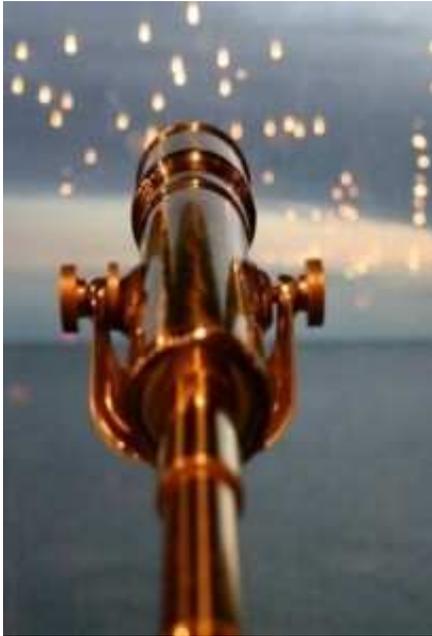


# A General Counsel's Take On LPM & Foreseeability

**Guest Post by Russ Dempsey, Vice President and Chief Legal Officer  
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Pam Woldow's recent blog post, *Putting Some Pepper Into Legal Project Management* [At the Intersection, <http://www.pamwoldow.com/?p=1117>] called to mind my own recent successful use of Legal Project Management (LPM) to manage the risks and foreseeability issues in an engagement with one of our outside counsel for reviewing and negotiating leases.

## **Getting On the Same Page**

We lawyers are supposed to be great foreseeability experts, having had the idea drilled into us in law school, and a significant area of jurisprudence, negligence, is founded upon it. As Eugene O'Neill said: "There is no present or future, only the past, happening over and again, now." Yet both inside and outside counsel too often fail to test assumptions and identify possible risks in legal engagements, resulting in blown budgets, miscommunication, misaligned interests and sometimes,

regrettably, testy disputes. I really wanted to avoid this.

LPM makes a difference in helping firms work within agreed budgets, increase budgeting proficiency, improving communications and – a pressing priority for us these days – structuring value-based billing arrangements. Yes, LPM requires an upfront investment of time, but it can be adjusted to fit the circumstances. Not every engagement requires an elaborate project charter, yet *every* engagement requires that the parties agree upon their assumptions and look to the future.

## **Front-End Risk Discussions**

I wanted a fixed fee with our firm. **They** were concerned about the possible impact of some challenging lease provisions, (e.g., escalation-of-rent clauses, building allowances and improvement), as well as onerous leases that threatened the firm with spending so much time that they would take a bath on a fixed fee arrangement.

I worked collaboratively with them to develop a Risk Chart (see below) that would help manage uncertainties that could impact our fixed fee arrangement. The result was that I negotiated a fixed fee that was in my company's best interest, and the firm came away with a means to manage their time commitment. On our Risk Chart, we agreed on the fee, scope of the engagement, major decision points and who the decision makers were. Then we documented the risks and likely consequences, assigned a probability to each risk, prepared mitigation strategies, listed the triggering events, and – very important – scheduled a time for a project review.

Unlike many fixed fee engagements that attempt to define all possible opt-out circumstances, the risks identified in our agreement did not kick certain problematic leases out of the fixed fee

arrangement into an hourly rate. Instead, we used our Risk Chart to create solutions that *would preserve the alternative fee*.

## Hey, It Worked

Our mitigation strategies successfully controlled the potential time-consuming leases. For example, I reviewed my company’s position regarding building allowance and escalation-of-rent clauses – risks highly likely to occur – and we jointly created a term sheet to address these issues at the LOI stage. It proved more effective to discuss these potential problems in advance than it would have been to undertake damage control down the line. That same term sheet also protected both sides by reducing the number of turns of the document by stating my company’s position early in discussions.

We also agreed that there were some risks that were statistically unlikely (e.g., completely onerous lease terms), but that would have a very high impact if they did occur. We applied the same mitigation strategies to these low-probability-high-impact events, agreeing that if our strategies proved unsuccessful, I would agree to review and adjust the fee engagement.

## Responsibility Trumps Accountability

The attitude of outside counsel has a pronounced effect on whether negotiations like this produce win-win outcomes. I asked Pam to allow me to praise Porter Wright, Morris & Arthur by name, because they took such a constructive and responsible approach to this engagement.

Pasi Salhberg said it well: “Accountability is something that is left when responsibility has been subtracted.” Responsible firms foster client trust by helping to flesh out assumptions and risks at the outset, rather than by dodging thorny discussions early on and neglecting potential problems until they leap up to destroy budgets, trigger finger-pointing, and erode client-outside counsel relationships. At the outset of your next engagement, I urge you to collaborate with outside counsel on a Risk Chart. As Pam has often been heard to say, “Front-end planning beats damage control, any day.”

Foreseeable Risks	<ol style="list-style-type: none"> <li>1) Time consuming issues such as escalation of rent clauses, building allowances and improvements</li> <li>2) Completely erroneous lease</li> </ol>
Consequence	Result in more time spent by firm than budgeted
Probability	Time consuming issues have a 70% probability. Completely erroneous lease is unlikely and only a 3% probability.
Mitigation Tactics	<ol style="list-style-type: none"> <li>1) Develop points and position with respect to time consuming issues in advance and include in the LOI or term sheet</li> <li>2) Rely on LOI or term sheet provisions to help reduce time on erroneous leases. Also, company to share in coverage above the fixed fee on completely erroneous leases. Parties to review and agree after completion of the lease.</li> </ol>
Trigger	<ol style="list-style-type: none"> <li>1) Approach for this item applies to all leases</li> <li>2) Upon notice from Partner after initial review of lease</li> </ol>
Project Review	CEO and partner to review engagement after completion of lease project to determine effectiveness and examine whether there are any areas for improvement

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