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THE PRIVATE BRIEF · BUSINESS

When a Startup Actually Needs a General Counsel

ANTHONY CLEMENZA · MANAGING PARTNER

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IN BRIEF

- A startup needs ongoing counsel when legal questions arrive faster than about once a month and someone who is not a lawyer has become the person answering them. Funding stage and headcount are poor guides.
- Five tests show where you stand: who read your last ten contracts, who owns your customer template, whether contractors signed agreements assigning their work, whether your equity records are current, and what review is coming in the next year.
- Standing counsel does not have to mean a full-time hire. A monthly plan sized to how often questions really arrive is the usual first step, with a financing or a dispute that outgrows the hours scoped separately.

It is Thursday afternoon and a customer contract is sitting in your inbox with a request to sign by Friday. You read it on your phone between calls, it looks like the last one, and you sign. Nobody did anything wrong. But if you are the person at your company who reads the contracts, answers the hiring questions and decides what the option grant should say, and you are not a lawyer, it is worth asking whether that arrangement still fits the company you are running.

Here is the short answer. A startup needs ongoing counsel when legal questions start arriving faster than about once a month and someone without a law degree has quietly become the person answering them. That is the threshold. It is not a funding stage, a headcount or a revenue number. An eight-person company can be well past it and a sixty-person company comfortably short of it. What matters is how often decisions with legal consequences arrive, and who is absorbing them.

Founders usually ask the question as “are we big enough yet,” which gets the cause and effect backwards. Going without counsel does not send you a bill. It produces a series of decisions made slightly wrong, cheaply, over a year or two, which are then discovered all at once by someone reviewing your company before they invest in it, buy it or sign a large contract with it. That review is called due diligence, and it is where most early legal gaps come to light.

Five tests you can run this week

Each of these can be answered in an afternoon. Run them honestly.

1. **The signature test.** Look at the last ten agreements your company signed. How many were read by a lawyer before signing? If the answer is under half, you are not saving legal spend. You are postponing it, at a price nobody has worked out.
2. **The template test.** Open your standard customer agreement. Who owns it, and when was it last revised? If the honest answer is “a founder adapted it from a previous company a few years ago,” it describes a business you no longer run and a level of risk nobody chose.
3. **The contractor test.** Count the people doing work for you who are not on payroll. How many have a signed written agreement that assigns their work to the company? Every missing one may be a piece of your product you do not own.

4. **The records test.** Could you produce, today, a current capitalization table (the list of who owns what), the signed approvals behind every equity grant, and the minutes of your recent board meetings? If rebuilding that would take a week, it will take a month under deadline, which is exactly when someone will ask for it.
5. **The horizon test.** Is there a financing, an acquisition, a major customer, a first office lease or a regulator in your next year? Each of those brings a review of the decisions you have already made.

Two failures is the signal. Three is the signal with a date on it.

What is cheap now and expensive later

Some legal problems grow slowly. A few compound, and those are the ones that decide whether you have crossed the line.

- **Equity paperwork.** An option granted without the approvals it needed, a vesting schedule nobody wrote down, a missed 83(b) election. That election is a filing a founder or employee can make with the IRS when they receive stock that vests over time, choosing to be taxed on its value now rather than as it vests. The Treasury regulation requires it to be filed no later than 30 days after the date the stock is transferred, not 30 days after you signed the paperwork or started work. Equity mistakes are among the hardest to fix after the fact, because fixing them needs the cooperation of people whose interests have since moved apart.
- **Who owns the code.** Unless there is a written assignment, the copyright in code a contractor writes generally belongs to the contractor. Federal copyright law gives ownership to the person who creates a work, and its “work made for hire” exception, which would make the company the owner, reaches independent contractors only for a short list of kinds of work, and only with a written agreement signed by both sides. An acquirer’s lawyers will look for that paper before you think to.
- **Employee or contractor.** Getting that line wrong is inexpensive with three people and expensive with thirty, because the exposure grows with every person and every year.
- **Contract terms you repeat.** A bad indemnity (a promise to cover the other side’s losses) or an uncapped liability clause in your standard agreement is not one mistake. It is one mistake times every customer who signed it.

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Two New York rules that arrive with your first hires

New York adds obligations that show up early rather than with scale, and both tend to be discovered late.

Pay ranges in job postings. New York Labor Law section 194-b requires an employer that advertises a job, promotion or transfer opportunity to include the pay, or a pay range, and the job description if one exists. Three details matter. It applies only to employers with four or more employees, so a three-person company is not yet covered. It reaches internal promotion and transfer postings, not just public job ads. And it covers jobs performed at least partly in New York, including remote roles performed elsewhere that report to a supervisor, office or other work site in New York.

Written contracts with freelancers. New York's Freelance Isn't Free Act, in the General Business Law, protects freelancers who are individuals (or one-person businesses, incorporated or not) hired for $800 or more, counting that job together with every contract between you and the same freelancer in the 120 days before it. For those engagements, section 1412 requires a written contract that names both parties and their mailing addresses, itemizes the services, their value and the rate and method of pay, states when payment is due, and states the date by which the freelancer must submit a list of services rendered. You must give the freelancer a copy and keep the contract for at least six years. Section 1411 requires payment by the date in the contract or, if the contract sets none, no later than thirty days after the work is complete. A few groups fall outside the Act: sales representatives, licensed medical professionals, construction contractors, and lawyers, but only lawyers practicing law under that contract who are in good standing with a U.S. bar and not under a court order restricting their practice.

Neither rule is difficult. Both are the kind of thing nobody looks up until something goes wrong.

An illustration

This is a composite, not a client. A seed-stage software company has eleven people and sells to mid-sized businesses. Revenue is real but modest. The founders used a startup formation package and bought legal work by the hour twice, for their first financing and for a trademark.

They fail the signature test: eight of the last ten agreements were signed after a founder read them. They fail the contractor test: four of seven contractors have no signed agreement, and two of those wrote code the product still runs on. They pass the records test, narrowly. And they fail the horizon test, because investors expect to talk about a larger round within two quarters.

The sensible path is not a full-time hire. It is a monthly plan sized to how often questions actually arrive, a first review that lists what exists and ranks what is missing, and a first ninety days spent on the contractor assignments and then the customer template, in that order: one is a gap in what the company owns, the other a gap in what it promises. When the financing comes, it is scoped as its own engagement rather than squeezed into the monthly hours.

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What "not yet" looks like

It is a real answer, and a good counsel will give it. Two founders, no revenue yet, a clean formation, signed founder agreements that assign their work to the company, no employees and one customer do not need standing counsel. They need a few documents done correctly and a calendar reminder. Paying monthly for that buys availability you will not use, and on the firm's plans unused hours do not roll over.

Where to start

This week, run the signature test. Pull the last ten agreements your company signed, write next to each one who read it before it was signed, and count. Then run the other four. If you fail two, have the conversation with counsel. If you pass all five, put a reminder in your calendar to run them again in six months. The firm's General Counsel page sets out the plans, the hours included and the response times, if you want to see what the conversation would lead to.

This is general information about when a startup needs ongoing legal counsel, not legal advice about your company. The rules described here change from time to time; check the current text before relying on it.

WRITTEN BY

Anthony Clemenza

MANAGING PARTNER

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.

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The current version of this essay is kept at clemenzalaw.com/insights/when-a-startup-needs-a-gc