

UNDERTAKING REPRESENTATION

A. COMPETENCE TO HANDLE MATTER

[1:1] Businesses can be as varied and different as the individuals who comprise them. Before taking on a new business client, you should be confident that you will be able to advise the client competently in the matter for which you have been retained.

1. [1:2] **CRPC Ethical Requirements:** An attorney must not “intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence”—i.e., the attorney must apply the learning and skill, as well as the mental, emotional and physical ability, reasonably necessary for the performance of the service. [CRPC 1.1(a) & (b) (formerly Rule 3-110(A) & (B)); compare ABA Model Rule 1.1—“[A] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”; and see *Stevens v. State Bar* (1990) 51 C3d 283, 290, 272 CR 167, 171—attorney intentionally failed to perform legal services competently by incorporating client’s company in purchasers’ names before sale completed and without client’s knowledge or consent]

The lawyer also has a duty to ensure that *subordinates* act competently. [CRPC 1.1(b) & 5.3]



[1:3] **PRACTICE POINTER:** Attorneys are notoriously poor judges of their own limitations and often tend to take on more than they can handle. Therefore, be *extremely careful* about entering unfamiliar areas of practice—there is a substantial risk of malpractice liability and professional discipline in such situations.

- a. [1:4] **Handling matters beyond own expertise:** An attorney who lacks sufficient learning and skill to handle the matter “competently” must either decline the matter (or discontinue representation if the lack of expertise becomes apparent after the matter is accepted) *or* take one of the following steps:
 - *Associate or consult with* another lawyer reasonably believed to be competent; or
 - “Gear up” to handle the matter competently—i.e., *Acquire sufficient learning and skill* before performance is required; or
 - Refer the matter to another lawyer reasonably believed to be competent. [CRPC 1.1(c) (formerly CRPC 3-110(C))]

- (1) [1:5] **General duty to refer, associate or consult with specialist:** An attorney who undertakes to represent a client on a matter requiring specialized learning and skill is held to the same standard of competence as a specialist in the field. Thus, attorneys *lacking* the requisite learning and skill are exposed to *malpractice* liability (as well as disciplinary action); i.e., the failure to refer the client to, or associate or consult with, counsel with appropriate expertise in such circumstances itself constitutes professional negligence. [See *Home v. Peckham* (1979) 97 CA3d 404, 415, 158 CR 714, 720 (overruled on other grounds by *ITT Small Business Finance Corp. v. Niles* (1994) 9 C4th 245, 256, 36 CR2d 552, 559); and ¶1:191 re payment of fees to outside counsel]
 - (2) [1:6] **Exception—“emergency” advice:** Though not possessing the learning and skill ordinarily required, an attorney may give advice or assistance in an *emergency* where referral to or consultation with another lawyer would be “impractical.” But such “emergency advice” should be limited to that *reasonably necessary under the circumstances*. [See CRPC 1.1(d) (formerly CRPC 3-110, Discussion)]
 - (3) [1:7] **Application to advising clients forming new business:** Increasing complexities in tax and securities laws affecting the organization of a business entity demand increasing competence by lawyers advising business clients. Of course, this does *not* mean every client with a tax or securities problem must be referred to a specialist. Indeed, many such problems are so frequently encountered and the rules so well known that they can be handled by a general practitioner. [See *Home v. Peckham* (1979) 97 CA3d 404, 415, 158 CR 714, 720]

On the other hand, many tax or securities problems require knowledge and skill beyond the level of competence of most general practitioners. In such cases, a general practitioner who is not an expert may owe a duty to consult with or associate a specialist, or refer the client to such specialist. Failure to do so may lead to malpractice liability or disciplinary charges. [See *Home v. Peckham*, *supra*]
- ⇒ [1:8] **PRACTICE POINTER:** The important thing is to *recognize* the need for expert assistance when it exists. If you are not an expert in tax or securities law, be candid with the client regarding the need to associate or consult with a specialist. Most business clients will appreciate your candor and the value of having an expert review their problem.
- Be sure to confirm in writing whatever understanding is reached with the client and the specialist (if outside

your firm). Your engagement letter (*see Form 1:A*) should state the matters upon which outside expertise will be sought and the limits of your own undertakings with respect to such matters. In addition, confirm in writing with the experts (with copies to the client) those matters upon which they are assuming responsibility. This will avoid confusion or duplication of efforts, or matters “slipping through the cracks.” A well-drafted engagement letter can be critical in defending against a client’s malpractice claim.



