



Memorandum

To: Committee on Adjudication
From: Funmi Olorunnipa (Staff Counsel)
Date: April 21, 2011
Re: Draft Recommendation (revised as of 4/21/11)

The following draft recommendation is based on the report prepared by ACUS Attorney Advisor Funmi Olorunnipa entitled “Agency Use of Video Hearings: Best Practices and Possibilities for Expansion” and on the discussion at the Committee on Adjudication’s March 30, 2011 meeting. This version of the draft recommendation is intended to facilitate the Committee’s discussion at its April 27, 2011 public meeting, and not to preempt the Committee’s discussion and consideration of the proposed recommendations. In keeping with the Conference’s past practice, a draft preamble, which has also been revised from the prior draft issued on March 24, 2011, is included below. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-__

AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION

Draft Preamble

Since the early 1990s, video teleconferencing technology (“VTC”) has been explored by various entities in the public and private sectors for its potential use in administrative hearings and other adjudicatory proceedings.¹ In the last 10 years, advances in technology and carrier

¹ See e.g., Anderson, Robert, *The Impact of Information Technology on Judicial Administration: A Research Agenda for the Future*, 66 S. Cal. L. Rev. 1762, 1770 (1993).

services coupled with reduced personnel and increased travel costs have made the use of VTC more attractive to local, state and federal governments. The rise in the use of VTC by federal and state courts has also been noted by academics.² Similarly, in the past 10 years, there has been an increase in the use of video hearings by federal agencies with high volume caseloads. Since pilot programs for video hearings at agencies first began in the early 1990s, VTC technology has become more advanced, more readily available and less expensive.

Certain federal agencies, such as the Social Security Administration's Office of Disability Adjudication and Review ("ODAR"), the Department of Veteran Affairs' Board of Veteran Appeals ("BVA") and the Department of Justice's Executive Office for Immigration Review ("EOIR") have taken advantage of VTC for various adjudicatory proceedings. For example, in 2010, ODAR conducted a total of 120,624 video hearings, and a cost-benefit analysis conducted for the agency by outside consultants found that ODAR's current use of video hearings saves the agency a projected estimated amount of approximately \$59 million dollars annually and \$596 million dollars over a 10-year period. A study by the agency has also determined that the use of VTC has no effect on the outcome of cases.

Other agencies, such as the Railroad Retirement Board, the United States Postal Service, the Center for Medicare & Medicaid Services' Office of Medicare Hearings and Appeals and the Department of Health and Human Services' Departmental Appeals Board, specifically have statutes or regulations allowing for the use of video conferencing.³ Similarly, agencies such as the U.S. Merit Systems Protection Board and the Commerce Trademark Trial and Appeal Board use VTC to conduct administrative hearings and other adjudicatory proceedings as a matter of practice under the broad statutory and/or regulatory discretion given to them.⁴

Despite the fact that some agencies within the federal government have been using VTC to conduct mass adjudications for years, other agencies have yet to employ such technology.

² See, e.g., Sherwin, Richard K., Feigenson, Neal and Spiesel, Christina, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. Sci. & Tech. L. 227, 229 (2006); Catterson, Cathy, *Changes in Appellate Caseload and Its Processing*, 48 Ariz. L. Rev. 287, 295 (2006); Lederer, Fredric, *The Road to the Virtual Courtroom? A Consideration of Today's -- and Tomorrow's -- High Technology Courtrooms*, (State Justice Inst. 1999), reprinted in 50 S.C. L. REV. 799, 801 (2000).

³ See, e.g., 20 CFR § 260.5; 39 CFR § 966.9; and 42 CFR § 405.

⁴ See, e.g., 5 U.S.C. § 1204(a)(1) and 37 CFR § 2.129(a).

This may be because the use of VTC for administrative hearings is not without controversy. 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.⁵ Critics, however, have suggested that hearings and other adjudicatory proceedings conducted by video may hamper communication between a party and the decision-maker; may hamper the communication between a party and their attorney or representative; and/or may hamper the decision-maker's ability to make credibility determinations.⁶

Recognizing both the praise for and critique of the use of VTC in administrative hearings and other adjudicatory proceedings, the Administrative Conference of the United States (“the Conference”) issues this Recommendation regarding the use of VTC in federal agencies with high volume caseloads. The Conference has a long standing commitment to the values inherent in the agency adjudicatory process: efficiency, fairness and acceptability/satisfaction.⁷ These values should drive decisions to use VTC. Therefore, this Recommendation suggests that agencies should use VTC only after conducting an analysis of the costs and benefits of VTC use and determining that such use would improve efficiency (i.e. timeliness and costs of adjudications) and would not impair the fairness of the proceedings or the participants' satisfaction with them. In addition, this Recommendation supports the Conference's statutory mandate of making improvements to the regulatory and adjudicatory process by improving the effectiveness and fairness of applicable laws. *See generally* Administrative Conference Act, 5 U.S.C §§ 591-596.

