

2020 Annual Litigation Trends Survey

Perspectives from corporate counsel

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2020 Annual Litigation Trends Survey
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LitigationTrendsUS@nortonrosefulbright.com

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Toronto, Mexico City, Hong Kong, Sydney and Johannesburg.

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Methodology

Since its first edition in 2004, Norton Rose Fulbright's Litigation Trends research has sought to reflect ongoing trends in the US disputes space by measuring key indicators year-to-year. This year, Norton Rose Fulbright and Acritas adapted the methodology, honed over the past 16 years, to the challenges brought by the COVID-19 pandemic. Our goal was to retain as many of the core benchmarking measures as possible while exploring the wider trends and changes organizations are facing and providing a new layer of context to our clients.

Research was conducted in three key phases:



Internal survey of Norton Rose Fulbright's disputes teams

This phase assessed our lawyers' collective take on trends, anticipated changes, and areas of concern to clients.



In-depth interviews with key clients

Building on the results of phase one, we spoke to a cross-section of clients in detail to understand the challenges they faced in 2020 and assess the relative importance of different issues to their litigation teams.



Large-scale quantitative survey across the market

As the primary data source for this research, we channeled the results from phases one and two into a structured survey to quantify trends across a larger pool of respondents, conducting structured telephone interviews alongside an online survey.

Executive Summary

Fieldwork for Norton Rose Fulbright's 2020 annual litigation trends survey was concluded in December 2020, providing up-to-date insights on key US disputes trends across a tumultuous year and a look ahead into 2021. Highlights include:

Almost half of corporations have experienced some change in dispute volume from COVID-19, with significant impacts on resourcing

Driven largely by commercial and labor disputes, 31 percent of corporations reported an increase in disputes as a direct result of COVID-19, while 12 percent reported experiencing a decrease. In 2021, this will lead to more pressure than ever for in-house teams. Nearly 70 percent of respondents reported increasing workloads for their teams, while just 18 percent said they have a mandate to increase in-house team sizes. With many courts remaining shuttered, the one-third of corporations who saw their disputes backlog grow will face even greater strain as they seek to clear an excess of active cases.

Greater workloads are compounded by budget pressures for many respondents, with approximately half reporting increased pressure to reduce legal spend despite high demand for both in-house and external counsel. Simultaneously, more work may be heading in-house, with many reporting a decrease in proportion of budget allocated to external counsel.

Research indicates that this rise in workloads is likely to continue, with 7 percent of respondents foreseeing a decrease in disputes next year as a result of COVID-19, compared to 45 percent expecting an increase.

Despite increasing resource pressure, few corporations have turned to early settlements

Respondents seeking to generate advantage from pursuing early settlements represent a minority: 22 percent of defendants and 14 percent of plaintiffs reported an increase in the use of early settlements. The number accessing litigation funding was also low, with around one in ten existing users increasing their use of litigation funding above normal levels. Despite being in the minority, those reporting the greatest change in litigation volume as a result of COVID-19 are more likely to have drawn on early settlement and litigation funding for dispute resolution.

COVID-19 is likely to dominate attention in 2021, but other dispute types still feature more prominently on the risk map, with cyber security and data protection remaining of high concern

Pandemic impacts aside, disputes are generally predicted to rise year-on-year in 2021, with increased contract/commercial disputes and labor issues cited most often as the top three areas of concern. In addition, areas such as insurance and regulatory are set to grow as a proportion of disputes in 2021.

Around a quarter of those who identified contract/commercial disputes as the most common also identified them as the most concerning. From a risk perspective, cyber security and data protection disputes are by far the most concerning relative to volume, with antitrust and regulatory investigations also showing up as areas of real concern.

Exposure to emerging dispute sources is growing—notably cyber and discrimination/social justice and, to a lesser degree, ESG/environmental

Cyber security/data protection disputes have emerged as a key trend over the last several years and 2020 was no exception, with 44 percent of respondents feeling more exposed than they did twelve months prior. Respondents report past attacks that have disrupted operations, with others sensing that their company size or industry make them targets. The sheer scale of the potential impact and the penalties in force in certain jurisdictions have ensured this remains among the most concerning types of disputes.

With the pandemic dominating conversation, it is important to recognize other trends which have continued to grow in prevalence. A third of organizations now feel more exposed to disputes concerning discrimination and social justice, and a fifth are more exposed to ESG/Environmental disputes. Awareness of some of the potential drivers of discrimination disputes does, however, appear to be quite high and around half of respondents are either taking action now or have recognized that more needs to be done around diverse recruitment policies and educating the wider business on the legal implications of discrimination. These measures are also emerging in the selection of outside counsel. Fielding a diverse and inclusive team is considered a favorable selection criterion by most when instructing outside counsel, with one in ten deeming it to be an essential prerequisite to qualify for selection.

Most in-house counsel expect some elements of dispute activity to continue remotely post-pandemic

Three quarters of our respondents had engaged in some kind of dispute activity in a remote setting during 2020 and most expect elements of virtual activity to continue post-pandemic. It is fair to say that opinions are polarized on this topic. Vocal minorities on one side predict a drastic shift to remote disputes, driven by reduced travel costs and other efficiencies, as comfort/confidence grows in new ways of working. On the other side, some advocate a complete return to the old normal, where parties can look each other in the eye, operate at their most persuasive and remove existing concerns about monitoring jurors or deponents. Most sit somewhere in the middle and seek a blended approach that recognizes clear time/cost savings in areas such as depositions, while acknowledging the benefits of face-to-face interaction.

In 2020, the volume and types of disputes, along with approaches to resolution and virtual activities all shifted. The outside environment has overridden business-as-usual and the future remains uncertain, with heightened activity expected to continue into 2021. Organizations will need to find ways to make their constrained budgets go further and would be wise to embed as much preventative activity as possible.

The impact of COVID-19

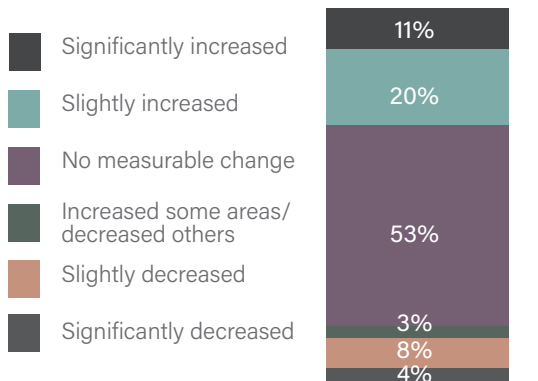
Increases in dispute activity predicted to continue into 2021, potentially leading to a surge in work for litigation counsel at a time when resources are stretched

Around half of organizations reported some change (up or down) in dispute volume as a direct result of COVID-19; for most of these (31 percent) the shift was upwards. The nature of disputes did vary depending on each organization's operations and relative exposure, however contract disputes (including force majeure), other commercial disputes and labor/employment matters were the predominant drivers of increasing activity in 2020.

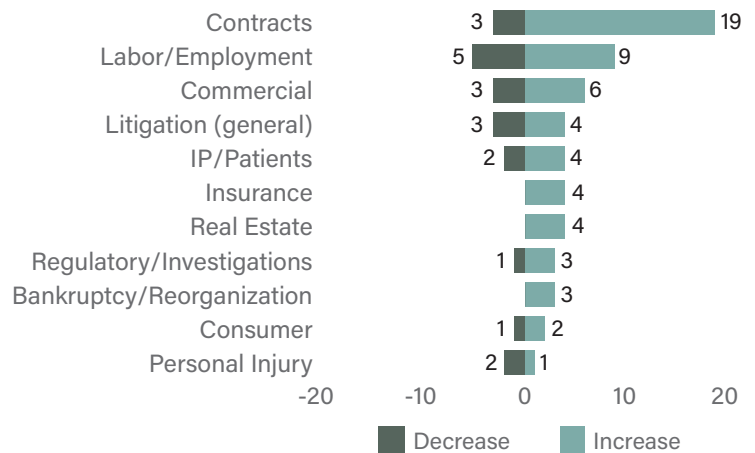
Respondents largely focused on the underlying market conditions brought about as a result of the pandemic as the driving forces behind changes—with financial conditions and distressed markets driving many increases—along with business interruptions, including supply chain disruptions, employment volatility and contractual disputes arising from force majeure provisions.

