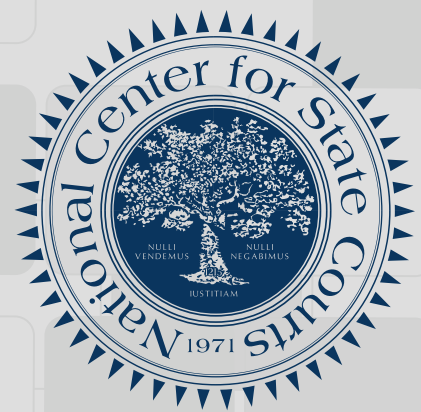


2018



Trends in State Courts

Courts and Society



2018 Review Board and Trends Committee

Trends in State Courts 2018 articles have been through a rigorous review process. The members of the 2018 Review Board and Trends Committee have provided valuable feedback on this edition. The patience and commitment of the Review Board and Trends Committee are greatly appreciated.

Howard H. Berchtold, Jr., Trial Court Administrator, Atlantic City, New Jersey

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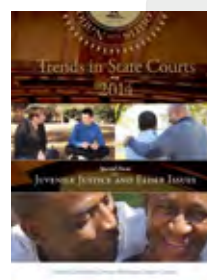
Robert A. Zastany, Executive Director, Circuit Court of Lake County, Illinois (ret.)

Call for Article Submissions

Trends in State Courts is an annual, peer-reviewed publication that highlights innovative practices in critical areas that are of interest to courts, and often serves as a guide for developing new initiatives and programs, and informing and supporting policy decisions. *Trends in State Courts* is the only publication of its kind and enjoys a wide circulation among the state court community. It is distributed in hard copy and electronically.

Submissions for the 2019 edition are now being accepted. Please email abstracts of no more than 500 words by October 12, 2018 to Deborah Smith at dsmith@ncsc.org. Abstracts received after this date are welcome and will be considered for later editions or for our monthly online version.

Visit the *Trends in State Courts* website at www.ncsc.org/trends for more information and detailed submission guidelines.



Trends in State Courts

Courts and Society

Edited by

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2018

To promote the rule of law and
to improve the administration of
justice in state courts and courts
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Acknowledgments

Trends in State Courts 2018 was truly a team effort. Without the support and dedication of the court community this publication would not have been possible.

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The *Trends in State Courts 2018* editorial staff also recognize Thomson Reuters for their ongoing provision of online legal resources and research support.



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"The needs and expectations of society are changing, and the courts are expected to change with them."

Mary Campbell McQueen

Preface

When someone mentions the “courts” or the “justice system” in the United States, what do they have in mind? Usually, it’s two attorneys arguing their case before a judge and jury, with one clear “winner” and “loser” at the end. This is the traditional, linear vision of justice.

Everyone likes a story with a beginning, middle, and end. But anyone who works in the courts, or who has business in the courts, will tell you that it’s not that simple. Many of the challenges and issues our society faces do not lend themselves to the traditional court or the classic trial. The needs and expectations of society are changing, and the courts are expected to change with them.

How courts are meeting the changing needs of society is the subject of *Trends in State Courts 2018*, the latest edition in a long-running series by the National Center for State Courts (NCSC). The articles in *Trends 2018* examine what courts are doing, or perhaps need to do, to confront many important issues, such as drug abuse, human trafficking, and immigration enforcement. Examples include:


- how New York State’s Opioid Intervention Court can serve as a model for other states;
- how the Maryland judiciary is confronting human trafficking;
- how Native American “peacemaking,” which stresses reconciliation over adversarial processes, can be applied in state courts; and
- how changes in federal immigration enforcement policies affect not only court operations, but also how the public views courts.

Other articles discuss civil justice reform to accommodate the changing needs of litigants; the use of legal design to develop a research agenda for access to justice; how courts should respond to cyberattacks; and how Blockchain records can help courts resolve recordkeeping challenges.


NCSC also publishes monthly *Trends* articles online at <http://www.ncsc.org/trends>. Online topics have included judicial education in domestic violence; management of high-profile cases; fines, fees, and bail practices; and self-help court services. We hope the court community finds both the print and online versions of *Trends in State Courts* useful in their efforts to improve court administration, customer service, and the rule of law.

Mary Campbell McQueen

President, National Center for State Courts



“Drug overdoses now kill more people every year than gun homicides and car crashes combined”



Opioid addiction has reached crisis levels in the United States. The Opioid Intervention Court in Buffalo, New York, serves as a model other state courts could follow to fight this epidemic.

New York State's Opioid Intervention Court

Hon. Janet DiFiore, Chief Judge, New York Court of Appeals

A National Crisis

On July 31, 2017, the President's Commission on Combating Drug Addiction and the Opioid Crisis issued a preliminary report describing the severity of the opioid-addiction crisis gripping communities across America.¹

- Approximately 142 Americans are dying every day from opioid abuse, a death toll equal to September 11th every three weeks.
- Drug overdoses now kill more people every year than gun homicides and car crashes combined.
- The number of drug overdoses in the United States has quadrupled since 1999.
- In 2015 nearly two-thirds of all drug overdoses were caused by opioids, especially heroin, fentanyl, Percocet, and OxyContin.

A new report from the Police Executive Research Forum, an independent research organization that focuses on "critical issues in policing," puts those numbers in context, noting that more Americans died from drug overdoses in 2016 (64,070) than lost their lives during the entirety of the Vietnam War (58,200).

New York's Response: A First-of-Its-Kind Court

The Opioid Intervention Court—the first of its kind in the nation—began operating on May 1, 2017, in Buffalo, Erie County, an area hard hit by opioid addiction and overdose deaths.² The new court is unique in that it relies on immediate intervention and treatment of individuals at high risk of opioid overdose. Within 24 hours of arrest, defendants are linked to medication-assisted treatment, followed by up to 90 days of intensive daily court monitoring.

In the Opioid Intervention Court, treatment is prioritized and criminal prosecution held in abeyance—thus flipping the usual legal process in order to save lives.

"...more Americans died from drug overdoses in 2016 (64,070) than lost their lives during the entirety of the Vietnam War (58,200)..."

Over the last several years, local judges, law enforcement, and public-health officials grew very concerned about the sharp increase in opioid-overdose deaths in Buffalo

and Erie County. According to statistics provided by the Erie County Department of Health, opioid-overdose deaths jumped from 127 in 2014 to 296 in 2016.³ In a single week in 2016, three defendants in the Buffalo City Court died from opioid overdoses, driving home the need for a different approach when dealing with defendants suffering from opioid-use disorders. Judges and court staff in Buffalo and Erie County took the lead in reaching out to local stakeholders to develop a new court model to address the unique needs of opioid-addicted defendants.

The Buffalo City Court was well positioned to take the lead on this issue because of its sophisticated and successful judicial-diversion and drug-treatment programs, and the extensive community partnerships developed under the COURTS program (Court Outreach Unit: Referral and Treatment Services). Started in 1994 by City Court Chief Judge Thomas Amodeo, COURTS integrates social-service professionals into the arrest-and-arraignment process so that judges can make informed decisions, linking defendants to the best available treatment options based on expert screening and referral recommendations.

With the support of the court system's grants and contracts office, the Buffalo proposal was submitted to the Department of Justice's Bureau of Justice Assistance, which awarded a \$300,000 grant for piloting a specialized opioid court for defendants at high risk of opioid overdose.

The grant supports immediate, targeted, and intensive drug-treatment services provided by physicians and case workers from the University of Buffalo's Family Medicine Addiction Clinic. A key to the program is the participation of physicians who administer medication-assistance treatment to severely addicted persons, which involves using certain medications, such as methadone, naltrexone, and buprenorphine, known to be effective in blocking the euphoric highs of opioids, stabilizing brain chemistry, and relieving psychological cravings. Experienced caseworkers provide behavioral therapy and counseling, enforce curfews, perform wellness checks, and transport patients to court.

The Opioid Court Process

Participation in the Opioid Intervention Court begins shortly after arrest and before arraignment. Each morning, trained court staff go through the city court's holding facility to personally interview all persons awaiting arraignment. A brief six-question protocol is used to identify those persons who are at risk of an opioid overdose. Persons deemed at risk are flagged and have their court files marked for appearance at a special morning arraignment calendar before Craig Hannah, the presiding judge of the Opioid Intervention Court. All persons appearing in the opioid court are represented by counsel.

At arraignment, persons charged with nonviolent crimes who consent to participate in the opioid court are released to the supervision of a treatment provider for up to 90 days of medication-assistance treatment. The Erie County district attorney, John J. Flynn, has agreed to suspend prosecution of participants for the period they are undergoing treatment.

Immediately following arraignment, each participant receives a complete psychosocial assessment by an on-site team of treatment professionals and case coordinators. An individualized treatment plan is developed for each participant based on the severity and circumstances of his or her addiction.⁴ Because so many opioid users experience severe addiction withdrawal symptoms, they are immediately linked to medication-assisted treatment.

Individuals who are sufficiently stable participate in a 90-day outpatient treatment regimen.

With few exceptions, the entire process of screening, arraignment, assessment, and placement in



treatment occurs within 48 hours of arrest and is carried out by trained personnel who personally transport each participant from the jail or courthouse to the treatment facility.⁵

Phase One of the Program

Participants released to the community for outpatient treatment following arraignment, or who return to the community after completion of inpatient treatment, must report, Monday through Friday, to Presiding Judge Craig Hannah for six weeks.

This initial 12-week, 90-day period of stabilization and intensive monitoring is phase one of the opioid-court treatment program. Phase one is critical because experience has shown that opioid users are most vulnerable to fatal overdoses when they first return to using opioids after having been “clean” for a period of time.



While drug testing generally takes place randomly in a standard drug court, participants in the Opioid Intervention Court undergo daily testing. Community-service providers and court staff are present in the courtroom every day to measure blood pressure, assess medical status, and report to the court on home visits and curfew checks.

"... the entire process of screening, arraignment, assessment, and placement in treatment occurs within 48 hours of arrest and is carried out by trained personnel ..."

Opioid court staff also check in with participants on weekends by phone and sometimes in person.

One of the clear success factors for the Opioid Intervention Court is the strong personal connection that quickly develops between the participants and the court's remarkable presiding judge, Craig Hannah, who is in recovery himself. Judge Hannah's philosophy of "tempering justice with mercy" permeates the entire process as he interacts with the participants daily. His firm but compassionate personality serves to motivate and support these individuals as they work to maintain sobriety and get their lives back on track.

Finally, the district attorney's office and defense counsel use the phase-one treatment period to investigate the case and negotiate an appropriate plea agreement. Even if participants do not move on to phase two because a plea agreement is not reached, or plead guilty and are sentenced to jail, they have at least been linked to appropriate treatment to

help get them through the difficult withdrawal phase and to overcome their opioid addiction.

Arrest warrants have been issued for participants who failed to make their court appearances during phase one, but the Buffalo Police Department and Erie County Sheriff's Office have agreed to prioritize execution of these warrants and return participants to court as quickly as possible to avoid the high risk that they will relapse and die of an overdose.

Phase Two

Following completion of phase one, and as part of a plea agreement, many participants move on to phase two and continued monitoring in Buffalo's drug-treatment or mental-health courts before Judge Robert T. Russell, a pioneering drug-court judge who also presides over the nation's first veterans treatment court. While some participants experience an adjustment period as they move away from intensive daily supervision and begin establishing a new weekly relationship with Judge Russell, the transition to phase two has gone smoothly.

Evaluating the Court

While it is too early to draw definitive conclusions about this innovative court, one vital outcome is already apparent. It is preventing the tragic overdoses that were occurring during the period between arrest and placement in treatment. The court has experienced just a single overdose death among its 204 participants since May 1, 2017, thus achieving the goal of saving lives. As Judge Hannah put it: “That is our purpose. If saving lives means we put their criminal case on hold for 30, 60, or 90 days, we have our partners in government who agreed to do it and we’re going to do it.”⁶

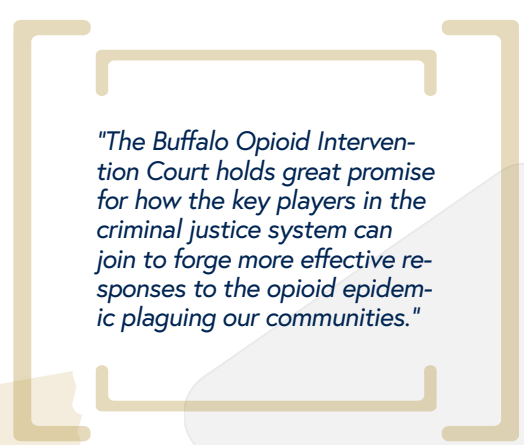
The court’s goal, initially, was to successfully treat at least 200 people a year and provide a model for potential replication in other jurisdictions.⁷ The court is currently handling between 45 to 60 active participants at any given time and is well on its way to doubling the original goal of 200 participants a year.

Learning from the Buffalo Experience

The Buffalo Opioid Intervention Court holds great promise for how the key players in the criminal justice system can join to forge more effective responses to the opioid epidemic plaguing our communities. Given the devastatingly addictive quality of opioids and the profile of their users, there is a high risk that these individuals will die without the kind of immediate intervention, linkage to treatment, and intense supervision provided by the opioid court.

The Bureau of Justice Assistance grant supports an evaluation of outcomes relating to reductions in recidivism and drug use, as well as a process evaluation to examine how the program can be sustained over time. One thing is clear. The Buffalo Opioid Intervention Court reflects a resource-intensive approach that may be hard for some jurisdictions to replicate given the many behavioral-health and court personnel required to manage and execute the multiple aspects of the program. The early

success of the Opioid Intervention Court is built on a strong infrastructure of community partnerships developed over many years by committed jurists like Buffalo Chief Judge Thomas Amodeo and Associate Judge Robert Russell. Replication efforts must consider the need for significant local planning and coordination with multiple stakeholders, as well as the available resources and prevailing conditions in each community.



"The Buffalo Opioid Intervention Court holds great promise for how the key players in the criminal justice system can join to forge more effective responses to the opioid epidemic plaguing our communities."

The New York State court system is taking the lessons learned from the Buffalo experience and applying it to other communities struggling with the opioid epidemic. For example, in Bronx County, 261 people died from opioid overdoses in 2016, and the final numbers are likely to be higher in 2017. District Attorney Darcel Clark, Bronx County Criminal Court Supervising Judge George Grasso, Bronx Community Solutions, the defense bar, and other providers have adopted the Bronx version of an opioid treatment court—a specialized case track called OAR (the Overdose Avoidance and Recovery Track)—for misdemeanor offenders at high risk for opioid overdose.

The protocol adopted in Bronx County provides strong incentives for treatment. The district attorney has agreed, where no new arrests occur while the case is pending and upon completion of treatment, that a case will be dismissed and the defendant’s record sealed. Plans are underway to expand the OAR approach to the rest of New York City as soon as possible.

In addition to these court responses, New York State Court Officers have now received training to administer Narcan, the critical antidote drug that instantaneously reverses an opioid overdose. This training investment has already paid off. In just a few months, court officers have saved the lives of four people overdosing on opioids in and around our courthouses.

Conclusion

For court leaders and policymakers in New York and around the country, the Opioid Intervention Court can serve as a useful model to help understand how the courts and the criminal justice system can respond effectively to the societal scourge of opioid abuse. It is also an example of how state court systems can advance the national conversation on critical justice issues by being proactive in devising better ways to meet the challenges presented by difficult and complex trends like

opioid addiction.⁸ The Buffalo Opioid Intervention Court is being watched closely by policymakers and court managers. We are optimistic that the lessons learned will have a positive impact on our justice system and the well-being of our communities in New York and all around the country.

The Opioid Epidemic & Children

The opioid epidemic is having a devastating impact on children and families. The number of children in foster care is rising. From 2012 to 2016, the percentage of removals nationally due to parental substance abuse increased from 13 percent to 32.2 percent. Research clearly shows that children do better in the least restrictive and most family-like placements, yet the shortage of placement resources is plaguing state child welfare systems. States are looking for innovative court programs and practices that specifically address parents and youth with opioid use disorders. Florida's Early Childhood Court is one such program that is helping curb the impact of the opioid epidemic on young children.

¹ Preliminary Report of the Presidential Commission on Combating Drug Addiction and the Opioid Crisis, July 31, 2017.

² Figures released by the Erie County Health Department show a major increase since 2014, when there were 127 opioid-related deaths. That number soared to 256 in 2015 and 296 in 2016.

³ "DA Joins Buffalo's Chief Judge in Announcing Country's First Opiate Intervention Court," press release, Congressman Brian Higgins, May 31, 2017, available at <https://tinyurl.com/ydck4frs>.

⁴ Community partners include University of Buffalo Family Medicine, Horizon Health Services, HOPE Program, Catholic Health Systems/Pathways, and Better Self Health.

⁵ If a defendant is held on bail, he or she is referred to the treatment program that operates within the sheriff's jail. If the defendant does not consent, the case proceeds under the traditional case-processing path.

⁶ "Buffalo Leads Nation with First Opiate Intervention Court," WKBW, May 31, 2017, available at <https://tinyurl.com/yaq8zdhx>.

⁷ In April the National Governors Association announced that eight states—Alaska, Indiana, Kansas, Minnesota, North Carolina, New Jersey, Virginia, and Washington—will study, among other things, how to expand treatment within the criminal justice system.

⁸ In 2017 all New York State court officers and sheriff's deputies were trained to administer Naloxone, or Narcan, a critical antidote drug that reverses the effects of an opioid overdose. Naloxone kits were supplied to the courts by the State Department of Health and are available in every courthouse in the state.



Early Childhood Court is a new type of problem-solving court in Florida that focuses on infants and toddlers in dependency court. Using specified core components, this differentiated case management approach has already demonstrated statistically significant positive outcomes for Florida's children and families.

Florida's Early Childhood Initiative

John Couch, Senior Court Operations Consultant, Florida Office of the State Courts Administrator

In recent years, numerous jurisdictions in Florida have implemented a new type of problem-solving court to improve outcomes for children in the child welfare system under the age of three. This differentiated case management approach—referred to nationally as Safe Babies Court Teams, and in Florida as Early Childhood Court—has demonstrated promising results in improving outcomes for infants and toddlers involved in the dependency court system. Through a combination of local, state, and federal resources, this initiative has grown from 2 jurisdictions in 2014 to 19 jurisdictions by the end of 2017. The goals of this initiative are to improve child safety and well-being, achieve timely permanency, heal trauma, repair the parent/child relationship, and stop the intergenerational cycle of abuse, neglect, and violence.

The seeds of this model were planted in Miami in the 1990s, when Judge Cindy Lederman pioneered the concept of a judge, a psychologist, and an early childhood expert collaborating on behalf of young children in the child welfare system. Informed by the science of early childhood development, the Miami Child Well-Being Court has improved safety, permanency, and well-being for infants and toddlers in dependency court over the last two decades. While this innovative approach has been, and continues to be, successful in Miami, it was never effectively replicated in other Florida jurisdictions.

In recent years, however, a variety of factors contributed to the growth of this initiative in other parts of the state. From 2014 through 2016, 51.5 percent of children entering child welfare services were five years of age or younger, and 23.8 percent were under the age of one (source: Florida Safe Families Network case management system). In addition to this population being the most prevalent, infants and toddlers are also particularly vulnerable to the damaging effects of trauma and toxic stress, as these early years are the most critical time for rapid brain development and the most opportune time for a child's healthy mental development. By 2014, two



judges, Judge Edward Nickinson (Escambia County) and Judge Lynn Tepper (Pasco County), had begun leading local efforts to address the needs of infants and toddlers in their courtrooms. These judges worked with the Florida State University's Center for Prevention and Early Intervention Policy and the national organization ZERO TO THREE to implement the Safe Babies Court Teams approach in their jurisdictions.

"...infants and toddlers are also particularly vulnerable to the damaging effects of trauma and toxic stress, as these early years are the most critical time for rapid brain development and the most opportune time for a child's healthy mental development."

ZERO TO THREE defines the Safe Babies Court Teams approach as "a community engagement and systems-change initiative focused on improving how the courts, child welfare agencies, and related child-serving organizations work together, share information, and expedite services for young children in the child welfare system" (<https://tinyurl.com/y9g7syfn>). The judges were drawn to this approach because of the positive outcomes being generated in the few implementation sites in other states. These positive outcomes led to Safe Babies Court Teams being added to the California Evidence-Based Clearinghouse for Child Welfare in 2014, scoring a scientific rating of 3, signifying promising research evidence. In one study conducted on the Safe Babies Court Teams approach, 97 percent of the 186 children served received necessary services and reached permanency 2.67 times faster than the national comparison group (Hafford

and DeSantis, 2009). In another study, 99.05 percent of the infant and toddler cases examined were protected from further maltreatment while under court supervision (McCombs-Thornton and Foster, 2012).

Florida's Court Improvement Program team—composed of Office of the State Courts Administrator (OSCA) staff who are funded by three federal grants—took notice of this new approach and began dedicating staff and monetary resources to support the two jurisdictions by arranging trainings and technical assistance. Noticing the similarities of this approach with other successful problem-solving courts in Florida—including drug courts, veterans' treatment courts, and mental health courts—OSCA's Court Improvement Program branded the initiative in Florida as Early Childhood Court (ECC) and aligned its oversight in a manner consistent with other problem-solving courts in the state. Later in 2014, the Court Improvement Program expanded the number of implementation sites by successfully acquiring a Quality Improvement Center for Research-Based Infant-Toddler Court Teams grant. This grant brought additional training and technical assistance resources to Florida, an evaluation component, and a full-time position to help coordinate activities across multiple sites.

With grant resources from the Court Improvement Program and the Quality Improvement Center, coupled with judges and magistrates throughout the state becoming interested in leading court teams in their



Judge Hope Bristol is a leader on dependency court issues in Florida.

own jurisdictions, the number of ECC sites expanded to 19 from 2014 to 2017. During this time, 600 children have been served by ECC, and the Court Improvement Program team has been able to provide the following support-related activities:

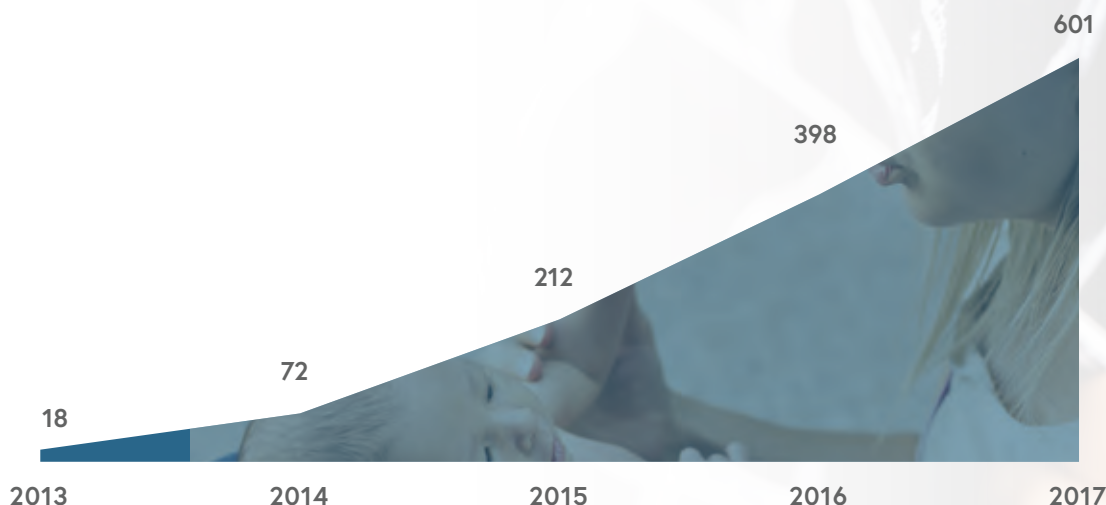
- build an ECC case management system to track cases across all of the sites and provide data analysis and reporting;
- provide ongoing consultation and coaching to sites throughout the implementation process;
- arrange cross-site visits to share practices;
- reimburse travel expenses for judges and ECC team members to attend national training events;
- organize monthly technical assistance calls on a variety of topics; and
- coordinate and execute two training events (one in 2015 and one in 2017), which convened teams from all of the sites (including judges, attorneys, caseworkers, community coordinators, service providers, clinicians, and others).

