

**NATIONAL ORGANIZATION OF  
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES  
(NOSSCR)**

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***Executive Director***  
**Barbara Silverstone**

December 21, 2018

Nancy Berryhill  
Acting Commissioner  
Social Security Administration  
6401 Security Boulevard  
Baltimore, MD 21235-6401

**Submitted via [www.regulations.gov](http://www.regulations.gov)**

**Re: Notice of Proposed Rulemaking on Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 83 Fed. Reg. 57368 (November 15, 2018), Docket No. SSA-2017-0015**

Dear Acting Commissioner Berryhill:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR).

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a specialized bar association for attorneys and advocates who represent Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claimants throughout the adjudication process and in federal court. Founded in 1979, NOSSCR is a national organization with a current membership of more than 3,000 members from the private and public sectors and is committed to the highest quality representation for claimants and beneficiaries. NOSSCR's mission is to advocate for improvements in Social Security disability programs and to ensure that individuals with disabilities applying for SSDI and SSI benefits have access to highly qualified representation and receive fair decisions.

Introduction

It is NOSSCR's position that it is possible in some, but not all, circumstances for a hearing conducted via video or telephone to protect the rights of claimants and lead to a policy-compliant decision. NOSSCR does not oppose the Social Security Administration (SSA) giving claimants the option for video or telephone (together, "remote") hearings; indeed, there are circumstances in which a claimant might need or prefer a remote hearing, such as a claimant with a severely

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depressed immune system or who is incarcerated. Many NOSSCR members have, at their own expense, installed SSA-approved technology in their own offices so they can conduct hearings through the Representative Video Project in appropriate circumstances.<sup>1</sup>

However, NOSSCR strongly opposes any proposed rule that would make a video hearing the only option for a claimant or beneficiary to communicate with an Administrative Law Judge (ALJ) or Disability Hearing Officer (DHO). These proposed regulatory changes are a solution in search of a problem. These changes, if implemented as proposed, are likely on balance to create more problems, delays, and continued appeals than they are to improve the efficiency or fairness of the disability appeals process. The purported purpose of these regulations is to improve the efficiency of the hearing process and allow some claimants to have hearings faster. SSA fails to demonstrate, however, that remote hearings are more efficient or reduce processing time. The agency relies on data that is more than six years old to support the argument that more video hearing will lead to more timely hearings, raising the question of whether more recent data would undercut the agency's rationale.

Of particular concern, some claimants will not be able to meaningfully participate in such a hearing, violating Section 504 of the Rehabilitation Act ("Section 504"); when a party to a matter cannot fully participate in a hearing, it impedes SSA's ability to make accurate determinations. Representatives, witnesses, and decision makers themselves may also experience violations of their rights under Section 504.

The proposed rules are not needed for SSA to achieve its goals of increasing the percentage of hearings performed using video teleconferencing (VTC) or reducing the time claimants must wait for hearings and decisions. SSA has not provided adequate data to justify the proposed rule and, if enacted, there would be no way for claimants or advocates to determine whether the rule is effective. The proposed rule ignores SSA's ongoing challenges with the technology and physical spaces used for VTC hearings, but even if every video hearing met all best practices, video and in-person hearings differ in significant ways that prevent the former from adequately replacing the latter in certain circumstances. If this rule is implemented as written, it will likely increase the number of decisions that are appealed to the Appeals Council and federal courts; these are expensive for SSA to adjudicate and delay claimants' receipt of important benefits.

Additionally, NOSSCR strongly opposes SSA's plan to reduce the notice the agency must provide when changing critical facts about an already-scheduled hearing. The current practice, which allows parties to a hearing to waive notice requirements, is sufficient; the proposed changes will lead to inefficiencies and more policy-noncompliant decisions.

Finally, the proposed rule's statements about compliance with the Regulatory Flexibility Act and Paperwork Reduction Act are inaccurate. The Notice of Proposed Rulemaking should be rescinded because it does not comply with these laws.

### The Proposed Rules are Unnecessary and Inefficient

SSA's current policy generally allows claimants to opt out of ALJ hearings conducted by video by submitting a written objection. After SSA sends a claimant a notification that a video hearing

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<sup>1</sup> [https://www.ssa.gov/appeals/documents/Representative\\_Video\\_Project\\_RVP-508.pdf](https://www.ssa.gov/appeals/documents/Representative_Video_Project_RVP-508.pdf)

could be scheduled (this notice is sent to all claimants as a matter of course along with the acknowledgement of their request for an ALJ hearing), the claimant has 30 days to object, unless there is good cause for an untimely objection.<sup>2</sup>

As the prefatory matter to the proposed rule explains, most claimants awaiting an ALJ hearing do not object to video hearings. In Fiscal Year 2018, SSA received 620,164 requests for ALJ hearings and only 216,484 video hearing opt-outs.<sup>3</sup> This is similar to the approximately 30% of opt-outs the NPRM reports in Fiscal Year 2015 and approximately 32% in Fiscal Year 2017. SSA, therefore, can schedule hundreds of thousands of cases for video hearings each year under its current rules. SSA has not published any data on video hearing opt-outs by claimants' geographic location or their assigned hearing office.

SSA met its goal of performing 28% of ALJ hearings via video in Fiscal Year 2014. SSA's goal for Fiscal Year 2015 was to perform 30% of hearings by VTC but they only performed 27% of their hearings by VTC that year.<sup>4</sup> SSA has chosen not to set any goals about the percentage of hearings performed by VTC in subsequent Annual Performance Plans. There is no indication that SSA has significantly increased its capacity to perform a greater percentage of hearings by VTC. In Fiscal Year 2018, 28.5% of hearings were performed by VTC.<sup>5</sup> Given that approximately two-thirds of claimants are willing to have video hearings and SSA appears to have the capacity to schedule fewer than one-third of hearings via VTC, there is no apparent reason for SSA to remove the opportunity for claimants to opt out.

SSA already encourages claimants not to opt out of video hearings, but some claimants may feel that an in-person hearing is more appropriate for them and their case, even if it requires them to wait longer for hearings. Just as most claimants do not exercise their right to opt out of having a hearing altogether, even though obtaining a decision on the record might reduce their wait time for a decision and eliminate the need to travel to a hearing. Claimants similarly should be able to object to a video hearing, even if it increases the time they will wait for a decision.

SSA has also not provided data to support the argument that opting out of a video hearing increases the time a claimant will wait for a hearing. Three of the eight hearing offices with the longest average processing times so far this fiscal year are National Hearing Centers (NHCs), which perform nearly all of their hearings via VTC, while none of them have a lower processing time than the national average.<sup>6</sup> In addition, the most recent data which SSA includes in the preamble to support its efficiency arguments to demonstrate that video hearings reduce processing time is quite old, with the most recent being from a 2012 Office of the Inspector

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<sup>2</sup> 20 CFR §§404.936 (d); 416.1436(d). Additional rules apply when a claimant moves changes residences while the request for hearing is pending; see [https://www.ssa.gov/OP\\_Home/hallex/I-02/I-2-3-11.html#i-2-3-11-b](https://www.ssa.gov/OP_Home/hallex/I-02/I-2-3-11.html#i-2-3-11-b).

<sup>3</sup> Caseload Analysis Report supplied to NOSSCR by SSA via FOIA request.

<sup>4</sup> <https://www.ssa.gov/budget/FY17Files/2017APP.pdf> p.43.

<sup>5</sup> [https://www.ssa.gov/appeals/DataSets/06\\_Hearings\\_Held\\_InPerson\\_Video\\_Report.html](https://www.ssa.gov/appeals/DataSets/06_Hearings_Held_InPerson_Video_Report.html) (FY18 data downloaded and retained by NOSSCR staff).

<sup>6</sup> [https://www.ssa.gov/appeals/DataSets/02\\_HO\\_Workload\\_Data.html](https://www.ssa.gov/appeals/DataSets/02_HO_Workload_Data.html) as of 10/26/18.

General Report that looked at hearings data from 2009 -2012.<sup>7</sup> In addition, even that report could not say for certain than any reduction it found in hearing processing time during the time period it studied could be attributed to video hearings.<sup>8</sup> Furthermore, even if the hearing is scheduled faster, the decision may not arrive quicker, given SSA's lengthy and unevenly-distributed decision-writing backlog. In addition, according to the same Office of Inspector General report, 236 video hearings needed to be rescheduled in FY 2011 due to technical problems.<sup>9</sup> It is unclear how many hearings have needed to be rescheduled in fiscal years since that time, but it is likely that any claimants who had their hearings rescheduled due to technical difficulties probably did not have their hearings sooner than they would have if they had been scheduled for in-person hearings in the first place.

Proposed 20 CFR §404.936(c)(1)(ii) states that when determining the manner of hearing, SSA will consider "whether use of video teleconferencing to conduct the appearance would be less efficient than conducting the appearance in person." However, the proposed rule does not specify how SSA will define efficiency: is it the fastest time until a hearing is held, fewest days until a decision is issued, least need for a time-consuming appeal, or a combination of these and/or other factors? The proposed rule also does not indicate whether, or how, SSA will communicate or justify its efficiency determination. If this proposed rule were to go into effect, claimants should be provided with individualized information, perhaps in the Notice of Hearing, explaining how SSA considered the relative efficiencies of scheduling their particular hearing and determined that a video hearing was preferable. Such a statement could include information about the average processing time at the claimant's assigned hearing office versus the video hearing site, among other factors. Without this information, claimants would be unable to determine whether SSA is following its own policies, and thus unable to seek redress if the agency failed to do so.

In addition to the efficiency reasons, proposed 20 CFR §404.936(c)(1)(iii) states that SSA will consider "any facts in [a claimant's] particular case that provide a good reason to schedule [his or her] appearance by video teleconferencing or in person." The regulations do not, however, provide any detail about what type of facts these are, and how a claimant can include information that may not be otherwise obvious in the claim for benefits that could provide the necessary "good reason."

Proposed 20 CFR §404.936(a) says "we" will set the time and place for a hearing and "we" may change it. SSA does not explain who at the agency will actually be making these decisions. This

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<sup>7</sup> OIG, Congressional Response Report: Current and Expanded Use of Video Hearings, A-05-12-21287, at 3 (June 18, 2012), available at: <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-12-21287.pdf>; OIG, Use of Video Hearings to Reduce the Hearing Case Backlog, A-05-08018079, at 3 (April 22, 2011), available at: <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-08-18070.pdf>.

<sup>23</sup> SSA, OIG, Use of Video

<sup>8</sup> See OIG Congressional Response Report, p. 7 "Determining the exact contribution of VTC to the improved hearing timeliness versus other Agency actions is difficult. While national average processing times for hearing cases has declined (see Figure 3),<sup>14</sup> this may relate to a number of factors. For instance, during FYs 2010 and 2011, ODAR added or expanded 28 hearing offices, satellite offices, and National Case Assistance Centers (NCAC).<sup>15</sup> As a result, in addition to video hearings, individuals in otherwise remote and backlogged regions were being served through in-person hearings at new hearing offices."

