

# Alternative Fee Arrangements and Litigation Finance

Kirkland is an industry leader in Alternative Billing Arrangements.

## Partnering with Clients Through Legal Risk Sharing

Kirkland has been entering into legal risk-sharing arrangements with clients for more than 20 years and has invested hundreds of millions of dollars in hundreds of our client's matters. These arrangements are designed to accommodate clients who are interested in a fee structure other than standard hourly billing. In return for investing some or all of our fees in the client's matter, or for taking on unusual fee or collection risk, we earn an agreed upon fee based on a set of specified criteria. In these arrangements, we share in both legal fee and outcome risk. Such arrangements, internally called special fee arrangements or SFAs, are maintained in strict confidence.

## What are Alternative Fee Arrangements?

Alternative or special fee arrangements are agreements between Kirkland and a client to provide compensation to Kirkland based on a structure other than hourly billing. Such structures can take the form of contingency fees, fixed fees, value or success based fees or other alternatives to hourly fees appropriate under the circumstances of a specific matter. Special fee arrangements can be hybrids in which Kirkland receives a percentage of its hourly rate, with the remainder contingent on the outcome of the matter. If there is an unfavorable result, no further fees are paid. If there is a positive outcome, Kirkland might receive a multiple of the fees it has at risk. In addition, special fee arrangements can span more than one case. Kirkland has extensive experience in negotiating special fee arrangements that provide a fixed contingency across a group of cases, or to

handle a group of defense cases at a reduced rate, in exchange for a contingency on plaintiffs' cases that a client may have.

## Why Do Clients Seek Alternative Fee Arrangements?

Clients now recognize the inherent benefits in shifting some or all of the legal fee risk to law firms. First and foremost, shifting the fee risk to the law firm aligns the law firm's incentives with the client's, and reduces the risk to the client. In addition, clients who lack the financial resources to pursue important but expensive litigation are provided the opportunity to pursue such matters by having their law firm invest in the case alongside the client. In the absence of SFAs, such matters might never be pursued. Clients also value SFAs because they can provide predictable cash flow and budgeting. An SFA with a fixed monthly fee or flat fee as an element is a prime example of a structure that guarantees certainty in legal expenditures. In surveying its clients, Kirkland has found that more and more clients are utilizing alternative fee arrangements and looking to firms, like Kirkland, that regularly provide such arrangements.

## How Does the Process Work?

The SFA process typically begins with a new client or matter. Clients often initiate the risk-sharing consideration process, but partners at the Firm also may suggest an SFA for a particular matter. Once the Firm and client decide to pursue a matter for non-hourly treatment and conflicts have been cleared, background information is shared so that the Firm can assess the nature and complexity of the matter, the likelihood of success or difficulty in

achieving success, the likely fees to be incurred (or invested by Kirkland), and the client's objectives for success in the matter. Once the Kirkland partner is familiar with the background facts, he or she will submit a proposal to the Firm's SFA Committee for guidance and approval. The SFA Committee will guide the partner in discussing the SFA with the client or may, if asked, have one or more of its members discuss the proposed SFA with the client directly. The SFA Committee ensures that the proposal fairly balances the risks and rewards to the client and the Firm, and assists in preparing an appropriate agreement with the client.

## What Type of Clients Choose Risk-Sharing Arrangements?

Many clients prefer SFAs over traditional hourly billing. Some clients lack the financial resources to pursue a particular case or matter, as is often the case in intellectual property litigation matters or litigation matters for smaller growth companies. Other clients favor the further alignment of interests inherent in certain risk-sharing arrangements where the Firm only gets paid where a "win" has been secured for the client, such as contingent fee litigation matters. Still, others prefer SFAs for their cash flow benefits or to bring certainty to budgeting. Whatever the motivation, our clients have been pleased with our flexibility and cooperation in arriving at fair and appropriate SFA structures. In the past few years, our institutional clients have requested SFAs on an ever increasing basis.

# Risk-Sharing Options

Our SFAs have included pure contingent fee and partial contingent fee litigation matters, fixed fees in litigated and non-litigated matters, “hold backs” or any combination of risk/reward structures negotiated on a case-by-case basis with the client. In certain matters, we have taken part of our fee in equity or stock. At Kirkland, we are prepared to discuss and pursue any reasonable risk-sharing fee structure that balances the relative investment and risk taken on by the Firm with the client’s objectives for success in the matter. Specific types of SFAs that Kirkland has entered into include:

## Pure Contingency Fee

A pure contingency fee arrangement is the most traditional alternative fee arrangement in which Kirkland receives a fixed or scaled percentage of any recoveries in a lawsuit brought on behalf of the client as a plaintiff. Typically, the client pays the expenses of the litigation, however, Kirkland is also willing to discuss sharing part or all of the expense risk with clients. Pure contingency fees can be useful structures in many plaintiff cases seeking monetary or monetizable damages. They are often appropriate when the client is an individual, startup or corporation with limited resources to finance its litigation. Even large clients, however, appreciate the budget certainty and risk-sharing inherent in a contingent fee arrangement.

