Civil Justice in the Pandemic

Innovations, Recommendations, and Redefining Normal

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We are now over a year into the COVID-19 pandemic. While everyone has experienced the pandemic uniquely, it is also a shared experience across our state, our country, and our world. The same is true of our courts. While each jurisdiction has had unique experiences and made individual decisions related to the pandemic, our court system has collectively had to face the challenge of ensuring continued access to, and the delivery of, justice during this time. The result of this challenge has been innovation at a scale and a pace that we haven't seen before—amounting to a yearlong national pilot project for both state and federal courts. At the same time, this has caused many to reframe how we think about courts: not just as a place but as a service.[1] While challenging, this process is ultimately to the benefit of our system at large. As Michigan Chief Justice Bridget Mary McCormack has shared regarding the impact on our courts, "the pandemic was not the disruption we wanted, but the disruption we needed."[2]

Pilot projects are a common way to test innovations and reforms in courts before being put in place permanently, and Colorado is no stranger to pilot projects or innovation. For example, beginning in 2012, Colorado adopted a pilot project to test a set of new pretrial procedures designed to increase access to civil justice by reducing cost and delay.[3] The Colorado Civil Access Pilot Project (CAPP) included new procedures for pleadings, disclosures, discovery, and case management.[4] In 2015, the Colorado Supreme Court adopted statewide amendments to the Colorado Rules of Civil Procedure, incorporating the best of CAPP and mirroring the rule changes at the federal level that would go into effect later that year.[5] By looking ahead to the upcoming rule changes at the federal level, Colorado stepped out as the first state to incorporate the federal amendments, even before they went into effect in the federal courts.

While not a formal pilot project, we nevertheless have gone through a year of innovation in response to the challenges of COVID-19. We have the opportunity to once again learn from the experience, allowing us to chart a path forward as we move out of the pandemic and put in place innovations and new practices to improve the administration of justice going forward.[6]

Civil Justice Reform Efforts Pre-Pandemic

CAPP was part of a larger nationwide effort to implement civil justice pilot projects in state and federal courts to test improvements to the civil justice process.[7] Some jurisdictions implemented pilot projects to test new civil procedures, such as New Hampshire and Iowa. Others moved forward with permanent amendments to their civil rules, such as Utah and Texas. Together, these state civil justice reform efforts provided experience and empirical evidence to support reforms at the federal level, including the 2015 federal rule amendments.[8]

Building on these lessons learned from individual state reform efforts, and given the challenges facing our civil justice system, the Conference of Chief Justices (CCJ) launched an effort to examine the civil justice system as a whole and develop a comprehensive set of recommendations to transform our civil justice system to meet the needs of the 21st century.[9] CCJ created a Civil Justice Improvements Committee, supported by the National Center for State Courts (NCSC) and IAALS, the Institute for the Advancement of the American Legal System. In 2016, the committee issued a report

with 13 recommendations for improving our civil justice system and a call to action to the state courts to adopt them. As Chief Justice Thomas Balmer, committee chair, shared at the time, "our state courts need to transform themselves and the way they deal with the public and the legal community if they are to continue to ensure access to justice in the 21st century."[10]

IAALS has worked in partnership with the NCSC on a follow-up three-year Civil Justice Initiative (CJI) project, with support from the State Justice Institute, focused on implementing these recommendations. From 2017 to early 2020, IAALS and the NCSC provided education, technical assistance, evaluations of pilot projects, and a number of practical tools and guidance to help state courts implement the recommendations nationwide.[11]

Civil Justice in the Pandemic

Enter the pandemic and its immediate challenges for our court system. Courts had to make quick decisions to ensure continuity of operations and access to justice in the face of public safety guidelines and restrictions. The five most common responses of courts during this time included:

- restricting or ending jury trials;
- restricting entry into the courthouse;
- generally suspending in-person proceedings;
- granting extensions for court deadlines, including deadlines to pay fines/fees; and
- encouraging or requiring teleconferences and videoconferences in lieu of hearings.[12]

