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Trial Handbook for Maine Lawyers

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BOOK REVIEW

TRIAL HANDBOOK FOR MAINE LAWYERS. By Bob Stolt (Lawyers Cooperative Publishing; $97.50)

*Reviewed by Joel C. Martin**

Lawyers Cooperative Publishing has issued trial handbooks for practitioners in some twenty-three states. One now appears for Maine lawyers, under the supervision of Bob Stolt[1] of the Maine Bar.

Trial Handbook for Maine Lawyers is a single-volume compendium of Maine precedent and practice as they relate to trials. Excluding the discovery matters that precede the trial and the appeal that may follow it, the book focuses on the actual conduct of the trial, from jury selection to verdict and judgment. In between, it covers the necessary matters: opening statements, the order and burden of proof, examination of witnesses, evidence, damages, and closing arguments. As with the corresponding trial handbooks in other states, this volume aims to collect in one place much of what a lawyer needs to know before going to trial and while in the midst of it.

We have not had such a book in Maine before now, and for that reason alone its appearance is welcome. But there are other reasons as well: the format is clear and logical; cross-references to other useful sources of information are provided throughout; and the presentation is generally well-balanced. The section on objections to evidence is an example of what is best in the book: it refers the reader to *Am. Jur.* digests and forms, to ALR annotations, and to the relevant Maine Rules of Evidence; it cites the leading Maine cases; and, by cross-reference, it directs the reader to related chapters of the book, such as those on mistrial and examination of witnesses.

The material in the book necessarily overlaps with that of several other books on the Maine litigator's shelf. The most extensive overlap is with Richard Field and Peter Murray's book on evidence.[2] Stolt devotes nearly a third of his book (as he must) to evidence issues, but one will still want the benefit of the fuller discussions by Messrs. Field and Murray. There is of course some overlap with Field, McKusick & Wroth, *Maine Civil Practice*,[3] but Stolt does not attempt to duplicate what those volumes have so comprehensively,

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1. Partner, Lipman & Katz, Augusta, Me.
2. RICHARD H. FIELD & PETER L. MURRAY, MAINE EVIDENCE (2d ed. 1987).
3. RICHARD H. FIELD, VINCENT L McKUSICK & L KINVIN WROTH, MAINE CIVIL PRACTICE, (2d ed. 1970 & Supp. 1981).

if not recently, treated. Throughout the volume there are useful citations to Cluchey & Seitzinger, *Maine Criminal Practice*,[4] and to Justice Alexander's *Maine Jury Instruction Manual*.[5]

The author's greatest debt, however, is to another Lawyers Cooperative publication, the multi-volume *Am. Jur. 2d.* Indeed, the debt is perhaps too great, and it illustrates the problem facing the author of any broad treatise on Maine law. A small state with only one court of record produces relatively few opinions. One who would summarize Maine practice and precedent is therefore in a dilemma: whether to rely on Maine cases alone, which provide slim support in many areas, or to refer broadly to the general law as contained in compendia such as *Am. Jur. 2d.*

Stolt has chosen the latter course, and it may indeed be a necessary choice. But his dependence on *Am. Jur.* is very great, even on occasion to the point of replication. Much of his discussion of shifting the burden of proof,[6] for example, is taken almost verbatim from the corresponding entry in *Am. Jur. 2d.*[7] Similarly, Stolt has relied heavily on versions of the trial handbook published in other states. Here are the opening paragraphs of Stolt's book and those of the Massachusetts counterpart:[8]

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The role of the attorney in the trial of the case is extremely complicated and becomes even more so when the case involves controversial or complex issues. On the one hand, the attorney is charged with a duty to represent his or her client with vigor and determination. Failure to do so not only results in loss of income, prestige and subjection to disciplinary action, but also may result in civil liability for malpractice. On the other hand, if the attorney is overly enthusiastic, he or she runs the danger of causing a mistrial, committing reversible error, being guilty of contempt of court and even being subject to disciplinary action.

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4. DAVID P. CLUCHEY & MICHAEL D. SEITZINGER, MAINE CRIMINAL PRACTICE (rev. ed. 1992).

5. DONALD A. ALEXANDER, MAINE JURY INSTRUCTION MANUAL (2d ed. 1990).

6. BOB STOLT, TRIAL HANDBOOK FOR MAINE LAWYERS § 9.6 (1991) [hereinafter STOLT].

7. 29 AM JUR. 2D *Evidence* § 124 (1967).

8. EDWARD M. SWARTZ, TRIAL HANDBOOK FOR MASSACHUSETTS LAWYERS (2d ed. 1990).

courtroom is obligated to do so with a thorough knowledge of the rules of evidence and procedure which will guide his or her conduct while in the courtroom. These rules are constantly changing, as a result of the activities of appellate courts, state and federal legislation, and changes in practice and procedure adopted by the local trial courts.[9]

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This may not be improper in any strict sense, because the same publisher holds the copyright on both books. It does illustrate, however, what this volume is and what it is not; at heart it is an all-purpose book adapted to local conditions, rather than one that grows organically from this jurisdiction.

