Virtual Hearings in Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Committee | April 20, 2021

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

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

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2 Id.
agency’s use of VTC is legally permissible under its organic legislation and other laws, whether
the nature and type of adjudicatory hearings conducted by an agency are conducive to use of
VTC, whether VTC can be used without adversely affecting case outcomes or representation of
parties, and whether the use of VTC would create affect costs, savings, increase productivity,
result in reduced wait times, and expand access to justice. The Administrative Conference has
also set forth best practices and practical guidelines for conducting video hearings.

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

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

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3 Id., ¶ 2.

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

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

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

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


Id.

Id. at 11, 15.
to take special measures to ensure interested members of the public can observe virtual hearings, when appropriate.  

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

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

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9 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).

10 Lederer, supra note 6, at 8–11, 17.

11 Id. at 10, 16–17.
Although the use of virtual hearings increased dramatically during the pandemic, their use predates it and will likely continue afterward given widespread satisfaction with the format, at least in some circumstances. Videoconferencing technology also continues to develop. Recent years have seen rapid developments in internet-based videoconferencing software, telecommunications infrastructure, and personal devices. At least one federal agency, the Department of Veterans Affairs, has developed its own videoconferencing software. Some tribunals around the world are now exploring the use of telepresence systems, which rely on high-quality video and audio equipment to connect participants at different video-equipped hearing sites to approximate the experience of an in-person proceeding.

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

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

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12 Id. at 7.
offer virtual hearings, they are able to provide a participant experience that meets or even exceeds the in-person hearing experience.

RECOMMENDATION

Procedural Practices

1. **If legally permissible**, agencies should offer virtual hearings when legally permissible, consistent with their needs, and in accord with principles of fairness, efficiency, and participant satisfaction. When considering whether and when to offer virtual hearings, agencies should balance factors including: Among other factors, agencies should consider:

   a. Whether the nature and type of adjudicatory proceedings at the agency are conducive to the use of virtual hearings, and whether virtual hearings can be used without adversely affecting the procedural fairness or substantive outcome of cases heard by the agency;

   b. Whether virtual hearings are likely to result in significant benefits for the agency and for non-agency participants, including improved access to justice, more efficient use of time for adjudicators and staff, reduced travel costs and delays, and reduced wait times and caseload backlogs;

   c. Whether virtual hearings are likely to result in significant costs for the agency and for non-agency participants, including those associated with purchasing, installing, and maintaining equipment and software, obtaining and using administrative and technical support, and providing training;

   d. Whether the use of virtual hearings would adversely affect the representation of parties in adjudicatory proceedings;

   e. Whether the use of virtual hearings would adversely affect communication between hearing participants (including adjudicators, parties, representatives, witnesses, foreign-language interpreters, agency staff, and others);

   f. Whether the use of virtual hearings would create a potential barrier to access for
individuals who belong to underserved communities, such as persons who lack adequate internet access or personal devices with disabilities, persons who live in rural areas, and persons otherwise adversely affected by poverty, or for individuals who may have difficulty using a personal device or internet-based videoconferencing software to participate in an adjudicatory proceeding;

g. Whether the use of virtual hearings would impede decisionmakers’ ability to make credibility determinations and thereby have an adverse effect on the outcome of cases heard by the agency; and

h. Whether there is a reasonable concern that the use of virtual hearings would enable someone to improperly interfere with participants’ testimony and thereby have an adverse effect on the outcome of cases heard by the agency.

2. Agencies should review their existing rules of practice to determine whether any provisions restrict adjudicators’ discretion to allow individuals to participate virtually, when such participation would otherwise satisfy the principles in Paragraph 1.

3. Agencies should adopt the presumption that virtual 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.

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

4. Agencies should work with information technology and data security personnel to develop protocols to properly safeguard classified, legally protected, or other sensitive information during virtual hearings and also to ensure the integrity of the hearing process.

