

Behind-the-Scenes of Latham's IP Litigation Surge

By Scott Graham

Latham & Watkins' intellectual property litigation group was in the doldrums. It was 2008 and the firm had lost a couple of high-profile partners to competing firms in the previous two years.

"We had some highly talented people," recalled former chairman Robert Dell, but "we weren't viewed as a real go-to IP litigation shop."

It was time for action. Partners Maximilian Grant and Robert Steinberg had a sit-down to discuss the future with Dell and Peter Wald, then chairman of the firm's litigation department. It was "a whole-day meeting, a come-to-Jesus thing," Steinberg said.

The IP partners wanted control over lateral hiring. They wanted their own dedicated group of associates focusing exclusively on IP. They wanted authority to hire nonlawyer technical specialists who could break down the science behind complex patents at reduced expense.

Dell signed off on most of the proposals or promised "a fair hearing." And he issued a challenge of his own: "There's no reason the practice shouldn't be a \$100 million practice," he recalls telling Grant. That would mean more than doubling what it was generating back then.

Eight years later, Latham's IP practice is thriving. Nineteen lateral partners have been added, about half of them in San Francisco or Silicon Valley. The firm scored big trial wins in the last year for clients including Symantec Corp., Arista Networks Inc. and, just last week, Nvidia Corp. At the U.S. Supreme Court, Latham won a key 2011 decision expanding Section 101 eligibility as a defense to patent infringement, then more recently persuaded the Federal Circuit that the defense may be raised early in litigation. Latham is also making a push at the Patent Trial and Appeal Board, stopping a patent challenge there last month to Abbvie Inc.'s \$14 billion-a-year drug Humira.

The firm won't say exactly how much revenue the group generates today, but the \$100 million mark—which Dell says he threw down mostly as a motivational challenge goal—was passed long ago. The group counts more than 110 litigators, eight technical analysts and 15 paralegals.



Left to right: Douglas Lumish, Richard Frenkel and Jeffrey Homrig

Latham leaders cite several factors in the IP group's revival. First is a patient and methodical approach to recruiting first chair-caliber IP trial lawyers. The recruiting process takes anywhere from six months to four years. Silicon Valley partner Douglas Lumish, who joined from Kasowitz, Benson, Torres & Friedman in 2013 and is now a group co-chair, said he met with 60 Latham partners before making the move.

Latham has focused on trial talent because "the person that doesn't blink at going to trial is going to be in the strongest position to win," group co-chair Matthew Moore said.

Second is developing its own home-grown ranks. Latham has added eight associates over the past five years with experience clerking at the U.S. Court of Appeals for the Federal Circuit. That's up from zero in 2010.

The third factor is a system designed to maintain a team approach to litigation. The practice group rotates its leaders every five years, for example, and partners are assigned different associates from different offices, depending on the matter, as opposed to building their own personal teams.

Trial lawyers at big law firms tend to be "individual gunslingers," said Dell, who retired as chairman a year ago. "What our group has built is they literally share trials."

Some challenges remain. Although six of the 19 lateral hires have been women, the leaders of the practice are men and there is no female first-chair rock star in the group. It's an issue a lot of IP practices are confronting, particularly as more women assume decision-making roles at their client companies and demand more diversity on trial teams.

"We're cognizant that we would be in a better position" with women filling first-chair roles, Grant said.

Two of the group's most recently elevated partners are women. This spring Grant is teaming up with Morrison & Foerster partner Rachel Krevans on a program aimed at developing women at both firms for leading trial roles. They plan to bring in judges, jury consultants and first-chair lawyers from other practice groups.

"I know some of it," said Grant, whose resume includes a \$1.3 billion jury verdict in a medical-device case. But as a man, "I may not know all of it."

'DILIGENCE AND FOCUS'

When Grant, a former Navy SEAL team leader, made his pitch to Dell for rebuilding the IP practice, he was all of 18 months into his partnership. "I'm not sure I did have the stature but that didn't stop me from acting like it," Grant said.

Once he got the green light, Grant brought aboard New York headhunter Linda Ginsberg, who has handled all of the IP group's recruiting. Grant remembers that on one of their first candidate phone calls, on a weekend morning, he was pleasantly surprised to hear Dell joining them on the line.

"It was a really big sign not just to me but to our headhunter," Grant said. Candidates always want to know, "Are they really serious?" Now Ginsberg could answer, "Well, I was on the phone with Bob Dell Sunday morning and this is what we talked about."