<sup>9</sup> OIG Congressional Response, page 11, footnote 25

is concerning for reasons of Section 504 compliance, discussed *infra*, and also because the prefatory matter to the proposed rule states that “an ALJ may continue to identify case-specific facts that affect which manner of appearance is most efficient. However, the agency will have the final responsibility to determine in which manner the individual must appear.” If this rule were to be enacted as proposed, it appears that even when an ALJ is aware of case-specific facts that indicate a hearing should be held in a particular manner, that decision could be overridden by an unidentified individual at the agency. In such situations, it seems unlikely that the ALJ would be able to perform as adequate a hearing and issue as policy-compliant a decision as he or she could with a hearing held in the manner the ALJ believes to be appropriate based on case-specific facts.

In continuing disability review (CDR) hearings performed by DHOs, SSA’s current procedures require beneficiaries to submit a signed statement voluntarily electing VTC. If SSA is dissatisfied with the status quo, the agency could switch to an opt-out system similar to that used for ALJ hearings. Just as with ALJ hearings, there is no need to change to a system that eliminates beneficiaries’ ability to object to a video hearing. SSA has published no data on how many DHO hearings are currently performed live, via VTC, and by telephone, and there is no indication that SSA has the capacity to perform more DHO hearings via VTC than it could schedule under its current procedures.

#### SSA Presents Insufficient Reasons for Changing Its Rules

Historically, SSA has intentionally not made VTC mandatory. As the agency wrote in the supplemental material to a February 3, 2003 rule:

In 1996 we published Social Security Ruling (SSR) 96-10p, Electronic Service Delivery [which]... explained that **we would not require claimants to work with us electronically**, but that we would use technology to provide options for different service deliveries....we decided to propose conducting hearings by VTC based on testing conducted in the State of Iowa that demonstrated that VTC procedures can be effectively used where large scale, high quality VTC networks exist **and claimants want to participate in VTC procedures**...there are sound reasons for assuring that all claimants retain an opportunity to appear in person at their hearings.... Our earliest regulations interpreting the hearing provisions of the Act specified that the claimant had a right to request a hearing “before” the decisionmaker (20 CFR 403.707, 1940), and our current regulations specify that claimants may appear “in person” at the hearing (20 CFR 404.929 and 416.1429), and that they have a “right to appear before the administrative law judge, either personally or by means of a designated representative \* \* \*” (20 CFR 404.950(a) and 416.1450(a)). Therefore, **we believe it is legally prudent to ensure that all claimants retain the opportunity to appear in person**....we believe that the policy of generally requiring claimants to take action to opt out of a scheduled appearance by VTC will be administratively beneficial and otherwise warranted.<sup>10</sup>

SSA’s position in 2003 was appropriate and should not change.

SSA should not attempt to justify these proposed rules simply because the number of claimants and beneficiaries has grown. SSA’s staff, administrative expenditures, and access to technology have also grown, making mandatory video hearings unnecessary. SSA now has an Office of Analytics, Review, and Oversight that can help the agency better balance and manage its

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<sup>10</sup> 68 Fed. Reg. 5210 (February 3, 2003), adopted without change at 68 Fed. Reg. 69003 (December 11, 2003).

workload. Electronic files can be, and are, worked on by telecommuting SSA employees, shifted to other hearing offices, or handled by centralized “pulling units” entirely separate from hearing offices. The prefatory matter to the proposed rule is therefore incorrect when it identifies discrepancies between “the availability of administrative resources in” various hearing office service areas. Improvements and cost decreases in travel<sup>11</sup> and increases in the percentage of SSA cases with electronic files make it possible for ALJs to review cases in their home offices and travel to in-person hearings. As the prefatory matter notes, having fewer paper cases “has allowed for smoother workload balancing, ensuring consistent service on a national level.”

SSA could also reduce processing-time discrepancies among hearing offices without resorting to mandatory video hearings if it re-routed claims from some district offices to different, but still nearby, hearing offices. For example, the New York hearing office is approximately one mile from the New York Varick hearing office, but has an average processing time that is 92 days longer.<sup>12</sup>

SSA should not justify these proposed rules based on the Office of Quality Review report included in the docket showing no significant difference in outcome or policy compliance between VTC and in-person hearings.<sup>13</sup> This study was done on a small number of cases, and reflects a situation where claimants could opt out of video hearings. Its findings cannot be generalized to explain whether claimants who would have opted out of video hearings will receive accurate and policy-compliant decisions if they are forced to have remote hearings.

It is also not accurate to describe SSA as facing an “unprecedented service challenge” as is stated in the prefatory matter to the proposed rule. The average processing time for ALJ hearings has dropped in each of the past 22 consecutive months, as initial applications for disability benefits and requests for ALJ hearings decreased and the number of ALJs and their average productivity has risen.<sup>14</sup> Although the current average processing time, 582 days as of September 2018,<sup>15</sup> is still unacceptably high, SSA’s Compassionate And REsponsive Service (CARES) plan has implemented many strategies to reduce processing time, and is proving successful without removing claimants’ ability to opt out of video hearings.

At the CDR level, SSA eliminated its backlog in Fiscal Year 2018,<sup>16</sup> and the number of individuals receiving disability benefits has decreased each year since 2014,<sup>17</sup> meaning that workloads and average processing times for DHO hearings should decline as well.

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<sup>11</sup> See, e.g., Derek Thompson, “How Airline Ticket Prices Fell 50% in 30 Years (and Why Nobody Noticed)” *The Atlantic*, February 2013 <https://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506/>. ;decrease in real (inflation-adjusted) cost of retail gasoline between 1976 and 2019, <https://www.eia.gov/outlooks/steo/realprices/>.

<sup>12</sup> [https://www.ssa.gov/appeals/DataSets/02\\_HO\\_Workload\\_Data.html](https://www.ssa.gov/appeals/DataSets/02_HO_Workload_Data.html) as of 10/26/18. Houston, Dallas, Atlanta, Tampa/St. Petersburg, and several other metropolitan areas have similar discrepancies between nearby hearing offices that could be ameliorated without removing the right to opt out of a video hearing.

<sup>13</sup> <https://www.regulations.gov/document?D=SSA-2017-0015-0006>

<sup>14</sup> Data on initial disability claims available at <https://www.ssa.gov/oact/STATS/dibStat.html>; other statistics from monthly Caseload Analysis Reports provided to NOSSCR by SSA in response to FOIA requests.

<sup>15</sup> Monthly Caseload Analysis Reports provided to NOSSCR by SSA in response to FOIA requests.

<sup>16</sup> <https://www.ssa.gov/open/data/Periodic-Continuing-Disability-Reviews.html>

<sup>17</sup> <https://www.ssa.gov/oact/STATS/dibStat.html>

Approximately one-third of CDR cases where SSA initially determines benefits should cease are reversed after appeal.<sup>18</sup> Properly training those who perform CDRs is therefore a more effective way than mandating video hearings to reduce the number of DHO and/or ALJ hearings, processing times for those hearings, and the amount of benefits paid during statutory continuation of benefits.

SSA does not explain how it plans to save \$67.2 million through reduced travel costs to ALJs, representatives, claimants, and contractors. If this figure is derived from increasing the number of video hearings performed, SSA would need to spend money increasing video hearing capacity, since the agency is already so close to its goal for the percentage of hearings performed through VTC. There is no indication in the NPRM of whether these costs are offset against projected savings. To achieve these reductions in travel costs, claimants in rural or outlying areas will by necessity be disproportionately affected by mandatory video hearings, as claimants who live within 75 miles of hearing offices are not eligible for reimbursement of travel expenses.<sup>19</sup>

Similarly, SSA provides no justification for the proposed administrative savings of \$118 million over a 10-year period. After subtracting the projected savings from reduced travel costs, the remaining \$50.8 million allegedly would come from “a reduced number of workyears needed, and fewer forms processed.” SSA does not explain what the costs of implementing this rule—for example, setting up a process for requesting a 504 modification and processing those requests or defending Section 504 lawsuits because it fails to do so, creating policies to determine when mandating a video hearing is appropriate, reviewing facts in each particular case to determine whether there is a good reason to schedule parties’ appearances by VTC or in person, updating the language of the hearing notice to reflect the finding of such a “good reason,” training staff, and increasing video hearing capabilities (video monitors, soundproofing, etc.) will be. The costs may well outweigh the benefits.

### SSA Continues to Experience Problems with Video Hearing Sites and Technology

Although the prefatory matter to the proposed rule indicates that NOSSCR provided “mostly positive comments about the role of VTC in the hearings process” it is disingenuous to use this as a basis for removing claimants’ ability to opt out of such hearings, especially when the sentence after the “mostly positive” statement in the cited OIG report is “However, NOSSCR meeting participants expressed some concerns about substandard audio quality.”<sup>20</sup> VTC is appropriate for some claimants and not others, and is performed better by SSA in some locations than others. Therefore, it should never be mandatory.

Similarly, while ACUS’ recommendation 2011-4 does encourage agencies to consider the use of VTC, it never suggests that parties be forced to accept video hearings; rather, ACUS notes:

Critics, however, have suggested that hearings and other adjudicatory proceedings conducted by video may hamper communication between a party and the decision-maker; may hamper

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<sup>18</sup> <https://www.ssa.gov/legislation/FY%202014%20CDR%20Report.pdf>

<sup>19</sup> [https://www.ssa.gov/appeals/hearing\\_process.html](https://www.ssa.gov/appeals/hearing_process.html). Claimants and representatives who will still have to travel long distances to VTC sites may still qualify for reimbursement of travel expenses, which would reduce SSA’s savings. In some cases, travel to the VTC site may cost more than travel to a hearing office.

<sup>20</sup> <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-08-18070.pdf> at p.10



communication between parties and their attorneys or representatives; and/or may hamper a decision-maker's ability to make credibility determinations. Recognizing both the praise for and critique of the use of VTC in administrative hearings and other adjudicatory proceedings, the Administrative Conference issues this Recommendation regarding the use of VTC in Federal agencies with high volume caseloads. The Conference has a long standing commitment to the values inherent in the agency adjudicatory process: Efficiency, fairness and acceptability/satisfaction. These values should drive decisions to use VTC. Therefore, this Recommendation suggests that agencies should use VTC only after conducting an analysis of the costs and benefits of VTC use and determining that such use would improve efficiency (i.e., timeliness and costs of adjudications) and would not impair the fairness of the proceedings or the participants' satisfaction with them.<sup>21</sup>

ACUS' Recommendation 2014-7 refers back to the prior recommendation when it states that "Best practices include offering VTC on a voluntary basis."<sup>22</sup> Recommendation 2014-7 also provides numerous best practices agencies should follow when providing video hearings, such as adequate audio and visual technology, clear lines of sight so that all participants in the hearing can see each other, soundproofing measures for video hearing rooms, and training of agency staff in use of VTC technology. As shown by the comments from claimants' representatives attached as Appendix 1 to these comments, SSA routinely fails to abide by these best practices. At times, VTC hearings are of such poor quality that they could not reasonably be considered to provide due process at all. The variability of remote hearings impedes SSA's goal of program uniformity: even matters as seemingly minimal as the size of the screen on which a decisionmaker views the claimant can affect the outcome of a hearing.<sup>23</sup> ALJs also highlighted the impact that screen size might have on their ability to accurately access a claimant via video in the 2011 Office of Inspector General report mentioned in the preamble to these proposed regulations.<sup>24</sup> Claimants who would have opted out of video hearings because of conditions at VTC sites or for other reasons will not be as satisfied with remote hearings as they would have been with in-person hearings, thus failing to meet ACUS' recommendation.

