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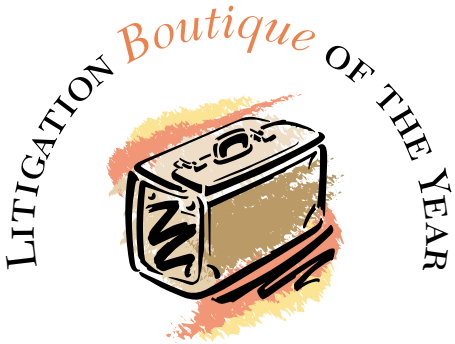
Litigation Boutique of the Year



Winner

KEKER & VAN NEST

For our *finalists,*
it's not the *size* that
matters, it's the *skill.*
Also the joy of *success.*

Small Is Beautiful

IN AN ERA WHEN LAW FIRMS feel an almost biological imperative to grow larger, there is still one practice area where some of the best clients send some of their best work to some of the smallest law firms: big-stakes litigation. This is a high-profile anomaly, one that brings intense interest, competition, and even a bit of envy from colleagues working in firms that are now the size of villages.

But who is doing the best work? Who is playing at the highest level, in the cases with the biggest impact, for clients who can afford to hire anyone? To find out, we decided to hold our first Litigation Boutique of the Year contest, a competition open to firms who were not members of The Am Law 200.

We invited the firms to report on their litigation records between January 1, 2003, and June 30, 2004. Specifically we asked for up to five examples of "significant achievements" in a broad range of litigation activities. In addition, we asked for client references, names of opposing counsel, and a list of firm partners who tried cases to verdict during that time period.

We winnowed the candidates and supplemented their submissions with reporting. We developed a shortlist of five finalists and then visited each of them, offering these master advocates the chance to make their case.

The contest was very close. One caveat: We were judging a specific 18-month time period, not a law firm's oeuvre. Our special report features the winning firm, the runner-up, and the other three finalists, plus three microfirms whose work and approach seemed particularly interesting.

These firms manage to combine cutting-edge technologies, palpable tastes for risk, and an old-fashioned sense of partnership. The rewards are obvious: Their clients are stellar, and so are their profits. The partners are more than names on a Web site: They don't need name tags at summer outings. That's not an accident: Many fled large firms to rid themselves of conflicts or anonymous alienation. Some just wanted the pleasure of uncertainty. And, best of all for those with the metabolism of gunfighters, they often get to try their cases, not just litigate them.

They say they're determined to stay small. And their very scale drives—and changes—almost everything. They don't have to hire platoons of young lawyers for pretrial trench warfare. They are content to cede the document churn to their megafirm cocounsel. They add lawyers as needed, by ones and twos, typically bringing on federal court clerks they hope will grow into partners. Think how different a firm's atmosphere would be if associates were not regarded as fungible but as the future.

Because they're small and focused, their clients tend to come only with important problems. And, because they're small and don't aspire to a full-service menu, they get referrals, especially from lawyers who don't have enough Xanax on hand to face a trial judge.

One more thing. We can't say these firms are sharper or more loyal or harder-working than the average Am Law 200 outfit. But after a month's worth of interviews, we've never met a group of litigators who seem happier.

—ARIC PRESS

Hard to Beat

At *Keker & Van Nest,* the work is as good as *the firm* itself.

By Paul Braverman

Photograph by Daneil Lincoln

KEKER & VAN NEST

SIZE 22 partners, 25 associates, 2 of counsel

FOUNDED 1978

FIRM ORIGIN Keker and the other founder, Bill Brockett, were federal public defenders.

UP NEXT Defending American Honda Motor in a class action claiming automakers conspired to prevent Canadian imports. Defending Micron in an antitrust suit by Rambus.

AL DAVIS, THE RENE- gade owner of the Oakland Raiders, made his reputation on the football field, where he prowls the sidelines like a mob enforcer looking for thumbs to break. But he's hardly a rookie in the courtroom, having spent many years tweaking and taunting the National Football League establishment.

So he was favored by at least a touchdown when he sat down for a deposition with a mild-mannered lawyer named Robert Van Nest. Hired by the heirs of one of Davis's Raiders partners, Van Nest was trying to get Davis to concede that the partnership agreement meant what it said; in this case, that his clients were limited partners and were entitled to review the team's books and put a value on their shares, estimated to be in the ballpark of $300 million.

