



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Virtual Hearings in Agency Adjudication

Committee on Adjudication

Proposed Recommendation | June 17, 2021

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from the Council (with sources shown in the margin).

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

12 The Conference has encouraged agencies, particularly those with high-volume caseloads,
13 to consider “whether the use of VTC would be beneficial as a way to improve efficiency and/or

¹ 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).

² *Id.*



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

14 reduce costs while also preserving the fairness and participant satisfaction of proceedings.”³
15 Recognizing that the use of VTC may not be appropriate in all circumstances and must be legally
16 permissible, the Conference has identified factors for agencies to consider when determining
17 whether to use VTC to conduct hearings. They include whether the nature and type of
18 adjudicative hearings conducted by an agency are conducive to the use of VTC; whether VTC
19 can be used without adversely affecting case outcomes or representation of parties; and whether
20 the use of VTC would affect costs, productivity, wait times, or access to justice.⁴ The Conference
21 has also set forth best practices and practical guidelines for conducting video hearings.⁵

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

29 Videoconferencing technology continues to evolve, with rapid developments in internet-
30 based videoconferencing software, telecommunications infrastructure, and personal devices.⁶
31 Recently, many agencies have also allowed, or in some cases required, participants to appear
32 remotely using internet-based videoconferencing software. Because individual participants can
33 run these software applications on personal computers, tablets, or smartphones, they can appear

³ *Id.*

⁴ *Id.* ¶ 2.

⁵ 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 2; *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).

⁶ 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

34 from a location of their choosing, such as a home or office, rather than needing to travel to a
35 video-equipped hearing site. This Recommendation uses the term “virtual hearings” to refer to
36 proceedings in which individuals appear in this manner. This term includes proceedings in which
37 all participants appear virtually, as well as hybrid proceedings in which some participants appear
38 virtually while others participate by alternative remote means or in person.⁷

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

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

Commented [CA1]: Proposed Amendment from Council # 1 (see parallel amendment at lines 200–201 below)

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

⁸ *Id.* at 1.

⁹ See Fredric I. Lederer & the Ctr. for Legal & Ct. Tech., Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings 6–7 (June 3/Apr. 14, 2021) (draft-report to the Admin. Conf. of the U.S.).

¹⁰ See *id.* at 3.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

54 Because virtual hearings allow participants to appear from a location of their choosing
55 without needing to travel to a facility suitable for conducting an in-person or traditional video
56 hearing, they have the potential to expand access to justice for individuals who belong to certain
57 underserved communities. Virtual hearings may be especially beneficial for individuals whose
58 disabilities make it difficult to travel to hearing facilities or participate in public settings;
59 individuals who live in rural areas and may need to travel great distances to hearing facilities;
60 and low-income individuals for whom it may be difficult to secure transportation to hearing
61 facilities or take time off work or arrange for childcare to participate in in-person or traditional
62 video hearings. The use of virtual hearings may also expand access to representation, especially
63 for individuals who live in areas far from legal aid organizations.¹¹

Commented [CA2]: Proposed Amendment from Council # 2 (including new footnote 11)

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

¹¹ 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).

¹² See Lederer, *supra* note 9, at 8–12, 18*id.* at 8, 11, 17.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

77 Agencies have devised several methods to address these concerns. The Board of
78 Veterans' Appeals conducts virtual hearings using the same videoconferencing application that
79 veterans use to access agency telehealth services. To enhance the formality of virtual hearings,
80 many adjudicators use a photographic backdrop that depicts a hearing room, seal, or flag. Many
81 agencies use pre-hearing notices and online guides to explain virtual hearings to participants.
82 Several agencies provide general or pre-hearing training sessions at which agency staff, often
83 attorneys, can familiarize participants with the procedures and standards of conduct for virtual
84 hearings. Though highly effective, these sessions require staff time and availability.¹³

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

94 Recording virtual hearings may raise additional legal, policy, and practical concerns. To
95 the extent that such recordings become part of the administrative record or serve as the official
96 record of the proceeding, agencies may need to consider whether and for what purposes appellate

¹³ See *id.* at ¶1012, 16–17.

¹⁴ See *id.* at ¶112, ¶117.

¹⁵ 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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

97 reviewers may consider and rely on them. Creating recordings may trigger obligations under
98 federal information and record-keeping laws and policies, including the Freedom of Information
99 Act,¹⁶ Privacy Act,¹⁷ and Federal Records Act.¹⁸ Agencies may need to review contract terms
100 when considering the use of videoconferencing software applications to determine whether any
101 other entities own or can access or use recordings made through the applications, or whether an
102 agency may obtain **legal and practical ownership and possession** of the recording. Steps may be
103 necessary to ensure that agencies do not inadvertently disclose classified, protected, or sensitive
104 information or make it easy for people to use publicly available recordings for improper
105 purposes. Practically, unless agencies store recordings on external servers, such as in the cloud,
106 agencies would need sufficient technological capacity to store the volume of recordings
107 associated with virtual hearings. Agencies would also need personnel qualified and available to
108 manage and, as appropriate, prepare recordings for public access.

