

DRAFT REPORT FOR THE  
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**VIRTUAL HEARINGS IN AGENCY ADJUDICATION**

Fredric I. Lederer and the Center for Legal & Court Technology  
William & Mary Law School

*This report was prepared for the consideration of the Administrative Conference of the United States. It does not necessarily reflect the views of the Conference (including its Council, committees, or members).*

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**Analysis of Administrative Agency Adjudicatory Hearing Use of  
Remote Appearances and Virtual Hearings**

A Study Conducted on Behalf of and With the Support of  
The Administrative Conference of the United States

Fredric I. Lederer and the Center for Legal & Court Technology

Draft Report

April 13, 2021

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## Introduction

With the advent of the COVID-19 pandemic, federal and state courts and federal adjudicatory agencies suspended most trials and hearings.<sup>1</sup> Faced with the requirement to fulfill their basic mission, many resumed partial operations using computer-based video conferencing,<sup>2</sup> especially for preliminary legal and procedural matters. As time passed, the use of that videoconferencing extended to bench trials in courts and to adjudicatory hearings and proceedings such as settlement meetings, mediations, arbitrations, and status conferences in federal agencies.

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<sup>1</sup> See, e.g., *Courts Suspend Jury Trials in Response to Coronavirus*, U.S. CTS (Mar. 26, 2020); Lorri Montgomery, *State Courts Lead National Effort to Maintain Access to Justice Despite COVID-19 Pandemic*, <https://www.ncsc.org/newsroom/news-releases/2020/state-courts-lead-national-effort-to-maintain-access-to-justice> (last visited Apr. 4, 2021). DEP'T OF LAB., ADMINISTRATIVE NOTICE, *In Re: Temporary Suspension of In-Person Hearings*, Docket No. 2020-MIS-00004 (Mar. 13, 2020), [https://www.oalj.dol.gov/DECISIONS/ALJ/MIS/2020/In\\_re\\_IN\\_RETEMPORARY\\_SUSPE\\_2020MIS00004\\_\(MAR\\_13\\_2020\)\\_080641\\_CADEC\\_PD.PDF?\\_ga=2.101895169.1823014364.1617970027-1904882216.1617970027](https://www.oalj.dol.gov/DECISIONS/ALJ/MIS/2020/In_re_IN_RETEMPORARY_SUSPE_2020MIS00004_(MAR_13_2020)_080641_CADEC_PD.PDF?_ga=2.101895169.1823014364.1617970027-1904882216.1617970027) (“In view of the risks presented by the novel coronavirus COVID-19, the United States Department of Labor, Office of Administrative Law Judges (OALJ) is, effective Monday, March 16, 2020 through Friday, April 10, 2020, suspending all in-person hearings, settlement judge conferences and mediations.”); NAT’L LAB. RELS. BD., *Order Postponing Trials Scheduled for Hearing in May 2020* (Apr. 15, 2020), available at <https://www.acus.gov/sites/default/files/documents/NLRB%20Division%20of%20Judges%20Order%204-15-2020.pdf> (“Due to the coronavirus, all trials scheduled through the end of May 2020 are postponed with the exception of any that can be conducted via video conferencing.”).

<sup>2</sup> See, e.g., DEP'T OF LAB., ADMINISTRATIVE ORDER AND NOTICE, *Continued Suspension of In-Person Hearings Due to COVID-19 National Emergency*, Docket No. 2020-MIS-00008 (June 1, 2020), [https://www.oalj.dol.gov/DECISIONS/ALJ/MIS/2020/In\\_re\\_CONTINUED\\_SUSPENSION\\_2020MIS00008\\_\(JUN\\_01\\_2020\)\\_131401\\_CADEC\\_PD.PDF?\\_ga=2.203099537.1823014364.1617970027-1904882216.1617970027](https://www.oalj.dol.gov/DECISIONS/ALJ/MIS/2020/In_re_CONTINUED_SUSPENSION_2020MIS00008_(JUN_01_2020)_131401_CADEC_PD.PDF?_ga=2.203099537.1823014364.1617970027-1904882216.1617970027) (extending moratorium on in-person hearings indefinitely and extending remote hearings indefinitely); CIVILIAN BD. CONT. APPEALS, *THE CIVILIAN BOARD OF CONTRACT APPEALS VIRTUAL PROCEEDING PROTOCOL*, available at <https://www.cbca.gov/howto/CBCAVirtualProceedingProtocol.pdf> (“Due to circumstances related to the COVID-19 pandemic, the Civilian Board of Contract Appeals (CBCA) is conducting all proceedings, including hearings, arbitrations, and mediations, virtually.”); FED. ENERGY REGUL. COMM’N, *NOTICE TO THE PUBLIC, Notice of Remote Hearings*, Docket No. AD20-12-000 (Apr. 23, 2020), available at <https://www.ferc.gov/sites/default/files/2020-06/Notice%20to%20the%20Public%20Re%20Remote%20Hearings%20%28Issued%20April%2023%2C%202020%29.pdf> (“In light of the existing public health emergency and to protect the health of the public and the individuals who work for the Commission, it is necessary to modify the venue for future hearings by conducting them remotely through video conference software.”); SOC. SEC. ADMIN., *Press Release, Social Security Announces New Online Video Hearings* (Sept. 3, 2020), <https://www.ssa.gov/news/press/releases/2020/#9-2020-1> (introducing Microsoft Teams as a hearing format); *USPTO Update on In-Person Meetings*, U.S. PAT. & TRADEMARK OFF. (Mar. 13, 2020), <https://www.uspto.gov/about-us/news-updates/uspto-update-person-meetings> (“Until further notice, examiner and examining attorney interviews, Patent Trial and Appeal Board (PTAB) and Trademark Trial and Appeal Board (TTAB) oral hearings, and other similar in-person meetings with parties and stakeholders scheduled to take place at USPTO offices on or after Friday, March 13, 2020 will be conducted remotely by video or telephone.”). Of course, so did many other professions and organizations. See, e.g., Laura Landro, *What the Pandemic Taught Us About Telemedicine*, WALL ST. J.: REPORT HEALTHCARE TECH. at R1 (Mar. 29, 2021). Ms. Landro’s reporting is markedly similar to the conclusions contained in this report: “Now as doctors resume in-person visits, virtual care is poised to play a permanent role, as evidence shows not only is it highly convenient, but often works just as well, and sometimes better, for an unexpected range of care.” *Id*

