

CEJA-JSCA® Working Paper

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# Technology, Criminal Proceedings, Hearings and Oral Trial

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# Technology, Criminal Proceedings, Hearings and Oral Trial

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## I.- Introduction

The Covid-19 pandemic has impacted health, society, economics and daily life in countries around the world and has generated an enormous number of challenges that must be addressed.

Although many countries and justice systems had already introduced mechanisms and technologies to develop electronic judicial work processes and litigation, in the area of justice systems, the levels of restriction of movement and limited interpersonal interaction imposed to contain the pandemic have generated unprecedented difficulties. Hearings and indeed entire proceedings have been postponed and rescheduled, and urgent matters have had to be conducted with significant restrictions in place. In response, legal interpretations have been developed and technological applications have been adapted for that purpose.

The return to normalcy will take time and will happen slowly, and though it will happen at some point, the system will have to process all of the cases that were postponed. This will generate delays and will impact citizens' rights, and that must be observed and addressed.

These delays have even more serious impacts in the area of criminal justice because there are cases in which individuals are detained pending decisions in their cases, defendants who are free while they await a final decision about their particular situations, victims with legitimate demands for resolution and justice in their cases, etc.

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These challenges are even more profound if one observes the mechanisms through which cases are channeled, discussed and resolved in an accusatory and adversarial criminal justice system that uses oral, concentrated and contradictory oral hearings that involve interactions between operators and litigators and among the litigators themselves. This comes in addition to the relationships and connections between litigants and witnesses or experts and among attorneys and their clients. All of this develops in the context of a hearing that is not easy to transfer to an electronic platform so that it can be held remotely (also referred to as virtually).

We also face the danger of causing setbacks in oral and adversarial systems and a return to a logic of asynchronous communication and debate, lack of transparency and lack of oversight of the quality of information due to the introduction of electronic certification solutions. These potentially temporary solutions tend to linger and become part of practice, damaging the foundations of the oral, accusatory and adversarial criminal justice system.

The challenge thus consists of considering and proposing mechanisms that guarantee the fundamental rights and principles of the oral and adversarial criminal justice system and of arriving at an adequate solution for urgent cases as well as those that are delayed due to the conditions imposed by the current context.

This document, which was drafted by judges, academics and experts in technological developments, seeks to provide an initial basis for discussion in order to approach solutions to address the challenges posed by our current situation. It weaves together regulatory aspects, standards and principles with electronic platforms, providing preliminary solutions that we trust will offer tools for improving the justice system's response.

## II.- Problems created by the pandemic in the oral accusatory system

As the CEJA-JSCA<sup>®</sup> report states,<sup>9</sup> in response to the World Health Organization's decision to declare a pandemic, 'nearly all of the judiciaries in Latin America temporarily suspended judicial services and deadlines, maintaining minimal provision of services.' The criminal

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<sup>9</sup>ARELLANO, Jaime et al. CEJA-JSCA (2020). *REPORTE CEJA<sup>®</sup> Estado de la Justicia en América Latina bajo el COVID-19. Medidas generales adoptadas y uso de TICs en procesos judiciales.* Santiago de Chile: Justice Studies Center of the Americas. Accessed online at <https://cejamericas.org/que-hace-ceja/estudios-y-proyectos/estudios-y-proyectos/tecnologia-de-la-informacion-y-comunicaciones-tics/reporte-ceja-estado-de-la-justicia-al/consideraciones-generales-ceja/>. Our translation.

justice system was one of the areas that was considered to be essential. As a result, judicial services had to continue to be provided.<sup>10</sup>

In the area of criminal justice, matters involving imprisonment, adolescent criminal responsibility, gender and domestic violence, crimes against public health, immigration violations, disruption of communications, exploitation of the disaster, habeas corpus, crimes against integrity, public safety and public order, in general, have been given priority. Steps have been taken to continue to hear these matters in person (with restrictions) or virtually, depending on the countries' capacity.<sup>11</sup>

In many countries in Latin America, 'a marked contrast was observed between formal statements about telework (working remotely using technological means) or the use of ICTs<sup>12</sup> and their actual use' (CEJA-JSCA Report, 2020, our translation). As such, the apparent extension of "virtual justice" in the midst of the health crisis is declared by the judiciaries but is not as well-developed, extensive or problem-free as they claim.

Virtual hearings have been used as an alternative given that it is not possible to hold in-person meetings, though unique developments occur in each country. For example, Panama, Costa Rica, Chile, Mexico, the Dominican Republic, Argentina and Colombia have been holding urgent "virtual" hearings. In other words, not all of the parties are present, and the proceedings are held using electronic platforms. The majority of the hearings in accusatory criminal justice systems are held as "videoconferences" using commercial platforms that were not developed to hold judicial hearings. These electronic platforms are mainly used for arrest and detention procedures, arraignment, discussions of protective measures or when the purpose is connected to procuring a benefit of release, or Superior Court Plenary Sessions, among others (CEJA-JSCA Report, 2020).

In other words, accusatory systems have generally developed hearings virtually when production of evidence is not required and the contradictory element can be covered through arguments based on the information contained in the prosecutor's investigation file. As we will see below, even in these simpler scenarios, there have been discussions regarding the best way to hold these "virtual hearings." As such, we cannot focus solely on the technological aspects that are applied to the hearing. Rather, it is necessary to review the way in which it should be managed so that guarantees and standards of accusatory and adversarial due process are respected.

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<sup>10</sup> The CEJA-JSCA® report explains that Panama's judiciary exempted the accusatory criminal justice system from the temporary interruption of judicial services regardless of jurisdiction, matter or type of procedure. As such, it continues to function in its entirety.

<sup>11</sup> See Reporte CEJA: Consideraciones generales de CEJA.

<sup>12</sup> ICTs is the acronym used for Information and Communications Technologies.

