

# Appellate Courts

## Reopening the Appellate Courthouse

A Pandemic Resource from CCJ/COSCA

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Nearly two years ago, in March 2020, COVID-19 emergency pandemic orders were issued by state and local authorities affecting virtually all aspects of what was considered to be normal life in the United States. In the state court systems, supreme courts and intermediate appellate courts began rescheduling oral arguments and preparing to conduct them remotely, restricting employee and public access to courthouses, and establishing remote working arrangements for both judges and staff. All appellate court functions were directly impacted. Judges and staff increasingly did their work remotely. While the courts quickly built or adapted their technological infrastructures to effectively enable remote oral arguments, judges relied almost exclusively on digital case files, and completed all decision-making and case processing tasks outside of the courthouse. Those appellate courts that did not implement fully remote operations established reduced staffing schedules and developed safe alternatives for filing hard copy documents, receiving and distributing mail, and other essential tasks that could not be done remotely.

To assess the status of planning by state appellate courts for reopening and providing services in the courthouse, the RRT-PPP Appellate Courts Workgroup, with the support of CCJ, COSCA and CCJSCA, surveyed appellate court justices and judges across the country during October 2021.<sup>1</sup>

Members of the Appellate Courts Workgroup are:

Chief Justice John Minton, Kentucky Supreme Court, Co-Chair  
Ms. Sara Omundson, Idaho State Court Administrator, Co-Chair  
Chief Justice Donald Beatty, South Carolina Supreme Court  
Judge Melanie May, Florida Fourth District Court of Appeal  
Judge Jack Sabatino, New Jersey Appellate Division  
Judge Frankie Moore, Nebraska Court of Appeals  
Ms. Sandra Vujnovich, Louisiana State Court Administrator  
Mr. Justin Forkner, Indiana State Court Administrator  
Mr. Blake Hawthorne, Clerk of the Texas Supreme Court  
Mr. John Doerner, National Center for State Courts

In mid-2021, as the level of vaccinations increased and COVID-19 infections declined, some appellate courts began planning to reopen the courthouse for all appellate services. As infection rates ebbed and flowed in different states, appellate courts had to adapt and change their plans and timelines to allow for more flexibility and a capability of changing the levels of service provided in the courthouse.

<sup>1</sup> A more complete presentation of the full set of responses to the “Appellate Courts Return to the Courthouse Survey” can be found in the companion volume titled, “Re-opening the Appellate Courthouse – Statistical Report.”

## **Abstract**

The world is a different place than it was in the first two months of 2020. The COVID-19 Pandemic has led to disruption in virtually all walks of life and the seemingly tradition-bound state appellate court community has not been spared these effects. During the latter half of 2021, there appeared to be some promise for a loosening of the pandemic's grip; by late November, the Omicron variant was threatening those hopes.

The survey that produced the data presented here was administered during October 2021. The significant unknowns, including the possible effects of the Omicron variant (as well as any future variants that may appear on the scene) and wide differences of opinion in how best to deal with the pandemic, may render the data either more or less accurate as time passes. It may be helpful to scan the state appellate court community to track ongoing changes that may occur in future years.

