# REIMAGINING
## CIVIL CASE MANAGEMENT

By Paula Hannaford-Agor

National Center for State Courts

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Concerns about the slow pace, high costs, procedural complexity, and lack of predictable outcomes in civil litigation have been raised repeatedly for more than a century.[2] Throughout the Twentieth Century, judicial policymakers expended considerable thought and attention on the development of court rules and operational practices, which collectively came to be known as "case management," to address problems not only in civil litigation, but also criminal and family court contexts. Many of these early efforts focused on internal procedures to ensure timely decisions in response to motions, evenhanded and consistent enforcement of procedural rules, and the development of case calendaring practices to ensure sufficient capacity for hearings.

Although early pioneers in civil case management successfully demonstrated the effectiveness of many of these techniques, widespread adoption in state courts was often hampered by concerns that fundamental principles of judicial impartiality required deference to civil litigants in matters of case processing.[3] Judges viewed their role as providing the forum in which civil litigants could resolve their disputes, but attempts to exert control over case processing encroached on party prerogatives to manage the case as they saw fit. Also underlying this attitude was the assumption that litigant interests were best served by professional attorneys who would zealously advocate on behalf of their clients with civility, competence, and due diligence. On the rare occasions that lawyers failed to do so, opposing counsel could be relied upon to bring matters to the attention of the trial judge to enforce the rules.[4]

Confidence in a well-functioning adversarial process for civil litigation continued to be embraced by both the bench and bar despite seismic shifts in societal conditions affecting the justice system. One major change was a substantial expansion in the scope of civil law, including the codification of common law;[5] dramatically increased

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[2] Roscoe Pound is credited with first raising these concerns in an address to the American Bar Association in 1906. Roscoe Pound, *Address at the American Bar Association Convention: The Causes of Popular Dissatisfaction with the Administration of Justice*, *in* A.B.A. Re., pt. I, 395-417 (1906).

[3] Judith Resnick, *Managerial Judges*, 95 Harv. L. Rev. 376 (1982).

[4] Paula Hannaford-Agor, *Changing Times, Changing Relationships for the Civil Bench and Bar*, 2018 Trends in State Courts 32-33.

[5] Mark D. Rosen, *What Has Happened to the Common Law? – Recent American Codifications and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 Wisc. L. Rev. 1119 (1994).

recognition of individual civil rights,[6] and the development of a robust regulatory infrastructure and administrative law[7] that led to dramatically increased civil filings in both state and federal courts.[8] At the same time, an increasingly global commercial system has placed new demands on state trial and appellate judges to familiarize themselves not only with their own state law, but to also keep abreast of national and international developments.

Advances in science and technology have also had a profound effect on civil litigation, raising novel legal issues and increasing the complexity and volume of evidence required to support civil claims.[9] Most trial judges were trained as legal generalists and many have struggled to understand the evidence and to manage complex civil cases filed in their courts. As the business climate became more competitive, some business litigants embraced alternative dispute resolution (ADR) processes, including mediation, arbitration and private adjudication, to resolve business disputes more quickly and cost-effectively than traditional litigation. Proponents of ADR also touted the additional benefit of shielding litigant information from public view.[10]

Keeping abreast of developments in commercial contract and complex tort law garnered most of the attention of the civil bench and bar, but similarly seismic changes have also taken place in civil cases involving routine consumer law, especially small claims, landlord/tenant, and consumer debt collection cases. In particular, the cost of securing legal services from licensed attorneys often exceeds the means of lower-income, and increasingly middle-income, persons. As a result, the proportion of civil cases in which one or more parties are self-represented has increased dramatically over the past three decades. As of 2015, three-quarters of all general civil cases had at least one self-represented litigant (SRL). To respond to the large influx of legally unsophisticated parties, state courts have to navigate a tricky balance of providing adequate information for SRLs about how to manage their cases while maintaining their ethical obligation of neutrality between parties.

These developments have led state courts to the realization that court rules are necessary, but insufficient by themselves to address problems of cost and delay. Instead, state courts today are embracing a considerably broader view of civil case management that encompasses the total constellation of court rules, business practices, culture and governance, and staffing and technology infrastructure. Effective case management now recognizes the importance of five core components that are necessary to achieve timely, cost-effective, and procedurally fair justice: (1) triage to ensure that cases receive attention proportional to their needs; (2) process simplification to remove procedural barriers that unnecessarily complicate litigation; (3) stakeholder engagement to ensure clear communication about case management objectives at every stage of the litigation; (4) effective use of court staffing and technology resources; and (5) an ongoing commitment to data management and performance management. Finally, it is critically important that effective case management not be viewed as an end in itself, but rather the means to achieve the ultimate goal of greater justice for all litigants served by the courts.

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[6] *See, e.g.*, Civil Rights Act of 1964, Pub. L. 88-352, prohibiting discrimination on the basis of race, color, religion, and national origin in voting (Title i), public accommodations (Title II), public education (Title IV), and employment (Title VII); Fair Housing Act, 42 U.S.C. 3601 et seq., prohibiting discrimination by direct providers of housing; American with Disabilities Act of 1990, 42 U.S.C. 12101 et seq., prohibiting discrimination against persons with disabilities in employment, public services, and public accommodations; Age Discrimination in Employment Act, 29 U.S.C. 621-634, protecting applicants and employees age 40 and over from discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms and conditions of employment.

[7] *See, e.g.*, Social Security Act of 1935, 42 U.S.C. 901, creating the Social Security Administration to administer retirement and disability payments to eligible persons and grants to states for unemployment and public welfare assistance; state and federal Workman's Compensation programs, such as Federal Employees Compensation Act, 5 U.S.C. 81; National Environmental Policy Act, 42 U.S.C. 4321 et seq., creating the U.S. Environmental Protection Agency; Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., protecting public and private employees from recognized health and safety hazards; National Housing Act of 1934, Pub. L. 73-479, creating the Federal Housing Administration to regulate residential mortgage financing.

[8] David Steelman, *Caseflow Management*, *in* Future Trends in State Courts 8 (2008).

[9] *See, e.g.*, Colin McFerren, DNA, *Genetic Material, and a Look at Property Rights: Why You Might Be Your Brother's Keeper*, 19 Tex. Wesleyan L. Rev. 967 (2012-13); Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 Yale J. L. & Tech. 106 (2019).

[10] Frances E. McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, 3 Disp. Resol. Mag. 12 (1996-1997).

