Termination of Employment: Who “Owns” the Patient?

written by Richard Leslie | May 26, 2016

Avoiding Liability Bulletin – July 2007

One of the more troubling aspects of practice for counselors and therapists occurs upon termination of employment, whether it is in a private practice setting or otherwise. Unless the employer and employee are clear with one another at the outset, disputes can arise over existing patients. Among the questions that typically arise for the departing counselor or therapist are: Who “owns” the patient? Can I take patients with me? How do I take patients with me in an ethical manner?

The answers to these questions are not always easy because the situations often vary. Sometimes the person leaving a work setting is licensed and sometimes they are pre-licensed. Sometimes the person leaving has been fired for cause or for wrongful conduct and sometimes they leave on their own volition. The setting may be a nonprofit and charitable corporation, a private practice, or a licensed clinic setting. The employment may be evidenced by a written contract or may be of a less formal nature.

Termination of an employment relationship, whether it is an “at-will” relationship or one based upon a contract of employment for a specified term, is often an emotionally charged occurrence, for any number of reasons. As a result, sometimes the parties threaten each other with lawsuits, and sometimes they threaten to complain to the licensing board. I believe that the recognition and observance of a few basic principles, however, can assist those involved to reach an amicable and ethically appropriate employment termination. Because of the emotions involved, this is not always easy to accomplish.

In order to help focus those with whom I have consulted, I ask the following questions at the outset: In whose best interest should we operate – yours, the other party to the dispute, or the patient’s best interest? Should your economic interests take precedence over the wishes of the patient? Should the patient be told about all of his/her options, or should the patient be kept in the dark? These rhetorical and somewhat sarcastic questions help to focus those who consult with me (departing employee and employer alike).

Who “Owns” The Patient?

At the outset, let’s be clear – no one person or entity “owns” the patient. The patient belongs to no one. The patient is free to terminate treatment at any time and for any reason. Additionally, the patient generally has the right to choose his or her counselor or therapist. Typically, the patient pays the business entity where he or she is receiving services. This could be a private practitioner doing business

as a sole proprietor, or perhaps a professional corporation, or a nonprofit and charitable corporation. While the employer may have a written agreement or verbal understanding with the employee that specifies what happens upon termination, this would not typically affect the patient's freedom to choose where and from whom he or she wants therapeutic services.

Employers often believe that since patients pay them and are being treated at their premises, often as a result of their advertising and/or reputation in the community, the employer "owns" the patient. They may believe that when the employee departs, the patient is expected to remain at that particular setting and to be seen by another therapist or counselor. Often, however, the patient has positive feelings about the relationship with his or her therapist or counselor and may want to continue with that relationship, if possible. Employers sometimes have a hard time digesting that reality, even though many recognize that continuity of care is a good thing, especially if that is the choice of the patient.

Can I Take Patients With Me?

Generally, the answer is "yes," but it might be a troublesome process or the answer may be "no" in particular circumstances. For instance, if the departing therapist is a trainee or an intern, it must be remembered that that such unlicensed persons may not be able to lawfully practice independently and may have to be appropriately employed and supervised. One must look to state law and regulation to determine if this is the case. A condition precedent to such pre-licensed persons "taking patients with them" is that they have a new and proper employment setting lined up.

Additionally, the departing intern or trainee should first obtain permission from the new or prospective employer to bring one or more patients into the new work setting. The issue of fee must also be addressed, even though the fee would not typically be paid to the intern or trainee, but to the employer. In order to avoid problems, the fee that the patient is to pay in the new setting should, if possible, be the same or close to the fee paid in the prior setting. A much higher fee would put the patient in an awkward position and raise the issue of exploitation, while a much lower fee might be viewed by the former employer as intended to improperly manipulate or entice the patient to leave the employer's practice.

How Do I Take Patients With Me In An Ethical And Lawful Manner?

Before acting, it is important for the departing practitioner to realize that the patient may want to stay at the counseling center originally chosen and may feel comfortable being treated at an agency with a good reputation in the community. Or, the patient may not be satisfied with how therapy is progressing and may want to change therapists or be referred to another agency or private practitioner. Similarly, the departing therapist may leave an employment setting and be pleased or relieved if one or more of the patients decide to remain at the employer's practice.

When an employee knows that he or she will be leaving an employer's practice, and assuming there is no written contract providing otherwise, the ethical and professional way to deal with the issue is to

address it early and in a straightforward manner. The employer should be informed of the fact that the employee plans to leave and that it is the intention of the departing practitioner to let the patient know of this impending departure at an early time. The employer can then be told that it is the intention of the practitioner to let the patients know what their options are regarding future treatment. At this point, the employer often gets uncomfortable. This is when it is important to ask the employer whether or not the patient is entitled to know of the options for further treatment.

If both parties focus on the best interests of the patient rather than their own financial interests, reasonable people can come to an appropriate and ethical resolution of the dispute. I am sometimes amused when I hear an agency director or employer claim that the reason he or she doesn't want the terminating employee to take patients with him/her is because of the concern about the practitioner's competence. Often, however, there are no documented employee records that support such concern, even though the employee may have been employed there for more than a year. This "concern" is often a manipulation – an excuse for trying to prevent the patient from leaving.

It is important to review written contracts of employment early and to understand how the issue of termination will affect patients being treated at the time of termination. Contracts that attempt to limit the patient's ability to select the practitioner of his/her choice are, in my view, suspect. Employers are legitimately and understandably concerned with protecting their businesses and with not suffering unanticipated and significant losses. What the employer typically tries to do in the contract is to provide for compensation from the departing therapist for each patient taken from the practice. This could be problematic for the employer, depending upon the specific contractual terms and applicable state laws.

Some contracts, for example, provide that the departing therapist will pay the employer a percentage of fees generated by future treatment at the new setting. Such contractual provisions may be against public policy and in violation of one or more state statutes. As a result, it is arguable that such provisions are ultimately unenforceable by the employer. If a percentage of the future fees were in fact to be paid, this might be considered to be payment (and receipt of payment) for the referral of patients – which is unlawful in most states. Thus, employer and employee could possibly be in trouble if this arrangement comes to light. This reality sometimes helps both parties to the dispute to seek a quick and quiet resolution, hopefully remembering to consider and respect the interests and wishes of the patients.