

GENERAL COUNSEL UP-AT-NIGHT REPORT



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Welcome

ALM Intelligence and Morrison & Foerster are pleased to announce the publication of the inaugural *General Counsel Up-at-Night* report.

The role of the general counsel has undeniably changed in recent years, both in terms of scope and importance within the corporate suite. There's plenty to keep a GC up at night, whether it's assessing and mitigating risk, ensuring compliance, managing a budget, or enabling the business to meet its goals.

To increase awareness of the myriad challenges faced by law departments today, ALM Intelligence and Morrison & Foerster have partnered on this one-of-a-kind project. Our shared aim is to shed light on the issues of greatest concern among general counsel and, in the longer term, create a benchmark of those matters and to track the evolution of how law departments address them.

In spring 2017, we conducted an online survey of US-based general counsel and in-house lawyers to better understand the demand for legal services, law department operational and sourcing strategies, and the approaches taken by law departments in confronting five key issues that we identified based on ongoing discussions between general counsel and outside counsel:

- Privacy and Data Security
- Risk and Crisis Management
- Regulations and Enforcement
- Litigation
- Intellectual Property

For each of these issues, the survey findings point to several chief concerns among law department leaders:

- **Privacy and Data Security:** Hacking/phishing/malware/ransomware is the area of greatest concern (87%) with respect to privacy and data security, followed by issues resulting from employee error (62%) and the risk of breaches via non-law-firm vendors (50%).
- **Risk and Crisis Management:** Cybersecurity threats (57%), potential costs and budgetary impact (55%), and government and regulatory investigations (55%) are the three areas of greatest concern with respect to risk and crisis management.
- **Regulations and Enforcement:** Changes in regulations (65%) and differences in regulations across jurisdictions (64%) are the two areas of greatest concern with respect to regulation and enforcement.
- **Litigation:** Labor and employment (59%), potential costs and budgetary impact (57%), and commercial disputes (54%) are the three areas of greatest concern with respect to litigation.
- **Intellectual Property:** Enforcing IP rights (67%) is the area of greatest concern with respect to intellectual property, followed by possible trademark and copyright infringement (60%).

The release of this report marks the first step in what we envision as a long-term project. We will field the survey semiannually to capture changes in sentiment, ultimately converting the results into an index that tracks trends and developments within corporate law departments.



We are extremely grateful to the more than 200 general counsel and other in-house legal decision makers who took the time to respond to this survey. The success of an endeavor such as this depends on your willingness to participate, and we thank you for your contributions.

As this project continues to evolve, we welcome the involvement of senior law department leaders in upcoming editions of the survey, index, and report. If you would like to join your peers in the next wave of research, please go to <http://bit.ly/GC-Up-At-Night-Panel> to be considered for the survey.

The legal profession is continuously changing. Understanding and monitoring these changes are crucial first steps in identifying new approaches and solutions that allow general counsel to fulfill their expanding responsibilities and the greater business interests of the companies they serve.

Sincerely,

Andrew Neblett, President of ALM Intelligence

Larren Nashelsky, Chair of Morrison & Foerster



Introduction

Corporate legal departments have become integral to enterprise decision making over the last decade, which has led to the emergence of the empowered general counsel — a department leader that is simultaneously legal advisor, strategic business partner, risk and crisis manager, and corporate conscience.

To adequately fill these roles, general counsel must be the proverbial Jack- or Jill-of-all-trades. Owing to a myriad of factors, from the size of the department to the business's industry sector and geographic reach, in-house counsel often lack the luxury of specialization. Day in and day out, these leaders must perform a variety of functions, including drafting and reviewing contracts, preparing for litigation, and performing compliance audits, along with other tasks, varying from the routine to the complex. All the while, general counsel must not abdicate their role as legal experts and efficient resource managers.

In the sections that follow, we take a closer look at the substantive legal and operational challenges that in-house leaders find most pressing based on the results of the inaugural *GC Up-at-Night* survey.

