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Psychotherapists' Sexual Relationships with Their Patients

Clifton Perry*

Joan Wallman Kuruc**

I. INTRODUCTION

Since 1980, reports of sexual contact between psychotherapists¹ and their patients have increased dramatically; sexual contact is currently the second leading cause of professional malpractice litigation among psychiatrists.² Patient-psychotherapist sexual intimacy is the leading cause of malpractice claims against psychologists, constituting the largest single category of cases that have been reported to the American Psychological Association Ethics Committee.³ Between 1976 and 1986, nearly forty-five percent of all malpractice insurance claims paid on behalf of psychologists resulted from psychotherapist-patient sexual contact.⁴ Similarly, a 1985 survey showed that sexual contact with clients was the leading cause of claims against social workers.⁵ Com-

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1. In this article, the term "psychotherapists" will refer to psychiatrists, psychologists, social workers, marriage and family counselors, clergy, and any mental health counselors who offer professional treatment for emotional, behavioral, or personality disorders.

2. Annette M. Brodsky, *Sex Between Patient and Therapist: Psychology's Data and Response*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 17 (Glen O. Gabbard ed. 1989) (between 1970 and 1974 only four complaints of sexual intimacy with patients were reported to the American Psychological Association Ethics Committee compared with more than 100 such reports in the following decade); ANDREW THOMPSON, *ETHICAL CONCERNS IN PSYCHOTHERAPY & THEIR LEGAL RAMIFICATIONS* 1983 (between 1959 and 1979 only six cases of psychotherapeutic malpractice reported at the appellate level in Anglo-American jurisdictions); Irwin N. Perr, *Medicolegal Aspects of Professional Sexual Exploitation*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 212-213 (Glen O. Gabbard ed. 1989) (reporting on a 1988 survey of 167 reported cases of sexual exploitation by professionals including 82 cases involving psychotherapists).

3. Brodsky, *supra* note 2, at 17, 24.

4. GARY R. SCHOENER ET AL., *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS: INTERVENTION AND PREVENTION* 538 (1989).

5. *Id.*

plaints of sexual exploitation have been made against marriage and family therapists,⁶ drug and alcohol abuse counselors,⁷ and members of the clergy.⁸

Ethical proscriptions against sexual contact between healthcare providers and patients have existed for centuries. The Hippocratic Oath, dating from the fourth century B.C., states:

In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and especially from the pleasures of love with women or with men.⁹

Early in this century, Sigmund Freud firmly based existing ethical proscriptions on the newly emerging scientific principles of psychotherapy.¹⁰ Freud warned against eroticizing a therapeutic relationship because the goal of therapy is to get the patient in touch with reality, not to permit the patient to be "distracted by the fantasy of a non-existent love relationship with the therapist" nor subjected to the "ultimate despair stemming from abandonment and betrayal."¹¹ He strongly advocated that psychoanalytic treatment be carried out in abstinence because the commencement of a sexual relationship with a patient deprives the patient of the needed therapeutic relationship.¹² Today, sexual activity between psychotherapists and their patients is universally condemned by all of the mental health professions. Modern ethical codes explicitly proscribe sexual contact with patients.¹³

6. St. Paul Fire & Marine Ins. Co. v. D.H.L., 459 N.W.2d 704 (Minn. 1990).

7. See, e.g., *Worsham v. United States*, 828 F.2d 1525 (11th Cir. 1987); *Sisson v. Seneca Mental Health/Mental Retardation Council, Inc.*, 404 S.E.2d 425 (W. Va. 1991).

8. See, e.g., *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988); *Erikson v. Christenson*, 781 P.2d 383 (Or. Ct. App. 1989). See also SCHOENER ET AL., *supra* note 4, at 39-40.

9. STEDMAN'S MEDICAL DICTIONARY 717 (25th ed. 1990).

10. Sigmund Freud, *Observations on Transference-Love* (1915), in 12 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 159, 165 (James Strachey ed. 1958).

11. Abraham Fuchsberg, *From Couch to Court: Wrongful Sex Therapy*, 14 TRIAL LAW Q. 60, 62 (1982).

12. Freud, *supra* note 10, at 166.

13. The necessary intensity of the therapeutic relationship may tend to activate sexual and other needs and fantasies on the part of both patient and therapist, while weakening the objectivity necessary for control. *Sexual activity with a patient is unethical.* (American Psychiatric Association 1985).

Psychologists are continually cognizant of their own needs and of their potentially influential position vis-a-vis persons such as clients, students and subordinates. They avoid exploiting the trust and dependency of such persons. . . . *Sexual intimacies with clients are unethical.* (American Psychological Association 1981).

The social worker should under no circumstances engage in sexual activities with a client. (National Association of Social Workers 1980).

Despite these proscriptions, six to thirteen percent of psychotherapists admit to having had sexual contact with their patients.¹⁴ However, most professionals who have studied this phenomenon believe these figures underestimate the magnitude of the problem.¹⁵ The extent of this underreporting is highlighted by a national survey in which sixty-five percent of responding psychiatrists claimed they had treated patients who had been sexually involved with a prior psychotherapist.¹⁶

The vast majority of patient-psychotherapist sexual intimacy occurs between female patients and male psychotherapists,¹⁷ but sexual exploitation of male patients by male psychotherapists has been reported,¹⁸ as has sexual exploitation by female psychotherapists.¹⁹ However, when studies report figures for male and female psychotherapists separately, rates of psychotherapist-patient sexual contact are always lower for female psychotherapists.²⁰

Sexual relationships between analyst and patient are antithetic to treatment and unacceptable under any circumstance. *Any sexual activity with a patient constitutes a violation of this principle of ethics.* (American Psychoanalytic Association 1983).

A therapist will attempt to avoid relationships with clients which might impair professional judgment or increase the risks of exploiting clients. Examples of such relationships include: Treatment of family members, close friends, employees, or supervisees. *Sexual activity with clients is unethical.* (American Association for Marriage and Family Therapy 1982).

KENNETH S. POPE & JACQUELINE C. BOUHOUTSOS, SEXUAL INTIMACY BETWEEN THERAPISTS & PATIENTS 31 (1986) (emphasis added).

