

# **SESSION 1 - Conducting Hearings During Coronavirus and Other Disasters**

## **Written Materials**

1. Introduction Slides Handout
1. Judge Mimi Tsanko Presentation Handout
2. ABA Article
3. [https://www.bloomberglaw.com/product/health/page/pg\\_coronavirus](https://www.bloomberglaw.com/product/health/page/pg_coronavirus)
4. Jeremy Graboyes Handout

## Conducting Hearings During Coronavirus and Other Disasters

Sponsored by the National Association of  
Administrative Law Judiciary (NAALJ) and the  
National Conference of the Administrative Law  
Judiciary (NCALJ), American Bar Association,  
Judicial Division

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Panelists

- Judge H. Alexander Manuel, Washington, DC  
ABA Judicial Division, NCALJ Chair (Moderator)
- Dr. Richard A. Berg, M.D., Baltimore, MD  
Internist and Epidemiologist
- Jeremy Graboys, Washington, DC  
Deputy Director of Research, ACUS
- James G. Pauli, Esq., Silver Spring, MD  
Managing Director, Innovative Justice Solutions, LLC
- Judge Mimi E. Tsankov, New York, NY  
Immigration Judge, New York Immigration Court

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## American Bar Association Coronavirus (COVID-19) Task Force

Website:  
[americanbar.org/coronavirustaskforce](http://americanbar.org/coronavirustaskforce)

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| <b>Immigration Court: Difficulties Exacerbated During the Pandemic</b>            |
| Monday, October 5, 2020   1:00 pm Eastern<br>Sponsored by NAALJ Annual Conference |
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| <b>Mimi Tsankov</b>  |
| <ul style="list-style-type: none"><li>• Hon. Mimi Tsankov</li><li>• National Association of Immigration Judges</li></ul> |
|                                        |
| Mimi Tsankov, NAIJ   |

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| <b>Disclaimer</b>   |
| <ul style="list-style-type: none"><li>• I am appearing in my capacity as Eastern Region Vice President, National Association of Immigration Judges.</li><li>• The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review.</li><li>• The views represent my personal opinions, which were formed after extensive consultation with the membership of NAIJ.</li></ul> |
| Mimi Tsankov, NAIJ  |

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| <b>The Basics</b>  |
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| <ul style="list-style-type: none"><li>• Association - representing about 500 non-managerial Immigration Judges</li><li>• Almost 70 courts around the nation</li><li>• ~ 1.4 Million Case Backlog</li><li>• ~ 2,800 cases per judge</li><li>• Immigration Judges preside every day, all day</li><li>• 3 - 4 individual trials per day</li><li>• up to 100-case master calendars</li></ul> |
| <small>Mimi Tsankov, NAJ</small>   |

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| <b>More Basics</b>  |
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| <ul style="list-style-type: none"><li>• Shared judicial law clerks, multiple judges per law clerk</li><li>• Immigration Judge Teams Model not implemented - less than 30 percent staffing at New York Immigration Court, heavy use of management judges who don't have assigned dockets</li></ul> |
| <small>Mimi Tsankov, NAJ</small>  |

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| <b>Structural Flaw</b>  |
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| <ul style="list-style-type: none"><li>• The Immigration Courts suffer from an inherent structural flaw<ul style="list-style-type: none"><li>○ Housed within the Department of Justice</li><li>○ Same Agency charged with prosecuting immigration cases in federal courts.</li><li>○ The Attorney General controls the jurisprudence, docket management, and even the terms of employment of immigration judges.</li></ul></li></ul> |
| <small>Mimi Tsankov, NAJ</small>  |

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**Politicization**

- Congress has so far failed to rectify the situation and create a new system that is truly independent.
- Our judicial system has made it vulnerable to the extreme policies of the Attorney General.
- On August 21, 2020, U.S. Senators Called for a GAO Investigation into the Politicization and Mismanagement of Immigration Courts as COVID-19 Crisis Rages

Mimi Tsankov, NAU

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**Both Practical and Rule of Law Concerns**

- Limited power to control the docket through prioritization.
- Every case is a priority - removal of authority to administratively closure (temporarily suspend) a case while an out-of-court process plays out.
- DOJ Implementing Regulations with very limited public comment periods.
- Heavy use of Attorney General-issued decisions

Mimi Tsankov, NAU

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**Both Practical and Rule of Law Concerns**

- Another troublesome policy is the imposition of numerical quotas to measure the performance of immigration judges.
- The quotas compromise the integrity of the court, undermine due process, and add to the court's backlog, which now exceeds 1,400,000 cases.
- They are unethical, unfair, and inefficient.

Mimi Tsankov, NAU

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| <b>Pandemic Issues</b>  |
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| <ul style="list-style-type: none"> <li>• Underutilization of judges during pandemic - failure to implement remote televideo hearings.</li> <li>• The backlog of immigration cases is ballooning and the mission has been severely compromised</li> <li>• The only technology solution EOIR has adopted remote conference calling for represented parties with judges and court staff forced to physically appear in court.</li> <li>• This solution is inexcusably inadequate.</li> </ul> |
| <div style="border: 1px solid black; padding: 2px; width: fit-content;">Mimi Tsankov, NAU</div>   |

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| <b>Pandemic Issues</b>   |
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| <ul style="list-style-type: none"> <li>• Throughout the pandemic, EOIR has attempted to run the detained immigration court dockets from the physical courthouses.</li> <li>• The results have been predictably poor.</li> <li>• The number of detained court hearings have dropped precipitously while at the same time EOIR has been forced to make emergency court closures across the country.</li> </ul> |
| <div style="border: 1px solid black; padding: 2px; width: fit-content;">Mimi Tsankov, NAU</div>  |

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| <b>Pandemic Issues</b>  |
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| <p style="text-align: center;"><b>Health and Safety Compromised</b></p> <ul style="list-style-type: none"> <li>• Judges, court staff, and the public have been exposed to the coronavirus and forced to self-quarantine.</li> <li>• Now, EOIR is steadily reopening non-detained courts across the country by again bringing judges, staff, and the public back to courthouses ill-prepared to protect individuals against the spread of the COVID-19 virus.</li> </ul> |
| <div style="border: 1px solid black; padding: 2px; width: fit-content;">Mimi Tsankov, NAU</div>   |

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**Pandemic Issues - Unsafe, Unproductive**

- The results are again predictable.
- Relatively few case completions
- More emergency court closures -- Dallas Immigration Court has closed multiple times for COVID exposures
- Parties must quarantine
- Presents more risk to all involved

Mimi Tsankov, NAIJ

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**NAIJ Proposed Solutions  
Remote Hearings**

- NAIJ urges EOIR to adopt remote hearings in a telework setting
- This will both safeguard the health of individuals involved while meeting the critical mission of the court to adjudicate immigration cases fairly and expeditiously under our nation's immigration laws.

Mimi Tsankov, NAIJ

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**Immigration Court Reform**

- Article I Immigration Court
- The only solution that would restore integrity to the system and ensure judicial independence
- Supported by
  - the ABA
  - the Federal Bar Association
  - the National Association of Women Judges
  - the American Immigration Lawyers Association

Mimi Tsankov, NAIJ

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| <b>Valuable liaison with the ABA</b>   |
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| <ul style="list-style-type: none"><li>• ABA Judicial Division, National Conference of the Administrative Law Judiciary</li><li>• ABA Commission on Immigration</li><li>• Value the support that these groups provide</li></ul> |
| <small>Mimi Tsankov, NAU</small>   |

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| <b>Thank you!</b>                |
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| <small>Mimi Tsankov, NAU</small> |

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# Human Rights at Risk: The Immigration Courts Are in Need of an Overhaul

The views expressed here do not represent the official position of the United States Department of Justice, the attorney general, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ.

by Hon. Mimi Tsankov

Share this:



“While immigration courts reside within the executive branch, they should not be merely a tool to achieve desired policy outcomes.”

—Senator Sheldon Whitehouse

So wrote Senator Sheldon Whitehouse (D-RI) in his [February 13, 2020, letter to Attorney General William Barr](#), in which he and eight members of the Senate Judiciary Committee called upon Barr to take action against, what he termed, an increasingly troubling politicization of the immigration court adjudication process.

The stakes couldn't be higher for those seeking human rights protection in the form of asylum and other forms of relief from persecution and torture. Individual liberty and personal safety interests are often at stake in immigration court proceedings where immigration judges have the authority to grant protection from persecution. *Id.*; *see also*, 8 U.S.C. 1158. Whitehouse gave voice to what is becoming an

alarming trend—the increasing political influence over individual immigration cases. This action, he explained, is undermining the public’s confidence in the immigration courts and creating an impression that “cases are being decided based on political considerations rather than the relevant facts and law. The appearance of bias alone is corrosive to the public trust.” Whitehouse Letter, *supra*, at 5; *see also*, 8 U.S.C. Section 1229a(b)(4)(A) and (B); 8 C.F.R. 1003.10(b).

Whitehouse recounted a sentiment articulated previously by a host of legal community leaders for more than a decade, not the least of which was ABA President Judy Perry Martinez, who in a [recent statement before the U.S. Congress](#) explained that housing a court within a law enforcement agency has exacerbated an inherent conflict of interest undermining “the basic structural and procedural safeguards that we take for granted in other areas of our justice system.” *See*, [Am. Bar. Assoc., 2019 Update Report: Reforming the Immigration System, Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases](#) (Mar. 2019). As she explained, “this structural flaw leaves Immigration Judges particularly vulnerable to political pressure and interference in case management.” Martinez Testimony, *supra*, at 1.

It is important to note that these concerns are being expressed on the heels of what some see as growing impunity within the executive branch, focused almost single-mindedly on the speed of removal hearings at the risk of diminished due process. *See* Statement of Jeremy McKinney, Secretary, American Immigration Lawyer’s Association, NPR, [Justice Department Rolls Out Quotas for Immigration Judges](#) (April 3, 2018). The Justice Department is being charged with implementing a host of policies that diminish the primary responsibility of ensuring a fair hearing. For the past three years, the attorney general has used a process known as “certification,” a power historically used sparingly, to overrule decisions made by the Board of Immigration Appeals and set binding precedent. *Id.* Some have argued that the frequency with which this procedure has recently been employed borders on abuse as it seeks to severely limit the number of immigrants who can remain in the United States. Whitehouse Letter, *supra*, at 5. Equally troubling is the charge that the attorney general is using certification as a way to overrule immigration judges whose decisions don’t align with the administration’s immigration agenda. *Id.*

One area of particular concern is the recent encroachment by the agency into judicial independence. The National Association of Immigration Judges (NAIJ), which is the union representing sitting immigration judges, argues, alongside many others in the legal community, that these incursions into judicial independence are part of a broader effort to fundamentally alter how immigration removal cases are adjudicated, and that such actions are having deleterious effects. *See* [Statement of Judge A. Ashley Tabaddor](#), President of the National Association of Immigration Judges, Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System” 2 (Apr. 18, 2018).



An overcrowded, fenced area holds families at a border patrol station in McAllen, Texas.

Thomas Cizauskas from Flickr

Among the new measures implemented by the Justice Department are unrealistic and impractical one-size-fits-all case quotas and deadlines that squeeze immigration judges where they are most vulnerable—their status as “employees.” If an immigration judge provides one too many case continuances, even though related to a valid due process concern, she risks being terminated. Every pause for judicial reflection, or break for much needed legal research, risks slowing down the “deportation machinery” that the adjudication process is veering toward and threatens to eviscerate procedural due process, even though such due process is mandated by the U.S. Constitution. *Id.*

These controversial new policies have become so pervasive and so threatening to judicial independence that they have raised alarms. What began in 2018 as a few dramatic instances involving the abrupt removal and reassignment of cases from an immigration judge’s docket previewed the agency’s more recent alarming actions where the shuffling of scores of cases and entire dockets sometimes multiple times within a single day has become the norm. The endless docket shuffling, and the chasing of performance “completions” that correspond to a job-preserving metric, seems designed to make political statements rather than ensuring victims of human rights abuses are afforded due process. A complex, multi-witness, multi-issue hearing is afforded the same value as an order of removal for failure to appear at a hearing. See Mimi Tsankov, *Judicial Independence Sidelined: Just One More Symptom of an Immigration System Reeling*, 55 Cal. W. L. Rev. 2 (2019).

The political backdrop couldn’t be more fraught with last year’s highly politicized standoff between President Donald Trump, who has expressed hostility toward the Immigration Judge Corps, and Congress, over how to fund immigration-related border security, including the provision of Immigration Court funding. [H.R.J. Res. 31 116th Cong.](#) (2019). That impasse culminated in an unprecedented 35-day shutdown of the Justice Department, with appropriations not finalized until

four months into fiscal year 2019. See Mallory Moench, [Immigration Courts in New York Stymied by Government Shutdown](#), TimesUnion (Jan. 22, 2019).

During the shutdown, most immigration courts were closed, and it is estimated that some 80,000 immigration court cases, which were scheduled to be heard during that period, were essentially “shelved” until they could be rescheduled some time in the next few years. The courts have still not fully recovered from this shock to the workload and are running the highest backlogs that have ever been recorded. See Ashley Tabaddor, [Insight: Immigration Courts Face More Than 80,000 Canceled Hearings in Federal Shutdown](#), Bloomberg Law (Jan. 29, 2019, 4:01 PM). As Judge Ashley Tabaddor, NAIJ president, has testified, despite funding allocations at record levels, the immigration courts have been hobbled by politically motivated docket shuffling and a heavy focus of resources skewed toward supervisory judges at the expense of trial judges and their support teams, which are critical to maintaining an efficient active docket. See [Statement of Judge A. Ashley Tabaddor](#), Jan. 29, 2020, Before the United States House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship Hearing on “The State of Judicial Independence and Due Process in U.S. Immigration Courts.”

The ABA has renewed its commitment to taking a leadership role in calling for an independent Article I Immigration Court. In Perry Martinez’s recent testimony before the House of Representatives Committee on the Judiciary, Subcommittee on Immigration and Citizenship, she acknowledged that while there are incremental reforms that the ABA could recommend within the current structure, the only way to resolve systemic issues within the immigration adjudication system is through the creation of an independent Article I court. See Martinez Testimony.

From unrealistic performance measures imposed on immigration judges, the unprecedented certification of cases to the attorney general for decision, to allegations of partisanship in the appointment of judges to the Board of Immigration Appeals, and the unparalleled regulatory schema now imposed whereby the director of the Executive Office for Immigration Review, itself a political appointment, will now serve as an appellate judge in addition to his prior responsibilities enabling political influence over individual cases, concern is mounting about the administration’s apparent efforts to undermine the independence of immigration courts. *Id.*

**Mimi Tsankov** serves as eastern region vice president with the National Association of Immigration Judges and has been a full-time immigration judge since 2006.

## **Resources for Adjudicators During the COVID-19 Pandemic**

***Jeremy Graboyes***

### **Federal Agency Policies**

Federal agencies are developing policies to manage their adjudication case loads while promoting health and safety during the COVID-19 pandemic. For a continuously updated list of relevant orders, policies, news releases, and other statements from more than three dozen federal adjudicative agencies, visit [www.acus.gov/coronavirus-and-adjudication](http://www.acus.gov/coronavirus-and-adjudication).

### **State and Local Agency Policies**

State and local agencies are developing policies to manage their adjudication case loads while promoting health and safety during the COVID-19 pandemic. For links to a partial list of relevant state and local agency policies, see Jeremy Graboyes, *How Administrative Courts Are Handling Hearings (For Now)*, Yale J. Reg. Notice & Comment (April 1, 2020), <https://www.yalejreg.com/nc/how-administrative-courts-are-handling-hearings-for-now-by-jeremy-graboyes/>.

### **Other Resources**

Jeremy Graboyes, *How Administrative Courts Are Handling Hearings (For Now)*, Yale J. Reg. Notice & Comment (April 1, 2020), <https://www.yalejreg.com/nc/how-administrative-courts-are-handling-hearings-for-now-by-jeremy-graboyes/>.

Jeremy Graboyes, *Legal Considerations for Remote Hearings in Agency Adjudications* (June 16, 2020), [https://www.acus.gov/sites/default/files/documents/Legal%20Considerations%20for%20Remote%20Hearings%20in%20Agency%20Adjudications\\_1.pdf](https://www.acus.gov/sites/default/files/documents/Legal%20Considerations%20for%20Remote%20Hearings%20in%20Agency%20Adjudications_1.pdf).

### **Questions?**

Contact me at [jgraboyes@acus.gov](mailto:jgraboyes@acus.gov).

