

The billing conundrum



This year's *Canadian Lawyer* Corporate Counsel Survey shows in-house counsel and law firms continue to struggle with the best way to bill legal services.

By Jennifer Brown

In-house counsel are expecting to take on more work internally next year to handle growth in their companies, but the management of their external law firm spending remains an ongoing challenge they wrestle with in an attempt to find value and meet budgets.

Responses to the 2013 *Canadian Lawyer* Corporate Counsel Survey indicate there is some traction being made in different ways of negotiating billing arrangements with law firms, but the billable hour remains No. 1. The fact 55.2 per cent selected hourly billing as their arrangement of choice doesn't surprise Steven Trumper, vice president and general counsel at Build Toronto Inc. He defends the choice and says it can be applied in a variety of ways that bring value and doesn't have to mean an expensive or ineffective outcome. "I agree with the survey — most matters are billed out on an hourly basis now. My business is very transaction-oriented so it's hard to do fixed-fee arrangements because there are so many twists and turns. It's not commodity work; it's very specialized," he says.

The prominence of hourly billing is a systemic issue says Terrie-Lynne Devonish, chief counsel with Aon Consulting Inc. Canada. "Law firms are designed around a time and materials formula for billing and most in-house counsel come from firms who use this billing model, so it is not a surprise that we all still use this model. I think we all need to be more proactive and creative in experimenting with and using [alternative fee arrangements]," says Devonish. "I would like to see law firms be more proactive in offering AFAs to their clients and I always appreciate it when a law firm is flexible about their billing model."

This year, just under 300 law department leaders from Canadian corporations and government participated in the *Canadian Lawyer* survey. The balance of respondents indi-

cated they use a combination of billable hours plus flat fees (36.3 per cent); RFPs (5.4 per cent); and alternative arrangements (2.7 per cent).

Trumper, who works for a public-private entity (Build Toronto is owned by the City of Toronto), says he uses a selection of big Bay Street firms and specialist boutiques depending on the project at hand. "The billing rates vary dramatically," he says, but he factors in the efficiency of the lawyers he chooses for a file. "If a lawyer at \$500 an hour takes twice as long to do something than one at \$1,000 an hour I'm basically paying the same price. So I look at the total bill as a measure of efficiency because I have it in my own mind what something should cost," he says.

He also takes into consideration non-financial factors such as chemistry (does he like working with them?), quality of work, and responsiveness. "Responsiveness is very important — does she return my calls immediately? Do I get work done in a timely manner? All those things factor into the billing analysis."

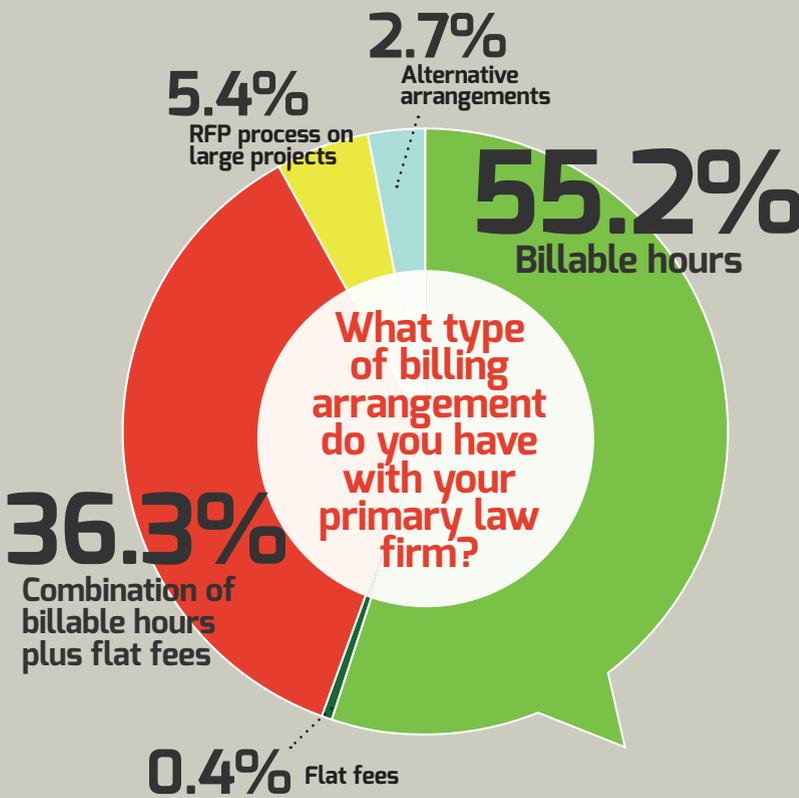
If embarking on a large project, Trumper sends out an RFP to a pre-selected group of firms and in that context he usually asks for billing proposals. "Typically what I get back is some sort of fee reduction based on volume of work. For example, if our billings are over X, they will cut the bill by 10 per cent."

