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KNOCKING OUT THE COMPETITION

How Fenwick & West won the world's most high-profile IPO.

By Ross Todd

FENWICK'S GORDY DAVIDSON
AND KATHRYN FRITZ



facebook's FRIEND

HOW FENWICK & WEST LANDED THE WORLD'S MOST HIGH-PROFILE IPO.

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Photographs by Annie Tritt

It's the assignment that got away

that has done as much to shape Fenwick & West as any other. Fenwick lawyers incorporated Steve Jobs and Steve Wozniak's Apple Computer Inc. in 1976, after a partner's sister referred the pair to the small Silicon Valley firm. But four years later, when Apple wanted to go public, the company took its IPO work to Fenwick's then-building mates at Wilson Sonsini Goodrich & Rosati. Fenwick chair Gordon "Gordy" Davidson says the trauma of missing out on the Apple IPO was part of what triggered his transition from litigator to corporate dealmaker.

Given that "Gordy" and "Fenwick & West" have largely become synonymous terms in the deal culture of Silicon Valley, that was a significant switch. Since losing out on the Apple offering, Davidson and Fenwick have helped launch the IPOs of Silicon Valley tech stalwarts including eBay Inc., Electronic Arts Inc., Intuit Inc., Oracle Corporation, and Symantec Corporation.

Still, none of those assignments matches the firm's latest coup—landing Facebook Inc.'s IPO—in terms of size and exposure. Facebook documents drive so much traffic to the Securities and Exchange Commission's Web site that the agency has asked the firm for a heads-up before any Facebook filings are made. Client and Intuit cofounder Scott Cook calls Facebook's IPO "bigger than the World Series" for the tech world.

Landing the Facebook IPO is a payoff for a strategic decision that the firm made when it was founded in Palo Alto 40 years ago: wooing and servicing tech clients. It's not all that

different from the approach of Fenwick's peer firms such as Cooley and Wilson Sonsini. But unlike those firms, which have expanded nationally and internationally, Fenwick has hunkered down in the tech corridor with just three main offices in Mountain View, California; San Francisco; and Seattle, and two small outposts in Boise and Williston, Vermont.

Three of Fenwick's four practice groups—litigation, intellectual property, and corporate—focus almost exclusively on tech and life sciences companies and the banks and venture funds that bankroll them. (The firm's tax practice is the exception. About 80 percent of that work comes from tax planning and international transactions for some 100 Fortune 500 companies.)

The tech focus is particularly evident in Fenwick's intellectual property group. The lawyers provide patent and soft IP prosecution work that some firms eschew as less profitable. They also lend transactional support to companies where intellectual property is central to the business, and to start-ups where IP can essentially be the *entire* business.

Fenwick's entrepreneurial clients have also affected the firm's own business practices. Cisco Systems Inc. general counsel Mark Chandler and former Sun Microsystems Inc. GC Michael Dillon convinced the firm to embrace fixed and alternative fees for deal work early in the past decade, before such arrangements were an industry norm. More than 20 percent of Fenwick's work today is done under nonhourly billing arrangements, including the firm's fixed-fee patent prosecution work for Facebook.

Managing partner Kathryn Fritz, an IP litigator in Fen-

wick's San Francisco office, describes the firm's culture as "very slow on policy implementation [but] early on people just doing things." (She points to IP and litigation partner Stuart Meyer, who has tele-commuted from Vermont since the 1990s and who actually made partner under the arrangement. The firm now has a small group of technical staff in Vermont that handle administrative work on patents and licensing matters at about two-thirds of the cost to do the same work in California.)

Fenwick has grown to 278 lawyers organically and through lateral acquisitions that were made without guaranteeing partner compensation. (All head count totals are full-time equivalent as of May.) A weekly e-mail to the firm's 95 partners details which clients have paid their outstanding bills that week. And profits are paid out at the end of every month, so partners feel the ebb and flow of the business cycle.

