

GENERAL COUNSEL UP-AT-NIGHT REPORT
Fall 2017



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Welcome

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

Reaffirming the findings of the inaugural *Up-at-Night Report* released in June, this report further emphasizes that the role of the general counsel continues to evolve both in terms of scope and importance within the organization.

Trusted legal advisor. Risk manager. Corporate conscience. In this brave new world general counsel are expected to fulfill each of these roles within their respective organizations.

Gone are the days of unlimited legal budgets with little oversight. The fallout of the 2008 global financial crisis has put the spotlight on legal departments and their operations. Consequently, new responsibilities have emerged for in-house leaders. Today's empowered general counsel have also added strategic business partner, effective crisis leader, and efficient operations manager to their growing list of responsibilities.

With these ever-increasing responsibilities, it is no wonder that the GCs we surveyed are kept up at night preparing for and responding to cyber incidents, assessing and mitigating risks, ensuring compliance amid a shifting regulatory landscape, managing a budget, and helping business to meet its strategic objectives.

ALM Intelligence and Morrison & Foerster have partnered on this unique project to track the emerging and developing challenges that general counsel face. Our common goal is to better understand in-house leaders' most pressing concerns and, in the long term, benchmark their evolution and emerging trends.

In keeping with the methodology of the first report, the fall 2017 research surveyed U.S.-based general counsel and in-house lawyers on their departments' approach to two primary areas: (1) confronting five key categories of substantive legal issues (i.e., regulations & enforcement, risk & crisis management, privacy & data security, intellectual property, and litigation) and; (2) managing operational and sourcing strategies.

Taken as a whole, our 2017 research provides a window into general counsels' current mindset and serves as a strong indicator of those areas that will require the closest attention in 2018. Notable findings from the combined research include:

- **Fragmented Regulatory Environment on an International Scale:** The emergence of complex global challenges like the fast-approaching deadline to comply with the European Union General Data Protection Regulations (GDPR) has left legal departments scrambling to keep pace.
- **Intellectual Property a Critical Asset:** There are some early indications that intellectual property is an increasing concern. From the spring to fall survey, the number of respondents describing IP litigation as a "very important" issue grew by 5 percentage points. Moreover, the number of respondents describing IP litigation as their "greatest" litigation concern increased by 9 percentage points.
- **Resource Crunch:** The aforementioned issues and concerns are exacerbated by a lack of resources (e.g., budget, staffing, and technology) – a sentiment present throughout the survey results.



- **Organizational Misalignment:** Increasing complexity of issues and the scarcity of resource can overwhelm some departments. For each of the five broad substantive categories we examined (i.e., regulations & enforcement, risk & crisis management, privacy & data security, intellectual property, and litigation) there is a growing discrepancy between the issue's perceived importance and the amount of time dedicated to it.

The release of this report marks the end of the first year of this long-term project. The study aims to look more carefully at some of the key factors driving changes to in-house leaders' priorities. Understanding and monitoring these changes are crucial first steps in identifying new approaches and solutions that will allow general counsel to fulfill their expanding responsibilities.

We are extremely grateful to the general counsel and other in-house legal decision makers who took the time to respond to our surveys in 2017. The success of an endeavor like this one depends on your willingness to participate, and we thank you for your contributions. As this project continues to evolve, we welcome senior law department leaders' participation in upcoming iterations of the survey. 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.

Sincerely,

Andrew Neblett, President of ALM Intelligence

Larren Nashelsky, Chair of Morrison & Foerster



The 21st Century GC

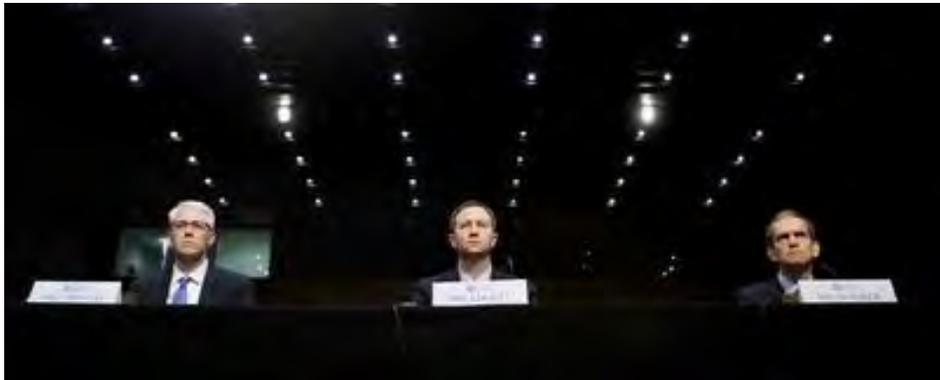
On November 1, 2017, Colin Stretch, Facebook general counsel, Sean Edgett, Twitter acting general counsel, and Kent Walker, Google vice president and general counsel, in separate hearings before the Senate and House Intelligence Committees, testified on matters related to the role of their platforms as tools for alleged Russian interference in the 2016 U.S. presidential election.

Welcome to life as a General Counsel in the 21st century.

While the facts in this case are unique, the challenge presented to these three tech GCs is one that in-house leaders face in the United States and across the globe.

Today, corporate legal departments and their senior leadership are called upon to fill a variety of critical roles including legal advisor, strategic business partner, risk and crisis manager, and corporate conscience, among others. They must meet these responsibilities while simultaneously confronting traditional challenges like regulations and enforcement (which themselves continue to evolve) along with emerging new ones like privacy and data security and risk and crisis management.

Consider, as another example, the road ahead for in-house lawyer Julia Houston. Most recently senior vice president of U.S. legal at Equifax, Houston has been tapped to fill the role of chief transformation officer, in the wake of the company's catastrophic data breach. She has been tasked with the responsibility of "overseeing the company's response to the cybersecurity incident and coordinating its efforts to build a new future."



(l-r) Colin Stretch, Facebook general counsel, Sean Edgett, Twitter acting general counsel, and Kent Walker, Google vice president & general counsel, during a U.S. Senate Intelligence Committee hearing. Credit: Diego M. Radzinski/ALM

CORPORATE COUNSEL

Equifax Looks to In-House Lawyer to 'Build a New Future' After Massive Breach

NOVEMBER 14, 2017

These events serve as terrific illustrations of the core challenges in-house leaders must overcome. Confronted with myriad legal, business, and political issues – all on a global scale – they must find the way forward. This is no easy task but perhaps one for which the general counsel is particularly well-suited. A recent study by executive leadership firm Heidrick & Struggles, "What Today's General Counsel Looks Like as a Leader," found that GCs surpassed their C-suite



peers on several key leadership metrics. GCs earn top marks for their ability to learn new information, reliability and the ability to execute.

