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TIME OUT: THE STATUTE OF LIMITATIONS AND FIDUCIARY THEORY IN PSYCHOTHERAPIST SEXUAL MISCONDUCT CASES

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Since 1975, sexual abuse of patients by psychotherapists has become an area of growing concern.¹ The damage precipitated by sexual contact between

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1. In 1975, Masters and Johnson vehemently denounced sexual contact between therapist and patient. It was their belief that such contact constitutes rape. See Masters & Johnson, *Principles of the New Sex Therapy*, 131 AM. J. PSYCHIATRY 548 (1976). For a discussion, see *infra* note 81 and accompanying text.

Since the late 1970s, a number of nationwide surveys have been conducted to determine the prevalence and effects on patients of sexual contact in the therapeutic relationship. See Holroyd & Brodsky, *Psychologists' Attitudes & Practices Regarding Erotic & Nonerotic Physical Contact with Patients*, 32 AM. PSYCHOLOGIST 843 (1977) [hereinafter Holroyd & Brodsky, *Psychologists' Attitudes*]; Pope, Levenson & Schover, *Sexual Intimacy in Psychology Training: Results &*

psychotherapists and their patients causes long-term harm which may be slow to manifest itself and difficult for the injured party to trace.² As a

Implications of a National Survey, 34 AM. PSYCHOLOGIST 682, 682-89 (1979) [hereinafter, Pope, *Sexual Intimacy in Psychology Training*]; Gartrell, Herman, Olarte, Feldstein & Localio, *Psychiatrist-Patient Sexual Contact: Results of a National Survey, I. Prevalence*, 143 AM. J. PSYCHIATRY 1126, 1131 (1986) [hereinafter Gartrell, *Psychiatrist-Patient Sexual Contact*] (this study surveyed one-fifth of all psychiatrists under the age of 65; while the return rate was low (only 26%), the profile of the respondents was consistent with the profile of the professional population in the American Medical Association master file except that a significantly larger proportion of board certified psychologists answered the survey). See also Gechtman, *Sexual Contact Between Social Workers & Their Clients*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 27 (G. Gabbard ed. 1989).

State legislatures have enacted both civil and criminal statutes to address the issue of psychotherapist sexual misconduct. Minnesota has been at the forefront of this issue. In 1984 the Minnesota legislature appointed a task force to study the problem of sexual exploitation by counselors and therapists. See MINN. STAT. § 631 (1984). The task force produced three publications — a brochure, a pamphlet, and a book. All three are titled *It's Never O.K.* See MINN. PUB. EDUC. WORK GROUP OF THE TASK FORCE ON SEXUAL EXPLOITATION BY COUNSELORS & THERAPISTS, *IT'S NEVER O.K.: A HANDBOOK FOR VICTIMS & VICTIM ADVOCATES ON SEXUAL EXPLOITATION BY COUNSELORS & THERAPISTS* (1988) [hereinafter MINN. TASK FORCE, *IT'S NEVER O.K.: HANDBOOK FOR VICTIMS*]; THE STATE TASK FORCE ON SEXUAL EXPLOITATION BY COUNSELORS & THERAPISTS, *IT'S NEVER O.K.: A HANDBOOK FOR PROFESSIONALS ON SEXUAL EXPLOITATION BY COUNSELORS & THERAPISTS* (B. Sanderson ed. 1989) [hereinafter MINN. TASK FORCE, *IT'S NEVER O.K.: PROFESSIONAL HANDBOOK*].

Gary Schoener, director of the Minnesota Walk-In Counseling Center, and his colleagues have written an extremely comprehensive book on this topic which is invaluable in detailing the clinical and ethical issues involved in psychotherapist sexual abuse of clients. See G. SCHOENER, J. MILGROM, J. GONSIORREI, E. LUEPKER & R. CONROE, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS: INTERVENTION & PREVENTION* (1989) [hereinafter G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*].

Several states have passed legislation making psychotherapist-patient sexual contact a criminal offense. See CAL. BUS. & PROF. CODE § 729 (West Supp. 1989); COLO. REV. STAT. § 18-3-405.5 (4)(c) (Supp. 1988); 1990 Fla. Sess. Law Serv. ch. 90-70, § 1(4)(a) (West); ME. REV. STAT. tit. 17-A § 253 (2)(I) (Supp. 1989); MINN. STAT. ANN. § 609.341 to 609.351 (Supp. 1989); N.D. CENT. CODE 12.1-20-06.1 (1) (Michie Supp. 1989); WIS. STAT. ANN. § 940.22 (2) (West 1985). Pennsylvania has a bill pending concerning sexual exploitation, while Massachusetts is in the task force process. See H.R. 151, 1989 Sess. (Pa. 1989); H.R. 976, 2d Sess., 176 Gen. Court (Mass. 1989).

Four states have created a civil cause of action. See CAL. BUS. & PROF. CODE § 43.93 (West Supp. 1989); ILL. ANN. STAT. ch. 70, para. 801 (Smith-Hurd Supp. 1989); MINN. STAT. ANN. § 148A (West 1985); WIS. STAT. ANN. § 895.70 (2) (West 1988).

All of the major mental health organizations prohibit sexual contact between therapist and patient. See *infra* note 6.

For a complete discussion of the new statutory enactments, see Jorgenson, Randles & Strasburger, *Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 WM. & MARY L. REV. 645 (1991) [hereinafter Jorgenson, Randles, & Strasburger, *Patient-Psychotherapist Sex*].

2. These consequences have been discussed in two cases. In *Simmons v. United States*, the court of appeals found legally sufficient evidence to support the district court's finding that the plaintiff did not know that the defendant's conduct caused her emotional injury until 1983 — more than three years after the sexual contact had occurred. *Simmons v. United States*, 805 F.2d 1363, 1367 (9th Cir. 1986).

In *Greenberg v. McCabe*, the court found the plaintiff's delayed discovery of her cause of

result of the unique characteristics of the injuries caused by sexual contact in a psychotherapeutic relationship, many victims are unable to prosecute claims within the period allowed by most statutes of limitations.³

This article explores fiduciary theory as the basis for tolling the statute of limitations in psychotherapist sexual misconduct cases. The article first discusses the circumstances leading to psychotherapist sexual abuse and victims' resulting inability to advance their claims within the statutory period otherwise imposed. A discussion follows as to why fiduciary theory provides a particularly appropriate model for the psychotherapist-patient relationship. The article then argues that fiduciary theory as applied to the psychotherapist-patient relationship justifies tolling the statute of limitations in these cases, through the application of either the discovery rule or the fraudulent concealment doctrine. Finally, the authors discuss the policy considerations involved in extending or tolling the statute of limitations.

I. The Damage Inflicted by Abusive Therapists

The injuries sustained by victims of sexual exploitation in the therapeutic relationship are wide-ranging and long-term.⁴ It is the abuse that occurs in

action explainable for three reasons: (1) dependence on her therapist impeded her ability to understand the relationship between the treatment she received and the damages she suffered; (2) the therapist assured her that the treatment was proper; and (3) the plaintiff could not reasonably be expected to independently investigate while still in therapy. *Greenberg v. McCabe*, 453 F. Supp. 765, 772 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979).

Commentators also recognize inappropriate treatment may cause long-term continuing harm. See G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 76-77 (victims may experience developmental fixation and continuing harm); Pope, *How Clients Are Harmed by Sexual Contact with Mental Health Care Professionals: The Syndrome and Its Prevalence*, 67 J. COUNSELING & DEV. 222 (1988) [hereinafter Pope, *How Clients Are Harmed by Sexual Contact*] (discussion of commonly occurring damages and long-term effects associated with sexual contact by psychotherapists).

Pope further discussed instances in which the damage may be slow to manifest. He stated:

The sequelae (for the court) of therapist-client [sexual contact] may form a distinct clinical syndrome, which is similar in some ways to Rape Response Syndrome, Battered Spouse Syndrome, reaction to Incest, response to Child Abuse and Post-Traumatic Stress Disorder. Like many of these syndromes the appearance of the damage may be considerably delayed.

Id. at 224.

For further discussion of these ideas, see *infra* notes 15-45 and accompanying text.

3. Many states have statutes of limitations ranging from two to four years. See, e.g., MASS. GEN. LAWS ANN. ch. 260, § 2A (West 1980) (three years for actions of tort and personal injury); TEX. REV. CIV. STAT. ANN. art. 4590, § 10.01 (Vernon 1979) (two years from occurrence of breach). However, victims may be unable to come forward for many years following the sexual misconduct. See *Simmons v. United States*, 805 F.2d 1363, 1367 (9th Cir. 1986); *Greenberg v. McCabe*, 453 F. Supp. 765, 772 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979). For further discussion of this proposition, see *infra* notes 26-45 and accompanying text.

4. See Pope, *Research & Laws Regarding Therapist-Patient Sexual Involvement: Implications for Therapists*, 40(4) AM. J. PSYCHOTHERAPY 564 (1986) [hereinafter Pope, *Research & Laws Regarding Therapist-Patient Sex*] (lists profound depression, inability to maintain employment,

the context of the special relationship between the therapist and the client that causes the harms suffered by victims of therapist exploitation.⁵ This section will examine the prevalence of sexual abuse, the characteristics of the victims, the injuries which are often caused by the abuse and how the psychotherapist's special relationship with the patient can give rise to abuse.

A. Prevalence Of Abuse

Every major mental health care organization denounces sexual contact in psychotherapeutic relationships.⁶ Despite these admonishments, a significant number of therapists still engage in sexual or sexualized conduct with their patients.⁷ Recent self-reporting surveys reveal that 7-12% of psychotherapists have engaged in sexual relations with at least one client.⁸ Professionals in the field believe the figure may be as high as 20%.⁹ One study finds that 80% of those reporting any sexual involvement become sexually intimate with more than one patient.¹⁰ A researcher reports that of the psychiatrists she surveyed, 65% have counseled at least one patient who had been sexually abused by a prior therapist.¹¹ These statistics indicate that large numbers of

anxiety, suicide attempts, suicide, and the need for hospitalizations and shock treatments among damages suffered by victims); G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 65-79 (discussion of sexual involvement between therapists and clients as form of abuse, and comparing it to incest).

5. When a psychotherapist becomes sexually involved with a patient, the patient loses the psychotherapist as a caretaker, gaining instead a lover. But when an adult seeks professional help for an emotional hurt, that person is placed in a childlike posture of dependence. The patient must place trust in the caretaker in order to effect a cure. "Regression in the service of cure" may stimulate latent conflicts within the patient and harm the patient's emotional well-being. Kardener, *Sex & the Physician Patient Relationship*, 131 *AM. J. PSYCHIATRY* 1134, 1135 (1974) [hereinafter Kardener, *Sex & the Physician Patient Relationship*]. See also R. SIMON, *CLINICAL PSYCHIATRY & THE LAW* 289 (1986); G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 65-79.

6. See AM. PSYCHIATRIC ASS'N, *Principles of Medical Ethics & Annotations Especially Applicable to Psychiatry* (1985); AM. PSYCHOANALYTIC ASS'N, *Principles of Ethics for Psychoanalysis & Provisions for Implementation of the Principles of Ethics for Psychoanalysis* (1983); AM. PSYCHOLOGICAL ASS'N, *Ethical Principles of Psychologists* (1980); NAT'L ASS'N OF SOCIAL WORKERS, INC., *Code of Ethics of the National Association of Social Workers* (1980).

7. For a complete review of the literature, see G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1; Moison, *Sins of the Secular Priesthood: Civil Liability for the Sexual Seduction of Patients*, 33 *MED. TRIAL TECH. Q.* 441 (1986-87) [hereinafter Moison, *Sins of the Secular Priesthood*] (discussion of injuries commonly manifested in victims of sexual abuse). For further discussion, see *infra* notes 8-14 and accompanying text.

8. See Gartrell, *Psychiatrist-Patient Sexual Contact*, *supra* note 1, at 1128 (reporting 7.1% of all male psychiatrists and 3.1% of female psychiatrists have engaged in sexual contact); Pope, *Sexual Intimacy in Psychology Training*, *supra* note 1, at 682 (12% of male therapists admitted sexual contact and 3% of female therapists had engaged in sexual contact).

9. See Pope, *Research & Laws Regarding Therapist-Patient Sex*, *supra* note 4, at 565 (reporting insurance industry data that 20% will engage in sexual abuse at some time in career); Moison, *Sins of the Secular Priesthood*, *supra* note 7, at 444.

10. Holroyd & Brodsky, *Psychologists' Attitudes*, *supra* note 1, at 848-49.

11. Gartrell, Herman, Olarte, Feldstein & Localio, *Reporting Practices of Psychiatrists Who*

psychotherapy patients become victims of sexual abuse.¹² The Minnesota Walk-In Counseling Center reports counseling over 1500 victims within the last ten years alone.¹³ Sexual involvement with patients is the leading source of litigation against psychologists insured under the American Psychological Association's policy.¹⁴

B. Characteristics of the Victims

Victims vary widely in socioeconomic status, diagnosis, and level of functioning.¹⁵ Both men and women may be victimized by their therapists, although most victims are female, attractive, and younger than their therapists.¹⁶ Regardless of the victim's profile, research shows that sexual contact with one's therapist can be very harmful.¹⁷

Knew of Sexual Misconduct By Colleagues, 57 AM. J. ORTHOPSYCHIATRY 287, 289 (1987) [hereinafter Gartrell, *Reporting Practices*].

12. Moison, *Sins of the Secular Priesthood*, *supra* note 7, at 443 (sex-related charges rank eighth among causes of malpractice actions against psychiatrists).

13. See G. SCHOENER, PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS, *supra* note 1, at iii. In a recent newspaper article, Gary Schoener, director of the Minnesota Walk-In Counseling Center estimated that "we have looked at in excess of 2000 cases in the last fifteen years." Taylor, *When Seeking Help Brings Additional Grief*, Toronto Globe & Mail, Oct. 8, 1990, at A1.

14. See G. SCHOENER, PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS, *supra* note 1, at 538. From 1976 to 1986, sexual intimacy with clients was the most frequent cause of suits against psychologists insured under the American Psychological Association's policy. Suits accounted for 44.8% of all monies — \$7,018,165 — paid in response to claims. *Id.*

15. See Robertiello, *Jatrogenic Psychiatric Illness*, 7 J. CONTEM. PSYCHOTHERAPY 6 (1975), cited in K. POPE & J. BOUHOUTSOS, SEXUAL INTIMACY BETWEEN THERAPISTS & PATIENTS 47-48 (1986).

16. See K. POPE & J. BOUHOUTSOS, *supra* note 15, at 46-56; Gartrell, *Psychiatrist-Patient Sexual Contact*, *supra* note 1, at 1128 (88% of contacts for which gender specified occurred between male psychiatrists and female patients; patients ranged from age 20 to 48); Marmor, *Some Psychodynamic Aspects of the Seduction of Patients*, 36 AM. J. PSYCHOANALYSIS 319, 320 (1976) ("[i]t is noteworthy that most erotic breaches of the therapist-patient relationship occur with women who are physically attractive, almost never with the aged, the infirm or the ugly, thus giving the lie to the oft-heard rationalization on the part of such therapists that they were acting in the interest of the patient"). See also G. SCHOENER, PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS, *supra* note 1, at 95 (most of the 1500 victims that have been treated by Minnesota Walk-In Counseling Center are women; over 80% exploited by male therapists).

17. Several studies have been conducted which quantify the prevalence of abuse and the type and severity of damage to victims of psychotherapist-patient sexual exploitation. See, e.g., Kardener, Fuller & Mensh, *A Survey of Physicians' Attitudes and Practices Regarding Erotic and Nonerotic Contact with Patients*, 130 AM. J. PSYCHIATRY 1077 (1973) [hereinafter Kardener, Fuller & Mensh, *A Survey of Physicians' Attitudes*]; Holroyd & Brodsky, *Psychologist's Attitudes*, *supra* note 1; Pope, *Sexual Intimacy in Psychology Training*, *supra* note 1; Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *Sexual Intimacy Between Psychotherapists and Patients*, 14 PROF. PSYCHIATRY 185 (1983) [hereinafter Bouhoutsos, *Sexual Intimacy Between Psychotherapists & Patients*]; Pope, Tabachnik & Keith-Spiegel, *Sexual Attraction to Clients: The Human Therapist and the (Sometimes) Inhuman Training System*, 41 AM. PSYCHOLOGIST 147, 151 (1986) [hereinafter, Pope, Tabachnik & Keith-Spiegel, *Sexual Attraction to Clients*]; Gartrell, *Psychiatrist-Patient Sexual Contact*, *supra* note 1; Gechtman, *Sexual Contact Between Social Workers & Their Clients*, *supra* note 1, at 27-38.

C. *Damage Caused by the Sexualization of Therapy*

1. *Mental and Emotional Dysfunction*

Studies indicate that up to 90% of the patients who have engaged in sexual contact with their psychotherapists were harmed as a result.¹⁸ The damage suffered by these victims is often extensive.¹⁹ The patient's presenting illness may be reactivated or aggravated.²⁰ In addition, the exploitation sometimes creates new psychopathology, such as post-traumatic stress disorder, not present prior to the client's commencement of therapy.²¹

Injuries suffered by victims of psychotherapist sexual exploitation include sexual dysfunction, anxiety disorders, psychiatric hospitalizations, increased risk of suicide, depression, dissociative behavior, internalization of feelings of guilt, shame, anger, fear, confusion, and hatred, and feelings of worthlessness.²² Inability to trust others is perhaps the most damaging and prevalent injury suffered by victims.²³ Because victims become wary of other psychotherapists, abuse renders subsequent treatment very difficult and of little value,²⁴ or causes a patient to avoid further therapy altogether.²⁵ The

18. Gartrell, *Psychiatrist-Patient Sexual Contact*, *supra* note 1, at 1126 (respondents indicated that 87% of patients suffered ill effects from sexual involvement with their psychotherapists).

