

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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DAVID RUDOVSKY, et al. : CIVIL ACTION
: NO. 09-CV-727
:
Plaintiffs :
:
vs. : Philadelphia, Pennsylvania
: April 14, 2009
WEST PUBLISHING CORPORATION, :
et al. :
Defendants : TESTIMONY OF WITNESSES AT
: PRELIMINARY INJUNCTION
: HEARING

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BEFORE THE HONORABLE JOHN P. FULLAM
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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1 (The proceedings held in open Courtroom 15A from 1:42
2 p.m. until 2:18 p.m. have been previously transcribed and are
3 filed under separate cover.)

4 * * *

5 (In open court at 2:18 p.m.)

6 MR. BAZELON: Yes, your Honor.

7 I'd like to call my first witness, Douglas Frenkel.

8 THE COURT: You're going to have to call him louder,

9 because I don't think he heard you. Oh, there --

10 MR. BAZELON: Here he is.

11 THE COURT: The record will note that the witness just
12 handed counsel his testimony in written form, apparently.

13 (Laughter.)

14 MR. FRENKEL: Good afternoon, sir.

15 ESR OPERATOR: Please raise your left hand -- please
16 place your left on the Bible and raise your right hand.

17 DOUGLAS FRENKEL, PLAINTIFF WITNESS, SWORN.

18 ESR OPERATOR: Please state your name and spell your
19 last name, sir.

20 THE WITNESS: Douglas Frenkel, F-r-e-n-k-e-l.

21 ESR OPERATOR: Thank you.

22 MR. BAZELON: With the Court's permission, I would
23 propose to mark Mr. Frenkel's CV as Plaintiff's Exhibit 1.

24 THE COURT: Go right ahead.

25 MR. BAZELON: Can I put a sticker on it or should I

1 leave this --

2 THE COURT: Any -- any way you want to do it.

3 MR. BAZELON: All right. Thank you.

4 MR. RITTINGER: Your Honor, could we have an offer of
5 proof as to what he's going to testify to, I don't know who he
6 is?

7 THE COURT: I think it will be faster just to find
8 out. Maybe, you can whisper what he -- what you're planning to
9 do with him.

10 (Discussion held off the record at 2:19 p.m.)

11 MR. RITTINGER: Well, your Honor, I -- your Honor, I
12 have no idea what relevance he would have to a preliminary
13 injunction hearing.

14 THE COURT: I don't know, let's find out. Go ahead.

15 DIRECT EXAMINATION

16 BY MR. BAZELON:

17 Q. Mr. Frenkel, can you identify for us, please, what has been
18 marked as Plaintiff's Exhibit 1?

19 THE COURT: That's his *curriculum vitae*, go ahead.

20 MR. BAZELON: All right.

21 Q. And did you, Mr. Frenkel, have a role in connection with
22 the West Practice Series and the origination of the West
23 Practice Series for Pennsylvania Law?

24 A. I did.

25 Q. And can you tell us about when you began to have some

1 involvement with respect to what came to be the West Practice
2 Series?

3 A. It was -- it would have been in the mid-1980s.

4 Q. What were you asked to do by West, if anything?

5 MR. RITTINGER: Objection.

6 THE COURT: Objection overruled.

7 A. I was asked by a representative of West whether I could
8 assemble a team of practitioners in Pennsylvania to serve as
9 authors of a new series of form books with commentary that they
10 wanted to come out with in a variety of subject matter areas.

11 Q. What did you -- and what was your response to West?

12 MR. RITTINGER: Objection.

13 THE COURT: I'll bet he accepted.

14 Let's -- he can go through this rapidly but these are
15 not disputed facts, I take it, so let's get moving.

16 A. My response was after thinking about it a bit, that this is
17 something that I would be happy to try to do on their behalf and
18 I did that.

19 Q. What -- why did you undertake this assignment?

20 A. Well, for a few reasons --

21 MR. RITTINGER: Objection.

22 THE COURT: Let's find out, it will be faster. It's a
23 waste of time, but let's waste as little time as possible.

24 A. I took --

25 THE COURT: Go ahead.

1 A. -- I took on the assignment for several reasons.

2 First of all, I was a relatively new faculty member
3 and one of the institutional expectations on me was to
4 contribute to the development and improvement of the law in a
5 variety of ways. And this was obviously something relevant to
6 -- to my work at the university.

7 Number two, I thought that what they wanted to do was
8 something that was needed. They -- West -- had expressed a
9 desire to -- to do -- to put something out there on the market
10 that was better than what was out there at the time.

11 And I -- I said that I'd be interested in doing this
12 but only if this could be -- what I thought -- was a quality
13 combination, not only of forms but of text that would represent
14 the best thinking of practitioners in the field, because I -- if
15 I was going to be associated with this and put it on my CV,
16 that's -- that's the kind of project I wanted to be involved in.

17 Q. Did you express your purpose as you've just described it to
18 West at the time?

19 A. Directly, yes.

20 Q. And did there come a time when you approached Professor
21 Rudovsky about the possibility that his -- his becoming an
22 author in the series?

23 A. Yeah.

24 Once -- once we decided to go ahead with this, David
25 Rudovsky, in fact, was the first practitioner I approached as I

1 recall.

2 Q. Why did you choose David Rudovsky?

3 A. Well, criminal procedure was one of the nine or ten subject
4 matters that West wanted to cover in the series. And I knew
5 David Rudovsky and, frankly, he was -- in my view -- the leading
6 practitioner of the quality that I was looking for statewide.

7 His name was very well known in both criminal defense
8 and prosecution circles. I thought that he -- his name --
9 attached to a book like this would, frankly, be a good seller
10 because I thought both sides of -- of a criminal case would want
11 to know what David Rudovsky thought.

12 And I also thought -- and knew -- of his writing, that
13 he was a prolific author, he had -- I believe at the time --
14 done a book on prisoners' rights, if I recall correctly.

15 I had read -- I had read stuff that he has written in
16 a more academic context.

17 And, perhaps, most importantly, in combination with
18 all of these things, I knew he would do the job, if he said he
19 was going to do it, he would do it and he would bring the level
20 of quality I was looking for.

21 Q. And did you ask Professor Rudovsky to take this on?

22 A. I did.

23 Q. And I take it, he responded affirmatively?

24 A. Well, I don't recall specifically --

25 THE COURT: I'm going to -- I'm going to --

1 A. -- he obviously -- obviously undertook it and at some
2 point, he affiliated with Professor Sosnov.

3 MR. BAZELON: I have no further questions, your Honor.

4 THE COURT: I don't appreciate the waste of time.

5 Anything -- any questions?

6 MR. RITTINGER: Just a couple, your Honor.

7 THE COURT: Go ahead.

8 CROSS-EXAMINATION

9 BY MR. RITTINGER:

10 Q. First of all, this was in the 1980s, is that correct?

11 A. That's correct.

12 THE COURT: That's what he said.

13 MR. RITTINGER: Right.

14 Q. Has any -- has anyone complained to you at any time -- have
15 you heard anyone complain -- other than the plaintiffs and their
16 attorney about the quality of the supplement, the 2008/2009
17 supplement?

18 MR. BAZELON: Objection, your Honor, no foundation.

19 THE COURT: Well, that's not proper cross-examination,
20 but we'll let it in. Go ahead.

21 A. No, no one has.

22 (Pause at 2:25 p.m.)

23 MR. RITTINGER: No -- no further questions, your
24 Honor.

25 THE COURT: You may step down.

1 I take it you haven't made a practice of consulting
2 with the practicing Bar as to whether they approve of this or
3 not?

4 THE WITNESS: Approved of?

5 THE COURT: The supplements?

6 THE WITNESS: Ah, well --

7 THE COURT: Have -- have you discussed with any
8 practicing lawyers in Philadelphia whether the supplements are
9 good or bad?

10 THE WITNESS: Ah, I can't speak to the supplements,
11 Judge, but the books have been very well received.

12 THE COURT: Well, I know but not the supplements?

13 THE WITNESS: I can't -- I can't say I have.

14 THE COURT: Didn't think so. Go ahead.

15 You may step down.

16 THE WITNESS: Thank you.

17 (Witness excused at 2:26 p.m.)

18 MR. BAZELON: Professor Rudovsky.

19 ESR OPERATOR: Good afternoon, sir.

20 DAVID RUDOFSKY, PLAINTIFF, SWORN.

21 ESR OPERATOR: Thank you, sir.

22 Please spell your name -- state your name -- and spell
23 your last name, sir.

24 THE WITNESS: David Rudovsky, R-u-d-o-v-s-k-y.

25 ESR OPERATOR: Thank you.

1 MR. BAZELON: Your Honor, Plaintiff's Exhibit 2 is the
2 CV for Professor Rudovsky.

3 THE COURT: And we will assume that if he were asked
4 questions, he would repeat what's in it --

5 MR. BAZELON: Yes.

6 THE COURT: -- and that it would all be true. Go
7 ahead.

8 I'm particularly interested in irreparable immediate
9 harm.

10 (Pause at 2:27 p.m.)

11 DIRECT EXAMINATION

12 BY MR. BAZELON:

13 Q. Mr. Rudovsky, I'm going to -- Dr. Rudovsky -- I'm going to
14 ask you the -- to turn your attention to the 2008/2009 packet
15 part that was sent out by West in December of 2008.

16 Can you tell the Court when you first saw this
17 document?

18 A. It was sent to my office some time in December of 2008.

19 Q. And did you -- how soon after that did you look through the
20 document?

21 A. Within a couple of days, I looked at it just to review it
22 to see what it was.

23 The background was that we had told West we were not
24 in a position to prepare that pocket part after having done it
25 for some eighteen years.

1 And it was sent to us, anyway and I looked at it
2 within a couple of days of receiving it.

3 Q. What if anything did you learn about deficiencies in this
4 pocket part?

5 A. Well, what I did -- and this is what I learned -- I looked
6 at it -- I -- I was just curious to see what kind of job they
7 had done.

8 So, I looked at several sections where I knew there
9 had been a fair amount of activity by the Pennsylvania courts,
10 post-conviction, sentencing, appeals were three I think I looked
11 at, because I was aware of certain cases that had come down
12 which surely should have been included in any new supplement or
13 packet part and when I looked, they weren't there. So, I found
14 that somewhat curious and unsettling.

15 I then -- what I did was looked at the table of cases
16 in the back just to kind of eyeball it to see if there were any
17 cases from 2008, because normally on the cycle we prepare our
18 pocket parts, you would have 2007 and 2008 cases.

19 I looked at all those cases and I -- I think -- I
20 didn't see a single case cited with a 2008 date, which meant to
21 me they had missed or had decided not to include scores of cases
22 decided by the appellate courts relating to the material in the
23 book.

24 I then went a little bit further and -- and kind of
25 compared the table of cases from the 2007 pocket part, which Mr.

1 Sosnov and I had prepared and compared it to the table of cases
2 for the 2008/2009 pocket part.

3 And on my first review, I think I found one or two
4 additional cases, that is of the hundreds of cases that we had
5 already included, it appeared to me that there were -- on first
6 glance -- one or two additional cases that had been included.

7 It turned out on further review, we were able to
8 determine that all they had included were three new cases, none
9 of them particularly significant, two in a string cite and one
10 with a parenthetical description, it didn't -- it didn't add
11 anything to the -- the pocket part.

