Time Out: The Statute of Limitations and Fiduciary Theory in Psychotherapist Sexual Misconduct Cases

Linda Jorgenson
Rebecca M. Randles

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
TIME OUT: THE STATUTE OF LIMITATIONS AND FIDUCIARY THEORY IN PSYCHOTHERAPIST SEXUAL MISCONDUCT CASES

LINDA JORGENSON* & REBECCA M. RANDLES**

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


* J.D., 1969, M.A., 1966, B.A., 1964, University of Iowa. Partner, Spero & Jorgenson, Cambridge, Massachusetts. Member, Massachusetts House Committee on Sexual Misconduct by Physicians, Therapists and Other Health Care Professionals; Co-chairperson of the Civil-Criminal Statutes subcommittee. Linda Jorgenson has authored many articles on sexual misconduct by psychotherapists and related topics such as post termination sexual contact between therapists and patients, mandatory reporting requirements and criminalization of therapist sexual contact. She is a member of the American Bar Association and the Massachusetts Bar Association.

** J.D., 1988, Baylor University; B.A., 1985, Southwest Baptist University. Rebecca Randles practices in St. Louis, Missouri. She has co-authored several articles on sexual misconduct by psychotherapists. She is a member of the American Bar Association, the Boston Bar Association and the Missouri Bar Association.

The authors wish to extend sincere thanks to Pamela Sutherland, attorney with Spero & Jorgenson, for her many hours of work and endless editorial suggestions. To Dr. Paul Appelbaum, A.F. Zelezinski Professor of Psychiatry and Director of the Law and Psychiatry Program at the University of Massachusetts Medical School, and Gary Schoener, Executive Director of the Walk-in Counseling Center in Minneapolis, Minnesota, we again wish to extend our thanks for reading our drafts.

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. PSYCHOLOLOGIST 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. 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 Gechman, Sexual Contact Between Social Workers & Their Clients, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 27 (G. Gabbard ed. 1989).


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. GONSIOREK, E. LUPECKER & R. CONROE, PSYCHOACTIVISTS' SEXUAL INVOLVEMENT WITH CLIENTS: INTERVENTION & PREVENTION (1989) [hereinafter G. SCHOENER, PSYCHOACTIVISTS' SEXUAL INVOLVEMENT WITH CLIENTS].


Pennsylvania has a bill pending concerning sexual exploitation, while Massachusetts is in the task force process. See H.R. 151, 1989 Session (Pa. 1989); H.R. 976, 2d Sess., 176 Gen. Court (Mass. 1989).


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. SCHROENER, 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. 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. Despite these admonishments, a significant number of therapists still engage in sexual or sexualized conduct with their patients. Recent self-reporting surveys reveal that 7-12% of psychotherapists have engaged in sexual relations with at least one client. Professionals in the field believe the figure may be as high as 20%. One study finds that 80% of those reporting any sexual involvement become sexually intimate with more than one patient. 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. 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.


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

B. Characteristics of the Victims

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

---


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 ill. 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.


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. PSYCHOANALYSES 319, 320 (1976) ("[It] 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.\(^\text{18}\) The damage suffered by these victims is often extensive.\(^\text{19}\) The patient's presenting illness may be reactivated or aggravated.\(^\text{20}\) In addition, the exploitation sometimes creates new psychopathology, such as post-traumatic stress disorder, not present prior to the client's commencement of therapy.\(^\text{21}\)

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.\(^\text{22}\) Inability to trust others is perhaps the most damaging and prevalent injury suffered by victims.\(^\text{23}\) Because victims become wary of other psychotherapists, abuse renders subsequent treatment very difficult and of little value,\(^\text{24}\) or causes a patient to avoid further therapy altogether.\(^\text{25}\)

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. Occasionally a client may repress the traumatic events from conscious memory. More commonly, victims are unable to connect their abuse experience with their subsequent psychological injuries. The injuries suffered by the victims of therapist negligence are to the personality and mind. 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. In addition, mental injury frequently manifests itself in incongruous ways. For example, panic attacks, sleeplessness, and inability to concentrate


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.


