Litigation as the Great Equalizer: New Fulbright & Jaworski Survey Finds Nearly 90% of U.S. Corporations Engaged in Lawsuits; Average $1 Billion Company in U.S. Faces 147 Cases at a Time

Unrelenting/unpredictable costs make litigation budgeting the bane of corporate counsel – 40% don't quantify dispute spending; for businesses keeping track, litigation costs an average of $8 million a year.
Class actions and toxic torts may grab headlines, but contract disputes and labor/employment claims keep most corporate counsel awake at night; electronic discovery and increased regulatory compliance are the most nagging new thorns for corporate law departments; the words counsel hate most: "It will cost more."

NEW YORK/HOUSTON (October 10, 2005) – In its latest annual *2005 Litigation Trends Survey*, the international law firm **Fulbright & Jaworski L.L.P.** has found that litigation has become the great equalizer of the modern corporation. Regardless of size, industry or location, there is certain to be a sizeable number of disputes diverting the resources of American businesses. Nearly 90% of U.S. corporations are engaged in some type of litigation, and the average company balances a docket of 37 U.S. lawsuits. For $1 billion-plus companies in the U.S., the average number of cases being juggled at home soars to 147.

This year's Fulbright survey is one of the largest samplings of in-house counsel in the United States and the United Kingdom on litigation concerns and trends. Fulbright drew responses from 354 corporate counsel (50 from the U.K.), the majority of whom held the title of general counsel or chief legal officer. The median-sized U.S. company surveyed reported annual gross revenues of $484 million; companies from 45 states were represented.

Accepting the reality that litigation is a constant in their business lives, close to 90% of U.S. corporate counsel have no plans to reduce the number of outside lawyers that handle their cases. The ubiquity of litigation in American business goes a long way toward explaining the overriding concern corporate counsel have with controlling litigation expenses. Indeed, respondents expressed more concern about what they perceived as the high costs of litigation than they did about winning or losing the underlying lawsuits.

Ironically, despite the certainty that litigation expenses will continually accrue, the inherent unpredictability of their pace or size makes budgeting for litigation a difficult task for many corporate counsel. Even as companies have figured out how to predict spending for other strategic areas such as R&D, technology, or sales and marketing, just under 40% of U.S. corporate counsel are still unable to predetermine the costs of managing business disputes, reporting that they could not quantify their litigation budgets in relation to their overall legal budgets. In companies with revenues under $100 million, 17% of all counsel surveyed said they had no budget at all for litigation costs. More surprising, over a quarter of corporate counsel in companies with revenues of $1 billion or more did not know their litigation budgets.

To be sure, a great many companies are acutely aware of the extent of their overall legal spending. Of the companies that did track spending (half of the respondents), their average legal budget was $20.1 million, of which $8 million was directed toward litigation. However, 10% of counsel reported that their legal spending accounts for 5% or more of their company's overall gross revenues, which for a $1 billion business, would translate into $50 million.

The concern about costs manifests itself across the survey, whether respondents were ranking their five leading litigation concerns or describing their ideal outside counsel. When asked what message they would most like to deliver to their outside lawyers, the number one directive was "control costs." That message took precedence over "win cases," "get results" or an array of other results-driven choices.

"A key value of such a broad survey of in-house counsel is that it gives the legal community an opportunity to step back from the trenches and tap into the mindset of corporate America, for whom litigation can play a key role in an overall business strategy," said **Stephen C. Dillard**, head of Fulbright's worldwide litigation practice. "The findings remind us that for our clients, litigation can be a challenging and costly part of doing business. Litigation is also a risk-reward decision in which costs can be as important as outcomes. Given the emphasis that survey respondents placed on expenses, professional litigators need to work harder with their clients to anticipate, budget and control costs."

Some of the survey's findings seem to be ripped from recent headlines, including dramatically increased concerns about the burdens stemming from electronic discovery in light of high-profile events, such as the Frank Quattrone trial and the Arthur Andersen Supreme Court decision. Electronic discovery was the number one new litigation-related burden for companies with revenues over $100 million. U.S. companies surveyed are mindful of the

consequences of faulty record keeping: over 80% now have records retention policies and three-quarters have litigation hold policies.