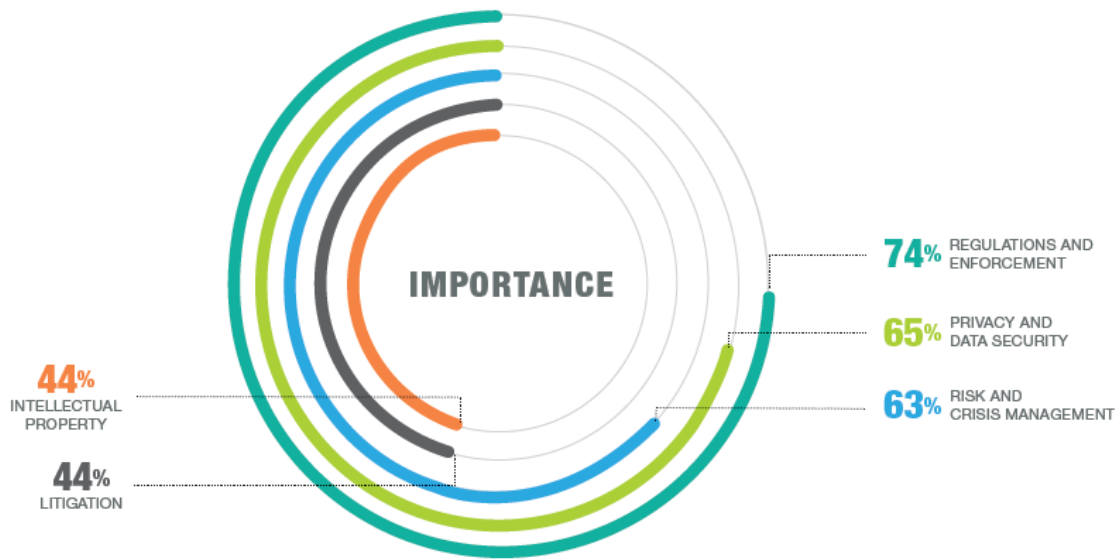


Substantive Legal Challenges

Overview

Regulations and enforcement is a significant challenge for legal departments, according to most survey respondents. This should come as little surprise since enforcement issues — such as navigating regulation, especially in highly regulated sectors such as financial services and healthcare — have long been considered a legal minefield. Moreover, in an increasingly global business environment, the divergence in regulatory requirements across jurisdictions has created new headaches. Now, GCs must not only think globally to maintain a culture of compliance regardless of geography, but also act locally in establishing policies and procedures to ensure corporate action meets the prevailing local regulatory standards.

% Respondents Describe the Topic as an Important Challenge for the Legal Department



Respondents rated the following question 8, 9 or 10. Using a scale from 10 to 0, rate how important each of the following challenges is for your legal department currently with 10 being extremely important and 0 being not at all important.

While advising a company on the nature of regulations and enforcement has been a traditional role for in-house lawyers, two issues have emerged as new areas of concern among law department leaders: privacy and data security and risk and crisis management.

In our survey, 65% of respondents indicated that privacy and security are a very important challenge, while 63% said risk and crisis management is an area of significant concern. The position of both of these issues near the top of the list of key challenges effectively illustrates the changing environment in which the GC now operates.

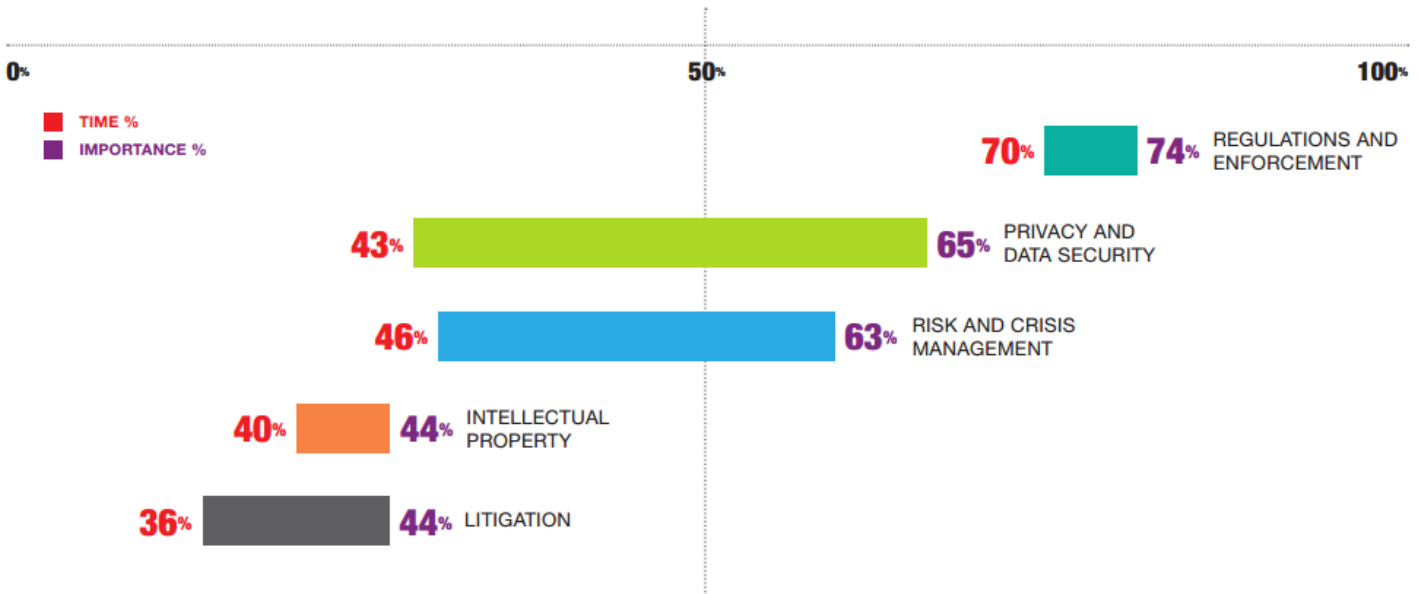
Indeed, privacy and data security is no longer considered a problem for the IT department alone. The steady drumbeat of news about threats to data security, coupled with wide-ranging jurisdictional differences around data privacy, is