14. Judith L. Herman et al., *Psychiatrist-Patient Sexual Contact: Results of a National Survey, II: Psychiatrists' Attitudes*, 144 AM. J. PSYCHIATRY 164 (1987); Nanette Gartrell, *Psychiatrist-Patient Sexual Contact: Results of a National Survey, I: Prevalence*, 143 AM. J. PSYCHIATRY 1126 (1986); Sheldon H. Kardener et al., *A Survey of Physicians' Attitudes and Practices Regarding Erotic and Nonerotic Contact with Patients*, 130 AM. J. PSYCHIATRY 1077 (1973).

15. Nanette Gartrell et al., *Prevalence of Psychiatrist-Patient Sexual Contact*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 10 (Glen O. Gabbard ed. 1989); SCHOENER ET AL., *supra* note 4, at 25; POPE & BOUHOUTSOS, *supra* note 13, at 28 ("Insurance industry data suggest that 20 percent of all therapists will, some time during their careers, become sexually intimate with at least one of their patients.").

16. Nanette Gartrell et al., *Reporting Practices of Psychiatrists Who Knew of Sexual Misconduct By Colleagues*, 57 AM. J. ORTHOPSYCHIATRY 287 (1987).

17. Denise LeBoeuf, *Psychiatric Malpractice: Exploitation of Women patients*, 11 HARV. WOMEN'S L.J. 83, 84 (1988).

18. *Riley v. Presnell*, 565 N.E.2d 780 (Mass. 1991); *State v. Leiding*, 812 P.2d 797 (N.M. Ct. App. 1991).

19. Jerry Adler, *Dr. Bean and Her Little Boy*, NEWSWEEK, Apr. 13, 1992, at 56 (reporting on prominent Boston female psychiatrist accused of seducing male patient); *Psychologist's License Revoked in Sex Case*, S.F. CHRON., Mar. 6, 1992, at A22 (reporting on female psychologist accused of sexual improprieties with female patients).

20. SCHOENER ET AL., *supra* note 4, at 38; Lucille Gechtman, *Sexual Contact Between Social Workers and Their Clients*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 33 (Glen O. Gabbard ed. 1989).

The psychological harm to patients caused by sexual intimacy with psychotherapists can be devastating. The emotional damage may persist for years.²¹ Clinicians have compared patient-psychotherapist sexual intimacy to rape,²² child molestation,²³ and incest.²⁴ Survivors of each of these forms of sexual abuse can share intense feelings of shame, guilt, and isolation, as well as self-blame for the sexual contact, and may be at an increased risk of suicide.²⁵

The purpose of this article is to examine the history of legal responses to the problem of psychotherapeutic sexual exploitation, and to explore the civil and criminal remedies available to victims of this exploitation.²⁶ Part II discusses the development of specific common law causes of action that can be used to state a claim of psychotherapist sexual abuse. Parts III and IV describe recently enacted legislation that either creates a civil cause of action for patient-psychotherapist sex or imposes criminal sanctions on psychotherapists who engage in this behavior.

II. COMMON LAW ACTIONS

Early lawsuits seeking damages for sexual exploitation by psychotherapists have been described as "wrongs looking for a legal name."²⁷ As recently as twenty-five years ago, no common law cause of action existed that specifically imposed civil liability on psychotherapists who had had sexual contact with a patient.²⁸ The evolution of a cause of action to address this wrong began with the use of the traditional tort claims of battery, alienation of affection, and malpractice.²⁹ More recently, plaintiffs have successfully re-

21. Kenneth S. Pope, *Therapist-Patient Sex Syndrome: A Guide for Attorneys and Subsequent Therapists to Assessing Damage*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 48 (Glen O. Gabbard ed. 1989).

22. William H. Masters & Virginia E. Johnson, *Principles of the New Sex Therapy*, 133 AM. J. PSYCHIATRY 544 (1976).

23. Fuchsberg, *supra* note 11.

24. Sheldon H. Kardener, *Sex and the Physician-Patient Relationship*, 131 AM. J. PSYCHIATRY 1134, 1135 (1974).

25. Pope, *supra* note 21, at 41-45.

26. Sanctions may also be imposed by professional organizations against their members or by state regulatory agencies, but a discussion of these administrative remedies is beyond the scope of this article.

27. Harvey A. Schwartz, *Patient Allegations of Sexual Abuse-Surviving a Lawsuit*, 5 MED. STAFF COUNS. 17, 19 (1991).

28. Juanita Benetin & Mary Wilder, *Sexual Exploitation and Psychotherapy*, 11 WOMEN'S RTS. L. REP. 121, 126 (1989).

29. This paper will be limited to a discussion of tort theories available to address therapist-patient sexual contact; actions for breach of contract have also been employed. See *Anclote Manor Found. v. Wilkinson*, 263 So. 2d 256 (Fla. Dist. Ct. App. 1972) (patient committed suicide following therapy for depression, which therapy included sexual

lied on the torts of intentional and negligent infliction of emotional distress to hold psychotherapists civilly liable for sexual abuse.

Battery

Battery is an unprivileged, intentional, and harmful or offensive contact of one person by another.³⁰ Although it appears to be an obvious cause of action for a harmful sexual contact, battery has not been successfully used to impose liability on exploitive psychotherapists. When sexual contact occurs in a psychotherapeutic setting, it is not unusual for the patient to have been persuaded that it was a necessary and integral part of the therapy itself.³¹ When the patient succumbs to the psychotherapist's advances, believing that they are an essential part of treatment, it is extremely difficult for the patient to prove lack of consent to the sexual contact. Proof that the patient consented to the sexual intimacy negates the tort of battery.³² In addressing this issue, one court found that a patient did not state a claim for battery when her psychotherapist persuaded her to become sexually intimate because she consented to sexual intercourse in the belief that "it was the best course of treatment for her."³³ Despite a finding that the psychotherapist "preyed on [the patient's] vulnerability by engaging her in sex" and that she was in a "confused state of mind," the court nevertheless determined that the patient consented to the sexual acts.³⁴

In addition to the difficulty of overcoming the defense of con-

overtures; husband allowed to recover in contract for cost of hospitalization and treatment).

30. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 39 (5th ed. 1984).

31. See, e.g., *Riley v. Presnell*, 565 N.E.2d 780, 783 (Mass. 1991) (psychiatrist successfully persuaded patient that in order to effectively deal with the patient's feelings toward his father, patient needed to engage in sex with psychiatrist); *Roy v. Hartogs*, 381 N.Y.S.2d 587, 588 (N.Y. App. Div. 1976) (psychiatrist recommended that patient have heterosexual intercourse with him to treat patient's lesbianism).

