

Twelve Essential Steps to Tackle Backlog and Prepare for a Surge in New Civil Cases

A Pandemic Resource from CCJ/COSCA

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State courts across the country mostly shut down in mid-March due to the COVID-19 pandemic. While some courts transitioned fairly quickly to a remote working environment, including offering telephone and videoconferencing platforms for many hearings and status conferences on civil matters, physical courthouses were generally closed for in-person proceedings, including jury and bench trials. Courts saw dramatic decreases in new civil case filings as lawyers and litigants also dealt with more immediate concerns about the pandemic. But while new cases were not being filed, neither were existing cases being resolved. The net impact is still a large backlog of civil cases waiting for judges and court staff as they resume slightly more normal court operations.

Complicating the task of tackling backlogs is the specter of a surge of civil cases in the coming months due to the economic impact of stay-at-home orders in most states. Federal and most state eviction moratoria will have expired by the end of the summer and an estimated one-third of renters in the United States failed to pay rent in April. U.S. home-mortgage delinquencies climbed in May to the highest level since November 2011 as the pandemic's toll on personal finances deepened. Consumer debt hit a high of \$14.3 trillion just as the pandemic hit, leaving millions of newly unemployed workers without a regular paycheck to pay existing debts even as many were forced to rely on credit cards to pay essential household expenses. State and federal policymakers are working hard to design new programs to provide crucial financial support to individuals, businesses, and governments affected by the pandemic, but the details and timeline for launching those programs shift on a daily basis, further complicating state court efforts to respond to the legitimate needs of court users.

For judges and court staff, “working harder” will not be enough to fully address either the existing backlog or increased civil caseloads, especially given expected cuts to judicial system budgets and as court resources are shifted internally to address similar backlogs on criminal dockets. At the same time, and perhaps now more than ever, courts have an obligation to use resources wisely and work efficiently, but to do so in a way that does not compromise access to justice or jeopardize critical and well-established principles of

procedural fairness. Courts need to take immediate steps to make civil case processing more effective, efficient, and fair to litigants.

- 1. *Provide information for litigants-early, often, and in an accessible way.*** Significant proportions of civil caseloads involve cases in which one or both parties are self-represented litigants (SRLs). Even before COVID-19, SRLs faced significant obstacles to accessing information about case status, court processes, and available options to resolve their cases fairly and expeditiously. As courts themselves now struggle to develop new procedures for accepting case filings, and scheduling and holding hearings, it is imperative that courts communicate these changes in plain language to litigants in a timely and accessible manner through push-notifications, court websites, and social media platforms. Court clerks should be thoroughly apprised of these changes so they can accurately answer litigant questions by telephone or in person. Effective and timely communication with litigants also requires modification of paper and e-filing civil case cover sheets and other intake forms to collect email and cell phone contact information for digital communication. Those modifications must be visible, accessible, and stated clearly in plain language. These resources should also be translated as needed to ensure their widest applicable use. For examples, see [Technology Considerations for High-Volume Dockets](#) and [Tiny Chat: High Volume Docket Series](#).
- 2. *Ensure that traditional paper notifications accurately communicate details about scheduled court hearings.*** Traditional paper notifications are usually generated automatically by the court's case management system. Court leadership should review the language of these notifications to ensure that they provide information that is consistent with electronic notifications, especially concerning whether hearings will be conducted in person or remotely. These notices should refer parties to court websites, social media accounts, telephone "hotlines," or other court information centers for instructions about how to participate. Notifications for court events scheduled more than several weeks into the future (e.g., final pretrial conference or trial dates) should explicitly acknowledge that court procedures may be adjusted in response to changing conditions related to the COVID-19 pandemic and advise litigants to verify the status and location of court hearings before the scheduled date.
- 3. *Triage existing cases and all new cases upon filing.*** Different types of cases need different levels of case management and different rules-driven processes. Tailoring the involvement of judges and court staff based on case characteristics and needs leads to efficiencies in time, scale, and structure. [Empirical research](#) has made it clear that a most civil cases require only minimal judicial attention, but this does not mean that those cases need no attention. If anything, they need more attention and support from court staff, including careful review to ensure compliance with procedural due process protections and clear and timely information to litigants, many of whom are self-represented. The [Civil Justice Initiative](#) (CJI) developed case processing pathways to match the needs of cases and litigants with the appropriate level of court resources, including judicial attention.
- 4. *Embed flexibility into the triage pathways.*** The pandemic has caused widespread social and economic disruption, including the threat of homelessness for large numbers of people who cannot afford to make rent or mortgage payments due to unemployment. State and federal policymakers are scrambling to design rental assistance and other financial support programs.

Case processing pathways must be flexible precisely because the situation is changing so rapidly.

