

Approved January 30, 1990  
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Wint Winter, Jr. at  
Chairperson

10:00 a.m./~~p.m.~~ on January 18, 1990 in room 514-S of the Capitol.

All members were present ~~except~~:

Committee staff present:

Mike Heim, Legislative Research Department  
Jerry Donaldson, Legislative Research Department  
Gordon Self, Office of Revisor of Statutes  
Eric Witkoski, Office of Revisor of Statutes  
Judy Crapser, Secretary to the Committee  
Conferees appearing before the committee:

Richard Morrissey, Deputy Director, Division of Health, Kansas Department of Health  
and Environment  
Sara Jane Russel, Douglas County Rape Victim Support Service

The Chairman convened the meeting by opening the hearing for SB 425.

SB 425 - Sexual exploitation by a mental health service provider, crime defined  
and punishment prescribed; Re Proposal No. 18

Richard Morrissey, Deputy Director, Division of Health, Kansas Department of Health and  
Environment, introduced Cathy Rooney, Director of Health Occupation Credentialing in  
the Department's Bureau of Adult and Child Care. He then gave background information  
and testified in support of SB 425. (ATTACHMENT I) Mr. Morrissey suggested technical  
amendments to the bill. (ATTACHMENT II) Correspondence received by Ms. Rooney from  
Minnesota, which has a law after which SB 425 was patterned, were distributed to the  
Committee for additional background information. (ATTACHMENT III)

Sara Jane Russel, Douglas County Rape Victims Support Service, testified in support of  
SB 425. She highlighted information and figures regarding effects from sexual assault  
and exploitation included in the booklet distributed to the Committee, Surviving Rape  
and Sexual Assault in Douglas County by Sarah Novotny, Diane Duffy and Ellie Le Compte.  
(Copy available in files of Senate Judiciary Committee) Ms. Russel also shared a letter  
written by a victim of sexual exploitation by a health care provider during her youth.  
(ATTACHMENT IV)

The hearing was continued to Monday, January 22, 1990.

The Chairman advised the Committee that the Supreme Court has invited it to attend the  
presentation of the Kansas Supreme Court Child Support Guidelines Commission's report  
on Wednesday, January 24, 1990 at 9:00 a.m. However, the Chairman noted, due to the  
duties of the Senate it would be unlikely Committee members would be able to attend at  
that time. He then asked staff to attend the meeting and report back to the Committee.  
He further added that the invitation stands for the Chief Justice to address this Committee.

Senator Gaines moved to approve the minutes of January 11 and January 12, 1990. Senator  
Yost seconded the motion. The motion carried.

The meeting was adjourned.

GUEST LIST

COMM. REE: SENATE JUDICIARY COMMITTEE

DATE: Jan 18, 1990

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Andy Toebben	3121 Longhorn <sup>Lawrence Ks.</sup>	Page
Jordan Lungstrum	1145 West Campus Rd	Page
Cara Bray	7021 Oxford Ks.	Page
Rick Kittel	1031 Kansas Ave	Appellate Defender Office
RG Frey	Topeka	KTLA
Jerry Clark	Topeka	KCPAA
William	"	KRA
Pat Johnson		Board of Nursing
MIKE WARNER	Topeka	Ks. Sent. Commission
Jacqueline Cartwright	Shawnee Ks	Ks Sent Commission
Laines A Jodd	Wichita	K.S. JJA
G. Schlobohm	Topeka	
T. Gress	"	Ks. Hosp. Assn.
KEITH L LANDIS	TOPEKA	CANSTAD & SONS Comp. ON PUBLICATION FOR K
Mindee Reece	Maple Hill	
Jola Baker	Topeka	SRS
Sarah Jane Russell	Lawrence	D.B. Co. P.U.S.S.
Mike Miller	Topeka	City of Topeka
Linda di Courney	Topeka	Kansas Psychological Assn.
David Podkoffter	Topeka	Kansas Psychological Assn.
Richard Maurice	"	KDHE
Julene Marsh	Topeka	Attorney General
Suzanne Stanley	"	" "
John R...	Topeka	KDHE
David H. Justice	Topeka	KDHE

GUEST LIST

COMM. FEE: SENATE JUDICIARY COMMITTEE

DATE: 1-18-90 (-)

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Marvin S. + Homie	Topeka	K. D. H. E.
Chip Wheelen	Topeka	Ks Psychiatric Soc.
Julie Hein	Topeka	KANS-T
Virginia Fodor	Hutchinson	TALK
Frank Craft	Hutchinson	TALK
Clay Korte	M. P. Korte	TALK
J. C. Schlatter	Hutchinson	OKLA/TALK
Filbert N. Hammond	So. Kans	TALK
W. F. Craft	Hutchinson	TALK
Russell P.	Topeka	
David M. ...	Topeka	Assoc. of ...



