



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Virtual Hearings in Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Committee | April 20, 2021

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

12 The Administrative Conference has encouraged agencies, particularly those with high-
13 volume caseloads, to consider “whether the use of VTC would be beneficial as a way to improve
14 efficiency and/or reduce costs while also preserving the fairness and participant satisfaction of
15 proceedings.”² Recognizing that the use of VTC may not be appropriate in all circumstances, the
16 Administrative Conference has identified factors for agencies to consider when determining
17 whether to use VTC to conduct hearings, such as whether an agency’s use of VTC is legally
18 permissible under its organic legislation and other laws, whether the nature and type of

Commented [JG1]: This paragraph quotes extensively from Rec. 2011-4.

Commented [JG2]: This paragraph quotes extensively from Rec. 2011-4 and cites the principles in Recs. 2011-4 and 2014-7.

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.*



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19 adjudicatory hearings conducted by an agency are conducive to use of VTC, whether VTC can
20 be used without adversely affecting case outcomes or representation of parties, and whether the
21 use of VTC would create cost savings, increase productivity, result in reduced wait times, and
22 expand access to justice.³ The Administrative Conference has also set forth best practices and
23 practical guidelines for conducting video hearings.⁴

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

32 More recently, agencies have allowed, or in some cases required, participants to appear
33 remotely using internet-based videoconferencing software run on personal computers, tablets, or
34 smartphones. This Recommendation uses the term “virtual hearing” to mean any proceeding in
35 which one or more participants appear from a location of their choosing, such as a home or
36 office, using user-friendly, readily-available videoconferencing software run on personal devices.

37 Although some agencies used virtual hearings before 2020, their use expanded
38 dramatically during the COVID-19 pandemic, when agencies maximized telework, closed
39 government facilities to the public, and required social distancing.⁵ Agencies gained considerable

³ *Id.*, ¶ 2.

⁴ 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).

⁵ Jeremy Graboyes, *Legal Considerations for Remote Hearings in Agency Adjudications 1* (June 16, 2020) (report to the Admin. Conf. of the U.S.).



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40 experience conducting virtual hearings during this period,⁶ and this Recommendation draws
41 heavily on these experiences.

42 Virtual hearings offer several benefits to agencies and parties compared with traditional
43 video hearings. Because individuals often own the equipment needed to participate in virtual
44 hearings, participants can often appear from their home or an attorney’s office without the need
45 to travel to a video-equipped hearing site. This can simplify scheduling for parties and
46 representatives and may facilitate the involvement of other participants such as foreign-language
47 interpreters, court reporters, witnesses, staff or contractors who provide administrative or
48 technical support, and other interested persons. Given this flexibility, virtual hearings may be
49 especially convenient for short and relatively informal adjudicatory proceedings, such as pre-
50 hearing and settlement conferences.⁷

51 But virtual hearings can pose challenges as well. They can suffer from technical glitches,
52 often related to short-term, internet bandwidth issues. In some contexts, agencies may need to
53 take special measures to ensure the integrity of adjudicatory proceedings. Such measures may be
54 necessary, for example, to safeguard protected or sensitive information or to monitor or sequester
55 witnesses to ensure third parties do not interfere with their testimony.⁸ Agencies may also need
56 to take special measures to ensure interested members of the public can observe virtual hearings,
57 when appropriate.⁹

58 Most significantly, the effectiveness of virtual hearings depends heavily on individuals’
59 access to a suitable internet connection, personal device, and space from which to participate, as

⁶ Fredric I. Lederer & the Center for Legal & Court Technology, Analysis of Administrative Agency Adjudicatory Hearing Use of Remove Appearances and Virtual Hearings 6–7 (Apr. 14, 2021) (draft report to the Admin. Conf. of the U.S.).

⁷ *Id.*

⁸ *Id.* at 11, 15.

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).



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60 well as their ability to effectively participate in an adjudicatory proceeding by remote means
61 while operating a personal device and videoconferencing software. Virtual hearings may create a
62 barrier to access for individuals who belong to underserved communities, such as persons with
63 disabilities, persons who live in rural areas, and persons otherwise adversely affected by poverty.
64 Some individuals may have difficulty or feel uncomfortable using a personal device or internet-
65 based videoconferencing software to participate in an adjudicatory proceeding. Some critics have
66 also raised concerns that virtual participants may not take proceedings as seriously as they would
67 if they appeared in a formal hearing room, or that virtual participation can negatively impact
68 parties' satisfaction, engagement with the adjudicatory process, or perception of justice.¹⁰

69 Agencies have devised several methods to address these concerns. To establish the
70 formality of virtual hearings, many adjudicators use a photographic backdrop that depicts a
71 hearing room, seal, or flag. Many agencies use pre-hearing notices and online guides to explain
72 virtual hearings to participants. Several agencies provide general or pre-hearing training sessions
73 where agency staff, often attorneys, can familiarize participants with the procedures and
74 standards of conduct for virtual hearings. Though highly effective, these sessions require staff
75 time and availability.¹¹

76 Although the use of virtual hearings increased dramatically during the pandemic, their
77 use predates it and will likely continue afterward given widespread satisfaction with the format,
78 at least in some circumstances.¹² Videoconferencing technology also continues to develop.
79 Recent years have seen rapid developments in internet-based videoconferencing software,
80 telecommunications infrastructure, and personal devices. At least one federal agency, the
81 Department of Veterans Affairs, has developed its own videoconferencing software. Some
82 tribunals around the world are now exploring the use of telepresence systems, which rely on

Commented [JG3]: See EO 13985, which directs agencies to identify and develop plans to address “[p]otential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs.” Underserved communities include, among others, “persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.”

