

Rising Risk

Sexual Misconduct & Harassment Claims in the #METOO Era

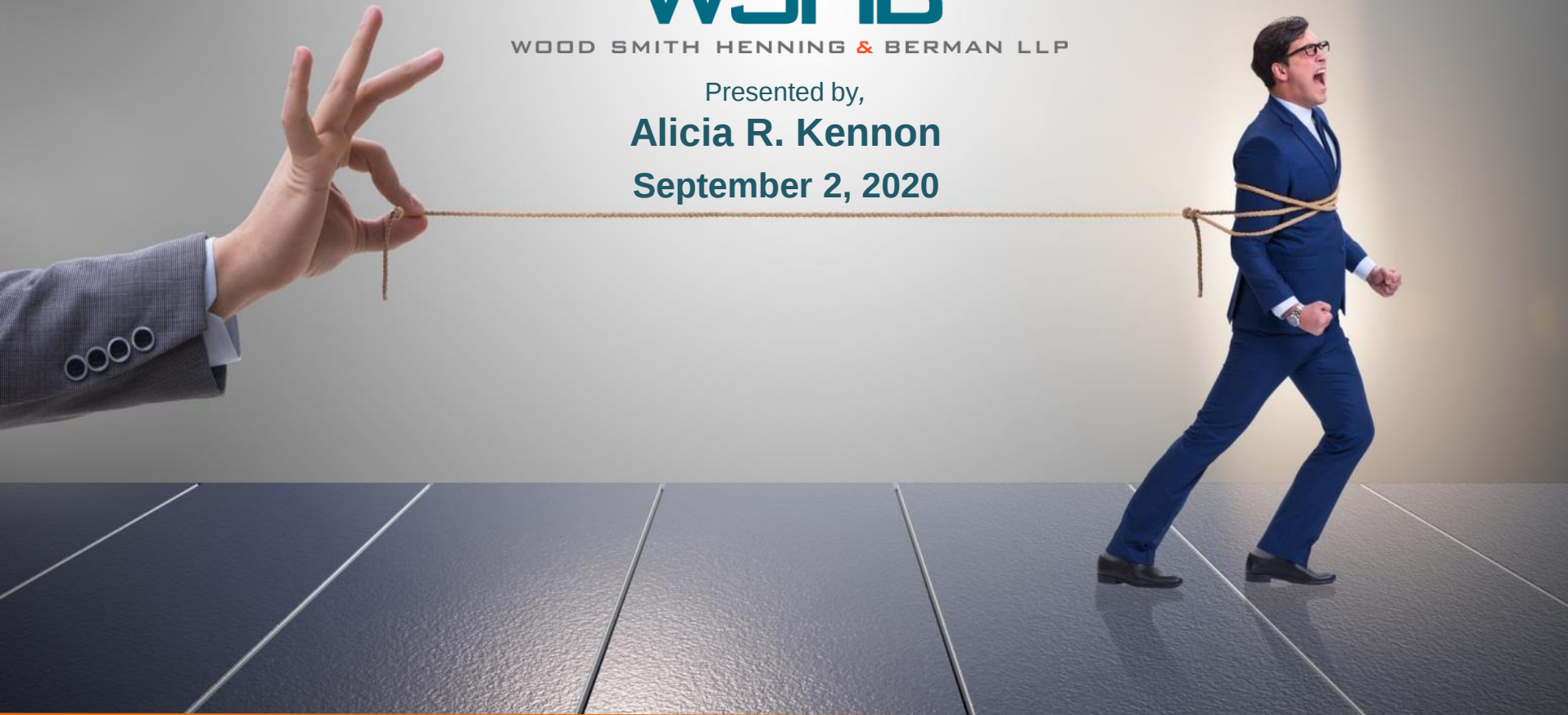
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WOOD SMITH HENNING & BERMAN LLP

Presented by,

Alicia R. Kennon

September 2, 2020



Types of Claims Asserted



- Professional Negligence
 - Malpractice: All cases of therapist abuse involve malpractice but not every malpractice case necessarily includes abuse
- Assault
- Battery/Sexual Battery
- Negligent Hiring, Supervision, and/or Retention
- Negligence
- Intentional Infliction of Emotional Distress
- Fraud

Malpractice and Abuse

- Psychotherapist Negligence
 - “Traditional” Malpractice
 - A psychotherapist/counselor owes a duty to use reasonable care in his/her treatment of a patient
 - Failure to meet the standard of care in diagnosing or treating a patient results in liability
 - Abuse based malpractice
 - Involves sexual or other exploitations of a patient for the therapist’s benefit
 - Sex with a current patient or patient who has been seen within the last 2 years is strictly prohibited.
 - » California Civil Code Section 43.93
 - » California Business Code Section 729