In this regard, the CEJA-JSCA Report (2020) indicates that the majority of the instructions or protocols issued by the region's judiciaries did not address or explore aspects linked to the protection of principles and guarantees. Instead, they were more centered on offering solutions that implicitly would allow for adequate respect of the rights and guarantees of the justice system. However, as time has passed, some judiciaries that sought to provide a framework for containment for the judge while balancing principles and guarantees that reflect a context of "normality" with a context that prevents the court from holding in person hearings in the traditional sense.<sup>13</sup>

All of this allows one to preliminarily observe that investigation and intermediate phase hearings have been held more frequently than trial hearings. It is more difficult to use electronic platforms to hold an oral criminal trial hearing (a hearing focused on the provision of evidence) due to the technological difficulties and requirements imposed by guarantees and standards. In these hearings, the focus of the adversarial debate is the content of the records that both parties have and can address without major difficulties.

This set of statements requires the development of ideas and approaches that can serve as the foundation for a more intense and extensive discussion in justice systems. It also requires an analysis of comparative law that weaves together and aligns best practices and solutions that operators and the judicial system have developed to address both the urgent need to resolve cases and the approach to addressing the enormous backlog of cases that this health emergency has generated and will continue to generate.

This approach cannot be solely developed from the perspective of administration, management and technology. It is imperative that we connect temporary solutions to the demands that emerge from the principles that inform the accusatory criminal procedure system. This can expand the discussion to include how a technological solution can meet needs derived from due process, the rights and guarantees of the criminal justice system, and the logics of information quality assessment and measurement that are used as the basis for resolving each dispute.

It is thus important to distinguish between types of hearings, types of debates, the importance and urgency of the matter to be heard, the parties' wishes and other elements. The situation also requires a flexible perspective on addressing the solution and the use of fully remote (or virtual), blended (or hybrid) and in-person hearings depending on the case. The modes chosen often have virtues and advantages that demand that we analyze the

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<sup>13</sup> Mexico has broadly regulated a series of aspects that the judge must consider when conducting a sentencing hearing. Some Argentine processes have done this in the areas of criminal, civil, labor and family justice. (Reporte CEJA, 2020)

elements that may persist over time and become permanent, generating a dialogue and integration process that aligns with the requirements specific to due process.

### III.- Hearings

#### 1.- Initial approaches

As was stated in the previous section, in order to ensure the continuity of the judicial service during exceptional times, two modes or technological tools (ICTs) have been used: telework and videoconferences.

In the case of the first, telework, it has been key to have professional services in the various units that form part of the justice administration system. This ensures that a work culture is imposed that adapts to sudden and profound changes and is capable of implementing computer systems that allow for electronic processing in all jurisdictions and instances. The efficient remote performance of duties would be hard to imagine without the move away from paper files, which were replaced with electronic or virtual ones. This facilitates the use of electronic signatures by judges and electronic request submissions by the parties, the existence of virtual connections with the institutions that work within the judicial system (prosecutor's offices, public defender's offices, police stations, detention centers and jails, youth centers, treatment centers for the mentally ill, the forensic service, etc.), the use of email notifications by operators, installing VPNs on the computers of judges and prosecutors and employees, and the existence of virtual judicial offices that allow the parties to access information about the proceedings in a timely manner.

All of those measures allow judges to continue to rule on the requests submitted by the parties through written instructions. They also use telephonic shifts to facilitate access or reject intrusive measures and early protective measures (in cases of domestic violence and sex crimes).

Furthermore, judicial officials continue to serve the public, the units continue to ensure accountability, the courts keep scheduling hearings and the case units oversee and execute rulings.

For their part, hearings have become the space in which the most important rulings are issued. It is important to recall that the criminal justice system has moved from an inquisitory system to mixed or reformed inquisitory models and then to oral and adversarial accusatory models.

Under the principles of the use of oral and adversarial procedures, immediacy, contradiction, continuity and openness, the accusatory adversarial model sets itself apart

from others precisely because of the way that procedural information is generated and the ways that stakeholders and operators intervene in the various phases and hearings. This system privileges an interactive, equitable, intense and serious mode of analysis that allows the parties to offer arguments and provide evidence for them, allowing their counterparts access to the same information in order to ensure that all parties can monitor it. The accusatory adversarial model also allows those who adjudicate the solution to the case to have a broad perspective. Judges are aware of the claims of each party and challenges to the information that they offer, and can evaluate and weigh its level of reliability, seriousness, quality and sustainability.

The dynamic described above gives life to hearings in the investigation, intermediate and trial phases of the criminal proceedings, allowing the parties to present their perspectives, arguments and information in each of them, which can then be challenged by the opposing party or parties.

This interactive model facilitates oversight and the testing of the quality of the information by the person who must make a decision in the case, leaving aside unsubstantiated, irrelevant and implausible information and that which has limited or no reliability.

The oral and public hearing allows for debate and interaction among the parties in order to achieve the beneficial effect of the same. It ensures that the ideals of immediacy, the use of adversarial procedures, openness, concentration and equal footing are respected.

The hearing thus becomes the privileged space for interaction, discussion and resolution of the case.

It is precisely that hearing that is at the center of the discussion today given the challenges associated with holding it, restrictions on the movement of litigators and operators, rules against large groups of people meeting in closed spaces and the requirement that individuals engage in physical distancing, among other rules.

In this context of prohibitions and restrictions, several countries have begun to hold remote hearings using online videoconferencing platforms that connect judges, prosecutors, defense attorneys and private lawyers in the various hearings that form part of criminal proceedings.

## 2.- Preliminary and sentence execution hearings and remote models for debate

In general, we can state that there is room for the development and implementation of virtual hearings during the investigation, intermediate (preparation for oral trial) and sentencing phases of the criminal proceedings.

Many criminal justice systems have experience in this area. There has been a growing trend to allow certain parties to appear remotely when justified, and this began long before the global pandemic was declared. Noteworthy examples include the preliminary stages of the proceedings and particularly the use of statements offered remotely by defendants in arrest and detention proceedings in countries like the US and Canada and in some Mexican states.

In order to map out these measures, the courts must have processing systems with properly stored audio or video, maintaining a reliable record of everything that has happened, the discussions that have taken place and the decisions that have been made. Of course, the courts must have adequate computer systems and existing digital platforms must be strengthened, including the acquisition of the respective licenses. Steps must be taken to provide all parties with computer solutions that facilitate high quality interaction and fluid communication in real time.

