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ARTICLES

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

Remedying this exclusion of diverse firms requires prioritizing diversity in the procurement process.

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Preferred counsel lists—the result of a corporate process to actively limit the number of law firms on the law department's approved list of firms—came into widespread use in the 1990s, when minorities and women were markedly underrepresented in the legal profession. Then, as now, preferred counsel lists allowed companies to obtain more favorable terms with outside counsel by forming consolidated networks. In recent years, corporate law departments started using national contracts for certain types of work. Prior to the rise of preferred counsel lists and national contracts, insurance companies used panel counsel lists. Companies retain these lists for years, often listing law firms of retained lawyers who have long left those firms. The continued use of law firms on these lists, and the creation of new such lists, has had the unfortunate consequence of perpetuating historic inequality and of causing the companies using them to miss out on the business advantages of having more diverse counsel, those firms owned by minorities or women.

More diverse viewpoints among a legal team increase the likelihood of it generating innovative ideas and solutions. Retaining minority- and 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 for 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 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 whom 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 create 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 get 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*, p. 9 (2005). This suggests that as many as 4 out of 5 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. Texas Young Lawyers Association and the Florida Bar, Young Lawyers Division, *From the Inside Out: In-House Counsel's Advice for Young Lawyers*, p. 4 (2013). Whatever process is used, all too often, minority- and women-owned law firms 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. This effect is heightened by the "convergence" phenomenon—the process by which preferred counsel lists are made—that drove companies to consolidate their legal work and create preferred counsel lists in the first place.

This "convergence" phenomenon is becoming increasingly prevalent and exclusive. In a 2010 survey by 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 ten or fewer firms on their lists and spending a staggering 91 percent of their total legal fees on work performed by preferred counsel. Altman Weil, *Chief Legal Officer Survey*, pp. 6–7 (2010).

The procurement and convergence process has created a vicious cycle that has made it difficult, if not impossible, for minority- and women-owned firms to break into preferred networks, as companies often do not include diversity as a weighted factor in selecting outside counsel. The International Litigation Management Association reported in its May 2003 article "How to Overhaul Your Panel Counsel Network" 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 earlier, only 4 to 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*, pp. 11 and 14 (2005). By effectively excluding diverse law firms from their preferred counsel lists, corporations are at the same time depriving themselves of outstanding legal representation *and* acting against their diversity and inclusion initiatives.

Preferred Networks Fuel the Underrepresentation of Minorities and Women

Preferred counsel lists are predominantly comprised of large, traditional, majority-owned firms (large law firms whose ownership is primarily white and male), where minorities and women have been traditionally underrepresented. Preferred counsel lists thus effectively maintain the status quo of excluding many of the top minority and women lawyers in minority- and women-owned law firms.

In selecting firms for preferred networks, companies commonly require a history of representation and demonstrated value to those companies, thereby excluding newcomers from the competitive process. The forged relationships between those companies and their preferred predominantly white male counsel become deeply entrenched. It is nearly impossible for minority- and women-owned firms to demonstrate their unique advantages to the law departments.

Some large companies reason that they need law firms with a substantial geographic presence to manage their legal needs. Because many minority- and women-owned law firms are local or regional, these firms are not even informed about the opportunities to make proposals. Oftentimes, minority- and women-owned law firms first learn about the existence of a preferred counsel program when they are told to transfer their work to a national and/or non-diverse firm.

Minority- and women-owned firms, which have been steadily growing 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 for 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 using only firms on its preferred counsel list. Firms outside the preferred network are excluded from participating in the request for proposal (RFP) process and thereby are unable to compete for business.

Preferred counsel lists thus tend to perpetuate the historical 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 as 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 were to occur in the 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: "[t]radition *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 its members that was conducted by the National Association of Minority and Women Owned Law Firms (NAMWOLF), 50 percent of respondents indicated they experienced a reassignment of existing work to large traditional firms due to those firms' "preferred" status. Over 50 percent of responding NAMWOLF firms reported that they were neither given new assignments nor allowed to bid on work due to their non-preferred status. Tellingly, less than 10 percent reported being advised 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 to, among other things: (1) have the work moved to a more expensive firm on a preferred list; (2) learn

matters that were handled by senior lawyers at diverse firms are now being handled by junior associates at the preferred firms; and (3) have a new insurance carrier insist its panel counsel be used, despite successful work and vast corporate knowledge on the part of the diverse firm.)

