

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

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 NORTON ROSE FULBRIGHT

# 2016 Litigation Trends Annual Survey

Perspectives from corporate counsel

[#litigationtrends](#)

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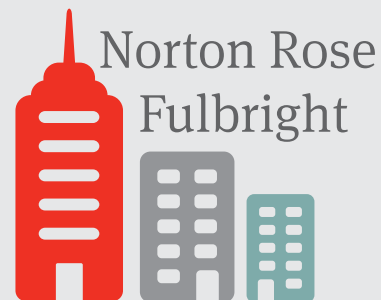


Framework for minimizing litigation 38

More than 50 locations, including Houston, New York, London, Toronto, Hong Kong, Singapore, Sydney, Johannesburg, Dubai and Munich.

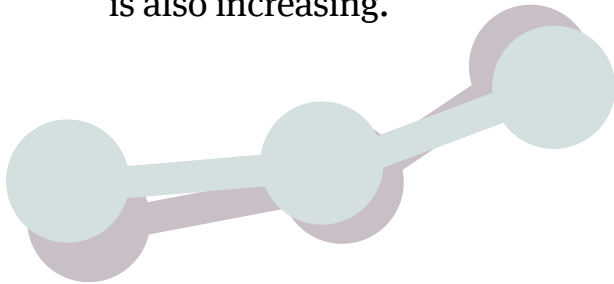
Attorney advertising

40



## Executive summary

The 12th annual litigation trends survey reveals an upward trend in virtually all of the metrics relating to litigation and the broader disputes area. Difficult market conditions in some industries, particularly those affected by low oil prices, are creating a more litigious environment. An increased volume of regulation and increased regulator intervention are resulting in the threat of more regulatory disputes. The burden of handling disputes is also increasing.



The whole area of discovery, more specifically eDiscovery, is increasingly painful and costly to manage, particularly considering the growth of cross-border discovery. With this, the resources required to effectively manage and resolve litigation are ever increasing, but there is light at the end of tunnel as respondents identify effective ways to control litigation moving forward. With greater controls in place to reduce the risk and cost of litigation, the upward trend has been tempered resulting in a more moderate rise in spending.



40%  
reported  
implementing  
effective preventative  
measures in the last  
12 months.

In reviewing and collating these successful measures, we have developed a litigation minimization framework, which organizations can adapt to suit their own environment and looks to proactively reduce the burden of litigation moving forward. We hope this model will be a practical tool for you to review your current approach and implement measures which enable you to reduce spend and risk over time.



0.1%  
of revenue  
Average spend on  
litigation

A detailed analysis of litigation spend data collected in this survey not surprisingly reveals a correlation with an organization revenue. The median average proportion of spend as a % of revenue came out at 0.1% - or a tenth of 1%.

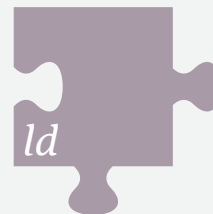
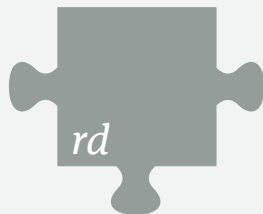
But this varied considerably by region and industry, with the US and financial institutions being the biggest spenders, relative to revenue and the UK and Australia the lowest spenders. We also found that larger organizations generally had a more efficient ratio, benefitting from economies of scale. A table in this report enables readers to benchmark their own proportion against that of a closer peer group.



97%  
satisfied with work  
conducted under AFA

More respondents are now using alternative fee arrangements and in a higher proportion of the litigation work they carry out. 97% were satisfied with the work conducted under an AFA, citing better control, greater efficiency and more certainty. Fixed fees were considered the most effective, but capped, contingent and performance-based fees were also highly rated. Uptake was expected to increase further moving forward.

The trends we have observed this year and over previous years are expected to continue. 24% expect the volume of disputes to increase in the year ahead versus only 13% expecting a decrease. The list opposite reveals the top ten most important litigation trends observed by respondents in 2016.



**Increasingly litigious environment**

Year-on-year figures show increasing volumes of litigation. Difficult market conditions are driving more parties to pursue litigation to recover monies.

**More regulatory disputes**

Regulatory disputes have risen due to the increasing volume of regulation along with more intensive scrutiny and enforcement. 97% reported increased regulator intervention. Regulatory disputes are considered strategically important and concerning because of the potential reputational risk.

**More class actions**

The rise of social connectivity to bring parties together and the support to execute class actions from organizers and funders has led to a general rise in the volume of class actions. The impact of class actions is now being felt outside the US. Financial Institutions are significantly more likely to identify class actions as the type of dispute they are most concerned about.

**More labor disputes**

The impact of reforms in certain countries and job losses in certain industries have led to an increasing volume of labor disputes.

**More IP disputes**

Organizations in Technology and Life Sciences industries in particular are experiencing a higher number of IP disputes as they look to protect their IP around the world.



### Burden of discovery/ ediscovery

A significant proportion of respondents talked about the costs and resource implications of ediscovery and how it was growing out of proportion to the benefits gained. As more discovery now has a cross-border element, this also creates more complexities.



### Increasing litigation costs

Organizations are feeling the pressure of the increased costs which come with a higher volume of disputes and the increased resources needed to manage and mitigate those disputes. The average in-house team size has increased. Uptake of Alternative Fee Arrangements continues to grow.



### Increasing use of ADR

Either because it has been imposed, or in an effort to avoid the costs and distraction of litigation, organizations are looking to use alternative methods, such as arbitration and mediation, to resolve disputes.



### Burden of data preservation

Data preservation requirements lead to a significant documents management burden, which is often complicated by privacy and cyber security issues across borders.

This report reveals the detailed findings of the research in two main areas. First, the types and volume of litigation, along with the drivers and key areas of concern and second, the challenges faced in managing disputes and approaches taken. The final section presents the litigation minimization framework.

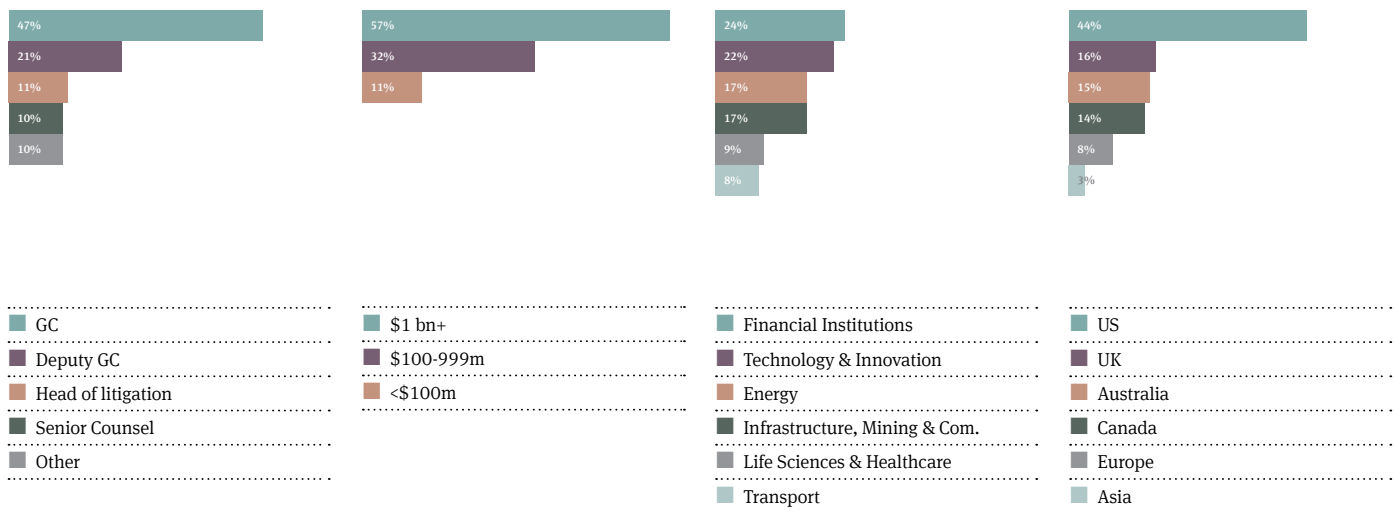
# Methodology and respondent profile



**Methodology and respondent profile**

# 606 corporate counsel responded to the survey during the first half of 2016.

The overwhelming majority of interviews were conducted by telephone and a small proportion participated in a web-based survey.



47% were General Counsel or equivalent and a further 21% were Deputy General Counsel. 11% were Heads of Litigation and a further 10% held Senior Counsel roles. Other roles included CEO, Company Secretary, CFO and Chief Counsel for Practice

57% of respondents were from organizations with at least \$1bn revenues, 32% had revenues of between \$100m and \$999m and the remaining 11% had revenues of less than \$100m.