Day in and day out, GCs and other senior law department leaders are expected to perform a variety of functions from the routine to the complex, all while remaining focused on their responsibilities 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 first two editions of ALM Intelligence and Morrison & Foerster's *GC Up-at-Night* survey.



Substantive Legal Issues: Keeping Up Is Hard to Do

Fragmented Regulatory Environment

To be successful, in-house leaders must effectively balance the aforementioned roles – legal advisor, strategic business partner, crisis manager, et al. – while confronting an ever-evolving set of substantive challenges. The results of our *GC Up-at-Night* surveys shed light on in-house leaders' perception of five broad substantive categories: regulations and enforcement, intellectual property, litigation, privacy and data security, and risk and crisis management.

“
Managing an increasingly complex global legal and regulatory environment within budgetary and other resource constraints
”

“
Data privacy and security regulations are continually evolving
”

Rate Issue as “Very Important”

% of Respondents (2017 surveys combined)



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 regulatory compliance and enforcement has traditionally fallen to in-house lawyers, two new categories have emerged as important challenges for law department leaders: privacy and data security and risk and crisis management. Their position near the top of the list of key challenges illustrates the changing environment in which the GC now operates.

Indeed, privacy and data security are no longer considered problems for the IT department alone. The steady drumbeat of news about high-profile security breaches and other data security threats coupled with new domestic and international privacy regimes with wide-ranging jurisdictional differences have brought these issues squarely within the legal department’s purview and undoubtedly contribute to their place among the GCs’ top concerns. Meanwhile, though in-house law departments have historically supported enterprise risk management, general counsel have also recently assumed the role of corporate crisis managers, requiring them to work closely with other business units including, IT, HR, and marketing to coordinate an effective crisis response.

Ranking of Issue as “Very Important” by Survey Edition

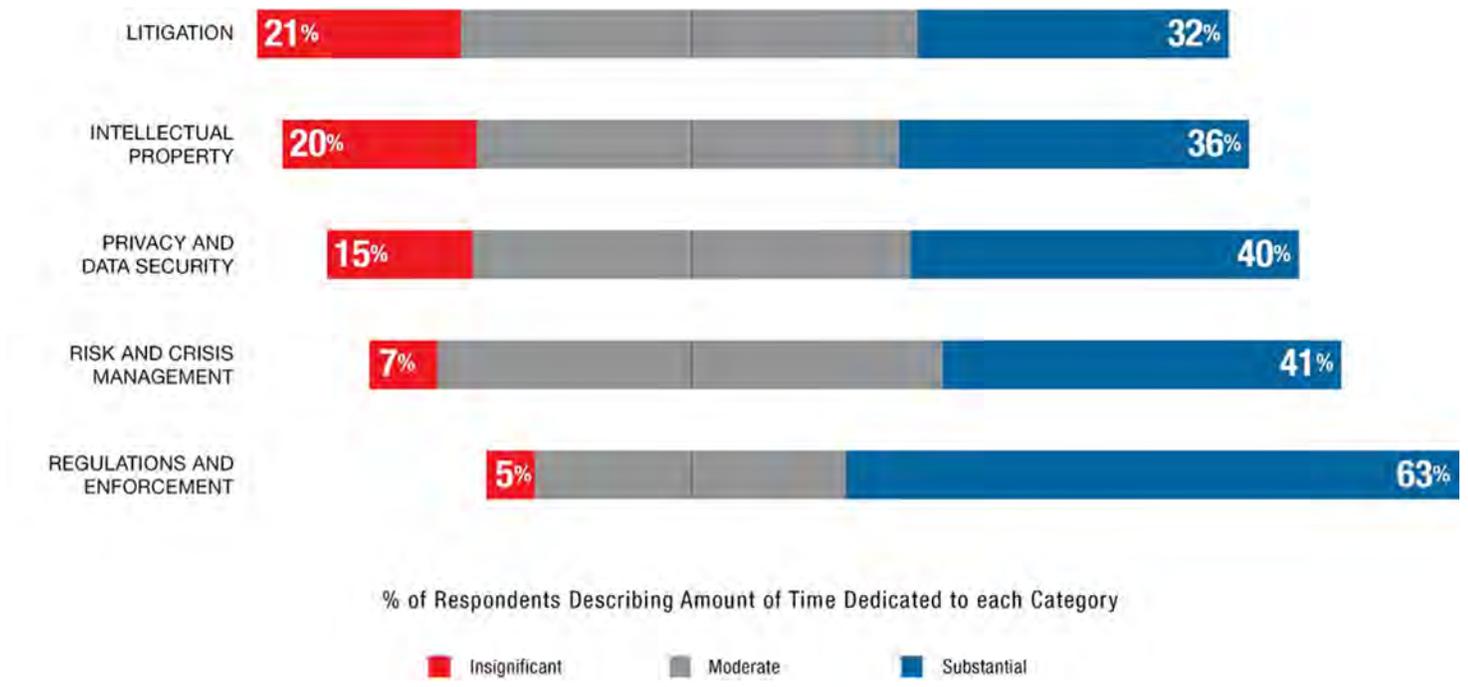


Respondents rated the following question 8, 9, or 10. Using a scale from 10 to 0, rate how important each of the following challenges is for your legal department currently with 10 being extremely important and 0 being not at all important.



Just as survey respondents were asked to consider the importance of each category, they were also asked to identify the amount of time their department dedicates to each one. We find that both of these metrics are roughly divided into three tiers with regulations and enforcement at the top, followed by privacy and data security and risk and crisis management, and then intellectual property and litigation trailing.

Time Dedicated to Issue
(2017 surveys combined)



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.