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 decoupling, 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 disorder— 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.

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

In Greenberg v. McCabe the plaintiff was unable to pursue her cause of action for several years. In this case, an osteopath undertook psychiatric counseling of the plaintiff. 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. 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.

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 distrustful . . . [of] themselves for developing a trust for the therapist. . . . [and] 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).


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.\textsuperscript{41} She reports that her clients are unable to reveal the
fact of abuse for, on the average, eight years.\textsuperscript{42} Her observations are in
accord with those of other professionals.\textsuperscript{43} In fact, studies indicate that only
4-8\% of victims of psychotherapist sexual exploitation ever report the
behavior or bring civil suits.\textsuperscript{44} The special relationship between psycho-
therapists and patients renders patients unable to recognize their injuries or
seek redress.\textsuperscript{45}

\section*{D. Why Damage Occurs}

The nature of the psychotherapist-patient relationship grants great power
to the psychotherapist.\textsuperscript{46} The psychotherapist must exercise this power for
the client’s benefit in order for therapy to be effective.\textsuperscript{47} Manipulating this
power for a therapist’s own benefit exploits the patient\textsuperscript{48} and prevents further
healing.\textsuperscript{49} Sexual exploitation by a psychotherapist destroys the fundamental

\textsuperscript{41} E. Disch, In Defense of a Flexible Definition of Discovery & a Flexible Statute of

\textsuperscript{42} Id.

\textsuperscript{43} See Gartrell, Reporting Practices, supra note 11, at 293.

\textsuperscript{44} Id. at 289.

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

\textsuperscript{46} See T. Guthell, 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 trusting 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), \textit{cited in} Frankel, supra. However, Hale’s
definition of power appears too narrow to encompass fiduciary relationships.

\textsuperscript{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,
g geared entirely to the welfare of the patient").

\textsuperscript{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 com-
pletely 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 \textit{rape} to describe the occurrence is
not without some validity.

\textsuperscript{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 relationship and causes long-term developmental harm to the client. 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. 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.\textsuperscript{53} Many times patients lack self-esteem or are fearful and doubting of their own sanity.\textsuperscript{54} Patients often feel they must rely upon a professional to help them resolve their conflicts.\textsuperscript{55} Clients come to therapy in search of approval\textsuperscript{56} and concrete answers to their problems.\textsuperscript{57} Struggling with their private crises, many clients are in a helpless, almost childlike position in relation to the therapist.\textsuperscript{58} The therapist and the quality of the client/therapist relationship as the prime determinants of the outcome of the therapeutic process." \textit{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. \textit{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 \textit{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.

\textit{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. \textit{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. \textit{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. \textit{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.

\textsuperscript{53} See G. Schoener, \textit{Psychotherapists' Sexual Involvement with Clients}, \textit{supra} note 1, at 75 (the client is vulnerable and feels childlike because of inability to manage life without assistance).

\textsuperscript{54} See \textit{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).

\textsuperscript{55} See Kardener, \textit{Sex & the Physician Patient Relationship}, \textit{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").

\textsuperscript{56} See \textit{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, \textit{Psychotherapists' Sexual Involvement with Clients}, \textit{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, \textit{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. \textit{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." \textit{Id.} at 85.

\textsuperscript{57} G. Corey, \textit{supra} note 52, at 230 (initial expectations of clients are expert help and fast change, often expecting "magic" cure from therapist).