To what extent has the COVID-19 pandemic directly impacted the volume of disputes your organization has had to deal with over the last six months?

Volume of disputes in last 6 months due to COVID-19



Most common shifts (number of respondents)



Responses indicated that larger organizations (\$1bn+ revenue), along with financial institutions, were more likely to have seen an upward shift in dispute volumes.

Looking to the future, the trend toward higher volumes of disputes is set for a modest acceleration, with 46 percent of corporations predicting an increase in normal volumes in the next six month period—another trend that looks set to impact larger corporations more readily than smaller outfits, with two thirds of \$1bn+ companies expecting an increase compared to around a quarter of small organizations.

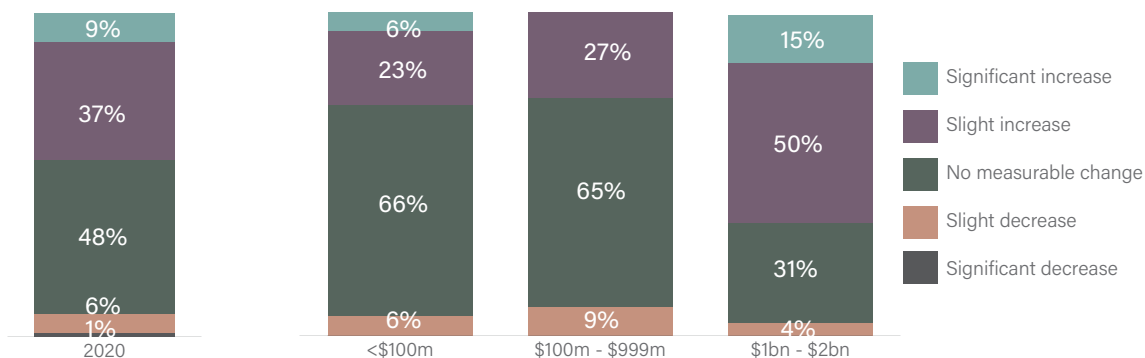
Preventative measures are being put in place by some to mitigate expected increases, with contractual review and internal policy revisions proving most common.

NRF Insight

“It is not surprising that larger organizations, and those in the financial services industry, are seeing an increase in disputes volume, given that the largest increases by subject matter are contracts, labor/employment, and commercial – which tend to be significant in such organizations even in an untroubled economy. The pandemic, and the resulting economic difficulties, would have a greater effect on those types of disputes due to higher unemployment, business interruption and overall disruption in lending, housing and spending.”

Judith A. Archer, Partner, Norton Rose Fulbright

To what extent has the COVID-19 pandemic directly impacted the volume of disputes your organization has had to deal with over the last six months?



Of course, the volume of dispute activity is only one pressure potentially facing in-house teams, with research also identifying a number of other pandemic-related pain points experienced by a large proportion of the surveyed population.

What, if any, preventative measures are you/do you plan to put in place to mitigate against a rise in disputes?



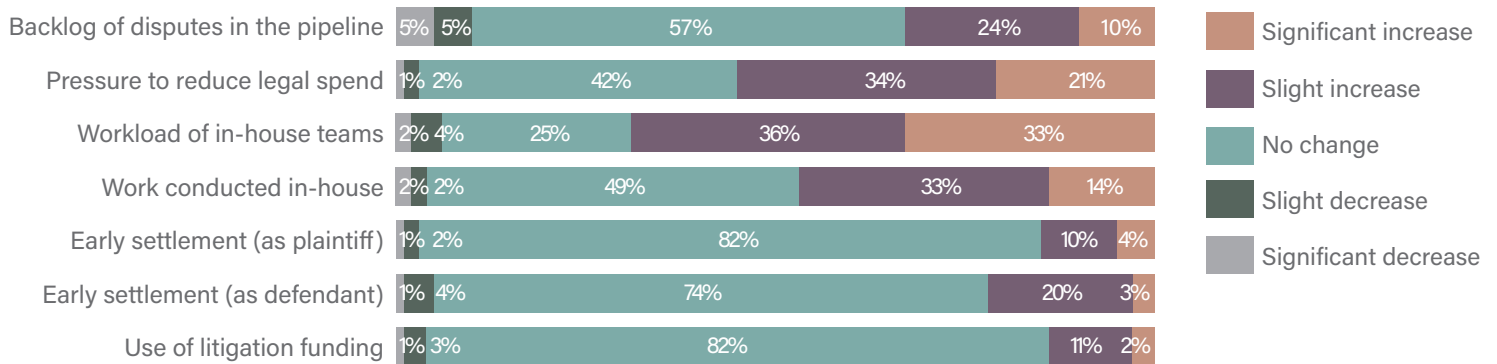
Resourcing challenges are among the most prominent focuses, with two thirds reporting increased workloads for internal teams as a result of the pandemic, half of whom describe the increase as significant. Crucially, this is coming at a time when increased management scrutiny is being placed on legal spending, with pressure mounting on half of in-house teams to reduce legal spending overall.

NRF Insight

“Clients particularly impacted by resourcing challenges and heightened demands for lowering legal spend increasingly stress ‘doing more with less...and doing less until more is needed.’ Internal legal teams are being asked to engage more and assume more responsibility on larger matters to drive higher utilization of internal resources to manage legal spend. In keeping with this approach, some clients have sought to disaggregate workflows and increase collaboration between internal legal teams and external counsel in search of discrete assignments to be carved-out and delegated to internal counsel.”

Carlos R. Rainer, Partner, Norton Rose Fulbright

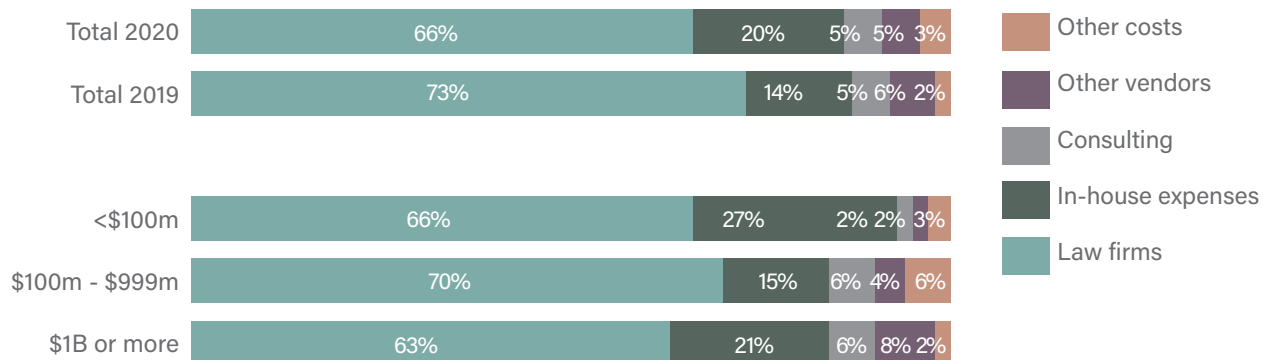
Across your organization, to what extent have the following areas increased or decreased as a direct result of the COVID-19 pandemic?



With external counsel accounting for around two thirds to three quarters of annual litigation spending, it is clear that a significant minority are looking externally for cost savings in the near term at least.

