

Invite the Previously
Uninvited

By Jessica R. Vartanian,
Heather Renée Adams,
Antonio Castro,
and Vijay Toke

A preferred counsel list that fails to include minority- and women-owned firms is poor for business and out of sync with modern times.

Counsel Lists: How They Limit Minority- and Women-Owned Law Firms' Access to Legal Work

Preferred counsel lists came into widespread use in the 1990s when minorities and women were markedly underrepresented in the legal profession. In compiling these lists, corporations actively and purposefully limit the

number of approved law firms on the lists maintained by their law departments. The process involved in creating these lists is often referred to as “convergence.” Then, as now, preferred counsel lists allowed companies to achieve more favorable terms from outside counsel by forming consolidated networks. In recent years, corporate law departments started using national contracts for certain types of work. Before preferred counsel lists and national contracts became predominant, insurance companies used panel counsel lists. Insurance companies often have retained these lists for years,

and they frequently misidentify the law firms of lawyers, many of whom have long left those firms. Continuing to use the law firms on these lists, and generating new lists, has unfortunately perpetuated historic inequality and caused the companies using the lists to miss out on the business advantages of having more diverse counsel. By “diverse counsel” or “diverse firms” the authors mean minority- or women-owned law firms.

More diverse viewpoints on a legal team increase the likelihood that members will generate innovative ideas and solutions. Retaining minority- and

■ Jessica R. Vartanian practices management-side employment law and commercial litigation with Bush Seyferth & Paige in Troy, Michigan. Heather Renée Adams is an attorney with Daley Mohan Groble PC in Chicago, where she specializes in management-side labor and employment and civil litigation. With more than 20 years of experience as a commercial and business litigator, Antonio C. Castro is chair of the complex commercial litigation group of Zumpano Castro LLC in Coral Gables, Florida. Vijay Toke of Cobalt Law PC in Berkeley, California, is an intellectual property litigator with a focus on trademark and copyright litigation.



women-owned law firms introduces a diversified pool of leading attorneys who are able to respond to legal matters with ingenuity and insight.

This article proposes methods that will permit companies to achieve the benefits associated with having a preferred network while at the same time increasing the benefits that minority- and women-owned law firms can offer to these clients.

Preferred Counsel Lists

Preferred counsel lists have been in use for more than 20 years. Some credit DuPont as among the first large American companies to consolidate its list of outside counsel when, in the early 1990s, it lowered the number of law firms with which it worked from 350 to 35. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *Fordham L. Rev.* 2067, 2085 (2010).

Companies have created preferred counsel lists not only to cut costs, but also to build relationships with subject-matter experts relevant to their industries in their most important geographical areas. By consolidating work across fewer firms, companies deepen their counsel's familiarity with their issues and achieve more consistency in their representation.

Prevalence

In a 2005 Martindale-Hubbell survey of in-house counsel, approximately 17 percent of surveyed companies maintained a formal procurement process for selecting law firms to place on their preferred counsel list, and approximately 63 percent reported having an informal "go to" list of approved lawyers. Martindale-Hubbell, *State of the Profession Report: How Corporations Identify, Evaluate and Select Outside Counsel* 9 (2005). This suggests that as many as four of five companies maintain some sort of preferred network of outside counsel.

While most American companies develop their preferred counsel lists informally, a 2013 survey of in-house counsel across industries in Texas and Florida found that 27 percent of the companies surveyed use formal procedures. Tex. Young Lawyers Ass'n & Fla. Bar, Young Lawyers Div., *From the Inside Out: In-House Counsel's Advice for Young Law-*

yers 4 (2013). Whatever process that a company uses, all too often, minority-owned and women-owned law firms generally are not invited to submit proposals or credentials.

Composition and Convergence

The law firms on most preferred counsel lists are typically identified from a corporation's long-standing legal group. Because diversity has historically been poor within law firms, the law firms that compose these preferred networks are disproportionately, and many times exclusively, owned by white men—that is, they lack the business advantages of having more diverse representation within their ranks. The longer a company has maintained a preferred counsel list, the more likely that is to be the case. The "convergence" phenomenon that drove companies to consolidate their legal work and create lists in the first place has tended to heighten this predominantly white male ownership.

