



NATIONAL ASBESTOS LITIGATION CONFERENCE

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Ethics and Successor Liability Issues



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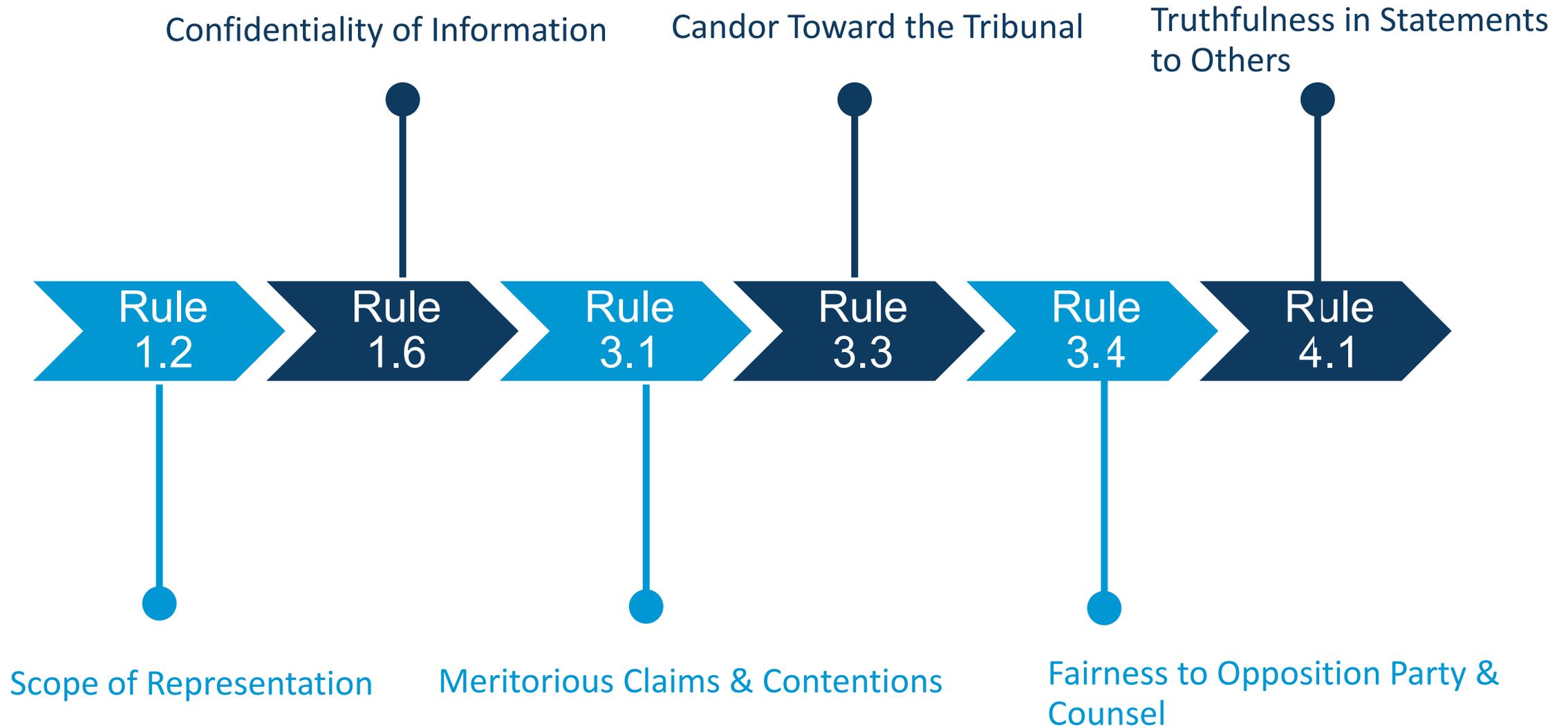


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Ethical Considerations in Asbestos Litigation

Corporate Restructuring, Obligations to Tort Victims,
and Case Resolution

Pertinent Ethical Rules



Rule 1.2 – Scope of Representation

ABA Model Rule 1.2(a)

“A lawyer shall abide by a client’s decisions concerning the objectives of the representation...”

