

V&E

Engagement Letters and Advance Waivers in the USA

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Engagement Letters are Critical in the USA

Engagement letters are critical to define the client, the scope of the engagement and when the engagement has ended.

Engagement Letters are Critical in the USA

1. Who is the client?
 - Parent, subsidiary, affiliated company.
2. What is the precise subject matter of the representation?
3. New engagement letter for each new subject matter.
4. When does the engagement end?
5. Must be signed by both parties.

Engagement Letters re Change of Client Address

1. Client undertakes to inform law firm promptly in writing of any change in address.
2. Law firm entitled to rely on and contact client at latest received business address.

Engagement Letters re Timely Information and Instructions

You agree to be candid and cooperative with us and will keep us informed with complete and accurate factual information, documents, and other communications relevant to the subject matter of our representation.

Engagement Letters re Timely Information and Instructions

We reserve the right to decline additional work if your information or instructions are not timely, and to withdraw from this representation altogether if this practice persists.

When Contemplating Advance Waivers, Loyalty is Crucial

1. Client loyalty is a crucial factor when considering advance waivers.
2. Watch out for clients who give you only small jobs to conflict you out of major projects.

Why Advance Waivers are Important

1. Conflicts of interest laws and rules are very strict.
2. Larger law firms.
3. Law firm mergers.
4. Clients tend to be much less loyal.
5. Hot potato rule – you can not dump a client to take on an adverse representation.

Advance Waivers

1. Loyalty to clients versus demands from law firms.
2. The length, nature and depth of relationship with the first client may affect enforceability of advance waivers.

Advance Waivers are Contracts

1. Advance waivers are contracts and will be interpreted by the courts.
2. Specify choice of law.
3. Specify arbitration.
4. Must be signed by both parties.

Content of Advance Waivers

1. Specify precisely who the first client is.
2. Define precisely what the scope of the representation is.
3. Preferably, specify which clients or which types of clients can be represented even if adverse to first client.
4. Preferably, specify in which areas or industries you can represent clients even if adverse to first client.

Advance Waivers Not Enforceable

1. If the new matter is substantially related to the current matter.
2. If confidential information of first client will inevitably be relevant.
3. If client has not been able to give informed consent. [The more sophisticated the client, the more likely that consent will be informed.]
4. If the lawyer cannot reasonably believe that he or she can be independent.