

A Champion in the Courtroom

John W. Keker '70 has been named the best lawyer in San Francisco, one of the top three criminal defense attorneys in the country, and a “super lawyer” by various articles and surveys. Keker & Van Nest, the firm he founded with his late classmate Bill Brockett, was named litigation boutique of the year last year. Keker doesn't put much stock in these honors. “Once you're on one list, you're more likely to be on other lists,” he says. But it was his skill in the courtroom that got him on the first list.

John Keker is often singled out for his powers as a cross-examiner.

Jan Little '81, a partner at Keker & Van Nest LLP, has tried criminal cases with Keker for almost twenty years. “In cross-examination, he's really able to control the witnesses,” she says. Little recounts how Keker decimated a brigade of government witnesses when they were defending Patrick Hallinan. Hallinan was a prominent San Francisco defense lawyer who was accused of colluding with his drug dealer clients. The case came to trial in 1995. “John's cross-examinations in that case were the stuff of legend,” says Little.

The government's primary witness was Ciro Mancuso, a former client of Hallinan's and an admitted drug smuggler, who was testifying to reduce his prison sentence. At one point in cross-examination, Keker confronted Mancuso with a letter he'd written to Hallinan, which contradicted Mancuso's testimony in the current case. Mancuso responded, “This is not a letter, Mr. Keker. This is some of my thoughts.”

by Jonathan T. Weisberg

Keker: “Well, what in this ‘not-letter,’ in this compendium of thoughts, is not true? Didn’t you lie to your lawyers?”

Mancuso: “At some point I did not tell the truth about everything.”

The revelation itself was devastating, as the case hinged on Mancuso’s reliability, but Little points out that Keker exploited it further. “John took those phrases and he kept bringing them back to Ciro, asking relentlessly, ‘Well what about these thoughts? And what about these thoughts? Were you telling the truth to your lawyers this time? Were you telling the truth to these lawyers?’” she says.

Another government witness was Michael McCreary. He was also a drug smuggler, but he appeared on the witness stand in a coat and tie and using refined language. Little recalls, “John said, ‘You’re a surfer, a Thai-dope smoker. When did language like “facilitate the importation of marijuana” enter your vocabulary?’ It just brought it home for

and having a career go on over time.” Beyond building a reputation, Keker thinks age has added a patina that makes him more agreeable to jurors. “When I was younger, I was acutely aware...that men who were just my age would develop a competitive resistance—it’s like roosters in the hen house or something,” he says. “Now that I’m a little bit older, I don’t scare anybody, so it’s easier to relate to everybody.”

But he also does acknowledge that he’s had a few good cross-examinations over the years.

Keker takes the three flights of stairs to his office as if he were in a hurry. “I hate elevators,” he explains. When he leads a writer on a tour of Keker & Van Nest’s expanding operations, he barrels through a series of hallways and stairs (still avoiding elevators whenever possible). Since the firm first moved to its current downtown San Francisco location in 1989, it has expanded from about a

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the jury.” Later in the cross, the witness’s façade cracked further and he asked the judge, “Your Honor, am I allowed to answer in my own words?”

Little says, “We had a chart at closing argument showing the thirteen felons who were testifying for the government. John was able to take each one and just kind of rip them up.” Hallinan was acquitted.

Robert Van Nest, who has worked with Keker since 1979, identifies another quality of Keker’s cross-examinations that’s particularly effective. “He starts on a point that’s sure to get the jury’s attention,” says Van Nest. In 1984, Keker and Van Nest defended George Lucas in a lawsuit brought by a man who claimed to have invented the Imperial Walkers that appear in the opening sequence of *The Empire Strikes Back*. The plaintiff’s girlfriend testified that she had seen the designs before the movie came out. “John stood up, and his first question for her was, ‘Ms. So-and-so, you are economically dependent on the plaintiff, isn’t that right?’ And she stammered around and stumbled around, but she ultimately said ‘yes.’... He went on from there, and it was a terrific examination.” The case was thrown out.

