

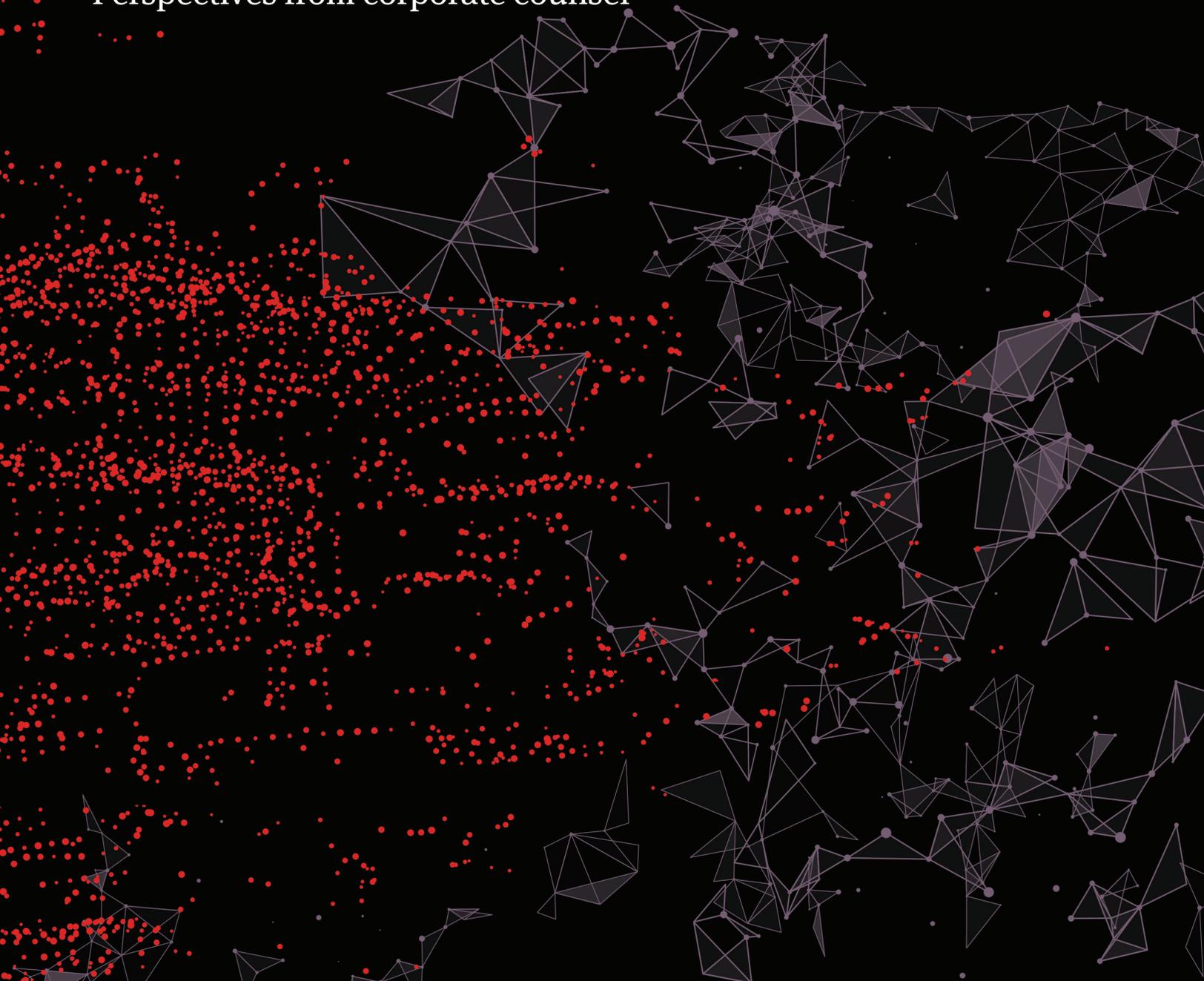
Financial institutions  
Energy  
Infrastructure, mining and commodities  
Transport  
Technology and innovation  
Life sciences and healthcare

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 NORTON ROSE FULBRIGHT

# 2018 Litigation Trends Annual Survey

Perspectives from corporate counsel



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Litigation Trends 2018  
Published by Norton Rose Fulbright

More than 50 locations, including Houston, New York, London,  
Toronto, Mexico City, Hong Kong, Sydney and Johannesburg.

Attorney advertising.

# Executive summary

Our 14th annual litigation trends study again this year shows that the number of lawsuits is down on average but organizations are facing more regulatory proceedings and arbitrations, trying to manage the cyber risk, data protection and tax controversy. At the same time, those who manage litigation are increasingly employing preventative measures and new technologies. Especially for those with a multi-jurisdictional caseload, that all combines to make their jobs much more challenging.

The results this year provide some unexpected findings. Although the number of regulatory proceedings were up, there was a drop in the level of concern. In some cases this is because organizations have implemented a strong compliance framework. Government promises to reduce regulation may also be a factor.

It was also interesting to observe a clear distinction emerging between efficiency-oriented legal tech and tech offerings which offer effectiveness advantages. Most legal departments rely, at least to some extent, on technology to tackle key processes in an efficient manner. A substantially smaller proportion are leveraging technological solutions to enhance overall departmental effectiveness; those who are report significant benefits.