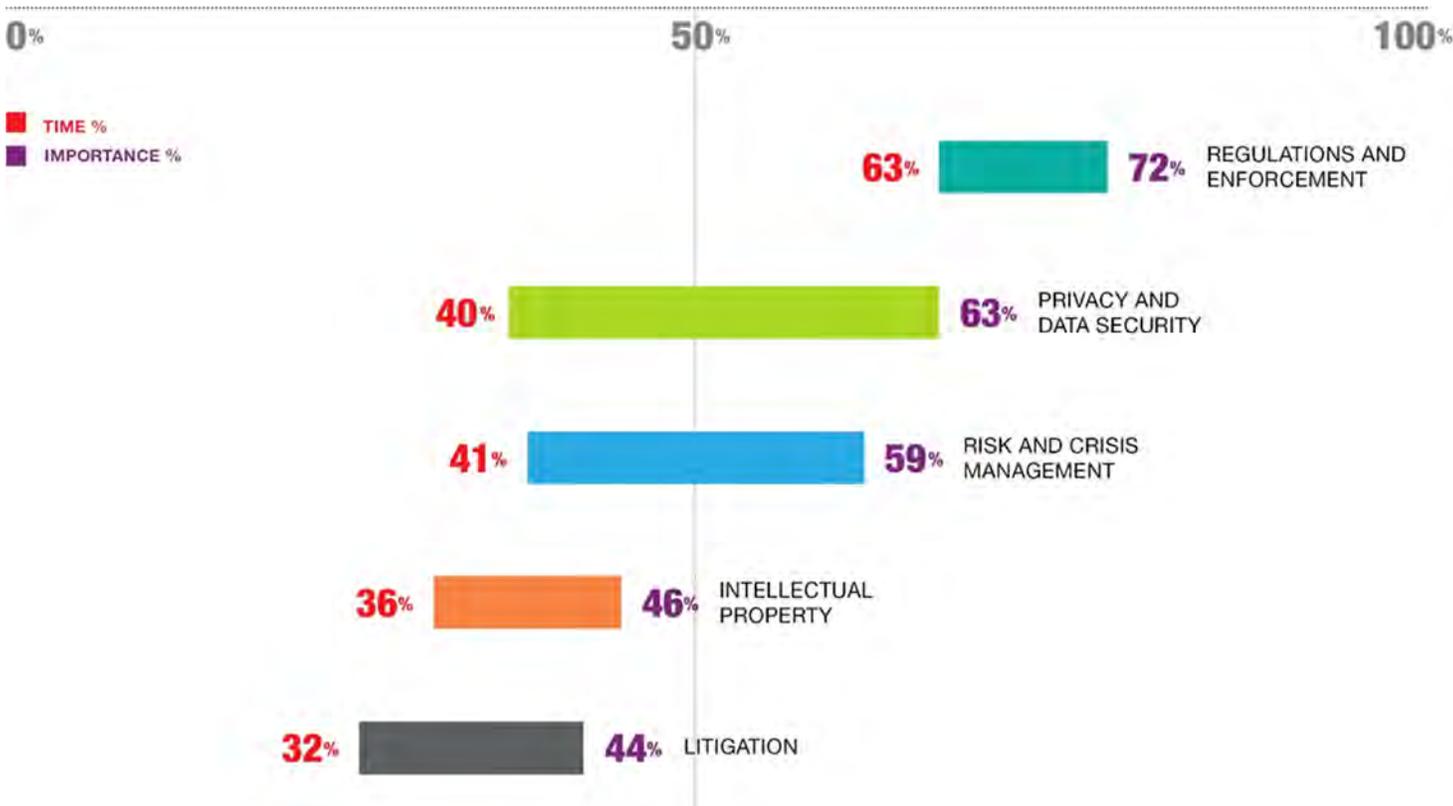
Organizational Misalignment

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 struggle with aligning actions to stated priorities. The chart below, which compares the survey responses to two fundamental questions — the perceived importance and the amount of time dedicated to addressing each of the substantive categories — is demonstrative.

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 23 percentage point and 18 percentage point difference, respectively, between time and importance. This may indicate that, in practice, general counsel are having a difficult time organizing and managing their responses to these issues.

Dedicate **“Substantial Time”** Compared To **“Very Important”**

% of Respondents by Issue (2017 surveys combined)

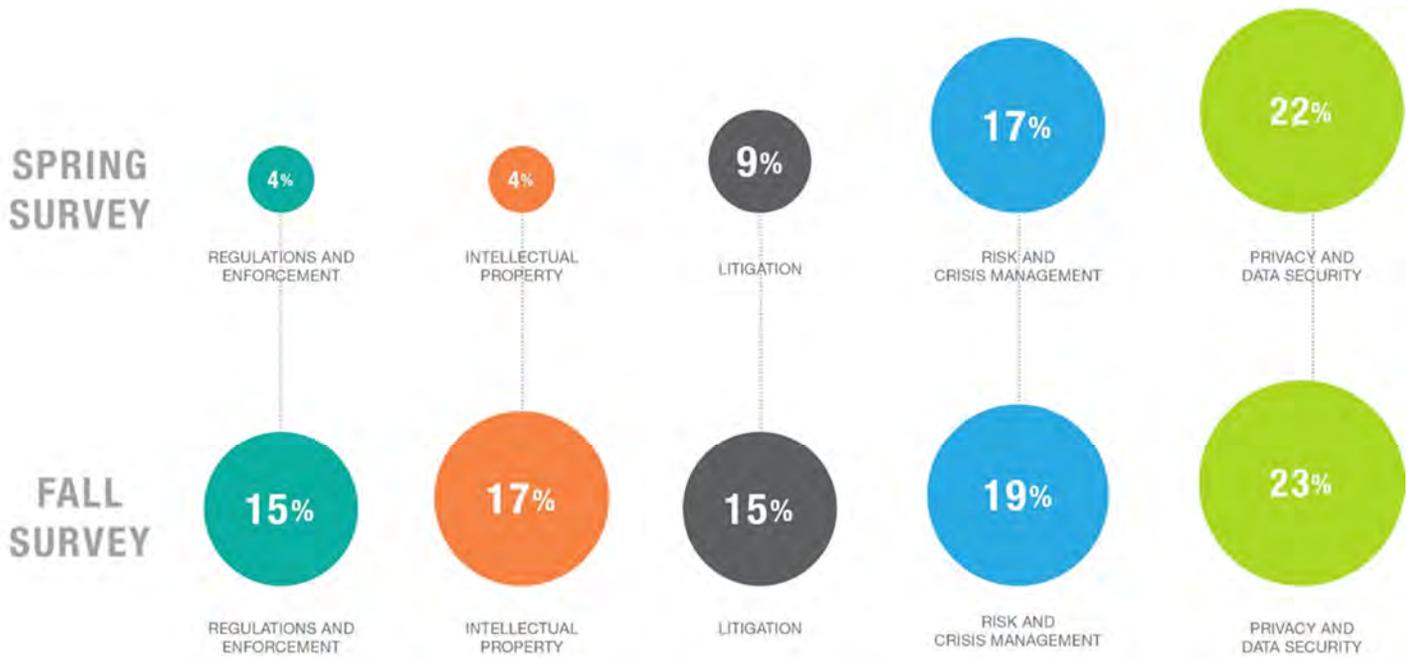


Respondents rated the following question 8, 9, or 10. Using a scale from 10 to 0, rate how important each of the following challenges is for your legal department currently with 10 being extremely important and 0 being not at all important. Using a scale from 10 to 0, rate how much time your legal department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



There is an imbalance existing across all five of the major areas, in the time dedicated to an issue when compared to that issue's perceived importance. And, perhaps most disconcerting, there appears to be no light at the end of the tunnel. From our spring to fall surveys, the disparity increased across all of the issue areas suggesting that legal departments are at risk of becoming overwhelmed.

