

Uncovering Talent

A New Model of Inclusion in the Legal Workplace

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Overview

- Diversity and Inclusion
- What is Covering?
- Four Axes of Covering
- Survey Results - Everyone Covers at Work
 - **Appearance-based covering**
 - **Affiliation-based covering**
 - **Advocacy-based covering**
 - **Association-based covering**
- The Impact of Covering
- A Model to Uncover Talent in Legal Organizations

Diversity and Inclusion

- Diversity and Inclusion has become largely institutionalized, and many law firms and corporations have dedicated Diversity and Inclusion officers and departments.
- While many organizations tout their **Diversity**, which tends to focus on overall statistics (i.e., numerical representation), **Inclusion** has been more difficult to implement, particularly in law firms and legal departments.

Highest Performing Companies

Harvard
Business
Review

How and Where Diversity
Drives Financial
Performance

McKinsey & Company

More Evidence That Company
Diversity Leads To Better Profits

What Happens When CEOs Take A
Pledge To Improve Diversity And
Inclusion?

"We just completed a two-year research study (Bersin by Deloitte 2015 High Impact Talent Management research) and the results are amazing: among more than 128 different practices we studied, **the talent practices which predict the highest performing companies are all focused on building an Inclusive Talent System.**"

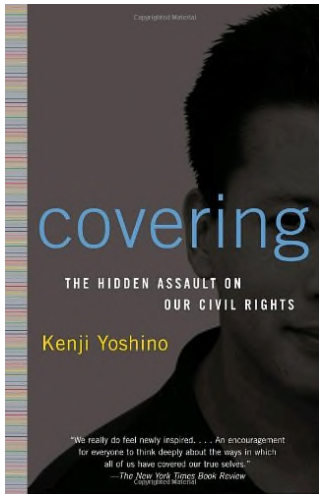
Challenges for Inclusion Programs

- Whereas an organization can improve its diversity simply through recruiting, inclusion depends on development, advancement and retention of those diverse individuals.
- Competing Interests and Human Tendencies:
 - Assimilation (and the innate human desire to belong)
 - vs.
 - Inclusion (and the innate human desire to be unique)
- Kenji Yoshino: “The ideal of inclusion has long been to allow individuals to bring their authentic selves to work. However, most inclusion efforts have not explicitly and rigorously addressed the pressure to conform that prevents individuals from realizing that ideal.”

Challenges for the Legal Profession

- **Management issue**
 - Diversity and inclusion have become important issues for legal departments and law firm management.
- **Recruiting/retention issue**
 - In vying for and keeping the very best attorneys, a professional culture of inclusion can provide an edge in a competitive talent market.
- **Client issue**
 - Corporate leadership and clients are increasingly aware of the importance of fostering diverse and inclusive teams and workplaces, and cultivating diverse teams of outside counsel.

What is Covering?



Covering is a strategy through which an individual downplays a *known* stigmatized identity to blend into the mainstream.

(Yoshino, 2006)

Analyzing “Covering” As A Means To Improving Inclusion To the Benefit of the Organization

- Kenji Yoshino hypothesizes that a model of inclusion that analyzes the pressure to conform might actually be beneficial to historically underrepresented groups.
- Because everyone has an authentic self, a culture of greater authenticity might benefit all individuals in the organization, including those who have traditionally been left out of the inclusion paradigm.
- To test this theory, Kenji’s research draws on the concept of “covering.”

Examples of Covering



What Is Covering?

- In 1963, sociologist Erving Goffman coined the term “covering” to describe how even individuals with known stigmatized identities made a “great effort to keep the stigma from looming large.”⁴
- “Covering” differs from the more familiar term “passing.”
- In 2006, Kenji Yoshino further developed the concept of “covering,” by elaborating on the four axes along which individuals can cover:⁵
 - **Appearance**
 - **Affiliation**
 - **Advocacy**
 - **Association**

⁴ Erving Goffman *Stigma: Notes on the Management of Spoiled Identity* (New York: Simon & Schuster, 1963), 102

⁵ Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2006).

The Four Axes of Covering Are Found in Legal Organizations (Law Firms and Legal Departments)



Appearance-based covering concerns how individuals alter their self-presentation — including grooming, attire, and mannerisms — to blend into the mainstream.



Affiliation-based covering concerns how individuals avoid behaviors widely associated with their identity, often to negate stereotypes about that identity.