# **SESSION 2 - Due Process and Administrative Hearings in the Time of Covid-19**

## **Written Materials**

1. Judge Leslie Ann Birnbaum Presentation Handout

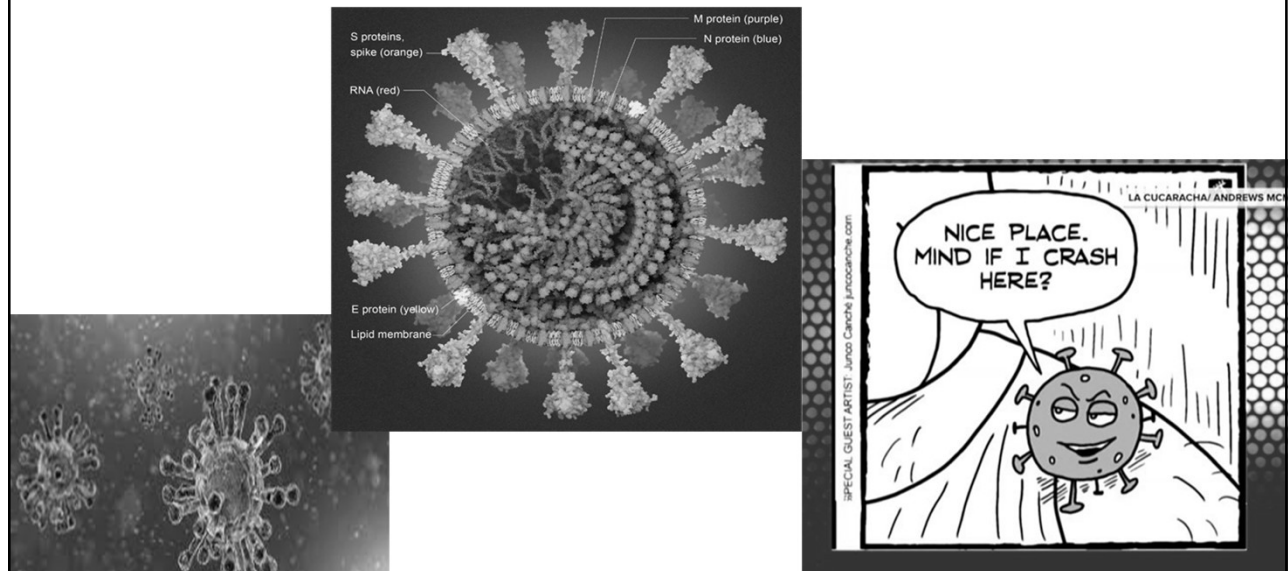
# Due Process and Administrative Hearings in the Time of Covid 19

HELP-I NEED SOMEBODY!

Leslie Birnbaum  
Industrial Appeals Judge  
Board of Industrial Insurance Appeals  
Washington State  
leslie.birnbaum@biia.wa.gov

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## Images of Covid 19



2

## COVID HEADLINES

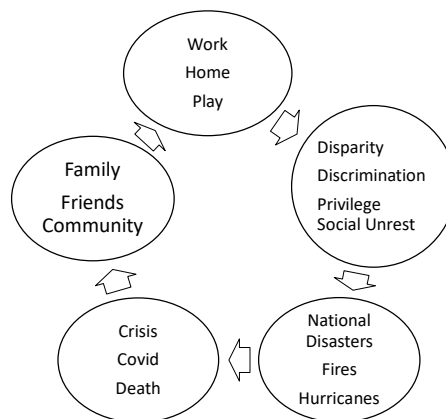
**Coronavirus Leads to 30-Day Delay for many NC Court Hearings, North Carolina Health News, March 15, 2020,**

**Here are the Updates that Hamilton SE Schools made to its Reopening Plan Indianapolis Star, August 14, 2020**

**Zoom Trial Interrupted with 9/11 Images, Pornography, Law 360, Georgia, September 11, 2020**

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## COVID CYCLE



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## HISTORY

- Unknown: Small Pox: 3<sup>rd</sup> Century BCE
- 1347-1353: Bubonic Plague  
<https://www.youtube.com/watch?v=c2QN3kzA6rg>
- 1894: Polio (1916, 1952)
- 1918: Influenza of 1918 (Spanish Flu)
- 1957-1958: the H2 N2 virus (Asian flu)
- 1968: H3N2 virus, (Avian influenza A)
- 2002-2004: Sars (Severe acute respiratory syndrome-Coronavirus 2)
- 2009-2010: H1N1 (Swine Flu)
- 2019: Covid-19 (Coronavirus 19)

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## The Hearing Room

- Ritual and Traditions
- Administrative process
- Consistency, control and balance
- Crisis
- Accessibility
- Work and personal adaptations



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## Due Process and the Constitution

- 5<sup>th</sup> and 14<sup>th</sup> Amendments
- contain a due process clause.
- Due process deals with the administration of justice
- a safeguard from arbitrary denial of life, liberty, or property by the government outside of the law.
- 14<sup>th</sup> Amendment: nor shall any State deprive any person of life, liberty, or property, without due process of law.

### 14th Amendment

...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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## Procedural Due Process

*Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct.1011, (1970)

- Procedural due process in a public assistance case
- Recipients terminated, or were about to terminate, without prior notice and hearing, and denied due process of law.
- Notice and Opportunity to be Heard
- pretermination hearing must include the following elements
- (1) a timely and adequate notice
- (2) an opportunity for a hearing at a meaningful time and manner, to confront any adverse witnesses, and present arguments and evidence orally

*Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, (1976)

- Procedural due process in a social security disability benefit case
- Balancing Test –
  - private interest affected by official action;
  - Risk of erroneous deprivation of interest
  - Governmental interest

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## COVID 19 & ADMINISTRATIVE HEARINGS

- Exodus from Office to home
- Paper to electronic
- In-Person to virtual/hybrid
- Testimony and Exhibits
- Objections
- Travel/Expense/Time Issues
- Backlog



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## Due Process Obstacles

### Notice

- Accurate Notices
- Timely Notices

### And the Opportunity to be Heard

- Meaningful
- Oral argument
- Cross-examination
- Clear, Complete Record

- Challenges: Remand the appeal for another hearing opportunity. Failure to appear-failure to present evidence when due. Appeal dismissed. Appellant received inconsistent information about whether he was supposed to call in or wait for a call. Good cause shown. *Kinchen*, BIA Dec., 1924896 (May 2020) (unrepresented) Washington state
- Covid Continuances: The Administrative Conference of the United States compiled Covid-related memos and polices pertaining to federal administrative agencies, the Executive Office for Immigration Review, in June 11, 2020, in a document from the Department of Justice regarding Immigration Courts, that stated that the granting of motions cannot be "a cover for purely dilatory tactics." June 11, 2020, Executive Office for Immigration Review (EOIR)

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## Due Process Considerations

- Pandemic Pace (accelerated v. stalling)
- Self-Represented Parties
- ESL
- Audio/technical difficulties
- The Digital Divide/Equipment
- Disparate Outcomes
- Reopening and Safety

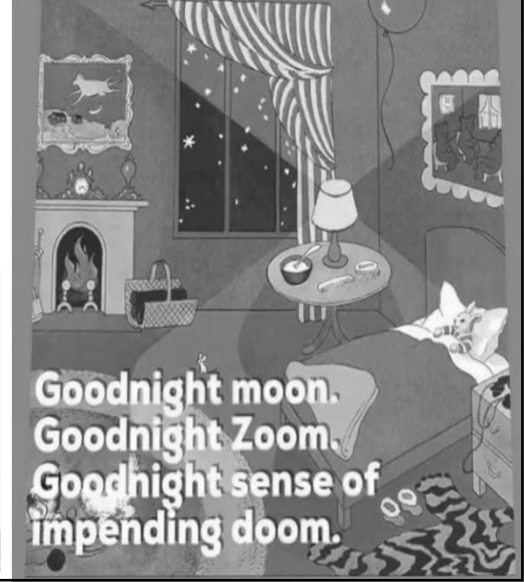
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## SURVEYS

- Telephone hearings
- Video hearings

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# Picture the New Normal



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# Positive Outlook



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## Judicial Voices



Lorraine Lee, Chief Judge/Director, Office of Administrative Hearings, Washington State



Irene Herman, Hearing Officer, Health Connector Authority, Massachusetts

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## Judicial Voices

Judge Heidi Bolong,  
Washington State



Judge Carrie Ingram,  
Indiana



Judge Omar Hernandez,  
Massachusetts



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## Judicial Voices



Bob Cohen, Chief Judge/Director,  
Florida Division of Administrative  
Hearings

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## Judicial Voices



Judge Brian Watkins,  
Olympia, Washington

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## Recommendations

- Notice: Accuracy and Timeliness
  - Consistency
- Meaningful Opportunity to be Heard
- Remote hearings-Training, practice, ease, breakout rooms, waiting area
  - Exhibits and Objections
  - Organize, Practice, Prepare: first glance, witness arrivals, instructions, test audio and reconnect
  - Delays and Continuances
  - Consecutive interpretation-Interpreters on another line
  - On-site accessible rooms for those who don't have equipment
  - Equity, dignity and safety

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## TOP 10

1. Barking
2. Crying, miscellaneous sounds
3. Failure to hit mute
4. Failure to adapt smartphones
5. Failure to thrive computers
6. On-hold, looped (Elevator) muzak
7. Page-turning, typing
8. Zoom drama-Walkouts
9. Crashing, freezing and connectivity issues
10. Groundhog Day



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## RBG

- “I am very hopeful that if the court has a blind spot today, its eyes will be open tomorrow.” July 2014



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## PowerPoint Presentation

This presentation was prepared for the National Association of Administrative Law Judiciary (NAALJ) October 2020 conference. It does not reflect the views of NAALJ (including the committees or members) or the Board of Industrial Insurance Appeals in Washington state.

The content, statements and opinions are those of Leslie Birnbaum.

The deminimus use of humor, the Beatles, video clips, music, cartoons, comics in conjunction with the fair use doctrine, for educational purposes and parody.

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# **SESSION 3 - Best Practices in Telephone and Videoconference Hearings**

## **Written Materials**

1. Judge Gwenlynn D'Souza Presentation Handout
2. Jeremy Graboyes ACUS Report
3. Special Education Hypothetical

**National Association of  
Administrative Law Judiciary**

October 5, 2020

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**Evolving Best Practices in  
Telephone and Video Conference Hearings**

**Deborah A. Carroll**, Interim Chief Administrative Law Judge, District of Columbia Office of Administrative Hearings  
**Michelle W. Cole**, Administrative Law Judge, Maryland Office of Administrative Hearings  
**Gwenlynn D'Souza**, Administrative Law Judge, District of Columbia Department of Employment Services  
**Jeremy Graboyes**, Deputy Research Director at Administrative Conference of the United States  
**Fredric I. Lederer**, Chancellor Professor of Law and Director of the Center for Legal & Court Technology (CLCT),  
 William & Mary Law School

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**Overview**

- How to set-up a hearing with remote participants,
- How to implement the formal hearing in accordance with due process and other procedural considerations, and
- How the virtual hearing format affects decision-making, if at all.

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2

Student, who was recently diagnosed with ADHD and dyslexia, is in the second grade at Public School A, which is participating in online learning for all students for 2020-2021. Beginning in kindergarten, Student struggled with listening attentively and remaining seated for instruction. Kindergarten Teacher developed strategies, such as a timer, fidgets, and verbal reminders, to address problem behaviors and recommended that First Grade Teacher continue to implement these strategies to keep Student on task. Student's First Grade Teacher noticed similar problems with the Student's behavior, which were interfering with the Student's ability to timely complete his work. While Student continued to make progress in academic areas, he struggled with attention and his problem behaviors increased. First Grade Teacher added additional strategies to address problem behaviors.

By the end of second quarter, Student was working towards grade-level standards and was reading at an appropriate first grade level. However, he still had problems with attentive listening, following directions, and organization. His formal assessments scores were in the average range, with math scores in the high average range and reading comprehension in the low average range. First Grade Teacher, at a parent-teacher conference, suggested that Parents may want to consult with their pediatrician to inquire if medication may be helpful.

During the 3rd quarter, Parents asked that the Student be evaluated for eligibility for special education services under the IDEA. Specifically, they were concerned about the Student's progress in reading and written language compared with same-aged peers. Parents noticed that Student's written work was often incomplete, messy, and filled with spelling and capitalization errors. They also were concerned about behavioral problems, both at school and at home, which they believe are caused by Student's frustration related to his learning disability.

Based on its review of the Student's classwork, formal and informal evaluations, and teacher reports, School A determined that the Student is not eligible for special education services because the Student has made progress in all academic areas and does not require special education services to access the curriculum.

Shortly after all schools in the State were closed based on the COVID-19 pandemic, Parents filed a due process complaint and request for mediation, regarding School A's eligibility determination. Parents are frustrated that they have not been able to resolve this matter before the new school year began. And they now have additional concerns because the Student is not adjusting well to on-line learning and is falling behind.

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**Preliminary Considerations**

**Procedures upon request for mediation/ due process hearing:**

- Telephone Conference or Telephone Pre-Hearing Conference to discuss scheduling, timeline, motions, accommodations, witnesses, exhibits, etc.
- Additional Telephone Conference or Pre-Hearing Conference
- Mediation or Status Conference

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**Select Forum for Hearings**

Consider options on how to safely ensure due process for every proceeding:

- In-person proceedings
- Remote by video or telephone
- Hybrid

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**Other Considerations**

What to consider when parties disagree on the forum?

- Needs and experience of special populations
  - Psychiatric patients who may suffer from delusions or paranoia
  - Special education students whose routine has been interrupted, school closures, remote learning with limited services, no access to services for long period of time
- Access to technology due to age, income, language barriers

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**Notice of Proceedings**

**Should Contain Information on How to Access Selected Forum**

- Content – What information is required?
- Conveyed to Participants either by:
  - Written Notice of Mediation/SC/Hearing
  - Letter memorializing TC or TPHC Order
  - Email Notice
- Agency Information Available to Public - FAQs

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**Other Due Process Considerations**

**Witness Testimony & Presentation of Evidence**

- Sequestration/Waiting Room
- Sharing Documents
- Exhibits

**Effects of COVID-19 on decision-making**

- Postponement Requests;
- Timeliness
- Substantive changes because of COVID-19
  - CARES Act
  - Special Ed DOE Guidance

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**Resources**

- CARES Act
- Agency Directives & Statements
- Guidance - DOE

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### Due Process Foundations

- **Mathews v. Eldridge, 424 U.S. 319 (1976).** Three-factor balancing test to identify what federal constitutional due process requires:
  - The private interest that will be affected by the official action.
  - The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.
  - The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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### DP Objections to Online Hearings

- Party objects to own manner of participation vs. party objects to another participant's manner of participation
- Despite legal challenges, no per se federal constitutional right to any particular manner of hearing: in person vs. online vs. traditional video vs. telephone vs. written
- Remember: *Mathews v. Eldridge* factors
- When setting hearing manner, judges should consider facts of case and parties' circumstances, e.g.:
  - Nature of evidence and complexity of presentation
  - Factual disputes vs. primarily legal questions
  - Importance of assessing credibility
  - Physical, mental, education, or linguistic limitations
  - Access to technology
  - Public health concerns
  - Likelihood and effects of delay

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### DP and Development of Online Hearing Procedures

- When adapting in-person procedures for online hearings or developing procedures for conducting online hearings, consider *Mathews*
- Provide advance notice of online hearing procedures and expectations to participants
  - Provide electronic invitation early so attorneys have ample time to contact witnesses and send invitation with link to virtual hearing room
  - Provide electronic invitation to court reporter and interpreter as needed

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**DP Issues That Arise During Online Hearings**

- Technical issues
- Participants' lack of familiarity with technologies
- Issues adapting in-person procedures to virtual spaces
- Impartiality concerns
- Interpersonal communication issues

Ask: Is a party likely to experience substantial prejudice as a result of the issue? Is the issue likely to affect the outcome of a case?

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**Other Legal Norms**

- Be mindful of other legal norms besides federal constitutional due process, including:
  - Access to counsel
  - Accessibility (ADA)
  - Privacy and data security
  - Transparency
  - Professional ethics
  - Dignity value for participants
- Be mindful of other sources of law: state constitution, relevant statutes, rules, other guidance

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**Video hearings**

- What is your required protocol?
- Will counsel stand?
  - That affects the technology and requires advance notice

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Consider a backdrop:



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Video hearings: Internet Connection

- Try to use a hard-wired connection to a modem
- Wi-Fi is more variable and liable to fail

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Video hearings: Audio/Video

Use a dedicated camera/microphone



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**Video hearings: Equipment**

Consider two screens:

- One to view participants;
- One to view documents and visual content

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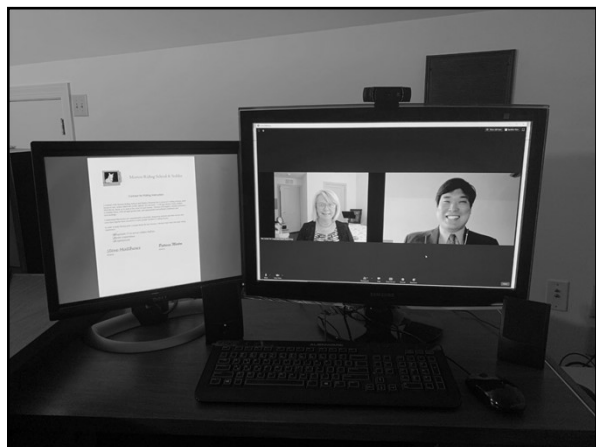
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**Handling the Technology**

- Ideally, have IT support or a vendor.
  - NOTE – supporting counsel, witnesses, and others should NOT be the judge’s responsibility.
  - A staff member or vendor should handle appearances as well as who appears on screen and, when possible, where.
- If you’re alone, consider the following:
  - Reviewing online tutorials on locking screen to focus attention on judge or witness and grid view to view all participants simultaneously
  - Back-up plans

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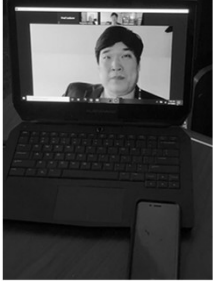
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### Backup for when things go wrong

Spare computer



Smartphone

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### When things go wrong!

