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LIABILITY FOR FAILURE TO SUPERVISE ADEQUATELY MENTAL HEALTH ASSISTANTS, UNLICENSED PRACTITIONERS AND STUDENTS

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I. INTRODUCTION

In order to meet entry level requirements for independent professional practice, mental health professionals are required to obtain relevant supervised experience under an experienced professional.¹ For example, clinical psychologists in training programs approved by the American Psychological Association must obtain a minimum of 400 supervised practicum hours of training and a minimum of 1,500 hours of predoctoral internship training to qualify for a Ph.D. degree.² In addition, many states require an additional minimum of 1,500 hours of supervised training before the psychologist is eligible for licensure.³ Despite the necessity for extensive supervision of mental health practitioners, there have been relatively few lawsuits arising from the failure to supervise adequately mental health assistants, unlicensed practitioners and students.⁴ The relative lack of litigation in this area may be because attorneys, due to relatively little formal clinical training, may fail to notice the possibility of training-related injuries.⁵ Nevertheless, the failure to supervise adequately may result in liability under a variety of legal

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1. See Steven R. Smith, *Liability and Mental Health Services*, 64 AM. J. ORTHOPSYCHIATRY 234, 240 (1994).

2. See AMERICAN PSYCHOLOGICAL ASS'N, *CRITERIA FOR ACCREDITATION: DOCTORAL TRAINING PROGRAMS AND INTERNSHIPS IN PROFESSIONAL PSYCHOLOGY* 7, 18 (1979).

3. See CAL. CODE REGS. tit. 16, § 1387 (e)-(f) (1997). California requires two years of satisfactory supervised professional experience, one of which must be completed after being awarded a doctoral degree. A year of professional experience is defined as not less than 1,500 hours. CAL. CODE REGS. tit. 16, § 1387 (e)-(f) (1997).

4. See STEVEN R. SMITH & ROBERT G. MEYER, *LAW, BEHAVIOR, AND MENTAL HEALTH: POLICY AND PRACTICE* 3-43 (1987). As these authors note, there are few reported legal cases involving injuries suffered as a result of poor treatment by students.

5. See *id.* at 27.

theories.⁶

The purpose of this article is to explore the various theories of legal liability under which supervisors and mental health professionals may be held, and to examine the underlying ethical basis for such liability. The starting point for assessing liability can be found in state licensing laws. In addition, there are a variety of legal theories of liability. The practice of supervision is also guided by a variety of ethical documents and a rapidly growing professional literature. From an analysis of the basis of liability and the relevant literature, guidelines for a general standard of care are proposed. Finally, reform in this area must include methods for disseminating and promulgating appropriate standards of care.

II. STATUTORY BASIS

In evaluating liability and defining a standard of care for supervision, it is useful to look at legislative mandates as well as relevant judicial decisions. Three major issues are: Who is qualified to supervise? What is supervision? Who is in need of supervision?

With fifty different states each with its own regulations, there are, of course, at least fifty different approaches to these issues. However, certain important patterns can be discerned. An analysis of the pertinent statutory schemes in Delaware, California, and Ohio illustrate these patterns.

A. Delaware

For most states, a qualified supervisor is one who has practiced under a relevant license in the state. In Delaware, for example, the state licensing law for psychologists⁷ defines "supervising psychologist" as someone who has been licensed for two years.⁸ As in most states, Delaware defines supervision in terms of face-to-face consultation between the supervisor and supervisee (i.e., psychological assistant).⁹ In addition, Delaware law holds the supervisor responsible for ensuring that the "quality of the service rendered by the psychological assistant [is] consistent with the person's education, training, and experience."¹⁰ Thus, the supervisor is required to prevent the supervisee from functioning beyond his or her competence.

The requirement of ensuring that the supervisee does not practice beyond his or her competence has important implications. Implicit in this re-

6. See Steven R. Smith, *The Legal Liabilities of Mental Health Institutions*, 21 ADMIN. POL'Y IN MENTAL HEALTH 379, 381 (1994).

7. See DEL. CODE ANN. tit. 24, §§ 3501-3520 (1996).

8. *Id.* § 3502(7) (1996).

9. See *id.* § 3502(8). Note that nearly all state laws governing the practice of psychology require face-to-face supervision. Further note, however, that few state laws specify the standard which the supervisor is to use to monitor the supervisee.

10. *Id.*

quirement is that the supervisor is familiar with the supervisee's qualifications, training, and experience. Keeping supervisees within their level of competence also requires ongoing assessment of that competency as well as active monitoring. Further, to meet this responsibility, the supervisor must have sufficient control over the supervisee.

Failure to meet the standards of supervision may result in revocation of the supervisor's license. In *Masterson v. Board of Examiners of Psychologists*,¹¹ a Delaware licensed psychologist, Jill Masterson, appealed the decision of the Board of Examiners of Psychologists to revoke her license to practice psychology. Masterson had been supervising Susan Wellington, a psychological assistant. Wellington, in turn, was counseling a woman with whom she had a social relationship and a common circle of friends. Such dual relationships are unethical, and in Delaware, the ethical standards for psychologists are specifically referenced in the Delaware law.¹²

The Delaware Psychology Board held that Masterson failed to monitor and/or control relationships involving her supervisee, Susan Wellington. It found that Masterson failed to properly supervise Wellington, such as to prevent the exploitation of her professional relationships. In affirming the Board's decision to revoke Masterson's license, the Delaware Appellate Court emphasized the supervisor's responsibility for controlling the actions of the supervisee.¹³

Depending on the jurisdiction, violation of a statute may constitute

11. *Masterson v. Board of Examiners of Psychologists*, No. 95A-03-011, 1995 LEXIS 589 (Del. Super. Ct. Dec. 29, 1995).

12. Delaware law provides:

(c) Psychologists who employ or supervise other professionals or professionals in training accept the obligation to facilitate the further professional development of these individuals. They provide appropriate working conditions, timely evaluations, constructive consultation, and experience opportunities . . .

(d) Psychologists do not exploit their professional relationships with clients, supervisees, students, employees, or research participants sexually or otherwise

Masterson, 1995 LEXIS 589, at *15, citing AM. PSYCHOLOGICAL ASS'N., ETHICAL STANDARDS FOR PSYCHOLOGISTS (1977).

13. The court stated:

Nothing in this chapter shall be construed to prevent psychological assistants from rendering psychological services, other than diagnosis and formulation of a treatment plan, under the direct supervision and control of a licensed psychologist pursuant to the rules and regulations adopted by the Board; provided however, that such psychological assistants shall have obtained educational training of at least a master's degree in psychology or related field and shall render such psychological services from the office of the supervising psychologist who shall be responsible for the services rendered by the psychological assistant acting under his direction and control

Id. at *13-*14 (citing AM. PSYCHOLOGICAL ASS'N., ETHICAL STANDARDS FOR PSYCHOLOGISTS (1977)).

negligence per se,¹⁴ in which negligence is presumed and cannot be rebutted.¹⁵ In jurisdictions such as California, violation of a statute creates only a rebuttable presumption of negligence.¹⁶ Thus, given a violation of the licensing statute in California, the burden shifts to the supervisor to prove that he or she was not negligent.

B. California

In California, the requirements of primary supervisors are codified in Section 1387 of the Code of Regulations.¹⁷ A qualified "primary supervisor" must be a licensed psychologist or board certified psychiatrist, with a minimum of three years of professional experience following licensure.¹⁸ A supervisor may not have a family or interpersonal relationship with the supervisee.¹⁹ In addition, a licensee may not supervise a supervisee who is, or has been, a psychotherapy client of the supervisor.²⁰ Finally, a qualified primary supervisor must be engaged in the same work setting a minimum of 50% percent of the time, and at the same time as the person being supervised.²¹ Presumably, this on site requirement will ensure that the supervisor has ample opportunity to monitor and control the work of the supervisee.

California law requires all supervisees to maintain written weekly logs of all hours of supervised experience.²² California law further requires the supervisee to obtain the supervisor's signature on the log, and to record the specific work setting in which the work took place, dates, the nature of the interaction (e.g., individual, group, face-to-face), and the professional services or work performed.²³ As in Delaware, a psychologist's license may be

14. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 229-31 (5th ed. 1984 & Supp. 1988).

15. See *id.*

16. See *Salinero v. Pon*, 177 Cal. Rptr. 204, 211 (Cal. Ct. App. 1981) (construing CAL. EVID. CODE § 669 (DEERING 1996)).

17. CAL. CODE REGS. tit. 16, § 1387 (1997).

18. *Id.* See, e.g., Medical Board of California, *Regulatory Agency Action*, 15 CAL. REG. L. REP. 59 (1995). At its November 5, 1995 meeting in Sacramento, California, the Board of Psychology ("BOP"), a state regulatory agency for psychologists, created an ad hoc committee to analyze the issue of statutory qualifications for supervisors, and whether a training program for supervisors would ensure higher quality supervised experience than the present rigid three year requirement.

19. See CAL. CODE REGS. tit. 16, § 1387.3 (1997). The term interpersonal relationship is not defined further. Apparently, the BOP can make this determination on a case by case basis. However, when evaluating the qualifications of any psychologist, whether licensed or in training, the prudent attorney can inquire into the qualifications of each supervisor, and whether there was an undisclosed interpersonal relationship between supervisor and supervisee.

20. See *id.* § 1387(s).

21. See *id.* § 1387(b).

22. See *id.* § 1387(t).

23. See *id.* § 1387 (t)(1)-(7).

revoked for inadequate supervision.²⁴

An issue that has been a source of litigation concerns whether a psychological assistant can be considered an agent of a treating psychologist. In *Bergental v. Workers' Compensation Appeals Board*,²⁵ a licensed psychologist, Karl Bergental, conducted psychological testing and clinical evaluation of an injured worker. The psychologist then referred the worker to his psychological assistant to perform psychotherapy. Dr. Bergental argued that he complied with California's statutory requirements for supervision because he formulated a treatment plan, worked solely with the patient on a number of occasions, interpreted test results, and used all this information to guide the supervised psychological assistant. Further, he was located on the premises and met on a weekly basis with the assistant to discuss treatment plans.

At issue was the defendant's failure to reimburse for services provided by the psychological assistant. The court found that the assistant was qualified to treat the applicant pursuant to Section 2913 of the Business and Professions Code²⁶ and opined that the supervisory activities described by Dr. Bergental met that standard.²⁷ The court held that the supervisor was eligible for reimbursement because the assistant can be considered an agent of the treating psychologist.²⁸

As is the case in Delaware, the California supervisor has an implicit responsibility to monitor and control the supervisee. In California, the supervisor is responsible for ensuring that "the extent, kind, and quality of the

24. See *Report of Disciplinary Actions, BOP Update* (California Department Of Consumer Affairs Board Of Psychology), Oct. 1995, at 11. In its report of disciplinary actions for January 1, 1995 - August 1, 1995, out of twenty-seven revocations, one was for inadequate supervision of a psychological assistant.

25. *Bergental v. Workers' Compensation Appeals Bd.*, 53 Cal. Rptr. 2d 266 (Cal. Ct. App. 1996).

26. Section 2913 provides:

A person other than a licensed psychologist may be employed by a licensed psychologist . . . to perform limited psychological functions provided that all of the following apply: (a) The person is termed a "psychological assistant." (b) The person . . . has completed a doctoral degree which qualifies for licensure under § 2914 . . . (c) The person is at all times under the immediate supervision, as defined in regulations adopted by the board, of a licensed psychologist, or board certified psychiatrist, who shall be responsible for insuring that the extent, kind, and quality of the psychological services . . . she performs are consistent with . . . her training and experience and be responsible for . . . her compliance with this chapter and regulations duly adopted hereunder . . . (d) The licensed psychologist . . . has registered the psychological assistant with the board

Id. at 269 n.3 (citing CAL. BUS. & PROF. CODE § 2913) (Deering 1996) (noting that becoming a registered psychological assistant could be one way of obtaining the two years of clinical experience which satisfies one of the prerequisites to being considered a psychologist under CAL. LAB. CODE § 3209.3).

