Administrative Conference Recommendation 2014-7

Best Practices for Using Video Teleconferencing for Hearings

Adopted December 5, 2014

Agencies conduct thousands of adjudicative hearings every day, but the format of the hearing, whether face-to-face or by video, has not been analyzed in any systematic way. Some agencies have provided hearings by video teleconferencing technology (VTC) for decades and have robust VTC programs. These programs strive consistently to provide the best hearing experience, even as technology changes. Other agencies have been reluctant to depart from traditional formats. Some are skeptical that hearings may be conducted as effectively via VTC as they are in person. Others are uncertain about how to implement VTC hearings. But all could benefit from an impartial look at the available technologies for conducting adjudications.

The varied agency experiences and concerns reflect the tension between long-established values and technological innovations. Adjudicative hearings must be conducted in a manner consistent with due process and the core values of fairness, efficiency, and participant satisfaction reflected in cases like *Goldberg v. Kelly*[1] and *Mathews v. Eldridge*.[2] At the same time, agencies that have explored the use of technological alternatives have achieved benefits in the effective use of decisionmaking resources and reduction in travel expenses.[3] Upholding core values and making the best use of technology—both in hearings and related proceedings

[1] 397 U.S. 254 (1970).

[2] 424 U.S. 319 (1976); *see also infra* note 8.

[3] In fact, agencies have been directed to increase efficiency through their use of technology. *See* Exec. Order No. 13,589, 76 Fed. Reg. 70,861 (Nov. 15, 2011) (directing agencies to "devise strategic alternatives to Government travel, including . . . technological alternatives, such as . . . video conferencing" and to "assess current device inventories and usage, and establish controls, to ensure that they are not paying for unused or underutilized information technology (IT) equipment, installed software, or services").

such as initial appearances, pre-hearing conferences, and meetings—is the challenge this recommendation seeks to meet.[4]

In 2011, the Administrative Conference adopted Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*.[5] Recommendation 2011-4 had two main purposes. First, it identified factors for agencies—especially agencies with high volume caseloads—to consider as they determined whether to conduct VTC hearings.[6] Second, it offered several best practices agencies should employ when using VTC hearings.[7] The recommendation concluded by encouraging agencies that have decided to conduct VTC hearings to "[c]onsult the staff of the Administrative Conference of the United States . . . for best practices, guidance, advice, and the possibilities for shared resources and collaboration."[8]

This recommendation builds on Recommendation 2011-4 by providing practical guidance regarding how best to conduct VTC hearings. The Administrative Conference is committed to the principles of fairness, efficiency, and participant satisfaction in the conduct of hearings. When VTC is used, it should be used in a manner that promotes these principles,

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[4] While this recommendation refers primarily to adjudication, it may apply to other proceedings as well.

[5] *See* 76 Fed. Reg. 48,795 (Aug. 9, 2011), *available at* http://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion.

[6] Such factors include whether (1) the agency's statute permits use of VTC; (2) the agency's proceedings are conducive to VTC; (3) VTC may be used without affecting case outcomes; (4) the agency's budget allows adequate investment in VTC; (5) the use of VTC would result in cost savings; (6) the use of VTC would result in a reduction in wait time; (7) the participants (e.g., judges, parties, representatives, witnesses) would find VTC beneficial; (8) the agencies' facilities and administration would be able to support VTC hearings; and (9) the use of VTC would not adversely affect either representation or communication. *See id.*

[7] Best practices include (1) offering VTC on a voluntary basis; (2) ensuring that the use of VTC is outcome-neutral and meets the needs of users; (3) soliciting feedback from participants; (4) implementing VTC via a pilot program and evaluating that program before establishing it more broadly; and (5) providing structured training and ensuring available IT support staff. *Id.*

[8] *Id.*

which form the cornerstones of adjudicative legitimacy.[9] The Conference recognizes that VTC is not suitable for every kind of hearing, but believes greater familiarity with existing agency practices and awareness of the improvements in technology will encourage broader use of such technology.[10] This recommendation aims to ensure that, when agencies choose to offer VTC hearings, they are able to provide a participant experience that meets or even exceeds the in-person hearing experience.[11]

RECOMMENDATION

Foundational Factors

1. Agencies should consider the various physical and logistical characteristics of their hearings, including the layout of the hearing room(s) and the number and location(s) of hearing participants (i.e., judge, parties, representatives, and witnesses) and other attendees, in order to determine the kind of video teleconferencing (VTC) system to use. These general principles should guide agencies' consideration:

(a) Video screens should be large enough to ensure adequate viewing of all participants;

(b) Camera images should replicate the in-person hearing experience, including participants' ability to make eye contact with other participants and see the entire hearing room(s). If interpreters are involved, they should be able to see and hear the participants clearly;

[9] *See* EF Int'l Language Schools, Inc., 2014 N.L.R.B. 708 (2014) (admin. law judge recommended decision) (finding "that the safeguards utilized at hearing [to take witness testimony by VTC] amply ensured that due process was not denied to" the party).

