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STATE OF WISCONSIN

BEFORE THE PSYCHOLOGY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY

PROCEEDINGS AGAINST

ANDREW W. KANE, Ph.D.,	**FINAL DECISION AND ORDER**
RESPONDENT.	**[Case No. LS 9805081 PSY]**

The parties to this proceeding for the purposes of Wis. Stats. § 227.53, are:

Andrew W. Kane, Ph.D.
2726 E. Newberry Boulevard
Milwaukee, WI 53211

State of Wisconsin
Psychology Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin
Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A hearing in this matter was conducted on November 17, 18, 19, 23, 24, and December 14, 1998. The respondent, Andrew W. Kane appeared personally and by his attorney, Paul R. Erickson, Gutglass, Erickson, Bonville, S.C., 735 North Water Street, Suite 1400, Milwaukee, Wisconsin. The complainant appeared by attorney, John R. Zwieg, Department of Regulation and Licensing, Division of Enforcement, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708. A transcript of each day of the hearing was prepared and filed. Written closing statements were submitted, the last of which was received on January 19, 1999.

Pursuant to an *Order Granting Motion* entered by the Psychology Examining Board under date of July 1, 1998, pursuant to Wis. Stats. § 227.46(3), the decision of the administrative law judge in this proceeding constitutes the final decision of the board. Accordingly, on the basis of the entire record, the administrative law judge hereby adopts as the final decision in this proceeding the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Andrew W. Kane, Ph.D., the respondent herein (DOB 11/3/44), is currently licensed and registered as a psychologist in the state of Wisconsin, pursuant to license number 439, which was first granted on January 21, 1972.

2. Dr. Kane's most recent address reported to the Department of Regulation and Licensing is 2726 E. Newberry Boulevard, Milwaukee, Wisconsin 53211.

3. Ms. A received an undergraduate degree in art education from the University of Wisconsin-Milwaukee in 1965, and was an art teacher at the Milwaukee Area Technical College from approximately 1965-66 to approximately 1972-73.

4. Ms. A entered into individual psychotherapy with another psychologist, Dr. Goldsmith, for marriage counseling in the fall of 1971. At that time, Ms. A had two children, ages 7 and 10.

5. Dr. Goldsmith sexually exploited Ms. A for several years, beginning in February 1972. Ms. A continued to see Dr. Goldsmith for psychotherapy into 1978 and the sexual exploitation by Dr. Goldsmith continued to that time. Among other things, Dr. Goldsmith suggested that Ms. A, who was then married, should have encounters with multiple partners as part of her therapy, which Ms. A did.

6. During 1972 and 1973, Dr. Kane practiced psychology at the Counseling Center in Milwaukee, Wisconsin.

7. From 1972 through 1974, Ms. A was a graduate student in educational psychology at the University of Wisconsin - Milwaukee, and received a master's degree in December 1974.

8. During the first semester of the 1972-1973 school year, Ms. A took a fieldwork counseling course with a placement at the Counseling Center where Dr. Kane was practicing.

9. In the fall of 1972, Dr. Kane and Ms. A engaged in sexual intercourse on two occasions at his home. The two encounters occurred within a two-week period. At the time Dr. Kane was single, and had not been previously married. Ms. A initiated the sexual encounters and claims that she did so on the basis of Dr. Goldsmith's suggestion that she engage in intercourse with multiple partners. Dr. Kane was not aware that Ms. A was seeing Dr. Goldsmith, nor that she was acting upon Dr. Goldsmith's recommended "therapy". Dr. Kane refused to have further sexual encounters with Ms. A after their second occasion. Since that time, and up to the present, Dr. Kane and Ms. A have not engaged in sexual intercourse or any other sexual conduct between themselves.

10. During the second semester of the 1972-1973 school years, Ms. A took a supervised practicum at the Counseling Center under Dr. Kane's supervision.

11. Ms. A and Dr. Kane had no further contacts of any kind from August 1973 through the spring of 1983.

12. In 1978, the relationship between Ms. A and Dr. Goldsmith was terminated. In 1979, Ms. A complained to the Department of Regulation and Licensing and the Psychology Examining Board about having been sexually exploited by Dr. Goldsmith. In February 1982, the Psychology Examining Board based upon Ms. A's complaint disciplined Dr. Goldsmith.

13. In January 1981, Ms. A was involved in an automobile accident, resulting in a concussion and eye and neck injuries. Resulting physical problems included memory impairment, an inability to concentrate, and interference with her ability to do her art due to a problem in perceiving colors.

14. On April 29, 1983, Ms. A attended the Wisconsin Psychological Association's Spring conference, which was titled "Sexual Abuse: In Every Aspect of Our Lives." At that conference, a member of the Psychology Examining Board gave a presentation on "Sexual Abuse in the Professional Office" and during the presentation described the disciplinary process. At that point, Ms. A stood and disclosed that she had been sexually exploited by a psychologist (Dr. Goldsmith) and that she was disappointed with the manner in which the Department of Regulation and Licensing and the Psychology Examining Board had handled her complaint of that exploitation.

