

A CASE OF PROFESSIONAL NEGLIGENCE?

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Writer's comment: English 19 (Writing Research Papers) gave me the opportunity I needed to “kill two birds with one stone”-improve my writing skills and research something important to me but non-academic in origin. The subject I chose, dealing with the ethics of psychologists, helped me to produce a personal paper in which I could mix emotion with legality. The balance of these two aspects was often hard to find, but my professor, Pamela Demory, helped guide me to achieve just that. Through many major changes in both organizational strategy and my own mindset, I discovered that research is more about process than about product. This paper is, in fact, a narrative of my research's development-the actual process I went through.

— *Meredith Roberts*

Instructor's comment: In English 19: Writing Research Papers, students spend the quarter working on one major research project. Two essential ingredients for success in this project are curiosity-using the assignment to find answers to REAL questions-and willingness to let go of preconceived conclusions when the research reveals the “wrong” answers to the questions. In both areas, Meredith excelled: she really wanted to know what legal recourse you have when a health professional takes advantage of someone you care about. She dived into the research expecting clear-cut answers. When she didn't get them, she kept asking questions, gave up the idea of writing a simple report on solving the problem, and found a new way to approach the topic. The result is a paper that recognizes the complexity of the legal and ethical issues involved and, while it is less optimistic than the paper she had hoped to write when she began her search, it is also more realistic and thus more truthful-and more interesting to read.

— *Pamela Demory, English Department*

Picture yourself in this situation: A family member, extremely mentally troubled, has been seeing a psychologist for eight years. Over the course of this long therapy, you, as an interacting observer, see this relative's mental and physical health deteriorate at an unsteady yet often exponentially quick rate. Between times of displayed complacency and calmness, you see climactic emotional outbursts that are always, though unbelievable to you at the time, outdone and outmatched by the next. You see this person controlled by not only anger but hate-hatred toward other family members; hatred that has burned like a wild fire for decades, always growing and with little hope of extinguishing; hatred that sometimes gets so out of hand that it will often attack even those most loved. You see this family member become increasingly fragile physically: not eating well or enough; not sleeping at all, and only a little after taking sleeping pills so strong they'd knock out a horse; skin so pale and weak against a bony skeleton that at times you find yourself looking directly into the face of a ghost. You hear implied threats of suicide often enough, but not too often, so that you don't know what to make of them, whether they are true cries for help or a whole new method or angle of verbal manipulation. You see all this over time, all while this close relative of yours has been in therapy with the same psychologist for at least three hours per week, every week, for eight years.

What you don't see is improvement. Though you can only speculate what issues and goals are being addressed in this relative's therapy, you don't see resolution on any one issue. You don't see a forward progression since the first issues addressed eight years ago. In fact, you don't even see the issues at the same level, for they've only intensified and magnified over time. Most importantly, you don't see anything that would make you believe that the psychologist is doing something to change this—you don't see him ending the therapy when realizing that his patient's emotional status was not improving; you don't see him referring his patient, your close family member, to someone else who might be more successful; you don't see him do anything when approached by other family members with their concerns for the well-being of his patient, their loved one.

This case that I've just placed you in is possibly one of professional negligence. Negligence, defined in legal terms, is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm" (qtd. in Everstine 252). When put in a professional setting, this is called malpractice, which is "negligence in the execution of professional duties" (Everstine 252). And as described in the American Psychological Association's (APA) Code of Ethics, the primary professional duty of the psychologist is to protect both the individual and society by aiming to "improve the condition" of both (Gorlin 360). If a psychologist fails to uphold his duty by specifically violating any laws or codes expected and commanded of him professionally, then he may be subject to a number of controls by a number of regulating bodies. In the situation presented above, you must first determine, given the specifics of the case, whether or not your case is truly one of professional negligence. Then, if you believe you have a strong enough case against the psychologist involved, you must fully consider the options available to you, a third party to the case.

