



Pathway Approach for Civil Cases

The pathway approach to case management involves assigning appropriate time and resources to cases based on need. Pathway challenges courts to triage cases based on the case type and attributes to promote efficiency. Due to the pandemic, the pathways approach should be explored, but this approach has utility beyond the pandemic.

The pathway approach is similar to traditional differentiated case management (DCM), but with a more modern approach, “(1) using case characteristics beyond case type and amount-in-controversy, (2) requiring case triaging at time of filing, (3) recognizing that the great majority of civil filings present uncomplicated facts and legal issues, and (4) requiring utilization of court resources at all levels, including non-judicial staff and technology, to manage cases from the time of filing until disposition.”¹

In July 2016 the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) endorsed a report and recommendations for the adoption of the pathway system made by the CCJ Civil Justice Improvements Committee. The report made 13 recommendations intended to reduce cost and delay in civil litigation, improve customer service to litigants, and stated courts should use a pathway-assignment system to achieve right-sized case management.²

COMMON PATHWAY CHARACTERISTICS³

- Defined timeframes for discrete stages of litigation process;
- Mandatory disclosures;
- Proportionally assigned resources;
- Expedited resolution of discovery disputes; and
- Informal communications with parties concerning dispositive motions and settlement negotiations.

Courts should use a pathway-assignment system to systemize the court’s triage process.

The Civil Justice Initiative advocates a three-pathway approach. Court staff should initially divide cases into three pathways:

STREAMLINED • COMPLEX • GENERAL

Courts can transfer a case from one pathway to another if the needs of the case dictate a reassignment.

Courts should utilize staff to designate case pathways and guide the case through the system. Examples of touch points that can be delegated to court staff include:

1. Initial triage by the court and the filer through use of a cover sheet for civil filings.
2. Scheduling cases for dispute resolution if agreed by both parties without requiring a judicial referral.
3. Case conferencing check-ins: lawyers must report progress to staff by a specific date.
4. Submission of exhibits: lawyers must submit all witness lists and exhibits to staff by a specific date.

THE STREAMLINED PATHWAY

The streamlined pathway seeks to reduce the cost of litigation and time to disposition for the majority of civil cases. Cases fitting this pathway are likely to present uncomplicated facts and legal issues. Judges must manage cases in an efficient and time-sensitive manner to ensure an affordable option for litigants. Automobile torts, premises liability, debt collection, and simple contracts typically are suited to the streamlined pathway.

See Endnotes, page 4.

The court shall assign civil cases for a streamlined pathway based on these factors:

- Limited number of parties, including self-represented litigants;
- Simple issues related to liability and damages;
- Few, if any, anticipated pretrial motions;
- Little need for extensive discovery;
- Few witnesses;
- Minimal documentary evidence;⁴ and
- Both parties agree to participate.

PROCEDURES FOR STREAMLINED PATHWAY CASES

Require and Enforce Mandatory Disclosures⁵

- Each party shall make disclosures within brief standardized timelines.
- Sample disclosures the court may require include:⁶
 1. Statement summarizing each contention in support of every claim or defense;
 2. Brief statement of the facts upon which the contentions are based;
 3. Name, address, and telephone number of each individual likely to have discoverable information, along with the subjects of that information and any statement from such individual, which the disclosing party may use to support its claims or defenses;
 4. A copy of description, by category and location, of all documents, electronically stored information, and tangible things the disclosing party has in its possession, custody, or control and may use to support its claims or defenses;
 5. Precise damages being sought, if any, and the method for calculation of damages;
 6. Liability insurance coverage providing coverage for the claims being made by another party, name of the insurance company, limits of coverage, and existence of any issue affecting coverage availability;
 7. Offers of stipulations; and
 8. Estimate of the number of trial days.

Set Discovery Limits and Methods

- All discovery shall be completed 30 days before trial.
- Discovery is not permitted to be served, absent agreement, before a party receives mandatory disclosures from the opposing party; if not received, until the deadline for opposing parties' disclosures passes.