As of this writing, there have also been a small number of remote or virtual jury trials in state and federal courts.

There appears to be a national consensus that remote work using computer-based video conferencing has proven sufficiently successful that much of it will survive the pandemic. As a *Wall Street Journal* report has observed:

Here are two things we can be sure of as people start to return to offices. First, remote work is here to stay. And second it shouldn't look anything like the improvised approach that was hastily thrown together in the face of a global pandemic.<sup>3</sup>

The Administrative Conference of the United States (ACUS) initiated a project to study how federal adjudicatory agencies are using remote appearances and virtual hearings<sup>5</sup> with the intent to propose recommendations for the future. The Center for Legal & Court Technology (CLCT)<sup>4</sup> has prepared this report in response.

## Methodology

Pursuant to its ACUS-approved research plan, while CLCT staff<sup>5</sup> conducted background research, Professor Fred Lederer, Chancellor Professor of Law and Director of CLCT, interviewed senior adjudicators and staff from twelve agencies specified by ACUS,<sup>6</sup> gathering the primary data that is the basis of this report. CLCT staff also planned to attend hearings where possible to better understand how virtual hearings work. This largely will take place between submission of this draft report and the final report.

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<sup>3</sup> Alexandra Samuel, *How to Manage the Hybrid Workplace*, WALL ST. J.: REPORT, WORK FROM HOME, at R1 (Mar. 22, 2021).

<sup>4</sup> A joint initiative of William & Mary Law School and the National Center for States Courts which has, in the Law School's McGlothlin Courtroom, the world's most technologically advanced trial and appellate courtroom. We distinguish between remote appearances in which one or more persons participating in a hearing appears remotely and "virtual" hearings in which all participants are remote. We use the term "videoconferencing" to refer to the technology which permits two-way audio-video communication. We do not address telephonic hearings in this report.

<sup>5</sup> We acknowledge with deep appreciation the assistance of student colleagues Alyssa Pearce, Kazia Nowacki, Cynthia Jue Meng, Will Reach, Amber Rieff, Taylor Lain, and Josh Turiel.

<sup>6</sup> Occupational Safety and Health Review Commission, Department of Labor, Merit Systems Protection Board, Social Security Administration, Department of the Interior, Civilian Board of Contract Appeals, Federal Energy Regulatory Commission, Centers for Medicare and Medicaid Services, Coast Guard, Patent Trial and Appeal Board, and the Board of Veterans Appeals.

We note that due to the constrained time frame for this project, CLCT did not obtain data directly from other adjudicators and staff or counsel, claimants, parties, and witnesses as to their reaction to virtual hearings. Critically, CLCT could not, in the time permitted and with the allocated resources, directly determine the relative utility or accuracy of virtual hearings as compared with traditional in-person hearings although the information gathered supports a conclusion that virtual hearings do not differ in result from in-person hearings.

## **Pre-Pandemic Use of Remote Appearances**

### ***Courts***

The most basic method of remote appearances by counsel before a court has been by telephone. CourtCall, a California firm which provides such services to courts, now augmented by video, has been in business since 1995.<sup>7</sup> At least some federal circuits permitted telephone-based argument before the COVID-19 pandemic.

Remote audio-video appearances largely began with remote first appearances and arraignments in state court criminal cases.<sup>8</sup> Although remote appellate arguments by counsel have been common via videoconferencing for many years in Canada and Australia, in the United States videoconferencing for remote appearances has largely been used, and only then rarely, for witness testimony. Such testimony is authorized by Federal Rule of Civil Procedure 43(a). Remote witnesses have testified in criminal cases as well, but the constitutionality of remote prosecution testimony is unclear in light of the Sixth Amendment's Confrontation Clause.<sup>9</sup>

### ***Agencies***

Prior to the pandemic, a number of federal adjudicatory agencies permitted and sometimes regularly used telephone appearances for parties and/or witnesses. The Department of Labor, for example, continues to use telephone-based hearings exclusively when dealing with Black Lung cases. A number of other agencies, such as the Board of Veterans Appeals, the Patent Trial and Appeal Board, the Merits Systems Protection Board, Coast Guard, and Social Security also used

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<sup>7</sup> See <https://courtcall.com/what-is-courtcall/about/>.

