

**RRC2 – Rule 5-120 [3.6]**  
**E-mails, etc. – Revised (May 2, 2016)**  
**Drafting Team: Clopton (Lead), Bleich, Cardona, Croker**

**Table of Contents**

April 28, 2016 OCTC Memo to RRC2:..... 1  
April 29, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:..... 1

**April 28, 2016 OCTC Memo to RRC2:**

\* \* \*

**D. Rule 5-120 [Trial Publicity]**

OCTC does not recommend any revisions to rule 5-120.

**April 29, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

A few thoughts ---

1) Regarding the unnumbered paragraph that comes after paragraph (b)(7):

a. I would like to discuss at the meeting the use of "may" in If (b)( 1) - (7) are the only safe harbor, then doesn't paragraph (a) apply to any statement not within the safe harbor? And if that is correct, shouldn't "may" be removed? This might read: "...but statements on other matters are subject to paragraph (a)."

b. Shouldn't this paragraph be a Comment?

2) Proposed paragraph (d) is interesting and might trigger some discussion, but I wonder whether it is too narrow. Isn't its logic applicable to any lawyer associated with the lawyer "who is participating or has participated in the investigation or litigation" even if not in the same firm? For example: "Any lawyer associated with a lawyer subject to paragraph (a) also is subject to its restrictions." This might even be put into paragraph (a): "A lawyer who is participating or has participated in the investigation or litigation of a matter, and any associated lawyer, shall not ...."

3) Regarding Comment [1]:

a. In its second line, I think that our custom is to use "including" without the redundant "without limitation". The word "including" is not limited by the examples that follow.

b. Its first sentence then goes on to focus on the extrajudicial speakers purpose, but paragraph (a) has an objective standard. The speaker's subjective purpose is irrelevant, and the Comment conflicts with the Rule.

c. That same sentence adds two further thoughts, that the extrajudicial statement involve "a material fact in issue" and that the statement "presents information clearly inadmissible as evidence in the matter". Neither point is contained in the draft Rule.

d. My recommendation is that we drop Comment [1].