12 And then, I and Mr. Sosnov also had occasion to look
13 at cases where we knew that the Pennsylvania Supreme Court had
14 actually reversed lower courts, either, Common Pleas Courts or
15 the Superior Court to determine whether this pocket part would
16 include -- what we call -- that negative case history. That --
17 that there had actually been reversals by the highest court in
18 Pennsylvania and we looked at a number of cases that we were
19 aware of in which those reversals had occurred and none of them
20 were in the book.

21 And -- and, essentially, what I found was that what
22 had happened -- in our view -- was that the pocket part that was
23 mailed out called the 2008/2009 pocket part, was almost verbatim
24 -- again, with a couple of added cases and a couple of citations
25 to rules -- but virtually verbatim which had been sent out under

1 our names a year and a half previously or a year previously
2 which we had done.

3 It -- it had, basically, they'd put a different cover
4 on it, 2008/2009 instead of 2007/2008 and -- and that's what
5 they did. Very upsetting.

6 Q. Professor Rudovsky, when you and Professor Sosnov prepared
7 an annual pocket part -- which I take it you had done for a
8 number of years before 2007/2008, is that correct?

9 A. Yes, sir.

10 Q. Approximately, how many new cases each year did you include
11 in the new pocket part?

12 A. Finally, including -- we -- we included anywhere from a
13 hundred to a hundred and fifty, sometimes, more new cases.

14 We would read every case that was decided by the
15 appellate courts in Pennsylvania. We read every case in this
16 field, decided by the U.S. Supreme Court and some selected
17 federal cases.

18 We followed rule changes as well, statutory changes as
19 well. We did that during the year, we accumulated all of that.

20 And then, when we distilled it and added material to
21 the pocket part, our best estimation is that we added up to a
22 hundred and fifty new cases each year.

23 Some were just in a string cite, it gives another
24 authority for an established proposition. Many were new -- new
25 principles of law or different principles of law, building on

1 what had happened before. We would explain that in the pocket
2 part.

3 Some were questionable decisions in our mind, we would
4 say that. Some left issues open, we would say that.

5 In other words, we'd try to bring the pocket part up
6 to date.

7 Q. Now, Professor Rudovsky, can you identify for the Court,
8 the cases which were cited in the prior year -- 2007/2008 --
9 pocket part, that had been reversed by the Pennsylvania Supreme
10 Court in the succeeding year but were not shown as having been
11 reversed by the Supreme Court in the 2008/2009 pocket part?

12 A. They -- I can't -- from memory, they are in the amended
13 complaint, I believe, we listed the --

14 Q. Let me -- can I show you the amended complaint, Paragraph
15 26 and ask you if this refreshes your recollection?

16 A. Yes.

17 MR. BAZELON: May I approach, your Honor?

18 THE COURT: Go right ahead.

19 A. Yes, to my best recollection, these were the cases that on
20 our initial review, we found were not covered by the -- by the
21 2008/2009 pocket part where the Pennsylvania Supreme Court had
22 actually reversed decisions of the Superior Court or the Common
23 Pleas Court.

24 I should say, this was a sample, this was not an
25 exhaustive study. Since then, we've found some additional ones,

1 but on -- on our first take on this -- and I think we made it
2 clear to -- to West -- this was a sample of cases in which they
3 did not advise the subscriber that cases they had previously
4 cited -- or we had previously cited -- had been overturned on
5 appeal.

6 THE COURT: And how many cases were there?

7 THE WITNESS: There were -- there were six of these
8 that -- I believe -- one, two, three, four -- actually, we -- we
9 had seven, because one was just noting than an allowance of an
10 appeal had been granted, it hadn't yet been ruled on but -- but
11 the Pennsylvania Supreme Court had granted a review.

12 So, there were six reversals and one cited in the
13 complaint where the Pennsylvania Supreme Court granted a review,
14 but it had yet decided the case.

15 Q. And since that time, have you become aware of at least one
16 additional case that was cited in the 2007/2008 pocket part --

17 A. Yes.

18 Q. -- that was reversed in the succeeding year and not cited
19 for having been reversed in the 2008/2009 pocket part?

20 A. Yes. And -- yes, we did.

21 There's a case -- I'll give the citation --
22 Commonwealth versus Holmes, the citation is 933 Atlantic 2nd,
23 57, again, this was another case that had been previously cited
24 from the Superior Court.

25 The Supreme Court in 2007, October reversed in large

1 part the Superior Court. This also was not included.

2 And I might add that in the new pocket part -- which
3 has just been published -- it's not referenced, either. And so
4 we have it even with the new pocket part, we have a case from
5 the Pennsylvania Supreme Court reversing a Superior Court
6 decision, this new pocket part that was sent out over this
7 weekend makes no reference to it.

8 THE COURT: And which court do you think was correct?

9 (Laughter.)

10 THE WITNESS: I -- I refused to answer that question.

11 THE COURT: Okay.

12 MR. RITTINGER: Your Honor, I'm sorry, I missed that?
13 I -- I missed your comment, I'm sorry, your Honor.

14 THE COURT: I just asked him which court was correct?

15 MR. RITTINGER: Oh.

16 THE COURT: It was a joke.

17 BY MR. BAZELON:

18 Q. Professor Rudovsky, in addition to cases that were reversed
19 that had been cited in a prior pocket part, but the reversal had
20 taken place in the next year and were not referenced as such,
21 did you find that there were cases that had been cited in the
22 prior pocket part which had been affirmed by opinion of the
23 Pennsylvania Supreme Court in the succeeding year where -- where
24 that was not noted?

25 A. Yeah.

1 I did and I just might as well, of the six cases that
2 had been reversed and were not included in the original pocket
3 part sent in December, one of them is a case called Commonwealth
4 versus Leigh, 935 Atlantic 2nd, 865, that too was not included
5 in the new pocket part, even though we had specifically advised
6 West of that fact. They didn't even correct that in the new
7 pocket part.

8 To answer your question directly, we found two cases
9 in which the Pennsylvania Supreme Court granted a review and
10 affirmed the lower court -- so I'll give you both of those
11 citations -- the reasoning was somewhat different, the
12 Pennsylvania Supreme Court adopted its own reasoning in its
13 affirmance, but neither of those cases were cited in the 2008
14 pocket part and they're not in the new pocket part, either, the
15 pocket part that's just been sent out.

16 And I'll give you the two cases, one is Commonwealth
17 versus States, S-t-a-t-e-s, 938 Atlantic 2nd, 1016 and the other
18 is In the Interest of J period, E period, 937 Atlantic 2nd, 421.

19 As I say, both cases affirming the Superior Court --
20 using somewhat different reasoning but affirming -- but neither
21 Supreme Court case included in the 2008 pocket part that went
22 out or the most recent, the 2009 pocket part.

23 Now, I haven't had time to go through all -- you know
24 -- four hundred pages, but just on a cursory review between last
25 night and tonight, we have found four Supreme Court cases highly

1 pertinent to our work that are not included in what has just
2 been sent out to subscribers.

3 (Pause at 2:39 p.m.)

4 BY MR. BAZELON:

5 Q. Why is it important, Professor Rudovsky, to cite a Supreme
6 Court of Pennsylvania affirmation, if all it's doing is affirming
7 the opinion below -- or the holding?

8 MR. RITTINGER: Objection, your Honor.

9 THE COURT: Objection overruled.

10 A. I think two primary reasons.

11 Oftentimes, an appellate court even when they affirm
12 will adopt their own reasoning, it wouldn't be the affirmances
13 of the judge, you often have different kinds of reasoning,
14 different kinds of rationales.

15 The second one is more practical, that's the end of
16 the issue as far as Pennsylvania is concerned, the issue was
17 decided by the Superior Court, there's still an argument that
18 might get reversed. I can't imagine a practitioner wouldn't
19 want to know that the Supreme Court has finally talked
20 authoritatively on a particular issue and that's why it's
21 important.

22 THE COURT: You would agree that a practitioner might
23 even go so far as to Shepardize?

24 THE WITNESS: And probably should Shepardize, your
25 Honor, that's correct.

1 BY MR. BAZELON:

2 Q. Professor Rudovsky, you mentioned in your testimony rules
3 changes, can you tell us what you meant by that?

4 A. Yes.

5 Well, I mean, the treatise, obviously, is -- concerns
6 Pennsylvania Criminal Procedure, a lot of that is governed by
7 Rules of Court. Both the Pennsylvania Rules of Criminal
8 Procedure, there are Rules of Juvenile Procedure, there are
9 Rules of Appellate Procedure, sometimes, there are Rules of
10 Evidence that interrelate as well. All of which we cover.
11 There are Rules of Habeas Corpus, we have a section -- we have a
12 chapter on federal habeas corpus litigation.

13 So, there are rules that govern all those areas and
14 what we've done over the years -- both in the main volume and in
15 the pocket part -- is to alert the reader to changes in those
16 rules.

17 Q. And I take, Professor Rudovsky, that it's not just a --
18 that not referring to a reversal or a granting of a petition for
19 review, is not simply a matter of the citation, itself, but it
20 also affects the discussion that takes place within the text?

21 A. Well, that's right.

22 I mean, the -- the Judge did say, you could always
23 Shepardize although I'm not sure why you'd need a treatise, you
24 could always take an original case and go from that.

25 What West wanted from us and what we set out to do

1 starting in 1991 when we first -- or 1990 -- when we first
2 published this book, is to give the practitioner, not just a
3 list of cases in each area but a discussion of those cases, what
4 the cases mean, how the law is developing, what issues are open,
5 what arguments could still be made, notwithstanding certain
6 decisions from both sides, prosecutor or defense. And, indeed,
7 when you look at our pocket parts, we try to integrate that.

8 So, if a major case came down, we just wouldn't say,
9 the Supreme Court has decided this issue in X, we would then
10 explain what the Supreme Court did including all those other
11 factors that as a lawyer, you'd want to know, Shepardizing it,
12 wouldn't necessarily give you that.

13 Q. What kind of feedback have you gotten over the years,
14 Professor Rudovsky, in connection with your authorship of this
15 treatise?

16 MR. RITTINGER: Objection.

17 THE COURT: Objection overruled.

18 A. We've gotten comments, questions, feedback from a variety
19 of sources, I think the subscribed list includes defense
20 lawyers, prosecutors, judges, prison-law libraries, university-
21 law libraries and the like.

22 Leonard and I have fielded -- probably over the years
23 -- hundreds of -- of kind of inquiries or comments. You talked
24 about this case, can you give me some more advice? You know,
25 something like that, 'cause they'd pick something up in the

1 treatise.

2 I get letters from inmates all the time, who use this
3 as a reference book in *pro se* litigation.

4 I've had comments from prosecutors about a certain
5 issue.

6 So, when lawyers look at a particular issue,
7 sometimes, they comment on it, sometimes, they say, you did a
8 good job, that's a good analysis, other times, they just ask us
9 a question.

10 But there's -- there's kind of a constant --

11 THE COURT: I think he wants you to brag about how
12 mostly they're favorable comments.

13 (Laughter.)

14 MR. BAZELON: Thank you, Judge.

15 A. I would say over the years, that -- that the comments have
16 been favorable, some are just inquiries but I -- I don't -- I
17 can say this thing, I've never gotten a negative comment in the
18 sense that this isn't up to par.

19 And I can also say that in eighteen years of producing
20 the -- our producing -- both the main volume and the pocket
21 part, we have never in eighteen years gotten a negative comment
22 from the West ever. That is, everything we've sent in to my
23 knowledge, they've published. They never come back and said,
24 substantively, you missed a case, you -- maybe, you ought to
25 consider this. They've basically taken what we've sent in and

1 -- and published it.

2 (Pause at 2:44 p.m.)