Immediately on Grant's and Ginsberg's radar screen was Moore, who was then at Howrey. Moore told Ginsberg he wasn't interested. She recalls telling him, "Talk to Max. You and Max will really like each other."

Ginsberg was right. The two bonded over lacrosse. Grant had played at the Naval Academy and Moore played professionally in the early 1990s.

When Moore decided to move on from Howrey in early 2010, he chose Latham. Later that year Bert Reiser, a veteran U.S. International Trade Commission litigator, joined from Howrey and Lawrence Gotts made the move from Paul Hastings.

But Grant and Ginsberg were just getting warmed up. Latham had been looking for years to boost its Silicon Valley IP litigation practice, and 2011 brought Ron Shulman and five other partners from Wilson Sonsini Goodrich & Rosati. More Valley firepower was added in 2013 with Lumish and two other partners from Kasowitz.

In many cases the recruiting process took years to play out. "Every single one of them told us to drop dead" when first approached, Grant swears.

Ginsberg credits Latham with "diligence and focus and strategy and patience."

FINDING EFFICIENCIES

When Moore joined the firm he noticed that a lot of associates were splitting their time between intellectual property and other types of litigation. That might have made sense years ago when patent cases were few and far between, but it wasn't going to work in today's market, he said.

"A lawyer that's switched between securities, antitrust and IP for three years isn't going to be as efficient as a lawyer who's focused on IP for three years," he said.

In another bid for efficiency, Latham's IP group has hired eight nonlawyer technical experts to break down the science behind patents at billing rates below an associate from an elite law school with a science degree.

The group also is collecting and organizing data about how much time various tasks require in particular courts against particular opposing counsel. As one simple example, nine months of litigation in the rocket docket of the Eastern District of Virginia can be far more costly than in venues where it takes three years to reach trial.

Moore has been on a good run in the courtroom, including trial and appellate wins last year on behalf of Capital One Financial Corp. against Intellectual Ventures. But wins aren't enough in today's market if lawyers aren't managing to budgets.

"I came from a manufacturing environment," said Moore, who was an engineer at General Electric Co. before starting his law career. "Budgeting was everything."

That mindset is appreciated by clients like Newegg Inc. general counsel Lee Cheng, who practiced corporate law at Latham in the early 2000s. Though he considers the firm "too expensive for day-to-day work," he entrusts Latham and partner Richard Frenkel with some of his company's critical patent issues. "I've never gotten an invoice where I did not think that we got value," Cheng said.

SURFING THE PTAB CURVE

Patent law is evolving constantly and Latham is trying to stay ahead of the curve. The dawn of the America Invents Act in 2012, and the wave of administrative trials it's unleashed at the Patent Trial and Appeal Board, posed a particular challenge because Latham does not maintain a traditional patent office practice.

Nor was it a problem that could be solved with a lateral hire. "No one else was doing it before," Latham partner Steinberg said.

So Steinberg, one of the architects of Latham's IP rebuild, volunteered to head up the practice. "We want the support of the firm in making this investment and I'm spending 100 percent, 150 percent of my time on PTAB cases," he said.

Steinberg's group is involved in about 90 proceedings before the PTAB. His work there intersects with another trend the firm is anticipating—a boom in litigation over biosimilar drugs.

Last year Amgen Inc. filed challenges over two of Abbvie's Humira patents at the PTAB, then used that opening to seek Food and Drug Administration approval for a biosimilar version of the drug. Latham short-circuited the plan, at least for now, by persuading the PTAB in January to reject Amgen's two petitions for inter partes review.



Maximilian Grant, Latham & Watkins

Steinberg teamed up with partners Michael Morin and David Frazier, who lateraled into the firm last year from Finnegan, Henderson, Farabow, Garrett & Dunner.

Biosimilar and life sciences litigation are big today, but only getting bigger, Lumish said. "They're going to be hugely important as the economy develops," he said.

FIVE-YEAR PLAN

Grant and Steinberg have handed over the reins of Latham's IP group to Moore, Lumish and partner Kenneth Schuler. The plan is to limit practice group chairs to five-year terms. That's partly to prevent the center of gravity from falling on any individual lawyer, and partly to give midlevel partners the opportunity to raise their profiles within firm management, the bar and among clients.

In the same vein, the firm encourages partners to work with a variety of associates, depending on the nature of an assignment, rather than build their own personal teams.

"You can be General Patton and he's got his style, and you can be General Bradley and he's got his style," said Grant. "You have to figure out what works for you, but it's much easier to do that if you see different people in action."