This "convergence" phenomenon is becoming increasingly prevalent and exclusive. In a 2010 survey by the legal consulting firm Altman Weil, 32 percent of corporate law departments reported that they planned to decrease the number of firms on their preferred counsel lists within a year. In that same survey, the majority of the corporate law departments that maintained preferred counsel lists reported having 10 or fewer firms on their lists and spending a staggering 91 percent of their total legal fees on work that preferred counsel performed. Altman Weil, *Chief Legal Officer Survey* 6–7 (2010).

These procurement and convergence processes have created a vicious cycle that has made it difficult, if not impossible, for minority- and women-owned firms to break into preferred networks; companies often do not include diversity as a weighted factor in selecting outside counsel. The International Litigation Management Association reported in a May 2013 article, "How to Overhaul Your Panel Counsel Network," for example, that although 22 separate categories of information were sought from outside counsel in the selection process, neither diversity nor diversity initiatives were among them. Similarly, in the 2005 Martindale-Hubbell survey discussed above, only 4–5 percent

of participants stated that diversity was an extremely important factor in selecting firms for their preferred counsel lists. Martindale-Hubbell, *State of the Profession Report: How Corporations Identify, Evaluate and Select Outside Counsel* 1, 14 (2005). By effectively excluding diverse law firms from their preferred counsel lists, corporations are both depriving themselves

■ ■ ■ ■ ■
Minority- and women-
owned firms, which
have grown steadily in
number and size over the
past several decades,
are virtually absent from
preferred counsel lists.

of outstanding legal representation and acting against their diversity and inclusion initiatives.

Preferred Networks Fuel Underrepresentation

Preferred counsel lists are predominantly comprised of large law firms for which ownership is primarily white and male. These "majority" or "traditional" firms generally have hiring practices that have left minority and women attorneys underrepresented compared to their numbers in the population as a whole. Preferred counsel lists thus, in effect, maintain the status quo, excluding many of the top minority and women lawyers in minority- and women-owned law firms from opportunities to represent the companies that keep these lists.

When they select firms for preferred networks, companies commonly require a history with the company forming the network and demonstrated value to it, thereby excluding newcomers from the competitive process. The forged relationships between those companies and their preferred predominantly white male counsel become deeply entrenched. It

becomes nearly impossible for minority- and women-owned firms to demonstrate their unique advantages to these law departments.

Some large companies reason that they need law firms with a substantial geographic presence to manage their legal needs. Since many minority- and women-owned law firms are local or regional, these

In a survey of 200

law firms, highly diverse law firms were found to generate, on average, “more than \$100,000 of additional profit per partner than their non-diverse counterparts.”

firms are not even informed about opportunities to submit proposals. Often, minority- and women-owned law firms first learn about a preferred counsel program when they are told to transfer their work to a national or a nondiverse firm.

Minority- and women-owned firms, which have grown steadily in number and size over the past several decades, are virtually absent from preferred counsel lists. The lists operate as an unintended barrier to access to work from major corporations. Indeed, a common response from a corporate legal department to a request for work by a minority- or women-owned law firm is that the company has a policy of only using firms on its preferred counsel list. Firms outside the preferred network are excluded from participating in the “Request for Proposal” (RFP) process, and thereby unable to compete for business.

Preferred counsel lists thus tend to perpetuate the use of large, majority-owned law firms to handle most of a company’s legal work. They make minority- and women-owned law firms have to fight “built-in headwinds” to pursue large matters. The process is concerning because it operates to “freeze” or “lock” historical

inequality. Corporations with preferred counsel lists would be well advised to use those lists in ways that do not freeze any groups out of opportunities. If such a freeze did occur in the general employment arena, as opposed to the market for outside counsel, the practice could be challenged. See *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 657 (5th Cir. 1976) (holding that under Title VII, an employer’s hiring procedures must be both fair in form and fair in operation). Indeed, on the topic of tradition with a discriminatory effect, Justice Posner in *Baskin v. Bogan*, recently stated, “Tradition *per se* therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition.” *Baskin v. Bogan*, 2014 U.S. App. Lexis 17294, at *55 (7th Cir. 2014).

In response to a recent survey of members conducted by the National Association of Minority and Women Owned Law Firms (NAMWOLF), 50 percent of the respondents indicated that they experienced a reassignment of existing work to a large traditional firm due to the firm’s “preferred” status. Over 50 percent of responding NAMWOLF firms reported that they neither received new assignments nor had received invitations to bid on work afterward. Tellingly, fewer than 10 percent of respondents reported being advised that they were denied work because of performance issues. NAMWOLF members also reported numerous anecdotal situations in which they provided successful, efficient, and cost-effective representation to a client, only (1) to have the work moved to a more expensive firm on a preferred list; (2) to learn that junior associates at preferred firms now handled matters that the diverse firms’ senior lawyers had previously handled; or (3) to have a new insurance carrier insist that a client use its panel counsel, despite successful work and vast corporate knowledge on the part of the diverse firm that had previously handled work for the client.