<sup>8</sup> See, e.g., *The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida*, 38 U. MIAMI L. REV. 657 (1984). Federal Rule of Criminal Procedure 5(f) declares that "Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents." After the COVID-19 pandemic hit, Congress expanded federal court use of videoconferencing for criminal cases in the Cares Act, Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 15002, 134 Stat. 281, 527-530 (2020).

<sup>9</sup> Compare *Harrell v. State*, 709 So.2d 1346 (Fla. 1998), cert. denied, 525 U.S. 903 (1998) (holding remote witness testimony from Argentina constitutional), with *United States v. Yates*, 438 F.3d 1307 (11<sup>th</sup> Cir. 2006) (en banc) (holding remote witness testimony from Australia unconstitutional).

audio-video appearances by video conferencing. The Coast Guard used the government's VTC network for such appearances. Generally speaking, however, when videoconferencing was used, adjudicators viewed remote participants from a physical hearing room.

## **Videoconferencing Technology**

Pre-pandemic, some agencies used purpose-built commercial-quality videoconferencing equipment, most notably by Polycom and Cisco Systems. Although modern video-conferencing systems use the Internet for data transmission, at least some agencies such as the immigration courts used the older ISDN (Integrated Services Digital Network System), the equivalent of a number of high-capacity phone lines,<sup>10</sup> at least ostensibly for added security. Although early models of Internet-based system had the capacity to connect ("bridge") to ISDN systems, that capability became far less likely as the years and technology advanced, sometimes isolating some federal agency systems. Overall, as noted above, these systems were used so as to provide the judge or judges located in a courtroom or hearing room with the opportunity to see, hear, and question a remote person, usually a remote witness. In CLCT's experience, for example, Social Security Disability Hearings often used testimony from remote medical and vocational experts who were viewed by the adjudicator, court reporter, claimant and counsel, all in the hearing room. Inasmuch as the hearing room was the central focus for remote appearances, proper lighting, sightlines, and hardware were essential.<sup>11</sup> Notably, this approach required that participants travel to the hearing room location, often a substantial expense.

Skype was one of the earliest widely used computer-based videoconferencing products.<sup>12</sup> When loaded on a notebook or laptop computer, or a tablet with adequate Internet bandwidth, inexpensive and highly portable videoconferencing was now available. As additional companies entered the marketplace, organizations began to use videoconferencing to a greater degree. Critically, this implementation of videoconferencing technology obviated the need not only for expensive hardware but also for centralized physical facilities such as agency hearing rooms. Both judges and lawyers, however, remained reluctant to use videoconferencing extensively for a variety of reasons, including concerns about credibility determinations, a belief that physical presence in

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<sup>10</sup> See Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENTERTAINMENT & TECH. L. 301, 326 (2021).

<sup>11</sup> See, e.g., ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, HANDBOOK ON BEST PRACTICES FOR USING VIDEO TELECONFERENCING IN ADJUDICATORY HEARINGS (December 2015) (prepared by CLCT).

<sup>12</sup> The impact of Apple's FaceTime on people's perceptions of the utility of video communications is hard to gauge. FaceTime as such, however, was not a substantial method for court or agency remote appearances insofar as we know. It likely has had a substantial impact, we assume, on the degree to which people take audio-video communications as normal.

a courtroom or hearing room emphasized the importance of the proceeding, and classic reliance on tradition.

The pandemic forced courts and agencies to use technology, especially videoconferencing, to continue functioning. The number of virtual hearings used by federal agencies varies greatly. The Board of Veterans Appeals reports over 15,000 virtual hearings since the start of the Pandemic. The Department of Labor reports more than one hundred virtual hearings Social Security reports more than three hundred fifty full virtual disability hearings with thousands now scheduled.<sup>13</sup>

Forced to use technology because of the pandemic, judges and lawyers largely have found technology such as remote appearances to be easy, efficient, and cost-effective, leading them to become more positive when considering use of technology. As Michigan Chief Justice Bridget Mary McCormack stated, “The pandemic was not the disruption we wanted, but the disruption we needed.”<sup>14</sup>

After the beginning of the pandemic, the agencies contacted for this study moved to Skype’s descendants—all videoconferencing applications designed to run primarily on computers, tablets, and smartphones. The chosen application varies by agency, but the agencies involved in this study largely use Zoom for Government (“Zoom”), Microsoft Teams, or Cisco’s WebEx.<sup>16</sup> Notably, the Board of Veterans Appeals uses its own application. Most agencies use only one platform, but the Civilian Board of Contract Appeals and the Occupational Safety and Review Commission use both Zoom and WebEx. Although all agency personnel expressed great satisfaction with the usual technical quality of the remote connections,<sup>15</sup> nearly all reported the frequent occurrence of short “glitches” due at least to bandwidth variation. One adjudicator correctly noted that computer application videoconferencing often has audio and video that is inferior to that of smartphones.<sup>16</sup> Further, it should be noted that given delays in application audio transmission, it is difficult to interrupt someone. Instead, it usually is best to wait until someone completes a statement before addressing a question or remark to that person. The Federal Energy Regulatory Commission uses a “three second rule,”—not continuing until the speaker has been silent for at least three seconds in order to avoid crosstalk.

