

**EXHIBIT “3”**

Page 1	Page 3
<p>IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA</p> <p>-----</p> <p>DAVID RUDOVSKY and LEONARD SOSNOV, Plaintiffs, No. 09-CV-727</p> <p>v.</p> <p>WEST PUBLISHING CORPORATION, WEST SERVICES INC., AND THOMSON LEGAL AND REGULATORY INC., t/a THOMSON WEST, Defendants.</p> <p>-----</p> <p>Video-recorded Deposition Upon Oral Examination of: Catherine J. Smith Location: Thomson West .50 Broad Street East Rochester, New York 14614 Date: March 3, 2010 Time: 11:44 a.m. Reported By: LYNN A. MULLEN, RPR</p>	<p>1 EXHIBITS</p> <p>2 Smith</p> <p>3 No. 1 Rochester Content Center</p> <p>4 organizational chart, Bates West-R 05934</p> <p>5 through 05941 (PAGE-9)</p> <p>6 .</p> <p>7 No. 2 E-mail string ending with an</p> <p>8 e-mail dated 1/18/08 to John Wierzbicki</p> <p>9 from Karen Earley, Bates West-R 00204</p> <p>10 through 00205 (PAGE-31)</p> <p>11 .</p> <p>12 No. 3 E-mail string ending with an</p> <p>13 e-mail dated 2/11/08 to Catherine Smith</p> <p>14 from Teri Kruk, Bates West-R 04728</p> <p>15 through 04730 (PAGE-32)</p> <p>16 .</p> <p>17 No. 4 E-mail string ending with an</p> <p>18 e-mail dated 5/21/07 to Teri Kruk from</p> <p>19 Catherine Smith, Bates West-R 00004</p> <p>20 through 00006 (PAGE-55)</p> <p>21 .</p> <p>22 .</p> <p>23 .</p> <p>24 .</p>
<p>Page 2</p> <p>1 APPEARANCES</p> <p>2 Appearing on Behalf of Plaintiffs:</p> <p>3 Noah H. Charlson, Esq.</p> <p>4 Bazelon, Less &amp; Feldman, P.C.</p> <p>5 .1515 Market Street, Suite 700</p> <p>6 Philadelphia, Pennsylvania 19102-1907</p> <p>7 ncharlson@bazless.com</p> <p>8 .</p> <p>9 Appearing on Behalf of Defendants:</p> <p>10 Aaron M. Zeisler, Esq.</p> <p>11 Satterlee, Stephens, Burke &amp; Burke, LLP</p> <p>12 .230 Park Avenue</p> <p>13 New York, New York 10169</p> <p>14 azeisler@ssbb.com</p> <p>15 .</p> <p>16 Also Present:</p> <p>17 John Wierzbicki</p> <p>18 Appearing as Videographer:</p> <p>19 David Parrotta</p> <p>20 .</p> <p>21 WITNESS</p> <p>22 Name Page</p> <p>23 Catherine J. Smith</p> <p>24 By Mr. Charlson 7</p>	<p>Page 4</p> <p>1 EXHIBIT INDEX CONTINUED</p> <p>2 No. 5 E-mail string ending with an</p> <p>3 e-mail dated 2/13/09 to Betty Walker and</p> <p>4 others from Amber Becker, Bates West-R</p> <p>5 .00216 through 00217 (PAGE-62)</p> <p>6 .</p> <p>7 No. 6 E-mail string, 2/11/09, between</p> <p>8 Sarah Redzic and Catherine Smith, Bates</p> <p>9 West-R 00214 (PAGE-64)</p> <p>10 .</p> <p>11 EXHIBITS PREVIOUSLY MARKED</p> <p>12 Redzic</p> <p>13 Exhibit Description</p> <p>14 No. 4 Time Data Report, 1/1/07</p> <p>15 through 12/31/09, Bates West-R 05866</p> <p>16 through 05869 (PAGE-28)</p> <p>17 .</p> <p>18 DOCUMENT REQUESTS</p> <p>19 Request</p> <p>20 Copy of contract with Ms. Gimeno</p> <p>21 (By Mr. Charlson) (PAGE-60)</p> <p>22 E-mail communications with Ms. Gimeno that</p> <p>23 Ms. Smith was copied in on</p> <p>24 (By Mr. Charlson) (PAGE-61)</p>

Page 57	Page 59
<p>1 Q. And at this time were you aware 2 that \$10,000 was the fee that Rudovsky 3 and Sosnov had been paid by West for 4 previous years?</p>	<p>1 contractors? 2 MR. ZEISLER: Objection. Lacks 3 foundation.</p>
<p>5 MR. ZEISLER: Objection. Lacks 6 foundation.</p>	<p>4 A. I personally did not. 5 Q. Do you know whether others did?</p>
<p>7 A. I was aware of what Karen says 8 in her e-mail.</p>	<p>6 A. I believe one other contractor 7 may have been approached.</p>
<p>9 Q. And do you recall discussions 10 around that time about -- in that time in 11 May 2007 about whether the Pennsylvania 12 Criminal Procedure title should be revised 13 and a new edition published?</p>	<p>8 Q. Do you know who that was? 9 A. No, I don't. 10 Q. Was Ms. Gimeno paid for the 11 supplement?</p>
<p>14 A. I remember it being mentioned, 15 yes.</p>	<p>12 A. Yes, she was. 13 Q. What was her fee?</p>
<p>16 Q. And what decision did West make 17 with respect to preparing a new edition 18 of that treatise?</p>	<p>14 A. I don't recall. 15 Q. Do you know whether it was 16 greater than \$5,000?</p>
<p>19 A. Our decision was not to pursue 20 it.</p>	<p>17 A. That sounds correct. 18 Q. Correct that it was greater 19 than 5,000?</p>
<p>21 Q. And was that because the cost 22 did not -- the cost of paying the authors 23 did not -- wasn't justified by the 24 revenue?</p>	<p>20 A. Oh, I'm sorry. I misunderstood 21 what you said. No, I thought it was 22 around 5,000. 23 Q. And was there a contract 24 executed with Ms. Gimeno?</p>
Page 58	Page 60
<p>1 A. Yes, it was.</p>	<p>1 A. Yes, there was.</p>
<p>2 Q. Ms. Smith, did you have any 3 involvement in the preparation of the 4 April -- the 2009 supplement to 5 Pennsylvania Criminal Procedure that was 6 mailed out in April 2009?</p>	<p>2 Q. And who was involved in 3 executing that contract? 4 A. The Attorney Editor who drew up 5 the contract was Jerome Conkey. I do not 6 know who signed it. It would have been 7 a Director or higher.</p>
<p>7 A. Yes.</p>	<p>8 MR. CHARLSON: Well, Aaron, 9 we'd request a copy of that contract with 10 Ms. Gimeno.</p>
<p>8 Q. What was your involvement?</p>	<p>11 MR. ZEISLER: I'll take it 12 under advisement.</p>
<p>9 A. Suggesting a contractor.</p>	<p>13 Q. And did you deal directly with 14 Ms. Gimeno with respect to preparing the 15 April version of the 2009 supplement?</p>
<p>10 Q. And did you suggest a 11 contractor?</p>	<p>16 A. Only insofar as she was willing 17 to be involved.</p>
<p>12 A. Yes, I did.</p>	<p>18 Q. You mean in hiring her?</p>
<p>13 Q. And did that contractor prepare 14 the supplement?</p>	<p>19 A. Yes.</p>
<p>15 A. Yes, she did.</p>	<p>20 Q. And after she was hired, did 21 you remain part of the process?</p>
<p>16 Q. And who was that?</p>	<p>22 A. I was copied in on some of the 23 communications with her.</p>
<p>17 A. Chris Gimeno.</p>	<p>24 Q. "Some of the communications"</p>
<p>18 Q. Could you spell that?</p>	
<p>19 A. G-I-M-E-N-O.</p>	
<p>20 Q. And who is Chris Gimeno?</p>	
<p>21 A. Chris Gimeno is a contract 22 writer, former employee of West, licensed 23 to practice in Pennsylvania.</p>	
<p>24 Q. Did you contact any other</p>	