19. For a discussion, see G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 103-12 (describing common client experiences); see *infra* notes 20-45 and accompanying text.

20. See Apfel & Simon, *Patient-Therapist Sexual Contact: I. Psychodynamic Perspectives on the Causes & Results*, 43 *PSYCHOSOMATIC PSYCHOTHERAPY* 57, 60 [hereinafter Apfel & Simon, *Patient-Therapist Sexual Contact*] (original symptoms, including sexual dysfunction that brought patient to therapy may persist or worsen).

21. See MINN. TASK FORCE, *IT'S NEVER O.K.: PROFESSIONAL HANDBOOK*, *supra* note 1, at 35 (injuries include confusion, guilt, shame, sense of loss, and new psychological problems); Pope, *How Clients Are Harmed by Sexual Contact*, *supra* note 2, at 224-25 (therapist-patient sexual contact may cause distinct clinical syndrome in which damage is considerably delayed); G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 145 (discussing types of damages a psychotherapist might expect following an exploitative relationship including post-traumatic stress disorder).

22. See, e.g., Pope, *Research & Laws Regarding Therapist-Patient Sex*, *supra* note 4, at 567; Pope, *How Clients Are Harmed by Sexual Contact*, *supra* note 2 (delineates syndrome with symptoms including guilt; denial; isolation; feelings of emptiness; sexual confusion; impaired ability to trust; identity, boundary and role confusion; repressed rage; increased suicide risk; and cognitive dysfunction); Collins, Mebed & Mortimer, *Patient-Therapist Sex: Consequences for Subsequent Treatment*, 3 *MCLEAN HOSP. J.* 24 (1978) [hereinafter Collins, *Consequences for Subsequent Treatment*] (documents injuries including depression, anxiety, psychiatric hospitalizations); Pope, *Therapist-Patient Sex Syndrome: A Guide for Attorneys*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 45 (G. Gabbard ed. 1989) [hereinafter Pope, *Therapist-Patient Sex Syndrome*] (ambivalence, guilt, emptiness and isolation, sexual confusion, impaired ability to trust, identity problems and role reversal, emotional lability or dyscontrol, increased risk of suicide, cognitive dysfunction).

23. See *infra* notes 52-93 and accompanying text.

24. See Collins, *Consequences for Subsequent Treatment*, *supra* note 22 (studying dynamics of subsequent therapy, finding limited success).

25. See Apfel & Simon, *Patient-Therapist Sexual Contact*, *supra* note 20, at 58 (describes ambivalence toward therapists and therapy expressed through difficulty finding therapist, frequent changes of therapist, delays, and avoiding seeking needed therapy).

key needed by patients to learn of the consequences of their abuse is taken from them by the very misconduct.

2. *Inability to Enforce Legal Rights*

Victims of sexual exploitation often are unable to enforce their legal rights within the statutory time limit.²⁶ Occasionally a client may repress the traumatic events from conscious memory.²⁷ More commonly, victims are unable to connect their abuse experience with their subsequent psychological injuries.²⁸ The injuries suffered by the victims of therapist negligence are to the personality and mind.²⁹ Clients sometimes attribute the symptoms experienced — such as emotional instability, depression, and guilt — to personal inadequacies, rather than to the therapist's abuse of the relationship.³⁰ In addition, mental injury frequently manifests itself in incongruous ways.³¹ For example, panic attacks, sleeplessness, and inability to concentrate

26. See *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986) (inability to recognize cause of injury until statute of limitations had already run); Gabbard, *Introduction*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* xi (G. Gabbard ed. 1989) [hereinafter Gabbard, *Introduction*]; MINN. TASK FORCE, *IT'S NEVER O.K.: PROFESSIONAL HANDBOOK*, *supra* note 1, at 15-17.

27. See *Evans v. Eckelman*, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605, 608 (1990); *Mary Doe v. John Doe*, 205 Cal. App. 3d 1354, 254 Cal. Rptr. 633 (1989); *Meiers-Post v. Schafer*, 170 Mich. App. 174, 427 N.W.2d 606 (1988). It should be noted that as of this date, no cases have been reported concerning psychotherapy patients having lost all memory of the abuse. However, practitioners report having treated victims who did repress all memory of the event. G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 142 (describing atypical dissociative behavior); see also *infra* notes 269-73, 293 and accompanying text.

28. For a discussion, see *TASK FORCE ON SEXUAL EXPLOITATION BY COUNSELORS & THERAPISTS*, MINN. DEP'T OF CORRECTIONS, *REPORT TO THE MINNESOTA LEGISLATURE* 12 (1985); CAL. SENATE RULES COMM., *REPORT OF THE SENATE TASK FORCE ON PSYCHOTHERAPIST & PATIENTS SEXUAL RELATIONS* 12 (1987).

29. See *Shamloo v. Lifespring, Inc.*, 713 F. Supp. 14 (D.D.C. 1989) (plaintiff alleged emotional injury suffered as a result of improper and physically abusive psychological training course; court denied summary judgment on grounds that psychological injury is not sufficient in itself to put reasonable person on notice of legal injury); *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780, 786 (1991) (discussing how injury to the mind may interfere with discovery of cause of action); see also *Kropinski v. World Plan Executive Counsel*, 853 F.2d 948, 954-55 (D.C. Cir. 1988) (evidence of "thought reform" caused by psychological training may be admitted as evidence to establish why plaintiff failed to detect mental injury).

30. See, e.g., *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986). In this case, the plaintiff testified that she believed the conduct occurred because "she was a very bad person, a worthless person, a guilty person." *Id.* at 1367. Her expert witness explained that she began to think of herself as "a sexually bad person, someone who was sexually dirty or degraded or whorish." *Id.*

31. See *Shamloo v. Lifespring, Inc.*, 713 F. Supp. 14 (D.D.C. 1989). In this case, the plaintiff alleged she began suffering psychological decompensation, severe and continuing depression, and mood swings. The court held

the fact that an individual develops psychological problems, even severe ones, is not sufficient in itself to put a reasonable person on notice that they have been injured. Far too many persons undergo serious psychological suffering without legally compensable injury to make it a reasonable expectation on the part of the

— all symptoms of post-traumatic stress disorder³² — do not intuitively flow from the act of sexual intercourse or other sexualized behavior. Most clients need professional assistance to understand the results of sexual exploitation.³³

Yet the act of exploitation causes most victims to remain distrustful of other psychotherapists.³⁴ This situation renders many victims incapable of discerning the cause of their injury until their remedy is time-barred.³⁵ Like victims of incest, victims of abuse by their therapists are often unable to come forward for many years.³⁶

In *Greenberg v. McCabe*³⁷ the plaintiff was unable to pursue her cause of action for several years. In this case, an osteopath undertook psychiatric counseling of the plaintiff.³⁸ During the course of treatment, the plaintiff became so dependent on her therapist that he became god-like to her. Because of her dependence on him, she did not question his therapy techniques or the sexual relationship that he began with her.³⁹ She finally discovered her legal rights against him, but it was more than three years after the therapy and the relationship ended. The statute of limitations had run.⁴⁰

courts that the emergence of a psychological problem should be evaluated immediately in terms of injury.

Id. at 18. See also *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780 (1991). In *Riley*, the plaintiff alleged he began suffering severe psychological and emotional problems after exploitative therapy which involved marijuana, alcohol and valium use as well as sexual intimacy, but could not link his therapy to his injury for several years. The court held that, while the evidence on record did not require a ruling that *Riley's* action was timely, "a reasonable fact-finder could find that *Riley* did not make the causal link and that his failure to do so was reasonable. Thus, summary judgment should not have been granted." *Id.* at 786.

32. For a description of Post-Traumatic Stress Disorder, see AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1978).

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

34. Pope, *How Clients Are Harmed by Sexual Contact*, *supra* note 2, at 225 ("[v]ictims become mistrustful . . . [of] themselves for developing a trust for the therapist. . . [and of] others, particularly professionals, most particularly therapists").

35. See, e.g., *Seymour v. Lofgren*, 209 Kan. 72, 495 P.2d 969 (1972) (dismissal of suit upheld as time-barred on ground that plaintiff knew fact and cause of injury when she began new course of treatment); *Decker v. Fink*, 47 Md. App. 202, 422 A.2d 389 (1980) (plaintiff's action barred as court held that plaintiff reasonably should have known sexual relationship with therapist injured her prior to running of the limitations period); *Lenhard v. Butler*, 745 S.W.2d 101 (Tex. 1988) (claim barred by the statute of limitations despite transference phenomenon).

36. See *Simmons*, 805 F.2d at 366-67 (relied on findings that plaintiff did not know of injury within statutory period); *Greenberg v. McCabe*, 453 F. Supp. 765, 772 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979) (injury and cause subtler than normal malpractice, inappropriate to determine as a matter of law what plaintiff should have known); *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780, 788 (1991). See *infra* notes 55-58, 251-93 and accompanying text.

37. 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979).

38. *Id.* The court noted that the plaintiff's presenting problem was "harried housewife syndrome."

39. *Id.*

40. *Id.* However, the court denied summary judgment on the ground that sufficient evidence

This plaintiff's inability to protest the maltreatment is common among survivors of therapist sexual abuse. One commentator notes that in her work with victims, nearly all have been unable to complain of the abuse for a period of time.⁴¹ She reports that her clients are unable to reveal the fact of abuse for, on the average, eight years.⁴² Her observations are in accord with those of other professionals.⁴³ In fact, studies indicate that only 4-8% of victims of psychotherapist sexual exploitation ever report the behavior or bring civil suits.⁴⁴ The special relationship between psychotherapists and patients renders patients unable to recognize their injuries or seek redress.⁴⁵

D. Why Damage Occurs

The nature of the psychotherapist-patient relationship grants great power to the psychotherapist.⁴⁶ The psychotherapist must exercise this power for the client's benefit in order for therapy to be effective.⁴⁷ Manipulating this power for a therapist's own benefit exploits the patient⁴⁸ and prevents further healing.⁴⁹ Sexual exploitation by a psychotherapist destroys the fundamental

existed that the plaintiff's failure to discover her injury was caused by the defendant's conduct. *Id.* at 770.

41. E. Disch, In Defense of a Flexible Definition of Discovery & a Flexible Statute of Limitations in Cases of Sexual Abuse by Psychotherapists 2-3 (1990) (unpublished paper).

42. *Id.*

43. See Gartrell, *Reporting Practices*, *supra* note 11, at 293.

44. *Id.* at 289.

45. For a discussion, see T. Gutheil, *Insights: Patient-Therapist Sexual Relations: The Search for Clarity in Complexity* 3-5 (1989) (unpublished paper) [hereinafter T. Gutheil, *Insights*]; see also *infra* notes 46-74 and accompanying text.

46. See T. Gutheil, *Insights*, *supra* note 45, at 5 ("[i]n therapy, the therapist's power derives not only from special legal sanctions . . . but from transference attributions and the dependency that some patients come to feel for the therapist"). Power is seldom defined in either psychiatric literature or in discussions of fiduciary law but the concept appears to be the same for both — the ability to make changes that affect the entrusting party. See Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 809 n.47 (1983). Others have defined "power" as "a means or capacity to coerce." See R. HALE, *FREEDOM THROUGH LAW* 30 (1952), cited in Frankel, *supra*. However, Hale's definition of power appears too narrow to encompass fiduciary relationships.

47. Dagish, *Many Legal Pitfalls and Ethical Dilemmas Exist in Psychiatry*, *The Psychiatric Times*, Feb. 1989, at 8 ("[t]he physician-patient relationship is supposed to be a fiduciary one, geared entirely to the welfare of the patient").

48. See Marmor, *supra* note 16, at 323.

It is precisely on the implicit and explicit assumption that this trust [between a psychotherapist and patient] will not be betrayed that the patient is encouraged to lay aside her customary guard and psychological defenses and open herself completely to the presumably benign influence of the therapist's professional skill. She is particularly vulnerable and defenseless under such circumstances, and when a therapist exploits the transference to seduce a woman patient her apparent consent is really meaningless. Thus, the use of the term *rape* to describe the occurrence is not without some validity.

Id.

49. Pope, *How Clients Are Harmed by Sexual Contact*, *supra* note 2, at 223. "Amatory and sexual interaction between client and therapist dooms the potential for successful therapy and is detrimental if not devastating to the client." *Id.* (quoting L. Durre).

characteristics of the therapy relationship⁵⁰ and causes long-term developmental harm to the client.⁵¹ This section will examine in detail why clients often face debilitating mental injury from sexual misconduct.

1. *Vulnerability and Intimacy Lead to Power Imbalance*

Most clients are vulnerable when they enter therapy.⁵² Clients come to therapy with personal crises and problems that they have been unable to

50. See Stone, *Boundary Violations Between Therapist and Patient*, 6 *PSYCHIATRIC ANNALS* 670 (1976) [hereinafter Stone, *Boundary Violations*] (“a psychiatrist who permits such [a sexual] encounter is subjecting his patient to a betrayal of trust precisely where she was most troubled to begin with and where she is most vulnerable”).

51. See G. SCHOENER, *PSYCHOTHERAPISTS’ SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 76.

The clients who have sought my help for problems stemming from sexual exploitation by therapists or counselors have seemed ‘stuck’ in resolving the issues they were attempting to master at the time the exploitation began. They also have diminished self-esteem, problems forming relationships with others, and problems succeeding in other life tasks (e.g., parenting, school, or career).

Id.

How sexual exploitation affects the “development of identity” depends in part upon such things as age of the client at the time the exploitation occurred, the duration and extent of the abuse, and if and how other important relationships were disrupted. *Id.*

52. The concept of the vulnerability of the patient is common to many schools of therapy. In psychoanalytic thought, the relationship between the patient and psychoanalyst is conceptualized in the transference process. See G. COREY, *THEORY & PRACTICE OF COUNSELING AND PSYCHOTHERAPY* 21 (1982). Transference is a process by which clients attribute to the neutral, objective psychoanalyst “unfinished business” from past relationships with significant others. The treatment process requires the reconstruction and reliving of past events. As therapy progresses, clients resurrect childhood feelings, emotions and conflicts buried in the unconscious. *Id.* At these times, the patient is in a state of emotional regression. *Id.* See also Smith, *The Seduction of the Female Patient*, in *SEXUAL EXPLOITATION BY PROFESSIONALS* 58 (G. Gabbard ed. 1989). Proponents of this theory believe that, in this state, a patient is unable to realistically evaluate the actions of the psychotherapist, making her vulnerable to him. *Id.* The therapist becomes all-powerful. G. COREY, *supra*, at 21.

Harry Stack Sullivan extends psychoanalytic theory with his interpersonal theory. In contrast to the neutral, objective observer, he views the therapist as a participant/observer and expert in interpersonal relations. *Id.* at 47. He stresses the power a therapist has over his client and urges the therapist to use the relationship as an agent for change. *Id.* at 49.

A second group of therapies — existential, person-centered and Gestalt therapy — have philosophically reacted against the psychoanalytic approach. This view is grounded on the assumption that people are free, whereas psychoanalysis considers freedom to be constricted by unconscious forces, irrational drives and the past. *Id.* at 61. However, these theories also recognize the vulnerability of clients coming to therapy. *Id.* at 61.

In existential therapy, clients are encouraged to take responsibility for how they now choose to be in therapy. The therapist encourages clients to take action based on the insights they develop in the therapeutic process. *Id.* at 66. The opening of these doors is anxiety producing, after making clients feel vulnerable and insecure. Corey gives as an example the notes one of his clients kept for herself during therapy. She writes:

I started therapy today. I was terrified, but I didn’t know of what. Now I do. First of all, I was terrified of Jerry himself. He has the power to change me. I’m giving him that power and I can’t go back . . . I’ve sandblasted security right out of my life and I’m really frightened of who I’ll become.

Id.

A similar theory, client-centered therapy, emphasizes the “personal characteristics of the

resolve themselves.⁵³ Many times patients lack self-esteem or are fearful and doubting of their own sanity.⁵⁴ Patients often feel they must rely upon a professional to help them resolve their conflicts.⁵⁵ Clients come to therapy in search of approval⁵⁶ and concrete answers to their problems.⁵⁷ Struggling with their private crises, many clients are in a helpless, almost childlike position in relation to the therapist.⁵⁸ The

therapist and the quality of the client/therapist relationship as the prime determinants of the outcome of the therapeutic process." *Id.* at 81. This method of counseling is nondirective, assuming that people have a vast potential for resolving their own issues without direct intervention by the counselor. *Id.* at 80-81. According to Rogers, there are six conditions necessary for personality changes:

- (1) Two persons in psychological contact.
- (2) The client is in a state of incongruence, being *vulnerable* or *anxious*.
- (3) The therapist is congruent or integrated in the relationship.
- (4) The therapist experiences unconditional positive regard for the client.
- (5) The therapist experiences empathic understanding of the client's internal frame of reference and endeavors to communicate this to the client.
- (6) The communication of empathic understanding and unconditional positive regard is to minimal degree achieved.

Id. at 86. Thus, even in this mode of relating, the vulnerability of the client is pre-supposed.

