



AMERICAN IMMIGRATION LAW FOUNDATION

Practice Advisory¹ - Objecting to Video Merits Hearings

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The use of video hearings is on the rise. More immigration courts now have the technology and are using it for all types of hearings, including merits hearings and master calendar hearings in which the respondent's credibility is at issue. As one court has indicated, however, video hearings raise serious due process concerns and their use may deprive a respondent of a full and fair hearing. *Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002).

Practitioners should consider the risks that a video hearing will pose in each particular case, particularly those in which credibility likely will be an issue. If the fairness of a hearing may be jeopardized by a video hearing, the respondent or representative can object and request an in-person hearing. Whether to do so is a strategy decision that will vary from case to case. This practice advisory discusses the problems arising from the use of video hearings, and suggests ways to protect the respondent's rights and move for in-person hearings where that strategy is selected.

This advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. Additionally, cases are cited as examples only and are not intended to replace individual research relevant to a particular case.

I. Use of Video Hearings in Removal Proceedings Must Comport with Due Process

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Section 240(b)(2)(A)(iii) of the Immigration and Nationality Act (INA) authorizes the use of video hearings in removal hearings. The statute is silent on the need to obtain the respondent's consent before conducting a merits hearing by video. The regulation on the use of video hearings is more explicit than the statute, and states that an Immigration Judge may conduct video hearings "to the same extent as he or she may conduct hearings in person." 8 CFR §3.25(c) (emphasis added).³ The statute and regulation can be read as setting a floor against which to measure video hearings: that is, that video hearings must provide at least the same level of procedure as is required of an in-person hearing.

Moreover, we submit that video hearings can be used in removal proceedings only when their use will not violate a respondent's due process and statutory rights. Thus, video hearings cannot be used in an identical manner as in-person hearings. The Fourth Circuit Court of Appeals affirmed this principle in the only decision to examine the legality of video hearings in removal proceedings. In *Rusu v. INS*, 296 F.3d 316 (4th Cir. 2002), the court determined that video hearings have the potential of violating due process by depriving an individual of a full and fair hearing.

Due process requires, at a minimum, that immigration courts adopt procedures to ensure that noncitizens be heard at a meaningful time and in a meaningful manner. *Rusu*, 296 F.3d at 321-22; see also *Armstrong v. Manzo*, 380 U.S. 545, 552 (1952); *Jacinto v. INS*, 208 F.3d 725, 727 (9th Cir. 2000). Where video hearing procedures interfere with an individual's statutory right to be represented by an attorney of her choice, to present evidence, or to cross examine witnesses and examine adverse evidence, and where prejudice results, the individual has failed to receive a full and fair hearing consistent with due process. *Rusu*, 296 F.3d at 321 n.7.

Video hearings also should not be used in any case in which the credibility of the respondent or a witness is at issue, for this procedure "may render it difficult for a fact finder in adjudicative proceeding to make credibility determinations and to gauge demeanor." *Rusu*, 296 F.3d at 322. In most removal hearings, the respondent's testimony will be the most important evidence presented. See, e.g., *Ladha v. INS*, 215 F.3d 889, 900-01 (9th Cir. 2000) (where an asylum petitioner is found to be credible, there may be no need for corroborative evidence). Deference is generally accorded an IJ's credibility determination because the IJ is the only tribunal to observe the respondent's testimony in person. See, e.g., *Matter of A—S—*, 21 I&N Dec. 1106 (BIA 1998) (*en banc*); *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994); *Kaur v. INS*, 237 F.3d 1098, 1101 (9th Cir. 2001); *Efe v. Ashcroft*, 293 F.3d 899, 903 (5th Cir. 2003);

³ More than two years ago, EOIR took the position in a liaison meeting that, under the statute, a respondent does not have the right to object to the use of a video hearing. March 22, 2001 EOIR/AILA Liaison Meeting Questions, Posted on AILA InfoNet at Doc. No. 01050902 (May 9, 2001). As far as we know, however, there is no official EOIR policy adopting this position. We believe that a blanket policy that allows for no exceptions would conflict with the constitutional requirement that a removal hearing comport with due process.