3 BY MR. BAZELON:

4 Q. Professor Rudovsky, what is the relief that you are asking
5 the Court to provide?

6 A. Oh, wait a minute, could you -- I think the Judge has heard
7 that.

8 I -- I think we do want -- and it sounds like West is
9 agreeable on the West Law, that people who access this
10 electronically, ought to know that Ms. Sosnov and I are no
11 longer associated with the book. We stopped our work as of 2000
12 -- 2007/2008 and any of the updates are being done by someone
13 else.

14 The other thing we're asking for and I think it's --
15 it's also important, is that current subscribers ought to know
16 not only that we are no longer associated with the publication
17 of the book, that it's being produced only by West -- you know
18 -- internally by -- by their own authors. But they have a right
19 to the extent they've relied in this book because they have
20 confidence in the work that Mr. Sosnov and I have done, that
21 they have a right to return it and -- and not use it any more.

22 I mean, that's -- that I think is what is necessary at
23 this point, at least, that's what we're asking the Court to do.

24 (Pause at 2:46 p.m.)

25 Q. Professor Rudovsky, do you feel that the sale of the

1 2008/2009 pocket part on or about December of 2008, was done
2 with, either -- well, it was done with an expression by West
3 that it was endorsed by you?

4 MR. RITTINGER: Objection.

5 THE COURT: Objection overruled. I don't know what he
6 means.

7 MR. RITTINGER: I don't understand it --

8 THE COURT: I don't, either --

9 MR. RITTINGER: -- I'm sorry, your Honor, I -- I --

10 THE COURT: -- that makes two of us, maybe, the answer
11 will clarify it.

12 MR. RITTINGER: Right.

13 A. Well, it -- it was clearly an endorsement in that sense, as
14 I understand the question.

15 When you -- if you received that 2008 supplement in
16 December of 2008 -- which as I said, in our view totally
17 incomplete and -- and inadequate -- as you've pointed out, the
18 cover page of that listed Ms. Sosnov and I as the authors in
19 bold print -- large print.

20 And then, at the bottom -- I think -- with the
21 assistance of the publisher's staff.

22 I think any lawyer who received that would assume that
23 Ms. Sosnov and I were the authors of that product. Somebody on
24 the staff may have added something, but we continue to be --
25 and, remember, people who got that pocket part, presumably, had

1 the book for years, have known we've published the book for
2 years, published the pocket part each year.

3 Clearly what -- in my view -- what West was saying is
4 -- trading on our name -- saying, here's the new pocket part,
5 it's as good as all of the other pocket parts, here's the law
6 that you should know for 2007/2008.

7 MR. RITTINGER: Your Honor, I'd move to strike the
8 answer as not responsive.

9 THE COURT: Oh, I think it's responsive. Objection
10 overruled, it doesn't mean anything.

11 MR. RITTINGER: Hmm?

12 THE COURT: It's his view that since it's under -- the
13 reader would understand he was responsible for what's in it,
14 that's what you wanted to get, right?

15 MR. BAZELON: Yes.

16 BY MR. BAZELON:

17 Q. And Professor Rudovsky, how did you feel about that, about
18 having your name used that way?

19 A. I -- I -- I -- it's -- it's the reason I retained you, I --
20 I -- I was -- we -- we were both stunned. I mean, I -- I can
21 use that word without exaggerating.

22 I can't imagine that a publisher could put out
23 something, charge somebody for it, use our names, when it was, I
24 -- and -- and sham is the only word that comes to mind that
25 actually describes it.

1 There was nothing new other than these three
2 meaningless citations in -- in this pocket part that gave the
3 subscriber anything that was worthwhile. It was the same as
4 they had gotten the years before.

5 And prominently displayed on that pocket part were our
6 names.

7 And I was immediately concerned -- quite frankly --
8 not that people would have come up to me and complained -- but
9 someone is going to look at that, rely on it as they have over
10 the years, look at the pocket part, there's no change in the
11 law.

12 Sure and they Shepardize and maybe they'll find it,
13 but if they do that, they're going to say, what are these guys
14 doing? They didn't alert me of a -- of a new Supreme Court
15 case.

16 THE COURT: Would you agree then that you suffered
17 emotional distress as a result of this whole thing?

18 THE WITNESS: I -- distress, I -- I would say -- I --
19 I won't categorize it as emotional distress, Judge, at -- at
20 this point.

21 I was -- I -- we -- we were both professionally
22 stunned, quite frankly, that -- that our names were being used
23 on a sham product.

24 And that West which -- counsel is right, they have a
25 very good reputation -- I -- I literally, couldn't believe it.

1 And when I -- when I started to compare those cases, I said, I
2 must be missing something. I went back and I went back and I
3 went and literally, they put out one year, what they had put out
4 the year before with -- with no changes of any significance.

5 BY MR. BAZELON:

6 Q. I take it that in addition to the three new cases, did they
7 also include some changes in the Rules of Criminal Procedure?

8 A. There were -- there were references to new Rules of
9 Criminal Procedure. They also -- when they send out the pocket
10 part, they send out -- as -- as another part of the package --
11 the Rules of Criminal Procedure, which I assume were updated,
12 that's just a separate package, you pay separately for, another
13 fifty dollars or whatever that -- that goes out with it.

14 I don't recall -- I could be wrong on this -- I don't
15 recall any commentary on the new rules, they may have cited the
16 rules, not even an indication that the rule was changed.

17 They clearly did not make any changes in Juvenile
18 Rules which were significant and Rules of Appellate Procedure
19 which were significant, no changes in those rules even though
20 there had been rule changes.

21 THE COURT: May I ask a --

22 MR. BAZELON: That's all I have, your Honor.

23 THE COURT: -- stupid question No. 17?

24 Does everybody who purchased the original publication,
25 does everybody purchase the annual pocket parts in your

1 understanding?

2 THE WITNESS: My understanding is when you purchase
3 the book, you agree by -- with West -- that you'll be sent the
4 pocket part automatically as a subscriber. You can certainly
5 cut off your subscription at any time.

6 But I -- I think the practice is, if you had
7 subscribed, let's say, in 2004, you would have gotten the volume
8 and then, each year, you would get the pocket part and then,
9 you'd be billed for the pocket part.

10 THE COURT: Okay. Thank you.

11 THE WITNESS: That -- that's my understanding of the
12 -- of the way it worked.

13 THE COURT: It's your turn.

14 MR. BAZELON: Nothing further.

15 MR. RITTINGER: Thank you, your Honor.

16 Your Honor, is it all right if I use the podium?

17 THE COURT: Sure, anywhere you want.

18 MR. RITTINGER: Thank you.

19 Your Honor, I'd like to mark the customer letter dated
20 2009 as Defendant's Exhibit -- you got my letters, I guess?

21 THE COURT: Anyway you want to do it.

22 (Pause at 2:52 p.m.)

23 MR. RITTINGER: Your Honor, do you want a copy for
24 yourself or a copy for --

25 THE COURT: I don't care, as long as I have access to

1 one.

2 DEPUTY CLERK: What is it?

3 MR. RITTINGER: Defendant's Exhibit A?

4 THE COURT: It's best to mark your own exhibits.

5 MR. RITTINGER: Your Honor, may I show this to the
6 witness?

7 THE COURT: Yes, of course.

8 MR. BAZELON: Are you providing counsel a copy?

9 MR. RITTINGER: It's the copy of the letter, you'll
10 get --

11 (Discussion held off the record.)

12 CROSS-EXAMINATION

13 BY MR. RITTINGER:

14 Q. Now, this customer letter was submitted with your papers on
15 the motion for a preliminary injunction, isn't that correct?

16 A. I believe that's correct, yes, sir.

17 Q. And in response to counsel's question as to how you were
18 being irreparably harmed today and what you wanted -- the
19 irreparable harm stopped, you said, that you wanted people to
20 know that you are no longer associated with the work, isn't that
21 correct?

22 A. That's part of what we wanted, that's correct, that's
23 right.

24 Q. That's one of the things.

25 And this letter specifically so advised subscribers,

1 isn't that correct?

2 A. It does indicate -- that's right -- it does state that we
3 did not participate in the 2008/2009 pocket part.

4 Q. All right.

5 And that you're no longer going to be associated with
6 the work --

7 A. That's correct.

8 Q. -- isn't that correct? All right.

9 So, West already did that, isn't that correct?

10 A. They did that.

11 Q. Okay.

12 And you also said the second part of the preliminary
13 injunctive relief that you want is, you want people who paid for
14 what you call, the sham publication to be reimbursed, isn't that
15 correct?

16 A. That's correct.

17 Q. All right.

18 And this letter offers to give a refund to any West
19 subscriber who asked for it --

20 A. Well, I --

21 Q. -- does it not?

22 A. -- I don't quite read it that way, quite frankly.

23 I think what this letter says is, we sent out a pocket
24 part to you. On review it was not all it should have been --
25 I'm paraphrasing here. We will send out a new pocket part in

1 the future.

2 And then, -- and this was in the earlier argument --
3 if you're not satisfied with the information provided -- which
4 is referring to the new 2009 pocket part -- please contact
5 Customer Service.

6 The problem is when the new pocket part was sent out
7 on Friday -- I haven't seen it, 'cause I haven't got it yet, so
8 I don't know what's included altogether -- but I -- as I
9 understand it, there's no notice, other than to say, take out
10 the old one, put in the new one. There's nothing there that
11 refers them to either this notice or to their right to
12 reimbursement.

13 Q. So, it's your position that this letter is not offering to
14 give back money to the subscribers?

15 A. Not -- in the context in which it was said and --

16 Q. You want it said a different way, is that correct?

17 MR. BAZELON: Objection to interrupting the witness,
18 your Honor.

19 A. That's right. And we actually made some suggesting to you
20 that -- on the letter -- you rejected them.

21 We -- there were discussions between counsel on what
22 the letter ought to include. You sent this out. All I'm saying
23 is in context. Sending this out in March and then sending out
24 the pocket part -- the new one that you've just sent out in
25 April -- doesn't do what you're suggesting it does that's --

1 Q. Is it --

2 A. -- that's my view.

3 Q. -- is it your understanding that counsel objected to this
4 part of the letter?

5 A. There were discussions as to what the letter ought to
6 contain, I don't know what -- what parts were -- I -- I do know
7 what we wanted as the letter did not go out. I don't know which
8 parts were included and which parts --

9 Q. So, you don't know whether --

10 A. -- were not.

11 Q. -- your counsel did or did not object to this part --

12 A. Don't know.

13 Q. -- is that correct?

14 A. (No verbal response.)

15 (Pause at 2:56 p.m.)

16 BY MR. RITTINGER:

17 Q. Now, other than being informed that you were no longer
18 associated with the work -- which this letter does -- and that
19 you want all subscribers to get a refund, is there any other
20 irreparable harm that you're suffering today that you can advise
21 the Court of?

22 A. Yes.

23 As I said, the -- the irreparable harm we're suffering
24 today -- in our view, I -- first of all, we talked about the
25 West electronic and how -- you know -- that change hasn't been

1 made yet, that's -- that's ongoing, people who access the
2 electronic version are not informed in an adequate way that
3 we're no longer part of this publication. So, that's -- that's
4 one.

5 Q. Well, let -- let me interrupt you there.

6 A. Yes.

7 Q. They were involved in the Scope section, isn't that
8 correct?

9 A. The -- the Scope section, no -- nobody reads, you know,
10 when --

11 Q. Well --

12 A. -- if I -- if I -- let me finish.

13 If I, as a lawyer, have a problem in criminal
14 procedure and I think -- well, I've been -- I need an issue, I
15 need a case on post-conviction relief in Pennsylvania.

