

**RE: Rule 3-320
6/10/05 Commission Meeting
Open Session Item III.L.**

-----Original Message-----

From: Kevin Mohr [mailto:kemohr@comcast.net]
Sent: Monday, April 11, 2005 7:29 AM
To: Kurt Melchior; JoElla L. Julien; Anthonie Voogd
Cc: Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Kevin Mohr; Sean SeLegue; Robert Kehr
Subject: RRC - 3-320 - Rule Draft (post 4/1 & 4/2/05 Meeting)

Greetings all:

I've attached the following:

1. Draft of proposed rule 3-320, Annotated, in Word.
2. File comparing proposed rule 3-320 to current rule 3-320, in Word and PDF.
3. My notes for the 4/1 & 4/2/05 meeting for 3-320.

I included a "knowledge" standard in the rule and substituted "lawyer" for "member" throughout as agreed at the meeting.

I've also added a comment concerning vicarious disqualification, though as I explain in a note, I'm not sure it belongs in this rule. I've added it mostly to flag the issue for the 3-310 team that will consider how the ABA deals with this issue. See note 5 of the rule draft.

I've copied Sean and Bob, the other members of the 3-310 team.

Thanks,

Kevin

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[Proposed] Rule 1.8.3 [3-320].¹ Relationship With Other Party's Lawyer

A lawyer² shall not knowingly³ represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer, or has an intimate personal relationship with the lawyer, unless the lawyer informs the client in writing of the relationship.

Comment

[1] Rule 1.8.3 [3-320] is not intended to apply to circumstances in which a lawyer fails to advise the client of a relationship with another lawyer who is merely a partner or associate⁴ in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter.

[2] Any disqualification that may arise from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See [Rule 1.10].⁵

Drafters' Notes

¹ **Drafters' Note**: The counterpart of rule 3-320 was MR 1.8(i) of the pre-Ethics 2000 Model Rules. Rule 3-320 should be a separate rule. To date, the RRC has assigned tentative "Model Rule" numbers to two rules: Rule 3-300, which has a counterpart in MR 1.8(a), has been designated Proposed Rule 1.8.1. Rule 3-120, which has a counterpart in MR 1.8(j), has been designated Proposed Rule 1.8.2. At least for the time being, it is recommended that rule 3-320 be numbered 1.8.3.

² **RRC Action**: At the 4/1 & 4/2/05 meeting, Kurt Melchior proposed substituting "lawyer" for "member" throughout the rule. There were no objections.

³ **RRC Action**: At the 4/1 & 4/2/05 meeting, Kurt Melchior proposed that the rule contain a knowledge requirement. There were no objections.

The use of the adverb "knowingly" to modify "represent" was intended to track the construction now used in MR 1.10(a) concerning vicarious disqualification ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so ...")

An alternative approach, suggested by Kurt in his 3/7/2005 e-mail to the rule drafters (and transmitted to the RRC by Lauren McCurdy), would be to write the rule as follows:

"A lawyer shall not represent a client in a matter in which the lawyer knows that another party's lawyer is a spouse, ..."

As Kurt observed in his 3/7/05 e-mail, requiring that the lawyer be put on notice of a conflict by a writing from the opposing party would be too narrow. A knowledge standard would encompass such a writing, and would also include other means by which the lawyer may have gained knowledge. A knowledge standard would also address the problem identified by Kurt in his November 12, 2004 e-mail to the RRC about the “minor flaw” of the rule not requiring a knowledge standard, i.e., where a lawyer has no way of knowing that a close relative is involved in the matter, e.g., where the matter is litigation that was referred to the litigation department of the firm by the opposing client’s transactional lawyer, the relative.

⁴ **Drafters’ Note**: In Kurt’s 3/7/05 e-mail, he forwarded the e-mail of one of his partners, who suggested that perhaps the rule should refer to “of counsel” as well as to “partner or associate”. The proposed definition of “law firm” that the RRC has tentatively approved does not capture that nuance. That definition, as tentatively approved by the RRC at the 2/4/05 meeting and designated Proposed Rule 1.0.1(a), provides:

(a) “Law firm” means a lawyer or lawyers in a law partnership, professional law corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization.

Question: Should “of counsel” be added here?

⁵ **KEM Note**: This comment is the last sentence of MR 1.7, cmt. [11]. Originally, personal relationship conflicts were governed by MR 1.8(i). Ethics 2000, however, deleted MR 1.8(i) and addressed the concept in a comment to MR 1.7 because MR 1.8(i) was underinclusive. See Reporter’s Explanation of Changes, reproduced in KEM’s 3/15/05 Notes in the Rule 3-320 E-mail compilation (revised 3/23/05). However, because rule 3-320 does not expressly address the issue of disqualification, this comment may be better left for California’s Rule 1.7 or 1.10. The comment probably should be included in the rules. Whether it remains here, or in 1.7 or 1.10 will depend on the specific approach the drafters of rule 3-310 take (for example, if the drafters do not adopt the “material limitation” approach of MR 1.7, then rule 1.10 might be the best place for it.)

[Proposed] Rule 1.8.3 [3-320].¹ Relationship With Other Party's Lawyer

A memberlawyer² shall not knowingly³ represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the memberlawyer, lives with the memberlawyer, is a client of the memberlawyer, or has an intimate personal relationship with the memberlawyer, unless the memberlawyer informs the client in writing of the relationship.

Discussion:

Comment

[1] Rule 1.8.3 [3-320] is not intended to apply to circumstances in which a memberlawyer fails to advise the client of a relationship with another lawyer who is merely a partner or associate⁴ in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter. ~~(Amended by order of Supreme Court, operative September 14, 1992.)~~

[2] Any disqualification that may arise from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See [Rule 1.10].⁵

Drafters' Notes

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*Melchior
Julien
Voogd

O. Consideration of Rule 3-320 Relationship with Other Party's Lawyer

[anticipated ½ -hour discussion]

(Materials enclosed.) **[pages 257 – 264]**

1. KEM explains what the ABA did.
2. Kurt proposes substituting “lawyer” for “member” throughout. No objections.
3. Kurt: There should be a knowledge standard in the rule.
 - a. KEM: Agrees.

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| 4. KEM: Will prepare the rule for Kurt, in MR format and send it on. |
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