.
- The cybersecurity risk management program must cover all information types (public, administrative, and confidential) in the court's information classification policy.
- The cybersecurity risk management program should incorporate national standards (e.g., NIST Cybersecurity Framework, NIST Risk Management Framework, or Federal Information Processing Standards [FIPS] 199).
- Staff cybersecurity readiness and performance scores must be part of the court's cybersecurity risk management program (see Naseem and Rakoski, 2020).
- Cybersecurity risk management staff should be trained to support the program and provide additional training to stakeholders.

It is important to incorporate security analytics into the risk management program. This may include tracking the number of findings in risk assessments, audited systems, and risk levels. More mature cybersecurity risk management programs may consider measuring changes in people, processes, and technology and mathematically incorporating them into risk assessments.

> *The first principle is that you must not fool yourself—and you are the easiest person to fool.*
>
> - Richard Feynman, Nobel Laureate and Physicist

LEADERSHIP IN REDEFINING CYBERSECURITY

Court leadership must recognize that cybersecurity is not just an information security topic but one that involves all facets of the organization. The court's organizational culture should incorporate measuring the readiness and performance of court staff. Due to the global pandemic, problems with cybersecurity could harm remote court proceedings that could adversely affect health, families, and resources. "Digital" justice is here to stay.

Courts need not only physical but also digital leadership because the release of any confidential information, such as location of an individual, can harm the entire court system. Leadership must incorporate ethics into daily practice to answer critical questions related to best practices, safety, and overall management of court staff.

> *Cybersecurity can no longer be the concern of just the information security department. Within organizations, it needs to be everyone's business.*
>
> - Rothrock, Kaplan, and Van der Oord, 2020

INFORMATION CLASSIFICATION AND HANDLING

The risk management program must cover all information types in the court's information classification policy. Once all information types are covered, processes and technology must be developed to handle different information types. They would likely include the use of encrypting, two-factor authentication, and data loss prevention to confidential systems. It is critical to classify court information. Without proper information classification, it would not be clear what information should be protected, what controls should be used to handle that information, and what training should be provided to cross-functional teams.

INCORPORATION OF NATIONALLY RECOGNIZED STANDARDS

A cybersecurity risk management program should incorporate national standards. National standards, as opposed to internally developed standards, can provide clarity in case of conflict. This will also allow the risk management program to be consistent with vendors, technologies, and intergovernmental partners and allow for consistent contracts—for example, when drafting a memorandum of understanding.

As an example, FIPS 199 defines "moderate" risk as follows: "if the loss of confidentiality, integrity, or availability could be expected to have a **serious** adverse effect on organizational operations, organizational assets, or individuals" (see National Institute of Standards and Technology, 2004: 2, emphasis in original). This would be consistent when working with other courts, public institutions, and organizations that use the FIPS 199 standard.

CYBERSECURITY READINESS AND PERFORMANCE AND RISK MANAGEMENT

Humans are fallible. No matter the nature, scope, or extent of an organizational cybersecurity event, invariably at some point, a witting or unwitting action of an individual inside an organization will facilitate a cyber event. Every aspect of securing, defending, and attacking a system has a human element, which profoundly affects all other components and guarantees that there can be no silver bullet in cybersecurity.

Specifically, the reliance of organizational cybersecurity on employees' keen sense of cyber readiness and performance can be defined by three dimensions where organizations provide actionable knowledge to their employees, affect their attitudes toward cybersecurity, and consequently affect a behavioral shift in their cyber interactions. These three dimensions constitute the Knowledge (K), Attitude (A), and Behavior (B), or K-A-B, cyber awareness model (see chart for a sample quantification of K-A-B of employees in different court functions).

CYBERSECURITY READINESS AND PERFORMANCE MODEL USING K-A-B

Dimension	Knowledge (%)	Attitude (%)	Behavior (%)	AWARENESS
Employee #1	19	8	23	**50**
Employee #2	11	15	4	**30**
Employee #3	33	33	15	**81**

APPLYING SECURITY ANALYTICS TO RISK MANAGEMENT

Even with advances in technology, managers need to be aware of what to look for and how to focus their security efforts to get the greatest return. Managers must understand assets, know their people, apply security analytics, and cover the basics.

