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Litigation Management Report

Features

- Executive Editor's Report 1
- Big Ideas 2
- Welcome Aboard 3
- How to Effectively Use AFA's 4
- James M. Poerio Interview 6
- Must Reads 8

Executive Editor's Report



Welcome to the issue that will introduce you to an e-billing powerhouse. My **Big Ideas** article sets the tone for litigation managers to set their minds to when looking at how they should evaluate convergences. Bottomline Technologies wants to **Welcome you on Board**. I encourage you to take a step beyond just glancing at the picture of the leaders and relationship managers you'll be interfacing with at Bottomline. Dan Costello's article on **Profit and Predictability** provides readers with what I like to refer to as the "hard stuff" that helps you work smart. The **James M. Poerio Law Firm Profile** may come as a surprise to some litigation managers who are accustomed to thinking that boutique law firms are limited to exotic areas such as high tech IPOs. **The Must Reads** is an excellent mix of strategic advice and food for thought.

Enjoy the read,
John G. Kelly
 Executive Editor

How to Effectively Implement AFA's

Insights From The Inside

There has been quite a bit of talk about the “Great Recession” and how it has affected all industries. The insurance and legal industries have not been immune from the impacts and both have searched for ways to adjust. For some insurance carriers and law firms alike, the new financial landscape has left them reeling. Our firm and others like us have used this as an opportunity to truly differentiate ourselves with clients and new prospects. I have been to many industry conferences and spoken to colleagues in both business and law, and the question is why would anyone switch from the current model to AFAs? Our answer is simple: we can differentiate ourselves from our competitor by creating certainty of cost outcomes, and we create value that we can measure for our clients. Under the billable hour model, our clients perceive the differentiator between firms very simply- the rate. This is not the measure by which any firm wants to be judged.

However, with alternative fees and clearly defined financial and result metrics, we can present a much more robust discussion to our clients. The goal is to present current and potential clients with a well-reasoned, experience-based value pricing model which changes the conversation. We focus not on what this will cost you per hour, but on how we will measure our success. We like to say “we don’t talk results, we show them.” On the law firm side, many of my colleagues complain that a move to alternative fees is just a way for their institutional clients to further reduce their costs and adjust to the economy on their backs. They believe that any change, especially AFAs is a way to cut their firms profitability to the bone.

So, the question becomes, how can firms implement AFAs and insure that they are profitable not only for the client but also for the firm?

I suggest that the information required to provide services at a price point that is still profitable is already available to many firms through their billing departments. Additionally, your clients, especially those with e-billing software already, can give you aggregates for what it costs for certain matters in your relevant line of business and geographic area. At our firm, we have placed an emphasis on tracking results and

measuring our success ourselves, and we have stockpiled and mined years of data for this purpose. By doing so we could clearly define what success meant to us, and where profitability and predictability intersect on a financial chart.

Many firms confuse the concepts of revenue and profitability. Although there might be a great deal of revenue coming in, the infrastructure that is needed to support the same may not be the best business venture. Conversely, profitability deals with the percentage of fees the firm has left over as profit after paying all expenses. We submit that under the right circumstances, profitability increases under AFAs, and we have the data to prove it.

Those critical of any shift away from the billable hour often overlook the importance of predictable costs. Opponents of AFAs also believe that methods like fixed fee arrangements are premised on a distrust of outside counsel to honestly and effectively use their time. Likewise, the same dissenters expect AFAs to permit and even incentivize attorneys to cut serious corners in their legal work. However, the problem fixed by AFAs is not one of trust, but of accuracy. Regardless of the billing scheme used, no client would engage any counsel that abused their billing practices or produced ineffective results. Rather, the AFA is simply an alternative billing scheme that shares the risk of litigation costs and creates a strategic partnership. Clients like it because it is predictable. We like it because it is profitable and truly sets apart our value.

Don't Talk Results, Show Them

Understanding what the most profitable approach is for various types of matters or services helps move a firm towards developing AFA financial models that can be re-leveraged for future work. This is especially true as the sharing of this data can be invaluable to your clients. In fact, a recent comprehensive national litigation management study that was released by the Counsel on Litigation Management in March 2011 found that out of 47 senior litigation executives, 74% put their own metrics as “fair” or worse.¹ In that same group, 34% rated their metrics as poor, and 3% at very poor.² Thus, the information that we share between the firm and our clients is key to not only making this relationship work, but creating significant value.