The first thing Keker himself says when asked why others consider him a skilled trial attorney is, “Partly, I’m old.” Whether asking questions or answering them, he’s direct to the point of being blunt. But he goes on to explain, “There’s just no way to get a reputation without doing a lot of trials

dozen lawyers to over fifty, and its offices have burrowed through several adjacent buildings and into a former bank vault, forming what Keker calls a “rabbit warren.”

“We’re going to take this all over,” Keker says as he waves his right hand at a hallway still occupied by another company. Keker collects Napoleon memorabilia and displays pictures of the great general in his office, and one is tempted to see a little of Napoleon when Keker declares, “Within a couple years we’ll have all of this.” But would Napoleon nod and smile to everyone he passed or stop at an assistant’s desk to chat for a moment? Keker saves his aggression for where it matters, the courtroom.

Keker’s interest in Napoleon is more than a fetish or a quirk, as Keker started his adult life as a soldier, leading a Marine platoon in Vietnam. In fact, Keker visited Yale Law School shortly after returning from Vietnam in 1967. His left arm was still in a sling, since his elbow had been destroyed by an enemy gunner. He interviewed with Associate Dean Jack Tate, a World War II veteran who had lost an arm to cancer. After an hour discussing how to eat and bathe with only one arm, Tate told Keker, “You’re in.”

Keker worked in the Legal Aid Clinic on Congress Avenue in his second year, though he doesn’t remember getting to a courtroom. “What passed for legal problems were bureaucratic problems,” he says. Starting his third year, he faced a choice between being an officer on *The Yale Law Journal* and



Keker consults with one of his famous clients, former Enron Chief Financial Officer Andrew S. Fastow (left), during a break in hearings before the House Energy and Commerce Oversight and Investigations Subcommittee in 2002.

chairing the Legal Services Organization. The *Journal* seemed like the better résumé item, but Keker really liked the idea of helping to build a clinical program at the Law School. Keker took the LSO position, and that year the organization hired Daniel Freed to develop the Law School's clinical programs, opening the way for future students to get into the courtroom. "I was proud to make the choice that I did," says Keker. "Besides, I would have been a terrible officer of the *Law Journal*."

After clerking for Earl Warren, who was then retired, Keker went to work for the Natural Resources Defense Council in Washington, D.C. In his first case Keker represented Ralph Nader in a suit against the Rohm and Haas Company for dumping arsenic. But Keker says that he was uncomfortable trying to represent something as abstract as the public interest. He quickly moved on to the federal public defender's office in San Francisco. "I felt a great sense of relief, like coming home, when I got to the federal public defender's office. Somebody would come in, they might

be the wretched of the earth, but the person was a human being who had needs. There was a good result for them and a bad result for them," he says.

His first case was an accused bank robber, who had been caught just outside the bank with the money in his pockets. "He was a heroin addict; he was loaded," says Keker. He had also confessed. But since he was facing a life term in prison for prior offenses and had never had a trial, he wanted one. Keker was excited to take his first case in front of a jury, though he didn't have any idea how to defend his client. His boss said to argue reasonable doubt. "I was very proud to keep the jury out past lunchtime. They went out and had lunch and came back and convicted him."

"I thought I was never going to win a case," Keker says of this time. But in his fourth or fifth trial, after handling dozens of felonies, he got a hung jury and then a dismissal in a drug case using an entrapment defense. He tried close to thirty cases in his two years as a public defender, and he left for private practice with no doubt about what he wanted

to do. When he and Bill Brockett founded Keker & Brockett in 1978, their intent was to do one thing and do it well: Try cases. Keker describes their founding philosophy: “We want to get the best cases, but we don’t want a client who we do everything for, all their grunt work and everything.”

