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Building the Pipeline and Bridging the Gap: Strategies for Success in Achieving Diversity and Inclusion in the Construction Claims Industry

I. Understanding Bias

Bias in General

Bias, which can be explicit or implicit, is generally defined as "a particular tendency, trend, inclination, feeling, or opinion, especially one that is preconceived or unreasoned." (<http://www.dictionary.com/browse/bias>) It is one-sided and lacks neutrality. A cognitive bias can lead to, *inter alia*, inaccurate judgment, illogical interpretation, or irrationality. (Baron, J. (2007) *Thinking and Deciding* (4th ed.), New York, NY: Cambridge University Press; Ariely, D. (2008), *Predictably Irrational: The Hidden Forces That Shape Our Decisions*, New York, NY: HarperCollins.)

Bias takes many forms and remains pervasive in society. Cognitive biases, which are errors in thinking, can be extremely difficult to identify, and thus challenging to eliminate in a personal or professional context. We often do not even realize how an implicit bias can impact our decision-making skills despite our best efforts to set aside personal biases in the professional context. For example, a recent sociological study by Ohio State University Assistant Professor Natasha Quadlin, concluded that hiring patterns revealed "high-achieving men are called back significantly more often than high-achieving women—at a rate of nearly 2-to-1." (Quadlin, N. (March 15, 2018), *American Sociological Review*.) The study's findings therefore suggest that high achievement "invokes gendered stereotypes that penalize women for having good grades, creating unequal returns to academic performance at labor market entry." (*Ibid.*) Simply put, we still have a long way to go as a society when it comes to eliminating bias and its negative impact on equality and inclusion.

Recognizing and Acknowledging Bias

Logically, to proactively fix a problem, one must first be able to identify the problem itself. However, with unconscious or implicit bias, what lies beneath the surface may not be readily apparent.

One tool, "Project Implicit"- a joint effort by psychologists at Harvard University, the University of Virginia and the University of Washington - provides Hidden Bias Tests, also known as Implicit Association Tests, which measure unconscious bias and can be found at:

<https://implicit.harvard.edu/implicit/takeatest.html>

Recognizing one's own implicit biases is a key first step to addressing them, and the Implicit Association Tests provide one method for identifying a potentially harmful bias.

II. The Difference Between Diversity and Inclusion

Understanding the difference between the notions of diversity and inclusion is nuanced, but important. "Diversity can bring many organizational benefits, including greater customer satisfaction, better market position, successful decision-making, an enhanced ability to reach strategic goals, improved organizational outcomes, and a stronger bottom line." (Riordan, C. (June 5, 2014) *Diversity Is Useless Without Inclusivity*; Harvard Business Review.) Inclusivity, then, is the deliberate act of putting diversity to work, resulting in "an atmosphere in which all people feel valued and respected and have access to the same opportunities." (*Ibid.*) Therefore, diversity can be seen as the means to an end, with the end being the ultimate goal of creating an inclusive workplace.

Why Diversity and Inclusion Matter

To begin with, numerous federal and state regulations aim to eliminate discrimination in the workplace. For example, the Civil Rights Act of 1964 created federal protections from discrimination relative to certain classifications such as gender, race, age (40 or older), religion, national origin, pregnancy status, veteran status, and disability. (Pub. L. 88-352, 78 Stat. 241.) Several states nationwide have also implemented stricter laws protecting classifications such as, among others, gender identity, sexual orientation, marital status, or political affiliations. (See, e.g., Cal. Gov. Code § 12940(a).) Thus, in many cases, elimination of bias is necessary to comply with the law.

What is more, however, the elimination of bias in favor of promoting diversity and inclusion is simply good business practice. According to a recent study by McKinsey & Co., "companies in the top quartile for gender or racial and ethnic diversity are more likely to have financial returns above their national industry medians. Companies in the bottom quartile in these dimensions are statistically less likely to achieve above-average returns." (Hunt, V. (January 2015) *Why Diversity Matters*; McKinsey & Co.) More specifically, the McKinsey study revealed the following:

- "Companies in the top quartile for racial and ethnic diversity are 35 percent more likely to have financial returns above their respective national industry medians.
- Companies in the top quartile for gender diversity are 15 percent more likely to have financial returns above their respective national industry medians."