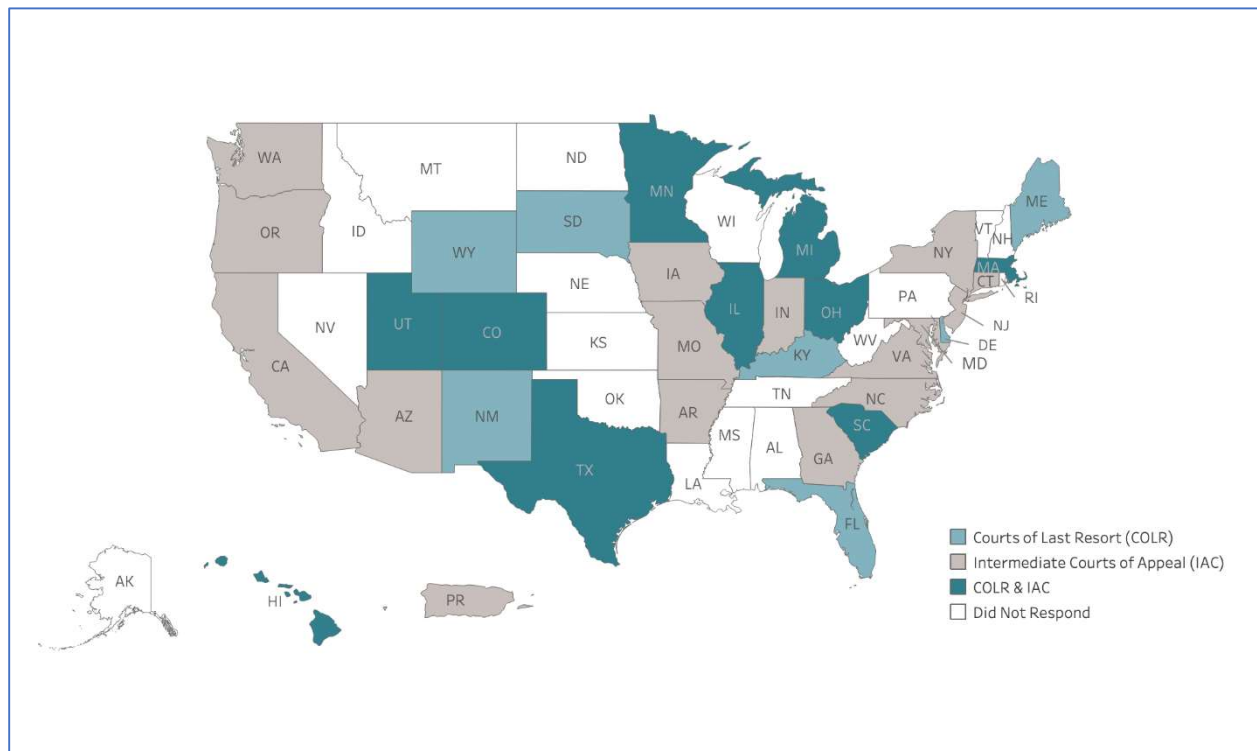
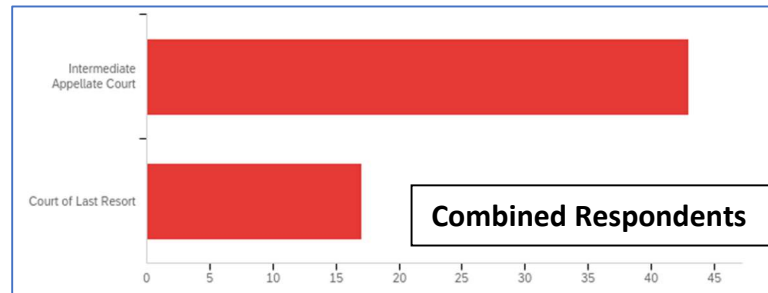
The data does identify a number of areas in which state appellate courts have responded in a reasonably consistent way across the country. These include:

- 88% of intermediate appellate courts and 76% of courts of last resort have primarily or somewhat returned to the appellate courthouse.
- 46% of intermediate appellate courts and 50% of courts of last resort expect to be conducting mixed-format oral arguments in the future.
- Both levels of appellate courts expressed a high degree of satisfaction, across all personnel groups, with working remotely.

There are also some distinct variations identified in the data, such as:

- 91% of combined appellate courts report having a "Return to Courthouse" plan. However, among those courts, 58% said the plan is "informal" rather than written.
- 43% of combined appellate courts expect that future remote oral arguments will be scheduled "On court discretion alone" while 57% will do so "Upon request from counsel."

The 60 respondents<sup>1</sup> to the Appellate Courts – Reopening the Courthouse survey included **17 courts of last resort** and **43 intermediate appellate courts** cumulatively representing **32 states and territories**.



This document provides a summary of the survey responses, both quantitative and related descriptive comments, and includes observations from the workgroup members. For some questions, responses were split between courts of last resort and intermediate appellate courts; for others, the responses are combined.

