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Electronic Trial At The Supreme Court: Needs, Challenges And Arrangement

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ABSTRACT

Purpose of thestudy: *This study aims to find out about the current needs, challenges, and arragment for The Electronic Trial at The Supreme Courts. The implementation of e-court that has been running so far still causes problems, so it needs an in-depth study.*

Methodology: In this research, the method used was normative juridical using a statutory and conceptual approach.

Results: *The result of this study conclude that: first, the factual needs of the implementation of electronic trials in Indonesia cannot be separated from the social transformation that occurs in Indonesian society itself. Second, the general challenge in the implementation of electronic trials, which are trials and verdicts pronounced in court hearings that are open to the public or in public, is one part that is inseparable from the principle of fair trial. Third, the regulations related to the public trial should start from the preparation of PERMA that must obey the principle and with laws that are hierarchically higher than PERMA.*

Applications of this study: *This research is expected to identify the challenges posed in electronic courts, and provide policy recommendations on the regulation of electronic courts in Indonesia.*

Novelty/ Orginalty of this study: *Changes to the Law on Judicial Power must be formulated first in order to facilitate electronic court process services in the current digital era. Then, the existing PERMA needs to be adjusted to the principles of the principle of a trial open to the public in order to prevent conflicts with the laws and regulations on it.*

Keywords: *Eletronic Trial, Supreme Court, Fair Trial, Principle of the Openess to the Public*

INTRODUCTION

Article 18 of Law Number 48 of 2009 concerning Judicial Power (hereinafter referred to as the Law on Judicial Power) states that the judicial power is enacted by a Supreme Court and judicial bodies under it in the general judicial environment, religious justice environment, military justice environment, state administrative justice environment, and by a Constitutional Court (*Mahkaham Konstitusi*) in the enforcement of the judicial power of the Supreme Court (*Mahkamah Agung*) as the highest state court, who oversees all judicial environments in Indonesia in accordance with Article 18 of the Law on Judicial Power.

The Supreme Court as the highest court frequently moving dynamically with the times in the era of digitization becomes the main concern of the Supreme Court. One of the embodiments is to enact a Case Search Information System in the District Court known as *Sistem Informasi Penelusuran Perkara* (SIPP) then to create a trial that was once conventional into a trial digitally and online.

The online trial began due to Supreme Court Regulation No. 3 of 2018 on the Administration of Cases in Court Electronically then updated to Supreme Court Regulation No. 1 of 2019 concerning the Administration of Cases and Trials in the Court Electronically (PERMA No. 1 of 2019) by adding a new feature called E-Litigation.

E-Litigation is one of the advanced features possessed by the Supreme Court from previous features encompassing online case registration (E-Filling), online case payment (E-Skum), online summons (E-Summons) and online payment (E-Payment). The four features owned by the Supreme Court are as an integral part of the master program named E-Court (Electronic Court) which is based on PERMA No. 1 of 2019. Based on the Supreme Court Decree No. 129/KMA/SK/VIII/2019, not all cases in the Court can be performed on an E-Litigation basis, but only limitedly applied to cases with the classification of Lawsuits, Simple Lawsuits, and Objections to Applications (Hukum Online, 2019).

Article 1 Paragraph (4) of Law No. 1 of 2019 on the Administration of Cases and Trials in Court Electronically explains that E-Litigation can be employed by all litigated parties under certain conditions. E-Litigation users can be divided into 2 (two) groups, first is Registered Users and second is Other Users. Registered Users are advocates who qualify as users of the court information system with rights and obligations regulated by the Supreme Court (advocates who have registered their accounts and have been verified by the relevant High Court). Other Users are legal subjects other than advocates who are qualified to perform

the court information system with rights and obligations regulated by the Supreme Court encompassing the State Attorney, Government Law Bureau/TNI (Indonesian National Army)/POLRI (Indonesian Republic Policeman), the Indonesian Prosecutor's Office, Directors/Administrators or employees appointed by legal entities (in-house lawyers), incidental power determined by law (Article 1 Paragraph (5) of Law No. 1 of 2019 concerning the Administration of Cases and Trials in Court Electronically).

