

TABLE OF CONTENTS

PREFACE	V
ACKNOWLEDGMENTS	VII
TABLE OF CASES	XXXIII

PART I. MENTAL HEALTH TREATMENT AND THE CLIENT-THERAPIST RELATIONSHIP

Chapter One. Mental Disorders and Their Treatment, the Mental Health Professions, and the Financing of Mental Health Care	3
I. Introduction	4
II. Perspectives on Mental Disorders.....	5
A. The Interface of Law and Mental Disorders.....	5
B. What Is a Mental Disorder?.....	7
1. The Biological Model	10
2. The Psychodynamic Model.....	12
3. The Cognitive-Behavioral Model	13
Questions and Comments	14
C. Diagnosing a Mental Disorder.....	20
Questions and Comments	24
III. Treatment of a Mental Disorder.....	28
A. Introduction	28
B. Biological Therapies	31
1. Treatment of Depression.....	31
a. Pharmacological Therapy.....	31
b. Electroconvulsive Therapy (“ECT”)	34
2. Treatment of Bipolar Disorders.....	34
3. Treatment of Schizophrenia.....	35
4. Treatment of Attention Deficit Hyperactivity Disorder (ADHD).....	39
5. Treatment of Anxiety, Panic Disorders, and Phobias	40
Questions and Comments	41
C. Interactive Treatments (Psychotherapy)	43
Mental Health: Report of the Surgeon General.....	44
1. Psychodynamic Therapy	44
2. Behavior Therapy	45
3. Humanistic Therapy.....	46
Questions and Comments	46
D. Treatment Outcomes.....	48
1. Psychotropic Medications.....	50
2. Non-Biological Treatments	51
Jonathan Shedler, The Efficacy of Psychodynamic Psychotherapy	52

	Questions and Comments	54
IV.	The Mental Health Professions	56
	A. Overview	56
	B. Psychiatrists	57
	1. Development of the Profession	57
	2. Education and Training	58
	3. Function	60
	C. Psychologists.....	61
	1. Development of the Profession	61
	2. Education and Training	62
	3. Function	63
	D. Clinical Social Workers	64
	1. Development of the Profession	64
	2. Education and Training	65
	3. Function	66
	E. The Interaction of the Professions in an Era of Managed Care	66
	Jeffrey Cohen, Managed Care and the Evolving Role of the Clinical Social Worker in Mental Health	66
	Questions and Comments	69
V.	Financing Mental Health Care: Cost and Coverage Issues.....	70
	A. An Overview of Public and Private Financing Options	70
	1. Public Sources of Financing	71
	2. Private Sources of Financing	73
	B. Parity and the Line Between Mental and Physical Disability	75
	Ringwald v. Prudential Insurance Co. of America	77
	Questions and Comments	87
	Chapter Two. Regulation of the Mental Health Professions	95
I.	Administrative Regulation	95
	A. Introduction	95
	B. Licensure and Certification	96
	1. Perspectives on Occupational Licensing	96
	2. Entry into the Profession	99
	a. Licensing of Psychiatrists	99
	b. Licensing of Psychologists.....	101
	i. Licensing Approach to Regulation	101
	ii. Certification or Title Licensing Approach to Regulation	102
	c. Clinical Social Workers	103
	Questions and Comments.....	103
	C. Administrative Regulation of Professional Activity.....	106
	Mississippi State Board of Psychological Examiners v. Hosford	107
	Questions and Comments	112
II.	Allocation of Responsibilities Among the Mental Health Professions	119