- Internet failure – go to phone
- Computer/microphone/camera failure
  - Go to backup computer or, if necessary, phone

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### Simple Documents

- Use content share feature, not screen share, if possible
  - This protects information on your computer that might be inadvertently shown
- If you're alone, best to practice content share before your first hearing and best to open exhibits before opening up a videoconference program.

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**Complicated documents/video material**

- Usually best to circulate before the hearing
- Create procedure for impeachment or rehabilitation material to be seen during hearing

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**Record**

- Will a simple recording suffice
  - Will it implicate privacy protections?
- Note that Artificial Intelligence transcripts from open microphone recordings already exist
  - Research quality of recordings

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**In-hearing communications**

- “Breakout rooms” provide some help but can’t guarantee attorney-client confidence
  - A recess may be sufficient
- Disabling a chat feature may block private witness prompting but “cheating” can be easily facilitated via other devices

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**Cybersecurity**

- Are aspects of evidence and/or hearing adequately secured to remain private?
- Are you reasonably sure your hearing and content haven't been hacked?

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**The oncoming future**

- Many administrative hearings have been at least partially remote for years
- Post COVID-19, many virtual hearings will remain
  - But most should originate from properly equipped hearing rooms
  - Who will be responsible for producing the multi-media record?
  - Who will own, maintain, and secure the servers?

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**We Live in Interesting Times**

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**Assessing Credibility**

Does technology assist or hinder the assessment of credibility?

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**Initial View**

- Recommend grid view so an ALJ can view all participants at the beginning of a hearing.
- Recommend purchasing an application with a feature that can focus on speaker, for instance, a judge when dealing with preliminary matters before taking testimony.

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**Focusing on Witness to Assess Credibility**

- Drag corner of witness image to enlarge view of witness
- Use a large second screen solely for witness
  - I use a HDMI cable to attach to a TV screen

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**Focusing on Witness to Assess Credibility**

Notable Program Application Features:

- WebEx – Lock the view with pushpin icon
- Zoom – Spotlight to focus on speaker
- Blackboard – Follow the speaker view
- Blue Jeans – Pin a participant

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**When to Change the View**

Timing is everything!

Before administering the oath, change the settings.

You will be able to see any hesitation or facial expression by a witness before answering a question.

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**Inaudible Testimony/Static**

Ask the witness:

- To use headphones or earbuds;
- To move a step away from the laptop; or
- To move his or her microphone away from an attorney’s microphone or speaker

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**Telephone Hearings- Before the Hearing Begins**

- Be prepared
- Set up your platform templates before scheduling
- Start the hearing at least a few minutes before it is scheduled
- Mute the line and ensure video is turned off
- As participants join, mute their lines by clicking the microphone button near their name on the participant list

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**Telephone Hearings-During the hearing**

- Call and conduct the case just as if you were in the hearing room
- Establish and explain hearing protocols
- Take steps to “check in” with parties to keep them engaged
- Periodically check to make sure the systems are working as intended
- Have a plan to address disruptive parties or lawyers
- Be prepared for the unexpected

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**Telephone Hearings- Concluding the hearing**

- Close the hearing as you would for an in-person hearing
- Formally tell them that the hearing is adjourned, and that the parties can hang up
- Do not hang up or stop recording until hearing is adjourned

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## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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STAFF REPORT

Final Version  
June 16, 2020

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# LEGAL CONSIDERATIONS FOR REMOTE HEARINGS IN AGENCY ADJUDICATIONS

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Administrative Conference of the United States

This report was prepared for the Office of the Chairman of the Administrative Conference of the United States. It does not necessarily reflect the views of the Office of the Chairman or the Conference (including the Conference's Council, committees, or members).

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## BACKGROUND

Agencies are increasingly using and relying on remote hearings to fulfill their workload responsibilities during the COVID-19 pandemic.<sup>1</sup> The Administrative Conference of the United States (ACUS) has previously recommended best practices for using and expanding the use of video teleconferencing (VTC) in agency adjudications<sup>2</sup> and published a *Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings*.<sup>3</sup> ACUS has also addressed the use of written-only hearings in adjudications not subject to the Administrative Procedure Act's (APA) formal-hearing requirements.<sup>4</sup>

This Report is intended to supplement those materials by providing an overview of legal issues that federal agencies may encounter as they develop and implement processes for remote hearings, defined broadly to include any adjudicatory hearing in which at least one individual participates by VTC, by telephone or internet telephony, or through written submissions. It does not condone or condemn the use of remote participation in any circumstance or attempt to set forth best practices for its implementation. Readers interested in these subjects should refer to the ACUS materials noted above.

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<sup>1</sup> ACUS is collecting materials related to federal agency adjudication during the pandemic on its website at <https://www.acus.gov/coronavirus-and-adjudication>.

<sup>2</sup> Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011); Ctr. for Legal & Court Tech., *Best Practices for Using Video Teleconferencing for Hearings and Related Proceedings* (2014) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/best-practices-using-video-teleconferencing-final-report>; Nathaniel Flanders & Amber Williams, Admin. Conf. of the U.S., *Memorandum on the History of Agency Video Teleconferencing Adjudications* (Nov. 26, 2014), [https://www.acus.gov/sites/default/files/documents/VTC%20Hearing%20History\\_FINAL.pdf](https://www.acus.gov/sites/default/files/documents/VTC%20Hearing%20History_FINAL.pdf); Funmi E. Olorunnipa, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion* (May 10, 2011) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-use-video-hearings-final-report>.

<sup>3</sup> MARTIN E. GRUEN & CHRISTINE R. WILLIAMS, ADMIN. CONF. OF THE U.S., *HANDBOOK ON BEST PRACTICES OR USING VIDEO TELECONFERENCING IN ADJUDICATORY HEARINGS* (2015), *available at* <https://www.acus.gov/report/handbook-best-practices-using-video-teleconferencing-adjudicatory-hearings>.

<sup>4</sup> Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016); *see also* MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., *FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 80–81* (2019), *available at* <https://www.acus.gov/publication/federal-administrative-adjudication-outside-administrative-procedure-act>.

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## INTRODUCTION

Adjudicatory hearings vary widely across federal agencies. While some evidentiary hearings resemble federal-court proceedings, complete with formal rules of procedure and evidence, others are as simple as an informal conversation or the exchange of documents. Depending on the proceeding, participants may include a single adjudicator or multiple adjudicators, adjudicative staff, representatives of the agency as a party, a private party or multiple private parties, attorney or non-attorney representatives of private parties, agency witnesses, non-agency expert and lay witnesses, and foreign- and sign-language interpreters.

Adjudicators ordinarily conduct adjudicative hearings from their official duty station or a designated hearing space managed by the agency or another federal-, state-, or local-government entity. They sometimes also conduct hearings from non-government spaces secured for the purpose of holding a hearing. During the COVID-19 pandemic, many adjudicators are, for the first time, conducting hearings remotely from their alternative duty stations—generally their homes.<sup>5</sup> This raises new practical and potentially legal questions as adjudicators are unlikely to have ready home access to the same quality of remote-hearing infrastructure or level of administrative support.

Non-adjudicator participants participate in evidentiary hearings in person or remotely by VTC or telephone from designated agency hearing spaces or elsewhere, or through the interchange of written correspondence. The basic features of each of these four manners of participation are:

|                             | Same Space as<br>Adjudicator | Synchronous<br>Visual | Synchronous<br>Audio | Information<br>Exchange |
|-----------------------------|------------------------------|-----------------------|----------------------|-------------------------|
| <b>In person</b>            | ●                            | ●                     | ●                    | ●                       |
| <b>Video teleconference</b> |                              | ●                     | ●                    | ●                       |
| <b>Telephone</b>            |                              |                       | ●                    | ●                       |
| <b>In writing</b>           |                              |                       |                      | ●                       |

Although we often speak of “in-person hearings” and “remote hearings,” all participants in a proceeding need not participate in the same manner. One party may appear in person before the adjudicator while another participates remotely. Both parties may participate remotely from the adjudicator, separately or sometimes from the same location. A witness or interpreter may participate remotely in an otherwise in-person hearing. Indeed, individual participants may participate by different means at various stages of a case—in person at an initial hearing and remotely at a supplemental hearing, for example. For purposes of this Report, a “remote” hearing means any evidentiary hearing in which at least one participant participates by VTC, telephonically, or in writing.

As a matter of policy, each manner of participation has its benefits and costs and the potential to provide, in appropriate circumstances, an effective and efficient means of exchanging information and developing a record for decisionmaking. However, this Report addresses only the legal questions regarding their use. Part I examines legal questions agencies may encounter when parties voluntarily participate by remote means. Part II examines legal questions agencies may

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<sup>5</sup> See *supra* note 1.

encounter when they require private parties to participate remotely. Part III examines legal questions that have arisen when witnesses and opposing parties participate remotely. Part IV addresses potential legal questions related to remote-hearing infrastructure, including technical problems that may occur during remote hearings and legal standards governing privacy, accessibility, and open hearings.

## I. VOLUNTARY REMOTE PARTICIPATION BY PRIVATE PARTIES

Many agencies, by rule or practice, permit parties to voluntarily participate in evidentiary hearings by remote means. Depending on an agency tribunal's rules of practice, parties may voluntarily participate by remote means when:

- an adjudicator grants a party's individual request to participate remotely;
- an adjudicator grants opposing parties' joint request to participate remotely;
- a party agrees to an adjudicator's offer or request that he or she participate remotely;
- a party declines or fails to follow procedures to inform the adjudicator in advance of scheduling that he or she would prefer not to participate remotely; or
- an adjudicator notifies a party that he or she is scheduled to participate remotely, and the party declines or fails to avail himself or herself of procedures to opt out of remote participation.

Legal questions may arise when a party claims that his or her remote participation was not truly voluntary. A party may allege, for example, that he or she followed procedures to opt out of remote participation,<sup>6</sup> showed good cause for not following opt-out procedures,<sup>7</sup> did not understand or receive legally required notice that he or she would be participating remotely,<sup>8</sup> lacked knowledge of a deadline to object to remote participation,<sup>9</sup> did not understand the effect of participating remotely,<sup>10</sup> or was not given adequate time to make travel arrangements to attend in person.<sup>11</sup> Agencies should be mindful of any statutory or regulatory requirements for obtaining parties' consent or processing objections to remote participation.

Even in instances in which a party explicitly agrees to participate by remote means, legal questions may arise related to another participant's manner of participation, technical problems

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<sup>6</sup> See, e.g., *Dudek v. Comm'r of SSA*, 2018 U.S. Dist. LEXIS 164261, at \*3–4 (E.D. Mich. Aug. 24, 2018), *adopted by* 2018 U.S. Dist. LEXIS 163588 (E.D. Mich. Sep. 25, 2018); *McDavid v. Colvin*, 2017 U.S. Dist. LEXIS 32397, at \*5–10 (N.D. Ill. Mar. 7, 2017); *Alzamora v. Comm'r of Soc. Sec.*, 2014 U.S. Dist. LEXIS 176093, at \*8–11 (M.D. Fla. Dec. 22, 2014); *Pittman v. Astrue*, 2013 U.S. Dist. LEXIS 122707, at \*3–5 (M.D. Ga. July 29, 2013), *adopted by* 2013 U.S. Dist. LEXIS 121523 (M.D. Ga. Aug. 27, 2013).

<sup>7</sup> See, e.g., *Cavazos v. Berryhill*, 2018 U.S. Dist. LEXIS 215851, at \*7–9 (W.D.N.Y. Dec. 21, 2018).

<sup>8</sup> See, e.g., *Zuniga v. Barr*, 934 F.3d 1083, 1085 n.2 (9th Cir. 2019); *Birdwell v. Berryhill*, 2018 U.S. Dist. LEXIS 128999, at \*15 (E.D. Tenn. June 22, 2018), *adopted by* 2018 U.S. Dist. LEXIS 128571 (E.D. Tenn. Aug. 1, 2018); *Kilcrease v. Comm'r of Soc. Sec.*, 2018 U.S. Dist. LEXIS 38675, at \*25–31 (E.D. Tenn. Mar. 9, 2018); *Pokluda v. Colvin*, 2014 U.S. Dist. LEXIS 59337, at \*11–13 (N.D.N.Y. Mar. 21, 2014), *adopted by* 2014 U.S. Dist. LEXIS 58394 (N.D.N.Y. Apr. 28, 2014).

<sup>9</sup> See, e.g., *Scott v. Comm'r*, 2014 U.S. Dist. LEXIS 45266, at \*24–27 (D. Md. Apr. 2, 2014).

<sup>10</sup> See, e.g., *Gunter v. OPM*, 15 Fed. Appx. 873, 874 (Fed. Cir. 2001).

<sup>11</sup> *Momentum EMS v. Sebelius*, 2013 U.S. Dist. LEXIS 183591, at \*29 (S.D. Tex. Dec. 18, 2013).

which occur during the hearing, or other issues related to the agency’s remote-hearing infrastructure. These issues are discussed in Parts III and IV.

Legal questions may also arise when an agency denies a party’s request to participate remotely and mandates that he or she participate in person. Such disputes typically arise when a party contends that a disability or other limitation prevents him or her from traveling to an in-person hearing site or participating in an in-person setting. When evaluating claims that due process requires an agency to accommodate an individual’s request to participate remotely, courts seem to consider factors including the party’s compliance with agency procedures to request an alternative manner of participation, the nature of the alleged limitation and evidence of its limiting effects, and any actual effect on the conduct of the hearing or the outcome of the proceeding.<sup>12</sup>

Parties may also raise parallel claims of disability discrimination under section 504 of the Rehabilitation Act. Section 504 provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency or by the United States Postal Service.”<sup>13</sup> (Similar requirements under the Americans with Disabilities Act are inapplicable to federal agencies.<sup>14</sup>) Parties have occasionally alleged that agencies violate section 504 when they mandate in-person participation for parties whose disabilities may with their ability to travel to a hearing site or participate in an in-person setting.<sup>15</sup>

During the COVID-19 pandemic, most federal agencies have postponed in-person hearings or encouraged parties to agree to participate remotely to curb the virus’s spread. At least one federal agency, the Executive Office for Immigration Review, has continued to conduct in-person hearings in some circumstances.<sup>16</sup> A recent suit requested that a federal district court issue a temporary restraining order that would require the EOIR to “postpone all in-person detained hearings, with the exception of bond hearings, for the longer of the duration of the currently declared National Health Emergency or a Relevant State Emergency” and install adequate remote-hearing infrastructure.<sup>17</sup> Although the court ultimately concluded it lacked jurisdiction to hear the case, it stressed that “promoting public health—especially during a pandemic—is in the public

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<sup>12</sup> See, e.g., *Calderon v. Comm’r of Soc. Sec.*, 2013 U.S. Dist. LEXIS 89079, at \*13–18 (M.D. Fla. May 31, 2013), *adopted by* 2013 U.S. Dist. LEXIS 89264 (M.D. Fla. June 24, 2013); *Pitts v. Comm’r*, 2010 Tax Ct. Memo LEXIS 136, at \*27–28 (2010); *Walker v. Astrue*, 2009 U.S. Dist. LEXIS 65096, at \*53–55 (E.D.N.Y. July 28, 2009); *Vicari v. Astrue*, 2009 U.S. Dist. LEXIS 9670, at \*17–18 (E.D.N.Y. Feb. 10, 2009); *Davidson v. Astrue*, 2008 U.S. Dist. LEXIS 91401, at \*27–28 (W.D. Wis. Nov. 6, 2008)

<sup>13</sup> 29 U.S.C. § 794(a).

<sup>14</sup> See *Sanders v. Herin*, 2019 U.S. Dist. LEXIS 230540, at \*9–10 (D.S.C. Dec. 12, 2019), *adopted by* 2020 U.S. Dist. LEXIS 75272 (D.S.C. Apr. 29, 2020); *Pitts v. Comm’r*, 2010 Tax Ct. Memo LEXIS 136, at \*27–28 (2010).

<sup>15</sup> See, e.g., *Sanders v. Herin*, 2019 U.S. Dist. LEXIS 230540, at \*10–12 *adopted by* 2020 U.S. Dist. LEXIS 75272 (D.S.C. Apr. 29, 2020); *Wilson v. Astrue*, 2012 U.S. Dist. LEXIS 89923, at \*9–13 (W.D.N.C. May 23, 2012), *adopted by* 2012 U.S. Dist. LEXIS 88861 (W.D.N.C. June 26, 2012).

<sup>16</sup> Exec. Office for Immigr. Rev., EOIR Operational Status During Coronavirus Pandemic, <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic> (last visited May 15, 2020).

<sup>17</sup> *Nat’l Immigration Project of the Nat’l Lawyers Guild v. EOIR*, 2020 U.S. Dist. LEXIS 74324, at \*25–29 (D.D.C. Apr. 28, 2020).

interest” and that the court is “certainly not well-positioned to second-guess [the agency’s] health and safety determinations.”<sup>18</sup>

## II. MANDATORY REMOTE PARTICIPATION BY PRIVATE PARTIES

Some agencies have adopted policies or practices that permit officials to compel parties to participate remotely in agency evidentiary hearings. These policies, and their application in individual cases, have faced legal challenges under agency-specific statutes, generally applicable statutes such as the Administrative Procedure Act (APA) and Rehabilitation Act, and the Fifth Amendment’s Due Process Clause.