Page 61	Page 63
<p>1 meaning e-mail communications? 2 A. Yes. 3 Q. Was -- to your knowledge, was 4 West's counsel part of those discussions? 5 A. I do not know. 6 MR. CHARLSON: I think that any 7 communications with Ms. Gimeno are 8 responsive to requests that we've already 9 served, and so I request production of 10 all such e-mails. 11 MR. ZEISLER: I'll take it 12 under advisement. 13 Q. Had you worked with Ms. Gimeno 14 before? 15 A. Yes. 16 Q. While she was an employee of 17 West? 18 A. Yes. 19 Q. Did you work with her as a 20 contractor after she left West? 21 A. No. 22 Q. Had she worked as a contractor 23 for West? 24 A. Yes.</p>	<p>1 Pennsylvania Criminal Procedure, the order 2 couldn't be fulfilled? 3 A. That's correct. 4 MR. ZEISLER: Objection. 5 Q. Is that hold still on the 6 title? 7 A. I do not know. 8 Q. Who would you expect to know 9 that? 10 A. Probably Sarah Redzic. 11 Q. Is Pennsylvania Criminal 12 Procedure still under your team? 13 A. No. 14 Q. Who's the coordinator of that 15 team now? 16 A. For the Attorney Editors it 17 would be Glenn Guarino. 18 Q. And do you know whether any -- 19 do you know whether any orders for 20 Pennsylvania Criminal Procedure have been 21 fulfilled since February of 2009? 22 A. I do not know. 23 MR. CHARLSON: A one-page 24 e-mail marked West-R 00214 will be Smith</p>
Page 62	Page 64
<p>1 Q. But not with your involvement? 2 A. Correct. 3 MR. CHARLSON: I'll ask the 4 court reporter to mark as the next in 5 order. Redzic Exhibit 5? I'm sorry, 6 Smith Exhibit 5. 7 (The following exhibit was 8 marked for identification: Smith 5.) 9 Q. I've handed you what's marked 10 West-R 216 to 217. It's a string of 11 e-mails that refers to something called a 12 -- that refers to a hold being put on 13 Criminal Procedure in February 2009. Do 14 you recall that happening? 15 A. Yes. 16 Q. And what is a hold? 17 A. Discontinuance of sale of the 18 publication. 19 Q. And why was West putting a hold 20 on Pennsylvania Criminal Procedure? 21 MR. ZEISLER: Objection. 22 A. Because of this lawsuit. 23 Q. So does that mean that if 24 anybody -- anybody who requested to order</p>	<p>1 Exhibit 6. 2 (The following exhibit was 3 marked for identification: Smith 6.) 4 Q. Ms. Smith, I'm showing you an 5 e-mail you sent to Sarah Redzic on 6 February 11, 2009, in response to an 7 e-mail from her to you. The e-mails 8 refer to a marketing piece that's 9 scheduled to mail in March that contains 10 PA PR Volumes 2 and 2A. Does that refer 11 to Pennsylvania Criminal Procedure? 12 A. Yes, it does. 13 Q. And what -- what was your 14 understanding of what Ms. Redzic was 15 saying about letting the marketer know to 16 take the title off the mailer? 17 MR. ZEISLER: I'm sorry, could 18 you repeat that question, please? 19 (The reporter read the requested 20 material.) 21 MR. ZEISLER: Thank you. 22 A. My understanding was that we 23 would not be sending out any marketing 24 pieces concerning this volume of</p>

**EXHIBIT "4"**

## **Charlson, Noah H.**

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**From:** Charlson, Noah H.  
**Sent:** Thursday, April 15, 2010 4:01 PM  
**To:** 'Aaron M. Zeisler'  
**Cc:** Bazelon, Richard L.  
**Subject:** Rudovsky v. West

Aaron: There are a number of matters that are still outstanding from the recent depositions.

Specifically, I requested on the record the following items, to which I have received no response:

1. Any email communications from Sarah Redzic to Karen or Amy advising them that the Supplement was complete. (Redzic p. 64)
2. The identification of any publications that Ms. Redzic worked on prior to October 2008 involving criminal law. (Redzic p. 69).
3. A copy of West's editorial standards for instruction lines. (Redzic p. 89)
4. A copy of West's contract with Chris Gimeno (Davis) - Smith p. 60.
5. Any email communications with Ms. Gimeno. Smith p. 61.
6. Email from Karen Earley requesting that the language on the scope statement be changed.

In addition, given that West was able to produce virtually every Westlaw search ever performed in the Criminal Practice and Procedure database going back several years, I find it difficult to believe that West is unable to produce Ms. Redzic's search records for the time period in 2008 when she was "working" on the 2008-09 supplement. I believe that these records are responsive to requests already made and I reiterate them now. Otherwise I will ask Judge Fullam to order their production.

Since Judge Fullam does not require a pretrial memorandum, I propose that we exchange our exhibit lists and witness lists two weeks prior to trial.

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## Charlson, Noah H.

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**From:** Charlson, Noah H.  
**Sent:** Sunday, May 02, 2010 12:00 PM  
**To:** 'Aaron M. Zeisler'  
**Cc:** Bazelon, Richard L.  
**Subject:** RE: Rudovsky v. West - pre-trial

Aaron: The contract that you provided us requires production of the manuscript by March 31, but it is executed by West on April 27, and by Chris Gimeno sometime earlier in April 9 (the date is illegible). This strongly suggests that there must be other written communication between them, which has not been produced. Obviously, these documents are responsive to earlier discovery requests, and should have been produced long ago. I'd prefer not to have to bring a motion, so please produce all correspondence. Also, please identify the person who signed the contract on behalf of West.

**oah H. Charlson**  
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**From:** Aaron M. Zeisler [mailto:azeisler@ssbb.com]  
**Sent:** Friday, April 30, 2010 5:11 PM  
**To:** Charlson, Noah H.  
**Subject:** Fw: Rudovsky v. West - pre-trial

Aaron M. Zeisler  
Satterlee Stephens Burke & Burke LLP  
230 Park Avenue  
New York, New York 10169  
Tel: (212) 404-8737  
azeisler@ssbb.com

---

**From:** Aaron M. Zeisler  
**To:** 'Charlson, Noah H.'  
**Sent:** Fri Apr 30 16:27:00 2010  
**Subject:** Rudovsky v. West - pre-trial

Noah,

You must be busy because I still haven't heard from you. With respect to exchanging pre-trial materials, I would propose that you provide your proposed exhibit list on Monday and then we can add to it (I would imagine there will be substantial overlap). As for witness lists, I propose exchanging them on Wednesday.

5/12/2010

**Charlson, Noah H.**

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**From:** Charlson, Noah H.  
**Sent:** Monday, May 03, 2010 4:34 PM  
**To:** 'Aaron M. Zeisler'  
**Cc:** 'James Rittinger'; Bazelon, Richard L.  
**Subject:** RE: Rudovsky v. West - pre-trial

We are entitled to 21 days pursuant to the Federal Rule, which, i will remind you, was passed in December 2009, and therefore, as a specific, later-adopted federal rule addressed to the specific situation of Summary Judgment motions, supersedes the general motion practice rule of the EDPA.

