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MEMORANDUM

TO: Office of Court Administration, David Nocenti, Esq., Counsel
(via email to rulecomments@nycourts.gov)

FROM: Susan C. Bryant, Executive Director

DATE: August 8, 2025

RE: Comments on proposed rule 22 NYCRR § 200.9-a regulating the use of electronic appearances during criminal proceedings

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The New York State Defenders Association (NYSDA) offers these comments on the proposed rule 22 NYCRR § 200.9-a regulating the use of electronic appearances during criminal proceedings. NYSDA appreciates the opportunity to provide such comments.

NYSDA is a non-profit, membership organization with more than 1,600 members. Our mission is to improve the quality and scope of public defense representation. For over four decades, NYSDA has received state funding to operate the Public Defense Backup Center, which provides resources and support to defenders around the state who practice in criminal and family courts. Our services include research assistance, training, publications, our Public Defense Case Management System, and other support. We also run the state-funded Veterans Defense Program (VDP), which provides training, support, and legal assistance to promote trauma-informed effective representation of veterans and service members in New York State's criminal and family court systems.

Our comments on the proposed rule, which has been in effect since July 8, 2025, are set out in Section I. We also include information regarding the fundamental problems with the law that directed the promulgation of court rules, Criminal Procedure Law article 182, and the amendments to Executive Law 832(4). This legislation was enacted as part of the SFY 2025-2026 Budget without any input from people who appear in our state's criminal courts every day, nor people who are charged with crimes, nor the NYS Office of Indigent Legal Services. The problems with CPL article 182 and amended Executive Law 832(4) are outlined in Section II.

While we recognize that the Chief Administrative Judge does not have authority to promulgate rules that change the language of article 182, we respectfully request that the Office of Court Administration collaborate with criminal defense attorneys, people who have been or are defendants in criminal cases, the NYS Office of Indigent Legal Services, and others to propose amendments to the law that can be presented to the Legislature and the Executive in the upcoming legislative session.

I. Recommended Changes to Proposed Rule § 200.9-a

A. Language Regarding Consent by the Defendant

Rule § 200.9-a may be read to improperly allow courts to engage directly with represented defendants, without them first receiving counsel's advice, as to whether they consent to appear remotely. But the statute is clear that consultation with counsel is required. CPL § 182.20(1) describes consent in the following terms: the "defendant, after consultation with counsel or a legal advisor, if any, … consent[s] on the record to conducting such proceeding [or in (1)(b) arraignment] by electronic appearance …." In contrast, the last sentence of Rule § 200.9-a(2) states: "The determination of whether to consent to an electronic appearance for a defendant who is represented by counsel shall be made by the defendant rather than defense counsel and may be evidenced either by a statement by counsel, after consulting with the defendant, or a statement by the defendant."

Although the statute does require that the defendant consent to the electronic appearance, the Rule emphatically states that the determination of whether to consent, where the defendant is represented by counsel, "shall be made by the defendant rather than defense counsel," and includes language that connects the consultation with counsel to situations where counsel will be the one to make the statement on the record, but not necessarily when the defendant makes their own statement regarding consent. This is inconsistent with the statutory language mandating consultation with counsel. We recommend that the last sentence of (2)(a) be amended to read: "Where the defendant is represented by counsel, the defendant must consult with counsel before consenting to conducting the proceeding by electronic appearance. Consent by the defendant may be evidenced either by a statement by counsel or a statement by the defendant."

B. Timing of Consent

Rule § 200.9-a(2)(a) contains language that suggests there are situations where the parties might consent to an electronic appearance in advance of a proceeding but then not "confirm such consent" at the commencement of the hybrid or virtual proceeding. However, the Rule does not specify how the Court should proceed under these circumstances. If a party does not confirm consent, the Court will have to adjourn the proceeding for at least a brief time, and it is possible that the Court would want the party to justify the decision. Because CPL article 182 does not require a party to provide a justification for the decision to consent or not, we recommend that the Rule be amended to include a clear statement that the Court may not inquire about the reason(s) why the party does not confirm consent.

C. Hybrid or Virtual Proceedings Should Not Be the Norm

CPL article 182 allows courts to dispense with the physical appearance of any party "in its discretion." The law does not give the Court the authority to make electronic appearances the default option. In-person proceedings remain the norm. However, language in parts of Rule 200.9-a, particularly 200.9-a(4), suggest that individual judges may default to electronic appearances. We are concerned that this approach could give the defendant and/or prosecutor the impression that consent is preferable or even necessary for proceedings identified in CPL 182.10(1)(a) and (b). At a minimum, the Rule should be amended to include language that makes it clear that the lack of consent or the withdrawal of consent must not negatively impact judicial decision-making at any stage of the case.

