

Prohibiting Lawyer-Client Sex

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Psychotherapists' and physicians' sexual contact with their patients has been long held as unethical conduct. However, lawyers' sexual contact with clients has been largely ignored in the professional literature. This article uniquely anatomizes the similarities in the vulnerabilities and power imbalances that exist between psychotherapists' and lawyers' relationships with patients/clients. These characteristics enable the professional to exert undue influence over the less-powerful party, and for these reasons lawyers should be held to fiduciary standards in their personal dealings with clients. The authors propose a rebuttable presumption that sexual contact between an attorney and client was obtained through the attorney's exercise of undue influence and was therefore a breach of the attorney's fiduciary duties to the client.

The only way a lawyer's sexual relationship with a client would be wrong would be a case where the lawyer's infatuation with the client caused him to miss a filing deadline.

—Appellate court judge during a medicolegal seminar on sexual misconduct

National legal ethics codes and most states' ethics codes support the judge's comment: sex with a client is (usually) not unethical or malpractice for the lawyer unless it negatively affects the client's case.¹ Psychotherapists and physicians, however, are barred from engaging in sexual relations with patients regardless of the effect it may have on the patient's treatment.² Why is it "sexual misconduct" for health professionals and merely "private sexual conduct"³ when a lawyer engages in sexual relations with a client?

Since the time of the Hippocratic Oath, physicians have been proscribed

from having sex with patients.⁴ Psychotherapists of all disciplines over the last two decades have unanimously declared that sex with a patient is unethical.⁵ In 1989, the American Medical Association incorporated a specific prohibition in their ethics code banning all physicians' sexual liaisons with patients: "sex with a patient violates the trust necessary for the physician-patient relationship."⁶

Legislators around the country have specifically dealt with the issue of psychotherapists engaging in sex with their patients. Since the mid-1980s, nine states have criminalized therapist-patient sex.⁷ Four states have made therapist-patient sex a civil cause of action.⁸ All states allow patients to sue their therapists for common law malpractice when the therapist engages in sex with his or her patient.⁹ Patients may bring claims for either intentional acts by the therapist (battery, intentional infliction of emotional distress) or negligent acts

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by the therapist (the therapist had a duty to the patient that the therapist breached; the breach of that duty caused the patient injuries).¹⁰ The most common injury patients allege in common law malpractice is psychological or emotional damage.¹¹ States have also passed statutes mandating reporting of therapists who have sex with their patients.¹²

On the other hand, attorneys' sexual contact with clients remains what one judge has called "the legal profession's 'dirty little secret.'"¹³ Attorneys' ethical codes, with few exceptions, are silent regarding prohibitions on sexual contact with clients.¹⁴ Five states have ethical rules or advisory opinions regarding attorney-client sexual contact.¹⁵ Very recently,¹⁶ the American Bar Association Standing Committee on Ethics and Professional Responsibility approved a formal opinion advising against attorneys' sexual contact with clients.¹⁷ However, the opinion is merely advisory and has no binding effect in any jurisdiction. Similarly, the American Academy of Matrimonial Lawyers has adopted the following nonbinding proscription: "An attorney should never have a sexual relationship with a client or opposing counsel during the time of the representation."¹⁸ Lawyers generally believe, though, that existing ethical codes provide sufficient protection: if the legal representation suffers, the code provides a remedy.¹⁹

There are no statutes that provide civil actions for lawyer-client sex and no reporting requirements. Only California has recognized a common law malpractice action by a client against an attorney

who had sex with her. In *Barbara A. v. John G.*,²⁰ the California court held that Barbara A. stated a claim for battery and deceit against her attorney for impregnating her. John G., the attorney, had misrepresented to his client that he could not get her pregnant. The attorney and client engaged in unprotected sex that resulted in an ectopic pregnancy for the client. She required surgery to save her life. The court found that if the client could prove a confidential relationship with her attorney, the burden would shift to the attorney to show that he did not use undue influence to induce his client to have sex with him.

More recently, the California Appeals Court decided *McDaniel v. Gile*,²¹ in which the client alleged that her legal position was compromised because she refused to have sex with her attorney. The court agreed that the case presented enough facts to establish a cause of action for intentional infliction of emotional distress and malpractice. The court declined to address whether attorney-client sexual contact was a *per se* violation of ethical and fiduciary duties the attorney owes a client. However, neither *Barbara A.* nor *McDaniel* answers the question of whether a client may recover for purely emotional distress or psychological damages.

