



Conference of

**CHIEF JUSTICES**

Civil Justice Improvements Committee

# Taking a Fresh Look at Access to the Courts: Can We Make Improvements for Civil Cases?

Suggestions for Reducing Litigants' Expense and Time to Final Outcome



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## National Center for State Courts, Conference of Chief Justices: Civil Justice Initiative (NCSC:CCJ-CJI)

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices establishes a Committee charged with (1) 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 (2) making recommendations as necessary in the area of case flow management for the purpose of improving the civil justice system in the state courts. (Resolution Adopted January 30, 2013)



# CCJ-CJI Participants

- Chaired by Chief Justice Tom Balmer (OR)
- Subcommittees:
  - Rules/Litigation-Chair Jerome Abrams, Judge, Minnesota
  - Court Operations-Chair Jennifer Bailey, Judge, Florida
  - Staff Support-NCSC; IAALS
- Participants: Chief Justices, Associate Justices; Trial Court Judges; Court Administrators; Legal Services Representatives; Lawyers including General Counsel; Plaintiff's Counsel; Defense Counsel; Young Lawyers; Law Professor (Civil Procedure); and as liaison, a Federal Court Judge
- Diversity in viewpoints



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# The CCJ-CJI Project

- Established a principled approach to task of reducing litigation expense and time to disposition
- Focus on recurring attributes of cases that can be more effectively controlled (than under present generally adopted rules and procedures)
- Rejection of assumption that trans-substantive (one size fits all) rules should apply to every case
- Acceptance of 'Typology Approach' which implements three pathways for party and court management of case from commencement to resolution



# Principled Approach Framework

- Recommendations should not systematically favor plaintiffs or defendants, bigger or smaller cases, or types of litigants whether represented or not
- Different case types have different needs in terms of court and litigant time and resources
- Proposals must reflect effective economic utilization of resources, consistent with fairness
- Proposals must enhance public confidence in the courts and the perception of justice



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# Fresh Approach

We should look at cases based on case attributes: determine what cases need and match them with services the courts can provide



We have the tools and ability to more correctly align the resources of the parties, lawyers, and courts to the actual needs of the case.

**ITS ABOUT “RIGHT SIZING”**



# Court Operations Subcommittee

- Identify points of delay in the life of a civil case and corresponding remedies
- Identify new opportunities for technology-based processes to reduce cost and delay through systemized case management
- Identify appropriate staff resources for case management tasks/decision points
- Apply the right resource to the right task
- Utilize hiring practices, education and assignments to take best advantage of skill sets of judges and staff





# Tiered Case Management

- Technology
- Administrative review
- Skilled review
- Judicial Review



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Triage Passes	Triage Basis	Resource Level Conducting Pass	Algorithm	Notes
Initial Pass	Case Type/Action Code	Technology	If case type x AND Amount in controversy Y, then pathway presumed	Adjustable per local jurisdiction data (considers need changes, etc); Subject to reassessment, right-sized docket management, national data provides exemplar for local algorithm; There should be different amounts in controversy set for different case types
	Amount in controversy	Technology		
	Self-represented or represented litigants	Technology	Presence of bar # per party	
Second Pass	Complex Opt-In	Technology	Exclude specified action codes and/or amount in controversy	Presumptive reassignment subject to review at next triage pass and later
	Number of parties (Defendant/Plaintiff)	Technology	If action code and total parties served is 5 or great, triggers pathway review	Triggers case manager/clerk pathway review (see CJS 2005 data)
	Self-represented or represented litigants	Technology	Presence of bar # per party	
	Injunctive/Equitable relief	Technology	N/A	Check for type of relief
	Jury demand	Technology	N/A	Check for demand
Third Pass	Response	Technology		
	Counter/Cross/3rd Party	Technology		
	Number of law firms	Technology		
	Total number of counts in all pleadings	Technology or Administration		
	Related Cases	Technology		
	Jury Demand	Technology	N/A	Check for demand
	Self-represented or represented litigants	Technology	Presence of bar # per party	12



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# Case Typology

From the simple to the complex, traditional application of court rules varies slightly, if at all. By separating cases into an attributes or needs based model, the correct sizing of resources needed to resolve a case can be determined.

It's no longer one size fits all.



