

Six Strategies to Reduce Felony Case Delay

May 5, 2020: *In response to COVID-19, many courts have reduced operations to focus only on essential matters and postponing all other matters. The impact of the reduced operations will likely produce significant delays in case processing and backlogs of pending cases. The strategies below are considered best practices under normal conditions but can be adapted to help courts be proactive in taking steps now, before stay at home orders are lifted, to mitigate the effects of the shutdown. These adaptations are shown in italics.*

The following six strategies are designed to reduce felony case delay, especially for cases in which the defendant is incarcerated pretrial. A criminal case management plan and the efforts to implement it include these strategies and a holistic approach to improving procedural justice and changing local legal culture. These recommendations all include a monitoring component and assume that the court will create and maintain a reporting system to track pending cases and determine if the strategies are being implemented and succeeding. The strategies are organized into two categories: eliminate backlog and reduce delay.

Eliminate Backlog

1

Adopt a one year or faster time standard for felony cases and prioritize scheduling of older cases, particularly for those in custody, to be among the first heard when operations resume.

Adopt, by agreement of the bench, administrative order, or court rule, a time standard of 365 days for felony cases if your court or state does not already have one. A time standard is not a speedy trial law. If your state's speedy trial law is 120 days or longer, then this should be the time standard.

- Notify and work with the prosecutor and defense to ensure buy-in when appropriate.
- Make a list of all felony cases older than one year for the whole court and for each judge that is individually assigned felony cases. Call the list of old cases the "backlog."
- When counting the age of cases do not include bench warrant time due to failures to appear, competency evaluation time, or pre-adjudication diversion or specialty court.

Average percentage and age of backlog felony cases:

- I. Count the total number of pending felony cases
- II. Count the backlog of pending felony cases older than 365 days
- III. Calculate the backlog percentage = backlog / pending
- IV. Sum the case age of felony cases in backlog
- V. Divide by the total number of pending felony cases – 365 days = average backlog delay

2 Attack the felony backlog.

Attack the backlog, by prioritizing cases older than the time standard with the highest priority on incarcerated defendants.

- *Identify cases and schedule a virtual status conference with the prosecutor and defense to determine the status of plea negotiations or trial readiness.*
- *Use video technology for plea hearings when pleas have been reached to dispose of cases.*
- *Notify and work with the prosecutor and defense to organize calendars and ensure buy-in. This should include putting backlog cases built up during the pandemic on a separate track for assignment and resolution.*
- *For jurisdictions with high percentages (more than 20% of the pending cases) of backlog cases, or very old cases (older than 18 months), set up a special backlog assignment for visiting or ad hoc judge(s). This must be coordinated with the prosecutor and defense.*
- *Alternatively, the presiding judge or judges should prioritize old cases for review and a trial date within 60 days of notice to the parties. This may be disruptive to the normal trial calendar, so backup systems should be established for judges, when needed, to help out other judges on trial dates.*
- *For all cases placed on a special backlog docket, a bond review should be conducted. Many of the cases filed during the pandemic will not have made progress and will require expedited discovery and resolution.*

Average daily population (ADP) of the jail for pending felony cases in backlog:

- I. Count the total number of pending felony cases with a defendant in jail.
- II. Count the backlog of jailed defendant cases = number of cases older than 365 days = ADP.
- III. Sum the case age – 365 days of jailed defendant cases in backlog.
- IV. Divide by the ADP = average length of stay (ALOS) of jail cases in backlog.

To calculate the impact on ADP:

- V. $\text{Reduction in days of ALOS} / 365 \text{ days} \times \text{ADP} = \text{net reduction in ADP}$

Reduce Delay

3 Adopt court-wide, one-page scheduling orders.

Adopt, by agreement of the bench, administrative order, or court rule, short (one to two pages) scheduling orders for three or more tracks: expedited, standard, and complex. *If the court has built a backlog during the pandemic, these cases should become a separate track with the highest priority for resolution.* The three baseline tracks should correspond to the severity of the highest charge or to complexity such as for multi-defendant cases. Scheduling orders should be signed by the parties when appropriate, such as for complex cases that require additional planning.