32. KEETON ET AL., *supra* note 30, § 18, at 112-113. ("One, of course, consents to an invasion such as a sex contact if he or she wants or desires the invasion. Consent avoids recovery because it destroys the wrongfulness of the conduct as between the consenting parties . . . even though it is perhaps both immoral and criminal.")

33. *Andrews v. United States*, 732 F.2d 366, 371 (4th Cir. 1984).

34. *Id.* at 369. Consent as a defense to sexual contact with a patient arises not only in the context of a claim of battery but also as a defense to the crime of sexual assault. Historically, proof of common law sexual assault (or rape) required both a showing of use of force and lack of consent. Modern sexual assault laws have been expanded to include penalties for some non-forcible, consensual sexual acts when the victim is considered incapable of intelligent, informed consent. These protected victims include minors, the drugged or unconscious, or the seriously emotionally or mentally ill. Current laws that criminalize psychotherapist-patient sex extend this protection to psychotherapy patients and do not allow consent as a defense. For a discussion of the historical development of

sent, plaintiffs rarely pursue battery as a cause of action if they are seeking damages for injuries caused by sexual contact with a psychotherapist because psychotherapists' malpractice insurers do not provide coverage for intentional torts.³⁵

Alienation of Affection

Alienation of affection is an archaic tort that has been abolished by statute in most jurisdictions.³⁶ Where alienation of affection has not been abolished, it is available as a cause of action against any outsider who has interfered with the marital relations between a husband and wife, causing one spouse to be deprived of the affection, love, and companionship of the other.³⁷ In jurisdictions where this tort has been abolished, married couples bringing claims for sexual exploitation by psychotherapists have had their allegations carefully examined to determine whether they disguised a barred claim for alienation of affection. A court finding such a disguised claim will dismiss the case for failure to state a cause of action. The first lawsuit in an American jurisdiction seeking damages resulting from psychotherapist-patient sex was dismissed for just this reason.³⁸

In *Nicholson v. Han*, the plaintiff, Mr. Nicholson, and his wife sought marital counseling from a psychiatrist.³⁹ During the course of therapy, the psychiatrist persuaded Mrs. Nicholson to have sexual intercourse with him and she subsequently divorced her husband.⁴⁰ On learning of the sexual contact, Mr. Nicholson sued the psychiatrist for fraud and breach of contract. Despite the pleadings, the court found that the complaint in fact stated a claim for alienation of affections, an action that had been statutorily abolished in Michigan. The suit was subsequently dismissed for failure to state a claim.⁴¹

Later courts explicitly rejected this initial characterization of psychotherapist-patient sex as a claim for alienation of affection or

criminal laws to protect those deemed incapable of consent, see SCHOENER ET AL., *supra* note 4, at 545-47.

35. Linda Jorgenson et al., *The Furor Over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 WM. & MARY L. REV. 645, 685 (1991); SCHOENER ET AL., *supra* note 4, at 537.

36. Benetin & Wilder, *supra* note 28, at 126.

37. KEETON ET AL. *supra* note 30, § 124, at 918.

38. *Nicholson v. Han*, 162 N.W.2d 313 (Mich. Ct. App. 1968).

39. *Id.* at 314.

40. *Id.* at 315.

41. *Id.* at 317.

the related tort of seduction.⁴² Modern cases focus not on the injury to the marital relationship but on the injury suffered by the patient. Today, the majority of courts, including the Michigan court that decided *Nicholson v. Han*,⁴³ recognize malpractice as the appropriate tort claim for a sexually exploited patient.

Malpractice

Most patients alleging sexual exploitation by psychotherapists bring claims under a theory of malpractice. In contrast to general medical malpractice suits, claims of psychotherapeutic malpractice are nearly always successful.⁴⁴ Those few plaintiffs who are unsuccessful in their suit typically do not lose on the merits but as a result of a technical defense such as expiration of the statute of limitations or failure to plead the proper cause of action.⁴⁵

Standard of Care

In order to state a claim for psychotherapeutic malpractice, a plaintiff must show that the psychotherapist had a duty to adhere to a professional standard of care, that the psychotherapist breached that duty, and that the plaintiff's injury was proximately caused by that breach.⁴⁶ Determining the appropriate standard of care to apply when psychotherapists were sexually intimate with their patients presented an initial problem for the courts.

When the first group of malpractice claims against psychotherapists was adjudicated, none of the mental health professions' codes of ethics explicitly proscribed sexual intimacy with patients.⁴⁷ Lacking guidance from ethical codes, courts articulated two means of imposing a professional duty on psychotherapists not to engage in sexual activity with their patients.

42. *Cotton v. Kambly*, 300 N.W.2d 627, 628 (Mich. Ct. App. 1980); *Roy v. Hartogs*, 381 N.Y.S.2d at 588. *But see Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

43. *Cotton*, 300 N.W.2d 627.

44. *Perr*, *supra* note 2, at 213; SCHOENER ET AL., *supra* note 4, at 537. Although the issue of malpractice insurance is beyond the scope of this article, it is important to note that courts have consistently found that the harm caused by sexual contact with a psychotherapist is covered by malpractice insurance. Sexual contact with a patient has been found to be a foreseeable risk of therapy that is directly connected with the professional services that the psychotherapist rendered or failed to render. *See, e.g., Vigilant Ins. Co. v. Employers Ins. Wausau*, 626 F. Supp. 262 (S.D.N.Y. 1986).

45. SCHOENER ET AL., *supra* note 4, at 537.

46. Lawrence P. Hampton, Note, *Malpractice in Psychotherapy: Is There a Relevant Standard of Care?*, 35 CASE W. RES. L. REV. 251 (1984).

47. The first professional code of ethics explicitly proscribing sexual contact with patients was published by the American Psychiatric Association in 1973. The American Psychological Association explicitly proscribed sexual contact with patients in 1977.

