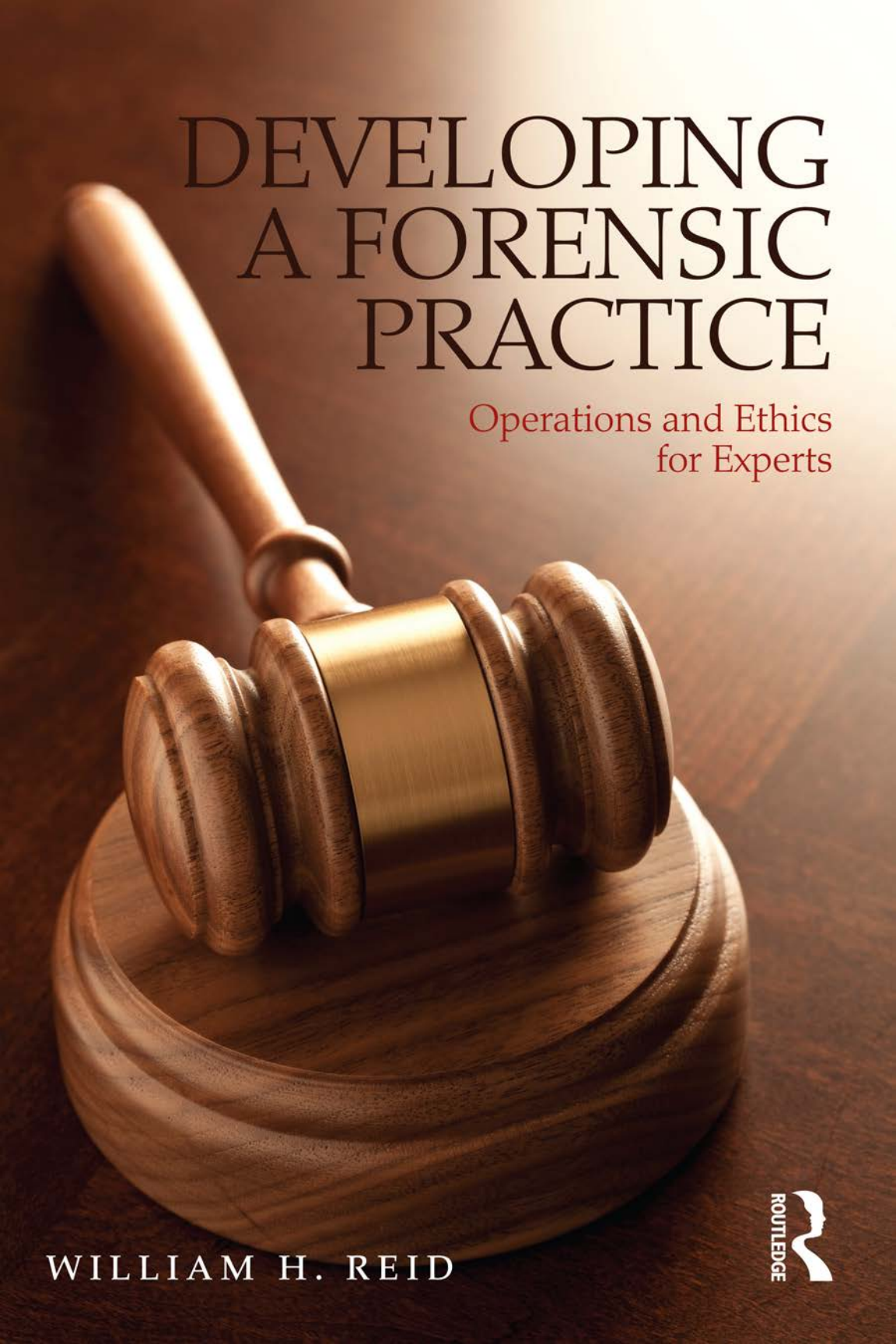
DEVELOPING
A FORENSIC
PRACTICE
Operations and Ethics
for Experts
WILLIAM H. REID
ROUTLEDGE

DEVELOPING A FORENSIC PRACTICE

Developing a forensic practice can be confusing and intimidating. Dr. William Reid, a highly experienced forensic psychiatrist, has written a practical, straightforward guide for clinicians interested in doing it right and increasing their opportunities for a successful transition to forensic work. This book, which will be of interest to many attorneys as well, provides straightforward details, along with many case examples, of lawyer–expert communications and relationships, case assessment, record review, evaluations, reports, deposition and trial testimony, fees and billing, office operations, marketing, liability, and professional ethics. A bonus chapter by a successful malpractice attorney gives a unique and valuable "lawyer's perspective" on the content and mental health experts in general. The huge appendix provides over 40 highly useful examples in the appendices of common office forms, letters, reports, and affidavits.

Any mental health professional who currently practices, or wants to practice, at the interface of mental health and the law will find this an indispensible practice resource.

William H. Reid, M.D., M.P.H., past president of the American Academy of Psychiatry and the Law, has practiced forensic psychiatry for over 35 years in private settings, medical schools, and the public sector.

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Psychiatry for the House Officer (1979)
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DEVELOPING A FORENSIC PRACTICE

Operations and Ethics for Experts

William H. Reid

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To my teachers, friends, and colleagues in the American Academy of Psychiatry and the Law, and to the many fine and ethical attorneys with whom I have worked over the years

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CONTENTS

PREFACE

Nothing in this book should be construed as any form of legal advice. The contents represent the author's opinions and recommendations at the time of writing. Dr. Reid is not an attorney and does not represent that any of these materials meets, or fails to meet, any legal standard.

Once written for psychiatrists, this work has been completely updated for use by any independently licensed mental health clinician who practices—or wants to practice—at the interface of mental health and the law in the United States legal system. The book is written from the viewpoint of a private practitioner or forensic service contractor, one who acts as a forensic consultant or expert in his or her particular clinical field (psychology, psychiatry, social work, mental health nursing, mental health administration, and others.)