In March 2020, CCJ and the Conference of State Court Administrators (COSCA) established a Rapid Response Team (RRT) to provide guidance to state courts through this time of national emergency. To achieve this goal, the RRT created a series of working groups to help issue guidance and recommendations, both for what can be done during the pandemic to ensure access and how to resume court operations as we move beyond the pandemic.[13] Areas of focus included the study of court management (including civil; criminal; children, families, and elders; and appellate), a technology working group, and a communications working group. The working groups have provided hundreds of webinars, "Tiny Chats," bench guides, checklists, guidance documents, and other resources to help courts deal with the challenges presented in the pandemic.[14]

This work builds on, and often refers back to, the CJI recommendations issued by CCJ and COSCA in 2016. At the core of those recommendations was

> the premise that the courts ultimately must be responsible for ensuring access to civil justice. Once a case is filed in court, it becomes the court's responsibility to manage the case toward a just and timely resolution. When we say "courts" must take responsibility, we mean judges, court managers, and indeed the whole judicial branch, because the factors producing unnecessary costs and delays have become deeply imbedded in our legal system.[15]

The pandemic has driven this responsibility home, as the courts have had the important responsibility for maintaining access to justice and the rule of law during this time. What follows is a collection of this work across a number of different innovations, with highlights and recommendations.

Remote Hearings

One of the key innovations that has been embraced by state and federal courts across the country is the use of videoconferencing platforms to conduct routine hearings during the pandemic. The Call to Action report highlighted the need for courts to take steps "to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services," including promoting the use of remote audio and video services for case hearings and case management meetings.

While this recommendation was slow to be adopted before the pandemic, it is the number one example of the courts immediately pivoting and implementing innovation to ensure access to justice in 2020.

While videoconferencing is an effective solution for managing cases in the pandemic, this remote platform creates a different experience than in-person hearings, with its own challenges and opportunities. The RRT has issued a *Remote Hearings and Access to Justice Guide* for COVID-19 and beyond, based on the work of the California Commission on Access to Justice.[16] This comprehensive guide covers a number of different considerations for courts: (1) deciding which proceedings to conduct remotely, (2) selecting and implementing technology, (3) adopting procedures and practices consistent with open and equal access, (4) providing information and training to court personnel and users, and (5) guidelines for conducting proceedings remotely.

Conducting Fair and Just Remote Hearings: A Bench Guide for Judges highlights key recommendations for judges to have at their fingertips to ensure procedural fairness during these remote hearings, including topics such as prehearing preparation, fair and effective use of videoconferencing platforms, and judges' conduct during hearings.[17] The *Virtual Courtroom Standards and Guidelines*, adapted from Michigan's guidance, similarly highlights standards, guidance, and best practices for virtual hearings, attorney-client communications, public and press access, making a clear record, exhibits, and providing virtual meeting information to the parties.[18]

These resources provide a wealth of best practices for the court and attorneys for navigating remote proceedings in a way that harnesses the best of remote hearings while mitigating barriers that may result. In terms of positives, many courts have found an increase in appearance rates as a result of virtual hearings.[19] Pre-pandemic litigants had to travel to in-person hearings, sometimes great distances or via public transportation, pay for parking and childcare, and miss work. Attorneys billed their clients for these costs and time. While remote hearings eliminate these obstacles, courts must also recognize new barriers that are created, such as lack of access to devices, access to the internet or limitations to broadband or data, and technology literacy. As courts continue to offer virtual services, they must also recognize this digital divide and work to identify and implement solutions, including helping consumers use technology and creating access to devices or connectivity.[20]

High-Volume Cases

To inform the deliberations of the Civil Justice Improvements Committee efforts and ensure evidence-based recommendations, the NCSC conducted a study titled *The Landscape of Civil Litigation in State Courts* to document the characteristics and outcomes of cases in our state courts.[21] The landscape that emerged from the study was very different than the view of civil cases that many have in their heads, particularly attorneys.