Behavior therapy differs from all of the previous approaches as it is primarily concerned with modifying behavior rather than exploring historical causes of present behavior. *See id.* at 141. Behaviorists assume an active, directive role in the relationship. They attempt to apply scientific principles to finding solutions to human problems. A behaviorist may function as a teacher, director, expert, and role model in the relationship. *Id.* at 145. Therapists in this mode of counseling play a crucial role as a figure worthy of emulation. Clients often pattern their attitudes, values, beliefs, and behavior after the therapist. *Id.* Thus, it appears that even in the schools of thought removed from psychoanalytic theory, the client is vulnerable. While some schools seem to eschew the inherent vulnerability of a client entering therapy, they seem to be in agreement that a therapist wields great power over the client, and thus, may become vulnerable in the relationship.

53. *See* G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 75 (the client is vulnerable and feels childlike because of inability to manage life without assistance).

54. *See id.* at 68-71 (because clients are largely uninformed about proper therapy techniques and many clients feel vulnerable, they are hesitant to trust gut instincts concerning sexual involvement).

55. *See* Kardener, *Sex & the Physician Patient Relationship*, *supra* note 5, at 1135 ("[w]hen one seeks professional help for a hurt, one is placed emotionally in a childlike posture of dependency characterized by varying degrees of vulnerability, with a concomitant necessity that trust be placed in the wiser, more experienced (parentoid) healer").

56. *See id.* at 1135 (the need to be loved and the desire to feel special to an important "other" must be considered universal among human emotions); G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 87-88 (client seeks validation as good person from therapist). According to Rogers' client-centered therapy, the therapist must communicate unconditional caring that is not contaminated by evaluation or judgment of the client's thoughts, feelings or behavior. G. COREY, *supra* note 52, at 87-88. According to Rogers, the greater the degree of acceptance of the client, the greater the chance therapy will be effective. *Id.* at 88. It is this unconditional validation of the client as a person that helps create the therapeutic environment which allows clients to explore "the hidden aspects of their personal world." *Id.* at 85.

57. G. COREY, *supra* note 52, at 230 (initial expectations of clients are expert help and fast change, often expecting "magic" cure from therapist).

58. *See* G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note

therapist often becomes a parental-type caretaker, exercising a power over the patient similar to a parent's power over a child.⁵⁹

Superimposed over the patient's basic vulnerability is the high degree of intimacy present in the therapeutic setting. This intimacy further increases the relationship's power imbalance.⁶⁰ One commentator has noted, "Counseling is a process by which clients are invited to look honestly at their behavior and life-style and make certain decisions about the ways in which they want to modify the quality of their life."⁶¹ In therapy, clients are encouraged to discuss candidly their innermost thoughts, wishes, and desires, whether socially acceptable or not.⁶² Before clients can begin the task of self-revelation and evaluation, they must experience a psychological climate which grants them the freedom to safely reveal their innermost thoughts, wishes, and desires.⁶³ The therapist creates this environment by first establishing a confidential and secure setting in which the patient is encouraged to cast aside all defenses,⁶⁴ and then persuading the client of the trustworthiness of both the climate and the therapist.⁶⁵

1, at 75.

When the client seeks help, even a healthy individual may feel there is nobody he/she can trust completely — except the therapist. Thus, both cultural stereotypes tend to idealize both therapists and parents, which leads to an extremely high level of trust, a desire to preserve the idealization, and a tendency to accede to the demands made upon them. Self-protective instincts are weakened or, at times, ignored in both situations.

Id.

59. *Id.*; see also Marmor, *supra* note 16, at 322 (unconscious transference relationship between patient and psychotherapist tends to replicate child/parent relationship).

60. See Heller, *Some Comments to Lawyers on the Practice of Psychiatry*, 30 TEMP. L.Q. 401, 405 (1957) [hereinafter, Heller, *Some Comments to Lawyers*] (whatever psychiatrist has learned intimately of a client's affairs, the psychiatrist has learned in a soundproof office, alone with a patient who "fearfully confided his thoughts and deeds in order to overcome the misery of his symptoms").

61. G. COREY, *supra* note 52, at 228.

62. See Heller, *Some Comments to Lawyers*, *supra* note 60, at 405.

The patient is called upon to discuss in a candid and frank manner personal material of the most disturbing nature. He did not, after all, come into therapy to find out what a fine fellow he is. He is expected to bring all manner of socially unacceptable instincts and urges, immature wishes, perverse sexual thoughts — in short the unspeakable, the unthinkable, the repressed. To speak of such things to another human requires an atmosphere of unusual confidence and trust.

Id.

63. See G. COREY, *supra* note 52, at 85.

64. See Heller, *Some Comments to Lawyers*, *supra* note 60, at 405 ("psychiatry must offer complete privacy and strictest confidence to its patients . . . [s]urely no genuine therapy can occur unless clients trust the privacy of their revelations to their therapists . . . [i]t is the therapist's responsibility to define the degree of confidentiality that can be promised"); Stone, *Sexual Misconduct by Psychiatrists: The Ethical & Clinical Dilemma of Confidentiality*, 140 AM. J. PSYCHIATRY 195, 196 (1983) [hereinafter Stone, *Sexual Misconduct*] (confidentiality merits special consideration in psychiatry because it is necessary to protect privacy of patients and because expectation of privacy is essential to the process of psychotherapy itself).

65. See Heller, *Some Comments to Lawyers*, *supra* note 60, at 405. "Patients will only be

Confidentiality is a requirement for establishing the psychotherapeutic environment and is prescribed by professional ethics. Few clients would be willing to reveal their innermost secrets without assurances that these secrets will not be exposed. Often, the secrets revealed in therapy are known only to the client and the therapist.⁶⁶ This further enhances the intimacy between the patient and the therapist⁶⁷ and may serve to bind the patient to the therapist.⁶⁸

While counseling theory requires that the patient reveal everything, this same theory commands the therapist to reveal little of the therapist's own self.⁶⁹ Unilateral self-revelation gives the therapist power to use information acquired from the patient, without risk.⁷⁰ Therapists must be "continually cognizant" of their powerful position in their relationships with clients.⁷¹ They are ethically commanded to use their position of power only in ways directly related to, and in furtherance of, treatment goals.⁷²

helped if they can form a trusting relationship with the psychiatrist. Psychotherapy otherwise becomes an ineffective and intellectual exercise." *Id.* at 406.

66. See Stone, *Sexual Misconduct*, *supra* note 64 (discussing resolution of conflicts between section four of the American Psychiatric Association's Principles of Medical Ethics, which requires confidentiality, and the affirmative duty of psychiatrists to expose colleagues engaging in unprofessional behavior). See also G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 66.

67. See Kardener, *Sex & the Physician Patient Relationship*, *supra* note 5, at 1135 ("the very process of the psychotherapeutic reaction fosters a special quality of emotional intimacy").

68. See M. MCGILL, *THE MCGILL REPORT ON MALE INTIMACY* 14 (1985) (discussing bonding and intimacy).

The time we spend with others, and the variety of things we know about them, lead us together, creating the interpersonal exchanges that lead to intimacy. A third important source of this emotional bonding comes not from time spent together or from the breadth of the relationship, but rather from the value of what is exchanged, the depth of disclosure. The revelation to another person of something that is very important to us, central to who we are, constitutes an intimate exchange, regardless of the history of the relationship or what else the other may know about us.

Id.

69. Under classical psychoanalytic theory, the psychoanalyst is to engage in very little self-revelation. See G. COREY, *supra* note 52, at 20. (Classical analysts assume anonymity toward clients, sometimes called blank-screen approach; they engage in very little self-disclosure to foster transference relationship in which client will make projections onto them). Other theories of counseling allow some self-disclosure, provided the disclosure serves the needs and interests of clients and does not burden them or hinder them in exploring and understanding themselves. See *id.* at 89.

70. See Feldman & Summers, *Sexual Contact in Fiduciary Relationships*, in *SEXUAL EXPLOITATIONS BY PROFESSIONALS* 193 (G. Gabbard ed. 1989).

The vulnerability of either low self-esteem or high dependency is compounded if the underlying feelings are revealed to the fiduciary. Having acquired such information, the fiduciary is now in a position to misuse or exploit these weaknesses on the part of the trusting client. Enhanced vulnerability due to revelation is virtually inevitable in the therapist-client situation because the client is encouraged to "tell-all."

Id. at 200.

71. AM. PSYCHOLOGICAL ASS'N, *ETHICAL PRINCIPLES OF PSYCHOLOGISTS* 4 (1981).

72. AM. PSYCHIATRIC ASS'N, *PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY*

In addition, as patients often model their behavior after their therapists, therapists must conduct themselves with utmost propriety, even in personal matters.⁷³ Psychotherapists may have great power to influence the attitudes and behaviors of their clients.

The very nature of the therapy environment — including the client's initial vulnerability, the therapist's control of the environment, confidentiality, client intimacy, and unilateral self-revelation — engenders a significant power imbalance of the therapist over the patient. This power must be used solely for the benefit of the client.⁷⁴ This is the essence of therapy.

2. *Misuse of Power Through Sexual Contact*

Sexual contact with clients constitutes misuse of a therapist's power.⁷⁵ Most clients are uninformed or unclear about the propriety of erotic touch in the therapy environment.⁷⁶ Clients often depend upon⁷⁷ and idealize the therapist.⁷⁸ Many clients either do not trust or are unable to trust their judgment that sexual involvement is improper.⁷⁹ For a therapist to take advantage of a patient's emotional dependence to gain personal gratification exploits the therapist's power.⁸⁰ Some commentators believe this exploitation to be of the same magnitude as rape.⁸¹ Even in cases in which a patient is flirtatious or

APPLICABLE TO PSYCHIATRY § 2 (1985), *quoted in* G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 68.

73. G. SCHOENER, *supra* note 1, at 68.

74. *Id.* at 67-68.

75. *Id.* at 65-72.

76. *Id.* at 68.

77. In *Greenberg v. McCabe*, the plaintiff testified that she had become so dependent on the defendant therapist that "he became a God" to her and she would not question the therapy he prescribed because she so feared displeasing him. *Greenberg v. McCabe*, 453 F. Supp. 765, 771 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979).

78. See G. COREY, *supra* note 52, at 21 (clients might develop positive transference and fall in love with analyst, desire analyst to adopt them, seek love, acceptance, or approval from therapist).

79. G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 68 (clients uninformed and unclear about propriety of touch in therapy and rules for sexual involvement).

80. See *supra* notes 52-74 and accompanying text.

81. *Id.*; see also Masters & Johnson, *supra* note 1. In their address to the American Psychiatric Association, the famous researchers expressed outrage at the numerous incidents of sexual exploitation and urged criminalizing the behavior:

We feel that when sexual seduction of patients can be firmly established by due legal process, regardless of whether the seduction was initiated by the patient or the therapist, the therapist should be initially sued for rape rather than malpractice, i.e., the process should be criminal rather than civil. Few psychotherapists would be willing to appear in court on behalf of a colleague and testify that the sexually dysfunctional patient's facility for decision-making could be considered normally objective when he or she accepts submission after developing extreme emotional dependence on the therapist.

Id. at 553.

seductive, it is still an abuse of power when the therapist steps out of the role of "healer" and succumbs to sexual temptation.⁸²

The damages to be expected from sexual exploitation have previously been described.⁸³ These damages occur because the misuse of power destroys the foundations of the relationship.⁸⁴

The psychotherapist changes roles from a neutral and objective source of approval to a lover.⁸⁵ In doing so, the therapist loses the ability to guide the patient's growth and development.⁸⁶ The patient then is psychologically "orphaned," losing the parentlike mentor.⁸⁷ This alone may cause a reactivation of prior conflicts.⁸⁸

Misuse of the power differential may also forestall long-term emotional development.⁸⁹ Many patients report having imaginary conversations with their therapists in order to self-evaluate feelings and attitudes and make decisions.⁹⁰ This internalized therapist helps clients continue their growth and development.⁹¹ Breaking trust with clients destroys this avenue of their development.⁹² Also, clients may doubt the truthfulness and effectiveness of all therapy, undoing prior work and precluding future help.⁹³

82. See Stone, *Boundary Violations*, *supra* note 50, at 674 (doctor-patient relationship fiduciary; even women willing to engage in sex with therapists have right to consider themselves victims); Pope, *How Clients Are Harmed by Sexual Contact*, *supra* note 2 (it is always the therapist's responsibility to ensure sexual contact does not occur). One commentator has addressed the claim made by psychotherapists that they were seduced by their patients by analogizing the seductive patient's requested act (sex) with the masochistic patient's requested act (being beaten). See *infra* note 130.

83. See *supra* notes 18-45 and accompanying text. See also generally Pope, *How Clients are Harmed by Sexual Contact*, *supra* note 2, at 222-25; G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 103-45 (describing common client experiences, male experiences and guidelines for assessing damages); Apfel & Simon, *Patient-Therapist Sexual Contact*, *supra* note 20, at 57-62 (cataloguing effects on patient of sexual conflict with therapist).

84. See Bouhoutsos, *Sexual Intimacy Between Psychotherapists & Patients*, *supra* note 17.

85. Kardener, *Sex & the Physician-Patient Relationship*, *supra* note 5, at 1135.

86. *Id.* at 1136.

87. *Id.*

88. See Apfel & Simon, *Patient Therapist Sexual Contact*, *supra* note 20, at 60 (discussing ways in which sexual involvement may lead to reactivation of prior symptoms or failure to address issues which brought patient to therapy in the first place).

89. See *supra* note 51 and accompanying text.

90. See Pfeffer, *The Meaning of the Analyst After Analysis*, 11 J. AM. PSYCHOANALYTIC A. 229, 243 (1962). "[T]here is manifested in vivid form a repetition of the essence of the analysis — from unresolved conflict to resolution and in relation to the analyst, but now telescoped into a relatively short period of time [I]n life situations this same capacity to regress and progress facilitates adaptation." *Id.*

91. *Id.* at 243. See also Geller, Cooley & Hartley, *Images of the Psychotherapist: A Theoretical & Methodological Perspective*, in 1 IMAGINATION, COGNITION & PERSONALITY 123 (1981-82). "The vividness of the representation and the use of the representation for the purpose of continuing the therapeutic dialogue are significantly correlated with self-perceived improvement." *Id.*

92. See also Jorgenson, Randles & Strasburger, *Psychotherapist-Patient Sex*, *supra* note 1, at 26.

93. See Pope, *Research & Laws Regarding Therapist-Patient Sex*, *supra* note 4, at 566-67.

*II. The Psychotherapist as a Fiduciary: Legal Responsibility
Commensurate with Risk of Harm*

Fiduciary theory provides a model by which a psychotherapist should be judged in all dealings with clients.⁹⁴ A "fiduciary relation" is a relationship in which trust and confidence are necessarily reposed by one party, investing in the other party a corresponding amount of power.⁹⁵ The term embraces a variety of relationships and may arise any time one party's position is "trustee-like" in regard to another party.⁹⁶ Examples of fiduciary relationships include those between attorneys and their clients, guardians and wards, principals and agents, and executors and heirs.⁹⁷

The essence of a fiduciary relationship is that the parties do not deal on equal terms.⁹⁸ The relationship arises because one party desires a benefit or service from another party which requires him to entrust power to the other party.⁹⁹ The more powerful party or "fiduciary" who accepts that trust of power is in a superior position to exert unique influence over the dependent party or "entrustor."¹⁰⁰ The more an individual must entrust to receive the intended benefit, the more power the fiduciary wields.¹⁰¹

94. For discussion of general fiduciary principles, see Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975); Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69 (1962); Frankel, *supra* note 46, at 795.

95. Fiduciary theory is a product of Roman law. See Adams, *Benefiting from Fiduciary Office: A Presumption of Fraud*, 47 TEX. BAR J. 648, 649 (1984). It has been a fixture of common law for centuries. See Frankel, *supra* note 46, at 795 n.1. Slowly, fiduciary law has expanded and embraced many different types of relationships, imposing a high duty of fidelity on those named as fiduciaries. *Id.*; see also BLACK'S LAW DICTIONARY 564 (5th ed. 1979) ("[i]t exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence").

The term "entrustor" will be used in this article to denote the dependent individual who must repose confidence in the relationship. This term was coined by Tamar Frankel. For its etymology, see Frankel, *supra* note 94, at 800 n.17.

96. Sealy, *Fiduciary Relationships*, *supra* note 94, at 75. The terms "fiduciary" and "confidential" relationship are sometimes used synonymously. See *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422, 431 (1983). Both types of relations ordinarily arise where confidence is reposed by one person, granting the other corresponding power. *Id.* Likewise, both confidential and fiduciary relationships require the individual in whom trust is reposed to take no advantage from it. *Id.* However, important distinctions exist. Fiduciary relationships are recognized legal relationships, such as guardian to ward and attorney to client, while "confidential" relationships include these but also may be founded on a "moral, social, domestic, or interpersonal relationship." *Id.* The existence of a confidential relationship is usually a question of fact for the fact-finder at trial. *Id.*, 193 Cal. Rptr. at 432. However, where the relationship is legally recognized as fiduciary, its existence is considered confidential as a matter of law. *Id.* It is this article's contention that the psychotherapist-patient relationship should be legally recognized as a fiduciary one.

97. See *Barbara A.*, 193 Cal. Rptr. at 431; see also BLACK'S LAW DICTIONARY 564 (5th ed. 1979).

98. *Barbara A.*, 193 Cal. Rptr. at 432.

99. Frankel, *supra* note 46, at 800 (by definition, the entrustor becomes dependent because he or she must rely on the fiduciary for a particular service).

100. *Barbara A.*, 193 Cal. Rptr. at 432.