enough to keep even the soundest-sleeping in-house counsel awake at night. Meanwhile, though in-house law departments have a history of supporting enterprise risk management, general counsel have recently also assumed the role of corporate crisis managers, requiring them to work closely with other business units such as IT, HR, and marketing to coordinate an effective crisis response.

Despite the importance of these emerging and cross-departmental issues, general counsel are not able to give them the attention they deserve — or at least are struggling with aligning their actions to their stated priorities. The chart below, which compares the survey responses to two fundamental questions — the perceived importance of an issue and the amount of time spent addressing that issue — is demonstrative.

Aligning Priorities: Importance vs. Time



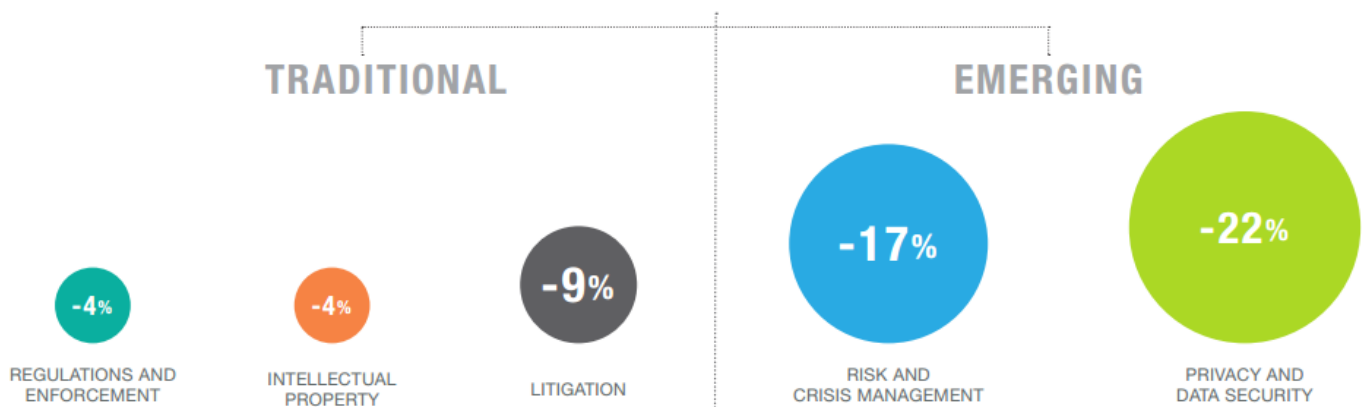
Respondents rated the the following questions 8, 9 or 10. Using a scale from 10 to 0, rate how important each of the following challenges is for your legal department currently with 10 being extremely important and 0 being not at all important. Using a scale from 10 to 0, rate how much time your legal department spends currently on each of the following challenges with 10 being a significant amount of time and 0 being no time spent.