Financial Institutions and Technology & Innovation were the industries most represented in the survey with 24% and 22% respectively. Energy and IMC each accounted for 17% of the sample. Life Sciences & Healthcare were 9% collectively and transport made up 8% of the sample. Note: Multicoded.

The survey was global in nature with US headquartered organizations representing 44% of respondents, followed by the UK (16%), Australia (15%), Canada (14%) and the remaining 11% coming from countries across Europe and Asia.

Please note the distribution of the respondent sample in 2016 is very similar to 2015. There is slightly less emphasis on the US and more respondents from other regions. The technology industry is more represented and there are slightly more respondents in the \$100-999m category and slightly fewer in the \$1bn+ category.

Note: All currency amounts are stated in US dollars unless otherwise specified.

# Survey findings

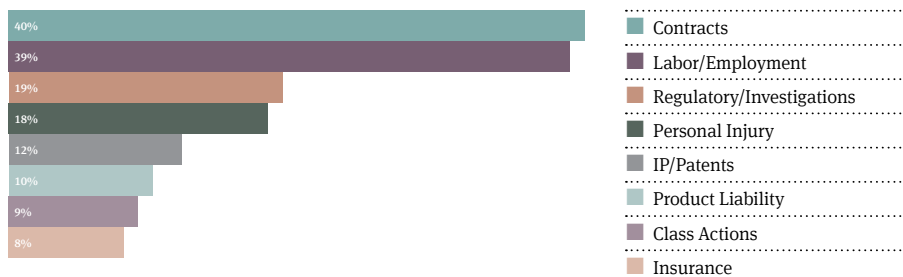
*Types and volume of litigation,  
drivers and key areas of concern*





**Types and volume of litigation, drivers and key areas of concern**

## Most numerous types of litigation pending in last 12 months



**Identify the three most numerous types of litigation matters that were pending against your company in the last 12 months.**

There was no significant change in the most numerous types of litigation since 2015, with contracts and labor/employment considered the most numerous by 40% and 39% of respondents respectively. When comparing the results by region and industry sector, significant differences did occur. For example, an even higher proportion of respondents in Energy and IMC mentioned contracts, labor/employment was higher for Life Sciences & Healthcare, and Regulatory was higher for Financial Institutions and in Australia.

The dashboard opposite provides a look at the most numerous types of litigation for each region and sector. Entries highlighted were significantly different to the overall result.

## Types and volume of litigation, drivers and key areas of concern

## Most numerous types of litigation pending in last 12 months (cont'd.)

## Regional view

	US	Canada	UK	Australia
1	Labor/Employment 46%	Contracts 46%	Contracts 43%	Contracts 44%
2	Contracts 34%	Labor/Employment 43%	Labor/Employment 34%	Labor/ Employment; Regulatory/ Investigations 32% each
3	Personal Injury 24%	Class Actions 20%	Regulatory/ Investigations 23%	
4	Product Liability; IP/Patents 15% each	Regulatory/ Investigations 17%	Personal Injury 16%	Personal Injury 19%
5		IP/Patents 12%	IP/Patents 12%	Insurance 12%

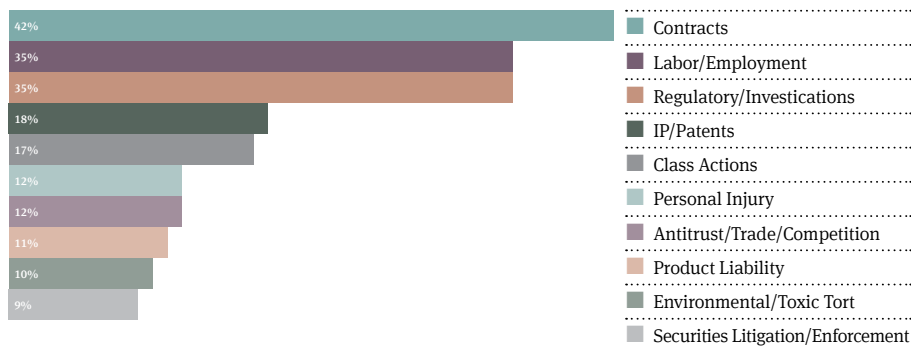
## Industry sector view

	Financial Institutions	Energy	Infrastructure, Mining & Commodities	Life Sciences & Healthcare	Technology & Innovation	Transport
1	Contracts 30%	Contracts 51%	Contracts 58%	Labor/ Employment 59%	Labor/ Employment 44%	Labor/ Employment 51%
2	Regulatory/ Investigations 27%	Labor/ Employment 40%	Personal Injury 28%	Product Liability; IP/ Patents 30% each	Contracts 39%	Contracts 38%
3	Labor/ Employment 26%	Regulatory/ Investigations 24%	Labor/ Employment 25%		IP/ Patents 27%	Personal Injury 30%
4	Banking/ Finance disputes 24%	Environmental/ Toxic Tort 22%	Regulatory/ Investigations 19%	Contracts; Professional Malpractice 21% each	Personal Injury 20%	Regulatory/ Investigations 17%
5	Insurance 21%	Personal Injury 21%	Tax; Real Estate 10% each		Product Liability 16%	Business Torts 13%

**Types and volume of litigation, drivers and key areas of concern**

## Types of legal disputes that most concern companies

**Top concerns**



**What are the three to five types of legal disputes that most concern your company?**

**Main drivers of concern**

- Prevalence 39%
- Financial exposure 15%
- Volume of regulation 14%
- Strategically important 11%
- Legal costs 8%
- Reputational risk 7%
- Highlighted an issue in the business 7%

As in 2015, contracts, labor/employment and regulatory/investigations are the top three most concerning types of disputes. Contracts and labor are most concerning because of the prevalence and the financial exposure. Whereas regulatory/investigations are concerning because of the volume of regulation impacting organizations and the reputational risk.



“The majority of our litigation would be contracts litigation and it would be the highest dollar value.”

“The volume – that is the issue; we see the most both in terms of the amount of disputes and the value of them.”

“(A) The march onwards of regulatory regimes across the world and (B) the reputational impact that it has on the organization.”

“The regulators are extremely active and there a lot of them. So, if there is an action or if an enquiry taking place in the UK, for example, then four or five other regulators may also become involved. We are multiply regulated, whether it’s the UK, whether it’s Ireland, whether it’s the US. So, that’s really sort of the main issue. Obviously, it’s a very public environment [and] whatever is being investigated reflects upon [us] – it is a very public act and obviously the reputation of a firm like the bank is paramount.”

“We’re a highly regulated industry in Australia and the regulator has the ability to come in and to investigate and make its findings public. So it’s reputational damage and it can be dollars and [...] you could lose your license, which could mean stopping your business – so the consequences can be severe.”

Further down the list we see specific concerns within industry sectors:

IP disputes are particularly concerning for the Life Sciences & Healthcare and Technology & Innovation industries because of the strategic importance and prevalence of such disputes in those industries:

“Because our business is based on the IP that we own.”

“Sometimes companies come after and accuse us of an acquisition or mostly its patent infringement against us.”

“Litigation affects our ongoing ability to manufacture and sell products.”

Class actions are most concerning for Financial Institutions because of the financial exposure, costs and prevalence:

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“The financial exposure involved in those cases tends to be larger than the other examples.”

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“Well, it could be the biggest dollars; the most expensive to defend and the most expensive to settle.”

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“They are growing in popularity in Canada and we are subject to a number of them right now.”

Product liability for Life Sciences & Healthcare

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“It’s several things; one, its reputational harm both for company and as well as the particular medicines or product [...] the second is because of the numerosity [sic] of claims and the potential exposure depending on the injury and the risk.”

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“Companies in our industry have faced hundreds and thousands of these types of lawsuits related to their products. So, it’s always a concern for lawyers representing pharmaceutical or medical device companies. It’s an attractive lawsuit for the plaintiffs’ bar to bring.”

Personal Injury is higher for Infrastructure, Mining & Commodities

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“Because we have a high priority on safety in our organization, we have around 8,000 employees working in potentially dangerous situations, around heavy equipment and at height.”

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“We work in this sort of hazardous industry on the construction side, so we usually get people with contact injuries...”


Environmental disputes are concerning for Energy and Infrastructure, Mining & Commodities:

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“Because the few environmental matters we have are both significant in terms of dollars and significant in terms of our reputation.”