A.	Independent Billing Authority	120
	Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia.....	120
	Questions and Comments	123
B.	Authority Within a Psychiatric Facility.....	126
	California Association of Psychology Providers v. Rank.....	126
	Questions and Comments	131
C.	Prescription Privileges	137
	1. Overview.....	137
	2. Legislative Initiatives and Developments.....	138
	3. Educational Requirements for Competency to Prescribe.....	140
	a. Risk Factors Associated with the Prescription Function.....	140
	b. Educational Requirements	141
	4. Economic Dimension of the Debate	142
	Questions and Comments	143
	Chapter Three. Professional Liability for Malpractice	147
I.	Introduction	148
	Questions and Comments.....	150
II.	Claims of Negligent Care.....	152
A.	The Doctrine: An Overview.....	152
	Questions and Comments	153
	1. The “Standard of Care” Element	155
	a. Introduction.....	155
	b. Defining the Standard	157
	Stepakoff v. Kantar.....	157
	Questions and Comments.....	160
	2. Defenses and Limitations	162
	a. Professional Judgment Rule	162
	Schrempf v. State.....	162
	Questions and Comments.....	166
	b. Respectable Minority Doctrine	167
	Osheroff v. Chestnut Lodge, Inc.	168
	Questions and Comments.....	174
B.	Selected Malpractice Issues.....	180
	1. Recovered Memory Therapy	180
	a. Prologue.....	180
	b. Anatomy of a Recovered Memory Malpractice Law Suit.....	183
	c. Legal Issues Raised by MPD Litigation Cases	184
	i. MPD as a Diagnostic Category	184
	ii. Methods of Treatment	185
	Questions and Comments.....	186
	2. Liability for the Suicide of a Client	191
	Weathers v. Pilkinton.....	192
	Questions and Comments	197

3.	Sexual Misconduct as a Basis for Liability	201
	Corgan v. Muehling	201
	Questions and Comments	205
C.	Liability to Third Parties	208
1.	The Dangerous Client and Duty of Care to Third Persons	208
a.	Introduction.....	208
b.	Foundations for <i>Tarasoff</i> : Institutional Liability	210
	Merchants National Bank & Trust Co. of Fargo v. United States.....	210
	Questions and Comments.....	212
c.	The <i>Tarasoff</i> Doctrine.....	214
	Tarasoff v. Regents of University of California	214
	Questions and Comments.....	224
d.	Later Applications of <i>Tarasoff</i>	230
	Brady v. Hopper	230
	Questions and Comments.....	234
	Hamman v. County of Maricopa	234
	Questions and Comments.....	240
e.	Perspectives on <i>Tarasoff</i> : Predicting Dangerousness....	246
f.	Restatement (Third) of Torts	251
2.	Alternate Theory: Negligent Infliction of Emotional Distress.....	252
	Questions and Comments	257
D.	Liability of Other Parties	259
1.	Liability of Non-Licensed Therapists	259
	Nally v. Grace Community Church of the Valley	259
	Questions and Comments	268
2.	Liability of Health Care Institutions.....	270
	Muse v. Charter Hospital of Winston-Salem, Inc.....	270
	Questions and Comments	274
3.	Liability of Institutions of Higher Learning	277
a.	Introduction.....	277
b.	Case Study—the Virginia Tech Shootings of April 2007.....	278
	Questions and Comments.....	285
4.	Public Officials and Governmental Units	288
a.	Introduction.....	288
b.	Immunity Under Federal Law	289
c.	Immunity Under State Law.....	290
III.	Other Bases for Recovery and Damages.....	293
A.	Miscellaneous Non-Negligence Theories.....	293
B.	Claims Based on Federal Civil Rights Laws	294
	Spencer v. Lee.....	295
	Questions and Comments	302

