

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
DOCKET No. SJ-2012-0306

DISTRICT ATTORNEY FOR THE NORFOLK DISTRICT

vs.

JUSTICES OF THE QUINCY DISTRICT COURT

DOCKET No. SJ-2012-0308

ANTHONY BENEDETTI, CHIEF COUNSEL, COMMITTEE FOR PUBLIC COUNSEL  
SERVICES

vs.

JUSTICES OF THE QUINCY DIVISION OF THE DISTRICT COURT DEPARTMENT OF THE  
TRIAL COURT

MEMORANDUM AND JUDGMENT

The District Attorney for the Norfolk District (District Attorney) and the chief counsel of the Committee for Public Counsel Services (CPCS) petition this court under G. L. c. 211, § 3, to exercise its superintendence powers to prohibit the Justices of the Quincy District Court (Justices) from permitting OpenCourt<sup>1</sup> to broadcast or record courtroom proceedings in the Quincy District Court other than those occurring in the first session, until this court has approved guidelines for the operation of OpenCourt.

The relevant background is as follows. As currently in effect, Rule 1:19 of the Rules of

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<sup>1</sup> OpenCourt is a pilot project of WBUR-FM, a National Public Radio station in Boston that promotes public access to courts through the use of digital technology.

the Supreme Judicial Court, as amended, 430 Mass. 1329 (2000) (rule 1:19), provides that "[a] judge shall permit broadcasting, televising, electronic recording, or taking photographs of proceedings open to the public in the courtroom by the news media for news gathering purposes and dissemination of information to the public," subject to certain limitations. Most importantly, a judge has discretion to limit or temporarily suspend coverage "if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence." A revised version of rule 1:19 was approved by this court on February 28, 2012; it will take effect on September 17, 2012. The provisions of the rule directly relevant to this case are substantially the same in both versions.<sup>2</sup>

In May, 2011, pursuant to rule 1:19 and "as part of a pilot project" that is "intended to promote greater public access to courts through the use of digital technology," Commonwealth v. Barnes, 461 Mass. 644, 645, 647 (2012) (Barnes), OpenCourt began streaming live over the Internet on a daily basis audio and video recordings of the proceedings taking place in the first session of the Quincy District Court.<sup>3</sup> Since June, 2011, OpenCourt has also maintained an

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<sup>2</sup> The amended version of the rule adds some more detail both to the rule's general directive that judges permit photographing and broadcasting of courtroom proceedings, and to its condition that judges may take steps to protect against the substantial likelihood of harm. The provisions of the rule quoted in the text are taken from the provisions of rule 1:19 in effect until September 17, 2012. The amended version of rule 1:19 provides in part: "A judge shall permit photographic or electronic recording or transmitting of courtroom proceedings open to the public by the news media for news gathering purposes and dissemination of information to the public, subject to the limitations of this rule"; and "[a] judge may impose . . . limitations necessary to protect the right of any party to a fair trial or the safety and well-being of any party, witness or juror, or to avoid unduly distracting participants or detracting from the dignity and decorum of the proceedings." Rule 1:19 (2), and (2)(b), effective September 17, 2012.

<sup>3</sup> Judges in the first session primarily hold hearings on the beginning stages of criminal cases, including arraignments, but the session also sees other types of proceedings, such as probation surrender hearings, hearings on protective substance abuse commitments and protective orders under G. L. c. 209A, summary process cases, and debt collection cases. Jury trials are not conducted in the first session.

online archive of its recordings that is accessible to members of the public who register on its Web site for access to the archive. In Barnes, the court addressed challenges to the OpenCourt project, or more particularly, to certain orders issued by a judge in the Quincy District Court raised by the District Attorney and a defendant represented by CPCS in separate petitions under G. L. c. 211, § 3; both petitions sought to enjoin OpenCourt from publishing certain recordings to its online archive. The court rejected these challenges in its opinion. See id. at 645-646, 654-660.<sup>4</sup> However, noting that "OpenCourt's recording of court room proceedings on a daily basis permits a new and different application of our rule and policy generally authorizing cameras in and electronic access to Massachusetts court rooms," id. at 653, and "when one of our courts establishes or permits a pilot project relating to an area of its work, it is generally the case that a set of guidelines or rules are issued to govern the pilot's operation," the court determined it would be appropriate to develop guidelines for the operation of the OpenCourt project, and requested that its judiciary-media committee prepare a set of guidelines and submit them to the full court for approval. Id. at 661. At the same time, the court stated expressly that "[w]e will not require OpenCourt to suspend its operations pending the preparation, submission, and approval of these project guidelines." Id. at 662.

