NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 PH 518.463.3200 www.nysba.org

MEMORANDUM

To: David Nocenti, Esq., Counsel, New York State Unified Court System, Office of Court Administration

From: The NYSBA Criminal Justice Section

Date: August 10, 2025

Re: Request for comment on the Office of Court Administration's proposed 22 NYCRR § 200.9-a ("Rule 200.9-a")

We are writing in response to the request for comment on the Office of Court Administration's proposed 22 NYCRR § 200.9-a ("Rule 200.9-a"). As the Criminal Justice Section of the New York State Bar Association (CJS), we are judges, prosecutors, and defense attorneys with deep experience practicing in the criminal courts across the state. Our Section brings together these across-the-aisle viewpoints and experiences to collaborate on improvements to the criminal justice system.

With that breadth of experience in mind, CJS empaneled a select subcommittee of defense attorneys and prosecutors to examine the proposed rule, which has been in effect on a temporary basis since July 8th. We also have taken a fresh look at the amendments to Criminal Procedure Law Article182, which were passed as part of the FY26 budget. Following that review, we offer some comments.

To begin, we feel compelled to note some concerns about the amended CPL article 182, which substantially changed the law governing electronic appearances in certain proceedings. We believe that the statute appears unclear regarding several issues including:

- Whether an arraignment may be conducted by electronic appearance in a jurisdiction where the prosecutor is not present;
- How the defendant's opportunity to confer with counsel is accomplished in a virtual setting without breaching confidentiality;
- Who may be present with a witness who is testifying virtually;
- How language interpreters will be provided and participate;
- The definition of "good cause" under CPL § 182.20(1)(c) and (5); and

- How virtual evidentiary hearings can be conducted consistent with standard courtroom procedure and due process.

Additionally, the Legislature may wish to reconsider whether there should be a blanket prohibition on virtual appearances for minors 18 years and younger who are accused of crimes. Permitting virtual appearances in appropriate circumstances would allow these young defendants to attend programs or school rather than travel to court for non-essential appearances.

We also see significant barriers to equitable and consistent implementation across our state. There are 1,200 town and village courts that represent a significant part of our criminal justice system. Those courts, however, might not be equipped with the technology needed to make electronic appearances possible. We are also concerned that in many courts that have equipment and software needed for electronic appearances, the methods used for defense counsel to confer with their clients might not be sufficient to ensure confidentiality. Also, county jail facilities for electronic appearances are monitored by jail staff, usually by having a corrections officer in the same room as the defendant. We recommend that measures be taken to ensure the confidentiality of attorney-client communications. One possible solution might be for county jail facilities to establish testimonial rooms for virtual proceedings similar to those required by CPL Article 65 for vulnerable witnesses.

We are also concerned that there could be unforeseen consequences in applying the new statute and rule to centralized arraignment parts. Of the numerous centralized arraignment parts around the state, many if not all were built upon OCA-approved plans requiring in-person arraignments. The Counsel at First Appearance (CAFA) contracts with the Office of Indigent Legal Services were drafted with the expectation that arraignments would occur in person. These contracts supply a significant amount of the funding for such venues to assist the defense in meeting their constitutional mandates. Courts and stakeholders should carefully consider whether it is possible, consistent with due process, to alter centralized arraignment plans that currently require in-person appearances. Additionally, virtual appearances should not take place in centralized arraignment parts unless there is a reliable procedure for obtaining valid, voluntary consent from a defendant at first appearance to proceed virtually.

We offer our collaboration in the upcoming legislative session to address these issues. In the meantime, we offer the recommendations below for proposed 22 NYCRR § 200.9-a ("Rule 200.9-a").

Rules Governing Consent

We have concerns about proposed Rule § 200.9-a(2)(a), which states simply that the decision whether to consent to a virtual appearance "shall be made by the defendant rather than defense counsel." If the defendant is represented by counsel, the decision should be a collaborative one made by the defendant after a confidential consultation with counsel. We suggest that a model colloquy be developed where the court elicits, on the record, that the defendant has consulted with counsel about the decision to proceed virtually.

We are also concerned that courts may, overtly or tacitly, give the parties the impression that consent to virtual appearances is preferable or expected for virtual proceedings that require consent. We suggest that OCA develop a model colloquy that reminds both parties—the defense and the prosecutor—of their right to an in-court appearance. If virtual appearances become too routine, that could negatively impact attorney-client communications, as defendants will have fewer opportunities to consult in-person with counsel. The rules and model colloquy should ensure that courts respect the parties' choices and their right to an in-person proceeding.

Rules Governing Arraignments

CPL § 182.30(b) requires that any "system for arraignments" must ensure a full and fair opportunity for a defendant "without prejudice" to "choose to have an arraignment conducted with the defendant physically present, rather than through an electronic appearance."

Rule § 200.9-a(4) implicitly recognizes there may be delay if a defendant requests an in-person arraignment. The rule states that if a party does not consent to a virtual arraignment, an on-call judge or backup judge must be made available for an in-person arraignment "within a reasonable time." Although the rule states that there cannot be "undue delay" or "prejudice," we are concerned that the delays might be significant in some jurisdictions and will have the result of effectively coercing consent to virtual arraignments. We believe instead that an on-call judge or backup judge should be available for a "prompt" in-person arraignment.

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. Consultation with the stakeholders identified in section 212(1)(w) is essential, as the proposal could change the CAP plan. In jurisdictions without a CAP, the rule should require consultation with defense providers and prosecutors before submission to the appropriate administrative judge.

Rules Governing Evidentiary Hearings

The rules should ensure that witnesses cannot be coached, coerced, or intimidated in any way during their virtual testimony. OCA should implement procedures to ensure that no such circumstances occur. Courts must also ensure that witnesses are testifying from their personal knowledge and are not consulting notes or reports unless duly directed by the court. Courts should also take appropriate measures to ensure that other witnesses who are not supposed to overhear the testimony cannot access the virtual proceeding. Finally, courts should ensure that virtual proceedings are not recorded without

authorization.

Rules Governing Interpreters

Courts should ensure that a reliable interpreting service is available for those who request an interpreter. Interpreters should be permitted to stop proceedings to clarify what is being said at any point to ensure that the defendant or witness is receiving clear and correct interpretation. If interpretation is needed during a virtual pretrial hearing with testimony, courts should ensure that simultaneous translation is provided, just as it would be during an in-court pretrial proceeding. Interpreters should also be present, as needed and appropriate, for private consultations between attorneys and clients or witnesses.

Thank you for taking the time to consider our observations and recommendations.

David M. Cohn
Chair, Criminal Justice Section