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

¹¹ *Id.* at 10, 16–17, .

¹² *Id.* at 7.



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83 high-quality video and audio equipment to connect participants at different video-equipped
84 hearing sites to approximate the experience of an in-person proceeding.

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

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

Commented [JG4]: The language in this paragraph is taken verbatim from Recommendation 2014-7.

RECOMMENDATION

Procedural Practices

- 102 1. Agencies should offer virtual hearings when legally permissible, consistent with their
103 needs, and in accord with principles of fairness, efficiency, and participant satisfaction.
104 Among other factors, agencies should consider:
- 105 a. Whether the nature and type of adjudicatory proceedings at the agency are
106 conducive to the use of virtual hearings, and whether virtual hearings can be used

Commented [JG5]: Items (a) through (e) draw heavily from paragraph 2 of Rec. 2011-4, with some modifications for virtual hearings.



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- 107 without adversely affecting the outcome of cases heard by the agency;
- 108 b. Whether virtual hearings are likely to result in significant benefits for the agency
- 109 and for non-agency participants, including improved access to justice, more
- 110 efficient use of time for adjudicators and staff, reduced travel costs and delays,
- 111 and reduced wait times and caseload backlogs;
- 112 c. Whether virtual hearings are likely to result in significant costs for the agency and
- 113 for non-agency participants, including those associated with purchasing,
- 114 installing, and maintaining equipment and software, obtaining and using
- 115 administrative and technical support, and providing training;
- 116 d. Whether the use of virtual hearings would adversely affect the representation of
- 117 parties in adjudicatory proceedings;
- 118 e. Whether the use of virtual hearings would adversely affect communication
- 119 between hearing participants (including adjudicators, parties, representatives,
- 120 witnesses, foreign-language interpreters, agency staff, and others);
- 121 f. Whether the use of virtual hearings would create a potential barrier to access for
- 122 individuals who belong to underserved communities, such as persons with
- 123 disabilities, persons who live in rural areas, and persons otherwise adversely
- 124 affected by poverty, or for individuals who may have difficulty using a personal
- 125 device or internet-based videoconferencing software to participate in an
- 126 adjudicatory proceeding;
- 127 g. Whether the use of virtual hearings would impede decisionmakers' ability to
- 128 make credibility determinations and thereby have an adverse effect on the
- 129 outcome of cases heard by the agency; and
- 130 h. Whether there is a reasonable concern that the use of virtual hearings would
- 131 enable someone to improperly interfere with participants' testimony and thereby
- 132 have an adverse effect on the outcome of cases heard by the agency.
- 133 2. Agencies should review their existing rules of practice to determine whether any
- 134 provisions restrict adjudicators' discretion to allow individuals to participate virtually,

Commented [JG6]: See EO 13985, which directs agencies to identify and develop plans to address “[p]otential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs.” Underserved communities include, among others, “persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.”



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135 when such participation would otherwise satisfy the principles in Paragraph 1.
136 3. Agencies should adopt the presumption that virtual hearings are open to the public, while
137 retaining the ability to close the hearings in particular cases, including when the public
138 interest in open proceedings is outweighed by the need to protect:

- 139 a. National security;
- 140 b. Law enforcement;
- 141 c. Confidentiality of business documents; and
- 142 d. Privacy of the parties to the hearing.

143 For virtual hearings that are open to the public, agencies should provide a means for
144 interested persons to attend the hearing, view streaming video of the hearing, or access a
145 recording of the hearing.

146 4. Agencies should work with information technology and data security personnel to
147 develop protocols to properly safeguard classified, legally protected, or other sensitive
148 information during virtual hearings.
149 5. Agencies that offer virtual hearings should develop guidelines for conducting such
150 hearings and make those guidelines publicly available in an appropriate location on their
151 websites. Such guidelines should address, as applicable:

- 152 a. Any process by which parties, representatives, and other participants can request
153 to participate virtually;
- 154 b. Circumstances in which an individual's virtual participation may be inappropriate,
155 and any process by which parties, representatives, and other participants can, as
156 appropriate, object to or express concerns about participating virtually;
- 157 c. Technological requirements for virtual hearings, including the internet-based
158 videoconferencing software that the agency uses and any technical suggestions for
159 virtual participants;
- 160 d. Standards of conduct for participants during virtual hearings;
- 161 e. The availability of or requirement to attend a general training session or pre-
162 hearing conference to discuss technological requirements, procedural rules, and
163 standards of conduct for virtual hearings;

Commented [JG7]: This recommendation, through (d), is taken largely verbatim from paragraph 18 of Rec. 2016-4.



