SAMPLE CHAPTERS

The Legal Project Management Quick Reference Guide

Tools and templates to increase efficiency

Third edition

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Please do not read this book.

This Reference Guide was written for lawyers who don’t have time to read books but do need to find ways to quickly apply proven project management principles.

It was designed for lawyers in our coaching and training programs to help them identify the action items that are most likely to produce immediate results, by helping them to find exactly the information they need, just when they need it.

The first edition appeared in 2010, when legal project management (LPM) was a brand new field. LPM grew so rapidly that we put out a second edition in 2011. The growth has continued since then, and now this third edition adds still more tools and templates.

Thirteen contributing authors have helped to develop the new techniques described in this volume. About half are practicing lawyers, and half are LegalBizDev LPM coaches.

The second edition included background information which is now in a separate paperback entitled Legal Project Management, Pricing, and Alternative Fee Arrangements. That book outlines the big picture of what leading law firms are doing to transform the way they plan, manage, and price legal work.

This is a more advanced “how to” book for lawyers who are ready to act to obtain the benefits of LPM, including:
Protecting business with current clients

Increasing new business

Increasing the predictability of fees and costs

Minimizing or eliminating surprises

Improving communication with clients

Managing risk

Increasing profitability

Improving realization

Delivering greater value to clients

LPM is so new that there is controversy about almost every aspect of it, starting with its very definition. We define LPM very broadly, as an umbrella term that covers a wide range of management techniques: legal project management adapts proven management techniques to the legal profession to help lawyers achieve their business goals, including increasing client value and protecting profitability.

Purists may argue that some of the best practices in this book should be classified as process improvement or knowledge management or communication or finance or something else. We don’t really care what you call them; we just want to provide easy access to ideas that can help you achieve your business goals in a profession that is changing faster than ever before.

Our examples draw on a rich and deep body of knowledge that project managers have developed over the last several decades to help businesses run more efficiently. This book describes and adapts the tactics that lawyers will find most useful and ignores the rest.

Exactly what should you do to benefit from all this knowledge? The answer depends on your practice and your personality.

If you had enough time to get a master’s degree in project management, you could consider all the possibilities at length. But the truth is you probably had trouble finding the time to read the last few paragraphs. So we believe that the best way to find your unique answer is to jump right in.

Begin by selecting a key client or matter, then identify which of the eight key issues in legal project management in Chapter 2 are most critical to meet your goals. Turn to that chapter in the book, and scan the content for ideas that may fit your situation. Select the idea that offers the greatest potential, and then try it. If it works, do more. If it doesn’t, try something else.
The good news about LPM is that the billable hour has created an enormous amount of inefficiency and “low hanging fruit”—areas where lawyers can instantly increase efficiency simply by adopting proven best practices. This book will show you how. It provides easy access to hundreds of ideas that other lawyers have found useful, so you can decide for yourself what will best fit your practice, and where to begin.

The innovative tools in this guide will help you gain an advantage in today’s highly competitive marketplace. All you have to do is use them.
This book is organized around eight key issues in legal project management, listed below. Just pick an issue that could have an immediate impact on your practice, turn to that section, and start identifying action items.

**The big picture**

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### Key Issue | Page | Description
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7. Manage client communication and expectations | 115 | This is extremely important to clients, and it is an area where many lawyers have room to improve. This section describes best practices, including using a “RACI matrix” to clarify who is Responsible, Accountable, Consulted, and Informed for each task.

8. Negotiate changes of scope | 139 | No matter how well lawyers manage legal matters, things often change. The issue here is deciding when and how to negotiate these changes with clients.

Start today. Select an issue, review your options, define your action item, implement it, and see the results for yourself. Or, if you’d prefer to have a bit more of the big picture first, read on.

## Six ways LPM improved our practice

By Liz Harris, Harris Cost Lawyers

Since I began focusing on LPM, our practice has improved in six major ways:

1. **Setting and defining the scope.** We undertake work on a fixed fee basis and in the past the scope was often not clearly agreed on and defined. Our expectations often differed from those of the client regarding the work which was to be included within the fixed fee, and scope creep could easily develop. By improving the way we define scope at the beginning of every matter, we have been able to make fixed fee work far more profitable.

2. **Identifying and scheduling tasks.** The identification of tasks is particularly important, as the failure to identify actions which will be required affects both the fee which is set and the schedule of work. In the past, work had been held up because dependencies had not been identified and there were consequential delays in waiting for predecessor activities to be completed. By focusing upfront on identifying and scheduling tasks, we have been able to reduce the number of situations in which a failure to identify all the activities to be undertaken resulted in the fixed fee being too low and the schedule blown out. With more planning, we have a better understanding of what the finished product should look like, and work breakdown structures have helped us to formulate better estimates.