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<sup>13</sup> Immediately after the pandemic began, Social Security conducted disability benefit hearings by telephone. In the last twelve months or so, it has conducted more than 200,000 disability hearings by telephone, although it is now rapidly expanding into greater videoconferencing use.

<sup>14</sup> National Center for State Courts Newsroom, *Pandemic Response, Corona Virus and the Courts* (last visited Apr. 4, 2021). See also David W. Slayton, Tex. Admin. Dir. Off. Ct. Admin., *Keynote Address at the 2020 CLCT Court Affiliates Conference: The Role of Video Technology in the Pandemic Era* (June 1, 2020)<sup>16</sup> All three of these companies are CLCT Participating Companies and provide CLCT with the use of these platforms or other products at no charge.

<sup>15</sup> One adjudicator spoke of the use of Microsoft Teams for hearings as an “intimate almost in-person experience.”

<sup>16</sup> This is because most persons using videoconferencing applications are using notebook or laptop computers or tablets, which were not designed for high-quality video or audio.



Based both on CLCT's own experience and the agencies' experience, no platform is now generally superior to the others. Because of intense competition, distinct features possessed by one tend to be copied by the others.<sup>17</sup> That said, Zoom appears to have the largest market share in the United States, and most application-based video users are comfortable with Zoom.

It should be noted that the various applications are stand-alone products. They provide videoconferencing, now often augmented by audio-video recording and, perhaps an AI-based transcript or captioning feature. They do not integrate into an agency case management system, a preference noted by one agency.

## Human Factors

### *General*

Of all of the human factors that potentially can foreclose remote appearances and virtual hearings, personal wealth and human condition are the most basic. Even if a virtual hearing is legally and pragmatically the same as an in-person hearing, that is of little consequence to a person who cannot afford the equipment and/or bandwidth to participate electronically or whose human condition forecloses the ability to meaningfully participate. Agencies must have the ability and willingness to either provide adequate technological assistance or in-person hearings in these cases.

What if wealth and human condition were not barriers? The effects of videoconferencing on dispute resolution and the people involved in that resolution are largely unknown. That is not to say that members of the legal professions do not have strong opinions about aspects of videoconferencing use; they certainly do, especially when it comes to credibility determinations. But there is little scientific evidence to support most of those opinions.<sup>18</sup> That is especially true when it comes to administrative proceedings given that most research in the general area focuses on criminal proceedings. We do know that insofar as bail and pretrial release proceedings are concerned, that improperly installed technology predictably yields unacceptable results,<sup>19</sup> results

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<sup>17</sup> Microsoft Teams does have one small unique characteristic: when using a photographic backdrop such as an image of a hearing room, the user of that backdrop sees it as a mirror image; remote persons, however, see it correctly.

<sup>18</sup> See note 17 *infra*.

<sup>19</sup> Cook County, Illinois (Chicago) remote bail determinations were stopped because the conditions of release for those who appeared remotely were significantly more onerous than for those who appeared in person. Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010). Professor Lederer, the author of this report, has concluded that the lack of direct visual sight lines between the detainee and judge was the probable cause of this result. This view is bolstered by observation supplied to Professor Lederer by Professor David Tait of the University of Western Sydney University who visited one of the hearings. Interestingly, evaluation of the

which cannot be used as evidence that videoconferencing should not be used in the legal system. Two separate controlled experiments conducted years ago by Professor Kelly Shaver, then of William & Mary, showed no statistically significant differences in damage verdicts in simulated personal injury jury trials regardless of whether key medical experts testified remotely or in person when the expert or the expert's image faced the jurors directly.<sup>20</sup>

Although likely constrained to its facts, one study does raise concerns. Professor Eagly's study of remote immigration proceedings<sup>21</sup> found that detained persons who participated in remote proceedings "exhibited depressed engagement with the adversarial process."<sup>22</sup> In light of Professor Eagly's work, it may be that adjudicators should watch for any evidence that unrepresented parties or claimants appearing by videoconferencing are waiving their rights to an unusual degree.

### **Credibility Determinations**

A fundamental aspect of American dispute resolution is the ability of judges to determine witness truth-telling by observing "demeanor evidence," the appearance and voice of the witness. Most judges and lawyers believe that demeanor can give important clues to whether a person is telling the truth or, in jury selection, to what type of juror that person might be. Traditionally, judges have been deeply concerned about their ability to evaluate demeanor evidence from remote witnesses. Scientific studies have cast doubt on whether judges or jurors actually can determine truth-telling by demeanor evidence.<sup>23</sup> Such evidence, however, is a long-hallowed and important

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use of a software-based "booking tool" in Surrey, England, found that conditions for pretrial release were less demanding in "video court" than in in-person proceedings. PROF. NIGEL FIELDING, PROF. SABINE BRAUN, DR. GRAHAM HIEKE, & CHELSEA MAINWARING, VIDEO ENABLED JUSTICE EVALUATION FINAL REPORT VERSION 12 at 10 (May 2020) (University of Surrey). *But compare* the Surrey Report with E.F. Cimino et al., *Charm City Televised and Dehumanized: How CCTV Bail Reviews Violate Due Process*, U. BALTIMORE L. FORUM (2014) (remote bail reduction hearings less likely to be successful than in-person ones).

<sup>20</sup> Unfortunately, those studies were not published and are reported by Professor Lederer who was present for them.