101. Frankel, *supra* note 46, at 809.

Because of the power differential inherent in the relationship, all fiduciary relations subject the entrustor to a risk of abuse at the hands of the more powerful party.¹⁰² The more power an entrustor must grant to the fiduciary to receive the intended benefit, the more vulnerable the trusting individual becomes to abuse of that power by the fiduciary.¹⁰³ The law has long recognized the need to protect these less powerful individuals.¹⁰⁴

The purpose for legal control of fiduciary relationships is to diminish this risk of abuse.¹⁰⁵ However, recognition of the variety of fiduciary situations eschews the creation of a single set of legal rules or method of handling these cases.¹⁰⁶ Rather, the courts must consider each circumstance with regard given to the amount of power exercised by the fiduciary in that particular type of relationship.¹⁰⁷ In determining the existence of a fiduciary relationship and fashioning the appropriate rules, the courts should analyze the nature of the relationship, the degree of power imbalance and the availability of alternative protections for the entrusting party.¹⁰⁸ Accordingly, the greater the risk of a fiduciary's abuse, the more the law should be willing to protect the trusting party.¹⁰⁹

A. *Standard of Care of Fiduciaries*

Two ways the court may protect the entrustor are by placing higher standards of care upon the professional¹¹⁰ and imposing specific duties corresponding to that level of care.¹¹¹ Fiduciaries are held to a higher degree of care than those involved in arm's-length transactions.¹¹² Courts do not generally acknowledge or systematize the various levels of care that may be required in differing situations.¹¹³ However, courts should determine the level

102. *Id.* at 807-08.

103. Frankel points to two characteristics of fiduciary relationships which increase the risk of abuse in such a relationship. The first is "substitution" — the fiduciary performs a service in place of the "entrustor." The second feature is that "the fiduciary obtains power from the entrustor . . . for the sole purpose of enabling the fiduciary to act effectively." *Id.* at 809. For a discussion of "power," see *supra* notes 46, 52-74 and accompanying text.

104. Adams, *supra* note 95, at 649.

105. Frankel, *supra* note 46, at 811.

106. *Id.* at 805-07.

107. *Id.* at 807.

108. *Id.* at 810.

109. *Id.* at 807-08, 811, 818. The legal duties imposed upon a fiduciary are coextensive with the degree of power the fiduciary holds over the other party. See Brown, *Franchising — A Fiduciary Relationship*, 49 TEX. L. REV. 630, 664 (1971).

110. See Frankel, *supra* note 46, at 823 (In contrast to status and contract relations, courts more actively supervise fiduciary relations, requiring fiduciaries to act with loyalty and skill in the entrustor's interest; as the amount of power delegated or length of relation increases, judicial intervention will as well).

111. *Id.* at 824 (court can protect entrustor by regulating fiduciary).

112. See generally Frankel, *supra* note 46, at 801-02 (contrasting fiduciary, status, and contract relationships).

113. However, a few courts have extended a higher degree of care to certain fiduciaries. See, e.g., *Mazza v. Huffaker*, 61 N.C. App. 170, 300 S.E.2d 833, 837 (1983) (psychiatrist's duties more stringent than a physician's); *Beery v. State Bar of Cal.*, 43 Cal. 3d 802, 739 P.2d 1289,

of care required, by examining the purpose of the relationship and the possible consequences that abuse of the relationship might bring.¹¹⁴ In some cases, courts will declare that the highest level of care will be required.¹¹⁵ By examining the characteristics of the relationship, the court remains sensitive to differences in varying types of fiduciary relationships, while requiring higher standards of conduct of those exercising the most power.

In a psychotherapist-patient relationship, the degree of success of treatment is directly related to the amount of trust the patient reposes.¹¹⁶ This trust is the "raison d'être" for the relationship.¹¹⁷ It permeates all dealings with the patient, not just those concerning the patient's presenting illness.¹¹⁸ Patients who place utmost trust in their therapists must be afforded assiduous protection by the law. Several jurisdictions have recognized this.¹¹⁹ Because abuse of the power the therapist holds may impair the patient's mind, one case has found that a psychiatrist is held to a higher standard of care than other doctors.¹²⁰ The risk a patient must endure to reap expected benefits from the therapist warrants the extension of a very high duty of care.¹²¹ The duty may be fairly placed upon therapists, as they "invite" clients' confidences by representing themselves as professional confidantes.¹²²

1294, 239 Cal. Rptr. 121, 126 (1987) (attorney-client relationship is fiduciary relationship of "the very highest degree").

114. Frankel, *supra* note 46, at 810.

115. See *Beery*, 739 P.2d at 1294, 239 Cal. Rptr. at 126 (attorney-client relationship is fiduciary of "very highest degree"). For examples of differing standards applied to fiduciaries, see Frankel, *supra* note 46, at 825 n.98.

116. See *supra* note 65 and accompanying text.

117. This description of the counselor-counselee relationship is used in *Strock v. Presnell*, 38 Ohio St. 3d 207, 527 N.E.2d 1235, 1246 (1988) (Sweeney, J. dissenting). Judge Sweeney stated:

This case does not resemble your garden variety seduction scenario. The wife did not get involved with the milkman, the mailman or the guy next door. Here, the couple's minister, under the guise of offering pastoral counseling services, abused the trust placed in him. This trust was the *raison d'être* of the relationship.

Id. These thoughts are amply supported by the professional literature. See *supra* notes 46-93 and accompanying text.

118. See *supra* notes 71-74 and accompanying text. See also *L.L. v. Medical Protective Co.*, 122 Wis. 2d 455, 362 N.W.2d 174, 177 (1984) (discussing need for psychiatrist to conduct himself properly in all actions as patients model behavior after therapist); *Mazza v. Huffaker*, 61 N.C. App. 170, 300 S.E.2d 833, 837-38 (1983) (expert testimony concludes that psychiatrist's duty extends beyond hospital or consulting room to social situations).

119. See *Horak v. Biris*, 130 Ill. App. 3d 140, 474 N.E.2d 13, 17 (1985) (defendant's social work license placed him in position of trust; violation of that trust constitutes breach of fiduciary relationship); *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780, 788 (1991) (there are fiduciary aspects to psychotherapist-patient relationship); *Mazza v. Huffaker*, 61 N.C. App. 170, 300 S.E.2d 833, 839 (1983) (psychotherapist abused position of "trust and confidence"); *Roy v. Hartogs*, 81 Misc. 2d 350, 366 N.Y.S.2d 297, 299 (Civ. Ct. 1975).

120. *Mazza v. Huffaker*, 61 N.C. App. 170, 300 S.E.2d 833, 837 (1983) (basic duties of physician apply and are more stringent with psychiatrist).

121. *Id.* at 838. For a discussion of the damages likely to result from a sexually exploitative counseling relationship, see *supra* notes 18-45 and accompanying text.

122. Because a therapist by the very nature of the profession invites confidence, he or she

B. Duties Of A Fiduciary

The most basic tenet of fiduciary theory is that in all transactions associated with or arising out of the relationship, fiduciaries must act with utmost good faith and solely for the benefit of the entrustor.¹²³ All of the actions of a fiduciary should be judged according to this requirement.¹²⁴ A therapist as a fiduciary should also be held to this standard. Acting in a patient's best interest requires a therapist to refrain from all activities which pose an unreasonable risk of harm to patients.¹²⁵ One court described this duty:

We think that the very nature of the therapist-patient relationship . . . gives rise to a clear duty on the therapist's part to engage only in activity or conduct which is calculated to improve the patient's mental or emotional well-being, and to refrain from any activity or conduct which carries with it foreseeable and unreasonable risk of mental or emotional harm to the patient.¹²⁶

The injuries associated with sexual contact in a therapeutic relationship have been well documented and described.¹²⁷ Accordingly, sexual contact exposes clients to an unreasonable risk of harm and should be considered a breach of a psychotherapist's fiduciary duty toward clients.¹²⁸ The duty to refrain from sexual conduct belongs entirely to therapists as they have undertaken to provide the service.¹²⁹ Regardless of the client's willingness,

falls within the technical definition of fiduciary which reads in part: "A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." BLACK'S LAW DICTIONARY 564 (5th ed. 1979) (emphasis added). See also *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985) (court held a fiduciary relationship may exist where there is a difference in business experience and an invited confidence).

123. See *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422, 432 (1983) (an attorney as a fiduciary is required to exercise the utmost good faith); *Hales v. Pittman*, 118 Ariz. 305, 576 P.2d 493, 496 (1978) (a physician may be in a fiduciary relationship with his or her patient which would require the physician "to exercise the utmost good faith").

124. See *Hobbs v. Eichler*, 164 Cal. App. 3d 174, 210 Cal. Rptr. 387, 403 (1985) (relationship between broker and principal is fiduciary; imposes duty on broker to act in highest good faith toward principal); *Barbara A.*, 193 Cal. Rptr. at 432 (relation between attorney and client highly fiduciary; binds attorney to "most conscientious fidelity"); *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1039 (La. 1987) (elected public officials are bound to exercise official functions with utmost honesty and fidelity).

125. See *Horak v. Biris*, 130 Ill. App. 3d 140, 474 N.E.2d 13, 17 (1985); *Mazza v. Huffaker*, 61 N.C. App. 130, 300 S.E.2d 833, 837 (1983); *L.L. v. Medical Protective Soc'y*, 122 Wis. 2d 455, 362 N.W.2d 172, 177 (1984).

126. *Horak v. Biris*, 130 Ill. App. 3d 140, 474 N.E.2d 13, 17 (1985).

127. See *supra* notes 18-45 and accompanying text.

128. See, e.g., *Horak*, 474 N.E.2d at 17 (holding therapist to fiduciary standard); *Mazza*, 300 S.E.2d at 839 (sustaining trial court's finding that relationship was one of trust and confidence); *Roy v. Hartogs*, 81 Misc. 2d 350, 366 N.Y.S.2d 297, 301 (Civ. Ct. 1975) (there is public policy to protect patient from deliberate, malicious abuse of power, breach of trust).

129. Fiduciary relationships, unlike status relationships, are created with the consent of the fiduciary. The law allows parties to enter these relations freely; however, once entered, the duties of the fiduciary will largely be determined by law. See *Frankel, supra* note 46, at 820. As

seductiveness, or aggressiveness, therapists have no justification for engaging in activity which poses unreasonable danger.¹³⁰

A fiduciary relationship, including a psychotherapist-patient relationship, satisfies the needs of the entrusting party alone. The fiduciary generally receives compensation.¹³¹ When therapists enter sexual relationships with their patients, they place their own needs and desires above those of their clients,

discussed in the text at *supra* note 123, the highest duty of any fiduciary is to act with utmost good faith, solely for the benefit of the client. Any activity which unreasonably threatens the patient's welfare is therefore per se prohibited. See *supra* notes 124-27 and accompanying text. Since sexual intimacy threatens the patient's well-being, it should be proscribed absolutely. Such a proscription is fair to the therapist, as he or she has entered the relationship voluntarily.

130. See J. Wohlberg, *The Psychology of Therapist Sexual Misconduct: A Victim's Perspective* (Feb. 10, 1990) (paper presented at The Boston Psychoanalytic Society). In her presentation, Wohlberg stated:

Unfortunately, many in the mental health professions seem to take comfort in the idea of the seductive patient. Somehow, they use this to rationalize the breaking of professional boundaries either for themselves or their colleagues. I suggest there is no conceivable justification for this conduct; and this would be so even if this absurd stereotype were accurate.

Assume with me for a moment that what is being described by the therapeutic community is pathological, but that this pathology is not seductive behavior but masochism. In other words, the patient doesn't suggest that she would like to become sexually involved with her therapist but rather that she would like to be beaten by him.

Is it possible to believe that a therapist who obliges that request could be excused by pleading that his patient had taken advantage of his sadistic tendencies? If not, I have to wonder about the dual standard that appears to be at work in the case of sexual abuse.

Id. at 4. Psychiatric literature supports Wohlberg's premise that psychiatrist and other mental health professionals must refrain from sexual contact, even in the situation in which a patient is openly seductive. See, e.g., P. RUTTER, *SEX IN THE FORBIDDEN ZONE*, reprinted in *PSYCHOLOGY TODAY*, Oct. 1989, at 34, 36. In describing an encounter with a seductive patient, the author concludes that the patient was re-enacting her role as a victim with him. "I realized at that critical moment, the path taken depended not on her, but on me." *Id.* Kardener, *Sex & the Physician-Patient Relationship*, *supra* note 5, at 1135 ("it is duty of physician to guide patient's growth and development . . . without sacrificing his availability as a caretaker"); Masters & Johnson, *supra* note 1; Stone, *Boundary Violations*, *supra* note 50, at 675 ("it cannot be overemphasized that, however much the high risk patient wants to seduce her therapist, as much or more of her desire lies in testing whether the therapist, in contrast to all the other men she has known, can actually be trusted to safeguard her rights and allow her to grow and mature unmolested").

Fiduciary theory requires the fiduciary to engage in conduct solely designed for the welfare of the patient. See *DeStefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988). If sexual contact is damaging, as psychiatric literature indicates, then the fiduciary has an absolute obligation to avoid that risk of harm. See *supra* note 129.

131. Frankel, *supra* note 46, at 801. Fiduciaries need not receive compensation. It is by virtue of their position in relation to the entrustor that the fiduciary's duties derive. *Id.* However, fiduciary relationships usually are professional relationships. They are legally recognized relationships such as guardian to ward, trustee to beneficiary, principal to agent or attorney to client. *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422, 431 (1983). As such, a fiduciary is not prevented from obtaining fees for his or her services and indeed, usually does. Frankel, *supra* note 46, at 819.

breaching their fiduciary duties.¹³² This kind of breach destroys the foundations of the therapeutic alliance¹³³ and deprives patients of the benefits for which they are compensating their therapists. Thus sexually exploitative therapists in effect breach their duty twice when they act to further their own interests at their clients' expense and when they deprive their patients of the benefits of therapy.

C. *Undue Influence*

As part of the fiduciary's duty to act with utmost good faith and solely for the benefit of the entrustor, fiduciaries may also be required to disclose all material facts which might affect the rights and interests of the vulnerable party.¹³⁴ This duty should be imposed when the client is less knowledgeable and must rely upon the expertise of the fiduciary for assistance.¹³⁵ By requiring disclosure, courts attempt to protect an entrustor from undue influence.¹³⁶ In a fiduciary relationship, influence is naturally exerted by the more powerful party over the less powerful party.¹³⁷ This influence becomes "undue" when the fiduciary gains an advantage or benefit.¹³⁸ The courts have long guarded

132. See generally Feldman-Summers, *Sexual Contact in Fiduciary Relationships*, in *SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS* 193 (G. Gabbard ed. 1989).

133. See Marmor, *supra* note 16, at 322. Basic trust is the foundation of a beneficial psychotherapist-patient relationship as it is of a good parent-child relationship. It is precisely on the implicit and explicit assumption that this trust will not be betrayed that the patient is encouraged to lay aside her customary social and psychological defenses and open herself completely to the presumably benign influence of the therapist's professional skill. She is particularly vulnerable and defenseless under these circumstances. *Id.*

What makes sexual intimacy with a patient so egregious is that this trust is exploited to meet the needs of the therapist rather than utilized for the patient's benefit. R. SIMON, *supra* note 5, at 286.

134. See *Burns v. Massachusetts Inst. of Tech.*, 394 F.2d 416, 419 (1st Cir. 1968); *Jenkins v. Jenkins*, 15 Mass. App. Ct. 934, 444 N.E.2d 1301, 1303 (1983); *Frank Cooke, Inc. v. Hurwitz*, 10 Mass. App. Ct. 99, 406 N.E.2d 678, 683 (1980). See also *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 429, 98 Cal. Rptr. 837, 845 (1971); *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1039 (La. 1987); *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988).

135. *Merkley v. Beaslin*, 778 P.2d 16, 19 (Utah Ct. App. 1989) (court applied the discovery rule to an attorney malpractice situation, as the relationship between attorney and client is based on trust, and, in addition, the client is less knowledgeable and must rely upon the expertise of the attorney).

136. *Estate of McRae v. Watkins*, 522 So. 2d 731, 737 (Miss. 1988) (because of fiduciary relationship between physician and patient, transaction will be deemed void). See also *Butler v. Gleason*, 214 Mass. 248, 101 N.E. 371, 372 (1931); see *infra* text accompanying notes 144-47.

137. Frankel, *supra* note 46, at 809.

138. *Hawkes v. Lackey*, 207 Mass. 424, 93 N.E. 828, 830 (1911). The court stated:

Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

Id. (quoting Lord Chelmsford in *Tate v. Williamson*, 2 L.R.-Ch. 55, 61 (Ch. App. 1866)).

against the dangers of “cupidity and avarice” by declaring benefits conferred on fiduciaries by their clients presumptively void.¹³⁹ In order to retain benefits, fiduciaries must prove that their benefits were not conferred as a result of abuse of the relationship, thus reversing the burden of proof in these cases.¹⁴⁰ They must show that the benefit was conferred after fair and full disclosure and that it did not disadvantage their clients.¹⁴¹ At least one jurisdiction also requires that fiduciaries prove that the client could deal with the fiduciary at arm’s length in regard to the matter from which the fiduciary receives benefit.¹⁴² Thus, even if a client understands the transaction, the court will carefully scrutinize it in order to learn how the client’s participation was induced.¹⁴³

For example, in *Butler v. Gleason*,¹⁴⁴ the plaintiff was injured in a carriage accident. She had, however, signed a release of liability for the defendant, who raised the release as a defense.¹⁴⁵ The court found that the defendant, who was also the plaintiff’s doctor, had obtained the release from the plaintiff through assurances to her that she would be able to resume work and that

139. *Estate of McRae v. Watkins*, 522 So. 2d 731, 737 (Miss. 1988). In *McRae*, the elderly patient of a physician was hallucinating that Indians and demons were dancing in her yard and on top of her smoke house. The court held that even though the patient had legally deeded her house and land to her physician, the physician was not allowed to keep the benefits. In holding that a benefit conveyed by the beneficiary to his trustee was presumptively void, the court waxed poetic: “While its application, like the tide, may ebb and flow, as long as cupidity and avarice remain a part of the human character, courts will retain this salutary principle.” *Id.* See also *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 402 N.E.2d 76, 94 (Mass. 1980) (if attorney gains advantage from transaction with client, it is presumptively voidable); Adams, *supra* note 95, at 649-51 (discussing generally doctrine of presuming fraud when fiduciary benefits from office).