According to the survey data, in the domains traditionally associated with the law department’s portfolio — regulations and enforcement, intellectual property, and litigation — the relative importance of each issue aligns with the time dedicated to it.

When it comes to emerging challenges, the perceived importance far outstrips time spent. In the case of privacy and data security and risk and crisis management, for example, the survey results reveal a 22 percentage point and 17 percentage point difference, respectively, between importance and time. This may indicate that, in practice, general counsel are having a difficult time organizing and managing their responses to these issues.

Traditional vs. Emerging Issues



Successful GCs will shift their attention to emerging challenges before they become crises.

Respondents rated the following questions 8, 9 or 10. Using a scale from 10 to 0, rate how important each of the following challenges is for your legal department currently with 10 being extremely important and 0 being not at all important. Using a scale from 10 to 0, rate how much time your legal department spends currently on each of the following challenges with 10 being a significant amount of time and 0 being no time spent.



Substantive Legal Challenges by Category

Risk & Crisis Management

A crisis, almost by definition, happens without warning. The survey results reflect this inherent uncertainty. Rather than coalescing around a particular threat, the results visualized in the chart below reveal a state of generalized anxiety on the part of in-house leaders.

TOP RISK AND CRISIS MANAGEMENT CONCERNS



Which concerns does your company currently have regarding risk and crisis management? Please select all that apply.

While the survey responses may not identify a consensus of thought when it comes to risk and crisis management concerns, in many respects, this study as a whole does just that. The results presented throughout this report can be interpreted as an exposition on the issues that in-house leaders see as posing the most significant risks to their organizations.

In assessing the potential risks to businesses, it is important to remember crises are rarely precipitated by black swan events. Instead, though they occur unexpectedly, their causes and effects are often predictable. As a result, a crisis is something that can be anticipated and managed in a way that mitigates the damages incurred.



Regulations & Enforcement

The survey responses reveal that in-house lawyers confront two key challenges when handling regulatory and enforcement matters: regulatory uncertainty and jurisdictional variance.

Regulatory uncertainty includes issues related to changes in the language or enforcement of existing regulations, increased regulation, or removal of regulations. Jurisdictional variance, on the other hand, includes concerns about differences in regulations across jurisdictions and the difficulties ensuring compliance in cross-border transactions.

As shown in the chart below, nearly 70% of respondents cited either regulatory uncertainty or concerns over jurisdictional variance as their primary obstacle in this domain.

REGULATIONS & ENFORCEMENT CONCERNS



What is your company's greatest concern regarding regulations and enforcement? Please select one response.

Significantly, one primary obstacle is often compounded by the other, making this a particularly worrisome one-two punch for in-house lawyers. Moreover, in a global economic system where political and economic unrest has resulted in the ouster of the politicians and ruling governments most associated with maintaining the status quo, the trend of wild swings in economic and regulatory policy will likely continue unabated for the foreseeable future.

