



Bennett Jones

A BENNETT JONES WHITEPAPER:

**Imagining the Ideal Video-Conferencing
Solution for Hearings, Arbitrations,
Mediations, Depositions and
Corporate Meetings**





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I. The Problem

In 1988, amendments to the *Criminal Code of Canada* first introduced the ability to incorporate video and remote evidence into legal proceedings. In the 1990s further amendments were made to enable the use of video- or teleconferencing for civil matters. Despite this, such technologies have had low levels of adoption prior to the COVID-19 pandemic. The pandemic made such technologies a necessity to ensure continued access to justice, especially for matters classified as “urgent” or an “emergency”. Following the pandemic, the need for such technologies will continue to grow as courts struggle to build capacity to address the backlog of cases that were adjourned, and an influx of new cases, as a result of the pandemic; all while social-distancing may still be required.

As aptly stated in a recently reported decision from the Ontario Superior Court¹:

... “It’s 2020”. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.

Technological advancements offer the legal industry substantial opportunities to deliver services in new ways. Digital transformation of these services can enable equal access and participation in the justice system, but the move to modernize has been slow and the global access to justice crisis has yet to be solved. But we now have a catalytic event in front of us that has accelerated the need to modernize and bring the courts and the justice system into the digital age.

As Richard Susskind summarizes from his book, *Online Courts and the Future of Justice*²:

It seems to me we have some significant difficulties and challenges facing our courts around the world. For example, in Brazil, there is a backlog of 100 million cases in their court system. In India, there are 30 million cases in this category. According to the Organization for Economic Cooperation and Development, only 46% of human beings live under the protection of the law, with access to lawyers and the courts. The reality is for low-volume civil claims, going to court costs too much and takes too long. The process is unintelligible to anyone other than lawyers, and it is very combative. The process also doesn’t scale well and somehow seems out of step in a digital society. So online courts are my answer to this access-to-justice problem.

The time is now for a videoconferencing solution that can transcend jurisdictions, forums and cultures. A platform that can turn the courts from being a place of bricks and mortar, into a service that more people can participate in and access expert guidance to resolve their legal disputes.

The problem is that the ideal technological solution for hearings, arbitrations, mediations, depositions, and corporate meetings does not yet seem to exist. There are drawbacks with the use of the most popular technologies, resulting in participants having to find work-arounds that are often inconsistent, and result in additional time and costs, which further impede the likeliness of adoption. Apart from becoming a necessity in a post-COVID-19 world, video-conferencing has massive potential to increase access to justice and general efficiency, but that potential will not be realized while the current compromises in functionality need to be accommodated.



II. Our Mission and Our Process

The Financial Times Innovative Lawyers programme, along with the Global Legal Hackathon organisation, issued their 2020 innovation challenge at the end of April to: “unleash the talent and creativity of the world’s legal industry to collaboratively innovate solutions to the most pressing legal, regulatory and civil society challenges posed by the global crisis that is currently engulfing the world”.

The Global Legal Hackathon (GLH) is an annual event usually held over a weekend where the global legal community, including lawyers, technologists, designers and data scientists gather to rapidly develop solutions that will improve the legal industry on a global scale. This year, that hackathon moved to a virtual platform that enabled even more teams to connect and work collaboratively on the challenges posed by this pandemic.

Bennett Jones decided to join this year’s Hackathon held from April 27th to May 22nd 2020. Internally we held a virtual brainstorming session to come up with a specific challenge that our lawyers were facing since businesses and courts were forced to close.

This is the challenge that we prioritized out of that brainstorming session and subsequently posted on the GLH platform:

The COVID-19 crisis has accelerated the need for a robust remote video conferencing solution that meets all of the requirements of the legal community.

Challenge: Design the user journeys, interface (screens) and feature requirements for the ideal video conferencing solution for legal hearings, arbitrations, mediations, depositions and corporate meetings.

Our Project Team took on this challenge and followed a Design Thinking process to develop feature requirements, mockups and best practices for the ideal video conferencing solution.

1. What Is? The first step was to ensure the entire project team understood the problem facing us. We had to resist jumping to conclusions and designing from scratch where we didn’t need to. So we undertook a wide-ranging research phase across the market and our firm to understand: (a) what technologies were already out there, (b) the frustrations and issues that lawyers and others were encountering with these generic video conferencing solutions, and (c) the best practices and processes that were being used, on an almost daily basis, by the courts and others in running virtual hearings, trials and arbitrations.

2. What If? The next step was to sift through all this research and imagine what an ideal platform could do, what features and controls we would want if we were participating in a hearing, arbitration or a corporate meeting. We were empathetic and examined needs from each stakeholder’s perspective. We took our stakeholder lists and developed a set of personas that could help us frame a solution and that took into account as many different user experiences as possible. We considered equality, diversity, inclusion and access to justice issues.

3. What Wows? This step involved finding the sweet spot between “valuable, doable, scalable and defensible.” To move forward into the next phase the idea that we developed had to be:

- valuable to the audiences named
- achievable by the technology that exists today
- scalable to the scope as defined, as well as
- defensible to manage any risk and operate within ethical frameworks

This is known as “assumption testing” of our hypotheses. This engaged more of our familiar analytical and legal reasoning in order to test future possibilities and outcomes of the drafting or solution. We used visuals to mock-up our ideas that could be shared and explained to

II. Our Mission and Our Process

the team. These went through a number of edits as we developed and thought through how to turn our wish-list into product design and specific interactions on multiple screens and basic functionality. We focused on hearings as our primary use case throughout our process, and gathered input from experts on arbitrations, mediations, depositions and corporate meetings to build out specific examples where those differed, and accommodated those differences in our design.

4. What Works? The final phase is also known as “prototyping”; testing in the real world by creating a physical manifestation to see whether it will actually work. Sense-checking of our innovative thinking with future users of such a system (should it be built) then took place. We combined all of our thinking into this Whitepaper along with visuals to tell our story and present our ideal video-conferencing system.

- See **Appendix C for sample visual mockups** of how we imagine some of the Features and Controls (outlined in Section III below) would look.

Design Principles

As our project took shape and our discussions continued, a few principles began to structure the deliverables and designs that we were working on.

1. Adapt what already exists on the market.

Rather than designing from scratch or recreating the wheel, our preference is to use the technical capabilities that are already in use, eg. video functionality. We intend to use design patterns that already exist and functionality that is already familiar.

2. Defaults and presets preferred.

Our preference is to push as much complexity of function and control to the codebase and keep the user interface as intuitive as possible.

3. A recognition that there are multiple actors and demands involved in court proceedings and corporate meetings.

Wherever possible therefore, the system should take account of all these experiences. See in particular Sections IV and V of this paper where we outline some of these different perspectives.

4. Provide flexibility to each user.

In addition to the presets and defaults we were designing, we also wanted to ensure each user of the system is able to fully customize their environment within the system. We want to give each user as much flexibility to create the layout and controls of the multiple windows and screens that works best for them, their role in the proceedings and their individual circumstances.

5. Leverage familiarity and existing mental models for faster adoption.

There are already quite powerful mental models that already exist about courtrooms and how they work, so we wanted to mimic these real-world counterparts in our ideal solution. Skeuomorphism makes interface objects familiar to people by using concepts that they are already familiar with in real life.

While our Whitepaper is aspirational, it can also be used by users of current video-conferencing technology as a checklist of functionality that they may require for their meetings, and what “work-arounds” they will have to employ to bridge the gaps in current technology.



III. Features and Controls

Our team determined that the ideal video-conferencing solution should include the following features and controls.

The Heart of the System: Host Controls

Powerful Host Controls allow the system to be customized and scaled to any needs.

- **Host controls and presets** for any use case (e.g. any type of hearing, arbitration, mediation, deposition, or corporate meeting - “factory” and user-defined presets)
- “**Host**” is typically a Judge, Registrar, Clerk, Arbitrator (or assistant), Mediator (or assistant), Meeting Chair, Corporate Secretary (or assistant) etc., but Host control can be granted to any participant
- The Host has exclusive access to some functions, some of which can be further delegated to other participants:
 - Add/delete **participants**
 - Create additional **virtual rooms** and **controls** individual participant **access** (e.g. caucus/ breakout rooms, chambers conferences with counsel and judge only, excluding witnesses from the proceedings, excluding the jury from the proceedings, excluding the public from the proceedings, etc.). These are saved as presets accessible in the **Meeting Map Window**
 - **Control** which of the **functionality** explained below is available to which participant, with ability to save presets to account for different needs throughout a meeting
 - Control access and functionality **during** an active meeting, and **before** and **after** the meeting
- See **Appendix A** for sample **Host Control** menus for various use cases

Participant Invitations

- Host can generate **email** invitations to participants with **unique** access **codes** (see Security below). Host can optionally grant this functionality to other participants
- **Integration** with Microsoft Outlook and other calendar applications
- **Integration** with Management Calendar (see below)
- Participants with access can **add attachments** to the Outlook (etc.) appointment for all invitees to see
- Participants must “**accept**” **rules** of the hearing/ meeting (or other text) **before joining** the hearing/ meeting (optional)

View Layout and Presets

- All windows can be **moved** and **sized**
- Participants can **save personal layout presets** that allow quick toggling between the different ways they may want to view the various windows (size and position) given the “screen real estate” available to them and how they are using the system at the time, and their preferences (see Section V. Best Practices and Etiquette)
- “**Factory**” and **user-defined** presets – “Factory” presets will be important for one-time users and will offer the most popular and valuable layouts for one, two, and three screens and for the typical ways that various participants would interact with the application
- **Slideout Panels** can be accessed from the main window and are easily **hidden/collapsed** into a streamlined tabbed-view on a click of the tab
- Windows can be “**docked**” and “**undocked**” or “**pinned**” and “**unpinned**” into and out of position
- Other native applications (*e.g.* chat amongst counsel teams) given “**Keep on Top**” functionality and added to the view layout preset functionality

