



## **Administrative Conference Recommendation 2021-4**

### **Virtual Hearings in Agency Adjudication**

**Adopted June 17, 2021**

The use of video conferencing (VTC) to conduct administrative hearings and other adjudicative proceedings has become increasingly prevalent over the past few decades due to rapid advances in technology and telecommunications coupled with reduced personnel, increased travel costs, and the challenges of the COVID-19 pandemic. As the Administrative Conference has recognized, “[s]ome applaud the use of VTC by administrative agencies because it offers potential efficiency benefits, such as reducing the need for travel and the costs associated with it, reducing caseload backlog, and increasing scheduling flexibility for agencies and attorneys as well as increasing access for parties.”<sup>1</sup> At the same time, as the Conference has acknowledged, critics have suggested that the use of VTC may “hamper communication” among participants—including parties, their representatives, and the decision maker—or “hamper a decision-maker’s ability to make credibility determinations.”<sup>2</sup>

The Conference has encouraged agencies, particularly those with high-volume caseloads, to consider “whether the use of VTC would be beneficial as a way to improve efficiency and/or reduce costs while also preserving the fairness and participant satisfaction of proceedings.”<sup>3</sup> Recognizing that the use of VTC may not be appropriate in all circumstances and must be legally permissible, the Conference has identified factors for agencies to consider when determining whether to use VTC to conduct hearings. They include whether the nature and type of

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<sup>1</sup> Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48795, 48795–96 (Aug. 9, 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

adjudicative hearings conducted by an agency are conducive to the use of VTC; whether VTC can be used without adversely affecting case outcomes or representation of parties; and whether the use of VTC would affect costs, productivity, wait times, or access to justice.<sup>4</sup> The Conference has also set forth best practices and practical guidelines for conducting video hearings.<sup>5</sup>

When the Conference issued these recommendations, most video participants appeared in formal hearing rooms equipped with professional-grade video screens, cameras, microphones, speakers, and recording systems. Because these hearing rooms were usually located in government facilities, agencies could ensure that staff were on site to maintain and operate VTC equipment, assist participants, and troubleshoot any technological issues. This setup, which this Recommendation calls a “traditional video hearing,” gives agencies a high degree of control over VTC equipment, telecommunications connections, and hearing rooms.

Videoconferencing technology continues to evolve, with rapid developments in internet-based videoconferencing software, telecommunications infrastructure, and personal devices.<sup>6</sup> Recently, many agencies have also allowed, or in some cases required, participants to appear remotely using internet-based videoconferencing software. Because individual participants can run these software applications on personal computers, tablets, or smartphones, they can appear from a location of their choosing, such as a home or office, rather than needing to travel to a video-equipped hearing site. This Recommendation uses the term “virtual hearings” to refer to proceedings in which individuals appear in this manner. This term includes proceedings in which

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<sup>4</sup> *Id.* ¶ 2.

<sup>5</sup> Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75114 (Dec. 17, 2014); Recommendation 2011-4, *supra* note 1; *see also* MARTIN E. GRUEN & CHRISTINE R. WILLIAMS, ADMIN. CONF. OF THE U.S., HANDBOOK ON BEST PRACTICES FOR USING VIDEO TELECONFERENCING IN ADJUDICATORY HEARINGS (2015).

<sup>6</sup> For example, some tribunals around the world are now exploring the use of telepresence systems, which rely on high-quality video and audio equipment to give participants at different, specially equipped sites the experience of meeting in the same physical space. *See* Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 326 (2021).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

all participants appear virtually, as well as hybrid proceedings in which some participants appear virtually while others participate by alternative remote means or in person.<sup>7</sup>

Although some agencies used virtual hearings before 2020, their use expanded dramatically during the COVID-19 pandemic, when agencies maximized telework, closed government facilities to the public and employees, and required social distancing.<sup>8</sup> Agencies gained considerable experience conducting virtual hearings during this period,<sup>9</sup> and this Recommendation draws heavily on these experiences.

Virtual hearings can offer several benefits to agencies and parties compared with traditional video hearings. Participants may be able to appear from their home using their own personal equipment, from an attorney's office, or from another location such as a public library or other conveniently located governmental facility, without the need to travel to a video-equipped hearing site. As a result, virtual hearings can simplify scheduling for parties and representatives and may facilitate the involvement of other participants such as interpreters, court reporters, witnesses, staff or contractors who provide administrative or technical support, and other interested persons. Given this flexibility, virtual hearings may be especially convenient for short and relatively informal adjudicative proceedings, such as pre-hearing and settlement conferences.<sup>10</sup>

Because virtual hearings allow participants to appear from a location of their choosing without needing to travel to a facility suitable for conducting an in-person or traditional video hearing, they have the potential to expand access to justice for individuals who belong to certain underserved communities. Virtual hearings may be especially beneficial for individuals whose disabilities make it difficult to travel to hearing facilities or participate in public settings;

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<sup>7</sup> See Jeremy Graboyes, Legal Considerations for Remote Hearings in Agency Adjudications 3 (June 16, 2020) (report to the Admin. Conf. of the U.S.).