Some respondents to the survey indicated they are trying to get away from the billable hour: "We have a variety of arrangements with our primary firms, some of these are derived from RFPs for particular work, others are long-term arrangements with flat or alternative fees. Billable hours are our last alternative," said one.

Trumper also uses a roster of lawyers for the company's regular stream of municipal and planning work. "I'll do an RFP and send it to all the planning firms and from that process I will have four or five firms on my municipal and planning law roster. So every time an issue comes up I don't have to RFP it; I'll simply go to the next person on the roster and give the file to them directly," he says.

Focus on value

Grant Borbridge, vice president of legal and general counsel with MEG Energy Corp. in Calgary, says for in-house counsel the focus should really be on finding value and getting





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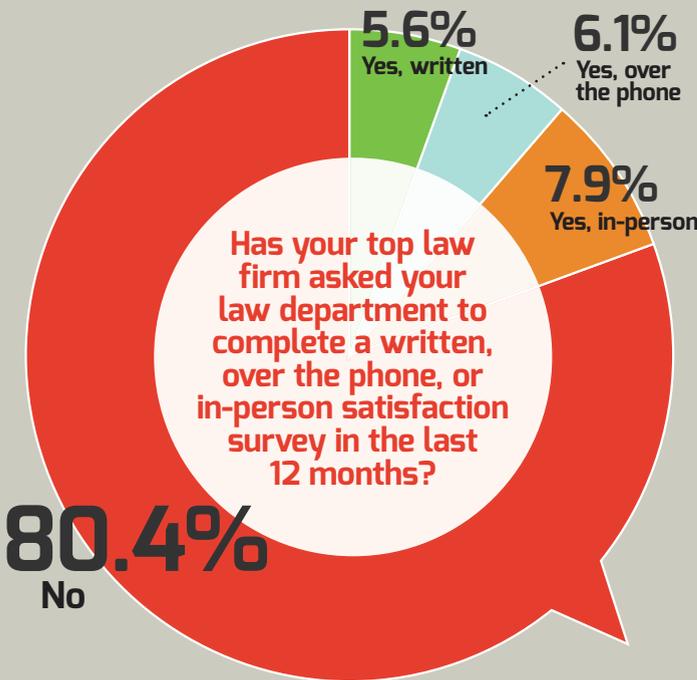
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No 12.6%
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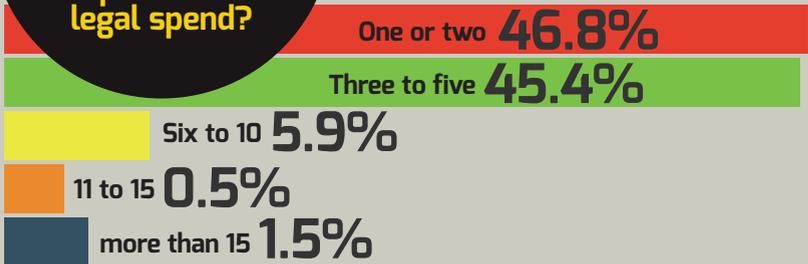
Is the volume of legal work carried out by your department and external counsel combined likely to grow?