3. **Planning and managing the budget.** We have considerable control to introduce changes in the way work is undertaken, including who performs particular aspects of the work. In the past, we did not
sufficiently consider this when planning the budget. Nor did we take into account the level of expertise of the person undertaking the work and the fact that the time likely to be spent on the task would vary depending on the person’s experience. There was also little management of the budget as the matter progressed. By devoting more attention to planning and management, we have been able to identify potential problems much earlier in the process, and thus reduce the number of instances where the budget has been exceeded.

4. **Assessing risks to the budget and schedule.** Before we started focusing on LPM, we did not assess budget and schedule risks at the beginning of a matter. Risks can be both internal and external and often we are asked to give estimates by someone who has little understanding of the background to the matter and can therefore give us only very limited instructions. We have developed checklists of possible risks and questions to be asked to identify them. A brainstorming session with all team members often goes a long way to addressing this issue.

5. **Negotiating changes of scope.** In the past, most of our descriptions of the scope of work were far too general and therefore gave us little ability to negotiate changes to the scope. We have since trained our lawyers to better define scope in the first place and be more aware of changes as a matter proceeds. We have also focused on promptly speaking with the client when there is a change of scope.

6. **Conducting end of matter reviews.** Before we began focusing on LPM, we did not take the time to carry out end of matter reviews. We now conduct them frequently, and as a result are learning from our experience and introducing process improvements to enhance future performance.

*This is based on a brief essay the author wrote when she completed the LegalBizDev Certified Legal Project Manager® program, plus updated information 18 months later based upon subsequent results.*
The top 10 best practices

When picking your action items to focus on, you may find it useful to briefly review this list of the top 10 best practices:

1. Make sure you understand client needs early on. What would the client consider to be a successful outcome? What are their priorities, both overall and for this particular matter? Also determine who the primary decision makers are on the client side, especially about cost issues.

2. Divide a large complex matter into a number of smaller tasks. Then schedule a meeting of key team members to define the schedule and budget the tasks. Bottom-up planning (which is interactive and iterative) is more effective than top-down planning (which is linear and one-way). Remember that it is human nature to be optimistic; don’t underestimate how long tasks will take.

3. Aim for a cohesive team approach, with one lawyer managing all assignments and monitoring the time of all lawyers assigned to the matter. Also assign primary responsibility for each task to a single individual. When specific people are assigned to tasks, each person will have a sense of ownership and you will have a clear view of who is responsible for what.

4. Individual tasks should be easy to track. Each activity should be budgeted for a manageable chunk of time (typically 8 to 80 hours) to give team members freedom to perform the task as they think best while still assuring accountability.

5. Communicate the budget and hourly expectations for each task to the team. Then ask the person who is responsible for each task to estimate how long they think it will take. If there is a large gap between their estimate and yours, discuss why and consider revising the estimate.

6. Always know what you have spent so far, and what you expect to spend in the future. Check at regular intervals to make sure the work is being done within the projected budget. Compare the percentage of the budget you have spent with the percentage of work you have completed. Focus attention on the largest tasks that will require a high percentage of the budget.

7. In large projects, schedule regular team meetings to review progress and remind members of the overall goals of the project and of upcoming tasks. Create status reports that are easy to review. Watch for roadblocks that interfere with team progress and remove them.
8. If cost reduction is required, look for procedures that can be simplified or standardized. Also consider delegating some tasks down if they can be performed efficiently at lower hourly rates. But note that the cost will often be lower if you “delegate up” to more senior lawyers who need less guidance and feedback.

9. Keep clients informed as the matter progresses. Consider whether it would be useful to send monthly one-page status reports which summarize what was accomplished last month, what is planned for next month, and any issues or challenges.

10. Effective managers spend twice as much time planning as ineffective ones.¹ Find the balance between planning too little and planning too much.

**Warning signs that you need LPM**

By Steve Barrett, LegalBizDev

Are you uncertain whether you should care about legal project management?

In an hourly billing environment, few incentives exist to be alert for warning signs of threats to the planned schedules or costs of a matter. More than a generation of lawyers has practiced without the pressures of creating and tracking budgets, but with the recent client pressures on value, outright costs, and timeliness, this is changing.