Using the K-A-B model, it is critical for courts to incorporate cybersecurity readiness and performance scores, as well as vulnerability data (e.g., time needed to mitigate critical, high, medium, and low vulnerabilities), into their risk management programs. As an example, if a team of court staff are working on a project with confidential information within the family division and their cybersecurity readiness and performance scores are below acceptable levels, they may require additional custom training to fill those gaps (such as information classification or cybersecurity training), or a new project team with more experience might be needed to run the project.

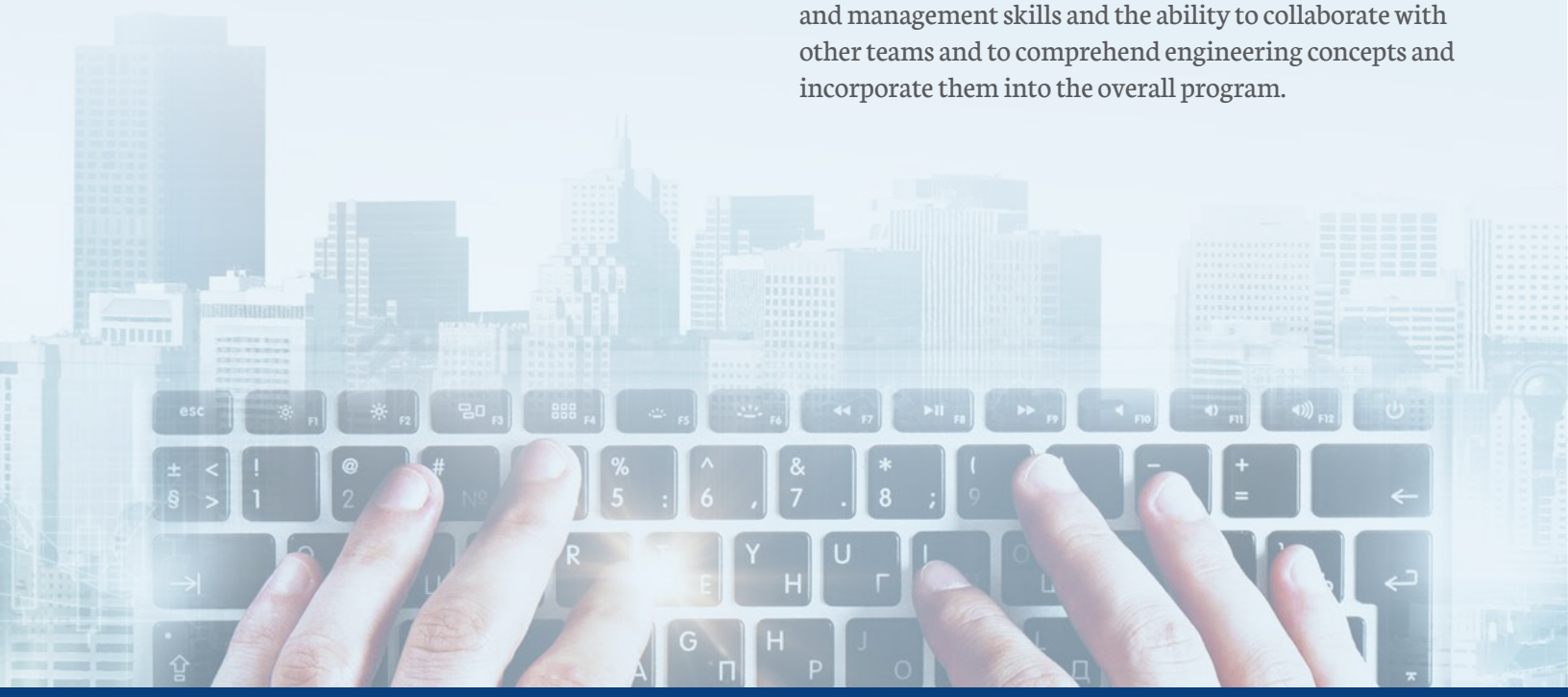
The goal of the cybersecurity risk management program is to protect the court and public from harm by developing the competency of court staff, department processes, and overall information security functions. This could entail mitigating vulnerabilities, incorporating best practices into computer configurations, applying critical software updates on time, and looking for anomalous network behavior, among other activities.