Are you likely to implement new arrangements to get more value from the firms you deal with?

Yes 59%
No 41%

How many firms received the top 80 per cent of your Canadian legal department's legal spend?



the project done effectively. "My guess is 10 years from now we'll still be discussing the fact a certain percentage of projects are still being run on the billable hour," he says. "There's two sides to this: there's very little proof that flat-rate billing on projects is actually to the benefit of the client. Presumably the law firm doesn't necessarily want to hand over a lower revenue base as a result of changing to a different billing method, and the same would go for other alternative arrangements," he says.

In terms of work growth, 60.1 per cent of participants said the volume of legal work carried out by their department and external counsel combined is likely to grow in 2014 compared to 2013. The increase (59.7 per cent, up from 54.9 per cent last year) is largely attributed to the company being in growth mode, followed by a one-time project (37.6 per cent), or the company making an acquisition (17.1 per cent, also up from 2012). But survey respondents said they are more likely to hire additional staff (39 per cent) than send work out (14.9 per cent), even though it would take at least six months of solid improvement in the economy before they would take those steps to address the additional work.

For the most part, the size of in-house counsel departments appears to be staying flat with 49.5 per cent saying there was no change in their legal team over last year, and if the department did grow, 30.6 per cent said it was because there was more work to be done. Similar to last year, 11.4 per cent said their departments decreased in size and 8.4 per cent said growth meant any positions left vacant were filled.

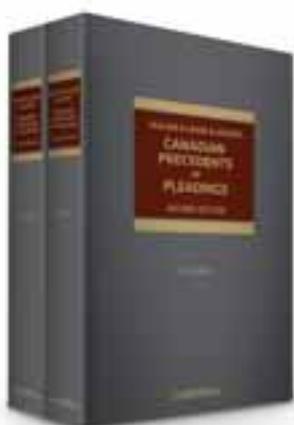
"With increasing pressure around cost containment in most companies, most in-house departments, along with their counterparts in finance, human resources, operations, etc., are being asked to tightly manage their budget," says Devonish. "For in-house counsel, this means bringing more work in-house where possible, but also managing external counsel spend when there is a need to retain external counsel."

Diversity

The majority of in-house counsel who answered the survey still aren't asking the law firms they deal with to provide a diverse roster of lawyers to work with, whether it be women or minorities — 74.3 per cent indicated they don't ask (up from 70.9 per cent last year) — they just want "the best person for

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

Yes **16.8%**
We're thinking about it **8.9%**

No **74.3%**

Do you involve your primary law firm in internal risk-management strategies?

Yes **21.1%**
No **78.9%**

the file” or said, “They already offer a diverse range; I want the best people.”

“It doesn’t surprise me,” says Devonish. “I think many people think that asking for a diverse roster of lawyers and getting ‘the best lawyer for the file’ are mutually exclusive. The proven fact is having a diverse roster of legal advice ensures you have the best thought, analysis, and advice. I would assert that if you are not working with a diverse roster, you are getting some, but not all, of the best lawyers on your files.”

Not feeling satisfied

Tracking how the in-house/external relationship is doing remains a low priority for law firms. Of the more than 200 respondents to this question, 80.4 per cent said their top law firm had not asked them to complete a written, phone, or in-person satisfaction survey in the last 12 months. However there has been some improvement in this area — five years ago 92 per cent said they had not been asked to complete a satisfaction survey.