I do not provide very much information about basic law or legal cases (such as the "landmark cases" that underlie much of the interface between mental health and the law). This is a *practical* guide that assumes the reader is already well founded in his or her clinical field and wishes guidance about forensic practice matters.

The *nidus* for this work was designed in a workshop format with a qualified discussant available. I have tried to make this new book format stand alone. Most or all of the content should be readily understandable by clinicians with little experience in forensic work, but the very nature of practical books implies that one should often look elsewhere for details, further education, specialized information, and clarifications. One should get relevant (often supervised) training and experience before representing oneself as a subspecialist. Various references and bibliographies should help, but readers should feel free to query and work with experienced, credible forensic specialists and training programs; this, like other professional pursuits, is not a "cookbook" endeavor.

William H. Reid, M.D., M.P.H.
Horseshoe Bay, Texas, 2013

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1

GETTING STARTED

Most of this book assumes that the reader has (or is actively seeking) a terminal degree in a clinical mental health specialty (psychology Ph.D./Psy.D./Ed.D., M.D./D.O. with psychiatry residency, M.S.W., R.N./M.S.N./R.N.-P.) and wants to learn about private consultation at the interface of that specialty and the law. (I generally use the terms "forensic professional" or "forensic clinician" for efficiency's sake, including others as applicable.) Many of the principles and procedures also apply to employed clinicians, including those who carry out consultations separate from their employment (such as "moonlighting"), those who perform forensic services through agency or facility contracts, and those who perform forensic services as employees of agencies or facilities.

Much of this book assumes that the reader will be retained most of the time by an attorney in a contested ("adversarial") proceeding. Experts are sometimes retained directly by courts or agencies for other purposes, but it is a common misconception that experts are usually "friends of the court" (a misuse of that phrase as well).

Readers in academic or agency settings may notice differences between the professional viewpoints implied here and those in their own settings, such as (but not limited to) a focus on work done as part of retention by an attorney and one's relationships with retaining attorneys. This should not be construed as suggesting any significant differences in duty or ethics.

My references to lawyers may sound stilted (e.g., repetitive use of "the lawyer who retained you" or "the retaining entity"). That's my inartful way of avoiding any implication that the attorney who retains you is "your" lawyer. Expert witnesses should not be direct advocates for the side on which they work[1] but, rather, advocate articulately for the opinions they legitimately form if asked to do so. Thus it is improper for an expert

1 "Consulting" experts who do not anticipate testifying have much more flexibility in this regard.

to refer to "my lawyer" when the lawyer actually represents his or her own client, not the expert.

Similarly, although I sometimes refer to "the opposing lawyer," I actually mean "the lawyer for the party who opposes the client of the lawyer who has retained you." I could have said that every time, but the printer would have run out of ink.

Before we go further, here are five postulates that can guide you to a career that is both successful and rewarding. We'll discuss each of these postulates in various ways throughout this book; keep them in mind:

1. Practice well.
2. Understand the point of the legal exercise.
3. Be serious about ethics.
4. Quality begets quality.
5. Quality begets success.

You will have no trouble competing with forensic professionals who are poorly trained, lazy, sloppy, single-sided, "hired guns," unethical, or just don't get the point of the lawyer's or court's work.

Finally, courts and lawyers need experts with clinical expertise and some understanding of the legal process at hand, not quasi-attorneys or doctors who act like lawyers. Forensic mental health professionals are generally not, and should not act as, attorneys. Simply understand your clinical discipline and how it applies to the forensic arenas in which you work. If you happen to have a law degree in addition to your clinical credentials, note that the material in this book is completely unrelated to legal consultation or representation of legal clients. I strongly recommend that professionals with such dual credentials (M.D./J.D., Ph.D./J.D., R.N./J.D., etc.) refrain from mixing them in the same case.

Training and Credentials

Clinical training, experience, and certification (as relevant to the field of practice) are necessary and expected for every forensic medical/mental health expert. Your usefulness to lawyers, courts, and other entities almost always comes much more from your clinical expertise and experience than from your forensic background. As I have told countless high school, college, medical, and graduate students, one must first be (and want to be) a clinician, then consider working toward forensic goals, not the other way around.

Specifically forensic fellowships, post-docs, and internships can be valuable preparation for a forensic career but are not usually necessary for forensic practice. Many certifying bodies (such as the American Board of Psychiatry and Neurology [ABPN] and the American Psychological Association) require them in order to sit for subspecialty diplomate exams (see below).

Professionally accepted forensic subspecialty certifications include those of the American Psychological Association's American Board of Professional Psychology (ABPP) and the ABPN. In my experience, "forensic" certification is a worthwhile pursuit and useful for practitioners who work in academic or administrative environments, but it is far less important than *clinical* certification when working with attorneys and courts.

There are other "certification" organizations and companies that market their "credentials" to various kinds of mental health professionals. One should investigate their claims and usefulness carefully before applying, since many (but not all) hold no particular influence in either clinical or forensic fields, often giving certificates and titles to those who merely take a simple test and pay a fee (sometimes even waiving the test). Some are outright "diploma mills" that should be avoided. Good lawyers quickly discover which are legitimate and which can be criticized if you list them on your *curriculum vitae*.

Continuing education courses and workshops in forensic practice can be valuable and efficient ways to increase and/or update one's practice skills. Professionally recognized forensic organizations, such as the American Academy of Psychiatry and the Law (AAPL) and the American Academy of Forensic Sciences (AAFS), offer a variety of educational opportunities, usually at their annual or semiannual meetings. One in particular deserves special mention—the comprehensive forensic psychiatry course by Dr. Phillip Resnick and colleagues, sponsored by the AAPL and offered at AAPL and some American Psychiatric Association meetings. Most recognized national (and some state and regional) clinical organizations offer approved continuing education in forensic practice.

