



## **Agency Use Of Video Hearings: Best Practices And Possibilities For Expansion**

### **Committee on Adjudication**

#### **Proposed Recommendation | June 16-17, 2011**

1           Since the early 1990s, video teleconferencing technology (“VTC”) has been explored by  
2 various entities in the public and private sectors for its potential use in administrative hearings  
3 and other adjudicatory proceedings.<sup>1</sup> In the last 10 years, advances in technology and carrier  
4 services coupled with reduced personnel and increased travel costs have made the use of VTC  
5 more attractive to local, state and federal governments. The rise in the use of VTC by federal  
6 and state courts has also been noted by academics.<sup>2</sup> Similarly, in the past 10 years, there has  
7 been an increase in the use of video hearings by federal agencies with high volume caseloads.  
8 Since pilot programs for video hearings at agencies first began in the early 1990s, VTC  
9 technology has become more advanced, more readily available and less expensive.

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11           Certain federal agencies, such as the Social Security Administration’s Office of Disability  
12 Adjudication and Review (“ODAR”), the Department of Veteran Affairs’ Board of Veteran  
13 Appeals (“BVA”) and the Department of Justice’s Executive Office for Immigration Review  
14 (“EOIR”) have taken advantage of VTC for various adjudicatory proceedings. For example, in  
15 2010, ODAR conducted a total of 120,624 video hearings, and a cost-benefit analysis conducted  
16 for the agency by outside consultants found that ODAR’s current use of video hearings saves

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<sup>1</sup> 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).

<sup>2</sup> 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).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

17 the agency a projected estimated amount of approximately \$59 million dollars annually and  
18 \$596 million dollars over a 10-year period. A study by the agency has also determined that the  
19 use of VTC has no effect on the outcome of cases.

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21 Other agencies, such as the Railroad Retirement Board, the United States Postal Service,  
22 the Department of Health and Human Services' Office of Medicare Hearings and Appeals,  
23 specifically have statutes or regulations allowing for the use of video conferencing.<sup>3</sup>  
24 Similarly, agencies such as the U.S. Merit Systems Protection Board and the Commerce  
25 Trademark Trial and Appeal Board use VTC to conduct administrative hearings and other  
26 adjudicatory proceedings as a matter of practice under the broad statutory and/or regulatory  
27 discretion given to them.<sup>4</sup>

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29 Despite the fact that some agencies within the federal government have been using VTC  
30 to conduct mass adjudications for years, other agencies have yet to employ such technology.  
31 This may be because the use of VTC for administrative hearings is not without controversy.  
32 Some applaud the use of VTC by administrative agencies because it offers potential efficiency  
33 benefits, such as reducing the need for travel and the costs associated with it, reducing  
34 caseload backlog, and increasing scheduling flexibility for agencies and attorneys as well as  
35 increasing access for parties.<sup>5</sup> Critics, however, have suggested that hearings and other  
36 adjudicatory proceedings conducted by video may hamper communication between a party  
37 and the decision-maker; may hamper communication between a party and their attorney or

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

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

<sup>5</sup> 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).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

38 representative; and/or may hamper a decision-maker's ability to make credibility  
39 determinations.<sup>6</sup>

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41 Recognizing both the praise for and critique of the use of VTC in administrative hearings  
42 and other adjudicatory proceedings, the Administrative Conference of the United States ("the  
43 Conference") issues this Recommendation regarding the use of VTC in federal agencies with  
44 high volume caseloads. The Conference has a long standing commitment to the values inherent  
45 in the agency adjudicatory process: efficiency, fairness and acceptability/satisfaction.<sup>7</sup> These  
46 values should drive decisions to use VTC. Therefore, this Recommendation suggests that  
47 agencies should use VTC only after conducting an analysis of the costs and benefits of VTC use  
48 and determining that such use would improve efficiency (i.e. timeliness and costs of  
49 adjudications) and would not impair the fairness of the proceedings or the participants'  
50 satisfaction with them. In addition, this Recommendation supports the Conference's statutory  
51 mandate of making improvements to the regulatory and adjudicatory process by improving the  
52 effectiveness and fairness of applicable laws. *See generally* Administrative Conference Act, 5  
53 U.S.C §§ 591-596.