- Expedited and standard scheduling orders should be pro-forma, generated automatically by the case management system if possible, and issued at formal arraignment after the filing of the formal charges by the prosecutor. The parties may modify the scheduling order by written request within 14 days. If the defendant is self-represented, a hearing shall be set to ensure representation and/or ensure defendant buy-in.
- Complex scheduling orders should be negotiated at a scheduling conference within 14-30 days of the arraignment.
- All changes to scheduling orders after the initial modification period shall be considered a continuance request (see below).
- Scheduling orders shall include the following milestone dates:
 - (a) Pretrial motions deadline;
 - (b) Discovery deadline, with a placeholder date for an evidentiary hearing on or within 14 days of the discovery deadline; and
 - (c) Disposition or plea hearing on or within 30 days of the discovery deadline. At this juncture, the case will plead or a trial order issued with the standard and complex cases set to a pretrial conference and trial dates. Expedited cases will not include a pretrial conference.

4 Adopt a continuance policy and monitor continuances.

Adopt, by agreement of the bench, administrative order, or court rule, a court-wide continuance policy – a key method to ensure that cases will not simply become old again. A continuance policy can be effective even in jurisdictions that allow one continuance per side by statute or court rule. The one continuance must have good cause. The elements of an effective continuance policy include the following:

- Define a continuance as the resetting of a scheduled hearing or trial to a future date due to a prosecution or defense conflict or by motion of the court. A continuance is not a suspension of case time.
- No continuances will be granted by agreement of both parties, without a good cause reason.
- All continuances, except for emergencies, will only be granted if requested in writing at least seven days in advance of any hearing date or 14 days in advance of a trial date.
- All advance requests for continuances must include proof of notification of the other party and a proposed reset date coordinated with the clerk or judge's staff in advance of the request.
- Reset dates must be to the next available docket for the hearing or trial, subject to the reason for the continuance. Under no circumstances should a trial be set out longer than 30 days.
- The court should adopt as part of the policy a list of good cause reasons for a continuance. If in advance, the good cause reasons may require documentation of the reason.
- The court should adopt as part of the policy a list of emergency good cause reasons for a continuance within seven days of or on the hearing date or within 14 days of or on the trial date. Most emergency continuances shall be for family or health emergencies.
- Judges must have the power of discretion to deny a continuance request if good cause reasons are not properly documented.

5 Adopt and monitor a court-wide probation revocation review policy.

Adopt, by agreement of the bench, administrative order, or court rule, a court-wide probation revocation review policy *and expedited process for conducting probation revocation hearings*. The court should create a policy appropriate to each jurisdiction and collaborate with the prosecutor, defense, jail, and probation in order to ensure buy-in. The policy should include the following elements:

- All arrested and jailed defendants should appear before a judge or judicial officer within the same statutory time constraints as any new felony case to determine release or hold and conditions.
- The first formal judicial review of a probation revocation case should ideally occur within 48 hours of arrest and seven days of summons, in other words, concurrent with the first appearance above.
- For jurisdictions where this is not possible due to probation not being under court supervision, and due to delays in submitting the probation revocation report, a review hearing should be set within seven days regardless and the probation officer and witness (e.g. police officer) should be subpoenaed to appear and present orally.
- *Establish a specialized docket or set time on calendars for revocation hearings.*
- The policy should define technical and substantive violations and identify which technical violations would allow for immediate release on own or personal recognizance bonds.

Average daily population (ADP) of the jail for probation revocation cases:

- I. Count the total number of pending felony revocation cases with a defendant in jail = ADP.
- II. Count the number of days in jail for felony revocation cases.
- III. Sum the case age of jailed defendants with felony revocation cases / ADP = ALOS.

6 Adopt and monitor a court-wide pre-sentence investigation (PSI) and sentencing policy

Adopt, by agreement of the bench, administrative order, or court rule, a court-wide pre-sentence investigation and sentencing policy. The policy should include the following elements:

- A presumption that a negotiated plea will include a waiver of the PSI requirement and that plea and sentencing will take place on the same date and time, subject to statute or local rule. The court, on its own motion or at the request of the parties, may require, in its discretion, a PSI after a negotiated plea. If the court requires a PSI, the remainder of the policy would apply.
- Use of criminal history and a short-form (one-page) PSI, where required, for low-level felony cases and first or second-time offenders to be provided within two to three days and sentencing hearing set within five to seven days of verdict or guilty plea.
- On all other felony cases, PSIs to be provided within 14 days and a sentencing hearing set within 30 days. If plea and sentencing do not take place at the same time, and the defendant is to be released to probation upon sentencing, bond may be reviewed at the taking of the plea.
- Issuance of sentencing order within 48 hours, or simultaneous with the sentencing hearing.

Average daily population (ADP) of the jail for PSIs:

- I. Count the total number of pending felony cases with a defendant in jail waiting for a PSI = ADP.
- II. Count the number of days, from verdict or plea, in jail for felony PSI cases.
- III. Sum the case age of jailed defendants with waiting for PSIs / ADP = ALOS.

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