The survey questions addressed three discrete focus areas: (1) planning for the reopening of the courthouse; (2) conducting appellate oral arguments; and (3) creating remote working plans.

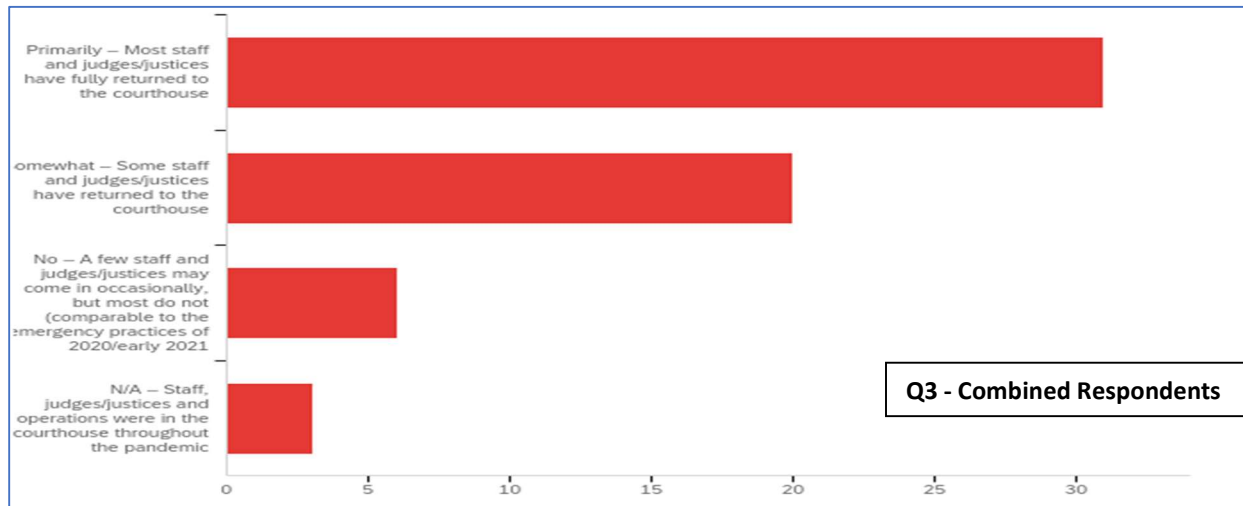
<sup>1</sup> Sixty courts submitted responses to the survey, however, not all respondents answered every question. Some questions were pertinent to each respondent based on the answer to a previous question. Some questions allowed for multiple answers. As a result, the number of responses for individual questions vary.

## 1. Reopening the Courthouse Planning

The initial questions in the survey focused on the planning process for reopening the courthouse.

- Status of reopening the courthouse

When the survey asked, Q3<sup>2</sup> - *Have the appellate court staff/operations returned to the courthouse*, 85% of combined respondents selected *Primarily* or *Somewhat*.



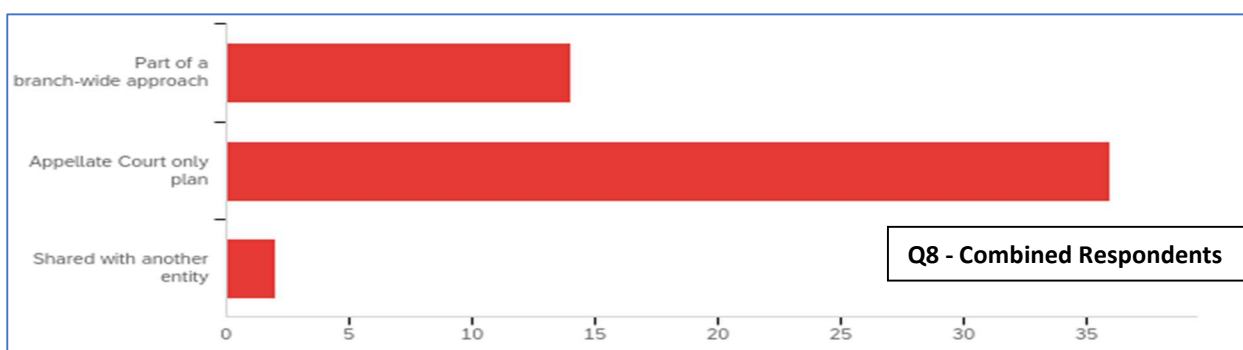
When breaking down the responses between IACs and COLRs, some differences can be seen. For example, over 88% of IAC respondents selected “Primarily” or “Somewhat” while only 76% of COLR respondents made that selection. This is likely explained by the respondents that selected N/A, which was defined as: *Staff, judges/justices and operations were in the courthouse throughout the pandemic*. Almost 12% of COLR respondents selected N/A while only 2% of IACs made that selection.