In any event, you can expect our response on Wednesday the 12th of May. I invite you to contend to Judge Fullam that our responsive brief is dilatory, when you filed your motion less than a month before trial. Please also advise me as soon as possible about the correspondence with Ms. Gimeno, which is extremely dilatory.

**Noah H. Charlson**  
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**Direct Dial: (215) 609-3147**

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**From:** Aaron M. Zeisler [mailto:azeisler@ssbb.com]  
**Sent:** Monday, May 03, 2010 4:30 PM  
**To:** Charlson, Noah H.  
**Cc:** James Rittinger; Bazelon, Richard L.  
**Subject:** RE: Rudovsky v. West - pre-trial

Noah, as I said on Friday, we would stipulate to May 7 to give you a few extra days. (May 12 would be 21 days).

Aaron

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

**From:** Charlson, Noah H. [mailto:NCharlson@bazless.com]  
**Sent:** Monday, May 03, 2010 2:08 PM  
**To:** Aaron M. Zeisler  
**Cc:** James Rittinger; Bazelon, Richard L.  
**Subject:** RE: Rudovsky v. West - pre-trial

Aaron: I continue to disagree with you, but in the interest of spending time on more important things than arguing about this, will you stipulate to a May 12 filing date for our opposition to summary judgment,

5/12/2010



**Charlson, Noah H.**

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**From:** Charlson, Noah H.  
**Sent:** Wednesday, May 05, 2010 5:04 PM  
**To:** 'Aaron M. Zeisler'  
**Cc:** Bazelon, Richard L.  
**Subject:** Plaintiff's Witness List and Deposition Designations

**Attachments:** Plaintiffs' Witness List.doc; Teri Kruk Designations.doc; Catherine Smith Designations.doc; Karen Earley Designations.doc; Sarah Redzic Designations.doc

Aaron: Attached are plaintiffs' Trial Witness List and Deposition Designations. We will be sending over our exhibit list tomorrow morning. Please provide defendants' witness list by tomorrow, and please be prepared to add defendants' exhibits to our list by Friday.

Please also let me know when we can expect the correspondence with Ms. Gimeno.

Thanks.



Plaintiffs' Witness  
List.doc (...



Teri Kruk  
esignations.doc (37.



Catherine Smith  
Designations.d...



Karen Earley  
Designations.doc



Sarah Redzic  
...Designations.doc ...

**Noah H. Charlson**  
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**Charlson, Noah H.**

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**From:** Charlson, Noah H.  
**Sent:** Thursday, May 06, 2010 4:55 PM  
**To:** 'Aaron M. Zeisler'  
**Subject:** RE: Defendants' Trial Witness List

Aaron: Please confirm that Chris Davis and Chris Gimeno are the same person. Note that we will object to any testimony by West witnesses about the April 2009 supplement if the correspondence between West and Chris Gimeno are not produced by Monday.

**Noah H. Charlson**  
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**From:** Aaron M. Zeisler [mailto:azeisler@ssbb.com]  
**Sent:** Thursday, May 06, 2010 4:42 PM  
**To:** Charlson, Noah H.  
**Cc:** Bazelon, Richard L.; James Rittinger  
**Subject:** Defendants' Trial Witness List

Noah,

Attached please find Defendants' Witness List. We will provide you with our list of deposition designations tomorrow.

Aaron

Aaron M. Zeisler, Esq.  
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To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

## **Charlson, Noah H.**

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**From:** Charlson, Noah H.  
**Sent:** Saturday, May 08, 2010 5:48 PM  
**To:** 'Aaron M. Zeisler'  
**Cc:** Bazelon, Richard L.  
**Subject:** Rudovsky v. West - Gimeno Documents

Aaron: Thank you for producing the Gimeno documents that you sent today. It is very unfortunate that these highly relevant documents were not produced before the West witnesses were deposed. The documents make clear that Ms. Smith was more "in the loop" with respect to Ms. Gimeno's involvement than she testified to at her deposition.

Furthermore, the documents also strongly suggest that there are additional communications that were not produced. For example, Mr. Kahnke's March 30 2009 email to Ms. Gimeno refers to "materials that I sent you." Obviously, the transmittal letter and documents themselves should have been produced. Moreover, there is a gap in the documents from March 2, the date on which Ms. Gang advises that she has received approval to engage Ms. Gimeno, to March 30, at which point Ms. Gimeno is apparently nearly complete. This gap in communication is surprising, to say the least. Given the difficulties we have had in obtaining these documents, I respectfully request that you inquire of your client, as well as Ms. Gimeno, about this remarkable gap in communications. In this regard, I note that the produced documents all appear to come from West, rather than from Ms. Gimeno. Has Ms. Gimeno been requested to produce all of her documents?

I also note that Mr. Kahnke has labeled his communication with Ms. Gimeno as "ATTORNEY CLIENT PRIVILEGE COMMUNICATION." Ms. Smith testified that Mr. Kahnke was an "attorney editor." Please advise whether Mr. Kahnke is an attorney, and what his actual position and title are (Mr. Kahnke's LinkedIn page describes him as "Senior Principal Attorney for Thomson Reuters"). Please also advise whether West is purporting to assert a privilege over these communications. (I note that West produced no privilege log with these documents listed)

We take this extremely delayed production of obviously relevant and responsive materials very seriously. Mr. Kahnke refers to "shortcomings" in the 2008-09 Supplement prepared by Ms. Redzic. Had West not withheld production of these documents until a week before trial, and we had therefore been aware of the nature of these communications between West and Ms. Gimeno, we certainly would have taken the depositions of Ms. Gimeno and Mr. Kahnke.

We will be reviewing our options with respect to this disturbing disclosure. I strongly suggest that West take whatever steps are necessary to mitigate the prejudice caused to plaintiff, including producing all materials exchanged between Ms. Gimeno and anyone at West, identifying and producing all materials provided to Ms. Gimeno, and immediately making Ms. Gimeno and Mr. Kahnke available for deposition in Philadelphia, sometime before trial.

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**EXHIBIT "5"**

**Charlson, Noah H.**

---

**From:** Aaron M. Zeisler [azeisler@ssbb.com]  
**Sent:** Friday, May 07, 2010 7:12 PM  
**To:** Charlson, Noah H.  
**Cc:** James Rittinger  
**Subject:** West production - Gimeno (Davis)  
**Attachments:** WEST-R-6341-6359.pdf

Noah,

Attached please find Gimeno emails in response to your recent request. The production of these specific documents is without waiver of any work-product objections or privileges that West has previously asserted.

Aaron

Aaron M. Zeisler, Esq.  
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To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

## Charlson, Noah H.

---

**From:** Aaron M. Zeisler [azeisler@ssbb.com]  
**Sent:** Tuesday, May 11, 2010 5:19 PM  
**To:** Charlson, Noah H.  
**Cc:** Bazelon, Richard L.; James Rittinger  
**Subject:** Re: Rudovsky v. West - Gimeno Documents

Noah,

We have confirmed that you possess all written communications between west and chris gimeno davis. We have also confirmed that the "materials" sent to ms davis referenced in the email you cited was a regular mail package (not email) containing only copies of the plaintiffs' complaint, the treatise itself and the 2007-08 and 2008-09 pocket parts, which west previously produced. Thus, to the extent that west had discovery obligations it has met them, and the fact that west listed davis and kahnke and their roles in its interrogatories and in its rule 26a disclosures (for davis) completely undercuts your newly-minted assertion that you were somehow prejudiced from taking their depositions. Indeed, you even indicated at one point during discovery that you were going to depose them -- but you failed to do so -- and not for lacking information about their roles (again, which we set forth in disclosures). Accordingly, we consider this issue at an end.

