

Sex with former patients: OK after retirement?

Dear Dr. Mossman,

A psychiatrist retires from practice and goes into some other line of work—perhaps managing a restaurant. He then has an “affair” with a former patient whom he had not treated for several years. Could the retired psychiatrist’s conduct be the basis of a successful lawsuit?

Submitted by “Dr. D”

Evidence tells us that the retired psychiatrist’s behavior likely could do emotional harm to his former patient. If the former patient suffers some injury, a successful suit could follow—if not on grounds of malpractice, then on other grounds. In this article we’ll see why by looking at:

- rates of doctor-patient sex
- potential harm from doctor-patient sex
- ethical bans on sex with former patients
- possible legal actions.

Sex with patients: Rates and risk

Doctors and patients often develop erotic thoughts about each other.^{1,2} But as Sigmund Freud noted almost a century ago, an actual love relationship between a doctor and a psychotherapy patient can cause a “complete defeat for the treatment” and destroy the patient’s chance for recovery.³

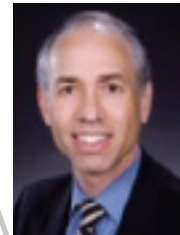
More than 5 decades later, surveys of medical professionals supplemented Freud’s observations with data about the frequency and impact of doctor-patient sex. In a 1973 survey, 11% of physicians said they had erot-

ic contact with patients, and 5% reported intercourse.⁴ In a 1986 survey of psychiatrists, 3% of women and 7% of men acknowledged having sexual contact with patients.⁵ In a 1992 study of 10,000 nonpsychiatric physicians, 9% of respondents reported having sex with patients.⁶ Actual rates of doctor-patient sex probably are much higher than reported because physicians may be reluctant to admit to having erotic contact with patients, even in anonymous surveys.⁷ The typical therapist-patient sex scenario involves a male doctor and an adult female patient, but same-sex encounters and sexual contact with minors occur, too.⁸

Sex between a therapist and a patient is likely to cause emotional injury. For example, a 1991 study found that 90% of psychotherapy patients who had sexual involvement with a prior therapist had been harmed by the experience.⁹ Books, articles, and Web sites offer vivid individual accounts of harm patients have suffered (*Table, page 26*). Doctors who have sex with patients could face public opprobrium, civil lawsuits, actions against their medical licenses, and prosecution in states that make sex with psychiatric patients a criminal offense.¹⁰

What about former patients?

Sex between providers and *current* patients is opposed by all major healthcare organizations, including the American Psychiatric Association (APA),¹¹ American Medical Association,¹² and American Psychological



Douglas Mossman, MD

DO YOU HAVE A QUESTION ABOUT POSSIBLE LIABILITY?

■ Submit your malpractice-related questions to Dr. Mossman at douglas.mossman@dowdenhealth.com.

■ Include your name, address, and practice location. If your question is chosen for publication, your name can be withheld by request.

■ All readers who submit questions will be included in quarterly drawings for a \$50 gift certificate for Professional Risk Management Services, Inc’s online marketplace of risk management publications and resources (www.prms.com).

Dr. Mossman is director, Glenn M. Weaver Institute of Law and Psychiatry, University of Cincinnati College of Law, and volunteer professor of psychiatry and associate program director, Institute for Psychiatry and Law, University of Cincinnati College of Medicine.

Clinical Point

Improper relationships with former patients disrupt the doctor's obligation to remain available for future care

