

Keeping It Profitable: Creating and Managing Alternative Fee Agreements in IP Cases

Tuesday, March 10, 2015

Thomson Reuters, 3 Times Square, New York 10036

This panel will address Alternative Fee Agreements, including perspectives from outside counsel, in-house counsel, and a litigation-funding entity. Various types of alternative fee arrangements for representations of both plaintiffs and defendants will be explored, with specific discussions of common and optional provisions. Profitability will also be addressed, including procedures law firms may take to achieve and maximize profitability of AFAs.

PANELISTS

Jim Batson, *Bentham IMF*

Marla Butler, *Robins Kaplan*

Jeff Gold, *Pfizer*

Scott Stimpson, *Sills Cummis & Gross*

SCHEDULE

8:00 AM - 8:30 AM Registration and Breakfast

8:30 AM - 10:00 AM Presentation

Hosted by the Law Firm Management Committee
Co-Chairs **Scott Stimpson** and **Richard Goldstein** and Member **Pricilla Saraf**
Subcommittee Programs Chair **Jamie Lucia**

The Breakfast is sponsored by



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New York Intellectual Property Law Association
Law Firm Management Committee

AN INTRODUCTION TO COMMERCIAL AND IP LITIGATION FINANCING:
CREATING A PROFIT CENTER FROM A COST CENTER

James Batson, Esq.
Senior Investment Manager and Legal Counsel
March 10, 2015

Why Litigation Funding?

“Litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation.”

New York Supreme Court Justice Eileen Branston

Types of Litigation Funding

- Full Hourly
- Hybrid 50:50 Fees
- Costs
- Portfolios
- Appeals
- Working Capital
- Flat Fee Advance
- Defense
- Due Diligence
- Judgment Purchasing and Enforcement

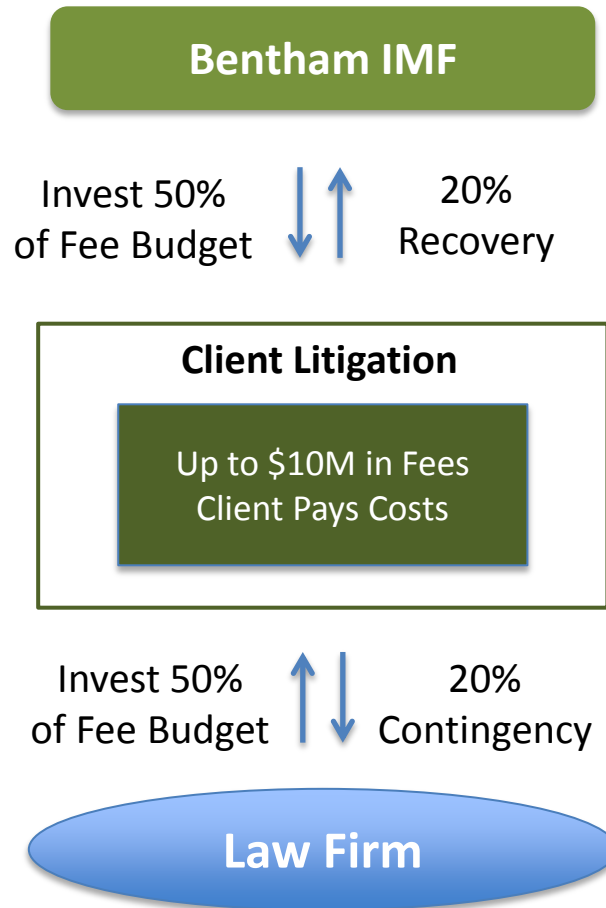
Patent Litigation Costs

Patent Infringement (all varieties)

