

**THE THORNY PATH THROUGH
UNDUE FAMILIARITY CLAIMS**

**by Bruce M. Brady, Esq.
and Michael P. Kandler, Esq.**

INTRODUCTION

Claims brought by victims of sexual misconduct (“undue familiarity”) against medical professionals, mental health counselors and school districts present some of the most unique and challenging issues in the field of personal injury litigation. These issues are often complex and strain the three-sided relationships between insurance carrier, insured and defense counsel. Questions regarding the scope of coverage create conflicts between the interests of the insurance carrier and those of the insured. Decisions regarding settlement and disposition of the case involve not only the traditional risk avoidance analysis by the insurer, but also licensing considerations for the insured. The sensitive nature of the allegations may sometimes affect the reporting responsibilities of defense counsel.

This article addresses many of the common issues concerning professional liability coverage and trial strategy that arise in cases of alleged undue familiarity.

INSURANCE COVERAGE ISSUES

The types of professional liability policies that may be the object of claims of professional sexual misconduct include psychiatric malpractice policies, social worker professional liability policies, medical malpractice policies, commercial general liability policies and E & O policies.

The first critical issue presented by these claims is whether the allegations in the complaint fall within the coverage provisions of the policy. The second key issue is whether there are any particular exclusions contained in the policy which may serve as a basis to deny coverage.

In a typical medical malpractice policy, coverage is afforded for damages arising out of the “furnishing of or failure to furnish health care services . . .”¹ Claims of sexual abuse by a patient against a physician will typically fall outside the scope of coverage under a medical malpractice policy. In Snyder v. Major, M.D. v. National Union Fire Insurance Company, a case brought in the Southern District of New York, a plastic surgeon was accused of having sexual intercourse with a patient while the patient was partially sedated. The court held that the conduct that was the subject of the complaint did not constitute a “medical incident” within the scope of the coverage provision of the medical malpractice policy. The court followed the view of most jurisdictions that sexual misconduct, by a non-psychiatrist, is not a medical incident that will trigger coverage under a medical malpractice

¹Snyder v. Major, 789 F. Supp. 646 (SDNY 1992).

policy.²

In addition to being outside the scope of coverage, medical malpractice policies typically contain exclusions for damages arising out of “sexual acts.” In addition to the “non-coverage” grounds for a denial of coverage based upon the coverage provision in the policy, exclusions for “sexual acts” or intentional wrongful and/or illegal conduct may provide additional grounds for denying coverage.

An experienced plaintiffs’ attorney will know that a complaint couched simply in terms of intentional sexual misconduct will lead to a denial of coverage and an uninsured defendant. In an effort to trigger insurance coverage, plaintiffs’ attorneys will often try to expand a case of sexual misconduct by adding allegations of routine malpractice. Because the duty to defend is broader than the duty to indemnify, such “hybrid” complaints will typically trigger, at the very least, a duty to defend the insured. In such cases, the professional liability insurance carrier must issue a prompt reservation of rights letter clearly stating that although a defense is being provided, the carrier will not indemnify the insured for any damages arising out of non-covered or excluded acts.

To prevent expansion of coverage under these circumstances, the policy must be carefully drafted to exclude indemnification for damages caused “in whole or in part” by acts of sexual misconduct. This language has been used successfully to bar coverage in such cases.³ The key question for the Court is whether the claim under consideration is so

²Smith v. St. Paul Fire & Marine Ins. Co., 353 N.W.2d 130 (Minn. 1984); Hirst v. St. Paul Fire & Marine Ins. Co., 106 Idaho 792, 683 P.2d 440 (Ct. App. 1984); Standard Fire Ins. Co. v. Blakeslee, 54 Wash. App. 1, 771 P.2d 1172 (App. 1989)

³American Home Assurance Co. v. Stone, 61 F. 3d 1321, 1329-1330 (7th Cir.1995); Govar v. Chicago Insurance Co., 879 F. 2d 1581, 1583 (8th Cir. 1989); Franklin v. Professional Risk Management Services, 987 F. Supp. 71, 76 (D. Mass. 1997); Chicago Insurance Co. v. Griffin, 817 F. Supp. 861, 864-865 (D. Hawaii

intertwined with the underlying sexual misconduct as to make the two inseparable. As a practical matter it is usually impossible to separate the injuries caused exclusively by the sexual misconduct and those caused by other malfeasance.