5. Agencies that offer virtual hearings should develop guidelines for conducting such
hearings and make those guidelines publicly available in an appropriate location on their websites. Such guidelines should address, as applicable:

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

b. Circumstances in which an individual’s virtual participation may be inappropriate, and

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

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

e. Standards of conduct for participants during virtual hearings;

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

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

i. When and how to join a virtual hearing;

ii. How to submit exhibits before or during a hearing;

iii. Whether and how to use screen sharing or annotation tools available in the web conferencing software;

iv. How to make motions, raise objections, or otherwise indicate that a participant would like to speak;

v. How to indicate that there is a technical problem or request technical support;

vi. When the adjudicator will stop or postpone the proceeding due to a technical problem and what actions the agency will take to attempt to remedy the problem;

vii. How to examine witnesses who participate virtually and monitor or
sequester them, as necessary;

viii. How parties and their representatives can consult privately with each other;

ix. When participants should have their microphone or camera on or off;

x. Whether, and, if so, how, participants should or should not communicate with each other using a videoconferencing software’s chat feature or other channels of communication;

xi. How to properly safeguard classified, legally protected, or other sensitive information;

xii. Whether participants may record proceedings; and

xiii. Whether and how other interested persons can attend, view streaming video, or access recordings of virtual hearings.

6. Agencies should provide information on virtual hearings in pre-hearing notices to participants, including the availability of the guidelines described in Paragraph 5.

7. When feasible, agencies should provide adjudicators with a space, such as an office or hearing room, that the agency equips and maintains for the purpose of conducting hearings that involve one or more remote participants. When designing such spaces, agencies should:

   a. Use professional-grade cameras and microphones to capture and transmit audio and video of the decisionmaker to remote participants; and

   b. Provide the adjudicator with access to a desktop computer and a minimum of two monitors—at least one for viewing remote participants, one for viewing the record, and potentially a third for performing other tasks or accessing other information during proceedings.

8. Agencies should provide adjudicators who appear from a location other than a space described in Paragraph 6 with a digital or physical backdrop so that they appear to other hearing participants as if they are in a physical hearing room or other official space.

Training and Support

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9. Agencies should provide training for adjudicators on conducting virtual hearings.

10. Agencies should provide adjudicators with adequate technical and administrative support so that adjudicators are not responsible for managing remote participants (e.g., admitting or removing participants, muting and unmuting participants, managing breakout rooms) or troubleshooting technical issues for themselves or other participants before or during proceedings. Agencies should provide advanced training for administrative and technical support staff to ensure they are equipped to manage virtual hearings and troubleshoot technical problems that may arise before or during proceedings.

11. Agencies should consider providing general training sessions or pre-hearing conferences at which staff can explain expectations, technological requirements, and procedural rules for virtual hearings to parties and representatives.

Assessment and Continuing Development

12. Agencies should periodically assess their virtual hearings program to ensure that the use of virtual hearings produces outcomes that are comparable to those achieved during in-person or traditional video hearings.

13. Agencies should collect anonymous feedback from participants (using, for instance, post-hearing surveys) to determine participants' satisfaction and identify any issues with virtual hearings. Agencies should also maintain open lines of communication with representatives in order to receive feedback about the use of virtual hearings. Agencies should review this feedback on a regular basis to determine whether any previously unrecognized deficiencies exist.

14. Agencies should monitor technological and procedural developments to ensure the options for individuals to participate remotely in adjudicatory proceedings remain current and reasonably comport with the expectations of people, organizations, and groups that regularly participate in agency proceedings.

15. Agencies should share expertise with each other in order to reduce costs and increase efficiency, while maintaining a fair and satisfying hearing experience. In addition, the Office of the Chairman of the Administrative Conference should provide for, as
authorized by 5 U.S.C. § 594(2), the “interchange among administrative agencies of information potentially useful in improving” virtual hearings and other forms of remote participation in agency adjudicatory proceedings.