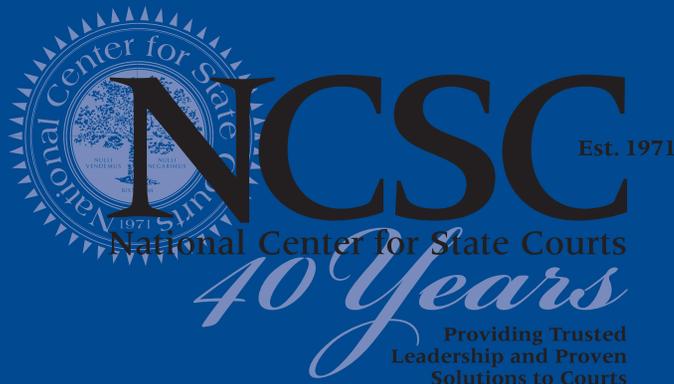


FUTURE
TRENDS IN
STATE COURTS

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Special Focus on Access to Justice



*Case Triage for the
21st Century*

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CASE TRIAGE FOR THE 21ST CENTURY

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Differentiated case management was a distinct advance in the effort to reduce court delay. Here the next step in the evolution of case management—a more refined triage based upon issues raised rather than case type, a larger role for litigant choice, and the best use of scarce resources—is previewed.

One observer said, “The Courts have changed more in the last 50 years than any other institution in American Society.”¹ Whether or not that is precisely true, it is unquestioned that the numbers and types of matters litigated have greatly expanded, and courts have accommodated by structural and procedural changes ranging from increased use of alternative dispute resolution to specialized “courts” for a variety of different case types. Has the *conception* of what courts do and how they do it kept pace with changing circumstances? When we think of courts, does not the idea arise of a court using the adversary process to conduct trials in very serious cases? Yet that core function is only a very small part of the business of modern courts. Here we argue for a further refinement of classic case-processing principles by which to assign cases to tracks based upon issues, enable litigant choice, and preserve judge time for trials.

In this article we will pursue the mechanics of case triage in more detail, discussing some historical strategies, some new strategies, and some real examples of courts applying modern ideas of case triage.

Historical Case Triage Strategies

Reducing court delay has been central to 20th-century court reform efforts. Steelman, Goerdt, and McMillan (2000) argue that caseload management is not only a way to reduce delay, but also the “heart of court management.”

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In the early days of professional court management, case delay was significant and widespread. To combat this problem, court experts developed a set of best practices known as differentiated caseload management (DCM). Thousands of court personnel were trained on these concepts, and such training continues to this day.

It makes sense that cases will languish if nobody pays any attention to them. In an age when case management systems did not routinely produce reports flagging problem cases, such problems could go unattended. So paying attention was the first requirement. Even today, simply having case managers who spend time ensuring that cases move in a timely fashion will improve a court’s performance. This is the basic caseload management tenet of early court intervention and continuous court control of case progress, which results in shorter times to disposition, at least in civil cases (Stelman, Goerdt, and McMillan, 2000: 3; Goerdt, Lomvardias, and Gallas, 1991: 55).

A key feature of DCM is assigning cases to different processing queues, or “tracks,” by case type and complexity. There is often an expedited track for cases that have a modest need for court oversight, a track for “ordinary” contested cases, and a track for complex cases, each with different scheduled events and time frames (Office of Justice Programs, 1995). Obviously, more complex cases require more processing time on average and are more vulnerable to encountering problems and significant delay.

While these ideas seem both obvious and noncontroversial, DCM has been adopted only sporadically and piecemeal in relatively few jurisdictions. Even in those jurisdictions that have adopted DCM, the serious problems that remain have spurred us to seek a more aggressive form of caseload management.

First and foremost, case pressure on courts and judges is steadily increasing over time, requiring courts to process more cases with fewer staff. This trend has been going on now for over three decades and shows little sign of abating. Even courts using DCM to keep pace with increasing caseloads may have difficulty maintaining that equilibrium when future increases in caseload demand even higher productivity.

Second, when DCM was invented, courts lived in a less complex world, with fewer diversion, mediation, and alternative dispute resolution programs. The number of self-represented litigants was small. Neither problem-solving courts nor electronic discovery existed. In short, both the variety of cases and the number of case-processing alternatives have grown significantly. To make matters worse, cases may contain multiple issues that may require shifting from one case-processing strategy and process to another, depending on how the issues manifest themselves. Classic DCM needs to be updated to accommodate these new complexities and to promote ever higher levels of case-processing productivity.

New Case Triage Strategies

The basic principle of case management—*aggressive case management*—will not change. Cases are controlled early and that management continues for the life of the case. The court is not passive, waiting for lawyers to decide what they want to do and when they want to do it, or waiting for self-represented litigants to figure out how to navigate the courts. The refinement is that triage be done earlier in the process, be done more effectively and transparently, and be focused on issues raised rather than type of case considered.