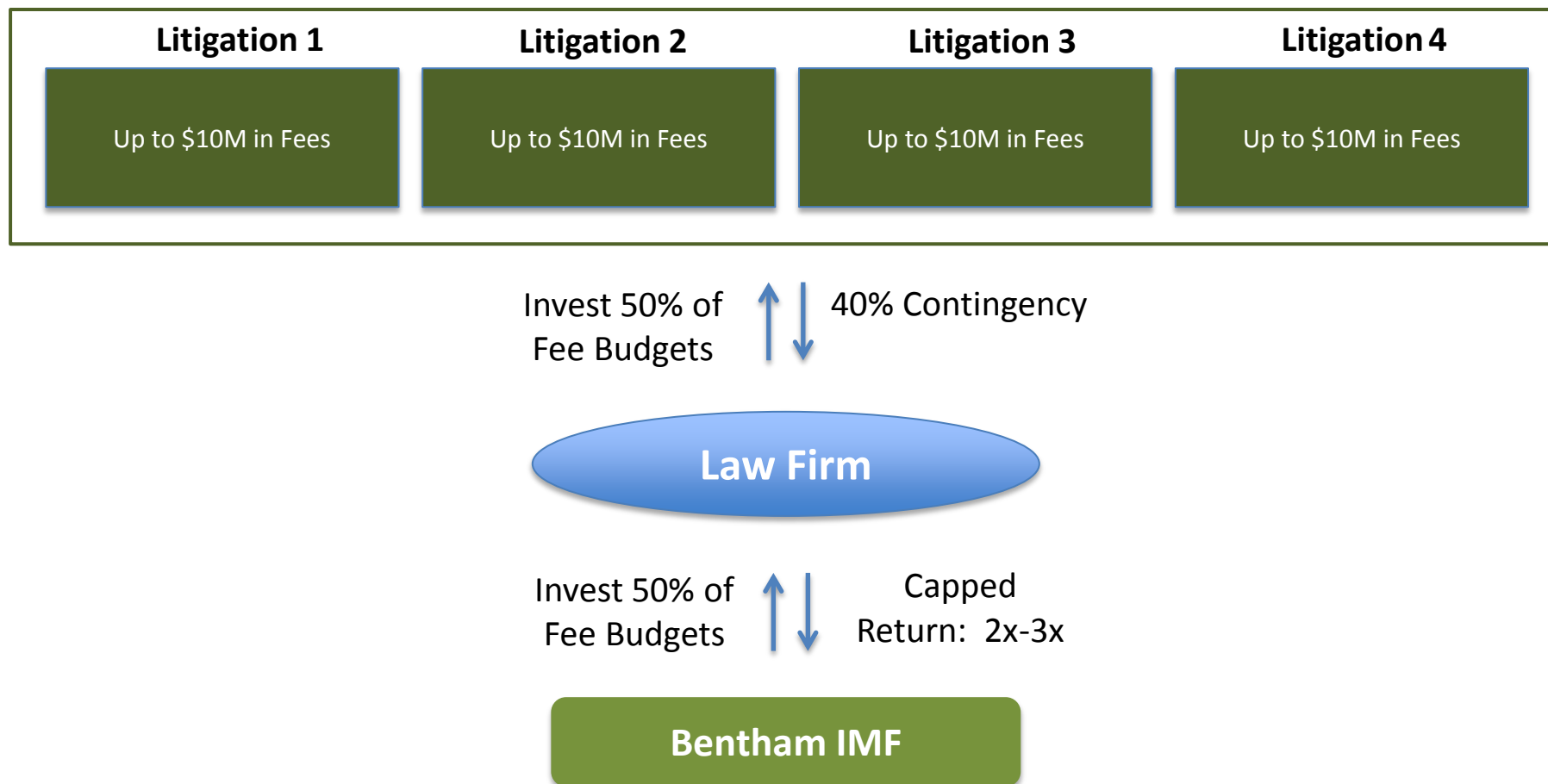
Amount in Controversy	End of Discovery	Through Trial
<\$1M	\$530K	\$970K
\$1M-\$10M	\$1.2M	\$2.1M
\$1M-\$25M	\$1.7M	\$2.8M
\$10M-\$25M	\$2.2M	\$3.6M
>\$25M	\$3.6M	\$5.9M

