

by Annie Rogaski

## Commentary: Is the Third Metric the Key?

In 2007, I entered a Federal Circuit courtroom to defend the district court's decision in a patent case. I had argued before many district courts, but the Federal Circuit felt different—quieter, more formal, more demanding of preparation and oratorical skill. For patent litigators, this is the pinnacle court (other than the Supreme Court). It felt good to be there. But, as I looked around, it dawned on me that I was the only woman in the courtroom. The Federal Circuit hears all patent appeals, so, I rationalized, perhaps this is the tech law factor—that few women seek out tech law or stay with it until they are at the top. I remained unsettled by the disparity. Reflecting later, I realized that, throughout decades of practicing patent litigation, I was often the only woman at technical depositions, one of the few women in court, the most senior woman on patent litigation cases on both sides of the “v.” While we've made strides increasing our numbers entering the legal practice and, to a limited extent, in the tech world, two areas remain the last bastion of men: tech law and the top echelons of law firms.

I could recite statistics and personal stories to establish this underrepresentation of women, but if you're reading this, you've likely felt it, know it, and could offer your own stories. There is unquestionably a problem. Most firms recognize this and want to change it, but change remains slow. We need concrete suggestions for firms and a commitment by firm leadership to make real change.

I don't have all the answers, but have spent considerable time thinking about women's leadership generally and from the perspective of firm management, and offer suggestions in three areas: (1) our own actions; (2) our legal community; and (3) workplace structure.

### Helping Ourselves

While I am a bit fatigued with the *Lean In* buzz, it does offer good suggestions and has opened a productive discussion about how women hold themselves back. Ultimately, we need to identify, acknowledge, and overcome the things we do that limit ourselves. There are certain common pitfalls that we naturally fall into having been raised in communities with different expectations for boys and girls. Some women follow instructions too slavishly and don't

test the boundaries or push themselves to where they are capable of going. Others do not raise their hands or wait to be invited into a conversation. Still others won't accept an opportunity if they feel less than 100 percent qualified.

I've always considered myself ambitious and took proactive steps toward my goals. But a few years back, I realized I, too, was guilty of “leaning out.” At the time, while co-managing my firm's litigation department, I was responsible for distributing cold calls that came in. I tried to be fair and, as a result, referred almost none of those calls to myself—to avoid any appearance of self-dealing. My husband called me on it—“if someone else was distributing those calls, would you have received more of them?” “Yes,” I responded. “Then why are you giving those opportunities to someone else, if you are the right person for them?” Why indeed? Women tend to want to support those around them, even at their own expense. But being fair includes being fair to ourselves.

Reflecting on two decades of law firm life (including equity partnership, first chair trial experience, law firm management, and, most recently, launching my own firm with two other women in tech law), I offer the following suggestions:

- DON'T pass on opportunities that move you forward;
- DON'T wait for opportunities for which you are perfectly qualified;
- DO take on stretch assignments that help you grow and learn;
- DO ask for what you need to succeed (which requires you first to figure out what you need);
- DO position yourself for opportunities (engage a mentor / sponsor, articulate what experience you want, ask for speaking opportunities);
- DO use your networks to progress; and
- DO build your own client base (the only way to professional independence).

### Community Support

How can we help each other? Here, my suggestions diverge between what is needed for gender diversity generally versus what is needed in tech law. The latter issue is more complex, as it layers the challenges of getting women into tech onto the already

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complicated issue of advancing women in law. All the more reason to tackle it.

For women in tech, early steps are needed, when interest in tech tends to wane:

- **Middle/High School.** Girls' science weekends; female science, technology, engineering, and mathematics (STEM) mentors; role models who can stem the change in perception of what is cool for girls; and positioning tech as a way to make a difference
- **College/Law School.** STEM career discussions during orientation; mentors; focused career counseling; affinity groups; career days with female tech professionals.

The key is to provide successful role models of women in tech and help them envision changing the world for the better using technology.