Given that the courts have a more limited ability to offer virtual hearings compared to the level of service that exists when in-person proceedings are possible in their physical spaces, it is clear that the most pressing hearings must be privileged over those that can be rescheduled.

Hearings designed to determine the legality of an arrest and those involving defendants held in pretrial detention are particularly urgent. In addition, the proper steps can be taken to hold hearings on indictments (formalization of the investigation); discussion of protective measures (personal and real) or coercive measures; setting deadlines for, expanding and issuing a warning regarding the closure of the investigation; defendant statements; proceedings in which the defendant incriminates themselves (abbreviated); alternatives to criminal proceedings (conditional suspensions of the proceedings and reparations agreements); sentence oversight and execution; and conditions of detention (review of payments, transfers between prisons, disciplinary actions, healthcare, etc.); arguments regarding guarantee measures; monitoring of measures and treatment in domestic violence and drug cases (hearings with a non-adversarial logic); preparation for oral trial; and all other proceedings that can be developed without seriously impacting the quality of the debate.

Furthermore, only proceedings focused on the legality of arrest, laying of charges, alternative outcomes and self-incrimination procedures require the virtual presence of the

defendant. In the rest, it may be sufficient for the defense attorney to appear. This simplifies matters related to transfers, logistics, etc.

In any case, the possibility of holding hearings in remote contexts is facilitated by the epistemic logic of the structure of the hearing in regard to the inputs that underlie the debate and ruling. The information that sustains the confrontation is more records-based in preliminary and sentencing hearings. Immediacy is not related to the provision of the information (typically a witness) being separate from the person who presents the argument. On the contrary, in these hearings it is the litigator who provides the information directly to the judge regardless of whether it should be based on that which already exists, is already recorded, was verified *ex ante*, etc.

During trials themselves, the information that will serve as a foundation, by contrast, is produced in real time and does not exist prior to the debate. This distinction is essential as a point of departure. The mechanisms of control of information are different during the investigation stage or in cases of abbreviated trials than classic oral trials for this reason. The advantage of this approach is that it allows for distinctions to be made and subtleties to be elucidated more clearly even in the context of trials.

This set of decisions requires the development of reflections around the advantages and limits of the technological system for the holding oral criminal hearings, identifying the critical nodes and the most difficult aspects related to the massive and generalized adoption of these approaches in the era of computer devices for the criminal justice system.

It is important that the judiciary ensure that reasonable guarantees are in place for all parties: a technically adequate digital platform (sound quality, synchronization, elimination or control of frozen or interrupted images), prior access to official records, the opportunity for the defense to conference with defendants in private, proper identification of the parties, openness and transparency and an environment that is not subject to influence.

In addition, technological platforms have an advantage in that they facilitate the inclusion of background information such as images presenting statistics or footage from security cameras or documents that can be viewed simultaneously by all parties, substantially elevating the quality of the information introduced in the debate.

### 3.- Adversarial models and interaction using remote systems: Difficult aspects

Reviewing the performance of the preliminary hearing system (investigation and intermediate phases) and the sentencing stage based on the statements set out above, one

can observe that the aspects that merit special attention when introducing remote interaction systems and that must be maintained at all times are the following:

a.- The opportunity to preserve fluid interaction and especially private interaction between the defense attorney and the defendant or accused. This allows for the adequate provision of information, assessment of procedural options and discussion of needs for intervention during the hearing. These individuals should be able to conference whenever necessary based on these and other aspects.

b.- The opportunity for the defense attorney to access prosecutor's office records to review them, develop a case theory (whether preliminary or definitive), generate spaces for negotiation and intervene in the hearings in an informed manner.

c.-The opportunity for private dialogue and conferences between the prosecutor and defense attorney to evaluate alternative dispute resolution formulae or procedural agreements that may be pertinent to each hearing.

d.- The opportunity to refute the information introduced by the counterpart before the court that is hearing the cause in due time and adequate form.

e.- The opportunity to offer defendant, witness or victim statements as evidence or as evidence produced before the trial under exceptional circumstances.

f.- The opportunity to ensure that the hearings are public, entered into the record and recorded for the purposes of having information available regarding the work conducted during each hearing.

g.- Offering a context that allows the parties to generate procedures that are unique to preliminary and sentencing hearings that can later be resolved by the court without issues of mechanics or timeliness.

h.- When evidence is produced during said hearings, allowing the litigators to use the pertinent oral litigation techniques.

i.- The opportunity for the court to oversee and determine the relevance of the procedures proposed and require that the court maintain the corresponding records, if this is the case, in order to resolve the point being debated.

The actions described above merit being addressed, processed and resolved when a conferencing system or remote interactions are used, ensuring full validity of the principles of immediacy, the use of adversarial procedures and openness.

#### 4.- Possible solutions and approaches to the preceding points

It is necessary to address each of the actions described as essential and inherent to oral and adversarial litigation and to determine which of them can reasonably coexist with remote systems and which present additional challenges that require more intricate solutions.

**a.- The possibility of preserving fluid and private interaction between the defense attorney and the defendant or accused in order to allow for adequate provision of information, assessment of procedural options, discuss when it might be necessary to intervene during the hearing and conferencing when necessary, among other aspects.**

This seems to be, at least in principle, one of the activities that merits special attention and that at the same time can be solved by turning to the following ideas and approaches:

a.1.- Generating systems that allow for private meetings between the defendant or accused and their defense attorney at all times and prior to the respective hearing. This may be managed via phone or videoconference with technological protections in place to prevent others from accessing those conversations. In this case, ZOOM has been used to operationalize those interactions in the virtual context with technological options that allow the “host” to virtually “dismiss” other participants or “leave them in the waiting room” during the conversation between the attorney and the defendant.

In the case of defendants or accused parties who are detained, the judicial system should create protocols that guarantee direct access to the defendant for the defense attorney or videoconferencing with staff and mechanisms in detention centers that control the defendant’s access to the conference, the privacy of those communications in special rooms, and other measures. Failure to engage in these actions is very serious and, given that the right to defense is at play, access to a technical defense and the preparation of defense strategies may result in the uselessness or nullification of the deriving actions.

a.2.- A second aspect that must be guaranteed in the relationship between the defendant or accused and their defense attorney involves ongoing contact and communication, which must be guaranteed at all times during the hearings. The judge must ensure that this basic concept of interaction and advising is respected. This involves developing protocols and technical platforms that facilitate recesses during the hearings so that conversations can be held before decisions are made or to guarantee parallel and ongoing communication between the defendant or accused and their counsel during the discussions and hearings.