The Supreme Court issued a Circular Letter of the Supreme Court No. 1 of 2020 on Guidelines for the Implementation of Duties during the Prevention of the Spread of Corona Virus Disease 2019 (Covid-19) in the Environment of the Supreme Court and judicial bodies under it (SEMA No. 1 of 2020) to deal with the situation of the Covid-19 pandemic in Indonesia. In SEMA No. 1 of 2020, the Supreme Court regulates restrictions in the implementation of the trial, among others with the provisions of:

1. The postponement of the trial and restrictions on the visitors of the hearing are the authority of the Judges to determine;
2. The Panel of Judges may limit the number and safe distance between visitors to the hearing (social distancing);
3. Justice seekers are encouraged to utilize e-litigation applications for civil, religious civil and state administrative proceedings.

Covid-19 is participating in accelerating the digitization of the electronic justice system in Indonesia. Trials during the Covid-19 pandemic almost 80% (eighty percents) using digital platforms, until the pronouncement of the verdict in some courts is notified through the digital platform e-court which in this case, is merely known by the litigated parties but not known to the public.

The main issue in this investigation is actually to cover the need for the fulfillment of the conference based on the general principle implemented in the conference, which is the principle of openness to the public even though it is organized through a system based on technology and information with all its limitations. It is because the consequences that must be borne if the principle is not fulfilled based on applicable laws and regulations are null and void.

However, as mentioned above, the implementation of e-court that has been open so far still causes problems on various fronts, ranging from common problems that grip the examination, to technical problems that sometimes occur, such as the inaudible what the parties read, to the examination of evidence tools that are also constrained by technical such as image quality. Furthermore, when talking in areas that signal to communicate via online is not adequate, it will certainly potentially violate the principle of openness to the public embraced by civil event law in Indonesia.

With the constraints as mentioned in the details of paragraphs above, in the future, this study will also discuss the extent of the benchmark of the openness principle to the public that has been fulfilled, or has not been fulfilled which results will be a recommendation whether or not the renewal of existing laws or regulations is required.

RESEARCH METHOD

This is a normative legal research by using a statutory and conceptual approach. This research used secondary data. The collected data were analyzed qualitatively to answers the problem formulation under study by drawing conclusions using both induced and deductive reasoning, namely from specific/particular reasoning to general reasoning, and vice versa. Data were analyzed thoroughly as a single unit.

RESULTS AND DISCUSSION

The Need for Electronic Trials in Indonesia

a. Social change takes place

Arnold M. Rose once proposed three general theories about social change, which were later associated to the law. These three general theories actually have more concerns about the main causes of social changes, that is each of them:

1. Progressive calculation of regulations in the field of technology;

2. Contact or conflict between cultures;

3. Social movement.

According to these three factors, the law is a contributing factor to social changes. The theory of discoveries in the field of technology, among others expressed by William F. Ogburn stated that new discoveries in the field of technology are the main factors that make social changes, because they have a strong growing power. Soerjono Soekanto argued that the law as a tool to change society, in the sense that the law may be employed as a tool by agents of change. An agent of change or pioneer of change is a person or group of people who gain the confidence of society as leaders of one or more community institutions. The pioneer of change leads society in changing the social system and is immediately caught up in the pressures to effect change, probably even causing changes in other community institutions. A desired or planned social change is always under the control and supervision of the pioneer of such change. The methods to influence society with an orderly and planned system in advance, are called social engineering or social planning (Soerjono Soekanto, 2016).

In this study, social transformation as mentioned above occurred with the outbreak of the Covid-19 Virus around the world which inevitably forced a transformation in the procedures of speech in the judiciary. Quoting the opinion of Arnold M. Rose who explained in essence that the law is more the result of social changes, so that in accordance with the Dutch proverb that says "*het recht hink achter de feiten aan*" which is the law is always left behind from events. Therefore, the law must always be able to encapsulate the events occuring in society.

Furthermore, when reflecting on the words of William F. Osburn who expressed that new discoveries in the field of technology are the main factors that cause social changes happening in the use of e-court is a social phenomenon that also occurs due to changes in offline technology to online that continue to expand into all sectors of life. Indeed, the technological changes existing today are also driven by pandemic conditions that make activities in the judicial realm also possess an impact.

b. There is a compelling situation

President Joko Widodo officially designated Corona Virus Disease 2019 (COVID-19) as a national disaster. The determination was asserted in Presidential Decree No. 12 of 2020 on the Determination of Non-Natural Disasters spreading Corona Virus Disease 2019 (COVID-19) as a national disaster. This situation certainly affects the activities in court.