Keker and Brockett got the good cases they were looking for. The firm took a lot of criminal cases early on, including a number of pro bono cases. Keker represented former Black Panther Eldridge Cleaver, for one. They hired more lawyers and took on complex civil cases. Their clients included Intel, Chubb, and Merrill Lynch. Keker handled a string of high-profile cases. In 1986, he successfully defended a prominent Bay Area architect who was accused of vehicular homicide.

hand—the injured left arm usually remaining sedentary; when he manipulates exhibits he swings them around his body to lift them with his stronger arm.

The combat-trial comparison is an easy metaphor to fall into, with gratifying rhetoric and brave words—lawyers become warriors battling over a motion; one side vanquishes the other. But Keker uses it carefully and applies the limits of real experience. “Combat is combat, and there’s nothing like it,” he says. “Trials aren’t combat, because in trials people don’t get killed; at least they don’t get killed in the courtroom.”

The last qualification in that statement reveals why Keker remains so intense about what he does: the consequences for

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In 1989, Keker commuted to Washington to lead the criminal prosecution of Oliver North. After that he defended a group of lawyers who were threatened with sanctions by a federal judge. Keker also won high-profile victories, such as a \$195 million award for trade secret theft and a bet-the-company defense of Genentech in a \$300 million patent dispute. He built a national reputation that has brought him clients like former Enron CFO Andrew Fastow.

Keker draws a comparison between being in the courtroom and his experience as a platoon leader in Vietnam. “What’s absolutely necessary in combat is to overcome fear, to act well under pressure, to be alert and focused, to take care of the people who are fighting with you, and to make no mistakes. That self control and control of your performance is something that you have to do in a trial.” Every magazine profile and every newspaper story about Keker mentions his combat experience. It’s a good bet that his opposing counsel in any case have heard of it. He comments, “My experience in the Marines is one of the things I am proudest of in my life, because I was a good Marine and cared a lot about being a good Marine. But it’s also part of the cliché that a person becomes, I guess.”

If one knows where to look for it, there is a reminder of Keker’s experience in Vietnam every time he’s in the courtroom: he holds his eyeglasses and gestures with his right

people’s lives. As civil as a courtroom may be, the outcome of any case could produce death, incarceration, bankruptcy, destruction of a reputation, the dismantling of a company. “I care a lot about how the trial comes out and about my client,” says Keker. “If you don’t get emotionally involved then you’re probably just not very good.”

Any lawyer who is in the courtroom as often as Keker is going to lose some cases. In 2004 Keker represented Frank P. Quattrone, a Wall Street banker accused of obstructing a federal investigation into business practices at his company. Keker had obtained a hung jury in a first trial a year before. However, after a three-week second trial, the jury returned a verdict of guilty.

“I flew to Minneapolis and got in a car and drove to the Black Hills, which I thought was a good metaphor,” says Keker. After another tough loss, Keker went to Death Valley, the lowest point in the U.S., to begin his journey back.

He doesn’t just take losses hard, he takes them as judgments on himself. “When you’re dealing with juries, you’re really asking the jury to judge you. You’re the one making arguments to them, telling them how they ought to decide the case, and if they go against you, they are rejecting you personally, as far as I am concerned. It’s horrible.”

Even when Keker looks back at a case with an analytical

eye, trying to understand what he can do better the next time, he won't shy away from what he calls "the humiliation and horror of losing" by finding excuses. "You win cases that you probably shouldn't have won. You lose cases that you shouldn't have lost. And looking back and trying to explain to yourself how it all happened, I see as a sort of rationalization, and not too useful."

This refusal to ameliorate losing, besides sending him on periodic near-mythological journeys of recovery, keeps him motivated to win. "You have to win about fifteen times for every loss, because the losses are devastating," says Keker.

And winning takes hard work, both before and throughout a trial. Keker estimates that he spends at least three hours working outside the courtroom for each hour in it. And for a complex case this ratio is much higher. Jan Little credits Keker's thorough preparation for his ability to nimbly adjust to whatever witnesses tell him. "He's able to move with the witness, because he knows all the underlying documents, all the underlying facts," she says.

