Counselor Spotlight: Reporting to Third Parties

Healthcare Providers Service Organization (HPSO), in collaboration with CNA, has published our *Counselor Liability Claim Report: 2nd Edition* (the "2019 claim report"). It includes statistical data and legal case studies from CNA claim files, as well as risk management recommendations designed to help counselors and other behavioral health professionals reduce their malpractice exposures and improve patient safety.

You may access the complete report, and additional Risk Control Spotlights, at: www.hpso.com/counselorclaimreport

This Counselor Spotlight focuses on our analysis and risk recommendations regarding one of the most significant topics in the report: Reporting to Third Parties.

Counselors are expected to be accurate, honest, and objective in reporting their professional judgments to appropriate third parties, including courts, recipients of evaluation reports, and others. While counselors have a duty of confidentiality, they are obligated to inform clients, prior to commencement of treatment, regarding exceptions to confidentiality, such as when information will be shared with a third party. In this Counselor Spotlight, we examine: disclosures of otherwise confidential client information for court-mandated clients (mandated client), circumstances where disclosures are permitted, and a counselor's legal obligation to warn others if clients pose a threat to themselves or others. Disclosure verbally, method of counseling item needs to be addressed.

In the 2019 claim report, issues related to reporting to third parties represented 7.3 percent of license protection cases involving counselors, resulting in an average expense payment of $5,109. Although the majority (71.7 percent) of these cases closed without action taken by the state board of counseling, 28.3 percent resulted in disciplinary action against the insured counselor, ranging from fines to license revocation. An example of a case that resulted in action against the insured counselor's license is the following scenario:

> A licensed professional counselor provided family therapy to a child, the child's mother, and the child's father, as well as individual therapy to the child, during the mother and father's divorce proceedings. Through treatment and journal entries, the child disclosed to the counselor that the father was verbally abusive and used hands-on intimidation, including pushing the child around and placing his hands around the child's neck. After the counselor failed to provide the child's records to the father, despite repeated requests, the father filed a complaint with the State Board of Behavioral Health Examiners. During the Board's investigation, the counselor indicated that she believed release of the child's records to the father could potentially be harmful to the child's wellbeing. However, Board investigators found that the counselor failed to report the suspected child abuse to Child Protective Services, failed to document her determination in the child's clinical record, and failed to provide the child's healthcare decision-maker with a written explanation of the reason for the denial of access to the child's records. The Board placed the counselor on probation for 12 months and required her to complete six hours of continuing education and a three-credit hour, graduate-level behavioral health ethics course on mandatory reporting. The expenses paid to defend the insured counselor in this case exceeded $10,000.

Counselors bear the responsibility to facilitate client growth and development in ways that foster the interest and welfare of clients and promote formation of healthy relationships (*2014 American Counseling Association Code of Ethics*, Section A, The Counseling Relationship). Therefore, a counselor should aspire to earn the trust of a client by creating an ongoing partnership, establishing and upholding boundaries and maintaining confidentiality. The American Counseling Association (ACA) states that counselors should recognize that trust is the cornerstone of the counseling relationship.

However, situations may arise where a counselor believes a client represents a harm to oneself or others, or suspects child or elder abuse or neglect. When these types of scenarios occur, the general requirement that counselors keep information confidential does not apply. According to the *2014 ACA Code of Ethics*, Section B.2.a., counselors have an ethical duty to disclose information to prevent "serious and foreseeable harm" to their clients and others. Therefore, counselors must consider their legal and ethical duties to protect their clients or others from harm, act in their clients' best interests, and protect themselves from potential liability.

Counselors also may receive third party requests for information from a variety of entities for various reasons. These requests may include client healthcare and billing records requested from third party payers (i.e., Government or private insurance carriers) and the judicial and/or other legal bodies. (*2014 ACA Code of Ethics* Sections B.2.d., B.2.e., B.3.d.). Although infrequent, a third party request can also be made by local, state or federal agencies (e.g., Centers for Disease Control and Prevention, Department of Justice, law enforcement and/or health departments). The *ACA Code of Ethics*, Section C.6.b. states that counselors are expected to be "accurate, honest, and objective in reporting their professional activities and judgments to appropriate third parties, including courts, health insurance companies, those who are recipients of evaluation reports, and others." A counselor who fails to fulfill these legal and professional obligations may incur liability. For additional information on responding to these types of requests, please review the Counselor Spotlights on Release of Records and Documentation.

COUNSELOR SPOTLIGHT

For more risk control resources and top findings from the 2nd Edition of the *Counselor Liability Claim Report*, please review additional Counselor Spotlights on the following topics:

- **Boundaries**
- **Release of Records**
- **Telebehavioral Health**
- **Documentation**
- **Supervision**
- **Preparing for a Deposition**
- **Identifying Your Client**
- **Informed Consent**
- **What to Do if you Receive a Subpoena**

Visit www.hpso.com/counselorclaimreport

Additional Resources:

For additional information on enhancing clinical and operational processes when it comes to reporting to third parties in your practice, consider the following resources:

- American Counseling Association – Licensure Requirements for Professional Counselors: https://www.counseling.org/knowledge-center/licensure-requirements
- Wheeler, A. M. & Bertram, B. (2019). *The Counselor and the Law: A Guide to Legal and Ethical Practice*. 8th ed. Alexandria, VA: American Counseling Association (ACA).
- Considerations for the use of distance counseling, Counseling Today: https://www.counseling.org/docs/default-source/ethics/ethics-columns/ethics_march_2015_distance-counseling.pdf?sfvrsn=a24522c_4
- Wade, M. E. (2015). The counselor's duty to report. *Counseling Today*. https://www.counseling.org/docs/default-source/ethics/ethics-columns/ethics_february_2015_duty-to-report.pdf
- Kenny, M. C., Abreu, R. L., Helpingstine, C., Lopez, A., & Mathews, B. (2018). Counselors' mandated responsibility to report child maltreatment: A review of US laws. *Journal of Counseling & Development*, 96(4), 372-387.

