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Improving the Quality of Mandated Representation Throughout the State of New York

Notification Regarding Representation at Arraignment

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On March 7, 2020, Governor Cuomo issued Executive Order 202, Declaring a Disaster Emergency in the State of New York, which acknowledged that the ongoing transmission of COVID-19 is a disaster that requires a coordinated New York State response. Since, he has issued a series of continuing Executive Orders with additional provisions. All these Executive Orders are time-limited emergency measures.

Executive Order 202.1, issued March 12, 2020, includes the following emergency provision regarding arraignments:

Suspensions of law relating to appearances by defendants:

Notwithstanding any other provision of law and except as provided in section 182.30 of Article 182 of the Criminal Procedure Law, the court, in its discretion, may dispense with the personal appearance of the defendant, except an appearance at a hearing or trial, and conduct an electronic appearance in connection with a criminal action pending in any county in New York State, provided that the chief administrator of the courts has authorized the use of electronic appearance due to the outbreak of COVID-19, and the defendant, after consultation with counsel, consents on the record. Such consent shall be required at the commencement of each electronic appearance to such electronic appearance.

This provision was extended with modifications by subsequent Executive Orders. See EO 202.14 (continuing to May 7, 2020); EO 202.28 (continuing to June 6, 2020); EO 202.38 (continuing to July 6, 2020); EO 202.48 (continuing to August 5, 2020 with modifications that allow for limited resumption of in-person arraignments); EO 202.55 (continuing to September 4, 2020); EO 202.60 (continuing to October 4, 2020); EO 202.67 (continuing to Nov. 3, 2020); EO 202.72 (continuing to Dec. 3, 2020).

Currently, depending on the rate of COVID-19 infections and in accord with directives from the Chief Administrative Judge and each Judicial District's Administrative Judge, some arraignments are being conducted in-person, while others are virtual.

The Office of Indigent Legal Services (ILS) has always maintained that representation at arraignment must be in person. The *Hurrell-Harring* Settlement Agreement, paragraph III (A) (1), required New York State to "ensure...that each criminal defendant within the Five Counties who is eligible...is represented by counsel in person at his or her Arraignment." Executive Law § 832(4)(a), enacted in 2017 to extend the *Hurrell-Harring* settlement reforms to the entire state,

likewise requires that each person who is eligible “is represented by counsel in person at his or her arraignment[.]” (emphases added)

Nonetheless, as we noted in a statement issued on March 19, 2020, the current pandemic has required our government to institute unusual, time-limited, emergency measures to protect public health. **It bears emphasizing, however, that conducting arraignments virtually is a temporary, emergency exception to the legal requirements of personal appearance by the defendant, and in person representation by counsel. When virtual arraignments are no longer a public health necessity, justified by a valid Executive Order, in-person arraignments must resume in accordance with CPL §§ 170.10, 180.10, and 182.20, and in-person representation must be provided in compliance with the *Hurrell-Harring Settlement* and Executive Law § 832(4).**

Finally, we remind everyone of two foundational requirements for effective representation at any arraignment, whether virtual or in-person. First, prior to the arraignment, defense counsel must be given all arraignment documentation, including the defendant’s RAP sheet. Second, defense counsel must be given an opportunity to engage in confidential consultation with the defendant in advance of his or her appearance before the court.