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# PAUL J. LIACOS: HANDBOOK OF MASSACHUSETTS EVIDENCE

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## BOOK REVIEW

HANDBOOK OF MASSACHUSETTS EVIDENCE. By Paul J. Liacos. Boston, Massachusetts: Little, Brown and Co. 1981.

*Reviewed by Michael G. West\**  
*Joseph H. Reinhardt\*\**

In 1940 the late W. Barton Leach, Story Professor of Law at Harvard University, published the first edition of the *Massachusetts Handbook of Evidence*. Publication of the second and third editions occurred in 1948 and 1956, respectively. Justice Liacos collaborated with Professor Leach on the fourth edition, published in 1967. After publication of the fourth edition, the meticulous scholarship of Professor Leach and Justice Liacos garnered for the book the acclamation of "‘the Bible’ on evidence in the Commonwealth of Massachusetts."<sup>1</sup> In 1981, a fifth edition, written by Justice Liacos, was published and is the subject of this review.

The format of the fifth edition parallels that of the fourth edition. The book is divided into twenty topics, ranging from "Authentication" to "Search and Seizure."<sup>2</sup> In this edition, however, Justice Liacos has deleted the fourth edition topic, "Recent Developments,"<sup>3</sup> and has added an entirely new topic entitled "Identification Evidence."<sup>4</sup> This change was a result of significant developments in the law of evidence in the fourteen years since the publication of the fourth edition.<sup>5</sup>

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1. P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE xxi (5th ed. 1981).
2. P. LIACOS, *supra* note 1, at ix-xix.
3. W. LEACH & P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE, 1-13 (4th ed. 1967).
4. P. LIACOS, *supra* note 1, at 245-59.
5. *Id.* at xxi-xxii.

Each subject is presented in outline format and the analytical approach taken toward individual topics is determined by the specific nature of the topic. Analysis of topics not evoking constitutional issues<sup>6</sup> includes a statement of the appropriate evidentiary rule within the commonwealth and a discussion of the history and recent developments associated with the rule. Citations to cases with historical value are provided, as are citations to cases as of December 31, 1980. A particularly helpful addition to this edition is citation to and discussion of the proposed Massachusetts Rules of Evidence which are currently under consideration by the Massachusetts Supreme Judicial Court and which parallel the Federal Rules of Evidence.<sup>7</sup>

The material on judicial notice<sup>8</sup> represents an excellent example of Justice Liacos' analysis of a nonconstitutional topic and one citing relevant portions of the proposed Massachusetts Rules of Evidence. Justice Liacos notes that under current Massachusetts practice, information not introduced into evidence that may influence the outcome of a case is judicially noticeable when it is already part of a court's knowledge or is derived from an almanac, court report, or statutory compilation not in evidence. Such information may be judicially noticed only when it is indisputably true, a matter of common knowledge within the community, or a matter of generalized knowledge readily ascertainable from authoritative sources.<sup>9</sup> Professor Kenneth Culp Davis, a leading expert in the field of administrative law, has termed such information "adjudicative facts."<sup>10</sup> Adjudicative facts are distinguished from legislative, legal, and political facts, a trio whose elements are not subject to the requirement of judicial notice in order to be considered in the court's decision.<sup>11</sup> Rule 201 of the proposed Massachusetts Rules of Evidence limits the requirement for judicial notice to adjudicative facts. The proposed rule, therefore, does not affect the current power and practice of the courts to

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6. See, e.g., P. LIACOS, *supra* note 1, at 1-61, 133-63 (topics on Judicial Admissions and Judicial Notice, Burden of Proof and Presumptions, and Impeachment).

7. Justice Liacos includes specific provisions of the proposed Rules in relevant sections of the book. For a complete text of the proposed Rules, see 19 K. HUGHES, MASSACHUSETTS PRACTICE EVIDENCE 333-413 (West Supp. 1981). The Rules were submitted to the Supreme Judicial Court by the Advisory Committee in July, 1980. The court has not yet approved the Rules. *Id.* at 325.

8. LIACOS, *supra* note 1 at 17-20.

9. *Id.* at 18-19.

10. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

11. *Id.* at 402-07.

consider matters which are legislative, political, or legal in nature without taking judicial notice of them.<sup>12</sup>

Analysis of topics evoking constitutional issues<sup>13</sup> begins with a short synopsis of the status of federal constitutional law as of March 1, 1981. Subsequent discussion within these topics involves a statement of the Massachusetts rule of evidence and how the rule is intertwined with the federal constitutional scheme. Here again, Justice Liacos includes citations to both significant historical and recent cases.

The discussion of search and seizure<sup>14</sup> is a representative example of Justice Liacos' analysis of a topic that provokes constitutional issues. He begins with an historical discussion of the exclusionary rule, noting that illegally obtained evidence long was held admissible under both the Federal and Massachusetts Constitutions. Massachusetts and federal practice diverged, however, when the Massachusetts Supreme Judicial Court adopted the view that the sole remedy of the aggrieved party was a civil or criminal action against the offending law enforcement officer.<sup>15</sup> This view was contrary to that of the Supreme Court in *Weeks v. United States*,<sup>16</sup> where the Court adopted an exclusionary rule for evidence illegally obtained by federal officers. The Supreme Court finally applied the exclusionary rule to state practice with its 1961 decision in *Mapp v. Ohio*.<sup>17</sup> Historical discussion of the exclusionary rule concludes with the observation that, in light of Justice Burger's recent criticism of the rule, the Court has adhered to the rule but has refused to extend its reach.<sup>18</sup> Substantive discussion of the rule ranges from what constitutes a "search" to the requirements of standing for initiation of a motion to suppress. Until recently a defendant could establish standing to pursue a motion to suppress in any one of three ways: (1) Demonstration of a proprietary or possessory interest in the premises searched or object seized; (2) a showing of the defendant's legitimate presence on the premises searched; or (3) automatic standing derived from the existence of an element of possession in the

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12. P. LIACOS, *supra* note 1, at 19-20.

13. *See, e.g., id.* at 217-59, 295-320 (topics on Search and Seizure, Identification Evidence, and Hearsay-Confessions).

14. *Id.* at 217-44.

15. *Id.* at 218; *Commonwealth v. Wilkins*, 243 Mass. 356, 361-62, 138 N.E. 11, 13 (1923).

16. 232 U.S. 383, 398 (1914).

17. 367 U.S. 643, 654-55 (1961).

18. P. LIACOS, *supra* note 1, at 219-20.

crime charged.<sup>19</sup> Of particular interest is the point that, despite the Supreme Court's recent revision of the doctrine of establishment of standing to a single requirement of demonstration of violation of reasonable expectation of privacy,<sup>20</sup> the Massachusetts Supreme Judicial Court has not considered whether the former standing doctrine will continue to have some utility for treatment of claims based on state law.<sup>21</sup> This potential divergence is important to attorneys who would seek to advance a motion to suppress but are unable to do so under the fourth amendment because of an absence of a violation of the expectation of privacy, required under the federal doctrine of standing.

Throughout the analysis of each topic, Justice Liacos attempts to adhere to the three purposes underlying both this edition and the fourth edition: To provide quick reference aid to members of the bench and bar in the trial of cases; a means of preparation for Massachusetts bar examinations; and use as a textbook in law school evidence courses.<sup>22</sup>

The outline format of the analysis within each topic is supportive of the book's intended function as a quick reference aid. The inclusion of tables of cited cases,<sup>23</sup> statutes,<sup>24</sup> and rules of court,<sup>25</sup> and an extensive topical index<sup>26</sup> further enhances this function.

The characteristics adding to the book's value as a quick reference aid also facilitate its proposed use as an aid in the preparation for Massachusetts bar examinations. These same characteristics, however, limit the book's use as a primary text in law school evidence courses. The book is more akin to a hornbook or treatise which presents statements of the appropriate principles of law, rather than a casebook requiring the student to inductively reason those principles from analysis of a series of successively related cases. The book, however, will function as an excellent supplementary reading assignment to be made by those law professors who wish to provide students with discussion of Massachusetts evidence and a comparison of Federal and Massachusetts Proposed Rules. The book will

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19. *Id.* at 241.

20. *Id.*

21. *Id.* at 242-43.

22. *Id.* at xxiii.

23. *Id.* at 459-588.