## Partial Contingency Fee

A partial contingency fee arrangement is when Kirkland receives a portion of its hourly rate plus a smaller percentage of any recoveries in the lawsuit. Partial contingency fees reduce the cost of litigation to the client, while still aligning Kirkland’s incentives with the client and sharing the fee risk between Kirkland and the client. Partial contingency fees are most common in plaintiff cases seeking monetary or monetizable damages; however, they are not limited to such matters. Defense cases can also be structured as partial contingency fees with success contingent on agreed upon results or milestones being achieved.

## Fixed Fee

Fixed fee or flat fee arrangements are typically arrangements whereby Kirkland agrees to handle a matter or group of matters for a sum certain or for a certain rate of investment per month. Fixed fees can be subject to an overall cap paid up front, or they can be for a fixed amount per month without a cap. The specific nature of any fixed fee arrangement can be tailored to the nature of any given matter. Clients who desire budgeting certainty often find fixed fee arrangements attractive.

## Holdback/Success Fee

A holdback/success fee arrangement is similar to a partial contingency fee in that Kirkland is paid a portion of its fees up front, but has a portion withheld contingent upon success in the matter. If the matter is concluded successfully, Kirkland receives a multiple of the holdback or an agreed upon success fee. This structure is often used in defense cases, or when the result sought in the matter is not monetary. For instance, Kirkland has used this type of arrangement in corporate transactions where success is the completion of an acquisition, sale or other transaction. Kirkland has also used this structure in patent cases where the outcome sought is a finding of validity or invalidity of a patent, or in litigation defense cases where the result sought is summary judgment or limiting damages below a certain quantum.

## Multiple Matters

Often, SFAs can cover several cases or matters. Kirkland has entered into arrangements with clients that pool groups of plaintiffs cases on a contingent fee basis, as well as groups of defense cases on a fixed or flat fee basis. In addition, Kirkland has negotiated arrangements with clients where it handles a fixed pool of defense cases on a reduced hourly fee basis in exchange for handling a group of plaintiff contingent fee cases for the client, or for receiving right of first refusal to handle all plaintiff contingent fee cases for the client for a period of time.

## Appeals

Appellate matters can also be well suited to alternative fee arrangements. Kirkland is willing to handle appellate work where its compensation rests, in whole or in part, on the success of the appeal.

## Other Matters

The examples provided above are not meant to be exhaustive. Kirkland is willing to discuss any alternative fee arrangement structure for all different types of matters with clients. As long as the risks are fairly balanced between Kirkland and the client, there is no type of matter that cannot be structured as an SFA.

# Examples of SFAs

The following are examples of matters we have handled under risk-sharing arrangements:

- A cash-strapped manufacturing company retained Kirkland on a pure contingent fee basis to pursue its former owner for breach of contract and fraud due to alleged overstatements of earnings in connection with the sale.
- A client retained Kirkland to pursue arbitration against its partner in a \$500 million development project. Under the arrangement, the client paid Kirkland 50 percent of its standard rates, and Kirkland received a percentage of the value the client received upon liquidation or sale of the venture.
- Many clients have retained Kirkland on a partial or pure contingency fee basis to pursue product manufacturers for patent infringement relating to technology patents.
- A client retained Kirkland on a tiered contingency fee basis to handle an insurance recovery action, paying an up-front multi-million dollar fee. Kirkland then took on all additional fee risk and received a percentage of the recoveries from the litigation.
- A client retained Kirkland to pursue litigation against numerous former officers and directors for fraud. The client also requested that Kirkland pay all expenses including expert costs. In return, Kirkland received full reimbursement of expenses, from “first dollars out” and a percentage of the recoveries from the litigation.
- A client and Kirkland negotiated an agreement, whereby Kirkland handled a fixed group of defense cases for a 30 percent reduction in its normal fees in exchange for a right of first refusal for all plaintiff contingent fee cases the client has for a three-year period.
- Several clients have asked Kirkland to “hold back” 20 to 30 percent of its normal fees in return for payment of the “hold back” and multiples thereof depending on the outcome of litigation.
- After settling a patent infringement lawsuit with the patent owner, a client retained Kirkland to pursue multiple manufacturers of the allegedly infringing product sold to the client on a contingent fee basis.
- Several clients have retained Kirkland to handle individual or groups of commonly litigated claims on a fixed or flat fee basis.
- A copyright holder retained Kirkland on a pure contingent fee arrangement to pursue a builder and architect for infringing on the copyright. The client lacked the resources to pursue the matter absent full investment by Kirkland.

## Litigation Finance and Alternative Billing Counseling

Kirkland is a leader in negotiating and structuring alternative billing arrangements and third party litigation finance structures. We are often asked to assist clients in evaluating SFA proposals made by other firms. We are glad to provide our input in these situations.

Kirkland has significant experience with all of the major litigation funding entities and has negotiated and concluded deals with many of them on behalf of our clients. Our relationships with litigation funders have proven a significant asset to our clients, as often clients require liquidity during the prosecution of a trial or appellate SFA matter.

We also have been involved in negotiating and purchasing insurance for our clients' trial victories and have significant experience and contacts with entities that provide these types of insurance products.

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