When considering this potential case of professional negligence, you must first question the ethics of the situation—does this scenario show the psychologist to be acting unethically? To answer that question, you must turn to the actual bodies that determine such ethics. The first type of regulating body, an Ethics Committee, is one of a large collection of local, state, and national committees meant to help enforce and maintain the Code of Ethics accepted by different psychological associations (such as APA and CPA, or California Psychological Association). If a code, or standard, is broken, then a complaint may be filed with an Ethics Committee, who, in turn, may punish the psychologist by making the psychologist stop the unethical conduct voluntarily, by conducting a formal hearing, or by sanctioning the psychologist via

reprimand, probation, suspension or even expulsion (Gorlin 330). Relevant to the case in point, the psychologist may be violating Article 4.04 (b) of APA's Ethics Code, which states: "Psychologists terminate a professional relationship when it becomes reasonably clear that the patient or client no longer needs the service, is not benefiting, or is being harmed by continued service" (373). With this standard in mind, it seems more than reasonable to believe that this code is being violated in the scenario presented, where the patient's emotional and physical status has deteriorated over the extended length of the therapy.

The second group whose purpose is to uphold the Ethics Code, and who might even be more important in such a role than the Ethics Committees, is the Board of Psychology. This state Board, unlike the Ethics Committees, focuses its regulating power on psychologists' licenses directly. By using the guidelines derived by the Psychology Licensing Law, this Board has the authority to deny, suspend, or revoke a psychologist's license. Included in the law's guidelines is a rather lengthy list of grounds, or causes, for such licensing control (Article 4, Section 2960). For example, the conviction of a crime related to the psychologist's profession and gross professional negligence would be considered grounds enough for licensing regulation (Laws and Regulations 1516). Thus, considering this list and how it is used by the Board of Psychology, the case given above may be cause enough for some sort of licensing control by the Board-that is if your evidence is solid enough to prove professional negligence.

Furthermore, if you are questioning the ethical implications of this case of potential professional negligence, and thus are wanting to prove this professional negligence, then you'll want to question and investigate the legal implications as well. Such an investigation of the legal aspects of the case is necessary, for malpractice is, in fact, the legal term for professional negligence. Here, in this legal situation, a couple different types of law come into play. Primarily, with this case, torts law is what is best applied. Tort, defined, is the "type of harm done to an individual in such a manner that the law orders the person who does the harm to pay damages to the injured party" (Schutz 1-2). As in any type of law, the burden of proof is on the plaintiff. And for this specific type of law, the burden of proof breaks down into four essential parts: first, the defendant's duty, in this case to the psychologist-patient relationship, must be established; second, a breach of duty, or therapy which falls below the standard of care (a standard defined by the usual level of care and skill exercised by psychologists "in good standing of the same school or system of practice in the nation" (Schutz 2), must be proved; third, there must be causation, where the defendant must have caused harm to the patient; fourth, actual damages, or injury, must have been sustained (Schutz 2; Everstine 252). For this last part, relevant injuries that have been documented include "exacerbation of the presenting symptoms" (such as increased depression, paranoia, decreased self-esteem, and expansion of phobias), "appearance of new symptoms" (such as "suicide attempts, development of new forms of acting out, [and disruption of previously solid relationships]"), and "patient misuse or abuse of therapy (generally settling into a dependent relationship that is more gratifying than the 'real' world") (Schutz S-9). If the case is proven in the torts court of law, punitive or compensatory damages would be granted to the plaintiff.

Another type of law relevant to this case is contracts law, for the therapist-patient relationship, being one that is based on both trust and a "fee-for-services," fits under this category. When looking at this contractual aspect of the relationship and how it pertains to your case at hand, you'll find that "fiduciary [or trust-based] abuse" could be charged "when [the psychologist] recommends that a patient not terminate therapy or that a patient increase the frequency of [the] sessions" purely for personal interests (such as personal income) and not for the patient's interests (Schutz 12-13). Again, this is relevant if you can prove that the psychologist continued to treat his patient long after it became obvious the therapy wasn't working. When looking at this information, you might feel confident that your belief is correct-that this case is clearly one of unethical misconduct, of professional negligence. You might feel certain that if you brought up this case to the Board of Psychology, to an Ethics Committee, or to any court of law, you'd win hands

down. Well, nothing is so clear-cut, especially not this case. Though you may feel that you'd be able to present a fairly solid, fact-filled complaint to any of these regulating bodies-proof of injury, proof of mental and physical deterioration, proof of little or no therapeutic progression-your case may or may not be truly solid enough, for there are a number of factors that are automatically against you.