While Court Improvement Program staff have provided the statewide infrastructure to support the initiative, judges and their court teams at each of the local sites

have worked tirelessly to change the culture in their courtrooms and within their systems of care. The importance of strong judicial leadership—both on and off the bench—cannot be overstated and is absolutely critical to the success of ECCs. ECC judges and magistrates exhibit leadership by:

- maintaining a specialized docket and holding hearings monthly to ensure timeliness and accountability;
- interacting frequently and respectfully with participants, giving due consideration to input of other team members;
- creating a nonadversarial atmosphere in dependency court proceedings with a therapeutic, trauma-responsive, team-based approach;
- remaining up-to-date on the research of early childhood development, realizing the urgency of ordering the right services to be received at the right time;
- promoting practices that increase frequency and efficacy of contact between children and parents to strengthen child-parent relationships;
- managing concurrent planning from the bench—optimizing services toward reunification, but simultaneously planning for an alternative permanent family if the biological family is unable to reunify;

Total Number of Children Served 2013-2017




- including infant-mental-health clinicians as part of the multidisciplinary team and giving them a meaningful opportunity to be heard during court proceedings; and
- frequently convening local multidisciplinary teams to maintain strong collaborative relationships and stay abreast of the resources and services available in their communities.

The multidisciplinary team convened by the judge or magistrate typically includes child welfare attorneys; parents' attorneys; guardian *ad litem* attorneys, staff, and volunteers; child protective investigators; community service providers; a foster-parent-association representative; parents; caregivers (foster parents, relatives, or nonrelatives); an infant-mental-health specialist; and the community coordinator. A full-time community coordinator at each site is another essential feature of ECCs. This position serves as a liaison between the diverse professional roles that are involved with ECC cases, coordinates services across providers, and conducts follow-up activities. All of those duties ensure a continuum of timely, appropriate services and interventions, which are individually tailored to each family. The coordinator is also responsible for scheduling and organizing family team meetings, where a multidisciplinary team reviews each family's progress (referrals made, services received, and barriers encountered) and determines the appropriate actions to improve outcomes and prepare for the monthly ECC hearing. Family team meetings and monthly hearings are both crucial to the success of ECCs.

Another hallmark of ECC is the central role of an experienced mental health provider with specialized skills and training in early childhood development, attachment, and trauma—known as an infant-mental-health specialist. The infant-mental-health specialist provides intensive therapy to heal trauma by building parenting capacity, provides in-depth assessments of the child-parent relationship, and recommends

appropriate therapeutic interventions. The expertise of the infant-mental-health clinician informs decisions about placement, visitation, readiness for transitions, and reunification. In Florida, most ECC clinicians use child-parent psychotherapy, which is an evidence-based treatment for trauma-exposed children ages 0-5 and their primary caregivers. This intervention examines how the parent's trauma and relational history affect the child-parent relationship and strengthens this relationship as a vehicle for restoring and protecting the child's mental health. Child-parent psychotherapy has been successful with parents with trauma histories of domestic violence, maltreatment, substance dependency, and mental health issues, and even those who have had prior termination of their parental rights.

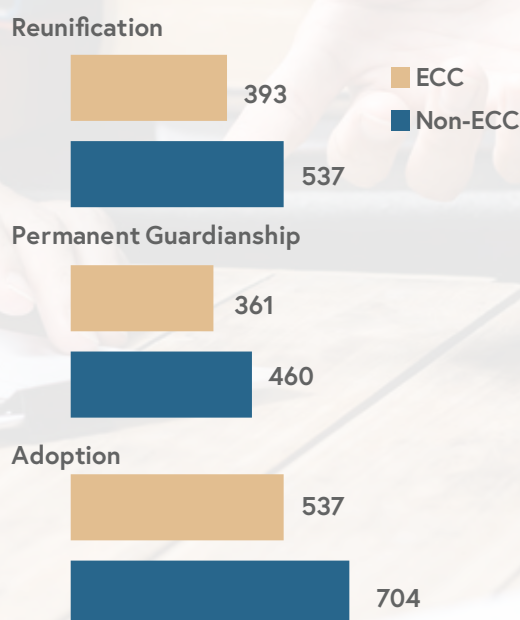


The expertise of the infant-mental-health clinician informs decisions about placement, visitation, readiness for transitions, and reunification.

Across the ECC sites, this approach has yielded promising preliminary results. Using the Court Improvement Program's dependency court information system and ECC tracking system, staff have analyzed and compiled the following findings. For calendar year 2016, the median number of days for children ages 0-3 from removal from their homes to case closure due to reunification with their parents was 537. For children participating in ECC, the median number of days was 393—a reduction of 144 days, meaning ECC children returned home to their parents more than four months sooner than the non-ECC group. For calendar year 2016, the median number of days for children ages 0-3 from removal from their homes to case closure

due to permanent guardianship was 460. For children participating in ECC, the median number of days was 361—a difference of 99 fewer days, meaning ECC children reached a permanent placement of guardianship over three months sooner than the non-ECC group. For calendar year 2016, the median number of days for children ages 0-3 from removal from their homes to adoption into new and permanent homes was 704 days. For children participating in ECC, the median number of days was 537—a difference of 167 days, meaning ECC children were adopted over five months sooner than the non-ECC group.

Days to Permanency



In addition to improving permanency timelines, this approach aims to improve child safety outcomes, specifically to reduce instances of repeat maltreatment after cases have been closed. Of all of Florida's ECC cases

that closed during calendar year 2016, only two cases resulted in recurrences of maltreatment (removal from homes) after case closure. Court Improvement Program staff are currently examining how this rate compares to the repeat maltreatment rate of non-ECC children and whether there is a statistically significant association between these two groups.

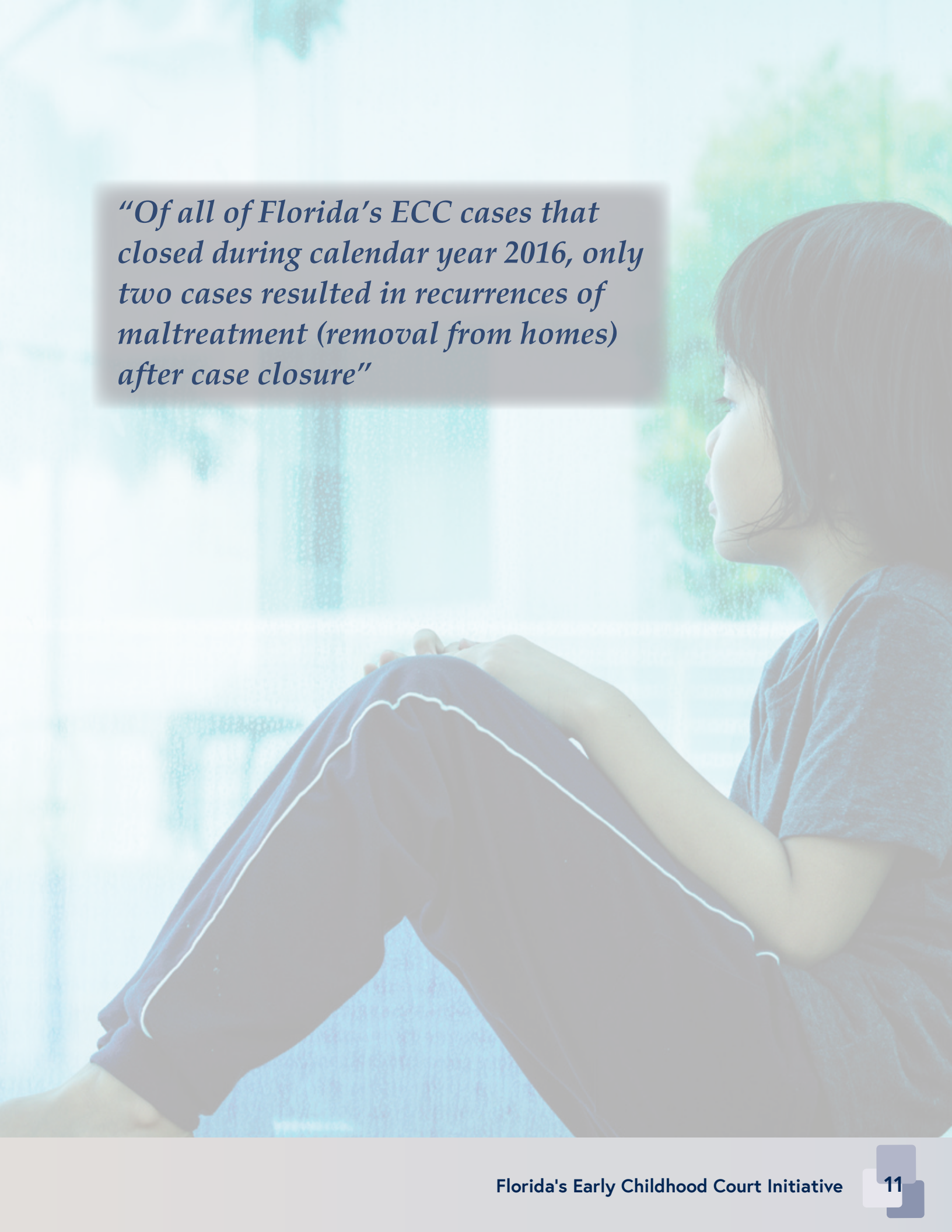
Conclusion

In only a few years, Florida's ECC initiative has grown from a promising idea to a problem-solving court docket spanning 21 jurisdictions, producing tangible results. The combination of a trauma-responsive judge, community coordinator, infant-mental-health clinician, multidisciplinary team, monthly court hearings, frequent child-parent contact, and a continuum of evidence-based services has proven to be a better way of helping young children and families in Florida's dependency courts. Looking ahead, Court Improvement Program staff are focused on sustaining this initiative at the current 19 sites, with a long-term goal of statewide implementation. Staff will continue working with each jurisdiction to measure data indicators, monitor fidelity, and provide training and technical assistance resources, as each of the ECC teams continue their work to improve outcomes for Florida's most vulnerable citizens.


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“Of all of Florida’s ECC cases that closed during calendar year 2016, only two cases resulted in recurrences of maltreatment (removal from homes) after case closure”



Courts are uniquely positioned to see the many faces of human trafficking. This article tells you how the Maryland Judiciary is becoming better equipped to identify and address human-trafficking issues, what it has learned, and its plans for the future.

A Firm Foothold: Establishing the Judiciary's Role in the National Response to Human Trafficking

Abigail Hill, Staff Attorney, Department of Juvenile and Family Services,
Administrative Office of the Courts-Programs Division, Maryland

Court leaders and other decision makers sometimes have difficulty grasping the scale of human trafficking in the world today. According to the latest global estimate (September 2017), 24.9 million people are victims of human trafficking (ILO and Walk Free Foundation, 2017). A grotesquely lucrative business, human trafficking generates approximately \$150 billion in annual profits. Global aid organizations estimate that most human trafficking is labor exploitation. Only an estimated 19 percent of activity in human trafficking is commercial sexual exploitation, but that 19 percent generates an estimated 66 percent of the \$150 billion of profits (Human Rights First, 2017).

There is no way to accurately estimate the number of traffickers. But compared to the number of victims and the revenue generated by their exploitation, the number of prosecutions is infinitesimal. According to the 2017 U.S. Department of State *Trafficking in Persons Report*, there were only 14,894 prosecutions and 9,071 convictions for trafficking globally in 2016. U.S. Department of Justice prosecutions resulted in only 439 human-trafficking convictions, up from 297 in 2015 and 184 in 2014 (Human

Rights First, 2017). This number does not include cases brought in state courts, and state laws and penalties vary substantially. The National Conference of State Legislatures (2016) notes that “[c]urrently there is uneven data, particularity [sic] across state and local jurisdictions, concerning the extent to which state laws criminalizing trafficking have acted as an effective deterrent or been utilized in prosecutions.”

To ensure fair and effective justice, it is critical for the courts to be aware of the many aspects that surround the ongoing fight against human trafficking. What follows is a brief description of the Maryland Judiciary's initiatives to educate its judges about human trafficking and to equip the courts with knowledge and skills about these challenging cases.

The Maryland Judiciary's Efforts

Maryland is a relatively small state; it is 42nd in size, but ranks 13th-15th in number of human-trafficking cases (National Human Trafficking Hotline, 2016). The state has a variety of features that contribute to its high rate of trafficking: It lies in the middle of the highly populated Eastern Seaboard; it is directly in the path of Interstate

95 and intersected by Interstates 81 (North-South) and 70 (East-West) and, therefore, is heavily traveled by tractor-trailers; Baltimore's BWI airport is easily accessible; and there are casinos, sports arenas, national sporting events, and major transit hubs clustered conveniently together.

In October 2015, Maryland Court of Appeals Chief Judge Mary Ellen Barbera led a delegation to the National Human Trafficking Summit in New York. That summit provided invaluable information about the scope and complexity of the issue. Shortly after returning from the national summit, Chief Judge Barbera convened a new work group of judges to examine issues related to human trafficking. The Judicial Council's Work Group on Human Trafficking was formed in March 2016 and was charged with developing and implementing plans to educate judges, magistrates, appropriate judiciary staff, and justice partners on issues related to human trafficking.

"An informed bench will allow the judiciary to be mindful of the unique challenges that a trafficking case presents without exceeding the scope of a judge's authority."

In addition, the work group was asked to identify other resources and best practices for helping victims of human trafficking who come into the court system.

As the work group delved deeper into human trafficking, they realized that the problem is far more complex and insidious than it initially seemed, and that it makes its way into the courtroom in a broad range of cases. Judges occupy a unique role, and the work group was mindful that judges must remain fair and impartial arbiters and, thus, are somewhat limited as to what, if any, actions they can take to fight trafficking. The work group determined that the judiciary can make the greatest impact by making sure that judges are educated about the crisis in human trafficking. An informed bench will allow the judiciary to be mindful of the unique challenges that a trafficking

case presents without exceeding the scope of a judge's authority. As they planned the education initiatives, the work group members considered the concepts they felt were most central to the judiciary's mission.

Commercial Sexual Exploitation: Not Just Prostitution by Another Name

Judges encounter victims and survivors of human sex trafficking far more often than they may think. Human sex trafficking is not simply prostitution by another name; it does not show up in courtrooms as an orderly procession of young women arrested for engaging in commercial sex. Arrests for prostitution are increasingly rare. Instead, a trafficked individual is far more likely to end up in court on a "masking charge": an ancillary offense that is, on its face, unrelated to commercial sex, but is a direct result of being trafficked. Examples include shoplifting, possession of prohibited substances or paraphernalia, loitering, and theft.

Human sex trafficking can also come into the courtroom under the guise of an immigration case, a truancy petition, a motion for third-party custody, or other case types that seem to have nothing to do with human trafficking. And while the outcome of the case may not be directly affected, the judge is better able to do his or her job if the judge understands what is happening in the courtroom. For example, a judge who can discern that a defendant has most likely been a victim of human trafficking, and that his or her trafficker might be present in the courtroom, can use the available tools to help ensure the defendant's safety. This may include bringing counsel to the bench to ask if the defendant has been screened for trafficking, using an address-confidentiality program (if available), and ordering a staggered exit from the courtroom, as in domestic violence cases.

Similarly, judicial education must prepare the bench for the effects of trauma on survivors of human trafficking. Most victims of human trafficking have experienced multiple forms of trauma. Some experience post-

traumatic stress disorder. Others exhibit behaviors of “complex trauma,” which results from ongoing exposure to trauma, rather than a discrete incident. Complex trauma is often characterized by an increase in symptoms, both in number and severity. Survivors who suffer from complex trauma can come across as emotionless, oppositional, and aggressive, among other symptoms. It is important for judges to recognize that a witness’s or defendant’s blunted affect or uncooperative behavior may be a manifestation of trauma and that it should not be taken as repudiation of human-trafficking allegations.

Judges should also be aware of the risk factors for human trafficking. No one is immune from being exploited;

"The Administration for Children and Families estimates that between 50 and 90 percent of trafficking victims have had some involvement with the child welfare system."

traffickers are often skilled predators who can manipulate, intimidate, woo, cajole, and threaten with equal ease. However, there are some circumstances

that correlate with a higher risk of being trafficked, such as a history of sexual abuse or commitment to foster care. Children in foster care are far more likely than their non-foster peers to become victims of human trafficking. The Administration for Children and Families estimates that between 50 and 90 percent of trafficking victims have had some involvement with the child welfare system (Child Welfare Information Gateway, 2017). These data are corroborated by other agencies, both governmental and nongovernmental: In 2012 the National Center for Missing and Exploited Children reported that 67 percent of youth who were reported missing—and likely trafficked—were in foster care at the time (Children’s Rights, 2014). And in 2013 the FBI reported that 60 percent of child-sex-trafficking victims recovered from across the nation were in foster care (Rights4Girls, 2017).

Involvement in foster care is a risk factor for another reason: Under the best of circumstances, it presents a situation in which the child’s physical self has a pecuniary value. Former foster youth and trafficking victims have reported that the child welfare system served to prime them for trafficking, as it “normalize[d] the perception that [the children’s] presence is to be used for financial gain” (former foster youth Withelma “T” Ortiz Walker Pettigrew, testifying before the House Ways and Means Committee on October 25, 2013).



LGBTQ youth (already dramatically overrepresented in the child-welfare population) are even more likely to become trafficking victims. LGBTQ kids are more likely to be homeless, or to feel like they have no safe place to go, because of their gender identity or sexual orientation. They are far more likely than their non-LGBTQ peers to be shut out of foster homes or to feel unsafe in a group home.

For survivors of human trafficking, recovery is a very long road. In many instances, judges must make difficult choices about where to place a juvenile who has been recently recovered from a trafficker.

The judge must be aware of the possible dynamics between the trafficker and the survivor and must understand the effects of trauma bonding

and its implications. For example, judges must be aware that it is highly likely that the survivor will run back to

"The more a judge understands the powerful dynamic at play, the better positioned he or she is to make informed decisions regarding the youth and the case."

his or her trafficker, not once but several times. The more a judge understands the powerful dynamic at play, the better positioned he or she is to make informed decisions regarding the youth and the case.

One of the most serious, but often overlooked, problems facing survivors is the difficulty of rebuilding their lives once they have been recovered from traffickers. Survivors face numerous obstacles because of convictions for prostitution and criminal charges that resulted from being trafficked. Almost all facets of survivors' lives are affected by these convictions, including access to housing, jobs, public benefits, and student loans. In addition to the practical and logistical barriers that a criminal conviction creates, it also hinders the survivor's emotional recovery and ability to heal from the trauma of being trafficked.

While this is true of all criminal convictions, it is especially so for survivors of human trafficking because the underlying actions were often not under their control. The traffickers' influence and control over their victims cannot be overstated. The survivors may be stripped of their identity (if the trafficker has confiscated their driver's license or other form of identification); physically branded by the trafficker to show his or her ownership; wholly dependent on the trafficker for food, shelter, or affection; and threatened with violence to themselves or their families (or any number or combination of other things).

Judicial education must include post-conviction issues. Many states have limited tools for survivors of human sex trafficking who seek post-conviction relief, and for many survivors of human trafficking, the criminal records that result from being trafficked will present an insurmountable obstacle to building a new life.

Labor Trafficking

All too often, "human trafficking" is used to mean only sex trafficking. The reality, as discussed at the beginning of this article, is that labor trafficking, while far less lucrative than sex trafficking, is far more prevalent. According to the 2017 *Trafficking in Persons* report (U.S. Department of Justice, 2017), approximately 79 percent of human trafficking across the globe—almost 20 million people—is for labor, not for sex. Yet labor trafficking generates only \$51 billion a year, while sexual exploitation earned traffickers a whopping \$99 billion (LIO, 2014).

Despite the prevalence of labor trafficking and its majority share of the global trafficking market, there is very little information

about it. In many states, there is a shocking paucity of information on labor-trafficking cases and trends. There are several reasons for this, including 1) there are no robust statutes under which to prosecute labor traffickers; 2) there have been no resources allocated to the investigation of labor-trafficking cases; and 3) it is very difficult to investigate reports of suspected activity because labor trafficking occurs mainly in homes and on farms that are private property.

"...approximately 79 percent of human trafficking across the globe—almost 20 million people—is for labor, not for sex."

Now for the Hard Part: Implementation

The work group considered all the information it had gathered and reviewed and identified several key components of a judicial education program.

First, a “Trafficking 101” section provides a broad introduction to the topic, including applicable federal and state statutes; factors that make Maryland particularly attractive to traffickers; risk factors and demographic information; and observable indicia of trafficking, such as certain tattoos or patterns of behavior. In addition to providing a general overview, this section also helps judges and magistrates understand how prevalent human trafficking is and how it pervades many more types of cases than one might expect.

Second, it is important to understand the dynamic of the trafficker-victim relationship and the trauma that results, with emphasis on the effects of complex trauma and on trauma bonding. In many ways, judicial education on human trafficking is analogous to domestic violence. It helps judges understand the issues at play, anticipate safety concerns, and make informed decisions about service referrals, conditions of probation, placement decisions, and many other considerations. The judiciary’s educational initiatives will include information on trauma-informed practices and services that are available for survivors of human trafficking.

Third, the education program should include issues related to conviction and post-conviction relief, such as juvenile immunity, affirmative defenses, and vacatur. While the specifics will vary widely from state to state, particularly regarding immunity and vacatur, most states (32) have some form of vacatur law.

Having determined what content was necessary, the work group then faced the question of *how* to deliver this information. The work group decided a three-pronged approach was necessary: 1) in-person programs, which

would be taught by subject-matter experts and for which judges could individually register; 2) a comprehensive resource manual of written materials, including the material taught in the live classes, as well as benchcards and best-practices materials; and 3) a Web-based course, which would provide an interactive and engaging curriculum and be available to all judicial officers.

As Maryland’s judicial work group continues, it will consider the experiences of other states as it develops best practices, needed resources, and innovative judicial education programs, while contributing to the national discourse on this important issue.

