

American Bar Association Presidential Diversity Hearing

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Testimony of Dr. Peter Blanck

**Chairman, Burton Blatt Institute
University Professor**

**Syracuse University
Syracuse, New York, USA**

Introduction

Thank you for the opportunity to testify about diversity in the legal profession. My testimony will focus on disability as a significant element of diversity.

I am Dr. Peter Blanck, Chairman of the Burton Blatt Institute (BBI) and University Professor at Syracuse University. I received my Ph.D. in Psychology from Harvard University and J.D. from Stanford Law School. My short biography is presented at the end of this testimony. The Burton Blatt Institute was established to advance the civic, economic, and social participation of people with disabilities. BBI takes its name from Dr. Burton Blatt, a pioneer of disability rights who helped light the fires of legal reform.

1. Disability diversity and the legal profession¹

Soon after the Americans with Disabilities Act (ADA) passed in 1990, the first case in which I served as an expert witness involved a lawyer with a disability. The plaintiff was a graduate of the Harvard Law School. He had worked successfully as an in-house lawyer for a large California corporation. The company had sixty or more in-

¹ Section numbering herein is keyed to ABA Survey questions addressed in this testimony.

house lawyers and he was one of their best. He consistently billed more hours than the average firm lawyer.

After a grueling year, this lawyer asked his general counsel for the ability to limit his weekly billable work hours to a number that was higher than the average billable. He needed some limits, given his bipolar disorder led to short, intense periods of high productivity followed by down time—he requested a work accommodation.

The General Counsel refused the accommodation request, believing it would not be fair to the other lawyers and it would tarnish the firm’s reputation that its lawyers do “whatever it takes” to get the job done. Without accommodation, the plaintiff would and did burn out. The General Counsel then fired the plaintiff.

The parties agreed to arbitration on the alleged disability discrimination. I testified about the value of workplace accommodations and stigma facing persons with mental disabilities. The arbitrator, a retired state supreme court justice, awarded the plaintiff monetary damages and attorney fees that far exceeded his annual salary. What I will never forget about this case was how the General Counsel was willing to “throw away” one of his best lawyers, because of his own bravado. Unconsciously, I believe the General Counsel was afraid of a person with a mental disability—a fear of the “different lawyer” with a disability. As a result, this firm lost a talented and productive lawyer and the plaintiff a promising career.

Diversity—including disability diversity and human difference—is essential to the legal profession—not only for reasons of justice and fairness—but for practical reasons; we must train and retain the best in our profession regardless of differences based on gender, race, nationality, religion, age, sexual orientation, or disability.

Today, our society is global and increasingly diverse. To be a crucial force in the world, the legal profession must reflect that diversity. As we must mirror the diversity of our clients, regulators, colleagues, and decision makers, we must show the disability diversity of the world. The first United Nations treaty of the new millennium focused on this diversity and the human rights of some 650 million persons with disabilities around the world.

People with disabilities are involved at all levels and in all capacities that attorneys serve—in industries, governments, and communities. Attorneys may no longer assume that people with disabilities are poor, uneducated, isolated, and uninvolved. Nor can attorneys believe that people with disabilities care only about specialized disability issues. Rather, people with disabilities are CEOs, government officials, professors, community leaders, and decision makers throughout the world. People with disabilities no longer find it acceptable to work with law firms and other legal organizations that exclude people like them from their ranks.

Law firms and legal organizations that fail to recruit, hire, promote, and accommodate lawyers with disabilities risk losing talents, ideas, and perspectives they need to be competitive. Because many people develop their disabilities as they age, firms that fail to provide accommodations or make people with disabilities feel unwelcome risk losing a wealth of experience and skills developed over the years.

True commitment to disability diversity benefits the law firm and its workforce as a whole, making employees with and without disabilities more productive. Workplace climate, such as attitudes, policies, and norms, make a great difference, not only in employee experiences, but also in workplace performance. In recent studies with the

Office of Disability and Employment Policy of the U.S. Department of Labor examining the impact of corporate culture on the employment of persons with disabilities, my colleagues and I find evidence that employee attitudes and perceptions about their work environment impact perceptions of feeling included and engaged in the workplace as well as actual engagement and productivity.