Other states that have faced claims by clients for harm caused by attorneys' sexual contact have repeatedly held that the client has failed to state a valid cause of action. Illinois, in several cases, has refused to recognize a common law cause of action for malpractice against attorneys who had sex with clients.²²

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*Suppressed v. Suppressed*²³ involved a client's claim of emotional distress caused by her attorney's sexual contact with her. The court held that the attorney's fiduciary duties to his client did not extend to his personal relationship with the client. The court would only entertain a cause of action if the attorney had made the sexual contact a requirement for legal representation or if the attorney's representation of the client had been adversely affected by his sexual relations with her. The Illinois court did, however, call upon the legislature to enact legislation making attorney-client sex a civil cause of action much as the state had recently done for psychotherapist-patient sexual contact.²⁴

Legislation addressing psychotherapist-patient sexual contact was preceded by the research done a decade ago on the prevalence of therapist sexual misconduct, and the harm that such contact causes patients.²⁵ Psychotherapist-patient sexual contact occurs with some frequency; several rates of prevalence are described in the literature.²⁶ The incidence rate of attorney-client sexual contact is still relatively unknown. Lawyers have not yet officially taken the step of investigating attorney-client sexual contact. Any harm caused by the contact has only been documented in the few cases brought by former clients against their attorneys. The evidence that does exist demonstrates that there are many similarities between psychotherapist-patient relationships and attorney-client relationships. The vulnerabilities of the patients and clients and the professionals' power over the clients may lead to

the professionals' exercise of undue influence or exploitation of the trusting party. For this reason, psychotherapists are held to higher standards, "fiduciary" standards, in their personal dealings with patients. The authors find the similarities between the relationships of therapists and their patients and attorneys and their clients persuasive. Attorneys should be held to similar high standards in their personal dealings with clients.

The Incidence Sexual liaisons between professionals and their clients have been amply documented in the area of psychotherapist-patient sexual contact. Nationwide studies have revealed that up to 12 percent of therapists self-report that they have had sex with one or more patients.²⁷ Comparable data on nonpsychiatric physicians (obstetricians, gynecologists, surgeons, internists and general practitioners) are more limited yet indicate that the incidence rate is even higher with these professionals and their patients (for obstetricians/gynecologists, 18% reported that they had engaged in sexual contact with their patients).²⁸ A recent study by Gartrell supports the findings of the earlier studies.²⁹ Most of the patients sexually exploited by therapists are female (88–92%), and most of the therapists involved are male.^{30, 31}

Lawyers have not been eager to undertake similar studies. No national organizations have studied the issue. Preliminary results of a study conducted by researchers at Memphis State University reveal that 31 percent of attorneys surveyed knew other attorneys who had been sexually involved with their clients:

only 6% reported their own sexual involvement with clients.^{31A} An informal survey undertaken by two of the authors found only 90 complaints have been filed with state bar associations alleging attorneys' sexual contact with clients over the past two years.³² However, as one bar counsel noted, complaints to bar associations represent only the tip of the iceberg.³³ In addition, as another commentator noted, why would clients bother to file a complaint if the complained-of activity is not even recognized as unethical and thus carries no sanctions?³⁴

The Harm Additional studies of physicians' and psychotherapists' sexual contact with patients found that over 90 percent of patients were harmed by the contact.³⁵ Injuries sustained by patients include post-traumatic stress disorder, suicidal ideation, dissociative behaviors, and decreased ability to trust.³⁶ One study of nonpsychiatric physicians concluded that the injuries caused patients by the contact were similar because of the breach of trust that was involved in both instances.³⁷

No studies have been conducted of attorneys' sexual contact with clients. However a review of the case law on the topic reveals that clients may suffer mental anguish,³⁸ nightmares,³⁹ depression,⁴⁰ suicidal ideation⁴¹ and post-traumatic stress disorder.⁴² In one recent Canadian case, *Szarfer v. Chodos*,⁴³ the attorney had an affair with his client's wife. As a result of the breach of trust, the client was awarded damages based upon his

nervous shock, mental anguish, and a loss of

memory as a result of the defendant's conduct. [The plaintiff] required hospitalization on two occasions, extensive psychiatric care, medication, and psychotherapy. There is no doubt that he has sustained considerable loss of enjoyment of life and will continue to do so for some time.⁴⁴

These limited data indicate that the harm caused by an attorney's sexual intimacy with a client or client's spouse is similar to harm caused patients by therapist sexual contact. The similar harms may result from the similarities in the relationships.