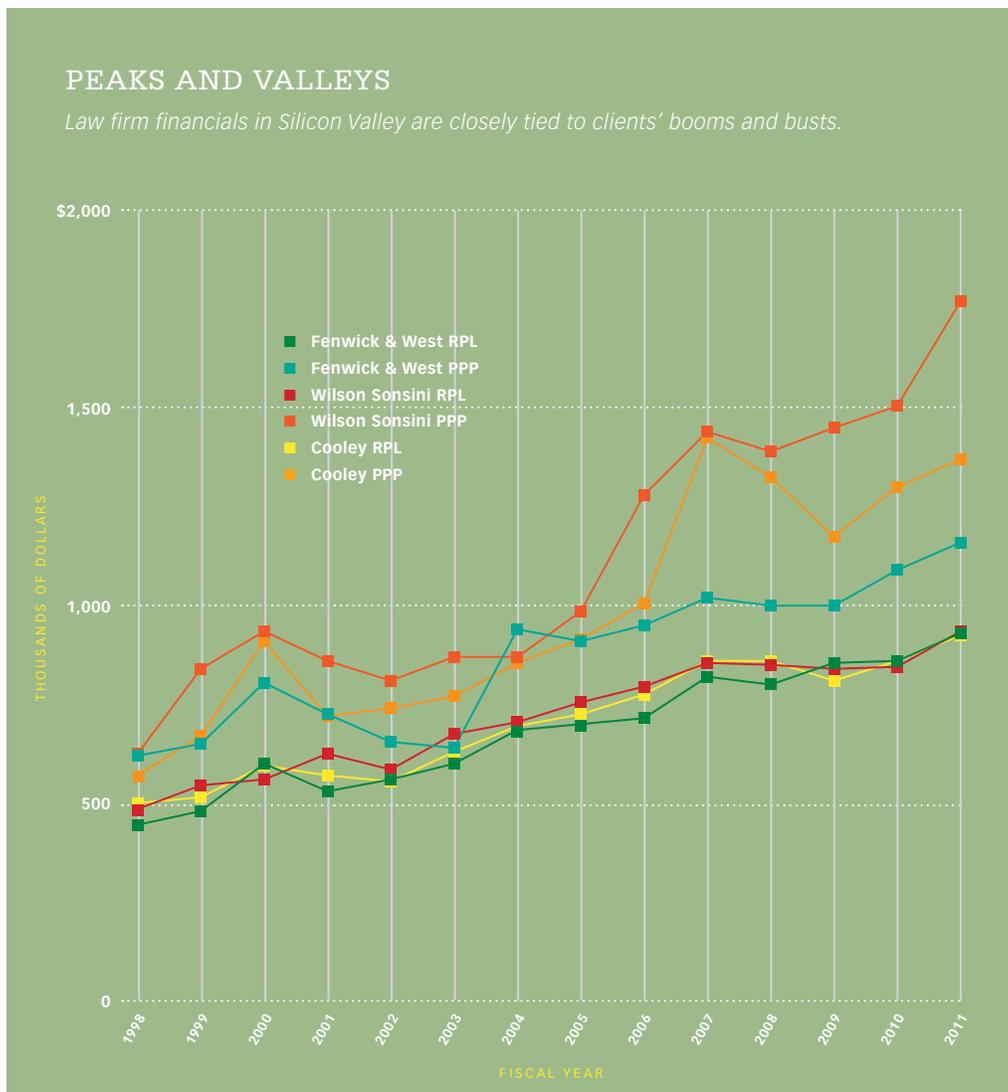
This fiscal approach has put Fenwick on a solid if not spectacular financial footing. The firm's revenue per lawyer of \$925,000 ranks among the top 50 in The Am Law 200 and compares well with those of its tech-focused rivals at Cooley and Wilson Sonsini—\$920,000

and \$930,000, respectively. However, profits per partner for fiscal year 2011 came in at \$1.155 million, still lagging behind Cooley's PPP of \$1.4 million and Wilson Sonsini's \$1.8 million. (Fenwick has a small nonequity tier—just 11 of its partners—while nonequity tiers account for more than 25 percent of partners at Fenwick's Am Law 100 neighbors. That difference explains much of the profit gap.) Says Fenwick CFO Scott Pine: "From the purely economic side, we want to have something that's competitive with the top national firms, but that doesn't mean we have to be 20 percent higher than everybody in the market."

FOUNDED IN 1972 by a handful of Cleary Gottlieb Steen & Hamilton associates who relocated to Palo Alto to represent the fledgling technology industry, the firm initially put out its shingle behind a fish and chips shop. When Cleary colleague William "Bill" Fenwick joined, he brought a significant litigation book of business that helped keep the nascent firm afloat. The name partner has focused on legal issues affecting the tech industry for decades.

