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How to Successfully Use Alternative Fee Agreements for Legal Services: A 10-Step Guide

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Qualifying Whether an AFA is Appropriate

There are many misconceptions about alternative fee arrangements (AFAs). Chief among them is the notion that if the matter is likely to change or if the scope is ambiguous, then you must stick to the billable hour. As you will see in this Guide, there are many AFA approaches designed to tackle the ambiguity that is inherent in legal services, and which can account for potential changes in scope with simple, pre-agreed adjustments.

Still, there are some instances in which you may not be ready to implement an AFA or in which the billable hour truly is the only feasible model to engage in. What are these rare instances in which an AFA would not make sense?

1

You are looking to retain a firm to ask questions infrequently, but have no idea how frequently you will come to them with questions. In other words – you just want a firm to be identified as preferred counsel and retain them for a certain type of legal service, but you cannot provide a specific scope of work. If that is the case, we recommend just negotiating preferred hourly rates or a blended rate with the firm of choice.

On the other hand, if you can clearly define the exact repeatable tasks that will be performed each time you engage the firm (e.g., a particular corporate filing that must happen every term) then you may be able to implement task based fixed fees for those services and then pay those fixed fees as and when the need arises.

2

You have no ability to (or are unwilling to) perform the steps necessary to determine an appropriate price. If your goal is to contain the cost of ever-growing legal work with some type of AFA with the firm currently doing the work (e.g., legacy litigation), but do not intend to consider switching firms, you cannot get around conducting some data analytics to determine an appropriate fee amount for the work. This task can be daunting. Clients need to be willing to do the work to analyze the average fees paid to the firm on prior similar matters and provide an estimate of the major cost drivers that were involved in those prior matters to appropriately benchmark a fair price for the matter at hand.

Alternatively, you can ask other firms for quotes or proposals based on a set of assumptions (we will discuss these approaches in detail in step 4). If performing these steps is not an option, then its ill-advised to agree to an AFA based on general guesses: The burden that likely will result from renegotiating the AFA outweighs the benefit of agreeing to an uninformed fixed price. An uninformed fixed price can result in a windfall benefit to either the client or the firm if there was no reasonable basis upon which to come to a pricing agreement.

If the parties start from an uninformed anchor point and then must completely renegotiate later, likely it will be the billable hour invoice that informs what the buyer pays. Therefore, you may as well have engaged on an hourly model to begin with and avoided all the hassle.

Define Success

Once you have established that you would like to implement an AFA, identify what goals for the AFA. What outcome would you consider as a success for the AFA negotiation? There are several reasons you might negotiate an AFA:

BUDGET PREDICTABILITY

Finance appreciates having a good understanding of the exact fees that will be incurred during the fiscal year and some AFA approaches may provide this benefit even where there is no net difference in fees paid compared to an hourly arrangement.

REDUCED COST FOR THE CLIENT

Some AFA approaches correctly align incentives between client and firm such that the firm is incentivized to be more efficient. Any savings efficiencies realized by the firm can be passed back to the client in the form of a lower overall fee amount billed.

BETTER LEGAL OUTCOMES

Some AFAs provide added incentives for firms to deliver successful results for the client in a way that leads to better legal outcomes.

WELL-INFORMED SETTLEMENT STRATEGY

A better understanding of the fee amount that will be incurred at each phase of a litigation matter can provide the client a clearer picture as to whether it ought to settle and if so, for how much.

ALIGNMENT OF EXPECTATIONS

The sheer act and effort of coming to an agreement on the quantity of major tasks that the client would like performed in a matter can lead to better firm performance because the firm has a clearer understanding of the client's expectations. Hourly billing encourages laziness by the client in defining the scope of work and the parties may then have to have difficult discussions about why certain tasks were needed. Discussions about what work was done should not happen after it has been invoiced.

REDUCTION IN INVOICE REVIEW

Some AFAs can be paid via single line-item invoices, which can reduce the client's administrative overhead related to invoice review.

ENHANCED PROFITABILITY FOR THE FIRM

This is important for the client to consider since unprofitable pricing models are not sustainable. Some AFAs provide firms the opportunity to bring in a set amount of revenue and they unshackle firms in such a way as to enable them to be more leveraged in their staffing model such that even if the fee amount is reduced, the firm has a greater profit margin on that fee.

Success may look completely different depending on the history and relationship with the firm or client you are negotiating with. For instance, your goal may be to corral a growing multi-district litigation by placing a high-end boundary on a firm's annual spend and encourage the firm to be most efficient with its resources across hundreds of similar matters. Maybe you are looking for greater budget predictability across your IP patent filing portfolio or you would like to align the pricing approach adopted across your eDiscovery vendors so that you can more clearly establish unitized pricing on document review.

The goals of the AFA will impact the approach and it is possible that both the client and the firm will have goals that align. Too often clients think of AFAs as a zero-sum game in which one party wins (pays more or earns more) than they would have in an hourly billing scenario and the other side loses. However, a firm will benefit from a clearly defined revenue amount and, under a fixed fee, can deploy its resources in such a way as to reduce its costs.

Some of the savings realized by the firm (less duplication of effort, more work done by less costly junior resources) can be passed back to the client such that the client pays a reduced fee amount, but the firm maintains or increases its profit margin. In this way, a good AFA should be defined as one that is beneficial to both sides.