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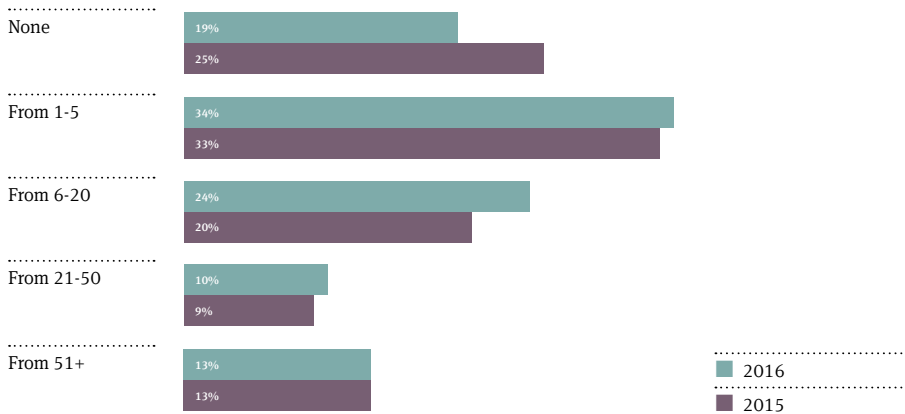
“Because the potential risks are very high. Some of the chemistry we do involves difficult and dangerous products.”



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**Types and volume of litigation, drivers and key areas of concern**

## Lawsuits/proceedings commenced against companies in the last 12 months



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### How many lawsuits were commenced against your company in the last 12 months?

In the last year, the proportion of companies who have no disputes commenced against them in the last 12 months has fallen from a quarter to just 19%, so in effect an additional 6% of organizations have been sued this last year. The biggest increase is in the group who have had between 6 and 20 disputes, up from 20% to 24%

**Types and volume of litigation, drivers and key areas of concern**

## 6% more organizations were sued this last year

The overall mean average number of disputes is 68, but the median (middle of the range) is now five, up from four in 2015. The mean is much higher than the median because there are some respondents who have had thousands of disputes and they raise the average. The median is a more typical result but varies considerably by region and by size of business. The US had the highest typical number of disputes at seven and those with \$1bn or more in revenues had a median of 20.

**Lawsuits with \$20m+ at issue commenced against companies in the last 12 months**

	Median average	Base
Overall	5	445
US	7	203
Canada	5	63
Australia	5	72
UK	3	62
<\$100m	1	36
\$100m-999m	4	112
\$1bn+	20	153

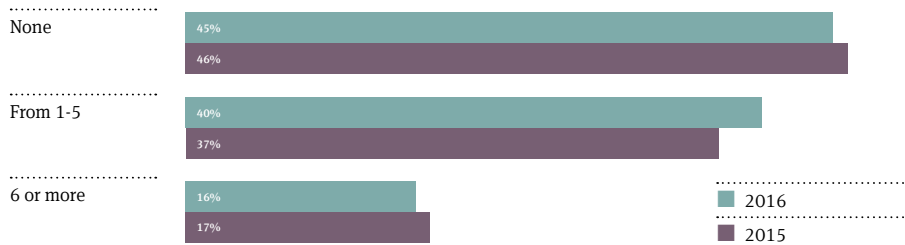
Despite there being more disputes overall, there are fewer with \$20m+ at issue. 85% have had no lawsuits above \$20m, which is up from 74% in 2015, so in effect, the proportion being sued for more than 20m+ this last year has almost halved (from 26% to 15%).

The largest companies, with revenues over \$1 billion, are more likely to be facing these large value claims with 24% of the largest companies facing at least one claim of \$20m+ compared with 7% of companies below \$1bn revenue.

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**Types and volume of litigation, drivers and key areas of concern**

## Lawsuits commenced by companies in the last 12 months



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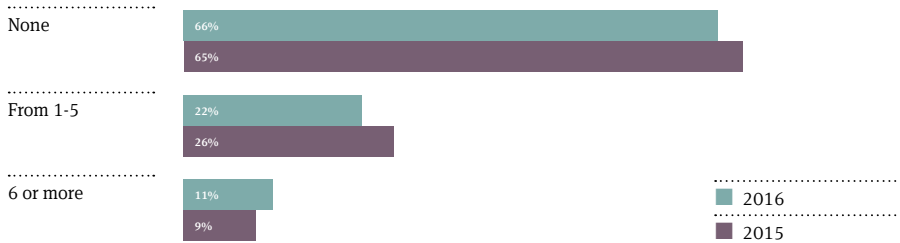
**How many law suits were commenced by your company in the last 12 months?**

There is no real change in the number of lawsuits commenced by companies in the last 12 months, with 45% not commencing any lawsuits. The median number was one lawsuit for most segmentations, except for the UK, which was zero.



**Types and volume of litigation, drivers and key areas of concern**

## Arbitrations commenced against companies in the last 12 months



### How many arbitrations were commenced against your company in the last 12 months?

There is no real change in the number of arbitrations pending against companies in the last 12 months, with 66% experiencing no pending arbitrations.

Alternative Dispute Resolution (ADR) was cited as one of the growing trends in litigation, however, especially by companies with leaner litigation resources in terms of spend and headcount.

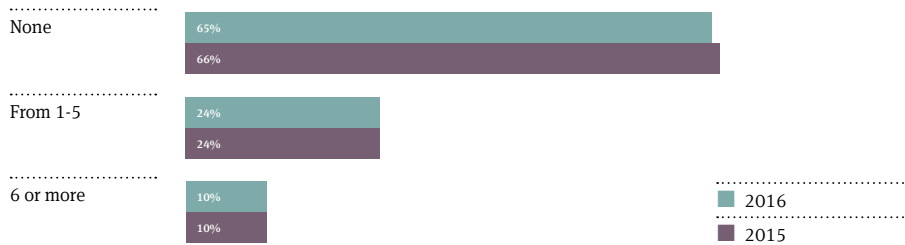
In some headlight sectors such as Energy and IMC, ADR is imposed by regulators. Where companies are choosing ADR over litigation, it is seen as a more commercial solution that delivers an earlier resolution and avoids the expense of discovery and trial. Where a high volume of disputes occurs, for example in employment and labor disputes, ADR allows companies to settle on an individual basis, avoiding class settlements.

Overall, companies are more likely to choose arbitration when the value of the claim is less than \$10m.

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Types and volume of litigation, drivers and key areas of concern

## Regulatory proceedings against companies



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### How many regulatory proceedings were commenced against your company in the last 12 months?

There is no real change in the number of regulatory proceedings against companies in the last 12 months, with 65% experiencing no regulatory proceedings.

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Types and volume of litigation, drivers and key areas of concern

## Trend in perceived regulator intervention

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Over the past 12 months, have any regulators become more or less interventionist, in your experience? Please identify the regulator and the change.

Regulators are considered to be more proactive and some described them as being aggressive. Respondents perceived there to be more investigations, although the statistics reported here did not back this up. Respondents felt there is more regulation therefore more opportunities for regulators to intervene and the general political climate was driving this increased scrutiny and enforcement.

The focus of regulatory pressure differed by region, with securities forming the key focus for those headquartered in Australia and Canada, while the emphasis from the UK was more centered on finance and competition, as well as energy. Within the US, regulatory intervention around labor was most predominant; however finance was also a key minority area.

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“I think they’re trying to become more proactive rather than reactive.”

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“They’ve been making contact with us – proactively them approaching us.”

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“More audits, closer analysis, more proactive regulatory activity.”

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“The political agenda coming out of the financial crisis.”

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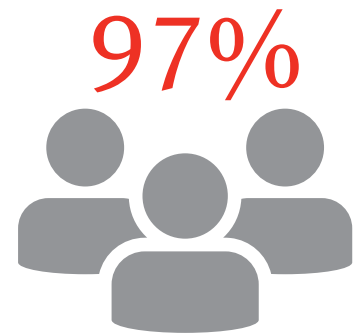
“I think it is part of the policy of the current administration.”

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“I believe that there is a politically motivated agenda to aggressively seek enforcement opportunities against the fossil fuel industry.”

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“Because the Obama administration has appointed exceedingly aggressive persons who frequently have low opinions on business to run those agencies.”

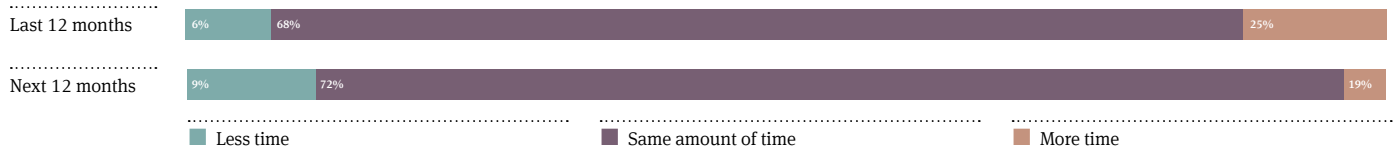


97%

perceived  
regulators  
to be more  
interventionist  
during the last  
12 months.

