

Chapter Seventeen: Reporting Therapist Malpractice**[TOC](#)**

When you are seeing a client and they report to you what appears to be previous malpractice on the part of a previous therapist, what considerations should you take? There are several considerations:

1. Confidentiality of their disclosure
2. Duty to report therapist abuse
3. Legal rights of the client
4. Minor versus adult client
5. Was the former therapist licensed?

This is one of those issues that involves a conflict of authority for a therapist and you may have competing authorities with diametrical actions they suggest. It is not uncommon for a professional ethics association (APA, ACA) to place a recommendation or requirement for a counselor to report an offending therapist. The purpose of this requirement is to preserve the integrity of the profession and to prevent further abuse to other clients. This chapter highlights:

1. There is no legal duty to report therapist malpractice unless it fits under the child abuse reporting statutes.
2. While professional codes often guide the therapist to act, any action must get the client's permission to undertake.
3. Advise your client as soon as possible to seek legal advice regarding time limits and evidence protection; otherwise the client may forgo the legal right to file a suit.
4. Licensure is not a requirement to file a suit for therapist sexual malpractice.
5. A client can recover funds spent for treatment of a mental health problem by a non-licensed therapist.

Professional duty

APA Ethics Code (2010) offers the following guidance:

1.04 Informal Resolution of Ethical Violations

When psychologists believe that there may have been an ethical violation by another psychologist, they attempt to resolve the issue by bringing it to the attention of that individual, if an informal resolution appears appropriate and the intervention does not violate any confidentiality rights that may be involved.

1.05 Reporting Ethical Violations

If an apparent ethical violation has substantially harmed or is likely to substantially harm a person or organization and is not appropriate for informal resolution under Standard 1.04, Informal Resolution of Ethical Violations, or is not resolved properly in that fashion, psychologists take further action appropriate to the situation. Such action might include referral to state or national committees on professional ethics, to state licensing boards, or to the appropriate institutional authorities. This standard does not apply when an intervention would violate confidentiality rights or when psychologists have been retained to review the work of another psychologist whose professional conduct is in question.

The guidance points out the desirability of informal versus formal resolution and stresses the consideration and priority of confidentiality over resolution. Does your client give you permission to speak with the other professional? A therapist cannot address violations of ethics without the permission of the client. In choosing to address a previous therapist malpractice, clients often must consider the impact of disclosure on their other social relationships, the impact on their current therapeutic journey, career implications if any and the benefit versus cost of keeping a focus on the past.

ACA Code of Ethics (2014) gives the following guidance:

1.2.a. Informal Resolution

When counselors have reason to believe that another counselor is violating or has violated an ethical standard and substantial harm has not occurred, they attempt to first resolve the issue informally with the other counselor if feasible, provided such action does not violate confidentiality rights that may be involved.

1.2.b. Reporting Ethical Violations

If an apparent violation has substantially harmed or is likely to substantially harm a person or organization and is not appropriate for informal resolution or is not resolved properly, counselors take further action depending on the situation. Such action may include referral to state or national committees on professional ethics, voluntary national certification bodies, state licensing boards, or appropriate institutional authorities. The confidentiality rights of clients should be considered in all actions. This standard does not apply when counselors have been retained to review the work of another counselor whose professional conduct is in question (e.g., consultation, expert testimony).

1.2.c. Consultation

When uncertain about whether a particular situation or course of action may be in violation of the *ACA Code of Ethics*, counselors consult with other counselors who are knowledgeable about ethics and the *ACA Code of Ethics*, with colleagues, or with appropriate authorities, such as the ACA Ethics and Professional Standards Department.

The ACA and APA codes are identical in the desirability of informal versus formal resolution and stresses the consideration and priority of confidentiality. The ACA code is more instructive on deciding between informal and formal resolution, depending on whether *substantial harm* has occurred to the client.