We find when more employees with and without disabilities are granted appropriate accommodations, there is less prejudice toward people with disabilities generally. Workplaces that are accommodating to all employees reflect a positive climate for the treatment of people with disabilities. Bottom line: companies with an inclusive culture benefit from a workforce that feels valued and returns value.

2 - 5. Disability diversity initiatives, challenges, successes, opportunities

The legal profession has changed its approach to disability diversity over the past decades. Law schools, such as Syracuse University, have been more open to admitting students with disabilities. Often in the past, applicants with physical disabilities were required to make extra efforts to secure admission—such as demonstrating their ability to hand-write exams or carry books. These requirements have been eliminated, though challenges remain.

Law schools have increased admission of students with vision and hearing disabilities, due to the availability of Braille books, taped texts, notetakers, captioning, and sign language interpreters. Ninety-eight law schools have educated students who are deaf or hard of hearing (*DeafAttorneys.com*). Law schools recognize that students with learning disabilities can succeed with the provision of testing in alternative formats

and changes to the timing of exams. But it took the lawyers themselves to make change in this area.

In an early challenge, in 1996, I served as an expert for plaintiffs in a class action lawsuit brought by law students with learning disabilities enrolled at Boston University (BU). The students claimed they had been discriminated against on the basis of their disability in violation of the Americans with Disabilities Act and other laws because BU did not provide reasonable procedures for evaluating requests for accommodations. Federal District Court Judge Patti Saris found BU violated the law students' rights.

About the same time, the then BU Provost delivered speeches in which he stated that "the learning disability movement is a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence, and also for genuinely humane social order." The BU law students rejected this bias and negative prejudice. However, some at the Law School Admissions Council continue to challenge inclusion of students with learning disabilities, relying on outdated beliefs about intellectual capacity and the impact of a learning disability, though inclusion efforts are improving.

Today, law students with disabilities have formed the National Association of Law Students with Disabilities. Law schools have hired professors with disabilities, acknowledging the capabilities of attorneys with disabilities and creating opportunities for mentoring of students with disabilities. Syracuse University's College of Law Disability Rights Clinic is run by Professor Michael Schwartz, who is deaf. Harvard Law School's Project on Disability is directed by Michael Stein, who uses a wheelchair. The University of Washington's Disability Studies program is directed by Law Professor Paul Miller, who is a little person. These and other high-profile academic leaders challenge

negative attitudes toward disability and provide positive models and mentoring for law students with disabilities.

The gatekeepers to the legal profession—such as testing agencies and Bar associations—have improved their openness to prospective lawyers with physical and sensory disabilities and offer testing in accessible locations and with alternative formats. Bar associations have increased recognition and support of attorneys with disabilities by conducting surveys of attorneys with disabilities (e.g., in California and Florida), forming sections or committees of attorneys with disabilities, and offering conferences, courses, and articles. As a prior member of the ABA Commission on Mental and Physical Disability Law, I refer you to a Commission conference in 2006 on Employment of Attorneys with Disabilities and another to be hosted in 2009.

Advances in technology and accessibility, and changes in attitudes have opened the practice of law. Although scant research has been done on the subject, lawyers with disabilities appear to be practicing law at greater levels than in the past. At least 176 deaf or hard-of-hearing lawyers are practicing in the United States (DeafAttorneys.com). The California Bar found that at least four percent of its members have disabilities (“Challenges to Employment and the Practice of Law Continue to Face Attorneys with Disabilities”, <http://calbar.ca.gov/calbar/pdfs/public-comment/2004/Disability-Survey-Report.pdf>).

Lawyers with disabilities practice in government (*California Survey – 20%*), non-profit (*California Survey – 10%*), and small (*California Survey – 15%*) and solo (*California Survey – 28%*) firms. However, attitudes remain a significant barrier to lawyers with disabilities in medium-firm (*California Survey – 5%*) and large-firm

(*California Survey – 3%*) practice. Law firm practice often is still reserved for those of the greatest physical, intellectual, and mental strength—and disability is often misunderstood as an indication of weakness.