BEWARE OF COMPARING TO THE BILLABLE HOUR TO DETERMINE SUCCESS – OR: WHY CLIENTS SHOULD NOT FEAR A LEVERAGED STAFFING MODEL

Avoid a “show me what I would have paid” approach to determining whether you had a successful outcome. You need to consider that the firm’s actual operating model may have changed because of the AFA: For example, if a law firm’s partner can delegate certain tasks to the appropriate resources such that there are fewer partner hours billed on the matter, the firm can decrease its cost while maintaining the same revenue via the fixed fee. However, if the client looks at the shadow bill, the firm may be reluctant to deploy such a strategy because the client could read the invoice and say – “oh we would have paid less under an hourly billing arrangement.”

In reality, the billable hour invoice would not have been the same as the shadow bill so it is not a fair determination. It is more important to establish a true market price and seek to pay a fee amount that is in line or lower than the true market price for the work and then let the firm manage its time the way it deems best (see step 3 on true market price).

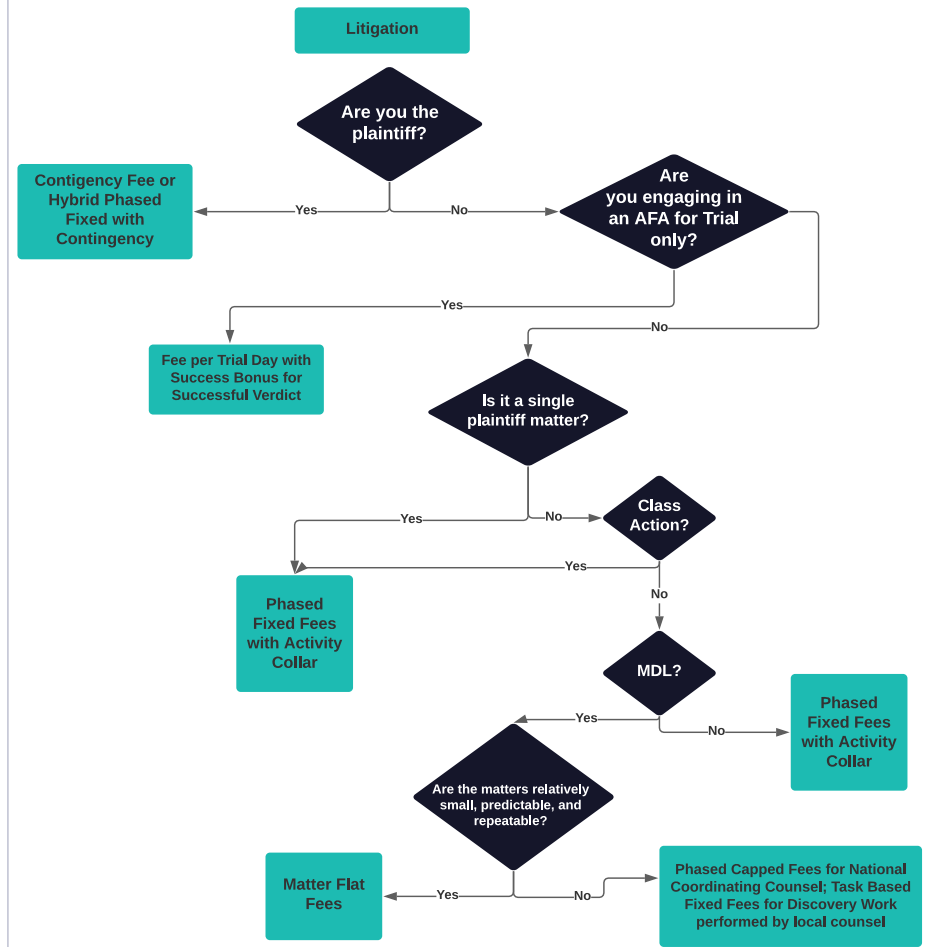
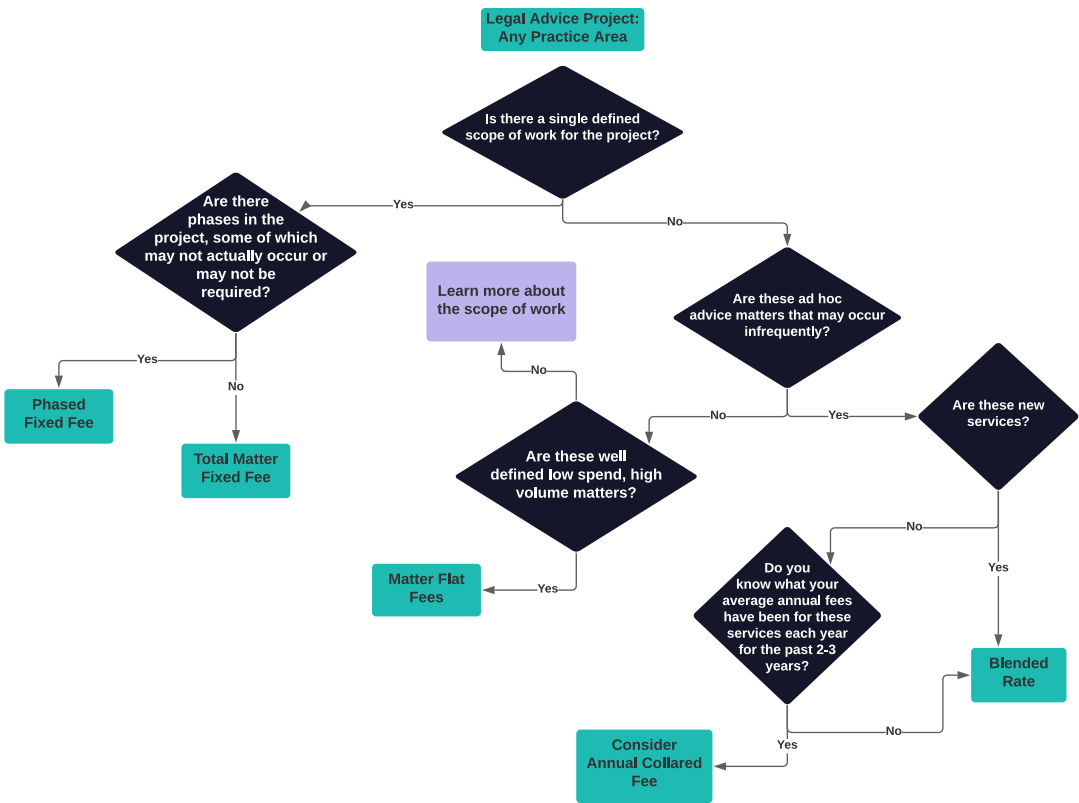
If an AFA incentivizes a more leveraged staffing model with more junior resources, will the client suffer a drop-off in quality? The answer is no. Too often the client mentally associates value with effort – “if I get more partner effort, then I get more value.” However, that is the wrong outlook. A truly effective and efficient law firm partner will know how to lead their team such that they can deliver the same high quality work product without having to personally perform as many of the tasks. The client should be fine with this so long as the firm delivers the desired outcome. In practice, quality is table stakes. Law firms that do not deliver will not be hired again and so firms must still focus on execution even where associates represent a bigger piece of the staffing pie.