**Types and volume of litigation, drivers and key areas of concern**

## Trend in time addressing antitrust or competition issues



During the last 12 months has your company spent less time, the same amount of time or more time addressing antitrust or competition issues either as a party or non-party compared to the previous 12-month period?

In the next 12 months, do you expect your company to spend less time, the same amount of time or more time addressing antitrust or competition issues either as a party or non-party compared to the previous 12-month period?

25% of respondents had spent more time looking at antitrust issues during the last 12 months versus only 6% who have spent less time. Looking forward, more are expecting time to increase rather than decrease but the gap is narrowing from 19% to 10% on balance (calculated by taking the proportion decreasing from the proportion increasing).

This increased trend is driven by a number of factors including increased regulation, more antitrust cases being observed and more M&A.

“Just the way the regulators and investigatory powers are more closely looking at the way the bank does – or has – conducted business in the past.”

“I think it’s a combination of anticipated increased litigation and increased appreciation of the risks involved in antitrust law.”

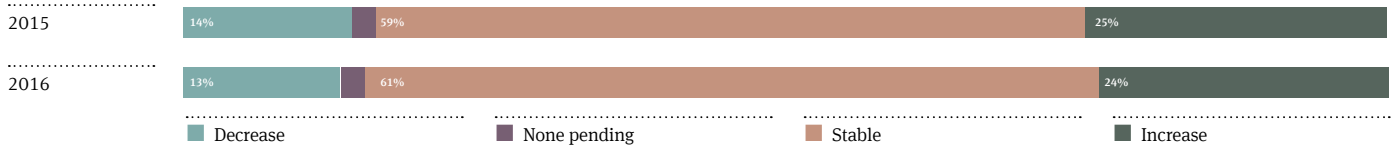
“More likely to be looking at expanding [and more likely to] buy other companies in the next twelve months.”



of respondents spent more time looking at antitrust issues

**Types and volume of litigation, drivers and key areas of concern**

## Expected trend in volume of disputes



**Do you expect the number of legal disputes your company will face in the next 12 months to increase, decrease or stay the same? Why?**

The trend moving forward is consistent with 2015, with 11% more respondents anticipating an increase in the volume of disputes versus a decrease (calculated by taking the proportion decreasing from the proportion increasing). Those with the highest litigation spend (\$15m+) were more likely to predict an increase in the year ahead (40%).

**Drivers for decreasing volume**

- Resolving current disputes
- Has been heavy but will return to normal levels
- Better management/more prevention
- Nothing on horizon

The drivers for those forecasting a decrease in volume are consistent with last year, with resolution of existing disputes, returning to normal levels and better prevention/management being the top three reasons.

“We’ve been putting in place a lot more compliance and governance type programs, so it’s more processes [and] better training which ultimately, hopefully, reduces overall exposures.”

“We have a few pending claims that I expect to be resolved within the year, and we don’t presently expect anything new.”

**Drivers for increasing volume**

- Economic climate
- Current trends will continue
- Increasing litigious environment
- Disputes on horizon
- Company expanding
- Increased regulation

The drivers for those forecasting an increase in the year ahead have seen some change. The economic climate and associated market conditions have increased significantly as a driver, particularly among those affected by low oil prices. The number citing expansion as a driver of increasing litigation has decreased. Respondents also mentioned continuation of current disputes, seeing new disputes on the horizon and increased regulation.

“Economy goes sour, lawsuits increase.”

“The financial markets are difficult, the regulatory obligations are increasing and, in the United States, litigation is not considered an exceptional recourse.”

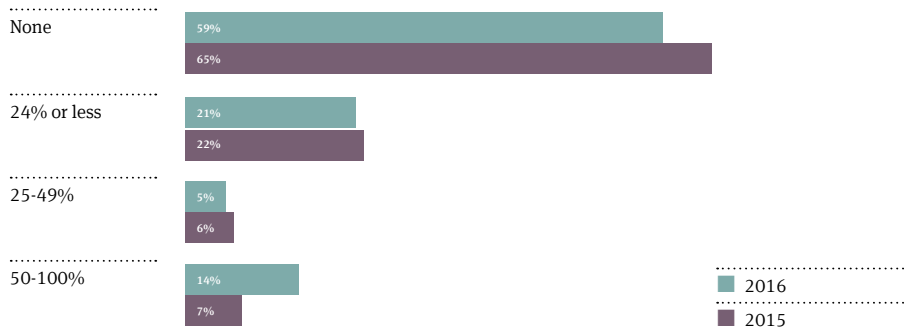
# Survey findings

*Challenges faced in managing  
disputes and approaches taken*



Challenges faced in managing disputes and approaches taken

## Proportion of matters requiring cross-border discovery



**In the past 12 months, for what percentage of your matters have you been required to conduct cross-border discovery?**

There has been a significant increase, of 6 percentage points, in the proportion of respondents now having to conduct cross-border discovery from 35% to 41%. An additional 7% of respondents are having to conduct cross-border discovery in half or more of their matters.

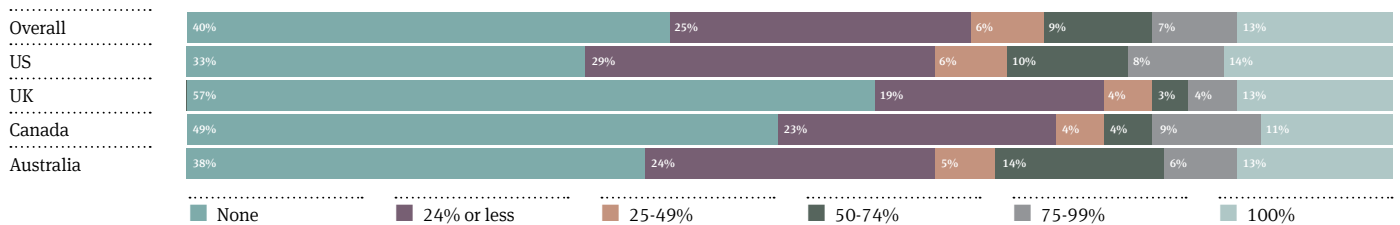
Within industries, the highest proportion of respondents having to conduct cross-border discovery was in Financial Institutions (49%). Within regions, Australian respondents had the lowest proportion at 24%.

*There has been a significant increase in the proportion of respondents now having to conduct cross-border discovery*

**Challenges faced in managing disputes and approaches taken**

Proportion of respondents who have had to balance data protection regulations in one jurisdiction with discovery obligations in another.

**Annual litigation spend by region**



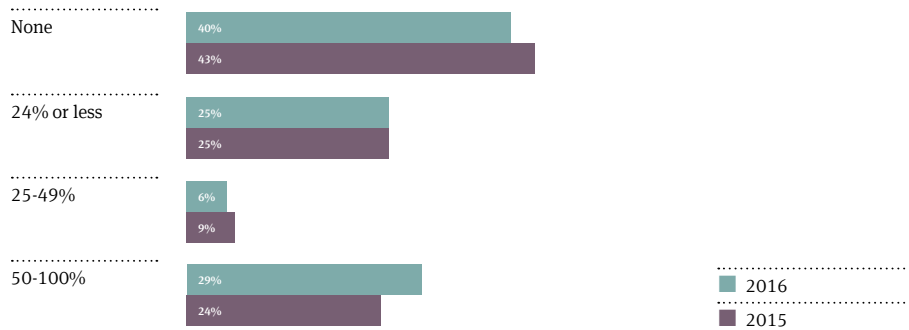
US respondents are significantly more likely to use technology-assisted review; UK respondents are significantly less likely overall.





Challenges faced in managing disputes and approaches taken

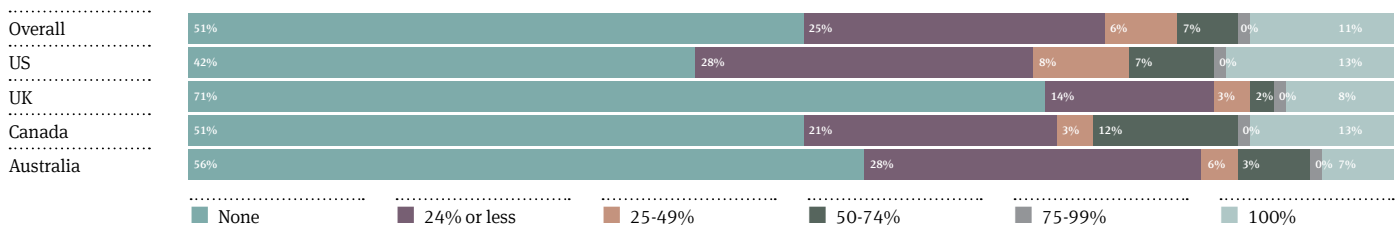
## Proportion of matters using technology assisted review



### For what percentage of your current matters are you using technology assisted review (for example predictive coding or data analytics)?