Patients and clients have some common characteristics. They often are vulnerable when they seek help from the professional. In addition, there is a power imbalance based upon the professional's expertise and the confidences and trust that clients have in them. For these reasons, there is the potential for the professional to exert undue influence over the patient or client. Out of concern for the less-powerful party, therapists and doctors are held to fiduciary standards in their dealings with patients.⁴⁵ Similarly, there should be a presumption that an attorney's sexual relationship with a client is unethical and violative of the attorney's fiduciary duties to the client.

This paper will examine characteristics of psychotherapist/physician-patient relationships in comparison with attorney-client relationships. Two cases will be examined to illustrate the similarities between the relationships. Enough similarities exist between the two professions to warrant similar treatment in the area of sexual contact.

Two Cases

*Mazza v. Huffaker*⁴⁶ Dr. Robert Huffaker was a psychiatrist who began treating Jeffrey Mazza in 1975 for manic depressive psychosis. During the course of the therapy, "in many of [Mazza's] sessions, for example, one on 4 May 1979, [Mazza] expressed to Huffaker serious concern about maintaining a healthy marital relationship with his wife, Jacqueline Mazza."⁴⁷ Mazza developed a strong positive transference to Huffaker: "[Mazza] had come to think of defendant Huffaker as his best friend."⁴⁸ However, in May of 1979, Mazza and his wife separated and in July of 1979, Mazza discovered his wife and his psychiatrist "together in bed. Huffaker was naked and putting on his undershorts, and Jacqueline was naked and putting on a light housecoat."⁴⁹

The court held that Dr. Huffaker had committed malpractice on his patient, Mazza. Dr. Huffaker had breached his duties as a physician to first, "do no harm,"⁵⁰ and "second . . . to maintain the patient's trust and confidence in the physician."⁵¹ The court noted evidence which established that "[s]exual relations between a psychiatrist and his patient's wife would destroy the patient's trust in the psychiatrist and would destroy the doctor-patient relationship."⁵²

As a result of Dr. Huffaker's negligence, Mazza "constantly relives the [July 1979] discovery and . . . it impairs his concentration and deprives him of sleep."⁵³ The court stated that evidence had been introduced "tending to show that a patient who discovered his wife in bed with his psychiatrist would *never*

again be able to form the trusting relationship with a psychiatrist that is necessary for psychiatric treatment, and that such discovery would harm the mental well-being of a patient."⁵⁴ The jury found for Mazza and the appeals court affirmed the verdict on all counts.

*Szarfer v. Chodos*⁵⁵ A similar decision was reached in the Canadian case of *Szarfer v. Chodos*, in which an attorney engaged in sexual relations with his client's wife.⁵⁶ Szarfer sought legal assistance from Chodos in June of 1978.⁵⁷ At that time, Szarfer had fallen, fractured his arm, and had been unable to work for many weeks.⁵⁸ When Szarfer returned to work, he was unable to perform his job as he had before and he was terminated.⁵⁹ Chodos represented Szarfer in his claims before the Workers Compensation Board, small claims court, and a wrongful dismissal action against Szarfer's employer.⁶⁰

Szarfer consulted with Chodos in January of 1979 regarding filing a wrongful dismissal action against his former employer. Szarfer's injury had required additional surgery and Szarfer had been unable to obtain permanent work. Szarfer's wife assumed financial responsibilities for the family, "which placed a strain on the marriage relationship which did not abate when the plaintiff returned to college for retraining."⁶¹ The court also noted, "In addition to the marital strain, the plaintiff was depressed as a result of his circumstances and sought professional assistance from a psychiatrist, Mr. H. Fenigstein, from whom he took group psychotherapy

from June 1980, until some time in the spring of 1981."⁶²

Szarfer was "a man who looked up to and respected professionals and had a deep and abiding trust in both his wife and [his lawyer, Chodos]."⁶³ In February of 1981, Chodos interviewed Szarfer again with the intention of adding a claim for mental damages to Szarfer's wrongful dismissal claim. In March of 1981, Chodos interviewed Mrs. Szarfer regarding the effects the loss of job had on their marital relationship.

In approximately May of 1981, Chodos and Mrs. Szarfer began an affair that continued until approximately the end of June 1981. On June 26, 1981, Szarfer happened to come upon his wife and his lawyer exiting an elevator together in a hotel. "The plaintiff was shocked. He was unable to move. He was not seen by his wife or the defendant and shortly after they left he left the lobby."⁶⁴ Shortly thereafter, Szarfer suffered an anxiety attack and was hospitalized twice for nervous shock and mental anguish.

