

The Alternative  
Alternative Fee Arrangements

## **Beyond Flat Fees** **Adding AFAs to the Tool Box Means More Doing and Less Talking**

By John F. Brown Jr. and Thomas M. Clark

When it comes to AFAs, many see only a flat fee versus hourly rate dichotomy. Even those with a broader perspective observe, “There’s a lot more talking than doing.” Why?

The attraction of the flat fee is obvious: an all-inclusive legal fee through matter resolution. Flat fees were shaped initially for lower value cases with legal fees expected to be less than \$10,000. When pushed to higher complexity matters, flat fees come with various opt outs and case segment-phase limitations that revert fees back to pure hourly billing.

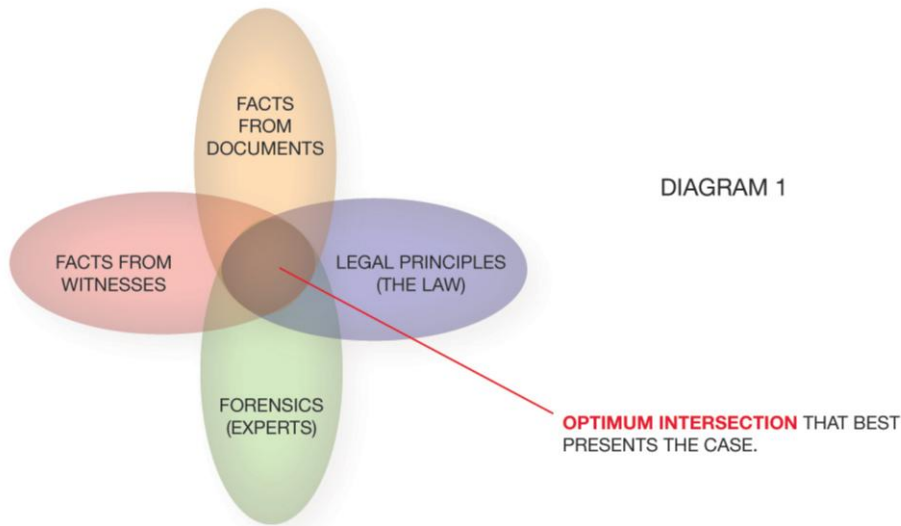
In short, the message these arrangements convey is, “We love the predictability, cost control and concept of a fixed budget to case resolution, ... BUT in more complex matters we can’t predict how hard the opposition will fight, and how readily the court will narrow the dispute with appropriate legal rulings... so — why don’t we just do it hourly.”

The interest in the AFA concept stems in part from the recognition that even with the rigorous application of litigation guidelines, budget-challenged cases are not extinct. Over budgeting creates a disincentive to properly contest a defensible matter. Frequent upward budget revisions skew expected legal expense ROI and can make rejection of opportunities to consider an early resolution ill advised. Litigation management professionals still ask why certain types of matters cost so much to resolve and wonder why it is that so many matters drift to trial, consuming budgets before resolution is achieved.

What’s the Goal?

Perhaps to fully understand the potential relevance and application of AFAs, one needs to step back and ask what it is that litigation management hopes to accomplish? Less time to resolution means less consumption of defense resources. A targeted focus on issues most likely to change the plaintiff’s case perception before the opposition has upped their own commitment by incurring large costs is preferable to a broader more diffuse approach that doesn’t result in early, successful resolution.

## Making Choices



Every case involves making choices. If each oval in the diagram — facts from documents, facts from witnesses, forensics (experts) and legal principles (the law) — represents the range of possibly pertinent information to a case, do you give your counsel authorization to explore the full oval? If so, with what intensity of resources — which oval sectors should be allotted pebble, rock or boulder treatment compared to hill, mountain or asteroid treatment?

With 20/20 hindsight, looking at a moderately complex case, what percentage of the legal activities would fit within the following categories?

- Essential to creating verdict risk.
- Wouldn't be used at trial, but may make it into a mediation statement as a talking point.
- Intellectually relevant to the issues, but only a small piece of puzzle that doesn't change the big picture.
- Pursuit of a dead end that bore no fruit.

The underlying potential and attraction of AFAs is whether the fundamental paradigm shift that all AFAs at their root share — a focus on what projected resources are necessary to resolve the matter — can become the reality. How to select and sequence discovery for maximum impact requires being able to see the big picture, a perspective not afforded by uninspired perfunctory early case assessments and budgets, nor necessarily emphasized by checking tasks off [a](#) list.

### Setting Course

AFAs are a two-step process. First is the early case assessment and litigation management plan that projects a budget, timeline and targeted result. Second are the financial arrangements. Companies looking to broaden their toolbox beyond flat fees versus hourly rates can take the plunge by requiring that counsel submit a plan and budget that would allow negotiation of an AFA, even if that next step were not taken for administrative and other considerations.

In fact, companies looking to critique the rigor and performance of their current litigation management guidelines might ask themselves, “In what percentage of our matters are the early case assessments and budgets received from counsel of sufficient quality that we could evaluate an AFA if we chose to do so?”

Established confidence in proof of the underlying process could eventually pave the way towards adoption of AFAs in appropriate matters. In the interim, companies could benefit from more of what has attracted them to flat fee AFAs in the first place, a focus on a more predictable budget for legal activities that will generate a preferred resolution.

#### Case Options

In considering the budget-challenged case, rather than think in terms of business lines, practice areas or severity levels, perhaps fertile ground for consideration of an AFA would be when this thought occurs, “I know from experience that this is one of those cases where potentially we could spend a lot on fees and where we wind up on indemnity and getting any bang for our buck is going to depend on a smart well-executed game plan.”

If counsel is engaged on a risk collar where an estimated budget to resolution is projected and counsel shares in absorbing legal expense over that budget (and also shares to some degree in savings generated under that budget), the key is what are the probable resources that will best position the matter for resolution?

If counsel is engaged on a holdback bonus arrangement (where the client withholds a fixed percentage of the hourly rate billings during the case, and at case end may refund to the law firm some, none or all of the holdback and consider a bonus for extraordinary results), a key part of the arrangement is evaluating the projection of required legal resources and the return on that investment — the result. Many holdback bonus arrangements are also done with a hard cap on total fees, a feature that emphasizes a budget.

Creating a successful AFA requires a strong early case assessment, a solid fee strategy and excellent communication between the law firm and client. With those points in mind, AFAs can help manage litigation expenses.

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