



Did You See *That* Coming?*

By Phillip Knox, Janet Cornell, and Peter Kiefer

If you want to get ahead, “don’t look ahead —
look around.”

Paraphrased from Julian Ayrs, September 1, 2011

We, as court professionals, are faced with political and economic pressures throughout our country that we have never experienced in our careers. Courts are witnessing severe battles between principles and purse. Taxpayers and the media demand published court performance data yet still harbor profound misperceptions of the judiciary’s role. We manage in an era

of accelerating change and unanticipated user expectations. Courts deal with this pressure but lack the power to support themselves through taxes and are yoked by the political priorities of the executive and legislative branches.

Within this turbulent environment, we are still faced with the daunting challenge of predicting the future * through our courts’ strategic plans.

Routinely, we draft the plan from results of a group meeting of court notables, or revisit an older plan with extrapolated projections from which we then make assumptions.

As stated so succinctly in NACM’s *National Agenda* in 2010, “NACM, as arguably the nation’s leading organization of court management professionals, has an obligation to its

* This article had its genesis in a spring 2013 *Judges’ Journal* article, “We Never Saw It Coming . . . or Did We?”

⁴ Knox, Phillip, Janet Cornell and Peter Kiefer, “Did You See that Coming?” *The Court Manager*, National Association for Court Management, Vol. 28, No. 4, Winter 2013-2014, 4-12. www.nacmnet.org
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members, to the profession, to the judiciary and to the public to call attention to important issues facing courts. It must identify and discuss such issues and provide means through education, publications, conferences and partnerships through which court managers and leadership judges may address them in their trial courts, states and the nation.”¹ In this article we examine those important issues through a number of scenarios determined as likely to occur within the next 10 to 15 years, and we will look at those scenarios through the lens of NACM’s *2010-2015 National Agenda*.

The Survey

We started in December 2012 by asking a large and diverse group from around the country to assess the likelihood of 44 different scenarios occurring (or having had occurred) by the year 2025.² In recruiting a national group of court professionals to complete the survey, we focused on four criteria: 1) *Diversity*: a variety of viewpoints; 2) *Independence*: independent perspectives; 3) *Decentralization*: local and specific knowledge; and

4) *Aggregation*: a methodology to compile responses.³ The number of participants mushroomed, and by late spring 218 professionals from across the United States and other countries had responded, assessing the scenarios on a five-point Likert-type scale (1: highly likely to 5: improbable).

In addition to having the group assess the likelihood of the scenarios, we created analytical descriptions of the ones gauged as most probable. The descriptions are not intended to be definitive treatises on each scenario; rather, they are “thumbnail sketches.” Each description focuses on *drivers* and *counter-drivers*, which could be interpreted as trends and counter-trends; they will be what either propels a scenario to reality by 2015, or prevents it from coming to fruition.

The Respondents

Baby Boomers (born between 1945 and 1964) made up 58 percent, followed by *Gen Xers* (born between 1965 and 1980) with 25 percent, and finally Millennials (born after 1980) with 15 percent. Respondents came from 28 different states in addition

to Canada, Nigeria, and Moldova. Almost two-thirds of the respondents were women. Respondents from superior courts and circuit courts made up 22 percent each; municipal courts, 20 percent; AOCs and supreme courts, 7 percent; and the federal courts, 4 percent.

Analysis

The group was asked to assess each scenario’s likelihood of occurring using a one-to-five scale. Results were then averaged and grouped into categories for analysis. Responses averaging between one and two were categorized as *highly likely*; responses averaging between two and two-and-a-half were *likely*; responses averaging between two-and-a-half and three were described as having an equal or 50-50 chance; responses averaging between three and three-and-a-half were *unlikely*; and, finally, responses averaging greater than three-and-a-half were improbable. This article will only touch upon 8 of the 44 scenarios the group assessed and we analyzed.