Therefore, diversity is not merely a noble aim, it is good for business.

III. The Potential Workforce Crisis in the Construction Claims Industry

The Anticipated Talent Shortage

Most often referred to as "Generation Y" or "Millennials," persons born between 1982 and 1999 have now surpassed Baby Boomers as the largest living generation in the United States. In fact, the Bureau of Labor & Statistics (BLS) estimated that by 2025, they will provide nearly 75% of the national workforce. Unfortunately, studies indicate that they do not consider the insurance industry to be an attractive career choice, and so attracting the best and brightest is an uphill battle for an aging workforce. It is an issue that must be addressed, as it is estimated that the insurance industry will lose approximately 1.3 million people by 2028 due to the retirement of the Baby Boomers, according to the BLS, and a shortage of labor supply in the insurance industry is anticipated as early as 2020. However, there are very few full-time university-level programs specializing in risk management and insurance in the United States. In addition, according to the Insurance Journal, over half of Millennials believe the insurance industry is "not innovative," and two-thirds consider it to have a "poor public image," thus creating a potential crisis in the construction claims industry due to a talent pool shortage.

Bringing the Best Candidates in the Door

Despite Millennials' possible perceptions otherwise (they also have their biases to overcome, after all), a career in the insurance industry, and in construction claims, is typically known to offer flexibility and good work-life balance, both of which directly correlate to higher rates of job satisfaction. As a matter of fact, studies indicate that younger workers value job flexibility substantially higher than salary considerations. There is, however, a reputation that claims industry professionals are overworked, making it highly unattractive for the most qualified candidates as a career choice. To counter that argument, a firm is well-served to make better use of Generation Y's unique skillset – their ease and familiarity with current technology and communication tools – and offer benefits such as flex-time and telecommuting in return.

Moreover, emphasizing workplace diversity and inclusion pays dividends. According to a 2017 study by the Institute for Public Relations, "47 percent of Millennials consider the [diversity and inclusion] of a workplace an important criterion in their job search compared to 33 percent of Gen Xers and 37 percent of Boomers." (Kochhar, S. (December 4, 2017) *Nearly Half of American Millennials Say a Diverse and Inclusive Workplace is an Important Factor in a Job Search*, Institute for Public Relations.) In fact, according to a 2015 study by PwC, a startling 86% of female Millennials consider a prospective employer's policies on diversity and workplace inclusion as an important factor in a job search. Thinking outside the box is necessary to effectively encourage the most talented applicants to consider a career in the construction claims industry.

One strategy to improve the construction claims industry's messaging is to begin outreach out to the future generation of workers at a much younger age, such as participating in career fairs at the elementary or high school levels, to tout the prospect of gainful employment in an industry that values diversity and work-life balance. Social media, now a standard component of managing a firm's brand image, has also proven to be an effective method to recruit qualified candidates at a lower cost but is typically not adequately utilized from a recruiting standpoint. It

is typically thought to be more useful from a customer/consumer perspective, rather than selling a career to a talented prospective employee, and that conception must change. Companies must also improve efforts to emphasize and market the value of diversity as a corporate culture, not only to better identify with and serve their clients, but also to attract the talents of the next generation of construction claims professionals and attorneys.

Avoiding Costly Turnover

Human capital is an investment and a corporate asset. Once an employee is in the door, successfully mentoring and maintaining that employee is the next key step. A 2012 study in the *Journal of Business and Psychology* concluded that a company loses up to \$9,000 to replace an employee who works less than one year and up to \$47,000 to replace an employee that stayed three years or more. In-house training programs are imperative, though they have fallen off in recent years. The industry should revisit that practice given the lack of university-level instruction available in the claims handling industry. In-house training programs provide new hires with necessary tools to hit the ground running and to set them up for success.

In addition, a business that advertises an inclusive workplace, a flexible work schedule, work-life balance, and access to the most current technology and communication tools, must live up to that promise. It may require a change in the way of thinking for many, especially at the most senior level, but it is imperative to foster long-term corporate growth and profit. Firms must do more than "talk the talk" to avoid costly high employee turnover.