With respect to the subject of jean maess' testimony, please see our rule 26a disclosures for the topics, which have not changed. Also, please recall that you also elected not to depose ms maess.

Aaron

Aaron M. Zeisler  
Satterlee Stephens Burke & Burke LLP  
230 Park Avenue  
New York, New York 10169  
Tel: (212) 404-8737  
azeisler@ssbb.com

---

**From:** Charlson, Noah H.  
**To:** Aaron M. Zeisler  
**Cc:** Bazelon, Richard L. ; James Rittinger  
**Sent:** Mon May 10 17:24:19 2010  
**Subject:** RE: Rudovsky v. West - Gimeno Documents

Aaron: You are missing the point. Had West complied with its discovery obligations and produced the correspondence when it was obligated to do so, I would have been aware that there was relevant communications between Gimeno, Kahnke, and Smith. By not producing responsive documents, West prejudiced our ability to take discovery of those witnesses.

With respect to your point about other methods of communication, I think you should take another look at Kahnke's email, where he refers to "the materials I sent you." Unless he sent them by carrier pigeon, there should be a record of the correspondence.

In light of your recent representation that you can only produce "what exists," and Mr. Kahnke's reference to the existence of other correspondence, the only reasonable conclusion is that West has destroyed, or at least failed to preserve, relevant documents during the pendency of a litigation.

In the absence of the immediate production of the referenced correspondence, we will be taking appropriate steps

5/12/2010

**EXHIBIT "6"**

**Smith, Catherine J. (West)**

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**From:** Kahnke, Jerome (West)  
**Sent:** Monday, March 02, 2009 3:44 PM  
**To:** Gang, Polly (West)  
**Cc:** Smith, Catherine J. (West)  
**Subject:** RE: Chris Gimeno

ATTORNEY CLIENT PRIVILEGED COMMUNICATION

Polly:

I have been in contact with Chris Gimeno today, and we are moving forward.

Have a great day!

Jerome

---

**From:** Gang, Polly (West)  
**Sent:** Monday, March 02, 2009 7:38 AM  
**To:** Kahnke, Jerome (West); Smith, Catherine J. (West)  
**Subject:** Chris Gimeno

We are cleared to use Chris so you can go ahead and contract with her.

Polly

**Paulette Gang**  
Dir, Content Ops  
**Thomson Reuters**  
Phone: 585-546-5530  
polly.gang@thomsonreuters.com  
thomsonreuters.com



**Smith, Catherine J. (West)**

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**From:** Kahnke, Jerome (West)  
**Sent:** Monday, March 30, 2009 1:18 PM  
**To:** cgimeno1@rochester.rr.com  
**Cc:** Smith, Catherine J. (West); Eckleben, Jon (West)  
**Subject:** RE: Pennsylvania Criminal Procedure Update

Chris:

Thank you for the prompt and positive response.

Although it would normally be a great idea to add a new chapter in the fashion you have described, in light of the ever-increasing pressure we are now under to publish this update as soon as possible, please forget the new chapter and instead keep your focus on the fixing the shortcomings identified by the name authors in the current pocket part. As we have discussed (and understanding that a relatively small number of rules need to be updated per the materials I sent you), the primary focus in that regard should be updating the case law. Beyond that, the unique circumstances in which we find ourselves re this project are such that a list of the cases you have updated, added, or otherwise addressed would be more helpful than adding a new chapter.

Regarding your electronic file, please send it to both me and Jon Eckleben. Jon will be the Lead Production Specialist on this project, and you will see his e-mail address included above.

Finally, I have mailed you a formal standard contract consistent with our understanding (a flat fee of \$3,500).

Thanks again for diligently working to produce a quality update as soon as possible ... and have a great day!

Jerome

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

**From:** cgimeno1@rochester.rr.com [mailto:cgimeno1@rochester.rr.com]  
**Sent:** Monday, March 30, 2009 11:38 AM  
**To:** Kahnke, Jerome (West)  
**Subject:** Re: Pennsylvania Criminal Procedure Update

Privileged Attorney Client Communication

Hi Jerome,

I am working away on this. I am 2/3 of the way through the book and hope to be finished by Wednesday. Where do I send the electronic file?

Also, I was thinking about the anti-terrorism laws and was wondering, if Pa has any, should I add them in as a new chapter?

Thanks!

Chris

---- jerome.kahnke@thomsonreuters.com wrote:  
> Privileged Attorney Client Communication

>  
>  
>  
> Chris:  
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>  
> I just left you a too lengthy voice-mail message regarding the project  
> referred to above (my apologies). As I mentioned in that message, the  
> pressure to get this update published as soon as possible is building,  
> and yet, as always, to need to make sure that what we publish is a  
> high-quality product....  
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>  
> Could we please visit about where things stand in regard to your  
> efforts at your very earliest convenience?  
>  
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>  
> Thanks again for your assistance on this very challenging project ...  
> and have a great day!  
>  
>  
>  
> Jerome  
>

**Smith, Catherine J. (West)**

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**From:** Kahnke, Jerome (West)  
**Sent:** Tuesday, March 31, 2009 3:38 PM  
**To:** Smith, Catherine J. (West)  
**Cc:** Eckleben, Jon (West)  
**Subject:** Pennsylvania Criminal Procedure Update

Privileged Attorney Client Communication

Catherine:

I just spoke directly with Chris Gimeno regarding her progress on the project referred to above. She indicated that she would make every effort to send the first five chapters later today, and that she would attempt to send another five chapters tomorrow, with another five chapters each day after that. She is targeting Friday to complete the project (although, at a rate of five chapters per day, she would not finish until Saturday).

I told Chris that we were now being asked for hourly updates, and I emphasized that time is a major concern.

I will continue to keep you posted.

Thank you ... and have a great day!

Jerome

## **Smith, Catherine J. (West)**

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**From:** Kahnke, Jerome (West)  
**Sent:** Wednesday, April 01, 2009 1:02 PM  
**To:** cgimeno1@rochester.rr.com  
**Cc:** Eckleben, Jon (West); Smith, Catherine J. (West)  
**Subject:** Pennsylvania Criminal Procedure Update

Chris:

I have reviewed your submission for the first five chapters. Your work appears to be substantively excellent. The only actual error that I noted is in subsection 4.9A where the title should be "The Right to Effective Assistance of Counsel." (You currently have "Ineffectiveness Standards" which is, of course, the title of subsection 4.9B)

Beyond that, the only problem I see concerns your instruction lines, and you should be able to fix that problem very easily. While many if not most of your instruction lines are accurate and workable, there are some problems and inconsistencies. For example, for Section 4.0 you have an insert with the instruction line: "Add the following after second sentence of third paragraph p. 42." When you look at the actual bound volume, Section 4.0 begins on page 42, and only the first portion of the first paragraph appears on page 42. It is not clear whether you intend to add the new material after the second sentence of the first paragraph on page 42 (as I believe is the case) or whether you intend to have the material added after the second sentence of the third paragraph on page 43.

In a similar vein, you will see that, in your instruction lines for Section 4.9B, you sometimes appear to be referring to a paragraph in the section, while at other time you refer to a paragraph on a specific page. At another point, your instruction states: "Add the following after the third sentence of the second paragraph, p. 57." However, neither the second paragraph of the section nor the second paragraph on page 57 has three sentences.