\textsuperscript{58} See G. Schoener, \textit{Psychotherapists' Sexual Involvement with Clients}, \textit{supra} note
therapist often becomes a parental-type caretaker, exercising a power over the patient similar to a parent’s power over a child.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{61} In therapy, clients are encouraged to discuss candidly their innermost thoughts, wishes, and desires, whether socially acceptable or not.\textsuperscript{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.\textsuperscript{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,\textsuperscript{64} and then persuading the client of the trustworthiness of both the climate and the therapist.\textsuperscript{65}

\begin{flushright}
\textit{Id.}
\end{flushright}

\begin{quote}
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 adhere to the demands made upon them. Self-protective instincts are weakened or, at times, ignored in both situations.
\end{quote}

\begin{flushright}
\textit{Id.}
\end{flushright}

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

60. \textit{See} Heller, \textit{Some Comments to Lawyers on the Practice of Psychiatry}, 30TEMP. L.Q. 401, 405 (1957). Hereinafter, Heller, \textit{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.


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.
\end{quote}

\begin{flushright}
\textit{Id.}
\end{flushright}

\begin{quote}
63. See G. COREY, supra note 52, at 85.

64. See Heller, \textit{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, \textit{Sexual Misconduct by Psychiatrists: The Ethical & Clinical Dilemma of Confidentiality}, 140 AM. J. PSYCHIATRY 195, 196 (1983). Hereinafter Stone, \textit{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, \textit{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. This further enhances the intimacy between the patient and the therapist and may serve to bind the patient to the therapist.

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

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, Psychologists’ 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”)


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.


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.


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. 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. This is the essence of therapy.

2. Misuse of Power Through Sexual Contact

Sexual contact with clients constitutes misuse of a therapist's power. Most clients are uninformed or unclear about the propriety of erotic touch in the therapy environment. Clients often depend upon and idealize the therapist. Many clients either do not trust or are unable to trust their judgment that sexual involvement is improper. For a therapist to take advantage of a patient's emotional dependence to gain personal gratification exploits the therapist's power. Some commentators believe this exploitation to be of the same magnitude as rape. 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.\textsuperscript{82}

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

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

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

82. See Stone, Boundary Violations, supra note 50, at 674 (doctor-patient relationship fidu-
ciary; 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 Bouhoutos, 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 involvements 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
"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. 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. The term embraces a variety of relationships and may arise any time one party's position is "trustee-like" in regard to another party. Examples of fiduciary relationships include those between attorneys and their clients, guardians and wards, principals and agents, and executors and heirs.

The essence of a fiduciary relationship is that the parties do not deal on equal terms. The relationship arises because one party desires a benefit or service from another party which requires him to entrust power to the other party. 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." The more an individual must entrust to receive the intended benefit, the more power the fiduciary wields.


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 those 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. 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. The law has long recognized the need to protect these less powerful individuals.

The purpose for legal control of fiduciary relationships is to diminish this risk of abuse. However, recognition of the variety of fiduciary situations eschews the creation of a single set of legal rules or method of handling these cases. 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. 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. Accordingly, the greater the risk of a fiduciary's abuse, the more the law should be willing to protect the trusting party.

A. Standard of Care of Fiduciaries

Two ways the court may protect the entrustor are by placing higher standards of care upon the professional and imposing specific duties corresponding to that level of care. Fiduciaries are held to a higher degree of care than those involved in arm's-length transactions. Courts do not generally acknowledge or systematize the various levels of care that may be required in differing situations. 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. 610, 664 (1971).
110. See Frankel, supra note 46, at 823 (In contrast to status and contract relations, courts move 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.\textsuperscript{114} In some cases, courts will declare that the highest level of care will be required.\textsuperscript{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.\textsuperscript{116} This trust is the "raison d'etre" for the relationship.\textsuperscript{117} It permeates all dealings with the patient, not just those concerning the patient's presenting illness.\textsuperscript{118} Patients who place utmost trust in their therapists must be afforded assiduous protection by the law. Several jurisdictions have recognized this.\textsuperscript{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.\textsuperscript{120} The risk a patient must endure to reap expected benefits from the therapist warrants the extension of a very high duty of care.\textsuperscript{121} The duty may be fairly placed upon therapists, as they "invite" clients' confidences by representing themselves as professional confidantes.\textsuperscript{122}

