



# SEE HOW WE READ II

## AN UPDATE WITH REFLECTIONS

*Rhonda K. Wood & Brian W. Johnston*

THE WHEELS OF JUSTICE kept turning for state appellate courts during COVID. But our workflow changed here in Arkansas. Our chambers continued drinking our coffee (or Diet Coke, tea, or water), reading our briefs on our iPads (or desktops, Kindles, Surfaces, or paper), and discussing the law (or language, SCOTUS, #appellatetwitter, or the news). But unfortunately, we did much of this over Zoom or Microsoft Teams. Our court, like many others, started conducting oral arguments over Zoom and videoconferenced cases and administrative matters. Back in 2020, before COVID, we surveyed how state appellate courts approached their work.<sup>1</sup> We've now been back in chambers for a year and decided to resurvey how COVID changed those habits.

We sent the new survey to state supreme court justices.<sup>2</sup> The survey included some questions from our earlier one. For those who neglected to read the first article, the questions ranged from those about preferences – paper or electronic briefs? – to those that were more methodological –

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<sup>1</sup> See *How We Read*, 24 Green Bag 2d 227 (2021).

<sup>2</sup> All state chief justices were sent the survey by email through the Conference of Chief Justices and asked to share it with their fellow court members. All responses were anonymous. We used SurveyMonkey and had the survey open from March 7, 2022 to April 20, 2022.

when deciding a case, which brief do you read first?<sup>3</sup> We also added a few new questions. These new questions asked the justices whether and how often their court conferenced virtually. We also asked an open-ended question about how COVID generally impacted their workflow. The results reveal justices' thoughts and work habits. The sample size – around 100 respondents – was the same as the first survey, which we take to mean the justices who ignored the survey in 2020 also ignored the survey in 2022. But we (again) believe enough responded for us to draw meaningful conclusions.<sup>4</sup>

We will not bury the lede any further. COVID moved state supreme courts forward technologically but decreased collaboration among justices and their staffs. On the one hand, our respondents reported an increased use of technology, specifically videoconferencing and virtual oral arguments. On the other hand, respondents said remote work fractured traditional collaborative interactions. Many respondents lamented the loss of interpersonal relationships. Appellate courts, just like any other workplace, must grapple with this dilemma going forward. Technology makes work easier, but it imposes a social cost. Courts must balance these costs and benefits to achieve the most productive, efficient, and rewarding work environment.

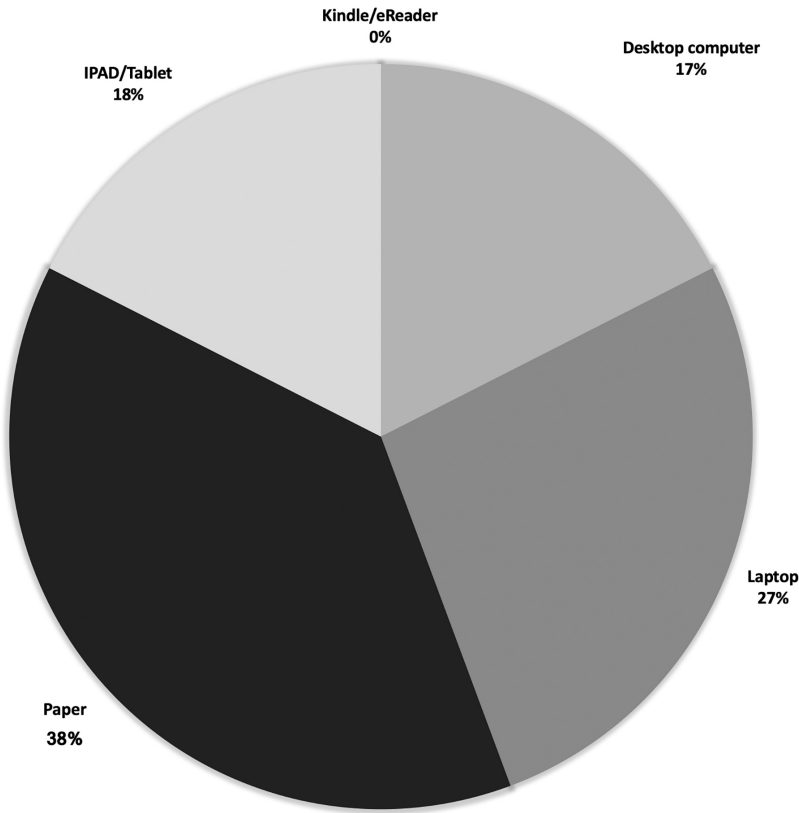
We now turn to the results:

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<sup>3</sup> In this article, we excluded survey questions that showed no change in behavior. For those of you who missed the opportunity to see those responses and are on the edge of your seats to discover the results, we encourage you to study our first article.

<sup>4</sup> As with the last survey, so with this survey: the respondents were self-selecting. And those who were comfortable with technology were probably predisposed to respond. This was an online survey, after all. We also note the possibility that one court had all their justices respond, others had a single justice respond, and others had no respondents. This disparity could skew the results, too.

QUESTION 1:  
DO YOU PRIMARILY READ APPELLATE BRIEFS ON . . .

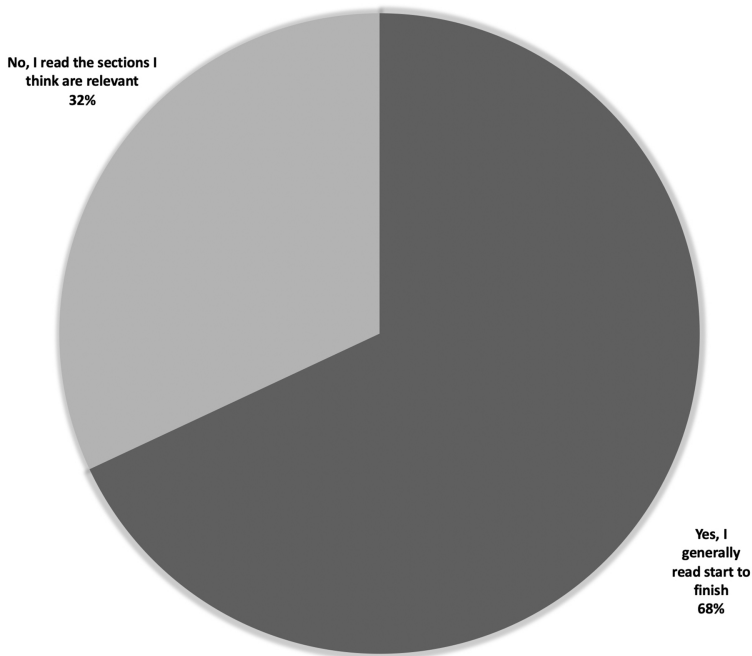


ANSWER CHOICES	RESPONSES	
Kindle/eReader	0.00%	0
Desktop computer	17.53%	17
Laptop	26.80%	26
Paper	38.14%	37
iPad/Tablet	17.53%	17

The number of justices reading briefs on paper is shrinking. In 2020, a majority (54%) of respondents reported they primarily read appellate briefs on paper. Two years later, a clear majority (60%) of justices read electronically. We theorized in our first article that this would occur after

many justices shifted to remote work during the pandemic.<sup>5</sup> We now theorize this shift to be permanent. After all, we conducted this survey when most courts had returned or settled into the “new normal” in early 2022. Once electronic reading has been adopted, we doubt a justice will return to paper. The biggest barriers to reading and analyzing legal materials electronically are fear of technology and anxiety about learning new skills.<sup>6</sup> Once exposed to these technologies, there is no turning back.

QUESTION 2:  
DO YOU READ THE APPELLANT’S BRIEF  
IN THE ORDER IT IS WRITTEN?