"The advent of electronic discovery, coupled with more stringent record keeping requirements, has exponentially added to the burdens imposed by litigation," said **Robert D. Owen**, a Fulbright litigation partner and leader of the firm's records management and e-discovery practice group. "In light of the enormous risks involved with poor records retention, it comes as no surprise that electronic discovery is identified as the number one new concern of this year's respondents. I don't believe it a coincidence that in-house counsel raised these concerns while simultaneously voicing their distress over rising litigation costs – in my view, the two are inseparably linked."

For companies with gross revenues under $100 million, there was a different new worry, also straight from the front page – regulation and compliance. As many of the comments showed, the Sarbanes-Oxley Act, and its tougher requirements for securities filings, has had a large effect on smaller companies.

As for the kinds of claims U.S. companies face most, the answer is surprising. Despite the constant buzz about class actions, tort reform and corporate fraud, the top litigation concerns of corporate counsel are much more staid: contracts and labor/employment claims. Largely ignoring size or industry differences, these two areas each account for roughly one-quarter to one-half of the litigation dockets of American corporations.

"We wanted to build on our original experience last year and delve deeper into the litigation reality that confronts corporate America, as well as take a closer look at the relationship between corporate counsel and outside lawyers," noted Mr. Dillard. "The survey demonstrates what we have long suspected – that litigation has become an integral part of the structure of corporate life. We believe the stark light the data sheds on the impact of litigation on the U.S. economy, as well as on how businesses meet that challenge and process it as part of their ongoing operations, is of critical importance to law firms and the business community."

For a direct link to survey results, go to: http://www.fulbright.com/media/litigation.

Here is a summary of key findings in the 2005 Fulbright & Jaworski *2005 Litigation Trends Survey*:

1) **Litigation Dockets** – Eighty-seven percent of U.S. companies are engaged in some form of litigation in the U.S. Twenty percent had one to three cases pending, nearly a quarter had between four and 10 cases pending, and another quarter of respondents had up to 50 cases pending. That still left a full 20% facing an average caseload of 50 to 100 litigation matters. Given how much of an equalizer litigation is – hitting all companies regardless of size, industry or regional differences – it seems remarkable that as much as 13% of U.S. companies surveyed managed to avoid business disputes. Companies most likely to be litigation-free: those with revenues under $100 million. However, 12% of $1 billion-plus companies also reported that they are free of litigation, which may be one of the survey's biggest surprises.

On average across all sectors, U.S. companies carried a U.S. docket of 37 lawsuits. When broken out by revenue size, U.S. companies with revenues under $100 million had an average of 15 lawsuits going at once; mid-market companies had 30 cases on their dockets; and U.S. companies with $1 billion or more in revenues had a whopping 147 cases to litigate.

2) **Sector Specific** – The U.S. health care industry had the greatest number of pending litigation matters in the U.S., with an average of 64 cases. Energy companies were second in line with 49 pending litigation cases, followed by technology/communications (with 42 pending cases) and manufacturers (with 40 pending cases) in third and fourth. Tied for fifth were insurance providers and real estate companies (with 39 pending cases each). Filling the remainder of the field: finance (34 pending cases) and retail/wholesale (22 pending cases). By a large margin, companies in the tech/comm sector were the most likely to escape the reality of litigation, with 41% reporting that they had no matters pending against them.

3) **Litigation as a Percentage of Overall Legal Spending** – Litigation is not eating up all of the legal costs in corporate America, though it is a significant chunk. Among counsel who track litigation costs, about a quarter said that they account for 21 to 50% of their legal budgets; an additional 12% reported that litigation expenses accounted for more than 50% of the total legal budget. Broken out by size, counsel for 15% of mid-market companies and 16% of businesses in the $1 billion-plus range reported that litigation consumes over half of their legal budgets. For companies with revenues under $100 million, that figure dropped dramatically to only 8%. Translated into the bottom line, nearly a quarter of U.S. companies are spending 2% or more of their gross revenues on legal fees; 10% of them spend more than 5%.

