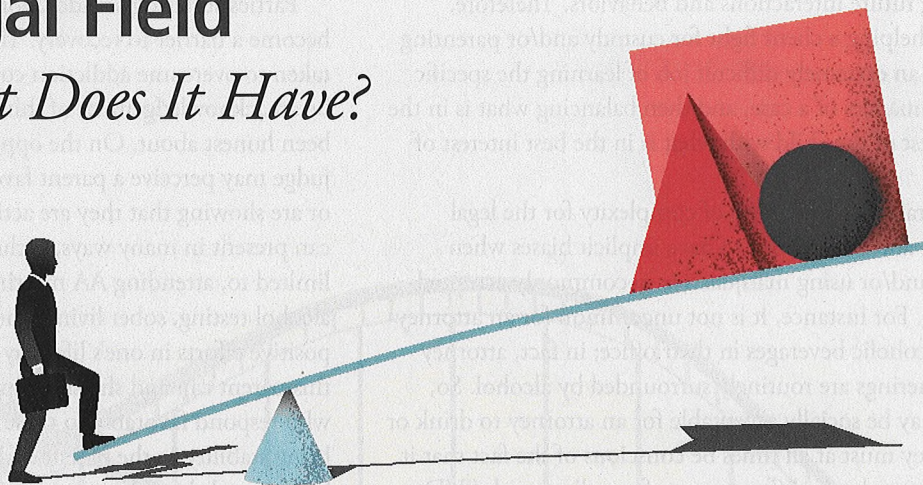


Recognizing Addiction Bias in the Legal Field

What Impact Does It Have?

BY ANDREA MUCHIN



In the year 2021, 46.3 million people aged 12 or older met the specific criteria needed for having a substance use disorder (SUD). Within that population, 29.5 million of those individuals have an alcohol use disorder, while 24 million of those individuals have a drug use disorder. U.S. Dep't of Health & Hum. Servs., *SAMHSA Announces National Survey on Drug Use and Health (NSDUH) Results Detailing Mental Illness and Substance Use Levels in 2021* (Jan. 4, 2023), <https://bit.ly/474I8dR>. Addiction is a public health concern that does not discriminate. For purposes of this article, addiction and SUD will be used interchangeably to describe those who are addicted to either alcohol or marijuana. People with SUD have stereotypes and stigmas that follow them throughout their lives.

In the legal field, where justice and equality are the driving goal, the bias that exists with respect to addiction can have far-reaching implications. Most times, the actions taken by those with addiction are viewed through a moral turpitude lens rather than as the complex physiological and psychological issues that arise as a result of the addiction. This is prevalent in divorce and child custody cases, where the spotlight is always on the parent, how they behave around their children, and how their behavior impacts the children.

This article explores the complex and pressing issues of bias against those with addiction, especially in a family law

case, shedding light on how the biases of the lawyer and the judge can manifest and impact the lives of those navigating the legal system during a divorce or child custody case.

Lawyers' Bias

Unsurprisingly, emotions run high in family law as the stakes are incredibly personal. While lawyers must uphold certain ethical standards, when a client going through a child custody case divulges information to their lawyer indicating that they have an addiction, it may change the lawyer's perception of their client. The lawyer may have implicit biases that can lead to stereotyping. It is important for the lawyer to recognize their biases and the shame that their client is likely experiencing. To best serve the a client who has SUD, the lawyer representing them should challenge their own biases and be upfront and honest with them about the ramifications of being in active addiction and/or recovery.

A common stereotype that surrounds those with SUD is that they are dangerous. Being perceived as "dangerous" is potentially disastrous for a client in a custody battle. Another stereotype or stigma surrounding those with SUD is unpredictability. Having an unpredictable client can be difficult for any attorney to deal with and can also adversely impact a client in a custody battle. Moreover, if an attorney already believes

that the client will be unpredictable, there lies an underlying bias that the attorney should recognize and address.