First of all, the case you are trying to prove, whether in the ethical or legal sense, is inherently vague. What you might see as solid evidence, such as eight years of seemingly useless, non-progressive therapy, might be simply "not enough" to convince either psychologists or legal authorities. Dr. Emil Rodolfa, Training Director at the UC Davis Counseling Center and one of eight members of the state's Board of Psychology, is not quick to judge such a scenario as "necessarily unethical." Though he states that "patients should be getting better," he also notes that a case is dependent on its own "context," or specifics, further stating that there aren't many clear situations that are obviously unethical. However, Dr. Rodolfa comments that he might "question" such a case of long-term therapy, for the average length of therapy is eight to ten sessions (Rodolfa, Personal Interview). In such a case, he further comments that the psychologist may need to reconsider his professional beliefs and duties. However, such a case doesn't necessarily show that this therapy is downright unethical, as you may be expecting. Moreover, Dr. Rodolfa believes that the case "must look at the goals set for the therapy," which are sometimes hard to verify, for they often change or grow throughout the course of the treatment. With these goals in mind, you, the patient's relative, may begin to determine how effective the therapy truly is and thus if the psychologist is acting negligently. From this point, you will begin to see how solid a case you actually have against the psychologist.

Like Dr. Rudolfa, Debbie Perschbacher, a lecturer in Professional Responsibility for the UC Davis law school and lawyer for Sacramento's Court of Appeal with an undergraduate major in psychology, agrees that such a case "depends so much on the specifics." In a legal setting, she states that a long length of therapy and deteriorating family relationships is "not enough." When asked what would be enough, Perschbacher described how "something traumatic [must have] changed [that had been] truly detrimental to the client and [was the] fault of the psychologist." For example, if suddenly the patient, who was formerly fairly docile, became belligerent, both at home and in the workplace, when there was "no other reason to be so," then that might be proof enough.

Another huge obstacle, if not the biggest obstacle, that stands in the way of your case, if you haven't figured it out yet, is the actual patient. Let's assume that, given the earlier scenario, you are wanting to file a complaint without the consent of your relative. According to Dr. Emil Rodolfa, because the Board of Psychology conducts its own investigation, a complaint filed by a third party to the Board would be "no different" from a complaint filed by the patient directly. However, in any other setting, this would not be the case. According to Debbie Perschbacher, this case in which the patient is non-complaining produces a couple of problems. First, both Ethics Committees and courts of law require interviews of both the patient and the psychologist. The problem is that both of them would most definitely testify to having no problems with how the therapy has progressed over the years and to wanting to continue with the sessions. Just imagine how the individual regulating bodies would react to such testimonies from the two people who are being affected the most. Remember, you are just a third party.

Second, beyond just the testimony of the non-complaining patient, you will also run into problems with any type of legal case, be it torts or contracts, particularly the latter. In a legal case, the plaintiff is always the one who's been injured most directly by the defendant (Perschbacher, Personal Interview). In our case, this becomes a problem because you, as a third party, are not legally the one being most affected. Instead, the most injured person is the patient. Thus, regardless of whether or not the patient complains of the therapy, you are not the best plaintiff for the case. Any case you would bring against the psychologist must focus on your own injuries and not those of the patient. In my interview with her, Ms. Perschbacher

points out that, relative to torts law, contract law is “even more trouble if the client is not the patient.” In fact, she “can’t imagine the court would [even] want to hear it” (Perschbacher, Personal Interview).

With these obstacles observed, you can now see some soft spots in your case. And with these soft spots, you are limited as to how effective you can be as a third party complainant. Of course, you still have some options. Now, the route, or option, you choose depends on your purpose, or goal, for the complaint.

If your purpose is to prove that the psychologist is acting unethically, then the key is to go to the Board of Psychology. Complaining to an Ethics Committee could prove to be supplementary, but the Board is key, for it can directly control a psychologist’s license. By filing this complaint, you pass along the burden of investigating the case to the Board. On the complaint form, you are asked to “summarize the details of your complaint” and questioned about whether or not you’ve “tried to mediate this complaint with the [psychologist] directly” (Filing, Pamphlet). The Board will then take the investigation from here, doing such follow-ups as reviewing medical and psychological patient records. After the investigation, the Board of Psychology will decide whether or not some sort of regulation should be done on the psychologist’s license, as explained earlier. If the Board finds the psychologist guilty of, in this case, professional negligence, then your work is done, that is unless you wish to pursue the psychologist for money damages in a court of law. If the Board does not find the psychologist guilty and you still wish to pursue the case, then you can ask the Board to reconsider its decision and, assuming that doesn’t pan out, you can have the case reviewed in a court of law. Though most often the court won’t rule differently than the Board, such contrasting rulings do occasionally occur. In such a case, the court will send the case back to the Board, stating exactly what evidence made the court rule differently than the Board, and thus the Board will reconsider its decision (Perschbacher, Personal Interview) Though this ping-pong process won’t necessarily lead you to a reversal in the Board’s decision, it is definitely a possibility that shouldn’t be overlooked, that is if you are serious about pursuing your case.

