

Appellate Courts

Appellate Case Conferencing amid the COVID-19 Pandemic

A Pandemic Resource from CCJ/COSCA

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In March 2020, state appellate courts began rescheduling oral arguments and preparing to conduct them remotely, restricting access to courthouses, and establishing remote working arrangements for both judges and staff. One of the appellate functions that was directly impacted is case conferencing. While case conferencing may not be as well-known to those outside the courts, it is a critical aspect of appellate decision-making. Case conferencing is the process by which the appellate judges jointly share their views and perspectives about the issues on appeal. Usually, the judges will vote on the case and assign responsibility for drafting an opinion to a member of the majority. In many state appellate courts, case conferences are conducted immediately after the cases are argued. Prior to the COVID-19 pandemic and the prevalence of remote oral argument, case conferences often took place in a room adjacent or near the courtroom with all judges in-person.

As judges and staff increasingly did their work remotely, and courts quickly built or adapted the technological infrastructure for remote oral arguments, case conferences also moved to remote platforms. To assess the effect of conducting case conferences on the work of appellate judges, the RRT-PPP Appellate Courts Workgroup, with the support of CCJ and CCJSCA, surveyed appellate court justices and judges across the country during October 2020. Respondents to the case conference survey included 24 supreme court justices and 65 intermediate court judges cumulatively representing 27 states and territories. In a separate appellate court leadership survey conducted by the workgroup, 89% of 19 CoLR respondents indicated that case conferences always or primarily in-person before the pandemic. During the pandemic, those answers flipped to 89% of case conferences always remote, email or a roughly equal mix of remote and in-person. The comparable responses for 21 IAC respondents was 62% always in-person before the pandemic and 95% always remote and email during the pandemic. Based on an initial review of this data by the workgroups case conferencing subcommittee, several follow-up questions were circulated among 13 CoLR and 20 IAC respondents who indicated a willingness to participate further. A summary of the key takeaways in the responses to the various surveys are presented on the following pages.

Key Takeaway 1: *In the courts of last resort and the intermediate appellate courts, responding appellate justices and judges report that remote case conferences are both efficient and effective.*

(Case Conference Survey) In my personal opinion, the discussions in remote case conferences are:

	CoLR	IAC
Always inefficient – the discussions are unfocused and do not stay on task	0	1
Usually inefficient – the discussions are mostly unfocused and usually do not stay on task	1	1
Usually efficient – the discussions are mostly focused and usually stay on task	14	39
Always efficient – the discussions are focused and stay on task	9	24

(Case Conference Survey) In my personal opinion, remote case conferences are:

	CoLR	IAC
Always ineffective – issues are not adequately discussed, and differences are not communicated well	0	1
Generally ineffective – issues are discussed but thoughts and ideas are not communicated clearly	1	1
Usually effective – issues are discussed, and differences are usually communicated well	15	39
Always effective – issues are carefully discussed, and issues are communicated well	8	24

Almost all appellate justices and judges responding indicated that remote case conferencing is both efficient and effective.

Comments submitted by the three respondents who reported that remote case conferences are inefficient and ineffective primarily referred to how the remote case conferences were conducted. They provided critiques that remote discussions:

- tend to be brief and abrupt
- go quickly without a full examination of the matter
- include lots of dead silence

Key Takeaway 2: *The respondents identified advantages to remote case conferencing especially regarding convenience, ease of scheduling, and use of judicial time. Disadvantages identified were the adequacy of technological infrastructure and ineffectively incorporating norms of interpersonal communications.*

(Case Conference Survey) In my personal opinion, the top 3 advantages of remote case conferences relative to in-person conferences are:

	CoLR	% of 24 CoLR Respondents	IAC	% of 65 IAC Respondents
Personal Convenience	16	67%	45	69%
Ease of Scheduling	14	58%	38	58%
Good Use of All Judge's Time	11	46%	34	52%
Cost Savings	6	25%	29	44%
Other – please briefly describe	11	46%	15	23%

Personal convenience, ease of scheduling, and good use of a judge's time were the top three selections for both levels of appellate courts. Cost savings had a high selection rate among IAC respondents but not so much with CoLR respondents. Those respondents selecting "Other" were asked to provide explanatory comments and among the 11 CoLR respondents, five listed health safety with respect to COVID-19 and maintaining social distancing; two pointed out that judges could participate even when travelling; one noted that continued use of remote technologies may cause more trial judges from outlying areas to consider applying for appellate court vacancies; one commented on the effective use of lawyer's time; one remarked that remote conferences are more efficient overall; and one responded "None".

