



CIVIL JUSTICE INITIATIVE PERFORMANCE MEASURES FOR CIVIL JUSTICE

In July 2016, the Conference of Chief Justices and the Conference of State Court Administrators formally adopted the [report and recommendations of the CCJ Civil Justice Improvements Committee](#). The recommendations are intended to reduce cost and delay in civil litigation and improve customer service to litigants. Recommendation 10 focuses on the role of technology to support effective oversight of civil case management, including routine measurement and publication of performance measures. Performance measures are used to assess the extent to which courts are meeting defined objectives. Other than clearance rates and time standards, courts have not developed performance measures specifically for civil justice. This document, which identifies data elements that have been used to evaluate recent civil justice reform efforts, is a preliminary step in that direction.

Recommendation 10: Courts must take full advantage of technology to implement right-sized case management and achieve useful litigant-court interaction.

- 10.1: Courts must use technology to support a court-wide, teamwork approach to case management.**
- 10.2: Courts must use technology to establish business processes that ensure forward momentum of civil cases.**
- 10.3: To measure progress in reducing unnecessary cost and delay, courts must regularly collect and use standardized, real-time information about civil case management.**
- 10.4: Courts should use information technology to inventory and analyze their existing civil dockets.**
- 10.5: Courts should publish measurement data as a way to increase transparency and accountability, thereby encouraging trust and confidence in the courts.**

Common Objectives of Civil Justice Reform

The most frequently expressed objectives of civil justice reform are to improve access to justice by reducing cost and delay, to increase consistency and fairness in case outcomes, and to increase litigant convenience and satisfaction. These objectives may be pursued through a variety of approaches, and not all reform efforts are intended to achieve all objectives. For example, some courts have implemented mandatory disclosure rules, which are primarily intended to streamline the discovery process, reducing the frequency of discovery disputes and the overall time to disposition, but would not otherwise be expected to affect the manner of disposition.

Each individual objective is also constrained by the other objectives, creating a trade-off in which an improvement in one objective may lead to an apparent deterioration in others. New Hampshire, for example, adopted a fact-pleading standard in 2010 to provide more complete information to defendants with which to assess the validity of civil claims. That change decreased the rate of default judgments, ostensibly improving the likelihood of a fair outcome for both parties. Compared to cases resolved by default judgment, however, cases in which the defendant files an answer or otherwise makes an appearance generally involve more time to resolve and increased litigation costs for both parties. When developing specific performance measures, courts should recognize the potential for trade-offs among competing objectives and seek the *optimal* measure for each objective, rather than the most extreme measure (e.g., shortest time to disposition, lowest cost).

Distinguishing Performance Measures from Evaluation Criteria

Performance measures are used to assess the effectiveness and efficiency of court operations in achieving program objectives. Often, they are described as objective, quantifiable benchmarks that the court must meet or exceed to be deemed effective or to be seen as performing to expectations. [Clearance rates](#) are one example of a key performance measure for civil justice. Clearance rates are the number of outgoing (closed) cases as a percentage of the number of incoming (newly filed or reopened) cases. Ideally, clearance rates will be 100 percent or more, indicating that the court is keeping up with its incoming caseload. Clearance rates below 100 percent produce backlogs, often increasing the time to disposition.

Time standards are another common benchmark that establish defined time frames in which civil cases should be disposed. The [Model Time Standards for State Trial Courts](#), for example, specify that 75 percent of general civil cases should be disposed within 180 days, 90 percent within 365 days, and 98 percent within 540 days. Clearance rates and time standards are both widely recognized by courts as performance measures for civil case management.

Differences in organizational structure, rules of civil procedure, civil case management practices, and caseload composition across states have made it difficult to form a consensus on more discrete performance measures. For example, Florida and Alaska require that plaintiffs serve the defendant within 120 days of filing the complaint, but Hawaii allows for service up to one year, which could lead to a longer time to disposition. Differences in rules concerning the completion of discovery, for filing dispositive motions, and for setting cases for trial would have similar effects, again making it difficult to develop concrete performance measures that would be appropriate for widespread use. In the absence of a consensus about national performance measures for civil justice, courts are encouraged to develop statewide or court-specific performance measures by documenting the current value for key case management statistics and specify corresponding performance measures that reflect a meaningful, and achievable, improvement over the status quo.