If your purpose for pursuing this case is not to regulate the psychologist’s licensing or practicing abilities but to seek money damages instead, then you should go directly to the legal courts. Here, your best bet for winning such a case is, as stated before, under torts law, with a claim of professional negligence against the psychologist. The process for this case is like one in any court of law, where you, as the plaintiff, must present a case in which you affirm all parts of your burden of proof while focusing on your own personal injury caused by the defending psychologist. With this case, however, keep in mind that not having the patient on your side will be a definite obstacle to overcome.

This reminder that the patient here is non-complaining introduces another option available to you as a third party complainant. If you believe, and think you can prove, that your relative’s health deterioration is due to the psychologist’s negligence in not referring him or her to a psychiatrist, or someone who could prescribe neural or hormonal medication-if you believe your relative has a neurological imbalance that may be helped with medical treatment-then perhaps you should pursue filing for official guardianship over your relative. In your motion with the court, you would have to prove that your relative is not legally capable because of such a mental illness. Furthermore, in this motion, you would present evidence of the patient’s deterioration while under the care of the psychologist and a list of ways the patient’s life has been affected. After this, the court will allow all parties to respond to the motion and thus base its decision on those responses. If the court finds it necessary, it will request that the patient be evaluated by a psychiatrist, who will then produce the ultimate recommendation as to whether or not the patient needs a guardian. If this is your purpose in making a complaint-to get psychiatric help for your relative-then, according to Debbie Perschbacher, this might be the most successful route, for once you are officially the guardian of your relative, then you can speak on the behalf of your relative. As you might guess, this would be incredibly beneficial to your case, opening up many doors to new options, not only because you could end the therapy with the psychologist directly and start a new treatment with, say, a psychiatrist, but because you could

then file legal cases, such as the fee-for-services contracts case, or simply strengthen the cases with your previous options.

I cannot tell you that this case in point is unmistakably an example of professional negligence on the part of the psychologist. It is not clear, in fact, whether or not this case would hold up in a Board of Psychology investigation or even in a court of law. In 1997, only 145 Board investigations were opened out of 600 received complaints, of which only 61 decisions received penalty. However, 12 of these 61 decisions were of gross negligence or incompetence (BOP: Booklet 14). Such statistics imply that though a relatively decent-sized number of decisions made were on the same issues, or complaints, made in this case, the number of cases decided on is small when compared to the number of complaints received. (The same highly-selective weeding out process occurs in the legal system as well.) Furthermore, this case of professional negligence, specifically in the sense of a psychologist creating and encouraging the ineffectual patient dependence on the therapy, is not a common occurrence. As a result, little in the way of precedence has been established for this case.

However, in *Ethics in Psychology: Professional Standards and Cases*, by Patricia Keith-Spiegel and Gerald P. Koocher, a brief section, entitled "The Client Who Does Not Improve," provides a couple of hypothetical situations that have been derived to show how such similar patient dependence may be the fault of a psychologist's negligence (246-247). For instance, one case describes how a patient, who had been seeing the psychologist for six years, had dealt with her problems and now had no reason to go to therapy except that she felt dependent on it. Another example describes a patient who, throughout the therapy, became increasingly "paranoid and troubled" yet continued to see the same psychologist who did recommend a referral but didn't terminate the sessions (246-247). These examples, though slightly different from our case in point, do suggest that the psychologists might be acting unethically. Thus, it is very possible that our case would be one of psychologist misconduct as well. Again, picture your situation. Consider its context and its specifics, for they are what will make or break your case. Then determine your purpose-your goal. Whether you decide to file a complaint, a lawsuit, or nothing, expect some rough road ahead, but then give it all you can. As Debbie Perschbacher told me, "it is an uphill battle, but it's not necessarily unwinnable."