- Interrogatories are expressly permitted. The court should consider limiting the number of interrogatories, pursuant to Civ.R. 26.⁷ Some states using pathways suggest a maximum of 10 interrogatories be permitted.
- Requests for the production of documents are expressly permitted. The court may order a limit on the number. Some states using pathways suggest a maximum of 10 requests be permitted.
- Set limits on non-party depositions and require they be recorded under oath to be used at trial in lieu of testimony.
- Set time guidelines for disclosures of experts and require brief reports about expert opinions. Parties are encouraged to stipulate to the foundation and format of their expert disclosures.
- Parties are required to meet and confer in an attempt to resolve the dispute before a motion can be filed. If there is no resolution, a short briefing and telephone conference with the court shall resolve the matter.
- Motions shall be served, filed, and if argued to the court, concluded in every respect, except for the court's decision on the motion 30 days before trial. Informal communication with parties concerning dispositive motions and settlement negotiations is an aspect of the streamlined approach.
- Parties may engage in any form of alternative dispute resolution prior to 30 days before trial.

Streamline the Trial

- Schedule the case for trial not later than 180 days from filing of the defendant's response to the plaintiff's complaint. Set the trial date as soon as possible per the court's practices, recognizing many streamlined cases will not require a pretrial hearing.
- Witness and exhibit lists shall be exchanged at least 14 days before trial.
- Parties shall provide objections with particularity to any exhibit listed by the opposing party at least five days before trial.
- Pretrial Agreements
The parties are expected in advance of trial to:
 1. Agree on foundation for exhibits and other documentary evidence, including, but not limited to, business and medical records customarily requiring the testimony of a records custodian. In the absence of agreement, objection(s) with reasons shall be specified in writing.
 2. Agree on a means of submitting expert opinion to the fact finder without calling the expert at trial.

See Endnotes, page 4.

3. Enter factual stipulations as possible; from the stipulations, prepare jury instructions to inform the jurors of the facts agreed to by the parties.
4. Prepare a joint set of jury instructions and verdict form.
5. Exchange motions in limine at least seven days before trial.
6. Parties shall designate and counter-designate testimony of witnesses whose depositions are to be used at trial. Such designations and counter-designations, including all objections thereto, shall be filed with the court at least three days before trial.

THE COMPLEX PATHWAY

The complex pathway proportionally assigns resources to address the needs of the few most complicated civil cases (approximately 3 percent of cases). Courts should implement a complex pathway for cases presenting multiple legal and factual issues involving many parties, or likely to require close court supervision.⁸ Cases fitting this pathway are likely to be cases including multi-party medical malpractice, antitrust, class actions, environmental torts, securities, and mass torts.

The court shall assign civil cases to the complex pathway based on these factors:

- Complex law;
- Numerous parties;
- Numerous witnesses;
- Voluminous documentary evidence;
- High amount in controversy; and
- High level of interpersonal conflict.

PROCEDURES FOR COMPLEX PATHWAY CASES

- Case assignment is permitted in limited circumstances pursuant to Sup.R. 36.011 (C). Modifications to the individual assignment system can provide for redistribution of cases involving the same subject matter.
- Set a mandatory early case management/meet-and-confer conference, followed by periodic conferences.
- Keep the goal in mind to provide close judicial supervision.
- Avoid placing unnecessary burdens on the court or the litigants.
- Expedite the case, keep costs reasonable, and promote effective decision-making by the court, the parties, and counsel.
- Simplify, when possible, in a complex case.

- The parties should consider using alternative dispute resolution to narrow the issues for trial or to resolve the case.
- Set deadlines for completion of key case stages established early in the life of the case, including a firm trial date. Courts should set expedited hearings responding to the needs of business litigants for prompt decisions that do not unnecessarily disrupt routine business operations.
- Set a detailed discovery plan, including:
 1. Mandatory disclosures;
 2. Tailored discovery;
 3. Phases, when more efficient; and
 4. Plans for preservation and production of evidence.
- The complex pathway approach includes informal communication with parties concerning dispositive motions and settlement negotiations. Any ex parte communication made in an effort to settle matters must be made with the prior consent of the parties and attorneys.⁹

THE GENERAL PATHWAY

The general pathway should be assigned to the 20 - 25 percent of traditional litigation cases. Courts should implement a general pathway for cases whose characteristics do not justify assignment to either the streamlined or complex pathways.¹⁰ The court shall assign civil cases to the general pathway based on these factors:

- Medium level of legal complexity;
- Attorneys on both sides;
- Traditional litigation;
- Average amount of documentary evidence; and
- Reasonable level of interpersonal conflict.