The court found that the attorney had breached his fiduciary duties to his client. The court held that "[t]he highest and clearest duty of a fiduciary is to act to advance the beneficiary's interest and avoid acting to his detriment."⁶⁵ Szarfer was harmed by his attorney's conduct as "[u]pon discovery of the affair, the client's trust in the solicitor was destroyed."⁶⁶ The appeals court affirmed the trial court's award of damages to the plaintiff.

Similar factors gave rise to the imposition of fiduciary duty and civil liability in both *Mazza* and *Szarfer*. These fac-

tors exist in most therapist-patient relationships and in many attorney-client relationships. When these characteristics are present, there is the potential for the more-powerful party, the professional, to exert undue influence over the less-powerful party, the patient or client. For this reason, both psychotherapists and attorneys should be held to fiduciary standards in their dealings—both business and personal—with their respective patients and clients.

Similarities in Characteristics of Therapist-Patient Relationships and Attorney-Client Relationships

As the two cases suggest, there are many concordances between therapist-patient relationships and relationships between attorneys and their clients. These relationships will be examined for the similarity in their dynamics. The authors hypothesize that two basic characteristics exist in both relationships. One is vulnerability and the other is a power imbalance favoring the professional. These two characteristics frequently lead to the professional's exercise of undue influence and the imposition of fiduciary duties on the professional.

"Vulnerability" is operationally defined as consisting of four factors: (1) presenting problem, (2) revelation of confidential information, (3) transference or idealization, and (4) stress resulting from the therapy process or litigation.

The second major characteristic is the power imbalance that exists in both therapist-patient and attorney-client rela-

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tionships. The power imbalance results from two factors: (1) the professional's position of authority, and (2) the patient's or client's vulnerability.

Vulnerability and power imbalance create a unique environment wherein the professional may exercise undue influence over the patient/client. This undue influence may result in harm to the patient/client and thus requires the imposition of fiduciary duties on both therapist and attorney.

Vulnerability The vulnerabilities of both Mazza and Szarfer are clear in the cases. Their presenting conditions were affected by preexisting problems and a "marker event" that caused them to seek the professionals' help. Once the therapeutic relationship began in *Mazza*, and once the attorney-client relationship began in *Szarfer*, confidences were revealed and positive transferences developed. The stresses that occur during the course of therapy were not discussed by the court in *Mazza*, but were a factor in the *Szarfer* decision.

Patient/Client's Presenting Condition

Patients or clients are often inherently more vulnerable than the population at large when they walk into the professionals' offices. This is due to either or both a preexisting condition causing enhanced vulnerability, and a more transient vulnerability resulting from the event that brought the patient/client to seek the professional's advice. Quite simply, at the entry point to the relationship, the patient/client is seeking help and, expecting to receive it, is particularly open and receptive.

Preexisting Condition It almost goes without saying that people who seek ex-

pert psychological help generally have psychological problems. These can range from situational distress to more major psychopathologies, such as Mazza's manic depressive psychosis.⁶⁷

The susceptibility the patient/client may have to abuse by the professional may be compounded by the particular preexisting condition. Feldman-Summers⁶⁸ has identified two conditions that increase the patient/client's vulnerability to abuse: "an overriding need for approval or acceptance and a state of psychological dependency." Feldman-Summers observed that these conditions are particularly potent in any situation in which there is a confidential or "fiduciary" relationship.

In addition, some patients and clients may be particularly vulnerable to sexual exploitation. Recent studies show that a large percentage of the population has been sexually abused, either by a family member or another person in a trusted position.⁶⁹ Kluff⁷⁰ has described a "sitting duck syndrome" of extreme susceptibility by many previously abused people to additional abuse. The patient/client's preexisting condition may be of varying severity, but in almost every situation there is some event that causes the patient/client to seek professional assistance.

"Marker Event" The patient/client's need for assistance from a therapist or a lawyer is often prompted by an intensely emotional event that the patient/client experiences.⁷¹ In the area of psychotherapy, Wohlberg⁷² has termed these momentous events "marker events," representing current losses and significant de-

velopmental turmoil. This period of loss or turmoil is also one of increased vulnerability.⁷³

The analogy may be made to the event that brings a client into an attorney's office: it is often a current loss or some sort of significant turmoil that causes a client to seek an attorney's advice. The decision to seek legal aid may be the "last straw" after many previous attempts at remedy have failed. Examples of marker event losses include being deprived of one's liberty as a client seeking legal advice regarding a criminal matter, the loss of a spouse for a divorce client, the financial losses of one seeking help in a bankruptcy proceeding, or the death of a spouse or loved one for a client probating an estate. Szarfer had lost his job and was suffering financially and emotionally when he sought legal help from Chodos.⁷⁴ Presenting vulnerabilities are enhanced by the dynamic that occurs during the professional relationship: the confidential information revealed, transference, and the stresses that occur during therapy or during the legal process.

