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This past year, litigators at Cooley won rulings knocking out two long-running cases accusing Facebook Inc. of illegally tracking users internet behavior—cases that carried potential statutory damages in the tens of billions of dollars, given the size of the social media giant’s user base. The firm also squelched a right-of-publicity class action against Twitter Inc. that alleged the company provided access to user profiles without consent to an app-maker that allowed people to buy and trade Twitter profile information like trading cards. There the court accepted Cooley’s argument that Twitter had immunity under section 230 of the Communications Decency Act.

Michael Rhodes and Matthew Brown, co-chairs of Cooley’s privacy and data protection practice, recently answered questions from The Recorder about what keeps some of tech’s leading brands coming back to the firm with their thorniest questions about user privacy.

**What do each of these cases the firm is being recognized for demonstrate about the firm’s privacy litigation capacities?** They demonstrate our deep domain expertise in defending platforms (such as Twitter, Facebook, Google, Instagram, Snap) and our fluency with the underlying technologies of web and mobile based business models.

In the Twitter example, we successfully argued that CDA Section 230 immunized the company from claims involving user content that was allegedly improperly shared with a third-party app through the Twitter API. We were involved with CDA 230 cases early on, having handled the seminal case of *Gentry v. eBay*, 99 Cal.App.4th 816 (2002). Having used CDA 230 in varied ways over the past 15 years, we quickly identified how we could deploy it to defeat the right-of-publicity claims asserted against Twitter.

In one of the cases we handled for Facebook, much of the discovery, briefing and argument focused on whether any of the claimed personally identifiable information (PII) was actually ever seen by an advertiser (which was the core basis of the claim). This required a complex analysis of a large sampling of millions of referrer headers (browser metadata handed off by one web page to another as a user navigates the internet) to show that the class could not prove, on a common basis, whether alleged PII embedded in that metadata was ever actually “disclosed.”

**Are there other significant victories in the past year that you would point to?** When a feature of the Golden State Warriors mobile app was alleged to have violated the federal Wiretap Act, the defending NBA champions enlisted Michael Rhodes and Whitty Somvichian to do battle with plaintiffs firm and longtime Cooley adversary Edelson PC. Cooley also represents co-defendant Signal360, the technology company that innovated the feature. Cooley notched an early win for the Warriors when the Northern District of California’s Judge White granted a motion to dismiss with leave to amend, finding the complaint failed to allege facts showing the Warriors “intercepted” any user communications. The second round of motions has been briefed and argued.

The Supreme Court’s decision in *Spokeo* didn’t quite have as major an impact on your practice as you initially thought it could have when the case was taken up by the high court. With that as the backdrop, where do you see this practice headed in the next two to five years? There is still a lot of action yet to be seen over the use, handling and protection of user information. Events like the massive Equifax data breach will lead to increased regulatory scrutiny and litigation over the nature of standing and injury in cases involving user information. Our notions of privacy and how our online identities and data should be handled remain in flux. So far, *Spokeo* has not been interpreted by the lower courts in a way that definitively shuts the door to these claims across the board.

With so few cases going to trial these days in any practice area, how do you make sure that new lawyers at Cooley get chances to build their skills, especially when it comes to oral advocacy and taking witness testimony? We are aware that it has become more challenging to get young lawyers chances to test their skills in court. So we have to proactively ensure those opportunities. For example, Max Bernstein, a junior SF litigation associate, recently argued part of the motion to dismiss in the Warriors’ privacy class action in federal court. The court had encouraged the parties to let their younger colleagues present the argument and we jumped at the chance to give Max the opportunity.

**How are your litigators harnessing technology to work more efficiently?** Just as our clients expect that we have deep expertise and understanding of online platform, e-commerce, mobile, app and web technologies, we also use them in the delivery of our legal services. Communications are streamlined and often use message apps, document editing is centralized and often cloud-based, billing is electronic, and case files are available via private intranets.

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