

**CSC FOR MENTAL HEALTH
PROFESSIONALS**

**House Bill 4525 as enrolled
Public Act 505 of 2000
Third Analysis (1-30-01)**

**Sponsor: Rep. Jon Jellema
House Committee: Criminal Law and
Corrections
Senate Committee: Judiciary**

THE APPARENT PROBLEM:

The therapeutic relationship between mental health professionals and their patients requires a degree of trust and intimacy that rarely, if ever, occurs in other professional relationships. Unfortunately, some mental health professionals abuse these relationships by using their position as emotional counselor to seduce their clients. Surveys have shown that 53 percent of all complaints against psychiatrists involve sexual misconduct, and between 44 and 65 percent of therapists report having treated a patient who had sexual contact with a prior therapist. Although, according to the American Psychological Association, "all major mental health organizations recognize the unethical nature of sexual involvement with patients", current laws and professional disciplinary measures have been insufficient to resolve this problem. Due to the potential for exploitation and abuse in counseling situations, it has been suggested that the criminal sexual conduct laws be changed to provide stricter and more certain punishment for those counselors who take sexual advantage of their patients.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Penal Code to extend fourth-degree criminal sexual conduct (CSC) penalties to sexual contact by a "mental health professional" with a client or patient. "Mental health professional" would mean that term as defined in the Mental Health Code (an individual who is trained and experienced in the area of mental illness or developmental disabilities and is one of the following: a physician, psychologist, or registered professional nurse licensed to practice in Michigan; a certified social worker, social worker, or social worker technician registered in Michigan; a licensed professional counselor licensed to practice in Michigan; or a licensed marriage and family therapist).

Under the Penal Code, a person is guilty of fourth-degree CSC if he or she engages in sexual contact with another person under specified circumstances. The bill would add a situation in which the actor was a mental health professional and the sexual contact occurred during or within two years after the period in which the victim was the mental health professional's client or patient, and the victim was not his or her spouse. Fourth-degree CSC is a misdemeanor punishable by up to two years' imprisonment, a maximum fine of \$500, or both.

The bill also would amend the definition of "sexual contact", which currently includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. Under the bill, "sexual contact" would include that intentional touching if it were done for sexual arousal or gratification, done for a sexual purpose, or done in a sexual manner for revenge, to inflict humiliation, or out of anger.

MCL 750.520a and 750.520e

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, to the extent that the bill led to increased numbers of offenders receiving prison or jail sentences, or increased the lengths of sentences, it would increase costs for the state or local units of government. To the extent that it increased collections of penal fines, it would increase penal fine revenues going to local libraries under Article VIII, section 9 of the state constitution. (1-30-01)

ARGUMENTS:

For:

As fifteen other states have done, Michigan should criminalize a particularly heinous type of abuse, one that is all too common and all too rarely punished. Sexual misconduct by mental health professionals is an abuse of power, an exploitation of vulnerability and use of undue influence. To that extent the instances of such misconduct parallel incest. Mental health professionals occupy a position of trust and authority over those whom they are counseling. The people who seek counseling are particularly vulnerable because of the intimacy and dependency that is usually part of a counseling relationship. As a result, many victims of such abuse feel powerless to resist the advances of their counselors; thus their apparent consent is not fully knowing and voluntary as it might be between two persons who were not in a therapeutic relationship. Under current law, many counselors who have sexually abused their clients are able to avoid successful prosecution by asserting that the victim consented or did not object. By eliminating consent as a defense these bills will protect people who seek counseling and have their faith and/or their trust abused by the person who is supposed to be helping them.

Surveys have found that the effect of sexual contact between a patient and a counselor is almost always negative. Some 90 percent of the people who have had sexual relations with their therapists have suffered harm – ranging from feelings of guilt, post traumatic stress disorder, emptiness and isolation, sexual confusion, impaired ability to trust, boundary and role confusion, emotional lability, suppressed rage, and increased suicidal risk and cognitive dysfunction, to psychiatric hospitalization, attempted and even successful suicide. In addition, the problems that caused the person to seek help are often exacerbated. These victims may also suffer physical problems ranging from mild physical problems such as headaches and nausea to ulcers, chronic fatigue, and the development of long-term physically debilitating physical problems.