The courts first imposed a duty by recognizing the existence and effects of the psychological transference that takes place during psychotherapy and the psychotherapist's professional responsibility to manage this phenomenon for the benefit of the patient. Transference occurs when, during the course of therapy, the patient transfers onto the psychotherapist repressed feelings toward some important person from the patient's past.⁴⁸ Transference is a necessary part of successful psychotherapy and its development is encouraged by the psychotherapist.⁴⁹ By creating, experiencing, and resolving transferred feelings with the help of the psychotherapist, the patient's condition may improve.⁵⁰ Because psychotherapy fosters an especially close emotional intimacy between psychotherapist and patient,⁵¹ the patient's transference often includes feelings of erotic love and adoration toward the psychotherapist, making the patient extremely vulnerable to the psychotherapist's sexual advances.⁵² It is at this point that the psychotherapist has a professional obligation to recognize that a patient's "falling in love" is induced by the analytic situation,⁵³ and must use transference only as a therapeutic tool to help the patient analyze feelings.⁵⁴ Allowing the patient to act out erotic feelings by engaging in sexual intimacy is recognized as substandard psychotherapeutic care.⁵⁵

The first court to apply this standard of care and recognize malpractice as an appropriate tort claim for a sexually exploited patient based liability on the psychiatrist's professional mishandling of transference.⁵⁶ In *Zipkin v. Freeman*, the court found that a patient's transference had rendered her uniquely vulnerable to the sexual and social manipulations of an unscrupulous psychotherapist.⁵⁷ Dr. Freeman, the defendant, so controlled his patient's be-

48. Sigmund Freud, *The Dynamics of Transference* (1912), in 12 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 108 (James Strachey ed. 1958); *Simmons v. United States*, 805 F.2d 1363, 1364 (9th Cir. 1986).

49. Freud, *supra* note 10, at 169.

50. *L.L. v. Medical Protective Co.*, 362 N.W.2d 174, 177 (Wis. Ct. App. 1984).

51. Kardener, *supra* note 24, at 1135.

52. Thomas S. Szasz, *The Concept of Transference*, 44 *INT'L J. PSYCHOANALYSIS* 432, 434 (1963).

53. Freud, *supra* note 10, at 160-161.

54. *Id.* at 164-166.

55. *L.L.*, 362 N.W.2d at 176. *Cf. Sisson v. Seneca Mental Health/Mental Retardation Council, Inc.*, 404 S.E.2d 425, 429-30 (W. Va. 1991) (recognizing the effects of transference but finding that a trusting relationship subject to a psychotherapist's manipulation cannot occur after only one visit).

56. *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968).

57. *Id.*

havior through exploitation of her transference feelings that he was able to persuade her to leave her husband, attend nude swimming parties with other patients, invest \$14,000 of her own money in a farm for him, and then work on that farm.⁵⁸ The plaintiff's malpractice claim against Dr. Freeman was predicated on his mishandling of "the transference phenomenon, which is a reaction . . . psychiatrists anticipate and which must be handled properly."⁵⁹

Later cases have followed *Zipkin* in finding that a psychotherapist has a professional duty of care to properly manage a patient's transference. Sexual contact with a patient is mismanagement of transference and a breach of the psychotherapist's duty.⁶⁰

The second method by which courts have defined an appropriate standard of care utilizes a legal concept rather than a psychodynamic one. Courts have based liability not on a professional mishandling of transference but on a breach of care analogous to a breach of fiduciary duty. In the psychotherapeutic setting, the psychotherapist accepts the trust and confidence of the patient and in return promises to place the needs of the patient before his own.⁶¹ Under this analysis, the trusting and confidential relationship that is established between the psychotherapist and the patient is paramount.⁶² As a fiduciary, the psychotherapist has a duty to avoid sexual involvement with a patient for three reasons.⁶³ First, due to the great imbalance of power between patient and psychotherapist, the potential for exploitation is increased because the patient is unable to give or withhold any meaningful consent within the relationship.⁶⁴ Second, the psychotherapist is obligated to act in the

58. *Id.*

59. *Id.* at 761.

60. *Simmons v. United States*, 805 F.2d at 1365-1366 ("Courts have uniformly regarded mishandling of transference as malpractice or gross negligence. . . . The crucial factor in the therapist-patient relationship which leads to the imposition of legal liability [is that therapists] offer a course of treatment and counseling predicated upon handling the transference phenomenon."); *Corgan v. Muehling*, 574 N.E.2d 602, 607 (Ill. 1991) ("[Defendant was] negligent by having sexual relations with [his patient] during the course of her treatment; and . . . failed to recognize or properly deal with the psychotherapeutic phenomenon of transference."). *Accord L.L.*, 362 N.W.2d 174.

61. Shirley Feldman-Summers, *Sexual Contact in Fiduciary Relationships*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 193 (Glen. O. Gabbard ed. 1989).

62. Jean M. Moisan, *Sins of the Secular Priesthood: Civil Liability for the Sexual Seduction of Patients*, 33 *MED. TRIAL TECH. Q.* 440, 452 (1987).

63. Feldman-Summers, *supra* note 61, at 201.

64. For one court's discussion of the analogy between therapeutic and fiduciary relationships and the diminished capacity for consent in both, see *Roy v. Hartogs*, 366 N.Y.S.2d 297, 299 (N.Y. Cir. Ct. 1975), *aff'd* 381 N.Y.S.2d 587 (N.Y. App. Div. 1976) ("[A] fiduciary relationship between psychiatrist and patient . . . is analogous to [a]

patient's best interest, and sexual contact is not in the patient's best interest since it causes psychological harm to the patient. Third, sexual activity creates an inherent conflict of interest between the patient's need for therapy in a safe and trusting environment and the psychotherapist's need for self-gratification.

In *Roy v. Hartogs*, the New York Appellate Court affirmed the lower court's holding that a patient stated a malpractice claim when she alleged that her psychiatrist had sexual intercourse with her for a period of thirteen months as part of his prescribed treatment for her.⁶⁵ The trial court found that the relationship between a patient and psychiatrist was a fiduciary one, and it based liability on the psychiatrist's misuse of his position of overpowering influence and trust to coerce Mrs. Roy to have sex with him.⁶⁶ In addition, the trial court found: "[T]here is a public policy to protect a patient from the deliberate and malicious abuse of power and breach of trust by a psychiatrist when that patient entrusts to him her body and mind in the hope that he will use his best efforts to effect a cure."⁶⁷

Whether a court defines the psychotherapeutic standard of care using either a transference or a fiduciary analysis, it is clear that a psychotherapist has a legal duty to refrain from sexual intimacy with a current patient. The issue of whether that duty extends to former patients, however, is still a matter of controversy within the mental health and legal professions.⁶⁸ Authors of one article advo-

guardian-ward relationship . . . [in which] the ward cannot waive performance of [the fiduciary] duty, or surrender these rights of protection. When the guardian thus betrays his trust, . . . he should not be heard to say in a court of justice . . . that the ward was capable of consenting. Consent obtained under such circumstances is no consent, and should stand for naught.").