Source: AIPLA 2013 Report of the Economic Survey Overview

Funding Model 1: 50/50 Hybrid

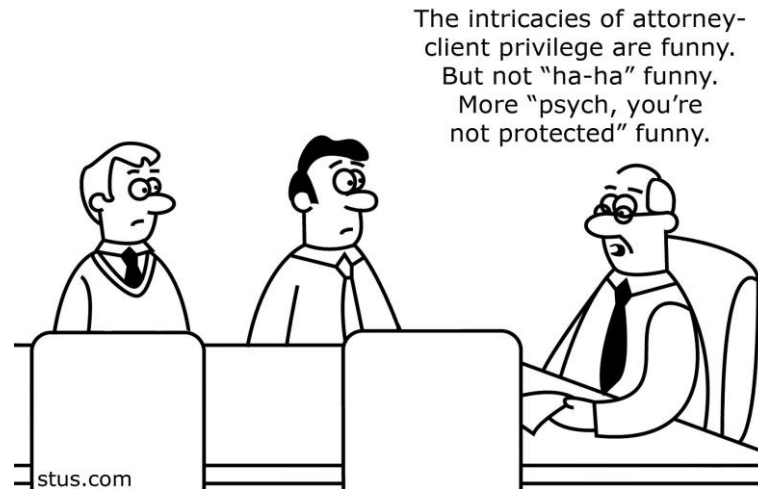


Funding Model 2: Portfolio



Litigation Finance and Protecting Privileges

- Maintenance, champerty, and barratry
- Privilege and confidentiality: the attorney-client privilege and the work product doctrine
- Written NDAs are imperative



Presenter: James Batson, Esq.

- Trial lawyer for 20 years
- Former partner, Liddle & Robinson, New York, NY
- Lead counsel, *Zubulake v. UBS Warburg* (U.S. District Court for the Southern District of New York), which led to several seminal e-discovery opinions
- Former member, United States District Court for the Southern District of New York Advisory Group Pilot Project Regarding Case Management Techniques For Complex Civil Cases
- JD, Fordham University Law School; MBA, Fordham Graduate School of Business; and BA, Cornell University

Alternative Fee Arrangements in Patent Matters

NYIPLA

Law Firm Management Committee

March 10, 2015

Marla R. Butler

Robins Kaplan LLP

rewriting the odds

Overview

- Goals of the Attorney-Client Relationship
- Some AFA Options

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Goal #1: *Trust*

- Client: “Why so much time on this task?”
- Client: “Why so many lawyers at this hearing?”
- Lawyer: “How is it that my client is complaining about my bills but still expecting a scorched earth defense?”
- We want to eliminate these frustrations.

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Goal #2: *Certainty*

- Legal spend = Budget
- Not over, not under

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Goal # 3: *Skin in the Game*

- Full contingency = bad news (generally)
 - Not paying expenses?
 - Not paying any fees?
 - Then probably not aligned.

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Goal #4: *Value*

- Client gets its money's worth
- Firm makes a profit

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AFA's \rightarrow Goals

. . . if done right

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Contingency... Modified

- Client pays costs or percentage of hourly rate
- “Hybrid”
- More likely to agree on strategy and settlement
- Terms of arrangement depend on merits
- Contingency defense too
 - Less client pays plaintiff, higher the fee

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Contingency... Modified

- More client pays, lower percentage of recovery law firm collects
- Examples:
 - Client pays only costs; 35% fee
 - Client pays costs and 50% of hourly rates; 20% fee
 - Different percentage at different stage of litigation

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Caps

- Not-to-exceed by phase, for entire case or both
- Have to build in and agree on assumptions
- Requires trust and communication on front end
- Safety net

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Fixed/Flat Fees

- All work for fixed \$ (few or no confines)
 - Risky for the firm
 - Risk misalignment of strategy and goals
- X hours for X dollars
 - More certainty
- Can agree on composition of team
- Can work well for due diligence work

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Billable hour → AFAs

- Redefine profitability
- Collect and use data
- Efficiency
- Thoughtful and deliberate leverage

rewriting the odds

Move Over Billable Hour, There's a New IP Fee Arrangement in Town

By Marla R. Butler, Robins Kaplan LLP

The practice of law has changed greatly over the past decades. We have witnessed great growth in solo and small firm practice, as well as a large movement to in-house practice. We are even seeing growth in freelance attorneys who only assist other lawyers with document drafting and litigation and appeals support.