16 And maybe, the Rudovsky/Sosnov book would be helpful.
17 I'd go to that section of the book, I'd go to 16.3 and I see
18 what cases are there. I -- I don't go to the Scope section
19 which is just kind of the West description of what you'll find,
20 that's where you put the fact that we're no longer associated.

21 I, as a lawyer -- as a practitioner -- would have no
22 reason to go to the Scope section. In fact, I didn't even know
23 about a Scope section until I was -- I was informed by counsel.

24 THE COURT: Okay. We understand your position.

25 What else have you got?

1 THE WITNESS: I -- I'm sorry, your Honor?

2 THE COURT: I think we understand --

3 THE WITNESS: Okay.

4 THE COURT: -- your position.

5 I wanted to know what other questions he has?

6 BY MR. RITTINGER:

7 Q. Now, it is also true, is it not, that the supplement -- the
8 new supplement -- makes it absolutely clear that you and your
9 co-author are no longer involved with the publication?

10 A. Here's -- here's the problem with -- with what you've sent
11 out.

12 It is true on the cover page, ah, you say that we -- I
13 -- the --

14 Q. Well, that's my question.

15 A. No, the --

16 MR. BAZELON: No, no, that wasn't his question.

17 A. -- the question, I don't think.

18 MR. BAZELON: It was not the question.

19 THE COURT: Go ahead --

20 A. Well, first of all, again as --

21 MR. RITTINGER: Your Honor --

22 A. -- again as --

23 MR. RITTINGER: -- could I have the question read
24 back?

25 THE COURT: No, you cannot. Let's hear the witness.

1 A. As -- as a user, I would almost never look -- whether it's
2 this pocket part or any other pocket part -- to the cover page
3 of the pocket part.

4 Again, as a user, I would go to 16.3 and see what new
5 cases there are or what new discussion there is.

6 So -- and that's why I think it was essential that
7 something more than just the pocket part be sent out with new
8 shelving instructions, that the subscriber -- that the reader --
9 actually be told that we no longer are part of this.

10 And you can -- if you were relying on the work we have
11 done over the years -- and that's why you have it -- then, you
12 have a right to return it and -- and we'll give you a full
13 credit.

14 So, the answer is, no, I -- I think on the face of
15 this, given the way lawyers use pocket parts, nobody looks at a
16 pocket part and says, you know, examines the names on it. You
17 go right to the section that deals with the substance and there
18 it is.

19 And so, unless there's some direct notice to the
20 subscriber/lawyer, user at the library -- whoever it might be --
21 I don't agree with your premise, no.

22 Q. Let me get that straight.

23 Nobody looks at the names on the -- of the authors on
24 the -- on the front page of the supplement?

25 A. I -- on a pocket part -- I've used pocket parts for, you

1 know, for -- I've been a lawyer for forty years, I look at the
2 book, I see there's a book by who --

3 THE COURT: The question that he asked is --

4 A. I -- I --

5 THE COURT: -- you can either answer yes or no, you
6 don't have to make --

7 A. In my -- my experience, I --

8 THE COURT: -- a long --

9 A. -- I don't.

10 Q. So, nobody looked at the names on the -- on what you call,
11 the sham supplement as well, isn't that correct?

12 A. No, because -- you know, the -- you don't -- you look at
13 the names on the book and if it is a sham publication, ah,
14 they'll associate -- if you're referring to the December of
15 2008, they'll associate our names with it, whether it's on the
16 pocket part --

17 Q. Well --

18 A. -- or on the binder, it's the same thing.

19 Q. Okay.

20 Let me -- let me just try to understand your
21 testimony.

22 A. Yeah.

23 Q. Nobody would look at the names on the new supplement,
24 that's your testimony, 'cause nobody ever looks at the names on
25 the first page of the supplement.

1 But your testimony is also that people would look at
2 the names on the supplement that it replaced, is that your
3 testimony?

4 A. They wouldn't have to look at the names, they would know
5 this was a pocket part, they've been subscribers for years, they
6 are getting Rudovsky and Sosnov every year. They get a letter
7 that says, here's the new Rudovsky and Sosnov pocket part, put
8 it in. They -- they know it, they don't have to read that first
9 page.

10 Q. All right.

11 So, then to -- to answer my questions, they would look
12 at the names on the supplement or they wouldn't have to look at
13 them?

14 A. You might look at it, you might not look at it when you
15 open it up, it's -- you know when you shelve it, if you shelve
16 it personally, you might look at it, in terms of research,
17 you're probably not looking at the first page.

18 Q. All right.

19 MR. RITTINGER: Let me have marked, please, as -- or
20 as Defendant's Exhibit 2, it would be a dec --

21 THE COURT: Except that you started out with the --

22 MR. RITTINGER: I'm --

23 THE COURT: -- Defendant's Exhibit A.

24 MR. RITTINGER: I'm sorry, your Honor?

25 THE COURT: Your first exhibit was Defendant's Exhibit

1 A.

2 MR. RITTINGER: Defendant's Exhibit B, your Honor.

3 The declaration of David Rudovsky.

4 (Pause at 3:01 p.m.)

5 MR. RITTINGER: May I give it to the witness, your
6 Honor, a copy of the --

7 THE COURT: All right.

8 This is his declaration, what do you want to ask him
9 about it?

10 BY MR. RITTINGER:

11 Q. Professor, could you turn to Paragraph 7 and the last
12 sentence -- and I'll -- I'll read it for you?

13 The treatise, including all pertinent parts
14 except for the 2007/'8 pocket part were prepared by
15 us pursuant to a July, 1987 agreement with West --
16 with West Publishing Company.

17 It turns out that that's not correct, isn't that
18 correct?

19 MR. BAZELON: Objection to form, your Honor, but
20 beyond that, objection to the question, A, on the grounds of
21 relevance and, B, I thought your Honor was interested in
22 focusing on the --

23 THE COURT: I am.

24 MR. BAZELON: -- irreparable harm.

25 THE COURT: But let's find out what he wants.

1 A. There are -- as it turns out -- three written agreements
2 we've had with West over the years.

3 Let me answer the question this way, we -- we had
4 the --

5 MR. RITTINGER: Well, your Honor -- your Honor --

6 THE COURT: Let him answer the question.

7 A. Because as a legal matter, I can't answer your question,
8 which contract controls, you'll have to argue that to the Judge.

9 I can say there was a 1987 agreement. There was a
10 2000 agreement when we agreed to do the second edition. And
11 there was a 2007 agreement for the 2007 pocket part. Those are
12 the only agreements we've had with West.

13 When I first discovered in December when I looked at
14 the new pocket part and was concerned, I looked at my file, I
15 just pull the relevant material. I immediately found the 1987
16 agreement, it had a blue backer on it that we used to have.

17 And I had on top of it, the most recent agreement,
18 which was the 2007 agreement for the pocket part. I did not
19 notice at that time the 2000 agreement, it was my mistake. I
20 should have noticed it in my file at that time, I did not.

21 We, therefore -- I prepared this declaration based on
22 the 1987 and the 2000 agreement -- the 2007 agreement -- I'm
23 sorry, the 2007 agreement -- which said it superseded all
24 previous agreements. I did that.

25 You then had a filing in which you attached the 2000

1 agreement, it was unsigned by West as I recall. I then looked
2 in my file to see if I had that 2000 agreement, I had one. In
3 fact, I had a signed copy by West and I provided it.

4 Which agreement controls -- which provisions of the
5 agreements control -- I can give you my view on it --

6 THE COURT: I'd rather not hear it.

7 A. -- if you want to know it, but that's -- that's what I
8 have --

9 MR. RITTINGER: Well, your Honor, I didn't --

10 A. -- well -- we have those three agreements.

11 Q. I didn't ask for your -- for --

12 A. And that's why I'm not giving it.

13 Q. All right.

14 Is it fair to say that you had forgotten about the
15 existence of the 2000 agreement at the time that your complaint
16 was filed?

17 A. I think that's fair to say.

18 At the time we filed the complaint I --

19 Q. Is it -- is it --

20 A. -- that's fair to say, I --

21 Q. -- I'm sorry -- I'm sorry.

22 A. -- did not recall a written 2000 agreement, that's right.

23 Q. And is it also fair to say that you had forgotten about the
24 existence of the 2000 agreement at the time you filed your
25 motion for a preliminary injunction?

1 A. If that was done before I filed the amended declaration,
2 that's right.

3 Q. Okay.

4 Now, I believe the -- the 1987 agreement is attached
5 as an exhibit, is that correct?

6 A. Yes, it is.

7 Q. All right.

8 MR. RITTINGER: Now, could I have the -- the 2000
9 agreement, please? Do you want to mark that as C?

10 (Pause at 3:04 p.m.)

11 (Discussion held off the record.)

12 MR. RITTINGER: Defendant's Exhibit C, an agreement
13 between the plaintiffs and West Group Publisher dated as of
14 September 7th, 2000 are executed by West Group.

15 THE COURT: I'm sorry. Where does it say that, I see
16 August 22nd, 2000.

17 MR. RITTINGER: Your Honor, each signature is dated
18 with a different date, the last date is the -- is the date that
19 I referred to executed by West.

20 (Pause at 3:06 p.m.)

21 BY MR. RITTINGER:

22 Q. Now, is that a copy of the 2000 agreement?

23 A. It is.

24 Q. All right.

25 And is -- according to your understanding today -- is

1 that the agreement pursuant to which the West Pennsylvania
2 Practice was published?

3 A. The second edition, that's correct.

4 Q. The second edition?

5 A. Yes.

6 Q. And by the way, it says West Group on the spine, correct?

7 A. It does.

8 Q. Right.

9 You knew who West Group is, don't you?

10 A. We started with West Publishing, it was West Group, it's
11 Thompson West. It's West.

12 Q. You don't dispute that that was an agreement with the
13 publisher that published the second edition, is that correct?

14 A. I -- I assume it was, that's right.

15 Q. Okay.

16 A. Absolutely.

17 Q. Now, I want to direct your attention first of all to
18 Paragraph B2 -- 2B -- capital B -- do you see that?

19 A. Yes.

20 Q. All right.

21 And I'm going to read that into the record:

22 Authors will provide upkeep to the work on an
23 annual basis or as otherwise agreed by publisher and
24 authors, including but not limited to supplements,
25 revisions or new editions of the work in order to

1 keep it current and marketable. All references to
2 the work in this agreement also apply to such upkeep
3 as well as to the original work unless otherwise
4 provided.

5 Do you see that?

6 A. I do.

7 Q. All right.

8 And you agreed to that provision at the time you
9 entered into the 2000 agreement?

10 A. We did.

11 Q. All right.

12 And then --

13 (Pause at 3:08 p.m.)

14 Q. -- turning your attention to Paragraph 3A2 on the next
15 page.

16 A. Yes.

17 Q. Do you see that?

18 A. I do.

19 Q. And I'm going to read that into the record, use of authors'
20 names.

21 MR. BAZELON: Your Honor, excuse me, I -- I want to
22 object. I think -- it appears that we're going to go to reading
23 in provisions with the question of, did you agree to it? And I
24 think that's a waste of time.

25 THE COURT: I do, too, but if he wants to waste time,

1 he may.