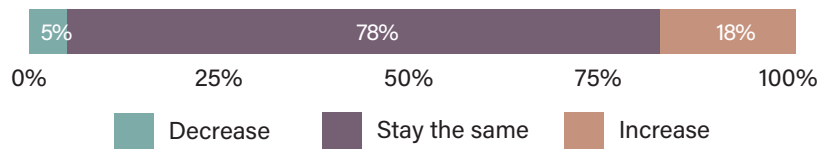
Almost half of respondents report bringing more work in-house this year as a response to pandemic conditions and proportional spending is also reflecting this shift. In 2019, 73 percent of litigation spending was allocated to law firms, dropping to 66 percent in 2020 with a comparable increase in in-house spending allocation. This pattern is even more prevalent in larger (\$1bn+) organizations, with law firm spending allocation dropping to 63 percent on average, compared to 72 percent in both 2019 and 2018.

Approximately what percentage of your annual litigation spend (excluding cost of settlement and judgments) is allocated to the following areas:



For most, these growing pressures come against a backdrop of static or even decreasing median in-house headcount in 2020 and, with only 18 percent of corporations expecting to add to headcount in 2021, it is clear that resourcing will remain strained for many in-house teams in the coming year.

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?



Expected increases in headcount are largely motivated by resource reallocation or increases in workload. These departments are either looking to shift more work in-house to reduce external legal spending or desire to add headcount and expertise to address increased dispute volume and complexity.

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“Notably, those clients who are looking to increase their internal legal teams are placing greater emphasis on candidates with specialized knowledge and multidisciplinary skills, leading some to request assistance from external counsel to identify target referral candidates to recruit or for selection among external counsel for possible secondment.”

Carlos R. Rainer, Partner, Norton Rose Fulbright

Given these resourcing pressures, surprisingly few corporations have turned to early settlements

The 2019 edition of Litigation Trends indicated less than one in ten corporations had an appetite for quick/early settlements and, for most, the pandemic does not appear to have moved the needle in this area. Twenty-three percent of respondents have increased the volume of early settlements as defendant (3 percent significantly increasing) and 14 percent as plaintiff (4 percent significantly). Starting from the relatively low number who adopted this approach in normal times, increased early settlements are being driven by a minority overall.

Of course, for some, early settlement was a valuable aspect of their toolkit in 2020. Anecdotally, respondents have found a strategic imperative to come to the table early—whether as a means of quick resolution to limit workload, or seeing an opportunity where a counterparty may be financially distressed and more open to alternative resolution.

Even fewer have shifted in their attitudes on litigation funding—among those who felt funding was relevant to them, over eight out of ten have not changed their approach this year and only 2 percent have increased usage significantly (11 percent slightly).

For those increasing funding and/or early settlements, it's clear their level of actual or perceived exposure to the pandemic is higher than average, with this group more likely to:

- Have seen an uptick in dispute volume as a result of COVID-19
- Have a backlog of disputes in the pipeline
- Be experiencing increased workload pressure
- Expect an increase in disputes volume into next year
- Feel exposed to business interruption disputes

“With the pandemic, plaintiffs have an extra motivation to settle due to the situations they find themselves in. They need to have fewer complications in their lives, so in some cases the pandemic has presented more motivation to settle.”

Senior In-house counsel at Fortune 100 company

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“In this climate, we’ve found litigation opponents are frequently anxious to pocket cash, and in light of the uncertainty of when courts will reach actual trial dates or rule on substantive motions, early settlements often look pretty appealing.”

D’Lesli Davis, Partner, Norton Rose Fulbright

“Companies whose business is more susceptible to disruption from the pandemic are more likely to pursue early case resolution opportunities, where advisable – for example, for matters that are one-off or that will not greatly impact the company in terms of precedent. We are also seeing courts increasingly suggest mediation or other early settlement processes, which may impact client strategy as well. “

Judith A. Archer, Partner, Norton Rose Fulbright

The importance of Legal Operations Consulting

Resourcing challenges exacerbated by the pandemic are complex problems requiring holistic, data led solutions.

“In-house teams are expected to deliver measurable, strategic value to the business with limited resources and increased workloads. These pressures have been compounded by the pandemic. The traditional response to increased financial pressures is to reduce headcount or external legal spend - sometimes and more often than not both at the same time, however unless those decisions are data led, part of a holistic External Resource Management (ERM) or resourcing strategy and aligned to the business’s strategic priorities, they may prove more costly than cost-saving in the longer term.”

Stephanie Hamon, Head of Legal Operations Consulting, Norton Rose Fulbright

Potential risks to not managing changes with a holistic ERM strategy that we have identified include:

- a lack of specialist skills in-house leading to negative litigation outcomes and an increase in reputational risks
- increased workload negatively impacting team morale
- a reduction in service levels affecting relationships with internal and external customers
- focus diverted from strategic initiatives when assigning more internal staff to litigation matters

Any decision to move work in-house should be preceded by an examination of the current landscape: What work is being done and by whom? What types of disputes are taking up most of the Legal team’s time? What capabilities currently exist in-house, are there skills or capacity gaps and what support does the business need - now and in the future?

Answering these questions can help Legal teams identify opportunities and threats and ensure the right work is being done by the right people for the right price.

Before, or at least parallel to, embarking on more significant (and potentially costly) changes to any panel, existing law firm relationships or ERM structure, we encourage our clients to consider:

- Deploying legal project management techniques to manage litigation matters more efficiently. This may involve documenting project scope with greater accuracy to prevent scope creep and aid pricing negotiation with external counsel, ensuring the proper resources are allocated in the correct proportions or better budget management to avoid write-offs and unexpectedly high fees. Legal project managers can focus on matter administration, thereby freeing up valuable time of in-house lawyers to focus on higher value work; use of LPM methodology has proved to deliver up to 25 percent of savings against budgets forecast.
- Implementing a spend management tool and appropriate KPIs to analyze external spend data and support strategic decision making as well as avoiding potential leakage from billing rules non-compliance.

Longer-term solutions which are increasingly on our clients’ radar and from which they can derive significant value include:

- The bulk outsourcing of high volume, low value matters to law firms in order to benefit from efficiencies of scale and reduce administrative complexities.
- Implementing an intake and matter management system to track resource demand, matter progress and trends.
- Using automation tools and AI to drive efficiencies and provide business users with more self-service options. This has existed for some time already around e-discovery exercises for example, but other applications are emerging, some prompted by the current pandemic.
- Conducting a review of the external resource management structure/ panel and shifting to a relationship management model to ensure a return on investment.

*Our **Legal Operations Consulting Practice** within NRF Transform helps general counsels and in-house legal teams optimize the delivery of legal services to their organizations, enabling them to go beyond managing legal risk and become a strategic business partner, supporting the wider objectives of the business. The Practice offers strategic legal consulting, legal operations advisory and legal operations delivery services, including legal project management.*

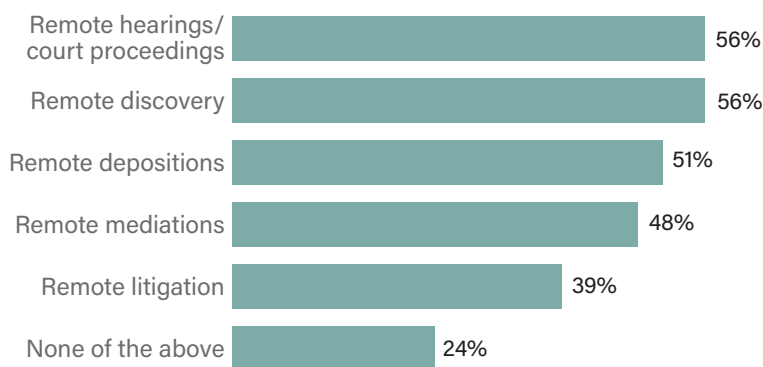
More information about our Legal Operations Consulting Practice can be found at: <https://nrfttransform.law/legal-operations-consulting/>

Three quarters have been involved in virtual dispute activity with a majority seeking a permanent shift in behavior—particularly depositions, mediations, discovery and some court proceedings—views are polarized.

