



## AILA Position on the Use of Virtual Hearings in Immigration Removal Proceedings

October 20, 2021

### AILA's Position

AILA takes the position that virtual hearings (i.e. WebEx, VTC, and other similar technologies) should be used only at the Respondent's request given the serious due process concerns at stake in removal proceedings. While we understand circumstances might require that some master calendar hearings be held virtually, if a respondent requests an in-person master calendar hearing, EOIR should generally grant that request. However, individual hearings should be scheduled as in person hearings unless a virtual hearing is specifically requested by the respondent.

### Background

AILA is deeply concerned with reports about the growing and unilateral use of virtual hearings without a public health justification. For years, organizations have raised concerns about the use of virtual hearings to conduct immigration merits hearings.<sup>1</sup> Decisions made in immigration court are weighty—whether a family can remain together or whether an individual will be sent back to violence or even death in her home country – and virtual hearings can adversely affect respondent's abilities to access due process in hearings.

For example, an empirical study published in the Northwestern University Law Review revealed that detained respondents appearing virtually were more likely to be deported than those with in-person hearings.<sup>2</sup> In April of 2017, a separate EOIR-commissioned report concluded that virtual proceedings should be limited to procedural matters because virtual appearances may interfere with due process.<sup>3</sup> Among other concerns, virtual hearings can negatively impact the following:

- **Credibility:** Virtual hearings do not provide for the ability to transmit nonverbal cues, which can impact an immigration judges' assessment of an individual's demeanor and credibility.<sup>4</sup>
- **Quality of Interpretation:** Accuracy of interpreters is greatly reduced when they are not in person.<sup>5</sup> Remote interpretation eliminates the ability for simultaneous interpreting, and consecutive interpreting necessarily lengthens hearings. Telephonic interpreters also inhibit confidential attorney-client interaction using the interpreter.

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<sup>1</sup> See American Bar Association, [2019 Update Report – Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases](#) (March 2019); Young Center for Immigrant Children's Rights, [Immigration Hearings by Video: A Threat to Children's Right to Fair Proceedings](#) (Updated January 2020); American Immigration Lawyers Association, [Featured Issue: Use of Video Teleconferences During Immigration Hearings](#) (Updated October 2020).

<sup>2</sup> Ingrid V. Eagly, [Remote Adjudication in Immigration](#), 109-4 NW. U. L. Rev. 933 (2015).

<sup>3</sup> Booz, Allen, Hamilton, [Legal Case Study: Summary Report](#) (April 6, 2017).

<sup>4</sup> *Id.*; American Bar Association, [Letter to Acting EOIR Director Jean King: Comments on EOIR Operating Policies and Procedures Memoranda and Policy Memoranda](#) (May 20, 2021); American Bar Association, [2019 Update Report – Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases](#) (March 2019).

<sup>5</sup> See Nat'l Ass'n of Judicial Interpreters & Translators; [NAJIT Position Paper, Telephone Interpreting in Legal Settings](#) (Feb. 27, 2009); Laura Abel, [Language Access in Immigration Courts](#), BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, 9 (2011).

- **Presentation of Evidence:** Virtual hearings make it more difficult for attorneys to present and address evidence and make it more difficult for opposing parties and judges to examine evidence.<sup>6</sup>
- **Ability to Communicate with Representatives:** The physical separation between a lawyer and the client in virtual hearings prevents the lawyer and client from having confidential conversations that are necessary to present a case fully and which help facilitate the completion of the hearing.
- **Understanding of Court Process and Acceptance of Hearing Outcome:** Respondents in virtual hearings are less likely to understand the court processes, know what relief and options may be available to them, and accept the outcome of the hearing as fair.<sup>7</sup>
- **Immigration Judge Monitoring of Courtroom:** In virtual hearings, judges are unaware if respondents are being coerced or trafficked if they cannot see others present and may be less likely to know if other individuals are influencing the respondent or feeding them testimony.

