



## Virtual Hearings in Agency Adjudication

### Committee on Adjudication

#### Proposed Recommendation for Committee | April 20, 2021

1 The use of video teleconferencing (VTC) to conduct administrative hearings and other  
2 adjudicatory proceedings has become increasingly prevalent over the past few decades due to  
3 rapid advances in technology and telecommunications [. as well as the desire to save money in  
4 the aggregate and deal with the pressures of the pandemic]. As the Administrative Conference  
5 has previously recognized, “[s]ome applaud the use of VTC by administrative agencies because  
6 it offers potential efficiency benefits, such as reducing the need for travel and the costs  
7 associated with it, reducing caseload backlog, and increasing scheduling flexibility for agencies  
8 and attorneys as well as increasing access for parties.” At the same time, the Administrative  
9 Conference has acknowledged that critics have suggested that the use of VTC “may hamper  
10 communication between a party and the decision-maker; may hamper communication between  
11 parties and their attorneys or representatives; and/or may hamper a decision-maker’s ability to  
12 make credibility determinations.”<sup>1</sup>

13 The Administrative Conference has encouraged agencies, particularly those with high-  
14 volume caseloads, to consider “whether the use of VTC would be beneficial as a way to improve  
15 efficiency and/or reduce costs while also preserving the fairness and participant satisfaction of  
16 proceedings.”<sup>2</sup> Recognizing that the use of VTC may not be appropriate in all circumstances and  
17 must be legally permissible, the Administrative Conference has identified factors for agencies to  
18 consider when determining whether to use VTC to conduct hearings, such as whether an

**Commented [JG1]:** Staff will revise the wording along these lines.

**Commented [JG2]:** Should this section mention communication between the representatives and the decision-maker?

<sup>1</sup> 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).

<sup>2</sup> *Id.*



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19 ~~agency's use of VTC is legally permissible under its organic legislation and other laws,~~ whether  
20 the nature and type of adjudicatory hearings conducted by an agency are conducive to use of  
21 VTC, whether VTC can be used without adversely affecting case outcomes or representation of  
22 parties, and whether the use of VTC would ~~create-affect~~ costs-savings, ~~increase~~ productivity,  
23 ~~result in reduced~~ wait times, and ~~expand~~ access to justice.<sup>3</sup> The Administrative Conference has  
24 also set forth best practices and practical guidelines for conducting video hearings.<sup>4</sup>

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

33 More recently, agencies have allowed, or in some cases required, participants to appear  
34 remotely using internet-based videoconferencing software run on personal computers, tablets, or  
35 smartphones. This Recommendation uses the term “virtual hearing” to mean any proceeding in  
36 which one or more participants appear from a location of their choosing, such as a home or  
37 office, using ~~user-friendly, readily-available~~ videoconferencing software run on ~~their~~ personal  
38 devices. Virtual hearings can include hearings in which all participants appear remotely through  
39 videoconferencing. It is possible that a virtual hearing could be hybrid, in which some but not all  
40 participants appear remotely through videoconferencing. A hybrid virtual hearing could involve

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<sup>3</sup> *Id.*, ¶ 2.

<sup>4</sup> 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 1; 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).



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41 a combination of stipulations, decisions on the record, as well as testimony provided through  
42 videoconference and in person.

43 Although some agencies used virtual hearings before 2020, their use expanded  
44 dramatically during the COVID-19 pandemic, when agencies maximized telework, closed  
45 government facilities to the public and employees, and required social distancing.<sup>5</sup> Agencies  
46 gained considerable experience conducting virtual hearings during this period,<sup>6</sup> and this  
47 Recommendation draws heavily on these experiences.

