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## More Glass Ceilings Than Open Doors: Women as Outsiders in the Legal Profession

### Cover Page Footnote

Vice President and Assistant General Counsel at the New York Daily News, Eve B. Burton is responsible primarily for First Amendment and general litigation matters. Former senior associate at Weil Gotshal & Manges, and clerk for the Hon. Leonard B. Sand, S.D.N.Y., Ms. Burton received her J.D. from Columbia University in 1989 and her B.A. from Hampshire College in 1982. Between college and law school, she was a human rights worker in Asia, and a Fullbright Scholar in Thailand from 1985-1986. The author wants to acknowledge particularly John Finck and Katherine Oberlies for their insightful thoughts on the difficult issues about which this article is written.

## MORE GLASS CEILINGS THAN OPEN DOORS: WOMEN AS OUTSIDERS IN THE LEGAL PROFESSION

*Eve B. Burton\**

CYNTHIA Fuchs Epstein's report, *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*,<sup>1</sup> confirms what statistics have long shown and what many women have discussed quietly—that as a group we are a long way from being leaders or even formidable voices in the country's legal profession. Unfortunately, the sober message of Ms. Epstein's report is that the "club" is still closed, particularly at the highest levels, that many club members prefer it that way, and that the club will remain closed until a gale wind powered by innovative leaders—few of whom have yet emerged—opens the door, expands the culture, and redefines the basis by which success is measured. In such a new world, the quality of work product rather than billable hours might be paramount for advancement at firms, flexibility might foster creative solutions to legal problems, and family matters might well become an acceptable topic of conversation and concern. Without these changes, the legal profession, and large law firms in particular, will continue to lose women from among their ranks. Ms. Epstein's report, while not a happy commentary, should be seen as a map and a directive for redefining our profession in a way that is better for men, women and clients.

The universal benefit of Ms. Epstein's report is that any woman practicing law will be able to find her truth in some portion of the report's findings or observations. I found many. Most interesting to me as a mother was the information regarding three areas which have most affected my legal career: flexible schedules, support from a spouse or partner, and the general culture of the law firm or legal employer. As a relative neophyte to the legal profession, my experience has shown that the greater the support in these three areas, the better the legal experience and the greater the career rewards. From my own experience, to be successful in the legal profession as a mother requires the availability of support in at least two of these

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1. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *Fordham L. Rev.* 291 (1995).

three areas. Perhaps the biggest obstacle, and the one I have found most difficult and the hardest to change, is the legal culture. As the Epstein study shows, the general sociological world of law firms has historically favored white men, is uncomfortable with pregnant women and those who are different in other ways, honors dedication and time spent as much, if not more than results, and, in most instances, places no emphasis on an emotionally balanced life. For both men and women trying to balance a complex set of priorities, this world is inevitably inhospitable. My comments focus on the above three areas because they are—and I believe will remain—central considerations that will define the strides women will or will not make in the next decade.

#### FLEXIBLE SCHEDULES

As the Epstein report outlines, flexible schedules remain an important, yet problematic aspect for women lawyers who are also mothers.<sup>2</sup> While Ms. Epstein does not explicitly define part-time,<sup>3</sup> I have come to define a “flexible schedule” as eighty percent of a full time position. In my experience, it is difficult to have a position of significant responsibility while working much less than four days a week. On the other hand, I have always had a “flexible schedule,” both at a large firm and in-house for a newspaper, since the birth of my son five years ago. What “flexible” has meant practically is the reduction of the level of predictability in my schedule. For example, often my four-day week would become a ten-day stretch without time away from the firm. I would be compensated, however, by taking a chunk of time off after the completion of such a project. Likewise, in order to be an active participant in a criminal trial, I agreed to work in “overdrive” for the length of the trial. In turn, my financial compensation was adjusted to reflect the extra time commitment. Additionally, upon the trial’s completion, I took a significant amount of time off to be with my family (while still at full pay) before returning to the firm, again on a four day, or eighty percent work schedule. As unorthodox and unpredictably as my schedule often becomes, it allows me to be certain that the family “piece” of my life is protected and adequately respected by my employer.