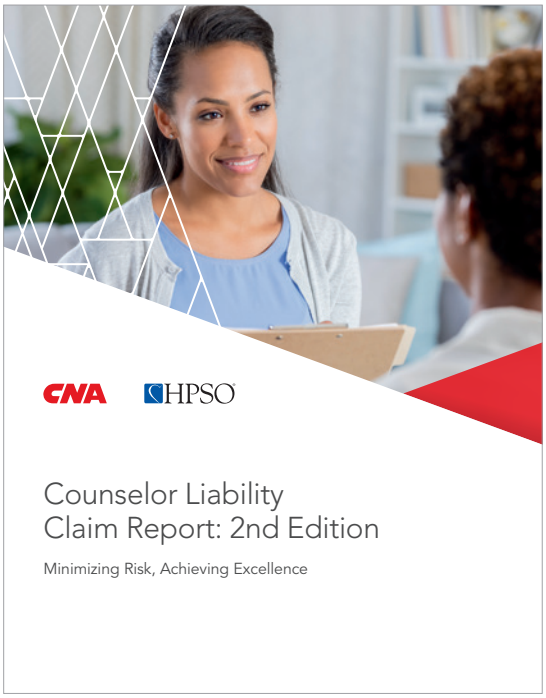
Self-Assessment Checklist: Reporting to Third Parties

This checklist is designed to assist counselors in evaluating risk control exposures associated with their current practice. For additional risk control tools or to download the *Counselor Liability Claim Report 2nd Edition*, visit Healthcare Providers Service Organization www.hpso.com or CNA Healthcare www.cna.com.

Self-assessment Topic

Professional Practice	Yes/No	Comments/Action Plans
I create and maintain records and healthcare documentation necessary for rendering professional services.		
In situations of couples and family counseling, **I clearly define who is considered "the client" and discuss expectations and limitations of confidentiality.**		
Despite the therapy location (telebehavioral, counselor office), I clearly define the limits and exceptions to confidentiality, privilege and privacy at the outset of counseling and periodically thereafter, and clearly document these discussions in the client's healthcare information record, including the client's acknowledgement and signature when possible.		
I have clients acknowledge treatment agreements, and I document in writing such agreement among all involved parties regarding the confidentiality of information discussed during therapy.		
In the absence of a treatment agreement during couple or family therapy, **I considered all individuals involved to be the client.**		
I periodically review treatment agreements with care plans to determine if the counselor-client has changed and if so, I update all documents as needed.		
I obtain client written authorization prior to releasing confidential and private information, where state and federal regulations permit such release.		
Mandated Reporting	**Yes/No**	**Comments/Action Plans**
I familiarize myself with all applicable mandatory reporter laws and regulations and under what circumstances a duty to report is imposed. For example, statues may impose a duty based upon a communicated threat against a specifically identifiable victim, or they may encompass a broader duty.		
I adhere to employer/institutional policies and procedures related to mandated reporting.		
As part of my continuing education, I regularly seek out and complete courses on the role of the mandated reporter.		
I consult with a trusted colleague, supervisor, and/or attorney when I am unclear as to my legal duty.		
I document all actions that I take, those I reject, and the rationale supporting each decision.		
I seek ways to keep my work in perspective, balancing work with taking time to care for myself to prevent compassion fatigue, professional burnout, and countertransference.		

Minor Clients	Yes/No	Comments/Action Plans
General Policy Considerations		
Does written policy define the period of adolescence in conformity with state law, especially in relation to the state statutory definition of a minor (e.g., 13 to 17 years of age)?		
Is "emancipated minor" defined in accordance with state law, e.g., a youth who is: • Emancipated by court order? • Legally married? • Independent of parental financial support and/or living apart from parents? • Pregnant or seeking treatment for possible pregnancy? • A parent of a minor?		
Are unemancipated minor clients and their parents/guardians informed in writing about basic healthcare provider-client issues, including, among others: • The limits of confidentiality between providers, clients and their parents/guardians? • The limits of informed consent requirements? • Care compliance expectations?		
Does the employee orientation program address minor-related issues and policies, including confidentiality, parental notification, consent and client education?		
Are minor clients who legally have the right to consent to their healthcare informed in the same manner as adult clients of payment requirements, including the offering of options other than insurance billing?		
Does written policy address treatment provisions for the unaccompanied homeless minor, including consent to routine medical care and any state-imposed reporting requirements		
I require a parent, guardian, or other person acting *in loco parentis* to attend the initial appointment with the minor patient/client, and document both their presence and relationship to the patient/client in the healthcare information record.		
I request a copy of the guardianship decree from divorced parents or a legal guardian prior to initiating treatment, and place a copy of that document in the minor's healthcare information record.		
I contact a parent, guardian, or other person serving *in loco parentis* prior to making any change in the plan of care when minors present for care without a parent/guardian.		
Are minor clients apprised of the information that will be shared with parents/guardians, as well as the rationale for such information sharing – e.g., a clear and specific intent to cause harm to self or others, an instance of reportable abuse (physical, sexual or emotional) or the presence of a communicable disease?		



This information was excerpted from HPSO and CNA's full report, *Counselor Liability Claim Report: 2nd Edition.* www.hpso.com/counselorclaimreport

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