Healthcare Providers Service Organization
Risk Advisor for Counselors

Balancing confidentiality and duty to warn

Shootings such as those that occurred at Virginia Tech in 2007, Sandy Hook Elementary School in 2012, and a movie theater in Aurora, Colorado, in 2012 have sparked widespread debate as to the state of mental health care in the United States. One issue has been the responsibility of mental health professionals such as counselors to warn others that a client may pose a danger.

As a counselor, you want to protect your client’s privacy and others in the community. Balancing these competing goals can be challenging. If you notify authorities inappropriately, your client could sue you. If you fail to notify authorities and something occurs, you could be sued by survivors and the families of those who didn’t survive. How can you best walk this fine line? By understanding your legal and ethical responsibilities for “duty to warn.”

An ethical and legal duty
It’s important to understand the differences between duty to warn and duty to protect. Duty to warn refers to situations where laws or statutes require a mental health professional to make a good faith effort to contact the intended target of a client’s serious threats of harm and/or to notify law enforcement of the threat. Duty to protect refers to a mental health professional’s legal obligation to protect a threatened third party.

Professional associations’ codes of ethics reflect the duty to warn. The American Counseling Association (ACA) Code of Ethics states the requirement to keep information confidential “does not apply when disclosure is required to protect clients or identified others from serious and foreseeable harm or when legal requirements demand that confidential information must be revealed.”

Should you disclose?
Although duty to warn is clear in principle, in daily practice it can be difficult to determine if a situation warrants disclosure. You should turn to state laws that define situations where a duty to warn exists. A summary of states’ duty to warn and duty to protect laws can be found on the National Conference of State Legislatures website at www.ncsl.org/issues-research/health/mental-health-professionals-duty-to-warn.aspx.

The primary question to answer is whether you have “reasonable cause” to suspect harm may occur. Reasonable cause has two main components: the threat is directed toward a specific target, such as self-harm or to a person or group of people; and the threat is explicit and not vague.

How to disclose
You have several options if you decide to take action in the case of a client you consider may cause harm to self or others. Steps include warning the intended victim, notifying law enforcement, contacting someone who can warn the potential victim of danger, or partnering with a psychiatrist to initiate voluntary or involuntary commitment. If appropriate, you should inform the client you will be disclosing information, and, if possible, obtain written permission to do so.

Document the disclosure in the client’s record, including your objective reasons for making the disclosure, who you disclosed the information to, what you disclosed, and whether the client gave you permission to disclose. Remember to date and time your entry.

This article has been edited for space. To read the full article with resources, visit www.hpso.com/newsletter13.
How to prepare for a deposition

Your worst nightmare has come true: You have been subpoenaed to give a deposition as part of a lawsuit involving a client with attention-deficit disorder who claims you never referred him to a physician for medications that might have helped his condition. He now says the lack of referral resulted in his inability to control his symptoms, which led to his losing his job as an accountant. How can you cope with the knots in your stomach and mental anxiety about the upcoming deposition?

When you know you will be counseling a client with a problem that’s not familiar to you, you prepare beforehand so you can design an effective approach. For example, if you have not counseled a client with a history of addiction to bath salts, you might conduct research in a reputable online database. Or, you might consult with a colleague who has past experience counseling clients with an addiction to bath salts.

Likewise, you need to prepare for a deposition so you can feel confident in your ability to be an effective witness. If you aren’t well prepared for your deposition, the plaintiff’s (opposing) attorney could easily challenge the legal defense your attorney has crafted for you. You can take several steps to prepare yourself, beginning with understanding the nature of a deposition.

What is a deposition?
A deposition is a legal proceeding for gathering information from someone named in a lawsuit or who is a witness in a lawsuit. Depositions occur in the discovery phase of a lawsuit—the investigative process that takes place after the complaint is filed and before the trial.

Depositions are key in a jury trial. Juries in medical malpractice trials want to hear the defendant describe what happened. During a deposition, you will testify under oath. A court reporter will record your testimony verbatim, and you may be videotaped.

What to do if you are subpoenaed
Be sure to notify your supervisor and HPSO, your professional liability insurance provider, that you have received a subpoena to provide a deposition.

