

Handbook for
**VALUE-BASED BILLING
ENGAGEMENTS**



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GUIDE TO VALUE-BASED BILLING

The demand for value-based billing options presents in-house counsel and their outside law firms with an opportunity to use the pricing of legal services to better allocate risks and align incentives in ways that best suit the client's goals for a particular case or portfolio of work. Doing so requires an understanding of how each fee structure shifts financial risks between the client and outside counsel, and how this potentially affects the law firm's staffing and case management. Properly structured and implemented, value-based billing can nurture a long-term partnership built on the creation of value for both client and law firm.

In the following pages we outline five value-based fee structures that are increasingly being used by law departments: (1) fixed or flat fees; (2) fixed fees with collars; (3) reverse contingent fees; (4) success fees; and (5) performance-based holdbacks. Each of these basic fee structures allocates risk and affects law firm incentives in different ways. We outline the incentives created by each fee structure, and provide our recommendations of where each fee structure can be used most effectively. Additionally, we provide sample language illustrating how these fee structures can be adapted and tailored to specific engagements.

The fee structures covered here by no means represent the universe of value-based billing. Rather, they should be seen as building blocks that can be combined and sequenced in different ways. Combining different elements can give in-house counsel additional flexibility and options for designing the optimal fee structure for each engagement or relationship.

We hope these materials will help you to develop increased value and lasting partnerships with your outside counsel.

FIXED *(OR FLAT)* FEES

I. HOW THEY WORK

A. Basic Structure

- At the outset of a matter, the client and the law firm agree on a fixed (or flat; we use the two terms interchangeably in this handbook) fee to cover the cost of a defined scope of legal work, instead of hourly billing.
- The fixed fee is established based on a mutually agreed upon scope of work, and on shared projections of what the work should cost and the matter's value to the client.
- The fixed fee can be set in a variety of ways, including (1) as a periodic payment (monthly, quarterly, annually); (2) per "life of matter"; (3) per each phase or defined subset of work in a matter (e.g., motions to dismiss, discovery, dispositive motions); or (4) for a portfolio of matters.

B. Considerations for Client

- The client eliminates risk of unpredictable legal costs due to expected or unexpected fluctuations in the amount of lawyer time needed to handle the matter or group of matters.
- The client assumes the risk of giving the law firm a "windfall" in the event the matter can be resolved for much less effort than anticipated in arriving at the fixed fee (but the fee presumably reflects that risk in the "what is it worth" assessment).
- The client has an incentive to expand the number of matters under the fixed fee, to mitigate the risk of budgeting inaccuracies by diversifying the portfolio.

C. Considerations for Law Firm

- The law firm has greater incentive to staff matters as leanly as possible to achieve the client's objective, because the law firm profits are correlated directly with how well it minimizes costs. Similarly, the law firm has a greater incentive to manage the case and make strategic decisions that resolve the case using less aggregate attorney time.

- The law firm bears the downside risk in the event the matter (or portfolio of matters) requires more effort than expected, making it unprofitable for the firm.
- The law firm may expand its relationship with and representation of the client through the use of portfolio pricing.

D. Considerations for Both

- A clear statement of assumptions about the scope of work covered by the fee, and how the project will be staffed and handled by the law firm, is critical to avoid misunderstandings and tensions once underway.
- The value created by the law firm's increased efficiency should be shared between the client and the law firm over time. Avoid unsustainable, zero-sum engagements.

II. WHEN THEY WORK

A. Best Uses

- Fixed fees are well-suited for a large portfolio of similar matters. By paying a fixed fee for a portfolio of matters, the client and law firm can diversify the risk of under-budgeting or over-budgeting that is otherwise inherent in any single matter.

Fixed fees are also well-suited for phase-based billing, because it is easier to assess the work required for discrete phases of litigation than it is to estimate at the outset the total investment needed to resolve the entire case. Over or under estimates in one phase can be offset in other phases.