TEAMWORK

Court leadership needs to consider teamwork in building a strong cybersecurity risk management program. This program needs to be housed within the office of the administrative director, operationalized by the chief information security officer. The risk management team should be trained to support the program and provide additional training to cross-functional teams (e.g., judicial, administrative, or technological). Defining the risk management program is the first step; however, teamwork at all levels of the court is what holds the program together.

This leadership can be incorporated into the risk management committee (RMC). The RMC should document regular meetings with cross-functional management teams in judicial, business, and technology divisions to complete risk assessments, get their buy-in, and inform the RMC of changes in risk (such as project being done without a memorandum of understanding, changes to a vendor, or lack of training).

As technology departments adapt toward increasingly agile bimodal processes and refine security and risk governance toward increased agility, switching from a "control" to an "influence" mind set will help avoid enforcing a formal risk appetite at initiation, but provide guidelines at the outset (see McMillian and Scholtz, 2018). This allows for reconciliation of risk requirements during the build and scale-out phases and better conflict resolution, while building better trust among the cross-functional teams. The cybersecurity risk team should have strong leadership and management skills and the ability to collaborate with other teams and to comprehend engineering concepts and incorporate them into the overall program.



CONCLUSION

The pandemic has taught us that leadership is critical for the overall health of court systems. Since March 2020, many court systems have worked diligently to enable court staff to work remotely and hold remote court proceedings through the pandemic. Given the increased reliance on information technology, the cybersecurity risk management program is even more important due to the additional risks to courts—for example, hackers targeting remote employees, COVID-related phishing emails, or social-engineering attacks. A cybersecurity risk management program starts with leadership and requires defining information classification levels, vigilantly following nationally recognized standards, and incorporating cybersecurity readiness and performance and security analytics into the program. Such a program is held together by a trained and accountable risk management team.

Building the foundation of a strong risk management program will allow the courts to reopen normally for the public in the future, while accounting for risks in a measurable way. Courts have a good opportunity to incorporate ethical standards, the K-A-B model, and risk management principles to provide justice digitally and physically.

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NCSC
TRENDS IN STATE COURTS

USABILITY AND COURT DISPUTE RESOLUTION PLATFORMS*

Lise Embley
National Center for State Courts

Hon. Constandinos Himonas
Justice, Utah Supreme Court

Stacy Butler
Director, Innovation for Justice, University of Arizona
James E. Rogers College of Law

Courts around the world are implementing online dispute resolution (ODR) platforms that make it possible for parties in civil cases (e.g., small claims, tenant disputes, traffic, motor vehicle injuries, and even no-contest divorce) to proceed in legal matters online anytime, from anywhere. Simply providing an online option eliminates some of the most obvious access and convenience issues for those parties. However, court platforms have a unique usability mandate that ordinary consumer websites do not. If consumers are unable to navigate a company's website, they can choose a different company or product. But courts have a monopoly on the resolution of most legal matters. If parties cannot navigate a court's platform, they are not free to simply "take their business elsewhere." A user who has difficulty navigating a court's platform can experience harms that impact the user for years to come. Making court proceedings accessible and usable is tied very closely to making them just. As more and more courts implement digital and virtual processes, it is essential that they ensure the parties involved can successfully use them. Rigorous usability testing is essential to creating highly usable platforms.

*Thanks to Justice Constandinos Himonas of the Utah Supreme Court and Professor Stacy Butler and Sarah Mauet of the University of Arizona for their contributions to this article. The Innovation for Justice (i4J) Program at the University of Arizona James E. Rogers College of Law is available to work with courts interested in using UX research and design to improve their technologies and services. Visit law.arizona.edu/innovation-for-justice, or contact i4J Program Manager Mackenzie Pish at pishm@arizona.edu, for more information.

