THE POWER OF PARTNERING

Guidelines for Diverse Collaborations Among NAMWOLF Law Firms and Majority Law Firms

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ABOUT THE AUTHORS

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I. A PROBLEM IN SEARCH OF A SOLUTION

For many corporations, diversifying outside counsel teams has become a priority. That goal, however, quickly meets up with the reality that to obtain the services of senior women and minority lawyers, companies will need to do more than hire Big Law firms. Big Law has not yielded the number of experienced diverse lawyers that corporations are looking for – and will not anytime soon. Indeed, if firms continue to grow their women and minority equity partnership ranks at the current (optimistic) rate of 1% a year, it will take until 2045 for firms to reach gender parity at the equity level – and longer to reach parity based on race and national origin.[1]

One potential solution is increased use of NAMWOLF firms, a number of which are led and largely staffed by lawyers who were formerly Big Law partners, Assistant U.S. Attorneys, federal court clerks, and high-level members of corporate law departments. Their credentials, experience, judgment and ability certainly rival partners in majority firms.[2]

At the same time, we are aware that NAMWOLF firms are not always top of mind when any given corporation considers outside counsel for a major matter. The reasons vary. In some instances, corporations have found it difficult to identify and vet appropriate firms. There is a reluctance to try out firms that are not known, especially in an era when even small matters are scrutinized for the quality of the result. Inside counsel are evaluated on the basis of results. When a matter is handled by a well-known large firm, and it does not go as well as desired, it is safer to be able to say, "We hired a big firm." Some companies hold the view that a large matter needs lots of lawyers, and necessarily send the client to a large firm.

We offer a solution that takes account of these competing concerns: to use collaborations of NAMWOLF firms and majority owned firms to provide legal services on major client matters. By "major matters," we mean matters that involve sophisticated legal and business strategies, a range of complex issues or large-scale fact finding, coordination of many moving pieces, and more than a few lawyers to complete the work.

The benefits to such collaborations can be substantial. *First* – and as detailed in Section II below – it has become well recognized that diversity imparts value to the results of business activities, including legal matters. Indeed, in this day and age– with women making up roughly 35% of the legal profession and lawyers of color making up some 15% of the profession[3] – ignoring diversity means excising a large chunk of legal talent from client matters. *Second*, while diversity within the legal profession as a whole has increased, the nation's largest firms have overall struggled to advance a meaningful number of women and minority lawyers into lead positions. *Third*, while NAMWOLF firms are clearly diverse, the size of even a large NAMWOLF firm pales compared to AmLaw 100 or 200 firms, which many clients view as the greatest impediment to retaining a NAMWOLF firm on large litigation and corporate matters.

These *Guidelines*, including a "Checklist for Collaboration Among NAMWOLF Firms and Majority Firms," provide models and procedures for the most effective working arrangements. By using the approaches described in this paper, clients will have the advantages of retaining highly qualified and deeply experienced women and minority lawyers on major matters combined with the benefits of working with large majority firms. NAMWOLF firms, too, will benefit through work on major matters for which they might not ordinarily be considered because of their size.

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II. THE VALUE TO CLIENTS OF CREATING DIVERSITY THROUGH NAMWOLF AND MAJORITY FIRM COLLABORATIONS

Over the past decade, many businesses and law firms have come to understand the value of diversity. Some of that understanding flows from data about businesses. The financial returns of companies with three or more women on the board outperform companies with all-male boards by 60 percent, looking at return on invested capital, 84 percent in return on sales, and 60 percent in return on equity.[4] A recent McKinsey & Company 2015 report shows a similarly positive impact:

- Companies in the top quartile for racial and ethnic diversity are 35 percent more likely to have financial returns above their respective national industry medians.
- Companies in the top quartile for gender diversity are 15 percent more likely to have financial returns above their respective national industry medians.
- Companies in the bottom quartile both for gender and for ethnicity and race are statistically less likely to achieve above-average financial returns than the average companies in the data set – that is, bottom-quartile companies are lagging rather than merely not leading.[5]