1. Rule 200.9-a(4) Will Cause Prejudice

   CPL § 182.30(b) provides that the Chief Administrative Judge's rules regulating electronic appearances shall be designed "to ensure that any system for arraignments provides a full and fair opportunity for any defendant, without prejudice, to choose to have an arraignment conducted with the defendant physically present, rather than through an electronic appearance." In contrast, Rule § 200.9-a(4) authorizes a system for arraignments where delay is inevitable when a defendant "does not consent" so long as the delay is not "undue." It is our position that any delay is prejudicial. Further, a defendant who does not consent automatically becomes the exception to the rule; by insisting on their right to an in-person arraignment, that defendant is necessarily seen as disrupting the regular course of business. The judge conducting the arraignment will have to travel an unspecified distance and the law enforcement official detaining the defendant may need to also travel to a different location. While the judge may not explicitly say they are treating the defendant differently because of the disruption, or even consciously know that they are treating the defendant differently, the risk of prejudice is too high. And there are no consequences if there is undue delay in one case or many. The Rule should be amended to specify that in-person arraignments are the default.

   Assuming that the Rule is not amended as we recommend, it should provide clear guidance as to what constitutes "undue delay."

D. Consultation with Stakeholders

Rule § 200.9-a(4) does not address the interrelationship between CPL article 182 and Judiciary Law § 212(1)(w), which governs approval of plans for a centralized arraignment part (CAP). Section 212(1)(w) requires input from identified stakeholders regarding CAP plans. But Rule § 200.9-a(4) appears to allow a court to submit changes to that plan unilaterally and in a way that can default to electronic appearances by the defendant or the judge or all parties. Assuming subdivision 4 is not revised as suggested above, at a minimum, it should be amended to require consultation with the identified stakeholders in 212(1)(w) when the proposal would change the CAP plan. We also recommend that, in jurisdictions without a CAP, the Rule be amended to require the Court to consult with defense providers and prosecutors before submission to the appropriate administrative judge.

E. Electronic Appearances of Witnesses in Evidentiary Hearings

The Rule does not provide any guidance or require that certain protocols be put into place to address issues that may arise when a testifying witness appears electronically. For example, the Rule should include language that protects against witness coaching and ensures that witnesses cannot read notes or other materials while testifying unless specifically permitted to do so. And in proceedings where there is more than one witness, there should be protocols to prevent witnesses from hearing each other's testimony. There should also be protocols for the introduction and use of exhibits when one or more parties is appearing electronically.

F. Protocols for Interpreters Should Be Added

Neither CPL article 182 nor Rule § 200.9-a addresses the use of interpreters during electronic appearances. Courts have an obligation to ensure that interpreters are provided when needed. *See, e.g.,* 22 NYCRR Part 217. Instead of leaving it up to each court to decide how to do so, Rule § 200.9-a should be amended to add clear guidance or protocols to all courts so that interpreters are made available and properly used during electronic appearances.

G. <u>Guidance on Implementation Should Be Added</u>

Rule § 200.9-a should include guidance and minimum standards for implementation of electronic appearances, such as the technology that must be used, the expectations of parties that are appearing electronically, how a party appearing electronically should communicate about technical issues (*e.g.*, sound cutting out, freezing video, problems with the technology used for confidential communication) and contingency plans and protocols for disruptions, and other issues.

H. <u>Data Collection and Reporting Requirements Should Be Added</u>

Rule § 200.9-a should include data collection and reporting requirements to track the use of and compliance with CPL article 182 for each type of proceeding that may be conducted by electronic appearance. The court system, policy makers, and the public should all have access to information about when electronic appearances are being used, whether there are variations in implementation throughout the state and the reasons for those differences, whether there are any violations of the rule against recording video or audio of the proceeding, and other data that is vital to ensuring the constitutional and statutory rights of defendants, including due process and the right to counsel.

II. Problems with CPL article 182 and the Amendment to Executive Law 832(4)

As noted above, we understand that the Chief Administrative Judge cannot promulgate rules that conflict with CPL article 182. However, it is important that we identify some of the problems with article 182 as enacted and the amendment to Executive Law § 832(4) and raise concerns about provisions of the law.

CPL article 182 does not address several critical issues and must be amended to provide clarification. These include:

- Is there any limitation on the Court's authority to order a witness to appear electronically instead of in person?
- If a prosecutor is not present for an arraignment, can the Court proceed with an electronic appearance?
- How is "good cause" defined with respect to objections under CPL § 182.10(1)(c) and (5)?
- In situations where a proceeding is adjourned to a time when it can be held in person, what are the implications for CPL § 30.30 calculations?

We are also concerned about several provisions of CPL article 182.