- Fixed fees are easiest to use on matters with which both the client and law firm are already familiar, which involve common issues and a common life cycle, reducing variability in costs.
 - For example, product liability litigation typically involves a large number of cases with the same basic set of issues over a long period of time, and for which in-house counsel needs to ensure a predictable level of legal spend. Using a fixed fee for the entire portfolio leads to predictable costs and promotes efficient case management and strategy, while the repeat nature of the litigation minimizes the risk of inaccurate forecasting of costs.

B. Less Effective Uses

- Especially in matters requiring significant judgment and ongoing strategic decision-making, fixed fees can be risky when used by a law firm and client that do not have experience and comfort with each other's expertise, work habits, and expectations.

Fixed fees succeed in an environment of clear and open communication, trust, shared risk, and loyalty.

- When combined with “shadow billing” (in which the law firm also provides bills calculated on an hourly-rate basis for comparison purposes), the law firm incentives can become perverse. Also, the inevitability of determining who “won” and who “lost” under the flat fee arrangement undercuts the premise of the value-based agreement, and retrenches reliance on hourly-based costs as reliable and appropriate.
- Used solely as a device to obtain the lowest price (as in an auction or RFP environment), quality of service and ultimately results may suffer.
- Fixed fees require the support of senior leadership at both law firm and client, as even the most thoughtful fixed fee arrangement can result in significant and unexpected economic benefit or hardship to either the firm or the client.

III. SAMPLE ENGAGEMENT TERMS

Work-Based Fixed Fee – One Payment

We have agreed that we will perform the work described above for a flat fee of \$xx. On a matter such as this, we prefer to staff a small team of attorneys in order to increase efficiency. I will take the lead on this matter, accompanied by a senior associate/counsel, one or two junior associates and a paralegal. In the event this matter proceeds beyond the preliminary analysis described above, we will want to discuss potential fee arrangements for any further phases of work on this matter.

Time-Based Fixed Fee – Installments

For the period of March, 2015 – January, 2016, [client] will pay [law firm] a flat fee of \$xx million, payable in eleven installments. The initial five payments will be in the amount of \$aa, the subsequent five payments in the amount of \$bb, and a final payment of \$cc will be submitted on or before January 31, 2016. The scope of work covered by the flat fee is described in the attached work plan. Expenses, expert fees and vendor costs are outside the scope of this fixed fee agreement and will be billed monthly on a pass through basis.

If developments in the litigation cause [law firm’s] work to expand outside the scope of the work plan or contract, [client] and [law firm] will renegotiate the flat fee.

Portfolio Fixed Fee

This letter is a proposal for a fixed fee arrangement for counseling on global privacy matters between [client] and [law firm]. To that end, we propose an arrangement whereby [client] would be able to call upon [law firm] on an as-needed basis for rapid responses to spot global privacy counseling issues, a concept that we believe will provide a cost-effective arrangement that encourages utilization of [law firm’s] resources:

1. The agreement would cover general counseling on global privacy matters (“Covered Matters”).
2. For its services in connection with Covered Matters, [law firm] would be paid a flat fee in monthly installments of \$aa.

In addition to the payment of fees provided for in this agreement, [client] would be responsible for reasonable expenses and disbursements, if any, in accordance with the guidelines set forth in our prior agreement.

3. To the extent that the value of [law firm’s] time for any single global privacy counseling matter exceeds \$bb (based on [law firm’s] standard rates), or by mutual agreement of [client] and [law firm], a separate matter would be opened. If [client] elects to retain [law firm] for any such new matters, fees for those matters would either be billed pursuant to our prior agreement or we can negotiate a new arrangement specific to that matter.

FIXED FEE WITH COLLARS

I. HOW THEY WORK

A. Basic Structure

- The client and law firm agree to a fixed fee, as well as a collar that is set as a percentage of the fixed fee.
- Some level of shadow billing is employed to track the value of time actually spent (at agreed hourly rates) against the fixed fee.
- If fees, as reflected in the shadow bills exceed the fixed fee by the amount of the collar, then the client pays a percentage of the over-run. If less than the collar, the law firm pays back a percentage of the savings to the client.

