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COURT ORDERED COUNSELING

An ethical minefield for PSYCHOTHERAPISTS

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Abstract

Psychotherapists who enter a relationship where therapy is used as punishment (TAP) are entering an ethical minefield littered with serious threats to professional psychotherapy. Ethical concerns relating to confidentiality, dual relationships, and informed consent require that the psychotherapist be extremely vigilant in avoiding ethical violations that are inconsistent with the well-established professional procedures in the field of psychotherapy.

Psychotherapists have increasingly been recruited to provide their services to clients who are ordered by the courts to undergo counseling. This practice has been referred to as “coerced treatment,” “court-ordered treatment,” “mandated treatment,” “involuntary treatment,” or “compulsory treatment.” In any case this “therapy as punishment” (TAP) practice constitutes some form of legal sanction and some degree of involuntary counseling. Psychotherapists and counselors who enter a therapeutic relationship with a court-ordered client are entering an ethical minefield containing serious threats to professional psychotherapy.

Several writers outside the field of professional psychotherapy are convinced that court-ordered counseling is an acceptable practice. Their focus has been primarily on whether it is effective. The effectiveness issue presents an interesting dilemma for counselors. Motivation to change one’s behavior has been viewed as a process that involves a number of steps or stages (Connors, Donovan, & DiClemente, 2001). In addition, the literature of motivation identifies two different but related types of motivation. The first is motivation to change one’s behavior, which usually involves a major lifestyle change. The second is motivation to enter counseling or psychotherapy, which may be a gesture to alleviate an immediate aversive threat (Donovan & Rosengren, 1999). Traditionally, internal motivation is a fundamental prerequisite for most professional counselors to develop counseling interventions that will facilitate client growth and change.

On the other hand, a number of studies and reviews have supported the effectiveness of coerced treatment (Finn & Newlyn, 1993; Leukefeld & Timms, 1988; Satel, 2000). These results would suggest that internal motivation is not a construct of paramount importance. Specific research evidence seems to indicate that external motivation is related to retention in treatment programs, but internal motivation is related to the recovery process (DeLeon, Melnick, & Tims, 2001). The dilemma is also highlighted by practical concerns. Inciardi (1994)

indicates that if we exclude people from treatment who are not ready, the treatment process would never begin. He further points out that clients mandated by the criminal justice system to undergo treatment are usually not enthusiastic about entering treatment. It usually offers a more attractive alternative to incarceration. The strategy of coerced treatment is created to exert extrinsic pressure on the person, through legal means, in order to create a fear of more aversive sanctions.

Currently, this strategy is in operation at the local, state, and national levels. Offenders are court-ordered to enter residential treatment facilities, in-prison therapeutic communities, and community outpatient counseling programs for a variety of problems. Coerced counseling has become quite commonplace, widely accepted, and widely practiced.

The concern in this discussion is not to determine whether coerced counseling is effective, but to determine whether it is ethical, and to examine the various ethical risks assumed in a coerced counseling relationship. The concern is not how it affects the client, but how it affects the counselor.

In addition to a guaranteed caseload, the practice of court-ordered counseling may also include one or more of the following conditions: clients may not understand whether their treatment status is voluntary or involuntary; clients may not think they have a need for counseling; clients may not actually have a problem; clients do not choose their therapists; clients cannot change their therapists; clients cannot freely terminate counseling; clients may be forced to consider compliance to avoid serious consequences for leaving counseling; clients may be agreeing to enter a counseling relationship without sufficient information about the relationship. The extent to which these elements exist is likely to determine the extent to which the counseling is voluntary or coerced. These elements are, in turn, likely to affect future criminal activity (Boyum & Kleiman, 2002).

Therapeutic Jurisprudence

In addition to drug and alcohol counseling in community and institutional correctional settings, drug courts have been one of the primary settings where clients are ordered by the court to attend counseling. The theoretical and philosophical foundation of court-ordered treatment is therapeutic jurisprudence. An attempt has been made to improve current procedures so that the courts will be more effective in treating drug offenders (Hora, Schma, & Rosenthal, 1999). Even though most of the conceptual parts were in place, drug courts were a practice in search of a theory, because they have only recently been linked in the literature.