REMEMBER: AFAS ARE ABOUT MOVING AWAY FROM PAYING FOR EFFORT AND MOVING TOWARDS PAYING FOR OUTCOMES AND RESULTS!



STEP THREE Choose an AFA Type that Fits the Matter Type

AFAs come in different types, and each AFA type comes with its pros and cons. Thus, an effective AFA negotiation starts with an alignment on the optimal pricing strategy based on your goals and the type of matter at hand. The below charts provide frameworks for determining an optimal AFA type based on the practice area and matter type. For definitions on AFA types, please see the BLC AFA Primer [HERE](#).





Assess True Market Price

Legal services are typically priced by comparing one's rates to the going rates set by other firms in the same market rather than manufactured goods which are usually priced by calculating the good's cost and then adding an acceptable profit margin over the cost. Law firms purchase reports that provide insights on hourly billing rates and help inform whether the firm ought to increase its rates.

Thus, an optimal outcome for an AFA negotiation from the client's perspective is one in which it agrees to pay an overall price for the matter that is in line or lower than the market price for the work. So how do you determine what the market price is for the work? You can assess what the market price is for a matter in different ways. There are pros and cons for each approach, and a combination of multiple approaches above would yield the greatest level of confidence in what a fair price would be for the matter.

✓ Approach 1

REVIEW HISTORICAL BILLING DATA

This approach involves picking a handful of prior matters that you deem as most similar to your matter at hand. For instance, if you are negotiating an AFA for a single-plaintiff employment litigation defense matter, you might pull the average total spend for such matters over the past 2 years to give yourself a baseline of what you might pay on an hourly basis.

The benefits of this approach as that once you have your "baseline" or the price you would have paid in the past, the delta between that baseline and the agreed price of your final AFA may be considered savings. However, there are

several drawbacks with this approach: Finding prior similar matters is easier said than done. Clients do not often categorize matters in a way that is conducive to conducting this analysis. Further, even with a strong taxonomy, it may be unclear how "far" the matter went in terms of phases before it was settled or dismissed. So, you may be calculating an average price of matters that went down completely different paths. Thus, it is important to calculate the average price of matters by phase and to take note of the number of major cost drivers within each phase (e.g., the average fees paid for discovery phase was \$100,000 for matters in which there were 3 fact witness depositions and 1 expert). Ironically, the more lines of data within the billable hour invoices, the more difficult it can be to attain this basic level of information about the quantities of major activities performed by the firms doing the work.

✓ Approach 2

PURCHASING BENCHMARKING REPORTS

You may be asking yourself – how does it help knowing the average price we paid in the past for purposes of assessing a fair price in the future if we paid too much in the past? Or how can we assess what other clients pay on average for this work? In theory, the ideal state would be to look at a catalog of matters of a given type listed by complexity (e.g., 10 deposition matters vs. 2 deposition matters) and then see an average market fee paid by other similarly situated clients. For instance, in Southern California single plaintiff employment litigation disputes, banking clients paid on average \$250,000 for matters that progressed through trial of average complexity. That would be amazing information to have at your fingertips, but may not be available.

Instead, what most benchmarking reports provide are hourly rate-based benchmarking – what is the average rate paid for partners in Los Angeles in employment law, for instance. This information is helpful for negotiating a firm's rate, but when it comes to an AFA, it provides little value unless you can derive a really accurate average number of hours billed by timekeeper level by phase in your historical data review and then multiple those hours by the benchmark hourly rates to derive a target AFA amount.

