PART I

THE JUDICIAL SYSTEM

When warring parents head to court to fight over child custody in New York, their lawyers often let them in on a little secret. The most powerful person in the process is not the judge. It is not the other parent, not the lawyers, not even the child.

No, the most important person in determining who gets custody, and on what terms, is frequently a court appointed forensic evaluator. Forensics, as they are often called, can be psychiatrists, psychologists or social workers; they interview the families and usually make detailed recommendations to judges, right down to who gets the children on Wednesdays and alternate weekends.

And the judges usually go along. *(Emphasis added.)*

New York Times, Sunday, May 23, 2004, pp. 1, 25.

The preceding article emphasizes what lawyers have known all along and what every lawyer underscores to potential witnesses: The testimony of the forensic mental health professional is crucial, important, worthy of extensive preparation, and can affect the lives of an

entire family immediately following the trial and for countless years into the future. Thus, it is imperative that the forensic witness be schooled in all the techniques necessary to prepare for evaluation, assessment, and court appearances.

The court appearance is the final report card. The grade is awarded by the judge or jury.

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Our System of Justice

After practicing as counseling interns for two years and completing the requisite supervised hours, Karen and Jim became fully licensed counselors. They formed a partnership and opened a marriage and family counseling practice. Initially, business was slow, and they had to squeeze every ounce of revenue from the practice to keep the doors open. One unsettling day they each were served with a subpoena in a divorce case involving a couple they had counseled. Jim had provided individual counseling to the husband, and Karen had done so for the wife. Jim and Karen were obligated to appear to give depositions, and they did not know what to anticipate. They were also very upset at the loss of income that would result from their being away from the office.

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Even the most seasoned mental health professional can be unnerved by interaction with the legal system, especially the first time. Undergraduate and graduate mental health programs seldom offer courses that acquaint students with American jurisprudence. This chapter gives an overview of the legal process for the uninformed or novice mental health professional.

To say that there are many courts in the United States is an understatement. We are truly a country of law, litigation, and conflict, and we have the courts to prove it. There are city (municipal) courts, county courts, state courts, federal courts, appellate courts, courts of very specialized jurisdiction (e.g., bankruptcy and admiralty), administrative law courts, civil courts, and criminal courts. The military has its own courts, as do Native Americans.

The number of civil lawsuits filed today is extraordinary. If you consider just divorces and the fact that 50 percent of all first marriages and a still greater percentage of second marriages end in divorce, you can see how great the possibility is for a mental health professional to be involved in a civil lawsuit.

The Process in Civil Litigation

Civil lawsuits seek recovery or redress for some wrong done to, or harm suffered by, the person bringing the suit. The recovery of a monetary award is most often the goal.

Step One: Filing a Petition

To initiate a civil lawsuit, a party must file a *petition* (or a *complaint* in some jurisdictions) in the appropriate court, setting out the identity of the parties, reason(s) that the court has jurisdiction over the parties and the dispute, subject matter and appropriate facts of the dispute, and relief or damages requested. Defective filings are subject to attack and can be stricken, or the filing party can be ordered to file an amended petition.

Step Two: Service of Process

After the suit has been filed, the opposing party, commonly referred to as the *respondent* or *defendant,* must be given notice of the suit and allowed to respond. A process server is sent to serve the opposing party with a copy of the suit (in some jurisdictions, service can be accomplished by mail). Courts require proof of such notice before allowing the suit to go forward. An opposing party can waive this right to service and enter an appearance in the suit.

Step Three: Answer

The opposing party is usually required to file an *answer* or response to the suit within a short time period after receiving notice. A failure to

file the answer can result in a default judgment being entered. In the answer, the opposing party can set forth defenses to the suit and file counterclaims against the person or party that brought the suit. Any defects in the complaint are generally raised at this time.

Step Four: Preliminary Motions

In some suits, a court may need to address some matters quickly, and hearings may be conducted very early on by the court. This procedure is common in family law cases where a court is asked to decide temporary custody of children or use and possession of the family residence. In other kinds of cases, the court may need to enter injunctions to preserve or protect property or the rights of a party. Injunctions generally maintain the status quo until a more detailed hearing can be arranged or until the final hearing or trial.