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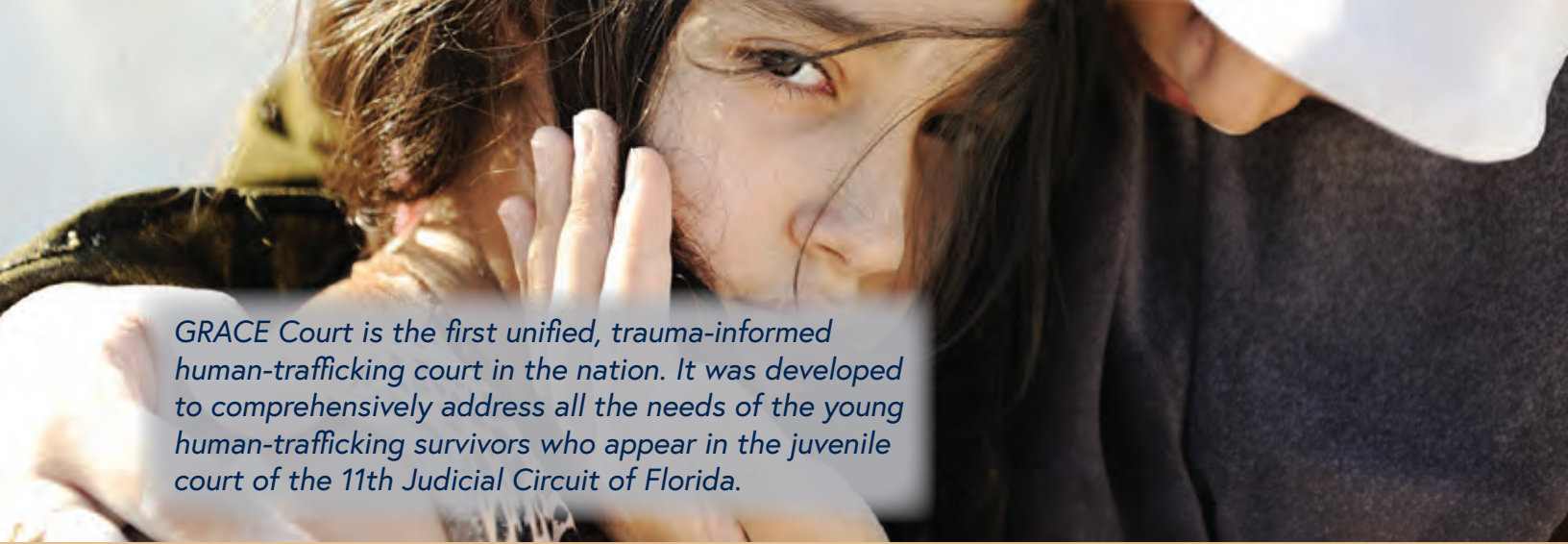
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GRACE Court is the first unified, trauma-informed human-trafficking court in the nation. It was developed to comprehensively address all the needs of the young human-trafficking survivors who appear in the juvenile court of the 11th Judicial Circuit of Florida.

Florida's GRACE Court

Hon. Mari Sampedro-Iglesia, Associate Administrative Judge, Unified Children's Court and Human Trafficking Division, 11th Judicial Circuit of Florida

When I took the juvenile court bench in 2009, my goal was to help children and families. I felt so honored to be entrusted with a job that would allow me to make "forever families," as well as protect children from households that were not keeping them safe. Never would I have realized that Miami-Dade County, home for most of my life, was also home to an underground world where children as young as 11 years old were being sexually exploited and sold as property.

"GRACE stands for Growth Renewed through Acceptance, Change and Empowerment, to remove the stigma of the term "human trafficking" and to focus instead on the goal of creating positive and promising futures for these children."

I remember attending a judges' conference, where a speech detailed the atrocities that were occurring to victims of human trafficking. I, along with most of the judges from all over the state of Florida, were sure that the speaker was talking about the movie *Taken* or something similar. Never did any of us think that the speaker was talking about our neighborhoods.

Returning to Miami and once again hearing my dependency cases, where babies are abandoned, neglected, or abused, I still could not get out of my mind that speaker who so clearly painted a picture of a young runaway girl being approached by a man claiming to want to befriend her, then wooing her, and then eventually selling her as property.

On one of those afternoons where the speaker's words would not escape my mind, a new case came in.

A 12-year-old was brought in by the Florida Department of Children and Families (DCF) to shelter the child from her mom, who was not coping appropriately with the child's "ungovernable behaviors." I called the child for a sidebar, as I often do, and I thought, "Why does this child not look me in

the eye when I speak to her?" I slowly realized that this child's eyelids had been tattooed, as though she were an animal who had been branded. That day was the start of my quest to do my part to end the horrific crime of human trafficking.

There is no official estimate of the total number of human-trafficking victims in the United States, but the Polaris Project, a program that helps fight human trafficking, estimates that the total number of victims nationally reaches into the hundreds of thousands, including both children and adults.

Human trafficking may involve forced labor or the commercial sexual exploitation of a human being, where that person is treated as a commercial object used for sexual activity in exchange for money or other items of value. Our juvenile court has seen victims as young as age 11 being used for commercial sex.

This crime generates billions of dollars in profit to human traffickers in the United States and around the world. It is a crime that is insidious and often hard to identify because the young victims may be involved in illegal activities, such as prostitution, escort services, underground brothels or pornography, and sometimes gang activity and drug use or sales, and it can be difficult for law enforcement to determine that juvenile criminal behavior is a result of victimization rather than intent.

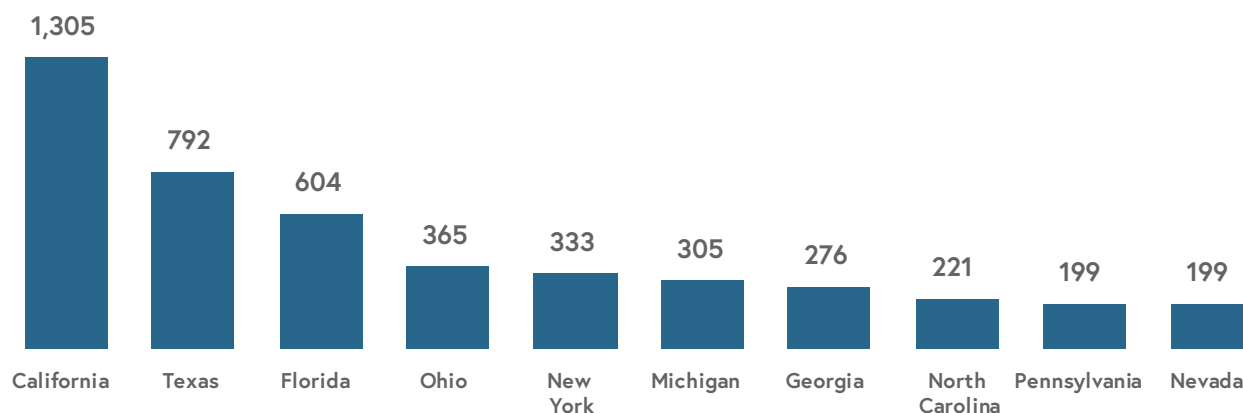
To make matters worse, these victims might not see themselves as victims, believing instead that despite repeated abuse, the trafficker is still a loving boyfriend, friend, or parent.



Florida Human Trafficking
Cases Report, 2007-17:

2,940

Human-Trafficking Cases Reported by State, 2017



Source: National Human Trafficking Hotline

The National Human Trafficking Resource Center ranks Florida third in the nation by number of calls per capita to their human-trafficking hotline. About 40 percent of the victims are minors, with an average age of 12 to 14 when they are first exploited for commercial sex.

For all these reasons, I requested that Miami-Dade County serve these children. The 11th Judicial Circuit of Florida established GRACE Court in 2016 upon my request. GRACE stands for Growth Renewed through Acceptance, Change and Empowerment, to remove the stigma of the term “human trafficking” and to focus instead on the goal of creating positive and promising futures for these children.

GRACE Court is the first known court of its kind in the United States that addresses, in a comprehensive manner, all aspects of the child’s involvement with the justice system. If a child with a dependency, delinquency, family, or substance-use disorder “Marchman” case is identified as a victim of human trafficking, that child is transferred to GRACE Court, and all those matters are heard there. The court is run by one judge trained in human trafficking. All the participants in GRACE Court are also fully trained in human trafficking. Each child is appointed an attorney *ad litem*, so that each child can have his or her own voice heard.

The GRACE Court approach, although at times a traditional adversarial approach, is first and foremost trauma informed. Upon entering GRACE Court, the child is evaluated, and the appropriate services are established. Hearings are allotted more time to fully address the specific and often complex needs of victims of human trafficking. Children are given stress balls to help relieve their anxiety, and therapists will accompany them in court as their support system. Therapy dogs sit with these children as they testify, and often console them when words fail.

A key component of GRACE Court is collaboration. A regular team staff meeting includes the child, the therapist, court case manager, the attorney from DCF,

and the attorney *ad litem* and guardian *ad litem*. If the case came in due to juvenile criminal activity, the state attorney and the public defender attempt to resolve the case in a way that serves the needs of the child. This team approach allows the child to better understand and be an active participant in his or her case.

"Marchman Case" Definition

A "Marchman" case arises from a Florida statute that allows family members to petition the courts for mandatory assessment and treatment of someone who is abusing drugs or alcohol or appears to be a danger to themselves or others. (See Florida's Substance Abuse Impairment Act, Fl. Stat. Ann. § 397.301 to 397.998; also known as Hal S. Marchman Alcohol and Other Drug Services Act or Marchman Act.)

To help my fellow juvenile court judges identify cases where the child might be a victim of human trafficking, I collaborated with DCF and a Harvard Law School student intern to create a “G.R.A.C.E Court Benchbook” (online at <https://tinyurl.com/y9dt2aem>). The benchbook includes common human-trafficking street terminology, elements most often seen in human-trafficking cases, resources and contact information, and what steps to take when a child is identified as a possible victim of human trafficking.

The benchbook provides guidance from the start, including the essential step of matching a child’s needs with the appropriate trauma-informed services from the right provider. In trauma-informed counseling, the child should receive clinical treatment primarily centered on trauma-focused care, cognitive behavioral treatment, and motivational interviewing.

The benchbook states, “When a child is accepted into G.R.A.C.E. Court, the court evaluates his or her needs and ensures that the child is referred to appropriate service providers. However, the judge cannot select which *particular* service provider the child will be referred to” (p. 19; emphasis in original). The benchbook provides an eight-page list of 45 resources to help find the right services and providers for the child. Trauma-informed services are much like those provided for all court-involved cases but with a sensitivity, awareness, and understanding of the behaviors, responses, and needs of individuals who are reacting to the trauma of trafficking.

Florida Human-Trafficking Cases, 2017



Source: National Human Trafficking Hotline

GRACE Court has received national recognition, and we have had judges and attorneys from Texas, Canada, and Washington, D.C., visit our court to learn about our protocol. In addition, the GRACE Court team has participated in information-sharing conference calls with jurisdictions from Colorado, Arizona, and other parts of Florida.

"Dealing with the negative effects of sexual trauma is not easy, and everyone in GRACE Court, despite their best efforts, will on many days feel more defeated than anything else."

I have been asked to speak about human trafficking at various conferences each year, including the Annual Shared Hope JUST Conference in New Orleans. I am happy to take these opportunities to shed light on this most humiliating of crimes, which can scar victims for life.

Along with sharing our protocols, I advise judges and justice partners that the work is often difficult, and they should be prepared for these ramifications. In GRACE Court, the days can be long and draining. Unfortunately, the trauma of sexual exploitation rears its head often and in painful ways. There are many emergencies during a typical GRACE Court calendar, including defiant teenagers, contempt proceedings, frequent runaway episodes, and hearings to commit young children into residential psychiatric treatment facilities. Dealing with the negative effects of sexual trauma is not easy, and everyone in GRACE Court, despite their best efforts, will on many days feel more defeated than anything else.

Early research on outcomes shows this effort makes a difference, and its many challenges are worthwhile and valuable for both the benefit of the child as well as the administration of justice.


A progress report of a pilot study, *Citrus Helping Adolescents Negatively Impacted by Commercial Exploitation (CHANCE)*, by researchers at the Louis de la Parte Florida Mental Health Institute within the College of Behavioral and Community Sciences at the University of South Florida, sees early positive results. “Notable improvements are observed on the majority of outcome variables between baseline and subsequent assessment, although not all changes are statistically significant,” the progress report states. “Some outcomes that appear more resistant to change, on the other hand, include depression, anxiety, and anger.”

As promising as early results are, the work remains taxing.

It is challenging, to say the least, when you want with all your heart to help these children, and they turn around and tell you off in open court. We know that is their pain and trauma speaking—not their true selves—but it is still challenging. Parents sometimes beg the court to lock their child away to keep him or her out of the reach of traffickers. It is a hard concept for a parent to accept that no matter how much they want their child locked away, it would be unconstitutional to do so simply to keep them out of harm’s way. The most disheartening days are when the court system and the therapeutic team feel that they are accomplishing so much with a child only to see that child once again fall victim to sexual exploitation on the streets.

However, there are days that raise our spirits again. The days when a parent thanks you for returning their lost little girl, the days when a child finally realizes that her pimp does not really love her, and she thanks you for getting her out of that life. There are those days when a child gets a full scholarship to a four-year college and thanks you for helping her turn her life around. Sometimes a child thanks you for being the only one who believed in her and listened to her. Those days are well worth the long and exhausting wait, and those days are the ones that give me and my GRACE Court justice partners the will to continue our work—saving one child at a time.





Peacemaking is a form of Native American justice that stresses reconciliation over adversarial court processes. Can peacemaking be applied to state courts?

Peacemaking Programs Offer State Courts an Alternative Path

Nora Sydow, Senior Court Consultant, National Center for State Courts

In 2013 the Michigan Supreme Court, through a Court Performance Innovation grant, asked the Washtenaw County Trial Court to explore tribal peacemaking philosophies, principles, and procedures and report on whether state courts could benefit from this Native American practice. The short answer was, “yes.”

But the Washtenaw County Trial Court has not been the only state court to implement a peacemaking program. These innovative programs are drawing the attention of judges, court administrators, attorneys, and other justice partners. These programs are spreading to other jurisdictions, including Brooklyn, New York, and Chicago, and other new programs are in the planning stages, including a dependency peacemaking program in the Los Angeles Superior Court.

What Is Peacemaking?

Peacemaking is a traditional Native American form of restorative justice that focuses on healing and restoration, with the core values of community, cooperation, and relatedness. Peacemaking generally brings together the disputants, along with family members and other members of the community who have been

"The Indian tribal courts' development of further methods of dispute resolution will provide a model from which the Federal and State courts can benefit as they seek to encompass alternatives to the Anglo-American adversarial model."

*-U.S. Supreme Court Justice
Sandra Day O'Connor (1996: 14)*

affected by the dispute. Community member volunteers, trained as peacemakers, allow each participant to speak about how the event, crime, or crisis affected him or her personally, without restricting what is said according to evidentiary rules. The purpose of peacemaking is to reach a consensus to resolve the dispute. Peacemaking differs significantly from the western, adversarial justice system. The adversarial system focuses on assigning guilt and meting out punishment, while peacemaking seeks to achieve the long-term healing of relationships and strengthening of communities.

How Is Peacemaking Different from Mediation or Other Forms of Dispute Resolution?

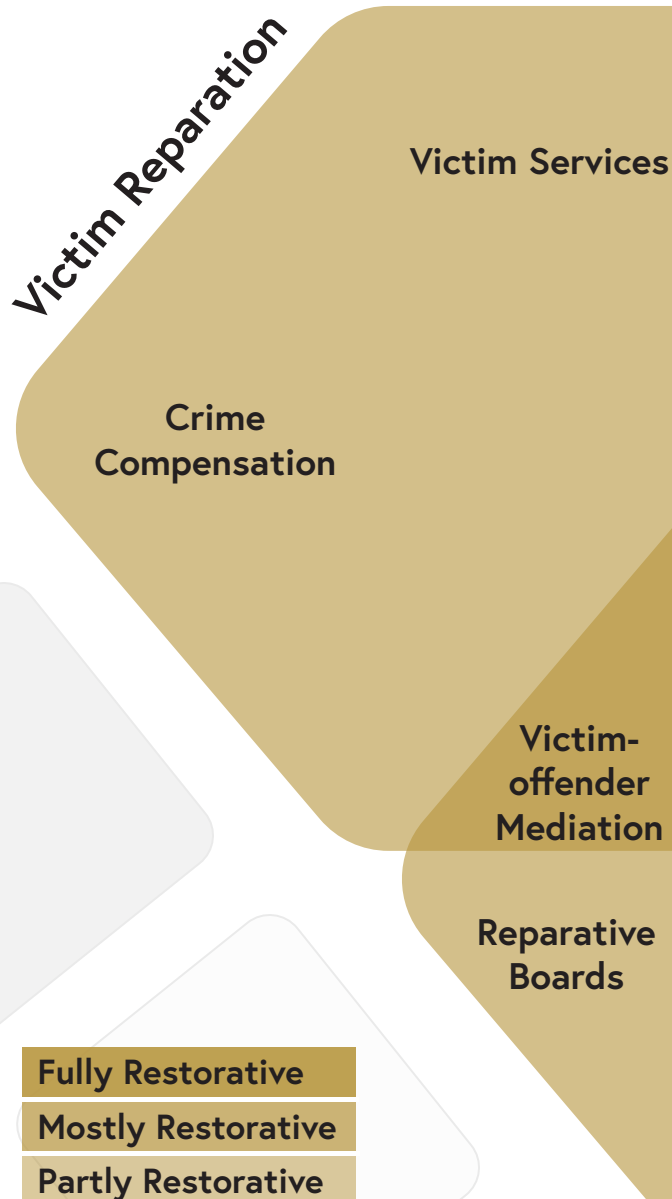
Although mediation also brings parties together to settle their disputes outside the adversarial model, it focuses on resolving the issue at hand and typically requires each party to give up something to reach a compromise. By contrast, peacemaking focuses less on the present dispute and more on healing relationships and creating long-lasting harmony. As Chief Justice Herb Yazzie (2010) of the Navajo Nation has stated, “When people leave a peacemaking session, they leave talking to each other.” The Navajo Nation’s peacemaking guide explains: “Peacemaking encourages people to solve their own problems by opening communication through respect, responsibility and good relationships. . . . Rather than judge people, peacemaking addresses bad actions, the consequences of such actions and substitutes healing in place of coercion” (Judicial Branch of the Navaho Nation, 2004: 1).

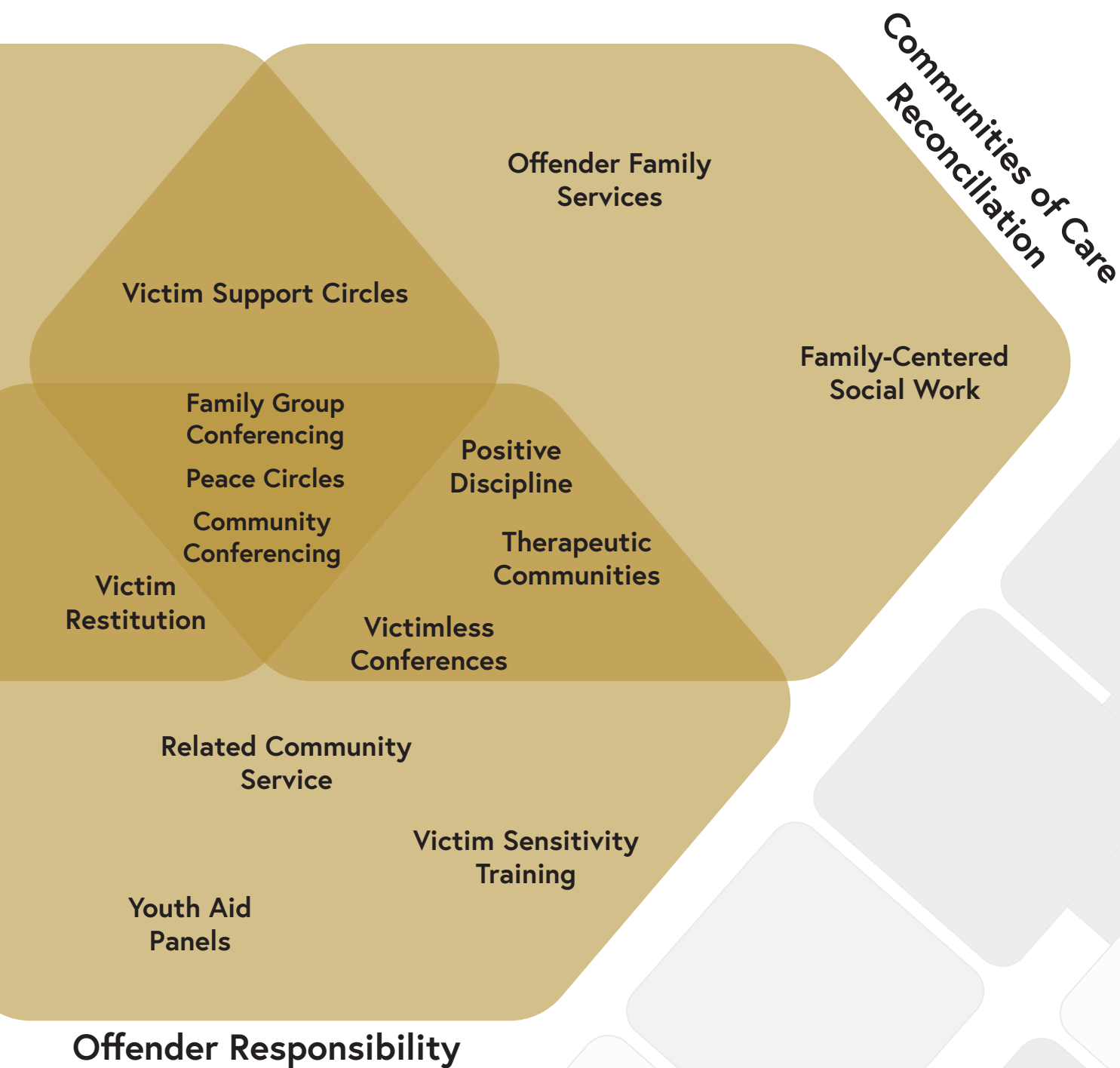
What Case Types and Issues Are Appropriate for Peacemaking?

Peacemaking programs have been used in a variety of state court case types, including criminal, juvenile delinquency, civil disputes, child protection, and family law, including dissolution and child custody and guardianship cases. Within a case type, several different issues often arise that could benefit from a peacemaking process (e.g., see the flowchart on pp. 26-27 for issues in a typical child protection case that could be addressed through peacemaking).