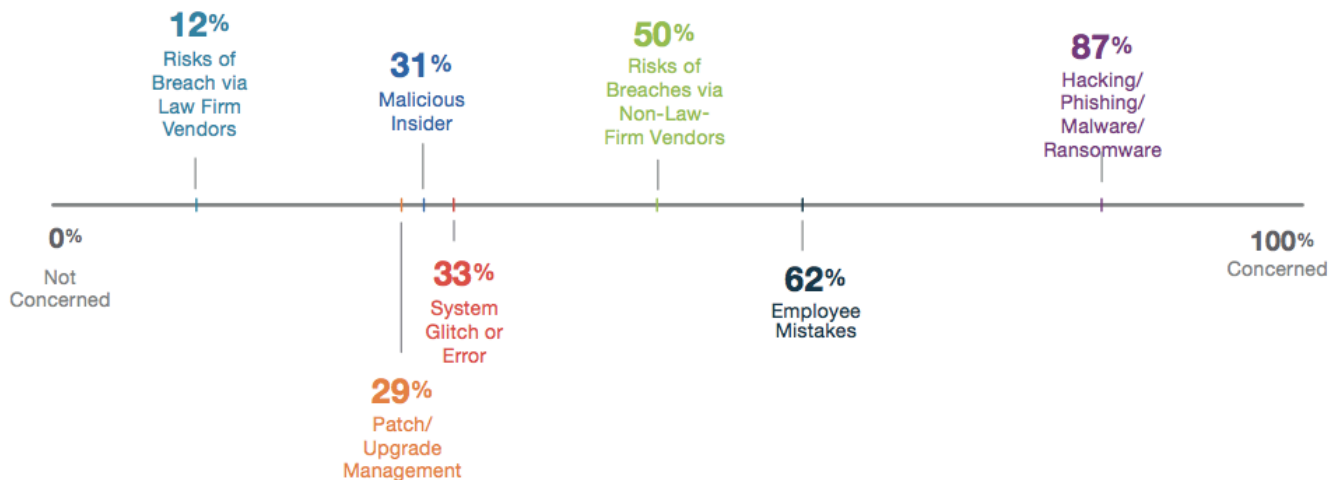


Privacy & Data Security

Corporate law departments are slowly coming to terms with their position in the trenches of the cyber fight. Some are even going a step further by embracing a leadership role. It’s amazing to consider the rise to prominence of an issue such as privacy and data security. Five or 10 years ago, this would have been a top-of-mind concern to only a few in-house practitioners. Today, as seen in the survey results, law department leaders regard it as the second most important challenge they face.

While progress is being made, and general awareness of the issue has been achieved, a level of uncertainty and confusion remains about how to best approach the problem. This is evidenced by the disconnect, discussed above, between the stated importance of the challenge and the actual time dedicated to it. This disconnect is further reinforced by the results displayed in the chart below.

PRIVACY & DATA SECURITY CONCERNS: WHAT’S ON THE GC RADAR



Which concerns does your company currently have regarding privacy and data security? Please select all that apply.

Thirty-eight percent of respondents indicate that they are not concerned about employee mistakes, even though human error is a contributing factor to the majority of data security incidents. In addition, the responses demonstrate a low level of concern over the risk presented by third-party vendors. Failure to properly secure the information supply chain can create serious vulnerabilities that need to be better understood and addressed.



Intellectual Property

Nearly 70% of respondents identified the enforcement of IP rights as a challenge for their in-house departments, making it the most frequently cited concern with respect to intellectual property. In a knowledge and information economy where IP is emerging as the most valuable asset for many companies, the fact that businesses are finding it difficult to enforce their ownership rights is significant.

TOP INTELLECTUAL PROPERTY CONCERNS



Which concerns does your company currently have regarding intellectual property? Please select all that apply.

These difficulties can be broadly attributed to three not necessarily mutually exclusive issues:

- The “whack-a-mole” nature of asserting claims in the digital age where intellectual property can be quickly and cheaply reproduced;
- The rise of cultural and social norms that value open-source rights over private property rights, especially in the realm of digital creations; and
- Cross-border differences in the enforcement of IP claims.

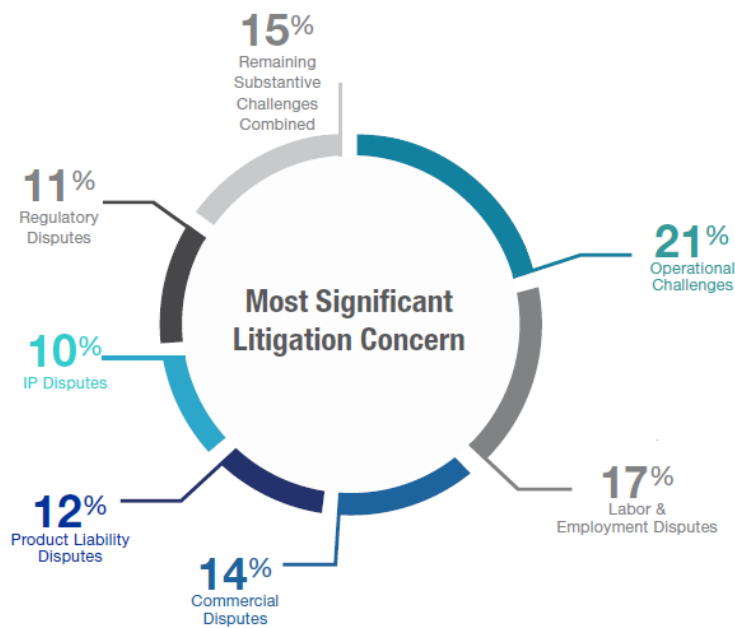


Litigation

Whether it is inflicted piecemeal, causing death by a thousand cuts, or through one blockbuster bet-the-company suit, by slowly draining resources, hurting morale, and damaging the company’s reputation, litigation poses an existential threat to any business organization. Nearly six in 10 respondents indicated that their company was concerned about labor and employment litigation, far more than any other substantive litigation challenge. Moreover, when asked to identify their most significant substantive legal concern with regard to litigation, labor and employment disputes are at the top of the list.

