

UNDERSTANDING AND ACCOMMODATING MENTAL HEALTH DISABILITIES

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Defining Implicit Bias

- Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.
- These biases encompass both favorable and unfavorable assessments.

What do you think of?

Black Camaro



Black LeSabre



How about now?

Red Camaro



Beige LeSabre



Origins of Implicit Bias

- They are activated involuntarily and without an individual's awareness or intentional control.
- Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal.

Development of Implicit Bias

- The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance.
- They develop over our lifetime through exposure to direct and indirect messages.
- The media and news programming are often-cited origins of implicit associations.

Characteristics

- Implicit biases are **pervasive**. Everyone possesses them, even those, such as judges, who are committed to impartiality.
- Implicit and explicit biases are **related but distinct**. They are not mutually exclusive and may even reinforce each other.

Characteristics

- The implicit associations we hold **do not necessarily align with our declared beliefs** or even reflect stances we would explicitly endorse.
- We generally tend to hold implicit biases that **favor our own ingroup**, though research has shown that we can still hold implicit biases *against* our ingroup.
- Implicit biases are malleable. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of techniques.

Implicit bias and the legal profession

- Enactment of laws
- Prosecutorial discretion
- Client communications
- Jury selection
- Sentencing/probation decisions
- Hiring
- Promotion
- Rainmaking

Law (and other) Office Implications

- Informal assignment processes lack standardization or systematic checks to ensure that all similarly situated attorneys receive the same or similar levels of assignments and opportunities.
- Do supervisors tend to distribute work – or the best work - to those most like themselves?

Harvard Implicit Association Test

- Project Implicit - non-profit created to educate the public about hidden biases and to provide a “virtual laboratory” for collecting data on the Internet
- The IAT measures attitudes and beliefs that people may be unwilling or unable to report and that are outside of conscious awareness and control.

IAT Topics

- Race
- Gender
- Age
- Sexual Orientation
- Disability
- Additional variations such as career, skin-tone and weight.

Why Does this Matter?

- Ethics
- Stigma
- Bias
- Public Service
- Well Being

The “Diversity Wheel”

- Two or more circles, innermost usually protected classes
- These include race, gender, sexual orientation, age and, typically, physical disability.
- Additional circles address differences such as marital status, work affiliations and geography



WHAT WORDS DESCRIBE

A Cancer Patient?

WHAT WORDS DESCRIBE

A Person With a Mental
Illness?

Paulette Brown, Past President, American Bar Association

- Implicit bias can be and is manifested toward those who suffer from mental health issues, depression, anxiety and substance problems in our profession.

What if Mental Health is Included?

- Reduction of stigma
- A place at the table
- Distinguishing ability and disability
- Universal design
- What else?



Lawyer Impairment - 2016 data

- ABA and Hazelden Betty Ford surveyed over 15,000 lawyers in multiple states
- 20.6% met the criteria for alcohol use disorder
 - US population: 6.4%
- 28% had experienced depression, 18% anxiety, and 23% debilitating stress during their careers

It's not just alcohol

- Drugs
- Gambling
- Internet Addiction
- Sexual Compulsivity
- Eating Disorders
- Shoplifting Addiction
- Compulsive Shopping

Many of these issues are present in lawyers' clients

Other Mental Health Issues

- Anxiety Disorder
- Bipolar Disorder
- Obsessive Compulsive Disorder
- ADHD
- Post Traumatic Stress Disorder
- Cognitive Impairment
- Lawyers serve clients with other mental health issues including personality, autism spectrum and schizoaffective disorders.

Erasing the stigma

- Stigma refers to a feeling of disgrace or fear
- Experienced with mental health issue *or just stress*
- The bearer has feelings of shame and isolation
- “I’ll do it myself!”
- Education can help with public stigma; personal stigma is tougher

What Stigma Means

- ABA Hazelden Study - Barriers to seeking help included
 - “not wanting others to find out they needed help”
 - “concerns regarding privacy or confidentiality”
- Those who are subjected to greater degrees of implicit bias have higher rates of depression.

Make It OK – What Not to Say

- "It could be worse."
- "Just deal with it."
- "Snap out of it."
- "Everyone feels that way sometimes."
- "You may have brought this on yourself."
- "We've all been there."
- "You've got to pull yourself together."
- "Maybe try thinking happier thoughts."

