A. What Is Therapist Abuse and Malpractice.

1. Basic duty of care not to harm a patient.

A psychotherapist, under California law, owes a duty to use reasonable care in his or treatment of a patient or client. When the psychotherapist violates that duty by either acting negligently toward the patient, intentionally harming the patient, sexually abusing the patient or defrauding the patient, it is considered a breach of the duty of care and the psychotherapist is liable to the patient for all allowable damages under California law that the psychotherapist causes.

2. Most cases against psychotherapists involve a combination of negligent and intentional acts.

Most psychotherapist abuse cases involve combination of negligent and intentional/sexual misconduct. This is because negligence cases without additional intentional/sexual misconduct are difficult for patients to recognize and prove.

3. Pure negligence cases.

However, there are cases in which the psychotherapist is merely negligent and his or her behavior has not risen to the level of abuse. These cases are still viable and would be considered under the law to be therapist malpractice cases. The laws that apply to therapist malpractice are identical to the laws that apply to any medical malpractice case.

A therapist has the duty to practice up to the standard of care of the therapist's specialty and a failure to do so is negligence, i.e., malpractice.

4. Unique aspects of therapist malpractice/abuse cases.

Even though the law of a therapist malpractice case and a malpractice case against another health care provider is similar, the cases themselves can take on a very different character and therapist malpractice cases require special expertise on the part of the attorneys. This article will discuss some of the special factors involved in litigating, settling and trying therapist malpractice and therapist abuse cases.

5. The transference phenomenon makes understanding and litigating therapist abuse cases more difficult than other malpractice cases.

An attorney handling a therapist malpractice/abuse case must have a thorough understanding of the critical transference phenomenon which occurs during psychotherapy. Transference will be described in more detail later; however, it essentially describes the process by which a patient in psychotherapy transfers feelings and perceptions which he or she had for people in his or her past onto the psychotherapist. This is an unconscious process and results in a situation in which the patient, without really knowing or understanding it, relates to the therapist in a similar way to the way the patient related to his or her parents or significant others in the past.

Therapists are trained to recognize and understand the transference phenomenon and work with it to help the patient. This makes therapists different than most other health care providers. Transference exists in all relationships, but only psychotherapists are trained in its recognition and use. It puts the psychotherapist in a position of tremendous power over the patient and if the therapist is not careful, it can easily lead to a situation of abuse. This abuse, particularly if it is sexual abuse, can lead to a devastating long term injury for the patient.

However, because of the transference phenomenon, the fact that a patient reveals to a therapist the patient's deepest darkest secrets, and the power differential between the therapist and the patient, even negligent acts of a therapist or sexual or quasi-sexual acts sometimes included in the term "boundary violations" can also result in very serious injury to a patient with lifetime consequences.

B. Therapist Malpractice/Therapist Abuse and the Various Theories of Recovery.

1. Negligence versus other causes of action.

Lay people, and sometimes attorneys, use the terms "therapist malpractice" and "therapist abuse" interchangeably. Technically, under California law, a therapist malpractice case would be limited to a professional negligence cause of action. In a case against a therapist involving allegations of intentional, sexual, quasi-sexual or fraudulent misconduct there would be additional causes of action (i.e., theories of recovery under the law). Additional causes of action might include:

- Abuse of transference (which has elements of both negligence and intentional misconduct).
- Intentional infliction of emotional distress.
- Battery.
- Sexual battery.
- Breach of fiduciary duty.
- Sexual harassment by a professional.
- Breach of the California statutes prohibiting sexual conduct between a psychotherapist and a patient.
- Fraud and fraud related causes of action.

2. Hybrid cases.

A case involving negligence and allegations of one of the sexual or intentional causes of action listed above is sometimes called a "hybrid" case because it involves elements of negligence plus elements of intentional/sexual misconduct which are in some ways are separate and in some ways interact. It is important for the purpose of insurance coverage and avoiding the limitations on medical/therapist malpractice cases in California for a patient who has been treated negligently and abused to simultaneously pursue negligence and intentional/sexual misconduct claims. The reasons for this will be explained later.

3. Ordinary negligence and premises liability.

Also, sometimes, particularly if there has been misconduct outside of the psychotherapist's office, it is important for the plaintiff to pursue a cause of action for "ordinary" negligence (i.e., non-professional negligence) and if there is misconduct in the defendant's home, to plead "premises liability." The theory behind these causes of action is that at some point in a boundary violation and abuse of transference case, a therapist steps outside of his or her role as a professional; yet, because of the prior relationship, the therapist still owes the "patient" the same duty as a professional would owe a patient. Thus, any breach of that duty in a non-professional context might be considered "ordinary" negligence. The importance of pleading ordinary negligence or a premises liability cause of action is that it may bring a homeowner's insurance carrier into the case to provide the defendant a defense and perhaps pay all or part of a plaintiff's settlement or verdict. Plaintiff may also be able to bring a comprehensive general liability (CGL) insurer into the case by pleading wrongful negligent acts that do not fall under the umbrella of professional negligence.

4. "Pleading into insurance coverage."

Insurance coverage will be discussed in detail later in this article, but suffice it to say that the existence of insurance coverage will normally be the only way that a plaintiff can collect a large settlement or verdict against a psychotherapist since very few psychotherapists make enough money to pay for a large verdict or settlement. Further, not infrequently, a defendant psychotherapist will go into bankruptcy during the case which creates further complications, although a patient can still recover from the insurance company of a bankrupt defendant.

C. The Transference Phenomenon and its Abuse.

1. There is some degree of transference in every relationship.

To one degree or another, every relationship and certainly any psychotherapy relationship involves at least some transference. As previously mentioned, transference is the process by which the patient transfers onto the psychotherapist perceptions and feelings for significant others, usually parents, in the patient's past. Transference is an unconscious process, i.e., the patient does not realize it is occurring. Significantly, this is true even when psychotherapists or psychoanalysts are being treated by other psychotherapists and psychoanalysts. There are always aspects of the transference that the patient does not understand and the therapist -- through training and experience -- understands very well.

2. The power of the transference.

Transference is an extraordinarily powerful phenomenon. The therapist, essentially, becomes the parent in the unconscious mind of the patient. Further, the aspect of the patient that is transferring feelings or perceptions onto the psychotherapist is a very young, vulnerable aspect of the patient. Frequently, the feelings that are being transferred onto the therapist are long-repressed, unrecognized sexual feelings and/or a childlike need to be held, loved and taken care of.

Although we as adults have long ago repressed many of these feelings, particularly the sexual ones and it is hard for us to believe that they ever existed, they do in fact remain in a patient's unconscious ripe for the taking by an exploitive psychotherapist. A psychotherapist who has been trained in the transference phenomenon and understands the transference phenomenon and uses it to encourage the patient to act out on these feelings.

Because the sexual feelings and the desire to be hugged, held and taken care of are not distinguishable in the child-like unconscious of the patient, for a therapist to encourage a patient to act on these feelings or for the therapist to step out of his or her role as a professional and engage in any type of touching with the patient (other than a handshake or a non-sexual hug at the end of a session), is considered to be professional incest.

Experts in this field often consider the injury and damages that flow from professional incest to be worse than a situation in which a parent has sex with a child because the patient is already

"injured" and is actually coming to the therapist for help, paying for help and, instead, is being exploited by somebody who has been trained to know better than to abuse the transference phenomenon.

3. The importance of the extent of the transference in a therapist abuse case.

One of the battlegrounds in a case involving therapist abuse will frequently be a disagreement over the intensity of the transference between the therapist and the patient.

The therapist will defend the action by claiming that there was no or very little transference, while the patient will attempt to establish that there was a deep, intense transferential relationship. Experts who testify on behalf of plaintiffs in therapist abuse cases will generally hold the belief that an intense transference occurs in virtually every psychotherapy and the experts who testify on behalf of the defendants will generally hold the belief that transference only occurs to any significant degree in old-fashioned psychoanalysis.

a. **The deeper the transference, the better the plaintiff's case.**

Whether or not there is transference and the extent of the transference is really not a legal issue in a case -- the legal issues focus on the defendant's conduct and not the patient's state of mind; however, there are several reasons why a plaintiff's case will improve if the plaintiff can establish that there was an intensive transference before or at the time of defendant's exploitive behavior.

The existence of intensive transference will, to some extent, help plaintiff's case on at least the following issues:

i. Jurors angry at a defendant will usually award large verdicts.

The deeper the transference, the more despicable it is for a therapist to take advantage of the patient. Thus, proving the existence of a deep transference helps establish the heinousness of defendant's misconduct -- the more intense the transference, the more likely a jury will become angry at the defendant and award a large verdict.

ii. Deeper transference negates the idea that the sexual relationship was between two equals.

The more intense the transference, the less likely a jury will be able to find that the patient was complacent in the sexual relationship that developed.

iii. Deeper transference belies a defendant's claim that the sexual relationship was consensual.

An intensive transference will make it easier for jurors to understand why the patient could not consent to the sexual relationship. Even though under California law, consent is not a defense for a therapist in a therapy negligence claim, it can technically be a defense in a battery or sexual battery claim.

Further, in a case in which the jurors do not believe there was a significant transference, they may find ways to "blame the victim" and hold the plaintiff responsible or equally responsible for the sexual relationship. This is one of the reasons why it is so critical that both plaintiff's attorney and experts understand transference - - so that they can overcome the defense argument of "consensuality" by establishing the fact that defendant was in a nearly parental role with the plaintiff.

iv. Deeper transference will help jurors understand how defendant's misconduct "caused" a significant permanent injury.

The existence of an intensive transference will help plaintiff prevail on the all-important "causation" issue in a therapist abuse case. In a therapist abuse case, it is not enough for a plaintiff to prove that the defendant committed wrongful acts. The plaintiff has to prove that the wrongful acts "caused" his or her damages.

Causation will be found if the defendant's misconduct was "a substantial factor" in causing plaintiff's damages. In therapist abuse cases, by definition, the plaintiff had pre-existing psychological problems (or else they wouldn't have been in treatment). The defense tries to point to distressing factors in the plaintiff's past and current life as the "cause" of the injury as opposed to the defendant's misconduct.

The existence of a deep intensive transference allows the plaintiff's expert to testify to the way in which the transference

leaves a patient extraordinarily vulnerable and in a regressed, child-like state. It then becomes easy for the jury to understand how someone who has a sexual relationship with a person in a child-like state has exploited them and caused them severe injury. Thus, the "mechanism" of an injury will be clear to jurors.

v. The more intense the transference, the more likely a plaintiff will be severely injured by its abuse.

The existence of a deep significant transference will help a jury understand the **extent** of damage that is caused by the abuse of the transference. The deep injury and lack of trust that inevitably flows from abuse of an intense transference creates a situation in which the patient sometimes requires long term hospitalization and a life time of intensive therapy. Only the abuse of a deep transference will allow jurors to believe that someone will require hundreds of thousands or millions of dollars of future treatment to heal from the abuse.

4. Factors which tend to indicate the existence of a deep transference.

There are several factors which will tend to indicate the existence of an intensive transference. (Please note that an intensive transference can exist without the presence of any of these factors, and the presence of these factors will not necessarily mean an intense transference will exist.)

a. **Preexisting condition.**

The more vulnerable the plaintiff, the more likely an intense transference will exist. Generally speaking, vulnerable patients, i.e., patients with a history of severe deprivation, physical, emotional and sexual abuse or abandonment as children will form a quick and intense transference with a psychotherapist.

Further, people who never felt loved or cared for by a parent or caregiver will form quick and intensive transferences.

This will also be true for patients who have been abused, mistreated and abandoned as adults. A very vulnerable patient will develop a quick and intensive transference in almost any type of therapy with almost any type of therapist. Thus, if a patient is very vulnerable,

one rarely has to look beyond the vulnerability for a reason why a deep transference quickly developed in treatment.

b. **The type of treatment may determine the extent of the transference.**

It must first be remembered that transference is a subjective (i.e., internal to the patient) not an objective (i.e., the same for everyone) phenomenon. Thus, any "type" of treatment can create an intense transference. However, there are certain treatment modalities that generally speaking can create more or less intensive transferences.

There is a continuum of treatment modality likely to produce a deep transference with three- or four-time a week for years Freudian analysis being at one end of the continuum, in which there almost has to be an intensive transference, and a psychopharmacologist who sees the patient for 15 minutes four times a year to discuss medicines and focuses only on the patient's symptoms and not his or her underlying problems at the other end of the continuum.

In between there are hundreds of different therapy modalities and types of therapy.

Again, generally speaking, any therapy that focuses on a patient's childhood issues or attempts to connect current problems to childhood issues is more likely to create an intensive transference. On the other hand, a therapy which focuses on a patient's current issues, looking for strategies for improvement rather than focusing on the underlying problems of the patient, may be less likely to create an intensive transference. Remember, however, that given the right patient and the right therapist, an intensive transference can quickly develop in any form of therapy.

c. **The style of the therapist.**

There are two important aspects of the style of the therapist that will influence the development of transference.

First, some therapists work with the transference as a treatment modality while others, at least when they are sued, claim they do not. One would, at first blush, think that a therapist who works with the transference is more likely to have a patient develop an intense transference during therapy. However, the opposite may be true. A therapist who ignores the transference is leaving the patient's inevitable transferential feelings towards him or her

unanalyzed and uncontained. Thus, the patient may be developing a very deep transference which is being totally neglected and unrecognized by the therapist.

Secondly, if the therapist's style consciously or unconsciously reminds the patient of how the patient's parents related to them as a child, there will likely be either an intense positive or negative transference, or both.

D. The Therapeutic Container, Boundaries and the Slippery Slope.

1. The "therapeutic container" defined.

A useful way to conceptualize most therapist malpractice/abuse cases is to begin by understanding the concept of the "therapeutic container." The "therapeutic container" is a term used to describe how, under normal circumstances, out-patient psychotherapy is supposed to proceed.

That is, the therapy should take place in the therapist's office at regularly scheduled visits for a regularly scheduled amount of time with the therapist sitting across from the patient or, in the case of some analysis, the therapist sitting while the patient lies down on a couch. The focus of the therapy should be on issues that the patient brings to the therapy and the patient's problems. The therapy session should end with the patient walking out of the office with no physical contact with the psychotherapist whatsoever or, at the most, a handshake or in clearly non-sexual situations, a hug. There should be no business, social, work, employment, personal relationships and certainly no romantic relationship between the therapist and the patient.

2. The "therapeutic container" maintained.

Therapy should be "contained" within the "boundaries" described above, and if it is, the therapeutic container is maintained and the therapist will rarely get himself or herself into trouble and the patient will be, to a large extent, protected from any potential abusive behavior of the therapist.

Of course, therapists can commit malpractice and, under certain circumstances, abuse patients without breaking the therapeutic container, for example by initiating unrecognized psychotherapy techniques such as alien abduction therapy, evil entity releasement therapy or inappropriate hypnotherapy.

However, the great majority of therapist abuse cases stem from some failure to maintain the therapeutic container and appropriate boundaries.

3. Situations in which breaking the therapeutic container is excusable.

There are always exceptional circumstances in which the therapeutic container needs to be broken; such as conducting therapy on the telephone if the patient is out of town and there is a therapeutic purpose to the telephone calls; a very rare visit that goes longer than scheduled if the patient is in crisis (although it is usually better to schedule another visit); a hospital visit; a visit to a trauma site to desensitize the patient as part of treatment plan and a number of other examples.

4. Steps that should be taken if the therapeutic container has to be breached.

Before the therapeutic container can be breached, the following should occur:

- Except in emergency situations, such as an imminent suicide or homicide, the potential breach of the therapeutic container should be thoughtfully considered by the therapist.

- It should be part of a treatment plan with the goal to help the patient, and not to convenience the therapist (unless the therapist is out of town).

- The potential breach should be discussed with the patient so that the patient is advised of the potential risks and benefits and the patient understands that this is not a usual therapeutic procedure or intervention.

- The therapist fully considers the potential risks to the patient, such as a situation in which a patient might welcome a home visit if they are too sick to go to therapy; however, afterwards the patient might feel invaded, entitled or misinterpret the visit as erotic.

- The therapist must recognize that this breach will almost inevitably make the patient feel "special" which is almost never a good thing in treatment. This is why it should so rarely be done and if it is going to be done, the therapist should take whatever steps possible to minimize the trauma to the therapy which will be created if a patient feels special and entitled.

- The therapist should carefully consider what effect such a breach will have on increasing a patient's dependency needs.

- The therapist should carefully consider the effect the breach will have on the ultimate goal of most therapies which is to help the patient integrate into his or her real life and not over-focus on therapy and the relationship with their therapist.

- It will generally be wise for a therapist to obtain a consultation before breaching the therapeutic container.

5. Boundaries versus the therapeutic container.

The concept of the therapeutic container is closely related to the therapeutic concept of "boundaries." However, it is a little different in that the therapeutic container conceptualizes the therapy itself while the concept of boundaries refers to the therapist's and the patient's relationship to each other and the outside world. Both the therapist and the patient have their set of boundaries that must be understood and respected.

6. Poor boundaries and poor impulse control of the therapist lead to trouble.

Trouble usually begins in therapy when the therapist has poor boundary or poor impulse control.

7. Boundaries and counter-transference.

Just as therapists are trained in the transference phenomenon, they are also trained in the phenomenon of counter-transference. Counter-transference occurs when a therapist transfers perceptions and feelings for his or her own parents or significant others in the therapist's past onto the patient.

Just like transference, it is an unconscious process. Thus the therapist will have difficulty recognizing it when it occurs. However, all properly trained psychotherapists spend a great deal of their academic and clinical training, learning how to watch out for counter-transference issues and deal with them appropriately when they arise.

Psychotherapists are trained to watch out for the warning signs of counter-transference the most significant of which are an over-positive or over-negative view to the patient. When they feel they are at risk, therapists are taught to seek immediate consultation

and sometimes therapy of their own. If they cannot resolve the counter-transference issue within themselves, they should conduct an appropriate termination and referral.

The therapist's counter-transference issues should not be a subject of therapy between the therapist and the patient -- the patient is there to deal with his or her own issues, not the therapist's.

Under no circumstances should a therapist act out, verbally, physically or sexually, on his or her own counter-transference issues. A therapist who cannot control his or her impulses within a therapy setting is impaired and should not be practicing.