### A. *Agency-Specific Statutes*

Many statutes guarantee parties the opportunity for a hearing before a federal agency decisionmaker. Some explicitly authorize or prohibit an agency from compelling a party to participate by any or by specific remote means. Most, however, require the agency to provide the opportunity for a hearing without specifying its format.

#### 1. **Statute Explicitly Authorizes an Agency to Mandate Remote Participation**

At least one statute, the Immigration and Nationality Act (INA), explicitly grants an agency the discretion to compel parties to participate by VTC.<sup>19</sup> As discussed in Part II.C., courts have thus far rejected facial due-process challenges against this broad grant of discretion.

#### 2. **Statute Explicitly Prohibits an Agency from Mandating Remote Participation**

Some statutes explicitly prohibit an agency from compelling a private party to participate by any or by specific remote means. They do so either by requiring the agency to secure the party’s consent prior to scheduling him or her to participate remotely, or by granting the party an absolute right to opt out of remote participation. For example:

- Immigration courts may only schedule removal hearings by telephone “with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.”<sup>20</sup>
- The Department of Agriculture’s (USDA) National Appeals Division must conduct evidentiary hearings in person, “unless the appellant agrees to a hearing by telephone or by a review of the case record.”<sup>21</sup>

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<sup>18</sup> *Nat’l Immigration Project of the Nat’l Lawyers Guild*, 2020 U.S. Dist. LEXIS 74324, at \*40–41.

<sup>19</sup> 8 U.S.C. § 1229a(b)(2); *see also* *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *Melgar v. AG of the U.S.*, 442 Fed Appx. 695, 697–98 (3d Cir. 2011); *Veliz v. Holder*, 375 F. Appx. 148, 149 (2d Cir. 2010); *Eke v. Mukasey*, 512 F.3d 372, 382 (7th Cir. 2008); *Ezenabo v. CBP*, 2019 U.S. Dist. LEXIS 81771, at \*4–6 (E.D. Mich. May 15, 2019).

<sup>20</sup> 8 U.S.C. § 1229a(b)(2); *accord* *Gaye v. Lynch*, 788 F.3d 519, 533 (6th Cir. 2015).

<sup>21</sup> 7 U.S.C. § 6997(c)(2).

- The America Invents Act requires an “oral” hearing before the Patent Trial and Appeal Board on post-grant and inter partes review of patents.<sup>22</sup>
- Although the Board of Veterans Appeals (BVA) is authorized to docket cases for a hearing “by picture and voice transmission at a facility of the Department where the Secretary has provided suitable facilities and equipment to conduct such hearings,” it must grant a party’s request to participate in person. (Parties who are scheduled to appear in person are also entitled to participate remotely from a Department facility. Additionally, any party can request to appear from a location of their choosing “via a secure internet platform established and maintained by the Secretary that protects sensitive personal information from data breach.”<sup>23</sup>)

An agency would almost certainly violate federal law by compelling a party to participate remotely or by proscribed remote means in contravention of its organic statute. The only question would be whether the party enjoys a remedy on judicial review. Legal questions are more likely to focus on whether an agency’s procedures to secure parties’ consent or process parties’ objections comply with statutory directives, or whether the agency or an individual party complied with those procedures in a specific case.<sup>24</sup>

### 3. Statute Requires a “Hearing” Without Explicitly Specifying Its Format

Federal statutes more commonly require agencies to provide parties the opportunity for a “hearing” without specifying its format. Some agencies have either declined to recognize statutory authority to compel parties to participate remotely or have simply not exercised it. Others—especially those that adjudicate a higher volume of cases—have interpreted such language to permit officials to compel parties to participate by remote means in at least some circumstances. For example:

- The Internal Revenue Code guarantees taxpayers a “fair hearing” before the Internal Revenue Service (IRS) files a lien notice or imposes a levy on a person’s property or right to property.<sup>25</sup> Treasury Department rules grant the IRS Independent Office of Appeals discretion to conduct informal Collection Due Process (CDP) hearings in person (“face-to-face”), by telephone, or through written correspondence. The Independent Office of Appeals ordinarily grants a taxpayer’s request for an in-person CDP hearing only if he or she presents “relevant, non-frivolous reasons for

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<sup>22</sup> See, e.g., *id.* §§ 316(a)(10), 326(a)(9). Federal law tends to contrast “oral” and “written” hearings. See, e.g., *id.* § 5327(c)(1) (Financial Stability Oversight Council).

<sup>23</sup> *Id.* § 7107(c). The virtual hearings program has been fully operational since early 2020 via the Department of Veterans Affairs’ telehealth application, VA Video Connect. Under the program, veterans can participate in BVA hearings from home using their mobile phone or personal computer.

<sup>24</sup> See, e.g., *McDavid v. Colvin*, 2017 U.S. Dist. LEXIS 32397, at \*5–10 (N.D. Ill. Mar. 7, 2017); *Garcia v. Colvin*, 2014 U.S. Dist. LEXIS 183925, at \*15–17 (S.D. Cal. Dec. 17, 2014), *adopted by* 2015 U.S. Dist. LEXIS 65542 (S.D. Cal. May 15, 2015).

<sup>25</sup> 26 U.S.C. §§ 6320(b), 6330(b); see generally Danshera Cords, *How Much Process Is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51 (2004).

disagreement with the proposed levy;” provides certain materials; and agrees to appear at a local agency office.<sup>26</sup>

- The Social Security Act guarantees parties the “opportunity for a hearing” in disputes concerning Social Security Old-Age, Survivors, and Disability Insurance (OASDI) and Supplemental Security Income (SSI).<sup>27</sup> SSA rules provide parties a 30-day window to object to appearing by VTC, after which the agency may schedule parties to appear before an administrative law judge (ALJ) in person or, absent an objection, by VTC subject to certain good-cause exceptions.<sup>28</sup> However, the rules permit the agency to direct incarcerated parties to appear by telephone or VTC subject to certain good-cause exceptions.<sup>29</sup> (SSA abandoned a 2018 proposal that would have removed the opportunity for non-incarcerated parties to opt out of appearing by VTC.<sup>30</sup>)
- The Social Security Act grants parties in disputes over Medicare Parts A, B, and C the same opportunity for a “hearing.”<sup>31</sup> HHS rules direct ALJs in the Health and Human Services Department’s Office of Medicare Hearings and Appeals (OMHA) to schedule unrepresented Part A and Part B beneficiaries and Part C enrollees to appear by VTC and other appellants to appear by telephone or in some cases by VTC with exceptions for good cause. Parties who wish to appear in person must explain their objection “at the earliest possible opportunity before the time set for the hearing” but are not guaranteed in-person participation.<sup>32</sup>
- The Perishable Agricultural Commodities Act (PACA) provides for a “hearing . . . before a duly authorized examiner of the Secretary [of Agriculture]” in cases where an investigation substantiates the existence of PACA violations with alleged damages exceeding \$30,000.<sup>33</sup> USDA rules provide that such hearings “shall be conducted by audio-visual telecommunication” with certain good-cause exceptions for in-person participation. Examiners may also conduct hearings by telephone when doing so would be more cost-effective, “[w]ould provide a full and fair evidentiary hearing,” and “[w]ould not prejudice any party.”<sup>34</sup>
- Certain federal employees and applicants have a statutory right to a “hearing” before the Merit Systems Protection Board.<sup>35</sup> The Board has held that MSPB administrative judges (AJ) “may hold videoconference hearings in any case, regardless of whether the

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<sup>26</sup> 26 C.F.R. § 301.6330-1(d)(2) (Q&A-D6, Q&A-D7, and Q&A-D8).

<sup>27</sup> 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A).

<sup>28</sup> 20 C.F.R. §§ 404.936, 416.1436.

<sup>29</sup> 20 C.F.R. §§ 404.936, 416.1436.

<sup>30</sup> *See* Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 84 Fed. Reg. 69,298, 69,300 (Dec. 18, 2019).

<sup>31</sup> 42 U.S.C. §§ 1395w-22(g)(5), 1869(b)(1)(A).

<sup>32</sup> 42 C.F.R. §§ 405.1020, 423.2020.

<sup>33</sup> 7 U.S.C. § 499f(c)(2).

<sup>34</sup> 7 C.F.R. § 47.15(c)(3).

<sup>35</sup> 5 U.S.C. § 7701(a)(1).



appellant objects,” so long as individual adjudications are “fair and just.”<sup>36</sup> (The Board undertakes a more searching inquiry when an AJ directs a private party to participate by telephone and credibility is at issue.<sup>37</sup>)

Courts have applied a variety of interpretive methods and deference doctrines to reach different conclusions on whether a right to a “hearing” guarantees parties the right to an *in-person* hearing. For example:

- Courts have consistently upheld the Treasury Department’s CDP-hearing rules under both textualist and intentionalist readings of the Internal Revenue Code, emphasizing that the statute does not specify the format for a “hearing” and that Congress was aware of the IRS’s practice of using telephone hearings when it enacted the statute.<sup>38</sup>
- An earlier version of the INA required that determinations of deportability be made “in a proceeding *before* a special inquiry officer.”<sup>39</sup> Relying on a popular dictionary, the Ninth Circuit held that Congress “used ‘before’ to require the appearance of the [immigration judge] and the persons charged in each other’s physical presence during the course of a deportation proceeding.”<sup>40</sup> The Eleventh Circuit rejected that holding, instead deferring to the agency’s “reasonable interpretation” of the INA.<sup>41</sup>
- Before it was repealed, a 1976 statute granted prisoners the right to “appear” before the Parole Commission. The Sixth Circuit held that the statute unambiguously barred the agency from compelling prisoners to appear by VTC because Congress could not have foreseen using VTC for parole proceedings when it enacted the statute in 1976.<sup>42</sup>

Except for persons outside the United States,<sup>43</sup> the courts have not definitively resolved whether mandatory remote participation comports with the broad language of the Social Security Act.

## **B. Generally Applicable Statutes**

Parties have sometimes alleged that policies that permit agencies to compel a party to participate by remote means, or their application in specific cases, contravenes generally applicable statutes such as the APA and the Rehabilitation Act.

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<sup>36</sup> Koehler v. Dept. of the Air Force, 99 M.S.P.R. 82, 87–88 (2005).

<sup>37</sup> See Lowe v. Dept. of Defense, 67 M.S.P.R. 97, 99 (1995); see also Robertson v. Dept. of Transp., 2009 M.S.P.B. 229 (2009).

<sup>38</sup> Robinson v. Comm’r, 572 Fed. Appx. 846, 847–48 (11th Cir. 2014); Murphy v. Comm’r of Internal Revenue, 469 F.3d 27, 30 (1st Cir. 2006); Kindred v. Comm’r of Internal Revenue, 454 F.3d 688, 691 n.4 (7th Cir. 2006); Katz v. Comm’r, 115 T.C. 329, 337–338 (2000); Davis v. Comm’r, 115 T.C. 35, 41 (2000).

<sup>39</sup> 8 U.S.C. § 1252(b) (1982) (emphasis added).

<sup>40</sup> Purba v. INS, 884 F.2d 516, 517 (9th Cir. 1989).

<sup>41</sup> Bigby v. U.S. INS, 21 F.3d 1059, 1963 (11th Cir. 1994).

<sup>42</sup> Terrell v. U.S., 564 F.3d 442, 449–54 (6th Cir. 2009).

<sup>43</sup> Courts have upheld mandatory remote participation for persons outside the United States. Mendoza v. Soc. Sec. Comm’r, 92 Fed. Appx. 3, 4 (D.C. Cir. 2004); Reyes v. Sec. of HEW, 476 F.2d 910, 915 (D.C. Cir. 1973).

## 1. Administrative Procedure Act

The APA’s formal-adjudication provisions generally require that agencies provide an opportunity for a “hearing” before it takes final action.<sup>44</sup> In claims for money or benefits and applications for initial licenses, the APA explicitly permits agencies to “adopt procedures for the submission of all or part of the evidence in written form” so long as those procedures will not “prejudice” the parties.<sup>45</sup> Parties in other proceedings are generally entitled to present their case “by oral or documentary evidence, . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”

The Supreme Court has held that the term “hearing” as used in the APA “does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses or the right to present oral argument to the agency’s decisionmaker.”<sup>46</sup> Although the Supreme Court reached this holding in the context of a formal rulemaking, its logic likely forecloses the argument that the APA necessarily grants parties the right to an in-person or oral hearing in all formal adjudications.<sup>47</sup>

This is not to suggest that remote or non-oral participation will satisfy the APA in all contexts. The APA’s text contemplates that written participation could, in some cases, “prejudice” a party. And it is conceivable that a particular form of remote participation could, in some circumstances, inhibit the “full and true disclosure” of certain facts. For example, it may be more difficult to accurately assess a party’s credibility when he or she participate by phone or through the submission of written materials.<sup>48</sup> When an agency in a proceeding governed by the APA’s formal-adjudication provisions intends to compel a party to participate in a particular remote manner, it should, as applicable, consider whether the chosen form of remote participation will facilitate a “full and true disclosure” of the facts in issue or will not “prejudice” the party.

## 2. Rehabilitation Act

As discussed before, section 504 of the Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency or by the United States Postal Service.”<sup>49</sup> (Similar requirements under the Americans with Disabilities Act are inapplicable to federal agencies.<sup>50</sup>)

Advocates in both the Social Security and immigration contexts have argued that agencies violate section 504 when they mandate remote participation for parties whose disabilities may

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<sup>44</sup> 5 U.S.C. § 554(a).

<sup>45</sup> *Id.* § 556(d).

<sup>46</sup> *U.S. v. Fla. E. Coast Rwy.*, 410 U.S. 224, 240–42 (1973).

<sup>47</sup> *See Lunsford v. Comm’r*, 117 T.C. 159, 171–73 (2001) (Halpern, J., concurring).

<sup>48</sup> *Cf. ASIMOW*, *supra* note 4, at 81.

<sup>49</sup> 29 U.S.C. § 794(a).

<sup>50</sup> *See Sanders v. Herin*, 2019 U.S. Dist. LEXIS 230540, at \*9–10 (D.S.C. Dec. 12, 2019), *adopted by* 2020 U.S. Dist. LEXIS 75272 (D.S.C. Apr. 29, 2020); *Pitts v. Comm’r*, 2010 Tax Ct. Memo LEXIS 136, at \*27–28 (2010).

negatively impact their ability to participate by remote means.<sup>51</sup> While courts have so far decided these challenges on jurisdictional grounds without reaching the merits, agencies should be mindful of section 504's requirement to provide reasonable accommodations or respond to reasonable accommodation requests.<sup>52</sup>

### C. *Constitutional Due Process*

Many parties and other stakeholders have argued that agencies deny parties due process of law when they compel them to participate by remote means generally, by particular remote means, or by remote means in specific circumstances.

The basic guarantee of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner” before an agency deprives a person of a liberty or property interest.<sup>53</sup> With few exceptions, courts have rejected the general argument that agencies inherently deny parties such an opportunity when they compel them to participate by remote means.<sup>54</sup>

Courts instead evaluate claims under the familiar three-part rubric of *Mathews v. Eldridge*.<sup>55</sup> This framework requires courts to consider (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards;”

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<sup>51</sup> See Class Action Complaint at 52–54, P.L. v. U.S. ICE, 2019 U.S. Dist. LEXIS 104478 (S.D.N.Y. June 21, 2019) (No. 19 Civ. 01336), available at <https://www.bronxdefenders.org/wp-content/uploads/2019/02/19-Civ.-01336-Complaint-Digital.pdf> (last visited May 6, 2020); Comment of Nat'l Ass'n of Disability Representatives (Jan. 11, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0063>; Comment of Nat'l Org. of Soc. Sec. Claimants' Representatives (Dec. 21, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0041>.

<sup>52</sup> Cf. *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (requiring that service providers offer “meaningful access to the benefit that the grantee offers” including “reasonable accommodations” under some circumstances).