[1:9] PRACTICE POINTER: Even if you refer the matter to a tax or securities law specialist, you should continue to act as liaison with the clients. Your existing relationship with them will usually make it easier to ascertain the facts, gather whatever information the specialist may require, and arrive at decisions that need to be made. Moreover, your doing so tends to ensure that, after the business organization is complete, the clients will expect you to continue to represent them.

- b. [1:10] **“Good faith” as excuse:** “Good faith” is no defense to malpractice (professional negligence) liability.

However, good faith may be relevant in determining whether the attorney’s mistakes warrant suspension, disbarment, or other professional discipline.

- (1) [1:11] **What constitutes “good faith”:** “Good faith” in rendering legal services means more than lack of intent to take advantage of the client or to harm the client’s interests. Attorneys are *not* acting in “good faith” if they attempt to perform services they *know or should know* they cannot competently perform without consulting or associating competent counsel. Professional discipline is appropriate under such circumstances. [*Lewis v. State Bar* (1981) 28 C3d 683, 689, 170 CR 634, 637—criminal lawyer undertook to handle probate estate, having no prior knowledge of probate procedures]

- (2) [1:12] **Mere negligence:** An attorney’s “negligent” representation may give rise to malpractice liability. However, an attorney is not subject to professional discipline unless he or she “intentionally, recklessly, with gross negligence, or repeatedly” fails to perform legal services with competence. Thus, a single act of mere negligence is not sufficient to warrant professional discipline, but 11 *repeated* acts of incompetency may result in discipline . . . even if each act was merely negligent (i.e., neither intentional, nor recklessly incompetent nor grossly negligent). [CRPC 1.1(a) (formerly CRPC 3-110(A)]

- c. [1:13] **Diligence in handling matter:** Attorneys must also act with diligence in performing legal services for their clients,

[1:14 — 1:26]

and thus must be careful not to take on more work than they can handle. An attorney “shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.” [CRPC 1.3(a) (formerly CRPC 3-110(B))]

“Reasonable diligence” means acting with commitment and dedication to the interests of the client and not neglecting or disregarding, or unduly delaying, a legal matter entrusted to the attorney. [CRPC 1.3(b) (no counterpart under former CRPC)]

[1:14-20] *Reserved.*

B. ETHICAL (CONFLICT OF INTEREST) LIMITATIONS ON REPRESENTATION

[1:21] Situations may arise in which, because of a conflict of interest, an attorney is ethically barred from accepting employment or dealing with the clients in formation of a business entity.

Cross-refer: The sections below (§1:22 ff.) summarize the pertinent California Rules of Professional Conduct dealing with conflicts of interest. For a thorough discussion of the subject, see Tuft & Mohr, *Cal. Prac. Guide: Professional Responsibility & Liability* (TRG), Ch. 4.

1. [1:22] **Representing Multiple Clients/Adverse Interests:** Conflicts of interest between an attorney and a *current* or *former* client may arise in a variety of circumstances surrounding the formation of a new business entity:
 - [1:23] **Concurrent representation of conflicting interests:** An attorney is often called upon to do all the work, in effect representing all sides. Or, while the attorney represents only one party in a particular transaction, the attorney may be simultaneously representing *another* client with adverse interests in an *unrelated* matter. Either situation presents the problem of *concurrent* representation of clients with conflicting interests. [CRPC 1.7(a), (b) (formerly CRPC 3-310(C))]
 - [1:24] **Successive representation of conflicting interests:** Although the attorney represents only one party, the attorney may have *formerly* represented *another party* whose interests conflict with the current client (*successive* representation of a client adverse to a *former* client). [CRPC 1.9(a) (formerly CRPC 3-310(E))]
 - [1:25] **Attorney’s adverse interest:** The attorney may have an *interest in the subject matter* of the representation or a present or past “legal, business, financial, professional, or personal relationship” with *another party* in the same transaction. [CRPC 1.7(b), (c) (formerly CRPC 3-310(B))]
 - a. [1:26] **Disclosure and written consents required:** Counsel is not necessarily forbidden from representing a client in any of the above situations (§1:22 ff.). However, at a minimum, counsel must provide the affected clients with *written disclosure*

of the potential conflicts of interest (CRPC 1.7(a)-(c), 1.9(a) (formerly CRPC 3-310(B), (C) & (E))); and, where the conflict arises out of concurrent or successive representation of conflicting interests, representation may ethically proceed only with the affected clients' *informed written consent* (CRPC 1.7(a), (b), 1.9 (a), 1.9 (b) (formerly CRPC 3-310(C) & (E))).

