

# The Law of Sexual Misconduct

## Lesson Three

### The Law of Sexual Misconduct

- 1) The criminalization of sexual misconduct in counseling and pastoral ministry has begun.
- 2) The failure of the church to control their harmful members, especially their sex-abusing members, invites the legal control the church detests.
  - a) Over half the lawsuits and legal actions against all counselors are for some form of sexual misconduct; over two-thirds of these actions are successful.
  - b) Only 1 to 5 percent of therapeutic sexual abuse is reported.
- 3) Traditional legal barriers to suit success, especially those that have historically protected the church, are increasingly being overcome.

### Civil Liability for Sexual Misconduct

- 1) Civil lawsuits under tort and related law.
  - a) The most well-known form of legal action against an abusing counselor is the tort-based civil lawsuit.
  - b) The basis for the malpractice—the failure to maintain a minimal standard of psychotherapeutic care—is mishandling of the therapeutic transference.
    - i) Transference denotes a patient's emotional reaction to a therapist and is “generally applied to the projection of feelings, thoughts, and wishes onto the analyst, who has come to represent some person from the patient's past.”
- 2) Blocks to winning suits.
  - a) Credibility.
    - i) Presumption of honesty and integrity given the professional.
    - ii) Stigmas attached to mental patient status—mental instability, lack of credibility, and impugned motives cast in the guise of hostile transference.
    - iii) Difficult to overcome these presumptions on the testimony of one victim.
  - b) Consent to sex.
    - i) Not only have to prove the four elements of malpractice (duty, breach of duty, harm, and causation); have to prove they did not consent to sexual relations
    - ii) True consent if only possible between adults on equal standing, something that does not exist in professional therapy relations where the therapist holds greater power over the client.
    - iii) Courts are beginning to deny that consent is valid when done in the context of therapy.
    - iv) Sex after termination.
      - (1) If sufficient time has passed.
      - (2) Therapy not terminated for the purpose of another kind of relationship.
  - c) Statute of limitations.
    - i) Often statute of limitations runs out before client realizes the damage.

- ii) Exception that allows the statute to begin running only after the plaintiff becomes aware of the harm.
- d) Difficulties with traditional tort standards (lawsuits based on other legal theories).
  - i) Infliction of emotional distress.
    - (1) Emotional injury with “physical impact.”
    - (2) Evidence that the defendant’s conduct was “outrageous” and the mental/emotional harm “severe.”
  - ii) Breach of contract.
    - (1) Most contract-based suits revolve around issues of promise of gain or cure, lack of risk, and treatment superiority.
    - (2) Sexual misconduct a case of breach of the inherent duties to good faith and fair dealing that undergird all contract relations.
  - iii) Breach of fiduciary duty.
    - (1) Duty to act always in the best interests of the one served, never taking advantage of that trust nor advancing personal interests.
    - (2) Duty is grounded in the special trust and confidence placed in the professional by the client and the power to abuse that trust with devastating consequence.
    - (3) A fiduciary trust standard demands that the client’s or parishioner’s interests are held above all others at all times in the helping relationship.
    - (4) Fiduciary trust, as a unifying concept and as law that is friendly to biblical standards, could allow the church to forge the lead in establishing right standards.

## **Criminal Liability**

- 1) Criminal liability is increasingly being attached to sexual misconduct in psychotherapy.
- 2) By 1993, eleven states had criminalized sexual misconduct between counselors and clients:
  - a) Minnesota, Colorado, North Dakota, California, Maine, Florida, Michigan, New Hampshire, Rhode Island, and Wyoming.
  - b) In 1994, Texas criminalize sexual misconduct, wrapping the church and its ministers under its sweeping jurisdiction.
  - c) It is likely that sexual misconduct will be criminalized throughout most of America early in the new millennium.
- 3) California.
  - a) Makes it a crime for a “psychotherapist, or any person holding himself or herself out to be a psychotherapist, to engage in sexual intercourse, sodomy, oral copulation, or sexual contact with a patient or client, or with a former patient or client when the relationship was terminated primarily for the purpose of engaging in those acts.”
  - b) Bars the consent defense and requires at least a two-year waiting period before therapist-patient sex might be deemed allowable.
- 4) Colorado.
  - a) Applies to anyone doing psychotherapy and defines therapy so broadly that pastoral counselors would easily come under this rule.
  - b) Sexual penetration is aggravated sexual assault and can lead to an eight year prison sentence.
  - c) The same act in Minnesota, criminal sexual conduct in the third degree, is punishable by up to ten years in prison with fines up to \$20,000.

- 5) Wisconsin.
  - a) Includes any “physician, psychologist, social worker, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed by the state who performs or purports to perform psychotherapy.”

### **The New Texas Sexual Exploitation Statute**

- 1) Requires strong action in the face of abuse allegations and requires that employers do thorough background checks—looking for sexual abuse histories going back at least five years in a prospective employee’s work life.
- 2) Pastors and churches are required to do the same with all new employees and are subject to the same criminal penalties as nonchurch organizations if they do not.
- 3) The law criminalizes “making sexually demeaning comments to or about an individual’s sexual orientation—a vague standard that may be easily twisted to prosecute Christian counselors who honorably challenge homosexual lifestyles and behavior.
- 4) Texas authorities can imprison a counselor for asking a client for a date or for asking for a client’s sexual history” when not necessary for counseling of the individual.”
- 5) This legislation is the result of frustration about the high rate of abuse and misconduct going on in churches and the failure of many churches to cooperate with the state and take serious action to protect victims.
- 6) If churches refuse to work voluntarily with states to control problems of sexual misconduct, they will be forced to comply with laws that will be coercive, unwanted, and far more oppressive than if the churches themselves had put effective policies in place.

### **Sexual Misconduct Reporting**

The criminalization of sexual misconduct has led to various reporting schemes regarding adult victims.

- 1) The Minnesota Mandatory Model.
  - a) Mandates therapist reporting of sexual misconduct if reported by a client.
  - b) Immune from legal action for good-faith reporting; liable to the state for failing to report as required to the appropriate state licensing board.
- 2) The California Consultative Model.
  - a) The therapist acts as a consultant to client decision-making and action.
  - b) The therapist is required to review four action options with a client, but the victim retains control of whatever action he or she takes, including the choice of no action.
- 3) The Wisconsin Discretionary Model.
  - a) The therapist seeks the client permission to allow reporting of sexual misconduct.
  - b) If the client does not allow it, the therapist does not report it.

### **Conclusion**

- 1) Criminalizing sexual misconduct fails at three critical points:
  - a) It is not likely to deter the sexual predator, who must be stopped, but rather will drive predatory behavior into deeper darkness.

- b) It paralyzes constructive victim action, which is crucial to both therapeutic recovery and justice.
  - c) It tempts states to overreach their just authority and oppressively impinge upon legitimate professional autonomy and church ministry.
- 2) There is a need for outer control and inner transformation in response to the sexual misconduct crisis.
    - a) Legal and ethical liabilities are expressions of the outer control necessary to check harmful action at the threshold of wrongdoing.
    - b) Criminal sanction is the harshest and most serious response possible by the state to the sexual misconduct epidemic.
  - 3) For the nonpredatory offender and at-risk minister, the criminalization of this behavior may serve as a necessary shower of cold water to deter sexual misconduct.
  - 4) For predators, prison and criminal punishment may be the just dessert for their corrupted actions.