27. See *id.* at 271.

28. See *id.* at 270.

psychological services he or she performed are consistent with his or her training and experience and . . . responsible for his or her compliance with the regulations of the Board of Psychology."²⁹ Moreover, while no case has expressly stated the standard of care of a psychological assistant, the Board of Psychology has generally held assistants to the same standard of care as their supervisors in terms of quality of patient care.³⁰

The disclosure requirement is a critical feature of California law. Prior to the rendering of services by the assistant, the supervisor is required to inform each patient in writing that the assistant is unlicensed and supervised as an employee of the supervisor.³¹ Thus, by statute, supervisors of unlicensed psychologists in California are considered employers of the supervisees.

In addition to the psychology licensing law, which is regulated by the Board of Psychology under the Board of Medical Quality Assurance, California regulates marriage, family, and child counselors (MFCC) through the Board of Behavioral Science Examiners.³² As with psychologists, MFCCs are required by statute to obtain a minimum of 3,000 hours of supervised experience.³³

However, the statutory supervision requirements for MFCCs are somewhat different from those for psychologists. This difference helps to illustrate the variability in various statutory schemes. Requirements for MFCC supervisors are more precise. Supervisors must have practiced psychotherapy for at least two years within the last five year period immediately preceding any supervision.³⁴ To qualify as having practiced psychotherapy, the supervisor must have averaged at least five patient contact hours per week.³⁵ Moreover, the supervisor must affirm that he or she is competent to supervise, i.e., has sufficient education, training or experience in the area of clinical supervision to supervise competently.³⁶ The requirement of affirming competence to supervise is laudable, but not widely found in many statutory schemes.

Another interesting and innovative feature is the requirement that the supervisor inform the supervisee in writing, prior to the commencement of supervision, the methods by which the supervisor will monitor and evaluate

29. CAL. BUS. & PROF. CODE § 2913(c) (Deering 1996).

30. See O. BRANDT CAUDILL & KENNETH S. POPE, LAW AND MENTAL HEALTH PROFESSIONALS 68 (1995). See also *People v. Stanley*, 681 P.2d 302 (Cal. 1984) (holding that a psychological assistant was qualified as an expert to testify on Rape Trauma Syndrome, over the objection of a criminal defendant).

31. See CAL. CODE REGS. tit. 16, § 1391.6(b) (1997). It is noteworthy that the supervisor is the statutory employer of the supervisee.

32. See CAL. BUS. & PROF. CODE § 4980 (Deering 1996).

33. See *id.* § 4980.37.

34. See CAL. CODE REGS. tit. 16, § 1833.1(a)(3).

35. See *id.*

36. See *id.* § 1833.1(a)(4)-(5).

the supervisee's work.³⁷ This disclosure requirement is an important step toward an informed consent process between supervisor and supervisee. Finally, the MFCC rules on the nature of the supervisor-supervisee interaction are more narrowly defined than those for psychologists. The supervisor is required to provide either one hour of individual (one-on-one) supervision or two hours of group supervision each week.³⁸

C. Ohio

The Ohio statutory scheme requires the supervisor to monitor the supervisee through a written treatment plan reviewed and signed by the supervisor.³⁹ The Ohio statute also contains a general clause that requires the supervisor to exercise reasonable judgment, "consistent with the standards of the profession of psychology, when providing mental health worker supervision."⁴⁰

*Steckler v. Ohio State Board of Psychology*⁴¹ provides some insight into the Ohio courts' interpretation of the "standards of the profession." In *Steckler*, a licensed psychologist agreed to act as supervisor for an unlicensed counselor. The psychologist's failure to meet with any of the unlicensed counselor's clients was sufficient to establish that he violated the rules of professional conduct as a supervisor in psychology.

The facts showed that Steckler was paid an hourly fee for case review and test interpretation. However, he did not personally consult on all of the unlicensed counselor's patients, and never actually visited the unlicensed counselor's office. Nevertheless, Steckler signed insurance forms which stated that services were to be rendered by the signatory or under his imme-

37. See *id.* § 1883.1(a)(6).

38. See *id.* § 1833.1(a)(7), 1833(b). Note, however, that the standard for monitoring is not specified.

39. The Ohio scheme outlines the following provisions:

(A) Requirements for mental health worker supervision. (1) Work done under mental health supervision shall not be represented to any party as psychological work. (2) A treatment plan shall be prepared for each recipient of services as part of the initial evaluation and shall be signed by the mental health worker delivering the services and the recipient or his/her legal guardian. (3) Within a reasonable time period thereafter, the supervising licensed psychologist shall review the plan and shall either: (a) Sign it as submitted; (b) Require modifications prior to signing it; or (c) Refuse to sign it if in his/her professional judgment in conformance with the standards of the profession of psychology it is unsatisfactory or unnecessary. (4) A licensed psychologist shall exercise reasonable professional judgment, consistent with the standards of the profession of psychology, when providing mental health worker supervision.

OHIO ADMIN. CODE § 4732-13-04 (1995).

40. *Id.* Thus, by statute, the standard of care of supervision in Ohio is "reasonable professional judgment."

41. *Steckler v. Ohio State Bd. of Psychology*, 613 N.E.2d 1070 (Ohio Ct. App. 1992).

diate supervision.

In reaching its holding, the court in *Steckler* cited the Ohio Code by quoting that the supervisor shall have "full direction, control, and responsibility for client welfare."⁴² The court held that because Steckler never met with his supervisee's clients, he did not have full control over their welfare.⁴³ Thus, Steckler was found in violation of the rules of professional conduct, and the court affirmed a decision by the Board of Psychology to suspend his license for 60 days.

The court's decision is noteworthy because Steckler was in violation of a statute and any damages that can be proximately linked to his supervisory activities may be considered negligent per se, or create a rebuttal presumption of negligence.⁴⁴

D. Other Statutory Schemes

Examination of state licensing laws makes it clear that supervisors are statutorily liable not only for their own negligence in failing to supervise adequately, but also for the actions of supervisees. The New Hampshire Code articulates this standard and leaves little room for interpretation: "The supervisor shall assume professional responsibility for the psychological assistant in a written agreement on record with the board. If the supervisor is a private practitioner, he must assume both professional and legal responsibility in the agreement."⁴⁵

III. GENERAL LEGAL THEORIES OF LIABILITY

In addition to statutory liability, supervisors, as well as any employee of a psychologist, whether supervised or not, can be liable under any one of several negligence theories. The theories can be divided into two main types, (1) vicarious liability in which the supervisor or employer is held liable for actions of the supervisee regardless of any fault on the part of the supervisor; and (2) direct liability in which the supervisor is held directly liable for his or her own negligence, such as negligent supervision and hiring.⁴⁶

42. *Id.* at 1073 (citing OHIO ADMIN. CODE § 4732-13-03 (J)(12)).

43. *See id.* at 1073.

44. *See generally* Walker v. Bignell, 301 N.W.2d 447, 454 (Wis. 1981). To meet the elements of negligence per se, the harm inflicted must be the type the statute was designed to prevent and the person injured must be within the protected class.

45. N.H. REV STAT. ANN. § 330-A:16-b(II)(b) (1996).

46. *See* Ralph Slovenko, *Legal Issues in Psychotherapy Supervision*, in PSYCHOTHERAPY SUPERVISION: THEORY, RESEARCH AND PRACTICE (Allen K. Hess ed., 1980).

A. Vicarious Liability

1. *Respondeat Superior*: A supervisor may be held vicariously liable under the doctrine of respondeat superior, which holds that one who occupies a position of authority or control over another may be held legally liable for damages caused by the subordinate.⁴⁷ In terms of clinical supervision, the doctrine of respondeat superior means that supervisors can be held legally liable for actions of supervisees.⁴⁸ This liability attaches whether or not the supervisor breached a duty.⁴⁹ Supervisors may be held liable under this doctrine as either the “master”,⁵⁰ or as an employer.⁵¹

Application of the respondeat superior doctrine varies widely across jurisdictions.⁵² In the context of an employer-employee relationship, three elements must be shown to hold the employer (principal) liable. First, the existence of an employer-employee relationship must be established.⁵³ The existence of such a relationship is usually demonstrated by such factors as: selection and engagement of the employee, the power of dismissal, and the power to control the employee’s conduct.⁵⁴

The second element that must be established is that the act which injured the patient must be within the supervisee’s scope of employment.⁵⁵ The scope of employment within the context of the supervisory relationship

47. See M. JANELLE DISNEY & ANTHONY M. STEPHENS, *LEGAL ISSUES IN CLINICAL SUPERVISION* 3 (1994).

48. See *id.*

49. See Adrian Tabangay, *Scope of Employer, Sex and Transference: When is an Employer Liable for Therapist Sexual Relations*, 28 J. HEALTH & HOSP. L. 108 (1994).

50. That is, simply on the basis of the supervisor’s authority and control over the supervisee.

51. Recall that in many states, supervisors are statutorily defined as the supervisee’s employer.

52. See Linda Mabus Jorgenson et al., *Transference of Liability: Employer Liability for Sexual Misconduct by Therapists*, 60 BROOK. L. REV. 1421, 1422-23 (1995).

53. See *Darensburg v. Tobey*, 887 S.W.2d 84, 88 (Tex. Ct. App. 1994).

54. See *Haight v. Aldridge Electric Co.*, 575 N.E.2d 243, 252 (Ill. App. Ct. 1991); *Hopping v. Louisiana Horticulture Comm’n*, 509 So. 2d 751, 755 (La. Ct. App. 1987); *Clarke County v. State Indus. Ins. System*, 724 P.2d 201, 202 (Nev. 1986). A factor that may also be considered is enumeration or wages. In the supervisory context, supervisees may or may not be paid. However, they do earn credit toward a degree or licensure, and thus are compensated.

55. See *id.* Scope of employment is defined as:

[C]onduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master. (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a person to serve the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

is not clearly defined. Adrian Tabangay has emphasized the right to control the supervisee as being the most critical factor.⁵⁶

M. Janelle Disney and Anthony M. Stephens note five factors that are used by the courts to determine whether the supervisee's acts fall within the scope of employment: (1) the supervisor's power to control the supervisee; (2) whether the supervisee had a duty to perform the act; (3) the time, place, and purpose of the act; (4) the motivation of the supervisee in committing the act; and (5) whether the supervisor could have reasonably expected that the supervisee would commit the act.⁵⁷

In general, and consistent with these five factors, courts tend to interpret scope of employment broadly. In fact, despite variations across jurisdictions, some courts have gone so far as to define a therapist's sexual relations with a client as within the scope of employment. Thus, a supervisor has been held liable for sexual misconduct of a supervisee in the absence of any wrongdoing on the part of the supervisor.