> State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial and tort cases. Only one in four cases has attorneys representing both the plaintiff and the defendant. Only a tiny proportion of cases are adjudicated on the merits, and almost all of those are bench trials in small claims and other civil cases.[22]

This landscape and the challenges that come with it are most evident in high-volume dockets, including lower-value contract cases, landlord/tenant, and debt collection cases.[23] The Call to Action report and recommendations included specific recommendations for high-volume dockets, recognizing the percentage of the state court docket, high number of self-represented litigants, and seriousness and long-lasting consequences of these cases. The pandemic has sped up the adoption of a number of these recommendations, including remote hearings and limiting circumstances in the courthouse that tend to intimidate self-represented persons or create confusion about the roles of the court and counsel.

In other ways they have created new barriers. Courts have traditionally relied on foot traffic in the courthouse—offering self-help, information, and resources in the physical building. These high-volume cases are even more serious and life-impacting because of the pandemic, yet we have new barriers to access and justice. *Considerations for High-Volume Dockets During the Pandemic* highlights best practices for high-volume dockets, including calendaring cases in smaller batches and holding informal proceedings prior to hearings conducted by court navigators or mediators.[24] IAALS' *Pandemic Positives: Extending the Reach of Court and Legal Services* highlights how courts, self-help centers, legal aid centers, and law/public libraries have made the transition to remote services, including balancing remote services with in-person needs and technologies used.[25] Self-represented litigants will continue to look to remote services long after the pandemic, and there are many lessons to be learned from states that have led the way in innovation, as highlighted in this report.

Many have suffered from unemployment and financial hardships during the pandemic, and these challenges are expected to have lasting impacts beyond the pandemic. One expectation is that debt collection cases will rise, as they did in the last major recession. While IAALS and NCSC have published recommendations for consumer debt reform, including key suggestions for rule changes, we also recognize that significant rule reform is challenging amid a pandemic.[26] Courts can get ahead of a potential rise in consumer debt actions by implementing changes now. *Key Steps and Tools to Implement Now to Ensure the Fair and Efficient Handling of Consumer Debt Actions* provides key guidance for courts: triaging to a specific streamlined pathway/process for debt collection cases, addressing the specific challenges in debt collection cases (including service of process and answer forms), and providing increased information to litigants.[27]

Tackling the Backlog

In the first few months of the pandemic, many courts around the country saw dramatic decreases in civil case filings. The basis for civil lawsuits continues in our communities, and the expectation is that these suits will eventually be brought before the courts. In addition, cases that traditionally would have moved to resolution have not been resolved at the same rate. Courts

have largely delayed trials over the last year. Even those that have conducted virtual bench trials—and even some virtual jury trials—have had the vast majority of their trials put on hold. On top of this is the expectation of a surge in cases due to the pandemic, such as evictions and consumer debt.

In the face of this backlog and increasing caseloads, there is more incentive than ever for courts to implement case management approaches to increase efficiency while also ensuring a fair and just process for all.[28] These goals are at the heart of the CJI recommendations. While those recommendations were not developed with pandemic conditions in mind, they were developed with the goals of tackling the challenges of a modern world—decreasing court funds, increasing numbers of self-represented litigants, changing caseloads, and increasing opportunities from technology. *Twelve Essential Steps to Tackle Backlog and Prepare for a Surge in New Civil Cases* highlights many of the recommendations, but through the lens of the pandemic.[29] Triaging existing and new cases becomes all the more important, so the needs of cases and litigants are matched with the appropriate level of judicial attention and court resources.[30] Other recommendations recognize the importance of early and active case management, creation and communication of key deadlines, and timely judicial attention when needed.

With Colorado's adoption of rule reforms in 2015, many of the recommendations for rule reform are already in place in our courts. The CJI recommendations and best practices highlighted above also speak to the use of court resources, court business processes, and judicial case management, and there is still much that our courts can do to reexamine approaches in light of these new challenges. While it is hardest to do so amid a crisis, it has become more important than ever.

