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Q&A With Keker & Van Nest's Robert Van Nest

Law360, New York (November 17, 2009) -- Robert Van Nest is name partner at Keker & Van Nest LLP, the San Francisco-based litigation firm. Van Nest has worked as a trial attorney for 30 years, specializing in intellectual property litigation in a wide range of technologies. Representing clients like Intel and Google, he has successfully handled trials, arbitrations and appeals in California and across the U.S.

Q: What is the most challenging case you've worked on, and why?

A: Most recently CSIRO v. Intel, in which a group of scientists working for the government of Australia claimed to have invented wireless LAN. It was challenging because CSIRO had previously sued another party and won and had established some fixed ideas in the mind of the trial judge.

It was also challenging because we were attempting to gather up not only Intel but most of the WiFi laptop and game industry. You could imagine there were a lot of strong personalities there. The fact that the trial judge changed the claim construction on the Friday before jury selection didn't help. Nor did the fact that many of our key witnesses were from overseas and had thick accents.

Put all these factors together in a trial in the Eastern District of Texas and you've got all the challenges you could ever want.

Q: What accomplishment as an attorney are you most proud of?

A: Building up a firm that focuses on diversity, insists on high integrity and takes on big cases with fewer lawyers than anybody on the other side. I'm more proud of that than any particular case that I've handled as a lawyer.

Many of our clients are companies that we have represented for more than 20 years. To me, that signals that we've been able to provide a high quality of service and met their

needs throughout a long period of time and changing environments. I've also been married for 36 years, so I guess I like long-lasting relationships.

Q: What aspects of law in your practice area are in need of reform, and why?

A: The assessment of patent damages is the most pressing problem in IP law today. In light of the enormous number of patents out there — and the enormous amount of patented content in products like laptops, cell phones, set top boxes — there has got to be a better way and better guidelines for assessing patent damages.

Right now, the system encourages juries to decide these things based on their gut rather than any evaluation of the technical contribution to the overall success of the product. If you have a patent on one small circuit on a chip with thousands of circuits and millions of transistors, you shouldn't be able to ask for damages based on the total price of the chip.

Either the Federal Circuit or Congress needs to provide more guidance on this. I think the Federal Circuit's decision in Lucent v. Microsoft is a step in the right direction.

Q: Where do you see the next wave of cases in your practice area coming from?

A: It's already here — Internet patents. With the success of Google, Facebook, Twitter and others, patents covering aspects of the Internet are going to be asserted more and more frequently. And even patents obtained without any thought about the Internet will be asserted against Internet activities. Companies like Google, Facebook, Intel and Microsoft will be subject to these kinds of claims.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: Bill Lee at WilmerHale. I am impressed with the breadth of cases he handles and the connection he establishes with the jury. His direct style with judges and juries is a model for any young lawyer to follow. If everybody operated the way Bill Lee does, our system would be a lot better — and trial judges would have a much easier time running their courtrooms.

I first met Bill 10 years ago, working together on a case, and I still enjoy working with him today. I have a much better sense of humor than he does, though. And I'm taller.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: Get a lot of trials if you can. Before you settle down into a patent litigation practice, find a job where you can get as many trials as you can in as short a time as you can. It doesn't matter what field they're in. You can be a DA, a public defender or do small civil trials for a municipality. Unless you get a lot of trial experience before you settle into patent practice, it will be hard to find a place on the trial team in a big patent trial.

My first trial was a personal injury case in my first year as a lawyer, a 10-day trial in Marin Superior Court that was hard fought all the way. In my second trial, a few months later, I defended an alleged bird smuggler in federal court in Los Angeles. I called into the office every night to get advice on my witness exams for the next day. I was lucky that our firm had lots of trials to make available.

That's less true in bigger firms today. Because really, there's no substitute for doing trials for learning how to do them. You can do all the trial practice activities you can find, but until you've done your own trial you don't really understand what you need to accomplish.