# State of Kansas

Mike Hayden, Governor

Department of Health and Environment  
Division of Health

Stanley C. Grant, Ph.D., Secretary

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TESTIMONY PRESENTED TO  
SENATE JUDICIARY COMMITTEE

BY

THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

Senate Bill 425

The Kansas Department of Health and Environment was alerted to the problem of sexual exploitation of patients by mental health care providers through the review of the marriage and family therapists' licensure application requests. Under the credentialing review program (KSA 65-5001, et seq), the Secretary of Health and Environment examines an application from a health care occupation that desires licensure requirements of its members to be made into law. The final product of the review is a report that is generated by the Secretary and submitted to the legislative House and Senate Public Health and Welfare Committees. The report addresses whether a particular health occupation should be licensed in order to protect the public from a specified harm. In the case of the marriage and family therapists' application, the documented harm was from mental health care providers sexually exploiting patients.

Secretary Grant concluded that the problem of sexual exploitation was indeed serious and warranted attention. However, the problem is not confined to marriage and family therapists. It involves all types of mental health care providers, both licensed and those not licensed. In addition, the Secretary concluded that: (1) licensure only protects the public by setting minimum standards of education and training necessary to practice within a given profession, and (2) sexual exploitation results from ethical or moral failures of individual therapists rather than from a lack of specialized training. On the basis of these findings, the Secretary reported to the Legislature that there are other initiatives that would better protect the public from sexual exploitation than the licensure of marriage and family therapists. The initiatives are: (1) changing the criminal code to make it illegal for a mental health care provider to sexually exploit a patient; (2) create a civil cause of action for sexual exploitation victims who have been harmed; (3) require mental health care providers to distribute educational materials about ethics to patients prior to treatment; and (4) establish a regulatory board

to review complaints and discipline unlicensed mental health care providers. These initiatives are modeled after legislation enacted in Minnesota. Several other states have similar laws comparable to one or more of these initiatives.

During the last session, House and Senate Public Health and Welfare Committees and the Secretary of Health and Environment requested that an interim study be conducted on the issue of sexual exploitation. As you are aware, this summer and fall the Special Committee on Corrections and Mental Health conducted an interim study on the issue of, recourse for, and redress of victims of sexual exploitation. The committee recommended that a bill be drafted to make it illegal for a mental health care provider to sexually exploit a patient. Senate Bill 425 is that bill and is modeled after legislation enacted in Minnesota.

#### Effects on Patients

All of the major mental health professions have declared that sexual intimacy between a patient and a mental health care provider is inherently unethical, unacceptable, and severely damaging. Such behavior on the part of the therapist is seen as "sexual exploitation." Studies have shown that 90 percent of patients who are involved sexually with therapists sustain some type of damage that ranges from their personalities being negatively affected (34 percent), to hospitalization (11 percent), and to suicide (one percent). Negative personality affects include increased depression, impaired social adjustment, exacerbated drug and alcohol use, etc.

Glen O. Gabbard, MD, Director of the C.F. Menninger Memorial Hospital and editor of the book Sexual Exploitation in Professional Relationships, described in his testimony during the interim study several reasons why such behavior on the part of the therapist is unethical and unacceptable. Dr. Gabbard stated that "in every therapeutic relationship the patient begins to experience the therapist as though the therapist is a parent." Therefore, "the effects of patient-therapist sex on the patient is similar to the effects of incest on children." In addition, the therapist in these types of situations takes unfair advantage of a position of power and trust. The therapist has privileged information about the patient that he/she can use to manipulate the patient. Dr. Gabbard noted that therapist-patient sex is wrong due to the fact that the original psychological problems of the patient for which he/she sought treatment have gone unaddressed, and even further damage has been caused by the sexual relationship.

The American Psychiatric Association has taken the stand that at no time after the termination of the patient-therapist relationship is it ethical to be sexually intimate with a former patient. Dr. Gabbard testified at the interim study that there are several

reasons why sexual intimacies between therapists and former patients are not acceptable. He stated:

Numerous studies have demonstrated the tendency to experience the therapist as a parent for many, many years after treatment is over. Also, formal ethical standards, legislation, and case law have established that the therapist's obligation to respond appropriately to the patient's rights to privacy, confidentiality, and privilege is unaffected by termination or passage of time after termination.

In addition, many patients return for follow-up consultations.

#### Scope of the Problem

Studies have attempted to determine the magnitude of the problem of sexual exploitation by mental health care providers. Surveys show that approximately five to seven percent of male psychiatrists, PhD psychologists, and physicians reported having had sexual intercourse with patients during treatment stages. Double that number have had erotic contact with patients. Eighty percent of the mental health care providers who reportedly had intercourse with a client also reported doing so with more than one patient. Examples of sexual exploitation that the California licensing body for psychologists has dealt with include such acts as: sexual intercourse, sexual caressing, kissing, spanking, group sexual activity, masturbation, photo taking, etc.

It is likely that the prevalence of sexual exploitation of clients would be the same in the unlicensed mental health care occupations, such as marriage and family therapists, drug and alcohol counselors, etc. For example, the Kansas Attorney General's Office concluded there were from 25 to 35 complaints filed against unlicensed therapists in 1985. The most common complaint made against persons who call themselves "counselors" or "therapists" who are not regulated was that the practitioner made sexual advances or actually engaged in sexual conduct with the patient.