ANSWER CHOICES	RESPONSES	
Yes, I generally read start to finish	68.04%	66
No, I read the sections I think are relevant	31.96%	31

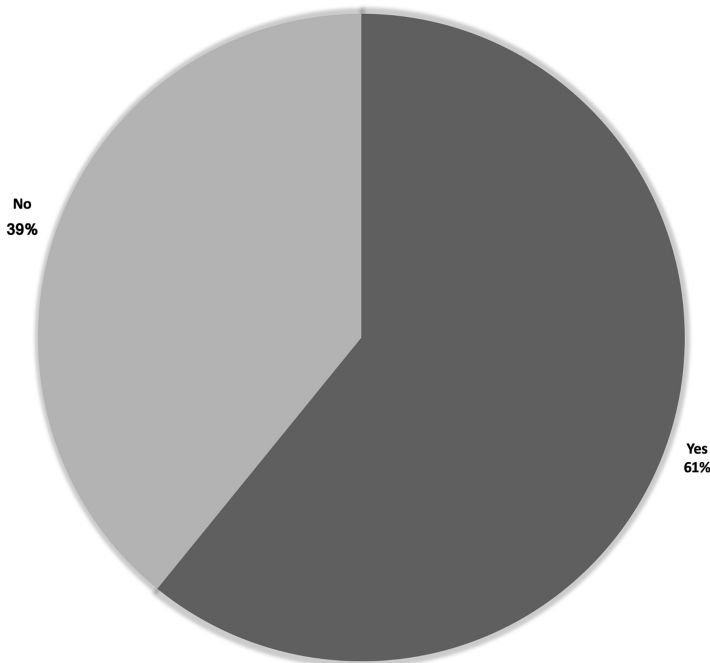
<sup>5</sup> See *How We Read*, at 228.

<sup>6</sup> Sara J. Czaja et al., *Factors predicting the use of technology: Findings from the center for research and education on aging and technology enhancement (CREATE)*, 21 *Psychology and Aging* 333 (2006).

We believe the downward trend in sequential reading is worth mentioning. The respondents who reported reading briefs in the order presented has decreased from 71% to 66%. That means six more justices read briefs in the order they believe most relevant, bringing the number closer to one third of the justices. Attorneys ignore this number at their peril when preparing briefs. One cannot assume a justice plows through a brief page-by-page, first reading the table of contents, statement of the case, and other introductory matters before finally turning to the argument. This result emphasizes our belief that every section of a brief must be concise and laser focused on the appeal's key issues.

### QUESTION 3:

IF THERE ARE HYPERLINKS OR INTERNAL LINKS IN BRIEFS,  
DO YOU UTILIZE THEM?