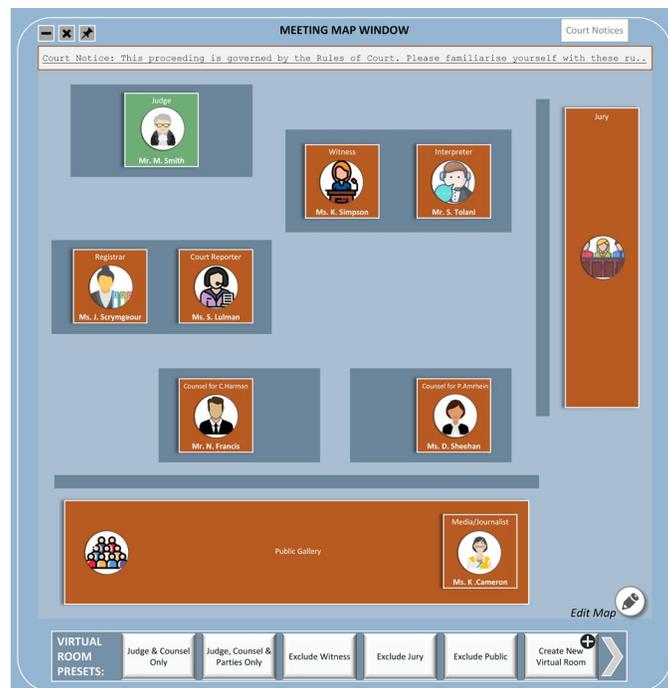
Our team recognized the need for private and confidential “conversations” and sharing of information between **limited groups of participants** (*i.e.* text chat, audio, video). These can be facilitated in three ways. First, limited groups of participants can utilize a **virtual room** set up by the meeting host for that purpose (see **Meeting Map Window** below). Second, the display of information in the **Display Windows** and **Court File Window** can be categorized so that it is viewable only by selected participants. In those cases, the information involved travels across the video-conferencing application and may raise concerns with respect to privacy and maintenance of privilege. Alternatively, caucus groups (*e.g.* counsel teams) can use their **own communication application** (*e.g.* Cisco Jabber), which is “air-gapped” from the video-conferencing application. In that case it becomes valuable to add “**keep on top**” functionality for those other native applications and add them to the functionality of the **layout presets**.

- **Menu appearance** – menu options **automatically adjust** to show functionality granted by the Host in the **Host Controls**



Meeting Map Window

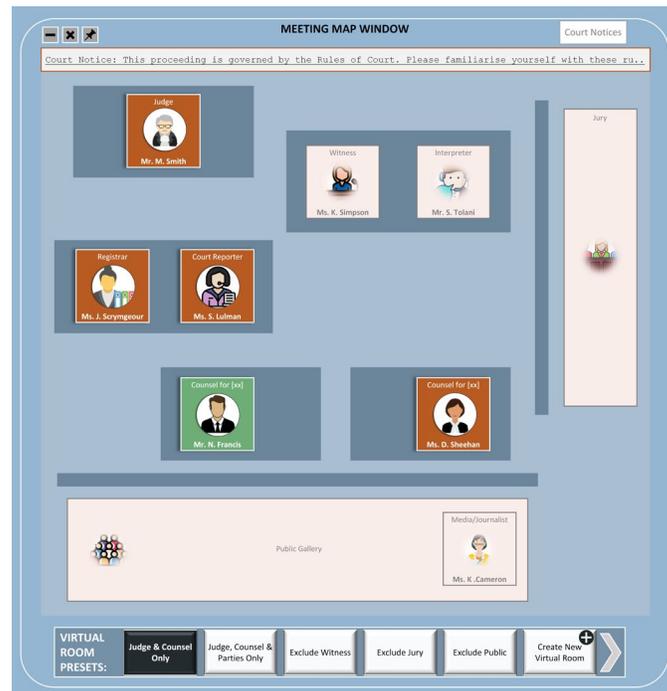
- Separate window providing a **graphical representation** of the meeting or hearing, with some included functionality
- The map shows the layout of a typical courtroom, hearing room or meeting room. Within the map, each participant's name appears under their avatar in the position they would occupy if the meeting or hearing were in-person.
- Avatars are **customizable** (in “**Editor**” options) by participants granted that functionality in the **Host Controls**. Avatars can be re-positioned to represent any form of meeting.
- The map helps identify **who is speaking and their role**, for laypeople in particular.
- When a participant speaks, their Avatar is **green** – other participants are shown **red** or grey



- **Virtual breakout rooms** are created by the Host, and the Host may also grant permission to other participants to create a virtual room. Each participant can see the virtual rooms on the map.
 - Easily “**enter**” the **virtual rooms** by clicking on the preset virtual room within the meeting map
 - Participant **access** is preset for each virtual room in the **Host Controls**; by clicking on a virtual room icon, those participants who should be there are, and those who should not be aren't

Our team recognized the need to be able to **quickly toggle** between the various “caucus” or “breakout” rooms as participants typically would in in-person meetings. For example, in a court setting, a judge may want to exclude the jury from the courtroom. This is simply accomplished by pressing the “**Exclude Jury**” virtual room preset in the **Meeting Map Window**. Another example is where the parties and their counsel could step into a virtual room to negotiate a settlement or try to agree to the admission of an exhibit. All of the functionality of the software suite travels with the participants into a virtual room, except that access is limited to permitted participants as controlled in the **Host Controls**

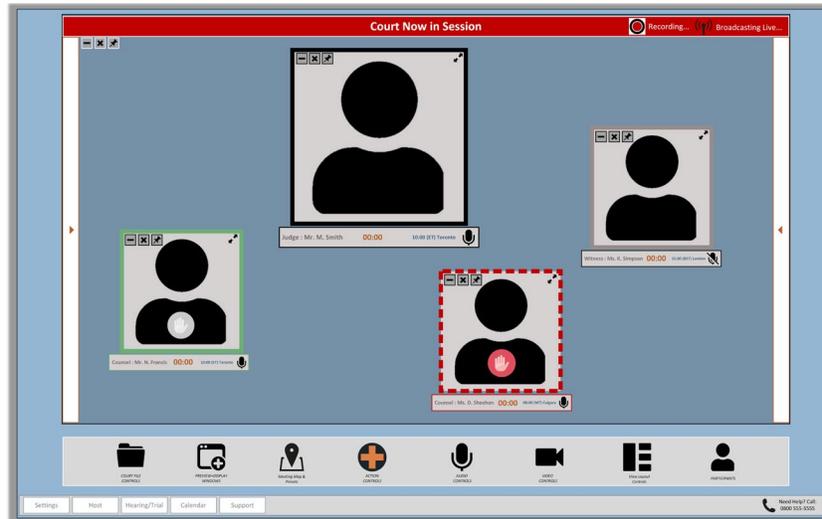
III. Features and Controls



- Overlaid on **participant avatars**: Function, Name (if applicable), X and greyed out if excluded from the “room” by a virtual room button being pressed
 - Select participants can optionally upload a **photo** for their avatars. Option to **pre-approve** photos (e.g. by a Registrar or Judge) before being displayed
- Access to additional functions included on the Map Window:
 - Access to **Management Calendar** (see below)
 - Access to **Important Notices** (see below)
 - Controls to **record** the meeting video and/or audio
 - Controls to **broadcast** or **livestream** to YouTube or Vimeo etc. (for participants granted that functionality in **Host Controls**) - “broadcasting” icon present when actively broadcasting
- Participants granted such functionality (e.g. Registrar/ clerk, or judge) can **open/adjourn** proceedings/ meetings by pressing bar at top – turns red when adjourned. All participants muted automatically, except registrar/clerk who commences the proceedings.
- The meeting map is a useful tool for self-represented litigants, or for the general public who may not be familiar with the formalities of a courtroom or other hearing. Being able to see who is speaking can be helpful when all parties and counsel are strangers to one another, and can be used for telephone conference if bandwidths are too low for video.