## A Brief History of the Development of Civil Case Management

An early crystalizing event in the development of case management practice and theory was a decision in 1967 by the U.S. Supreme Court. *Klofer v. North Carolina* ruled that the Sixth Amendment speedy trial guarantee was so fundamental to justice that it applies to trials in state courts as well as those in federal courts.[11] While *Klofer* did not specify a precise timeframe during which a criminal defendant must be tried, the decision prompted the enactment of federal and state legislation setting strict time limits for completing various stages of a criminal prosecution.[12] Because trials are typically the last court event that takes place at the trial court level, the timeframes established by these statutes set the presumptive maximum amount of time permitted for criminal cases to be resolved, regardless of the manner of disposition. Nevertheless, many of these statutes provided numerous exemptions, for example, allowing delays caused by pretrial motions,[13] by the unavailability of the defendant or witnesses,[14] and other continuances that serve "the ends of justice."[15] As a practical matter, these exemptions provided ample opportunities for prosecutors and defense counsel to extend the timeframe for case resolution. Some judges, in turn, continued to defer to the trial attorneys on how best to manage the cases. If the attorneys were in no particular hurry to dispose the case, the judge was not inclined to second-guess their reasons. Other courts, however, embraced the principle of firm trial dates as the controlling mechanism to ensure expeditious criminal case processing. Based on the scheduled trial date, courts then worked backward to establish interim deadlines for key stages of litigation, many of which became codified over time.

Early success with criminal case management in the 1970s and 1980s subsequently led to similar statutory and regulatory timeframes for family and civil cases. Efforts to ensure timely case processing took on added importance during this period as limited financing for state courts, the static number of judgeships, increased filings, and growing numbers of litigants without formal legal expertise created increasingly crowded dockets and longer delays.[16] In part to address how loopholes in speedy trial statutes allowed cases to languish, many states began to adopt time standards setting statewide expectations for case resolution. In 1983, the Conference of State Court Administrators (COSCA) promulgated national time standards, which specified that non-jury civil cases should be disposed within 12 months of filing and jury trials should be concluded within 18 months of filing.[17]

The American Bar Association had also weighed in with recommended time standards for civil cases beginning in 1976 and offering amendments in 1984 and again in 1992.[18] The ABA time standards differed from the COSCA standards insofar that they didn't differentiate between non-jury and jury cases; instead, they articulated timeframes in which certain percentages of civil caseloads were expected to be fully resolved. The 1992 standards, for example, specified that 90% of civil cases should be closed within 120 days, 98% within 180 days, and 100% within 365 days.[19]

The ABA standards proved to be wildly optimistic, however, and state courts routinely failed to meet them. In 2011, the National Center for State Courts reviewed state courts' reported experience with time standards and developed the *Model Time Standards for State Trial Courts*, which were "intended to establish a reasonable set of expectations for the courts, for lawyers, and for the public."[20] The *Model Time Standards* adopted a framework similar to the ABA standards, but extended the timeframes for concluding civil cases and

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[11] Klopher v. North Carolina, 386 U.S. 213 (1967).

[12] *See, e.g.*, Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174.

[13] *Id.* at § 3161(h)(1)(F).

[14] *Id.* at § 3161(h)(3).

[15] *Id.* at § 3161(h)(8)(a).

[16] David Steelman, *Caseflow Management, in* Future Trends in State Courts 8 (2008).

[17] Richard Van Duizend et al., Model Time Standards for State Trial Courts 8, (2011).

[18] *Id.* at 2.

[19] *Id.* at 3.

[20] *Id.* at 1.

lowered the percentages for each specified timeframe (75% of general civil cases disposed within 180 days; 90% within 365 days; and 98% within 540 days).[21] *The Model Time Standards* also established timeframes for civil "summary matters," such as small claims and landlord/tenant cases (75% disposed within 60 days; 90% within 90 days; and 98% within 180 days).[22] A significant difference in the *Model Time Standards* was the implied expectation that a very small percentage of cases (2%) would not resolve within the maximum timeframe articulated in the standards. Instead, some cases are so inherently complex or encounter unusual obstacles that it is unreasonable to expect them to resolve within that timeframe.

The development and adoption of time standards pushed state courts to pay greater attention to timely case processing, but speed is not the only, nor necessarily the most important, performance measure for the American justice system. Quality, accuracy, fairness, transparency, accessibility, and cost-effectiveness are also critical factors for the fair and efficient adjudication and disposition of cases. Beginning in the 1990s, the NCSC undertook a national research project to develop performance standards and measurement tools for state courts to assess these aspects of their operations. The resulting *Trial Court Performance Standards* included 22 standards and an initial set of 75 discrete performance measures, which were developed, pilot-tested, and refined for broad applicability in state courts.[23]

The standards were organized into five thematic categories. The Access to Justice category included five standards (21 measures) focused on eliminating geographic, economic, procedural, language, and psychological barriers to the justice system.[24] Three Expedition and Timeliness standards incorporated traditional time standards for case processing (3 measures) and also focused on timely implementation of changes in law and procedure (5 measures) as well as timely responses to requests for information and releases of required reports (2 measures).[25] Six standards and 23 measures were developed related to Equality, Fairness, and Integrity, which addressed the constitutional guarantees of due process and equal protection under law.[26] The measurement approach for the Independence and Accountability standards differed from the others. Rather than defining specific measures of performance, this performance category described the process a court should employ to infer its degree of independence and accountability based on empirical results.[27] Finally, the standards in the Public Trust and Confidence category assessed court performance through the eyes of various constituencies, including practicing lawyers, court employees, court users, and independent court observers.[28]

The *Trial Court Performance Standards* were the first largescale effort to introduce the concept of performance measurement to judicial policymakers and encourage its routine use in court management. However, the number of distinct standards and measures proved to be overwhelming. Few courts had case management systems that were technologically sophisticated enough to easily automate data collection and most had insufficient resources and expertise to manually collect and analyze data for more than a small handful of measures. What was needed was a simplified, well-balanced set of measures that trial courts could use to conduct a preliminary performance assessment, which could be followed with a more detailed investigation if the initial assessment raised concerns. Such was the genesis of *CourTools*, the next iteration of performance measures released in 2004, which developed 10 trial court performance measures drawn predominantly

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[21] *Id.* at 3.

[22] *Id.*

[23] U.S. Dept. of Justice, Bureau of Justice Assistance, Trial Court Performance Standards and Measurement System (July 1997)(available at https://www.ojp.gov/pdffiles1/161569.pdf).

[24] *Id.* at 3-4, 8-9.

[25] *Id.* at 4, 9.

[26] *Id.* at 4-5, 9.

[27] *Id.* at 5, 9-10.

[28] *Id.* at 5-6, 10-11.

from the Access to Justice, Expedition and Timeliness, and Equality, Fairness and Integrity standards.[29] Although not as comprehensive as the *Trial Court Performance Standards, CourTool*s were designed to provide a dashboard view of court performance that would indicate areas of court performance that might merit additional attention.