Online dispute resolution (ODR) is becoming more common in U.S. courts and around the world, but is ODR usable and accessible to litigants? The Utah Courts offer an example of how to measure the usability of ODR platforms.

One of the most successful and widely respected ODR systems today is British Columbia's Civil Resolution Tribunal (CRT). The platform, as well as the process, are notable for their human-centered design. Focusing on the needs of those who face the greatest barriers and conducting rigorous user testing have helped CRT create a platform that is not only aesthetically pleasing, mobile responsive, and user friendly, but highly successful at delivering on the CRT's justice objectives.[1] In fact, the CRT's continuous user-centric design process is central to its success.

The Utah Courts are another recognized leader in court technology. Like British Columbia's CRT, Utah Courts worked intentionally to create a user-centric (versus court-centric) small-claims experience. Two years after the platform launched, Utah had comparative data that showed some success. But the platform was not achieving the levels of engagement they hoped giving the public 24/7 online access would bring. Instead of assuming the issue was the users, Utah was determined to discover and address the barriers that were keeping users from successfully navigating the small-claims ODR process.

Utah recently partnered with the Innovation for Justice Program (i4J) at the University of Arizona James E. Rogers College of Law to test the usability of the court's groundbreaking small-claims ODR platform. The study, funded by a grant from the Pew Charitable Trusts, sought to systematically identify and address issues that were preventing some users from successfully navigating the small-claims platform and process. This study puts Utah courts front and center in the conversation about courts and usability.

MEASURING USABILITY

The field of user experience (UX) exists to improve users' interactions with products, services, and systems. Usability—how well things work for the people who use them—is one aspect. Systematically studying usability was a war-time innovation, dating back to World War I and the early days of aviation, when the U.S. military sought ways to help pilots avoid crashing. Usability testing helped determine the best placement of controls in the cockpit, ultimately reducing the human and financial toll of airplane crashes. This is an iterative refinement that continues today. Like human error in the cockpit, human error in the use of court processes has a notable toll. Addressing the usability failures in court platforms requires a similar determination to make improvements that quantifiably reduce negative impacts.

THE EMPATHY GAP

Usability issues often stem from an empathy gap: a cognitive bias that causes us to overvalue our own ideas and experiences. Courts have not traditionally designed their services for self-represented litigants. The civil legal system is a system built by lawyers, for lawyers, even though the vast majority of civil cases involve at least one self-represented litigant. As a result, court users are disempowered; many simply choose not to engage with the civil legal system. In short, courts have a usability problem.

In technology circles, if a significant percentage of users fail to successfully navigate a particular process, the issue is the app's design, not the users. In contrast, courts place responsibility for successful navigation squarely on the shoulders of the user. The expectation underlying the justice system is that people involved in a legal case should somehow

1 The Civil Resolution Tribunal publishes an annual report (Perma link: https://perma.cc/8ZUW-Y4J6) as well as monthly stats (Perma link: https://perma.cc/EVA5-DYXK) of new and resolved cases, including how those cases are resolved (agreement, default, decision, or withdrawn).

"come up to speed" on legal terminology and processes. To help such people navigate the complexities of legal processes, many courts have created online learning resources and guidance. In essence, they have focused primarily on trying to create better pilots instead of improving the placement of controls in the proverbial cockpit.

Many court leaders do recognize the importance of usability and acknowledge the lack of usability in the way courts conduct dispute resolution. There is growing understanding of the need for usability research in emerging ODR initiatives. However, a significant cohort of judges and lawyers believe that traditional legal language and procedures are "the way court is done." Dress codes, for example, are still a hot topic among court managers. A disconcerting empathy gap exists between the needs and lived experiences of the public and those of the designers of court processes and platforms. While this issue is not unique to the courts, public services are particularly prone. Platforms and services are often designed by people who do not use them and whose lived experience has little in common with those who do.

> [I]t is common to find, for instance, designers of public transport systems who use private drivers and health experts who never received treatment in a public hospital. The result are services built on a larger empathy gap, conceived by people whose frame of reference is even more distant from everyday users (Peixoto, Kaiser, and Tran, 2020).