Table

How sexual relationships can harm patients

Type of harm	Explanation
Ambivalence	Psychological paralysis regarding whether to protect or take action against the abusive therapist
Cognitive dysfunction	Impaired memory and concentration, intrusive thoughts, flashbacks
Emotional lability	Unpredictable emotional responses, abrupt changes in mood, severe disruption of the patient's typical way of feeling
Emptiness, isolation	Lost sense of self, feeling cut off from others
Guilt	Irrational self-blame for causing the sexual contact
Impaired trust	Fear of being taken advantage of, used, or abused in future therapy
Suicide	14% of patients who had sex with a therapist attempt suicide; approximately 1% commit suicide
Role confusion	Treatment sessions and the therapeutic relationship serve the therapist's needs rather than the patient's; this perception may generalize to later therapies and other relationships
Sexual confusion	Examples include disgust with sexual feelings, uncertainty about sexual orientation, belief that self-worth comes from gratifying others' sexual desires
Confusion about anger	Rage at self, self-loathing, need to suppress angry feelings, mistaken beliefs that others are angry at you

Source: Adapted from reference 8

Association.¹³ The last 2 groups strongly discourage sex with former patients, but the APA's ethics code states that such activity is *always* unethical.

The APA's position reflects 2 general truths of psychiatric practice:

- Psychiatric patients often return for care years after initial treatment has ended. "Former patients" are really "possible future patients." Improper relationships with former patients disrupt the doctor's obligation to remain available for future care.

- Even if a patient never returns to treatment, intense feelings about a doctor can last for years. A psychiatrist who engages in sex with a former patient may evoke and manipulate feelings "left over" from therapy.

Psychiatrists therefore "have only one kind of relationship with a patient—that is, a doctor-patient relationship."¹⁴ Moreover, as Simon and Shuman observe, "[N]o patient [is] strong enough, no pause is long enough, and no love is true enough to justify compromising this boundary."¹⁵

Legal actions

If a physician no longer practices medicine, can any of his activities—including with a former patient—be malpractice? In fact, sex between practicing doctors and current patients might not always be malpractice. If a psychiatrist gains sexual access to a patient by saying that the sex will be therapeutic, the psychiatrist has perpetrated fraud and this intentional action might not be covered by malpractice insurance.¹⁶

In several cases involving nonpsychiatric physicians,¹⁷ courts have held that consensual doctor-patient sex is not malpractice, though it might represent some other form of wrongdoing. The argument is that sex with a patient is an *intentional* act that is never a professional service, whereas malpractice by definition arises *unintentionally* from negligence while rendering professional services. Other courts, however, have held that doctor-patient sex can be malpractice because it breaches the physician's fiduciary relationship and can constitute an abuse of power.¹⁸

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After retirement, physicians still have responsibilities to former patients: to protect records, to respect confidentiality, and to release information upon proper requests. Some fiduciary duties to patients survive the conclusion of treatment, and behavior that breaches those responsibilities can bring legal action.

Psychiatrists should realize that many former patients remain vulnerable because of feelings “left over” from therapy. Therefore, potential civil actions against a retired psychiatrist might include:

A suit for intentional infliction of emotional distress. This tort action requires proving more than mere insults or indignities; it occurs only when someone “by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.”¹⁹ Initiating sex with a former patient is strongly disapproved and meets the legal criterion of having a high probability of causing mental distress.²⁰

A suit for negligent infliction of emotional distress. Modern law permits recourse for negligently inflicted emotional distress when harm occurs in “the course of specified categories of activities, undertakings, or relationships in which the negligent conduct is especially likely to cause emotional disturbance.”²¹

Suits for exploitation. Some jurisdictions allow suits against therapists who have sex with former patients, irrespective of therapists’ license status. For example, Minnesota allows lawsuits for “sexual exploitation” if the former patient’s capacity to consent was impaired by emotional dependence on the psychotherapist.²²

Actions by licensing boards. Many retired practitioners maintain their medical licenses. Retired-but-still-licensed psychiatrists can be subject to professional disciplinary actions.

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Clinical Point

Initiating sex with a former patient meets the legal criterion of having a high probability of causing mental distress

Bottom Line

Sex with patients could cause emotional harm no matter how long ago treatment ended. Some duties to patients extend well after the end of a medical career. Whether you’re still practicing or retired, sex with former psychiatric patients is improper and could lead to legal action against you.