

GENDER & THE BILLABLE HOUR

For as long as I have been a lawyer (since 1993, if anyone is counting), the percentage of women graduating from law school has hovered right around the 50 percent mark. In fact, the year that I graduated was also the year with the highest percentage of women enrolled in law school – 50.4%.¹ Although there has been an increase in the number of women partners in law firms since that time (13.4% in 1995 compared to 19.5% in 2011)², given that snail’s pace of change, a 2012 Catalyst report on “Women in Law in the U.S.” estimated that it will take more than a woman lawyer’s entire lifetime (if born in 2010) to achieve equality in the partnership ranks in law firms.

What has caused the proverbial “leak in the pipeline” given the ample supply of women graduating law school and entering the ranks of lawyers in law firms is a question that academics and lawyers alike have grappled with for years. To this day, there is no consensus about why women are not achieving equality in partnership status, or, commensurately, in pay. Still, the search for the illusive “cause” continues.

Myriad explanations such as the existence of explicit or implicit bias, that there are differences in the way women were raised or have learned to generate of business, have all been explored, *ad nauseum*. A contributing factor of another kind – the role of the billable hour –

¹ American Bar Association, “First Year and Total J.D. Enrollment by Gender 1947 – 2010.” ”
http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/1947_2010_enrollment_by_gender.authcheckdam.pdf

² Due to the antiquated manner in which law firms report their partnership numbers, this “total number of partners” does not even paint the full picture, as the number of equity partners within the “grand total” are purposely hidden instead of broken out separately.

however, has largely been overlooked. This may be because the billable hour is so inextricably intertwined with the law firm model, and has been since before women began achieving parity in terms of the total number graduating from law school. Whatever the reason, the billable hour cannot be ignored as one of, if not *the* likely culprit contributing to the stagnant advancement of women in law firms today.

Disclaimer: This is probably the appropriate time for full disclosure. In 2008, I left my partner position in a large Chicago law firm to co-found a new firm designed to “kill the billable hour” by offering litigation representation using alternative fee arrangements. Admittedly, my obsession with the billable hour (or, put more accurately, with its demise), can be characterized as strong bias. With that disclaimer out of the way, let me explain the basis for my belief that the billable hour model materially inhibits the advancement of women.

Under the traditional law firm model, a lawyer’s value is measured by two tangible things – (1) hours billed and (2) revenue generated by bringing in new business. Statistics show that, in general, women do not generate as much business in law firms as men.³ In fact, the disproportion is staggering.⁴ This means that most women must make their mark via the other method of measurement – by the number of hours billed per year. We all know that the number of hours available in any given day, week or year is finite. The more things that require attention during those limited number of hours; for example, raising a family, caring for aged parents,

³ Almost half of large firms count no women at all among their top ten rainmakers. In 2011, a National Association of Women Lawyers Survey found that women partners only constituted 16% of those partners who received credit for at least \$500,000 in business generation. <http://www.scribd.com/doc/72250477/NAWL-2011-Annual-Survey-Report-FINAL-Publication-Ready-11-9-11>. See also, “Challenges Women Attorneys Face – Can they Break the Glass Ceiling?” National Association of Professional Women, Brenda K. Radmacher.

⁴ The disparity in the generation of business is a topic worthy of discussion, but not the one I focus on today.

sleeping, etc., the less hours available for billing. The fewer hours devoted to billing, the less valuable that lawyer is to the firm.⁵

Despite great strides in the amount of time men devote to raising a family today compared to 20 or 30 years ago, women still bear the brunt of the responsibility for raising children and running a household -- even women who work full time.⁶ Needing to care for elderly parents at the same time as children has also become more prevalent; hence the moniker, “the sandwich generation.” *Id.* It follows that, as external demands on women increase, the ability to meet billable hour demands becomes that much more unattainable. With both of the measures of value either unattainable or unsustainable, it is no wonder that women often settle for part-time or “contract lawyer” status or drop out of firm life entirely.⁷ And for women coming “up in the ranks,” seeing a dearth of women lawyers in the partnership ranks, particularly at the equity level, reaffirms the message that it simply can’t be done.

Ironically, even the natural by-products of mastering the juggling act of working while raising a family do not seem to help under the billable hour model. For example, being more efficient or more nurturing are two qualities that the billable hour disfavors. In fact, the more efficient a lawyer becomes under the billable hour model, the more work that must be undertaken to meet the billable hour minimums. (Never has the phrase, “Slow and steady wins the race” taken on such a significance as in the traditional law firm world). And because “nurturing” client

⁵ Despite men and women enter the legal job market on equal footing, “ultimately their paths diverge, with women lawyers generally earning 73 percent of men’s median salaries

⁶ <http://www.rightathome.net/chiswsuburbs/blog/workplace-policies-fail-to-acknowledge-that-men-share-the-responsibility-of-raising-children-and-caring-for-elderly-parents/> (As of 2010, childcare responsibilities were split two-thirds to women, one-third to men; adult daughters provide two-thirds of unpaid care for elderly parents; adult sons provide about one-third); see also Arlie Hochschild, *The Second Shift* (motherhood is a second shift of work at home, one that men still don’t help with equally, and this inhibits women’s ability to succeed in the workforce.)

⁷ <http://www.scribd.com/doc/72250477/NAWL-2011-Annual-Survey-Report-FINAL-Publication-Ready-11-9-11> (Women represent 55% of all staff attorneys and 34% of the “of counsel” positions in law firms).

relationships or internal client teams -- a talent many women seem to have -- is simply an “intangible” that rarely finds its way into the rigid calculation of a lawyer’s value to the firm, even this quality is disfavored in the billable environment.

Put differently, consider the qualities that are valued in a non-billable environment, such as one where a fixed fee arrangement is in place. Being efficient is actually one of the most valued characteristics, as doing only that which needs to be done helps maximize profits which are otherwise squandered by doing unnecessary things or spending more time than necessary on any given task. Being creative ranks equally high on the value scale world because “thinking outside of the box” and looking at things from a new perspective eliminates the weighty red tape that comes along with repetitively doing things the way they have always been done before, and without question. In the non-billable hour world, quality also reigns supreme over quantity.

Similarly, boiling the ocean to make a cup of tea or uncovering every stone simply to see what lies beneath is anathema under the non-billable hour model. In fact, perhaps the most determinative factor to the value of a lawyer outside of the billable world is something rarely, if ever, looked at in the traditional law firm model – the results achieved.

When the formalistic measurements of value are eliminated, the incentive to reward quantity over quality falls by the wayside. For women who are disproportionately burdened by the many demands on the finite commodity of time – doing away with the billable hour (or that aspect of the measurement of value) causes a shift in the focus to the measurement of the many intangible qualities that women have in spades. Perhaps when the billable hour is finally dead (or at least maimed in a significant way), women will find it possible to not only persevere in law firms, but also to thrive.