

5 Questions To Ask Before Entering Joint-Representation AFA

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One growing trend is for clients to enter into alternative fee arrangements in which one law firm represents multiple parties who “share” fees and costs in a related matter. For example, a law firm might represent co-defendants in one case or related litigation, and each party would pay a percentage of the fees, or each party may pay a portion of a total fixed fee for outside counsel. These joint-representation arrangements help avoid duplicative fees that would be incurred if all the parties had separate counsel doing the same tasks (preparing motions and briefs, attending hearings and discovery). By hiring one law firm to do these tasks for the group and then splitting the costs, the parties can more efficiently manage a matter and reduce their individual legal fees. However, joint representation is not without its own risks and challenges. In this sixth and final installment in our [series](#), we consider five questions that a client should consider before entering into an alternative fee arrangement involving joint representation.



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1. Do the Parties Share the Same Goals and Views on the Level of Intensity?

Before entering into a joint-representation fee arrangement, parties need to determine if they are a good match. While sharing legal fees is an attractive option, parties may find that the others in the joint representation group have very different goals and views on how intensely the law firm should work the matter. For example, in joint representation for litigation matters, one party may want to aggressively litigate (e.g., by filing early motions, serving voluminous discovery, etc.) while another party may prefer deferring activity (and corresponding fees) while trying to reach an early settlement. Similarly, parties may take different approaches to their involvement and supervision of outside counsel — some in-house counsel may want to supervise and review every piece of correspondence or court filing, while other parties may take a more hands-off approach and rely on outside counsel to work more independently. The parties may also differ as to what a successful outcome would be. For example, in defending patent litigation brought by a patent assertion entity (PAE), one party might want outside counsel to seek the quickest and least expensive settlement while another might not want to pay a settlement to a PAE under any circumstances.



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When evaluating a potential joint-representation arrangement, the in-house counsel for each party should have frank and robust discussions with each other and proposed outside counsel about their goals, risk tolerance and expectations about how the matter will be handled by the jointly retained counsel. This information will be helpful in determining whether there is a good fit, and how to structure the alternative fee arrangement.

2. Will Fees and Costs Be Split in an Equitable Way?

The parties need to consider how to structure the alternative fee arrangement in a fair and equitable manner. As a starting point, it may be easy to evenly divide the fees among the multiple clients. For example, for a fixed fee retainer of \$300,000, each of three clients may agree to pitch in \$100,000 each. However, as the matter develops, it is possible that one party may require more of outside counsel's resources than the others — such as with complicated e-discovery issues, or other issues particular to one client. The parties should reach an understanding up front about these possible scenarios, and discuss how the AFA will address them. For example, will the parties share equally in the fees and costs, even if they may be disproportionate at any given time, or will there be carveouts for certain matters or issues that affect only one client?

3. How Will Litigation Decisions Be Made?

Parties who enter into a joint-representation AFA also need to consider who will be making decisions during the course of the litigation. For example, will all decisions be discussed by all members of the joint representation group or will one or more in-house counsel be designated as lead contacts and then interface with the others? Outside and in-house counsel need to know who has decision-making authority and for what issues, and which decisions need to be approved by each individual party.

Likewise, in-house and outside counsel should establish protocols for reporting various activities in the representation and what will be reported to individual parties only and what will be reported to all clients, and how that will happen.

4. Are There Protections for Confidential Information?

Alternative fee arrangements involving joint representation also need to consider and address the use and disclosure of confidential information. This issue has the potential to become particularly tricky with the joint representation of competitors, such as in response to a PAE assertion. In-house attorneys may be privy to confidential technical information about how the various clients' products work, or confidential financial information that they would not want disclosed to a competitor. In the course of representation, a settlement offer may be extended to one of the jointly represented parties, but can outside and in-house counsel disclose that fact to the other parties?

In forming a joint representation, the parties should spell out what information may be shared with other jointly represented parties, and what information may not be shared. In-house counsel should consider technical and business information that may be disclosed during the case, and information about settlement. And the parties should anticipate that there may be some information that can't be shared with other parties.

5. What Happens if a Conflict Arises or One Party Settles Out?

An AFA that includes joint representation should address what will happen if a potential conflict arises during the course of the matter. For example, in a patent infringement case, the jointly represented defendants may take divergent positions on claim construction. Or there may be a dispute involving indemnification involving a supplier and its customer who are jointly represented. If a conflict arises between two jointly represented parties, what happens? Will the outside counsel be able to continue representing one of the parties (and if so, which one), or will the outside attorney need to withdraw and all parties need to get new counsel?

To avoid surprises, in-house attorneys for all parties should try to address these issues up front when considering whether to enter into an AFA involving joint representation.

This is the last article in our series on crafting a workable litigation AFA. All articles can be found [here](#).

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