



**2022 CLM Focus June Conference
June 15th – 16th 2022
Nashville, TN**

A Beginner's Guide to Allyship in Law, Construction, and Insurance

I. Basic Concepts and Their Context in Law and Insurance

Diversity vs. Equity vs. Inclusion

There is a misconception by many that equality is the same or like equity. According to difference101.com, the primary difference between equity and equality lies in the treatment given to people. Everyone is treated fairly in the case of equity; otherwise, equal treatment is provided. Equity aims to bring everyone at par by giving them what they need, while equality distributes everything equally without considering the individual needs.

The root word for both is *aequus* (pronounced \EYE-kwus\), meaning “even” or “fair” or “equal.” That word led to the direct antecedents of our English words: equity is from the Latin *aequitas*, and equality is from *aequalitas*. Equity is the older word in English, appearing in the 1300s, and it also has a broader range of meanings. It came from the French derivative of *aequitas*, *équité*, a word that has clear legal connotations; in French and in English it means “justice” or “rightness,” and “fairness.”

I also want to share this from the book of Proverbs in the King James Bible: “Then shalt thou understand righteousness, and judgment, and equity; yea, every good path.” This idea of “justice” connects equity more directly with the law as well: in early modern England there was an institution known as an “equity court” that had the power to rule on cases for which there was no adequate remedy in written law, seeking “natural justice” that could then be taken as precedent. These courts later blended with the legal court system in the late 1800s. It is for this reason that, in the language of the U.S. Constitution, which was written in the context of the British legal system, equity is mentioned alongside law in the first sentence of Article III, Section 2: The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution.

In this industry hiring practices and policies that aim to develop, retain, elevate (promote) with equity as the desired goal means imparting the necessary resources to bring everyone to a more equal level. Making equity a priority in the firm or company helps assure proportional representation in all departments and at all levels.

Bias

Bias, or prejudice, is a strong inclination of the mind or a preconceived opinion about something or someone which may be favorable or unfavorable: bias in favor of or against an idea. Prejudice implies a preformed judgment even more unreasoning than bias.

We are constantly under the influence of our biases (cognitive bias). Our time is so limited, and with information coming at us through social media at a constant rate, we filter so much of it through mental shortcuts informed by our biases. These mental shortcuts are taken subconsciously to save us the time and mental energy of researching an informed decision when anecdotal history says a predictable decision is available. they have measurable consequences in the real world, especially when handling claims. We usually form our opinions based on preconceived ideas, and usually implies an unfavorable opinion about one race, culture, sexual orientation ability or religion.

Biases keep us from considering qualified candidates because they create a certainty of what the potential response will be to an invitation to an opportunity. (Ex: “___ would not be interested because they [insert any verb or adjective].”) Hiring practices, polices on retention, promotion, or opportunities should all be considered by individuals and groups who are committed to building and maintaining a diverse workforce as a safeguard against these unconscious biases that might otherwise go unnoticed.

II. Legal vs Ethical

Historical Context

Since the early 1960’s, several federal laws have been enacted that help to promote DE&I in the workplace:

- Equal Pay Act (1963) – wage disparity based on sex.
- Title VII of the Civil Rights Act (1964) – Discrimination based on race, color, national origin, sex, or religion (expanded to include including pregnancy (1978 Amendment) and sexual orientation and gender identity (Bostock v. Clayton County, Georgia)).
- Age Discrimination in Employment Act (ADEA) (1967) – discrimination against employees and applicants at least 40 years old.
- Americans with Disabilities Act (ADA) (1990) – unlawful to discriminate against a qualified person based on disability.
- Genetic Information Nondiscrimination Act (GINA) (2008) – discrimination based on genetic health information.

No doubt these laws have helped to promote DE&I in the workplace for many underrepresented and oppressed classes of people. However, can strict adherence to DE&I objectives help create an environment that is not appropriately diverse, equitable or inclusive? Are your attempts to create equity for one group or groups creating inequities for other individuals? Are you fostering division as opposed to inclusion? Firms are undoubtedly wary of perceived “aggressive” DE&I initiatives and the potential for reverse discrimination lawsuits (e.g., Duvall v. Novant Health, Inc., (W.D.N.C. Oct. 2021) - \$10 million reverse discrimination award.).

DE&I Efforts Beyond the Law

Despite the potential issues in establishing DE&I policies, firms should not let this paralyze them or deter them from being an ally to underrepresented classes and developing programs to promote and foster DE&I in their workplaces. The legal profession has a long way to go in achieving true diversity and inclusion and becoming accessible to underprivileged and underrepresented classes. In addition to complying with antidiscrimination laws, initiatives that can foster DE&I in the workplaces:

- Cultural sensitivity and implicit bias training
- Cultural programming and newsletters
- Joining and supporting diversity and affinity-based organizations
- Amending mission statements
- Establishing affinity groups within the firm

There is no scientific formula or one-size-fits-all solution. Each firm should develop strategies based on an in-depth evaluation of their DE&I needs, which can only be done by soliciting input not only from leadership, but also from associates of all levels. Directives should not come from a single power source who most likely does not relate or is unaware of the issues.

