

Comprehensive Alternative Fee Proposal for Project Development (with Form)

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*Age has revealed the frailties of hourly billing arrangements.
Luckily, alternatives are available.*

THE HOURLY BILLING REGIME IS BEGINNING to show signs of its age. The practice of billing on an hourly basis rose to prominence in light of an ABA study, entitled *The 1956 Lawyer and His 1938 Dollar*, published in the early 1960s. The practice grew through the decades of the '60s, '70s, and '80s as firms found hourly billing

a profitable way to charge both for lawyer time and for work previously viewed as overhead, such as legal assistant and legal staff time.

Though stalwart in its service for nearly four decades, hourly billing has lately come under increasingly vigorous scrutiny. Documented abuses such as time padding and task padding

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are by now familiar. *See, e.g.*, Gerald F. Phillips, *Time Bandits*, 24 *Los Angeles Lawyer* 24 (March 2001). Such abuses damage reputations, fracture client relationships, and otherwise generally stain the public image of the profession.

Critics of the status quo assert that the hourly billing model has, from its inception, suffered structural flaws. *See, e.g.*, William Kummel, Note, *A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation, and Ownership in Corporate Legal Services*, *Colum. Bus. L. Rev.* 379 (1996). These flaws carry with them challenges that affect law firms both in marketing services and in managing personnel.

From a marketing standpoint, the flaws are hard to ignore. For example, hourly billing frequently places a client's wish to resolve a matter quickly into direct conflict—in the near term, at least—with a lawyer's desire to maximize revenue from the matter.

In addition, hourly billing offers little predictable correspondence between the fee charged and the tangible work product for which the client is being billed. Sometimes this makes sense—when the matter at hand is truly unique, for example, or when the client's stake in a matter goes to the essence or the viability of its business. Other times, however—when routine drafting or negotiating is involved, for instance—it frankly makes no sense whatsoever. When successfully arrayed, alternative billing methods harmonize the respective interests of client and lawyer in the lawyer's delivery of capable technical work. Flat fee billing, value billing, adjusted-hour billing, equity billing, and multiple permutations of each—all aim to strike a more efficient balance between lawyer and client.

The appendix to this article suggests how these aims may be served in the context of commercial real estate development.

USING THE APPENDIX • The appendix details an array of fee arrangements that largely speak for themselves. These arrangements are the easy part. The lawyer-client relationship that the Appendix suggests, however, should not be undertaken without at least three central understandings.

Understanding the Underlying Costs

The first is a good understanding of underlying costs. The mechanisms outlined in the appendix will not minimize the risks inherent in a poor understanding of what it costs to deliver the contemplated legal services.

Understanding Transactional Distinctions

The second is an experienced understanding of the meaningful substantive distinctions built into the transactions with which the Appendix deals. In this respect—in understanding the difference between conducting a lease transaction with a national retailer and a local retailer, and reflecting that difference in pricing, for example—the devil is indeed in the details.

Trust and Goodwill

The last is a reservoir of trust and goodwill. We doubt that the relationship outlined by the appendix could successfully be maintained with a brand new client. Entirely unforeseen and potentially catastrophic events will sometimes happen. In that instance—in the event of “truly unusual circumstances”—there seems to us little recourse but to rely on an upfront agreement that, as the appendix indicates, “such instances [will] be handled in good faith and in a spirit of fairness” both by the client and the lawyer.

APPENDIX

Form of Comprehensive Alternative Fee Proposal

We are pleased to present XYZ Limited partnership (the "Client") with this fee proposal in connection with the Client's efforts to develop [RETAIL CENTER] and [OFFICE PARK] (together, the "Project") in the Village of Arcadia. Our understanding of the Project is based on the [DATED SITE PLAN] prepared by Design Group.

Fee Structures Defined

In discussing our legal services fees, this proposal incorporates the terms "Discounted Hourly Fee," "Maximum Fee," "Fixed Fee," and "Unit Fee." What we mean by these terms is the following:

- *Discounted Hourly Fee* means a total fee calculated by multiplying an agreed, hourly services rate by the total number of hours devoted to the applicable matter. Each of the lawyers on our practice team is assigned a standard hourly services rate, which we have set forth on the attached *Exhibit A*. The hourly services rates we propose for the Project, however, have been reduced from the standard rates we would expect to charge for such a development. These rates are also shown on *Exhibit A*.
- *Maximum Fee* means a total fee calculated by multiplying an agreed, hourly services rate by the total number of hours devoted to the applicable matter, provided that the total fee shall not exceed a specified maximum amount. In this instance, the hourly services rates shall be the Discounted Hourly Rate set forth on *Exhibit A*.
- *Fixed Fee* means a specified fee payable by the Client without regard to the number of service hours devoted to the pertinent matter.
- *Unit Fee* means a total fee calculated by multiplying an agreed unit rate by the total number of units involved in the applicable matter. In this instance, Unit Fees are established for certain leasing matters based on the rentable square footage of the demised premises.