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

117 As emphasized in Recommendation 2014-7, the Conference is committed to the
118 principles of fairness, efficiency, and participant satisfaction in the conduct of adjudicative
119 proceedings. When virtual hearings are used, they should be used in a manner that promotes
120 these principles, which form the cornerstones of adjudicative legitimacy. The Conference

¹⁶ 5 U.S.C. § 552.

¹⁷ *Id.*, § 552a.

¹⁸ 44 U.S.C. § 3101 *et seq.*

Commented [CA3]: Proposed Amendment from Council #
3



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

121 recognizes that the use of virtual hearings is not suitable for every kind of adjudicative
122 proceeding but believes greater familiarity with existing agency practices and awareness of the
123 improvements in technology will encourage broader use of such technology in appropriate
124 circumstances. This Recommendation aims to ensure that, when agencies choose to offer virtual
125 hearings, they are able to provide a participant experience that meets or even exceeds the in-
126 person hearing experience.¹⁹

RECOMMENDATION

Procedural Practices

- 127 1. If legally permissible, agencies should offer virtual hearings consistent with their needs,
128 in accord with principles of fairness and efficiency, and with due regard for participant
129 satisfaction. In considering whether and when to offer virtual hearings, agencies should
130 consider, at a minimum, the following:
- 131 a. Whether the nature and type of adjudicative proceedings are conducive to the use
132 of virtual hearings and whether virtual hearings can be used without affecting the
133 procedural fairness or substantive outcomes of cases;
 - 134 b. Whether virtual hearings are likely to result in significant benefits for agency and
135 non-agency participants, including improved access to justice, more efficient use
136 of time for adjudicators and staff, reduced travel costs and delays, and reduced
137 wait times and caseload backlogs;
 - 138 c. Whether virtual hearings are likely to result in significant costs for agency and
139 non-agency participants, including those associated with purchasing, installing,
140 and maintaining equipment and software, obtaining and using administrative and
141 technical support, and providing training;
 - 142 d. Whether the use of virtual hearings would affect the representation of parties;
 - 143 e. Whether the use of virtual hearings would affect communication between hearing

¹⁹ 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

- 144 participants (including adjudicators, parties, representatives, witnesses,
145 interpreters, agency staff, and others);
- 146 f. Whether the use of virtual hearings would create a potential barrier to access for
147 individuals who belong to underserved communities, such as low-income
148 individuals for whom it may be difficult to obtain access to high-quality personal
149 devices or private internet services, individuals whose disabilities prevent
150 effective engagement in virtual hearings or make it difficult to set up and manage
151 the necessary technology, and individuals with limited English proficiency, or for
152 other individuals who may have difficulty using a personal device or internet-
153 based videoconferencing software to participate in adjudicative proceedings;
- 154 g. Whether the use of virtual hearings would affect adjudicators' ability to make
155 credibility determinations; and
- 156 h. Whether there is a reasonable concern that the use of virtual hearings would
157 enable someone to improperly interfere with participants' testimony.
- 158 2. Agencies should revise any provisions of their codified rules of practice that
159 unintentionally restrict adjudicators' discretion to allow individuals to participate
160 virtually, when such participation would otherwise satisfy the principles in Paragraph 1.
- 161 3. Agencies should adopt the presumption that virtual hearings are open to the public, while
162 retaining the ability to close the hearings in particular cases, including when the public
163 interest in open proceedings is outweighed by the need to protect:
- 164 a. National security;
165 b. Law enforcement;
166 c. Confidentiality of business documents; or
167 d. Privacy of hearing participants.
- 168 For virtual hearings that are open to the public, agencies should provide a means for
169 interested persons to attend or view the hearing.
- 170 4. If agencies record virtual hearings, they should consider the legal, practical, and technical
171 implications of doing so and establish guidelines to seek to ensure, at a minimum,
172 compliance with applicable information and recordkeeping laws and policies and guard



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 173 against misuse of recordings.
- 174 5. Agencies should work with information technology and data security professionals to
- 175 develop protocols to properly safeguard classified, legally protected, confidential, and
- 176 other sensitive information during virtual hearings and also to ensure the integrity of the
- 177 hearing process.
- 178 6. Agencies that offer virtual hearings should develop guidelines for conducting them, make
- 179 those guidelines publicly available prominently on their websites, and consider which of
- 180 those guidelines to include in their codified rules of practice. Such guidelines should
- 181 address, as applicable:
- 182 a. Any process by which parties, representatives, and other participants can request
 - 183 to participate virtually;
 - 184 b. Circumstances in which an individual's virtual participation may be
 - 185 inappropriate;
 - 186 c. Any process by which parties, representatives, and other participants can, as
 - 187 appropriate, object to or express concerns about participating virtually;
 - 188 d. Technological requirements for virtual hearings, including those relating to access
 - 189 to the internet-based videoconferencing software used for virtual hearings and any
 - 190 technical suggestions for participants who appear virtually;
 - 191 e. Standards of conduct for participants during virtual hearings, such as those
 - 192 requiring participants to disclose whether they are joined or assisted by any silent,
 - 193 off-camera individuals;
 - 194 f. The availability of or requirement to attend a general training session or pre-
 - 195 hearing conference to discuss technological requirements, procedural rules, and
 - 196 standards of conduct for virtual hearings;
 - 197 g. Any protocols or best practices for participating in virtual hearings, such as those
 - 198 addressing:
 - 199 i. When and how to join virtual hearings using either a personal device or
 - 200 equipment available at another location, such as a public library or other
 - 201 governmental facility;