Revelation of Confidential Information The patient/client's presenting vulnerability is compounded by what happens in the professional's office. One commentator has observed, "Once the patient has crossed the office threshold, she has established herself as someone willing to expose the secrets of her life to a person specially trained to hear and deal with them."⁷⁵ Pope and Bouhoutsos⁷⁶ noted that "We speak to therapists about our deepest secrets." Enhanced vulnerability due to revela-

tion is virtually inevitable in the therapist-patient situation because the patient is encouraged to "tell all."⁷⁷ The court noted in *Mazza* that the patient revealed intimate details to his psychiatrist, Dr. Huffaker, about his emotional difficulties and the condition of his marriage.⁷⁸ Many experts believe that the level of revelation that the patient achieves with the therapist directly relates to the effectiveness of the therapy.⁷⁹ To encourage patient confidences and to create a "safe haven" for patients, the law has shielded others' access to psychotherapy records by creating a psychotherapist-patient privilege.⁸⁰

In addition, in therapy sessions, the confidential revelations are one-sided—the patient reveals intimate details and the therapist listens. This further enhances the patient's vulnerability to the therapist.⁸¹

As evident in Szarfer's situation, in attorney-client relationships the client reveals similar intimate details in order for the lawyer to be able to effectively represent the client.⁸² Attorney-client confidences are also protected by privilege⁸³ and by ethical rules prohibiting attorneys from revealing client's confidences.⁸⁴ Clients' confidences are protected for reasons similar to those set forth for the patient-psychotherapist privilege: protecting confidential information is instrumental to the lawyer providing effective assistance of counsel, and serves collateral ends of assuring the client that the lawyer will not use the information to the client's disadvantage or to the lawyer's advantage.⁸⁵

The vulnerability created by the rev-

elation of confidential information is enhanced by a psychological phenomenon identified by Freud as "transference" that exists in all relationships, though particularly so in relationships in which one party is more powerful than the other.

Transference or Idealization Therapists' sexual contact with patients has been identified as arising from the therapist's negligent mishandling of the patient's transference and the therapist's own counter-transference. Transference in a classic Freudian perspective has been defined as follows: "[Patients] replace some earlier person by the person of the physician. To put it another way: a whole series of psychological experiences are revived, not as belonging to the past, but as applying to the person of the physician at the present moment."⁸⁶ Transference has been identified as occurring in all relationships in which there is a power imbalance. Jung⁸⁷ stated, "The transference itself is a perfectly natural phenomenon which does not by any means happen only in the consulting room—it can be seen everywhere and may lead to all sorts of nonsense."

The patient may view the therapist as a powerful, benevolent parent figure. Mazza viewed his therapist as his "best friend."⁸⁸ Other courts have found that the patient's positive transference to the therapist increased the patient's vulnerability to the therapist.⁸⁹ It is the therapist's mishandling of the transference that case law has identified as giving rise to the therapist's liability in negligence actions brought by patients with whom

the therapist has been sexually intimate.⁹⁰

Transference, although present without question within the attorney-client relationship, has not been examined as much as within the therapist-patient relationship.⁹¹ However, as evident in Szarfer's case, clients experience strong positive feelings toward their attorneys. Watson,⁹² writing on attorney-client relationships, stated, "[a]nyone occupying an authority role will often be seen as a person with godlike powers." Godlike or not, the attorney's knowledge of the law, legal procedures, and the litigation terrain clearly place the attorney in a superior position—a position to which the client's feelings respond.

Both the revelation of confidential information and the patient's or client's transference to the professional increase the vulnerability of the patient/client to the profession's undue influence. Moreover, additionally compounding the patient/client's vulnerability are the stresses arising out of both therapy and the legal process.

Stress Caused By Therapy or Legal Process During the course of the professional relationship, what presenting vulnerabilities the patient/client had may be enhanced by the process of either therapy or the legal undertaking. To start, the investment of time and emotional energy that both patients and clients put into their therapy or legal matter increases their vulnerability as they trust the professional more and are far less likely to terminate their professional relationship.