This is potentially significant insofar as it provides a glimpse of the current state of the employer-employee relationship. One might conclude that this dynamic is less collaborative and more adversarial, with the general counsel on the front lines.

LITIGATION CONCERNS



What is your company's greatest concern regarding types and other factors pertaining to litigation? Please select one response.



Operational Challenges

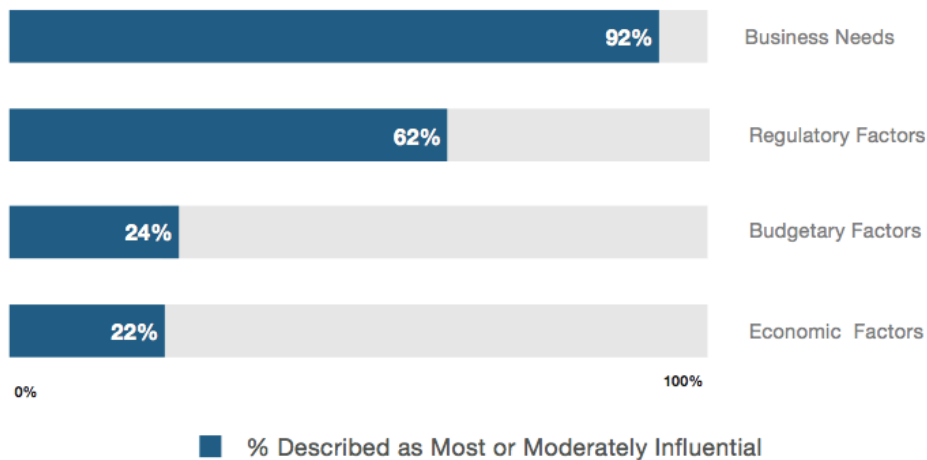
Demand

Given the prevalence and variety of the substantive challenges in-house leaders must overcome, it is no wonder that survey respondents report that demand is high for their department’s services.

When asked to describe the level of demand on their departments — in the previous six months, currently, and expected in the next six months — at least 90% of respondents indicated experiencing strong to heavy demand in each instance.

What’s more, and of particular interest to law firms and other providers of legal services, respondents gave some insight into the factors that most influence changes in demand. As seen in the chart below, the needs of the business and the state of the regulatory environment are the primary drivers influencing changes in demand.

FACTORS THAT MOST INFLUENCE CHANGES IN DEMAND FOR LAW DEPARTMENT SERVICES



Respondents ranked factors 1 or 2. Please rank the below factors, in order of importance, that impact the future increase/decrease in demand for legal services.

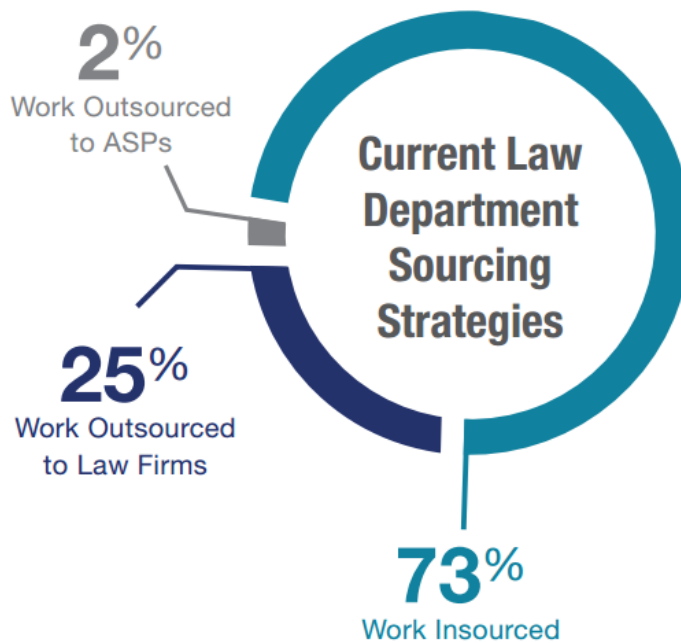
Notably, survey respondents report that the state of the broader economy and budgetary factors are the least influential on demand.