Around a third of respondents reported an increase in the backlog of disputes in the pipeline, citing a combination of court closures and lockdowns. For more than half, there was no particular increase in backlog and, as in a myriad of other areas of personal and professional life, dispute activity has adapted and continued remotely.

A quarter of respondents reported no direct experience of undertaking dispute activity remotely. However, the majority had been involved in remote hearings or court proceedings, discovery conferences and depositions. Just under half had undertaken mediations remotely and over a third actually litigated in a remote environment.

Since the beginning of the pandemic, have you/your teams had experience doing the following things remotely (i.e. via Zoom or phone)?



“On screen there is no hiding, you can read their facial expression, you know if they are paying attention or not”

Chief IP Counsel – Fortune 200 Company

Our in-depth interviews have shown that in-house teams have adapted successfully to remote activity—albeit with the usual adjustment issues experienced universally following a sudden and massive shift to remote working.

Confidence in remote processes was also high. While not every individual is an advocate of the remote approach, most were as confident in the remote processes as they had been when things were done face to face. In some cases respondents identified strategic opportunities or participated in activities they would not have travelled for in the past.

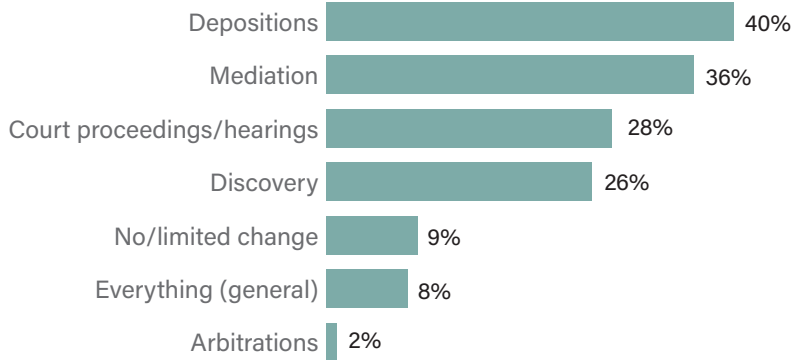
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Remote communication technology has enhanced collaboration on key tasks, with some side benefits that are likely to remain even after full-time remote working ends:

- Ease of document sharing / collaboration has significantly improved, but brevity and focus are more important than ever as attention spans reduce – the days of the 100-page briefs may be over
- More people can attend key events now that travel and budget constraints have been removed, optimizing staffing decisions on disputes
- Lack of personal interaction has led to more intentional outreach to maintain culture and relationships

Data trends certainly point to a continuation of some remote elements of dispute activity once the pandemic is over and parties can travel and meet more freely. Most respondents identified areas that they felt would continue remotely in the future, with depositions and mediations the most common areas mentioned, along with certain court proceedings and discovery activities.

Which elements of disputes do you think will continue to be done remotely after the COVID-19 crisis has ended?



“I think dispute resolution is still going to be as in-person a process as possible. I don’t see a significant change in how that is handled.”

Associate General Counsel – Technology Company

As may be expected, the concept of dispensing with in-person dispute activity absent any medical safety justifications is polarizing opinions across the corporate counsel we spoke to—similar to ongoing debates about future working practices across the legal sector and other professions.

A minority of opinion sits at the extreme edges of the debate: some want to use this experience as a catalyst to embrace long-term shifts to remote working across all or most dispute activity, while others are anxious to return to in-person working as soon as possible.

Arguments for and against each viewpoint do vary; proponents of the remote method tend to focus on practical efficiencies, while those seeking a return to in-person working tend to highlight weaknesses in the remote process or point to human behavior as the key influencer:

Positive about remote option	Seeking return to FTF sessions
Saving on travel expenses	Deponents using notes remotely
Significant time savings	Trials – too challenging to monitor Jurors
Already demonstrated that it works	Resistance from lawyers – want to be in the room ‘eyeballing people’
Efficient clearance of backlog	Counterparties likely to insist in FTF
Increased comfort from users of remote software	Depends on Court decision
	Human contact beneficial (mediations, depositions)
	People more persuasive in-person

The majority opinion is between these two views, with many seeking a blended approach, seeing clear time/cost savings in areas such as depositions for instance, but predicting that many key touchpoints will continue to be face-to-face.

Emerging issues

Four in ten respondents see new sources of disputes for their business emerging in the next two-to-three years

Unsurprisingly, the COVID-19 pandemic has been the primary driver of anticipated emerging disputes. The fallout from the pandemic has the potential to drive increased dispute activity from a myriad of areas—new patterns and practices of working, the wider economic impact and anticipated legislation or decisions governing key areas of conflict (for example business interruption insurance).

However, in the wake of the pandemic it is easy to lose sight of other emerging risks as legal teams prioritize reacting to the immediate crisis. Our internal partner survey predicted the growing emergence of concern around climate change and environmental disputes, alongside an increased focus on antitrust and discrimination and a continued focus on cyber security—all of which have been reiterated by the survey respondents as areas of growing future risk.

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“Most observers anticipate that antitrust enforcement, both merger enforcement and cartel prosecutions, will increase in the coming years in light of the very substantial market disruption and dislocation caused by the COVID-19 pandemic, as many believe that regulators both at the DOJ and FTC most likely will view the crisis and concomitant economic fallout as creating real opportunities and incentives for consolidation leading to highly concentrated markets and increased collusion in the form of price fixing, bid rigging, market allocation and other forms of unlawful anticompetitive conduct ...the DOJ’s newly-created Procurement Collusion Strike Force is on high alert for such activity...the Strike Force was created specifically to deter, detect, investigate and prosecute bid-rigging and other antitrust offenses.”

Carlos R. Rainer, Partner, Norton Rose Fulbright

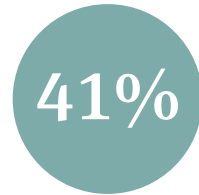
Looking forward to the next 2-3 years, do you foresee any new sources of disputes for your business on the horizon?

COVID

- Workers compensation
- Health and safety
- Remote working
- Documenting procedures
- General compliance
- Bankruptcies / loan defaults
- Business Interruption
- New legislation emerging
- Insurance claims

Growing awareness

- Environmental
- Climate change
- Air pollution
- Discrimination
- Freedom of speech



saw new sources of disputes emerging

Growing awareness

- Environmental
- Climate change
- Air pollution
- Discrimination
- Freedom of speech

Data Privacy

- Cyber security
- Increase tech focus – more breaches

Emerging Industries

- Cannabis industry
- Autonomous vehicles

“[We] will definitely see disputes arise from equality types of claims, not only in racial discrimination, but [also] gender equality. My hope is that most organizations, including ours, are taking positive steps to address those types of issues and are being proactive in their approach of how they address those claims.”

Global Head of Labor & Employment – Fortune 200 company

Despite rarely being top of mind, levels of exposure to emerging disputes are high for many organizations

As our research has identified, the level of concern that organizations express for certain dispute types can bear little relationship to the frequency of occurrence. Emerging disputes are not always top of mind, even when exposure may be relatively high.