B. Considerations for Client

- The fixed fee aspect enhances the predictability of the legal spend and minimizes the risk of unpredictable costs. It also gives client an opportunity to “practice” flat fee pricing with less risk of an unexpected result.
- The collar does shift some of the risk of cost overrun back to the client (as compared to a pure fixed fee), but the risk is smaller when compared to standard hourly billing. The collar also protects the client (to some degree) against underworking by the firm once the fixed fee has been reached.
- The collar retains the incentive for the law firm to work efficiently, while ensuring that the law firm will not receive a “windfall.”

C. Considerations for Law Firm

- The collar mitigates fixed fee risks. By allowing some true-up, the law firm bears less risk of imperfect calculation of fee and unpredictability of costs, and so has more incentive to move away from straight hourly billing. It is a good “starter” arrangement for firms trying out flat fee pricing.
- The collar also gives the law firm an incentive to manage the case to the needs of

the matter, not to the fee. The fixed fee makes overkill unprofitable, but the collar provides some protection to the firm if the needs of the case require more effort than expected.

- The collar enables the firm to give the client reassurance against a “windfall” situation.

D. Considerations for Both

- The fee structure focuses the conversation on “what should be done to achieve objectives” in order to set the initial fee; collars act as buffers in the event there are unexpected developments in either direction.
- Both the size of the collar (representing the risk assumed by each side) and the percentage of rates to be paid outside the collar can be adjusted to insure against an agreed level of inequity, but to retain the primary incentives for efficiency.
- The need for shadow billing can create perverse incentives, potentially sets up a “winner/loser” environment, and eliminates one of the attractive features of a flat fee arrangement (no hourly bill preparation or review).

II. WHEN THEY WORK

A. Best Uses

- Where the matter is new in type or the scope of the matter is particularly hard to define or predict, the collar structure mitigates the effects of fixed fees on the risk borne by the law firm and the incentives with respect to managing the litigation.
- Collars can be an effective way to transition the client-law firm relationship away from hourly billing toward fixed fees, while providing interim protection against “mistakes.”

B. Less Effective Uses

- Administering the collar requires a commitment by the client and the law firm to the true-up process. Where the motivation for a fixed fee is driven by a desire to minimize the time and attention needed from in-house counsel on the billing process, the administrative costs of collars may be a deterrent.
- Collar arrangements require the use of shadow billing, and shadow billing may undercut the law firm’s incentive to maximize efficiency. It also continues to tie the client and the law firm to the concept that fees resulting from an hourly rate arrangement reflect the “real” or appropriate cost.

III. SAMPLE ENGAGEMENT TERMS

We would like to present to [client] a flat fee proposal, effective January 1, 2015, to encompass all Labor & Employment and Privacy matters throughout the United States. We estimate that the total billings for [client's] work for 2014 in this regard will be in the range of \$xx million. This proposal is to provide a flat fee for 2015 that is 10% less than the actual 2014 spend, subject to the following principles:

1. The proposed flat fee is premised on a shared risk/shared reward principle. We would thus propose that there be a 15% "collar" around the flat fee. If we are very successful in driving down total legal costs (as measured by the agreed blended hourly rates and the hours spent), [law firm] would be rewarded by receiving all the savings within the 15% lower collar, and would then share in an additional 50% of the savings below the bottom collar amount. For example, if the 2015 flat fee is \$zz, and the actual 2015 spend is \$aa, [client] would still pay the full flat fee of \$zz. If the actual spend were to be much lower, for example \$bb, [client] would pay \$cc (85% of the \$zz flat fee, equaling \$dd, plus 50% of the difference between \$dd and \$bb). Conversely, [law firm] shares the risk on the upside -- if the actual spend is \$ee, for example, [client] would still pay only \$zz million. If the actual spend is likely to exceed the upper collar, the parties would agree to review the reasons for that outcome, and could agree on an appropriate resolution. In principle, however, we would envision that [client] would pay only 50% of the agreed blended hourly rates, solely on the hours above the upper collar. That is, [law firm] would fully absorb the first 15% of overage within the fixed fee proposal.
2. The fee proposal is premised on [client] retaining [law firm] at a flat fee of \$ff to provide and institute our compliance advice intended to reduce the source of litigation, as well as any other areas designated by mutual agreement to reduce the outside counsel spend.
3. All expenses will be invoiced monthly and due on receipt of invoice.