140. Adams, *supra* note 95, at 649-51.

141. *Searcy v. Novo*, 188 So. 490, 491 (La. Ct. App. 1939).

142. *Id.* The court stated:

When a transaction between an attorney and his client is attacked, the burden is cast upon the attorney to prove that it was not influenced by the relationship. He must show that it was made in the best of faith and without disadvantage to his client, that it was fair and equitable, and that the client was fully informed of his rights and interests in the subject-matter of the transaction, of the nature and effect of the transaction itself, and was so placed as to be able to deal with the attorney at arm’s length. (citation omitted)

Id. at 493.

143. One jurisdiction even “jealously” scrutinizes the transaction. See *Butler v. Gleason*, 214 Mass. 248, 101 N.E. 371, 372 (1931):

But the relation of a physician to his patient is necessarily one of trust and confidence, and commercial transactions between them where fraud or undue influence is charged, are viewed by the courts with some jealousy, and are carefully scrutinized. If he solicits and procures a conveyance to himself of the property of his patient, whether by way of gift or of purchase, the burden, where the good faith of the transaction is attacked, rests upon him to show that the patient’s confidence has not been abused, and that undue influence has not been exerted. It is not sufficient that the patient knew what he was doing, but the question is how the intention was produced.

Id.

144. 214 Mass. 248, 101 N.E. 371 (1931).

145. *Id.*, 101 N.E. at 372-73.

if she did not sign the release he would be forced to take "the poor debtor's oath."¹⁴⁶ The court held that the doctor abused his position of trust by making misrepresentations and inducing his patient to act against her own interests.¹⁴⁷

Undue influence is also a risk associated with psychotherapy-patient relationships, and the protections recognized for other relationships are applicable.¹⁴⁸ Courts should apply strict fiduciary duties and standards of conduct to the psychotherapist-patient relationship in order to minimize the risk of abuse to patients. In this context, fiduciary theory provides a rational, coherent model by which to view psychotherapist-patient relationships.

III. Raising the Bar: Fiduciary Theory and Statutes of Limitations

Fiduciary theory provides psychotherapy abuse plaintiffs with a vehicle with which to circumvent the statute of limitations bar imposed on tort claims.¹⁴⁹ The remainder of this article will consider the purpose and history of statutes of limitations, explore the discovery rule and fraudulent concealment as a tolling provision as they relate to the psychotherapist-patient relationship, and offer a paradigm for determining when the statutory period should begin to run.

A. Historical and Policy Reasons Behind Statutes of Limitations

Statutes of limitations are referred to by courts as tools of expedience.¹⁵⁰ They are pragmatic devices intended to encourage injured parties to bring claims before evidence becomes unobtainable.¹⁵¹ Fairness to defendants is the

146. *Id.*, 101 N.E. at 373.

147. *Id.*

148. *See, e.g.*, *Greenberg v. McCabe*, 453 F. Supp. 765, 771 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir. 1979), *cert. denied*, 444 U.S. 840 (1979) (plaintiff testified that therapist "became a God" to her; she was dependent on him; feared displeasing him and would not question the therapy he prescribed); *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780, 783 (1991) (the plaintiff became totally dependent on Dr. Presnell; on one occasion he expressed the opinion that his psychiatrist might be "God"); *Roy v. Hartogs*, 81 Misc. 2d 350, 366 N.Y.S.2d 297, 300-01 (Civ. Ct. 1975) (petition alleges coercion by person in position of overpowering influence; jury might find that plaintiff could reasonably have submitted to intimate treatment in hope that condition would improve). *See also* *Estate of McRae v. Watkins*, 522 So. 2d 731, 737 (Miss. 1988). The court noted that physicians and attorneys have been encouraged to refer their clients to independent third parties before receiving any benefit in order to insure that the transaction is free from undue influence. *Id.* The argument may be made that this minimum requirement of referral to an independent party should exist within the psychotherapist-patient context, particularly as it is the patient's whole self that is being transacted, not just property or market shares.

149. *See infra* notes 177-293 and accompanying text.

150. *See Decker v. Fink*, 47 Md. App. 202, 422 A.2d 389, 392 (1980).

151. Note, *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter, Note, *Statutes of Limitations*]. *See also* *Decker v. Fink*, 47 Md. App. 202, 422 A.2d 389, 392 (1980); Olsen, *New Jersey Developments — The Discovery Rule in New Jersey: Unlimited Limitation on the Statute of Limitations*, 42 RUTGERS L. REV. 205, 206 (1989) (chief purpose of statute of limitations to protect defendants from prejudice by lapse of time).

primary rationale behind statutes of limitations.¹⁵² Defendants must be given a fair opportunity to defend against claims before evidence becomes stale and witnesses disappear.¹⁵³

Basic policies associated with statutes of limitations sometimes conflict with the policy which values allowing meritorious claimants to have their day in court.¹⁵⁴ Limitations periods are designed to run against those who fail to use reasonable diligence in bringing claims.¹⁵⁵ They are not intended to "unjustly deprive one of his remedy."¹⁵⁶ Occasionally cases arise in which it would be patently unfair to strictly apply the applicable statute of limitations.¹⁵⁷ These cases often involve fiduciary relationships or other relationships in which a high degree of trust and confidence is reposed by one party in another. In recognition of this, the courts have carved out instances in which limitations periods are extended or the running of the period is tolled. Two exceptions to the statute of limitations are the discovery rule and fraudulent concealment doctrine.¹⁵⁸ The authors contend that because of the fiduciary relationship between patients and psychotherapists, the discovery rule and fraudulent concealment doctrines should be readily available to this class of cases.

B. Applying the Discovery Rule to Psychotherapist Sexual Abuse of Patients

1. Discovery Rule Defined

One of the more difficult issues involving statutes of limitations is determining when they commence running.¹⁵⁹ Statutes of limitations generally begin to run after a cause of action "accrues."¹⁶⁰ This determination is left largely to judicial interpretation.¹⁶¹ The courts have interpreted "accrual" to mean

152. Note, *Statutes of Limitations*, *supra* note 151, at 1185. See also DeRose, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 216 (1988) [hereinafter DeRose, *Adult Incest Survivors*].

153. Note, *Statutes of Limitations*, *supra* note 151, at 1185. See Decker, 422 A.2d at 392; DeRose, *Adult Incest Survivors*, *supra* note 152, at 216. See also *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (search for truth impaired by loss of evidence, disappearance of witnesses, fading memories).

154. Note, *Statutes of Limitations*, *supra* note 151, at 1185. See also Annotation, *Limitations of Actions*, 51 AM. JUR. 2D § 143 (1972) (law favors right of action rather than right of limitation and statute which tolls statute of limitation should be liberally construed); Olsen, *supra* note 151, at 206 (discussing balancing of interests between plaintiff and defendant).

155. Note, *Statutes of Limitation*, *supra* note 151, at 1203. See also *Evans v. Eckelman*, 216 Cal. App. 3d 1608, 265 Cal. Rptr. 605, 610 (1990).

156. *Evans*, 265 Cal. Rptr. at 610.

157. See, e.g., Note, *Statutes of Limitation*, *supra* note 151, at 1203-05 (describing unfairness of barring plaintiffs where wrong inherently unknowable during statutory period); Olsen, *supra* note 151, at 206; O'Neal, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CAL. L. REV. 106, 107-08 (1980) (discussing situations in which misrepresentations made by defendant should toll statute of limitations).

158. Olsen, *supra* note 151, at 206-07. See also Dawson, *Undiscovered Fraud & Statutes of Limitation*, 31 MICH. L. REV. 591 (1933).

159. Note, *Statutes of Limitations*, *supra* note 151, at 1185.

160. See generally Annotation, *Limitations of Actions*, *supra* note 154, § 111.

161. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 30, at

that a legal wrong will not mature until plaintiffs discover or should discover that they have been harmed as the result of the defendant's conduct.¹⁶² This rule of construction is known as "the discovery rule."

The discovery rule has been adopted by the vast majority of states¹⁶³ and has been applied to many areas of tort law.¹⁶⁴ In their various holdings, courts emphasize the principle that plaintiffs should be put on notice before their claim is barred.¹⁶⁵ Plaintiffs must have knowledge of their injury and its cause before the statute of limitations begins to run against them.¹⁶⁶

However, lack of knowledge is generally not sufficient if a reasonably prudent person in the plaintiff's position should have discovered personal harm caused by the defendant's conduct.¹⁶⁷ The courts apply the "reasonable person" standard in determining plaintiffs' levels of knowledge and whether they were under a duty to investigate suspicious circumstances.¹⁶⁸ Where the

167 (5th ed. 1984). See also *Franklin v. Albert*, 381 Mass. 611, 411 N.E.2d 458, 462-63 (1980) (determination of accrual of a cause of action is left to judicial interpretation); *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780 (1991) (legislature has not defined when cause of action accrues; that is product of judicial interpretation). *But cf.* CAL. CIV. PROC. CODE § 338(4) (West Supp. 1979) (cause of action in cases of fraud or mistake will not accrue until the discovery by aggrieved party of facts constituting fraud or mistake).

162. See O'Neal, *supra* note 157, at 107. See also *Teller v. Schepens*, 381 Mass. 621, 411 N.E.2d 464, 467 (1980).

163. See Note, *Accrual of the Cause of Action for Medical Malpractice: Penrod v. Hoskinson*, 38 MONT. L. REV. 399, 401 n.22 (1977) (citing 38 states) [hereinafter Note, *Medical Malpractice*]. See also *Willis v. Maverick*, 760 S.W.2d 642, 646 (Tex. 1988); *Franklin v. Albert*, 381 Mass. 621, 411 N.E.2d 458, 463 (1980).

164. The discovery rule has been applied to tort claims concerning occupational disease. See *Olsen v. Bell Tel.*, 388 Mass. 171, 445 N.E.2d 609 (1983). The rule has also been applied to medical malpractice. See *Kaufman v. Taub*, 87 Ill. App. 3d 134, 410 N.E.2d 114 (1980). Further, the rule has been applied to attorney malpractice. See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971). In *Neel*, the court stated:

[W]e find that the rule as to legal malpractice contrasts with the rule as to accrual of causes of action against practitioners in all other professions; it ignores the right of the client to rely upon the superior skill and knowledge of the attorney; it denigrates the duty of the attorney to make full and fair disclosure to the client; it negates the fiduciary character of the attorney-client relationship. We conclude that the statute of limitations for legal malpractice, as for all professional malpractice, should be tolled until the client discovers, or should discover, his cause of action.

Id., 491 P.2d at 422, 98 Cal. Rptr. at 838.

165. See *Urie v. Thompson*, 337 U.S. 163, 168-70 (1949) (cause of action should not accrue until victim has been apprised of his illness); *Olsen v. Bell Tel.*, 388 Mass. 171, 445 N.E.2d 609, 611 (1983).

166. See, e.g., *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).

167. See, e.g., *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1113, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 662-63 (1988) (a plaintiff need not be aware of the specific facts necessary to establish the cause of action; once plaintiff has suspicion of wrongdoing, plaintiff must go find facts).

168. *Malapanis v. Shirazi*, 21 Mass. App. Ct. 378, 383, 487 N.E.2d 533, 536 (1986) (stating that statute of limitations period "commences to run when a reasonably prudent person [in the tort claimant's position], reacting to any suspicious circumstances" should have discovered his harm).

relationship of the two parties is fiduciary in nature, the reasonable person standard is moderated by the courts' recognition that the trust reposed by victims may blind them to the wrongdoing because of undue influence.¹⁶⁹

In fiduciary or confidential relationships, the courts presume that the one in whom trust is reposed exerts undue influence.¹⁷⁰ Courts should not impose a duty on the plaintiff to investigate suspicious circumstances in these situations.¹⁷¹ Also, in these jurisdictions, the plaintiff will not be deemed to have the knowledge of facts which would have been disclosed by an investigation.¹⁷² The statute will begin to run only after the plaintiff gains actual knowledge, or knowledge of sufficient facts to place the plaintiff on notice.¹⁷³ Courts use the justification that facts which ordinarily require investigation may not incite suspicion where the relationship is confidential, due to the fiduciary's position of trust.¹⁷⁴ These rules may be useful in examining the legal significance of injuries arising from a psychotherapist's sexual exploitation of patients.

2. *Discovery Rule and Emotional Injury Cases*

Undiscovered emotional injury cases provide for a unique application of the discovery rule.¹⁷⁵ Psychological injuries and illnesses are recognized in the scientific community as being as real and debilitating as other legally cognizable injuries. Cases in which the plaintiff suffers a latent physical disease and cases in which an attorney's negligence is undisclosed to the client provide analogies for emotional injury cases. Courts have recognized these similarities in incest cases. The psychological injuries suffered by victims of psychotherapist sexual exploitation are sufficiently similar to other injuries which are given judicial recognition under the discovery rule to warrant application of the rule.¹⁷⁶ This section discusses these three areas of substantive law to which the discovery rule applies and which provide analogies to psychotherapist-patient malpractice actions.

169. See, e.g., *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 427, 98 Cal. Rptr. 837, 838 (1971); *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422, 433 (1983).

170. *Barbara A.*, 193 Cal. Rptr. at 431, 433 (attorney is in such a position as to enable him to "exert unique influence" over the client).

171. *Willis v. Maverick*, 750 S.W.2d 642, 645 (Tex. 1988).

172. See *United States Liab. Ins. Co. v. Haidinger-Hayes Inc.*, 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970) (the court found that when an insurer sues a general agent and a fiduciary relationship existed between the two, the usual duty of diligence to discover facts is not required).

173. *Neel*, 491 P.2d at 429, 98 Cal. Rptr. at 844.

174. *Hobbs v. Eichler*, 164 Cal. App. 3d 174, 210 Cal. Rptr. 387, 404 (1985). The *Hobbs* court held that when a fiduciary relationship exists, facts which usually should be investigated would not invite suspicion and thus the usual duty of diligence to discover facts is suspended. "Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she *actually discovers* the facts constituting the cause of action, even though the means for obtaining the information are available." *Id.* (emphasis added). See also *supra* notes 134-48 and accompanying text.

175. See *infra* notes 183-268 and accompanying text.

176. See *infra* notes 177-88, 205-07, 225-50, 254, 260-68 and accompanying text.

a) *Analogy to Latent Disease*

Discovery doctrines routinely extend to cases of latent disease.¹⁷⁷ The reasoning is that it is unfair to bar plaintiffs' actions before they know of their injuries.¹⁷⁸ Courts also prefer that claims be brought when the injury is "ripe" — not while it is still a mere possibility.¹⁷⁹

Insidious diseases in many cases remain dormant or unrecognizable for a period of time.¹⁸⁰ They are often the result of prolonged exposure to the reactive agent.¹⁸¹ Courts hold that "blameless ignorance" of the encroachment of a disease manifesting itself in physical injury will not bar an action for the negligence precipitating it.¹⁸²

Similarly, psychological and emotional damages do not manifest themselves at the time the negligent act takes place.¹⁸³ The negligence takes place over a period of time in the form of small seductions, mishandling of transference, and gradual erosion of the boundaries of professional behavior.¹⁸⁴ Moreover, undue influence may be exercised by a therapist over the patient, which keeps the cause of action camouflaged.¹⁸⁵ The victim's inability to recognize the negligence or injury should likewise be viewed as blameless ignorance.¹⁸⁶ A

177. A cause of action should not accrue until a victim has been apprised of her injuries. *See Urie v. Thompson*, 337 U.S. 163, 169 (1949) (to not apply the discovery rule "would mean that some past moment in time, unknown and inherently unknowable even in retrospect, [the plaintiff] was charged with knowledge of the slow and tragic disintegration of his lungs"). *See also Olsen v. Bell Tel.*, 388 Mass. 171, 445 N.E.2d 609, 612 (1983) ("the discovery rule has been applied to causes of action based on 'inherently unknowable' wrongs").

178. *Olsen*, 445 N.E.2d at 612.

179. *See Gore v. Daniel O'Connell*, 17 Mass. App. Ct. 645, 461 N.E.2d 256, 259 (1984).

180. *See, e.g., Urie v. Thompson*, 337 U.S. 163, 170 (1948) (plaintiff became too ill to work in 1940; subsequently diagnosed as having silicosis, a disease resulting from working daily in silica dust over a period of years).

181. *See, e.g., id.* (involving an individual who unknowingly contracted silicosis as a result of prolonged exposure to silica dust).

182. *See id.* at 170. The Supreme Court stated:

We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

Id.

183. *DeRose, Adult Incest Survivors, supra* note 152, at 213.