As state courts became more familiar with performance measures, they began to use them both for monitoring internal operations as well as external transparency to the public and to key stakeholders, including public funding agencies. Clearance rates, age of pending caseload, and compliance with time standards became standard items in annual caseload reports published by state judicial branches. The ability to compare performance measures across courts made it possible to identify high and low-performing courts. When poor performance could be plausibly attributed to lack of resources, the performance measures could be used to support requests for additional funding for upgrades in physical facilities and technology or for increased judgeships or court staff positions.

Over the same time, however, state and local legislators had also become more skeptical about the relationship between court performance and funding. It was no longer a given that court requests for increased funding would be blindly granted in legislators' budget-making processes. Instead, they began to make demands for reliable data to support court budget requests, especially evidence showing that increased funding would result in improved performance. Workload assessments thus became a vital component of court performance measurement.[30] They were initially designed to answer the question of how many judges are necessary to manage the court's caseload at reasonably high quality and in a timely manner, but later extended to assessments of combinations of judges and professional and administrative court staff and even to other justice system partners (e.g., prosecutors and public defense counsel). In addition to providing empirical support for budget requests to the legislature, these analyses were used to assess resource equity among courts across the state and to manage the distribution of resources across various case types and functions within individual divisions of the court (e.g., civil versus family versus criminal).

Sophisticated and highly motivated state trial courts used performance measurement to continue to improve court operations, but also drew on other sources to better articulate their vision for improved court management, to develop concrete plans to achieve that vision, and to document whether they had, in fact, achieved it. To support their efforts, the NCSC published the *High Performance Court Framework (Framework)* in 2010, providing guidance to state courts on conducting robust self-assessments and identifying strategies for improved court management.[31] The *Framework* identified six key elements, the first of which was institutional commitment to four administrative principles: (1) each case receives individual attention; (2) the amount of individual attention is proportional to need; (3) court procedures are fair and understandable; and (4) judges control the legal process. All four principles directly relate to effective case management.[32]

Each of these initiatives advanced the theory and practice of case management. Over the past 50 years, various state and local courts have made concerted efforts to implement case management practices to reduced cost and delay, often with demonstrable success.[33] But many courts have struggled to maintain effective case management over time, especially with respect to civil dockets. Some of the difficulty reflects deep-seated beliefs about judicial involvement in the management of disputes between private parties. In most criminal and some types of family cases, judicial control is often required to ensure compliance with statutory mandates. In contrast, civil cases have very few externally established timelines. State statutes or court rules generally set strict deadlines for service of process on and responsive pleadings by defendants in civil cases, but the prevailing practice for most jurisdictions has been to allow the parties to negotiate

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[29] *See* www.courtools.org. A supplemental set of performance measures for appellate courts was released in 2011.

[30] Workload assessment employs a sophisticated multi-method approach to translating caseload into workload.

[31] Brian Ostrom & Roger Hanson, Achieving High Performance: A Framework for Courts (April 2010).

[32] The remaining elements addressed the court's managerial culture; performance perspectives, measurement, and management; and a step-by-step process for identifying operational weaknesses and implementing evidence-based solutions (the Quality Cycle).

[33] *See, e.g.*, Barry Mahoney et al., Changing Times in Trial Courts (1988); William E. Hewitt, Geoff Gallas & Barry Mahoney, Courts That Succeed: Six Profiles of Successful Courts (1990); Lisa M. Rau, The Philadelphia Experiment in Civil Case Management: From Disaster to Model Court (2019).

their own timeline for completing each stage of litigation. Judges viewed their role as largely reactive; if the parties could not agree on a mutually acceptable case management plan or encountered other problems while the case was pending, they could file a motion seeking a judicial decision, but otherwise judges left the management of the case to the discretion of the attorneys.[34]

Confronted with the reality that cost and delay continued to plague civil litigation in state courts, in spite of decades of experience with proven case management techniques, the Conference of Chief Justices (CCJ)[35] authorized the creation of the CCJ Civil Justice Improvements Committee (CJI Committee) in 2013 to examine the civil justice system and develop recommendations to ensure the "just, speedy, and inexpensive resolution of civil cases."[36] The CJI Committee was charged with developing guidelines and best practices for civil litigation based on evidence derived from state pilot projects and other applicable research, informed by the results of rule changes and stakeholder input, and making recommendations as necessary in the area of case management for the purpose of improving the civil justice system in state courts.[37]

Mindful that its mission to improve civil justice might be confused with controversial "tort reform" efforts, one of the first actions of the CJI Committee was to draft a set of governing principles to guide its deliberations—namely, that proposed recommendations had to be consistent with existing substantive law and not systematically favor plaintiffs or defendants, types of litigants, or represented or unrepresented litigants. Instead, recommendations should be supported by clear evidence of effectiveness in reducing cost and delay; they should protect litigants constitutional and procedural due process rights; and they should promote effective and economic use of court resources.[38]

Most committee members began their work believing that the major problems causing cost and delay involved more complex tort and business litigation, especially related to pleadings, discovery and e-discovery, and dispositive motions. To inform the CJI Committee's deliberations, however, the NCSC also conducted a *Landscape of Civil Litigation in State Courts (Civil Landscape)*, which examined case characteristics and outcomes in all civil cases disposed in state courts in 10 large, urban counties.[39] Findings from the Civil Landscape presented several surprising revelations, including:

- A large majority of civil cases involve straightforward facts and law and relatively small monetary amounts-in-controversy.
- Nearly two-thirds of civil caseloads are contract cases, most of which are consumer debt collection, landlord/tenant, and mortgage foreclosure cases. Likewise, small claims cases are overwhelmingly consumer debt collection cases.
- More than three-quarters of civil cases have at least one self-represented litigant (SRL), usually the defendant.
- Civil cases are very rarely adjudicated on the merits; instead, most cases are disposed by default judgment or dismissal.
- None of the courts that provided data for the *Civil Landscape* disposed cases within the *Model Time Standards* timeframes.

Ultimately, the CJI Committee concluded that its recommendations had to be comprehensive in scope, with respect to both the full range of civil cases filed in state courts and the methods employed to manage these cases. In 2016, the CJI Committee presented its report and 13

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[34] Paula Hannaford-Agor, *Changing Times, Changing Relationships for the Bench and Civil Bar*, *in* NCSC Trends in State Courts 2018.

[35] The Conference of Chief Justices is the association of all chief justices of the state courts of last resort in the United States, including justices of the five federal territories.

[36] CCJ Resolution 5 to Establish a Committee Charged with Developing Guidelines and Best Practices for Civil Justice (adopted Jan. 30, 2013). The committee consisted of 24 members, including judges and court administrators representing all levels of state courts, plaintiff and civil defense attorneys, corporate counsel, legal aid, and academia. It was chaired by Chief Justice Thomas Balmer, Supreme Court of Oregon, and staffed by the National Center for State Courts and IAALS, the Institute for the Advancement of the American Legal System. Civil Justice Improvements Committee, Call to Action: Achieving Civil Justice for All (2016) (*hereinafter* Call to Action).