Q3 – IAC & COLR Respondents				
Answer	IAC		COLR	
	%	Count	%	Count
Primarily – Most staff and judges/justices have fully returned to the courthouse	51.16%	22	52.94%	9
Somewhat – Some staff and judges/justices have returned to the courthouse	37.21%	16	23.53%	4
No – A few staff and judges/justices may come in occasionally, but most do not (comparable to the emergency practices of 2020/early 2021)	9.30%	4	11.76%	2
N/A – Staff, judges/justices and operations were in the courthouse throughout the pandemic	2.33%	1	11.76%	2
Total	100%	43	100%	17

<sup>2</sup> Question numbers are inserted in this document to simplify reference to the attached survey report.

The survey also asked, Q4 - *Is your appellate court currently in planning or completed planning the return of staff judges/justices and operations to the Courthouse*, to which over 58 courts responded with 91% (53) selecting *Yes* and 9% (5) selecting *No*. Among the 5 courts responding *No*, 4 of them indicated (Q10) that such planning was *not needed* and 1 indicated that planning was *expected to begin soon*. The *Yes* responses were broken down with several questions focused on the courts planning efforts.

- a) Of the 53 respondents to Q4 that selected *Yes*, 34% or 18 indicated that the planning was (Q5) *in-process* while 66% or 35 indicated that planning was *completed*.
- b) Of the 35 respondents to Q5 indicating that the planning was completed, 41% or 14, have a (Q6) *written plan* while almost 59%, or 20, have an *informal plan*.
- c) A substantial majority of combined respondents indicated that the reopening plan is an (Q8) *Appellate Court only plan*.



Differences are more apparent when the responses are split between COLR and IAC respondents.

Q8 – IAC & COLR Respondents				
Answer	IAC		COLR	
	%	Count	%	Count
Part of a branch-wide approach	22.22%	8	37.50%	6
Appellate Court only plan	75.00%	27	56.25%	9
Shared with another entity	2.78%	1	6.25%	1
Total	100%	36	100%	16

A sizeable difference in having plans that are *Part of a branch-wide approach* and an *Appellate Court only plan* was reported. This might logically result from the COLR being actively engaged in the branch-wide planning efforts.

- d) With respect to including input from court users in the development of a reopening plan, the survey asked, Q9 - *Did the appellate bar or other stakeholders provide input during the planning process?* Just over 38% (20) of combined respondents selected *Yes*. With this question there is a substantial difference between the IACs and the COLRs.

Q9 – IAC & COLR Respondents				
Answer	IAC		COLR	
	%	Count	%	Count
Yes	44.44%	16	25.00%	4
No	55.56%	20	75.00%	12
Total	100%	36	100%	16

44% of IAC respondents did include appellate bar or other stakeholder input in planning process. In contrast, COLRs included such user input only 25% of the time according to the respondents.

The survey listed a series of health/safety protocols (Q11) and asked respondents whether they are, or will be, addressed in policies with respect to future courthouse use. The health/safety protocols and combined responses are displayed below, in descending order of Yes response rate.