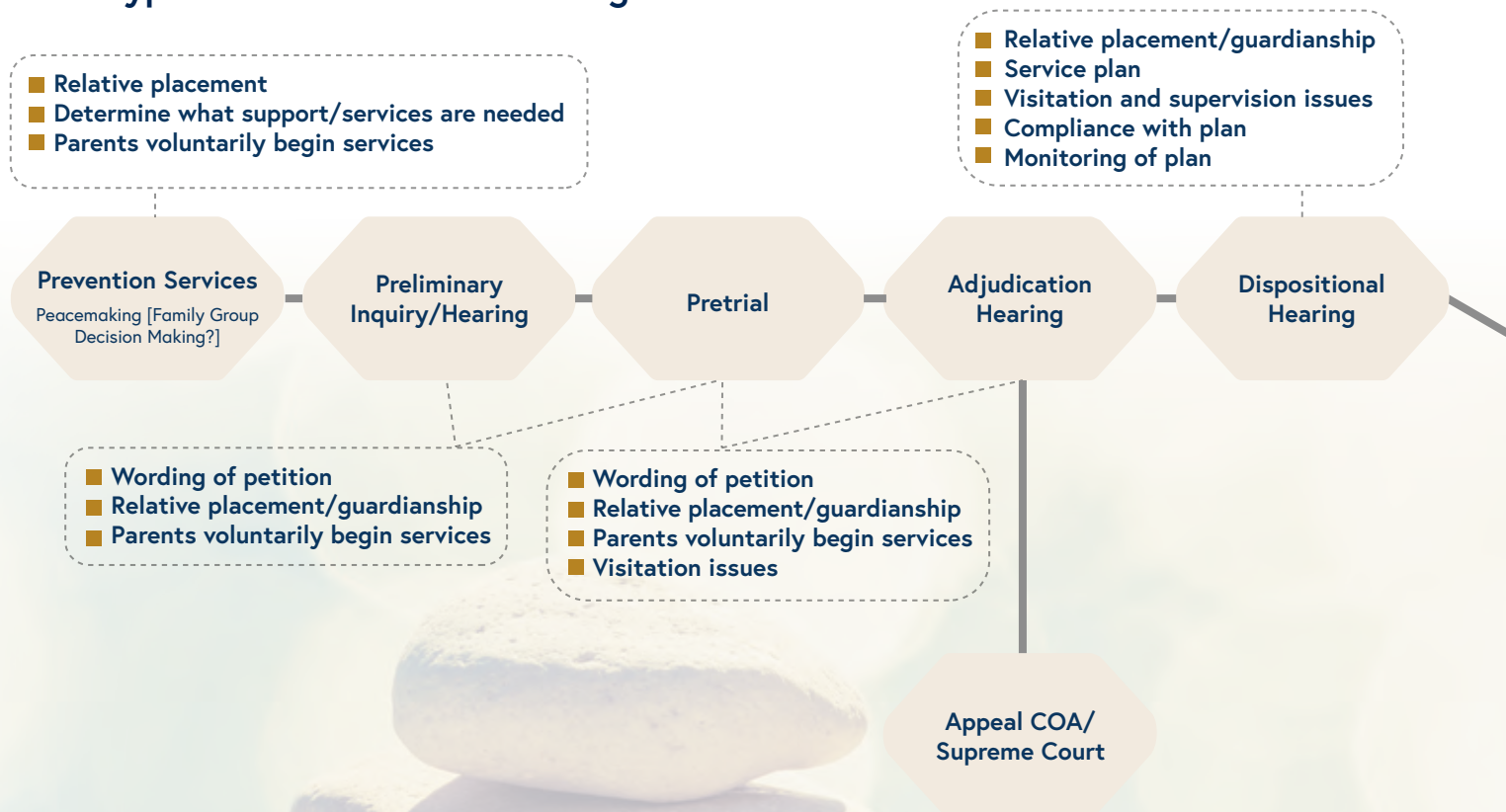
Restorative Practices Typology

Note: See McCold and Wachtel, 2003.





Example of Michigan Child Protection Court Process, with Typical Issues for Peacemaking in Dotted Lines

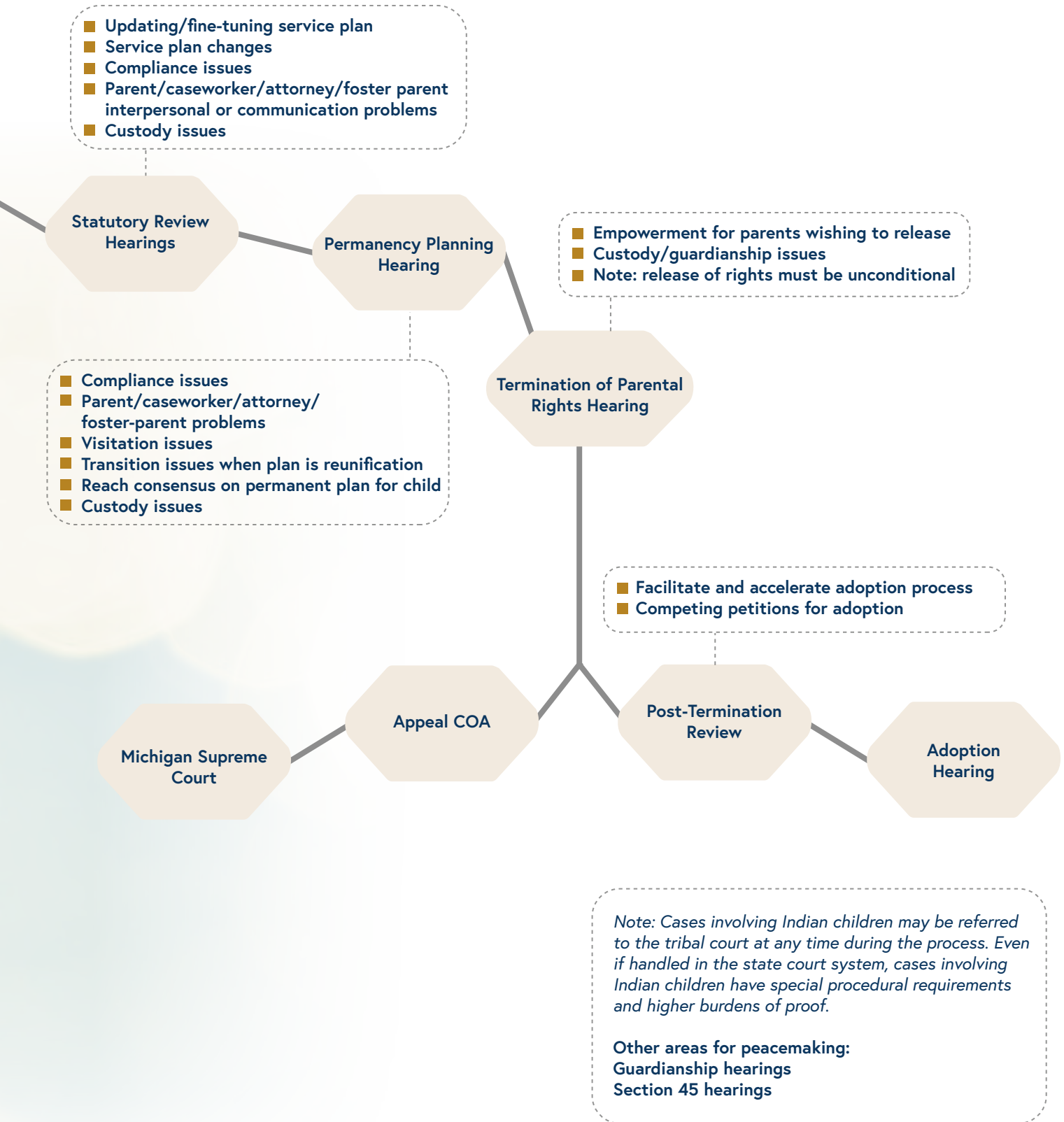


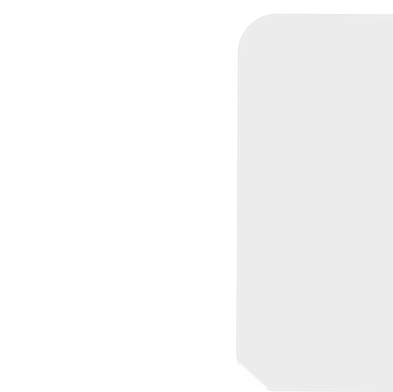
How Does a Case Get Referred to Peacemaking and When in the Court Process?

The process varies across programs and case types, but the Red Hook Peacemaking program provides a good example. This program, operating out of the Red Hook Community Justice Center in Brooklyn, was launched in 2013 as a diversion program for criminal and family court matters.

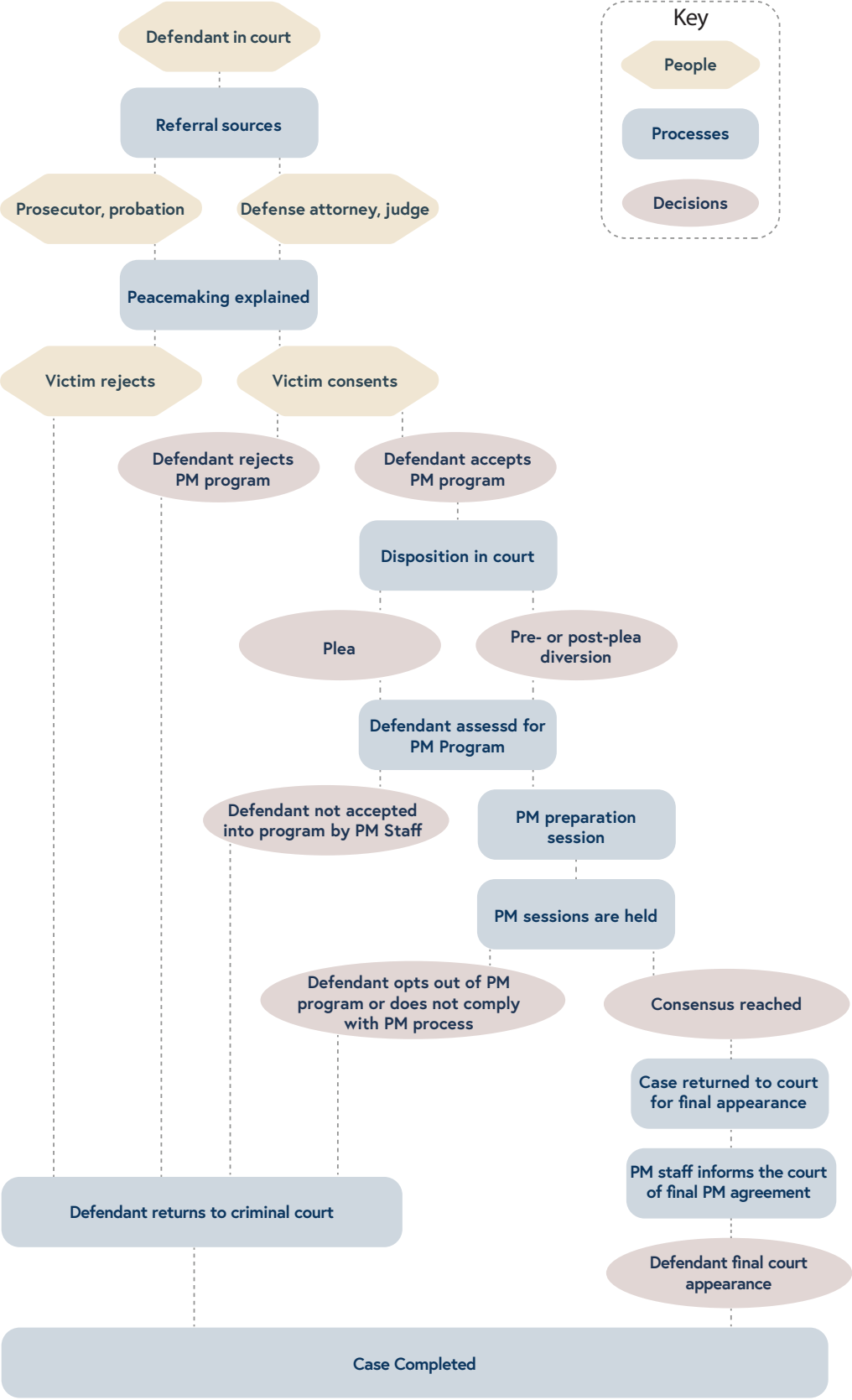
Once the Red Hook Peacemaking program receives a referral, and if the judge and attorneys agree to proceed with peacemaking, the program coordinator will meet with the defendant to explain how the program works. The program coordinator will also confirm whether the defendant meets all eligibility criteria.¹ The defendant will decide whether to participate in the peacemaking program. In cases involving a victim, the prosecutor

will speak with the victim to ensure the victim's consent to send the case to peacemaking. The victim will be invited—but not required—to speak with the program coordinator to learn more about the peacemaking process. Generally, victims may decide whether to participate personally in the peacemaking sessions, or whether to have their interests represented by the peacemakers or another participant in the peacemaking session. The court will then recall the case to enter the disposition consistent with the plea offer. Disposition may include a guilty plea, the reduction of the charge, or a dismissal as a form of pre-plea diversion.





Red Hook Peacemaking Program Caseflow Diagram



Is It Working?

Before we can answer whether it is working, we must first define success. In other words, what impacts on the participants, the court system, and the community do court peacemaking programs hope to achieve? Some of the identified participant, community, and court outcomes of peacemaking programs include the following:

Participant Outcomes

- reduce recidivism for this particular type of behavior
- resolve conflicts that are related to and may aggravate the issues at hand
- illuminate how third parties are affected by conflict
- increase restitution collected
- reduce the use of conventional outcomes (e.g., jail, fines, etc.)
- reduce costs paid by litigants (e.g., court fines, fees, etc.)
- improve victim satisfaction in the court process
- improve offender satisfaction in the court process
- have participants take responsibility for resolving the matter
- increase accountability
- improve relationships

Community Outcomes

- increase public trust and confidence in the court system
- bring conflict resolution skills to members of the community
- increase community engagement with the criminal justice system
- replace the focus on process with a focus on healing
- instill community members with a sense of responsibility to their fellow citizens in crisis

Court Outcomes

- reduce pending caseload
- improve court-processing-timeliness measures
- improve court staff job satisfaction, as the revolving door of justice is replaced with more long-term and sustainable solutions

Early evidence suggests positive results in many state court peacemaking programs. For example, survey responses from the first year of the Washtenaw County, Michigan peacemaking program, across a variety of probate and family cases, stated that 94 percent of cases resulted in an agreement from both parties, and of those agreements, 82 percent agreed or strongly agreed that the results were fair as compared to what might have occurred in a traditional court. In addition, 91 percent of participants agreed or strongly agreed that after listening to everyone speak, the participant had a better understanding of the other person's perspective. And finally, 94 percent of respondents agreed or strongly agreed that they would recommend peacemaking to others. One of the attorney participants commented, "I have no doubt in my mind that if this guardianship petition would have gone through the normal court procedure, there would be no mother/daughter relationship today. . . . [T]he Peacemaking Court saved one of the most important relationships one can experience—the parent/child relationship."²

What Is the Future for Peacemaking in State Courts?

Strengthening of Juvenile and Family Courts

The traditional adversarial family court is hard on families—including parents, children, and extended families—and communities. State courts will continue to develop innovative ways to offer more accessible, affordable, timely, peaceful, and effective ways to resolve disputes for the families they serve. Furthermore, many family courts now identify their role as beyond simply arbitrating immediate disputes. Family courts are including in their mission and programmatic responses a duty to improve the lives of the families they serve, regardless of the jurisdiction door the family enters. These innovations includes peacemaking, and court experts predict that peacemaking programs will continue to spread to other juvenile and family courts, and existing programs will grow.

Criminal Justice Reform

State court leaders are actively engaged in several criminal justice reform efforts, including the areas of sentencing, pretrial and bail, and fines and fees.

"By offering an intervention that interrupts the revolving door of the criminal justice system, peacemaking programs can offer sustainable change."

Peacemaking offers state court judges an alternative to the traditional, adversarial criminal court process that is very beneficial to offenders, victims, and their

communities. By offering an intervention that interrupts the revolving door of the criminal justice system, peacemaking programs can offer sustainable change.

Education of Future Attorneys

Peacemaking courses are increasingly being offered at law schools across the country as law students' desire to learn alternative methods for resolving disputes increases. For example, since 2015, Columbia Law School has offered the course *Native Peacemaking*.³ Other law schools that have recently offered peacemaking courses include Marquette University, University of Minnesota, UCLA, and DePaul University.

Implementation Resources

In response to the call from the court community for information and advice about implementing peacemaking programs, the National Center for State Courts and the Center for Court Innovation developed the 2017 implementation guide for state courts interested in developing a peacemaking program: *Inspired by Peacemaking: Creating Community-Based Restorative Programs in State Courts* (Sasson and Sydow, 2017). This guide offers profiles of several existing peacemaking programs, implementation information and advice, stories from the field, and other helpful resources. This guide was supported by the State Justice Institute.

Conclusion

The American state courts are currently experiencing a transformative moment. Court leaders and experts are calling for courts to reimagine their processes and move from a rigid, expensive, one-size-fits-all adversarial form of justice to processes that are more individualized and responsive to litigants and communities (Flango and Clarke, 2015). Peacemaking programs are one way we see state courts answering this call to action. The peacemaking approach to resolving disputes and strengthening relationships, families, and communities is spreading throughout the state court system in a variety of case types, including family law, child protection, probate, juvenile delinquency, and adult criminal matters. These state court peacemaking programs are experiencing positive outcomes and are anticipated to continue to spread to other courts.

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¹ In the Red Hook Peacemaking program, eligibility criteria include the following: defendants must accept responsibility for their actions related to the dispute or crime; all participation must be voluntary; the defendant understands the intensive nature of the peacemaking process and is willing and able to commit the time and effort to complete the process; parental/guardian consent is required for defendants under the age of 18; the defendant does not suffer from a severe and/or untreated mental illness and is not in need of intensive drug treatment; and the case does not involve any history of or allegations of intimate partner domestic violence, elder abuse, or sexual assault.

² A more rigorous evaluation of Washtenaw's peacemaking program was conducted in 2016; see Waverley Group Midwest, L.L.C. (2016), online at <https://tinyurl.com/yycbco5m>.

³ Course description available online at <https://tinyurl.com/yccfhs78>.





For the past century, the interests of the bench and bar in delivering justice to civil litigants were closely aligned. As civil litigants' needs change, courts recognize they must lead the way on civil justice reforms both for their own sake and to encourage productive change in civil legal practice.

Changing Times, Changing Relationships for the Bench and Civil Bar

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National Center for State Courts

In July 2016, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) adopted resolutions endorsing the report and recommendations of the CCJ Civil Justice Improvements Committee (CJI Committee). The report and recommendations resulted from a three-year, painstaking effort to identify and develop rules and best practices for courts to manage civil cases. The explicit objective of the CJI Committee was to reduce delay and expense in civil litigation and to ensure access to justice for civil litigants.¹ CCJ and COSCA encouraged courts to implement the recommendations in their respective jurisdictions. However, many judicial policymakers encountered only a lukewarm reception by state and local civil bar organizations. Several responded only with a polite “thank you, but we’re not really interested in pursuing those recommendations at this time.”

This response was surprising given ongoing demands from the organized civil bar for civil justice reforms. For years the civil bar has clamored for additional resources such as:

- business and complex litigation courts;
- judicial education on e-discovery and other knotty problems in contemporary litigation; and

- more consistent and effective judicial involvement in case management.

In many respects, the bar’s indifference to the CJI Committee recommendations is less indicative of their merits and more a symptom of the widening gulf between the bench and civil bar over their institutional obligations to civil litigants. The conflict stems from growing recognition that lawyer and client interests do not always closely align. In fact, courts have contended with a growing number of lawyers who exploit the litigation process to support their own business model through excessive gamesmanship that drives up litigation costs and, more recently, through ethically dubious practices in cases with self-represented litigants (SRLs).

Courts now recognize that a major shift in approach is needed to address the current needs of civil litigants, and the CCJ recommendations provide the framework for that change. The civil bar cannot be permitted to veto civil justice reform by insisting on maintaining the status quo.

Mutually Compatible Interests?

To better understand how the bench and bar arrived at this point in their relationship, it is useful to examine the factors that made the relationship mutually satisfying for so long. Traditionally, courts viewed their role as providing an impartial forum in which civil litigants could resolve their disputes. Their primary obligation was to provide the forum, the ground rules, and the procedural decision-making criteria that both sides—plaintiff and defendant—agree are fair. By doing so, courts could enjoy broad public respect and support. Key to maintaining public perceptions of fairness, however, was the caveat that trial courts respect the traditional adversarial system. That system assumes that lawyers will contest illegitimate claims and raise appropriate defenses on behalf of their clients, so that the outcome of the case is substantively fair given the applicable law (substantive justice). Judges are responsible for ensuring procedural due process (procedural justice) for both sides, but should not rule on the legitimacy of claims or defenses unless specifically requested to do so by the lawyers. Judges who inserted themselves into disputes over substantive justice were viewed as unfairly favoring one side of the litigation

over the other.

"Courts have always been sensitive to complaints that civil litigation takes too long and costs too much, especially when those complaints were directed to state and local legislatures..."

From the bar's perspective, the interests of lawyers and their clients were synonymous. The lawyers' role was to navigate the procedural

framework provided by the courts, assert legitimate claims and defenses on their clients' behalf, and thereby obtain the best possible outcome for their clients given the applicable substantive law. Lawyers who routinely accomplished this goal could make a very decent living from attorneys' fees. By bringing civil cases to court for

resolution, lawyers provided continued justification for the existence of courts, but also provided a buffer between the bench and the litigants that protected trial courts from being drawn directly into disputes about substantive justice. Greater procedural flexibility benefited both the lawyers and the bench. As civil procedure grew more complex, lawyers who successfully navigated that complexity could command higher fees from clients. At the same time, greater procedural flexibility for lawyers created a more effective buffer to maintain the impartiality of the bench.

This arrangement worked fairly well for much of the 20th century, but occasionally problems would arise, especially when the interests of the lawyers and their clients did not align perfectly. Courts have always been sensitive to complaints that civil litigation takes too long and costs too much, especially when those complaints were directed to state and local legislatures, which controlled funding for the courts. Periodically, it became imperative for courts to respond by enacting procedural reforms, including alternative forums and procedures, such as small-claims courts; ADR programs; and, more recently, business and commercial courts. Such reforms generally included features to make them palatable to the organized bar, such as:

- greater procedural flexibility;
- greater access to judges;
- more experienced judges; or
- more resources allocated for civil caseloads.

By cooperating for a time, both sides could plausibly claim to be improving the delivery of justice to civil litigants. However, most of these reform efforts only marginally improved the problems of cost and delay. A significant obstacle to meaningful change was the difficulty in getting reforms to take root and become firmly entrenched in court operations. Some judges introduced reforms, but after those judges left the bench, reforms often withered on the vine. Institutional

fragmentation, in which judges operate more or less autonomously, also made it difficult to spread reforms across the entire trial bench.

Another factor was the inability to enforce reforms. Absent an objection from one of the parties, most courts lack an effective mechanism to identify cases that fail to comply with rules or to address noncompliance in a timely manner. Even in jurisdictions that have such tools, many judges are unwilling to employ them rigorously or consistently. Some judges believe that unless the parties specifically seek judicial enforcement, preemptive enforcement interferes with lawyers' prerogatives to manage civil cases as they see fit. Other judges, especially those who were elected to the bench, believe that

"Further complicating the ability to conduct effective case management is the development of case law in many jurisdictions that favors unrestricted and unlimited examination of claims and defenses over the prompt resolution of litigants' cases."

unsolicited enforcement risks alienating lawyers on whom their continued status as judges relies.

Further complicating the ability

to conduct effective case management is the development of case law in many jurisdictions that favors unrestricted and unlimited examination of claims and defenses over the prompt resolution of litigants' cases. It should not be surprising that civil cases will languish or unnecessarily drive up costs when "due process" requires judges to permit litigants to repeatedly amend pleadings, expand discovery, or continue a case over and over again. There are few incentives for trial judges to enforce existing court rules when decisions concerning case management are likely to be overturned on appeal.