<sup>21</sup> Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 N.W. U. L. REV. 933 (2015)

<sup>22</sup> [T]hese data uncover a paradoxical result: televideo cases were more likely to result in deportation, yet there was no statistically significant evidence that judges adjudicated deportation cases more harshly over a video screen. Instead, when compared with similar detained in-person cases, detained televideo cases exhibited depressed engagement with the adversarial process. Televideo litigants were less likely to retain counsel, pursue an application for permission to remain lawfully in the United States (known as relief), or seek the right to return voluntarily (known as voluntary departure). Moreover, these televideo versus inperson differences in litigant engagement remained statistically significant even when controlling for numerous factors that could influence case outcomes, including prosecutorial charge type, proceeding type, judge assignment, representation by counsel, nationality, and fiscal year of decision. When compared to similarly situated detained televideo respondents, detained in-person respondents were a remarkable 90% more likely to apply for relief, 35% more likely to obtain counsel, and 6% more likely to apply only for voluntary departure.

*Id.* at 937-38 (footnotes omitted).

<sup>23</sup> See, e.g., Robert Fisher, *The Demeanour Fallacy*, 2014 N.Z. L. REV. 575 (2014). See also Vincent Denault & Miles L. Patterson, *Justice and Non-verbal Communication in a Post-pandemic World: An Evidence-Based*

part of American adjudication. Accordingly, it is important that every adjudicator interviewed in this project reported the ability to adequately evaluate demeanor despite the use of videoconferencing, although a few adjudicators reported concerns when video quality was poor.”

### ***Technology and Technology Competence***

Adjudicators were generally satisfied in the hardware and software that they use for remote appearances and virtual hearings, although two agencies reported inadequate bandwidth when they first attempted to cope with the pandemic by using computer-based videoconferencing. One agency’s adjudicators are restricted in their use of agency hardware and network to ensure that they do not compromise classified material.

As reported in the Findings, all of the agency representatives reported that their adjudicators were competent in the use of their computer-based videoconferencing, if only because of in-agency training and support. Party, claimant, counsel, and witness competence are another matter. Nearly all agencies provide or offer prehearing conferences, often the day before or earlier, to explain hearing protocols and behavioral expectations and to permit remote participants to test their equipment. A number of adjudicators make it clear to counsel that they are responsible for the ability of their witnesses to participate competently. The use of agency staff to conduct prehearing meetings and to assist the adjudicator in conducting the hearing proper means that those staff members must be diverted from their ordinary duties.

### ***Hearing Length***

A number of agencies reported that virtual hearings can take longer than in-person ones, sometimes due to inefficient access to and use of exhibits. One adjudicator suggested that a nine-day hearing might have only taken five days had it been in person. However, judges from multiple agencies mentioned time saved from not having to travel, and one adjudicator suggested that public interest groups seeking to either view proceedings or act as intervenors might be more likely to participate in some hearings if they did not have to pay the cost of travel.

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*Commentary and Cautionary Statement for Lawyers and Judges*, J. NONVERBAL COMMUNICATION (2020), available at <https://link.springer.com/article/10.1007/s10919-020-00339-x> (arguing that hand gestures and other human aspects are part of “communication” which may not be conveyed by videoconferencing. Professor Lederer questions the degree to which the legal system should rely on information which is not considered “evidence” and the implications of formally doing so). Of course, a judge’s *belief* that she or he can determine truth this way could be determinative in a remote proceeding even if erroneous, especially as it is clear that normal “communication” ordinarily includes a great deal of non-verbal content. See Lederer, *supra* note 10, at 323 n.98; Carol Schiro Greenwald, *Maximize Your Brand, The Psychological and Social Differences When Meeting Online*, L. PRACTICE, March/April 2021, 31-35 (“Ninety-three percent of our communication is nonverbal: 55 percent . . . we learn from their body language, 38 percent from their tone of voice and only 7 percent from their words.”); see also Denault & Patterson, *supra*.

A related issue is whether the use of virtual hearings affects the number of hearings proper. Although this was mentioned as a possibility once, no causative evidence seems to exist.

### ***Fatigue***

At least one analysis has confirmed the existence of “Zoom fatigue,” tiredness and more stemming from long-term use of videoconferencing displayed on small screens: “There are four primary aspects of prolonged video chats that contribute to the feeling of video-chat fatigue including: excessive amounts of close-up eye contact, constantly seeing yourself during video chats, video-chats’ effect of reducing usual physical mobility, and increased cognitive load.”<sup>24</sup> Consistent with this, senior members of one agency reported substantial fatigue from all-day virtual hearings lasting more than two or three days. Another agency suggested that fatigue can set in after a half-day of hearing.

### ***Absence of Hearing Room Formality***

In English-derived legal systems, judges ordinarily wear robes and preside in courtrooms designed to suggest to those attending court that the proceedings there are of special importance and necessitate truth-telling. Although often smaller than traditional courtrooms, hearing rooms usually follow the same approach. There has been substantial concern voiced about whether remote appearances and virtual trials and hearings suffer from the physical absence of the courtroom or hearing room. This could yield at least two results: remote participants taking proceedings less seriously and judges feeling a loss of control.<sup>25</sup> The news media have reported on a number of cases of lawyers and others appearing remotely in casual fashion, including from under bedding.<sup>26</sup> Recent reports of a lawyer appearing as a cat because of accidental use of a “cat filter” and a surgeon in scrubs appearing for traffic court from an operating room went viral and are well known. Overall, in this study, adjudicators reported few issues of improper behavior by remote participants during virtual hearings, although origination from locations such as cars were mentioned. One adjudicator reported having to order one agency participant to turn on that person’s camera.<sup>27</sup> Another adjudicator noted that in-person hearings are not free of difficulty.

