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Q&A With Sheppard Mullin's Nick Setty

Law360, New York (April 26, 2013, 12:27 PM ET) -- Nagendra Setty is a partner in Sheppard Mullin Richter & Hampton LLP's San Francisco and Palo Alto, Calif., offices and co-chairman of the firm's intellectual property practice group. He has an international practice representing leading global businesses such as Bank of America, Cipla, Cisco, EchoStar, Landis & Gyr, LG, McKesson, Samsung, Siemens and Verint. His practice focuses on litigating jury, bench and arbitration trials in patent, trademark, trade secrets, and copyright cases. Over the past 20 years, he has served as lead counsel in more than 120 IP cases..

Q: What is the most challenging case you have worked on and what made it challenging?

A: In recent history, the most challenging case I've tried was the HTC/Intellect Wireless case. This case dealt with IW's patents claiming what was purportedly the first "picturephone." The complexity was due in large part to the fact that trial was focused solely on inequitable conduct, which normally presents a high burden, and which Therasense made more so. Also, trying the case against Ray Niro Sr. is always a good fight, with highly experienced counsel on both sides. But substantively the case was also particularly challenging because HTC had to prove that statements made in declarations to the U.S. Patent and Trademark Office were false and that the falsity pervaded a 20-plus patent portfolio. In the end, the cross-examination of the inventor, which lasted hours, became the basis for Judge William Hart (NDIll) to find that the inventor had intentionally misled the USPTO, had done it repeatedly, and that the asserted patents were all unenforceable. The case is on appeal now, but the end result and 50-plus page order on inequitable conduct is the result of a significant trial effort and success. As shown at trial and in Law360 articles, many other industry leaders licensed the IW patents, and HTC's investment and confidence with our team prevailed in the end.

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

A: There is little doubt that the most criticized aspect of patent litigation is the role of nonpracticing entities, or PMEs as Congress now refers to them. PMEs bring a vast number, and perhaps a majority, of patent suits, and the question of whether society gains in the balancing calculus is still open. Certainly one can conceptually agree that PMEs play a role in enforcing rights that universities, individuals and small companies might not otherwise be able to enforce. This is the so-called economic or capitalization argument. But the pervasive nature of PMEs, and the vast patent assets of PMEs such as IV, Round Rock, Acacia and others serves to skew the market perception from the arguably justifiable role of PMEs to a more nefarious impact on innovation and technology commercialization. Congress has scratched the surface, but that is it.

Q: What is an important issue or case relevant to your practice area and why?

A: The smartphone wars continue to impact our practice significantly, given our representation of HTC, ZTE and Samsung. These matters are important to many leading/growing patent litigation practices, and our rapidly growing practice is no different.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Ragesh Tangri and Daralyn Durie (Durie Tangri) have continued to impress me consistently. Their practice, post-Keker, continues to blossom, and their role with the post-startup nation of LinkedIn, Netflix, Facebook and other Valley success stories is singular and far from proportionate with the number of lawyers at that firm.

Q: What is a mistake you made early in your career and what did you learn from it?

A: One mistake that I have confessed in other interviews is to try a case that really should settle. When one sees a case with a risk profile that cannot reasonably be managed, pressing for settlement if at all possible seems obvious. Advocating a client's interests zealously in such cases may mean pressing harder for creative settlement options, rather than the natural or predictable march toward trial. Of course, if all such efforts fail, deep and thorough trial preparation is the ticket to a higher likelihood of success, despite the arduous risk profile.

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