Separated by industry sector, 23% of insurance company in-house counsel reported that their litigation budgets account for over half of their total legal budgets. Over a third of manufacturing and energy companies spend between 21% and 50% of their legal budgets on litigation; the same is true for more than a quarter of retail/wholesale, health care and tech/comm companies. In contrast, 26% of real estate and finance company respondents reported spending less than 20% of their legal budgets on litigation.

4) **Litigation Cost Averaging** – Respondents had difficulty in averaging costs for specific types of litigation matters, with many saying that costs varied too widely to make hard estimates. However, for U.S. in-house counsel who did respond, personal injury actions are the most expensive cases on average to litigate, followed by intellectual property cases, regulatory matters, contracts claims, and employment actions. The cases most likely to cost a company over $500K were IP matters. Broken out by industry, the expense of IP cases appears particularly acute, costing manufacturers an average of $575K per case. For energy and tech/comm companies, the average cost to resolve IP matters is $255K and $151K, respectively. Employment disputes were the least likely to cost huge sums: only 5% of respondents estimated that the average cost to resolve employment matters was between $200K and $499K, and none put the cost at over $500K.

5) **Is That a New Suit?** – How much of corporate America's litigation docket is new this year? Two-thirds of the companies surveyed were slapped with a summons and complaint during the past year; almost a third of them were hit with between six to 20 suits, and 18% were hit with more than 21. Size seemed to matter: on average, small companies were hit with only three new suits on average, while mid-market companies were hit with 17. Businesses in the $1 billion-plus club were served with an average of 65 new suits.

Courtrooms clearly remain the favorite forum; about two-thirds of U.S. companies did not have any arbitration or regulatory proceedings initiated against them during the year. Of those who did, however, the numbers were considerably less than the lawsuit figures. Businesses in the $1-billion-plus category were only hit on average with 11 new arbitration suits and 10 new regulatory filings. As for the location where U.S. corporate counsel anticipate seeing the largest increases in lawsuits in the next three years, the United States reigned, although many expect to see small but notable amounts of litigation increasing overseas.

6) **Shifting Roles as Plaintiffs/Defendants** – More than half of the companies surveyed are comfortable in the role of plaintiff, filing at least one action in the last year; the average U.S. company initiated 11 new suits and 2 arbitrations during the past year. Larger companies are more litigious in general: the $1 billion-plus group was two times as likely as their under-$100 million counterparts to commence lawsuits or arbitrations. Finance companies turn out to be the most proactive in starting litigation, filing 30 cases on average last year. This is nearly triple the number filed by technology companies, which filed only 11 suits on average. Energy was a close third (10 suits filed), followed by manufacturing (9), real estate (5), insurance (5), retail/wholesale (4) and health care (3).

7) **Who's Minding the Docket?** – The survey makes clear that there are very few U.S. companies that don't have an in-house counsel whose job is to manage litigation. Only 8% of corporate law departments manage to get by without the necessity of a staff lawyer managing company litigation matters, while 44% had at least one staff litigator. On average, smaller companies were the most likely to have only one in-house litigation manager; mid-market companies employ an average of three in-house attorneys to oversee outside litigators, while companies with revenues of $1 billion-plus have an average of over 10 lawyers. The technology sector has the most staff lawyers who manage litigation, employing an average of nine attorneys in this role. The next highest were energy and finance companies, who each had six in-house litigation counsel on average, followed by retail/wholesale and health care (each with 5 attorneys), insurance (4 attorneys), manufacturing (3 attorneys) and real estate (2 attorneys).

Nor are these numbers likely to go down anytime soon: virtually no one surveyed thinks that the number of lawyers managing litigation in America's corporations will decrease in the coming years. Not surprisingly, the overwhelming majority of companies plan to keep the number of in-house counsel the same in the future, and over 20% intend to increase the number.

8) **Top Current Litigation Matters** – Despite the dramatic headlines about corporate corruption, the top two slots on the in-house litigation docket are contracts claims and labor/employment matters. For mid-market and $1 billion-plus companies, these types of actions accounted for as much as half of their litigation matters. For smaller companies, contract disputes account for more than a quarter of their caseload. Following contracts and labor/employment actions, the third most frequent type of case filling corporate America's litigation plate is personal injury actions. Rounding out the top five – product liability and IP disputes. A snapshot of each sector reveals more of a spread: the most frequent type of case pending against health care companies was professional services litigation, whereas insurance litigation topped the list for insurance companies. For manufacturers, product liability cases were most commonly pending, while real estate companies face personal injury lawsuits. The most common cases for other industries were: energy and finance (contracts); tech/comm (labor/employment); and retail/wholesale (split equally between contracts and labor/employment).