# Three Predominant Case Types

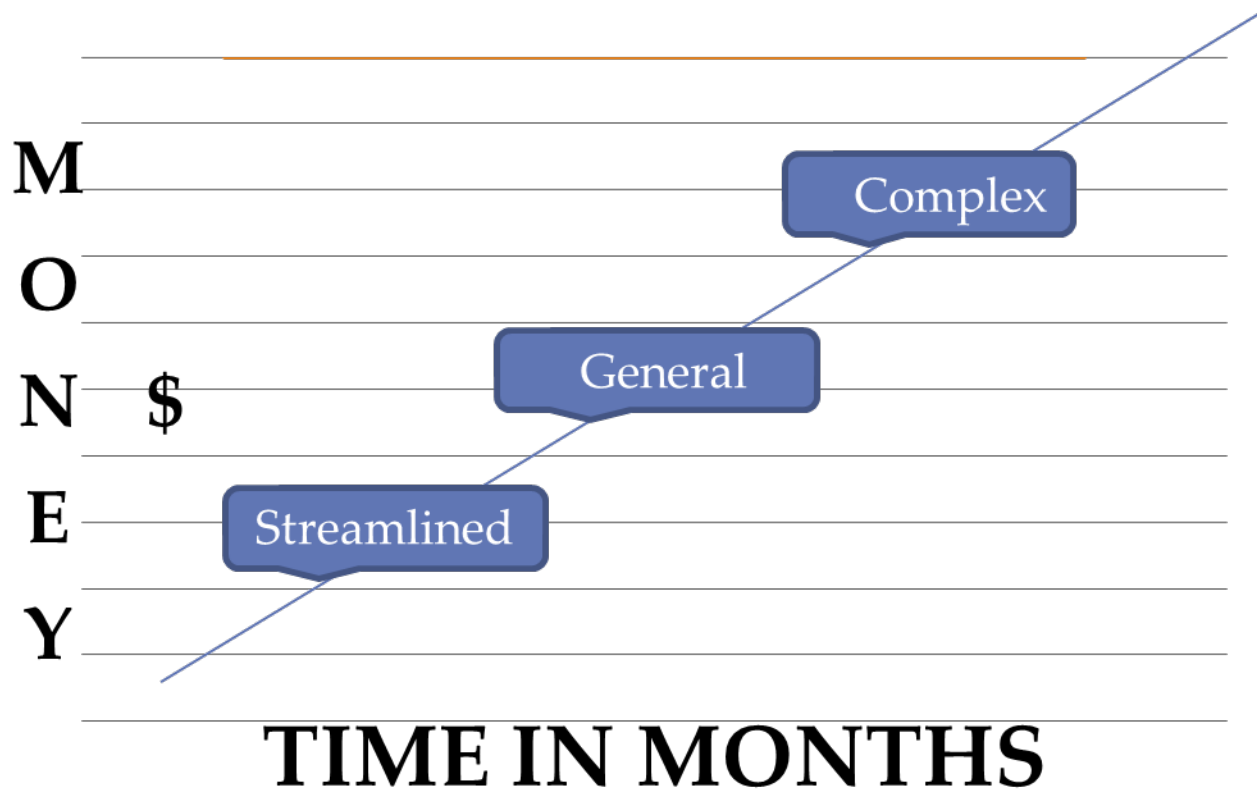
“Streamlined”

“General”

“Complex”



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# “Streamlined Cases”

- Cases in which the claims and defenses are well known to the parties
- Cases in which there is minimal need for non-party discovery
- Matters which involve relatively straight forward legal theories
- Cases which benefit from having a reasonably short window from commencement to trial
- Disputes among only a few parties
- Typically (not exclusively) smaller amounts in dispute





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# Working Hypothesis Streamlined Pathway

- Prescriptive requirements can produce desired change without disruption of essential elements of civil cases
- Addressing change which preserves case attributes while simultaneously mandating progress towards resolution
- Limitations imposed by Streamlined Pathway rules are not theoretical, not actual (taking away something not used)
- Whenever it appears the Streamlined Pathway is inappropriate cases can be easily redirected to other pathways



# Subcommittee Consensus Streamlined Pathway Features

- Firm date, trial in 6-8 months
- Mandatory, proportional initial disclosures
- Limitations on all forms of discovery
- Mandatory expert report disclosure
- Liberal use of party agreements to simplify process
- Jury trials with consensus of 6 jurors
- Complete record, with conventional appeal rights
- Low threshold for removal from Streamlined Pathway



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# Inclusion in the “Streamlined” Pathway Is Not Based on Amount of Damages

Many programs around the country link entry into a simplified litigation process based on the amount of the claim. This has led to ‘creep’ in pled amounts as well as reluctance to plead case values that could put a case into a simplified litigation program.



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# Case Type Examples for the Streamlined Pathway

- Simple commercial disputes
- Sales cases including warranty, fitness, etc.
- Consumer debt
- Appeals from small claims court decisions
- Auto negligence
- Premises liability
- Intentional tort
- Insurance coverage disputes related to the above case types
- Simple Contract



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## How Do Cases Get into the Streamlined Pathway?

- Can be presumptive on case filing by statistical categories developed by NCSC
- Could be selected through 'triage' by judge or other qualified person
- Could be self-selected by parties (would likely not be selected by many)



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## “General Pathway”

- Cases which require more development through efforts of the parties, and their counsel than “Streamlined Pathway” cases
- Cases which are not inherently complicated but require some management from the court and counsel
- Claims and defenses which need time for discovery
- Cases which involve legal issues and theories likely to be subject to motions



# Progress: General Pathway

- Its all about case management with the principal direction coming from the judge
- Proportionality is an indispensable component
- Mandatory disclosures must be made and need to be effective
- Expedited motions should be encouraged and used when possible
- Conferencing dispositive motions before filing is encouraged
- Trial by agreement is a useful concept
- ADR can be helpful for resolution if agreed by the parties
- Most cases in this pathway should be completed in 12-18 months
- Early setting of a trial date is confirmed to be the universal recommendation for reducing cost and delay



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# Progress: Complex Pathway

- Its all about case management
  - One judge for the life of the case
  - Customized approach especially throughout pretrial process
  - Early CMC with party involvement, setting of schedule for major aspects of case needing completion
  - Periodic conference opportunities and progress monitoring initiated by the judge
  - Timely judicial decisions on contested issues submitted to the court





# Progress: Complex Pathway

- Proportionality applies to discovery: discovery and its scope should be established early in a discovery plan.
- Discovery plans are incomplete without discussions of preservation and disclosure of ESI
- Mandatory disclosures
- Support for specialized courts (and judges) to handle complex cases



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