Step Five: Discovery

After the suit and the litigants have been engaged, the parties can implement procedures to help them prepare for trial. The goal is to avoid "trial by ambush" by allowing each side to learn as much about the dispute as possible before going to trial. Such procedures include interrogatories, depositions, request for records, and admissions.

Interrogatories are written questions that can be propounded to a party as well as to third persons who are not parties to the suit.

Depositions are usually conducted in an attorney's office.

Interrogatories are written questions that can be propounded to a party as well as to third persons who are not parties to the suit. These questions must be answered fully under oath (notarized) within a prescribed time period. Often this kind of discovery tool is referred to as a *deposition by written interrogatory*.

Depositions usually involve live, person-to-person questions and answers that are recorded by a court reporter and sometimes also videotaped. Depositions occur outside the courtroom and are usually conducted in an attorney's office. Both sides have the right to ask questions of the witness either directly or through their attorney.

Requests for records require production for inspection and copying of records or documents in the possession of a person or subject to

Attempts to secure computer records and computer drives are very common in a party's search for evidence.

that person's control. These kinds of requests can also be used to compel the production and inspection of any tangible item, not just written documents. Today, attempts to secure computer records and computer drives are very common in a party's search for evidence.

Admissions are requests for a party to admit or deny certain facts. Admissions can be very useful in establishing important case facts without introducing other proof at trial. Often, admissions can limit the scope of the trial.

Step Six: Alternative Dispute Resolution

The goal of ADR is to resolve the suit without having to go through a trial.

Alternative dispute resolution (ADR) can occur at any point in the proceedings, even before the filing of a lawsuit. America's style of litigation can be very expensive for the parties, government, and society as a whole; thus, alternatives have become increasingly more attractive. ADR includes techniques such as arbitration, mediation, moderated settlement conferences, conciliation, negotiation, and summary jury trials. The goal of ADR is to resolve the suit without having to go through a trial and perhaps years of appeals. If the matter can be resolved through ADR, the case is usually concluded with less cost and in less time. The lawyers and the court typically control litigation while through ADR techniques, the process and outcome of the dispute can be put in the parties' hands.

Step Seven: Trial

If the parties are unable to reach a settlement of the contested issues in the lawsuit, a *trial* will take place. Americans have always safeguarded the fundamental right to have an independent tribunal resolve disputes between its citizens. Cases are tried before a judge (bench trial) or a jury (jury trial). Either way, a decision is made and a final judgment (sometimes referred to as *decree* or *court order*) is then entered by the court.

A complete civil jury trial consists of six main phases:

1. **Selecting a jury:** Prospective jurors are generally provided minimal case information and then questioned to determine their ability to be fair and unbiased in determining the case. Each side in the case is given an opportunity to challenge jurors for ineligibility or bias and has a limited number of "strikes" to eliminate jurors for any reason. At the end of the process, a jury is seated to decide the issues submitted to it by the judge in the case.
2. **Opening statements:** Attorneys or litigants are allowed to address the jury directly in an opening statement providing an overview of the evidence they expect to present to the jury and their theory of the case.
3. **Witness testimony and cross-examination:** The party initiating the lawsuit is allowed to present evidence first, which consists primarily of calling witnesses to testify. In direct examination, a party calls a witness and begins asking questions of the witness. The opposing party is then allowed to ask questions of the witness, called *cross-examination*. When the initiating party has called all of his or her witnesses, the responding party goes forward with presenting his or her witnesses for direct and cross-examination.
4. **Closing arguments:** After all witnesses and evidence have been presented, each side is allowed to talk directly to the jury to summarize the case and present reasons that the jury should rule in a party's favor.
5. **Jury instruction:** After the parties have concluded their closing arguments, the judge gives the jury instructions on the decisions it will make with respect to the case. These instructions include the selection of a foreman and decisions on facts and the law that must be applied to these facts in rendering the verdict.
6. **Jury deliberation and verdict:** Jurors are required to deliberate until a verdict is reached or the court declares a mistrial because of deadlock. Either way, the jury is brought back into the courtroom, and the results of its deliberations are announced to the judge, parties, and lawyers in the case. The jury is then discharged, and members are free to leave the courtroom and to

discuss their experience if they choose to with the parties and lawyers.

Step Eight: Postjudgment Motions

If a party is not satisfied with the outcome of the trial, postjudgment motions may be filed. Such motions include motions for new trial, motions for judgment notwithstanding the verdict, and motions for reconsideration. After the court has heard and rendered its decision on these types of motions, the judgment becomes final and appealable.