But, what hasn't changed – for the most part – is the billable hour. Law firms continue to bill clients by the hour and require employees to record their days in six-minute increments. The lack of flexibility is not reflective of the art that is the practice of the law. Attorneys must constantly adapt to changing forces, new laws, new rulings, and unique situations. Our approach to billing should follow suit.

It is time for the billable hour to step down as the dominant law firm billing model, especially in IP cases. This article addresses why this must happen, and what alternative fee arrangements (AFAs) can step in to replace time-based billing.

AFAs better support the attorney-client relationship

AFAs provide greater flexibility for lawyers to meet the particular circumstances involving any given IP case. This also enables us to more easily support the goals of the attorney-client relationship.

Goal #1: Mutual trust

Trust is essential to any successful attorney-client relationship. There are several ways for the billable hour model to undermine that trust. For instance:

- A client loses trust when she feels her attorney has charged more for a matter than the result appears to warrant
- A client may also lose trust when she feels that her matter has more lawyers on staff than appears necessary
- A lawyer's trust diminishes when her client expects her to leave no stone unturned, but that same client only expects to pay for the most essential of tasks

Implementing creative alternative fee arrangements can help alleviate these possibilities and assist in establishing attorney-client relationships built on trust.

Goal #2: Budget certainty

Clients need to budget for legal spend, and they generally need that legal spend to precisely match that budget. Many clients would much rather prefer their lawyers come in at budget rather than under budget. This is often due to the fact that clients could have budgeted for those unspent expenses elsewhere. On the other side of the equation, it is clear that a lawyer coming in over budget is a problem.

Clients require certainty in their legal spend. Alternative fee arrangements would allow for the certainty that client budgeting processes require.

Goal #3: Mutual investment

It is easy to take risks with someone else's investment, but that does not mean it benefits either or both parties. For instance, a full contingency arrangement in which the client pays no fees or expenses can turn out quite poorly for the lawyer. But when clients pay at least some portion of the fees or expenses, they tend toward greater reasonableness in deciding on strategy. And clients likely feel that lawyers are more efficient and strategic in their approach when the lawyers have fees at risk.

The answer to this predicament is a fee arrangement in which both client and lawyer have "skin the game" because they have each made some financial investment. They will each stay involved and will more likely have a meeting of minds on strategy.

Goal #4: Value

Law firms are, generally, for-profit entities. This means that any result that does not provide a profit for the firm is not a successful one. This is true even if the client is pleased with a reduced legal spend. And clients need to feel that their legal spend was worth it, no matter how much or how little was spent.

We need to look to fee arrangements outside of the billable hour that leave firms with acceptable profits and clients feeling like they got their money's worth.

Three alternatives to the billable hour fee arrangement

AFAs provide multiple, creative modes through which lawyers and clients can modify the hourly billing model – or abandon it altogether. The examples below are not exhaustive. Instead, they are illustrative of the creative arrangements we can create for any given situation. These options can be combined with one another so that, for example, a client's case is assessed on a flat-fee basis and litigated for a partial contingency.

AFA #1: The modified contingency fee arrangement

One of the simplest alternatives to the billable hour is the contingency fee, where the attorney only receives payment when the client does. IP lawyers can modify the contingency fee arrangement for plaintiff or defense work.

When representing plaintiffs in an IP lawsuit, the firm and client can agree to a partial contingency arrangement in which the client pays costs (which is often considerable in patent litigation) and/or a percentage of the law firm's hourly rate. This would help align the goals and strategy of the client and the law firm.