“Substantial Time” - “Very Important” Imbalance
Percentage Point Deficit by Survey Edition



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. 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.



Issue By Issue

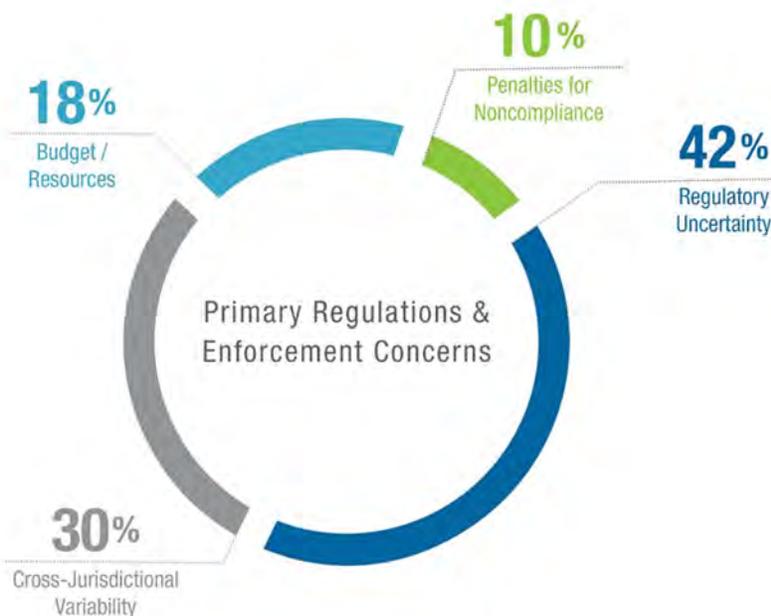
Regulations & Enforcement

Many of the survey respondents reported that they struggled to keep up with the pace of change across all five of the substantive categories. GCs must think globally to maintain a culture of compliance across geographies and act locally in establishing policies and procedures that meet the prevailing local standards. This can put a tremendous strain on resources, particularly in the privacy context, as companies fit compliance with the upcoming European Union General Data Protection Regulation (GDPR) into their overall global compliance strategy.

“
Need to achieve GDPR compliance
and operationalize it
”

Primary Regulations & Enforcement Concern

% of Respondents (2017 surveys combined)



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



The survey responses reveal that in-house lawyers confront two key challenges when handling regulatory and enforcement matters: regulatory uncertainty and cross-jurisdictional variability. Regulatory uncertainty includes issues related to changes in the language or enforcement of existing regulations, increased regulations, 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.

Significantly, one primary obstacle is often compounded by the other, making this a particularly worrisome one-two punch for in-house lawyers. As the geographical complexities of doing business on a global scale show no signs of slowing down, we anticipate unpredictable swings in economic and regulatory policy will likely continue in the near term.

Intellectual Property

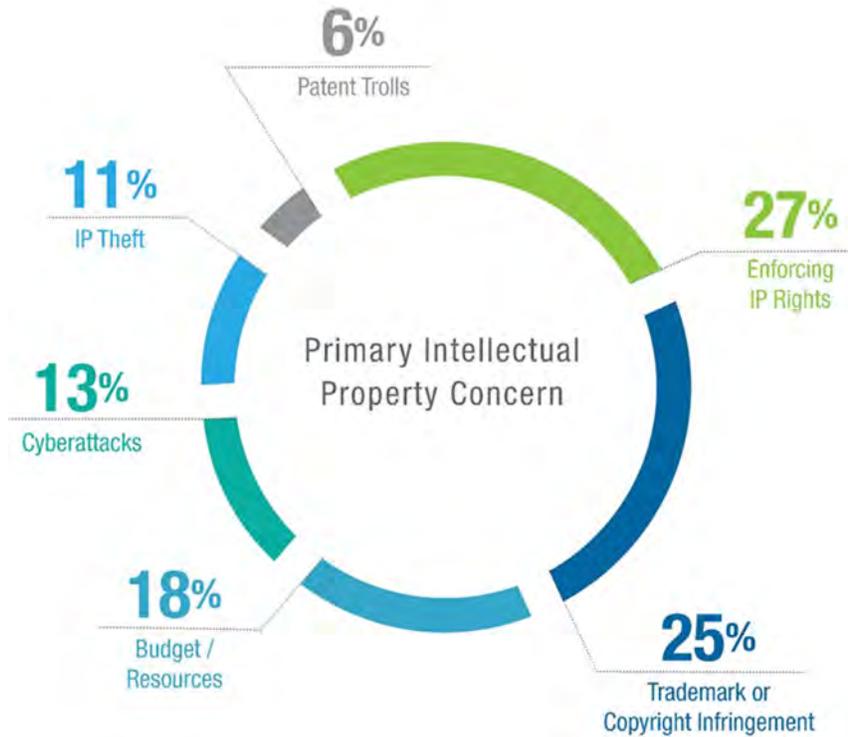
Whether patents, copyrights, trademarks, or trade secrets, intellectual property is emerging as the most valuable asset for many companies in today's knowledge and information economy. A little over half of the respondents (52 percent) described enforcing IP rights and trademark/copyright infringement as their primary concerns in the realm of intellectual property.

The fact that businesses are finding it difficult to enforce their ownership rights in what is in many cases their most valuable asset poses an existential threat. From China to the United States, the volatile political and global economic environment compounds the problem by adding an extra layer of complexity. Managing cross-border regulatory differences means intellectual property legal knowledge and expertise are at a premium.





Primary Intellectual Property Concern
% of Respondents (2017 surveys combined)



What is your company's greatest concern regarding intellectual property?

And if the sentiment expressed by the survey respondents continues to hold, increased economic and political uncertainty across the globe could result in even more IP work being sent to outside providers. Working with limited resources under increased scrutiny, the legal department is now held accountable for its spending, but that doesn't mean it won't spend for services it deems valuable.



