The use of video teleconferencing (VTC) to conduct administrative hearings and other adjudicative proceedings has become increasingly prevalent over the past few decades due to rapid advances in technology and telecommunications coupled with reduced personnel, increased travel costs, and the challenges of the COVID-19 pandemic. As the Administrative Conference has previously recognized, “some 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 among participants, including parties, their representatives, and the decision maker, 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


2 Id.
consider when determining whether to use VTC to conduct hearings. They include whether the
nature and type of adjudicative 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 affect costs, productivity, wait times, and access to justice.³
The Administrative Conference has also set forth best practices and practical guidelines for
cconducting video hearings.⁴

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. 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. Because individual participants can
run these software applications on personal computers, tablets, or smartphones, they can appear
from a location of their choosing, such as a home or office, rather than needing to travel to a
video-equipped hearing site.

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
videoconferencing software run on their personal devices. This term includes proceedings in

³ Id., ¶ 2.
which all participants appear virtually, as well as hybrid proceedings in which some participants appear virtually while others participate by alternative remote means or 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. Virtual hearings can simplify scheduling for parties and representatives and may facilitate the involvement of other participants such as 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 adjudicative 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. They may also sometimes require agencies to take special measures to ensure the integrity of adjudicative 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

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7 See id.
8 See id. at 11, 15.
also need to take special measures to ensure that interested members of the public can observe virtual hearings in appropriate circumstances by, for example, streaming live audio or video of a virtual hearing or providing access to a recording afterward.²

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

Most significantly, the effectiveness of virtual hearings depends on individuals’ access to a suitable internet connection, 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 Graboyes, Legal Considerations for Remote Hearings in Agency Adjudications 22–23 (June 16, 2020) (report to the Admin. Conf. of the U.S.).

¹² 44 U.S.C. § 3101 et seq.
a personal device, and a space from which to participate, as well as their ability to effectively participate in an adjudicative 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 who lack adequate internet access or personal devices. Some individuals may have difficulty or feel uncomfortable using a personal device or internet-based videoconferencing software to participate in an adjudicative proceeding. Some critics have also raised concerns that virtual participation can negatively affect parties’ satisfaction, engagement with the adjudicative process, or perception of justice.\(^\text{13}\)

Agencies have devised several methods to address these concerns. To enhance 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 at which 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.\(^\text{14}\)

Although the use of virtual hearings increased dramatically during the pandemic, their use predates it and will likely continue after it given widespread satisfaction with the format in many circumstances.\(^\text{15}\) Another reason is that 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 give participants at different...
equipped hearing sites to approximate the experience of an in-person proceeding the perception
that they are meeting in the same physical space. [46]

This Recommendation builds on Recommendation 2011-4, *Agency Use of Video
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
courages 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
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 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, among

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other relevant factors, the following:

a. Whether the nature and type of adjudicative proceedings at the agency are conducive to the use of virtual hearings and whether virtual hearings can be used without 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 affect the representation of parties in adjudicative proceedings;

e. Whether the use of virtual hearings would affect communication between hearing participants (including adjudicators, parties, representatives, witnesses, 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, or for individuals who may have difficulty using a personal device or internet-based videoconferencing software to participate in an adjudicative proceeding;

g. Whether the use of virtual hearings would affect decisionmakers’ ability to make credibility determinations; and

h. Whether there is a reasonable concern that the use of virtual hearings would enable someone to improperly interfere with participants’ testimony.

2. Agencies should review their existing rules of practice to determine whether any provisions therein 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.

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

5. 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.

6. 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;
   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

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

Facilities and Equipment

8. 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.

9. 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

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

11. 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.

12. 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

13. 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.

14. 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.

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

16. 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 adjudicative proceedings.