Studies have shown that 92 percent of the patients involved with a therapist are women. Other studies have shown that the male therapists involved have a mean age of 43 with five to 30 years of private practice experience. Some 90 percent of the therapists reported feeling vulnerable, unwanted, or lonely when the sexual contact occurred. Most of these therapists were separated, divorced, or unhappily married at the time.

The patients are generally women who are 12 to 16 years younger than the therapist, vulnerable, with low self-esteem, and also trust the therapist. Often they were not sexually attracted to the therapist but desired acceptance. A task force of the American Psychological Association concluded that erotic contact with

patients is based on the mental health care provider's need for power or sexual gratification. Patients who have been sexually exploited come from all age groups. A recent national study discovered that children and adolescents were unfortunately well represented among those who have been sexually exploited by therapists.

#### Recourse Options for Victims

Presently in Kansas, patients who are sexually exploited have three basic avenues for recourse: (1) attempt to have rape charges filed (criminal law), (2) attempt civil action for injuries suffered, or (3) complain to the state regulatory agency or the therapist's employers, if any. These recourse options are not currently effective. In the case of criminal sanctions, by classifying the incident as rape, the mental health care provider is afforded the consent plea (e.g., the patient consented to the sexual act). There is currently limited civil cause of action which addresses this harm. Malpractice suits apply only to licensed health care occupations (e.g. physician.) A civil plaintiff seeking redress would be required to convince the Kansas courts that a new cause of action should be created. Victims can and do complain to state regulatory agencies and employers, but not all mental health providers are regulated or have an employer. In the case of the unlicensed or unregistered professions, even if there is a government agency to which a complaint can be filed, there are no legal avenues to pursue the matter further. For example, no action could be taken by the Kansas Attorney General's office on the complaints received about nonlicensed or nonregistered therapists who allegedly sexually exploited patients unless the therapist misrepresented himself as a licensed or registered professional.

#### Senate Bill 425

Senate Bill 425 provides the victim of sexual exploitation a more viable criminal recourse alternative than the present law provides. This measure protects the public by sending a clear message that such behavior on the part of the mental health care provider is against the law.

The bill amends the criminal code (KSA 21-3501, et seq) and makes it unlawful for health care providers rendering mental health care services for pay to be sexually intimate with a patient or a former patient under certain circumstances.

Under the new Section 1, a health care service provider is defined as a physician, psychologist, nurse, professional counselor, social worker, marriage or family therapist, alcohol or drug counselor, member of the clergy, or any other persons, whether or not licensed or registered by the state, who provides or purports to provide mental health services for remuneration. Mental health services is also defined in this new section.

Under the new Section 1, subsection (2), page two, the circumstance in which sexual contact between therapist-patient is sexual exploitation is defined as: (1) when sexual contact occurred during the psychotherapy session, (2) when the patient or former patient is emotionally dependent upon the mental health service provider, or (3) when sexual contact occurred by therapeutic deception. Sexual exploitation is defined as a Class E felony.<sup>1</sup> "Sexual contact" is defined under subsection (f) of this section and refers to any lewd fondling or touching of the victim or the offender for the intent to arouse or satisfy sexual desires of either party or both.

"Aggravated sexual exploitation" is defined under the new Section 1, subsection (3), page two, as sexual intercourse or sodomy under the same circumstances as described pertaining to sexual exploitation. Aggravated sexual exploitation is defined as a Class D felony.<sup>2</sup>

Subsection 4, page two, removes consent by the victim as a defense to the crime of sexual exploitation and aggravated sexual exploitation.

Amendments to KSA 21-3501, Section 2, subsection (4), add sexual exploitation and aggravated sexual exploitation to the list of unlawful sexual acts. KSA 21-3525, the rape shield statute, is amended under Section 3(n) and (o) to afford victims of sexual exploitation and aggravated sexual exploitation the same protection during prosecution that other sexual assault victims are provided regarding previous sexual histories.

For the purposes of clarity, the Department recommends some technical changes to the bill. (Please refer to the attached bill balloon.) These changes do not alter the intent or policies of the bill.

#### Other State Laws

At least four states (California, Colorado, Minnesota, and Wisconsin) have specific criminal penalties for this type of activity. The Department requested information from each of these states about their experiences with their particular laws. We learned that California and Colorado enacted such legislation in 1989. California's law went into effect January 1, 1990. No cases have gone to trial in Colorado. However, the Colorado State Grievance Board, which handles disciplinary cases against licensed

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<sup>1</sup>Class E felony - a minimum of one to two years and a maximum of one to five years (state prison); up to \$10,000 fine.