In assessing the viability of flexible work schedules in law firms, Ms. Epstein’s report concludes that “most lawyers agree” that a barrier to a flexible schedule is the need for “long hours” which are “tied to client expectations.”<sup>4</sup> Due to long hours and client expectations, she concludes, many women find it difficult to “compete” with men when they have family responsibilities.<sup>5</sup> In my view, the suggestion that cli-

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2. See *id.* at 392-414.

3. *Id.* at 393.

4. *Id.* at 302.

5. *Id.* at 302-03.

ents are the problem may overlook the law firm culture which perpetuates this self-serving "barrier."

When I was a senior associate, few of the numerous clients I was servicing knew that I was on a flexible schedule, and those that did know seemed not to care. I always made myself accessible and never left unfinished a time-sensitive project. Moreover, I used that "female" quality of giving special attention to client needs—which did not always require long hours. Often, all that a client wanted was careful listening and a thoughtful, creative solution. I have come to conclude that overburdened lawyers spend too little time reflecting and thinking and too much time talking—both of which lead to the inefficient use of time.

In this vein, I have learned that many clients do not necessarily need or want to pay for the typical product offered by firms—a "masterpiece" or "Cadillac" that requires the efforts of fifteen people working seven days a week over a three week period. Rather, often all that is necessary is a solid product that gets the job done. As Judge Leonard B. Sand said to me when I was his law clerk, "polishing" an opinion which he wanted released immediately, "Eve, I do not believe that the parties will see a difference in the result on the basis of a Bluebook error."

Applying the spirit of Judge Sand's advice in my private practice, I worked with a number of media clients who often needed briefs or answers quickly, and I developed a niche producing "Ford" rather than "Cadillac" products for them. While it is difficult for large firms, whose profit depends upon billable hours, to accept a notion which is not in their economic self-interest, clients often want a less elaborate product which simply gets the job done effectively and, not surprisingly, costs less. In other words, there was a synergy between my flexible schedule and my clients' needs. Given the current trend to move away from billable hours in favor of alternative fee arrangements, it is now, arguably, in the economic interest of firms to attract people and develop policies which promote efficiency. These alternative fee arrangements, therefore, tend to be more family friendly. Firms that fail to make the appropriate changes will be significantly reducing their pool of talented people—women in particular, who often have made a special effort to work efficiently in order to have more family time.

Presently, as a client who hires law firms, my foremost concern is obtaining a quality product with the least amount of hours necessary, which often means I am looking for a smart, efficient lawyer who can—yes—create a "Ford" product. In other words, I have concluded, contrary to Ms. Epstein's view, that clients are an "upward mobility" ticket to smart women who are working on a flexible schedule and who aim for absolute efficiency.

In seeking a flexible schedule and a hospitable cultural environment, I suffered a number of initial setbacks. I became pregnant when

I was a federal law clerk to Judge Sand. As I got rounder each day, my status was never challenged. The judge could not have been more supportive. Litigants smiled. After all, I was responsible for research that might affect the outcome of their case, and, I worked for “the Judge.” Consequently, senior partners who were before the Court arguing motions or participating in trials showed remarkable interest in my pregnancy. Some even offered commentary on parenting. Any difficulties I might encounter as a young practicing lawyer and mother-to-be were still theoretical. A flexible schedule made perfect sense and moreover, no one seemed uncomfortable with my large size or my legal abilities, that is, until I came looking for a job.

My job search began when I was five months pregnant. For those that did not know me I looked only a bit “chubby.” When I went to interviews I decided initially not to share my exciting news. As a federal law clerk for Judge Sand and a graduate from a leading law school, and given the thriving economy, I was well received by virtually all firms until I shared the wonderful news of my pregnancy.

Most firms reacted to my pregnancy in an icy manner. Others engaged in actionable behavior. My perception that Ms. Epstein’s study shows that the club is consciously closed comes in part from the depth of personal prejudice I felt as a pregnant woman. In one instance, I called a firm prior to coming for an interview—one which had already been set up on the basis of my resume—to tell them I was pregnant. The day before the interview, I arrived home to a hand-delivered form letter from the firm informing me that there were no positions for lawyers in my class. Another firm, which had already offered me a job, took a slier approach. Upon learning of my “disability,” they wrote informing me that all members of my class were required to start at the firm no later than October 1, after I told them that my child was due September 30. The firm where I had been a summer associate offered me a job and honored that offer, but rejected my request for a flexible schedule. After a self-financed maternity leave, I went to work at a large New York law firm on a four day a week schedule.

