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HPSO and CNA

## Counselors Medical Malpractice Case Study with Risk Management Strategies

### Case Study: Failure to release records, failure to supervise, practicing outside the scope of practice

**Indemnity Payment:** Greater than \$30,000

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

#### Summary

(Monetary amounts represent only the payments made on behalf of the supervising counselor as her role of the owner of the counseling firm.)

The counseling firm owner (defendant) was not only the owner, but also a counselor in the firm. The firm included eleven counselors that all specialized in family, adult and/or child psychotherapy working under the firm's LLC. Even though the counselors worked in the same building, they all maintain their own client medical records, insurance billing and appointment scheduling.

The counselors in the firm would meet weekly during lunch to discuss personal issues, current events and issues with respective clients. The weekly meetings were more of a sounding board, with no advice having been given and no documentation kept.

The clients of the treating counselor were a 15-year-old brother and a 14-year old sister for individual therapy. The treating counselor's therapy focused on behavioral issues the children were exhibiting from the stress related to their parent's recent bitter divorce. The mother had received custody of the children and was also seeking counseling from another counselor in the firm. Both mother and children were seen together and separately by the children's treating counselor as part of the children's therapy.

After several months of treatment, the mother informed the treating counselor that her ex-husband (plaintiff) was taking her back to court to request custody of the children. The mother asked the treating counselor to testify on her behalf and requested she testify that the children would be better served by remaining in the custody of the mother. The treating counselor agreed to testify in court and told the judge that it would be in the best interest of the children to remain in custody of their mother. Despite the counselor's testimony, the court granted custody to the father.

Shortly after the trial, the father allowed the children to continue treatment with the treating counselor, but noticed his children were becoming more withdrawn. He became concerned that the treating counselor had been "brain washing" his children against him and decided to request copies of the children's counseling records. The first request for the medical records was made through his attorney and according to father, the records were never produced. The father made a second request in-person a few months later at the counselor's office and copies were given to the father three weeks after his second request. Once the records were received, the father observed that the treating counselor had crossed professional

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 counselor working in a counseling firm.



boundaries with both his children and his ex-wife. He found notations in the children's records where the treating counselor was advising the mother in her custody dispute as well as encouraging the children to act out against their father. The father filed a complaint with the state board.

Upon investigation, the state board found that the treating counselor's conduct was unprofessional and included boundary violations, multiple relationships, personal bias against the non-custodial parent, and raised issues of competency. The licensing board sent a letter of reprimand and mandated disciplinary actions against the treating counselor including working under supervisor for one year and 100 hours of continuing education.

Soon after the board action was made against the treating counselor, the father filed a malpractice claim against the treating counselor and the defendant firm owner. In the malpractice claim, the plaintiff's experts alleged that the treating counselor was negligent in the following aspects:

1. By participating in therapy with the children while participating in therapy with mother.
2. By participating in therapy with plaintiffs for the purpose of advising mother in her custody dispute while preparing to testify on mother's behalf.

*continued...*

3. By participating in therapy with plaintiffs despite being informed that this therapy was not authorized.
4. By abusing her position as a child therapist for the purpose of advising mother in the custody dispute.
5. By providing incompetent child therapy for plaintiffs and then by failing to anticipate psychological damage to plaintiffs by virtue of therapist's therapeutic involvement.
6. By refusing to release medical records to the father after receiving two medical record release authorizations.

The plaintiff's experts alleged that the defendant firm owner was negligent in the following aspects:

1. By participating in therapy with the children through weekly discussions with the treating counselor.
2. By failing to voice concerns relating to the children's care and treatment.

### ▶ Resolution

The possibility of a defense verdict was deemed to be less than 20 percent.

Experts assessed the potential exposure/claim value of the case for all defendants (including statutory prejudgment interest) as being between \$50,000 and \$75,000 with the defendant counselor identified as having all of the liability.

### ▶ Risk Management Comments

When the defendant firm owner was named in the lawsuit she denied knowing the details of the treating counselor's relationship with the plaintiff even though the therapy with the children, the mother and the custody battle had been discussed in detail during the "lunch meetings" with the firm. No records were kept of any discussions held during the "lunch meetings" even though patients were discussed by name.

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

- **Know and practice within the state scope of practice act** and in compliance with the standard of care and state licensing/certifying board requirements.

- **Decline to perform requested actions/services if they are outside the legal scope of practice.**
- **Engage in peer review and/or quality review in your organization/practice.** Participate in quality improvement and client safety committees or initiatives in your organization/practice/professional organization, in order to enhance your clinical competencies and client safety awareness.

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

- **Monitor the client welfare.**
- **Encourage compliance with relevant legal, ethical and professional standards for clinical practice**
- **Monitor clinical performance and professional development of supervisees.**
- **Evaluate and certify current performance** and potential of supervisees for academic, screening, selection, placement, employment and credentialing purpose.
- **Inform supervisees of professional and ethical standards** and legal responsibilities of the counseling/therapy profession.
- **Review actual work samples via session notes, audio and/or video tape or live observation** in addition to case notes should be reviewed as a regular part of the ongoing supervisor process.
- **Provide ongoing feedback regarding performance.** Feedback should take a variety of forms, both formal and informal, and should include verbal and written evaluations. It should be formative during the supervisory experience and summative at the conclusion of the experience.
- **Ensure that all parties understand each party's role under the agreement,** and communicate openly and often about any question or concerns that may arise.
- **Review all counselor agreements at least annually,** and revise with the assistance of legal counsel, if necessary.

## 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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