As Alan Bryan, Walmart’s associate general counsel for legal administration and external relations and outside counsel management, put it:

Despite collaborative efforts of several companies through the Inclusion Initiative, minority and women owned law

firms are still often overlooked by corporate legal departments. That is surprising. There is a clear business benefit to utilizing women or minority owned law firms. These firms often offer the most cost-effective, highly-credentialed, and talented lawyers in a jurisdiction. Plus, they deliver extraordinary results. Women and minority owned law firms have been part of Walmart’s approved counsel list for several years and they will continue to perform work for the company in the foreseeable future.

The Business Case for Supplier Diversity Programs

Corporations have several compelling reasons to change outside counsel hiring practices.

Business Imperative

Many corporations struggle to monetize the services of in-house counsel and view these legal departments as cost centers. Thus, to some corporations, investing in outside counsel supplier diversity programs seems unintuitive and to waste resources. However, there is a powerful business case for investing in supplier diversity initiatives.

Satisfying supplier diversity objectives is not merely the right thing to do, it is a business imperative. Many corporations have already made the business case for diversity internally and have extended this to develop comprehensive supplier diversity policies as cornerstones of their businesses. Moreover, the U.S. government and many corporate customers require that corporations procure goods and services from a diverse supplier group, and this includes legal services procurement.

Profitability

On the profit-generating side of the equation, a number of studies, taken together, show that both racial and gender diversity are associated with increased sales revenue, more customers, greater market share, and high relative profits for companies. L. Diaz & P. Dunican, Jr., *Ending the Revolving Door Syndrome in Law*, 41 Seton Hall L. Rev. 947, 958–59 (2011). In a 2011 comparison study, Fortune 500 companies with the most women on their boards “outperformed those with the least by 66 percent

in return on invested capital, 42 percent in return on sales and 53 percent in return on equity.” Sheryl L. Axelrod, *Disregard Diversity as Your Financial Peril: Diversity as a Financial Competitive Advantage*, GPSolo eReport, Vol. 3, No. 4 (A.B.A., Nov. 2013) (citing Nancy M. Carter & Harvey M. Wagner, *The Bottom Line: Corporate Performance and Women’s Representation on Boards*, Catalyst, Inc. (2004–2008)). Another study revealed that “on average, the most racially diverse companies bring in nearly 15 times more revenue than the least racially diverse.” *Id.* (citing Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, American Sociological Review (2009)). That study shows that “for every percentage increase in racial or gender diversity up to that represented in the relevant population, sales revenues increase approximately 9 and 3 percent respectively.” *Id.*

These benefits of diversity apply to law firms as well. In a survey of 200 law firms, highly diverse law firms were found to generate, on average, “more than \$100,000 of additional profit per partner than their non-diverse counterparts.” *Id.* (citing Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, The Journal of the Legal Profession (2009)). Diverse law firms are more profitable because diverse groups perform better. *Id.* (citing Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (2007)). Without representation by a robust number of minority- and women-owned law firms, companies retaining firms that have poor diversity records miss out on the enhanced performance that more diverse counsel teams bring.

Expertise

Large corporations spend vast sums of money on legal services. Unfortunately, in-house departments often disproportionately tap their former majority-owned law firms to serve as outside counsel. Minority- and women-owned law firms are often specialists in a particular practice and highly regarded in their respective fields, but they are not invited to submit bids for germane work. Overlooking expertise in favor of the “tried-and-true,” although expedi-

ent in the short term, can, in the long term, result in exorbitant legal fees and costly mistakes.

The criteria used to develop preferred counsel lists would likely lead to the hiring of diverse law firms, if they had the opportunity to be considered. For high-stakes matters, in-house counsel place paramount importance on subject-matter expertise and client service, to the exclusion of geography. This suggests that diverse firms with highly specialized practices, if offered the opportunity to apply, could be viable candidates for inclusion on a company’s preferred counsel list. For low-stakes matters, in-house counsel rank client service, lawyer expertise, and cost as about equally important, with geography playing a significant factor. Minority- and women-owned firms tend to be local or regional, making them strong contenders for local or regional work.