2 MR. RITTINGER: I'm sorry?

3 THE COURT: I said, you may waste time if you want to.

4 BY MR. RITTINGER:

5 Q. Use of author's name:

6 Publisher will have the right to use author's
7 names in connection with the work and upkeep of the
8 work.

9 So, at the time you entered into the 2000 agreement --

10 THE COURT: Read the next sentence -- read the next
11 sentence.

12 Q. If -- if the work or upkeep is prepared by persons
13 other than the --

14 THE COURT: By a person. Read -- read it for heaven's
15 sake.

16 Q. If the work or upkeep is prepared by a person other
17 than authors, publisher may identify that person on
18 the new material and any related advertising and give
19 him or her authorship credit in addition to or in lieu
20 of credit given to the authors.

21 Do you see that?

22 A. I do.

23 THE COURT: That's right there.

24 Q. Is there a comparable provision to that according to your
25 understanding in the 1987 agreement?

1 A. Not in those --

2 MR. BAZELON: Your Honor, I'm going to object, but I'm
3 going to stop objecting, 'cause I understand that you're going
4 to listen to all of it.

5 THE COURT: Either there is or there isn't, I don't
6 know whether there is or not.

7 MR. BAZELON: Exactly. A continuing objection.

8 THE COURT: It's going to speak for itself.

9 A. You -- you can compare them, in those words, there's --
10 there's not, but that's the best I can say, right.

11 Q. Well, is there any comparable provision according to your
12 understanding?

13 A. There -- I'll have to look at the '87.

14 (Pause at 3:10 p.m.)

15 A. There is a provision in the '87 agreement, Section -- under
16 what's titled miscellaneous agreements that:

17 The author shall have first option to prepare
18 pocket parts and revise volumes.

19 And then, it goes on:

20 If the authors are deceased or for any reasons,
21 the authors do not exercise such option to prepare
22 pocket parts and related material, then the publisher
23 may arrange for these at its own expense and in that
24 event, the authors would not have any compensation.

25 So, there is a provision that deals with the

1 contingency of us not continuing as authors. So, there is a --
2 in that sense -- a comparable provision, not with all the terms
3 you just read.

4 Q. Is there a provision that is similar to the provision of
5 the --

6 (Pause at 3:11 p.m.)

11 MR. RITTINGER: All right.

12 THE COURT: -- witness says about it.

13 MR. RITTINGER: I -- I accept that, your Honor.

14 BY MR. RITTINGER:

15 Q. The 2007 agreement and I'll -- I'll cover this quickly.

16 It's your position that that does not apply, correct?

17 A. It's not -- ah -- as a legal matter and there could be
18 argument, the 2007 agreement purports to supersede all previous
19 agreements. It describes the work as being the work -- the --
20 the volume and the pocket parts.

21 And then it has this language in there someplace --
22 which I'll put my finger on it -- where it says, it supersedes
23 all previous agreements.

24 I'm not an expert in this area, I'm not going to make
25 any argument on that. I'm just saying that there is an argument

1 here that could be made that the 2007 agreement is the one that
2 controls. But I --

3 Q. Well --

4 A. -- you probably don't want my opinion on that.

5 Q. Let me -- let me -- you are a professor and you're --
6 you're careful in what you've -- what you do when you write
7 books and you --

8 THE COURT: What's your question -- what's your
9 question?

10 BY MR. RITTINGER:

11 Q. I'm going to read to you, first of all, Paragraph 1,
12 subject:

13 Publisher is preparing a work for publication
14 entitled, Pennsylvania Practice Criminal Procedure,
15 2007 Supplement, quote, The Work.

16 A. Hm-hmm.

17 Q. That's the work that's referred to in this agreement,
18 correct?

19 THE COURT: Yes, it is.

20 A. Yes, it is.

21 Q. It doesn't refer to any other supplements or any other
22 updates, does it anyplace?

23 A. Not there, but the agreement later says:

24 This supersedes --

25 Q. Okay.

1 A. -- all previous agreements --

2 Q. All right.

3 A. -- between the parties.

4 Q. All right.

5 And -- and that's Paragraph H?

6 A. Ah --

7 THE COURT: We'll take your word for it.

8 A. Can you tell me which page you -- you have there?

9 Oh, yeah, yeah, that's right on Page 5 under 9H:

10 This is the entire agreement of the parties, all
11 prior negotiations and representations are merged into
12 this agreement. This agreement supersedes all
13 previous agreements regarding the work.

14 Q. Okay.

15 Let me stop you there.

16 A. Yeah.

17 Q. Now, where is work defined in this agreement?

18 THE COURT: Yes, exactly.

19 A. It's defined in the first paragraph.

20 Q. Right.

21 It only refers to the 2007 supplement, isn't that
22 correct?

23 A. That's what it refers to there, there was no previous
24 agreement. This -- this was -- this was the only agreement we
25 had.

1 Q. Were there -- were there oral discussions beforehand?

2 A. I don't recall if there were or there were not at that
3 point.

4 Q. In your vast experience, have you ever seen an agreement
5 have a similar provision when there was not a written agreement
6 preceding it?

7 A. I've seen standard language like this, sure.

8 Q. Right.

9 It can apply to oral discussions and agreements,
10 correct?

11 A. It could.

12 Q. Okay.

13 MR. RITTINGER: Your Honor, could I have a minute or
14 two to look through something?

15 THE COURT: You may have up to seven.

16 MR. RITTINGER: I'm sorry?

17 THE COURT: You may have as many as seven, go ahead.

18 (Pause at 3:14 p.m.)

19 (Discussion held off the record.)

20 MR. RITTINGER: Your Honor, I only have one copy of
21 this document, but I'd like to mark it as Defendant's Exhibit 4.

22 THE COURT: Sure, go ahead.

23 I think you're going to mark it as a defense exhibit,
24 possibly.

25 MR. RITTINGER: D, I'm sorry, D.

1 MR. BAZELON: May I see it, please?

2 MR. RITTINGER: Yeah.

3 THE COURT: What's it going to turn out to have been?

4 MR. BAZELON: Your Honor, this document is part of the
5 settlement discussions that took place between counsel.

6 Mr. Rittinger wrote me an e-mail and he said, I want
7 it understood that everything that takes place in settlement
8 discussions is privileged and confidential.

9 Now, he is taking out a document that are part of
10 those discussions and having it marked and wanting to use it at
11 this hearing.

12 THE COURT: No, he marked it himself.

13 What's -- how do you get around that?

14 MR. RITTINGER: Yes, your Honor.

15 The witness testified that he wasn't satisfied with
16 the last paragraph of the letter that went to the customers,
17 because it didn't explicitly state a refund.

18 And I asked him, if -- if his counsel had objected to
19 that and he said, no.

20 This is a letter that has counsel's markups on it that
21 does not in any way reflect any changes in the -- in the
22 penultimate paragraph -- well, it gets to the -- the paragraph
23 that --

24 THE COURT: What --

25 MR. RITTINGER: -- we referred to.

1 THE COURT: -- what do you do with the objection that
2 it's part of the settlement discussions which are privileged and
3 don't get into evidence?

4 MR. RITTINGER: Well, your Honor, the door was opened
5 by counsel when -- when he said that he objected to that
6 paragraph.

7 THE COURT: That's ridiculous.

8 Are you objecting to this --

9 MR. BAZELON: I certainly am.

10 THE COURT: -- I don't know what it is, I don't want
11 to know. The objection is sustained. Let's get on to something
12 that makes sense.

13 (Long pause at 3:17 p.m.)

14 BY MR. RITTINGER:

15 Q. Professor, I take it that you have received no complaints
16 or inquiries and no one has called you and said, you're
17 associated with a bad publication or anything along those lines,
18 isn't that correct?

19 A. I have not.

20 Q. All right.

21 And as far as you know, neither has your co-author?

22 A. That's correct.

23 Q. And it is true, is it not, that good practice when you're
24 using a treatise of any sort and you're citing a case, that you
25 either Shepardize it as his Honor suggested or as we like to at

1 West, suggest that you KeyCite it, that is good practice, is it
2 not?

3 A. Absolutely.

4 Q. All right.

5 And you would expect any lawyer who is using -- no
6 matter what the work is, if it was your treatise, your
7 supplement or anyone else's -- that they would -- they would
8 either Shepardize or KeyCite a case?

9 A. But -- but only after having looked at a pocket part and
10 seeing that it covered a certain period of time, you would
11 certainly -- there's always a lag time -- you would want to
12 Shepardize or KeyCite for that reason.

13 But the whole point of the book from the -- from the
14 beginning from twenty years ago -- was to give readers something
15 more than a list of cases that they can KeyCite. That's not
16 what we were asked to do, that's not what we did.

17 We -- we did a book -- we did a treatise -- we did an
18 analysis of the case law. You don't get that by KeyCites.

19 Q. No, I understand that.

20 But it's true -- is it not -- as a professor, good
21 practice --

22 A. The -- the answer is, yes, you --

23 Q. -- everybody knows that --

24 A. -- Shepardize.

25 Q. -- every treatise is always going to -- if it's in print --

1 it's always going to be six to nine months behind --

2 A. On that point --

3 Q. -- am I correct?

4 A. -- you're absolutely right.

5 Q. Right.

6 And as far as when the treatise -- when the -- when
7 the supplement was up on West cite -- on -- on West Law -- no
8 matter what was there, if someone clicked on to that case, they
9 would get an update through KeyCite, isn't that correct?

10 A. I assume they would, that's right.

11 Q. Right.

12 And good practice, again, anyone who was using even
13 what you consider to be the sham supplement, if they clicked on
14 to any case that you've complained about, they would have got
15 the current history of that case, isn't that correct?

16 A. And -- and they could do that without paying the fifty
17 dollars for a product that gave them nothing.

18 Q. I -- I understand that, but they could do it --

19 A. They could do it.

20 Q. -- couldn't they?

21 Well, they --

22 A. They could also go to another reference book, they could go
23 to another treatise which was updated and --

24 Q. But --

25 A. -- and was timely.

1 Q. -- but even if they did that, they'd still have to go and
2 do a KeyCite --

3 A. That's right.

4 Q. -- or a Shepardization --

5 A. Absolutely.

6 Q. -- isn't that correct? All right.

7 And just to -- to go back to your affidavit for a
8 second and the 2007 agreement, the first -- I've already read
9 the first sentence in Paragraph -- well, not the first sentence,
10 I've read a sentence that started with the treatise and the
11 pocket part were prepared by the authors.

12 Let me go to the --

13 (Pause at 3:21 p.m.)

14 Q. -- let me go to the last sentence:

15 The 2007 pocket part was prepared pursuant to a
16 stand-alone agreement.

17 What did you mean by a stand-alone agreement, that it
18 only related to the 2007 supplement?

19 A. At that point, having only looked at the 2007 and not the
20 2000, I assumed it referred only to the 2007 supplement, that's
21 correct.

22 Q. Well, is it your position, the 2007 pocket part was
23 prepared pursuant to the 2000 agreement?

24 A. No. It was prepared pursuant to the 2007 agreement.

25 Q. Okay.

1 And you called it a stand-alone agreement?

2 A. That's right.

3 Q. What did you mean by a stand-alone agreement?

4 A. It governed the preparation that year of that pocket part.

5 Q. And only that?

6 A. For that year, we -- I don't know what would happen in the
7 future, but for that year, that's right.

8 MR. RITTINGER: I have no further questions, your
9 Honor.

10 THE COURT: Everyone content?

11 MR. BAZELON: Very brief, your Honor.

12 REDIRECT EXAMINATION

13 BY MR. BAZELON:

14 Q. Professor Rudovsky, can I refer you please to West -- I
15 guess -- West Exhibit 1, which is the March, 2009 letter?