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<sup>24</sup> AMBER RIEFF, DIFFERENCES BETWEEN IN-PERSON AND VIRTUAL HEARINGS AND HOW TO BEST CONDUCT VIRTUAL ADJUDICATORY HEARINGS n. 71 (Mar. 31, 2021) (paper prepared for this project on deposit with CLCT); *Stanford Researchers Identify Four Causes for ‘Zoom Fatigue’ and Their Simple Fixes*, STANFORD NEWS (Feb. 23, 2021), <https://neuroscience.stanford.edu/news/stanford-researchers-identify-four-causes-zoom-fatigue-and-their-simple-fixes>.

<sup>25</sup> See, e.g., Emma Rowden & Anne Wallace, *Remote Judging: The Impact of Video Links on the Image and Role of the Judge*, 14 INT’L J. L. (2018).

<sup>26</sup> See, e.g., Jacey Fortin, *When Court Moves Online, Do Dress Codes Still Matter?*, N.Y. TIMES (Apr. 15, 2020).

<sup>27</sup> Professor Lederer notes that this is sometimes a problem in teaching remotely. A small number of people vigorously resist turning their cameras on in class even when directed to do so.

Adjudicators, however, did report concerns that proceedings were less formal than when conducted in-person. Generally, when not originating from hearing rooms, adjudicators are using photographic backgrounds placing the judge in a simulated hearing room, frequently complete with the agency seal and the U.S. flag.

### ***Improper Witness Conduct***

As two trial lawyers observed in the ABA's Criminal Justice Section Newsletter:

Virtual trials are more susceptible to improper witness and attorney interaction than typical, in-person trials. For instance, a virtual trial environment hinders counsel's ability to identify, monitor, and control what notes or other materials are within the reach and/or view of a remote witness, and/or whether a witness is receiving emails, text messages, or other communications from an attorney or a party during an examination that would never occur in an actual courtroom.<sup>28</sup>

The lawyers suggest a variety of coping mechanisms including pretrial orders requiring remote witnesses to certify that they are alone when testifying or specifying who else will be with them and having witnesses certify under oath that they have not improperly consulted materials or communicated with others.<sup>29</sup>

A more basic question, for which we do not have an answer, is whether remote witnesses are more likely to lie than in-person witnesses:

We do not know whether the psychological separation from the courtroom that unavoidably accompanies remote testimony affects the willingness to lie. One of the reasons used to justify remote testimony by abused young children after all is to insulate them from the fear that can accompany being in the same courtroom with the defendant. Does the same removal affect other witnesses and if so, how?<sup>30</sup>

### ***Remote Party-Claimant Comfort***

A number of adjudicators noted that some remote participants were likely to be more comfortable in participating from their home than attending an in-person hearing in a hearing room. One adjudicator spoke of the difficulties often inherent in debt collection cases and what she

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<sup>28</sup> *Avoid Losing Control of a Remote Witness: Some Suggestions*, ABA CRIM. JUSTICE SECTION NEWSLETTER, Winter 2021, at 9 (reporting views of Daniel B. McLane and Michael P. Pest of Eckert Seamans).

<sup>29</sup> *Id.*

<sup>30</sup> FREDRIC I. LEDERER, BASIC ADVOCACY AND LITIGATION IN A TECHNOLOGICAL WORLD 96 (2017) (footnote omitted).

viewed as the potentially useful element of a debtor feeling safe in one's home surroundings which could encourage that person to fully present evidence

## **Due Process and Public Access Requirements**

### ***Due Process***

Setting aside the potential impact of statutes and agency regulations,<sup>31</sup> the primary legal question posed by remote appearances and hearings is that of constitutional due process. As Jeremy Graboyes of the Administrative Conference of the United States has written:

The basic guarantee of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner” before an agency deprives a person of a liberty or property interest. With few exceptions, courts have rejected the general argument that agencies inherently deny parties such an opportunity when they compel them to participate by remote means. Courts instead evaluate claims under the familiar three-part rubric of *Mathews v. Eldridge*[, 424 U.S. 319 (1976)]. This framework requires courts to consider (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>32</sup>

Given a virtual hearing context, the key question is: Can a remote party fully participate in the virtual hearing so as to present all relevant evidence, adequately challenge adverse evidence, fully observe proceedings, make appropriate argument, and communicate effectively?

Assuming that the usual in-person adjudicatory hearing satisfies these requirements, pragmatically, the easiest way to answer the question is to ask to what degree does a virtual hearing mirror an in-person hearing. The data collected from adjudicators and other agency staff incident to this study answers that question simply. The ordinary virtual hearing fully accords with due process requirements by providing participating persons with all of the rights and protective procedures present at in-person hearings. Note, however that in any specific case, special circumstances may raise due process issues. That would include a hearing with serious technology

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<sup>31</sup> JEREMY GRABOYES, ACUS, LEGAL CONSIDERATIONS FOR REMOTE HEARINGS IN AGENCY ADJUDICATIONS (June 16, 2020).

