Legal and Ethical Implications of Refusing to Counsel Homosexual Clients

Mary A. Hermann and Barbara Richter Herlihy

In 2001, a federal appeals court upheld the job termination of a counselor who requested being excused from counseling a lesbian client on relationship issues because homosexuality conflicted with the counselor’s religious beliefs (Bruff v. North Mississippi Health Services, Inc., 2001). This article provides the facts of the case and the legal reasoning of the court. The authors also explore the legal and ethical issues related to this case.

In March 2001, the United States Court of Appeals for the Fifth Circuit held that an employer’s statutory obligation to make reasonable accommodations for employees’ religious beliefs does not include accommodating a counselor’s request to be excused from counseling homosexual clients on relationship issues (Bruff v. North Mississippi Health Services, Inc., 2001). The counselor who filed the lawsuit claimed that her employer’s failure to allow her to refrain from counseling clients on issues inconsistent with her religious beliefs violated federal law. The court disagreed and found the counselor’s allegations had no merit. Although the court addressed only the counselor’s rights according to state and federal laws, this case has broader legal and ethical implications. The purpose of this article is to inform counselors of this legal precedent and to address the legal and ethical issues related to this case.

Bruff v. North Mississippi Health Services, Inc. (2001)

In the Bruff case, the plaintiff was one of three counselors in the North Mississippi Medical Center Employee Assistance Program, a program established to provide counseling to employees of regional businesses. In 1996, Bruff counseled a client identified in the pleadings as Jane Doe. After several counseling sessions, Jane Doe informed Bruff that she was a lesbian and asked for assistance in improving her relationship with her partner. Bruff refused to counsel Jane Doe on this issue, explaining that homosexual behavior conflicted with her religious beliefs. Bruff offered to counsel Jane Doe on other issues and scheduled another appointment for her. Jane Doe did not return for further counseling and complained to her employer about the counselor’s conduct. Jane Doe’s employer filed a complaint with Bruff’s employer, the North Mississippi Medical Center.

In response to the complaint, Bruff told her employer that she refused to counsel Jane Doe on how to improve her homosexual relationship because homosexuality was inconsistent with Bruff’s religious beliefs. As per company policy, the Medical Center requested that Bruff document the job responsibilities from which she wished to be excused. She responded that she wanted to be excused from “actively helping people involved in the homosexual lifestyle to have a better relationship with their homosexual partners” (Bruff v. North Mississippi Health Services, Inc., 2001, p. 497). She also expressed that she would decline to counsel clients on having better sexual relationships if those relationships were outside of the bounds of marriage. She further indicated that she did not have a problem counseling clients who were homosexual or having extramarital relationships, she would simply decline to counsel the clients about these relationships.

The Medical Center management considered accommodating Bruff’s religious beliefs by shifting responsibilities among the three Employee Assistance Program (EAP) counselors. However, on the basis of their limited resources, they found that this option was not feasible. Accordingly, the management sent Bruff a letter explaining that EAP contracts obligated counselors “to treat a wide variety of psychiatric disturbances and clinical issues” (Bruff v. North Mississippi Health Services, Inc., 2001, p. 497) and that the contracts did not exclude “individuals with certain types of issues” (p. 497). The letter also explained that treating a client on some issues, but not other issues, could be considered a violation of ethical standards. Bruff was dismissed from her counseling duties and placed on leave without pay.

Bruff appealed this decision to the vice president of the Medical Center. The vice president asked Bruff if there were any other situations in which she would not be willing to counsel a client. Bruff responded that she would “not be willing to counsel anyone on any subject that went against her religion” (Bruff v. North Mississippi Health Services, Inc., 2001, p. 498). Considering Bruff’s religious beliefs, the vice president discussed the possibility of transferring Bruff to a Christian counseling position. Bruff refused to consider a transfer because she believed the head of the Christian
counseling division held liberal religious views and would not tolerate her conservative perspective.