Advocacy-based covering concerns how much individuals "stick up for" their group.



Association-based covering concerns how individuals avoid contact with other group members.

Examples of Covering from Case Law

- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
 - Plaintiff was the sole woman out of 88 nominees for partnership. She was not promoted, despite excellent record for generating business.
 - But she was also criticized for being too abrasive, "macho," told to "walk more femininely, talk more femininely, wear make-up and jewelry [and] have [her] hair styled," and to "take a course at charm school."
 - SCOTUS ruled in her favor under Title VII.
 - At PwC, aggressiveness, a desirable trait, was believed to be peculiar to males. If Hopkins lacked it, she would not be promoted; if she displayed it, it would not be acceptable.
 - Plurality opinion: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not."

Examples of Covering from Case Law

- *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y 1981)
 - American Airlines had a policy of not allowing braided hair styles.
 - Plaintiff claimed the policy discriminated against black women.
 - Court upheld the defendant's policy because it applied equally to employees of all races and genders.
- *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992)
 - Male postal worker harassed because coworkers thought he was gay.
 - Plaintiff argued he was being punished for not acting "masculine enough."
 - Sixth Circuit rejected the argument.
 - "Dillon's supposed activities or characteristics simply had no relevance to the workplace, and did not place him in a 'Catch 22.'"

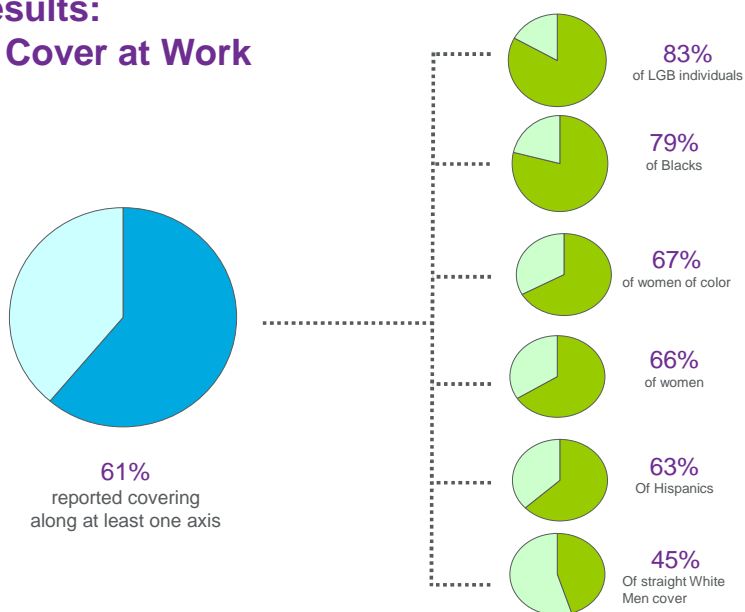
Examples of Covering from Case Law

- *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir.2004).
 - Harrah's Casino required employees to participate in a grooming program to focus on improving their personal appearance.
 - Harrah's required women employees to wear makeup, including foundation, blush, mascara and lipstick. Male beverage servers were prohibited from wearing makeup.
 - But, makeup made Darlene Jespersen "feel sick, degraded, exposed, and violated." So she worked for over a decade without it.
 - When, as part of an overall image program, Harrah's enforced its makeup rules, Jespersen was fired, and she sued under Title VII.
 - Appellate court rejected discrimination claim, finding that she had been fired for appearance and behavior, not gender.

Studying The Effect of Covering

- **The Survey:** To measure the prevalence of covering within corporate cultures, a survey was distributed to employees in organizations spanning ten different industries.
- The 3,129 respondents included a mix of ages, genders, races/ethnicities, and orientations. The respondents also came from different levels of seniority within their organizations.
- The results may surprise you . . .

The Results: We Do Cover at Work







Covering at Work (continued)

Black respondents reported the highest degree of covering.

All individuals worked for companies that had inclusion programs pertaining to race and ethnicity.

Nevertheless, almost all Black respondents reported pressure to downplay their identities.