Video Windows

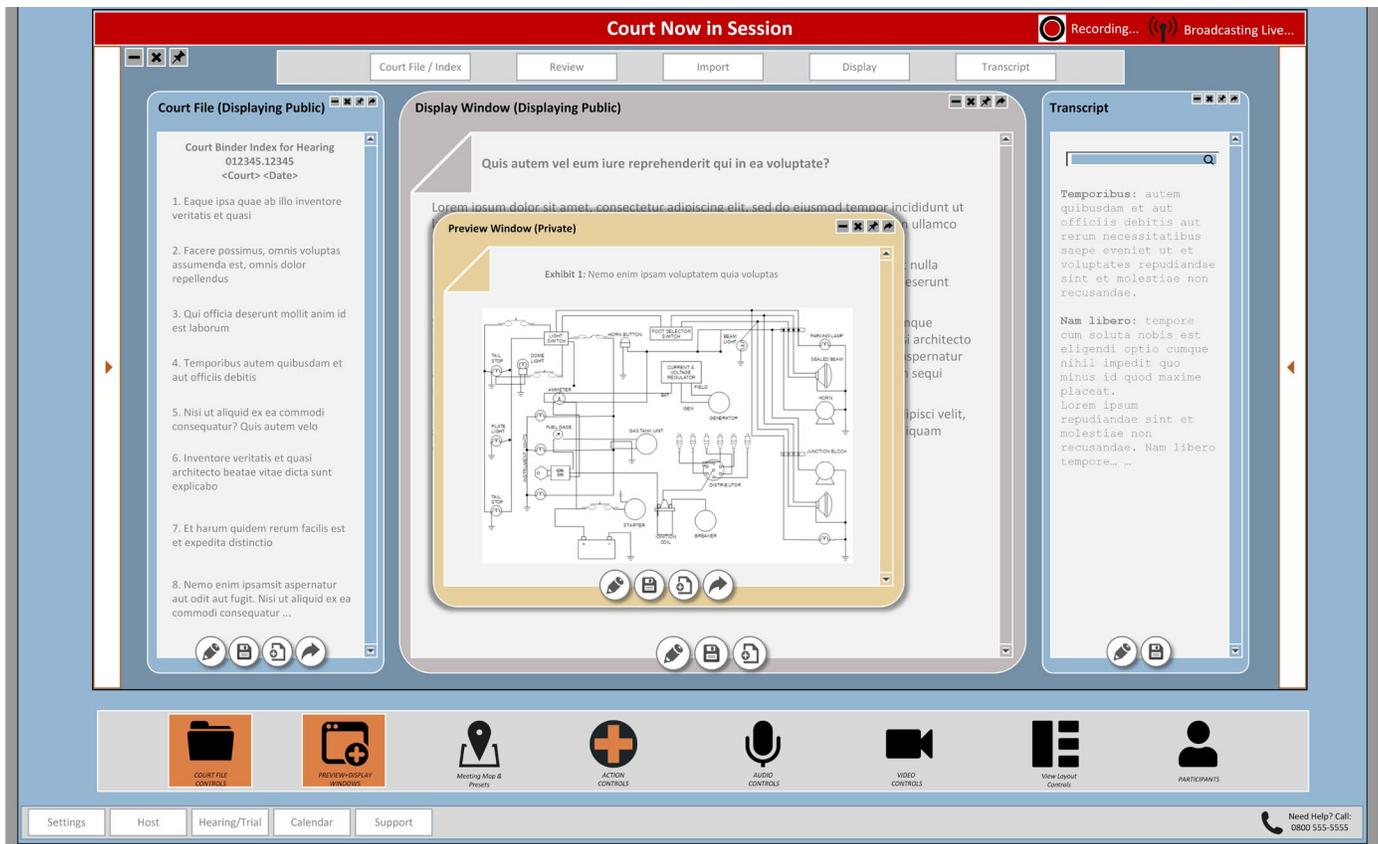


- High-resolution video and audio with **no lag**
- **Presets** for alternate views of multiple video windows – “factory” and user-defined
- Able to **“pin”** or **“feature”** select video windows so that they appear centred and larger etc.
- Option to **display** name, role, local time, or timer for each participant
 - **Timer** optionally activates **coloured icons** in or **border** of Video Window as the set time is expiring
- Option to **change background** to something neutral
- Video/Audio **preview/test** – with on-screen reference to best practices for lighting, background, surroundings, and framing
 - A **“wizard”** that assists to find the best lighting, framing, and audio quality
- Mute and Video on/off functionality customizable in the **Host Controls**

Our team recognized that some participants should be granted rights to be able to **mute any/all** participant audio or video (e.g. a judge), that some participants should have rights to **mute only their own** video/audio (e.g. lawyers), and that some participants **may not** have that functionality at all in some instances (e.g. a witness).
- **“Raise Hand”** functionality with graphical display in each Video Window so a “raised hand” cannot be missed
- **Accessibility controls:** closed captioning (including translation), TTY, font/button size, boost volume, etc.
- **Voting Controls:**
 - **Participants** can cast votes in their own **Video Window**
 - Host Controls allow **optional anonymous** voting, otherwise individual votes are displayed in the Video Windows
 - Vote tallies are displayed in the **Vote Window** to participants with such rights (anonymously or by name as set in the Host Controls)
 - **Virtual Rooms** can be used to **restrict voting** access to select participants
 - **Vote Editor** in the **Vote Window** allows **customization** of the **matters/resolutions being voted on** by the Host or other participants granted such rights
 - **“Record Vote”** in the Vote Window records vote results in meeting minutes or any other designated document

Preview and Display Windows

Our team recognized that video-conferencing hearings and meetings offered a tremendous opportunity to increase the efficiency with which documents and other information are shared and used by participants. This opportunity is realized with powerful integration and functionality in the Display Windows, Preview Window, and Court File Window.

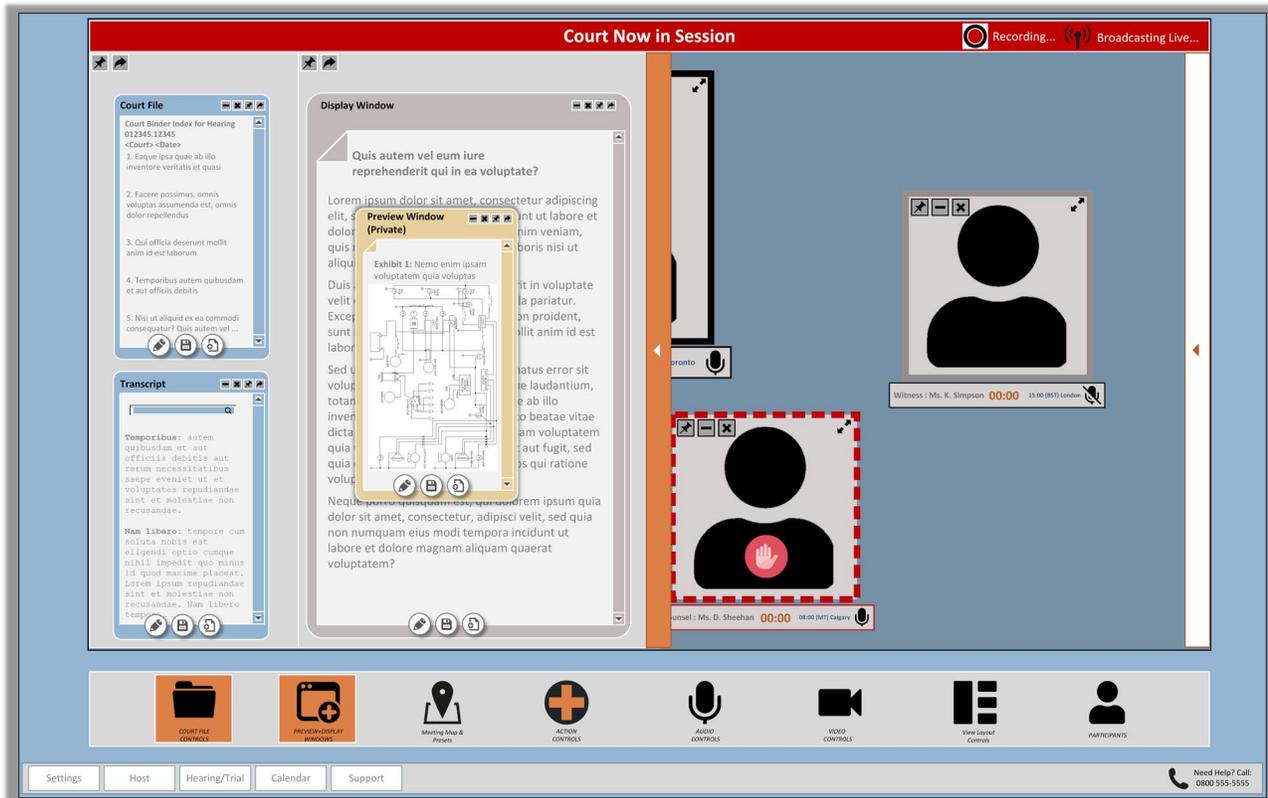


- Combines file management/e-discovery capability, presentation capability and video-conferencing capability
- **Multiple uses:**
 - **Display** different types of documents and images from various applications in native file formats (e.g., .docx, .pdf, .mov, .ppt etc.), and from sources including e-discovery software, virtual data rooms, an integrated e-filing platform or other sources.
 - **Play** video and audio (both pre-recorded and in real-time - e.g. a FaceTime cellphone video from a witness explaining a demonstrative aid)
 - **Import** images, video, and audio for filing as Exhibits. Ability to upload in the hearing with drag and drop functionality
 - **Preview** a document before displaying it to the room, and organize a small selection of documents or exhibits to be used in the hearing or meeting



- **Multiple** Display Windows can be viewed and used at the same time, and rearranged as needed by the participants
- **Multiple** participants can **display simultaneously**, or control over the display functions can be restricted so that it is passed from one participant to another
- **Multiple** participants can display simultaneously, or “**share**” control can be restricted so that it is passed from one participant to another
- **Full integration** with any document management, e-Discovery, virtual data room (VDR), or document exchange applications
 - Any **security/access** functionality in the native document management or e-Discovery or “document room” applications are preserved in the video-conferencing application
 - Additionally, able to **upload** documents, images, audio, video to the Display Window “on the fly” with **drag-and-drop** functionality
- **Import** and **display** files that reside outside of the file management systems associated with the Display Windows
- Display Window contents can be **previewed** privately before displaying
 - The **Preview Window** is docked within the Display Window and can be **undocked**.
- Display Window contents can **categorized** before they are displayed (*e.g.* “public”, “private”, or any other user-created category) in order to easily restrict view access to selected subgroups of participants, all as defined in the **Host Controls**
- **Markup** and **annotate** documents/images displayed in Display Window and **screen capture** and **copy** the markup
- Registrar (etc.) may **file** the contents of the Display Window and filed exhibit, in which case the Display Window contents are automatically transferred into the court file and accessible in the **Court File Window** as an Exhibit
- **Electronic “binders”** can be created in the Display Window to group, index, and organize documents before, during, or after a hearing/meeting
- Participants granted access can **copy** documents from the Display Window or Display Binder (*e.g.* a Judge wishing to make private notes on a document for the purposes of writing her decision)

