



Virtual Hearings in Agency Adjudication

Committee on Adjudication

Proposed Recommendation | June 17, 2021

1 The use of video teleconferencing (VTC) to conduct administrative hearings and other
2 adjudicative proceedings has become increasingly prevalent over the past few decades due to
3 rapid advances in technology and telecommunications coupled with reduced personnel, increased
4 travel costs, and the challenges of the COVID-19 pandemic. As the Administrative Conference
5 has recognized, “[s]ome applaud the use of VTC by administrative agencies because it offers
6 potential efficiency benefits, such as reducing the need for travel and the costs associated with it,
7 reducing caseload backlog, and increasing scheduling flexibility for agencies and attorneys as
8 well as increasing access for parties.”¹ At the same time, as the Conference has acknowledged,
9 critics have suggested that the use of VTC may “hamper communication” among participants—
10 including parties, their representatives, and the decision maker—or “hamper a decision-maker’s
11 ability to make credibility determinations.”²

12 The Conference has encouraged agencies, particularly those with high-volume caseloads,
13 to consider “whether the use of VTC would be beneficial as a way to improve efficiency and/or
14 reduce costs while also preserving the fairness and participant satisfaction of proceedings.”³
15 Recognizing that the use of VTC may not be appropriate in all circumstances and must be legally
16 permissible, the Conference has identified factors for agencies to consider when determining

¹ 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).

² *Id.*

³ *Id.*



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17 whether to use VTC to conduct hearings. They include whether the nature and type of
18 adjudicative hearings conducted by an agency are conducive to the use of VTC; whether VTC
19 can be used without adversely affecting case outcomes or representation of parties; and whether
20 the use of VTC would affect costs, productivity, wait times, or access to justice.⁴ The Conference
21 has also set forth best practices and practical guidelines for conducting video hearings.⁵

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

29 Videoconferencing technology continues to evolve, with rapid developments in internet-
30 based videoconferencing software, telecommunications infrastructure, and personal devices.⁶
31 Recently, many agencies have also allowed, or in some cases required, participants to appear
32 remotely using internet-based videoconferencing software. Because individual participants can
33 run these software applications on personal computers, tablets, or smartphones, they can appear
34 from a location of their choosing, such as a home or office, rather than needing to travel to a
35 video-equipped hearing site. This Recommendation uses the term “virtual hearings” to refer to
36 proceedings in which individuals appear in this manner. This term includes proceedings in which

⁴ *Id.* ¶ 2.

⁵ 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 2; *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).

⁶ For example, some tribunals around the world are now exploring the use of telepresence systems, which rely on high-quality video and audio equipment to give participants at different, specially equipped sites the experience of meeting in the same physical space. *See* Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 326 (2021).



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37 all participants appear virtually, as well as hybrid proceedings in which some participants appear
38 virtually while others participate by alternative remote means or in person.⁷

39 Although some agencies used virtual hearings before 2020, their use expanded
40 dramatically during the COVID-19 pandemic, when agencies maximized telework, closed
41 government facilities to the public and employees, and required social distancing.⁸ Agencies
42 gained considerable experience conducting virtual hearings during this period,⁹ and this
43 Recommendation draws heavily on these experiences.

44 Virtual hearings can offer several benefits to agencies and parties compared with
45 traditional video hearings. Participants may be able to appear from their home using their own
46 personal equipment, from an attorney's office, or from another location such as a public library,
47 without the need to travel to a video-equipped hearing site. As a result, virtual hearings can
48 simplify scheduling for parties and representatives and may facilitate the involvement of other
49 participants such as interpreters, court reporters, witnesses, staff or contractors who provide
50 administrative or technical support, and other interested persons. Given this flexibility, virtual
51 hearings may be especially convenient for short and relatively informal adjudicative proceedings,
52 such as pre-hearing and settlement conferences.¹⁰

53

54 But virtual hearings can pose significant challenges as well. The effectiveness of virtual
55 hearings depends on individuals' access to a suitable internet connection, a personal device, and
56 a space from which to participate, as well as their ability to effectively participate in an
57 adjudicative proceeding by remote means while operating a personal device and

⁷ See Jeremy Graboyes, Legal Considerations for Remote Hearings in Agency Adjudications 3 (June 16, 2020) (report to the Admin. Conf. of the U.S.).

⁸ *Id.* at 1.

⁹ See Fredric I. Lederer & the Ctr. for Legal & Ct. Tech., Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings 6–7 (Apr. 14, 2021) (draft report to the Admin. Conf. of the U.S.).