15. Dr. Kane was also at the April 29, 1983 conference and heard Ms. A's remarks. During a break in the conference, Dr. Kane approached Ms. A and they talked.

16. In June 1983, Ms. A wrote a letter to Dr. Kane. In the letter, she acknowledged their discussion of April 29, 1983 and congratulated Dr. Kane on his election as president of the Wisconsin Psychological Association.

17. Ms. A's letter to Dr. Kane also included a copy of testimony she had provided before the legislature on June 6, 1983 on a bill to criminalize the sexual exploitation of patients by therapists. Patient A's testimony was compelling and provided an articulate description of the personal toll suffered by victims of sexual assault by therapists. Part of her testimony, copied to Dr. Kane, stated:

> ". . . I was psychologically coerced into sex acts with him (Dr. Goldsmith) when I was emotionally stripped and vulnerable. Immediately after the assault under these conditions, I went through a radical character change. I became suicidal, drank heavily, slept continually and withdrew from my life activities."

She further indicated that her attempts to obtain assistance from various therapists had been unsuccessful, stating in part:

> "My experience with counselors was as frustrating as trying to find justice. After being propositioned by the first male therapist and blamed by the second, I attempted to get help from female counselors.

Two very good ones could not work with me because one knew my daughter and the other left the agency. Her replacement was so defensive about the profession that she could not respond to me. I talked to another woman a couple of times on the phone to build a trust, and when I told her the therapists name she immediately communicated with him because he was her therapist, too. One discounted my feelings; another projected her anger onto me. Others acted uneasy or unconcerned. Finally, I gave up trying to find a counselor."

18. Dr. Kane wrote back to Ms. A on June 18, 1983, stating in part:

"I very much wanted to continue our brief discussion of what you'd gone through, particularly in light of the info. you added when (the Psychology Examining Board member) was speaking (on April 29, 1983). . . .

"Since we spoke April 29th, I've often found myself wishing you had called me years ago so that the problem could have been addressed long ago, hopefully with a different ending from the present one. If I can do anything further personally, please call me so we can get together. . . ."

19. On June 25, 1983, Ms. A and Dr. Kane talked by telephone about the possibility of Ms. A entering into psychotherapy with Dr. Kane. During the conversation, Ms. A indicated that a therapist beginning in 1972 had sexually assaulted her. Dr. Kane's notes of the conversation indicate Ms. A had "became suicidal, tried a few times". His notes go on to indicate that Dr. Kane discussed the pros and cons that their prior relationship could have on therapy, suggesting that it could make it easier for Ms. A to "open up", but that it could also pose an impenetrable barrier to successful therapy. Ms. A indicated that she recalled her prior relationship with Dr. Kane as positive and that she believed that would help. Nevertheless, Ms. A said she would call Dr. Kane if and when she wanted further contacts with him, but that she would like to become friends again. Dr. Kane indicated that they could not be "friends", if she decided to enter into a therapeutic relationship with him.

20. On October 11, 1983, Ms. A and Dr. Kane had another telephone conversation. Dr. Kane's notes indicate in part that Ms. A said: "I've tried to do everything with some success and some failure and I've reached the end of my rope". His notes further indicate that Ms. A's voice broke. Dr. Kane testified Ms. A sounded very distraught.

21. On October 12, 1983, Ms. A told Dr. Kane that she wanted to begin therapy with him. She and Dr. Kane again discussed the pros and cons of entering into a therapeutic relationship given their past personal relationship. She told him that he was the only therapist that she could trust; that she had nowhere else to turn; that she could not go on living feeling the way she did; and that she was suicidal. It was agreed that Dr. Kane would begin to provide Ms. A with therapy, but that further therapy would be re-evaluated after one month.

22. Dr. Kane's initial diagnoses of Ms. A were dysthymic disorder and posttraumatic stress disorder.

23. Ms. A remained in therapy with Dr. Kane through January 27, 1987.

24. On October 13, 1983, Dr. Kane consulted with another psychologist, Dr. Mark Ackerman, regarding whether or not he should agree to provide therapy to Ms. A. Dr. Kane disclosed to the psychologist his sexual relationship on two occasions in "1973 or 74" with Ms. A, and her nevertheless desiring to enter into therapy with him. Dr. Kane stated that Ms. A had been to other therapists, but that they had all been failures. He also indicated that Ms. A was "on verge of suicide" and she says "she'll give up if (Dr. Kane) closes door" on her. Dr. Kane's notes state that Dr Ackerman said it was "not a great idea" to enter into therapy with Ms A, but would not say not to, given the need to "take suicide threat seriously." Dr. Ackerman also said it was a good idea to establish a one month "trial" period, and to make sure that their past personal relationship was discussed further and then decide as to providing further therapy. Dr. Ackerman told Dr. Kane that he could talk with him in the future about the situation.

25. Dr. Kane scheduled therapy sessions with Ms. A for one hour each week. However, during the first few weeks of the therapy relationship, Ms. A called Dr. Kane 2 to 6 times a day and made unscheduled visits to his office and home. Dr. Kane's office is located in a coach house, about 40 feet from his home.