<sup>53</sup> *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>54</sup> *Reyez v. AG U.S.*, 767 Fed. Appx. 358, 362 (3d Cir. 2019); *Gibbs v. U.S.*, 517 Fed. Appx. 664, 668 (11th Cir. 2013); *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *Melgar v. Atty. Gen. of the U.S.*, 442 F. App'x 695, 698 (6th Cir. 2011); *Swidecki v. DOC*, 431 Fed. Appx. 900, 902–03 (Fed. Cir. 2011); *Leiva-Molina v. Holder*, 439 Fed. Appx. 571, 573 (9th Cir. 2011); *Miller v. AG of the U.S.*, 397 Fed. Appx. 780, 783 (3d Cir. 2010); *Veliz v. Holder*, 375 F. App'x 148, 149 (2d Cir. 2010); *Toyama v. Leavitt*, 408 Fed. Appx. 351, 353 (Fed. Cir. 2010); *Jhin v. OPM*, 368 Fed. Appx. 118, 121–22 (Fed. Cir. 2010); *Chavez-Vasquez v. Mukasey*, 548 F.3d 1115, 1118 (7th Cir. 2008); *Raphael v. Mukasey*, 533 F.3d 521 (7th Cir. 2008); *Eke v. Mukasey*, 512 F.3d 372, 382 (7th Cir. 2008); *Ligoussou v. Mukasey*, 297 Fed. Appx. 11, 12 (1st Cir. 2008); *Fall v. Gonzales*, 218 Fed. Appx. 385, 389 (6th Cir. 2007); *Brienza-Schettino v. AG of the U.S.*, 221 Fed. Appx. 140, 145 (3d Cir. 2007); *Burroughs v. Dep't of the Army*, 254 Fed. Appx. 814, 818–19 (Fed. Cir. 2007); *Rusu v. INS*, 296 F.3d 316, 321–22 (4th Cir. 2002); *Butler v. Apfel*, 144 F.3d 622, 627–28 (9th Cir. 1998); *Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980); *Ezenabo v. CBP*, 2019 U.S. Dist. LEXIS 81771, at \*6 (E.D. Mich. May 15, 2019); *Kollmeyer v. Comm'r of SSA*, 2019 U.S. Dist. LEXIS 13158, at \*46 (D. Ariz. Jan. 28, 2019); *Sahin v. Green*, 2018 U.S. Dist. LEXIS 3138, at \*5 (D.N.J. Jan. 8, 2018); *Brown v. Comm'r of Soc. Sec.*, 2015 U.S. Dist. LEXIS 177223, at \*17 (M.D. Fla. Nov. 24, 2015), adopted by 2016 U.S. Dist. LEXIS 40192 (M.D. Fla. Mar. 28, 2016); *Loya v. Colvin*, 2015 U.S. Dist. LEXIS 35787, at \*8–10 (D. Colo. Mar. 20, 2015); *Dalton v. Comm'r of Soc. Sec.*, 2012 U.S. Dist. LEXIS 15324, at \*14 (E.D. Mich. Jan. 23, 2012), adopted by 2012 U.S. Dist. LEXIS 15344 (E.D. Mich. Feb. 8, 2012); *Doyle v. Astrue*, 2009 U.S. Dist. LEXIS 117142, at \*22–23 (N.D.N.Y. Sep. 30, 2009), adopted by 2009 U.S. Dist. LEXIS 117110 (N.D.N.Y. Dec. 15, 2009). But see *Kirby v. Astrue*, 731 F. Supp. 2d 453 (E.D.N.C. Aug. 3, 2010) (“The use of video conferences for hearings before an ALJ raises serious questions as to a claimants [sic] due process rights to receive a full and fair hearing.”).

<sup>55</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); see *Eke*, 512 F.3d at 383; *Rusu*, 296 F.3d at 316.

and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>56</sup>

The *Mathews* calculus will necessarily differ from agency to agency and from case to case given factors including the nature of the private interests at stake; the factual and legal issues in question; the nature of probative evidence and the probable value of an alternative manner of participation for adducing such evidence; and the governmental interests at stake, including the fiscal and administrative costs associated with providing the alternative manner of participation. The first three of the following sections compare certain compelled means of participation with frequently requested alternatives. The fourth section addresses additional legal questions that agencies may encounter during the COVID-19 pandemic.

## 1. Video Teleconference Participation Versus In-Person Participation

Both in-person and VTC participation provide parties and adjudicators synchronous oral and visual communication with other participants. However, when a party participates by VTC, he or she does not participate in the adjudicator’s physical presence and must communicate with the adjudicator through software and hardware systems. Parties may request in-person participation in place of VTC participation.

Proponents of VTC often assert that video participation preserves the most salient features of in-person participation—sight and sound—while allowing for more efficient case processing, greater scheduling flexibility for agency and non-agency participants, and reduced travel expenses.<sup>57</sup> Critics often assert that the lack of physical presence or the need to participate through hardware and software systems can substantially increase the risk of an erroneous deprivation of the private interest at stake in agency proceedings.

A growing body of anecdotal and empirical research suggests that private parties in some mass adjudication programs may be more likely to prevail when they participate in person rather than by VTC.<sup>58</sup> Some agencies have argued that disparities in decisional outcomes between in-person and VTC hearings are not statistically significant, or that such disparities result from factors

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<sup>56</sup> *Mathews*, 424 U.S. at 334–35 (1976).

<sup>57</sup> See Recommendation 2014-7, *supra* note 2; Recommendation 2011-4, *supra* note 2.

<sup>58</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-37, SOCIAL SECURITY DISABILITY: ADDITIONAL MEASURES AND EVALUATION NEEDED TO ENHANCE ACCURACY AND CONSISTENCY OF HEARINGS DECISIONS 26, 44 (2017); U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 51–59 (2017); Lenni B. Benson & Russell R. Wheeler, Enhancing Timeliness and Quality in Immigration Removal Adjudication 100 (2012) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/immigration-removal-adjudication-report>; Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933 (2015); Ctr. for Legal & Court Tech., *supra* note 2, at 16–17; Harold Krent & Scott Morris, Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms 46–47 (2013) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/achieving-greater-consistency-social-security-disability-adjudication-report-final>; Comment of Ass’n of Admin. Law Judges (Dec. 20, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0040>.

other than those that distinguish the two forms of participation.<sup>59</sup> Critics suggest several possible explanations for these disparities, including that:

- technical issues affecting a party’s opportunity to be heard in a meaningful manner are more likely to arise when a party participates through the hardware and software systems required by VTC;
- adjudicators may have greater difficulty assessing the credibility, trustworthiness, demeanor, presentation, or symptomology of parties who participate by VTC due to a video screen’s constraints on an adjudicator’s field of vision, diminished eye contact, or difficulty interpreting nonverbal cues such as body language, facial expressions, and tone of voice over video;
- parties may feel greater discomfort interacting or communicating with other participants by VTC;
- parties and adjudicators may become distracted when they communicate using VTC;
- VTC participation may not foster the same degree of interpersonal rapport or emotional connection among hearing participants;
- non-local adjudicators, who frequently conduct hearings in which a party participates by VTC, may have less familiarity with regional conditions than local adjudicators who frequently preside over in-person hearings;
- members of the public or press may be less likely to attend or face greater difficulty attending hearings conducted using VTC.<sup>60</sup>

These possible effects may be more consequential in some circumstances than in others. For example, the Fourth Circuit in a seminal opinion acknowledged “[t]he potential negative impact of video conferencing on a factfinder’s credibility assessments” but cautioned that this “may be of little consequence in certain types of proceedings” where credibility is not central to an adjudicator’s decision.<sup>61</sup> When agencies compel parties to participate by VTC rather than in

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<sup>59</sup> SOC. SEC. ADMIN., FISCAL YEAR 2017 VIDEO TELECONFERENCE REPORT: ADMINISTRATIVE LAW JUDGE HEARING DECISIONS (2017), <https://www.regulations.gov/document?D=SSA-2017-0015-0006>; GAO-18-37, *supra* note 58, at 76; GAO-17-438, *supra* note 58, at 76, 145 (2017).

<sup>60</sup> *See, e.g., Rusu*, 296 F.3d at 322–23; GAO-17-438, *supra* note 58, at 51–59 (2017); Booz Allen Hamilton, *Legal Case Study: Summary Report* 23 (Apr. 6, 2017) (report to the Exec. Office for Immigr. Rev.); Ctr. for Legal & Court Tech., *supra* note 2, at 13–16; Eagly, *supra* note 58; Neil Fox, Note, *Telephonic Hearings in Welfare Appeals: How Much Process Is Due?*, 1984 U. ILL. L. REV. 445 (1984); D. Randall Frye, *Statement of the Association of Administrative Law Judges, Committee on Ways and Means, Subcommittee on Social Security, June 27, 2012*, 33 J. NAT’L ASS’N ADMIN. L. JUD. 35, 50–51 (2013); Allan A. Toubman, Tim McArdle & Linda Rogers-Tomer, *Unemployment Compensation and Procedural Issues: Due Process Implications of Telephone Hearings: The Case for an Individualized Approach to Scheduling Telephone Hearings*, 29 U. MICH. J.L. REFORM 407 (1995–1996); Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259 (2008); Comment of Rep. Richard E. Neal et al. (Jan. 31, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0247>; Comment of Nat’l Ass’n of Disability Representatives (Jan. 11, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0063>; Comment of Nat’l Org. of Soc. Sec. Claimants’ Representatives (Dec. 21, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0041>; Comment of Ass’n of Admin. Law Judges (Dec. 20, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0040>.

<sup>61</sup> *Rusu v. INS*, 296 F.3d 316, 322–24 (4th Cir. 2002); *see also Vilchez*, 682 F.3d at 1199 (9th Cir. 2012) (quoting *Rusu*).

person, they should consider whether any adverse effects are particularly likely under the circumstances.

Both ACUS and the Government Accountability Office have recommended that agencies take steps to measure and remedy differences that develop in the decisional outcomes of in-person and VTC hearings.<sup>62</sup> Agencies should be prepared to respond to due-process concerns where measurable disparities in decisional outcomes exist, regardless of their cause—not only in litigation but also in rulemaking proceedings, congressional interactions, and public affairs.

To succeed on a due-process claim, courts have typically required parties to demonstrate that their participation by VTC actually resulted in substantial prejudice.<sup>63</sup> For example, some parties have argued that the lack of physical presence in VTC hearings or reliance on current VTC technologies impeded an adjudicator's ability to assess their credibility or demeanor. Although federal courts have occasionally found that VTC negatively impacted an adjudicator's credibility assessment and resulted in great consequence,<sup>64</sup> parties appear to face a high bar demonstrating that the non-voluntary use of VTC likely affected an adjudicator's decision or otherwise resulted in actual prejudice. For example, courts have frequently denied relief, finding that a party failed to show how VTC prevented an adjudicator from accurately assessing his or her credibility; that an adjudicator did not make an adverse credibility determination; that an adjudicator made an adverse credibility determination based on inconsistencies between a party's testimony at the hearing and other evidence, a lack of corroborating evidence in the record, or other evidence of record; or that an adjudicator decided the case based primarily on factors other than an adverse credibility determination.<sup>65</sup>

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<sup>62</sup> GAO-17-438, *supra* note 58, at 51–59 (2017); Recommendation 2014-7, *supra* note 2, ¶ 11; Recommendation 2011-4, *supra* note 2, ¶ 2(c)

<sup>63</sup> *See, e.g.,* Vilchez v. Holder, 682 F.3d 1195, 1199–1200 (9th Cir. 2012). *But see* Pataro v. Berryhill, 2019 U.S. Dist. LEXIS 47150, at \*54 (quoting Absalon v. Comm'r of Soc. Sec., 2009 U.S. Dist. LEXIS 32767, at \*8 n.4 (S.D.N.Y. Apr. 17, 2009)), *adopted by* 2019 U.S. Dist. LEXIS 43979 (S.D.N.Y. Mar. 18, 2019); Taylor v. Astrue, 2010 U.S. Dist. LEXIS 112583, at \*7 (E.D.N.C. Oct. 22, 2010).

<sup>64</sup> Many of the cases identified present fairly idiosyncratic fact patterns. *See, e.g.,* McDavid v. Colvin, 2017 U.S. Dist. LEXIS 32397, at \*8–10 (N.D. Ill. Mar. 7, 2017); Benson v. Colvin, 2016 U.S. Dist. LEXIS 125222, at \*33–34 (D. Idaho Aug. 18, 2016), *adopted by* 2016 U.S. Dist. LEXIS 125807 (D. Idaho Sep. 12, 2016); Perry v. Colvin, 2015 U.S. Dist. LEXIS 164239, at \*7–8 (E.D.N.C. Dec. 8, 2015); Hernandez v. Colvin, 2014 U.S. Dist. LEXIS 177950, at \*19–20 (C.D. Cal. Dec. 29, 2014); Kalishek v. Astrue, 2011 U.S. Dist. LEXIS 107615, at \*17 (M.D. Fla. Aug. 23, 2011), *adopted by* 2011 U.S. Dist. LEXIS 107554 (M.D. Fla. Sep. 21, 2011); Kirby v. Astrue, 731 F. Supp. 2d 453, 457 (E.D.N.C. Aug. 1, 2010); Jopson v. Astrue, 517 F. Supp. 2d 689, 707 (D. Del. 2007)).

<sup>65</sup> *See, e.g.,* Talipov v. Holder, 591 Fed. Appx. 4, 7 (2d Cir. 2014); Liu v. Holder, 566 Fed. Appx. 333, 334 (5th Cir. 2014); Vilchez, 682 F.3d at 1200; Li v. Holder, 478 Fed. Appx. 884, 887 (5th Cir. 2012); Veliz v. Holder, 375 Fed. Appx. 148, 149–50 (2d Cir. 2010); Miller v. AG of the U.S., 397 Fed. Appx. 780, 783 (3d Cir. 2010); Atugah v. Holder, 321 Fed. Appx. 431, 436 (6th Cir. 2009); Eke v. Mukasey, 512 F.3d 372, 382–83 (7th Cir. 2008); Jean v. Gonzales, 461 F.3d 87, 91 n.1 (1st Cir. 2006); Vanepps v. Comm'r of Soc. Sec., 2019 U.S. Dist. LEXIS 43300 (N.D. Iowa Mar. 18, 2019); Kilcrease v. Comm'r of Soc. Sec., 2018 U.S. Dist. LEXIS 38675, at \*28–30 (E.D. Tenn. Mar. 9, 2018); Loya v. Colvin, 2015 U.S. Dist. LEXIS 35787, at \*9–10 (D. Colo. Mar. 20, 2015); Maurice v. Colvin, 2014 U.S. Dist. LEXIS 91263, at \*61–62 (S.D.N.Y. July 2, 2014); Walker v. Comm'r of Soc. Sec., 2014 U.S. Dist. LEXIS 46013, at \*23–25 (D.N.J. Apr. 3, 2014); Scott v. Comm'r, 2014 U.S. Dist. LEXIS 45266, at \*27–28 (D. Md. Apr. 2, 2014); Shreve v. Colvin, 2014 U.S. Dist. LEXIS 23098, at \*22 (D. Colo. Feb. 24, 2014); Yearby v. Astrue, 2013 U.S. Dist. LEXIS 46604, at \*18 n.4 (N.D. Ala. Apr. 1, 2013); Encinas v. Astrue, 2012 U.S. Dist. LEXIS 59890, \*25–28 (D. Ariz. Apr. 30, 2012), *adopted by* 2015 U.S. Dist. LEXIS 142373 (D. Ariz. Oct. 20, 2015); Warner v. Comm'r of Soc. Sec., 2012 U.S. Dist. LEXIS 38875, at \*8–10 (E.D. Mich. Mar. 22, 2012); McGovern v. Astrue, 2012 U.S. Dist.

Some parties have alleged that they possess some attribute which makes it difficult for them to participate by VTC.<sup>66</sup> Individuals whom stakeholders have suggested may have difficulty participating by VTC include:

- individuals with hearing or vision impairments;
- individuals who require the services of a foreign- or sign-language interpreter (especially where the interpreter participates telephonically or from another location);
- individuals who speak softly or have speech impairments, as a result of a physical or mental disorder;
- individuals with auditory or visual hallucinations;
- individuals with epilepsy or other seizure disorders;
- individuals who, as a result of mental impairments, do not recognize the individual with whom they are remotely interacting as the adjudicator who will decide their case, distrust technology, or fear being recorded;
- individuals with intellectual disabilities, borderline intellectual functioning, brain injury, learning disabilities, and developmental disorders such as autism;
- low-income and elderly individuals who may be less familiar with VTC; and
- children.<sup>67</sup>

Several agencies have adopted policies that provide adjudicators the flexibility to permit in-person participation as circumstances require. SSA rules, for example, require the agency to consider “[a]ny facts in [a party’s] particular case that provide a good reason to schedule [his or her] appearance . . . in person.”<sup>68</sup> OMHA rules require agency officials to consider whether “[s]pecial or extraordinary circumstances exist” which may warrant in-person participation.<sup>69</sup> And PACA examiners at the USDA have discretion to permit in-person appearances when “necessary because of a disability.”<sup>70</sup>

When courts confront challenges that an agency denied a party due process by requiring him or her to participate remotely despite a limitation, they seem to consider factors such as the nature of the alleged limitation, the existence of evidence corroborating the alleged limitation, the party’s compliance with agency procedures to request an accommodation or object to remote

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LEXIS 38551, at \*51 (W.D. Wash. March 1, 2012), *adopted by* 2012 U.S. Dist. LEXIS 38548 (W.D. Wash. Mar. 21, 2012); *Dalton v. Comm’r of Soc. Sec.*, 2012 U.S. Dist. LEXIS 15324, at \*13–15 (E.D. Mich. Jan. 23, 2012), *adopted by* 2012 U.S. Dist. LEXIS 15344 (E.D. Mich. Feb. 8, 2012); *Cassidy v. Astrue*, 2011 U.S. Dist. LEXIS 104094, at \*39–41 (N.D. Fla. Aug. 9, 2011), *adopted by* 2011 U.S. Dist. LEXIS 104093 (N.D. Fla. Sep. 13, 2011).

<sup>66</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) (“[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”).

<sup>67</sup> See, e.g., Comment of Rep. Richard E. Neal et al. (Jan. 31, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0247>; Comment of National Ass’n of Disability Representatives (Jan. 11, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0063>; Comment of Nat’l Org. of Soc. Sec. Claimants’ Representatives (Dec. 21, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0041>; Comment of Ass’n of Admin. Law Judges (Dec. 20, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0040>; see also *Legal v. Lynch*, 838 F.3d 51, 53 (1st Cir. 2016); *Tankisiv v. Comm’r of Soc. Sec.*, 521 Fed. Appx. 29, 31 (2d Cir. 2013); see also *Ctr. for Legal & Court Tech.*, *supra* note 2, at 44–45.