In March, 2012, the "OpenCourt Work Group" hosted the first in a series of meetings to develop guidelines under which OpenCourt would broadcast and archive jury trials occurring in Jury Room A at the Quincy District Court.<sup>5</sup> The Quincy district court judges and OpenCourt invited stakeholders in that court to be involved in the development of these guidelines. Due to

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<sup>4</sup> In Commonwealth v. Barnes, 461 Mass. 644 (2012), the court also considered a challenge by WBUR-FM to a separate order of the judge that related to the OpenCourt project. The court upheld that challenge. See id. at 645-646, 657.

<sup>5</sup> The facts set out in this paragraph are taken from the affidavit of John Davidow, executive editor of WBUR and executive producer of the OpenCourt project.

concerns that the counsel table microphones used in the first session to supply the audio for both the official court record and OpenCourt's broadcasts were picking up confidential attorney-client communications, OpenCourt decided to create a different audio mix for its recording of proceedings in Jury Room A, one that would not include in the mix any recording from the counsel table microphones at all. To make the audio mix without contribution from the counsel table microphones, OpenCourt installed two microphones against the outside walls of the courtroom. In the opinion of the executive producer of OpenCourt, this change "dramatically limits the possibility that a conversation between client and counsel might be streamed and recorded by OpenCourt." OpenCourt demonstrated the audio and video setup at a meeting of the OpenCourt Working Group in Jury Room A on May 30, 2012. Representatives of the District Attorney and CPCS attended this meeting.

On June 25, 2012, the first justice of the Quincy District Court issued a set of guidelines (interim guidelines) to govern operation of the OpenCourt project in Jury Room A, and indicated that live streaming of jury trials in that room would begin on July 16, 2012. The interim guidelines provide as follows:

"1. No sexual assault or domestic violence cases will be broadcast where the victim indicates she/he does not want to be on camera.

"2. No cases will be broadcast involving sexual assault or domestic violence where witnesses are minors.

"3. Cases where witnesses will be subject to retaliation or placed in physical jeopardy, for example cases involving gang violence, will not be broadcast.

"4. Cases involving undercover police officers or civilian informants will not be subject to broadcast.

"5. The camera has been arranged so that the jurors will not be on camera at any time.

"6. The judge will control the switch to turn off the audio during bench conferences.

"7. Microphones at the attorney table will not be connected to the videostream so as to protect attorney/client communications.

"8. The videostream will not be on archive until a verdict has been returned, so that no one can watch the trial on archive during the course of the proceedings."

Soon thereafter, the District Attorney and CPCS filed separate civil actions in the Norfolk Superior Court seeking to enjoin the Justices from permitting OpenCourt to broadcast or archive proceedings in Jury Room A, or in any other courtroom of the Quincy District Court besides the first session, until guidelines for OpenCourt's operation had been submitted to and approved by the Supreme Judicial Court. After hearing the plaintiffs' motions for a preliminary injunction, and citing concerns about the plaintiffs' lack of standing and the inappropriateness of the Superior Court as a forum for resolving the plaintiffs' concerns, the Superior Court judge took no action on the requests for injunctive relief after counsel for the plaintiffs and for the Justices stipulated that OpenCourt would not be permitted to record in Jury Room A until the matter had been heard by a single justice of this court.<sup>6</sup> The district attorney and CPCS then filed the G. L. c. 211, § 3, petitions before me.

As argued by the parties, this case presents the question whether the District Attorney and CPCS are entitled to relief under G. L. c. 211, § 3, generally, and also whether the plaintiffs meet the standard for granting a preliminary injunction. "A party seeking review under G. L. c. 211, § 3, must demonstrate both a substantial claim of violation of its substantive rights and an error that cannot be remedied under the ordinary review process." Commonwealth v. Goodwin, 458 Mass. 11, 14 (2010). To obtain a preliminary injunction, a party must demonstrate, among other

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<sup>6</sup> The Superior Court judge hearing the motions for a preliminary injunction permitted WBUR (referred to hereafter as OpenCourt) to intervene. OpenCourt did not join in the parties' stipulation.

requirements, a likelihood of success on the merits of the claim(s) asserted, and also “that, without the requested relief, [the party] may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits.” Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980). As just summarized, the two standards impose related and substantial burdens on a party seeking relief to demonstrate both a substantive legal entitlement to relief and substantial, imminent harm.