As a first step in this direction, many courts begin by articulating working hypotheses about the anticipated effect of the reforms and identifying appropriate evaluation criteria to test those hypotheses. Typically, those hypotheses describe the general direction of the anticipated effects (e.g., default judgment rates will decrease, time to disposition will decrease), but do not specify a concrete objective to achieve. Testing those hypotheses can confirm their validity, and often can diagnose the reason if reforms do not perform as expected. Analyses can also identify unanticipated consequences and illuminate potential remedies for unwanted consequences. The key difference between a performance

measure and evaluation criteria is that the former establishes numerical thresholds at which civil justice reforms show that they have successfully achieved their objectives; the latter focuses on whether reforms resulted in an anticipated or unanticipated impact.

The evaluation criteria employed to assess the impact of reform efforts should be strategically selected to provide insights about the anticipated effects. Similarly, courts should identify and routinely measure performance on general civil case processing, as well as on specific items of interest. It may be necessary to differentiate cases based on case and litigant characteristics when developing performance measures. For example, the optimal time to disposition for landlord/tenant and personal injury cases is likely to differ substantially. Case and litigant characteristics should be documented in the case management system (CMS) with sufficient specificity to permit discrete analyses of performance measures. Key characteristics include *case type*, *the type of relief sought* (e.g., equitable/injunctive relief, compensatory damages, punitive damages, other relief), and *litigant representation status*. The [State Court Guide to Statistical Reporting](#) provides definitions for common civil case types and guidance on documenting litigant representation status. The performance measures described below are the most commonly recognized related to these objectives.

Performance Measures

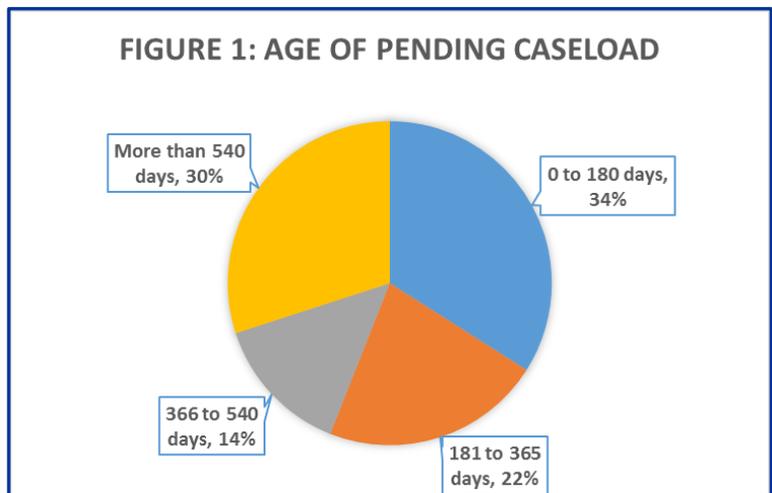
Clearance Rates: Clearance rates measure whether the court is keeping up with its incoming caseload. Use the instructions for [CourTools Measure 2 \(Clearance Rates\)](#) to calculate and interpret this measure.

Clearance rates should be 100 percent or greater, indicating that the court has allocated sufficient staff and other resources to meet current caseload demands, including minimizing the incidence of delays and effectively addressing problems when they arise. When clearance rates consistently exceed 100 percent, the court is in a position to reduce time to disposition for the existing caseload (and commensurate costs for litigants), or possibly even shift court resources to other caseloads that are not performing as well. Conversely, clearance rates that are significantly below 100 percent create backlogs, increasing the time to disposition and litigant costs. The cause may be an increase in the number of filings, a decrease in the resources allocated to that caseload (e.g., due to judicial vacancy, inadequate staffing), or a change in litigation practices (e.g., increase in trial rates).

One important caveat about clearance rates is that they only measure the relationship between the incoming and outgoing cases, but do not measure time to disposition or other indicia of effective case management.

Time Standards: Time standards are the court's expectations for timely justice. Time standards articulate the percentage of cases that are disposed or otherwise resolved within established timeframes. In 2011, the [Model Time Standards for State Trial Courts](#) were adopted by the Conference of Chief Justices, the Conferences of State Court Administrators, the American Bar Association House of Delegates, and the National Association for Court Management.

