

**OFFICE OF THE GENERAL COUNSEL**  
**Division of Operations-Management**

MEMORANDUM OM 08-20

January 8, 2008

**TO:** All Regional Directors, Officers-in-Charge,  
and Resident Officers

**FROM:** Richard A. Siegel, Associate General Counsel

**SUBJECT:** Pilot Video Testimony Program in Representation Cases

Recently, the Board authorized the General Counsel to implement a two-year Pilot Video Testimony Program in Representation case hearings. The General Counsel recommended the establishment of a pilot program to assess whether the use of video testimony will enhance the Agency's ability to process representation cases in a manner that is more efficient and responsive to the public's needs.

The General Counsel convened a Committee<sup>1</sup> to examine the feasibility and propriety of utilizing video testimony, to identify the procedural issues that may arise, and to develop recommendations for implementation of the program. The Committee advised the General Counsel that using video testimony, in limited circumstances, may be beneficial to both the parties and the Agency, and may allow for a more complete record in situations where a party, witness, or representative is unable to appear in-person. In particular, it was noted that delays due to the unavailability of witnesses could often be addressed by allowing the witness to testify via videoconference.

Presently, the pilot is limited to the taking of video testimony in pre- and post-election representation cases. Employing the procedure in post-election cases provides the Regions with experience in using video testimony when credibility is an issue.

There is a strong preference for hearings in which all parties, witnesses, and the hearing officer are located in the same hearing room. Nonetheless, there may be circumstances that would warrant the use of video testimony. Under the pilot program, Regional Directors have the discretion to decide on a case-by-case basis whether there are compelling circumstances demonstrating "good cause" warranting the use of video testimony. Although it would be preferable if all parties agreed to the use of video testimony, the Regional Director has the discretion to order the use of video testimony over the objection of a party when warranted. Also, the Regional Director has the discretion to refuse to use video testimony even if the parties are in agreement to use it. In exercising this discretion, the Directors should look at such factors as:

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<sup>1</sup> Members of the Committee are Joe Barker, Director, Region 13; William Baudler, RA, Region 32; Yvette Hatfield, DAGC, Operations-Management; Nelson Levin, AGC, Operations-Management; Randy Malloy, ARD, Region 8; Gary Muffley, Director, Region 9; and Nancy Wilson, SFX, Region 11. Richard Hardick, Associate Executive Secretary, Office of Executive Secretary and Lafe Solomon, Director, Office of Representation Appeals also participated.

- the availability of the participants and proximity of the participants to the hearing site;
- the adequacy of the available videoconferencing facilities, and any technological issues;
- the anticipated length and scope of the hearing;
- the number, length, and types (e.g., affidavits) of documents likely to be in evidence;
- the number of witnesses who would testify by video and the expected length of their testimony;
- the types of issues the testimony addresses;
- the potential cost of using video testimony<sup>2</sup> versus travel costs; and
- the positions of the parties.

Four scenarios<sup>3</sup> where the use of video testimony could arise involve:

- (1) A witness at a location remote from the hearing site;
- (2) A representative at a remote location;
- (3) The hearing officer at the Regional Office, but the parties and witnesses at a remote location; or
- (4) Multiple locations are involved (for instance the hearing officer is in one location, witnesses are at another, and representative(s) are in still another location).<sup>4</sup>

The first scenario above will probably be the most frequent situation in which a party requests the use of video testimony. It is not anticipated that requests described in the third and fourth scenarios would be granted, except under the most unusual of circumstances, such as inclement weather preventing Board agent travel. In each of these scenarios, Regional Directors should consider the factors discussed above when deciding whether to use video testimony.

Absent unusual circumstances, it is anticipated that video testimony should take place from a neutral location, either from the offices of another Region or another government agency.<sup>5</sup> In exceptional circumstances, the videoconference equipment of a commercial establishment may be utilized. However, the cost of using such equipment may preclude its use for anything but a brief witness. Further, if videoconferencing from a neutral location is not feasible, Regional Directors may consider using a party's private video equipment where it will facilitate the timely and quality processing of the representation case.

One of the more difficult issues arising from the use of video testimony is the handling of documents, particularly affidavits. When a request for the use of video testimony arises, the Region should discuss with the parties the number, length, and types of documents anticipated for introduction at the hearing so that the Regional Director may make an informed decision whether to permit video testimony. If the Director decides to permit video testimony and a party(ies) objects, the Director should instruct the hearing officer to document for the record

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<sup>2</sup> Every Regional Office and Resident Office has video equipment in its offices. The costs, if any, of using the video equipment during a hearing will be borne by the Agency.