[10] For greater detail about how to implement VTC hearings, see Center for Legal and Court Technology, *Best Practices for Using Video for Hearings and Related Proceedings* (Nov. 6, 2014), *available at* http://www.acus.gov/report/best-practices-using-video-teleconferencing-final-report.

[11] This recommendation does not take a position on when parties should be entitled to, or may request, an in-person hearing.

(c) Microphones should be provided for each participant who will be speaking during the hearing;

(d) The speaker system should be sufficient to allow all participants to hear the person speaking. If a participant has a hearing impairment, a system that complies with the Americans with Disabilities Act and other applicable laws should be used to connect to the VTC system;

(e) The record should be adequately captured, either by ensuring that the audio system connects with a recording system, or by ensuring that the court reporter can clearly see and hear the proceeding;

(f) Sufficient bandwidth should be provided so that the video image and sound are clear and uninterrupted; and

(g) Each piece of equipment should be installed, mounted, and secured so that it is protected and does not create a hazardous environment for participants or staff.

2. Agencies should ensure that the hearing room conditions allow participants to see, be seen by, and hear other participants, and to see written documents and screens, as well as, or better than, if all of the participants were together in person. These general principles should guide agencies' consideration in creating the best hearing room conditions:

(a) Lighting should be placed in a way to create well-dispersed, horizontal, ambient light throughout all rooms used in the proceeding;

(b) Noise transference should be kept to a minimum by:

(i) Locating hearing rooms in the inner area of the office and away from any noise or vibration-producing elements (e.g., elevator shafts, mechanical rooms, plumbing, and high-traffic corridors); and

(ii) Installing solid doors with door sweeps, walls that run from floor to ceiling, and sound absorption panels on the walls.

(c) Room décor, including colors and finishes of walls and furniture, should allow for the camera(s) to easily capture the image(s).

3. Agencies should retain technical staff to support VTC operators and maintain equipment.

Training

4. Agencies should provide training for agency staff, especially judges, who will operate the VTC equipment during the hearing. Agencies should also provide a reference chart or "cheat sheet" to keep with each VTC system that provides basic system operation directions that operators can easily reference, as well as a phone number (or other rapid contact information) for reaching technical staff.

5. Agencies should provide advanced training for technical support staff to ensure they are equipped to maintain the VTC equipment and provide support to operators, including during a proceeding if a problem arises.

Financial Considerations

6. The capabilities and costs of VTC systems vary widely. Before purchasing or updating their VTC systems, agencies should first consider their hearing needs (e.g., the needs of hearings conducted by judges at their desks with a single party will be different than the needs of hearings conducted in full-sized federal courtrooms with multiple participants and attendees present at several locations) both now and in the future (e.g., the bandwidth needed today may be different than the bandwidth needed tomorrow).

7. Once agencies have identified their hearing needs, they should consider the costs and benefits of implementing, maintaining, and updating their VTC systems to suit those needs.

(a) Costs to be considered include those associated with purchasing, installing, and maintaining the VTC system; creating and maintaining the conditions necessary to allow participants to see and hear each other clearly; and providing training to staff.

(b) Benefits to be considered include better access to justice by increased accessibility to hearings, more efficient use of time for judges and staff, reduced travel costs and delays, and backlog reductions.

Procedural Practices

8. Judges should consider how to establish and maintain control of the hearing room, such as by wearing robes as a symbol of authority, appearing on the screen before the other participants enter the room(s), requiring parties and representatives to use hand signals to indicate that they would like to speak, and reminding representatives that they are officers of the court.

9. Agencies should install VTC equipment so that judges can control the camera at the other location(s), if possible.

10. Agency staff should ensure that the hearing will run as smoothly as possible by removing any obstacles blocking lines-of-sight between the camera and participants and testing the audio on a regular basis.

Fairness and Satisfaction

11. Agencies should periodically assess their VTC hearings program to ensure that the use of VTC produces outcomes that are comparable to those achieved during in-person hearings.

12. Agencies should maintain open lines of communication with representatives in order to receive feedback about the use of VTC. Post-hearing surveys or other appropriate methods should be used to collect information about the experience and satisfaction of participants.

Collaboration Among Agencies

13. Agencies should consider sharing VTC facilities and expertise with each other in order to reduce costs and increase efficiency, while maintaining a fair and satisfying hearing experience.

14. Agencies that conduct hearings should work with the General Services Administration (GSA) in procuring and planning facilities that will best accommodate the needs of VTC hearings.

Development of a Video Teleconferencing Hearings Handbook

15. The Office of the Chairman of the Administrative Conference of the United States should create a handbook on the use of VTC in hearings and related proceedings that will be updated from time to time as technology changes. The handbook should reflect consultation with GSA and other agencies with VTC hearings expertise. It should be made publicly accessible online to agencies, and include specific guidance regarding equipment, conditions, training that meets industry standards, and methods for collecting feedback from participants.