¹⁰ See *id.*



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58 videoconferencing software. As a result, virtual hearings may create a barrier to access for
59 individuals who belong to underserved communities, such as low-income individuals for whom
60 it may be difficult to obtain access to high-quality personal devices or private internet services,
61 individuals whose disabilities prevent effective engagement in virtual hearings or make it
62 difficult to set up and manage the necessary technology, and individuals with limited English
63 proficiency. Some individuals may have difficulty, feel uncomfortable, or lack experience using
64 a personal device or internet-based videoconferencing software to participate in an adjudicative
65 proceeding. Some critics have also raised concerns that virtual participation can negatively affect
66 parties' satisfaction, engagement with the adjudicative process, or perception of justice.¹¹

67 Agencies have devised several methods to address these concerns. The Board of
68 Veterans' Appeals conducts virtual hearings using the same videoconferencing application that
69 veterans use to access agency telehealth services. To enhance the formality of virtual hearings,
70 many adjudicators use a photographic backdrop that depicts a hearing room, seal, or flag. Many
71 agencies use pre-hearing notices and online guides to explain virtual hearings to participants.
72 Several agencies provide general or pre-hearing training sessions at which agency staff, often
73 attorneys, can familiarize participants with the procedures and standards of conduct for virtual
74 hearings. Though highly effective, these sessions require staff time and availability.¹²

75 Virtual hearings can also pose practical and logistical challenges. They can suffer from
76 technical glitches, often related to short-term, internet bandwidth issues. Virtual hearings may
77 sometimes require agencies to take special measures to ensure the integrity of adjudicative
78 proceedings. Such measures may be necessary, for example, to safeguard classified, legally
79 protected, confidential, or other sensitive information, or to monitor or sequester witnesses to
80 ensure third parties do not interfere with their testimony.¹³ Agencies may also need to take
81 special measures to ensure that interested members of the public can observe virtual hearings in

¹¹ *See id.* at 8–11, 17.

¹² *See id.* at 10, 16–17.

¹³ *See id.* at 11, 15.



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82 appropriate circumstances by, for example, streaming live audio or video of a virtual hearing or
83 providing access to a recording afterward.¹⁴

84 Recording virtual hearings may raise additional legal, policy, and practical concerns. To
85 the extent that such recordings become part of the administrative record or serve as the official
86 record of the proceeding, agencies may need to consider whether and for what purposes appellate
87 reviewers may consider and rely on them. Creating recordings may trigger obligations under
88 federal information and record-keeping laws and policies, including the Freedom of Information
89 Act,¹⁵ Privacy Act,¹⁶ and Federal Records Act.¹⁷ Agencies may need to review contract terms
90 when considering the use of videoconferencing software applications to determine whether any
91 other entities own or can access or use recordings made through the applications, or whether an
92 agency may obtain legal and practical ownership of the recording. Steps may be necessary to
93 ensure that agencies do not inadvertently disclose classified, protected, or sensitive information
94 or make it easy for people to use publicly available recordings for improper purposes.
95 Practically, unless agencies store recordings on external servers, such as in the cloud, agencies
96 would need sufficient technological capacity to store the volume of recordings associated with
97 virtual hearings. Agencies would also need personnel qualified and available to manage and, as
98 appropriate, prepare recordings for public access.

99 This Recommendation builds on Recommendation 2011-4, *Agency Use of Video*
100 *Hearings: Best Practices and Possibilities for Expansion*, and Recommendation 2014-7, *Best*
101 *Practices for Using Video Teleconferencing for Hearings*, by identifying factors for agencies to

¹⁴ For evidentiary hearings not required by the Administrative Procedure Act (APA), the 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). Similar principles may also apply in other proceedings, including those conducted under the APA’s formal-hearing provisions. See Graboyes, *supra* note 7, at 22–23.

¹⁵ 5 U.S.C. § 552.

¹⁶ *Id.*, § 552a.

¹⁷ 44 U.S.C. § 3101 *et seq.*



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102 consider as they determine when and how to conduct virtual hearings. Specifically, this
103 Recommendation provides practical guidance regarding how best to conduct virtual hearings and
104 encourages agencies to monitor technological and procedural developments that may facilitate
105 remote participation in appropriate circumstances.