Additionally, technological glitches such as weak connections, poor camera positions, and bad audio can make it difficult to communicate effectively in virtual hearings. An EOIR-commissioned study revealed that 29 percent of EOIR staff reported that virtual technologies caused meaningful delay, a finding that is supported by accounts from AILA members nationwide and documented by media reports.<sup>8</sup> Specifically:

- **Immigration Judges Do Not Adjourn Hearings Despite Failed Technology:** AILA members report WebEx hearings being interrupted numerous times due to failed technology without immigration judges adjourning the hearing.
- **Failed Technology Affects Respondents' Ability to Present Their Case:** Interruptions of WebEx hearings due to technological failures are distracting and disrupt respondents' ability to set forth their cases fully and accurately.

Despite insufficient technology and training, EOIR has expanded its use of virtual technologies for substantive hearings, going as far as to create immigration adjudication centers where immigration judges adjudicate cases from around the country from a remote setting. We are deeply concerned that virtual hearings appear headed towards being the rule rather than the exception, without guardrails for due process or stakeholder input.

### Guiding Principles

- Fairness to respondents and ensuring due process rights should be the first and primary concern of the courts.

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<sup>6</sup> American Bar Association, [Letter to Acting EOIR Director Jean King: Comments on EOIR Operating Policies and Procedures Memoranda and Policy Memoranda](#) (May 20, 2021).

<sup>7</sup> See Ingrid V. Eagly, [Remote Adjudication in Immigration](#), Northwestern University Law Review 109 (2015) (“These reasons include litigants’ perception that televideo is unfair and illegitimate, technical challenges in litigating claims over a screen, remote litigants’ lower quality interactions with other courtroom actors, and the exclusion of a public audience from the remote courtroom.”); American Bar Association, [2019 Update Report – Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases](#) (March 2019) (“For instance, advocates and judges reported that the respondents (many of whom appear pro se) can only see a small portion of the courtroom, are unable to determine who is speaking, and may have little privacy in the facility from which their testimony and argument is being broadcast.”).

<sup>8</sup> Booz, Allen, Hamilton, [Legal Case Study: Summary Report](#) (April 6, 2017); Kelan Lyons, [Technical Difficulties](#), Salt Lake City Weekly (October 10, 2018); Beth Fertig, [Do Immigrants Get a Fair Day in Court When It's by Video?](#), WNYC News (September 11, 2018); Camila DeChalus, [Immigration attorneys face courtroom challenges amid pandemic: Hearings conducted by phone or video have posed technical challenges, as well as concerns about due process](#), Roll Call (June 17, 2020);

- Due process demands that respondents have the right to be both seen and heard when requested, considering the high, often life-and-death, stakes of removal proceedings.
- The convenience of the other parties – including EOIR, immigration judges, attorneys, court staff, and ICE personnel – should be secondary to ensuring the rights of the respondent.
- Understanding of and compassion for the respondent and their case can be reduced when a hearing is held virtually.

### **Initial Recommendations**

- EOIR should limit the use of virtual hearings to procedural matters. Individual hearings should not be held virtually, unless requested by the respondent. Immigration Judges must inform respondents of their right to have an in-person hearing.
- Immigration Judges should receive clear guidance regarding when to adjourn a virtual hearing due to technological difficulties. EOIR should work closely with stakeholders to ensure technology and policies governing use of technology are implemented fairly and effectively.
- All virtual hearings must be made available to the public in accordance with 8 C.F.R. § 1003.27, subject to applicable privacy exceptions that necessitate a closed hearing.
- EOIR should use in-person interpreters whenever possible when holding an in-person hearing, particularly for individual hearings.

### **Additional Resources**

- [AILA Featured Issue: Use of Video Teleconferences During Immigration Hearings](#) (Updated October 2020)
- Ingrid V. Eagly, [Remote Adjudication in Immigration](#) (2015)
- [Legal Case Study: Summary Report](#) (April 6, 2017)
- [ABA Letter to Acting EOIR Director Jean King: Comments on EOIR Operating Policies and Procedures Memoranda and Policy Memoranda](#) (May 20, 2021)
- [ABA 2019 Update Report – Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases](#) (March 2019).