Among IAC respondents selecting "Other"; eight listed health safety with respect to COVID-19 and social distancing; two listed the ease for lawyer's and litigants; one remarked that remote conferences are more efficient overall; one could not think of a 3rd advantage; two responded "None"; and one expressed a preference for in-person conferences.

(Case Conference Survey) In my personal opinion, the top 3 disadvantages of remote case conferences relative to in-person are:

	CoLR	% of 24 CoLR Respondents	IAC	% of 65 IAC Respondents
More Distractions	0	0%	20	31%
Frequent Interruptions	0	0%	8	12%
Miscommunication	6	25%	7	11%
Scheduling Difficulty	1	4%	3	5%
Slow or Unstable Technology	14	58%	38	58%
Cybersecurity Concerns	5	21%	21	32%
Less Interpersonal Civility	15	62%	19	29%
Negative Impact on Collegiality	12	50%	30	46%
Other – please briefly describe	6	25%	14	22%

The three most selected disadvantages by the 24 CoLR respondents were: 1) less interpersonal civility, 2) slow or unstable technology, and 3) negative impact on collegiality. Among 65 IAC respondents, they were: 1) slow or unstable technology, 2) negative impact on collegiality and 3) cybersecurity concerns; with less interpersonal civility as a close fourth. Among the six CoLR respondents who selected “Other”; two indicated that remote conference participants “have to repeat things more often” and “difficult to sit in front of a screen all day”; three suggested difficulties with interpersonal relationships and pointed to the “impact on continual ability to develop ongoing personal relationships”, “we are a very collegial group, so I miss the one-on-one, how are you REALLY doing conversations”, and the loss of “interpersonal nuances-empathy, informal interactions”. Among the 14 IAC respondents who selected “Other”; two indicated technological issues; eight described communication or relationship issues such as a “lack of interaction with colleagues and the ease of in-person discussions”, “missing out on how much we learn from each other when we’re casually sitting around together”, “less meaningful dialogue/exchange of ideas; less satisfying problem-solving dynamic” and “miss the in-person community of colleagues”.

Key Takeaway 3: *Most appellate justices and judges reported that they would prefer a return to in-person case conferencing, with remote participation at each judge’s discretion, once the pandemic is over.*

(Case Conference Survey) As the pandemic-related health emergency ends, I would like for my court to:

	CoLR	% of 24 CoLR Respondents	IAC	% of 65 IAC Respondents
Establish a norm of in-person case conferences except in rare circumstances	12	50%	29	45%
Allow remote participation in case conferences at each judge’s discretion	8	33%	26	40%
Establish a norm of remote case conferences	3	13%	5	8%
Do nothing and see how it all plays out	1	4%	5	8%

The consensus among appellate justices and judges is to return to in-person case conferences once the pandemic has ended. Of the CoLR respondents, 83% prefer to “establish a norm of in-person case conferences except in rare circumstances” or “allow remote participation in case conferences at each judge’s discretion.” Among IAC respondents, 85% agreed with those preferences.

(Follow-up Survey) Do you have any ideas or suggestions of how appellate courts can best maintain or improve effectiveness in remote case conferencing?

The follow-up survey included the above question for which 12 respondents answered yes. They also provided the following suggestions:

- Exchange an outline of issues/concerns in advance so everyone can better prepare, and less time is needed in the virtual meeting
- Make sure that the remote experience includes time for chit-chat, sharing of new baby pictures, humor, etc.
- First off, high quality internet connections and video and audio feed are crucial. Our conversations become stunted if someone's remote feed is cutting in and out. Secondly, it is not safe to be in the same room, but we do need to find a way to stay connected, as otherwise people start to feel isolated and not part of a judicial team.
- We have had good luck using Microsoft Teams, and each justice has equipment to work remotely from chambers or home. We set up meetings, and justices can make unscheduled video calls to talk about cases or administrative issues.
- One impediment for our Justices (not our court staff) is their limited tech proficiency. Zoom and other platforms feel very alien to those who are over 70 or so on our bench, and some simply refuse to use the video feature on any platform. This makes contact tense and awkward and is one reason that I try to do more one on one over the phone with those on the far side of the digital divide.
- Regular video meetings are helpful. The host should allow time for informal interactions.
- Send a follow-up email regarding the matters discussed and any resolutions reached. Eliminate distractions during the call, including personal phones.
- There should be an effort to congregate even virtually on a regular basis whether for administrative meetings or just informal social gatherings.
- Pick a time that works best for everyone, which may not always be right after argument when people are working remotely. Start with a little small talk before getting right to business.
- I think it is important that such remote conferencing be on video, so that justices can see one another. I think it is also important that remote conferences be on a schedule, so that everyone makes it a priority and blocks out the time for it. Last, I think such conferences need to leave time for some personal discussion and socializing. Those are what help build collegiality and civility.
- Zoom meetings or 1-1 masked in person meetings
- Regularly scheduled remote interactions would facilitate general discussion rather than conversations that are just focused on resolving dispute. Now remote interaction only occurs when it is "required."