9) **Emerging Lit Pressures** – Asked to identify the biggest litigation-related burden that did not exist three years ago, in-house counsel pointed to electronic discovery as the number one headache, followed by 'increased regulatory/compliance" issues, which is a certain legacy of the Sarbanes-Oxley Act of 2002. Compliance with Sarb-Ox seems to be particularly onerous for smaller companies; they cited regulatory compliance as their top new

"litigation-related burden associated with [their] job." Compliance and regulatory issues hit home especially hard in the finance, energy and real estate sectors.

10) **What A Difference a Year Makes** – Since last year's survey, corporate counsel have adjusted some of their top litigation concerns. In finance, bankruptcy was one of the top three concerns last year; this year, it has been replaced by securities actions. Real estate companies are now troubled by personal injury suits instead of real estate disputes, while the insurance industry sees less of a threat from class actions than from insurance coverage matters, a concern that could eerily prove to be true in the wake of Hurricane Katrina's large-scale devastation.

11) **What Litigation Concerns Are On the Horizon?** – Reflecting the types of cases in-house counsel currently face, contract and labor/employment actions topped the list of matters that U.S. counsel were most concerned about for the future. Number three was IP disputes, followed by class actions. For counsel at $1 billion-plus companies, however, class actions rose to the number two spot, over concerns about contract-based litigation. Technology companies are far more focused on IP/patent issues then any other industry, whereas real estate and energy companies are understandably more concerned than other sectors about environmental/toxic tort litigation. Professional services litigation naturally was the leading concern for health care companies, but not for others, while insurance litigation was of principal concern only for those in the insurance industry. Only the financial and real estate industries had serious concerns about securities litigation/enforcement in the future.

12) **Class Conscious** – The bigger the company, the more likely it is to end up at the receiving end of a class action. While only 5% of smaller companies were targeted with class actions in the past year, nearly 40% of companies with revenues of $1 billion or more were served with class action lawsuits. Manufacturers were the most likely to be named as defendants in class actions; almost a quarter of them had at least one such action pending. Energy, finance and tech/comm companies were the next most likely to have at least one class action filed against them last year, although real estate companies were most likely to have been hit with more than three such actions. The prospects for the future didn't seem terribly different. Three-quarters of responding U.S. counsel believe that the number of class actions filed against their companies would remain about the same going forward; an additional 15% believe the numbers will increase. The latter view was expressed most by counsel for the largest companies and those in the energy industry. Paralleling their top litigation concerns and case dockets, about a third of the respondents reported that labor/employment was the area which had the largest percentage of class action activity during the past three years; labor/employment was also the area in-house counsel anticipated as being most active for class actions against their companies in the future.

13) **Impact of the Class Action Fairness Act** – A large percentage of U.S. corporate counsel predict little impact from the Class Action Fairness Act of 2005. Nearly half believe the Act will have no impact on U.S. litigation costs; 13% believe it will actually increase such expenses. Over a quarter of respondents, however, believe the Act will lead to a decrease in U.S. litigation costs. Most optimistic were energy companies: 47% of industry respondents believe the Act will reduce litigation costs. The greatest pessimists were finance, retail/wholesale and health care companies, 25% of whom said the Act will increase litigation costs. As for liability, 69% of corporate counsel predict that the Act will have no impact on the liability their company faces; although 16% felt it would have a beneficial effect, only 6% said that its impact would be to increase their company's liability. Energy companies were again the greatest optimists, with 42% of counsel predicting a decrease in liability faced by their companies. Almost a quarter of health care companies agreed.

14) **Domestic and International Arbitration Preferences** – Arbitration has been keeping lawyers busy at $1 billion-plus companies this year: over 50% of such respondents reported having arbitrations initiated against their companies in the past year; 18% reported being on the receiving end of least four to 10 new arbitrations. By contrast, only 4% of small companies had four to 10 arbitrations initiated against them during the last year. And while no companies in the small- or mid-market range reported having 100 new arbitrations, 3% of the $1 billion-plus group did.