Courts Disrupted: Self-Represented Litigants, ADR, and Technology

Societal changes have also disrupted the civil justice system, introducing an additional wedge between the bench and civil bar. One of the most noticeable changes is the increase in self-representation in civil cases. A 2015 study of civil litigation in state courts found that both sides were represented by lawyers in less than one-quarter of civil cases (Hannaford-Agor, Graves, and Miller, 2015). The driving factor for the increase in self-represented litigants (SRLs) is that many litigants do not believe that lawyers can solve their legal problems in a timely and cost-effective manner. (Sandefur, 2010-11). In many instances, the estimated legal fees greatly exceed the monetary value of the case, so lawyers providing services on a contingency-fee basis cannot afford to accept otherwise meritorious cases, and plaintiffs cannot pay for legal services upfront, even if those fees would be wholly or partially reimbursed by a damage award. Similarly, defendants do not hire lawyers because the costs of doing so often exceed the likely damages, especially in contract cases in which the damages are more easily known.

For decades, both the bench and bar tried to stem the tide of SRLs by pushing for expansion of programs that provide free or low-cost legal services for people who could not afford lawyers. But as litigation costs continued to rise, those efforts fell far short of the demand (Cummings and Sandefur, 2013; Legal Services Corporation, 2017). Until very recently, the civil bar strongly resisted proposals to change how lawyers provide legal services to clients (e.g., unbundled legal services) or to allow specially trained nonlawyers to provide simple legal services and advice.

"The influx of large numbers of self-represented litigants greatly undermines the argument that the interests of the civil bar and civil litigants are synonymous."

The influx of large numbers of SRLs greatly undermines the argument that the interests of the civil bar and civil litigants are synonymous. Courts today must accommodate the needs of SRLs, who, by definition, are independent of the organized bar. Independence does not necessarily imply opposition; SRLs, like the civil bar, have a legitimate interest in courts providing a neutral, accessible forum to resolve disputes. There is strong disagreement, however, that maintaining a highly complex procedural framework provides an optimal forum to deliver justice. Particularly given the customer-friendly, streamlined experience that users have come to expect from other public and private institutions, many SRLs find court processes to be frustrating, time-consuming, expensive, and unnecessarily byzantine. Courts' insistence on maintaining these procedures in the interest of "procedural due process" is unpersuasive, at best, and sometimes viewed as a deliberate effort to favor represented litigants.

SRLs are similarly impatient with courts' reluctance to be held accountable for the substantive fairness of case outcomes. In contrast to lawyers' preferences for the traditional adversarial system, SRLs are considerably more comfortable with an inquisitorial system that delivers substantive justice, rather than just a neutral forum in which advocates resolve civil disputes on behalf of their clients. SRLs assume that judges know the substantive law and expect that judges will proactively apply the law without waiting for litigants to explicitly request relief in formal pleadings, motions, or in-court hearings. This is a tough proposition when both sides are self-represented, but it is even tougher in cases with asymmetrical representation. Courts across the country have reported widespread instances of sharp practices in which represented plaintiffs seek judgments in consumer debt collection, landlord/tenant, mortgage foreclosure, and other high-volume dockets in which legitimate counterclaims or defenses would likely be successful, if only the defendants had sufficient legal expertise to raise them. Judges face the untenable position of watching

injustices occur in their courtrooms, but often feel ethically constrained from intervening.

Another major disruption to the bench/bar relationship is the growing availability of alternatives to traditional adjudication that has diverted civil cases away from both courts and lawyers. Alternative dispute resolution (ADR) programs have proliferated over the past several decades. Many of these programs offer litigants a more streamlined and procedurally flexible process of resolving disputes at less cost and greater privacy than traditional litigation. Increasingly, standardized contracts include binding-arbitration provisions that prohibit employees and consumers from filing cases in court. Because these programs have largely developed outside the formal justice system, few states have developed a robust regulatory system setting procedural standards or qualifications for who may serve as a mediator or arbitrator. More recently, states are experimenting with permitting nonlawyers to provide certain types of legal services to litigants. For example, limited legal license technicians (LLLTs) in Washington State and family law facilitators in New York State (Clarke and Sandefur, 2017) are authorized to undertake specifically enumerated legal matters for clients without supervision by a lawyer and without violating state unauthorized-practice-of-law (UPL) statutes.

Finally, technology platforms are disrupting the bench and bar by offering both legal services and dispute resolution solutions online (JTC Resource Bulletin, 2017). For example, LegalZoom, Avvo, and Rocket Lawyer provide legal services, including standard legal documents customized for each state for common issues such as residential and commercial leases; common business documents; guardianship petitions, wills, and trusts; and divorce petitions, including child-support and custody petitions. These companies have survived a number of UPL enforcement actions, and most states have moved from blocking to regulating their participation in the legal-services marketplace (Rhode

and Ricca, 2014). Online dispute resolution (ODR) originated as embedded tools within online commercial platforms, such as eBay, PayPal, and Amazon, to provide a technologically supported, and largely automated, means for buyers and sellers to resolve disputes about commercial transactions without resorting to traditional courts. Most courts have been skeptical that ODR algorithms can replace judicial oversight in adjudication,



but recently a handful of courts have begun to explore this option for small-claims, consumer-debt-collection, landlord/tenant, and domestic-relations cases.

Conclusion

Continued solidarity by the bench and the bar will not be sufficient to overcome the challenges that they both face. The solutions that they have traditionally employed to address complaints about cost and delay have not solved those problems, and the unrelenting external forces continue to marginalize the relevance of both institutions. Although a bare majority of civil cases still have a lawyer representing at least one party, the continued presence of large numbers of SRLs in civil caseloads demands that courts acknowledge and accommodate these stakeholders on an equal basis with lawyers. Civil litigants are already speaking with their feet, leaving courts for more responsive

forums such as ODR and private ADR programs. They are also increasingly speaking with their mouths—to legislators and executive-branch officers—about the wisdom of supporting a civil justice system with declining caseloads and widespread litigant (public) dissatisfaction. No rapprochement with the bar will change this dynamic for the bench. Pretending otherwise also causes the bar to put off hard decisions it needs to make about its own future in the legal-services marketplace.

The CCJ civil justice recommendations set the parameters of what a new relationship might look like. In that framework, courts are responsible for their own procedures and set the pace of litigation with the explicit objective of reducing expense and delay and ensuring access to justice for all litigants. Courts employ a robust administrative infrastructure to monitor case progress and to enforce rules and case management orders. Courts take responsibility for ensuring procedural due process, especially for cases involving SRLs. Courts provide SRLs with effective tools and streamlined procedures, including greater use of common communication technologies that offer a more even playing field with represented litigants.

"...allowing courts to implement civil justice reforms that address contemporary challenges will also free the bar to leverage technologies and make long overdue changes..."


The organized bar should still have input about civil justice reforms, especially in the narrow range of cases in which lawyer representation on both sides is still the predominant practice. The civil bar could be enormously helpful in identifying and highlighting

areas in which procedural or administrative changes might unfairly benefit one side or the other. But it is critical that the bar no longer be able to exercise a veto over court reform efforts. In the broader context, allowing courts to implement civil justice reforms that address contemporary challenges will also free the bar to leverage technologies and make long overdue changes in legal practice that will ultimately help keep the legal professional relevant into the future.


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¹ The resulting recommendations incorporate principles of proportionality and evidence-based case management practices. They also bring renewed focus on high-volume calendars that comprise the vast majority of contemporary civil caseloads, especially improved access for self-represented litigants, greater attention to uncontested cases, and greater scrutiny of claims to ensure procedural fairness for litigants.



“The tools are in place to move forward with meaningful, tested applications that can enhance justice for all, and an access-to-justice research agenda will be an important first step”



Courts can achieve the promise of access to justice for all by embracing human-centered design. A research agenda built on legal-design principles will enable courts to ground future investments in scientifically rigorous, user-driven innovation and evaluation.

Developing a Research Agenda for Access to Justice

Pamela Cardullo Ortiz, Director, Access to Justice Department,
Maryland Administrative Office of the Courts

How will we know when we have achieved the promise of “justice for all”? In 2015 the Conference of Chief Justices and the Conference of State Court Administrators unanimously endorsed Resolution 5, “Reaffirming the Commitment to Meaningful Access to Justice for All.” The resolution supports the “aspirational goal of 100 percent access to effective assistance for essential civil legal needs.” To achieve the goal of “justice for all,” courts will need to incorporate innovation and research as the twin poles of an ongoing reform cycle.

“To achieve the goal of “justice for all,” courts will need to incorporate innovation and research as the twin poles of an ongoing reform cycle.”

As they seek to enhance access to justice, courts are asking a range of questions. In which case types, or under which circumstances, is it critical that individuals have full representation? How much legal help is “enough”? What factors affect the quality of judicial decisions? How can we evaluate online tools, forms, and resources to ensure readability and usefulness? Are access-to-justice innovations cost-effective for the courts, for the parties, and for society as a whole?

By developing a well-thought-out research agenda to answer these questions, courts have an opportunity to set the stage for the future. This research agenda should incorporate a range of views. As public institutions, courts have a mandate to serve all effectively, efficiently, and fairly. Courts also serve many types of constituents: litigants, attorneys, agencies, and members of the public. A research agenda to help courts evaluate their ability to provide access to justice will need to incorporate the points of view of all participants.

The legal profession has been slow to embrace evidence-based practices. After all, it is difficult to say what success looks like. A trial court win is a success for the prevailing

party, but was it the right outcome? What about justice or fairness? What about the perceptions of the parties or society as a whole? The creation of new entities, like the Access to Justice Lab at Harvard Law School and other university-based centers, and the research undertaken by the Self-Represented Litigant Network and others suggest the legal profession is starting to recognize the importance of research.

New developments in research design and management can help courts develop an effective access-to-justice research agenda. Design thinking is a technique borrowed from the technology sector that can help courts ground their research in the needs of court users and promote innovation. This article will address how courts can take advantage of the principles of design thinking by building court-innovation teams, by focusing on good research design, and by being strategic when making data-collection decisions. The article will also address how courts can align the goals of their research with their aspirations for access to justice; the importance of grounding that research in social context and user experience; and, finally, on the importance of this type of research for the future of the courts.


The tools are in place to move forward with meaningful, tested applications that can enhance justice for all, and an access-to-justice research agenda will be an important first step.

Creating the Mechanism for Court Research

Design Thinking for Courts

For courts, research is not an academic endeavor. Courts must manage thousands of cases while evaluating best practices, advocating for resources, and playing a critical role as part of the larger justice system. Courts can balance assessment and practice by adopting research methods that build on design thinking. Design thinking is associated with engineering and tech startups. It was

popularized in the 1980s by Stanford University's Rolf Faste as a method for the creative resolution of problems to improve future results (Cohen, 2014). Margaret Hagan, director of the Legal Design Lab at Stanford Law School, has a blog, Open Law Lab (www.openlawlab.com), through which she explores the application of design thinking to the law. Her project documents initiatives that increase access to justice through technology and design. She promotes "legal design," a concept she defines as "the application of human-centered design to the world of law, to make legal systems and services more human-centered, usable, and satisfying."



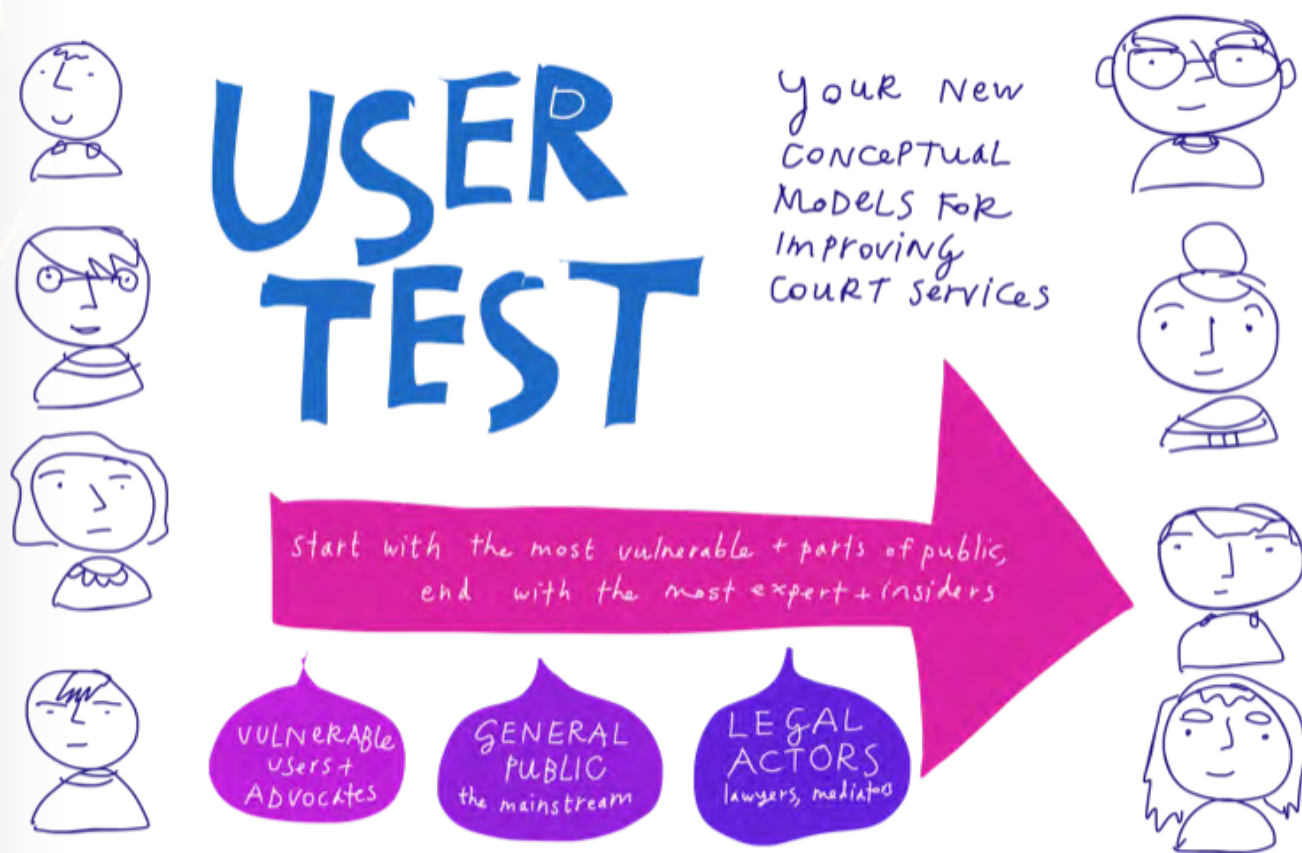
"Design thinking permits high-volume production environments like the courts to experiment with new practices while continuing to serve the public."

Courts are primed to serve as centers for design thinking. Design thinking emphasizes collaborative decision making. Courts are hubs for multiple stakeholder groups, each of which plays a defined role in the justice process. Design thinking focuses on empathy and human-centered values. The design-thinking process engages program developers and decision makers with the individuals directly affected by the system. Courts have direct access to large numbers of individuals from whom the court can directly learn: What does it feel like to go through this process? What would help you most? How would that improvement work for you? What would keep you from using it? Design thinking always begins with the user, in a bottom-up approach. Design thinking also prioritizes action by moving quickly from preliminary research to prototype. Those "prototypes," or pilot projects, would then go through user testing and be

refined and adjusted based on user feedback. This model works well for courts. Courts cannot stop what they are doing to conduct extensive research before trying a new idea, yet some preliminary research is critical. Design thinking permits high-volume production environments like the courts to experiment with new practices while continuing to serve the public. It provides a balance between the theoretical and the practical.

It is difficult to imagine how a court can incorporate design thinking into its research agenda without building some in-house capability for managing these types of projects. A court committed to design-thinking principles will want to build an in-house innovation team that is on hand and nimble enough to glean new ideas from court users; design new practices and programs; and implement, test, and refine them in a continuous feedback loop that can inform project design.

Stakeholders in British Columbia came together in 2013 and established what eventually became the British Columbia Family Justice Innovation Lab. They originally convened in response to a report of the Action Committee on Access to Justice in Civil and Family Matters, chaired by Supreme Court of Canada Justice Thomas Cromwell. The group paid close attention to the process by which they would do their work, consulting first with Adam Kahane, author of *Solving Tough Problems* (2004) and an expert in scenario planning and conflict resolution. Over time they shifted from a social lab—with a focus on inclusivity and process, but less focused on results—to an innovation lab built on the principles of design thinking. They have educated themselves about human-centered design and have embraced an experimental and innovative approach, which engages users in the design process. Their attention to process has allowed the group to ensure they are adaptive—able to focus on the process



Source: M. Hagan (2017). "User Testing for Courts." Blog, Open Law Lab, November 14, 2017. Used with permission. Online at <https://tinyurl.com/yd9gg6bs>.

and the product, on the families engaged in the justice system, and on the impact on the system itself. The group has launched several on-the-ground projects, including the Northern Navigator project, a collaborative law roster for family cases, and a project to provide mediation on a sliding scale for individuals over-income for legal aid (Morley and Boyle, 2017).

Thus, one important step courts can take to ready themselves to implement a research agenda is to create an in-house innovation team. This includes educating a cross-section of court stakeholders in the principles of design thinking and then giving them the opportunity to canvas users, generate new ideas, and put those ideas to the test.

Research Design

Another step courts can take is to engage individuals or organizations that are experienced in research design, so the work done by the innovation team is grounded in good science. Professor James Greiner and his team at the Harvard Access to Justice Lab have done much to draw the attention of the legal profession to the importance of using scientifically proven methods in research. They have championed the use of randomized control trials in the legal profession (Greiner and Pattananak, 2012).

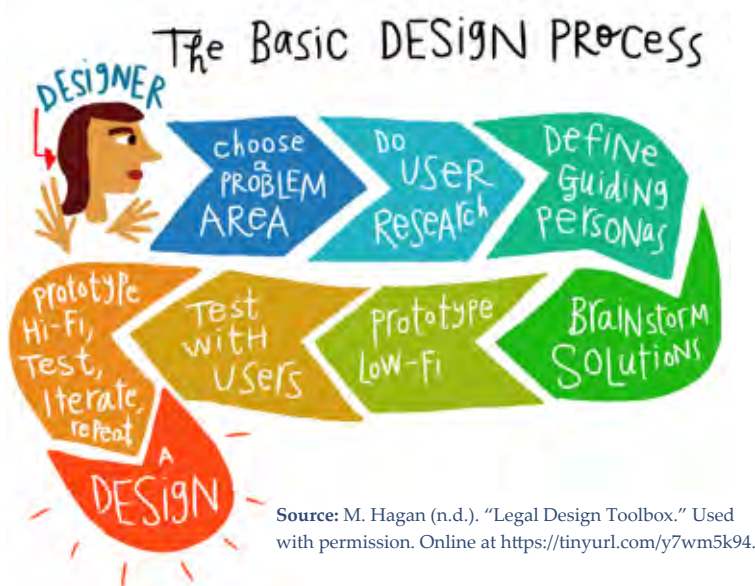
In addition, the Lab recently announced the creation of the “Evaluation Feedback Project.” Programs can submit an evaluation tool for feedback. If the submission falls within the scope of their project, they will match the submission with one to three volunteer evaluators from across the country. Volunteers will review the tool and provide feedback. Their hope is to develop a national resource for collaboration on data and evaluation among the access-to-justice community (Faith-Slaker, 2018).

Other tools can aid courts and their research and innovation teams. For example, the Self-Represented Litigant Network provides a library of tools for evaluating self-help programs and services (<https://tinyurl.com/y9aus5c5>). The Stanford d.school provides tools and materials for organizations that want to learn design-thinking principles. For example, their “Design Thinking Bootleg” (<https://tinyurl.com/ycrgbkhs>) is a toolkit to help organizations learn and use design-thinking practices to innovate, implement, test, and refine new projects.

Data

Finally, courts can plan for future data collection by being liberal in the design of case management systems and technology. Courts may only have the opportunity to alter the architecture of information-technology systems once a generation. It is essential, therefore, to think as far ahead as possible when identifying the types of data to be captured, and reports to be generated, to anticipate future data needs. In their 2014 Draft Research Agenda, the Self-Represented Litigant Network identified several types of data that will be critical for future research about the self-represented. The Network calls for the collection of basic demographic data about court users, basic attitudes and perceptions of the self-represented, and case outcomes and post-judgment activity disaggregated by representational status.

In some instances, preliminary research and collaboration will be needed before courts can know what should be captured. For example, the Self-Represented Litigant Network has



called for the development of standards to identify case complexity and the capability of litigants to proceed without counsel, and methods for capturing representational status, including the ability to identify those receiving limited-scope representation. They also urge courts to evaluate representational status at different stages in litigation as that can change throughout the history of a case.

Defining the Goal

Once courts have the capability to implement a research agenda, what will courts need to know to improve their ability to provide access to justice? What should an access-to-justice research agenda look like? A research agenda must first articulate the goal of research and then identify what research is needed to understand the court today, and what courts will need to know to prepare for the court of the future.

Resolution 5 articulates a clear goal—access to justice for all, with appropriate services and resources targeted to meet the needs of court users. It envisions a nuanced, user-driven system. An access-to-justice research agenda must begin by helping courts truly know the needs and experiences of all court users.

Building a Human-Centered Research Agenda

What Do Court Users Need?

Using legal-design principles, an access-to-justice research agenda should begin with court users themselves—engaging a range of court users to elicit their help to design the agenda itself. Research should explore the types of problems faced by the public, when court involvement is most effective, and how courts can communicate most effectively with court users. If research begins with the question, “How to be a better court,” courts may miss the opportunity to adapt to a world in which people solve their problems in a very different way. Many individuals do not recognize their problems as legal problems. When they finally engage with the court, the problem may have progressed. A human-centered research agenda will take a broader perspective, examining first the

social context before fully defining the terms of research. In their article, “Expanding the Empirical Study of Access to Justice,” Catherine R. Albiston and Rebecca L. Sandefur (2013) call for “a research agenda that steps back from lawyers and legal institutions to explore not only whether existing policies are effective, but also how current definitions and understandings of access to justice may blind policy makers to more radical, but potentially more effective, solutions.”


"Using legal-design principles, an access-to-justice research agenda should begin with court users themselves—engaging a range of court users to elicit their help to design the agenda itself."

Research grounded in the social context from which legal problems emerge can answer a range of questions:

- Who are court users and potential court users? Where do they turn first when they have a problem? How do they use technology? How do they want to be able to solve their problems?
- When can problems be handled effectively outside of court?
- When is it most effective for individuals to engage with the court?
- What are the most effective methods to communicate with the public, litigants, attorneys, agencies, and other stakeholders?
- How much support do individuals need when engaging with the court, and at what stage?
- What do court users (broadly defined) expect from the courts?

How Do Court Users Experience Courts Today?

Evaluative studies are important but, when conducted as part of a human-centered agenda, will answer more than simply, “Is this program or policy effective?” They should expand beyond case outcomes to consider the program’s impact on the whole system. Researchers need to engage with all system users to identify what is meant by “effective.” Policies designed to protect victims, for example, by limiting the information available to the public, may make it more difficult for legal-services providers to assist those same victims. Policies that increase access to representation may lead to higher trial rates or scheduling delays. Unless all stakeholders participate in defining the goals of evaluation research, the broader impact of court practices and programs may be missed. The opportunity to craft user-oriented solutions to secondary impacts may be missed as well. A court committed to an access-to-justice research agenda will incorporate evaluative research into all aspects of the user experience. The results of that research will then be fed back into the program’s design.