Court File Window



- **Access** to and **display** of court file contents (full or limited), including filed exhibits, as defined in the **Host Controls**
- Create **Electronic “Exhibit Books”** to group, index, and organize documents before or during a hearing
- Court File Window is **integrated** with court filing system
- Court File Window contents can be **categorized** before they are displayed (e.g. “public”, “sealed”, or any other user-created category) in order to easily restrict view access to selected subgroups of participants, all as defined in the **Host Controls**
- Participants granted access can **copy** documents from the Court File Window (e.g. a Judge wishing to make private notes on an exhibit, media copying an exhibit for a news story, etc.)
- Court File Window **can be renamed** for other use cases (e.g. “Document Database” for a corporate meeting)



Transcript Window

- **View, scroll, search, markup, capture** image, and **copy** real-time transcripts
- **File** all or portions of a transcript as an **exhibit**

Objection!

- Objection Controls window: **Object | Resolve Objection**
- Judge or other Host has ability to control what happens when the “Objection” button is pressed, *e.g.*:
 - audible **chime**
 - display of various **graphics** in various windows, *e.g.* red icon in witness or counsel Video Window
 - witness audio and/or video automatically **muted** until the objection is resolved
- Additionally – “**raise hand**” functionality for other participants (see Video Windows above)
- Host can assign “objection” and “raise hand” functionality to select participants in the **Host Controls**

Management Calendar

- **Integrated** calendar with some project manager functionality
- Option to **embed link** to Management Calendar in other websites (*e.g.* overall court schedule website) and mark read only
- **Integration** with Microsoft Outlook and other calendar applications
- **Integration** with **Participant Invitations** (see above)

Recording and Broadcast

- Proceeding/meeting video, audio, and shared displays can be recorded and/or broadcast on the internet
- Integration with YouTube and other broadcast channels

Court Notices

Our team recognized that **special rules** may have to be created to facilitate remote video hearings and meetings. For instance, courts may want to expressly mandate that witnesses cannot be assisted by anyone or anything (*e.g.* out-of-court notes, text messages, etc.) while testifying remotely; proceedings may not be recorded, etc. Likewise, courts may want to remind participants of appropriate **courtroom decorum** in the same way that they do today with physical notices posted in courthouses. Similarly, this feature could be used to provide some basic procedural guidance for self-represented parties. The ideal solution will allow courts and other hosts to **post any such notices**.

- Accessible in **Meeting Map Window** – Important Documents icon
- Can optionally display court notices, or references to them, in a **ticker type banner** that is periodically superimposed on the video windows (*e.g.* “*This proceeding is governed by the Rules of Court viewable by pressing the Important Documents icon in the Meeting Map Window*”)

Help! Desk

- Available technical support

Security

- Unique access codes per user (and optionally per meeting)
- Optional two-factor authentication
- Optional encryption
- Metadata associated with all access and functionality is stored
- Security of underlying file management system(s) is preserved



IV. Access to Justice and Equality, Diversity, Inclusion

With the unprecedented global constraints on mobility and public assembly under COVID-19, video-conferencing software has paved the way forward to allow for the administration of justice to continue.³ However, many existing video-conferencing platforms are also presenting clear and dramatic practical barriers to access to justice during the COVID-19 pandemic.

These barriers fall into two broad categories: (1) practical barriers to access that can affect all court system participants; and (2) barriers that undermine equality, diversity, and inclusion in the court system.

The OECD recognizes equal access to justice and legal empowerment as “intrinsic goods and fundamental components of inclusive and sustainable development, good governance, effective public policy and the rule of law.”⁴ The Supreme Court of Canada has affirmed that access to the courts is essential to the rule of law.⁵

The most transformative legal innovations will be those that not only consider access to justice, but seek to catalyze it. At its best, the delivery and administration of justice should be:

- a. impartial and non-discriminatory;
- b. fair and transparent;
- c. effective; and
- d. efficient.⁶

The ideal video-conferencing solution for legal processes will be specifically designed to enhance these features.

Practical Barriers to Access to Justice in Video-Conferencing

Inefficient Platforms

Technology that is difficult to use, has poor functionality, or is prone to malfunction can reduce the efficiency of the courts’ process and obstruct the conduct of a fair hearing.

The Justice Video Network (**JVN**), a laptop-based video conferencing solution last updated in 2008 that is currently being employed in Canada’s criminal court system, provides a worthy foil for how video-conferencing can impair access to justice. JVN has confronted participants with “glitches” and inefficiencies, including⁷:

- a. Entry to the platform requires a series of complex pins and meeting numbers that are often entered incorrectly or difficult for parties to locate, preventing timely entry to the court space, and making the proceedings difficult to log in and view for members of the public;
- b. Low bandwidth and server capacity results in frequent lags and freezing;
- c. Users may screenshare but cannot control the screen once displayed, so counsel are unable to point to document pinpoints or features, or otherwise interact with a document on display;
- d. No guidance is published or distributed to users and witnesses as to lighting/audio/video best practices, and as such their appearances are frequently distorted, indiscernible, or frozen; and
- e. The platform only works in one internet browser program (Google Chrome) and only on certain types of processors.

Such technological shortcomings affect all court system stakeholders, including judges, lawyers, and court staff. The platform’s use in the criminal justice context also means that the barriers it creates disproportionately affect poor and marginalized groups.

IV. Access to Justice and Equality, Diversity, Inclusion

Privacy and Security Concerns

The deployment of video-conferencing platforms also presents practical risks to fundamental human rights, such as privacy and security. For example, the Zoom platform was rapidly deployed in the early days of the pandemic as a legal video-conferencing option. Its widespread use soon occasioned an eruption of security and privacy breaches.⁸

The security inherent in having to go to the courthouse to obtain records and access to the forum is lost, which may result in problematic use of materials and engagement with virtual platforms (such as spamming courtrooms, interfering with processes, access to “sealed” documents, hacking and phishing risks, etc.)⁹ The respect and protection of these rights is a universal concern.

Systemic Barriers to Access to Justice in Video-Conferencing: the Digital Divide

While the digital availability of legal processes may seem virtuous on its face, “[c]areful planning is needed to prevent technological innovations from creating or reinforcing barriers to equal justice”.¹⁰ Video-conferencing platforms present unique challenges that could reinforce or exacerbate existing inequities—or create new ones—in the access to and delivery of justice.

Yet, there remains a serious access to justice problem in Canada.¹¹ Former Chief Justice of the Supreme Court of Canada, Beverly McLachlan has maintained that access to justice for poor and marginalized citizens is the biggest challenge to the Canadian legal system.¹²

The systemic barriers associated with legal video-conferencing spring largely from existing inequities in society that may hinder or prevent individuals from possessing the knowledge, resources and services that allow people to deal effectively with legal matters¹³ virtually.

For example, the American Bar Association has identified the risk that adverse credibility assessments may be made in trials based upon framing, lighting, camera angle and location, and that errors in these matter may create juror bias:¹⁴

A jury could view defendants differently if they are seated in jail, wearing an orange jumpsuit and 10 feet away from a camera, or if they are framed from a low angle or have shadows on their faces.

Conversely, a defendant represented by a high-powered law firm might have the financial means to appear in slickly produced video court proceedings and testify in lavish surroundings.

Socio-economic inequities can thus have a significant material effect on the outcomes individuals can ultimately achieve in using videoconferencing to navigate the legal system.

In the context of information technology solutions, the “digital divide” describes the gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard to both their opportunities to access information and communication technologies (ICTs) and to their use of the Internet for a wide variety of activities.¹⁵ Categories of the “digital divide” include gaps arising from gender, income, age, education levels, immigration, native language, physical disabilities, and geographical separation from resources (like broadband access or sources of effective technological products). In contemplating the ideal videoconferencing solution, it is critical to bear in mind that the digital divide produces inequity in access to justice upon entry to the legal process, as well as working within it.

Challenges Facing Self-Represented Litigants

As a result of the inaccessibility of legal assistance, up to half of the participants in Canadian court proceedings are self-represented.¹⁶ Despite their wide diversity of backgrounds, self-represented litigants are consistently overwhelmed by court procedures,¹⁷ and often lack the knowledge, skills, literacy, or language fluency to participate effectively in their own litigation.¹⁸

Online and virtual platforms do not guarantee improvements for self-represented litigants in navigating the court process. Self-represented litigants report finding online court forms complex and difficult to complete, court guidance documents to be written in a confusing manner, and the proliferation of online resources to add to, rather than reduce, confusion.¹⁹

Existing online resources—which may include an abundance of rules, checklists, and guidance documents for each step in the litigation process—require a level of understanding and knowledge to be useful. Resources and literacy, both legal and technological, stand to affect a self-represented litigant’s substantive case outcome.



The challenges facing self-represented litigants may be either exacerbated by adding a layer of technological complexity, or institutions may seize the opportunity to streamline and clarify online guidance.

Video-Conferencing as a Solution for Enhancing Access to Justice

Conversely, virtual hearings have the potential to mitigate or eliminate many of the non-legal barriers to open courts.