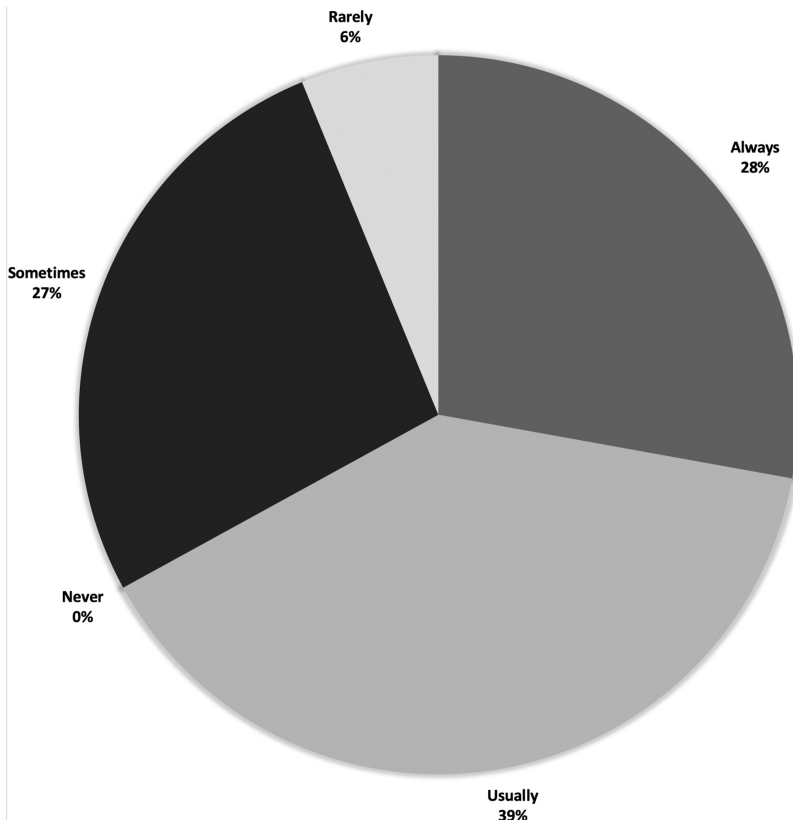


ANSWER CHOICES	RESPONSES	
Yes	60.87%	56
No	39.13%	36

The increased use of hyperlinks is one of the most noteworthy changes. In 2020, 45% of respondents reported they used hyperlinks or internal links if included in a brief. Now, 61% use them. But the real takeaway is not the percentage increase but the gross number of respondents. Compare this number – 56 – in relation with the number of respondents in Question Two who read electronically. This number – 60 – equals those who read either on a desktop (17), laptop (26), or tablet (17). That means almost 100% of the justices who read electronically also use embedded hyperlinks. We conclude that inserting links, when appropriate, is worth an attorney’s time because justices use them.

#### QUESTION 4:

DO YOU INDEPENDENTLY CONDUCT RESEARCH  
FOR CASES OTHER THAN THOSE CITED IN THE BRIEFS?

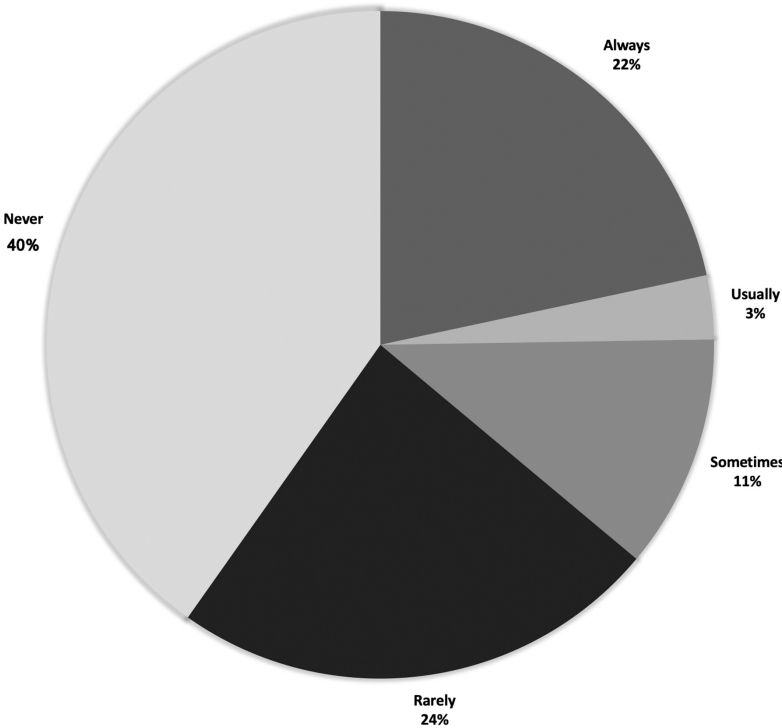


ANSWER CHOICES	RESPONSES	
Always	27.84%	27
Usually	39.18%	38
Sometimes	26.80%	26
Rarely	6.19%	6
Never	0.00%	0

There was a post-pandemic decrease from 75% of respondents who either always or usually conduct additional research for cases to only 67% who now do so. The good news for attorneys: the largest decrease was the number of justices who “always conduct their own research,” going from 44% to 28%. Why this decrease? Perhaps state appellate courts are receiving higher quality briefs. Or perhaps justices now find themselves with less time to conduct the outside research. We hope it’s the former.

QUESTION 5:

DOES YOUR COURT CIRCULATE A DRAFT  
OPINION/MEMO BEFORE CONFERENCING A CASE?