48 Virtual hearings can offer several benefits to agencies and parties compared with  
49 traditional video hearings. Because individuals often own the equipment needed to participate in  
50 virtual hearings, participants can often appear from their home or an attorney's office without the  
51 need to travel to a video-equipped hearing site. This-Virtual hearings can simplify scheduling for  
52 parties and representatives and may facilitate the involvement of other participants such as  
53 foreign-language-interpreters, court reporters, witnesses, staff or contractors who provide  
54 administrative or technical support, and other interested persons. Given this flexibility, virtual  
55 hearings may be especially convenient for short and relatively informal adjudicatory  
56 proceedings, such as pre-hearing and settlement conferences.<sup>7</sup>

57 But virtual hearings can pose challenges as well. They can suffer from technical glitches,  
58 often related to short-term, internet bandwidth issues. In some contexts, agencies may need to  
59 take special measures to ensure the integrity of adjudicatory proceedings. Such measures may be  
60 necessary, for example, to safeguard protected or sensitive information or to monitor or sequester  
61 witnesses to ensure third parties do not interfere with their testimony.<sup>8</sup> Agencies may also need

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<sup>5</sup> Jeremy Graboyes, Legal Considerations for Remote Hearings in Agency Adjudications 1 (June 16, 2020) (report to the Admin. Conf. of the U.S.).

<sup>6</sup> Fredric I. Lederer & the Center for Legal & Court Technology, Analysis of Administrative Agency Adjudicatory Hearing Use of Remove-Remote Appearances and Virtual Hearings 6-7 (Apr. 14, 2021) (draft report to the Admin. Conf. of the U.S.).

<sup>7</sup> *Id.*.

<sup>8</sup> *Id.* at 11, 15.



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62 to take special measures to ensure interested members of the public can observe virtual hearings,  
63 when appropriate.<sup>9</sup>

64 Most significantly, the effectiveness of virtual hearings depends ~~heavily~~ on individuals'  
65 access to a suitable internet connection, personal device, and space from which to participate, as  
66 well as their ability to effectively participate in an adjudicatory proceeding by remote means  
67 while operating a personal device and videoconferencing software. ~~As a result, Virtual-virtual~~  
68 ~~hearings may create a barrier to access for individuals who belong to underserved communities,~~  
69 ~~such as persons with disabilities, persons who live in rural areas lack adequate internet access or~~  
70 ~~personal devices, and persons otherwise adversely affected by poverty.~~ Some individuals may  
71 have difficulty or feel uncomfortable using a personal device or internet-based  
72 videoconferencing software to participate in an adjudicatory proceeding. Some critics have also  
73 raised concerns that virtual participants may not take proceedings as seriously as they would if  
74 they appeared in a formal hearing room, or that virtual participation can negatively impact  
75 parties' satisfaction, engagement with the adjudicatory process, or perception of justice.<sup>10</sup>

76 Agencies have devised several methods to address these concerns. To establish the  
77 formality of virtual hearings, many adjudicators use a photographic backdrop that depicts a  
78 hearing room, seal, or flag. Many agencies use pre-hearing notices and online guides to explain  
79 virtual hearings to participants. Several agencies provide general or pre-hearing training sessions  
80 where agency staff, often attorneys, can familiarize participants with the procedures and  
81 standards of conduct for virtual hearings. Though highly effective, these sessions require staff  
82 time and availability.<sup>11</sup>

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<sup>9</sup> For evidentiary hearings not required by the Administrative Procedure Act, the Administrative 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).

<sup>10</sup> Lederer, *supra* note 6, at 8–11, 17.

<sup>11</sup> *Id.* at 10, 16–17, .



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83 Although the use of virtual hearings increased dramatically during the pandemic, their  
84 use predates it and will likely continue afterward given widespread satisfaction with the format,  
85 at least in some circumstances.<sup>12</sup> Videoconferencing technology also continues to develop.  
86 Recent years have seen rapid developments in internet-based videoconferencing software,  
87 telecommunications infrastructure, and personal devices. At least one federal agency, the  
88 Department of Veterans Affairs, has developed its own videoconferencing software. Some  
89 tribunals around the world are now exploring the use of telepresence systems, which rely on  
90 high-quality video and audio equipment to connect participants at different video-equipped  
91 hearing sites to approximate the experience of an in-person proceeding.