24. *Id.* at 489-92.

25. *Id.* at 493-500.

26. *Id.* at 501-48.

provide professor and student with a starting point for discussion of the strengths and weaknesses of state and federal rules.

Although adherence to the book's purposes results in concise but brief topic analyses, the book remains valuable to those searching for an extensive discussion of evidentiary principles. This is primarily due to the cross-referencing of topics and the citations to such noted authorities on evidence as Morgan,<sup>27</sup> McCormick,<sup>28</sup> and Wigmore.<sup>29</sup>

The materials on judicial notice and burden of proof provide excellent examples of references to noted authorities. The section on judicial notice refers the reader first to the late Dean Morgan's 1944 article in the *Harvard Law Review*.<sup>30</sup> Morgan's article lays the foundation for the modern concept of judicial notice of adjudicative facts, that is, judicial notice of those propositions whose truth is "notoriously indisputable among reasonable men."<sup>31</sup> The judicial notice section then refers the reader to Professor McCormick's hornbook on evidence<sup>32</sup> for a detailed discussion of modern concepts of judicial notice; ranging from the need for and effect of judicial notice to trends in judicial notice of facts and law.

The material on burden of proof refers the reader to Wigmore.<sup>33</sup> Professor Chadbourn of the Harvard Law School completed revision of Wigmore's burden of proof materials in 1981. These revised materials include discussion of the two facets of burden of proof: persuasion and production of evidence, and the tests associated with their establishment.<sup>34</sup> The materials also include discussion of the sufficiency of evidence in the context of directed verdicts and the various standards of proof, ranging from beyond a reasonable doubt to preponderance of evidence.<sup>35</sup> The entire discussion in Wigmore is heavily footnoted, including citations to significant historical and leading cases and the Federal Rules of Evidence. In summary, Jus-

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27. *Id.* at 17.

28. *Id.*

29. *Id.* at 37.

30. *Id.* at 17 (citing Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944)).

31. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 274 (1944).

32. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 328-335 (E. Cleary 2d ed. 1972).

33. P. LIACOS, *supra* note 1, at 37 (citing 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2485-2489, 2494-2495, 2497-2498 (Chad rev. ed. 1981)).

34. 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2485-2489 (Chad rev. ed. 1981).

35. *Id.* §§ 2494-2495.

tice Liacos' numerous references to other sources makes the book an excellent starting point for those readers seeking extensive analysis.

The book's sole shortcoming is its absence of a provision for updating. As Justice Liacos notes in his preface, statutory enactments, adoption of new rules of court and ever-changing state and federal decisions continually modify evidentiary principles and establish new ones.<sup>36</sup> "An effective advocate needs concise knowledge of the current doctrine. . ."<sup>37</sup> associated with the various areas within the field of evidence.

There are two potential methods for annual updating of the book. First, Justice Liacos could undertake the task himself and publish the result as an annual cumulative pocket part.<sup>38</sup> Second, one of the law schools within the Commonwealth could undertake the task as an annual project in conjunction with its law review.<sup>39</sup> In any event, implementation of an updating procedure would ensure the book's continuing value to members of the bench and practicing bar.

In its present form and at this point in time, the book provides a concise description of current evidentiary doctrine within the commonwealth. The result is that any attorney who used and liked the fourth edition will find that Justice Liacos has continued that tradition of excellence in the fifth edition. This edition is worthy of its acclamation as "the Bible" of evidence in the Commonwealth of Massachusetts.

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36. P. LIACOS, *supra* note 1, at xxii.

37. *Id.* at xxiii.

38. Judge Weinstein's work on the Federal Rules of Evidence is a prime example of this type of annual update. See J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* (1975 & rev. ed. 1982).

39. Several law reviews within the commonwealth already undertake this type of annual survey and update. See, e.g., *Annual Survey of Labor Relations and Employment Discrimination Law*, 21 B.C.L. REV. 85 (1979); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 1 (1980); *Annual Survey of Rhode Island Law for the 1978-79 Term*, 14 SUFFOLK U. L. REV. 497 (1980); *The United States Court of Appeals for the First Circuit, 1978-79 Term*, 14 SUFFOLK U. L. REV. 199 (1980).