In addition, the therapeutic process

may alone cause the patient stresses beyond the patient's presenting problems. As therapy progresses, the patient's condition may worsen: the patient may become depressed, angry, or anxious in reaction to what is happening in the therapy.⁹³

Litigation stress syndrome is a recognized by-product of pursuing a legal claim.⁹⁴ The process of litigation may be an enormous stress on the client, and may compound the client's existing injuries. In addition, the more stressful the therapy or case, the more the patient/client depends upon the therapist/attorney.

The patient and client may be vulnerable to the professional as a result of presenting problems, or may be made vulnerable through the course of the therapy or legal matter. This vulnerability may be exacerbated by the power imbalance that exists between professionals and their patients/clients. When there is vulnerability and a power asymmetry, there is the potential for the more powerful party to exploit or exercise undue influence over the less powerful party.

Power of Therapist/Attorney The power imbalance that exists between therapists and their patients and attorneys and their clients results from many features of the respective relationships.⁹⁵ There is an inherent inequality that exists due to the "expert" nature of the services rendered by both psychotherapists and attorneys. In addition, the power imbalance is increased during the course of the professional relationship due to many of the same factors that

cause an increase in vulnerability in the patient/client during the course of the relationship.

"Presenting" Power Imbalance/Dependency The power imbalance in *Mazza* and *Szarfer* was clear from the outset. Both Dr. Huffaker and the attorney, Mr. Chodos, possessed specialized knowledge and expertise obtained through years of training; Dr. Huffaker was actually "titled." Both *Mazza* and *Szarfer* sought their respective professionals' assistance with issues that exceeded their ability to deal with alone. By virtue of their respective roles, the therapist/attorney is more powerful than the patient/client, and the patient/client is dependent upon the therapist/attorney.

The nature of the psychotherapist-patient relationship grants great power to the psychotherapist.⁹⁶ Therapists and attorneys are cast as "experts" and patient/clients are those who seek their help with sometimes intimate problems that they are unable to resolve without the help of an expert.⁹⁷ One scholar noted:

In the usual case the client seeks the assistance and advice of the solicitor in matters on which the client is largely or totally uninformed. The client thus places himself in a position of dependence and the solicitor in a position of influence.⁹⁸

In their role as educated experts, both therapists and attorneys enjoy a privileged standing in society.⁹⁹ The patient/client often may be in awe of the professional since the patient/client knows little about the workings of therapy or the legal system.¹⁰⁰ Patients often seek therapists' support with the idea that the therapist can "cure" them.¹⁰¹ Similarly,

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commentators have noted that clients may have "magical expectations" of their attorneys' abilities.¹⁰²

All of these features may lead to a power imbalance and the patient/client's dependency before the patient/client even utters a first word to the professional. This initial disparity may be increased as the relationship develops.

Power Imbalance/Dependency Enhanced During Course of Professional Relationship As both the therapeutic and legal relationships continue, the patient/client's trust in the therapist/attorney increases, and correspondingly so does the power imbalance and the patient/client's dependency upon the professional. The professional's power over the trusting party may increase due to the simple passage of time. Patients and clients are often reluctant to terminate a professional relationship after much time and money has been expended¹⁰³; both represent valuable investments that are not readily jettisoned. As the patient/client's investment increases, the professional may manipulate the trusting party's reluctance to terminate the professional relationship through threats or coercion ("have sex with me or I will stop helping you").

Mazza and Szarfer both revealed intimate details regarding their marriages to their respective professionals. The trust that each had in their therapist and attorney not to misuse their confidences was so powerful that both Mazza and Szarfer suffered serious psychological injuries when the trust was breached. Trust is critical to the therapeutic relation-

ship.¹⁰⁴ Watson described a similar "blind trust" that some clients have in their attorneys to act only in the clients' best interests.¹⁰⁵ The trust patient/clients have in their therapists/attorneys in turn increases the power the professionals have.

In addition, as a result of the self-revelations, patients/clients may begin to idealize the professional and develop positive transference toward the professional. While this enhances the patient/client's vulnerability as discussed *supra*, transference also increases the patient/client's dependency on the therapist/attorney and the professional's power over the trusting party. For example, in *Greenberg v. McCabe*,¹⁰⁶ the patient became so dependent upon her therapist that he "'became a god' to her" because she so "feared displeasing him." A California State bar ethics opinion comparably noted that "[a] client with a propensity to be 'too trusting' may perceive the lawyer as a 'savior' who will do no harm."¹⁰⁷

When an unequal power relationship combines with presenting vulnerability and vulnerability enhanced by disclosure of confidential revelations, transference, and stresses accompanying therapy or legal matters, the patient/client is in a position to be unduly influenced by the professional. It is the likelihood of undue influence and the possible unfairness that may result that causes the law to impose fiduciary duties upon the professional.