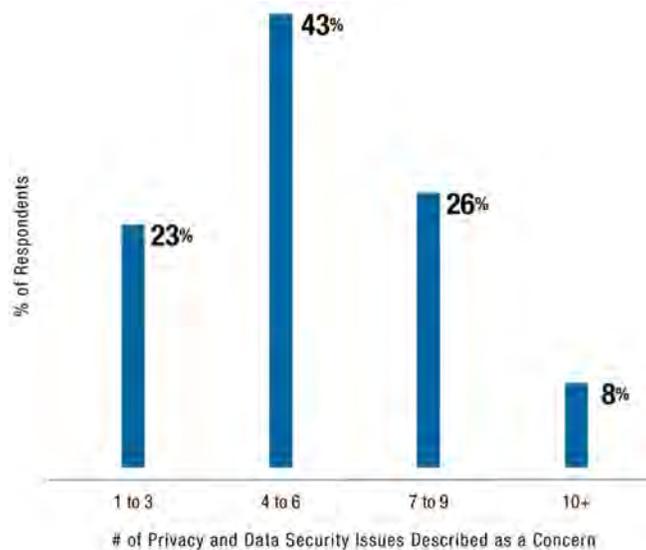
Privacy & Data Security

Corporate law departments are coming to terms with their position in the trenches of the cyber fight. Some are even going a step further and embracing a leadership role. It is amazing to consider this issue's rise to prominence. Ten years ago, cybersecurity would have been a top-of-mind concern to only a few in-house practitioners. Today, law department leaders regard it as one of the most important challenges they face.

While significant progress has been made with regard to corporate awareness of cyber threats, recent high-profile incidents, coupled with our survey responses, reflect lingering uncertainty and confusion about how to approach the challenge.



Number of Privacy & Data Security Concerns (Out of Possible 13)
(Fall survey)



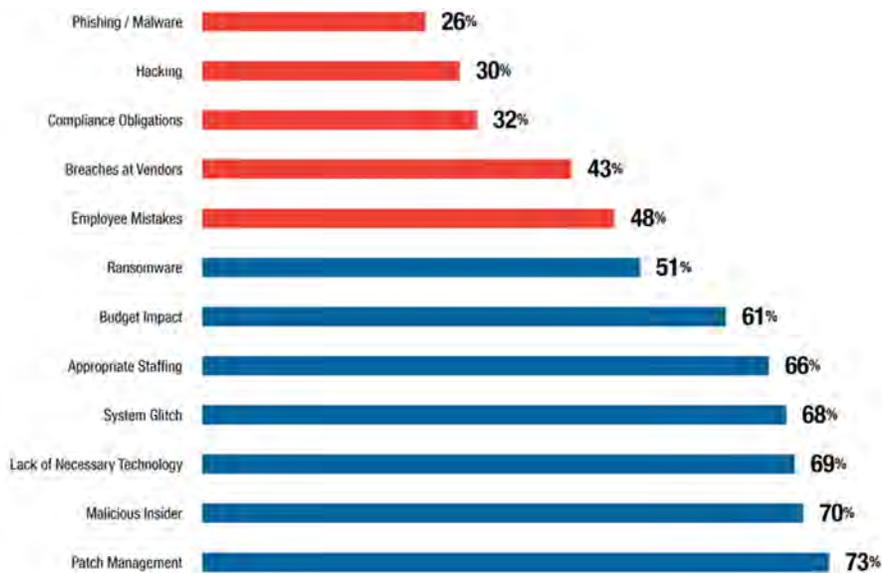
Looking at the list below, which concerns does your company currently have regarding privacy and data security? Please select all that apply.



Approximately half (48 percent) of respondents failed to identify employee mistakes as a privacy and data security concern, even though human error is a contributing factor to the majority of data security incidents. Moreover, nearly three quarters of respondents were not concerned about patch management protocols. Maintaining vigorous patch and update management processes is a vital component of any enterprise data security regime.

NOT a Privacy & Data Security Concern

% of Respondents (Fall survey)

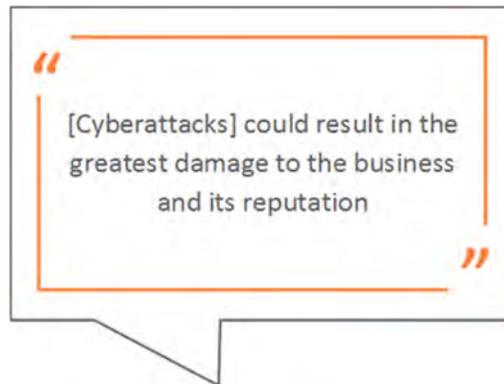


Looking at the list below, which concerns does your company currently have regarding privacy and data security? Please select all that apply.

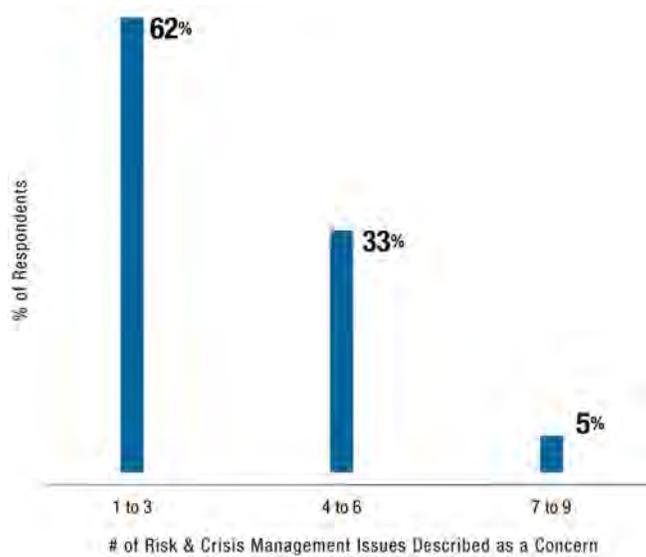


Risk & Crisis Management

In assessing the potential risks to businesses, it is important to remember that crises, while tending to occur unexpectedly, often have predictable causes and effects. As a result, a crisis is something that can be anticipated and managed in a way that mitigates the damages incurred.