"Informed written consent" means the affected clients' written agreement to the representation *after* having been informed by counsel of the "relevant circumstances" and the "material risks, including any actual and reasonably foreseeable adverse consequences" to the clients. [CRPC 1.0.1(e), (e-1), (n) (formerly CRPC 3-310(A)); see *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.* (2018) 6 C5th 59, 84, 237 CR3d 424, 442—"To be informed, the client's consent to dual representation must be based on disclosure of all material facts the attorney knows and can reveal . . . An attorney or law firm that knowingly withholds material information about a conflict has not earned the confidence and trust the rule is designed to protect."; *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 CA4th 1240, 1255, 84 CR2d 204, 214—"Clearly, as a threshold matter one must know of, understand and acknowledge the presence of a conflict of interest before one can give *informed* consent to its existence" (emphasis in original)]

While the extent of the requisite disclosure will vary in each situation, at a minimum the clients should probably be apprised of the following:

- (1) [1:27] **"Joint client waiver" of attorney-client privilege:** Under former CRPC 3-310 and case law decided thereunder, "informed consent" required disclosure that joint representation on a matter of common interest will result in each client's waiver of the attorney-client privilege with respect to communications with counsel in the event of subsequent litigation *between themselves* (Ev.C. §962). [Former CRPC 3-310, Discussion; see *Marriage of Egedi* (2001) 88 CA4th 17, 24, 105 CR2d 518, 523; see also *Fiduciary Trust Int'l of Calif. v. Sup.Ct. (Brown)* (2013) 218 CA4th 465, 482-486, 160 CR3d 216, 228-232—Ev.C. §962 does not implicitly permit concurrent or successive representation of conflicting interests; compare *Roush v. Seagate Tech., LLC* (2007) 150 CA4th 210, 223-225, 58 CR3d 275, 284-286—co-employees represented by same attorney in *separate* suits against their employer were not "joint clients" despite cooperative sharing of information]

While this requirement does not expressly appear in CRPC 1.7, the waiver of attorney-client privilege may be considered one of the "reasonably foreseeable adverse consequences" requiring disclosure under CRPC 1.0.1(e) (¶1:26).

- (2) [1:28] **Consequential waiver of individual confidences:** As a result of the Ev.C. §962 “joint client exception” (§1:27), multiple clients also *waive any confidences from each other* with respect to the common matter, thus permitting the attorney to serve with equal loyalty and openness toward each. [See *Wortham & Van Liew v. Sup.Ct. (Clubb)* (1987) 188 CA3d 927, 932-933, 233 CR 725, 728-729]
- (3) [1:28.1] **Compare—implied consent:** In extreme circumstances, a client’s consent to an attorney’s representation of conflicting interests may be implied. “Where a party’s course of conduct under all of the circumstances reflects a knowing, informed choice to permit continued concurrent representation [in separate matters] notwithstanding potential or actual adverse interests, we conclude that requiring a writing as the sine qua non of effective consent would celebrate literalism and elevate form over substance to the detriment of substantial justice for the other parties.” [*Antelope Valley Groundwater Cases* (2018) 30 CA5th 602, 624, 241 CR3d 692, 709]
 - (a) [1:28.2] **Caveat:** *Antelope Valley* involved a complicated multi-party litigation matter in which a law firm, which acted as general counsel to a public entity *before* the entity became a party to the litigation, also represented another party whose interests were adverse to the public entity. The simultaneous representation in separate matters continued *for 10 years with the parties’ full knowledge and without objection*. Moreover, there was no evidence that confidential information germane to the litigation had ever been disclosed, and a motion to disqualify was brought only after the public entity terminated the law firm as its general counsel. Lastly, the court’s finding of implied consent is arguably dictum because the court also found, as an independent ground for its decision, that the disqualification motion was untimely. [See *Antelope Valley Groundwater Cases* (2018) 30 CA5th 602, 613-614, 625-629, 241 CR3d 692, 699-700, 709-713]