8. When a patient has poor impulse control, they need help, not a therapist with poor boundaries.

Unfortunately many people who grew up under disturbed circumstances, either because they were abused, neglected or abandoned, end up growing up with poor impulse control and poor boundaries. A person whose needs were not gratified as a child may have a great deal of difficulty as an adult resisting the impulse to have quick self-destruction, and sometimes inappropriate, gratification of those needs. This is frequently the central reason why patients seek treatment in the first place.

9. Patients with poor boundaries are vulnerable to their therapist's abuse.

A somewhat similar phenomenon occurs in the realm of boundaries. A child who has a poor attachment to his or her parents may develop an unhealthy need to seek quick, intense and frequently unhealthy attachments as an adult. This creates a situation in which the person will sometimes have poor boundaries because the need for attachment will overwhelm intellectual better judgment.

Under the wrong set of circumstances, the patient will lose his or her own sense of self or not appreciate another person's, and will sometimes futilely seek and obtain self-destructive attachments. The neediness will create a situation where the patient has poor boundaries and will not recognize and be able to respect the boundaries of others either. This will leave the patient vulnerable to the exploitation of a therapist.

10. Victims of therapist abuse were frequently sexually abused as children.

Additional problems results when children are abused, particularly sexually abused, by authority figures such as their parents. In order to survive this type of abuse, the child must to some extent attempt to normalize behavior which he or she at some level knows is abnormal. After a period of time, this rationalization and normalization of the sexually inappropriate relationship becomes the child's understanding of reality.

When the child grows up and learns that the behavior of the authority figure was indeed abnormal or wrong, there is still a deep seated, childlike part of the adult who still needs to believe that inappropriate sexual behavior is "normal."

Further, the adult victim of childhood sex abuse is likely to have blamed himself or herself for the abuse and may have grown up feeling that they "deserve" to be re-abused as adults.

Unfortunately, many of these children, if untreated, will grow up with the self-destructive, unconscious need to "reenact" their childhood abuse with adults (and sometimes, God forbid, with children). These patients may also develop serious boundary problems because they will have grown up without developing an adequate internal appreciation of what is or is not appropriate behavior, particularly appropriate sexual behavior. Thus, they will not be able to appropriately assert their own boundaries or recognize the boundaries of others in a health manner. Again, this will leave them vulnerable to abuse by a therapist.

11. Growing up in a "crazy" environment distorts a person's sense of reality.

This same phenomenon also occurs when children grow up with "crazy" parents. A child who grows up in a household where crazy, illogical and inconsistent behavior is the norm will have trouble as an adult establishing and recognizing appropriate boundaries since most boundaries are based on societal norms of what is or is not appropriate behavior and the child will have an unconscious need to either reenact the crazy behavior of his or her parents or not be able to recognize inappropriate, crazy behavior in other people.

A plaintiff in a therapist abuse case during a deposition, when being challenged by the defense attorney on the issue of why she did not recognize that the therapist's sexual relationship with her was inappropriate, replied "Why would you expect me to think that having a sexual relationship with my therapist was any more or less normal than the sexual relationship that I had with my father?"

12. When a patient with poor impulse control treats with a therapist with the same problems, trouble can result.

The enormous problems in psychotherapy that stem from both therapists and patients growing up with poor impulse control and poor boundaries cannot be overstated. For most people, the only way that they will ever learn to control their impulses and maintain their boundaries is to enter therapy, usually long term therapy, with a competent psychotherapist with little or no impulse or boundary problems of his or her own.

Tragically, boundary and impulse control issues are not only the problem of many patients, but also a problem for many therapists who may be as likely as a patient to have grown up in a disturbed environment.

In most training programs, therapists have to receive treatment and/or analysis of their own. However, the therapy in such programs is sometimes not enough because, one, the therapist's problems run so deeply; two, the therapist received inadequate or inappropriate therapy during training; or, three, the therapist was only willing to enter into therapy as part of a training program and had no desire to change.

13. The slippery slope.

There is no specific pattern as to how boundaries break down in a particular therapy situation; however, the process usually follows what is known as "the slippery slope" where the therapist slowly lets down his or her boundaries and moves further and further outside the therapeutic container while the patient becomes more and more enraptured, confused or dependent as the patient has his or her "transference fantasy" fulfilled.

14. Once a therapist begins the slide down the slippery slope, it is difficult to climb out.

Frequently, the therapist will remain in the unhealthy, boundary-violated relationship for a long period of time, because of fear of hurting the patient or himself or just not being able to navigate any way out.

Other times, the therapist will try to terminate the doomed relationship only to have the patient, who now feels dependent and

abused, become rageful, threatening or suicidal. Still, other times the therapist will not terminate the relationship, for fear of what will happen to the therapist in a lawsuit, licensing board or criminal action.

In all these circumstances, the therapist slides further down the slippery slope as the dysfunctional, harmful, destructive relationship continues.

15. Hundreds of variations of the slippery slope.

There are hundreds of variations of how the therapist goes from conducting a standard of care practice to entering into an inappropriate relationship with a patient and there are many points along the slippery slope that either the therapist or the patient may terminate the relationship or stop the misconduct.

16. Typically the therapist develops a misplaced attraction to a patient.

Typically, the therapist develops an attraction for the patient, either out of counter-transference or conscious attraction and holds the attraction inside for a period of time. Sometimes the therapist might even receive consultation.

17. Self-revelations begin.

However, eventually the therapist begins to over-personalize the therapy relationship, frequently inappropriately revealing intimate details about himself or herself.

18. Patients pick up on the conscious or unconscious cues of the therapist.

The patient, with or without these self-revelations, will usually, at least on some unconscious level, pick up on the cue that the therapist is attracted to the patient and, depending on the patient's own boundaries, will either engage in a flirtatious relationship or attempt to hold his or her own boundaries for a period of time.

19. Therapy turns to talk of sexual fantasies and acting out on these fantasies.

Next, there is usually either some variation of the expression of sexual fantasies and feelings of the patient to the therapist, the therapist to the patient, or both or the beginning of physical contact which can include: the therapist sitting next to the patient or vice versa; the patient laying down with his or her head in the therapist's lap; long passionate hugs at the end of therapy; the patient sitting in the therapist's lap; or in the more "heated" situations, oral, manual or genital intercourse soon after the touching begins.

20. Foreplay may be slow or fast.

Many times there is a quick escalation of the physical and sexual touching climaxing in intercourse while other times, the erotic talk or the petting and kissing goes on for a long period of time without any actual intercourse.

21. Frequency of sexualized therapy and touching can vary.

Sometimes it occurs every session, sometimes every other session or even less frequently.

22. Sometimes the therapist and sometimes the patient begins the sexual contact.

At times the therapist initiates the physical/sexual contact, at other times the patient. In either situation, it is the therapist's responsibility to hold the boundaries and not allow the sexual touching to occur.

23. The slippery slope leads to multiple violations of the therapeutic container.

As the therapist travels down the slippery slope, the therapeutic container is frequently violated in additional ways. For instance, sessions will go longer and the patient will just "drop in" for sessions. A part of the relationship or the entire relationship may move outside of the therapy office into discrete meetings in private

or public places, meetings in the home of the patient or therapist, or both, or motels or hotels.

24. Therapy sessions become polluted.

The therapy sessions themselves will contain relatively little truly therapeutic content, although on many occasions there is at least an attempt to continue real therapy. Generally if therapy sessions continue, the focus will be on, at first, usually positive, and eventually, negative aspects of the inappropriate sexual relationship.

25. Telephone contact sometimes picks up.

Telephone calls become more frequent, last longer and are generally untherapeutic as the patient's dependency on the therapist increases and the patient's ability to "live without" the therapy increases.

26. Ending of formal treatment is illusory.

Sometimes the therapy is stopped just before or after the physical relationship begins; however, only very rarely is the therapy stopped before the therapist begins the slide down the slippery slope and commits boundary violations.

27. Multiple dual relationships follow.

Not only will there be the dual relationship of therapist/patient and friend/lover but frequently a business relationship will begin and either the therapist or patient will begin to help the other with their business expertise.

For instance, a patient who owns an art gallery may help the therapist sell his or her paintings. A therapist who is good at investment will start investing money for the patient.

28. Informal treatment replaces formal treatment.

Even if formal therapy has ended, an informal form of therapy will continue because the therapist and patient never really extinguish

their roles and after the patient's transference fantasy crashes, and it almost always crashes, the patient becomes in acute need of help, i.e., therapy, and the abusing therapist is at first there to provide advice, sometimes medication, sometimes suicide intervention and he or she will use therapeutic techniques to attempt to lessen the patient's rage and anger.

Despite the fact that the therapist has lost all objectivity, rarely will the therapist attempt to refer the patient to another objective therapist for risk of getting caught. If a referral to a truly neutral therapist is made, the patient will be sworn to secrecy about the relationship with the therapist which, of course, will be the main subject on the patient's mind and the main reason the patient needs therapy so therapy will be fruitless.

More often, when a referral is made, it is made to a buddy of the defendant therapist whom the defendant therapist hopes will discourage the patient from taking any action against the therapist.

29. The patient's dependency becomes too much for the therapist to bear.

Most frequently, this slide down the slippery slope ends when the therapist can no longer handle the overwhelming dependency that the patient has on the therapist which, of course, was created by the therapist through the numerous boundary violations. This may happen shortly after the inappropriate relationship begins or sometimes many years later after living together and, occasionally, after a marriage and divorce.

E. Differences in the Cases Depending upon Whether the Therapist Is a Psychiatrist, Psychologist, Licensed Social Worker, MFT or Unlicensed.

1. Cases against licensed clinical psychologists, MFTs and LCSW's are similar.

There is almost no difference in a therapist abuse/malpractice case if the therapist is a psychologist, LCSW or MFCC (MFT). All of these specialties aspire to a similar standard of care, with only very slight variations and all have malpractice insurance readily available to them.

2. Cases against psychiatrists and psychopharmacologists may be different because there may be medication involved and they have medical training.

Cases against psychiatrists and psychopharmacologists (psychiatrists who specialize in medication) may be different for the reason that medication may be involved, and they may be held to a higher standard of care to recognize "medical" problems because of their medical training.

a. **How medication makes a plaintiff's case different.**

The existence of medication in a case is usually helpful from a plaintiff's point of view for a number of reasons. First, it increases the power differential between the psychiatrist and the patient. Secondly, the psychiatrist has within his or her power the ability to alter the patient's symptoms and inhibitions and create a chemical dependency which can have enormous effect on the transference itself and can either add to a further destabilization in a patient, making the patient more vulnerable to a psychiatrist's boundary violations, or alleviate the patient's symptomatology, making the patient grateful and dependent and, once again, making them vulnerable to the psychiatrist's boundary violations.

b. **Medications rarely stops with the end of formal therapy if a personal relationship develops.**

In cases in which the patient is being medicated and formal therapy ends, rarely will the psychiatrist stop medicating the patient during the personal relationship.

Under the law, a physician cannot prescribe medications to a non-patient; therefore, in the civil case or licensing board action, the psychiatrist is forced to either admit that the plaintiff remained his or her patient during the time of medication or admit to a violation of the law.

The existence of the medication and thus a presumption of treatment will frequently extend the statute of limitations and extend the period for potential insurance coverage and covered claims. Further, medication should not be prescribed outside of the context of formal therapy where it can be properly monitored, and should not be prescribed when the therapist has lost his or her objectivity, so the dispensing of medication provides proof of clear acts of negligence.

c. **Psychiatrist will be held to a higher standard of care in terms of recognizing medical problems.**

The standard of care in terms of therapy and boundary violations is the same for psychiatrists and psychopharmacologists as all other licensed therapists.

However, psychiatrists, because of their medical training, will be expected to be more aware of medical conditions that can create symptoms which mimic psychological symptoms such as thyroid problems, subtle seizure disorders and other brain disorders.

3. Problems that can arise when a therapist is unlicensed.

Multiple problems exist in a case in which the therapist is not licensed. This frequently occurs when therapy is performed by clergy members, alcohol and drug rehabilitation counselors, sexologists or many of the other people who bill themselves as “psychotherapists” or “counselors: or “hypnotists.”

These unlicensed “therapists” rarely have any money to pay a significant settlement or judgment and are rarely insured, at least with a malpractice policy. Thus, the only way to have a potential for recovery of damages when they are guilty of negligence or abuse occurs if they are working for a clinic, hospital or rehabilitation center which is either insured or has significant assets.

However, to prevail on an abuse case against the employer of an unlicensed therapist, one must prove that the therapist's conduct was in the course and scope of their duties which can be difficult in a case of sex abuse, that the employer negligently hired, monitored or retained the therapist.

Another problem with unlicensed therapists is that they will frequently defend the case by stating that there is no "standard of care" applicable to their practices since their practices are unregulated. In these situations, plaintiffs have to establish that even these unlicensed specialists have to follow some basic standards and are responsible for the negligent and intentional injury to their clients or patients.

F. The Civil Case, the Licensing Board Action, and the Criminal Case.

1. Civil and licensing board actions can be brought in all states; criminal actions may be maintained in some states.

In every state a victim of therapist abuse/malpractice may bring a civil lawsuit seeking monetary damages against the perpetrator and, in addition, can file a complaint with the state licensing board(as long as the therapist has a license).

In some states therapist sexual abuse is also considered to be criminal misconduct and a victim may be able to file criminal charges.

2. In California, a therapist abuse victim can bring a civil, licensing board and criminal case.

In California, a therapist abuse/medical malpractice victim can bring a civil case as long as the case is brought within the statute of limitations period (see the Statute of Limitations section below), and also is entitled to initiate a complaint with the medical board if the therapist is a psychiatrist or clinical psychologist, or with the Board of Behavioral Sciences if the therapist is an MFCC, MFT or LCSW.

Further, if the abuse includes sexual touching during therapy or the therapy is terminated by the therapist for the purpose of engaging in a sexual relationship with the plaintiff, the victim can file a complaint with the local police or district attorney and attempt to have a criminal case initiated against the therapist.

3. Pursuit of a civil, licensing board and criminal case will have different consequences for the defendant though they are interrelated.

Each type of action -- civil, licensing and criminal -- has a different set of consequences for the defendant, although all three actions can be to some extent interrelated. Further, the rights and potential financial recovery of the victim can be affected either positively or negatively if the victim proceeds in any combination of the three cases or just one.

4. The civil case.

In a **civil case**, the malpractice/abuse victim is called a "plaintiff" and the plaintiff brings his or her own case seeking money damages against the therapist who becomes the "defendant" in the case.

In the broadest sense, there are only three possible results in a civil case: the plaintiff can win the case at trial or at arbitration and be awarded a verdict; the plaintiff can lose the case; or the case can settled for an agreed-upon amount of money. If the case goes to trial or arbitration, the judge, jury or arbitrator's only power is to award the plaintiff money or not award the plaintiff money. The verdict or award, in and of itself, cannot punish the defendant in any other way.

However, as part of the settlement of a civil case, the parties (the plaintiff and defendant) can agree to non-monetary terms which can affect the future lives of the plaintiff and the defendant. There are hundreds of non-monetary terms and conditions that can be included in a settlement agreement. Thus, the settlement of a civil case increases the plaintiff's and defendant's potential to control both the monetary and non-monetary outcome of the case.

For instance, in a therapist abuse case, the defendant will normally want to condition the payment of money on some type of confidentiality agreement from the plaintiff. Less common, but in the category of "it doesn't hurt to ask," the plaintiff may seek an agreement from the defendant to not practice any more or to not treat women any more (the enforceability of this would be somewhat questionable). Further, settlement agreements can contain "stay away orders," or agreements that the defendant will obtain therapy.

5. The licensing board action.

a. **Two ways that a licensing board action can be initiated.**

Licensing board actions can be initiated in two ways. First of all, the victim can file a complaint with the licensing board, hoping this will trigger an investigation and the eventual filing of charges against the therapist by the Attorney General of the State of California.

Second, any settlement over a certain amount of money must be reported to the licensing board by the therapist's insurance company or by the therapist. In the case of psychiatrists, any settlement

over $30,000 must be reported and in the case of all other licensed therapists, a settlement in excess of $10,000 must be reported.

Once the settlement is reported, the licensing board will usually conduct an investigation of the underlying case and decide, with the attorney general's office, whether or not to bring charges against the therapist.

b. **Report of large settlement is likely to get the licensing board's attention.**

In most cases, if there is a significant settlement, the report of the settlement is more likely to get the licensing board's attention than a complaint sent by the therapist abuse victim.

c. **The licensing board action belongs to the licensing board and not the victim.**

It is essential for a therapist abuse victim to realize that unlike a civil case seeking monetary damages, the licensing board action is not the victim's case. The licensing board action will be entitled "Medical Board of California vs. Dr. Smith" or "Board of Behavioral Science Examiners vs. Mr. Smith."

The case will focus on the licensing board's effort to protect the people of California by trying to take some kind of action against the therapist's license because the therapist is a potential danger to other patients.

The case is not meant to compensate the patient for the patient's losses (although there may be a small payment of restitution) and it is not meant to "right the wrong" done to the victim (although, to some extent, it might have that effect).

d. **Like civil cases, most licensing board actions are settled short of hearing.**

Most licensing board actions are settled between the licensing board and the therapist and those that are not go to a hearing. The decision at the hearing can be appealed.

e. **The power of the licensing board.**

There are many different actions that can be taken by the licensing board against the therapist. These include: a warning, suspension of the therapist's license for a period of time, conditions put on the therapist's ability to practice for a period of time or indefinitely (such as no longer being allowed to see patients of a given gender or patients under a certain age or a limitation of seeing patients only in a clinic setting with monitoring) or permanent revocation of the license to practice psychotherapy.

f. **Possible outcomes of a licensing board action.**

At times a therapist will settle the licensing board action for a lesser license limitation than the therapist fears might be handed down at a hearing. At other times, the matter will go to a hearing and an administrative judge will decide the fate of the therapist's license. In cases in which the licensing board is seeking a permanent revocation of a license, the therapist has little incentive to settle. These are the cases that usually go to a hearing.

The licensing restriction that the licensing board will settle for under a given set of facts changes from time to time. In recent years, the boards have been fairly aggressive in pursuing and insisting on severe license restrictions and sometimes revocation in cases of sexual abuse of patients. If there is more than one known victim and/or the therapist has already been sanctioned by the licensing board in the past, the board will take much harsher action.

g. **Limitations on discovery in licensing board actions.**

Unlike a civil case in which both sides are allowed to conduct an almost unlimited amount of discovery about the other side's case, licensing board actions involve almost no discovery beyond the allegations of the patient.

h. **The patient plays little role in the licensing board case.**

The patient, who is not represented by the licensing board, can choose to hire an attorney to help monitor the proceedings; however, after an initial interview and statement taken by a licensing board investigator, the patient plays very little role in the case unless and until there is a hearing, in which case the patient will testify.