Number of Risk & Crisis Management Concerns (Out of Possible 12) (2017 surveys combined)



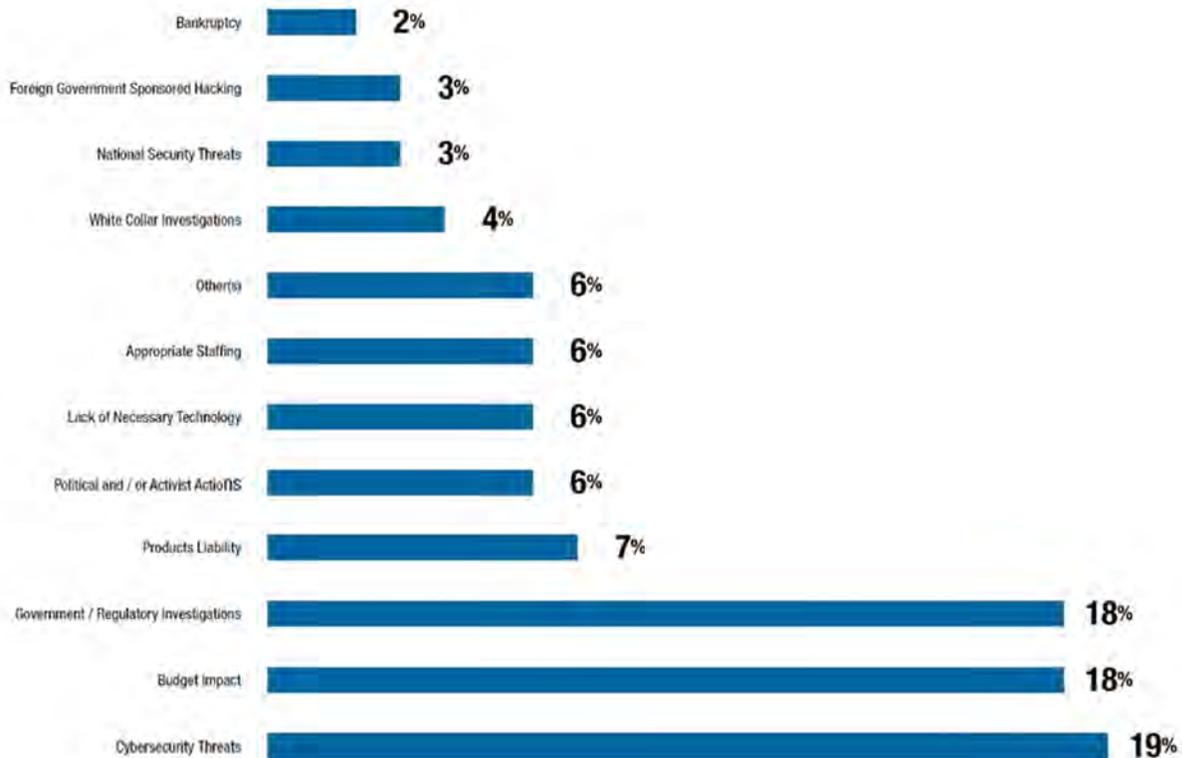
Looking at the list below, which concerns does your company currently have regarding risk and crisis management? Please select all that apply.



Although the structure of the survey considered each of the five issues in isolation, they are inextricably linked. Themes of data security, regulation and compliance, and resource management are front and center when in-house leaders think about the issue of risk & crisis management. In 2017, government/regulatory investigations, budget impact, and cyber threats combined to account for nearly 60 percent of all the risk & crisis management concerns expressed by survey respondents.

Most Frequently Cited Risk & Crisis Management Concerns

% of Total Risk & Crisis Management Concerns Expressed (2017 surveys combined)



Looking at the list below, which concerns does your company currently have regarding privacy and data security? regulations and enforcement? litigation? risk and crisis management? intellectual property?



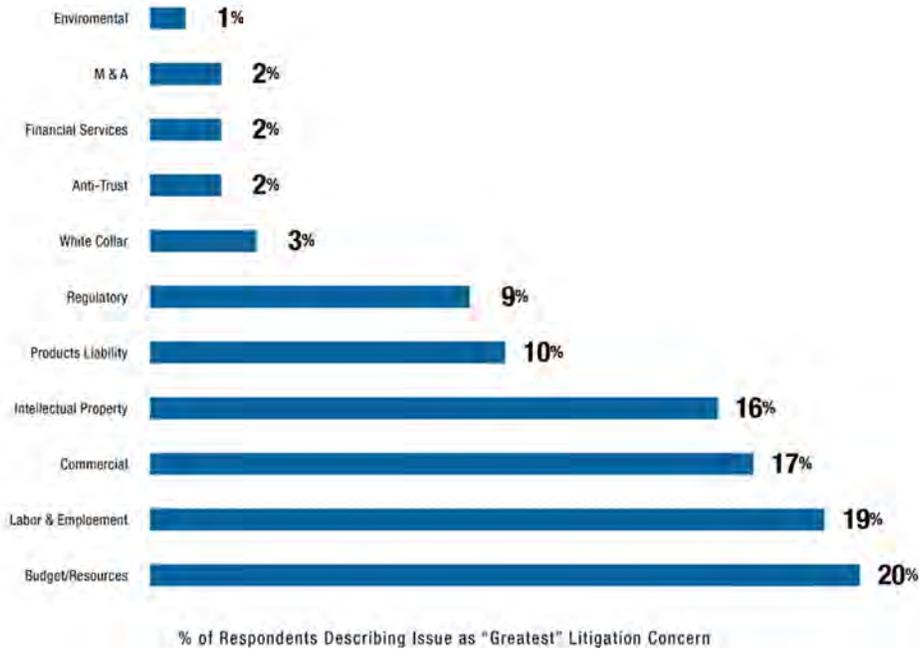
Litigation

Whether through one blockbuster bet-the-company suit or through several smaller ongoing suits which slowly drain resources, hurt morale, and damage the company's reputation, litigation poses a real threat to any business organization. Look no further than the fate of Gawker Media to see the devastating impact litigation can have on a business.



Primary Litigation Concern

% of Respondents (2017 surveys combined)



Looking at the list below, which concerns does your company have regarding types and other factors pertaining to litigation?



Resources & Ops: Doing More with Not Enough

Finally, in addition to handling these substantive issues and performing the necessary functions to get the job done, in-house leaders need to also concern themselves with being effective resource managers. Working with limited resources under increased scrutiny, the legal department must account for its spending. This has led to an explosion of legal operations professionals in in-house departments.