As a result of attitudinal barriers, a significant percentage of attorneys with disabilities are unemployed (*California Survey – 12%*), lack career advancement opportunities, or are engaged in non-legal work (*California Survey - 4%*). Attorneys with disabilities earn less money on average than attorneys without disabilities. One California survey finds that in 2001, nearly half (41%) of attorneys with disabilities earned less than \$50,000, compared to only 16% of attorneys generally earning less than \$50,000.

Many firms are hesitant to “take a chance” on candidates with disabilities. Those that do hire a lawyer with a disability often hold him or her up as a symbol or representative of the entire disability community. If he or she fails, the firm is likely to avoid hiring anyone with a disability, having “tried that already.” This is the same experience that women, racial minorities, and gays and lesbians faced—and still face—in trying to break into the practice of law.

6. Diversity Efforts: Sufficient success?

Although the legal community has witnessed improvements in attitudes toward attorneys with disabilities, more may be done to enhance disability diversity in the profession. Significant stigma arising from misconceptions about ability, competence, and workplace safety is directed at attorneys with disabilities, especially those with sensory, mental health, and learning disabilities. Law firms, like other business and

professional work environments that lack accommodation policies and practices, discourage employees with disabilities from requesting accommodations. Similarly, the absence of employee assistance programs (EAPs) indicates uncertain acceptance and support by management for valuable employees.

More so for attorneys with disabilities compared to the majority of Americans with disabilities, attorneys typically make a living salary, rendering them ineligible for income and asset capped federal Medicaid or SSDI benefits. As such, law firms must ensure they offer equal health and mental health benefits to all their employees, lest the attorney with a disability is forced to abandon the workforce for federal benefits to ensure essential healthcare is available.

The legal profession generally benefits from modern office technologies, hardware, software, broadband internet access, subscription to electronic legal databases, and electronic court filing systems. When the design of these technologies is guided by accessibility standards (e.g., Web Accessibility Initiative and § 508) or universal design principles (www.globaluniversaldesign.org), assistive technology effectively may accommodate human differences. Attorneys with hearing impairments have equal access to audio information through closed captioning of audio-video materials. Individuals with visual impairments have equal access to software and internet-based information using screen reader applications. Persons with fine motor impairments use voice recognition applications and alternate input devices (e.g., adaptive keyboards and track ball mice) to write and communicate with computers.

However, in purchasing and using these technologies, law firms, like other employers, need to implement accessibility features as a matter of course, rather than

as a special last-minute exception. While use of electronic documents may improve access for lawyers with vision disabilities, it works only if the accessibility features of the system are used by the firm creating the documents. Courts, too, have a role to play in ensuring not merely equal access to approach the jury or bench, but also to select smart technology upgrades that seamlessly support these and other adaptations.

Technological challenges still exist. Recently, as co-counsel for the National Federation of the Blind (NFB), we filed a class action lawsuit on behalf of NFB members against a large retail chain, Target Corporation, claiming its website was not accessible to blind customers, thus violating the ADA and state law. The U.S. District Court found the ADA and California state laws apply to the internet.

The Target case established an important legal principle for blind lawyers and others who rely on Internet services for research, writing and advertising. The Federal Court in the Target case aptly noted that “it is ironic that [many companies], through [their] merchandising efforts on the one hand, seek [] to reach greater numbers of customers and enlarge [their] consumer-base, while on the other hand [] seek [] to escape the requirements of the ADA.” (NFB, 2006, n. 4).

7. Future disability diversity efforts and the legal profession

The business case for a diverse workforce has proven itself in industries with a direct connection to their consumer bases. Television, radio outlets and advertisers recognize the value of a diverse workforce for reaching their targeted audiences; although this commitment to diversity has not yet extended fully to disability.