Malpractice and Abuse

- California Civil Code Section 43.93
 - A patient has a cause of action for damages arising from sexual contact with a therapist under any of the following conditions:
 - During the period when the patient was actually receiving therapy;
 - During the period within 2 years following termination of therapy;
 - By means of therapeutic deception
 - It is not a defense that the sexual contact occurred outside the session or off the premises

Malpractice and Abuse

- California B&P Code Section 729
 - Any therapist or alcohol and drug counselor who engages in any sexual act
 - intercourse, sodomy, oral copulation, sexual contact
 - With a patient or former patient
 - Where the relationship terminated for the purpose of engaging in a sexual act
 - Will be liable for sexual exploitation



PROGRAM MATERIALS

Program #30189

September 2, 2020

Defending Sexual Abuse Claims in the MeToo Era

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www.celesq.com

5255 North Federal Highway, Suite 310, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

Malpractice and Abuse

- B&P Code Section 729
 - Defense
 - Therapist refers the patient to an independent and objective provider for treatment
 - This is a pretty narrow exception



Assault

California Jury Instruction 1301

1. Therapist/Counselor acted, intending to cause harmful [or offensive] contact;
2. That Patient reasonably believed that [he/she] was about to be touched in a harmful [or an offensive] manner; OR
 - Therapist threatened to touch Patient in a harmful [or an offensive] manner;
3. That it reasonably appeared to Patient that Therapist was going to carry out the harm or threat of harm;
4. That Patient did not consent to Therapist's conduct; and
5. That Patient was damaged as result of the conduct/contact/behavior





Battery/Sexual Battery

California Jury Instruction 1306

- Patient claims that Therapist committed a sexual battery. To establish this claim, Patient must prove the following:
 1. [(a) That Therapist intended to cause a harmful [or offensive] contact with Patient's [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [name of plaintiff] resulted, either directly or indirectly;
[OR]
[(b) Therapist intended to cause a harmful [or offensive] contact with Patient by use of Therapist's [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with Patient resulted, either directly or indirectly;
[OR]
[(c) That Therapist caused an imminent fear of a harmful [or offensive] contact with Patient's [sexual organ/anus/groin/buttocks/ [or] breast]/ [or] Patient by use Therapist's [sexual organ/anus/groin/buttocks/ [or] breast]], and a sexually offensive contact with Patient resulted, either directly or indirectly;
AND
 2. That Patient did not consent to the touching; and
 3. Patient was harmed [or offended] by Therapist conduct.
- Notably, there really is no ability for the patient to consent to such contact based on the various statutory bases for liability so

Negligent Hiring, Retention, and Supervision

- These claims are self explanatory and directed at facilities who hire, supervise, and retain allegedly abusive therapists/counselors
- With these claims, there will be extensive analysis of personnel records, supervisory requirements, and information available regarding the therapist at the time of hire



Intentional Infliction of Emotional Distress

California Jury Instruction No. 1600

Patient claims that Therapist's conduct caused him/her to suffer severe emotional distress. To establish the claim, Patient must prove:

1. That Therapist's conduct was outrageous;
2. That Therapist intended to cause emotional distress;

OR

That therapist acted with reckless disregard of the probability that Patient would suffer emotional distress

3. That Patient suffered severe emotional distress; and
4. That Therapist's conduct was a substantial factor in causing Patient's emotional distress

Fraud Based Claims

Fraud

- Fraud is an intentional act, generally
- It involves an intentional misrepresentation
- It can provide a basis for punitive damages

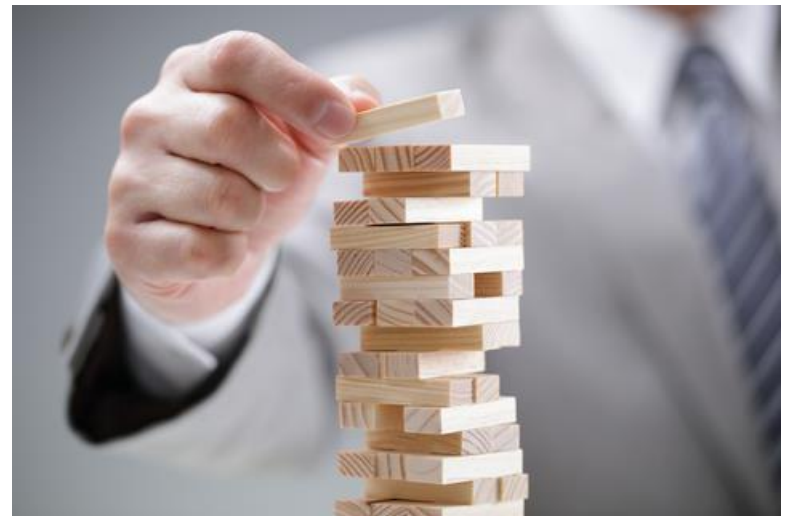
Breach of Fiduciary Duty

- This falls under the umbrella of negligence, generally
- It involves action that is intentional but perhaps has an unintended outcome
- It arises from the relationship between the patient and the therapist is premised entirely on the superior influence that the therapist has over the action or inaction of the patient