Race/ethnicity-based covering (Black)	
Appearance 	"I went through a period two years ago where I had a bad reaction to the chemical straightener I used in my hair and had to stop. It was so uncomfortable wearing my natural hair to work that I resorted to wearing weaves, which were very costly and did more damage to my hair. However, I felt that the weave was more acceptable than wearing my natural hair. I also hated that when I wore my natural hair it always seems to be the subject of conversation as if that single feature defined who I am as a person."
Affiliation 	"[I] remov[e] myself from discussions involving mainstream news figures of the day (Susan Rice, Tiger Woods, Barack Obama)."
Advocacy 	"I definitely avoid being too involved in events at work targeted to Blacks because too often when we speak up, we are seen as 'having an attitude' or having a chip on our shoulders. I even go to the point of making it very clear that I am from the Caribbean so that [I] am not associated with the negative stereotypes I hear about Blacks and sometimes to make the majority feel more comfortable around me."
Association 	"I am very close to the two other African American attorneys here at the firm but I work very hard not to exclusively talk to them at firm events or to enter an event together."

Covering at Work (continued)





- None of the Black respondents complained of exclusion from a particular work situation, so the issue is not formal inclusion. Those who covered perceived that they were expected to manage aspects of their identity.
- As one individual reported, covering “takes energy that I would rather give to my job.”
- Understanding group-based covering can aid an organization concerned about its inclusion efforts.
- Asking the right questions about the perceived pressure to conform can provide organizations with fresh insights about how to improve the organization’s inclusiveness.

Covering at Work (continued)

45% of straight white men reported covering at work on at least one dimension.

While Affinity and Employee Resource Groups develop bonding among groups, they also lead to silos.

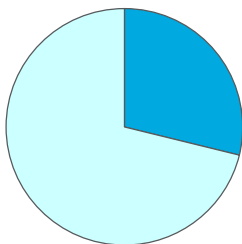
The Uncovering Talent model breaks across those silos by showing how all groups cover along the four axes in the charts to follow.

Covering by Straight White Men	
Appearance 	"I had a serious illness and hid it from most out of fear of being ostracized. "
Affiliation 	"I requested less time off for the birth of a child than was allowed under company policy because I felt discouraged from doing so as a male. "
Advocacy 	"When comments are made about blue collar or working class [individuals] and I don't correct those misrepresentations, I feel like I am not being proud of who I am and where I came from."
Association 	"I [do] not associate only with white males. "

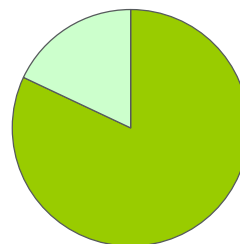
Appearance-based covering



Appearance-based covering



29%
of respondents said they engaged in appearance-based covering

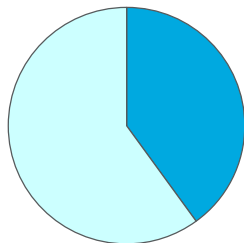


82%
of those who covered believed appearance-based covering was "somewhat" to "extremely" important to their long-term professional advancement

Appearance-based covering

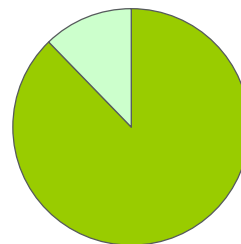
Race/ethnicity (Asian)	"To overcome for Asian stereotype[s], I do my best to speak up, speak clearly, and carry myself in a confident manner."
Gender (female)	"[I] wear clothes to appear more masculine, model male behavior to break down barriers to success, go to places that men like to go to be part of my group at work, [and] downplay my interest in feminine things."
Sexual orientation	"I have thought to myself — 'I can't wear that to work; it's too gay.'"
Disability	"I don't use my cane if I can avoid it."
Military status	"[I do] not openly display my military status unless asked about it."
Socioeconomic background	"I also grew up very poor and for whatever reason felt that people would know that by looking at me. For years, I would make sure my clothes were name brand (even if they were bought at a discount) just so that I could feel like I belonged."

Affiliation-based covering



40%

of respondents said they engaged in affiliation-based covering.



79%

believed affiliation-based covering was "somewhat" to "extremely" important to their long-term professional advancement.