The NACM National Agenda Priorities and Selected Scenarios of the Year 2025

Agenda Priority: Emphasizing Caseflow Management Improvements

Caseflow management is, indeed, the center of what courts do daily. It targets access to court services, litigant expectations, understanding of court processes, and the full use of information technology as ongoing concerns. It includes managing and coordinating cases from filing to disposition, monitoring cases post-adjudication, and monitoring compliance and performance with data and trend evaluation.⁴

The 2010 National Center for State Courts’ (NCSC) *Future Trends* publication noted, “Case triage is literally just that: decisions are made about each case and not just by placing them into relatively crude case-type bins. This idea is more like classic differentiated caseflow management by tracks, only on steroids.” Case triage aligns nicely with several of the case administration principles proposed in NCSC’s *High Performance Court Framework*. Two of those principles state the importance of treating cases proportionately, and giving each case individual attention.⁵ There is a strong call for “customized procedures and expectations” in court performance.⁶

Scenario: By the Year 2025 Courts Will Have Even More Accurate Differentiated Caseflow Management

Assessed as Highly Likely, with 214 respondents giving the scenario a 1.9 average response.

Continued refinements in analysis of case filings, parties, and investigations through regression analysis lead to increasingly accurate predictions of which cases go to trial, how long the trials will take, which cases will settle, and when. Courts become increasingly able to direct resources to where they will be most effective, and even proactively manage the disputes most likely to go to trial.

Drivers

Courts are advancing differentiated case management in surprising new areas, such as contested guardianships and conservatorships.⁷ Misdemeanors and even some felonies will see more restorative justice panels, and this methodology could be applied to various personal injury and contract cases, juvenile delinquencies, and even family court. Pressure will increase to resolve as many cases as possible quickly and permanently.

The private sector even now tracks our buying habits through devices such as supermarket loyalty cards.

Law enforcement is increasingly using data analysis to predict times, locations, and circumstances of criminal behavior. Courts could use this technology to track frequent court users and predict, prepare, and respond to court behavior.⁸

Counter-Drivers

Research on which cases will settle and how soon will quickly intrude into parties' private concerns. Attorneys will naturally object to having their tendencies on legal dealings researched like some sort of graduate school social work experiment.

There is already a small backlash. Some feel there are too few jury trials; we need to stop trying to end cases and reestablish the jury as the crown jewel of the court system.

Agenda Priority: Preparing for and Responding to Trends

NACM must lead in visioning and strategic planning. While everything on the horizon will not mature into a practical court concern or implementation issue, court leaders have too often been behind the curve. There is a need to keep current and be aware. This agenda item particularly cuts across all priorities and drives us back to the necessity that we must lead nimble and flexible organizations. John Martin gave us a wake-up call when he pointed out, "The face of America is becoming more diverse, with no one social, ethnic, nor racial group commanding an absolute majority in terms of numbers and ultimately in terms of power."⁹

Scenario: By the Year 2025 the Gap Widens Between Society's Expectations of Courts and the Courts' Capacity to Meet those Expectations.

Assessed as likely with 184 respondents giving it a 2.1 average response.

Communities will expect courts to do an even better job of solving family problems, rehabilitating the homeless and drug addicted, protecting neighborhoods from potential criminals, and dispensing mistake-free justice quickly without additional resources.

Drivers

The public expects government to solve everyone's problems; courts in particular should protect the public. Many see the expectation gap as most pronounced in the difference between rural and urban courts. The public expects that "doing one's business with the courts" should get progressively easier over time. Advancing technology and centralization *should* be able to address the needs of rural areas.

There will be more movement toward the multilayered court system and "justice complex." Traditional and familiar adjudication courts, a self-help center, and a "mediation center" (for lack of a better term) will all be co-located with social service agencies (education, unemployment, anger management, substance abuse, child welfare, etc.).

— Chuck Oraffik, Senior Vice President HOK, Inc.

Counter-Drivers

Many feel that courts have already overstepped their bounds and become de facto "social work" agencies instead of arbiters of justice. There is some evidence of this in the public's desire to handle more types of cases administratively. Courts face a significantly difficult challenge in the years to come educating communities in what they do and what they do not do.