Chapter Four. Informed Consent	307
I. Introduction: The Origins of the Doctrine of Informed Consent	307
Questions and Comments	314
II. Elements of the Doctrine of Informed Consent	315
A. The Disclosure Requirement	315
1. Standards Governing the Scope of Disclosure	315
Aiken v. Clary	316
Questions and Comments	320
Canterbury v. Spence	322
Questions and Comments	329
2. Exceptions to the Duty to Disclose	334
Canterbury v. Spence	334
Questions and Comments	335
B. Other Elements Necessary to Establish a Claim	338
1. Causation	338
Canterbury v. Spence	339
Questions and Comments	340
2. Damages	341
C. Issues Pertaining to Client Understanding and Assent	342
1. Introduction	342
Questions and Comments	344
2. The Determination of Client Assent: Evidentiary Problems	345
Questions and Comments	346
3. Psychiatric Client Consent	349
Questions and Comments	351
III. Informed Consent to Participate in Research	353
A. Introduction	353
B. Overview of Statutory and Administrative Regulation	354
Questions and Comments	356
C. Individuals with a Mental Disorder as Research Participants	358
1. Introduction	358
2. Obtaining Consent	360
Questions and Comments	361
3. Consent in the Absence of Capacity	363
Questions and Comments	364
D. Special Problems Associated with Behavioral Research	364
1. Passive Observation Studies	365
2. Surveys/Manipulation Studies Without Overt Deception	366
3. Studies Involving Deception	366
Questions and Comments	368
Chapter Five. Confidentiality and Access to Records	371
I. Protection of Privacy and Confidentiality	372
A. The Development of Privacy and Confidentiality in Mental Health Care	372

B.	Federal Protection of Health Care Privacy.....	374
1.	Overview of HIPAA Legislation.....	374
2.	Rationale for Federal Regulation of Health Care Privacy	375
	Department of Health and Human Services	375
3.	Regulatory Implementation of HIPAA Privacy Provisions....	378
a.	Covered Health Care Providers	379
b.	Protected Health Information.....	380
c.	Regulation of Disclosure.....	381
d.	Exceptions to the Authorization Requirement	383
e.	Miscellaneous Requirements	383
f.	Enforcement.....	384
g.	Relationship to State Laws	385
	Questions and Comments.....	387
C.	Protection of Educational Records Under FERPA	389
	Questions and Comments	390
D.	Legal Remedies for Breach of Confidentiality Under State	
	Law	391
1.	General Remedies.....	391
a.	Actions Based on Breach of Privacy	391
	Commonwealth v. Wiseman.....	392
	Questions and Comments.....	397
b.	Defamation.....	399
	Hughley v. McDermott	400
	Questions and Comments.....	405
2.	Remedies Arising from a Treatment Relationship Breach....	406
	Doe v. Roe.....	406
	Questions and Comments	410
	MacDonald v. Clinger.....	412
	Questions and Comments	415
II.	Exceptions to the Duty of Confidentiality	417
A.	Introduction	417
B.	Mandatory Reporting Requirements.....	418
	Daymude v. State	418
	Questions and Comments	422
C.	Disclosures of Information Indicative of a Mental	
	Disorder/Dangerousness	425
1.	Disclosure by Entities Covered by HIPAA.....	425
2.	Disclosure by Institutions Covered by FERPA (Institutions	
	of Higher Learning)	425
	Questions and Comments	428
D.	Judicial Proceedings and the Testimonial Privilege	431
1.	Introduction	431
a.	Perspectives on the Judicial Process	431
b.	Role/Function of the Testimonial Privilege;	
	Exceptions	431
	Jaffee v. Redmond.....	433
	Questions and Comments.....	439

2.	Conditions Giving Rise to the Privilege	442
a.	The Course of Treatment Requirement.....	442
	State v. Cole	442
	Questions and Comments.....	444
b.	Scope of the Privilege: Communications Made in the Presence of Others	446
	State v. Andring.....	446
	Questions and Comments.....	449
3.	Express or Implied Waiver of the Privilege	449
a.	Civil Proceedings	451
	<i>In re</i> Lifschutz	451
	Questions and Comments.....	457
b.	The Insanity Defense Context	459
	People v. Edney	459
	People v. Knuckles	462
	Questions and Comments.....	466
4.	Admissibility in Criminal Prosecutions of Disclosures During Treatment.....	467
a.	Treatment Information About Prosecution Witnesses... ..	467
	Pennsylvania v. Ritchie	467
	Questions and Comments.....	475
b.	Defendant’s Threats/“Dangerous Patient” Exception	478
	United States v. Hayes	478
	Questions and Comments.....	486
III.	Insurance Mandated Disclosures and Client Access Issues.....	489
A.	Communications Involving Insurers and Managed Care Entities.....	489
B.	Patients’ Access to Records	491
	Questions and Comments	492