Participating in recognized forensic organizations is a good way to stay abreast of important professional information, learn of continuing education opportunities, keep in touch with colleagues, compare your procedures with those of other forensic practitioners, and remain aware of ethical issues and guidelines. Some professions, such as psychiatry and psychology, have active forensic organizations; others have forensic sections or interest groups within their national associations.

Your membership in a recognized professional organization is one sign to clients and courts that you are not some sort of isolated "maverick" practitioner and that you have adopted, at least by your membership, that organization's code of ethics. Conversely, there are poorly recognized organizations that focus more on "guild" issues or superficial titles than professional education or scientific endeavor; in my opinion, many of them should be avoided.

Mentoring by someone you know to have excellent skills, ethics, and reputation is very helpful. *Books and publications* are great sources of information and reference, but are not sufficient for the knowledge and experience you need for practice.

I am often asked whether or not attending *law school* is helpful in forensic practice. I believe law school to be completely unnecessary for forensic practice, and it may be detrimental to some careers. Most M.D./J.D. and Ph.D./J.D. holders practice as either clinicians or lawyers. The combination seems reserved largely for academic settings and a few medical malpractice attorneys. Some R.N./J.D. and M.S.W./J.D. holders find careers in law firms or as legal consultants but not often, in my experience, as forensic experts (the practice discussed in this book). Forensic experts with law degrees need the *imprimatur* and credibility of their clinical professions as they communicate with judges and juries; a law degree may decrease some of that credibility (no offense to our legal brethren). If you decide to go to law school, do it because you want to be a lawyer, not because you think it will make you a better (or more sought-after) forensic clinician.

Reputation and Credibility

Get it. Keep it.

Have the requisite education, training, and experience. Do not misrepresent or "pad" your credentials. First, it's dishonest. Second, lawyers who will question you often check out your background and know the answers to questions before they are asked.

Do quality work. Much of this book is devoted to showing you how to do quality forensic work. Your clinical work should be relevant and free of serious criticism as well.

Do ethical work. Don't get into ethics trouble, and don't do things that are likely to get you into ethics trouble. Be an example of ethical practice in both clinical and forensic work.

Continue to do clinical work. Much, perhaps most, of your forensic work rests on a foundation of current clinical expertise. This is critical for most kinds of malpractice consultation and testimony and important for many other forensic practices as well.

Don't be a "hired gun" (or even look like one). Some of the public, including some lawyers and jurors, get their ideas about forensic experts from television and movies. That means they see dramas about experts who say whatever the lawyer wants, work as "advocates" for the retaining lawyer's case, get paid flat fees to say something, or shade evaluation results to fit the case. Those people are not common, but they do exist. *Do not* be one of them. First, it's dishonest. Second, nothing ruins a career faster than getting a reputation as a hired gun.

Have unblemished licenses and certifications. Your licensing board status and lots of other credentials information is easily available to lawyers and courts.

Guard against hospital or organization censure, such as privilege suspensions, expulsions, or termination for cause.

Avoid malpractice suits, especially if you consult in malpractice cases. No one is perfect, and a malpractice judgment can happen to anyone over a career, but more than one is difficult to explain in the best of circumstances.

Be completely honest in your testimony and reports. Your past testimony is easily available to attorneys, and your honesty and consistency will be scrutinized during trials and depositions.

Your nonprofessional pursuits can affect your forensic credibility. This includes damning items such as arrests and convictions, as well as seemingly less significant things like questionable websites, hobbies, and associates.

A clinician was discussing forensic careers in one of my workshops when the topic of websites arose. She mentioned her nonclinical website dedicated to an interest in witchcraft and the paranormal. She was proud of her reputation in that avocation, said it was quite separate from her mental health practice, and wondered if it might interfere with forensic referrals or credibility. We examined her website with that question in mind.

The website was "dark"—deep red in color, with ominous background music and drawings of satanic-appearing figures and symbols on the main page. It included a forum with comments from visitors, often followed by the clinician's own comments or answers (which focused enthusiastically on wiccan topics, never mentioning that she was also a clinician). She offered a witchcraft-related music CD for sale.

Without knowing more about her clinical practices, I nevertheless suggested that the website and similar pursuits would indeed be a problem, since it could be easily found by lawyers and others and she would have to acknowledge it if asked. I asked her privately to think about what the website and activities might represent about her professional identity and her ability to work objectively with patients and forensic clients. I told her that she should at least disclose the website and related activities to anyone who wanted to retain her, and that it might indeed put off forensic clients and decrease referrals.

The clinician balked at those ideas, choosing to believe that her wiccan pursuits were kept separate from her clinical work and any forensic pursuits, and that they "shouldn't make any difference." Several years later, I learned that she had had both licensure and practice problems as a result of her unusual practices.

Lawyers communicate with each other about experts. They ask others for recommendations when they're searching for experts. Once they have your name, they may ask others about you before calling. Those who depose or cross-examine you are likely to have researched your background to a greater or lesser extent.

Duties

Just as a clinician has certain duties to his or her patients or clients, forensic experts have duties that must be fulfilled in order to meet professional practice standards and, in some cases, legal requirements.

You have *duties to the attorney or organization that retains you* (referred to in this book as the "retaining entity"). He/she/it is entitled to know of any issues that may affect your ability to do the work for which you have been hired or which may occur at some future time (such as testifying). Those concerns include, but may not be limited to, conflict of interest (such as relationships with one of the parties, financial conflict, or strong personal feelings about the litigation or the parties), scheduling difficulty, past license problems or relevant lawsuits of your own, and inadequate knowledge, training, or experience. In most cases, you act as the attorney's *agent*, within legal and ethical limits, but almost never as a direct *advocate* for any litigant.

Part of your duty to the retaining entity is to be accurate and objective. You should not offer, nor should ethical lawyers or other clients expect, opinions that lie by either commission or omission. In fact, an attorney's learning things that go against the case can be as valuable to him or her as learning those that support it.