<sup>2</sup>Class D felony - a minimum of two to five years and a maximum of three to 10 years (state prison); up to \$10,000 fine.



and unlicensed mental health care providers, has referred two licensed psychologists complaints to the local district attorneys' offices. In Minnesota, the Attorney General's office is aware of nine cases that have been charged alleging therapist-patient criminal sexual conduct since the law went into effect in 1985. These cases involved a clinical dependency counselor, five psychologists, a spiritual guide, an alcohol abuse counselor, and a minister. In all of the cases but one, the therapist was convicted or pled guilty. In one case, a psychologist was acquitted after a jury trial.

The Minnesota Special Assistant to the Attorney General had several suggestions that this Committee may want to consider. Based on Minnesota's experience, she suggested that: (1) the statute include protecting victims from having their entire psychological histories presented to the jury; and (2) delete requiring proof of emotional dependency by the victim, and replace with the requirement that sexual exploitation during an ongoing counseling relationship, whether or not in a formal session, be deemed criminal. Attached to the testimony are the responses received from the Minnesota Attorney General's office and a local county attorney's office.

Recommendations

We recommend that the policy suggestions from Minnesota be considered for adoption in Senate Bill 425. The Department supports this bill and recommends that technical revisions for clarification purposes be made. Thank you for the opportunity to testify.

Presented by: Richard Morrissey, Deputy Director  
Division of Health  
Kansas Department of Health and Environment  
January 18, 1990

SENATE BILL No. 425

By Special Committee on Corrections and Mental Health

Re Proposal No. 18

12-21

12 AN ACT defining certain crimes relating to sexual exploitation by  
13 mental health service providers and prescribing punishments  
14 therefor; amending K.S.A. 21-3501 and 21-3525 and repealing the  
15 existing sections.  
16

17 *Be it enacted by the Legislature of the State of Kansas:*

18 New Section 1. (1) As used in this section, the following words  
19 and phrases have the meanings respectively ascribed thereto:

20 (a) "Mental health service provider" means a physician, psy-  
21 chologist, nurse, professional counselor, social worker, marriage or  
22 family therapist, alcohol or drug counselor, member of the clergy,  
23 or any other person, whether or not licensed or registered by the  
24 state, who provides or purports to provide mental health services  
25 for remuneration;

26 (b) "mental health service" means the treatment, assessment, or  
27 counseling of another person for a cognitive, behavioral, emotional,  
28 mental, or social dysfunction, including any intrapersonal or inter-  
29 personal dysfunction;

30 (c) "emotionally dependent" means that the nature of the pa-  
31 tient's or former patient's emotional condition and the nature of the  
32 treatment provided by the mental health service provider are such  
33 that the mental health service provider knows or has reason to know  
34 that the patient or former patient is significantly impaired in the  
35 ability to withhold consent to sexual contact~~or sexual intercourse~~, or sodomy  
36 by the mental health service provider;

37 (d) "patient" means a person who seeks or obtains mental health  
38 services for remuneration from a mental health services provider and  
39 who is not married to the mental health services provider;

40 (e) "former patient" means a person who obtained mental health  
41 services for remuneration from a mental health service provider prior  
42 to sexual contact~~with that mental health service provider, who was~~, intercourse, or sodomy  
43 not obtaining mental health services for remuneration from such

1 mental health service provider at the time of such sexual contact, ← intercourse, or sodomy  
2 and who is not married to such mental health service provider at  
3 the time;

4 (f) "sexual contact" includes any lewd fondling or touching of the → means  
5 person of either the victim or the offender, done or submitted to → patient or former patient  
6 with the intent to arouse or to satisfy the sexual desires of either → mental health care service provider  
7 the victim or the offender, or both;

8 (g) "therapeutic deception" means a representation by a mental → patient or former patient  
9 health service provider that sexual contact with the mental → mental health care service provider  
10 service provider is consistent with or part of the patient's or former  
11 patient's treatment; and

12 (h) "personal contact" means any direct contact in person and  
13 does not mean any indirect contact or communication, whether or  
14 not written or oral or by means of the mail or telephone or any  
15 other telecommunications device.

16 (2) Sexual exploitation is sexual contact with a person under any  
17 of the following circumstances:

18 (a) ~~The offender is a mental health service provider and the victim~~  
19 ~~is a patient of the mental health service provider and the sexual~~  
20 ~~contact occurred during the psychotherapy session;~~

21 (b) ~~the offender is a mental health service provider and the pa-~~  
22 ~~tient or former patient is emotionally dependent upon the mental~~  
23 ~~health service provider; or~~

24 (c) ~~the offender is a mental health service provider and the victim~~  
25 ~~is a patient or former patient and the sexual contact occurred by~~  
26 ~~means of therapeutic deception.~~

27 Sexual exploitation is a class E felony.

28 (3) Aggravated sexual exploitation is sexual intercourse or sodomy  
29 under any of the circumstances described in subsection (2) → following

30 Aggravated sexual exploitation is a class D felony.

31 (4) Consent by the victim to sexual contact under any of the → : (a) the sexual intercourse or sodomy occurred during the psychotherapy session;  
32 circumstances described in subsection (2) is not a defense to the → (b) the patient or former patient is emotionally dependent upon the mental health  
33 crime of sexual exploitation. Consent by the victim to sexual inter- → care service provider; or (c) the sexual intercourse or sodomy occurred by means  
34 course or sodomy under any of the circumstances described in sub- → of therapeutic deception.