184. *See, e.g., Zipkin v. Freeman*, 436 S.W.2d 753, 764 (Mo. 1968) (court found that plaintiff, while damaged by the therapist's sexual misconduct, had also been damaged by the therapist's continuously occurring acts or omissions over a three-year period).

185. *See supra* note 148.

186. *DeRose, Adult Incest Survivors, supra* note 152, at 212-13. *See also Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780, 786 (1991). In *Riley*, the court examines how the injuries themselves may interfere with the discovery of the cause of action. The court stated:

An injury to the mind could interfere with the discovery of the cause of action. Here, Dr. Presnell has allegedly caused great psychological harm to Riley, and that very harm allegedly caused Riley to be unable to link the misconduct to the damage. Furthermore, there was evidence to support the conclusion that a reasonable person who had been subject to the type of abuse alleged by Riley would have been unable

victim of psychological injury can no more self-diagnose than can a victim of latent disease.¹⁸⁷ This argument is enhanced by the fact that most psychological injuries may not ever manifest themselves physically — unlike the victims of latent disease who at a point during the course of their disease begin suffering extreme physical symptoms.¹⁸⁸

Application of the discovery doctrine to emotional injury would be consistent with its application to latent disease. There appear to be no valid reasons to differentiate between victims of insidious physical disease and victims of latent psychological injury.

b) *Analogy to Attorney-Client Relationship*

The discovery rule has been extended to the attorney-client relationship in two separate lines of cases.¹⁸⁹ In one line of cases, usually involving damage resulting from simple negligence, the courts focus on the disparity of expertise between the client and attorney.¹⁹⁰ The differential in knowledge effectively camouflages a plaintiff's cause of action.¹⁹¹

In the second line of cases, courts focus on the nature of the attorney-client relationship. The discovery rule is applied to situations in which the attorney receives a benefit from the client on the grounds that the nature of the relationship diminishes the client's duty to investigate.¹⁹² In these respects, the psychotherapist-client relationship is sufficiently analogous to vindicate use of the discovery rule and the lessened degree of diligence in sexual misconduct cases.

(1) *Mere Negligence*

Courts place "a trust of the very highest character" on attorneys.¹⁹³ In addition to the duty of reasonable care and contractual duties, attorneys have a high duty of fidelity because of the unique nature of the relationship.¹⁹⁴

to draw a causal connection between that improper therapy and the psychological problems.

Id.

187. See *Shamloo v. Lifespring, Inc.*, 713 F. Supp. 14, 18 (D.D.C. 1989); *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986); *Riley*, 565 N.E.2d at 786 ("[i]n other words, if the defendant's conduct would, in an ordinary reasonable person, cause an injury which by its very nature prevents the discovery of its cause, the action cannot be said to have accrued").

188. See, e.g., *Urie v. Thompson*, 337 U.S. 163, 170 (1948) (plaintiff eventually became so ill he was unable to work). For a discussion of the nature of psychological injury, see *supra* notes 18-45 and accompanying text.

189. See *infra* notes 193-229 and accompanying text.

190. See *infra* notes 193-207 and accompanying text.

191. See *infra* notes 193-224 and accompanying text.

192. See *infra* notes 208-29 and accompanying text.

193. *Beery v. State Bar of Cal.*, 43 Cal. 3d 802, 739 P.2d 1289, 1294, 239 Cal. Rptr. 121, 126 (1987); see also *Barbara A. v. John G.* 145 Cal. App. 3d 369, 193 Cal. Rptr. 422, 432 (1983) (relation between attorney and client is fiduciary of highest character); *Hendrickson v. Sears*, 365 Mass. 83, 310 N.E.2d 131, 135 (1974) (relation of attorney to client is highly fiduciary).

194. *Barbara A.*, 193 Cal. Rptr. at 432. A cause of action was allowed against an attorney

The fiduciary relationship imposes the duty to exercise the utmost good faith, fairness, and fidelity.¹⁹⁵

One of the reasons for imposing these duties is that "the attorney is an expert and much of his work is done out of the client's view."¹⁹⁶ The client is not an expert and should not be expected to recognize professional negligence.¹⁹⁷ In *Merkley v. Beaslin*,¹⁹⁸ the court found that because the client must rely on the attorney for expertise, advice, and assistance on matters in a forum especially obscure to the client, fundamental fairness required the application of the discovery rule.¹⁹⁹

Many courts recognize clients' vulnerable positions and a majority apply the discovery rule in cases where negligence occurs.²⁰⁰ In *Hendrickson v. Sears*²⁰¹ the court applied the discovery rule in an action based on an attorney's negligence in certifying a real estate title.²⁰² In its ruling, the court compared the attorney-client relationship to that of a doctor.²⁰³ It held:

The attorney, like the doctor, is an expert The client is not an expert; he cannot be expected to recognize professional negligence if he sees it, and he should not be expected to watch over the professional or to retain a second professional to do so. The relation of attorney and client is *highly* fiduciary in its nature.²⁰⁴

These justifications for applying the discovery rule to the attorney-client relationship apply with equal force to the psychotherapist-patient relationship. Psychotherapy clients have little knowledge or expertise in the technical aspects of psychotherapy. Even more so than clients seeking the aid of attorneys, psychotherapy clients must rely on the advice and expertise of psychotherapists

for false representation when he caused a pregnancy in a client after he told her, "I can't possibly get anyone pregnant." An attorney may be disciplined for violation of his fiduciary duty even in the absence of an attorney-client relationship. See *Worth v. State Bar of Cal.*, 17 Cal. 3d 337, 551 P.2d 16, 18, 130 Cal. Rptr. 712, 714 (1976); *Sodikoff v. State Bar of Cal.*, 14 Cal. 3d 422, 535 P.2d 331, 334-35, 121 Cal. Rptr. 467, 472 (1975); *Lewis v. State Bar of Cal.*, 9 Cal. 3d 704, 511 P.2d 1173, 1178-79, 108 Cal. Rptr. 821, 826-27 (1973).

195. See *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1040 (La. 1987) ("[i]n all his relations with his clients, it is [an attorney's] duty to exercise and maintain the utmost good faith, honesty, integrity, fairness, and fidelity"). See also *Searcy v. Novo*, 188 So. 490, 498-99 (La. Ct. App. 1939) ("relation of attorney and client . . . 'superinduces' a trust status of highest order; [it] devolves upon the attorney the duty of dealing with client only on basis of strictest duty and honor").

196. *Hendrickson*, 310 N.E.2d at 135.

197. *Id.*

198. 778 P.2d 16 (Utah Ct. App. 1989).

199. *Id.* at 19. See also *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

200. See *supra* notes 193-99.

201. 365 Mass. 83, 310 N.E.2d 131 (1974).

202. *Id.*, 310 N.E.2d at 132.

203. *Id.*, 310 N.E.2d at 135.

204. *Id.* (emphasis added).

because that trust is what makes the therapy work.²⁰⁵ As a result, psychotherapy patients almost necessarily have a "low index of suspicion" for negligent acts.²⁰⁵ They, like attorneys' clients, should not require another expert to watch over the professional. And, like attorneys, therapists are fiduciaries to their clients.²⁰⁷ As the psychotherapy client is in a position the same as or similar to that of the client of an attorney, the statute of limitations should be equally interpreted to include the discovery doctrine in psychotherapist negligence cases.

(2) *Benefit Conferred on Fiduciary*

Courts generally hold that attorneys who receive advantages from their clients have the burden of proving that the transaction was free from coercion, fraud, or undue influence and was entered into only after full and fair disclosure.²⁰⁸ In *Beery v. State Bar of California*,²⁰⁹ the defendant attorney contended that the loan he encouraged his client to make to a company in which the attorney held a significant and undisclosed interest was "purely a business matter."²¹⁰ The court held that the loan was "not an arm's length business deal, material facts were concealed, and there is ample precedent for imposing discipline."²¹¹ The attorney concealed that he had an interest in the company, which was sufficient to create liability in the attorney.²¹²

*Goldman v. Kane*²¹³ involved an attorney who arranged a \$30,000 loan for a client, secured by the attorney obtaining title to approximately \$80,000 worth of the client's property.²¹⁴ The client defaulted on the loan, and the attorney sold and seized the client's home and boat.²¹⁵ The benefit to the attorney was clear: "The fundamental unfairness of the transaction and the egregious overreaching by [the attorney] in his dealings with [the client] are self-evident."²¹⁶ The court held that "[i]n light of the nature of the transaction, [the attorney], at a bare minimum, was under a duty not to proceed with the loan until he was satisfied that [the client] had obtained independent advice on the matter."²¹⁷ As the attorney had failed to do this, the court ordered the attorney to repay the client.²¹⁸

205. See *supra* notes 52-74 and accompanying text.

206. T. GUTHEIL & P. APPELBAUM, *CLINICAL HANDBOOK OF PSYCHIATRY & THE LAW* 152-53 (1982).

207. See *supra* notes 193-95 and accompanying text.

208. See, e.g., *Beery v. State Bar of Cal.*, 43 Cal. 3d 802, 739 P.2d 1289, 1294, 239 Cal. Rptr. 121, 126 (1987).

209. 43 Cal. 3d 802, 739 P.2d 1289, 239 Cal. Rptr. 121 (1987).

210. *Id.*, 739 P.2d at 1293, 239 Cal. Rptr. at 126.

211. *Id.*, 739 P.2d at 1295, 239 Cal. Rptr. at 128.

212. *Id.*

213. 329 N.E.2d 770 (Mass. App. Ct. 1975).

214. *Id.* at 772 n.4.

215. *Id.* at 772.

216. *Id.* at 773.

217. *Id.*

218. *Id.* at 774.

Ordinarily, the court determines when the statute of limitations has run by determining when a reasonable person "ought to have known" of the cause of action.²¹⁹ Reasonable persons are expected to use "due diligence" in obtaining knowledge as to their cause of action.²²⁰ However, in the context of attorney-client relationships, and when a benefit has been conferred to the fiduciary, several courts have relaxed the "reasonable diligence" standard because they find that clients are entitled to rely on the good faith of their fiduciaries.²²¹

In *Plaquemines Parish Commission Council v. Delta Development Co.*,²²² the Louisiana court held the plaintiffs to a lesser degree of diligence. The court explained that it was reasonable for the plaintiffs to rely on the attorney to affirmatively disclose all conflicts of interest he might have in regard to his representation of them.²²³ The court commented that where suspicions are raised and the fiduciary "quiets the suspicions," the plaintiffs are further entitled to rely on the fiduciary's representations.²²⁴

Where the psychotherapist receives a benefit from the client, such as sexual gratification, the same presumption should apply: the transaction should be considered presumptively the result of undue influence.²²⁵ The lessened degree of diligence is particularly appropriate to the psychotherapist-patient relationship. In a psychotherapist-patient relationship, the patient is required to trust in and rely upon the good faith of the therapist. Abuse of this trust, in the form of advantage taken by the therapist, destroys the very purpose of therapy.²²⁶ At the very least, clients should be able to rely upon the therapist to do no harm and to affirmatively disclose any potential risks.²²⁷ Often, though, therapists will assure their clients that the therapy was proper.²²⁸ In these situations, like the situation present in *Plaquemines Parish*,²²⁹ the client should be allowed to rely upon the representations of the fiduciary, and a lesser degree of diligence should be required in discovering the wrong.

219. *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1113, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 661 (1988).

220. *See, e.g., id.*, 751 P.2d at 927, 245 Cal. Rptr. at 662.

221. *See Beery v. State Bar of Cal.*, 43 Cal. 3d 802, 739 P.2d 1289, 239 Cal. Rptr. 121 (1987); *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034 (La. 1987); *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983). *See also* *Hobbs v. Eichler*, 164 Cal. App. 3d 174, 210 Cal. Rptr. 387, 404 (1985) (court notes that in a fiduciary relationship, facts "which ordinarily require investigation may not incite suspicion, and [thus] do not give rise to a duty of inquiry"); *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780, 786 (1991) (failure of a psychotherapist to reveal facts relevant to a potential malpractice action will toll the statute of limitations until the plaintiff discovers the cause of action).

222. 502 So. 2d 1034 (La. 1987).

223. *Id.* at 1059.

224. *Id.*

225. *See, e.g., Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422, 432 (1983).

226. *See supra* notes 75-93 and accompanying text.

227. *See Beery v. State Bar of Cal.*, 43 Cal. 3d 802, 739 P.2d 1289, 239 Cal. Rptr. 121 (1987); *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034 (La. 1987).

228. *See supra* notes 76-80 and accompanying text.

229. *See supra* notes 222-24 and accompanying text.

The subtle nature of psychological damages further compels the application of the "lessened degree of diligence" to psychotherapist-patient relationships. The Federal District Court of Washington, D.C. confronted this issue in *Shamloo v. Lifespring, Inc.*²³⁰ The plaintiff had been emotionally damaged by a psychological training program but was unable to causally link her injury to the defendants.²³¹ She had experienced "atypical behavior" during the course of the training program but had been unable to recognize the cause of it until she read a news article about the defendants.²³² The court said:

[T]he fact that an individual develops psychological problems, even severe ones, is not sufficient in itself to put a reasonable person on notice that they have been injured. Far too many persons undergo serious psychological suffering without legally compensable injury to make it a reasonable expectation on the part of the courts that the emergence of psychological problems should be evaluated immediately in terms of injury.²³³

As the *Shamloo* court discussed, it may be "unreasonable to expect a person with psychological problems to identify one cause, injury or emotional trauma as the reason for a prolonged disorder."²³⁴ The doctrine of "over-determination" of psychological traits holds that all psychological disorders are derived from more than one cause.²³⁵ Many cases revolve around victims who cannot understand the injury and its cause for years following the maltreatment.²³⁶ For example, in *Riley v. Presnell*,²³⁷ the defendant allegedly introduced alcohol, marijuana, and Valium use into therapy sessions with his male patient.²³⁸ Also, on at least two occasions, Presnell persuaded his client to engage in sexual activity with him, supposedly under the guise that this activity was necessary for the patient to deal with his feelings toward his father.²³⁹ Riley became extremely dependent upon his therapist, opining on one occasion that Presnell could be "God."²⁴⁰ After Presnell abruptly abandoned the plaintiff, Riley began experiencing severe emotional and psychological problems, as well as Valium, marijuana, and alcohol addictions.²⁴¹ Although he began therapy with a new psychiatrist in 1980 to ease his Valium addiction, Riley claimed that he did not know that his psychological problems

230. 713 F. Supp. 14 (D.D.C. 1989).

231. *Id.* at 16.

232. *Id.* at 18.

233. *Id.*

234. *Id.*

235. *Id.* at 18 (citing S. FREUD, *Mourning and Melancholia*, in *PSYCHOLOGICAL THEORY* 177 (P. Rieff trans. 1963)).

236. See, e.g., *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986); *Greenberg v. McCabe*, 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979).

237. 409 Mass. 239, 565 N.E.2d 780 (1991).

238. *Id.*, 565 N.E.2d at 783.

239. *Id.*

240. *Id.*

241. *Id.*

were related to his therapy until 1984, when he met another former patient of Dr. Presnell's who had been similarly abused.²⁴² The court reversed summary judgment and remanded the statute of limitations issues to trial on the ground that "there was evidence to support the conclusion that a reasonable person who had been subjected to the type of abuse alleged by Riley would have been unable to draw a causal connection between that improper therapy and the psychological problems."²⁴³

In *Simmons v. United States*,²⁴⁴ the plaintiff was involved in a sexual relationship with her therapist, an Indian Health Services employee.²⁴⁵ Although the relationship ended in 1980, Simmons did not learn that her emotional problems were related to this exploitative relationship until February of 1983.²⁴⁶ Prior to that time, the plaintiff had believed that the sexual relationship was "her fault" and that she was a worthless person, "particularly as a sexually bad person, someone who was sexually dirty or degraded, or whorish."²⁴⁷

Simmons and *Shamloo* illustrate the practicality of applying relaxed delayed discovery principles to psychotherapist-patient cases commensurate to the relaxed principles applied to attorney-client cases,²⁴⁸ while *Riley* reaches the same result with slightly different reasoning.²⁴⁹ The similarity of the relationships warrants application of the "lesser degree of diligence" standard in both types of cases. In addition, an independent justification for applying these principles lies in the nature of the injuries that victims of psychotherapist abuse are reasonably likely to withstand.²⁵⁰ The subtlety of psychological

242. *Id.*, 565 N.E.2d at 784.

243. *Id.*, 565 N.E.2d at 786.

244. 805 F.2d 1363 (9th Cir. 1986).

245. *Id.* at 1364.

246. *Id.* Simmons suffered a variety of emotional problems that resulted in a hospitalization in May 1982 and a suicide attempt in November 1982. In February 1983, her subsequent treating therapist told her that her condition, identified as post-traumatic stress disorder, was caused by her prior therapist's bad treatment. *Id.*

247. *Id.* at 1367.

248. *Simmons*, 805 F.2d at 1363; *Shamloo v. Lifespring, Inc.*, 713 F. Supp. 14, 16-17 (D.D.C. 1989).

249. *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780, 786 (1991). Rather than specifically relying on a "lessened degree of diligence," the Massachusetts court has redefined the discovery rule. *Id.* Under this decision, the "reasonable man" who serves as the standard in psychological injury cases

is not a detached outside observer. . . . Rather it is a reasonable person who has been subjected to the conduct which forms the basis of the plaintiff's complaint If such an initially reasonable person would, by reason of the experience forming the basis for the plaintiff's complaint, have his or her judgment altered in some way, *such altered judgment then becomes the standard*. The cause of action will not accrue until such an individual would have discovered the damage.