Victims who pursue licensing board actions are sometimes frustrated not only by their belief that the therapist "got off easy" but more frequently by the loss of control that they feel since they are not normally represented in the proceeding and have little say as to what will occur in the case, particularly a settlement.

6. The criminal case.

As mentioned previously, a criminal case can also be initiated against the therapist in some circumstances. A criminal case can only be brought if there was sexual touching that occurred during the therapy or the treatment was terminated by the therapist to initiate the sexual relationship with the patient.

Criminal prosecution of therapists for sexually abusing patients has been rare in California. Police departments and district attorneys offices seem to have a hesitancy in trying to prosecute cases which may look "consensual" to an unsophisticated observer. They are more likely to act when physical force is involved.

Further, the standard of proof in a criminal case is "beyond a reasonable doubt" as opposed to "clear and convincing evidence" in a licensing board action and a mere "preponderance of the evidence" in a civil case. If the therapist denies the sexual misconduct or invokes his right not to testify under the Fifth Amendment, a district attorney may feel that the victim's testimony alone without some physical proof or eyewitnesses to the sexual abuse, may not carry the prosecutor's burden of proving the misconduct beyond a reasonable doubt.

Just as in a licensing board case, the criminal case does not belong to the victim, it belongs to the People of California. Even more than in licensing board actions, victims frequently feel frustrated attempting to pursue criminal charges since they are so infrequently filed and police officers and district attorneys (as opposed to the licensing board investigators) are unsophisticated and usually untrained in the dynamics of therapist sexual abuse.

7. A patient should seek the advice of an attorney before initiating any action against the therapist.

Before deciding how to proceed in any or all of the potential actions, the patient should seek the advice of an attorney who specializes in therapist abuse cases. Although the cases are separate, each case will impact significantly on the other cases.

8. How the different case have an impact on each other.

a. **Presence of a criminal case reduces the likelihood that a therapist will admit to sexual abuse.**

First of all, the presence or threat of criminal case will make it far less likely that a therapist will admit to the sexual misconduct or at least admit that the misconduct occurred during therapy.

This could put a tremendous burden on the plaintiff's civil case if there are no eyewitnesses or evidence that the sexual misconduct and other claimed acts of negligence and abuse occurred.

b. **Threat of a criminal case increases the likelihood that the defendant will take the Fifth.**

Secondly, because of the threat or existence of a criminal prosecution, the therapist is allowed to assert Fifth Amendment rights and not testify at all in a civil case until there is no longer any possibility of criminal prosecution.

This can either cause a delay in the civil case and the existence of one-sided discovery, where the defendant is able to discover everything about the plaintiff's case while the defendant does not have to reveal any information about his or her case.

c. **Presence of a criminal case reduces the chances of insurance coverage.**

Further, the existence of criminal charges increases the risk that a plaintiff will not be able to have their verdict or settlement paid by the therapist's insurance company.

Although a sophisticated attorney will plead causes of action for non-sexual negligence in a therapist abuse case, in California, it is **illegal** to provide insurance to a therapist, or actually anyone, for criminal misconduct.

In all therapist abuse cases, the therapist's insurance company will seek to avoid paying any verdict or settlement based on the therapist's intentional and sexual misconduct. The chances of the insurance company prevailing are increased if it can establish that

all, or the great majority, of plaintiff's damages flow from criminal, non-insurable misconduct.

Further, as will be discussed below in section ix, c, if the therapist has a "claims made" insurance policy, it is essential that a damage claim is made before defendant drops coverage. Therapists who believe they may lose their license may not be willing to renew their insurance.

d. **Effect of the pressure of an ongoing license board action on a plaintiff's civil case, generally.**

If a victim brings a licensing board action before or at the same time he or she brings a civil case, the existence of the licensing board action will effect a therapist's willingness to settle and the intensity of the attack on the patient in a civil case.

e. **Existence of licensing board action usually has a negative effect on therapist's willingness to settle a civil case.**

In most therapist abuse cases, the therapist is far more concerned with protecting his or her license and ability to make money in the future than with how much money an insurance company pays the plaintiff and even how much money the therapist has to pay the plaintiff out of pocket in a civil case.

If the patient has put the therapist at risk by putting his or her license at risk, the therapist might feel that it is not worth settling with the patient because the therapist might have a better chance of prevailing at a jury trial than they will at a licensing board hearing (although a therapist's victory in a civil case does not preclude the licensing board from taking action, it may discourage the licensing board from taking action).

f. **Pressure of a licensing board action will increase the attack on the plaintiff in the civil case.**

Further, as mentioned earlier, a therapist in a licensing board action is only able to conduct a very limited amount of discovery of the plaintiff's case to defend himself or herself. On the other hand, in a civil case, the defendant has a wide latitude in the amount of discovery that can be conducted in terms of very long depositions and requests for production of documents and other discovery techniques aimed at calling the plaintiff's credibility

into question. The therapist can use all of the evidence in the civil case for his or her defense in the licensing board action. Plus, all of this will be funded by the therapist's insurance company, while most insurance policies do not provide defense costs, or only limited defense costs in a licensing board action.

g. **Effect of a licensing board or criminal action on the statute of limitations in a civil case.**

Another reason not to pursue a licensing board or criminal action **before** a civil case is that the statute of limitations, i.e., the period in which a civil case must be filed, continues to run while a licensing board or criminal action is being pursued.

In other words, the filing of a criminal or licensing board complaint does not "toll" the statute of limitations,, i.e., or stop it from running in a civil case.

Licensing board actions almost always take a long time to conclude. The licensing boards and the attorney general's offices are always understaffed and overworked. Thus, if a victim waits for the licensing board case to conclude, or even for the board or the district attorney to decide whether to pursue a licensing or criminal case, the victim may, and usually will, run out of time to bring the civil case. (See section M below.)

The single most damaging piece of evidence on the issue of the statute of limitations in a civil case is a licensing board complaint that is filed more than a year before the civil complaint is filed. It is close to impossible for a victim to claim a lack of knowledge sufficient to stop the statute of limitations from running in a civil case once the plaintiff has filed a licensing board complaint.

Licensing board complaints invariably indicate an acute awareness of the misconduct of the defendant and almost without exception indicate an awareness of the injury caused by that misconduct.

An unfortunate number of victims do not consult a civil attorney until after they have filed a licensing board complaint or even worse, until after the licensing board has completed its case. This can doom the plaintiff's civil case to failure on the statute of limitations.

h. **Benefits versus risks of waiting to bring a licensing board action or criminal complaint before a civil case.**

The benefits of bringing a licensing board or criminal complaint before a civil lawsuit all deal with the issue of proof.

i. Licensing board can obtain records of other patients.

The licensing board, in particular, may be able to access information involving other patients and past complaints that a plaintiff may not be able to obtain in a civil case. This information could obviously be helpful in pursuing the case.

ii. Licensing board and police can tape record conversations.

Further, and more significantly, in the right situation the licensing boards and police are entitled to obtain a warrant to conduct legal secret recordings between the patient and the therapist.

The licensing board and the police can be granted the power to wire a patient who could then go into the therapist's office or home and attempt to induce a confession or record a telephone call between the therapist and the patient with the patient's permission, again attempting to induce a confession or at least evidence of sexual impropriety.

iii. Secret recordings are particularly helpful when a plaintiff lacks credibility.

The times when this type of intervention are most useful in a plaintiff's civil case are when the plaintiff, for one reason or another, may lack credibility and the therapist will be highly credible.

A plaintiff's credibility problem, more often than not, is no fault of his or her own. Most often in therapist abuse cases, the credibility problem will stem from the plaintiff suffering from a severe personality disorder, psychosis or some other problem that puts their ability to perceive reality into question.

Also problematic for a plaintiff's credibility may be a history of multiple claims of sexual abuse as an adult, multiple lawsuits and questionable disability claims and/or a serious drug, alcohol or criminal history.

In situations in which a plaintiff's attorney feels that the plaintiff's credibility may be seriously at risk **and** there is enough time to pursue a medical board or criminal investigation before a civil case has to be filed, it may be wise for a victim to pursue such an investigation.

iv. Secret recordings will only work if the therapist and patient are still talking.

Obviously, any surreptitious recording will only work if the patient and therapist still have a relationship in which the therapist would not be overly suspicious of a telephone call, home or office visit.

Thus, the strategy of bring a licensing board or criminal case before a civil case for the purpose of gaining evidence of a taped confession can only be utilized in limited circumstances -- usually when the relationship between the therapist and patient is still "fresh."

9. Generally it makes the most sense to pursue the civil case first.

a. **There is no statute of limitations in licensing board cases.**

The wisest decision in almost every therapist abuse case is to pursue the civil case first. The criminal case will rarely be successful and the licensing board action can, and in almost every case will be, brought after the civil case is resolved. There is no statute of limitations on licensing board cases and in many ways, the plaintiff in a civil case is helping the licensing board by performing discovery and collecting information that the licensing board would not be entitled to receive in its own case.

Although there are probably some situations in which a therapist is such an imminent danger to other patients that a licensing board action should be maintained at the same time as the civil case; in a great majority of cases, once a therapist has been sued and endured the emotional and financial stress of a civil case, then he or she will not be a repeat offender.

b. **Atomic warfare can be avoided by bringing the civil case first.**

The threat of a licensing board action is one of the key pieces of leverage that the plaintiff may have in a civil case against the therapist, although a plaintiff is not allowed to threaten a licensing board or criminal action to gain an advantage in a civil case. A plaintiff, who is at risk in a civil case because, for instance, of statute of limitations, credibility or insurance coverage problems, will need all of the leverage that they can get.

At times it can be like atomic warfare with the plaintiff holding the bomb of being able to annihilate the therapist's ability to practice in the future, while the defendant may hold the bomb of being able to have plaintiff's case dismissed because of a failure to comply with the statute of limitations or to win the case against the plaintiff because of a lack of plaintiff's credibility and proof problems. Further, defendant can impede plaintiff's efforts to achieve a settlement or collect a judgment from the defendant's insurance company.

c. **Plaintiff can have their cake and eat it too by bringing the civil case first.**

From the plaintiff's point of view, the beauty of the strategy of not filing a licensing board complaint immediately is that it will help achieve a better and quicker settlement and any significant settlement **will be** reported to the licensing board anyway. The higher the settlement, the more likely the licensing board will be to conduct a thorough investigation and the more likely the licensing board will be to take action against the therapist's license since a high settlement number indicates likely misconduct.

d. **Plaintiff may choose not to pursue the licensing board aggressively after a settlement.**

Further, if the plaintiff believes that the therapist has learned his or her lesson, or at least will not commit sexual misconduct against another patient, the plaintiff retains the choice of whether or not to push the licensing board case aggressively.

e. **Why the strategy of filing the civil case first usually works.**

If the settlement will be reported and the licensing board can take action with or without the cooperation of the victim, why does waiting to file a licensing board action until after the civil case is concluded give a plaintiff leverage for settlement in the civil case?

i. The therapist's attorney will try to obtain a confidentiality agreement and limit plaintiff's ability to cooperate with the licensing board.

May the defendant demand a confidentiality clause in a settlement agreement? The answer is somewhat complicated; however, it begins with the non-monetary terms that can be included in a settlement agreement. It is the thinking of most attorneys who defend therapists in civil and licensing board cases in California that they can, under the law, before agreeing to pay a sum of money, insist on a plaintiff signing a confidentiality agreement which will prevent the plaintiff from speaking to virtually anyone about the plaintiff's relationship with the therapist or the subsequent litigation.

As to the licensing board, the defense attorneys take the position that they can have the plaintiff agree **to not report** the case to the licensing board and to not cooperate with the licensing board unless ordered to do so by a court, i.e., usually a subpoena.

ii. The squeaky wheel gets the grease.

There is no law in California specifically on this issue and there are many who believe that such an agreement is not enforceable. However, for a therapist already in deep trouble for sexually abusing a patient, this type of agreement is better than nothing since normally there is a "liquidated damage" clause in a settlement agreement by which the plaintiff will have to pay a hefty penalty, sometimes as much as the entire share of the settlement, for a breach of the confidentiality and licensing board provisions of the settlement agreement. Further, the therapist's attorneys believe that "the squeaky wheel gets the grease" and if they can stop the plaintiff from aggressively pursuing a licensing board action against their client, the busy board will go on to other matters.

iii. The non-cooperation strategy is no longer as effective.

In reality, the "non-cooperation with the licensing board unless court ordered" clause in a settlement agreement is far less effective than it used to be.

Before a recent change in California law, the licensing board was not allowed to subpoena a plaintiff and the plaintiff's records unless there was already a licensing board case filed against the therapist. Without the cooperation and testimony of the plaintiff, frequently there would be no grounds for filing a case so, in this Catch 22 situation, the defendant, despite the report of a large settlement, could avoid licensing board prosecution.

Now, the law has changed so that the licensing board can issue a subpoena without filing a formal case or accusation against the therapist. Thus, when the licensing board attempts to contact the plaintiff or the plaintiff's attorney after a settlement is reported, and the plaintiff or plaintiff's attorney indicates that they are not free to cooperate unless subpoenaed, the licensing board can, and almost always does, immediately issue a subpoena.

Under this scenario, the best that a therapist or defense attorney can hope for is that the plaintiff will feel vindicated by a settlement and will indicate a lack of desire to cooperate with the licensing board, in which case the hope would be that the licensing board would go on to cases in which they have more cooperative complainants.

f. **Waiting to file a licensing board action may allow plaintiff to settle his or her civil case with very little financial or emotional cost.**

Another significant reason for a plaintiff to wait to file a licensing board action is because it may help the case get settled before there is any significant litigation or any litigation at all.

Why? Because a therapist who realizes that there is nothing that they can do to prevent the settlement from being reported to the licensing board will realize that he or she is better off having the civil case settled before a lot of bad evidence is created which will come back to haunt them in the inevitable licensing board action. This bad evidence will include most significantly the plaintiff's deposition (i.e., out of court testimony) and the defendant's deposition.

If a case can be settled without any deposition testimony, then there will usually be no admission of sexual misconduct on the part of the defendant and no sworn testimony of the plaintiff. This will put the therapist in a much better posture when attempting to defend the licensing board action.

Why should the plaintiff want to protect the abusing therapist this way? Because the plaintiff will receive the benefit of not undergoing a grueling litigation which almost always will involve some sort of character assassination and interference with the plaintiff's life. Defendants, in many civil cases, will take the deposition of the plaintiff for five or more days and take the depositions of plaintiff's past and current therapists, close friends and relatives which can be very disturbing for a plaintiff. This provides plaintiff a strong incentive to settle before discovery.

Of course, a plaintiff is always free to decide to take the risk of pursuing litigation and not settling early and to pursing the licensing board action early and aggressively.

G. Limitations on Damages in Therapist Negligence Cases in California.

1. MICRA limitations on therapist negligence claims.

There are significant restrictions, at least on plaintiffs and their attorneys, in medical negligence cases which include causes of action for negligence against licensed therapists. The set of laws that places these limitations on plaintiffs' cases is called MICRA. As will be explained below, these limitaitons do not apply to cases of therapist sexual abuse and intentional misconduct.

2. What are the MICRA limitations?

The limitations are completely one-sided, i.e., there are no limitations placed on the therapists and their attorneys. The most significant limitation is a $250,000 limit on recovery of general damages, i.e., damages for pain, suffering and emotional distress. Further, if the plaintiff has health coverage, they may not be allowed to recover any damages for past or future treatment and expenses that would be covered by insurance. Also, if there is an award for future therapy expenses ir income loss, the therapist's insurance company can wait until the time the loss actually occurs to pay the plaintiff's damages.

In other words, if an arbitrator, judge or jury were to decide that the plaintiff will require $300,000 for psychotherapy over 15 years and will incur a $50,000 a year wage loss for 20 years, the therapist and/or his or her insurance company can essentially pay on an installment schedule over a 15-year or more period rather than paying the plaintiff a lump sum after the judgment is entered like in every other personal injury case.

3. The MICRA limitations are particularly heinous for victims of therapist abuse.

The effect of the general damage cap is particularly significant for therapist abuse victims because if they win their case, they will usually receive general damage awards far in excess of $250,000; frequently millions of dollars.

In addition, the future payment schedule creates a situation in which the plaintiff cannot receive closure with their relationship with the defendant and, at least in a symbolic manner, the therapist

will remain in the patient's life for a significant period of time as payment for future treatment expenses comes in on a yearly basis. This is a much bigger emotional issue for therapist malpractice victims than for other malpractice victims.

4. MICRA limits attorney fees.

Further, fees which an attorney can charge in a medical/therapist negligence case are limited by statute. Fees are limited to 40% of the first $50,000 recovered, 33-1/3% of the next $50,000 recovered, 25% of any recovery between $100,000 and $600,000, and 15% of any recovery over $600,000.

These limitations are particularly onerous because there is no limitation as to what the therapists and their insurance companies can pay their attorneys who generally try to make the litigation so expensive that the MICRA fee limitation, in combination with the $250,000 general damage limitation, make therapist negligence cases unprofitable. A plaintiff's attorney will have to advance $50,000 to $150,000 in case costs to pursue a therapist abuse case through trial. This creates a great disincentive for plaintiff's attorney to handle any type of malpractice case, including therapy malpractice cases.

5. MICRA limitations apply only to a therapy negligence cause of action and not to causes of action for sexual and intentional misconduct.

The good news is that the California Supreme Court has ruled that in a case in which a psychotherapist sexually abused his patient, the medical malpractice limitations do not apply to the recovery of general damages on the intentional/sexual misconduct causes of action such as intentional infliction of emotional distress and sexual battery. A recent appellate court decision has clarified this ruling in plaintiff's favor.

Further, the Court held that the attorney fee limitations do not apply to the intentional tort or sexual abuse causes of action; therefore, an attorney is free to enter into any reasonable contingency fee contract with a client that they can agree upon.

Therefore, it is critical in a therapist abuse cases for an attorney to plead causes of action for both negligent and intentional non-sexual abuse torts.

However, this can create difficulties for insurance coverage which will be dealt with next.

