

Privacy MVP: Cooley's Michael Rhodes

By **Natalie Olivo**

Law360, New York (December 12, 2016, 12:47 PM EST) -- Cooley LLP's Michael Rhodes landed a major victory for Facebook when the social media giant defeated class certification in a high-stakes privacy dispute, continuing his success streak of expertly defending market-disrupting technology companies and earning him a spot among Law360's 2016 Privacy MVPs.

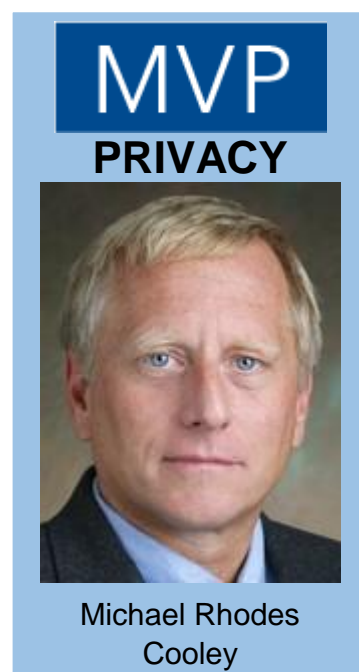
A litigation partner based in Cooley's San Francisco and San Diego offices, and co-chair of the firm's privacy practice, Rhodes has been at the forefront of tackling novel legal issues that arise from the advent of new technology. He added to his track record of tech company victories in June, when a California federal judge denied class certification to a group of users who alleged Facebook breached a privacy agreement by sharing their user information with third-party advertisers.

The proposed class had claimed that Facebook specifically designed its "unique resource locators," or URLs, to include a user's Facebook username, which was then accessible to third-party advertisers whose ads were clicked on — and that Facebook knowingly lied about the data's protection.

In getting the judge to deny certification, Rhodes told Law360 that "the key thing for us was that we demonstrated that there was no ability of the proposed class to show whether or not the information they claimed was embedded in the URL was actually sent to and used by advertisers."

Scoring another win for Facebook in a separate case, Rhodes defended the company when the Ninth Circuit in February said it would not rehear a panel decision upholding Facebook's \$20 million privacy settlement with parents whose kids' pictures were used in the company's advertisements. The ruling came despite the objections of a father who claimed Facebook was let off the hook for violating California law.

Regarding the settlement notice, Rhodes said that "we sent out something like 150 million emails, making it one of the largest class actions in the privacy realm ever."



Rhodes noted that the challenging aspect about privacy cases involving large online communities like Facebook, Google, Twitter, Instagram and Snapchat — the companies he works with — is the potential for very large classes since the users are engaged in the same behavior governed by a common set of terms.

“When you have to settle a case, the scale gets very big,” Rhodes said. “The stakes are very high, even if the individual recovery isn't very high, because of the class numbers.”

Now a six-time Law360 privacy MVP, Rhodes is no stranger to recognition for his work in the practice area. He said that while his daughter was attending law school at the University of Pennsylvania, she texted him one day to tell him that she was in a privacy law class, and the cases discussed were ones that he had argued.

“That's when it hit home that privacy had become a modern practice area,” Rhodes said. “There's a handful of us who have sat at the intersection of new technologies and older privacy statutes and concepts, and have worked with the courts on how technology should be considered in light of these older laws.”

Noting that “technology always outpaces the law,” Rhodes said that a technology that uses a phone's microphone to track a user's location through audio signals emitted at intervals by beacons, which are inaudible to humans and only temporarily stored on the device, will become more prevalent.

This technology is at the center of a suit brought by Golden State Warriors fans who claim the team's app unlawfully accesses the microphone on a user's smartphone in order to deliver ads and offers using beacon technology. Rhodes, who was recently retained to defend the team, said that “the question is whether opening up a microphone and grabbing a short burst of everything that's audible and looking for a specific piece of spectrum is eavesdropping under the Electronic Communications Privacy Act.”

Rhodes added, “it's like 'virtual tagging.' If you're in a certain location, then things will happen on your phone. It's correlating users' location with an app. The rules of engagement have not been settled.”

--Additional reporting by Sindhu Sundar, Kat Greene and Steven Trader. Editing by Emily Kokoll.