Q11 - Combined Respondents				
Answer	Yes - %	Yes - Count	No - %	No - Count
Availability of PPE and sanitation supplies	92.98%	53	7.02%	4
Mask usage	87.93%	51	12.07%	7
Social distancing	87.50%	49	12.50%	7
Building and workspace cleaning protocols	86.44%	51	13.56%	8
Courthouse exit/entry guidelines	77.19%	44	22.81%	
Break room and kitchen guidelines, e.g., social distancing or masking	76.79%	43	23.21%	13
Building sign-in requirements	56.14%	32	43.86%	25
Reconfiguration of employee workspaces	49.12%	28	50.88%	29
HVAC improvements	48.21%	27	51.79%	29
Vaccination Requirements	38.60%	22	61.40%	35
Directional flow considerations in common/public areas	35.71%	20	64.29%	36
Temperature Screening	30.36%	17	69.64%	39

Seven of the health/safety protocols were included in a follow-up question Q12 asking – *Will the protocols be applicable to: Judges/Justices; Staff; Public; Attorneys?*

Q12 - Combined Respondents				
Answer	Judges/Justices	Staff	Public	Attorneys
Courthouse exit/entry guidelines	30	34	41	41
Building sign-in requirements	6	6	24	25
Vaccination Requirements	18	20	6	7
Temperature Screening	11	12	14	14
Availability of PPE/sanitation supplies	51	51	50	48
Mask usage	47	48	49	48
Social distancing	44	45	46	43

## 2. Appellate Oral Arguments

The second focus area of the survey pertained to the present and expected future methods for conducting oral arguments

The initial question in this focus area asked about the format (Q13 ) presently used to conduct oral arguments and provided four alternative selections. Among 58 combined respondents to this question, 46.5% (27), selected *conducted either remotely or in-person*; 24% (14) selected *conducted in-person only*; and just under 21% (12) selected *conducted remotely only*. 8.6% of combined respondents reported that *in-person oral arguments are scheduled to resume at a later date*.

A substantial difference was seen in several of the responses to this question between the two appellate court levels.

Q13 – IAC & COLR Respondents				
Answer	IAC		COLR	
	%	Count	%	Count
Conducted remotely only	23.81%	10	12.50%	2
Conducted either remotely or in-person	52.38%	22	31.25%	5
Conducted in-person only	16.67%	7	43.75%	7
In-person oral arguments are scheduled to resume at a later date	7.14%	3	12.50%	2
Total	100%	42	100%	16

- IACs were almost twice as likely to be conducting only remote oral arguments (23.8% to 12.5%) and also more likely to be conducting oral arguments either remotely or in-person (52.3% to 31.25%).
- COLRs were almost three times more likely to be conducting only in-person arguments (43.7% to 16.6%).
- The two appellate court levels were reasonably close in the percentage of respondents that indicated in-person oral arguments are scheduled to resume at a later date.

It also appears that the differences with respect to conducting oral arguments will likely continue in the future. The next question focused on the (Q14) appellate court expectations regarding future oral arguments and included the following four alternatives: *conducted in-person only (all judges and all counsel in-person)*; *conducted remotely only*; *conducted in mixed format (some judges/some attorneys in-person and others remote)*; and *conducted either fully remote or fully in-person*.

Q14 – IAC & COLR Respondents				
Answer	IAC		COLR	
	%	Count	%	Count
Conducted in-person only (all judges and counsel in-person)	24.39%	10	31.25%	5
Conducted remotely only	2.44%	1	0.00%	0
Conducted in mixed format (some judges/some attorneys in-person and others remote)	46.34%	19	50.00%	8
Conducted either fully remote or fully in-person	26.83%	11	18.75%	3
Total	100%	41	100%	16

- COLR respondents are more likely to require all judges and counsel to be present for oral arguments (31.2% to 24.3%).
- IAC respondents are more likely to conduct oral arguments in either fully remote or fully in-person options.
- Both levels of appellate courts suggested a fairly even split in the expectation that future oral arguments would be conducted in a mixed format, with some in-person and some remote participants.

The survey then asked several questions about future remote oral arguments, including whether remote oral arguments will be scheduled on court discretion alone or upon request from counsel, who will make that decision, and the conditions under which remote arguments will be allowed.