26. On November 2, 1983, Dr. Kane consulted with Dr. Ackerman about Ms. A's stopping at his house periodically, every several days. Dr. Ackerman said that conduct should be discouraged. Dr. Kane indicated he believed it probably impossible to stop Ms. A from coming to his house, and that he had discouraged it and would continue to do so. He indicated to Dr. Ackerman that demanding she not visit his house could be more detrimental, in that she was a major suicide risk and that anything could trigger it. Dr. Ackerman recommended that Dr. Kane press her harder, if possible, without increasing the threat of suicide.

27. After the call to Dr. Ackerman, on November 2, 1983, Dr. Kane telephoned Ms. A and discussed her frequent visits. Ms. A said she would try to visit less, but that it was "not under her control". Dr. Kane then expressed again the necessity for Ms. A to separate their personal and therapeutic relationship. Dr. Kane's notes indicate that Ms. A then "blew up, raged over the phone for a long time (5+ minutes)". Dr. Kane testified that, seeing the conversation was not productive, told Ms. A that he would call back later and hung up.

28. Dr. Kane and Ms. A talked by telephone later on the day of November 2, 1983. Dr. Kane's notes indicate that Ms. A had "calmed down tho still upset & angry -- but said she'd try again."

29. Dr. Kane talked with Dr. Ackerman again on November 18, 1983. Dr. Kane indicated that he still believed Ms. A might commit suicide unless he continued in therapy with her, and that Ms. A "begs" him not to terminate therapy. Dr. Ackerman raised the question as to whether Ms. A may be engaged in a ploy and manipulating him. Dr. Ackerman also indicated that it was probably not a good idea for Dr. Kane to continue providing therapy, but that he may have no choice given Dr. Kane's belief she would commit suicide without therapy and that the possible dual relationship was the lesser evil. They also discussed setting limits on Ms. A's telephone calls.

30. In a session on November 26, 1983, Dr. Kane placed the following limits on Ms. A's contact with him:

a. No more than 5 telephone calls a day.

b. No more than one hour of contact (telephone calls, unscheduled visits, and messages) per day.

c. May come to office when not scheduled no more than 1 time per day.

d. May stop by his house if she feels very urgent need for contact with him, but only at reasonable times. She could have limited contact with his kids at those times.

e. No calls before 9 a.m. or after 10 p.m., unless urgent.

31. Dr. Kane estimates that he had 2,000 telephone discussions with Ms. A from October 12, 1983 through October 31, 1985, for which he did not charge a fee. Those telephone discussions continued to occur until the end of therapy.

32. Dr. Kane estimates that on 100 occasions from October 12, 1983 through October 31, 1985, Ms. A made drop by visits of Dr. Kane at his office and home for which he did not charge a fee. Those drop by visits continued to occur through the end of therapy. Dr. Kane's office is located in a coach house behind his home.

33. Ms. A planted flower bulbs in Dr. A's garden, while Ms. A was his client. Some, if not all, of these were transplanted plants from the home she had sold in order to save them.

34. On March 30, 1984, while Ms. A was his client and at a time when Ms. A was behind on the mortgage payments and other bills, such as telephone and gas, related to her house, Dr. Kane loaned Ms. A $1,800.00. Ms. A needed the loan in order to postpone or eliminate foreclosure by her bank. Dr. Kane had Ms. A execute a promissory note which was due on September 1, 1985, for that amount with interest at the rate of 15% per annum, with payments to be made monthly, and which provided Dr. Kane a lien on Ms. A's home.

35. Prior to loaning Ms. A the $1,800.00, Dr. Kane discussed the matter with Dr. Ackerman on March 30, 1984. Dr. Ackerman indicated that such a loan was an "awfully big step", and that he would not do it for anyone he had ever seen for therapy, but could not say he never would. Dr. Ackerman suggested that it be handled as a straight business deal, and that they should sign a formal contract.

36. Ms. A never made any monthly payments on the loan. However, Ms. A repaid Dr. Kane the $1,800.00 and interest out of the funds received from the sale of her home on October 31, 1985.

37. On April 21, 1984, Ms. A brought poison (Timik) and some razor blades to Dr. Kane. She indicated she was afraid she would hurt herself if they were too handy.

38. At the times indicated, while Ms. A was his client, Dr. Kane employed Ms. A to provide Dr. Kane with the following services and paid Ms. A the following amounts:

a. February, 1984 Miscellaneous office duties $ 16.25

b. March, 1984 Miscellaneous office duties $ 21.50

c. April, 1984 Miscellaneous office duties $ 20.00

d. November, 1984 Babying-sitting Dr. Kane's children $ 12.00

e. 1985 Photocopying $370.00 (credited on bill)

39. In 1984, the Wisconsin Psychology Association formed the Task Force on Sexual Misconduct by Psychotherapists and Counselors, which was later renamed the Wisconsin Coalition on Sexual Exploitation by Professionals. From its inception, Ms. A was an active member who attended most meetings. Dr. Kane also attended meetings and became the second Chair of the Task Force, serving as such during 1985 - 1989. During the time Ms. A was his client, Dr. Kane provided Ms. A with rides to and from some, if not most, of the meetings.