After careful consideration, the vice president found that accommodating Bruff’s religious beliefs would create an undue hardship on the Medical Center, the other EAP counselors, and the clients. He supported his position by enumerating the logistical problems related to granting Bruff’s request, including the small number of EAP counselors and the additional sessions necessary for the new counselors to build trust with the referred clients. The vice president informed Bruff that her options were to reconsider her request, transfer to another position in which value conflict issues were less likely to occur, or resign. The vice president explained that if she chose to transfer, she would have 30 days to secure another position or she would be terminated. Bruff applied for a transfer to another position, but the transfer was not granted because another applicant was better qualified for the position. Another counseling position became available while her application to transfer was being considered, but Bruff did not apply for the position. After the 30 day period ended, Bruff was terminated.

Bruff filed suit in federal court, and the case was tried by jury. Bruff asserted that her employer had violated federal law by failing to accommodate her religious beliefs. She based her claim on Title VII of the Civil Rights Act of 1964, as amended in 1972, which states that it is unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin” (42 U.S.C. § 2000e-2(a)(1), 2004). The jury found that the Medical Center had violated federal law by discriminating against Bruff and not providing reasonable accommodations for her religious beliefs. However, on appeal, the court reversed the jury’s findings and held that no violation of the counselor’s rights had occurred.

In reversing the jury’s verdict, the appeals court relied on U.S. Supreme Court precedent. Although the Supreme Court has found that employers have a statutory obligation to make reasonable accommodations for the religious beliefs of their employees, the Court has clarified that this obligation does not include requiring employers to accommodate all of their employees’ requests. For example, in Trans World Airlines, Inc. v. Hardison (1977), the Court explained that giving one employee Saturdays off to observe the Sabbath may deprive other employees of their shift preference. The Hardison Court concluded that “the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment” (p. 85) and the Court refused to “construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath” (p. 85).

In the case at bar, the court noted that allowing Bruff to refer clients with issues that conflicted with Bruff’s religious beliefs would result in her two colleagues assuming these responsibilities, thereby assuming a disproportionate workload. The court explained that these referrals would have had a discriminatory effect on Bruff’s colleagues. Thus, following Supreme Court precedent, the court found that discriminating against Bruff’s colleagues to accommodate Bruff’s religious beliefs was not legally permissible.

The Supreme Court has also explained that the law does not require employers to incur “undue hardship” related to accommodating employees’ religious beliefs (Trans World Airlines, Inc. v. Hardison, 1977, p. 84). According to the Court, undue hardship exists when an employer is required to incur more than “de minimis cost” (p. 84) to make the accommodations. Applying this precedent, the Bruff court considered the size of the staff, the travel involved throughout the area covered by the EAP, and the necessity of the new counselor taking time to develop trust with the referred client, and they found Bruff’s request would involve more than de minimis cost to her employer. The court added that requiring one or both counselors “to travel involuntarily with Bruff to sessions to be available in case a problematic subject area came up, is an undue hardship as a matter of law” (Bruff v. North Mississippi Health Services, Inc., 2001, p. 501).

The court addressed Bruff’s testimony that when she applied for the counseling position, she assumed she would be able to refer clients when they sought counseling on issues that conflicted with her religious beliefs. The court noted that Bruff did not discuss this assumption during her application interview. Furthermore, the contracts between the Medical Center and its client companies did not limit the scope of issues that could be addressed in counseling sessions. Bruff simply assumed that “she would only have to perform those aspects of the position she found acceptable” (Bruff v. North Mississippi Health Services, Inc., 2001, p. 500). The court concluded that federal law does not require employers to accommodate “such an inflexible position” (p. 500).

Bruff further alleged that accommodating her religious beliefs was similar to accommodating the preferences of one of the other EAP counselors who did not like to work with children. The court distinguished Bruff’s demands and considered the fact that the other counselor would work with children when the other two counselors were not available. The court noted that Bruff was not as flexible with her request for religious accommodations.

The court also commented on the potential effect of Bruff’s actions on clients. The court considered testimony indicating that refusing to counsel a client on certain issues could have a negative impact on the client. The court was further persuaded by the possibility that homosexual employees might not seek counseling through an EAP that allowed counselors to refuse to work with clients because of their sexual orientation. Therefore, accommodating Bruff’s religious beliefs could harm clients and could prevent employees from getting the assistance to which they were entitled.
The court addressed the accommodations offered to Bruff as well. The court found that the Medical Center offered Bruff reasonable accommodations in offering her the option of finding another position within the next 30 days. The court explained that even if the alternatives offered were not desirable for the employee, offering such alternatives satisfied the employer’s obligation under federal law.