106 As emphasized in Recommendation 2014-7, the Conference is committed to the
107 principles of fairness, efficiency, and participant satisfaction in the conduct of adjudicative
108 proceedings. When virtual hearings are used, they should be used in a manner that promotes
109 these principles, which form the cornerstones of adjudicative legitimacy. The Conference
110 recognizes that the use of virtual hearings is not suitable for every kind of adjudicative
111 proceeding but believes greater familiarity with existing agency practices and awareness of the
112 improvements in technology will encourage broader use of such technology in appropriate
113 circumstances. This Recommendation aims to ensure that, when agencies choose to offer virtual
114 hearings, they are able to provide a participant experience that meets or even exceeds the in-
115 person hearing experience.¹⁸

RECOMMENDATION

Procedural Practices

- 116 1. If legally permissible, agencies should offer virtual hearings consistent with their needs,
117 in accord with principles of fairness and efficiency, and with due regard for participant
118 satisfaction. In considering whether and when to offer virtual hearings, agencies should
119 consider, at a minimum, the following:
- 120 a. Whether the nature and type of adjudicative proceedings are conducive to the use
121 of virtual hearings and whether virtual hearings can be used without affecting the
122 procedural fairness or substantive outcomes of cases;
 - 123 b. Whether virtual hearings are likely to result in significant benefits for agency and

¹⁸ This Recommendation does not take a position on when parties should be entitled to, or may request, an in-person hearing.



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- 124 non-agency participants, including improved access to justice, more efficient use
125 of time for adjudicators and staff, reduced travel costs and delays, and reduced
126 wait times and caseload backlogs;
- 127 c. Whether virtual hearings are likely to result in significant costs for agency and
128 non-agency participants, including those associated with purchasing, installing,
129 and maintaining equipment and software, obtaining and using administrative and
130 technical support, and providing training;
- 131 d. Whether the use of virtual hearings would affect the representation of parties;
- 132 e. Whether the use of virtual hearings would affect communication between hearing
133 participants (including adjudicators, parties, representatives, witnesses,
134 interpreters, agency staff, and others);
- 135 f. Whether the use of virtual hearings would create a potential barrier to access for
136 individuals who belong to underserved communities, such as low-income
137 individuals for whom it may be difficult to obtain access to high-quality personal
138 devices or private internet services, individuals whose disabilities prevent
139 effective engagement in virtual hearings or make it difficult to set up and manage
140 the necessary technology, and individuals with limited English proficiency, or for
141 other individuals who may have difficulty using a personal device or internet-
142 based videoconferencing software to participate in adjudicative proceedings;
- 143 g. Whether the use of virtual hearings would affect adjudicators' ability to make
144 credibility determinations; and
- 145 h. Whether there is a reasonable concern that the use of virtual hearings would
146 enable someone to improperly interfere with participants' testimony.
- 147 2. Agencies should revise any provisions of their codified rules of practice that
148 unintentionally restrict adjudicators' discretion to allow individuals to participate
149 virtually, when such participation would otherwise satisfy the principles in Paragraph 1.
- 150 3. Agencies should adopt the presumption that virtual hearings are open to the public, while
151 retaining the ability to close the hearings in particular cases, including when the public



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152 interest in open proceedings is outweighed by the need to protect:

- 153 a. National security;
- 154 b. Law enforcement;
- 155 c. Confidentiality of business documents; or
- 156 d. Privacy of hearing participants.

157 For virtual hearings that are open to the public, agencies should provide a means for
158 interested persons to attend or view the hearing.

159 4. If agencies record virtual hearings, they should consider the legal, practical, and technical
160 implications of doing so and establish guidelines to seek to ensure, at a minimum,
161 compliance with applicable information and recordkeeping laws and policies and guard
162 against misuse of recordings.

163 5. Agencies should work with information technology and data security professionals to
164 develop protocols to properly safeguard classified, legally protected, confidential, and
165 other sensitive information during virtual hearings and also to ensure the integrity of the
166 hearing process.

167 6. Agencies that offer virtual hearings should develop guidelines for conducting them, make
168 those guidelines publicly available prominently on their websites, and consider which of
169 those guidelines to include in their codified rules of practice. Such guidelines should
170 address, as applicable:

- 171 a. Any process by which parties, representatives, and other participants can request
172 to participate virtually;
- 173 b. Circumstances in which an individual's virtual participation may be
174 inappropriate;
- 175 c. Any process by which parties, representatives, and other participants can, as
176 appropriate, object to or express concerns about participating virtually;
- 177 d. Technological requirements for virtual hearings, including those relating to access
178 to the internet-based videoconferencing software used for virtual hearings and any
179 technical suggestions for participants who appear virtually;
- 180 e. Standards of conduct for participants during virtual hearings, such as those



