

Counselors and Medical Malpractice: A Case Study with Risk Management Strategies

In this case, 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. He further collaborated (unsuccessfully) with a friend to attempt to engage his wife in an affair to prove his belief that she was unfaithful ... To read the full case with risk management recommendations, go to www.hpso.com/case-studies/casestudy-article/409.jsp.



Healthcare Providers Service Organization Risk Advisor for Counselors

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Evidence-based practice protects against litigation

Studies show that too many counseling clients don't receive the care they need. For example, only about 20 percent of people with major depressive disorder receive optimal treatment. To achieve better outcomes, counselors need to apply evidence to their practice. Basing your interventions on the latest evidence is essential to ensuring optimal client outcomes, and it protects you from litigation should an untoward event occur.

Evidence-based practice (EBP) is a problem-solving approach that encompasses research, clinical expertise, and client values and circumstances. Counselors should use information from these three components to make informed decisions.

Advantages of EBP include the ability to obtain an accurate assessment of the risks and benefits of various therapeutic approaches. Integrating EBP with your practice will improve the quality of your decisions and reduce your risk for legal action.

The gold standard

Evidence-based practice is accepted as the gold standard because it improves outcomes. For example, the 2003 Institute of Medicine (IOM) report *Health Professionals Education: A Bridge to Quality* states EBP is a core competency for healthcare professionals.

Although the American Counselors Association's (ACA) Standards of Practice document doesn't specifically cite EBP, some of the standards relate to it. For example, one standard states, "Counselors must engage in continuing

education to maintain their professional competence." This implies that counselors will apply what they learn to their practice—the very essence of EBP. The ACA's Code of Ethics calls for counselors to use modalities that are "grounded in theory and/or have an empirical or scientific foundation."

Further support is provided by standards from specialty counseling organizations. For instance, the American Mental Health Counselors Association's *Standards for the Practice of Clinical Mental Health Counseling* states that evidence-based knowledge is needed for faculty members and supervisors.

All this adds up to a consensus that EBP is a vital part of the profession. In a court case, an attorney will stress this fact while attempting to prove that you failed to engage in EBP. That's why your practice must be based on evidence, even though doing so can be challenging.

Barriers to EBP

Many counselors cite time as the greatest barrier to engaging in EBP. Like other healthcare professionals, counselors also face additional barriers such as lack of mentors to help learn the EBP process and resistance from colleagues and managers. This resistance is often based on misconceptions about EBP. Some counselors incorrectly view it as a means for a "cookie-cutter" approach to client management and that it only considers randomized clinical trials as evidence. Fortunately, you can take steps to remove these barriers.

Steps of evidence-based practice

Here are the basic steps of EBP:

1. **Cultivate** a spirit of inquiry.
2. **Ask** the clinical question in PICOT (**P**atient [client] population, **I**ntervention or **I**ssue of interest, **C**omparison intervention or group, **O**utcome, and **T**ime frame) format.
3. **Search** for and collect the most relevant best evidence. This includes searching for systematic reviews and meta-analyses.
4. Critically **appraise** the evidence for its validity, reliability, and applicability.
5. **Integrate** the best evidence with one's clinical expertise and client preferences and values in making a practice decision or change.
6. **Evaluate** outcomes of the practice decision or change based on evidence.
7. **Disseminate** the outcomes of the EBP decision or change.

Source: Melnyk BM, Fienout-Overholdt E. *Evidence-Based Practice in Nursing & Healthcare: A Guide to Best Practice*, 2nd ed. Philadelphia: Lippincott, Williams & Wilkins; 2010.

Overcoming the time barrier

Many resources are available to break this barrier, particularly when it comes to collecting and evaluating the evidence. These resources include:

- Guideline Clearinghouse (www.guideline.gov), which provides summaries of clinical practice guidelines and has a tool that allows you to compare multiple guidelines (free access). Also check specialty associations, such as the National Society of Genetic Counselors, for practice guidelines.
- PubMed, which has a feature that allows you to limit your search to systematic reviews or meta-analysis articles (free access)
- Trip (www.tripdatabase.com), a clinical search engine where you can quickly find high-quality research evidence (free access)
- Cochrane Database of Systematic Reviews (www.cochrane.org), which provides analysis of available literature related to a topic (subscription, but some information available for free)
- Joanna Briggs Institute (joannabriggs.org), which provides evidence reviews (some information available for free)
- General counseling journals and journals related

to your specialty area of practice (requires a subscription)

- Tools to help in critically appraising the evidence, including those from the Centre for Evidence Based Medicine (www.cebm.net) and the University of Minnesota (<http://hsl.lib.umn.edu/biomed/help/levels-evidence-and-grades-recommendations>). You might also want to review CONSORT (Consolidated Standards of Reporting Trials), an evidence-based tool to help assess the quality of the reports of trials and PRISMA (Preferred Reporting Items for Systematic Reviews and Meta-Analyses).