I had two mentors at the firm during the years I was in law firm practice. While my official evaluations put me at the “top of my class,” one of my mentors told me that “this firm” will never make a “part-timer a partner in my life time.” My other mentor, took the opposite view, believed “the times were changing,” and thought my “successful” efforts at servicing clients would overcome any concerns raised about my part-time schedule when I was considered for partnership. One of my greatest personal accomplishments was a comment from a member of the firm’s management committee who told me that I had overcome the negative perceptions usually associated with part-timers. This victory was particularly important to me because this same individual was reluctant, three years earlier, to even

allow me to be staffed on a criminal case involving one of his major clients, due to his concern about my flexible schedule.

While I left for my present job shortly before my class was to be considered for partnership, I do believe I was, at least, not relegated to a "second tier" position. The important lesson for me was that flexible schedules need not be a barrier to advancement as long as both the lawyer and the firm are open-minded and continually willing to evaluate and adjust both salary and time requirements.

#### FAMILY SUPPORT SYSTEMS

The second important ingredient to a well-balanced legal career for lawyers who are also parents is the role of one's partner. To this subject, Ms. Epstein gives scant attention. While this ingredient is often overlooked in evaluating whether women succeed in the legal profession, I believe the level of support a woman has from her spouse or life partner is unquestionably one of the most important elements in developing a balanced and productive professional and home life. As a practical matter, a woman and mother who has a life partner who works in any profession that expects long and unpredictable hours, is at a disadvantage in her ability to balance successfully family and work.

On this subject, Ms. Epstein in her report states "Women have greater family obligations than male lawyers, many of whose wives do not work for pay."<sup>6</sup> While this certainly sounds accurate, I question why women lawyers do not demand that their life partners take a fairer share of the family burden. Because the professional demands on lawyers are the same for both men and women, it is equally important for women to require from their partners active involvement in family matters. There certainly is literature which suggests that men are becoming more receptive to being primary caregivers. As Gloria Steinem once said to the women graduating from Smith College,

until men raise children as much as women do—and are raised to raise children, whether or not they become fathers—they will have a far harder time developing in themselves those human qualities that are wrongly called 'feminine,' but are really those necessary to raise children: empathy, flexibility, patience, compassion and the ability to let go.<sup>7</sup>

Male lawyers who have taken an active role in childrearing activities—experiencing both the burdens and joys of their kids—and who have the qualities Ms. Steinem identifies are, also, undoubtedly better lawyers.

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6. *Id.* at 304.

7. Tammy Audeh, *Graduation: Words from the Famous to Those Who May Be*, N.Y. Times, May 29, 1995, at 9.

In my family, my husband commits most of his time to our son. At gatherings with lawyers he is always asked about his "profession." His stock answer is "Oh, I'm a civilian. One lawyer per family is enough." Interestingly, the response from many men and women lawyers has been that this arrangement is rather strange. Few affirmatively articulate that our arrangement is a step forward either for families or the profession. Women often ask me if I fear an inability to provide adequately for the family? Do I resent supporting my husband financially? Do I miss the status that goes with marrying or being with a man who makes a lot of money? Am I concerned about whether my husband will properly raise our children? Do I mind giving up control in childraising activities? While these are fair questions, my answer to each is simply, no.

### CULTURE

Sprinkled throughout the Epstein study is a story of the cultural alienation felt by many women who work at law firms, which she demonstrates through statistics are lead primarily by men and have few women partners. The consequence, she finds, is that, among other things, women: (1) are not part of the "networks in which business is generated;" (2) often get less interesting work after becoming pregnant and giving birth; (3) are harassed through "the use of coarse and vulgar joking and behavior" by male colleagues; (4) face "double-binds when [we] do not exhibit behavior based on male models . . . but are regarded as impaired women for acting 'like men;'" and (5) "face more ambivalence on the part of senior partners with regard to becoming their mentors."<sup>8</sup> What makes these findings "sting" most is that they are by nature non-empirical, hard to prove statistically, and extremely difficult to overcome, short of a decision on the part of a senior partner to minimize these barriers.