It is likely that attorneys may have had previous clients with substance abuse issues who have been more challenging to work with than other clients. These past experiences and interactions likely contribute to the attorneys' implicit biases. However, not everyone who has SUD is the same nor should they be treated the same. Attorneys should know that previous interactions should not be the determining factor in predicting future interactions and behaviors. Therefore, attorneys helping a client fight for custody and/or parenting time have an extremely difficult job of learning the specific facts and nuances of a case, and then balancing what is in the best interest of the child with what is in the best interest of the client.

It also raises another level of complexity for the legal profession and an attorney to have implicit biases when drinking and/or using marijuana is so commonly accepted these days. For instance, it is not uncommon for an attorney to have alcoholic beverages in their office; in fact, attorney social gatherings are routinely surrounded by alcohol. So, while it may be socially acceptable for an attorney to drink or smoke, they must at all times be conscious of the fact that it may be a completely different story for a client with SUD.

With the legalization of marijuana in many states in recent years, it has become more challenging to distinguish between what is truly an addiction and non-addicted recreational use. Moreover, specifics as to these distinctions are often dependent on what jurisdiction the attorney and client are in, as some jurisdictions are more progressive and forgiving than others. Unlike alcohol, where limits are universally measurable both because it is easy to show if a person is impaired and because there are breathalyzers and other such standards that measure them, it is extremely difficult to determine with marijuana if and how long the effects of the drug stay in someone's system, as well as what impact they are having on a person's functioning and parenting. As a result, lawyers' bias and how to guide a client can become both confusing and multifaceted.

Judges' Bias

There are statutes and laws that are designed to protect children. It is a judge's duty to uphold the law fairly and impartially. When presented with a case where a party struggles with addiction, the judge faces a new set of issues not present in a routine family court case. In trying to determine what is in the child's best interest, the judge's biases with respect to addiction may impact their decisions relating to custody and related issues such as employment and whether a parent can contribute to the family's support. While the burden is on the attorneys for both parties to present their case in the best light possible for their client, when addiction comes into play, there are a lot of underlying

and ancillary questions and concerns that the judge must take into consideration.

A judge is human being and can be susceptible to societal pressures and biases, especially if a judge has been in family court for many years and has seen numerous cases involving a parent with SUD or has personal experiences with a family member or friend who has experienced addiction. This may skew the way a judge thinks and/or rules on a case. It is a judge's duty to consider each case in a fact-specific way.

Parties suffering an addiction might feel shame, which can become a barrier to recovery. They may also fear that steps taken to overcome addiction could harm them, as it would be an acknowledgement of things they have not previously been honest about. On the opposite end of the spectrum, a judge may perceive a parent favorably when they have shown or are showing that they are actively working to recover. This can present in many ways, including, but not necessarily limited to, attending AA meetings, NA meetings, drug/alcohol testing, sober living, and/or treatment programs. The positive efforts in one's life may demonstrate to a judge that this parent can and should be present in a child's life. Judges who respond favorably to these actions by a parent may help bring stability to the parent and the family unit. It can only be assumed that when an individual with SUD receives positive reinforcement, the recovery will continue, further benefiting the parent, child, and their relationship. This is known as a community reinforcement approach (CRA), which aims to enforce sobriety through positive reinforcement. William R. Miller, PhD, et al., *The Community-Reinforcement Approach*, 23 Alcohol Res. Health, 116-121 (1999), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6760430>. A CRA approach has some of the strongest scientific evidence of efficacy. *Id.* While the job of sobriety rests on the person with the addiction, the judge and court system can assist that individual.

A judge must be careful to review all relevant facts when considering addiction claims. For instance, is a parent drinking or smoking recreationally and around friends in a social outing? Or is a parent drinking or smoking in the presence of their children? Or is a parent drinking or smoking alone, trying to hide their addiction from others? Very different scenarios may be presented wherein a judge must make difficult decisions regarding the family and/or child's best interest. Even when judges are known to be equitable and fair, there can be a point in a case where a judge might start to see one side in a different light. It is imperative judges acknowledge their biases so they can fairly execute their duties.