We believe that it is important –and this applies to all matters addressed when designing and implementing virtual hearings- to always consider the elements that may be compromised from a procedural perspective of legitimacy and/or validity of actions so that

technological tools are not used in a way that goes against guarantees, using up time and resources related to the effectiveness of the system of challenging any harm that may be caused. While this is valid in general, it is particularly important to highlight it in view of the interactions between attorneys and the clients they defend. Failure to adequately operationalize this point turns it into a space that is particularly vulnerable to matters of procedural validity because it impacts the right to defense both technically and materially. For example, think how sensitive the information presented is in adjudication procedures based on regulated self-incrimination (abbreviated procedures, pre-arranged allegations, etc.). This is also determinant for adequate judicial control of the true voluntary nature and adequate process of informing defendants of the consequences of renouncing their right to an oral trial.

a.3.- The third aspect is more complex than the first two. It involves the opportunity that the defendant always has to testify during any hearing if he or she believes that it is necessary in order to contribute to an adequate defense. The complexities here cover both statements made by the defendant during preliminary hearings and those offered at trial. As we have noted from the outset, epistemic oversight of information is not verified in this case based on that which the parties introduce argumentatively. Rather, it is produced in real time. In this case, the defense attorney must adequately and privately counsel the client with regard to the advantages and disadvantages of this option, examine him or her if necessary and prepare objections for a potential cross-examination by the prosecutor. This procedure and the actions related to it require the availability of a computer platform that allows questions to be asked, objections to be formulated and documents to be presented to the person testifying in order to refresh their memory or draw attention to contradictions. This requires that all parties have the materials needed to develop such actions and that the court be able to make a decision regarding such developments if necessary.

**b.- The opportunity for the defense attorney and complainant to access prosecutor records for the purposes of reviewing them prior to and during the hearing.**

One critical aspect that must be adequately protected is all parties' access to the file, records or dockets related to the prosecution's investigation (except in cases in which legal privacy is justified). This allows them to exercise the right to complement, confront or make use of the information contained in those records in accordance with the relevant procedural rules and the litigation techniques that are applicable to the case.

It is possible to address this requirement by digitizing the texts in question and notifying the parties that they have the right to access them at least 24 hours prior to the hearing. This

will give them the opportunity to review and question the information emanating from those records.

One matter that merits special attention is related to the court's ability to access those records given that, as a general and essential rule of the guarantee system and impartiality, judges are prohibited from reviewing records unless exceptional circumstances require the court to review the text discussed to address a specific development. This would be the case of a dispute over specific content that the parties do not agree on, regarding which there are irreconcilable differences and where the text would allow this to be easily clarified. In these cases, and prior to giving the courts a copy of the specific piece of information under discussion, the party that wishes to benefit from the specific content of the text should be able to present it remotely using the technological means that allow it on a screen for all of the litigants and the court.

**c.- Possibility of private dialogues and conferences between the prosecutor and defense attorney to assess alternative dispute resolution formulae or procedural agreements regarding each hearing.**

Interaction between the litigants and particularly between the prosecutor and defense attorney is essential to any oral and accusatory system. Technical mechanisms should allow for flexibility at all times during the hearing. Litigants should be able to interrupt the proceedings and use a communication channel to negotiate agreements or alternative outcomes or terminate the proceedings after consulting with the defendant or accused and providing information to the victim or complainant if they are present. This will allow them to exercise their right to be heard on the matter when the procedural systems allow it.

Furthermore, such communications must be adequately protected so that they are private and records are eliminated and cannot be used as evidence in future hearings.

**d.- Possibility of offering statements from the defendant or a witness or victim as evidence in the respective hearing or evidence submitted prior to trial where applicable.**

One critical aspect of preliminary hearings –even if it is exceptional (evidence submitted prior to trial or evidence in specific cases) is the opportunity for defendants, witnesses or victims to make statements remotely without there being any obstacles to them being examined and then cross-examined and for such interactions to be managed by the respective court. This procedure involves a protocol that addresses at least the following:

1. Swearing in, privileging the greater formality and seriousness of the proceedings;
2. Adequate custody and safety of the witnesses and experts who will testify;

3. Identification of the individuals who will make statements;
4. Physical environment in which the witnesses will make statements, in order to avoid undue pressure or duress. Here it is important to review the way in which technological platforms allow for a clearer and more global view of the speaker, allowing their gestures and movements of their mouth, eyes and hands to be captured. In addition, it is possible to check the environment to ensure that he or she is not reading statements prepared in advance or being influenced in any way.
5. Mechanisms for conducting examinations and presenting material evidence for review and validation;
6. Procedures for guaranteeing adequate cross-examination of the witness; and
7. Mechanisms for confronting the witness using prior statements.

**e.- Possibility of addressing when and how information is introduced by the counterpart to the court that hears the case.**

Another aspect that is important to protect is related to ensuring that litigants are always in a position to review and address any information that the other parties seek to use or present during hearings. To this end, there should be a protocol in place and technical platform that allows texts and documents to be introduced, presented on the screen, reviewed and addressed by the other parties.

**f.- Possibility of a private conference between the prosecutor/complainant and defense attorney before the judge in the case to present arguments and resolve disagreements.**

This is especially important in the case of objections that would make the tool of objection lose its meaning if posed in front of the witness (such as leading questions), thus addressing an obstacle that is frequently observed during in-person trials.

#### IV. Proposal for minimum criteria for oral criminal trials in the context of the Covid-19 health crisis

The migration to virtual or remote systems presents the greatest challenges in regard to oral criminal trials.