Fee Breakdown: [RETAIL CENTER]

We understand that the Client's plans for [RETAIL CENTER], the retail portion of the Project, call for development of three anchor pads (one each for a home improvement store, food center, and department store), eight outlots (including one each for a drug store, fast food restaurant, and bank), and from 25,000 to 45,000 square feet of in-line retail space. We propose to provide legal services for this part of the Project on the following bases:

REA and Project Planning—Discounted Hourly Fee

Team Members: Adams, Brown, and Carter. A substantial effort will be required to lay the Project's groundwork. This effort obviously must include defining and establishing the Project's tax parcels, determining its common areas, and drafting and negotiating—and, as development goes forward, amending—the controlling reciprocal easement agreement. Laying the groundwork for the Project must also include preparing standard documentation (such as standard purchase and sale agreements, ground leases, in-line retail leases, and letters of intent) for use in connection with prospective buyers, tenants, and lenders.

We will provide services in connection with drafting the REA and with addressing the general planning tasks we have identified, as well as others as they arise, at the Discounted Hourly Fee.

Adams will be the Client's principal contact for all REA and project planning matters. He will be assisted in REA matters and in preparing anchor tenant agreements by Brown. In the balance of the project planning matters (including establishing tax parcels, preparing other forms of agreement, and all other planning efforts), Adams will be assisted by Carter.

Financing—Fixed Fee Based on the Client's Determination of Financing Arrangements

Team Members: Adams, Brown, Davis, and Ellis. This phased development will call for a number of different credit facilities. Right now, however, the outlines of the required credit transactions remain subject to a considerable number of variables, including the number and location of the Project's tax parcels, the identity of the retail anchor tenants and the nature of their realty interest in the Project, and the Client's specific plans for phasing the projected retail and office portions of the development.

We are confident that our services in connection with the required financings can be provided on a Fixed Fee basis for each such financing transaction. We are also confident that we can reach agreement with the Client on the terms of such Fixed Fee arrangements as the key details of the Project emerge with greater clarity. Alternatively, such services—whether uniformly or on a financing-by-financing basis—could also be provided at the Discounted Hourly Rate.

In any event, Adams will be the Client's principal contact for all financing matters. We expect that he will be regularly assisted by Davis, a partner in our real estate practice group who specializes in lending matters—especially in construction lending. Carter and Legal Assistant would assist Adams and Davis as required, particularly in addressing title, title insurance, and survey matters.

Anchor Pad Sales and Ground Leasing—Maximum Fee

Team Members: Brown, Carter, and Legal Assistant. For anchor pad sales and ground leases ultimately consummated with a purchaser or ground lessee, services will be charged per transaction based on the Discounted Hourly Fee, up to a maximum total fee of \$[] per sale and \$[] per ground lease. Services rendered in transactions not ultimately consummated will also be billed at the Discounted Hourly Rate, but the total invoice for any unconsummated transaction will not exceed the specified Maximum Fee.

Brown will be the Client's principal contact for all anchor pad ground leases and Carter will be the Client's principal contact for all anchor pad sales. Legal Assistant will help prepare sale and, where practical, leasing documentation.

Anchor Tenant Build-to-Suit Leases—Unit Fee

Team members: Brown and Carter. For original build-to-suit leases ultimately executed by an anchor tenant, services will be provided at a Unit Fee per transaction of []¢ per rentable square foot of the leased space. Rentable square footage will be determined according to the rentable area figure (calculated by the prevailing BOMA method) specified in the controlling lease.

Services rendered in preparing lease amendments, lease renewals, lease assignments, and sub-leases will be billed at the Discounted Hourly Rate. Services rendered in transactions not ultimately consummated will also be billed at the Discounted Hourly Rate, but the total invoice will not exceed the Unit Fee that would have been owing had the lease been executed.

Brown will be the Client's principal contact for all anchor build-to-suit leasing. Brown and Carter together will be responsible for preparing lease documentation.

Outparcel Sales and Ground Leasing—Maximum Fee

Team Members: Brown, Carter, and Legal Assistant. For outparcel sales and ground leases ultimately consummated with a purchaser or ground lessee, services will be charged per transaction based on the Discounted Hourly Fee, up to a maximum total fee of \$[] per sale or ground lease to a local tenant and \$[] per ground lease to a national tenant. (National tenants include all chain and franchise entities and their affiliates; local tenants include all other entities.) Services rendered in transactions not ultimately consummated will also be billed at the Discounted Hourly Rate, but the total invoice for any unconsummated transaction will not exceed the specified Maximum Fee.

