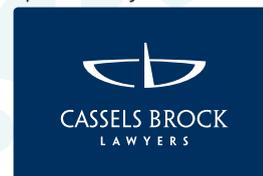


SEEKING alternative arrangements

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The annual *Canadian Lawyer Corporate Counsel Survey* shows in-house counsel have an open mind to alternative fee arrangements, but do they really know how to get better value?

By Jennifer Brown

The momentum has been growing slowly for years but it seems in-house counsel are ready and want to trade in the billable hour model for something more progressive. Responses to the 2014 *Canadian Lawyer Corporate Counsel Survey* indicate there is a growing interest within the in-house bar to changing the conversation when it comes to negotiating billing options with external law firms.

While the billable hour is still No. 1, there was a considerable drop to 47.3 per cent, compared to 55.2 per cent last year, who cite the billable hour as their primary arrangement. "Absolutely, I agree the billable hour is still No.1," says Peter Gutelius, assistant general counsel at RBC. "We're all still working hard to move away from it but it's been around for a long time and covers a large industry and takes a while to move away from it."

This year, more than 320 law department leaders from Canadian corporations and government participated in the *Canadian Lawyer* survey. The balance of respondents indicated they use a combination of billable hours plus flat fees (30.5 per cent), alternative fee arrangement (7 per cent), flat fees (4.4 per cent), RFP process on large projects (4.4 per cent), and "other" (6.2 per cent). Many said they have "billable hours, RFPs, and flat fee" arrangements in "varying measures."

When asked what measures they put in place in the last year to manage costs, 42.9 per cent said they brought more work inside with 28.3 per cent indicating they came to a new fee arrangement with their outside counsel.

For those in-house counsel who are using alternative fee arrangements, 73 per cent say they introduced the idea to their law firm, while 21 per cent said they discussed it mutually with their law firm partners, and six per cent said their firm introduced the idea. One respondent indicated they retained a third party to negotiate with law firms.

Interestingly, 75.6 per cent of respondents said they would be receptive if a firm other than who they are currently working with proposed an alternative fee arrangement.

MORE THAN JUST A DISCOUNT

When asked which AFAs are being used, 56.3 per cent of respondents said discount, followed by flat fee, quoted on a prescribed scope, or phase/bundled portfolio of work. Capped fees, where the client pays the lesser of the actual cost or pre-determined capped fee, was third most popular at 49.6 per cent.

Gutelius, who leads RBC's legal team supporting its global commercial



litigation, says while it's a good idea for in-house counsel to try and figure out new arrangements, it's important to spend the time in advance to consider what it is you really want from the process. "What some people put in the category of AFA doesn't actually create incentives for efficiency. That's when I question whether they are truly changing the landscape and should they be called AFAs?" he says. "We don't think a volume discount or a blended hourly rate is an AFA. They don't encourage anyone to work fewer hours or to find a different, more efficient way to complete the work. If I get a 10-per-cent volume discount but my bill is 50-per-cent too high because you're not efficient, that really doesn't help me."

When considering different fee arrangements in-house need to look at what they want their firms to do differently. "You can't build a value billing program unless you understand the component parts of what you're asking law firms to do. They need to understand how they are supposed to get there and what the ultimate objective is," he says.

So are firms embracing alternative models for billing?

"I think most law firms, if not outright resistant, would prefer it be something that just quietly went away," says Gutelius. "I will say that with most big law firms, I don't know if we have convinced them and they like it, but they are certainly participating in it. I will say the moment clients stop requiring it my guess is they will return to the hourly rate."

Christine Silversides, director of legal services with the office of the counsel at York University in Toronto says the results of the survey regarding fees are indicative of the challenge that face law firms, and by extension, their clients. It is: What is an appropriate and viable alternative to the hourly billing model? "There can be little doubt that the hourly billing model must become less and less common over time," says Silversides. "York University and many in-house units of other organizations have been clear to their legal service providers that hourly billing is not a sustainable model. These are tough fiscal times for university external legal budgets as well as for the budgets of others, including those in the private sector."

Silversides says York expects its legal



What was the external legal spend for the Canadian legal department in your last fiscal year?

\$100,000 or less	13.68%
\$101,000-\$500,000	25.84%
\$501,000-\$1 million	14.59%
\$1 million to \$3 million	23.10%
\$3.1 million to \$5 million	6.38%
\$5.1 million to \$10 million	7.29%
More than \$10 million	9.12%

If external spend changed, why?



service providers to take the initiative to bring innovative billing solutions to the table when negotiating fees. "We employ a range of billing models, depending upon the subject matter of the legal work. We are currently 'test-driving' new billing models to see how they work for us, and our external legal service providers are keen to participate with us in those tests."