Looking ahead, more companies expect the volume of disputes to increase than decrease. The type of disputes vary by industry, with some more focused on labor, others on class actions, and some on regulation (see page 9 for a breakdown by industry). A significant portion, two thirds, feel more exposed to cybersecurity and data protection disputes. Many see no end in sight given the difficulty in finding and prosecuting the perpetrators of cyber crime, combined with the increased and varying data protection regulation across the world. More than ever, companies are turning to technology-enabled processes and systems for monitoring and managing these risks and to protect the organization.

We hope you find this report useful. Please reach out either to myself or your contact partner at Norton Rose Fulbright to discuss this research and the issues raised in more detail.



**Gerry Pecht**  
Global head of litigation

## In this year's report:



We help you navigate some of the legal technologies available and share those which all of you find most useful.



We build on the litigation minimization framework with a special focus on cybersecurity and data protection.



We look into some of the potential pitfalls for international companies around balancing cross-border discovery requirements and privacy regulation along with sensitive issues such as facilitating payments.



We share some example metrics which companies can use to help measure their success and suggest ways in which alternative fee arrangements (AFAs) can help both your internal teams and external suppliers to work towards the same goals.

# Key statistics

**\$1.2m\***

spend on disputes per  
US\$1bn of revenue

**2.7\***

Disputes lawyers per  
US\$1bn revenue

**22%**

spent more time dealing  
with tax controversy issues

**<50%**

Over half now have  
to balance cross-  
border discovery with  
jurisdictional data  
protection regulations

**67%**

feel regulators are  
becoming more  
interventionist, a  
decreasing proportion  
over the last two years

**27%**

expect volume of disputes to  
rise moving forward

**70%**

of work still conducted  
under hourly rate despite  
95% satisfaction level  
with AFAs

**27%**

Embedding lawyers,  
training and early case  
evaluation identified  
as most effective  
preventative measures

**2/3**

Two thirds feel more  
exposed to cybersecurity  
and data protection issues

*\*Median average*

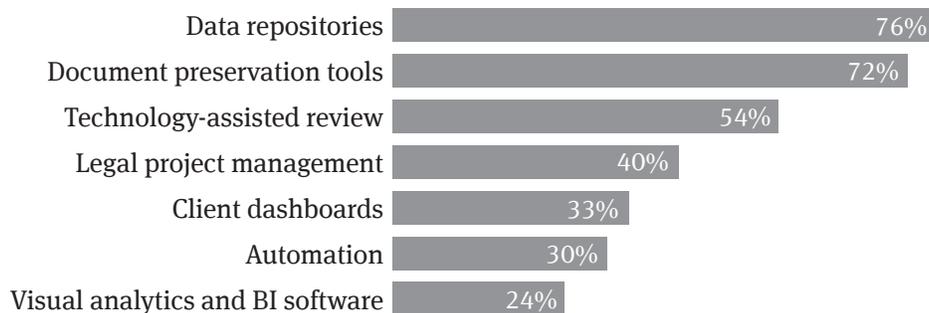
*Unless otherwise noted, all currency values are stated in US dollars.*

# The main trends



**Efficiency-enhancing legal technology is now a must have for legal departments; now is the time to embrace newer, value-adding technologies**

*“Data review tools are essential for discovery. We would be lost without them.”*



Data repositories and tools for document preservation, technology-assisted review and other process automation have now seen wide uptake and been successfully embedded in most large legal departments. With their adoption comes a shift in how they are viewed by users. When asked why they are helpful, many are so accustomed to using them that they think simply of how inefficient the department would be without them – the benefits are taken as a given.

*“There is a lot of stuff that goes on, so sifting through it manually would be a nightmare.”*

With less widely used software in areas such as project management, client dashboards, visual analytics and business intelligence (BI), corporate counsel describe the benefits as more effective overall outcomes. These include efficiency gains with wide reaching impact – cost management remains a focus for all. In the cases of project management software and client dashboards, respondents see improved control as a major gain. Greater ease of tracking and monitoring projects means that departments have better clarity on priorities. Technology-enabled project management helps avoid a host of issues that could divert attention from core litigation issues.

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*“It just helps make sure that things stay on track and are handled appropriately and on time – and I think that helps avoid other types of issues.”*

Taking enhanced effectiveness a step further, sophisticated use of tools such as client dashboards and BI enables corporate counsel to be more proactive and extend the assistance they offer beyond the conclusion of litigation.

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*“(It is helpful in) knowing where our operations are and where disputes are likely to arise.”*

Nearly half the organizations we interviewed have dedicated innovation teams. But only 15% of these report active innovation initiatives in the legal department. For legal departments striving for continual improvement, a key take-away must be not to stop pushing forward with technological advancement once the more obvious efficiency gains have been achieved. The continued drive for innovation in legal department management needs to come from within the department itself – take advantage of support from experienced innovation teams where available but don’t rely on such resources to provide the impetus, as their focus may be too diffuse.

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*“It helps us provide a big picture of litigation trends and how we might be able to provide greater assistance to our clients, after litigation is over.”*

We recommend looking at our NRF Transform initiative on page 14 where we present the global change and innovation program offered to our clients.

