

Guide to
**Value-Based
Billing**



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Guide to Value-Based Billing

The growing 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 potentially affects the incentives of the law firm in how it staffs and manages a case. Properly structured and implemented, value-based billing structures should nurture a long-term partnership built on outside counsel creating and maintaining value for the client.

In the following pages we outline six fee structures that are growing in popularity in step with the movement toward value-based billing: (1) fixed fees; (2) budgeted fees with collars; (3) blended rates; (4) reverse contingent fees; (5) success fees, and (6) holdbacks. Each of these 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. Finally, we provide some sample language illustrating how these fee structures can be adapted and tailored to specific engagements.

The fee structures we outline here by no means define 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 of each give in-house counsel additional flexibility and options for designing the optimal fee structure for each project or relationship.

We hope that these materials will be a guide down the path toward better value and lasting partnerships with your outside counsel.

Fixed Fees

I. HOW THEY WORK

A. Basic Structure

- ▶ At the outset of a matter, the client and the law firm agree on a fixed fee to cover the cost of the legal work, instead of hourly billing.
- ▶ The fixed fee is established based on mutually agreed projections of “what work should cost” and “what is the matter worth” to the client.
- ▶ The fixed fee can be set in a variety of ways, including (1) as a monthly retainer; (2) per single piece of litigation; (3) per each phase of a single litigation (e.g., motions to dismiss, discovery, dispositive motions); or (4) for a portfolio of litigation 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 litigate the case.
- ▶ The client assumes the risk of over-budgeting the total cost of resolving the matter, and risks giving the law firm a “windfall” in the event the litigation can be resolved for much less than 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 cases under the fixed fee, to counteract 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.

Fixed fees may encourage the law firm to manage the case to the fee, using fewer senior, more experienced lawyers and avoiding strategic decisions that would significantly increase the amount of lawyer time needed.

- ▶ The law firm bears the entire downside risk in the event the fixed fee ends up below the amount of work required for the case.

II. WHEN THEY WORK

A. Best Uses

- ▶ Fixed fees are well-suited for a large portfolio of litigation matters. By paying a fixed fee for a portfolio of litigation matters, the client and law firm can diversify the risk of under-budgeting or over-budgeting that is otherwise inherent in any single litigation.
- ▶ 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.
- ▶ Fixed fees work best for litigation matters that both the client and law firm are already familiar with, which involve common issues and a common life cycle, reducing variability in litigation costs.
- ▶ For example, product liability litigation typically involves a large number of cases with the same basic set of issues but 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

- ▶ Fixed fees are less well-suited for a single large, complex, stand-alone litigation matter because of the difficulty of predicting the investment needed for such a matter.
- ▶ Fixed fees are also ill-suited for litigation presenting novel or cutting-edge issues requiring highly-specialized expertise. Such matters typically benefit from the staffing of more senior and experienced (higher-rate) attorneys, but a fixed fee will encourage law firms to push down work to more junior attorneys as much as possible.

III. BEST PRACTICES (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, 2011 – January, 2012, [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 \$yy, the subsequent five payments in the amount of \$zz, and a final payment of \$zz will be submitted on or before January 31, 2012. 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 agreement.

If developments in the litigation cause [law firm's] work to expand outside the scope of the work plan or to 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 General Services Administration ("GSA") schedule 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 GSA schedule 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 GSA schedule 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] time for any single GSA schedule 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 an alternative arrangement specific to that matter.

Budgeted Fee with Collar

I. HOW THEY WORK

A. Basic Structure

- ▶ The client and law firm agree to a budgeted fee as well as a collar, set as a percentage of the budgeted fee.
- ▶ The work is measured at an agreed hourly rate.
- ▶ If fees as measured by hourly rates exceed the budgeted 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 savings to the client.

B. Considerations for Client

- ▶ A budgeted fee ensures predictable legal spend and minimizes risk of unpredictable litigation costs, much like a fixed fee.
- ▶ A collar shifts some of the risk of litigation cost over-run back to client, as compared to a fixed fee, but the risk is much smaller when compared to standard hourly billing.
- ▶ Periodic review to true-up the budgeted fee encourages client and law firm to work together to define objectives and value for litigation.

C. Considerations for Law Firm

- ▶ A collar mitigates risks of fixed fees when applied to a single, large complex piece of litigation. By allowing 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.
- ▶ A collar also gives the law firm more of an incentive to manage the case to the needs of the litigation, not to the fee. The budgeted fee makes litigation overkill unprofitable, while the collar gives the firm more incentive to increase intensity of work if the needs of the litigation so require.