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

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, investment in outside counsel supplier diversity programs seems unintuitive and wasteful of resources. However, there is a powerful business case for 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 themselves and have developed comprehensive supplier diversity policies as cornerstones of their businesses. Moreover, the U.S. government and many other corporate customers require that corporations source from a diverse supplier group, including in their procurement of legal services.

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 within companies. L. Diaz and 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 at Your Financial Peril: Diversity as a Financial Competitive Advantage*, American Bar Association, GPSolo eReport, Vol. 3, No. 4 (November 2013) (citing Nancy M. Carter and 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."

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 and 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 than non-diverse groups. *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 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. Overlooking expertise in favor of the "tried and true," although expedient 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, were they given 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 non-diverse counterparts. L. Diaz and P. Dunican, Jr., *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). 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. L. Diaz and P. Dunican, Jr., Supra at 956. This will not only result in growth opportunities for minority and women-owned firms, but also instigate an important change in the diversity initiatives at 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. Increased retention of diverse firms will ensure that legal departments realize *all* their performance expectations for outside counsel, including diversity and inclusion goals.

Implement "Rooney Rule" supplier diversity policies. In-house counsel and procurement professionals should employ a policy similar to the National Football League's Rooney Rule in their solicitations for legal services, to ensure that minority and women-owned law firms that possess the requisite practice-area expertise are included in the competitive bidding

process. The rule is named after the Pittsburgh Steelers' chairman, Dan Rooney, who staunchly advocates that every NFL team interview at least one minority candidate for open coach and general manager positions. Since the rule's introduction in 2003, 17 NFL teams have had either an African-American or Latino head coach or general manager. In the 80 years prior to the rule, only seven coaches of color had ever been hired. Mike Freeman, The Bleacher Report, "*The Rooney Rule 10 Years Later: It's Worked . . . Usually, and We Still Need It*" (Oct. 24, 2013), available at http://bleacherreport.com/articles/1822988-the-rooney-rule-10-years-later-its-worked-usually-and-we-still-need-it. Legal departments that maintain preferred counsel lists that exclude minority- and women-owned law firms would be forced 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.

A lack of qualified minority and women-owned firms should never be a reason for corporations not to diversify. Corporations should partner with diversity-advocacy organizations to solicit bids from diverse firms. This partnering 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. California Minority Counsel Program, "*Diversity Business Matters: 2011 Corporate Programs Supporting Business for Diverse Outside Counsel*," (Mar. 2011) at 49. Pacific Gas demonstrates that corporations can direct a meaningful amount of work to diverse law firms and enhance the quality of the representation they receive.

Retaining minority- and women-owned firms should be a 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, their compensation. In-house attorneys should be rated, in part, according to a "diversity performance factor," which reflects satisfaction of the legal department's supplier diversity goal. When greater inclusion of minority businesses is part of in-house counsel's compensation package, it becomes a

greater priority. Diversity MBA, "*Supplier Diversity Programs and Practices Overview*" (Oct. 12, 2009).

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

Moreover, there must be some tangible consequences for law firms that choose to ignore their corporate clients' diversity mandates. Legal departments must be prepared to terminate relationships with outside firms that fail to achieve diversity goals built into their outside counsel guidelines. Diaz and Dunican, Jr., *supra*, at 958–59 (stating that in 2011, the Institute for Inclusion in the Legal Profession 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 based on poor performance against their companies' diversity objectives. Moreover, of the roughly 10 percent of in-house counsel who had changed their relationships with law firms based on poor diversity performance, only 16.6 percent terminated the attorney-client relationship with firms believed to be underperforming.)

Unbundle large legal services contracts. In-house departments should consider unbundling legal services into separate RFPs or other opportunities and qualifications. Unbundling of legal services can lead to (1) optimized service delivery, (2) retention of experienced specialists, and (3) cost savings. Unbundling means that corporate clients 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. Segmentation of legal services also makes more opportunities accessible to minority- and women-owned law firms, which are generally smaller than their larger, less diverse counterparts.

Unbundling work allows minority and women-owned law firms to bid on matters within 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

Like an exclusive private club with arcane restrictions, preferred counsel lists that fail to include minority- and women-owned firms are 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.

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