40. Ms. A drew portraits of Dr. Kane's children and pets in 1986. These portraits were not requested by, nor given to, Dr. Kane. Ms. A also claims to have knit sweaters for Dr. Kane and his children, and to have provided them as gifts while she was Dr. Kane's client.

CONCLUSIONS OF LAW

The Psychology Examining Board has jurisdiction in this proceeding pursuant to Wis. Stats. § 455.09(1).

COUNT I By entering into a psychotherapist-client relationship with Ms. A, with whom Dr. Kane had a prior sexual relationship, Dr. Kane has not practiced psychology in a grossly negligent manner in violation of Wis. Admin. Code § Psy 3.02(2) [1983] and, therefore, is not subject to discipline pursuant to Wis. Stats. §§ 455.09(1)(g) and (h).

COUNT II By entering into a psychotherapist-client relationship with Ms. A, with whom Dr. Kane had a prior sexual relationship, Dr. Kane has not practiced psychology below the minimal standards of the profession and, therefore, is not subject to discipline pursuant to Wis. Stats. § 455.09(1).

COUNT III By engaging in the above conduct and continuing a psychotherapist-client relationship with Ms. A, in the circumstances set out above, Dr. Kane has not practiced psychology in a grossly negligent manner in violation Wis. Admin. Code § Psy 3.02(2) [1983] and, therefore, is not subject to discipline pursuant to Wis. Stats. §§ 455.09(1)(g) and (h).

COUNT IV By engaging in the above conduct and continuing a psychotherapist-client relationship with Ms. A, in the circumstances set out above, Dr. Kane has not practiced psychology below the minimal standards of the profession and, therefore, is not subject to discipline pursuant to Wis. Stats. § 455.09(1).

COUNT V By loaning Ms. A $1,800.00 while Dr. Kane was in a psychotherapist-client relationship with Ms. A, Dr. Kane has not practiced psychology in a grossly negligent manner in violation of Wis. Admin. Code § Psy 3.02(2) [1983] and, therefore, is not subject to discipline pursuant to Wis. Stats. §§ 455.09(1)(g) and (h).

COUNT VI By loaning Ms. A $1,800.00 while Dr. Kane was in a psychotherapist-client relationship with Ms. A, Dr. Kane has not practiced psychology below the minimal standards of the profession and, therefore, is not subject to discipline pursuant to Wis. Stats. § 455.09(1).

COUNT VII By employing Ms. A to work in his office while Dr. Kane was in a psychotherapist-client relationship with Ms. A, Dr. Kane has not practiced psychology in a grossly negligent manner in violation of Wis. Admin. Code § Psy 3.02(2) [1983] and, therefore, is not subject to discipline pursuant to Wis. Stats. §§ 455.09(1)(g) and (h).

COUNT VIII By employing Ms. A to work in his office while Dr. Kane was in a psychotherapist-client relationship with Ms. A, Dr. Kane has not practiced psychology below the minimal standards of the profession and, therefore, is not subject to discipline pursuant to Wis. Stats. § 455.09(1).

ORDER

NOW, THEREFORE, IT IS ORDERED that the Complaint be, and hereby is, DISMISSED.

OPINION

This case concerns a psychologist providing therapy to a client, beginning in 1983, with whom he had had consensual sexual intercourse on two occasions approximately eleven years earlier, in 1972. The board has designated the administrative law judge to be the final decision maker in this case.

The Complaint sets forth four factual bases upon which it is alleged that Dr. Kane engaged in gross negligence and practiced below the minimal standards of the profession. It is charged that Dr. Kane violated professional requirements respecting his client, Ms. A, by:

1. Entering into a psychologist-client relationship with Ms. A, with whom Dr. Kane had had a prior sexual relationship. (Counts I and II).

1. Continuing to provide psychological services to Ms. A, from October 12, 1983 through January 27, 1987. (Counts III and IV).

2. Loaning Ms. A $1,800.00 in March 1984, while she was receiving psychological services. (Counts V and VI).

3. Employing Ms. A in his office while she was receiving psychological services. (Counts VII and VIII).

The charges involve Dr. Kane's conduct from the time he undertook psychological care for Ms. A on October 12, 1983, through the date the professional relationship terminated on January 27, 1987. Accordingly, the complainant's burden of proof given the time frame is clear and convincing evidence. However, many, if not most of the determinative facts in this matter are not in dispute. So in large part it becomes primarily a matter of applying the law as it existed at the time of Dr. Kane's conduct to the facts of this case. Dr. Kane contends the applicable prior law requires dismissal of all charges. The complainant argues to the contrary. This decision concurs with the position of Dr. Kane.

As indicated, each count must be measured under the substantive law as it existed at the time of the conduct alleged, which is essentially from October 12, 1983 through January 27, 1987, the time during which Dr. Kane and Ms. A had a psychologist/client relationship. The current provisions prohibiting undertaking care of client with whom sexual conduct previously had occurred was not adopted until 1992. The question is whether it was nevertheless prohibited in 1983 under other more "general' standards.