Finally, with regard to instruction lines generally, you should make every effort to be as precise as possible while following the convention already used in the current pocket part. You will note, for example, that the primary authors refer to the paragraph in the section in their instruction lines for Section 4.9B, and that they specifically refer, for example, to the "fifth paragraph of section." Of course, if you would like to instead refer to a paragraph on a particular page of the book (when, for example, you are dealing with a lengthy section), please again be precise by referring, for example, to "the first full paragraph" on a particular page.

Again, the substance of your work appears to be very good. Please briefly stop your other work just long enough to make the instruction lines completely accurate and as consistent with the current pocket part as possible. Once you have done that, please send it again so that we can move forward with releasing this first partial submission into production.

Thanks again for your excellent assistance with this very important project ... and have a great day!

Jerome

**Smith, Catherine J. (West)**

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**From:** cgimeno1@rochester.rr.com  
**Sent:** Wednesday, April 01, 2009 2:54 PM  
**To:** Kahnke, Jerome (West)  
**Cc:** Smith, Catherine J. (West); Eckleben, Jon (West)  
**Subject:** Re: Pennsylvania Criminal Procedure Update  
**Attachments:** PaPrac Chap1-5.doc; PaPrac Chap6-10.doc

PRIVILEGED ATTORNEY CLIENT COMMUNICATION

Here are the updated files. Sorry about the confusion!

Chris

----- [jerome.kahnke@thomsonreuters.com](mailto:jerome.kahnke@thomsonreuters.com) wrote:

> Chris:

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> I have reviewed your submission for the first five chapters. Your  
> work appears to be substantively excellent. The only actual error  
> that I noted is in subsection 4.9A where the title should be "The  
> Right to Effective Assistance of Counsel." (You currently have  
> "Ineffectiveness Standards" which is, of course, the title of  
> subsection 4.9B)

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> Beyond that, the only problem I see concerns your instruction lines,  
> and you should be able to fix that problem very easily. While many if  
> not most of your instruction lines are accurate and workable, there  
> are some problems and inconsistencies. For example, for Section 4.0  
> you have an insert with the instruction line: "Add the following after  
> second sentence of third paragraph p. 42." When you look at the  
> actual bound volume, Section 4.0 begins on page 42, and only the first  
> portion of the first paragraph appears on page 42. It is not clear  
> whether you intend to add the new material after the second sentence  
> of the first paragraph on page 42 (as I believe is the case) or whether  
> you intend to have the material added after the second sentence of the  
> third paragraph on page 43.

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> In a similar vein, you will see that, in your instruction lines for  
> Section 4.9B, you sometimes appear to be referring to a paragraph in  
> the section, while at other time you refer to a paragraph on a  
> specific page. At another point, your instruction states: "Add the  
> following after the third sentence of the second paragraph, p. 57."  
> However, neither the second paragraph of the section nor the second  
> paragraph on page 57 has three sentences.

>

>

>

> Finally, with regard to instruction lines generally, you should make  
> every effort to be as precise as possible while following the  
> convention already used in the current pocket part. You will note,

> for example, that the primary authors refer to the paragraph in the  
> section in their instruction lines for Section 4.9B, and that they  
> specifically refer, for example, to the "fifth paragraph of section."  
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> particular page of the book (when, for example, you are dealing with a  
> lengthy section), please again be precise by referring, for example,  
> to " the first full paragraph" on a particular page.

>  
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>

> Again, the substance of your work appears to be very good. Please  
> briefly stop your other work just long enough to make the instruction  
> lines completely accurate and as consistent with the current pocket  
> part as possible. Once you have done that, please send it again so  
> that we can move forward with releasing this first partial submission  
> into production.

>  
>  
>

> Thanks again for your excellent assistance with this very important  
> project ... and have a great day!

>  
>  
>

> Jerome

>

## Chapter 1: The Initiation of Criminal Proceedings and the Initial Steps for Defense Counsel

### *&s;1.4 Private Criminal Complaint*

<r>Am. Jur. 2d, Criminal Law &s;511</r>

<r>C.J.S., Criminal Law &s;439</r>

<r>Am. Jur. Pleading and Practice Forms, Criminal Procedure &ss;80 et seq.</r>

Add the following after second sentence of first paragraph of Comment p. 7:

A district attorney has the duty to avoid prosecution by withdrawing prior approval given a private criminal complaint when that office is satisfied that such a course will advance the interests of justice. <c>Com. v. Michaliga, 947 A.2d 786, 2008 PA Super 78 (2008)</c>.

### *&s;1.4 Private Criminal Complaint*

<r>Am. Jur. 2d, Criminal Law &s;511</r>

<r>C.J.S., Criminal Law &s;439</r>

<r>Am. Jur. Pleading and Practice Forms, Criminal Procedure &ss;80 et seq.</r>

Add the following at the end of the Comment p. 7:

<p>When a district attorney disapproves a private criminal complaint on wholly policy considerations or on a hybrid of legal and policy considerations, a trial court's standard of review of the district attorney's decision is abuse of discretion; thereafter, an appellate court will review the trial court's decision for an abuse of discretion. In such a case, the complainant has the burden to prove that the district attorney abused his or her discretion, which burden is a heavy one. In order to show that a district attorney abused his or her discretion in disapproving a private criminal complaint on wholly policy considerations or on a hybrid of legal and policy considerations, the complainant must demonstrate that the district attorney's decision amounted to bad faith, fraud, or unconstitutionality. In the absence of such evidence, a trial court cannot presume to supervise the district attorney's exercise of prosecutorial discretion and should leave the district attorney's decision undisturbed. <c>Com. v. Michaliga, 947 A.2d 786, 2008 PA Super 78 (2008)</c>.

## Chapter 4 Counsel

### *&s;4.0 Introductory Comment: Right to and Waiver of Counsel*

<r>Am. Jur. 2d, Criminal Law &ss;1097 et seq.</r>

<r>C.J.S., Criminal Law &ss;339 et seq.</r>

<r>Am. Jur. Pleading and Practice Forms, Criminal Procedure &ss;54</r>

<r>Am. Jur. Pleading and Practice Forms, Criminal Procedure &ss;55 et seq.</r>

Add the following after the first sentence of the first paragraph of section p. 42:

A suspect, however, has no Sixth Amendment right to counsel until the first formal charging proceeding has transpired, and it can be said that the formal initiation of adversarial judicial proceedings has occurred. <c>Com. v. Page, --- A.2d ----, 2009 WL 243046, 2009 PA Super 20 (Pa.Super. Feb 03, 2009)</c>.

Add the following after second sentence of first paragraph of section p. 42:

Among other factors that may be relevant to a defendant's financial ability to hire private counsel are the probable cost of representation for the crime charged and the defendant's liabilities. <c>Com. v. Cannon, 954 A.2d 1222, 2008 PA Super 178 (Pa.Super. Aug 06, 2008)</c>.

Add the following after the fourth sentence of the first paragraph of section p. 42:

Neither the Rules of Criminal Procedure nor due process, however, requires that the appointment of counsel to defendants unable to employ counsel be made within a specific amount of time prior to the preliminary hearing. <c>Com. v. Wright, 961 A.2d 119 (Pa. Dec 22, 2008)</c>.

Add the following after first sentence of third paragraph of section p. 43:

The right to self-representation is necessarily implied within the structure of the Sixth Amendment of the United States Constitution. <c>Com. v. Blakeney, 596 Pa. 510, 946 A.2d 645 (Pa. May 01, 2008)</c>.