⁵ See Dunn, Meghan and Norwick, Rebecca, Federal Judicial Center Report of a Survey of Videoconferencing in the Court of Appeals (2006), pp. 1-2, available at [http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/\\$file/vidconca.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/$file/vidconca.pdf).

⁶ See American Bar Association's Commission on Immigration Report entitled “*Reforming the Immigration System*” (2010), pp. 2-26-2-27.

⁷ See Cramton, Roger C., A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 591-93 (1972) (Professor Cramton is a former Chairman of the Conference); *see also* Verkuil, Paul R., A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976) (describing the values of efficiency, fairness and satisfaction)(Mr. Verkuil is the current Chairman of the Conference). The balancing of these procedural values was undertaken in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Accordingly, this Recommendation is directed at those agencies with high volume caseloads that do not currently use VTC as a regular practice in their administrative hearings and/or other adjudicatory proceedings and that may benefit from the use of it to improve efficiency and/or reduce costs. Agencies with high volume caseloads are likely to receive the most benefit and/or cost savings from the use of VTC. However, the Conference encourages all agencies (including those with lower volume cases) 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. This Recommendation sets forth some non-exclusive criteria that agencies should consider. For those agencies that determine that the use of VTC would be beneficial, this Recommendation also sets forth best practices provided in part by agencies currently using VTC.

Draft Recommendation

1. Federal agencies with high volume caseloads should consider using video teleconferencing technology to conduct administrative hearings and other aspects of adjudicatory proceedings. Agencies with lower volume caseloads may also benefit from this recommendation.

2. Federal agencies with high volume caseloads should consider the following non-exclusive criteria when determining whether to use video teleconferencing technology in adjudicatory proceedings:

- a. whether an agency's use of VTC is legally permissible under its organic legislation;
- b. whether the nature and type of administrative hearings and other adjudicatory proceedings conducted by the agency are conducive to the use of VTC;
- c. whether VTC can be used without negatively affecting the outcome of cases heard by the agency;
- d. whether the agency's budget would allow for investment in appropriate and secure technology given the costs of VTC;
- e. whether the use of VTC would create cost savings, such as savings associated with reductions in personnel travel and with increased productivity resulting from reductions in personnel time spent on travel;

- f. whether the use of VTC would result in a reduction of the amount of wait time for an administrative hearing;
- g. whether users of VTC, such as administrative law judges, hearing officers and other court staff, parties, witnesses and attorneys (or other party representatives), would find the use of such technology beneficial;
- h. whether the agency's facilities and administration, both national and regional (if applicable), can be equipped to handle the technology and administration required for use of VTC;
- i. whether the use of VTC would adversely impact the representation of a party at an administrative hearing or other adjudicatory proceeding; and
- j. whether the communication between the various individuals present at a hearing or proceeding (including parties, witnesses, judges, hearing officers and other agency staff, translators and attorneys (or other party representatives)) would be adversely impacted.

3. Federal agencies with high volume caseloads that decide to use video teleconferencing technology to conduct administrative hearings and other adjudicatory proceedings should consider the following best practices:

- a. Consider using VTC on a voluntary basis and allowing a party to have an in-person hearing or proceeding if the party chooses to do so.
- b. Periodically evaluate the use of VTC to make sure that the use is outcome-neutral (*i.e.* does not affect the decision rendered) and that the use is meeting the needs of its users.
- c. Solicit feedback and comments (possibly through notice-and-comment rulemaking) about VTC from those who would use it regularly (e.g. administrative law judges, hearing officers and other administrative staff, parties, witnesses and attorneys (or other party representatives)).
- d. Begin the use of VTC with a pilot program and then evaluate the pilot program before moving to wider use.
- e. Structure training at the outset of implementation of VTC use and have technical support available for troubleshooting and implementation questions;

- f. Consult the staff of the Administrative Conference of the United States and/or officials at other agencies that have used VTC for best practices, guidance, advice, and the possibilities for shared resources and collaboration.