Even lawyers who are good matter planners and budget estimators sometimes fail to watch for early warning signs. But business analysts see such signs as critical, and sometimes use the popular phrase “canary in a coal mine”:

Early coal mines did not feature ventilation systems, so miners would routinely bring a caged canary into new coal seams. Canaries are especially sensitive to methane and carbon monoxide, which made them ideal for detecting any dangerous gas build-ups. As long as the canary in a coal mine kept singing, the miners knew their air supply was safe. A dead canary in a coal mine signaled an immediate evacuation... Many business and political analysts use the term canary in a coal mine to describe a harbinger of the future. A melting glacier in Alaska, for example, may be described as a canary in a coal mine for global warming. One small event in an isolated area may not seem especially noteworthy, but it may offer the first tangible warning of a larger problem developing.²

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Just as miners needed to look for signs of silent, odorless, and lethal gases, lawyers in the “new normal” must be especially alert to precursors of trouble that can upset the best plans and budgets, including:

- Missed internal deadlines
- Over-researched tasks or issues
- Hours spent well in excess of pre-set quotas, without warning
- Miscommunication
- Delays in people being released from prior or competing assignments
- Increased numbers, whether number of deponents, witnesses, experts, parties to receive copies, regulatory questions/clarifications, etc.
- Typos
- Missing time entries
- Last-minute personnel substitutions
- Poor attendance at scheduled meetings or calls
- Unexplained absences
- Long silences
- Work delivered that doesn’t reflect the project or matter goals

Many of these symptoms can be addressed or rectified in real time. Improved communications are vital. Too many problems are detected after it’s too late to cure or correct them. The chapters in this book offer many solutions. Here are a few easy places to start:

- Improved time/dollar data updates—such as “pre-bills” that are provided daily or weekly, not monthly—at least for the lawyer managing each matter, and maybe for the whole team
- Daily time entry integrity. Without it, projects can stumble and write-offs can result.
- Group communications discipline
- To do list tracking/status tools
- Scheduled monitoring
- Better internal communications
- More efficient brief meetings
- Better client communications, starting with small communications, rendered steadily

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3 http://amlawdaily.typepad.com/amlawdaily/2010/03/0319future.html
Ultimately, these vital skills must become automatic.

Four ways litigators can improve LPM

By Jonathan Cooper, Tucker Ellis

Project managers are required to plan and to set objectives, up front, in detail. I think that we as lawyers fall down on this. Often we do not sit down with our clients and with our teams and discuss how to solve the issue. What is the objective? To win at all costs? To settle the case early? To settle the case between X dollars and Y dollars before the end of the year? We often dive right in and just start working.

The second area for improvement is that I do not believe that we as lawyers budget with the team in mind. Budgets are often drafted with almost no thought as to how to implement them or measure whether they are being followed or will be accurate. Budgeting needs to be done after a “road map” of the case has been at least sketched out. It then needs to be done in conjunction with the team of players involved.

Third, we do not do much to reassess how we are doing in the middle of the matter. We get some data, but we often do not get useful data. The budgeting that we do is seldom revised. In fact, it is seldom reviewed at any point after it is drafted. We need to start letting the budget drive our decisions, which means we need a better way to interact with it. This is difficult when you have team members who are not dedicated exclusively to one project. We need to track time spent on a case or a matter and then put it in the right bucket.

Currently, most budgets are built along topical lines to set forth dollar values for various portions of the case. But billing software often does not work that way. It is therefore hard to extract what Associate A did on the XYZ case that relates to drafting the first set of interrogatories without examining time entries. One solution is to create the budget using the ABA task and activity codes and to require billing according to those codes. That way, at least we would know what was billed to that particular task.

The fourth and last area for improvement is that I think we need to do a much, much better job at the end to see if we achieved the client’s goal.

For litigators, part of the problem is fed by the fluidity of cases. You are never sure what the case will look like at the end. Facts will come out that were unanticipated. Rulings will be made. Strategic choices will be made. However, I think for the reasons outlined above, we make this harder than it should be.
Better planning and orientation would lead to a better understanding of the case and fewer surprises. The possible results could be narrowed and ranked and there could be certain “check offs” like a wide receiver and a quarterback learn depending on how the defense sets up.

With better budgets, and better ability to see where we are midstream with the budgets, we could have a much better chance of steering toward the expected or hoped-for result. With better budgeting and better accountability, we would know, without hours of analysis, whether we came in under budget.

This is not just a budget issue. We also need to do a better job of holding people accountable for doing tasks in a timely manner. If the plan says that associate A is going to draft the opening set of interrogatories within the first month, we ought to know if it happened on the right timeline as well as whether it was done “on budget.” Without that you cannot really tell if you succeeded. All you may have is the sort of subjective belief that the client seemed pleased. Maybe the client is polite and but dissatisfied.