Although based on the Law of Judicial Power in principle the assembly is open to the public, but there is a principle in the law that reads *salus populi suprema lex esto*, which means the safety of the people is the highest law for a country. Then, how to respond to these two existing principles, according to the author of the principle *salus populi suprema lex esto*? because the government itself has prepared a mechanism to limit community activities, there should be no need to be contested with the principle of openness to the public while still employing the options that have been proposed above, particularly recently, the e-court trial process continues to develop and integrate with each other. Hence, in the future, with the continued construction of infrastructure, it ensures the implementation of the trial process through e-court based on the principle of openness to the public and also the principle of saving and light cost.

c. Basic Manifestations of Saving and Light Cost

E-Court is a series of process of receiving a lawsuit or application, answer, replica, duplica, and conclusion, management, submission and storage of case documents using electronic systems applied in each judicial environment. E-court applications encompass online case registration services, online payments, sending court documents, and online summonings or notifications. E-court application serves to improve services for the realization of a professional, transparent, accountable, effective, efficient, and modern case administration, and to save time and costs (Sudikno Mertokusumo, 2010). It indicates that with the existing e-court platform, the principle of saving and light cost becomes manifested in its entirety with this e-court platform. This method is conducted to minimize the parties to meet face-to-face and attend to the court. It intends to realize the principle of simple, fast and light costs as stipulated in Article 2 Paragraph (4) of Law No. 48 of 2009. The simple, fast and light cost principle is the most fundamental judicial principle of the implementation and administrative services of the court that leads to the principles of effective and efficient, when the principle has been pursued in such a way as to be implemented properly by the entire judicial system in Indonesia, particularly the civil justice system (Mohammad Saleh, 2016).

Electronic Trial Challenge in Indonesia

a. **Principle of Openness to the General which is Imperative**

Trials and verdicts pronounced in court hearings that are open to the public or in public, are one of the integral parts of the principle of fair trial. According to the principle of

fair trial, the examination of the trial must be based on an honest process from start to finish. Thus, the principle of justice which is open to the public from the beginning of the examination until the verdict is enacted, is part of the principle of fair trial. In literature, it is called the open justice principle. Its main purpose, to ensure that the judicial process avoids the reprehensible deeds (misbehaviour) of the official judicial (M. Yahya Harahap, 2017).

Through the principle of being open to the public, it is considered to have a deterrent effect of the occurrence of a judicial process that is partial or discriminatory, because the examination process from the beginning until the verdict is handed down, seen, and heard by the public can even be extensively publicized. It makes judges more careful about errors and abuses of authority on the one hand, and prevents witnesses from committing perjury on the other. The principle of open justice is contrary to the judiciary that is confidential (secrecy) or confidence as in the process of mediation or arbitration examination. In mediation or arbitration, the examination is designed confidentially with the max to maintain the credibility of the parties to the dispute. Indeed, the law justifies the examination of extra judicial institutions based on the agreement of the parties. However, if the resolution of a state court dispute (state court) or ordinary court, must be affirmed the principle of examination open to the public. This principle cannot be disregarded by the agreement of the parties. Such an agreement is contrary to public order, since the principle of openness is imperative. Therefore, it should not be disregarded through agreement (M. Yahya Harahap, 2017).

b. Procedural Law Update

According to Yahya Harahap (Kamri Ahmad and Hardianto Djanggih, 2017), the trial process is open to the public so that all court trials are clearly seen and known to the public, cannot be dark and whispery. All court hearings are open to the public. When the judge is about to open the hearing, it must declare "the hearing open to the public". Anyone who wants to follow the course of the trial, can enter the courtroom. The doors and windows of the courtroom were opened, so that the basic meaning of the trial open to the public was actually achieved. However, Yahya Harahap said that by allowing the public to attend the court hearing, do not let their presence disrupt the order of the trial because everyone must respect the dignity of the judiciary, especially for people who are in the courtroom while the trial is taking place.

Meanwhile, Moch. Faisal Salam interpreted the principle of the trial open to the public as a guarantee that the judge was impartial, that anyone can attend such hearings, so that the judiciary is under the supervision of public opinion. The goal is that judges do not apply the law arbitrarily or by discriminating people, so that the basis of the trial is open to the public in essence aimed as a form of general supervision of the trial process (Moch. Faisal Salam, 2001).