[37] *Id.*

[38] *Id.* at 7.

[39] Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, The Landscape of Civil Litigation in State Courts (2015).

recommendations, the first of which addressed a question that its members confronted early in their deliberations: why do effective civil case management techniques, which have been around for decades, so often fail to take permanent root in state courts? Part of the answer, they concluded, was ongoing confusion about the meaning of the term judicial case management, which seemed to imply that judges individually were responsible for managing civil cases. Given the size of most civil caseloads in state courts, it was wholly unrealistic to expect that judges could give individualized attention to all their assigned cases. Instead, the court as an organization must embed case management into its routine business practices. Doing so would also prevent those practices from being discarded with new rotations on the bench. Case management cannot be an idiosyncratic quirk of individual judges, but must instead be a defining characteristic of the institution.

With that lesson in mind, the first CJI recommendation was that courts (not just judges) must exercise ultimate responsibility for managing civil cases from filing to disposition.[40] The remaining 12 recommendations set out a comprehensive plan for doing so. They featured a Pathway Approach based on the concept of proportionality in which both civil rules and court resources are matched to the unique needs of each case;[41] a radically different staffing model for civil case processing that delegates substantial responsibility for routine case management to specially trained professional staff, supported by effective case automation, permitting judges to focus on tasks that require their unique training and expertise;[42] and a renewed focus on high-volume calendars that comprise the vast majority of contemporary civil caseloads, especially improved access for self-represented litigants, and greater attention to uncontested cases and greater scrutiny of claims to ensure procedural fairness for litigants.[43]

## Experiments in Measuring the Effectiveness of Civil Case Management Techniques

One of the fundamental principles for the CJI Committee was that "recommendations should be supported by data, experiences of the Committee members, and/or 'extreme common sense.'"[44] For data, the CJI Committee members looked to states that had implemented civil justice reforms either on a pilot basis or statewide changes to civil rules and procedures. Most of these efforts focused on discrete stages of litigation (e.g., pleading, discovery) or on specific types of cases (mortgage foreclosure, business, complex litigation). Without exception, rigorous evaluations of these reforms provided important information to the CJI Committee; more recent reform efforts continue to inform civil justice reform efforts in state courts.

### Pleading and Discovery Reforms

One of the earliest pilot projects considered by the CJI Committee took place in New Hampshire, which implemented Proportional Discovery/Automatic Disclosure (PAD) Rules on a pilot basis in two counties effective October 1, 2010. The rules changed the pleading requirement from a notice pleading to a fact pleading standard, which was expected to reduce the time from filing to disposition, mostly by reducing the amount of time expended on case initiation and discovery. The rules also introduced a mandatory disclosure requirement intended to reduce the incidence of discovery disputes and a meet-and-confer requirement for parties to submit proposed case structuring orders. An NCSC evaluation found a mixed impact of the rule changes.[45] Anecdotal reports from attorneys suggested

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[40] Call to Action, *supra* note 35, at 16.

[41] *Id.* at 18-27.

[42] *Id.* at 27-33.

[43] *Id.* at 33-38. The recommendations were endorsed by the CCJ and COSCA at their 2016 Annual Meeting. Resolution 8 in Support of the Call to Action and Recommendations of the Civil Justice Improvements Committee to Improve Civil Justice in State Courts (July 27, 2016). The NCSC and IAALS then undertook a three-year Civil Justice Initiative Implementation Plan, providing technical assistance and education, developing tools and resources for state courts, and overseeing and evaluating pilot projects to demonstrate the effectiveness of the techniques featured in the CJI Committee recommendations. Details about the CJI Implementation Plan are available at www.ncsc.org/cji.

[44] Call to Action, *supra* note 35, at 7.

[45] Paula Hannaford-Agor et al., New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules (Aug. 19, 2013).

that these provisions were working as intended, but a survival analysis of the rate at which cases were disposed showed no difference between cases filed before and after implementation of the PAD Rules. On the other hand, close examination of case outcomes showed a dramatic decrease in default judgment rates. Ostensibly, fact-pleading and automatic disclosure requirements provided defendants with sufficient information on which to contest claims, which may have resulted in fairer case outcomes, but would take somewhat longer to resolve. In addition, the PAD Rules did not specify deadlines, or even suggest recommended timeframes, for completing litigation tasks. Consequently, attorneys' self-imposed deadlines largely mirrored the deadlines imposed before the PAD Rules were implemented.[46]

Several states have focused on reforming discovery in civil litigation, which was widely viewed as the primary cause of increased litigation costs.[47] After extensive discussion and public comment, the Utah Advisory Committee on the Rules of Civil Procedure proposed changes to the scope of discovery by introducing the concept of proportionality, which became effective on November 1, 2011. The revisions created three tiers of discovery based on the amount-in-controversy. Each tier defined the amount of permissible discovery and deadlines for completing fact and expert discovery. They also imposed mandatory disclosure requirements for the documents, physical evidence, and the names and expected testimony of witnesses that each party expected to offer as evidence.[48] The rule revisions resulted in reduced time to disposition and significantly increased settlement rates across all three discovery tiers.[49] In addition, the frequency of discovery disputes decreased in non-debt collection cases and, when they occurred, they did so significantly earlier.[50]

Texas likewise implemented the Expedited Actions Rules (EAR), which restricted the scope and timeframe for completing discovery for cases valued less than $100,000, effective November 13, 2012. In addition to restrictions on discovery, the rules mandated that trials for EAR cases must be scheduled within 90 days after the completion of discovery, limited trials to no more than 8 hours per side, and placed restrictions on the amount of time and fees assessed for parties engaged in alternative dispute resolution.[51] The results in Texas for EAR cases were similar to Utah's: significantly decreased time to disposition, increased settlement rates, and reduced frequency of discovery disputes.[52]

A particularly telling finding from the evaluations in both Utah and Texas was the very high rates of compliance with the restrictions on the scope of discovery. Many opponents of the rule changes in both states expressed concern that restrictions on the scope of discovery would prevent parties from gathering the evidence needed for trial unless judges granted permission for expanded discovery. In both states, however, attorneys reported that they were able to complete discovery within the rule restrictions in more than 90% of cases.[53] Indeed, a sizeable number of cases resolved with no discovery other than mandatory disclosures.[54] These findings confirmed that discovery rules for state courts, which generally mirrored those for federal courts, were designed primarily to guide civil case processing for the most complex cases rather than relatively straightforward cases that make up the vast majority of civil cases filed in

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[46] *Id.* at 19-21.