PART II. DEPRIVATIONS OF LIBERTY AND PROPERTY

Chapter Six. Mental Health Professionals and Expertise.....	495	
I. Introduction	495	
II. Admissibility of Clinical Opinion Testimony.....	497	
A. Normality	499	
	Testimony in the Hinckley Case.....	499
	Questions and Comments	512
	Stephen Morse, Crazy Behavior, Morals & Science: An Analysis of Mental Health Law.....	513
	Questions and Comments	516
	Ahmed Aboraya, Eric Rankin, Ahmed El-Missiry & Collin John, The Reliability of Psychiatric Diagnosis Revisited: The Clinician’s Guide to Improve the Reliability of Psychiatric Diagnosis	519
	Questions and Comments	521

B.	Responsibility	524
	United States v. Lewellyn	524
	Questions and Comments	528
	Stephen Morse, Crazy Behavior, Morals & Science: An Analysis of Mental Health Law	532
	Richard Bonnie & Christopher Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation	536
	Questions and Comments	539
C.	Propensity	541
	Barefoot v. Estelle	541
	Questions and Comments	550
	Wisconsin v. Loomis	556
	Questions and Comments	563
D.	Competency	570
	Competency Report	571
	Questions and Comments	573
III.	Implementation Issues	575
A.	Who Is an Expert?	576
	<i>In re</i> Commitment of Dodson	577
	Questions and Comments	582
B.	The Right to an Expert Evaluation	585
	Ake v. Oklahoma	585
	Questions and Comments	592
C.	The Basis of Clinical Opinion	595
	1. The Defendant as a Source: Constitutional Considerations	595
	Estelle v. Smith	596
	Questions and Comments	604
	2. Hearsay and Other Evidentiary Considerations	613
	People v. Goldstein	614
	Questions and Comments	620
D.	The Ultimate Issue	624
	United States v. Edwards	625
	Questions and Comments	627
	Chapter Seven. Mental Disorder and Criminal Law	631
I.	Introduction	631
II.	Criminal Responsibility	634
A.	The Insanity Defense	635
	1. A Brief History	635
	Questions and Comments	640
	2. Cognitive Impairment	646
	The Heads Case	646
	Defense Argument	648
	Prosecution Argument	650
	Questions and Comments	651

3.	Volitional Impairment.....	661
	United States v. Pollard.....	661
	Questions and Comments	668
B.	The Automatism Defense.....	676
	Note: Automatism and Actus Reus	676
	Questions and Comments	677
C.	Expert Testimony on Mens Rea (the Diminished Capacity Doctrine).....	679
	Note: Mens Rea.....	679
	Clark v. Arizona.....	680
	Questions and Comments	695
D.	Other Defenses	707
	Note: Self-Defense, Provocation and Duress	707
	Jahnke v. State.....	709
	Questions and Comments	715
E.	Abolition of the Insanity Defense	720
	Questions and Comments	722
F.	The “Guilty but Mentally Ill” Plea	734
	People v. Crews.....	734
	Questions and Comments	740
III.	Sentencing	744
A.	Capital Sentencing	745
	Note: Supreme Court Cases.....	745
	Questions and Comments	748
	Atkins v. Virginia	756
	Questions and Comments	768
B.	Non-Capital Sentencing	776
	1. History: Retribution v. Incapacitation/Rehabilitation	776
	2. Mentally Disordered Sex Offender Statutes.....	781
	Kansas v. Hendricks.....	783
	Questions and Comments	794
	Chapter Eight. Civil Commitment.....	811
I.	Introduction	812
II.	The Basis for State Intervention.....	820
A.	Introduction	820
	Case Illustrations	820
	Note: Government and Individual Interests.....	823
B.	Police Power Commitment.....	825
	1. Rationale	825
	Note, Civil Commitment of the Mentally Ill: Developments in the Law.....	827
	Stephen Morse, A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered	828
	Questions and Comments	829