The *Model Time Standards* specify that 75 percent of general civil cases should be resolved within 180 days, 90 percent within 365 days, and 98 percent within 540 days. For summary civil matters, including landlord/tenant and small claims cases, the *Model Time Standards* specify that 75 percent be resolved within 60 days, 90 percent within 90 days, and 98 percent within 180 days. Figure 1 displays a graphical illustration of the **age of pending caseload**, which is a useful format for reporting compliance with time standards. The court in Figure 1 is not performing to expectations. Instead, less than half of the optimal proportion of cases are being resolved within 180 days, and the proportion of cases older than 540 days is 15 times greater than recommended by the standards.



The *Model Time Standards* also include intermediate benchmarks regarding service of process (98 percent within 60 days), responsive pleadings and default judgments (98 percent within 90 days), completion of discovery (98 percent within 300 days), and trials (98 percent of trials initiated within 480 days). How well courts achieve these intermediate standards will be a significant predictor of how well they achieve the overall standards, but can also be used to identify key stages of litigation at which delay is most likely to occur.

Time to Disposition: Time to disposition is necessary for assessing compliance with time standards. It measures is the number of days from initial filing to the disposition or other resolution of the case, minus any time during which the case was inactive (e.g., bankruptcy stay, removal to federal court, interlocutory appeal). It provides even more useful information for subcategories of cases, especially based on manner of disposition. For example, uncontested cases generally resolve in much less time than contested cases, and cases disposed by settlement tend to resolve earlier than those disposed by trial. Documenting the “normal” range of disposition times for different types of dispositions can help courts identify gaps in the court’s business rules that contribute to delay in civil case processing. Table 1, for example, reports the time to disposition at the 25th and 75th percentiles (the interquartile range), the 50th percentile (the median), and the average time to disposition (mean) overall and by manner of disposition for cases in the [Landscape of Civil Litigation in State Courts](#). Evaluating time to disposition based on the interquartile range excludes cases that are statistical outliers (e.g., cases that disposed either very quickly or that lingered a long time on the docket), providing information about the normal timeframe in which cases resolve.

	N	Mean	Interquartile Range		
			25th	50th	75th
	820,893	306	35	113	372
Settlement	84,992	478	78	267	650
Summary judgment	5,812	441	185	321	574
Dismissal	293,466	391	49	195	544
Other disposition	7,819	323	57	149	374
Unknown disposition	16,740	316	64	147	373
Judgment (unspecified)	229,634	264	19	68	302
Adjudicated disposition	27,281	147	13	21	167
Default Judgment	155,149	132	36	70	159

* Categories sorted in descending order based on 75th percentile.

There is no national consensus on the optimal time to disposition for different disposition types. The court should develop its own time standards for each manner of disposition based on reasonable expectations of efficiency given applicable state and local rules and the time frame for disposition under existing case-processing procedures.

When using time to disposition to measure the impact of civil justice reform efforts, it is important to keep in mind that some reform efforts have resulted in shifts in the manner of disposition, which can mask (or accentuate) changes in time to disposition. In Texas, for example, the proportion of cases disposed by settlement increased significantly after the state adopted its expedited actions rules in 2013, and those settlements took place on average three months earlier than settlements that occurred in cases before implementation of the rules. In contrast, cases disposed by summary judgment or trial appeared to take longer to dispose. Upon closer examination, it became apparent that the increased settlement rate was taking place in relatively uncomplicated contract cases that previously would have been disposed by bench trial early in the case. Only the more complex contract and tort cases remained for trial, and although these cases needed comparatively more time for discovery and pretrial motions, they were still being tried earlier than comparable cases before the expedited actions rules were enacted.

Discovery Disputes: Concerns about costs and delays caused by protracted discovery disputes have led to reform efforts to reduce the frequency of discovery disputes and to expedite decisions when disputes arise. Although it is unrealistic to expect that civil justice reforms can eliminate discovery disputes entirely, they can minimize the frequency of needless satellite litigation and ensure prompt resolution of meritorious disputes when they arise.