Against:

While the consent of a child in cases of child sexual abuse or incest may justifiably be ignored, it is a different matter entirely to claim that an adult lacks the capacity to consent. Even if some or even most people who seek therapy are in such weakened condition that their capacity to give consent may be limited, it is wrong to suggest that all adults who seek emotional or psychological counsel lack the capacity to legitimately

give consent to sexual activity. This is an issue that clearly should be determined on a case by case basis. That a person later came to regret or feel foolish for having granted the consent should not be sufficient to vitiate his or her consent.

Response:

According to the American Psychological Association, many consider the dynamics of the therapist-patient relationship itself to vitiate consent in what otherwise appear to be consensual relationships. Others argue that consent is irrelevant, arguing that therapy is a fiduciary relationship in which “it is the duty of the therapist to attend only to the needs of the patient and to do no harm”.

Against:

Undoubtedly, there should be protections against counselors who intentionally betray the trust of their clients and act in a sexually predatory manner. However, the bill assumes that all sexual contact between a counselor and a client is predatory. What if a counselor falls in love with one of his or her clients and the client returns those feelings and this leads to a sexual relationship between the two people? And what if, after a time, the person who was being counseled changes his or her mind about the relationship, end its and concludes that his or her feelings were clouded by the other person’s position as counselor? Under the bills, if the counseled person chooses to prosecute, the counselor could spend two years in prison. It may be argued that the counselor should have known better and should have recognized that the client’s (or even his or her own) feelings could be influenced by the therapy relationship. But the question is whether the harsh criminal punishment provided in this bill is warranted where the counselor’s behavior was foolish or naive, rather than intentionally predatory. It is more appropriate that such behavior be dealt with by professional ethical standards.

Furthermore, it is unfair to make such behavior a criminal offense for an emotional or psychological counselor, but not for a professor, lawyer or other professional.

Response:

In life, mature adults often are faced with difficult choices; in this case, a mental health professional must choose between maintaining the ethical standards of his or her profession, and his or her desire to have a personal relationship with a particular person. This is no more onerous than the demands other professions may make upon their members. Certain behavior is just not appropriate in certain circumstances. What is more, in this case, inappropriate behavior may well lead to

harming the other person, and that is appropriately punished as a criminal offense. Finally, it is likely that the legislation would provide a powerful deterrent against the proscribed behavior, rather than actually leading to imprisonment of mental health professionals.

Against:

The bill lacks the scope to help many victims of this type of abuse. An earlier version of the bill would have applied not only to mental health professionals, but to members of the clergy as well. The same risks of harm to the victim exist in instances where a member of the clergy engages in sexual activity with a church member who has sought counseling. According to a 1984 study of 300 Presbyterian, 302 Methodist, 404 Assembly of God, and 190 Episcopalian clergy, 38.6 percent admitted to having had inappropriate sexual contact of some kind with a church member, and 76.5 percent claimed to know of a minister who had sexual intercourse with a church member. Another 1988 survey found that 12 percent of the ministers interviewed admitted to having engaged in intercourse outside of marriage, and 17 percent of these ministers admitted to having had intercourse with someone they were counseling. By not requiring that members of the clergy face the same possibility of criminal charges, an entire subgroup of these types of victims will continue to have only minimal recourse against their abusers.

Furthermore, the bill should have a higher penalty. The bill would be more effective if the crime were third degree CSC, which carries a penalty of up to 15 years imprisonment.

Against:

The bill is overly broad in its application and could result in unwanted or unfair results. For example, any mental health professional who engages in a sexual relationship with a former client within two years of the end of the emotional or mental health service or treatment relationship is guilty under the bill's provisions, regardless of the duration of the treatment relationship. Thus, a person who offered one, two, or three hours of treatment or services and a year and half later entered into a sexual relationship with the former client would be guilty of criminal sexual conduct.

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