

## 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 involved a certified alcoholism counselor (licensure was not required in the relevant state) working in a private alcohol and drug inpatient rehabilitation center.

### Case Study: Alleged Failure of Counselor to Report Client's Condition to Psychiatrist

**Settlement Payment:** Settled at policy limits following a jury verdict for the client

**Legal Expenses:** High six-figures

**Note:** There were 20 codefendants named in this suit. Settlements on behalf of all but our defendant counselor were subject to tort reform in the state where it occurred that limited the non-economic damages of specific professionals. Despite counsel's arguments that the counselor should be included in this protection since he was being supervised by a covered professional, this protection did not extend to our insured counselor. All other defendants were either dismissed or settled prior to trial with combined indemnity payment in the range of \$4,700,000.

The client was a 52 year-old woman who was admitted to a private alcohol and drug rehabilitation inpatient facility with diagnoses of long term depression, fibromyalgia and chronic pain being treated with pain medication and antidepressants. Of interest is the fact that the facility required full payment for the patient's stay in advance, at the time of admission and asserted that the facility was appropriate for the care and treatment of her multiple problems and symptoms.

The defendant counselor assessed the client shortly after her admission. He determined that while the client had a distant history of alcohol use and required medication for pain management, that she did not have a current alcohol or drug disorder. Within his scope of practice he could not make a determination of mental illness, but he believed the client was not appropriate for treatment in an alcohol and drug program and was in need of psychiatric inpatient treatment which was not offered at the facility. He reported his findings and concerns to his supervisor, the client's psychologist and the facility owner on at least two occasions. In response to the defendant's counselor recommendation that the client was not

appropriate for admission to the substance abuse treatment facility, the facility owner (who was not a health care professional) indicated that the client's diagnosis was the responsibility of the clinical staff and that it would be managed by them and stated that the client was in the correct treatment setting.

The defendant counselor is an experienced, state-certified alcohol and drug counselor who was working as a contracted (non-employed) counselor for the codefendant facility which provided six inpatient beds for alcohol and substance abuse client treatment and rehabilitation. The defendant counselor was neither qualified, nor was he asked to evaluate any other aspect of the client's mental or physical health and his actions remained appropriately within his scope of practice. He could not have evaluated the client's risk for suicide as it was outside his scope of practice. He was appropriately concerned for the patient and did report his findings regarding her past and current use of narcotic pain drugs to all appropriate caregivers.

Following a visit from her family, the client attempted suicide by stabbing herself in the neck and while she survived the attempt she suffered severe anoxia and permanent brain damage. The defendant counselor was not working on the day of the suicide attempt. The client's permanent condition dictates that she cannot be left alone and requires full-time assistance with all aspects of her personal care. Client's experts valued her future care at \$4-6 million dollars. Defense experts place the value at \$2.7 million. The client sought economic, non-economic and punitive damages and client's counsel fees.

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## Risk Management Comments

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- ◆ Defense experts and the defense attorneys judged the counselor's actions to be within the standards of care and his actions reporting his findings to his superiors as appropriate. His potential liability in the matter was deemed to be two percent or less. The relevant state provides protection in the form of the Medical Injury Compensation Reform Act (MICRA) caps for non-economic damages in medical malpractice claims for psychologists and psychiatrists and limits attorney's fees. This coverage is not extended to certified counselors. All MICRA-protected codefendants settled or were dismissed from the case leaving only our insured counselor as the sole remaining defendant. Attempts were made to make a reasonable settlement but the client's demands were greatly in excess of the counselor's policy limits.
- ◆ Despite his very minor role in the care of the client and the fact that there were positive expert opinions regarding the care he provided, the client's attorney was unwilling to release him from the case or even to offer a reasonable settlement demand as to the defendant counselor. Because of the state's existing professional liability laws related to joint and several liability, if the defendant were to be found responsible for as little as 1% of the client's damages, he could theoretically be held liable for the entire amount of any jury verdict. Given the counselor's positive expert reviews and the client's unreasonable settlement demand, the decision was made to vigorously defend this case and trial commenced in July, 2010.

## Resolution

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Despite expert findings and a vigorous defense, the jury found the counselor to be eight percent liable for the client's injuries. This amount could have been in excess of \$4 million dollars. Counsel deemed that there were several appealable matters related to the trial and the judge's rulings and there was some discussion about appealing the jury's decision given the counselor's adherence to the standard of care. However, there were no guarantees that re-trying any of those matters would change the result when such a sympathetic client with grievous injuries was involved. Additionally, the counselor suffered emotional distress and anxiety from the entire matter and was very anxious to settle the claim without any further legal actions.

Post-verdict jury interviews included some juror that the counselor should have notified the client or her family that she was not appropriate for care in an alcohol and drug treatment facility or taken other more aggressive steps to have her transferred to a more appropriate facility. Such actions would have been outside his scope of practice. Given the potential for appealable issues in the case, defense counsel leveraged these issues to obtain a post-judgment settlement that would include a total dismissal of the claim against the counselor.

The judge agreed to the proposed settlement with dismissal action and the certified alcohol counselor was dismissed totally from the action with no liability. The settlement monies were paid to the client's estate to contribute to her lifetime care needs and her attorney fees. Because the counselor was ultimately dismissed from the action and because he was a certified counselor in a state which did not require alcohol and drug counselors to become licensed, there was no requirement to report the settlement to the National Practitioner Data Bank.

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## Risk Management Recommendations

- **Know and understand the medical malpractice laws in your practice state as they pertain to your potential professional liability.** Review your state practice act, speak with representatives of your professional associations, and discuss your potential liability risks with your professional liability insurance carrier.
- **Before accepting employment the counselor should investigate the facility's stated clinical services and scope of care** by reviewing the facility's website, asking direct questions during employment interviews regarding the patient population treated and the scope of care offered by the facility.
- **Check with regulatory and professional licensing agencies** if questions arise regarding the appropriate and or ethical management of the facility and or the clinical care provided by the licensed professional staff working in the facility.
- **Document assessment findings clearly and factually** including the details of the counselor's decision making process utilized in arriving at the stated findings, all parties/titles notified of those findings and any recommendations for additional diagnostic assessments from appropriate level professionals.
- **Notify regulatory bodies when the chain of command fails to address clinical concerns related to patient care, treatment and patient safety within the facility.** Most states have anonymous complaint hot lines but even if patient safety reporting requires identification of the complainant, if a patient or client is in jeopardy, counselors may determine the need for such a regulatory report. In this instance, the counselor notified all possible parties within the facility and an external report to a regulatory body would have been the only alternative left to him within his scope of practice if he believed the patient to be at risk

## 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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