

5 Questions To Ask Firm Before Accepting A Litigation AFA

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In-house attorneys routinely receive, review and compare alternative fee arrangement proposals and nearly all law firms regularly submit them, but the parties often do not follow a disciplined approach in developing a realistic budget. In this series of six articles, we provide guidance to ensure that AFA proposals are meaningful and realistic to both the client and outside counsel. In this second article in the series, we discuss five questions that every client should ask the law firm before accepting an AFA proposal for a litigation matter.



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1. How Did Outside Counsel Generate the Numbers?

First, a client should ask how outside counsel came up with their numbers. Law firms, and partners within those firms, have differing techniques for generating AFA proposals, and some techniques are more precise than others. To ensure that an AFA is realistic and reasonable, in-house attorneys should ask outside counsel for an explanation as to how the firm arrived at the specific proposal.



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An AFA proposal generated from a detailed budget forecast specifically tailored to the case at hand is likely to be the most realistic. Such a budget forecast uses expected tasks, staffing and hourly estimates to calculate the estimated litigation fees. Then, once the case budget is known, it can be converted to a case-specific AFA. In a simple example, a projected case budget can be converted to a monthly fixed fee by dividing the total estimated fees and costs into equal monthly payments over the expected duration of the case. In a more complex example, the budgeted fees can be used to generate variable fixed fees for each phase of a case.



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Another advantage of using a budget based on tasks and hours is that the hourly estimates can then be compared to the actual time taken to perform various litigation tasks. Thus, generating the AFA based on a detailed budget allows outside counsel to know where the firm really stands as compared to what was budgeted in calculating the AFA.

However the AFA has been generated, outside counsel should be able to explain the basis for the proposal. If outside counsel cannot show his or her work, then the AFA probably has not been well thought through.

2. What Assumptions Are Built Into the AFA?

AFA proposals may vary significantly, even for the same case, leaving a client to wonder how different firms arrived at their numbers. The answer may lie, in part, in the assumptions underpinning each firm's proposal. To gain valuable insight, clients should ask the bidding firms to provide detailed explanations of the assumptions (in addition to any supplied by the client itself) underlying the AFAs.

The assumptions underlying an AFA go well beyond the fundamental assumptions as to the risk exposure of a case, which always factor into litigation strategy. Instead, the assumptions driving an AFA are much more detailed, including things such as:

- Will there be an early round of dispositive motions?
- How many party and third-party depositions are included in the AFA?
- How many expert reports and expert depositions are included?
- Will discovery be contentious, necessitating multiple discovery disputes and motions?
- Are document collection, first-level review, and production included, or will the client handle those separately?
- Is there a joint-defense group to share some expenses, and will the client want its outside counsel to take a leadership role?

Understanding assumptions such as these made by the bidding firms will help a client compare and evaluate competing AFAs. And as the case unfolds, understanding the assumptions built into a selected proposal will benefit both the outside counsel and the client in measuring the success of the AFA.

3. How Does This AFA Incorporate Lessons Learned?

Outside counsel experienced with AFAs will have many war stories regarding successful — and less successful — fee arrangements. Asking outside counsel to share these experiences can provide useful insight into the strength of a proposed AFA.

When asked this question, outside counsel who has provided a well-considered proposal should be able to articulate the characteristics of successful AFAs, and how the proposal includes those features of success. Whether those features include regular budget reports, frequent status meetings, careful tracking of the case against original assumptions, or some other set of characteristics, the AFA should be structured for success.

Likewise, outside counsel should be prepared to explain how the AFA has been designed to avoid the pitfalls of less successful AFAs. For example, if AFAs with ambiguous assumptions, ineffective budget tracking, inability to adapt to changing circumstances, or other issues have been less successful in the past, the AFA should be designed to avoid these weaknesses.

Asking outside counsel to explain the strengths and weaknesses of AFAs generally, and then to compare the proposed AFA to these traits can be an enlightening and educational exercise that leads to a stronger AFA overall.

4. Who Is on the Team and What Are Their Existing Commitments?

The makeup of the litigation team can dramatically affect not only the cost, but also the outcome, of a case. Therefore, it is important that an AFA be tailored to a team that meets the client's strategic needs. For example, a large, experienced trial team may be essential in a high-stakes competitor case. In contrast, if a nuisance-value case is likely to settle before trial, bringing on an experienced trial team early in the proceedings could be an unnecessary expense.

For these reasons, when a client is evaluating AFA proposals, it is essential to understand what the proposed litigation team from each firm will look like — both in the near term and at trial. A client should ensure that the AFA includes team members who are properly qualified for the case, and that the size and experience of the team at various phases is appropriate for the litigation risk.

A client should also ask about the ratio of associates to partners that the AFA assumes. A low budget might reflect high associate-to-partner leverage, which in turn, reflects an assumption that junior team members can run large portions of the case, including depositions and brief writing. In contrast, a higher AFA budget may assume that partners will be heavily involved in most aspects of the case. Different cases — and sometimes different phases within a case — will require different staffing.

Importantly, when discussing all of these topics, the client should ask what would happen to the AFA if the team structure or members changes over time.

The makeup of the litigation team is essential to the success of a case, whether success is measured by the cost of the litigation, the outcome, or both. For that reason, a client should feel empowered to ask tough questions about the structure of a proposed team and its members, and how the AFA reflects that proposed team.

5. How Will Counsel Keep the Client Informed of Its Progress Against the AFA?

A successful AFA requires trust, and this trust can be built through transparency. Therefore, a last question that a client should ask before entering into an AFA is how the firm will keep the client informed about how the cost of the case is tracking to the AFA budget. In response, a firm should propose mechanisms by which it will track actual fees and costs incurred to the AFA budget, and share those with the client.

Frequent communication about the budget is important because a client needs to know the firm is putting sufficient effort into the case to ensure success, but that the firm is not on a track to “blow the budget” such that the funds run out before trial. A properly designed AFA should provide the firm sufficient resources to litigate the entire case successfully, including trial, and few things are more discouraging to a client than suddenly learning before trial that a firm needs to renegotiate an AFA because it has already spent the entire budget.

In response to a client's question, a firm should propose regular reporting of the actual-to-budget spending, and regular status reports. The firm should closely track the litigation events to the assumptions built into the AFA, and alert the client if they diverge. The more open the communication about the progress of the AFA and the status of the case, then the earlier that issues can be spotted and addressed. AFAs ultimately are a partnership between the firm and a client, and both should participate to ensure that they are running smoothly.

Conclusion

There are, of course, many additional questions inside and outside counsel should address before accepting/submitting an AFA proposal for a litigation matter. Even with respect to the five questions above, there is significant complexity in translating the information received from the prospective client into a well-planned AFA proposal. We will touch on some of these additional considerations in the weeks to come with our remaining articles, which will address questions for individual partners and law firm management, the final AFA document, and the issue of joint representation.

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