



CHIEF DEFENDERS ASSOCIATION OF NEW YORK

MEMORANDUM IN OPPOSITION TO PERMANENT VIRTUAL ARRAIGNMENTS

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Arraignments commence a criminal proceeding, making them one of the most important court appearances in a criminal case. Persons accused are notified of the substance of charges, enter a not guilty plea, are notified of orders of protection or loss of licensing privileges, and can face potential pre-conviction incarceration. In New York, arraignments have always been live appearances, in Court, with arraigning judges being required to assign counsel. The Hurrell-Harring settlement and statewide expansion provide funding for required in-person counsel at arraignment.

The Governor's Executive Budget correctly points out that, under his leadership, New York Courts were able to quickly and successfully pivot to conducting arraignments in a virtual setting during the court system shutdown necessitated by the COVID crisis. This was a necessary step during a time of an unprecedented health crisis. Unfortunately, the Governor has also stated his intention to render essential in-person arraignments obsolete.

CDANY is calling on the legislature to protect the integrity of the judicial system by requiring that live arraignments return when courts are reopened.

Virtual arraignments deprive the accused of effective assistance of counsel. The personal appearance of counsel is necessary to develop an attorney-client relationship, to foster trust, and to privately obtain information necessary to enable zealous advocacy. Much critical communication is lost when using screens.

Empirical evidence demonstrates that virtual arraignments lead to worse outcomes for the accused. The virtual system proposed by Governor Cuomo was already tried in Cook County, Illinois, where an ill-fated televised arraignment protocol was implemented in 1999. A lawsuit ensued, alleging that the system was unconstitutional and denied arrestees both due process and effective counsel. Bail outcomes of virtual arraignments were

studied as part of the lawsuit, revealing that bail was a staggering 51% higher than it had been before the televised system was implemented. Plaintiff's counsel largely attributed the disparity to the inherent dehumanization of those appearing as defendants in a virtual setting.¹

Virtual arraignments devalue the Constitution and the integrity of the Court process. Chief Judge DiFiore affirmed that virtual arraignments were a temporary, emergency measure, as the law requires arraignments be conducted in person.² Clients are constitutionally entitled to private, privileged conversations with counsel before and during court proceedings, which is not feasible in a virtual setting. A judge's ability to gauge a defendant's mental status and understanding of legal proceedings is also impeded. Also, virtual appearances lack necessary formality and decorum by their very nature.

Virtual arraignments exacerbate the divide between the rich and the poor, creating a Tale of Two Justice Systems: Poor people are far less likely to have access to the resources necessary to make virtual appearances adequate. Poor rural New Yorkers often do not have access to internet at all, and clients living in areas where internet is available may not be able to afford it. Many indigent clients do not have computers or smartphones. With a virtual system in place, a poverty divide is evident in the provision of legal representation--poor clients are more likely to have counsel assigned, and may be unable to meet their attorney until arraignment, whereas people with resources to retain can meet with attorneys beforehand. Therefore, rich clients are afforded attorney-client privilege and better informed advocacy, while poor individuals have impersonal representation, hampered by lack of time and proximity.

Virtual arraignments are less efficient. Pre-COVID, many individuals could be arraigned consecutively, in a single docket. Clients were interviewed privately prior to appearance, counsel assigned, cases heard by judges, and paperwork served and processed. In the virtual system, attorneys must wait for phone lines or virtual rooms to open before speaking to clients. Often, links do not work, or are sent incorrectly or to the wrong person. Internet connections fail, and programs crash. When multiple people speak simultaneously, speakers cannot be heard, making the record inaudible for court reporters and interpreters. Paperwork must be emailed, causing delay and issues with data storage. Clients cannot sign or be served orders of protection. This has culminated in arraignment calendars taking far longer per case than under old

¹ Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869 (2010).
<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>

² See State of New York Office of Indigent Legal Services, "Notification Regarding Representation at an Arraignment," Dec. 2, 2021 (public document, on file with the Chief Defenders Association of New York).

systems. The issue is even more pronounced in counties with Centralized Arraignment Parts in their jails, where deputy sheriffs are forced to act as IT professionals, court clerks, and courtroom security. During the COVID shutdown, there have been far fewer cases requiring arraignment; once courts are fully open, a virtual arraignment system would lead to increasingly bottlenecked calendars.

Virtual arraignments deprive the public of access to the Courts. The Public cannot walk in to a virtual courtroom, and links have to be carefully shared to avoid internet trolls. This results in family and friends being unable to attend arraignments to vouch that their loved one has a place to live, or will be supervised if released.

It is impossible to prevent recording of virtual proceedings. It is currently illegal to record court proceedings without a court order. This is simply impossible to police in the digital sphere, and could lead to permanent recordings on social media and elsewhere on the internet.

Questions? Please contact CDANY Lobbyist Robert Perry at robt.perry@gmail.com or 646-296-5220.