92 This Recommendation builds on Recommendation 2011-4, *Agency Use of Video*  
93 *Hearings: Best Practices and Possibilities for Expansion*, and Recommendation 2014-7, *Best*  
94 *Practices for Using Video Teleconferencing for Hearings*, by identifying factors for agencies to  
95 consider as they determine when and how to conduct virtual hearings. Specifically, this  
96 Recommendation provides practical guidance regarding how best to conduct virtual hearings and  
97 encourages agencies to monitor technological and procedural developments that may facilitate  
98 remote participation in appropriate circumstances.

99 As emphasized in Recommendation 2014-7, the Administrative Conference is committed  
100 to the principles of fairness, efficiency, and participant satisfaction in the conduct of adjudicative  
101 proceedings. When virtual hearings are used, they should be used in a manner that promotes  
102 these principles, which form the cornerstones of adjudicative legitimacy. The Administrative  
103 Conference recognizes that the use of virtual hearings is not suitable for every kind of  
104 adjudicative proceeding but believes greater familiarity with existing agency practices and  
105 awareness of the improvements in technology will encourage broader use of such technology in  
106 appropriate circumstances. This Recommendation aims to ensure that, when agencies choose to

**Commented [JG3]:** Staff counsel will add language that clarifies what telepresence is citing the consultant report for support.

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<sup>12</sup> *Id.* at 7.



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107 offer virtual hearings, they are able to provide a participant experience that meets or even  
108 exceeds the in-person hearing experience.

### RECOMMENDATION

#### Procedural Practices

- 109 1. ~~If legally permissible, Agencies-agencies~~ should offer virtual hearings ~~when legally~~  
110 ~~permissible,~~ consistent with their needs, and in accord with principles of fairness,  
111 efficiency, and participant satisfaction. ~~When considering whether and when to offer~~  
112 ~~virtual hearings, agencies should balance factors including: Among other factors,~~  
113 ~~agencies should consider:~~
- 114 a. Whether the nature and type of adjudicatory proceedings at the agency are  
115 conducive to the use of virtual hearings, and whether virtual hearings can be used  
116 without ~~adversely~~ affecting the ~~procedural fairness or substantive~~ outcome of  
117 cases heard by the agency;
  - 118 b. Whether virtual hearings are likely to result in significant benefits for the agency  
119 and for non-agency participants, including improved access to justice, more  
120 efficient use of time for adjudicators and staff, reduced travel costs and delays,  
121 and reduced wait times and caseload backlogs;
  - 122 c. Whether virtual hearings are likely to result in significant costs for the agency and  
123 for non-agency participants, including those associated with purchasing,  
124 installing, and maintaining equipment and software, obtaining and using  
125 administrative and technical support, and providing training;
  - 126 d. Whether the use of virtual hearings would ~~adversely~~ affect the representation of  
127 parties in adjudicatory proceedings;
  - 128 e. Whether the use of virtual hearings would ~~adversely~~ affect communication  
129 between hearing participants (including adjudicators, parties, representatives,  
130 witnesses, ~~foreign language~~ interpreters, agency staff, and others);
  - 131 f. Whether the use of virtual hearings would create a potential barrier to access for



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132 individuals who belong to underserved communities, such as persons who lack  
133 adequate internet access or personal devices~~with disabilities, persons who live in~~  
134 rural areas, and persons otherwise adversely affected by poverty, or for  
135 individuals who may have difficulty using a personal device or internet-based  
136 videoconferencing software to participate in an adjudicatory proceeding;

- 137 g. Whether the use of virtual hearings would impede~~affect~~ decisionmakers' ability  
138 to make credibility determinations ~~and thereby have an adverse effect on the~~  
139 outcome of cases heard by the agency; and
- 140 h. Whether there is a reasonable concern that the use of virtual hearings would  
141 enable someone to improperly interfere with participants' testimony ~~and thereby~~  
142 have an adverse effect on the outcome of cases heard by the agency.

