



## Virtual Hearings in Agency Adjudication

### Committee on Adjudication

#### Proposed Recommendation for Committee | May 4, 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 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” among participants, including parties, their representatives, and the decision  
11 maker, between a party and the decision-maker; may hamper communication between parties  
12 and their attorneys or representatives; and/or may “hamper a decision-maker’s ability to make  
13 credibility determinations.”<sup>1</sup>

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

**Commented [JG1]:** Compare with Recommendation 2011-4:  
“In the last 10 years, advances in technology and carrier services coupled with reduced personnel and increased travel costs have made the use of VTC more attractive to local, state and federal governments.”

<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 consider when determining whether to use VTC to conduct hearings. They include whether the  
20 nature and type of adjudicative hearings conducted by an agency are conducive to use of VTC,  
21 whether VTC can be used without adversely affecting case outcomes or representation of parties,  
22 and whether the use of VTC would affect costs, productivity, wait times, and access to justice.<sup>3</sup>  
23 The Administrative Conference has also set forth best practices and practical guidelines for  
24 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. This setup, which this Recommendation calls a “traditional video hearing,” gives  
31 agencies a high degree of control over VTC equipment, telecommunications connections, and  
32 hearing rooms.

33 More recently, agencies have allowed, or in some cases required, participants to appear  
34 remotely using internet-based videoconferencing software. Because individual participants can  
35 run these software applications on personal computers, tablets, or smartphones, they can appear  
36 from a location of their choosing, such as a home or office, rather than needing to travel to a  
37 video-equipped hearing site.

38 This Recommendation uses the term “virtual hearing” to mean any proceeding in which  
39 one or more participants appear from a location of their choosing, such as a home or office, using  
40 videoconferencing software run on their personal devices. This term includes proceedings in

Commented [JG2]: For the Committee’s consideration: This revision is intended to better clarify the distinction between traditional video hearings and virtual hearings.

<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 which all participants appear virtually, as well as hybrid proceedings in which some participants  
42 appear virtually while others participate by alternative remote means or 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. Virtual hearings can simplify scheduling for  
52 parties and representatives and may facilitate the involvement of other participants such as  
53 interpreters, court reporters, witnesses, staff or contractors who provide administrative or  
54 technical support, and other interested persons. Given this flexibility, virtual hearings may be  
55 especially convenient for short and relatively informal adjudicative proceedings, such as pre-  
56 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. They may also sometimes require agencies  
59 to take special measures to ensure the integrity of adjudicative proceedings. Such measures may  
60 be necessary, for example, to safeguard protected or sensitive information or to monitor or  
61 sequester witnesses to ensure third parties do not interfere with their testimony.<sup>8</sup> Agencies may

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<sup>5</sup> See 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> See Fredric I. Lederer & the Center for Legal & Court Technology, *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.).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 11, 15.



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62 also need to take special measures to ensure that interested members of the public can observe  
63 virtual hearings in appropriate circumstances by, for example, streaming live audio or video of a  
64 virtual hearing or providing access to a recording afterward.<sup>9</sup>

65 Recording virtual hearings may raise additional legal, policy, and practical concerns. To  
66 the extent that such recordings become part of the administrative record or serve as the official  
67 record of the proceeding, agencies may need to consider whether and for what purposes appellate  
68 reviewers may consider and rely on them. Creating recordings may trigger obligations under  
69 federal information and record-keeping laws and policies, including the Freedom of Information  
70 Act,<sup>10</sup> Privacy Act,<sup>11</sup> and Federal Records Act.<sup>12</sup> Agencies may need to review contract terms  
71 when considering use of videoconferencing software applications to determine whether any other  
72 entities own or can access or use recordings made through the applications, or whether an agency  
73 may obtain legal and practical ownership of the recording. Steps may be necessary to ensure that  
74 agencies do not inadvertently disclose classified, protected, or sensitive information or make it  
75 easy for people to use publicly available recordings for inappropriate, harmful, or misleading  
76 purposes. Practically, unless agencies store recordings on external servers, such as in the cloud,  
77 agencies would need sufficient technological capacity to store the volume of recordings  
78 associated with virtual hearings. Agencies would also need personnel qualified and available to  
79 manage and, as appropriate, edit recordings for public observation.

80 Most significantly, Further significant challenges may arise due to the fact that the  
81 effectiveness of virtual hearings depends on individuals' access to a suitable internet connection,

<sup>9</sup> For evidentiary hearings not required by the Administrative Procedure Act (APA), 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). Similar principles may also apply in other proceedings, including those conducted subject to the APA’s formal-hearing provisions. See Jeremy Graboves, Legal Considerations for Remote Hearings in Agency Adjudications 22–23 (June 16, 2020) (report to the Admin. Conf. of the U.S.).

<sup>10</sup> 5 U.S.C. § 552.

<sup>11</sup> 5 U.S.C. § 552a.

<sup>12</sup> 44 U.S.C. § 3101 et seq.