✓ Approach 3

ASSESSING THE MARKET IN REAL TIME VIA COMPETITIVE BIDDING OR TENDERING

The best way to assess the market price for the work is often to ask multiple firms for proposals in a competitive RFP process. With this approach, the client might provide some assumptions on the level of complexity involved in the matter in terms of the quantities of major cost drivers and then ask firms to provide proposals based on these assumptions. This allows an apples-to-apples comparison in which you can determine the real-time, true market price for the work.

This also gives you a strong position to negotiate with your firm of choice. Ideally, you would still have strong benchmarking data because there is still a risk that the outcome of your RFP is above market if you have only invited wildly expensive firms. However, because you are inviting firms you actually would consider doing the work, the price that these firms would charge is the most instructive benchmark to compare to your firm of choice.

Once you have conducted one of these approaches or a combination of them, you should feel confident that you know the market price for the work and have a good baseline upon which to negotiate your AFA.

Once a law firm has defined its standard rates by timekeeper level (Partner, Of Counsel, Associate Year 9, Associate Year 8, etc.) it will seek to maximize its utilization rate of all available resources at the firm in order to maximize profitability.





Account for Changes in Scope (Draft Material Deviation Clauses)

One of the biggest factors that prevent clients from implementing AFAs is the uncertainty around how the price will change if there is a significant change in the work required for the matter. For instance, how do we adjust the fixed fee if the matter settles or is dismissed? Would we resort back to the billable hour? If so, why even bother with an AFA? After all, most cases settle before trial. The same types of questions exist in the transactional sphere. Your transaction negotiation could break down and one side could pull out of the deal. So how can an AFA work in that situation?

Legal services are inherently ambiguous in their scope of work. The amount of work or effort required can vary based on a number of factors:

- ✓ Opposing party action (e.g., the plaintiff files more motions than anticipated)
- ✓ Client change in direction (e.g., the client asks the firm to do more research or doc review than originally anticipated)
- ✓ Third party decision or action (e.g., the judge rules a certain way or there is some other intervening factor that gets in the way of a deal being done)

While legal services have built in forks in the road that can lead to a significant increase or decrease in work, many of these forks are themselves predictable and you can ask firms to price each path that they could conceivably walk down. Further, the type of matter or project can speak volumes about the likelihood of material deviations and the process of aligning the AFA type with the matter type has already progressed us towards a viable solution for changes in scope.

However, every AFA should include a clause that defines what events can trigger a material deviation and how the parties will proceed to adjust the fee amount if a material deviation does occur. **There are several key principles that parties should adopt when drafting material deviation clauses:**

- ✓ Seek to limit renegotiation as much as possible. A good material deviation clause sets boundaries such that the parties do not need to renegotiate the AFA frequently.
- ✓ Do not leave it open ended. If you want to limit renegotiation, you have clearly defined events that can trigger a change in price. Leaving it open ended based on what is fair and reasonable could cause either party to have free reign to ask for frequent adjustment.
- ✓ Keep it simple. If the clause is too complicated to understand, both sides will opt to resort back to the billable hour the next time around.
- ✓ Make it formulaic if possible. While (most) lawyers dislike math, it can certainly be helpful to use a simple formula for pre-determining how the price will change if there is a material deviation. The more we can align on preset mathematical adjustments, the less need there will be to have lengthy AFA renegotiations later.



Sample Material Deviation Clause

[COMPANY]'s objective is to obtain [insert AFA] proposals with a total price based on several assumptions. Note that hours worked will not be considered grounds for an amendment to this fixed fee proposal. See material deviation section below.

While [COMPANY] does not intend to pay per activity, [COMPANY] seeks to obtain activity/task-level proposed fees that would help inform what a fair adjustment should be if there is a material deviation in the quantity of the activities/tasks assumed.

Example of Material Deviation Clause (US Litigation)

The firm selected will periodically review the actual work performed in connection with this matter against the above Scope of Services that underlie the Fixed Fee.

The firm will contact [COMPANY] promptly if it believes that the actual work performed to defend [COMPANY] in connection with this matter has significantly changed from the Scope of Services as detailed above.

Based upon a standard of good faith and fairness, [COMPANY] and the firm may then review the work performed and may consider accelerating or decelerating the invoicing schedule and/or increasing or decreasing the amount of the Fixed Fee.

[COMPANY] may also request that the firm conduct such a review of actual work against the work contemplated by the Scope of Services. This review of the status of the work and material change discussion between Company and the firm may occur more than once during the pendency of the matter.

Otherwise, the Fixed Fee comprises the total and maximum that [COMPANY] will pay against the Scope of Services, subject only to the existence of a Material Deviation.

A Material Deviation shall be defined as a 30% increase or decrease in the following key cost drivers:

1. Motion to Dismiss (assume 1)
2. Answer (assume 1)
3. Motion for Summary Judgment including Hearing (assume 1)
4. Depositions:
 - Taking Deposition - Fact Witness (assume 5)
 - Defending Deposition - Fact Witness (assume 5)
 - Taking Deposition - Expert (assume 5)
 - Defending Deposition - Expert (assume 5)
5. Daubert Motion (assume 1)
6. Document Review and Production - (assume 1,000 Documents)
7. Trial Days (assume 15)

If there is a Material Deviation, then [COMPANY] would use the fixed fees set forth in each phase or phase sub-part to determine how much to increase or decrease the price for any phase.