Add the following after second sentence of fourth paragraph of section p. 43:

Thus, before a defendant will be permitted to proceed pro se, the defendant must knowingly, voluntarily, and intelligently waive the Sixth Amendment right to counsel. If the trial court finds that the defendant's waiver of the Sixth Amendment right to counsel



*&s;4.7 Motion to Withdraw as Counsel*

<r>Am. Jur. 2d, Attorneys at Law &ss;181 et seq.</r>

<r>Am. Jur. 2d, Criminal Law &ss;1097 et seq.</r>

<r>C.J.S., Criminal Law &s;396</r>

<r>Am. Jur. Pleading and Practice Forms, Criminal Procedure &ss;66 et seq.</r>

Add the following after first sentence of second paragraph of the Comment p. 52:

An attorney owes a client a duty of loyalty, including a duty to avoid conflicts of interest. An actual conflict of interest is evidenced whenever during the course of representation, the interests of defendant and the interests of another client towards whom counsel bears obligations diverge with respect to a material factual or legal issue or to a course of action. An actual conflict of interest is evidenced whenever during the course of representation, the interests of defendant and the interests of another client towards whom counsel bears obligations diverge with respect to a material factual or legal issue or to a course of action. <c>Com. v. Tedford, --- Pa. ----, 960 A.2d 1 (2008)</c>.

Add the following after first sentence of second paragraph of Comment p. 52:

A defendant cannot prevail on a preserved claim that trial counsel had a conflict of interest absent a showing of actual prejudice; nevertheless, the Supreme Court presumes prejudice when the defendant shows that trial counsel was burdened by an actual, rather than mere potential, conflict of interest. To show that trial counsel had an actual conflict of interest, such that prejudice would be presumed, a defendant must demonstrate that (1) trial counsel actively represented conflicting interests and (2) those conflicting interests adversely affected trial counsel's performance. Interests of trial counsel's clients actually conflict, such that prejudice would be presumed, when during the course of representation they diverge with respect to a material factual or legal issue or to a course of action. <c>Com. v. Collins, --- Pa. ----, 957 A.2d 237 (2008)</c>.

*&s;4.9 B. Ineffectiveness Standards*

<r>Am. Jur. 2d, Criminal Law &ss;1135 et seq.</r>

<r>C.J.S., Criminal Law &ss;397 et seq.</r>

Add the following after first indented paragraph after "...1076-77 (Pa.1999)" in Part B of this section p. 57:

<c>Com. v. Daniels, 963 A.2d 409, 2009 WL 153250 (2009)</c>; <c>Com. v. Jones, 597 Pa. 286, 951 A.2d 294 (2008)</c>; <c>Com. v. Dennis, 597 Pa. 159, 950 A.2d 945 (2008)</c>.

*&s;4.9 B. Ineffectiveness Standards*

<r>Am. Jur. 2d, Criminal Law &ss;1135 et seq.</r>

<r>C.J.S., Criminal Law &ss;397 et seq.</r>

Add the following as new paragraph following second indented paragraph in Part B of this section p. 57:

A failure to satisfy any prong of the test for ineffective assistance requires rejection of the claim. <c>Com. v. Daniels, 963 A.2d 409, 2009 WL 153250 (2009)</c>.

A court, therefore, need not reach every prong of the test for ineffective assistance if the defendant fails to prove any one prong, <c>Com. v. Daniels, 963 A.2d 409, 2009 WL 153250 (2009)</c>; <c>Com. v. Puksar, 597 Pa. 240, 951 A.2d 267 (2008)</c>.

which, in turn, requires rejection of a layered claim of ineffective assistance of direct-appeal counsel. <c>Com. v. Collins, --- Pa. ---, 957 A.2d 237 (2008)</c>; <c>Com. v. Puksar, 597 Pa. 240, 951 A.2d 267 (2008)</c>.

*&s;4.9 B. Ineffectiveness Standards*

<r>Am. Jur. 2d, Criminal Law &ss;1135 et seq.</r>

<r>C.J.S., Criminal Law &ss;397 et seq.</r>

Add the following after second sentence of sixth full paragraph of Part B of this section, after "...was reasonable." p. 58:

In other words, it must be shown that counsel's action or inaction caused prejudice to the defendant. <c>Com. v. Daniels, 963 A.2d 409, 2009 WL 153250 (2009)</c>; <c>Com. v. Wright, 961 A.2d 119 (2008)</c>; <c>Com. v. Clark, 961 A.2d 80, 2008 WL 5235786 (Pa. 2008)</c>; <c>Com. v. Cook, 597 Pa. 572, 952 A.2d 594 (2008)</c>; <c>Com. v. Puksar, 597 Pa. 240, 951 A.2d 267 (Pa. Jul 22, 2008)</c>; <c>Com. v. Green, 957 A.2d 1238, 2008 PA Super 220 (2008)</c>.

*&s;4.9 B. Ineffectiveness Standards*

<r>Am. Jur. 2d, Criminal Law &ss;1135 et seq.</r>

240, 951 A.2d 267 (2008)</c>; <c>Com. v. Hammond, 953 A.2d 544, 2008 PA Super 128 (2008), reargument denied (Aug 19, 2008)</c>.

Counsel also is not ineffective for failing to raise meritless claims. <c>Com. v. Wright, 961 A.2d 119 (2008)</c>.

Likewise, trial counsel cannot be held ineffective for failing to anticipate a change in the law. <c>Com. v. Dennis, 597 Pa. 159, 950 A.2d 945 (2008)</c>.

*&s;4.9 B. Ineffectiveness Standards*

<r>Am. Jur. 2d, Criminal Law &ss;1135 et seq.</r>

<r>C.J.S., Criminal Law &ss;397 et seq.</r>

Add the following at end of Part B of this section p. 59:

Strickland (Strickland v. Washington) requires that a court assess counsel's performance under the law in existence at the time counsel acted when reviewing a claim of ineffective assistance of counsel. <c>Com. v. Daniels, 963 A.2d 409, 2009 WL 153250 (2009)</c>. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. <c>Com. v. Daniels, 963 A.2d 409, 2009 WL 153250 (2009)</c>; <c>Com. v. Sattazahn, 597 Pa. 648, 952 A.2d 640 (2008)</c>; <c>Com. v. Williams, 597 Pa. 109, 950 A.2d 294 (2008)</c>; <c>Com. v. Hammond, 953 A.2d 544, 2008 PA Super 128 (2008), reargument denied (Aug 19, 2008)</c>.

*&s;4.9 B. Ineffectiveness Standards*

<r>Am. Jur. 2d, Criminal Law &ss;1135 et seq.</r>

<r>C.J.S., Criminal Law &ss;397 et seq.</r>

Add the following at end of sixth paragraph of Part B of this section, p. 57:

Ineffectiveness claims also have failed because a trial court is within its discretion to exclude jurors who express reservations about imposing the death penalty, and trial counsel has no constitutional obligation to attempt to change the jurors' views. <c>Com. v. Steele, 961 A.2d 786 (2008)</c>. An effective attorney may refrain from asking a prospective juror repeatedly about racial bias if the attorney believes doing so may anger, embarrass, or annoy a potential juror that the attorney finds acceptable. <c>Com. v. Steele, 961 A.2d 786 (2008)</c>.

In addition, trial counsel will not be found ineffective for failing to pursue a diminished capacity defense when the defendant maintains his or her innocence throughout the trial. <c>Com. v. Gibson, 597 Pa. 402, 951 A.2d 1110 (2008)</c>.