In *Simmons v. United States*,⁵⁸ a woman with a history of emotional abuse was seen by a social worker in an outpatient setting. The social worker engaged in inappropriate behaviors such as kissing and touching.⁵⁹ This behavior escalated to sexual intercourse on an out of town trip. The patient subsequently developed severe psychological problems as a result of the sexual relationship.⁶⁰ The court found it immaterial that the sexual misconduct occurred outside of the usual time and place of the therapy relationship because the sexual relations were initiated during the therapy sessions.⁶¹

The court held that the sexual acts were within the course of employment because the wrongful conduct arose out of the therapy relationship.⁶² Through the doctrine of respondeat superior, the employer was held liable for the social worker's malpractice.⁶³

An employer was also held vicariously liable for sexual misconduct by an employee therapist under the doctrine of respondeat superior in *Doe v. Samaritan Counseling Center*.⁶⁴ In *Doe*, a pastoral counselor kissed and fondled a woman who had sought spiritual and emotional counseling.

56. Tabangay, *supra* note 49.

57. See Disney & STEPHENS, *supra* note 47, at 16-17.

58. *Simmons v. U.S.*, 805 F.2d 1363 (9th Cir. 1986).

59. For a discussion of physical contact in psychotherapy, see Elizabeth A. Holub & Sandra S. Lee, *Therapists' Use of Nonerotic Physical Contact: Ethical Concerns*, 21 PROF. PSYCHOL.: RES. & PRAC. 226 (1991). See also Kenneth S. Pope et al., *The Beliefs and Behaviors of Psychologists as Therapists*, 42 AM. PSYCHOL. 993 (1987). According to the Pope survey of therapists, kissing a client was considered unquestionably unethical by 48% of the respondents, and something done under only rare circumstances by the next 36%. Only about 2% of the therapists surveyed approved of the practice.

60. See *Simmons*, 805 F.2d at 1364.

61. See *id.* at 1370.

62. See *id.*

63. See *id.* at 1363.

64. *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344 (Alaska 1990).

Shortly after the patient canceled the therapy sessions with the counselor, the patient met him and the two had sexual intercourse.

The Alaska Supreme Court held that although the therapy sessions had been canceled, the sexual misconduct occurred during the course of the therapist's employment.⁶⁵ The counselor's employer was held liable under the doctrine of respondeat superior.⁶⁶

While not all jurisdictions consider therapist sex with patients within the scope of employment,⁶⁷ the risk does exist. Employers in general, and supervisors in particular, who may also be statutory employers of their supervisees, are subject to a broad definition of scope of employment. In fact, when a student or unlicensed therapist is treating a patient under the supervision of a licensed practitioner, it is difficult to imagine any conduct that would not be considered within the scope of employment.⁶⁸

The third and final element needed to establish liability on the basis of the respondeat superior doctrine is that the supervisee's patient must prove that he or she was in fact injured.⁶⁹ Thus, the patient must prove all of the elements of negligence.⁷⁰

In considering the doctrine of respondeat superior, there is little doubt that the supervisor may be liable where the actions of an unlicensed or student supervisee negligently result in damages to a patient. In the case of sexual misconduct, the supervisor may be liable even where the misconduct occurs outside of the therapy office or after therapy has been terminated.⁷¹ To reduce the risks of liability, supervisors must carefully monitor the therapy process, and above all, maintain control of the case.⁷²

2. *The Borrowed Servant Rule:* A problem frequently arises in determining who is the supervisor. For example, in university training programs for psychologists, students in training are often placed in hospitals or community mental health facilities. The student may then be under the general direction and supervision of professors at the university as well as under the licensed staff of the hospital or community facility. Under these circumstances, supervisory liability may be determined under the borrowed servant

65. See *id.* at 348.

66. See *id.* at 344.

67. See *Birkner v. Salt Lake County*, 771 P.2d 1053, 1058 (Utah 1989) (holding social worker who engaged in sexual misconduct was not acting within the scope of employment); *P.S. v. Psychiatric Coverage, Ltd.*, 887 S.W.2d 622, 622 (Mo. Ct. App. 1994) (holding employer not liable for damages resulting from employee psychologist's sexual relations with a patient).

68. See Stewart R. Reuter, *Professional Liability in Postgraduate Medical Education*, 15 J. LEGAL MED. 485, 496 (1994).

69. See *Morris v. Francisco*, 708 P.2d 498, 502 (Kan. 1985); *Grewe v. Mount Clemens Gen. Hosp.* 273 N.W.2d 429, 432 (Mich. 1978); *Whitfield v. Whittaker Mem'l Hosp.*, 169 S.E.2d 563, 568 (Va. 1969).

70. See KEETON ET AL., *supra* note 14.

71. See *supra* text accompanying notes 58-68.

72. See ASSOCIATION FOR COUNSELOR EDUC. AND SUPERVISION, STANDARDS FOR COUNSELING SUPERVISORS (1989).

rule.⁷³ In the context of universities and clinical training programs who place their students in mental health facilities outside of the university structure, the university (or university supervisor) would be considered the general employer and the placement facility (or on site licensed practitioner) would be known as the special employer.⁷⁴

As with the doctrine of respondeat superior in general, a critical factor in determining liability is who had control of the supervisee at the time of the negligent act. For example, in *McConnell v. William*⁷⁵ the court found:

In determining whether a person is the servant of another, the essential test is whether he is subject to the latter's control or right of control with regard not only to the work to be done but also to the manner of performing it . . . the true criterion is the existence of the power to control the employee at the time of the commission of the negligent act.⁷⁶

In evaluating whether either the general or special employer agreed to assume liability, courts will examine any affiliation agreements.⁷⁷ Such agreements may be useful to both the university and the placement facility, in that they may avoid subsequent disputes over liability for negligent acts of the supervisee. The parties can also control the risks and distribute them in advance through the agreements. Absent such an agreement, the university may be presumed liable.⁷⁸

3. *Enterprise Liability*: Another way a supervisor may be held liable for negligent acts of supervisees is through an enterprise liability theory. In this theory, the costs of compensating injured patients are balanced against the benefits derived by the supervisee/employer; damages are viewed as part of the cost of doing business. For example, supervisors commonly bill for the patient contact hours of supervisees. All income above the supervisee's salary (if any) and overhead are profits of the supervisor. Given that the su-

73. The borrowed servant rule is defined as follows: "A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others." RESTATEMENT (SECOND) OF AGENCY § 227 (1958).

74. In borrowed servant cases, the general employer is considered to be the employer with the ongoing or long term relationship, whereas the special employer (sometimes also known as the temporary employer) is the employer for a temporary relationship.

75. *McConnell v. Williams*, 65 A.2d 243 (Pa. 1949).

76. *Id.* at 245 (citing *Walters v. Kaufman Dep't Stores*, 235 A.2d 559, 560 (Pa. 1939)); *McGrath v. Edward G. Budd Mfg. Co.*, 36 A.2d 303, 305 (Pa. 1944).

77. These agreements specify the conditions under which students will function in a facility.

78. As a general employer, the university may be presumed liable via inference:

[i]n the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it.

RESTATEMENT (SECOND) OF AGENCY § 227 cmt. b (1958).

supervisor stands to make a profit, he or she should be willing to bear the risk of damages to patients.

Enterprise liability theory focuses on the foreseeability of a supervisee's actions in view of the nature of the supervisee's duties. Liability may attach where there is a factual determination that the supervisee's acts are a foreseeable risk of the enterprise.⁷⁹ In the context of psychotherapy supervision, some courts have held that sexual misconduct is a foreseeable risk of therapeutic relationships.⁸⁰

In sum, supervisors/employers may be held vicariously liable under a variety of legal theories. Liability may attach regardless of how careful the supervisor was. To minimize risks, supervisors are advised to maintain strict control. On the other hand, attorneys need to be alert to the possibility of supervisor/employer liability when a client is injured by a student or unlicensed therapist under supervision. Matters may become complicated where university students are placed in community settings. Under these conditions, liability may attach under a borrowed servant rule or enterprise liability theory. Universities and the mental health facilities in which students are placed may well be advised to consider affiliation agreements so that duties, liabilities, and responsibilities are specified in advance. On the other hand, attorneys seeking damages from supervisors/employers are advised to carefully examine any affiliation agreements that may exist.

B. Direct Liability: Negligent Supervision

In addition to vicarious liability, supervisors may be directly liable for their own negligent acts. In the context of supervision of students and unlicensed practitioners, such negligence is usually in the form of negligent supervision. To establish direct liability for negligent supervision, the patient/plaintiff must demonstrate a direct link between the actions of the supervisor and the injuries. Thus, liability is not based on the actions of the supervisee; it is based on the supervisor's own negligence.⁸¹ Given that liability is based on the supervisor's negligence, it is possible that liability may attach to the supervisor even where a plaintiff cannot establish all the elements of negligence linking the supervisee's acts to the injury.⁸²

The basis for supervisor liability for negligent supervision can be found in Section 213 of the Restatement of Agency,⁸³ which provides: "A person

79. See *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 348 (Alaska 1990).

80. See *id.*

81. See *McCullough v. Hutzel Hosp.*, 276 N.W.2d 569, 571 n.1 (Mich. App. Ct. 1979) (where the court noted, "[w]e must point out that the defendants' liability is not predicted on the negligence of the resident, but upon their own negligence in failing to provide adequate supervision").

82. See Stewart R. Reuter, *Professional Liability in Postgraduate Medical Education: Who Is Liable for Resident Negligence?*, 15 J. LEGAL MED. 485, 517 (1994).

83. RESTATEMENT (SECOND) OF AGENCY § 213 (1959).

conducting an activity through servants or other agents is subject to liability for harms resulting from his conduct if he is negligent or reckless . . . in the supervision of the activity."⁸⁴

In *Andrews v. United States*,⁸⁵ the court did not find respondeat superior liability where under the guise of providing counseling, a physician's assistant began to touch, kiss, and attempt to undress a plaintiff, and eventually had sexual intercourse with her.⁸⁶ The court held that the assistant's conduct was not motivated to serve the employer⁸⁷ and, thus, was beyond the scope of employment.⁸⁸ However, the court did find the employer directly liable for negligent supervision.⁸⁹ Thus, the supervisor was held liable in addition to the assistant, for failing to provide proper supervision of the abusing supervisee.⁹⁰

Similarly, in *Simmons v. United States*⁹¹ where the court did find the sexual misconduct of a supervised therapist to be within the scope of employment, the role of proper supervision was emphasized. The *Simmons* court found that a significant portion of the plaintiff's emotional damages could have been prevented with proper supervision of the abusing therapist.⁹²

Attempts by the supervisor to abrogate responsibility by claiming he or she did not do the work are unlikely to succeed, as in *McCullough v. Hutzell Hospital*.⁹³ In *McCullough*, the plaintiffs brought a medical malpractice action following alleged negligence in a tubal ligation operation performed by a resident in training under the supervision and training of defendants who were specialists. The defendant's supervisors' defense was that because they did not actually perform the surgery, they were merely responsible for supervising the resident. Thus, they were not practicing their specialty and should not be held to a specialists' standard of care.⁹⁴

The court strongly rejected the supervisors' argument and held:

Even though the . . . procedure was actually performed by a resident, [the supervisors] were under a duty to see that it was performed properly. It is their skill and training as specialists which fits them for that task, and their advanced learning which enables them to judge the competency of the resident's performance. Their failure to take reasonable care in ascertaining that the surgery was competently performed renders them liable

84. *Id.*

85. *Andrews v. U.S.*, 732 F.2d 366 (4th Cir. 1984).

86. *See id.* at 367.

87. The U.S. Government.

88. *See id.* at 370.

89. *See id.*

90. *See id.*

91. *Simmons v. U.S.*, 805 F.2d 1363 (9th Cir. 1986).

92. *See id.* at 1371.

93. *McCullough v. Hutzell Hosp.*, 276 N.W.2d 569 (Mich. Ct. App. 1979).