Legal Considerations

In all cases of ethical violation, the client should consider whether to resolve it without action, by making a complaint to the licensing board or credentialing bodies (ACA, APA), or to institute a civil action for malpractice. If taking civil action is an option under consideration, knowing the statute of limitations is crucial. Most clients will not know this information and it is important for a counselor to have a rough idea of the issue in play so they can inform their client correctly. ***A statute of limitation is a time limit to pursue a legal case against another person.*** If the suspected violation is not of a sexual nature, for example, breach of confidentiality, the statute of limitations for civil actions must be accounted for. Generally, it is one year from the date of the injury. There are discovery considerations in counting the time; the year starts when it is discovered by the client. Thus, if a client did not know that a violation occurred, but found out six months after the violation occurred, then the year would begin on the date of discovery. A good example of this was the ***Roe v. Jefferson*** (Tenn. Supreme Court, 875 S.W.2d 653) where the client was engaged in a sexual relationship with her therapist and then attended a Board hearing and listened to testimony about the inappropriateness of the activity. However, she failed to file a lawsuit until over a year from the time she attended the Board hearing. As the law stood at the time, this client was barred from filing a suit because she missed the statute of limitations, the one-year time bar from the time she discovered the nature of the violation.

If the violation is sexual in nature, TCA §29-26-xxx will likely be the basis of a lawsuit. Perhaps in reaction to the ***Roe v. Jefferson*** case, the Tennessee legislature passed TCA §29-26-xxx, the Therapist Sexual Misconduct Compensation Act. This legislation, among other things extended the statute of limitations:

29-26-208. Statute of limitations.

(a) The statute of limitations in sexual misconduct actions is two (2) years from the date the alleged injury occurred or is discovered, whichever is later. For purposes of this section, discovery of the alleged injury occurs after therapy ends, the victim is no longer emotionally dependent upon the therapist, and the patient knew or should have known that sexual misconduct by a therapist is unprofessional and harmful to the patient.

(b) Except as provided in subsection (c), no such action shall be brought more than three (3) years after the date of the last communication of any kind between the therapist and the patient.

(c) Where the sexual misconduct involves a minor, the statute of limitations shall be one (1) year after the minor's eighteenth birthday, except that where subsection (a) or (b) would provide for a longer time in which to bring a claim, the provision that provides the longest time in which to bring a claim applies.

The full statute is included in the appendix. The goal of imparting this information is not to give you as a therapist enough legal information to fully advise your client, but rather to apprise you of the issues so that you can correct ***advise your client to seek competent legal advice as soon as possible.*** Laws changes and the attorney will be tasked to know the current law on the subject. The Therapist Sexual Misconduct Compensation Act defines sexual behavior and also

includes liability for non-licensed therapists. The remedies under this statute are some of the most strongly worded remedies in law.

If a client believes they were treated by a non-licensed therapist for a mental health problem, they also have a remedy under Public Chapter 0359 which was enacted in May 2019 and effective July 1, 2019. Under this law, any client that was treated for a mental health issue by a non-licensed therapist can recover any fees spent plus attorney fees in filing a suit. This bill is attached in the appendix.

Minor vs. Adult Client Considerations

As stated above, if you client is an adult, then reporting always is secondary to confidentiality. The client must agree to release you to report formally or informally misconduct on the part of a previous therapist. When the client is an adult, but the offenses occurred when they were a minor, it remains that any reporting is subject to your now-adult client's permission. No exceptions to this.

When a client is a minor, there are two lines of thought that you should take:

- A. Did the therapist misconduct constitute child abuse or neglect that must be reported?
- B. If the therapist misconduct did not constitute abuse, the parents hold the decision about breaking confidentiality.