<sup>32</sup> *Id.* at 11-12 (footnotes omitted).

issues, such as substantial bandwidth or equipment failures. Further, the involvement of one or more people with conditions (disabilities) that interfere with the ability to fully use videoconferencing likely would necessitate an in-person hearing.

One other matter may be germane. Parties represented by counsel sometimes need to communicate privately with counsel. That could be dealt with simply by having represented parties or claimants appear remotely with their counsel physically present in their location. Given that possibility, appearance from separate locations could be considered a voluntary decision by the parties or claimants. Especially in light of the COVID-19 pandemic, alternative solutions include the use of “breakout rooms,” which allow two or more people to communicate privately while within the videoconferencing application or other electronic communication means such as phone, text, or email. Such communication may necessitate a somewhat longer delay in the hearing than a simple in-person whisper but would not rise to a due process concern.

### ***Public Access***

Although some adjudicatory hearings may be closed to the public, especially when protected or sensitive information is involved, most are legally open, although it seems that few members of the public actually seek access. With the advent of virtual hearings, physical hearing presence is not possible; the hearing exists only in an electronic form. Three principal potential solutions exist to provide public access:

- 1) Members of the public may access the specific hearing, whether in participatory or webinar form<sup>33</sup> and observe it;
- 2) The agency may choose to stream the proceeding; or
- 3) The agency may record the hearing’s audio-video content and make it available from a website.

In all of these variations a member of the public would need to have electronic access to view the proceedings, and we know that many members of the public lack that access. Of course, many people would not be able to afford travel to attend a given in-person hearing either. Notwithstanding that, agencies may wish to provide special solutions for the rare cases in which the public not only has the right of access but persons without the ability to view the hearing have compelling reasons to do so.

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<sup>33</sup> Subject to the “host” who controls the videoconferencing, the individual joining as a participant would have the ability not only to see and hear the proceeding, but also to have his or her presence appear on screen and the potential to speak. If accessing in a “webinar” format, the individual would only be able to see and hear the proceeding and could not make comments or ask questions unless functions similar to “chat” were enabled.

A related issue is the potential need to determine whether specified material is protected by an evidentiary privilege, which ought not to be available to the public. The Federal Energy Regulatory Commission holds special privilege sessions for this purpose.

## Findings

In his interviews of agency adjudicators and staff, Professor Lederer found that:

- 1) Representatives of every agency lauded the use of remote appearances and virtual hearings<sup>34</sup> and expressed without exception the intent to use videoconferencing post-pandemic as appropriate to the agency's needs and goals.

Generally, remote appearances and/or entire virtual hearings are attractive to save time and cost when the adjudicators or others involved in the hearings would otherwise need to travel. Further, some agencies do not have their own hearing rooms and are dependent upon other organizations for hearing locations. The use of virtual hearings obviates the need to locate temporary hearing rooms.

Some agencies such as the Social Security Administration, leave it to the claimant to decide whether to proceed via virtual hearing or to wait for an in-person case. Some agencies by policy use telephone-based hearings for certain types of cases even though videoconferencing could be used.

- 2) *Everyone* interviewed believed that—absent poor bandwidth—the audio and video quality experienced in remote appearances and virtual hearings were ordinarily sufficient to make adequate credibility determinations. As distinct from judging credibility by demeanor evidence, a number of adjudicators evinced concern that remote witnesses could receive off-screen help or interference from other people not visible to the adjudicator or by consulting material not visible to the adjudicator.

Adjudicators from the Occupational Safety and Review Commission emphasized the utility of their use of their Denver hearing room equipped with large (e.g., 84-inch) monitors on which the judge could see remote persons.

- 3) Although remote appearances and virtual hearings are useful, they consistently suffer from minor “glitches” most usually related to short-term bandwidth issues.
- 4) Adjudicators are competent in the use of the needed hardware and software. Some remote persons, often witnesses, sometimes have difficulty with the equipment. No

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<sup>34</sup> The Occupational Safety and Review Commission in particular expressed satisfaction with remote settlement meeting ascribing that success to the use of electronic “breakout rooms.”



one believed that remote appearances or virtual hearings have presented due process problems, although wealth-based disparity could pose such an issue if an individual could not afford videoconferencing capability.

- 5) Although most agencies have unrepresented parties or claimants at hearings, adjudicators report that there have been no significant differences with respect to technology use or hearing result in hearings with unrepresented persons as compared with those with counsel.
- 6) After the initial research and adoption period for those agencies that moved to extensive use of remote appearances and virtual hearings for the first time, the largest cost or problem associated with continuing videoconferencing operations has been staff support, especially for remote users. Most agencies provide for remote persons a preliminary meeting before a scheduled hearing at which staff, often lawyer staff, go over how to properly use the equipment and how to conduct themselves during the hearing. This approach has been highly successful but at the cost of staff time that is outside original planned duties.
- 7) Although videoconferencing applications are superior to telephone-based remote appearances, one agency's representatives suggested that many of its claimants lacked computers for remote video appearances and further that the claimants could be stressed by in-person hearing room or visual appearances. Accordingly, only remote audio might be desirable for some hearings.
- 8) No one reported a remote appearance by a person with disabilities, although one adjudicator interviewed said that he had heard of a remote appearance using American Sign Language. The agency most likely to have remote persons with disabilities, the Social Security Administration, leaves to the claimant the decision to proceed by virtual hearing or to wait for an in-person hearing. Accordingly, self-selection may be at work here.
- 9) Adjudicators from two agencies expressed interest in and need for simultaneous foreign language interpretation. An adjudicator from one agency noted that although consecutive foreign language interpretation worked well, simultaneous interpretation would be better, were it to be available.
- 10) Most agencies require parties and their counsel to submit exhibits in advance of the hearing. During the hearing agency staff can access a given exhibit and display it, although the adjudicator frequently has independent access. Some agencies