- 143 2. Agencies should review their existing rules of practice to determine whether any  
144 provisions restrict adjudicators' discretion to allow individuals to participate virtually,  
145 when such participation would otherwise satisfy the principles in Paragraph 1.
- 146 3. Agencies should adopt the presumption that virtual hearings are open to the public, while  
147 retaining the ability to close the hearings in particular cases, including when the public  
148 interest in open proceedings is outweighed by the need to protect:
  - 149 a. National security;
  - 150 b. Law enforcement;
  - 151 c. Confidentiality ~~of business documents~~; and
  - 152 d. Privacy of the parties to the hearing.

153 For virtual hearings that are open to the public, agencies should provide a means for  
154 interested persons to attend or view the hearing, ~~view streaming video of the hearing~~.  
155 Agencies should carefully consider the implications of creating a recording, ~~or access a~~  
156 recording of the hearing.

- 157 4. Agencies should work with information technology and data security personnel to  
158 develop protocols to properly safeguard classified, legally protected, or other sensitive  
159 information during virtual hearings and also to ensure the integrity of the hearing process.
- 160 5. Agencies that offer virtual hearings should develop guidelines for conducting such

**Commented [JG4]:** Staff will add language to the preamble that highlights potential issues that may arise when agencies record virtual hearings or provide public access to such recordings. For example: Is the video recording part of the record? How does the availability of a video recording affect appellate or judicial review (esp. regarding credibility)? How can people use and misuse publicly available recordings? FOIA implications? When the agency uses commercially-available videoconferencing software, what access and rights does the service provider have to any recordings? How do agencies store and provide public access to recordings? What guidelines should agencies follow to start, end, and edit video recordings, and who should be responsible for creating and potentially editing the recordings?

**Commented [JG5]:** FedRAMP?



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161 hearings and make those guidelines publicly available in an appropriate location on their  
162 websites. Such guidelines should address, as applicable:

163 a. Any process by which parties, representatives, and other participants can request  
164 to participate virtually;

165 b. Circumstances in which an individual's virtual participation may be inappropriate,  
166 and

167 b.c. any Any process by which parties, representatives, and other participants can, as  
168 appropriate, object to or express concerns about participating virtually, and  
169 circumstances in which it is appropriate to grant the request;

170 e.d. Technological requirements for virtual hearings, including the internet-based  
171 videoconferencing software that the agency uses and any technical suggestions for  
172 virtual participants;

173 e.e. Standards of conduct for participants during virtual hearings;

174 e.f. The availability of or requirement to attend a general training session or pre-  
175 hearing conference to discuss technological requirements, procedural rules, and  
176 standards of conduct for virtual hearings;

177 f.g. Any protocols or best practices for participating in virtual hearings, such as:

- 178 i. When and how to join a virtual hearing;
- 179 ii. How to submit exhibits before or during a hearing;
- 180 iii. Whether and how to use screen sharing or annotation tools available in the  
181 web conferencing software;
- 182 iv. How to make motions, raise objections, or otherwise indicate that a  
183 participant would like to speak;
- 184 v. How to indicate that there is a technical problem or request technical  
185 support;
- 186 vi. When the adjudicator will stop or postpone the proceeding due to a  
187 technical problem and what actions the agency will take to attempt to  
188 remedy the problem;
- 189 vii. How to examine witnesses who participate virtually and monitor or