[47] Am. Coll. of Trial Lawyers Task Force on Discovery & Inst. for the Advancement of the Am. Legal Sys., Final Report (2009).

[48] Tier 1 Utah Supreme Court Advisory Committee on the Rules of Civil Procedure, Proposed Rules Governing Civil Discovery (available at https://www.utcourts.gov/committees/civproc/Proposed_Rules_Governing_Discovery_Summary.pdf).

[49] Paula Hannaford-Agor & Cynthia G. Lee, Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts (April 2015). In Tier 1 debt collection cases, the frequency of discovery disputes more than doubled from 2.2% to 5.6%, which the evaluators concluded was a normatively positive impact as it indicated increased motivation by defendants to actively engage in litigation.

[50] *Id.*

[51] Texas Rules of Civil Procedure, Rule 169.

[52] Paula Hannaford-Agor & Scott Graves, Texas: Impact of the Expedited Actions Rules on the Texas County Courts of Law (Sept. 1, 2016).

[53] Utah, *supra* note 48, at 35; Texas, *supra* note 51, at 9.

[54] In Texas, 51% of plaintiffs and 56% of defendants reported no discovery other than mandatory disclosures, and 38% of cases involved no discovery by either party. Texas, *supra* note 51, at 10. In Utah, no formal discovery took place in 32% of Tier 1 and Tier 2 cases. In Tier 3 cases, no formal discovery beyond automatic disclosures occurred in 9% of cases. Utah, *supra* note 48, at 34-35.

state courts. The kinds of restrictions and limitations imposed by the Utah and Texas rules reduced time to disposition, increased settlement rates, and reduced discovery disputes without constraining attorneys' ability to gather the evidence needed to inform settlement negotiations or to offer at trial.

## Civil Case Management Teams

While some courts focused on triage and pathways, others focused on strengthening court staffing and technology infrastructure to ensure compliance with court rules and orders. The Philadelphia Court of Common Pleas was one of the first to implement the concept of civil case management teams (CCMTs) to support effective civil case processing. A 1995 study of the 45 largest urban state trial courts ranked the Philadelphia Court of Common Pleas as second to last for time to disposition.[55] The study prompted the court's leadership to undertake a massive restructuring of civil operations, including a judicial team structure, streamlined motion and discovery procedures, mandatory mediation with volunteer lawyers, and a trial scheduling system that was predictable and responsive to last-minute settlements. Within three years, the reform effort eliminated a decades-long backlog.[56] By 2004, an NCSC study concluded that Philadelphia's civil case management system has resulted in "arguably the best managed large urban court operation in the nation."[57]

In 2008, the economic recession precipitated a spike in mortgage foreclosure actions across the country, including in the Eleventh Judicial Circuit Court (Miami-Dade) where mortgage foreclosure rates increased nearly threefold. Traditional case management had been performed by judges, who examined the needs of cases one by one as each case was presented by attorneys. The foreclosure crisis turned that model upside down, as attorneys had more cases than they could manage and quality control was erratic. To address the crisis, the Eleventh Judicial Circuit Court obtained funding to develop a case management system featuring four distinct tiers of processing and oversight: technology, clerical staff, skilled (professional) staff, and judicial staff. The intent of the staffing model was to ensure that judges would not perform routine case reviews that could be performed by less expensive human resources. Each tier had assigned tasks that matched the training level of the individuals employed in that capacity. Matching task to skill level avoided wasting judicial time on mundane reviews, resulting in a cost-effective system that produced actual momentum each time the judge saw the case.

The staffing model was implemented in two divisions of the Circuit Court to address the backlog of foreclosure cases in 2011. The court collected data for evaluation purposes on the clearance rates for all divisions managing mortgage foreclosure cases. The clearance rate for the two divisions using the staffing model was nearly double (281%) compared to the division that did not employ the staffing model (145%). Moreover, newly filed cases were disposed considerably faster under the staffing model. Nearly two-thirds of cases (62%) were disposed within 12 months compared to 45 percent of cases in the division that did not employ the staffing model. Eighty percent (80%) of newly filed cases were disposed within 18 months compared to only half (52%) of cases in the division that did not employ the staffing model.

The Eleventh Judicial Circuit Court replicated this approach in 2016 as a demonstration pilot site for the CJI Implementation Plan. The court created four civil case management teams (CCMTs) comprised of judges, specially trained professional staff, and administrative court staff. In addition to creating the CCMTs, the Miami-Dade Civil Justice Implementation Pilot Project (CJIPP) triaged cases to pathways as proposed by the CJI recommendations. Case characteristics and outcomes for CJIPP cases were compared to those of non-CJIPP judges. After a year, CJIPP cases had a higher closure rate and shorter times to disposition for both contested and uncontested cases across all pathways.[58] CCMT members also reported improved satisfaction with their work as a result of the staffing model. Judges reported that delegating routine case management to their teams allowed them more time to review case details before a hearing or deciding a motion, while professional and administrative

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[55] John Goerdt at al., *Litigation Dimensions: Torts and Contracts in Large Urban Courts*, 19 St. Ct. J. Appendix 8 (1995).

[56] Lisa M. Rau, The Philadelphia Experiment in Civil Case Management: Journey from Disaster to Model Court (2019).

[57] David Steelman, Civil Programs in the Philadelphia Court of Common Pleas (2004).

[58] Lydia Hamblin & Paula Hannaford-Agor, Evaluation of the Civil Justice Initiative Pilot Project (CJIPP) (April 2019).

court staff appreciated having greater responsibility for case processing tasks.[59] In surveys and focus groups, attorneys also reported positive reviews of the pilot project. One theme expressed during the focus group meetings was how CJIPP procedures tended to discourage unnecessary gamesmanship in litigation because the court was positioned to detect noncompliance with court orders and proactively addressed problems without prompting by the affected parties.