16 A. Exhibit A, yes.

17 Q. Yes.

18 THE COURT: Exhibit A.

19 A. I have it.

20 Q. And I take it --

21 MR. BAZELON: I'm sorry, your Honor.

22 Q. -- I take it that this is a letter that has been identified
23 by West as having been sent to the subscribers for the treatise
24 some time in March of 2009?

25 A. That's my understanding.

1 Q. Now, what is your understanding, Professor Rudovsky, as to
2 whether users of the treatise and the pocket part, that is, the
3 people who actually have a book in hand and are using it, see
4 this letter that's written to the subscribers?

5 MR. RITTINGER: Objection.

6 THE COURT: I don't see how he would have any
7 knowledge of that.

8 MR. BAZELON: Let me try and lay a foundation, if I
9 can, your Honor?

10 THE COURT: All right.

11 BY MR. BAZELON:

12 Q. You have worked -- on your *curriculum vitae* -- among other
13 places, at the Philadelphia Defender's office?

14 A. I have.

15 Q. And are you -- do you have knowledge of how organizations
16 -- let me ask -- and you are also presently associated with the
17 University of Pennsylvania Law School?

18 A. I am.

19 Q. Do you have knowledge about how those organizations
20 function with respect to what they include in their bound
21 volumes and pocket parts?

22 A. I do.

23 Q. Based on your knowledge, Professor Rudovsky, does this kind
24 of a letter find its way into the bound volume?

25 A. It -- it would not find its way into a bound volume, for

1 example, the Defender Associations has a couple of copies in the
2 library, this letter would not be there.

3 A law library at the University of Pennsylvania, if
4 you'd put a sticker and said, put the sticker in instead of the
5 supplement, it would go there, but this letter would not.

6 Prison law libraries, the prison administration would
7 get the letter, the inmates who use it, would have no idea that
8 the pocket part they're dealing with has any deficiencies.

9 Q. So, in your experience then, a user -- as opposed to
10 whoever gets this letter -- is in all probability never going to
11 see this letter?

12 A. I think that's right, this is not -- this was not intended
13 to be put in the book. And for -- certainly, for users in
14 libraries, institutional places.

15 And even in multi-person law firms, if three or four
16 people do criminal law in that firm, the secretary/manager gets
17 this, it's -- there's no instructions, put this in, advise
18 people. It's a bookkeeping notice in a lot of ways. You'll get
19 something later. People using it will not -- in my experience
20 -- will not know.

21 (Pause at 3:25 p.m.)

22 BY MR. BAZELON:

23 Q. Professor Rudovsky, you were asked to read one or two
24 provisions that had to do with the preparation of pocket part
25 going forward, that is, provisions in an agreement.

1 The question I want to ask you is this:

2 What took place that led to you and Professor Sosnov
3 not doing the pocket part beyond the pocket part that was used
4 in 2007/2008?

5 MR. RITTINGER: Objection.

6 THE COURT: Objection overruled.

7 A. In 2007/2008, Mr. Sosnov and I kind of consulted on what we
8 should be doing with the book and we both decided it was time
9 for a new edition.

10 You know, at some point the pocket part becomes the
11 tail that wags the dog, the pocket part becomes too cumbersome,
12 everything is in the pocket part, very little is left from the
13 main text which is why in 2000, we did a new edition after about
14 nine years.

15 We thought it was appropriate to do a new edition. We
16 talked to our editor at that time, she said she would check.
17 She got back to us and said -- and we said, you know, that's
18 obviously a more expensive proposition to rewrite the whole book
19 is more expensive. We were then getting paid -- I believe --
20 five thousand dollars each for the pocket part.

21 She came back and said, West didn't want to do that,
22 but would you prepare another pocket part as we'd been doing.
23 We said, we'd consider it.

24 At that point or some subsequent conversation, she
25 said, we can only pay you twenty-five hundred each instead of

1 five thousand each, twenty-five hundred each. And our response
2 after we consulted was, we're almost -- we're already doing this
3 for -- for very little. We spend hundreds of hours every year
4 on this book at twenty-five hundred, it just wasn't worth it to
5 us at that point. And we said that we were going to decline to
6 -- to participate that year.

7 MR. BAZELON: I have nothing further, your Honor.

8 RECROSS-EXAMINATION

9 BY MR. RITTINGER:

10 Q. Do you know how much the pocket part generated?

11 A. I have no idea, we were not on royalty, so we never saw any
12 income from pocket parts, we were just on -- you know -- a
13 salaried basis for doing it.

14 MR. RITTINGER: Now, if I could mark as Defendant's
15 Exhibit E, a document entitled, Shelving Instructions.

16 Q. Now, while the customer letter will not go in every
17 individual work, it's your understanding that these instructions
18 say, that the new supplement should go in every single work,
19 correct?

20 A. That's correct.

21 Q. And we've already established that you have no complaint
22 about what is on the front cover of the new supplement that went
23 out Friday night, isn't that correct?

24 A. We're not complaining about that cover standing alone,
25 that's right.

1 Q. Thank you. All right.

2 And at one time, you wanted -- you -- your demand was
3 that West go out and sticker all of the works, isn't that
4 correct?

5 A. Before you published this -- this new one, we -- we had --
6 you know -- what I described as the sham product -- we asked you
7 to send a sticker out to inform readers -- not only people, who
8 were buying it -- but readers, people who used it, that this
9 pocket part was, in effect, not worth anything and don't --
10 don't use it.

11 Q. But now that pocket part is being discarded and this has
12 replaced it and, therefore, you are no longer asking for a
13 sticker, isn't that --

14 MR. BAZELON: Your Honor --

15 Q. -- correct?

16 MR. BAZELON: -- I object only because there's no
17 evidence of this, other than what Mr. Rittinger has said. If he
18 -- if he intends to present evidence that this is what has taken
19 place --

20 THE COURT: He's a very truthful person, I'm sure.

21 MR. BAZELON: It's just, your Honor, I'd prefer to
22 have it in the form of a witness and evidence rather than --

23 THE COURT: Right.

24 MR. BAZELON: -- counsel's assertion.

25 THE COURT: I understand. Go ahead.

1 What are you doing?

2 MR. RITTINGER: Well, I think there's a question
3 pending.

4 A. If -- if this instruction goes out and people get the new
5 pocket part, I assume what they'll do is put it in the back of
6 their book or someone will and they'll throw out what I've
7 described as sham pocket part. That's what will happen.

8 They won't know by virtue of this, that -- by virtue
9 of this -- this notice here, which says nothing about us
10 participating or not participating, that -- you know -- they're
11 getting something that -- that we're not involved with.

12 Now, you're right, the cover page of the pocket part
13 says that, that's the debate you're having as to what additional
14 relief is -- is necessary.

15 But as a factual matter, someone will put that in
16 their book, that's correct.

17 Q. Have you heard from any prisoners that complained about
18 this?

19 A. I have not heard from any prisoners, who have complained
20 about it, no.

21 Q. Any users?

22 A. I -- I've already said, I've gotten no complaints. I
23 wouldn't expect --

24 Q. Have you --

25 A. -- I also would --

1 Q. All right.

2 A. -- add, I wouldn't expect if -- if somebody --

3 Q. No, I --

4 A. -- used it for --

5 THE WITNESS: If I can explain, your Honor?

6 THE COURT: He hasn't gotten any complaints and he
7 wants to explain why. Go ahead.

8 A. People use this on discrete research problems. I have a
9 problem with post-conviction, I want to see if there's case law
10 on it, I want to see what the rule says, I'd go to that section.

11 My understanding -- and certainly it's true with what
12 I've done -- if somebody went to that section, did it and -- and
13 as you suggested Shepardizes as they should -- and found that we
14 did not include -- or you did not include -- a case that was
15 highly relevant, I wouldn't expect them to call me and complain.

16 I would expect them to think, Rudovsky and Sosnov
17 aren't up to snuff. I wouldn't expect them to call me. I
18 wouldn't expect a prisoner surely to say, how come you didn't
19 have Commonwealth versus Graves with the updated cite, I -- I
20 just wouldn't expect them to do that.

21 Q. Okay.

22 Now, in your direct testimony you talked about over
23 the years, you got a lot of positive comments or you got
24 questions and things of that nature, correct?

25 A. That's correct.

1 Q. Have you had any of those since December of 2000 up until
2 Friday?

3 A. I don't recall any, people may have called about it -- no,
4 I would have remembered because by the end of December, we knew
5 what was going on. And I can't --

6 Q. So, it's fair --

7 A. -- I can't recall any -- any comments or anything since --
8 THE COURT: Either way?

9 A. -- the end of December.

10 THE WITNESS: Either way, yes.

11 BY MR. RITTINGER:

12 Q. So, it's fair to say since the publication of the 2008/2009
13 supplement that's now been withdrawn, you have had no comments
14 one way or the other with respect to this work?

15 A. That's correct.

16 MR. RITTINGER: I have no further questions, your
17 Honor.

18 THE COURT: Everyone content?

19 MR. BAZELON: No, your Honor.

20 THE COURT: You may step down. Thank you, sir.

21 THE WITNESS: Thank you, your Honor.

22 (Witness excused at 3:31 p.m.)

23 THE COURT: Do you have anything further?

24 MR. BAZELON: Yes, your Honor, I have two more
25 witnesses that will be brief.

1 THE COURT: Good.

2 MR. BAZELON: Does your Honor want to keep going?

3 THE COURT: Yes.

4 MR. BAZELON: I'm calling Alan Yatvin.

5 ESR OPERATOR: Good afternoon, sir.

6 ALAN YATVIN, PLAINTIFF WITNESS, SWORN.

7 ESR OPERATOR: Please state your name and spell your
8 last name for the record.

9 THE WITNESS: Alan, Yatvin, Y-a-t-v-i-n.

10 ESR OPERATOR: Thank you, sir.

11 THE COURT: How do you spell Alan?

12 THE WITNESS: A-l-a-n, your Honor.

13 THE COURT: Thank you.

14 MR. RITTINGER: Your Honor, could I have him list for
15 us as to why he's got him on?

16 THE COURT: Sure. Do you want to whisper?

17 MR. BAZELON: Okay, yes.

18 MR. RITTINGER: Or he could tell me out loud.

19 (Discussion held off the record at 3:33 p.m.)

20 MR. BAZELON: Your Honor, I'm marking a *curri*

21 vitae for Mr. Yatvin as Plaintiff's Exhibit 3. I previously
22 gave this to Mr. Rittinger.

23 THE COURT: That's nice.

24 DIRECT EXAMINATION

25 BY MR. BAZELON:

1 Q. Mr. Yatvin, can you first identify yourself for the record?

2 A. I'm -- my name is Alan Yatvin, I'm an attorney practicing
3 in Philadelphia.

4 Q. And is P-3, your *curriculum vitae*?

5 A. Yeah, it's actually my December version which I tried to
6 quickly update yesterday afternoon, so I'm -- I can't guarantee
7 that everything between December and today is current.

8 Q. And if I were to ask you about your history and the matters
9 that are covered by this *curriculum vitae*, would you testify --

10 THE COURT: Yes, he would --

11 Q. -- as set forth herein?

12 THE COURT: -- let's not waste time.

13 A. Yes, I would.

14 Q. Did there come a time -- I take it part of your practice,
15 Mr. Yat -- Yatvin -- is in the area of criminal law?

16 A. Yes.

17 My practice consists of predominately police
18 misconduct, civil rights. Almost an equal amount of criminal
19 defense, principally, appellate.

20 And my partner, sort of the other way around, he does
21 mostly criminal defense trial and works with me on the civil
22 rights cases.