While hearings where the claimant and representative are in a different location than the ALJ can be challenging, the potential for technological problems are exponentially worse when there is a vocational and/or medical expert calling in from a third and/or fourth location. Therefore, the proposal that "In general, we would schedule witnesses to appear at hearings by VTC or telephone" is especially troubling. While experts appearing remotely can at times be appropriate, it should not be the default. It is more difficult to determine whether an expert appearing remotely, especially via telephone, is paying attention to the hearing. There is no way to verify that the expert is in a private location where others cannot overhear the testimony, which often involves personally identifiable and/or sensitive information. And although SSA has increased

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<sup>21</sup> <https://www.gpo.gov/fdsys/pkg/FR-2011-08-09/pdf/2011-20138.pdf>, 76 Fed. Reg. 48795-6 (August 9, 2011)

<sup>22</sup> <https://www.gpo.gov/fdsys/pkg/FR-2014-12-17/pdf/2014-29546.pdf> 79 Fed. Reg. 75119 (December 17, 2014) at fn 7.

<sup>23</sup> Heath W. P. and Grannemann B. D. (2014), How Video Image Size Interacts with Evidence Strength, Defendant Emotion, and the Defendant-Victim Relationship to Alter Perceptions of the Defendant, *Behavioral Sciences & the Law*, 32, 496-507. doi: 10.1002/bsl.2120 ("Larger screens generally accentuated what was presented (e.g., made stronger evidence seem stronger and weaker evidence seem weaker), acting mainly upon trial outcome variables (e.g., verdict).")

<sup>24</sup> OIG, Use of Video Hearings to Reduce the Hearing Case Backlog, A-05-08018079, p. E-2



experts' access to claimants' electronic files, it is generally difficult or impossible for an expert appearing remotely to view evidence submitted at or very shortly before a hearing, which is sometimes necessary. If the expert's testimony does not reflect such evidence, the testimony may not be reliable. If the evidence is read aloud so the remote expert can hear it, this is time-consuming and the expert may not retain all details.

Challenges with remote hearings are further compounded when a party requires an interpreter due to limited English proficiency and/or auditory disorders. Appendix 2 is a compilation of NOSSCR members' comments about hearings with remote experts and/or interpreters. Research indicates that remote consecutive interpretation (as exists at SSA hearings with an interpreter calling in) is inferior to consecutive interpretation with the interpreter in the same room: For example:

- In a study of English- and Spanish-speakers discussing medical topics, remote consecutive interpreted conversations took 23.7 minutes on average while proximate consecutive conversations averaged 19.62 minutes, a 21% difference.<sup>25</sup>
- Interpreters at hospitals where the most common non-English spoken languages were Spanish, Chinese, Russian, and Vietnamese, “favored in-person to telephonic interpretation for establishing rapport (95% versus 71%,  $p = .002$ ) and for facilitating clinician understanding of patients' social and cultural backgrounds (92% versus 69%,  $p = .002$ ). Scenarios with substantial educational or psychosocial dimensions had no more than 70% of respondents rating telephonic interpretation as adequate (25–70%).”<sup>26</sup>
- In a study comparing video and live sign language interpretation in a courtroom setting, all of the participants who could hear commented “that they felt the AVL [video communication technology] was effective, with the exception of minor technical problems. By contrast, the deaf participants and the interpreters identified some significant areas of concern and limitations of the current AVL system... such as: multiple images on the television screen; the slight delay between signing production and seeing it on camera; seeing oneself on the screen; environmental factors such as lighting and distracting backgrounds; fixed camera angles and the position of the TV screens; location of the microphone; the difficulty in watching the television screen and observing what is happening within the courtroom; limited feedback and ability to interact with each other; and the small TV screens which made it difficult to see each other clearly....to ensure accuracy there were times when the interpreter needed to interrupt and seek clarification and they commented that this was much more difficult through AVL than face-to-face.

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<sup>25</sup> The Impact of Medical Interpretation Method on Time and Errors, Gany, F., Kapelusznik, L., Prakash, K. et al. *J GEN INTERN MED* (2007) 22(Suppl 2): 319. <https://doi.org/10.1007/s11606-007-0361-7>

<sup>26</sup> Price, Erika Leemann et al. “Interpreter perspectives of in-person, telephonic, and videoconferencing medical interpretation in clinical encounters” *Patient education and counseling* vol. 87,2 (2011): 226-32. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4059012/>

Furthermore, the inflexibility of the current system, with fixed camera angles and screen layouts, meant that communication was challenging at times.”<sup>27</sup>

### Even With Improved Technology, In-Person Hearings Differ From Video Hearings

As the Advisory Committee on Rules noted with its 1996 amendments to Rule 43 of the Federal Rules of Civil Procedure, “the importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.” NOSSCR agrees with this statement, and with the distinction the notes to FRCP 43 draw between mandatory remote proceedings and ones where participants voluntarily accept them: “Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission.” However, some claimants prefer in-person hearings, which is why approximately 30% of claimants opt out of video hearings. As one claimant for Disabled Adult Child (DAC) benefits from New Jersey wrote to his representative this year when explaining why he opted out of a video hearing,

While teleconferencing obviously enables us to see body language, there is still an inevitable awkwardness and indirectness to the teleconference mode that is unnecessary and therefore unacceptable. And a DAC hearing and other such hearings are, if anything, far more important than most of the other interactions a person would ordinarily have. Just as we would not want to visit or chat with a good friend we already know well by teleconference if we could help it, we would not want to have a discussion about a life-changing matter by teleconference with a judge we don't even know at all! Why? Precisely because the danger of misinterpretation is greater when the person is not even someone we know *and* because the encounter is not in person.

If SSA perfected its video and telephonic hearing sites and technologies to fully comport with ACUS’ list of best practices, remote hearings would still be inappropriate in some circumstances and different in certain respects. The claimant, not SSA, should be the one who decides the appropriate format for a hearing that will best allow him or her to present a case for disability benefits.

For example, it will never be possible to hand a remote adjudicator a piece of evidence that the claimant brings to the hearing. Evidence submitted at the hearing,<sup>28</sup> which is allowable in certain circumstances and likely most common with unrepresented claimants who do not have access to SSA’s electronic records system or a fax machine, can be critical to the outcome of a case. An in-person ALJ, vocational or medical expert, or interpreter can review such evidence at the hearing. A remote hearing participant would need an SSA employee to scan and send documents, and staff at remote sites—especially those at VTC sites at non-hearing office locations like

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<sup>27</sup> Braun, Sabine. (2015). Remote Interpreting.

[https://www.researchgate.net/publication/280305163\\_Remote\\_Interpreting](https://www.researchgate.net/publication/280305163_Remote_Interpreting).

<sup>28</sup> Evidence is submitted at the hearing in 13.8% of in-person hearings and 11.9% of video hearings.

<https://www.regulations.gov/document?D=SSA-2017-0015-0006>. ALJs also “included reports of problems with last-minute evidence submission,” when conducting video hearings. OIG, Use of Video Hearings to Reduce the Hearing Case Backlog, A-05-08018079, p. E-2

federal courthouses, SSA field offices, or Program Service Centers—frequently lack the technology, skills, or willingness to perform these tasks.

In addition, ALJs have a duty to develop the record and to make decisions based on evidence adduced at hearings.<sup>29</sup> If they fail in these duties, their decisions may be remanded by the Appeals Council or federal courts, which is costly and inefficient.<sup>30</sup>

The prefatory matter to the proposed rule says “VTC technologies offer expanded service options for parties, especially for geographically and otherwise isolated claimants.” However, some of these claimants are willing to travel for an in-person hearing. If “isolated claimants” are more likely to be scheduled for VTC hearings than claimants in more densely populated areas, this negates the idea of nationwide program uniformity. Additionally, some claimants, both in urban and rural settings, may find that the video hearing site is in fact further from their home,<sup>31</sup> or a more difficult journey (perhaps with less accessibility via public transportation, or fewer nearby parking spaces) than what they would have experienced traveling to their local hearing office. The claimant’s individual circumstances, from their precise address to their preferred mode of transportation, could affect whether a video or in-person hearing is more appropriate, and the person most capable of making that determination is the claimant. Although SSA says it will make case-specific determinations based on the facts in the file, it would be impossible for the unnamed SSA official who will be making these determinations to be aware of many of these considerations and hence include them in determining the most appropriate and efficient manner of appearance for many claimants.

There are some aspects of a claimant’s appearance that can never be adequately conveyed by video or telephone, such as odor. Grooming and hygiene are among the “activities of daily living” SSA considers when evaluating claimants under several listing categories, including hematological, immune, neurological, musculoskeletal, and mental disorders.<sup>32</sup> Body odor can also be present and useful for assessing the severity of disorders such as Phenylketonuria (PKU) or hidradenitis suppurativa. The decisionmaker’s ability to assess the claimant’s body odor can therefore be important in cases where the claimant’s limitations in performing activities of daily living affect whether a claimant meets a listing, or the claimant’s residual functional capacity. Such a claimant may reasonably prefer a hearing where the decisionmaker can smell him or her.

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<sup>29</sup> See, e.g., HALLEX I-2-6-56, [https://www.ssa.gov/OP\\_Home/hallex/I-02/I-2-6-56.html](https://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-56.html): “Under sections 205(b) and 1631(c) of the Social Security Act, an administrative law judge (ALJ) must base his or her decision on “evidence adduced at the hearing.” The regulations provide that the ALJ will look fully into the issues, question the claimant and other witnesses, and accept as evidence any documents that are material to the issues. See 20 CFR 404.944 and 416.1444. “Evidence” is defined in 20 CFR 404.1513 and 416.913. An ALJ has a duty to ensure that the administrative record is fully and fairly developed. See 20 CFR 404.1512(b) and 416.912(b). An ALJ will make reasonable attempts to obtain evidence pertinent to the matters at issue.”