Legal clients now insist on diversity by their service providers, including law firms. Coca-Cola has implemented a diversity recruitment policy, though not explicitly including disability, requiring its in-house legal counsel to contract only with outside law firms that demonstrate diversity in hiring. Other companies that made the business case for disability diversity in the workforce, such as CISCO Systems, show greater sales and service to the disability community and the general population.

When companies, such as Walgreens, incorporate accessibility as a part of their retail systems, they better serve all their employees and customers with and without disabilities. When companies recognize the unique abilities of employees and customers with disabilities to provide perspectives in design and delivery of products and services, those products and services prove more effective for everyone.

In short, law firms, organizations, and governments significantly improve their disability diversity by assuming that people with disabilities will be part of their work force and client base, and by preparing to serve those people through physical, technological and programmatic accessibility. Firms need to incorporate accessibility in their systems and practices as a matter of course, for example, by ensuring accessibility features are activated in their computer systems, offices are accessible, employment benefits are equal, and systems for providing and paying for accommodations are in place. Waiting until the client or employee with a disability shows up ensures the firm will less effectively include that person. The federal government, as our country's largest employer, also has a central role to play in hiring, promoting, and accommodating its lawyers with disabilities.

8. Conclusion

Law firms, lawyers, and all organizations must continue to recognize and challenge negative attitudes and outdated stereotypes that hamper recruitment, hiring, retention, accommodation, and promotion of lawyers with disabilities. Not only is this approach the right thing to do, but also it makes economic sense to firms of all sizes.

Disability properly is included in diversity training, legal education and continuing education, and other diversity efforts. Law firms and lawyers should reach out to organizations and communities of people with disabilities as colleagues and clients, and as valuable members of the team.

As we have done throughout our history, the legal profession will lead the world in efforts to enhance diversity in general, and now to appreciate disability as an element of diversity in particular. The result will make our communities, workplaces, and world a better place to live.

Thank you again for the opportunity to testify today.

For more information about the content of this testimony, the Burton Blatt Institute, and related articles, see <http://bbi.syr.edu>. Or contact:

Peter Blanck, Ph.D., J.D.
University Professor
Chairman, Burton Blatt Institute

Syracuse University
900 Crouse Avenue, Crouse-Hinds Hall, Suite 300
Syracuse, New York. 13244-2130
(315) 443-9703 phone
<http://bbi.syr.edu>

Biography -- Peter Blanck, Ph.D., J.D.

Dr. Blanck is University Professor at Syracuse University, which is the highest faculty rank granted to only eight prior individuals in the history of the University. He is Chairman of the Burton Blatt Institute (BBI). Prior to his appointment at Syracuse, Blanck was Kierscht Professor of Law and director of the Law, Health Policy, and Disability Center at the University of Iowa.

Blanck has written articles and books on the Americans with Disabilities Act (ADA) and related laws, received grants to study disability law and policy, represented clients before the U.S. Supreme Court in ADA cases, and testified before Congress. His work has received national and international attention. He is a board member of the National Organization on Disability (N.O.D.), Disability Rights Law Center (DRLC), and Disability Rights Advocates (DRA). He is a trustee of YAI/National Institute for People with Disabilities Network. In 2008, he was appointed Chairman of the Global Universal Design Commission (GUDC).

Blanck received a J.D. from Stanford University, where he was President of the *Stanford Law Review*, and a Ph.D. in Psychology from Harvard University. He is a former member of the President's Committee on Employment of People with Disabilities, Senior Fellow of the Annenberg Washington Program, Fellow at Princeton University's Woodrow Wilson School, and Mary Switzer Scholar. Prior to teaching, Blanck practiced law at the Washington D.C. firm Covington & Burling, and served as law clerk to the late Honorable Carl McGowan of the United States Court of Appeals for the D.C. Circuit.

Blanck's books in the area include: *The Americans with Disabilities Act and the Emerging Workforce* (AAMR, 1998); *Employment, Disability, and the Americans with Disabilities Act* (Northwestern U. Press 2000); and *Disability Civil Rights Law and Policy* (with Hill, Siegal & Waterstone) (West, 2005, 2009 forthcoming).