

Just Say No

Lawyers who are afraid to write non engagement letters can cost their firm money.

Lawyers are encouraged to seek new business opportunities and to expand existing ones. As a result, the last thing an attorney wants to do is foreclose business opportunities by advising existing and prospective clients that he cannot represent everyone, that he is not capable of doing everything they want, or that his legal representation has concluded. But that is precisely what he must do in the name of loss prevention. Non engagement letters, while uncommon, often can do the trick.

For example, a skilled advocate suing a lawyer for malpractice will try mightily to come up with some plausible basis for arguing that an ethical breach has occurred in his conduct of the case. By making this argument, a garden-variety malpractice claim can be turned into something far more lucrative for the plaintiff, and far more difficult for the lawyer-defendant to defend.

Consider the following:

- **Case One.** A lawyer (L) meets with his friend (A) and the friend's new business "partner" (B). L is hired to represent A's and B's new business venture. L forms Newco, drafts a shareholders' agreement, and proceeds to represent the business. A and B soon have a falling-out. A leaves the corporation on unfavorable terms. A then sues L for malpractice and breach of fiduciary duty, alleging that he believed L to be representing him personally in addition to Newco, and accusing L of favoring Newco's interests over his.

- **Case Two.** The basic facts are the same as Case One. L is a senior partner with a sophisticated litigation practice. After the initial consultation with A and B, he assigns the work to a corporate associate. Later, a lawsuit alleging malpractice and lack of supervision over the associate is filed against L and his firm, claiming that significant tax advantages could have been obtained if Newco had been organized as a limited partnership. Exhibit 1 at the ensuing trial is the Law firm's standard engagement letter. Not wanting to compromise his claim for billing credit, L had included the following in the letter: "I will be primarily responsible for your work." Exhibit 2 is the firm's time records showing that L recorded no time to the Newco account following the meeting at which he "pitched" the business.

- **Case Three.** Now assume the start-up is completed successfully. A periodically calls L for personal and business advice, and L obliges him by answering his questions without billing any time. Later, L's firm is conflicted out of representing a Fortune 100 company in a major litigation in which Newco is among the defendants, after A refuses to sign a conflict waiver and claims that Newco is a current client of the firm.

So-called non engagement letters are just as important as engagement letters. Most reasonable clients will respect and understand a carefully worded letter saying just that. A client who will object to such a qualifying letter is not a client whom the prudent lawyer should agree to represent in the first place.

-Alan Rutkoff is a partner at McDermott Will & Emery and the firm's general counsel.