The session, which was held last June, didn't go well for Davis. He tried blustering: "Don't keep pointing at me like that. . . . You're lecturing me. . . . Don't sneer at me. . . . Don't threaten me!" But Van Nest kept up the offensive. Eventually, Davis made the innocuous but damning concession that there was no ambiguity in the partnership agreement: "But, yeah, I think it's pretty clear—sure do—for someone like me. I don't know what isn't." A few months later, the trial judge ruled for Van Nest's clients. The experience seems to have soured them—they're now seeking a sale of the team because of "irreconcilable

(STANDING FROM LEFT) JEFFREY CHANIN, JON STREETER, ELLIOT PETERS, JAN LITTLE; (SEATED FROM LEFT) JOHN KEKER, DARALYN DURIE, ROBERT VAN NEST

The *Keker* Docket

PUBLIC SERVICE Keker & Van Nest lawyers devote a remarkable 8 percent of their time to pro bono. No case was more spectacular than a successful three-year effort to free John Tennison, who spent 13 years in jail for a murder he did not commit. A firm team, led by Elliot Peters (photo below with Tennison) established that California prosecutors had withheld exculpatory evidence at Tennison's trial. The firm now is helping Tennison seek compensation from the state.

ON THE EDGE The firm is at home in areas of intellectual property where the law is unsettled. *MGM Studios v. Grokster* involves the entertainment industry's efforts to control copyright infringement of their works. Partner Michael Page won the case for Grokster in the trial court and the Ninth Circuit; the U.S. Supreme Court has agreed to hear the case in March.

IN THE DOCK The firm's white-collar criminal defense practice puts it in the headlines. Name partner John Keker is on the shortlist of lawyers for high-profile corporate executives under criminal investigation. In the photo above, Keker is standing with Andrew Fastow, the disgraced Enron chief financial officer. Keker's deal with the feds: Fastow will testify and serve ten years. Keker is very good, but Fastow's fraud was very big.

PLAYING OFFENSE The firm handles a broad array of disputes. When the menacing Al Davis tried to bully members of the Oakland Raiders ownership, Robert Van Nest stepped in to win the right to examine the team's books. Now his clients may try to force a team sale.

differences" with Davis.

In many ways, the case is typical of those handled by Keker & Van Nest. The stakes are high. Opposing counsel is prominent: Davis used Stuart Lipton, the managing partner of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, and noted plaintiffs lawyer Joseph Cotchett. And Van Nest was brought in late, with his side already behind.

The Raiders case is just one piece of a caseload that is rivaled by only a few firms in the country. (And those firms employ hundreds of lawyers.) Keker & Van Nest lawyers handle cases of national importance in criminal law, antitrust, and intellectual property, and the success they've achieved over the last two years is the reason they're our choice as the litigation boutique of the year. Not only do they win consistently, they do so while working in an environment that is a model for the legal industry in the areas of diversity and pro bono. Also, the partners like each other, or do a great job of disguising any animosity beneath a shower of banter and playful teasing.

No one wins them all, not even our designated champions. And in our time period, Keker & Van Nest suffered a serious defeat: the conviction of Frank Quattrone, the former high-flying investment banker at Credit Suisse First Boston. John Keker, the firm's founder and marquee attraction, was hurt by his client's testimony and by a federal trial judge who appeared to lean heavily on the prosecution's side [see "Quattrone Lost. How Can Keker Win?" page 83]. But that loss didn't cost them the prize, because their record was simply that good.

In some ways, Keker & Van Nest is a throwback. The firm's two calling cards—white-collar criminal defense and IP litigation—were traditionally dominated by boutiques. Big firms have moved in on that action, but Keker & Van Nest remains stubbornly independent. The firm is also a throwback, at least relative to Susman Godfrey and Bartlit Beck Herman Palenchar &

Scott, two of our other finalists, because most of its work is billed by the hour rather than handled on contingency. Keker says that the firm's hourly rates and profitability are comparable to the top firms in the Bay Area.

In other ways, however, the firm is in the vanguard. In intellectual property, for example, Keker & Van Nest is helping to define the outer reaches of the law. Much of that work is done for Genentech, Inc., a big player in the litigation free-for-all that is biotechnology. Last June, for example, the firm handled a case in which MedImmune, Inc., claimed that the patent on Genentech's basic method for producing recombinant antibodies (which are used in the production of many drugs) was invalid. Had MedImmune prevailed, it would have been devastating to Genentech's business, but partner Daralyn Durie got the case thrown out on motion papers. The win came only a few months after another victory for Genentech, when the U.S. Court of Appeals for the Federal Circuit affirmed the firm's landmark win in a case brought by Chiron Corporation concerning the patent rights to a breast cancer treatment.