94. *See id.* at 570.

for the resulting damages.⁹⁵

Notice the court's emphasis on proper monitoring ("duty to see that it was performed properly") and ascertaining the competence of the supervisee. Similar reasoning has been applied to psychological supervisors as well. In *Masterson v. Board of Examiners of Psychologists*,⁹⁶ a psychologist's license was revoked for failure to "monitor and control" the supervisee.⁹⁷ In *Steckler v. Ohio State Board of Psychology*,⁹⁸ a supervising psychologist's license was suspended for failure to exercise "full direction, control, and responsibility" for client welfare.⁹⁹ While the number of cases involving psychological supervisors is relatively small,¹⁰⁰ this situation may change as attorneys become more aware of the liability of supervisors. Arguments for liability can then be analogized from cases in medical settings.

An important case that provides some guidance in assessing when liability might attach is *Mozingo v. Pitt County Memorial Hospital*.¹⁰¹ In *Mozingo*, a woman was admitted to a teaching hospital for the delivery of her second child. She was treated by residents who were being supervised by a private "on call" medical group. The supervisors were contracted to provide supervision by telephone from their homes. The defendant supervisor lived about two miles from the hospital. The supervisee began experiencing difficulty in *Mozingo's* delivery in the early evening. The supervisor was immediately informed and, upon receiving the call, immediately went to the hospital. Unfortunately, he did not arrive in time to prevent severe injury to the newborn. The *Mozingo* family sued the supervisor for failing to meet acceptable standards of supervision.¹⁰²

The court confronted two major issues of relevance to supervisors of mental health practitioners. First, did the supervisor have a direct duty of care arising from a patient-physician relationship? Second, did defendant's supervision meet the standard of care for applicable supervision?

The court's analysis began with the rule that, "[w]hen a physician and a patient enter into a consensual physician-patient relationship . . . a duty arises requiring the physician to conform to the statutory standard of care."¹⁰³ Further, "[w]hether the defendant and *Mozingo* or *Mozingo, Jr.* established a physician-patient relationship depends on whether the defendant accepted *Mozingo* or *Mozingo, Jr.* as patients and undertook to treat

95. *Id.* at 571.

96. *Masterson v. Board of Examiners of Psychologists*, No. 95A-03-011, 1995 LEXIS 589 (Del. Super. Ct. Dec. 29, 1995).

97. *Id.* at *1.

98. *Steckler v. Ohio State Bd. of Psychologists*, 613 N.E.2d 1070 (Ohio Ct. App. 1992).

99. *Id.* at 1073.

100. See SMITH & MEYER, *supra* note 4.

101. *Mozingo v. Pitt County Mem'l Hosp.*, 400 S.E.2d 747 (N.C. Ct. App. 1991).

102. See *id.* at 747-49.

103. *Id.* at 750-51.

them.¹⁰⁴ In this case, the court found no evidence of a relationship between the on-call supervisor and Mazingo because the supervisor "never accepted Mazingo or Mazingo, Jr. as patients or undertook to treat them, and therefore there was no consensual relationship between [them]. . ."¹⁰⁵

In contrast, the court found that where the defendant's supervisory duties may be expected to affect the interests of the patients receiving care from the supervisee, tort law will impose a duty to act in a way that patients will not be injured by the supervisee. In order to assess the supervisor's duty, the court recognized six factors: (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered the injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.¹⁰⁶

Mazingo has important implications for supervisors of students and unlicensed practitioners in mental health settings. First, because supervisors in mental health settings often see the patient and have some direct responsibility for patient care,¹⁰⁷ they may be held directly liable as primary therapists. The assumption would be that when the supervisor saw the patient as part of the supervisory process, he or she undertook to treat that patient. Further, the six factors accepted by the court provide some guidance on evaluating the supervisor's potential liability. It is noteworthy that the court in *Mazingo* did find that the potential "negative consequences for the community, such as increased medical costs," were not outweighed by the policy of preventing harm to patients.¹⁰⁸

A final example shows the emphasis given by the courts on the supervisor's duty to monitor the supervisee's treatment. In *Powers v. United States*¹⁰⁹ a supervising physician left the postoperative care of the plaintiff to hospital residents. The patient subsequently experienced complications. The court found the supervisor negligent in both his direct care as well as in the supervision of the residents.¹¹⁰

104. *Id.* at 750.

105. *Id.* at 751.

106. *See id.* at 752.

107. *See Bergenstal v. Workers' Compensation Appeals Bd.*, 53 Cal. Rptr. 2d 266 (Cal. Dist. Ct. App. 1996) (supervisor formulated treatment plan and worked solely with the patient on a number of occasions).

108. *Mazingo*, 400 S.E.2d at 753.

109. *Powers v. U.S.*, 589 F. Supp. 1084 (D. Conn. 1984).

110. The Court found:

. . . [The supervisor] failed to adequately monitor Powers' condition and he offered [the supervisee] virtually no personal diagnostic supervision and assistance [The supervising doctor] had ultimate responsibility for Powers . . . and for him to entrust Powers' care entirely to a first-year orthopedic resident at this crucial stage of a very alarming post-surgical condition was a breach of the standard of care.

IV. ETHICAL BASIS FOR STANDARD OF CARE IN SUPERVISION

A. Introduction

While licensing statutes and case law provide some guidance on how courts may define the standard of care in supervision, thus far there is neither a consensus nor an explicit statement of the standard of care in psychotherapy supervision by psychologists and other mental health professionals.¹¹¹ As the authors of an extensive bibliography on clinical supervision note, “[g]uidelines and standards are lacking for interdisciplinary and postdoctoral supervision, as well as for ongoing supervision (as mandated in some states), of impaired psychological practitioners or those with subdoctoral training.”¹¹² As these same authors also note, “no model training sequence in supervision has been developed or adopted by professional or accreditation organizations.”¹¹³ An examination of ethical and professional issues, as well as formulations concerning areas where liability may attach in the supervisory process, however, can provide some insights into the generally accepted duties of supervisors. In conjunction with statutory guidelines and case law, generally accepted principles of clinical supervision can help point the way toward a standard of care in supervision.

1. *Relevant Documents of the American Psychological Association (“APA”)*: Psychologists who provide supervision are guided by the Ethical Code and related standards promulgated by the American Psychological Association. The latest version of the APA Ethical Principles of Psychologists and Code of Conduct was published in 1992.¹¹⁴ The 1992 code represents the evolution of the APA’s efforts to formulate a formal body of ethical standards, beginning with the organization’s first statement of ethical standards in 1953.¹¹⁵

The 1992 code represented a considerable reorganization from the earlier 1981 code¹¹⁶ which had been revised in 1989 with relatively minor modifications. The significance of the various codes and revisions is that many state licensing boards have adopted, in whole or in part, the APA Ethical Standards as part of the statutory basis for regulating psychologists. Therefore, the specific APA code incorporated into these state licensing laws varies, depending on when the licensing law was adopted. Thus, one is

Id. at 1101.

111. See William N. Robiner & William Schofield, *References on Supervision in Clinical and Counseling Psychology*, 21 PROF. PSYCHOL.: RES. & PRAC. 297 (1990).

112. *Id.* at 298.

113. *Id.*

114. American Psychological Ass’n, *Ethical Principles of Psychologists and Code of Conduct*, 47 AM. PSYCHOL. 1597 (1992) [hereinafter *APA Code*].

115. AMERICAN PSYCHOLOGICAL ASS’N, ETHICAL STANDARDS OF PSYCHOLOGISTS (1953).

116. American Psychological Ass’n, *Ethical Principles of Psychologists*, 36 AM. PSYCHOL. 633 (1981)[hereinafter *Ethical Principles*].

likely to find the 1981, 1989, or 1992 versions in any given state law, depending on when the state licensing law was enacted. Fortunately, in formulating a standard of care in supervision, it is possible to draw from the wisdom and underlying principles of all versions of the code.

The APA has also published other relevant documents. The General Guidelines for Providers of Psychological Service¹¹⁷ provides underlying principles as well as specific guidelines pertaining to supervision, as do the Specialty Guidelines for Delivery of Services by Clinical Psychologists.¹¹⁸

2. *Statements by Other Organizations:* The Association for Counselor Education and Supervision ("ACES") is the only organization to develop a specific set of ethical guidelines with relevance to supervision of students and unlicensed practitioners.¹¹⁹ This same association has also developed a set of standards for counseling supervisors.¹²⁰

Other relevant codes from which it is possible to draw general guidelines pertaining to a standard of care in supervision include the Code of Ethics of the National Association of Social Workers¹²¹ and the ethical guidelines developed by the American Academy of Psychiatry and Law.¹²² Finally, the American Association of State Licensing Boards has published guidelines pertaining to supervision of unlicensed persons.¹²³

With all of the various guidelines, ethical codes, and position papers, it is no wonder that it is hard to find clear guidelines on standard of care. Where inconsistency exists, it may be difficult to establish liability. For example, different supervisors might claim to be following different codes. Without some guidance as to which principles should control, it may be difficult to find liability. Similarly, supervisors may be confused as to what approach should be followed. Fortunately, there is considerable overlap and consistency.

3. *Five Underlying Principles:* K.S. Kitchener has described five basic underlying principles upon which she believes all ethical codes are based: (1) autonomy; (2) beneficence; (3) nonmaleficence; (4) justice; and (5) fidelity.¹²⁴

117. American Psychological Ass'n, *General Guidelines for Providers of Psychological Services*, 42 AM. PSYCHOL. 1 (1987) [hereinafter *APA Guidelines*].

118. American Psychological Ass'n, *Specialty Guidelines for the Delivery of Services by Clinical Psychologists*, 36 AM. PSYCHOL. 640 (1981).

119. See ASSOCIATION FOR COUNSELOR EDUC. AND SUPERVISION, *ETHICAL GUIDELINES FOR COUNSELING SUPERVISORS* (1993).

120. See ASSOCIATION FOR COUNSELOR EDUC. AND SUPERVISION, *STANDARDS FOR COUNSELING SUPERVISORS* (1989).

121. NATIONAL ASS'N OF SOC. WORKERS, *CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS* (1990).

122. See AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, *ETHICAL GUIDELINES FOR THE PRACTICE OF FORENSIC PSYCHIATRY* (1989).

123. See AMERICAN ASS'N OF STATE PSYCHOLOGY BOARDS, *GUIDELINES FOR THE EMPLOYMENT AND SUPERVISION OF UNCREDENTIALLED PERSONS PROVIDING PSYCHOLOGICAL SERVICES* (1979) [hereinafter *AASP*].

124. See K.S. Kitchener, *Intuition, Critical Evaluation and Ethical Principles: The*

Autonomy, taking responsibility for one's own behavior, underlies a number of important ethical principles. For example, confidentiality and informed consent follow from concerns for respecting autonomy and right to privacy.¹²⁵

Nonmaleficence, which is the obligation to prevent or minimize the infliction of harm, underlies competence. Competence applies in several ways to supervision. The supervisor must be aware of his or her own competency, so as not to supervise a case for which he or she is unqualified. In addition, the supervisor must be aware of the competence of the supervisee. Finally, the supervisee must be ever mindful of the limits of his or her own competence. As Melba Vasquez notes, the rule of competence "arises from the need to prevent harm; our codes similarly forbid us to violate an individual's civil rights or to misuse assessment and diagnostic results."¹²⁶

Beneficence, a principle derived from the Hippocratic Oath, refers to the goal of promoting the well-being and interest of patients. This principle requires practitioners to balance between competing positive goals to be achieved and competing harms to be avoided. The supervisory process involves a number of competing factors: for example, the supervisor must consider the safety of the patient as well as the personal growth of the supervisee.