His law school dissertation at Vanderbilt University, published in 1968, was on automation and the law. "I could see that technology was going to be a greater force for change than anything ever seen," says Fenwick, 73, sitting at a table in the backyard garden of his modest one-story Palo Alto home, where he works a couple of days a week.

Bill Fenwick says litigation work for client Pioneer Electronics Corp. in more than 25 states kept the firm busy in its first four years and accounted for as much as 85 percent of the business back then. Apple was also an important early client. Fenwick himself helped the young company develop a solution to its novel problem of how to protect software on its home computers by developing what many of his partners consider the first "shrink wrap" license—an unsigned agreement that is accepted when a user opens the packaging on a new piece of software.



SOURCE: THE AMERICAN LAWYER AND THE RECORDER



ONE OF THE FIRM'S important early hires was Davidson, a Stanford-trained engineer turned lawyer. Davidson caught the start-up bug working as an engineer in a small company in the early 1970s, but he realized that he liked working with people more than products. He joined the firm in 1975 as one of its first associates. Davidson says Bill Fenwick told him at the time that the firm would grow to be 50 lawyers in five years. Says Davidson: "I remember thinking, 'Wow, this guy is crazy, but I like the way he thinks.'"

Davidson, who worked on tax and IP licensing issues early in his career, was primarily a litigator when Apple's IPO work went to Wilson Sonsini. He says he knew he eventually wanted to practice corporate law, but the loss of that assignment convinced him that it was time to make the change. Davidson landed his first corporate client, a Santa Barbara company that made sound boards for recording studios, through a law school friend. His second client was a bit more indicative of where his practice was heading: Davidson represented VisiCorp, the company that developed the first database software for the Apple II.

After a decade and a half of building up his corporate practice, Davidson became the firm's first—and so far only—Fenwick chair in 1995. He has been reelected every year or two since and says he has no plans to retire anytime soon. Down-to-earth and unassuming, the 63-year-old has led the firm through the tumultuous period of the

NAME PARTNER BILL FENWICK WROTE HIS 1968 LAW SCHOOL DISSERTATION ON AUTOMATION AND THE LAW. EIGHT YEARS LATER, HE WAS INCORPORATING APPLE COMPUTER.

Internet boom and bust. Fenwick's profits per partner reached a then peak of \$800,000 at the height of the dot-com bubble in fiscal year 2000. In 2001 Fenwick's gross revenues of \$148 million landed it on The Am Law 100 at number 97 for the first—and only—time. The trough in deal work that followed overlapped with a period when partners were paying for dual leases as Fenwick moved its Silicon Valley headquarters from Palo Alto to a new building in Mountain View in 2002. Profits per equity partner hit bottom at \$635,000 in fiscal year 2003. But rather than looking to merge, expand, or diversify, the firm elected to double down on its tech focus by betting on a Bay Area rebound.

It turned out to be a solid bet—undoubtedly benefiting from the 2003 demise of tech rival Brobeck, Phleger & Harrison. Besides picking up Brobeck alums, including securities litigation partners Kevin and Susan Muck, the firm won the business of a prized Brobeck client, the highly acquisitive networking giant Cisco Systems. The relationship with Cisco has roots in a day in the early 2000s that Davidson spent with the company's GC Mark Chandler on a mutual friend's sailboat in San Francisco Bay. Chandler says there wasn't much wind that day, but there was beer, and he and Davidson quickly hit it off. "[Gordy is] not a games-playing kind of guy, and he wasn't particularly self-promoting," Chandler says. Then, as Brobeck was spiraling toward dissolution in

late 2002, Chandler ran into Davidson jogging one morning in his Palo Alto neighborhood. The two shared a run and talked, and Chandler says that over the course of those 45 minutes, he

decided that he wanted to work with Gordy in the wake of Brobeck's collapse. Fenwick has handled Cisco's transactional work since 2003.

Although the relationship dates back to the friendship between Davidson and Chandler, partner Douglas Cogen has become a central figure in Fenwick's M&A work with the computer networking giant. "Gordy sets a tone where he builds up those around him and lets them have the spotlight," says Cogen, who took the lead on Cisco's \$5 billion acquisition of video streaming software company NDS Group Ltd. that was announced in March. Chandler adds that Cogen has become integral to the Cisco transactional team.