You have *duties of honesty and objectivity to any court or other judicial or arbitrating body* to which your opinions are offered. Your opinions and other comments may reach a judge or court in several ways: in a report, by affidavit or sworn statement, in deposition testimony, or in direct testimony at a hearing or trial. You are expected to articulate your opinions well and defend them convincingly, but you must be honest. Do not allow others, such as a retaining entity, to offer in your name opinions that have not been genuinely and properly rendered.

You have *duties to the retaining entity's client(s)*, including those of adequate qualifications, practice standards, and good faith. However, as already noted, you should not advocate directly for the litigant, nor should the litigant or any interested party be your patient.

You have a *duty of honesty and good faith to the opposing entity*. Being a "hired gun" may be the lawyer's role, but it's not yours.

*Here are some duties you **don't** have.* Forensic consultation or expert witness activity does not, in most instances, create a "doctor–patient" or clinician–patient/client relationship. When you evaluate a person solely for a forensic or administrative purpose (not for direct treatment or contemplating

treating the person yourself), you do not, in my opinion, incur the same duties as a treating clinician or clinical consultant. There are times when you cannot place an evaluee's needs before those of others, for example, or maintain his or her confidentiality. It is a good idea to remind evaluees of that fact and to refrain from calling them "patients" or "clients."

Treater vs. Expert Witness or Consultant

One of the most important topics for clinicians doing forensic work is the separation of clinical and forensic roles. A clinical relationship with the subject of a forensic or administrative issue raises very important conflict-of-interest issues and should be avoided in almost all instances. Those who act as both treater and expert without very good reason (such as a genuine emergency) are at best imprudent and at worst knowingly misleading the judicial process.

- With rare exceptions, *a treating clinician should not become an expert witness for his or her past, present, or foreseeable patient.*
- With rare exceptions for emergencies, *an expert witness should not treat a plaintiff, defendant, or evaluee in the same forensic case.*

When these prohibitions are violated, significant conflicts arise for both the patient and the court. Those conflicts are often partially unconscious, and are often irreconcilable.

A psychotherapist treated a man for several years in psychodynamic therapy. When the man was sued over a business transaction, his attorney asked the therapist to become an expert witness in his defense. The therapist agreed, and spent many hours reviewing records, working with the lawyer on her patient's behalf, providing written opinions in the patient's legal defense, and testifying at deposition and trial. In addition to statements about the legal matter, the therapist agreed that she had been paid several thousand dollars over the years for treatment, had received many thousands more as the attorney's expert witness, and planned to continue providing therapy to the defendant in the future.

Although the judge allowed the therapist-"expert" to testify, she was later brought before her professional licensing board for unethical practice and was eventually censured. The licensing case was appealed to civil court, where the therapist did not prevail.

The purpose and goals of a treating clinician are fundamentally different from, and often conflict with, those of a forensic expert. The treater has "fiduciary" (or near fiduciary; see definition in chapter 2) and ethical obligations to the patient which demand that the patient's interests be placed above all else. The forensic consultant's responsibilities, on the other hand, are to objectivity and the court.

There are at least four reasons that such a dual relationship should be avoided.

First, a treatment relationship clearly creates a professional and ethical obligation to act in the best interests of the patient. The patient has a right to rely on this attitude in the doctor or therapist during (and after) the treatment relationship. It is a cornerstone of the patient's ability to be free of concerns about future divulging of confidences, betrayal, or exploitation. Since forensic consultation or testimony, by definition, requires objective comment regardless of the patient's wishes or needs, an inherent clinical and ethical conflict is created. This conflict is recognized in the ethical guidelines of all mental health professions, often expressed as the patient's right to expect a single, private treatment role from his or her clinician or therapist.

Second, a treating clinician who testifies regarding a current or past patient knows (or should know) that he or she is ethically required to act in the patient's interest. Having spent many hours (perhaps dozens or hundreds) working with a patient, sometimes quite intimately, clinicians often feel a personal affinity for that patient's viewpoint. There is thus a danger of *intentional bias* toward the patient.

Third, separate from the clinician's conscious awareness of a duty or wish to act in the patient's interest, the obligation to "do no harm" to the patient is keenly felt by ethical practitioners. Even if they attempt to be objective in forensic reports or testimony, there is a danger of *unintended bias* toward the patient.

Fourth, the ethics principles of both the American Psychiatric Association and the American Psychological Association require that when a treating clinician believes it may later become necessary to comment to a third party (such as an employer or insurance company), this is to be discussed fully with the patient as early as is feasible. Awareness of the probability of disclosure affects the patient's conversations and disclosures to some extent, and this in turn affects the validity of both clinical and forensic participation.

If we look more closely, we can see even more reason for concern. I have seen examples of each of the following:

1. If the initial referral is forensic and the forensic professional elects to treat the person as a patient, the clinical evaluation may intentionally be incomplete and/or may not document the evaluation, history,

symptoms, diagnoses, treatment plan, and prognosis as completely or objectively as would a solely treating clinician. That is, the care and documentation may be modified to fit the forensic purpose, thus short-changing patient care.