The public's perception of the courts' role ebbs and flows as the economy improves or declines and court budgets expand or contract. As the economy grows the desire for courts to protect us will decrease.

Scenario: By the Year 2025 Courts Will Be "Paperless"

Assessed as the most likely scenario with 185 respondents giving it a 1.7 average response.

Increasingly, courts will convert to electronic filing, document imaging, or both, thereby going "paperless" (also known as "paper-on-demand").

Drivers

Many trial courts have already installed or are installing systems capable of managing electronic documents. "Paper-on-demand" technology allows everyone to have instantaneous information. This will change people's view of the courts; traveling to the physical courthouse will become much less frequent.

A court still using physical documents in 2025 will be like a court with no electricity in 1940, or a court with no telephones in 1970, or a court with no internet in 2013. It won't be acceptable.

— Jeff Barlow, "Gazing Into the Crystal Ball Part 2: Some Longer Term Implications of Universal Implementation of Paper-On-Demand Courts," *Order in the Court*, July 15, 2013.

Counter-Drivers

Navigating through the world of "paper on demand" is still daunting. Large, complex documents are still difficult to view on a computer screen, so there will continue to be a strong disincentive against going "paperless." A subversive subculture of printing case files when hearings approach already exists. "Paperless courts" will not be universal until a technological solution to the age old desire for "paper-in-hand" is solved.

Agenda Priority: Funding of State Court Systems and Trial Courts

Financial pressures on our courts have never been greater. The National Agenda calls on us to sustain excellence during difficult budget times.¹⁰ As retired Chief Justice John Broderick said, "How can it be that in this new world, which is literally and exponentially remaking itself with alarming speed through science, technology, emerging markets, and global interdependence, that the American justice system can remain the only institution in American life that need not adapt, that need not adjust to current-day realities? Quite simply, it can't. It just can't."¹¹

Scenario: By the Year 2025 Courts Will Increase Their Revenue through User Fees

Assessed as highly likely with 179 respondents giving the scenario a 1.8 average response.

As many cases require more services than others, courts will charge users fees for specific types of activities based on the resources needed.

Drivers

State legislatures have always been reluctant to fully fund the judicial branch, and now courts (chronically underfunded and desperate for operating funds) are faced with the most devastating economic crisis yet. As they desperately look for innovative ways to secure operating funds, the use of interpreter fees, fees to access court files on the Internet, audio-video conferencing fees, higher jury trial fees, higher public defender fees, intercounty or interstate probation transfer costs, warrant issuance surcharges, late payment surcharges, partial payment surcharges, credit-card service charges, and user fees for investigations and mediations are all on the table.

Rather than fee waivers, courts could turn to prorated fees, which raises a question: Can fees be prorated administratively rather than by judicial officers?

There is a price point where more fees become cost prohibitive, but that point is higher than most people think; courts have a captive clientele.

Counter-Drivers

Increasing user fees always hurts the poor by excluding them from the courthouse. Courts will have to ensure that self-represented litigants are not priced out of using the courts.

User fees have always been a limited solution to funding woes. Adding user fees only increases the requests for fee waivers and deferrals.

Many see adding user fees and enhancing collection efforts a waste since much of what courts collect is earmarked to activities unrelated to the courts.

As legislatures become more dependent on user fees to fund services, they may well reduce the court's discretion to waive or defer fees.

There is a small but growing sentiment throughout the country that the new user fees imposed on criminal defendants actually cost taxpayers and the indigent more since defendants are often forced back to jail when they cannot pay their debts.¹²

Scenario: By the Year 2025 Centralized Data Storage Will Be Commonplace; Data Will Be Immediately Accessible to Stakeholders

These two scenarios were both assessed as highly likely. Centralized Data Storage garnered 180 respondents giving it a 1.9 average response; Centralized Data received 179 respondents with a 1.8 average response.

