

NJSBA to state Supreme Court: Facebook communications subject to heightened privacy protections before issuing warrant

Arguing an issue of first impression in New Jersey, the New Jersey State Bar Association said Facebook Messenger communications demand a heightened standard of required showings before a judge can issue a warrant to obtain those messages. NJSBA Board Trustee Brian Neary argued on behalf of the NJSBA as *amicus curiae* in *Facebook v. New Jersey* before the state Supreme Court that a hybrid standard—somewhere between that necessary for a communications data warrant (CDW) and a wiretap order—should be developed for these communications. Neary authored the brief along with past NJSBA President Robert B. Hille, Holly A. Maynard, James H. Maynard and Matheu D. Nunn.

“We see this as an opportunity to highlight the need and the role of the courts and legislatures to adapt to changes in technology,” said Neary to the Supreme Court. “Technology like Facebook Messenger or other similar platforms has undoubtedly made it easier for people to freely and course effectively communicate and express their ideas.”

The matter arises from two interlocutory appeals that were consolidated to consider whether CDWs or wiretap orders had to be served on Facebook in order to obtain prospective electronically stored information from two Facebook user accounts as part of separate ongoing criminal investigations. The warrants sought information including “real time” access to these communications for 30 days—one on a continuing basis and another in 15-minute intervals.

The state argued that the practice of obtaining these communications in 15-minute intervals had been the practice

The NJSBA urged a middle-ground approach that requires three aspects: Showing that there is evidence that

approval; and the time frame for which the warrant is offered is limited to a reasonable amount of time necessary to collect the information. The proposal is meant to provide safeguards in these “prospective communications that are sought on a near-contemporaneous basis” so that the law catches up to technology, said Neary during arguments.

“Prospective speech is more heavily impacted by a reduced sense of confidence in privacy, than is the case with stored communication,” said the NJSBA in its *amicus* brief. “In prospective communications, an individual maintains control of their actions, and the chilling effect from the possibility of being monitored on a prospective basis will inhibit free speech. Thus, a greater burden for obtaining a warrant for prospective communications is necessary to provide the constitutional protections of privacy-in-speech that are well recognized in American jurisprudence.”

Also appearing as *amicus curiae* in favor of heightened protections were the American Civil Liberties Union, Microsoft Corporation and Google LLC.



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since February 2020 as the communications are not able to be produced simultaneously, according to Facebook. This point was critical in the Supreme Court’s mind as the parties were peppered with questions regarding whether the communications were prospective in nature, or simultaneous with such collection occurring only after they became available by Facebook. The Appellate Division affirmed the trial court’s decision that CDWs, and not wiretap orders, were required, but pointed out that the CDWs issued in these two cases were too lengthy in duration.

A CDW addresses acquisition of communications that are electronically stored while wiretap orders seek to intercept contemporaneous communications, the Appellate Division pointed out in its review of this matter. The standard of review for issuing such orders differ in that CDWs require a showing of probable cause, which is appropriate for stored, or past conduct. Wiretap orders are more stringent, requiring more particularity before they can issue. This is consistent with the Constitutional privacy protections.



NJSBA Trustee Brian Neary argued the Association’s *amicus* position before the state Supreme Court.

normal investigative procedures have failed or less intrusive means cannot be employed; minimization efforts are used, including a monitor who will receive the communications covered by the warrant to ensure that unrelated or privileged communications, or communications about other crimes, are sealed and not provided to other investigators without judicial

This is a status report provided by the New Jersey State Bar Association on recently passed and pending legislation, regulations, gubernatorial nominations and/or appointments of interest to lawyers, as well as the involvement of the NJSBA as amicus in appellate court matters. To learn more, visit njsba.com.

NJSBA Family Law Retreat held in Scottsdale

Hundreds of attorneys, judges and legal professionals gathered in Arizona last week for the annual Family Law Retreat. The gathering provided family law practitioners an opportunity to take part in cutting-edge CLE programs, connect with colleagues and experience a thriving Southwestern destination. ■



Princeton Day School is the New Jersey Mock Trial winner for 2023

Princeton Day School of Mercer County won the annual Vincent J. Apruzzese High School Mock Trial Competition on March 20, edging out Mendham High School of Morris County for the state title. The final matchup, hosted by the New Jersey State Bar Foundation, was the culmination of a statewide tournament that involved more than 3,000 students from 209 high schools in all 21 counties. With the win, Princeton Day School earned the right to represent New Jersey in the upcoming National High School Mock Trial Championship, held in Little Rock, Arkansas. New Jersey Supreme Court Chief Justice Stuart Rabner and retired Passaic County Judge Marilyn C. Clark presided over the championship round. Members of the Mainland High School team of Atlantic County, who placed third, served as jurors and received awards. The Foundation also honored Cypress Drueding from Cumberland County Technical Education Center for drawing the winning sketch in the High School Courtroom Artist Contest. ■



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