<sup>8</sup> *Id.* at 1.

<sup>9</sup> See Fredric I. Lederer & the Ctr. for Legal & Ct. Tech., Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings 7 (June 3, 2021) (report to the Admin. Conf. of the U.S.).

<sup>10</sup> *See id.* at 3.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

individuals who live in rural areas and may need to travel great distances to hearing facilities; and low-income individuals for whom it may be difficult to secure transportation to hearing facilities or take time off work or arrange for childcare to participate in in-person or traditional video hearings. The use of virtual hearings may also expand access to representation, especially for individuals who live in areas far from legal aid organizations.<sup>11</sup>

But virtual hearings can pose significant challenges as well. The effectiveness of virtual hearings depends on individuals' access to a suitable internet connection, a personal device, and a space from which to participate, as well as their ability to effectively participate in an adjudicative proceeding by remote means while operating a personal device and videoconferencing software. As a result, virtual hearings may create a barrier to access for individuals who belong to underserved communities, such as low-income individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals whose disabilities prevent effective engagement in virtual hearings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency. Some individuals may have difficulty, feel uncomfortable, or lack experience using a personal device or internet-based videoconferencing software to participate in an adjudicative proceeding. Some critics have also raised concerns that virtual participation can negatively affect parties' satisfaction, engagement with the adjudicative process, or perception of justice.<sup>12</sup>

Agencies have devised several methods to address these concerns. The Board of Veterans' Appeals conducts virtual hearings using the same videoconferencing application that veterans use to access agency telehealth services. To enhance the formality of virtual hearings, many adjudicators use a photographic backdrop that depicts a hearing room, seal, or flag. Many agencies use pre-hearing notices and online guides to explain virtual hearings to participants.

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<sup>11</sup> See ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR. FOR JUSTICE, *THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT* 9–10 (2020); NAT'L CTR. FOR STATE CTS., *CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL* 37–38 (2016); Lederer, *supra* note 6, at 338; Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 *BUFF. L. REV.* 1275, 1313–14 (2020).

<sup>12</sup> See Lederer, *supra* note 9, at 8–12, 18.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Several agencies provide general or pre-hearing training sessions at which agency staff, often attorneys, can familiarize participants with the procedures and standards of conduct for virtual hearings. Though highly effective, these sessions require staff time and availability.<sup>13</sup>

Virtual hearings can also pose practical and logistical challenges. They can suffer from technical glitches, often related to short-term, internet bandwidth issues. Virtual hearings may sometimes require agencies to take special measures to ensure the integrity of adjudicative proceedings. Such measures may be necessary, for example, to safeguard classified, legally protected, confidential, or other sensitive information, or to monitor or sequester witnesses to ensure third parties do not interfere with their testimony.<sup>14</sup> Agencies may also need to take special measures to ensure that interested members of the public can observe virtual hearings in appropriate circumstances by, for example, streaming live audio or video of a virtual hearing or providing access to a recording afterward.<sup>15</sup>

Recording virtual hearings may raise additional legal, policy, and practical concerns. To the extent that such recordings become part of the administrative record or serve as the official record of the proceeding, agencies may need to consider whether and for what purposes appellate reviewers may consider and rely on them. Creating recordings may trigger obligations under federal information and record-keeping laws and policies, including the Freedom of Information Act,<sup>16</sup> Privacy Act,<sup>17</sup> and Federal Records Act.<sup>18</sup> Agencies may need to review contract terms

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<sup>13</sup> *See id.* at 12, 16–17.

<sup>14</sup> *See id.* at 12, 17.

<sup>15</sup> For evidentiary hearings not required by the Administrative Procedure Act (APA), the Conference has recommended that agencies “adopt the presumption that their hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public interest in open proceedings is outweighed by the need to protect: (a) National security; (b) Law enforcement; (c) Confidentiality of business documents; and (d) Privacy of the parties to the hearing.” Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 18, 81 Fed. Reg. 94312, 94316 (Dec. 23, 2016). Similar principles may also apply in other proceedings, including those conducted under the APA’s formal-hearing provisions. *See Graboyes, supra* note 7, at 22–23.

<sup>16</sup> 5 U.S.C. § 552.

<sup>17</sup> *Id.* § 552a.