For the hours in the courtroom, Keker says that the challenge is to remain focused every moment—both to catch mistakes by the other side and to maintain the consistency of his own presentation. "The trial of a case is a story that needs to be told," says Keker. "You tell the story in the opening statement, you support the story with evidence through witness examination and all of the exhibits, you tell the story again in closing argument. And if any of that is false, or if any of that doesn't fit, if you get out of character or out of the story for even a minute, the jurors are going to remember that."

Keker says the story is constructed through which facts he chooses to emphasize. "The facts are the facts," he says, "they can't be changed." Indeed, he advocates dealing directly and quickly with all the facts. He gives the example of a case in which he defended a Marine corporal who was prosecuted for homicide after flipping the vehicle he was driving, killing a female passenger. "It was raining, the guy was drunk out of his mind, the Jeep flipped, and the girl was killed," says Keker in a typically succinct handling of the facts. But he was able to also present evidence that the Jeep CJ-5 the Marine was driving was an unsafe car. "What we did is move the jury. He was drunk, we got that. But did being drunk kill the girl?" Keker recreates his appeal to the jury—though it slips into conversation easily, since there's nothing obviously theatrical about his courtroom persona. "No, ladies and gentlemen, what killed the girl was that this Jeep CJ-5 is a bad car."

Bob Van Nest suggests that because Keker handles facts with such assurance, he can take over the courtroom. "You

try to be the person that everyone in the courtroom looks for control, for leadership, for guidance, and John provides that role.... It's in his manner, it's in his confidence. It's in his speaking up first and often, and providing good and reliable information when the judge or jury needs it."

Keker's subtle showmanship plays a role, too. In *Maglica v. Maglica*, Keker represented Claire Maglica, who was suing her longtime companion Anthony Maglica, for half the value of Mag Instrument, the company they had run together for many years. Keker's examination of Tony was one of those few good crosses he admits to. Tony officially owned the company and denied that Claire had played an important role in Mag. Keker presented example after example of Tony's own



Dark days. Keker represented Frank Quattrone (left) in two trials. Keker obtained a hung jury in the first one, but lost the second.



When representing high-profile criminal defendants, Keker says it's a struggle to keep the media from leaping to judgment.

words in a deposition from an earlier case, in which Tony said that Claire was responsible for major portions of the company's operations. The contrast between Keker's simple presentation and Tony's meandering interpretations of how his words didn't mean what they seemed to mean left little doubt who had control of the facts. Underscoring his control, Keker put each line of testimony on a display monitor just long enough to read it, then removed it. The truth seemed to rest in his power to give and take. (The result was a record verdict for his client, later overturned on appeal and then settled.)

While Keker says a good lawyer has to be emotionally engaged in his or her case, he also keeps himself from getting entangled. He maintains an analytical distance. "Any lawyer who completely believes in his or her side isn't paying attention to the case in the right way," he says. "There's always two sides—sometimes there's more than two

sides—and if you can't keep the rational part of your brain focused on that and see how it looks to somebody else and see what the other side might say about what you say, then you're not doing what a good lawyer ought to do."

Keker also keeps a certain distance from his clients. He'll give his all to defend an accused drug dealer or a peace activist, but the relationship doesn't extend outside the courtroom. "I rarely socialize with people we represent. Often we just represent somebody once and move on." He cares about his clients as creatures of a court proceeding.

Keker often avoids giving away what he really believes about a case or a client. But we can find glimmers of his true feelings in his descriptions of his favorite cases. The first he names is the Hallinan case. The case was tried in Reno. "That seemed like such a hostile venue," says Keker, "with the tremendous prejudice against San Franciscans." Hallinan was also charged as part of a powerful federal task force operation. "It was pretty scary. I had nightmares during that case."