1. Assign Cases Early to One of Four Processing Tracks

Courts determine the most appropriate form of case processing each case deserves. Rather than the three tracks based upon case complexity proposed by DCM, courts should acknowledge at least four types of case-processing queues: 1) the traditional court adversary process; 2) an adversary process modified to handle a high volume of “ordinary” cases; 3) a nonadversary process for cases requiring the solution to a problem; and 4) a nonjudicial process better suited to administrative resolution (see Flango and Clarke, 2011, 2010a, b).

Cases are not initially assigned to one “track” and then retained there for the duration, regardless of how circumstances change. Instead, the court establishes repeatable, consistent, and legally responsible business processes for ensuring cases are handled in the most appropriate and expeditious manner possible.

2. Issue-Based Assignment to Processing Tracks

Triage matches the issues raised with the right adjudicatory processes. This requires that incoming cases be classified *not according to case type*, but according to the *types of issues* they raise and the processing they require. Cases requiring the full adversary process because of the seriousness of the issues raised need to be identified early and assigned to the trial track. This is not much of a change for criminal cases where the state brings the charges and the accused are required to come to court. Triage for those cases will continue to be done by prosecutors who decide on which charges to bring, which to reduce, and which to prosecute to the fullest extent of the law.

3. Litigant Choice

Early intervention starts even before the case is filed and continues throughout the process. Information about case-processing alternatives and historical outcomes should be readily available to both lawyers and self-represented litigants. Electronic filing portals should use TurboTax-like interrogations to elicit basic information necessary to screen and initially assign cases. Early case conferences should be scheduled and decisions on the extent of discovery, motions, and expert witnesses should be established at the outset.

Litigants now make the threshold decision of whether or not to bring civil, traffic, and probate cases to court and should control the process after the case is filed. To do so they need to understand the alternative case-processing tracks available, along with the due-process protections, costs, and legal expertise associated with each

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track. A litigant who chose not to contest a case could pay a fine or settlement in full or on a payment schedule, perhaps electronically. Would it be worthwhile for a litigant to reduce the dollar amount in controversy to fit the jurisdiction of a lower court if the result was a quicker resolution? Some principles may be worth fighting for in terms of a more protracted, involved, and costly process; whereas in other cases, litigants may prefer a faster resolution even if it means a smaller award. Why should they not be able to make those choices just like they do in medicine and other spheres of life?

4. Best Use of Resources

Finally, courts should never forget their most defining operating characteristic: Judges, who have the most education and greatest legal expertise, are the most expensive court resource. Courts should do everything they can to maximize other staff resources to perform appropriate tasks, including analyzing the issues in a case and managing the case-processing tracks, much in the same way physicians use physician's assistants and nurse practitioners to treat routine patient complaints.

Many family cases, other than delinquency cases that would be criminal except for the age of the offender, are not "contested" in the same adversary sense other court cases are. Some are more likely to require "diagnosis" of the problem, a joint search for a solution, and perhaps selection among various treatment options. Some may be similar to the civil cases discussed above; for example, a family may choose to compromise over the amount of child support paid if it increased the likelihood that the agreed-upon amount would be paid regularly. Some contain multiple, interrelated issues—such as a divorce proceeding with issues of domestic violence, child custody, and child support—that need to be resolved together. These cases may require early assignment to a mediator or other non-judge professional to narrow the issues to those in dispute, search for compromise, or recommend a course of treatment.

Examples of Successful Case Triage

The strategies discussed above require significant investment in protocols and procedures to develop decision trees appropriate for clerks, paralegals, and staff lawyers, but have shown impressive results in the few places they have been attempted.

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1. Reducing Jurisdiction

Opposing the trend to adding more and more types of cases to the courts, some courts have curtailed jurisdiction.

One experiment in New York eliminated family-court jurisdiction over status offenses. In 2004 there were at least 159,000 status-offense cases processed in the United States, which is approximately 12 percent of the juvenile dockets of general- and limited-jurisdiction courts.² Status offenses are behaviors that are offenses only because the persons involved are minors and include truancy, curfew violations, and runaways.

2. Litigant Choice

The Maricopa family court decided to put the initial case triage decision in the hands of litigants after providing appropriate guidance via their Web site and court rules. The court discovered that about half of all the family cases required only an entry of decree or judgment by default or consent to dispose, so it decided to use technology in a very innovative way. The Web site began to offer online decree-on-demand and default-on-demand capabilities. Litigants were able to receive the desired court decrees without physically going to the court. Judges produced the decrees more efficiently, and court staff avoided unnecessary appearances and file manipulation. The Web site provided detailed guidance on what case characteristics would qualify a litigant for an online decree.

3. Streamlined Processes

New York City Housing Court has empowered judges to handle their cases with simplified processes in informal settings.³ The lessons for courts facing significant issues with self-represented litigants are instructive. The court permits representation by professionals or family who are not lawyers. Judges use a set

of best practices to ensure that all parties are effectively represented in terms of consistency and fairness during the hearing without acting in unlawful or unconstitutional ways. In addition to relaxed rules of due process and evidence, judges are considering holding virtual hearings.