REVERSE CONTINGENT FEES

I. HOW THEY WORK

A. Basic Structure

- The fee is structured similarly to standard contingency fees used for recovery work, except that the contingent fee is based on a percentage of the amount saved for the client in the matter vs. a recovery amount.
- The client and law firm must agree in advance on the “fair value” of the exposure the client faces if it loses the case, as well as the costs of full litigation.
- The reverse contingency fee is set as a percentage of the difference between the value of the estimated exposure and the amount, if any, the client ultimately pays in damages or settlement, plus avoided legal costs.
- A reverse contingency fee can be used alone or in conjunction with either discounted hourly rates or a fixed fee.

B. Considerations for Client

- Like a standard contingency fee, the reverse contingency shifts some of the downside risk of the litigation to the law firm, which can profit from the matter only if it obtains an excellent result for the client. Thus, the reverse contingency aligns the client’s and law firm’s incentives in defense cases in ways that are not possible with standard hourly billing.
- A reverse contingency allows the client to demonstrate to the law firm the impact of the litigation, both in terms of exposure and legal costs, to the client’s business. This, in turn, can encourage a stronger partnership between the law firm and client, and more effective management of the litigation by the law firm, because the law firm better understands the litigation in its broader business context.

C. Considerations for Law Firm

- The law firm has stronger financial incentives to achieve the best possible result possible for the client, taking into account both the exposure on the claims and the costs of defense.

- The law firm has the incentive to staff and pursue the litigation in a more streamlined and targeted manner, because the law firm's margins increase the more it minimizes costs while still achieving a successful result.
- The law firm will be less motivated to litigate for litigation's sake, and more motivated to pursue settlement or non-traditional litigation strategies that minimize impact of litigation on the client's bottom line.

II. WHEN THEY WORK

A. Best Uses

- Reverse contingency fees are well-suited for large, sophisticated matters where the client needs the best possible result, but is under pressure to minimize the total cost of litigation. For example, they are well-suited to antitrust defense or IP litigation where the client may perceive little merit to the underlying claim, but faces large potential exposure and the likelihood of protracted and expensive litigation.
- Reverse contingency fees work best where the law firm and the client have a preexisting relationship and the law firm understands the client's business. This allows for the client and law firm to more easily reach a common understanding of the potential impact of the litigation and the basis for the reverse contingency.
- Because reverse contingency fees put a substantial amount of downside risk on the law firm, and most defense-oriented law firms typically are not comfortable with the economics of contingent fees, the reverse contingency model may be a better sell for the law firm if combined with other fee arrangements that produce some interim cash flow not tied to results.

B. Less Effective Uses

- Reverse contingency fees are difficult to implement for matters where it will be difficult to quantify the effect of a successful result on the client's balance sheet or income statement.
- A reverse contingency may be difficult to implement and a tough sell for management because of the challenges of funding the contingency fee. Unlike a standard contingency fee, there is no new source of revenue (like a settlement or judgment) which can be used to fund the fee award at the conclusion of the litigation.

III. SAMPLE ENGAGEMENT TERMS

Reverse Contingency with Fixed Fee

Fixed Fee: [Law firm] will be paid a fixed fee of \$xx, regardless of additional discovery, post-hearing briefs, or other procedural steps in the arbitration that are presently not known. Beyond the fixed fee, [law firm] will continue to invoice [client] for costs.

