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THE PRIVATE BRIEF · BUSINESS

Outside General Counsel in NYC: How to Evaluate One

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IN BRIEF

- Three questions do most of the work: is the monthly scope defined in writing, who actually does the work, and how is work outside the plan priced and approved.
- Seven more cover conflicts, how hours are reported, whether unused hours roll over, what is excluded, which states' law the lawyer can advise on, who covers absences, and how the relationship ends.
- New York generally requires a lawyer who charges a fee to put the scope, fees and billing practices in a written engagement letter, so a proposal that cannot answer these questions on paper is not ready to sign.

Two proposals are on your desk, and they look almost the same. Each offers ongoing legal help for a monthly fee. Each comes with a friendly cover note and a lawyer you liked on the call. The fees are close. You are about to pick the one whose website you liked better.

Before you do, ask three questions, and ask them before you talk about price. They are the same three we suggest asking any lawyer who offers this kind of arrangement, us included.

1. **Is the monthly scope defined in writing?** Hours, response times, what is included and what is not.
2. **Who does the work?** The lawyer you met, or someone else?
3. **How is work outside the plan priced, and are you told before that meter starts?**

The names on these arrangements vary: outside general counsel, fractional general counsel, counsel on demand, legal subscription. The names tell you very little. The engagement letter tells you almost everything.

Why the letter matters more than the pitch

New York does not leave the letter to chance. Under the state court rules on engagement letters (22 NYCRR Part 1215), a lawyer who charges a fee must give you a written letter of engagement before the work starts. It can come within a reasonable time afterward only if a letter first would be impractical or the scope cannot yet be pinned down. The letter has to explain the scope of the work, the fees, expenses and billing practices, and, where it applies, your right to take a fee dispute to arbitration. When the scope or the fee changes significantly, you are owed an updated letter.

The rule has exceptions, among them a matter where the fee is expected to be less than $3,000, and work of the same general kind the lawyer has done for you and been paid for before. Whatever the rule requires in your case, you can ask for the terms in writing, and you should. The three questions are not awkward. They are what the letter is supposed to answer anyway.

The three questions, and what a weak answer sounds like

Is the scope defined in writing?

A good answer names a number of hours, a response time for routine matters and for urgent ones, and a list of what the plan does not cover, and points to the paragraph of the engagement letter where each one lives.

A weak answer is "unlimited," or "as much as you need." Nothing is unlimited. That phrasing usually means the boundary exists but has not been written down, so it gets drawn later, by the lawyer rather than by you, at the moment you most need the work. Every arrangement has edges. Ask to see them.

Who does the work?

A good answer names the person, and if work is shared, says with whom, for what, and under whose review. Work done by the person you met and work shared across a team can both be a perfectly good answer here. It just has to be given.

A weak answer is a senior lawyer in the pitch and silence about whose desk the work lands on. Ask directly: of the hours each month, how many are yours?

How is work outside the plan priced and approved?

A good answer gives a rate and, more importantly, a process: you are told before the meter starts, and you agree before the work begins. On our plans, additional hours are at preferred member rates and are always confirmed with you before the work begins. If you go over regularly, we recommend moving up a plan at the next monthly renewal rather than sending a larger invoice.

A weak answer is a rate with no process. The rate is not the risk. The surprise is the risk.

The seven that follow

1. **How do you check for conflicts, and what happens if one comes up later?** A conflict of interest is a situation where the lawyer's duty to someone else, or the lawyer's own interest, could pull against yours. The answer you want: a check before every engagement, monitoring as matters change, and prompt disclosure, with help finding other counsel, if one appears.
2. **How are my hours reported?** Ask to see a sample monthly summary, and ask whether you can see time as it is recorded rather than only at month end. Hours that are tracked but never shown to you make a subscription, not a relationship. On our plans you get both: a private portal showing every matter, what has been done and what has been billed, and a monthly summary of hours used and matters handled.
3. **Do unused hours roll over?** On our plans they do not, because the fee reserves your lawyer's availability whether or not you use every hour. A no is defensible. Hearing it for the first time in month four is not. Ask in month zero, and ask what happens if you are consistently under. The honest answer is that you should move down a plan, and on ours you can, at any monthly renewal.
4. **What is excluded, in writing?** The answer should name litigation, major transactions such as a financing or an acquisition, and how disputes are treated, since "disputes" can mean a sharp letter or a lawsuit. On our plans, a dispute handled at the negotiating table sits inside the monthly hours, litigation is never part of a plan, and a dispute that outgrows the hours is scoped separately before any of it is incurred.
5. **Which states' law can you advise on?** A lawyer is licensed by the states where they are admitted. If your contract is governed by Delaware or California law, you want counsel who says so and brings in a lawyer admitted there, not counsel reading that state's statute for the first time on your file. Our work covers New York-law and federal matters, and when another state's law, court or agency controls, we coordinate with counsel admitted there, with scope and fees approved by you first.
6. **Who covers you when your lawyer is away?** Vacations, trials, illness. A named colleague, a referral arrangement, or a candid statement of the limit are all acceptable answers. Not asking is the only bad one.

7. **How does it end, and what happens to the file?** Month to month, with thirty days' written notice and fees prorated to the end date, is a fair structure, and it is ours. Ask what happens to your documents on the way out and how long the handover takes. Every matter here ends with a closing letter that says what was done and how long we keep your file.

The rate is not the risk. The surprise is the risk.

Two proposals, side by side

Here is an illustration. Both proposals are composites built for this article; neither is any real firm's proposal, ours included. They answer the same request from a thirty-person company, and their fees are close.

Proposal A offers "ongoing general counsel services, unlimited email and phone support." No hour figure. No response time. Exclusions described as "complex matters quoted separately." A two-page letter.

Proposal B states an hour figure, response times for routine and urgent matters, the name of the lawyer who will do the work and the colleague who covers absences, a written list of exclusions that names litigation and financings, an hourly rate for extra work that must be approved before it starts, and a short notice period to leave.

Proposal A is the one more likely to end in an argument. Not because its lawyer is worse (we have no idea whether they are) but because "unlimited" and "complex matters quoted separately" together mean the boundary is undefined and movable, and the person who defines it later will not be you. The first disagreement will be about whether something was included, and it tends to arrive in the week you can least afford it.

Proposal B may still be wrong for the company; its hours might be too few. But you can see that it is wrong before you sign, which is the whole point.

What nobody should promise you

No lawyer should promise you a result. Ongoing counsel is a relationship for making decisions with better information and fewer surprises. A pitch that turns that into a guarantee, of an outcome, a saving, or a risk eliminated, is telling you something about the lawyer that matters more than anything else in the proposal.

Where to start

Take the proposals you have, or the arrangement you already pay for, and write the ten questions down the left side of a page. Fill in each answer from the engagement letter, not from the pitch or the website. Every blank is a question to send back this week, in writing, before you sign or renew.

This is general information about choosing and evaluating outside counsel, not legal advice about your company.

WRITTEN BY

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Anthony is the Managing Partner of Clemenza Law Group and serves as general counsel to a wide range of companies and philanthropic organizations. Nearly every essay here began as a real question from a real client: the contract that landed at 4 p.m., the board that meets on Thursday. He writes them the way he would answer you across the table, plainly and with care.