**Regulatory proceedings are slightly up versus last year and substantial regulator intervention continues – yet concern over regulatory issues is starting to subside**

*“In the United States our regulatory regime has changed, in some ways for the better... but things aren’t settled in a lot of ways and there’s a lot of public attention and political attention”*



- Average number of regulatory proceedings increased from three to four
- Yet the proportion considering regulatory disputes among the most concerning dropped from 26% in 2017 to 18% in 2018

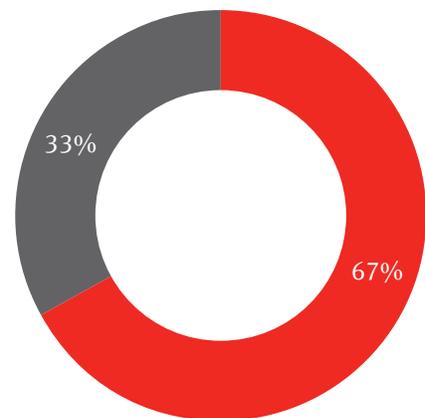
Despite regulatory proceedings being up compared to last year, our research, perhaps surprisingly, shows that respondents are becoming progressively less concerned about regulatory disputes – significantly fewer overall cited regulatory as their top area of concern than did in 2017.

*“We just have to make sure we keep up with the regulatory rules and laws – and we are in full compliance with those... We’re very conscious to make sure we are in full compliance.”*

Two factors may be at work: First, a political shift towards reduced red-tape makes some optimistic (while most respondents still indicate that more regulators are increasingly interventionist, this figure has dropped considerably over the last two years). Second, many organizations have been heavily focussed on building their compliance frameworks in recent years and are now at a stage where this investment is expected to pay off.

Year-on-year, our research tracks the number of regulatory proceedings. This year has seen the number increase slightly with two thirds saying regulators have become more interventionist in the last 12 months: overall, regulatory remains the third most concerning disputes area and the number one concern within the Finance sector.

Those respondents who put regulation at the top of their list of concerns, say this is because regulation is increasing and with it, much greater levels of financial exposure and reputational risk.



■ Less interventionist  
■ More interventionist

*“In our industry in the United States, there is very little private litigation relating to investment management contracts; what happens instead is the regulator takes it upon themselves to be the central client, and reputationally it’s harmful.”*

**Exposure to cybersecurity and data protection disputes is increasing across all industries – investment in this area is needed as it seems unlikely that the risk will reduce in the short to medium term**

Two thirds of respondents report feeling more exposed in 2018 to cybersecurity and data protection disputes. Environmental factors including increased and more sophisticated hacker activity, greater regulatory complexity and higher reputational risk (given greater public interest in these areas) are all contributory factors. Respondents also worry about the increasing business reliance on technology and digital links with external parties, storage of greater volumes of data and increasing cloud storage.

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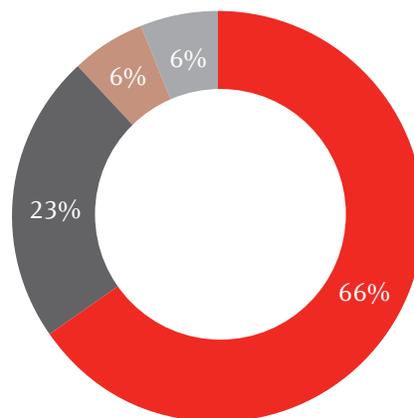
*“We’ve also had some disruption on our emails, with people phishing and rechannelling commission payments somewhere else.”*

Only 10 percent said cybersecurity and data protection disputes were their top concern at present but within this group it was evident that the concern was substantial – over a quarter described their exposure in this area as significant and almost as many were dealing with a live matter. At present, organizations most concerned about cybersecurity/data protection are concentrated in two groups – those dealing with sensitive, personal data (particularly health or financial data) and those working on critical services such as transport, energy, healthcare and finance.

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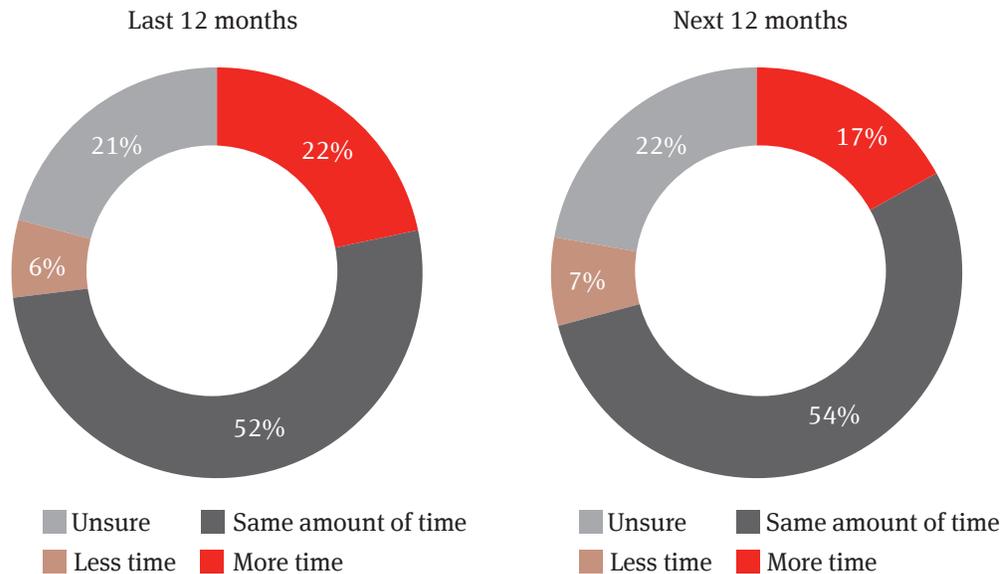
*“There’s just more enforcement around it and the cybersecurity risks are more aggressive.”*

Many respondents shared with us the steps they’ve taken to mitigate risk in this area. We recommend referring to the cybersecurity risk mitigation framework within our toolkit on Page 11.