35 subsection (2) is not a defense to the crime of aggravated sexual → (3)  
36 exploitation.

37 (5) It is a rebuttable presumption that a former patient is not  
38 emotionally dependent upon a mental health service provider if there  
39 is a period of one year or more, prior to the sexual contact, sexual  
40 intercourse or sodomy, during which period there is no personal  
41 contact between a former patient and a mental health service  
42 provider.

43 (6) This section shall be part of and supplemental to the Kansas



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November 20, 1989

Cathy Rooney  
 Department of Health & Environment  
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 Topeka, KS 66612-1290

Dear Ms. Rooney:

I am in receipt of your letter concerning Minnesota's sexual exploitation by therapist statute. I have passed on your request to Mary Theisen of the Minnesota State Attorney General's office, who has recently prosecuted one of these cases and has collected data on other prosecutions, and Nancy Biele of the Sexual Violence Center, who was active on our original task force and who has some statistics on the alarming incidence of sexual conduct by therapists with patients. They will respond separately.

The statute has been in effect since August 1, 1985. There have been very few prosecutions. This is in large part because this type of victim is far less likely to report to the police and because such victims are often, by definition, extremely vulnerable and emotionally fragile. Counsellors advising these victims typically offer them a wide variety of options only one of which is criminal prosecution. There are many reasons why this would not be the preferred option.

Nevertheless, I believe it is useful to have a criminal statute as a clear statement of public policy. It may have some deterrent effect on potential offenders, and it increases the likelihood that a victim will be able to recognize unlawful behavior. It is worth noting that all but one of the cases charged to date have resulted in pleas or verdicts of guilty.

Very truly yours,

*Jeanne L. Schlee* (11) Gene Schlee  
 JEANNE L. SCHLEE  
 Assistant Ramsey County Attorney  
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JLS/bak  
 cc: Mary Theisen  
 Nancy Biele

*Nancy Biele*



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III  
ATTORNEY GENERAL

November 27, 1989

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Ms. Cathy Rooney  
Director of Health Occupation Credentialing  
Bureau of Adult and Child Care  
Landon State Office Building  
Topeka, Kansas 66612-1290

Re: Psychotherapist-Patient Criminal Sexual Conduct

Dear Ms. Rooney:

Ms. Jeanne L. Schleh from the Ramsey County Attorney's Office has forwarded to me your November 14, 1989 letter requesting information about Minnesota's statutes concerning psychotherapist-patient criminal sexual conduct. I have gathered data regarding these criminal statutes, although my data may not be complete. It is complete to the best of my knowledge.

In Minnesota, I am aware of nine cases that have been charged alleging psychotherapist-patient criminal sexual conduct. Of these cases, five involved a psychotherapist having sex with a patient during a session. One alleged both therapeutic deception and emotional dependency. One alleged emotional dependency. Another involved a psychotherapist who was charged with a psychotherapist criminal sexual conduct count, but pled guilty to a count not involving the psychotherapist element. The final case resulted in an acquittal by a jury on an allegation under the emotional dependency provisions of the statutes. Following is information regarding each case.

A. Sex during a session (Minn. Stat. } } 609.344, subd. 1(h) (penetration) or 609.345, subd. 1(h) (contact)).

1. Rocky Allen, a chemical dependency counselor, was charged with and convicted by a jury of three counts of criminal sexual conduct in the fourth degree for touching the breast of a chemically dependent and mentally ill patient during

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a session. Evidence was admitted during the trial that demonstrated that Allen had also engaged in inappropriate sexual behavior with other patients.

Allen was sentenced to a presumptive probationary sentence under the Minnesota sentencing guidelines. He received a stay of imposition of his sentence for five years and 120 days in jail, also stayed. He was ordered to refrain from counseling other individuals, and received a fine.

2. Richard Sanford was a psychologist who engaged in sexual contact and penetration with a woman whom he was counseling for various emotional problems. He was charged with three counts of third-degree criminal sexual conduct for engaging in sex during sessions.

As part of a plea agreement, the prosecution agreed to depart downward from the presumptive prison sentence contained in the Minnesota Sentencing Guidelines. The prosecution also agreed not to charge certain other offenses involving alleged sexual contact with other patients.

Sanford pled guilty to one count of criminal sexual conduct in the third degree for engaging in sexual penetration with a patient during a session. The trial court sentenced him to one year and one day in prison.

3. Silva was a "spiritual guide" who gave lectures followed by "readings" in his hotel rooms. In at least two cases, he engaged in sexual contact and/or penetration with women who attended these readings. In one case, he told a woman that he had contact with her dead brother's spirit.

Silva was charged with one count of criminal sexual conduct in the fourth degree for engaging in sexual contact during a session, and two counts of criminal sexual conduct in the third degree - one under the force or coercion section of the criminal sexual conduct provisions, and one under the sex during a session provision.