The next case Keker mentions is *Neary v. Regents of University of California*. George Neary was a rancher in California. The state sprayed a number of his cattle with toxaphene, and Neary claimed this caused the deaths of about 500 cows and calves. Scientists from the University of California School of Veterinary Medicine published a report blaming Neary's ranching practices for the deaths. Neary sued the scientists and the university for libel. The case went on for five months, with the defense bringing in expert witnesses from all over the country. "It was a fabulous case. The jury got so angry with the university and the veterinarians that they awarded him \$7 million. George had no hard damages," says Keker.

What do these cases have in common? Keker won despite representing the underdog. He opposed intrusive and overweening government actions. He exposed and remedied deceit by the other side. "Cases where somebody's really getting screwed are far more exciting than cases that are just about large, dinosaur-like corporations passing money back and forth," says Keker.

But perhaps what Keker liked most about both of these cases is that something was accomplished through the process of the trial. No one could have predicted that Neary would win \$7 million or that Hallinan would be vindicated, until Keker and his opponents hashed it out in court. "I like to go to trial," Keker says.

A trial has a way of turning principles into practical outcomes. For instance, even something as basic as the idea of innocent until proven guilty just doesn't exist without a defense lawyer fighting for it. "The notion that people believe that a man is presumed innocent until proven guilty is completely b.s.," says Keker. "They say it but don't believe it. Your job is to get the judge and the jury to think, 'Well at least there's going to be two sides to this story, and I'll try to listen.' Otherwise, they just come in and say, 'When's it over? When can we vote?'"

Keker has written about the trend toward more settlements and plea bargains, noting, for instance, that the percentage of trials in criminal cases fell from 12.6 to 4.7 between 1991 and 2002. While he acknowledges that trials can be inefficient and costly, he also laments what is lost without a vigorous trial. "In criminal cases, the Constitution used to mean something," he says. "You got charged with a crime. Okay, the government had to prove it. Now we have this generation of judges who act like you're insulting the system if you insist on going to trial.... I basically think it's terrible."

While Keker & Van Nest has added many lawyers and occupied more offices, it has maintained its focus on trial lawyering. Keker has no interest in expanding into other fields or opening branch offices. This doesn't mean others aren't interested in acquiring Keker & Van Nest, though. He gets regular calls with offers to merge or sell out, which he always turns down flat. "If they pursue it I get mad. It's as though they don't believe me."

The firm has been in the same neighborhood since its inception. Keker has lived nearby with his wife, Christina Day Keker, all the time, and they've raised two sons now in their late thirties.

Some changes have been unavoidable, however. Bill Brockett left the firm in 1994, because he felt it had gotten too big already. "In 1995, he had what we thought was a stroke, which left him unable to talk and move his right side," says Keker. "It was horrible for a guy who was the most verbal, the most fun, and the most athletic. And then we eventually found out that that was caused by a brain tumor, and he died in June of 1996." The Bill Brockett Public Interest Fellowship, which funds community outreach projects, is now managed by Brockett's stepdaughters and Keker's sons.

Bob Van Nest was the first associate hired by Keker and Brockett, and he emphasizes how much the firm in its current form grew from the nature of its conception. He says, "[John] and Bill really pioneered the concept of a small firm that could do the work of a big firm and compete with the big firms.... That's what they wanted to do, and we've stuck to it."

Van Nest adds, "John has set the pace around here for years, since day one.... He really hasn't slowed down at all."

Keker reviews his schedule for the next few months, "I have a case for Google against Microsoft set for January. I've got another case set in February. I had a legal malpractice case that just settled; it was set in March. Another case set in April.... Some of them will settle." He can't help sounding disappointed when he imagines a case settling, because settlements cut off what he calls "the fun stuff" — "the Sherman's march through Georgia type work" of preparation and then the battle in the courtroom.

Jan Little has only worked with Keker on criminal cases, but she has a theory about what always draws Keker back to the courtroom: "In a criminal case, someone is really in deep trouble and they need a champion by their side. And John loves that role—he loves to be someone's champion." **Y**