Although it may be reasonably argued that Dr. Kane's decision to undertake the psychological care of Ms. A constitutes poor judgment, in my opinion the determination to provide therapeutic services does not rise to the level of either gross negligence or incompetent practice under the standards of the profession as they existed in 1983. In my opinion, the Complaint must be dismissed, as the facts do not clearly and convincingly establish violation of these standards by Dr. Kane.

The primary reasons for this determination are as follows:

1. It has not been clearly and convincingly established that the alleged misconduct was accepted within the professional as unethical at the time it occurred.

2. The sexual relationship between Dr. Kane and Ms. A. occurred 11 years prior to the alleged misconduct commencing in 1983, and then on only two occasions.

3. There has been no clear and convincing showing that Dr. Kane intended to take undue advantage of Ms. A, or exploit her in the professional relationship.

4. Dr. Kane sought professional advice on whether to take Ms. A as a client prior to entering into the therapeutic relationship.

5. Dr. Kane reasonably believed Ms. A to be suicidal at time the professional relationship commenced.

6. Neither Dr. Kane nor Ms. A believed their prior relationship would impair therapy.

7. Ms. A believed that only Dr. Kane could be of assistance to her as others had turned her down or been ineffectual.

One of the primary issues in this proceeding is whether or not Dr. Kane reasonably believed that Ms. A was suicidal upon seeking his care in 1983. Several items suggest that he was so justified, including:

1. In her complaint to the Division of Enforcement, Ms. A, herself, alluded to "several months of suicide attempts in late fall of 1984." (Ex. 14, p. 32.)

2. She also claimed: "Further, according to my records, I was lucky if Kane returned one in four or five of my phone calls -- even when I left a message that I was suicidal." DOE Complaint (Ex 14, pp. 40-41).

3. The health questionnaire completed by Ms. A (Ex. 12. p. 9) indicated she felt hopeless, helpless and suicidal on a range of "10-5", on a scale of 1 through 10, with 10 being the highest.

4. Ms. A admits she was suicidal in 1986, and that there were a couple other periods in her life when she's been suicidal (Transcript, p. 98). She first tried to commit suicide when in therapy with Dr. Goldsmith by cutting her wrists. (T., p. 99). She then did so by taking 20-40 aspirin. She also claimed to have cut her wrists plenty of times while with Dr. Goldsmith. (T., pp.100-1).

5. She informed the DVR that she was suicidal in late 1983 or early 1984. (Ex. 20; T. pp. 196-7).

It is my opinion that Dr. Kane was reasonably justified in believing that Ms. A. may have been suicidal in 1983. Furthermore, there has been no evidence presented that Dr. Kane's decision to undertake Ms. A's care was based upon any inappropriate or unethical consideration.

It must be observed the language in the board's statute and rule are silent regarding whether or not it was a violation of this state's law in 1983 to provide services for a client with whom the psychologist had had a prior

sexual relationship. Accordingly, one must look to expert opinion regarding this issue and the basis upon which they base those conclusions. Given the time devoted by the parties to the American Psychological Association ("APA") standards existing in 1983, it may be concluded that it would not be unreasonable for psychologists to look to the APA standards for professional guidance when the state requirements are either silent or ambiguous.

Principle 6(a) of the American Psychological Association ("APA") Ethics Code [1981] provides:

> "Psychologists are continually cognizant of their own needs and of their potentially influential position vis-à-vis persons such as clients, students, and subordinates. They avoid exploiting the trust and dependency of such persons. Psychologists make every effort to avoid dual relationships that could impair their professional judgment or increase the risk of exploitation. Examples of such dual relationships include, but are not limited to, research with and treatment of employees, students, supervisees, close friends, or relatives. Sexual intimacies with clients are unethical." (Ex. 38).

Dr. Kane testified in part as follows respecting the application of the APA standard to his conduct as to whether or not it was appropriate (T., 295).

> "The answer to your question would depend on the nature of the personal or otherwise relationship; the length of that relationship; whether they had any contact over a lengthy period of time between the request for therapy and the past personal, be it sexual or otherwise, relationship; and a number of other variables. Then the ethical mandate is to talk about it. The therapist can make his own decision, but unless the therapist decides it's absolutely not appropriate, the question becomes one for discussion with the potential patient, and if the conclusion is that from neither end does it appear to be inappropriate, then there was nothing in the code of ethics that said not to proceed."

Dr. Kane indicates that he considered the ethical factors involved in reaching his conclusion to provide treatment to Ms. A.