With ever-increasing centralization of data storage, input, and transactions, centralized (state) centers for paying traffic fines, filing fees, restitution, and bail bonds will become the norm. Centralized data will permit real-time access to payment, restitution, bond, case, and criminal history information.

Drivers

Databases for all court levels already exist. States have databases for warrants and criminal histories. Creating a divorce and domestic violence database will make checking for divorces, restraining orders, and domestic violence orders more efficient. Centralized data needs less actual storage capacity and is easier for multiple jurisdictions to access.

Storing large quantities of data in the cloud is becoming an increasingly viable option.¹³

Centralized data can help systems direct information to various districts, courts, regions, or centralized locations, based on workload or availability of assets, thus reducing management responsibilities.

Feeding into centralized data storage will dissolve the geographic barriers to collecting debts, and improve the ability to track people and hold them accountable. It is less expensive for courts to populate centralized databases that are maintained by larger government entities, so it will be a huge motivator for courts to centralize.

Counter-Drivers

The allure of “economies of scale” through centralization has long been a fantasy. The truth is that centralized administration rarely lowers costs; in fact, it often increases costs through the need for increased oversight demands spanning wide geographic areas.

Some courts will always want to remain separate, with their own rules, regulations, and fees, which will be a major hurdle to overcome.

Centralized databases (and standardized data entry) cannot accommodate the nuances of the contributing systems, and there is little motivation for contributors to correct problems. For example, some states do not accommodate the dismissal of lower-court charges when a defendant is held to answer in a general jurisdiction court. This results in a muddled criminal history.

Privacy groups are worried about the “big brother” effect of a centralized data warehouse.

Agenda Priority: Enhancing Public Perceptions of the Courts and Increasing Community Collaboration

For a decade now the court system has emphasized responsiveness to community needs. This responsiveness normally manifests itself through *CourTools* customer surveys and direct queries from post-service jurors.

Scenario: By the Year 2025 Courts Will Have Redefined Their Relationship with Social Media

Assessed as likely with 179 respondents giving the scenario a 2.0 average response

The advent of social media and legal reality shows may force us to redefine the “community” to which we respond. Will court reality television and the social network result in citizens well beyond those actually inside the courthouse becoming stakeholders in court operations? What opinions will this broader community have of the judicial branch?

Modeling off the example of the most innovative jurisdictions nationally, courts across the country craft workable and enforceable regulations on the limits of social media within the justice system.

Drivers

Most jurors and court visitors are considerate of the court's preeminent mission to fairly dispense justice. They do not abuse that mission by inappropriately recording in a courthouse or posting blog comments.

Judges nationally now admonish jurors not to use their cell phones while in court.

Some propose that the rules could be loosened on what jurors should be allowed to review. The instructions could limit such social media interaction but not make it a deal breaker. Jurors could be told they can say or post whatever they want (even read what they want?), but they must limit their decisions to what is presented in court.

Courts could develop "jamming" technology to prevent video-audio recording of proceedings, and work with the media so they could use special transmitting frequencies.

Counter-Drivers

Even if most jurors and court visitors are considerate, it only takes a few to cause a mistrial and undermine the court's mission. Technology is evolving so rapidly that it will soon be impossible to stop visitors from sitting in the gallery with a small video recorder and capturing a jury. Just look at the potential of *Google Glasses* for doing this.

Court professionals now access the Internet within the courthouse as part of their job. "Jamming" the Internet or cell phones is a meat-cleaver approach when a scalpel is needed.

Expert trial witnesses are already harassed on the social network, which could have a chilling effect on future expert witness testimonies.¹⁴ This kind of techno harassment could easily become commonplace in the future.