Example - If the proposed total price was \$400,000 (USD) and the price per deposition proposed was \$5,000 (USD) and the matter required 18 depositions instead of the 15 that were assumed (i.e., a 20% deviation, which is less than the 30% threshold), then there would be no change to the Fixed Fee. The additional 3 depositions would fall under the Fixed Fee. However, if the matter required 20 depositions > 30% deviation), then the total price would be increased by \$25,000 (USD) (5 * \$5,000 (USD)) + \$400,000 (USD) to a new total of \$425,000 (USD). Likewise, if the number of actual depositions required was less than the number assumed by more than 30%, the total price would be decreased based on the price per deposition provided.



Consider Hybrid Fee Types by Phase

In addition to providing guidance around how the fee might be adjusted in the event that there is a material deviation in the scope of work, clients should also consider breaking their AFAs into multiple phases such that there is a clear understanding of what fees are paid for each. That way, if the project or deal is cancelled or if the case settles or is dismissed, you only pay for the phases that have occurred at the phase level prices. If the ending of the matter falls in the middle of the phase, then you would look to the material deviation clause to assess whether there needs to be an adjustment on the fee paid in that phase.

While fixed fees by phase is a common AFA structure, you can also consider deploying a hybrid structure that involves fixed fees for some phases and another AFA type like a capped fee for later phases. A great approach in cases where a success outcome is clearly defined, you may want to agree to a minimal fixed fee for some phases of the matter with success bonuses that would be paid over and above the fixed fee if the successful outcome is achieved at that phase of the matter. For example, a Fixed fee per phase for each phase of litigation except using discounted hourly rates for discovery with a 5% contingency based upon recovered amounts.





Quantify your Assumptions

To minimize the amount of renegotiation that may be required throughout the life of a matter after an AFA has been agreed to, it is important to provide quantities of the assumed major cost drivers. For litigation, for instance, do not just say “we will have fact witness depositions and expert depositions,” but provide an assumption and quantities, such as 5 fact witnesses and 2 experts (based on your best guess given your understanding of the case). That way, only a significant change in those quantities can be considered grounds for adjusting the price.

Using specific quantities, prevents the parties from having a disagreement about what changes are material and which are not. If a firm takes more time to conduct the depositions but the baseline quantities have not changes from that originally assumed, that should not be grounds for an adjustment to the agreed fee amount. Only a material change in the quantities of major cost drivers should be grounds for an adjustment.

Here are some examples of the types of activities within matters that you might provide specific assumed quantities for when negotiating an AFA (this is not an exhaustive list):

Litigation

- ✓ The number of documents in scope of second level review
- ✓ The number of motion hearings
- ✓ The number of case conferences
- ✓ The number of fact witness depositions

- ✓ The number of experts
- ✓ The number of interviews
- ✓ The number of anticipated trial days

M&A & Transactions

- ✓ The number of rounds of negotiation in the term sheet negotiation phase
- ✓ The number of target contracts, including customer agreements, supplier and vendor agreements and IP inbound and outbound licenses in scope of the acquisition

The better you quantify your assumptions, the better you will be able to hold firm on your negotiated fee amounts after the matter concludes.



Negotiate on Value

A key goal of moving towards AFAs is driving towards paying for value rather than paying for effort. As such, both parties should strive to find win-win opportunities when negotiating. For instance, for firms, a Fixed Fee presents a clear revenue opportunity in which the firm is freed up to provide a more discounted price because it can control its staffing mix in way that maximized profitability. Since Fixed Fees are inherently risk-sharing agreements (firms bear risk that they effort incurred is greater than anticipated while clients bear risk that the effort is less than anticipated) both sides can mitigate that risk by agreeing to pre-set success bonuses if the outcome sought is reached and preset price reductions in the event of an unsuccessful outcome.

For example, it is common in M&A transactions to include a pre-agreed broken deal discount such that the parties know that the fee amount will be reduced significantly if the deal falls through. In the litigation context, if a client is asking for a more aggressively discounted fixed fee, the firm could consider providing a fixed fee that is 15% lower than its anticipated budget in return for a success bonus of 25% in the event of a successful verdict or early case dismissal. In this way, clients and firms can create win-win scenarios and negotiate in a way that incentivizes the right outcomes.





Provide True Up Documentation to your Firm

After coming to an agreement, it is helpful to have a defined process for allowing firms to request changes to the agreement in the event of a material deviation.

Price / Activity (Applied only if there is a Material Deviation)		Original Assumed Quantity	Actual Performed Quantity	Material Deviation Triggered? (30%)	Adjustment Amount
\$20K	Fact Witness Dep	10	15	Yes	(5*20K) = +\$100,000
\$50K	Expert Dep	10	11	No	
\$100K	Motion to Dismiss	1	1	No	
\$300K	Motion for SJ	1	1	No	
\$5.00K	Document Review	5000	5500	No	
\$100K	Daubert Motion	1	1	No	
				TOTAL	+\$110,000

You will notice in the above chart that not every activity in the matter is being tracked – only those activities that were expressly quantified in the assumptions. A change in research time or prep time is not quantified and both sides assume risk that a change in effort in the activity outside of these items will not trigger a change in price. Only a 30% change in the quantity of the activities defined in these rows can trigger an adjustment to the overall fee amount.