<sup>18</sup> 44 U.S.C. § 3101 *et seq.*



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

when considering the use of videoconferencing software applications to determine whether any other entities own or can access or use recordings made through the applications, or whether an agency may obtain ownership and possession of the recording. Steps may be necessary to ensure that agencies do not inadvertently disclose classified, protected, or sensitive information or make it easy for people to use publicly available recordings for improper purposes. Practically, unless agencies store recordings on external servers, such as in the cloud, agencies would need sufficient technological capacity to store the volume of recordings associated with virtual hearings. Agencies would also need personnel qualified and available to manage and, as appropriate, prepare recordings for public access.

This Recommendation builds on Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, and Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, by identifying factors for agencies to consider as they determine when and how to conduct virtual hearings. Specifically, this Recommendation provides best practices for conducting virtual hearings in appropriate circumstances and encourages agencies to monitor technological and procedural developments that may facilitate remote participation in appropriate circumstances.

As emphasized in Recommendation 2014-7, the Conference is committed to the principles of fairness, efficiency, and participant satisfaction in the conduct of adjudicative proceedings. When virtual hearings are used, they should be used in a manner that promotes these principles, which form the cornerstones of adjudicative legitimacy. The Conference recognizes that the use of virtual hearings is not suitable for every kind of adjudicative proceeding but believes greater familiarity with existing agency practices and awareness of the improvements in technology will encourage broader use of such technology in appropriate circumstances. This Recommendation aims to ensure that, when agencies choose to offer virtual



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

hearings, they are able to provide a participant experience that meets or even exceeds the in-person hearing experience.<sup>19</sup>

### RECOMMENDATION

#### Procedural Practices

1. If legally permissible, agencies should offer virtual hearings consistent with their needs, in accord with principles of fairness and efficiency, and with due regard for participant satisfaction. In developing policies regarding virtual hearings, agencies should consider, at a minimum, the following:
  - a. Whether the nature and type of adjudicative proceedings are conducive to the use of virtual hearings and whether virtual hearings can be used without affecting the procedural fairness or substantive outcomes of cases;
  - b. Whether virtual hearings are likely to result in significant benefits for agency and non-agency participants, including improved access to justice, more efficient use of time for adjudicators and staff, reduced travel costs and delays, and reduced wait times and caseload backlogs;
  - c. Whether virtual hearings are likely to result in significant costs for agency and non-agency participants, including those associated with purchasing, installing, and maintaining equipment and software, obtaining and using administrative and technical support, and providing training;
  - d. Whether the use of virtual hearings would affect the representation of parties;
  - e. Whether the use of virtual hearings would affect communication between hearing participants (including adjudicators, parties, representatives, witnesses, interpreters, agency staff, and others);
  - f. Whether the use of virtual hearings would create a potential barrier to access for individuals who belong to underserved communities, such as low-income

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<sup>19</sup> This Recommendation does not take a position on when parties should be entitled to, or may request, an in-person hearing.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals whose disabilities prevent effective engagement in virtual hearings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency, or for other individuals who may have difficulty using a personal device or internet-based videoconferencing software to participate in adjudicative proceedings;
- g. Whether the use of virtual hearings would affect adjudicators' ability to make credibility determinations; and
  - h. Whether there is a reasonable concern that the use of virtual hearings would enable someone to improperly interfere with participants' testimony.
2. Agencies should revise any provisions of their codified rules of practice that unintentionally restrict adjudicators' discretion to allow individuals to participate virtually, when such participation would otherwise satisfy the principles in Paragraph 1.
  3. Agencies should adopt the presumption that virtual hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public interest in open proceedings is outweighed by the need to protect:
    - a. National security;
    - b. Law enforcement;
    - c. Confidentiality of business documents; or
    - d. Privacy of hearing participants.

For virtual hearings that are open to the public, agencies should provide a means for interested persons to attend or view the hearing.

4. If agencies record virtual hearings, they should consider the legal, practical, and technical implications of doing so and establish guidelines to seek to ensure, at a minimum, compliance with applicable information and recordkeeping laws and policies and guard against misuse of recordings.
5. Agencies should work with information technology and data security professionals to develop protocols to properly safeguard classified, legally protected, confidential, and other sensitive information during virtual hearings and also to ensure the integrity of the





## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

hearing process.