■ Don't know    ■ About the same  
■ Less exposed    ■ More exposed

### Focus on responsible tax practices increases time dedicated to tax controversy



In a year when news has focused on the controversial tax arrangements of high profile companies, it is not surprising to find our respondents increasingly focused on such matters: 22 percent spent more time dealing with tax controversy issues over the last 12 months and 17 percent expect to spend still more time in the future.



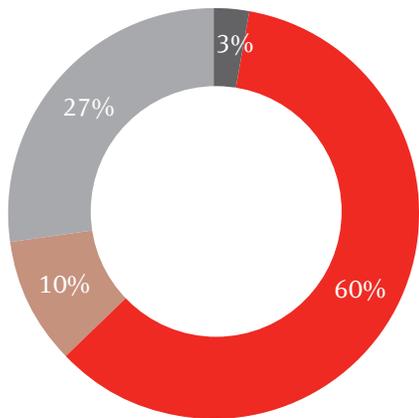
### Increasingly international business operations lead to increase in cross-border discovery and related data protection issues

There has been a small increase in the percentage of matters requiring cross-border discovery over the last year, now at 45 percent and likely reflective of ongoing globalisation trends. However, legal departments are reporting a much more substantial rise in the need to balance discovery obligations in one jurisdiction with data protection regulations in another – the number facing this challenge has gone up by 11 percent, a notable jump in just 12 months. This issue has long existed but the onset of GDPR in May 2018 has brought it to the fore. Key implications of the regulation include that orders by non-EU authorities requiring data transfer are not valid reasons for disclosing data to third countries and all data created or stored in the US relating to an EU citizen is now subject to GDPR. Essentially, grey areas and potential for pragmatic workarounds have been removed and the stakes are high, with fines for non-compliance extremely steep.

- Increase in those facing cross-border discovery from 41 to 45%
- Increase in those having to balance discovery obligations in one jurisdiction with data protection regulations in another rises from 43 to 54%

# Looking to the future – predicted trends

Over a quarter of businesses surveyed anticipate the volume of disputes to increase over the next year, driven mostly by expansion. This is slightly up since last year and the technology, life sciences and healthcare industry sectors anticipate the biggest uptick.



27% expect an increase in the volume of disputes  
10% expect a decrease  
= on balance +17%

- Increasing
- Stay the same
- Decreasing
- None pending

The continued and growing trend for class actions, in particular in securities litigation, is currently the biggest litigation issue faced by **financial institutions**. In over a quarter of cases, class actions represent the most numerous dispute type being handled and the potentially enormous cost implications and reputational risk also make these one of the most concerning. Cybersecurity and, specifically, data protection regulation are similarly regarded as particularly significant trends for financial institutions – as with class actions, the potential financial and reputational costs are extremely high and, given their nature of business, financial institutions are particularly exposed.

The **energy** and **IMC** (infrastructure, mining and commodities) sectors report being impacted by a wide range of litigation trends and issues but the most numerous and concerning area of dispute is contracts. Reflecting this, important trends in these sectors include the increasingly litigious environment and the need to manage escalating costs of outside counsel.



*“My only concern is everything becoming more litigious... People looking for easy money. And insurance companies just settling instead of fighting; that I see as a problem too.”*

	Financial Institutions	Energy	IMC	Life Sciences and Healthcare	Technology and innovation
<b>Most numerous disputes</b>	Labor 32% Contracts 31% Class actions 26%	Contracts 56% Labor 27% Pers. injury 21%	Contracts 71% Injury 43% Labor 29%	Labor 59% Contracts 37% Malpractice 26%	Labor 47% Contracts 40% IP/Patent 30%
<b>Most concerning</b>	Regulatory 29% Class actions 19% Securities 19%	Contracts 34% Regulatory 19%	Contracts 37% Cybersecurity 14% Real estate 14%	IP/Patent 23% Regulatory 21% Labor 21%	IP/Patent 30% Contracts 26% Labor 22%
<b>Top trends facing them in litigation</b>	Class actions Cybersecurity	Counsel cost Class actions Labor Tech Disputes increase	Cybersecurity Labor Discovery	Labor Discovery Regulation Class actions IP	IP Regulation Class actions Cost
<b>On balance increase in volume</b>	+11%	+20%	+20%	+27%	+29%

Within the **life sciences and healthcare** and **technology and innovation** sectors, while labor matters represent the most numerous type of disputes, the most concerning area is IP/Patent disputes. IP/Patent disputes are regarded as relatively costly in comparison to other areas and technology companies in particular face large exposures.

# Legal department litigation toolkit

## Preventative measures

In 2016 we asked respondents whether they had implemented any preventative measures aimed at reducing the volume of litigation that they found to be effective. From the success stories they spoke about, we refined a list of the top measures legal departments had implemented and have tested the success of each over the last two years.

Notably, the measure with the highest success rate is not the one that is most heavily implemented; as a proportion of those departments who have attempted it, embedding lawyers within business operations is deemed to have been the most effective measure. However, less than half have attempted this.



Training and seminars with internal people has proved the most popular measure for the last two years with three quarters implementing this as a measure in the last 12 months – its ratio of success to usage is almost as high as embedded lawyers, with early case resolution/evaluation also proving beneficial in many cases.