In addition to health care professionals, claims involving sexual misconduct are often brought against school districts and other employers. In such cases, causes of action against individual employees will typically be outside the scope of the coverage clause of a commercial general liability policy. The current ISO CGL policy also contains an exclusion for “expected or intended injury.” In a leading case, the highest appeals court in New York has ruled that in cases of child sexual abuse, the harm that is sure to result is always “intended” within the meaning of this exclusion.⁴

With regard to coverage, a more difficult claim to assess is the claim of negligent hiring, training, or supervision that is frequently brought against an employer when an employee is accused of committing an act of sexual misconduct. The law in many jurisdictions is unsettled on this issue. Two of the four appellate divisions in New York have held that in cases involving claims of intentional sexual misconduct by school employees, the inclusion of negligent hiring and negligent supervision claims did not create an “occurrence” within the coverage provision of a CGL policy.⁵ In these decisions, the courts applied the “operative acts” test which focuses on the “operative acts” which caused the

1993); Cranford Insurance Co. v. Allwest Insurance Co., 645 F. Supp. 1440, 1444 (N.D. Cal. 1986); Chicago Insurance Co. v. Manterola, 191 Ariz. 344, 955 P. 2d 982, 984-985 (Ariz. App. Div. 1998).

⁴Allstate Insurance Company v. Mugavero, 79 N.Y.2d 153, 589 N.E.2d 365 (1992)

⁵Green Chimneys School for Little Folk v. National Union Fire Insurance Company of Pittsburgh, P.A., 244 A.D.2d 387, 664 N.Y.S.2d 320 (2d Dep’t 1997); Sweet Home Central School District of Amherst and Tonawanda v. Aetna Commercial Insurance Company, 263 A.D.2d 949, 695 N.Y.S.2d 445 (4th Dep’t 1999)

alleged damages. The courts reasoned that despite the inclusion of a claim for negligent hiring and supervision, the operative acts giving rise to recovery were the intentional sexual acts of the employees. Therefore, the courts reasoned that CGL coverage, which applies to accidental occurrences, was not implicated.

In contrast, one of the other two appellate divisions in New York recently rejected the “operative acts” test.⁶ In this case, a tenant sued a cooperative apartment corporation alleging an intentional assault by the building superintendent. The complaint included claims of negligent hiring and supervision. Rather than focusing on the intentional nature of the assault, the court reasoned that from the standpoint of the insured employer, the incident was not expected or intended. Therefore, it was held that the incident constituted a covered “occurrence” under the CGL policy.

E & O COVERAGE FOR CLAIMS AGAINST SCHOOL DISTRICTS

In a recent decision in the Second Department of New York State’s Appellate Division, it was held that a claim of negligent hiring against a school district arising out of an incident in which a teacher allegedly molested students was covered under the school district’s E & O policy. Watkins Glen School District v. National Union Fire Insurance Co. of Pittsburgh, PA, 2001 WL 1346713 (2d Dep’t 2001). In that case, the court held that while such a claim would typically not be covered under a CGL policy, because of the nature of E & O coverage, the allegations of negligent hiring triggered a duty to defend and indemnify. The court stated that E & O coverage is a form of professional malpractice coverage and

⁶Park Terrace Arms Corp. v. Nationwide Insurance Company, 268 A.D.2d 297, 701 N.Y.S.2d 390 (1st Dept., 2000)

that the allegations of negligent hiring constituted a claim of professional malpractice. Therefore, the court rejected the E & O carrier's argument that the complaint involved only excluded intentional conduct.

COVERAGE ISSUES IN CLAIMS AGAINST MENTAL HEALTH PROFESSIONALS

Claims of sexual misconduct are frequently seen in the fields of psychiatry, psychology and social work. The American Psychiatric Association has long condemned any form of sexual contact between a therapist and a patient. Despite this prohibition, these claims, also called claims of "undue familiarity," are frequently seen.

It has been recognized in the field of psychiatry that through a process known as "transference," patients will often develop intense romantic and/or sexual feelings toward the therapist.⁷ Any inappropriate interaction between a psychiatrist/psychotherapist and a patient that breaches the commonly accepted limitations of the relationship is known as a "boundary violation." Clearly, the most extreme form of boundary violation is the development of a sexual relationship between the therapist and the patient.

Because the transference phenomenon is a recognized part of the psychotherapeutic relationship, the argument that improper handling of the transference phenomenon is outside the scope of coverage has not been as successful in psychiatric malpractice cases.⁸

As a consequence, psychiatric malpractice insurance policies typically contain specific exclusions which limit or completely exclude coverage for claims arising out of

⁷The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry, American Psychiatric Association, (1995 Edition).