Commented [CA4]: Proposed Amendment from Council # 1 (see parallel amendment at line 47 above)



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 202 ii. How to submit exhibits before or during virtual hearings;
- 203 iii. Whether and how to use screen sharing or annotation tools available in the
- 204 videoconferencing software;
- 205 iv. How to make motions, raise objections, or otherwise indicate that a
- 206 participant would like to speak;
- 207 v. How to participate effectively in a virtual setting (e.g., recommending that
- 208 participants not appear while operating a moving vehicle and, to account
- 209 for audio delays, that they wait several seconds after others finish talking
- 210 before speaking);
- 211 vi. How to indicate that there is a technical problem or request technical
- 212 support;
- 213 vii. When adjudicators will stop or postpone virtual hearings due to technical
- 214 problems and what actions will be taken to attempt to remedy the problem;
- 215 viii. How to examine witnesses who participate virtually and monitor or
- 216 sequester them, as necessary;
- 217 ix. How parties and their representatives can consult privately with each
- 218 other;
- 219 x. When participants should have their microphones or cameras on or off;
- 220 xi. Whether participants may communicate with each other using a
- 221 videoconferencing software’s chat feature or other channels of
- 222 communication, and, if so, how;
- 223 xii. How to properly safeguard classified, legally protected, confidential, or
- 224 other sensitive information;
- 225 xiii. Whether participants or interested persons may record proceedings;
- 226 xiv. Whether and how other interested persons can attend or view streaming
- 227 video; and
- 228 xv. Whether and how participants or interested persons may access recordings
- 229 of virtual hearings maintained by the agency.
- 230 7. Agencies should provide information on virtual hearings in pre-hearing notices to



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

231 participants. Such notices should include or direct participants to the guidelines described
232 in Paragraph 6.

Facilities and Equipment

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

Training and Support

- 247 10. Agencies should provide training for adjudicators on conducting virtual hearings.
- 248 11. Agencies should provide adjudicators with adequate technical and administrative support
249 so that adjudicators are not responsible for managing remote participants (e.g., admitting
250 or removing participants, muting and unmuting participants, managing breakout rooms)
251 or troubleshooting technical issues for themselves or other participants before or during
252 proceedings. Agencies should provide advanced training for administrative and technical
253 support staff to ensure they are equipped to manage virtual hearings and troubleshoot
254 technical problems that may arise before or during proceedings.
- 255 12. Agencies should consider providing general training sessions or pre-hearing conferences



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

256 at which staff can explain expectations, technological requirements, and procedural rules
257 for virtual hearings to parties and representatives.

Assessment and Continuing Development

258 13. Agencies should try to measure how virtual hearings compare with proceedings
259 conducted using other formats, including whether the use of virtual hearings affects
260 procedural fairness or produces different substantive outcomes. Agencies should
261 recognize the methodological challenges in measuring procedural fairness and comparing
262 substantive outcomes to determine ~~assessing~~ whether different hearing formats, apart
263 from other relevant factors and case-specific circumstances, produce comparable results.

Commented [CA5]: Proposed Amendment from Council #
4

264 14. Agencies should collect anonymous feedback from participants (e.g., using post-hearing
265 surveys) to determine and assess participants’ satisfaction with the virtual format and
266 identify any concerns. Agencies should also maintain open lines of communication with
267 representatives in order to receive feedback about the use of virtual hearings. Agencies
268 should collect feedback in a manner that complies with the Paperwork Reduction Act and
269 review this feedback on a regular basis to determine whether any previously
270 unrecognized deficiencies exist.

271 15. Agencies should monitor technological and procedural developments to seek to ensure
272 that options for individuals to participate remotely in adjudicative proceedings remain
273 current and that those options reasonably comport with participants’ expectations.

274 16. Agencies should share information with each other in order to reduce costs, increase
275 efficiency, and provide a hearing experience that seeks to ensure fairness and participant
276 satisfaction. To help carry out this Recommendation, the Conference’s Office of the
277 Chairman should provide, as authorized by 5 U.S.C. § 594(2), for the “interchange
278 among administrative agencies of information potentially useful in improving” virtual
279 hearings and other forms of remote participation in agency adjudicative proceedings.