The court further averred that providing reasonable accommodations did not obligate the Medical Center to employ Bruff for a job in which another applicant was more qualified. Noting that Bruff did not apply for the second counselor job that became available, the court stated that an “employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end” (Bruff v. North Mississippi Health Services, Inc., 2001, p. 503). The court found that Bruff did not exhibit such cooperation or flexibility.

In addition to her federal law claims, Bruff alleged that by directing her to counsel a client about a homosexual relationship the employer was requiring her to violate the Mississippi state sodomy law. The trial court found this allegation had no merit and dismissed the claim. The appeals court upheld the dismissal of the claim.

Legal Consequences of Refusing to Counsel Homosexual Clients

The most significant legal aspect of the Bruff case is the court’s holding that an employer’s legal obligation to make reasonable accommodations for employees’ religious beliefs does not include accommodating a counselor’s request to refer homosexual clients who ask for assistance with relationship issues. According to the court, providing counseling only on issues that do not conflict with a counselor’s religious beliefs is an inflexible position not protected by the law. The court further acknowledged that homosexual clients may not seek counseling in a setting that allows counselors to refuse to work with clients on issues related to the client’s sexual orientation. The court found this discriminatory result was not legally permissible either.

The court noted that a counselor who refuses to counsel a homosexual client on relationship issues may cause emotional harm to the client. The fact that Jane Doe did not return for further counseling indicates that she may have suffered such harm. Jane Doe’s not returning for further counseling also illustrates that Bruff was naïve in her belief that she would be able to counsel homosexual clients only on issues not related to their relationships. A counseling relationship is not likely to survive if the counselor refers the client because the counselor condemns the client’s sexual orientation. In effect, if a counselor refuses to counsel a homosexual client on relationship issues, the counselor is refusing to counsel homosexual clients. Furthermore, both refusing to counsel homosexual clients and refusing to counsel homosexual clients on relationship issues constitute illegal discrimination.

The Bruff case is an important legal precedent. Although the case was decided by the Fifth Circuit Court of Appeals and only courts under the jurisdiction of the Fifth Circuit are obligated to follow the holding, the case provides strong persuasive authority for courts in other jurisdictions. The court’s decision is consistent with Supreme Court precedent interpreting employers’ obligations to make reasonable accommodations for employees’ religious beliefs. Furthermore, recent Supreme Court cases indicating that discrimination against lesbians, gay men, and bisexual women or men is unconstitutional support the Bruff court’s holding as well.

The U.S. Supreme Court has addressed discrimination against lesbians, gay men, and bisexual women or men several times in the last decade. In 1996, the Supreme Court held that states violate the Equal Protection Clause of the Fourteenth Amendment if they discriminate on the basis of sexual orientation, even if some of their citizens may have personal and religious objections to homosexuality (Romer v. Evans, 1996). More recently, the Court held that state sodomy laws are unconstitutional (Lawrence v. Texas, 2003). Specifically, the Lawrence Court found that the criminalization of sexual intercourse between individuals of the same sex violated constitutional due process and privacy interests. Thus, Bruff’s allegation that counseling a client on her homosexual relationship violated state sodomy laws is no longer a valid legal argument. The Lawrence and Romer cases further illustrate that the U.S. Supreme Court has taken a stand condemning discrimination against lesbians, gay men, and bisexual women or men.

Considering relevant legal precedent, the Bruff court’s holding is well supported. The message of the court is clear. Counselors cannot use their religious beliefs to justify discrimination based on sexual orientation. In addition, an employer can terminate the employment of a counselor who refuses to counsel clients on issues related to the client’s sexual orientation.