23 Q. Did there come a time when you became a subscriber to --
24 what I'll call -- the treatise that's the matter of discussion
25 here today?

1 A. Yeah.

2 I looked on the shelf and the one I have is the 2001,
3 but I'm pretty sure I subscribed right after it came out in
4 1990. I'd gone into private practice from the Defender
5 Association in '88. I knew the book was in progress. I -- I
6 have a vague recollection of even sending over a form or two to
7 -- to Mr. Rudovsky when they were in the process of putting it
8 together. So, I'm pretty sure, I subscribed right away.

9 Q. When you subscribed on or about in 1988, did you know
10 Professor Rudovsky and Professor Sosnov?

11 A. Yes.

12 I -- when I graduated from law school in 1983, I went
13 to work at the Defender Association of Philadelphia, I was there
14 for not quite five years.

15 At that time, Professor Rudovsky was on a three-year
16 sabbatical from his firm, acting as the First Assistant Defender
17 of the Defender Association and so, I got to know him very well
18 through that.

19 And Len Sosnov was a Senior Appellate Attorney and I
20 think that his particular job description was law reform at the
21 time. But Len was one of the go-to guys on appellate issues or
22 -- or law-development issues.

23 So, I -- I knew both of them very well professionally.

24 Q. Why did you decide to become a subscriber for the treaties?

25 MR. RITTINGER: Your Honor, objection.

1 THE COURT: Objection overruled, if he wants it in.

2 A. As a practitioner, there are certain books that are useful
3 for their forms, for their updates on the law and for giving you
4 a quick summary of things you know.

5 And this book was a corollary for Pennsylvania
6 Criminal Practice to Wright Miller for federal/civil or Goodrich
7 Amram for Pennsylvania civil or Arbiter for Philadelphia civil
8 practice. It provided text, commentary --

9 THE COURT: So, it seemed like a good idea at the
10 time. Go ahead.

11 BY MR. BAZELON:

12 Q. What if anything did the identity of the authors have to do
13 with your decision?

14 A. Libraries -- especially back then -- are very expensive, so
15 you're selective and you're trying to pick things that are going
16 to be useful to you.

17 And in determining whether something is useful, you
18 have to either know of it and know its reputation or know the
19 people involved. In this case, it was a new book, but the two
20 authors were very highly respected.

21 Dave Rudovsky is the got-to guy on criminal procedure
22 in Pennsylvania, particularly, Fourth Amendment stuff.

23 And Len is widely known for his appellate work and,
24 particularly, PCRA post-conviction stuff.

25 Q. Now, I want to direct your attention to December of 2008.

1 At that time, did you receive a pocket part and an
2 invoice for what was called the 2008/2009 pocket part for this
3 treatise?

4 A. I'm -- I'm sure I received both.

5 We're a two-person practice, we have two lawyers, we
6 have two --

7 THE COURT: It's all right, you've answered the
8 question. Wait for another one.

9 Q. And in connection with the invoice, I want to show you a
10 document which I've marked as P-4 and ask you if you can
11 identify this for us?

12 THE COURT: And he wants you to tell us, yes, this is
13 the invoice you got.

14 A. Yes, this is the invoice I got.

15 Q. And when you received this invoice, did you receive it at
16 the same time or if not, how close in time to you actually
17 receiving the 2008/2009 pocket part?

18 A. We subscribe to a number of West publications.

19 And the way it works is, the pocket part come in with
20 a shipping manifest of some kind, usually, taped to the cover of
21 the box or the envelope or inside.

22 Someone on my staff unpacks it, they -- they replace
23 the old pocket part with the new pocket part. And at some later
24 point, we receive invoices. It's usually not together.

25 THE COURT: Well, just as a matter of curiosity, the

1 bottom portion you're supposed to re -- return with payment, how
2 come it's still here?

3 THE WITNESS: Well, Judge --

4 (Laughter.)

5 THE WITNESS: -- end of the year, a lot of bills.

6 West -- West is very good about sending followup
7 notices where they list all your outstanding invoices.

8 THE COURT: Okay.

9 THE WITNESS: And I tend to pay them in clumps.

10 I'm -- I'm the bookkeeper/chief cook and bottle washer
11 and it just happens that way, sometimes.

12 BY MR. BAZELON:

13 Q. Has the invoice been paid?

14 A. Yes.

15 Q. And this invoice is dated -- is it not -- December 26th,
16 2008?

17 A. That's what date it says, yes.

18 MR. BAZELON: I want to mark as Exhibit P-5 and I do
19 not have an extra copy of this, this is the cover page for the
20 2008/2009 pocket part.

21 Q. I want to show this document along with the 2008/2009
22 pocket part and ask you whether P-5 is the cover page for that
23 document, that is for the pocket part you received in December
24 of 2008?

25 A. That is the pocket part.

1 Do I know exactly when I got it -- but it's the one
2 that's in my book that I looked at yesterday, that's the one
3 that's there -- when I got it, December, November, January, I
4 don't know. I know it was there when I spoke to David Rudovsky
5 some time in February -- January or February.

6 Q. And the cover page is the -- is the cover page of that
7 pocket part?

8 A. It seems to be the same one, yeah.

9 MR. RITTINGER: I'm sorry, I couldn't hear your
10 answer.

11 THE WITNESS: I said, it seems to be the same one and
12 then, I said, yeah.

13 (Pause at 3:43 p.m.)

14 THE WITNESS: You know, I'm not sure if it was
15 simultaneous, but I think I also got a CD with all of this with
16 the forms, if I remember correctly. I'm not sure what the
17 timing is, but I know that -- that periodically forms come out
18 on a CD.

19 BY MR. BAZELON:

20 Q. Mr. Yatvin, as a attorney practicing in criminal law and
21 civil rights, what do you expect to be contained in the pocket
22 part to this treatise?

23 MR. RITTINGER: Objection.

24 THE COURT: The objection is overruled. But it's
25 unnecessary. You expect all the up-to-date information, right?

1 THE WITNESS: I -- I expect the cases to be up to
2 date, the text to be up to date and the forms to be updated
3 consistent with the case law and -- and the text.

4 MR. BAZELON: Nothing further, your Honor.

5 THE COURT: Any questions?

6 MR. RITTINGER: Yes, your Honor.

7 CROSS-EXAMINATION

8 BY MR. RITTINGER:

9 Q. I -- I missed it.

10 Do you specifically recall receiving the invoice
11 that's been marked into evidence?

12 A. No, when -- when I was asked if I had an invoice, I have a
13 box where I keep pending bills or recently-paid bills and it's
14 all clipped together and I pulled out the West packet and I
15 don't know if it was in the paid or the to be paid, but it was
16 in there. I have no specific recollection.

17 I get more West mail than any other category because
18 everything you've ever subscribed to, they send you trying to
19 get you to go back to subscribing it.

20 Q. All right.

21 Well, let -- let me ask you this question:

22 First of all, when is the first time that you learned
23 that there was a dispute between West and the plaintiffs?

24 A. I -- well, the first time I learned that there was a
25 problem with the pocket -- with the pocket part --

1 Q. Well, that's what I -- yeah.

2 A. You know, I want to say it was February, but it may have
3 been January.

4 Q. All right.

5 Do you recall, did you receive a copy of Defendant's
6 Exhibit A?

7 A. You know, I -- I was asked about it. I -- I don't recall
8 seeing it. I'm not saying it didn't come in, like, I say, I get
9 a lot of stuff from West, but I don't recognize it.

10 Q. Well, is it fair to say that -- that any letter that --
11 according to -- at least, in your practice, any letter that
12 comes in from West, you really don't pay that much attention to?

13 A. No, it -- it all comes -- it all ends up on my desk.

14 And some of it goes into the shredder and some of it
15 goes into the bill file and any -- I get pocket parts which go
16 in the book.

17 I also sometimes get stickers. They send you out,
18 like, these adhesive things that you -- you're putting over
19 certain sections of the books or the pocket parts.

20 And I look at it all, but I don't have a specific
21 recollection of that letter. I don't know if I got it or not --
22 I'm not saying, I didn't get it, but I don't remember seeing it.

23 Q. Let me ask you this question:

24 In your practice, you said that you expect print
25 products to be up to date.

1 You are aware that there's always going to be a lag
2 between the time that you receive the print product and the time
3 that the print product was actually prepared, correct?

4 A. Of course.

5 Q. All right.

6 A. Of course.

7 Q. And you also know there's going to be a lag a lot of times
8 between the time that you actually got the current supplement
9 and the time that you actually look at it, correct?

10 A. Of course.

11 Q. All right.

12 And is it your practice similar to the -- you were in
13 court during the Professor's testimony, correct?

14 A. Yes, I was.

15 Q. All right.

16 And it is your practice always to Shepardize or
17 KeyCite cases that you find in a treatise?

18 A. You know, if I'm writing a brief or a memorandum for the
19 Court, I'm going to Shepardize, I'm a Lexis subscriber, I'm
20 going to Shepardize it.

21 But if I'm checking something that doesn't rise to
22 that level, I may not Shepardize it, I may rely on what's in the
23 book in the pocket part.

24 Q. But you're -- you do understand that anything you're
25 submitting to a court or anything that you're relying on to go

1 to a court, good practice mandates that it be Shepardized or
2 KeyCited, is that correct?

3 A. Sure. I can give you an example, if you'd like.

4 Q. No, that's okay.

5 Have you checked today to see if the new supplement
6 has arrived?

7 A. I left my office around noon.

8 THE COURT: It's either yes or no.

9 A. The mail had not come when I last spoke to my office.

10 THE COURT: I think the answer is, no.

11 MR. RITTINGER: Thank you, your Honor.

12 No further questions.

13 THE COURT: You may step down. Thank you, sir.

14 Oh, wait a minute, okay.

15 MR. BAZELON: Your Honor, can you give me one second?

16 (Discussion held off the record.)

17 MR. BAZELON: No further questions, your Honor.

18 THE COURT: You may step down. Thank you, sir.

19 THE WITNESS: Thank you, your Honor.

20 MR. BAZELON: Thank you.

21 (Witness excused at 3:48 p.m.)

22 MR. YATVIN: Your Honor, may I be excused?

23 THE COURT: Sure.

24 MR. YATVIN: Thank you.

25 (Discussion held off the record.)

1 MR. BAZELON: Yes, thank you.

2 Your Honor, I'm calling as my next -- and I believe
3 last witness -- Noah Charlson.

4 ESR OPERATOR: Good afternoon, sir.

5 Please place your left hand on the Bible and raise
6 your right hand.

7 NOAH CHARLSON, PLAINTIFF WITNESS, AFFIRMED.

8 ESR OPERATOR: Please state your name and spell your
9 last name for the record, please.

10 THE WITNESS: Noah Charlson, C-h-a-r-l-s-o-n.

11 ESR OPERATOR: Thank you, sir.

12 MR. RITTINGER: Your Honor -- your Honor, I believe
13 this witness is an attorney in Mr. Bazelon's firm and I think
14 his name --

15 THE COURT: Well, that's not a criminal offense, go
16 ahead.

17 (Laughter.)

18 MR. RITTINGER: Well --

19 MR. BAZELON: I hope not, Judge. Thank you.

20 DIRECT EXAMINATION

21 BY MR. BAZELON:

22 Q. Mr. Charlson, are you an attorney at Bazelon, Less and
23 Feldman?

24 A. I am.

25 Q. Are you, in fact, a shareholder at Bazelon, Less and

1 Feldman?

2 A. I am.

3 Q. Mr. Charlson, do you have occasion frequently in your legal
4 practice to use West Law?

5 A. I do.

6 Q. How many years have you been practicing?

7 A. Thirteen, I believe.

8 Q. And have you specifically used West Law to access what I'll
9 call the Rudovsky/Sosnov treatise?

10 A. I have.

11 Q. I want to mark as P-6, a document that I'm going to ask you
12 please identify.

13 (Pause at 3:50 p.m.)

