TERMINATION AND REFERRAL – When Does the Duty to the Patient End?

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One aspect of termination and referral that I have not previously written about involves the issue of follow-through after a referral is made and communicated to the patient. Referrals are usually made after the licensed mental health practitioner decides to terminate with the patient, which may occur for a variety of reasons. Perhaps the practitioner has determined that the patient is not sufficiently benefiting from the treatment and would be better served by another practitioner – whether of the same licensure or otherwise. Practitioners may terminate because the patient is no longer able to pay the previously agreed upon fee or because a conflict may have arisen requiring, in the judgment of the practitioner, a termination. Additionally, a termination may occur because the practitioner becomes ill or is otherwise incapacitated. It is of course possible that the patient or client will unilaterally terminate treatment for one or more reasons, or for no reason.

Whatever the reason for termination may be, the mental health practitioner is likely to be under the ethical and/or legal duty to refer the patient or client elsewhere – whether to an individual licensed practitioner, or to a governmental agency, such as a county mental health facility, or to a nonprofit organization providing counseling or psychotherapy services. Once the referral is given and the termination occurs, there would seem to be nothing further for the practitioner to do. In fact, many practitioners believe that they owe no further duty to the patient. Thus, practitioners should be sure to carefully and fully document the entire termination process. Doing so could prove critical in the event that there is a case or controversy.

Were a question to arise regarding the duty of the practitioner in this regard, much depends on the particular facts and circumstances and the law in the state in which such a situation occurs. The issues of termination and referral may be covered, to some extent, in state statute or regulation. More likely, common law principles regarding "duty" and "negligence" will be applied to particular cases. Ethical standards of professional associations may also play a role. Generally, the duty of a mental health practitioner begins when a contract for professional services is entered into – whether in writing or orally. Likewise, I believe that the duty to the patient should end concurrently with the termination of the therapeutic relationship. This of course assumes that the termination is made in a clinically appropriate manner. A proper termination process requires the practitioner to carefully consider whether a referral is necessary or appropriate, and if so, how the actual referral will be implemented.

In some cases, it might be appropriate for the practitioner to call or otherwise contact the terminated patient, or ask the patient to communicate with the therapist, for the purpose of assuring that the patient is following through with needed treatment. In rare cases, the therapist or counselor may be compelled to take other action (e.g., arrange for an involuntary commitment) when it is determined that the patient is not following through with the referral. Perhaps the post-referral contact reveals something to the practitioner that indicates a worsening of the patient's mental or emotional condition. Unless state law or regulation dictates or specifies when the duty (to provide competent care) to the patient ends, the therapist or counselor may not be able to avoid taking some form of action after a referral is made.

I am not an advocate of the proposition that once there is a therapist-patient relationship, there is always a relationship. Such a belief would keep the therapist or counselor "on the hook," or under a duty to act under certain and various circumstances, forever. This is not a good idea! Likewise, I don't subscribe to the notion, as some posit, that the practitioner is only relieved of a duty to the patient when the referral is "consummated" by the patient. That too would keep the practitioner "on the hook" at the discretion or pleasure of the patient and would place the practitioner in an ambiguous and perhaps vulnerable situation. If state laws or regulations address this subject matter (to wit, when does the professional relationship and the duty to the patient end), practitioners will be guided by the standards thereby established.

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REFERRALS – When Does the Duty to Refer Arise, If At All?

I recently spoke with a mental health practitioner who was dealing with a situation where a non-patient was in apparent need of therapy or counseling. The person in apparent need had referred a friend to this therapist, and the therapist was treating that friend. The person who made the referral thereafter e-mailed the therapist on more than one occasion, providing the therapist with information (some accurate, some not) about the patient. The therapist in such a situation should ordinarily tell the informant that nothing the informant says is confidential and that the therapist is free to share this information with the patient. The therapist was planning to tell this person not to call or e-mail anymore and wanted to refer the informant to a mental health practitioner because it was clear to the therapist that the informant had mental health "issues."

In such a situation, the question arises as to whether there is a legal or ethical *duty* to make a referral. If "yes," then a referral must of course be made. If "no," then the question arises as to whether a referral should be made. My view is that there is no general duty (unless state law, regulation, or ethical standards provide otherwise) to make a specific referral in the scenario described above. To do so may create problems for the practitioner. Referrals must of course be made with care, and they should be tailored to the individual's particular needs. The failure to do so could result in allegations of negligence. Clearly, if a mental health practitioner has seen a patient for any amount of time, and then, for one

reason or another, must terminate treatment, there typically is a legal and ethical duty to refer. However, if there is no practitioner-patient relationship established (e.g., no fee has been paid for services, and no contract, whether oral or written, has been entered into), and a referral is sought, a different situation is presented.

Some may argue (as I do) that when services are denied or refused for appropriate reasons, no *duty* to refer arises because no practitioner-patient relationship has been established. If such a duty does exist, it would likely be as a result of an ethical code provision or law or regulation that imposes such a duty. Such a provision can create problems for practitioners if drafted in such a way that the ethical duty to refer arises with those who are not considered patients or clients. Of course, if a practitioner desires to make a referral, that is another thing. There is a big difference between acting voluntarily and being under a duty to act. Mental health practitioners must check the applicable ethical standards (and the applicable laws/regulations) in their respective professions and the states within which they practice to determine whether a duty to refer exists in particular or various circumstances.