Losing one’s job is not the only legal ramification of refusing to counsel a homosexual client on relationship issues. Counselors who engage in this type of discrimination also could incur significant legal liability. A homosexual client could use a counselor’s unwillingness to counsel the client on relationship issues as the basis for a malpractice lawsuit against the counselor. To prevail in a malpractice suit, a client must show that there was a duty owed to the client, that the counselor breached that duty, and that the client was injured (physically or emotionally) because the counselor breached his or her duty. Remley and Herlihy (2005) explained that when a counselor enters a counseling relationship, the counselor has a legal duty to provide the client with counseling services consistent with the standard of care in the profession. In this instance, the American Counseling Association’s (ACA; 2005) ACA Code of Ethics may be used as evidence of a counselor’s standard of care. Discriminating against clients because of their sexual orientation could be considered a
breach of a counselor’s duty based on the numerous ethical mandates forbidding discrimination against homosexual clients. Furthermore, such discrimination could be considered emotionally harmful to clients. Thus, all of the elements of malpractice could be established in a case in which the counselor refused to counsel a homosexual client on relationship issues.

Ethical Implications for Counselors

The Bruff case raises an ethical issue with which counselors often struggle: When it is appropriate, and when it is inappropriate, to refer a client. The 2005 ACA Code of Ethics cautions counselors to practice only within the boundaries of their competence (C.2.a.). The ACA Code of Ethics also advises counselors to avoid entering or to immediately terminate a counseling relationship when they determine that they are unable to be of professional assistance to a client and to refer that client (A.11.b.) to another counselor. These standards may seem straightforward, but they can be difficult to apply in actual practice. How do counselors determine that they are unable to be of professional assistance? How do counselors decide their boundaries of competence? How should the ethical standards related to competence and referral be interpreted?

Bruff contended that her actions were in accordance with ethical standards. She argued that she acted appropriately because ethical guidelines obligate counselors to disclose to clients when they are not qualified or capable to work with those clients. However, although these ethical standards do caution counselors not to exceed their boundaries of competence, the 2005 ACA Code of Ethics contains numerous references to cultural diversity issues, including direct statements that counselors do not condone or engage in discrimination against clients based on their “age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law” (ACA, 2005, C.5.). The Bruff case demonstrates the inadequacy of an ethical reasoning process that attempts to extract isolated standards from the Code and then interpret them to support one’s viewpoint. Rather, the ethical standards are best understood in the context of the spirit in which they were created. Authors have urged counselors to practice aspirational ethics by striving to understand the intentions that underlie the standards (Herlihy & Corey, 1996; Pope & Vasquez, 1998; Remley & Herlihy, 2005). The spirit of the Code is grounded in moral principles to which helping professionals are expected to adhere (Corey, Corey, & Callanan, 2003; Remley & Herlihy, 2005; Welfel, 2002). The moral principles of justice (fairness), beneficence (doing good), nonmaleficence (doing no harm), and respect for autonomy all seem to apply to the Bruff case.

The ethical standards that address diversity issues are rooted in the principle of justice (Welfel, 2002). Although it can be challenging for counselors to work with clients who hold values different from their own, counselors must respect these differing values of clients and not impose their values in the counseling relationship. Counselors need to be “aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals” (ACA, 2005, A.4.b.). Although a standard in the ACA Code of Ethics cautions counselors to practice within the boundaries of their competence, the same standard continues with the statement that counselors are to “gain knowledge, personal awareness, sensitivity, and skills pertinent to working with a diverse client population” (ACA, 2005, C.2.a.). Counselors have an ethical obligation to actively seek out knowledge that will enhance their understanding of clients who are culturally different from themselves. Remley and Herlihy (2005) have recommended that counselors strive to learn how to effectively counsel clients with values that differ from their own. They added that if “a counselor’s values were so strong that he or she could not counsel clients who held differing beliefs, we would be concerned that the counselor is not well suited for the counseling profession” (p. 20).

The principle of beneficence is embodied in counselors’ commitment to keeping client welfare first and foremost. The counseling profession attaches such importance to this obligation that it is the first standard in the ACA Code of Ethics, which states that the “primary responsibility of counselors is to respect the dignity and to promote the welfare of clients” (ACA, 2005, A.1.a.). The Bruff court seemed to support the counseling profession’s commitment to client welfare when it expressed concern that refusing to counsel a client on certain issues would have a negative impact on the client. The counseling literature indicates consistently that acceptance of clients despite differences in culture, values, or belief systems is a critical component of being an effective counselor (Neukrug, 2003). Remley and Herlihy (2005) further noted that “honoring diversity is fundamental to counselors’ efforts to promote the welfare and to respect the dignity of their clients” (p. 67).