⁸St. Paul Fire & Marine Ins. Co. v. Love, 459 N.W.2d 698 (Minn.1990); Zipkin v. Freeman, 436 S.W.2d 753 (Mo.1968); L.L. v. Medical Protective Co., 122 Wis.2d 455, 362 N.W.2d 174 (App.1984)

sexual misconduct or the mishandling of the transference phenomenon.⁹ These sexual misconduct exclusions may provide for a defense and a cap or complete exclusion on indemnification. Malpractice insurance carriers who are defending such claims must be diligent in putting the insured and, if required by the jurisdiction, the injured party, on notice that they are defending under a reservation of rights with regard to indemnification.

Injured patients have challenged exclusions which limit coverage for sexual misconduct by arguing that they are void as against public policy. Plaintiffs have unsuccessfully argued that such exclusions should be voided because they leave the victims of sexual misconduct with an uninsured defendant. Most courts dealing with this argument have upheld the validity of the exclusions.¹⁰

SETTLEMENT ISSUES

The final disposition of a case involving claims of undue familiarity can have dramatic consequences for the insured professional. Often the plaintiff has already reported the incident to the licensing authority which has jurisdiction over the insured. Although settlement of a civil action is explicitly not an admission of liability on the part of the insured, it is often viewed as such by the licensing agency. Consequently risk avoidance assessment is only one of many of the considerations that influences the question of settlement. Awareness of this potential jeopardy to the insured is critical to maintaining a harmonious relationship between the insurance company, its insured, and defense counsel.

⁹See, American Home Assurance Company v. Stone, 61 F. 3d 1321 (7th Cir. 1995); American Home Assurance Company v. McDonald, 274 A.D.2d 70, 712 N.Y.S.2d 507 (1st Dep't 2000); Legion Insurance Company v. Singh, 708 N.Y.S.2d 183; Legion Insurance Company v. Vemuri, 1997 WL 757529 (ND Illinois 1997)

¹⁰See, American Home Assurance Company v. McDonald, 274 A.D.2d 70 (1st Dep't 2000); American Home Assurance Company v. Stone, 61 F.3d 1321 (7th Cir. 1995).

Where under other circumstances the settlement of a particular case might be financially prudent and reasonable from a risk management standpoint, it may be directly at odds with the overall interests of the insured in an undue familiarity case. This tension becomes paramount in those cases in which the insured steadfastly maintains his or her innocence. In such cases, all parties must be prepared from the start to litigate the case through to verdict.

DISCOVERY AND TRIAL ISSUES

The central issue of any case involving a claim of undue familiarity is whether or not the insured admits the improper conduct. The answer to this question governs every subsequent decision and tactic utilized during discovery and trial. Consequently, the insured must be vigorously cross-examined by counsel on this question at the very beginning of the relationship.

If the conduct is admitted, then the focus of the defense will concentrate on the issues of causation and damages. As detailed below, a thorough examination of the claimant's background, mental and physical medical history, education, social life and professional experiences must be undertaken.

DEFENSES

The defenses available to a professional accused of improper sexual misconduct are fairly limited. The spectrum of every conceivable defense has been thoroughly litigated and those that have proven both legally and strategically successful are listed below:

- 1) The statute of limitations has expired.
- 2) There are no professional standards prohibiting such conduct.

- 3) The misconduct occurred after the termination of the fiduciary relationship.
- 4) The claim is false, no sexual misconduct occurred.

Statute of Limitations

Often the person claiming to be the victim of sexual misconduct delays filing an action against the offender for a substantial period of time. Ordinarily, the standard statute of limitations for a personal injury action will apply. Some states, however, have adopted shortened statutes of limitations for professional liability claims. [Arkansas: Ark. Code Ann. §16-114-203; Florida: Florida Statutes Section 95.11(4)(b); Indiana: Ind. Code §34-18-1-1(6); Michigan: MCL §600.5805.4; Mississippi: Miss. Code Ann. §15-1-36; New York: NYCPLR §214-a; South Dakota: SDCL 21-5-3].

One dangerous exception to this defense is found in the doctrine of “equitable estoppel.” If applied, this doctrine has the effect of tolling the statute of limitations, sometimes for a significant period of time. The concept underlying the doctrine is that it is fundamentally unfair for the professional in a fiduciary relationship to obtain an advantage over the victim through the influence that the relationship continues to exert, even after termination. Often these relationships require a great deal of trust and disclosure on the part of the patient/client. The relationship causes the patient/client to endow the professional with an exaggerated aura of power and authority. In some cases, the patient/client requires an extended period of counseling and therapy before he or she can muster the courage and inner strength to turn against the professional by filing a legal claim. Consequently, the courts will sometimes determine that the professional is equitably estopped from raising the defense of statute of limitations. The application of this doctrine

only occurs on a case-by-case basis and is generally fact specific. [eg., Coopersmith v. Gold, 172 A.D.2d 982, 568 N.Y.S.2d 250 (3rd Dept., 1991)].

