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New York Needs a New Statute Authorizing Virtual Criminal Proceedings

The court system has had great success over the past year in implementing digital proceedings during the pandemic. We are now transitioning to ever-increasing in-person appearances. But allowing for continued remote proceedings is also important.

By **Daniel Conviser** | July 08, 2021



New York City's criminal court started conducting all arraignments by video conferencing in March 2020 to limit traffic in courthouses during the coronavirus outbreak. Judges by and large were given discretion to use technology (<https://www.law.com/nationallawjournal/2020/04/22/courts-in-the-age-of-covid-19/>) to limit in-person courtroom appearances.

Above, a virtual arraignment is conducted at Criminal Court in Manhattan. Photo: New York Unified Court System via AP

On June 24th, 2021, Gov. Andrew Cuomo issued Executive Order 210, which rescinded previous COVID-19 emergency orders impacting the justice system and other subjects, effective the following day. The order was premised on New York's improved COVID-19 metrics and the Governor's view that the emergency authorities he rescinded were no longer necessary.

Executive Order 210 was based on sound reasoning and entirely foreseeable. It has left a void, however, in the legal authority courts have used to support effective virtual criminal proceedings. That void can only be filled through legislation. Enacting such legislation should be among the legislature's priorities when they next convene.

The Criminal Procedure Law presumes that litigants must generally be physically present in court, particularly for important proceedings like pleas, sentences, evidentiary hearings and trials. During the COVID-19 emergency, Executive Orders suspended those requirements. Under Executive Order 202.76, issued on Nov. 19, 2020 and periodically extended since then, criminal proceedings were explicitly authorized to be conducted virtually with the consent of the parties, "including but not limited to bench trials, evidentiary hearings, CPL 440 hearings, and/or probation or parole violation hearings." The elimination of that authority has now forced courts to fall back on two options for continued virtual proceedings, both unsatisfactory: Criminal Procedure Law Article 182 and the doctrine that litigants in criminal cases may be entitled to waive the physical presence requirements of the Criminal Procedure Law.

CPL Article 182

Article 182 of the Criminal Procedure Law authorizes digital appearances under certain conditions with the consent of a defendant. But its provisions are incomplete, problematic and archaic. The statute does not apply to evidentiary hearings or trials. It explicitly prohibits the taking of felony pleas or the imposition of felony sentences and prohibits misdemeanor pleas or sentences which result in additional incarceration. These prohibitions apply even if a defendant consents to a virtual appearance. The statute also only applies in 27 of New York's 62 counties. It thus applies in all five boroughs of New York City, but not, for example, in Nassau County. In one case, the First Department held the statute could be used to allow a defendant to appear remotely for a trial based on the trial court's inherent authority, even though the statute did not literally permit it. But that holding was based only on the "valid and exceptional medical reasons" the defendant was facing in that particular case. *People v. Krieg*, 139 A.D.3d 625, 627 (1st Dep't 2016), lv. denied 28 N.Y.3d 932. In the 35 counties in which Article 182 does not apply, the statute provides no authority to conduct remote proceedings of any kind, even the most routine calendar call.

Article 182 was enacted in 1993. Some of its provisions, moreover, are clearly outdated. The statute, for example, requires the Commission on Cable Television to "inspect, test, and examine" digital systems to ensure they comply with the law's requirements. CPL 182.40(2). The Commission on Cable Television went out of existence on Jan. 1, 1996. See Chapter 83 of the Laws of 1995, §121.

The Waiver Doctrine

There are also good arguments that the Criminal Procedure Law's requirements for in-person appearances can be waived by the mutual consent of the parties. Defendants have been held entitled to waive a large range of rights, many arguably much more significant than the right to be present physically rather than virtually. Thus, defendants can waive the right to a trial (by pleading guilty), the right to a jury trial, the right to appeal, the right to be prosecuted by an indictment, the right to be present when prospective jurors are questioned, the privilege against self-incrimination and the right to be present during a trial at all. See *People v. Spotford*, 85 N.Y.2d 593 (1995) (defendant's waiver of right to be present during trial proceedings); *People v. Betts*, 70 N.Y.2d 289 (1987) (outlining the scope of a testifying defendant's waiver of the privilege against self-incrimination); *People v. Steininger*, 66 Misc.3d 693, 701 (Sup. Ct., NY County 2019) (decision of this court surveying case law on multiple additional waiver issues). Some of these waiver allowances are provided by

the New York State Constitution and statutes. But courts have also held that important rights can be waived in the absence of specific statutory allowances. As the New York Court of Appeals explained in *People v. Seaberg*, 74 N.Y.2d 1, 7 (1989): “[W]here there is no constitutional or statutory mandate and no public policy prohibiting it, an accused may waive any right which he or she enjoys.” (citation omitted).