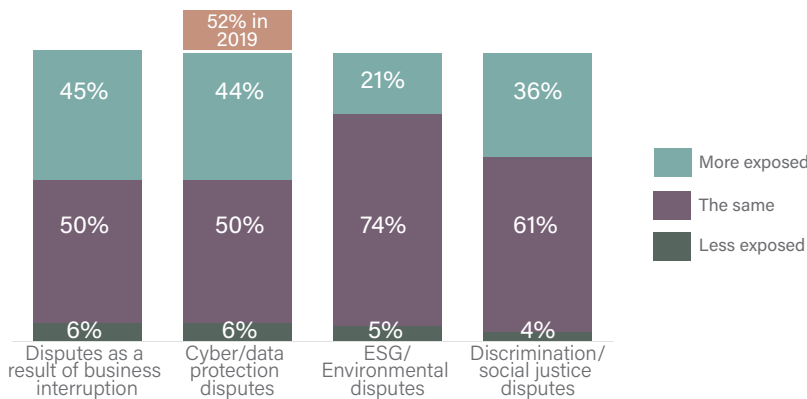
Using the results of our initial internal partner survey and early in-depth interviews with a cross section of clients, we found four key areas of emerging risks which we directly tested in the wider market survey:

- Exposure to business interruption disputes
- Exposure to cyber/data protection disputes
- Exposure to ESG/environmental disputes
- Exposure to discrimination/social justice disputes

All four of these areas have received increased coverage in the legal sector and beyond in recent months. In the case of cyber security, previous Litigation Trends reports have shown that wider awareness of a topic is a catalyst for increased focus from a legal risk perspective.

A key takeaway from this year’s report is that very few organizations feel less exposed to any of these risks than they did 12 months ago, and substantial minorities feel more exposed.

(Where relevant) Over the last 12 months do you feel your business has become more or less exposed to disputes in the following areas?



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Cyber disputes are on the rise and quickly evolving

In 2019, companies were focused on implementation of, and ensuring compliance with, GDPR and other new privacy mandates. In 2020, cyberattacks have skyrocketed and disputes have been more numerous – and more serious – as sophistication of the attackers increases, and even those investing heavily in counter measures may struggle to keep pace.

Ransomware and accompanying data theft attacks are becoming more widespread, exposing companies in all industries to significant risk from potential class actions, as well as business interruption and other commercial disputes – particularly when the company has what could be deemed insufficient safeguards.

Perceived exposure to business interruption disputes were the net result of an ongoing pandemic, the depth of economic fallout and the volume of financially distressed counterparties engaging in disputes activity. Similarly, the majority of respondents to the 2019 survey felt that economic downturns would increase dispute volume. However, business interruption exposure should be limited in duration, whereas the other trends are likely to continue, thus increasing the level of uncertainly and potential exposure.

Cyber security has been a growing trend for several years, and perceived growth in exposure to it was actually higher in 2019 than in 2020 (the only one of the four that was tested in 2019), though this shouldn’t diminish the overall concern—on balance the level of exposure is still growing for a far higher proportion than are feeling less exposed. Along with business interruption, the threat of cyber attacks is more prevalent in certain groups of respondents, with \$1bn+ revenue organizations feeling substantially more at risk overall.

As may be expected, exposure to ESG/Environmental disputes is felt most distinctly among our energy sector respondents (a third compared to a fifth overall).

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Despite being under pressure, in-house teams remain on top of critical emerging risks.

Organizations have to conduct business according to today’s standards – especially those whose shares are publicly traded. Now, more than ever, companies must be authentic and measured in the claims that they make because they will be held accountable by their people and the wider market through litigation and the press.

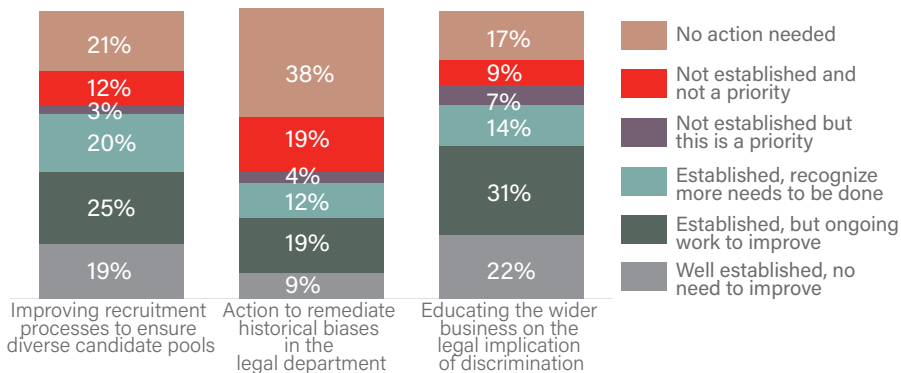
The focus on ESG and sustainability increasingly extends to companies outside of the energy industry as well – in areas ranging from retail and travel to construction and pharmaceuticals. Companies will have to show consumers and investors that they take ESG seriously, including going beyond sustainability to operations, labor practices, product safety and community involvement.

Risk from discrimination disputes is felt to be high, but many are taking (or have taken) action to reduce the level of exposure they face and to encourage changes to working practices

Results from this year’s survey show that around half of respondents feel they either need to, or are taking, active steps around recruitment policies to improve the diversity of teams in legal departments specifically, and to educate the wider business on the legal implications of discrimination.

Across the respondent base the picture is relatively mixed with respect to recruitment tactics, with organizations at different stages of perceived need and realized activity. A fifth do not feel any action is needed—often related to the relatively small size or long tenure of the legal teams, where it is difficult to place a wide variety of candidates in a very limited number of roles or where there has been no active recruitment for a long period of time. A further fifth feel policies are already very well established, with no need for improvement, and about a quarter feel they have established policies that are still a work in progress—rising to a third for \$1bn+ organizations.

Across your internal legal department, to what extent has action been taken on the following areas?



Some organizations feel there is still work to be done in this respect, with around a quarter feeling either more needs to be done or that this is a priority for the future.

Respondents took a similar view on the extent to which action had been taken to educate their organization to mitigate against discrimination disputes in the future. Again, around a fifth see this as very well established, but over half see opportunities for more work to be done, with increased awareness being higher in the larger organizations participating. Notably, those who feel more exposed to discrimination disputes in general are significantly more likely to have made efforts to educate the wider business on the legal implications of discrimination internally—a clear sign that in-house teams are recognizing the risk and taking action.

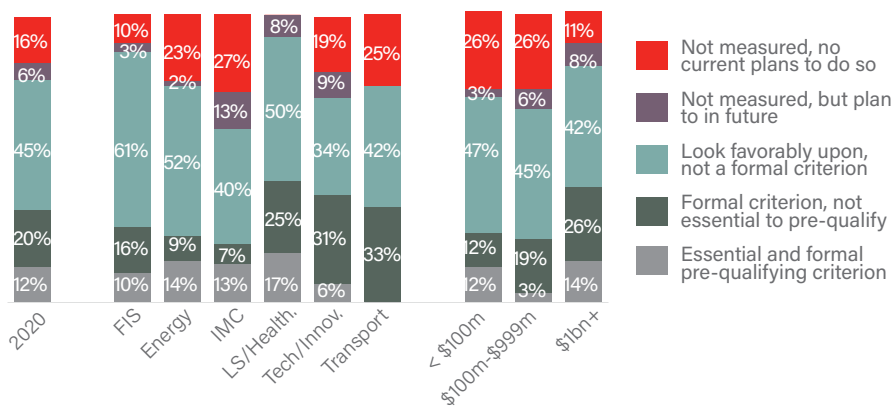
The last few years has seen a significant increase in the emphasis placed on the diversity of teams that law firms field on clients’ matters. Increasingly, clients are challenging law firms to showcase a variety of talent and, in many cases, undertaking data collection exercises to rate their panel firms’ performance in this respect.

“[The] General counsel had a whole day for our entire legal and regulatory department where there was a four-hour open conversation about race and hearing about the experiences of our minority colleagues. There is a follow up session happening, which is a good start. The organization is trying to move forward with the ongoing support around diversity and inclusion, there’s a reading group etc. There is a diversity and inclusion council and the department is pretty diverse.”

Deputy General Counsel –
Fortune 500 company

Our research shows that fielding a diverse and inclusive team is an attractive characteristic for most in-house teams we spoke with, especially for the larger organizations, which are more likely to have formal policies regarding Diversity and Inclusion (D&I). Slightly under a third of organizations have D&I as a formalized selection criteria, with it being deemed essential for one in ten overall.