ANSWER CHOICES	RESPONSES	
Always	21.65%	21
Usually	3.09%	3
Sometimes	11.34%	11
Rarely	23.71%	23
Never	40.21%	39

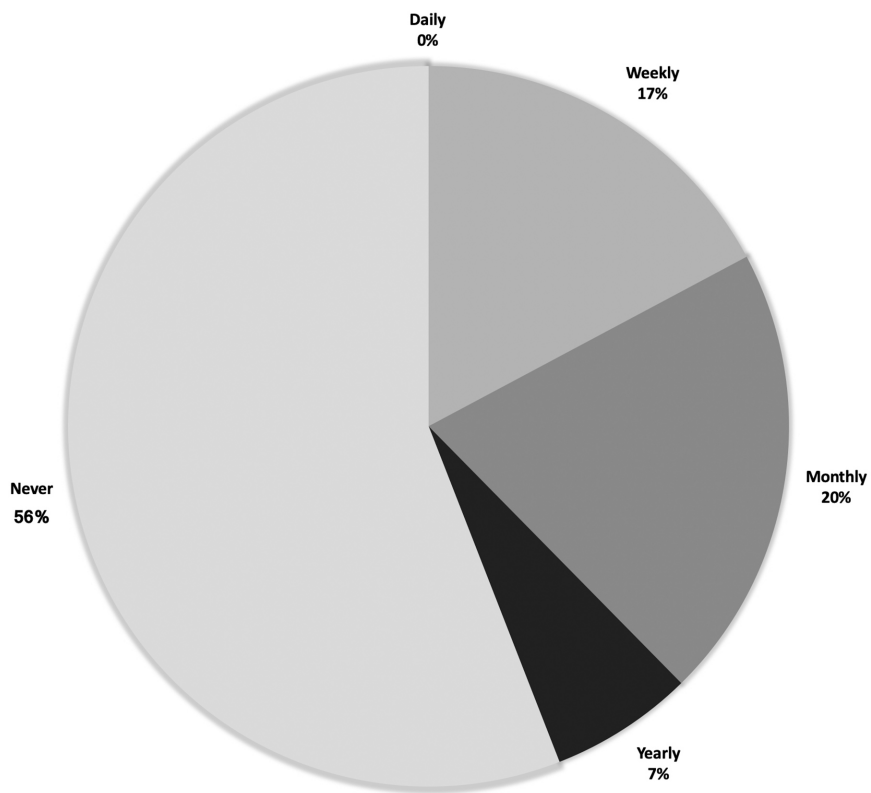
Our survey showed a significant shift since COVID in the number of courts that circulate a draft opinion or memo before the case conference. In 2020, only 9.5% reported always circulating a written document beforehand. That percentage more than doubled to 21.7%. We wonder whether the shift to videoconferencing, discussed more below, is responsible for this increase. As many know from experience, communication can be difficult over electronic media. A pre-circulated opinion could frame a conference discussion, leading to a more productive and efficient conference.

### QUESTION 6:

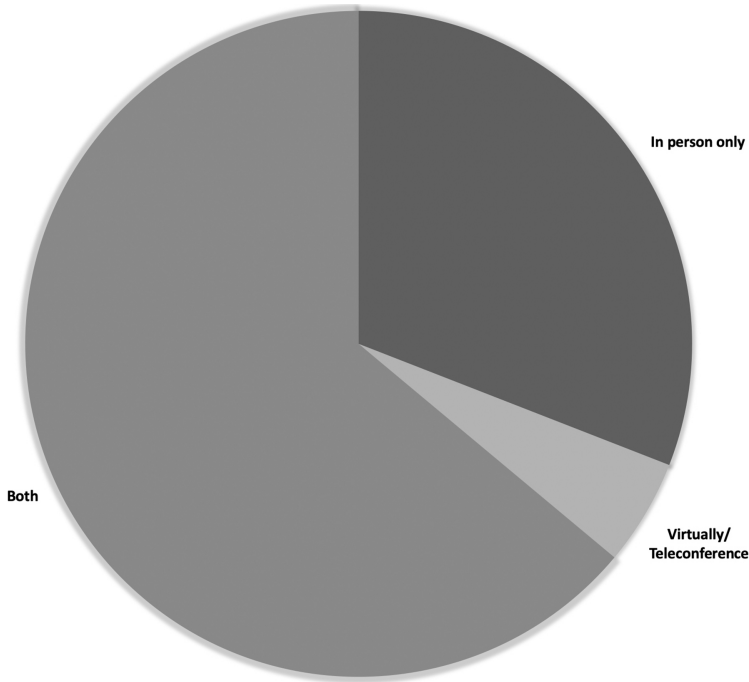
#### HOW OFTEN DID YOUR COURT MEET VIRTUALLY OR VIA TELECONFERENCE PRE-COVID?