H. Insurance Coverage in Therapist Abuse Cases and How it Effects Settlement.

1. Two types of insurance policies issued to therapists.

At this point in time, there are basically two types of errors and omissions (i.e., malpractice) insurance policies issued to therapists.

a. **Psychiatrists and psychopharmocologists have policies that cover negligence but exclude sexual and intentional misconduct.**

Most of the psychiatrists and psychopharmacologists are insured by doctor-owned insurance companies in California that will provide one million dollars or more insurance coverage for any injury that a plaintiff can prove was caused by the psychiatrist's or psychopharmocologist's negligence. The insurance policy will also include an exclusion, i.e., a statement of non-coverage, for any intentional or sexual misconduct of the psychiatrist or psychopharmacologist.

b. **Ph.Ds, MFTs and LCSWs have policies with sex caps that attempt to limit all coverage to $25,000 when there are allegations of sexual misconduct.**

Almost all of the insurance policies issued to other licensed therapists are issued by private insurance companies who usually contract with organizations such as the American Psychological Association or the state or national associations for MFCCs and LCSWs to provide errors and omissions coverage. These policies will provide coverage any where from $250,000 on up; however, they contain what is known as a "sex cap," usually $25,000, which attempts to limit coverage in a case in which there is any allegation of sexual impropriety, even non-touching, to $25,000. The policies attempt to limit coverage for all wrongdoing including negligence to $25,000 even if there are provable injuries stemming from acts of negligence which had nothing to do with the sexual misconduct such as a misdiagnosis or a failure to properly terminate.

c. **The onerous nature of the sex cap.**

This second type of insurance policy is extraordinarily onerous to both the therapist and the patient because even in a case of clear negligence, the therapist's personal assets become at risk and, obviously, if the "sex cap" is upheld by a court and the therapist does not have significant assets, which is usually the case, a plaintiff's entire recovery will be limited to $25,000.

2. The combination of the MICRA limitations and insurance policy exclusions put plaintiff in a bind.

Under either type of policy, the plaintiff is in a bind when deciding how to proceed in a therapist abuse case. The plaintiff has to make the choice whether to plead causes of action for intentional/sexual misconduct, which will help the plaintiff obviate the MICRA limitations and receive a larger damage award, or risk losing insurance coverage or limiting coverage to $25,000, by pleading allegations of sexual abuse and intentional misconduct.

3. Insurance companies use the sex caps to leverage lower settlements.

No appellate court in California has ever ruled one way or another on the legality of the sex caps. Thus, in almost every case, the insurance company uses the sex cap as leverage to lower the plaintiff's settlement expectations by creating a risk of plaintiff's recovery being limited to $25,000. So far, the insurance carriers will pay more than $25,000 to settle a therapist sexual abuse case in California.

4. Covered claims in M.D. cases.

In cases involving insurance policies issued to psychiatrists and psychopharmacologists, the coverage issue focuses on what portion of the plaintiff's damages stem from the therapist's negligent misconduct versus intentional misconduct.

Plaintiffs usually fare better in cases against psychiatrists and psychopharmacologists because, one, damages caused from defendant's negligence are clearly covered by defendant's insurance policy and, two, most psychiatrists and psychopharmacologists earn far more money and have more assets than other therapists; therefore, plaintiff is more likely to receive a significant personal contribution from the defendant towards the settlement, verdict or judgment.

In addition, because they have significant assets, psychiatrists are far less likely to declare bankruptcy which can impair a plaintiff's ability to recover against defendant's insurance company and the fact that they prescribe medication usually makes negligence, and thus insurance coverage, easier to establish.

5. It is important to retain an attorney who understands coverage issues and how to avoid the MICRA limitations.

One of the most important reasons to retain an attorney with expertise in therapist abuse cases is so that the attorney knows how to walk a tightrope of getting around the MICRA limitations while establishing insurance coverage.

6. How to best achieve insurance coverage and avoid the MICRA limitations.

It is currently felt that the best way to achieve insurance coverage and avoid the MICRA limitations is to plead a separate cause of action for therapist negligence, specifying what are usually dozens of acts of negligence, and specifically stating that this cause of action does not include any intentional/sexual misconduct or any acts that led to sexual or intentional misconduct. Then plaintiff should plead separate causes of actions which reference intentional and sexual misconduct and do not include any acts of the negligent acts listed in the first cause of action.

The hope is that this will increase the likelihood that an appellate court in an insurance coverage case will understand that the plaintiff is not simply pursuing a sexual abuse case but, rather, there are legitimate acts of negligence which caused the plaintiff's damages.

Under both types of policies, this will position plaintiff in the best way possible to obtain insurance coverage and avoid MICRA. Further, it will give the plaintiff an opportunity to collect the entire judgment against the insurance company, even a recovery for intentional/sexual abuse. How? It is a two-step process.

7. How plaintiff can have an entire verdict covered by insurance.

a. **Step one: the therapist should insist on a special verdict at trial.**

If a case goes to trial, the defendant has the option of requesting a "special verdict" which would set out which portion of the plaintiff's recovery is for negligence versus intentional sexual misconduct, or, requesting a "general verdict" which would allow a jury to simply make a finding of wrongdoing against the therapist and awarding the appropriate damages without specification of whether the damages are being awarded for negligent versus intentional/sexual misconduct.

The decision that the attorney for the therapist has to make in this regard turns the MICRA versus insurance coverage dilemma right back on the therapist. The therapist is now in a bind. He must make a choice as to whether to insist on a special verdict which will limit the plaintiff's recovery on the negligence cause of action and thus, probably result in a smaller verdict or to risk a larger verdict by insisting on a general verdict which will increase the likelihood that an insurance company will have to pay for the entire verdict.

Thus, it will ultimately be in the therapist's best interest to have the entire verdict covered by insurance than it will be to limit the amount of the verdict which will, hopefully, benefit the plaintiff.

b. **Step two: plaintiff tries the case into coverage relying on California Concurrent Causation Law.**

Why? Because under California law, if a plaintiff can establish that both a negligent, i.e., insurable, course of conduct combines with a intentional act or non-insurable course of conduct to cause the plaintiff's injury, then the plaintiff can recover the entire judgment from defendant's insurance company as long as the negligent act is found to be the "predominate proximate cause" of injury, i.e., the major cause of the injury.

As long as there is no special verdict, a plaintiff can plead and present his or her case at trial in such a way as to increase the likelihood that the predominant proximate cause of injury will be found to be the defendant's negligence. Thus, plaintiff may be able to simultaneously avoid the MICRA limitations and have the entire verdict covered by insurance.

This strategy does not necessarily guarantee that a plaintiff will be able to collect the entire judgment from the therapist's insurance company. The insurance company in an action either before or after the verdict will attempt to claim that it is entitled to put on its evidence to establish that the plaintiff's damages were

caused predominantly or entirely by the defendant's uninsurable intentional or sexual misconduct.

8. Dealing with the sex cap.

As to the $25,000 sex cap, in addition to the concurrent causation argument made above, a plaintiff should claim in an insurance coverage action that the sex cap is unenforceable under public policy for at least two reasons.

First of all, the sex cap leaves the therapist exposed to a judgment far in excess of the $25,000 limit, even if plaintiff's injury was entirely caused by negligence. The reason a therapist purchases a policy in the first place is to, at least, receive coverage for negligent acts.

Secondly, the sex cap comes into play when there is any "allegation" of sexual misconduct. This puts the determination of whether or not there will be coverage into the hands of the plaintiff who may be making up the sexual allegations. Thus, a truly innocent therapist would have his or her coverage for wrongdoing limited which is inherently unfair.

This is one of the many reasons why the plaintiff is better off attempting to settle a therapist abuse case before the therapist's deposition is taken and either admits to sexual misconduct, thus putting coverage at additional risk, or denies the misconduct, putting plaintiff's chances of winning at risk.

9. Coverage exclusions and limitations put the therapist and the therapist's insurance carrier in a conflictual relationship.

It should be obvious that the insurance coverage exclusions and limitations put therapists clearly at odds with their insurance companies.

Recognizing that there is an inherent conflict in a case in which an insurance company is willing to pay for the defense of a claim, but is unwilling to pay for any or all damages awarded against its insured (i.e., the therapist), California courts have decided that an insurance company must not only provide one of its attorneys to defend the therapist, but also, the therapist is entitled to, at insurance company expense, retain personal counsel to protect the rights of the therapist against the insurance company and defend the therapist according to the therapist's best interests. The insurance

company must pay the reasonable fees of personal counsel if it is "reserving its rights" to not pay for a judgment.

10. **Cumis** counsel, insurance defense counsel and coverage counsel.

The appellate court case which set out this doctrine was called Cumis; thus, the attorney who represents the therapist personally in a therapist abuse case (as well as any other case in which there is a coverage dispute) is known as Cumis counsel. In the Cumis case, the court recognized that the lawyer assigned by the insurance company to represent the defendant, commonly known as "insurance defense counsel" is in an impossible conflict between attempting to best represent the rights of the insured, and protecting the entity from whom he or she expects to get further business, i.e., the insurance company. Thus, the therapist gets to choose his or her own attorney. However, the insurance company also selects it own attorney to represent its interest who is generally referred to as "coverage counsel." Sometimes, if the therapist has enough assets, in addition to retaining "**Cumis**" counsel, (paid for by the insurance company to protect the therapist's best interests against the insurance company) the therapist will also hire "coverage counsel" (an attorney with expertise in coverage issues) to help in the battle against the insurance company.

Thus, in some cases, there are three or four different law firms and, perhaps two or more attorneys from each law firm, representing the interests of the defendant and the defendant's insurance company during a therapist abuse case. One of the many reasons for the plaintiff to retain an attorney sophisticated in therapist abuse cases is because the relationship between the therapist, the insurance company and their attorneys can be extremely confusing. It takes experience for an attorney to understand whom to trust and whom not to trust and how to use the potential conflict between the therapist and the insurance carrier to the plaintiff's advantage.

11. Declaratory relief actions.

When the insurance company retains its own counsel to litigate the insurance coverage issue, it will sometimes file what is known as a "declaratory relief" action against both the patient and the therapist. In this separate lawsuit, the insurance company will ask a court to "declare" that the insurance company is not responsible for providing a defense to a therapist or providing any money towards a settlement or verdict if the plaintiff prevails.

Fortunately, the plaintiff and the therapist can usually "stay" (i.e., delay) this declaratory relief action until after the

plaintiff's case against the therapist has either settled or gone to trial. The "stay" will be granted because if the declaratory relief action is litigated at the same time as the therapist abuse case, the declaratory relief action will create bad evidence for the therapist which will once again put the insurance company in conflict with its insured.

The "stay" is important because it allows the plaintiff and the therapist to apply pressure on the insurance company who is paying for three attorneys (the insurance defense counsel, **Cumis** counsel and coverage counsel) to settle the case without incurring the cost of two litigations (the therapist abuse case and the coverage case which will follow) and three attorneys. Of course, the plaintiff and plaintiff attorney must also recognize the expense of proceeding in two different cases.

12. Insurance coverage makes a simple case complicated and makes for strange bed fellows.

In other words, what at one time to the therapist abuse victim might have seemed like a relatively simple case against the therapist in which if the plaintiff was believed, he or she would win and if disbelieved, would lose, can become an extraordinarily involved situation in which the therapist's insurance company becomes the "real enemy" in the lawsuit as it attempts to avoid its responsibility to protect the rights of the therapist and to compensate the plaintiff for his or her injuries.

Thus, in a way that it is unanticipated by most therapist abuse victims in the beginning of a civil case unless they have hired an attorney who is experienced in these matters and can explain this potential scenario, the therapist and patient become strained allies, yet allies nonetheless, in an effort to have the therapist's insurance company pay the plaintiff so that the therapist can attempt to save his or her practice and money.

13. Insurance coverage under homeowner's policies.

a. **In any therapist abuse case in which there is contact outside of the office, there is a potential for homeowner's coverage.**

If it is possible, insurance coverage can get even more complicated and in some ways more interesting if in addition to an errors and

omissions policy, a homeowner's policy comes into play to potentially pay for the defense for a therapist and/or pay for a patient's damages.

b. **Homeowner's policy may be the only insurance coverage available or can supplement a malpractice policy.**

If the therapist and patient had a relationship outside of the therapist's office, it is sometimes wise for the plaintiff to plead causes of action for ordinary negligence (i.e., non-professional negligence) and if there was improper conduct in the defendant's home, for the plaintiff to plead a cause of action for premises liability.

Pleading either of these causes of action may trigger coverage and the defense of a therapist under a homeowner's policy. A homeowner's policy may provide additional coverage or, at times when the therapist does not have a malpractice insurance policy a homeowner's policy may be the only insurance policy from which the plaintiff can collect.

c. **Homeowner carriers are resistant to participate in therapist abuse cases.**

Homeowner insurance carriers will generally be very resistant even to pay for a psychotherapist's defense in a therapist abuse case and even more resistant to pay a plaintiff money in settlement. However, if a case is "pled" properly and the facts indicate some exposure on the part of the homeowner's carrier, it may have to contribute to a settlement rather than risk the expense of defending a lawsuit and a subsequent coverage or bad faith case and the risk of ultimately losing and being found responsible for all or part of plaintiff's damages.

d. **First line of defense for a homeowner's carrier will be no "bodily injury."**

The homeowner's carrier will, first, take the position that its policy provides coverage for "bodily injury" and that the plaintiff did not suffer any "bodily injury," at least from anything that happened outside of therapy. It may concede that the plaintiff suffered emotional distress; however, under insurance coverage law, emotional distress is different than a bodily injury which a

homeowner's carrier will claim means a "physical" injury to a part of the plaintiff's body and not emotional distress alone.

Plaintiff will counter this argument by stating that either the sexual battery or some similar improper touching and the emotional distress from that, does, in fact, constitute a bodily injury or, in the alternative, that a plaintiff developed physical symptoms such as hair loss, high blood pressure, gastrointestinal problems, headaches or similar physical problems from the defendant's negligence or intentional infliction of emotional distress.

e. **Homeowner's second defense will be no coverage for criminal, intentional or sexual acts.**

The homeowner insurance carrier, like the malpractice carrier, will next claim that by operation of statutory law and case law, there can be no homeowner's coverage for sexual abuse. Every homeowner's insurance policy has an exclusion for sexual and intentional misconduct. The insurance carrier will rely on the cases that hold that you are not "allowed" to insure for criminal misconduct.

Plaintiff, on the other hand, will take the position that there should be coverage because while the defendant may have intended his or her wrongful acts; the defendant, did not **intend** to harm the plaintiff (which is actually usually true). This used to be a good argument; however, now the homeowner's insurance carrier will cite a California Supreme Court case that held that the sexual molestation of a minor is an inherently harmful act; therefore, it is irrelevant as to whether or not the molester intended to harm the minor. In the situation, there is no possibility for homeowner's coverage to apply.

However, the plaintiff therefore respond by claiming that Supreme Court case is only intended to apply to minors. Unfortunately, the plaintiff's position in this regard is weakened by the criminal statutes passed in California prohibiting a psychotherapist's sexual contact with a patient during therapy. (See section G, xiii, i above.)

f. **Homeowner carriers will also claim "no occurrence" under the policy.**

Next, the homeowner's insurance carrier will claim that its coverage is only triggered in the case of an "occurrence." Since an "occurrence" is usually defined as an "unexpected" event, the homeowner's insurance carrier will claim that a therapist's abuse

will rarely involve the plaintiff being injured by a "unexpected" event.

g. **Homeowner carriers will rely on a business exclusion in the policy.**

The carrier will also rely on "business exclusions" that are found in every homeowner's insurance policy. A "business exclusion" generally states that the insurance company will not cover any losses that arise out of the homeowner's business or professional pursuits.

Thus, in a therapist abuse claim, the insurance carrier will take the position that at all times, the therapist was acting in his or her professional capacity when committing the misconduct that harmed the plaintiff.

In response, the patient will claim that almost any contact between the therapist and patient outside of the office cannot possibly be characterized as "therapy" and thus, the therapist, by providing negligent advice or unintentionally mistreating plaintiff in other ways, was acting in his or her personal capacity and outside of the professional relationship.

h. **Homeowner's carrier will claim that unless defendant was acting in his "professional," i.e., business capacity, there is no prohibition against having sex with the plaintiff.**

The insurance carrier will respond to this argument by claiming that under the law, a person does not owe a "duty" to another person unless there is some type of "special relationship" recognized by the law. The insurance carrier will claim that only the therapist's therapeutic relationship with the plaintiff created a duty. Thus, once a therapist steps outside of his or her role as a treater, the therapist no longer has a "duty" to not harm the patient.

i. **The triple whammy defense of a homeowner's carrier.**

The homeowner insurance carriers rely on a California statute which states that a person can never be found liable for seducing another person or entering into a consensual sexual relationship with an adult. Using this analogy, the insurance company will claim that, especially as to the plaintiff's damages that flow from the sexual touching of the plaintiff, there are only three possibilities:

- The claimed sexual touching was forced or unconsented to; therefore, excluded under the intentional tort/sexual act exclusions in the homeowner's policy.

- Criminal and civil statutes in California prohibit a therapist from having sexual contact with a patient during the course of therapy or, in the case of a civil lawsuit, within two years of the date of termination of therapy, and that the "duty" not to have sexual contact with a patient arises "solely" out of the special relationship created by the therapist/patient relationship. Thus, the therapist's potential liability stems only from the therapist's professional relationship with a patient, and professional activities (i.e., business activities) are excluded from the homeowner's policy.

- If, for any reason, the sexual touching of the plaintiff is found to have occurred outside of the defendant's role as the plaintiff's therapist, there can be no insurance coverage under a homeowner's policy because there can be no liability found on the part of the defendant, since the only thing that makes the sexual touching "actionable" is the defendant's status as the patient's therapist.

j. **Plaintiff's response to the triple whammy coverage defense.**

Plaintiff will, in turn, respond that a situation can exist, and in fact exists in plaintiff's case, in which, because of the mix of the professional and personal relationship between the therapist and the patient, or because of the fact that the relationship, at least at one time, was professional, that the therapist, in his or her professional capacity, learned of the plaintiff's vulnerabilities, increased the plaintiff's dependency on the therapist and essentially "set the plaintiff up" for the improper personal relationship which coincides with or follows the professional relationship. Thus, the special relationship actually continues after or outside of treatment despite the fact that the therapist is acting in his or her personal capacity.