To do so, the court should document:

- The proportion of cases in which motions to compel discovery, motions for protective orders, or other filings indicate the existence of a discovery dispute, which provides a baseline rate to compare to the impact of civil justice reforms;
- The number of separate discovery disputes that occur in each case. Multiple discovery disputes within the same case may indicate that past attempts to resolve disputes have been unsuccessful, suggesting the need for more intensive judicial involvement;
- The elapsed time (in days) between the initiation of a discovery dispute and its resolution.

- The proportion of cases in which no formal resolution to the dispute is documented, indicating the failure of the court to address the dispute; and
- The elapsed time (in days) between the initiation of the discovery dispute, the resolution of the dispute, and the case disposition. Prompt resolution of discovery disputes can sometimes remove obstacles to settlement or other final disposition of the case.

For courts that employ informal discovery dispute processes (e.g., telephonic hearings), it is important that the CMS or other readily available documentation indicate when those informal processes are invoked and the outcomes of those processes. This will prevent the court from mistakenly equating the absence of a filed discovery motion with the nonexistence of a discovery dispute. As a performance measure, establish formal or informal expectations about the optimal amount of time from the filing of a discovery dispute motion and the order resolving the dispute (e.g., 30 days or less) and document the proportion of cases exceeding that amount of time.

Default Judgment Rates: Concerns about procedural due process and the fairness of judgments in civil cases, especially in high-volume civil dockets, have prompted reform efforts to increase the appearance or answer rates by defendants and to reduce the proportion of default judgments that are subsequently vacated due to procedural irregularities. These efforts include changes from a notice-pleading to a fact-pleading format, a requirement that plaintiffs attach relevant documentation for contract claims, and greater judicial scrutiny of plaintiff claims to ensure that final judgments comply with basic procedural requirements for notice, standing, timeliness, and the sufficiency of the documentation supporting the relief sought. Decreases in default judgment rates, particularly following changes to rules or case-processing practices, should be accompanied by commensurate increases in other disposition types, which may also result in changes in the time to disposition based on disposition type.

For reliable analysis, the court should ensure that default judgments are consistently differentiated from other judgment dispositions (e.g., judgment unspecified, judgment following bench or jury trial, etc.) in the CMS. There is no national consensus on the optimal default judgment rate or rate of post-judgment orders to vacate or set aside judgments; courts should establish performance measures for these rates that reflect reasonable, attainable rates. To inform those decisions, courts should document:

- The proportion of dispositions by default judgment;
- The time to disposition for cases disposed by default judgment¹; and
- The proportion of cases disposed by default judgment in which the judgment is subsequently vacated and reopened for further activity. Documenting the basis for vacating default judgments (e.g., improper service) may also indicate the need for additional reform efforts.

Continuances/Extensions: Liberal policies for granting continuances or lax enforcement of deadlines to complete litigation tasks can result in excessive delay in civil cases. Performance measures concerning continuances and extensions should focus on the proportion of cases in which the parties request a continuance or extension of time, the justification for each request, the proportion of cases in which the

¹ Recommendation 12 of the CCJ Civil Justice Improvements Committee highlighted the importance of managing uncontested cases to assure steady, timely progress toward resolution.

request is granted, and the number of requests for a continuance or extension filed within the same case. Reform efforts focused on the court's continuance policy may cause the rate at which continuance motions are filed and granted to fluctuate over time. For example, the frequency of continuance motions should decrease over time as litigants become aware that the court will deny motions except those supported by good cause. Similarly, the proportion of cases with multiple continuance motions should decrease. Average time to disposition should also decrease as litigants adhere to established timeframes for completing key litigation tasks. At some point, the court should anticipate that only continuance motions supported by good cause will be filed, and consequently the proportion of motions granted will be relatively high.

Trial Rates: Concerns about declining trial rates, especially jury trial rates, have prompted reforms intended to expedite pretrial procedures, reducing associated costs, so that litigants who wish to resolve their cases by trial can do so affordably. Performance measures should focus on three areas:

- The rate at which cases are tried to the bench or a jury should be documented, including a breakdown of the types of cases tried. Following implementation of the Texas expedited actions rules, for example, trial rates for contract cases decreased substantially, but increased for tort cases.
- The time to disposition for cases disposed by trial should be documented by case category or case type. Ideally, cases would proceed to trial earlier than before reforms were implemented. As trial rates increase, however, it is possible that more complex cases, which might have previously resolved by non-trial disposition, may increase the average time to disposition because they may take longer to become trial ready.
- The relationship between the rate at which trials are scheduled and the rate at which trials occur can illuminate operational issues affecting trial rates. In courts with congested trial dockets, cases scheduled for trial may be repeatedly continued to a new date through no fault of the litigants. These continuances often result in greatly increased costs, prompting litigants to seek non-trial resolutions even for cases in which a trial was the preferred disposition. Documenting the cause of trial continuances can be used to identify trial-calendaring problems, as well as the effectiveness of policies developed to address those problems.

