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Confronting Unconscious Biases in Litigation

I. Overview

When we use the phrase “diversity and inclusion” certain universal images are conveyed. In the context of the workplace, we think of the need to have more women, ethnic minorities and others with diverse backgrounds included in the corporate culture. Over the last 20 years there have been a multitude of programs instituted by various organizations with the goal of making sure that the workplace promotes and supports those who are not from a majority background. These programs run the gamut from those developed by individual companies, to group letters issued by CEOs wherein they commit to a diverse workplace, to the formal programs created by professional sports leagues whereby it is necessary to interview diverse candidates before management employees can be hired. In recent years, there has almost become a fatigue with the concept of diversity and inclusion, and some backlash has developed as many feel that it is no longer needed as the world has changed enough. It is the purpose of this program to reinforce the continuing need for diversity and inclusion efforts, as there is both a moral and an economic value to these principals. There must be systemic efforts to ensure that the insurance defense industry recognizes the need for diversity and does not allow itself to step away from this issue.

Having a diverse community, both in the claims process and through legal representation, helps to ensure the best possible outcomes for the industry. While diversity and inclusion does include gender and sexual identity, the focus of this conversation is racial and ethnic diversity. As one begins to think about this topic, it becomes increasingly clear how complicated the issue is.

Why does diversity matter? The main reason, of course, is that it is the right things to do. This country is founded on the idea that all people are created equal and that there is equal opportunity for everyone. While there may be some discussion as to whether these tenets are actually true, the fact that they remain aspirational is important to all of us. What is critical to remember then, is that diversity matters because it impacts how we see things; what we hear; and how we experience the world. Because it is so fundamental, it by definition impacts our industry.

II. Defining Unconscious Bias

Unconscious biases are those prejudices we all have that impact our belief structure about other groups. These biases may be based on race, gender, ethnicity, age, disability status, personality type or some other factor. They don't necessarily all exist together, but we all manifest them in some way or another.

For those of you who doubt that you have biases, the empirical data suggests otherwise. This group recommends that all of you make the time to take any of the implicit bias tests that are provided by Harvard University. These tests suggest that our tendency toward bias is even deeper than most of us know or want to admit. These studies, as well as others, reinforce why diversity is important:

- <https://implicit.harvard.edu/implicit/>
- <https://www.nytimes.com/2019/01/25/us/black-dialect-courtrooms.html>
- Pew Research Center – Social and Demographic Trends (<https://www.pewsocialtrends.org/2019/05/08/americans-see-advantages-and-challenges-in-countrys-growing-racial-and-ethnic-diversity/>)
- *Uncovering the Hidden Prejudice that Shapes What We See, Think and Do* by Jennifer Eberhart
- *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations* by Samuel R. Sommers.
- How the Best Bosses Interrupt Bias on Their Teams, Harvard Business Review, Joan C. Williams and Sky Mihaylo, November, December 2019

The research emphasizes, in different ways, that race impacts how we view the world and how we treat others. In the legal context there is evidence of how diversity impacts juries and evidence as to how differences in hearing language impacts racial perception which in turn impacts legal outcomes.

While many of us talk about the importance of diversity, there is an interesting conundrum which is pointed out by the Pew Research Institute – while most people will say that there is a benefit to diversity in the workplace and that the workforce should represent our diverse culture, many do not think that ethnicity should be taken into consideration in either hiring or promotion. This same study shows that African-Americans place a greater value on workplace diversity than do either whites or Hispanics. In fact, a majority of whites believe that having a majority nonwhite country by 2050, which is projected, may weaken American values. How do we square this inherent conflict with the need to have a diverse workforce?

This conflict is seen in the insurance/defense industry where the statistical information suggests that there is a need for greater diversity. The insurance industry and the defense legal industry is predominantly white. Defense counsel were called on the carpet in January 2019 when more than 170 general counsel and corporate legal officers signed an open letter to big law firms, which stated, in part, "We expect the outside law firms we retain to

reflect the diversity of the legal community and the companies and customers we serve.”
“... we are disappointed to see that many law firms continue to promote partner classes that in no way reflect the demographic composition of entering associate classes. Partnership classes remain largely male and largely white.”

III. The Statistics

According to the 2018 findings of The Journey of African American Insurance Professionals, a report by Marsh and the National African American Insurance Association, African Americans are severely underrepresented in the insurance industry. The results, which were gathered from 312 online surveys, 25 interviews and seven focus groups, showed some surprising statistics.