For example, a client is more likely to accept a reasonable offer if it has money at risk. This arrangement would also help prevent a situation where a client lacks incentive to agree to a settlement because he or she has spent nothing on the litigation. Similarly, if the client is participating in the financing of the litigation, he or she is more likely to pursue reasonable and efficient strategies, rather than insisting that every stone be turned.

Defense lawyers can modify the contingency fee structure to better suit defense cases. One solution includes tying the fee to the amount the defendant ultimately pays the plaintiff in the litigation. For example, in a case in which a plaintiff is seeking \$20M, the fee agreement might look something like this:

- Set one fee if the client pays more than \$10M
- Assign a higher fee if the client pays more than \$5M, but less than \$10M
- Set an even higher fee if the client pays \$5M or less
- Assign a premium fee if the client pays nothing

IP lawyers should take care to avoid pursuing pure contingency arrangements, as IP cases are often expensive. To take a patent case under a contingent fee arrangement is to place significant fees at risk. The client, on the other hand, faces no direct monetary risk. As a result, the client and the law firm can find themselves on different pages in the litigation, which can lead to problems in the relationship.

AFA #2: The capped fee arrangement

Caps provide a not-to-exceed dollar amount that you can use for each phase of the litigation, for the entire litigation, or both. Caps give the client certainty for budgeting purposes and force the law firm to set a deliberate strategy.

For utmost effectiveness, caps require good communication on the front end. A law firm must lay out clearly which assumptions it has built into its proposed caps.

For example, if the firm assumes that it will retain one liability expert and one damages expert, it needs to state this assumption explicitly in the proposal. The same is

true if the firm assumes that it will only employ certain defenses while avoiding others. A well-drafted capped fee agreement should include a provision that allows the client and the law firm to revisit the caps. This is especially important if something unexpected occurs that materially changes the litigation and upsets the assumptions.

AFA #3: The fixed- or flat-fee arrangement

Under the fixed- or flat-fee arrangement, the firm essentially agrees to do any work the client sends its way for a fixed monthly or annual amount. It requires the utmost in trust between law firm and client. To work best, the law firm will perform a large volume of work under a fixed- or flat-fee arrangement and will feel fairly compensated for that work.

As with the contingency arrangement, however, there is risk of misalignment of strategy and goals. To help avoid this misalignment, the client and law firm can agree on an initial monthly hourly goal. If the law firm regularly exceeds that goal, the parties will know it is time to reassess. The downside here is that the billable hour still factors into the arrangement in a significant way.

To avoid relying on the billable hour, the parties could agree to a finite team that only works on behalf of that client (e.g., two partners, two junior associates, two senior associates and a paralegal). That team will do whatever work the client sends with no collective billable hour expectation. We see this as the ultimate rejection of the billable hour model.

Law firms need to make room for AFAs

Right now, the law firm institution is the biggest impediment to AFAs. Law firms most often measure their success by comparing firm revenue to firm capacity. They determine that capacity by multiplying their billable hour expectations by their hourly rates. There is little hope of moving away from the billable hour model when a firm builds its measure of success on hourly rate.

But, when a firm measures its success simply in profits-per-partner, it has already made the mental leap needed to move away from that billable hour model. Many factors affect profits-per-partner, including:

- The number of non-partners
- Salaries
- Overhead expenses

Law firms ought to measure success more like their corporate clients, with little to no regard for billable hours. Only then will we break the ties that bind us to the billable hour model.

Conclusion

It is time for IP litigation firms to think outside the billable hour box. Doing so will provide for improved client-lawyer relationships and increased investment in case strategy by all parties to an IP case. It will also bring this aspect of the practice of law in line with the other changes occurring in the industry and lead to more productive IP litigation for everyone who is a part of the IP litigation equation.