The Multnomah County civil court has embarked on an ambitious civil reform project to speed up the average processing of civil cases without sacrificing legal quality. An initial case management conference is held within ten days, and a firm trial date is set within four months. The court aggressively manages the parties' discovery plans. A pretrial conference produces stipulations limiting exhibits, expert testimony, and motions. A voluntary expedited track is provided for civil jury trials. A number of other features ensure a significantly speedier, more predictable, and less costly trial process (Multnomah County Circuit Court, 2011).

4. Making Best Use of Scarce Resources

The clerk's office has literally been reinvented in Utah, resulting in a significant reduction in the number of managers. All job descriptions were completely rewritten to emphasize case management and litigant support skills, rather than low-level data-entry and paper-case-file-management abilities. The clerks were reorganized into cross-trained teams better positioned to provide help and move cases forward. The result is impressive. The average clerk is more capable, better educated, and better paid, so more work is accomplished with fewer staff. More important, litigants and judges are better supported.⁴

Implications for Court Organization and Management

If we take these ideas seriously, there are some significant implications for how courts are organized and operated. First, the staffing models may require alteration. Courts may need fewer judges and more lawyers and paralegals. Court clerks may need to have higher skill sets, education levels, and salaries than they do now. Staffing by case type, especially for back-office clerks, may no longer make sense. Case management systems would need to support easy assessment of the status of case issues and include contingencies to support dynamic shifts to other case-processing tracks. Much more information must be both elicited from and provided to litigants at the beginning of their cases for initial placement in the correct case-processing queues.

On the last point, note that what constitutes a "correct" queue depends on not only the court's technical legal analysis, but also the litigants' preferences for tracks based upon their assessment of cost, complexity, timeliness, and due-process requirements. Litigants cannot make these kinds of tradeoffs rationally in the absence of "market" information about these characteristics of case-processing tracks. Many lawyers would also benefit from this type of information, perhaps to the detriment of the few "insiders" who are being compensated for such advice.

These examples of case-processing strategies are encouraging. Many strategies are being pursued by some major courts in some locations, but no single court is pursuing all of them systematically. Thus, it is difficult to assess the total impact on productivity and customer satisfaction that might result if they were employed collectively. It will certainly be interesting to see which courts step up to that challenge and move their case-processing performance to the next level.

ENDNOTES

- ¹ Richard B. McNamara, Memo “Innovation Commission,” June 8, 2010.
- ² Stahl et al., 2007. Percentage is calculated from the National Center for State Courts’ Court Statistics Project. The proportion for the states with unified courts is even higher.
- ³ See Goldin and Casey, 2010. Admittedly, the housing court is not a traditional court, but an administrative law court dealing with a high volume of relatively low stakes cases mostly involving self-represented litigants.
- ⁴ Personal communication, Tim Shea of the Utah AOC, dated June 25, 2010 with an attachment, “Proposed Rules Governing Civil Discovery,” by the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure.

RESOURCES

- Clarke, T. M. (2010a). “The Business Case for Court-Principles-Based Essential Functions: Which Disputes Belong in Court?” In C. R. Flango, A. M. McDowell, C. F. Campbell, and N. B. Kauder, *Future Trends in State Courts 2010*. Williamsburg, VA: National Center for State Courts.
- (2010b). “Possible Implications of the Principles-Based Essential Functions of Courts: A Modest Proposal.” In C. R. Flango, A. M. McDowell, C. F. Campbell, and N. B. Kauder, *Future Trends in State Courts 2010*. Williamsburg, VA: National Center for State Courts.
- Flango, V. E. (2010). “Which Disputes Belong in Court?” In C. R. Flango, A. M. McDowell, C. F. Campbell, and N. B. Kauder, *Future Trends in State Courts 2010*. Williamsburg, VA: National Center for State Courts.
- Flango, V. E., and T. M. Clarke (2011). “Which Disputes Belong in Court?” *50:2 Judges’ Journal* 22.
- Goerdt, J., C. Lomvardias, and G. Gallas (1991). *Reexamining the Pace of Litigation in 39 Urban Trial Courts*. Williamsburg, VA: National Center for Courts.
- Goldin, D. B., and M. I. Casey (2010). “New York City Administrative Tribunals: A Case Study in Opportunity for Court Reform,” *49 Judges’ Journal* 20.
- Multnomah County Circuit Court (2011). “Speedy Justice for Civil Cases in Multnomah County.” Media release, April 4.
- Office of Justice Programs (1995). “Differentiated Case Management.” Fact sheet, U.S. Department of Justice, Washington, D.C., November.
- Stahl, A. L., C. Puzanchera, S. Livsey, A. Sladky, T. A. Finnegan, N. Tierney, and H. N. Snyder (2007). *Juvenile Court Statistics 2003-2004*. Pittsburgh, PA: National Center for Juvenile Justice. www.ncjrs.gov/pdffiles1/ojdp/218587.pdf
- Steelman, D. C., J. A. Goerdt, and J. E. McMillan (2000). *Caseflow Management: The Heart of Court Management in the New Millennium*. Williamsburg, VA: National Center for State Courts.

