

5 Questions To Ask Yourself Before Submitting A Litigation AFA

Law360, New York (July 18, 2017, 9:34 AM EST)--

In this third article in our series about alternative fee arrangement proposals, we discuss five questions that outside lawyers should be able to answer for themselves before submitting an AFA proposal for a litigation matter to a client.

1. Why Am I Proposing an AFA for This Litigation Matter?

First, outside counsel should ask herself why she is proposing an AFA for this matter. To be sure, AFAs are often beneficial — providing clients with predictability in litigation costs and simplifying the billing for outside counsel — but they are not without risk. For example, if assumptions underlying the AFA were not accurate, or if these assumptions change over time, the original AFA proposal may likewise be off base.

Thus, outside counsel should be able to articulate the reason for proposing an AFA as a pricing alternative. One common reason is client preference. Some clients, including many public companies, value stability and predictability in litigation costs, and seek to avoid unexpectedly high monthly bills. Other clients may prefer AFAs with success premiums to ensure that outside counsel has “skin in the game.” But if the client has not requested an AFA, this might not be a good case to propose one. Indeed, some clients prefer hourly-based billing. And some cases may be unusual or unpredictable enough to make an AFA inappropriate.

In short, outside counsel should discuss the AFA approach with the client, understand the client’s preferences and concerns, and structure the proposal to address those needs. While some clients are eager for AFA proposals, not all cases and clients are good fits for AFAs. If the client has not requested an AFA or the case is unusually difficult to budget with accuracy, this might not be the case to propose an AFA.

2. How Long Do I Expect This Matter to Last?

Second, outside counsel should ask herself how long she expects this matter to last. Outside counsel often has a sense of when or if a case might settle, depending, for example, on the litigation history of the opposing party and its counsel, and on the client’s historic preference for settlement versus trial.

Cases that are expected to settle almost immediately would probably not warrant an AFA. Cases expected to last longer, but to settle before trial, could be good candidates for AFAs. In those cases, AFAs provide predictability to clients without significant risk of diverging from the original budget estimate. Likewise, AFAs in cases likely to proceed to trial are often



Gregory Lantier



Natalie Hanlon Leh



Mindy Sooter

beneficial to the client, providing the desired predictability and stability of fees throughout the case. Those cases, however, present greater risk to outside counsel because over time, the budget assumptions underlying an AFA — formulated before litigation began — are more likely to prove inaccurate.

For all AFA cases, and especially cases expected to “go the distance” to trial, outside counsel and her client should discuss and document the original budget assumptions as well as the circumstances under which the AFA may be modified if the litigation diverges from those original assumptions. This will ensure that the AFA remains realistic and beneficial not only to the client but also to outside counsel.

3. Would This AFA Be an Appropriate Template for This Client?

Next, outside counsel should ask herself whether this proposal is a sustainable model for future matters with this client. Often AFAs are presented in response to requests for proposals. These are competitive bids, and, especially if this is an opportunity to work with a client for the first time, outside counsel might be tempted to present a low offer to beat out the competition.

If outside counsel hopes to build a lasting relationship with this client, however, it is important that the proposed AFA reflect a realistic case budget. Certainly, the AFA should reflect any discount the firm is willing to offer to obtain this matter, but it should not be unsustainably low. This proposal is likely to become a standard to which future proposals are compared. If the original AFA is unsustainably low, the client will be shocked when the firm presents a more realistic budget next time.

Thus, instead of presenting an unrealistically low proposal, outside counsel should talk through the AFA with the client to ensure that they are both working under similar budget and case assumptions. That common understanding, leading to a realistic AFA, will build trust needed for future engagements, and be more likely to lead to a long-term relationship.

4. Am I Confident the Client Will Make Adjustments if Circumstances Change?

Outside counsel should also ask herself how confident she is that the client will be reasonable in making adjustments to the AFA necessitated by changes in litigation circumstances. Unfortunately, litigation is not always predictable. A plaintiff may add claims or parties, and new issues may arise. If these circumstances were not accounted for in the original case budget, it may be necessary to alter the AFA. And if outside counsel is not confident that the client will cooperate in reasonably modifying the AFA, then an AFA may not be appropriate in this case.

To determine a client’s willingness to reconsider an outdated AFA, outside counsel should have a frank discussion with the client before litigation begins about the circumstances under which the AFA may be modified. Certainly, the outside firm should bear responsibility for meeting the original budget under the original assumptions. But if those assumptions change, for example if the plaintiff adds new claims, there should be a mechanism by which the client and outside counsel

negotiate a modified AFA. If the client is not willing to include any such mechanism, or if outside counsel senses that the client will be unreasonably inflexible, an AFA pricing structure might not be the best approach.

5. How Will I Train the Team to Work Within the Budget?

Finally, outside counsel should ask herself whether she has a plan for building a team that will work within the budget. A good AFA is typically derived from an estimated case budget, calculated from the estimated number of hours to perform each litigation task.

To ensure success of the AFA, therefore, outside counsel should have a plan for building a team that can work within the budget. The plan should include training the team members about the budgets for each task, providing the team with tools for tracking their actual time spent and comparing it to the time allotted, and providing additional resources or skills to team members that have difficulty staying within budget. Counsel must also ensure there are tools to track the overall team's progress as compared to the budget. These tools require mechanisms to track and report the hours expended versus hours budgeted.

Without a plan for building a team that can work within the budget and for tracking that progress, an AFA becomes difficult to manage and the risk of departing from the AFA increases significantly. Putting the necessary tools in place and training the team on the budget are essential prerequisites to entering into an AFA.

There are, of course, many additional questions that should be addressed before an AFA for a litigation matter is submitted or accepted. 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 law firm management, the final AFA document, and the issue of joint representation.

[Gregory Lantier](#) is a partner in the Washington, D.C., office of [WilmerHale](#). [Natalie Hanlon Leh](#) is co-partner-in-charge of the firm's Denver office. [Mary \(Mindy\) Sooter](#) is a partner in the firm's Denver office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.