LEGAL DIVISION

Alternative Fee Arrangements

Jeff Gold

Lead Patent and R&D Counsel
for Pfizer Consumer Healthcare

March 10, 2015

Transparency

- A key advantage of a flat-rate pricing model is that flat fees are transparent and easy for all to understand. Budgets can be more easily managed and income can be anticipated.
- For instance; if a firm charges a flat rate for a certain type of service, customers can easily decide whether they can afford the service or not. This is very applicable to IP services, international matters in particular.
- With hourly rates, clients might agree to go forward with a case, but in the end owe more than expected, which can lead to budgetary issues and dissatisfaction.

Flat Rates Put the Focus On Productivity

- Another advantage of a flat-rate pricing model is that flat fees reward productivity. This could be instructive from the firm's side for monitoring associate productivity.
- Hourly pricing for services does not reward productivity:
“an hour is an hour is an hour” (but it's not)

Quality of Services

- Since flat-fee pricing puts the emphasis on producing as much work as fast as possible to maximize profit, it can lead to poor work quality. This is a great concern for in-house counsel. A firm might take shortcuts to get a job done faster if they know it will allow them to complete more jobs and bill more clients. On the other hand, a firm that charges hourly has no incentive to rush; therefore, time is taken to make sure that everything is done very well.
- Quality must never be sacrificed, nor even the perception thereof, in any attorney-client relationship or credibility will be quickly lost.

Unexpected Difficulties

- A potential disadvantage of flat-fee pricing is that obstacles get in the way of productivity that reduce income. Of course, if a firm agrees to do a job for a flat rate and then it turns out to be more difficult than expected, the job may not be as profitable.
- This contingency should lead to more careful early analysis, scrutiny and discussion of possible outcomes with the client.
- Generally, renegotiation is provided for, but is perhaps too often utilized. Firms must try hard to minimize and/or anticipate issues and not overuse renegotiation provisions, or risk losing credibility.

Pfizer Legal Alliance

- The Pfizer Legal Alliance is a collaborative partnership between Pfizer and several law firms that aims to transform the way legal services are delivered and valued. These firms have agreed to work on a flat-fee basis, which is established at the beginning of each calendar year, and to provide counsel to the company on a wide range of matters.
- Collaboration between Pfizer and the Alliance firms, and among the Alliance firms, is a signature element of the Alliance. Built on the mutual commitment and desire to advance value for all members, the Alliance represents an entirely new approach to the delivery of legal services. It emphasizes proactive, preventive counseling and the delivery of comprehensive solutions, and rewards partnership and collaboration.
- It emphasizes proactive, preventive counseling and the delivery of comprehensive solutions, and rewards partnership and collaboration.
- As members of the Alliance, firms are freed from the need to compete with each other and are able to focus exclusively on partnering to provide the best counsel to Pfizer.
- Further, it liberates lawyers from measuring their contribution based on time worked, and instead rewards them for the worth of their advice and ability to effectively solve problems, share knowledge and work together.



Vision:

To advance the value of legal counseling to benefit all Alliance partners, their clients and our profession.



LEGAL DIVISION

Objectives:

- **Reconfigure the value paradigm** - The Alliance is defined by a commitment to change the experience of lawyering by providing support and incentives to Alliance members to redefine the value and conduct of legal counseling. With a steady flow of work, the firms have an opportunity to expand their scope of work, deepen their knowledge of Pfizer and the pharmaceutical industry, and develop junior-level talent.
- **Promote proactive, solutions-based lawyering** - The Alliance is focused on enhancing the delivery of superior legal services and enabling the shared development of new knowledge, work practices and providing growth experiences across all levels of the firms. When lawyers are not tethered to a timekeeping system, they are free to work in a way that is most productive, most efficient, and harnesses the capabilities of everyone working on a matter. Legal counsel becomes both proactive and solutions-based.
- **Foster trust and collaboration** - The Alliance is an information-sharing culture aimed at creating enduring relationships. It operates on a shared governance model that is built upon open, meaningful dialogue, real time feedback, and requires and rewards true collaboration from all its members.