Risk Avoidance Techniques

- Clear, consistent, contemporaneous, documentation
 - The cases without good clean documentation are more difficult to defend
 - Remember, your attorney may be trying to prove a negative so do your part to make that easier for your attorney to accomplish



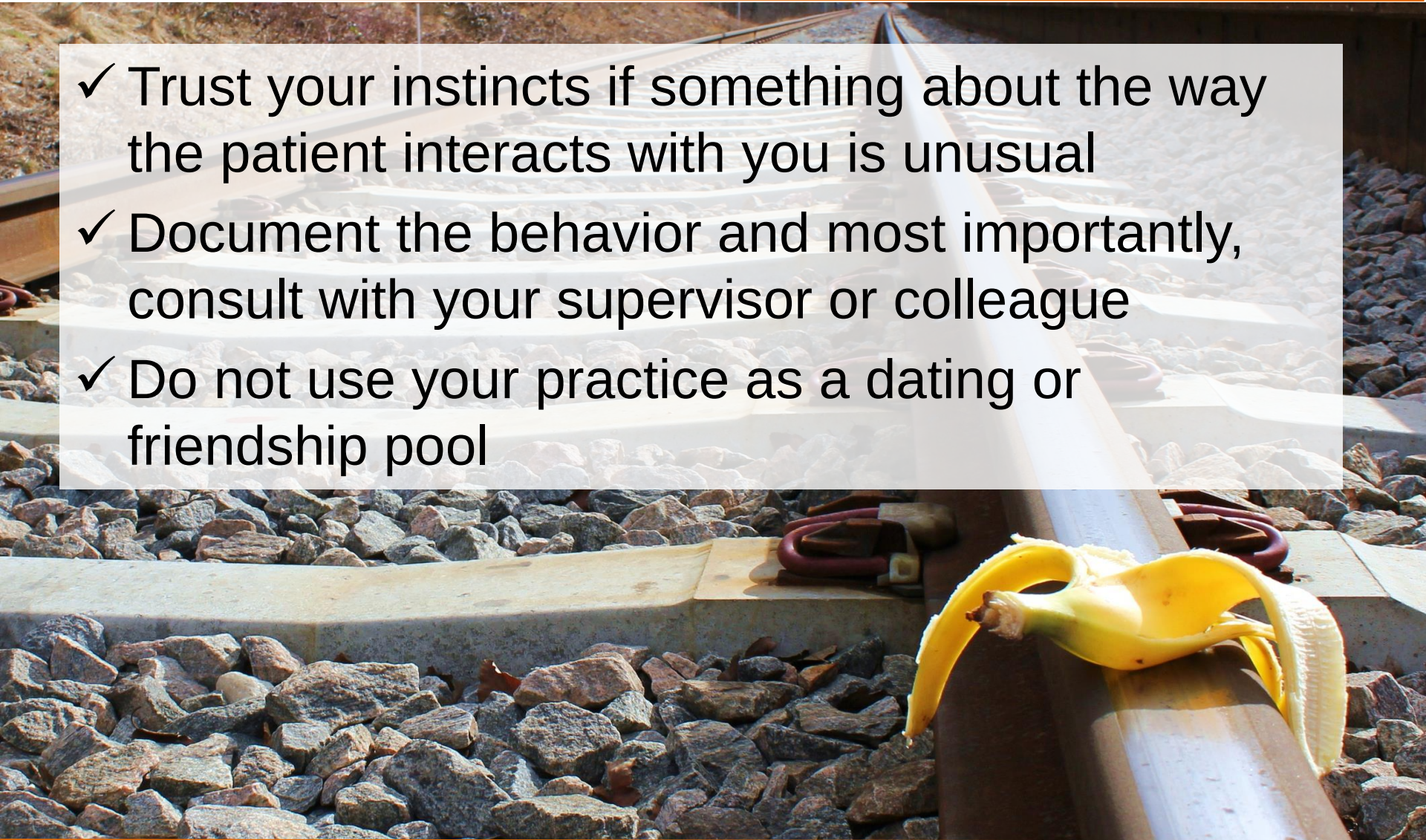
Risk Avoidance Techniques

- Maintain appropriate boundaries
 - Resist the urge to overshare
 - Self disclosure is certainly part of your process but before you disclose, ask yourself:
 - Why am I disclosing? Will it help the patient or is it helping me?
 - Should I disclose this to a patient with “X” type of condition?
 - Be mindful that your disclosures will be part of a deposition or trial and will often serve as “proof” of a certain level of inappropriateness



Risk Avoidance Techniques

- ✓ Trust your instincts if something about the way the patient interacts with you is unusual
- ✓ Document the behavior and most importantly, consult with your supervisor or colleague
- ✓ Do not use your practice as a dating or friendship pool



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Alicia R. Kennon

akennon@wshblaw.com

Direct: (925) 222-3412

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