Diverse teams perform well along a number of dimensions. With respect to problem solving, for example, one study concluded that on almost every measure, racially, ethnically, and culturally diverse workplace teams function more effectively than homogenous teams at solving problems – even better than teams whose individual members are uniformly "smart."[6] One explanation is that teams with members from diverse backgrounds, experiences, and perspectives avoid "groupthink," whereas nondiverse teams often approach problems from a unilateral perspective. As one well-known researcher wrote, if the goal "is to be accurate and objective," then diversity trumps homogeneity in its power to reach that goal.[7] In summarizing decades of multi-disciplinary research, a prominent researcher concluded:

> "The fact is that if you want to build teams or organizations capable of innovating, you need diversity. Diversity enhances creativity. It encourages the search for novel information and perspectives, leading to better decision-making and problem solving. Diversity

can improve the bottom line of companies and lead to unfettered discoveries and breakthrough innovations. Even simply being exposed to diversity can change the way you think. This is not just wishful thinking: it is the conclusion I draw from decades of research from organizational scientists, psychologists, sociologists, economists and demographers."[8]

Law firms will benefit just like companies from innovation and best ideas. So, there is every reason to believe that diverse legal teams likewise yield better decision-making, problem solving and results. Indeed, at the anecdotal level, there is broad consensus that diversity positively impacts results:

"Diversity and inclusion in the business and legal world are becoming imperative. As the demographics of both the customer base and the talent pool for employees becomes more diverse, not embracing inclusion puts a business in peril. Numerous studies over the past decade show that diverse teams perform better and diverse companies tend to be far more productive. When working groups, including juries, consist of mixed gender, age, ethnicity, sexual orientation, and physical ability, they offer a broader array of viewpoints and experiences which improves the decision-making process and the ability to solve problems."

Paulette Brown
President, American Bar Association

"At GSK, our experience and belief is that breakthrough thinking and high performing teams come from the alternative perspectives found in an inclusive environment. Successful leaders realize that the way each of us looks at the world is just one way of seeing things. Time and again, our most effective solutions and best results have come when we have drawn upon the diversity of our organization in putting together the right team to tackle an issue."

Mark E. ("Rick") Richardson, III
Vice President and
Associate General Counsel, GSK

"Diversity should be an established core value, not only because it has been proven to increase profitability, but because of the unique nature of our profession. However that value may be achieved – whether through creative formation of minority firms or diversity initiatives within firms – it is vital to pursue."

Hon. Lisa Walsh
President, National Association
of Women Judges

"Diversity is vital in the legal profession. Individual talent is the most important asset of any law firm or practice, and talent does not come in a one- size-fits-all package. Diversity means clients can benefit from the best talent without being limited to lawyers who fit a 'type' or missing out on the broadest possible range of ideas. Clients absolutely expect that we will leave no stone unturned and no assumption unexamined in solving their most complex challenges. The same must be true in building the teams that will meet those challenges with the client."

Thomas J. Reid
Managing Partner, Davis Polk

Systematic data about law firm performance support these views. In one study, the authors looked at data from the 200 highest-grossing firms and found substantially higher profits per partner and revenue per lawyer in highly diverse firms than the rest of the Am Law 200 firms.[9] Even controlling for hours, location, and firm size, "differences in diversity are significantly correlated with differences in financial performance."[10]

At bottom, diversity is a question of talent. Talent is optimized by including all groups from the legal profession, and any business that wishes to recruit, retain and advance the best talent necessarily needs to focus on diversity.

III. IMPLEMENTING AND MANAGING NAMWOLF FIRM AND MAJORITY FIRM COLLABORATIONS

A. The Virtual Firm Model of Collaboration

As background for these *Guidelines,* we note that on certain litigation and corporate matters, some clients have teamed two or more majority firms, thereby forming a "virtual firm" to serve client needs. The virtual firm model is best known in the context of large national mass tort litigation, whereby each law firm is responsible for a given area of the litigation defense with ongoing coordination about strategy and goals at the senior partner level, and with oversight by the client. The plaintiffs' side of the bar has also developed collaborative models. When pursuing major litigation, most plaintiffs' firms (which are typically small in size) effectively join forces to work together on a matter against a corporate defendant. Product liability multi-district litigation, antitrust opt-out cases, and class actions are all examples where multiple small plaintiffs' firms, working together, can achieve highly effective results.