Download useful apps and databases on your smartphone or tablet so you can access them more easily.

An often overlooked but highly valuable resource is the medical librarian. For example, the medical librarian at your local university can guide you through the process of conducting a literature search so it's more efficient.

Overcoming resistance

Overcoming resistance can be challenging. You can start by serving as a role model for others. Take the lead in suggesting practices that could benefit from a re-examination.

If you are also a manager, you might want to consider building EPB projects into counselors' job descriptions and evaluations. Another option is to partner with a faculty member at a local university.

Overcoming a lack of knowledge

You don't need a large budget to gain knowledge about EBP. You can access free self-study programs online. For example, staff at Duke University Medical Center Library and the Health Sciences Library at the University of North Carolina at Chapel Hill developed an "Introduction to Evidence-Based Practice" tutorial (<http://guides.mclibrary.duke.edu/content.php?pid=431451&sid=3529491>).

For tips on interpreting the information that you find, access the "How to read a paper" section of the BMJ website, which contains article on how to read and interpret different types of research studies and includes two articles related to statistics (www.bmj.com/about-bmj/resources-readers/publications/how-read-paper).

If your organization provides educational reimbursement, consider attending a workshop on EBP. If you are in private practice, consider investing in an education program. Retain documentation of courses you complete so you can show evidence of your efforts should you be involved in a lawsuit. The evidence will also be helpful for career advancement.

Keeping up

Staying on top of developments in your field helps ensure you are aware of the latest research and evidence-based guidelines. You can use technology to make the process easier. For example, services such as Feedly (www.feedly.com) let you customize feeds of news stories related to your interest areas. You can easily scan the headlines and short descriptions to determine if you want to learn more.

Other options you might want to try:

- Sign up to receive electronic tables of content from journals you are interested in. You can scan the table of contents to determine what's of interest to you.
- Subscribe to electronic newsletters such as those provided by Medscape and JournalWatch.
- Listen to podcasts as you exercise or drive to work. Several of the continuing education modules (fee applies) available through the ACA can be downloaded as MP3 files.

- Download an app such as Mendeley (www.mendeley.com) that lets you capture articles as PDFs and organize them according to keywords and other parameters.

Taking just these few steps can ensure that you are current in your knowledge.

Practicing effectively

Basing your practice on evidence will benefit patients by ensuring optimal outcomes and will benefit you by providing support for your decisions should you find yourself in the uncomfortable position of being named in a legal action.

RESOURCES

American Counseling Association. ACA Code of Ethics. 2014. <http://www.counseling.org/resources/aca-code-of-ethics.pdf>.

American Counseling Association Standards of Practice. <http://www.cacounseling.org/standards.pdf>.

American Mental Health Counselors Association. Standards for the Practice of Clinical Mental Health Counseling. 2011. https://www.amhca.org/assets/content/AMHCA_Standards_1-26-2012.pdf.

Institute of Medicine. Health Professions Education: A Bridge to Quality. April 18, 2003. <http://www.iom.edu/reports/2003/health-professions-education-a-bridge-to-quality.aspx>.

Lilienfeld S. Evidence-based practice: the misunderstandings continue. *Psychology Today*. January 27, 2014.

Melnyk BM, Fienout-Overholdt E. *Evidence-Based Practice in Nursing & Healthcare: A Guide to Best Practice*, 2nd ed. Philadelphia: Lippincott, Williams & Wilkins; 2010.

Saver C. Keeping practice knowledge current. Part 1. *Nurse Pract*. 2012;37(12):1-5.

Yates C. Evidence-based practice: The components, history and process. *Counseling Outcome Research and Evaluation*. 2013;4(1):41-54.

An effective treatment plan protects against litigation

Creating an individualized treatment plan is a basic counseling task, but given counselors' busy practice, it's easy to forget the importance of not only creating a detailed plan but also of evaluating and revising it as needed.

A well-conceived treatment plan that serves as a working document can be a front-line tool in defending yourself in the case of legal action. For instance, if a client claims he was not referred to a psychiatrist when he should have been, you can show how you incorporated the possible need for referral into your plan, your evaluation as to when the referral was

needed, and your follow-up with the client and the psychiatrist after the referral was made.

Here's more about your risk for litigation and how a treatment plan can reduce that risk.

Counselors at risk

As a professional counselor, it's important to have professional liability and license protection insurance in case you are involved in litigation. Even if you have done nothing wrong, you will need support to defend yourself.

The cost of litigation and claims can be significant.

For instance, a 2014 claims survey by CNA/HPSO, *Understanding Counselor Liability Risk*, analyzed 1,034 counselor claims that closed between January 1, 2003, and December 31, 2012, and found that the total paid indemnity and expenses was \$16,009,398.