Reverse Contingency: In the event, and at the time, of a final decision or settlement, [client] would pay [law firm] a guaranteed bonus in addition to the amount earned under the fixed fee. The amount of the guaranteed bonus would be determined as follows:

5% of the exposure amount that is avoided (\$10 million total exposure determined at outset of case). For example, if [client] only has to pay 1\$ million then [law firm] will earn 5% of the \$9 million avoided (\$450,000).

SUCCESS FEES

I. HOW THEY WORK

A. Basic Structure

- Client and outside counsel first define what results – interim or final – will constitute a “success,” and defined bonuses are awarded for successes achieved. Successes may include an early resolution at or below a particular total cost, achieving a desired schedule, narrowing or avoiding discovery, winning a dispositive motion, or reducing overall economic cost of the case below a certain agreed upon threshold.
- The law firm may also reduce its regular fee (whether hourly or flat), as a price for sharing in the potential upside, and to reflect that an outcome that meets no definition of success does not earn full fees. Alternatively, an explicit “broken deal discount” can be established, so that if the transaction does not close successfully, or the matter is lost or otherwise “fails,” a percentage of the fee otherwise earned is forfeited to the client.
- The defined successes, and defined failures, are often matters within the law firm’s ability to influence, but not always. Sometimes the relationship between law firm and client supports an “in it together” investment approach in which the law firm’s fortunes follow the client, regardless of the firm’s ability to influence the outcome.

B. Considerations for Client

- Reduces case expense where the law firm is unable to deliver a successful outcome.
- At the outset, focuses on defining what the client’s objectives – business and legal – are for the matter, so there are early, clear metrics against which the law firm’s performance is measured.
- Forces early case/matter assessment; helps manage expectations and encourages candid advice.
- Higher legal spend occurs only where the law firm delivers measurable value.

C. Considerations for Law Firm

- Provides specific rewards for successful outcomes to align law firm incentives with the client’s pre-determined metrics of success.

- The law firm can realize premium returns.
- Rewards creative solutions that may be discouraged through pure hourly engagements (under which the law firm is not rewarded for high value/low fee outcome).

D. Considerations for Both

- This arrangement requires substantial thought and communication at the outset of the engagement. Ideally, business stakeholders are also included in designing the success-fee triggers.

II. WHEN THEY WORK

A. Best Uses

- Where the matter involves complex issues and uncertain levels of investment, such that front-end collaboration on client goals sharply focuses the effort.
- Where creativity and quality of outside counsel will be a key component to achieving success, as defined.

B. Less Effective Uses

- Where “success” may not mean there is substantial incremental value created.
- Where degree of contribution by outside counsel to the successful outcome is difficult to assess.

III. SAMPLE ENGAGEMENT TERMS

Transactional Fixed Fee by Phase with Success Bonus

We have agreed to represent [client] on a fixed fee by phase basis for the transaction detailed previously which includes the phases set forth below. Each phase will be billed in full at the commencement of the phase. If anything arises which falls outside of the detailed scope, it shall not be a part of this agreement and must be separately negotiated by [client] and [firm]. We have also included a success fee alongside our discounted fixed fees to further align our interests and share in the inherent risks and rewards.

Phase 1 – Analysis, structure, initial diligence and assistance with identifying various areas of due diligence - \$aa

Phase 2 – Drafting and negotiation of main and ancillary agreements - **\$bb**

- Firm would be responsible for drafting all transaction documents, including a definitive Purchase Agreement
- Two rounds of negotiation and two turns of the Purchase Agreement
- Negotiate other transaction documents

Phase 3 – Full due diligence including preparation of due diligence reports and specialist review - **\$cc**

- The diligence review will be staffed with the required experts from the various disciplines, such as tax, intellectual property, employment, benefits, etc.

Phase 4 – Preparation for, completion of documentation to execution and closing - **\$dd**

- Finalize all agreements and prepare necessary consents and resolution for signing
- Closing

Total Fixed Fee: **\$xx**

Success Fee

If the transaction closes, [firm] will receive a 10% bonus (measured on flat fee).