Thinking about the importance of Diversity and Inclusion, and the diversity of matter teams, which of the following best describes your organization’s position when deciding which law firm to work with on a matter:



“We have an incredibly diverse legal team [...] It brings all of the benefits that are advertised - I’ll be honest I have always considered it to be an important thing, but it is difficult to ascribe a measured value to it. We are at the point in American culture and society where no one needs to be convinced on the advantages—it’s a question of how you recruit, retain and promote.”

Chief Legal Officer –
Fortune 1000 Company

NRF Insight

“Norton Rose Fulbright has a long-standing commitment to fostering diversity and inclusion. Some of our recent efforts, to name only a few, have included forming a Racial Equity Council which is focused on recruitment, retention and promotion of our Black lawyers and non-lawyer personnel. Through that Council, we have developed an in-depth sponsorship program for our Black non-partner lawyers. We have also improved our processes for filling non-lawyer positions and are ensuring that a diverse slate of candidates is considered for each opening. In addition to our efforts within our firm, we are working with the community at large to effect change. We work with several pipeline programs helping to increase the diversity of students entering and graduating from law school. Our lawyers contribute thousands of hours towards community initiatives and pro bono efforts, including matters focused on racial, gender and LGBTQ+ equality. These are but a few of the many steps we are taking to make a real difference.”

Katherine Tapley, Partner, US Chief of Diversity & Inclusion

Disputes Trends

Overall trends/year on year

Predictions once again point to an increase in disputes, however reported lawsuit rates have tended to remain flat despite previous predictions of increases.

On balance, disputes are expected to rise in 2021: 40 percent of those questioned this year predict an increase next year compared to 7 percent anticipating a decrease. Notably, not all of those expecting a future increase were impacted by COVID-19, with many neither predicting a short-term increase as a direct result of the pandemic nor having experienced a rise in the past year.

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

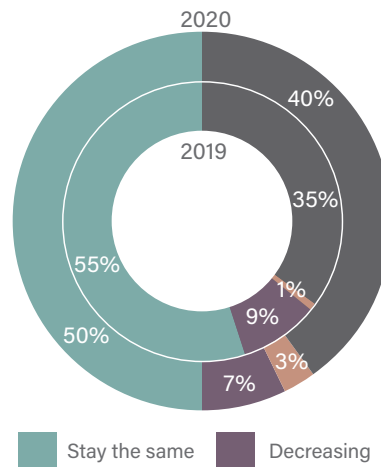
Decreasing drivers

- Current disputes will be resolved
- Do not anticipate new disputes arising
- Smaller business

On Balance changes*

2020
+33%

2019
+26%



Increasing drivers

- Economic climate
- Anticipating likely disputes
- Expanding company

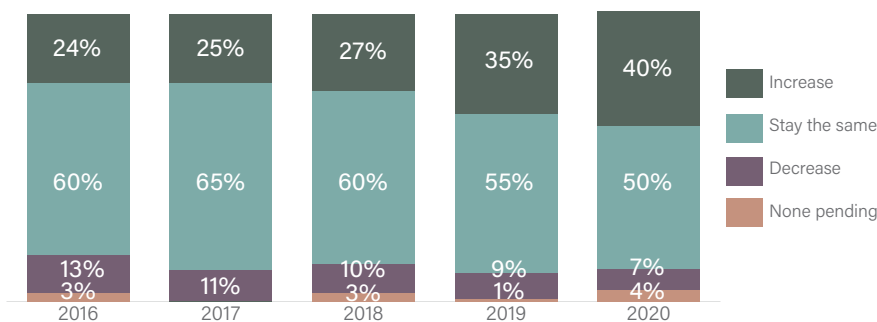
Those who saw an increase as a result of COVID more likely to predict an increase next year overall – but many predicting an increase were not affected by COVID

Increasing Stay the same Decreasing None pending

*On Balance = proportion increase minus proportion decrease

Predictions of increased disputes year-on-year have not been uncommon in previous Litigation Trends studies—in fact predictions for 2021 continue to follow a year-on-year trend with similar proportions expecting a decrease, but growing proportions predicting a rise year-on-year.

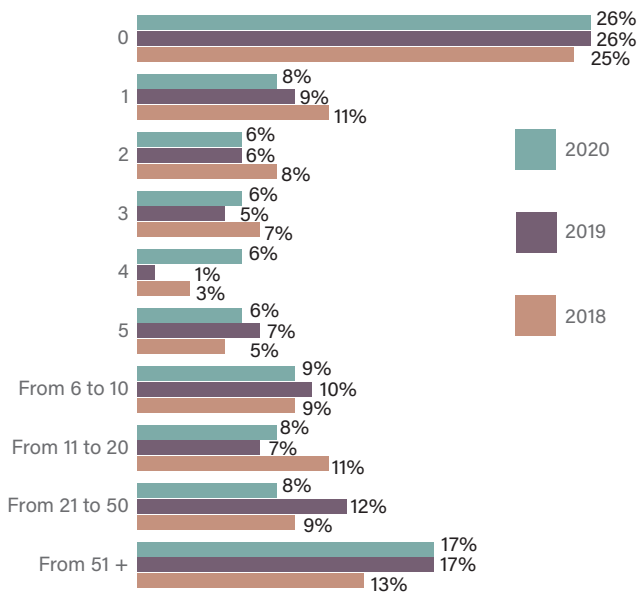
Expectations show increasingly litigious environment is continuing



Continued increase in number of respondents expecting disputes to increase every year from 2016 to 2020

Despite previous predicted increases, the actual reported volumes of lawsuits have remained remarkably steady over recent years. With the unprecedented external market conditions in 2020-21, it will be interesting to observe if pessimistic predictions of more disputes come to pass. Both median and mean averages for number of lawsuits faced by defendants have remained almost exactly the same over the last three years, with plaintiff numbers showing some fluctuation as a mean value, but little at the median level—a measure less likely to be impacted by high or low outliers.

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

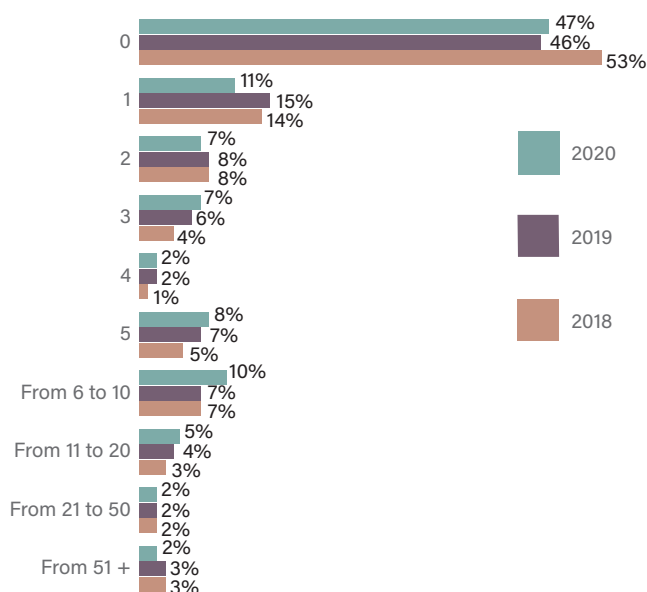


Lawsuits

	2020	2019	2018
Median	4	5	3
Mean	92	90	87*

*Excluding 2 large outliers, mean = 203 otherwise

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



Lawsuits

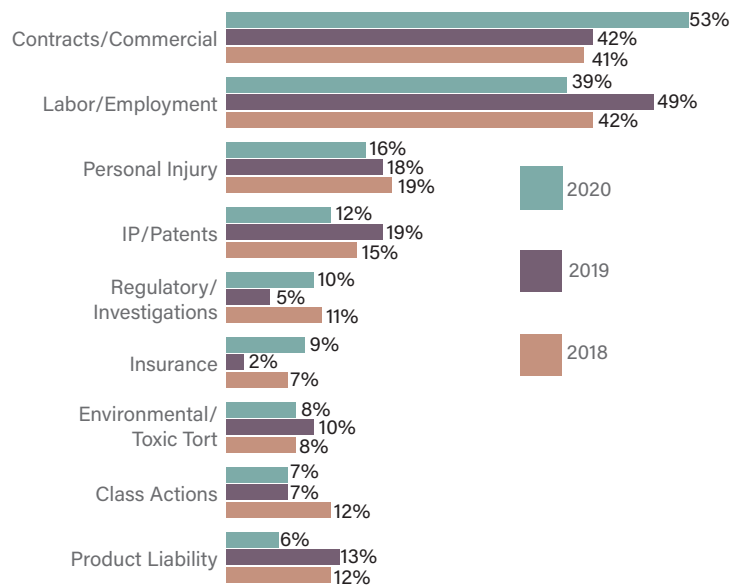
	2020	2019	2018
Median	1	1	0
Mean	20	44	8