Online hearings eliminate the burden of locating and travelling to courthouses, and concerns about the physical accessibility of the forum may disappear. It may be free for a participant to attend her hearing: many videoconferencing software applications are free to use, and platforms such as Zoom and Webex require little set-up time. Zoom and WebEx are capable of operating on an array of hardware devices and web browser applications.

The ability to record and broadcast proceedings to YouTube or similar platforms may enable public access to hearings in an unprecedented manner, enabling the public at large to access hearings for free at their convenience. Thus the justice system may be broadly scrutinized and observed, serving the constitutional ideal of the open court principle.

Easy sharing, filing, and cataloging of information will greatly increase efficiency and reduce administrative costs, both in courts and in lawyers' offices.

Proposed Strategies for Addressing Access to Justice in the Ideal Video-Conferencing Solution

Many solutions to access barriers are public and institutional, and beyond the scope of the development of a video-conferencing application. For example, courts and stakeholders must have regard to the barriers posed to persons living in poverty, in rural or remote communities, and to indigenous people and residents of reservations, among others, who lack reliable internet connectivity and access to essential technological hardware. Courts may also consider self-represented litigants' plea for person-to-person orientation, education, and support, to enable them to participate effectively in video-conferencing hearings.²⁰

Language

A starting point for ensuring equitable access to our platform is language accessibility. The application would be fully functional in both French and English, and would ideally be adaptable for use in a range of languages.

The platform would also have optional closed-captioning/subtitles functionality for live translation during proceedings.

Privacy and Security

The platform allows for ease of access to the public. While arguably in alignment with the open court principle, this necessarily engages privacy concerns for individuals.²¹

Our platform allows the Host to control participant access to the plenary session or any virtual rooms, or to information being displayed and shared.

Video-conferencing platforms require robust security measures to protect against privacy and security breaches.²² We recommend two-factor verification for hearing participants, with ongoing monitoring and updates to maintain effectiveness.

Technological Literacy and Accessibility

Having regard to the digital divide herein described, our platform is designed to be intuitive, user-friendly, minimalist, and simple to use, whilst providing key tools for efficiency in process.

Our concept contemplates a publically-available video demo that would provide a comprehensive plain-language introduction to the platform, user profiles, and controls, and could be accessed at any time by court staff, counsel, parties, witnesses, and members of the public.

Our platform was designed with reference to commonly-used applications (such as Zoom and Webex) in order to foster instant familiarity for people already accustomed to popular digital technology, and to thereby reduce the learning curve in navigating internal controls.

Customizable Design for Cultural Adaptability

Norms on the way hearings and meetings are conducted vary between cultures, including seating arrangements. The platform allows for individual user adaptability to construct a "Meeting Map" and/or to size and position

IV. Access to Justice and Equality, Diversity, Inclusion

video windows to align with such cultural norms and preferences. The view layout of the video windows can be pre-set for various applications.

Video-conferencing and Indigenous Peoples

Many of the over 600 First Nation communities in Canada are situated in small, remote, and rural areas.²³ Geographic and social isolation, high costs, and lack of infrastructure contribute to a digital divide between indigenous peoples and mainstream Canadian society.²⁴ The adoption of information technology can contribute significantly to positive economic, social and community development among indigenous peoples, as well as provide a vector for enhanced solidarity and political empowerment.²⁵

Against this backdrop, our hope is that our video-conferencing platform would be adaptable to—and indeed, work to enhance—justice in indigenous communities. The modular design and customizable controls would ideally allow the platform to see and account for cultural differences within and across indigenous communities. Our goal is that the customizable aspects of the platform such as layout, “action” buttons, and user profiles would allow the platform to be adapted for use in indigenous communities.

Ongoing research and consultation with indigenous groups and leaders will be critical to building trust in the platform, increasing adoption, and enhancing its cultural relevance to indigenous communities.

Physical Access to Technology

Having regard to the economic and hardware access barriers, our concept includes a standard model kiosk that could be built and/or distributed for public facilities (such as town halls, courthouses, or community centres) and would have built-in hardware, software and basic user controls. This kiosk would provide a secluded enclave with ideal conditions for audio/video, and privacy at a quality sufficient for any user profile (advocate, witness, member of the public, etc.).

Accessibility

Our model incorporates a number of controls and user options to address accessibility concerns. The platform would have integrated user options for both deaf and blind participants, as well as controls to enhance font size, volume, activate closed captioning and voice-to-text recognition.

As previously noted, users will have the ability to customize their user settings and to move elements in the panel, such as the control menu, video, and document windows, in order to make the display more comfortable for the eyes and enhance audio.

Children and Vulnerable Litigants

Testifying in public or being in the formal courtroom environment are some of the most stressful aspects of testifying for many young witnesses.²⁶ Videoconferencing has already been incorporated into criminal proceedings to reduce stress for participants and allow young witnesses to testify outside of a courtroom.²⁷

Our platform has the flexibility to accommodate further testimonial aids for children and vulnerable litigants. In some proceedings witness screens are employed to block the witness from seeing the accused person. By blocking the accused’s video from a witnesses’ monitor, a virtual screen is created, ensuring that counsel and the accused are still able to view the witness and assess their testimony.

Our platform is alive to the fact that participants may need assistance throughout the hearing process. Participants may identify a helper to assist them with navigating our platform. Similar to the role of helpers in British Columbia’s Civil Resolution Tribunal, a helper may be a trusted friend, family member, or service provider that can support the user through the dispute resolution process.²⁸ A helper cannot be a witness or other party to the proceeding.



Criminal Justice and Accused Persons

Using video-conferencing as a tool for criminal justice presents exceptional challenges due to the high standard of proof and impacts on liberty involved in judgements on witness credibility. Nevertheless, there is a demand globally for videoconferencing in criminal matters,²⁹ and a well-designed platform may be instrumental in expediting criminal procedures and fulfilling specific needs unique to the criminal context, such as the need to protect vulnerable witnesses,³⁰ moving forward more routine matters such as petty crimes and bail hearings, and bridging large distances and costs for low-income individuals.³¹

Our concept for a video-conferencing solution incorporates modification options and tools adaptable to the criminal context. In particular:

- a. the user demo video may assist counsel with preparing their witnesses and clients for proceedings and becoming comfortable and familiar with the forum;
- b. the integrated document management system and smart index would allow criminal counsel to display court files including criminal record, charge sheets, and other frequently referred-to documents with a referencing system that could be programmed for standard criminal document reference numbers and forms;
- c. virtual breakout rooms can allow for expedited communication between counsel, opposing counsel, and clients;

- d. the live digital signature function can assist with signing orders digitally in real time, reducing the cost and difficulty of travel to courthouses to have documents sworn;
- e. the uniform video background can eliminate presentational barriers, neutralizing the courtroom experience and helping to alleviate bias;
- f. based on socio-economic disparities, accused individuals may not have access to even the most basic technology. Our concept of free, public kiosks would provide a venue for those without access to a cellphone or computer to use the platform.

Ideally, the layout and functionality of this platform could provide a better basis to conduct even the sensitive aspects of criminal hearings virtually (should the parties agree), in order for justice to be able to be served more immediately and efficiently for criminally accused persons. The platform may also provide a promising forum to employ progressive approaches to criminal law, such as victim-offender mediations and other restorative justice strategies.³²



V. Best Practices and Etiquette

Our research included a consideration of “best practices” and etiquette for remote video-conferenced hearings and meetings.

Lawyers: Civility – Cooperation – Collaboration³³

Counsel bear the following obligations to ensure the just, fastest, and least costly resolution of matters³⁴ in the context of electronic hearings:

- To be flexible and to accommodate at all times, where such accommodation does not affect the merits of the case or result in prejudice to the client’s rights, technical difficulties and other challenges arising from working from home, and the unique challenges faced by self-represented litigants;
 - To work to enable sufficient preparation by all participants and to assist in securing access to technology for all within a reasonable window of time before the hearing: the Advocates’ Society recommends at least 48 hours;³⁵
 - Where possible, to secure technological support for the hearing and designate a team member to communicate with the technological support person or team;
 - Together with opposing counsel, to determine a protocol for addressing technological disruptions including protocol for notifying the judge of any such disruption, and exchanging telephone numbers that can be used to communicate in such event;
 - To reach agreement prior to the hearing concerning:³⁶
 - Hearing format: what issues may be argued in writing and which require oral submissions;
 - Need for language interpretation, court reporting, or other services;
 - Preparation of a joint book of documents, where possible;
 - Document format and procedure for pre-hearing document exchange, including, where appropriate, identifying documents with which witnesses will be presented;
- Protocol for identifying the particular page to which counsel refers (recommended best practice is to refer exclusively to pdf page numbers);³⁷ and
 - Treatment of documents subject to publication bans, sealing orders, or pertaining to confidential or sensitive matters.

Audio/Video Issues

Guidance concerning audio and video best practices are about more than an artful presentation: remote hearings must meet the constitutional requirements of a fair hearing, including the right to confront witnesses. The video of any witness or expert witness must be sufficient to enable the court to make determinations of credibility including catching non-verbal cues. High-quality video and audio without any lag is key.