Step Nine: Appeal

After the case is concluded at the trial court level, a party may appeal the case to an appropriate appellate court. Appellate proceedings usually include submission of a transcript of the trial, written briefs from each party, and oral argument to the appellate court.

An appellate court may affirm or reverse the trial court's judgment, in whole or in part, and may send the case back to the trial court for rehearing. The decisions of the first level of state appellate courts may be appealed to the state's highest court and ultimately to the U.S. Supreme Court. The decisions of the first level of federal appellate courts may also be appealed to the U.S. Supreme Court. A litigant generally has a right to appeal a case to the first level of appellate courts. State supreme courts and the U.S. Supreme Court have discretion in determining many of the cases they decide to hear. After all appeals have been exhausted, the case truly becomes final and the judgment is subject to enforcement.

The Process in a Criminal Case

A criminal case is brought by a governmental authority to establish whether a crime has been committed and, if so, what the appropriate punishment should be—imprisonment, assessment of fines, or both can be the result.

Step One: Arrest

A criminal case typically begins when a police officer places a person under arrest. An *arrest* occurs when a person has been taken into police custody and is no longer free to leave or move about. A police officer may usually arrest a person if the officer observes a crime; has a reasonable belief, based on facts and circumstances, that a person has committed or is about to commit a crime; or when an arrest warrant has been issued. An *arrest warrant* is a legal document issued by a judge or magistrate, usually after a police officer has submitted a sworn statement that sets out the basis for the arrest.

Step Two: Booking

After arrest, a criminal suspect is usually taken into police custody and *booked,* or *processed.* During booking, personal information is recorded about the suspect; the suspect is searched, photographed, and fingerprinted; a criminal background search of the suspect is conducted; and the suspect is placed in a holding cell or local jail. Except when very serious crimes are charged, a suspect usually can obtain pretrial release through bail or *own recognizance* (the suspect is released after promising, in writing, to appear in court for all upcoming proceedings).

Step Three: Bail

If a criminal suspect is not released on his or her own recognizance or pretrial release, then release can occur only through the bail process. *Bail* is a process through which an arrested criminal suspect is allowed to pay money in exchange for his or her release from police custody, usually after booking. As a condition of release, the suspect promises to appear in court for all scheduled criminal proceedings—including the arraignment, preliminary hearing, pretrial motions hearings, and trial. The bail amount may be predetermined through a bail schedule, or the judge may set a monetary figure based on the crime's seriousness, the suspect's criminal record, the danger the suspect's release

may pose to the community, and the suspect's ties to family, community, and employment.

Step Four: Arraignment

Arraignment is the first stage of courtroom-based proceedings during which a person who is charged with a crime is called before a criminal court judge. The judge reads the criminal charge to the suspect (now called the *defendant*), asks the defendant if an attorney has been retained or if he or she needs the assistance of a court-appointed attorney, and asks how the defendant answers or *pleads* to charges ("guilty," "not guilty," or "no contest"). Next, the judge decides whether the defendant can be released on his or her own recognizance or what bail amount is appropriate. Last, the judge announces dates of future proceedings in the case.

Step Five: Plea Bargain

In a plea bargain, the defendant agrees to plead guilty in exchange for a more lenient sentence.

The vast majority of criminal cases are resolved through a *plea bargain* usually well before the case reaches trial. In a plea bargain, the defendant agrees to plead guilty, usually to a lesser charge than one for which the defendant could stand trial, in exchange for a more lenient sentence and/or so that certain related charges are dismissed. For both the government and the defendant, the decision to enter into (or not enter into) a plea bargain may be based on the seriousness of the alleged crime, the strength of the evidence in the case, and the prospects of a guilty verdict at trial. Plea bargains are generally encouraged by the court system and have become something of a necessity because of overburdened criminal court calendars and overcrowded jails.

Step Six: Preliminary Hearing

Usually held soon after arraignment, a *preliminary hearing* can be described as a "trial before the trial" at which the judge decides *not* whether the defendant is guilty or not guilty, but whether there is

enough evidence to force the defendant to stand trial. In making this determination, the judge uses the probable cause legal standard, deciding whether the government has produced enough evidence to convince a reasonable jury that the defendant committed the crime(s) as charged. A preliminary hearing may not be held in every criminal case in which a not guilty plea is entered. Some states conduct preliminary hearings only when a felony is charged, and other states use a *grand jury indictment* process in which a designated group of citizens decides whether, based on the government's evidence, the case should proceed to trial.