- 90 percent of agency principals/senior managers are white and 3 percent of them are black.
- 85 percent of non-principal agency managers are white and 3 percent of them are black.
- 88 percent of non-principal producers are white and 5 percent of them are black.
- 85 percent of insurance customer service representatives are white and 7 percent of them are black.
- 85 percent of additional insurance professionals are white and 6 percent of them are black.

While the industry numbers certainly suggest that more diversity is needed, these statistics are not going to magically change overnight. In the meantime, companies can institute programs that recognize the value of diversity and note when and how biases are seen on a daily basis. Unless there is leadership from the top that dictates otherwise, it is often easy to let these biases go unchecked. Addressing these issues can be as simple as having your team take the Harvard Implicit Bias Test(s) to assess assumptions to something as intricate as helping your executive team realize that this blind spot may impact their bottom line.

How do you know if their blind spots exist in your organization? Ask yourself if the value of a Puerto Rican claimant’s case, whose first language is Spanish, is the same as it would be if he were a white male. Does the adjuster in the Midwest understand that an African-American jury in Philadelphia is going to evaluate a case involving an African-American plaintiff very differently than the same case would be worth in federal court in the same geographic area? If the answer to these questions are no, then perhaps your company needs that additional diversity and inclusion training and may need to reconsider its hiring practices. The Harvard Business Journal noted when one insurance company began to change its hiring so that objective criteria for any open role was used and the rating of all candidates was done with the same rubric, it increased its hiring of minority candidates by 46 percent.

IV. Bias in Reserving

Proper reserving is one of the most important aspects of working in the insurance industry. Carriers set their premiums based upon algorithms used by underwriters when issuing policies. Those algorithms take into account the likelihood of a claim occurring. Insurance companies are obviously in the business of making money when writing insurance, and, from the inception of a claim until its conclusion, it is critical that the reserves are adequate. Once a claim does occur, the initial reserve is set by the insurance adjuster. The setting of the reserves is based upon the most accurate assessment of the case that is possible. Reserves, however, are fluid and should change as the case evolves. Should the case go into litigation, the attorney representing the defendant then becomes involved in the valuation process. It is essential that the adjuster and the defense attorney be as accurate as possible when evaluating cases and that all factors involved in the case are appropriately assessed. One way to assure that this happens is to make certain that neither the claims professional nor the defense attorney allows his or her unconscious biases to impact the valuation of the case.

V. Confronting Unconscious Bias to Effect Change

The problem has been identified, but what is the solution? The importance of training to help insurance personnel and their defense counsel understand what unconscious biases are and how to overcome them or compensate for them cannot be underestimated.

Unconscious bias training programs are designed to expose people to their unconscious biases, provide tools to adjust automatic patterns of thinking, and ultimately eliminate discriminatory behaviors. A critical component of unconscious bias training is creating awareness for implicit bias.

VI. Unconscious Bias vs. Implicit Bias

Unconscious bias refers to a bias that we are unaware of, and which happens outside of our control. Implicit bias refers to the same area but questions the level to which these biases are unconscious especially as we are being made increasingly aware of them.

In unconscious bias training, facilitators generally explain how these biases work, showing examples of how people can make snap judgments about others based on their race, age, gender, or other identity.

Training experts are quick to explain that bias is a normal biological function, and to dispel any assumptions that only unfair or unintelligent people are biased. Unconscious bias can be explained in part in conjunction with how the human brain processes information.

In the context of training litigation management professionals, a Bloomberg Law article published in May 2019 discusses how when training attorneys, a good program usually

consists of a presentation of the evidence. According to a training source quoted in the article, lawyers need far more evidence than other audiences and any approach should include studies and statistics about diversity in the legal profession. It's interesting to note that a 2014 study from NEXTIONS found that law firm partners gave more positive feedback to a memo written by a hypothetical white associate than the same memo written by a hypothetical black associate.

Conclusion

Regardless of how one feels about the issue politically, the fact is that many plaintiffs/claimants are people of color and having claims professionals and defense counsel who have a similar experience can help reduce costs. It is not the intent of this discussion to suggest that only non-white people can handle cases involving non-white people. What we are suggesting is that a more diverse and inclusive workforce changes the conversation and lets other factors into the discussion. This broader conversation recognizes that the world is not a homogenous place, and the full range of discussion helps your company to appropriately and more accurately assess risks and consequences of action or inaction.