“
In order of priority: (1) Adequate legal staffing – ours is well below any industry norm in financial services; (2) Lack of efficient use of legal resources – too much time spent on ‘non-legal’ activities such as project and process management; and (3) Budgetary constraints – too little travel, CLE and in-house legal research resources such as relevant treatises, etc.
”

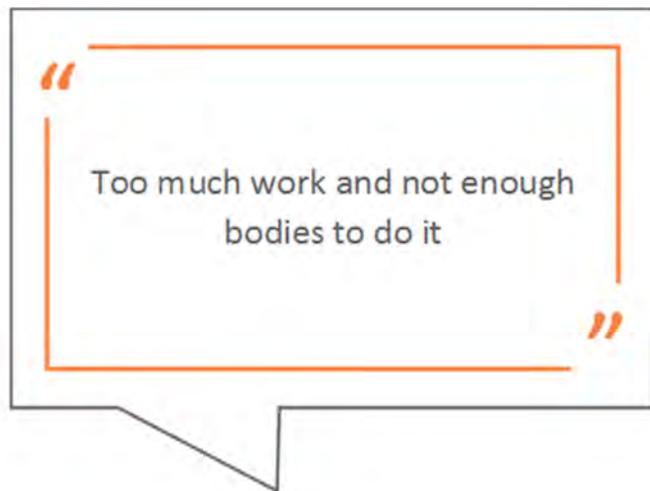
The 21st Century GC Must Fulfill the Roles and Responsibilities Listed on the Right While Expertly and Efficiently Managing Resources and Operations – Budget and Staffing Constraints Leave Them No Other Choice





Resource Crunch

The aforementioned roles and responsibilities are made more challenging by a lack of resources (e.g., budget, staffing, and technology) – a sentiment expressed throughout the survey. Moreover, those difficulties are heightened in areas with the least predictability (e.g., litigation and risk & crisis management).

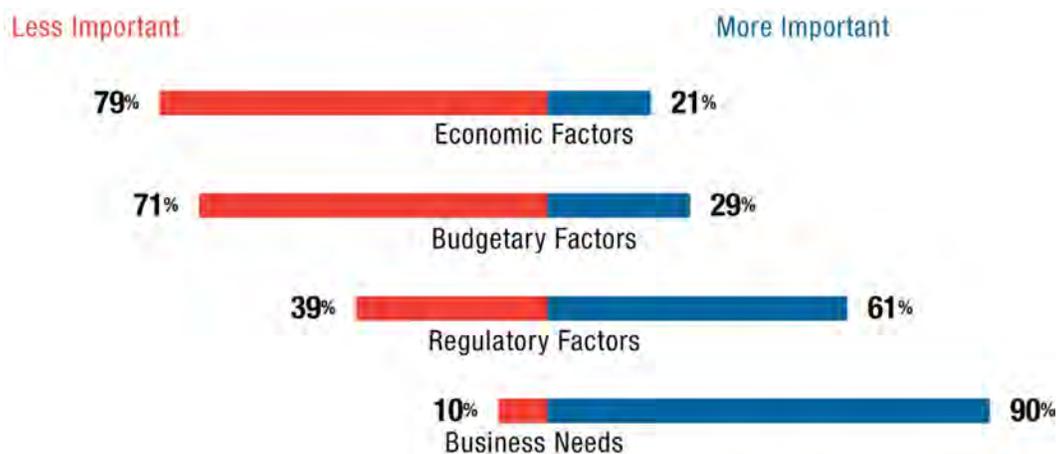


Given the prevalence and variety of the substantive challenges in-house leaders must overcome, it is no wonder that survey respondents report that demand is high for their department’s services.

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.

Comparative Importance of Factor in Influencing Demand for Legal Services

% of Respondents (2017 surveys combined)



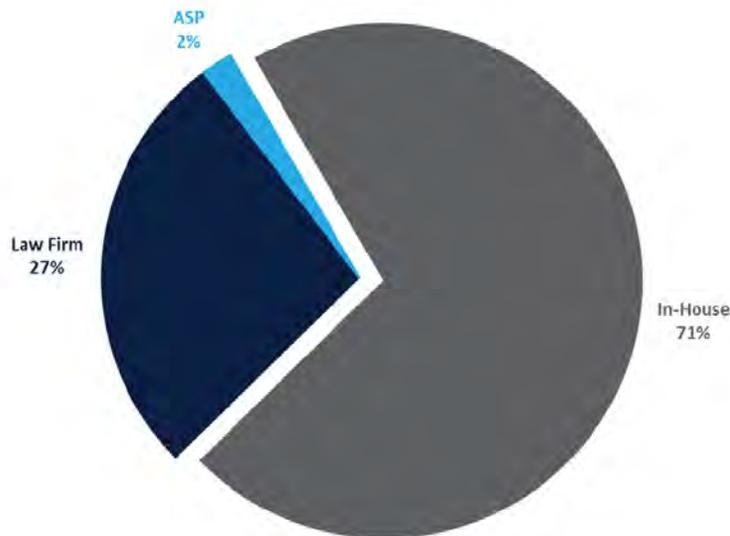
Please rank the below factors, in order of importance, that impact the future increase/decrease in demand for legal services?



Strategic Sourcing

Most legal work coming to in-house counsel is handled internally. As illustrated in the chart below, survey respondents indicated that 71 percent of legal work was kept in-house; whereas law firms account for the largest portion of outsourced work (27 percent) and alternative service providers are responsible for 2 percent.