*&s;4.9 B. Ineffectiveness Standards*

<r>Am. Jur. 2d, Criminal Law &ss;1135 et seq.</r>

Add the following at the end of sixth paragraph of Part B of this section, p. 58:

Likewise, ineffectiveness claims stemming from a failure to object to a prosecutor's conduct may succeed when the petitioner demonstrates that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process. <c>Com. v. Tedford, --- Pa. ----, 960 A.2d 1 (Pa. 2008)</c>.

*&s;4.9 B. Ineffectiveness Standards*

<r>Am. Jur. 2d, Criminal Law &ss;1135 et seq.</r>

<r>C.J.S., Criminal Law &ss;397 et seq.</r>

Add the following at the end of seventh paragraph of Part B of this section, p. 59:

If a defendant can show that counsel was ineffective in failing to secure the suppression of evidence pre-trial, the remedy is not a new suppression hearing; instead, determining prejudice in such a case requires an examination of the effect of the tainted evidence on the trial. <c>Com. v. Mallory, 596 Pa. 172, 941 A.2d 686 (2008)</c>.

## Chapter 6 Philadelphia Municipal Court Proceedings

*&s;6.7 Petition to dismiss under Pa.R.Crim.P. 1013 (formerly Rule 6013)*

<k>West's Key Number Digest, Criminal Law &key;577.1 to 577.16</k>

<r>Am. Jur. 2d, Criminal Law &ss;945 to 966</r>

<r>C.J.S., Criminal Law &ss;827 to 875</r>

Add the following as new paragraph at end of Comment p.92:

The rules governing speedy trials serve two equally important functions: the protection of the accused's speedy trial rights, and the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. <c>Com. v. Staten, 950 A.2d 1006, 2008 PA Super 118 (2008)</c>.

*&s;6.7 Petition to dismiss under Pa.R.Crim.P. 1013 (formerly Rule 6013)*

<k>West's Key Number Digest, Criminal Law &key;577.1 to 577.16</k>

<r>Am. Jur. 2d, Criminal Law &ss;945 to 966</r>

<r>C.J.S., Criminal Law &ss;827 to 875</r>

Add the following as new paragraph at end of Comment p.92:

The first step in reviewing a speedy trial claim under the municipal speedy trial rule is to determine whether the defendant's trial commenced before the mechanical run date. Where the Commonwealth is prepared to go to trial before the mechanical or adjusted run date of a speedy trial rule, and the court is able to reschedule the trial to commence within 30 days after that run date, a defendant's constitutional rights to a speedy trial are not seriously implicated. For purposes of determining whether the Commonwealth exercised due diligence to bring a defendant to trial within the time limits of a speedy trial rule, a court will find that the Commonwealth acted with due diligence if, prior to the expiration of the mechanical run date, the prosecutor indicates readiness to try the case and requests the earliest possible trial date consistent with the municipal court's business. Reasonable effort includes such actions as the Commonwealth listing the case for trial prior to the run date to ensure that the defendant was brought to trial within the time prescribed by the rule. Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth. It is a fact-specific concept that must be determined on a case-by-case basis. <c>Com. v. Staten, 950 A.2d 1006, 2008 PA Super 118 (2008)</c>.

*&s;6.7 Petition to dismiss under Pa.R.Crim.P. 1013 (formerly Rule 6013)*

<k>West's Key Number Digest, Criminal Law &key;577.1 to 577.16</k>

## Chapter 7 Accelerated Rehabilitative Disposition and Other Non-Trial Dispositions

### *&s;7.0 Introductory Comment:*

<k>West's Key Number Digest, Sentencing and Punishment &key;2045 et seq.</k>

<r>Am. Jur. 2d, Criminal Law &ss;866 to 869</r>

<r>C.J.S., Criminal Law &ss;556 to 580</r>

Add the following before first full sentence of second paragraph of this section p. 94:

The decision to submit a case for accelerated rehabilitation disposition rests in the sound discretion of the district attorney. <c> **Com. v. Fleming**, 955 A.2d 450, 2008 PA Super 191 (2008)</c>.

### *&s;7.3 Termination of ARD for Violation of Conditions*

<k>West's Key Number Digest, Sentencing and Punishment &key;2087</k>

<r>Am. Jur. 2d, Criminal Law &ss;866 to 869</r>

<r>C.J.S., Criminal Law &ss;576 to 580</r>

Add following to end of first paragraph of this section p. 99:

While a person undergoes the Accelerated Rehabilitative Disposition (ARD) under the driving under the influence (DUI) statute, the criminal proceedings are held in abeyance pending successful completion of the program or revocation for violation of the conditions. If the ARD under the DUI statute is not completed successfully, the defendant may be prosecuted upon revocation of the defendant's participation in the program. <c> **Com. v. Love**, 957 A.2d 765, 2008 PA Super 218 (2008)</c>.

### *&s;7.5 Consequences of ARD acceptance for proceedings in other cases*

<k>West's Key Number Digest, Sentencing and Punishment &key;2045 to 2057</k>

<r>Am. Jur. 2d, Criminal Law &ss;866 to 869</r>

<r>C.J.S., Criminal Law &ss;556 to 580</r>

Add the following to citations following second sentence of third paragraph of section p. 101:

<c> **Gigous v. Com., Dept. of Transp., Bureau of Driver Licensing**, --- A.2d ---, 2009 WL 498676 (Pa.Cmwlth. 2009)</c>, referring to <s>75 Pa.C.S. &s;3806</s>.

## Chapter 9 Pretrial Discovery and Inspection

### *&s;9.0 Introductory Comment*

<k>West's Key Number Digest, Constitutional Law &key;4592 to 4597</k>

<k>West's Key Number Digest, Criminal Law &key;627.5 to 627.8</k>

<r>Am. Jur. 2d, Depositions and Discovery &ss;231 et seq.</r>

<r>C.J.S., Criminal Law &ss;587 to 591, 619 to 643, 663 et seq.</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Criminal Law &ss;194 et seq.</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Depositions and Discovery&ss;6, 7, 9, 12, 13</r>

Add the following after third sentence of seventh paragraph of section p. 127:

<c>Com. v. Collins, --- Pa. ----, 957 A.2d 237 (2008)</c> (the failure of the prosecution to preserve for defense inspection the vehicle in which the victim was shot did not violate the defendant's right to due process in a prosecution for capital murder; absent a request for a defense inspection of vehicle, the defendant failed to trigger any mandatory discovery obligation of the prosecution with respect to the vehicle).

### *&s;9.0 Introductory Comment*

<k>West's Key Number Digest, Constitutional Law &key;4592 to 4597</k>

<k>West's Key Number Digest, Criminal Law &key;627.5 to 627.8</k>

<r>Am. Jur. 2d, Depositions and Discovery &ss;231 et seq.</r>

<r>C.J.S., Criminal Law &ss;587 to 591, 619 to 643, 663 et seq.</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Criminal Law &ss;194 et seq.</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Depositions and Discovery&ss;6, 7, 9, 12, 13</r>

Add the following as new paragraph after fourth paragraph of section p. 125:

A *Brady* violation consists of three elements: (1) suppression by the prosecution (2) of evidence, whether exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. <c>Com. v. Tedford, --- Pa. ----, 960 A.2d 1 (2008)</c>; <c>Com. v. Gibson, 597 Pa. 402, 951 A.2d 1110 (2008)</c>; <c>Com. v. Pagan, 597 Pa. 69, 950 A.2d 270 (Pa. Jun 17, 2008)</c>; <c>Com. v. Clark, 961 A.2d 80, 2008 WL 5235786 (Pa. 2008)</c>. In order to establish a *Brady* violation, the evidence purportedly suppressed must have been material to guilt. <c>Com. v. Clark, 961 A.2d 80, 2008 WL 5235786 (Pa. 2008)</c>. Under *Brady*, evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. <c>Com. v. Puksar, 597 Pa. 240, 951 A.2d 267 (2008)</c>. No *Brady* violation occurs, therefore, if the evidence at issue is available to the defense from non-governmental sources. <c>Com. v. Tedford, --- Pa. ----, 960 A.2d 1 (2008)</c>. Also, a defendant's argument, comprised entirely of conjecture,