Justice refers to the underlying principles of fairness and equity. The issue of justice is of particular relevance to the question of the standard of care to which students should be held. As Steven R. Smith and Robert G. Meyer have noted:

While it seems unfair to hold students to the same level of care and practice expected of a fully trained professional, it is nevertheless unfair for patients to receive a lower standard of care because they are being seen by a student. Many patients are probably unaware about the status of their therapists, who are sometimes not clearly identified. Certainly, whenever a client has reason to believe that the student is actually a fully trained professional, the student should be held to the professional level of care.¹²⁷

Thus, supervision involves a number of competing goals. Students must learn, yet patients have a right to receive the best treatment possible. It is never appropriate, however, to leave the training status of a supervisee unclear or vague. For example, California law requires written informed consent of the supervisee's training status,¹²⁸ as does sound ethical practice.

Fidelity involves honesty, integrity, and fulfilling one's commitments,

Foundation for Ethical Decisions in Counseling Psychology, 12 COUNSELING PSYCHOL. 43 (1984).

125. See Melba J. T. Vasquez, *Psychologist as Clinical Supervisor: Promoting Ethical Practice*, 23 PROF. PSYCHOL.: RES. & PRAC. 196 (1992).

126. *Id.* at 197.

127. SMITH & MEYER, *supra* note 4, at 27.

128. See CAL. CODE REGS. tit. 16, § 1391.6(b) (1997).

promises, and obligations. In following the principle of fidelity, the supervisee is clear about his or her training status. Similarly, the supervisor has an obligation of honesty to the supervisee. This obligation entails providing timely and accurate feedback to the supervisee so that the supervisee can benefit from the supervised experience.

4. *What is Supervision?* With the five general principles in mind, it is helpful to look more closely at the process of supervision. Gary R. Schoener and colleagues have identified six methods of monitoring the supervisory relationship: self-report, examination of treatment record notes, audiotape, videotape, live observation, and cotherapy.¹²⁹ Each of these represents a point on the continuum of standard of care, ranging from the minimum (self-report) through the most active forms of supervision (live observation and cotherapy).¹³⁰

In the self-report technique, the supervisee simply tells the supervisor about the therapy process. This technique is obviously subject to important limitations. What the supervisee reports is selective, and the supervisee may not have sufficient experience to know what relevant aspects of the treatment should be brought to the attention of the supervisor. The supervisee may also hide information that may be difficult to deal with, embarrassing, or indicative of errors.

In relying solely on self-report, the supervisor limits considerably his or her ability to monitor and control the supervisory relationship. Ralph Slovenko notes two major pitfalls that supervisors risk when relying solely on self-report: "(1) the supervisee engaging in unethical conduct with the patient which is not reported to the supervisor; (2) the supervisee not carrying out the supervisor's recommendations but saying that he did."¹³¹

Slovenko then lists thirteen areas of potential liability for supervisors.¹³²

129. See GARY R. SCHOENER ET AL., *PSYCHOTHERAPISTS SEXUAL INVOLVEMENT WITH CLIENTS: INTERVENTION & PREVENTION* (1989).

130. No supervision at all, as in *Steckler v. Ohio State Board of Psychology*, 613 N.E.2d 1070 (Ohio Ct. App. 1992), would be below the standard.

131. Ralph Slovenko, *Legal Issues in Psychotherapy Supervision*, in *PSYCHOTHERAPY SUPERVISION: THEORY, RESEARCH AND PRACTICE* 452, 463 (Allen K. Hess ed., 1980).

132. The thirteen areas for potential liability include:

- (1) The supervisor or agency promulgates an intake form to be used by the trainee, it omits relevant questions (homicidal tendencies, suicidal tendencies, previous therapy). The client receives improper treatment and injures himself or others.
- (2) The trainee takes relevant notes during therapy, the supervisor does not study these notes and does not realize that the notes indicate a therapy method other than that offered or available.
- (3) The trainee even with the supervisor's help is incapable of offering proper therapy. There is a need to refer to a more competent professional.
- (4) There is a need to consult a specialist, but the supervisor does not realize the need because certain facts are not discussed during the supervisory sessions.

At least four of these can be attributed to the limitations of the self-report technique. For example, Slovenko's ninth potential area of liability is as follows: "The trainee becomes socially involved with the client, but cleverly hides the involvement from the supervisor. The supervisor should have known by more complete supervisory sessions."¹³³

Although such blatantly unprofessional and unethical behaviors on the part of the supervisee probably occur rarely, Slovenko's example does help to illustrate the inherent risks of the self-report technique. Other risks may arise due to the supervisee's inexperience.¹³⁴

These situations amply illustrate the limitations and risks of the self-report method. Surprisingly, the self-report method is in common use. For example, state licensing laws such as California's, simply specify that the supervision is to be "face-to-face."¹³⁵ One retrospective study revealed that self-report was the exclusive method used by supervisors to monitor the supervision for 14% of the sessions, and that self-reports were the secondary source of information in 67% of all supervisory experiences.¹³⁶ In legal matters, one of the first things attorneys need to ask of supervisors is how

(5) There is a medical problem which would be discovered by a person with more training, but which is not discovered by the trainee. A medical doctor is not consulted. The psychological problem is caused by a hearing loss, a vitamin deficiency, or other physical imbalance.

(6) The diagnosis is improper, the prognosis faulty, or the treatment plan ineffective. The supervisor does not discover the error in any of the three areas or the interrelationship of one to the other, and therapy continues inappropriately.

(7) Written progress notes are inadequate or do not support the treatment plan.

(8) The trainee and patient (or trainee and supervisor) have a conflict of personalities, yet the treatment continues.

(9) The trainee becomes socially involved with the client, but cleverly hides the involvement from the supervisor. The supervisor should have known by more complete supervisory sessions.

(10) The trainee goes on vacation, there is no adequately prepared relief therapist.

(11) The trainee breaches confidentiality and shares a particularly intriguing story with a co-trainee or friend, word gets back to the client. The supervisor had not warned the trainee of the importance and meaning of confidentiality.

(12) The client consents to treatment but does not know it is by a trainee. He assumes it is on a regular professional level.

(13) The trainee is subpoenaed to testify in court and is improperly prepared by training or experience for courtroom testimony.

Id. at 463.

133. *Id.*

134. These risks are illustrated in examples (4), (5), and (6) of Slovenko's thirteen areas for potential liability. *See id.*

135. CAL. CODE REGS. tit. 16, § 1387(k)(1) (1997).

136. *See* George J. Allen, *Doctoral Students' Comparative Evaluations of Best and Worst Psychotherapy Supervision*, 17 PROF. PSYCHOL.: RES. & PRAC. 91 (1986).

they monitored and controlled the supervision. Of particular relevance would be the methods the supervisor used to guard against sexual misconduct problems.

It is difficult to see how self-report techniques can be used to protect patients from sexual misconduct by supervisees. If the sole or major method is through self-report, the supervisor may be in a very awkward position, because there is no independent source to verify the supervisee's reports. Supervisors who rely exclusively or heavily on self-report techniques should carefully scrutinize their practices.

Supervisors can increase their ability to monitor and control by examination of treatment records or notes in conjunction with self-report.¹³⁷ These notes provide a somewhat more objective way to review patient progress as well as to ascertain whether the supervisee is following up on the supervisor's suggestions. Again, however, such review is limited by the abilities of the supervisee to report accurately and identify the critical aspects of treatment.¹³⁸

The supervisor can obtain an independent review of the therapy process through the use of audiotapes, videotapes, or live observation through a one-way screen. A retrospective survey has shown that of these techniques, audiotapes are perhaps the most frequently used (36% of sessions), followed by videotaping (14%) and live observation (13%).¹³⁹ Cotherapy, in which the supervisor and supervisee act as partners in the treatment process and see the patient together during the same hour, accounted for about 10% of the sessions.¹⁴⁰ These various practices provide a starting point for examining the ethical and professional responsibilities of supervisors and for determining a standard of care.

B. Ethical and Professional Standards

1. *The American Psychological Association Standards:* Perhaps the best starting point for understanding the ethical and professional obligations of supervisors is the APA Ethical Principles of Psychologists and Code of Conduct.¹⁴¹ Section 1.22 of the general standards is directly relevant, and

137. See CAL. CODE REGS. tit. 16, § 1387(k)(1) (1997). Examination of the notes alone would be insufficient. The general standard, as exemplified in states such as California, is a minimum of one hour of "face-to-face" supervision per week. CAL. CODE REGS. tit. 16, § 1387(k)(1) (1997).

138. Slovenko's thirteen areas of supervision liability, for example, include at least two related to record review: (1) The trainee takes relevant notes during therapy, the supervisor does not study these notes and does not realize that the notes indicate a therapy method other than that offered or available. (2) Written progress notes are inadequate or do not support the treatment plan. See *Slovenko*, *supra* note 131, at 463.

139. See *Allen*, *supra* note 136, at 93.

140. See *id.*

141. *APA Code*, *supra* note 114.

has important implications.¹⁴²

It is the supervisor's ethical responsibility to ensure that the supervisee practices within his or her competence. In order to exercise this duty, the supervisor must, of course, be aware of the supervisee's competence, as reflected in his or her education, training, or experience. The supervisor, by necessity, must conduct a reasonable assessment of the supervisee's level of skill. Similarly, the supervisor must have made a sufficient assessment of the patient the supervisee is assigned to treat. Otherwise, the supervisor would have no way of knowing whether the supervisee had the competence to treat the patient.¹⁴³

The supervisor must monitor the supervisory process to ensure that the supervisee's services are being performed according to this standard of competence. Unfortunately, the APA standards give little guidance on the standard by which this monitoring should be accomplished, other than "reasonable steps." Is accepting a supervisee's verbal reports at face value a reasonable step? Is monitoring therapy notes along with self-reports reasonable?

A problem with a vague term like "reasonable steps" is that reasonableness is apt to be assessed after a patient is injured. Hence, the supervisor's level of monitoring may not seem reasonable in light of the injury. While it is clear that the APA is reluctant to impose inflexible standards, it would appear that some guidance on what is reasonable is needed.

One approach is to require monitoring based on the level of education, training, and experience of the supervisee. For beginning supervisees, the monitoring should be at the high end of scrutiny, with videotapes, careful monitoring of progress notes, and continual ongoing assessment of the supervisee. As the supervisee gains in experience, the level of scrutiny and hence "reasonable steps" needed could be gradually reduced. During the end phases of training, at the post-degree level where the supervisor has a thorough knowledge of the supervisee's strengths and limitations, self-report may be sufficient.¹⁴⁴

A critical aspect of the APA's ethical code pertaining to supervision concerns evaluation and feedback. Section 6.05(a) of the Ethical Code states: "In academic and supervisory relationships, psychologists establish an appropriate process for providing feedback to students and supervi-

142. Part (a) of section 1.22 states: "Psychologists delegate to their employees, supervisees, and research assistants only those responsibilities that such persons can reasonably be expected to perform competently, on the basis of their education, training, or experience, either independently or with the level of supervision provided." *APA Code, supra* note 114, § 1.22(a).

143. Part (b) of § 1.22 states: "Psychologists provide proper training and supervision to their employees or supervisees and take reasonable steps to see that such persons perform services responsibly, competently, and ethically." *APA Code, supra* note 114, § 1.22(b).

144. See L. Dianne Borders & Claire Hamilton Usher, *Post-Degree Supervision: Existing and Preferred Practices*, 70 *J. COUNSELING. & DEV.* 594 (1992).

sees."¹⁴⁵

The requirement of feedback is critical, as has been repeatedly noted in the supervision literature.¹⁴⁶ In the APA Ethical Code, the key words are "an appropriate process."¹⁴⁷ Notice that the supervisor maintains ultimate responsibility. If there are no procedures, then it is the supervisor's obligation to encourage the development of such procedures.