Common and concerning disputes

Given the prevailing events surrounding the 2020 survey, it is little surprise that contracts/ commercial disputes and labor/ employment issues have remained the top two most common disputes faced by respondents—a pattern which has persisted for a number of years.

Of course, these are challenges likely to be faced by the majority of corporations in an average year. As such, dispute sources lower down the list that may be less commonly experienced have shown more interesting fluctuations in 2020, with both regulatory investigations and insurance disputes more commonly appearing in respondents' top three dispute types by volume.

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

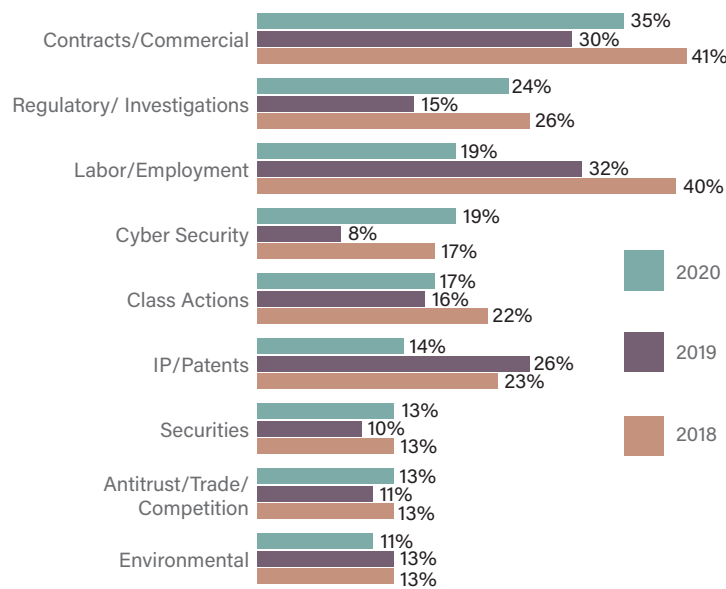


Although contracts/commercial and labor disputes are by far the most prevalent, relative concern is flat or declining compared to previous years, with the former fairly flat since 2018, and the latter declining steadily.

In contrast, regulatory investigations and cyber security have both grown in their share of the top three most common disputes compared to last year. Similarly, although mentioned by far smaller proportions of respondents, fraud, insurance and energy-based disputes have also seen a year-on-year increase in terms of relative levels of concern.

What would be the top three types of legal dispute which would be of most concern to your company?

What are the top three types of legal disputes of most concern to your company?



This pattern of changing risks becomes more prevalent when viewed by industry sector. When asked about the single most concerning dispute facing their organizations, the collective view of each headlight sector is different from the 2019 picture.

2020 Picture

	Finance	Energy	IMC	Life + Health	Tech + Innovation	Transport
1	Insurance 16%	Contracts/Comm. 28%	Contracts/Comm. 20%	Regulatory 18%	Cyber 19%	Personal Injury 21%
2	Cyber/Contracts/ Comm. 13% each	Environmental 15%	Regulatory/ Securities 13% each	Cyber/Antitrust/ Class/IP 14% each	Contracts/Comm. 11%	Cyber/ Regulatory 14% each
3	Regulatory/Class actions/Malpractice 9% each	Antitrust/ Regulatory 9% each			Regulatory/Antitrust/IP/ Product/Commercial 8% each	

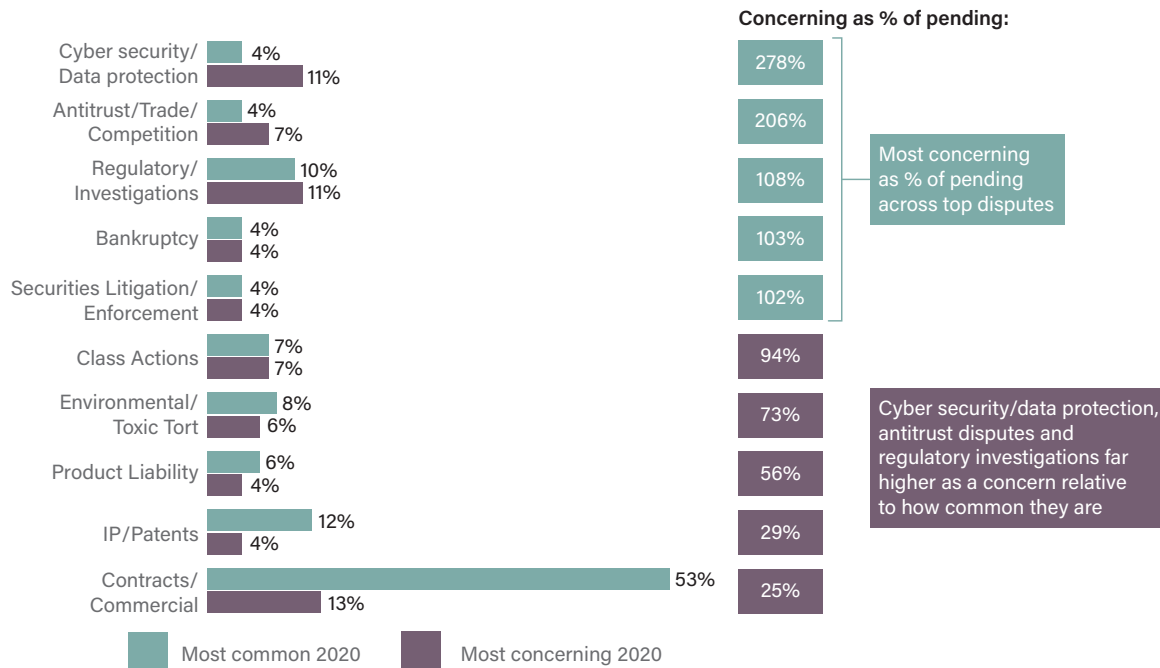
2019 Picture

	Finance	Energy	IMC	Life + Health	Tech + Innovation	Transport
1	Regulatory 17%	Environmental 19%	Labor/ Employment 16%	Product liability 17%	IP/Patent 33%	IP/Patent/ Labor/ Employment 19% each
2	Labor/Employment/ Class actions 15% each	Contracts 13%	Environmental/ Contracts/ IP/Patents/ Construction 11% each	IP/Patents/ Regulatory/ Professional/ Malpractice 14% each	Labor/Employment 16%	Class actions/ Insurance 13% each
3	Securities 11%	Regulatory 11%		Labor/ Employment 10%	Class actions/Contracts/ Cyber security 10% each	

As in previous surveys, it remains evident that it is the things one doesn't see coming that cause the most concern. While contractual disputes and labor issues are highly prevalent, in-house teams are, by and large, very well-prepared to deal with them, with the associated risk factors generally quite low as a result.