Costs of Litigation: There are two types of litigation costs—costs incurred by the court and costs incurred by the litigants. [CourTools Measure 10](#) describes methods to measure the average cost of processing a single case based on total court expenditures, case dispositions or filings by case category or major case type, and the total number of judicial officers and court staff.

For several reasons, costs incurred by litigants are much more difficult to document with accuracy. Attorneys' fees can vary substantially depending on the contractual relationship with the litigant (e.g., contingency fees, reduced fees based on a preexisting retainer agreement, pro bono or low bono arrangements, unbundled service agreements, and traditional hourly fee agreements). Expert-witness fees also vary substantially based on the subject-matter expertise, expert-witness credentials, and the format of the expert evidence (e.g., written report or live testimony). Even self-represented litigants may incur costs in the form of lost income/wages and time expenditures to prepare for and participate in court hearings.

In the past, researchers have attempted to collect information about attorney and expert-witness fees using survey methods, but have had only limited success as most attorneys consider the financial details of their attorney-client relationship confidential and are unwilling to disclose that information for research purposes.² The NCSC overcame this objection in its [Civil Litigation Cost Model \(CLCM\) study](#) by asking lawyers about the amount of time expended on specific litigation tasks in a “normal” case rather than actual cases. Based on that information and on prevailing attorney and paralegal hourly billing rates, the NCSC estimated the attorneys’ fees for specific case and disposition types. The results were reported as the typical range of attorneys’ fees expended. Due to the relative imprecision of the cost estimates, the CLCM approach would not be appropriate to measure the impact of civil justice reform efforts on litigant costs, but could be used as a rough baseline estimate of litigant costs. The CLCM survey is available in Appendix D of the [NCSC evaluation of the Utah discovery reforms](#).

If the court has direct access to litigants through in-court hearings or contact information such as mail address, email address, or cellular telephone, the court can survey litigants directly about the costs incurred to prosecute their cases. These surveys should include questions about monetary expenditures for court costs, attorneys’ fees, and expert-witness fees; lost income/wages for court hearings; and case preparation time. Asking about the costs that the litigant believes would have been reasonable for each of those items also allows the court to perform a gap analysis describing the difference between the litigant’s actual costs versus expectations of reasonable costs.

Attorney Experience and Opinions: Surveys can be a useful way to identify and document attorney opinions both about perceived problems in the civil justice system and proposed or implemented solutions to those problems. In addition, surveys can provide useful information that is not typically available in court case files or CMS data, especially information that routinely takes place without direct court oversight or involvement (e.g., exchange of discovery information). The NCSC evaluations of the Utah and Texas civil justice reform efforts include the attorney survey instrument as appendices, which may provide a basic template for relevant questions and response codes.

Researchers using survey methods should be cautious about challenges that may limit the reliability of survey findings, especially inadequate response rates. Surveys are ubiquitous in contemporary society, and many people now experience “survey fatigue,” making them less willing to respond to lengthy surveys. Some attorneys object to questions about specific cases due to attorney-client confidentiality. Consequently, survey responses are more likely to reflect self-selection bias by attorneys who have strong opinions about the issues. Finally, attorney perceptions of litigation issues are not always well-informed or accurate. In the NCSC evaluation of the Texas expedited actions rules, for example, many attorneys who were contacted for personal interviews were unaware that they had expedited actions cases, although CMS data confirmed that they were the attorney of record in multiple cases.

² Some researchers have been successful in documenting attorney fees by reviewing court orders awarding attorneys’ fees in specific types of cases (e.g., contract cases in which the contract provides for payment of attorneys’ fees, cases involving statutory claims that provide for attorney-fee awards), but these necessarily only apply to those types of cases.

