



Memorandum

To: Committee on Adjudication
From: Funmi Olorunnipa (Staff Counsel)
Date: March 24, 2011
Re: Draft Recommendation

The following draft recommendation is based on the report prepared by ACUS Attorney Advisor Funmi Olorunnipa entitled “Agency Use of Video Hearings: Best Practices and Possibilities for Expansion.” This draft is intended to facilitate the Committee’s discussion at its March 30, 2011 public meeting, and not to preempt the Committee’s discussion and consideration of the proposed recommendations. In keeping with the Conference’s past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-__

AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION

Draft Preamble

Since the early 1990s, video teleconferencing (also known as “VTC”) has been explored by various entities in the public and private sectors for its potential use in adjudicatory proceedings.¹ In the last 10 years, advances in technology and carrier services coupled with reduced budgets and increased travel costs have made the use of video teleconferencing more attractive to local, state and federal governments. In the public sector, the rise in the use of video teleconferencing by federal and state courts has particularly been noted by academics and has

¹ See e.g., Anderson, Robert, *The Impact of Information Technology on Judicial Administration: A Research Agenda for the Future*, 66 S. Cal. L. Rev. 1762, 1770 (1993).

been the subject of a number of law review articles.² Similarly, in the past 10 years, there has been an increase in the use of video hearings by federal agencies with high volume caseloads. Since pilot programs for video hearings at agencies first began in the early 1990s, the use of video teleconferencing technology has become more advanced, more readily available and less expensive.

Certain federal agencies, such as the Social Security Administration's Office of Disability Adjudication and Review, the Department of Veteran Affairs' Board of Veteran Appeals and the Department of Justice's Executive Office of Immigration Review have taken advantage of video teleconferencing technology and have been using video hearings for years. Other agencies, such as the Railroad Retirement Board, the United States Postal Service, the Center for Medicare & Medicaid Services' Office of Medicare Hearings and Appeals and the Department of Health and Human Services' Departmental Appeals Board, specifically have statutes or regulations allowing for the use of video teleconferencing.³ Similarly, agencies such as the U.S. Merit Systems Protection Board and the Commerce Trademark Trial and Appeal Board use video teleconferencing technology to conduct hearings and/or meetings as a matter of practice under the broad statutory and/or regulatory discretion given to them to hear and adjudicate administrative proceedings.⁴

Despite the fact that some agencies within the federal government have been using video teleconferencing to conduct mass adjudication for years, other agencies have yet to employ video teleconferencing technology to conduct administrative hearings. This may be because the use of video teleconferencing to conduct adjudications is not without controversy. Some applaud the use of video teleconferencing because it offers potential efficiency benefits, such as reducing the need for travel and the costs associated with it, reducing caseload backlog, increasing scheduling

² See, e.g., Sherwin, Richard K., Feigenson, Neal and Spiesel, Christina, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. Sci. & Tech. L. 227, 229 (2006); Catterson, Cathy, *Changes in Appellate Caseload and Its Processing*, 48 Ariz. L. Rev. 287, 295 (2006); Lederer, Fredric, *The Road to the Virtual Courtroom? A Consideration of Today's -- and Tomorrow's -- High Technology Courtrooms*, (State Justice Inst. 1999), reprinted in 50 S.C. L. REV. 799, 801 (2000); Lederer Fredric, *The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 2 J. APP. PRAC. & PROCESS 251 (2000), reprinted in 50 DEFENSE L.J. 773,775 (2001); Rigot, Linda M., *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, 75 Fla. Bar J. 14, 15 (2001).

³ See, e.g., 20 CFR § 260.5; 39 CFR § 966.9; and 42 CFR. § 405.