The reasons for this include:

- a. In many countries, trials are held before more judges and there are thus more judges involved in the adjudication of the case (particularly in countries with collegiate tribunals for ordinary jurisdictions or cases involving crimes that carry longer sentences);
- b. Larger number of parties (particularly under legislation that allows the complainant to participate);
- c. Presentation of evidence consisting of statements, documents and objects;
- d. The issue of attorney-client communication during the trial, particularly if they are not in the same location;
- e. Greater interaction between the litigants and judges deriving from the disagreements to be resolved by the court;
- f. Challenges linked to witness and expert examination and cross-examination, particularly when objections are to be made to questions formulated by opposing counsel;
- g. Importance and consequences of court decisions when the case is adjudicated;
- h. Simultaneous use of records or documents, mechanisms for calling evidence into question, mechanisms for refreshing one's memory or those to be used to elucidate contradictions;
- i. Need to incorporate material evidence;
- j. Longer duration of the hearing as a result of difficulties producing evidence and debate (potentially full days or several days/weeks).

All of this means that moving from the in-person format to a virtual or remote trial, or even a hybrid or blended one, should be handled with greater rigor and should be subject to more requirements.

This is particularly important given that, as we have said, there are various procedural rights that must be satisfied in order to guarantee a fair trial, adequately respecting the principle of contradiction, ensuring control and that the evidence presented by opposing council is challenged, allowing for the satisfaction of the fundamental right inherent in this instance

and using the methodological instrument that ensures the search for the truth during trial. It is also important because the trial is meant to satisfy the principle of immediacy so that judges can use their senses to consider the information that comes from the source directly, without intermediaries, where it is recorded or from its origin. The goal is to avoid any interpretive filters that are unique and essential to the source of the evidence in question.

Considering these elements, it is possible to share the following approaches and recommendations in order to address the matter of holding oral trials during times of health restrictions:

### 1.- Rescheduling of criminal trials

One measure that justice systems have adopted in response to the pandemic is rescheduling<sup>14</sup> criminal trials based on the urgency and nature of each specific case.<sup>15</sup>

In regard to this point, and based on a review available evidence,<sup>16</sup> it seems reasonable to set the following criteria for rescheduling:

- a. Simple rescheduling: Trials in which the defendant is not held in pretrial custody, under house arrest or subject to other limitations on their freedom.
- b. Rescheduling with an agreement: Both parties consent to use technology to hold the trial and the court authorizes it. The defendant must expressly state that they have been informed of their options including their right to a trial and accept the agreement. In other words, they must indicate that they are exercising their option to have a virtual or hybrid trial, as the case may be, at the earliest possible date.<sup>17</sup>

We generally share the opinion that if the date for holding the trial in person approaches and the court determines that it will not be able to hold it in that mode on the date in question, the parties must be called and the court must work with them to agree on the mode to be used (simple rescheduling or rescheduling with an agreement to hold a virtual or hybrid trial).

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<sup>14</sup> We define rescheduling as the court's decision to set a new date and time for the verification of the hearing, which is communicated to the parties involved in accordance with the law.

<sup>15</sup> Several Latin American countries report that they have rescheduled hearings, but they were simply suspended or postponed, meaning that a new date and time was not set. This leads to significant levels of uncertainty and involves leaving the task of scheduling a new date to the discretion of the court. (See "*Reporte CEJA sobre el estado de la Justicia en América Latina bajo Covid-19*").

<sup>16</sup> See the shared protocol for a safe return to oral courts in Santiago and Colina developed by the Chief Justices of the Oral Criminal Trial Courts of Santiago and Colina, Chile (22/05/2020).

<sup>17</sup> See criteria for holding virtual or hybrid trials.

## 2.- Urgent in-person criminal trials

In this regard, and given the restrictions inherent to the pandemic such as the use of masks, physical distancing, sanitizing spaces and other practices, a rigorous evaluation must be conducted of the cases that cannot be postponed and must be held with at least a marked in-person proceeding.

Some criteria that can serve to guide this judicial decision are:

- a. Cases in which the defendant is in pretrial detention and that involve the submission of complex evidence involving witnesses and/or experts based on a pretrial coordination hearing.
- b. Cases in which the defendant is under house arrest or subject to another type of limit on freedom that involve the submission of complex evidence involving witnesses and/or experts based on a pretrial coordination hearing.
- c. Cases in which there are victims who require prompt resolution of the case (such as domestic violence cases).

These trials have an entity that requires that they be held urgently and preferably in person or at least with specific protections that provide the strictest compliance with the procedural rights of all of the parties.

In these cases, we suggest following these guidelines:

- a. Use of mechanisms for controlling access to the courts when necessary in order to verify compliance with health guidelines (serological evidence that a person tested negative for Covid-19, use of masks, thermometers, verification that the individuals are not under quarantine after testing positive for Covid-19);
- b. Only judges, litigators, the accused, witnesses, experts and officials who are deemed essential to the development of this specific hearing should be admitted;
- c. The public should be prohibited from entering the court, though the hearings may be transmitted using available technological media in order to ensure that the proceedings are public;
- d. The press should be prohibited from entering the court, though the hearings may be transmitted using available technological media in order to ensure that the proceedings are public. The proceedings could be observed by journalists in adjacent rooms and they could then meet with the litigators at the end of each day of the trial;

- e. Adequate use of the physical space of the hearing room, allowing for physical distance between the parties but without restricting procedural rights, particularly that of reviewing the evidence presented by the opposing party, confronting the person testifying through the use of prior statements, refreshing their memory, and presenting material evidence. This does not apply to cases in which the protections established by the health officials are taken to allow for closer interaction. One must distinguish between a witness who is in the courtroom without attorneys (which could be handled by a court official on an ad-hoc basis who must comply with these submissions of documents or objects that are presented to the person offering a statement) or if the witness and the professionals are not in the courtroom (a contiguous room can be outfitted or a location agreed to by the litigants with the court's approval).
- f. Adequate use of the physical space in hallways and waiting rooms (ensuring physical distance between everyone called to attend the trial with the aforementioned safeguards).

### 3.- Criminal trials which, by their nature or by virtue of agreement of the parties, can be held virtually or remotely or using a hybrid or blended approach

There are trials which can be partially or fully likened to investigation phase hearings due to the nature of the elements discussed or the evidence to be presented. We are referring to trials (or sections of the hearing that comprises it) that focus on the examination of records and in which the parties discuss regulatory or dogmatic aspects.