It's an intense client relationship. Says Chandler: "We've probably done close to 100 deals with them, and we've never had any big problems. We've never had a deal go sideways. We've never had anything get past us that we should have thought about." Chandler and the Fenwick lawyers believe that familiarity breeds efficiencies. Cisco in-house counsel and Fenwick lawyers talk regularly about how they do their work, who does what, and ways things can get done more productively. The conversations have led to changes in the way Fenwick lawyers handle due diligence, for example. They enter data about an acquisition target's contracts (such as the dollar value and expiration date) that Cisco wants to flag into a database—rather than writing up contract summaries. That database is then searchable and sortable.



Fenwick has handled Cisco's deal work for a monthly fixed fee since the beginning of the relationship. "Fixed fee is a relative term," Chandler says. "What that means is when something unexpected happens, you have to make adjustments." Although the amount Cisco pays Fenwick as a fixed fee has gone down over time, Davidson says the work remains roughly on par with the rest of the firm's matters in terms of profitability. "Each year [our budget has] been within spitting distance of what it would have been in hourly business," he says.

ANOTHER CORE CLIENT IS FACEBOOK. The firm's patent lawyers landed Facebook as a client a couple of months before their corporate colleagues in 2007. Partner Robert Hulse's work for the company predates 95 percent of the social media site's current employees. Facebook's deputy GC of intellectual property, Samuel O'Rourke, says that Hulse and his team are deft at keeping up with the company's pace. "The software engineers like having a lawyer they can relate to who doesn't waste their time," O'Rourke says. The company puts meetings on Hulse's schedule remotely, often without asking. "We own Bob, basically," O'Rourke says.

Although Facebook has brought on patent lawyers from Baker Botts and Greenberg Traurig as the company's prosecution needs have grown, Fenwick's volume of Facebook work has continued to increase. O'Rourke says Fenwick now handles roughly half of Facebook's total prosecution work—all on a fixed fee.

ROBERT SACHS (LEFT) AND ROBERT HULSE HEAD UP FENWICK'S PATENT RELATIONSHIPS WITH GOOGLE AND FACEBOOK, RESPECTIVELY. FACEBOOK'S IN-HOUSE IP LAWYER SAYS: "WE OWN [HULSE], BASICALLY."

Where many big firms have eschewed patent prosecution as commodity work that goes to the lowest bidder, Fenwick has embraced it as central to the mission of its technology and life sciences clients and start-ups whose small IP portfolios can be the crown jewels of their business. The eccentricities of the firm's patent practice are not lost on the partners. Robert Sachs, who manages Fenwick's patent prosecution relationship with Google, likes to say that his colleagues in patent litigation are samurai, but they could not fight their battles without the weapons he helps build. During Hulse's first round of interviews at Fenwick in 2001—he was then at IP boutique Lyon & Lyon—Hulse and Sachs spent two hours in front of a whiteboard in Sachs's office, arguing about software patents. By the end of the argument, Hulse had won Sachs's endorsement, but missed his flight home.

On the corporate side, Fenwick got an invite to Facebook's 2007 beauty contest in part because of start-up partner Ted Wang's relationship with then-Facebook CFO Gideon Yu. Wang had joined Fenwick from boutique White & Lee in 2006 as the firm was recommitting to its start-up practice. He and Yu became acquainted while sitting on the advisory board of a start-up, and Wang represented Yu when the former YouTube, Inc. CFO joined Facebook. Still, Wang, whose profile has risen dramatically since joining Fenwick and landing Facebook and Twitter Inc. as clients, downplays his role in winning the Facebook business, pointing to Davidson's presence at the pitch.

Although the public offering has been the firm's highest-profile assignment for Facebook, Fenwick's work was critical in allowing the social media company to stay private for so long. That work has also had industrywide implications. In Silicon Valley, where equity stakes are commonly used to lure and retain talent, the 500-shareholder threshold has been a looming trigger that forces private companies to share their financial results publicly. (The 500-shareholder rule was reportedly a major factor in the timing of Google Inc.'s 2004 IPO.)

In October 2008 Fenwick lawyers helped Facebook obtain a "no-

FENWICK'S IN-HOUSE TEMP AGENCY

Late in the last decade, Fenwick & West partner Ralph Pais and his colleagues in the firm's tech transactions practice saw many of their start-up clients moving their work on smaller deals to boutiques and solo practitioners in Silicon Valley. They also saw clients who were not quite ready to hire full-time in-house lawyers, but who were still generating enough legal work to warrant some part-time lawyering. Pais thought that Fenwick could help. In early 2010 he created Flex by Fenwick, a legal temp agency that provides in-house lawyers to budding tech clients.