Addressing the merits of his claim, the District Attorney argues that this court's decision in Barnes holds that "specific official guidelines approved by the Supreme Judicial Court" are "necessary" for OpenCourt's operation, and that the proposed broadcasts from Jury Room A constitute an "expansion" of the project forbidden by the Barnes decision. I disagree. Barnes states that it would be "appropriate" to have guidelines because of the unique nature of the OpenCourt project's continuous coverage and its pilot status, but the decision also specifies that there is no reason to suspend the project's operations pending the adoption of those guidelines. Barnes, 461 Mass. at 661-662. The continuous coverage of jury trials in a different court room in the same court house constitutes part of the same OpenCourt “pilot project” considered in Barnes. As such, it fits within the provision permitting OpenCourt to continue its operations while formal guidelines are developed.

Moreover, to the extent the court was concerned in Barnes generally about the absence of guidelines for a pilot project and about some of the specific risks to victims, witnesses, and defendants posed by OpenCourt's continuous Internet coverage of court proceedings, it is important to take into account the interim guidelines issued by the first justice of the Quincy District Court. First, as their title reflects, they are guidelines, thus addressing, albeit in a temporary fashion, the court's observation that pilot projects generally operate under guidelines. See Barnes, 461 Mass. at 661. More particularly, the interim guidelines will govern all of OpenCourt's coverage of jury trials in Jury Room A, and they address directly this court's

substantive concerns in Barnes relating to victims and witnesses. Thus, the guidelines direct that in any case where a victim or a witness is a minor, the case may not be broadcast at all; and in any sexual assault or domestic violence case, no broadcast may be made if the victim does not want to be on camera. See Barnes, 461 Mass. at 655-657, 662 n.31.

The District Attorney argues also that the interim guidelines are insufficient to offer real protection to minor victims and witnesses or to victims of sexual assault or domestic violence, and essentially raise more questions than they answer; the specific complaint is that the guidelines do not spell out how a victim or witness is to establish that she or he does not wish to have the trial broadcast. This fear seems unfounded. As suggested by the Justices, it is appropriate to anticipate and expect that they will exercise their discretion to delineate clear and reasonable procedures for the presentation of requests by such victims and witnesses to prohibit the broadcast of a particular trial. Furthermore, to the extent that the District Attorney is worried about the risk of injurious invasion of privacy threatened by the broadcast of jury trials in domestic violence or sexual assault cases where an (adult) victim does not testify – and therefore, under the interim guidelines, cannot request that the broadcast not occur – the District Attorney’s fears seem speculative at best. He provides no indication about the frequency of jury trials in which an alleged victim of sexual assault or domestic violence does not testify, and in any event, other measures are available to protect against the name of the alleged victim being used. In addition, as discussed in Barnes, OpenCourt’s own project guidelines provide opportunities to request that the name or identifying information of a victim or witness be redacted from the broadcast before it is archived. See Barnes, 461 Mass. at 649-650 & n.11.

It also bears noting that some of the concerns about the continuous nature of OpenCourt's coverage of the first session that the court noted in Barnes, supra at 661, and that the District Attorney raises again here – namely, that because coverage is continuous, there is no real time to consider the risks of broadcasting on a case-by-case basis and in advance – should be alleviated

in the context of jury trials. Because jury trials, unlike most proceedings in the first session, are generally scheduled substantially in advance of the trial date, and because presumably the parties to the case – and perhaps especially the prosecutor – will be aware in advance of the subject matter of testimony to be presented and issues to be covered at the trial, both the District Attorney, on behalf of the Commonwealth, and CPCS, for an indigent defendant, can move to preclude coverage prior to the day of trial, if necessary.<sup>7</sup>

Turning to the petition filed by CPCS, it argues that its clients' constitutional rights to the effective assistance of counsel would be violated by permitting OpenCourt to record jury trials without guidelines in place that ensure the complete confidentiality of attorney-client communications. It suggests that advising a defendant to proceed to trial when OpenCourt is recording could constitute ineffective assistance of counsel, citing Commonwealth v. Downey, 58 Mass. App. Ct. 591 (2003), S.C., 65 Mass. App. Ct. 547 (2006), and Commonwealth v. Perkins, 450 Mass. 834 (2008). Although confidentiality of attorney-client communications is of paramount importance, we stated in Barnes that the fact that OpenCourt derived its audio feed from the same microphones used to create the official court record did not impair a defendant's right to effective assistance of counsel, because attorneys and defendants must take the same