Undue Influence and the Fiduciary Relationship

Undue Influence "Undue influence" has been described as follows:

Any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forebear an act which he would not do or would do if left to act freely Undue influence consists in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; in taking an unfair advantage of another's weakness of mind; or in taking a grossly oppressive and unfair advantage of another's necessities or distress.¹⁰⁸

The concept of undue influence has been given its greatest legal attention in the area of wills and trusts. Courts have developed several factors to determine whether the more powerful party (usually an "unnatural" beneficiary, such as a friend, distant family member, or attorney) exercised undue influence over the less powerful party. These four factors are: (1) the susceptibility of the patient/client to undue influence, (2) the opportunity of the more powerful party to exercise undue influence, (3) the disposition of the more powerful party to exert undue influence, and (4) the effects of undue influence on the patient/client.¹⁰⁹

Undue influence is widely acknowledged and protected against in the area of therapist-patient sexual misconduct. In one of the first therapist sexual exploitation cases, *Roy v. Hartogs*,¹¹⁰ the patient alleged she had been coerced by a person in a position of overpowering influence—her psychiatrist. Similarly, the court in *Mazza v. Huffaker* found that Dr. Huffaker had breached his duties to do no harm and to maintain his patient's trust and confidence.¹¹¹ The features of the therapist-patient relation-

ship that lead to the patient's vulnerability and the therapist's power have mandated the imposition of fiduciary duties on the therapist to act only in the patient's best interest.¹¹²

Attorneys' undue influence over their clients is recognized in the area of financial dealings.¹¹³ If an attorney-client relationship exists, lawyers' ethical codes prohibit the attorney from engaging in a business dealing with a client without full and fair disclosure and a written acknowledgement from the client.¹¹⁴ However, in the area of attorneys' personal dealings with clients, the extent of the attorneys' ability to exercise undue influence over their clients has not been dealt with in the United States legal system. The Canadian court in *Szarfer v. Chodos* discussed the client's vulnerability and the attorney's power, and found that the attorney was a fiduciary in his personal dealings with his client.¹¹⁵

Fiduciary Relationship A "fiduciary relationship" exists "where one party places trust and confidence in the other and that other accepts and encourages that trust."¹¹⁶ However, a fiduciary relationship may exist *de facto* or may be recognized legally.¹¹⁷ "Fiduciary standards" are imposed upon those in a legally recognized fiduciary relationship and hold the fiduciary, or the more powerful person, to higher standards than those that would be imposed upon two strangers. Fiduciaries are held to higher standards than others because of the increased potential for undue influence that exists in a fiduciary relationship.¹¹⁸ A higher level of care is required of fiduciaries: they must act in only their

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patient/client's best interest.¹¹⁹ Courts will more closely scrutinize a transaction between a fiduciary and the less-powerful party.¹²⁰ One who is a fiduciary for another will be found liable for harm resulting from a breach of the fiduciary duty.¹²¹ Fiduciary duties include:

absolute duties [of] loyalty and good faith, due care, full disclosure of all material facts, the duty not to act adverse to the interests of the principal and the duty of confidentiality (i.e., not to misuse or disclose facts acquired during the fiduciary relationship in a way that might foreseeably injure the principal).¹²²

Therapists have long been held as legal fiduciaries for their patients in regard to sexual relations with clients. In *Mazza*, the court held that the psychiatrist abused his position of "trust and confidence."¹²³ Other cases have explicitly held that psychotherapists are fiduciaries for their patients.¹²⁴

As noted above, courts have been slow to apply legal fiduciary standards to attorneys' sexual contact with clients, despite attorneys' *de facto* fiduciary relationships with clients. While attorneys are fiduciaries vis-a-vis their clients' business or financial matters, only California has held that an attorney may be a fiduciary vis-a-vis his personal dealings with his client.¹²⁵ The Canadian case of *Szarfer v. Chodos* found that the confidential or fiduciary relationship existed between Attorney Chodos and his client, Szarfer, regardless of the matter in question: "A fiduciary cannot permit his own interest to come into conflict with the interest of the beneficiary of the relationship."¹²⁶ The court went on to note that the information Attorney Chodos had obtained from Szarfer "was an indivisi-

ble part of the task undertaken by him as a solicitor."¹²⁷ It was Attorney Chodos' use of the confidential information "for his own purposes in order to obtain the delights and benefits of the affair" that caused the court to hold him liable for the damages suffered by his client.