Regarding scheduling of remote oral arguments (Q15), 42 combined respondents indicated that about 43% of appellate courts would do so *on court discretion alone* while 57% would schedule remote arguments *upon request from counsel*. Differences between IAC and COLR response rates are detailed in the table below.

Q15 – IAC & COLR Respondents				
Answer	IAC		COLR	
	%	Count	%	Count
On court discretion alone	37.93%	11	53.85%	7
Upon request from counsel	62.07%	18	46.15%	6
Total	100%	29	100%	13

How appellate courts make the decision on whether to schedule an oral argument will also be done in a variety of ways. A follow-up question presented to the 18 combined respondents for Q15 who selected *On court discretion alone*, asked: (Q16) *On whose discretion will remote arguments be allowed* and provided 4 selections. These were: *Chief Judge of the court*, *Presiding Judge of the panel*, *Panel majority*, and *Other - Please describe*. The combined and split responses are listed below.

Q16 – Combined, IAC & COLR Respondents						
Answer	Combined		IAC		COLR	
	%	Count	%	Count	%	Count
Chief judge of the court	16.67%	3	18.18%	2	14.29%	1
Presiding judge of the panel	16.67%	3	27.27%	3	0.00%	0
Panel majority	44.44%	8	45.45%	5	42.86%	3
Other: Please describe <sup>3</sup>	22.22%	4	9.09%	1	42.86%	3
Total	100%	18	100%	11	100%	7

<sup>3</sup> The four respondents that selected *Other* provided the following descriptions: 1) The court as a whole, 2) court decision, 3) Supreme Court and 4) majority vote of all justices. Based on these descriptions, the Other selection can be interpreted as an *en banc* decision.



The only significant differences in the remote argument decision process appear to be inherent to the structures of IAC and COLR arguments. Most COLRs hear cases en banc and a relative few use panels for explicit purposes while IACs hear the vast majority of oral arguments in panels.

### 3. Remote Working Arrangements

As a result of the pandemic, most courts strengthened their technological infrastructure, changed practices, and made provisions for judges and staff members to work remotely. The extent of these provisions varied among state appellate courts but likely affected each one to some degree. As planning for courthouse reopening began, it became apparent that many judges and court staff had concluded that remote working offers a variety of benefits to both the court and personally. This third focus area addresses appellate courts' experience with remote working and planning for its future use.

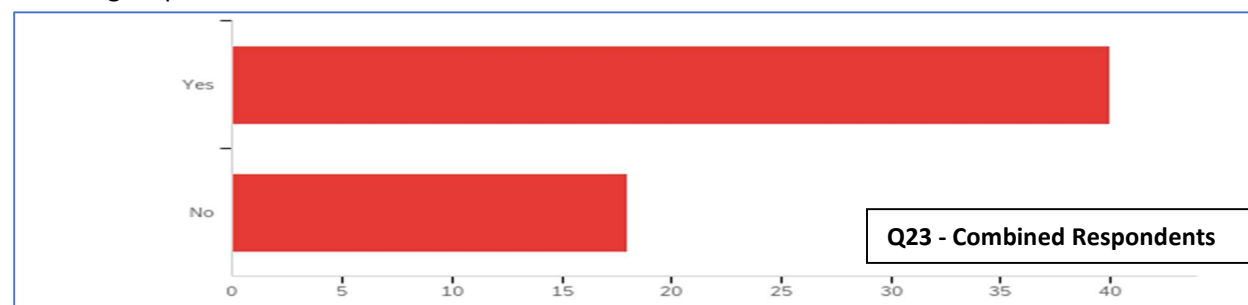
The initial question in this focus area asked respondents to (Q22) ... *rate the court's overall satisfaction level with remote working arrangements among the following groups*. The groups were 1) Clerk's Office Staff, 2) Central Staff Attorneys, 3) Chambers Staff, 4) Judges/Justices, 5) Administrative Staff, and 6) Others.

There is very little variation between the mean scores for each grouping, as shown in the table below.