Step Seven: Pretrial Motions

Pretrial motions are presented after the preliminary hearing and before the case goes to trial. Such pretrial motions often involve evidentiary issues about the admission or exclusion of certain evidence. They are tools used by the government and the defense in an effort to set the boundaries for trial, should one take place.

Step Eight: Trial

In a criminal trial, a jury examines the evidence to decide whether, beyond a reasonable doubt, the defendant committed the crime in question. A trial is the government's opportunity to argue its case, in the hope of obtaining a guilty verdict and a conviction of the defendant. A trial also represents the defense's opportunity to refute the government's evidence and to offer its own in some cases. After both sides have presented their arguments, the jury considers as a group whether to find the defendant guilty or not guilty of the crime(s) charged. (Note: Although a trial is the most high-profile phase of the criminal justice process, the vast majority of criminal cases are resolved well before trial—through guilty or no contest pleas, plea bargains, or dismissal of charges.)

The vast majority of criminal cases are resolved well before trial.

A criminal trial consists of the same six main phases as a civil jury trial described earlier:

1. Choosing a jury.
2. Opening statements.
3. Witness testimony and cross-examination.
4. Closing arguments.
5. Jury instruction.
6. Jury deliberation and verdict.

Step Nine: Sentencing

After a person is convicted of a crime, whether through a guilty plea, plea bargain, or jury verdict, the appropriate legal punishment is determined at the *sentencing* phase. The punishment that may be imposed on a convicted criminal defendant includes fines, incarceration in jail (shorter term), incarceration in prison (longer term), probation, a suspended sentence (which takes effect if conditions such as probation are violated), payment of restitution to crime victims, and community service.

Step Ten: Appeals

Both a state governor and the president have pardon authority.

An individual who has been convicted of a crime may *appeal* his or her case, asking a higher court to review certain aspects of the case for legal error as to either the conviction itself or the sentence imposed. The government does not have the right to appeal a not guilty jury verdict. As in civil cases, there is an absolute right to a first level of appeal, but there is greater access to state supreme courts and to the U.S. Supreme Court for many criminal cases, especially death penalty cases. Both a state governor and the president have pardon authority and can be considered a final appeal option for the defendant who is not successful in having a criminal conviction reversed by the courts.

Step Eleven: Expungement

Expungement is a process through which the legal record of a criminal conviction is *sealed,* or erased in the eyes of the law, after the passage of a certain amount of time or the fulfillment of certain conditions.

After expungement, a criminal conviction (and in some cases even an arrest) ordinarily need not be disclosed by the person convicted, and no arrest or conviction shows up if a potential employer, educational institution, or government agency conducts a background search of an individual's public records.

The Juvenile Case

Just as adult crime has increased, so has the misconduct of our youth. Juvenile courts are handling increasingly higher caseloads, and juvenile detention facilities are overcrowded. With the emphasis on rehabilitation and continued monitoring, it is not difficult to envision the extensive involvement by mental health professionals in juvenile cases.

Step One: Referral

A case can arise when the police apprehend a minor for violating a statute, but more commonly it begins when a school official, parent, or guardian refers a problem with a juvenile to the court. In this context, school counselors often are the first to recognize the genesis of criminal potential. Often the school counselor recognizes inappropriate behavior before the parent is willing to admit there is a problem.

The court intake officer then evaluates the case, sometimes called a *juvenile delinquency* case, to determine whether further action is necessary, the child should be referred to a social service agency, or the case should be formally heard in juvenile court. If the situation is serious enough, the juvenile may be detained in a juvenile correction facility pending resolution of the matter or be sent to an alternative placement facility, such as a shelter, group home, or foster home. Juveniles do not have the option to pay bail or post a bond to obtain their release.

Step Two: Proceedings Determination

An intake officer makes an initial determination as to whether formal proceedings are necessary. If the intake officer decides that a formal hearing in juvenile court is not necessary, arrangements may be

made for assistance for the child from school counselors, mental health services, or other youth service agencies. The intake officer considers a number of factors in deciding whether informal proceedings are appropriate, including the seriousness of the alleged crimes, the minor's delinquency and social history, and the level of remorse expressed by the minor.