There are many possible variations on the virtual firm or "collaboration" model whether the context is class action defense, insurance coverage disputes, complex commercial disputes, white-collar investigations, mass torts, mergers, bankruptcy proceedings, and more. In the transactional context, for example, there can be one firm responsible for driving the core components of the deal, but other firms may be responsible for the labor due diligence or regulatory due diligence or the IP aspects of the transaction. Indeed, we view the virtual firm model as applicable to any engagement that would benefit from the talent and differing perspectives available in two or more law firms.

While the value of a collaboration may be appreciated at an abstract level, we are well aware that it takes more than a concept to make the model work in positive ways for all participants, especially clients. Indeed, expectations for client and law firm roles is a core element of a successful collaboration. In the following section we discuss the factors that we believe should frame a solid working collaboration between law firms on a major client matter.

B. Initiating the Collaboration

A collaboration may be suggested by the client, the majority firm, or the NAMWOLF firm so long as the engagement plainly serves the client's legal needs and the client is firmly in favor of it. Identifying participant firms can come from a variety of sources – through client networks, majority firm suggestions, and recommendations by NAMWOLF firms. We have seen successful models started by all three players (although to date it has been most common for a client to suggest a majority firm/NAMWOLF collaboration).

Any collaboration begins with some ideas about how the collaboration would work. Here are a few "true life" examples:

1. A majority firm specializing in mergers and acquisitions collaborated with a NAMWOLF firm on the acquisition of a large business unit being purchased by the client from a competitor. The NAMWOLF firm was responsible for the litigation due diligence and antitrust due diligence, while the majority firm handled the other aspects of the transaction. The client selected the NAMWOLF firm because its litigation and antitrust lawyers were highly experienced. The fact that the two firms' areas of responsibility were clearly defined lead to an efficient and smooth working relationship. The two firms were in regular speaking communication (not only email) and the collaboration was well managed on that basis.

2. A mid-sized majority firm specializing in class action litigation collaborated with a NAMWOLF firm in defending a class action. The NAMWOLF firm also had good class action experience and the added benefit of a strong local presence. The two firms worked jointly on pleadings. The large firm managed

all of the written discovery and production of documents. The firms took and defended depositions of fact witnesses and experts, with each firm assigned to particular fact areas. Briefs were drafted by one firm with input from the other. The lead lawyer at hearings was from the firm that took the lead on the briefing. The firms met at least bi-weekly by telephone on case strategy and ongoing projects. Over time, the lawyers developed the same type of collegial and respectful working relationships that each had within their firms. The collaboration also worked well because there was meaningful work available to both firms, not just the majority firm.

3. A large toxic tort matter was staffed with three firms, where one firm was responsible for developing both the corporate defense and the expert defense regarding the history of contamination at the property. This firm was also overall in charge of the strategy for the litigation. A second large firm was responsible for all written and document discovery. The NAMWOLF firm was responsible for developing the expert defense on medical issues. The firms met three times a year with the client and had frequent communications with each other. This is an example of a collaboration that worked well because of good client oversight and a clear understanding as to the roles that each firm would play.

4. Some clients have encouraged (even insisted) that for litigation matters, local counsel roles should be filled by NAMWOLF firms. That is potentially an excellent role for a NAMWOLF firm. It works best, however, if the majority firm truly collaborates and gains from the NAMWOLF firm's knowledge of the law and local courts, whether state or federal. For example, an effective collaboration could have the NAMWOLF firm responsible for jurisdiction-specific motions and hearings; or the NAMWOLF firm could be responsible for all local discovery. The danger to be avoided is for the NAMWOLF firm to be little more than a mail drop, with virtually all meaningful work taken by the majority firm.

Of course, there are many other possibilities for a successful collaborative structure, and there is nothing magical about one form of collaboration over another. Whatever the format, the goal should be to create a team that is participatory and an operational framework that is transparent. Thus, collaborative engagements work well when:

(a) the lawyers in collaborating firms respect the quality of work and quality of all the lawyers on the team;

(b) the focus of each firm is on getting the job done at the highest level of quality and efficiency;

(c) each firm appreciates that it is not best positioned to do all of the work on the matter, and all participating firms have meaningful work;

(d) the assignments given to each firm are understood by all the players to be appropriate for each firm; and

(e) the client strongly encourages a successful collaboration through his/her words and actions.

