

Privacy Group of the Year: Cooley

By **Cara Salvatore**

Law360, New York (January 27, 2017, 11:12 PM EST) -- Cooley LLP appears to be a darling of the giants of Silicon Valley, and its wins this year for Facebook, Twitter and Google in privacy actions make it one of Law 360's 2016 Privacy Groups of the Year.

Practice chair Mike Rhodes says that the group has laid a legal foundation that more and more businesses want to draw on, especially with regard to the Federal Wiretap Act of 1968, updated in 1986 by the Electronic Communications Privacy Act, which added guidance around email privacy and communications that are more high-tech than phone calls.

"At least in the context of communications, the federal Wiretap Act is something we've litigated a lot," Rhodes said.

Referring to the 1980s update, he added, "If you think about Cold War America, you're talking about the privacy interests [when] I'm staring at you through a telescope or I've got a physical tap on a landline." Rhodes said technology is now light years beyond what that legislation contemplated.

"That's the challenge of that litigation, which is why I like it, frankly. But that's also the challenge of it," he said.

In June, Cooley helped Facebook Inc. defeat a class certification bid by a group of users who alleged the company breached a privacy agreement by sharing their user information with third-party advertisers. The issues raised were too individualized to get class treatment, U.S. District Judge Ronald Whyte ruled in a heavily redacted order.

The Facebook users had accused the social media giant of making them agree not to put any false personal information in their profiles in exchange for the company's protecting those details, when in reality the company was allowing third-party advertisers to see the names of the people who click on advertisements. The reasons for the individualized-issues conclusion and most of the 18-page ruling were redacted.

"Defeating an old case like that that's got a developed record and getting the judge to agree with us that there's not a lot of proof, that guts the case," Rhodes said. "Because no one's interested in litigating the case over one or two plaintiffs."



There were more than one or two plaintiffs involved in another big win for the firm. In August, a California federal judge told 879 college students, faculty and staff accusing Google Inc. of scanning their emails for unlawful advertising purposes that they must file separate lawsuits against the tech giant.

The students and staff from more than 20 schools claimed that Google violated the Electronic Communications Privacy Act by reviewing the content of communications sent through their Google Apps for Education accounts in order to create targeted advertising profiles, even though the company had said it wouldn't engage in the practice.

But U.S. District Judge Lucy H. Koh said each institution created a unique contract with Google and provided different disclosures, and that a mass joinder would be unfair since the question of consent is "intensely individualized."

And back in January 2016, Cooley helped out Twitter in a class action brought by a man who claimed the microblogging platform was profiting off tracking links its users shared in private messages. The plaintiff, Wilford Raney, voluntarily dropped his class action after receiving documents from and speaking with a representative of the social network.

Raney told the court that after taking a deposition and conducting expedited discovery, he had decided to drop his claim that Twitter Inc.'s practice of rerouting links sent in Direct Messages violated the Electronic Communications Privacy Act and California's Invasion of Privacy Act. A Twitter employee had previously sworn that the practice was only for spam detection and didn't directly generate revenue for the company.

"That case was another one of these message-scanning cases that these guys are ... trying to shoehorn under the Wiretap Act," Rhodes said. "We were telling them from the get-go that they just didn't have the facts right. We put up a senior engineer who walked them through the system ... [and] they went away."

What won't go away soon is Cooley's value to Silicon Valley. Rhodes says he loves working with tech powerhouses and is thrilled by "the ingenuity of the people behind the companies that I represent."

--Editing by Jill Coffey.