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Some Brief Thoughts on Second Order Discrimination and the "Business Case for Diversity"

I was recently (well, sort of recently, at least) on a panel hosted by the Fordham chapter of OutLaws where the topic being discussed was being "Out at Work." I raised a question there—one I've been mulling for quite some time—that my co-panelists and I had no really good answers to, and indeed, had some profoundly contrary intuitions about. Of late, I've been running into the "business case for diversity" thing quite a bit. Which, spoiler on my take: there is a case to be made, but any suggestion that it's the primary or even an important reason to pursue diversity is *deeeeeply* short-sighted, problematic, worrying. A quick warning: this post deals with diversity and discrimination on a 201 or 301 level. Thus, I presume that the "we" referred to here includes the facts that (1) we are talking about a business or organization that values diversity qua diversity; (2) everyone involved is already on board for the project of diversity and anti-discrimination; and (3) we want to achieve the best possible outcomes for all of the people in the organization. So, without further windup. . .

Question: where discrimination might impact the results for a client or advocacy oriented organization, how should *we* deal with the fact using diverse people might create worse results?

Or, in an alternate framing, where someone is at least somewhat comfortable (see e.g., me) with a version of self expression that is less authentic but more conventional, are there contexts where they should suborn their self to the client or mission? How far does that principle extend?

I think it is probably easiest if I speak in the specific here, and then let you, the reader, infer the abstract principle. Let's talk about me, then.

I am a gender-non-conforming, penis-having (penised? penile?), transgender lawyer in a small litigation department (generally, our cases are staffed by 2–4 lawyers). Most days, I am quite comfortable anywhere in the androgynous spaces on the gender spectrum, and don't experience profound dysphoria when dressing a little bit masculine.



See, I can totally be masc!



... but I'm happiest a bit femme-ier most of the time. Incidentally, this was taken on the way to the aforementioned OutLaws panel.

That said, neither do I feel entirely myself in a men's suit, loafers, and a tie (heels and a necklace with a suit, though, and I am at my best). Day-to-day, this seems to create absolutely no problems where I work. Everyone is absolutely wonderful about me being a gender-queirdo and

I get loads of compliments for my biz-queer lewks (to use the technical term).

The problem arises in a number of *outward* facing scenarios. Let's say I'm being considered to be on a small case team and a client is sued in—to pick a random place out of nowhere—North Carolina or Texas. The case goes to trial. And let's say we know for a fact that the judge thinks transgender people are evil or don't exist.

- If the partner (senior, team leader type, for the non-lawyers) on the team is already *diverse* (say, a woman or a person of color), do we need to have a white man on the team to simply get credibility in front of the judge?
- If we assume the judge is discounting things I say, should I take on less responsibility, at least visibly? That is, let's say if I were a white cishet man, I'd be making the opening argument. Should we consider giving that role to a white cishet man on the team, so the judge is more receptive?
- Should I dress in a suit and tie for the duration of the trial, even if doing it every day makes me uncomfortable? Even if I would make this decision on my own (I'm a fucking fierce-ass advocate), is it appropriate for the partner *ask* me to do it?
- Given that we can quantifiably expect a worse result if I work on this case over, say, a equivalently credentialed and competent cishet white man, should my firm just not staff me on cases in Texas and North Carolina?
- Over the long run, should we be worried about the results for diverse folks if work experience goes to non-diverse folks?

So, put in context of the recent strong push on the **business** case for diversity, I worry that that particular argument very much obscures this set of points. That is, if we in the broader world of large organizations allow ourselves to believe that the reason for diversity is really *business*—and good goddesses have I seen some people drinking this kool-aid—do we end up with problematic results? It's taken a long time, but there are some really great signs that the business world has bought in to diversity in a broad and meaningful way.

And while they are points that have obviously been made before, particularly in the race context, I haven't seen much discussion (perhaps because examples are relatively rare) of the problem as presented by a person that straddles multiple identities.* Moreover, what discussion exists does not present anything like an answer.

So, what I'm saying is that I'd love to hear from anyone who has some insight, I guess?

*I think a good similar discussion does exist with regard to "black" hairstyles, but as far as I'm aware, the answers amount to people telling folks of color, "welp. that sucks."