Silva pled guilty to two counts of criminal sexual conduct in the fourth degree for engaging in sexual contact with an individual through the use of force and/or coercion. He received a stay of execution of a 21 month prison sentence and 100 days in jail. He was then deported to Peru.

4. Alfred O'Connor was an elderly man who acted as a alcohol abuse counselor through word-of-mouth referrals. He was charged with four counts of criminal sexual conduct in the fourth degree for engaging in sexual contact with two patients. One was an undercover police officer, the other was an 18-year-old boy. His actions involved whipping his clients and hitting them on their buttocks with a board.

O'Connor pled guilty to one count of criminal sexual conduct in the fourth degree; the count involving the eighteen year old. He received a stay of imposition of sentence and was placed on probation. He also received 30 days in jail.

5. Gregg Rochester was a psychologist who had sexual intercourse with a woman whom he was counseling. He eventually pled guilty to one count of criminal sexual conduct in the fourth degree, and a third degree count was dismissed. He received a 54-month prison term in accord with the

Minnesota sentencing guidelines; to run concurrent to his 41-month prison term for seven counts of theft by misrepresentation (medicaid fraud).

6. Gene Hochalter was a psychologist who visited a patient at her home, where they engaged in sexual intercourse. The state and the defense agreed that this meeting would constitute a "session", because Hochalter counseled her during this meeting and billed her for the time.

Hochalter pled guilty to one count of criminal sexual conduct in the third degree, and the state agreed to a downward dispositional departure from the presumptive prison sentence in the Minnesota Sentencing Guidelines. He received seven months in jail.<sup>1/</sup>

B. Sex while victim emotionally dependent (Minn.Stat. }609.344, subd. 1(i) (penetration) and 609.345, subd. 1(i) (contact).

1. A psychologist was acquitted after a jury trial of criminal sexual conduct in the third and fourth degrees for allegedly engaging in sexual contact and penetration with a patient while she was emotionally dependent upon him.

According to the prosecutor of this case, the psychologist counseled the woman, then terminated the therapy and engaged in sex with her four days later. They had a romantic relationship for two and one-half months. The prosecutor indicates that the jury was not convinced beyond a reasonable doubt as to the woman's emotional dependency.

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<sup>1/</sup> Hochalter was recently taped by the television show "USA Today" regarding his case. Other individuals in Minnesota were also taped by the program regarding the psychotherapist/patient provisions. I expect the segment to air shortly.



This psychologist has been suspended from his practice of psychology.

2. Phillip French was a licensed psychologist who was engaged in both inpatient and outpatient treatment of the chemical dependency problems of a woman. The two engaged in sexual penetration and contact. French characterized it as a "love relationship."

French pled to one count of criminal sexual conduct in the third degree under the emotional dependency provisions. The prosecutor agreed to drop other counts and not charge counts relating to other alleged victims.

The trial court sentenced French in accord with the Minnesota Sentencing Guidelines to 24 months in prison.

C. Therapeutic Deception (Minn. Stat. } } 609.344, subd. 1(j) (penetration), and 609.345, subd. 1(j)) (contact), and Emotional Dependency.

1. Robert Dutton was a minister who engaged in sexual contact and penetration with a parishioner he was counseling for emotional problems. He was charged with and convicted after a jury trial of two counts of criminal sexual conduct involving therapeutic deception (third and fourth degree) and two counts of criminal sexual conduct involving emotional dependency (third and fourth degree).

In this case, Dutton and the woman both left their respective families and lived together for a period of time.

Dutton was sentenced to 90 days in jail, which represents a departure from the guidelines. The state appealed, and the Minnesota Court of Appeals affirmed the sentence. The Minnesota Supreme Court declined to hear the case.

Ms. Cathy Rooney  
November 27, 1989  
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Dutton has appealed his convictions, arguing, in part: sufficiency of evidence to support all counts, the admission of certain expert testimony, and the constitutionality of the emotional dependency provisions of the statute. The case has been orally argued, and I am awaiting a decision, which I expect around the first week in February, 1990.

I hope that Kansas is also considering enacting a provision designed to shield victims of this type of abuse, similar to Minn. Stat. § 609.347, subd. 6 (1988). I have enclosed a copy of this statute for your review. As you can see, the statute protects victims from having their entire psychological history presented to the jury. Without such protection, of course, victims will be extremely hesitant to come forward.

I do have a personal feeling regarding the wording of the Minnesota statutes. It is my personal belief that victims would be better protected, better served, and violations easier to prove if instead of requiring proof of emotional dependency by the victim when there is an ongoing counseling relationship, that the statute be worded so as to provide that any sexual contact or penetration by a psychotherapist when there is an ongoing psychotherapist-patient relationship, whether in or out of a formal session, be deemed criminal. The Kansas legislature may also wish to consider outlining the parameters of the use of expert testimony in a psychotherapist-patient criminal sexual conduct prosecution.