In its 2016 *Call to Action*, the Conference of Chief Justices called for improved usability of the civil legal system: "Those who enter the system confront a maze-like process that costs too much and takes too long. . . . Many courts lack any of the user-friendly support we rely on in other sectors" (Civil Justice Improvements Committee, 2016: 2). The chief justices' call instructs courts to "take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services" (Civil Justice Improvements Committee, 2016: 37). In 2017 the Joint Technology Committee recommended that, "to glean the greatest benefit, ODR should be co-designed and rigorously user-tested by the public it seeks to serve. Courts must involve the public as key stakeholder participants" (p. 29). The concept of co-designing processes and rigorously testing is at the heart of UX. Utah Courts are demonstrating commitment to that effort with their ODR small-claims process and the openness to serious examination of its usability.

DESIGNING THE TEST/TESTING THE DESIGN

At the core of usability testing is a bridge in the empathy gap: To know if the court has implemented technology successfully for the people it serves, the court needs to know whether parties to a case can use it and whether it accomplishes the court's goals. Usability testing gives judges and court administrators a fresh perspective on court processes from the viewpoint of a typical or intended court user. Rather than assume that technology ensures a process that is fair, respectful, and impartial, the court needs to evaluate the extent to which those things are in fact accomplished.

Through user research and interviews with a variety of Utah stakeholders, the i4J team at the University of Arizona identified potential vulnerabilities in the Utah small-claims platform that might be further explored through targeted testing. Researchers divided the process into 11 discrete tasks (such as understanding the summons, registering, and logging in), and then had representative users attempt those tasks while narrating their thoughts, feelings, and actions. Researchers measured key indicators:

- task completion rates
- time on task
- error rates
- user satisfaction

This form of testing allows researchers to collect data about what users do and say, how long it takes them to complete each task, where they make errors, whether they can actually complete the task, and how satisfied they were with the process. To count as successful, participants had to complete each task without help. Task completion rates on the "as is" Utah ODR platform ranged from 100 percent on some tasks down to a disconcerting 12.5 percent on others. High completion rates indicated aspects of the platform design that were very usable. Low completion rates identified areas where changes would have the most beneficial impact. Significant time on task also pointed to usability issues or platform functionality that needed refining.

Since a large percentage of Utah's potential ODR platform users are low-income minorities who rely on cellphones for Internet access, researchers recruited study participants who mirrored those demographics. Participants used their own smartphones for testing, which was conducted at a local United Way office.

By observing and measuring how well the platform enabled typical users to navigate the small-claims process, usability testing provided Utah Courts with actionable insights into where the platform needed improvement to achieve court goals. Based on those results, researchers worked with representative users to redesign aspects of Utah's ODR process and platform that were most challenging for participants.