At the end of the day, the notion of hiring the most talented employees in an industry revolving around the resolution of claims is pointless unless those employees are adequately provided with the tools to properly evaluate a case. Identifying and mitigating bias is a key component of that toolbox, and a component of in-house training programs should include the development of these skills, as bias can negatively impact the resolution of claims.

IV. Bias in the Claim Resolution Process

Biases Impact Claim Resolution

The personal biases of litigants claim handlers, or attorneys can significantly impede the efficient resolution of disputes. Even impartial neutrals such as mediators or arbitrators are not immune to feeling and even exhibiting more sympathy toward one side than the other.

For example, a 2006 research study involving 600 cases in Albuquerque, New Mexico concluded that "[while some...variation was due to other 'case characteristics,' such as the claimant being a lawyer or represented by a lawyer], the mediated outcomes for minorities were less favorable than for non-minorities." (Hoffman, D., et al., *Mediation: A Practice Guide for Mediators, Lawyers and Other Professionals* (Massachusetts Continuing Legal Education 2013) at p. 233, citing Herman M. et al., *An empirical study of the effects of race and gender on small claims adjudication and mediation*. In: Alfini J. et al., editor. *Mediation theory and practice*. 2nd ed. New York: LexisNexis; 2006.)

It specifically found that "minority disputants received less money than non-minority litigants in adjudicated cases and mediated cases, with the latter being 'more pronounced.'" (*Ibid.*) Therefore, even with a so-called "neutral process" like mediation, implicit bias can impact fairness and successful, expedient resolution.

V. Strategies for Mitigating Bias in Settlement Negotiations

All parties to mediation or any settlement negotiation in which bias may negatively impact the resolution process can benefit from thorough advance preparation. As an example, Massachusetts mediators David A. Hoffman and Katherine Triantafyllou, authors of the book *Mediation: A Practice Guide for Mediators, Lawyers and Other Professionals* write in their chapter on "Cultural and Diversity Issues in Mediation and Negotiation":

"Cultural competence involves more than freeing our minds of bias—it requires affirmatively seeking to understand the people we encounter in the mediation process and elsewhere. Curiosity is key. If participants are from a country or ethnic group outside your experience, spend some time reading about that culture. If the person's background or ethnicity is not apparent, do not be afraid to ask background questions that will aid your work. Avoid stereotypes—for example, do not assume that all people from a particular country or culture are likely to have the same negotiating style." (Hoffman, D., et al., *Mediation: A Practice Guide for Mediators, Lawyers and Other Professionals*, *supra*, at p. 245.)

This advice applies not just to mediators, but also to claim handlers, attorneys, and even litigants themselves. However, with respect to litigants for whom the negotiation process is particularly personal, setting aside one's biases can be a challenging request.

To that end, Hoffman and Triantafyllou also counsel that in addition to research and preparedness, directly confronting bias during the negotiation process itself may be called for. (*Id.* at 246-247.) Another strategy for eliminating bias proposed in an article penned by professors at Carnegie Mellon University and University of Texas at Austin proposes having the parties "see both sides", so to speak:

"In the literature on debiasing, one type of intervention stands out as effective against a wide range of biases.

This involves having subjects question their own judgment by explicitly considering counterarguments to their own thinking. For example, Slovic and Fischhoff (1977) found that the hindsight bias was reduced when subjects were instructed to provide reasons for why events other than those that occur could have occurred. Koriat, Lichtenstein, and Fischhoff (1980) found that overconfidence was reduced when subjects listed counterarguments to their predictions. They concluded that 'overconfidence derives in part from the tendency to neglect contradicting evidence, and that calibration may be improved by making such evidence more salient' (Koriat et al. 1980, 113)." (22 *Law & Soc. Inquiry* 913, 916.)

Their own research on the subject concluded that "bargaining pairs in which subjects thought about the weaknesses in their cases were much more likely to settle than those who did not." (*Id.* at 920.) Therefore, simply having an open dialogue about cultural biases may open the door to the parties involved being able to "see both sides" of the dispute and resolve the claim more quickly and efficiently. Although settlement negotiations are rooted in dispute and controversy, which obviously hinders setting bias aside, a respectful settlement negotiation process which is sensitive to issues of bias and cultural differences ultimately benefits all parties involved in the long run.