MEMORANDUM

TO: John Kim

FROM: Deborah Mailander

RE: Pennsylvania Rules of Professional Conduct

DATE: August 5, 1993

Attached is a copy of Pennsylvania's Rules of Professional Conduct for your use during the Jeffrey Bair deposition. Although Mr. Bair now practices in Aiken, South Carolina, he is admitted only in Pennsylvania. He is currently Senior Counsel at Westinghouse Savannah River Co.

Pennyslvania's disciplinary rules for destruction of evidence, for acts on or after March 31, 1988

> A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act.

Rule 3.4(A), Rules of Professional Conduct. Acts prior to March 31, 1988 are governed by the Code of Professional Responsibility. Relevant portions of the code include DR 7-109(A), 7-109(B), and 7-106(C)(7). I have sent Pennsylvania's rules which also have excerpts the code with July Lockwood.

Mr. Bair in his 22 page memo proposed and quite possibly implemented a program of document destruction which violates the ethical rules by obstructing access to evidence. This issue may be interesting to bring up during the deposition.

RULES
OF
PROFESSIONAL CONDUCT

Includes Amendments Through April 1, 1989

Adopted by Order of the Supreme Court of Pennsylvania dated October 16, 1987 to take effect April 1, 1988 at which time the Rules of Professional Conduct shall supersede the present Code of Professional Responsibility.

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE: CODE OF PROFESSIONAL RESPONSIBILITY	: No. 412 : Disciplinary Docket No. 2
IN RE: RULES OF PROFESSIONAL CONDUCT	: No. 412 : Disciplinary Docket No. 2

ORDER

AND NOW, this 16th day of October, 1987, upon recommendation of the Disciplinary Board of the Supreme Court of Pennsylvania, it is ORDERED, pursuant to Article V, Section 10 of the Constitution of Pennsylvania, that:

1. The Rules of Professional Conduct are adopted and promulgated in the form attached hereto. Any Comments or Comparisons to the Code of Professional Responsibility shall not be a part of the Rules of Professional Conduct.

2. This order shall take effect on April 1, 1988 at which time the Rules of Professional Conduct shall supersede the present Code of Professional Responsibility.

3. The Rules of Professional Conduct, as adopted hereby, do not apply to professional misconduct occurring on or before March 31, 1988. Such misconduct shall be governed by the present Code of Professional Responsibility, which is continued in full force and effect as grounds for disciplinary action, as if this order had not been adopted.

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RULE 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case; but a lawyer may pay, cause to be paid, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying,

(2) reasonable compensation to a witness for the witness' loss of time in attending or testifying, and

(3) a reasonable fee for the professional services of an expert witness;

(c) When appearing before a tribunal, assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(d) request a person other than a client to refrain from voluntarily giving relevant informationn to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2.

COMMENT:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (d) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rules 4.2 and 4.3(b).

CODE COMPARISON:

With regard to Rule 3.4(a), DR 7-109(A) provides that "A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal. . . ." DR 7-109(B) provides that "A lawyer shall not advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness. . . ." DR 7-106(C)(7) provides that a lawyer shall not "Intentionally or habitually violate any established rule of procedure or of evidence."

With regard to Rule 3.4(b), DR 7-102(A)(6) provides that a lawyer shall not "Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109(C) provides that "A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) A reasonable fee for the professional services of an expert witness." EC 7-28 states that "Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

With regard to Rule 3.4(d), DR 7-104(A)(2) provides that a lawyer shall not "Give advice to a person who is not represented . . . other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

RULE 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct disruptive to a tribunal.

COMMENT:

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

CODE COMPARISON:

With regard to Rule 3.5(a), DR 7-108(A) provides that "Before the trial of a case a lawyer . . . shall not communicate with . . . anyone he knows to be a member of the venire. . . ." DR 7-108(B) provides that "During the trial of a case . . . A lawyer . . . shall not communicate with . . . a juror concerning the case." DR 7-110(B) provides

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For additional copies, please write or call:

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