The goal is to be able to show that you did what you promised. You changed strategy when events dictated and kept the client informed. The result was within the anticipated range and the budget was met.
Chapter 3
Set objectives and define scope

Tools and templates in this section include:

- A checklist of best practices
- Engagement letters vs. statements of work
- How to write a statement of work
- Examples

Checklist

- Write a short simple summary of the project objective, including what is within the reasonably expected scope for each matter, and what is not:
  - Share the written project objective with the client and verify that they agree
  - Share the written project objective with team members
- Align client expectations with firm expectations
- Consider how the client defines success:
  - What are the legal and business problems?
  - What outcomes are possible?
  - What outcomes are acceptable?
  - Are there budget constraints?
  - Is there a desired end date?
  - Who are the client decision makers for legal and business matters?
Talk to clients about the differences between wants and needs

Communicate to the client how much each “want” will cost

Ensure that every member of your team is familiar with the written project objective:
  - Post the project objective prominently on a bulletin board or online
  - Regularly remind team members of the project objective, in memos and meetings

Manage team members to work within the project objective and to consult with the key partner before performing work that may not be within scope

Be sure to define the assumptions of your budget and “carve-outs“—the work that won’t be included within a set price

In large complex projects, in addition to the high-level objective, consider listing separate objectives for different team members

After scope is defined, and as the project proceeds, hold periodic check-in meetings with the client. Busy lawyers may avoid checking in because other things seem more important, and they assume that if the client is not complaining everything must be fine. However, it is extremely valuable to communicate with clients regularly to give them an opportunity to re-commit to the scope of a matter or to reconsider it. These discussions may also identify new opportunities for efficiency based on past performance.

Engagement letters and statements of work

At the beginning of a new matter, lawyers often specify its scope and fees in an engagement letter. The engagement letter is designed to clarify exactly what is included, and excluded, from a particular matter.

Some states have specific requirements for what must be included in an engagement letter, and some firms have their own requirements as well. For example, in New York State, Part 1215 of the Joint Rules of the Appellate Division requires a letter of engagement in most matters, except for certain exceptions listed in the rule (i.e., an engagement letter is not required if the fee is expected to be $3,000 or less).

From a project management point of view, there is considerable room for improvement in many engagement letters. Consider, for example, this language from the sample letter of engagement published by New York State:

Scope of representation

A claim, dispute or dealings with relating to ______________.
All of our services in this matter will end, unless otherwise agreed upon in a writing signed by us, when there is a final agreement, settlement, decision or judgment by the court. Not included within the scope of our representation are appeals from any judgments or orders of the court. Appeals are subject to separate discussion and negotiation between our firm and you. Also not included in the scope of this agreement are services you may request of us in connection with any other matter, action, or proceeding.

The rest of New York’s two-page sample focuses on fees and client rights. Fee options for the sample include a flat fee, a contingency, or hourly rates.

If a law firm copied the New York State sample exactly and negotiated a fixed fee, they might end up being very sorry when the matter spiraled out of control. They would be better protected if the engagement letter specified timelines and deliverables, such as the maximum number of interviews, pleadings, interrogatories, opinions, and reports, the anticipated scope of travel and research, the use of outside consultants, and so on.

Could a lawyer possibly know in advance how many depositions would be required to settle or plead a particular case? Of course not. But he or she could specify the maximum number of depositions they expected, and exactly what would be included within the fixed price.

This failure to provide sufficient detail is quite common. As the executive director of one AmLaw firm recently put it, “The scope of work often contained in our engagement letters is generally no more than one or two lines. Lawyers are missing an opportunity to clearly specify the scope of what is included in each matter, and what is not.”

From the client perspective, better specifying the work up front could lead to more predictable costs and a more sophisticated understanding of what they are paying for. From the law firm’s point of view, it could reduce fee disputes, write-downs and write-offs.

Entire textbooks have been written on how to develop what project managers call a statement of work (SOW), which specifies what a particular project includes and excludes. Lawyers may wish to adapt some of these ideas and write an SOW which could either be included in the engagement letter or be a separate document, depending on the nature of the matter, the lawyer-client relationship, and joint expectations.