Professional Standards

By this point, most professions are either licensed by the state or have developed their own codes of professional standards. Almost all of these standards prohibit the professional from engaging in any kind of sexual behavior with the patient. However, there are some exceptions. An example of just such an exception occurred in a recent New York case in which a hypnotist admittedly engaged in sexual relations with a current client. These incidents did not occur during hypnotic trances, otherwise the hypnotist could have been subjected to criminal prosecution.¹¹ Ultimately the case was tried to verdict. The hypnotist was exonerated on the ground that there was no expert testimony establishing the existence of a recognized body of ethical standards for hypnotists. Without a generally accepted standard of practice, the jury found that there was no breach of duty. Obviously, the availability of this defense is extremely limited.

Post Termination Conduct

Professional and ethical standards are designed to regulate conduct occurring in the context of a therapeutic relationship. The courts have struggled over the question of whether and to what extent the professional still owes the client a duty once that relationship terminates. Several states have determined this question by legislative action. In 1987, California created a cause of action for money damages against a psychotherapist for sexual contact, if the sexual act occurred within two years following the termination of

¹¹New York Penal Law §130.05-Lack of consent due to mental incapacity.

therapy. (*California Civil Code, 43.93*). Similarly, in 1988, Minnesota created a cause of action for sexual exploitation which is defined as sexual contact between a psychotherapist and a former patient, if the contact occurs within two years of the termination of treatment. (*Minnesota Statute, 148 A.01, et seq.*).

The American Psychiatric Association, in its Code of Ethics, has become increasingly intolerant of sexual involvement with patients and former patients. In 1988, the APA concluded that sexual contact with a patient is always unethical and potentially damaging. By 1995, it extended this prohibition to dealings with former patients as well, under the concept that “once a patient, always a patient.”

Where there has been no legislative or professional clarification of this murky area, this defense may very well prove viable. However, to be effective, proof of the termination of therapy must be clear and convincing. If there is any indicia of a therapeutic relationship (a prescription, invoice, appointment book note, memorandum, insurance claim form, etc.), the defense will be revealed to be a sham.

False Allegation

The only defense which has been shown to be consistently effective is simply that the allegation is false. The resolution of such a case is always determined by the jury’s assessment of the credibility of the parties. Support for the insured’s position must be exhaustively pursued. The discovery process takes on the character of detective work. If this defense is going to be successful, the primary question for which a compelling answer must be developed is,

“Why would the claimant fabricate this story and put herself through the rigors of discovery and trial, if the allegation is untrue?”

Unless the trier of fact is given a satisfactory answer to this question, the most natural and instinctive reaction will be to believe the claimant. It is virtually impossible for the trier of fact to reject the claim unless the answer to this question resonates with common sense and credibility.

The motivation behind a false allegation of sexual misconduct can usually be identified through a common sense analysis of the information developed through discovery. Usually, the insured is in the best position to speculate on the claimant's motivation. It often has its origin in a perceived rejection, unfulfilled expectation or disappointment in the therapist's behavior. A common personality disorder found in most originators of false allegations is that of "Borderline Personality Disorder," *Diagnostic and Statistical Manual of Mental Disorders IV*, 301.83. Several consistent traits are found in persons with this pathology. They tend to be very demanding and narcissistic. They have a tendency to overidealize the therapist and develop unrealistic expectations, often having to do with personal or sexual fantasies. Once they feel rejection or disappointment, they turn on the professional with disproportionate rage and anger, culminating in the false accusation.

It is often advantageous to have the claimant's medical and psychiatric records analyzed by a mental health professional familiar with this disorder. If enough traits are identified to characterize the claimant as having a borderline personality disorder, the explanation of her conduct is more easily accepted by the trier of fact.

Absent a clinical diagnosis, knowledge of human behavior and insight into common emotional conduct is essential to building a successful defense. It is essential to identify the specific event or circumstance which gave birth to the allegation. Once the event is

identified, evidence of other behavior and personality traits will give substance to the portrait that the defense wants to paint of the claimant.

Before formulating the answer to this question, the defense team must have a thorough understanding of the claimant. This knowledge can only be gained through exhaustive use of discovery. Most claimants in this type of case already have a substantial history of mental health counseling. Obviously, all these records must be obtained and analyzed. Similarly, records of any subsequent treatment will play a role. Of particular interest and importance are the circumstances (the who, what, when, where and how) under which the claimant first revealed the allegation. Often the evidence relating to the “initial outcry” will shed significant light on the question of why.

