



LAWYERS CONCERNED FOR LAWYERS

Confidential Support for Legal Professionals

Implicit Bias is the Legal Profession: Including Mental Health

By Joan Bibelhausen, Executive Director, Lawyers Concerned for Lawyers

Are disability issues diversity and inclusion (D & I) issues? Of course they are. There are laws against disability discrimination. Disability is included in diversity committee missions. We know there can be assumptions, biases and stigma that affect individuals with disabilities and potentially disabling conditions just as they affect members of other represented groups in our profession. Yet there are challenges to consideration of disability issues at the same level. People may choose not to disclose so there is less tracking of success in hiring, promotion and retention than in other D & I areas. Because of the broad range of concerns, conditions and impacts, and perhaps other reasons, there is no disability affinity bar. Lawyers Concerned for Lawyers (LCL) has made the commitment to join with other affinity bars to help include disability in the D & I discussion and we have been welcomed.

This concerns all of us because every single lawyer has the potential to need accommodation for a temporary or permanent disability, whether a sensory, mobility, psychiatric, or other issue. It impacts all of us because we may have colleagues, clients or family members who suffer from mental health or other issues. The most common disabling conditions in the legal profession involve mental health, including substance use issues.

There is a great deal of stigma around asking for help or even acknowledging that there is a problem, and it can mean the end of a career if someone does not get the help they need. LCL also recognizes that individuals from other diverse groups within the legal profession may experience additional stress because of explicit or implicit bias or disparate treatment. Fortunately, we have a champion.

Paulette Brown, immediate past-president of the ABA, spoke about stigma and mental health in the legal profession at the ABA Commission on Lawyer Assistance Programs annual conference in October 2016. She remarked on the outstanding work that LAPs are doing in this area, and that LAP resources and innovative approaches have helped many to find success in a profession that they love. Ms. Brown discussed the ABA Diversity and Inclusion [360 Commission](#), with its focus on the concept of implicit biases, those unconscious influences on our decisions and actions. She noted that implicit bias can be and is manifested toward those who suffer from mental health issues, depression, anxiety and substance problems in our profession. Here are some highlights of her remarks.

While there has been some progress on expanding opportunities for lawyers of all races and ethnicities, women and members of the LGBTQ community, the same cannot be said for those with mental illness or substance use disorders. Mental health and substance use disorders are by far the most pervasive and ignored disability issues in our profession. It is similar to issues faced by people in the LGBTQ community – you can't tell by looking. It must be acceptable for people to 'come out' with mental health issues just as it is becoming acceptable to do so in the LGBTQ community.

Implicit bias and stigma force our colleagues into the shadows. It is important to address these conditions before they become issues. We cannot avoid them and hope it they will go away. Our colleagues do not feel safe revealing a mental health or substance issue. Many will not seek the assistance they need unless and until the stigma is removed. This can only begin to happen if we recognize and acknowledge our implicit biases in this area. Like other areas of diversity and inclusion, the legal profession is far behind many other professions in how it treats those who struggle with mental health and substance use issues.

Implicit bias permeates everything we do. Lawyer Assistance Programs see it in the work they do every day where someone is treated differently (or perceives they are treated differently) because they asked for help. When we think about disability issues in our profession, mental health is bar far the most common area of disability. It should be recognized in discussions, trainings and other efforts to enhance diversity and inclusion in our profession. Perhaps then people needing help can seek the attention they need with less trepidation about reaching out. It is the only way to remove stigma.

A discussion about open and equal treatment is necessary. These issues need to be part of conversations on diversity and inclusion in the legal profession. We should not be reticent about talking about it anywhere, any place. All must work together to reduce stigma about mental health and substance issues in our profession. If we could convey this message over and over on a broad based stage, how many more could we serve?

I would add, how many more could we save?

Lawyers Concerned for Lawyers provides free and confidential peer and professional support to lawyers, judges, law students and their immediate family members on any issue that causes stress or distress. LCL offers help to those affected by alcohol, drugs and other addictions; depression, anxiety and other mental illnesses; stress and other life-related problems; and any condition which negatively affects the quality of one's life at work or at home. There is someone to talk to 24 hours a day and counseling is offered throughout Minnesota. You can help us reduce the stigma. If you'd to learn more or would like to get involved, go to www.mnlcl.org, call 651-646-5590 or email help@mnlcl.org.



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ABA Immediate Past-President Paulette Brown remarks at the ABA Commission on Lawyer Assistance Programs Annual Conference

October 5, 2016

- Substance use and mental health issues are diversity and inclusion issues. The intersection of inclusion and Lawyer Assistance Programs is really, really critical.
- Implicit bias is manifested toward people with mental health and substance use issues. It forces our colleagues into the shadows. It is important to address these conditions before they become issues. We cannot avoid them and hope it they will go away.
- It is similar to issues faced by people in the LGBT community – you can't tell by looking at them. We must make it safe for people to 'come out' with mental health issues as it has become safe in the LGBT community.
- Implicit bias permeates everything we do. Lawyer Assistance Programs see it in the work they do every day. When we think about disability, mental health should be included. People needing help can seek the attention they need with less trepidation about reaching out. It is the only way to remove stigma.
- A discussion about open and equal treatment is necessary. It is not enough to be contained in this room or at this conference. We should not be reticent about talking about it anywhere, any place. All must work together to reduce stigma about mental health and substance issues in our profession. If we could convey this message over and over on a broad based stage, how many more could we serve?

Implicit Bias Resources

ABA 360 Commission - <https://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission.html>

ABA Section on Litigation - <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html>

<https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2018/winter2018-lawyer-well-being-alcoholism-self-help.html>

Harvard Implicit Association Test - <https://implicit.harvard.edu/implicit/takeatest.html>

Harvard Mental Health Implicit Association Tests - <https://implicit.harvard.edu/implicit/user/pimh/index.jsp>

Kirwan Institute for the Study of Race and Ethnicity - <http://kirwaninstitute.osu.edu/>

Mindfulness articles:

<http://www.forbes.com/sites/jeenacho/2016/07/14/10-scientificallly-proven-benefits-of-mindfulness-and-meditation/#127564036e91>

<http://abovethelaw.com/2016/07/scientificallly-proven-reasons-for-why-lawyers-should-practice-mindfulness/>

Above the Law – Impact of implicit bias on diversity in the legal profession - <http://abovethelaw.com/2015/02/implicit-bias-the-silent-killer-of-diversity-in-the-legal-profession/>

Stress in America: The Impact of Discrimination, released 3/10/2016 by the American Psychological Association. <http://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf>

Association of Corporate Counsel - <https://www.acc.com/chapters/sandiego/upload/Implicit-Bias-in-the-Legal-Profession.pdf>

Lawyers Concerned for Lawyers – www.mnlcl.org, 651-646-5590, help@mnlcl.org. Experiencing bias is stressful. Growing as we explore our own bias is stressful. LCL offers up to 4 free counseling sessions on any issues that cause stress or distress. It's not just for when something is wrong - it can help you to move forward in the right way.

MRPC Rule 8.4 – Misconduct

RULE 8.4: MISCONDUCT

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. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including:

- (1) the seriousness of the act,
- (2) whether the lawyer knew that the act was prohibited by statute or ordinance,
- (3) whether the act was part of a pattern of prohibited conduct, and
- (4) whether the act was committed in connection with the lawyer's professional activities[.]

Comment

[4] Paragraph (g) specifies a particularly egregious type of discriminatory act -harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.

[5] Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer's professional activities.

Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

[6] Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.

[7] Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).