Consequently, a client’s implied consent to an attorney’s representation of conflicting interests is likely to be found only in extreme circumstances involving sophisticated clients over an extended period of time with no evidence of detriment to the client.
- (4) [1:29] **Caveat—conflicting professional obligations precluding “informed written consent”:** Other rules and laws, such as the attorney’s duty to preserve client confidences (see Bus. & Prof.C. §6068(e)), may preclude making adequate disclosure. In such situation, “informed written consent” cannot be obtained;

and, consequently, counsel will have to *decline* the proposed “dual” or other adverse interest representation. [See CRPC 1.7, Comment [7] (formerly CRPC 3-310, Discussion); see also *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.* (2018) 6 C5th 59, 86, 237 CR3d 424, 443, fn. 8]

- (5) [1:29.1] **Consent to future conflicts (“blanket advance waivers”):** A client may give informed written consent to future conflicts so long as the client reasonably understands the material risks that an advance waiver entails. The more comprehensive the attorney’s explanation of (i) the types of future representations that might arise and (ii) the actual and reasonably foreseeable adverse consequences to the client, then the more likely the client will have the requisite understanding to consent to the future conflicts. The relevant considerations are the client’s experience and sophistication, as well as whether the client is independently represented in connection with giving consent. [CRPC 1.7, Comment [9]]
 - (a) [1:29.2] **Comment:** The California Supreme Court had occasion to address “blanket advance waivers,” but concluded that the future conflict waiver at issue was ineffective because the firm failed to disclose a *known, existing* conflict with another client, thus rendering the consent not “informed” (*see* ¶1:26). Although the Court declined to address the legality of blanket advance waivers, it noted that, when it approved the CRPC that went into effect November 1, 2018 (*see* ¶1:1.1), it approved Comment [9] to CRPC 1.7 (¶1:29.1). [*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.* (2018) 6 C5th 59, 85-86, 237 CR3d 424, 443-444, fn. 7]
- (6) [1:30] **Impact of conflict on attorney fees entitlement:** An attorney who violates the ethical rules governing *conflict-free* representation jeopardizes entitlement to legal fees. Unless counsel obtained the client’s informed written consent as required by the CRPC (¶1:26), the right to attorney fees (both contractual and quantum meruit) for services rendered during the period of the violation may be forfeited. [See *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.* (2018) 6 C5th 59, 87-96, 237 CR3d 424, 445-452—because firm’s ethical breach rendered entire engagement agreement unenforceable, firm not entitled to unpaid contractual fees (whether firm may recover under quantum meruit to be determined by trial court after considering all relevant facts and circumstances); *A.I. Credit Corp., Inc. v. Aguilar & Sebastianelli* (2003) 113 CA4th 1072, 1079, 6 CR3d 813, 819]

[1:31 — 1:38]

- (7) [1:31] **Other potential consequences of noncompliance:** Of course, representation of conflicting interests without client consent may also lead to *disciplinary action* and, if the client suffers damages as a result, may support a professional *malpractice*, *breach of fiduciary duty* and/or *breach of contract* cause of action. [CRPC 1.0(b)(1) (formerly CRPC 1-100(A)); see, e.g., *Stanley v. Richmond* (1995) 35 CA4th 1070, 1086-1092, 41 CR2d 768, 776-780 & fn. 7]

[1:32-35] *Reserved.*

- b. [1:36] **Concurrent representation of conflicting interests:** Ordinarily, counsel “shall not” represent a client if the representation is *directly adverse* to another client in the *same* or a *separate* matter. Such representation is permitted only where:
- Counsel obtains each client’s *informed written consent* (§ 1:26);
 - Counsel reasonably believes *competent and diligent* representation can be provided to each client;
 - The representation is *not prohibited by law*; and
 - The representation does *not* involve the assertion of a claim by one client against another in the *same litigation* or *other proceeding before a tribunal*. [CRPC 1.7(a), (d)(1)-(3); see former CRPC 3-310(C) & Discussion (4)—such representation permitted with informed written consent]
- (1) [1:37] **Attorney-client relationship not a prerequisite:** Application of CRPC 1.7 does not require representation of both clients *as an attorney*. A conflict requiring disclosure and client consent may arise where counsel has *any confidential or fiduciary* relationship with a “client” whose interests conflict with those of another client. [*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 CA4th 1017, 1039-1040, 117 CR2d 685, 702—attorney breached duty to former client by acting as expert witness for another client in related lawsuit against former client]
- (2) [1:38] **Representation of conflicting interests in same matter (“dual representation”):** This limitation on simultaneously representing clients with actually or potentially conflicting interests *in the same matter* applies whenever a lawyer is asked to represent two or more persons entering into a business venture. In such circumstances, each client may have separate objectives and concerns which conflict with the objectives of the others. Typical situations: one client is putting up most of the capital and wants a priority return; or the client