Gary Richard Schoener, a licensed psychologist in Minnesota testified as follows regarding the professional standards that were in place in 1983 (T. 859-861):

> Q. With your background and -- and the work that you've done on sexual misconduct by therapists, can you tell us was there in place between '83 and '87 a standard that forbade a therapist from providing therapy to a patient with whom that therapist had previously had a sexual experience?
>
> A. No.
>
> Q. In terms of -- of such a scenario, can you describe for us what guidance there was for a therapist back at that time to consider whether or not to take on such a patient?
>
> A. Well, that scenario was rarely, if ever, discussed. The real focus back then was on other aspects of the relationship such as should you treat family members or friends or things like that. The question about a former sexual partner or -- was not typically discussed. It did come into discussion by the late '80's and was often -- would have been one of the hypotheticals presented in a discussion, but in the early '80's that just didn't tend to enter the discussion. To my knowledge, there is nothing written that would have been in the literature before say 1986 that addressed that issue specifically or had any kind of guideline.
>
> Q. So given this lack of information, what was a counselor to do in October of 1983 if confronted with that situation?
>
> A. Well, I -- you know, again here I -- my only way of responding is -- is in some frame and a frame I typically am using is what a reasonable and prudent practitioner would do is hold a discussion about the pros and cons of that and what remains from the previous relationship. As a general rule, if the previous relationship was a -- a long-term one involving sexual contact over a number of years or something, I assume that most practitioners would presume this is probably not a great idea. Doesn't mean that it would always be inappropriate. One of the early caveats and problems that the field of psychology discovered was that most of the codes of ethics originally were not written with rural and small town life in mind. The current code, in fact, actually notes that point; that there are particular issues there, so that some of the attempts at setting up rules in this area have been very difficult because there are enough exceptions that you can't have a general rule. But I would say the bottom line would be to hold a discussion and weigh the pros and cons of the intended relationship. The second rule would be if this because an issue later in the therapy, whatever you did at the time, you might have to say: well, we thought it wasn't an issue. It looks like it is. We're going to have to arrange for a transfer of the care 'cause I -- right now it's clear that this is bothering you, and it's getting in the way, and we're wasting a lot of time on it, and that's not reasonable or fair, and that's not what you came in for, so there's always the caveat that if something becomes a problem, one has to deal with it.

Q. With respect to this methodology you've described about having a discussion and weighing the pros and cons, is that consistent in your mind with the codes of ethics in place at that time?

A. Yes.

Q. And is that your opinion to a reasonable degree of psychological certainty?

A. Yes, it is.

The thrust of Dr. Schoener's testimony is essentially that in the absence of a specific rule of the Psychology Examining Board on the issue in 1983, a psychologist would look to the APA Ethics Code for guidance as to what constituted prohibited, as well as competent, professional practice. The APA Ethics Code did not specifically address the issue at that time. Therefore, a reasonable psychologist might view whether to take on a client with whom they had had a prior sexual relationship as a matter to be determined under all the facts and circumstances in the exercise of sound professional judgment. Although Dr. Schoener provided his professional opinion respecting the standard existing in 1983, he did not testify whether he believed Dr. Kane to have met that standard. But his testimony does support Dr. Kane's position that providing services for an individual, with whom sexual intimacies occurred previously, was not unprofessional conduct as a matter of law in 1983. It might also be inferred that Dr. Ackerman was of the same or similar opinion as Dr. Schoener when he consulted with Dr. Kane in 1983.

Complainant's expert, Dr. Louis Stamps, conceded that the APA Ethics Code did not specifically address the issue of prior sexual relationships until 1992, when it was expressly modified to prohibit a psychologist from providing psychotherapy to a person with whom he or she had previously engaged in sexual activity. However, Dr. Stamps believed that the APA code covered the situation in 1983. Again, Principle 6(a) of the 1981 APA Ethics Code provided as follows:

> "Psychologists are continually cognizant of their own needs and of their potentially influential position vis-à-vis persons such as clients, students, and subordinates. They avoid exploiting the trust and dependency of such persons. Psychologists make every effort to avoid dual relationships that could impair their professional judgment or increase the risk of exploitation. Examples of such dual relationships include, but are not limited to, research with and treatment of employees, students, supervisees, close friends, or relatives. Sexual intimacies with clients are unethical." [Ex. 38, emphasis added].

The emphasized sentence in the above professional standard was a primary area of discussion and interpretation between the parties. Even though the prior relationship between Dr. Kane and Ms. A was not specifically listed as one of the "dual relationships" covered by the rule, complainant contended that it was one that "could impair . . . professional judgment or increase the risk of exploitation." Dr. Kane contended that, even if that were the case - which was not conceded - there is no evidence that his professional judgment was impaired or that he at any time exploited Ms. A in any manner.

Strictly construed, Principle 6(a), appears to define a "dual relationship" as one existing at the same time as the psychologist/client relationship; i.e., current employee, current student, current friend, current relative, current sexual partner, etc. In intent and language, it does not appear specifically directed at former employees, former students, or former sexual partners. In this sense, a past sexual relationship does not appear to have been classified in the 1980's as one of those relationships existing alongside the psychologist/client relationship, to which the "dual relationship" requirements of Principle 6(a) applied.

Additionally, the language in Principle 6(a) states that "psychologists make every effort to avoid dual relationships". (Emphasis added). However, the language employed does not express a clear and unambiguous prohibition against dual relationships. It easily could have by simply saying, "psychologists shall avoid dual relationships". Perhaps it is just poor draftsmanship, but the language appears to inferentially acknowledge that there are unique cases in which providing professional services is appropriate, if not indeed necessary, despite the dangers regarding the possible impact of the dual relationship upon professional judgment and possible exploitation.