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82 a personal device, and a space from which to participate, as well as their ability to effectively  
83 participate in an adjudicative proceeding by remote means while operating a personal device and  
84 videoconferencing software. As a result, virtual hearings may create a barrier to access for  
85 individuals who belong to underserved communities, such as persons who lack adequate internet  
86 access or personal devices. Some individuals may have difficulty or feel uncomfortable using a  
87 personal device or internet-based videoconferencing software to participate in an adjudicative  
88 proceeding. Some critics have also raised concerns that virtual participation can negatively affect  
89 parties' satisfaction, engagement with the adjudicative process, or perception of justice.<sup>13</sup>

90 Agencies have devised several methods to address these concerns. To enhance the  
91 formality of virtual hearings, many adjudicators use a photographic backdrop that depicts a  
92 hearing room, seal, or flag. Many agencies use pre-hearing notices and online guides to explain  
93 virtual hearings to participants. Several agencies provide general or pre-hearing training sessions  
94 at which agency staff, often attorneys, can familiarize participants with the procedures and  
95 standards of conduct for virtual hearings. Though highly effective, these sessions require staff  
96 time and availability.<sup>14</sup>

97 Although the use of virtual hearings increased dramatically during the pandemic, their  
98 use predates it and will likely continue after it given widespread satisfaction with the format in  
99 many circumstances.<sup>15</sup> Another reason is that videoconferencing technology also continues to  
100 develop. Recent years have seen rapid developments in internet-based videoconferencing  
101 software, telecommunications infrastructure, and personal devices. At least one federal agency,  
102 the Department of Veterans Affairs, has developed its own videoconferencing software. Some  
103 tribunals around the world are now exploring the use of telepresence systems, which rely on  
104 high-quality video and audio equipment to ~~connect-give~~ participants at different, ~~videosp~~pecially-

Commented [JG3]: For the Committee's consideration: Is this the correct formulation?

<sup>13</sup> See Lederer, *supra* note 6, at 8–11, 17.

<sup>14</sup> See *id.* at 10, 16–17.

<sup>15</sup> See *id.* at 7.



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105 equipped hearing sites to approximate the experience of an in-person proceeding the perception  
106 that they are meeting in the same physical space.<sup>16</sup>

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

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

### RECOMMENDATION

#### Procedural Practices

- 124 1. If legally permissible, agencies should offer virtual hearings consistent with their needs,  
125 and in accord with principles of fairness, efficiency, and participant satisfaction. When  
126 considering whether and when to offer virtual hearings, agencies should balance, among

<sup>16</sup> 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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- 127 other relevant factors, the following:
- 128 a. Whether the nature and type of adjudicative proceedings at the agency are
- 129 conducive to the use of virtual hearings and whether virtual hearings can be used
- 130 without affecting the procedural fairness or substantive outcome of cases heard by
- 131 the agency;
- 132 b. Whether virtual hearings are likely to result in significant benefits for the agency
- 133 and for non-agency participants, including improved access to justice, more
- 134 efficient use of time for adjudicators and staff, reduced travel costs and delays,
- 135 and reduced wait times and caseload backlogs;
- 136 c. Whether virtual hearings are likely to result in significant costs for the agency and
- 137 for non-agency participants, including those associated with purchasing,
- 138 installing, and maintaining equipment and software, obtaining and using
- 139 administrative and technical support, and providing training;
- 140 d. Whether the use of virtual hearings would affect the representation of parties in
- 141 adjudicative proceedings;
- 142 e. Whether the use of virtual hearings would affect communication between hearing
- 143 participants (including adjudicators, parties, representatives, witnesses,
- 144 interpreters, agency staff, and others);
- 145 f. Whether the use of virtual hearings would create a potential barrier to access for
- 146 individuals who belong to underserved communities, such as persons who lack
- 147 adequate internet access or personal devices, or for individuals who may have
- 148 difficulty using a personal device or internet-based videoconferencing software to
- 149 participate in an adjudicative proceeding;
- 150 g. Whether the use of virtual hearings would affect decisionmakers' ability to make
- 151 credibility determinations; and
- 152 h. Whether there is a reasonable concern that the use of virtual hearings would
- 153 enable someone to improperly interfere with participants' testimony.
- 154 2. Agencies should review their existing rules of practice to determine whether any
- 155 provisions therein restrict adjudicators' discretion to allow individuals to participate

Commented [JG4]: For the Committee's consideration: Is this list meant to be exhaustive or non-exhaustive?

Commented [JG5]: For the Committee's consideration: As above, is this the correct formulation?



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- 156 virtually, when such participation would otherwise satisfy the principles in Paragraph 1.  
157 3. Agencies should adopt the presumption that virtual hearings are open to the public, while  
158 retaining the ability to close the hearings in particular cases, including when the public  
159 interest in open proceedings is outweighed by the need to protect:
- 160 a. National security;
  - 161 b. Law enforcement;
  - 162 c. Confidentiality of business documents; and
  - 163 d. Privacy of the parties to the hearing.

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

- 166 4. If agencies record virtual hearings or the virtual testimony of individual participants, they  
167 should carefully consider the legal, practical, and technical implications of doing so and  
168 establish guidelines to, among other things, ensure that they comply with applicable  
169 information and recordkeeping laws and policies and guard against misuse of recordings.