<https://makeitok.org/what-to-say>

Make It OK – What to Say

- **"Thanks for opening up to me."**
- **"Is there anything I can do to help?" or "How can I help?"**
- **"Thanks for sharing."**
- **"I'm sorry to hear that. It must be tough."**
- **"I'm here for you when you need me."**
- **"I can't imagine what you're going through, but I'll be here."**
- **"How are you feeling today?"**

Making a Change

- Be openly supportive of those working to eliminate unconscious bias
- Do not support jokes that degrade any group of people
- Develop a good understanding of the potential for unconscious bias and be alert
- Use inclusive language
- Notice and interrupt/stop biased behavior and statements

Uncovering Bias

- What impact do your decisions have on decision making?
- Think about your own comfort and discomfort when communicating.
- Be aware of the comfort/discomfort of others.
- Be open to feedback.

Mindfulness

- Increase awareness
- Factors that can increase implicit bias

Ethics! - RULE 8.4

It is professional misconduct for a lawyer to:

- (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities;
- (h) commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer.

Resources

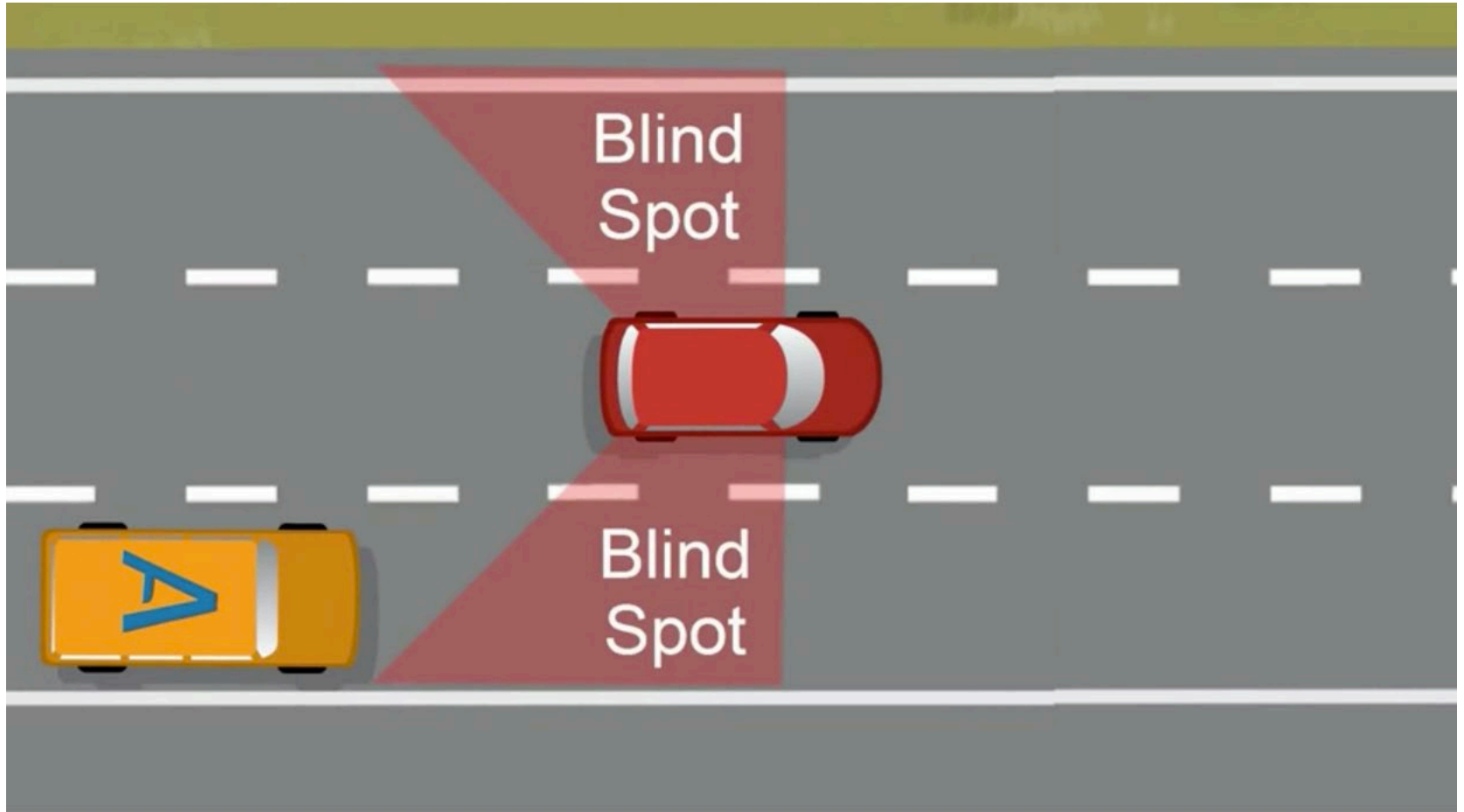
- Harvard Implicit Association Test -
<https://implicit.harvard.edu/implicit/takeatest.html>
- Harvard Mind Trails Project -
<https://implicit.harvard.edu/implicit/user/pimh/index.jsp>
- Kirwan Institute for the Study of Race and Ethnicity -
<http://kirwaninstitute.osu.edu/>
- ABA 360 Commission -
<https://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission.html>