<sup>68</sup> 20 C.F.R. §§ 404.936(c)(1)(iii), 416.1436(c)(1)(iii).

<sup>69</sup> *Id.* §§ 404.1520(b)(1)(ii)(B), 423.2020(b)(1)(ii)(B).

<sup>70</sup> 7 C.F.R. § 47.15(c)(3).

participation, and any effects on the outcome of the proceeding that actually resulted from the alleged limitation.<sup>71</sup>

Finally, parties may allege that a technical issue interfered with their opportunity to be heard in a meaningful manner. Technical issues—which can also occur when parties voluntarily participate by VTC—are discussed in Part IV.A.

## **2. Telephonic Participation Versus In-Person or Video Teleconference Participation**

Parties may request in-person or VTC participation in place of telephonic participation. In-person, VTC, and telephonic participation all provide parties and adjudicators synchronous oral communication. Of course, telephonic participation lacks the physical presence of in-person participation. Compared with VTC, its primary benefit is that it can be simpler to install and use. (Telephonic participation often requires nothing more than an operable telephone at each location, a conference bridge, and perhaps a means to record the conversation.) However, parties may argue that accurate decisionmaking requires that some participants be able to see each other.<sup>72</sup>

Although courts have generally found compulsory telephonic participation consistent with due process,<sup>73</sup> visual observation may be fundamental to the accurate resolution of a genuine issue of material fact in some circumstances. For example, administrative and judicial decisionmakers have been skeptical of telephonic participation when a participant’s credibility is central to a decision given the potential significance of nonverbal cues.<sup>74</sup>

As with VTC participation, agencies should also consider whether individual parties have attributes (e.g., hearing loss) which might make it difficult for them to participate by telephone.<sup>75</sup>

## **3. Written Participation vs. Oral Participation**

Although written participation allows for the exchange of information, it lacks the physical presence of in-person participation, the visual aspect of in-person and VTC participation, and the opportunity for oral communication common to all other manners of participation. In many cases, parties have instead requested a manner of participation that permits oral communication.

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<sup>71</sup> See, e.g., *Brown v. Comm’r of Soc. Sec.*, 2015 U.S. Dist. LEXIS 177223, at \*11–21 (M.D. Fla. Nov. 24, 2015), adopted by 2016 U.S. Dist. LEXIS 40192 (M.D. Fla. Mar. 28, 2016); *Pitts v. Comm’r*, 2010 Tax Ct. Memo LEXIS 136, at \*27–28 (2010); *Evans v. Astrue*, 2009 U.S. Dist. LEXIS 123360, at \*22–25 (E.D. Tenn. Nov. 16, 2009), adopted by 2010 U.S. Dist. LEXIS 3502 (E.D. Tenn. Jan. 15, 2010).

<sup>72</sup> See, e.g., *Koehler v. Dept. of the Air Force*, 99 M.S.P.R. 82, 87 n.3 (2005); Comment of Center for Medicare Advocacy (Aug. 29, 2016), <https://www.regulations.gov/document?D=CMS-2016-0122-0060>.

<sup>73</sup> See, e.g., *Jhin v. OPM*, 368 Fed. Appx. 118, 121–22 (Fed. Cir. 2010); *Sanford v. Comm’r*, 283 Fed. Appx. 780, 783 (11th Cir. 2008); *Casey v. O’Bannon*, 536 F. Supp. 350, 353–55 (E.D. Pa. 1982).

<sup>74</sup> See, e.g., *Johnson v. Colvin*, 2016 U.S. Dist. LEXIS 166436, at \*53 (M.D. Pa. Dec. 2, 2016); *Couch v. Comm’r of Soc. Sec.*, 2012 U.S. Dist. LEXIS 36223, at \*18 (S.D. Ohio Mar. 19, 2012); see also *infra* note 90 (discussing telephone participation by witnesses); *Krehibel v. USPS*, 2011 MSPB LEXIS 4568 (July 25, 2011); *Leighton v. OPM*, 2007 MSPB LEXIS 8188 (Oct. 18, 2007), review denied by 2008 MSPB LEXIS 116 (Jan. 24, 2008). But see *Lev v. Astrue*, 2010 U.S. Dist. LEXIS 77456, at \*20–21 (N.D. Cal. July 30, 2010).

<sup>75</sup> See *supra* notes 67–71 and accompanying text.



Whether compulsory written participation satisfies due process likely depends on the material issues in dispute, the nature of probative evidence, and the usefulness of oral testimony or argument. In *Goldberg v. Kelly*, for example, the Supreme Court held that written participation, at least by beneficiaries of public benefits, provides a “wholly unsatisfactory basis for decision” “where credibility and veracity are at issue.”<sup>76</sup> And in hearings not governed by the APA’s formal-adjudication provisions, ACUS has recommended that “good candidates for written-only hearings” are those that “solely involve disputes concerning: (a) Interpretation of statutes or regulations; or (b) Legislative facts as to which experts offer conflicting views.”<sup>77</sup>

As with VTC and telephonic participation, agencies should also consider whether individual parties have attributes which might make it difficult for them to participate in an adjudicative hearing through the submission of written materials.<sup>78</sup> Again in *Goldberg*, for example, the Supreme Court held that written participation is “an unrealistic option for most [public assistance benefits] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance.”<sup>79</sup> Other factors may make it difficult for certain persons or persons with certain attributes to effectively present evidence and arguments in written form.

#### **4. Remote Participation Versus In-Person Participation During the COVID-19 Pandemic**

During the ongoing COVID-19 pandemic, many federal agencies have closed their facilities to the public and adopted or encouraged maximum telework. State stay-at-home directives and social-distancing guidelines may also be in place. As a result, many agencies have adopted or explored policies that would mandate remote participation in appropriate circumstances.<sup>80</sup> In many cases, the only alternative may be to indefinitely delay an in-person hearing.

The courts have not yet addressed the fiscal and administrative burdens associated with indefinitely delaying case processing during a global pandemic or requiring agency officials to conduct in-person hearings. In a recent suit, a family asked a federal district court to enjoin the EOIR from mandating that they participate by VTC during the pandemic.<sup>81</sup> Although the court ultimately concluded it lacked jurisdiction to hear the case, as noted before, at least one federal court has stressed that “promoting public health—especially during a pandemic—is in the public interest” and that the court is “certainly not well-positioned to second-guess [the agency’s] health

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<sup>76</sup> *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970).

<sup>77</sup> Recommendation 2016-4, *supra* note 4, ¶¶ 21–22.

<sup>78</sup> See *supra* notes 67–71 and accompanying text.

<sup>79</sup> *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970). In *Goldberg*, the Court found that written participation is “an unrealistic option for most [public assistance benefits] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance” and are a “wholly unsatisfactory basis for decision” “where credibility and veracity are at issue.” *Id.*

<sup>80</sup> ACUS is collecting materials related to federal agency adjudication during the pandemic on its website at <https://www.acus.gov/coronavirus-and-adjudication>

<sup>81</sup> *Rosales v. Barr*, 2020 U.S. Dist. LEXIS 55132, at \*24 (N.D. Cal. Mar. 30, 2020).

and safety determinations.”<sup>82</sup> Other courts may apply similar reasoning. Courts may also consider factors such as the government’s interest in promptly resolving matters before it, avoiding litigation resulting from an indefinite delay of in-person hearings, and protecting the health and wellbeing of agency employees and the public.<sup>83</sup>

### III. REMOTE PARTICIPATION BY OPPOSING PARTIES AND WITNESSES

Parties who participate in person have sometimes objected to remote participation by opposing parties and witnesses based on a statutory or regulatory right to an in-person hearing or to cross-examine witnesses, the Fifth Amendment’s Due Process Clause, and the Sixth Amendment’s Confrontation Clause.

The Confrontation Clause applies only in criminal proceedings and is inapplicable in the civil administrative context.<sup>84</sup> Courts have not identified a general due-process right to confront opposing parties or witnesses in person.<sup>85</sup> They have also typically rejected arguments that a statutory or regulatory right to an in-person hearing or to cross-examine witnesses entitles parties to confront other participants in person.<sup>86</sup>

Courts have tended to reject arguments that remote participation by witnesses, standing alone, inherently denies parties due process. In the Social Security context, for example the Eighth Circuit has held that due process “does not require in-person cross-examination,” reasoning, “we do not believe that, in a non-adversarial proceeding, an in-person cross-examination would significantly increase the accuracy of determining a witness’s credibility over that of a telephone cross-examination.”<sup>87</sup> The Ninth Circuit has rejected the argument that telephonic testimony undermined the reasonableness of credibility findings in a disciplinary action affirmed by the

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<sup>82</sup> *Nat’l Immigration Project of the Nat’l Lawyers Guild*, 2020 U.S. Dist. LEXIS 74324, at \*40–41.

<sup>83</sup> *See Doe v. Transylvania*, 2020 U.S. 63965, at \*37 (E.D. Ky. Apr. 13, 2020); *MPLX Ozark Pipe Line LLC*, 171 F.E.R.C. 63,018 (May 4, 2020); FERC Chief Administrative Law Judge’s Notices to the Public, Docket No. AD20-12-000, Notice of Remote Hearings (Apr. 23, 2020).

<sup>84</sup> *Cf. Akinwande v. Ashcroft*, 380 F.3d 517, 522 (1st Cir. 2004); *Gibbs v. SEC*, 1994 U.S. App. LEXIS 10771, at \*10–11 (10th Cir. May 13, 1994) (citing *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 742 (1984)); *Peretti v. NTSB FAA*, 1993 U.S. App. LEXIS 16132, at \*3–5 (10th Cir. 1993) (same); *see also* *Ctr. for Legal & Court Tech.*, *supra* note 2, at 10.

<sup>85</sup> *See, e.g., EF Int’l Language Schs. v. NLRB*, 673 Fed. Appx. 1, 3–4 (D.C. Cir. 2017); *Reyes v. U.S. A.G.*, 565 Fed. Appx. 785, 787–88 (11th Cir. 2014); *Aslam v. Mukasey*, 537 F.3d 110, 114–15 (2d Cir. 2008); *Akinwande*, 380 F.3d at 522; *Pujols v. Ashcroft*, 2003 U.S. App. LEXIS 23042, at \*10 (3d Cir. Oct. 6, 2003); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1185–86 (9th Cir. 2000); *Gibbs*, 1994 U.S. App. LEXIS 10771, at \*8–10.

<sup>86</sup> *See, e.g., Pujols*, 2003 U.S. App. LEXIS 23042, at \*10 n.5; *Beltran-Tirado*, 213 F.3d at 1185–86; *Wight v. Vilsak*, 2011 U.S. Dist. LEXIS 167723, at \*17–18 (W.D. Tex. Apr. 7, 2011); *see also U.S. v. Fla. E. Coast Rwy.*, 410 U.S. 224, 240–42 (1973). A notable exception is the federal Individuals with Disabilities Education Act (IDEA) whose text guarantees parts the right to “confront” witnesses. Many courts have interpreted this language to provide parties a right to in-person confrontation. *See, e.g., Genn v. New Haven Bd. Of Educ.*, 2015 U.S. Dist. LEXIS 29663, at \*3–8 (Mar. 11, 2015); *Farmington Public Schools v. Lenhoff*, 1989 U.S. Dist. LEXIS 17801, at \*8–13 (E.D. Mich. May 25, 1989). State agencies administer the IDEA. No statute administered by a federal agency appears to include explicit language permitting a party to “confront” witnesses.

<sup>87</sup> *Hepp v. Astrue*, 511 F.3d 798, 805–06 (8th Cir. 2008); *see also Henry*, 561 Fed. Appx. at \*57–58; *Johnson v. Colvin*, 2014 U.S. Dist. LEXIS 49372, at \*10–11 (W.D.N.Y. Apr. 9, 2014).

Securities and Exchange Commission.<sup>88</sup> And although the Tenth Circuit has upheld telephonic testimony by an Immigration and Customs Enforcement agent, it cautioned that in other cases “the lack of in-person confrontation might so undercut the purposes of cross-examination as to deprive a lawful resident of the fundamental protections of procedural due process.”<sup>89</sup>

However, individual cases may present factors that raise due process concerns, especially when a technical problem interfered with a party’s ability to examine or cross-examine a remote witness (see Part IV.A) or a party demonstrates that a witness’s remote participation negatively impacted an adjudicator’s ability to assess his or her credibility. For reasons discussed earlier, credibility arguments may be stronger when a witness participates by telephone rather than VTC,<sup>90</sup> so long as the party can demonstrate that telephonic testimony resulted in actual prejudice to a party, likely affected the outcome of the case,<sup>91</sup> or otherwise violated an agency rule.<sup>92</sup>

Of note, parties have occasionally (and unsuccessfully) challenged an adjudicator’s decision *not* to permit a witness to testify remotely.<sup>93</sup>

#### IV. REMOTE-HEARING INFRASTRUCTURE

Another class of potential legal issues relates to the design and functioning of remote hearings, including the privacy and accessibility of physical spaces designated for remote hearings; the security and usability of the hardware and software systems that enable remote participation; procedures for resolving technical issues when they arise; and compliance with open-hearing requirements. Agencies are facing new legal questions during the COVID-19 pandemic due to

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<sup>88</sup> *Alderman v. SEC*, 104 F.3d 285, 288 n.4 (9th Cir. 1997).

<sup>89</sup> *Barrera-Quintero v. Holder*, 699 F.3d 1239, 1247–49 (10th Cir. 2012).

<sup>90</sup> *See, e.g.*, *EF Int’l Language Schs. v. NLRB*, 673 Fed. Appx. 1, 3–4 (D.C. Cir. 2017); *Ngassaki v. Holder*, 538 Fed. Appx. 28, 30 (2d Cir. 2013); *Edwards v. Astrue*, 2011 U.S. Dist. LEXIS 88293, at \*28–29 (D. Conn. Aug. 10, 2011), *adopted by* 2018 U.S. Dist. LEXIS 15156 (D. Conn. Jan. 31, 2018); *Ainsworth v. Astrue*, 2010 U.S. Dist. LEXIS 60686, at \*10–12 (D.N.H. June 17, 2010); *see also* *Robertson v. Dept. of Transp.*, 2009 M.S.P.B. 229 (2009).

<sup>91</sup> *See Barrera-Quintero*, 699 F.3d at 288 n.4.

<sup>92</sup> *See, e.g.*, *Bryant v. Colvin*, 661 Fed. Appx. 686, 689–91 (11th Cir. 2016); *Henry v. Colvin*, 561 Fed. Appx. 55, at \*57–58 (2d Cir. 2014); *De Rojas v. Gonzales*, 2007 U.S. App. LEXIS 5511, at \*5–6 (9th Cir. 2007); *Torres v. Colvin*, 2015 U.S. Dist. LEXIS 177283, at \*9–24 (D. Conn. Dec. 2, 2015), *adopted by* 2016 U.S. Dist. LEXIS 40078 (D. Conn. Mar. 28, 2016); *Ramsay v. Comm’r of Soc. Sec.*, 2015 U.S. Dist. LEXIS 73125, at \*22–26 (S.D. Ohio June 5, 2015); *Cooley v. Comm’r of SSA*, 2015 U.S. Dist. LEXIS 43022, at \*48–59 (D.S.C. Mar. 13, 2015); *Hannah v. Colvin*, 2014 U.S. Dist. LEXIS 85751, at \*7–19 (M.D. Fla. June 4, 2014), *adopted by* 2014 U.S. Dist. LEXIS 85754 (M.D. Fla. June 24, 2014); *Brown v. Comm’r, SSA*, 2014 U.S. Dist. LEXIS 37942, at \*20–24 (E.D. Tex. Mar. 24, 2014); *Lipincott v. Comm’r of Soc. Sec.*, 982 F. Supp. 2d 358, 378–81 (D.N.J. Nov. 8, 2013); *Richey v. Colvin*, 2013 U.S. Dist. LEXIS 133683, at \*65–66 (N.D. Cal. Sep. 17, 2013); *Cheatham v. Comm’r of Soc. Sec.*, 2013 U.S. Dist. LEXIS 62386, at \*27–31 (E.D. Mich. Mar. 19, 2013), *adopted by* 2013 U.S. Dist. LEXIS 61311 (E.D. Mich. Apr. 30, 2013); *King v. Comm’r of Soc. Sec.*, 2013 U.S. Dist. LEXIS 46392 (D. Mass. Mar. 28, 2013); *Green v. Astrue*, 2013 U.S. Dist. LEXIS 23629, at \*30–34 (D. Mass. Feb. 20, 2013); *Tardiff v. Astrue*, 2012 U.S. Dist. LEXIS 30132, at \*15–20 (D.N.H. Mar. 7, 2012); *Koutrakos v. Astrue*, 2012 U.S. Dist. LEXIS 52319, at \*13–27 (D. Conn. Jan. 9, 2012), *adopted by* 906 F. Supp. 2d 30 (D. Conn. 2012); *Porter v. Barnhart*, 2006 U.S. Dist. LEXIS 101838, at \*3–6 (W.D. Wash. Apr. 12, 2006).