<sup>30</sup> Inadequate development of the record has been among the top 10 reasons for federal court remands of Social Security cases since Fiscal Year 2014: [https://www.ssa.gov/appeals/DataSets/AC08\\_Top\\_10\\_CR.html](https://www.ssa.gov/appeals/DataSets/AC08_Top_10_CR.html)

<sup>31</sup> For example, a NOSSCR member from New Jersey reported in December 2018 that his client, who lives in Millville, New Jersey, was scheduled for a remote hearing where the client would need to travel to Egg Harbor, “a substantially longer drive than going to the South Jersey office [the claimant’s assigned hearing office based on address] which is in PennsaukenPennsauken, New Jersey....When I asked if the remote ALJ would be willing to simply hold the hearing with us in Pennsauken, we were met by various objections.”

<sup>32</sup> 20 C.F.R., Appendix 1 to Subpart P of Part 404.

Additionally, ALJs who turn on the cameras when the claimant is already seated and turn them off immediately after the hearing concludes miss seeing how the claimant walks, sits, and rises. Video hearings also make it more difficult to notice facial expressions (such as wincing of pain), a claimant who mutters under his or her breath, skin lesions, or other subtle indications that can be important to the decision-making process.<sup>33</sup>

Social Security Ruling 16-3p requires adjudicators to evaluate whether claimants have medically determinable impairments that could reasonably be expected to produce the individual's alleged symptoms, and then to determine whether the intensity, persistence, and limiting effects of an individual's symptoms limit the ability to perform work-related activities for adults and ability to function independently, appropriately, and effectively in an age-appropriate manner for children.<sup>34</sup> As SSR 16-3p notes, an ALJ should "consider an individual's statements about the intensity, persistence, and limiting effects of symptoms, and [then] evaluate whether the statements are consistent with objective medical evidence and the other evidence."<sup>35</sup> Although these determinations are not assessments of the claimant's character and truthfulness, an ALJ must still evaluate the claimant's testimony and decide whether it comports with other evidence in the case. Decisionmakers may make different findings on this topic in remote hearings versus in-person ones. Research shows that in court proceedings, "live observers rated the witnesses' appearance in a more positive way and perceived them as being more honest than did video observers."<sup>36</sup> Therefore, in cases where decisionmakers must determine whether a claimant's statements about the intensity, persistence, and limiting effects of symptoms are consistent with other evidence, remote hearings are substantively different than in-person ones and could reasonably impede the decisionmaker's ability to issue a policy compliant decision.

Other aspects of SSA's policy require knowledge of local conditions. For example, SSR 18-3p (and SSR 82-59, which was rescinded and replaced by SSR 18-3p on October 29, 2018) allows for good cause exceptions to SSA's requirement that claimants must comply with prescribed treatment if it would be expected to restore the individual's ability to engage in substantial gainful activity if followed. SSR 18-3p indicates one such good cause situation is when the "individual is unable to afford prescribed treatment, which he or she is willing to follow, but for

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<sup>33</sup> As a NOSSCR member wrote, "People who would be negatively impacted by a video hearing include anyone with a gait disturbance or shuffling gait; anyone with a tremor; anyone with unusual mannerisms or tics; anyone disheveled, malodorous or dirty; anyone with anxiety that may be tapping or shaking their legs; anyone with a hearing problem, even if that is not the basis of their disability claim; anyone whose disability can be visually observed. Depending on the set up of a VTC hearing, the ALJ sees only the claimant's face or, at the most, the claimant from the waist up."

<sup>34</sup> Social Security Ruling 16-3p, [https://www.ssa.gov/OP\\_Home/rulings/di/01/SSR2016-03-di-01.html](https://www.ssa.gov/OP_Home/rulings/di/01/SSR2016-03-di-01.html)

<sup>35</sup> *Id.*

<sup>36</sup> Sara LandstromLandström et al., "Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity

Assessments and Memory" *Appl. Cognit. Psychol.* 19: 913–933 (2005). *See also* Landström, S., Ask, K. & Sommar, C. (2015). The emotional male victim: Effects of presentation mode on judged credibility. *Scandinavian Journal of Psychology*, 56, 99–104 (finding that "The complainant was perceived as more truthful when communicating live, as opposed to via video"); Landström, S., Granhag, P. A. and Hartwig, M. (2007), Children's live and videotaped testimonies: How presentation mode affects observers' perception, assessment and memory. *Legal and Criminological Psychology*, 12: 333-348. doi:[10.1348/135532506X133607](https://doi.org/10.1348/135532506X133607) ("The live observers perceived the children in more positive terms and rated the statements as being more convincing than did video observers....Live observers had a better subjective, as well as objective, memory of the children's statements than video observers.")

which affordable or free community resources are unavailable.” SSR 82-59 had slightly different text, allowing for good cause exemptions when an “individual is unable to afford prescribed treatment which he or she is willing to accept, but for which free community resources are unavailable.” Claimants whose communities do not have affordable resources for a prescribed treatment might reasonably choose an in-person hearing with an ALJ familiar with local health care options rather than a remote hearing performed by someone who lacks this local knowledge.

Local knowledge is also important to ALJs’ determinations about whether representatives are exhibiting appropriate conduct. 20 CFR §404.1470(b)(5)(ii) requires representatives to disclose in writing at the time a medical or vocational opinion is submitted if the “representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.” NOSSCR staff met with SSA leadership in August 2018, when this regulation took effect, to request clarification on what should be considered a referral. For example, if a representative tells a client “you may want to see a neurologist about those headaches,” “I know Free City Clinic has doctors for people without insurance,” or “I can help you search for Cantonese-speaking doctors on your insurance company’s website: looks like Dr. Lam and Dr. Cheong are the two taking new patients” should any or all of these be considered referrals that require disclosure? SSA leadership declined to give guidance beyond the regulations, stating that these are fact-specific inquiries without bright-line tests—for example, what if Free City Clinic only has one doctor?—and thus analysis would be done case-by-case by adjudicators with knowledge of the local health care scene. Remote hearings cannot provide this level of knowledge and thus are inappropriate in certain cases.

Finally, local knowledge can be critical in cases where a claimant has a regional accent or uses local dialect. For example, a speaker of Hawaii Creole English<sup>37</sup> may not be easily understood by an ALJ in the Chicago National Hearing Center, and claimants with strong New York accents may speak too fast or be otherwise unintelligible to an ALJ in Mississippi.

### The Proposed Rules Violate Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973, as amended (“Section 504”) “prohibits Federal agencies and programs that receive Federal funding from discriminating against qualified individuals with disabilities.”<sup>38</sup> A qualified individual is defined as someone with a physical or mental impairment that substantially limits one or more major life activities.

Many people involved in the disability determination process are qualified individuals. Every beneficiary receiving a continuing disability review, and every claimant who is awarded benefits after an ALJ hearing, has at one point been found by SSA to have a severe impairment or combination of impairments, meaning that the impairment(s) “significantly limits [his or her]

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<sup>37</sup> See, e.g. <https://www.hawaii.edu/satocenter/langnet/definitions/hce.html>

<sup>38</sup> [https://www.ssa.gov/accessibility/504\\_overview.html](https://www.ssa.gov/accessibility/504_overview.html). It is also unclear how the proposed rule will fit with SSA’s existing subregulatory guidance about requesting accommodations under Section 504, which allows field offices and hearing offices to grant certain accommodations by themselves; see POMS GN 00211.001 <https://secure.ssa.gov/poms.nsf/lnx/0200211001>. This appears to be in conflict with the proposed rule, which would not allow ALJs to grant the modification of an in-person hearing.

physical or mental ability to do basic work activities.”<sup>39</sup> This makes it very likely they are qualified individuals. Many claimants who are not awarded benefits after an ALJ hearing, as well as some representatives, medical and vocational experts, interpreters, witnesses, ALJs, DHOs, and support staff may also be qualified individuals within the definition of Section 504.

Federal agencies have an affirmative duty to make “reasonable modifications” for qualified individuals.<sup>40</sup> Some qualified individuals would need the modification of an in-person hearing. Given that SSA currently conducts approximately 70% of hearings in person, the modification of providing in-person hearing appears to be reasonable. Yet the proposed rule does not indicate any process by which such a modification would be requested or granted. The prefatory matter to the proposed rule says that for ALJ hearings “we...will determine how parties and witnesses will appear at the hearing...an ALJ may continue to identify case-specific facts that affect which manner of appearance is most efficient. However, the agency will have the final responsibility to determine in which manner the individual must appear.” For CDR hearings before DHOs, “the State agency or the Associate Commissioner for Disability Determinations, or his or her delegate” will do so. This is not precise enough to allow claimants and their representatives (or others, such as an ALJ or witness) to communicate with SSA or state agencies about the need for a reasonable modification. Although SSA has a Center for Section 504 Compliance,<sup>41</sup> it is unclear what role the Center had in developing this proposed rule and what role it might play in administering this rule if it were finalized.

The prefatory matter to the proposed rule says “we will evaluate the specific circumstances of each claimant’s or beneficiary’s case to determine what is the most efficient and appropriate manner of hearing” and “whether there are circumstances in the case that provide a good reason to schedule an individual to appear by VTC or in person” but this is not feasible. The proposed rule does not explain what a “good reason” for scheduling a video or in-person hearing might be, or how claimants and other participants in a hearing might communicate with SSA or state agencies about their good reasons.

SSA and state agencies cannot simply look at the evidence in the file at the time a hearing is scheduled, because hearings must be scheduled 75 days in advance and evidence can be submitted up to 5 business days before hearings in most cases—and submission closer to the hearing date is allowed under certain circumstances and in certain claim types.

Even if all the evidence was submitted when the hearing was scheduled, it would not necessarily be sufficient to show if a reasonable modification were needed. People with the same impairment might need different modifications: some people with epilepsy have seizures triggered by television screens, while others do not. Some people with an intellectual disability can understand a VTC proceeding while others—even others with the same IQ test scores—can not.

Claimants may have impairments that are not considered severe or are not included in their applications, such as mild hearing loss or vision changes, but which, in combination with other impairments, may necessitate the reasonable modification of an in-person hearing. According to

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<sup>39</sup> 20 CFR §404.1520; a slightly different definition applies to children.

<sup>40</sup> See *Alexander v. Choate*, 469 U.S. 287 (1985).

<sup>41</sup> [https://www.ssa.gov/accessibility/504\\_overview.html](https://www.ssa.gov/accessibility/504_overview.html)



the National Institutes of Health’s National Institute of Deafness and Other Communications Disorders, “about 2 percent of adults aged 45 to 54 have disabling hearing loss. The rate increases to 8.5 percent for adults aged 55 to 64. Nearly 25 percent of those aged 65 to 74 and 50 percent of those who are 75 and older have disabling hearing loss.”<sup>42</sup> Even lower levels of hearing loss can limit an individual’s ability to work or adjust to new work, and these losses occur more frequently among older people. While about 15% of the general population reports some level of hearing loss,<sup>43</sup> “there is a strong relationship between age and reported hearing loss: 18 percent of American adults 45-64 years old, 30 percent of adults 65-74 years old, and 47 percent of adults 75 years old, or older, have a hearing impairment.”<sup>44</sup> People in their 40s and older also often begin to experience vision changes that lead to difficulties reading and performing other close work, decreased color perception, and difficulty handling glare.<sup>45</sup>

Furthermore, evidence in a claimant or beneficiary’s file generally only relates to that person’s impairments. It does not indicate whether a witness, representative, adjudicator, interpreter or other participant in the hearing has a disability requiring a reasonable modification, and the proposed rule describes no way for such participant to indicate their need for modification. NOSSCR’s membership includes representatives with hearing loss that make video hearings and telephonic testimony challenging, those who use power wheelchairs that may not fit into certain video hearing rooms, and other conditions that might necessitate modifications.