Increasingly judges are using social media. How soon will the contradiction surface when a judge tells jurors not to use Facebook, and that judge is on Facebook?¹⁵

Agenda Priority: Promoting Court Leadership and Governance

The National Agenda calls for improving court leadership and governance. This priority may very well be one of the most challenging we face in the next decade. NACM must promote skillful leadership of courts, of the justice system, of well-functioning team environments, and of smooth, healthy operations. Issues include the roles and responsibilities of state chief justices, state-level central offices, and trial courts regarding matters such as the authority, selection, and oversight of trial court leadership judges and court managers. Demographics demand attention to succession planning for the next generation of court managers. Retaining and recruiting talented junior managers will ensure continuity as Baby Boomers retire.¹⁶

Scenario: By the Year 2025 Courts Will Lose Most of Their Organizational Memory

Assessed as likely with 216 respondents giving the scenario a 2.4 average response.

An aging workforce that fears losing its pensions and more judicial officers seeing judgeships as a career stepping-stone rather than a capstone results in a significantly younger workforce with little recall of organizational history.

Drivers

Experts have warned of this exodus for years, yet courts have done little to address the issue. The need for organizational retraining will increase as continually changing leadership forces courts to re-acknowledge the need for fundamental functions and re-discuss old ideas. Outsourcing is an example of an idea that often looks cost-effective, yet frequently ends up costing more than in-house staff. As the public's memory fades, long-established programs will become targets of budget cuts.

Courts will have to reanalyze long-settled issues. Ultimately, fewer well-trained people will want to enter government service as the reputation of government workers declines.

Counter-Drivers

The bad financial climate and uncertainty over pensions will spread the exodus out over years, and lessen the short-term impact. Court personnel will increase in ethnic and gender diversity. Inevitably, the slow exodus will result in a cultural shift from a traditional organization (e.g., 8-5, business conducted in person) to a more adaptive, experimental culture.

The need to re-discuss once discarded ideas is actually a benefit that organizations should welcome.

Agenda Priority: Professional Court Management Education

This priority focuses on in-service training targeting NACM's Core Competencies, and college-level certificate and degree programs. Retired Chief Judge John Broderick has said, "If change does not happen, I wonder whether we will attract the best and brightest lawyers to preside in our courts or the best and brightest managers and administrators to tackle the difficult challenges of running and managing a state court system."¹⁷

The preparation and performance of court managers is of paramount importance to NACM, which has been documented in the Core Competencies.¹⁸ These competencies remain the focus of professional court managers. However, court managers of the future will need to practice new approaches to be effective. Their skills may derive from in-service training, or from formal educational settings, such as university-based education. Research indicates a change in the landscape. Court leaders are being urged toward "creating and engaging a work environment to attract, retain and motivate skilled staff."¹⁹

Scenario: By the Year 2025 Courts Will Employ Significantly More Knowledge Workers

Assessed as likely with 214 respondents giving the scenario a 2.3 average response.

As judicial administration in general becomes more complex, courts will hire staff with a broad range of skills, including computer technology experts, interpreters, accountants, mediators, conciliators, grant writers, webmasters, forensic psychologists, public information specialists, and security analysts. The expertise of these professionals will lie in new areas, in addition to their knowledge of court procedures and the law.

Drivers

Many specialty problem-solving courts require sophisticated staff with knowledge of both legal procedures and specific areas of expertise. An example includes a court focusing on infants and toddlers in family and juvenile matters. Staff include child counselors, early childhood specialists, social workers, and probation officers specializing in specific problem-solving courts.

Counter-Drivers

Many knowledge workers have expertise in areas poorly understood by the general public and funding bodies, which leaves them vulnerable during times of fiscal austerity.

Court systems may start centralizing more services to cultivate expertise in specific areas, such as interpreters who can work in multiple courts through audio-video conferencing.

The National Agenda and the Future

We have just glimpsed a few possible scenarios of the future, which NACM invites us to view through the perspective of the *National Agenda*, and its priorities of good governance, sustained performance even with limited funding, imaginative trend analysis, solid caseload management, insightful scrutiny of the public's perception of the courts, and dedication to professional court management education. These priorities provide a framework for forecasting the future, a framework that can allow us to say, "Yes, we saw it coming and we're ready."

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