While these barriers are disheartening, they are not surprising. The challenge for me was how to remain productive professionally, and emotionally balanced as a mother, while learning from the firm what it had to offer. I was lucky to have mentors. It was through these mentors that I had significant contacts with clients. To the extent that I was successful at the firm it was due to the fact that clients took a strong interest in my work on their behalf and shared their views with the appropriate partners. I came to conclude early in my legal career that pleasing clients was one of the best ways to overcome the cultural barrier.

Another way in which I overcame cultural barriers was through participation in pro bono work. Since I knew that my billable hours were never going to be competitive with the hardest, I decided not to compete. I came to believe that a successful pro bono result which posi-

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8. Epstein et al., *supra* note 1, at 302-05.

tively reflected on a firm was worth any trade off on the billable hour count. Moreover, by choosing projects that were worthwhile to me, I was, by definition, in a more "comfortable" culture. I had left a career in international human rights where the ethnic, racial, and gender make-up of the profession was diverse enough that no single culture dominated, and I returned to this world to do pro bono work.

To the credit of the firms where I worked, they funded my participation in a one month human rights legal project in Southeast Asia and in a human rights delegation to Afghanistan. One important, but unanticipated, aspect of these successful pro bono projects was the contact I had with senior partners. After years of being on the billable hour treadmill, many of these partners were hungry for different projects that engaged their skills in new ways. In one case, my pro bono interaction with a senior partner resulted in my inclusion on a high profile, billable case that was important to the firm.

There was only one aspect of law firm life about which Ms. Epstein does not comment and which came as a total culture shock to me. As a practical matter, the culture in many large firms demands that its members choose between "marrying" the firm or their life partners. This choice is particularly painful for women since we have not been raised to assume our work will always come first. No one told me that the level of time commitment required to succeed at a large law firm would mean that life as a normal person would end. An honest recruiting partner should not only offer a fancy lunch, but should also inform both men and women that they must understand that, partnership or not, their ability to date, have and raise children, and participate in life-broadening activities, will be severely curtailed if they choose to work at a firm. Even after learning of this cultural dimension of firm life the hard way, I continued to fight to have both a productive firm life and to be an involved mother. The true cultural challenge was learning to act with the utmost efficiency while at work, given that it was required to succeed professionally, and learning to be equally as inefficient and relaxed upon returning home. As all mothers know, efficiency and children are not compatible concepts.

While the Epstein study focused on law firms, they are not alone in creating a world of cultural barriers for women. Large corporations, such as publishing companies, which have increasingly offered legal employment opportunities to women, fare equally poorly. A study by Professor Robert Picard, a professor at California State University, Fullerton, reviewed 562 top positions at nineteen publicly-held newspaper companies and found only 11.6%, or sixty-five jobs on the business side of operations, held by women.<sup>9</sup> This lack of diversity creates the same cultural problems that occur at law firms. Productivity is still

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9. George Garneau, *Women Bump Corporate Ceiling*, Editor & Publisher, June 24, 1995.

often evaluated on the basis of hours invested. Vulgarity and aggressive behavior is not only ignored, but is in some cases part of the culture which one must learn to navigate. Mentors are still hard to find and significant promotions of women are still reported as "firsts" in the press. Moreover, my experience as an in-house lawyer shows that most important business decisions are usually made by a small nucleus of men and often not shared with the larger team. While I know of no statistics, I would be surprised if women are made general counsel for corporations at any greater rate than women are made partners at firms.

As the Epstein study sadly shows, the problems of balancing work and family responsibilities overwhelmingly fall upon women and have minimal affect upon the leaders of law firms, most of whom are older men with wives who stayed home with the children. The inclination of us all to define these issues as belonging to women does a disservice to men and women alike. This is unfortunate because there is no lack of men at firms who have young children and who are interested in spending more time with their families. While men tend to fear such acknowledgments, however, it certainly is the reality. If and when firms begin to address some of the problems identified in Ms. Epstein's study, they may be surprised to find that men, women, and clients alike will benefit. This benefit will foster loyalty, efficiency, and certainly a profession of more content lawyers, which inevitably means a more economically viable firm in the long run.