Id. (emphasis added). The court explained that "[a]ccrual of the cause of action occurs when the ordinary reasonable person who had been subject to the experience would have discovered that the injury was caused by that experience." *Id.* By placing the reasonable person in the shoes of an injured plaintiff, the diligence to investigate required is lessened to the extent that a plaintiff's perception is impaired. *Id.*

250. See *supra* notes 18-45 and accompanying text.

injuries and the variety of their causes create a compelling argument for the application of the "lessened degree of diligence" standard to psychotherapist-client malpractice cases.

c) *Analogy to Incest*

Most similar to psychotherapist-patient sexual misconduct cases are incest cases. In deciding whether to apply the discovery rule to toll the statute of limitations in incest cases, courts have distinguished between two types of situations.²⁵¹ In the first, the victim may have completely blocked the traumatic events from conscious memory.²⁵² In the second, memory of the events themselves may not be repressed, but years may have elapsed before the victim can recognize the wrongfulness of the acts.²⁵³ Victims of psychotherapist sexual misconduct often experience either a complete repression of the traumatic events or an inability to recognize the wrongfulness of the acts.²⁵⁴ The similarity between psychotherapist sexual misconduct and incest is so marked that a discussion of the analogy and the courts' rulings concerning incest is appropriate.

Incest ruptures the close, caretaking relationship that occurs between the parent and child.²⁵⁵ It is an abuse of trust of the highest magnitude, and it causes long-term injury to the personality.²⁵⁶ The actual sexual abuse of the

251. See *Johnson v. Johnson*, 701 F. Supp. 1363, 1367 (N.D. Ill. 1988). For a general discussion of incest and the discovery rule, see Hartnett, *Use of the Massachusetts Discovery Rule by Adult Survivors of Father-Daughter Incest*, 24 NEW ENG. L. REV. 1243 (1990).

252. See *Evans v. Eckelman*, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605, 608 (1990) (plaintiffs, three brothers, "developed various 'psychological blocking mechanisms,' . . . [t]hey were consequently unable to perceive the psychological injuries caused them or their causal connection to [the abuser's] acts"); *Mary Doe v. John Doe*, 216 Cal. App. 3d 285, 254 Cal. Rptr. 633 (1989) (plaintiff had repressed all memory of childhood sexual abuse by father). See also *Meiers-Post v. Schafer*, 170 Mich. App. 174, 427 N.W.2d 606 (1988) (plaintiff repressed memory of sexual relationship with teacher until memory revived by television program); *Peterson v. Bruen*, 106 Nev. 271, 792 P.2d 18, 23-24 (1990) (plaintiff "blocked from his memory the incidents involving [his abuser]," who was his Big Brother in a Big Brother/Little Brother program). *But cf.* *Tyson v. Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (1986) (holding that the discovery rule does not apply to cases in which the plaintiff has repressed memory).

253. See *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1989) ("the severe emotional trauma experienced by [the plaintiff] resulted in her being unable to fully understand or discover her cause of action during the applicable statutory limitations period"); *Hammer v. Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23 (1987), *review denied*, 144 Wis. 2d 953, 428 N.W.2d 552 (1987) ("even if [the plaintiff] may have harbored some subjective doubts about the normalcy of [her father's] actions, because of [her father's] domination and authority and her own guilt, depression and disassociation, she had no information to a reasonable probability of the nature of her injuries or the facts with respect to their cause"). *But see* *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987) (where plaintiff was aware of the abuse but not the consequences, the court held that the statutory period was not tolled).

254. See, e.g., *Simmons v. United States*, 805 F.2d 1363, 1368 (9th Cir. 1986) ("Ms. Simmons' transference and dependence made it very difficult for her to believe that anything [her therapist] had done caused her emotional damage; rather . . . she blamed herself for her problems").

255. See, e.g., *Hammer v. Hammer*, 142 Wis. 2d 953, 418 N.W.2d 23. "Victims of incest have been harmed because of a 'most egregious violation of the parent/child relationship.'" *Id.*, 418 N.W.2d at 27 (quoting Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 631 (1983)).

256. Even though parents are usually not considered professional "fiduciaries" to their children,

child is one aspect of the injuries resulting from incest.²⁵⁷ Another aspect is the abuse of the dependency and innocence or naivete of the child to prevent revelation of the abuse.²⁵⁸ This may be accomplished by instructing the child that the sexual acts are normal or necessary to the relationship. The damage to the incest victim flows from the wrong perpetrated, but the longer-lasting, more devastating damage results from the destruction of the important relationship itself.²⁵⁹

The psychotherapist-patient relationship is parallel to the parent-child relationship in both the structure of the relationship and the damages which follow.²⁶⁰ The structure is similar due in part to the extreme vulnerability that many individuals carry into the psychotherapist-patient alliance and the power imbalance and trust that is created as part of the therapeutic relationship.²⁶¹ Many times the psychotherapist becomes a benevolent parent figure to the client.²⁶² Abuse of this position of power actually constitutes two wrongs, as in incest. The first is that the therapist sexually abuses a dependent client.²⁶³ The second is that the therapist uses the dependency and innocence or naivete of the client to prevent revelation of the abuse.²⁶⁴ This may be accomplished by instructing the client that the sexual acts are normal or necessary to the relationship, just as children are so taught in incestuous relationships.²⁶⁵

Deception leads clients to believe that their doubts concerning the sexual relationship demonstrate their own inadequacies.²⁶⁶ Likewise, future injuries

the courts do see parents as having a "confidential" relation toward them which affords children a high degree of protection. See *Evans v. Eckelman*, 215 Cal. App. 3d 1608, 265 Cal. Rptr. 605, 608-09 (1990). For a discussion of the differences between confidential and fiduciary relationships, see *supra* note 96.

257. See, e.g., Blake-White & Kline, *Treating the Disassociative Process in Adult Victims of Childhood Incest*, 66 Soc. CASEWORK 394 (1985).

258. See, e.g., *Hammer v. Hammer*, 142 Wis. 2d 953, 418 N.W.2d 23 (1987), *rev. denied*, 144 Wis. 2d 953, 428 N.W.2d 552 (1987).

259. The parent-child relationship is also called a "status relationship." Frankel, *supra* note 46, at 798-99. A status relationship exists when "one party (the Power Bearer) . . . has a partial or full monopoly over the means for satisfying the needs of the other party (the Dependent)." *Id.* at 798. See also, e.g., *Evans v. Eckelman*, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605, 609 (1990).

260. G. Gabbard, *Introduction*, *supra* note 26, at xi; MINN. TASK FORCE, *IT'S NEVER O.K.: PROFESSIONAL HANDBOOK*, *supra* note 1, at 15-17. See *supra* notes 52-59 and accompanying text.

261. See, e.g., *Roy v. Hartogs*, 81 Misc. 2d 350, 366 N.Y.S.2d 297, 300 (Civ. Ct. 1975) ("in essence [the plaintiff] alleges coercion by a person in a position of overpowering influence and trust").

262. See, e.g., *Greenberg v. McCabe*, 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979) ("the [therapist] 'became a God' to [the plaintiff]"). See also *supra* notes 52-59 and accompanying text.

263. See DeRose, *Adult Incest Survivors*, *supra* note 152, at 204.

264. *Id.*

265. See, e.g., *Roy*, 366 N.Y.S.2d at 298 ("during the course of [the plaintiff's] treatment and in furtherance thereof, [the therapist] suggested that they have sexual relations as part of her treatment"). See also G. SCHOENER, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS*, *supra* note 1, at 75-77.

266. See, e.g., *Simmons v. United States*, 805 F.2d 1363, 1367 (9th Cir. 1986) (the plaintiff believed that the sex that occurred was because she was "a very bad person, particularly . . . someone who was sexually dirty, degraded, or whorish").

arising from the deception will probably also be attributed to personal shortcomings and not the therapist.²⁶⁷ These psychological syndromes may prevent the child abuse victim or the psychotherapist abuse victim from discovering the cause of their malaise.²⁶⁸ The victim may either repress all memory of the abuse or be unable to recognize the wrongfulness of the acts.

Several jurisdictions have applied the discovery rule in incest cases and other sexual abuse cases involving repressed memory.²⁶⁹ For example, in *Mary Doe v. John Doe*,²⁷⁰ the plaintiff had repressed all memory of the acts of incest by her father that occurred from the time she was an infant until she was five years old. Only when she was in her twenties did an incident occur which triggered her memory of the abuse, and she then filed suit.²⁷¹ The court held that the complaint alleged sufficient facts which, if true, would make the discovery rule applicable and reversed the summary judgment of the lower court.²⁷² Specifically, the court found that because the plaintiff had "repressed her contemporaneous awareness of the assaults against her [as a child] and then later recovered those buried memories [as an adult] . . . it would be most unfair to the plaintiff not to toll the statute."²⁷³

However, in another opinion, a California court has indicated that total repression might not be necessary for the discovery rule to apply. In *Evans*

267. See, e.g., *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780, 785 (1991) (the plaintiff stated, "I learned [through subsequent therapy] that [the defendant] was the root of my Valium addiction, alcohol abuse and marijuana use").

268. See *supra* notes 26-45 and accompanying text.

269. See, e.g., *Johnson v. Johnson*, 701 F. Supp. 1363 (N.D. Ill. 1988) (federal court applied Illinois discovery rule to incest case in which victim had repressed all memory of the events); *Evans v. Eckelman*, 216 Cal. App. 3d 1608, 265 Cal. Rptr. 605 (1990) (application of discovery rule in case involving three brothers, all having repressed memory of sexual abuse by their foster father); *Meiers-Post v. Schafer*, 170 Mich. App. 174, 427 N.W.2d 606 (1988) (discovery rule applied where high school teacher had sexual relations with the plaintiff but the plaintiff had repressed all memory of the event until the plaintiff was 30 years old).

270. 216 Cal. App. 3d 285, 264 Cal. Rptr. 633 (1989).

271. *Id.*, 264 Cal. Rptr. at 636. Mary Doe's story was profiled in a recent article in the New York Times Magazine section. Mithers, *Incest and the Law*, N.Y. Times, Oct. 21, 1990, § 6 (Magazine), at 44. Doe had been arrested for drunk driving and began attending Alcoholics Anonymous:

Asked to write an inventory of her life as part of her A.A. experience, [Doe] realized that she had no memories of her early childhood. "I thought maybe kids just don't remember," she said in a recent interview, her voice low and shaky. "But after I was sober, it was like walls crumbling in my head. Feelings started coming back. I'd lie down, close my eyes and feel my body hurting. Sometimes if I was driving I'd have to pull over."

In therapy, she began to rediscover her early childhood memories — and found that she had repressed numerous instances of sexual abuse by her father. "On the black couch — 4-5 years old, afternoon," she wrote as part of her therapy, describing some of what she recalled. "He was on top of me. . . . I remember searing, burning pain. . . . I didn't move, I didn't cry. I didn't feel. I had learned to make myself dead on the inside. The life inside me was gone."

Id.

272. *Id.*, 264 Cal. Rptr. at 640.

273. *Id.*, 264 Cal. Rptr. at 638-39.

v. Eckelman,²⁷⁴ the California Appeals Court held that a cause of action for an adult survivor does not accrue until the plaintiff discovers or should discover the act of molestation and the wrongfulness of these acts.²⁷⁵ Although *Evans* concerned an individual who had repressed all memory of the abuse he suffered, the court specifically referenced survivors who did not repress memory of the acts themselves: "Even where memory of the events themselves is not suppressed, it may be some time before the victim can face the full impact of the acts."²⁷⁶ The court concluded that the statute of limitations does not begin to run until the plaintiff understands or should understand that the injury was caused by wrongdoing.²⁷⁷

Other jurisdictions have also utilized the discovery rule in cases in which memory of the acts of sexual abuse is not repressed.²⁷⁸ In a Wisconsin case, *Hammer v. Hammer*,²⁷⁹ the plaintiff was sexually abused by her father from ages five to fifteen.²⁸⁰ When she was fifteen, the plaintiff told her mother about the abuse.²⁸¹ Both parents denied that the abuse had occurred and then blamed the plaintiff for causing the family strife.²⁸² The plaintiff finally brought suit when she reached the age of twenty-two.²⁸³ In the appeal from summary judgment, the court held that the delayed discovery rule applies as a matter of law where a plaintiff does not know that abuse had caused psychological injuries.²⁸⁴

Another jurisdiction has held that the discovery rule does not apply as a matter of law to repressed-memory incest cases. In *Tyson v. Tyson*,²⁸⁵ the Washington Supreme Court accepted the argument that the expert testimony needed to prove the occurrence of incest is tenuous.²⁸⁶ The court questioned the ability of an expert witness to reconstruct past events with accuracy, as is sometimes required in repressed-memory incest cases.²⁸⁷ Its ruling appears to limit incest cases and may be an impediment to successfully pursuing

274. 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605, 608 (1990).

275. *Id.*, 265 Cal. Rptr. at 608.

276. *Id.*

277. *Id.*, 265 Cal. Rptr. at 609.

278. See, e.g., *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1989) (while there was no allegation that the plaintiff had repressed all memory, the plaintiff had been unable to discover the cause of action within statutory period); *Hammer v. Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23 (1987), review denied, 144 Wis. 2d 953, 428 N.W.2d 552 (1987) (plaintiff did not repress memory of acts but did not know they caused damage until age 22).

279. 142 Wis. 2d 257, 418 N.W.2d 23 (1987), review denied, 144 Wis.2d 953, 428 N.W.2d 552 (1987).

280. *Id.*, 418 N.W.2d at 24.

281. *Id.*

282. *Id.*, 418 N.W.2d at 24-25.

283. *Id.*, 418 N.W.2d at 25.

284. *Id.*, 418 N.W.2d at 26.

285. 107 Wash. 2d 72, 727 P.2d 226 (1986). *Tyson* excluded cases in which the victim was unable to recognize the wrongfulness of the acts as well. However, the Washington legislature enacted a statute specifically including such cases within the ambit of the discovery rule. See WASH. REV. CODE ch. 144, S.S.B. No. 6305. WASH. REV. CODE § 4.16.350 (Supp. 1991).

286. *Id.*, 727 P.2d at 229.

287. *Id.*

psychotherapist misconduct cases involving repressed memory as well. The court feared the encouragement of spurious or stale claims and the resulting injustice.²⁸⁸ The court stated that given the “substantial risks of stale claims in cases of this nature, we conclude that a literal reading of the statute of limitations strikes the proper balance between the possibility of such claims and the right to bring an action.”²⁸⁹

A number of protections are recognized by the law which would insure fairness to the defendant in incest and, by analogy, psychotherapist malpractice cases. In a delayed discovery case, plaintiffs bear the burden of proving the reasonableness of their delayed discovery.²⁹⁰ Once a plaintiff has offered facts, which if true are sufficient to apply the discovery rule, these facts must be submitted to and determined by the trier of fact. The procedural devices of cross-examination and counter-testimony of opposing experts should provide protections in cases of this type.²⁹¹ In addition, psychiatric evidence is admitted in a wide variety of cases, including personal injury, custody, and even criminal trials. To label psychiatric evidence as presumptively incompetent seems to be entirely contrary to established legal thought.

*Tyson*²⁹² also highlights an important difference between incest cases and cases involving psychotherapist sexual misconduct. With psychotherapist sexual misconduct, the victim is nearly always an adult. The chances of total repression of the memory of the events is not as great with adults as with children in incest cases.²⁹³ This difference makes psychotherapist malpractice cases more compelling than incest for application of the discovery rule in cases in which the injury or its likely cause is not recognized within the statutory period.

d) Summary

Psychotherapist malpractice is similar to other acts of negligence that by their nature result in damages that remain obscure to the injured party.²⁹⁴ Harsh results often occur when the courts construe the statutes of limitations as beginning at the time of injury. These results are especially common when the negligence giving rise to the action takes place over a period of time instead of at one discernible moment.²⁹⁵ The “discovery” interpretation of statutes of limitations mitigates these harsh results.

The discovery rule as applied to fiduciary relationships decreases the duty of diligence required of plaintiffs.²⁹⁶ This rule provides that a plaintiff’s cause of action does not accrue until a reasonable plaintiff laboring under coercion,

288. *Id.*, 727 P.2d at 230.

289. *Id.*

290. *Evans v. Eckelman*, 216 Cal. App. 3d 1608, 265 Cal. Rptr. 605 (1990).

291. *See Barefoot v. Estelle*, 463 U.S. 880 (1983).

292. 107 Wash. 2d 72, 727 P.2d 226 (1986).

293. E. Disch, *supra* note 41. *See also* G. SCHOENER, PSYCHOTHERAPISTS’ SEXUAL INVOLVEMENT WITH CLIENTS, *supra* note 1.

294. *See supra* notes 177-293 and accompanying text.

295. *See supra* notes 181-84 and accompanying text.

296. *See supra* notes 221-24 and accompanying text.

fraud, or undue influence knows or should know of the injury and its cause.²⁹⁷ Formulated in this manner, the rule still holds the parties to an objective standard, making it appropriate as a rule of construction.

Psychotherapist malpractice cases lend themselves easily, by analogy to attorney malpractice cases, to the application of the relaxed discovery rule.²⁹⁸ In jurisdictions which either have not adopted the discovery rule or have abolished it, these types of cases may be brought through an equitable tolling provision, such as fraudulent concealment of a cause of action.

