

Presented by  
HPSO and CNA

## Counselors Medical Malpractice Case Study with Risk Management Strategies

**Case Study:** Failure to practice within boundaries of competence, failure to monitor services provided by other employed counselors/counselors-in-training, use of inaccurate or deceptive certifications to diagnosis a patient, failure to make a correct diagnosis, failure to refer for second opinion as regards professional opinion of a minor that may had been sexually abused

**Indemnity Payment:** Greater than \$600,000

**Legal Expenses:** Less than \$31,000

### Summary

(Monetary amounts represent only the payments made on behalf of the counselor and as his role of the administrator/owner of the pediatric counseling private office.)

The claim involves a 5 year-old child whose parents were in the process of divorcing. The father made allegations that his daughter (5 year-old child) had been sexually abused by the mother's 17 year old son, from a previous relationship. Consequently the judge ordered counselling for the daughter and the mother (plaintiff) sought out assistance from our insured (defendant).

The insured and an employed counselor-in-training were involved in the treatment of the minor child. The counselor-in-training would begin each session coloring with the child and asking about her day. The counselor-in-training testified that she had been sexually abused by a family member while a child and due to her abuse history requested to be involved in the child's counseling sessions. She would often talk about her abuse to the child as part of a relationship building process. As part of the treatment, the counselor would observe and videotape play sessions. He subsequently told the mother that he "could conclusively state that the child had been sexually abused by her half-brother." It was his opinion only after a few sessions that the child had been orally, anally and vaginally penetrated by her half-brother.

After a few more sessions with the child, our insured and his counselor-in-training were even more convinced that child was being molested by her half-brother and reiterated their opinions to the mother. The mother was unconvinced and they encouraged her to get a second opinion. The mother terminated the child's therapy with our insured and his counselor-in-training after he refused to provide her access to the video recordings. Several days later, the father met with our insured and the insured described the events that led to his belief that the child had been sexually abused. The counselor did not tell the father why the child's counseling had been terminated, but encouraged him to contact the court.

A few weeks later, our insured received a letter from the mother's attorney requesting copies of the child's therapy health record and the videotaped therapy sessions. Additionally, the letter warned against destroying any of the requested information and threatened that a subpoena would be issued if the information was not provided. Our insured then called the court to inform them of his suspicions of child's abuse. The court requested that the insured produce a report of child's therapy and the events leading up to child's withdrawal from counseling.

The insured completed a report of events and forwarded it to court with a letter detailing his opinion. The letter stated that the insured and his

Medical malpractice claims can be asserted against any healthcare provider, including counselors. In fact, over \$14 million was paid in indemnity and expenses for malpractice claims involving counselors, according to the most recent CNA HealthPro 10-year study.\*

This case study involves a pediatric counselor working in a private office.



counselor-in-training had observed three of child's therapy sessions and he had no doubt that her half-brother had been sexually molesting her for some time. His letter recommended that child get a soft tissue exam from a pediatrician as he was convinced that she had been orally, vaginally and anally penetrated.

An emergency hearing was ordered and at the hearing, the judge ordered that the children be under adult supervision at all times and a report was to be made to the Department Child Protective Services (DCPS). DCPS investigated the insured's claims and determined that there was no basis to support his conclusions of sexual abuse. Additionally, the judge ordered that the videotapes be reviewed by a separate certified pediatric counselor that specializes in play therapy. It was her conclusion that there was not "one iota of evidence of abuse." She stated that after her review of videotapes "a conclusion that any professional with a modicum of competence would also determine that no sexual or physical abuse had occurred between the child and her step-brother." Additionally, the reviewing counselor stated that any counselor who was making this determination should have consulted with another professional and obtained a second opinion.

As a result of the investigation of DCPS and of reviewing counselor's opinion, the judge found that there was no evidence of abuse. The mother filed a lawsuit against our insured, his business and the counselor-in-training less than six months later.

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It is alleged that the actions of the insured and his counselor-in-training caused “great bodily injury, emotional distress, humiliation, mental anguish, embarrassment, damage to familial relationships, loss of income and other injuries.” For over a year, the mother, who was employed as a teacher, could not work, did not sleep, and “became sick with the very real worry that at any moment the police would show up at her doorstep and take her son away for a horrific crime.”

### Resolution

Initially the insured did not feel as though he violated the standard of care. However, as discovery developed and he sat in on plaintiff expert’s depositions in the week prior to mediation, the insured came to agree that plaintiff’s experts were correct. The insured felt as though he probably did violate the standard of care and that his accusations of sexual molestation should have been further investigated through counseling and by a secondary counselor.

Defense counsel had several pediatric counseling experts review the claims made against the insured. Their findings were that the insured was not using play therapy correctly and in fact, he did not appear to be certified in play therapy. The experts remarked that the insured should have never allowed a counselor-in-training, with a history of being sexually abused as a child, be a part of this patient’s therapy. Additionally, it could be argued that the counselor-in-training would tend to taint any subjective evaluation where sexual abuse was a diagnosis.

The defense attorney also had concerns that the insured would make a bad impression to a jury because at his deposition testimony he was not supportive of his own treatment of the child. After listening to the opinions of the plaintiffs’ and defenses’ experts, the insured requested that the malpractice claim against him be resolved. Defense counsel estimated the settlement range was \$60,000 to \$250,000.

### Risk Management Recommendations with regards to treating Counselors:

- **Work in areas that are consistent with licensure, specialty certification, training and experience.**
- **Know and practice within the state-specific scope of practice**, and in compliance with the standard of care and state licensing/certifying board requirements.
- **Proactively obtain whatever professional education and training are required to maintain and enhance clinical expertise.** Contact the American Counseling Association (ACA) state and/or local professional associations, state licensing/certifying bodies, healthcare/mental health agencies and other counselor organizations for information about recognized educational offerings.
- **Decline to perform requested actions/services if they are outside the legal scope of practice.**

### Risk Management Recommendations with regards to Counseling Firm Owners:

- **Provide appropriate clinical support for counselors, in compliance with supervisory or employment agreements.** Encourage compliance with relevant legal, ethical and professional standards for clinical practice.
- **Monitor clinical performance and professional development of supervisees, students and counselors-in-training.**
- **Evaluate and certify current performance** and potential of supervisees for screening, selection, placement, employment and credentialing purpose.
- **Inform supervisees of professional and ethical standards** and legal responsibilities of the counseling/therapy profession.
- **Maintain a safe environment**, to enhance the clinical experience and protect clients and others.

### Guide to Sample Risk Management Plan

Risk Management is an integral part of a healthcare professional’s standard business practice. Risk Management activities include identifying and evaluating risks, followed by implementing the most advantageous methods of reducing or eliminating these risks – a good Risk Management Plan will help you perform these steps quickly and easily!

Visit [www.hpso.com/risktemplate](http://www.hpso.com/risktemplate) to access the Risk Management Plan created by HPSO and CNA. We encourage you to use this as a guide to develop your own Risk Management Plan to meet the specific needs of your healthcare practice.



\*CNA HealthPro Understanding Counselor Liability Risks, CNA Insurance Company, March 2014. To read the complete study along with risk management recommendations, visit <http://www.hpso.com/counselorclaimreport>.

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