Technology support, especially the ability to perform data analytics, is critical to effective civil case processing. The 22nd Judicial Circuit Court in McHenry County, Illinois, another demonstration pilot site for the CJI Implementation Plan, implemented pathways and civil case management teams, but also invested heavily in the development of technology tools both for self-assessment purposes and to provide tools for parties. The self-assessment tools included monthly courtroom caseload summaries that indicated average time to disposition, the number of cases exceeding disposition guidelines, the number of cases pending, the ratio of cases set for trial and the result (continued/settled or dismissed/tried), and an "old case" report providing the age of the pending caseload and a list of backlogged cases with the case's next court date and accompanying brief caseflow history.[60] Tools for parties included mandatory e-filing, an email notification service alerting parties to new case filings, online access for parties to case files, and text and email reminders about upcoming court dates.[61]

The McHenry County Circuit Court did not have a large case backlog, so the intent of pilot project was to implement the CJI recommendations to proactively manage newly filed cases. But it nevertheless had the effect of cleaning up old cases that had languished on the docket. By 2018, the court's clearance rate increased from 107% in 2016 to 111% in 2018 in spite of an increase in filings during the same period.[62] In addition, 84% of cases closed in 2018 had been pending for less than 365 days at disposition compared to 80% of cases in 2016.[63]

## Managing SRLs and High-Volume Dockets

Individual judges and court staff in state trial courts are aware that the rate of self-representation has increased steadily over the past three decades. However, the *Civil Landscape* study was the first to document the extent of self-representation across multiple jurisdictions and civil case types. SRLs are considerably less informed about court rules and procedural complexity than represented litigants, and consequently are susceptible to sharp litigation practices. Several members of the CJI Committee with experience on these dockets briefed their colleagues on serious, recurrent problems, including inadequate service, insufficient information available to litigants, overcrowded and confusing courtrooms, inadequate explanations to litigants concerning the role of counsel, and insufficient court scrutiny of plaintiff claims.[64] In response, the CJI Committee offered several recommendations related to improved information and convenience to SRLs, simplified procedures, and enhanced court oversight of civil case processing to ensure compliance with procedural due process, especially related to notice, standing, timeliness, and proof of claims before a default judgment can be entered.[65]

The Fulton County Magistrate Court (FCMC), located in Atlanta, Georgia, was selected as a demonstration pilot site to implement CJI Recommendations 11 and 13, focusing on high-volume dockets and improving litigants' experience with the court system. In many respects, FCMC epitomizes the experience of contemporary high-volume courts. Sixteen magistrates manage a civil caseload that averages approximately 74,000 case filings per year. Small claims (cases involving demands for money damages less than $15,000), dispossessory (landlord/tenant), and garnishment cases composed approximately 90% of the total filings in 2017. From March 2017 through October 2018, CJI implementation efforts in FCMC included the creation of informational materials for litigants, adjustment of docket calendaring to relieve backlogs, and the development of checklists for judges and court staff to ensure consistent

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[59] *Id.* at 18.

[60] Courtney Broscious & Shelley Spacek Miller, Evaluation of the Civil Justice Initiative Project (CJIP)(June 2019).

[61] *Id.* at 8-9.

[62] *Id.* at 10-11.

[63] *Id.* at 11.

[64] Call to Action, *supra* note 35, at Appendix I.

[65] *Id.* at Recommendations 11-13.

and accurate case processing. Concurrent with the CJI pilot project, the FCMC undertook several complementary efforts, including redesigned Clerk of Court offices with additional space and computers for litigant use; the adoption of text reminders; and the launch of online dispute resolution (ODR) to facilitate early resolution in small claims cases. The FCMC used successive surveys of litigants to assess whether litigants were accessing the materials and, if so, litigants' views about their usefulness. In the first survey, administered in early 2017, one-third of litigants accessed the materials. In the second and third surveys, administered in October 2017 and June 2018, respectively, litigant use of the materials increased to 45% and 49%, indicating that the FCMC redesign of materials and website made these resources accessible.[66] Most litigants also reported that they found the materials useful (56%) and were generally satisfied with their experience in court (78% to 89%, depending on case type).[67]

## Innovations to Assist Self-Represented Litigants

Beginning in 2001, CCJ and COSCA adopted numerous resolutions in support of access to justice and increased services for SRLs.[68] Many of the earliest resolutions endorsed increased funding for legal services organizations and lawyer pro bono programs; later resolutions expanded the scope of support for a variety of self-help services for SRLs. Undoubtedly these programs have helped many litigants achieve fair resolutions to their legal cases. Nevertheless, empirical studies have repeatedly found that the legal needs of large numbers of Americans go unmet each year, sometimes because legal services are unaffordable or unavailable, but frequently because people do not even realize that their "problem" is one that might be solved with legal assistance.[69]

Growing recognition about the unmet legal needs of Americans led CCJ and COSCA to endorse the creation of a national Justice for All (JFA) Initiative.[70] Through a competitive process, fourteen states received strategic planning grants to engage with social and community organizations not only to assist SRLs in navigating court processes, but, as importantly, to address the unmet legal needs of persons who do not even realize that their problems have a legal component.[71] Much of this work entails outreach to and collaboration with non-legal community partners, such as social service and healthcare providers, libraries, schools, community organizations, and other state and local branches of government. The JFA Initiative provides a framework for state teams to inventory their existing processes, partners, self-help services, and other factors that affect court users' experience and ability to get their legal needs met. A subsequent analysis of the inventory can identify existing gaps and help states develop a continuum of targeted resources, services, programs, educational systems, triage processes, and referral networks

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[66] Courtney Broscious, Shelley Spacek Miller & Paula Hannaford-Agor, Evaluation of a Demonstration Pilot Project of the Civil Justice Initiative 8-10 (Dec. 2019).

[67] *Id.*

[68] *See, e.g.*, Resolution 23: Leadership to Promote Equal Justice (adopted as proposed by the CCJ Access to and Fairness in the Courts Committee on Jan. 25, 2001); Resolution 31: In Support of a Leadership Role for CCJ and COSCA in the Development, Implementation, and Coordination of Assistance Programs for Self-Represented Litigants (adopted as proposed by the CCJ/COSCA Task Force on Pro Se Litigation, Aug. 1, 2002); Resolution 2: In Support of Efforts to Increase Access to Justice (adopted as proposed by the CCJ Access to and Fairness in the Courts Committee, July 30, 2008); Resolution 8: In Support of Access to Justice Commissions (adopted as proposed by the CCJ/COSCA Access, Fairness & Public Trust Committee, July 28, 2010); Resolution 1: In Support of Encouraging Pro Bono Service in Law Schools (adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee, July 31, 2013); Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All (adopted as proposed by the CCJ/COSCA Access, Fairness & Public Trust Committee, July 2015).

[69] Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. Rev. 443 (2015-2016).

[70] CCJ & COSCA, Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All (adopted as proposed by the Access, Fairness, and Public Trust Committee at the 2015 Annual Meeting). The JFA Initiative includes an advisory committee of judicial thought leaders, legal services organizations, the Self-Represented Litigant Network, and state access-to-justice commissions.