Key Takeaway 4: *Unanimously, all follow-up respondents said that collegiality and civility among judicial colleagues is an essential aspect to having an effective decision-making process in an appellate court.*

The follow-up survey asked, “Is collegiality and civility among judicial colleagues an essential aspect to having an effective decision-making process in an appellate court?”, and all 16 respondents said yes. Examples of the comments they provided are listed below:

- If colleagues are not civil or collegial, it can lead to one's ego determining how and when a matter will be reviewed.
- Communication is the key to collaborative thinking and civility, collegiality foster same. Knowledge of another person on a personal level lowers the walls of arrogance, suspicion, and self as the center of the world.
- We need to be able to engage in frank discussions with each other about how cases should be resolved without causing rancor that extends past that case.
- It is crucially important to maintain interpersonal relationships in order to sustain the wellbeing of our judges and staff and the cohesiveness of our court
- Collegiality and civility allow a free and respectful discussion of decisions, and that results in better decisions.
- We rely on each other to timely respond to issues so that we can get decisions out in a timely manner while they are fresh in our minds. Lack of collegiality can lead to splintered opinions and divisive language in separate opinions.
- Engaging with colleagues on a personal level keeps communication open. And being willing to hear a colleague's viewpoint encourages dialogue essential to the decision-making process.
- Collegiality and civility promote productive discussion of cases, including when there is a dissenting opinion, often resulting in compromise and consensus. Other times, it allows all authoring justices to address analytical weaknesses in their own opinions.
- So that colleagues understand that differences in opinion are not personal attacks
- The process is intended to be collaborative and the ability to sit down and chat about a case or an issue is an important part of reaching compromise and consensus.

Key Takeaway 5: *Very few of the responding appellate courts have discussed civility and collegiality in case conferencing or adopted any rules, protocols, or expectations for them.*

(Court Leadership Survey) My court has adopted rules, protocols and expectations regarding the importance of civility and collegiality in case conferencing.

	CoLR	IAC
Yes	2	5
No	16	14
It has been discussed and is being developed	1	0
It has been discussed but is not in process	0	2

Only two of 19 CoLR respondents (11%) and five of 21 IAC respondents (24%) have adopted rules, protocols or expectations for civility and collegiality in case conferences. One additional CoLR has discussed and is developing them while two additional IACs have discussed it but are not developing them.

Key Takeaway 6: *A majority of follow-up respondents reported that they have been able to interact with colleagues for meaningful conversations during the pandemic.*

(Follow-up Survey) During the pandemic, have you been able to interact sufficiently with some or all your colleagues to have meaningful conversations?

	CoLR	IAC
Yes	4	8
No	2	2

Twelve of the sixteen respondents said they have been able to interact sufficiently with colleagues and to have meaningful conversations during the pandemic. In addition, all respondents were asked some further questions to define the types of conversations they had or did not have.

For those who responded 'Yes':

- Two of the four CoLR respondents and three of the eight IAC respondents said these conversations were only to discuss work (case-related and administrative) matters while two of the four CoLR respondents and five of the IAC respondents said the conversations covered both work and personal matters.

- All of these respondents indicated that these interactions consisted of both one-on-one and larger group conversations.
- These respondents were also asked to indicate whether the interactions were helpful in maintaining or improving several areas. They responded as follows:

	CoLR	IAC
Effectiveness in case resolution	4	8
Civility in dealing with your colleagues	2	7
Collegiality among the bench	2	7
Collegiality with staff	2	3

For those who responded 'No', we asked whether they believed that having such conversations would be helpful in maintaining or improving the same areas.