It is difficult to understand Bruff’s rationale for her assertion that she could counsel clients who are homosexual or who are engaged in sexual relationships outside the bounds of marriage, but not on the issues of homosexual or extra-marital relationships. Bruff’s unusual position suggests that it is the counselor’s role to decide which issues a client can and cannot address in the counseling sessions. Such a stance runs counter to the principle of respect for autonomy. Counselors believe that clients are autonomous human beings, capable of directing their own lives and setting their own goals for counseling (Welfel, 2002).

Finally, the principle of nonmaleficence should be considered in the Bruff case. Clients share intimate details of their lives with their counselors, and they can be harmed when counselors are judgmental. Any harm done in the Bruff case may have been compounded by the number of counseling...
sessions prior to Jane Doe revealing her lesbian sexual identity and Bruff’s subsequent refusal to counsel Jane Doe on relationship issues. After several counseling sessions, Jane Doe may have invested a great deal of trust in her counselor, enough trust to disclose her sexual identity without fear of judgment. Possibly, Jane Doe may have invested considerable emotional energy in working through stages of lesbian identity development to achieve acceptance of her sexual orientation (Cass, 1984). Homosexual clients, and other clients who have been subjected to discrimination and marginalization, are particularly vulnerable when counselors perpetuate discrimination against them. Counselors must take care to avoid replicating in the counseling relationship the discrimination that these clients have encountered and continue to encounter in their daily lives (Herlihy & Watson, 2003).

Violating ethical codes and the moral principles on which the codes are based has serious consequences. In the Bruff case, if the counselor was a licensed professional counselor, the client could have filed a complaint against the counselor with the Mississippi State Board of Examiners for Licensed Professional Counselors. Considering the facts of the case, the Board could have found that the counselor’s behavior violated ethical mandates related to nondiscrimination, and the Board could have imposed sanctions, suspended the counselor’s license, or revoked the counselor’s license to practice counseling (Remley & Herlihy, 2005).

Acting unethically also could result in suspension or expulsion from professional organizations. For example, if the counselor was a member of ACA, the client could have filed a complaint with the ACA Ethics Committee. If the Committee found that an ethical violation had occurred, the Committee could have assigned remediation activities, suspended the counselor’s membership in ACA, or permanently expelled the member from ACA (Hubert & Freeman, 2004).

Recommendations

The Bruff case presents an opportunity to explore both legal and ethical issues related to discrimination against lesbians, gay men, and bisexual women or men by members of the counseling profession. From a legal perspective, the Bruff court clarified that refusing to counsel homosexual clients on relationship issues can result in a counselor’s job termination. Furthermore, the numerous references in the ACA Code of Ethics to working effectively with a diverse population could be used as evidence that a counselor who refuses to counsel homosexual clients on relationship issues is violating the standard of care in the counseling community. Thus, a client would likely prevail in a malpractice lawsuit against the counselor.

The Bruff case underscores the importance of developing a tolerant and nonjudgmental attitude, regardless of one’s own values. Counselors need to remain cognizant that they are ethically obligated to seek the knowledge, skills, and sensitivity required to effectively counsel a diverse client population. Counselors who engage in discrimination based on sexual orientation are violating ethical mandates.

The case has particular implications for counselors who, like Bruff, find it impossible to reconcile their religious values with certain client issues. To avoid finding themselves in situations like Bruff’s, these counselors might choose to work in settings that are compatible with their values and advertise these values to potential consumers of counseling services. If it is not possible to work in a compatible setting, these counselors have an ethical duty to avoid harm to clients by ensuring that counselors’ informed consent procedures provide potential clients with adequate information about the counselors’ values.

References


Bruff v. North Mississippi Health Services, Inc., 244 F.3d 495 (5th Cir. 2001).


