TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE

Public Hearing on House Bills 894, 895, 896 and 897

ABUSE BY PROFESSIONALS

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As legal counsel for the Pennsylvania Coalition Against Rape, I would like to thank the members of this Honorable Committee for the opportunity to appear before you to provide testimony regarding legislation directed toward abuse by professionals. I hope the wide range of expertise I bring to the Committee will be useful as you proceed to formulate proper legislation that will further your already expressed commitment to the many victims of sexual assault who are citizens of the Commonwealth of Pennsylvania.

I have been a practicing attorney in Allegheny County for slightly over sixteen (16) years. My experience in working with victims of sexual assault started early in my career when I began as an assistant district attorney in the Office of the District Attorney of Allegheny County. For approximately one year, I handled extensive jury trial work in the Crimes Persons Unit of the Office of the District Attorney and was responsible for the prosecution of many cases involving a variety of different kinds of sexual assault. I grew up in rural Clearfield County in a day and age when issues such as sexual assault were never discussed, and when first confronted with these issues, I was surprised and shocked, as I assume many of you are as you come to understand the pervasiveness of sexual asssault. After working in the Office of the District Attorney, I clerked for several years for the Court of Common Pleas of Allegheny County where I worked in several divisions of the Court, including the Civil Division. That experience, along with my own experience in the general practice of law, has enlightened me as to the laborious, and often painful, process our clients must go through as they plod their way through the

adversarial court system. My work and understanding of victims also comes from other parts of my practice and my career. In my private law firm, I practice extensively in the area of matrimonial law, where often our clients are fraught with trauma and insecurity. In hearing about the lives of my clients, I often hear about many of their early childhood traumas, all too many of which include times in their lives when they were child or young adult victims of sexual assault. Lastly, for over ten years, I have worked on both an informal and formal basis as legal counsel to local rape crisis centers in Allegheny County, and over the past several years, I have worked on an informal, and now formal, basis as legal counsel to the Pennsylvania Coalition Against Rape. As many of you know, the Pennsylvania Coalition Against Rape is a state-wide network of rape crisis centers which has worked actively throughout the Commonwealth to provide direct services to victims of sexual assault and extensive education and training to psychologists, social workers, mental health counselors and other professionals. The Pennsylvania Coalition Against Rape has gained a national reputation for its in-depth expertise in working with victims and in the training of other professionals about issues related to sexual assault. For that reason, it is not uncommon that counselors working at rape crisis centers throughout the Commonwealth of Pennsylvania hear countless stories from clients about significant and severe abuse that has been perpetrated upon them by a wide range of professionals.

Before discussing the particular bills that are at issue, I would first like to applaud this Committee's ongoing effort to face this issue and to make abuse by professionals an issue of significance and importance in the Commonwealth of Pennsylvania. While in this state and nationally, there have been various civil actions brought against professionals under common law theories of negligence, the codification of criminal sanctions and civil causes of action are very key components to secure the rights of victims. Abuse by professionals is a problem, not only in

Pennsylvania, but continues to be a national problem that is now being addressed by many professional organizations and by the courts in many other states. Over the past year, the American Trial Lawyers Association started a special litigation practice group, of which I am a member, in the area of sexual abuse by professionals. As more victims become aware of conduct that is abusive and as more attorneys become sensitive to these issues, we are finding a dramatic increase in litigation.

What is particularly useful about the Pennsylvania legislation you are proposing and what is to be particularly commended, are the lengths to which you have gone to try to understand and codify the real power differential that exists in relationships between clients and helping professionals, so as to create legislation that negates the ability of a defendant to use consent as a defense. This recognition is so important because, as in all areas of sexual assault, sexual abuse has very little to do with sexuality and has everything to do with power. It is really the abuse of power by those in power against those who are so vulnerable that is the action that causes severe betrayal and trauma. Unfortunately, many of the victims who have suffered abuse by professionals are also persons who have been victims of child sexual abuse. When the abuse by a professional occurs, not only is there trauma related to that particular conduct, but often that abuse exacerbates many early childhood traumas the victim has suffered. While I will speak more generally at the conclusion of my comments about the difficulty posed by this area of litigation, I would like to make some comments and address a few specific points in the legislation that has been proposed.

With regard to House Bill 894, which is the required reporting statute, I first want to applaud your effort in attempting to ensure that there is a way to identify those professionals who are abusing clients and who are clearly acting outside the scope and standard of careful practice mandated by their professions. What is

beneficial about the statute is that it does create a statutory duty of reporting and does create a standard of care that professionals must exhibit when they find out about these incidences. What is also beneficial about the statute is that it attempts to recognize the importance of the therapeutic relationship and the right of a client/victim to make choices and control what information is taken outside the scope of a current therapeutic relationship. Obviously, it is for that reason that the statute provides that reports shall be made only if the patient or client wants a practitioner of the healing arts or psychotherapist to make a report under the Act.