One of the procedural law updates conducted by the Supreme Court, especially to deal with the current of digitization in all fields, on August 19, 2019, Supreme Court has issued PERMA No. 1 of 2019 on the Administration of Cases and Trials of Courts Electronically (PERMA No. 1/2019). The implementation of the PERMA has changed some important provisions in the HIR which was previously retained in the process of being spoken in the District Court (Bernadette Mulyati Waluyo, 2020).

Changes to the provisions of the court, among others, regarding: (a) The principle of the conference is open to the public as embraced by the potential HIR changed due to the enactment of PERMA No. 1 of 2019. Based on this principle, technically, the trial must be conducted openly to the public, in the sense that the public is allowed to attend, witness, and listen to the proceedings in the District Court. If the judge organizes a closed-door district court hearing, it may result in the limitations of the judge's ruling, unless the law regulates the closed hearing specifically; (b) Physical presence in the District Court hearing of the parties to the dispute and/or their power of attorney is required by HIR and RBg. At the very least, physical presence is required at the time of mediation, submission of a lawsuit, and at the time of proof, and the reading of the verdict.

In order to ensure or account for the objectivity of the case examination process, the trial must in principle be open to the public, which means that the public is allowed to attend, witness and listen to the proceedings. Similarly, the reading of the District Court's decision must be conducted in a trial that is open to the public. Violation of this principle will result in the judge's decision being null and void, as stipulated in Article 13 of the Act. No. 48 of 2009 on the Power of Justice (Judicial Power Act) which states: "(1) All court hearings are open to the public, unless the law determines otherwise. (2) The court's decision is only valid and has the force of law when spoken in a hearing open to the public (3) Not fulfilling the provisions

as referred to in paragraph (1) and paragraph (2) resulted in a null and void decision (bold printing by the author*)"* (Bernadette Mulyati Waluyo, 2020).

The principle of hearings opens to the public shows that basically the court can be known by the general public. It means that the general public can monitor every trial so that accountability of the judge's decision can be accounted for (Suharto dan Efendi, 2013). The mean rules of exception in the principle of open hearings to the public regulated by law are:

a. Based on the provisions of Article 70 paragraph (2) of Law No. 5 of 1986 on State Administrative Justice which states: If the Panel of Judges considers that the dispute heard concerns public order or state safety, the trial can be declared closed to the public.
b. Based on the provisions of Article 80 paragraph (2) of Law No. 7 of 1989 on Religious Justice which states: The examination of divorce lawsuits is conducted in a closed hearing.
c. Based on the provisions of Article 141 paragraph (3) of Law No. 31 of 1997 on Military Justice which states: In matters concerning military secrets and/or state secrets, the Presiding Judge may declare the hearing closed to the public.
d. Based on the provisions of Article 54 of Law No. 11 of 2012 concerning the Criminal Justice System of Children which states: The judge examines the case of the Child in a hearing that is declared closed to the public, except the reading of the verdict.

In connection with the enactment of PERMA No. 1 of 2019, Article 4 of the PERMA stipulates that the pronouncement of the decision/determination of the District Court is completed electronically. This provision has the potential to violate the principle of a trial that is open to the public as stipulated in Article 13 of the Judicial Power Act. Potential violations of the principle will result in the threat of limitations to the decision of the judge who tried the related case.

Article 27 PERMA No. 1 of 2019 states that the electronic trial conducted through the Court Information System on the public internet network, is legally declared to have fulfilled the principles and provisions of the trial open to the public in accordance with the provisions of the legislation.

If observed, the formulation of Article 27 PERMA No. 1 of 2019 which states that the trial electronically through the Court Information System has fulfilled the principles and provisions of the trial open to the public, only to the extent of regulating qualifications, but does not explain the meaning of "open to the public" electronically. Likewise, the formulation of Article 26 PERMA No. 1 of 2019 states that the verdict/determination is pronounced by the Judge/Presiding Judge electronically has been performed by submitting a copy of the verdict/electronic determination to the parties through the Court Information System. Thus, the pronouncement of the verdict is legally considered to have been attended by the parties and conducted in a hearing open to the public.