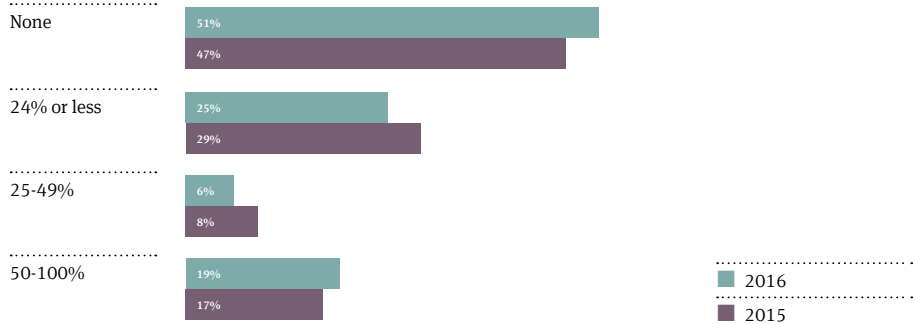
The proportion of respondents using technology assisted review has increased from 57% in 2015 to 60% in 2016, although this level of change is not statistically significant. Those that are using technology-assisted review are using it for more of their matters, with 29% now using it in 50% or more of matters, up 5% from the 2015 result.

Uptake is significantly higher in the US with 66% using technology assisted review, in contrast to the UK, where uptake is significantly lower at 46%.



**Challenges faced in managing disputes and approaches taken**

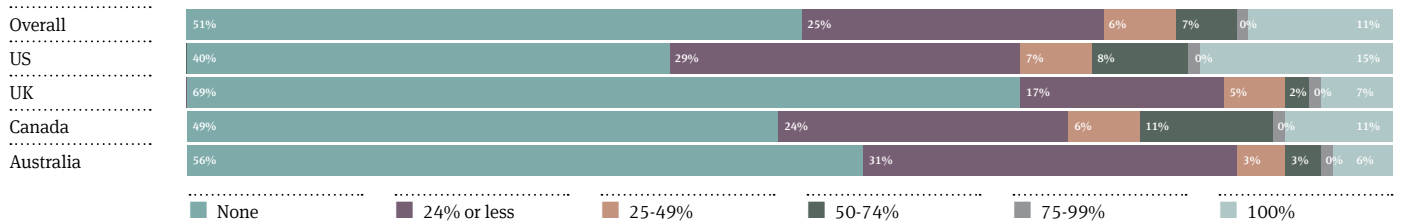
## Proportion of matters where required to preserve or collect data from a mobile device



**In the past 12 months, for what percentage of your matters have you been required to preserve or collect data from a mobile device?**

Respondents have been required to preserve or collect data from a mobile device in just under half of matters (49%), slightly down on 2015 at 53%, although not a statistically significant difference.

Once again, regional differences are observed between the US and the UK. 60% of US-headquartered respondents have had to preserve or collect data from a mobile device one versus only 31% of UK-headquartered respondents.



**Have you had to preserve or collect from any of the following devices in the last 12 months?**

Smartphones                      Tablets

For those who had preserved or collected data from a mobile device, 93% involved smartphones and 71% involved tablets. 18% cited laptops and 13% talked about wearable technology.

Challenges faced in managing disputes and approaches taken

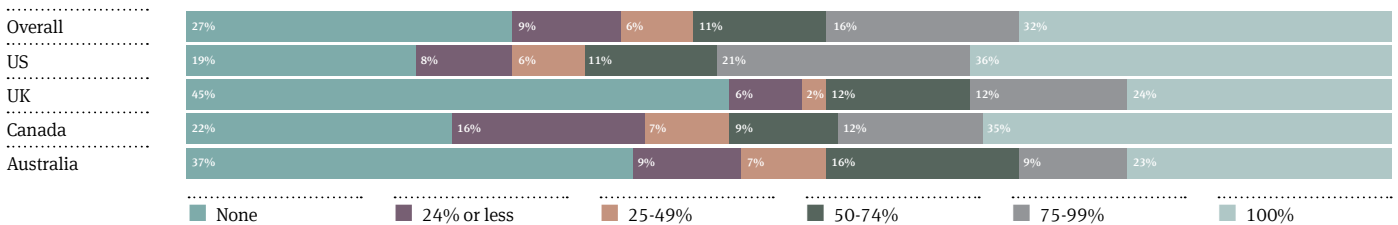
## Proportion of cases relying upon self-preservation



### In what percentage of cases have you primarily relied upon Self-Preservation?

There is no real change in the proportion of respondents who have primarily relied upon custodian self-preservation at 73%, or in the percentage of cases.

US and Canadian organizations were even more likely to have primarily relied upon self-preservation with 80% and 82% respectively, whereas UK and Australian organizations were less likely to have relied upon self-preservation at 56% and 62% respectively.



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Challenges faced in managing disputes and approaches taken

## Proportion of cases relying upon self-preservation (cont'd.)

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### When you do not rely upon Self-preservation, why don't you?

21% of those who hadn't relied primarily upon self-preservation didn't feel it was necessary. 13% felt that IT systems were more effective and 11% relied on the automated back-up. Others felt it depended on the matter or felt they used self-preservation but didn't necessarily rely on it.

#### IT systems

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"Usually it's more efficient to preserve in some other way, so for example, if it's going to be a large amount of material or a large number of custodians it might be simpler and more efficient to utilize some behind the scenes IT support to preserve the documents as opposed to going to 200 employees."

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"The way that our IT systems are set up, we have servers with back-ups and we generally go to the server to get the information rather than the individual."

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"I think it's more reliable and consistent to instruct our IT people to conduct the relevant searches."

#### Automated backup

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"We have backup systems that automatically back everything up on our servers so we're not relying on any employees."

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"We are trying to automate that so that it takes out the uncertainty. So, rather than relying on people to remember or to correctly identify relevant [material] we're trying to develop systems [whereby] we flick a switch and say 'all matters relating to this will be held' and then it gets automated. But, as you imagine, that's a tall order."

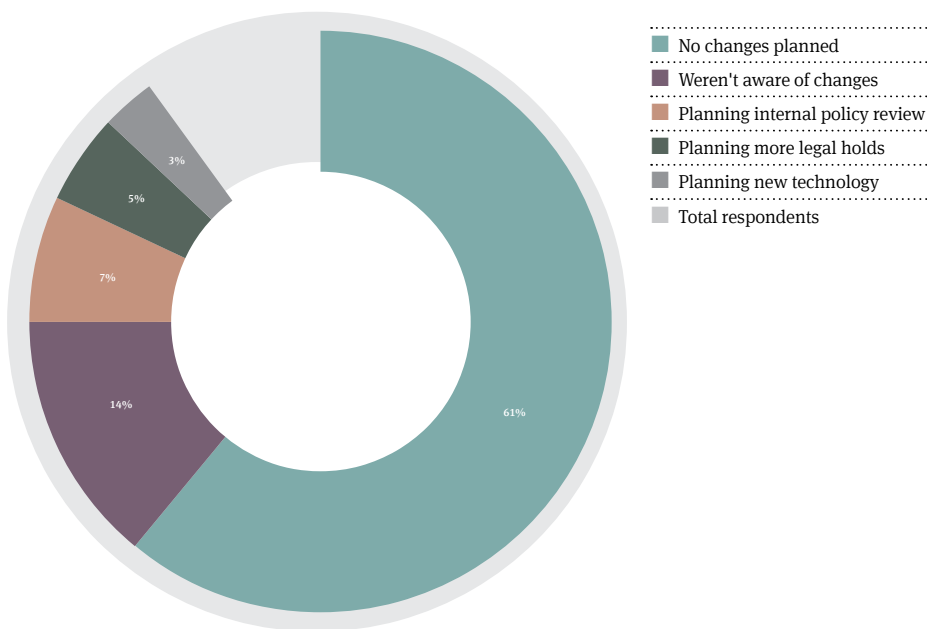
Challenges faced in managing disputes and approaches taken

## US organizations

Given the changes to Federal Rules of Civil Procedure, particularly to Rules 26(b)(1) (proportionality) and 37(e) (sanctions of spoliation), what if any changes does your company plan on making to its preservation process?

61% had no changes planned in relation to the changes in the Federal Rules of Civil Procedure and a further 14% weren't aware of the changes.