I do think some confusion arises and some problem exists under §2 (f) of the Act, which attempts to create a reporting exception, allowing the practitioner to defer reporting if the practitioner believes that immediate reporting would be detrimental to the welfare of the client, so that a report does not have to be made until the practitioner believes that reporting will not harm the treatment process or for a period not to exceed one year, whichever first occurs.

One difficulty with the exception in House Bill 894 is that, while recognizing that reporting may be detrimental to treatment, the legislation then attempts to place an artificial time limit on the exception by imposing a one year requirement. Having worked with a number of victims and having extensive experience in the therapeutic community, I must say that it is often not uncommon that reporting could be detrimental to treatment, even if it occurs beyond a one year period. While I know the thinking behind the legislation was really to impose an obligation upon practitioners to make reports so as to prevent "protection" of one professional by another, and while I believe that is an important aspect of the legislation, I think it is also important to recognize that each victim who is in treatment will proceed at a different pace and will be dealing with different issues, depending upon his or her life experience, personality, etc. The statute, as drafted, creates a situation where reporting is mandated after the passage of a one year

period, regardless of the effect that reporting will have upon the client. While I understand that reporting only occurs if a client requests reporting, I also want to suggest that there may be times when a client might request that a report be made and when a therapist may, in his or her reasonable judgment, believe that reporting will be detrimental to the client for a wide range of reasons. This becomes a very confusing issue because primarily, I think it is important that we support the client's right to make these choices all of the time. I am not suggesting, necessarily, any particular change in the statute. I do think it is important to recognize there may be times when the one year period will not be reasonable, or when a therapist may run the risk of malpractice by making a report that will then trigger a number of other procedures that will necessarily involve his or her client and for which that client may not be psychologically prepared.

The other gap I see in House Bill 894 is that it does not clarify what reporting is required if a client terminates therapy before the one year period has elapsed. For instance, let us assume that in the third month of therapy, a client reveals to a practitioner an incident of abuse by another practitioner and the client requests that a report be made, but the practitioner believes that at that point in time, reporting is detrimental to the client's well-being. The client gets angry and leaves therapy, and the practitioner does not make a report, again believing it would be detrimental to the client. They have no further contact, and a year passes. Does the practitioner still have an obligation to file a report? The statute needs some clarification.

House Bill 895 creates a range of sexual offenses by a practitioner of the healing arts. Again, I believe the legislation has a critical component in its recognition of the power differential that occurs between the professional and a patient/client. One of the things I find interesting is the disparity in treatment you have created for actions by psychotherapists and actions by practitioners of the

healing arts. In House Bill 895, the requirement is that a practitioner of the healing arts "impair a patient's power by administering or controlling, without the patient's knowledge, drugs or other treatments for the purpose of preventing resistance." While that is certainly important conduct to target and something that occurs often in those situations involving abuse by practitioners of the healing arts, it is unclear why this legislation does not pattern the legislation for psychotherapists and also make it unlawful for a practitioner of the healing arts to engage in a wide array of sexual activity with a patient/client at any time, whether or not this conduct involves the use of drugs, etc.

For some reason, House Bill 895 does not specifically state that consent will not be a defense. Again, why the disparity?

While House Bill 895 does cover some aspects of abuse by practitioners of the healing arts, for some reason this statute is much more limited and not nearly as broad-based as the statute pertaining to psychotherapists. In the Commonwealth of Pennsylvania, and nationally, we have, unfortunately, many persons who have been the victims of abuse by physicians, physical therapists, dentists and other professionals. While it is true that clients/patients are not involved in therapeutic aspects of a relationship with these categories of professionals, I would submit to you that the same power differential does exist internally within the relationship, and often we are talking about professionals who are seen by the patient/client as being one who is in charge, in control, who knows more, etc. I see no reason to differentiate between or among these categories of professionals, and I believe it is imperative that if we are going to have strong legislation that is directed toward abuse by professionals, we should be talking about comparable legislation for practitioners of the healing arts.

I must also say, with some risk, I suppose, that it is interesting we do not include attorneys as professionals in our definition of practitioners of the healing

arts. I can tell you, with a great deal of sadness, that the stories I hear about members of the Bar engaging in sexual relationships with their clients when those clients are in very vulnerable states, is extensive.

