

CASE STUDY WITH RISK MANAGEMENT STRATEGIES

Presented by HPSO and CNA

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 to clients. 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 licensed professional counselor.

Case Study: Alleged breach of confidentiality, incorrect diagnosis and alienation of affection resulting in emotional distress, loss of his marriage and loss of his relationships with his children

Indemnity Payment: \$0.00

Legal Expenses: Mid five-figure range

The insured licensed professional counselor (defendant) provided services to a married couple both together and individually for approximately one month. The sessions revealed multiple episodes of the husband being emotionally abusive and making physical threats against the wife and their children. The husband had a history of self abuse and admitted to holding a loaded gun during some marital discussions. He believed it was reasonable that he had placed security cameras throughout their home and required his wife to wear a recording device in order for him to hear her conversations when not in his presence. He further collaborated (unsuccessfully) with a friend to attempt to engage his wife in an affair to prove his belief that she was unfaithful.

The defendant counselor identified that the wife and children were at risk and she recommended to the wife that she leave the marital home to live with her parents who were located several hours away. The defendant counselor reported the husband's behavior as child abuse in compliance with state child protection regulations. The wife left the marital home

with the children and subsequently filed for divorce and sole custody of the children due to the husband's emotional and physical abuse in the family.

The defendant counselor was ordered by the court to provide her client records and was subsequently required to testify under oath during the divorce and child custody proceedings. The defendant counselor had maintained meticulous entries into the clinical records for both the husband and wife during treatment. Included in each file were signed statements from both parties that they understood that their personal information would be kept private unless they directed the counselor to release it, if the counselor determined that they were a danger to themselves or others, if there was evidence of child abuse or if the counselor was ordered to disclose the information by the courts.

The husband sued the counselor for breach of his privacy, breach of the counselor's fiduciary duty, his emotional distress, the loss of his marriage and family and an incorrect diagnosis of his mental state by the counselor.

Resolution

Defense experts fully supported the counselor's assessment of the husband, her actions in reporting the abuse and her advices to the wife to leave the marital home with her children for safety reasons. They further noted that the husband did not have an awareness of the seriousness of his problems. The defense filed a motion for summary judgment. The plaintiff's experts were unable to support the allegations against the counselor and the judge granted both the motions for summary judgment and dismissal of the claim.

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Risk Management Comments

- ◆ The counselor had carefully reviewed with the husband and wife the conditions under which she would release the clients' personal information and both the husband and wife had signed their agreement to those conditions. Further she maintained client records that supported her clinical decision making processes, the husband's diagnosis and her actions in reporting the husband for child abuse. The presence of strong documentation provided the defense experts and defense counsel with the information needed to successfully defend the counselor in this lawsuit and no indemnity payment was made on her behalf.

Risk Management Recommendations

Law, ethics, scope of practice and established standards of care all govern the practice of licensed counselors. A full understanding of all these factors when considering the release of confidential information is essential to preventing client injury and litigation.

- **Know and practice within the counselor's state scope of practice and in compliance with the standard of care and state licensing/certifying board requirements.**
- **Know the national and state-specific laws, regulations and requirements and employers' policies regarding client healthcare information confidentiality and privacy laws and act accordingly.** When multiple requirements are identified, the counselor must comply with the strictest of those that apply.
- **Maintain client confidentiality between spouses and/or multiple family members being provided with counseling services and explain the confidentiality boundaries with every client.**
- **Know state and national regulations regarding relevant confidentiality/privacy exemptions that require the unauthorized release of private healthcare information such as the "Duty to Warn" if a client is a danger to themselves or others and/or the requirements for reporting known or suspected child abuse.**
- **Review with each client the applicable confidentiality/privacy regulations and protections along with any exemptions to those protections.** This is best performed at the initiation of treatment and should include a written acknowledgment from each involved client of their understanding and acceptance of those conditions.
- **Know and comply with the American Counseling Association Code of Ethics (www.counseling.org) and other applicable ethics codes from other professional organizations or certification and licensure/certification boards related to client confidentiality and privacy.**
- **NEVER IGNORE a SUBPOENA for clinical records, to appear for a deposition or to testify in a court.**
- **Engage a health law attorney for assistance and guidance if there is a conflict between what is asked for in the subpoena and the counselor's authorization to release the client information involved.**
- **Engage a healthcare attorney to prepare for any deposition or testimony under oath.** The preparation should minimally include a careful review of clinical records and practice in the appropriate manner for responding to questions truthfully and without provided un-asked or additional information.
- **Maintain complete documentation in the client's clinical record to memorialize the counselor's clinical decision making process, the client's response to treatment, discussions and client acceptance of confidentiality/privacy regulations and exceptions and any client related correspondence.**

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 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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