	CoLR	IAC
Effectiveness in case resolution	1	1
Civility in dealing with your colleagues	2	1
Collegiality among the bench	3	1
Collegiality with staff	3	1

Key Takeaway 7: *Almost all respondents said that their court regularly conducted activities and events designed to promote collegiality and civility among colleagues prior to the pandemic and that they were widely perceived as beneficial. However, only a small percentage conducted such activities, even in a modified form, during the pandemic.*

(Follow-up Survey) Prior to the pandemic, did your court regularly or occasionally conduct various activities, events or other practices that promoted collegiality or maintained civility among colleagues?

	CoLR	IAC
Yes	6	9
No	0	1

(Follow-up Survey) Were these activities, events or other practices beneficial?

	CoLR	IAC
Yes	6	9
Maybe	0	0
No	0	0

Examples of the types of activities or events conducted were:

- Social events and parties (holiday, birthday, retirement, etc.)
- Having meals together; lunch or dinner
- Employee appreciation events
- Annual barbeque, golf outing, judicial conference and related activities

(Follow-up Survey) Did the activities, events or other practices continue during the pandemic, even in a modified form?

	CoLR	IAC
Yes	2	3
No	4	7

Those responding 'Yes', were asked to describe the modifications. Examples are listed below:

- Virtual retirement parties and a virtual employee appreciation celebration. The virtual celebrations are not as successful as the virtual meetings. Virtual celebrations feel a bit forced and it is hard to foster informal interactions.
- Administrative meetings (remote)
- Monthly judges meeting (remote)
- Law clerk welcome ceremony (remote)
- We (justices) have started bringing in food and eating together, socially distanced in a large conference room

Key Takeaway 8: *Unanimously, all respondents said that collegiality and civility among judicial colleagues is an essential aspect to having an effective decision-making process in an appellate court.*

The survey asked, "Is collegiality and civility among judicial colleagues an essential aspect to having an effective decision-making process in an appellate court?", and all 16 respondents said yes. Examples of the comments they provided are listed below:

- If colleagues are not civil or collegial, it can lead to one's ego determining how and when a matter will be reviewed.
- Communication is the key to collaborative thinking and civility, collegiality foster same. Knowledge of another person on a personal level lowers the walls of arrogance, suspicion, and self as the center of the world.
- We need to be able to engage in frank discussions with each other about how cases should be resolved without causing rancor that extends past that case.
- It is crucially important to maintain interpersonal relationships in order to sustain the wellbeing of our judges and staff and the cohesiveness of our court
- Collegiality and civility allow a free and respectful discussion of decisions, and that results in better decisions.
- We rely on each other to timely respond to issues so that we can get decisions out in a timely manner while they are fresh in our minds. Lack of collegiality can lead to splintered opinions and divisive language in separate opinions.
- Engaging with colleagues on a personal level keeps communication open. And being willing to hear a colleague's viewpoint encourages dialogue essential to the decision-making process.

- Collegiality and civility promote productive discussion of cases, including when there is a dissenting opinion, often resulting in compromise and consensus. Other times, it allows all authoring justices to address analytical weaknesses in their own opinions.
- So that colleagues understand that differences in opinion are not personal attacks
- The process is intended to be collaborative and the ability to sit down and chat about a case or an issue is an important part of reaching compromise and consensus.

Summary Findings:

The combined responses from justices, judges and court leaders in state appellate courts to the recent surveys addressing remote case conferencing during the pandemic indicate that:

- Remote case conferences are widely perceived to be both effective and efficient in appellate courts.
- Remote case conferences present generally recognized advantages including convenience, good use of time and easy to schedule.
- Remote case conferences present commonly recognized disadvantages that include the current level/inconsistency of technological infrastructure and difficulty incorporating common norms of interpersonal communications.
- Appellate judges and justices strongly agree that collegiality and civility are essential to effective decision-making. However, activities and events designed to promote collegiality, that were regularly conducted prior to the pandemic, have been discontinued or substantially scaled back.
- Very few of the responding appellate courts have had discussions about declining civility and collegiality in case conferences or have established rules, protocols or expectations for them.

These summary findings, and the additional highlights presented in this document provide appellate courts with useful information regarding the benefits and the concerns with remote case conferencing. If additional information is needed, please contact John Doerner of NCSC at: jdoerner@ncsc.org.