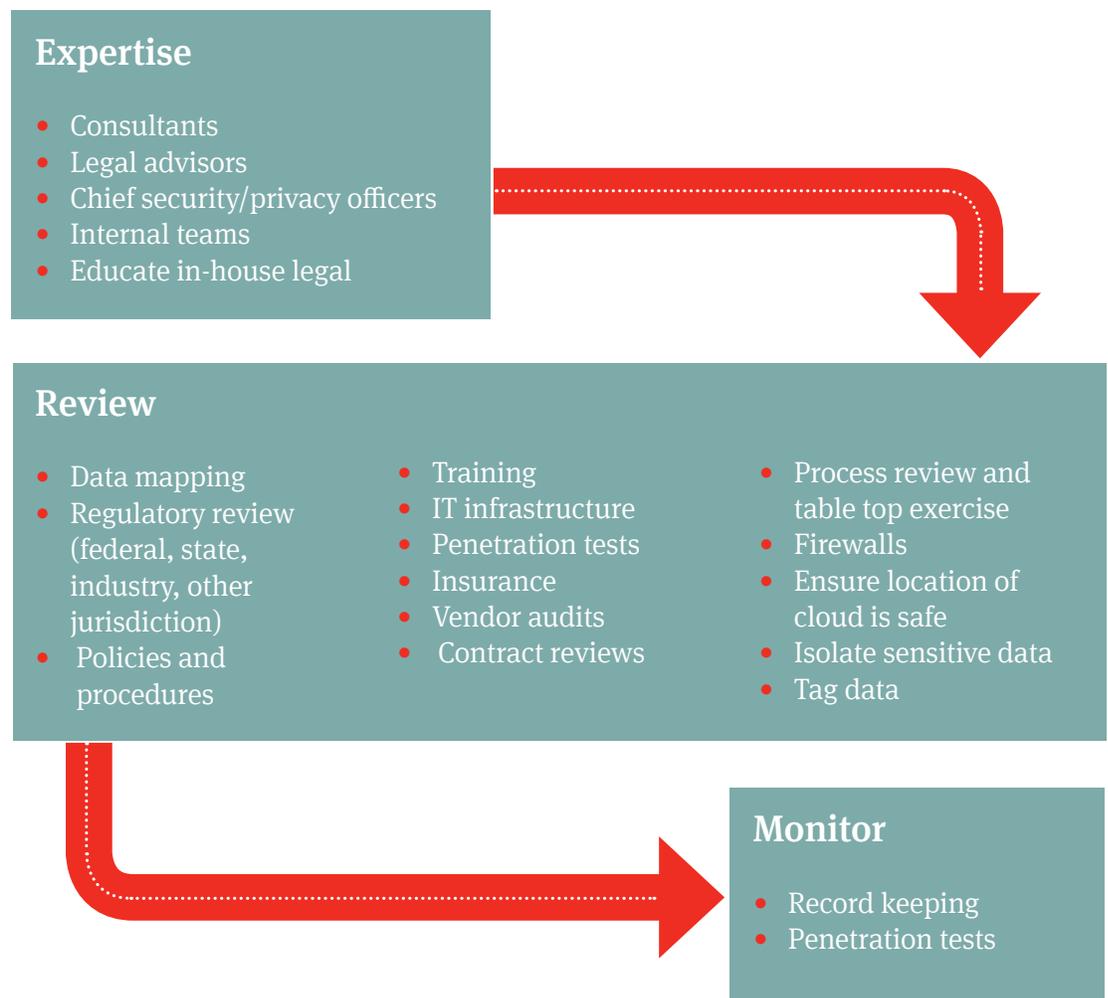


## Litigation minimization framework special focus on cybersecurity/data protection

Increased exposure to, and concern regarding, cybersecurity threats were reported across all sectors, with many attributing this to external environmental factors, rather than internal business model factors.

We therefore asked respondents about the actions they are taking to mitigate risk in this area. Based on the activities reported, we have developed the Cyber Risk Mitigation Framework to provide a comprehensive overview of steps being taken to actively manage exposure to cyber risk. The framework outlines the key areas of expertise being pooled, developed and drawn upon; the perceived need to review and/or implement a wide-reaching range of processes, documentation and critical infrastructure; and efforts to monitor activities using record keeping and testing.

### Cyber risk mitigation framework



## Metrics

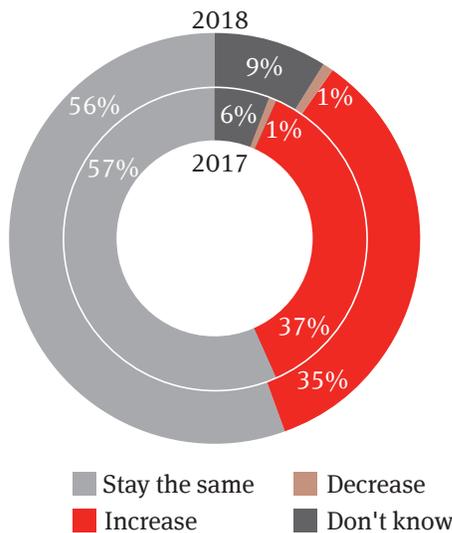
The performance of most legal departments is measured in five key areas: results, spend, meeting budget, supporting the business and managing risk. Clear targets should be put in place against which success can be objectively measured. Each year, targets should be recalibrated, taking into account the previous year's results. A scorecard approach enables businesses to monitor and disseminate key metrics in an easily accessible manner.