It means that the mechanism of reading the verdict through e-court in a civil trial that is currently used, has the potential to violate the principle of open to the public, if in the course of it is not immediately addressed, especially related to public access specifically to participate in the process of reading the verdict by the judge.

The preparation of PERMA must be basic as well as with laws that are hierarchically ediled higher than PERMA. Therefore, in the author's point of view, there are two options that can be implemented, which are: First, changes to the Law on Judicial Power must be made first in order to facilitate the service of judicial proceedings electronically in the current digital era. Second, adjust the existing PERMA to the limitations of the basic principle of the open session to the public so as not to conflict with the laws and regulations above. For court hearings conducted electronically, the notion of "open to the public" should be provided a different meaning, not only can be attended by the public, but the trial process and court decisions must be accessible to the public in general easily from real-time (from time to time) and/or Live Court. Ironically, let alone access the court proceedings, to access the court's ruling only, the public in general until now there are still difficulties. Not all court rulings can be accessed easily through the court's website or official website. Although accessible, the contents of court rulings are sometimes incomplete, making it difficult to understand the verdict comprehensively. Therefore, in addition to increasing access to court decisions through the court's website or official website, the Supreme Court must facilitate the creation of applications such as live court streaming that can be accessed by the public wherever they are through the internet network with practical electronic devices (gadgets). Live court streaming applications are able to facilitate access for the public in general to watch and hear

the process or the course of a court trial through channels or electronic networks directly (real time).

Seeing the condition of Indonesian society is still very varied, definitely, the nature will cause difficulties in the implementation of the trial electronically. Not everyone can afford to buy gadgets, literate technology, and can obtain adequate signal or internet network access. Therefore, the electronic use of the court's trial mode must be applied gradually. Furthermore, it is necessary to think about which 'stages' in the Court trial can be conducted electronically. For district courts that can already apply electronic trials, the author proposes that the use of electronic mode is intended for the delivery of files only. For the process of proof and reading of the verdict, the process of the district court hearing must still be attended physically by the litigable parties, pending changes to the Law on Judicial Power that will serve as the basis for the preparation of PERMA (Bernadette Mulyati Waluyo, 2020).

Policy Recommendations on Electronic Trial Arrangements

a. Procedure Law Adjustments

The preparation of PERMA must be basic as well as with laws that are hierarchically higher than PERMA. Therefore, in the author's point of view, there are two options that can be implemented, which are: first, changes to the Law on Judicial Power must be performed first in order to facilitate the service of judicial proceedings electronically in the current digital era. Second, adjust the existing PERMA to the limits of the basic principle of the open session to the public so as not to conflict with the laws and regulations on it. For an electronic trial, the notion of "open to the public" should be provided a different meaning, not only can be attended by the public, but the trial process and court decisions must be accessible to the public in general easily from real-time (from time to time) and/or Live Court.

b. Judicial Accountability

The Supreme Court should facilitate the creation of applications such as live court streaming that can be accessed by the public wherever they are through the internet network with practical electronic devices (gadgets). Live court streaming application is able to facilitate access for the public in general to watch and hear the process or the course of the court trial through channels or electronic networks directly (real time).

Seeing the condition of Indonesian society is still very varied, definitly, the nature will cause difficulties in the implementation of the trial electronically. Not everyone can afford to buy gadgets, literate technology, and can obtain adequate signal or internet network access. Therefore, the trial of the Court electronically must be enforced gradually. Furthermore, it is necessary to think about which 'stages' in the Court trial can be conducted electronically. For District Courts that can already apply electronic trials, the author proposes that the use of electronic mode is intended for file submission only. For the process of proof and reading of the verdict, the district court proceedings must still be attended physically by the litigated parties, pending changes to the Law on Judicial Power that will serve as the basis for the preparation of PERMA.

c. Limitations of Electronic Trials

The current Law of Judicial Power, has not sufficiently regulated restrictions related to the principle of open hearings to the public. It is very unfortunate because in fact, the International Covenant on Civil and Political Rights (ICCPR) which was ratified by Law No. 12 of 2005 on the ratification of ICCPR, but the article that regulates the restriction of open sessions to the public is not fully accommodated both and Law No. 12 of 2005 and the Law on Judicial Power. Hence, in this study, the author presents a comparison of the arrangement of the principle of the open to the public between Law No. 12 of 2005 on the ratification of ICCPR and ICCPR which is officially translated by the State Department:

Law No.12 of 2005 on Ratification of ICCPR (Article 14)	**ICCPR confirmed by State Department (Article/Article 14)**
equality of all persons before courts and judicial bodies, the right to fair and open examination by competent, free and impartial judicial bodies, the right to presumption of innocence for any person accused of a criminal offence, and the right of any person sentenced to judicial review or punishment by a	All persons have an equal standing before the courts and judicial bodies, in determining a criminal charge against them, or in determining all their rights and obligations in a lawsuit, everyone is entitled to a fair and open examination to the public, by an authorized judicial body, independent and impartial and established according to the law. The media and the public may be

higher judicial body (Article 14);	prohibited from following all or part of the session for reasons of moral, public order or national security in a democratic society, or if absolutely necessary in the opinion of the court in a special circumstance, where publication would actually harm the interests of justice itself, but any decision taken in criminal and civil matters must be pronounced in an open hearing, except where the interests of minors determine otherwise, or when the conference is concerned with child disputes or guardianships.

Based on the table above, it can be identified that Indonesia has ratified ICCPR with the passing of Law No. 12 of 2005 on the ratification of ICCPR. However, the Law on the Ratification of civil and political rights does not imply limitations regarding the principles of the session open to the public, in which the original ICCPR text in detail has mentioned its limitations. The formulation of the limitations provided by ICCPR in Article 14 is as similar as the following:

> *"Everyone is entitled to a fair and open examination to the public, by an authorized, independent and impartial judicial body established by law. The media and the public may be prohibited from following all or part of the session for reasons of moral, public order or national security in a democratic society, or if absolutely necessary in the opinion of the court in a special circumstance, where publication would actually harm the interests of justice itself, but any decision taken in criminal and civil matters must be pronounced in an open hearing, except where the interests of minors determine otherwise, or if the proceedings relate to child disputes or guardianships."*

It can then be known that the limits of the principle of open to the public are as long as they do not conflict with moral, public order, or national security grounds in a democratic society, or if absolutely necessary in the opinion of the court in a special circumstance, where publication would actually harm the interests of justice itself. At the same time, in the Law of

Judicial Power also does not regulate exclusively related to the restrictions contained as a result in the ICCPR, so in the future, it is necessary to make revisions to the existing Justice Law to accommodate the limits of the principle of open hearing to the public.

CONCLUSION

Based on the discussion of the above research, the author can formulate the conclusion into three points, which are: First, the factual needs of the implementation of electrobonic trials in Indonesia cannot be separated from the social transformation that occurs in Indonesian society itself which actually triggers already exist before the outbreak of covid-19 which also contributes to transforming the procedure of the trial in general, which is through virtual means. Hence, there is an e-court mechanism that exists today is a manifestation of the social needs of Indonesian society itself.

Second, the general challenge in the implementation of electronic trials, which are trials and verdicts pronounced in court hearings that are open to the public or in public, is one part that is inseparable from the principle of fair trial. According to the principle of fair trial, the examination of the trial must be based on an honest process from start to finish. Thus, the principle of justice is open to the public from the beginning of the examination until the verdict is enacted, is part of the principle of fair trial. In literature, it is called the open justice principle. The main purpose, to ensure the judicial process is avoided from the misbehaviour of judicial officer, the mechanism of reading the verdict through e-court in civil trials that are currently used, has the potential to violate the principle of open hearing to the public if on the process it is not immediately addressed, particularly associated with public access specifically to participate in the process of reading the verdict by the judge.

Third, the regulations related to the public trial should start from the preparation of PERMA that must obey the principle and with laws that are hierarchically higher than PERMA. Therefore, in the author's point of view, there are two options that can be implemented, which are: first, changes to the Law on Judicial Power must be formulated first in order to facilitate the service of judicial proceedings electronically in the current digital era; second, adjusting the existing PERMA with the limitations of the basic principle of open hearing to the public in order to prevent conflict with the laws and regulations on it. For court trials conducted electronically, the notion of "open to the public" should be provided a broader

meaning, not only can be attended by the public, but the trial process and court decisions must be accessible to the public in general easily from real-time (from time to time) and/or Live Court.

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