2.	Implementing the Police Power	834
a.	Defining Mental Illness	834
	Dodd v. Hughes	834
	Questions and Comments.....	835
b.	Defining Danger to Others	839
	Lessard v. Schmidt	839
	Alexander Brooks, Dangerousness Defined in Law, Psychiatry & Mental Health Systems	839
	Matter of Gregorovich.....	840
	In Interest of Nyflot	845
	Whaley v. Jansen	846
	Questions and Comments.....	847
c.	The Overt Act Requirement	857
	People v. Sansone.....	857
	In Matter of Mental Health of D.R.S.....	858
	Questions and Comments.....	860
C.	<i>Parens Patriae</i> Commitments.....	861
1.	Rationale	861
	Note, Civil Commitment of the Mentally Ill: Developments in the Law.....	865
	O'Connor v. Donaldson.....	866
	State ex rel. Hawks v. Lazaro.....	874
	Questions and Comments	875
2.	Implementing the <i>Parens Patriae</i> Authority	880
	Mayock v. Martin.....	880
	Boggs v. N.Y. City Health & Hosp. Corp.....	884
	Questions and Comments	891
III.	The Least Restrictive Alternative Doctrine.....	896
	Lake v. Cameron	896
	Questions and Comments	900
IV.	Procedures	912
A.	General Considerations.....	912
	Lessard v. Schmidt	912
	Questions and Comments	915
B.	Emergency Detention and Screening Mechanisms.....	920
	Gerstein v. Pugh	921
	Questions and Comments	924
C.	Adjudicatory Hearing Procedures	930
1.	Standard of Proof.....	930
	Addington v. Texas	930
	Questions and Comments	934
2.	The Decisionmaker	935
	Questions and Comments	936
3.	The Adversary Process: Notice, Public Trial and Confrontation Rights	940
	Questions and Comments	941

4.	The Right to Counsel	948
	Vitek v. Jones	949
	Questions and Comments	951
5.	The Privilege Against Self-Incrimination	959
	Allen v. Illinois	959
	Questions and Comments	963
D.	Release Procedures	966
	Fasulo v. Arafeh	966
	Questions and Comments	969
E.	Voluntary Admission Procedures	974
	Janet Schmidt & John Gilboy “Voluntary” Hospitalization of the Mentally Ill	975
	Questions and Comments	978
V.	Commitment of Other Populations	985
A.	Insanity Acquittees	985
	Jones v. United States	986
	Questions and Comments	992
B.	Prison and Jail Inmates	1001
	Vitek v. Jones	1001
	Questions and Comments	1005
C.	Chemically Dependent Persons	1009
	Questions and Comments	1010
D.	People with Developmental Disabilities	1014
	Heller v. Doe	1015
	Questions and Comments	1022
E.	Children	1026
	Parham v. J.R. et al.	1026
	Questions and Comments	1038
	Chapter Nine. Competency Determinations.....	1045
I.	Introduction	1045
II.	General Considerations	1047
	Test Cases	1047
	Paul Appelbaum & Loren Roth, Competency to Consent to Research: A Psychiatric Overview	1049
	Duncan Kennedy, Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power	1052
	Bruce Winick, The Side Effects of Incompetency Labeling and the Implications for Mental Health Law	1053
	Questions and Comments	1054
III.	Guardianship	1061
A.	History and Development	1061
	Gary Melton, John Petrila, Norman Poythress & Christopher Slobogin, Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers ...	1061