Perinpanathan v. INS, 310 F.3d 594 (8th Cir. 2002). Thus, an IJ's credibility determination is often critical to the success of the case.

Because an accurate assessment of credibility frequently turns on the direct observation of the witness, federal courts in other types of civil proceedings have expressed concern about allowing a party to testify over video where the party's credibility is at issue. See, e.g., *U.S. v. Baker*, 45 F.3d 837, 845 (4th Cir. 1995) (allowing testimony by video because case did not turn on judge's impression of the witness). As one court has noted, a video hearing "is not the same as actual presence, and ... the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing." *Edwards v. Logan*, 38 F.Supp. 2d 463, 467 (W.D. Va. 1999); see also, *Crickard v. Department of Veteran's Affairs*, 92 MSPB 625, 2002 MSPB LEXIS 1129 (2002) (holding that when an ALJ must make a credibility determination, an appellant's request for an in person hearing cannot be denied absent good cause). Even the former INS recognized the importance of the respondent's presence to assess credibility, and thus agreed that telephone hearings should not take place where credibility was at issue. *Bigby v. INS*, 21 F.3d 1059, 1064 (11th Cir. 1994); *Purba v. INS*, 884 F.2d 516, 518 (9th Cir. 1980).

Video hearings also may interfere with due process by interfering with an attorney's ability to fully represent the respondent. As the Fourth Circuit stressed, video hearings put the respondent's lawyer in "a 'Catch-22' situation" because the lawyer must choose between being with the client at the detention facility or being at the Immigration Court with the IJ and, frequently, the trial attorney; "under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option." *Rusu*, 296 F.3d at 323. The INA and due process encompass more than representation by counsel in name only – they guarantee "meaningful access to counsel." *Garcia-Guzman v. INS*, 65 F.Supp. 2d 1077, 1081 (N.D. Cal. 1999). In the context of a telephonic hearing, the court in *Garcia-Guzman* found that the respondent's statutory and due process right to counsel was violated, in part because the respondent and the attorney had no way of privately conferring during the hearing. *Id.* at 1090.

While the *Rusu* Court recognized these potential due process problems, it held that the petitioner in that case had not been prejudiced by any due process violation.⁴ Nevertheless, *Rusu* firmly stands for the proposition that the use of video hearings in removal proceedings must comport with due process.

⁴ To succeed on a due process claim, a petitioner must frequently show prejudice as the result of a procedural due process violation. While the standard for prejudice varies depending on the court and the issue involved, an individual must generally demonstrate that the deficient procedure could have impacted the outcome of the case. See e.g., *Reyes-Melendez v. Ashcroft*, 342 F. 3d 1001, 1006 (9th Cir. 2003); *Kerciku v. INS*, 314 F.3d 913, 918 (7th Cir. 2003); *Lopez v. Heinauer*, 332 F.3d 507 (8th Cir. 2003); *Moi Chong v. Dist. Dir.*, 264 F. 3d 378 (3d Cir. 2001). Further research on the prejudice standard in a particular circuit may be necessary to ensure that the standard is met.

II. What to Do before a Video Hearing

When faced with a video hearing in which witness credibility is essential, the respondent may file a pre-hearing motion objecting to a video hearing and asking the IJ to hold the hearing in person. The motion should inform the IJ of the various ways in which the video hearing will jeopardize the respondent's right to a full and fair hearing. If the respondent has already experienced difficulties during a video master calendar hearing, attach a declaration that describes these problems.

III. What to Do during a Video Hearing

If the Immigration Judge denies the motion and the hearing proceeds by video, the respondent or representative can again object on the record to the video hearing. Additionally, objections can be made on the record whenever the respondent is unable to fully present the case because the hearing is taking place by video.