12 tips for giving a deposition

- Listen carefully and think before you speak. Don’t be pressured into rushing a reply.
- Speak slowly and clearly and answer courteously.
- If you need to consult your client records, ask to do so.
- If your attorney objects, stop speaking.
- Don’t look at your attorney when a question is asked; this is your testimony.
- If you don’t know the answer to a question, say so instead of guessing.
- If you don’t remember something, say so.
- If you don’t understand a question or word being used, don’t answer; ask for clarification or rephrasing.
- Answer only the question asked; don’t anticipate further questions.
- Understand the theme of your case: You should know every allegation being made against you and the best responses to be made for the defense.
- Be confident and self-assured. If you need a break or drink of water, ask for it.
- Tell the truth.

What is the plaintiff attorney’s goal?
The plaintiff’s attorney will try to restrict you to one version of the incident or facts so your trial testimony is consistent with what you said during the deposition. The plaintiff’s attorney may also try to maneuver you into testifying inconsistently by rattling you or undermining your credibility, while assessing your strengths and weaknesses as a witness. You’ll learn more about how to conduct yourself at the meeting with your attorney assigned to you by CNA, the insurance underwriting company for the HPSO program.

What should I do before the preparation meeting?
The most important step to prepare for the deposition is to meet with your assigned attorney. Usually, the preparation meeting is held about a month ahead of the deposition and follows at least one face-to-face meeting where you learn about the details of the lawsuit, including the specific allegations being made.

Before the preparation meeting with your attorney, thoroughly review the client’s record. Consider all aspects, including your notes and the treatment plan. It may help to develop a timeline showing the chronology of what occurred each time you saw the client. Determine how what you have found compares to the allegations. To the best of your recollection, discuss with your attorney what you recall of the incident.

What happens during the preparation meeting?
Your attorney will work with you to create a “theme” for your defense. For example, if paperwork for the client with attention-deficit disorder doesn’t clearly indicate the client was referred but you remember doing so, the theme might be that even though the paperwork may have suffered, care to the client did not. You will want to keep that theme in mind at all times during the deposition so the plaintiff’s attorney doesn’t pressure you into making statements that don’t support your case. This meeting is also a time when your attorney can help prepare you by discussing questions the plaintiff’s attorney will likely ask and your possible responses.

Finally, your attorney will review guidelines you should adhere to when you give your deposition (see 12 tips for giving a deposition). Keep in mind that your role is to answer only the questions you are asked; do not explain or volunteer information. You will also meet with your attorney the day of the deposition to touch base and discuss any last-minute concerns. Remember to dress professionally because first impressions count.

How to prepare your defense before a regulatory board
Another instance where you will need to prepare with an attorney is to defend yourself when someone files a complaint against your license. License defense is needed when someone (client, client’s family, colleague, or employer) files a complaint with the state regulatory board against a counselor’s license.

An action taken against a counselor’s license differs from a professional liability claim in that it may or may not—as in the case of professional misconduct—involves allegations related to client care. In addition, payments made as a result of a claim cover defense attorney costs, as opposed to being part of a settlement payment to a plaintiff. License protection ensures you have coverage for legal representation for defending yourself against allegations that could lead to revocation of your license.

You are an expert
Remember that counselors are considered experts. To give a deposition like an expert, you must prepare like an expert. It may help you avoid a trial and give you peace of mind.

To help you better understand the deposition process, CNA, the insurance carrier for the HPSO program, has created a video, Preparing for a Deposition. For more information, visit www.hpsos.com/resources/deposition-preparation-video.jsp.

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Medical malpractice claims can be asserted against any healthcare provider, including counselors. Although there may be a perception that physicians are held responsible for the majority of lawsuits, the reality is that counselors are more frequently finding themselves defending the care they provide.

In this case, the defendant was a licensed mental health counselor in solo practice who treated the client (a 51-year-old married woman) for multiple issues over approximately a two-year period. The client’s intake form stated she was seeking treatment for problems in her marriage, symptoms related to being an adult child of an alcoholic, codependency, and difficulties with communication. The defendant treated the client both separately and in couples’ therapy sessions with her husband.

To read the full case with risk management recommendations, go to www.hpso.com/case-studies/casestudy-article/381.jsp.