Therefore, with regard to House Bill 895, I believe the Committee should consider expanding the acts that are unlawful so as to be comparable to the bill pertaining to psychotherapists, and to specifically insert language indicating that consent is not a defense. The statute should also be clarified so that the portions of the statute that require that acts be done "without the patient's knowledge" be removed because often, a patient or client may have knowledge of certain acts, but have no appreciation as to the effect of those acts or the repercussions that can occur.

House Bill 896 establishes certain sexual offenses committed by psychotherapists and, again, this is clearly legislation that is essential and protective for victims in the Commonwealth. The main difficulty I see with House Bill 896 is that it prohibits conduct that occurs during the ongoing relationship or within "six months" of the termination of the relationship. I want to suggest to you that the time period of six months is not sufficient, is not long enough, and it does not parallel the growing trend of ethical guidelines that are being promulgated by many professional groups and associations.

As those expert witnesses from the psychotherapeutic community may have told or will tell this Committee, over the past five years various professional groups and organizations have begun to focus on and debate the issue of the length of time that must pass before it would be ethically permissible for a psychotherapist to become involved with his or her client. There are certainly some theories that it is never permissible, in the lifetime of the therapist, for that therapist to become involved with a client because many take the position that once a therapeutic relationship has been established, it is always present and it must always stay open

to re-establishment at any given point in the future. I suspect there is another theory that is totally opposite and that says that we must treat clients as capable and autonomous human beings who are able to make choices about their lives. That would mean that at any time a client chooses to become involved with her or his therapist, that choice would be respected and honored and there would not be anything unethical about it.

In drafting this particular legislation, I believe it is incumbent upon us to reach some middle ground that will recognize the extreme power imbalance in the therapeutic relationship and the lack of appreciable choice that clients often have, while also accepting, understanding and supporting the proposition that if therapy works well, clients do become empowered and do become able to make reasonable choices about how they want to live their lives.

I want to suggest that six months following termination is not sufficient and that this Committee should give great consideration to expanding that time period to at least two (2) years, which would then parallel the emerging standard of care that is being set by numerous professional groups and associations. However great the debate will be in the legislature of this Commonwealth, I don't believe it will ever be able to really compare with the debate that is being held internally in professional groups and organizations. It is the heart of those debates that are creating a proper standard of care which, though not by any means uniform, is beginning to recognize a two year limitation. If we are to err on one side or the other, I believe it is most important that we err on the side that protects clients/victims. I also believe it is important that we not codify these matters in such a manner that legislation might allow courts to construe a standard of care in Pennsylvania that is less than the emerging standard of care that is being set and established by those groups and organizations that have professionals as their members.

Again, a critical piece of the legislation, as proposed, provides that consent shall not be a defense. That is an important part of the legislation that must remain.

Lastly, House Bill 896 creates a codified civil cause of action for clients who have been sexually assaulted by a psychotherapist. Before addressing specific provisions of the bill, I again must question why this codification pertains only to psychotherapists and not to other practitioners of the healing arts. It is true that suits have been brought in this state and across the country under common law theories of negligence and/or malpractice against healing arts practitioners, but why not clarify the existence of this civil cause of action and codify it in the same way we are attempting to codify actions against psychotherapists.

With regard to House Bill 897, I again must reiterate my concern that the six month period is used to identify and define "former patient or former client", and I again want to suggest that this time period is just not long enough. The Committee should give very serious consideration to amending this statute so as to provide for a time period of two years following treatment.

The other critical issue in House Bill 897 relates to the statute of limitations. In the legislation you have created a five year statute of limitations. This is yet another example of the extreme sensitivity you show in understanding that a two year statute of limitations would never be sufficient, as it is often impossible for the client to identify conduct as abusive and/or have the psychological capacity to file suit within a short length of time. While five years is not an unreasonable time period, I think the legislation would be greatly enhanced if this Committee were to consider an even more extensive statute of limitations.

These cases are not so dissimilar from those cases involving adult survivors of childhood sexual assault, where often, upon recollection or memory of the assault, the trauma is so severe and so significant that the client is often unable

to act in any short length of time. It is important to remember that in our culture, we have trained those who are victims to believe that the wrongs that have been perpetrated against them are their fault. Often, victims come to us in a state of psychological trauma and in a state of very low self-esteem, believing they should not be entitled to take any action. Some states have begun to greatly extend the statute of limitations for the filing of criminal and civil suits by adult survivors of child sexual assault. If not totally dismissing the statute of limitations, states have greatly extended the time period for filing suit to ten, fifteen, twenty or greater years.