The prefatory matter to the proposed rule says “all video hearings rooms are section 504 compliant based on the capacity for individuals attending a hearing, providing equal access to hearings for claimants with disabilities.” This sentence is not grammatical or clear, but to the extent it can be understood, it is not accurate. Stating that a room is “section 504 compliant” does not make it so: as described by NOSSCR members in Appendix 1, many of the rooms used for video hearings are too small to accommodate power wheelchairs or to be comfortable for a person with severe claustrophobia, as just two examples of their potential noncompliance. Even if a claimant can get into a room, that does not make a video hearing conducted in such a room compliant: a person with a hearing impairment may not be able to hear proceedings if there is an echo or background noise; a person with an intellectual disability may not be able to understand that the person on the screen can see her and is determining her eligibility for benefits.<sup>46</sup> People with different disabilities have different needs and Section 504 requires individualized modifications.

If SSA were to create a Section 504-compliant process for accepting and deciding on requests for the reasonable modification of an in-person hearing, the process would need to be individualized and responsive to the qualified individual’s specific needs. Such a process might be different for

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<sup>42</sup> National Institutes of Health, National Institute of Deafness and Other Communications Disorders. “Quick Statistics” <http://www.nidcd.nih.gov/health/statistics/pages/quick.aspx>

<sup>43</sup> *Id.*

<sup>44</sup> NIH Senior Health, “Hearing Loss.” <http://nihseniorhealth.gov/hearingloss/hearinglossdefined/01.html>

<sup>45</sup> American Optometric Association, “Adult Vision: 41 to 60 Years of Age” <http://www.aoa.org/patients-and-public/good-vision-throughout-life/adult-vision-19-to-40-years-of-age/adult-vision-41-to-60-years-of-age?sso=y> See also National Eye Institute “Age Related Eye Diseases” [https://nei.nih.gov/healthyeyes/aging\\_eye](https://nei.nih.gov/healthyeyes/aging_eye)

<sup>46</sup> A claimant’s representative from Georgia noted that her client, who had a traumatic brain injury, believed she was on a movie set when she arrived for her video hearing.



ALJ hearings versus those conducted by DHOs at state agencies; state agencies are staffed by state government employees and as such their proceedings could also be required to comply with the Americans with Disabilities Act.<sup>47</sup> Creating a Section 504-compliant process is likely less efficient than the current process of allowing people to opt out of video hearings. The current process does not require individuals to identify their disabilities but allows them to opt out of a video hearing if their disabilities make having an in person hearing a reasonable modification.

If SSA does not create a Section 504-compliant process, the agency could be sued both in individual cases and in class actions. SSA has already indicated to the Administrative Conference of the United States and the Judicial Conference that the agency struggles to handle its current federal court caseload; SSA has already dealt with class actions involving 504 violations, like *American Council of the Blind v. Astrue*,<sup>48</sup> which enmeshed the agency in nearly seven years of litigation and settlement activity.<sup>49</sup> Creating a situation where the agency must defend itself against additional suits seems unwise.

### Proposed Changes to Timing of Amended Hearing Notices are Problematic

When SSA issues an amended notice of hearing or schedules a supplemental hearing, it is NOSSCR's position that 75 days' notice is appropriate unless the claimant waives their right to such notice.

SSA changed the amount of notice claimants are entitled to from 20 days to 75 days in a rule that became effective on January 17, 2017.<sup>50</sup> In the notice of rulemaking, SSA said "In order to minimize the burden on claimants, we have decided to adopt the commenters' suggestion that we continue to provide at least 75-day advance notice of a hearing, as we have done under the rules we have been applying in the Boston region since 2006." Circumstances have not changed in the less than two years since this rule went into effect, and SSA should not change the amount of notice provided to claimants.

It is worth noting that when SSA proposes to send amended notices or notices of supplemental hearings "at least 20 days prior" to a hearing, claimants and appointed representatives may receive the notice fewer than 20 days before the hearing. SSA generally allows 5 days mailing time for notices to arrive,<sup>51</sup> meaning that in some cases notices will not be received until 15 days before the hearing.

It would be inappropriate for SSA to only provide 20 days' notice about a change to the date or time of a hearing. Whether a hearing is performed via VTC or in person, claimants often need to arrange transportation (paratransit, ride from friend or relative, etc.), arrange childcare,

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<sup>47</sup> See [https://www.ada.gov/ada\\_title\\_II.htm](https://www.ada.gov/ada_title_II.htm)

<sup>48</sup> Case No. 05-04696 (N.D. Cal. Oct. 3, 2008)

<sup>49</sup> See <https://www.clearinghouse.net/detail.php?id=10899>

<sup>50</sup> 81 Fed. Reg. 90987 (December 16, 2016)

<sup>51</sup> See, e.g., HALLEX I-3-1-1 ("The AC presumes the claimant received the notice of the ALJ's decision or dismissal five (5) days after the date of the notice, unless there is a reasonable showing to the contrary"); POMS DI 12027.008 ("Presume that the notice was received 5 days from the actual notice date, unless there is reason to believe otherwise.")

reschedule medical appointments, or meet other needs. Allowing 15 days to perform these tasks once the notice is received is not sufficient in many circumstances.

Reducing notice time to just 20 days will lead to difficulties when hearings are rescheduled at a time that the claimant or representative cannot attend—for example, when the representative has already been scheduled for a hearing in another hearing office or in court, or when the claimant already has an important medical appointment. Given SSA’s staffing challenges, it can take several days or weeks to receive a response to a request to reschedule a hearing, even when good cause exists. Providing a minimum of 15 days once the notice is received is not workable.

The proposed rule is especially troubling because of how it interacts with SSA’s program uniformity rule, which imposes a deadline of 5 business days before the hearing for the submission of evidence, pre-hearing briefs, or objections to issues raised in the notice of hearing, and a 10 business day deadline for subpoena requests.<sup>52</sup> It may be impossible for a claimant who receives an amended notice of hearing 15 calendar days before the hearing to make a subpoena request 10 business days before the hearing, and it may be challenging to meet the 5-day deadlines as well. If the proposed rule is finalized, ALJs (and eventually the Appeals Council and federal courts) may be tasked with determining in more cases whether evidence, subpoena requests, and other materials submitted after the deadline meet good cause exceptions for late submission. This is not efficient.

Sending notices changing the manner of the hearing less than 75 days before the hearing is inappropriate unless the claimant agrees to waive his or her notice rights. The problems discussed above with mandatory video hearings are amplified when a claimant receives so little notice. Claimants may have to arrange transportation to a different location, representatives will need to prepare their clients for a different type of hearing, and SSA will need to respond to Section 504 requests for reasonable modification, all within scarcely more than two weeks once mailing time is taken into consideration. While SSA should continue to allow claimants to opt out of video hearings, claimants who are willing to participate in VTC should still be provided 75 days’ notice that they will receive such a hearing.

Similarly, SSA should give 75 days’ notice when there is a change to the issues or witnesses at a hearing, unless the claimant waives that amount of notice. Claimants or representatives may need to research a witness to decide whether to object to him or her. Claimants and representatives also need sufficient time to raise objections to issues in the amended hearing notice. If an amended notice with different issues is mailed 20 calendar days before a hearing and arrives 5 days later, it will be difficult to meet the 5 business day deadline for submitting objections to issues raised in the notice.

NOSSCR appreciates the language in proposed §§404.936(e), 416.1414(h), and 404.1429(e) about good cause for objecting to the time of a hearing but notes that the reasons listed in subsection (2) of each are merely suggestions and do not require an ALJ to reschedule a hearing. This will create situations—whether there was at least 75 days’ notice of hearing or merely 20 days’ notice of a rescheduled hearing—where transportation is not available to the hearing, the representative has a prior commitment to be in court or at another administrative hearing, or

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<sup>52</sup> See note 45, *supra*.

other important circumstances exist and an ALJ will not grant a change in the time of the hearing. This is counterproductive: Appeals Council requests for review, federal court cases, new applications, withdrawals of representation, and other filings that are complex and time-consuming for SSA to administer become necessary when simply changing the date or time of a hearing would have sufficed.

Additionally, proposed §404.936(d)(1)(i), regarding objecting to the time of the hearing, says objections must be filed in writing “not later than 5 days before” the hearing. SSA should clarify in any final rule whether those are business or calendar days.

SSA can already, and often does, ask claimants if they will waive 75 days’ notice for a rescheduled or supplemental hearing, or an amended notice of hearing. For example, SSA is currently testing a Voluntary Standby List as part of its CARES plan for reducing the hearings-level backlog. Most claimants who have the ability to attend a rescheduled or otherwise modified hearing on short notice will do so because of their profound interest in obtaining a decision for which they have already waited years. But to require claimants to act on very short notice because of factors that are often completely outside of their control, such as SSA incorrectly describing the issues to be addressed at a hearing or an ALJ making last-minute changes to his or her schedule is unfair and ultimately inefficient for the agency.

#### The Proposed Rules Require OMB Approval Under the Paperwork Reduction Act

The prefatory matter to the proposed rule says “these proposed rules do not create any new or affect any existing collections and, therefore, do not require Office of Management and Budget approval under the Paperwork Reduction Act.” This is incorrect.

The proposed rules affect SSA’s information collection of the HA-55 form. SSA states in “Agency Information Collection Activities: Proposed Request,” at 82 Fed. Reg. 15779 (March 30, 2017), that “We use the HA-55, Objection to Appearing by Video Teleconferencing, and its accompanying cover letter, HA-L2, to allow claimants to opt-out of an appearance via video teleconferencing (VTC) for their hearing with an ALJ.” The proposed rule removes claimants’ right to opt out of VTC for ALJ hearings, indicating that the HA-55 and HA-L2 will no longer be sent out or considered. The proposed rule’s “cost information” section notes that one reason for savings is “fewer forms processed.” Therefore, an existing collection is affected, OMB approval is required by the Paperwork Reduction Act, and the proposed rule should be rescinded.

#### The Proposed Rules Lack a Required Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA), as amended, requires agencies to provide a regulatory flexibility analysis for proposed rules that will have a significant economic impact on a substantial number of small entities. Although SSA certifies that such an analysis is not needed for these proposed rules “because they only affect individuals,” this is incorrect. The proposed rules affect professional representatives and medical and vocational expert witnesses as well as claimants.