Stacking up the most concerning disputes against the most common gives a very different picture of what is on the mind of litigation counsel this year. Despite appearing in the top three most common dispute sources for four percent of respondents, cyber security/data protection is the single most concerning dispute for 11 percent (or almost three times the number) of respondents. Similarly, antitrust has a far higher proportion citing it as a concern than those who actually experience the issue with any regularity, with more people highlighting regulatory investigations as a concern than the number experiencing them. All three of these areas directly contrast with contractual disputes which, despite being the most concerning overall, are far down the list of concerns as a proportion of pending disputes.

Most common disputes versus single most concerning disputes



NRF Insight

Our world class cyber and privacy practices have seen the largest uptick in activity amongst our disputes attorneys. This largely results from so-called ransomware attacks on clients' information technology systems which require a combination of remedial measures, negotiations with applicable insurance carriers and attackers, counseling concerning risk mitigation for the current and any future potential attacks, and handling claims and lawsuits asserted against the companies that have been hacked. Without significant protections in place, we see a growing trend continuing in the foreseeable future, with important mitigation measures and protocols becoming more and more critical.

With multiple changes in governmental leadership in the investigations and enforcement arena, our global disputes practice has also seen an uptick recently in the investigations of alleged market manipulation and anti-bribery statutes. We believe this activity will only increase given changes in the executive branches worldwide, and the likely focus by the DOJ, SEC, FCC and other similar agencies around the globe on enforcement and criminal actions against alleged wrongdoers.

Richard Krumholz, Global Head of Litigation

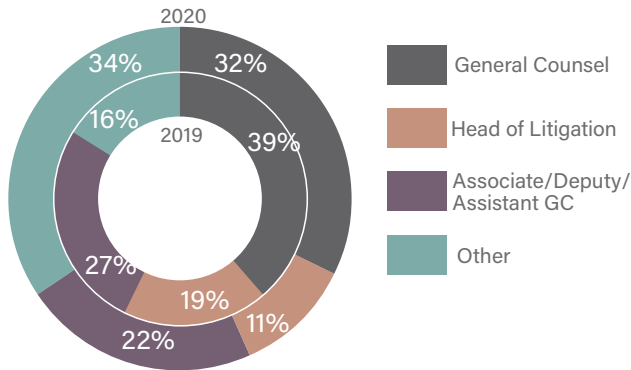
What is driving concern?

Cyber / Data Protection 11%	Regulatory 11%	Antitrust 7%
<p>"Law is less well established, and penalties and judgments can be arbitrary."</p>	<p>"Potential for criminal liability, size of civil penalties and reputational damage."</p>	<p>"We are growth focused and do quite a bit of M&A - anything that stops growth or unwinds transactions would be problematic."</p>
<p>"Cyber attacks have already shut down our operations more than once...and expect it to continue."</p>	<p>"It has continued to rise under "business friendly" Presidential administration and would probably increase by an order of magnitude under the anticipated administration."</p>	<p>"Potential for fines/criminal liability"</p>
<p>"I believe our size company is a target for cyber attacks."</p>	<p>"The power of regulatory agencies, the potential damage to business reputation, the potential costs/exposure and the inability to limit potential costs/exposure by using contract term"</p>	<p>"Antitrust is the most concerning as it's so expensive to defend here in the US and the potential damages is so high."</p>
<p>"Reputational impact, cost of defense and cost of damages/penalties."</p>	<p>"Regulatory issues could prevent us from being able to produce pharmaceutical products... a material negative impact on our business."</p>	<p>"Impacts our ability to conduct business in the most efficient way."</p>
<p>"...can affect so many countries / individuals at the same time... including remediations for essentially millions of people as well as the government getting involved and sanctioning you on top of it for not protecting individuals or not... It's so damaging in so many ways...I can't think of anything that's worse."</p>	<p>The power of regulatory agencies, the potential damage to business reputation, the potential costs/exposure and the inability to limit potential costs/exposure by using contract terms, limitation of liability clauses, or arbitration clauses..."</p>	<p>"Just because there's very high stakes." "Infringement of consumers right."</p>

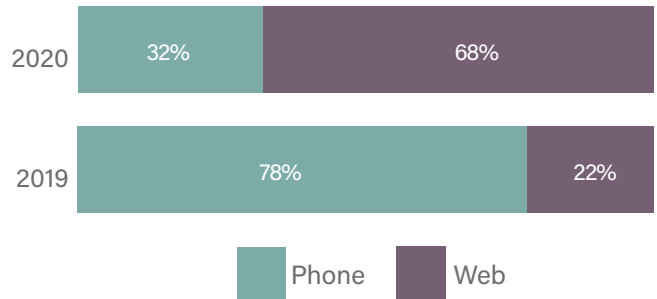
A key area of interest for the coming months will be the extent to which regulatory investigation concerns actually materialize. The proportion feeling that regulatory bodies have become more interventionist in the last 12 months was consistent with the 2019 results (40 percent in 2020 versus 38 percent in 2019). These figures in themselves are a shift in sentiment from previous editions of the survey conducted in a different political era, where far higher proportions had indicated that regulatory intervention was increasing. As 2021 ushers in a new administration, there is an open question as to extent to which regulatory investigations will increase in volume.

Demographics

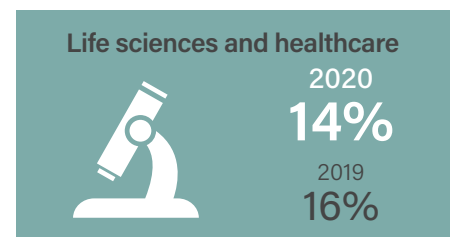
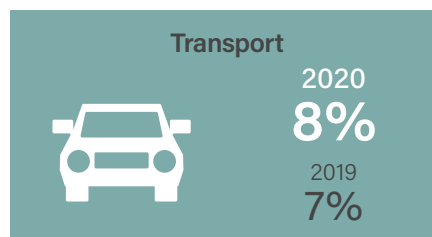
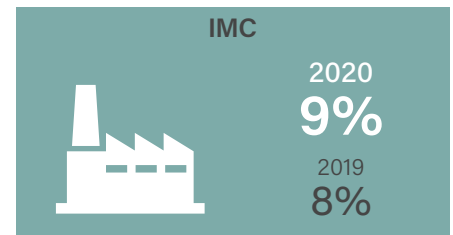
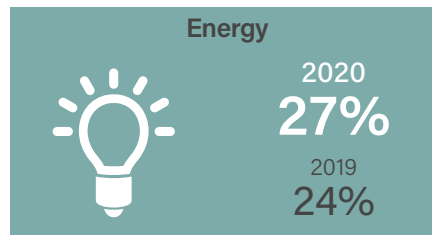
183 respondents



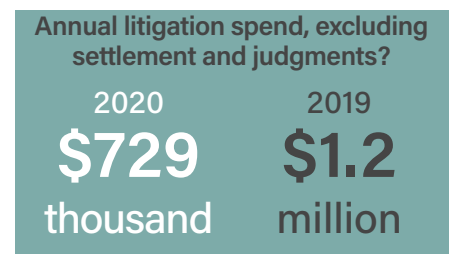
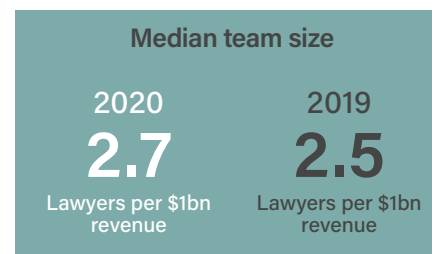
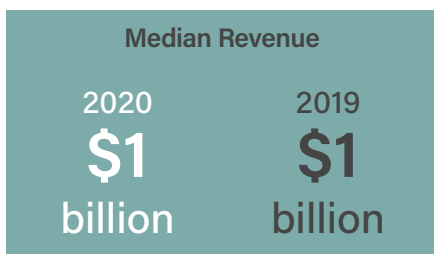
Methodology



Industry breakdown



Average dispute activity





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Law around the world

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