All clients who suffer abuse by professionals are not adults. While House Bill 897 deals only with psychotherapists, it is certainly not uncommon to hear stories of children who have been sexually assaulted by pediatricians or other helping professionals. As with any other type of child sexual assault, it will not be uncommon and is not uncommon for these victims to have a loss of memory about this assault as they get older, only to find out that a memory of this incident or incidences comes back in later adult life. Likewise, for those who are adult victims of professional abuse, often this abuse patterns early childhood abuse and creates trauma for the client that is very comparable to early childhood trauma. For this reason, the therapeutic work that must be done is often delicate, painful, and extensive.

Not only should the statute of limitations be extended, but the statute should be clarified so that the statute is not deemed to begin to run until such time as a client has knowledge of the abuse or is mentally able, given the facts and circumstances of that particular situation, to file suit. In a way, this would mean codification of what has become known as the "discovery rule" in Pennsylvania law. There are currently no cases in Pennsylvania that discuss the applicability of the "discovery rule" to cases involving civil suits or criminal suits for victims of any

sexual assault. It is important that this aspect of the statute of limitations become codified, if at all possible.

Lastly, I have some concern about the ambiguity of the conduct that is attempted to be defined in House Bill 897. Clearly, you have gone to great lengths to identify those parts of the body and those activities which would involve sexual conduct that would give rise to a cause of action. This is one of those areas where, often, the needed objectivity of the law is not sufficient to mirror the subjective experience of the person who has been violated. For instance, oral penetration to one person may be very severe, and to another person a mere stroking and touching of the neck may be just as traumatic.

I have been acting as counsel for the Pennsylvania Coalition Against Rape in a number of cases that have been argued before the State Supreme Court regarding issues of confidentiality and interpretation of other enactments of this particular legislature. For whatever reason, the Courts of this Commonwealth are very strictly construing statutes that are designed in any way to protect victims of sexual assault, and the court, in the past, has been very strict about the interpretation it has given to the exact language of statutes that have been passed. For that reason, I have some concern that in your great effort to delineate and differentiate conduct that would be actionable, you have, by necessity, excluded a range of other actions that can be just as traumatic. The legislation, as drafted, does nothing to prohibit kissing with closed mouths, touching on cheeks or neck, touching on the lower parts of the legs, etc. Clearly, these are other identifiable body parts that might be touched for purposes of sexual gratification, and in such a way and in such a manner that those touches will result in trauma to a client or patient.

One suggestion I would make is that the legislation not delineate body parts but be directed more toward any touching or contact that is done for the

gratification or sexual arousal of the practitioner, etc. Whether or not body parts are delineated, proof of this intent will always be difficult and will always be one of those issues that can only be resolved in a jury process. However, the exclusion of various actions in the statute will create a wide array of litigation over issues that should really be non-issues.

The other question I have with regard to House Bill 897 is the ambiguity that seems to be created when the statute admirably provides that consent shall not be a defense, but then goes on to define scope of discovery and admission of evidence in a way that allows the court to, at times, determine whether or not past sexual conduct will be relevant. If consent is not a defense, then why would past sexual conduct on the part of the victim ever be relevant unless it is an issue that is first raised by the plaintiff in the cause of action. For instance, it would be understandable that past sexual conduct might be relevant if a victim raises an issue that the abuse by the professional is a direct and proximate cause of current sexual dysfunction that never existed before, or if there is some past sexual history with this particular psychotherapist that preceded the time of psychotherapy. When, though, on any other occasion, would past sexual history really be relevant unless first raised by the plaintiff? I believe that by allowing the court to have an *in camera* hearing and rule on the relevancy of this information, we open the door to a wide range of conduct that will be truly irrelevant, and that will be prejudicial to a particular case.

I wish that cultural attitudes about women and victims had changed. I acknowledge that for some persons, there have been changes. I also know from working extensively with my own clients and from those serviced by rape crisis centers that the attitudes in the court today, in the year 1991, are not so significantly different from those attitudes that have been displayed for centuries. While it would be nice to believe that judges come into the court system without biases and without

cultural attitudes, that is just not realistic. Often those biases and cultural attitudes do work against those who have already been abused and who end up feeling further abused by the system. While an argument can be made that if a court makes improper rulings, these rulings can be reversed by the appellate courts, etc., the damage to the victim will have already occurred. One who has already suffered significant trauma as a victim of professional abuse will continue to be traumatized and retraumatized by the adversarial process.

You should give some consideration to even further limiting the scope of discovery and admission of evidence with regard to the past sexual history of the victim.