By objecting on the record, the respondent/representative will preserve the issue for any appeal that may be necessary. The Board is generally prohibited from engaging in fact-finding during the course of an appeal. 8 C.F.R. § 3.1(d)(3)(iv). Consequently, detailed and descriptive objections on the record will ensure that there is evidence before the Board of the problems created by the use of video hearings.⁵ Similarly, objections will serve as evidence of the problems for federal court review, since federal courts are limited to reviewing only the record of the proceeding and cannot take additional evidence. 8 U.S.C. § 1252(b)(4)(A).

Following are some potential problems that may arise during the hearing as the result of video hearings:

- **The respondent cannot testify effectively over video.** The video hearing may interfere with the respondent's statutory right to present evidence on her own behalf. INA § 240(b)(4)(B); *see also Matter of Torres*, 19 I&N Dec. 464 (BIA 1987). Technological problems with the video equipment may make it difficult for the judge to hear and understand the respondent, and for the respondent to understand questions asked of her. She may also be confused if the camera in the courtroom is not focused on the person asking the questions.

⁵ There may be circumstances in which it is impossible to fully describe the extent of the problem during the hearing itself. If the Board cannot properly resolve the respondent's appeal without additional evidence of the problems, the respondent/representative can file a request for a remand. *See* 8 C.F.R. § 3.1(d)(3)(iv). The respondent/representative can support the motion with the additional evidence sought to be admitted, such as an affidavit describing in detail problems resulting from the videoconferencing that were not apparent in the record.

Additionally, the respondent may be intimidated by the camera equipment. She may look at the screen when answering questions, rather than at the camera, and thus may appear evasive and unwilling to make eye contact. Where a “witness becomes camera conscious, and either ‘grandstands’ or becomes nervous, videoconferencing may make the witness appear more or less confident and thus affect his believability.” Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 *UCLA L. Rev.* 185, 204 & n.107 (October 2000) (*citing* David M. Doret, *Trial by Videotape - Can Justice Be Seen To Be Done?*, 47 *Temp. L.Q.* 228, 245-46 (1974); Joanne Cleaver, *Videoconferences Not the Place to Put Candid in Front of Camera: Everyone Sees Small Gestures, Nervous Habits*, *Crain's Chi. Bus.* Feb. 2, 1998, available at WL 7284407).

- **Inadequate translation.** A number of courts have held that an inadequate translation in deportation hearings can violate the respondent’s due process rights. *See, e.g., Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000); *Amadou v. INS*, 226 F.3d 724 (6th Cir. 2000); *Matter of Tomas*, 19 I. & N. Dec. 464 (BIA 1987). As these cases demonstrate, obtaining an acceptable interpretation of removal proceedings can be challenging even in live hearings. Satisfactory translation of the respondent's testimony becomes even more difficult in a video hearing. In addition to any sound problems that the video equipment may cause, the respondent will not be able to see the interpreter because the courtroom camera will be directed at the person asking the questions rather than the interpreter. Thus, the interpreter and the respondent will not be able to exchange visual clues to enhance the translation. In some cases, the interpreter will be appearing telephonically, which will make communication even more difficult.
- **Representative and client cannot communicate directly and privately.** If the representative is in Immigration Court and the respondent is at the detention facility, they will not be able to communicate freely. For example, the respondent will not be able to let the representative know if a document presented by INS is faulty in some way and therefore needs to be objected to, or if she disagrees with a witness's account of events, thereby preventing effective cross-examination of that witness. The representative will also be unable to discuss changes in strategy with the respondent, or to explain to the respondent what is happening and what the IJ and the trial attorney are discussing .
- **Cannot examine physical evidence presented by INS.** When located at a remote facility, the respondent/representative may be unable to review a document or other physical evidence presented by the trial attorney at the immigration court.
- **Cannot effectively examine and/or cross-examine witnesses.** When located at a remote facility, the respondent/representative may be unable to effectively examine or cross-examine witnesses present in Immigration Court. It may be difficult to hear the witness or for the witness to hear the

respondent/representative. It may also be hard to observe the witnesses' demeanor through a television screen. In some cases, the witness may not even be visible to those located at the remote facility because, for example, the camera is focused exclusively on the IJ.