\begin{flushright}
\textsuperscript{1294}, 239 Cal. Rptr. 121, 126 (1987) (attorney-client relationship is fiduciary relationship of "the very highest degree").
\textsuperscript{114} Frankel, supra note 46, at 810.
\textsuperscript{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.
\textsuperscript{116} See supra note 65 and accompanying text.
\textsuperscript{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'etre of the relationship.
\textsuperscript{118} Id. These thoughts are amply supported by the professional literature. See supra notes 46-93 and accompanying text.
\textsuperscript{119} 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).
\textsuperscript{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).
\textsuperscript{121} Id. at 838. For discussion of the damages likely to result from a sexually exploitative counseling relationship, see supra notes 18-45 and accompanying text.
\textsuperscript{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,
seductiveness, or aggressiveness, therapists have no justification for engaging in activity which poses unreasonable danger.\footnote{130}

A fiduciary relationship, including a psychotherapist-patient relationship, satisfies the needs of the entrusting party alone. The fiduciary generally receives compensation.\footnote{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.


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.

\textit{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, \textit{SEX IN THE FORBIDDEN ZONE}, reprinted in \textit{PSYCHOLOGY TODAY}, Oct. 1989, at 54, 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." \textit{Id.} Kardener, \textit{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, \textit{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. \textit{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. This kind of breach destroys the foundations of the therapeutic alliance 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. This duty should be imposed when the client is less knowledgeable and must rely upon the expertise of the fiduciary for assistance. By requiring disclosure, courts attempt to protect an entrustor from undue influence. In a fiduciary relationship, influence is naturally exerted by the more powerful party over the less powerful party. This influence becomes “undue” when the fiduciary gains an advantage or benefit. The courts have long guarded

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.

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 (1913); see infra text accompanying notes 144-47.
137. Frankel, supra note 46, at 809.

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.\textsuperscript{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.\textsuperscript{140} They must show that the benefit was conferred after fair and full disclosure and that it did not disadvantage their clients.\textsuperscript{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.\textsuperscript{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.\textsuperscript{143}

For example, in \textit{Butler v. Gleason},\textsuperscript{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.\textsuperscript{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

\textsuperscript{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 cupididy and avarice remain a part of the human character, courts will retain this salutary principle." \textit{Id. See also} Markell v. Sidney B. Pfeiffer Foundation, Inc., 402 N.E.2d 76, 94 (Mass. 1980) (if attorney gains advantage from transaction with client, it is presumptively voidable); Adams, \textit{supra} note 95, at 649-51 (discussing generally doctrine of presuming fraud when fiduciary benefits from office).

\textsuperscript{140} Adams, \textit{supra} note 95, at 649-51.


\textsuperscript{142} \textit{Id.} The court stated:

\begin{quote}
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)
\end{quote}

\textit{Id.} at 493.

\textsuperscript{143} One jurisdiction even "jealously" scrutinizes the transaction. See Butler v. Gleason, 214 Mass. 248, 101 N.E. 371, 372 (1931):

\begin{quote}
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.
\end{quote}

\textit{Id.}

\textsuperscript{144} 214 Mass. 248, 101 N.E. 371 (1931).

\textsuperscript{145} \textit{Id.}, 101 N.E. at 372-73.
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. Prensell, 409 Mass. 239, 565 N.E.2d 780, 783 (1991) (the plaintiff became totally dependent on Dr. Prensell; 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.
primary rationale behind statutes of limitations.\textsuperscript{152} Defendants must be given a fair opportunity to defend against claims before evidence becomes stale and witnesses disappear.\textsuperscript{153}

Basic policies associated with statutes of limitations sometimes conflict with the policy which values allowing meritorious claimants to have their day in court.\textsuperscript{154} Limitations periods are designed to run against those who fail to use reasonable diligence in bringing claims.\textsuperscript{155} They are not intended to "unjustly deprive one of his remedy."\textsuperscript{156} Occasionally cases arise in which it would be patently unfair to strictly apply the applicable statute of limitations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{159} Statutes of limitations generally begin to run after a cause of action "accrues."\textsuperscript{160} This determination is left largely to judicial interpretation.\textsuperscript{161} The courts have interpreted "accrual" to mean

