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## Privacy Group of the Year: Cooley

By **Christopher Crosby**

*Law360, New York (January 29, 2018, 4:37 PM EST)* -- When the likes of Google, Facebook, Twitter, Niantic and the Golden State Warriors faced privacy suits in 2017, they relied on attorneys at Cooley LLP to solve complex issues posed by the handling of sensitive information, resulting in innovative legal solutions and the firm being named among Law360's Practice Groups of the Year.

As more companies accumulate vast troves of personal information, the question of how to use — but also protect — data occupies much of the time of the group's 40-odd attorneys.

Business is booming. Already with offices in New York and California, Cooley recently announced that it had hired the former U.S. co-chairs of Norton Rose Fulbright's data protection, privacy and cybersecurity practice group.

Cooley has big wins to name, representing the likes of Facebook, a client with whom the firm has developed a close relationship after years spent side-by-side in the trenches of legal fights.

In November, Cooley convinced a California federal judge to dismiss for a third and, hopefully, final time a widespread multidistrict litigation suit — said by plaintiffs to be worth some \$15 billion — accusing Facebook of unlawfully tracking users' browsing activity after they signed off.

Users had argued Facebook made implicit and explicit promises not to track their web browsing activity after they logged out and opened third-party websites. But while users had a valid contract with Facebook when they signed a statement of rights and responsibilities, the court found there was no mention of tracking logged-out users in that document. Instead, mention of tracking was made in Facebook's privacy policy and relevant pages from its help center — policies in no way tied to the company's statement of rights and responsibilities.

The case, which has been appealed to the Ninth Circuit, never fazed Cooley partner Matthew D. Brown, who succeeded in winnowing the claims over several years by poking holes in the users' allegations and taking shots at their standing.

"We saw the case as a challenge, but accepted it," Brown said. "I always thought the claim was a serious



overreach. If you look at what they were actually alleging, we had good arguments for knocking the case out."

Cases like Facebook's often require applying laws that were created before the technology at issue. With Facebook, that involved applying the Wiretap Act — created during the Cold War — and the Stored Communications Act to browser cookies. The plaintiffs claimed that Facebook features on third-party sites such as the "Like" button trigger cookies that send to Facebook the user's browsing activity when that person is logged out, allegedly without the user's consent.

"We're often called on to defend cases and business models that do not fit easily with the old laws," Brown said. "After you understand the technology, you can design your legal strategy to be consistent with it, and figure out how to explain the technology in a cogent way to a judge, so they can understand the legal claims being asserted — and why we should win."

When Twitter was caught in the crosshairs of a right-of-publicity class action alleging it shared user profiles without consent to an app developer — allowing people to buy and sell the profiles "like trading cards" — Michael Rhodes, co-chair of Cooley's privacy and data protection group, was ready.

Rhodes and the Cooley team argued that the claims were barred by Section 230 of Communications Decency Act, which immunizes companies that create a platform for others to speak from actions those users might make. They argued that the CDA preempts any state law claim that treats an interactive computer service, like Twitter, as the publisher of content that was created by a third-party content provider. The case was voluntarily dismissed from California federal court, and the firm won on a motion to dismiss at the state court level.

"We've seen this move so many times, you get accustomed to applying it to different situations," Rhodes said.

"It's fun for us, thinking how these legal principles apply and extend to new technologies," Brown said.

Cooley delivered for "Pokemon Go" maker Niantic Inc. in May by beating a Florida state court suit alleging users were tricked into handing over their private and personal information. The man bringing the suit said the game's privacy policy and terms of use were unenforceable, but Cooley argued — and the court concurred — that no actual injury took place.

And while the case against the Golden State Warriors saying the NBA team secretly recorded private conversations through its smartphone app is headed for arbitration, Cooley was able to have the first complaint dismissed, and trimmed an amended complaint.

"We forced them to articulate a theory that's factually unsustainable," Rhodes said. "They claim the app records all sound when it's open, including voice communications. [But] it's listening for a very distinct sounds outside the ear's range for less than one millisecond."

--Editing by Catherine Sum.