2. *The Association for Counselor Education and Supervision Ethical Standards:* The Ethical Standards of the ACES are more extensive as well as better organized.¹⁴⁸ The ACES standards emphasize three main principles: client welfare and rights, the supervisory role, and the program administration role.

In explicating the meaning of client welfare and rights, the ACES guidelines specify that "supervisors should have supervisees inform their clients that they are being supervised and that the observation and/or recordings of the session may be reviewed by the supervisor."¹⁴⁹ Notice the clear statement of the need for informed consent for the supervisory process.¹⁵⁰

Another important feature of the ACES guidelines are the explicit statements pertaining to confidentiality in the supervisory relationship.¹⁵¹ The ACES code expressly states that supervisors are to "make supervisees aware of clients' rights, including protecting clients' right to privacy and confidentiality."¹⁵²

While the importance of confidentiality cannot be overstated, Section 5.03 of the APA code may be more realistic than the ACES standards. Section 5.03 presents the duty as one of discussing the limits of confidentiality.¹⁵³ As Steven R. Smith has noted, there are many exceptions to confi-

145. *APA Code*, *supra* note 114, § 6.05(a).

146. See William Robiner et al., *Evaluation Difficulties in Supervision of Psychology Interns*, 46 *CLINICAL PSYCHOL.* 3 (1993).

147. Procedures for providing feedback should be clear and should be available to the students and supervisees. Ordinarily, these procedures are developed by programs with the input of individual psychologists. When specifications of program requirements are inadequate and not under the control of the psychologist, the psychologist should encourage and document attempts to develop new ones. See MATHILDA B. CANTER ET AL., *ETHICS FOR PSYCHOLOGISTS: A COMMENTARY ON THE APA ETHICS CODE (1994)* (interpreting the term "an appropriate process").

148. ASSOCIATION FOR COUNSELOR EDUC. AND SUPERVISION, *ETHICAL GUIDELINES FOR COUNSELING SUPERVISORS (1993)* [hereinafter *ACES*].

149. *Id.*

150. The *APA Code* makes several references to informed consent. See *APA Code*, *supra* note 114, § 4.02 (discussing informed consent to therapy); *Id.* § 5.01 (discussing the limits of confidentiality); *Id.* § 6.11 (discussing informed consent to research). The duty to provide informed consent in a supervisory setting can thus be legitimately inferred.

151. *ACES*, *supra* note 148.

152. The *ACES* code further states: "Clients also should be informed that their right to privacy and confidentiality will not be violated by the supervisory relationship." *ACES*, *supra* note 148, § 1.03.

153. *APA Code*, *supra* note 114, § 5.03.

confidentiality.¹⁵⁴ In the context of supervision, an important exception concerns the limits of privilege for students and assistants. For example, a psychology student in training may be covered by privileges only to the extent that the student is seeing patients as an assistant to a covered professional.¹⁵⁵ Thus, while a supervisee might be able to give limited assurances of confidentiality, he or she cannot guarantee that the communication will be privileged. If these limitations are not discussed, or if the patient is falsely led to believe that a communication is privileged when it is not, the patient may have a common law cause of action for failure to provide informed consent.¹⁵⁶ Section 2 of the ACES Code, supervisory role, emphasizes monitoring. The ACES code also emphasizes the importance of evaluation and feedback. Unlike the APA code, the ACES code provides specific guidance as to what constitutes a standard of care for monitoring and evaluation. This includes the use of actual work samples via audio and/or videotape, or the use of live observation.¹⁵⁷ The ACES code further specifies that feedback should be "ongoing," and in a variety of forms.¹⁵⁸ Finally, Section 2.14 expresses an important standard for ethical supervision: "[s]upervisors should incorporate the principles of informed consent and participation; clarity of requirements, expectations, roles and rules; and due process and appeal into the establishment of policies and procedures of their institution, program, courses, and individual supervisory relationships."¹⁵⁹

The third major portion of the ACES code also emphasizes the supervisor's duty to assess the supervisee. Such assessment is critical to the supervisor's ability to restrict supervisees' activities to "those that are commensurate with their current level of skills and experiences."¹⁶⁰

154. See Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 KY. L. REV. 473 (1986). Among the possible exceptions discussed are child abuse, adult abuse, child custody, dangerous patients, patient/litigant, criminal defense, court ordered examinations, third-party payers, and privileges after death. *Id.*

155. See *id.* at 520 (reviewing *Hall v. State*, 336 S.E.2d 812 (Ga. 1985)) (noting "that an appellate court had refused to apply the psychologist-patient privilege to a student in training"). See also *People v. Gomez*, 185 Cal. Rptr. 155, 159 (Cal. Ct. App. 1982). The court held that "[f]irst, and decisive of this case, the privilege does not extend to student interns; since the privilege does include virtually every licensed classification of 'therapist,' defendant is unable on this record to provide a reason that the privilege should include 'psychology students' or 'student interns.'"

156. As noted by Vincent R. Johnson and Alan Gunn, "[c]onsent to medical treatment, to be effective, should stem from an understanding decision based on adequate information . . . The doctrine [of informed consent] imposes a duty . . . to inform a patient of his options and their attendant risks. If a physician breaches this duty, patient's consent is defective, and physician is responsible for the consequences." VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 264 (1994).

157. See ACES, *supra* note 148, § 2.06.

158. ACES, *supra* note 148, § 2.08. ACES recommends formal as well as informal evaluation throughout the supervisory process.

159. ACES, *supra* note 148, § 2.14.

160. ACES, *supra* note 148, § 3.09.

Examination of the APA and ACES codes show the consistent themes of competence, confidentiality, informed consent, monitoring, and evaluation and feedback in the supervisory process. These themes are reflected in the growing literature on the supervisory process.

C. *Standard of Care as Reflected in the Relevant Literature*

The number of articles devoted to the supervision of mental health professionals numbers in the thousands.¹⁶¹ Of these, several dozen relate to legal and ethical issues. A few relatively recent treatments are illustrative of the relevant literature.

According to Melba Vasquez, supervisors have three major responsibilities in training supervisees to practice ethically: competency, personal functioning, and supervisor ethics.¹⁶² The first of these, competency, is pervasive, as seen in statutes, case law, professional ethics, and the relevant literature. Vasquez argues that competence is developed by formal training and through appropriately supervised experience. She provides an answer to the question of what might constitute reasonable steps to monitor and evaluate: "A responsibility of the supervisor is to assess the supervisee's skills to ensure competence with the clientele and to follow progress through audio and videotapes, notes, discussion, cotherapy, and observations."¹⁶³ "Promoting competency for our trainees is one of the most important ethical responsibilities."¹⁶⁴

It is noteworthy that Vasquez, consistent with the ACES guidelines, points to audio and videotapes, in conjunction with more direct techniques, as the standard. It thus appears as though the time has come in which self-report, or self-report in conjunction with record review, will not meet the minimum standard of care in supervision. Vasquez's emphasis on personal functioning is also telling:

One of the most important responsibilities of a supervisor is to assess the supervisee's limitations, blind spots, and impairments in order to protect the welfare of the supervisee's clients. . . . As supervisors, we are responsible for monitoring trainee progress to benefit and protect the public and the profession, as well as the trainee.¹⁶⁵

The multiple roles and responsibilities of the supervisor are evident. The supervisor must assess the supervisee and monitor the supervisory process for the protection of all the parties, and, it might be added, to avoid

161. See William N. Robiner & William Schofield, *References on Supervision in Clinical and Counseling Psychology*, 221 PROF. PSYCHOL.: RES. & PRAC. 297 (1990) (reporting over thirteen hundred references on supervision between 1983 and 1989).

162. See Vasquez, *supra* note 125.

163. *Id.* at 198.

164. *Id.* at 199.

165. *Id.*

liability. Vasquez's third category, supervisor ethics, includes a variety of familiar principles. First, the supervisor must be "well trained, knowledgeable, and skilled in the practice of clinical supervision,"¹⁶⁶ that is, competent to supervise. Vasquez also emphasizes the need to obtain informed consent from the supervisee.¹⁶⁷

A review of other leading articles in the professional literature confirms the themes emphasized by Vasquez. For example, an article by Patrick Sherry is illustrative. Sherry's analysis is based on the 1981 APA Code.¹⁶⁸ Sherry examined each of the first eight principles of the 1981 code and applied them to the supervisory process.¹⁶⁹

In analyzing the Principle of Responsibility, Sherry's analysis points to the importance of informed consent. He urged supervisors to develop a contract specifying both the supervisee's duties as well as the consequences of failing to fulfill these duties.

The principle of Competence naturally was prominent in Sherry's analysis:

Several implications for the supervisory relationship follow from this standard. First, it would seem that supervisors should supervise students only over those cases for which they feel competent to provide treatment. . . . The supervisor also has the responsibility for determining whether the student is sufficiently free from personal and emotional conflicts to be able to provide effective treatment. . . . From an ethical standpoint competence as a supervisor also implies a sensitivity to multicultural issues.¹⁷⁰

In reviewing the principles of Confidentiality, Sherry, like others, again emphasizes the importance of informed consent: "It is also the client's right . . . to decide how information shall be used by the therapist. In fact, APA has issued guidelines that suggest that the client be informed about the

166. *Id.* at 200.

167. Supervisees have similar rights to privacy, respect, dignity, and due process that clients do. Because of those rights, supervisors should provide trainees with information regarding expectations, anticipated competency levels, activities, and optional experiences so that the supervisee knows ahead of time whether to agree to the particular experience and thus to participate with informed choice. . . . The failure to provide relevant and timely feedback is the problem identified in most ethical complaints from supervisor-supervisee relationships. *Id.* at 200 (citing PATRICIA KEITH-SPIEGEL & G. P. KOOCHER, *ETHICS IN PSYCHOLOGY: PROFESSIONAL STANDARDS AND CASES* (1985)).

168. *Ethical Principles, supra* note 116. Note that the 1981 Code was revised in 1989 with relatively minor changes. The 1992 APA Code, while containing many of the same underlying principles, represented a considerable reorganization of the 1981/1989 principles. Nevertheless, the basic ideas pertaining to supervision are remarkably similar.

169. See Patrick Sherry, *Ethical Issues in the Conduct of Supervision*, 19 *COUNSELING PSYCHOLOGIST* 566 (1991). These eight principles are (1) Responsibility; (2) Competence; (3) Moral and Legal Standards; (4) Public Statements; (5) Confidentiality; (6) Welfare of the Consumer; (7) Professional Relationships; and (8) Assessment Techniques. Principles (9) and (10), Research with Human Participants and Care and Use of Animals, were not seen as applicable. See *id.* at 566.