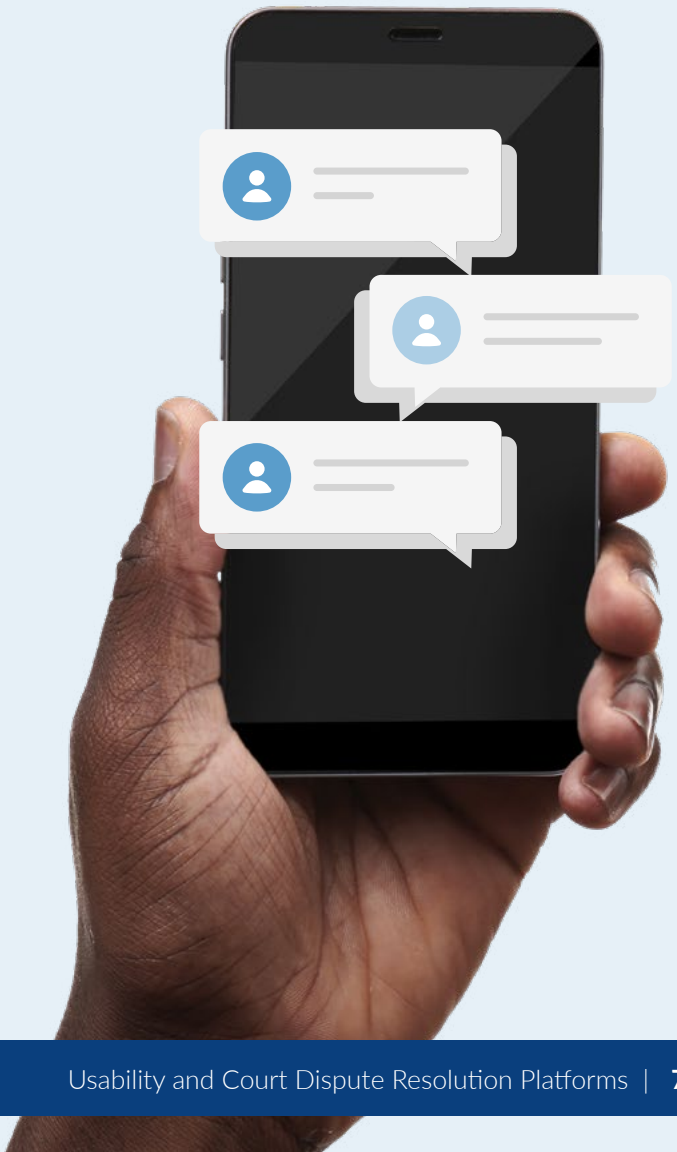
WHAT UTAH LEARNED

The i4J usability study confirmed Utah's underlying premise for ODR: users are ready for ODR and online courts. But users want ODR to be intuitive and for court platforms and apps to feel and function like other apps.

The study's findings also supported or explained Utah's own data. For example, Utah stats showed that 64 percent of defendants do not log into the ODR platform after receiving a summons. The usability study identified specific functionality and design issues with the summons/registration/sign-in process that were contributing to task-completion failures (critical errors) and extending time on task that caused user frustration.

UX facilitators and participants then worked together to prototype adjustments. Since COVID-19 pandemic restrictions interrupted the study, researchers were forced to find creative ways to complete their work. Instead of engaging with participants from the public, members of researchers' households who met demographic criteria were selected to participate in the prototype-testing phase.

Protype designs significantly reduced both critical errors and time on task. In initial testing, only 12.5 percent of participants were able to successfully register and log in without any assistance, while 75 percent of prototype participants were able to complete the prototype task. Improvements included a simplified URL, plain-language explanations, and a streamlined registration/login process. Other prototype designs incorporated status indicators, a "back" button, error-prevention mechanisms, plain-language legal terms and definitions, improved document-sharing functions, and the ability to print settlement agreements both before and after signing. Each improvement was designed in response to a specific task-completion issue identified in usability testing. Overall, the prototype improvements increased the task completion rate to 75 percent or more for each task. Utah will continue to track key metrics as platform adjustments are rolled out to real users.



IT'S NOT ROCKET SCIENCE.

The kinds of changes a usability study might recommend are often fairly simple ones. For example, simplifying a URL; incorporating a QR code; or changing the font size, color, or placement of a button or link can dramatically reduce user errors that negatively impact the user's experience and, ultimately, the fairness of outcomes.

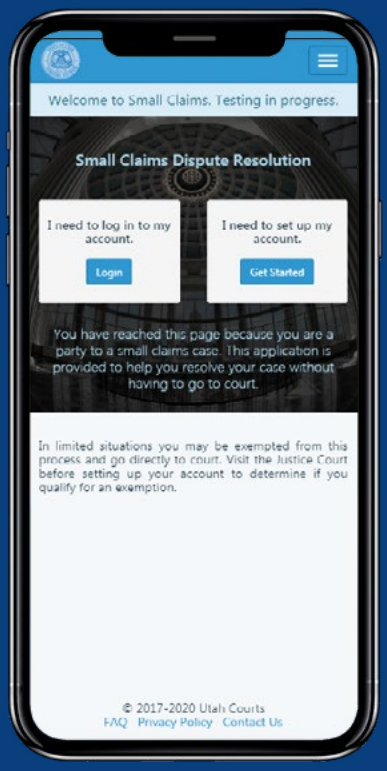
Researchers made five summary recommendations to better align the ODR platform to the needs of its users:

- ease the transition from paper to platform
- streamline the registration process
- simplify document sharing and review
- improve ODR information and help
- clarify legal information and user options

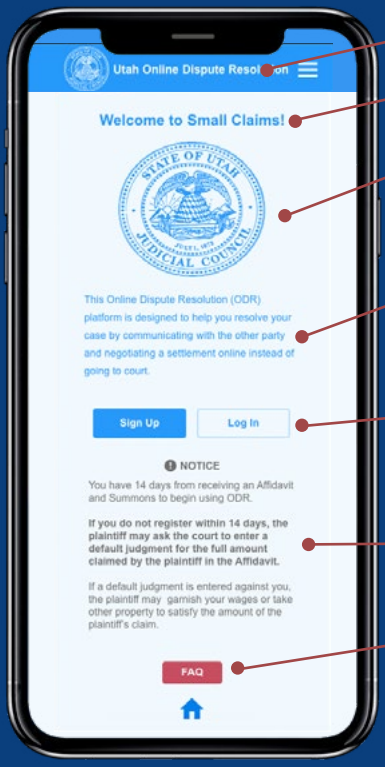
Some recommended improvements were specific to platform functionality, while others were related to content and the presentation of information. More detailed information about these recommendations is provided in the full report, which also includes comments/quotes from study participants that court managers might find applicable to their own platforms and processes. The following screen comparison illustrates one prototype redesign based on participant input.

An interactive prototype created by researchers based on input from workshop participants now forms the basis of design modifications Utah is making to the ODR process and platform. Utah plans to complete the rollout of the improved ODR platform to every county in the state by the end of 2021.

UTAH ODR LANDING PAGE



PROTOTYPE LANDING PAGE



MODIFICATIONS

- Website name prominent.
- A friendly welcome message.
- Size and placement of official State seal to address users' concerns about legitimacy.
- Brief plain-language explanation of ODR/the platform.
- Button differentiation to indicate primary and secondary actions.
- Surfacing essential, consequential information.
- Placement, design, and function of user help/FAQ link leading to streamlined FAQ content.

INCREASING THE FOCUS ON USERS AND USABILITY

Ideally, all courts would incorporate formal UX research design principles and usability testing into their product development life cycle. While that is unlikely to happen in the immediate future, courts can take simple low-cost and no-cost steps to better understand users and discover pain points in processes by:

- attempting to navigate the system as a first-time/external user
- reviewing website analytics and help desk requests
- interviewing users (simply listening to people talk about their experiences)
- observing real people (with their permission) as they use the court's platform/app

Partnering with a local university to apply usability curriculum in a real-world justice setting is a win for the university as well as the court, students, and the public. The Utah study also engaged a wide range of community agencies to connect with the low-income communities they serve for usability testing and participatory action research (PAR) workshops. A usability study provides an opportunity for the court to connect with the community it serves in beneficial ways.

Courts can also invest in UX design training for some staff or work with their human resources department to incorporate UX expertise requirements into future hiring, increasing organizational awareness and capabilities.[2]

In the same way that Utah is using their report's recommendations to improve *all* their public-facing court technology (not just the ODR platform that was tested), courts can foster UX awareness and promote user-centric design by applying recommendations from the Utah report. All courts can benefit from reading the "Utah Online Dispute Resolution Platform: A Usability Evaluation and Report" (Butler et al., 2020).

Courts inherently struggle with the concept of useful failure. Justice Himonas of the Utah Supreme Court and executive champion of the Utah ODR effort emphasizes that courts tend to learn too much from their successes and not enough from their failures. While winning and losing is the most common metric of success in court, failure is an essential component of a successful UX design process. Allowing users to "fail fast" in testing is the best way to reveal what most needs to change. Designing for end users is a process of continuous improvement.

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2 A variety of reputable public and private organizations offer usability learning resources, including www.usability.gov (Perma link: https://perma.cc/UU45-MLXY); https://ux-guide.18f.gov/ (Perma link: https://perma.cc/8H5R-Q8AF); and https://www.nngroup.com/topic/user-testing/ (Perma link: https://perma.cc/A9VX-FMRB).

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