Thus, the therapist continues to owe an affirmative duty of care to the plaintiff and any damages that flow from the breach of that duty in the defendant's personal relationship with the plaintiff should be covered by the homeowner's policy. In this regard, the plaintiff will rely on California cases that hold that a doctor can be found liable to a patient for "ordinary negligence" even if a doctor/patient relationship was never formally established or even if the doctor was acting outside of his or her capacity.

14. Cases in which there are multiple insurance carriers or policy periods.

a. **More often than not, a therapist is insured by more than one insurance carrier.**

It is not infrequent that a therapist will have more than one malpractice policy and one or more homeowner's policies that will provide potential coverage for the plaintiff's injuries.

It is not at all uncommon for therapists to change insurance companies every year or so.

b. **"Occurrence" versus "claims made" policies.**

For many years, insurance policies issued to non-M.D. therapists were "occurrence" policies which provided coverage if the negligent act occurs within the year of the policy.

Most malpractice policies offered to psychiatrists and psychopharmacologists and, more recently, many of the policies issued to other psychotherapists are "claims made" policies in which coverage is triggered, not by the negligent act of a therapist, but the year in which the plaintiff brings a claim against the therapist.

To explain this simply, assume that a therapist abused a patient in 1998 but the patient did not bring claim until 2000. An "occurrence" policy will provide coverage for any acts which occurred in 1998 but will not cover any acts after that policy period (a subsequent occurrence policy may provide coverage for acts that occurred after 1998). A "claims made" policy will only provide coverage for the year a claim is made, in this example, 2000.

The existence of "occurrence policies" increases the likelihood that a number of different malpractice carriers will be involved.

Unfortunately, because of the confusing nature of the occurrence versus claims made policies, it is not uncommon for there to be a "gap" in insurance coverage, i.e., some period of time in which there will be no insurance coverage available. This may be the period of time at the beginning, middle or end of therapy, which may complicate coverage problems.

c. **Because a therapist is likely to have a claims made policy, a lawsuit should be brought as soon as possible in case a therapist drops coverage.**

Since almost every insurance carrier insuring therapists has begun writing "claims made" policies, a civil case should be initiated as soon as possible and before a licensing board or criminal action. A therapist, facing the loss of his or her license, may very well decide to drop what can sometimes be an expensive insurance policy. If the therapist has a claims made policy, and the therapist stops paying premiums before the patient brings his or her lawsuit, then there will be no potential coverage available for plaintiff's injuries.

d. It usually works to a plaintiff's advantage if there are multiple insurance carriers.

Usually, the presence of multiple insurance carriers is an advantage to the plaintiff since it creates multiple sources of money for contribution to a settlement or collection of a verdict or judgment.

e. **Situations in which the presence of multiple insurance carriers will be a disadvantage to plaintiff.**

However, it can also complicate matters if the different insurance carriers have different exclusions, a different view of the plaintiff's case, or take more or less of a hardline position on the viability of their sex caps and exclusion.

For instance, if a plaintiff is willing to settle for $300,000, and two of the carriers will only pay $100,000, but the third insists on limiting its contribution to a settlement to the $25,000 sex cap, all kinds of problems can arise. The plaintiff will either have to lower settlement expectations to $225,000, go through more litigation while the insurance companies fight it out with each other, or hope the insurance carriers will eventually raise their offers or the carrier relying on the sex cap will finally decides to pay its fair share of the settlement.

This situation can also occur if one of the carriers, for whatever reason, evaluates the plaintiff's case much lower than the other carriers. Further, a dispute between the carriers can arise if one of the carriers takes the position that most of the wrongful misconduct occurred outside of its policy period and, therefore, the

other insurance carriers should contribute more money toward a settlement.

f. **The wars between insurance carriers are outside of the plaintiff's control.**

The wars and disputes that occur between insurance companies can be monumental and for the most part are outside of the plaintiff's control. Thus, a plaintiff might have to endure a monetarily and emotionally expensive litigation and sometimes a trial while the insurance companies are unable to settle their differences with each other.

g. **In rare situations, a plaintiff can settle with one insurance carrier at a time.**

In some cases, if the therapist's personal counsel allows it, a plaintiff can settle with one or more insurance carriers and then continue to pursue the case against the therapist. (Usually an insurance carrier cannot settle without obtaining a dismissal of the action against the therapist because this would be in bad faith.) This will put an immense amount of pressure to settle on the remaining insurance carrier who now will be wholly responsible for any verdict received by the plaintiff that is covered under their insurance policies.

Probably the best opportunity to achieve this type of partial settlement against one or more insurance carriers in a case will be if one of the carriers has an occurrence policy. Plaintiff can then settle the case with this carrier based on damages that the plaintiff received during the one or more year policy period. The plaintiff can then dismiss that one or more year period from the complaint and not claim any damages at trial arising from that period of time. Thus, the remaining insurance carriers gain no benefit at all from that settlement and remain at risk for the entire judgment rendered against the therapist.

Again, this strategy will not work unless personal counsel for the therapist allows it since the case against the therapist will not be dismissed and the therapist will still have to continue with the litigation and the trial and is personally at risk if it is later determined that a verdict is outside of coverage.

The reason why the therapist's personal attorney may agree to this arrangement is because he or she recognizes the amount of pressure that it will place on the other insurance carriers to settle and

greatly increase the likelihood that the entire case will settle quickly, without more litigation.

15. Insurance coverage issues in a therapist abuse case can seem daunting.

As one can see, the insurance coverage issues in a therapist abuse case are complex and can seem daunting. However, an experienced plaintiff's attorney will usually be able to wade their way through the morass and obtain a fairly reasonable settlement, frequently without a great deal of litigation.

I. Common Acts of Negligence That Can Be Claimed in Therapist Abuse and Therapist Malpractice Cases.

1. Stating a powerful negligence cause of action free of any sexual allegations is critical.

It is important for both liability and insurance coverage purposes for a plaintiff to be able to state a valid claim of negligence against a therapist, even when there is also abuse that goes far beyond negligent misconduct. To strengthen the negligence claim, it is usually wise to provide a long list of acts of negligence of the therapist in the legal complaint which begins the lawsuit. A careful review of the facts of a case by an expert psychotherapist retained by the plaintiff's attorney, or by a sophisticated plaintiff's attorney's review of the facts, will usually lead to the presence of most of the following acts of negligence, plus some additional acts which would be case specific:

a. **Negligent acts at the beginning of treatment.**

- Failure to take an adequate history.
- Failure to utilize information learned in the history to further the patient's treatment.
- Failure to diagnose appropriately the patient.

b. **Negligent acts as treatment progresses.**

- Failure to properly monitor the progress or lack of progress of a patient during the course of therapy.
- Using unrecognized or below standard therapy techniques.
- Utilizing massive regressive therapy techniques in a patient who was not an appropriate candidate for such techniques.
- Instituting or switching therapy modalities without obtaining the informed consent of the patient.

- Inappropriately conducting therapy sessions outside of the therapist's office.

- Conducting therapy in such a manner so that the patient became overly focused and dependent on the therapy.

- Conducting the therapy in such a manner that the patient who needed help with individuation became even more dependent on the and others.

- Taking an inappropriate amount of control over the plaintiff's life through various inappropriate techniques utilized throughout therapy.

- Breach of confidentiality.

- Failing to refer plaintiff to a psychiatrist or psychopharmacologist for a medication consultation.

c. **Non-sexual boundary violations and dual relationships.**

- Failing to treat a patient for the patient's presenting problems but rather, developing his or her own agenda for treatment.

- Improper self-revelations by the therapist.

- Wrongfully engaging in non-sexual boundary violations with the patient.

- Entering into non-sexual dual relationships with the patient.

- Inappropriately letting a patient feel that he or she was "too special" in the therapist's eyes, thus increasing the patient's dependency on the therapist.

- Failing to help the patient integrate into real life.

- The therapist inappropriately encouraging plaintiff to comfort, please and listen to him or her rather than the reverse.

- Having sessions go over the regularly scheduled times and setting up inconsistent times and length of time for sessions.

- Seeing patient outside of the therapy office.

- Conducting telephone calls without a therapeutic purposes.

d. **Failures once plaintiff begins deteriorating from the other techniques.**

- Failing to recognize the deterioration of the patient and acting accordingly.

- Failure to obtain appropriate consultations.

- Failure to refer the patient to another therapist once the therapist has lost objectivity.

e. **Failures at the end stage of treatment.**

- Failing to appropriately terminate therapy.

- Abandoning the patient.

2. Additional allegations in cases against psychiatrists.

In addition to the above allegations, in a case against a psychiatrist or psychopharmacologist involving medication, a plaintiff will generally be able to add allegations such as:

- Failing to prescribe appropriate medications to the patient.

- Failure to prescribe the appropriate medication in the proper dosage.

- Failing to prescribe an appropriate combination of medications for the patient.

- Failure to keep appropriate notes of the medication and the patient's response to the medication.

- Prescribing medications such that plaintiff became addicted to the medications.

- Prescribing medication to increase the patient's dependency on the therapist rather than to alleviate the patient's symptoms.

3. There will be additional allegations of negligence which can be added on a case-by-case basis.

The allegations above represent the "typical" facts and negligence that can be found in a therapist abuse case. Any specific case will usually involve a dozen or more additional allegations about negligence.

J. Statutory Provisions That Apply Specifically to Therapist Abuse Cases.

1. California Civil Code section 43.93.

This Code section, which has been in effect since 1987, states that:

a. When sexual conduct prohibited by a licensed therapist.

"A cause of action against a psychotherapist for sexual contact exists for a patient or former patient for injury caused by sexual contact with the psychotherapist, if, the sexual contact occurred under any of the following conditions:

- During the time that the patient was receiving psychotherapy from the psychotherapist.
- Within two years following termination of therapy.
- By means of therapeutic deception."

This Code section applies to all licensed psychotherapists performing any modality of therapy.

b. Sexual contact defined.

"Sexual contact" means the "touching of an intimate part of another person" which is generally defined as touching of genitals, buttocks and in the case of women, breasts.

c. Damages are recoverable.

That statute goes on to state:

"The patient or former patient may recover damages from a psychotherapist who is found liable for sexual contact."

The statute also contains other important provisions:

d. **Location no defense.**

It is not a defense to the action that sexual contact with a patient occurred outside a therapy or treatment session or that it occurred off the premises regularly used by the psychotherapist for therapy or treatment sessions.

e. **Married couples excluded.**

No cause of action shall exist between spouses within a marriage.

f. **Limited admission of plaintiff's sexual history.**

In an action for sexual contact, evidence of the plaintiff's sexual history is not subject to discovery and is not admissible as evidence except in either of the following situations:

- The plaintiff claims damage to sexual functioning;

- The defendant requests a hearing prior to conducting discovery and makes an offer of proof of the relevancy of the history, and the court finds that the history is relevant and the probative value of the history outweighs its prejudicial effect. Even in this situation, the court should limit the discovery of evidence to specific relevant situations.

g. **Standard of care: no sex until no transference, if ever.**

It should be noted that while this statute prohibits sexual contact that begins within two years of the termination of therapy, the statute does not define the standard of care.

Most therapists will testify that the standard of care requires that the therapist never enter into a sexual relationship with a former patient, or at least not enter into such a relationship until there is an assurance that the transference is no longer in existence and that the patient will not be harmed by the relationship based on the fact that the patient had once been in a professional relationship with a therapist. This normally requires an objective consultation.

h. **Consent is not mentioned.**

Although C.C.C. 43.93 does not deal with the consent issue specifically, Business and Professions Code section 729 below does. Attorneys should point out that, if a criminal statute states consent is not a defense, than certainly a "lesser" civil statute should follow that standard.

2. Business and Profession Code section 729.

a. **Applies criminal sanctions to all psychotherapists, medical doctors and other health care providers.**

This is the statute that criminalizes sexual exploitation by psychotherapists and all physicians and drug abuse counselors -- however, the discussion will be limited in this section to the psychotherapists.

b. **Sex with patients always prohibited; sex with former patients prohibited when treatment relationship terminated to begin sexual relationship.**

This Code section states that any psychotherapist who engages in an act of sexual intercourse, sodomy, oral copulation or sexual contact with a patient or client or with a former patient or client when the relationship was terminated primarily for the purpose of engaging in those acts, unless the psychotherapist has referred the patient or client to an independent and objective psychotherapist recommended by a third party psychotherapist for treatment, is guilty of sexual exploitation by a psychotherapist.

c. **The punishment.**

It goes on to state that sexual exploitation by a psychotherapist is a "public offense" punishable by imprisonment in a county jail for a period of not more than six months or a fine not exceeding $1,000, or both.

In the case of two or more victims, the punishment can be increased to state prison for a period of 16 months, two years or three years, and a fine not exceeding $10,000.

Two or more acts of sexual exploitation with single victim, when the offender has at least one prior conviction for sexual exploitation, shall be punishable by imprisonment in a state prison for a period of 16 months, two years or three years, and a fine not exceeding $10,000. The same punishment applies when there are two or more victims and one prior conviction for sexual exploitation.

d. **Consent is not a defense.**

In determining whether there is a violation of section 729 "consent" of the patient or client is not a defense.

This is a critical element of this statute since Civil Code section 43.93 above does not explicitly deal one way or another with the consent issue.

An attorney handling a therapist abuse case can argue that if consent is not a defense to a criminal charge, then it certainly should not be a defense to a lesser civil charge.

e. **Violation of Business and Professions Code section 729 can form a basis for a civil lawsuit.**

Under California law, a plaintiff can sue a psychotherapist for violation of a criminal statute including Business and Profession Code section 729; thus, if the plaintiff can prove that the statute was violated consent will not be able to be utilized by a defendant at least as to a cause of action based on the violation of Business and Profession Code section 729 in a civil case.

f. **Sexual contact defined.**

"Sexual contact" in this Code section means sexual intercourse or the touching of an intimate part of the patient for the purpose of sexual arousal, gratification or abuse. "Intimate part" means generally genitals, buttocks or the breasts of a woman.

g. **Patients in domestic relationships with psychotherapists excluded.**

This section specifically excludes sexual contact between a therapist and his or her spouse or "a person in an equivalent

domestic relationship" when the therapist provides medical treatment or other than psychotherapeutic treatment to his or her spouse or a person in an equivalent domestic relationship. In other words, it is not a violation of Business and Profession Code section 729 for a therapist to have sex with his or her spouse or domestic partner just because that person happens to be a patient.

3. Business and Profession Code sections 4982-4982.3 and Business and Profession Code section 726.

These are Code sections that authorize the licensing boards to take action against a psychotherapist based on, amongst other things, sexual abuse of a patient. Since these Code sections only apply to licensing issues, they are not enforceable in civil cases; therefore, they will not be discussed in detail in this section.

4. California Civil Code section 51.9.

a. **Extends California sexual harassment law to psychotherapists.**

This Code section became effective in 1995. It extends California sexual harassment law to business and professional relationships including psychotherapists. It applies to a whole slew of professionals, business and service providers, but this section will focus on psychotherapists.

b. **When a treater will be found liable.**

Under this section, a person can be found liable in a cause of action for sexual harassment when a plaintiff proves

- There is a psychotherapist/patient relationship.
- The defendant has made sexual advances, solicitations, sexual requests or demands for sexual compliance by the plaintiff that were unwelcome and persistent or severe, continuing after a request by the plaintiff to stop.
- There is an inability by the plaintiff to easily terminate the relationship without tangible hardship.

- The plaintiff has suffered, or will suffer, economic loss or disadvantage or personal injury as a result of the conduct.

c. **Violation allows for an attorney fee award.**

The most significant advantage to a plaintiff prevailing under this Code section is that plaintiff is entitled to an award of attorneys fees. This is a significant "enhanced" remedy.

Attorneys fees are awarded pursuant to the actual hours that an attorney spends on a case, at her or his usual rate, with the rate sometimes multiplied.

Under most attorney-client retainer agreements, the attorney fee award in sexual harassment cases becomes part of the plaintiff's recovery in the case and the contingency fee is taken out of the plaintiff's award of damages plus the award for attorneys fees.

In other words, if the plaintiff were awarded $500,000 in damages and another $500,000 in attorneys fees, that would make the total award $1,000,000, and under most attorney-client retainer agreements, the attorney would then take 40% of the entire award or $400,000. Thus, the client's recovery would be increased by hundreds of thousands of dollars.

Further, the existence of the attorney fee award creates a disincentive for therapists and their insurance companies to conduct a lot of aggressive discovery that will simply run up the attorneys fee award for the plaintiff.

d. **Open issue as to whether an insurance carrier would have to pay for a damage or fee award under C.C.C. section 51.9.**

There have not been, as of this date, any cases decided in California which would indicate one way or another whether a therapist's insurance company would be responsible for paying the fee or damage award against its insured.

Certainly the insurance carriers would argue that they should not be responsible based on the fact that sexual abuse is excluded from their insurance policies; however, plaintiffs can make an argument that an award of attorneys fees is not a stated part of the exclusion and that in certain cases, a therapist could be guilty under this Code section and not commit sexual abuse or intentional misconduct as defined by a particular policy.

e. **To prove a violation of C.C.C. section 51.9, plaintiff might have to prove actual "resistance."**

The most difficult aspect of proving a violation of this Code section in most psychotherapist abuse cases may be the fact that the sexual misconduct must be "unwelcome," "continuing after a request by the plaintiff to stop."

Because of the transference phenomenon, most sexual contact between therapist and patient does not, at least on its face, appear to be "unwelcome" and there usually is not a "request to stop." There have not been any cases decided yet on this issue, but even in cases where there is no resistance, plaintiff should attempt to claim that the transference phenomenon makes "consent" impossible. Plaintiff should argue that by law, i.e., C.C. 43.93 and Business and Professions Code 729, the sexual contact is always illegal; thus, by definition "unwelcome."

Further, a careful analysis of the facts of the case and the relationship will generally reveal at least several instances, usually at the beginning or the end of the relationship, when the sexual advances of the therapist truly were "unwelcome," and it is not uncommon that there is at least some effort by the patient at the beginning or end of the relationship to "stop" the sexual advances from occurring.

K. Statute of Limitations.

1. The statute of limitations is confusing and inconsistent in therapist abuse cases.

Insofar as a therapist abuse case will involve a number of different causes of action, there are also a number of different statute of limitations which will apply.

For torts based on most of the acts of intentional/sexual misconduct, the statute of limitations begins to run one year from the "date of accrual of the cause of action" unless the defendant is a public entity in which case it runs six months from the date of accrual of the cause of action.