When it comes to drafting international arbitration clauses, American lawyers have a clear preference for AAA/ICDR; two-thirds identified that as their tribunal of choice. The second most popular (selected by less than a third) was the International Chamber of Commerce. Roughly 10% each said they prefer the London Court (LCIA) and the CPR Institute. Respondents gave an overwhelming thumbs-up to administered arbitration over non-administered arbitration, with more than half reporting that they liked the process and the rules better and are more "familiar with that type."

Paris may be lovely, but American corporate counsel are not particularly anxious to arbitrate there, citing convenience and cost; far and away the favored spot for Americans to arbitrate international disputes is New York. Close to 30% of U.S. respondents believe they have realized "some savings" from international arbitrations, with a small percentage achieving "large savings." No companies reported large cost increases from arbitrating international disputes, although 4% reported that their company had experienced some cost increases.

15) **Counting the Days to Resolution** – Nearly half of U.S. corporate counsel reported that they track the time it takes to resolve a legal matter. The average days to resolution figures provided by these respondents offer an interesting comparison between different types of matters. Personal injury cases had the highest average (358 days), taking nearly a full year to resolve, followed by IP claims, which took 225 days on average. Next in line were labor/employment claims (161), regulatory actions (146) and contract disputes (138). Smaller companies seemed mired longer than larger companies when it came to personal injury cases, while mid-market companies took the longest on average to resolve employment and IP actions. The $1 billion-plus group took longer than either small or mid-market companies to resolve contract and regulatory matters.

16) **Results Matter Most** – For more than half of U.S. corporate counsel, a successful finish is more important than how fast they get there. Asked how their success is measured, more than 50% identified good results as the number one benchmark. Following in distant second and third places were cost efficiency (36%) and avoiding trials (14%). Positive results was universally named as the top measure of success no matter what the company's size, but the bigger the company, the more important cost efficiency seems to become.

17) **Policies On Document Retention** – Corporate counsel appear to have gotten the message about maintaining strong document retention programs. Eighty-one percent of U.S. corporate counsel surveyed said that their companies now have written records retention policies. Larger corporations are more likely to have such policies in place than smaller companies, as are manufacturers and financial companies. Tech/communications and energy companies are less likely to have records retention policies than companies in other industry sectors. Remarkably, three-quarters of U.S. companies now have written policies mandating the retention of documents once a lawsuit is commenced, known as a litigation hold policy, although smaller companies are markedly less likely than their larger counterparts to have them. The most likely to have litigation hold policies were energy (89%) and real estate companies (81%). Finance companies appeared to be the least cautious: only 66% of corporate counsel in that industry reported having a litigation hold policy.

The relative newness of required document retention may explain why U.S. companies prefer to tinker with these policies. Nearly two-thirds of companies with document retention policies revised them during the past year; 43% of businesses with litigation hold policies did so as well. Of those companies that do not currently have a document retention policy, almost two-thirds plan to adopt procedures this year, while a third of those without litigation hold policies foresee adding them. The business sectors most likely to add records retention policies were health care and energy, followed by manufacturing and tech/comm; energy, manufacturing and tech/comm were the most likely to implement litigation hold policies.

18) **The Words In-House Counsel Don't Want to Hear** – For the most part, U.S. respondents are satisfied with the jobs that their outside counsel are doing. When asked what message they would most like to deliver to their outside lawyers, nearly a quarter of those surveyed said some variation of "keep up the good work." However, consistent with their concern about unpredictable expenses, the number one message was "control costs," a sentiment shared by more than a third of respondents. Cost containment outpaced the desire to tell outside lawyers to "win cases," "get results," "be proactive" or other similar case-oriented messages. Not surprisingly, the one phrase in-house counsel hate to hear most from their law firms is, "It will cost more." A quarter of respondents agreed that they are more incensed by the prospect of higher litigation costs than hearing their outside attorneys tell them, "we can't help you," "we made a mistake" or even, "we lost."