Policies should also not be static. DE&I efforts need to be continuously monitored and evaluated for effectiveness and for ways to improve. DE&I committees are one of the best ways a firm can help educate itself, help create a diverse and inclusive culture and help eliminate equitable barriers. Firms can also benefit by bringing in third party consultants to provide a neutral perspective, as well training (cultural sensitivity, implicit bias, etc.).

III. Cognitive Adaptation

Psychological Safety

While the definition has been changed over time as research moved to specifically focus on psychological safety in the workplace, this original definition brings the concept to its most simple level: the extent to which individuals feel secure and confident in their ability to manage change. The "growing pains" associated with diversity, equity, and inclusion programs boil down to an employee's fear that being authentically themselves will have negative consequences to their career, social status, and even sense of self. For more information on how psychological safety is measured, I encourage you to research Edmonston's 7-item scale.

Managing fear of consequences while retaining accountability is a difficult balancing act. A DE&I program without accountability leaves diverse voices fearful of the professional and social consequences of reporting misconduct. On the other hand, a DE&I program where the in-group (those who belong to the perceived social majority) is fearful of making a potentially career ending mistake creates a workforce that is unwilling to engage in anything other than compliance, furthering the cultural divide.

Ideally, a DE&I based conflict should have enough consequences to their career, social status, and sense of self to catalyze growth, but not so much impact that they can never recover. Consequences to one's career may amount to a written warning, for example, but the other two are a bit more abstract. Social consequences are a natural byproduct of culture and

lie outside of administrative control, but it should be prevented from swinging wildly one way or the other. Office cultures that collectively view DE&I infractions as a joke gut the program of its validity, but an office that has cultivated a "cancel culture" provides no intrinsic motivation for an individual to take the social risks needed to grow.

Sense of self is yet another step further in complexity. In a perfect world, DE&I missteps should trigger a healthy concern about one's sense of self to intrinsically motivate the individual to change regardless of the consequences to their career and social standing. Those who want to change and adapt will always experience more growth, but for that to happen the individual needs to see the need for personal change.

Complexity-Extremity Model

For a period, DE&I programs hailed the "colorblind" approach, or the belief that social groups should ignore our differences and only focus on the similarities that unite us. While a kind sentiment on the surface, this model pushes communities toward homogeneity bordering on assimilation and is no longer considered best practice. Research now favors a middle ground between denying the existence of our differences and emphasizing them to the point of furthering the social divide.

The complexity-extremity model asserts that the more complex view you have about a group or social category, the more moderate your opinion will likely be of an individual from that group. In short, this principle argues that the more social categories you can mentally assign the individual to, the less likely you are to jump to an extreme conclusion based on stereotypes. This is because the more categories a person belongs to, the more likely you are to encounter "stereotypical inconsistencies" that need to be resolved.

Research shows that being confronted by the mental "error" message that occurs with the existence of counterstereotype combinations (example: a transgender republican or an overweight athlete) will reduce your stereotyping in future tasks. You are forced to look closer to resolve that mental error -- your brain thinks both conditions can't exist at the same time, so it must re-write your internal rules and expectations to be able to move on, re-shaping the mental rules of what a person of a particular out-group can look like.

Categorization Processing-Adaptation-Generalization (CPAG) Model

Step One: The diversity experience takes a form that involves stereotypic inconsistencies. (AKA, "I just experienced something that is inconsistent with the stereotype/generalization I previously believed to be true.")

Step Two: The perceiver is motivated and able to engage in elaborative processing to resolve the stereotypic inconsistencies. (AKA, "I have a desire and willingness to change my existing thought pattern.")

Step Three: The perceiver engages in a process of inconsistency resolution involving stereotype suppression and generative thought. (AKA, "What exactly about my existing thought

pattern was just proven incorrect? What new thought process should I train myself to think instead?")

Step Four: Their multiple diversity experiences result in repeated engagement of the inconsistency resolution process. (AKA, "Because I actively am part of diverse groups with people different than myself, I will have lots of opportunities to catch myself in the future.") Without continued and frequent opportunities to correct yourself and your thought process, your brain will never truly "re-wire." It's like push-ups: The more pushups you do, the easier they get. If you do one push up in January and then another in February, no benefit is gained from the strain.

Step Five: The perceiver develops generalized cognitive flexibility characterized by spontaneous inhibition of stereotype-based knowledge and generative thought. (AKA, "I am actively working on noticing when I default to my previous generalization. Over time, correcting the stereotypical thinking will become more automatic and less intentional.")