Although there has been a great deal of talk in the industry about the effectiveness of AFAs and their impact on the bottom-line, no one has actually been willing to share this information or publish this to

their peer group. And while there have been a number of generalized reports by esteemed industry groups, this information is hard to segment in a meaningful manner. However, having financial models for AFAs which are tested and backed by historical data is key.

AFAs are not just about fees. they are about a whole new way of conducting and managing the business of law firms.

At our firm we like to say “we don’t talk results, we show them”. This is done by publishing to our clients on a monthly or quarterly basis the actual results on our work versus the goal. Since this information is one of the few sourced reference points for real world AFAs, we believe that they are extremely valuable to our clients, and to us. So let’s look at some real world data.

From 2008-2011 our firm has worked on a total of 178 different litigated matters using alternative fees. This work spanned across what we would call our core clients who are mid-sized to large property and casualty insurers. Although we have data in-house which segments these matters into line of business, geography, and severity, on average for all matters we saw a 30% straight cost reduction from industry average to our work.³ Members of that same group also saw up to 40% straight cost reduction from their previous cost per file per month ALAE costs versus our actual results.⁴ Additionally, these same core clients saw a decrease in cycle time to an average of 300 days, from an industry average of 728.⁵

These results by themselves speak toward value to the client, but coupled with the fact that the cases have a quantified financial end result on costs makes this result outstanding. With the predictive metrics these same clients could easily define a “win” by implementing a cost structure to eliminate or reduce a key financial litigation risk.

Profitability to our Firm

For those of you outside attorneys who are still not ready for this, you may say well that is great to the insurance carriers, but not

if it means I will have to lay off staff, close offices, or cut my paycheck by a third. We agree. Our firm is currently in expansion mode with the use of AFA, and we are profitable. We believe that maximizing efficiency and aligning our goals with the client are the quickest way to increase our profit. Contrary to what many law firms and pundits have espoused, we actually make a profit, and usually a more hefty one, with the use of AFAs. The key is knowing what your potential exposure is for the work, and what is the most likely outcome.

Again, real world data is helpful in this analysis. Of the same 178 different litigated matters using alternative fees we tracked our profit margin on these fees both by hours spent versus billable hour rate, and more importantly AFA fee received versus our true cost. The results speak for themselves. On 40% of the matters we received a bonus of 65% over what we would have received on an hourly basis, and a better than 60% profit margin. On 45% of the matters we received a bonus of at least 30% or more over our billable rate, and 50% profit margin. In fact, in less than 0% of those matters did we make the same or less than we would have using billable hours as our arrangement.

How can that be? Well the fee structures that we used rewards early case resolution, winning a matter on a dispositive motion, and early issue identification - essentially all goals of our clients. This is quite the contrast to being rewarded by the time spent billing on a matter. Our clients are perfectly happy to trade incentives for reworking the current legal model which may unwittingly reward longer rather than shorter resolution time. By thinking about the cases differently we resolve them differently with aggressive, tailored approaches to meet our clients' goals. This is the value that they expect, and when we deliver we share in the success.

AFAs are not just about fees. they are about a whole new way of conducting and managing the business of law firms. And, despite the challenges they bring, or more factually, because of those challenges, they offer new and exciting ways for law firms to increase competitive advantage and achieve greater revenue and profitability. The key is embracing and shaping the change. As one of my old bosses used to say, who was one of the last old school claims vice presidents, "if you push on a string it bunches up and zags as it moves forward; however, if you pull the string from the front you move forward easily in a straight line." Our model is pulling toward the future.

Daniel Costello, Founder of Daniel P. Costello & Associates, LLC, has years of experience concentrating in construction litigation, litigation management, and insurance coverage. He has successfully handled over 150 major jury trials, arbitrations, and mediations. Additionally, he has substantial corporate business experience. In his time working for a Top 40 P&C Carrier company he became the youngest Vice President of Claims Litigation in the history of the 90 year old company rising to the position in only five and half years. During this time the company implemented a full range of cost and litigation management tools including the use of active metrics, counsel scorecards, continuous process improvements, and systematic audits.



1) Counsel on Litigation Management March 2011 Litigation Management study available at report@revereconsulting.com; 2) Id.; 3) Costello Legal Internal Litigation Study, May 2011, sourced six different insurance carriers for a global period of 36 months for alternative fee agreements; 4) Costello Legal Study, May 2011, pg 4.; 5) Costello Legal Study, May 2011, pg 5.