ABA Model Rule 1.2(b)

“A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social, or moral views, or activities.”

ABA Model Rule 1.2(c)

“A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

Rule 1.6 - Confidentiality

ABA Model Rule 1.6(a)

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent”

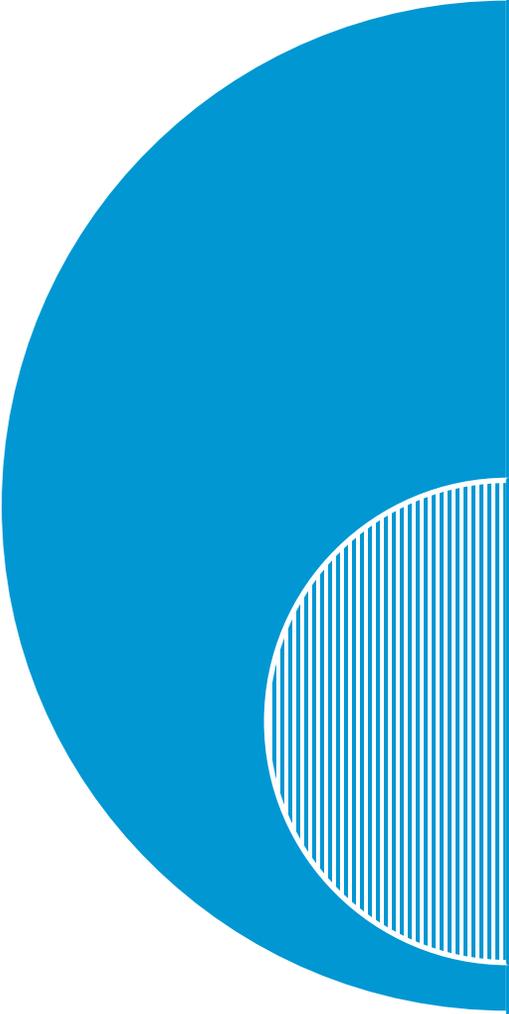
ABA Model Rule 1.6(c)

“A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

ABA Model Rule 1.6 cmt. [3]

“The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

Rule 1.6: “Whatever its source”



Rule 1.6 provides no exception for information that is "generally known" or "contained in a public record."
See [American Bar Association Formal Opinion 479](#) (Dec. 15, 2017).

The ABA adopts the majority position that the public filing of a document that contains confidential information, in nearly all cases, will not convert the information contained in that document into "generally known" information, and the normal rules of confidentiality will still apply.

Rule 3.1: Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a **basis in law and fact** for doing so that is **not frivolous**, which includes a good faith argument for extension, modification, or reversal of existing law.

Rule 3.3: Candor Toward the Tribunal

Rule 3.3(a)

A lawyer shall not knowingly:

- (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) Offer evidence that the lawyer knows to be false.

Rule 3.4: Fairness to Opposing Party & Counsel

A lawyer shall not:

Falsify evidence or
offering inducements to
a witness

Knowingly disobey a
tribunal's obligations
under the rules

Make frivolous
discovery request

Obstruct another party's
access to evidence

In trial,
allude to irrelevant
matters

Request a person other
than a client to refrain
from voluntarily giving
relevant information to
another party

Rule 4.1 in Truthfulness in Statements to Others



Rule 4.1 - Truthfulness in Statements to Others

In the course of representing a client, a lawyer must not **knowingly:**

4.1(a)

- **Make a false statement**
 - Of material fact or law to a third person.

4.1(b)

- **Fail to disclose a material fact**
 - When disclosure is necessary to avoid **assisting a criminal or fraudulent act** by the client

Rule 4.1 – Truthfulness in Statements to Others

What does “knowingly” require?

Actual knowledge of
the fact in question

Knowledge may be
inferred from
circumstances

See Rule 1.0(f)

What does that mean?