65. Roy, 381 N.Y.S.2d 587.

66. Roy, 366 N.Y.S.2d at 300. *Accord* Horak v. Biris, 474 N.E.2d 13, 17 (Ill. App. Ct. 1985) ("[The] very nature of the therapist-patient relationship . . . gives rise to a clear duty on the therapist's part to engage only in activity or conduct which is calculated to improve the patient's mental or emotional well-being, and to refrain from any activity which carries with it a foreseeable and unreasonable risk of mental or emotional harm to the patient."); Omer v. Edgren, 685 P.2d 635, 637 (Wash. Ct. App. 1984) ("The State of Washington also has characterized the relationship between physician and patient as fiduciary The inherent necessity for trust and confidence requires scrupulous good faith on the part of the physician."). *Cf.* Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) (refusing to recognize a claim for clergy malpractice when a priest seduced a parishioner receiving marital counseling but recognizing a separate action for breach of fiduciary duty).

67. Roy, 366 N.Y.S.2d at 301.

68. Robert I. Simon, *Sexual Misconduct of Therapists*, TRIAL, May, 1985, 46, 49 ("Once a patient, always a patient."); Melanie Carr & G. Erlick Robinson, *Fatal Attraction: The Ethical and Clinical Dilemma of Patient-Therapist Sex*, 35 CAN. J. PSYCHIATRY 122, (1990) ("the ex-therapist must . . . always put the needs of the ex-patient first in

cated a one-year waiting period between the termination of psychotherapy treatment and the commencement of a sexual relationship between the psychotherapist and patient.⁶⁹ The article kindled strong debate concerning whether a sexual relationship between a psychotherapist and patient is ever appropriate at any time after the termination of therapy.⁷⁰ Psychotherapists who argue against sexual involvement with a former patient believe that a sexual attraction begun in the context of therapy is always contaminated by the imbalance of power and patient dependency that characterize the therapeutic relationship.⁷¹ They feel that transference issues between patient and psychotherapist are never completely resolved and in fact may not peak until five to ten years after therapy ends.⁷²

Although little research has been done on the effects of sexual intimacy with former patients, one study showed that more than sixty percent of patients had recontacted their psychotherapist for a consultation within three years of the termination of therapy.⁷³ This study emphasizes the strong argument in favor of the continuing professional responsibility psychotherapists have toward their former patients. Courts have not been willing to adopt the point of view of mental health experts who believe that sexual relations with a former patient are unethical and clinically contraindicated. A legal duty to refrain from sexual activity once therapy has ended has not been generally imposed.⁷⁴

order not to abandon or exploit his patient"). Cf. Phyllis Coleman, *Sex Between Psychiatrist and Former Patient: A Proposal for a "No Harm, No Foul" Rule*, 41 OKLA. L. REV. 1 (1988) (suggesting that a psychiatrist's duty of care is not everlasting and that sexual relations between the psychiatrist and his patient would not be harmful to the patient if transference issues have been properly resolved).

69. Paul S. Appelbaum & Linda Jorgenson, *Psychotherapist-Patient Sexual Contact After Termination: An Analysis and a Proposal*, 148 AM. J. PSYCHIATRY 1466 (1991).

70. Letters to the Editor, 149 AM. J. PSYCHIATRY 979 (1992) (majority of letters condemning sexual intimacy with a former patient no matter how much time has transpired since termination of therapy).

71. Carr & Robinson, *supra* note 68.

72. Glen O. Gabbard & Kenneth S. Pope, *Sexual Intimacies After Termination: Clinical, Ethical and Legal Aspects*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 115, 118 (Glen O. Gabbard ed. 1989). In discussing the persistence of transference following termination of therapy, these authors state, the "concept of a supposed 'waiting period' . . . before sexual intimacies are initiated is naive because it does not take into account the timeless nature of the unconscious."

73. SCHOENER ET AL., *supra* note 4, at 269.

74. See, e.g., *Perkins v. Dean*, 570 So. 2d 1217 (Ala. 1990) (plaintiff did not state a claim for sexual exploitation against therapist where sexual relations occurred after termination of therapy and also after social worker had resigned from his job as therapist); *Noto v. St. Vincent's Hosp. & Medical Ctr. of N.Y.*, 559 N.Y.S.2d 510 (N.Y. App. Div. 1990) (no cause of action stated against psychiatrist who engaged in sexual relations with

Problems of Proof

A patient who sues a psychotherapist for psychotherapeutic malpractice faces substantial problems of proof. Using one of the two standards of care discussed above, courts generally find that sexual relations with a current patient are a breach of the psychotherapist's duty of care. However, the patient must prove that sexual contact actually occurred. In doing so, the plaintiff will face problems similar to those faced by the victims of rape or incest.⁷⁵ Sexual contact between psychotherapist and patient generally occurs in private, with only the psychotherapist and patient as witnesses. Thus, the patient's claims can be dismissed as mere fantasy or delusion by a professional whose therapy records will show that the patient is mentally ill.⁷⁶ When a psychotherapist denies the sexual contact, the patient needs to produce evidence that supports her version of the events. This evidence may include diaries or notes written at the time of the sexual contact, intimate knowledge of the psychotherapist's residence, personal life or unique characteristics of his body, or gifts or letters indicating a romantic involvement.⁷⁷

If the plaintiff is successful in proving that sexual contact occurred, she must then prove that the psychotherapist's substandard treatment caused the damage to her mental and emotional health. Expert testimony will be required, preferably from a subsequent psychotherapist, showing that the patient's deterioration in mental and emotional health is due to the offending psychotherapist's treatment.⁷⁸ The difficulty lies in distinguishing any pre-existing mental illness that prompted the patient to seek therapy from a worsening of the patient's condition caused by the psychotherapist's behavior.⁷⁹ The patient must prove that the sexual contact caused emotional or psychological damage in addition to any conditions that initially prompted the patient to seek psychotherapeutic treatment.⁸⁰

a former patient after she had been discharged from the hospital and was no longer under his professional care).