We should clarify that, regardless of the nature of the debate or evidence to be presented and the agreement of the parties, along with the express and informed acquiescence of the accused, the court is responsible for holding a "coordination hearing" when the decision is made to schedule a virtual or hybrid trial to replace an in-person proceeding. This allows the parties and the judge to meet to set the guidelines and discuss the elements that such a move involves.

In order to determine the type of trial that can be developed virtually or remotely or using a hybrid or blended mechanism, we think that the following criteria could be followed:

- a. Scheduling virtual or remote trials in cases in which there is solely documentary evidence and a very limited number of witnesses, and in which the protections necessary to maximize the fulfillment of all parties' procedural rights have been

adopted in advance. This is to be conducted in accordance with the agreements made in the coordination hearing, and the application of sentences that do not involve depriving the defendant of their freedom is not anticipated;

- b. Scheduling virtual or remote trials in cases in which the discussion is focused on legal and regulatory variables associated with the applicable sentence. This is also the case of the hearing during which the ruling is read and sentencing is determined after a trial, which may be entirely in-person given the characteristics of the discussion and evidence to be presented;
- c. Scheduling completely virtual or remote trials in cases in which both parties agree to this option and the court authorizes it. The defendant must make an express statement to the effect that they accept the agreement and recognize their right to an in-person trial and have been properly informed;
- d. Scheduling hybrid or blended trials in cases in which both parties agree to this decision and the court authorizes it. The defendant must make an express and informed statement that they accept the agreement and recognize their right to an in-person trial. These hybrid trials may take on several modes, including:
  - i. With the presence of the court, the accused and/or prosecutors, public defenders or private defense lawyers, in which witnesses and/or experts may offer statements using an electronic platform;
  - ii. With the presence of some parties in the court and others participating via an electronic platform. In this case, the possible combinations are endless as long as adequate steps are taken to ensure that the procedural rights of all of the parties to the trial are protected.

#### 4.- Virtual or hybrid criminal trials scheduled against the wishes of the defense at the request of the prosecutor's office

During the current stage of the health crisis, the judiciary may be confronted with scenarios that do not align with any prior hypotheses and in which it is not advisable to delay the criminal trial.<sup>18</sup> This may include a trial that includes complex debate, extensive evidence and multiple witnesses and/or experts and in which the defense does not agree to an option other than an in-person trial.

Here it is important to note that many of the rules that currently regulate the way in which evidence is produced and litigators act at oral trial are not naturally designed for the

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<sup>18</sup> Consider, for example, the case of the trial involving the police officer accused of murdering George Floyd in Minneapolis, Minnesota in May 2020.

exceptional situation that we are experiencing. The situation described must necessarily pose the need for the jurisdiction to make an effort to engage in a systematic interpretation of the procedural rules in terms that are consistent with procedural principles and guarantees. As such, it is not a question of sacrificing guarantees in order to protect the right to health, because in that case the only possible response would be to categorically state that the trial cannot be verified virtually. This would indefinitely paralyze the continuity of service until the health situation allows for in-person proceedings to be conducted. It would also mean the opposite: compromising its validity by verifying everything and partially “sacrificing,” for example, the right to defense or another guarantee.

In that sense, we understand that the judge must systematically interpret the rules in terms that are compatible with the nucleus of procedural guarantees at play, protecting the use of technological tools in the development of all or part of a trial that allows for adequate deployment of the exercise of procedural rights and guarantees. This would also allow for adequate epistemic control of the quality of the information that is to be admitted at trial.

These decisions seek to adjust the guarantees and make them compatible with the use of virtual tools, and do not involve sacrificing them or tempering them in exchange for satisfying other interests. This also at least partially dilutes the risk of rulings being appealed to the IACHR.

We thus believe that it is important to provide a series of criteria that the judge can consider when resolving this by weighing the elements. It can guide them when it comes time to resolve some of these arguments:

1. The defendant’s right to be informed in clear and precise terms: The accused must be heard in this instance to learn what their opinion is of the mode that will be used for the hearing at which they will be judged. He or she will also weigh the options, particularly if they are held in pretrial detention.
2. The use of adversarial proceedings is inherent to the essence of the oral hearings system, as is immediacy. It is not enough to provide technological elements. Real efforts must be made to analyze the possibility that immediacy and the use of adversarial proceedings will be missing from a virtual or blended hearing.
3. The judge must be able to engage in a concrete analysis of the possibility of ensuring that adversarial mechanisms are used that are similar to the ones that would be included in an in-person hearing. It is not enough to ensure the right to a fair trial.

One must consider whether confrontation can be verified based on the specific case, the evidence offered, and the nature of the crime.

4. One variable that must be considered to identify the best option is the likely harm that repeatedly rescheduling hearings may have, affecting the reasonableness of the timeframe for the criminal proceedings. The use of virtual or blended procedures may help avoid further delays.

Furthermore, some procedural systems allow witnesses and experts who could not testify at trial due to serious and qualified reasons to do so via videoconference.

This tends to be based on the same hypothesis used to address the obstacles to appearing in person at trial due to the health emergency. It is a serious reason and one that is difficult to dismiss. However, lawmakers have decided that it should not impede the provision of that information to the judge or the development of the trial. This mode of providing witness and expert testimony can thus be authorized by the court after one of the parties proposes that this step be taken during the pretrial hearing.

It therefore does not seem unreasonable to extend the same solution to a hypothesis of a general impediment to in-person court appearances by the parties to the hearing due to the health crisis, danger to individuals' health and, in some cases, the existence of a quarantine in the places where judges, parties or witnesses and experts live or where the court is located.

Given these circumstances, if the prosecution asks that a virtual trial be scheduled, the court may rule, for example, that witnesses and experts testify via videoconference following the steps outlined in the section below, even if the defense does not agree.

In any case, along with outlining the circumstances and providing a basis for the decision that this particular trial be held remotely, we believe that the court should encourage the use of the alternative mode –hybrid or virtual trials- that best allows for the effective and efficient development of the trial. It should also have the least possible impact on allowing judges and parties to have adequate and sufficient access to testimony, expert statements and the production of other evidentiary information in accordance with the principles that allow the fulfillment of all of the respective procedural powers and rights to be maximized, thus guaranteeing that a fair trial will be held.

