

LIFE, LIBERTY, AND THE PURSUIT OF EQUALITY



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THE ONGOING CHALLENGE OF LAWFIRM GENDER DIVERSITY

Justice Ruth Bader Ginsburg was first in her class at Columbia, a distinction she achieved while also helping her husband with his coursework, taking care of her daughter, and getting very little sleep in the process, but it was impossible for her to find a job at a New York law firm after graduation. "I had three strikes against me: one, I was Jewish. Two, I was a woman. But the killer was I was a mother of a four-year-old child," she recalled in an interview in 2016. So she built her career with a hard-won clerkship and by teaching law school. And beginning in the 1970s, she led major women's rights cases for the ACLU, winning five of the six she argued before the Supreme Court and combatting discrimination on the basis of sex.

Some of Ginsburg's biggest achievements in the fight for gender equality from the advocate's side of the bench came through representing men. She realized that advancement for women was largely contingent on breaking not just stereotypes about

women, but stereotypes about men, as well. If men are not encouraged to assume responsibility for things like childcare, housework, and other emotional labor, then it all falls on women. A brilliant strategist, Ginsburg also understood that an all-male panel of Supreme Court Justices might be more sympathetic to the plight of male plaintiffs.¹

Though the legal field has come a very long way since Ginsburg graduated from law school, women are not yet on anything resembling an equal playing field. Female attorneys comprise only 18 percent of equity partners even though they represent about 47 percent of law school graduates.² Their careers are often sabotaged if they choose to have children, reduce their schedules, or participate in non-billing initiatives. In addition, they face pernicious bias in firms that are still frequently old boys' clubs.

The theme of this column will be to identify and dissect those areas of inequality that still exist within the legal profession, ferret out the root causes, and proffer some solutions as to what lawyers can

do—both individually and within the workplace to advance the work of Ruth Bader Ginsburg and of those advocates for equality who preceded her. While these topics may be viewed as “women’s issues,” hopefully this column will resonate with all genders because balancing family and work responsibilities is a concern that affects everyone.

Tackling issues of equality is no small feat in a year when life has been upended by the coronavirus. Statistics suggest that any progress that has been achieved will not only be eliminated by the demands placed on women and caregivers, but face massive setbacks. This will create a tsunami-like effect with inequities in the workplace growing larger every time a woman leaves until the point where it is nearly insurmountable. On a global level, the GDP could take a \$13 trillion hit if nothing is done immediately to combat the gender-regressive effects of the coronavirus.³

Although the pandemic took everyone by surprise, its impact on women in the profession should not have been a shock. For years, women have been teetering on a tightrope trying to balance the demands of their jobs while tending to everything else. Some balanced it all by outsourcing—child-care, laundry, cleaning, tutoring, cooking, and more. Others balanced by willful ignorance—neglecting piles of laundry, home maintenance, and even their children. When the coronavirus hit, outsourcing came to a screeching halt and women were forced to come face-to-face with all of those things that were, previously, so easily overlooked.

In addition, the emotional toll the pandemic has taken on women cannot be underestimated. Women are more empathic than men. With friends, family, and colleagues getting sick, struggling with mental health and job insecurity, and feeling frightened, many women have found themselves in emotional overdrive trying to help everyone around them. Unfortunately, that often means compartmentalizing their own anxiety. This is compounded by the fact that there are no ideal solutions to these problems, so the empath is driven to make things better, but without the warm-and-fuzzy results.

With no clear solution and no end in sight to the pandemic, many women are opting out. In September alone, approximately 617,000 women left the workforce. An astounding number, particularly when juxtaposed with the fact that only 78,000 men left the workforce that same month.⁴

While some women are opting out, some are “opting over”—moving to smaller firms or in-house positions where they are being lured with promises of a more sustainable work/life balance. Further contributing to attrition, many firms have hiring freezes; consequently, work is being piled onto an already busy and stressed out pool of attorneys creating the perfect storm for additional attrition. A mass exodus now will have far-reaching effects for years to come. Research on retention suggests that women who do not see others that look like them in positions of power often chose to leave because they lose motivation to strive for something they view as unattainable.⁵ Fewer women in the ranks at senior levels means fewer women to emulate and more attrition.

This is a dire problem for law firms which already suffer from gender imbalances. Clients, spearheaded by many of those recently departed and disillusioned female attorneys, are increasingly looking to hire law firms that can propose diverse and inclusive teams. Firms are going to have difficulty wooing clients if they aren’t able to hire, retain, and promote female attorneys. Furthermore, from a purely economic standpoint, attrition is bad for firms. A law firm loses \$2 million each time a senior associate leaves, taking into consideration training and recruitment costs for the departing attorney and their replacement.⁶

So how can law firms support their attorneys who are about to fall—or jump—off of the tightrope? The answers to this multifaceted problem are many, but this article will tackle one major change that must be implemented—the way firms calculate billable hours. The bottom line is that when law firms base compensation, bonuses, terminations, and promotions on billable hours, women lose.

In the pre-COVID world, women were already fighting an uphill battle at law firms due to the focus on billable hours. Unfortunately, peak child-bearing years fall right around the time when women are up for partnership. While many law firms offer impressive parental leave benefits, taking full advantage of such leave impacts billable hours. Top firms also offer flexibility to parents through reduced hour schedules, yet many firms do not know how to account for compensating or promoting reduced-hour attorneys. Often, the part-time attorneys who are promoted are those who are working closer to a full-time schedule.

Moreover, women do a significant amount of the “citizenship” work at firms at the expense of their billable hours. A disproportionate number of female attorneys can be found chairing committees, ordering gifts, checking on the well-being of staff, arranging for lunch at meetings, and other such non-billable work. In fact, a 2007 study found that, in academia, women faculty members spent 15 percent more time each week on non-billable work than their male counterparts.⁷ Some of this work is inequitably delegated to women because of sexist stereotypes. Perhaps because of these stereotypes, women feel compelled to volunteer more often than men. And still other women derive satisfaction in coordinating relationship building projects.

During the COVID era, these team-building contributions are more necessary than ever. It is incredibly difficult to cultivate relationships remotely. When

such efforts (often denigrated as “soft skills”) are undervalued, it is easy to see how quickly women may become prime targets for layoffs or, alternatively, such efforts may go by the wayside at the risk of eroding corporate culture.

These are complicated problems and a profound change in the professional culture is necessary to resolve them. Firms must begin to value quality over quantity. Just because someone bills 3500 hours a year doesn’t mean they are a good attorney-or citizen. In order to combat the prevalent culture of overwork, some firms employ Balanced Hours Coordinators.⁸ This individual works with attorneys by helping them devise successful reduced hour or flex-time proposals. Then, as they progress, the coordinator monitors attorney workloads for “hours creep” and advocates for them on compensation and promotion issues.

But firms need to go further and erase the stigma of reduced hours and leave. Lawyers of all genders should be given credit for valuable non-billable work and they should still be able to have successful and fulfilling careers if they make adjustments to their schedules. Firms must implement policies so that they are able to consider, elevate, and compensate attorneys on a level playing field, regardless of the impact their leave has on their billable hours. This is how all attorneys can succeed in the post-COVID world. This is the way to increase gender diversity and retain female voices. If the legal world does not change, it risks losing the expertise and input of 50 percent of the population. 🌱

Notes

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- 8 UC Hastings College of the Law. "Effective Policies and Programs for Retention and Advancement of Women in the Law." WorkLife Law, available at <https://worklifelaw.org/publications/Effective-Policies-and-Programs-for-Retention-and-Advancement-of-Women-in-the-Law.pdf>.