Keker tried the Chiron case himself. The dispute turned on obscure issues (whether the company had adequately described the technology in its patent application), but at trial Keker didn't

Quattrone Lost. How Can *Keker* Win?

"GO TO TRIAL ENOUGH TIMES AND YOU'LL LOSE A FEW." THAT mantra is repeated by every trial lawyer, including those in this year's survey. Every firm that we surveyed took its hits. For those that finished near the top, however, the losses were dwarfed by the victories.

Keker & Van Nest piled up impressive wins in criminal, intellectual property, and general commercial cases. Wins of that magnitude usually obscure any loss. But two of John Keker's clients were so visible—Frank Quattrone and Andrew Fastow—that nothing else the firm did could overshadow them. Both men have been sentenced to jail, yet we have decided that Keker & Van Nest was the top-performing litigation boutique in the country. How can we square those results?

Let's take Fastow first. Under the terms of a plea bargain, Fastow will serve a ten-year sentence, pay $20 million, and cooperate with the prosecution as it makes cases against other Enron Corp. defendants. Keker is clearly uncomfortable talking about the plea, and says that no self-respecting defense lawyer can be happy when his client goes to jail.

But he may have made the best out of a bad situation. Fastow long ago lost his reputation; in hometown Houston, he's a pariah. Could any lawyer have overcome the inevitable animosity flooding the jury pool as well as compelling if confusing evidence of his guilt? Had he gone to trial and lost, Fastow could have faced a 40-year prison term. In a recent trial about Enron's infamous Nigerian barge deal, bankers from Merrill Lynch & Co., Inc., were found guilty and are expected to receive five-to-ten-year sentences. Fastow was also charged with that crime, but it made up only two of the 109 counts against him. By that measure, Keker, who won't discuss the advice he gave Fastow, made a good deal for his client.

The Quattrone case was another uphill battle. Again, the pretrial publicity had been tough. Another problem was the presiding judge, Richard Owen of the Southern District of New York. Owen has a pro-prosecution reputation, and a demeanor described by those who have appeared before him as anywhere from "cranky" to "crazy."

KEKER (LEFT) SAYS HE HAD TO PUT FRANK QUATTRONE ON THE STAND. OTHERS WONDER.

Owen was openly antagonistic toward Keker. He interrupted Keker's opening three times; he frequently made, then sustained, objections on behalf of the prosecution; in chambers he told Keker, "You're like a fire hydrant on the corner of somewhere in New York City in the summer, and I can't turn you off. You're just going on and on and on." We all know what happens to fire hydrants in New York.

Those who criticize Keker usually focus on Quattrone's testimony, specifically on his client's denial that he helped allocate the shares of lucrative Internet IPOs. The prosecution tore that testimony apart, and second-guessers say that it was a mistake for him to take the stand in the first place. Quattrone was eventually found guilty and sentenced to 18 months in prison. The sentence was stayed during the appeal.

But most experts say that Quattrone needed to testify, that in a case where so much turned on intent, Quattrone needed to talk to the jury himself. To Keker, the decision was an easy one. "Anyone who says that Quattrone could have won without taking the stand is a moron," Keker says. But could he have been better prepared? Of course. If the federal appeals court agrees with Quattrone's appeal, Keker may get one more crack at getting this right. —P. B.

get bogged down in science. When Chiron's key expert was on the stand, for instance, Keker caught him in a contradiction, then cut into him like he was cross-examining a cop who had planted a dime bag on his client. "The jury didn't understand the science, but they understood his cross," says opposing counsel Harold McElhinny of Morrison & Foerster. "Genentech is a very sophisticated customer. They've worked their way through the legal industry looking for lawyers. They've probably used 15 law firms over the past few years, and they use Keker for their most important cases."