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{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].
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{156} Evans, 265 Cal. Rptr. at 610.
\item \textsuperscript{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'Nen, 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).
\item \textsuperscript{158} Olsen, supra note 151, at 206-07. See also Dawson, Undiscovered Fraud & Statutes of Limitation, 31 MICH. L. REV. 591 (1933).
\item \textsuperscript{159} Note, Statutes of Limitations, supra note 151, at 1185.
\item \textsuperscript{160} See generally Annotation, Limitations of Actions, supra note 154, § 111.
\item \textsuperscript{161} W. KEETON, D. Dobbs, R. KEETON & D. Owen, Prosser & Keeton on Torts § 30, at
\end{enumerate}
\end{footnotesize}
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. This rule of construction is known as "the discovery rule."

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

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. The courts apply the "reasonable person" standard in determining plaintiffs' levels of knowledge and whether they were under a duty to investigate suspicious circumstances. 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. Fresnell, 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).


170. 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.


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

173. 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).

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.\footnote{169}

In fiduciary or confidential relationships, the courts presume that the one in whom trust is reposed exerts undue influence.\footnote{170} Courts should not impose a duty on the plaintiff to investigate suspicious circumstances in these situations.\footnote{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.\footnote{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.\footnote{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.\footnote{174} These rules may be useful in examining the legal significance of injuries arising from a psychotherapist's sexual exploitation of patients.

2. \textit{Discovery Rule and Emotional Injury Cases}

Undiscovered emotional injury cases provide for a unique application of the discovery rule.\footnote{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.\footnote{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.

\footnote{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).
\footnote{171} Willis v. Maverick, 750 S.W.2d 642, 645 (Tex. 1988).
\footnote{172} See United States Liab. Ins. Co. v. Haidinger-Hayes Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1973) (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).
\footnote{173} Neel, 491 P.2d \textit{et al} 429, 98 Cal. Rptr. at 844.
\footnote{174} Hobbs v. Eichler, 164 Cal. App. 3d 174, 210 Cal. Rptr. 387, 404 (1985). The \textit{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 \textit{actually discovers} the facts constituting the cause of action, even though the means for obtaining the information are available." \textit{Id.} (emphasis added). \textit{See also supra} notes 134-48 and accompanying text.
\footnote{175} \textit{See infra} notes 183-268 and accompanying text.
\footnote{176} \textit{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 at 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.


\(^{180}\) *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.


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. 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.

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. 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. The differential in knowledge effectively camouflages a plaintiff's cause of action.

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. 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. 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.

---

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 wculd, 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 (1949) (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.


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


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.


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).


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. As a result, psychotherapy patients almost necessarily have a "low index of suspicion" for negligent acts. They, like attorneys' clients, should not require another expert to watch over the professional. And, like attorneys, therapists are fiduciaries to their clients. 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. In Beery v. State Bar of California, 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." 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." The attorney concealed that he had an interest in the company, which was sufficient to create liability in the attorney.

Goldman v. Karem 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. The client defaulted on the loan, and the attorney sold and seized the client's home and boat. 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." The court held that "in 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." As the attorney had failed to do this, the court ordered the attorney to repay the client.

205. See supra notes 52-74 and accompanying text.
207. See supra notes 193-95 and accompanying text.
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.
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.

220. See, e.g., id., 751 P.2d at 927, 245 Cal. Rptr. at 662.
222. 502 So. 2d 1034 (La. 1987).
223. Id. at 1059.
224. Id.
226. See supra notes 75-93 and accompanying text.
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. The plaintiff had been emotionally damaged by a psychological training program but was unable to causally link her injury to the defendants. 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. 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.