Also, as noted by the federal court in the *Elliott* case (footnote cited below) involving the same provision and the North Carolina psychology board, given the impact of adverse findings against a licensee, rules of professional conduct must be strictly construed. Otherwise, a licensee may be left to essentially speculate regarding the standard of conduct required, and lose one's professional livelihood in the process. The standard must be sufficiently clear respecting prohibitions to assure that a competent and trustworthy psychologist may adhere to them. In this specific instance, the standard states specific examples of prohibited conduct. Providing psychotherapeutic services for an individual with whom the therapist previously was sexually involved, is not listed. Nor would a minimally competent psychologist necessarily imply it through a reading of the standard.

Of course, many, if not arguably most psychologists might have decided, even in 1983, that he or she should not provide psychotherapeutic services for former sexual partners. This decision is made all the easier in most cases given the abundance of access by patients to other psychologists. However, given the experience of the patient

with prior psychologists in this case, that approach may not have been a viable option. This possibility is perhaps increased by the patient's claim of suicide attempts. The testimony suggests that such verbalized intentions must be accepted as accurate for treatment purposes, at least during the initial stages of the psychotherapeutic relationship. After several sessions, the psychologist may be able to establish whether the patient's statements accurately reflect the true state of mind or are essentially an attempt to gain attention or "acting out". Additionally, given a prior sexual relationship in this case, the psychologist might also need to be aware that a patient may attempt to rekindle the former relationship through suggesting that they are suicidal and can only obtain help from that specific psychologist. Accordingly, it appears that a psychologist walked an extremely precarious path in 1983 in determining whether to provide services to such patients.

In light of all of the factors involved, it is my opinion the Principle 6(a) as it existed in 1983-1987 must be construed narrowly. There is one absolute prohibition clearly set forth in Principle 6(a). It unequivocally provides, "Sexual intimacies with clients are unethical". Accordingly, the drafters of the provision were aware of how to employ precise language to unambiguously enunciate an absolute prohibition. No such direct and clear prohibition is stated for the specific relationships listed in Principle 6(a), with the exception of sexual intimacies with clients. In fact, Dr. Schoener testified that one of the problems with the 1981 approach to dual relationships if read too broadly was that it failed to take into account that the number of psychologists from which a client might select a therapist tends to be fewer in small towns or areas than in metropolitan areas. Under these circumstances, dual relationships might be unavoidable from a practical standpoint if a client is to obtain psychological care. There are doubtless other examples that could arise as well (e.g., uncle absolutely refuses to receive critically needed care from any psychologist other than his nephew).

A major position of the complainant appears to be that the prior sexual relationship between Dr. Kane and Ms. A rendered it nearly *per se* impossible for Dr. Kane to provide competent services to her. However, Dr. Kane disagrees, arguing that he objectively considered all of the pros and cons of entering into a professional relationship with Ms. A, and determined that he could do so. The determination, in fact, was made after consultation with another psychologist. Dr. Kane's records document those discussions. Although it is clear his colleague was less than enthusiastic about Dr. Kane's decision to undertake care for Ms. A, he did not denounce it outright. Certainly, Dr. Kane is not guilty of any *intentional* violation of professional standards. It appears that, if anything; he exercised poor judgment. However, poor judgment alone does not constitute gross negligence or incompetency. Furthermore, Dr. Kane may not even be guilty of poor judgment. This is because he did evaluate his ability to provide professional services to Ms. A in light of their past relationship. He also discussed the matter with Ms. A, and she indicated that she had no problem. In fact, she indicated she would feel more at ease given their past relationship. Thus, it appears that Dr. Kane made the necessary analysis. It would seem highly likely that many, if indeed not most professionals would have declined Ms. A as a client under those circumstances. However, that is not the standard for determining gross negligence or incompetency either.

Accordingly, in my opinion, it does not appear that the 1981 APA provision constituted a *per se* prohibition on providing psychological services for even the specifically listed relationships, if exceptional circumstances were present. Furthermore, the standard did not address in any fashion the professional propriety of providing psychological services for a patient with whom the psychologist had previously been sexually involved. The best that might be argued is that the language utilized in Principle 6(a) of the 1981 APA Ethics Code was ambiguous with reference to the issue of entering into a professional relationship with a previous sexual partner. More likely, however, given the testimony and exhibits in this case, such prior relationships were not intended to be addressed at all by that code, as it was not an issue under any significant discussion within the profession at that time. It did not become a violation of the APA Ethics Code until 1992. In my opinion, Principle 6(a) of the 1981 APA Ethics Code neither addressed nor prohibited a psychologist from providing professional services to former sexual partners.

Furthermore, taking on clients with whom a psychologist has had a previous sexual relationship did not become a specifically enumerated violation of the rules of the Wisconsin Psychology Examining Board until 1995. Nevertheless, it is contended that psychologists perceived such conduct as constituting gross negligence and unprofessional conduct in 1983. Given the testimony presented, Dr. Stamps' opinion notwithstanding, I am of the opinion that it has not been clearly and convincingly established that Dr. Kane's conduct was either unprofessional or grossly negligent under Wisconsin law as it existed at the time.