- ▶ The law firm has an increased incentive to smooth out the spending on the case on a month-to-month basis to prevent “sticker shock” during true-up.
- ▶ The budget/collar fee establishes a structured mechanism for evaluating whether to revisit the budgeted fee, in contrast to a simple agreement to reevaluate the fixed fee as the litigation develops.
- ▶ The fee structure focuses on the conversation on “what should be done to achieve objectives” in order to set the initial budget target; collars act as buffers in the event there are unexpected developments in either direction.

II. WHEN THEY WORK

A. Best Uses

- ▶ Where client needs the benefit of a fixed fee for a large, stand-alone piece of complex litigation, 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 budgeted fees, without fully embracing fixed fees, and may encourage the firm to try out budgeted fees.

B. Less Effective Uses

- ▶ Administering the collar requires a commitment by the client and the law firm to the periodic 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.
- ▶ Collars mitigate, but do not eliminate, the risk of unpredictability and variability in the amount of lawyer time needed for a piece of litigation. Where the case involves a high degree of unpredictability, and the collar is frequently exceeded, the client and law firm may be frustrated by repeatedly invoking the true-up process. This generally means that the parties have not effectively focused on the litigation objectives, or have not developed and enforced reasonable project management plans.

III. BEST PRACTICES (SAMPLE ENGAGEMENT TERMS)

We would like to present to [client] a flat fee proposal, effective January 1, 2011, to encompass all Labor & Employment and Privacy matters throughout the United States. We estimate that the total billings for [client's] work for 2010 in this regard will be in the range of \$xx million. This proposal is to provide a flat fee for 2011 that is 10% less than the actual 2010 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 25% of the savings below the bottom collar amount. For example, if the 2011 flat fee is \$zz, and the actual 2011 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 25% 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 appears during the course of the year to be likely to exceed the upper collar, the parties would agree to review the reasons for that outcome, and could agree on an appropriate resolution at that time. In principle, however, we would envision that [client] would pay only 75% of the agreed blended hourly rates, and only 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, going forward, the source of litigation, as well as any other areas designated by mutual agreement to reduce the outside counsel spend.
3. The 2011 flat fee would be payable as utilized. End of month billing will detail activity and value of time accrued at the agreed rates.
4. All expenses will be invoiced monthly and due on receipt of invoice. I look forward to your comments and ideas to create a continuing relationship where the goal is to reduce cost while increasing the potential to eliminate litigation.

Blended Rates

I. HOW THEY WORK

A. Basic Structure

- ▶ Client and law firm agree on a single hourly rate to be charged for attorneys that typically bill out at different standard rates. These rates can be used for a single matter or for all work on a portfolio of matters.
- ▶ The blended rate can be set for all attorneys working on a matter or portfolio of matters, or can be set by timekeeper level (e.g., partner rate, counsel rate, associate rate).

B. Considerations for Client

- ▶ Using blended rates may result in an overall reduction of legal spend on a particular matter or portfolio of matters and so may be attractive to in-house counsel under pressure to reduce aggregate spending for a particular category of litigation.
- ▶ Using blended rates makes overall legal spend more predictable than traditional hourly billing. Legal spend will not fluctuate depending on internal decisions by the law firm regarding staffing and allocating work on the matter. Blended rates offer less predictability than flat fees depending on how difficult it is to predict the amount of attorney time needed for a particular litigation.
- ▶ Blended rates typically require less administrative costs than budgeted fees with a collar, and so may be attractive for matters where in-house counsel wants to reduce legal costs without increasing the cost of oversight.

C. Considerations for Law Firm

- ▶ Blended rates encourage law firms to push down work on a matter to more junior members of a case team in order for the blended rate to work financially. If work cannot be allocated to attorneys with billing rates lower than the blended rate, then the blended rate simply becomes a straight discount off standard rates.

- ▶ Over time, blended rates encourage a law firm to staff matters with a dedicated staff attorney who has a lower cost (and therefore rate) than the equivalent partner-track attorney, and develops experience specific to the litigation matters being serviced under the blended rate.

II. WHEN THEY WORK

A. Best Uses

- ▶ Blended rates are well-suited for rate-sensitive, routine or repeat litigation involving common issues and a predictable procedural course, which can be effectively serviced by more junior, lower-rate attorneys. Examples include single-plaintiff employment litigation and insurance coverage litigation.
- ▶ Blended rates tend to be more effective in combination with a success fee or holdback that rewards the firm for making staffing decisions that promote both efficiency and excellent results.