We included several new questions developed from changes we saw on our own court during the pandemic. We didn't think to ask about the frequency of videoconferencing when we created the survey in January 2020. But now, asking about videoconferencing seems obvious. In Question 6 we asked how often courts met virtually or via teleconference pre-COVID. 56% of our respondents answered "Never." This result wasn't surprising. Before 2020, our court exercised considerable discretion when deciding to videoconference in lieu of an in-person conference. And before the pandemic, eliminating the tradition of in-person conferencing – a tradition as old as the court itself – would have been unthinkable. Our results show many other courts followed a similar tradition.

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ANSWER CHOICES	RESPONSES	
Daily	0.00%	0
Weekly	17.20%	16
Monthly	20.43%	19
Yearly	6.45%	6
Never	55.91%	52

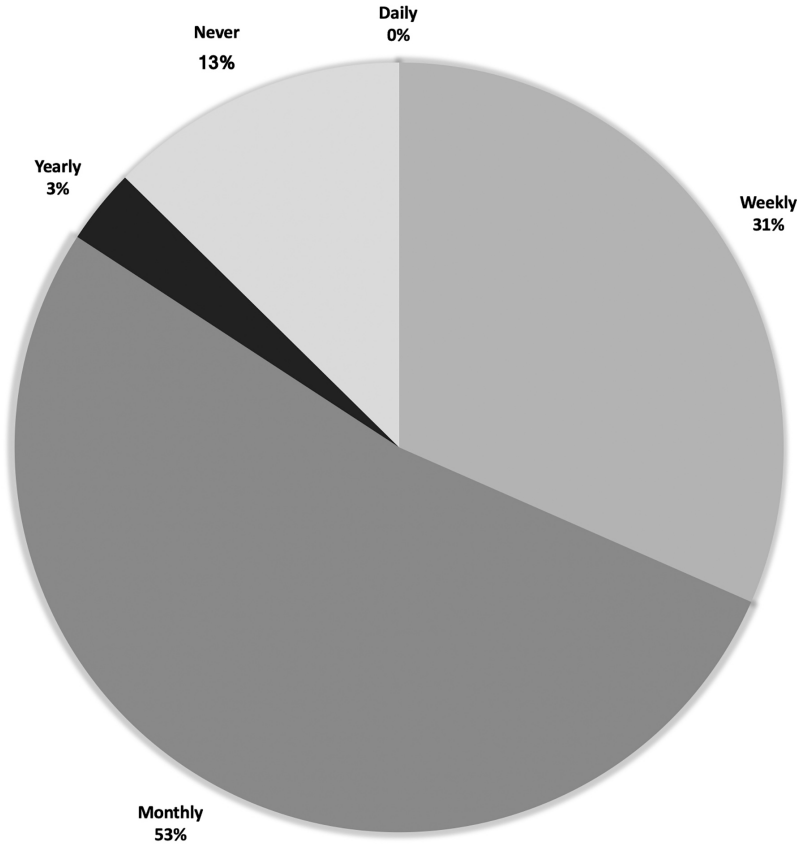


**QUESTION 7:**  
**HOW DOES YOUR COURT CONFERENCE CASES?**

ANSWER CHOICES	RESPONSES	
In person only	30.93%	30
Virtually/Teleconference	5.15%	5
Both	63.92%	62

But did COVID change that age-old tradition? Did in-person conferencing survive the pandemic or was it replaced by videoconferencing? Before COVID, 54% reported they never videoconferenced. After COVID, 69% responded that their courts videoconferenced all or some of the time. Only 31% reported that their court conducted in-person conferences only. A slim number, 5%, went the opposite direction and now videoconference exclusively. The pandemic prompted many courts to move their proceedings to the virtual world. At minimum, we believe these courts will retain the flexibility to conduct both virtual and in-person conferences as circumstances require.