“who had the idea” wants control even though others are contributing most of the capital; or one client wants voting control or a “veto” power over certain acts by the others. [See CRPC 1.7, Comments [2] & [4] (formerly CRPC 3-310, Discussion)]

Here, the principal fiduciary value jeopardized by the “dual representation” is the attorney’s duty—and each client’s legitimate expectation—of *undivided loyalty*. [*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 C4th 1135, 1146-1147, 86 CR2d 816, 824; *Flatt v. Sup.Ct. (Daniel)* (1994) 9 C4th 275, 284, 36 CR2d 537, 542; see *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 CA4th 1832, 1840-1845, 43 CR2d 327, 332-335]

- (a) [1:39] **“Potential” conflict:** CRPC 1.7(a) does not refer to “potential” conflicts. [Compare former CRPC 3-310(C)(1) (requiring informed written consent to simultaneously represent clients whose interests “potentially conflict”)]

Comment [4] to CRPC 1.7, however, states that a conflict exists if there is a “significant risk” that an attorney’s ability to effectively represent more than one client “will be” materially limited. Counsel should disclose the conflict to the client and obtain informed written consent when there is a “likelihood that a difference in interests exists or will eventuate” and the conflict “will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of each client.” [CRPC 1.7(a), Comment [4] (“The mere possibility of subsequent harm does not itself require disclosure and informed written consent”); compare *Havasu Lakeshore Investments, LLC v. Fleming* (2013) 217 CA4th 770, 779, 158 CR3d 311, 319 & fn. 7 (recognizing “that a mere *hypothetical* conflict is insufficient” to compel attorney disqualification under former CRPC 3-310(C)(1) and there must be “a *reasonable likelihood an actual conflict will arise*”) (emphasis in original)]

- (b) [1:39.1] **Includes prospective clients:** The bar against representation of conflicting interests applies where an attorney is approached to take on a matter against a party who simply *consulted* but did *not retain* that attorney. One who consults with an attorney to retain the attorney or secure legal service advice from the attorney in the attorney’s professional capacity is a prospective client. [CRPC 1.18(a); see *Med-Trans Corp., Inc. v. City of Calif. City* (2007) 156 CA4th 655, 666-667, 68 CR3d 17, 26; *Pound*

[1:39.2 — 1:39.3]

v. DeMera DeMera Cameron (2005) 135 CA4th 70, 76, 36 CR3d 922, 926; see also *Flatt v. Sup.Ct. (Daniel)* (1994) 9 C4th 275, 281, 36 CR2d 537, 540]

Ordinarily, the attorney may *not* represent a client whose interests are materially adverse to a prospective client in the *same* or a *substantially related* matter (see ¶1:67) where the prospective client gave the attorney confidential information material to the matter. However, such representation is permitted if:

- Both the affected client and the prospective client give their informed written consent (¶1:26); *or*
- The attorney took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client, the attorney is timely screened from any participation in the matter (see ¶1:81.5 *ff.*) and is apportioned no part of the fee therefrom, *and* written notice (including a general description of the subject matter about which the attorney was consulted and the screening procedures) is promptly given to the prospective client to enable the prospective client to ascertain compliance with these requirements. [CRPC 1.18(c), (d) & Comments [4], [5]]

1) [1:39.2] **Conflict extends to attorney's firm:** If the attorney is prohibited from undertaking representation adverse to a prospective client, no other lawyer in the attorney's firm may knowingly continue or undertake representation in such a matter, except as provided above (¶1:39.1). [CRPC 1.18(c)]

2) [1:39.3] **Limitations:** Not all persons who communicate information to an attorney are treated as prospective clients within the meaning of CRPC 1.18. A person who unilaterally communicates information to an attorney without reasonable expectation that the attorney is willing to discuss the possibility of retaining the person or providing legal advice is *not* a prospective client. Similarly, a person who discloses information to an attorney after the attorney has stated his or her unwillingness or inability to consult with the person, or a person who communicates information to an attorney without a good faith intention of seeking legal advice or representation, is *not* a prospective client. [CRPC 1.18, Comment [2]]