Judicial Experience and Opinions: Due to small sample sizes in many jurisdictions, surveys of judges may be less effective than other research methods (e.g., focus groups or personal interviews) at eliciting meaningful information about the impact of civil justice reforms. For both methods, it is often useful to provide data based on other research methods (e.g., findings from case-level analyses, attorney surveys, etc.) to structure the focus group or interview session, especially to solicit expert opinions about questions that arose from other research methods. The focus group/interview protocols employed in the evaluations of the [Texas expedited actions rules](#) and the [Utah discovery rules](#) are included as appendices to those reports.

Court Staff Experience and Opinions: [CourTools Measure 9](#) provides a survey instrument to assess the quality of the work environment and relations between staff and management, focusing specifically on the extent to which court staff believe they have the materials, motivation, direction, sense of mission, and commitment to do quality work. The survey is designed for distribution to the entire court, but analysis can focus on specific work units (e.g., civil division) to provide meaningful feedback on the impact of civil justice reform efforts on court staff. The survey can also be supplemented with open-ended questions to solicit additional written feedback or particular concerns.

Litigant Experience and Opinions: Litigants are the ultimate customers of court services, but can be a difficult cohort from which to solicit meaningful feedback. Courts rarely have direct contact information for litigants who are represented by attorneys, and many attorneys are reluctant to forward correspondence, including litigant surveys from the court to their clients, even after the case has been fully resolved. Moreover, litigants are less likely to have well-informed opinions about civil justice reform efforts, especially procedural or case management reforms. They may have no previous experience on which to assess the impact of those efforts or an inadequate understanding of the implications for litigants. Courts have had somewhat more success with surveys of self-represented litigants, especially when the focus of the surveys relates to accessibility and procedural fairness. [CourTools Measure 1](#) provides a litigant survey with instructions for distribution and analysis.

Using and Interpreting Performance Measures for Civil Justice Reform

No one performance measure will provide a comprehensive assessment of civil justice reform efforts. The use of multiple measures will provide a more complete picture, as well as reduce the risk of drawing inaccurate conclusions based on ambiguous or unreliable data (e.g., biased survey responses). Practitioners and researchers involved in state and national access-to-justice efforts have developed a [useful framework for identifying performance metrics for a comprehensive, well-balanced evaluation of pilot programs or innovative approaches](#) that can be easily adapted for assessments of civil justice reform efforts. That framework stresses the need for performance metrics that focus on the *appropriateness*, the *efficacy*, and the *sustainability* of reform efforts.

Appropriateness refers to the relationship of the reform effort to its intended goals including its implementation strategy. For example, will a proposed expedited discovery dispute procedure result in decreased litigation costs? (Highly plausible.) To reduced time-to-disposition? (Maybe.) To increased settlement rates? (Why would it?) Have judges and lawyers received training about the reform effort? Are they generally supportive of or resistant to this effort?

The performance measures identified in this document are the ones that are most frequently associated with the concept of efficacy. They measure whether a reform effort is working as intended and whether it has resulted in unanticipated impacts.

Performance measures related to sustainability focus on the legitimacy and perceived value of a reform. For example, if increased jury trial rates are the intended goal of a particular reform effort, is the inherent value of trial by jury sufficient to induce civil justice participants—judges, lawyers, and litigants—to embrace the reform?

Finally, performance measurement should not take place in a vacuum; instead, it should be employed as part of ongoing court improvement efforts. After documenting baseline performance, courts should continue to use performance measures to identify gaps for which additional reform efforts should be focused. The [NCSC High Performance Court Framework](#) offers detailed instructions for using performance measures to improve court management over time.

With generous support by the State Justice Institute, the National Center for State Courts and IAALS are partnering on a three-year project to implement the CJI Recommendations. The CJI Implementation Plan is a multipronged effort that includes assistance in strategic planning for state judicial leadership, education and technical assistance for state and local courts, evaluation of demonstration pilot projects to document the impact of best practices, and the development of practical tools and instructions on effective implementation efforts.

For more information about the CJI Implementation Plan, visit www.ncsc.org/civil.

National Center for State Courts
300 Newport Avenue
Williamsburg, Va. 23185
(800) 616-6164



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