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<sup>7</sup> I mention briefly additional reasons advanced by the District Attorney to show why he is entitled to an injunction against operation of the OpenCourt project in a jury trial session before approval of guidelines by this court. He claims that notifying victims and witnesses that their testimony will be recorded, live-streamed, and posted is “a complex and delicate task,” that there is a risk that victims and witnesses will refuse to testify once they are so notified, and that operation of the project without SJC-approved guidelines will “complicate” the relationship between the District Attorney and the victims. The District Attorney also argues that it is impractical for prosecutors to notify the Associated Press prior to filing a motion to prohibit recording, and taking the time to do so will interfere with their ability to prepare for trial. These concerns are not unique to the OpenCourt project – they would apply to any case that any representative of the media requests to broadcast – and specifically not unique to OpenCourt's recording of jury trials: under rule 1:19 (h) as currently in effect, parties must provide notice before filing a motion to prohibit coverage by any media organization. Furthermore, notice may be provided by e-mail, minimizing the burden on a prosecutor's time and resources.

precautions to ensure that they are not overheard as they would if no media were present. Barnes, 461 Mass. at 660. Given that OpenCourt's microphones for its audio feed in Jury Room A will be placed on the room's side walls rather than directly on the counsel tables, it is even less likely that confidential communications will be picked up. Additionally, the precautions attorneys must take when conversing with their clients would be the same if another media organization chose to record in the court room, and under rule 1:19, another organization would be entitled to do so. The Downey and Perkins cases are also distinguishable. In both, the defendants' attorneys wore live microphones on their bodies during trials that were being recorded for television programs. Commonwealth v. Downey, 58 Mass. App. Ct. at 592-593; Commonwealth v. Perkins, 450 Mass. at 847. This was problematic because it created an actual conflict of interest between the attorney's duty of confidentiality to his client and his arrangement with the television company. Perkins, *supra* at 854. Here, there is no such active participation among attorneys and OpenCourt. But more to the immediate point, OpenCourt's microphones are certainly not placed on an attorney's body for the specific purpose of capturing confidential attorney-client communications; as just described, precisely because of concerns expressed about inadvertent capture of attorney-client conversations, the microphones are not even at the table where the attorney and the client sit, but on the walls of the courtroom.

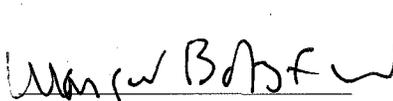
CPCS also raises concerns that because of OpenCourt's recording and broadcast of trials, defendants and their witnesses may be reluctant to testify, and that the identification of defendants or witnesses in the recordings may be detrimental to their safety. Finally, CPCS claims that under the interim guidelines, it is possible that only portions of certain trials will be recorded, leading to a one-sided presentation of the evidence that could prejudice defendants. Each of these objections is not only speculative but applies to all media organizations that might seek to record trials under rule 1:19, not just OpenCourt. This court originally adopted rule 1:19 in 1998, and has previously adopted the rule amendments due to go into effect on September 17,

2012. There is no reason to single OpenCourt out and impose on it a variety of restrictions that do not apply to other media organizations. Furthermore, in any specific case scheduled for a jury trial that, in the view of a CPCS attorney, presents a substantial likelihood of harm to the defendant or a witness, CPCS, on behalf of the defendant, may file a motion to bar its recording. There is no showing that judges will not apply the individualized analysis required by rule 1:19 under its current and future provisions in any case where such a motion is made. Therefore, these general objections are insufficient to show that the operation of OpenCourt in Jury Room A would cause a substantial violation of defendants' substantive rights.

In sum, I conclude that the District Attorney and CPCS have failed to show, as required by G. L. c. 211, § 3, that they will suffer any substantial violation of their substantive rights by the authorization that the Justices of the Quincy District Court have given to OpenCourt, as part of its pilot project, to cover proceedings in Jury Room A subject to the interim guidelines, but before permanent guidelines have been approved by this court.<sup>8</sup> Moreover, if and when OpenCourt proceeds to operate in Jury Room A, both the District Attorney and CPCS will have the opportunity to seek relief from a particular order relating to OpenCourt's coverage.

### **ORDER**

For the foregoing reasons, it is ORDERED that the petitions under G. L. c. 211, § 3, of the District Attorney and CPCS be denied.

  
Margot Botsford  
Associate Justice

DATED: August 14, 2012

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<sup>8</sup> They have also failed to show that they would be entitled to a preliminary injunction to prohibit operation of OpenCourt in Jury Room A until this court approves permanent guidelines.