SSA considers a rule “to have a significant economic impact on a substantial number of small entities if at least 5 percent of small entities experience an impact of more than 3 percent of revenue.”<sup>53</sup> Small entities include “(1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000 (states and individuals are not included in the definition of “small entity”).”<sup>54</sup>

Most claimants at ALJ hearings, and many at DHO hearings, are represented.<sup>55</sup> Most representatives in private practice meet the SBA size standard, which for “offices of lawyers” is average annual receipts of less than \$11 million.<sup>56</sup> SSA’s inspector general found that of the 3,222 firms that received direct payment of fees from SSA in Tax Year 2013, “Firm median annual income was approximately \$44,100, with about 5 percent of the firms receiving more than \$1 million in income.”<sup>57</sup> Although some firms have revenue sources other than fees paid directly by SSA, hundreds if not thousands of small entities will be affected by this proposed rule. This is especially true when considering nonprofit legal and social services organizations, hospitals, nursing homes, and small government jurisdictions that provide representation for ALJ and DHO hearings, as well as the companies and sole proprietorships that provide medical and vocational experts for such hearings.

It is likely that at least 5% of representatives who are small entities, as well as many of the medical and vocational experts who so qualify, will experience an impact of more than 3 percent of revenue. Some claimants will withdraw hearing requests rather than go through with a VTC hearing; this reduction in hearings affects experts who are paid by the hearing and will likely affect representatives, who are paid only if their client is awarded benefits. Representatives with disabilities that require the reasonable modification of an in-person hearing will have to stop or curtail their work on Social Security cases if they can no longer choose to represent only claimants who have opted out of video hearings; alternately, they and expert witnesses with disabilities may have to hire additional staff to attend otherwise inaccessible remote hearings or purchase additional services to accommodate their needs, such as a representative or witness who is hard of hearing hiring a real-time captioner for video hearings in rooms with known soundproofing or other audio problems. The proposed changes to notice rules may also require additional travel costs or hiring of supplemental staff for representatives and witnesses if hearings are changed with only 20 days’ notice.

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<sup>53</sup> 83 Fed. Reg. 28497 (June 19, 2018).

<sup>54</sup> *Id.*

<sup>55</sup> NOSSCR is not aware of publicly available statistics about representation at DHO hearings. However, in Fiscal Year 2016, over 182,000 Title II dispositions at the ALJ level involved a representative (82% of such dispositions). <https://www.ssa.gov/foia/resources/proactivedisclosure/FY2016%20SSDI%20Dispositions%20Represented%20and%20Not%20Represented.pdf>. In Fiscal Year 2017, 80% of the Title II claimants at the ALJ level—297,000 claimants—were represented. <https://www.ssa.gov/foia/resources/proactivedisclosure/2018/FY%202017%20Title%20%20Claim%20Statistics%20on%20Representation.pdf>

<sup>56</sup> <https://www.sba.gov/document/support--table-size-standards>

<sup>57</sup> <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-15-15017.pdf>. In Fiscal Year 2017, only ten firms received more than \$11 million in direct payment of fees; the average fee payment within the top 300 firms was under \$2.3 million and most firms have receipts well below these top firms. <https://www.ssa.gov/foia/resources/proactivedisclosure/2018/FY2017%20-%20300%20Top%20Paid%20Claimant%20Representative%20Firms.xlsx>.

Therefore, SSA's certification is not correct and a regulatory flexibility analysis as provided in the RFA, as amended, is required. This proposed rule should be rescinded and only re-issued with a full regulatory flexibility analysis.

### Conclusion

SSA should rescind this NPRM and retain the current policy of allowing claimants to decide the manner in which they appear for a hearing. The claimant, with counsel from his or her representative, is in the best position to determine whether appearing before an ALJ by video will allow the ALJ to accurately access the claimant's impairments (and their impact on the ability to work) and, as importantly, whether the claimant can meaningfully participate in the hearing if conducted by video.

SSA completely fails to demonstrate that there is a need to make the changes outlined in this NPRM. SSA has more than enough claimants willing to have a hearing via VTC to meet its goals and rebalance its workloads without denying claimants their rights under Section 504 of the Rehabilitation Act. SSA also fails to demonstrate that it has the capacity to increase the percentage of hearings held by video.

The agency also fails to provide evidence that the proposed changes will actually lead to increased efficiency in the disability appeals process. Given the technological problems with many hearing sites, the likelihood of increased appeals to the Appeals Council and Federal Court, and the clear violation of Section 504 of the Rehabilitation Act created by this proposal, the changes if enacted could actually lead to increased processing times and inefficiency.

The stakes for disability claimants are too high (the outcome of the hearing can literally be the difference between life and death for some claimants) to make these changes without being certain that they are needed and will be effective. Therefore, NOSSCR urges SSA to rescind this NPRM, maintain its current policies, and focus on improving the quality of its VTC facilities.

Thank you for the opportunity to comment on these proposed regulations.

Respectfully submitted,

Barbara Silverstone  
Executive Director

## Appendix 1: NOSSCR Member Responses to Survey on Video Hearings, May 2018

*Some responses were edited for length and clarity. Comments proceed by an asterisk were submitted to NOSSCR later in 2018.*

### *Arizona*

Globe: clients and attorneys not allowed to speak in SSA lobby, have to stand in parking lot (often 100+ degree heat).

### *California*

Bakersfield Satellite Hearing Office: temperature (building AC was down or malfunctioning more than once last summer), hearing monitors (agency stopped using local hearing monitors and instead used contractors who were flown in from all over the country, who had trouble finding the hearing office, and who were unfamiliar with hearing office equipment).

El Centro: room size is small-no room for witnesses or care attendants, tiny screen

Moreno Valley: I do video hearings all over the west and this is the worst site.

Norwalk: the sound of the Vocational Expert by phone was extremely loud and had feedback

Redding: at times they have trouble with the audio portions and have to fix it which can be quick or take a bit of time.

West Los Angeles: a very small conference room off of the hearing office waiting room was turned into a video room and has a very awkward table set up for the participants. There is no hearing monitor present in the room should there be technical difficulties.

### *Georgia*

Albany: it can sometimes be cold. Plus the waiting space for hearings is quite cramped and it is barely off the lobby of the regular Social Security office and can be quite loud.

Atlanta Downtown (multiple respondents): very small room; one video hearing room is more like a closet. Very hard for larger claimants, wheelchairs, and claimant's with anxiety. Would be almost impossible for someone with claustrophobia!; one of the VTC rooms (outside of the locked area) is very small. I use a computer at hearings and cannot really use it in this room due to the room size. One of the VTC rooms is only about 25 square feet. With the desk, TV monitor, computers and the hearing assistant's area there is absolutely no room to breathe in that room; The small attorney conference room is tiny and has a very small monitor for the video conference; also with the monitors and multiple parties in that room it is hot as Hades.

Atlanta West FO: no soundproofing (could hear the conversations as people walked by), don't believe there is a room where you can meet privately with your client, can hear the

announcements in the hearing room (we had to pause a hearing because the announcement was so loud).

Macon: I could hear an entire hearing while in the waiting room.

Marietta FO: the room for representatives to meet with clients seems to connect the hallway and another room—when my client and I were talking, a guard walked through the room . The OHO is also at the back of the building but it is not marked at all.

Rome: no sound proofing between waiting room and hearing room

South Fulton County: I appeared at the local office for hearing scheduled for 8:30 and the door was locked; the office usually opens at 9. In one hearing the VE's phone disconnected.

Valdosta FO: The room is a nice size, but the desk space where the computer monitor (used instead of a large screen TV on the wall) sits is a bit small and it is sometimes difficult to accommodate my files and have room to take notes. If I have a client in a wheelchair or scooter or walker, there is room for them at the table, but that may push me over to almost being out of camera range so the ALJ can't see me. It depends on the day, but sometimes you can hear the ALJ on video through the wall, sometimes you can't. The room can sometimes be stuffy. There is also no room for attorneys and clients to meet privately.

### *Illinois*

Carbondale: you can hear some hearing testimony from the waiting room even though they play the radio.

Champaign (multiple responses): audio problems; equipment issues, cannot hear judge most hearings over typing from hearing monitor as the room is too small, poor soundproofing

Galesburg: room temperature is very hot in the summer and very cold in the winter

Kankakee: equipment problems, trouble hearing if VE is on the phone

Rockford: equipment problems, trouble hearing judge

### *Indiana*

Gary (multiple respondents): frequently have problems there of not starting on time, delays, and for one claimant, who is homeless - his hearing was cancelled and postponed altogether! He had to wait an extra 3 months to get a new hearing date. Many times, one cannot understand the experts over telephone when they appear by phone. Very muffled and distorted. Also, not nearly enough room for things and they have computers sitting around the work area that are, according to monitors there, never used. Makes it very difficult to keep relevant paperwork accessible. Very poor audio quality to the point where we could not hear the ALJ. Also had one instance where the video feed completely dropped for approximately 5 minutes



Lafayette: Small room, small screen.

Terre Haute: can hear testimony from outside the hearing room

Valparaiso (multiple respondents): VERY small rooms for video hearing. One desk, small screen and about the size of a half bathroom; room is very small and the screen is the size of a computer screen

### *Kentucky*

Louisville site X80: Numerous problems with the audiovisual equipment, more often than not.

Madisonville FO: feels like a closet (VTC room); no room for using a laptop or paper documents during a hearing.

### *Louisiana*

Baton Rouge: noise problems from air conditioning or work on the building itself.

### *Maryland*

Baltimore OHO: The temperature is often uncomfortably hot, and the size of the three COV hearing rooms on the second floor are not conducive to clients with wheelchairs or giving the attorney any room to use their laptop and take notes without basically sitting on the client's lap.

Hagerstown: poor phone reception and volume for those (claimant, VE, ME) participating by phone

### *Massachusetts*

Worcester: Equipment malfunctions

### *Michigan*

Ludington DO: cramped space, rep sits behind claimant holding computer/file/legal pad on lap. No private space to talk to claimant unless we go outside to parking lot.

### *Missouri*

Creve Coeur and St. Louis: Most rooms are set up backwards, TV on the back wall of the hearing room. Have to sit on the far side of the room, next to client. If the judge is questioning claimant, client has back turned to me. If I am questioning the claimant, their back is turned to the judge. Audio quality generally good with ALJ, but terrible with VEs who often use cell phone line and / or speaker phone. However the biggest problem is doing VTC hearings in rooms OHO has converted from attorney / client prep rooms, into VTC rooms. Both local OHOs have

done this. Some rooms use a 24 in computer monitor with web cam. Some have a 60 in TV in a room 8 feet wide. Rooms are way too small. It is so cramped you have to sit shoulder to shoulder with client for ALJ to see both. No room for witnesses. No room to put a computer and file down on the table. Have to juggle something in my lap. If client has to stand up to stretch, ALJ only sees their belly. Very claustrophobic and difficult for people with anxiety.

Rolla FO: The room used for VTC hearings is too small.