*See How We Read II*



**QUESTION 8:**  
**HOW OFTEN DOES YOUR COURT MEET VIRTUALLY  
OR VIA TELECONFERENCE?**

ANSWER CHOICES	RESPONSES	
Daily	0.00%	0
Weekly	31.58%	30
Monthly	52.63%	50
Yearly	3.16%	3
Never	12.63%	12

Assuming a court used technology to videoconference, we asked how often their court meets this way. 53% reported monthly videoconferences, with 32% using videoconference methods weekly. In gross numbers, 80 of our 97 respondents reported conducting at least a monthly virtual conference.

One statistic puzzled us initially. In Question 7, 30% of respondents reported only conferencing cases in person. Then in Question 8, 12% responded they never met virtually or by teleconference (or only in person). What's the difference? We assume these justices answered Question 7 about how their court "conferenced a case" as being when they substantively decided a fully-briefed appeal. We call this a submission conference at our court. But courts also meet to decide motions or administrative matters, rather than deciding a "case." These results suggest some courts decide their submitted cases by in-person conference only but still use videoconferences to handle motions or operational matters.

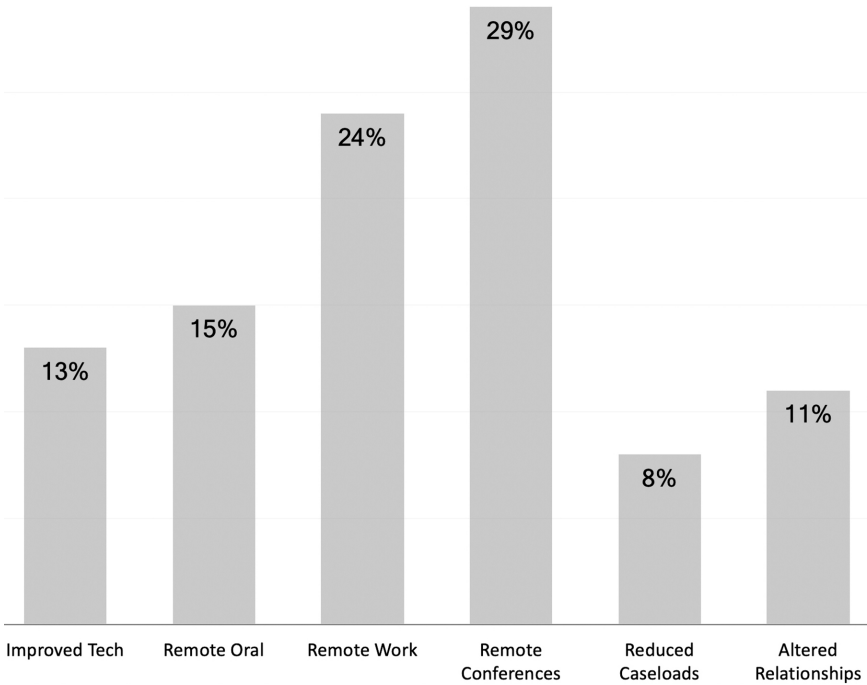
## QUESTION 9: WHAT HAS BEEN THE SINGLE GREATEST IMPACT TO YOUR APPELLATE COURT WORK AS A RESULT OF COVID?

And finally, we took the greatest risk when sending out any survey – we asked an open-ended question. SurveyMonkey, our survey tool, cautioned against this and warned that our response rate would plummet. We threw caution to the wind, ignored SurveyMonkey, and asked about COVID's single greatest impact on appellate courts. A startling 89 of our 97 respondents answered the question. We enjoyed disproving SurveyMonkey's analytics.

