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Linda Marks

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ALTERNATIVE WORK SCHEDULES IN LAW:
IT'S ABOUT *TIME!**

LINDA MARKS**

How many of you can think of a time when you might like a career-oriented, regular part-time job, with good salary, good benefits, and everything else a full-time job has except the number of hours? That is what I want to talk about today: some real, practical alternatives that employers can make available for women—and men—in the lawyering workplace. First I will tell you a little about myself and how, as a non-attorney, I got involved in this subject. Then I will present the range of alternative work schedules that are out there. I will finish by explaining how we can get employers interested in these alternatives without making it a “mommy track” issue, by instead addressing the economic realities in law firms and other places of legal employment.

I come from a social science background. After working as a program evaluator at a government medical center for ten years, I then worked for seven years at New Ways to Work (NWW), a nonprofit organization based in San Francisco that promotes alternatives to the Monday-through-Friday, nine-to-five workweek. While there, I directed NWW's Work Time Options in the Legal Profession Project. NWW is *not* a women's organization and has never looked at alternative work schedules as a women's issue.

Joan Williams talked this morning about people having choices.¹ My view is that people need to have *true* choices—that each individual should have the opportunity to choose when to work and how much to work. Society will have to change substantially before such choices will be acceptable. Right now, men especially have a hard time working anything but long, full-time hours. It is beginning to be acceptable for women to have the choice to work part-time—but only for child-rearing purposes. The choice has not yet been opened up for everyone.

The differing philosophies of Felice Schwartz and Arlie Hochschild provide insight to this subject. Schwartz, the director of Catalyst, a nonprofit organization in New York, authored an often-cited article on the “mommy track.”² Schwartz believes that employers should make accommodations for *women* with children. Hochschild, a professor of

* Presented at *New York Law School Law Review's* Symposium on Women in the Lawyering Workplace: Feminist Considerations and Practical Solutions (March 15, 1990).

** Work options consultant. Former Program Manager for New Ways to Work, San Francisco, Cal.

1. See Williams, *Sameness Feminism and the Work/Family Conflict*, 35 N.Y.L. SCH. L. REV. 347 (1990).

2. Schwartz, *Executives and Organizations: Management Women and the New Facts of Life*, 67 HARV. BUS. REV., Jan.-Feb. 1989, at 65.

sociology at the University of California at Berkeley points out in her book *Second Shift*³ that as women have entered the work force, both women and the work force have changed. What still have to change are the *workplace* and men. Whereas Schwartz wants employers to accommodate *women*,⁴ Hochschild wants them to accommodate *people*.⁵ I am in the Hochschild camp.

Now let me tell you about the range of alternatives that are possible. I want to address this as a people's issue rather than a women's issue, even though our topic today is women in the lawyering workplace. I would also like to discuss not only attorneys, but also the other people who work in the lawyering workplace: legal secretaries, receptionists, paralegals, legal administrators, and others. We tend to focus on attorneys and their need for alternatives because attorneys work such tremendously long hours. However, legal secretaries and others who have children or want to go back to school to upgrade their education have need for these alternatives too. Alternative work schedules can be divided into two main groups: restructured full-time work schedules and reduced work schedules. In addition, we can talk about leaves, sabbaticals, and flexiplace or telecommuting.

In the restructured full-time group are flexitime and compressed workweeks. Flexitime is short for flexible work time.⁶ Within limits set by management, each employee gets to choose when to come to work, when to leave work, and in some cases the time and length of the lunch hour. Employees continue to work the same number of hours as they did under their regular schedule. With flexitime, if you want to leave work early one afternoon or come in late one morning to be able to see your child in a school play, you can. Usually in a flexitime program everyone must be there during core hours set by the employer. The employer might say, "I want everyone here from ten to noon and from one to three, but you can come in any time from seven to ten in the morning and leave any time between three and seven, as long as you put in the number of hours you're supposed to in any day or any week."

3. A. HOCHSCHILD (WITH A. MACHUNG), *SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

4. See Schwartz, *supra* note 2, at 66 (arguing that the workplace must become more responsive to the needs of women).

5. A. HOCHSCHILD, *supra* note 3, at 12-13. According to Hochschild, most workplaces have remained inflexible in the face of family demands of their workers, and at home, most men have yet to really adapt to the changes in women. This has led to what the author calls the "stalled revolution." The stalled revolution lacks social arrangements that ease life for working parents. This affects not only women, but men, and the whole family structure.

6. B. OLMSTED & S. SMITH, *CREATING A FLEXIBLE WORKPLACE: HOW TO SELECT AND MANAGE ALTERNATIVE WORK OPTIONS* 11 (1989). Flexitime is a general term for flexible work scheduling programs, usually with varying starting and quitting times.