Affiliation-based covering

Race/ethnicity (Hispanic)	"I try to speak without my hands and lower my voice so as not to appear as 'too Hispanic.'"
Gender (female)	"I was coached to not mention family commitments (including daycare pickup, for which I leave half an hour early, but check in remotely at night) in conversations with executive management, because the individual frowns on flexible work arrangements."
Sexual orientation	"[I have] no pictures of my partner in the office, [and leave] off personal pronouns in discussion."
Age (younger)	"I am hesitant about taking time off during the day to attend doctors' appointments or taking extended PTO. I feel that being a younger practitioner, I have not earned that type of flexibility."
Age (older)	"I am worried that my age will block me from promotion since I am older than many people in my position so I have been careful not to mention my age or anything that might date me."
Socioeconomic background	"I didn't always volunteer the information that I grew up very poor and that I was the first to go to college. It seemed like I wouldn't be accepted because I always assumed everyone I worked with grew up middle or upper class."

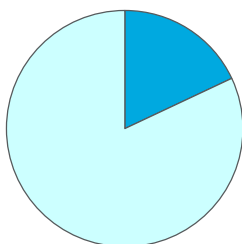
Advocacy-based covering



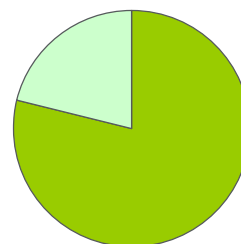
Advocacy-based covering

Race/ethnicity (Asian)	"Even though I am of Chinese descent, I would never correct people if they make jokes or comments about Asian stereotypes."
Gender	"I try not to make gender an issue at all. I never suggest it is an issue and do not bring up gender bias as a factor when considering applicants, etc., even if it might be present."
Sexual orientation	"I didn't feel I could protest when the person put in charge of diversity for our group was in fact an extremely vocal homophobe."
Citizenship	"Having a green card and not being a full citizen, I do not like to speak about anything political. The risk of hearing 'if you don't like it here, just leave' is always a fear."
Disability	"I would very much like to be an advocate for disability inclusion and improvements . . . but I have been reluctant to, because I'm afraid it will have [a] negative impact on my career."
Political affiliation	"It is difficult during an election year to not offend anyone who may be a Republican or a Democrat. And as such, you tend to downplay your own beliefs."

Association-based covering



18%
of respondents said they engaged in association-based covering



79%
believed association-based covering was "somewhat" to "extremely" important to their long-term professional advancement.

Association-based covering

Race/ethnicity (Hispanic)	"In my office, the few Latinos employed are predominantly from the mail room. I try to avoid them especially when around some of my attorney cohorts. I fear that I will be unfairly judged and castigated by being given menial or low-level assignments."
Gender	"I am extremely sensitive to whether I am viewed as a sponsor of women versus a sponsor of people. I recognize that women need sponsors and that it is important for me to act as a sponsor to women, but I am also sensitive to whether my efforts in that regard will be perceived as 'favoritism.'"
Sexual orientation	"I never bring a +1 to work events. I also try to avoid mentoring or sponsoring only people of color or LGBT."
Mental health	"While I privately associate and support others with depression, I avoid doing so publicly. When asked why I am a member of the [disability-focused] BRG, I say it is because I believe in equality for all . . . and do not mention it is personal."
Physical health	"I don't associate with cancer groups, because I don't want to draw attention to my medical status, disability, or flexible arrangements. People tend to look at me like I'm dying when they find out I have cancer, they avoid giving me longer term or higher-profile projects. Mostly I think they do this to be nice, because they assume I can't handle it."
Teetotalism	"Years ago, I was a social drinker but that's not a part of my life any more. The lead manager in our group often invites all of us to join him in an after-work drink. I joined the group a couple of times and was ribbed loudly for not ordering an alcoholic beverage. Now when the invitation goes out to our team, I always give an excuse not to join them. I think some people have begun to think I'm standoffish."

Each of Us Has Likely Experienced or Observed These Behaviors in Legal Workplaces



Appearance-based - traditional law firm and corporate culture tends to emphasize conforming appearance (grooming, hairstyles) and dress, and a desire to appear similar to those in position of management or power.



Affiliation-based - working mothers tend to suppress time and family needs to conform to hours-focused law firm culture (thereby internalizing pressure and creating resentment).



Advocacy-based - Ironically, while lawyers are strong advocates, the pressure to conform and cover often suppresses their personal advocacy of their ethnic, gender, sexual orientation, political or socioeconomic identities.



Association-based - minority attorneys may tend to limit interactions or speaking in foreign languages (particularly with staff) in the workplace, or discussing their outside-the-workplace activities that are ethnic, gender-focused or that otherwise identify the participant with a particular group.