<sup>3</sup> However, if the Agency's financial resources are sharply curtailed, consideration could be given to conducting some hearings, such as hearings involving no issues, in this manner to save Agency costs.

<sup>4</sup> In situations where a non-participant desires to observe the hearing by videoconference, the non-participant would be required to attend the hearing, as there does not appear to be any public benefit to using Agency resources for this purpose.

<sup>5</sup> EEOC has advised that its equipment could be used by our Agency without cost. At present, the EEOC only has approximately 20 offices with video connections, although it is slowly equipping its other offices.

both the nature of the objections, the Regional Director's decision, and the reasons for the decision. It would be preferable that an experienced hearing officer be assigned to the hearing.

If video testimony is to be conducted, it is critical that the hearing officer schedule a pre-hearing conference, either by telephone or in person, to be held at least one day before the hearing. At that time, documents to be used during the witnesses' video testimony could be identified and exchanged. The procedures for introducing documents during the direct examination will differ from the procedure used for introducing documents during the cross-examination of a witness via video testimony.

With respect to documents that will be introduced during direct examination, in either a pre- or post-election hearing, one approach could be that the parties will, at their own expense, provide their witness(es) at the remote location with any documents to which he (they) would testify on direct examination.

With respect to documents to be introduced during cross-examination in either a pre- or post-election hearing, the hearing officer must establish during the pre-hearing conference the procedures to be used during the hearing. Several options are available. For short documents, the document camera<sup>6</sup> could be utilized. Lengthier documents could be faxed to the witness during the hearing; although, if the documents to be faxed were voluminous, this would militate against video testimony. Another approach would be to require the party who may engage in cross-examination during the video testimony to provide to the hearing officer at least one day and preferably 2-3 days before the hearing, all documents about which the witness(es) at a remote location would testify. The hearing officer could transmit the documents by priority delivery to the remote location to be delivered before the start of the hearing. These documents could be in sealed envelopes if the party so desires, and only opened when counsel instructs. Attorneys attending from a remote location could overnight documents to the hearing officer who would then provide the opposing party and witnesses with each document at the appropriate point in the hearing. Videoconferencing equipment allows the hearing officer to scan the room to ensure that the witness does not read inappropriately from any of these documents during the testimony.<sup>7</sup>

It is anticipated that the court reporter and, when necessary, an interpreter would be at the same location as the hearing officer. At the start of the hearing, the hearing officer should state that video testimony will be taken and should state the name of the witness providing testimony via video conferencing for the record. The hearing officer should inform the parties that the video testimony will not be videotaped and the sole record of the testimony will be the transcript of the hearing.

Before the taking of video testimony, the hearing officer should ensure that there are no technological problems that could impede the hearing. The hearing officer should make sure that the video and audio transmissions are clear to all participants at all conference sites. It is recommended that the hearing officer use the camera's remote controls to scan the room in which a witness gives video testimony to determine if other persons are in the room. The hearing officer should ask other persons in the room to sit behind the witness and within viewing range of the video camera. The hearing officer should ask everyone in the remote location to

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<sup>6</sup> Every Regional Office and Resident Office has a document camera, which enables documents to be televised to the video participants.

<sup>7</sup> The hearing officer could control the video camera as long as there was only a two-way video connection.

identify themselves. The hearing officer should advise the parties and witness(es) to speak clearly, to sit near the microphone, and to expect a short delay in transmission.

Should technical difficulties arise during the hearing, the hearing officer should state for the record that he/she is stopping the hearing and discontinuing testimony via videoconference due to technical difficulties. The hearing officer will advise the parties that the video testimony will not continue until the technical difficulties are resolved. Upon correcting the technical difficulties, the hearing officer should reopen the hearing by noting that the cause of the interruption to the proceeding has been resolved.

In order to assess the success of the pilot program, the Region should request parties and party representatives who participate in video testimony hearings to provide feedback.

To obtain this feedback, attached is a questionnaire (Attachment A) that should be distributed to all parties at the close of the hearing with a request that it be returned to the hearing officer immediately or, in the alternative, mailed to the Region. Once the feedback is received, the Region must enter the completed questionnaires into the e-Room database. (See instruction in Attachment B.)