GOALS	SCORECARD METRICS	TARGET (EXAMPLES)	ACHIEVED
<b>Results</b>	% disputes achieving desired outcome	85%	<input type="checkbox"/>
	% disputes settled (vs litigated)	75% settled	
	% cases resolved early	40%	
<b>Spend</b>	Total dispute spend	Specific values, initially based on historical performance	<input type="checkbox"/>
	Internal spend		
	External spend		
	Value of settlements		
	Value of fines and damages		
<b>Meeting budget</b>	Dispute spend as % of dispute budget	<100%	<input type="checkbox"/>
	Dispute spend as % of total legal budget	<25%	
	Dispute spend as % of company revenue		
<b>Supporting the business</b>	% of business operations with embedded lawyers	90%	<input type="checkbox"/>
	Internal client satisfaction score	8/10	
<b>Managing risk</b>	Total number of disputes handled	10% reduction	<input type="checkbox"/>
	% of staff having attended training	40%	
	# of litigation risks identified	Increased year on year	
	# of litigation risks actively managed		



## Alternative fee arrangements

Almost 60 percent of businesses surveyed are using AFAs. These account for approximately 30 percent of their disputes fees and the overwhelming majority (nearly all) report high satisfaction levels with the arrangements. These figures have been stable over the last two years, despite 37 percent in 2017 expecting the use of AFAs to increase (again, a similar number said this in 2018.) This suggests that the desired change is not yet happening and there is considerable scope for further adoption.



Alternative fee arrangements

	2018	2017
% using	59%	58%
% of spend	30%	28%
% satisfied	94%	96%

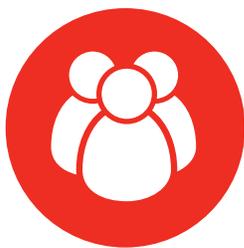
Various types of AFA should be considered to support the department’s performance in the key areas of measurement.

Goals	Suggested AFAs
Results	Success / contingent fees
Spend	Fixed / capped fees
Meeting budget	Fixed / capped fees
Managing risk	Retainer for monitoring regulations and periodically review contracts Bonus to law firms working on any matter who identify potential litigation risks

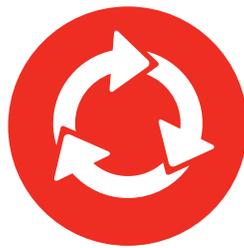
Fixed fees are currently the most widely adopted AFAs, with over 60% of respondents employing them to any extent. Those who are yet to set up such arrangements, or have struggled to do so in particular areas of dispute, could consider reviewing average spend per matter over an appropriate period (e.g. 1-2 years depending on volume) and using this as a starting point for a fixed fee level. It may be appropriate to agree to different fixed fees for different stages of a dispute – fixed should not mean inflexible, where flexibility is warranted and beneficial to both parties. A range of fixed fee levels relating to varying volumes of business could also be discussed.

## NRF Transform

Whether effectively handling high-volume litigation, staffing matters globally for time- and cost-management, or completing document discovery on a tight deadline, NRF Transform aims to change how our firm works internally and with our clients. Norton Rose Fulbright's global change and innovation program is driving effectiveness in our deployment of people, processes and technology and maximizing the value of the service we provide.



People



Processes



Technology

### Case study

#### High volume aviation litigation claim handling

A major airline asked us to help clear a growing backlog of small claims, relating to flight delays and cancellations. The problem for the airline had been made worse by third party firms buying up claims against them, in bulk, and pursuing them aggressively. The third parties knew the airline would have to settle if they could not respond fully to all claims within the short deadline imposed by legislation.

We designed a detailed process for tracking, reviewing and proactively defending the claims with the administration of the project and most of the work completed from our Hubs. This work was supervised through an online platform in which all work was completed by our aviation disputes team in London. They were in turn supported as needed by our aviation disputes team in South Africa. We have administered the process since early 2017 and have delivered material savings to the client while sharing the benefits of ongoing process and technology improvements. We have also freed up considerable internal resource at the client, to focus on work where they add more value.



### Running any legal project or process

With a complete range of legal specialisms, supported by resourcing, process and technology professionals, we can deliver any scale and any type of legal project or internal process end-to-end. This could be a one-off mass review of corporate positions across thousands of contracts, requiring efficient handling of the routine issues but needing specialists for more complex items and quality control.

### Case study

#### Three Mondays – Canada, Australia and the UK teams combine to meet 24-hour deadline

A client in Vancouver contacted us on a Sunday evening, and asked for a suite of construction documents to be turned around by midday Monday, Vancouver time.

Our London office, working with the Ottawa office, was working on the matter. That evening they briefed our Brisbane office, who started working on the main documents during their Monday.

At the end of their Monday, the Brisbane team handed over to the team in London, who reviewed the main contracts, and worked on the collateral suite, sending both back to Ottawa late afternoon Monday London time.

The client-facing team in Ottawa gave the documents a final review, before passing them to Vancouver, for midday Monday, Vancouver time.



### Round the world resources

Our global platform means that the legal services a client receives from us are not constrained by the time zone in which they operate. We can provide clients with a matter team using any combination of our 4000 lawyers, across any of our 50+ offices. These teams span all time zones to provide 24 hour resourcing, meaning we can comply with the most demanding turnaround times, designating legal teams across multiple time zones, practice areas and geographies to get the job done, to the right standard, and in the right timeframe.



