

**RRC2 – Rule 3-120 [1.8.10]**  
**E-mails, etc. – Revised (February 16, 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

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.pdf

**January 12, 2016 OCTC Memo to RRC2:**

\* \* \*

**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

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?

**February 12, 2016 OCTC Memo to RRC:**

\* \* \*

**F. Rule 3-120 [Sexual Relations with Client]**

OCTC supports rule 3-120. It neither recommends, nor opposes, prohibiting all attorney relationships with clients. (See January 12, 2016 Comment.)

***January 12, 2016 Comment:***

\* \* \*

**F. Rule 3-120: Sexual Relations with Client**

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

**February 14, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Jim and all: I support this proposed Rule as drafted but have a few thoughts on the Comments:

1) The word "ongoing" and the phrase "which predate" in the first line of Comment [1] would add modifiers not found in the Rule and that arguably are inconsistent with one another. This could cause confusion. Would the paragraph (a) exception for a preexisting relationship not

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apply if there had been some pause in it? Must the sexual relationship be continuous? I think it better to not tinker with the language of the Rule, even by implication. The lengthy first sentence includes a policy explanation that I don't believe is needed to understand the Rule. The second sentence of Comment [1] uses the material limitation standard of the Model Rules, a standard not found in the current California rules or the proposed Rule 1.7 to be discussed during the February meeting. Finally, less we suggest that any lawyer might be a Lothario, I would make "sexual relationship" singular. These problems could be resolved by the following:

[1] ~~Although this~~ This Rule ~~does not apply~~ is not applicable to ongoing a consensual sexual relationship ~~which that exists when a predate the initiation of the lawyer-client~~ lawyer-client relationship ~~commences because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer nevertheless should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See~~ must comply with all other applicable rules. See, e.g., Rules 1.7(a)(2) (conflicts of interest)], 1.1 (competence), and 2.1 (independent judgment).

I have inserted the "e.g." b/c there are other potentially applicable rules that might be implicated by a lawyer's sexual attachment to a client, such as 1.6 and 3.1. Also, I would put the Rule references in numerical order.

2) In Comment [2] "is applicable to" could be changed to the more conversational and less stilted "applies to" (as I suggested for Comment [1]).

**February 14, 2016 Ham Email to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

Thank you, Bob.