When asked for the "single" greatest impact from COVID, most respondents couldn't limit themselves to just one. Many gave expansive answers. One of COVID's biggest effects was the increased use of technology. Many state appellate courts went from in-person oral arguments to virtual oral arguments overnight.<sup>7</sup> And our respondents noted an increased use of

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<sup>7</sup> See generally Pierre H. Bergeron, *Covid-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?*, 21 J. App. Prac. & Process 193, 194 (2021). Michigan: Jennifer Copland & Jesse



ANSWER CHOICES	RESPONSES	
Improved Tech	13%	17
Remote Oral	15%	20
Remote Work	24%	31
Remote Conferences	29%	38
Reduced Caseloads	8%	10
Altered Relationships	11%	14

Zoom and videoconferencing. Anecdotally, we recall in the months before COVID lawyers asking in a demeaning tone, “We hear the Arkansas Supreme Court is conferencing by video?” The question implied laziness rather than efficiency. But when the pandemic hit, many proudly said,

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Kirchner, *Virtual Persuasion: Advice from the Michigan Supreme Court*, Mich. B.J., August 2020, at 42; Florida: Gary Blakenship, *Supreme Court Holds Virtual Oral Arguments*, The Florida Bar News, June 2020, at 1.

“Well, our Arkansas Supreme Court has been using this technology for years.” Our court also was a “leader” because we had live-streamed oral arguments for over a decade, had video-conferencing capability and experience, and implemented videoconferencing for trial courts statewide.<sup>8</sup>

But using technology has social costs. As the chart above shows, many justices acknowledged COVID’s diminution of interpersonal relationships. Responses included, “altered conference dynamics”; “personal interaction with colleagues and staff lacking”; “less in-person interaction . . . which has dampened the clerkship experience for everyone”; “affected relationship building”; “lost a little bit of civility when remote”; “lack of personal contact”; “reduced collegiality”; “loss of interpersonal contact”; and “losing all the advantages of working with support staff in person.”

These comments carry significant weight. Courts must be deliberate about using technology. Videoconferencing and virtual oral arguments are useful tools, but as collaborative decision-making courts, we should not permanently make most decisions over a video screen or by telephone. The strain on communication and loss of face-to-face contact will inevitably cloud the decision-making process. It is much easier to be curt with someone you can simply ignore after clicking “End Video.” It’s much harder when you leave conference with them through the same door. Certainly appellate courts should take advantage of the flexibility videoconferencing offers for health, family, and education. But we should also prioritize personal workplace relationships. This is especially true as justices mentor the next generation of law clerks.

COVID provided a needed push for most courts to improve technology. This will increase efficiency and access to the justice system. But let’s use technology in a way that improves our courts without harming the interpersonal relationships that make appellate courts unique. After all, we are collaborative decision-making bodies. We must continue collaborating in this new world.

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<sup>8</sup> Gavin Lesnick, *VIDEO: State Supreme Court to stream arguments*, Ark. Dem. Gaz., Sept. 14, 2010 ([www.arkansasonline.com/news/2010/sep/14/state-supreme-court-stream-arguments/](http://www.arkansasonline.com/news/2010/sep/14/state-supreme-court-stream-arguments/)); see also Timothy N. Holthoff, *View of the Pandemic From the Technology Trenches*, Ark. Law., Spring 2021, at 20.



We began this journey two and a half years ago to satisfy our chamber's curiosity about how other offices did their work. The results prompted more discussions around our water cooler.<sup>9</sup> We hope you've found value in it, whatever your role or interest in the justice system. Please reach out to discuss more with us. You can reach us at the Arkansas Supreme Court or on #appellatetwitter.



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<sup>9</sup> Our chamber's water cooler broke during COVID, and we were, meaning Justice Wood was, responsible for its replacement since it is not a court expense item. Having a water cooler in chambers is a luxury and furthers a healthy lifestyle. But we found not having a water cooler required us to leave our physical office and walk down the hall to the communal water cooler. This meant occasional interaction with other humans. We spent a year considering which was the greater benefit. As we write this footnote, the new chamber's water cooler has arrived. But being mindful of this survey's results, we still walk down to the communal water-cooler area for social visits.