

Comment from Public Member Russell Wheeler on *Virtual Hearings in Agency Adjudication*
May 14, 2021

I apologize for raising again two comments I made earlier, comments that committee rightfully thought it had resolved.

Recording of hearings by journalists or others The committee determined at its last meeting that delving into this matter would “open a can of worms” that it wished to avoid. I suggest, however, that ACUS should at least make clear that it recognizes that agencies that wish to prevent third party recording and use of hearings cannot prevent it for virtual hearings simply by banning cameras in the hearing room, as they can for traditional hearings.

Suggestion: Add to line 94 after “purposes.”: “Agencies should also be aware that preventing unauthorized recording of agency proceedings, fairly easily accomplished during traditional hearings, will be more difficult for virtual hearings.”

Standards of conduct I noted in the most recent meeting that the “[s]tandards of conduct” now referenced at line 180 were difficult to distinguish from the “best practices” enumerated at lines 189ff. To avoid confusion, the committee amended the standards of comment reference with two examples, now at 181-183.

With deference, I submit that both examples are more in the nature of best practices (designed to promote efficient hearings) than standards of conduct (which connote rules to discourage unethical behavior).

I suggest amending subsection “c” (lines 180-183) with the following or some variation: “Standards of conduct for participants during virtual hearings, such as those prohibiting participants from appearing while operating a moving vehicle and, to account for audio delays, requiring participants to wait several seconds after others finish talking before speaking requiring parties’ or their attorneys’ to disclose silent, off-camera individuals who are actively participating in the party’s representation during the hearing.”

(I have in mind an analogy to the standard protocol during a non-video conference call that the principal participants each announce who else is joining them on the call, so that other participants know who is hearing the conversation. That’s not practical with public, virtual hearings but principal participants should know with whom they’re dealing.)