C. Defining Roles

From the earliest stage of the collaboration, it is essential for firms working on a matter to have a clear understanding with each other and with the client about the roles each firm will play and reporting relationships. Client involvement is usually key. Otherwise, uncertainty regarding the roles that each firm will play can become a counterproductive impediment to effective management and to the collaboration itself.

Although successful collaborations may exist upon merely a verbal agreement or understanding, with a writing there is much less chance of misunderstanding and disappointment about which firm has responsibility for given areas of work. Even as simple a writing as a one page "bullet outline" can articulate the overall goals, law firm roles and areas of work, communications between firms, and contact with the client. The process also invites a candid and concrete

conversation about these key issues from the beginning of the undertaking, especially on the key strategic issues and activities.

We emphasize that each collaborating firm should have a meaningful role, even if the work is not evenly divided. Many times, the areas of responsibility might not be overlapping. On the other hand, firms may have shared responsibilities, either because the assigned areas of work overlap or firm personnel are fully integrated into subject matter teams. The parties should consider implementing mechanisms to ensure that the NAMWOLF (typically, smaller) firm is not drowned out of the collaboration. Where a NAMWOLF firm is paired with a majority firm, for instance, it is critical that the NAMWOLF firm have client contact to insure meaningful participation in the collaboration. Also, in consultation with the client, the collaboration can agree that a minimum percentage of the work done should be done by the NAMWOLF firm to ensure a consistent correlation between the firms' respective workloads.

However the collaboration is structured, it should go without saying that each firm needs to have a commitment to making the collaboration work as the client intends it to work. Indeed, as part of a client's assessment of the team effort, each firm should be evaluated according to its effort and success in making the collaboration work well.

There is another key factor in successful collaborations: the ability to work well with lawyers outside one's firm. We are aware that pressures inside firms, especially in Big Law firms, for lawyers to have greater billings, more obvious matter responsibility, and direct client communication, may undercut any given lawyer's willingness to share work and responsibility with those from another firm. Some firms have a culture that focuses on the value of teamwork while others may be so internally competitive that it is hard to imagine they would work well in collaboration with other firms. A collaboration, however, is not the place for hidden agendas. Nor should use of the NAMWOLF firm default to "window-dressing," where the NAMWOLF ends up doing only low level, routine tasks. That model does not take advantage of the talent in a NAMWOLF firm or its cost efficiencies, and also demeans the value of diversity.

Collaborations work best when there is a true commitment to working as one team and an appreciation that the whole is more than the sum of its parts. While we are not naïve about all of the potential dynamics, we firmly believe that any such concerns can be overcome by straightforward discussion, ideally with all team members, about the value of the collaboration and the expected long-term benefits for all of the participating lawyers.

We also recognize that as a matter progresses, areas of responsibility may change. Unexpected twists and turns on a matter may emerge that call for additional or different resources. Some people from the different firms may work especially well together and their responsibilities may expand on that basis. A matter may develop a greater need for a given specialization that is a good fit for a particular firm. One of the firms may turn out to be especially adept at developing long-term strategy, or efficient brief writing, or deposing plaintiffs. The client and the collaborating firms – working in the client's interest – should be alert to how skills and needs emerge over time and adjust accordingly. In short, a good collaboration, just like any model for providing excellent legal services, depends on flexibility and creativity in the initial designation of roles as well as making changes in roles as events and talents emerge.

D. Communication Is Critical

From the outset of the collaboration, it is important to set out the framework for communication among the firms and also with the client, including how key strategic decisions will be made. We believe that a collaboration works best when there is regular joint communication with the client and the team leaders, as appropriate for the work at issue.