Sourcing

Most legal work coming to in-house counsel is handled internally. As illustrated in the chart below, survey respondents indicated that 73% of legal work was handled internally by lawyers in their department. Law firms account for the largest portion of outsourced work (25%), with alternative service providers accounting for only 2%.

ALLOCATION OF WORK



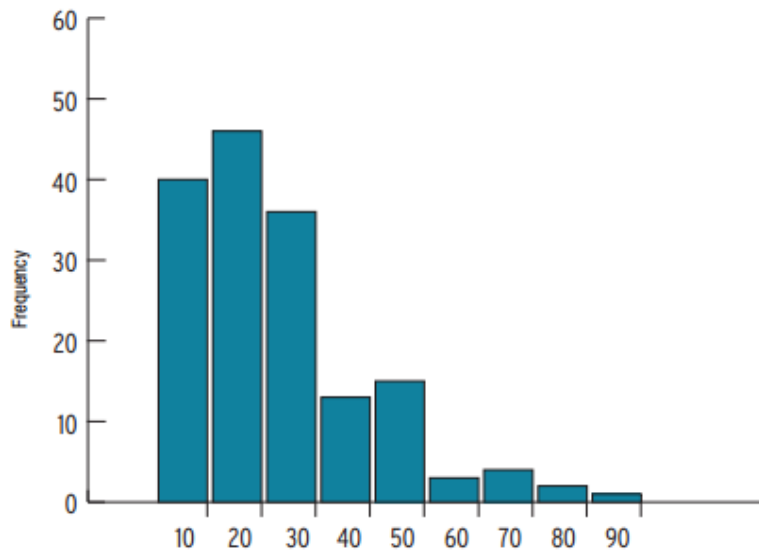
Please enter the percentage of your company's legal work that is handled...



The average allocation tells only part of the story, however. The histogram below, for example, contrasts the variability in sourcing strategies when it comes to sourcing work to outside counsel law firms. (Sourcing to alternative service providers was relatively consistent with the average.) A minority, though not insubstantial, number of respondents reported sending more than 40% of their work to outside counsel law firms which, when compared to the average displayed in the previous chart, indicates there can be significant variability in how individual law departments source their work.