> Some of *Keker & Van Nest's* most important *intellectual property* clients were first drawn to the firm because they needed Keker's help with a *criminal matter.*

The firm is also handling precedent-setting copyright cases, building on work done for Grokster Ltd. Virtually the entire entertainment industry sued Grokster in 2001, claiming that people were using its software to infringe their copyrights, and that Grokster was liable for contributory copyright infringement. Partner Michael Page got the case dismissed on summary judgment in 2003, and the Ninth Circuit affirmed. In December the U.S. Supreme Court agreed to hear the case on its March calendar. The Court appears to be reconsidering its decision in *Sony* v. *Universal City Studios*, according to Mark Lemley, a leading authority on intellectual property who teaches at Stanford Law School and is of counsel at Keker & Van Nest. In that case, the Court held that Sony wasn't liable if buyers of its VCRs used those VCRs to infringe copyrights. The decision had the effect of holding that copyright owners can't necessarily control new technologies, says Lemley.

Having won that case, Keker & Van Nest is now dealing with more far-fetched claims, such as the one brought by soft-core pornographer Perfect 10, Inc., against Keker & Van Nest client First Data Corporation, the nation's largest processor of credit card charges. Perfect 10 claims that Web sites steal their images (often altering them so that the head of, say, Britney Spears is pasted to the body of a nude model), then charge visitors to their sites. Those charges are processed by First Data; Perfect 10 claims that the processing makes First Data liable for enabling the infringement. Van Nest won a dismissal just before Thanksgiving. Page is handling a similar case for venture capital firm Hummer Winblad Venture Partners, in which members of the recording industry are claiming that by funding Napster, Hummer Winblad was contributing to infringement of their copyrights.

Some of Keker & Van Nest's most important intellectual property clients were first drawn to the firm because they needed Keker's help with a criminal matter. For example, Intel first came to the firm for advice when charges were brought against its executives in a trade secret case. Now it's a steady IP client. The criminal-to-IP cross-selling was a concerted effort. "We've always wanted to be in areas where we could charge top rates and try for bonus billing," says Keker. "That means being in whatever area is hot, and by the early nineties, that meant Silicon Valley."

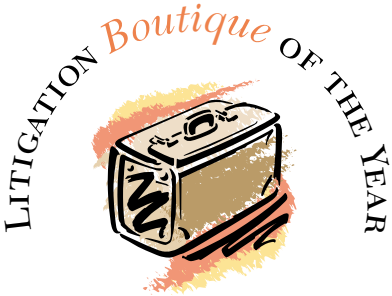
About one-quarter of the firm's work is criminal defense, much of it confidential, some of it in very public matters that also involve regulatory proceedings and civil lawsuits. "They know how to do those cases," says Howard Heiss of O'Melveny & Myers, one of Keker's cocounsel in the Quattrone case. "Some would think that a firm their size couldn't."

Keker may be the star, but he's surrounded by a team of top-flight criminal attorneys. One is Jan Little, who last year defended a Silicon Valley software executive who was the target of a yearlong securities fraud investigation by both the U.S. Department of Justice and the Securities and Exchange Commission. She convinced those agencies not to bring any charges against her client; other company officers went to jail and paid civil fines. Another star is Ethan Balogh. He recently represented a husband and wife employed by a well-known software company that the Federal Bureau of Investigation and the SEC were investigating for insider trading. (They sold stock on the morning before a gloomy company forecast.) Balogh convinced the Justice and SEC attorneys not to prosecute, then convinced the company to give the couple their jobs back. Elliot Peters represented an Asian bank whose assets were seized by the U.S. government. Peters was able to get the assets returned to the bank, along with an apology.

Nonetheless, Keker's personality and attitudes pervade the firm. At 60, he still looks like he's about to drop and start doing push-ups. He projects the image of a soldier, and in fact served in Vietnam as a platoon leader in the Marines. At a meeting when too many people started speaking at once, he invoked the motto of the Texas Rangers—"One riot, one ranger"—to restore order. When partner Durie had a baby, his gift to her newborn daughter was *The Oxford Book of War Poetry.*

Given that background, it's a bit incongruous to hear his antiauthority invective. Keker uses the word "corporate" as a curse and says that "resisting corporatization" is what sets Keker & Van Nest apart. He doesn't have much use for the former prosecutors in the big firms in New York and Washington, D.C, who make up the white-collar criminal defense establishment. "When was the last time any of them stood up to the government?" he sneers.

His antiauthority slant was on display last November, when the National Association of Securities Dealers barred Quattrone from the securities industry for life. Although association rules require cooperation, Keker had refused to let Quattrone testify before the NASD's disciplinary committee out of fear that the



Winner

Keker & Van Nest

testimony could be used in his criminal case. The NASD ruling called Quattrone's failure to testify "egregious." Keker's reaction: "Sanctimonious bastards. Piling on, trying to self-aggrandize their little agency. Outrageous." There was no love lost on NASD's part: "Sour grapes," says Rory Flynn, a lawyer in the enforcement department. "It was John Keker's advice that caused the lifetime bar for Mr. Quattrone."