Having addressed the particular pieces of legislation that have been proposed, I would now like to talk about the legal complications involved in this type of litigation, as I do not know if members of this Committee have worked directly with clients who have been victims of abuse by helping professionals. What I can say to you is that these cases, along with cases involving adult survivors of child sexual abuse or third party cases on behalf of those who have suffered sexual assault, are perhaps the most difficult and complex cases to handle. In private practice, our firm is handling a number of third party cases on behalf of those who have been victims of rape in shopping center lots, etc. and we are also handling several cases involving a range of abuse by professionals. Some of that conduct does not include direct sexual abuse, but includes the significant violation of various boundaries that should have been structured around the professional relationship.

First of all, these cases are difficult to handle because our clients come to us in a state of confusion, bewilderment, low self-esteem, and despair. They are often clients who have had very little experience with the legal system and clients who have no understanding or appreciation of what it is like to go through the process of filing a civil suit. They are clients who come to us having been abused

by other professionals and who, when they come to us, are still in a state of extreme pain and betrayal. They often come to us without money to pay hourly rates and with some impression that these cases will be handled on a contingency basis. Not only do these clients not have money for hourly rates, but they rarely have money to pay the wide range of expert witnesses who are necessary in order to sufficiently prepare for trial. Because of the trauma they have suffered as adults and the recreated trauma from childhood that often occurs, these are often clients who have a great need for information, to be in control, and to be in charge. The communication process that occurs with these clients is delicate, by necessity, and they are cases in which, as counsel, we must always be vigorous in our communication and in our pursuit of our clients' rights.

Although lawsuits in this area are becoming increasingly common at a national level, they are still cases that are "cutting edge" cases. They are difficult cases to explain to juries because, just like the clients who have suffered, juries often hold professionals in the highest regard and often have a difficult time believing that professionals held in that regard could be perpetrators of sexual abuse. Not only do we have to work with juries to educate them about abuse by professionals, but we often have to educate juries, often comprised of older adults, about the extent and nature of sexual abuse as it happens currently. In addition, we often have to attempt to educate those juries about early childhood sexual abuse because it is trauma that has been again brought to the surface.

The cost of expert testimony can range from reasonable to exorbitant. One case we are currently handling in our office deals, in part, with negligent treatment in the utilization of hypnotherapy, and we have found that national experts in this particular area of psychotherapy can charge up to $400 per hour and $4,000 per day for their services as expert witnesses. Rarely does a client have money to

make that kind of expenditure. Rarely will a law firm consider advancing those kinds of costs knowing that it is dealing with "cutting edge" litigation.

I make these comments to you because I believe it is important for you to understand that the legal work that evolves from this area is difficult and arduous. We are talking about clients who come in often highly-traumatized states and who face the prospect of several years of litigation in a system and an environment that is hostile to them.

You have aptly noted in the bill analysis that accompanies House Bill 897 the fact that professional malpractice insurers have begun to limit or eliminate coverage for damages related to patient sexual exploitation. While this particular legislation does not attempt to inhibit insurance companies from creating those types of limitations, I believe additional legislation should be considered so that insurance companies are prevented from imposing those types of limitations. I also suggest that it would be beneficial to review insurance policies and to create legislation that also prevents insurance companies from limiting liability under premises liability policies, so that these areas might rightfully be covered. In terms of funding, in the future, the legislature might also give consideration to making special funds available to rape crisis centers to provide the type of expert counseling that is necessary for this particular population of victims. The legislature might also consider expanding coverage under the Victim Compensation Fund so that a fund truly is created to pay compensation in the nature of pain and suffering for certain types of offenses where monies are not otherwise available.

I make these comments about financing to you because legislation will only be important and will only have meaning if persons who are victims are able to use the legislation in ways that are beneficial. As long as we have statutes of limitations that are not really long enough, discovery rules that are not really clarified, the need for extensive expert testimony, and clients who are severely

traumatized and without funds, then pursuit of the rights that are being created by this legislation will be minimal. That does not mean the legislation is not important. It is. And it is critical that you work actively to refine the legislation and to take all necessary steps to move this legislation through the Pennsylvania legislature. It is important that this is done in a way that is meaningful and in a way that will not be superficial, so that doors are really opened and clients are not further traumatized by the legal system and legal process.

On behalf of the Pennsylvania Coalition Against Rape, and as private counsel working in this area of the law, I again want to applaud your efforts and your sensitivity to these issues, as well as to many, many other issues that relate to victims' rights, for you have been called upon on several occasions to support the Pennsylvania Coalition Against Rape in efforts being made in related areas. I am certainly willing to assist in any way I can as the legislation goes through a process of refinement. It has been an honor to have an opportunity to appear before you and for that, on behalf of myself and the Coalition, I give my thanks.