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." The doctrine of "overdetermination" of psychological traits holds that all psychological disorders are derived from more than one cause. Many cases revolve around victims who cannot understand the injury and its cause for years following the maltreatment. For example, in Riley v. Presnell, the defendant allegedly introduced alcohol, marijuana, and Valium use into therapy sessions with his male patient. 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. Riley became extremely dependent upon his therapist, opining on one occasion that Presnell could be "God." After Presnell abruptly abandoned the plaintiff, Riley began experiencing severe emotional and psychological problems, as well as Valium, marijuana, and alcohol addictions. 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

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)).
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.\textsuperscript{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."\textsuperscript{243}

In \textit{Simmons v. United States},\textsuperscript{244} the plaintiff was involved in a sexual relationship with her therapist, an Indian Health Services employee.\textsuperscript{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.\textsuperscript{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."\textsuperscript{247}

\textit{Simmons} and \textit{Shamloo} illustrate the practicality of applying relaxed delayed discovery principles to psychotherapist-patient cases commensurate to the relaxed principles applied to attorney-client cases,\textsuperscript{248} while \textit{Riley} reaches the same result with slightly different reasoning.\textsuperscript{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.\textsuperscript{250} The subtlety of psychological

\textsuperscript{242} \textit{Id.}, 565 N.E.2d at 784.
\textsuperscript{243} \textit{Id.}, 565 N.E.2d at 786.
\textsuperscript{244} 805 F.2d 1363 (9th Cir. 1986).
\textsuperscript{245} \textit{Id.} at 1364.
\textsuperscript{246} \textit{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. \textit{Id.}
\textsuperscript{247} \textit{Id.} at 1367.
\textsuperscript{249} \textit{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. \textit{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.
\textit{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." \textit{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. \textit{Id.}
\textsuperscript{250} See \textit{supra} notes 18-45 and accompanying text.
injuries and the variety of their causes create a compelling argument for the application of the "lesser 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


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. Another aspect is the abuse of the dependency and innocence or naivete of the child to prevent revelation of the abuse. 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.

The psychotherapist-patient relationship is parallel to the parent-child relationship in both the structure of the relationship and the damages which follow. 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. Many times the psychotherapist becomes a benevolent parent figure to the client. Abuse of this position of power actually constitutes two wrongs, as in incest. The first is that the therapist sexually abuses a dependent client. The second is that the therapist uses the dependency and innocence or naivete of the client to prevent revelation of the abuse. 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.

Deception leads clients to believe that their doubts concerning the sexual relationship demonstrate their own inadequacies. 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.


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).


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. These psychological syndromes may prevent the child abuse victim or the psychotherapist abuse victim from discovering the cause of their malaise. 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. For example, in Mary Doe v. John Doe, 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. 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. 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." 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. Prennell, 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).


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.

v. *Eckelman*, 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. 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." 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.

Other jurisdictions have also utilized the discovery rule in cases in which memory of the acts of sexual abuse is not repressed. In a Wisconsin case, *Hammer v. Hammer*, the plaintiff was sexually abused by her father from ages five to fifteen. When she was fifteen, the plaintiff told her mother about the abuse. Both parents denied that the abuse had occurred and then blamed the plaintiff for causing the family strife. The plaintiff finally brought suit when she reached the age of twenty-two. 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.

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*, the Washington Supreme Court accepted the argument that the expert testimony needed to prove the occurrence of incest is tenuous. The court questioned the ability of an expert witness to reconstruct past events with accuracy, as is sometimes required in repressed-memory incest cases. Its ruling appears to limit incest cases and may be an impediment to successfully pursuing

---

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).
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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{296} This rule provides that a plaintiff's cause of action does not accrue until a reasonable plaintiff laboring under coercion,
fraud, or undue influence knows or should know of the injury and its cause.\textsuperscript{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.\textsuperscript{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.