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- 190 sequester them, as necessary;
- 191 viii. How parties and their representatives can consult privately with each  
192 other;
- 193 ix. When participants should have their microphone or camera on or off;
- 194 x. Whether, and, if so, how, participants should or should not communicate  
195 with each other using a videoconferencing software's chat feature or other  
196 channels of communication;
- 197 xi. How to properly safeguard classified, legally protected, or other sensitive  
198 information;
- 199 xii. Whether participants may record proceedings; and
- 200 xiii. Whether and how other interested persons can attend, view streaming  
201 video, or access recordings of virtual hearings.
- 202 6. Agencies should provide information on virtual hearings in pre-hearing notices to  
203 participants, including the availability of the guidelines described in Paragraph 5.
- 204 7. When feasible, agencies should provide adjudicators with a space, such as an office or  
205 hearing room, that the agency equips and maintains for the purpose of conducting  
206 hearings that involve one or more remote participants. When designing such spaces,  
207 agencies should:
- 208 a. Use professional-grade cameras and microphones to capture and transmit audio  
209 and video of the decisionmaker to remote participants; and
- 210 b. Provide the adjudicator with access to a desktop computer and a minimum of two  
211 monitors—at least one for viewing remote participants, one for viewing the  
212 record, and potentially a third for performing other tasks or accessing other  
213 information during proceedings.
- 214 8. Agencies should provide adjudicators who appear from a location other than a space  
215 described in Paragraph 6 with a digital or physical backdrop so that they appear to other  
216 hearing participants as if they are in a physical hearing room or other official space.

### **Training and Support**



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- 217 9. Agencies should provide training for adjudicators on conducting virtual hearings.
- 218 10. Agencies should provide adjudicators with adequate technical and administrative support
- 219 so that adjudicators are not responsible for managing remote participants (e.g., admitting
- 220 or removing participants, muting and unmuting participants, managing breakout rooms)
- 221 or troubleshooting technical issues for themselves or other participants before or during
- 222 proceedings. Agencies should provide advanced training for administrative and technical
- 223 support staff to ensure they are equipped to manage virtual hearings and troubleshoot
- 224 technical problems that may arise before or during proceedings.
- 225 11. Agencies should consider providing general training sessions or pre-hearing conferences
- 226 at which staff can explain expectations, technological requirements, and procedural rules
- 227 for virtual hearings to parties and representatives.

### Assessment and Continuing Development

- 228 12. Agencies should periodically assess their virtual hearings program to ensure that the use
- 229 of virtual hearings produces outcomes that are comparable to those achieved during in-
- 230 person or traditional video hearings.
- 231 13. Agencies should collect anonymous feedback from participants (using, for instance, post-
- 232 hearing surveys) to determine participants' satisfaction and identify any issues with
- 233 virtual hearings. Agencies should also maintain open lines of communication with
- 234 representatives in order to receive feedback about the use of virtual hearings. Agencies
- 235 should review this feedback on a regular basis to determine whether any previously
- 236 unrecognized deficiencies exist.
- 237 14. Agencies should monitor technological and procedural developments to ensure the
- 238 options for individuals to participate remotely in adjudicatory proceedings remain current
- 239 and reasonably comport with the expectations of people, organizations, and groups that
- 240 regularly participate in agency proceedings.
- 241 15. Agencies should share expertise with each other in order to reduce costs and increase
- 242 efficiency, while maintaining a fair and satisfying hearing experience. In addition, the
- 243 Office of the Chairman of the Administrative Conference should provide for, as

**Commented [JG6]:** This recommendation is based on paragraphs 4 and 5 of Rec. 2014-7.

**Commented [JG7]:** From Jeff Lubbers: Recommendation 10 on technical support is necessary. One issue I've had, especially at the beginning, is technical problems in setting up two (much less three) monitors.

**Commented [JG8]:** This recommendation is taken, largely verbatim, from paragraph 11 of Rec. 2014-7.

**Commented [JG9]:** This sentence is taken, largely verbatim, from paragraph 12 of Rec. 2014-7.

**Commented [JG10]:** This sentence is taken, largely verbatim, from paragraph 13 of Rec. 2014-7.

**Commented [JG11]:** This sentence is modeled on paragraph 18 of Rec. 2020-3, *Agency Appellate Systems*.



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244 authorized by 5 U.S.C. § 594(2), the “interchange among administrative agencies of  
245 information potentially useful in improving” virtual hearings and other forms of remote  
246 participation in agency adjudicatory proceedings.