Resources

The website <https://www.therapyabuse.org/resources.htm> is focused on therapist abuse and gives twelve options for a client involved in a sexual relationship with a therapist:

- File a civil suit for damages
- File a licensure complaint
- Write or call the ex-therapist
- Arrange for private compensation for damages
- File a criminal complaint (limited to states that have criminalized)
- Seek individual or group therapy
- Request a confrontation or processing session (with a qualified mediator)
- Seek compensation from a victims' fund (limited to states and organizations that maintain such funds)
- File a complaint with the ethics committee of a professional association
- Notify the employer, agency director, or church hierarchy (in the case of clergy practicing psychotherapy)
- Report to county or state authorities
- Do nothing

Note that in Tennessee there is no criminal action for therapist-client sexual interactions. However, the Therapist Sexual Misconduct Compensation Act create multiple civil remedies including:

- (1)** Reasonable economic losses caused by the emotional, mental or physical effects of the sexual misconduct, including, but not limited to:
 - (A)** The cost of counseling, hospitalization and any other expenses connected with treating the harm caused by the sexual misconduct;
 - (B)** Any payments made to the therapist for treatment;
 - (C)** The cost of counseling, hospitalization and any other expenses connected with treating the mental disorder, illness, condition, or symptom for which the patient had sought therapy from the therapist; and
 - (D)** Loss of income caused by the sexual misconduct;
- (2)** Pain and suffering caused by the sexual misconduct, including, but not limited to, psychological and emotional anguish;
- (3)** If the victim is dead, the claimant may seek damages for wrongful death where the victim's death is the result of the physical or emotional harm inflicted upon the victim by the sexual misconduct of the therapist; and
- (4)** Punitive damages as otherwise provided by law.

It should be remembered while there is a statute of limitations on civil cases, there is not a statute of limitations on board actions. Should the client decide to take action against an offending therapist by filing a complaint against the therapist with their licensing board, such action is not time-barred.

Appendices**[TOC](#)****A. Therapist Sexual Misconduct Act****Appendix A: Therapist Sexual Misconduct Act (TCA §29-26-xxx)****29-26-201. Short title.**

The title of this part is, and may be cited as, the "Therapist Sexual Misconduct Victims Compensation Act."

29-26-202. Intent.

It is the intention of the general assembly to provide victims of sexual misconduct by a therapist with a legal remedy, including significant compensatory damages and a more reasonable statute of limitations. It is intended to prevent sexual misconduct by a therapist by imposing significant liability upon any therapist who engages in this type of misconduct. This is necessary due to the inadequacy of the current system of malpractice where the statute of limitations fails to address the specific problems associated with sexual misconduct by a therapist. This part also clarifies the legal landscape and attempts to prevent most instances of sexual misconduct by making employers liable if they refuse to take simple and reasonable steps to avoid endangering their patients.

29-26-203. Definitions.

As used in this part, unless the context otherwise requires:

- (1) "Claimant" means any of the following;
 - (A) The victim;
 - (B) The parents of the victim where the victim is still a minor;
 - (C) The legal guardian of the victim if the victim is not competent to assert such victim's legal rights; or
 - (D) The spouse of the victim where the sexual misconduct occurred while the spouse and the victim were married;
- (2) "Deception" means the representation that sexual actions are part of or consistent with the patient's treatment by the therapist;
- (3) "Emotionally dependent" means that the patient's emotional condition is such that the therapist knows or has reason to know that the patient is not competent to give consent to sexual advances due to the relationship which the therapist and patient have developed in the course of treatment by the therapist;
- (4) "Employer" means any person or entity that employs any therapist for the purpose of providing therapy;
- (5) "Patient" means a person who has obtained therapy from a therapist. For purposes of this part, "patient" encompasses both current and former patients of a therapist;
- (6) "Sexual behavior" means sexual activity of the victim other than the sexual act or acts at

issue in the case;

(7) "Sexual misconduct" means any of the following, regardless of the consent of the patient:

(A)

(i) Any intrusion into an opening of the patient's body by any part of the therapist's body, or an object used by the therapist to effect an intrusion for the purpose of sexual arousal or gratification;

(ii) Any intrusion into an opening of the therapist's body by any part of the patient's body, or an object used by the patient to effect an intrusion for the purpose of sexual arousal or gratification where the therapist has consented to the conduct verbally or by acquiescence;