<sup>93</sup> *See, e.g.*, *Barriga v. Barr*, 2020 U.S. App. LEXIS 7537, at \*3 (2d Cir. Mar. 11, 2020); *Zhang v. AG U.S.*, 632 Fed. Appx. 680, 683 (3d Cir. 2015).

office closures, increased telework, state and local stay-at-home directives, social-distancing guidelines, travel limitations, and other factors.

### A. *Technical Issues*

Many of the most successful legal challenges related to remote participation are those in which a party demonstrates that a limitation or technical problem with an agency's remote-hearing technology interfered with the conduct of the hearing, resulted in an incomplete recording or transcript, or may have affected the proceeding's outcome.<sup>94</sup>

Whether a court will actually find that a specific limitation or technical problem denied a party due process and warrants remedial action depends heavily on both the facts and outcomes of the individual case, including whether the issue substantively prejudiced the party. Courts have remanded for a new hearing where a VTC participant was unable to review important documents;<sup>95</sup> where an immigration court did not record a witness's telephonic testimony;<sup>96</sup> where an expert's telephone testimony "cut out;"<sup>97</sup> and where the hearing transcript indicated that telephonic testimony was frequently "indiscernible" or "inaudible."<sup>98</sup> Courts have declined to remand cases when they found the technical issue harmless, for example where an adjudicator was briefly unable to see a private party,<sup>99</sup> where testimony was "indiscernible" but the broader context suggested that the participants were ultimately able to communicate or that the technical issues did not affect the outcome of the proceeding,<sup>100</sup> and where only a few words were inaudible and not so significant as to create an "evidentiary gap" that could change the outcome of the proceeding.<sup>101</sup>

Agencies should be mindful of potential limitations and technical problems in remote hearings and take steps to address them systemwide before they occur. Useful resources include ACUS materials on best practices in VTC hearings, especially the *Handbook on Best Practices for Using Video Conferencing in Adjudicatory Hearings*.<sup>102</sup> When technical issues do occur in individual proceedings, initial and appellate adjudicators should consider their likely effect, if any, on the outcome of the proceeding to determine an appropriate response.

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<sup>94</sup> See *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *Fall v. Gonzales*, 218 Fed. Appx. 385, 389 (6th Cir. 2007); *Rusu v. INS*, 296 F.3d 316, 324 (4th Cir. 2002).

<sup>95</sup> *Rapheal*, 533 F.3d at 532–34.

<sup>96</sup> *Millian-Zamora v. Ashcroft*, 228 F. Supp. 2d 272, 277–80 (E.D.N.Y. 2002).

<sup>97</sup> *Edwards v. Astrue*, 2011 U.S. Dist. LEXIS 88293, at \*28–29 (D. Conn. Aug. 10, 2011), *adopted by* 2018 U.S. Dist. LEXIS 15156 (D. Conn. Jan. 31, 2018).

<sup>98</sup> See, e.g., *Semenov v. AG of the U.S.*, 346 Fed. Appx. 783, 787–90 (3d Cir. 2009); *Ainsworth v. Astrue*, 2010 U.S. Dist. LEXIS 60686, at \*10–12 (D.N.H. June 17, 2010).

<sup>99</sup> *Loya v. Colvin*, 2015 U.S. Dist. LEXIS 35787, at \*9 (D. Colo. Mar. 20, 2015).

<sup>100</sup> *Vilchez v. Holder*, 682 F.3d 1195, 1200 (9th Cir. 2012); *Garza-Moreno v. Gonzales*, 489 F.3d 239, 241–42 (6th Cir. 2007); *Rusu v. INS*, 296 F.3d 316, 323–24 (4th Cir. 2002); *Cherry v. Comm'r of Soc. Sec.*, 2019 U.S. Dist. 48080, at \*25–26 (S.D.N.Y. Mar. 22, 2019); *Momentum EMS v. Sibelius*, 2013 U.S. Dist. LEXIS 183591, at \*29–31 (S.D. Tex. Dec. 18, 2013); *Bates v. Astrue*, 2008 U.S. Dist. LEXIS 30817, at \*38–39 (D. Del. Apr. 11, 2008); see also *Jhin v. OPM*, 368 Fed. Appx. 118, 121–22 (Fed. Cir. 2010).

<sup>101</sup> *Ford v. Astrue*, 2009 U.S. Dist. LEXIS 24204, at \*14–16 (M.D. Fla. Mar. 23, 2009).

<sup>102</sup> See *supra* notes 2–4.

During the COVID-19 pandemic, hearing participants (including parties, their representatives, witnesses, and even adjudicators) are unlikely to have ready home access to the same quality of remote-hearing infrastructure or level of administrative support. Although some agencies, notably the Board of Veterans Appeals,<sup>103</sup> have experience with fully virtual hearings, most have had to quickly adopt commercially available programs such as Zoom for Government.<sup>104</sup> Adjudicators and other participants may be relatively unfamiliar with these programs, or they may not offer the same features as technologies previously procured for agency hearing rooms. Some individuals may also lack home access to a computer; reliable, high-speed internet; or a private location from which to participate.<sup>105</sup>

## **B. Accessibility for Parties**

As agencies develop infrastructure to facilitate remote participation by parties, they should remain mindful of the requirements of laws governing access to federal buildings and programs, including section 504 of the Rehabilitation Act, which bars discrimination against persons with disabilities;<sup>106</sup> section 508 of the Rehabilitation Act, which sets minimum standards for federal-government information technology systems;<sup>107</sup> and the Architectural Barriers Act (ABA), which mandates that federal buildings be accessible to persons with disabilities.<sup>108</sup> Although courts have not decided the merits of section 504 challenges, and parties do not appear to have litigated the application of section 508 and the ABA to remote-hearing infrastructure, agencies should consider potential implications for telephone- and VTC-hearing systems, remote interpretation services, and VTC-only hearing rooms.

Several agencies have considered or begun using commercially available programs to conduct remote hearings during the COVID-19 pandemic. Agencies should ensure that these systems satisfy federal accessibility requirements, including sections 504 and 508 of the Rehabilitation Act.

## **C. Privacy and Confidentiality**

Agencies are subject to various laws intended to protect sensitive information, including the Freedom of Information Act,<sup>109</sup> the Privacy Act,<sup>110</sup> and the Federal Information Security

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<sup>103</sup> U.S. Dept. of Veterans Affairs, *Board of Veterans' Appeals Virtual Hearing Option*, [https://www.bva.va.gov/docs/VirtualHearing\\_FactSheet.pdf](https://www.bva.va.gov/docs/VirtualHearing_FactSheet.pdf) (last visited June 16, 2020).

<sup>104</sup> See, e.g., Merit Systems Protection Bd., *Zoom for Government Privacy Act Statement* (Apr. 2020), [https://www.mspb.gov/privacy/MSPB\\_Privacy\\_Act\\_Statement\\_for\\_Zoom\\_for\\_Government\\_Apr\\_2020.pdf](https://www.mspb.gov/privacy/MSPB_Privacy_Act_Statement_for_Zoom_for_Government_Apr_2020.pdf).

<sup>105</sup> Brennan Ctr. for Justice, *Promise and Peril as Courts Go Virtual Amid Covid-19* (May 29, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/promise-and-peril-courts-go-virtual-amid-covid-19>; Letter of New Yorkers for Responsible Lending to Chief Administrative Judge, New York State Unified Court System (Apr. 15, 2020), [http://www.nyrl.org/wp-content/uploads/2019/01/2020.4.15-NYRL-Ltr-re-virtual-appearances.pdf?fbclid=IwAR1tJJnALfomjBs7H0KNqt0NrskvmN8\\_uaFR9lcaz2SO-wTDuo5DirYxdXU](http://www.nyrl.org/wp-content/uploads/2019/01/2020.4.15-NYRL-Ltr-re-virtual-appearances.pdf?fbclid=IwAR1tJJnALfomjBs7H0KNqt0NrskvmN8_uaFR9lcaz2SO-wTDuo5DirYxdXU).

<sup>106</sup> 29 U.S.C. § 701.

<sup>107</sup> *Id.* § 794d.

<sup>108</sup> 42 U.S.C. § 4151 *et seq.*

<sup>109</sup> 5 U.S.C. § 552.

<sup>110</sup> *Id.* § 552a.

Modernization Act (FISMA).<sup>111</sup> Although parties have not litigated the application of these statutes to remote-hearing infrastructure, agencies should consider whether their remote-hearing infrastructure—including systems for exchanging written information and oral testimony over the internet—complies with the requirements of these and other generally applicable statutes and regulations under them.<sup>112</sup> Personally identifiable information that an agency collects through remote-hearing technologies may constitute a system of records for Privacy Act purposes.<sup>113</sup>

Agencies should also be mindful of relevant agency-specific statutory and regulatory requirements. For example, federal law directs the Department of Veterans' Affairs to establish and maintain a "security internet platform" for VTC participation in BVA hearings "that protects sensitive personal information from a data breach."<sup>114</sup>

Several agencies have considered or begun using commercially available programs to conduct remote hearings during the COVID-19 pandemic. Agencies should ensure that these systems satisfy federal privacy and confidentiality requirements.

#### **D. Open Hearings**

The First Amendment may require that agencies open hearings to the public in certain circumstances.<sup>115</sup> The Government in the Sunshine Act generally requires that multi-member agencies conduct agency business in open hearings.<sup>116</sup> Provisions of the APA, agency-specific statutes, and agency rules of practice may also provide for open hearings in at least some circumstances.<sup>117</sup>

Open-hearing issues are likely to arise when adjudicators conduct hearings individually from their offices, homes, or elsewhere, or jointly from a space to which members of the public lack access. Although courts do not appear to have addressed the application of open-hearing requirements to wholly remote hearings, agencies should consider whether their remote-hearing infrastructure complies with relevant statutory and regulatory requirements and provides public access to remote hearings when appropriate.

Many individual adjudicators and members of multi-member panels are participating in hearings from their homes during the COVID-19 pandemic. Agencies should ensure that the use

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<sup>111</sup> 44 U.S.C. § 3541 *et seq.*

<sup>112</sup> *See, e.g.,* Scott v. Shinseki, 2014 U.S. App. Vet. Claims LEXIS 191, at \*3–4 (Feb. 7, 2014).

<sup>113</sup> *See* 5 U.S.C. § 552a; *see also supra* note 104.

<sup>114</sup> 38 U.S.C. § 7107(c)(2)(C)(i)(II).

<sup>115</sup> *See* N.Y. Civ. Liberties Union v. N.Y. City Transit Auth., 684 F.3d 286, 300–01 (2d Cir. 2011); N.J. Media Gp. v. Ashcroft, 308 F.3d 198, 208–09 (3d Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002); *see generally* Christopher B. McNeil, *The Public's Right of Access to "Some Kind of Hearing": Creating Policies That Protect the Right to Observe Agency Hearings*, 68 LA. L. REV. 1121 (2008); Comm. on Comm. and Media Law of the Ass'n of the Bar of the City of N.Y., "If It Walks, Talks, and Squawks . . ." *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENT. L. 21 (2005).

<sup>116</sup> 5 U.S.C. § 552b. The Sunshine Act makes some exception for certain adjudicatory actions. *Id.* § 552b(c)(10); *see* Philadelphia Newspapers v. NRC, 727 F.2d 1195, 1200 (D.C. Cir.); Shurberg Broadcasting of Hartford v. FCC, 617 F. Supp. 825, 828–30 (D.D.C. 1985).

<sup>117</sup> ASIMOW, *supra* note 4, at 77–78; *see, e.g.,* 8 C.F.R. § 1003.27 (immigration courts).

of remote hearing technologies to conduct such proceedings complies with applicable open-hearing requirements.

### CONCLUSION

If there are any clear lessons regarding the law of remote hearings in agency adjudication, it is that the law is rarely clear. With scarce exceptions, there are relatively few bright-line rules. As agencies weigh the benefits and costs of developing and implementing remote-hearing policies and practices, they should carefully consider relevant statutory directives and the application of the *Mathews* balancing test given factors including the public and private interests at stake in agency proceedings, the nature of the facts in issue and testimony adduced at typical evidentiary hearings, the quality of their remote-hearing infrastructure and any technical problems that arise, and any personal attributes that may impact individuals' ability to participate remotely.

## Special Education Fact Pattern

Student, who was recently diagnosed with ADHD and dyslexia, is in the second grade at Public School A, which is participating in online learning for all students for 2020-2021. Beginning in kindergarten, Student struggled with listening attentively and remaining seated for instruction. Kindergarten Teacher developed strategies, such as a timer, fidgets, and verbal reminders, to address problem behaviors and recommended that First Grade Teacher continue to implement these strategies to keep Student on task. Student's First Grade Teacher noticed similar problems with the Student's behavior, which were interfering with the Student's ability to timely complete his work. While Student continued to make progress in academic areas, he struggled with attention and his problem behaviors increased. First Grade Teacher added additional strategies to address problem behaviors. By the end of second quarter, Student was working towards grade-level standards and was reading at an appropriate first grade level. However, he still had problems with attentive listening, following directions, and organization. His formal assessments scores were in the average range, with math scores in the high average range and reading comprehension in the low average range. First Grade Teacher, at a parent-teacher conference, suggested that Parents may want to consult with their pediatrician to inquire if medication may be helpful.

During the 3rd quarter, Parents asked that the Student be evaluated for eligibility for special education services under the IDEA. Specifically, they were concerned about the Student's progress in reading and written language compared with same-aged peers. Parents noticed that Student's written work was often incomplete, messy, and filled with spelling and capitalization errors. They also were concerned about behavioral problems, both at school and at home, which they believe are caused by Student's frustration related to his learning disability.

Based on its review of the Student's classwork, formal and informal evaluations, and teacher reports, School A determined that the Student is not eligible for special education services because the Student has made progress in all academic areas and does not require special education services to access the curriculum.

Shortly after all schools in the State were closed based on the COVID-19 pandemic, Parents filed a due process complaint and request for mediation, regarding School A's eligibility determination. Parents are frustrated that they have not been able to resolve this matter before the new school year began. And they now have additional concerns because the Student is not adjusting well to on-line learning and is falling behind.



# SESSION 4 - Judicial Ethics in the Time of COVID

## Written Materials


1. Judge Claudia Crichlow Presentation Handout
2. Benchguide Checklist
3. [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_opinion\\_478.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_478.pdf)
4. ABA Model Court of Judicial Conduct for State ALJs (2016)  
[http://naalj.org/resources/2020%20Annual%20Online%20Conference/Written\\_Materials/ABA\\_NCALJ\\_Model\\_Code\\_for\\_State\\_ALJs.pdf](http://naalj.org/resources/2020%20Annual%20Online%20Conference/Written_Materials/ABA_NCALJ_Model_Code_for_State_ALJs.pdf)

Judicial Ethics in the  
Virtual World




1

Presenters



Claudia A. Crichlow, Principal ALJ  
Christopher Costa, ALJ  
DC Office of Administrative Hearings



Denise Shaffer, ALJ  
Quality Assurance  
Maryland Office of  
Administrative Hearings

2

3

- Ms. Baker is testifying in a telephone hearing and seems to be reading from a document that is not in evidence and was not filed as a proposed exhibit. The other side does not object.
- **Does the judge have an obligation to ascertain what the witness is reading from?**
- \_\_\_ Yes
- \_\_\_ No
- **Why or why not?**

## REMOTE HEARING SITUATION #1

3

4

What should the judge do?

- Let the witness testify in the interest of developing a complete record.
- Ask the witness if she is reading from an exhibit.
- Ask the witness if she is reading for a document that was not filed as a proposed exhibit and then ask the other side if they object.
- Admonish the witness.
- Other?



4

5

- Rule 2.2: Impartiality and Fairness
- An ALJ shall uphold and apply the law and shall perform all duties of office fairly and impartially.
- Rule 2.6: Ensuring the Right to Be Heard
- (A) An ALJ shall accord to every person who has a legal interest in a proceeding, or that person's lawyer or lay representative, the right to be heard according to law.
- (B) An ALJ may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

## ABA MODEL CODE OF CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES

5

6



### REMOTE HEARING SITUATION #2

- In a telephonic pre-hearing conference, Petitioner Mr. Kowalski, who is self-represented, repeatedly and loudly interrupts Respondent's attorney with arguments about the contents of proposed exhibits. Your verbal admonishment to Mr. Kowalski does not deter him. His interruptions become louder, more frequent, and acerbic.
- **Does the judge have an obligation to take steps to restrain Petitioner?**
- Yes
- No
- **Why or why not?**

6

7

What should the judge do?

- Let Petitioner keep going until he wears himself out.
- Loudly admonish the witness, yelling if necessary.
- Rap your gavel.
- Mute Petitioner.
- Adjourn the proceeding.
- Stop the proceeding and refer both parties to the protocol discussed at beginning of hearing.
- Other?