### Data gathering and analysis

Using intelligent data gathering and analysis, we are able to gain new, sophisticated insights into our clients' legal positions and the progress of their matters in real time. For our clients, the scope and potential impact of these insights is considerable.

### Case study Global policy advice

A client headquartered in Hong Kong, but with global operations, asked us to advise on a new corporate policy. This meant checking the policy worked in each relevant jurisdiction, and preparing local amendments where needed to make it effective.

Step 1 was instructing and obtaining advice from our offices and other counsel around the world. Step 2 was analysing responses, and advising the client. The typical approach to a mandate like this would be to liaise by email with local counsel and other offices; obtain a written memo from each, then prepare an aggregate report on all jurisdictions.

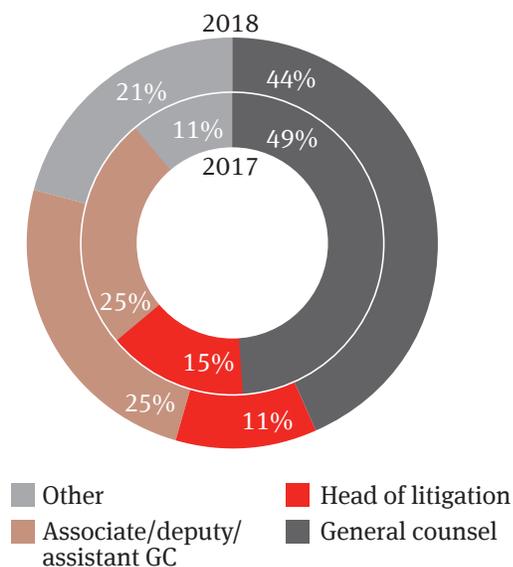
Instead, the Hong Kong corporate team worked with our Hub to prepare a bespoke online portal. Local counsel and our other offices confirmed the terms of their instructions, and then used a structured questionnaire on the portal to provide all advice. As well as eliminating most email traffic, the approach gave the Hong Kong team (and the client) a real-time view of the advice as it was prepared, allowing more effective project management, and timely interventions to keep local advisers on point and explore issues early. Because the questionnaire data was structured, a full report could then automatically be extracted, and a covering analysis prepared in which high level results were provided to the client in a dashboard format – saving the client and us time.

# Methodology and demographics

365 corporate counsel contributed to Norton Rose Fulbright’s 14th Annual Litigation Trends survey; respondents were overwhelmingly US-based, or representing US-based organizations.

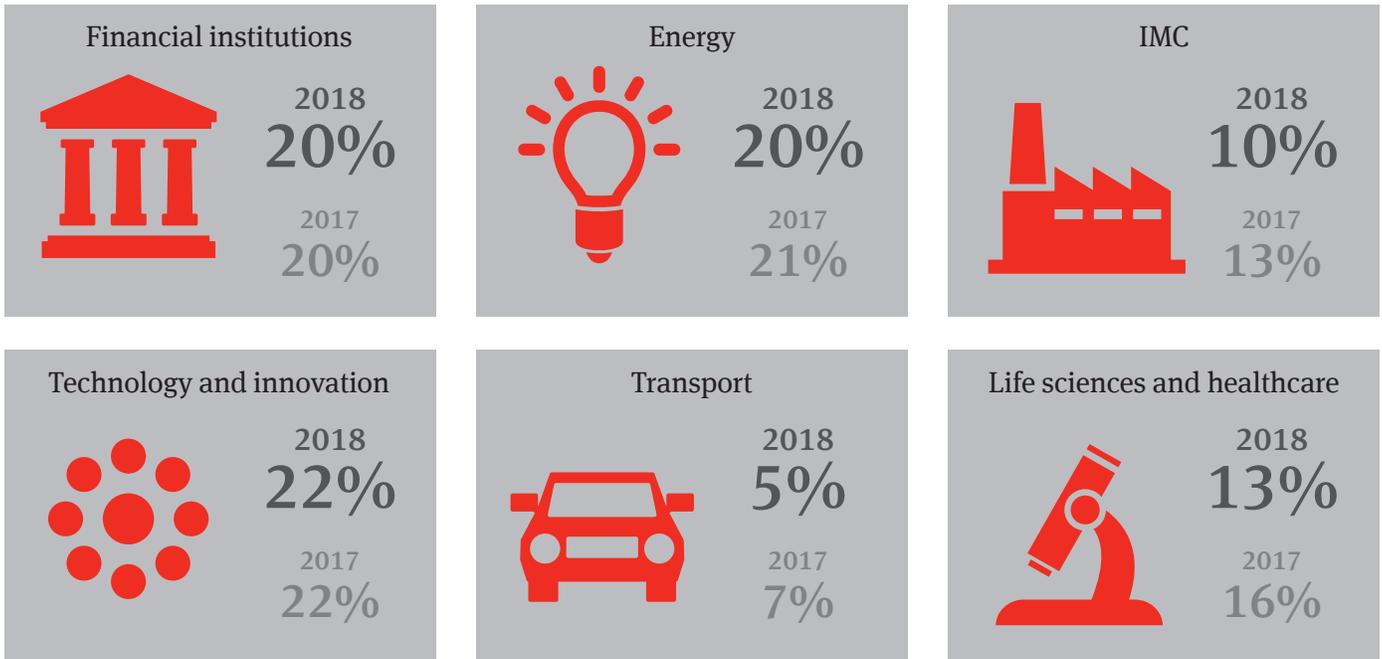
As with previous years, corporate counsel had the opportunity to participate using a web-based survey, with a telephone interview campaign following across July, August and early September 2018.

