

LAWYERS CONCERNED FOR LAWYERS

Confidential Support for Legal Professionals

Implicit Bias in 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 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 by 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 like 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>

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/2016/07/11/10-scientificallly-proven-benefits-of-mindfulness-and-meditation/#127564036e91>

<http://abovethelaw.com/2016/07/10/scientificallly-proven-reasons-for-why-lawyers-should-practice-mindfulness/>

Professor Rhonda Magee, <https://www.rhondavmagee.com/>, author of *The Inner Work of Racial Justice*

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/>

Association of Corporate Counsel - <https://www.ace.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).

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Mindfulness, the Breath, and Well-Being

Joan Bibelhausen, Executive Director, Lawyers Concerned for Lawyers

"Take just a few minutes to pay attention to your breath-how you're breathing can ease the mind."

Jeena Cho, co-author of *The Anxious Lawyer*.

"I can't breathe." George Floyd

As lawyers, we are bombarded with high expectations, emotional cases, and sometimes a struggle to maintain our jobs or practice, especially in these times. If you are preparing a deposition and remember the aggressive behavior of opposing counsel from a previous encounter, how might you respond? You may become anxious, quickly judge that person and the situation, and form impressions of the worst that can happen. By using your breath, by taking a breath, you can arouse your curiosity and look for options. Why did I react that way last time? What lesson is here for me? Use your conscious mind to counter your unconscious or implicit impressions. You can become the driver, not the passenger along for the ride.

Professor John A. Powell writes that "[t]he unconscious, more than the conscious mind, controls our daily decisions and actions, including how we relate to other people, especially those who look different from us." This applies to a colleague who questions whether someone who looks different is up to the job as well as the colleague who wonders if someone who looks different will support them in doing their best work. Our unconscious reaction, based on years of living our lives, is connected with our drive to survive. When registering a threat, we retreat to fight, flight, or freeze. Our analytical brain is pushed to the background. Mindfulness can bring it back.

Mindfulness is not new to us. As a child, perhaps you were advised to engage in the mindfulness activity of counting to 10 when angry or distressed. Mindfulness is an in-the-moment awareness of what is around us and how we are responding to it. It can help us with that deposition, it can help us to improve our overall well-being as we face traumatic cases and the pressure of law practice, and it can help us as we think about the role of lawyers in our society. By being aware of our inner selves, we can feel that we are leading our lives rather than being hijacked by external factors beyond our control. We cannot control opposing counsel's behavior, but we can govern our reaction to it.

Professor Rhonda McGee writes about mindfulness and reducing bias. She says that in addition to raising awareness in the moment "mindfulness and compassion practices assist in regulating emotional responses and specifically reducing anxiety, increasing empathy and perspective-taking, and increasing overall gratitude and well-being,"

This is important for our profession and for our own well-being. In LCL's statement following the death of George Floyd, we cited Robert Benham, former Chief Justice of the Georgia Supreme Court. He noted that the first professions in society were the clergy, who healed the spirit, the doctors, who healed the body, and the lawyers, who healed the community. Lawyers and judges will be involved in every single aspect of the aftermath of George Floyd's death as we ensure all voices are heard. The community needs us as healers now, but we must also care for ourselves. To help our clients, colleagues, and communities, we must be actively mindful of our emotions. We must put our oxygen masks on first, be attentive to our well-being and proactively engage in practices to enhance it.

LCL provides free, confidential, peer and professional support and services to lawyers, judges, law students, family members, and legal organizations throughout Minnesota who are facing mental health, substance use or other life challenges. This includes up to four free counseling sessions, someone to talk to 24/7, support groups, referrals to resources, and much more. 651-646-5590 or www.mnlcl.org.



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Legal Profession Racial Trauma Resources

- Lawyers Concerned for Lawyers: LCL provides free, confidential peer and professional assistance to Minnesota lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress. This includes up to 4 free counseling sessions. We help other legal professionals on a case-by-case basis. www.mnlcl.org. A recent LCL blog post refers to a strong article on workplace difficulties. <https://www.mnlcl.org/today-i-watched-george-floyd-die-again-but-sure-ill-have-that-memo-to-you-by-500/>.
- Professor Rhonda Magee, How Mindfulness Can Defeat Racial Bias at https://greatergood.berkeley.edu/article/item/how_mindfulness_can_defeat_racial_bias. Professor Magee has also written a book, *The Inner Work of Racial Justice*.
- The National Alliance on Mental Illness has created a comprehensive resource page at <https://namimn.org/bipoc/>. Additional materials are at <https://namimn.org/education-and-public-awareness/nami-resources-for-multicultural-communities/>.
- Jeena Cho, author of the *Anxious Lawyer*, has great guided meditations for legal professional on her website at www.jeenacho.com.
- Local attorney Spiwe Jefferson is a resource for mindfulness resources and practices. www.spiwejefferson.com.
- Mental Health America offers BIPOC mental health resources that address self-care, racial trauma and other topics at www.mhanational.org/bipoc-mental-health.
- The Legal Rights Center Toolkit and Restorative Journal is at www.legalrightscenter.org/toolkit-and-guides.html
- The Karuna Community is a local organization that provides compassion-based mindfulness training for people impacted by the Criminal Justice System. www.karunacmn.org.
- Resources for white people about racism may be found at <https://blog.fracturedatlas.org/resources-for-white-people-to-learn-and-talk-about-race-and-racism-5b207fff4fc7>