The defense of an undue familiarity claim is usually very challenging. The defendant is placed in the unenviable position of proving a negative. Very often, the situation arises when, without further digging, the case devolves into a classic “he said, she said” scenario. Therefore, the discovery process takes on a far greater role than in most other cases.

DISCOVERY

The principal goals of discovery in an undue familiarity case are (1) determining the existence or absence of corroborative evidence, and (2) uncovering any evidence that will undermine the claimant’s credibility. Corroborative evidence that supports the insured often takes the form of circumstantial evidence, since as stated above, the defense’s task is to prove a negative. Corroborative evidence that supports the claimant can often be direct evidence. For example, the claimant may have tape recorded a telephone conversation with the insured, or retained a letter from the insured, containing damaging statements or admissions.

In this regard, the most significant piece of information in any case in which sexual relations are alleged is the knowledge possessed by the claimant of intimate physical or personal details of the insured. If the claimant is aware of a distinguishing physical characteristic of the insured that could only be known through intimate contact, then the insured had better have a good explanation or be ready to settle the case. On the other hand, if the claimant is unaware of a characteristic that she would have naturally observed during intimate relations, then a strong inference can be drawn against the claim. In order to develop this issue, counsel must have a frank discussion with the insured. Inquiry must be made concerning the existence of any scars, deformities, birthmarks, or physical impairments. If any exist and they are obvious, then the claimant must be thoroughly questioned at deposition on this issue.

It is paramount that the initial discovery demands include requests for all items which may tend to either prove or disprove the relationship. These items include:

- photographs depicting both parties together or the insured alone
- letters between the parties
- any written material exchanged between the parties
- all gifts exchanged between the parties
- tape recorded conversations
- the identities of all non-party witnesses
- bills, receipts, cancelled checks relating to payment for services
- receipts, ticket stubs or programs for any entertainment allegedly attended by the parties together
- insurance claim forms

- appointment book notations
- diaries kept by the claimant

Other essential items to obtain through the discovery process include authorizations to obtain copies of all of the claimant's prior and subsequent psychiatric and medical records, school records (if age appropriate), employment records and health insurance records. Additionally, the claimant may have filed for disability either before, during or after treatment with the insured. Disability applications can often provide substantial ammunition to undermine the claimant's credibility. It is not uncommon that the claimant and his/her physicians have given reasons for the disability other than the consequences of sexual exploitation.

The nature of the issues raised in an undue familiarity case are broad-reaching. The claim usually includes allegations of mental suffering, difficulty with relationships, depression, suicidality and impaired functioning at work. Therefore, by filing the claim, the claimant has tacitly allowed the defense to explore almost every aspect of his or her background. Almost nothing is off limits during the course of discovery. Defense counsel is limited only by imagination in the avenues to be explored.

TRIAL ISSUES

As with any case, the defense approach must be fully developed well before the trial. If the insured has conceded the allegation of sexual exploitation, and yet the case has not settled, then the focus is geared toward causation and damages. Unless there is a well documented record of depression, suicide attempts and/or hospitalizations, the central issue must be the claimant's credibility. Subsequent mental health professionals base their impressions, diagnoses, treatment plans and prognoses almost exclusively on the

information provided by the claimant. No test, laboratory analysis or objective measure has yet been developed to substantiate emotional injury. Therefore the most effective approach is to remain focused on the claimant's credibility, rather than to attempt to undermine the professionalism or integrity of the subsequent treater. There are, of course, exceptions to every rule, as in the case of the well-known "professional expert." It is important for the jury to understand that most of these injuries are in the subjective realm and that the opinions expressed by the claimant's subsequent physicians are only as good as the information they were provided.

If, however, the defense is a blanket denial of the central allegation, then the trial must be conducted as a war of escalating intensity against the claimant. This approach must start out cautiously, otherwise it can result in a backlash of resentment from the jury. Only when the timing is appropriate (e.g., when the claimant is caught in a glaring inconsistency or obvious fabrication) should the "gloves be taken off." Given the nature of the allegation, with its potential consequences to the insured's personal and professional life, a full frontal assault must be levied against the claimant.

Since the critical issue for the jury is one of credibility, these cases are largely won or lost during the cross-examination of the parties. Therefore, every technique of confrontation and cross-examination and every available detail developed during discovery must be utilized to demonstrate that the claimant is unworthy of belief. The stakes are extremely high for the insured, even though the financial exposure may not be great. There is no greater satisfaction for defense counsel than to help exonerate a professional falsely accused of sexual misconduct.