We recommend that you determine a set date at the midpoint of the matter or project to assess whether there has been a material deviation as defined in your material deviation clause. If you have engaged in an activity-collared approach, the below is an example of a true-up sheet that clients have leveraged and have firms submit once a material deviation is triggered.

Firms can submit single line-item invoices billed as a pro-rate amount of the overall fixed fee and then submit an additional invoice or a credit (if necessary) if an adjustment needs to be made after conducting a mid-point true up review of the work performed.

WHAT ABOUT SHADOW BILLING? SHOULD WE ASK FOR A SHADOW BILL DURING THE TRUE UP?

We recommend that parties steer away from shadow bills that could be used to determine whether they “won or lost” on the deal. This is the wrong lens upon which to evaluate the success of an AFA.

There are three reasons why shadow bills present fundamental problems when attempting to drive more AFAs:

- 1 Shadow bills do not represent a picture of what “would have happened” in a pure billable hour scenario as firm’s behavior under an AFA changes. If the client is going to review the hours worked like a hawk and use those shadow bills to figure out “what we would have paid under hourly” they will find that the hours worked would have yielded a cheaper deal under hourly than the AFA because the firm already changed its behavior, and the shadow bill reflects that new behavior. In other words, a shadow bill is not an accurate representation of what you would have paid under hourly where the firm's incentives would have been completely different.
- 2 Shadow bills prevent firms from being able to reap the benefits of a fixed fee. Firms can lower their fixed fee (and pass savings back to the client) by leveraging their staffing model (more work to associates and paralegals and less to partners), which helps firms be more profitable. Clients should look at this change in staffing as a good outcome. Just like you would not want a doctor doing a nurse’s work and then billing you for it, you do not want a partner doing a paralegal’s work. Too often clients associate value with time and assume that if you get more partner time then you must have been given more value. Actually, what clients should care about is the outcome. As long as the firm delivers a successful outcome, the client should not care what staffing mix was required to deliver it.
- 3 Shadow bills set the wrong expectation. Looking at the shadow bill suggests that the client still thinks hours billed equate to value rather than some other qualitative assessment. The true up should assess whether the firm provided the deliverables that you asked for at a high quality and whether you paid the best price the market could bear for those deliverables (as achieved through competitive bidding).

STEP
TEN

Execute an Engagement Letter and Choose an Invoicing Strategy

After defining

- 1 The scope of work broken down by phase
- 2 The agreed fee amount for each phase
- 3 The AFA type (capped, fixed, hybrid, etc.)
- 4 Any value-based bonuses or preset adjustments
- 5 The material deviation clause
- 6 The invoicing approach and true up cadence
- 7 Documenting these items in an Engagement Letter. While you may have a master engagement letter on file, it is advisable to document matter level agreements in engagement letters to keep a record of the details of your AFA.



To invoice for an AFA within an eBilling system, there are a different options:

✓ SINGLE LINE-ITEM INVOICES

You can divide the total fixed fee for life of matter by the number of anticipated matter duration months and then instruct the firm to bill single line-item invoices in this amount each month. (For example, if the matter fixed fee was \$100,000 and the duration anticipated was 10 months, the firm would bill a single line-item amount of \$10,000 a month.) Alternatively, you may instruct the firm to bill a pro rate amount of each phase fixed fee in a single line item.

✓ CUSTOM TASK CODES FOR EACH MAJOR COST DRIVING ACTIVITY

The problem with relying on out of the box UTBMS code sets is that they are predicated on hourly billing. There is often a great deal of overlap across task codes and the structure and phases of your AFA may not align perfectly with the code set. For that reason, clients often create their own custom tasks codes so that they can consistently report on spend based on the codes that they have chosen to standardize within their department. With this approach many eBilling systems will be able to pull spend by custom task code and it is easier to distinguish AFA spend from normal hourly billing spend.

Some systems allow you to set an hourly rate that cannot be exceed for a particular task code, with this approach, the fixed fee amount become the "rate" in the system for each custom task code that corresponds to the phase of the matter that is fixed. The firms then bill a quantity of 1 for the phase fixed fees and additional quantities for activity/task level fixed fees like fees per deposition.

Example:

Phase 1: L1001 - Early Case Assessment - "Rate" = \$100,000 QTY = 1

Phase 2: L2002 - Motion Practice - "Rate" = \$175,000, QTY = 1

Phase 3: L30031 - Fact Witness Deposition - "Rate" = \$20,000, QTY = 10

✓ CAPS BY UTBMS CODE PHASES OR TOTAL MATTER BUDGET

With this approach, you would set a cap within the e-billing by UTBMS Phase (e.g., L300 is capped at \$300,000 and invoices beyond the cap are rejected). Alternatively, you may be able to just set a cap for the whole life of matter budget such that any invoices that exceed the cap are automatically rejected. However, we do not recommend this invoicing approach for fixed fees unless you have no other alternatives.

In summary, an alternative fee arrangement is a great way to move away from paying for effort and towards paying for value. However, for an AFA to provide this intended benefit, both sides must pre-agree on a way to adjust the fee amount.