Rewards of Sustained Diversity

Minority- and women-owned law firms have a competitive advantage when it comes to developing and retaining diverse senior attorneys. Evidence indicates that minority and women junior associates experience a higher attrition rate relative to their nondiverse counterparts. Diaz & Dunican, *supra*, at 948–49. Majority-owned law firms often do not retain their minority and women attorney hires; rather, “they simply change heads.” Elizabeth Chambliss, A.B.A. Comm’n on Racial & Ethnic Diversity in the Prof., *Miles to Go 2000: Progress of Minorities in the Legal Profession* 6 (2000); Diaz & Dunican, *supra*, at 948–49. Retention disparities at majority-owned law firms result in the loss of human capital and institutional knowledge regarding the corporate client, which can detrimentally affect long-standing attorney-client relationships.

Supplier diversity programs focused on staffing requirements generally neither address the dearth of promotion and mentorship opportunities for minorities and women at majority-owned firms, nor influence the diversity of these firms’ management teams. Thus, majority-owned firms endeavoring to meet a corporate client’s diversity requirements end up hiring from a less experienced pool of attorneys.

Proposed Solutions

When firms that are vying for corporate work provide comparable services, corporations should use diversity as the “qualitative differentiator” in retaining outside counsel. Diaz & Dunican, *supra*, at 956. This will not only result in growth opportunities for minority- and women-owned firms, but also instigate an impor-

Legal departments

must be prepared to terminate relationships with outside firms that fail to achieve the diversity goals in their outside counsel guidelines.

tant change in the diversity initiatives of majority-owned firms competing for the same work.

Including diverse firms in preferred counsel lists offers experienced and pedigreed attorneys who are ready, willing, and able to do the work. Increasing retention of diverse firms will ensure that legal departments realize *all* of their performance expectations for outside counsel, including diversity and inclusion goals.

Implement “Rooney Rule” Policies

When soliciting outside attorneys to perform legal services, in-house counsel and procurement professionals should employ a Rooney-like rule. The “Rooney Rule” is named after the Pittsburgh Steelers’ chairman, Dan Rooney, who staunchly advocates that every NFL team interview at least one minority candidate for every open coach and general manager position. The rule’s goal is to introduce black candidates to white owners and general managers “who otherwise were reticent about, or even feared, the hiring of black men to be the face of their franchise.” Cal. Minority Counsel Program, *Diversity Business Matters: 2011 Corporate Programs Support-*

ing *Business for Diverse Outside Counsel* 5 (Mar. 2011). Since the rule's introduction in 2003, 17 NFL teams have had either African-American or Latino head coaches or general managers. In the 80 years before teams began to adopt the rule, only seven coaches of color had ever been hired. Mike Freeman, *The Rooney Rule 10 Years Later: It's Worked... Usually*,

■ ■ ■ ■ ■
Segmenting legal services also makes more opportunities accessible to minority- and women-owned law firms, which are generally smaller than their larger, less diverse law firm counterparts.

and *We Still Need It*, The Bleacher Report (Oct. 24, 2013), <http://bleacherreport.com/articles/1822988-the-rooney-rule-10-years-later-its-worked-usually-and-we-still-need-it> (last visited June 11, 2015).

This would ensure that minority- and women-owned law firms that have the requisite practice-area expertise are included in the competitive bidding process. This also would encourage legal departments that maintain preferred counsel lists that may exclude minority- and women-owned law firms, perhaps inadvertently, to reevaluate their established ways of doing business and to extend the bidding process beyond their "go-to" networks of traditional law firms, connect with previously overlooked diverse law firms, and revise their preferred counsel lists to include minority- and women-owned firms meeting the qualifying criteria.

Corporations should partner with organizations such as NAMWOLF to solicit bids from diverse firms. Qualified minority- and women-owned firms definitely do exist, and the belief that they do not must have a basis in bad information or a failure

to understand the consequences to a business of "doing business as usual," mentioned above.

NAMWOLF membership solely consists of minority- and women-owned law firms that are vetted according to a rigorous set of standards including financial responsibility, excellence in legal practice, size of client base, favorable client references, Martindale-Hubbell peer review rating, size of firm, and liability insurance. Partnering with trade associations takes the guesswork out of identifying talent. In addition, using minority- and women-owned law firms aligns with company supplier diversity initiatives.