PROCEDURES FOR GENERAL PATHWAY CASES

- Set deadlines for completion of key case stages established early in the life of the case, including a firm trial date.
- Host an early case management/meet-and-confer conference.
 1. Have the parties submit a proposed case management order or a meet-and-confer report¹¹ addressing numerous issues, including an evaluation of proportionality factors.
 2. The parties should consider engaging in alternative dispute resolution at this time or sooner.

See Endnotes, page 4.

- Require mandatory disclosures and tailored additional discovery.
 1. Make full, mutual, and simultaneous disclosures of all relevant information, including electronically stored information known by a party to exist, whether in a party's possession, custody, or control.¹²
 2. Require all electronic-information discovery requests be made in proportion to the significance of the issues in dispute.
 3. The parties have a continuing duty to supplement the disclosures.
 4. Set a presumptive limit of one expert per side per issue. This limit can be increased by the judge after considering the parties' needs. Those needs also should be discussed and possibly agreed upon in the early case management conference.

5. Depositions are presumptively limited to a set number of hours (which can be adjusted by the judge based on the parties' needs). Only certain individuals may be deposed automatically.
- Formulate expedited approaches to resolve discovery disputes.
 - Informal communication with the parties regarding dispositive motions are part of the general approach. This could include telephone conferences, video conferences, or submitted letters to the court. Any ex parte communications made in an effort to settle matters must be made with prior consent of the parties and attorneys.

ENDNOTES

- 1 Redefining Case Management, IAALS – Institute for the Advancement of the American Legal System, p. 23 iaals.du.edu/sites/default/files/documents/publications/redefining_case_management.pdf (accessed June 18, 2020).
- 2 Sup.R. 5(D). Requires courts to have a local rule with a case management plan. The pathway approach is one such case management plan a court could choose to use.
- 3 Civil Justice Initiative Webinar, Civil Justice Reform: Essential Pathway Rules and Procedures, Judge Jerome Abrams, First Judicial District Court of Minnesota. ncsc.org/cji/webinars (accessed June 11, 2020).
- 4 The National Center for State Court adopted a Call to Action: Achieving Civil Justice for All, Appendix C ncsc.org/_data/assets/pdf_file/0020/25724/ncsc-cji-appendices-c.pdf (accessed June 11, 2020).
- 5 *Id.*
- 6 Civ.R. 26(B)(3).
- 7 Civ.R. 26(A). Policy; discovery methods. "It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of an adversary's industry or efforts. Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. ***Unless the court orders otherwise***, the frequency of use of these methods is not limited." (Emphasis added.)
- See also Civ.R. 26(B)(6). Limitations on Frequency and Extent. (a) When Permitted. By order, the court may limit the number of depositions, requests under Rule 36, and interrogatories or the length of depositions.
- 8 Civil Justice Initiative Webinar, Civil Justice Reform: Essential Pathway Rules and Procedures, Judge Jerome Abrams, First Judicial District Court of Minnesota. ncsc.org/cji/webinars (accessed June 11, 2020).
- 9 Jud.Cond.R. 2.9(A). A judge shall not initiate, receive, permit, or consider ex parte communications, except as follows: (1) When circumstances require it, an ex parte communication for scheduling, administrative, or emergency purposes, that does not address substantive matters or issues on the merits, is permitted, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;... (4) A judge, with the consent of the parties, may confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
- 10 Civil Justice Initiative Webinar, Civil Justice Reform: Essential Pathway Rules and Procedures, Judge Jerome Abrams, First Judicial District Court of Minnesota. ncsc.org/cji/webinars (last accessed June 11, 2020).
- 11 See Supreme Court of Ohio Foreclosures & Civil Justice Report & Recommendations, Appendix, June 2020.
- 12 The National Center for State Court adopted a Call to Action: Achieving Civil Justice for All, Appendix C ncsc.org/_data/assets/pdf_file/0020/25724/ncsc-cji-appendices-c.pdf (accessed June 11, 2020).