LEGAL ANALYSIS AND ACCOMMODATION FOR MENTAL HEALTH/SUBSTANCE ABUSE DISABILITIES

Sonja Dunnwald Peterson, Attorney at Law

Employment Law Specialist,
Certified by MN State Bar Association, 2011 - 2017

Picture of blind spots when driving a car.



HCBA Report and Model Guidelines for the Integration of Attorneys & Law Students with Disabilities Into the Legal Profession, May 1999.

“When my employer found out about my disability, they increased the hurdles to complete the work.”

“All of a sudden it was said that I couldn’t perform the job duties, although prior to [the disclosure of my disability] I had received very high praise.”

**“ATTITUDINAL BARRIERS ARE HIGHER
THAN THE PHYSICAL BARRIERS FOR
EMPLOYMENT OF PEOPLE WITH
DISABILITIES.”**

Margot Indieke Cross, Accessibility Specialist, MN
Council on Disability

Conscious experience provides only a small window into how the mind works.

What are your unconscious or uncontrolled reactions when you think about anxiety, depression, alcohol, eating disorders, or persons with mental illness? Find out by experiencing the Implicit Association Test (IAT).

<https://implicit.harvard.edu/implicit/user/pimh/index.jsp>

MENTAL HEALTH, PSYCHIATRIC CONDITIONS & CHEMICAL DEPENDENCY AS “DISABILITIES”

The Federal Americans with Disabilities Act defines disability as:

- “The term "disability" means, with respect to an individual
- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment.

42 U.S.C. § 12102(1)

ADA AMENDMENTS ACT (ADAAA) RULES OF CONSTRUCTION

The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

42 U.S.C. § 12102(4)(A)

The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

29 C.F.R. § 1630.2(j)(1); 42 U.S.C. § 12102(4)(B)

ADAAA RULES OF CONSTRUCTION (2)

An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

29 C.F.R. §1630.2(j)(1)(i) & (ii)

MENTAL HEALTH AND PSYCHOLOGICAL IMPAIRMENTS CAN CONSTITUTE DISABILITIES UNDER THE ADA AND MHRA

PHYSICAL OR MENTAL IMPAIRMENT

The ADAAA regulations provide that physical or mental impairment include:

- (2) Any mental or psychological disorder, such as . . . organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2 (h)

IMPAIRMENT OF MAJOR LIFE ACTIVITY

The ADAAA regulations also provide:

Major life activities -

- (1) In general. Major life activities include, but are not limited to: (i) Caring for oneself, . . . eating, sleeping, . . . concentrating, thinking, communicating, interacting with others, and working. 29 C.F.R. § 1630.2(i)

[T]he following types of impairments will, at a minimum, substantially limit the major life activities indicated: . . . major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

29 C.F.R. § 1630.2(j)(3)

Judicial Decisions

Both the Minnesota appellate courts and the Eighth Circuit have held that mental illnesses can constitute a disability under the MHRA and the Americans with Disabilities Act.

Battle v. United Postal Service, 438 F.3d 856, 861-62 (8th Cir. 2006)

(plaintiff's depression and anxiety substantially limited his ability to think and concentrate);

Phelps v. Commonwealth Land Title Ins. Co., 520 N.W.2d 748, 749-50 (Minn. Ct. App. 1994) (recurrent episodes of depression, requiring hospitalization/treatment constituted a disability).

SUBSTANCE MISUSE CAN ALSO CONSTITUTE A DISABILITY

The ADA specifically excludes illegal drug usage from protection under the ADA. 42 U.S.C. § 12114(a).

However, it also provides that:

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

42 U.S.C. § 12114 (b)

MHRA and drug use

The MHRA does not exclude illegal drug use from protection, but contains the following exemption:

Qualified disabled person.

