PSYCHOTHERAPIST-PATIENT SEX - Retrospective and Perspective

written by Richard Leslie | September 4, 2019

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In the late 1980's I asked a question of a group of therapists who were providing me with their input as I prepared to draft legislation that would, for the first time in California, make sexual relations between a psychotherapist and a patient a criminal offense – a felony, punishable by imprisonment. I was looking for a "yes" answer. The question asked was as follows:

"You can have sexual relations with everyone in the world except minors and your patients or former patients – isn't that enough?

One therapist quickly responded with a firm "no." She offered an example where a client participated in an initial group therapy session regarding relationships and never returned. A month or two later the therapist happens to meet the former client at a local pub and they thereafter develop a relationship, eventually leading to intimacy and sexual relations. At some point they both realize the one-time attendance at the group therapy session. Perhaps the couple might get married, the therapist explained. That scenario should not constitute a crime, with the possibility of jail, and their relationship should not be prohibited, she asserted. Despite the example, the proposed legislation referenced above became law almost three decades ago. The legislation was controversial, both among California legislators and the licensed professionals the legislation would affect.

A California senator and chair of the relevant committee was opposed to the bill and made it clear that it would go nowhere without his support. He was an ardent civil libertarian who took the position that consensual (?) sexual relations should not be criminalized. He asked, "What are you next going to make criminal, sex between an architect and a client?" After informing the senator of my civil libertarian credentials, and after explaining the power imbalance inherent in the professional relationship, I asked whether he didn't think it should be a crime if a surgeon asked a patient, perhaps the senator's spouse, about having sexual intercourse shortly before surgery, and whether consent under those circumstances would constitute a meaningful consent. I asked whether he didn't think that such conduct was a more serious violation than if the surgeon had stolen cash from the patient's wallet. His response was something close to the following: "Make it a misdemeanor, take it out of the Penal Code, put it in the Business and Professions Code, and you've got a deal."

Psychotherapist-patient sexual relations had long constituted a violation of the California licensing law, which could lead to revocation or suspension of the license by the state. It also was recognized as a tort, or civil wrong, which could lead to a monetary judgment against the practitioner if the patient sued. But

it was never before a crime. Presently, it is either a misdemeanor or a felony, depending upon the circumstances. In some cases, criminal liability can attach when the sexual relations begin after a termination. Each state treats the subject matter differently, and knowledge of the nuances of the law in your state of practice is a must – even though practitioners know, or should know, that sexual involvement with a patient is an intentional and prohibited act that can result in multiple forms of liability – which can ruin a career.

Thereafter, other states considered legislation regarding various aspects of the therapist-patient sex issue. Some states stopped short of criminalizing the offense, and some states imposed a requirement on the part of a subsequent therapist, who learns of the prior therapist's behavior from the patient, to seek the patient's authorization to report the conduct. Failing to get the patient's authorization, the therapist might be required to make a report to the licensing board. In California, no such requirement exists. It is entirely up to the patient as to what action he or she will take, but the therapist is required to give the patient a booklet (prepared by the government) that describes the issue and informs patients of their rights and the possible remedies available to them. There is also a requirement to discuss the contents of the booklet with the patient.

The California Department of Consumer Affairs (DCA), after receiving input from licensing boards for all psychotherapists, recently published an updated consumer booklet that must be given to patients who reveal to their current therapist that they had sexual relations with a prior therapist. I was surprised to see that the booklet was devoid of any meaningful information about the criminality of the prior therapist's acts and devoid of any meaningful information about the criminal and civil remedies available to the patient – this despite the fact that the statute mandates the delineation of those very remedies! It is important for patients, some of whom have been seriously harmed by their therapists, to know that criminal prosecution is both available and possibly helpful in a later civil action or administrative proceeding.

Laws were passed in some states, as in California, which expanded the civil liability of therapists who engage in sexual relations with a patient during the course of therapy, or with a former patient within, for example, two years (in California) following termination of therapy. If a sexual relationship began shortly after a termination, and if termination of the relationship was primarily for the purpose of engaging in sexual relations or behavior, the conduct could also constitute a crime. If the relations began later, perhaps a year later, a civil cause of action would exist in those states that enacted legislation creating a cause of action based upon sexual relations between patient and practitioner within a specified time period following termination. Both in the criminal and civil contexts, consent of the patient is typically not a defense. State laws vary widely on the required "waiting time" following termination, on the issue of criminalization, on the definitions, scope, and conditions necessary for the conduct to constitute a violation of law, and in other respects.

As to civil actions for malpractice and/or intentional wrongdoing, the DCA booklet is devoid of any meaningful information related to the civil remedies available to patients who have experienced sexual contact or sexual behavior from their therapists or counselors. It is important for patients and

consumers to know that sexual contact or behavior by the therapist is both a criminal act and a civil wrong, and that the consent of the patient, whether expressed or implied, is not a defense. Instead of providing such useful information, the DCA booklet, in describing client rights, makes the curious statement that the client has the right to "decline to answer any question or disclose any information you choose not to reveal." Perhaps the DCA will next ask therapists to give the Miranda warnings to their patients – "you have the right to remain silent, anything you say can and will be used against you"…, etc. Clients should be encouraged to be open and frank with their treating practitioners, just as they are with their physicians.

This failure to inform the patient of the civil and criminal remedies, together with enough information to allow the patient to consider the various options and to act in the patient's own interests rather than the government's interests, is more than unfortunate. These omissions were either the result of negligence or intention. If intentionally done, whatever the rationale, patients and consumers are entitled to more than what has been provided. The Department of Consumer Affairs has seemingly violated the law by not delineating the possible or available remedies. Is the omission of anything useful in the booklet regarding criminal and civil remedies consistent with the government's often repeated mantra of "protection of the public?"

Sexual contact, behavior, or involvement with a patient is a serious violation of the ethics of the various mental health professions and with statutory law, both civil and criminal, including licensing law definitions of "unprofessional conduct" that can result in revocation or suspension of the license. Civil lawsuits can be brought for hefty sums of money, and malpractice insurance typically excludes or otherwise limits coverage for such acts with patients– which are intentional wrongful acts and criminal acts (depending upon state law). Therapists know that such conduct is wrong and potentially career ending, yet it continues. I have spoken with practitioners who have lived with or married their patients or former patients and who later face a crumbling relationship. They ask, "what is my potential liability, do I have any defenses, what should I do?" A long conversation generally ensues!

Some argue for a lifetime ban on therapist-patient sexual contact or behavior. They might argue, among other things, that the therapist, by engaging in sexual conduct with the patient, is foreclosing the opportunity for the patient to engage the practitioner if further treatment is later required. They might also argue that the therapeutic relationship never ends, despite the conclusion of a particular course of treatment. Those against a lifetime ban might argue, among other things, that a lifetime ban raises constitutional questions and contributes to the very stigmatization of clients/patients that the mental health professions and others so strongly decry.