

## 5 Questions To Ask Client Before Proposing A Litigation AFA

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An alternative fee arrangement is frequently required as part of a law firm’s response to a client’s request for proposals to handle new litigation matters. In-house attorneys routinely receive, review and compare such proposals, and nearly all law firms regularly submit them, but the parties often do not follow a disciplined approach in developing a realistic budget. The risks to clients of retaining outside counsel subject to a poorly constructed AFA are very real, while outside counsel have their own set of considerations regarding whether to submit a proposal. To help ensure that the interests and goals of outside counsel and their clients are properly aligned throughout a litigation matter — and stay that way — it is crucial that AFA proposals be intentional in their construction.

In a series of six articles, we intend to provide guidance on this issue to be sure that responses are meaningful to both the client and outside counsel. We will identify questions that lawyers, clients and law firms should ask each other and themselves prior to proposing an AFA. We will also address the questions the final document should answer, and factors in-house lawyers should consider if joint representation is involved. In this first article in the series, we discuss five questions that every outside counsel should ask the prospective client before proposing an AFA for a litigation matter.

### 1. Why Is an AFA Being Requested?

Clients who request an AFA have various reasons for doing so and it is the outside counsel’s role to understand their intentions. The first step in assembling an intelligent response to a request for an AFA is for outside counsel to be certain they understand the primary reasons that the client is making the request.

Most often, predictability is the key driver for the client. But, is it predictability regarding overall fees for the matter? Monthly fees? And/or both fees and costs? To correctly structure an AFA proposal, outside counsel must know the client’s primary focus, so if the client hasn’t articulated her intentions, outside counsel should not hesitate to ask.

In some cases, the client may be requesting an AFA simply to find the lowest possible price, putting the quality of the legal services on a lower shelf. Comparing AFA bids (particularly if they are fixed fee proposals) makes it easy for the client to obtain the lowest price service. If the client is accepting competing bids, that is helpful for the bidding parties to know. This insight is necessary for outside counsel to determine whether making the proposal is in the best interest of the firm. If submitting is not the right choice, the firm’s internal resources are saved; if it is, this information allows the firm to price the matter as attractively as possible to be competitive — again, making the process more efficient for both sides.



*Gregory Lantier*



*Natalie Hanlon Leh*



*Mary (Mindy) Sooter*

Other circumstances also exist: the client may be requesting an AFA to better align the incentives of outside counsel with the client's own interests; or an in-house attorney may be requesting a proposal because it is required as a matter of policy by her employer, and she may not have a good understanding of the reasons for the AFA request.

Of course, and as is often the case, the reasons for requesting an AFA can include a combination of several of the above interests as well as others. No matter the circumstances, it is critical that outside counsel understand those interests prior to assembling an AFA.

## **2. Is the Client Able to Share Information Regarding the Value of the Matter?**

Intelligently constructing an AFA proposal requires outside counsel to make numerous assumptions concerning what steps will be taken in litigating the case. Those assumptions should be based, in part, on the expected value of the case. If a case is expected to settle for a relatively modest sum, for example, the proposal likely does not need to assume that there will be significant motions practice during expert discovery. Further, the number of hours budgeted for written discovery should vary greatly depending on the stakes in the case.

Outside counsel should ask their in-house counterpart for preliminary information about the exposed revenues and/or whether (if the client is a defendant) plaintiff has already made a settlement demand.

## **3. What Outcomes Would the Client Consider a "Win"?**

Learning what the client would consider a "win" is paramount in building an effective AFA proposal. Here's why:

- Articulating what would be a "win" will calibrate inside and outside counsel's goals. Starting off on the same page is important for efficiency's sake and satisfaction with results — from both client and outside counsel perspectives.
- If the only outcome that will please the client is a favorable, dispositive decision on the merits, then the proposal should reflect that, potentially by building in success bonuses or other financial incentives for outside counsel to devote the resources necessary to achieve that result.
- If the client would consider a settlement within a certain range a "win," then the matter strategy — and, accordingly, the AFA proposal — ought to be constructed to maximize the likelihood of achieving a win while moderating the legal fees and costs expended to do so. It may be appropriate, for example, for outside counsel to discount the fees that would be expected were the case tried because outside counsel expects that the case will be resolved short of a trial.
- If a "win" cannot be defined, the client and outside counsel should carefully consider whether to request/submit an AFA. It is possible, if not likely, that opting out of the proposal process in this situation is better than moving ahead with an AFA proposal that assumes the case must be litigated through a trial and budgets accordingly. If

the goals cannot be articulated, then it is less likely that either party will be satisfied with any outcome that is achieved.

- It is helpful to both in-house and outside counsel to express the goal for the matter up front, because if that goal changes over the course of the litigation, it may be necessary to also adjust the fee arrangement.

#### **4. What Level of Involvement Does the Client Expect to Have?**

A client's level of involvement impacts not only the results of many litigation matters, but it also can impact the costs.

Sometimes clients can help to decrease the time that outside counsel must devote to a matter by undertaking certain responsibilities, thereby decreasing the budget used to calculate an AFA. For example, in-house counsel can add significant value, and decrease fees, by taking responsibility for developing the facts in a portion of the matter. Under such an arrangement, in-house counsel functions in part as another member of outside-counsel's litigation team — and one who does not need to be budgeted for in an AFA. Similarly, some clients have robust internal procedures for collecting and conducting first-level document review or preparing first drafts of responses to written discovery requests. These capabilities should be accounted for when preparing an AFA.

On the other hand, while it clearly improves the team's work product, frequent consultation with the client can also be expensive. Discovery correspondence with opposing counsel, for example, can take twice as long if every email is sent first to the client, revised based on client feedback, recirculated for approval, and then sent to opposing counsel. The drafting of motions and other papers likewise can take significantly more time when a client regularly suggests substantial revisions to drafts and/or there are multiple revisions prior to filing most documents. Finally, the time required for multiple calls with a client each week can quickly add up.

Whether a client's desired level of participation in the litigation increases or decreases costs, it is important for both the client and outside counsel to understand the impact this has on an AFA.

#### **5. Who Else Is the Client Asking for a Proposal?**

A last question that outside counsel frequently do not ask, but should, is what other firms are submitting proposals. There are key reasons for asking the question.

Asking who else is submitting a proposal may prompt the client to comment on her decision-making process for selecting firms as candidates for the matter. This can provide valuable insight into what the client's goals are and how the client is viewing the matter at the outset.

In addition, knowing what other firms will be bidding can inform both the structure of the AFA that outside counsel submits and its packaging. If, for example, the other firms all have lower hourly billing rates than outside counsel, it may

make sense to submit an AFA that proposes making a larger initial investment to obtain an earlier result, followed by a negotiated resolution, rather than an AFA that assumes the matter will be litigated through expert discovery.

## **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 next five articles.

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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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