CPL article 182 does not ensure that the defendant will be able to confer confidentially with their attorney throughout a proceeding. The law merely provides that a proceeding that involves an electronic appearance "shall provide an appropriate opportunity for any defense attorney to confidentially consult with their client … during the proceeding." Although some technological innovations have made it possible for a degree of private communication between attorney and client during virtual appearances, these options are not the same as the one-on-one conversations that are possible when the attorney and client are together in person. How will courts ensure confidential communication between the defendant and their attorney or legal advisor when the defendant is held in pre-trial custody? Corrections officers are typically in the same room as the defendant during an electronic appearance, making confidential communications with counsel impossible.

The law should not have a blanket prohibition on electronic appearances where the person accused of a crime is under 18. In jurisdictions where electronic appearances were authorized under the old CPL article 182, children benefited from the ability to appear electronically for non-essential proceedings so that they did not, for example, lose a day of school or programming to travel to and from court.

We also see significant barriers to equitable and consistent implementation across our state, particularly in the town and village courts. In most parts of New York, justice court judges preside over arraignments in all cases, from felonies to violations. We learned over the past five years that many justice courts are not equipped with the technology needed to make electronic appearances possible. Additionally, not all courts, attorneys, defendants, and witnesses have access to appropriate technology, *i.e.*, devices and internet connections that are reliable and have fast enough speeds to allow participants to see and hear and be seen and heard.

The law should require the defendant's consent for electronic appearances in all types of proceedings, not just those identified in CPL § 182.20(1)(a) and (b). People accused of crimes should not be forced to appear electronically when they want to be in person. There are circumstances when a defendant will benefit from or prefer to appear electronically, but defendants should have the choice to be physically present with their attorney, the prosecutor, and the judge, even if it means that law enforcement must bring the person to court or that the proceeding will take a little longer to complete. In NYSDA's written testimony before the Commission to Reimagine the Future of New York's Courts – Pandemic Practices Working Group on November 7, 2022, we discussed the importance of consent and in-person appearances. *See also* NYSDA's Statement on Virtual/Remote Court Appearances (November 23, 2020); National Association for Public Defense Statement on the Issues with the Use of Virtual Court Technology (June 18, 2020).

> We cannot lose sight of the fact that ensuring private, in-person communications between clients and their attorneys is a key element of the fair administration of justice. Police and corrections agencies may be required to transport people to court, but the costs and time associated with transportation cannot take precedence over the fundamental right to counsel. [Footnote omitted.]
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> Virtual proceedings of any sort must not be used to avoid dealing with the court system's scheduling problems. Before the pandemic, many courts had significant issues with scheduling. Large numbers of cases were calendared for the same time and attorneys and their clients were expected to appear at that time, without any idea of how long they may have to wait. This situation has not changed much since the pandemic started. Some courts worked to set staggered appearance schedules, which improved wait times. With case backlogs and some courts that are not in session every day (particularly in town and village courts), the problems continue.
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> Individuals in criminal … court are more likely to agree to appear virtually if the choice is between appearing in person, which may include travelling a long distance to the court and waiting for hours for their case to be called, and appearing virtually, which takes a fraction of the time. But if they knew that their case would be called promptly and they were able to speak with their attorney privately and ask questions, they may choose to appear in person.

There are also times when the court appearance will not involve anything of substance, such as when an adjournment will be requested and a new appearance date set. In those situations, a party may elect to have their attorney appear without them. Courts should not require individuals to appear, in person or virtually, for these administrative matters. Further, the court system should consider whether those types of proceedings even necessitate an appearance by counsel. There may be matters that could be more efficiently addressed through a written status update to the court.

We are particularly troubled by the fact that the Legislature and Executive amended Executive Law § 832(4) without consultation with the NYS Office of Indigent Legal Services or criminal defense providers. The language in subdivision 4 came directly from the settlement in *Hurrell-Harring v State of New York* and was a fundamental tenet of the Executive and the Legislature's commitment to compliance with standards and best practices. And our existing criminal laws and procedures make obtaining valid, voluntary consent from a defendant at first appearance to appear electronically next to impossible.

Many OCA-approved Centralized Arraignment Part (CAP) plans require in-person arraignments. And contracts between the NYS Office of Indigent Legal Services and counties that provide funding for Counsel at First Appearance (CAFA) rightly require in-person arraignments. Counties and defense providers rely on these contracts to meet their constitutional and statutory obligations to ensure that people who cannot afford counsel are represented by an attorney at arraignment. This amendment appears to have been enacted without any consideration of the disruption and harm it would cause, and the brief time between enactment and the effective date left no opportunity for thoughtful planning.

Conclusion

We thank you again for the opportunity to provide these comments. If you have any questions or would like to discuss ways to improve the legislation, please do not hesitate to contact Susan Bryant, Executive Director, at sbryant@nysda.org or 518-465-3524.