customarily permit remote display via screen sharing; others rarely do. At least one does not appear to have the capability to do so. Remote lawyers able to use screen sharing sometimes use electronic annotation capabilities to highlight specific exhibit information.

- 11) No one has experienced an unwarranted intrusion (e.g., “Zoom bombing”) of a hearing. A few adjudicators have experienced individuals, usually witnesses, who have appeared improperly dressed or from an inappropriate location. A number of judges expressed concern that remote persons may be more casual in their demeanor and behavior than when in a formal hearing room.

Most agencies are using photographic backdrops so that the adjudicator appears to be in a formal hearing room. One agency was waiting for assistance from its IT Department to implement the feature.

- 12) Many agencies are using court reporters for at least the hearing record and sometimes to assist in the operation and administration of the hearing. One agency expressed interest in using the application record and transcript feature but only if the data was in the agency’s sole control. CLCT is in discussion with the application company insofar as this is concerned.
- 13) At least one agency has chosen to protect its data and network from cybersecurity threats from malware by having its adjudicators using personal equipment and non-government Internet access for normal hearings.
- 14) Other than wishing for universal familiarity with the use of videoconferencing applications by remote users, reliable and adequate Internet bandwidth everywhere, and/or more support staff, overall, everyone was satisfied with the current operation of virtual hearings and the technology used for them.

## **Recommendations**

### ***Initial Caveats***

Adjudicators from at least one agency emphasized the importance they placed on physically conducting a hearing at the claimant’s location. They believed that this can be a particularly important part of claimant satisfaction and the perception of justice. These are valid concerns and can prioritize in-person hearings even when a virtual one might be more efficient and cost-effective.

The use of agency staff, particularly lawyers, to assist in preparing for and conducting virtual hearings is an additional duty that most agencies did not anticipate in planning personnel staffing requirements. Given that successful remote appearances and virtual hearings may continue to require such support, agencies should consider, if they have not done so already, the long-term non-emergency impact of reallocation of these important human resources.

### ***Recommendations***

- 1) Both remote appearances and virtual administrative hearings should continue post-Pandemic to the degree consistent with the agency's goals and needs and, to a reasonable degree, that of the parties or claimants. Objections by counsel to virtual hearings merely because they are virtual should not be given substantial weight. Given due process requirements, parties or claimants without adequate equipment, bandwidth, or technology competence should be afforded in-person hearings unless those deficiencies can be remedied adequately by the agency.
- 2) Agencies should post on an appropriate website, in pre-hearing orders or notices, and otherwise, as appropriate, advise counsel, claimants, parties, and witnesses of the reason for, procedures, and expectations for remote appearances and/or virtual hearings. Such procedures should include the requirement and opportunity for individuals to express before a hearing any concerns about remote appearances or virtual hearings to include disability, lack of bandwidth, equipment, or competence. They should also include the equipment and platform to be used at the hearing; where applicable, when and how to test the remote connection, and methods for receiving help with the connection; when and how exhibits or other data should be presented for use at the hearing; the need to wait a brief period when replying to another person to ensure that person has finished speaking; appropriate clothing and appearance standards; and method of address to the adjudicator.
- 3) Adjudicators should be furnished with adequate human technical and administrative support. Adjudicators should not be expected to personally handle any degree of technical support, whether for the adjudicator or remote persons. Nor should the adjudicator need to manage "breakout rooms" and other remote people management.
- 4) When feasible, adjudicators using remote appearances should originate from an agency hearing room specially equipped for hearings involving one or more remote persons. Generally speaking, these hearing rooms should be designed so as to have

remote persons in the location and size that would be true of an in-person hearing. When adjudicators appear from a location other than a hearing room, they should use photographic hearing room backdrops so that the adjudicator appears as she or he would in a physical hearing room.

- 5) When using videoconferencing, adjudicators should use appropriate equipment. Ordinarily, this should include a purpose-built camera and, when necessary, a dedicated microphone, rather than relying on any built-in computer webcam. adjudicators should use at least two displays (monitors), one for viewing remote persons and one for any relevant exhibits. A third to provide the adjudicator access to other information is strongly suggested. When adjudicators are originating from a fixed location, agencies should consider supplying desktop rather than laptop computers.
- 6) Agencies should collect anonymous data from non-agency remote users as to their satisfaction with remote appearances and virtual hearings and any perceived difficulties. This data should be reviewed at least quarterly to determine whether any unrecognized deficiencies exist.
- 7) Agencies and/or ACUS should periodically and regularly review technological developments to keep remote appearance and virtual hearing options compatible with non-government use and expectations.

Respectfully submitted,

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