As well as combining alternative fees with "rigorous project management at every step," Silversides says York has chosen similar, fairly routine file matters, and are running each file on a different fee arrangement, to see which arrangement might be best for those types of files.

She says the law firms it works with are looking for new and inventive solutions to bring down the cost of their existing business models, creating efficiencies such as outsourcing legal research and project planning from a legal cost perspective. "In the end, the law firms can pass on the savings to their clients and thereby retain the clients," she says.

IS IT ABOUT THE LAWYER OR THE FIRM?

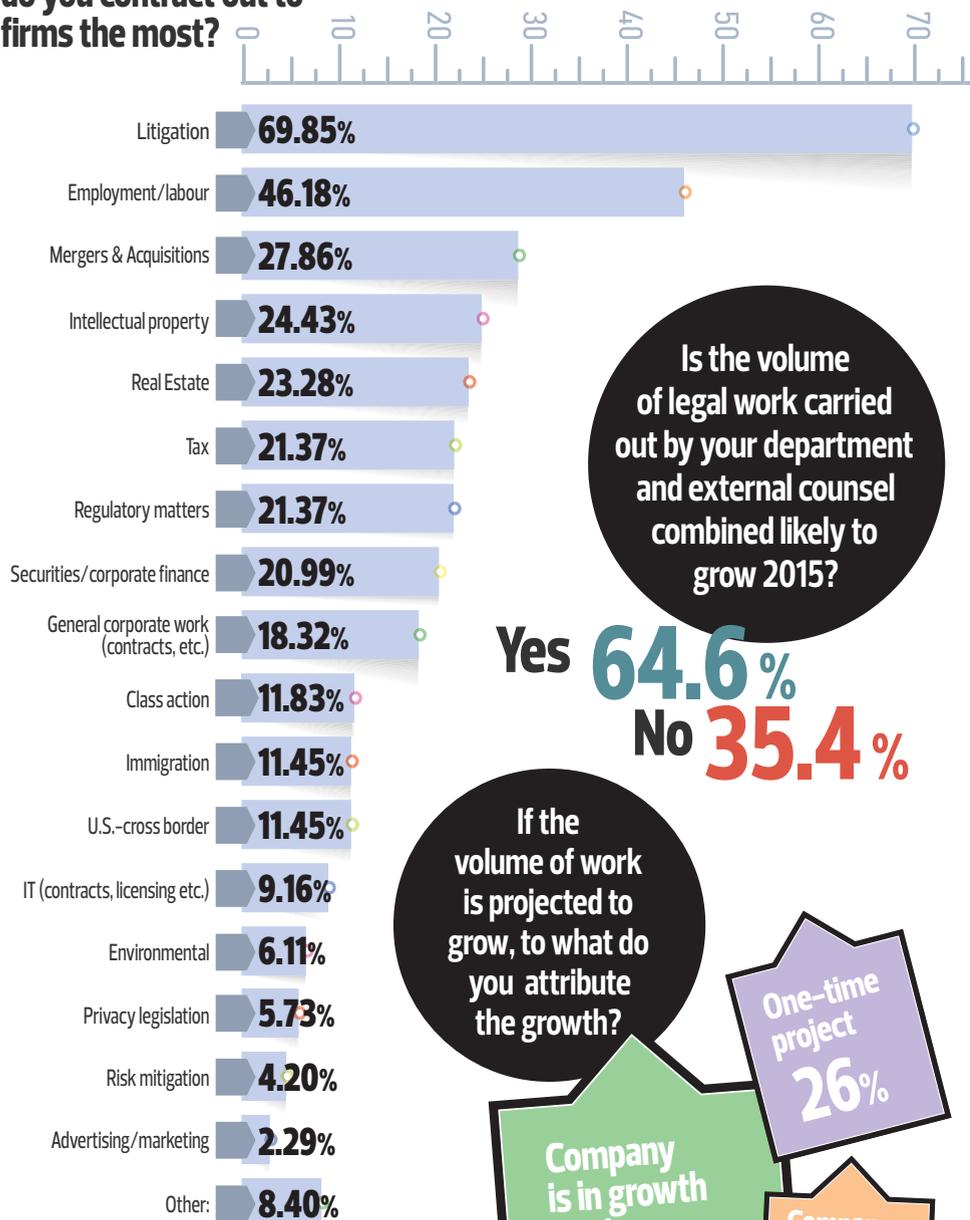
This year's Corporate Counsel Survey also asked in-house counsel to indicate how they choose their external law firms. The majority, at 75.7 per cent, said they choose based on specific lawyers, while 72.4 per cent base their choice on practice expertise, followed by law firm reputation at 33.8 per cent.