* * *

For the purposes of this subdivision, "disability" excludes any condition resulting from alcohol or drug abuse which prevents a person from performing the essential functions of the job in question or constitutes a direct threat to property or the safety of others.

Minn. Stat. § 363A.03, subd. 36

Based on this amendment, the Minnesota Court of Appeals and MN Federal District Court have held that alcoholism is a disability under the MHRA and ADA.

“Societal views toward alcoholism underwent radical alteration in the last decade. No longer is the condition looked upon as a self-inflicted vice, but is now considered a disease requiring medical attention. The legislature responded to this change by amending the Human Rights Act in 1983.”

Gruening v. Pinotti, 392 N.W.2d 670, 673 (Minn. Ct. App. 1986). See also *Larson v. Koch Refining Co.*, 920 F. Supp. 1000, 1004 (D. Minn. 1996); *Khalifa v. Gruys, Johnson & Associates*, 407 N.W.2d 733 (Minn. Ct. App. 1987).

“NO LONGER IS THE CONDITION LOOKED UPON AS A SELF-INFLICTED VICE, BUT IS NOW CONSIDERED A DISEASE REQUIRING MEDICAL ATTENTION.” But is it treated as such?

The diseases of chemical dependency and mental illness still are surrounded with stigma and prejudice. In 2007 the Centers for Disease Control and Prevention conducted a survey about stigma and prejudice related to mental illness.

2007 survey results

- Most adults without mental health symptoms (89%) and those with mental health symptoms (78%) agreed that treatment can help persons with mental illness lead normal lives.
- Yet only 57% of all adults believed that people are caring and sympathetic to persons with mental illness.
- Only 25% of adults with mental health symptoms believed that people are caring and sympathetic to persons with mental illness.

https://www.cdc.gov/mentalhealth/data_stats/mental-illness.htm

REASONABLE ACCOMMODATION - MHRA

Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer with a number of part-time or full-time employees . . . equal to or greater than 15 . . . not to make reasonable accommodation to the known disability of a qualified disabled person or job applicant unless the employer, agency, or organization can demonstrate that the accommodation would impose an undue hardship on the business, agency, or organization. . . .

Minn. Stat. § 363A.08, subd. 6; *see also* Minn. Stat. §§ 363A.10, subd. 1(2) (real property); 363A.11, subd. 1 (public accommodation); 363A.12, subd. 1 (public services); 363A.13, subd. 1 (education); 42 U.S.C. § 12112 (employment); 42 U.S.C. §§ 12132 (public services); 12182(b)(2)(ii) (public accommodations).

WHEN DO YOU NEED TO PROVIDE REASONABLE ACCOMMODATION TO AN EMPLOYEE OR PATRON?

When the disability is “known” and you

- Receive a request for accommodation; or
- Have reason to believe the individual needs accommodation, i.e., its apparent/obvious.

Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1284 (7th Cir. 1996) (employee could not articulate his needs due to his mental illness, but his doctor confirmed that he needed a less stressful work environment); *but see Kobus v. College of St. Scholastica, Inc.*, 608 F.3d 1034, 1038-39 (8th Cir. 2010) (employee telling employer that he was suffering from stress and anxiety and asked for a “mental health leave” did not inform the employer that an accommodation was needed).

INFORMAL, INTERACTIVE PROCESS

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630(o)(3)

IMPLICIT BIAS BLIND SPOTS TO LOOK FOR WHEN IN THE INFORMAL INTERACTIVE PROCESS

- RECOGNIZE THAT DUE TO THE STIGMA ASSOCIATED WITH MENTAL ILLNESS & SUBSTANCE MISUSE, THAT PERSON MAY BE UNWILLING TO ACKNOWLEDGE A PROBLEM OR ASK FOR ACCOMMODATION.
- TREAT EACH PERSON AS AN INDIVIDUAL AND ASK THEM WHAT YOU CAN DO TO ACCOMMODATE THEIR MENTAL OR PHYSICAL IMPAIRMENT.
- IF AN EMPLOYEE IS EXPERIENCING WORK-RELATED PROBLEMS, ASK ABOUT THEIR PROBLEMS AND THE REASON FOR THEIR CONDUCT.

Accommodation for people with mental health, including substance use disabilities often require no direct cost. They simply involve:

- Observation
- Flexibility, and
- Application of good management techniques.