Fiduciary theory has provided a paradigm from which to judge psychotherapist-patient sexual contact. As attorneys are fiduciaries for their clients in other respects, and as recognized in Canada, attorneys should similarly be held to fiduciary standards in their personal dealings with clients.

Conclusion

Differences exist between the psychotherapist-patient relationship and the attorney-client relationship. To start, the subject matter of each relationship is quite different: psychotherapists are entrusted with the patient's entire being. Generally, the greater the trust of the patient, the more effective the therapy is. Attorneys usually deal with more mundane matters although there are exceptions.

However, the similarities between the two relationships are compelling. Both psychotherapists and attorneys deal with vulnerable people, and both psychotherapists and attorneys are in positions of power over their patient/clients. The North Carolina court in *Mazza v. Huffaker* acknowledged the patient's vulnerabilities based upon Mazza's presenting condition of manic-depressive psychosis and the "marker event" that brought him into therapy—his concern over the state of his marriage. Mazza's vulnera-

bility was enhanced during the course of the therapeutic relationship—he told Dr. Huffaker about his marital problems and emotional difficulties. Mazza developed a positive transference toward his psychiatrist, viewing him as his “best friend.” The court also acknowledged Dr. Huffaker’s power over Mazza: the presenting power imbalance between therapist and patient that increased as the therapeutic relationship developed and confidences were revealed by Mazza and positive transference occurred.

Similarly, the client in *Szarfer v. Chodos* was vulnerable to his attorney, and his attorney stood in a more powerful position than the client, Szarfer. The client’s vulnerabilities were present before the client began consultation with the lawyer. Chodos. Szarfer had suffered a personal injury that prevented him from pursuing his vocation. Szarfer had been seeing a psychotherapist for depression resulting from his situation. Szarfer’s employer had fired him, which was the “marker event” that caused him to seek Attorney Chodos’ professional assistance. As the legal relationship developed, Szarfer became increasingly vulnerable through his disclosure of confidences to his lawyer and his idealization of and trust in his lawyer. The Canadian court in *Szarfer* was satisfied that enough elements existed to cause the attorney to be held to fiduciary standards in his dealings with his client.

The degree to which there is vulnerability and power asymmetry in the professional relationships affects the relative prohibitions on sexual contact between professionals and their patient/

clients. There is an outright prohibition on sexual contact between therapists and patients in recognition of the fact that patients are almost always vulnerable and there almost always is a power imbalance.

In attorney-client relationships, the presenting problem of the client may be such that the client is not particularly vulnerable. The degree to which the client shares confidential information with the attorney, idealizes the attorney, or develops stresses from the legal process varies depending on the legal matter involved. In addition, the attorney is not always in a more powerful position than the client. For example, “In business representation, it may well be the client who occupies the position of greater power through the ever-present threat that he or she may take business elsewhere.”¹²⁸

The current paucity of binding ethical rules regarding attorney-client sex is inadequate. The authors propose a rebuttable presumption that the sexual contact was obtained through the attorney’s exercise of undue influence.¹²⁹ This means that if an attorney has sex with a client, then the sexual contact is presumed to be unethical. The burden is shifted to the attorney to prove that the conduct was *not* unethical and that the attorney did not exercise undue influence over the client. The attorney who engages in sexual contact with a client will have to show that he or she did not exploit the client’s vulnerabilities and did not use the power imbalance to obtain sexual gratification at the client’s expense. The rule will fall harder on some attorneys

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who handle cases where clients are particularly vulnerable or where the power balance is particularly attenuated. However, to exert any meaningful effect, the rule will apply to all attorneys.

In addition, courts should allow clients a common law remedy against attorneys who cause them emotional or physical harm as a result of their sexual contact. When an attorney exploits the client's vulnerability and abuses his or her power by unfairly inducing a client to engage in sexual contact with the attorney, this should be acknowledged at law as a breach of the attorney's fiduciary duties to the client. State legislatures should draft legislation creating statutory causes of action if courts fail to act.

Like health professionals, attorneys should have clear guidelines so that they are on notice that sexual contact with clients may be harmful to clients. What is now the legal profession's "dirty little secret" should be acknowledged and constructively addressed, as the mental health profession has done a decade ago.

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