Each firm should designate a senior team leader, who will be part of the decision-making/strategy group in communication with the client. Stakeholders to a collaboration should evaluate the right amount of contact among them. The parties should establish a frequency of reporting that

does not unnecessarily burden any party, particularly the client, but that offers the transparency and ability to communicate that is necessary for an effective partnership. Parties will need to be flexible to adjust as necessary for the most efficient approach.

We urge clients to keep a direct line of communication with each firm the client retains, and not filter communications through only one firm. Direct communications with all participating firms will insure that the NAMWOLF and majority firms maintain the roles that the client and the firms envisioned.

It is our experience that an effective collaboration between firms does not just "happen." It typically requires active management at least by the firms themselves, and frequently by in-house counsel. Client and firms need to discuss up front the level of client involvement and client expectations for how the firms will work together. As one example, in a three-firm collaboration, where each firm was assigned to a particular aspect of a multi-faceted litigation with many fast-paced moving parts, the client met weekly with the three lead lawyers. No substitutions were permitted – the lead client and the lead lawyers had to be on the call. This weekly call insured that the client and its counsel could express its views about the substance of the work, necessary next steps, and quickly address any loose ends or issues.

Of course, over time as working relationships develop, there may be less need for client input. We anticipate that law firms would meet on a more regular basis and report back to the client when necessary. Firm to firm meetings are especially useful when there are tactical decisions to be made. It is also the way that all of the players are kept informed about key strategies, decisions and results – which of course will make the entire engagement more effective.

E. Collaborative Decision-Making

Ideally, decision-making should be collaborative, and that is often the case when firms share common approaches to strategy and tactics. By "collaborative" decision- making we do not mean that every lawyer at every level needs to agree with a given decision. Just as there is a hierarchy of decision-making within a firm, so we anticipate a similar hierarchy of decision-making in a team of two or more firms. Certainly when there are major differences in strategy or tactics – hopefully not too often – the designated leader from each firm should be able to articulate the value of a given approach.

Ultimately, of course, the client should make the decision – just as a client would make a decision about the pros and cons of a given strategy or tactic even when represented by one firm. Alternatively, depending on the circumstances, a given law firm may be designated as lead counsel, responsible for case strategy and the assignment of tasks and responsibilities for all attorneys participating in the case. With that structure, of course, it is important to maintain regular feedback among firms and with the client.

F. Feedback

We recommend that the client and firms check in with each firm on a regular basis, at least once every quarter, for feedback. Feedback should address how the virtual firm is working and whether adjustments may be needed. With good working relationships, firms should be able to discuss how the collaboration is progressing, and make adjustments as needed. At the same time, the client has the opportunity to give feedback to each of its firms, including where the client believes adjustments should be made.

At the completion of the assignment, all parties should check in with each other and the client to assess the partnership and best practices for any future collaborations.

G. Majority/NAMWOLF Collaborations Can Decrease Costs

Some have raised the question about whether the collaborative firm model will raise costs for the client. There are two key reasons why that should not be the case – indeed, why costs

should decrease. *First,* NAMWOLF firms typically have more experienced partners actually doing the work, with more reasonable costs and leaner staffing than majority firms. The NAMWOLF firm has fewer people "touching" a project. To the extent that the NAMWOLF firm is given meaningful work on a matter, the cost of that work may be lower than the same work given to a majority firm simply due to lower staffing levels for lawyers and paralegals. *Second*, just as communication is key within one firm in order to achieve the strategy and goals for a matter, including a NAMWOLF firm in the communication process should not increase costs, especially if the NAMWOLF firm is simply stepping into a role that under other circumstances would be played by lawyers in the majority firm. We come back to a central point: communication is key.

H. Does Size Matter?

There is often the presumption among clients and majority firms that because of their smaller size, NAMWOLF firms may not be able to work at the same level of competence as majority firms on major matters. Just as most stereotypes break down with even a little scrutiny, the "size" stereotype also falters when looking at the reality of both big firms and small. Not all big firms have equal experience in all areas of law. Certain majority firms, for example, are well known for product liability defense, or for employment counseling and litigation, or for mergers and acquisitions. The same is the case for NAMWOLF firms – they also have areas of specialization that fit particularly well with client needs in given areas. Just as majority firms should be retained for their ability to work in given practice areas, so should NAMWOLF firms be retained for that same level of ability.