Trumper says he has contact with



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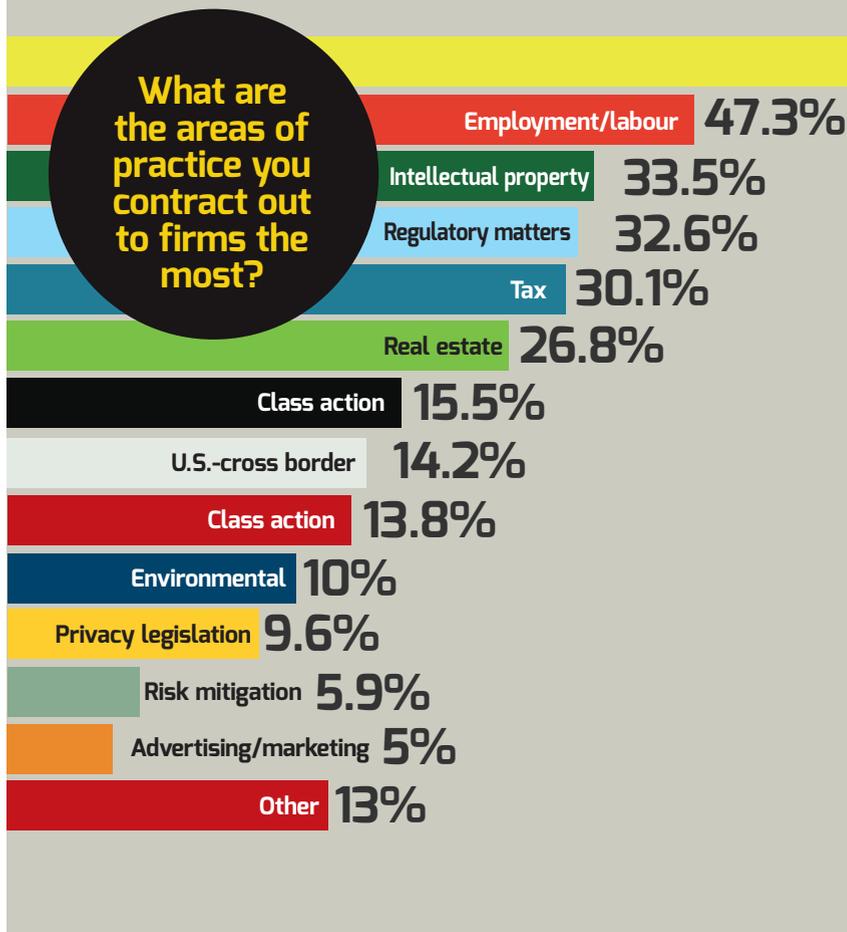
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relationship partners several times a year but end-of-project interviews are “quite rare.” He points out: “I spent a long time in private practice and one of the things we tried to emphasize was once you finished a major project for a client call them, take them out for lunch, and find out how we did.”

When it comes to loyalty to firms, several respondents who indicated they had replaced one of their top outside legal service providers in the last two years did so based on partners leaving the firm to go elsewhere. “If there was someone who was a particularly valuable resource to me and they moved I would be happy to follow them to the new firm,” says Trumper. “The person is more important than the platform, I think.”

By the numbers

Total responses to the survey were 298 and came from a cross-section of departments with 9.1 per cent from legal departments with \$10 million or more in legal spending



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in the last fiscal year, 25.3 per cent between \$1 million and \$3 million, 26.3 per cent between \$101,000 and \$500,000, and 12.5 per cent spent less than \$100,000 in legal costs.

More than half of the respondents were from small legal departments with fewer than five lawyers. Responses came from a variety of sectors: 21.9 per cent from financial services, 19.2 per cent from government, 14.8 per cent from industry and manufacturing, with the balance falling in under services (11.8 per cent), resources (10.8 per cent), technology (9.4 per cent), professional services (6.1 per cent), and non-profit (6.1 per cent).

Litigation was the primary area of practice corporate counsel outsource at 82.4 per cent — a jump from 74.2 per cent in 2012. Employment law remained in second spot at 47.3 per cent — an increase of five per cent compared to last year. Intellectual property matters came in third at 33.5 per cent followed closely by regulatory matters at 32.6 per cent and tax at 30.1 per cent. 

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