Litigation Fixed Fee by Phase with Success Bonus

[Client] will pay for [firm's] services pursuant to a multi-phase fixed fee, with an additional success fee component.

Fixed Fees

Phase 1: Case Assessment & Initial Pleadings: \$aa

Phase 2: Discovery: \$bb

Phase 3: Motion for Summary Judgment: \$cc

Phase 4: Trial: \$dd

The flat fee for each phase will be paid in installments, according to the schedule set forth below.

Success Fee

Success benchmarks and associated potential success fees are identified below. It is assumed that earlier successes are worth more than later successes, both for business reasons and because they avoid greater legal expense. [Firm] does not want to claim success for a result that our efforts did not facilitate, so where that might be the case, [firm] will defer to [client's] judgment.

Resolution	Success Fee
<p>Commercial resolution prior to service of Complaint</p> <p>(if facilitated, in [client's] judgment, by our inputs and efforts to set up the case for defense)</p>	<p>\$A to \$B</p> <p>(sliding scale, in [client's] discretion, based on our contribution)</p>
<p>Case dismissed on 12(b)(6) motion (and upheld on appeal)</p>	<p>\$C</p>
<p>Case dismissed on a Motion for Summary Judgment (and upheld on appeal)</p>	<p>\$D to \$E</p> <p>(sliding scale, in [client's] discretion, based on our contribution)</p>

PERFORMANCE-BASED HOLDBACKS

I. HOW THEY WORK

A. Basic Structure

- A holdback is not a stand-alone fee structure, but an overlay on traditional hourly billing or fixed fees.
- At the outset of the relationship, the client and the law firm agree on a set of performance metrics against which the law firm will be measured. Often these are law firm service-related, rather than (or in addition to) outcome related.
- A percentage of the fee is “held back” by the client (or by the firm). The law firm and the client meet at regular intervals to assess the law firm’s performance against the metrics and the holdback amount is paid to the law firm based on this evaluation.
- A holdback can be used in connection with a specific matter or for part or all of the client’s relationship with the law firm.
- A holdback is broader and more flexible than a contingency fee or a success fee. The holdback can be assessed on the basis of a successful outcome, efficient resolution, effective use of cost-saving measures, contribution toward client’s business objectives, service excellence, “client delight,” or any combination of these or other criteria.

B. Considerations for Client

- Holdbacks encourage outside counsel to share in the downside risks of a matter, with the potential to participate in the upside. The client, in turn, is better protected against cost overruns and incurring large costs for unsuccessful outcomes.
- Holdbacks can make more cost-neutral the decision between retaining a higher-rate firm, but one better equipped for the matter, versus a lower-rate, but less experienced firm. The holdback allows the client to demand that the higher-rate firm prove that its higher rates are justified by the expertise and experience it offers. Justifies its rates through result-oriented expertise.
- Holdbacks allow the client to hold the law firm accountable on a regular basis through periodic reviews. Holdbacks also encourage the client to re-evaluate the ways in which

law firms create value for the business and determine the best ways for measuring that value.

- Holdbacks can promote a better working relationship between in-house and outside counsel.
- Rather than arguing over fees, in-house and outside counsel engage in a regular dialogue about how the law firm is creating value.

C. Considerations for Law Firm

- A holdback creates a penalty for the perceived drawbacks of the hourly billing model, such as overstaffing or overworking certain tasks.
- A holdback creates incentives similar to a success fee, but offers the law firm more downside protection and is thus more adaptable to the economic structure of large law firms.
- The attorneys managing the matter are encouraged to actively manage the matter in ways that most align with the client's broader objectives.
- The attorneys managing the matter are encouraged to actively understand the client's business and how their work fits with the client's larger business objectives. When used across a portfolio of work, holdbacks encourage the firm to develop a stronger overall partnership with the client than under the traditional hourly billing model.
- Ultimately, holdbacks are intended to focus the law firm on developing highly satisfied clients, who are willing to acknowledge when value has been created by outside counsel.

