

5 Questions Firm Should Ask Before Approving Litigation AFA

Law360, New York (July 25, 2017, 9:34 AM EST) --

Alternative fee arrangements provide great opportunities for law firms to partner with clients and strengthen relationships. However, not every matter may be appropriate for an alternative fee or in the law firm's best interest. Firm management, which has its eyes on the overall economic health of the firm, its level of resources and maintaining and expanding its client base, should initiate a process to evaluate and approve alternative fee arrangements. In this fourth installment of our series on alternative fees, we discuss five questions that law firm management should ask when evaluating an alternative fee for a litigation matter.



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1. Why Is This Matter Appropriate for an AFA?

Not every legal matter is appropriate for an alternative fee. Law firm management should understand and consider the reasons why the partner is proposing an alternative fee arrangement for this matter.



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First, the law firm should consider whether the type of matter is well suited for an alternative fee. Alternative fee arrangements often work best for matters where the scope of the work is well defined and predictable. Examples of matters that may have a high degree of predictability include trademark and patent prosecution, drafting incorporation documents, review of contracts or leases or routine litigation matters. On the other hand, more complex litigation matters may present less predictability and enhanced risk for the law firm that it needs to consider as part of the approval process.



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Law firm management should also understand the client's reasons for requesting an AFA, and whether approving the fee will help grow the relationship with the client. Why does the client want an alternative fee? For example, law firms may significantly strengthen and grow their relationship with a client who is asking the firm for an AFA as part of being a select provider after a consolidation of work previously distributed among multiple firms. Likewise, a law firm may grow its relationship as a "trusted adviser" for a client who proposes a monthly retainer so that its in-house lawyers may freely seek advice. On the other hand, if the alternative fee is simply about lowering legal fees without investing in a relationship, an aggressive alternative fee that results in low realization may not be the best long-term investment for the firm.

2. How Did the Partner Arrive at the Alternative Fee Proposal?

Law firm management should ask partners to explain the methodology and assumptions behind the proposed AFA. There are many different ways to structure alternative fees including retainers, variable monthly rates by case phase, fixed fees for discrete tasks, and discounts coupled with success fees. When evaluating a proposed AFA, management should ask the

partner why one type of structure was chosen over others. They should also ask for an understanding of the inputs and assumptions lying behind the proposal.

In addition, as described above, when evaluating the economics of the proposal, firm management should understand and consider the client's goals for the AFA and the longer-term relationship with the firm. Successful AFAs are built upon both the client and law firm defining and delivering "value" and success. Understanding how the client views "value" and its goals for the alternative fee may help firm management decide whether the fee structure is a good fit and how the fee should be structured. For example, a client who places a higher value on predictability might want to break a two-year litigation budget into equal monthly payments. A client who places a priority on shared risk and reward might prefer up-front steeper discounts and larger success bonuses upon "successful" outcomes (which also should be clearly defined).

Law firm management should also ask the partner about the risks and protections if the matter changes scope. How accurate are the assumptions used to generate the alternative fee, and can it be adjusted if the conditions change over the course of the matter? These are important questions to understanding whether the fee will be a good deal for the law firm.

3. Have We Done This Before?

Law firms should utilize their own data and experience with similar matters when evaluating a new alternative fee proposal.

Initially, the law firm should draw on its own experience with similar types of matters as a check on the assumptions behind the AFA. The firm should look at historical billings for similar types of matters and use that as a basis for evaluating the likely fees for a matter of similar type and scope. For example, when evaluating an AFA for a litigation matter, the firm should consider historical billings for cases sharing similar characteristics such as the number of claims, jurisdiction, size of document production, likelihood of pretrial motions, length of trial, etc. Some firms have even used this data to create budgeting models that help generate more accurate budgets for future cases.

The law firm should also consider its past experiences with similar alternative fee arrangements, and learn from past experience what works and what might be improved.

4. What Is the Plan for Monitoring and Managing the Work?

Law firm management should ask partners how they plan to manage the matter and monitor the profitability of the AFA. Partners should be prepared to provide a plan demonstrating how they will deliver the services promised under the constraints of the AFA. Successful alternative fees will be bolstered by strong project management by the responsible partner and others on the team, such as a trained project manager, to track and manage resources. For example, hours worked can be tracked by timekeeper on a weekly basis to make sure that the level of activity is in line with the expected activity in the budget. Similar tracking can be done by phase or other parameters appropriate for the AFA. What is important is that the responsible partner continues to monitor whether the work is tracking with the budget on a "real time"

basis so that any adjustments or discussions with the client and/or firm management happen before a matter spins out of control.

5. How will AFAs Be Considered in the Performance Evaluation Process?

Finally, as alternative fees become more common, law firms need to consider whether their performance evaluation systems appropriately consider lawyer involvement on alternative fee arrangements. Systems that are based exclusively on billable hours are often unable to consider the mutual value that can be attained from AFAs by clients and firms. A well-rounded performance evaluation system that considers a variety of financial and nonfinancial-related measures may allow for better consideration of the successful use of AFAs. For example, nonfinancial measures such as client satisfaction with attorney work product, attorney management skills, project leadership, and success with proposal activity might address some non-financial aspects of alternative fees.

There are, of course, many additional questions that should be addressed before an AFA for a litigation matter is submitted or accepted. We have touched on several of these considerations in our prior articles, and will continue to do so in upcoming articles on the depth of the final AFA document and the issue of joint representation.

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