\section{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.\textsuperscript{299} Fraud concepts have been incorporated into the construction of modern statutes of limitations in nearly every jurisdiction.\textsuperscript{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.

\subsection{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{303} Fraudulent concealment operates in situations in which failure to toll the limitations period would be inherently unfair or unreasonable.\textsuperscript{304} Generally, the limitations period will be tolled until the injured party learns or should have learned through reasonable diligence of the wrong.\textsuperscript{305}

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

\begin{enumerate}
\item \textsuperscript{297} See supra notes 221-50 and accompanying text.
\item \textsuperscript{298} See supra notes 205-07, 225-50 and accompanying text.
\item \textsuperscript{299} Note, \textit{Statutes of Limitations, supra} note 151, at 1213.
\item \textsuperscript{300} See Annotation, \textit{Limitations of Actions, supra} note 154, § 147.
\item \textsuperscript{301} Black's \textit{Law Dictionary} 596 (5th ed. 1979).
\item \textsuperscript{303} See Annotation, \textit{Limitations of Actions, supra} note 154, § 147.
\item \textsuperscript{305} See, e.g., \textit{Borderlon v. Peck}, 661 S.W.2d 907, 908 (Tex. 1983).
\item \textsuperscript{306} 661 S.W.2d 907 (Tex. 1983).
\end{enumerate}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{309} Failing to disclose any of these facts may, in and of itself, constitute fraudulent concealment which will toll the statute of limitations.\textsuperscript{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.\textsuperscript{311}

\textsuperscript{307} Id. at 908-09.

\textsuperscript{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”).

\textsuperscript{309} See supra notes 134-43 and accompanying text.

\textsuperscript{310} See Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 429, 98 Cal. Rptr. 837, 845 (1971) (“[i]n 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).

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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”).

\textsuperscript{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”).


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

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

\textsuperscript{317} See supra note 311 and accompanying text.
negligence that they have failed to disclose.\textsuperscript{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.\textsuperscript{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.\textsuperscript{320}

\textit{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.\textsuperscript{321} The damages caused to a victim's psyche and emotional development are extreme and long-term.\textsuperscript{322} The psychotherapist should be held to the most stringent form of fiduciary responsibility. Several jurisdictions have already recognized this.\textsuperscript{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.\textsuperscript{324} As the injury arises directly out of the "very business in reference to which the relation exists,"\textsuperscript{325} any advantages

\textsuperscript{318} Annotation, \textit{Limitations of Actions}, supra note 154, § 148.

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

\textsuperscript{320} See Note, \textit{Medical Malpractice}, supra note 163, at 401 n.22.

\textsuperscript{321} See supra notes 123-32 and accompanying text.

\textsuperscript{322} See supra notes 18-45 and accompanying text.


\textsuperscript{324} See supra notes 26-45 and accompanying text.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{327}

This policy is recognized by the courts.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{332} In Greenberg v. McCabe,\textsuperscript{333} the court found that the victim's delayed knowledge of her cause of action could be based on three factors.\textsuperscript{334} First, Greenberg was extremely dependent on McCabe, who kept her from believing that his treatment caused her psychological harm.\textsuperscript{335} Second, McCabe's repeated assurances that his treatment was proper kept her from discovering her cause of action.\textsuperscript{336} Finally, because the therapy relationship continued, it made it very unlikely that she would go elsewhere to discover

\textsuperscript{326} See supra notes 26-45 and accompanying text.

\textsuperscript{327} See supra notes 150-58, 177-78 and accompanying text.


\textsuperscript{329} See supra note 156 and accompanying text.

\textsuperscript{330} See supra notes 189-250 and accompanying text.

\textsuperscript{331} See supra notes 52-74, 130 and accompanying text.


\textsuperscript{334} Id. at 771-72.

\textsuperscript{335} Id.

\textsuperscript{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 States339 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).
341. Id. at 1367.
342. Id.
343. Id. at 1368.
345. Id. at 19.
346. Id. at 18.
347. Id.
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.