Understanding The Impact of Covering

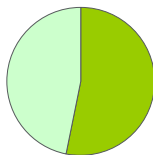
- Impact of covering is not trivial - for each axis, the percentage of respondents who stated that the practice of covering was "somewhat" to "extremely" detrimental to their sense of self was high



- The Survey next asked individuals how perceived expectations or the pressure to cover affected their sense of opportunity within the organization and their commitment to their organizations.

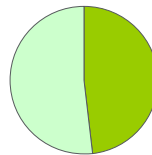
Leadership and Covering

53%
of respondents stated that their
leaders (implicitly or expressly)
expect employees to cover



Culture and Covering

48%
of respondents felt that their
organization had a cultural expectation
that employees should cover



In law firms and corporate law departments, these leadership-based and cultural expectations are more subtly emphasized through conformity-emphasizing "professional attire," "act like a professional" and "don't rock the boat" messaging.

Reversing the Impact of Covering in the Legal Profession

- **Kenji Yoshino:** “The pressure to cover is distinct from discrimination under governing legal standards. Organizations should be interested in covering not because they are ‘playing defense’ against lawsuits, but because they are ‘playing offense’ to create a more inclusive culture over and above legal compliance.
 - Job satisfaction and retention - creating a more authentic workforce is an imperative for retaining legal talent within firms and law depts.
 - Productivity - a more authentic attorney, freed from internalized pressures to cover, spends more of his/her time focused on his/her work.
 - Recruitment - organizational reputations are more public and spread more quickly today than 15-20 years ago; inclusive workplaces attract better talent.
 - Promotion/leadership effectiveness - allowing more authenticity will aid the organization to uncover its most talented and productive attorneys, and groom them to lead the organization's future.

Inclusive Leadership

- "Another important point to consider is that highly skeptical lawyers are likely to follow leaders only if they are credible—and credibility requires not only good legal skills but also authenticity. Authentic leadership requires a level of openness, humility and vulnerability that is often uncomfortable for lawyers to display on the job. So lawyers who are not open to the process of growth and do not want to develop new skills are unlikely to be good candidates for leadership development, and they probably should not be targeted for leadership positions."¹

¹ Bradley, Kathleen, LEADERSHIP DEVELOPMENT: Should Your Firm Invest In Growing Its Leaders?, Sept/Oct 2010, available at http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is5_pg38.html

Authentic Leadership

"Women lawyers rightfully place a high value on authentic leadership. They struggle with authenticity because they frequently face situations where expectations of them as women and as leaders are in conflict. Rather than fretting over how to meet others' contradictory expectations or avoiding leadership altogether, women should expand their leadership skills, use styles that match objectives, and focus on their greater purpose as leaders."¹

¹ Women Leaders and the Dilemma of Authenticity, Ida Abbott, Management Solutions © Issue 34

A Model to Uncover Talent in Legal Organizations

Professor Yoshino proposes a model for Uncovering Talent to help organizations, law firms and legal departments, close the gap between values and practices. The model illustrates how such organizations (starting with, and led by, *its leaders*) can begin to “uncover talent,” and consists of four phases.

- **Reflect** - law firm and corporate law department leaders should engage in organizational self-reflection to identify covering within their own organizations.
- **Diagnose** - use surveys and tools to identify the breadth and depth of covering, and which groups it affects the most in the organization.
- **Analyze** - law firm and corporate law department leaders can compare the covering taking place within their organization to their corporate values and determine if what areas should be addressed.
- **Initiate** - law firm and corporate law department leaders should identify solutions and implement them.

Uncovering Talent in your Attorneys

- Seventeen percent of the Survey's respondents stated that they have “uncovered in a way that has led to success” both for them and for their organization.
- One respondent stated, “The energy I put into trying to behave different[ly] than who I am drained my energy. Once I decided to bring my whole self to work, it was liberating and I became a lot more productive and successful.”
- Another responded, “If you can't be your ‘whole self’ at work, you're not at your best. A company that allows people to be themselves and judges them only (on) the quality of work they do will be far ahead in the long run.”

Recommendations for integrating inclusion into the workforce

- ✓ Reinforce the tone at the top
- ✓ Offer personal and professional training seminars
- ✓ Leverage the onboarding and integration processes
- ✓ Start a formal mentorship or sponsorship program
- ✓ Promote work-life balance
- ✓ Conduct climate or pulse surveys

Questions?



Thank you

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