The foregoing also applies respecting Dr. Kane's loaning Ms. A money to assure that her home was not foreclosed upon and providing her with nominal "employment". Although these actions may constitute poor judgment, it has not been clearing and convincingly established that such conduct was considered either gross negligence or unprofessional conduct within the field of psychiatry at the dates concerned.

DUE PROCESS

Although not determinative in this case for the reasons above stated, Dr. Kane has raised due process concerns that should be discussed briefly. Respondent primarily has three due process arguments. First, he contends that the board through its board member case advisor engaged in "forum shopping" in an effort to find an expert who would opine that Dr. Kane had engaged in unprofessional conduct and gross negligence. Second, the individual who ultimately was selected as the state's expert became a member of the Psychology Examining Board

subsequent to his retention as the state's expert. Dr. Kane contends that utilizing a current board member as an expert in this case to testify against him violates due process. Third, the board, itself, brought the Complaint against him, thereby violating his due process rights.

However, complainant suggests that there is really no appearance of, nor actual, impropriety. The primary position here is that the board member case advisor was not satisfied with the credentials of the first expert contacted during the investigation, Dr. Wish. Dr. Wish apparently was of the opinion that Dr. Kane had not violated existing standards. Subsequently, the case advisor suggested that Dr. Louis Stamps be contacted for his opinion. As it turned out, Dr. Stamps was of the view that Dr. Kane's conduct was unprofessional and constituted gross negligence under the standards as they existed in 1983. It is argued that there was no actual bias on behalf of the case advisor in seeking another expert opinion, merely a determination that Dr. Wish did not possess the qualifications the case advisor viewed necessary to properly assess this kind of case. The fact that Dr. Stamps was later appointed to the board did not necessitate that he withdraw as the complainant's expert in this matter. Obviously, he would not be able to participate in any deliberations or voting by the board whether he withdrew as an expert or not. This is because of his close relationship to, and participation in, the prosecution's investigation. Under the circumstances presented, I am not aware of any legal authority that would support a finding that Dr. Kane's due process rights were violated by this process.

If, however, the board were to be the final decision maker in this matter, the impartiality of this proceeding conceivably might be questioned, since the state's expert is a current member of the board. Even though Dr. Stamps would not be permitted to participate in the deliberations or voting under due process principles, the remainder of the board would be required to assess the credibility of one of its current members in determining the case. Even so, such circumstances would almost certainly pass constitutional scrutiny. Speculation on this issue is not necessary, however, since the board will not be the final decision maker in the case.

Dr. Kane also argues that due process was violated in these proceedings because it was the board that decided to file the Complaint against him. However, the record indicates that it was the prosecutor who actually decided to commence these disciplinary proceedings. Nevertheless, even had the board made that determination, there would be no due process violation. Wis. Stats. § 227.46(5), recognizes that administrative agencies that are the "final decision makers", such as professional licensing and disciplinary authorities, may determine that Complaints be filed against persons in class 2 proceedings such as this. However, the "remedy" provided a respondent for the agency's having commenced the action is not disqualification of the agency to act as the final decision maker or dismissal of the action. Rather, it is required that a hearing examiner preside over the proceeding and render a proposed decision to be reviewed by the agency before the agency makes *its* final decision. See, Wis. Stats. § 227.46(2). There is no due process violation here, even if Dr. Kane's position were accepted. In fact, it appears that the board has affirmatively acted to assure that due process is provided by disqualifying itself from making the final decision.

The board has removed itself from the judicial aspects of this case by delegating the rendering of the final decision to an administrative law judge. Since the board will not participate in the final outcome of this case, or in any other quasi-judicial role, whether it could provide an impartial decision if required to do so is a moot and irrelevant issue. The due process rights of Dr. Kane have not been violated in this proceeding.

CONCLUSION

This is a case in which the major alleged misconduct occurred in 1983, when Dr. Kane agreed to provide therapy to a former sexual partner of ten years past. Dr. Kane argues that, in fact, his 1983 conduct is being judged under standards that were not developed and formally enunciated by the profession until almost a decade later. Furthermore, had a prior sexual relationship not have taken place between Dr. Kane and Ms. A, it is not unreasonable to conclude that these proceedings might not have been commenced on the other allegations brought.

These are strong arguments, in my opinion. It has taken several professions, not just psychology, many years to realize that having sexual relations with a client constitutes unprofessional conduct. It has taken even more time to arrive at a professional consensus that providing psychological services for clients with whom the psychologist has had prior sexual contact is likewise, unprofessional. I am not convinced that the professional consensus on this issue had been built by 1983. Accordingly, measured by the legal and professional standards existing at the time, I do not believe it has been clearly and convincingly established that Dr. Kane engaged in either unprofessional conduct or gross negligence.

The case is dismissed.

Dated: March 8, 2000.

STATE OF WISCONSIN

DEPARTMENT OF REGULATION AND LICENSING

OFFICE OF BOARD LEGAL SERVICES

/s/ Donald R. Rittel

Donald R. Rittel

Administrative Law Judge