"Unless all stakeholders participate in defining the goals of evaluation research, the broader impact of court practices and programs may be missed."

Every aspect of the user experience can impact access to justice and can be evaluated and refined. How effective is court signage? What practices improve the ability of the courts to identify language needs or the need for an accommodation? How effective is the court at managing the flow of litigants and attorneys for high-volume dockets? What form or document templates, language, or layout are most effective? Which website design gets

users to the page they need quickly? What terms are most effective in conveying meaning to the self-represented at the clerk’s counter? Which judicial behaviors and communication techniques achieve the desired results in the courtroom?

Prepare for the Court of the Future

Finally, a human-centered access-to-justice agenda can help courts prepare for the future. A court that gathers data today about staffing levels, user tech-readiness, and the impact of representation will be able to plan for the impact of online dispute resolution, paperless case files, legal-practice innovations, machine translation, and remote participation. Research can help courts devise transition plans so they are ready to adapt to change while continuing to advance access to justice. What will court users need if the court shifts to online dispute resolution for small-claims or traffic cases? How will the needs of those without access to the Internet, for example, be accommodated if the court shifts to e-filing? What standards will be required for technology to ensure that persons with sensory impairments can participate as business practices shift to an online model?

Courts can achieve the promise of access to justice for all—not by creating new programs to meet what the court perceives as user needs, but by grounding future investments in scientifically rigorous, user-driven innovation, evaluation, and adaptation.


Legal Design
Principals

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Effective Stakeholder
Communication

Research Question
Social Context

A photograph showing the backs of two police officers in dark blue uniforms. The officer on the right has "POLICE" printed on his vest. They are standing behind a person who is seated in the back of a white vehicle. The scene is outdoors in bright daylight.

“The federal government has always recognized that the number of unauthorized aliens in the United States is far greater than the capacity to identify and initiate removal proceedings”



Changes in federal immigration enforcement policies can affect not only state court operations, but also public attitudes about appearing in court. How should state and local courts respond to federal immigration enforcement activities in and around their facilities?

Responding to the Clash Between Access to Justice and Immigration Arrests in State Court Facilities

James D. Gingerich, Founding Director, State Courts Partnership, University of Arkansas at Little Rock William H. Bowen Law School and National Center for State Courts

Changes in priorities, policies, and procedures of the U.S. Department of Homeland Security (DHS) and its Immigration and Customs Enforcement Agency (ICE) during 2017 prompted policy responses from some state and local governments and increased the number of enforcement actions by federal immigration officials in and around state court facilities. In some locations, these activities generated significant public controversy and created concern among court officials that the arrests could jeopardize the public's perception of the courthouse as a safe and secure location for resolving disputes and decrease the willingness of some members of the public to appear in court as parties, witnesses, or jurors. This conflict between the obligation and authority of federal officials to diligently enforce the nation's immigration policies and the power and responsibility of state court officials to both ensure free and open access to the courts and provide a safe and secure location for resolving disputes presents a classic example of the clashes that can result from our constitutional structures of federalism and separation of powers.

The Conference of Chief Justices (CCJ) appointed a special committee, chaired by Nebraska Chief Justice Michael Heavican, to study the issues; communicate with and provide recommendations to federal officials; and offer information, guidance, and advice to state court leaders. One recommendation from the committee is that court leaders, judges, and administrators in every state take action to better understand the legal and practical issues and to develop and implement responsive policies consistent with federal requirements, with any relevant law and policies adopted by their state and local governments, and with the state judiciary's overriding obligation and goal of ensuring access to justice for all.

What Changed?

On January 25, 2017, President Trump signed and released three executive orders that changed the scope and enforcement of federal immigration policies. The revision with the most impact on the increase in arrests in and around courts was a change in the enforcement priorities used by DHS and ICE in targeting aliens

subject to removal. The federal government has always recognized that the number of unauthorized aliens in the United States is far greater than the capacity to identify



and initiate removal proceedings. In addition, there has been a tacit recognition of the economic and other benefits that the individuals bring to the communities in which they work and reside. While

all presidential administrations have balanced these interests in different ways, each has adopted policies that established some system of priority for immigration enforcement activities.

"In some locations, these activities [by federal immigration officials] generated significant public controversy and created concern among court officials that the arrests could jeopardize the public's perception of the courthouse as a safe and secure location for resolving disputes ..."

Most recently, the policy directed ICE officers to focus on unauthorized aliens who were suspected of terrorism, who had been convicted of a felony, or who had been convicted of three or more misdemeanors or of a "significant" misdemeanor, such as domestic violence. Following President Trump's 2017 executive order, then-DHS Director John Kelly immediately released a new policy, which greatly expanded the scope of immigration

enforcement by eliminating the priority system and extending it to any person who could be subject to removal, providing that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement."

Because earlier policies focused on aliens who had been *convicted* of specific crimes, ICE focused its apprehension efforts at local jails and state detention facilities, because those who were in state custody were likely to match the profile of convicted individuals set out in the immigration enforcement policy. Under the new policy, one of the groups added to the broadened scope includes "those who have been *charged* with any criminal offense that has not been resolved." The obvious location at which to seek individuals who have been charged with an offense is the local courthouse. With the availability of public dockets, many of which may be accessed online, the search for targeted individuals and the added information that they may be in a specific location at a specific time now makes the local court facility an obvious choice for immigration enforcement officers. It is likely that this revision and expansion of enforcement priorities is one cause of the increase in enforcement activities at many state and local court facilities.

Many state and local executive- and legislative-branch officials responded to the changes to federal immigration practice by adopting local policies to limit the role of local agencies and employees in assisting federal immigration efforts. In some instances, the actions have caused federal administration officials to label the communities as "sanctuary" jurisdictions. While the term is not a legal one and has no formal or agreed-upon definition, the designation has been used to describe any agency, city, county, or state that has adopted a policy or practice that in any way limits the action local officials take toward supporting or assisting federal immigration enforcement efforts or attempts to limit the federal activities that can occur in their communities. The U.S. attorney general has attempted to use the designation as a basis for denying federal grant awards, a decision that is the

subject of litigation. ICE officials have also stated that it is the refusal of local officials to assist in their efforts that has caused them to increase the number of enforcement actions at court facilities.

What Is the Feared Impact?

The elimination of enforcement priorities was only one of several changes in immigration policy resulting from the 2017 executive orders. Immigration policy became one of the most contested, divisive, and politically charged issues of the last year. While state court judges and administrators have no role or direct interest in the policy choices and goals surrounding immigration issues, the potential impacts upon court facilities and the public's access to justice are central to the primary responsibility of state court leaders. For this reason, court officials in many states expressed their concerns and requested that immigration officials refrain from enforcement actions in and around court facilities. Since March 2017, five of the nation's chief justices have written to federal officials asking that such enforcement actions be limited. New Jersey Chief Justice Stuart Rabner described the potential impacts upon courts in his state:

A true system of justice must have the public's confidence. When individuals fear that they will be arrested for a civil immigration violation if they set foot in the courthouse, serious consequences are likely to follow. Witnesses to violent crime may decide to stay away from court and remain silent. Victims of domestic violence may choose not to testify against their attackers. Children and families in need of court assistance may likewise avoid the courthouse. And defendants in state criminal matters may simply not appear.

Similar comments were expressed by Chief Justice Mary Fairhurst of Washington:

When people are afraid to access our courts, it undermines our fundamental mission. . . . Our ability to function relies on individuals who voluntarily appear to

participate and cooperate in the process of justice. When people are afraid to appear for court hearings, out of fear of apprehension by immigration officials, their ability to access justice is compromised. Their absence curtails the capacity of our judges, clerks and court personnel to function effectively.

One specific request made by several court leaders and court-related organizations involves the DHS policy on "sensitive locations." The statutory authority of federal immigration officials to make arrests is quite broad. Through its own administrative regulations, DHS has self-imposed some limitations on where arrests should take place, recognizing that some locations are so "sensitive" as to make enforcement activities in these locations inappropriate. The current limitations, in place since 2011, include schools, hospitals, places of worship, and public demonstration sites. The policy does not completely bar arrests in these locations but presumes that they will be avoided absent a showing of exigent circumstances. While courthouses have never been included within the policy, the recent increase in courthouse arrests has led to calls for the expansion of the policy to include court facilities or proceedings. Early in the year, members of the CCJ committee raised the issue with federal officials, but the response, communicated in a letter sent in June from acting ICE Director Thomas Homan to NCSC President Mary McQueen, indicated that the agency was not willing to change the policy. In August the House of Delegates of the American Bar Association adopted a resolution requesting that the courthouse be included as a sensitive location and called upon Congress to adopt the policy change through legislation.

"When people are afraid to appear for court hearings, out of fear of apprehension by immigration officials, their ability to access justice is compromised."

On January 31, 2018, ICE publicly released a new policy, Directive Number 11072.1: “Civil Immigration Enforcement Actions Inside Courthouses.” It, for the first time, sets out in a public document the policies and procedures immigration officers will use for enforcement activities in court facilities. While not as protective as a “sensitive location” designation, it does provide for some important limitations in response to the concerns expressed by judicial leaders:

- Because the response was released as a “policy directive,” it is available to the public. Previous ICE policies on courthouse enforcement activities were not available to the public, causing both confusion and concern about their nature and scope. This new level of transparency will improve the ability of local courts to develop their own policies and provide for more consistency in enforcement practices.
- The scope of individuals who are targets of enforcement activities in court facilities is more limited than in other areas. ICE will only seek individuals in court facilities who 1) have criminal convictions, 2) are gang members, 3) are national security threats, or 4) have already been judicially ordered removed from the United States.
- Only the targeted individuals will be subject to enforcement actions in the court facility. Family members, friends, or others who may be with targeted individuals will not be questioned or subject to any enforcement activity.
- Officers will only engage in enforcement activities in court facilities or areas of court facilities dedicated to criminal proceedings and will avoid enforcement activities in noncriminal facilities or areas (such as family court and small-claims court).
- Enforcement activities will only take place in nonpublic areas of the courthouse and will be conducted in collaboration with court security staff.

How Should State and Local Courts Respond?

As state and local court officials review and consider what, if any, actions should be taken, care must be given to both understand and comply with applicable federal law and policy and all laws and policies adopted by state and local officials. Because the issue is surrounded by such heated and contentious political debate, it is not surprising that, irrespective of legitimate concerns, only a few court systems have enacted new policies. Following are a few actions and responses courts may want to consider.

“...some jurisdictions have enacted policies that limit the action local employees may take in response to requests for information from federal immigration officials...in other jurisdictions, local governments have taken action to increase their cooperation with federal immigration officials through the adoption of cooperative agreements...”

1. Every court should undertake a comprehensive review of the state laws, city and county ordinances, or policy statements that may have been enacted in their jurisdiction involving immigration issues. Such actions may guide or limit actions that can or should be taken by the court or may otherwise impact the court and any planned responses. For example, some jurisdictions have enacted policies that limit the action local employees may take in response to requests for information from federal immigration officials, including the provision of information or access to facilities. In some jurisdictions, these actions impact local jails and detention facilities,

probation officials, and even court security officers, where those officers are executive- rather than judicial-branch employees. In other jurisdictions, local governments have taken action to increase their cooperation with federal immigration officials through the adoption of cooperative agreements sanctioned under 8 U.S.C. §1357(g). The authority to enter into these agreements may require approval through the traditional process for the adoption of local law but, in some locations, only requires a decision by an agency head, such as a county sheriff or city police commissioner. In most cases, the judicial branch and court officials have no role in the discussion or adoption of such policies; yet the courts are affected as a result. For those courts whose geographical jurisdiction encompasses multiple cities or counties, different policy and legal choices may have been made in each jurisdiction.

2. Each court should be aware of the authority and limitations under their state law on the ability to limit access or activities in their court facilities. Greater attention to issues of courthouse security have caused courts to enact policies and restrict certain access to protect public safety. For this reason, every court should already have a written facility-access policy, which provides guidance on all issues of access to the court facility and grounds, a description of all security procedures, and any restrictions on authorized activities. In light of the new ICE directive, these policies should be reviewed and potentially clarified. The policies should be reduced to writing and clearly communicated to court officers and employees, justice partners, and the public.
3. Meetings should take place in each state involving the offices of the chief justice and state court administrator and the designated state-level ICE field office director and DHS special agent in charge to discuss the implementation of the new

ICE directive. Discussions should also include a description of the policies and practices being used by immigration enforcement officials that may involve court facilities and any policies that have been adopted by the courts that may impact immigration enforcement. Special concerns should be raised to develop procedures that honor and respect the separate and unique responsibilities of both federal immigration officials and the state courts. Communication protocols should be developed, including potential agreements for prior notification about significant activities or in response to special problems or incidents. In those states with nonunified judicial systems or with large urban court systems, similar meetings between local court leaders and the appropriate representatives of federal immigration agencies should also be established.



4. Where local court policy authorizes courthouse access to immigration officials and allows subsequent enforcement activities to take place in the court facility, consideration should be given to additional policies for communication to and from court security officers, as is required by the ICE directive. Courts should also consider whether court security will then be required to notify the judge should the intended target of the arrest be expected to appear as a party, as a witness, or in another capacity on a scheduled court docket.
5. Each court should adopt a requirement for the reporting of courthouse enforcement events after they occur. Many courts have already adopted incident-reporting systems for court security. If so, the current forms and process should be

reviewed in light of the special issues surrounding immigration-related arrests. Where no incident-reporting system is in place, this issue can be the catalyst for its introduction. States should consider adopting a uniform report to be used by all courts to allow the collection and comparison of state-level data. The report should include the time and date of the incident, the agency initiating the arrest, and a description of the activity. If available, the name and nationality of the target, the basis for the arrest (e.g., they have been convicted of theft or charged with a drug offense), and the reason they are in the court facility (called as a witness, a party, or defendant, present as a family member) are all helpful information in the future consideration of policies and their impacts.

6. Courts must ensure that all judges, administrators, and court security officers have access to training and education about immigration law and procedures and their potential impacts on court operations. As state and local policies are adopted, training about the policies will be necessary to ensure accurate and consistent application.





Immigrant crime victims are becoming more common in state courts. A national survey of judges in 2017 provides a look at what types of cases involving immigrants and their families are appearing in the courts.

Promoting Access to Justice for Immigrant Crime Victims and Children: Findings of a National Judicial Survey and Recommendations

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State Courts, Immigrant Crime Victims, and Immigrant Children

Over the past 27 years, the numbers of immigrants from linguistically and culturally diverse backgrounds has steadily increased nationwide.¹ Immigrants have moved beyond traditional gateway states (e.g., California, Florida, Illinois, New Jersey, New York, and Texas) and are settling in urban and rural communities across the country, particularly in the Southeast, the Pacific Northwest, Mountain States, and the Sun Belt (Immigration and the States Project, 2014). The immigrant population rose by 40.6 percent between 2000 and 2016. As of 2016:

- 13.5 percent (43,739,345) of the U.S. population is foreign born² (Migration Policy Institute, 2016b);
- 24.5 percent of the U.S. population is either foreign born or has one or more foreign-born parents (derived from data obtained from Migration Policy

Institute, 2016a, b; Immigration in the States Project, 2014);

- 25.8 percent of children in the United States under the age of 18 have one or more immigrant parents (Migration Policy Institute, 2016a); and
- 88.2 percent of children in immigrant families are U.S. citizens (Migration Policy Institute, 2016a).

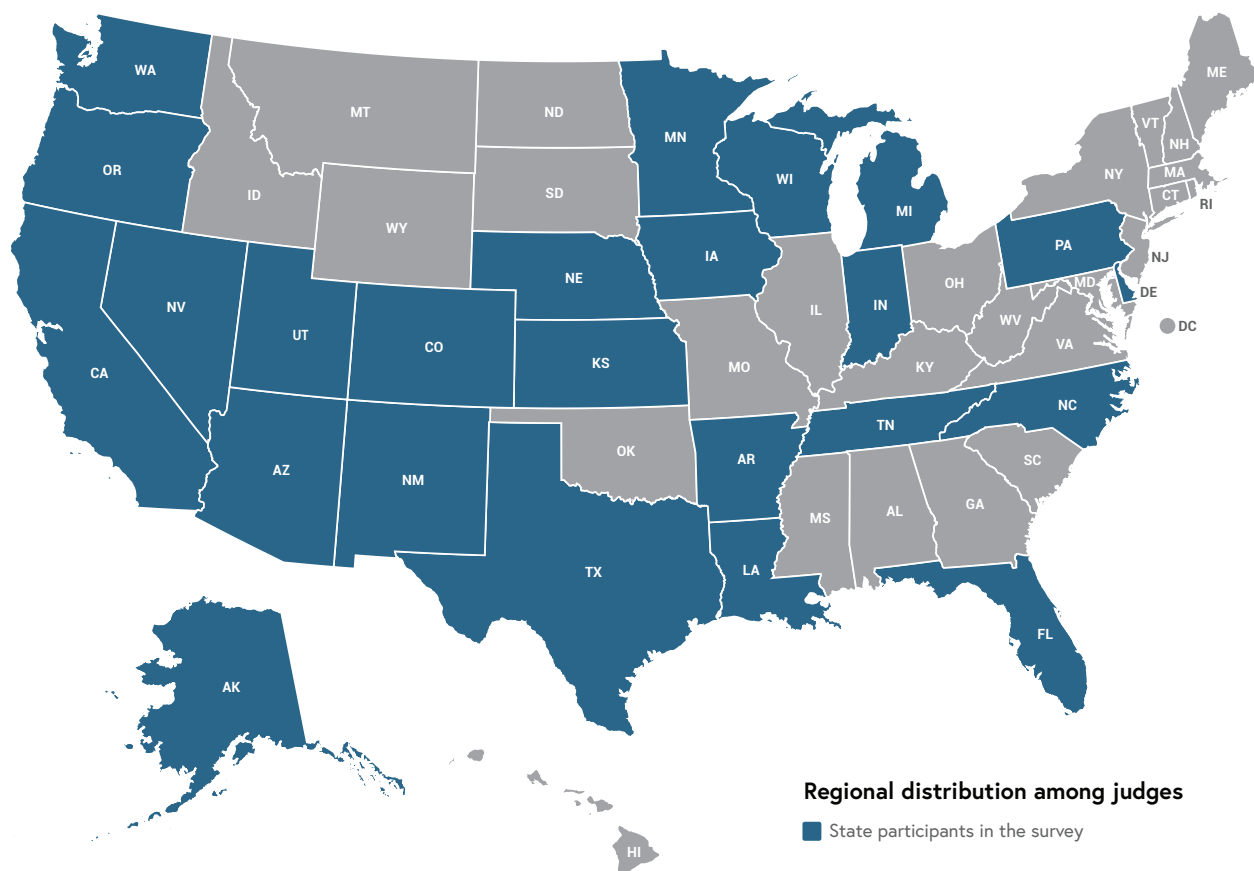
State courts are among the first in the justice system called upon to provide access to justice for new immigrant populations. Family courts nationwide are seeing growing numbers of immigrants seeking custody; child support; divorce; guardianship; protection orders; dependency/delinquency adjudications; U visa

certification from judges (Department of Homeland Security, 2016a, b); and state-court findings required for immigrant children applying for Special Immigrant Juvenile Status (SIJS) who have been abused, abandoned, or neglected by one of their parents (U.S. Citizen and Naturalization Services, 2017). Hearing cases involving immigrant families, children, and crime victims presents challenges for the courts. Immigrant litigants and children come to the United States with assumptions and expectations about the justice system based on experiences in their home countries. Most live in mixed-status families (Capps, Fix, and Zong, 2016); these are families in which one or more family members are undocumented and other family members are citizens, lawful permanent residents, or immigrants with another form of temporary legal immigration status (Fata et al., 2013).

Findings from 2017 National Survey of Judges

The National Immigrant Women's Advocacy Project (NIWAP) surveyed 107 judges in 25 states during November and December 2017. The aim of the survey was to learn from judges about cases coming before courts involving immigrant and Limited English Proficient (LEP) victims. The survey particularly examined the intersection of immigration status and immigration concerns with state family- and criminal-court proceedings. It also explored whether judges are seeing changes in immigrant victims' willingness to participate in various types of court proceedings in 2017 relative to 2016. The map below illustrates the states in which judicial survey participants work.

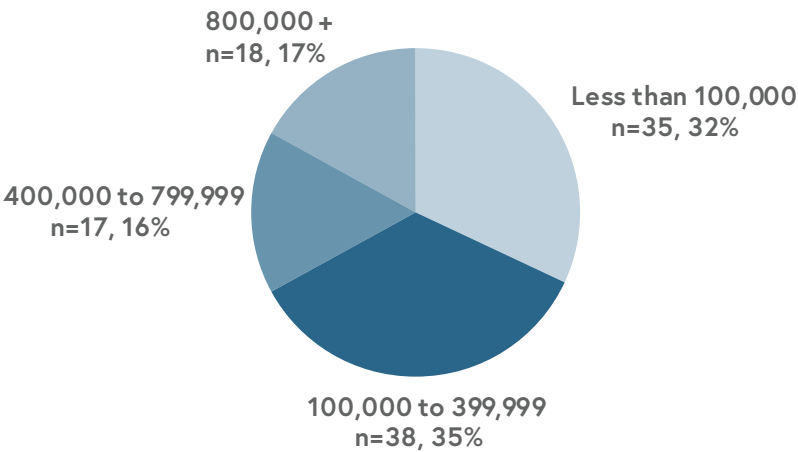
States with Judges Participating in the Survey



Most judges (69 percent) reported that they have many LEP residents living in their jurisdictions. Judges participating in the survey routinely worked with LEP victims who spoke 29 languages, including most prominently Spanish, Vietnamese, Russian, Chinese, Arabic, and Korean. They served jurisdictions with diverse population sizes and presided over a wide range of state court proceedings.

Judges were asked to indicate whether judges in their courts signed U visa certifications for immigrant crime victims, T visa certifications for human trafficking, or issued SIJS findings (“signing courts”). The majority (64 percent) of judges surveyed indicated that judges in their courts do not sign U or T visa certifications and SIJS findings (“non-signing courts”). Among the 36 percent of judges who reported working in signing courts:

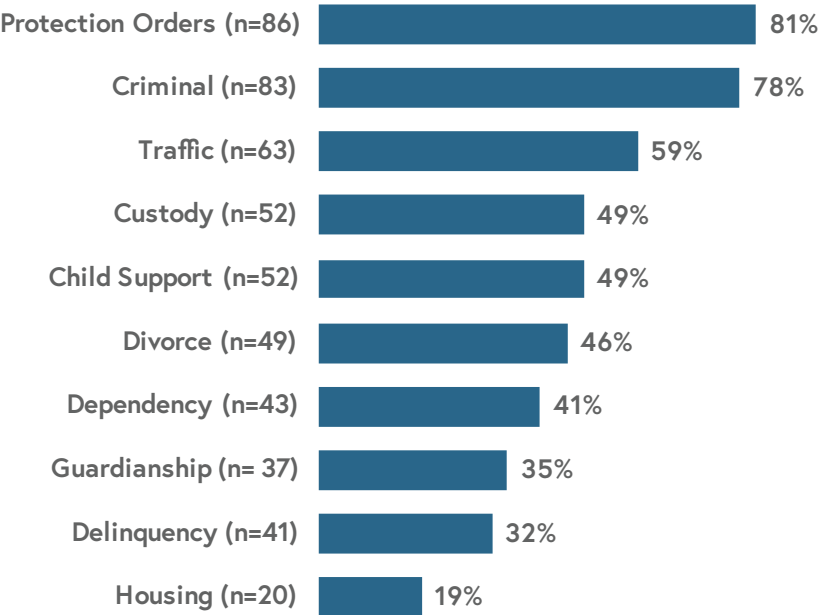
Figure 1. Population Size of Court's Jurisdiction



- 23 percent sign in only one case type (either U visas, T visas, or SIJS findings); and
- 13 percent report that judges in their courts sign more than one of the forms of certification or findings Congress authorized state court judges to sign.

