

Confronting Unconscious Biases in Litigation

By Niki T. Ingram, Esq.
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“Black lives matter,” “equality for women,” and “diversity and inclusion” are all phrases that are thrown about in today’s world. These phrases mean different things to different people, and one can argue that they refer to moral conclusions that some individual or groups espouse. They are generally not phrases that come to mind when talking to the insurance industry, but perhaps they need to be. It is important for insurance carriers, and those who represent them, to realize that the world is a very diverse place and that the appreciation of these differences can be critical when evaluating cases.

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.

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. In the context of this article, the biases that are being discussed are those of racial prejudice.

Several years ago, I had a case where I was asked to provide a settlement analysis for my client, which was a large third-party administrator. I went through the standard process of evaluating the case and considered the age of the plaintiff and her life expectancy, as well as the extent of her injury, the permanency of that injury, the cost of her medical treatment, what future treatment she would need, her ability to work, her loss of earnings and her level of

pain and suffering. My settlement recommendation was neither high, nor low, from my perspective. However, the client dismissed my analysis immediately. What was interesting was that the dismissal was done using terms that could be classified as “buzz phrases,” such as “people like her don’t need that kind of money” and “she’s just not a quality human being. I don’t want her to get a large settlement. Let’s make her sweat it out.” What was the plaintiff like? Where did she live? What made her not a quality human being? I’m not sure of all of the answers to these questions, but she was a middle-aged African-American woman who lived in a working class neighborhood that was primarily African-American and Latino. She had an Associate’s degree and had been working for a number of years when she sustained her injury. There was nothing to outwardly suggest that she was not “a quality human being.” The claims adjuster refused to settle the case, and it dragged on for another year.

The result of the failure to settle this case early was that by the time it did settle, my client paid \$50,000 more than the original settlement recommendation. This case has always resonated with me because it is emblematic of the many reasons why diversity and inclusion should be important to the insurance industry. Was the adjuster in this case a racist? Probably not. Did his unconscious biases about African-Americans impact the value that he placed on the case? Probably. There are many studies that show that affinity biases exist. These biases are those which make us inclined to like or value individuals who are most like ourselves. In recent years, many studies have been conducted on

unconscious biases, and one study done in 2014 showed that, even when people believe that prejudice and discrimination are wrong, they still harbor these biases. (Henneman, 2014). There are a myriad of unconscious biases that exist, and it is important for the defense industry to understand that hiring and retaining diverse personnel helps to reduce the biases of others in the office and that this, along with formalizing training about issues of diversity, leads to increased understanding and respect for individuals who are different than the evaluator.

The initial response from the insurance industry and the defense bar about a case such as my example above may be that this was an individual instance and there was no demonstrated racism. Perhaps a more thoughtful and realistic way to deal with the issues posed might be to focus on the fact that the case could have settled more quickly and more cheaply had the adjuster been able to recognize and appreciate the value of a non-white life. Even if minorities are not well represented in either the insurance industry or the defense bar, there can be training conducted that helps individuals to understand what their unconscious biases are and how to overcome them or compensate for them. While there is certainly a moral argument that the hiring and retention of minorities is important for the defense industry, there is also an economic incentive to implement and strengthen diversity programs and practices.

All cases need to be evaluated as accurately as possible. This starts with the first-line adjuster. These adjusters need to recognize and overcome any inherent biases they

have. As a case proceeds into the litigation process, it is incumbent upon defense counsel to do the same. The recognition that unconscious biases may play into analysis will not only help improve accuracies in setting reserves and settlements, but it is the beginning of change for the industry as a whole.



Niki T. Ingram is a Shareholder, Director of the Workers' Compensation Department, and a member of the Board of Directors at Marshall Dennehey Warner Coleman &

Goggin. A member of the Pennsylvania Bar and the Bar of the United States Supreme Court, she devotes the entirety of her practice to workers' compensation defense, representing self-insureds, insurance companies and employers. Ms. Ingram is a graduate of Smith College and received her law degree from the University of Pennsylvania Law School. Prior to joining Marshall Dennehey, she worked in the public interest sector, for the government, and as in-house counsel. She may be reached at ntingram@mdwcq.com.