St. Louis OHO (multiple respondents): video hearings are held in one room that was formerly a conference room for attorneys. That room is not soundproofed, and those sitting in the lobby can hear the testimony. The table in the room is too small to allow an attorney to use a notebook computer or have documents. The other room at the St. Louis OHO used for video hearings is so cold that it can be difficult for claimants. Two video hearing rooms are tiny (former small conference rooms). Claimant and rep cannot be on camera at same time. Insufficient table top space for file, laptop and notepad. Issues with telephone connection with Vocational Expert and temperature control. You can hear clearly the video hearing happening, through the closed door

#### *New Jersey*

\* Egg Harbor DO (multiple responses): Small, cramped room, very small monitor, noise leaking from DO. The judge said she had great difficulty hearing me and I had to shout. She said the hearing would have to be re-scheduled if I wasn't loud enough. It was awkward yelling and whenever I glanced down at my notes, she said to speak up. The video room is a former closet off the lobby with little sound and a window door allowing anyone to watch the hearing and the usual mini monitor, inadequate desk space, and cramped conditions.

\* South Jersey (multiple responses): very warm in the hearing room. They use a former attorney conference room, leaving only two rooms for conferences for five other hearing rooms, and in practice this is reduced to one because the room next door can't be used when a hearing is being held due to sound bleeding over. There is a mini monitor so the ALJ can't see both the rep and claimant at the same time.

#### *New York*

Binghamton: no parking that is reasonably accessible for persons with disabilities

Buffalo OHO: recent problems with VTC with and ALJ located in Lawrence MA; audio of ALJ kept dropping out. I told the hearing assistant but he did not help solve the problem.

Central Islip: the 3 or 4 regular hearing rooms that have in person ALJ hearings also can accommodate video hearings. However, there is one small room set apart from the regular ALJ hearing rooms. That one small room holds only video hearings. That room is so cramped that the client may have difficulty getting into a comfortable seated position. At one recent hearing, the room was so small that in order for my client to sit facing the ALJ, he had to also sit with his back to me.

Rochester OHO VTC site: there is no privacy as the audio of the ALJ can be heard in the waiting room, and there is also no private conference area to meet with the claimants prior to the hearing.

### *North Carolina*

Asheville, Charlotte, Greenville, New Bern, and Wilmington: no room for wheelchairs, screen size of a small computer, noise and feedback.

\* Charlotte: We do not have anywhere to meet with our clients privately. SSA has converted the attorney conference rooms into video rooms that are too small for the equipment and the number of people that need to be in there.

Hickory (multiple respondents)- soundproofing, audiovisual equipment; Hearings often delayed for hours due to technical problems.

Wilkesboro: soundproofing, audiovisual equipment, room size, wheelchair accessibility.

\* Wilmington (remote site to Charleston): poor soundproofing, creating privacy concerns.

### *Ohio*

Portsmouth: video hearing from Cincinnati ODAR rescheduled last year because an accident knocked out internet.

### *Oklahoma*

Ada: audiovisual equipment problems.

Ardmore (multiple responses): audiovisual equipment, soundproofing problems. Severe room size issues. Barely big enough for the claimant, attorney, and hearing monitor.

Clinton: soundproofing and room size problems.

Enid: Rooms too small.

Poteau: rooms too small.

### *Ohio*

Lima, OH satellite hearing site for Toledo: Soundproofing is better since renovation in the past few months, but still problematic.

### *Pennsylvania*

\* DuBois district office: The video screen is the size of a computer monitor. The ALJ sees only a close up of the claimant's face. In this very small room is a claimant, attorney, hearing

reporter, and, most upsetting, the security guard who sits in the corner and can listen to the entire hearing. The OHO that is associated with this remote site is very organized and professional, however, if the claimant has not opted out of video hearing, they will not permit us to find out whether or not the claimant could travel to a face to face location for a hearing with the exact same ALJ.

\* Erie (multiple responses): Problems on multiple occasions with audiovisual equipment. There are two remote hearing rooms in the federal courthouse where you can hear the entire hearing from the waiting room. For a long while the ALJ was also behind the claimant and the attorney in these video rooms but recently the tables were moved so that the attorney and claimant are now on a 90 degree angle to the ALJ video screen.

Elkins Park: audio problems.

\* Philadelphia (multiple responses): there is a great deal of feedback so that when the advocate or the claimant says something you hear the words that were spoken about 10 to 20 seconds later. When you ask to have this fixed you get a shrug and a we can't do anything attitude. It's incredibly distracting. I've also had problems where the only place to sit is facing the screen at an awkward angle. At one hearing in the Philadelphia office I spent the entire time looking at the back of my client's head and with no place to put my computer or take notes. The Judge apologized but nothing was done.

\* Philadelphia (300 Spring Garden Street payment center site): The Claimant and representative sit facing the screen with the claimant in front and the representative directly behind the claimant, both facing the camera. The representative cannot see the claimant's face and the claimant is torn between never looking at the representative (and not being able to hear the rep very well) or turning around and having her back to the Judge, who often chastises her for doing so. To make matters worse, the screen upon which the Judge can be seen has a tiny image that is difficult to see. Moreover, the representative's view is blocked by the claimant. If the rep wants to face the screen there is nowhere to take notes. Additionally, the hearing assistant sits just behind the representative and the noise from his/her typing makes it extremely difficult to hear. Hearing participants can hear feedback audio from the clerk's headphones, creating an echo a few seconds after anyone speaks. This is extremely distracting and confuses the claimant, but any request to turn down the volume is denied, probably because the clerk doesn't know how to do so. Even more distracting, the ALJ's microphone also picks up his or her typing, making it difficult to hear testimony. Finally, the room is not soundproof so anyone sitting outside waiting for the next hearing can hear what is being said, which is a privacy concern. Given that there are 3 other hearing offices serving the city all with better facilities, there is no reason to hold the hearings at this facility.

Philadelphia (833 Chestnut St.): very low audio volume. It got even harder to hear when someone started vacuuming in the room next to my hearing room.

Philadelphia East: audio problems.

\* Pittsburgh: In one hearing room, the location of the screen is behind where the claimant and attorney have to sit. This means that the claimant and the attorney have to turn around to face the ALJ. The attorney is not allowed to move the computer screen where the file is displayed so that they could at least sit sideways and the video screen is attached to the wall so it cannot be moved. Another hearing room is a converted attorney conference room off of the waiting room. That room is very small and the screen is the size of a computer monitor. The ALJ can only see a close up of the claimant's face. The room is jammed with claimant, attorney, and hearing reporter. The third option is a video room at the downtown DO which is off of the waiting room. The waiting room in that DO is busy and chaotic.

Wilkes Barre: not well suited for individuals with disabilities

### *Puerto Rico*

San Juan (multiple responses): Small room size, translator not always scheduled; soundproofing isn't adequate.

### *South Carolina*

Myrtle Beach Remote Site (the new one at 611 Chafin and Burroughs): Hearings are audible from outside the room. The picture quality is poor. They appear "pixalated" or the ALJ appears as a silhouette and you cannot discern facial features or expressions.

### *Texas*

Austin: Did not have client on the schedule, and she was ejected from the office by the security guard, who refused to either call San Antonio OHO to verify there was a problem or allow her to do so. He closed and locked the office, and the claimant was left sitting on the floor in the hallway crying, as the San Antonio staff valiantly tried to contact him to reopen the office, and to get other office staff back in to conduct the hearing. In the end, that hearing was continued and performed by phone later that week.

Harlingen: Did not have client on the schedule, could not figure out how to make the connection.

Paris: audiovisual equipment problems.

Tyler (multiple respondents): Technical difficulties with video and sound; could not make a connection for an hour or more, provided wrong connection info to San Antonio office, once connected the feedback and echo was so severe that the hearing was continued.

### *Tennessee*

Tullahoma: Video screens are VERY small.

### *Virginia*

Danville: Audio visual equipment problems.

*West Virginia*

\* Wheeling: Two rooms that are only used for video hearings are located in an office building. There is a security guard and a small waiting area next to the hearing rooms. The hearing rooms are standard size but the video screens are at a 90 degree angle to the attorney and claimant so both have to turn to address the ALJ. You can hear the proceedings in the hearing room from the waiting room.

*Wisconsin*

La Crosse: small room, warm

Milwaukee OHO: Problems with sound on audiovisual equipment. The room where hearing was conducted was very small and cramped.

Oshkosh: very small (extra) room with little room, variable sound quality and possible soundproofing issues. Also a scheduling issue with assigned monitor/security guard not showing up timely.

Wausau video hearing site: hearing monitor and security often do not show up on time.

Appendix 2: Problems with Remote Medical and Vocational Experts and Interpreters  
*Some responses were edited for length and clarity. Comments proceed by an asterisk were submitted to NOSSCR since the publication of the NPRM.*

It is hard to understand the VE, hard to know if he/she is actually paying attention, harder to cross examine. Our ALJs do not seem to like VE by phone either.

What has not worked well in Sioux Falls in the past is when the claimant, the VE and I are present for the hearing, the ALJ is in Denver and we try to have a translator on the phone. The system can't handle it so we have no translator. (Not fun.) I would vastly prefer the VE and ME were with the ALJ or with us and also able to see my client and vice versa. For one thing, I want to notice how closely the expert is paying attention to the testimony.

This has generally been negative, at times the witness has been unable to hear or hard to contact leading to delays in the hearing. It is very hard for me to tell over the phone if the witness hears and understands all of the questions. Some witnesses talk way too long and there is no way for the ALJ or I to break in because of the nature of speakerphone communication.

The VTC units in Lafayette Indiana and Terre Haute Indiana are of very poor quality. Tiny, hot and sound quality is problematic every day, every hearing. Medical experts by phone are lost multiple times per hearing. We are left to having a judge in another city listening to a phone speaker in the remote hearing room. Terrible and I have already had USDC sentence 6 remands over incomprehensible testimony. You are unable to see if the doctor has the file.

I have run into problems with poor audio or no audio from outside experts. There is also a challenge of getting all of the evidence to the expert. They are often not up to date.

I have been involved in situations where the VE was reached by telephone. Again, the reception was often poor and sometimes the communication was so poor that the hearing was delayed as the VE was not available at the designated time.

It was impossible to ascertain precisely what documents the Expert had reviewed or had in his/her possession or exactly what part of the record was being relied upon. Cross examination on documents that had not been provided to the Expert was near impossible and completely ineffective.

Experts appearing by telephone are often difficult to hear and technical problems with communication are frequent....Also, it does not appear anyone advises the experts on the best type of phone to appear. For example cell phones seem much worse than a traditional land line. Also, if the expert has their phone on speaker it seems to cause more problems. Perhaps some experimenting and training on this would help resolve the issue.

In all cases, this was a negative experience. It's difficult to hear the testimony, there is often background noise, the connections get cut off, the ME/VE can't see the claimant, and the ALJ or



I can't ask them to look at evidence on the spot if they haven't been sent the whole file. I have had at least one case remanded by the AC because the phoned in testimony was unintelligible.