2. If the initial relationship is clinical but the role later becomes forensic, the diagnosis, treatment, and/or documentation of care may change, to the detriment of the patient's clinical needs.
3. A forensic expert who is treating a litigant may *unconsciously* (i.e., without overt malicious intent) create incomplete or skewed treatment documentation. He or she knows that the notes are likely to be revealed during the litigation. There may be a subtle wish or impulse to support the attorney's case and/or to please the attorney.
4. A forensic expert who is treating a litigant may *unconsciously* diminish or otherwise change his or her treatment or procedures in a way that (a) creates findings that will support the legal case and/or please the attorney, (b) obscures findings that might refute the attorney's case, (c) avoids (or fails to encourage) potentially effective assessment and treatment procedures (e.g., to keep the patient from improving and decreasing damages), and/or (d) prevents timely referral to nonforensic clinicians.
5. A forensic expert who is treating a litigant may *consciously* create incomplete or skewed treatment documentation and/or diminish or change treatment or procedures in the ways described above.
6. A forensic expert who is treating a litigant may *consciously* use a nominal "treatment" relationship to prevent creation of a legitimate factual treatment situation. That is, by controlling the documentation of clinical care, an unscrupulous expert is in a position to control, if he or she chooses to do so, opposing counsel's access to accurate clinical information.
7. A forensic expert who is treating a litigant could *consciously* collude with the litigant to misrepresent symptoms, diagnoses, treatment response, or disability (note that this may occur with nonforensic clinicians as well, often out of a misguided effort to help the patient).

What "treater" situations might be acceptable? The above cautions notwithstanding, some administrative assessments are commonly and reasonably completed by treating clinicians (though a separate evaluator is often a better choice). In the simplest cases, agencies ask treaters to opine from their records about mental disability, fitness for duty, some sort of license or permit, or civil commitment, for example.

Things get a bit more complicated when one is asked for a separate assessment or opinion about a patient's/client's fitness or condition. I do not take a position of forbidding physicians and therapists from filling out disability forms or requests for opinions about, say, eligibility for a

driver's license, but there are several inherent sources of conflict. Clinicians know (or should know) that their patients and patient care are affected by what the doctor or therapist says to others, such as employers or agencies. We don't want to upset our patient relationships or make patients/clients uncomfortable. Moreover, we don't want to make ourselves uncomfortable by having to explain a negative opinion. Some of the conflicts are clear; others are hidden and even unconscious.

Some clinicians deal with this by being very open with patients for whom they write letters or complete administrative forms. Others have a rule that the form will not be discussed with the patient at all and will be sent directly to the requesting party. Still others have the patient participate in completing the form or letter, edit drafts, or even write it him- or herself. Although discussion is recommended, *I do not recommend allowing the patient to influence one's wording or opinions and believe that such a process is often dishonest and unethical.*

Career Directions in Private Forensic Practice

"Expert," "Expert witness" As we will quickly see, the word "expert" has both general and specific definitions and usually includes far more than testifying. Giving testimony is only a small part of most forensic experts' practices.

Litigation consultant Litigation consulting by itself is a relatively unusual subspecialty. General forensic work may include some litigation consultation, but that is not the primary role of most retained experts, and it may preclude an expert from testifying (because of the advocacy role that it implies). When attorneys hire an expert, they usually want the option of having that expert testify if his or her eventual opinions are helpful to the case. On the other hand, ethical experts who anticipate testifying should be cautious about the extent to which they assist in strategy and advocacy for one side or the other.

Doctor vs. doctor–lawyer As already mentioned, almost all of the forensic/expert roles discussed herein stem from a clinical foundation. Clinicians who also have a law degree are considered, in this book, from the standpoint of their psychiatric, not legal, expertise.

Part-time or full time? I recommend that almost all forensic expert careers be "part-time," in the sense that some aspects of patient consultation and/or care should remain a part of the forensic clinician's practice. Exceptions exist—for example, for a very experienced forensic professional who does not become involved in many matters involving malpractice or clinician competence.

Subspecialization (civil, criminal, child, family, substance abuse, worker's compensation, etc.) I do not recommend subspecialization early in one's forensic career. It is important to gain a breadth of experience in the field as a whole, and limiting oneself to, for example, criminal work reduces the practice "market." On the other hand, it is very important to refrain from accepting cases in which one is not qualified. Some specialty areas, such as child forensic work, require considerable additional clinical training in order to offer true expertise.

Case experience with both plaintiff/prosecution and defense In contested litigation, consulting to one side most or all the time should be avoided by private practitioners, since it may imply (accurately or not) a bias that can be exploited by the lawyer for an opposing side. Some forensic clinicians are employed by court systems or law-enforcement agencies, and thus naturally find themselves working for the prosecution more often than for the defense in criminal matters. Conversely, in cities in which prosecutors employ or commonly use particular experts, it may be difficult to develop local criminal experience except as a defense expert. Note that the proportion of cases in which one testifies for one side or another is not the same statistic as the proportion in which one is retained. If you are retained frequently by both prosecution and defense, or plaintiff and defense in civil matters (in separate cases, of course), but end up almost always testifying for one or the other, be prepared to discuss the reason.

Local vs. broad regional or national practice It is much easier to develop a local practice than a broad geographic one. Local practice has obvious advantages but is vulnerable to local change, such as becoming too familiar to local lawyers and judges, influx of competition in the form of new practitioners, state and local agency and judicial budgets, and changes in state law that may affect one's ability to testify (particularly professionals with less training or certification than, say, a fully trained and certified forensic psychiatrist). Gaining experience in other jurisdictions and states is usually helpful to one's knowledge and career, in spite of geographic inconvenience (but note that, in many cases, almost all forensic work, such as record review or deposition, is done near one's home). Those who have an active forensic practice outside their home communities should consider limiting their clinical work to patients and caseloads that can tolerate unexpected absences.

Kinds of Cases

As noted above, the kinds of cases in which one becomes involved is an individual choice, but one should be sure of actual expertise before representing oneself as qualified in a particular area. This list is not

all-inclusive, and the concepts often overlap; most are discussed to some extent later in this book.

Negligence, personal injury These are broad categories of common civil litigation that include medical/clinical malpractice and standard of care, emotional damage, liability, disability, harassment, and discrimination.

Criminal This category includes criminal responsibility (sanity, "not guilty by reason of insanity" [NGRI]), trial competency and other criminal-related competencies (e.g., to plead, to represent oneself, to be sentenced, to be executed), and offense mitigation.

Juvenile court matters These may not strictly be called "criminal" because of the age of the defendant, but include many of the above plus juvenile waiver (related to being tried as an adult) and other topics. Many of these topics suggest that the expert have extensive child or adolescent clinical training.