Civil Justice Post-Pandemic: Lessons Learned and Maintaining Momentum

Facebook's mantra has long been to "Move Fast and Break Things." For their developers, that meant the new tools and features might not be perfect, but speed was the top priority. The same has been true in this moment. In the face of the pandemic, ensuring immediate access to justice was essential—speed was the priority. A year later, we might temper the goal of speed just a bit. Facebook ultimately changed its motto to "Move Fast with Stable Infra[structure]." As CEO Mark Zuckerberg has shared, "It might not have the same ring to it and might not be as catchy . . . but it helps us build better experiences for everyone we serve and how we operate now."[31] Now is not the time for courts to slow down, but one year into the pandemic a slightly revised mantra is needed.

While we have all been through tremendous change over the last year, we can't be afraid of more change.

Assess and Evaluate

New procedures and approaches were put into place quickly to meet the immediate needs of access to justice. Now is the time to take a look back and assess. What is working and what is not? What data can be gathered to provide insights into decisions going forward?

Be Willing to Change, Again

While we have all been through tremendous change over the last year, we can't be afraid of more change. After a year of remote hearings, what can be done to make sure these are as efficient as possible? What can be done to make sure that self-represented litigants are getting the information they need, even when they are no longer coming into court for in-person help?

Redefine Normal

The entire world is going to have to figure out what "normal" looks like going forward. This is a moment of opportunity to redefine what normal can look like for the delivery of legal services and the delivery of justice in our country. This is true for our courts, law firms, legal aid, community partners, and all those who touch our system. As Richard Susskind reminds us, "Remember too that the current system is not an evidence-based option that we have consciously chosen. It is simply where we are. We can choose to be elsewhere."[32]

Conclusion

Colorado has been a leader in civil justice reform and innovation. The recommendations here build on—and are consistent with—those efforts. Now is the time to do what we do in pilot projects: innovate. The courts should seize on this moment, and these recommendations, to further innovate during this time. If we think beyond justice within our courthouse walls, and consider how we deliver justice in our communities in ways that meet people where they are, we can achieve greater justice for all. As we come out of the pandemic, we need to make sure we don't slip into the ease of "returning to normal." We must evaluate what has worked and what hasn't, keep the best of the pandemic innovations, and turn them into lasting reforms for the improvement of our legal system. CL

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NOTES

1. Susskind, "The Future of Courts," *The Practice*, vol. 6, iss. 5 (July/Aug. 2020), https://thepractice.law.harvard.edu/article/the-future-of-courts ("In light of the experience during the crisis, there is certainly greater acceptance now than in February 2020—amongst lawyers, judges, officials, and court users—that judicial and court work might be undertaken very differently in years to come.").

2. McCormack, Coronavirus and the Court, https://www.ncsc.org/newsroom/public-health-emergency.

3. Chief Justice Directive 11-02: Adopting Pilot Rules for Certain District Court Civil Cases (Colo. amend. June 2013).

4. IAALS was designated by the Colorado

Supreme Court to study the effects of the pilot project, and IAALS issued a report on that evaluation in 2014. Gerety and Cornett, Momentum for Change: The Impact of the Colorado Civil Access Pilot Project (IAALS 2014).

5. Rule Change 2015(5), Colorado Rules of Civil Procedure, https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2015/2015%2805%29%20redlined.pdf.

6. Judge David Campbell of Arizona, who has led the development of several federal pilot projects, has noted "that the purpose of pilot projects is to advance improvements in civil litigation by testing proposals that, without successful implementation in actual practice, seem too adventuresome to adopt all at once in the national rules." Advisory Comm. on Civil Rules, Agenda Book 73 (Nov. 3–4, 2016).

7. *See generally* Kourlis and Kauffman, "The American Civil Justice System: From Recommendations to Reform in the 21st Century," 61 *U. Kan. L. Rev.* 849 (2013).

8. *See* Memorandum to Judge Jeffrey Sutton, chair, Standing Comm. on Rules of Practice and Procedure, from Judge David G. Campbell, chair, Advisory Comm. on Federal Rules of Civil Procedure at 7 (May 2, 2014).

9. Conference of Chief Justices Resolution 5: To Establish a Committee Charged with Developing Guidelines and Best Practices for Civil Litigation (2013). Through this Resolution, CCJ created a Civil Justice Improvements Committee charged with "developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input; and making recommendations as necessary in the area of caseflow management for the purpose of improving the civil justice system in state courts."