5. ***Get the cases that need judicial attention in front of a judge as soon as possible.*** Some civil cases are inherently complex, involve high levels of conflict, or need additional judicial oversight because the case involves vulnerable parties. Part of the triage process must include criteria for identifying these cases as early as possible, ideally at filing, and ensuring that a judicial officer becomes involved to establish clear expectations about case processing.
6. ***Engage judges and court staff in standardizing processes to manage the entire civil caseload, including processes to monitor and incentivize effective case progression.*** Case management practices that vary from county to county, court to court, and even judge to judge, undermine efficient case processing by contributing to litigant confusion and encouraging unproductive gamesmanship by more sophisticated parties. After agreeing on standardized procedures for submission requirements, scheduling and conducting hearings, and other essential case processing tasks, translate those tasks into checklists that enable court staff to monitor compliance and correct errors, ensuring that judicial officers can focus attention on adjudicative tasks rather than routine case management. Standardization also facilitates enhanced automation, freeing up court resources to dedicate more attention to those cases that require it.
7. ***Put in place case scheduling orders, communicate deadlines to the parties, and monitor compliance with case processing guidelines.*** Only the most complex civil cases require an individualized case scheduling order. Scheduling orders for civil cases assigned to streamlined or general pathways can usually be tailored to specific case types with established deadlines for completing discovery, filing dispositive motions, participating in ADR, and other essential case events. As needed, the court may grant motions for a modification to the case scheduling order based on a good cause showing that established case processing expectations are unreasonable. By issuing case scheduling orders, communicating these deadlines to the parties, and monitoring their compliance, the cases will move efficiently toward resolution.
8. ***Compel lawyers and parties to communicate with each other and attempt to address procedural disputes without formal court involvement.*** In the pre-pandemic world, many cases settled on the day of trial simply because it was the first time the lawyers and parties had actually encountered each other in person, sometimes while walking up the courthouse steps, to discuss settlement terms. Similar dynamics also occurred before in-court hearings on pretrial motions concerning discovery disputes, motions to dismiss for failure to state a claim, and summary judgment motions. A requirement that lawyers and parties confer and attempt to resolve disputes before filing motions streamlines the litigation process, reducing the risk of procedural stagnation while motions are pending, and preserving valuable court time and judicial resources for substantive matters in other cases. See, for example, [*Efficiency in Motion: Recommendations for Improving Dispositive Motions Practice in State and Federal Courts* \(IAALS January 2019\)](#).
9. ***In high-volume dockets, provide procedural opportunities and resources for parties to reach resolutions.*** Before the pandemic, many courts offered parties in high-volume dockets the opportunity to engage in mediation with trained court staff or volunteer mediators while

waiting for their case to be called. This often resulted in workable solutions for the parties and less time expended in formal adjudication by the court. Mandatory Online Dispute Resolution (ODR) programs provide similar opportunities for parties to engage in negotiation or mediation online, typically weeks or months before an in-court hearing can be held.

10. Delegate essential case processing tasks to the persons who benefit most from their timely completion. In many courts, a great deal of court staff time and attention focuses on performing tasks that could be more efficiently performed by the persons who stand to benefit from those tasks. For example, many judicial assistants spend endless hours communicating with opposing parties to schedule hearings for mutually convenient dates and times. Relieving court staff of this task and providing the parties themselves with tools to schedule hearings on an available calendar frees up scarce court resources for more pressing tasks. See, for example, the courtMAP system developed by the Eleventh Judicial Circuit Court of Florida (Miami-Dade County), which allows parties to self-schedule case events and file related documentation.

11. Embed meaningful deadlines for essential case events to ensure that cases continue to move toward final disposition. A firm trial date was traditionally the most effective impetus for parties to engage in settlement negotiations, but in the midst of COVID-19 backlogs, the threat of an imminent trial is merely a paper tiger. Courts should use [lessons from behavioral economics \(“nudge techniques”\)](#) to develop meaningful case event deadlines that incentivize case progression. An essential component of these efforts must be to hold counsel and litigants accountable for representations to the court, especially concerning compliance with established case scheduling orders.

12. Employ meaningful court hearings as a substitute for firm trial dates to keep cases moving. Perhaps nothing is more frustrating than beginning a scheduled hearing only to discover that required documents are missing or incomplete, or that essential litigation tasks (notice preconference submissions, etc.) have not taken place. To make the most efficient use of judicial time and attention, the court should develop and implement a process for reviewing submissions before the hearing date. The process need not require extensive legal expertise, but should involve at minimum a checklist to ensure that all required notices have been sent and prehearing filings and documentation have been submitted. Anecdotal reports indicate that litigant appearance rates may be higher for hearings using telephone or videoconferencing technologies than for traditional in-person hearings, and each matter calendared for hearing may take longer. Consequently, prehearing preparation is essential to preserve valuable court time for meaningful adjudicatory matters rather than discovering that required case documentation is incomplete.