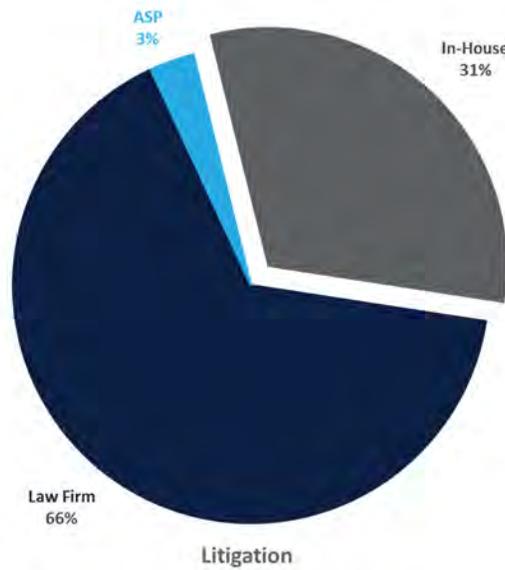
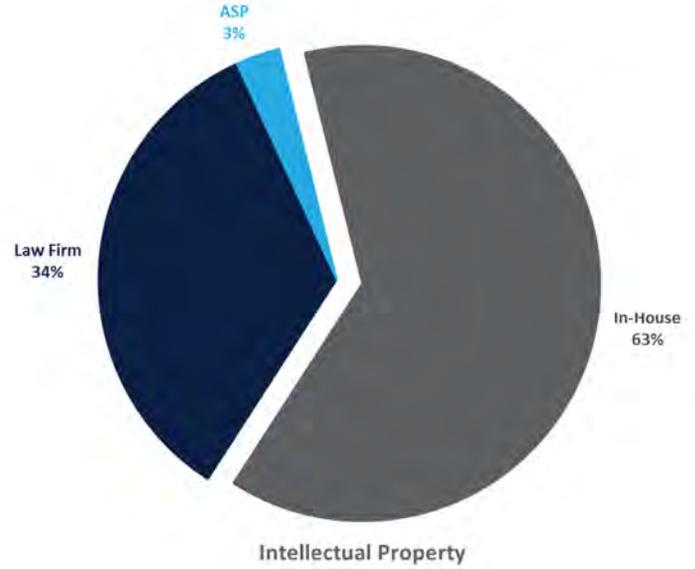
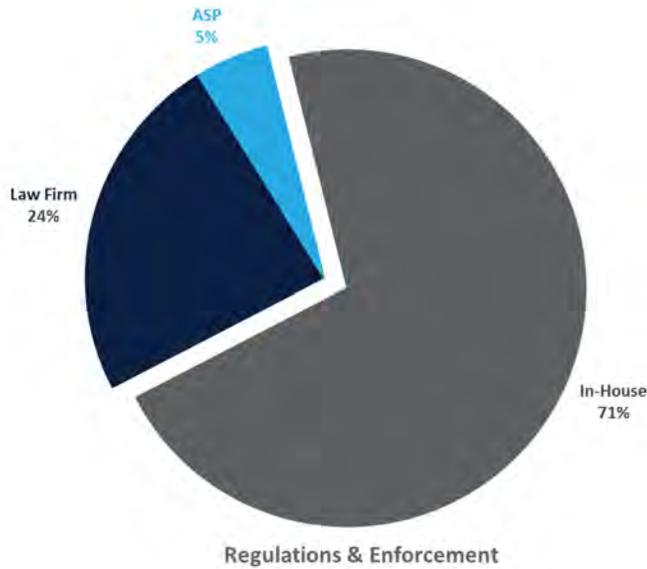
Average Percentage of ALL Company Legal Work Completed by Source
(2017 surveys combined)



Please enter the percentage of your company's total legal work that is handled by each of the following



Average Percentage of (Regulations & Enforcement, IP, and Litigation) Company Legal Work Completed by Source (2017 surveys combined)

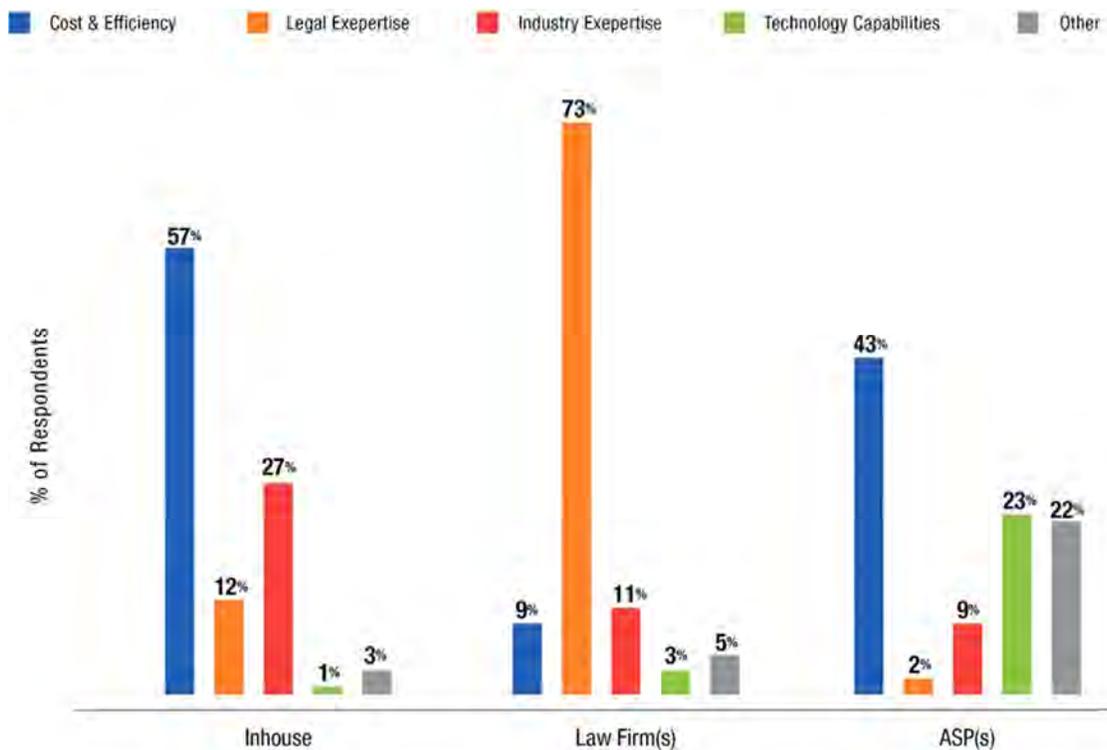


Please enter the percentage of your company's (regulations & enforcement, intellectual property, and litigation) legal work that is handled by each of the following



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 or are kept in house, “cost and efficiency” is the most prevalent rationale. This suggests that law firms may be not be competing against those providers on every occasion.

Primary Reason for Sourcing Work to Supplier (Fall survey)



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-house leaders turn to outside counsel, not for reasons of cost or efficiency, for example, but when they need legal experts on bet-the-company litigation, intellectual property defense, enforcement issues, or concerns related to privacy and data security and risk and crisis management. Strategic law firms should use these insights to carefully consider how they communicate their expertise and experience to their clients and the value that this brings to them.



Conclusion

More than ever before, the corporate law department is a significant force in shaping the future of a business. With that power has come new roles and challenges as well as increased scrutiny. In-house leaders are now expected to possess the skill and finesse to efficiently manage the departments' legal operations and resources. At the same time, they must do so in the face of tremendous uncertainty. The challenges remain, but new ones have also emerged. Rapid advances in technology and the global scale of events make this more complex. It's no wonder that so many GCs are 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. Its proprietary market reports, rating guides, prospecting tools, surveys, and rankings inform and empower leaders, enabling them to proceed with confidence.

About Morrison & Foerster

Morrison & Foerster is a global firm with exceptional credentials. Its 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 its 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. Morrison & Foerster's lawyers are committed to achieving innovative and business-minded results for their clients, while preserving the differences that make them stronger.