B.	The Basis for Intervention	1063
	Estate of Galvin v. Galvin	1063
	In the Matter of the Guardianship of Mary Lou Renz, an Incapacitated Person	1066
	Questions and Comments	1069
C.	Powers and Duties of the Guardian	1077
	Matter of Guardianship of Hayes	1078
	Questions and Comments	1083
IV.	The Right to Refuse and Consent to Psychiatric Treatment	1089
A.	Psychotropic Medication	1090
	Washington v. Harper	1090
	Questions and Comments	1106
B.	Electroconvulsive Therapy and Psychosurgery	1120
	Aden v. Younger	1120
	Questions and Comments	1126
C.	Behavior Modification Techniques	1129
	Knecht v. Gillman	1129
	Questions and Comments	1132
V.	Competency in the Criminal Process	1134
A.	Competency to Proceed	1135
	1. Criteria	1135
	Gary Melton, John Petrila, Norman Poythress and Christopher Slobogin, Psychological Evaluations for the Courts	1135
	Questions and Comments	1139
	2. Procedures for Assessing Competency to Proceed	1149
	Questions and Comments	1151
	3. Disposition	1159
	Jackson v. Indiana	1159
	Questions and Comments	1163
	Sell v. United States	1168
	Questions and Comments	1177
B.	Decisional Competency	1188
	Godinez v. Moran	1188
	Questions and Comments	1196
	Colorado v. Connelly	1211
	Questions and Comments	1219
C.	Dignitarian Competency	1223
	Ford v. Wainwright	1223
	Questions and Comments	1228
	Chapter Ten. Post-Commitment Issues	1241
I.	Introduction	1241
	Joseph Nocera, The Long, Lonesome Road	1242
	Laurie Kramer, My Week in the Psych Ward	1248
	William Fisher, Jeffrey L. Geller & John A. Pandini, The Changing Role of the State Psychiatric Hospital	1252

II. Theoretical Underpinnings of the Right to Treatment and Habilitation..... 1254
 Donaldson v. O’Connor 1254
 O’Connor v. Donaldson 1258
 Youngberg v. Romeo..... 1260
 Questions and Comments..... 1270
 III. Implementing the Right: *Wyatt v. Stickney*..... 1276
 Wyatt v. Stickney 1278
 Questions and Comments..... 1293
 IV. The Right to Community Services 1314
 Joseph Nocera, The Long, Lonesome Road 1315
 Questions and Comments..... 1320
 Olmstead v. L.C. ex rel. Zimring..... 1327
 Questions and Comments..... 1334

PART III. BENEFITS ELIGIBILITY AND LEGAL PROTECTION AGAINST DISCRIMINATION

Chapter Eleven. Entitlements for People with Mental Disabilities..... 1343
 I. Special Educational Benefits..... 1343
 A. Scope of Guaranteed Benefits..... 1344
 Andrew F., a minor v. Douglas County School District Re-1 1344
 Deal v. Hamilton County Bd. of Education 1352
 Questions and Comments 1362
 B. Mainstreaming 1371
 Board of Educ., Sacramento City Unified School Dist. v. Holland 1372
 Questions and Comments 1382
 II. Social Security Disability Benefits..... 1389
 Kohler v. Astrue 1390
 Questions and Comments..... 1399

Chapter Twelve. Protection Against Discrimination..... 1407
 I. Anti-Discrimination Law: An Overview 1407
 II. The Constitution and Discrimination on the Basis of Mental Disability..... 1411
 City of Cleburne, Texas v. Cleburne Living Center 1411
 Questions and Comments..... 1421
 III. Employment Opportunities 1422
 A. Conditions Giving Rise to Coverage..... 1422
 Murray et al. v. UHS of Fairmount, Inc. 1423
 Questions and Comments 1434
 B. Qualification and Reasonable Accommodation 1439
 Hoback v. Chattanooga 1439
 Questions and Comments 1446

C. Affirmative Action Programs.....	1452
Allen v. Heckler	1453
Questions and Comments	1460
IV. Postsecondary Education.....	1461
Wynne v. Tufts University School of Medicine	1462
Questions and Comments.....	1467
V. Licensing and Certification Programs	1471
Clark v. Virginia Board of Bar Examiners	1472
Questions and Comments.....	1481
VI. Housing	1483
Sinisgallo v. Town of Islip Housing Authority	1484
Questions and Comments.....	1492
Oxford House, Inc. v. Town of Babylon.....	1493
Questions and Comments.....	1498
Appendix A. Excerpts from Criteria for Selected Diagnoses in DSM-5	1501
INDEX.....	1519