RESOURCES TO HELP DETERMINE ACCOMMODATIONS

- Job Accommodation Network (JAN), <https://askjan.org>
- Disability Hub MN, <https://disabilityhubmn.org>
- Minnesota Council on Disability (MCD), <https://www.disability.state.mn.us/>

EXAMPLES OF ACCOMMODATIONS FOR PEOPLE WITH SUBSTANCE USE OR MENTAL HEALTH DISABILITIES

1. SCHEDULING ACCOMMODATION. Most frequent accommodation needed for employees with mental health and chemical dependency concerns, e.g.:
 - Leave of absence for treatment, recuperation: FMLA; Mpls, St. Paul sick leave; limited unpaid leave (*Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir. 1998) (“A leave of absence and leave extensions are reasonable accommodations in some circumstances”).
 - Flexible start times or variable work schedule for psychotherapy and medical appointments.
 - Flexible break policies.
 - More time to complete certain tasks.

2. INTERVENTION – formal and informal. It is common for persons with chemical dependency and mental illness to tend to ISOLATE themselves from colleagues and friends. Employers can address this isolation by participating in a formal intervention, or by providing information or a referral or assistance to concerned persons, e.g.:

- Lawyers Concerned for Lawyers (LCL) provides confidential intervention resources for lawyers, judges, law students, and their immediate family members.
<http://www.mnlcl.org/services/>
- National Alliance on Mental Illness (NAMI) provides mental health crisis resources.
<http://www.namihelps.org/support/crisis-resources.html>.
- There are many private professional intervention services available in Minnesota.
- Supervisory referral to EAP

MINNESOTA DRUG & ALCOHOL TESTING IN THE WORKPLACE ACT (“DATWA”)

If employers require an employee to undergo drug or alcohol testing in Minnesota, they must comply with the standards required under DATWA. Minn. Stat. §§ 181.950-.57.

DATWA Requirements

In general, DATWA requires that:

- Employers must have a drug/alcohol testing policy and provide employees with written notice of the policy. Minn. Stat. § 181.952.
- Employers can request employees to undergo testing if they have a reasonable suspicion that the employee is under the influence. Minn. Stat. § 181.951, subd. 5.
- Employers may not discharge employees who fail a drug or alcohol test unless the employee refuses to undergo rehab, or has failed to successfully complete the program. Minn. Stat. § 181.953, subd. 10.

3. SUPPORT.

- Individual – Mentoring, sponsorship. Make It OK – campaign to reduce the stigma of mental illness <https://makeitok.org/>
- Group – 12 Step Support Meetings, mental health support groups, Employee Assistance Programs.
- At social functions, make sure non-alcoholic alternatives are available and easily accessible, and don't pressure anyone to use alcohol.

4. EDUCATION, OUTREACH & PUBLIC AWARENESS, e.g.,

- Lawyers Concerned for Lawyers programs <http://www.mnlcl.org/resources/>;
- NAMI <https://www.nami.org/Learn-More>;
- Make It OK – campaign to reduce the stigma of mental illness <https://makeitok.org/>

5. CO-WORKER ASSISTANCE.

- Reallocate problematic marginal/secondary job functions to other co-workers.
- Provide a back-up system in case of medical emergency that is tailored to the needs of the particular employee's level of function and recovery.
- Identify and use peers willing to provide support as job coaches.

6. SUPERVISION ADJUSTMENTS.

- Develop work plans with a clear explanation of job duties and expectations.
- Change supervisory procedures to adjust to the needs of the employee, e.g., change communication methods to provide for written, instead of, or in addition to verbal instructions.
- Provide regular or easy access to a supervisor to obtain reassurance and direction and feedback for employees with mental illnesses like anxiety disorders.
- Train supervisors to provide positive reinforcement.
- Provide supervisors guidelines on giving negative feedback in a constructive way.

7. PHYSICAL ACCESS. Modify work space to reduce noise, distractions and interruptions, e.g.,

- Room dividers,
- Enclosed offices,
- Rearranging noisy equipment,
- Reducing volume of telephones.

8. TECHNOLOGICAL ACCOMMODATIONS.

Technological devices that may assist someone with a mental health disability include digital watches or software that provide scheduling, time line programs, reminders, brief notes, or prompts to add structure to time.

Remember

This is about all of us
being able to do our best
work!

Questions?

Go raibh maith agat
Merci *AITAH* Shukren Spasiba
спасибо Gracias grazie DANKU
σας ευχαριστώ 謝謝

Thank You!

DANK U

cảm ơn bạn *ALIQUM* hvala
təşəkkür edirəm
ありがとう