Virtual/Remote Court Appearance at a Critical Stage of Criminal Proceedings
Is Not the Correct Answer to Any Long-Term Question

New York Courts—like much of society—closed nearly all in-person public activities in March 2020 for an undetermined amount of time. A worldwide outbreak of a previously unknown disease caused by a novel coronavirus capable of killing untold numbers of people required this move. As the spread of COVID-19 slowed in New York, and knowledge about the virus’s characteristics grew, courts began slowly re-opening.

In the interim, much was learned about the mechanics of conducting court proceedings remotely. And some officials and even lawyers began suggesting that criminal courts can and should continue holding certain critical-stage proceedings, such as arraignments, via electronic communications. The New York State Defenders Association (NYSDA) opposes the use of virtual/remote communication for holding non-emergency court proceedings deemed critical stages, and for any proceedings, absent the consent of the person whose case is being heard.

This is not a new position. NYSDA issued a Statement in Opposition to Audio-Visual Arraignments in 2012. Recognizing that employing technology for remote appearances may be appropriate “when nothing of substance will occur in court,” the statement emphasized that remote appearances should be limited to those occasions and should continue to require informed, uncoerced consent by the litigant. The statement pointed out the limitations of electronic “appearances” in which decisions about someone are made without full personal engagement. Nonverbal cues and eye contact are lost. More broadly, having litigants physically appear in court demonstrates that they are the focus of the proceeding and that decisions will be made by an independent judiciary, not prosecutors or law enforcement. And, the statement noted, remote appearances infringe on the right to counsel, requiring difficult choices about client-attorney communications and attorney presence. The statement was noted in the January-May 2020 issue (p. 5) of the Public Defense Backup Center REPORT.

Even prior to its 2012 statement, NYSDA noted the hazards of virtual court proceedings. An item in the September-October 2002 issue of the REPORT noted that “substituting virtual presence for real attendance threatens due process.” It went on, “[c]redibility, demeanor, and the ineffable value of having a judge, lawyers, witnesses and the jury in the same room cannot be fully realized on a television screen.”

NYSDA’s position is not unique. As noted in a 2013 NYSDA blog post, the New York State Office of Indigent Legal Services (ILS) specifically said in its initial Request for Proposals (RFP) for initiatives intended to ensure representation at first court appearances, “Proposals should provide for the physical presence of counsel with the client in court.” That requirement remained in the most recent (2017) RFP. The initiatives being funded stemmed from a decades-long delay in ensuring the right to counsel at first appearance, set out by ILS on its webpage; that history contributes to on-going fears that the right will be eroded by efforts to save time or money, including by a switch to virtual appearances.
That NYSDA’s 2012 statement addressed only arraignments/first appearances stemmed from threatened developments at the time, not from any limitation of the underlying rationale to one type of critical court appearance. And while much has changed in the last eight years, the concerns underlying the 2012 statement have not. In-person, physical presence of the person who is the subject of court proceedings remains vital to ensuring constitutional and human rights. A recent 10-page Statement from the National Association for Public Defense sets out dangers of holding proceedings remotely and steps to take to avoid them—all in the context of honoring an underlying limit on virtual proceedings to situations in which holding them enhances, or avoids a shutdown of, access to justice. Except in times of emergency, when physical presence is literally impossible or when vital interests clash (the need for physical health and safety vs. the need to ensure due process), virtual appearances should not occur at any criminal court proceeding leading to decisions other than those of a ministerial or calendaring nature absent uncoerced and knowing consent. A litigant’s right to appear in person, along with counsel, the decision-maker, and witnesses, should not be abridged.

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