Therapeutic jurisprudence was initially used in 1987, so it is relatively new. It is the study of the extent to which the legal system provides therapeutic measures for people involved, and drug courts try to use it in order to treat drug offenders (Hora et al., 1999). In the structure, processes, and procedures of the drug court, therapeutic jurisprudence has been designed to cope with the problems of drug-addicted offenders by establishing a therapeutic foundation.

Therapeutic jurisprudence has been the drug court movement’s jurisprudential foundation. It operates by focusing on the sociopsychological way in which the legal system affects people, and has presented an instrument for a new and distinct understanding of the law and its applications (Hora et al., 1999). In addition to the concept being applied to drug and addiction problems, therapeutic jurisprudence has been applied to offenders with mental problems (Watson, Hanrahan, Luchins, & Lurigio, 2001), sex offenders (Edwards & Hensley, 2001), and DWI offenders (Winfrey & Giever, 2000). In any case, therapeutic jurisprudence is a concept that focuses on the therapeutic or destructive consequences on individuals produced by courts. This includes legal procedure, lawyers, judges, and rules. It is a new way of studying how the law and legal procedures may affect therapeutic outcomes (Watson et al., 2001). The challenge for drug courts is to transcend the essential differences

and possible conflicts in values, goals, and methods, when the criminal court and the treatment profession have been combined to create a dual role.

Coercion Issues

Legally mandated substance abuse treatment is the primary process for getting offenders into treatment in the criminal justice system. Nevertheless, coercion can occur in several different settings in the system. Probation officers can recommend that an offender enter treatment. A drug court judge can offer a choice between jail and a treatment program. A state may have a correctional policy of involuntarily sending inmates to a prison treatment program. For psychotherapists, this presents a confusing status of a court-ordered client because of the different procedures and inconsistent terminology. Outside the justice system, employees are frequently referred to counseling as part of the employee assistance program. The counseling programs deal not only with substance abuse, but with a variety of mental and physical health issues that may affect job performance (Lewis, Dana, & Blevins, 1994). Was the client coerced, compelled, ordered, voluntary, or involuntary?

Marlowe, et al. (2001) found that coercion was a continuous and multi-dimensional construct that has a great deal of value in predicting and understanding counseling outcomes. They suggest that psychotherapists consider the question of what brought the client into treatment in the first place.

As mentioned earlier, a critical coercion issue is the notion of internal or external motivation. Farabee, Prendergast, and Anglis (1998) point out that a client being referred by the criminal justice system does not necessarily mean that the client is entering treatment involuntarily. Many clients do not know or understand their status, and many would have entered treatment voluntarily even if they had not been required to enter.

A final study by Shearer and Ogan (2002) indicated that 32% of offenders in a sample of a prison substance abuse treatment program indicated they were there voluntarily, when clearly they were not.

This study further underscores the complexity and ambiguity of the issue of coercion. For example, the offenders may not have known their status, or they may not have understood the terms used in the survey to determine their status through self-report. Consequently, psychotherapists working with court-ordered clients need to explore motivation issues with clients if counseling is to be successful.

Ethical Issues

More important concerns for psychotherapists are the ethical liabilities and risks of treating court-ordered clients when the relationship approaches TAP. Satel (2000) found that coercion is not an issue, and can be a crucial tool in the treatment of drug addiction. Her justification for coerced treatment is that people respond to contingencies, incentives, and consequences, such as not getting paid if we don't work, and getting evicted if we don't pay rent. Her arguments are compelling, but it seems there is a substantial difference between choosing to work or not work and the possible consequences of choosing not to participate in therapy. In fact, people frequently choose to not work with few consequences. Additionally, her support for coerced treatment misses the critical points of informed consent and problem ownership. Most of the focus of court-ordered counseling has been on the effectiveness of the practice, how it can be done, and the role of the courts and justice system in externally motivating clients. Very little emphasis has been focused on how these referrals affect the ethical concerns, procedures, and behavior of the therapist.