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4 http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/SampleLetterofEngagement.pdf
5 Personal communication, February 2, 2011. This executive director preferred to remain anonymous.
6 For example, see Michael G. Martin, Delivering Project Excellence with the Statement of Work (Management Concepts, 2010).
How to write a statement of work

By Mike Egnatchik and Jim Hassett, LegalBizDev

Legal cases and transactions can have unpredictable aspects, sometimes beyond the control of the best managers and planners. Therefore, flexibility is key. Legal project management is all about tradeoffs, and efficient project managers must be ready to adjust scope, time, and budget as the case or matter evolves. This factor underscores the importance of the primary task at the start of any project: setting your objectives and carefully defining the project scope with the client. Doing so will align mutual expectations and prepare the stage for developing an activity schedule and budget.

A statement of work must fix the boundaries of what is within the reasonably expected scope for the matter and what is not. This is particularly critical if the work is to be performed for a fixed price. The details of contents and format will vary depending on the circumstances, but could include:

- The purpose of the engagement
- Specific measurable objectives
- The client’s desired outcome
- Detailed deliverables such as the number of depositions
- Deadlines or expected timelines
- Assumptions and exclusions
- Risks
- Budget or fee

The first draft of the SOW should be shared with both the client and the anticipated team members for their review and input. You need to understand the client’s goals and expectations and align them with the team’s approach, focusing on the business problem or dispute from which the matter arises and on acceptable outcomes and deadlines for the client. An optional summary could include a mutually agreed success statement, which will define the desired outcome of the matter.

As the team comes to an understanding of your client’s wants and needs, team members should keep in mind how much each want or need will cost, and whether there is any waste or excess in these expectations. These budgetary considerations may eventually affect the steps and actions taken to complete the matter. Of course

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7 As Eric Verzuh noted in his book *The Fast Forward MBA in Project Management*, “Some firms use the term charter instead of statement of work. This can be confusing because… this term has another common use in the project management vocabulary” (p. 60, third edition). We recommend that lawyers avoid the term project charter and instead use the more common phrase statement of work.
the budget is extremely important, so you must be sure to carefully define \textit{in writing} the anticipated assumptions of your budget and any “carve-outs,” that is, work that will \textbf{not} be included within the fixed price for the agreed scope. And, obviously, the SOW is simply a draft until the client approves it.

Some other helpful steps at this stage are common-sense items such as ensuring that every member of your team is familiar with the final project objective. It can be posted prominently on a bulletin board or online. Also, it does not hurt to remind team members of the project objective in regular memos and meetings.

The better your initial statement of work, the more likely you are to meet the client’s objectives. And if things change, the approved SOW will provide a solid basis for negotiating with key client decision-makers before performing work that may require additional funding.

However, remember that the SOW should be as short and simple as possible for managing the process. According to Michael Roster, Chairman of the ACC Value Challenge Steering Committee, “When I was general counsel at Stanford, our multi-million dollar arrangements with law firms were covered by a two-page business letter combined with a one-page exhibit describing the carve-outs.”

The SOW is not a deposition or an adverse negotiation, so make sure you don’t over-lawyer it.

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\footnote{Personal communication, March 21, 2011.}
Example: SOW for internal foreign corrupt practices act

By Mike Egnatchik, LegalBizDev

Client ABC Corp has contacted us to handle the following matter:

A man has just left an anonymous message on ABC’s ethics call-in hotline with allegations that the marketing director in ABC’s Malaysia branch has been offering free personal computers to decision-makers in various Malaysian government offices if they sign up to buy ABC’s products. The client asks that we conduct an internal investigation of the matter and prepare a privileged and confidential written report to the general counsel on the facts and law for a fixed price.

This project shall include the following activities:

1. Review company policy relating to FCPA and gifts to government officials.

2. Interview the Malaysia marketing director and up to 10 other Malaysian employees involved in local marketing/finance, and up to five US employees in the marketing chain of command for the Malaysia branch. The client will provide us the names and CVs of the individuals to be interviewed. We will handle the interviews for US-based employees, and our office in Singapore will handle the interviews of the employees in Malaysia. Notes will be typed after each interview.

3. Discuss with the client the justification for using a private investigator (Kroll’s Singapore office) to follow up on leads and to look into the matter in Malaysia with relevant Malaysian customers. If the client agrees to go forward with a private investigator, all related costs and expenses will be reimbursed by the client.

4. Complete a draft report on the facts and applicable US and Malaysian laws and review it with client. Update the report as necessary. The portion on Malaysian law will be prepared by our Singapore office. The report shall include our recommendations to the client as to next steps in the US and Malaysia.