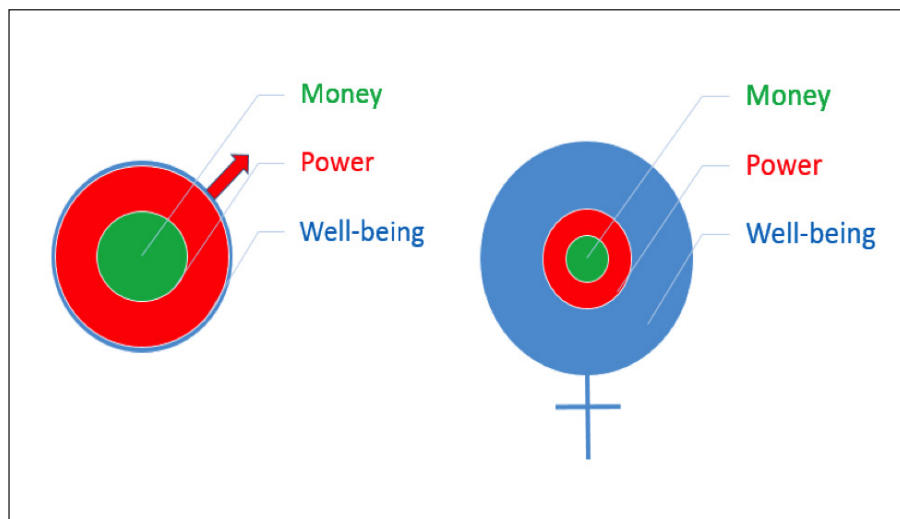
Law firms and their clients can both influence the number of women in top firms:

- **Law Firms.** Flexible (non-stigmatized) work arrangements sanctioned and actively supported by management, including partnership track availability; management oversight of client intake, to ensure fair distribution of "credit"; deliberate and early succession planning (including client responsibility transitions); diverse pitch teams, with a role for all members; encouragement for associates to stretch their wings and take on more responsibility.
- **Clients.** Clients hold the purse strings to the work all law firms want. This gives you incredible power in the diversity equation. Diversity of legal teams results in more varied, creative solutions, a more balanced jury story and a higher probability of getting the best result. You can: demand real diversity on law firm teams; communicate to law firms that diversity is a core value; refuse to hire firms that pitch the case with all men; hire truly diverse teams and law firms; ask for experienced women to be your first chair trial attorney.

## Structural Changes

Ultimately, these are important changes that will help but are not enough. Structural changes are needed to take gender diversity out of the news. It feels like we are at a flexion point for this change—there is so much discussion about diversity that there is more deliberate thought going into solving the problem; flexibility in the workplace is becoming less of a "women's issue" as the younger generations demand that we revisit our expectations of lawyers; and in the coming decades, the work structure created by men whose wives handled the homefront will no longer be relevant to a majority of workers. We are ready for change.<sup>1</sup>

What is that change? I'm reading *Thrive*, by Arianna Huffington, and think her hypothesis of the Third Metric is the key to women (and the younger generation) truly succeeding in the legal profession. Thrive is based on changing our definition of success—from old metrics of money and power to a new definition that adds a third metric—which, here, I'll distill down to well-being. Her premise is focused more on individual action, but I think ultimately advocates for a structural change in our workplaces. Not a complete overhaul, but adding the Third Metric. Decades from now, this could make the difference for diversity. I also think there is a potential immediate impact: when well-being is an equal part of "success," those who pursued well-being in addition to money and power are more "successful" than they historically were. This could immediately start to level the playing field, as shown below:



Bringing well-being into the mix means respecting those activities that foster well-being: time with family, exercise, yoga, meditation, gardening, etc. When there is more to an attorney's life than sitting in the office or working on a laptop, she is more productive and creative as a counselor, advocate, teammate—in short, she thrives. Imagine a law firm full of creative, productive, thriving attorneys—this would result in high-functioning, efficient teams that consider the whole problem when identifying solutions. It would benefit firms, clients, and the legal profession. Perhaps it's time for us to not just lean in but also to embrace the Third Metric in our profession.

My suggestions for this structural change: read *Thrive*; discuss the Third Metric with others in and outside the legal profession; and steer the conversation to what steps can we take to move to a profession that more naturally embraces "whole" attorneys, who are successful because of (not despite) their well-being. By embracing the Third Metric, I submit women will more naturally advance, making the workplace a more thriving environment for everyone. And that is a worthy goal. ☺

## Endnotes

<sup>1</sup>Indeed, the Federal Circuit reflects oncoming change, as we will have a female chief judge of the Federal Circuit, Judge Sharon Prost, replacing Chief Judge Randall Ray Rader.