While some noted they choose based on parameters set in RFPs, one survey respondent summed it up this way: "I choose the lawyer, the firm is immaterial." Some of the comments received on this question emphasized the importance of long-term relationships and some indicated the formula looks a bit like this: "Lawyers with specific skill sets, strong relationships, commitment to innovative service delivery, and support of in-house counsel."

However, others also noted cost was a significant factor overall, with one respondent saying: "All of the above also has to be balanced by cost." While another said: "You can get excellent lawyers in regional firms at reasonable rates."

Gutelius ranks the person ahead of the firm, but adds: "firms do matter. I would say the individual lawyer is a big driver

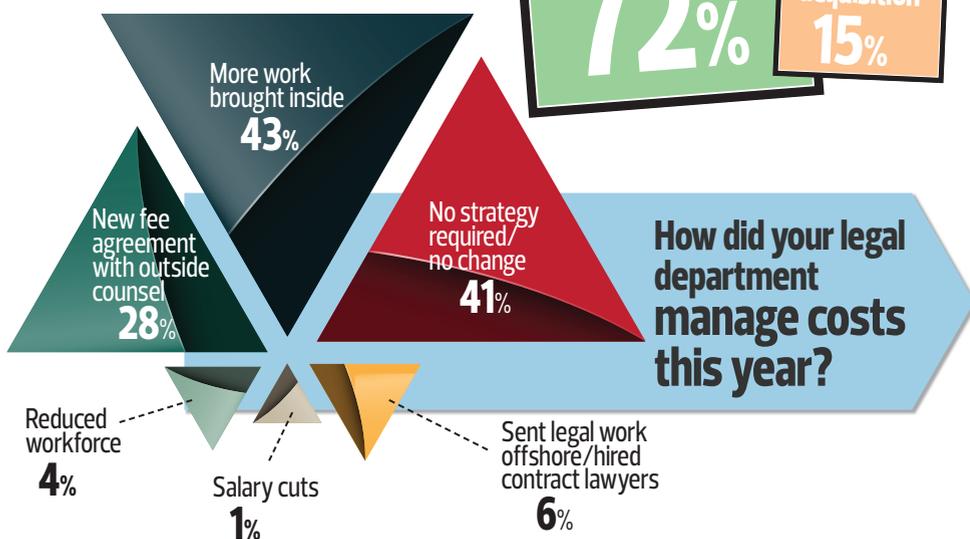
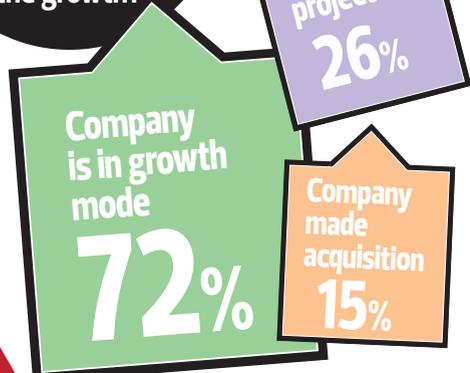
What areas of practice do you contract out to firms the most?



Is the volume of legal work carried out by your department and external counsel combined likely to grow 2015?

Yes **64.6%**
No **35.4%**

If the volume of work is projected to grow, to what do you attribute the growth?



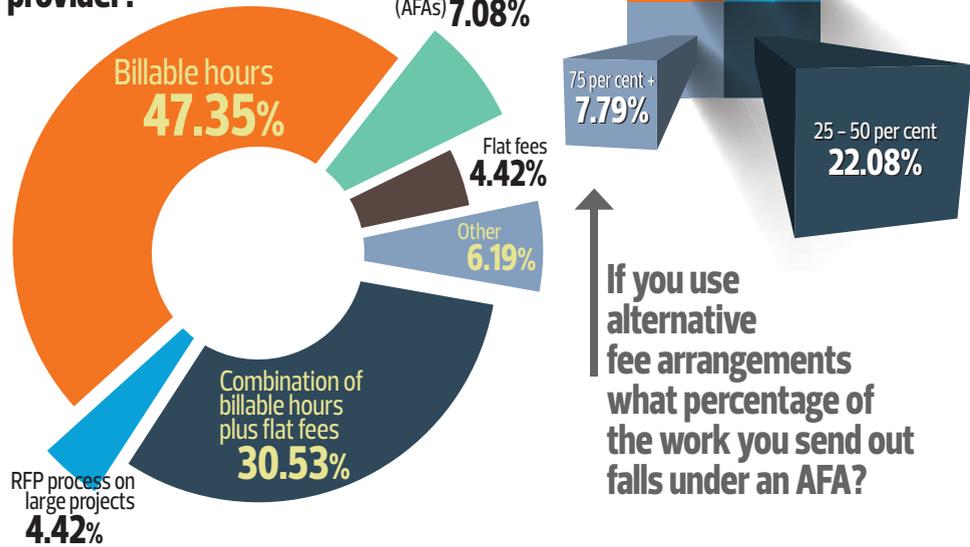
and it's often about an identification of a problem in a particular geography and that this person is the right person to go to. The firm is also important — then we know they have presence in the industry or region and that they have bench strength, or we have a relationship with them in another city.”

