



8 TIPS FOR BUILDING A SUCCESSFUL ALTERNATIVE FEE ARRANGEMENT

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Alternative Fee Arrangement (AFA) has become a buzzword in the legal community, and lawyers should expect clients to ask to enter into an AFA. Prepare yourself with these eight important tips for building an AFA.

There can be good reasons to work out an AFA for both the lawyer and the client: the most significant upside for the client is the predictability of the fees that will be incurred on a particular file or group of files. For lawyers, the particular structure of the AFA will determine the potential benefits.

Deciding on the form the AFA will be based on many factors as set out below. Some AFA structures to consider include:

1. CAP-FEE BUDGETING

No matter what method of billing is used, you should always make an effort to estimate the time and costs for a file. It's both good business and good client management. Setting a budget for the various stages in a file gives a client a sense of the big picture, when most of their expenses will occur and what they will achieve from that phase in the process. The budget can then act as a cap on the fees for a particular phase in a file, for example, attending a pre-trial or conducting a simple closing. It also often helps the client relationship to work out these issues before the file begins.

2. VOLUME-BASED BILLING

For the 'frequent flyers' you might consider an arrangement where the client guarantees either a certain number of files per year or agrees to pay for a certain number of hours per month in exchange for discounted hourly rates. For a lawyer, this arrangement gives certainty of revenues, and for the client, it gives certainty of expenses at a reduced rate. One variation on this type of arrangement is for the client to be reimbursed a percentage of the fees paid when its annual billings go above certain agreed-upon thresholds. In that way, lawyers don't require a crystal ball to try to predict the volume of work/billings in order to set an appropriate discount.

3. CONTINGENCY

There are different variations of contingency fee arrangements. Pure contingency fee arrangements see the lawyer or law firm assuming the lion's share of the risk in the litigation. Typically, clients will pay disbursements only, and fees only on a successful resolution of the matter. When considering this option, lawyers must carefully consider the value of the claim and what percentage of any recovery they would seek from the client. Further, as with all AFAs, if collectability of any judgment or settlement may be an issue, one should be sure to address same in the AFA as the risk factor would obviously increase substantially.

4. QUASI-CONTINGENCY

Partial contingency fee arrangements have the benefit of the client paying some of the fees in advance or irrespective of result. This both allows the lawyer some room to "work up" the file, but it also results in the lawyer assuming less of the risk. If you need to conduct some investigation, into the facts or law, consider asking the client for a flat fee for the initial work and then convert to a contingency fee arrangement if the file moves forward.

5. BONUSES

Bonuses, which can operate in a manner similar to a quasi-contingency can be part of any fee arrangements. The client should understand the terms of the bonus and that the amount of the bonus must be reflective of the risk to the lawyer of not getting paid and of the importance of the issue to the client. Recently, the Ontario Court of Appeal, in *Evans Sweeny Bordin LLP v. Zawadzki et al.* (2015 ONCA 756) found that an agreement between a lawyer and clients to pay a \$500,000.00 bonus was fair and reasonable. The context? The bonus would be paid in the event

that the lawyer was successful on an appeal of an order foreclosing on the client's lands, which were worth about \$20 million.

These methods, or a combination of them, may give you and potential clients the flexibility to proceed with a file which they may not otherwise have been able to pursue. The options present particular opportunities for junior lawyers who are trying to grow a practice. However, before proposing an AFA do your due diligence and make sure you know your client, the file and your bottom-line.

6. KNOW YOUR CLIENT

New and long-time clients may require different treatment. In cases where you understand a client's business and have a relationship with the client, you may feel more comfortable offering an AFA. Without the familiarity that comes from an ongoing relationship, you should go into detail about the client's objectives, expectations and timelines.

7. KNOW THE FILE

The amount of time a file will take and the amount of resources required will clearly impact the structure of your AFA. You should consider whether a file may lead to areas outside your core experience and/or are other than "routine" matters. For example, a lawsuit on an unpaid account versus an oppression remedy proceeding will have vastly different levels of predictability, time commitment, expenses and experience required. In addition, during the course of the file your perspective on the strength of a case may change.

Consider whether you have precedent materials that you can use for the file. Where you do have precedent material on point, an AFA involving a flat fee may be an appropriate means of proceeding. Also consider whether any research or assistance will be required on the file. Where you are obliged to conduct research or consult with other colleagues on the file, your time commitment and fee/expense on a file may increase.

8. KNOW YOUR BOTTOM LINE

You have overhead expenses and other fees that will be incurred on a file that you need to recover. Keep these fees in mind when constructing your AFA. Explaining this to a potential client can often help you both arrive at a mutually satisfactory agreement.

Consider the disbursements you will need to incur on a file: Are there filing fees? Will an expert witness be required? Are title searches and corporate searches required? To the extent possible, try to predict your expenses on a file so that you can do the math on what AFA may work for you and for the client.

Above all else, AFAs involve a mutual compromise. Where they are carefully planned, they can offer great advantages to lawyers and to clients.

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