## 5.- Practical aspects to consider in the organization of virtual or hybrid trials with regard to this last aspect

Holding trials virtually or remotely requires that a set of important variables be addressed, including the following:

- a. Regulating inter-institutional protocols for action or at least judicial protocols.
- b. Regulating the use of videoconferences in order to guarantee standardization and uniformity of procedures and processes among the parties. We recommend choosing a single system or platform for judiciary videoconferencing so that participants (judges, attorneys, support staff and others) can be trained in the adequate use of the platform. Similarly, continuous use of a single platform will generate familiarity and expertise, reducing wait times for achieving certain functions and increasing the efficiency of the processes.
- c. Protecting the confidentiality of the access links and codes for the hearings and restricting their dissemination as part of a policy. Videoconferencing platforms should generate unique access links that can only be used once. This reduces the likelihood that anyone who is not part of that proceeding can intervene. These steps are particularly critical when the link is shared with members of the press. Participants should avoid distributing the links or connection information.
- d. Creating mechanisms for controlling access and monitoring through prior registration and user authentication when someone accesses the hearing in order to ensure that only authorized participants have access.
- e. Generating separate virtual rooms for private conferences between the accused and defense counsel or between the prosecutor and victims. These spaces may also be used for arguments and decisions regarding objections that cannot be heard by a witness or expert (sidebar conferences). This can be achieved using a single videoconferencing platform or by using other platforms, including smartphones with videoconference applications.
- f. Creating procedures that will provide initial protection with connection tests to ensure feasibility and compatibility and avoid interruptions prior to the beginning of the hearing. In order to ensure that the processes are efficient and effective, minimum connectivity requirements must be set for each participant, particularly band width.
- g. Verifying the conditions of the location and environment in which the accused, witnesses and experts will testify in order to ensure that variables of reliability and security are adequately protected and avoid pressure or improper contact between witnesses, experts and litigators.

- h. Providing access to hearings to the press and the general public in order to guarantee the transparency of the proceedings. This access will be given to the public through mechanisms external to the videoconferencing platform such as Facebook Live or YouTube Live. This must not compromise the integrity of the videoconferencing platform used to conduct the hearing itself. The public can also be given access using asynchronous methods such as storing images or videos of the trials digitally so that the general public can have access at a later date.

The aspects that must be regulated with special care include:

1. Reviewing and approving the place in which the witnesses or experts will testify. This location may be specialized rooms in the courthouse, another court close to the person's home or any space that ensures that the person testifying is identified by a certifying officer or the court.
2. Reviewing mechanisms that will allow for the formalities of verifying the identity of the witness and/or experts to be completed and swearing in prior to questioning. The identification should be completed using their identify document, unique password or other information maintained by the Civil Registry Service<sup>19</sup> in accordance with the guidance provided by national officials. The witness or expert must be warned that identity theft or misrepresentation is a crime, as is the provision of false testimony.
3. Taking steps to ensure that the person testifying is not receiving support or information about what has happened in the hearing when they testify remotely. After they are sworn in and identified they should be warned about the criminal conduct in which anyone who uses, receives or provides information improperly engages regardless of the means or platform used.
4. Creating a protocol to regulate mechanisms for resolving disputes by the litigators and the court, particularly in regard to objections, which will require instant, uninterrupted communication and the opportunity to silence the communication of the person offering testimony while the incident is discussed.
5. Guaranteeing that there will be private and strictly confidential communication between the accused and their defense counsel as an expression of their right to confront the evidence regarding the charges.
6. Verifying and ensuring the use of litigation techniques such as refreshing memory, confronting with prior statements, offering new evidence and evidence on the evidence, and introducing material and documentary evidence.

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<sup>19</sup> Similar to the questions asked of individuals who obtain financial reports online.

7. In general, ensuring that judges and litigating parties have adequate and sufficient access to testimonies, expert statements and the production of other evidentiary information in accordance with the principles that maximize the exercise of all of the respective procedural powers and rights, thus guaranteeing that a fair trial is held.

#### 6.- Coordination hearing for the virtual or hybrid oral trial

The purpose of the coordination hearing prior to the virtual or hybrid oral trial is to establish and explain how the hearing will be held, including the discussion of and agreements regarding the following points:

- a. Minimum technical requirements based on applicable protocols;
- b. Identifying the evidence to be presented in person and the evidence to be presented virtually;
- c. Determining where the witnesses who will testify virtually will be located in order to ensure that sanitary and procedural regulations are followed;
- d. Familiarizing the parties with regulations that apply to hybrid hearings (swearing in, location and framing of cameras and situations such as loss of audio and/or video signal);
- e. The presentation of objections to any decision that the judge may make regarding the aforementioned matters; and
- f. Any other matter that may impart the way in which the hearing will be carried out.

This hearing occurs before the criminal oral trial court. It is not a hearing designed to prepare for the trial during which the admission or exclusion of evidence to be considered is discussed, nor does it cover other legal matters. The admissibility discussion should have been conducted previously before a different court. In Latin America, this generally takes place before the guarantee or oversight court or tribunal that has jurisdiction over the substantiation of pretrial hearings.

The administrative nature of the coordination hearing and the fact that it does not include legal debate clearly does not prevent the judge from presiding over these proceedings. They must constantly consider the parties' procedural rights in order to weigh and find the best way of facilitating the decision to hold an oral trial using a virtual or hybrid mode, under adequate conditions given the health crisis, and in a manner that always protects the guarantees and standards of the accusatory adversarial proceedings.

This same coordination will occur prior to or at the beginning of pretrial hearings, in this case before the same guarantee or oversight court. This coordination must occur under the

circumstances in which the court determines that the participants do not have experience using the virtual or hybrid hearing mode, that the complexity of the issues to be discussed merits such a decision or at the request of any of the parties to the case.<sup>20</sup>

## V.- Conclusions

1.- Imparting criminal justice through accusatory and adversarial systems in accordance with the principles of the use of oral and adversarial procedures, immediacy, and openness has been seriously impacted by the pandemic that is affecting our society. It has been particularly difficult to rethink the way in which the various hearings that comprise criminal proceedings must be conducted, including preliminary hearings, oral trial and sentencing hearings.