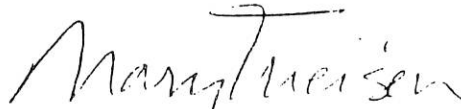
As you may be aware, the 1984 Minnesota Legislature mandated that a task force be convened to study the problem of sexual exploitation by therapists. That task force reported to the legislature in 1985, which resulted in the enactment of Minnesota's laws. The findings are appended to a published handbook entitled "It's Never O.K." You may find this book very helpful. It may be obtained by writing to: Minnesota Program for Victims of Sexual Assault, Minnesota Department of Corrections, 300 Bigelow Building, 450 North Syndicate Street, St. Paul, Minnesota. The telephone number is (612)642-0256.

I would be happy to assist you further with any other questions you have, or refer you to others in Minnesota who can help you. I would also appreciate being apprised of the actions

Ms. Cathy Rooney  
November 27, 1989  
Page 7

of the Kansas legislature as they consider enacting similar provisions to Minnesota. Please call me if I may be of further assistance.

Sincerely,



MARY J. THEISEN  
Special Assistant  
Attorney General

Criminal Division  
Telephone: (612) 296-1427

MJT:cld  
Enclosure

the offense follows or coincides with a conviction of the actor under sections 609.342 to 609.345 or under any similar statute of the United States, or this or any other state.

*History: 1975 c 374 s 7; 1978 c 723 art 1 s 16; 1981 c 273 s 4; 1984 c 588 s 9; 1984 c 655 art 1 s 77; 1986 c 351 s 10,11; 1Sp1986 c 3 art 1 s 70,71; 1987 c 224 s 1,2*

#### 609.347 EVIDENCE.

Subdivision 1. In a prosecution under sections 609.342 to 609.346, the testimony of a victim need not be corroborated.

Subd. 2. In a prosecution under sections 609.342 to 609.346, there is no need to show that the victim resisted the accused.

Subd. 3. In a prosecution under sections 609.342 to 609.346 or 609.365, evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in subdivision 4. The evidence can be admitted only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the circumstances set out in paragraphs (a) and (b). For the evidence to be admissible under paragraph (a), subsection (i), the judge must find by a preponderance of the evidence that the facts set out in the accused's offer of proof are true. For the evidence to be admissible under paragraph (a), subsection (ii) or paragraph (b), the judge must find that the evidence is sufficient to support a finding that the facts set out in the accused's offer of proof are true, as provided under Rule 901 of the Rules of Evidence.

(a) When consent of the victim is a defense in the case, the following evidence is admissible:

(i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue. In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated; and

(ii) evidence of the victim's previous sexual conduct with the accused.

(b) When the prosecution's case includes evidence of semen, pregnancy, or disease at the time of the incident or, in the case of pregnancy, between the time of the incident and trial, evidence of specific instances of the victim's previous sexual conduct is admissible solely to show the source of the semen, pregnancy, or disease.

Subd. 4. The accused may not offer evidence described in subdivision 3 except pursuant to the following procedure:

(a) A motion shall be made by the accused at least three business days prior to trial, unless later for good cause shown, setting out with particularity the offer of proof of the evidence that the accused intends to offer, relative to the previous sexual conduct of the victim;

(b) If the court deems the offer of proof sufficient, the court shall order a hearing out of the presence of the jury, if any, and in such hearing shall allow the accused to make a full presentation of the offer of proof;

(c) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the accused regarding the previous sexual conduct of the victim is admissible under subdivision 3 and that its probative value is not substantially outweighed by its inflammatory or prejudicial nature, the court shall make an order stating the extent to which evidence is admissible. The accused may then offer evidence pursuant to the order of the court;

(d) If new information is discovered after the date of the hearing or during the course of trial, which may make evidence described in subdivision 3 admissible, the accused may make an offer of proof pursuant to clause (a) and the court shall order an in camera hearing to determine whether the proposed evidence is admissible by the standards herein.

Subd. 5. In a prosecution under sections 609.342 to 609.346, the court shall not instruct the jury to the effect that:

actor under sections 609.342  
s, or this or any other state.  
73 s 4; 1984 c 588 s 9; 1984  
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609.346, the court shall not

(a) It may be inferred that a victim who has previously consented to sexual intercourse with persons other than the accused would be therefore more likely to consent to sexual intercourse again; or

(b) The victim's previous or subsequent sexual conduct in and of itself may be considered in determining the credibility of the victim; or

(c) Criminal sexual conduct is a crime easily charged by a victim but very difficult to disprove by an accused because of the heinous nature of the crime; or

(d) The jury should scrutinize the testimony of the victim any more closely than it should scrutinize the testimony of any witness in any felony prosecution.

Subd. 6. (a) In a prosecution under sections 609.342 to 609.346 involving a psychotherapist and patient, evidence of the patient's personal or medical history is not admissible except when:

(1) the accused requests a hearing at least three business days prior to trial and makes an offer of proof of the relevancy of the history; and

(2) the court finds that the history is relevant and that the probative value of the history outweighs its prejudicial value.