The survey sought to assess judges’ knowledge about the U visas, and their judicial role as U visa certifiers, and found many judges (32 percent) lacked knowledge about both U visas and certification.

Figure 2. Types of Court Proceedings Judge Survey Participants Hear

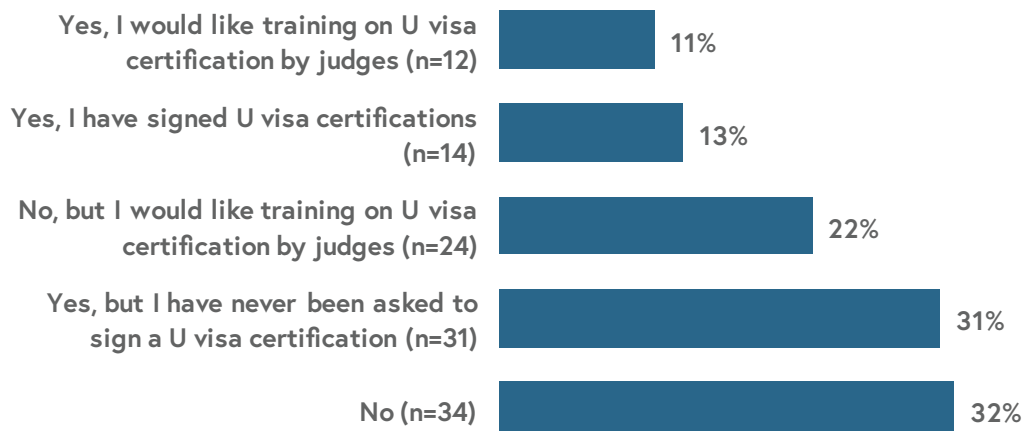


Over a quarter (26 percent) of judges reported that judges in their court issued SIJS findings that immigrant children who have been abused, abandoned, or neglected by one or both parents must obtain as a prerequisite to filing for SIJS immigration relief.

Judges participating in the survey were asked if they were aware of Violence Against Women Act (VAWA) confidentiality laws that place limits on immigration enforcement actions permitted at courthouses. The majority (55 percent) of judges reported knowing something about these laws, 22 percent had heard about them, and 23 percent were unaware of them.

Across a wide range of civil, family, and criminal court proceedings, the vast majority (88-94 percent) of judges participating in the

Figure 3. Do you understand what a U visa is and the role of a judge as a U visa certifier?

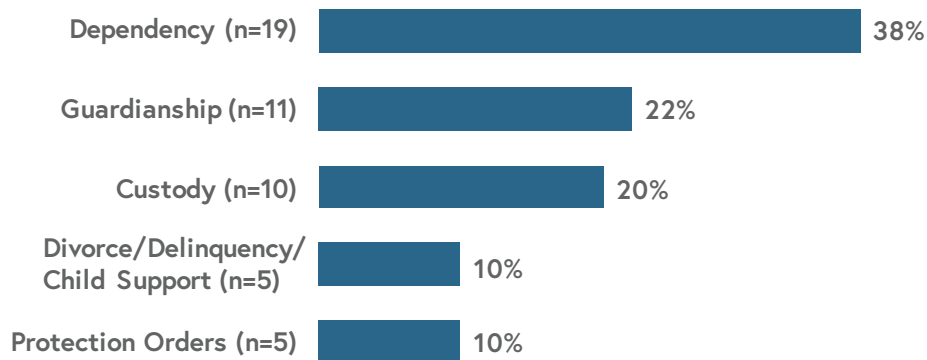


Signing courts (26 percent) were more likely than non-signing courts (16 percent) to have adopted policies on steps courts should take if immigration enforcement officials come to judges' courtrooms.

Judges were asked whether the number of cases involving immigrant or LEP victims changed in 2017 relative to 2016. Some judges reported an increase in immigrant victims coming to court in 2017 in several types of cases. Other judges reported some decline in victim participation in criminal, protection orders, and custody cases.

Signing courts differed from non-signing courts when asked to compare the number of cases involving immigrant or LEP victims appearing in state court proceedings in 2017 relative to 2016.

Figure 4. Judges Issued SJIS Findings in a Range of State Court Proceedings

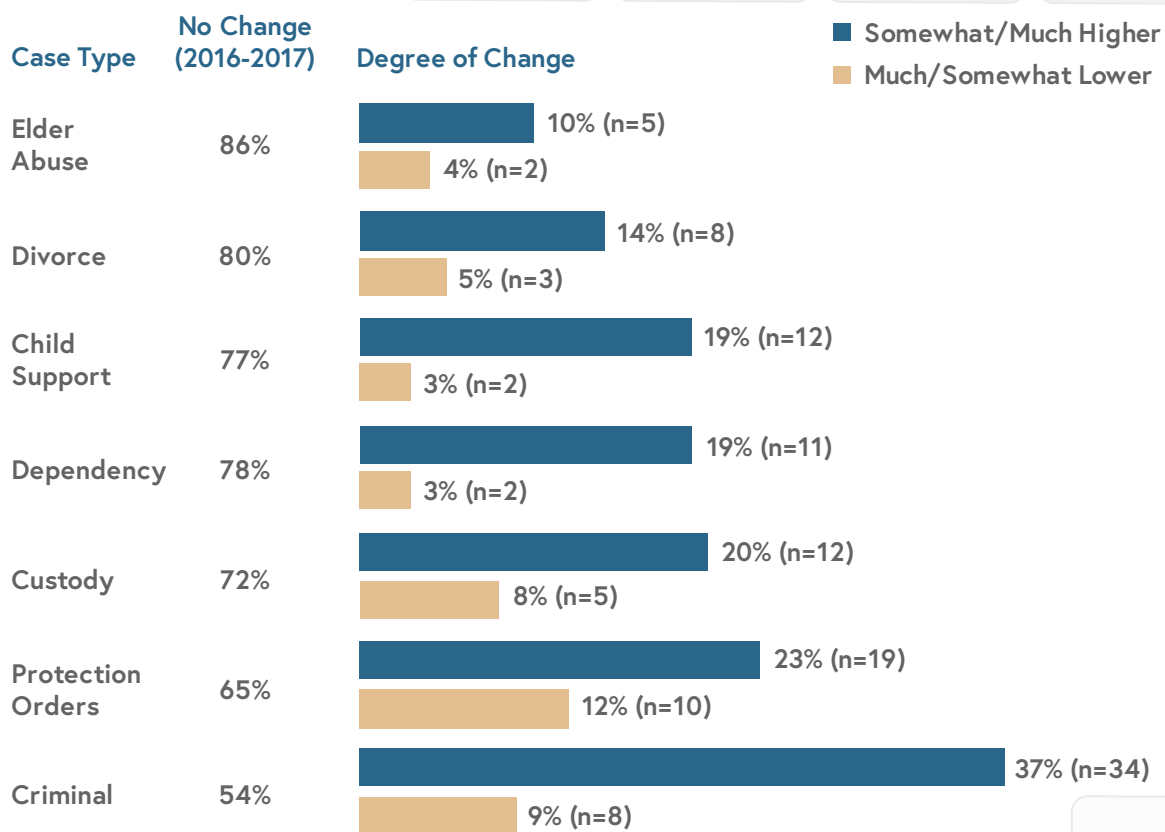


survey reported being concerned about the impact increased immigration enforcement could have on access to justice for immigrant and LEP victims and witnesses. A substantial percentage of these judges (26-40 percent) reported that they were very concerned about this issue. Judges reported the following numbers of cases in which immigration enforcement occurred at their courthouses:

- criminal cases—29 (2016=11; 2017=18)
- family-court cases (protection order, custody, child welfare)—14 (2016=6; 2017=8)
- employment and civil cases—4 (2016=2; 2017=2)

For criminal proceedings, a substantial portion of judges responding to the survey reported that they are seeing more criminal cases involving immigrant crime victims in 2017 than in 2016 (signing courts 45 percent; non-signing courts 35 percent). Among judges from signing courts, 20 percent reported increases in U visa certification requests, and 30 percent reported increases in SIJS requests in 2017 compared to 2016. Most judges participating in the survey (76 percent) reported that their courts do not distribute "Know Your Rights" information on immigration-law protections for crime victims and children.

Figure 5. Judges Reporting Changes in Numbers of Cases Involving Foreign-Born/LEP Victims in 2017 vs. 2016



More judges participating in the survey reported that court cases were interrupted in 2017 due to immigrant victims' fear of coming to court (54 percent) compared to 2016 (45 percent).

A substantial number of judges participating in the survey reported that immigration status was being raised offensively by an opposing party, or against a victim or another parent, more in 2017 compared to 2016 in a wide range of cases.

The survey asked judges to list other concerns or challenges they have encountered in cases involving immigrant or LEP victims. Several judges reported that fear of coming to court, worry, and distrust of the police,

courts, and getting involved with any government agencies impedes access to justice for immigrants and LEP victims (n=10). Additionally, several judges (n=7) commented about the need for more qualified interpreters and the difficulty in obtaining qualified interpreters in rural areas. They suggested that access to qualified interpreters not be limited to court proceedings. Qualified interpreters are needed to assist in preparation for court (e.g., in clerk's offices and other court services or court-ordered programs).

Figure 6: Immigrant/LEP Victim Participation in Family-Law Proceedings

| Type of Proceeding | Rate at Which Signing Courts Reported <i>Increases</i> in 2017 over 2016 Compared to Non-Signing Courts | Rate at Which Non-Signing Courts Report <i>No Change</i> Compared to Signing Courts |
|-------------------------|---|---|
| Child support | 3x higher | 1.8x higher |
| Custody | 2x higher | 1.6x higher |
| Child abuse/Neglect | 1.8x higher | 1.4x higher |
| Divorce | 1.7x higher | 1.7x higher |
| Civil protection orders | 1.1x higher | 1.7x higher |

Figure 7. Court Process Was Interrupted Due to Victim's Fear of Coming to Court 2017 vs. 2016

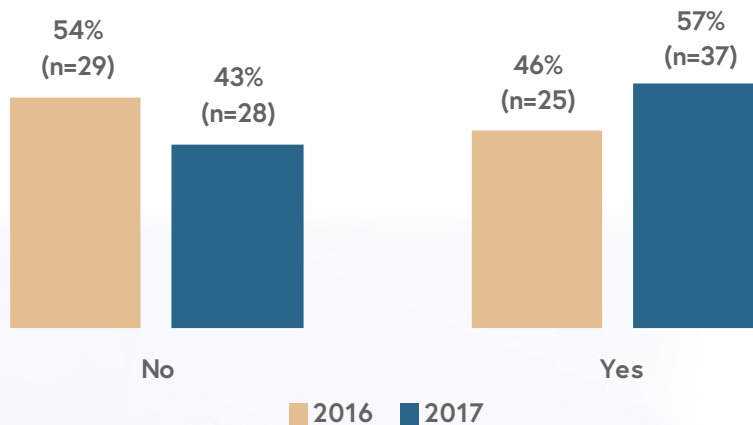
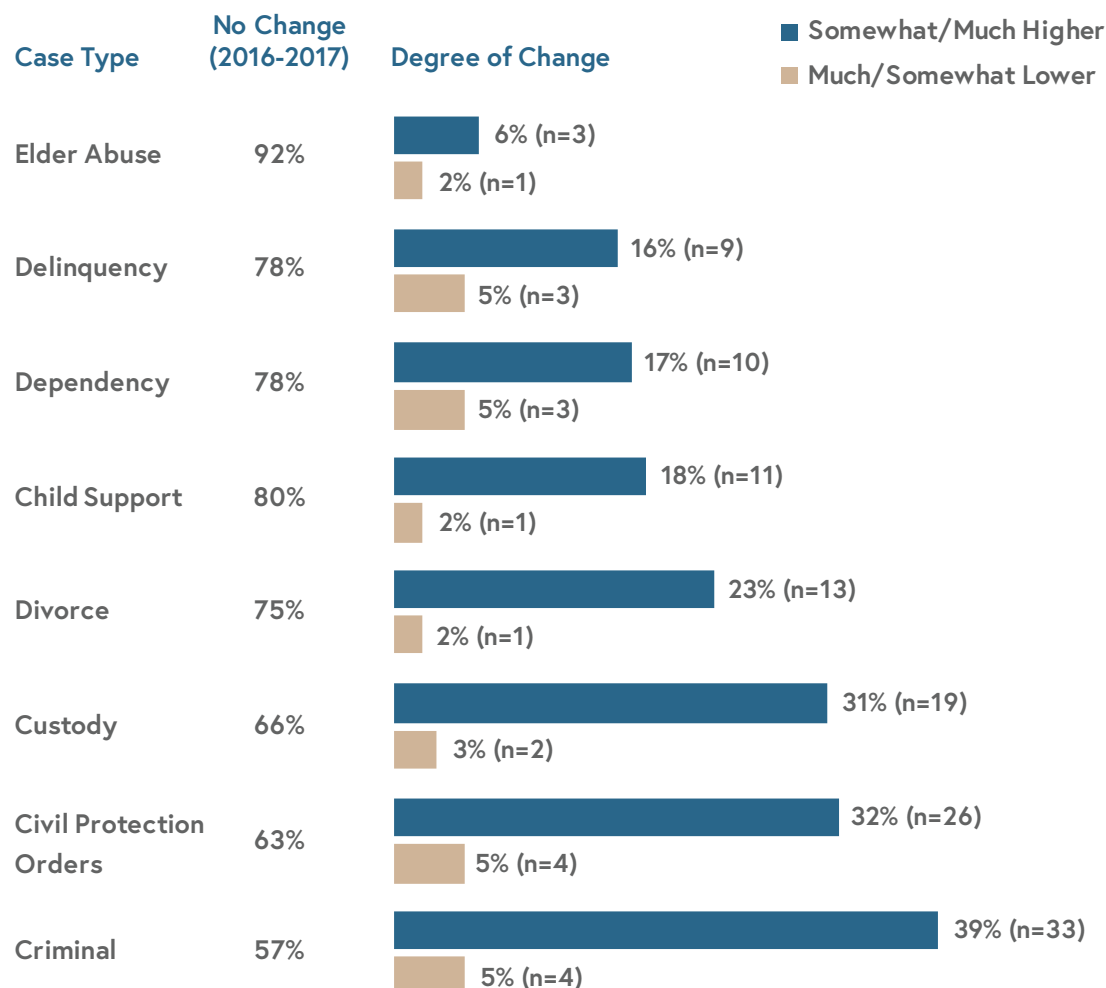



Figure 8. Extent to Which Immigration Status Is Raised Against Opposing Party in Courtrooms (2017 Compared to 2016)



Recommendations for Courts, Judges, Judicial Training, and Access to Justice

To promote access to justice for immigrant and LEP victims and children in immigrant families, judges, court leadership, and national judicial leadership organizations should implement the following recommendations and best practices at courthouses nationwide.³

1. Implement practices and policies that promote U and T visa certification and issuance of SIJS findings by state court judges.
2. Adopt language-access plans and practices that ensure language access to all court services, in addition to providing qualified interpreters in court proceedings.⁴
3. Develop relationships with local agencies serving immigrant and LEP communities that work collaboratively to promote access to justice and language access to courts (Uekert et al., 2006).

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4. Distribute Department of Homeland Security-produced “Know Your Rights” information on immigration protections for immigrant crime victims and immigrant children at courthouses.
 5. Adopt policies on steps judges should take if immigration enforcement officials come to civil, family, and criminal courtrooms.⁵
 6. Provide training for state court judges on:⁶
 - a. immigration relief for immigrant crime victims and children;
 - b. U and T visa certification by judges;
 - c. SIJS findings;
 - d. how to obtain and apply legally correct information about immigration law in custody, protection order, child welfare, and other state court cases in which immigration status is raised by a party as an issue in the case;
 - e. VAWA confidentiality protections against courthouse enforcement and discovery in family- and criminal-court cases; and
 - f. federal immigration laws and policies that limit courthouse enforcement of immigration laws.
 7. Sustain access to justice for immigrant and LEP victims and children by building these policies and trainings into court budgets, grants, and management and strategic plans.

Legally Accurate Information Promotes Fair Adjudication of Cases with Immigrants

A review of state family-court decisions reveals patterns of court rulings based on legally incorrect information about U.S. immigration laws or on assumptions about the potential for removal or deportation of one of the parties or witnesses in the case before the court (see Fata et al., 2013; Thronson et al., 2016). Access to legally accurate information about immigration laws, regulations, policies, and federal protections promotes the fair administration of justice in cases involving immigrant victims, children, and families.

The National Immigrant Women’s Advocacy Project (NIWAP), American University, Washington College of Law, with support from the State Justice Institute, the Office on Violence Against Women, and a team of national judicial faculty, has developed training materials, bench cards, manuals, and webinars to assist state courts in swiftly accessing legally correct information on topics like Immigration and State Family Law, VAWA Confidentiality, Courthouse Immigration Enforcement, Special Immigrant Juvenile Status, and Public Benefits. Visit <http://www.niwap.org/go/sji> to access these resources or contact NIWAP at (202) 274-4457 or info@niwap.org to learn about training and technical assistance available to judges and court staff.

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¹ Languages most commonly spoken are Spanish, Chinese, Vietnamese, Korean, and Tagalog (Zong and Batalova, 2015).

² The term "foreign born" includes naturalized U.S. citizens, lawful permanent immigrants (or green-card holders), refugees and asylees, certain legal nonimmigrants (including those on student, work, or some other temporary visas), and persons residing in the country without authorization.

³ Leadership organizations include the Conference of Chief Justices, Conference of State Court Administrators, American Judges Association, National Association for Court Management, National Association of State Judicial Educators, National Center for State Courts, National Council of Juvenile and Family Court Judges, and National Association of Women Judges.

⁴ For more information about interpreters in court, see Department of Justice, 2010; National Center for State Courts, 2006; and Interpretation Technical Assistance and Resource Center (ITARC), <https://tinyurl.com/y9khowl8>.

⁵ For examples of policies state courts are implementing, see Rodrigues et al., 2018.

⁶ Training and technical assistance are available to judges and court staff from NIWAP (202) 274-4457 or info@niwap.org.



The verifiable integrity of Blockchain records, linked and secured using cryptography, could soon be used in a variety of innovative ways to resolve court recordkeeping challenges. At the same time, Blockchain presents new legal issues that courts must be prepared to address.

When Might Blockchain Appear in Your Court?

Di Graski, Consultant, National Center for State Courts

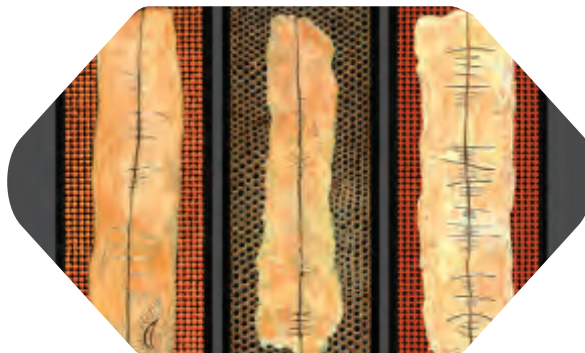
Paul Embley, Chief Information Officer, National Center for State Courts

Blockchain in Plain English

Blockchain is a set of technologies that creates an encrypted, distributed ledger. Probably the best-known application of Blockchain is the digital currency Bitcoin. Consider your own bank account: How do you know your balance? You trust (the word is one translation of the Latin word for “credit”) a central authority (your bank) to maintain a ledger of all your transactions and provide an up-to-date account status. As many recent security breaches demonstrate, central data repositories are big, lucrative targets for cybercriminals.

Documenting transactions in massive, centralized databases is the electronic equivalent of enormous, centralized paper ledgers not unlike those maintained by Ebenezer Scrooge’s ink-stained scribe, Bob Cratchit, in Dickens’s famous novel *A Christmas Carol*. Before paper ledgers, medieval Europeans used tally sticks to record transactions by notching a piece of wood

with marks to signify the amount of a transaction, and then splitting the wood lengthwise, with each party taking half. Neither party could change the value by adding more notches because corresponding notches would be missing from the other party’s stick. No central authority was required to validate the transaction because the uniqueness of the stick’s natural wood grain ensured that only the two original pieces would align perfectly when reunited.



Antique wooden tally stick, used as a ledger

Akin to tally sticks, Blockchain has no need for a central recordkeeper because it uses sophisticated cryptography in place of nature’s unique wood grains. The essence of Blockchain is “[c]onnected computers reaching agreement over shared data” (Van Valkenburgh, 2017).

Blockchain’s heart is a peer-to-peer network, instead of a central server. Blockchain’s brain is a consensus algorithm that syncs the peer-to-peer network at regular intervals. And Blockchain’s lifeblood is an encrypted, linked log of data. Together, these three technologies yield a chronological, immutable ledger

that is distributed across many participants. Because a Blockchain does not exist in one place, it offers two distinct advantages over a central server: both broader access and greater security.

Potential Benefits of Blockchain Technologies to State and Local Courts

In the future, courts may leverage Blockchain to help address at least three chronic challenges in court recordkeeping: managing court judgments, warrants, and criminal histories.