This broad generality in scope limits the book in some other ways. For example, while the chapter on search and seizure issues is extensive and well-organized, it leans heavily on federal sources. Certainly the United States Supreme Court is the primary authority for Fourth Amendment law. But it is a surprise to find only ten cases from the Maine Law Court, three from the First Circuit, and none at all from Maine's Federal District Court in fifty pages of text citing well over two hundred cases from 1920 onward. The paucity of Maine sources will, I suspect, limit the usefulness of this section to the Maine practitioner.

At times, too, the generality of the discussion and its limited reliance on experience hamper the presentation of a topic. The chapter on jury selection provides an illustration. It is correct to say, as the author does, that under Maine law[11] "[a]t the Court's discretion, counsel of record are entitled to inspect the list of jurors for use in voir dire."[12] The implication in this bare statement, however, is that lawyers must go through a procedure—perhaps even application to the court—before looking at this material. Experienced practitioners know that jury questionnaires are in fact customarily and immediately available in the clerk's office, and that reviewing them is an essential part of preparing for trial.

They know, too, that challenges for cause are exercised before the jury panel is drawn, and peremptory challenges afterward. In this book, however, defining the civil jury panel as fourteen persons, the author says, "From this panel the final jury is selected by challenges for cause and peremptory challenges."[13] A later section identifies the

9. STOLT, *supra* note 6, § 1.1.
10. SWARTZ, *supra* note 7, § 1.1.
11. ME. REV. STAT ANN. tit. 14, § 1254-A(7) (West Supp. 1991-1992).
12. STOLT, *supra* note 6, § 6.2.
13. *Id.* § 6.5.

correct procedure. But the nature of such a handbook is that its users are likely to dip in and out of it without reading the entire chapter. When a section does not stand correctly on its own, the risk of misdirection is great. Thus when, in a section dealing with jury instructions, Stolt observes that "[i]nstructions are read to the jury prior to closing argument,"[14] a correction later in the chapter does not help the attorney who relied on what she first found.

At times the text misleads because its treatment of an issue is not full enough. For example, in section 18.8, discussing privileged communications between attorney and client, Stolt writes that Evidence Rule 502(d)(1) and Rule 3.6(*l*)(4) of the Maine Bar Rules "permit an attorney to reveal a fraud upon a third party in the course of the representation."[15] It is true that the evidence rule removes the privilege "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit . . . a crime or fraud."[16] And Bar Rule 3.6(*l*)(4) does permit a lawyer, despite the privilege, to disclose a client's intention to commit a crime. But Bar Rule 3.6(c) (not cited in the text) puts strict limits on when the disclosure of a fraud may occur. Indeed, the Professional Ethics Committee of the Board of Overseers of the Bar has noted that "Bar Rule 3.6(c) specifically prohibits disclosure of fraudulent conduct by a client, even if the fraud occurs during the representation, if the attorney learns of the fraud through a privileged communication."[17] Stolt's blanket statement that "[t]he privilege does not apply where the client consults the attorney in furtherance of a crime of fraud"[18] misses most of the subtleties of the analysis.

Some of the statements in the handbook are simply incorrect. In discussing circumstantial evidence, for example, the author states, "The absence of previous accidents is not admissible."[19] This has not been true since *Payson v. Bombardier Ltd.*,[20] which allows such evidence to be introduced once an adequate foundation has been laid.

Finally, and regrettably, the author's copy editor has served him poorly. There are many sentences that do not parse, misplaced punctuation marks, sentence fragments, and misspellings.[21] Sometimes this leads to nothing more than momentary confusion; sometimes it makes nonsense of the text. One sentence in the section on

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14. *Id.* § 37.7.
15. *Id.* § 18.8.
16. ME R EVID 502(d)(1).
17. Professional Ethics Committee of the Board of Overseers of the Bar, Op. No. 60, O-219-20. (Sept. 4, 1985).
18. STOLT, *supra* note 6, § 18.8.
19. *Id.* § 32.5.
20. 435 A.2d 411, 413 (Me. 1981).
21. Perhaps the most startling of these is the citation of "Field, McCusik & Roth." STOLT, *supra* note 6, § 40.1, at 539 n.1.

handwriting as evidence, for example, says: "Almost always expert testimony will be required before the jury makes its own [handwriting] comparison."[22] The next sentence disagrees: "No expert testimony is required before the jury makes its own comparison."[23] None of these instances of carelessness is fatal in itself, but together they raise concerns about the overall accuracy of the work.

That is a shame, because there is much in the book that is of use to the litigator; and certainly there is no other one-volume treatment of so many topics related to trials in Maine. Perhaps a later edition will correct the problems in this one. When that happens, this handbook will be ready to take a place on the short shelf of indispensable books for Maine lawyers.

22. *Id.* § 26.16.
23. *Id.*