

RRC2 – Rule 3-120 [1.8.10]
E-mails, etc. – Revised (January 19, 2016)
Drafting Team: Ham (Lead), Clinch, Clopton, Eaton

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January 12, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:

The Office of Chief Trial Counsel's comments on the rules under consideration at the January meeting are attached. Please review them in preparation for the discussion at the January meeting.

Attached:

RRC2 - [1-100(B)][1-120][1-400][2-300][2-400][3-120][3-200][1.14] - 01-12-16 OCTC Memo to

RRC2.docx

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January 12, 2016 OCTC Memo to RRC2:

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F. Rule 3-120: Sexual Relations with Client

OCTC supports rule 3-120. It does not recommend any revisions.

January 12, 2016 Eaton Email to Drafting Team, cc Difuntorum & Mohr:

It appears that OCTC is rejecting our proposed change to 3-120 in support of leaving the existing rule unchanged. Am I reading the recommendation correctly?

January 12, 2016 Difuntorum Email to Drafting Team, cc Mohr:

I sought clarification from OCTC staff and was just informed that OCTC's recommendation is a statement of support for current rule 3-120. In other words, OCTC would maintain the current rule without any changes.

January 16, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

Here are my thoughts on this draft ---

- 1) The proposed Rule would cover constituents of an organizational client, but what about representatives an individual client? I notice that this is covered by Iowa ((j) A lawyer shall not have sexual relations with a client, or a representative of a client, unless"
- 2) The first sentence of Comment [1] ("predate the initiation of the lawyer-client relationship") is not consistent with the Rule ("existed between them when the lawyer-client relationship commenced"). I think the Rule has it right - the lawyer should not be freed from this Rule b/c there was a sexual relationship at some point in the past - and that the Comment should echo this.
- 3) As noted in ¶3 on p. 10 of 14, this draft doesn't discuss imputation to other firm lawyers. The first Commission got to that result by a Comment to Rule 1.8.11. B/c of our directions about the limited role of the Comments, we should consider adding something on this question. Here are two possibilities: "(c) The paragraph (a) is personal and does not apply to associated

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lawyers." or "(c) For purposes of this rule, "lawyer" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance." (I think the latter is more direct)

4) The second sentence of Comment [1] assumes the Commission will adopt the MR 1.7 material limitation standard. If the Commission instead retains a version of our current conflict rules, a lawyer's sexual relationship with a client, or certain constituents of an organizational client, would be a personal relationship under rule 3-310(B). This would be true whether the relationship exists when the lawyer is hired or begins during the lawyer-client relationship b/c of the "accept or continue" language in the introduction to rule 3-310(B). I imagine the need to make this disclosure would be a powerful incentive for chastity.

5) I would think the greatest risk when in an intimate relationship with an organizational constituent would be the duty of confidentiality, and we might add this to the Comment [1] references.

6) The assignment memo identified five possible issues, two of which seem to me to warrant being discussed by the Commission and addressed on the Report. These are:

(2) Business and Professions Code section 6106.9(b) exempts relationships with "spouses or persons in an equivalent domestic relationship." Current rule 3-120(C) only exempts "spouses." In light of United States Supreme Court decision in Obergefell v. Hodges (2015) 135 S.Ct. 2584, is the term "spouse" sufficient to cover same-sex marriages.

(4) Business and Professions Code section 6106.9(e) requires any party alleging a violation of the statute to submit a verified complaint to the State Bar. Should the proposed rule be harmonized with the statute?