Keker sees no contradiction between the good soldier and the maverick. To him, being on trial is like being in the Marines. "It's a chance to test yourself, a chance to be a hero," he says.

Keker may be a lightning rod, but he goes to great lengths to push his partners forward, and not only when the media is asking questions. Genentech, probably the firm's most important IP client, first came to the firm in 1995, when Keker defended an executive who was accused of paying kickbacks. (Keker won a dismissal.) He's happy to report that the company now thinks of Daralyn Durie and partner Susan Harriman as its go-to lawyers at Keker & Van Nest. (The firm religiously avoids ideas like "origination credit.") "This isn't the cult of John Keker," agrees Mark Lemley. "There's astonishing depth among the partnership."

When law firms get sued for malpractice, they also turn to Keker's platoon. Much of that work is done for firms insured either by the Attorneys' Liability Assurance Society, Inc., or MPC Insurance, Ltd., an ALAS–type carrier whose clients are mostly on the West Coast. Claims officers at both insurers readily approve the firm for their hard cases. "They're at the top of everyone's list," says William Friedrich, a director of MPC and a lawyer with Farella Braun + Martel. "They have trial experience. In today's legal world, that's an increasingly difficult thing to find." Of course, Keker & Van Nest isn't right for every case. The firm isn't cheap, and "you don't need a Sherman tank to take on a flea," says Paul Sugarman of MPC and Heller Ehrman White & McAuliffe.

Van Nest wants the firm to be involved in cases where the exposure is high, and where the law is uncertain. A recent example was a case against Orrick, Herrington & Sutcliffe by Michael Malcolm, the wealthy head of a computer manufacturing company. Orrick represented Malcolm in a divorce and negotiated a settlement with his ex-wife in which she was to receive $500 million. Malcolm signed the agreement, but quickly had second thoughts. When Orrick told him the agreement was binding, Malcolm hired other firms to break the deal and paid them several hundred thousand dollars in fees. But when the deal proved to be unbreakable, Malcolm sued Orrick, seeking not only the $470 million he claimed he had overpaid to his ex-wife but also the fees he had paid the other firms that tried to get him out of the deal. Van Nest and partner Steven Hirsch won for Orrick on summary judgment.

Like all high-powered litigators, the partners are proud of their record, but they're just as proud of their workplace. Of 22 partners, seven are women (five have kids; two made partner while pregnant) and five men are minorities. Partners Durie and Little both have children and speak highly of the firm's flexibility. By age four, for example, Durie's daughter was the veteran of two trials; she had the run of the war room in each. Little tried a case when she was seven months pregnant. To Keker, diversity is more than the right thing to do: "Tactically, it's important. White men bore the shit out of juries."

The firm is also a model when it comes to pro bono work, devoting a remarkable 8 percent of its time to public service. Many of the cases accepted by the firm involve important public issues—school desegregation in Berkeley, racial profiling by the California Highway Patrol, environmental protection in San Francisco Bay. But none were bigger wins than a case that started close to home.

In 1990 John Tennison was convicted of murder and sentenced to 25 years to life in prison. His brother Bruce was convinced that he was innocent, and tried a number of methods to call attention to his brother's plight, including putting flyers on the windshields of cars in the parking garage where he worked. One of the people who got a flyer was Dinah Roberts, the office manager of Keker & Van Nest, which is located next door.

Roberts told Bruce Tennison that he should speak to Peters, who agreed to take the case. Peters then led a team of five Keker & Van Nest lawyers on a three-year effort to free John Tennison. In 2003, after John had spent 13 years in jail, a federal judge in San Francisco ruled that the prosecution had unlawfully withheld evidence that another man had confessed to the crime, and John was set free. The case became a cause célèbre at Keker & Van Nest; paralegals and librarians told Peters that the case made them proud to work at the firm.

Tennison is a fitting place to conclude a reprise of the firm's outstanding work. Besides the obvious public service element, *Tennison* exemplifies the approach of Keker & Van Nest. The lawyers worked as a team. The odds were against them. The government's case withered under the firm's attack. That plus a couple laughs and a high five: What more could the litigation boutique of the year ask for?

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