Competencies and capacities "Competency" should always be followed by "to . . .." In the civil arena, it may refer to the mental ability to make a will, make a contract, act properly (e.g., drive a car), consent to something, refuse something, marry, parent, or act in light of others' influence. Competencies in criminal matters are noted above. (Note that an assessment of competency to parent is not the same as one for child custody; see below.)

Guardianships, conservatorships These matters refer to a person's ability to do something independently and, conversely, to a psychiatric or psychological need for outside help or substituted judgment when that ability is compromised. In children, guardianship is often predicated solely on age. In adults, the issues are mental function and capacity (such as the ability to manage one's finances or other affairs). Guardianship and conservatorship are similar concepts which may have specific differences in different jurisdictions.

Child custody or best interest These matters ordinarily involve comprehensive assessments of both children and adults and thus special expertise in both child psychiatry/psychology and family interaction.

Disability, impairment The most common tasks in this area are assessments of mental disability or impairment for such things as disability insurance income, allegations of mental damage, and fitness for a particular job or duty. They may also include assessing ability to perform functions for employment or licensure purposes (including professional licensure). Sometimes (often in employment cases) it refers to the interface of mental condition and the Americans with Disabilities Act (ADA).

Worker's compensation Worker's compensation is a fairly narrow and specialized area of law and forensic endeavor. It has elements of assessment of disability or impairment but is separate from civil liability *per se* (that is, it is related to a form of insurance rather than to the complexities and potential liabilities of civil lawsuits).

Consultations, second opinions Various kinds of entities (e.g., health-care facilities, businesses, government agencies) sometimes seek forensic clinicians when they encounter mental health issues that may also involve the law (such as potential liability, safety, or civil rights). The clinician may not only address the clinical aspects of such situations but be asked about (or asked to help the entity meet) some legal or liability standard. For example, a company may ask a forensic psychologist to assess the potential dangerousness of an employee; a hospital may ask for a second opinion about suicide risk before discharging a patient; an emergency room or physician may need assessment or certification of a patient being considered for involuntary psychiatric hospitalization; or a school system may retain a mental health expert to assist in writing policies about mental disorders in its students or staff. The clinician is not retained as a lawyer but, by virtue of forensic training and experience, offers something more than clinical expertise alone.

Clinical practice in forensic settings Although this book is not directed at clinical practice in forensic settings, many "forensic" mental health professionals spend most of their practice time providing patient/client care in jails, prisons, secure hospitals, juvenile residential centers, outpatient forensic clinics, and similar treatment environments.

A Few Practice Principles

Before we get to the nuts and bolts of forensic practice, let's touch upon a few of the basic principles to which those nuts and bolts apply.

Advocacy is the lawyer's job, not yours. When you are working on a case, it's not "your case," and the lawyer isn't "your lawyer." The lawyer's duty is to his or her client; most of your duty, within certain bounds, is to the lawyer or other entity that retained you, not to the litigant. With few exceptions (such as the complex area of being retained by a *pro se* litigant), you should not be retained directly by a litigant if you anticipate testifying as an expert.

You may (and often should) advocate articulately for your ***opinions*** *(e.g., in reports or testimony), but not for the case or litigant* per se. It should be obvious that the attorney who retains you will not ask you to testify unless he or she believes your opinions are helpful to his or her case, and will attempt to guide your testimony toward those opinions. This can often be done within the expert's ethical bounds, but one should be a bit cautious,

particularly if one is asked to gloss over important and relevant information that tends to detract from the lawyer's purpose.

Don't express an opinion before you have done sufficient objective review and/or evaluation, and be certain you ***have*** *sufficient and representative information before coming to any opinion.* Be sure the retaining lawyer understands that, although you may comment informally to him or her during the course of the case, any "opinion" attributed to you must have an adequate foundation.

If you are retained (or expect to be retained) by an attorney, do not communicate directly with the court, litigant, or opposing lawyer without authorization. Always communicate through the retaining attorney or with his or her approval. This applies to initial case contact (e.g., avoid calls or emails from litigants or potential litigants asking you to become involved), information gathering, obtaining corroborating information, scheduling examinations or interviews, preparing reports, and preparing for deposition.

Don't accept cases in which you aren't really an expert or don't think you can be objective. For example, all psychotherapists know something about psychotherapy and all psychiatrists know something about psychotropic medications, but if the case is likely to involve complex or esoteric knowledge you don't have, refer it elsewhere. With regard to objectivity, if you are particularly opposed to the death penalty, for example, or markedly repulsed by pedophilia, consider not becoming involved as an expert witness in such cases.

Consider not accepting an expert role in cases involving friends or close colleagues, even for malpractice defense, or in those involving your own (past or present) students, residents, supervisees, employees, or employers, for whom there is likely to be a bias or conflict of interest.

It is ethical to offer honest expert opinions against colleagues; however, you may wish to avoid those near whom you practice or whom you know fairly well. I sometimes tell colleagues or students in lectures that, although it is unlikely that I will be involved in a case against them, they might prefer that I were, since they at least would be assured of an honest review.

If you work on a case involving a defendant clinician (e.g., a malpractice action), *resist the temptation to be personally supportive of the physician (or any plaintiff or defendant).* You're not that person's therapist. Your usefulness lies in your independent expertise, not in your personal support. You may suggest (preferably through the attorney who has retained you) someone else to offer counseling or treatment, but you should not be directly involved in either the referral or the clinical case.

What the Heck Does "Do Not Allow the Lawyer to . . . " Mean?

