

## 5 Questions All AFAs Should Answer Clearly

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There are numerous ways in which the terms of an alternative fee arrangement are documented, ranging from a simple email exchange between client and outside lawyer to lengthy addenda to the retention agreement. While no particular form is required to establish a durable AFA, there are aspects of an AFA that should, for the benefit of both client and outside attorney, be clearly stated at the time the matter engagement is accepted. In the fifth article in this [series](#), we discuss five questions that AFAs should directly address, but for a variety of reasons often do not.



*Gregory Lantier*

### **1. What Is the Process for Requesting, Reviewing and Deciding Adjustments?**

While nearly all AFAs are agreed upon with the expectation that they will control throughout the life of the matter, sometimes the unexpected occurs and the agreed-upon assumptions no longer apply. While it is not possible to predict everything that might happen during a matter, it is possible to predict that something unexpected might happen.



*Natalie Hanlon Leh*

Because of this, the client and outside counsel should discuss the process for considering adjustments to the AFA and agree upon and document in the AFA itself how that process will work. In some cases, they may agree that there is no process for considering adjustments — i.e., that the terms of the AFA cannot be changed no matter what happens. Unless the value of the AFA is substantially higher than what outside counsel expects the matter will cost to litigate, then ordinarily such a rigid agreement will effectively make outside counsel the insurer against the risk of changed circumstances. While that arrangement may seem beneficial to the client, clients should carefully consider whether they really want their outside counsel to be incentivized by the fee arrangement not to vary the matter strategy if unexpected events occur.



*Mindy Sooter*

More likely, the client and outside counsel will agree that there may be some circumstances in which an adjustment (either up or down) to the AFA could be warranted. Where that is the case, it is important to agree upon (1) how the client or outside counsel should make a request for an adjustment, including any additional calculations or documentation that should be submitted with the request, (2) who the decision-maker is with respect to such requests, including the amount of time permitted for review, and, if there is no past practice to serve as precedent, (3) how the decision will be made, including what the client's and counsel's options are in the event that they cannot agree on an adjustment.

### **2. What Happens if the Matter Ends Early?**

The fees in many AFAs are based on the matter proceeding through summary judgment or a trial for litigation matters, or proceeding through some other large milestone in nonlitigation matters. But at least in litigation, most cases terminate

prior to that event. The client and outside counsel should expressly agree on what fees are owed in the event that a matter terminates earlier than expected.

### **3. What Is the Payment Schedule?**

Many times, the total fees will be agreed upon in an AFA, but the payment schedule will not. It is mutually beneficial to the client and outside counsel to document their understanding of when, and in what increments, the agreed-upon fees will be paid over the life of a matter (and sometimes beyond the life of a matter, if the matter ends early).

### **4. What Information About Time Spent Will Appear on the Bills?**

Unless the client knows how much time outside counsel is actually spending, she will lack an understanding of whether outside counsel is or is not managing the matter in a way that will keep the client and counsel's interests aligned. For that reason, even where the fees that the client will owe are fixed, it can be beneficial for the client to require outside counsel to provide monthly reports showing the actual time entries for each team member, or at least the actual monthly fees incurred by task. Ideally, if outside counsel have task coded those time entries in a manner that corresponds to the budget used to set the AFA, it can provide the client with real-time awareness of significant budget over-runs or under-runs, facilitating conversations at a time when there is still room within the existing AFA to make necessary adjustments. For certain matters, additional reporting — such as the fees to date as of the 15th of each month — can also be helpful. On the other hand, reporting detailed information to the client necessarily increases a firm's administrative overhead for the matter, and particularly with large matters, there are significant savings if bills are simplified. For these and additional reasons, determining in advance what information about actual time spent should appear on the bills should be carefully weighed.

Whatever determination is made, the specific details of what will be provided on bills should be specified in the AFA agreement itself.

### **5. What Are the Key Assumptions Underlying the AFA?**

Finally, an AFA should spell out the major assumptions the client and outside counsel have made in generating the budget and reaching agreement. There are several reasons for imposing this discipline on the AFA process. First, spelling out assumptions is one good check on the completeness of the AFA. If outside counsel hasn't made an express assumption, for example, about how many third-party depositions it will take and defend, then there's a good chance that the AFA overall is not fully thought through.

Second, identifying principal assumptions will help ensure that the client's expectations are known to outside counsel before work on the matter begins. If the client expects that outside counsel will submit expert reports on some defenses but not others, for example, and that assumption forms the basis for the AFA, then outside counsel should not expend resources on developing certain defenses without having a further conversation with the client.

Third, setting forth all major assumptions up front facilitates any later discussions about modifications to the AFA. If reality matches the initial assumptions, then normally no adjustment in the AFA is justifiable. If reality is significantly different than the initial assumptions, then some adjustment in the fee structure may be warranted, but that adjustment can be specifically pegged to the assumptions that proved to be incorrect and will be much simpler to explain and quantify.

One reliable way to identify the primary assumptions made in generating the AFA is by attachment of a task-based budget that specifies which tasks are expected to be performed and, in appropriate cases, specifying how many hours each timekeeper is expected to spend on each task. Such a budget will necessarily identify assumptions (for litigation matters) such as the number of each type of deposition, the amount of time spent on factual investigation, the amount of time working with each expert, etc., that are needed to intelligently generate an AFA. Additional assumptions, such as the length of the matter, the timing of key rulings, and others, can be set forth separately.

### **Conclusion**

The foregoing is a partial list of terms of an AFA that should be expressly set forth in the agreement itself, but are often overlooked. Client and counsel should make the investment of time and attention necessary at the outset of an AFA matter to ensure that it runs smoothly over its course.

Questions that should be addressed before an AFA for a litigation matter is submitted or accepted have been addressed in our prior articles. In our final article in the series, we will discuss AFAs and the issue of joint representation.

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[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.

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