Other writers have emphasized the concerns for therapists. Shearer (2000) has challenged coerced treatment from a research, practice-based, ethical, and theoretical perspective. The ethical challenge was the most serious one; the practice of TAP violates the codes of ethics of several professional organizations because coerced counseling is not supported by informed consent. Furthermore, it is naïve to suggest that signing a consent form meets the necessary requirements. If clients can be ordered to participate in counseling, they

can be ordered to sign a form that virtually indicates nothing will be kept confidential. This is not a hypothetical case. These forms do exist. Important treatment issues must be made on the basis of informed choice (Herring, 2002). In most criminal justice settings, there are no choices, and there is no confidentiality. Leukefeld and Farabee (2001) indicate that this fidelity of the therapist/client relationship is critical and requires vigilance on the part of the therapist.

Honea-Boles and Griffin (2001) question the practice of court-mandated clients or the punishment of therapy. Their concerns arise from coerced adult clients who have been ordered to attend counseling by a court or children's protective agency. Frequently, parents suspected of child abuse are referred to counselors who have a contract with the child protective agency. The parents risk losing their children if they refuse treatment, and the counselor is required to follow agency-outlined treatment goals, provide progress notes, and maintain regular verbal contact. The pressure on the parents to comply with therapy is enormous. Honea-Boles and Griffin argue that the counselor is an agent of social control rather than an agent of change in these types of relationships. The process appears to be more political than therapeutic. In this setting, clients would not have sought counseling, and can expect negative consequences if they refuse.

Honea-Boles and Griffin (2001) also point out that forcing therapy on a client violates the codes of ethics of several professional organizations, including the National Association of Social Workers, The American Association of Marriage and Family Counselors, The American Psychological Association, and The American Counseling Association. These organizations promote a fundamental belief in the client's right to self-determination. The organizations maintain the importance of the client's freedom to choose whether to engage in therapy and with which counselor.

In addition, the issue of confidentiality is a troubling concern when a client is coerced by a court order. A client is not

free to enter into a therapeutic relationship if the therapist cannot maintain confidentiality. How can a psychotherapist develop a relationship based on trust when the client is aware that the counselor is being paid by the court or correctional agency? This is an especially important question if the potential exists for the therapist to be subpoenaed to testify against the client. A lack of confidentiality sets in motion the potential for deception, compliance, and superficial play on the part of both the counselor and the client. A court-ordered client may appear ready for counseling as a form of compliance, but not ready for long-term personal or life-style change. The issue of confidentiality is another potentially lethal mine in the minefield of court-ordered therapy.

Finally, court-ordered therapy has activated the most troublesome mine in the ethical minefield. Court-ordered therapy creates the traditional anathema for most counselors of a dual relationship. Honea-Boles and Griffin (2001) identify this as the therapist becoming a double agent, where the counselor is at the behest of two masters—the ethics of the profession and the legal mandates of the court. The dual relationship is particularly troubling for most counselors and psychotherapists because dual relationships are usually identified in ethical codes, professional training programs, and the literature as a situation to be avoided completely (Corey, 2001).

On the other hand, Goldsmith and Latessa (2001) suggest that therapists should participate in triadic relationships instead of dyadic relationships. They suggest that the triangular relationship among the coercer, the individual, and the counselor is a collaboration that should not be missed in drug court treatment. Collaboration is an interesting choice of words, because legal agencies frequently expect the therapist to spy on the client and report relevant information to the coercer.

This triadic relationship is quite an unusual suggestion for several reasons: (a) it amplifies the confusion as to whether the therapist is an agent of change or an agent

of social control; (b) it is highly unlikely that any program exists to prepare therapists for this unusual relationship based on a theoretical orientation that guides the process of therapy; (c) a more important concern would be the degree of confidentiality that could be established in a triadic relationship; and (d) suggesting a triadic relationship fails to recognize the difficulty and responsibility of creating a working alliance in a traditional dyadic relationship, an art and skill that takes years of study, training, and supervision to perfect. Farabee and Leukefeld indicate that therapeutic fidelity requires the therapist to work primarily for the good of the client and to avoid any dual responsibilities that threaten the relationship between the client and therapist.

Conclusion

Based on the discussion of therapeutic jurisprudence, coercion issues, and ethical concerns as they relate to court-ordered therapy, psychotherapists need to be extremely vigilant in avoiding an ethical minefield. The shift of therapy from a clinical function to a criminal justice function, with the practice of judges dispensing treatment (Goldkamp, 1999), has initiated psychotherapeutic practices inconsistent with the established professional procedures developed by the major professional organizations and counselor training centers in this country. Psychotherapy should not be used as punishment.

About the Author

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