

Comment from Public Member Russell Wheeler on *Virtual Hearings in Agency Adjudication*  
May 3, 2021

I think the redraft has made a very good document even better. I am sending the few relatively minor suggestions below, keyed to the line numbers of the redraft, in advance of Tuesday's meeting. They pick up where I think we left off on 4/20.

- 167 “carefully consider”. Although a standard formulation, it implies that the agency default is “carelessly consider,” or “consider without care”. Is the adjective necessary? Does the consideration suggested here demand more care than other analyses? Perhaps simply “weigh”.
- 168 The infinitive-splitting phrase, as written, modifies “ensure”, i.e., among other actions, they should “ensure”. Suggest (1) moving the “among other phrase” to after “ensure,” (2) change “things” to “actions,” and (3) insert “seek to” before “ensure” because the guidelines, on their own, can’t “ensure” anything. Revisions would read: “they should seek to ensure, among other things . . .”
- 170 Is the recommendation to use agency personnel, contract out, or either? Does the point need clarification?
- 174 Instead of “appropriate location,” suggest “available prominently on their websites”. As written, it implies that agencies might otherwise put it on an inappropriate location.
- 186 What is the difference between the “standards of conduct” referenced here and at 189 and the “best practices” explained at 190ff? Does “standards of conduct” need at least a brief modifier or example? E.g., are they ethical standards?
- 214 Query whether “access recordings” should be “access recordings **or record on their own**”.
- 216 Is “Paragraph 5” now “Paragraph 6” (as at line 228)?
- 219 This paragraph refers to agencies that are “designing . . . spaces” but that seems inconsistent with, e.g., line 223 (“Provide the adjudicators . . .”). Perhaps at line 220, make it “agencies should provide for” and then modify “a” and “b” accordingly:  
“a. Professional-grade cameras and microphones . . .  
“b. Adjudicators access to a desktop . . .”
- 228 Is the reference to Paragraph 6 or 8?  
And “appear to other participants” almost seems to be ACUS’s endorsing deceit. It might be a little softer to replace “so that . . . are in” with “that simulates”.
- 241 I find para 13 troubling on several counts, but basically because it may suggest ACUS’s unawareness of the serious methodological challenges in measuring whether different conditions produce like outcomes. Indeed, the reference to “in-person or traditional video hearings” suggests just one of the problems.

I suggest, at least as a starting point:

Agencies should try to measure, through the use of participant-satisfaction scales and other instruments, whether their use of alternative hearing formats produce outcomes

that are comparable to those achieved through traditional hearings. Agencies should recognize the methodological challenges in assessing whether different formats produce comparable results.

Alternative paragraph 13 language will require paragraph 14 adjustment, perhaps: “Participant feedback can also help agencies assess participant satisfaction and identify problems that participants perceived in their virtual hearing [more specific than “identify any issues”].

250 As with line 168: “to try to ensure that”

252 “and **that those options** reasonably comport”. As written, the antecedent is unclear.

256 Suggest inserting the “as authorized” phrase after “provide”.