

Rare Experience

In IP, a lucky few land trials. Our sibling publication *The American Lawyer* found the ones who get the work.

By Brenda Sandburg

A

s Faegre & Benson was preparing to take Wyeth to trial in a trade secret theft suit, 43-year-old David Gross told the senior partner on the case that he'd like to serve as first chair.

Gross, who began his career trying cases at the U.S. Department of Justice, had won a patent trial for Streamfeeder, LLC, in the late 1990s, and a number of other jury trials, but the stakes in this case were much higher—Wyeth faced the loss of billions of dollars in revenue from its blockbuster hormone replacement drug, Premarin—and other partners on the team had more seniority. Wyeth's in-house counsel told senior partner Winthrop Rockwell to pick whomever he wanted to lead the trial team. Rockwell had decided not to take the lead himself, since he had many other cases on his docket. A year before trial, after evaluating the five other partners on the team, he picked Gross. "Gross's long-standing passion for and commitment to trial work, combined with his talent and decisiveness, made him an outstanding choice for this assignment," Rockwell says. "It oozes out of him that this is what he really loves and most wants to do."

Gross, who speaks with infectious enthusiasm about his work, led two mock trials, a year before and six months before the actual trial. Since these trials went well, Wyeth's in-house counsel felt assured he was the right choice. The company's CEO also interviewed Gross



Faegre & Benson's
David Gross

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about his trial strategy and gave his nod of approval. Gross and his team pulled off a major victory. A district court in Saint Paul found that Natural Biologics, Inc., had stolen Wyeth's secret process for manufacturing Premarin and issued a permanent injunction prohibiting the company from making a generic version of the drug.

Gross is one of the lucky ones. While plenty of younger lawyers hunger for a shot at first chair, it's a tough assignment to get in the intellectual property realm, particularly in patent trials. The majority of patent disputes settle—there are less than 100 patent trials per year in the United States, says Stanford law professor Mark Lemley—and when they go to trial, the partners with a track record generally take the lead.

Those who do land a big trial, however, can quickly become stars. There's so much at stake in patent battles that lawyers who win these cases become go-to lawyers for future work. "Ten years ago, the economic importance of patent cases was nowhere near where it is today," says Fish & Richardson partner Frank Scherkenbach. "The significance of the cases have become bigger, and hundreds of millions or billions in damages are being sought." And because IP law is constantly changing, and the technology involved in litigation is so complex, it takes a special skill set to be able to interpret matters for a judge and jury. "There's more room for lawyering in patent litigation than any other kind of litigation," since one can interpret the law and characterize the technology in a way that's beneficial to a client, says Jeffrey Randall, a partner at Skadden, Arps, Slate, Meagher & Flom. "In other areas, the facts are the facts."



he quickest path to stardom is getting a leading role at trial. And that, Lemley says, comes down to luck in getting cases that don't settle, and selecting the cases that aren't easy to settle. For young lawyers it also depends on the firm they are in and whether seasoned partners will give them the reins in a major matter. "If you want to break out, go where a law firm and clients are willing to give you a chance," says Gross. The firms that are building IP practices, he adds, are likely to give young lawyers a lot of opportunities.

That's how Charles Verhoeven, a partner at Quinn Emanuel Urquhart Oliver & Hedges, got his first big jury trial in 1999. Then a young partner, Verhoeven had been running Mentor Corporation's patent infringement case against Medical Device Alliance, Inc., up to the point of trial. The lead attorney, Adrian Pruetz, cochair of Quinn's IP litigation group, wanted to give him an opportunity to first-chair and talked him up to Mentor. (He won

a jury verdict of willful infringement and \$4.9 million in damages.) Scherkenbach, the partner at Fish & Richardson, also got his first lead role at the recommendation of a senior partner who fibbed about Scherkenbach's age. In 1999, at the age of 36, he won a \$32 million damages award for Power Integrations, Inc., in its suit against Motorola, Inc.

While clients still sometimes ask his age, Scherkenbach says his youth can be an advantage in the technology arena. "The engi-

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neers, vice presidents, and chief technology officers in many companies are in their late thirties or early forties and are comfortable with someone my age," he says.

Still, many highly regarded young lawyers with a string of settlements and summary judgment victories haven't gotten many first-chair roles at trial. I. Neel Chatterjee, a 37-year-old partner at Orrick, Herrington & Sutcliffe, has been lead counsel on a dozen cases, only one of which has gone to trial. "When you have an entire business on the line, or billions in dispute, it is frequently the case [that clients] will want the gray hairs" as first chair, Chatterjee says. Lawyers can make a splash off the trial stage as well. Chatterjee, for example, won a \$325 million settlement for EMC Corporation in a suit brought by Hewlett-Packard Company.

Karen Hagberg, a senior patent litigation partner at Morrison & Forester, says you don't have to be first chair at a trial to stand out as a star lawyer. "Being smart, well prepared, and having the ability to get a client's position across can come across in a lot of different ways," she says.

But winning a big case at trial is a career-making event. "It gives you the credibility you need when you are young," says Gross. "[Since the Wyeth victory], clients no longer question if I'm senior enough to be first chair on a big case." Instead, they're now seeking him out. He's currently lead trial counsel in a dozen patent infringement cases, four of which are set to go to trial. For someone who loves the courtroom stage, life couldn't be better.

This story originally appeared in The American Lawyer. For a complete list of the magazine's picks for top young litigators, visit american-lawyer.com.