(b) The court shall allow the admission only of specific information or examples of conduct of the victim that are determined by the court to be relevant. The court's order shall detail the information or conduct that is admissible and no other evidence of the history may be introduced.

(c) Violation of the terms of the order is grounds for mistrial but does not prevent the retrial of the accused.

Subd. 7. **Effect of statute on rules.** Rule 404, paragraph (c) of the Rules of Evidence is superseded to the extent of its conflict with this section.

**History:** 1975 c 374 s 8; 1984 c 588 s 10; 1985 c 297 s 8; 1986 c 351 s 12; 1986 c 444; 1Sp1986 c 3 art 1 s 72; 1987 c 114 s 1

#### 609.3471 RECORDS PERTAINING TO VICTIM IDENTITY CONFIDENTIAL.

Notwithstanding any provision of law to the contrary, no data contained in records or reports relating to petitions, complaints, or indictments issued pursuant to section 609.342, clause (a), (b), (g), or (h); 609.343, clause (a), (b), (g), or (h); 609.344, clause (a), (b), (e), (f), or (g); or 609.345, clause (a), (b), (e), (f), or (g) which specifically identifies the victim shall be accessible to the public, except by order of the court. Nothing in this section authorizes denial of access to any other data contained in the records or reports, including the identity of the defendant.

**History:** 1984 c 573 s 9; 1985 c 119 s 1; 1986 c 351 s 13; 1Sp1986 c 3 art 1 s 73; 1987 c 331 s 9

#### 609.348 MEDICAL PURPOSES; EXCLUSION.

Sections 609.342 to 609.346 do not apply to sexual penetration or sexual contact when done for a bona fide medical purpose.

**History:** 1975 c 374 s 9; 1981 c 273 s 5; 1986 c 351 s 14

**NOTE:** This section was also amended by Laws 1986, First Special Session chapter 3, article 1, section 74, to read as follows:

"609.348 Medical purposes; exclusion.

Sections 609.341 to 609.351 shall not apply to sexual penetration or sexual contact when done for a bona fide medical purpose."

#### 609.349 VOLUNTARY RELATIONSHIPS.

A person does not commit criminal sexual conduct under sections 609.342, clauses (a) and (b), 609.343, clauses (a) and (b), 609.344, clauses (a), (b), (d), and (e), and 609.345, clauses (a), (b), (d), and (e), if the actor and complainant were adults cohabiting in an ongoing voluntary sexual relationship at the time of the alleged offense, or if the complainant is the actor's legal spouse, unless the couple is living apart and one of

To the Legislative Committee:

I am writing in support of Legislative Bill #18. Perhaps by sharing an experience I had as a child, I can make it apparent that sexual exploitation by physicians is indeed a problem that needs to be dealt with.

As a child, I was molested by my pediatrician. This abuse occurred at least once a year until I was eleven or twelve years old and no longer went to the same physician. As a child, I had no idea what was or was not appropriate in a doctor-patient relationship, or what was or was not supposed to take place during an exam. All I knew was that he made me very uncomfortable and that I was afraid of him.

Now, I do know that what he did to me was terribly wrong. At first, this realization made me wonder what was wrong with me that would make someone treat me that way. I felt ashamed, as if I had done something wrong. As I became more educated about sexual assault, I began to realize that what happened to me was not my fault.

Dealing with the memories has been a very painful and tedious process. I have been seeing a psychiatrist for quite some time trying to come to terms with what happened to me. I had repressed the memories for ten years because they were too painful for me to deal with. The memories returned, in flashbacks and nightmares. I am still not sure that I have remembered everything, but I have remembered all that I can deal with right now.

Those years of abuse have affected almost every aspect of my life. I find it very difficult to trust others, especially men, and especially physicians. Going for my yearly physical is a traumatic experience for me. I live in fear of having a car accident or anything else that might make it necessary for me to go to a hospital or see a doctor because I do not trust anyone to have that kind of control over my body, and not use it to hurt me.

Relationships are very difficult for me for the same reasons. I sometimes wonder if I will ever be able to resolve all these issues and get over the shame, pain, and anger that all victims of sexual abuse and exploitation feel. Even if I do, I know

that I will never forget what happened, and that the experience will color my perceptions of life permanently.

This pediatrician is still practicing in Johnson County. It is very painful for me to wonder if he is hurting little girls now like he hurt me as a child. But I have never reported it because it was so long ago, and I have no evidence other than my pain. And even with all the education I have had, I am still ashamed for anyone to know that this happened to me. He is the one who should be ashamed.

Although this occurred when I was a child, I know there are many adults who are sexually exploited by physicians, and counselors, oftentimes because they do not understand what their rights and boundaries are in a professional relationship. And also because they are the vulnerable party in a counseling or doctor-patient relationship. They trust that the physician or counselor will do what is best for them. I no longer have that trust. It is my hope that the legislature can take steps to prevent others from going through the same trauma.

Sincerely,

Laura

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Sincerely,

Laura