10. Balmer, A Call to Action in our State Courts: Achieving Justice for All (Aug. 3, 2016), https://iaals.du.edu/blog/call-action-our-state-courts-achieving-justice-all.

11. *See generally* www.ncsc.org/civil.

12. McCormack, *supra* note 2.

13. The Pandemic RRT Creates Roadmap to Guide State Courts Forward (Apr. 29, 2020), https://www.ncsc.org/newsroom/at-the-center/2020/apr-29.

14. *See generally* McCormack, *supra* note 2.

15. NCSC, Call to Action: Achieving Civil Justice for All, Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee at 16 (2016) (hereinafter Call to Action), https://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf.

16. Remote Hearings and Access to Justice During COVID-19 and Beyond, https://www.ncsc.org/__data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf.

17. *Conducting Fair and Just Remote Hearings: A Bench Guide for Judges*, https://www.ncsc.org/__data/assets/pdf_file/0025/51784/Remote-Hearing-Bench-Guide.pdf.

18. COSCA and NCSC, *Virtual Courtroom Standards and Guidelines* (Apr. 2020), https://www.ncsc.org/__data/assets/pdf_file/0016/40363/RRT-Technology-Guidance-on-Remote-Hearings.pdf.

19. CCJ/COSCA, *Considerations for High-Volume Dockets During the Pandemic: A Pandemic Resource from CCJ/COSCA* at 4 (June 1, 2020), https://www.ncsc.org/__data/assets/pdf_file/0015/40362/RRT-Technology-High-Volume-Courts-Considerations-.pdf ("Several states that have been early adopters for remote hearings have noticed a marked increase in participation rates for all case types. For example, in both Arizona and Texas, courts have seen a manifold increase in self-represented litigant participation in cases.").

20. NCSC, *Digital Divide Considerations: A Pandemic Resource from NCSC* (Sept. 9, 2020) https://www.ncsc.org/__data/assets/pdf_file/0026/53738/PPP-Technology-Digital-Divide-Considerations.pdf.

21. Hannaford-Agor et al., *The Landscape of Civil Litigation in State Courts* at iii (NCSC 2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf.

22. *Id.* at 35.

23. *See generally* Call to Action, *supra* note 15 at Appendix I: Problems and Recommendations for High-Volume Dockets.

24. *Considerations for High-Volume Dockets During the Pandemic*, *supra* note 19.

25. Houlberg and Drobinske, *Pandemic Positives: Extending the Reach of Court and Legal Services* (IAALS 2020).

26. Hannaford-Agor and Kauffman, Preventing Whack-a-Mole Management of Consumer Debt Cases: A Proposal for a Coherent and Comprehensive Approach for State Courts (NCSC and IAALS 2020), https://iaals.du.edu/sites/default/files/documents/publications/management_of_consumer_debt_cases.pdf.

27. CCJ and COSCA, *Key Steps and Tools to Implement Now to Ensure the Fair and Efficient Handling of Consumer Debt Actions: A Pandemic Resource from CCJ/COSCA* (Oct. 20, 2020), https://www.ncsc.org/__data/assets/pdf_file/0032/55499/Ensure-Fair-and-Efficient-Handling-of-Consumer-Debt-Actions.pdf.

28. Kauffman and Knowlton, Redefining Case Management (IAALS 2018), https://iaals.du.edu/sites/default/files/documents/publications/redefining_case_management.pdf.

29. CCJ and COSCA, *Twelve Essential Steps to Tackle Backlog and Prepare for a Surge in New Civil Cases, A Pandemic Resource from CCJ/COSCA* (July 8, 2020), https://www.ncsc.org/__data/assets/pdf_file/0011/42230/RRT-Civil-12-steps.pdf.

30. *Id.* at 2.

31 Murphy, "Facebook Changes its 'Move Fast and Break Things' Motto," Mashable (Apr. 30, 2014), https://mashable.com/2014/04/30/facebooks-new-mantra-move-fast-with-stability.

32. Susskind, *supra* note 1.