75. LeBoeuf, *supra* note 17, at 97.

76. Moisan, *supra* note 62, at 448.

77. SCHOENER ET AL., *supra* note 4, at 329.

78. Moisan, *supra* note 62, at 449.

79. Donald J. Davidoff, *The Malpractice of Psychiatrists*, 1966 DUKE L.J. 696 (1966); Roy v. Hartogs, 381 N.Y.S.2d 587, 589 (N.Y. App. Div. 1976) (plaintiff's compensatory damages reduced from \$50,000 to \$25,000 because her mental disorders began years before her contact with the defendant and he may only be liable for the aggravation of her pre-existing condition).

80. LeBoeuf, *supra* note 17, at 89.

Expert testimony is also needed to describe the nature and extent of the psychological injury resulting from the psychotherapist-patient intimacy. Damage caused by psychotherapist-patient intimacy is difficult to prove because it is entirely emotional and psychological.⁸¹ The damages sought may include compensation for mental and physical suffering, the actual expenses of the original substandard treatment and subsequent care, and expenses for necessary future therapy.⁸²

Defenses

The plaintiff's problems of proof are counterbalanced by the lack of viable defenses available to a psychotherapist accused of sexual intimacy with a patient. The psychotherapist may claim that sexual contact did not occur, and that plaintiff's claim is the result of the patient's delusions or rooted in a desire for revenge for having had sexual advances turned down by the psychotherapist.⁸³

Although consent is not technically a defense to malpractice, defendant psychotherapists have often raised this issue by attempting to characterize patient-psychotherapist sexual intimacy as a "love affair" between two consenting adults. The harm suffered by the patient is portrayed as resulting from a failed personal relationship, and therefore a harm that is not cognizable at law.⁸⁴ Courts have not been willing to accept this portrayal of psychotherapist-patient sex. One court has stated:

The impacts of sexual involvement with one's counselor are more severe than the impacts of merely 'having an affair' for two major reasons: first, because the client's attraction is based on transference, the sexual contact is ordinarily akin to engaging in sexual activity with a parent and carries with it the feelings of shame, guilt and anxiety experienced by incest victims. Second, the client is usually suffering from all or some of the psychological problems that brought [her] into therapy to begin with.⁸⁵

Courts have also refused to find that a patient's purported consent to sexual activity was a viable defense where the psychotherapist's own malpractice induced the patient to agree to sexual contact.⁸⁶ Even where the psychotherapist has informed a patient

81. 14 AM. JUR. PROOF OF FACTS 3D 319 (1991).

82. Moisan, *supra* note 62, at 450.

83. Pope, *supra* note 21.

84. Benetin & Wilder, *supra* note 28, at 130.

85. Simmons v. United States, 805 F.2d 1363, 1367 (9th Cir. 1986).

86. Greenberg v. McCabe, 453 F. Supp. 765, 771 (E.D. Pa. 1978) (recognizing that the patient's diminished powers of judgment were brought about by the defendant's own conduct. Plaintiff testified that through therapist's treatment "[he] became a God to her

that sexual contact is part of her therapy, courts have found that a patient's consent to treatment is not a consent to sexual activity but a consent to psychotherapy.⁸⁷

A psychotherapist accused of sexually exploiting a patient may raise the statute of limitations as a defense.⁸⁸ In cases of medical malpractice, some states have adopted a "discovery rule" under which the statutory limitation period is tolled until the patient learns or reasonably should have learned that the defendant's conduct has caused harm. Application of this rule to psychotherapeutic malpractice has proved troubling, however. Courts must determine as a matter of law the point in time at which a patient discovers that she has been psychologically injured by her psychotherapist. When a psychotherapist raises the statute of limitations as a defense, the question to be decided by the court is not whether the patient was aware of sexual contact with the psychotherapist but when the patient discovered that it caused harm. Those courts that have relied on a mishandling of the transference phenomenon to impose liability on sexually exploitive psychotherapists have also allowed this mishandling to toll the statute of limitations. They have found that the plaintiff's failure to discover the injury is brought about by the defendant's own malpractice.⁸⁹ The psychotherapist's mismanagement of the patient's vulnerability and dependence not only delays the patient's discovery of the injury but also makes it difficult for the patient to recognize that the psychotherapist's treatment is the source of the harm.⁹⁰

Intentional and Negligent Infliction of Emotional Distress

In addition to malpractice claims, plaintiffs have been successful in proving both intentional and negligent infliction of emotional distress as a result of a psychotherapist's sexual exploitation of a patient. In *Destefano v. Grabrian*, a Colorado case, a husband and wife sued a Roman Catholic priest who had sexual intercourse with the wife during marital counseling.⁹¹ The court was unwilling to recognize a claim for clergy malpractice but did find Father

and that she was dependent on him, and that she feared displeasing him."); *Marston v. Minneapolis Clinic of Psychiatry & Neurology*, 329 N.W.2d 306, 310-311 (Minn. 1982) ("the patient submits to the advances because of the very mental and emotional problems for which she is being professionally treated").

87. LeBoeuf, *supra* note 17, at 102.

88. Schwartz, *supra* note 27, at 20.

89. Greenberg, 453 F. Supp. at 769. *Accord* Simmons, 805 F.2d at 1367-68; Riley v. Presnell, 565 N.E.2d 780, 783 (Mass. 1991).

90. Simmons, 805 F.2d at 1368.

91. *Destefano v. Grabrian*, 763 P.2d 275, 278-79 (Colo. 1988).

Grabrian's conduct "outrageous in character and so extreme in degree as to go beyond all possible bounds of decency."⁹² The court upheld the wife's claim of intentional infliction of emotional distress but dismissed the husband's identical claim. The court found his complaint to be one for alienation of affection, a claim barred by Colorado law.⁹³

In *Corgan v. Muehling*, an Illinois case, the plaintiff successfully stated a cause of action for negligent infliction of emotional distress.⁹⁴ She alleged that the defendant, an unlicensed psychologist, "repeatedly engaged in sexual intercourse with her under the guise of treatment," causing her profound emotional disturbance.⁹⁵ The court found that where the treatment was psychological in nature, the plaintiff did not need to allege a physical injury or impact in order to recover for psychological and emotional harm.