Revise or Establish Supplier Diversity Goals

In-house legal departments must challenge themselves to establish supplier diversity goals that dedicate a percentage of their procurement budget for legal services to the retention of minority- and women-owned law firms. For instance, in 2011, Pacific Gas and Electric Company directed 22.4 percent of its outside counsel budget to minority-, women-, disabled-, and veteran-owned law firms. Pacific Gas also recognized 2011 as one of its most successful years in terms of favorable case resolutions. Cal. Minority Counsel Program, *Diversity Business Matters*, *supra*, at 49. The Pacific Gas experience demonstrates that corporations can direct a meaningful amount of work to diverse law firms and enhance the quality of the representation that they receive.

Elevate Retaining Minority- and Women-Owned Law Firms to an In-House Counsel Priority

It is imperative that in-house counsel's hiring of minority- and women-owned law firms be tied to the in-house lawyers' performance reviews and ultimately to their compensation. In-house attorneys should be rated, in part, according to a "diversity performance factor," which would measure satisfaction of the legal department's supplier diversity goal. When greater inclusion of minority businesses is part of an in-house counsel's compensation package, it becomes "a greater priority." Diversity MBA, *Supplier Diversity Programs and Practices Overview* (Oct. 12,

2009), <http://diversitymbamagazine.com/supplier-diversity-programs-and-practices> (last visited June 11, 2015).

Legal departments can enhance their supplier diversity efforts in a number of ways. For instance, in-house supplier diversity protocols should require that decisions to transfer work from minority- or woman-owned firms to majority-owned firm first must be substantiated according to an objective evaluation matrix. This will ensure that work is not redirected simply to accommodate in-house counsel's predisposition toward former familiar firms or a personal network. Decisions to make first-time awards of work to majority-owned firms should be similarly evaluated.

Moreover, law firms that choose to ignore their corporate clients' diversity mandates should experience some tangible consequences. Legal departments must be prepared to terminate relationships with outside firms that fail to achieve the diversity goals in their outside counsel guidelines. Diaz & Dunican, *supra*, at 953. In 2011, the Institute for Inclusion in the Legal Profession (IILP) conducted a survey and found that nearly 90 percent of surveyed in-house counsel respondents indicated that they had not changed any law firm relationships because the firms that the companies hired had met the companies' diversity objectives poorly. Moreover, of the roughly 10 percent of in-house counsel who had changed their relationships with law firms based on poor diversity objectives performance, only 16.6 percent terminated the attorney-client relationship entirely with the underperforming firms.

Unbundle Large Legal Services Contracts

In-house departments should consider unbundling legal services rather than bundling them into one RFP. Unbundling legal services can lead to (1) optimized service delivery; (2) retention of experienced specialists; and (3) cost savings. By "unbundling" the authors mean that corporations would select one or several discrete lawyering tasks, which are traditionally contained in a full-service package, and direct the work to lawyers that have the most efficient service delivery structure and experience for the assigned

task. Unbundling provides the greatest number of opportunities to the greatest number of firms to do work. Segmenting legal services also makes more opportunities accessible to minority- and women-owned law firms, which are generally smaller than their larger, less diverse law firm counterparts.

Unbundling work allows minority- and women-owned law firms to bid on matters in their specialty areas and to focus on what they do best. It opens up opportunities for diverse firms to work together to form virtual firms in specific practice areas to respond to a client's need for national contacts or to pair specialized diverse law firms with traditional full service law firms to effectively resolve a matter. Unbundling services can also result in overall cost savings to corporations. Indeed, directing narrowly defined legal tasks to specialized firms not only optimizes service delivery but also eliminates the need for high retainers and increases a client's control over the amount of work performed by retained firms.

Conclusion

Just as an exclusive private club with arcane restrictions is poor for business and out of sync with the times, a preferred counsel list that fails to include minority- and women-owned firms is poor for business and out of sync with modern times. The problem for diverse firms is that they are not invited to the club, which precludes them from being retained as outside counsel. Remedying the historical exclusion of diverse firms caused by the proliferation of preferred networks requires making diversity a priority in the procurement process.

The following individuals also collaborated upon, and should be credited for, their contributions to this article:

Editors: Past Chair of the NAMWOLF Board of Directors Emery Harlan, Gonzalez Saggio & Harlan, NAMWOLF Chief Executive Officer Joel Stern, and NAMWOLF Advocacy Committee Co-Chairs Martin P. Greene, Greene and Letts, and Sheryl L. Axelrod, The Axelrod Firm, PC

Statistics Data Researchers: Linda Joseph of Schröder, Joseph & Associates and Sarah Perez of Perez & Morris.