Brown will be the Client's principal contact for all outparcel ground leases and Carter will be the Client's principal contact for all outparcel sales. Legal Assistant will help prepare sale and, where practical, leasing documentation.

In-Line Retail Leasing—Unit Fee

Team Members: Carter and Legal Assistant. For original leases ultimately executed by both landlord and tenant, services will be provided based on a Unit Fee calculated per transaction based on the rentable square footage of each leased space. Unit Fees will be []¢ per rentable square foot for national tenants and []¢ per rentable square foot for local tenants. Rentable square footage will be determined according to the rentable area figure (calculated by the prevailing Building Owners and Managers Association ("BOMA") standard) specified in the controlling lease.

Services rendered in preparing lease amendments, lease renewals, lease assignments, and sub-leases will be billed at the Discounted Hourly Rate. Services rendered in transactions not ultimately consummated will also be billed at the Discounted Hourly Rate, but the total invoice will not exceed the Unit Fee that would have been owing had the lease been executed.

Carter will be the Client's principal contact for all in-line leasing. Carter and Legal Assistant together will be responsible for preparing lease documentation.

Fee Breakdown: [Office Park]

We understand that the Client's plans for [OFFICE PARK], the office park portion of the Project, call for the development of six sites suitable to accommodate Class A office uses. We propose to provide legal services for this part of the Project on the following bases:

REA and Project Planning—Discounted Hourly Fee

Team Members: Adams and Carter. As noted in our remarks on the reciprocal easement agreement ("REA") and project planning for the retail portion of the Project, we will provide services in connection with the office park REA (including, in addition to the same issues arising with the retail spaces, organizing and documenting an owners association) and general office park planning on the basis of the Discounted Hourly Fee. Again, Adams will be the Client's principal contact for all REA

and project planning matters. He will be assisted in office park REA and project planning matters by Carter.

Financing—Fixed Fee Based on the Client's Financing Arrangements

Team Members: Adams, Davis, Carter, and Legal Assistant. Servicing in connection with financing transactions required for the office portion of the Project will be provided on the same basis as with the retail portion of the Project—that is, on the basis of a Fixed Fee to be negotiated as the Client's plans solidify or on the basis of a Discounted Hourly Fee. Again, Adams and Davis will be the Client's principal contacts for all financing matters, with Carter and Legal Assistant assisting in title, title insurance, and survey matters.

Parcel Sales and Ground Leasing—Fixed Fee

Team Members: Carter and Legal Assistant. For office parcel sales and ground leases ultimately consummated with a purchaser or ground lessee, services will be charged per transaction based on a Fixed Fee of \$[] per sale or ground lease. Services rendered in any transaction not ultimately consummated will be billed at the Discounted Hourly Rate, but the total invoice for an unconsummated transaction will not exceed the specified Fixed Fee.

Carter will be the Client's principal contact for all office parcel ground leases and sales. Legal Assistant will help prepare sale and, where practical, leasing documentation.

Office Build-To-Suit Leases

Team Member: Carter. For original build-to-suit leases ultimately executed by an office park tenant, services will be provided at a Unit Fee per transaction of []¢ per rentable square foot of the leased space. Rentable square footage will be determined according to the rentable area figure (calculated by the prevailing BOMA method) specified in the controlling lease.

Services rendered in preparing lease amendments, lease renewals, lease assignments, and subleases will be billed at the Discounted Hourly Rate. Services rendered in transactions not ultimately consummated will also be billed at the Discounted Hourly Rate, but the total invoice will not exceed the Unit Fee that would have been owing had the lease been executed.

Carter will be the Client's contact for all office park build-to-suit leasing.

Construction Contracting

As indicated in our original presentation to the Client, Ellis of our office will be the project team member responsible for all construction contracting matters. This includes review of all American Institute of Architects ("AIA") and Associated General Contractors ("AGC") agreements, handling of all lien, contracting, and subcontracting matters. Charges for services rendered in connection with construction contracting matters will be billed at the Discounted Hourly Fee.

Other Matters

Matters not outlined in this proposal will be handled by project team members where appropriate. In other instances—for example, environmental matters, state regulatory matters, and ad valorem tax assessment contests arising in connection with the Project—we will propose other members

of the firm whose experience may be more appropriate. Charges for services rendered in connection with such matters will be billed at the Discounted Hourly Rate. (In the case of lawyers other than project team members, the Discounted Hourly Rate will be a reduced hourly rate proportionately comparable to the discounts reflected on the attached *Exhibit A*.)