In California, two mothers stated separate claims for negligent infliction of emotional distress when a psychotherapist sexually molested both of their sons.⁹⁶ The court found that since the mothers were in treatment together with their sons, the psychotherapist owed them a duty of care independent of the duty owed the boys. The court implied that the mothers' claims might not have been allowed if they had not also been patients of the psychotherapist, but instead claimed emotional distress as the parents of sexually abused children.⁹⁷ A concurring opinion suggests that on the same facts an intentional tort would also have been appropriate.⁹⁸

III. STATUTORY CAUSE OF ACTION

Four states—California, Minnesota, Wisconsin, and Illinois—have recently enacted statutes that create a civil cause of action for patients who have been sexually exploited by a psychotherapist.⁹⁹

92. *Id.* at 286.

93. *Id.* at 288. *Cf.* *Richard H. v. Larry D.*, 243 Cal. Rptr. 807 (Cal. Ct. App. 1988) (complaint alleging severe emotional distress following psychiatrist's sexual relations with wife during marital counseling not alienation of affection but malpractice).

94. *Corgan v. Muehling*, 574 N.E.2d 602 (Ill. 1991).

95. *Id.* at 603.

96. *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 770 P.2d 278 (Cal. 1989).

97. *Id.* at 283.

98. *Id.* at 286 (Arguelles, J., concurring).

99. CAL. CIV. CODE § 43.93(b) (West Supp. 1993); 740 ILCS § 140/2(a) (West 1993); MINN. STAT. ANN. § 148A.02 (West 1989); WIS. STAT. ANN. § 895.70(2) (West Supp. 1992). At the time of this writing, Rhode Island had a similar bill pending in its legislature. R.I.H.R. 8702, 1992 Reg. Sess.

These statutes aid the victims of psychotherapist sexual abuse because they allow a patient to "recover damages from a psychotherapist" for "injury caused by sexual contact with the psychotherapist."¹⁰⁰ In jurisdictions where such statutes have been enacted, plaintiffs are no longer required to prove by expert testimony that sexual contact in a therapeutic setting is a breach of the psychotherapist's duty of care.¹⁰¹ They need only prove that sexual contact occurred and that it caused them harm.

Each of these statutes clearly provides a cause of action for current patients who are subjected to sexual contact with a psychotherapist. In addition, each specifies the conditions under which a former patient may state a claim for sexual exploitation by a psychotherapist. In Illinois, if sexual contact occurs within one year after the termination of therapy, the former patient must show either emotional dependence¹⁰² on the psychotherapist at the time of sexual intimacy or that the intimacy occurred as a result of therapeutic deception.¹⁰³

The Minnesota and California statutes allow a former patient a cause of action if the sexual contact occurs within two years of termination of the therapy. In Minnesota, as in Illinois, a plaintiff must prove the existence of emotional dependency on the psychotherapist or therapeutic deception at the time of the sexual contact. This additional burden is not imposed on the plaintiff under the California statute. In California, the former patient need only prove that sexual contact with her psychotherapist occurred within two years after therapy was concluded.¹⁰⁴

Wisconsin's statute provides the most liberal treatment to the former patient. A cause of action for psychotherapist sexual exploitation may be brought within three years of the sexual contact, or up to fifteen years after sexual contact has occurred if the patient failed to bring the action within the three year statutory limitation period due to "the effects of the sexual contact."¹⁰⁵ At the

100. 740 ILCS § 140/2(a)(b).

101. Jorgenson, *supra* note 35, at 703.

102. 740 ILCS § 140/1(a) (West 1993) ("'Emotionally dependent' means that the nature of the patient's or former patient's emotional condition . . . [is] such that the psychotherapist knows or has reason to believe that the patient is unable to withhold consent to sexual contact by the psychotherapist.").

103. 740 ILCS § 140/1(g) ("'Therapeutic deception' means a representation by a psychotherapist that sexual contact with the psychotherapist is consistent with or part of the patient's or former patient's treatment.").

104. CAL. CIV. CODE § 43.93(b)(2).

105. WIS. STAT. ANN. § 893.585(2) (West Supp. 1992). This statute incorporates the general medical malpractice statute of limitations.

time of this writing, there were no reported cases applying these statutes.

IV. CRIMINAL LAW

The majority of states have not criminalized psychotherapist-patient sexual exploitation.¹⁰⁶ Thus, in most jurisdictions, prosecution of sexually abusive psychotherapists can only occur under criminal sexual assault statutes. These statutes require that a patient be forcibly assaulted,¹⁰⁷ or that a patient be a minor or be mentally or physically incapacitated.¹⁰⁸ Usually, these conditions do not exist when sexual contact occurs in a psychotherapeutic setting.¹⁰⁹ Further, sexual assault statutes allow the defendant to raise consent as a defense, which is inappropriate in the psychotherapeutic context.¹¹⁰

Advocates of criminal sanctions for psychotherapists who sexually exploit their patients argue that effective deterrence of this behavior requires statutes that specifically prohibit psychotherapist-patient sex.¹¹¹ They also contend that prosecution under criminal statutes may have the added benefit of relieving the victim of the expense of mounting a civil suit.¹¹²

Nine states—California, Colorado, Florida, Georgia, Iowa, Maine, Minnesota, North Dakota, and Wisconsin—have passed statutes making patient-psychotherapist sexual contact a crime.¹¹³

106. SCHOENER ET AL., *supra* note 4, at 546.

107. Forcible sexual assault against a patient, when it occurs, usually involves physicians outside the mental health profession. *See, e.g.,* Hoover v. Univ. of Chicago Hosps., 366 N.E.2d 925 (Ill. App. Ct. 1977) (where physician overpowered patient during a physical examination and had sexual intercourse with her against her will).

108. Mental incapacity in criminal sexual assault statutes does not refer to mental illness but refers to an inability to conduct everyday affairs in the sense of legal incompetence. *See, e.g.,* Hickey v. Askren, 403 S.E.2d 225 (Ga. Ct. App. 1991) (psychiatric patient not considered mentally incapacitated or incompetent where despite mental illness requiring therapy, she was able to periodically hold a job, obtain a driver's license and socialize with friends).

109. *See, e.g.,* MINNESOTA DEPARTMENT OF CORRECTION, TASK FORCE ON SEXUAL EXPLOITATION BY COUNSELORS & THERAPISTS, REPORT TO THE MINNESOTA LEGISLATURE 28 (1985) [hereinafter MINNESOTA TASK FORCE].