2.- The mechanisms and technologies that had been implemented in Latin America for internal work in the courts and electronic processing have not been sufficient to meet the demand for criminal justice.

3.- There is a need for an informed discussion that addresses the dynamic of holding oral hearings in the criminal trial system in order to provide the necessary protection of the health of the individuals who have to participate in them and unrestricted respect for the procedural guarantees that comprise due process, which must be present in criminal proceedings that reflect the rule of law.

4.- Timely criminal justice that is respectful of both the adversarial dynamic and the guarantees necessary to ensure that justice is imparted with full respect for the rights and guarantees of those involved in criminal proceedings are an inescapable democratic imperative.

5.- When addressing an extraordinary situation like the one that we face with this pandemic, special care must be taken not to give in to the temptation to revive the practices that were used under inquisitory systems, which would mean taking a step back in the criminal justice system reform processes that began a few decades ago.

6.- It is thus necessary to take on the complex task of discussing and offering proposals for addressing the complex situation that the criminal justice system is facing during these difficult and uncertain times. Defendants demand hearings in which they can exercise their

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<sup>20</sup>An eventual discussion of presenting evidence in specific and exceptional cases during preliminary hearings in which this is allowed under local legislation must follow the same guidelines that we propose for the coordination of the oral trial hearing.

right to address the charges in a timely and efficient manner. For their part, victims need a system that addresses their demands for justice and reparations. And society as a whole demands a justice system that will not become paralyzed and that contributes to building social peace.

7.- The need for physical distancing and imperative that the system protect citizens' health require the legal world to rethink how criminal justice is imparted in adversarial accusatory systems. It must make the necessary distinctions to ensure due respect for the principles that inform the discussion that oral hearings propose in every criminal proceeding, preliminary hearing, trial and sentencing hearing.

8.- Beyond establishing the technological and computer criteria and pertinent health-related measures necessary to address the task of implementing mechanisms that are not necessarily required to hold the various hearings in the criminal process, certain parameters or criteria must be set when deciding in which contexts the system can move towards virtual hearings and in which the logic of in-person hearings must be preserved.

9.- Basically, the text proposes that we distinguish between preliminary hearings and oral trial. The former are generally characterized by the presentation of oral arguments mainly based on the content of the prosecution's folder or docket with no evidence produced by the litigators, which facilitates the implementation of virtual mechanisms. In the case of the latter, the standards of hearing and ruling centered on the production of evidence under conditions of immediacy and through adversarial proceedings require that the courts establish various parameters and criteria for determining the best way to develop them (in person, through a hybrid or blended mechanism or remotely).

10.- In the case of pretrial hearings, the authors recommend implementing remote hearing mechanisms that ensure that adversarial discussions are held between the parties so that rulings are based on quality information through interactive technologies and reliable and comprehensive records.

There is a need to prioritize scheduling and holding hearings that are considered necessary, such as those designed to ensure that an arrest was legal or those related to discussions of the use of pretrial detention or other high intensity personal protective measures over those that can be delayed and rescheduled. The basic criterion to consider is that holding them not impact the quality of the debate and that it is possible to ensure the presence of the defendant, where applicable, and/or ongoing and effective communication with their defense attorney.

It is important to consider the possibility that evidence be presented only exceptionally during preliminary hearings or that the defendant testify before the judge who oversees

the investigation. In that case, the authors propose the minimum conditions that must be met to receive such evidence remotely, ensuring immediacy, the use of oral procedures and the opportunity to monitor the evidence in the context of the formality of a submission of evidence.

Furthermore, we propose that steps be taken to control access to the information contained in the investigative file or docket prepared by the prosecutor's office for the defense and the parties where provided by procedural legislation, and to facilitate spaces of dialogue and private negotiation among the parties.

11.- In the case of oral trial hearings, due to complexities associated with holding them remotely, which include the presence of a collegiate tribunal, larger number of participants, incorporation of evidence comprised of witness and expert statements that must be simultaneously linked to objects or documents, duration of the hearing and the seriousness of the sentences that could be imposed, the authors propose various criteria to be considered when determining the mode of oral trial that is most appropriate for the specificities of the case to be tried and the principles inherent to oral adversarial trial. Based on the criteria laid out in the document, which are not meant to be the only criteria considered in decision-making processes, the authors suggest that various options could be adopted, such as rescheduling, in-person trial, virtual trial or intermediate options combining elements of both.

The document highlights informed decision-making by the defendant on the advice of counsel and considers the hypothesis that the oral court, weighing the interests at play, at least the right to defense, need for the justice system to remain operational in extraordinary circumstances and consideration of the health emergency that is impacting us, could make a well-founded decision to hold a virtual or blended trial even if the defense opposes it.

12.- The text proposes the considerations of guarantees and technological concerns that are necessary for successfully executing virtual or blended trials. It also presents operational considerations that make it feasible to hold those trials in a context characterized by exceptional circumstances while respecting the guiding principles and guarantees of an oral trial that can generate tested and quality information for judicial decision-making.

13.- A coordination hearing must take place before the court that will hear the oral trial. Introducing this step does not require legislative reform. The goal is for the court –prior to the debate between the parties and considering all of the principles at play and the specificities of the case to be heard- to determine the most effective mode for the case. The court may decide that that specific case should be rescheduled or held in person, using a blended approach or virtually.

14.- This text is meant to serve as a tool that illustrates the necessary discussion that must be held in doctrine and among the various criminal justice system operators regarding how to configure the indispensable functionality of the criminal justice system in contexts in which its guiding principles are impacted by external situations. These situations force us to seek out innovative solutions that allow the system to protect the health of all individuals who participate in the criminal proceedings and to avoid disproportionately impacting the principles, rights and guarantees that have been shaped as the foundation of the adversarial and accusatory process that reflects the rule of law that exists today in Latin America. This is nothing other than a reflection of the progress that our continent has made in the explicit recognition of the rights and guarantees of the citizens who are involved in criminal proceedings.