Court Judgments

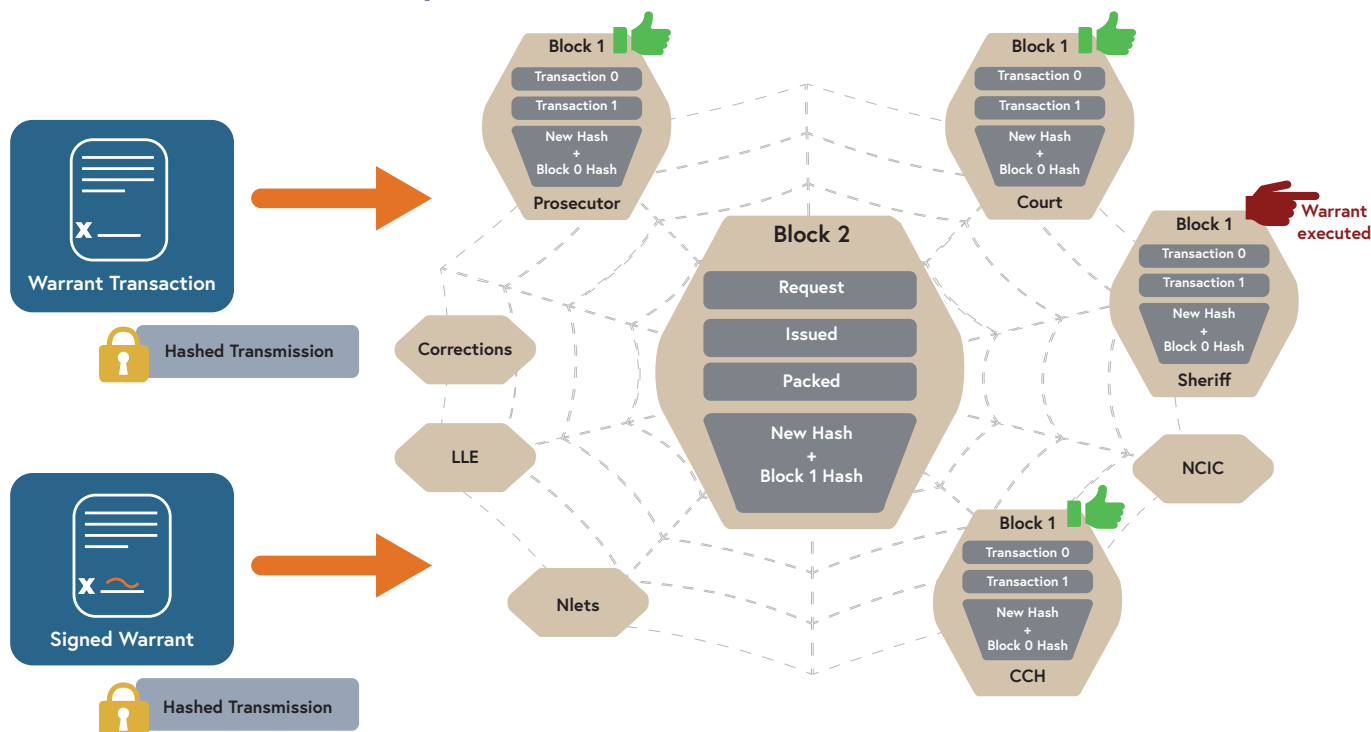
With the proliferation of electronic court case records, courts are justifiably concerned about third-party replication of judgments without a mechanism for ensuring that post-judgment updates are also reflected. Parties who have successfully expunged criminal convictions, reopened civil default judgments, or

secured other post-judgment relief can suffer harm in employment, housing, and their personal finances when outdated court case records persist.

With Blockchain, court updates of judgments would be reflected beyond the walls of the courthouse: No matter how many third-party data aggregators possessed a Blockchain-based order, the record would reflect the most current information.

"Because a Blockchain does not exist in one place, it offers two distinct advantages over a central server: both broader access and greater security."

Warrant Blockchain Example



Warrants

Courts receive requests for arrest and search warrants from a variety of sources: law-enforcement agencies, prosecutors, and probation and parole officers. Courts also issue arrest warrants when parties fail to appear or comply with orders. Once a warrant is issued, numerous criminal-justice partners need both “read” and “write” access to it. For example, law-enforcement officers are often required to contact the issuing court to validate a warrant before executing it, and other law-enforcement officers “pack” a warrant with additional information about the defendant (see Warrant Process Flow at wdmtoolkit.org). Jails need access to bail and bond requirements for pretrial release. The number of participants and handoffs involved in warrants will likely make it an excellent use case for Blockchain.

Criminal Histories

Blockchain could be used from the moment local law enforcement cites or arrests a criminal defendant. Each of the many participants in the disposition of those criminal charges—including prosecutors, courts, and criminal-history repositories—would update the single Blockchain record with the actions they took. Criminal charges on the initial Blockchain arrest record would flow throughout the adjudication process, tying charges to ultimate dispositions. The enormous efforts criminal-justice partners undertake today to maintain accurate, up-to-date criminal histories—manual data entry, data transformations, ongoing audits, and quality-control efforts—would be alleviated. Most important, the Blockchain record would offer verifiable integrity.

Blockchain in State & Local Court Cases

Much has been written about Blockchain’s likely impacts on federal legal issues, such as securities and currencies regulations, financial crimes, and federal taxation. The purpose of this section is to begin state and local courts’ conversation about how Blockchain implementations are impacting criminal law, real-property law, family law, business law, and other areas.

Criminal Prosecutions Involving Digital Currency

In 2016 the Florida Circuit Court for Miami-Dade County dismissed money-laundering charges arising from a defendant’s sale of Bitcoin to undercover law-enforcement officials (Higgins, 2016; Ovalle, 2016). The trial court held that Bitcoin is not “money” under Florida’s criminal code. The appeal sought by the state attorney general is pending in Florida’s Third District Court of Appeals, and the Florida legislature moved quickly to amend the Florida Money Laundering Act. Less than a year after the Bitcoin decision, Florida’s governor signed House Bill 1379 broadening the definition of “monetary instruments” to include “virtual currency”:

“Virtual currency” means a medium of exchange in electronic or digital format that is not a coin or currency of the United States or any other country.
Fla. Stat. § 896.101(2)(j).

State legislatures should update the definitions in their criminal codes to clarify that cryptocurrencies are “things of value.”

“Title to real property appears to be a tailor-made use case for Blockchain: a need to validate and make publicly transparent a lengthy succession of land transactions.”

Real-Property Disputes

Title to real property appears to be a tailor-made use case for Blockchain: a need to validate and make publicly transparent a lengthy succession of land transactions. Indeed, Cook County, Illinois’s Recorder of Deeds began piloting Blockchain for land-sale records in September 2016 and issued its final report in May 2017 (Mirkovic, 2017). Several

countries are also piloting Blockchain for their land registries, including Sweden, Georgia, and Ukraine. State and local courts could see Blockchain evidence in land disputes.

Valuation of Marital Property and Estates

Family and probate courts are accustomed to the challenges of assigning dollar values to a wide variety of property. However, the volatility and proliferation of cryptocurrencies will make it more difficult for courts to identify a trusted record of exchange rates. Bitcoin's trading price, for example, soared from around US \$1,200 in April 2017 to almost \$20,000 by mid-December, then adjusted back downward to just over \$11,000 a month later. State and local courts should prepare now for adjudicating the value of cryptocurrencies in marital property and estates.

Business Records

Urged by the vice chancellor of the Delaware Court of Chancery, Delaware's legislature recently adopted Blockchain to replace the state's circa-1970s nominee system of recording stock ownership. Delaware's General Corporation Law now allows corporate records such as "its stock ledger, books of account, and minute books" to be kept in the form of "one or more electronic networks or databases (including one or more distributed electronic networks or databases)." In a wide variety of cases involving issues of business ownership—from shareholder suits to "piercing the corporate veil" to the dissolution of for-profit entities—state and local courts can expect to begin seeing Blockchain evidence.

Smart Contracts

Legal scholars are already contemplating the potential ramifications of Blockchain-enabled smart contracts (Cohn, West, and Parker, 2017). The key concept is self-execution: The provisions of a contract can be expressed in code that is added to a Blockchain, including "If/Then" commands dictating remedies that a contract breach or other external condition would trigger. If a breach or other condition occurs, the remedy—such as the

transfer of a specified value of cryptocurrency—would be executed. State and local courts should anticipate disputes among the parties to smart contracts, including the propriety of self-executing remedies.

Personal Jurisdiction

In September 2017 the South Dakota Supreme Court struck down its state statute imposing sales-tax withholding-and-reporting obligations on remote retailers, finding that online retailers had an insufficient nexus with South Dakota to meet the United States Supreme Court's *Quill* test.

Arguably, a distributed ledger has an even more tenuous "physical presence in the State." South Dakota has appealed to the United States Supreme Court, and its petition for a writ of certiorari, together with a dozen amicus curiae briefs, is now being considered (petition filed 10/3/2017, docket number 17-494). State and local courts will likely hear serious challenges to their personal jurisdiction over the parties to Blockchain transactions.



"In a wide variety of cases involving issues of business ownership...state and local courts can expect to begin seeing Blockchain evidence."

Enforceability of State and Local Court Judgments

State and local courts in the United States rely heavily upon banks, employers, and other third parties to enforce the financial aspects of court orders, such as wage-withholding orders for child-support payments. For cryptocurrencies, there is no central authority to serve with a judgment and a command to comply. The difficulty of valuing and tracing virtual assets compounds the complexity. Judicial leaders should consider how they will enforce the rule of law in Blockchain transactions.

Blockchain and Justice

It is impossible to predict all the impacts Blockchain will have on the justice system, except to acknowledge that courts will not be insulated from the effects of this disruptive technology. The authors offer two additional, “crystal-ball” topics for judicial leaders to contemplate: digital evidence standards and court technology architecture.

For Blockchain’s use as evidence in specific cases, what standards should courts adopt for rendering the data in a human-readable format? For example, Delaware’s new Corporation Law recognizing Blockchain as a valid form of corporate records states this proviso: “provided that the records so kept can be converted into clearly legible paper form within a reasonable time.” (Del. Tit. 8, sec. 224—“a clearly legible paper form prepared from...1 or more distributed electronic networks or database shall be valid and admissible in evidence”). As judicial leaders work through a wide variety of practical and legal issues surrounding digital evidence, where does Blockchain fit in urgency and importance?

For Blockchain’s potential use in court technology, justice partners will also need to consider carefully the implications of a variety of architectural decisions, such as open or closed networks (might courts’ experiences with cloud computing be instructive?) and public access (for criminal histories, one can imagine significant updates to the security rules of the Federal Bureau of Investigation’s Criminal Justice Information System). The authors invite continued conversation about Blockchain in your court.

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CYBER SECURITY

NETWORK SECURITY

State court systems are guardians of sensitive data for individuals and organizations. To best address the threat of a cyberattack, internal coordination and external collaboration are essential in data governance.

Cybersecurity: Protecting Court Data Assets*

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When it comes to digital data assets, state court systems are not unlike financial institutions, retail companies, health-care providers, and other government organizations. This extraordinary public responsibility makes them a high-value target for cybercriminals. The threat of a cyberattack is not just an IT department problem; it is an organization-wide problem. Over time, the judicial branch has successfully used technological developments to improve the court process. Yet the increasing cyber threats are too significant for courts to address on their own. While there are indispensable technical tools, this article highlights administrative strategies to prevent and respond to cyberattacks. For effective data governance, state court systems must coordinate internally and collaborate externally with the executive and legislative branches.

Defining Cybersecurity

In our hyper-connected world, the technology that we rely on also makes us more vulnerable. State court systems are no exception. The many benefits of technology are accompanied by risks and challenges. Unfortunately, cyberattacks on individuals and

organizations continue to rise in frequency and sophistication. The Federal Bureau of Investigation (2017) reported that cyberattacks in the United States caused over \$1.3 billion in victim losses during 2016. Generally, cybersecurity involves the protection of computers and information systems from theft, damage, or disruption. More specifically, Craigen, Diakun-Thibault, and Purse (2014) define cybersecurity as “the organization and collection of resources, processes, and structures used to protect cyberspace and cyberspace-enabled systems from occurrences that misalign de jure from de facto property rights” (p. 17).

Cybercriminals seek undetected access to target information systems. Through this invasion, they may perform data exfiltration, which is the unauthorized transfer of data from a computer or device. Cybercriminals may also hold data hostage until a ransom is paid by the host organization. Additionally, they could try to sabotage data integrity and information systems. All three of these acts could catastrophically damage an organization’s operations and credibility.

* This article presents the personal views of the author, and does not represent the New Jersey judiciary.

Cyber Threats

The FBI defines a cyber incident as “a past, ongoing, or threatened intrusion, disruption, or other event that impairs or is likely to impair the confidentiality, integrity, or availability of electronic information, information systems, services, or networks” (2017). While data breaches can happen in many ways, this article focuses on the potential for targeted attacks. Four types of cyberattacks are particularly concerning for state courts.

1. **Phishing** uses social engineering to solicit personal information from unsuspecting users to compromise their own systems. Phishing e-mails appear legitimate and manipulate users to enter items, such as usernames or passwords, that can be used to compromise accounts. Spear-phishing, a more personalized method, could target specific judges and court employees.
2. **Ransomware** infects software and locks an organization’s access to their data until a ransom is paid. Through phishing e-mails, drive-by downloading, and unpatched software vulnerabilities, cybercriminals attempt to extort users by encrypting their data until certain conditions are met. The result is a temporary or even permanent loss of data.
3. **Advanced persistent threat (APT) attacks** attempt to maintain ongoing, extended access to a network by continually rewriting malicious code and using sophisticated evasion techniques. A successful APT attack results in complete invisible control of systems over a lengthy period time. APTs typically use socially engineered attacks to get a foot in the network door.
4. **Code-injection attacks** involve the submission of incorrect code into a vulnerable computer program without detection. Through these attacks, cybercriminals trick the target system into executing a command or allowing access to unauthorized data. The most common code-injection attack uses Standard Query Language (SQL) through an online application.

It is important to note that all these threats can evolve, while new cyberattack methods can emerge.

Targeting Courts

State court systems are guardians of sensitive data for individuals and organizations. Court records are crucial in the functioning of our society. Preserving these official records is a responsibility long held by judicial-branch administrators. The Judiciary Act of 1789 created the first position of district court clerk to record deeds and judgments of the courts (Sec. 7). Much has changed in the nearly 229 years since. Today, modern court administrators have extensive data-governance responsibility. Data governance includes the people, processes, and technology required to properly handle an organization’s data assets. Included under this umbrella are data quality, usability, integrity, security, and preservation. Data governance truly touches all aspects of a court organization.

“...there are multiple entry points for data breaches in the judicial branch...judiciary case management systems, networks, servers, cloud storage, software programs, WiFi systems, employee devices, and an array of court-specific technology.”

The landscape of court technology has changed rapidly, as digital tools help facilitate the business process of the court. This proliferation of technology has improved the judiciary’s access and transparency, while also significantly increasing data storage and the digital footprint. Consequently, there are multiple entry points for data breaches in the judicial branch. These include judiciary case management systems, networks, servers, cloud storage, software programs, WiFi systems, employee devices, and an array of court-specific technology. No longer is just one desktop PC assigned

to each employee within a court facility. Judges and court staff now use laptops, tablets, and smartphones to conduct court business. These devices are used outside the confines of the courthouse, accessing networks within and across jurisdictional lines.

Though most court records are nonconfidential, there is plenty of information legally shielded from public view. Beyond the damaging consequences of disrupting court operations, cybercriminals can target the trove of sealed and confidential information in judiciary systems. A sample of this data includes:

- personal identifiers, including Social Security numbers and bank account numbers
- victim information in domestic violence and sexual assault cases
- confidential informants and search warrants in criminal cases
- family court files involving children and families
- medical and psychological reports
- testimony within sealed transcripts and recordings
- intellectual property and trade secrets
- jury and grand jury records
- metadata within judiciary documents
- judicial deliberation records
- employee personnel data in HR files
- court financial records

This information is shielded from public view to protect the privacy of litigants, children, witnesses, judges, and employees. Courts are entrusted with these records, and consequently face varying degrees of liability if they fail to keep them secure. Many are negatively impacted by a cyberattack on a court: litigants, witnesses, victims, judges, lawyers, court staff, the organization itself, and the public as a whole.

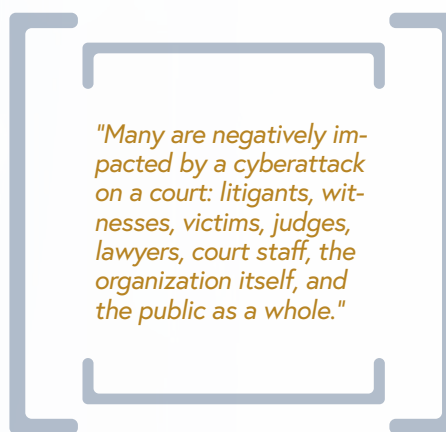


For example, the Washington State Administrative Office of the Courts public website suffered a data breach in 2013 effectuated through an unpatched vulnerability in Adobe software. Hackers obtained access to approximately

160,000 Social Security numbers, along with the names and driver's license numbers of millions of people. Washington's AOC responded immediately. They collaborated with the state's executive branch, including the Office of Chief Information Officer and Consolidated Technology Services, along with other

organizations, to manage the response and improve security measures (Washington State Chief Information Officer, 2013). The AOC communicated with potential victims and explained the attack to the public. They launched a website and hotline to answer questions about the breach. Finally, they undertook significant security enhancements to prevent another breach. Other recent victims of cyberattacks include the Columbiana County Juvenile Court and Kankakee County Circuit Clerk's Office in Ohio, as well as the Minnesota Judicial Branch.

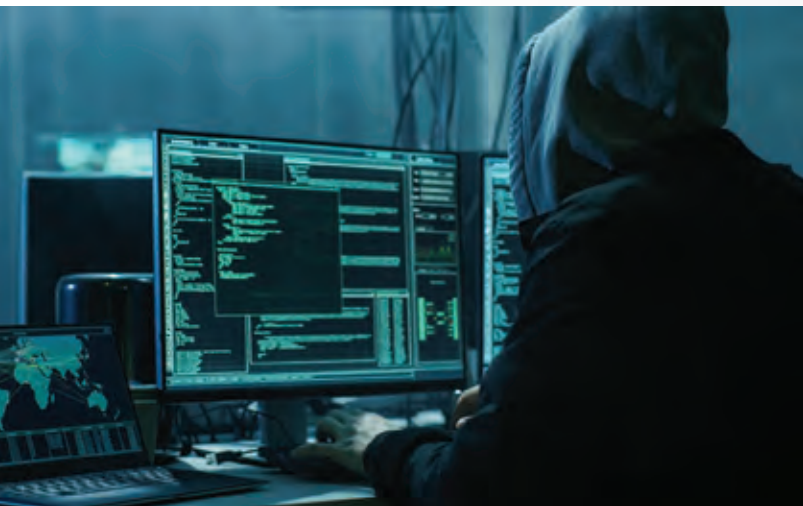
Court data assets are valuable for cybercriminals for several reasons. First, this information could be used for criminal purposes. Second, holding this type of data for



ransom can force court officials to pay to restore their access, as Columbiana County and Kankakee County both did in recent years. Third, access to judiciary systems

could enable cybercriminals to manipulate court data records, placing the credibility of the judicial process in

peril. Fourth, confidential records could be used as part of legal strategy in a host of docket types. Finally, data breaches can bring court operations to a halt as response measures are executed.



The National Association of State Chief Information Officers (NASCIO) designates security and risk management as the top priority facing state government (2018). Court systems cannot address this complex priority alone. Appropriate for the judicial branch, Agranoff and McGuire (2003) define public-sector collaborative management as “the process of facilitating and operating in multiorganizational arrangements to solve problems that cannot be solved, or solved easily, by single organizations” (p. 4). In addition to critical practices to employ internally, courts require the resources of executive and legislative branches to best address cyber threats. Any collaborative partnership should have clearly established roles and responsibilities for each party.

Preventing Cyberattacks

A multifaceted approach is required to prevent data breaches and begins with a detailed cybersecurity strategic plan. The plan’s mission is to develop, implement, and maintain appropriate cybersecurity programs. As a result, the strategic plan helps to limit damage, minimize work stoppage, and aid law enforcement in any investigation. It should be a living

document that adapts to new information. In this phase, identifying and understanding digital data assets is a vital step to protecting them. Court officials must be aware of relevant laws, statutes, and standards that guide their recordkeeping process.

Once assets and system vulnerabilities are identified, IT staff can establish layers of protection and monitoring protocols. Regular testing of cyberattack defenses is essential, as is adjusting systems to new threats. As part of the strategic plan, clear cybersecurity metrics should be designated. For example: How are information systems evaluated in real time? The National Institute of Standards and Technology (NIST), within the United States Department of Commerce, provides highly regarded standards, practices, and policies to follow for evaluating cyberattack defenses. Another important question: How often are security systems audited? A cybersecurity audit, often performed by an independent party, is a methodical validation of cyber policies and their accompanying control mechanisms.

State legislatures have a pivotal role in cybersecurity defense. The legislative branch is responsible for regulating information technology practices, passing laws for cybercrime, and providing funding for enhanced security. Keeping pace with cybercriminals requires state courts to be on the cutting edge of security and virus-detection technology. Investing in preventative security measures can save more money than recovering assets and covering losses. Cyber-liability insurance is a fast-growing tool that helps organizations cover the financial burden of cybersecurity incidents. In an era of challenges for public budgeting, courts should carefully tailor their funding requests to provide an appropriate defense. Established communication channels with legislative committees, in addition to executive-branch agencies, are critical to understanding cybersecurity developments.

Judicial and administrative leaders create the culture of cybersecurity within their organization. Communication,

threat awareness, and security education are central to building a robust culture focused on minimizing security risks. People, not systems, are often the weakest link in cybersecurity defenses. Workplace technology policies, regular employee training, and computer-user agreements are key steps to prevent compromising activity. This is particularly important for social-engineering attacks on employees, which directly target individuals.

Responding to Cyberattacks

Even with the best of intentions and diligent preventative measures, data breaches happen. A cyber-incident-response team should be created in the planning process. Immediate, strategic action on the part of the victimized organization is required to minimize damage and expedite recovery. Essential first steps for courts include pinpointing the area of intrusion, minimizing exposure and attack surface, and understanding the scope of the attack. For example: Was just a family-court case management system compromised? Was the breach confined to only certain courts in the state? Data on all attack-related events must be collected and logged, as it will be vital in the attack investigation.

After a breach is discovered, the attack should be reported to at least one law-enforcement agency. Within the federal executive branch, the United States Department of Justice, Department of Homeland Security (DHS), and FBI provide guidelines and best practices for responding to cyberattack incidents. These agencies supply secure forms to report cyber incidents for analysis. The Multi-State Information Sharing and Analysis Center (MS-ISAC), created by DHS, is the key resource for cyber-threat prevention, protection, response, and recovery for state and local governments. MS-ISAC is a voluntary and collaborative effort that serves as a central resource for situational awareness and incident response for state and local governments. Membership is open to all state and local governments at no cost. The Washington State AOC collaborated with MS-ISAC to determine the scope of their 2013 data breach.

"Communication, threat awareness, and security education are central to building a robust culture focused on minimizing security risks. People, not systems, are often the weakest link in cybersecurity defenses."

In addition to data-asset threats, shutting down court systems because of a cyberattack can have massive operational impact on normal court business. In these instances, courts must be able to hold time-sensitive and constitutionally mandated hearings, as well as issue warrants and orders. Courts also have to consider filing access for those parties bound by a filing statute of limitations. When necessary, impacted jurisdictions can issue an order tolling case activity during operational disruption. Sharing timely and accurate information to all impacted by the breach is crucial. Once the type of attack is identified and understood, sharing this information with other court systems is beneficial. Creating a heightened awareness for specific attacks, along with actionable information, provides great value to the court community.

Summary

State court systems have an extraordinary responsibility as the public guardians of sensitive digital data assets. Fortunately, the judicial branch is up to the challenge. The best administration of justice has long required the use of modern management techniques in daily court operations (Tolman, 1960). Safeguarding confidential court records remains essential to protecting the rights and liberties of individuals and organizations. To harness the resources necessary to protect the public's data, the threats posed by cyberattacks must be met with increased internal coordination and collaboration across branches. Through this process, courts can establish a data-governance framework that protects the privacy of all involved in the judicial process.



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