7% were planning an internal policy review, 5% were planning more legal holds and 3% Internal policy review new technology systems to accommodate the changes.



### IT systems

“We’re reviewing our current policies and procedures regarding document retention, preservation, and we’re looking to update those in light of some of these changes.”

“We are completely revamping our records retention policies and procedures and we’re implementing an automated legal hold system.”

*Proportionality is a key element of discovery and limits the scope of discovery even beyond relevance. The amendments to the Federal Rules, particularly those to Rule 26, were intended to “restore the proportionality factors to their original place in defining the scope of discovery.” Further, Rule 37(e) has been amended to create a consistent standard for the loss of evidence in all federal courts. Prior to the amendment, the standards of culpability ranged from mere negligence to recklessness and willful conduct among the various courts. The new Rule specifically overrules precedent that arguably authorized adverse-inference instructions on a finding of negligence or gross negligence and requires an intent to deprive for case-altering sanctions to be imposed.*

*The changes to the Rules on proportionality, in connection with the tougher rules on imposing curative measures for the loss of information, should work to allow parties to more efficiently engage in discovery in all litigations. The fact that it has not done so yet means that companies do not yet feel comfortable and are not fully taking advantage of the new amendments to allow for more efficient and less onerous discovery obligations.*

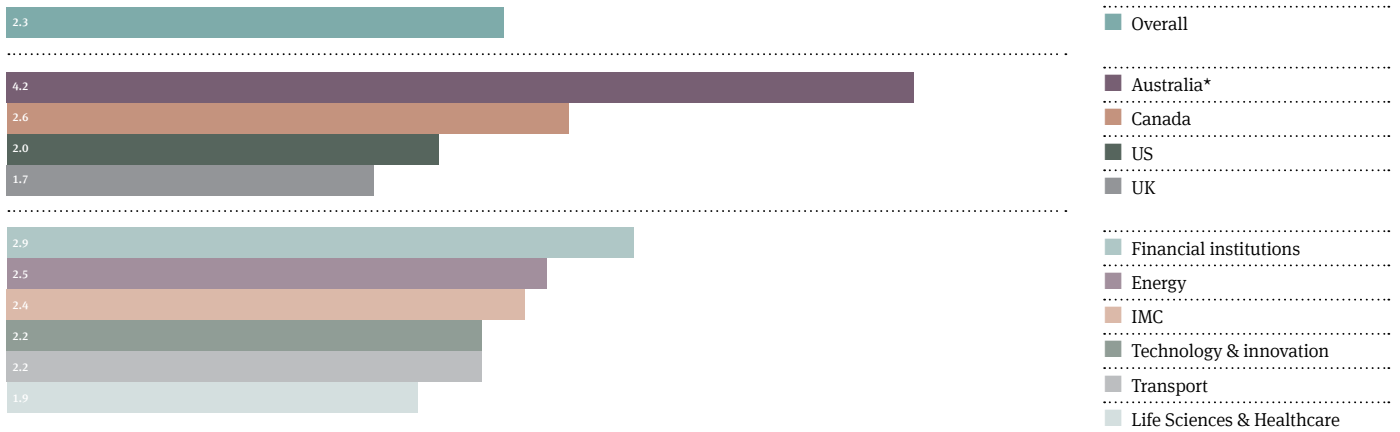
*For more information on the amendments to the Federal Rules, see the full article here:*

<http://www.nortonrosefulbright.com/knowledge/publications/134588/discovery-related-amendments-to-the-federal-rules>



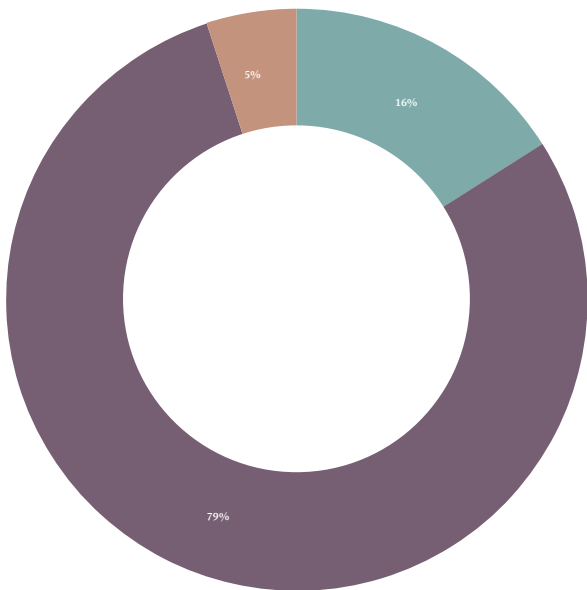
Challenges faced in managing disputes and approaches taken

Average number of disputes lawyers per \$1bn of revenue:



\*NB: The large proportion of Financial and Insurance respondents in the Australia sample is likely driving that region's high average.

Trend in number of disputes lawyers



- Increasing
- Stay the same
- Decreasing

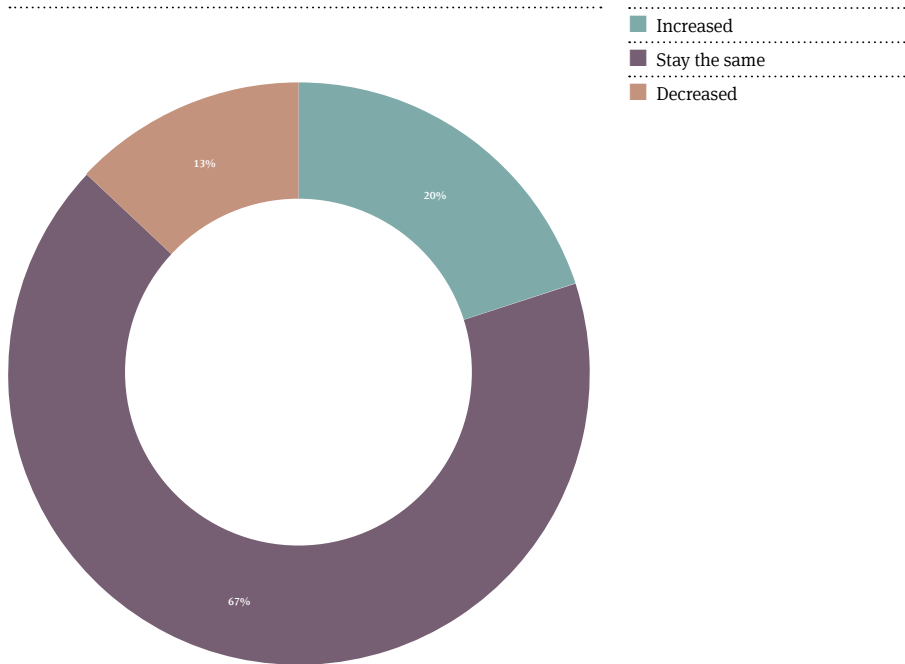
During the next 12 months, do you expect the number of in-house lawyers within your company who manage and/or conduct disputes to increase, decrease or stay the same?

While most organizations plan to keep their in-house disputes team the same size, 16% are planning to increase the number of disputes lawyers versus only 5% planning to decrease the team size. This is consistent with the finding in 2015. On balance, 11% plan to grow their in-house team (calculated by subtracting the number expecting a decrease from those expecting an increase).

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Challenges faced in managing disputes and approaches taken

## Historical trend in number of law firms on disputes roster



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Over the past 12 months, has the number of law firms on your outside counsel disputes roster increased, decreased or stayed the same?

Two thirds of respondents have kept the same number of law firms on their disputes roster, 20% have increased the number versus 13% that have decreased. On balance, 7% have added firms to their disputes roster.



Challenges faced in managing disputes and approaches taken

## Annual litigation expenditure

What is your annual litigation spend, excluding cost of settlement and judgements?