(iii) Touching of the patient's body by the therapist for the purpose of sexual arousal or gratification; or

(iv) Touching of the therapist's body by the patient for the purpose of sexual arousal or gratification where the therapist has consented to the conduct verbally or by acquiescence;

(B) Sexual misconduct includes attempts by the therapist to engage in the conduct described in (A)(i) through (iv), inclusive; and

(C) Conduct which is part of standard medical treatment shall not constitute sexual misconduct if the therapist is legally permitted and qualified to perform such medical treatment;

(8) "Therapist" means any person who performs therapy regardless of whether the person is licensed by the state; and

(9) "Therapy" means action by a person who represents that the person is and does practice the professional treatment, assessment, or counseling of a mental or emotional disorder, illness, condition or symptom. "Therapy" includes, but is not limited to, marital counseling, substance abuse treatment, and family counseling. Therapy begins the first time the patient seeks the therapist's assistance as a therapist. "Therapy" includes services provided without charge if they otherwise meet the definition.

29-26-204. Elements.

A cause of action for sexual misconduct exists for a claimant where the sexual misconduct occurred:

(1) During the time when the patient was receiving therapy from the therapist; or

(2) After the patient has stopped receiving therapy from the therapist if the patient is still emotionally dependent upon the therapist or the sexual misconduct was the result of deception; or

(3) Both (1) and (2).

29-26-205. Exceptions.

A therapist does not violate §29-26-204 if the patient is:

- (1) The spouse of the therapist and was married to the therapist prior to the establishment of the therapist-patient relationship; or
- (2) The sexual relationship began prior to the establishment of the therapist-patient relationship.

29-26-206. Employer liability.

(a) An employer of a therapist may be liable under §29-26-204 if sexual misconduct occurred as provided in §29-26-204, and either of the following applies:

- (1) The employer fails to take reasonable action when the employer knows or has reason to know that the therapist has engaged in sexual misconduct with any patient; or
- (2) The employer fails to make inquiries of a former employer concerning past sexual misconduct of the therapist and the:

- (A) Former employer's name and address has been disclosed to the employer;

- (B) Therapist was employed by the former employer as a therapist within five (5) years of the date of employment as a therapist for the employer and during the period of prior employment the therapist engaged in sexual misconduct.

(b) An employer or former employer of a therapist may be liable under §29-26-204 if:

- (1) Sexual misconduct occurred as provided in §29-26-204;
- (2) The employer or former employer receives a written request from another employer or prospective employer concerning sexual misconduct by the therapist;
- (3) The employer or prospective employer is considering the therapist for a therapist position; and
- (4) The employer or former employer knows or has reason to know of the sexual misconduct and fails or refuses to disclose to the requesting employer the occurrence of sexual misconduct by the therapist.

(c) An employer or former employer who gives information concerning sexual misconduct by a therapist when presented with a request for such information by a prospective employer of the therapist is absolved from any legal liability due to the therapist's failure to find employment or damage to the therapist's reputation as a result of the information provided, unless the information is false and the reporting employer knew or should have known that the information was false.

(d) Nothing in this section is intended to affect in any way the application of employer liability if such liability rests upon negligence by the employer in supervising the therapist or where the scope of employment would encompass the sexual misconduct.

29-26-207. Evidence of sexual conduct.

In an action for sexual misconduct, the victim's sexual history is not admissible as evidence except to prove that the sexual behavior occurred with the therapist prior to the provision of

therapy to the patient by the therapist. During discovery, only evidence of the victim's sexual history which is relevant to a determination of the timing of the sexual relationship between the parties is discoverable.

29-26-208. Statute of limitations.

(a) The statute of limitations in sexual misconduct actions is two (2) years from the date the alleged injury occurred or is discovered, whichever is later. For purposes of this section, discovery of the alleged injury occurs after therapy ends, the victim is no longer emotionally dependent upon the therapist, and the patient knew or should have known that sexual misconduct by a therapist is unprofessional and harmful to the patient.