7

8

ABA MODEL CODE  
OF JUDICIAL  
CONDUCT FOR  
STATE  
ADMINISTRATIVE  
LAW JUDGES

- **Rule 2.3: Bias, Prejudice and Harassment**
- (A) An ALJ shall perform the duties of office, including administrative duties, without bias or prejudice.
- (B) An ALJ shall not, in the performance of official duties, by words or conduct manifest bias or prejudice, or engage in harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit support staff, or others subject to the ALJ's direction and control to do so.
- **(C) An ALJ shall require lawyers in proceedings before the ALJ to refrain from manifesting bias or prejudice, or engaging in harassment, based on attributes or factors enumerated in (B) above, against parties, witnesses, lawyers, or others.**
- **Rule 2.6: Ensuring the Right to Be Heard**
- (A) An ALJ shall accord to every person who has a legal interest in a proceeding, or that person's lawyer or lay representative, the right to be heard according to law.
- (B) An ALJ may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.
- **Rule 2.8: Decorum and Demeanor**
- (A) **An ALJ shall require order and decorum in proceedings before the ALJ.**
- (B) An ALJ shall be patient, dignified, and courteous to litigants, witnesses, lawyers, staff and others with whom the ALJ deals in an official capacity, and shall require similar conduct of lawyers, staff, officials, and others subject to the ALJ's direction and control.

8

9

REMOTE HEARING  
SITUATION #3

- While Respondent is testifying in a telephonic pre-hearing conference, she pauses after questions are put to her on cross-examination. You think you hear someone whispering to her and that she may be being coached. You don't know whether Petitioner has heard the whispering or suspects that Petitioner is being coached. In any event, Petitioner does not object.
- **Does the judge have an obligation to take steps to ascertain whether Respondent is consulting with someone about her testimony or otherwise being coached?**
  - Yes
  - No
  - **Why or why not?**

9

10

What should the judge do?

- Nothing
- Listen carefully to see if you hear coaching and then listen to the coach.
- Listen carefully to see if you hear coaching and then inquire of Respondent.
- Ask Respondent whether there is someone with her, if they are helping her with her testimony, and strike Respondent's testimony.
- Other?

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ABA MODEL CODE OF CONDUCT  
FOR STATE ADMINISTRATIVE LAW  
JUDGES

- **Rule 2.2: Impartiality and Fairness**
- An ALJ shall **uphold and apply the law** and shall perform all duties of office fairly and impartially.
- **Rule 2.6: Ensuring the Right to Be Heard**
- (A) An ALJ shall accord to every person who has a legal interest in a proceeding, or that person's lawyer or lay representative, the right to be heard according to law.
- (B) An ALJ may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

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**REMOTE HEARING SITUATION**  
**# 4**

- During the remote hearing you are conducting, you realize that Petitioner has left the hearing. Petitioner did not alert you or Respondent that he was leaving the hearing. You are unsure when or why Petitioner left. During the period of time that Petitioner was not participating in the hearing, Respondent's witness testifies and Respondent's attorney asks you to admit exhibits. You realize that Petitioner has left the hearing because when you ask him whether he objects to the admission of Petitioner's exhibits there is no answer. Your screen shows that Petitioner's telephone is connected to the hearing. You then wait to see if Petitioner rejoins the hearing. Ten minutes later, Petitioner rejoins the hearing. You ask Petitioner how long he did not participate in the hearing and where he was. Petitioner responds that he stepped away from his telephone for about 15 minutes to have a snack and use the restroom.

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What should the judge do?

- Nothing.
- Admonish Petitioner for leaving the hearing without seeking permission.
- Admonish Petitioner and have the witness repeat her testimony from the time that Petitioner left.
- Read or replay the witness's testimony to Petitioner from the time that Petitioner left.
- Admonish Petitioner and proceed with the hearing right where it stopped when the judge asked Petitioner if he objects to the admission of the exhibit.

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Does the judge have an obligation to provide the Petitioner with information about what happened in the Petitioner's absence or, alternatively, admonish Petitioner for leaving without notice or permission?

- The ALJ should provide Petitioner with the information they missed.
- The ALJ should admonish Petitioner for leaving without notice or permission.
- The ALJ has an obligation to do something else.
- The ALJ has no obligation to do anything under these circumstances.
- **Why or why not?**

14



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ABA MODEL CODE OF CONDUCT  
FOR STATE ADMINISTRATIVE LAW  
JUDGES

- **Rule 2.2: Impartiality and Fairness**
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- **Rule 2.6: Ensuring the Right to Be Heard**
- (A) An ALJ shall accord to every person who has a legal interest in a proceeding, or that person's lawyer or lay representative, **the right to be heard according to law.**
- (B) An ALJ may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.
- **Rule 2.8: Decorum and Demeanor**
- (A) An ALJ shall require order and decorum in proceedings before the ALJ.
- (B) An ALJ shall be patient, dignified, and courteous to litigants, witnesses, lawyers, staff and others with whom the ALJ deals in an official capacity, and shall require similar conduct of lawyers, staff, officials, and others subject to the ALJ's direction and control.

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16

REMOTE HEARING  
SITUATION # 5

- During the remote hearing you are conducting, you realize that Petitioner is not focused on the proceeding but on trying to manage the technology. At least twice, Petitioner seems to have mistakenly muted himself. You previously gave Petitioner the option to participate in the hearing remotely or in-person and he opted to participate remotely. But you now realize that Petitioner's participation in the hearing is being impeded by his lack of familiarity with or inability to manage the technology.
- **Does the judge have an obligation to address the difficulty Petitioner is experiencing?**
- Yes
- No
- **Why or why not?**

16

17

What should the judge do?

- Nothing. Petitioner was given the option to participate remotely or in-person.
- Stop the proceeding and review how to use the technology with the parties.
- Adjourn the proceeding and schedule an in-person hearing.
- Other?

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ABA MODEL CODE OF CONDUCT  
FOR STATE ADMINISTRATIVE LAW  
JUDGES

- **Rule 2.2: Impartiality and Fairness**
- An ALJ shall uphold and apply the law and shall perform all duties of office fairly and impartially.
- **Rule 2.6: Ensuring the Right to Be Heard**
- (A) An ALJ shall accord to every person who has a legal interest in a proceeding, or that person's lawyer or lay representative, **the right to be heard according to law.**
- (B) An ALJ may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

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REMOTE HEARING  
SITUATION # 6

- A witness is testifying in a telephone hearing and you can hear in the background a small child crying and several people talking, making it difficult to hear the witness's testimony. You have asked the witness to eliminate the background noises and for a very short time the room is quiet. However, the room soon becomes noisy again. When you ask the witness if she can go to another room in the apartment, she says she has nowhere else to go. It becomes clear that not only can't you hear the witness, but she also is distracted by what is going on around her. There may also be a concern that other parties can't hear the witness and that the recording of the hearing will not be clear.

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What would you do?

- Nothing. The party calling the witness should have ensured the witness was prepared and, in a place, where the testimony would not cause such issues.
- Stop the proceeding and discuss with the parties how they propose to handle this witness's testimony, including possibly continuing the hearing to a new day.
- Adjourn the proceeding and schedule an in-person hearing.
- Other?

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ABA MODEL CODE OF CONDUCT  
FOR STATE ADMINISTRATIVE LAW  
JUDGES

- **Rule 2.2: Impartiality and Fairness**
- An ALJ shall uphold and apply the law and shall perform all duties of office fairly and impartially.
- **Rule 2.6: Ensuring the Right to Be Heard**
- (A) An ALJ shall accord to every person who has a legal interest in a proceeding, or that person's lawyer or lay representative, **the right to be heard according to law.**
- (B) An ALJ may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.
- **Rule 2.8: Decorum and Demeanor**
- (A) An ALJ shall require order and decorum in proceedings before the ALJ.
- (B) An ALJ shall be patient, dignified, and courteous to litigants, witnesses, lawyers, staff and others with whom the ALJ deals in an official capacity, and shall require similar conduct of lawyers, staff, officials, and others subject to the ALJ's direction and control.

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ABA MODEL CODE OF CONDUCT  
FOR STATE ADMINISTRATIVE LAW  
JUDGES

- **Rule 2.3: Bias, Prejudice and Harassment**
- (A) An ALJ shall perform the duties of office, including administrative duties, without bias or prejudice.
- (B) An ALJ shall not, in the performance of official duties, by words or conduct manifest bias or prejudice, or engage in harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit support staff, or others subject to the ALJ's direction and control to do so.
- (C) An ALJ shall require lawyers in proceedings before the ALJ to refrain from manifesting bias or prejudice, or engaging in harassment, based on attributes or factors enumerated in (B) above, against parties, witnesses, lawyers, or others.

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**REMOTE HEARING  
SITUATION # 7**



- The night before your virtual video hearing the video equipment breaks down. You notify the parties of the situation but assure them that the camera should be fixed in time for the evidentiary portion of the hearing, but to save time the preliminary matters will be by telephone. The following morning you begin the telephone hearing, and the attorneys introduce themselves. Attorney Smith is one of the attorneys representing a party. Although Attorney Smith's voice sounds familiar, he does not say much during the preliminary matters. After opening statements the camera is fixed and you can now see the parties. The reason why Attorney Smith's voice seemed familiar is because he represented your husband in your very contentious divorce.

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What would you do?

- Explain to the parties that you must recuse yourself because of the past relationship with counsel.
- Explain to the parties your past relationship with counsel and ask if they have an objection to your hearing the matter. If they do not, continue with the matter as you would any other.
- Do nothing. You are a trained judge and can handle any personal bias that anyone might perceive.
- Other?

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ABA MODEL CODE OF CONDUCT  
FOR STATE ADMINISTRATIVE LAW  
JUDGES

- **Rule 2.4: External Influences on Judicial Conduct**
- (A) An ALJ shall not be swayed by public clamor or fear of criticism.
- (B) An ALJ shall not permit family, social, political, financial, or other interests or relationships to influence the ALJ's judicial conduct or judgment.
- (C) An ALJ shall not convey or permit others to convey the impression that any person or organization is in a position to influence the ALJ.
- **Rule 2.5 Competence, Diligence, and Cooperation**
- (A) An ALJ shall perform judicial and administrative duties competently and diligently.
- (B) An ALJ shall cooperate with other ALJs, legal professionals and other officials in the administration of official business.

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ABA MODEL CODE OF CONDUCT  
FOR STATE ADMINISTRATIVE LAW  
JUDGES

**Rule 2.11: Disqualification**

- (A) An ALJ shall disqualify himself or herself in any proceeding in which the ALJ's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The ALJ has a personal bias or prejudice concerning a party or party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. (2) The ALJ knows that the ALJ, the ALJ's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such person is: (a) a party to the proceeding, or an officer, director, general partner, major shareholder, managing member, or trustee of a party; (b) acting as a lawyer in the proceeding; (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or, (d) likely to be a material witness in the proceeding.
- (3) The ALJ knows that he or she, individually or as a fiduciary, or the ALJ's spouse, domestic partner, parent or child, or any other member of the ALJ's family residing in the ALJ's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.
- (4) The ALJ has made a public statement, other than in a tribunal proceeding, adjudicative decision, or adjudicative opinion, that commits or appears to commit the ALJ to reach a particular result or rule in a particular way in the proceeding or controversy.
- (5) The ALJ:
  - (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association; (b) served in government employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed an opinion concerning the merits of the particular matter in controversy; (c) was a material witness concerning the matter; or (d) previously presided as an ALJ or judge over the matter in another tribunal or court.
- (B) An ALJ shall keep informed about the ALJ's personal and fiduciary economic interests, and make reasonable effort to keep informed about the personal economic interests of the ALJ's spouse or domestic partner and minor children residing in the ALJ's household.
- (C) An ALJ subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the ALJ's disqualification and may ask the parties and their lawyers to consider, outside the presence of the ALJ and staff, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the ALJ or staff, that the ALJ should not be disqualified, the ALJ may participate in the proceeding. The agreement should be incorporated

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## REMOTE HEARING SITUATION # 8



- One of your colleagues tells you about a telephone hearing experience with Attorney Lee, an attorney who has not appeared before you. They tell you that Attorney Lee was representing a party in a telephone hearing where Lee joined the hearing 15 minutes after its start and seemed a bit disorganized. The Judge gave her a minute to get herself settled and the hearing continued. During cross examination, the Judge noticed that Lee's speech was slurred, and she was having trouble maintaining her train of thought. The Judge also says that she was not exactly yelling but her voice was noticeably raised almost as if she were under the influence of something. The Judge then asks your advice on what to do if, anything. What do you say?

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What do you do, if anything?

- Contact Attorney Lee and ask if everything is all right and if she needs help. Be prepared to tell her about the available services for lawyers with substance abuse problems.
- Make a confidential referral to a lawyer assistance program without contacting the attorney and let the assistance service do its job.
- Report Lee to the Bar for a disciplinary investigation to determine if she appeared in a proceeding under the influence. It might save her life.
- Other?

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ABA MODEL CODE OF CONDUCT  
FOR STATE ADMINISTRATIVE LAW  
JUDGES

- **Rule 2.13: Disability and Impairment**
- An ALJ having a reasonable belief that the performance of a lawyer or another ALJ is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.
- **Rule 2.14: Responding to Judicial and Lawyer Misconduct**
- (A) An ALJ having knowledge that another ALJ has committed a violation of this Code that raises a substantial question regarding the ALJ's honesty, trustworthiness, or fitness as an ALJ in other respects shall inform the appropriate authority.
- (B) An ALJ having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.
- (C) An ALJ who receives information indicating a substantial likelihood that another ALJ has committed a violation of this Code shall take appropriate action.
- (D) An ALJ who receives information indicating that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

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- **Benchguide Checklist for Procedural Safeguards During OAH Remote Hearings**

- **Before Hearing**

- Ensure that all parties either (1) received a notification of a remote hearing, or (2) otherwise communicated their agreement to participate remotely.
- Check your bandwidth, equipment functionality, proper attire, and professional background.
- Ensure your own WebEx or Google Meeting settings (waiting room, whether others join before you, camera settings, etc.) are correct.
- Perform a CourtSmart test recording.
- Determine if an interpreter has been requested or a court reporter has been ordered.
- Ensure that observers or members of the public who wish to observe are given access to any public proceeding.

- **At Beginning of Hearing**

- Add interpreter and/or court reporter to the proceeding, if needed.
- If the proceeding is confidential, confirm that participants are alone in a private location and that no part of the proceeding can be overheard by others. (Consider having each party scan the room with their camera if in doubt.)
- Make findings about who is present/ask that all parties/counsel announce presence for the record.
- Inquire whether all participants, including any interpreter, can see and hear all other participants. If there is a court reporter, ensure that the reporter can see and hear. If there is an interpreter, confirm that the person requiring the interpreter is able to understand and communicate with the interpreter.
- Make findings that all participants have indicated for the record that they can all see and hear. Make findings that counsel/parties/witnesses are visible, audible to the ALJ.
- Instruct all participants to mute their microphone if not speaking/testifying so that you or the court reporter can make an accurate record and to limit distractions. Inform participants that you may mute microphones of participants who are not actively speaking if there is background noise.
- Instruct witnesses that they must turn off any electronic device not being used to participate in the hearing, and that they must refrain from exchanging any electronic messages during their testimony.
- Instruct participants that no party may record, capture a screenshot or otherwise preserve, all or part of any proceeding.
- Provide the information covered in your standard OAH introduction.
- Confirm with representatives/parties that exhibits were exchanged in advance, that you have a full copy of all the exhibits each party intends to offer, and determine how they intend to handle exhibits during the hearing—whether they will be relying on hard copies or are prepared to present documents on the screen.

- Inquire whether witnesses have access to documents for purposes of their testimony. You may have to address screen sharing during testimony in order to allow a witness to be confronted with an exhibit or impeachment material.
- Instruct participants that if an objection is made to stop speaking until you can rule on the objection. Sometimes remote platforms do not register the person speaking immediately. State that you will be carefully observing proceedings to ensure that objections are addressed immediately.
- If witnesses are being sequestered, first instruct them on sequestration, and get an acknowledgment that they understand the rule. Place witnesses in WebEx waiting room or otherwise “offline” to ensure that they do not observe proceedings and instruct them not to communicate with any other witnesses during proceedings before or after they testify.
- **During Hearing**
- When swearing witnesses make finding that you are able to see and hear the witness and positively identify the witness on the screen.
- During the presentation of witness testimony, make findings that you are fully able to see and hear each witness and able to observe the witness’s demeanor. Advise the witness that they may not rely upon notes or documents located outside of the camera’s view without your permission.
- Ensure that objections to the admission of exhibits are fully heard before admission. Rule on any objections immediately.
- Ensure that all parties have had the opportunity to confer with their counsel privately. This can be accomplished by taking breaks and/or allowing the party and attorney to confer privately before proceeding. If salient to the proceedings, note for the record that the parties had the opportunity to confer and did so.
- Make findings that no issue with connectivity or bandwidth occurred during hearing. If such an issue occurred, confirm how it was addressed and get the parties to acknowledge that they either object or are satisfied with how the matter was solved. For example, if audio is not working, instruct the party/lawyer to call in with their phone and mute their computer. Take a break and allow extra time to adjust for the interruption. Then, confirm the parties are satisfied that the solution is adequate to allow full participation.
- Make a finding at the conclusion that nothing occurred during the hearing that would have caused the court to halt the hearing or render the hearing unreliable.
- **Sources:**, Md. Code Ann., State Gov’t, Title 10; COMAR 28.02.01; [Benchguide Checklist for Procedural Safeguards During Hearings for Judges](#), Eleventh Judicial Circuit, Florida, May 4, 2020; National Center for State Courts, [Checklist for judges in virtual proceedings](#), April 22, 2020; [Trial Courts Virtual Courtroom Standards and Guidelines](#), Michigan Virtual Court Resources, April 17, 2020.