Opposing Clients' Bias

When a client retains a lawyer in a divorce case involving children, the lawyer should ask if there are any concerns with the other parent regarding addiction. Depending on

the answer, this can cause opposing client biases. Potentially, when an attorney hears that the opposing client might be struggling with addiction, it changes the scope of the representation. The attorney might want to be on the offense immediately in regard to custody or any form of emergency petition. There is also the requirement for the attorney to do their due diligence to ensure that the client they are representing is not exacerbating instances in order to receive more time with the children. A cautious lawyer may also want to explore what, if any, substance issues their own client has and what, if any, role their client may play in enabling the other parent.

In cases with a credible accusation of addiction, opposing counsel could potentially use the opposing parties' SUD as both a shield and a sword. In other words, opposing counsel might fight for 100 percent of the parenting time and all significant decision-making responsibilities based on one parties' SUD. In the same breath, that opposing attorney might also turn around and ask for support or other financial assistance from the party suffering from the SUD. Every case is unique, especially when dealing with a SUD, but there is a slippery slope that a case can end up on if biases are not kept in check.

In divorce and child custody cases dealing with addiction, the case will never be straightforward, and there will always be gray areas. If an attorney is working on a case whose opposing party is battling addiction, the attorney likely has a skewed view of that party. Even if the opposing client shows signs of recovery and sobriety, the attorney might not be as open to accommodating them. Again, while every case and attorney are different, implicit biases exist in everyone, and, often, people do not recognize that either they have them and/or how it is affecting the case. When an attorney and their client are facing an opposing party with a history of addiction, it is imperative to ensure that those biases are not blocking them from doing what is best for the children involved.

Biases against People in Recovery

There will always be a stigma attached to those who struggle with addiction. Whether an individual is in active addiction or recovery, they will forever be an addict and will likely always feel shame about their condition. Stigmas and labels can be damaging to an individual's self-worth. It can also deter people from seeking help.

Addiction is costly. It is believed "that the annual economic impact of substance misuse is estimated to be \$249 billion for alcohol misuse and \$193 billion for illicit drug use." U.S. Dep't of Health & Hum. Servs., *Addiction and Substance Misuse Reports and Publications* (Aug. 31, 2023), <https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/index.html>. Individuals who consume an average four drinks a night spends an upward of

\$14,000 a year on alcohol. Nat'l Inst. on Alcohol Abuse & Alcoholism, *Alcohol Spending Calculator*, <https://www.rethinkingdrinking.niaaa.nih.gov/tools/calculators/alcohol-spending-calculator.aspx>. Similarly, marijuana can be just as expensive. The legalization of marijuana has led to it being more accessible. For example, in the Chicagoland area, there are 21 weed dispensaries in the city plus another 53 in the surrounding suburbs. Jay Gentile, *Your Guide to Every Weed Dispensary in Chicago*, Thrillist (Apr. 12, 2023), <https://www.thrillist.com/lifestyle/chicago/best-dispensaries-in-chicago>. With such convenience, it is has become increasingly easier for any individual to access. These purchases, just like alcohol, add up. In instances where an individual with SUD lives in a state in which marijuana is not legal, their cost of addiction increases as they would either have to obtain a medical marijuana card or buy off the street. It is easy to see how those suffering from SUD can cause an individual a significant financial strain. This financial strain only grows when it is coupled with an expensive divorce and custody battle. For some, there becomes no end in sight.

The stigma surrounding SUD within the legal field may instill fear in those choosing recovery as they fear repercussions from seeking treatment and exposing their disorder. Many times, they may have thoughts of not seeking appropriate treatment or taking prescribed medications. It is important to note that taking the prescribed dose of a medication is not something that should adversely affect anyone's standing in a divorce or custody case.

Those suffering from SUD encounter biases and stigmas at every turn during their divorce or child custody litigation. In order to better advocate for them, it is important to recognize what an individual with a SUD may be experiencing so all involved can better navigate these difficult situations and ultimately do what is best for the family as a whole, the parties, and their children. **FA**



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