Video best practices include³⁸:

- Making eye contact with the camera and not focusing on one’s image, the image of other participants, or other points of focus on the screen or in the room (if you must speak while looking at a specific point on the screen (e.g. notes, or video of a participant) position those windows near the camera;
- Avoiding distracting attire including patterns that appear poorly on screen;
- Having appropriate lighting: plenty of light upon the face, and no backlight; and
- Framing wisely:
 - Head and the top of shoulders should dominate the screen. If your head is cut off at the top or bottom, you are too close. If your entire torso is in view, you are too far away.
 - Camera should be at eye-level to avoid distortion from an upward-facing camera. Laptops or web cams should be elevated to eye level by placing upon books or other elevated furniture.
 - Neutral background should be chosen or an appropriate digital background.

V. Best Practices and Etiquette

Audio best practices include:

- Setting device's speaker volume to 50 to avoid microphone feedback;³⁹
- Placing microphones directly in front of those who will be speaking and not to the side;
- Speaking slowly and clearly;
- Pausing before speaking to avoid interruptions, and for witnesses, to permit time for objections to be made; and
- Using or being subject to mute unless speaking at all times.

Attendance

Not only counsel, parties, witnesses, and other participants should be included, but also the right of the public to attend or access a hearing. Consideration should be given to providing sufficient notice to the potential audience that may wish to view or access a hearing.

In summons', sufficient information about the technology and procedure must be given to enable witnesses to attend.

Parties should develop a protocol for sequestering and excluding witnesses where necessary, including excluding witnesses to deal with an objection.

Preparation

Counsel should become familiar with any directions from the presiding justice, Notices to the Profession, Practice Directions, and applicable best practices guides and requirements.⁴⁰

Prior to the hearing, counsel should become familiar with the technology and practice using it, including testing its functionality, all audio and visual presentation issues, and security settings that may interfere with its operation.

Counsel must prepare not only themselves but also their witnesses, who must understand the functionality they will be expected to use, and those functions to which they will be subject by the hearing host.

Court Etiquette

Remote hearings remain court hearings. Counsel should maintain the etiquette of a court and avoid detracting from the dignity of a proceeding. This includes:

- Considering appropriate attire, whether gowning or business attire;
- Considering surroundings and minimizing risk of interruptions;
- Supplying a digital background, where possible;
- Addressing the judge and counsel as if they were in a physical courtroom;
- Not "ghosting": requesting permission to leave an electronic hearing as one would be required to do in a physical courtroom;
- Avoiding eating and drinking, other than water;
- Taking notes by hand, to avoid distraction caused by typing while making submissions; and
- If video is on, avoiding unwanted facial expressions

The Potential for Witness Coaching/Tampering

One significant risk associated with remote hearings is the potential for witness coaching or tampering "off-camera". This includes the witnesses' use of notes that are not part of the court record. Our platform contemplates the optional use of "I Agree" or "Undertaking" functionality that requires select participants to view any court rules or etiquette notices the Host wishes to post, and to have to agree to those rules before joining the hearing or meeting.



Notes

1. *Arconti v. Smith*, 2020 ONSC 2782 at para. 19
2. *Oxford University Press*, Dec 2019
3. OECD, “2019 Global OECD Roundtable on Equal Access to Justice – Highlights”, March 27-28, 2019, Lisbon, Portugal, available online: <www.oecd.org/gov/equal-access-to-justice-oecd-expert-roundtable-portugal-2019.htm>.
4. OECD, “2019 Global OECD Roundtable on Equal Access to Justice – Highlights”, March 27-28, 2019, Lisbon, Portugal, at 1, available online: <www.oecd.org/gov/equal-access-to-justice-oecd-expert-roundtable-portugal-2019.htm>.
5. *BCGEU v British Columbia (AG)*, [1988] 2 SCR 214; see also *Jonsson v Lymer*, 2020 ABCA 167 at para 38.
6. See United Nations and the Rule of Law, “Access to Justice”, available online: <www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>.
7. See Justice Video Network, “About JVN”, available online: <www.jvn.attorneygeneral.jus.gov.on.ca/en/About/AboutJVN>.
8. See, e.g., Omar Ha-Redeye, “Zoom, Zoom, Zoom... Videoconferencing in the Room”, *Slaw*, April 5th, 2020, available online: <www.slaw.ca/2020/04/05/zoom-zoom-zoom-videoconferencing-in-the-room/>.
9. Amy Salzyn, “Trial by Zoom”: What Virtual Hearings Might Mean for Open Courts, Participant Privacy and the Integrity of Court Proceedings”, *Slaw*, April 17th, 2020, available online: <www.slaw.ca/2020/04/17/trial-by-zoom-what-virtual-hearings-might-mean-for-open-courts-participant-privacy-and-the-integrity-of-court-proceedings/#_ftn4>.
10. Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013) at 9, online: Canadian Bar Association <www.cba.org/dev/cba/equaljustice/secure_pdf/Equal-Justice-Summary-Report-eng.pdf>; Action Committee on Access to Justice in Civil and Family Matters: Prevention, Triage and Referral Working Group, Final Report: Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector, (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at 8, Canadian Forum on Civil Justice, available online: <www.cfcjfcj.org/sites/default/files/docs/Report%20of%20the-%20Prevention,%20Triage%20and%20Referral%20WG%20.vpdf>.
11. *Access to Civil and Family Justice: a Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2011) at 1.
12. See, e.g., The Canadian Press, “Canada’s top judge calls for fair access to justice for all”, Friday, October 20, 2017, available online: <www.ctvnews.ca/canada/canada-s-top-judge-calls-for-fair-access-to-justice-for-all-1.3640939> .
13. See Trevor C. W. Farrow, “What is Access to Justice?” *Osgoode Hall Law Journal* 51.3 (2014) : 957-988 at 962.
14. Matt Reynolds, “Could Zoom jury trials become the norm during the coronavirus pandemic?” *ABA Journal*, May 11, 2020, online: https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic?utm_source=salesforce_209927&utm_medium=email&utm_campaign=weekly_email&utm_medium=email&utm_source=salesforce_209927&sc_sid=04467031&utm_campaign=&promo=&utm_content=&additional4=&additional5=&sfmc_j=209927&sfmc_s=64429531&sfmc_l=1527&sfmc_jb=323&sfmc_mid=100027443&sfmc_u=6874252
15. OECD, “Glossary of Statistical Terms: The Digital Divide”, *Understanding the Digital Divide*, OECD, 200, page 5, available online: <stats.oecd.org/glossary/detail.asp?ID=4719>; UNESCO, “I’d blush if I could: closing gender divides in digital skills through education”, *EQUALS Skills Coalition Policy Paper* (2019) at 10, available online: <unesdoc.unesco.org/ark:/48223/pf0000367416.pdf>; World Wide Web Foundation, ‘Women’s Rights Online. Translating Access into Empowerment’ (2015), available at:

- webfoundation.org/docs/2015/10/womens-rights-online21102015.pdf>; Huma Shah and Kevin Warwick, “Imitating Gender as a Measure for Artificial Intelligence: - Is It Necessary?”, in *Proceedings of the 8th International Conference on Agents and Artificial Intelligence - Volume 1*, ICAART, Rome, Italy (2016) at 126-131, available online: www.scitepress.org/Link.aspx?doi=10.5220/0005673901260131>; “Taking Stock: Data and Evidence on Gender Equality in Digital Access, Skills and Leadership”, EQUALS Skills Coalition Policy Paper (2019), available online: collections.unu.edu/eserv/UNU:7350/EQUALS-Research-Report-2019.pdf>; Martine Lagacé et al., “How Ageism Contributes to the Second-Level Digital Divide: The Case of Canadian Seniors”, *Journal of Technologies and Human Usability*, 2016, available online: www.researchgate.net/publication/283719507_How_Ageism_Contributes_to_the_Second-Level_Digital_Divide_The_Case_of_Canadian_Seniors>; See, e.g., UNESCO, “UNESCO global report: opening new avenues for empowerment: ICTs to access information and knowledge for persons with disabilities”, (2013), available online: unesdoc.unesco.org/ark:/48223/pf0000219767>
16. The research of the National Self-Represented Litigants’ Project (“**NSRLP**”) has found that 90% of self-represented litigants represent themselves because they cannot afford a lawyer: Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented litigants* (May 2013), Final Report at 2, 8, and 39 [**NSRLP Report**].
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 18. *Ibid* at 3; NSRLP Report at 53-54.
 19. *Ibid* at 108-110; See also *Reaching Equal Justice: An Invitation to Envision and Act*, Report of the CBA Access to Justice Committee (CBA: November 2013) at 32.
 20. NSRLP Report and CBA, both *ibid*.
 21. This can be analogized to the continuing debate on whether to allow televised proceedings, See *R v Squires*, 1992 CanLII 7627 (Ont CA); David Lepofsky, “Cameras in the Courtroom — Not Without My Consent” (March 1996) 6 NJCL 161, available online, <https://ciaj-icaj.ca/wp-content/uploads/documents/import/1994/LEPOFSKY.pdf?id=1486&1581946169>> at 354-6; Michael Spratt, “Cameras in court: Be careful what you wish for”, September 19, 2016, available online: <https://www.canadianlawyermag.com/news/opinion/cameras-in-court-be-careful-what-you-wish-for/270262>>.
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 23. *Ibid*.
 24. See, e.g., Marian Bredin, “Bridging Canada’s Digital Divide: First Nations’ Access to New Information Technologies”, *Canadian Journal of Native Studies*, XXI 2(2001), 191-21; and Susan O’Donnell et al., “Digital Adoption in Remote and Northern Indigenous Communities in Canada”, *Canadian Sociological Association*, 2016 Annual Conference, University of Calgary, Alberta, available online: firstmile.ca/wp-content/uploads/2016-CSA-Digital-Technology-Adoption.pdf>.
 25. *Ibid*.
 26. Project Lynx, “A Resource Guide for Working with Child Witnesses in Northern Canada” Available Online: http://cac-cae.ca/wp-content/uploads/Web-Resource-Guide_Lynx-1.pdf >
 27. *Criminal Code of Canada*, RSC1985, c 46, s 486.2.
 28. Shannon Salter, “The Civil Resolution Tribunal: How We’re Building Inclusivity into the Justice System” (2018), *Transition: The Magazine of Disability Alliance BC Access to Justice*, 8. Available online: <https://disabilityalliancebc.org/transspringweb18/>>
 29. See Evert-Jan van der Vlis, “Videoconferencing and criminal proceedings”, *Minist*
 30. *Ibid* at 13.
 31. *Ibid* at 14.