19) **Judging Outside Counsel** – Fulbright asked the in-house lawyers to identify the distinguishing characteristics of their *least* successful outside counsel. Among the most irritating: lawyers who communicate poorly, are unresponsive, are slow or late in delivering information, know little about the client's business and are unreliable. But even these failings aren't as egregious as overcharging. More than half of the counsel surveyed said their number one peeve was lawyers who charge too much. That was followed (trailing by nearly 10 percentage points) by incompetence/lack of knowledge, and then, poor communications and lack of responsiveness as the next greatest sins. Far less important were tardiness, lack of knowledge of the company and unreliability. The pecking order of wrongs remained essentially the same even when companies were separated by revenue size or industry sector.

On the flip side, almost two-thirds of respondents identified the top attribute of their *most* successful outside counsel as "knowledge, abilities, expertise." Cost efficiency was considered more important than responsiveness/promptness, with ability to communicate lagging behind as a fourth consideration.

20) **Diversity's Impact on Outside Counsel Selection** – The survey results suggest that diversity issues are beginning to creep into U.S. corporate decision-making about which outside counsel to retain. Twenty percent of in-house counsel reported that diversity was an important factor in the selection of their outside litigation counsel. Ten percent reported having written diversity policies in place. Diversity concerns are plainly on the radar of the largest corporations: 40% of the $1 billion-plus companies considered diversity important in

selecting outside counsel, 30% reported having had a dialogue with outside firms regarding diversity, and 16% had written diversity policies to which outside counsel were required to adhere. By industry, insurance and health care companies were by far the most likely to have written diversity policies in place (20% and 19%, respectively). Fulbright expects diversity to become a greater factor in outside counsel retention in the future.

Note about the Survey

Fulbright & Jaworski's corporate counsel *2005 Litigation Trends Survey* was conducted during June and July of 2005 by Greenwood Surveys., an independent research firm in Houston, Texas. This is the second survey conducted by Fulbright in what the firm anticipates will become an annual series. The survey samples corporate law departments for their views on the state of litigation in the United States as well as in the United Kingdom.

This year, the response rate exceeded last year's benchmark number of 300 respondents (one of the largest samples ever of in-house counsel for a research study of corporate litigation issues). Of this year's 354 respondents, nearly two-thirds (64%) held the title of general counsel. Other titles included assistant or deputy general counsel (7%), senior counsel or senior vice president and counsel (6%) and director or manager of legal services (8%). The remaining respondents reported titles that did not suggest legal backgrounds; most were associated with senior corporate management such as president, CEO or CFO.

Methodology

Overall, the survey reflects a broad range of enterprises. Respondents in manufacturing, finance/banking, energy, health care, retail/wholesale, tech/comm., engineering/construction, insurance, real estate, trade associations/nonprofit and education made up 87% of the sample; the remaining 13% were in industries that fell outside of these areas.

The median-sized U.S. company in the survey had annual gross revenues of $484 million. Compared to last year, the middle-market segment of the survey has grown, with more respondents from the $100-$999 million range in the U.S. participating, giving a better snapshot of the litigation scene in this sector. In the United States, one quarter of this year's respondents work for companies with revenues under $100 million, 46% for companies with revenues in the $100 to $999 million range, and 29% work for companies in $1 billion or more range. With the exception of hospitals most companies surveyed were for-profit organizations. Almost 40% of the companies were publicly held; the highest concentration of publicly held companies was found among the $1 billion-plus revenue club.

Companies from 45 states were represented in the survey, with the heaviest concentrations from the Midwest, New York-New England, and the South. Among individual states, Texas and California were most heavily represented.

About Fulbright & Jaworski L.L.P.

Fulbright & Jaworski L.L.P. is consistently ranked among the best litigation firms in the United States. The firm was named a top U.S. dispute resolution law firm in the Global Counsel 2004/2005 Dispute Resolution Handbook; among the "Arbitration Elite" by The American Lawyer; a top 10 U.S. law firm for intellectual property litigation by IP Worldwide; among the U.S.' top 30 firms for client service by BTI Consulting, and a top 20 corporate law firm in America by Corporate Board Member magazine. Founded in 1919, Fulbright is a full-service international law firm, with more than 900 attorneys in 11 offices. For more information, visit www.fulbright.com.