### \$1m median average spend

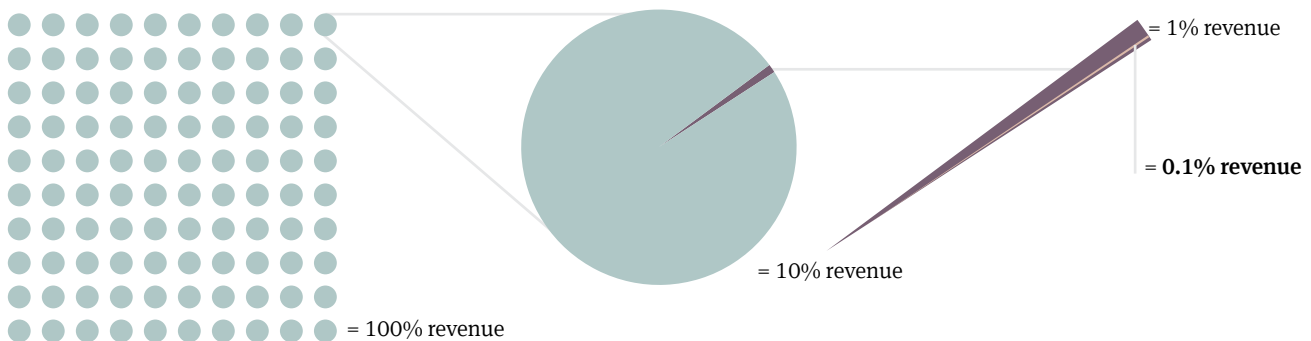
Litigation spend is hugely variable but does correlate with revenue, if outliers are excluded. Average spend is shown below for the different organizations sizes:

#### Spend by revenue 2016

	Mean	Median	Base
<\$100m	\$351k	\$72k	38
\$100-999m	\$1.3m	\$400k	110
\$1bn+	\$10.2m	\$3.6m	154

To help readers benchmark their own spend relative to their revenue, the table below to show the average % of respondent revenues which was litigation expenditure in the last 12 months.

The overall average litigation spend was 0.1% - or a tenth of 1% - of revenue.

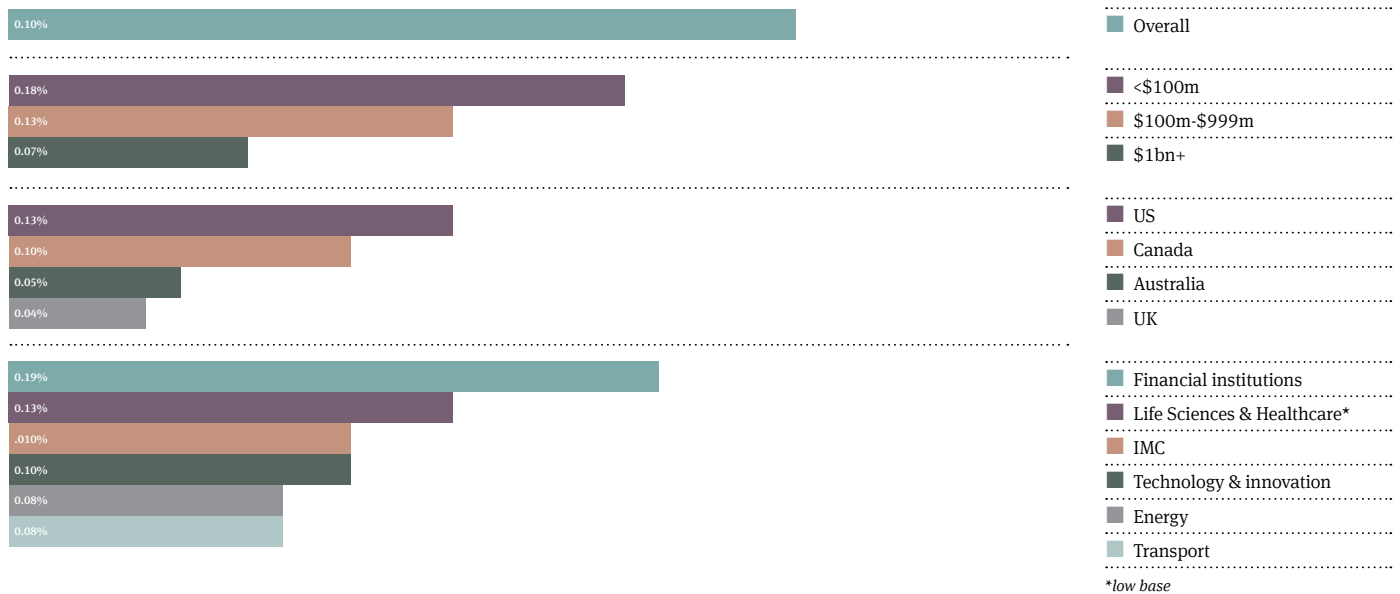


Challenges faced in managing disputes and approaches taken

## Annual litigation expenditure (cont'd.)

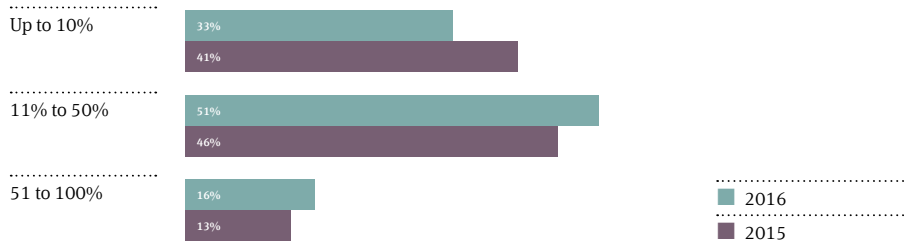
Simply multiply an organization's revenue by the % shown below which relates to size, region or industry to establish a relative range.

It is interesting to note that litigation expenditure reduces as a proportion of revenue as the scale of the organization increases. Effectively economies of scale come into play. Findings also indicate that some industries and regions are particularly high spending. For example, Financial Institutions report nearly twice the average proportion and the US is nearly a third higher. The UK and Australia are particularly low spending, at less than half the typical proportion.



Challenges faced in managing disputes and approaches taken

## Adoption of Alternative Fee Arrangements (AFA)



### Do you use Alternative Fee Arrangements?

60% using Alternative Fee Arrangements, up from 56% in 2015

The level of take-up is significantly higher in the largest organizations (\$1bn+ revenue) at 71% and those with more than \$15m litigation expenditure at 77%. The Technology & Innovation industry sector is also a higher adopter of AFAs at 68%.

31% of spend, on average, conducted under AFA

### Of those monies you spend with outside counsel, what is your best estimate of the percentage being billed via Alternative Fee Arrangements?

The average proportion of spend which is under AFAs is also increasing, up from 27% in 2015 to 31% this year. There is a drop in the proportion using AFAs for 10%.

or less of work and an increase in those using AFAs for more than 50% of work.

### AFA Types Explained

#### Blended Rate

One rate comprised of all Time Keepers individually with assigned work allocation. Additionally, blended rates can be presented by practice area, or within Time Keepers sub-classes. Good AFA for clients who prefer highly experienced attorneys at a lower rate.

#### Capped Fee

Maximum fee amount set prior to engagement, set by phase, matter or group of matters (portfolio).

Overages are absorbed by the firm, or fees renegotiated should the cap limit be exceeded. If the fees fall below the cap, the client only pays for the work done.

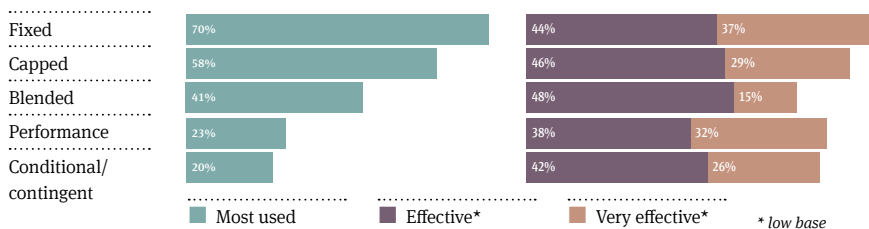
Good AFA for clients where the scope is not very detailed and an estimate of fees is required.

A capped fee with collar stipulates a predetermined percentage above/below the cap amount (e.g. 10%):

- Should the fee fall below the percentage band (i.e. collar), the firm and the client share savings.
- Should the fee fall below the cap, but within the percentage band, the firm retains 100% of the savings.
- Should the fee exceed the cap but within the percentage band, the firm absorbs the additional cost.
- Should the fee exceed the cap and the percentage band, remaining work is renegotiated with by a new fee amount or a significant hourly discount.

**Challenges faced in managing disputes and approaches taken**

## Usage and effectiveness of different types of AFA



**What are the three types of Alternative Fee Arrangements you use most? How effective have the following types of Alternative Fee Arrangements been in accomplishing your company's fee goals?**

Fixed and capped fees are the most used types of fee arrangements, followed by blended fees. Performance and conditional/contingent fees are used by less than a quarter of respondents.

When it comes to what is the most effective fee arrangement, fixed fees top the list with 81% of users considering them either effective or very effective. Capped fees come next with three quarters considering them effective pricing models and performance fees aren't far behind with 70%. Performance based fees are used significantly more often by the largest spenders (\$15m+ litigation expenditure).

Blended fees are considered effective by nearly half, but rarely very effective. Conditional/contingent fees are used the least, with around two-thirds of users considering them to be effective.