170. *Id.* at 573-74.

identity of the supervisor."¹⁷¹

Sherry emphasizes that to protect client rights, the supervisee must not only obtain consent for any audio or video recordings, but this consent process must include a discussion of how tapes might be used, including "the identities of those in any supervision group that might hear the tape."¹⁷² In sum, Sherry states that the principle of Confidentiality implies: ". . . [T]he supervisor has a duty to protect the client, the public, the profession, and the supervisee, in that order, by providing evaluative monitoring of the supervisee."¹⁷³

The supervisory literature pertaining to the ethical responsibilities of supervisors is surprisingly consistent.¹⁷⁴ William R. Harrar and colleagues identify three major ethical issues they believe transcend the various theoretical orientations in psychotherapy: supervisor qualifications (competence), duties and responsibilities of supervisors, and dual relationships.¹⁷⁵

As Harrar notes, the principle of competence is seen repeatedly in the ethical and professional literature, and is an important underlying guideline in the standard of care of supervision. For Harrar, competence encompasses the duty of the supervisor to be qualified as a supervisor by education, training, and experience. Competence also encompasses the duty of supervisors not to supervise a case they could not competently see themselves, or to assign to a supervisee a case for which he or she is not competent.¹⁷⁶

As with other commentators, Harrar calls for timely feedback, including written goals (for informed consent) and timely written evaluations relative to those goals. In addition, these authors emphasize the importance of guarding against dual relationships. The APA ethical codes have long been concerned with the problem of dual, or as they are now called, multiple relationships.¹⁷⁷ Dual or multiple relationships are those in which the psychologist has more than one relationship with an individual; for example, supervisee/sex partner; student/sex partner; patient/sex partner. Although dual relationships are not limited to those involving sexual relationships,¹⁷⁸

171. *Id.* at 577. Note that APA has never expressly stated that the supervisee's training status must be disclosed. However, in the APA principle of informing clients as to the limits of confidentiality (1992 code) and in informing clients as to any factors that might influence their willingness to enter a relationship (1981 and 1989 codes) it is clear that sound ethical practice would require the disclosure of this information.

172. *Id.* at 578.

173. *Id.*

174. This consistency is probably due to the fundamental values that underlie ethical codes such as that of the American Psychological Association.

175. See William R. Harrar et al., *Ethical and Legal Aspects of Clinical Supervision*, 21 *PROF. PSYCHOL.: RES. & PRAC.* 37 (1990).

176. Harrar and colleagues point not only to the APA ethical code, but also to the APA Specialty Guidelines. See *APA Guidelines*, *supra* note 117. See also *AASPB*, *supra* note 123.

177. See *APA Code*, *supra* note 114, § 1.17.

178. For example, patient/business partner.

all such relationships are suspect because of their potential to impair professional judgment and increase the risk of exploitation.

As Harrar notes, supervisors not only hold a position of power over their supervisees, they also occupy a position of trust. Present ethical practice expressly prohibits sexual and other dual relationships between supervisors and supervisees.¹⁷⁹ Thus, in the ethical practice of supervision, supervisors have a duty to operate in the best interests of the welfare of the supervisee, and to avoid sexual relationships with supervisees and other forms of exploitation.

V. TOWARD A STANDARD OF CARE IN PSYCHOTHERAPY SUPERVISION

A. Overview

The need to operate on behalf of the welfare of the patient, the supervisee, the public, and the profession creates tensions which complicate the formulation of a coherent standard of care in supervision. An articulated standard would be consistent with the often conflicting goals of protecting the patient, encouraging the growth of the supervisee, guiding the supervisor, minimizing the risks of liability, and protecting the public as well as the profession.

As an analysis of liability of supervisors/employers reveals, supervisors can be found liable on the basis of statutory obligations and on a variety of theories based on vicarious and direct liability. The absence of a coherent set of standards is not a shield against liability. On the contrary, the absence of articulated standards can lead to confusion in the supervisory setting. Must every session be taped? What are reasonable efforts to monitor? How does one cope with the multiple roles and sometimes conflicting duties of a supervisor?

As the present analysis suggests, plaintiff's lawyers, when pursuing a claim for damages against a psychotherapist, would be well advised to inquire into whether the therapist was under the employment or supervision of another therapist. A number of questions would arise. Was the supervisor competent to supervise? Was the supervisor qualified to treat this patient independently? Was the supervisee competent to treat this patient, given the level of supervision? What was the level of supervision? How was the supervision monitored? Was the monitoring limited to self-report? If not, what other techniques were used to insure adequate monitoring? How was this monitoring process documented? Did the supervisor follow accepted ethical principles, such as providing timely and periodic evaluations of the supervisee? Was there a dual relationship of any kind?¹⁸⁰ Was the patient

179. See *APA Code*, *supra* note 114, § 1.19(b) ("Psychologists do not engage in sexual relationships with supervisees in training over whom the psychologist has evaluative or direct authority, because such relationships are so likely to impair judgment or be exploitative.").

180. See *Masterson v. Board of Examiners of Psychologists*, No. 95A-03-11, 1995

fully informed as to the training status of the supervisee, the role of the supervisor, the limits of confidentiality, and other relevant factors pertinent to the relationship? These and other issues make the supervisory role quite hazardous.

Based on statutes, case law, ethical codes, and the professional literature, it is possible to distill a set of principles that could form the basis for a standard of care. These include the supervisor's responsibility to be aware of relevant legal, ethical and professional practices; the ethical principles of supervision; and a specific set of responsibilities and duties of supervisors.

B. Supervisor Responsibilities

Supervisor responsibilities are evident in statutes,¹⁸¹ in ethical codes,¹⁸² and in the relevant literature.¹⁸³ In short, the supervisor is responsible for the entire process, and thus must be aware of all factors involved in the practice of supervision. Such an awareness begins with a knowledge of the relevant licensing laws of the state in which the supervisor is practicing. Such laws typically provide explicit guidelines in the conduct of supervision.¹⁸⁴ Ignorance of the law is no excuse; and good intentions are no defense to a bad outcome. Thus, a basic building block of a standard of care in supervision would hold that supervisors accept full responsibility for the supervisory process and are aware of all relevant laws. Supervisors are also well advised to have some familiarity with case law and the various theories upon which liability may attach. Knowledge of case law is also useful for dealing with such issues as the limits of confidentiality.¹⁸⁵ Finally, supervisors have a responsibility to be familiar with the relevant professional literature, and to maintain a current knowledge of professional developments.

C. The Ethical Principles of Supervision

Five major ethical principles were seen repeatedly in statutes, case law, ethical codes, and the professional literature: (1) competence; (2) confidentiality; (3) avoidance of dual relationships; (4) welfare of the consumer; and (5) informed consent. Each of these principles involves tensions and divided loyalties.

LEXIS 589 (Del. Super. Ct. Dec. 29, 1995) (holding that supervising psychologist's license was revoked where the supervisee was allowed to treat a patient in the same social circle as the therapist and supervisee).

181. See N.H. REV. STAT. ANN. § 330-A:16(b)(II)(b) ("the supervisor shall assume professional responsibility for the psychological assistant in a written agreement . . .").

182. See ACES, *supra* note 148 (supervisor responsible for client welfare, monitoring clinical performance, and supervisee development).

183. See Sherry, *supra* note 169 (supervisor has duty to protect the client).

184. See *supra* Part II.

185. See Smith, *supra* note 154 (discussing case law which indicated some limits on the privilege for students).

1. *Competence*: The principle of competence applies in four ways. First, the supervisor must be competent to supervise.¹⁸⁶ This means that the supervisor is qualified to supervise by education, training, and experience. How often do clinical training programs assign the task of supervision to junior faculty, with relatively little direct experience, let alone training in supervision? Such practices must be examined in light of the ethical and legal responsibilities of supervisors. If junior faculty are assigned the task of supervision, these faculty should be supervised themselves by a more senior faculty member. One approach might involve teams comprised of practitioners and students of differing levels of skill. Experienced supervisors could then provide guidance to junior faculty members, who, in turn, could provide supervision for predoctoral students. Within the team, more advanced students could provide some support and guidance to less advanced students. In this way, all students can gain experience in the practice of supervision, thus ensuring that future supervisors will be competent.

Given that the supervisor is competent to supervise, he or she must also be competent to see the patient to whom the supervisee is assigned. This requirement demands that the supervisor make an assessment of patients before they are assigned to supervisees, and that the supervisor conduct an ongoing assessment of the patient.

With knowledge of the patient, the supervisor then has a duty to assign to supervisees only those patients the supervisee is competent to treat.¹⁸⁷ This duty requires that the supervisor conduct an assessment of the supervisee's education, training, and experience. It also requires the supervisor to gauge the supervision to the level of the supervisee and to the needs of the patient. The less experienced or the less competent the supervisee, the greater will be the level of involvement and monitoring required of the supervisor.

Finally, the supervisee must assess his or her own competence. The supervisee must learn from the start to share in the ethical responsibilities psychologists and other mental health practitioners have to patients.

2. *Confidentiality*: Supervision involves problems of confidentiality.¹⁸⁸ Supervisors and supervisees need a plan in advance to deal with these issues. First, there is the issue of dealing with the limits of confidentiality. Patients must be informed in advance as to all limits to confidentiality and

186. Supervisor competence was stressed in statutes. See CAL. CODE REGS. tit. 16, § 1833.1(a)(3)-(5) (1997) (explaining supervisor must affirm his or her competence to supervise).

187. See APA Code, *supra* note 114 ("psychologists delegate . . . only those responsibilities that such persons can reasonably be expected to perform). See also DEL. CODE ANN. tit. 24, § 3502(8) (explaining supervisor responsible for ensuring services rendered by psychological assistant are consistent with assistant's level of education).

188. The role of confidentiality in the supervisory process was noted in several sources. See APA Code, *supra* note 114 (duty to discuss limits of confidentiality); See also ACES, *supra* note 156 (explicit guidelines for maintaining confidentiality). See also Sherry, *supra* note 174 (confidentiality implies duty to protect the client by monitoring supervisee).

privilege.¹⁸⁹ It is clear that despite the common use of self-report in the supervisory process, self-report is insufficient to allow the monitoring necessary for competent supervision.¹⁹⁰ This is true even when it is used in conjunction with record review. Thus, audio, videotapes or some form of direct observation, or face-to-face interaction between the supervisor and patient will become inevitable.

Supervisors need to clarify in advance what their requirements are so that supervisees can discuss with patients the process by which the supervision will be monitored.¹⁹¹ Moreover, given that such devices as audio taping will be used, it is necessary to minimize intrusion by sharing such information with as few people as possible and by clear rules for disposal of such data once it is no longer needed.

3. *Avoidance of Dual Relationships:* The supervisor must recognize the position of power he or she holds vis-a-vis the supervisee, and avoid any exploitation.¹⁹² Sexual relationships with supervisees are expressly unethical and clearly fall below any standard of supervision because the supervisor's judgment and ability to protect the patient will be severely compromised.¹⁹³ Supervisors also must be alert to possible dual relationships between the supervisee and patient.

4. *Welfare of the Consumer:* The primary consumers of supervisory services are the supervisee and the patient. The supervisor is obligated to protect both.¹⁹⁴ The supervisee is protected when the supervisor provides clear goals, preferably written, and timely evaluative feedback.¹⁹⁵ Feedback is an essential aspect of the supervisory process, and failure to provide it would be less than the minimum standard of care.

At the same time, the supervisor must monitor the supervision sufficiently to protect the welfare of the patient.¹⁹⁶ Tension arises when the su-

189. See *APA Code*, *supra* note 114.

190. See Slovenko, *supra* note 131, at 462-63 (discussing inadequate monitoring as a major source of potential liability). See also *Powers v. U.S.*, 589 F. Supp. 1084, 1101 (D. Conn. 1984) (holding supervisor liable for failure to adequately monitor).

191. See OHIO ADMIN. CODE § 4732-13-04(12)(h)(3) (1998) (statutory requirement for written treatment plan signed by supervisor).

192. See Kitchener, *supra* note 124 (discussing the principle of nonmaleficence, implying that the supervisor should cause no harm to the patient as well as the supervisee; discussing the principle of justice and fidelity, implying that the supervisor act fairly and honestly in dealing with the supervisee).

193. See *APA Code*, *supra* note 114 (psychologists do not engage in sexual relationships with supervisees).

194. See OHIO ADMIN. CODE § 4732-13-04(10) (1995) (psychologist shall have full responsibility for client welfare). See also ACES, *supra* note 148 (supervisor responsible for monitoring client welfare).