Groups	Q22 - Combined Respondents - Count							IAC	COLR
	Not at all satisfied	Somewhat satisfied	Neutral	Satisfied	Very satisfied	N/A Unsure	Mean Rating	Mean Rating	Mean Rating
Clerks' Office Staff	2	8	3	17	18	4	3.85	3.86	3.79
Central staff attorneys	0	4	3	13	29	7	4.37	4.35	4.42
Chambers staff	1	6	2	20	21	4	4.08	4.11	4.00
Judges & Justices	0	9	2	18	24	1	4.08	4.08	4.08
Administrative staff	2	3	9	24	16	1	3.91	3.93	3.86
Other	0	0	0	0	0	4	-	-	-

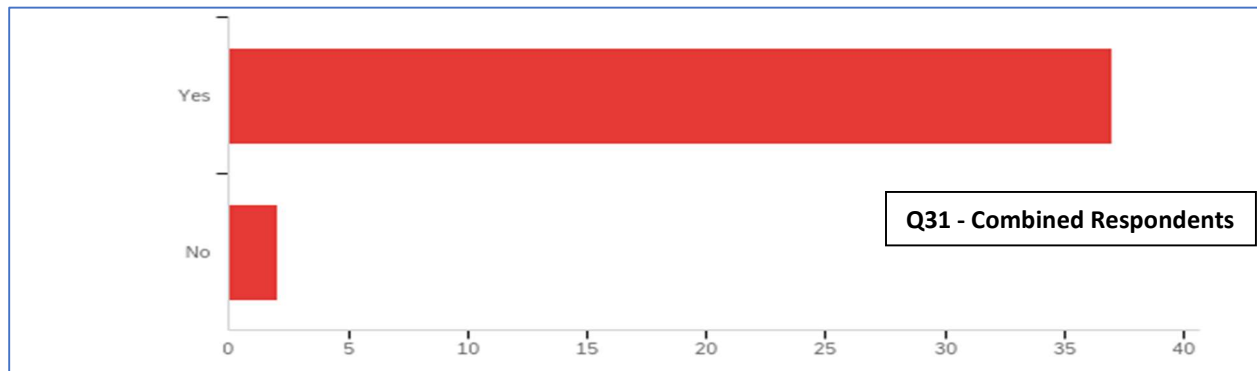
Note: Rating scores are quantified as: Not at all Satisfied = 1; Somewhat Satisfied = 2; Neutral = 3; Satisfied = 4; Very Satisfied = 5. The N/A – Unsure counts were excluded in the calculation of the mean ratings for these responses.

The survey then asked (Q23) *Does the appellate court have a Remote Work Policy?* And received the following responses.

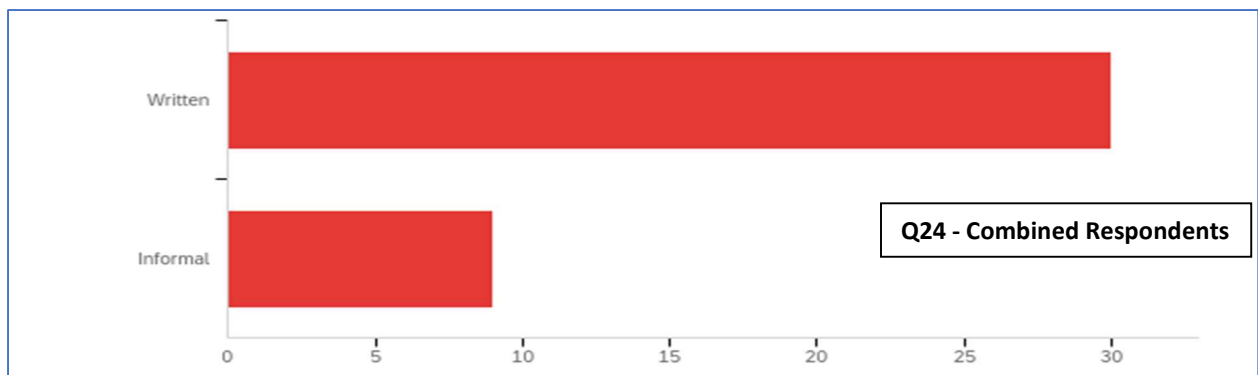


Three follow up questions were asked of the 40 combined respondents that selected Yes to Q23.