As to the therapist negligence cause of action, MICRA applies, and a plaintiff has three years from the date of "injury" or one year of the date of "discovery" of a cause of action to bring a case, whichever is "sooner." Thus, for practical intents and purposes, a plaintiff has one year from the date of discovery to bring a case.

Everyone of the key terms above are ill-defined and vague. The "date of accrual" generally means the point in time when plaintiff is aware of "all of the elements of a cause of action," but in the context of a therapist abuse case, when is that? What is an "injury?" What is "discovery?"

2. Plaintiff should bring a case as quickly as possible.

The case law interpreting the statute of limitations is all over the place. The only thing that is clear is that the longer plaintiffs wait to bring a case, the greater they are at risk for losing their rights under the statute of limitations.

There have been cases that have held that the statute of limitations ran while the plaintiff was still in treatment with the abusing doctor. Other cases have let a plaintiff bring a suit even after the MICRA three-year limitations. If you are thinking of bringing a case, you should consult with an attorney who specializes in therapist abuse cases to see if you can wait to sue or, if you have waited, if your case can be saved.

3. It is hard for therapist abuse victims to comply with the statute of limitations.

The statute of limitations is generally the most significant defense that a therapist will have in a malpractice or abuse case. Because of the nature of the transference phenomenon and the intensity of the therapist/patient relationship, it is extraordinarily hard for a patient or former patient to sue a psychotherapist within one year (unless the action is against a public entity or an employee of a public entity in which case it must be brought within six months) of the date that harm by the psychotherapist's misconduct was discovered, which is, more or less, the date the statute of limitations begins to run for most causes of action in a therapist malpractice or therapist abuse case in California. If a plaintiff loses a case on the statute of limitations, that is it. The case is gone and the defendant walked off Scott free.

4. The statute of limitations is unfair to therapist abuse victims in California.

The statute of limitations is inherently unfair and unreasonable for therapist abuse victims; however, it is the law and at least in California, there are no special statute of limitations that apply to victims of therapist abuse. Instead, the statute of limitation law, for the most part, follows the law in medical malpractice cases, which will be described below. It should, however, follow the law of the statute of limitations in child incest cases since all of the same psychological factors exist, sometimes to a greater degree, in a "professional incest case" when a therapist sexually abuses an adult patient, that exists in a child molestation or incest case.

In California, a child sex abuse victim has until reaching the age of 26 or three years from the date of discovery of injury, whichever is later to bring a case. However, adult therapist abuse victims in California are stuck for the most part with the one-year statute of limitations, which begins to run when a reasonable person is put on notice that he or she may have been injured by a defendant's negligence.

5. Discovery of harm versus being ready to sue.

Unfortunately, many therapist abuse victims are so devastated that they cannot come forward and bring an action until they are psychologically strong enough and "ready." This sometimes takes five, ten, 20 or more years. However, the statute of limitations that apply to therapist abuse cases all begin running upon the "discovery" of harm and not when the victim is "ready" to come forward. This is unfair and a tragedy; however, it is the law.

6. The statute of limitations at its most unfair: the requirement that if a plaintiff discovers harm, they must sue even if still in treatment.

One of the more unfair elements of the statute of limitations in California, particularly as it applies to therapists and other doctors, is that if a patient does, in fact, discover that she or he was harmed by the therapist's wrongful conduct, even during the course of therapy, he or she must bring a lawsuit within a year of the discovery even if treatment continued for a long period afterward. The existence of an ongoing treatment relationship **lessens** the burden of a patient to discover harm from wrongful conduct; however, it does not eliminate it. Thus, a plaintiff could lose her or his right to sue a therapist even if a case is brought within one year of the end of treatment. However, in this situation, if the misconduct of the therapist continued past the initial discovery date, the plaintiff should be able to sue for any acts which occurred within one year of the date the lawsuit is filed. But some courts have even thrown out these cases.

7. The disservice of many well-meaning therapists who treat a patient after the patient has been abused.

Many therapist abuse victims spend a long time with a therapist whom they go to see after the abusive therapist, deciding whether or not to take action. Unfortunately, many therapists do not understand the statute of limitations at all or misunderstand it. Thus, they encourage the patient to wait until he or she is "ready" to go forward before seeking the advice of an attorney. This normally has a double negative effect on the patient's statute of limitations case. First of all, while the patient is working with the therapist to decide whether or not to bring a case, or consult an attorney, the statute of limitations may very well have run by the time the patient and therapist decide the patient is ready to come forward. Further, if the therapist takes notes of these sessions, the notes might contain the very proof that the patient discovered the wrongful acts and the harm from them more than one year from the date they brought the lawsuit. It is almost impossible for a plaintiff to overcome a dated note that exists in the new therapist's records such as "Mary is still struggling with the decision whether or not to sue Dr. X. Although she realizes his conduct was very damaging and unethical, she is scared of going forward with a case because she is worried that no one will believe her." If that note was written anywhere close to one year before the plaintiff finally comes forward, the well-meaning therapist will have single handedly destroyed the plaintiff's case.

8. When there is a will around the statute of limitations, there may be a way: consider estoppel.

a. **Creative attorneys may help preserve a case under the statute of limitations even if it s quite old.**

However, therapist abuse victims should not give up hope if they have waited a long time to come forward. There are exceptions to the statute of limitations that can sometimes save a case, particularly if the victim's attorney is psychologically sophisticated and understands the theories by which someone can overcome the statute of limitations problems. If there is absolutely no discovery of wrongdoing or harm, the statute of limitations may extend many years after the abuse.

b. **Estoppel may save a plaintiff's case.**

Under California law, a defendant cannot receive the benefit of a statute of limitations defense if he or she prevented the victim from suing sooner. Most of the cases on this issue deal with defendants who have intentionally misled a plaintiff as to when the statute of limitations began; in some way have fraudulently concealed their misconduct in such a way that the plaintiff was prevented from discovering that they had been harmed by the defendant; or threatened harm on a victim if the victim would come forward.

The key doctrine is called "estoppel," and it generally states that a defendant should be "estopped" (i.e., prevented) from benefitting from his or her own wrongdoing. Thus, in a case in which the therapist has specifically threatened the victim with harm if the victim comes forward, this may create grounds for estoppel, as long as the victim has a reasonable fear that the therapist will cause harm. In this situation, it is always a little tricky to explain why a fearful victim all of a sudden became non-fearful, but there is sometimes a reasonable explanation like the patient or therapist moving out of town. Clearly, a plaintiff must bring a case within one year of the date that the plaintiff realized he or she could safely come forward.

A more sophisticated, but difficult, argument trying to assert the estoppel doctrine would be that the abuse of the transference in and of itself prevents the patient from discovering harm and taking action sooner because it so weakens, destabilizes and confuses the patient that it prevents discovery of harm.

Further, it almost always creates a situation of self-blame in the patient which makes the patient feel responsible all of the harm and not the therapist.

Finally, abuse of the transference creates an increased dependency on the therapist such that the patient feels as though he or she cannot live without the therapist, and despite the fact that they have not been together for some period of time, the patient still feels, because of the abuse of the transference, that he or she cannot live without the therapist. (This is an even more difficult argument.)

c. **If plaintiff can plead late discovery, he or she can keep their case alive: at least for a while.**

Generally, plaintiffs almost always have a chance of prevailing on the statute of limitations issue no matter how long they wait to sue the therapist; although, after one year from the date of the potential discovery, it becomes difficult and after three years, even more difficult.

The reason why plaintiffs have a chance of prevailing is because as long as the initial legal complaint, which is written by an attorney and not verified under oath by a plaintiff, contains an allegation that the plaintiff did not discover harm from wrongful conduct until within one year of the complaint, then the complaint should survive the initial legal challenge by the defendant known as a "motion to strike" or a "demurrer." There has to be some good faith belief on the part of the attorney that the plaintiff did not discover until within one year of the filing of the complaint; however, usually there are enough facts to make this a potential valid claim.

One of the limitations of utilizing an estoppel claim is that it will only stop the statute of limitations from running on the therapist himself or herself. If the main defendant in a case is a hospital or clinic where the defendant works, an estoppel argument will not stop the statute of limitations from running against those defendants. Thus, if the perpetrator does not have sufficient funds or insurance of their own, an estoppel argument will not be of much help to a plaintiff.

d. **Keeping the ball rolling: survival techniques for summary judgment motions.**

Once a plaintiff survives the initial challenge, then formal discovery can occur in the case including depositions. The next

opportunity that a defendant has to attempt to have the plaintiff's case dismissed on the statute of limitations occurs when the defendant files a "summary judgment" motion. This is a motion, which is decided by a judge, in which the defendant asserts that looking at all of the evidence acquired to that date in the light most favorable to the plaintiff, plaintiff still cannot prevail on a statute of limitations claim.

Thus, if the plaintiff admits in her or his deposition that there was discovery more than one year before the date of filing the lawsuit or the defendant is able to develop other evidence of discovery, the plaintiff can have the case dismissed at this point before the plaintiff ever has the opportunity to have the case heard by a jury.

e. **Surviving pre-trial motions and a jury verdict.**

Even if the plaintiff survives the inevitable summary judgment motion, the defendant has at least two more opportunities to knock the case out. Under California law, the defendant has the opportunity to have the statute of limitations issue "bifurcated" and tried to a jury before plaintiff has the opportunity to put on the liability and damage case in front of a jury or the defendant can elect to have the statute of limitations issue tried with the rest of the case (which creates a whole set of problems which will be explained below) and a jury can decide the statute of limitations issue at the same time that it decides liability, causation and damages.

f. **Surviving a jury verdict form with the odds stacked against the plaintiff.**

If plaintiff has not pled an appropriate "estoppel" claim, then some judges in either a bifurcated trial or a non-bifurcated trial will not instruct the jury on the law of the statute of limitations but, rather, will simply have the jurors answer one of the following questions:

- "What is the date that you believe that plaintiff discovered or, under the facts and circumstances of this case, was put on notice that they were harmed by the defendant's misconduct?" or worse,

- Did plaintiff discover that they was harmed before (date) (one year) or was plaintiff put on notice that would cause

a reasonable person to inquire as to whether or not they were harmed by the defendant's misconduct?

In either of these situations, the jurors will not know that if they find that there was discovery more than one year before the date of the filing of the lawsuit, that they are in fact finding in favor of the abusive therapist and eliminating the plaintiff's claim. This would be true even in a non-bifurcated case in which the jury found in favor of the plaintiff for millions of dollars.

g. **Pleading around the statute of limitations in the initial complaint gives plaintiff a chance for settlement even in a difficult statute of limitations case.**

However, the fact that the plaintiff can survive the initial legal challenge by the defendant on the statute of limitations means that he or she has an opportunity to attempt to settle the case before the second event that can knock out the case, i.e., the summary judgment motion, and once again, will have an opportunity to settle the case before trial if he or she survives the summary judgment motion.

h. **Plaintiff needs to find some leverage if plaintiff has severe statute of limitations problems.**

In a case in which there is actual sexual abuse and the therapist is in fear of losing his or her license, the therapist will still have incentive to settle the case without the plaintiff's deposition being taken and without the defendant's deposition being taken. This is true even if the therapist knows that there is an extremely good chance that he or she can win a summary judgment motion because the therapist will not want to have bad evidence created for the licensing board action. Thus, this is a situation, in which the strength of the plaintiff's potential licensing board action may give the plaintiff enough leverage to create an atmosphere conducive to settlement even though the defendant feels that they will ultimately prevail on the statute of limitations in a civil case if there is no settlement. Of course, under these circumstances, plaintiffs are under such high risk of losing that they will have to discount the value of the case substantially; however, some settlement is better than nothing and will, in some plaintiffs, create a sense that justice was done and actually led to a fairly significant settlement.

i. **If the treater doesn't care about his or her license, then this strategy will fail.**

This particular concept will only apply to cases in which the therapist believes that their license is at risk. Thus, if it is a case in which there is no sexual misconduct, wherein therapists rarely lose their licenses, it will almost always be worth it for the defendant to try to eliminate the plaintiff's case on a summary judgment motion or trial.

j. **Even if the therapist cares about losing his or her license, the insurance company cares about money and not the therapist's license.**

Further, even when the therapist's license is at risk, the therapist's insurance companies won't particularly care. Insurance companies care only about money and if an insurance company knows that a case can be dismissed on a summary judgment motion, it is unlikely to **want to** offer any significant money for settlement.

However, under California law, an insurance company owes its insured a duty to act in good faith and in some situations personal counsel for the defendant will be able to convince the insurance company that if it doesn't pay a reasonable sum in settlement, and as a result the therapist loses his or her license, that it acted in bad faith which could subject the insurance company to a lawsuit in the future brought by the therapist.

k. **Finding some daylight in the statute of limitations battle.**

As previously mentioned, plaintiffs can usually find enough daylight to at least reach a settlement in a case where there is a large statute of limitations problem as long as there was some form of sexual abuse.

l. **The statute of limitation killers for plaintiff.**

However, there are some types of evidence that can kill a plaintiff's statute of limitations claim or make it very, very difficult to win. If any of the following occurred more than a year before the plaintiff filed the lawsuit, the plaintiff will have severe statute of limitations problems:

- A licensing board complaint.

- A report of misconduct to the police.

- Diary entries indicating an awareness of the therapist's misconduct and harm from the misconduct.

- An entry in a subsequent therapist's records indicating discovery of misconduct and harm.

- Any meeting which occurred with a subsequent therapist in which the actions of the defendant were discussed. (Is the subsequent therapist going to say that he or she was told of the sex abuse and did not immediately inform the patient that the conduct was unethical and harmful? Maybe, but rarely, especially when the subsequent therapist has a duty to provide the patient with a handbook entitled "Professional Therapy Never Includes Sex.")

- A spouse, relative, lover or friend who testifies that the plaintiff reported the misconduct or the harm from the misconduct to them. (Again, is this person going to testify that they were told of the misconduct and encouraged the plaintiff to keep doing it? Although not quite as unlikely, since many friends and relatives will testify that the patient was so enamored with the therapist that they did not want to disturb the relationship -- but any spouse, lover, friend or relative who testifies under oath that they told the plaintiff that the plaintiff should get out of the relationship or seek legal or advice of another therapist will severely harm if not destroy the plaintiff's case.)

- Reports of the misconduct to medical doctors, particularly when it shows up in the doctor's notes.

- Letters or e-mails written by the plaintiff or to the plaintiff indicating discovery of misconduct or harm.

9. Conclusion: never wait to file -- you don't know what bad piece of evidence may bite you.

Because of the one-year statute of limitations, and in the case of a public entity, six-month statute of limitations, the lesson from all of this is that a plaintiff should proceed as soon as possible once discovering that they have been harmed by a therapist's misconduct.

L. Proving a Therapist's Misconduct.

1. Credibility is everything.

Sometimes the only proof of a therapist's misconduct will be the testimony of the plaintiff. If the plaintiff is credible, usually the plaintiff will win. This is why the credibility of a plaintiff is so critical.

a. People with credibility problems due to no fault of their own.

Some people, due to no fault of their own, have inherent credibility problems in a therapist abuse case. These include people who have:

- Psychoses, multiple personality disorder or other mental disorders that effect their "reality testing."
- Plaintiffs who have filed a number of prior lawsuits for emotional distress.
- People who allege that they were sexually abused by others as adults and the other people do not admit to the abuse or the abuse cannot be proven.
- Plaintiffs who are collecting government benefits such as health benefits or disability (private or public) benefits based on a psychological disability which pre-existed the relationship with the defendant or the end of treatment with the defendant.
- Plaintiffs who "have to" provide testimony that strains their credibility in order to preserve their case on the statute of limitations challenge.

b. Plaintiffs that create their own credibility problems.

Other people have credibility problems because they create their own problems by making statements under oath which are inconsistent with statements that they have made in the past to doctors, therapists, attorneys, judges, jurors or arbitrators in prior lawsuits.

c. **Because of the legal system, a defendant has far more opportunity to attack a plaintiff's credibility than a plaintiff has to attack a therapist's credibility.**

One of the most unfair aspects of a therapist abuse case, or actually any personal injury case, is the fact that because the plaintiff is claiming a psychological injury, the defendant is entitled to discover almost every medical record, school record, work record, therapy record, diary, letters and other documents that have anything to do with the plaintiff's psychological condition.

Since almost everything has something to do with a person's psychological condition, the defendant has the opportunity to discover thousands of pages of records and take the depositions of significant people in the plaintiff's life with the hope of finding something in the records or testimony of others to contradict the plaintiff's testimony.

This is why it is so critical for a plaintiff's attorney to order all of the plaintiff's records at the beginning of the case to refresh the plaintiff's memory before he or she testifies on statements made to others.

Unfortunately, since the mental state of the therapist is not at issue under California law, and the therapist's conversations with a spouse are privileged as are the therapist's conversation with and records of any other patient and the therapist's records of any other patient, there is very little opportunity for the plaintiff to impeach the therapist's testimony. This creates a very one-sided situation and makes it even more challenging for plaintiff to prevail on a he said/she said case.

2. Documentary evidence that can help prove plaintiff's case.

In addition to the testimony of the plaintiff, there are other documents in the plaintiff's possession which could help prove the case including diary entries, letters, journal entries and reports to other therapists and doctors.

However, a plaintiff must be cautious because it might be this very evidence that will be used against the plaintiff in the statute of limitations case if it indicates that the plaintiff was aware of the misconduct and the harm done by the misconduct more than a year before the lawsuit was filed.

3. Evidence of violations of the therapeutic container in a sexual abuse case.

In a case of sexual misconduct in which the defendant denies the misconduct, the plaintiff's testimony may be the only evidence available to prove the actual sexual misconduct (and under the law that can be enough).

However, plaintiff may be able to produce evidence that makes it more likely that the sexual misconduct occurred. This generally involves proof that the therapeutic container was violated. Although a violation of the therapeutic container does not necessarily indicate that sexual abuse occurred, it does indicate that the therapist had poor boundaries and a therapist with poor boundaries is more likely to have sexually abused the plaintiff.

4. Typical examples of evidence of boundary violations that may be admissible in therapist sexual abuse cases.

This type of proof can include:

- Other patients who come forward claiming sexual abuse or that the therapist violated the therapeutic container with them.

- Telephone bills which indicate the therapist's over-involvement with the patient or telephone calls to or from the places where the plaintiff claims inappropriate conduct took place.