There are certain rights defendants may not waive, however, such as the right to challenge an illegal sentence or a defendant’s competency to stand trial. *Seaberg*, 74 N.Y.2d at 9 (citations omitted). These prohibitions obviously apply to rights far different than the right to be present for a court appearance in-person rather than remotely. The practical problem with relying on the waiver doctrine regarding in-person appearances today, however, is that we will not likely have a final resolution of the issue by appellate courts for a long time. In the interim, many prosecutors and trial courts are unwilling to risk reliance on waiver principles and are instead requiring in-person appearances, even when the court and the parties would prefer digital proceedings if they were clearly authorized. The issue is further clouded because of the recent rescission of Executive Order authority and the provisions of CPL Article 182 which allow defendants (in some counties) to waive their presence for some appearances but not others.

There are also particular issues that are newly arising with the termination of Executive Order authority in specific jurisdictions or proceedings. For example, counties receiving financial assistance from the state to fund legal services for criminal defendants through the state’s Office of Indigent Legal Services must operate under a plan which ensures “that each criminal defendant who is eligible for publicly funded legal representation is represented by counsel *in person* at his or her arraignment.” Executive Law §832 (4)(a) (emphasis added).

The Simple Solution

These problems could be easily remedied by legislation. The Office of Court Administration’s Criminal Law Advisory Committee, which I chair, proposed such legislation almost a year ago. Our Committee is a group of judges, prosecutors, defense attorneys and a law professor who develop legislative proposals on criminal justice issues which, upon the approval of our Chief Administrative Judge, are submitted to the legislature. Our proposal would allow digital proceedings to be conducted for routine appearances, like calendar calls. It would authorize remote appearances for pleas, sentences, evidentiary hearings and bench trials only with the consent of both parties. The bill would also address an important issue which has arisen in virtual cases by requiring that any digital appearance must provide an appropriate opportunity for confidential attorney-client communications during the proceeding.

The legislature did not act on our proposal and there are a number of policy choices which could reasonably be made in structuring a digital appearance statute. But the need for such an updated statute should not be controversial.

The Benefits of Continued Virtual Proceedings

The court system has had great success over the past year in implementing digital proceedings during the pandemic. We are now transitioning to ever-increasing in-person appearances. But allowing for continued remote proceedings is also important. There are a number of obvious reasons.

Virtual appearances promote efficiency and save money, by eliminating the need for lawyers and defendants to travel to courthouses and for incarcerated defendants to be transported from jails. Remote appearances promote public health, by reducing the extent to which persons must travel to and convene in courthouses. The COVID-19 emergency may be over. But the presence and threat of future COVID-19 variants and the number of people who remain unvaccinated continue to counsel caution.

Given the phased resumption of in-person proceedings there will likely also continue to be cases where litigants will benefit by having a digital appearance which can be scheduled more quickly than an in-person proceeding. Indeed, there will likely continue to be instances where a defendant's liberty interests may be protected by a plea, sentence or hearing which can be conducted sooner through a remote appearance.

There is also much that can be lost when a bench trial, evidentiary hearing, plea or sentence is conducted virtually. That is why the Governor's Executive Orders previously provided and the Criminal Law Advisory Committee's proposed legislation would allow such proceedings only with the mutual consent of the parties. In our adversary system, where the judge, the prosecutor and the defendant all agree that a remote proceeding is preferable, it is difficult to understand why it should not be allowed.

The legislature has enacted monumental changes to our criminal justice system over the past two years. But there are also more mundane issues which deserve legislative attention. Providing clear rules of the road for digital proceedings would improve efficiency, protect public health and enhance the quality of our justice system.

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