195. See Vasquez, *supra* note 125 (failure to provide relevant and timely feedback frequently identified with ethical complaints).

196. See *Steckler v. Ohio State Bd. of Psychology*, 613 N.E.2d 1070 (Ohio Ct. App. 1992) (holding supervisor's license suspended for failure to exercise full direction, control, and responsibility for client welfare).

supervisor must choose between a closer level of scrutiny versus giving the supervisee the opportunity to make decisions and perhaps mistakes. To minimize risks, the supervisor must be ever mindful of the duty to provide a continual assessment of both the supervisee and the patient. Under the minimum standard of care, the responsibility for the welfare of both patient and supervisee falls on the supervisor's shoulders. Any mistakes that lead to patient injury are the supervisor's responsibility as well as that of the supervisee.¹⁹⁷

5. *Informed Consent*: Informed consent is multi-faceted. Both the supervisee and the patient must be informed of any factors that might influence their willingness to enter the relationship.¹⁹⁸ For supervisees, proper informed consent means a clear specification of the duties, training philosophy, expectations, and evaluative procedures of the supervisor.¹⁹⁹ For the patient, informed consent involves an explicit clarification of the relationship, status of the supervisee, and limits of confidentiality.

D. Specific Duties of Supervisors

Implicit in the responsibilities and ethical principles are a number of duties of supervisors. Several of these have appeared repeatedly through state statutes, case law, ethical codes, and the relevant literature.

1. *Duty to Monitor and Control*: Supervisors have a duty to monitor and control the supervisory process as necessary to protect the welfare of both the supervisee and patient. The degree of monitoring depends on the level of development of the supervisee and the nature of the patient's problem. For inexperienced supervisees, some form of video or audio taping, or perhaps even cotherapy, represents the minimum standard.

2. *Duty to Evaluate the Patient*: The supervisor has a duty to assess the patient, and to continue this assessment throughout the supervisory process. Unless such an assessment is done, the supervisor cannot properly monitor the treatment process.

3. *Duty to Evaluate the Supervisee*: Similarly, the supervisor has a duty to continually assess the skills and functioning of the supervisee in order to ensure that the supervisee's level of competence comports with the supervisor's level of competence. Again, unless the supervisor is aware of the supervisee's level of competence, it is not possible to know if the supervisee is capable of properly caring for the patient.

197. In supervision, responsibility is multiplied, it is never divided.

198. See ACES, *supra* note 148, § 2.14 (supervisors should have supervisees inform their clients that they are being supervised and should incorporate the principles of informed consent). See also CAL. CODE REGS. tit. 16, § 1391.6(b) (statutory requirement to inform patient in writing that assistant is unlicensed and supervised as an employee of the supervisor).

199. Appendix A contains a sample of an informed consent procedure used by this author to provide informed consent to students in a doctoral training program. See *infra* app. A.

4. *Duty to Provide Feedback:* The supervisor has a duty to provide timely evaluations in order to facilitate the supervisee's training and keep the supervisee informed as to his or her progress. Such feedback helps promote supervisee growth as well as keep the supervisee on track in the treatment process.

5. *Duty of Accountability:* The supervisor has the duty to document the supervision through careful record keeping. Such record keeping may prove invaluable in the event of a lawsuit for negligent supervision.

E. Promulgating the Standards to Supervisors

Dissemination is an issue that is perhaps more thorny than the problem of developing a standard of care for psychotherapy supervision. Three suggestions are provided to deal with this issue.

1. *Mandatory Continuing Education For Supervisors:* Given the requirement of supervised experience in all state licensing laws, it makes sense to require minimum levels of education, training, and experience for supervisors. In California, supervisors are qualified strictly by experience.²⁰⁰ In view of the complexities and divided loyalties inherent in the supervisory process, states that require supervision could strongly encourage a higher and uniform standard through mandatory continuing education of supervisors.

2. *Certification:* A movement is currently underway to provide specific certification for specializations.²⁰¹ To encourage continuing education and training of supervisors, the APA could set up a certification process for supervisors. Such a process could have specific minimum levels of education, training, and experience, and the certification body could be responsible for providing relevant continuing education.

3. *Specialization:* Along with certification is a move toward specialization, such as through the American Board of Professional Psychology ("ABPP"). Presently, ABPP provides diplomate status in clinical psychology, neuropsychology, forensic psychology, and school psychology. In addition, negotiations are underway for a diplomate in assessment psychology through the American Board of Assessment Psychology.

In order to encourage higher and more uniform standards in supervision, strong consideration should be given to the creation of a diplomate in supervision through the American Board of Professional Psychology. Such a specialization would provide a mechanism for uniform standards, peer review, and continuing education through newsletters and workshops.

200. See *supra* text accompanying notes 17-18.

201. For example, the American Psychological Association is presently involved in efforts to certify substance abuse therapists.

F. Reform in the Legal Profession

From the standpoint of the legal profession, attorneys need to remain cognizant of the statutes, case law, ethical standards, and professional literature discussed herein. If supervisors of mental health professionals do not police themselves, then perhaps it is up to the legal profession to protect the rights of patients receiving psychotherapy under supervision. Arguably, intervention by the legal profession in the mental health profession has had beneficial effects in areas such as the regulation of psychological testing²⁰² and providing a check of spurious predictions of violence.²⁰³ As with reforms within the mental health professions, the major barrier to reform in the legal arena is dissemination. To make attorneys more aware of the relevant issues and potential causes of action against supervisors, courses on law and mental health could be added to the law school curriculums. In addition, continuing education may help bridge the gap in knowledge due to the relatively limited clinical experience attorneys receive.

VI. CONCLUSION

Supervision is an integral part of the practice of psychology and other mental health professions. Presently, practitioners are regulated by state licensing laws, case law, a variety of legal theories, a body of ethical knowledge, and a rapidly growing body of literature. Supervision is a demanding, complex endeavor with competing demands and tensions.

Patients as well as the mental health profession have much to gain from sound supervisory practices. Patients benefit when the experienced supervisor carefully guides the therapy process. Their risk to exposure to the normal mistakes caused by inexperience are reduced by a careful monitoring process. Patients are also protected when the supervisor has conducted an assessment that the patient's problems are within the competence of both the supervisor and supervisee. Such competence is a prerequisite to effective treatment, and can only be assured by adherence to the standards of supervision as described herein. Adequate supervision will ensure that the patient's rights are protected. Foremost among these rights are the rights to be treated with dignity and respect. It is only through a careful and fully in-

202. For a discussion of the interface between psychology and the law, see Bruce D. Sales, *The Legal Regulation of Psychology: Scientific and Professional Interactions*, in 2 THE MASTER LECTURE SERIES: PSYCHOLOGY AND THE LAW (C. James Scheirer & Barbara L. Hammons eds., 1980). For a discussion of the regulation of psychological tests, see Donald N. Bersoff, *Regarding Psychologists Testily: The Legal Regulation of Psychological Assessment*, in 2 THE MASTER LECTURE SERIES: PSYCHOLOGY AND THE LAW (C. James Scheirer & Barbara L. Hammons eds., 1980).

203. For the limits of mental health professionals' ability to predict violence, see John Monahan, *The Predication of Violent Behavior: Developments in Psychology and the Law*, in 2 THE MASTER LECTURE SERIES: PSYCHOLOGY AND THE LAW (C. James Scheirer & Barbara L. Hammons eds., 1980).

formed consent process and frank discussion of the limits of confidentiality that such rights can be secured. In the end, sound supervisory practices must certainly increase the probability of a successful outcome for the patient, while at the same time minimizing the inherent risks of treatment from an inexperienced therapist.

The profession also has much to gain. Adequate supervision is perhaps the best guarantee that new practitioners will enter the profession with the experience and skills needed to meet the standards of patient care. Adequate supervision is also an important safeguard against the numerous sources of liability to which supervisors may be exposed. Lawsuits and bad outcomes injure the profession as well as the individual practitioner. Further, through sound supervisory practices supervisors manifest the ethical standards that are the backbone of the profession. In manifesting these standards, supervisors' actions reflect positively on the profession as a whole.

In sum, sound supervisory practices are good for the patient, the supervisee, the supervisor, and the profession as a whole. In order to promote excellence in supervision two problems must be confronted: (1) there is a need to develop a coherent set of principles to guide the standard of care in supervision; and (2) such principles must be promulgated. This article represents one effort toward the solution of these two problems. An additional problem is the lack of information in the legal profession on the role and liability of supervisors in the mental health delivery process. To deal with this problem, course work and continuing education for attorneys are strongly recommended.

APPENDIX A

SAMPLE INFORMED CONSENT FOR SUPERVISEES

Date

Student in Training
(address)
San Diego, California

Dear Supervisee,

RE: Supervisory Agreement

This is to confirm that I have agreed to provide practicum supervision for you for 1-2 patients through the Clinic.

I will expect you to act in accord with all Clinic policies, including videotaping your sessions.

For each new client that we accept, I expect you to provide informed consent at the outset of treatment and to explain verbally all of the limits of confidentiality. Your discussion with the client should include your training status, the fact that you are being supervised by me and the fact that your therapy will be videotaped and examined by me. Please provide the client with my name and clinic telephone number. In addition, I want you to personally explain all limits of confidentiality (e.g., reporting laws). While I realize that we obtain written informed consent, I want the procedure to be explained orally to each potential client. I also want your therapy notes to reflect what you told your potential clients regarding informed consent and the limits of confidentiality, as well as what the client said to communicate his or her understanding.

In obtaining informed consent, I want you to make it clear that the case may have to be transferred to another student therapist and/or supervisor over the summer.

I want you to bring the case file with your therapy notes to each supervisory session so that I can examine the file and countersign your notes.

In our supervisory sessions I will concentrate on two major issues: enhancing your professional development and providing formal evaluative feedback. Regarding professional growth, I will concentrate on correct application of the APA Ethical Code for Psychologists and all ethical principles and standards promulgated by the American Psychological Association. I will also concentrate on the development of your skills as a therapist, and on helping you to identify blind spots or limitations that you must confront as a professional psychologist. I also consider it to be my

job to help you sort out the difference between opinion and empirically demonstrated techniques.

Regarding the evaluative feedback, it is important for you to realize that any written evaluations by me will enter into your student file and may be discussed with others involved with your training. This is usual and customary practice in clinical programs.

I want to make it clear that I cannot supervise you on any case that I could not competently handle myself. You and I will discuss each potential case and make an evaluation pertaining to the appropriateness of the case, given your level of skill and my areas of competency. In order to facilitate my assessment of your skill level, I would like you to provide me with a summary of your clinical experience, which we will review in our first supervisory session.

I want you to know that in providing you with this informed consent concerning our relationship, I am trying to act as a model for you.

Ethically, I am required to inform you of an factors that might influence your willingness to enter a supervisee relationship with me, just as you must similarly inform your clients in advance of the relationship.

Since responsibility in clinical work is always multiplied, and never divided, you and I both have 100% responsibility for the welfare of any client you should see under my direction. I therefore, expect you to notify me immediately, should any problem arise.

I am enclosing a copy of our agreement so that you can keep one for your files and return one signed copy to me. Please let me know if you have any questions. At our first supervising session, I will go over the provisions outlined in this letter.

I look forward to working with you beginning in the fall.

Sincerely,

Dennis P. Saccuzzo, Ph.D., J.D.

I have read and understand this supervisory agreement between myself and Dennis P. Saccuzzo, Ph.D., J.D.

(name)

(date)