Q31 - *Does the Court's remote work policy provide for ongoing remote work arrangements for staff?*



Q24 - *Is the policy written or informal?*



Q26 - The Remote Work Policy applies to: (select affected groups)

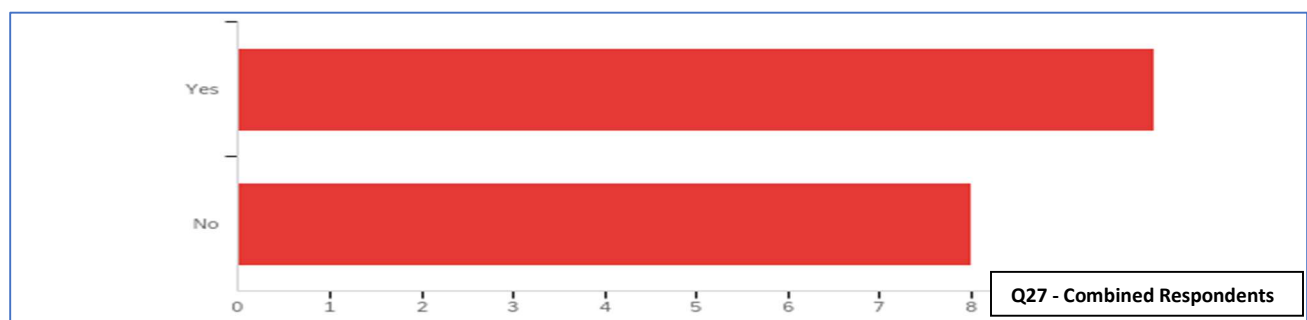
Q26 – Combined Respondents		
Group	%	Count
Everyone in the Appellate Court(s)	45.00%	18
Judges/Justices	2.50%	1
Chambers staff	2.50%	1
Central Staff Attorneys	2.50%	1
Clerk's Office staff	7.50%	3
AOC Staff	7.50%	3
Other (please describe)	32.50%	13
Total	100%	40

Descriptions provided by respondents that selected *Other* include:

- i. The policy applies to most staff, but it is job dependent - not all positions can work remotely.
- ii. The policy applies to all but the Justices. Department heads are given the discretion to determine remote work based on the unique needs of the department.
- iii. Justices have discretion over their staff policies.
- iv. Justices and staff attorneys.
- v. Applies to everyone except judges.
- vi. At the Court of Appeals, we decided that the policy applies to all of our judges and staff.
- vii. Everyone except if responsibilities cannot be done from home (e.g., court officers).
- viii. All AOC and judiciary employees.
- ix. We are in the process of developing a remote work policy for post-pandemic. Currently, there is a branch-wide policy for all court personnel that sets out procedures but does not designate job classifications that may work remotely.
- x. Except chambers.
- xi. All non-management employees, but the policy permits only 1 day of remote work per week.
- xii. Except judges.
- xiii. Applies to all certified staff (Central Staff Attorneys and Clerk's Office Staff). Judges are encouraged but not required to follow for discretionary staff.

One follow-up question (Q27) was asked of the 18 combined respondents that selected *No* to Q23.

Q27 - Is such a plan being considered?



## **Conclusion**

This survey and report present a snapshot on the many issues affecting efforts to reopen appellate courthouses as of late 2021 and is not intended to suggest a preferred or optimal path forward. The data herein may help appellate court leaders by confirming their own choices, cause reflection on matters yet to be decided, or help to shed light on future steps that an appellate court may choose to take. The RRT Appellate Courts Workgroup is hopeful that it achieves those goals.

NOTE: A more complete presentation of the full set of responses to the “Appellate Courts Return to the Courthouse Survey” can be found in the companion volume titled, “Reopening the Appellate Courthouse – Statistical Report.”