B. Less Effective Uses

- ▶ Sophisticated counseling projects, such as antitrust or IP counseling, where the work is typically done by a single, more experienced attorney.
- ▶ “Bet-the-company” cases where the client wants the most senior and experienced litigators at the firm heavily involved in all aspects of the litigation.

III. BEST PRACTICES (SAMPLE ENGAGEMENT TERMS)

Standard Blended Rate

At this time we propose the following fee increases effective January 2012: Blended rate for all employment practice liability matters (“EPL”) at a blended rate of \$cc per hour. This rate reflects a substantial discount from our current standard rates. Set forth below are the current standard rates for the attorneys who have been part of the [client] employment practices litigation team:

Senior Partner	\$xxx.00
Junior Partner	\$yyy.00
Counsel	\$zzz.00
Mid-level Associate	\$aaa.00
Junior Associate	\$bbb.00

The blended rate for the attorneys on the [client] employment practices litigation team at the firm's standard rates would be \$dd. As a result, the blended rate that we are proposing for all [client] employment practices litigation matters constitutes a substantial discount, while still providing the highest quality legal services. I hope that this new arrangement is acceptable to you.

Blended Rate with Holdback

With respect to potential reinsurance work for [client], we propose the following rate structure that is based substantially on the terms we offered to [client] in 2011:

- ▶ A blended hourly billing rate of \$gg for all hours spent by any attorneys working on matters involving disputes in which the amount at issue does not exceed \$1.5 million, and a blended hourly rate of \$hh for any legal assistants working on such matters.

- ▶ A blended hourly billing rate of \$ii for all hours spent by any attorneys working on matters involving disputes in which the amount at issue is or exceeds \$1.5 million, and a blended hourly rate of \$jj for any legal assistants working on such matters.

- ▶ An annual hold-back percentage of 5% off of the fee portion of any invoice, which we would show as a reduction on every monthly invoice. We will have the opportunity to earn up to the full hold back amount, if, in [client's] sole discretion, [client] believes that our performance met or exceeded the company's expectations. If [client] determines that we have earned the hold back amount, [client] shall pay it on or before December 31 of the relevant annual period.

- ▶ [Client] would be responsible for all costs and expenses incurred on any matters referred to us, including, but not limited to, arbitrator fees and expenses, expert fees and travel expenses.

These terms would apply to any and all invoices billed through December 31, 2012. We hope that this arrangement reflects our commitment to providing [client] with the highest quality service on forward-looking economic terms. If there is any aspect of our proposal that you would like to discuss, please do not hesitate to call. It is our goal to agree on a billing structure that will lead to a long and productive relationship between [client] and our firm.

Reverse Contingency

I. HOW THEY WORK

A. Basic Structure

- ▶ The fee is structured similar to contingency fees used for plaintiffs' work, except that the contingent fee is based on a percentage of the amount saved for the client in the litigation.
- ▶ The client and law firm must agree in advance on the "fair value" of the exposure the client faces if it loses the litigation, as well as the costs of full litigation.
- ▶ The reverse contingency fee is set as a percentage of the difference between the estimated exposure and the amount, if any, the client ultimately pays in damages or settlement, plus avoided litigation costs.
- ▶ A reverse contingency fee can be used alone, or in conjunction with either discounted/capped 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 overall 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 where the client 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 reach more easily 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. BEST PRACTICES (SAMPLE ENGAGEMENT TERMS)

Standard and Reverse Contingency with Fixed Fee

- ▶ **Fixed Fee:** [Law firm] will be paid at its standard rates for the Arbitration, up to a fee cap of \$kk (the “Fixed Fee Cap”), regardless of additional discovery, post-hearing briefs, or other procedural steps in the arbitration that are presently not known. After the Fixed Fee Cap has been expended, [law firm] will continue to invoice [client] for costs, but would provide its services without fee.

- ▶ **Payment up to Cap:** [Law firm] will invoice [client] beginning in June 2011 at a rate of \$vv per month through January 2012. Expenses would be billed separately on each monthly invoice.

- ▶ **Guaranteed and Discretionary Bonuses in the Event of a Final Award:** In the event, and at the time, of a final award, [client] would pay [law firm] a bonus in addition to the amount expended under the Fixed Fee Cap (“Guaranteed Bonus”). The amount of the Guaranteed Bonus would be determined as follows:
 - 10% of the total gross amount (i.e., including interest, if awarded) awarded to [client] for its principal claims; and
 - 1% of the total amount of the counterclaims dismissed.
 - In addition to the foregoing, [client] may pay a discretionary bonus to [law firm] in the amount of another 1% of the total amount of the counterclaims dismissed, depending on [client’s] level of satisfaction with [law firm’s] legal services in the Arbitration and at its full discretion.