D. Considerations for Both

- Both the law firm and the client must feel comfortable giving and receiving feedback, including subjective feedback.
- If and when it is fairly earned, the client must be ready, willing and able to pay the law firm the holdback. An upfront conversation about any practical or political limitations on making such payments in the future may drive towards a lower holdback amount or different holdback criteria.

II. WHEN THEY WORK

A. Best Uses

- Holdbacks require commitment on the part of the client and the law firm to an ongoing dialogue regarding the law firm's performance and whether it is meeting the client's objectives. This commitment can be a substantial investment in time, so holdbacks are better suited for large matters, or portfolios of matters, that justify this investment.
- Holdbacks work best where the client and the law firm have an ongoing relationship, making it easier for the client and law firm to define mutually-acceptable performance criteria, and for the law firm to trust the client to be fair.
- Building a bonus into the holdback, (e.g., 15% holdback, with a potential 5% bonus over and above the holdback amount if certain criteria are met) can further encourage the law firm to commit to the process of defining and evaluating performance and value.

B. Less Effective Uses

- There will be some matters for which holdbacks are ill-suited because of the difficulty of defining the performance metrics.
- Holdbacks may not be appropriate for relatively small matters, because the size of the engagement or relationship does not justify the investment by in-house and outside counsel in the periodic performance evaluations.

III. SAMPLE ENGAGEMENT TERMS

Holdback for Entire Relationship

We propose a firm-wide fee structure for all 2015 legal work done on or after February 1, 2015 that provides a 10% discount and 10% holdback applied to our standard hourly rates.

The 10% of fees would be held back – along with the 10% applied discount – from each bill. We would then work with you to define objectives which would potentially entitle us to a return of some or all of the 10% holdback. Of course, if we were unsuccessful in achieving these objectives, you would keep the 10%. The discount is premised on the prompt payment of billing statements. Our proposal introduces a “risk/reward” component to our relationship. Overall, our goal is to develop a fee structure which (1) is financially attractive to [client], (2) creates incentives to attract our best lawyers to this work, (3) injects a risk/reward component into the relationship that further aligns us on key objectives, and (4) is easy to administer across a range of matters.

We have discussed how our performance will be evaluated and your concern that holdback determinations may create the potential for disputes between [law firm] and [client], particularly since some number of objectives will have a subjective component. To make certain that there is never a dispute about whether [law firm] should or should not receive some or all of the 10% holdback, [law firm] agrees that such determination will be entirely up to [client], in its sole discretion. We propose to develop objectives for our existing work over the next 60 days. Additional objectives would be added if our work evolves and expands over time. Finally, we propose that we address the extent to which [law firm] should receive some or all of the holdback after this rate agreement has been in effect for a full year.

Holdback for Single Litigation

We would like to propose a value-based billing arrangement (VBB) pursuant to which [law firm] would be responsible for bringing to a resolution the claims in the litigation. This memorandum outlines an approach that we think would address [client's] key business and cost objectives for the case. We are happy to discuss other approaches, as well.

- [Law firm] will invoice [client] 85% of the total value of time recorded. The remaining 15% will be deemed the “holdback amount.”
- [Law firm] will have the opportunity to earn, and receive payment of the full holdback amount at the discretion of [client].
- [Law firm] will also have the opportunity to earn, and receive payment of, a performance bonus of up to ten percent (10%) over and above the holdback amount, again at the discretion of [client].
- Whether [law firm] earns back all or some of the holdback amount or performance bonus for this matter shall be determined based on [client's] assessment of [law firm's] performance against established criteria, such as quality, results, creativity, efficiency and cost-consciousness, and utilization of internal [client] resources. The criteria shall be established in advance but, by way of example, a performance bonus might be warranted if we dispose of the case on summary judgment and/or obtain a satisfactory mediated settlement that advances [client's] business objectives.
- Holdback determinations will be made each year by a date certain (e.g., at the end of [client's] fiscal year, at the end of the calendar year) or at the conclusion of the matter, whichever comes first.