Worst is when ALJs try to also include a phone witness with video. True with both Milwaukee and Madison offices. Biggest problem is quality of amplification and recording when any parties are on phone. Some witnesses very unprofessional with dogs, children, noise interfering. Never clear what the witness is actually listening to. Hard to cross-examine because they often don't have all of the records, are not understandable by phone or talk over the questioner.

The ME was driving while testifying and could barely be heard over the road noise and had difficulty hearing the questions.

Sometimes negative. One MD our ODAR uses a lot testified from an airport with all kinds of background noise of planes being announced. Another one has had dog barking noise. We have complained about these episodes.

I generally prefer an in-person hearing with an expert. When experts testify from home, they are more often distracted and unprepared. One VE is often interrupted by her barking dog, while another must shoo away her cat from the desk. One ME recently was clearly in a meeting with a patient during our hearing.

Interpreters have hung up mid hearing, translated incorrectly, and have left out testimony.

When a ME is attending by phone, it is difficult to cross examine the ME due to the audio quality. Also, the ALJs are hesitant to have the ME attend the entire hearing by phone. For this reason, the ME often misses the Claimant's testimony.

Sometimes there are technical problems that detract. Sometimes the strange situation makes clients more nervous. I particularly do not like electronic interpreters plus video hearings. I am fluent in Spanish and hear the mistakes. It is harder to get it right with the double electronics. Hartford is where I sit. Hartford strives to get in person interpreters for their hearings. This is so much better. There should be no electronic interpretation unless. It is impossible to do otherwise.

Often, in Elmira, NY, the VE is by telephone. This means that the VE cannot easily be given copies of other documents for comment or review. E.g., updated employment history, vocational rehabilitation evidence, or visual review of limitations set by medical sources. ALJs are, as one would expect, resistant to the delay and hassle of first faxing something from the remote location to the ODAR based ALJ, and then a second fax function from the ODAR to the remote located VE. Farthest VE was one in Rapid City, SD, 2/3 of the way across the country from Elmira, NY. Distant VE will have no personal experience in placement of people in the region in which the claimant lives.

I think it is important for the VE or ME to see the claimant in person and vice versa. I have had hearings where the ALJ did not have the expert on the line during the claimant's testimony. I also recall a case where my claimant had mental limitations. When asked the ALJ asked the VE if a person with the limitations testified about by the claimant could perform a simple, repetitive job,

there was a long pause. The VE replied that if he had just seen the claimant's file information, he would have said yes. After seeing the claimant and hearing him testify, he would have to say no. I thought at that moment, "That's the intangible, undefinable difference that personal contact makes."

My negative experiences relate to telephone testimony during a VTC. I often have problems understanding testimony given via telephone. Line quality may be poor, sometimes language is poor; these may combine for a bad telephone testimony experience (ME or VE testimony). Main problem is when the VE or ME testifies by telephone. Often I either can't hear the testimony very well or I can't understand it. Factors such as accent or poor English are multiplied by the fact that testimony is via telephone, then transmitted via VTC linkup. I do object to a VTC where there is telephone testimony to be given. Most often telephone testimony is a negative experience. There is no way to know if the witness is paying attention. It may be hard to hear the witness. The ALJ often has to "relay" my questions to the witness and, while not intentional, the ALJ may slightly change my question, directly or by inference.

I would be unable to do a telephone hearing because I am deaf.

I do not like these. you can't tell if the ME or VE is listening or paying attention. I had one ME who testified from his office and did not have the record with him so I could not question him on it. These are always cumbersome and seldom work out well.

Frequently (up to 2/3 of the time) the expert's testimony is broken up, or there is distracting noise in the background, or the call is dropped, or the sound is muffled.

Often the audio is poor, especially when an expert is appearing via telephone. It is common (I have experienced it in multiple hearing locations) that the expert will not be able to hear my questions and the ALJ will have to relay. Often negative because of the inability / delay in cross-examination because the expert cannot hear me. It is not uncommon for their testimony drops out and will miss key parts of the testimony.

Interpretation with the VTC hearings is a nightmare. That has been by far the most difficult part of trying to communicate with judges over video conferencing. There have been a number of times when the judge tries to include both an interpreter and an expert witness over the phone. It does not work. Any time they patch in more than one participant, we cannot communicate with all parties and often have to stop the hearing and reschedule when we can have people in person and only one individual over the phone.

I have experienced VE who was not listening, had to be called back to phone by ALJ. VE also disconnected midway through the hearing.

Had an expert raise an objection as to the question being speculation in response to an ALJ's question. He referred to the judge as "counsel". When I cross examined the expert I inquired as to whether he knew that the prior questioner was in fact the Judge, he did not.

I have had both positive and negative experiences. At times, telephone experts are very prepared and can offer thorough and positive testimony. At other times, it is obvious the expert is unprepared, distracted, and unable to provide competent testimony. I have heard airport announcements in the background of testimony at times, and have seen medical experts in one hearing office sitting in the hall and testifying for another case at another office in between hearings.

The combination of telephone testimony from experts and video hearing technology has been particularly awful in some situations, with bad phone connections leading to difficulty understanding and the judge sometimes summarizing a medical, psychological, or vocational expert's actual testimony rather than the claimant and the attorney being able to understand it. I had a terrible hearing in Kennewick recently, with a doctor who was testifying by phone. The doctor was hard to understand and the call got dropped at one point. Sometimes the phone quality is good. Sometimes the call is dropped and only discovered later.

I have had mixed experiences. Negatives: telephone connection not good; could hear music or water running in the background; could hear other calls come in or the expert speaking with someone else in his home/ office; difficult to measure the expert's attention or reaction to the testimony; difficult to find out background info on expert; sometimes the doctor is excused after testifying, but before the VE testifies - something comes up that it would be helpful for a doctor to weigh in on. Positives: being able get a medical specialist to testify.

Once the medical expert was clearly operating a motor vehicle and it was very chaotic.

I've had VEs testify they were at the mall when testifying. I've heard televisions on in the background.

Negative experience. You could hear other people over the telephone who could be listening to private medical information which my client did not authorize. One medical expert was conducting his personal business with a UPS carrier while on the phone. Another was testifying from a public airport. Another was at home and you could hear someone washing dishes in the background and a dog barking.

Having an expert testify by telephone is not ideal, especially when the hearing is held by video and the expert is on the phone in the same office as the judge, which makes it very difficult for the attorney/client to hear the expert's testimony.

Sometimes it was a bad technical experience, especially when more static came from the connection. Occasionally there were distracting noises from the other end of the phone too. Not sure it affected quality of testimony.

Horrible experience at times. Many times the Milwaukee ODAR will have the VEs appear by phone. Most of the time they are hard to hear until you inform the judge who will put the speaker phone system closer to the microphone. For the most part this works with only stopping once in a while for clarification. I had one instance with a medical expert testifying that I couldn't hear at all. I was completely incapable of cross examining her. So I requested that I be able to provide

the expert with interrogatories. The ODAR office did not forward the interrogatories to the expert and said I had to send them myself. This is problematic from a procedural sense, but I did as requested. The expert then refused to answer the interrogatories. I requested a supplemental hearing to question the expert, which was denied.

Even when the testimony is favorable to the client, the difficulty of understanding, relating to and cross-examining a disembodied voice is extreme, and mostly causes hearings to take MUCH longer! In the early years when the NHC first started doing hearings I did have many with them. My experience was mostly frustrating. Being hearing impaired required lots of camera manipulation, changes of seating arrangements, repetition of questions and answers, etc. It became virtually impossible once phone-in testimony became prevalent.

Audio hearings are terrible. Experts testifying by phone are inaudible about 50% of the time. The communication systems are faulty and efforts to remedy the situation during a hearing don't work well at all.

This occurs very frequently. I find this very negative, particularly with Medical Experts. The medical expert assume they have all the medical records and even say so, but then on cross "discover" that they do not actually have everything. The medical experts don't have any visual clues about what is happening and tend to talk at the wrong times and cross-examination is more difficult and the questioning takes longer. Also, quite frankly a picture is sometimes worth a thousand words and things in the medical record come to life when you see the claimant actually coping with his or her impairments (e.g., limping, grimacing in pain, crying, looking like they have been beaten down, etc.).

The call quality when everyone is on the phone is absolutely miserable. There is a lot of speaking over each other because there is no way to read audio cues from the other participants. Recordings are generally by phone. The audio quality also varies from expert to expert- some you can barely hear, some are too close to their mike and that is problematic as well. It would be nice if there was a requirement of uniform equipment for the experts. It is not uncommon to have audio recordings that are difficult if not impossible to hear. I don't dislike the video hearings as a whole, although there are certain conditions I think the ALJ should see in person. The audio quality is pretty miserable with the experts being on the phone and this is consistent across all the Montana sites. It is somewhat better if the ALJ mutes their mike when they are not speaking (cuts down on echoes) but most of our ALJs don't do this. I hate this, the experts don't have an opportunity to see the claimant (especially important for medical experts), you have no idea what they are doing during the hearing- whether they are paying attention or not- and again sound quality is poor see my previous comments. This my #1 pet peeve and something I would really like see reversed by the agency.

Quality is horrible. Often, there is an echo in people's voices. The voices sound like a robot. When a VE testifies, I have no ability to see what the VE is using or reading from to give his or her testimony.

The primary problem has involved use of telephonic translators and expert witnesses. Have had multiple times where the audio quality was poor enough that translation was not reliable. Also

have had multiple experiences where the ALJ was not able to get all the participants connected to hear the audio.

Almost all medical experts testify by telephone in my hearings. It is a negative experience in my opinion. I would prefer that they were at the hearing. At times the expert could not open the CD of the file, and thus could not testify requiring rescheduling of the hearing. Or the medical expert was not provided all of the exhibits. The quality of the phone call is also usually bad. This the expert's voice cutting out or not being able to hear them. The expert also does not have benefit of observing the claimant. I had one telephone hearing where all parties were by phone. It was a negative experience, as only three parties could be on the phone at a time. So the claimant had to get off the phone so we could talk to the medical expert. The medical expert did not have benefit of hearing the claimant testify before giving an opinion, as the medical expert had to be off the phone, so we could speak to the claimant. Then the medical expert got off the phone so we could speak with the vocational expert. Again, the claimant could not be on the phone at that time.

Virtually every hearing where I have appeared, which included an ME, had the ME testify by phone. While not overly burdensome or prejudicial, it is less than ideal, particularly given some MEs are not well prepared, or cannot be reached by phone at the appointed time (causing further delay) or are in the middle of other activities and place us on hold, etc.

\* Problems with VE and ME testimony that we have experienced include VEs or MEs that have had to hang up and call back because of a bad connection. VEs and MEs being asked to put the mute button on because of background noise, a hearing that was delayed because a plane was flying over the VE's home and the sound was very loud.