With RBC's RFP approach for any spend over \$75,000, it changes the dynamic. “So if we're spending \$75,000 I'm not in a position to say this lawyer is the lawyer I'd like to handle the case — I have to have at least three and in some jurisdictions it can be tough to come up with three where you can say all three are good,” he says.

DIVERSITY

It seems many in-house counsel are still lagging behind their peers in larger organizations when it comes to attitudes about whether inclusion of women and minorities should be a determining factor in the legal teams they deal with. According to the survey results, 77 per cent of corporate counsel said they are not asking law firms they do business with to provide a diverse

What type of billing arrangement do you have with your primary law firm/external service provider?



roster of lawyers as part of an overall diversity strategy; 15 per cent said they are asking, and seven per cent said they are thinking about it.

“Yes, there's no question that, as an

industry, we are just embarking on this important journey towards diversity,” says Simon Fish, general counsel and executive diversity champion of BMO Financial Group. “But I'm very confident

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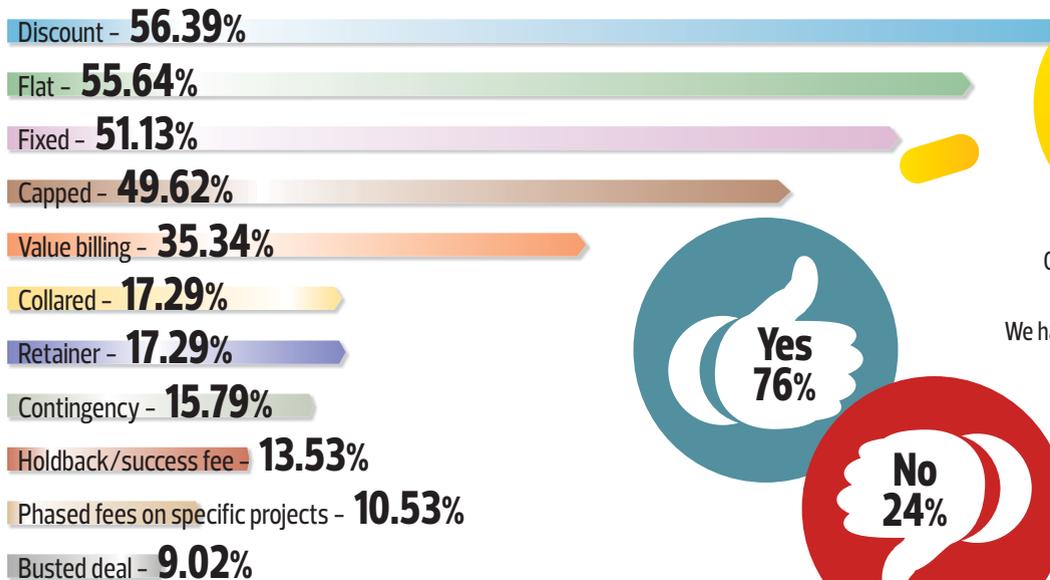
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From the following examples of AFAs please select the ones you are currently using or would consider using:



Would you be receptive to another law firm if they proposed an alternative fee arrangement?

our concerted efforts as global enterprises will affect change and encourage other companies to follow our lead.”

In late September, Fish announced that data collected around diversity met-

rics over the last two years from its law firms will eventually influence what firms BMO’s legal department does business with. “The banking industry is a major employer of legal services in Cana-

da and is in a position to move the needle in the corporate diversity space,” says Fish. “Law firms have never before been challenged in this way. This initiative will be an evolution for the industry with the

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goal of making a difference in the way we do business with suppliers.”

Fish says the policy BMO announced “will have traction. Firms who wish to do business with us now clearly understand that there is a *bona fide* opportunity to gain a competitive advantage over other companies vying for our business, not just by complying with our request for diversity metrics but also in our assessment of their diversity performance relative to their peers.”