Further, Regional Directors are requested to submit a report in each case where video testimony was requested by a party and/or was conducted. The Agency will maintain a nationwide database to capture information as to representation cases in which parties have requested and/or used video testimony. The database will include the following information:

- Case name, number, date of request, location from which the video testimony will be obtained.
- Name of party requesting use of video testimony and the reason for the request.
- The position of other party(ies) with respect to the request.
- Whether the video testimony occurred or would have occurred during a pre- or post-election hearing.
- The type of video testimony (e.g., one witness at a remote location).
- Whether the Regional Director approved the taking of video testimony and the reasons for the Regional Director's decision to approve or not to approve the taking of video testimony.

If video testimony was conducted:

- An assessment of the overall experience using video testimony.
- Length of the video testimony (number of transcript pages).
- Location of the remote testimony (e.g., another Regional Office).
- Whether the video testimony involved the use of exhibits. If so, how did the witness, parties and hearing officer obtain the documents? What, if any, difficulties were there relating to the use of exhibits?
- Whether any transmission problems detracted from the direct or cross examination.
- Whether the availability of video testimony adversely affected the ability to obtain a stipulated election agreement.

Attached to this memorandum are instructions for entering this information and the questionnaires into an e-Room database (Attachment B).

With the Regions' memoranda and the parties' evaluations, the Committee will assess the pilot program and provide the General Counsel and the Board with an informed recommendation as to whether, and if so to what extent, video testimony should be permanently incorporated into the Board's procedures.

If you have any questions regarding this memorandum, please contact Deputy Assistant General Counsel Yvette C. Hatfield or the undersigned.

/s/  
R.A.S.

cc: NLRBU

Attachments  
Release to the Public (w/o Attachment B)

MEMORANDUM OM 08-20

**ATTACHMENT A**

**QUESTIONNAIRE**

The National Labor Relations Board is interested in receiving feedback from you as a participant in a recent representation hearing in which video testimony was utilized. This information is useful to the NLRB in assessing the feasibility of using video testimony on a permanent basis and in developing guidelines for its usage. Please take a few moments to answer the following questions by circling the appropriate entry that best describes your experience and add any comments you feel necessary. Please turn in your completed form to the hearing officer before you leave the hearing room. If that is not feasible, please use the enclosed, self-addressed, stamped envelope to return the questionnaire within two weeks of receipt. Thank you in advance for your cooperation.

**CASE NAME:**

**CASE NUMBER:**

1. How would you rate the overall effectiveness of using video testimony in this hearing?

1	2	3	4	5
NOT EFFECTIVE		SOMEWHAT EFFECTIVE		VERY EFFECTIVE

**Comments:**

2. Do you believe the use of video testimony allowed you to examine or cross-examine the witness(es) effectively?

N/A	1	2	3	4	5
	NOT EFFECTIVE		SOMEWHAT EFFECTIVE		VERY EFFECTIVE

**Comments:**

3. Do you believe the use of video testimony allowed for the development of a more complete record?

1	2	3	4	5
STRONGLY DISAGREE		AGREE		STRONGLY AGREE

**Comments:**

4. Did any transmission problems during use of the video equipment detract from your overall experience with video testimony?

1	2	3	4	5
YES, SUBSTANTIAL PROBLEMS		MINOR ISSUES		NO PROBLEMS ENCOUNTERED

**Comments:**

5. If the video testimony involved the use of exhibits, how effectively were the exhibits used during the course of examination?

N/A	1	2	3	4	5
	NOT EFFECTIVE		SOMEWHAT EFFECTIVE		VERY EFFECTIVE

**Comments:**

6. Do you believe the availability of video testimony detracted from the likelihood that the matter could have been resolved without the need for a hearing?

1	2	3	4	5
YES, THE HEARING COULD HAVE BEEN AVOIDED IF VIDEO TESTIMONY WAS NOT AVAILABLE		THE AVAILABILITY OF VIDEO TESTIMONY MAY HAVE MADE A HEARING MORE LIKELY		THE AVAILABILITY OF VIDEO TESTIMONY HAD NO EFFECT

**Comments:**

7. Do you believe the NLRB should permanently adopt video testimony as a tool for use by parties in representation hearings?

1	2	3	4	5
STRONGLY OPPOSE		SOMEWHAT IN FAVOR		STRONGLY IN FAVOR

**Comments:**

8. Do you believe the NLRB should be more willing to expand the use of video testimony?

1	2	3	4	5
STRONGLY OPPOSE		SOMEWHAT IN FAVOR		STRONGLY IN FAVOR

**Comments:**

**Name of Party:** \_\_\_\_\_

**Representative:** \_\_\_\_\_