- **Cannot present respondent's physical injuries.** Because she is testifying by video, the respondent may not be able to clearly show any physical injuries that may be relevant to the case. While photographs of any wounds or scars can be admitted into evidence, she may also have injuries, such as a limp or limitation in mobility that can only be demonstrated in person.
- **Technical difficulties.** As the *Rusu* court explained, video hearings can cause numerous technical problems. Audio and/or video transmissions may drop or freeze for several minutes at a time. Even when they work, the picture and/or the sound may fade in and out or be fuzzy. Also, the person operating the cameras at either the detention facility or the immigration court may not know how to do so properly, resulting in blurry or incomplete pictures.

In each of these circumstances, the respondent/representative can object on the record, describe what the problem is for the record, and ask the IJ to stop the proceedings and reschedule as an in-person hearing. If the Immigration Judge denies this request, the respondent/representative can again object on the record that the continued use of a video hearing violates the respondent's statutory and constitutional right to present evidence on her own behalf, to cross-examine witnesses presented by the Government, to examine evidence used against her, and/or to be represented by counsel of her choice. INA §240(b)(4), 8 U.S.C. § 1229a(b)(4).

IV. What to Do after a Video Hearing

If the respondent is denied relief in a video merits hearing and the denial is attributable at least in part to the fact it was a video hearing, then the prejudice caused by the video hearing should serve as one or more grounds of appeal to the Board of Immigration Appeal. Describe the harms suffered by the respondent with specificity in the notice of appeal, as required under 8 C.F.R. §1003.3(b).

Where a pre-hearing motion was filed and objections were made on the record throughout the hearing, the respondent/representative will have preserved the issue for appeal and also insured that the record reflects the problems that occurred during the hearing. Even where no motion was filed, or objections were raised during the hearing, the respondent/representative can still raise the issue of the deficient video hearing procedures in the appeal to the Board.⁶ When preparing the brief for the BIA, carefully

⁶ Where the issue is not raised in the appeal to the Board, however, the respondent may be precluded from raising it in any subsequent federal court appeal on the basis that she either waived the issue or failed to exhaust available administrative remedies. *See, e.g.*, 8 USC § 1252(d)(1) (requiring exhaustion of administrative remedies).

review the transcript of the hearing and use excerpts to point out the various ways in which the respondent was hampered from presenting her case effectively because the hearing was held by video.

The *Rusu* Court identified a number of factors that demonstrate problems with video hearings. Look for similar problems in the transcript of the respondent's hearing:

- Whether the respondent had difficulty understanding questions;
- Whether and how often the respondent asked for questions to be repeated;
- Whether the respondent was confused when the person speaking was not on camera;
- Whether the respondent and the interpreter had trouble understanding one another;
- Whether a speech impediment or accent made it more difficult to understand the respondent over the video recording;
- Whether hearing testimony was "indecipherable";
- Whether the transcript reflects technical problems, such as the hearing being stopped and restarted due to problems with the equipment; the judge not being able to see the respondent clearly; the respondent not being able to see the judge, etc; and
- Whether an adverse credibility finding was due to any degree to the video hearing.

All of these problems can be raised in the brief to the Board. Additionally, the representative can emphasize any problems that the representative had representing his or her client during the hearing as a result of the respondent's absence from the hearing.

Finally, please contact the American Immigration Law Foundation (AILF) and let us know if you have an appeal based on a video merits hearing. AILF may be able to act as a co-counsel on the appeal or file an amicus brief, depending on the facts of your case.