The pre-agreed adjustment method should rely only changes in scope and not changes in effort/a shadow bill accounting approach. Only if the actual number of valuable deliverables performed is materially different from the amount assumed should the price change.

By aligning the matter type with the proper AFA approach, clients and firms can account for the inherent ambiguity challenges that legal work presents. For instance, a phased fixed fee in litigation allows parties to have predictability while naturally accounting for the fact that most cases don't go to trial.

By including success bonuses, firms and clients can negotiate discounted fee amounts in return for larger bonuses when the desired outcome is delivered. In this way, we can start to reward lawyers for the quality of their work and not the number of hours they spend in the office – an outcome that would make all lawyers happy.

Appendix



Please use the below table with suggested AFA types by matter category and sub category for particular examples:

Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
Litigation	Patent Litigation	<p>These are high spend matters, typically with a single plaintiff. The budget for a single matter can range from \$1M to \$5M.</p> <p>The value/importance to the company is very high.</p> <p>The total life of matter cost varies depending on when the case settles or is dismissed. Thus, the likelihood for later deviation in price from original budget is high.</p>	<p>Activity Collared Fixed Fee by Phase</p> <p>OR</p> <p>Phased Capped Fees</p>	<p>Phase 1: Fact Investigation and Interviews -\$200k Fixed or Capped</p> <p>Phase 2: Fact Discovery - \$250k Fixed or Capped (\$15k per deposition in case of deviation)</p> <p>Phase 3: Claim Construction - \$135k Fixed or Capped</p> <p>Phase 4: Expert Discovery - \$200k... (\$50k per expert in case of deviation)</p>



Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
Litigation	Employee Litigation	<p>These are medium spend matters, usually with a single plaintiff (former employee) suing over wrongful termination, discrimination, or wage and hour dispute, etc.</p> <p>The matter budget can range from \$100k to \$350,000.</p> <p>The value/importance to the company is low to medium.</p> <p>The total life of the matter cost varies but is more predictable on a scale with other litigation matters since the number of experts and witnesses involved is more predictable. Thus the likelihood of deviation in price from original budget is low to medium.</p>	<p>Activity Collared Fixed Fee by Phase</p> <p>OR</p> <p>Phased Capped Fees</p>	<p>Phase 1: Fact Investigation and Interviews -\$200k Fixed or Capped</p> <p>Phase 2: Motion Practice - \$250k Fixed or Capped (\$15k per deposition in case of deviation)</p> <p>Phase 3: Discovery - \$135k Fixed or Capped Fee per Fact Witness Deposition in case of deviation: \$20k Fee per Expert in case of deviation: \$40k</p>



Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
Litigation	Demand Letter Responses	<p>These are very predictable, low complexity and can be high volume in terms of the quantity of these matters per year.</p> <p>The focus is on efficiency. The likelihood of deviation in price from original budget is very low.</p>	Flat Fees per Matter	A pre-agreed flat fee of \$2,000 per matter that arises any time in the calendar year.





Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
Litigation	Products Liability Litigation Multi District Litigation ("MDL")	<p>A high volume of individual matters (multiple plaintiffs) that must be litigated separately (not consolidated into a single class) but which the discovery phase is consolidated. These matters have repeatable fact patterns surrounding the same product(s) (e.g., multiple consumers suing over a similar defect in their car, medical device, pharmaceutical drug, or any other product that has caused injuries). Clients often engage one firm to act as national coordinating counsel ("NCC") across all new matters related to the same product. Coordinating counsel would then be involved in engaging local counsel across multiple jurisdictions.</p> <p>The complexity can be high with these types of matters and depending on the allegations, the matters could be of very high value to the defending company.</p> <p>Because multiple matters fall under the same product category, a firm can benefit from repetition to reap efficiency gains. For example, there may be less prep work required for each subsequent depositions in related cases if the same firm is handling many of them. Because there may be multiple firms involved in the litigation, agreeing a total matter level fixed fee may be more challenging than putting in place controls at the task level.</p>	Activity or Line-Item Fixed Fees, OR Activity Collared Fixed Fee	\$10,000 per internal fact witness deposition \$50,000 per expert \$100,000 per Motion for Summary Judgment, etc. OR \$200,000 per matter with the following assumptions: If the quantity of the below assumptions varies by more than 30% (activity collar), we would adjust the price in accordance with the fee per task agreed herein.



Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
Litigation	Class Action Defense	<p>Large litigation matters where multiple plaintiffs (usually consumers) are consolidated into a single party as a class. Perhaps surprisingly, these can be treated very similarly to other individual large litigation matters for the purposes of negotiating an AFA but with additional class action-specific phases defined.</p> <p>Complexity is higher and it is very important to provide quantified assumptions as to the number of fact witnesses, documents in scope of review, number of experts, etc. so that firms can accurately price for the matter.</p> <p>The likelihood of deviation in price from the start of the matter is high.</p>	Phased Fixed Fees OR Phased Capped Fees	<p>Phase 1: Pre-Litigation Case Assessment and Initial Steps - \$95k</p> <p>Phase 2: Responsive Pleadings and Motion Practice - \$203k</p> <p>Phase 3: Discovery: \$1.7M</p> <p>Phase 4: Class Certification - \$150k</p> <p>Phase 5: Summary Judgment Motion - \$400k</p> <p>Phase 6: Trial Prep and Trial - \$1.4M</p> <p>Phase 7: Post Trial Briefing - \$130k</p>



Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
Litigation	Commercial Litigation as Plaintiff	Litigation matters wherein the corporate client is suing another corporate entity over some commercial dispute (non-patent related).	Contingency Fee	Contingency fee of 25% of recovery amount OR Fixed Fee by phase with contingency add on of 10% of recovery amount

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General Legal	Advice Project (Employment Advice, Privacy Advice, Contractual Advice and Negotiation)	<p>These matters have specific deliverable(s) and involve some mix of research, analysis, and a final report, presentation, or outcome for the client.</p> <p>Advice projects can span across many domains from HR, Privacy, Corporate, Commercial, etc.</p> <p>The likelihood of significant deviation in price later in the matter is low.</p>	Total Matter Fixed Fee	\$100k Fixed Fee for the matter to review and advise the company on its global work from home policies and to provide a new governance structure.



Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
M&A	Investment or Acquisition Transaction	<p>Investments of a similar nature typically follow the same process of document review or preparation, negotiation, due diligence, and completion.</p> <p>For most transactions there is often a term sheet or reference schedule already prepared which helps to inform the assumptions about each phase.</p> <p>Later phases of work may vary based on the outcome of earlier phases. For example, if the red flag report identifies incomplete records or missing regulatory approvals, the firm may need to do further investigation or review of materials to satisfy due diligence.</p>	<p>1. Activity Collared Fixed Fee by Phase,</p> <p>OR,</p> <p>2. Phased Capped Fees</p> <p>Consider adding value/outcome driven fee contingencies such as a broken deal discount or % of the transaction value</p>	<p>Phase 1. Preliminary Due Diligence - \$10K Fixed Fee</p> <p>Phase 2. Preparation and Negotiation of the Term Sheet - \$25K Fixed Fee assuming 2 parties, 3 rounds of amendments</p> <p>Phase 3. Preparation and Negotiation of Primary Agreement - \$50K assuming 2 parties, 2 rounds of amendments before signature</p> <p>Phase 4. Diligence - \$75K based on assumed number of documents to review, approvals to obtain, pre-determined set of pre-closing tasks</p>



Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
M&A	Divestment	<p>Divestiture follows a similar methodical approach to most transactions within M&A. There are fewer variables than in a purchase or investment, so phases will be easier to predict and most matters should proceed to completion.</p> <p>Cost drivers are typically fixed for the life of the matter and can be easily quantified so firms can predict exactly what will be required. For example, number of employers, stockholders, corporate entities, and filings required. Some flexibility will be required purchasing parties are involved and negotiation, and due diligence will be a cost factor.</p>	Activity Collared Fixed Fee by Phase OR Phased Capped Fees	_____



Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
Corporate	Corporate Secretarial and Governance	<p>A portfolio of small repetitive activities required on a regular basis to fulfil record keeping and reporting compliance requirements.</p> <p>Costs and volume are generally easy to predict in advance and can be wrapped into a single annual fee to meet all basic compliance requirements. More complex advice or restructuring needs can be addressed on a matter-by-matter basis.</p> <p>Consideration should be had to whether corporate compliance requirements are centralized in one jurisdiction, or globally and whether local firms are engaged for different jurisdictions.</p>	<p>Proactive Fee Schedule for ad hoc compliance requirements</p> <p>OR</p> <p>Annual Fixed fee based on a set of assumptions.</p>	<p>\$50,000 per annum to ensure company meets all of its corporate compliance requirements in a single jurisdiction.</p>



Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
Intellectual Property	Patent Filings, Office Actions, Renewals, Searches	<p>A portfolio of high volume, small repetitive activities required on an ad hoc basis.</p> <p>Costs are easy to predict but activities may need to be further qualified based on complexity or product type. Consider the variables that drive cost, for example the product type (pharma, medical, consumer) or the complexity (single class trademark filings vs multi-class trademark filings).</p> <p>Consider whether local firms are engaged to provide services within their countries, or whether you might engage a global firm to outsource the work as required and managed those fees themselves.</p>	<p>Proactive Fee Schedule for itemized activities</p> <p>Consider including a volume discount in exchange for awarding firms a portfolio of repetitive work.</p>	<p>1) Utility Patent Application Fees</p> <ul style="list-style-type: none">a. Fee for Low Complexity Applicationb. Fee for Medium Complexity Applicationc. Fee for High Complexity Application <p>2) Design Patent Application Fees</p> <ul style="list-style-type: none">a. Filing design patent with formal drawingsb. Filing design patent with client provided drawings <p>3) PCT Patent Application Fees</p> <p>Assumptions: Includes Initial Filing Service plus:</p> <ul style="list-style-type: none">• Tracking National Stage Deadline• Obtaining estimates for national stage filings in desired countries



Matter Category	Matter Sub-Category	Key Considerations	Suggested AFA Type (s)	Example
Intellectual Property	Trademark Filings, Office Actions, Renewals, Searches	_____	_____	1) Trademark Application (Single Class) 2) Trademark Application (Multi Class) 3) Trademark Search Comprehensive 4) Trademark Renewal 5) Response to Trademark Office Action – low complexity 6) Response to Trademark Office Action – medium – high complexity

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