Commonwealth for purposes of the pretrial-discovery rule. As the text of Pa.R.Crim.P. Rule 573(B)(1) suggests, when the evidence is exclusively in the custody of police, possession is not attributed to the Commonwealth for purposes of the Rule. Whether the Commonwealth's failure to disclose evidence that is exclusively in police custody constitutes a violation of Brady, of course, is a different matter. If the undisclosed evidence implicates (i.e., if it is favorable to the accused and its non-disclosure resulted in prejudice to his or her case), then the Commonwealth is charged with its possession even while it is exclusively in the custody of police. <c>Com. v. Collins, --- Pa. ----, 957 A.2d 237 (2008)</c>, referring to Kyles and Burke.

*&s;9.0 Introductory Comment*

<k>West's Key Number Digest, Constitutional Law &key;4592 to 4597</k>

<k>West's Key Number Digest, Criminal Law &key;627.5 to 627.8</k>

<r>Am. Jur. 2d, Depositions and Discovery &ss;231 et seq.</r>

<r>C.J.S., Criminal Law &ss;587 to 591, 619 to 643, 663 et seq.</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Criminal Law &ss;194 et seq.</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Depositions and Discovery&ss;6, 7, 9, 12, 13</r>

Add the following after fourth paragraph of section p. 125:

<c>Com. v. Pagan, 597 Pa. 69, 950 A.2d 270 (Pa. Jun 17, 2008)</c> (Commonwealth's alleged failure to disclose that police officer was subject of internal investigation prior to defendant's trial for first-degree murder and related offenses did not constitute Brady violation, where there was no evidence that prosecutor was aware of investigation at time of trial, fact of investigation itself was not admissible to impeach officer, and officer was not aware of investigation at time of trial, and therefore, there was no reason to believe that he testified in exchange for favorable treatment).

*&s;9.0 Introductory Comment*

<k>West's Key Number Digest, Constitutional Law &key;4592 to 4597</k>

<k>West's Key Number Digest, Criminal Law &key;627.5 to 627.8</k>

<r>Am. Jur. 2d, Depositions and Discovery &ss;231 et seq.</r>

<r>C.J.S., Criminal Law &ss;587 to 591, 619 to 643, 663 et seq.</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Criminal Law &ss;194 et seq.</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Depositions and Discovery&ss;6, 7, 9, 12, 13</r>

Add the following after fourth paragraph of section p. 125:

The prosecution's failure to inform the defense and the jury that charges against a cooperating witness will be dismissed in exchange for that witness' testimony against a



<c>Com. v. Sattazahn, 597 Pa. 648, 952 A.2d 640 (2008)</c> (defendant was not prejudiced, at retrial in first-degree murder prosecution in which his accomplice in robbery/killing testified that defendant was the shooter, by Commonwealth's failure to disclose as potential impeachment material that accomplice had told Commonwealth that he did not want to be incarcerated; accomplice had already entered his plea pursuant to plea agreement by the time of his testimony at retrial, and he had not received what he was seeking in terms of no incarceration).

*&s;9.9 Motion for Sanctions for Violation of Duty to Disclose*

<k>West's Key Number Digest, Criminal Law &key;627.8(6)</k>

<r>Am. Jur. 2d, Depositions and Discovery &ss;253 to 255</r>

<r>C.J.S., Criminal Law &ss;736 to 746</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Criminal Law &ss;220 et seq.</r>

Add the following at end of second paragraph of Comment p. 147:

<c>Com. v. Sattazahn, 597 Pa. 648, 952 A.2d 640 (2008)</c> (district attorney's alleged statement to defendant's trial counsel that he "would get everything" did not create an obligation in first-degree murder prosecution to assemble all potentially relevant records and transcripts from other criminal proceedings in other counties for the benefit of the defense; many of the out-of-county documents purportedly showing incentive of defendant's accomplice in robbery/killing to testify for prosecution did not fall within the four corners of defendant's document requests, other than via the catch-all provision requesting all potentially exculpatory evidence).

*&s;9.22 Notice of Insanity Defense*

<k>West's Key Number Digest, Constitutional Law &key;4596</k>

<k>West's Key Number Digest, Criminal Law &key;47 to 51, 627.5(3)</k>

<r>Am. Jur. 2d, Depositions and Discovery &ss;283 et seq.</r>

<r>C.J.S., Criminal Law &ss;593 to 595</r>

Add as new paragraph to end of Comment p. 153:

Cross-examination of a defendant's expert witness in capital murder prosecution concerning that witness's failure to consult with another potential expert whom the defendant decides not to call in support of an insanity defense does not implicate the work-product doctrine, even where the trial court made a pretrial ruling prohibiting the Commonwealth from acquiring and using the other potential witness's report or invading the area of confidential exchanges between the defendant and that potential witness.  
<c>Com. v. Baumhammers, 960 A.2d 59 (Pa. 2008)</c>.

*&s;9.21 Notice of Alibi Defense*

<k>West's Key Number Digest, Constitutional Law &key;4596</k>

## Chapter 10 Pretrial Motions

### *&s;10.2 Motion to Suppress Physical Evidence:*

<k>West's Key Number Digest, Constitutional Law &key;4655</k>

<k>West's Key Number Digest, Criminal Law &key;394.6/k>

<r>Am. Jur. 2d, Criminal Law &s;1181</r>

<r>Am. Jur. 2d, Depositions and Discovery &ss;283 et seq.</r>

<r>C.J.S., Constitutional Law &ss;1608, 1609</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Criminal Law &ss;220 et seq.</r>

Add the following to end of Comment p. 161:

Where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible. <c>Com. v. Wallace, 953 A.2d 1259, 2008 PA Super 144 (2008), reargument denied (Sep 02, 2008)</c>.

A capital defendant waives an argument asserted on appeal that evidence seized from the defendant's house should have been suppressed based on alleged invalidity of the search warrant and of consent for the search, where the defendant never filed a motion to suppress that evidence. <c>Com. v. Baumhammers, 960 A.2d 59 (Pa. 2008) </c>.

### *&s;10.19 Motion to Dismiss--Double Jeopardy*

<k>West's Key Number Digest, Constitutional Law &key;4655</k>

<k>West's Key Number Digest, Criminal Law &key;394.6/k>

<k>West's Key Number Digest, Indictments and Information &key;141.1(1)</k>

<r>Am. Jur. 2d, Criminal Law &ss;275 et seq., 579 et seq.</r>

<r>Am. Jur. 2d, Indictments and Information &ss;276 et seq.</r>

<r>C.J.S., Constitutional Law &s;1538</r>

<r>C.J.S., Criminal Law &ss;287 to 291</r>

<r>C.J.S., Indictments and Information &s;236</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Appeal and Error &ss;10.1, 27.2</r>

<r>Am. Jur. Pleading and Practice Forms (Rev), Criminal Procedure &s;125</r>

Add the following after eighteenth paragraph of section p. 194:

The decision to grant a motion to quash a criminal information or indictment is within the sound discretion of the trial judge. <c>Com. v. Weigle, 949 A.2d 899, 2008 PA Super 69 (2008), reargument denied (2008)</c>.