- The therapist's appointment book which indicates that plaintiff was seen as the last patient of the day on most days, or otherwise indicates the opportunity for sexual abuse to have occurred during or outside of therapy sessions.

- Any documents which indicate that the defendant entered into a dual relationship with the plaintiff, particularly a business relationship. This could include contract and loan documents.

- Restaurant, hotel and motel receipts.

- The testimony of witnesses that the plaintiff and defendant were seen together outside of therapy.

- Gifts which the plaintiff gave the defendant and vice versa.

- Correspondence between the plaintiff and the defendant.

- Consultations which the defendant had with other therapists during the course of plaintiff's treatment.

- Physical evidence that indicates that the defendant was in the plaintiff's car or home.

- The therapist prescribing birth controls to the plaintiff.

- The plaintiff being able to testify to intimate details of the therapist's past or life.

- The plaintiff being able to describe in detail the therapist's home.

- The plaintiff being able to describe in detail the defendant's genitalia and other body parts which could not be known if the defendant had clothes on all the time.

- Recorded admissions of the defendant obtained by the police or licensing board (note that surreptitious recording conducted by the patient without authority of the medical board or the courts are not admissible into evidence).

- Answering machine or voicemail messages.

- Testimony of other therapists and patients in the same suite as the defendant who may have witnessed unusual or inappropriate conduct.

- Someone on the therapist's staff who may have noticed misconduct or unusual scheduling and billing practices.

- The therapist's bills which may indicate a shift in billing practices consistent with the plaintiff's claim.

5. <u>It is much easier to prove boundary violations than sexual misconduct</u>.

There are many more examples of potential proof, but the above list illustrates the principle that it is much easier to prove boundary

violations than it is to prove actual sexual misconduct. At the very least, if the plaintiff can prove a boundary violation, then she or he should be able to establish a negligence claim.

6. Defendant may admit sexual misconduct but deny sex occurred during treatment.

Of course, the defendant may admit to all or some of the misconduct (most frequently claiming that the misconduct began after therapy was concluded) or the plaintiff's attorney will be able to develop admissions or near-admissions of at least boundary violations at the defendant's deposition.

7. Plaintiff attorney may be able to impeach defendant based on limited records that are available.

Further, although plaintiffs' attorneys do not have as much material at their disposal to attack the credibility of defendants as the defense attorneys have to attack the credibility of plaintiffs, there is still some material available. Thus, a plaintiff's attorney may be able to obtain testimony from the defendant which is inconsistent with medical records, therapy bills, telephone bills or written reports to other doctors.

8. If plaintiff can attack defendant's credibility, plaintiff will be more likely to prevail on all key issues in the case.

If the plaintiff can mount a formidable attack on the defendant's credibility, then it is more likely that plaintiff will be believed on important issues in the case, such as standard of care violations, sexual abuse, intentional misconduct, causation and damages.

9. Psychological testing can help establish credibility of plaintiff and existence of a psychological injury.

Further, in some cases, particularly cases in which the plaintiff's "reality testing" or ability to perceive reality is called into question, it may be wise for the plaintiff to retain a psychologist to perform psychological testing on the plaintiff.

Psychological testing, which consists of mostly paper and pen tests, can rule out the possibility that the plaintiff is psychotic or has significant reality testing problems, and can verify the extent of the plaintiff's symptomatology, and many of the tests have scales which indicate whether or not the plaintiff is at least answering the questions on the test truthfully, thus increasing the plaintiff's overall credibility.

10. Lie detector tests.

Finally, although it is not admissible in court, a plaintiff can take a lie detector test or suggest that both the plaintiff and the defendant submit to lie detector tests with the results of the tests being useful for settlement purposes, or the parties can stipulate that the results of the tests can be admissible at the time of trial. Before a plaintiff's attorney makes this offer, the attorney should first submit the plaintiff to a lie detector test to make sure that the plaintiff passes the test.

M. The Importance of Retaining an Expert with Specialized Knowledge of Therapist Abuse.

1. Plaintiff must retain an expert with a specialty in therapist abuse cases.

The need for the plaintiff to retain an expert witness in a therapist abuse case, who has a great deal of knowledge of the subject matter, cannot be emphasized enough. Theoretically, any therapist would probably be qualified to testify to most of the issues in a therapist abuse case; however, there are important aspects of a therapist abuse case in which the case will be vastly improved with the testimony of a therapist with specialized knowledge.

2. If medication is involved in standard of care issues or is an important issue in damages, plaintiff must retain at least one psychiatrist or psychopharmacologist.

In a case in which medication is involved, either on liability or damage issues, the plaintiff must retain at least one psychiatrist or psychopharmacologist.

3. Expert on liability should be at least equal to the defendant on therapist food chain.

Further, although there are exceptions, a plaintiff wants to retain an expert whose licensing and training is at least as high as the defendant's. In other words, although there are exceptions, one does not want a psychologist testifying against a psychiatrist or an LCSW or MFCC testifying against a psychologist or psychiatrist.

4. Plaintiff's expert must have treated and evaluated a significant number of prior therapist abuse victims.

With the above limitations, the plaintiff must retain a psychotherapist who either has studied the abuse of transference phenomenon, written on the subject, treated at least a dozen people who have been abused by therapists, evaluated at least a dozen people who have been abused by therapists, is very familiar with the literature and understands the special issues in a therapist abuse case.

It will be very rare that the defense will be able to retain an expert with this type of background and knowledge of the phenomenon of therapist abuse. Although there are such experts who exist, and the insurance companies are trying to find and develop experts all of the time, it is very unlikely that the defense will be able to hire someone with a great deal of knowledge of therapist abuse to justify the defendant's misconduct or attempt to downplay the plaintiff's damages.

If the defense does manage to find somebody with these qualifications, plaintiff's expert needs to be able to match the defendant's qualifications. If the defense does not find somebody who specializes in therapist abuse, then the plaintiff is at an advantage.

5. Expert testimony on the standard of care.

In order to prevail on any issue other than sexual abuse, the plaintiff must present expert testimony to win on the issue of therapist negligence. This will be achieved by expert testimony that the defendant violated the standard of care.

An expert who reviews therapist misconduct cases frequently will be able to find and establish standard of care violations.

Believe it or not, there are many therapists who hold themselves out as experts who do not appreciate the importance of the therapeutic container and maintaining boundaries. These potential "experts" will not be very helpful in a therapist abuse case, and should be avoided as experts.

6. Abuse of the transference.

Experts who have studied dozens of cases will have a superior knowledge of the subtle techniques that a defendant can utilize to abuse the transference phenomenon and engage in an inappropriate relationship with the plaintiff. An expert therapist with less experience may not appreciate the subtleties of a case and may attribute some form of blame to the plaintiff for the development of the inappropriate relationship.

7. Insurance coverage.

An expert experienced in therapist abuse cases will no doubt have been apprized of the serious insurance coverage issues that can be involved in a therapist sexual abuse case. The expert will be able to tailor their testimony to emphasize the negligent misconduct and to testify that the most, if not all, of plaintiff's damages flow from negligent covered acts as opposed to intentional or sexual abuse.

8. Causation.

a. **Causation is a key issue.**

Causation is one of the key issues in a therapist abuse case. The defense may concede that the therapist is somehow at fault, but then will claim that the plaintiff was only minimally damaged by the defendant or not damaged at all because the therapist's misconduct did not cause the plaintiff's injury.

Causation is defined as a wrongful act that is "a substantial factor" in bringing about a plaintiff's injury and an expert with specialized knowledge of therapist abuse will be able to testify to the mechanism by which plaintiff was injured by the negligence and abuse of transference.

b. **Typical causation argument of defendants.**

Further, the expert will be able to rule out the typical claims of the defendant: that the plaintiff's condition pre-existed the relationship with the defendant, that plaintiff's damages were caused by stressors other than the defendant's misconduct, and that the plaintiff is suffering from a lifelong personality disorder that, by definition, cannot be caused by the therapist's abuse.

c. **Plaintiff's expert should be able to beat back causation defenses.**

An expert with specialized knowledge will be able to point out that the other stressors in the plaintiff's life had never caused the plaintiff serious difficulties before; that a personality disorder, like any disorder, can be grossly aggravated by a therapist's misconduct and, most importantly, that plaintiff's pre-existing psychological condition made the plaintiff more vulnerable to the

therapist's abuse, thus more damaged once the therapist violated his or her duty to the plaintiff.

d. **An expert with specialty in transference abuse will be able to testify that plaintiff's symptoms are consistent with symptoms caused by therapist abuse.**

Further, the expert will be able to testify that the damages from which plaintiff now suffers are very typical of the damages incurred by victims of therapist abuse; thus, creating an inference that it was the therapist abuse and not other factors that have caused the plaintiff's damages.

9. Increasing the credibility of plaintiff.

Just as an expert with specialized knowledge can testify to the fact that the damages that the plaintiff suffers from are typical of therapist abuse victims, he or she can also testify that plaintiff's report of the way the sexual relationship developed is consistent with other cases, thus increasing the likelihood that the plaintiff will be believed in the all-important credibility issue.

10. Expert testimony and damages.

a. **Every damage issue will be helped by testimony of specialized expert.**

The testimony of a specialized expert is critical on every potential issue of damage in a case.

b. **The importance of understanding the profound injuries that flow from therapist abuse.**

First of all, a specialized expert will understand the profound injuries that flows from therapist abuse including loss of self-esteem, self-blame, sleeplessness, eating disorders, loss of trust, anxiety, depression and other injuries that flow from therapist abuse.

Most significantly, the expert will be able to testify that the defendant not only severely injured the plaintiff, but took away the cure because the only way to cure the plaintiff's injury is through psychotherapy and the plaintiff's ability to trust another therapist has been severely compromised; thus, any future therapy is not likely to be completely successful and will require an inordinate amount of time being spent on the issue of trust and dealing with the plaintiff's injury caused by the defendant.

c. **Understanding the high cost of future treatment and possible long term hospitalization.**

It is also critical to have an expert with specialized knowledge on the issue of the cost of future therapy. Therapists without significant knowledge of therapist abuse may assume that a victim can be treated in one to three years.

However, therapists with expertise realize that it will usually require a long period of intensive psychotherapy followed by a gradually lessened period of therapy, some psychotherapy for the rest of the plaintiff's life to overcome the harm caused by the defendant. Further, the expert will understand that this therapy must be conducted by highly trained, therefore expensive, specialist.

Additionally, there are situations in which a very expensive, long term hospitalization is required before the plaintiff can recover enough or trust enough to begin outpatient therapy.

Thus, a therapist with sufficient expertise may testify that plaintiff will require $500,000 to $1,500,000 of future psychotherapy while a therapist without expertise may testify that the plaintiff needs $30,000 of psychotherapy in the future due to the defendant's misconduct. This can obviously have a huge effect on the outcome of the case, particularly in light of the $250,000 cap on emotional distress damages for the therapist negligence cause of action.

d. **Expertise in wage loss/loss of earning capacity.**

On the issue of wage loss, a therapist with expertise will understand that it may take years for a plaintiff who was working up until the time of the abuse to work again. A certain amount of self esteem, concentration, mood control and upbeatness is necessary for someone to exist successfully in the workplace. These are the very qualities which are often stripped away by abusive therapists.

Further, many women who have been abused by therapists were in marriages in which they were supported and, after the therapist's abuse, the marriage breaks up and the plaintiff now has to return to work. An expert will be able to testify how the necessary ability to return to work has been compromised by the therapist's abuse.

11. Expert testimony and the statute of limitations

The date on which a plaintiff discovered that they were injured by the therapist's misconduct will be a critical issue in the case. A non-sophisticated psychotherapist will not be able to understand why it took so long for the plaintiff to discover the injury and come forward. However, a therapist with expertise in this area will be able to testify that more frequently than not, it takes a plaintiff more than a year after the termination of the relationship to discover harm; that it is virtually impossible for the plaintiff to discover or take any action during the continuation of the therapy and that it is the very abuse of the transference by the therapist that prevented the plaintiff's discovery and prevented the plaintiff from taking action sooner.

When the defendant files a summary judgment motion on the grounds of the statute of limitations attempting to have plaintiff's case dismissed by a judge, the plaintiff will be able to obtain a declaration from this expert which will set out all these principles and state the expert's opinion that the plaintiff did not discover harm caused by the defendant's misconduct until within one year of the filing of the lawsuit.

12. Expert testimony to meet the consent defense.

Unfortunately, a plaintiff's consent is still an issue in most therapist abuse cases. An expert with a specialty in the field of therapist abuse will be able to explain how the dynamics of psychotherapy and the transference phenomenon make it impossible for a patient to consent to any type of sexual relationship with a therapist even if the patient throws himself or herself at the therapist and insists on a sexual relationship.

N. Damages.

1. Damages from therapist abuse are usually devastating.

The damages that flow from therapist abuse are almost always devastating and permanent. In a legal case, a plaintiff is entitled to recover on a number of different elements of damages:

2. Past and future medical expenses.

a. **Past treatment expense including money paid to defendant.**

A plaintiff is entitled to recover for all past and future therapy expenses and medical expenses, including medication, that were caused by the therapist's abuse.

The past therapy expense claim will begin with an attempt to recover all of the money paid to the defendant for the worthless and bogus therapy. In addition to that, a plaintiff is entitled to recover for all therapy and medical expenses related to the therapist's misconduct up until the time of trial.

b. **Future treatment and hospitalization expenses.**

Future psychotherapy expense will be a major issue in a therapist abuse case. As was explained in section M x, c., a plaintiff, who has been the victim of therapist abuse, may require a lifetime of psychotherapy, a long period of intensive psychotherapy, occasional hospitalizations and sometimes a long term hospitalization.

c. **Need for treatment caused by destabilization.**

The need for this amount of treatment is caused by the abuse of the transference which seriously destabilizes the patient and makes them hard to treat because they can no longer trust.

d. **Need for intensive treatment and hospitalization caused by the "double bind."**

In addition, it is well known that victims of transference abuse suffer from an impossible double bind where, in order to be helped they must be able to stop blaming themselves and put the blame on the therapist where it belongs. However, to put the blame on the therapist requires the plaintiff to accept the fact that the therapist never had the plaintiff's best interest at heart and was lying when telling the patient how special and wonderful and attractive the patient was. For the patient to accept that all these statements that contributed to their "transference fantasy" and made them feel special for the first time in their life were a lie frequently makes them suicidal. The other part of the double bind is that if the patient is not able to blame the therapist, then they must blame themselves and this self-blame leads to serious and destructive depression and anxiety which can, once again, make the patient suicidal.

Thus, many victims of therapist abuse are at high risk for suicide and in the more severe cases, may require long term hospitalization so that they can be carefully monitored as they go through the process of coming to terms with the fact that they were exploited and abused.

e. **Future hospitalization and treatment can cost $500,000 to $1,500,000.**

Future therapy and medical expenses in a therapist abuse claim can easily fall within the $500,000 to $1,500,000 range or even higher.

The defense, of course, will hire an expert who will testify that with one or two years of one-time-a-week therapy, the plaintiff will be all better.

f. **Presence of a large award for future treatment helps overcome the MICRA general damage limitations.**

Also in cases with a cause of action for therapy negligence, which is almost all cases, the defense will be able to enter any evidence that past or future therapy and medical expenses will be paid by an insurance company. A plaintiff should argue that any future payment will be speculative.

3. Past and future wage loss and loss of earning capacity.

Plaintiff is entitled to recover for all lost income caused by the defendant's misconduct up until the time of trial. In addition, the plaintiff is entitled to recover for any future wage loss or diminution in earning capacity.

The potential recovery for loss of future earning capacity is critical in the case of a plaintiff who was not working at the time of the therapy abuse. A plaintiff in this situation can still establish a loss of earning capacity if she or he can prove that but for the defendant's misconduct, they now would be able to work. And in the case of a spouse that did not have to work, but now has to because the therapist's abuse has resulted in a divorce, that the plaintiff is not able to work up to her or his capacity if at all because of the therapist's abuse.

4. Damages for pain, suffering and emotional distress.

a. **Therapist abuse creates an incredible amount of emotional distress and suffering.**

"General damages," as they are called in the law, include damages for emotional distress and pain and suffering. There is probably no type of personal injury case that creates more emotional distress and pain and suffering than a therapist abuse case.

b. **Suffering in every sphere of functioning and existence.**

Victims of therapist abuse generally suffer in every sphere of their lives and existence. Their inner life is tormented; their spiritual life is compromised; their social life is usually devastated; their sexual life is frequently impaired; they usually develop physical symptoms such as gastrointestinal problem and headaches from the emotional distress; and, if they are able to work, their ability to enjoy it is ruined.

Most victims of therapist abuse will develop some or all of the following symptoms:

- Grief.
- Sense of betrayal.
- Anger.

- Loss of self-esteem.
- Suicidal ideations or plans.
- Loss of relationships.
- Loss of independence.
- Loss of identity.
- Loss of hope.
- Loss of hope of ever recovering from childhood abuse or their illness.
- Poor body image.
- Loss of ability to enjoy children.
- Interference or destruction of a romantic relationship including marriage.
- Sleep disturbance.
- Eating disturbance.
- Loss of dignity.
- Loss of self-respect.
- Loss of ability to be close to people.
- Loss of trust.
- Loss of ability to trust therapists.
- Loss of ability to trust any person of the opposite sex (or in same-sex abuse, the same sex).
- Loss of ability to trust any doctor, thus a dangerous hesitancy to seek needed treatment.
- Post traumatic stress disorder-like flashbacks of the abuse.
- Loss of ability to trust one's own judgment.

- Loss of confidence.
- Loss of faith.
- A feeling of loss of years of one's life.
- Severe isolation.
- Abandonment of relationships with others.
- Others abandoning relationships with the plaintiff.
- Confusion.
- Intrusive thoughts.
- Extreme anxiety.
- Severe depression.
- Loss of concentration and ability to focus.
- Fear of encountering the defendant and/or people that remind the plaintiff of the defendant.
- Guilt.

c. **Emotional distress damages and the MICRA $250,000 cap.**

The list above represents just a list of the typical consequences to the patient that flow from therapist abuse. A plaintiff is entitled to recover as general damages the full amount of money that a jury, in its wisdom, decides to award for these elements of damage unless they are limited by MICRA. To repeat, the MICRA cap on general damages applies only to causes of action for negligence. A plaintiff's award for damages flowing from intentional and sexual abuse will not be limited by the $250,000 sex cap.