14 Q. Would you tell the Court what Exhibit P-6 is, please?

15 A. These are several pages that I printed out this morning
16 from West Law for the purpose of demonstrating what a user who
17 accesses the Pennsylvania Criminal Procedure database would see
18 and what they would need to do in order to access the Scope
19 Section that there's been testimony about this -- this
20 afternoon.

21 Q. Mr. Charlson, would you describe the process that an
22 attorney goes through if he or she wants to access the Scope
23 page for the treatise on West Law and when you do so,
24 incorporating the images on Exhibit P-6?

25 A. Certainly.

1 Page 1 of Exhibit 6 is the -- the main screen --

2 MR. RITTINGER: Your Honor, could we get a date as to
3 when this was done?

4 MR. BAZELON: He said this morning.

5 THE COURT: This morning, I think.

6 MR. RITTINGER: This morning?

7 MR. BAZELON: This -- well --

8 THE WITNESS: Yes, approximately, four hours ago,
9 actually. Probably, around 11:55 this morning.

10 A. The first --

11 Q. Just -- just so we're -- we're clear on this.

12 You're talk -- that is when you prepared these
13 exhibits and did the search that is reflected on these exhibits?

14 A. Well, it's not a search but that's when I printed -- this
15 document was printed out, yes.

16 Q. Okay.

17 Had you on other occasions done the same search?

18 A. I -- I have --

19 Q. Or the other -- what --

20 A. -- I have accessed the Pennsylvania Criminal Procedure
21 database on West Law frequently in the last several months.

22 THE COURT: Well, you had started to tell us what Page
23 1 is.

24 THE WITNESS: Yes, Page 1, your Honor, is the main
25 screen that comes up as soon as I log into West Law.

1 Page 2 is the same screen, except that on the left-
2 hand side, most of the way down, I have typed in the database
3 identifier for the Pennsylvania Criminal Procedure database on
4 West Law, that's where it says, PAPRAC-CPFC, that is the West
5 Law code to get into the database for the Rudovsky and Sosnov
6 treatise.

7 The third page show the search box, once I get into
8 the Rudovsky/Sosnov database on West law.

9 And if I was going to be searching within that
10 database, I would enter the search terms in the box that appears
11 there on Page 3.

12 You'll also see at the top in the center, a -- next to
13 the words, West Pennsylvania Practice Series Criminal Procedure,
14 PAPRAC-CPFC, a circle with a small letter i in the middle of it.

15 If you happen to click on that icon, you would be
16 taken to what is known as the Scope Section of the database,
17 which appears on Pages 4 and 5.

18 And that -- I wouldn't say that's necessarily, the
19 only way to get into the Scope Section, it's certainly the only
20 way that I am aware of to get into the Scope Section.

21 And -- well, I think that answers the question.
22 That's what this -- that's what this exhibit is.

23 (Pause at 3:55 p.m.)

24 MR. BAZELON: No further questions, your Honor.

25 THE COURT: Any questions?

1 MR. RITTINGER: Yes -- yes, your Honor.

2 CROSS-EXAMINATION

3 BY MR. RITTINGER:

4 Q. I'm just curious, you say you accessed West Law and you got
5 to this this morning?

6 A. I did.

7 Q. All right.

8 And this -- this according to your understanding is
9 currently on West Law?

10 A. According to my understanding, it is, because -- actually,
11 I should say that the Scope -- let me correct something I said.

12 The Scope Section -- Pages 4, 5 and 6 -- is not a
13 direct screen shot, because I could not print the entire -- I
14 could not print the entire Scope as a screen shot, I had to copy
15 it into -- from the Internet Explorer program into a Word
16 program and print it as a Word document.

17 So, I can't say that this was printed directly as a
18 screen shot, but this was printed this morning at four o'clock.

19 Q. Well, I mean, do you know whether that -- the -- the Scope
20 Section or the -- the last couple of pages and particularly,
21 that part under Content Highlights is what was available on West
22 Law today?

23 A. Yes, this was -- I did this today.

24 Q. All right.

25 MR. RITTINGER: Let -- let me have marked as

1 Defendant's Exhibit -- A, B, C, D, E, F.

2 Your Honor, I -- I -- again -- I don't have an extra
3 copy of this.

4 BY MR. RITTINGER:

5 Q. And I guess, first of all, what is the --

6 MR. BAZELON: May I see it, please?

7 MR. RITTINGER: Yeah.

8 Q. What is it on --

9 MR. RITTINGER: Has this been marked as an exhibit?

10 THE WITNESS: 6.

11 MR. BAZELON: Yes.

12 THE WITNESS: P-6.

13 Q. -- 6 that shows that the Scope page is current as of
14 today's date?

15 A. (No verbal response.)

16 Q. Is there anything that you can point to?

17 A. Ah, my testimony.

18 Q. No, I know but I'm talking about on the document, itself?

19 A. I don't -- well, under coverage it says:

20 The database is current through the 2009 edition which
21 the Scope Section didn't say, at least, any time before Friday,
22 April 10th, according to you.

23 So, I -- 'cause I have been routinely monitoring the
24 Scope Section of the West database and it has not until -- until
25 yesterday -- to the best of my knowledge -- had never said,

1 current through the 2009 edition.

2 Previously, it had said something to the effect that
3 the database is current either through the 2008 edition or,
4 perhaps, through the 2007/2008 pocket part.

5 Q. All right.

6 And the first time that you have accessed it since
7 that was on there, was -- was today?

8 A. Ah, probably, yesterday, but I printed this today.

9 Q. Well --

10 A. I accessed it yesterday, but I printed it --

11 Q. -- could this be -- could this be have -- could this be
12 current then even according to your testimony only as of
13 yesterday?

14 A. I don't understand your question.

15 Q. Well, did you access it again today before you printed it?

16 A. I couldn't have printed it without accessing it.

17 Q. All right.

18 Let me show you --

19 MR. RITTINGER: Your Honor, may -- may I approach the
20 witness and read the document?

21 THE COURT: Of course.

22 (Pause at 3:58 p.m.)

23 MR. RITTINGER: Your Honor --

24 THE COURT: Go ahead --

25 MR. RITTINGER: -- is it all right, if I --

1 THE COURT: -- I said, yes.

2 BY MR. RITTINGER:

3 Q. Can you -- based upon your knowledge of West -- of how West
4 Law operates -- can you identify what the first page of this is?

5 A. This appears to be a search screen for the Pennsylvania
6 Practice Series database, but I notice -- now, whether this is a
7 Westlaw.com or West Law's proprietary software, I don't know --
8 I know sometimes, the search screens look different.

9 However, it seems to be a different database -- a
10 slightly different database -- than the one that I accessed
11 because PAPRAC is a database for -- from my understanding -- you
12 should know, 'cause you're counsel for West -- but it would seem
13 to be to be all of Pennsylvania Practice Series, including a --
14 a number -- whatever those ten different volumes are. I
15 accessed, specifically, the Criminal Practice forms and
16 commentaries which is what the CPFC is as far as I know.

17 Q. All right.

18 And turning to the next page, can you -- do you
19 recognize what that is?

20 A. The second page of Exhibit --

21 Q. F.

22 A. -- F looks familiar to me as a Scope Section for the
23 Pennsylvania Practice Series database, which I have accessed
24 previously, although not today.

25 Q. All right.

1 And could you read what it says under Content
2 Highlights?

3 A. West's Pennsylvania Practice Series written by local
4 experts as a practical and formative survey of PA.
5 Practice.

6 Q. All right.

7 And then, under Content Highlights, it's a note?

8 A. Note regarding Criminal Procedures Second edition.

9 Although the title page of the supplement references
10 David Rudovsky -- excuse me -- David Rudovsky and
11 Leonard Sosnov, neither author participated in the
12 2008-2009.

13 O. All right.

14 And that seems to be different from the one that you
15 have?

16 A. Ah, slightly different.

20 Q. Okay.

23 REDIRECT EXAMINATION

24 BY MR. BAZELON:

25 Q. Mr. Charlson, in your work with West Law doing legal

1 research, how frequently do you access the Scope Section of a
2 treatise?

3 A. Ah, the -- the Scope Section is something in my
4 experience --

5 MR. RITTINGER: Your Honor, I -- I --

6 THE COURT: He may answer the question. Go ahead.

7 A. It is -- it is not a routine part of computerized legal
8 research at all.

9 In my experience and the experience of others, you
10 know, with whom I have spoken, it's generally used only if one
11 is uncertain what's included in a particular database.

12 For example, how -- how far back the cases may go in a
13 particular case-related database or if it's a database
14 containing many different -- different types of source material,
15 one might want to know what's included.

16 But if one is accessing a specific database for a
17 particular treatise, I certainly would have no reason to check
18 the Scope Section. And it -- it's certainly not something that
19 a user, who is doing routine research would access in my
20 experience.

21 MR. BAZELON: No further questions.

22 RECROSS-EXAMINATION

23 BY MR. RITTINGER:

24 Q. You're an attorney on the papers for the plaintiff in this
25 case, correct?

1 A. That is correct.

2 Q. You prepared the papers and the legal arguments, isn't that
3 correct?

4 A. That's correct as well.

5 Q. And did the research, correct?

6 A. Ah, did some of it, yes.

7 MR. RITTINGER: I have no further questions.

8 THE COURT: You may step down. Thank you, sir.

9 (Witness excused at 4:03 p.m.)

10 * * *

11 (The remainder of the proceedings from 4:03 p.m.
12 until 4:27 p.m. have been previously transcribed and filed
13 under separate cover.)

14 * * *

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
DOUGLAS FRENKEL				

By Mr. Bazelon	3			
By Mr. Rittinger		7	-	-
DAVID RUDOFSKY				
By Mr. Bazelon	9			
By Mr. Rittinger		27		
By Mr. Bazelon			53	
By Mr. Rittinger				57
ALAN YATVIN				
By Mr. Bazelon	63			
By Mr. Rittinger		69	-	-
NOAH CHARLSON				
By Mr. Bazelon	73			
By Mr. Rittinger		77		
By Mr. Bazelon			82	
By Mr. Rittinger				83

* * *

<u>PLAINTIFF EXHIBITS</u>		<u>IDENTIFIED</u>	<u>EVIDENCE</u>
P-1	<i>Curriculum Vitae</i> of D. Frenkel	3	-
P-2	<i>Curriculum Vitae</i> of D. Rudovsky	9	-
P-3	<i>Curriculum Vitae</i> of A. Yatvin	63	-
P-4	Invoice	66	-
P-5	Cover Page for 2008/2000	67	-
	Pocket Part		
P-6	West Law Pages	74	-

<u>DEFENSE EXHIBITS</u>		<u>IDENTIFIED</u>	<u>EVIDENCE</u>
D-A	Customer Letter	27	-
D-B	Declaration of D. Rudovsky	36	-
D-C	2000 Agreement	39	-
D-D	E-Mail/Document	48	-
D-E	Shelving Instructions	57	-
D-F	Document	78	-

* * *

C E R T I F I C A T E

I do hereby certify that the foregoing is a correct transcript of the electronic-sound recording of the proceedings in the above-entitled matter.

Date: May 2, 2009

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