C. *Fraudulent Concealment and the Statute of Limitations*

Historically, in cases of fraud, mistake, and breach of trust, courts have allowed statutes of limitations to begin to run only after a plaintiff knows or should know of the cause of action.²⁹⁹ Fraud concepts have been incorporated into the construction of modern statutes of limitations in nearly every jurisdiction.³⁰⁰ One common doctrine is "fraudulent concealment." This section will describe fraudulent concealment and how it is particularly suited for application to sexual misconduct cases.

1. *Fraudulent Concealment Defined*

Fraudulent concealment is defined as knowingly concealing or suppressing a material fact which is intimately connected with the business in reference to which the relation exists; this concealment must also be done with the intent to mislead or defraud.³⁰¹ The doctrine is applied when an injured party does not know of the cause of action due to the wrongful conduct of the defendant.³⁰² Many times the defendant's action works as an independent act of fraud, concealing from the plaintiff a separate wrong over which the plaintiff now seeks to bring suit.³⁰³ Fraudulent concealment operates in situations in which failure to toll the limitations period would be inherently unfair or unreasonable.³⁰⁴ Generally, the limitations period will be tolled until the injured party learns or should have learned through reasonable diligence of the wrong.³⁰⁵

Courts use this equitable principle to estop defendants from profiting from their own wrongdoing. In *Borderlon v. Peck*,³⁰⁶ the Texas court eloquently describes this public policy:

297. See *supra* notes 221-50 and accompanying text.

298. See *supra* notes 205-07, 225-50 and accompanying text.

299. Note, *Statutes of Limitations*, *supra* note 151, at 1213.

300. See Annotation, *Limitations of Actions*, *supra* note 154, § 147.

301. BLACK'S LAW DICTIONARY 596 (5th ed. 1979). ◇

302. See, e.g., *Golden Nugget, Inc. v. Ham*, 98 Nev. 311, 646 P.2d 1221, 1223-24 (1982).

303. See Annotation, *Limitations of Actions*, *supra* note 154, § 147.

304. See, e.g., *Bennett v. Hibernia Bank*, 47 Cal. 2d 540, 305 P.2d 20, 33 (1956) (citing *Bartlett v. Pacific Nat'l Bank*, 110 Cal. App. 2d 683, 244 P.2d 91, 98 (1946); *Rose v. Dunk-Harbison Co.*, 7 Cal. App. 2d 502, 46 P.2d 242, 243 (1922); 2 WOOD ON LIMITATIONS 858-59 (4th ed. 1916)).

305. See, e.g., *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983).

306. 661 S.W.2d 907 (Tex. 1983).

Texas courts have long adhered to the view that fraud vitiates whatever it touches, and have consistently held that a party will not be permitted to avail himself of the protection of a limitations statute when by his own fraud he has prevented the other party from seeking redress within the period of limitations. To reward a wrongdoer for his own fraudulent contrivance would make the statute a means of encouraging rather than preventing fraud.³⁰⁷

In cases in which the parties deal at arm's length, the burden of proof is on the injured party. The injured party must prove that the defendant engaged in an affirmative act of concealment before the courts will exercise the fraudulent concealment exception to the statute of limitations.³⁰⁸

In cases involving fiduciary relationships, however, the courts are more lenient in finding fraudulent concealment. Fiduciaries are required to disclose all material facts connected with or affecting the purpose of the relationship.³⁰⁹ Failing to disclose any of these facts may, in and of itself, constitute fraudulent concealment which will toll the statute of limitations.³¹⁰ A fiduciary's breach of any duty owed to the client may be the basis of a fraudulent concealment tolling of the limitations period. Some jurisdictions require fiduciaries to disclose their own negligence to the trusting party or the limitations period will be tolled until the plaintiff has reason to discover the negligence.³¹¹

307. *Id.* at 908-09.

308. *See, e.g.,* *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 159 P.2d 958, 964 (1945) ("[i]n general, to establish a cause of action for fraud or deceit plaintiff must prove that a material representation was made; that it was false; that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true; that it was made with an intent to induce plaintiff to act in reliance thereon; that plaintiff reasonably believed it to be true; that it was relied on by plaintiff; and that plaintiff suffered damage thereby").

309. *See supra* notes 134-43 and accompanying text.

310. *See* *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 491 P.2d 421, 429, 98 Cal. Rptr. 837, 845 (1971) ("[in a fiduciary relationship] although the defendant makes no active misrepresentation, this element 'is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is a 'fraud'' (citations omitted)); *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1059 (La. 1987); *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985) ("if a fiduciary duty existed the fiduciary could 'be liable for fraudulent misrepresentation by silence even though there was no evidence of fraudulent statements or of intentional concealment'"); *Weaver v. Witt*, 561 S.W.2d 792, 793 (Tex. 1977).

311. *See* *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983) ("[b]ecause the physician-patient relationship is one of trust and confidence, Texas recognizes a duty on the part of a physician to disclose a negligent act or fact that an injury occurred"). *See also* *Golden Nugget, Inc. v. Ham*, 98 Nev. 311, 646 P.2d 1221, 1223-24 (1982) (court stated if a "fiduciary fails to fulfill his obligations and also fails to inform the other party of his failure, [this results] in fraudulent concealment"). *See also* *Geisz v. Greater Baltimore Medical Center*, 313 Md. 301, 545 A.2d 659, 670-71 (1988). In this case, the plaintiff brought suit ten years after the death of her husband, arguing that neither she nor the decedent discovered the doctor's alleged negligence until 1985 when she read an article concerning other malpractice cases pending against him. *Id.*, 545 A.2d at 671. *See also* *Dawson, supra* note 158, at 904-06. Today, however, many courts seem to hold that the fraud exception will toll the statute of limitation where the physician knew of the alleged negligence and concealed it, or if he knew of the negligence and failed to reveal it. *Geisz*, 545 A.2d at 671 (examining sixteen jurisdictions). Only one state applies constructive fraud tolling in

Recognizing that overreaching may be exercised in fiduciary relationships, the courts may not require plaintiffs to investigate the transactions they enter into with their fiduciary.³¹² Even if facts indicating the fraudulent concealment are available from a public record, knowledge of the fraud will not be imputed until the plaintiff learns of the concealment, or has actual knowledge of facts sufficient to put a reasonable person in the same position on inquiry concerning the transaction.³¹³ The courts, then, are less inclined to find that an injured party “should have known” of a fiduciary’s concealment before gaining actual knowledge of the fiduciary’s failure to disclose the facts.³¹⁴

The plaintiff is allowed to bring a claim within a “reasonable time” of discovery. Many states, though, have statutes providing for the running of the full limitations period after the finding of fraudulent concealment.

2. *Application to Psychotherapist Misconduct*

Based on the fiduciary relationship, several jurisdictions have employed the fraudulent concealment doctrine to toll the statute of limitations in cases in which physicians have failed to disclose material facts about their treatment of the plaintiff.³¹⁵ There appears to be no real distinction in this regard between psychotherapists and physicians and their relations to their patients. Failure to disclose any material fact which results in harm to the patient should trigger the fraudulent concealment doctrine as surely as it would for any other fiduciary.³¹⁶ This particular duty may also give rise to the duty to reveal any negligence by the fiduciary, as it was found to in Texas and Nevada.³¹⁷ Thus, the statute of limitations should also toll until victims of psychotherapist malpractice know or have actual knowledge of facts which would put them on inquiry.

In psychotherapist sexual misconduct cases, application of the fraudulent concealment doctrine in fiduciary relationships has approximately the same result as applying the discovery rule to a fiduciary relationship. In fraudulent concealment cases, fiduciaries must know or have reason to know of the

cases in which the doctor fails to disclose that which he *ought* to have known, regardless of his actual knowledge of the negligence. *See* *Walter v. Rinker*, 520 N.E.2d 468 (Ind. Ct. App. 1988).

312. *See* *Wills v. Maverick*, 760 S.W.2d 642, 646 (Tex. 1988) (the court stated that were it not for the discovery rule, “[the client] would have to hire a second attorney to observe the work of the first”).

313. *See* *Schaefer v. Berinstein*, 140 Cal. App. 2d 113, 295 P.2d 113, 124 (1956) (“where there is no prior duty to investigate [such as in confidential relationships] the statute does not run until [the plaintiff] has notice or knowledge of facts sufficient to put a reasonable [person] on inquiry”).

314. *See, e.g., United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 463 P.2d 770, 776, 83 Cal. Rptr. 418, 425 (1970).

315. *See, e.g., Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983).

316. *See, e.g., Hobbs v. Eichler*, 164 Cal. App. 3d 174, 210 Cal. Rptr. 387, 404 (1985) (citations omitted) (“[w]here there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud”).

317. *See supra* note 311 and accompanying text.

negligence that they have failed to disclose.³¹⁸ Because sexual contact between the patient and therapist is so clearly forbidden, in practice this requirement will have no bearing in psychotherapist sexual misconduct cases.³¹⁹

In both fraudulent concealment cases and discovery rule cases, if there is a fiduciary relationship, there is an affirmative duty to disclose all material facts relevant to the transaction. Failure of the fiduciary to disclose results either in the relaxing of the discovery rules or the tolling of the statute of limitations due to fraudulent concealment.

Delayed discovery doctrines provide relief for plaintiffs in jurisdictions that allow for such rules; plaintiffs in other jurisdictions may rely upon the equitable doctrine of fraudulent concealment. Both doctrines are accessible to victims of sexual exploitation by psychotherapists through the application of fiduciary principles. It appears that in every jurisdiction, the courts have carved out at least one exception to the statute of limitations, which victims of sexual exploitation may take advantage of to raise the limitations bar.³²⁰

IV. Conclusion: A Paradigm for Judging Psychotherapist Sexual Misconduct

Fiduciary theory offers a clear and coherent model for judging psychotherapist sexual misconduct. Since the success of therapy depends upon the degree of trust the patient is able to place in the therapist, the therapist's violation of that trust is a fiduciary breach of the highest order.³²¹ The damages caused to a victim's psyche and emotional development are extreme and long-term.³²² The psychotherapist should be held to the most stringent form of fiduciary responsibility. Several jurisdictions have already recognized this.³²³

Statute of limitations determinations should be made in light of the therapist's status as a fiduciary. The damage caused by sexualization of therapy and the boundary violations associated with this negligence are unique in that one of the injuries caused is an emotional paralysis or inability to confront or recognize that abuse has occurred.³²⁴ As the injury arises directly out of the "very business in reference to which the relation exists,"³²⁵ any advantages

318. Annotation, *Limitations of Actions*, *supra* note 154, § 148.

319. See *supra* notes 1-6 and accompanying text (describing proscriptions on sexual contact and resulting damages).

320. See Note, *Medical Malpractice*, *supra* note 163, at 401 n.22.

321. See *supra* notes 123-32 and accompanying text.

322. See *supra* notes 18-45 and accompanying text.

323. See, e.g., *Horak v. Biris*, 130 Ill. App. 3d 140, 474 N.E.2d 13, 17 (1985) ("[defendant's social work] license placed him in position of trust, the violation of which would constitute breach of the fiduciary relationship"); *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780, 788 (1991) (there are fiduciary aspects to psychotherapist-patient relationship); *Mazza v. Huffaker*, 61 N.C. App. 170, 300 S.E.2d 833, 839 (1983) (psychotherapist abused position of "trust and confidence"); *Roy v. Hartogs*, 81 Misc. 2d 350, 366 N.Y.S.2d 297, 299 (Civ. Ct. 1975).

324. See *supra* notes 26-45 and accompanying text.

325. *Beery v. State Bar of Cal.*, 43 Cal. 3d 802, 739 P.2d 1289, 1293, 239 Cal. Rptr. 121, 126 (1987).

derived by the fiduciary, including sexual self-satisfaction, should be closely scrutinized by the courts.

Because clients are unable to come forward for years after the abuse, the application of the discovery rule is warranted.³²⁶ Public policy favors the extension of discovery to this circumstance, as the limitations period is intended to run against those who fail to use diligence in enforcing their rights, not those who are unable to discern their injury and its cause.³²⁷

This policy is recognized by the courts.³²⁸ The public interest is best protected by allowing sexual misconduct cases to be brought through the application of existing rules to these circumstances. Extending the discovery rule to psychotherapist malpractice cases or applying an equitable tolling provision such as fraudulent concealment to these cases is a logical way of addressing this issue.

Further, it is against public policy to unjustly deprive one of his or her remedy.³²⁹ Failure to apply the discovery rule to psychotherapists in the same manner as it is applied to other fiduciary relationships will deprive an entire class of plaintiffs of a legal remedy.³³⁰ The relationship between therapist and patient is of a confidential nature, the negligence that produces the injury is of a type that is clearly known to be dangerous, and the risk can be guarded against by the psychotherapist.³³¹ The burden of applying the discovery rule to such an intimate, controlled relationship appears to be far less onerous than the injustice that would result from barring relief to an entire class of victims.

The discovery rule has been applied successfully in four cases of psychotherapist negligence.³³² In *Greenberg v. McCabe*,³³³ the court found that the victim's delayed knowledge of her cause of action could be based on three factors.³³⁴ First, Greenberg was extremely dependent on McCabe, who kept her from believing that his treatment caused her psychological harm.³³⁵ Second, McCabe's repeated assurances that his treatment was proper kept her from discovering her cause of action.³³⁶ Finally, because the therapy relationship continued, it made it very unlikely that she would go elsewhere to discover

326. See *supra* notes 26-45 and accompanying text.

327. See *supra* notes 150-58, 177-78 and accompanying text.

328. See, e.g., *Mazza v. Huffaker*, 61 N.C. App. 170, 300 S.E.2d 833, 837-38 (1983); *L.L. v. Medical Protective Co.*, 122 Wis. 2d 455, 362 N.W.2d 174, 177-78 (1984).

329. See *supra* note 156 and accompanying text.

330. See *supra* notes 189-250 and accompanying text.

331. See *supra* notes 52-74, 130 and accompanying text.

332. *Greenberg v. McCabe*, 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979); *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986); *Shamloo v. Lifespring, Inc.*, 713 F. Supp. 14 (D.D.C. 1989); *Riley v. Presnell*, 409 Mass. 239, 565 N.E.2d 780 (1991).

333. 453 F. Supp. 765 (E.D. Pa. 1978), *aff'd*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979).

334. *Id.* at 771-72.

335. *Id.*

336. *Id.* at 772.

the source of her affliction.³³⁷ The court held that “where the injury and cause thereof are subtler and more complicated than in the normal malpractice case, it seems particularly inappropriate to determine as a matter of law what the plaintiff should have known.”³³⁸

In *Simmons v. United States*,³³⁹ the court adopted the reasoning of *Greenberg*.³⁴⁰ The court reasoned that the patient was so dependent on the therapist that it was extremely difficult for her to believe that the therapist was the cause of her damage.³⁴¹ Instead, she blamed herself for the damage.³⁴² The court upheld the findings of the lower court, emphasizing that “what she knew and when she knew it are questions of fact.”³⁴³

In *Shamloo v. Lifespring, Inc.*,³⁴⁴ the court held that the discovery rule should apply to a psychological organization’s negligence.³⁴⁵ The court stated that the causes of emotional and psychological injury are too subtle to constructively hold a plaintiff to notice when she first begins experiencing “atypical behavior.”³⁴⁶ The assurances by the defendants upon which the plaintiff relied further “serve[d] to bring her within the ambit of the discovery rule.”³⁴⁷

Finally, in *Riley v. Presnell*,³⁴⁸ the court held that the statute of limitations does not begin to run against an injured patient until the patient knew or should have known that he or she may have been injured as a result of the psychotherapist’s conduct.³⁴⁹ The standard to be used is that of a “reasonable person who has been subjected to the conduct which forms the basis for the plaintiff’s complaint,”³⁵⁰ the determination of which is left to the trier of fact at time of trial.³⁵¹

These cases demonstrate the feasibility and efficacy of applying the discovery rule to cases of psychotherapist sexual misconduct. The close analogy of psychotherapist sexual misconduct to other situations in which discovery has long been recognized to apply further justifies its use in sexual abuse cases.³⁵² In jurisdictions where the discovery rule has been abolished, fraudulent concealment provides a possible remedy for victims of emotional trauma caused by sexual abuse.³⁵³

337. *Id.*

338. *Id.* (footnote omitted).

339. 805 F.2d 1363 (9th Cir. 1986).

340. *Id.* at 1367-68 (quoting *Greenberg v. McCabe*, 453 F. Supp. 765 (E.D. Pa. 1978), *aff’d*, 594 F.2d 854 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979)).

341. *Id.* at 1367.

342. *Id.*

343. *Id.* at 1368.

344. 713 F. Supp. 14 (D.C. Cir. 1989).

345. *Id.* at 19.

346. *Id.* at 18.

347. *Id.*

348. 409 Mass. 239, 565 N.E.2d 780 (1991).

349. *Id.* 565 N.E.2d at 784-85.

350. *Id.* 565 N.E.2d at 785-86.

351. *Id.*, 565 N.E.2d at 787.

352. See *supra* notes 175-298 and accompanying text.

353. See *supra* notes 299-320 and accompanying text.

The standard of care required is higher in both discovery rule and fraudulent concealment cases when there is a fiduciary relationship between the parties.³⁵⁴ Jurisdictions have recognized the fiduciary aspects of the psychotherapist-patient relationship.³⁵⁵ Thus, fiduciary theory provides a logically consistent, coherent paradigm from which to view psychotherapist sexual misconduct. It serves to protect patients from the perversion of justice that would often occur if the statute of limitations were strictly applied.

354. See *supra* notes 157-74 and accompanying text.

355. See *supra* notes 205-07, 225-50 and accompanying text.