Flexitime does not work well for attorneys in private law firms, although one could argue that attorneys in private firms have flexitime all the time. They can work their seventy to eighty hours per week any time, as long as they are there during the core hours of nine to five. But some of you might choose not to work in a law firm. You might choose to work for the government, for a corporation, or for a public interest organization where the hours are shorter and possibly more flexible.

Another full-time work schedule is the compressed workweek,⁷ and again, this is not going to work very well for attorneys in private law firms. A compressed workweek takes a standard workweek and compresses it into fewer than five days, however, it is hard to compress a seventy-hour workweek into fewer than five days and still do anything else. With a forty-hour week you might have what is called "4-10-40"—you work four ten-hour days to make up your forty-hour workweek. Some law firms use three twelve-hour shifts for word processors to staff the evening shifts. A popular schedule in the federal government is "5-4-9"—you work five nine-hour days, have a two-day weekend, then work four nine-hour days and have a three-day weekend. Those of you who rush off to the mountains or the seashore whenever there is a three-day weekend know how nice it would be to have one every other week.

The second group of alternative schedules, *reduced* work-time options, include part-time employment, job sharing, and phased retirement. The most popular is part-time employment.⁸ I want to acknowledge how difficult it is to come up with a standard definition of "part-time" in law.⁹ First, you have to define what full-time is in law, and as you know, that varies from workplace to workplace. I consult with law firms and other legal employers on alternative work schedule issues and deal with this frequently. In a law firm, do we look just at billable hours, or do we count both billable and non-billable? Can an attorney work three days a week, or five partial days, or does the schedule need to be flexible? There is not one answer.

The federal government, in the Federal Employees Part-Time Career Employment Act of 1978,¹⁰ defined part-time for its own employees as sixteen to thirty-two hours per week. Part-time in a law firm is more

7. *Id.* at 39. A compressed workweek refers to a workweek, usually 40 hours long, that is condensed into fewer than five days.

8. Part-time employment is a term that came into common use between the mid-1970s and 1982 referring to employment that includes job security and all other rights and benefits available to an organization's regular full-time workers. *Id.* at 63.

9. See generally Simms, *Women in the Lawyering Workplace: A Practical Perspective*, 35 N.Y.L. SCH. L. REV. 385, 386-88 (1990) (describing the different perspectives involved in determining what is "part-time").

10. 5 U.S.C. § 3401 (1988).

likely to be thirty-five to forty-five hours per week. What part-time is must be determined by your work setting. If everyone around you is working seventy hours per week and you want to reduce to half-time, you will probably find yourself working thirty-five hours per week. I knew a man who worked seventy hours a week and reduced his time to eighty percent of his full-time hours, but continued to bill ninety percent of his previous hours. I figured out that his "part-time" schedule was around sixty-three hours per week which does not seem very part-time to me.

Part-time in law firms seems to work best when figured in terms of billable hours or billable plus nonbillable hours worked per year, rather than a certain number of hours per week. Let's say you commit to working 1400 billable hours. It might be that for two weeks or a month you will be working full bore, just as you would if you were working full-time. If you are a litigator, you are not going to say, "Sorry, I have tomorrow off. I won't be able to come to court for this case." Instead, while the case is in progress, you will work as much as you have to, but when it's over you can take some time off before working on another case. It will be up to you to make certain that you bill 1400 hours by the end of the year.

If an attorney reduces to a part-time schedule, it may be helpful to make up the difference in billings by using a contract attorney.¹¹ I recently consulted to a law firm whose partners were concerned about indirect cost. Their concern was that if an associate is working sixty percent time are the partners, in effect, going to have to pay for the extra overhead out of their own pockets? I suggested they consider replacing the lost billable hours with a contractor so that the extra work would not fall on other attorneys in the firm. There has been a large growth in the use of contract attorneys because they can cover during maternity leaves or fill in the hours not worked by a part-timer. It is cost effective, too, because a firm can usually hire a contract attorney for about one-third of a regular associate's billing rate.

Job sharing¹² is a variation on part-time where two part-time individuals share one full-time position, with the salary and benefits prorated. One of the biggest concerns that law firms and other legal employers have about part-time is cost, especially overhead cost; an office will be empty part of the time, and a secretary will be needed only part-time. Job sharing is a way of meeting much of the resistance to part-time. It does not necessarily mean you will share the same cases. However, it

11. A contract attorney is one not in the direct employ of the company or law firm, to whom tasks are "contracted out." B. OLMSTED & S. SMITH, *supra* note 6, at 376. Contract lawyers frequently want or need to work on a temporary or part-time basis. Blodgett, *Temporary Duty: Part-Time Option for Lawyers*, 71 A.B.A. J., July 1985, at 17.

12. See B. OLMSTED & S. SMITH, *supra* note 6, at 105.

might mean that you will share an office or secretary, and provide backup to one another on cases.

The last of the reduced work-time options I will mention is phased retirement,¹³ which is another form of part-time. Firms have traditionally made "of counsel" arrangements for senior attorneys who want to phase out of practice gradually. Actually, I am glad that firms are open to "of counsel" arrangements that are less than full-time, because it weakens the argument that part-time is "impossible" in law firms.