EXCLUSIONS. This SOW does not cover any litigation/dispute resolution activity, including without limitation, lawsuits arising from related employee terminations, and/or future dealings with Malaysian or US authorities (Securities and Exchange Commission, Department of Justice, etc.) that may become informed of these allegations or otherwise involved in this matter.
**Example: SOW for product distribution in Europe**

**By Mike Egnatchik, LegalBizDev**

Client ABC Corp wants to have a subsidiary in Europe to distribute its products in the European Union (EU). To accomplish this, ABC wishes to acquire a privately-held company in Belgium called DistribCo. There have been friendly discussions with the owners of DistribCo, and the parties are close to an agreement in principle on a target price of approximately US$25 million, subject to due diligence. Since we have offices in New York and Brussels, we have been asked to handle the transaction for a fixed price.

This project shall include the following activities:

1. A one-day preparatory meeting with the client to understand the client’s strategy and objectives
2. Up to five days inside the Belgian offices of DistribCo for due diligence by three lawyers from our Brussels office
3. Review and recommendations by litigation, tax, labor, and competition law counsel in our Brussels office
4. Travel time (only) for five round-trips from New York to Brussels by our partners/associates
5. Five days for drafting and negotiating a stock purchase agreement with customary terms and conditions
6. All necessary regulatory filings and related filing fees (if any) in the US, EU and Belgium
7. A half-day in Brussels for the closing of this purchase

**EXCLUSIONS.** The fixed price for this matter does **not** cover legal costs incurred for settlement of any disputes or litigation matters of DistribCo prior to closing. In addition, pre-approved travel is not included in the fixed price, but shall be reimbursed at cost. This is expected to include business class airline tickets and reasonable and customary food/hotel/transport expenses for trips to Brussels from New York for partners or associates in our New York office.
Sample assumptions for defining scope

By Steve Barrett, Mike Egnatchik, and Jim Hassett, LegalBizDev

This section provides sample wording for various assumptions and exclusions that may be used as a reference to define, qualify, or limit the scope of work in an engagement letter or to plan for any legal matter.

Law firms need to protect themselves by being careful about phrasing assumptions. But if the list of carve-outs gets too long or too specific, it can annoy the client and lead to lost business.

Unfortunately, there is no simple general way to create assumptions that balance client needs and firm needs. The details must be worked out case by case. This can be especially difficult in a highly competitive environment, if clients take advantage of the awkwardness of this negotiation to pressure firms to agree to budgets and fixed prices without adequate protections.

These samples may be especially appropriate when providing budget estimates to clients where key details are not known, such as:

- Number of deponents, expert witnesses, consultants, etc.
- Number of document turnarounds
- Volume of document production requests from investigative agencies
- Quantity and physical condition of discovery materials (electronic, hard-copy, or poorly preserved documents)

For these and similar situations, law firms should develop general standards for use of the sample wording. Firms must constantly balance the level of written detail needed for self-protection vs. the business demands of good client relations.

Lawyers sometimes tend to err on the side of including assumptions and exclusions that protect themselves too well, and could wind up losing the business as a consequence. Excessively protective language in a highly competitive marketplace might result in the client saying, “Never mind. I’ll hire a different lawyer.”

The samples below are designed to help you give you some ideas about how to word assumptions, exclusions, and carve-outs for your clients.
Catch-all statement for material changes

This statement of work, together with the assumptions and tasks provided, is the basis for our budget estimate. If there are material changes, it may be necessary to negotiate appropriate budget adjustments.

General assumptions/carve-outs

- Matters not covered above in the “Activities” column of the attached spreadsheet are excluded from the budget
- Reimbursed costs and expenses are excluded from the fixed fee
- Local and foreign counsel fees and expenses are excluded from the fixed fee
- Any material change to the transaction structure will be handled at the firm’s prevailing hourly rates
- If the closing date of transaction occurs after [insert date], work conducted past that date will be handled at the firm’s prevailing hourly rates
- An electronic “deal room/litigation room” will be created for the use of all client personnel and relevant counsel and related entities, in which electronic datasets will house all documents produced, including segregation of privileged materials
- Documents sought for discovery and/or due diligence purposes will be readily available in electronic format
- All critical deal/litigation documents will be reviewed and revised in no more than three “turns” of drafts
- The agreed budget does not include risk factors such as extended negotiations on the bank commitment or requirements to increase the level of due diligence as a result of issues uncovered during the due diligence process
- The agreed budget does not include due diligence beyond one week, due diligence in specialized areas (such as employment, IP, IT, environmental, insurance, litigation, competition, real estate), a formal written due diligence memorandum or exceptions summary
- We anticipate that three experts will be needed for researching, vetting and selection, and deposition preparation and/or report analysis
Scope assumptions

- Based on the attached breakdown of work, we will analyze the legal and factual issues presented by the complaint (including preliminary witness interviews), prepare a memorandum of law in support of a motion to dismiss, analyze ABC’s opposition brief, and prepare for and argue the motion for a budgeted cost not to exceed $XX in legal fees.