[71] Justice for All: A Roadmap to 100% Civil Access to Justice (Aug. 2021).

to realize a justice ecosystem strong enough to meet court users' needs in any circumstance.[72]

The efforts underway through the JFA Initiative are encouraging, but a recurring theme in the states' gap analyses is recognition that the supply of affordable legal services by licensed attorneys will never satisfy the demand. Acknowledging this reality has led some judicial policymakers to propose dramatic reforms to the legal services marketplace. One of the earliest innovations was the development in 2012 of a certification program in Washington State to license nonlawyers to provide legal services in the area of family law. As of June 2020, several dozen paralegals had completed the training and been certified as Limited Licensed Legal Technicians (LLLTs) and another 275 were in the pipeline when the Supreme Court of Washington abruptly sunset the program, citing administrative costs.[73] However, Arizona[74] and Utah[75] have launched their own programs and programs in several other states (California, North Carolina) are in the planning stages.[76]

Other regulatory reform efforts provide opportunities for lawyers to more easily access capital for their operations, including fee-sharing arrangements, multidisciplinary partnerships, and nonlawyer investment in law firms. Both Arizona and Utah have developed rules and regulatory procedures to monitor the impact of these innovations, especially with respect to consumer protection.[77] The process of implementing these procedures also provides increased opportunities for legal technology companies, such as Rocket Lawyer and Legal Zoom, to provide low-cost legal information and templates for common legal documents online without running afoul of Unauthorized Practice of Law statutes.

Online dispute resolution (ODR) is another innovative technology solution designed to assist self-represented litigants resolve legal problems, including negotiating settlements or exchanging information to narrow the factual and legal issues in a formal court hearing.[78] Broadly speaking, ODR programs are designed to increase convenience, case processing efficiency, and awareness of litigant options. In most ODR programs, litigants try to resolve their disputes on the ODR platform first, and those who are unable to do so divert back to the traditional in-court process. As a practical matter, however, the generic term ODR encompasses a wide variety of programmatic features including case type, case processing rules and practices, and operational and procedural requirements for participation.[79] ODR platforms can also involve a broad array of technical functionality, such as assistance with legal document preparation; e-filing; embedded educational resources for litigants; asynchronous litigant-to-litigant settlement negotiation; payment plans to pay traffic fines and court costs; document sharing and storage; and online mediation (asynchronous or synchronous remote mediation).

To date, 24 states have implemented ODR in one or more trial courts based on survey findings indicating

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[72] *Id.*

[73] Lyle Moran, *How the Washington Supreme Court's LLLT Program Met Its Demise*, ABA J. (July 9, 2020, available at https://www.abajournal.com/web/article/how-washingtons-limited-license-legal-technician-program-met-its-demise).

[74] *See* Arizona Judicial Branch, Legal Paraprofessional Program at https://www.azcourts.gov/Licensing-Regulation/Legal-Paraprofessional-Program.

[75] *See* Utah State Bar, Licensed Paralegal Practitioner Program at https://www.utahbar.org/licensed-paralegal-practitioner/.

[76] State Bar of California, California Paraprofessional Program Working Group FAQs at https://www.calbar.ca.gov/paraprofessionals-FAQ; Proposal for a Limited Practice Rule to Narrow North Carolina's Access to Justice Gap at https://ncbarblog.com/wp-content/uploads/2021/03/Justice-for-All-Proposal-for-Limited-Practice-Rule-to-Supreme-Court-and-North-Carolina-State-Bar-Final.pdf.

[77] Arizona Judicial Branch, Alternative Business Structure at https://www.azcourts.gov/Licensing-Regulation/Alternative-Business-Structure; Utah Office of Legal Services Innovations at https://utahinnovationoffice.org/.

[78] ODR programs were first developed by online commercial businesses such as PayPal, eBay, and Amazon to resolve disputes more effectively between buyers and sellers. American Bar Association Center for Innovation, Online Dispute Resolution in the United States (Sept. 2020), available at https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf.

[79] Andrea Miller, Paula Hannaford-Agor & Kathryn Genthon, An Evaluation and Performance Measurement Framework on Online Dispute Resolution Programs: Assessing Improvements in Access to Justice (2021).

public support, especially for traffic tickets, consumer debt, and small claims cases.[80] Few ODR programs have been rigorously evaluated, but the NCSC has published a recommended evaluation and performance measurement framework to assess the effectiveness of ODR programs. The framework borrows heavily from previous NCSC evaluation and performance measurement tools insofar that it uses a balance scorecard framework to assess program effectiveness from the perspectives of users and court managers at both the individual case-level and at a system-wide level.[81]

A persistent concern that was raised about ODR programs was whether SRLs have sufficient access to and familiarity with internet technologies to navigate these platforms effectively. However, state courts' abrupt transition to remote communication platforms to conduct routine court hearings during the COVID-19 pandemic alleviated many of these concerns. Although research is still underway, early anecdotal reports suggest that most SRLs not only have the technology to appear remotely, but in fact prefer to do so due to increased convenience. A national survey conducted in June 2020 found that only 2.4% of Americans lack internet access at home and nearly two-thirds reported that they would be willing to use videoconferencing to appear in court for their own case.[82]

## What Outcomes Can We Measure?

Many of the experiments, innovations and pilot projects implemented to improve civil case management have been studied to assess their impact on case outcomes, but much more could be done provided that data exist on which to draw informed conclusions. One of the great limitations of existing studies is that they often default to examining the outcomes that *can* be measured rather than outcomes that *should* be measured. As judicial leaders learned from the *Trial Court Performance Standards*, it is critically important to assess civil case management through the lens of a balanced scorecard that considers timeliness, cost-effectiveness, compliance with procedural and substantive law, and litigant satisfaction. The essential task for researchers thus involves translating these broad objectives into concrete measures, identifying data that quantify the measures, and using appropriate research methods to collect the data.

Timeliness is by far the easiest measure to capture. The length of time from filing to disposition involves a relatively straightforward calculation and the *Model Time Standards* and *CourTools* provide well-established metrics for assessing the extent to which civil cases conform to recommended timeframes for completion. State courts routinely capture and publish not only time-to-disposition and compliance with state time standards, but also clearance rates and age of pending caseloads.

Measuring other objectives of civil case management is considerably more challenging. With respect to costs of civil litigation, for example, quantifying the measurement simply involves assigning a monetary value to discrete tasks or segments of civil litigation or an aggregated value for the entire case. The difficulty lies in specifying which costs—court costs, litigant costs, or societal costs—should be measured and how to collect data to document those costs. Court costs (filing fees, the value of judge and court staff time) can be more easily determined as they are usually a matter of public record, but researchers have struggled for decades to collect data about litigant costs because lawyers are reluctant to disclose the legal fees, expert witness fees, and other costs charged to clients. Sometimes even the parties themselves may not know the actual cost of the litigation in which they are involved.[83]

In 2013, the NCSC employed a modified Delphi technique to estimate the amount of time lawyers expend on various

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[80] GBA Strategies, 2018 State of the State Courts – Survey Analysis (Dec. 3, 2018). *See also* Paula Hannaford-Agor et al., Iowa Program Implementation Report 7, 12, 14 (2019); Shelley Spacek Miller, Paula Hannaford-Agor & Kathryn J. Genthon, Texas Program Implementation Report 7 (2019).