With all of the foregoing factors in mind, we set forth below a *Checklist for Collaboration Among NAMWOLF Firms and Majority Firms*, to provide in a simple format the recommended procedures for a successful collaboration.

A CHECKLIST FOR COLLABORATION AMONG NAMWOLF FIRMS AND MAJORITY FIRMS

Stephanie A. Scharf, N. Nate Saint Victor and Antonio C. Castro

1. Initiating the collaboration

- ☐ Choose outside counsel firms. List why each selected firm was chosen – for what capabilities.
- ☐ Confirm that the client and the outside counsel firms share the same understanding of the value that each firm brings. State which particular persons have communicated that understanding, and to whom.
- ☐ Set an early date for the client and key lawyers from each firm to meet in person at the beginning of the engagement.
- ☐ When staffing any matter, outside counsel should strive to ensure their team of lawyers is diverse.

2. Structuring the collaboration

- ☐ Identify which specific client representative is in charge of overseeing the engagement.
- ☐ Identify the areas of principal responsibility and of support work for each firm.
- ☐ Identify which firm partner is in charge of overseeing the collaboration of his/her firm's work.
- ☐ Identify who will have ultimate decision-making authority on the matter in a given area; and who will have overall decision-making authority for the matter as a whole.
- ☐ Determine how the client will assess the value of each firm's contribution. Will it be a combination of quality of work, timeliness, specialized knowledge, cost, and/or other factors?

3. Ongoing communication

- ☐ Determine how often the lead lawyers from each firm will meet (at least by telephone) with the client.
  - Set regular times for meetings/required attendance by each firm.
  - Determine that the frequency of meetings is appropriate for the nature of the matter.
  - Determine who will provide a written agenda for meetings, which sets out strategy, ongoing tasks, and assignments to firms.
- ☐ Determine how often the outside firms meet (at least by telephone) to discuss ongoing activities.
- ☐ For fast-moving matters, hold quarterly in-person meetings with the client.

4. Client check-in

- ☐ Determine when the client will "check in" with each firm about how the collaboration is proceeding.
- ☐ Determine if the client will solicit "360" views of how management by the client is proceeding.

5. Mid-term/end of engagement review

- ☐ For longer-term engagements, set a date for in-person or mid-term review.
- ☐ Conduct end of engagement review/lessons learned.

ENDNOTES

1. See, e.g., *2014 Report of the NAWL Annual Survey of Retention and Proportion of Women in Law Firms*, http://www.nawl.org/ (select "Resources" from drop-down menu, then "Publications," "Surveys," and "February 25, 2014 Survey Report PDF), which measured male and female equity partners, including male and female partners of color, within the largest 200 firms. The results are striking: roughly 17% of equity partners are women, while between 6% and 8% of equity partners are lawyers of color. Moreover, there has little change over time. See 2008 NAWL Annual Survey (at nawl.org).

2. Every NAMWOLF member is annually certified by the National Minority Supplier Development Council (NMSDC) or the Women's Business Enterprise National Council (WBENC), confirming that the business is minority or women owned, operated, managed and controlled (at least 51% of the firm's equity). In addition, every NAMWOLF firm is Martindale Hubbell AV-ranked, with the bulk of their matters devoted to the representation of corporate clients.

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4. Nancy M. Carter and Harvey M. Wagner, *The Bottom Line: Corporate Performance and Women's Representation on Boards (2004–2008)*, http://staging.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards-20042008. *See also* Sheryl L. Axelrod, *Disregard Diversity at Your Financial Peril: Diversity as a Financial Competitive Advantage,*" Diversity & the Bar (May/June 2013), http://theaxelrodfirm.com/mailChimpNewsletters.php?ID=12.

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7. Evan Apfelbaum, Katherine Phillips and Jennifer Richeson, *Rethinking the Baseline in Diversity Research: Should We Be Explaining the Effects of Homogeneity?*, Perspectives on Psychological Science 2014, Vol. 9(3) 235 –244, http://pps.sagepub.com/content/9/3/235

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9. Douglas E. Brayley and Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. Legal Prof. 1 (2009).

10. *Id*.

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