32. See, e.g., Pablo Galain Palermo et al., “Restorative Justice and Technology: Interdisciplinary Perspectives on Contemporary Conflict Resolution”, (2016), available online: <www.researchgate.net/publication/301891030_Restorative_Justice_and_Technology>.
33. See The Advocates’ Society, “Best Practices for Remote Hearings” (May 13, 2020).
34. *Hryniak v Mauldin*, 2014 SCC 7.
35. The Advocates’ Society, “Best Practices for Remote Hearings” (May 13, 2020).
36. See Tara Kaushik, “10 Tips for Virtual Hearings Before Regulatory Agencies”, *Law360* (May 15, 2020).
37. *Ibid* at para 85.
38. Alberta Court of Appeal, “Reference and Etiquette Guide for Electronic Hearings” (2020).
39. *Ibid*.
40. Please see the list of resources in Appendix “B”.



British Columbia Court of Appeal:

- “Updated Notice to the Public Regarding Access to Court Proceedings During the COVID-19 Pandemic” (May 14, 2020), online: https://www.bccourts.ca/Court_of_Appeal/covid-19/notices_announcements.aspx
- Notice to the Public Regarding Videoconference Proceedings in the Court of Appeal” (April 29, 2020), online: https://www.bccourts.ca/Court_of_Appeal/covid-19/notices_announcements.aspx

British Columbia Supreme Court:

- Index of COVID-19 Notices, online: https://www.bccourts.ca/supreme_court/index.aspx

Alberta Court of Appeal:

- “Notice – Electronic Hearings” (April 8, 2020), online: <https://albertacourts.ca/ca/publications/announcements/notice---electronic-hearings>

Court of Appeal for Ontario:

- “Practice Direction Regarding the Electronic Conduct of Matters During the COVID-19 Emergency” (April 6, 2020), online: <https://www.ontariocourts.ca/coa/en/notices/covid-19/ochome.htm>

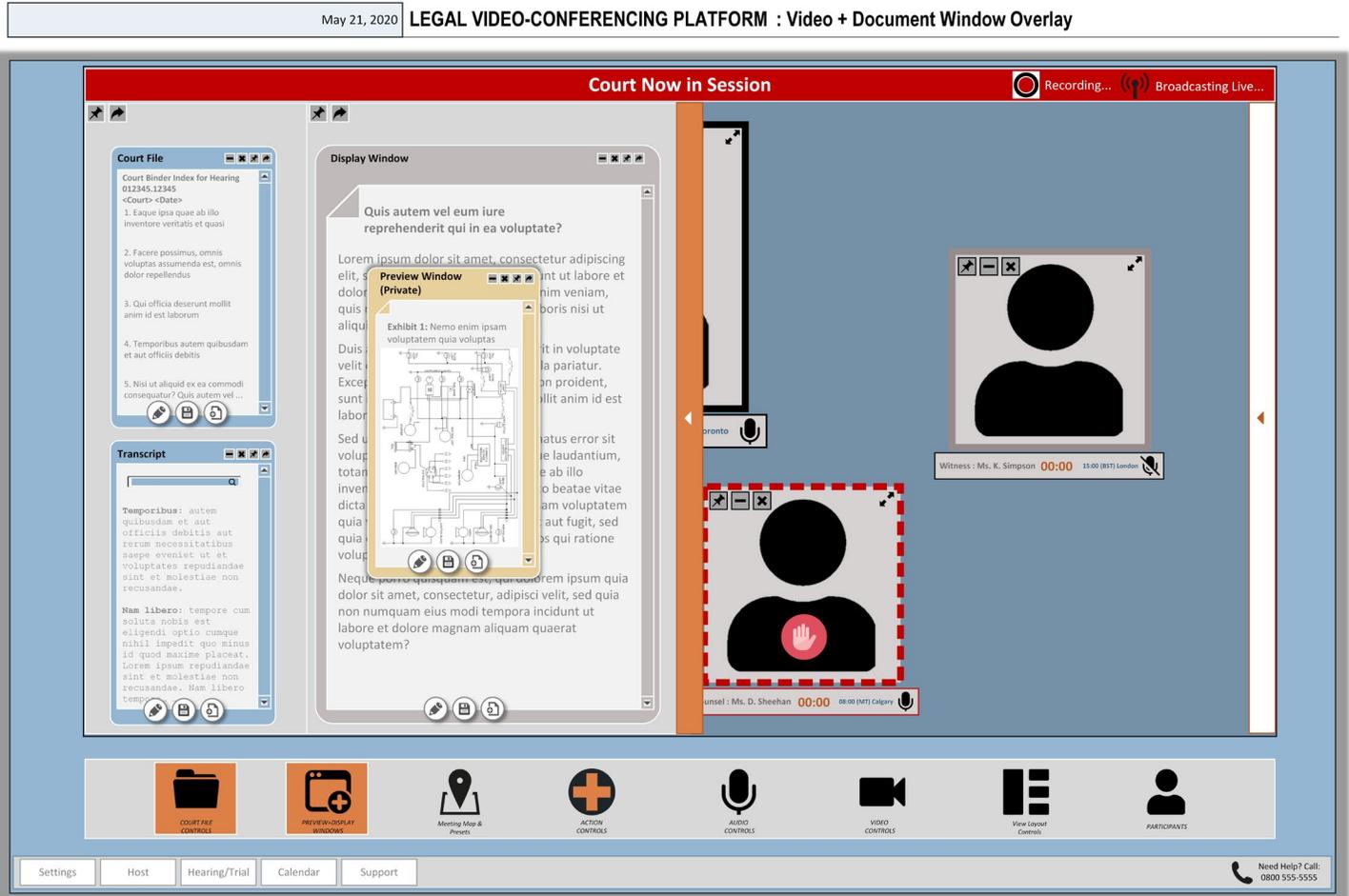
Ontario Superior Court of Justice:

- “Consolidated Notice to the Profession, Litigants, Accused Persons, Public, and the Media” (May 13, 2020), online: <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/>
- The Advocates’ Society, “Best Practices for Remote Hearings” (May 13, 2020), online: https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/The_Advocates_Society_Paperless_Trials_Manual_May29.pdf

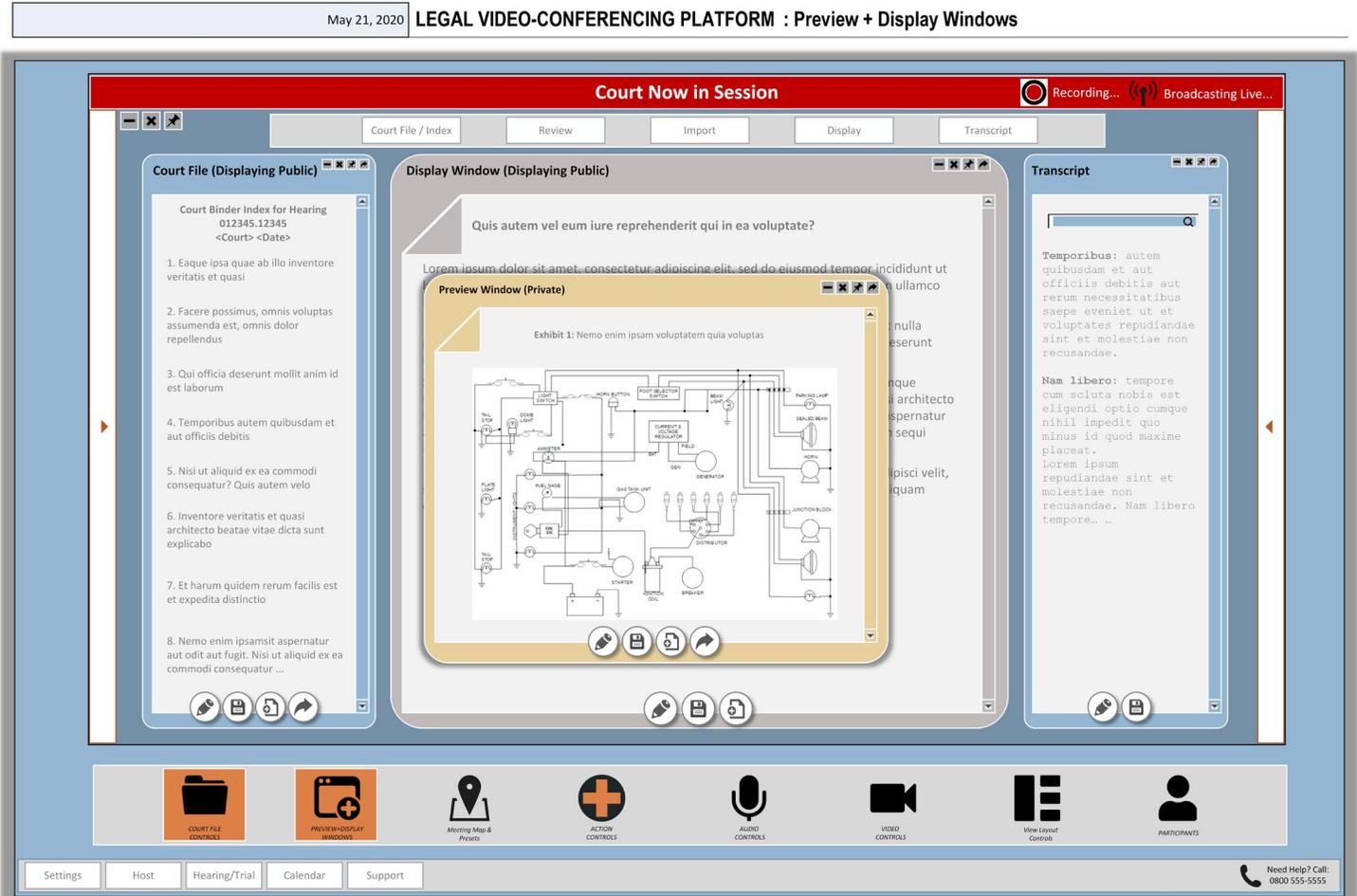
1. Mockup of Video Window with main navigation and control bar



