

1248 SEXUAL EXPLOITATION BY THERAPIST — § 940.22**Statutory Definition of the Crime**

Sexual exploitation by a therapist, as defined in § 940.22 of the Criminal Code of Wisconsin, is committed by one who is or holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist-patient or therapist-client relationship.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four¹ elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (was) (held (himself) (herself) out to be) a therapist.

"Therapist"² means a person who performs or purports to perform psychotherapy.³

To be considered a therapist, it is not necessary that a person be licensed or certified by the state.

ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE DEFENDANT IS A MEMBER OF A PROFESSION LISTED IN § 940.22(1)(I):

["Therapist" may include a _____ if that person performs or purports to perform psychotherapy.]⁴

2. (Name of victim) was a (patient) (client) of the defendant.
3. The defendant intentionally had sexual contact with (name of victim).

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE.

4. The sexual contact occurred during an ongoing therapist-patient or therapist-client relationship.

It is not required that the sexual contact took place during an actual treatment session, consultation, interview, or examination.⁵ It is sufficient if a therapist-patient or therapist-client relationship existed between the defendant and (name of victim) when the sexual contact occurred.

You should consider all the circumstances in determining whether a therapist-patient or therapist-client relationship existed.⁶

Whether or not (name of victim) consented to sexual contact is not an issue in this case.⁷

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1248 was originally published in 1987 and revised in 1992, 1996 and 2005. This revision was approved by the Committee in October 2005.

The 2006 revision changed the definition of "therapist" in the first element, in part to reflect the decision in State v. Draughon, 2005 WI App 162, 285 Wis.2d 633, 702 N.W.2d 412. The court of appeals held that "the jury instruction addressing Draughon's status as a 'therapist' under § 940.22(1)(I) was error." The trial court followed the format recommended by Wis JI-Criminal 1248 [8 1996], which provided as follows for the first element: "'Therapist' means a person who performs psychotherapy. It includes a (identify type of therapist)." The court of appeals concluded that stating "It includes a member of the clergy" as called for by Wis JI-Criminal 1248 "lead[s] to the faulty conclusion that by definition, clergy members perform psychotherapy." Because "the instruction given never directed the jury to make an independent, beyond-a-reasonable-doubt decision as to whether Draughon performed or purported to perform psychotherapy . . . its omission is constitutional error." Draughon, ¶14.

This instruction was revised in 2005 to reflect the decision of the Wisconsin Supreme Court in State v. DeLain, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484. The court held "that it is the totality of the circumstances . . . that determines whether there was an ongoing therapist-patient relationship when sexual contact occurred." DeLain, ¶24. See footnote 5, below. The DeLain decision also "disavow[ed] the court of appeals discussion of 'intentionally.'" Id. at ¶24. The court of appeals had concluded that because § 940.22 used the word "intentionally" it required that the defendant know that the victim was a patient and know that the defendant and the victim had an ongoing therapist-patient relationship. State v. DeLain, 2004 WI App 79, 272 Wis.2d 356, 679 N.W.2d 562, ¶¶10-11, citing § 939.23(3). The Committee had revised the instruction to add an element embodying this knowledge requirement but deleted it in response to the supreme court decision.

This instruction provides for inserting a definition of "sexual contact" as provided in Wis JI-Criminal 1200A. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing a separate instruction that included all alternatives for definition of the term. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. State v. DeLain, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484, the Wisconsin Supreme Court stated that this offense has three elements. ¶9. The instruction provides for four elements, using a separate element for the victim's status as a patient or client of the defendant. See element 2. No change in substance is intended.

2. Section 940.22(1)(I) provides the following definition of "therapist":

"Therapist" means a physician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy.

The Committee concluded that the instruction would be more clear if it provided a general definition of the term ("a person who performs or purports to perform psychotherapy") and then provided for a statement, to be used where applicable, that one of the professions named in subsec. (1)(I) may be included in the definition. See State v. Draughon, 2005 WI App 162, discussed in the first paragraph of the Comment, and note 4, below.

3. "Psychotherapy" should be defined if necessary. Section 940.22(1)(d) refers to the definition in § 455.01(6), which reads as follows:

"Psychotherapy" means the use of learning, conditioning methods and emotional reactions in a professional relationship to assist persons to modify feelings, attitudes and behaviors which are intellectually, socially or emotionally maladjustive or ineffectual.

4. If the case involves one of the "therapists" listed in § 940.22(1)(I), insert the name in the blank provided. See note 2, supra.

5. The requirement that the sexual contact occur "during an ongoing therapist-patient or therapist-client relationship" was added by 1985 Wisconsin Act 275. The same act eliminated the requirement that the contact occur during any particular examination, interview, etc.

A teacher who engages in informal counseling with students is not engaged as a professional therapist, even if the teacher has a psychology degree. "[T]he only reasonable meaning of the requirement for an ongoing therapist-patient/client relationship in the criminal statute is that of a professional therapist-patient/client relationship." State v. Ambrose, 196 Wis.2d 768, 777, 540 N.W.2d 208 (Ct. App. 1995).

6. This statement is based on State v. DeLain, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484, where the Wisconsin Supreme Court held "that it is the totality of the circumstances . . . that determines whether there was an ongoing therapist-patient relationship when sexual contact occurred." DeLain, ¶24. The decision then refers to factors that may be relevant to this determination, though not dispositive: a defendant's state of mind; a secret unilateral action of a patient; the explicit remarks of one party to the other regarding the status of the relationship; how much time has gone by since the last therapy session; how close together the therapy sessions had been to each other; the age of the patient; the particular vulnerabilities experienced by the patient as a result of his or her mental health issues; and, the ethical obligations of the therapist's profession [referring to sections in the Wisconsin Administrative Code: § Psy 5.01(31), § MPSW 20.02(21), and § Psy 5.01(14)(a)-(b) and (c)1-7]. DeLain, ¶24.

The DeLain decision also "disavow[ed] the court of appeals discussion of 'intentionally.'" Id. at ¶24. The court of appeals had concluded that because § 940.22 used the word "intentionally" it required that the defendant know that the victim was a patient and know that the defendant and the victim had an ongoing therapist-patient relationship. State v. DeLain, 2004 WI App 79, 272 Wis.2d 356, 679 N.W.2d 562, ¶¶10-11, citing § 939.23(3).

7. "Without consent" is not included as an element in the statute. To avoid possible speculation or confusion, the Committee concluded that the jury should be specifically informed that consent is not an issue.