From time to time in this text I say something like "Do not allow the attorney to (send you incomplete records, attribute an opinion to you that

you haven't genuinely expressed, etc.)." My point is that you should not knowingly participate in whatever shenanigans are being referred to. Sometimes it's an ethics matter; sometimes it's just bad practice or places you on a sort of "slippery slope." You can attempt to educate the attorney about your role and ethics, but your main "power" if that doesn't work is simply to decline to cooperate or, if the matter is serious, to withdraw from the case. Don't do this lightly, and be aware of the possible consequences of abandoning a case after time and money have been spent, but don't be a pushover, either.

The great majority of the attorneys and firms with whom I have consulted over the past 30 years or so are ethical, straightforward, and easy to work with (yes, even plaintiffs' lawyers). They need you for your skill and expertise, not as some kind of mouthpiece for their cases. Most will not ask you to do anything illegal or unethical (and will often help you to better understand legal and judicial propriety).

There are, however, a few real schmucks (like the one who once told a colleague: "Having an unbiased expert in your case is like having a pacifist in your foxhole"). Try to spot them early (there are often premonitory signs in the first phone call); get away from them as quickly as you can; don't go back to them in the future; and don't do anything your mother wouldn't approve of.

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VOCABULARY

Yep, a whole chapter on vocabulary. Much of your role involves translating clinical information into the language of lawyers and courts, so much of your success is related to familiarity with legal terms. I'm not trying to make you an attorney, but understanding and communicating with lawyers means that "vocabulary" is too important to relegate to an "appendix." I suggest you read this entire chapter *now* rather than simply referring to it when you think you need it.

By the way, don't rely solely on my definitions; *get an inexpensive dictionary of legal terms*.

***Ad litem* (Guardian *ad litem*)** Literally, a guardian "for the purpose of legal action." A guardian *ad litem* is a person (often a lawyer, occasionally a program or agency) appointed by a court to represent, in a legal proceeding, the interests of a child or incapacitated/incompetent person. It is not the same as a conservator or guardian of the person; the duty and responsibility are limited to the legal process.

***Amicus* (*Amicus curiae*)** In the context of this book, literally a "friend of the court." A person or group that communicates facts and/or opinions (via an "*amicus* brief," in a complex format that is never very "brief") to an appellate court regarding a case that it is scheduled to hear or is deciding whether or not to consider. The *amicus* is not a party to the litigation but has an interest in the outcome (for example, the American Psychological Association may file a brief supporting one side of an appeal involving the rights of mentally disordered offenders). The term does *not* refer to the work of forensic mental health professionals unless they happen to be assisting someone who is preparing an *amicus* brief.

Appeal, Appellate In the context of this book, the rehearing of some aspect of a case that has already been adjudicated in a trial court. Appeals are almost always appeals of matters of *law*, not matters of fact (for example, procedural matters such as whether or not a judge ruled properly on a motion or whether or not a case was heard in the proper

jurisdiction). Thus a trial court finding of guilt or innocence, or whether a plaintiff or civil defendant prevails, is not *per se* a matter for appeal (since these are matters of fact and decided by the "trier of fact"; see below).

When an error in law is found by the appellate court (which may be, but isn't limited to, a state supreme court or the U.S. Supreme Court), that court may or may not overturn the trial court's ultimate finding, depending on the importance of the error. An error important enough to justify overturning a trial court verdict is called a "reversible error."

Appeals are generally allowed for any verdict except one that finds a criminal defendant "not guilty." The judgments of appeals courts (except the U.S. Supreme Court in federal matters or a state supreme court in purely state matters) may themselves be appealed to a higher appeals court.

Appreciate, Appreciation Something more than the simple concept of "knowing" or verbalizing. Legal criteria for competence and responsibility often separate "knowing" from "appreciating" or "understanding." It is important that definitions be clear when using the term in some contexts (for example, one's knowing she is buying a car vs. appreciating whether or not the purchase is reasonable, or knowing that firing a gun may harm someone vs. appreciating wrongfulness and forming criminal intent).

Capacity A condition of being able to do something. It may be the same as "competence" in some matters but is often slightly different. See "Competence, Competency," below.

***Certiorari* (Writ of *Certiorari*)** Certain appellate proceedings to reexamine the actions of a trial court. Today this usually refers to a petition to the U.S. Supreme Court, which may be accepted for hearing or denied (the latter letting the next highest appellate decision stand).

Client (Business Client, Forensic Client) In this context, the person or entity with whom you have a consultative or expert witness relationship. This relationship is different from, and should not be confused with, either a clinician–patient or a lawyer–client relationship.

Client (Legal Client) A person or entity who has a fiduciary (q.v.) relationship with an attorney or law firm in which certain services and privileges are expected. This relationship is different from, and should not be confused with, a clinician–patient relationship or the relationship a forensic clinician has with a retaining entity. Note that you *do not* have a lawyer–client relationship with any person involved in your forensic cases; that's just for lawyers.

Client (Psychotherapy or Mental Health Client) See "Patient," below. I often use the term "patient" rather than "client" or "patient/client" when speaking of someone who is being treated by a clinician. I do not

use either term when describing a forensic professional's relationship with a litigant, defendant, or other evaluee (and neither should you).

Competence, Competency A condition of being able to do something. The elements of competence and the level of proof required to establish its presence or absence vary from topic to topic (e.g., competence to consent (q.v.), refuse consent, make a will, change a beneficiary, stand trial, plead, manage one's financial affairs, contract, parent, be sentenced, be executed). It may be the same as "capacity" in some matters but is often slightly different. *Note that competence is an **ability** to do some specified thing, separate from whether or not one **chooses** to do it.*

Consent A condition of allowing something. Valid consent requires adequate *knowledge*, *competence*, and *voluntariness* for the particular activity. Note that the concept of requiring "informed consent" is incomplete without the other two elements (competence and voluntariness). The criteria for competence to consent vary with both the complexity and the anticipated consequences of the proposed action, and thus *the criteria for competence to **consent** to something (such as hospital admission or a medical procedure) should be viewed differently from the criteria for competence to **refuse** it.*

Contingency Fee As used herein, a fee that is either based upon the hiring entity's (e.g., lawyer's) winning or settling the case or levied only if the case is won or settled. Plaintiffs' lawyers routinely work on contingency (at least in part). *Contingency fees are unethical for forensic clinicians and expert witnesses* and may be illegal in some jurisdictions. (Almost all forensic clinicians charge by the hour or day only; a few charge a flat rate for certain activities.)

