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Q&A With Mayer Brown's Ward Johnson

Law360, New York (August 03, 2009) -- Edward Johnson is a partner at Mayer Brown LLP and serves as litigation practice leader for the firm's Palo Alto office. Ward represents clients — often technology, telecommunications and media companies — in a wide variety of proceedings, including antitrust and intellectual property disputes. He regularly serves as counsel for license programs holding essential patents relating to a technology standard.

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

A: In my second jury trial, almost 20 years ago, I represented, pro bono, a defendant who had been the most wanted fugitive on the East Coast in a murder trial in Manhattan Supreme Court. It was a case taken over from the late Bill Kunstler and there was intense coverage from the tabloid press that took my client's guilt for granted. Nevertheless, after a six-week trial, the jury acquitted my client. That early experience still helps me to put the very real challenges and pressures of complex civil trials into perspective.

More recently, I have represented, in a variety of proceedings, clients who were accused of a Sherman Act violation for allegedly refusing to license essential patents on fair, reasonable and nondiscriminatory ("FRAND") terms.

The challenge here is that, while FRAND obligations are commonplace, there is very little law to spell out what those obligations mean in practice. To compensate, one needs to make a highly developed factual record. You then have to have convincing and well-prepared economists and industry experts who can work from that record and educate the fact-finder.

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

A: Moments of pride have come in knowing that I've helped to deliver the right result for my client. For moments of joy, nothing beats a good cross, especially of a well-prepared expert witness.

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

A: As I mentioned, FRAND licensing obligations are common. FRAND obligations are often imposed by standard setting bodies on owners of essential technology incorporated into the standard. But the FRAND obligation is not yet well defined in case law. This allows companies seeking access to the standard's technology to argue that FRAND means a compulsory license for all comers and that refusal to license to anyone is an abuse of market power.

A demand for a compulsory license could be particularly worrisome in the context of an unreliable would-be licensor (e.g., one with credit problems, a history of facilitating piracy or grossly underreporting royalties). The law needs to make clear that, as my partner Chris Kelly is fond of saying, a FRAND obligation is not a suicide pact. FRAND licensors still have a right to protect their intellectual property. Without being able to do that, licensors will lose the incentive to contribute that technology to a standard and, ultimately, to innovate.

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

I expect the contours of the FRAND licensing obligation to be further tested, especially in an antitrust/competition law context in both the United States and the European Union.

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

I have enjoyed working with Alan Blankenheimer of Covington and Joe Tringali of Simpson Thacher. They each bring humor, erudition and insight, which make them delightful and valued colleagues.

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

Demanding rehearsals and respect for craft, Stanislavski famously wrote, An Actor Prepares. That advice is no less important for a litigator who should expect several hours of preparation for each hour of live testimony.

And, of course, the place to start is documents because, to paraphrase Willie Sutton, that's where the evidence is.