

SIX PILLARS OF ENGAGEMENT

WHAT YOU NEED TO KNOW ABOUT SUCCESSFUL AFAS IN LITIGATION

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In recent years, increasing numbers of corporate legal departments have explored alternatives to the traditional hourly rate method of law firm billing in litigation matters. As a firm that has actively embraced such alternative fee arrangements (AFAs), Goodwin has amassed both a substantial track record of using AFAs to help our litigation clients meet their goals and a team of professionals with extensive experience in fashioning and implementing AFAs.

Our experience teaches that there is no magic bullet that guarantees the success of an AFA engagement. Rather, there are a host of factors that work in concert to develop and execute an AFA engagement that meets both the client's and the law firm's objectives. An AFA, like the traditional billable hour arrangement, is just one aspect of the attorney-client relationship that is about more than just price. In the end, a successful AFA is about partnership, with the firm and the client working together transparently to achieve the client's litigation objective through a multi-faceted approach.

Six Factors for Successful AFAs:

- 1. Trust** - Trust is the cornerstone of a successful AFA engagement. Trust is essential during both the development and execution of AFAs to ensure a collaborative design process for a win-win arrangement that aligns the interests of both client and law firm, and results in value and predictability. Both sides take on risk in an AFA, so having a high degree of trust is critical for dealing with scope changes and ensuring fairness to both parties.
- 2. Strategic Alignment** - Law firms that simply provide a long menu of AFA options to clients are not effectively listening to, or addressing, their clients' specific business needs. AFAs should be the result of a thoughtfully crafted, comprehensive pricing solution that addresses not only the client's goals but also their specific cost concerns. In litigation, an example of this could be an AFA that combines fixed fees and success fees to enable risk sharing and provide incentives for the law firm to achieve the best outcome in the most cost-effective manner possible.

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3. Accurate Scoping - The client must work in hand in hand with the law firm to realistically scope the matter. Through this process, you jointly identify key risks and cost drivers, analyze strategic options and possible outcomes, and develop a work plan that will achieve key objectives. Once the scope is determined, the law firm can then develop an accurate budget covering the key tasks outlined in the work plan. Attempting to develop a budget before thoroughly scoping the matter can lead to inaccurate estimates and confusion as to the core strategy for handling the matter.

4. Tactical Staffing - As part of the collaborative design process, the client should discuss staffing with the law firm. Building a team with the right mix of skills to effectively execute on the case strategy drives both efficiency and results. Through numerous engagements, we've seen that the greatest efficiency is achieved by having a team with relevant experience and subject-matter expertise who will deliver results on time and on budget.

5. Active Tracking and Matter Management - Once an AFA engagement is underway, it is critical that the case team carefully monitor progress against key milestones and deliverables. Clients should seek law firms with staff resources experienced in AFAs and the technology tools to ensure that projects remain on schedule and that potential scope changes are addressed immediately (especially if the change requires a reassessment of the terms of the AFA agreement). Having a law firm partner with dynamic, real-time reporting and monitoring systems helps make for an effective matter management process.

6. Consistent and Timely Communication - The importance of regular and open dialog between the law firm and client throughout the entire AFA lifecycle—from initial scoping through the end of the case—cannot be understated. Many AFA structures encourage frequent discussions about case progress and strategy. Case in point: Through a quarterly fixed-fee arrangement with one of our clients to handle several large litigation matters, we engage in regular discussions about the scope of work and any required changes to our case strategy based on the last quarter's events. While this approach may not be right for all companies, it has been effective to help this client achieve a high degree of transparency and cost management.

Ultimately, each client should engage in open dialogue with their outside counsel to define and capture value in structuring their engagements. While it takes hard work, investment, and patience to move litigation work to AFAs, we have found substantial rewards at the end of the road for both our clients and our firm. In the end, a law firm that is receptive to AFAs and is experienced in successful AFAs, as well as traditional fee arrangements, can help clients find the formula that makes the most sense for their business.