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55 Accordingly, this Recommendation is directed at those agencies with high volume  
56 caseloads that do not currently use VTC as a regular practice in administrative hearings and/or  
57 other adjudicatory proceedings and that may benefit from the use of it to improve efficiency  
58 and/or reduce costs. Agencies with high volume caseloads are likely to receive the most  
59 benefit and/or cost savings from the use of VTC. However, the Conference encourages all

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

<sup>7</sup> See Cramton, Roger C., A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 591-93 (1972) (Professor Cramton is a former Chairman of the Conference); *see also* Verkuil, Paul R., A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976) (describing the values of efficiency, fairness and satisfaction) (Mr. Verkuil is the current Chairman of the Conference). The balancing of these procedural values was undertaken in *Mathews v. Eldridge*, 424 U.S. 319 (1976).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

60 agencies (including those with lower volume cases) to consider whether the use of VTC would  
61 be beneficial as a way to improve efficiency and/or reduce costs while also preserving the  
62 fairness and participant satisfaction of proceedings. This Recommendation sets forth some  
63 non-exclusive criteria that agencies should consider. For those agencies that determine that  
64 the use of VTC would be beneficial, this Recommendation also sets forth best practices  
65 provided in part by agencies currently using VTC.

### **RECOMMENDATION**

66 **1. Federal agencies with high volume caseloads should consider using video**  
67 **teleconferencing technology to conduct administrative hearings and other aspects of**  
68 **adjudicatory proceedings. Agencies with lower volume caseloads may also benefit from this**  
69 **recommendation.**

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71 **2. Federal agencies with high volume caseloads should consider the following non-**  
72 **exclusive criteria when determining whether to use video teleconferencing technology in**  
73 **administrative hearings and other adjudicatory proceedings:**

74 (a) whether an agency's use of VTC is legally permissible under its organic legislation  
75 and other laws;

76 (b) whether the nature and type of administrative hearings and other adjudicatory  
77 proceedings conducted by the agency are conducive to the use of VTC;

78 (c) whether VTC can be used without affecting the outcome of cases heard by the  
79 agency;

80 (d) whether the agency's budget would allow for investment in appropriate and  
81 secure technology given the costs of VTC;

82 (e) whether the use of VTC would create cost savings, such as savings associated  
83 with reductions in personnel travel and with increased productivity resulting  
84 from reductions in personnel time spent on travel;



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 85 (f) whether the use of VTC would result in a reduction of the amount of wait time  
86 for an administrative hearing;
- 87 (g) whether users of VTC, such as administrative law judges, hearing officers and  
88 other court staff, parties, witnesses and attorneys (or other party  
89 representatives), would find the use of such technology beneficial;
- 90 (h) whether the agency's facilities and administration, both national and regional (if  
91 applicable), can be equipped to handle the technology and administration  
92 required for use of VTC;
- 93 (i) whether the use of VTC would adversely affect the representation of a party at  
94 an administrative hearing or other adjudicatory proceeding; and
- 95 (j) whether the communication between the various individuals present at a  
96 hearing or proceeding (including parties, witnesses, judges, hearing officers and  
97 other agency staff, translators and attorneys (or other party representatives))  
98 would be adversely affected.

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100 **3. Federal agencies with high volume caseloads that decide to use video**  
101 **teleconferencing technology to conduct administrative hearings and other adjudicatory**  
102 **proceedings should consider the following best practices:**

- 103 (a) Consider using VTC on a voluntary basis and allowing a party to have an in-  
104 person hearing or proceeding if the party chooses to do so.
- 105 (b) Periodically evaluate the use of VTC to make sure that the use is outcome-  
106 neutral (*i.e.* does not affect the decision rendered) and that the use is meeting  
107 the needs of its users.
- 108 (c) Solicit feedback and comments (possibly through notice-and-comment  
109 rulemaking) about VTC from those who would use it regularly (*e.g.*  
110 administrative law judges, hearing officers and other administrative staff,  
111 parties, witnesses and attorneys (or other party representatives)).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 112 (d) Begin the use of VTC with a pilot program and then evaluate the pilot program  
113 before moving to wider use.
- 114 (e) Structure training at the outset of implementation of VTC use and have technical  
115 support available for troubleshooting and implementation questions.
- 116 (f) Consult the staff of the Administrative Conference of the United States and/or  
117 officials at other agencies that have used VTC for best practices, guidance,  
118 advice, and the possibilities for shared resources and collaboration.