VARIABILITY IN SOURCING STRATEGIES

% Of Respondents Who Allocate Work To Outside Counsel

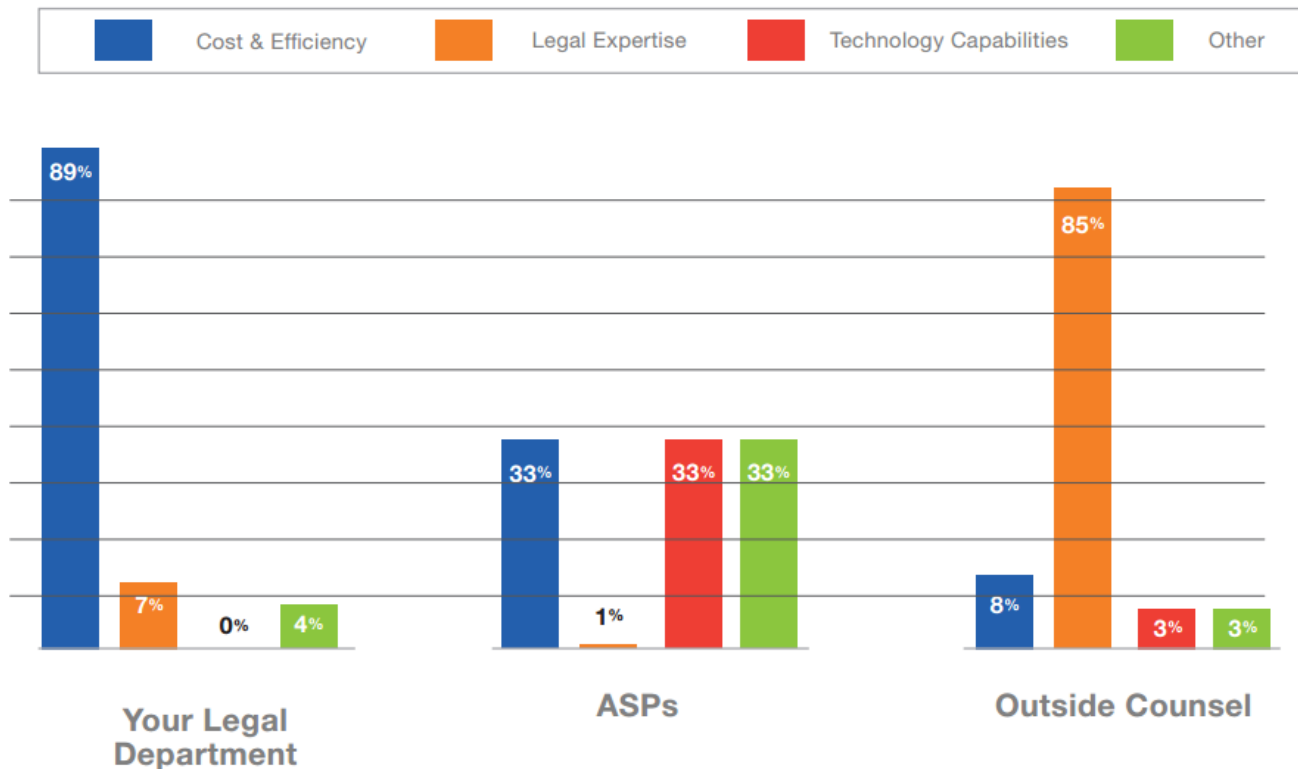


Please enter the percentage of your company's legal work that is handled...



When legal services are sourced to law firms, “legal expertise” is the primary reason identified by respondents. In contrast, when legal services are sourced to alternative service providers, the primary reason is “technology capabilities.” When legal services are kept in house, “cost and efficiency” is by far the most prevalent rationale.

WHAT DRIVES GCs TO CHOOSE THEIR WORK SOURCING STRATEGIES



Thinking about your company’s current legal work, what is the key reason for keeping the work within your legal department, sending to outside law firms, or sending to alternative service providers?

Though these sourcing justifications may have been predictable, their significance should not be underestimated, especially for outside counsel law firms. In an increasingly competitive market, where law departments are more amenable to insourcing and alternative service providers are an emerging threat, it is helpful to see the law firm’s perceived value proposition stated so clearly in black and white. In-house leaders turn to outside counsel for expertise and experience and choose counsel for more than cost or efficiency. Legal departments value outside counsel as legal advisors on matters like bet-the-company litigation, intellectual property defense, enforcement issues, or concerns related to privacy and data security and risk and crisis management.



Conclusion

The ascension of the general counsel into the role of corporate power player has brought with it new responsibilities, increased prestige, and, of course, a variety of new challenges. Law department leaders are now expected to possess the skill and finesse to lead interdepartmental efforts to tackle issues such as privacy and data security and to demonstrate the managerial know-how to efficiently and effectively manage the legal department's operations and resources. At the same time, traditional responsibilities remain, albeit with some new twists. General counsel must maintain their wide-ranging legal expertise to navigate a volatile regulatory environment that now stretches across the globe. More than ever before, the corporate law department is a significant force in shaping the future of the business, and with that comes a consistent stream of challenges that are sure to keep in-house leaders up at night.



About the Authors

About ALM

ALM, an information and intelligence company, provides customers with critical news, data, analysis, marketing solutions, and events to successfully manage the business of business. Customers use ALM solutions to discover new ideas and approaches for solving business challenges; connect to the right professionals and peers to create relationships that move business forward; and compete to win through access to data, analytics, and insight. ALM serves a community of over six million business professionals seeking to discover, connect, and compete in highly complex industries.

About ALM Intelligence

ALM Intelligence supports legal, consulting, and benefits decision makers seeking guidance on critical business challenges. Our proprietary market reports, rating guides, prospecting tools, surveys, and rankings inform and empower leaders, enabling them to proceed with confidence.

About Morrison & Foerster

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, and Fortune 100, technology, and life sciences companies. The *Financial Times* has regularly named the firm to its lists of most innovative law firms in North America and Asia since publishing its Innovative Lawyers Reports in those regions. In the past few years, *Chambers USA* has honored MoFo's Privacy and Data Security, Bankruptcy, and IP teams with Firm of the Year awards, the Corporate/M&A team with a client service award, and the firm as a whole with the Global USA Firm of the Year award. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.