[81] ODR Evaluation and Performance Measurement Framework, *supra* note 78.

[82] NCSC State of the State Courts in a (Post) Pandemic World: Results from a National Opinion Poll (June 2020).

[83] Emery G. Lee, *Law without Lawyers: Access to Justice and the Cost of Legal Services*, 69 U. Miami L. Rev. 499, 501 (2014-2015).

litigation tasks and then calculated the value of those tasks using reported average salaries for partners, associates, and paralegals.[84] Feedback from experienced civil trial lawyers suggested that the overall estimates of costs were reasonably accurate for the types of cases included in the model, but NCSC researchers noted that attorneys found it difficult to estimate the amount of time expended in, for example, drafting a complaint or conducting a deposition for a "typical" automobile tort case. In addition, the model was based on reported hourly billing rates for legal services, but billing practices vary a great deal from firm to firm and even from client to client. For example, some firms employ separate billing rates for in-court versus out-of-court tasks. Plaintiff lawyers who work primarily or exclusively under contingency fee agreements often had no basis on which to estimate an hourly rate comparable to the traditional hourly billable rate. In other law firms, billing may vary based on the client relationship with some work performed on a retainer basis, some work performed at a negotiated discount rate for high volume clients, and some work performed on a pro bono basis. Thus, the model provides a general estimate of costs, but would not necessarily be suitable for estimating costs for individual cases.

The problem of measuring litigation costs is not limited solely to the difficulty of accurate and reliable data collection. The objective of cost-effectiveness implies that the benefits derived by pursuing litigation exceed the costs incurred, but some benefits may be less easily quantified than others (e.g., vindication of legal rights, or benefits that accrue to third parties). Other litigants may question whether all the litigation tasks undertaken on their behalf are really necessary for the successful resolution of the case, if indeed they are given the opportunity to give informed consent to the anticipated costs of litigation before they are actually incurred.

Measuring the fairness of substantive or procedural due process poses its own set of difficulties, often because the data elements needed to make these assessments may not be documented in court case management systems (CMS) or readily available in other court records such as filings, court orders, and transcripts of oral hearings. Experienced researchers will immediately recognize some of the more common drawbacks of CMS data, especially the lack of specificity for key data elements. For example, case outcomes may differ dramatically by case type. While some courts may identify a particular type of case for case processing purposes (e.g., complex litigation, medical malpractice, business litigation, mass tort), more often case type will be recorded in CMS as a categorical description, such as "contract" or "personal injury" or "negligence" or the ubiquitous "other civil." Researchers who are focused on a single case type (employment discrimination, consumer debt) may have to review case pleadings to exclude other case types from their sample.

Disposition type is similarly problematic, in part because courts have historically recorded dispositions based on their legal significance rather than the actual manner of disposition. For example, a settlement might be recorded simply as "dismissed," indicating that the case was not adjudicated on the merits, but the same code might also be used to indicate an administrative decision to close the case for failure to prosecute. In either instance, the case could be refiled in the future. The term "judgment" indicates an enforceable court order that could result because a defendant failed to respond to the lawsuit (default) or because the case was adjudicated on the merits by a judge or jury after a full evidentiary hearing. From both a procedural and a substantive perspective, these are very different case outcomes.

In 2020, the NCSC released the *National Open Court Data Standards* (NODS), a detailed description of data elements, data definitions, and data values to facilitate data sharing, increased transparency, and consistency in data interpretation.[85] For civil cases, NODS specifies data elements, definitions, and values for cases, litigants, attorneys, pleading contents (e.g., request for jury trial, request for emergency relief, request for class action certification), motions/filings and court orders, and hearings and other court events. Six states have begun implementing NODS for civil cases. In other states, however, the implementation process is likely to be relatively slow as state and local courts replace or upgrade CMS systems.

Of course, researchers have options other than CMS data to

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[84] Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 Caseload Highlights 1 (Jan. 2013).

[85] *See* www.ncsc.org/nods. The NODS project also provides data mapping tools, leadership and user guides, data governance policy guide, and other tools and resources for courts to implement NODS.

assess civil case outcomes, including manual or technology-assisted (e.g., NLP) reviews of case filings; surveys, focus groups, and interviews with attorneys and litigants; and observation of court proceedings, all of which have advantages and disadvantages, depending on the type of case outcomes under examination. For cases that resolved through a formal adjudicatory process (summary judgment, bench or jury trial), researchers can usually locate data indicating the prevailing party, the amount and types of damage awards, and signs pointing to the ferocity of the litigants' adversarial posture (e.g., number and content of discovery motions, motions in limine). In the context of contemporary civil litigation, however, is the more general problem that many of the data elements of interest are not necessarily captured by the court in any form. A review of court documents may indicate that a case was settled by the parties, but the terms of the settlement are rarely filed with the court, making it difficult or impossible to determine which party had the more favorable outcome or what the monetary value of the case was ultimately worth. In a case that was ultimately dismissed for lack of prosecution, it is impossible to know from court documents whether the parties settled without informing the court or whether the plaintiff simply abandoned the claim. Attempts to follow-up with attorneys or litigants with surveys or interviews often yield disappointing responses.

## Paths Forward

As a result of the Civil Justice Initiative's comprehensive approach to civil justice reform, and similar initiatives in both family and criminal courts, interest in the topic of case management is undergoing a renaissance in state courts.[86] Large backlogs that formed due to the COVID-19 pandemic has certainly raised the stakes for courts to manage caseloads more effectively.[87] With 50 states and five federal territories, with different systems of state and local governance, statutes and court rules governing civil case processing, access to resources, and technological expertise and sophistication, the practical reality in state courts is nearly unlimited variations in progress toward effective civil case management. Across all of these efforts, however, is growing recognition of five core components of case management that will form the basis for continued study and refinement in the next several decades.

These components include the use of triage to ensure that cases receive the amount of court attention necessary for their prompt, cost-effective, and fair resolution; process simplification to remove procedural barriers that unnecessarily complicate litigation; stakeholder engagement to ensure clear communication about case management objectives at every stage of the litigation; effective use of court staffing and technology resources; and an ongoing commitment to data management and performance management. The immediate objective of civil case management is better resource management through effective use of technology, efficient procedures, and effective people-resource allocation. The ultimate goal is greater justice for all litigants served by the courts.

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[86] *See* the Cady Initiative for Family Justice Reform at www.ncsc.org/fji and the Effective Criminal Case Management (ECCM) at www.ncsc.org/eccm.

[87] The NCSC Court Statistics Project has published an interactive data dashboard showing filings and dispositions for civil cases during the pandemic at https://www.courtstatistics.org/interactive-data-displays-nav-cards-first-row/pandemic-data.


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