The rule requires the
lawyer to have
knowledge of truth of
falsity, as opposed to
uncertainty or even
suspicion of possible
falsity

Rule 4.1 - Truthfulness in Statements to Others

What IS a Material Fact

One that “reasonably may be viewed as important to fair understanding of what is being given up and in return gained by the deal”

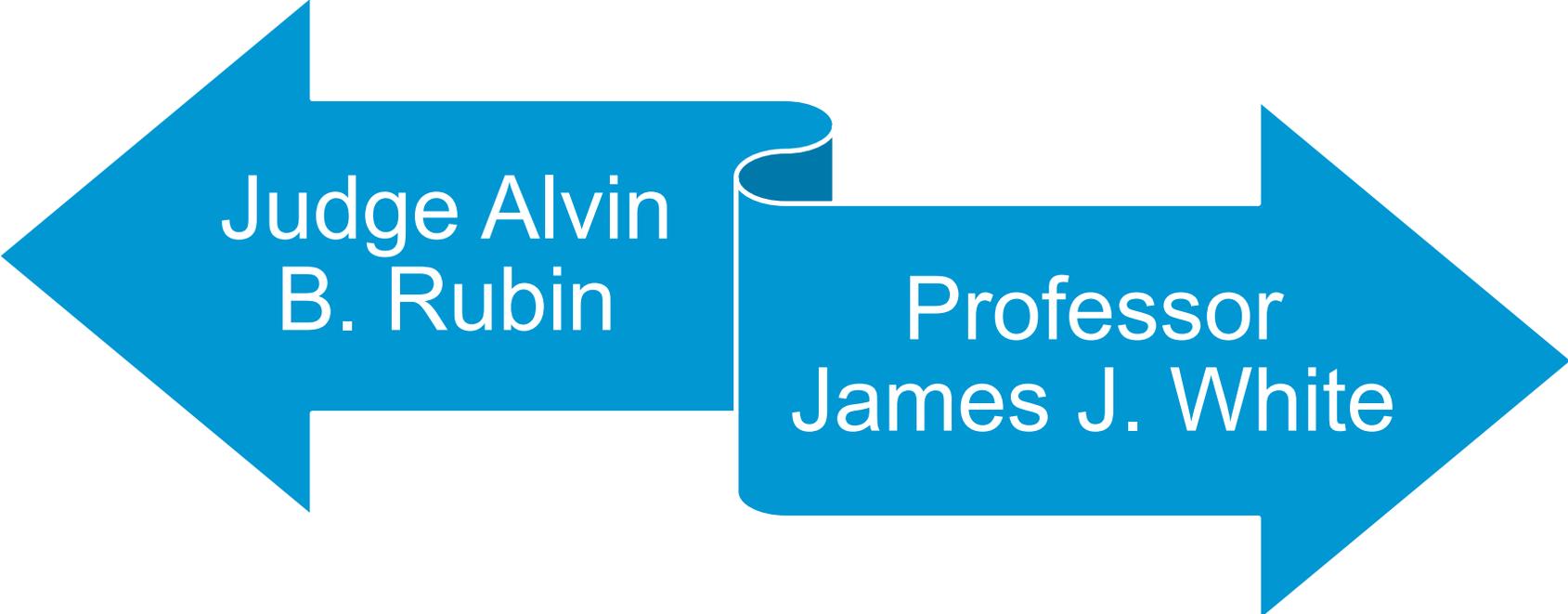
One that could have influenced the hearer

What ISN'T a Material Fact

Statements of Opinion
–
Over/understatements
re: strengths &
weakness

Lawyer's State of
Mind –
Party's intentions to
acceptable settlement
of a claim

The Truthfulness Spectrum



Judge Alvin
B. Rubin

Professor
James J. White

Rule 4.1 in Truthfulness in Statements to Others



Negotiations in Asbestos Cases & the Rules:

Death of a Client

Trust Submissions

Insurance Coverage

Successor Liability

- ▶ Depends on traditional corporate law principles and the specifics of the transaction.
 - Corporate enterprise transfer via **merger or consolidation** where the successor assumes the predecessors' liabilities including product liability claims.
 - Asset purchase where the successor purchases the assets of the predecessor and does not assume the debts and liabilities of the selling corporation unless:
 - Successor expressly or impliedly assumes the liabilities
 - Transaction is a de facto merger
 - Successor is considered a “mere continuation” of the predecessor
 - The successor executed the transaction fraudulently to escape liability

- ▶ Bankruptcy Issues