110. *See supra* text accompanying notes 83-87, discussing patient consent; MINNESOTA TASK FORCE at 29 ("In many of the cases of therapist-client exploitation, it is the client's vulnerability, dependency, and trust in the therapist that results in what is misconstrued as consent.").

111. SCHOENER ET AL., *supra* note 4, at 546.

112. Benetin & Wilder, *supra* note 28, at 133.

113. CAL. BUS. & PROF. CODE § 729(a) (West Supp. 1993); COLO. REV. STAT. ANN. § 18-3-405.5(1) (West 1990); FLA. STAT. ANN. § 491.0112(1) (West 1991); GA. CODE ANN. § 16-6-5.1(c)(2) (Michie 1992); IOWA CODE ANN. § 709.15 (West Supp. 1992); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(I) (West Supp. 1992); MINN. STAT. ANN.

As of January of 1993, at least four other states had bills pending in their legislatures that would criminalize psychotherapist sexual abuse.¹¹⁴

The majority of states having a criminal statute that specifically proscribes patient-psychotherapist sex define the term "psychotherapist" broadly to include both licensed and unlicensed practitioners.¹¹⁵ Only Maine limits defendants to psychiatrists, psychologists, and licensed social workers, arguably not drawing unlicensed psychotherapists within the reach of its statute.¹¹⁶

All nine states except Maine and Iowa specifically exclude consent as a defense, impliedly recognizing that transference and patient dependence within the psychotherapeutic setting essentially render patients incapable of consenting to the sexual contact in any meaningful way.¹¹⁷ Classification of the crime of patient-psychotherapist sex ranges from a misdemeanor in California for a first offense of sexual contact¹¹⁸ to a third degree felony in Minnesota, where sexual penetration by a psychotherapist is punishable by imprisonment for not more than fifteen years or a fine not exceeding \$30,000 or both.¹¹⁹

With the exception of Colorado and Maine, these state legislatures have addressed the problem of whether a former patient may rely on the statute when sexual contact occurs after termination of therapy. In Florida and California, a former patient may bring a charge only if the therapeutic relationship was terminated expressly for the purpose of engaging in sexual contact.¹²⁰ Minnesota and Iowa require proof that the former patient was emotionally

§ 609.344(1)(h) (West 1987 & Supp. 1993); N.D. CENT. CODE § 12.1-20-06.1 (1991); WIS. STAT. ANN. § 940.22(2) (West Supp. 1992).

114. Ind. S. 148, 108th Leg. Sess., 1993 Reg. Sess.; Mass. H.R. 1466, 177th Gen. Ct., 1992 Reg. Sess.; Pa. H.R. 896, 175th Gen. Ass., 1991-92 Reg. Sess.; Tenn. H.R. 2488, 97th Gen. Ass., 1992 2d Reg. Sess.

115. See, e.g., COLO. REV. STAT. ANN. § 18-3-405.5(4) (" 'Psychotherapist' means any person who performs or purports to perform psychotherapy, whether or not such person is licensed . . . 'Psychotherapy' means the treatment, diagnosis, or counseling in a professional relationship to assist individuals or groups to alleviate mental disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors which interfere with effective emotional, social, or intellectual functioning."); MINN. STAT. ANN. § 609.341(17) (" 'Psychotherapist' means a physician, psychologist, nurse, chemical dependency counselor, social worker, clergy, marriage and family therapist, mental health service provider whether or not licensed. ").

116. ME. REV. STAT. ANN. tit. 17-A, § 252(2)(I).

117. See, e.g., CAL. BUS. & PROF. CODE § 729(b)(2); FLA. STAT. ANN. § 491.0112(3).

118. CAL. BUS. & PROF. CODE § 729(b)(1).

119. MINN. STAT. ANN. § 609.344(2).

120. CAL. BUS. & PROF. CODE § 729(a); FLA. STAT. ANN. § 491.0112(1).

dependent.¹²¹ Only Wisconsin and North Dakota exclude the former patient entirely by stipulating that the sexual contact occur during "any ongoing psychotherapist-patient . . . relationship"¹²² or that it occur "during any treatment, consultation, interview, or examination."¹²³

Because statutes imposing criminal liability are relatively new, there are no reported cases construing statutory language or applying the law to specific cases. One author has described eight unreported prosecutions in the state of Minnesota.¹²⁴ Three of the eight psychotherapists charged were psychologists, and the remaining five were unlicensed practitioners, including clergy. Seven of these eight were found guilty of criminal sexual conduct and five were sentenced to prison terms varying from thirty days to two years. In the one case where the psychotherapist was found not guilty of criminal sexual conduct, the State failed to prove the former patient's "emotional dependency."¹²⁵

In Wisconsin, at least two psychiatrists have been prosecuted for sexual contact with a patient, but neither served any prison time for their offense. Both were able to plea bargain for probation.¹²⁶

V. CONCLUSION

During the past twenty-five years, the legal remedies available to victims of sexual exploitation by psychotherapists have expanded greatly. Judicial recognition of the transference phenomenon and the psychotherapist's professional duty to manage this phenomenon for the patient's benefit has enabled patients to succeed in their malpractice claims against psychotherapists. The courts have also recognized the severe emotional harm that patients suffer as a result of psychotherapist-patient sex, allowing patients to recover for intentional and negligent infliction of emotional distress. While an increasing number of state legislatures have enacted statutes imposing civil or criminal penalties on psychotherapists who engage

121. For definition of "emotionally dependent," see *supra* note 102.

122. WIS. STAT. ANN. § 940.22(2).

123. N.D. CENT. CODE 12.1-20-06.1.

124. SCHOENER ET AL., *supra* note 4, at 553-560.

125. *Id.* at 555. See also Jody M. Prescott & Matthew G. Snow, *Criminal Liability Under the Uniform Code of Military Justice for Sexual Relations During Psychotherapy*, 135 MIL. L. REV. 21, 31 (1992) (reporting that Colorado had referred three cases for prosecution under its criminal statute).

126. Memorandum from Lynn Maskel, M.D., Director Forensic Psychiatry Program, Loyola University Medical Center, Loyola University Chicago 2 (Apr. 22, 1993) (on file with the Institute for Health Law).

in sexual activity with their patients, other state legislatures must follow the lead and protect these victims. Legal sanctions should result in a decreased incidence of psychotherapist-patient sex and reduce the risk that psychotherapy will exacerbate, rather than cure, the patient's emotional difficulties.