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- 181 requiring participants to disclose whether they are joined or assisted by any silent,
182 off-camera individuals;
- 183 f. The availability of or requirement to attend a general training session or pre-
184 hearing conference to discuss technological requirements, procedural rules, and
185 standards of conduct for virtual hearings;
- 186 g. Any protocols or best practices for participating in virtual hearings, such as those
187 addressing:
- 188 i. When and how to join virtual hearings using either a personal device or
189 equipment available at another location, such as a public library;
 - 190 ii. How to submit exhibits before or during virtual hearings;
 - 191 iii. Whether and how to use screen sharing or annotation tools available in the
192 videoconferencing software;
 - 193 iv. How to make motions, raise objections, or otherwise indicate that a
194 participant would like to speak;
 - 195 v. How to participate effectively in a virtual setting (e.g., recommending that
196 participants not appear while operating a moving vehicle and, to account
197 for audio delays, that they wait several seconds after others finish talking
198 before speaking);
 - 199 vi. How to indicate that there is a technical problem or request technical
200 support;
 - 201 vii. When adjudicators will stop or postpone virtual hearings due to technical
202 problems and what actions will be taken to attempt to remedy the problem;
 - 203 viii. How to examine witnesses who participate virtually and monitor or
204 sequester them, as necessary;
 - 205 ix. How parties and their representatives can consult privately with each
206 other;
 - 207 x. When participants should have their microphones or cameras on or off;
 - 208 xi. Whether participants may communicate with each other using a
209 videoconferencing software's chat feature or other channels of



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- 210 communication, and, if so, how;
- 211 xii. How to properly safeguard classified, legally protected, confidential, or
- 212 other sensitive information;
- 213 xiii. Whether participants or interested persons may record proceedings;
- 214 xiv. Whether and how other interested persons can attend or view streaming
- 215 video; and
- 216 xv. Whether and how participants or interested persons may access recordings
- 217 of virtual hearings maintained by the agency.
- 218 7. Agencies should provide information on virtual hearings in pre-hearing notices to
- 219 participants. Such notices should include or direct participants to the guidelines described
- 220 in Paragraph 6.

Facilities and Equipment

- 221 8. When feasible, agencies should provide adjudicators with spaces, such as offices or
- 222 hearing rooms, that are equipped and maintained for the purpose of conducting hearings
- 223 that involve one or more remote participants. When designing such a space, agencies
- 224 should provide for:
- 225 a. Dedicated cameras, lighting, and microphones to capture and transmit audio and
- 226 video of the adjudicator to remote participants;
- 227 b. Adjudicators' access to a computer and a minimum of two monitors—one for
- 228 viewing remote participants and another for viewing the record—and potentially a
- 229 third for performing other tasks or accessing other information during
- 230 proceedings; and
- 231 c. High-quality bandwidth.
- 232 9. Agencies should provide adjudicators who appear from a location other than a space
- 233 described in Paragraph 8 with a digital or physical backdrop that simulates a physical
- 234 hearing room or other official space.



Training and Support

- 235 10. Agencies should provide training for adjudicators on conducting virtual hearings.
- 236 11. Agencies should provide adjudicators with adequate technical and administrative support
- 237 so that adjudicators are not responsible for managing remote participants (e.g., admitting
- 238 or removing participants, muting and unmuting participants, managing breakout rooms)
- 239 or troubleshooting technical issues for themselves or other participants before or during
- 240 proceedings. Agencies should provide advanced training for administrative and technical
- 241 support staff to ensure they are equipped to manage virtual hearings and troubleshoot
- 242 technical problems that may arise before or during proceedings.
- 243 12. Agencies should consider providing general training sessions or pre-hearing conferences
- 244 at which staff can explain expectations, technological requirements, and procedural rules
- 245 for virtual hearings to parties and representatives.

Assessment and Continuing Development

- 246 13. Agencies should try to measure how virtual hearings compare with proceedings
- 247 conducted using other formats, including whether the use of virtual hearings affects
- 248 procedural fairness or produces different substantive outcomes. Agencies should
- 249 recognize the methodological challenges in assessing whether different hearing formats
- 250 produce comparable results.
- 251 14. Agencies should collect anonymous feedback from participants (e.g., using post-hearing
- 252 surveys) to determine and assess participants' satisfaction with the virtual format and
- 253 identify any concerns. Agencies should also maintain open lines of communication with
- 254 representatives in order to receive feedback about the use of virtual hearings. Agencies
- 255 should collect feedback in a manner that complies with the Paperwork Reduction Act and
- 256 review this feedback on a regular basis to determine whether any previously
- 257 unrecognized deficiencies exist.
- 258 15. Agencies should monitor technological and procedural developments to seek to ensure
- 259 that options for individuals to participate remotely in adjudicative proceedings remain



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260 current and that those options reasonably comport with participants' expectations.
261 16. Agencies should share information with each other in order to reduce costs, increase
262 efficiency, and provide a hearing experience that seeks to ensure fairness and participant
263 satisfaction. To help carry out this Recommendation, the Conference's Office of the
264 Chairman should provide, as authorized by 5 U.S.C. § 594(2), for the "interchange
265 among administrative agencies of information potentially useful in improving" virtual
266 hearings and other forms of remote participation in agency adjudicative proceedings.