Assumptions on which this Proposal is Based

The proposal that we have set forth rests on several assumptions. These assumptions reflect our collective experience with alternative fee structures. The pertinent assumptions are:

1. The quoted structures are based on our mutual agreement that [LAW FIRM] will represent the Client throughout the Project's development. The fee structures we have outlined depend on our having confidence that our project team will be able to devote significant time to Project matters.
2. The quoted structures also depend on our ability to work together to lay the groundwork for the Client's systematic representation. Specifically, we believe that cost effective representation in developing the Project will require (i) that we have a regular chance to review sales and leasing strategy with the Client and to assemble some objective guidance to direct us as we go forward and (ii) that we work together with the Client—and with any brokers involved on the Client's behalf—to establish a uniform approach to the contemplated sales and leasing transactions. We should work together, for example, to establish objective criteria on some of the most important legal and business points (cost pass-throughs, indemnities, and environmental provisions, for example) that we will face in every sale and lease transaction. As for point (ii), our experience recommends that we spend some time putting together a form of term sheet that proactively seeks to resolve key legal and business points in every deal even before lawyers become involved.
3. We must have regular, personal contact with you and your business people. Communication is important; personal contact and personal relationships help cultivate good communication. Accordingly, we should commit ourselves together at the outset to regular, face-to-face meetings with a specified core of Project team members.
4. The unavailability of individual lawyers will occasionally require that we staff matters with other firm members of comparable experience and repute. From time to time, circumstances will dictate that a project team member be unavailable. In these unusual instances, we may—subject to your approving our selection—temporarily substitute another firm member of comparable experience and repute. If the particular matter is subject to billing on a Fixed Fee or Unit Fee basis, the substitution will not affect the total fee. If the particular matter is subject to billing on a Discounted Hourly Fee or Maximum Fee basis, the services of the replacement lawyer will be billed at a reduced hourly rate proportionately comparable to the discounts reflected on the attached *Exhibit A*. In no instance will a substitution affect the specified fee cap under a Maximum Fee.
5. No matter what the governing fee structure, statements of account will include an additional charge for disbursements made for photocopying, outgoing telecopies, local and overnight delivery charges, travel outside Grace County, and charges for computerized legal research on outside data bases for which we are charged access fees. We constantly strive to keep these charges at or below market rates. The Client will not be billed for a number of other items that, in our experience, other law firms routinely charge for—including library services, administrative computer time, domestic long distance telephone calls, ordinary postage, secretarial straight time, or equipment overhead.

Some Final Thoughts on Risk

Finally, experience has taught us that our efforts in transactional matters like this depend in large part on the tendencies and negotiating posture of our client. The rates quoted in this proposal are based on data from many different transactions we have handled, as well as on the contact we have had with the Client over the past several months. Nonetheless, unforeseen situations will arise.

We expect to assume the risk of many of these situations. If truly unusual circumstances were to arise, though, we would notify you of those circumstances in writing as soon as possible, and would then trust that such instances would be handled in good faith and in a spirit of fairness both by the Client and by [LAW FIRM].

Exhibit A Project Team Hourly Services Rates

Team Member	Standard Hourly Rate	Discounted Hourly Rate
Adams	\$285.00	\$260.00
Ellis	\$280.00	\$255.00
Davis	\$245.00	\$220.00
Brown	\$240.00	\$220.00
Carter	\$215.00	\$195.00
Fox	\$190.00	\$165.00
Legal Assistant	\$145.00	\$120.00

NOTE: Hourly services rates are subject to change annually as of _____.

PRACTICE CHECKLIST FOR

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Though stalwart in its service for nearly four decades, hourly billing has lately come under increasingly vigorous scrutiny. Time padding and task padding are too common. Such abuses damage reputations, fracture client relationships, and otherwise generally stain the public image of the profession.

• Flat fee billing, value billing, adjusted-hour billing, equity billing, and multiple permutations of each—all aim to strike a more efficient balance between the lawyer and the client. However, before using such alternative billing techniques:

- Understand and analyze the underlying costs—you must know what it costs to deliver the services at the outset;
- Understand the distinctions between the various sorts of transactions for which you will be billing, e.g., the differences between conducting a lease transaction for a national retailer and a local retailer; and reflecting those differences in the pricing;
- Establish trust and goodwill with the client. If unforeseen or catastrophic circumstances should arise you and your client will have to rely on the provision that these will be handled in a spirit of good faith and fairness.