(b) Except as provided in subsection (c), no such action shall be brought more than three (3) years after the date of the last communication of any kind between the therapist and the patient.

(c) Where the sexual misconduct involves a minor, the statute of limitations shall be one (1) year after the minor's eighteenth birthday, except that where subsection (a) or (b) would provide for a longer time in which to bring a claim, the provision that provides the longest time in which to bring a claim applies.

29-26-209. Damages.

The claimant may recover for damages caused by the sexual misconduct. Such damages include, but are not limited to:

(1) Reasonable economic losses caused by the emotional, mental or physical effects of the sexual misconduct, including, but not limited to:

(A) The cost of counseling, hospitalization and any other expenses connected with treating the harm caused by the sexual misconduct;

(B) Any payments made to the therapist for treatment;

(C) The cost of counseling, hospitalization and any other expenses connected with treating the mental disorder, illness, condition, or symptom for which the patient had sought therapy from the therapist; and

(D) Loss of income caused by the sexual misconduct;

(2) Pain and suffering caused by the sexual misconduct, including, but not limited to, psychological and emotional anguish;

(3) If the victim is dead, the claimant may seek damages for wrongful death where the victim's death is the result of the physical or emotional harm inflicted upon the victim by the sexual misconduct of the therapist; and

(4) Punitive damages as otherwise provided by law.

29-26-210. Construction.

The provisions of this part are declared to be remedial in nature and the provisions of this part shall be liberally construed to effectuate its purposes.

B. Unlicensed Practice

AN ACT to amend Tennessee Code Annotated, Title 29; Title 33; Title 63 and Title 68, relative to mental health disorders.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE

SECTION 1. Tennessee Code Annotated, Title 29, Chapter 34, Part 2, is amended by adding the following as a new section:

(a) For the purposes of this section

(1) "Mental health disorder" means a serious psychological condition, including, but not limited to, major depressive disorder, anxiety disorder, psychosis, bipolar disorder, personality disorder, and post-traumatic stress disorder, or any disorder found in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders; and

(2) "Psychotherapy" means an intervention for a mental health disorder by a licensed mental health professional.

(b)(1) A consumer is entitled to care from a competently qualified person when receiving care for a mental health disorder.

(2) A license is required under title 63 for a person to competently treat a mental health disorder. An unlicensed person is not competent to provide services that fall within any scope of practice for which a license is required under title 63 for treatment of a mental health disorder, and such treatment is illegal.

(c)(1) An unlicensed person may be civilly liable to the client if the unlicensed person knowingly offered psychotherapy services to treat a mental health disorder without being licensed as a mental health provider.

(2) The client may maintain an action to recover damages for the unlicensed psychotherapy treatment of a mental health disorder, including consideration paid to the unlicensed person, costs in recovering consideration paid, and reasonable attorney's fees as determined by the court.

(d) The following persons are exempt from this section:

(1) Clergy who are not being compensated on a fee-for-service basis;

(2) Students and practitioners in training when the student or practitioner is under the lawful supervision of a licensed healthcare professional;

(3) Persons holding a license under title 63 when acting within the lawful scope of practice;

(4) An unlicensed person operating under the supervision of a person holding a license under title 63, providing counseling or therapy services in a correctional facility;

(5) Any service provider at a homeless shelter, licensed behavioral health residential facility, hospital, or any state-operated agency or facility;

(6) State-contracted mobile crisis responders;

(7) An unlicensed person operating under the supervision of a person holding a license under title 63 providing counseling or therapy services in a community mental health center; and

(8) Any person providing peer counseling or social services not on a fee-for-service basis.

(e) This section does not expand or restrict the scope of practice for any person holding a license under title 63.

C. SECTION 2. This act shall take effect July 1, 2019, the public welfare requiring it.