- Alternate Dispute Resolution (ADR): If we determine to pursue ADR, the budget includes preparation and participation in mediation. The budgeted number assumes a one- to three-day mediation session, the negotiation of a settlement agreement, and limited discovery.

- Fact investigation and development: The budget includes preparing for a case management conference, making initial disclosures, propounding and responding to discovery requests, preparing documents for production and reviewing produced documents, negotiating a confidentiality agreement, and preparing for and attending fact depositions.

Discovery budget assumptions

- To the extent mediation is unsuccessful, the case will move into the discovery phase. For budget planning purposes, we have further divided this phase into the following three parts: (i) pre-trial planning, (ii) offensive discovery, and (iii) defensive discovery. Our estimated cost for the entire discovery phase is $XX.

- A breakdown of this estimate is set forth on the attached spreadsheet. There are several key assumptions in this cost estimate, including: (i) each side will depose no more than five witnesses; (ii) all discovery disputes (if any) will be resolved without court intervention; and (iii) we will not seek third party discovery. These assumptions are reasonable in light of the circumstances of this case; however a change in circumstances may impact the estimated costs.

- Expert Discovery: The budget includes preparation of expert reports and rebuttal reports (we currently estimate a total of three reports to cover the issues of infringement, patent validity, and damages) and preparing for and attending expert depositions. This budget does not include any fees for experts.

- Document Review: All required documents are readily accessible and in a machine readable and searchable electronic format. If a significant fraction of the documents are available ONLY in hard copy format, client agrees to reimburse firm for converting the material into readable/searchable electronic form. If such conversion is not possible, or if documents are...
damaged beyond acceptable scanning standards, the firm and client will negotiate a formula for their manual review.

- Case preparation includes:
  - Analysis of complaint and motion to dismiss
  - Factual investigation
  - Preparation of discovery requests and review of discovery responses by opponents
  - Motion to compel discovery (assumes one such motion)
  - Review of documents produced by the other side (assumes opponent’s production is XX pages)
  - Responding to opponent discovery requests
  - Review and production of our documents (assumes production is XX pages)
  - Responding to the opponent’s motion to compel (assumes one such motion)
  - Preparing our witnesses to be deposed (assumes XX witnesses)
  - Preparing for and taking opposition depositions (assumes XX depositions)

**Transaction budget assumptions**

For purposes of the fee proposed, we have made the following assumptions:

- The target does not have any material or significant legal/regulatory issues that necessitate material or significant changes to the transaction structure or require extensive additional due diligence
- Opposing counsel is sophisticated and knowledgeable in these matters
- Negotiations will take place in [insert city]
- Transaction documents will be executed within XX weeks and the transaction will close within XX weeks from the time of engagement of our firm for the transaction
- Each transaction document will be “turned” in three passes or less
- Diligence documents will be provided electronically or delivered to our firm’s XX office
- A tax diligence and opinion letter will be delivered by ___ or another leading accounting firm to be mutually agreed upon
Thirteen issues to consider for a value-fee engagement letter

By Patrick Lamb, Valorem Law Group

I am often asked for copies of our engagement letters by people who want to utilize an alternative fee arrangement with their client. To address these queries, I have boiled down the points to be covered. Valorem is a litigation firm, so this list is most relevant to other litigators. Some of the points are applicable elsewhere, but a fulsome list of points to cover should be prepared for each specific area in which a value fee might be used. Without further ado, here is my list of issues to be addressed in an engagement letter using value fees.

1. **Set a specific fee structure.** You need to determine the nature of the fee structure—fixed fee, fixed fee with holdback, capped fee, capped fee with shared savings, and so forth. If there is any kind of holdback or bonus element, you need to specify that the company will determine in its discretion if it is to be paid or the criteria that will be used to determine how much of the holdback will be paid.

2. **Define staffing.** Clients are concerned that firms may utilize less-experienced or less-qualified lawyers and staff once a fixed fee has been set. Avoid the problem. Define in writing which lawyers and paralegals will be utilized on a given matter and what their respective roles will be.

3. **Specify amounts of payments, and when payments will be billed and paid.** Most firms utilizing fixed fees identify advance payment, rather than payment in arrears, as a benefit. If your client pays bills on a 60-day or longer cycle, the benefit will be lost. The preferred approach is to determine the timing of payment at the outset. It also is important to specify whether fees will be billed monthly, by some other period (predetermined phases), or by work completed (this incentivizes firms to work faster). Amounts to be billed do not need to be equal, so specifying what amounts are to be billed and when, as well as when payments will be made, eliminates any potential misunderstanding.