Two years later, Flex's lineup of some 20 contract lawyers have served 31 clients on 46 engagements. All of the Flex lawyers have practiced in a law firm and in-house and have at least eight years of experience. Pais screens candidates through an experiential interview process: He has them mark up a mock commercial agreement, and then he calls pretending to be a pesky client who wants to discuss the document. The contract lawyers handle commercial and licensing deals, employment agreements, or any other legal work that might come up in the start-up's life cycle. Clients can subscribe to a set number of hours or days per week spread over a quarter, and the firm works to match them with the right Flex lawyer in terms of skills and work style. Fenwick covers the Flex lawyers's overhead, provides their malpractice insurance, and handles their billing, but only pays them while they're on assignment. Flex clients pay rates that typically decrease with increased usage and run about half of Fenwick's hourly rates.

Although Pais and the firm declined to discuss the specifics, Pais says the project has outperformed its budget, and the firm did not build low expectations into its projections.

Cyriac Roeding, the CEO of shopkick Inc., the maker of a mobile shopping application for smartphones, has worked with Fenwick on corporate issues since 2009. He has also used Flex lawyers for the past two years to handle more routine commercial agreements with retail partners. Roeding says that with Flex, start-ups like shopkick get to keep their ties with their large full-service firm without paying their prices. "You have a sustainable and affordable model while retaining the overall link to the mother ship that knows the corporation itself and the issues it has," Roeding says. He adds that Flex lawyers have called attorneys at Fenwick for advice on trademark, liability, and complex human resources issues.

Bobby Garcia, who landed his position as senior corporate counsel at Ustream Inc. in January 2011 after working there on a four-month assignment with Flex, has also leaned on Fenwick lawyers to help with more complex issues. Garcia brought on an additional Flex attorney to pitch in with the growing workload at the company, which provides a platform for live interactive Internet broadcasts. Still, Ustream runs into some issues that require them to call a Fenwick lawyer. "We do still have our limitations—as a Flex attorney, as a generalist—where you really need to run something by a specialist," Garcia says. For Fenwick, that's a good thing, too.

—R.T.

action" letter from the SEC, which clarified that restricted stock units, or RSUs, do not count toward the 500-shareholder threshold. RSUs are valued in terms of stock, but no stock is actually issued at the time of a grant. They usually vest after a set period of time, or if the company is sold or goes public. Facebook's RSU exemption served as a road map for Zynga Inc., whose in-house counsel received a similar exemption in June 2011, and for Twitter, for whom Fenwick procured an exemption in September 2011. In February, after Fenwick approached the SEC about getting a similar exemption for another client, the SEC instead had the firm write a letter on its own behalf. In response, the SEC promised no-action against any company using RSUs as employee compensation in the way described in Fenwick's letter. The JOBS Act signed by President Barack Obama in April has since raised the 500-shareholder threshold to 2,000 and exempts employee stock grants from that tally, but Fenwick's advocacy before the SEC allowed some of the Valley's mature private companies to hold their financial results close to the vest a while longer. "In the tech world what we as lawyers are doing is giving advice on things that are constantly changing," says managing partner Fritz. "You have to have a sense of where things are going. If you're not really embedded with the client, you can't do that."

Of course, having the firm's fate so closely tied to tech clients means that profitability rides the cyclical ups and downs of the Valley [see "Peaks and Valleys," page 70]. But Fenwick partners say they're committed to a long-term approach to investing in the firm. Even during the most recent recession, they put themselves through cost accounting and self-measurement exercises that have resulted in real-time budgeting tools that help them forecast their bills to clients and see where billings are likely to be 30, 60, and 90 days into the future, given the expected workflow. There are some things like large IPOs and internal investigations that are still very difficult to predict costs for, but the firm has invested in four full-time professionals to help partners build budgets, staff matters effectively, and explore alternative fees.

Fenwick's mantra of "don't let the client outgrow you" gets tougher to live up to as Silicon Valley companies grow internationally. Currently the firm has no plans to dramatically increase its practice offerings, partner size, or footprint in the United States or abroad. "Asia is on my mind," says Davidson. "It's been on my mind for 10 years, though."

That's just fine, says the firm's most high-profile client. Facebook's O'Rourke says the firm's size isn't an issue for him. "I'm more interested in deep relationships with the people we work with and people we trust [than in size and geography]," says O'Rourke. "What they do, they do well."

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