2. Mockup of Video Window with the Court Document and Display Windows overlaid



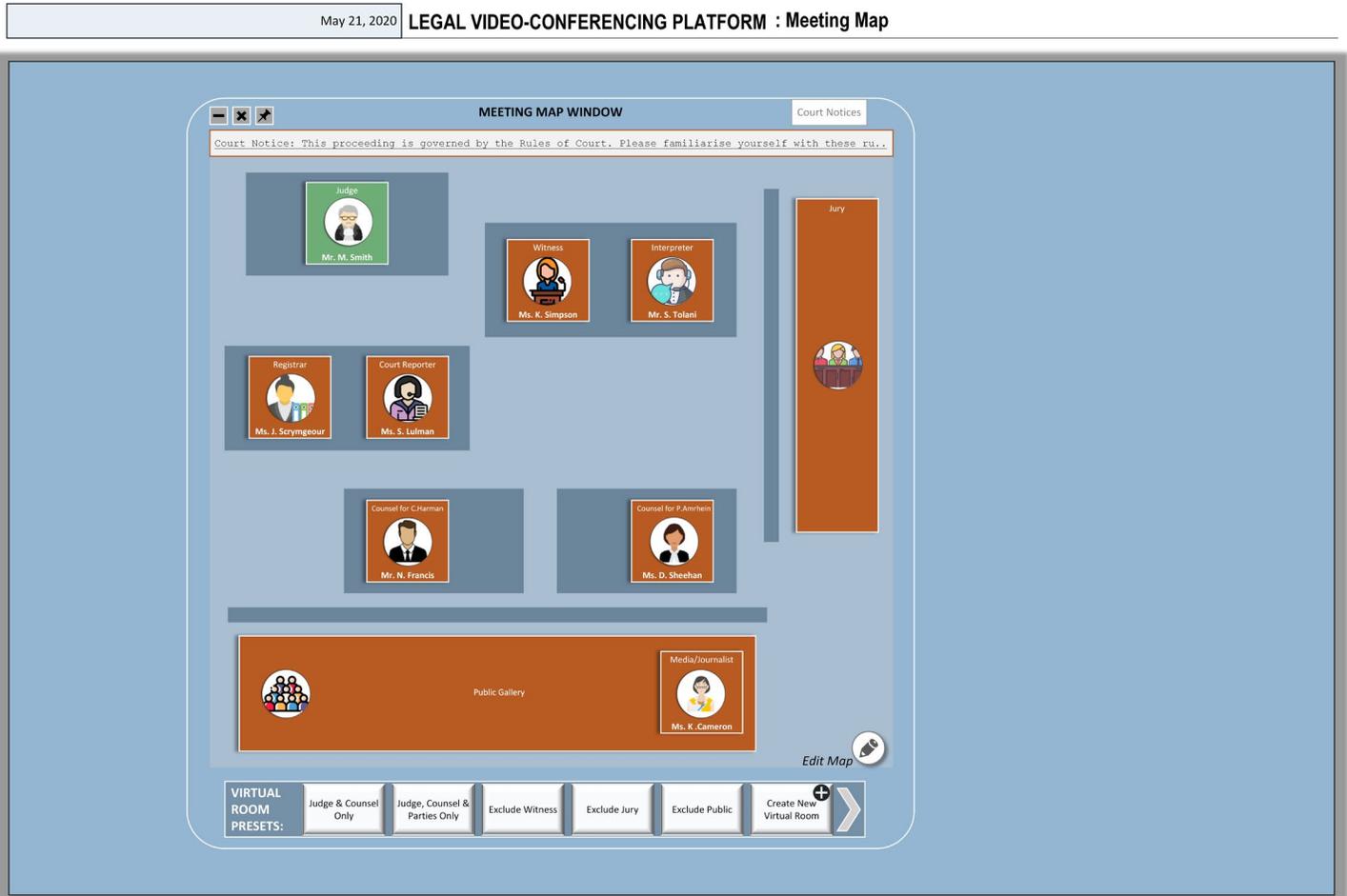
3. Mockup of the Document and Display Window pinned separately



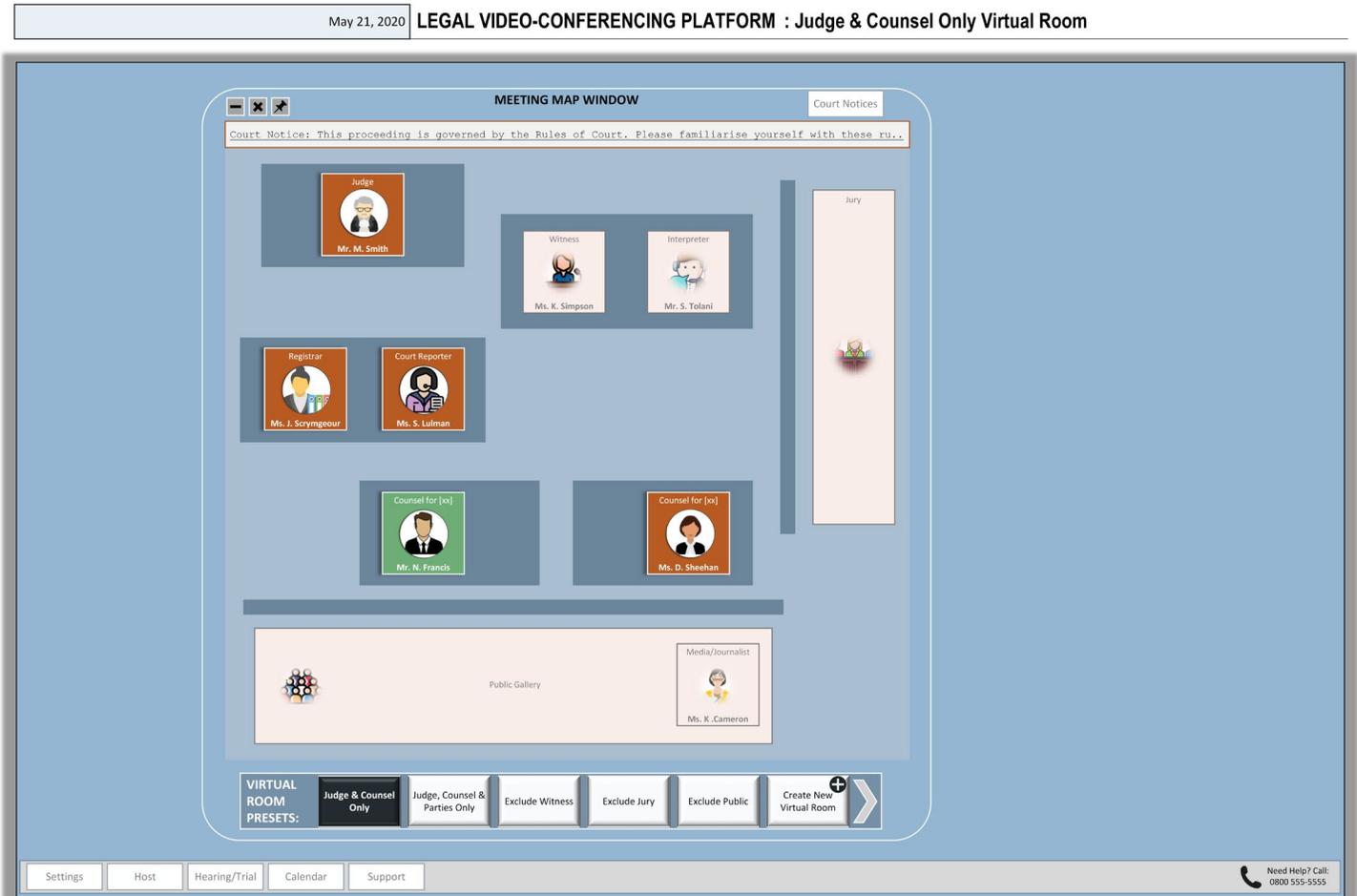
4. Mockup of Video Window with the Participant Window overlaid



5. Mockup of the Meeting Map Window to show participants, their roles and the virtual room presets



6. Mockup of Meeting Map Window with one of the virtual room presets applied to show excluded participants





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A Bennett Jones Whitepaper:

Imagining the Ideal Video-Conferencing Solution for Hearings, Arbitrations, Mediations, Depositions and Corporate Meetings

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