Survey respondents were a combination of Norton Rose Fulbright’s US clients and independently sourced corporates.

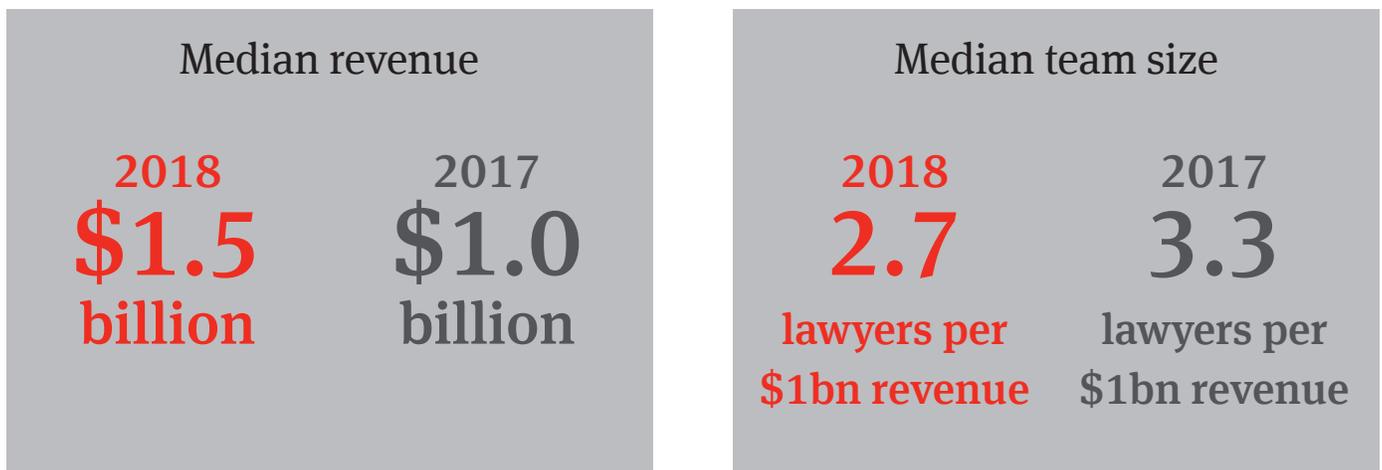


Industry representation proved highly comparable with 2017 US survey response breakdowns, with only small differences in breakdown.

Slight decrease in IMC, life sciences and healthcare, transport; approximately the same for finance, tech, energy.



The median (mid-point) size of participating organization was slightly higher than 2016 at US\$1.5 billion, with a slight drop in disputes team size at an average of 2.7 disputes lawyers per US\$1bn revenue.



Unless otherwise noted, all currency values are stated in US dollars.

## Our global resources

Key industry strengths	Partners Worldwide	Lawyers staff worldwide	Offices
Financial institutions	<b>&gt;1200</b>	<b>&gt;4000</b>	<b>58</b>
Energy			
Infrastructure, mining and commodities	75% men, 25% women (approximately)		
Transport			
Technology and innovation			
Life sciences and healthcare			

## Quality. Unity. Integrity.

Norton Rose Fulbright has one global set of business principles, which guide behavior and help to ensure that the business operates to the highest standards. Our business principles are based around quality, unity and integrity and apply to all our activities and staff worldwide. They describe our culture and personality both internally and externally, the way we work and what we stand for.

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**Honor roll of cybersecurity law firms by corporate counsel**

*BTI Consulting Group, 2017*

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**Chambers Global, USA: Litigation: E-Discovery**

*Chambers & Partners, 2018*

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**Chambers Global, Global-wide: Dispute resolution**

*Chambers & Partners, 2018*

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**Chambers USA, Texas: Litigation: General commercial**

*Chambers & Partners, 2018*



**Norton Rose Fulbright offices**

Europe		United States		Canada	Latin America
Amsterdam	Milan	Austin	San Francisco	Calgary	Bogotá
Athens	Monaco	Dallas	St Louis	Montréal	Caracas
Brussels	Moscow	Denver	Washington, DC	Ottawa	Mexico City
Frankfurt	Munich	Houston		Québec	Rio de Janeiro
Hamburg	Paris	Los Angeles		Toronto	São Paulo
Istanbul	Piraeus	Minneapolis		Vancouver	
London	Warsaw	New York			
Luxembourg		San Antonio			
Asia Pacific		Middle East	Africa		
Bangkok	Port Moresby	Bahrain	Bujumbura**	Harare**	
Beijing	Shanghai	Dubai	Cape Town	Johannesburg	
Brisbane	Singapore	Riyadh*	Casablanca	Kampala**	
Canberra	Sydney		Dar es Salaam	Nairobi**	
Hong Kong	Tokyo		Durban		
Jakarta*					
Melbourne					
Perth					

\*associate office

\*\*alliance

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If you have any questions or would like to be considered for inclusion in next year's survey, please email [litigationtrends@nortonrosefulbright.com](mailto:litigationtrends@nortonrosefulbright.com)



## Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa, the Middle East and Central Asia.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

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