**AFA Types Explained (cont'd.)**

AFA is good for clients who have a good relationship with the firm and are willing to share risk during the course of the matter.

**Fixed Fee**

A set fee amount based on upon an agreed scope of work.

Fees can be set by matter, phase or time period.

Good AFA when scope is well defined and client prefers a guaranteed spend amount.

**Contingent/Conditional Fee**

Fees that are paid only if the outcome of the matter is successful or meets the agreed upon outcome.

This is a high risk fee structure for the law firm and rates for success generally reflect that risk premium.

**Performance/Rewards (also called Success Fee (US))**

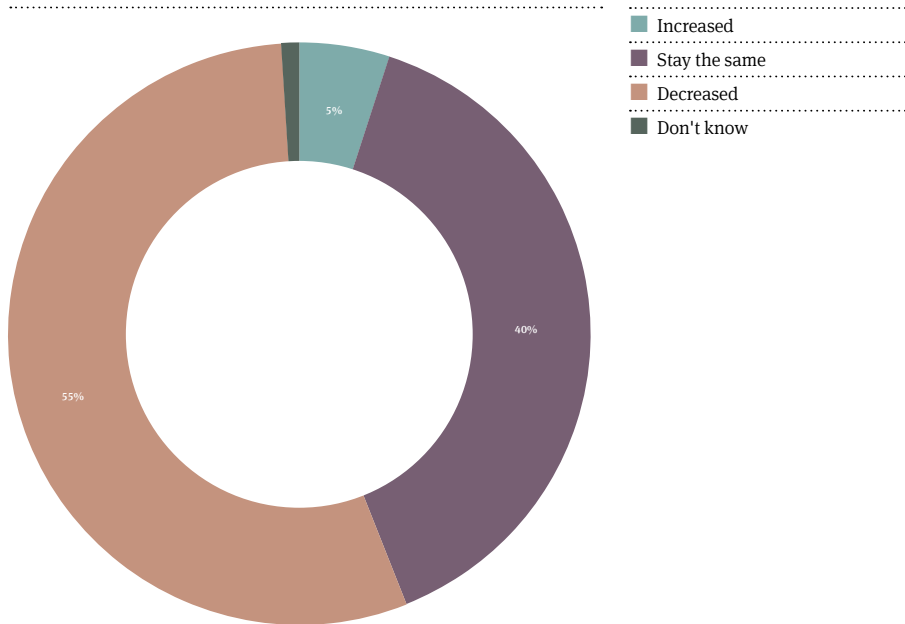
Fee amount agreed upon with an opportunity for a bonus based on the matter outcome, favorable spend, or matter progression.

Success bonus can be percentage of matter or a fixed amount.

This AFA is very good when a high level of success is possible.

Challenges faced in managing disputes and approaches taken

## Predicted trend in use of AFAs



### Do you expect your company's use of Alternative Fee Arrangements to change over the next 12 months? Why?

Adoption of AFAs is expected to increase in the year ahead, with a very similar response to 2015. This result is even higher for the highest spending organizations (\$15m+) where 59% are expecting to increase use of AFAs. Only 1% will use AFAs less in the next year.

Key drivers were considered to be:

- Greater control
- More firms offer AFA
- Interested in AFA
- Cost efficiency
- Greater certainty
- Budget pressures
- Positive experiences

*97% were satisfied with the quality of work conducted under AFAs.*

“Tight expense management as primary consideration.”

“I think the law firms are starting to become somewhat more efficient at offering more creative fee arrangements and so we start to see a prevalence of that in the market place.”

“Because I think it is more cost effective.”

“Just so that we have some certainty in terms of what we’re paying.”

“I just think that’s the way that the market is heading; it gives certainty and predictability to the business.”

“Just with increased pressure to reduce budgets. Alternative Fee Arrangements provide us an opportunity to be creative with outside counsel and with the goal of, hopefully, saving the company some money.” “Because we have very strict instructions from the board to reduce legal spend in the next twelve months.”

“The success that we’re having with the arrangements makes them appealing to the company, and the success appears to be giving the law firms a greater level of comfort with them.”

# Survey findings

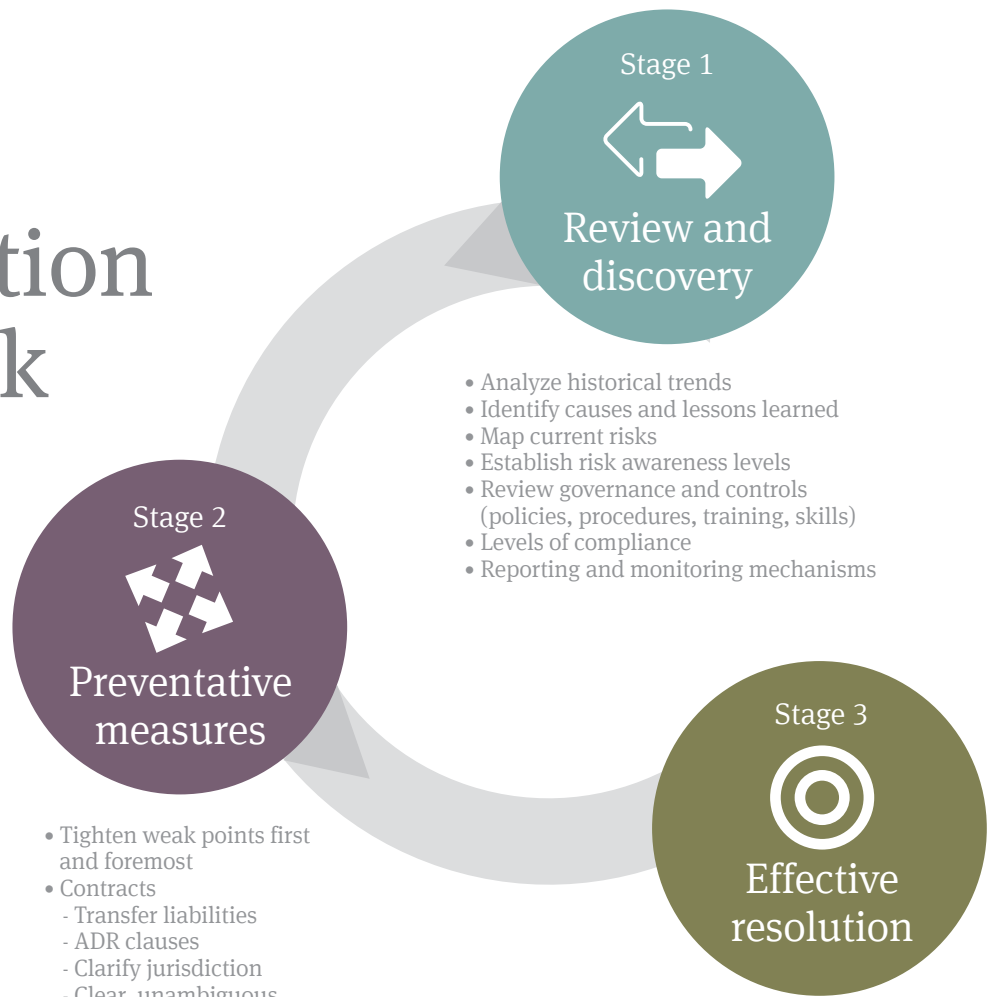
*Litigation minimization framework*



# Litigation minimization framework

Have you implemented any preventative measures aimed at reducing the volume of litigation in the last 12 months that you have found to be effective? If yes, what are they?

While each individual respondent provided us one or two measures, the framework takes the full range of measures and places them into a process. Some of these steps may not be relevant for individual organizations or may already be in place. The framework is intended to act as a guide to proactively addressing the level of litigation facing organizations.



The framework is broken into three stages, starting with a review and discovery stage where historical trends are analyzed and current processes, procedures and controls are critiqued. Current risk awareness levels should also be reviewed along with levels of training. The second stage looks to address any weak points identified in stage one and bolster current contracts, governance, training levels and insurance covers. Ensuring lawyers are embedded into business operations to uncover risks is key. The final stage looks to address disputes once they arise in order to minimize the costs and impact on the organization. Simple tips that have proven effective at this stage include early assessment, taking a sensitive approach, transparency, early settlement and incentivizing external advisors through AFAs to draw matters to an early close.

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### Lawyers

# 1200

### Contact

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+1 713 651 5243

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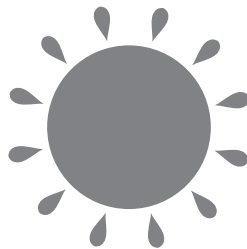


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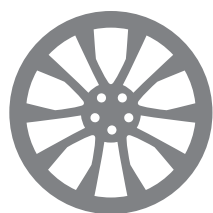


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