In just two years, 97 per cent of the law firms that responded to BMO’s request for metrics confirmed they now collect diversity metrics and understand they must provide those metrics as a precondition to being included on BMO’s external counsel panel. Fish adds that colleagues at TD Bank have also committed to requesting diversity metrics of the firms they hire. “My sense is that the other banks are similarly disposed.”

For York University, Silversides says it is “critical” that legal service providers reflect and promote diversity within their firms. “This is so fundamental to York

Do you ask the law firms you do business with to provide a diverse roster of lawyers to work with?



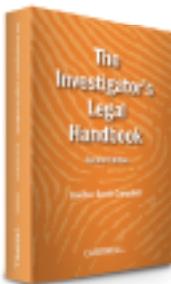
University that we do not even need to ask: we are presented each year with a roster of lawyers from our primary external law firm, which reflects, among other things, the diversity which we expect them to maintain. In our annual meetings with the managing partner of our primary external legal service provider, the topic of

diversity is always touched upon in some manner,” she says.

VOLUME OF WORK IS UP

Overall, 64.6 per cent of respondents said the volume of legal work carried out by their departments and external counsel combined is likely to grow in 2015 from

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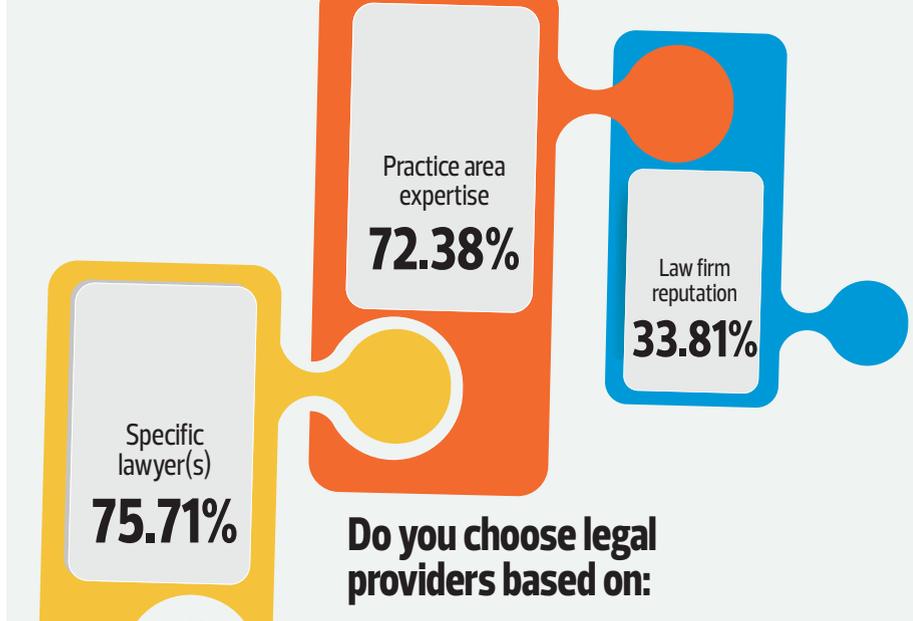


2014 (compared to 60.1 per cent the previous year) while 35.4 per cent said they expect no significant growth. The majority of those who said their department will grow said it will because the company is in growth mode: 72 per cent (up from 59.7 per cent last year), followed by 26.2 per cent who said growth was due to a one-time project, and 15 per cent indicated it is because the company made an acquisition.

BY THE NUMBERS

Total responses to the survey were 329 and came from a cross-section of departments. Similar to last year, 9.1 per cent came from legal departments with \$10 million or more in legal spending in the last fiscal year, 7 per cent with \$5.1 million to \$10 million, 6.3 per cent with a budget of \$3.1 million to \$5 million, 23.1 per cent at \$1 million to \$3 million, 14.6 per cent between \$501,000 to \$1 million, 25.8 per cent between \$101,000 and \$500,000, and 13.7 per cent spent less than \$100,000 in legal costs.

The majority of respondents (54.7 per cent) have less than five lawyers in



the department. Responses came from a variety of sectors including government (22.8 per cent), financial services (20.6 per cent), industry/manufacturing (14.3 per cent), resource-based industries (11.5 per cent), service industries (11.2 per cent), non-profits (8.8 per cent),

technology (6 per cent), and professional services (4.5 per cent).

Litigation remained the No. 1 area of practice in-house counsel outsource at 69.8 per cent, a drop from 82.4 per cent in 2013. Employment law remained in the second spot at a steady 46.2 per cent. Mergers and acquisitions came in third at 27.8 per cent followed by intellectual property matters at 24.4 per cent, and real estate at 23.3 per cent. 

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