If the intake officer decides that the case should be heard in juvenile court, a petition is filed with the court setting forth the statutes that the child is alleged to have violated. This petition is the equivalent of a criminal complaint in the adult criminal justice process.

In cases of serious offenses, such as rape and murder, the matter may be referred to the district or county attorney's office, after which the juvenile may be charged as an adult, tried in the criminal courts, and even sentenced to an adult correctional facility. Each state has a statutory age when a juvenile may be charged or certified as an adult for criminal law purposes.

Step Three: Hearing

If the matter proceeds to juvenile court and the child admits to the allegations in the petition, a treatment plan or program is ordered. If the child denies the allegations in the petition, a hearing like the criminal trial of an adult is held. At this hearing the child enjoys both the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination. Rather than try the case to a jury, however, a judge hears the matter and decides whether the juvenile has committed the acts alleged in the petition. If the allegations have not been proven to the court's satisfaction, the judge dismisses the case. If the judge decides that the allegations have been proven, he or she may rule that the child is a *status offender,* a *child in need of supervision,* or a *juvenile delinquent.*

Step Four: Disposition

If the judge determines that the juvenile is a status offender or a delinquent, a second juvenile court hearing is held to determine the disposition of the matter. If the juvenile is not considered to be dangerous

to others, he or she may be placed on probation. While on probation, the juvenile must follow the rules established by the court and report regularly to his or her probation officer. Serious offenders, however, may be sent to a juvenile correction or detention facility.

Other disposition options include community treatment, such as making restitution to the victim or performing community service; residential treatment, in which a juvenile is sent to a group home or work camp, with a focus on rehabilitation; and nonresidential community treatment, in which the juvenile continues to live at home or at a group home but is provided with services from mental health clinics and other social service agencies.

Answers to Frequently Asked Questions About:

Civil suit involvement

Criminal prosecution involvement

? *Question*

I am a counselor in private practice. I have been providing therapy to a client who is contemplating filing a civil lawsuit seeking money damages for injuries she sustained when a coworker assaulted her. In addition, a criminal case is pending against her assailant. The client initiated therapy with me when she began having panic attacks after the assault. When could I reasonably expect to be involved in her civil suit, and can I be asked to play a role in the criminal case? Will I be reimbursed for my time?

! *Answer*

The most likely point at which your involvement might be requested in the civil suit is during the discovery phase of the lawsuit. You may be asked to provide copies of your records, give written responses to a deposition by written interrogatories, or give an oral deposition. You might also be requested to testify concerning mental status, seriousness of psychological damage, extent of emotional injury, permanence of psychological trauma, or the nature and expense of treatment of all

the foregoing. It is also possible that one of the parties may wish to call you as a live and participatory witness at the trial in the case. Your client should have signed an intake and consent form that obligates the client to pay you a reasonable fee for your time spent in responding to any requests for your testimony or records. If the lawyer promises to pay or reimburse you, obtain that agreement in writing, signed by the lawyer. The form or letter should also indicate *when* you can expect to receive payment.

In connection with the criminal case, it is possible that both the state and the defendant could seek your records before trial. You could also expect to be called at trial as a witness and later during the sentencing phase of the case if the defendant is found guilty.

In either case, be sure you have written client consent or a court order before providing any records or information pertaining to your client.

Legal Lightbulb

- If your involvement in a lawsuit is anticipated, carefully review your client file to be sure it is in good condition. Review it for accuracy, completeness, and proper order. Make at least three copies.
- Lawsuits are generally open to the general public, and a poor or inaccurate client record not only will be scrutinized by the parties and lawyers in the case but also could be accessed by any interested person.
- The mental health professional has the duty to disclose information from a client file or about a client only when legally allowed or permitted to do so or when court ordered to make a disclosure.
- The massive amount of litigation occurring in this country creates ever-increasing risks for all citizens, not just mental health professionals, to be drawn into legal proceedings.

Summary

The sheer number of courts and the volume of litigation in our country virtually ensures that a practicing mental health professional will be involved with some clients' legal proceedings at least once, if not many times, while actively engaged in practice and even into retirement. It is simply a risk as well as a cost of being a mental health professional. There is no substitute for knowledge and preparation to make the court case experience as easy on the mental health professional as possible.