⁴ See, e.g., 5 U.S.C. § 1204(a)(1) and 37 CFR § 2.129(a).

flexibility for the courts and attorneys and increasing access to the courts for litigants.⁵ Critics, however, have suggested that hearings conducted by video may hamper communication between a party and the decision-maker; hamper the communication between a party and their attorney; and/or hamper decision-maker's ability to make credibility determinations.⁶

Recognizing both the praise and critique of the use of video teleconferencing in adjudicatory proceedings, the Administrative Conference of the United States ("the Conference") issues this Recommendation regarding expansion of the use of video hearings in federal agencies only where agencies have conducted a necessary analysis of the costs and benefits of video hearings and determined that the use of video hearings at a given agency would be beneficial in leading to increased efficiency and/or reduction in the cost of adjudications. This Recommendation is in line with the Administrative Conference's statutory mandate of making improvements to the regulatory and adjudicatory process by reducing unnecessary litigation, and improving the effectiveness and fairness of applicable laws. *See generally*, the Administrative Conference Act, 5 U.S.C §§ 591-596. Accordingly, this Conference Recommendation is directed at those agencies with high volume caseloads that do not currently use video hearings as a regular practice in their adjudicatory proceedings and that may benefit from the use of video hearings on a regular basis to increase efficiency and reduce costs through the use of technology. This Recommendation is also intended to set forth criteria that agencies considering the use of video hearings should consider when determining whether to use video hearings. For agencies that determine that video hearings would be beneficial, this Recommendation is also intended to set forth best practices advice, given in part by agencies that currently use video hearings and provided to the Conference during the course of conducting research for this Recommendation.

⁵ *See* Dunn, Meghan and Norwick, Rebecca, Federal Judicial Center Report of a Survey of Videoconferencing in the Court of Appeals (2006), pp. 1-2, *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/\\$file/vidconca.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/$file/vidconca.pdf).

⁶ *See* American Bar Association's Commission on Immigration Report entitled "*Reforming the Immigration System*" (2010), pp. 2-26-2-27.

Draft Recommendation

- 1. Agencies with high volume caseloads should consider using video conferencing technology to conduct hearings.**
- 2. Agencies considering using video conferencing technology to conduct hearings should consider the following non-exclusive criteria when determining whether using video conferencing to conduct hearings would be a beneficial way to increase efficiency and/or reduce the costs of adjudications:**
 - a. Whether the nature and type of hearings conducted by the agency are conducive to the use of video conferencing technology.
 - b. Whether video conferencing technology can be used without having any effect on the outcome determination of cases heard by an agency.
 - c. Whether the agency's budget would allow for investment in adequate technology given the costs of video conferencing technology.
 - d. Whether the use of video hearings would create fiscal cost-savings, such as the savings associated with reductions in the amount of personnel travel, non-fiscal cost-savings, such as the savings associated with increased productivity resulting from reductions in personnel time spent on travel, and other benefits such as the reduction in the wait time for a hearing.
 - e. Whether users of video hearings, such as administrative law judges, hearing officers and administrative staff, parties and attorneys representing parties, would find the use of video hearings beneficial.
 - f. Whether the agency's facilities and administration, both national and regional (if applicable), are equipped to handle the technology and administration required for video hearings.
 - g. Whether the use of video hearings would adversely impact representation of a party at a hearing and/or communication between the various individuals present at a hearing (parties, judges, hearing officers or administrative staff, and attorneys representing parties)
- 3. Agencies with high volume caseloads who decide to use video conferencing technology to conduct hearings should consider the following best practices advice:**

- a. Agencies should offer the use of video hearings on a voluntary basis and allow parties to have an in-person hearing if a party chooses to do so.
- b. Agencies should periodically evaluate the use of video hearings to make sure that the use is outcome-neutral (i.e. does not affect the decision rendered in a party's case) and that the use is meeting the needs of the users of video hearings.
- c. Agencies contemplating the use of video hearings should solicit feedback and comments (possibly through the notice-and-comment rulemaking process) about the use of video hearings from those who would use them regularly (e.g. administrative law judges, hearing officers and other administrative staff, parties and members of the private bar (or other party representatives)).
- d. Agencies should thoroughly investigate which types of video teleconferencing technology would be most appropriate for their case management needs and invest in the most adequate and up-to-date technology.
- e. Agencies interested in video hearings should start with a pilot program which uses video hearings on a smaller scale within the agency and evaluate the pilot program before moving to a wider use of video hearings.
- f. Agencies should have structured training at the outset of implementation of the use of video hearings and should have technical support available for troubleshooting and implementation questions.
- g. Agencies interested in video hearings should consult the staff of the Administrative Conference of the United States and/or officials at other agencies who have used video hearings for guidance, advice and resources regarding video hearings.