Defendant In civil matters, a person or entity against whom a lawsuit or other complaint or allegation is brought. In criminal matters, a person accused of a crime or juvenile infraction.

Deposition (Discovery Deposition) A formal process of testimony, usually in civil cases, in which the deponent (usually an expert witness or a fact witness [the same as "lay witness; see below]) is asked by the opposing side's lawyer(s) about his or her background, observations, and (in the case of an expert witness) opinions with regard to a case. This allows the other side to assess the strengths and weaknesses of the case and to "discover" what a witness is likely to say at trial. Depositions also allow the deposing attorney to "lock in" the deponent's opinions and other testimony for trial, so that, if he or she later testifies differently, apparent contradictions can be addressed. Deposition testimony is taken under oath, is recorded, and may be used at trial. (See "Deposition (Trial Deposition)" below.)

Deposition (Trial Deposition) Essentially similar to the above, but used in *lieu* of trial testimony if, for example, the deponent knows that he or she cannot be present at trial.

Discovery A process through which each side in a litigation is allowed access to information possessed by the other side. This increases the fairness of the litigation process, prevents last-minute surprises, and provides time to prepare rebuttals. When your work becomes part of the discovery process, it opens your files, notes, and memory to the other side. *You must respond honestly when asked.*

Duces tecum See "Subpoena."

Evaluee, Examinee In our context, a person who is evaluated for some forensic or administrative purpose in the absence of any clinician–patient relationship ("plaintiff" or "defendant" may also be correct). *It is important to refer to such a person as an "evaluee" or "examinee" (or "plaintiff" or "defendant" as appropriate) rather than as a "patient" or "client"* (which would imply a relationship with the evaluator, which should not exist).

Expert Deposition A discovery deposition of an expert witness, in which his or her opinions may be elicited.

Expert Witness A type of witness who is allowed to give opinions and who is allowed to consider things not directly observed (including "hearsay" evidence), as well as to testify to "facts" (observations). Expert witnesses are qualified by the court before their testimony is allowed. Expert witnesses need not be outstanding in their fields but should have special and reliable knowledge about a matter before the court. Qualifications considered include training and experience relevant to the case at hand, relevance of proposed testimony, and other criteria. (Contrast with "Fact Witness," below.)

Fact Often merely a statement made by one side or the other which is relevant to that particular side of a case. "Facts" in legal matters are not necessarily "true" unless a judge says they are true, and then they are true (as a "matter of law") whether they are accurate or not.

Fact Witness ("Lay Witness") The most common type of witness, and one who is allowed to testify only to what he or she knows from actual observation (e.g., things seen or heard firsthand). Fact witnesses generally are not allowed to give expert opinions (although they slip in from time to time, and certain opinions are permitted when they don't require special knowledge; see chapter 13).

Factfinder The person or persons who determine whether or not a litigant has met his/her/its burden. This may be a jury or, if there is no jury, a judge. See "Trier" (trier of fact) below.

Fiduciary, Fiduciary Duty An adjective or a noun which refers to a legal requirement to place another person's interests above virtually any others, including one's own. Banks have a fiduciary duty to their depositors. Doctors have a fiduciary (or near-fiduciary, depending on jurisdiction) duty to their patients. As already noted, that duty to patients or therapy clients generally precludes forensic expert

objectivity and credibility, because of the conflict between one's duty to a patient and his or her duty to the court.

Foreseeable, Foreseeability The reasonable expectation, by a prudent person, that something may occur. The term generally refers to *risk*. *Foreseeability is not the same as predictability*, does not "predict" specific events, and usually need not anticipate specific events. Think of a business with a big, unprotected hole in its sidewalk: a prudent person would expect that someone would eventually be injured, even if most patrons avoided the hole. Applied to mental health topics, it may be foreseeable, for example (that is, there is substantial risk), that a patient who has just tried to kill himself will try again if something doesn't change for the better.

Friend of the Court See "*Amicus*."

Guardian *ad litem* See "*Ad litem*."

Independent Medical Examination (IME) ("Independent Psychological Examination") Detailed, in-person examination of a litigant, complainant, or other party to a legal or administrative claim, undertaken by a clinician who may be retained by one side of a case but who has no clinician–patient relationship with the evaluee/examinee. Some jurisdictions reserve the word "independent" for examiners engaged by a judge or other disinterested party; others use the term when the examiner is retained by one side or the other (sometimes with the court's approval).

Know, Knowing May refer to simple, rote knowledge (such as knowing that one is signing a check or firing a gun); however, "know" may also refer to the broader concepts of understanding and/or "appreciation" (q.v.). It is important that definitions be clear when using the term in some contexts (for example, one's knowing she is buying a car vs. appreciating whether or not the purchase is reasonable, or understanding that firing a gun may harm someone vs. forming criminal intent).

Lay Witness As used herein, a fact witness (q.v.).

Negligence As primarily used herein (and called "ordinary" negligence), generally a failure to exercise reasonable care under the circumstances, particularly (e.g., in malpractice actions) when one owes a special "duty of care" (such as that created by a clinician–patient relationship).

There are many kinds of negligence, among them *gross negligence* (sometimes called something like "reckless indifference" or "wanton disregard"), which is a failure to exercise even slight care (definitions vary by jurisdiction).

Opine To offer an opinion.

Patient (or Psychotherapy or Mental Health "Client" [but not a Lawyer's Client]) As used herein, a person who has a doctor–patient (or clinician–client) relationship with a physician or other clinical professional. Such a relationship creates a number of duties of the clinician