4. **Specify the assumptions on which the fee agreement is based.** There are general assumptions built into every fee agreement, including the likely volume of documents, the issues (broadly defined, such as “no counterclaim”), the likely number of depositions, the time frame of events at issue, number of witnesses, time to trial and so forth. All assumptions underlying the fee structure should be specified.

5. **Specify work to be performed and any work not to be performed.** All work to be performed should be specified. For example, anticipated or possible motions should be defined as included or not. It is common
to say that one discovery dispute is included, but not more than that since discovery disputes are frequently within the control of the client. It is equally important to define any work not included. For example, if the firm believes it will be doing significant document review and the client anticipates outsourcing such work, or such reviews were completed on an earlier case, the expectation that such work is not included in the fee agreement should be specified.

6. **Identify the criteria for change order approval.** If the outside firm believes circumstances have changed materially, it will submit a change order proposal. Not every change order needs to be approved; the client always has the right to accept the risk of not changing the scope of the engagement. But it is important to clarify the criteria that the client will use to determine if it agrees the work that is the subject of the change order is within the original scope of work. For example, was the issue or circumstance foreseeable or not? If it was foreseeable, the change order is not appropriate and the work should be performed under the previously agreed-to fee structure.

7. **Require that the company approve any spending outside the fee agreement.** The money being spent on fees and disbursements is the company’s. The company has the right to determine if, when, and how such money is to be spent. Thus, experts, vendors and other expenditures over an agreed-upon threshold should require advance approval.

8. **Early case assessments are required and must be updated.** For many companies, this is a condition of payment of any fee. The company wants to invest in the prosecution and defense of the right cases. This is a critical tool to deciding what cases are worthy of investment. This tool is so important that it is entirely reasonable to create a specific fixed fee for ECA investigation that will be followed by a more fulsome fee agreement once risk has been assessed and a strategy determined.

9. **Basic “what-ifs” should be addressed.** Certain things are foreseeable—a key member of the team leaving the firm, significant scheduling changes, interlocutory appeals, bankruptcy of your adversary, and so forth. It is helpful to note that if these things occur, the parties will discuss renegotiation of the fee, if necessary.

10. **Specify whether local counsel fees are included or excluded.** One rule of thumb is that local counsel fees should be included if primary counsel is responsible for selecting local counsel and has the power to replace them. This gives primary counsel the degree of control to ensure that local counsel fee budgets are followed. If the company chooses local counsel, it is likely primary counsel will propose that
local counsel fees not be included in the fee agreement. Whichever way you go, the engagement letter should address the issue.

11. **Specify whether expert fees are included or excluded.** Some clients request “all in” numbers from their lawyers, while others anticipate that the expert fees will be the subject of a separate agreement at an appropriate time. There are merits and demerits to each position, but the engagement letter must address the issue.

12. **Be clear about whether fees for trial and trial preparation are included.** Most cases settle, so if fees for trial are included in the overall fixed price, it will be terribly inflated. If you know a case is likely to be tried, you can build in the price of trial as a separate phase. It is often easier to estimate the cost of trial when you are closer to trial since the factors influencing price are likely to be more certain. Either way, be clear about whether the price includes trial or not, and when the fee agreement ends.

13. **Consider whether a general retainer agreement providing volume discount is in place.** The company may have a general retainer agreement with some firms providing a volume discount based on the total amount of fees incurred in any given year or otherwise. In such a case, it should be specified whether the engagement governed by an alternative fee arrangement is to be included in the general retainer agreement providing a discount. It may be appropriate in some cases to specify how the alternative fee arrangement will be included in the general retainer agreement. Some portions or all portions of the fees could be included or excluded. For instance, the base fee could be included in the calculation of the volume discount provided for in the general retainer agreement, while the bonus element may be excluded. All components of fees could be included or excluded. Again, effort should be made to eliminate any potential misunderstanding.

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“Every partner should read this book. With prices being pushed down, the number one question lawyers ask me today is: How can I live within more stringent budgets without reducing quality? The Legal Project Management Quick Reference Guide helps answer this question with an impressive series of management tactics and templates. More than half of the tools are new to this third edition, reflecting a healthy evolution in a market that is requiring greater and greater levels of efficiency.” – Toby Brown, Director of Strategic Pricing & Analytics, Akin Gump

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