In the category of leaves, we have maternity-disability, parental, adoption, dependent-care, family illness, and educational leaves. Maternity leave¹⁴ seems to be a problem on a national level. We are one of the few so-called civilized countries in the world that does not have a national maternity leave policy, that is, a guarantee that a woman can take time off from work to have a baby and have a job waiting for her when she gets back. As an attorney-friend pointed out, we are on a level with South Africa and Upper Volta. This is something that has to be changed. Recently we have been hearing more about parental leave where either a father or mother can take time off for bonding with a child. Maternity leaves are often paid, but parental and other leaves usually are not.

Another option is sabbaticals.¹⁵ A sabbatical is defined as a paid period of time off on a regular cycle, in addition to vacation time. Sabbaticals are most common in colleges and universities. Some law firms, nonprofits, and corporations, however, offer sabbaticals as short as six weeks or as long as a full year. At Tandem Corporation in California, after four years of employment an employee gets six weeks sabbatical in addition to vacation time.¹⁶ The idea is to let the employee "freshen up" after a stressful time, and law, as you know, is a stressful field. For a while, there seemed to be a trend for law firms to develop policies on sabbaticals, but I see a pulling away from these policies because of economics. Law firm starting salaries have gone up so much for associates that most firms feel they just cannot afford to offer sabbaticals anymore.

The last option I will talk about is one of my favorites, telecommuting or flexiplace.¹⁷ I think we are going to see a lot more of it as the cost of

13. Phased retirement is a way for individuals to retire gradually by reducing their full-time employment commitment over a set period of years. *Id.* at 157.

14. *See generally id.* at 256-57. Despite the continued growth of the number of women in the labor force who have small children, the United States lags far behind other developed countries in creating social policies to reflect this change.

15. *See id.* at 263-64. Sabbaticals are still rare in the corporate world, but they are recommended as a means of combatting "burnout."

16. DUN'S MARKETING SERVICES, THE CAREER GUIDE 1490 (1990) (describing employment policies at Tandem Corporation).

17. *See* B. OLMSTED & S. SMITH, *supra* note 6, at 349. The practice of allowing

office space continues to go up. With flexiplace, people work off-site part of the time, usually from home or from a satellite office near their home, and in effect commute by computer. I live in San Francisco where, as you know, we had a major earthquake in October, 1989. It was a real disaster for business because the Bay Bridge, the major link between the East Bay and San Francisco, was down and people could not get to work. Suddenly, law firms that had said, "We couldn't possibly have people working from home," were calling NWW and asking, "How do we get people to work from home? We need to get this work done." Firms were willing to try flexiplace because it would be to their advantage. After the bridge was reopened, many employers who let people work at home found it very hard to get them to come back. Employers realized that there was also something in it for them.

This factor leads perfectly into the last part of my presentation, which is: How can we convince employers to allow these options for anyone who wants them? The first thing we have to do is to get away from viewing this as a "mommy track" issue and address what the advantages are for employers. When I work with individuals trying to negotiate work-time options for themselves, my advice is always, "put yourself in the employer's shoes. What do you have to know about these options in order to find them acceptable?" Employers need to hear that the options can be cost effective and provide other benefits to the firm as well.

The main reason why an employer will allow someone to work a part-time or flexible schedule is to retain a valued employee. Employers invest so much in the recruiting, hiring, and training of an attorney that they do not want to lose that person. Sometimes when I am talking to a managing partner or an administrator and the argument of cost comes up, I will say, "Wait, don't just think about how much it's going to cost to allow someone to work part-time. What is it going to cost to *not* allow that person to work part-time? Would you let a \$100,000 piece of equipment walk out the door? That's what the ABA estimates it costs to replace an associate."¹⁸ There are many cases where attorneys are leaving firms after three or four years, just when they are becoming of value to the firm, and going to firms that have more reasonable personnel policies.

The other compelling reason for a law firm to allow these options is to gain a recruitment edge. The National Association for Law Placement¹⁹ now asks firms, "What is your parental leave policy? What

employees to work at home is growing, due largely in part to the increased use of personal computers.

18. See Thomas, *Will Mega-Firms Convert the Profession to a Nationalized, Profit-Driven Business?*, 73 A.B.A. J., Aug. 1985, at 8. The American Bar Association estimates that the combination of costs associated with replacing a new attorney, including secretarial support and salary, amounts to almost \$100,000 per year.

19. See NAT'L ASS'N LAW PLACEMENT, DIRECTORY OF LEGAL EMPLOYERS, at xii

is your part-time policy?" Law students are looking at that information with great interest. I think for firms to stay competitive they are going to have to develop better policies.

(1990). The National Association for Law Placement is a nonprofit organization established in 1971 to provide information, standards, and coordination in legal employment.