6. Agencies that offer virtual hearings should develop guidelines for conducting them, make those guidelines publicly available prominently on their websites, and consider which of those guidelines to include in their codified rules of practice. Such guidelines should address, as applicable:
  - a. Any process by which parties, representatives, and other participants can request to participate virtually;
  - b. Circumstances in which an individual's virtual participation may be inappropriate;
  - c. Any process by which parties, representatives, and other participants can, as appropriate, object to or express concerns about participating virtually;
  - d. Technological requirements for virtual hearings, including those relating to access to the internet-based videoconferencing software used for virtual hearings and any technical suggestions for participants who appear virtually;
  - e. Standards of conduct for participants during virtual hearings, such as those requiring participants to disclose whether they are joined or assisted by any silent, off-camera individuals;
  - f. The availability of or requirement to attend a general training session or pre-hearing conference to discuss technological requirements, procedural rules, and standards of conduct for virtual hearings;
  - g. Any protocols or best practices for participating in virtual hearings, such as those addressing:
    - i. When and how to join virtual hearings using either a personal device or equipment available at another location, such as a public library or other governmental facility;
    - ii. How to submit exhibits before or during virtual hearings;
    - iii. Whether and how to use screen sharing or annotation tools available in the videoconferencing software;
    - iv. How to make motions, raise objections, or otherwise indicate that a



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- participant would like to speak;
- v. How to participate effectively in a virtual setting (e.g., recommending that participants not appear while operating a moving vehicle and, to account for audio delays, that they wait several seconds after others finish talking before speaking);
  - vi. How to indicate that there is a technical problem or request technical support;
  - vii. When adjudicators will stop or postpone virtual hearings due to technical problems and what actions will be taken to attempt to remedy the problems while preserving participants' hearing rights;
  - viii. How to examine witnesses who participate virtually and monitor or sequester them, as necessary;
  - ix. How parties and their representatives can consult privately with each other;
  - x. When participants should have their microphones or cameras on or off;
  - xi. Whether participants may communicate with each other using a videoconferencing software's chat feature or other channels of communication, and, if so, how;
  - xii. How to properly safeguard classified, legally protected, confidential, or other sensitive information;
  - xiii. Whether participants or interested persons may record proceedings;
  - xiv. Whether and how other interested persons can attend or view streaming video; and
  - xv. Whether and how participants or interested persons may access recordings of virtual hearings maintained by the agency.
7. Agencies should provide information on virtual hearings in pre-hearing notices to participants. Such notices should include or direct participants to the guidelines described in Paragraph 6.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **Facilities and Equipment**

8. When feasible, agencies should provide adjudicators with spaces, such as offices or hearing rooms, that are equipped and maintained for the purpose of conducting hearings that involve one or more remote participants. When designing such a space, agencies should provide for:
  - a. Dedicated cameras, lighting, and microphones to capture and transmit audio and video of the adjudicator to remote participants;
  - b. Adjudicators' access to a computer and a minimum of two monitors—one for viewing remote participants and another for viewing the record—and potentially a third for performing other tasks or accessing other information during proceedings; and
  - c. High-quality bandwidth.
9. Agencies should provide adjudicators who appear from a location other than a space described in Paragraph 8 with a digital or physical backdrop that simulates a physical hearing room or other official space.

### **Training and Support**

10. Agencies should provide training for adjudicators on conducting virtual hearings.
11. Agencies should provide adjudicators with adequate technical and administrative support so that adjudicators are not responsible for managing remote participants (e.g., admitting or removing participants, muting and unmuting participants, managing breakout rooms) or troubleshooting technical issues for themselves or other participants before or during proceedings. Agencies should provide advanced training for administrative and technical support staff to ensure they are equipped to manage virtual hearings and troubleshoot technical problems that may arise before or during proceedings.
12. Agencies should consider providing general training sessions or pre-hearing conferences at which staff can explain expectations, technological requirements, and procedural rules



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

for virtual hearings to parties and representatives.

### **Assessment and Continuing Development**

13. Agencies should try to measure how virtual hearings compare with proceedings conducted using other formats, including whether the use of virtual hearings affects procedural fairness or produces different substantive outcomes. Agencies should recognize the methodological challenges in measuring procedural fairness and comparing substantive outcomes to determine whether different hearing formats, apart from other relevant factors and case-specific circumstances, produce comparable results.
14. Agencies should collect anonymous feedback from participants (e.g., using post-hearing surveys) to determine and assess participants' satisfaction with the virtual format and identify any concerns. Agencies should also maintain open lines of communication with representatives in order to receive feedback about the use of virtual hearings. Agencies should collect feedback in a manner that complies with the Paperwork Reduction Act and review this feedback on a regular basis to determine whether any previously unrecognized deficiencies exist.
15. Agencies should monitor technological and procedural developments to seek to ensure that options for individuals to participate remotely in adjudicative proceedings remain current and that those options reasonably comport with participants' expectations.
16. Agencies should share information with each other to reduce costs, increase efficiency, and provide a hearing experience that seeks to ensure fairness and participant satisfaction. To help carry out this Recommendation, the Conference's Office of the Chairman should provide, as authorized by 5 U.S.C. § 594(2), for the "interchange among administrative agencies of information potentially useful in improving" virtual hearings and other forms of remote participation in agency adjudicative proceedings.