O. Claim for Loss of Consortium.

A plaintiff's spouse can also sue and recover damages for 'loss of consortium." A spouse is allowed to recover damages for the loss of society, comfort and care that result from the injured spouse's unavailability due to their injury and having to watch the plaintiff suffer. In order to recover these damages, a spouse must be named as a party to the lawsuit and must have been married to the plaintiff at the time of the injury.

There are advantages and disadvantages to filing a loss of consortium claim that should be discussed with an attorney before filing.

P. Punitive Damages.

Under California law, if a plaintiff can prove that the conduct of the wrongdoer was fraudulent, malicious or despicable, he or she is entitled to recover punitive damages which are intended to punish the wrongdoer and provide an example for the rest of society. The focus of this type of case is generally on the wrongdoing of the defendant as opposed to the injury to the plaintiff. The amount of punitive damage will vary depending upon the heinousness of the defendant's misconduct and his or her economic status.

Q. Trial of a Therapist Malpractice/Abuse Case.

1. Trial generally.

The trial of any case is an art and the trial of a psychotherapist abuse case is a particular art. A few of the more important aspects of the trial of a therapist abuse case are mentioned below.

2. Motions **in limine**.

a. **Plaintiff will try to exclude potentially harmful evidence**.

Before the trial begins, each side has the opportunity to persuade the judge to exclude evidence for the jury's consideration during the course of the trial. The plaintiff, as much as possible, must attempt to exclude evidence that will tend to prejudice a jury against him or her including:

- Evidence of unsubstantiated prior claims of sexual abuse by plaintiff as an adult.
- Evidence of prior lawsuits.
- Evidence regarding sexual history.
- Evidence of past drug or alcohol abuse unless it is a key issue in the case.
- Any criminal history.
- Any other evidence which the plaintiff believes may be harmful to the case.

The chances of this evidence being excluded in a psychological injury case are not as good as the chances would be of excluding the evidence on a physical injury claim because, in a psychological injury case, the plaintiff's entire psyche is at issue and almost everything can have some effect on the plaintiff's psyche and thus be considered relevant. However, the plaintiff can still claim that some of the evidence is irrelevant and prejudicial.

b. **Typical motions to exclude evidence by the defendant.**

The defense will try to exclude evidence of:

- Prior misconduct on the part of the defendant.
- Any negative testimony of other patients of the defendant.
- Any evidence of misconduct with other patients that coincided with the misconduct with the plaintiff or occurred after the misconduct with the plaintiff.
- Any evidence of treatment of other patients.
- Any prior lawsuits against the defendant.
- Any evidence of defendant's own psychiatric treatment.
- Any disciplinary action against the defendant.
- Any allegations of sexual abuse by the defendant.

A plaintiff must be prepared to meet these motions and hopefully prevail because some of the above evidence could be the very key to winning the case.

3. Jury selection in therapist abuse cases.

a. **Jury selection may be the difference between winning and losing.**

Jury selection is a critical phase of any trial. The makeup of the jury may very well determine the plaintiff's chance of winning or losing and/or obtaining a large verdict.

b. **Focus groups.**

Performing focus groups before jury selection is sometimes a helpful tool to ascertain which jurors will be helpful or harmful in a particular case.

c. **General principles for plaintiff in jury selection.**

With the recognition that there are always exceptions, the following general principals would hold true for jury selection from the plaintiff's point of view in a psychotherapist abuse case:

Since proving plaintiff's case and damages will ultimately depend upon the sophisticated theory of transference and the abuse of transference, a plaintiff generally wants sophisticated jurors who won't "blame the victim" and who will understand how the abuse of transference caused such severe injuries.

Jurors who have been in positive intensive psychotherapy relationships will generally be able to better understand the plaintiff's claim and why the plaintiff went along with the abuse.

Jurors who believe in psychotherapy or are in the counseling professions will usually be outraged by the defendant's misconduct and be good jurors.

Although at first blush, potential jurors who don't believe in therapy and don't like therapists would seem like they would be good jurors for plaintiffs; they usually are not. This is because they "expect" this type of behavior out of therapists and will believe that the plaintiff was "stupid" for going to a therapist in the first place and they would "have just slapped" the therapist and walked out.

d. **Additional helpful questions for jurors.**

Questions that are asked of the jurors should focus on their appreciation of the significance of psychological injury as opposed to physical injury and their ability to accept and respect the testimony of psychotherapists.

4. Opening statement in therapist abuse cases.

The plaintiff's opening statement, which sets the tone for the rest of the trial, should be focused almost entirely on the plaintiff's vulnerability, the psychological power which the defendant had over the plaintiff, the differential between the power of the patient and the defendant because of the defendant's experience, training, knowledge and the existence of the transference phenomenon. Focus should always be on the strength of the defendant versus the

weakness of the plaintiff due to deep seated vulnerabilities which have existed since childhood.

Finally, opening statement should explain the transference phenomenon and how the defendant abused it, to the defendant's advantage and the plaintiff's disadvantage.

5. Order of witnesses in therapist abuse cases.

a. **Plaintiff's expert must be called as the first witness.**

The first witness in a therapist abuse case should be the plaintiff's expert who will testify to all of the information reviewed, to his or her special knowledge on the subject of therapist abuse, and to opinions regarding the defendant's negligence, other misconduct and how those wrongful acts caused plaintiff's damages and the extent of plaintiff's damages. The expert "sets the table" for the juror's receptivity to all of the testimony and evidence which will follow.

b. **Plaintiff should next call defendant as an adverse witness.**

After plaintiff's expert has established the standard of care and how defendant has devastated plaintiff by abusing the transference phenomenon, the defendant should be called as an adverse witness and cross-examined on his or her failure to maintain the practice up to the standard of care, failure to maintain boundaries and the knowing abuse of the plaintiff. It is critical that plaintiff's attorney strips defendant of any credibility, deprives the opportunity of being rehabilitated by direct examination of defense counsel and makes the fact of the relationship between plaintiff and defendant indisputable.

c. **Other therapists and before and after witnesses and other experts.**

Next, the plaintiff should call any therapist or doctor whom the plaintiff saw before or after the defendant followed by lay people who will be able to describe how the plaintiff was before or after the relationship with the defendant or, preferably, both.

If necessary, an economist and a vocational rehabilitation counselor can be called to testify.

d. **Plaintiff should always be called after plaintiff's expert, preferably as the last witness.**

Under no circumstances should the plaintiff be called before the expert witnesses -- cross-examination of the plaintiff before plaintiff's expert testified would be like throwing the plaintiff to the wolves.

Instead, the expert will already have explained why plaintiff could not have consented to, or even for a time enjoyed, the relationship and why, in certain circumstances, the plaintiff will not be an attractive witness to the jurors.

Further, the expert will explain the reasons why plaintiff did not discover defendant's abuse and sue sooner on the statute of limitations issue which will help protect plaintiff from tough cross-examination questions on this issue like "Didn't you know it was wrong to have sex with your therapist before the relationship even began?"

The testimony of the plaintiff should be as short as possible covering the necessary bases. The longer the plaintiff is on the stand, either in direct or cross-examination, the more likely they are to make a mistake or appear "too healthy."

e. **Plaintiff should not be at trial except when testifying.**

Further, the plaintiff should not be present during the trial except to testify because as the expert witness will explain to the jury, it will be a further detriment to the plaintiff's psychological condition to hear all of the testimony. There may be exceptions to this rule in certain cases where the focus of the case is more on defendant's bad conduct than plaintiff's injuries -- but still, plaintiff should not sit through testimony wherein everybody is testifying to how injured he or she has become. It is bad for the plaintiff and looks bad.

6. Cross-examination of the defendant's expert.

a. **Recognizing the "no win" choice of the defendant and the defendant's expert.**

The key to cross-examining the defense expert in a psychotherapist abuse case is recognizing the fact that the defense and the defendant's expert must make a "no win" choice during the course of the litigation.

That is, the defense must decide whether to help their causation and damage case by attempting to establish that the plaintiff was seriously mentally disturbed before the relationship with the defendant, or to help their liability and consent defense by establishing that the plaintiff was relatively well put together mentally at the time the therapist and patient began the sexual relationship; thus arguing that the plaintiff was fully capable of consenting to the relationship, entered into it by free will and, there was either no transference or minimal transference because the plaintiff was so sophisticated and healthy that there was a level playing field between the defendant and the plaintiff.

b. **Don't let the defendant have it both ways: make the expert choose one or the bad choices.**

The defense will try to have it both ways but it cannot, i.e., if the plaintiff's attorney recognizes this dilemma, he or she will be able to exploit the defense's effort to paint the plaintiff as severely disturbed when plaintiff entered therapy for the purposes of the jury's damage evaluation; however, will switch gears and describe the plaintiff as well put together at the time that the sexual relationship began to somehow excuse or minimize the defendant's misconduct.

c. **Don't let the defense expert juggle.**

In some cases, the defense will attempt to perform this juggling act by claiming that the plaintiff was, in fact, deeply disturbed before plaintiff met the defendant; however, the defendant essentially "cured" the patient and then entered into the sexual relationship. Point out in cross-examination of the expert that the supposed "cure" was in fact a "transference fantasy" which was a sign plaintiff was decompensating as the plaintiff's core self was being destabilized.

Further, make the point through cross-examination and later argument, that this supposed cure does not really help defendant, because it still creates a baseline of a "cured" patient at the time that the sexual relationship began compared to a plaintiff who is now suffering from major psychological symptoms and disability.

d. **Once defendant's expert is forced to commit to one of the uncomfortable choices, a plaintiff attorney must jump on defendant's expert.**

Thus, whichever road the defense decides to travel down, the plaintiff's attorney will automatically have great material for the cross-examination of the defendant's expert.

For instance, if the defense chooses to take the position that the plaintiff was healthy at the time of the beginning of the sexual relationship, the plaintiff's attorney can obtain admissions from the defense expert that the plaintiff is now severely destabilized and decompensated (they usually cannot deny this) and plaintiff was supposedly not in this condition before the abuse began.

On the other hand, if the defense attempts to state that plaintiff was deeply disturbed before the relationship with the defendant and therefore is no worse off now than before, the plaintiff's attorney will be able, on cross-examination, to establish that the plaintiff was deeply in need of help when plaintiff met the defendant; that the playing field between the defendant and the plaintiff was extraordinarily unequal due to the extent of plaintiff's psychological disturbance; that the plaintiff, because of deep seated neediness, had an intense transference with the defendant and was utterly unable to consent to the relationship.

Further, the last thing that somebody in this condition needed was to be taken advantage of by somebody whom they paid to help them.

Whether the defense expert comes out and admits it or not, the jurors will get the picture that plaintiff has been severely exploited just by the questions above if they are properly phrased.

7. Closing argument in a therapist abuse case.

a. **Key theme is exploitation of a vulnerable patient.**

The key to closing argument for the plaintiff in a therapist abuse case is the plaintiff's attorney's understanding that large damage awards in psychotherapist abuse cases almost always flow from the jurors' anger of the therapist's exploitation of a vulnerable patient.

Thus, the theme of the closing argument should be that the therapist, someone whom we, as a society trusted to treat and care for the most vulnerable amongst us, those with mental disorders stemming from bad childhoods, has, by abusing the transference phenomenon that they were trained in, violated not only the plaintiff but all of us whose family and loved ones may some day require the treatment of a psychotherapist. We as a society licensed the defendant, and the therapist violated the sacred trust put on them by the plaintiff and all of us as a community.

This argument focuses the jurors on the bad conduct of the defendant and the fact that they should be personally affronted by this conduct and do something about it by awarding a large verdict to the plaintiff.

b. **Arguing causation.**

In terms of causation, the plaintiff's attorney should use, amongst other things, the cracked vase analogy, stating to the jurors that before plaintiff's relationship with the defendant, he or she had deep seated vulnerabilities and problems which caused them to be fragile but still functional. Plaintiff's attorney can then draw a picture of a vase which has fallen off a table due to the wind coming through a window and has a crack in it; however, plaintiff attorney will explain, the vase can be put back on the table and still hold water and flowers despite the crack. It's not the beautiful vase it once was, but it is functional.

Plaintiff's attorney can then analogize the abuse of the defendant as yet another strong wind blowing through the window, but this time, because the vase had a crack in it, it now shatters when it falls and is no longer functional, like the plaintiff. The defendant has shattered the plaintiff so badly, she can never be put together again. Psychotherapy, the only glue that could work, does not work because defendant has deprived plaintiff of a cure by stripping away her ability to trust which is necessary for treatment to work.

c. **Arguing loss of peace of mind.**

In terms of damages the key argument for a plaintiff's attorney is that the plaintiff has lost peace of mind as a result of the defendant's misconduct. Peace of mind is the most valuable treasure that we have as human beings. Someone can have the most severe physical injury or disability and, as long as they have their peace of mind, they can still lead a satisfactory life. However, when someone is stripped of peace of mind, life becomes pleasureless, pain ridden and a life without hope. That is always, along with the

loss of hope, the element of the damage that was caused to the plaintiff as a result of the defendant’s abuse.

R. Settlement.

1. Settlement of therapist abuse cases generally.

Therapist abuse cases, at times, can be amongst the easiest cases to settle and other times, the hardest.

a. **In a valid case, the therapist would usually like to settle quickly but the insurance companies will resist settlement.**

Especially in cases in which psychotherapists have sexually violated patients, when the plaintiff brings a claim or lawsuit, the therapist and the attorneys for the therapist usually realize that it is in the defendant's best interest to settle the case quickly before there is a lot of bad publicity and bad evidence created for the licensing board action. In a case in which the therapist has significant assets, or there are clear acts of insurable negligence, so that the insurance company will want to come to the bargaining table early, a therapist abuse case can settle within a few months of the date that a claim or complaint is initially filed.

b. **If the therapist has no insurance, the claim can still be settled early, but usually for less money.**

If it becomes clear that the therapist does not have any insurance that will cover the claim, and it is a clear liability case against the therapist, there is very little reason for the therapist to fight the claim hard, pay a lot of money in attorneys fees, only to pay fees and a settlement for the plaintiff or go into bankruptcy.

In these situations, if the plaintiff is willing to settle the case for less than value, which the plaintiff almost has to do because there is no reason to pursue a verdict which is not going to be collectible, the case can also settle early.

c. **Settlements can be very involved and delayed if the defendant and the defendant's insurance carrier are at war over who will pay a claim.**

In a case in which the therapist has or does not have significant assets, but the therapist's insurance carrier is insistent on defending the case aggressively, but resistant to paying the

plaintiff any money in settlement, a settlement will normally be delayed for months or sometimes over a year while plaintiff attorney, insurance coverage counsel, the therapist's personal attorney and the attorney hired by the insurance company to defend the therapist more or less simultaneously, battle out liability, damages and insurance coverage.

In this situation, the therapist and the patient are almost aligned in a desire that the insurance company pay the patient significant money to end the litigation, but the insurance company wants to rely on its coverage limitations or exclusions.

d. **If a licensing board action has been filed, settlement can be delayed while the therapist uses the civil case to defend the licensing board action.**

If plaintiff files a licensing board action at the same time or before filing a lawsuit, the therapist's personal attorney might reach the decision that the therapist is better off aggressively defending the civil case. This is because the therapist's insurance company will have to pay for the civil case defense whereas usually they do not have to pay for the licensing board action defense. Further, in the licensing board action, the therapist can perform very little discovery to help defend the case. However, in the civil action, there is almost an endless amount of discovery that can be performed.

This is one of the reasons why it is generally wise for a plaintiff to file a civil case before a licensing board action case.

2. Evaluating a therapist abuse case for settlement.

a. **There is almost always a disconnect between the "value" of a settlement in a therapist abuse case and the actual settlement number.**

Therapist abuse cases rarely settle for their full value because, one, the therapist usually does not have enough money to pay full compensation and, two, plaintiff has to discount the possibility or probability that the insurance company exclusions and limitations may prevent them from recovering the full amount of a potential verdict against the therapist's insurance company.

b. **The verdict value of a therapist abuse case can be in the millions of dollars.**

Many therapist abuse cases that have gone to trial have resulted in multimillion dollar verdicts. The reason for this is a combination of the jurors' anger at the therapist exploiting a patient; the devastating emotional distress damages caused to a therapist abuse victim; and the high cost of future psychotherapy and loss of income normally associated with the damages to victims of therapist abuse.

However, it does the plaintiff little good to obtain a multimillion dollar verdict unless it can be collected. This must be taken into consideration in settlement.

c. **A therapist abuse case should be settled on a risk analysis basis, not an actual determination of plaintiff's damages.**

Most personal injury and medical malpractice cases are settled by a studied analysis of the plaintiff's chances of winning and the actual monetary value of damages to the plaintiff.

This formula simply does not work for therapist abuse cases. The fact is that if the case is tried, the plaintiff will either receive a verdict far in excess of what anybody could have predicted for a damage award, or far below the expected damage award or the plaintiff will lose.

Thus, on an individual basis, the plaintiff attorney should attempt to accurately assess how angry a jury will become at a therapist's misconduct; how likely the jury will be to transfer that anger into a large verdict for the plaintiff and what are the chances of plaintiff losing or being unsympathetic in front of a jury. Those are the risks on both sides of the equation.

d. **What steps a plaintiff attorney can take to increase the settlement value of a therapist abuse case.**

Performing the following will increase the settlement value of a therapist abuse case for plaintiff:

- Plead many acts of negligence in the complaint, separate from the sexual misconduct. This will increase the likelihood of insurance coverage.

- Establish that plaintiff was extraordinarily vulnerable due to childhood trauma, but functioning fairly well at the time of the therapist's abuse.

- Obtain evidence and make arguments that the therapist took advantage of a very vulnerable patient who came to the therapist for help.

- Ensure, as best as possible, that the plaintiff will not lose on the statute of limitations.

- Retain an expert who specializes in therapist abuse cases to explain the power differential between a therapist and a patient and testify that plaintiff will suffer hundreds of thousands or millions of dollars of losses as a result of the therapist's misconduct.

This article was authored by John D. Winer. The Law Offices of John D. Winer specializes in catastrophic physical, psychological injury cases and wrongful death cases. The firm handles a significant number of catastrophic injury, traumatic brain injury, elder abuse, sexual abuse and harassment, post traumatic stress disorder and psychotherapist abuse cases. Please visit JohnWiner.com for more information or for a free online consultation.