**Commented [JG6]:** For the Committee's consideration, based on the discussion at the first meeting.

- 170 5. Agencies should work with information technology and data security personnel to  
171 develop protocols to properly safeguard classified, legally protected, or other sensitive  
172 information during virtual hearings and also to ensure the integrity of the hearing process.  
173 6. Agencies that offer virtual hearings should develop guidelines for conducting such  
174 hearings and make those guidelines publicly available in an appropriate location on their  
175 websites. Such guidelines should address, as applicable:

**Commented [JG7]:** For the Committee's consideration: Should this recommendation specifically reference any government-wide programs or offices, such as FedRAMP?

- 176 a. Any process by which parties, representatives, and other participants can request  
177 to participate virtually;
- 178 b. Circumstances in which an individual's virtual participation may be  
179 inappropriate;
- 180 c. Any process by which parties, representatives, and other participants can, as  
181 appropriate, object to or express concerns about participating virtually, and  
182 circumstances in which it is appropriate to grant the request;
- 183 d. Technological requirements for virtual hearings, including the internet-based  
184 videoconferencing software that the agency uses and any technical suggestions for



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- 185 virtual participants;
- 186 e. Standards of conduct for participants during virtual hearings;
- 187 f. The availability of or requirement to attend a general training session or pre-
- 188 hearing conference to discuss technological requirements, procedural rules, and
- 189 standards of conduct for virtual hearings;
- 190 g. Any protocols or best practices for participating in virtual hearings, such as:
- 191 i. When and how to join a virtual hearing;
- 192 ii. How to submit exhibits before or during a hearing;
- 193 iii. Whether and how to use screen sharing or annotation tools available in the
- 194 web conferencing software;
- 195 iv. How to make motions, raise objections, or otherwise indicate that a
- 196 participant would like to speak;
- 197 v. How to indicate that there is a technical problem or request technical
- 198 support;
- 199 vi. When the adjudicator will stop or postpone the proceeding due to a
- 200 technical problem and what actions the agency will take to attempt to
- 201 remedy the problem;
- 202 vii. How to examine witnesses who participate virtually and monitor or
- 203 sequester them, as necessary;
- 204 viii. How parties and their representatives can consult privately with each
- 205 other;
- 206 ix. When participants should have their microphone or camera on or off;
- 207 x. Whether, and, if so, how, participants should or should not communicate
- 208 with each other using a videoconferencing software's chat feature or other
- 209 channels of communication;
- 210 xi. How to properly safeguard classified, legally protected, or other sensitive
- 211 information;
- 212 xii. Whether participants may record proceedings; and
- 213 xiii. Whether and how other interested persons can attend, view streaming



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- 214 video, or access recordings of virtual hearings.  
215 7. Agencies should provide information on virtual hearings in pre-hearing notices to  
216 participants, including the availability of the guidelines described in Paragraph 5.

**Facilities and Equipment**

- 217 8. When feasible, agencies should provide adjudicators with a space, such as an office or  
218 hearing room, that the agency equips and maintains for the purpose of conducting  
219 hearings that involve one or more remote participants. When designing such spaces,  
220 agencies should:
- 221 a. Use professional-grade cameras and microphones to capture and transmit audio  
222 and video of the decisionmaker to remote participants; and
  - 223 b. Provide the adjudicator with access to a desktop computer and a minimum of two  
224 monitors—at least one for viewing remote participants, one for viewing the  
225 record, and potentially a third for performing other tasks or accessing other  
226 information during proceedings.
- 227 9. Agencies should provide adjudicators who appear from a location other than a space  
228 described in Paragraph 6 with a digital or physical backdrop so that they appear to other  
229 hearing participants as if they are in a physical hearing room or other official space.

**Training and Support**

- 230 10. Agencies should provide training for adjudicators on conducting virtual hearings.  
231 11. Agencies should provide adjudicators with adequate technical and administrative support  
232 so that adjudicators are not responsible for managing remote participants (e.g., admitting  
233 or removing participants, muting and unmuting participants, managing breakout rooms)  
234 or troubleshooting technical issues for themselves or other participants before or during  
235 proceedings. Agencies should provide advanced training for administrative and technical  
236 support staff to ensure they are equipped to manage virtual hearings and troubleshoot  
237 technical problems that may arise before or during proceedings.  
238 12. Agencies should consider providing general training sessions or pre-hearing conferences

**Commented [JG8]:** This recommendation is based on paragraphs 4 and 5 of Rec. 2014-7.

**Commented [JG9]:** 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.



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239 at which staff can explain expectations, technological requirements, and procedural rules  
240 for virtual hearings to parties and representatives.

### Assessment and Continuing Development

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

**Commented [JG10]:** This recommendation is taken, largely verbatim, from paragraph 11 of Rec. 2014-7.

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

**Commented [JG11]:** This sentence is taken, largely verbatim, from paragraph 12 of Rec. 2014-7.

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

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

**Commented [JG12]:** This sentence is taken, largely verbatim, from paragraph 13 of Rec. 2014-7.

**Commented [JG13]:** This sentence is modeled on paragraph 18 of Rec. 2020-3, *Agency Appellate Systems*.