- ▶ **Discretionary Bonus in the Event of a Final Settlement:** In the event that a suitable settlement is reached:
 - If [client] finally settles the Arbitration prior to [law firm] reaching the Fixed Fee Cap, [law firm] would only invoice [client] those fees actually incurred.
 - If [client] finally settles the Arbitration after [law firm] reaches the Fixed Fee Cap, [client] may, in its discretion, provide a bonus to [law firm] in an amount to be determined by [client], depending on [client’s] level of satisfaction with [law firm’s] legal services and the amount of time expended by [law firm] after the Fixed Fee Cap was expended.

Success Fees

I. HOW THEY WORK

A. Basic Structure

- ▶ Client and outside counsel first define what results will constitute “success.” This may be early resolution at or below a particular total cost; winning a dispositive motion; or defending through trial, but reducing overall economic cost of the case below an agreed threshold.
- ▶ The law firm will reduce its regular fees (whether budgeted, hourly or flat) to share in the downside of the outcome, as a price for sharing in the upside.

B. Considerations for Client

- ▶ Reduces case expense where the law firm is unable to deliver a successful outcome.
- ▶ Focuses relationship at the outset on defining what the client’s objectives are for the litigation, so there are early, clear metrics against which the law firm’s performance is measured.
- ▶ Forces early case assessment; helps manage expectations.
- ▶ Higher legal spend occurs only where the law firm delivers measurable value.

C. Considerations for Law Firm

- ▶ The law firm can realize potential premium returns.
- ▶ Provides specific reward for successful outcomes, so aligns law firm incentives with client’s pre-determined metrics of success.
- ▶ Rewards creative solutions that may be discouraged through pure hourly engagements (under which the law firm is not rewarded for high value/low time outcome).

II. WHEN THEY WORK

A. Best Uses

- ▶ Where dispute involves complex issues and uncertain levels of investment, such that front-end collaboration on client goals sharply focuses the litigation 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.

Holdbacks

I. HOW THEY WORK

A. Basic Structure

- ▶ A holdback is not a stand-alone fee structure, but an overlay on traditional hourly billing, fixed fees or blended rates.
- ▶ 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.
- ▶ 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 piece of litigation 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, or any combination of these or other criteria.

B. Considerations for Client

- ▶ Holdbacks encourage outside counsel to share in the downside risks of litigation, with the potential for participating 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 litigation, 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.

- ▶ 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 litigation tasks.
- ▶ A holdback creates incentives similar to a success fee, but offers the law firm much more downside protection and is thus much 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 litigation 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.

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, which make 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 20% if certain criteria 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. BEST PRACTICES (SAMPLE ENGAGEMENT TERMS)

Holdback for Entire Relationship

We propose a firmwide fee structure for all 2011 work done on or after August 1, 2011 which anticipates an 8% discount and 3% holdback applied to our standard hourly rates for Partners, Counsel and Senior Associates; 10% discount and 3% holdback for Junior Associates; and a 14% discount and 3% holdback for First Year Associates. We would also continue to bill project and legal assistants at a 17% discount with those rates also including a 3% holdback.

The 3% of fees would be held back – along with the applied discount – from each bill starting with the statements for our August 2011 work. We would then work with you to define objectives which would potentially entitle us to a return of some or all of the 3% holdback. Of course, if we

were unsuccessful in achieving these objectives, you would keep the 3%. These discounts are likewise premised on the prompt payment of billing statements.

Our proposal introduces a “risk/reward” component to our relationship by putting significant dollars at risk. 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 not 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 3% 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.

I have attached a revised fee schedule summarizing the proposed fee structure for our [law firm] timekeepers for all work for the balance of 2011. As we have discussed, for any given matter, we are open to entering into an alternate fee structure (e.g., flat fees, blended rates, etc.) which would replace the firmwide structure described above.

Holdback for Single Litigation

We would like to propose an alternative fee agreement (AFA) pursuant to which [law firm] would be responsible for bringing to a resolution the claims which remain in the [litigation]. This memorandum outlines an approach that we think would address [client's] key business and cost objectives for the remainder of 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.

- ▶ This arrangement can include flat monthly payments, quarterly planning and budgeting meetings, and semi-annual true-up discussions.