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- 164 f. Any protocols or best practices for participating in virtual hearings, such as:
- 165 i. When and how to join a virtual hearing;
- 166 ii. How to submit exhibits before or during a hearing;
- 167 iii. Whether and how to use screen sharing or annotation tools available in the
- 168 web conferencing software;
- 169 iv. How to make motions, raise objections, or otherwise indicate that a
- 170 participant would like to speak;
- 171 v. How to indicate that there is a technical problem or request technical
- 172 support;
- 173 vi. When the adjudicator will stop or postpone the proceeding due to a
- 174 technical problem and what actions the agency will take to attempt to
- 175 remedy the problem;
- 176 vii. How to examine witnesses who participate virtually and monitor or
- 177 sequester them, as necessary;
- 178 viii. How parties and their representatives can consult privately with each
- 179 other;
- 180 ix. When participants should have their microphone or camera on or off;
- 181 x. Whether, and, if so, how, participants should or should not communicate
- 182 with each other using a videoconferencing software's chat feature or other
- 183 channels of communication;
- 184 xi. How to properly safeguard classified, legally protected, or other sensitive
- 185 information;
- 186 xii. Whether participants may record proceedings; and
- 187 xiii. Whether and how other interested persons can attend, view streaming
- 188 video, or access recordings of virtual hearings.
- 189 6. Agencies should provide information on virtual hearings in pre-hearing notices to
- 190 participants, including the availability of the guidelines described in Paragraph 5.
- 191 7. When feasible, agencies should provide adjudicators with a space, such as an office or
- 192 hearing room, that the agency equips and maintains for the purpose of conducting



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- 193 hearings that involve one or more remote participants. When designing such spaces,
194 agencies should:
- 195 a. Use professional-grade cameras and microphones to capture and transmit audio
196 and video of the decisionmaker to remote participants; and
 - 197 b. Provide the adjudicator with access to a desktop computer and a minimum of two
198 monitors—at least one for viewing remote participants, one for viewing the
199 record, and potentially a third for performing other tasks or accessing other
200 information during proceedings.
- 201 8. Agencies should provide adjudicators who appear from a location other than a space
202 described in Paragraph 6 with a digital or physical backdrop so that they appear to other
203 hearing participants as if they are in a physical hearing room or other official space.

Training and Support

- 204 9. Agencies should provide training for adjudicators on conducting virtual hearings.
- 205 10. Agencies should provide adjudicators with adequate technical and administrative support
206 so that adjudicators are not responsible for managing remote participants (e.g., admitting
207 or removing participants, muting and unmuting participants, managing breakout rooms)
208 or troubleshooting technical issues for themselves or other participants before or during
209 proceedings. Agencies should provide advanced training for administrative and technical
210 support staff to ensure they are equipped to manage virtual hearings and troubleshoot
211 technical problems that may arise before or during proceedings.
- 212 11. Agencies should consider providing general training sessions or pre-hearing conferences
213 at which staff can explain expectations, technological requirements, and procedural rules
214 for virtual hearings to parties and representatives.

Assessment and Continuing Development

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

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

Commented [JG9]: This recommendation is taken, largely verbatim, from paragraph 11 of Rec. 2014-7.



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- 218 13. Agencies should collect anonymous feedback from participants (using, for instance, post-
219 hearing surveys) to determine participants’ satisfaction and identify any issues with
220 virtual hearings. Agencies should also maintain open lines of communication with
221 representatives in order to receive feedback about the use of virtual hearings. Agencies
222 should review this feedback on a regular basis to determine whether any previously
223 unrecognized deficiencies exist.
- 224 14. Agencies should monitor technological and procedural developments to ensure the
225 options for individuals to participate remotely in adjudicatory proceedings remain current
226 and reasonably comport with the expectations of people, organizations, and groups that
227 regularly participate in agency proceedings.
- 228 15. Agencies should share expertise with each other in order to reduce costs and increase
229 efficiency, while maintaining a fair and satisfying hearing experience. In addition, the
230 Office of the Chairman of the Administrative Conference should provide for, as
231 authorized by 5 U.S.C. § 594(2), the “interchange among administrative agencies of
232 information potentially useful in improving” virtual hearings and other forms of remote
233 participation in agency adjudicatory proceedings.

Commented [JG10]: This sentence is taken, largely verbatim, from paragraph 12 of Rec. 2014-7.

Commented [JG11]: This sentence is taken, largely verbatim, from paragraph 13 of Rec. 2014-7.

Commented [JG12]: This sentence is modeled on paragraph 18 of Rec. 2020-3, *Agency Appellate Systems*.