The same claims survey found that about half (50.8%) of the counselors worked in an office-based setting and most professional liability claims (66.7%) involved face-to-face counseling of an individual client. Marriage and family counselors accounted for the largest percentage of closed claims (27%), followed by a licensed professional counselors (19%) and mental health counselors. This profile information can help you in determining if you are at higher risk for litigation.

Claims related to the category of professional responsibility accounted for 20.6 percent of closed claims, with an average paid indemnity nearly twice that of the overall average paid indemnity (\$224,783 compared to \$128,220). This category includes failure to practice within boundaries of competence, failure to obtain appropriate referrals or consultations, and failure to implement a counseling plan with a “reasonable likelihood of success.” Clearly, a valid treatment plan that is evaluated on a regular basis and revised as needed is essential both for optimal client outcomes and to protect yourself against litigation.

Legal and ethical responsibilities

Establishing an effective plan of treatment for each client is a professional responsibility and may be cited as such in your state’s practice act. For instance, the Texas Board of Examiners of Professional Counselors states that the practice of professional counseling includes planning, implementing, and evaluating treatment plans.

Planning and evaluating treatment is also an ethical responsibility. The American Counseling Association (ACA) Code of Ethics states that the counselor’s primary responsibility is to “respect the dignity and promote the welfare of clients.” An effective treatment plan is a valuable tool in promoting welfare.

The code calls on counselors and clients to collaborate in creating a plan that is consistent with the “abilities, temperament, developmental level, and circumstances” of clients. Both counselors and clients need to regularly review the plan to assess its effectiveness and revise as needed while respecting



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the client’s freedom of choice. A defense attorney is likely to cite responsibilities related to treatment plans in a court of law if he or she feels they will support the plaintiff’s case.

A multicultural approach

Counselors need to respect cultural differences, according to the ACA Code of Ethics. At the most basic level, this means ensuring that the client understands what you are communicating. If necessary, arrange for a qualified interpreter.

It’s also important to understand possible cultural influences that might affect assessment test results. Otherwise, your treatment plan may be based on inaccurate conclusions.

Developing multicultural counseling competencies will ensure that your plan of treatment is appropriate and effective. Competencies include being aware of your own attitudes and beliefs, understanding the worldview of the client, and using culturally appropriate intervention strategies. Resources for more information include the *Journal of Multicultural Coun-*

Creating and maintaining an effective treatment plan

The suggestions below will help you in assessing clients and devising and revising an effective treatment plan. They will also help you document appropriately so that you have a sound defense in case of legal action.

- Use evidence-based practice guidelines and protocols when establishing a diagnosis and providing treatment.
- Obtain a complete patient history, including signs, symptoms, and medications.
- Complete assessment tools and other diagnostic tests so you have a sound foundation for your diagnosis and treatment approach.
- Discuss the treatment plan with the client, including the risks of not complying with the plan.
- Communicate the treatment plan when you need to have another counselor cover for you or you need to transfer the client to another's care.
- Facilitate emergency medical treatment as needed.
- Obtain consults and refer the client as appropriate.
- Discuss the treatment plan and response to treatment with the collaborating/supervising counselor or physician, as required and appropriate.
- Provide accurate, complete, and current documentation. Include the client's adherence and response to treatment and subsequent modifications to the plan.

Source: CNA, HPSO. 2014 *Understanding Counselor Liability Risk*.

seling and Development and the National Center for Cultural Competence (<http://nccc.georgetown.edu>).

Privacy issues

The ACA Code of Ethics emphasizes the importance of client privacy, which extends to the treatment plan. The treatment plan, along with other client records, must be kept confidential and in a secure location. Counselors who lease space or time in an established counseling center or clinic should take particular care that records are locked and access is limited.

If you need to disclose information to other professionals, obtain the client's consent. An exception is in cases where there is the potential for serious harm.

Collaboration and monitoring

Collaborating with clients can help you establish an effective treatment plan. The success of that plan depends on continued monitoring and making adjustments as needed. Through these efforts, you can enhance the likelihood your counseling will be effective and provide protection should you become involved in legal action.

RESOURCES

American Counseling Association. 2014 ACA Code of Ethics. <http://www.counseling.org/docs/ethics/2014-aca-code-of-ethics.pdf?sfvrsn=4>.

Association for Multicultural Counseling and Development. Arredondo P, Toporek MS, Brown S, et al. Operationalization of the multicultural counseling competencies. 1996. http://www.counseling.org/docs/competencies/multicultural_competencies.pdf?sfvrsn=5.

Board of examiners of professional counselors about the profession—scope of practice. http://www.dshs.state.tx.us/counselor/lpc_scope.shtm.

CNA, HPSO. 2014 *Understanding Counselor Liability Risk*.

Avoiding liability in cases of marital discord

Clients affected by marital discord are often experiencing serious emotional turmoil. As a professional counselor, you strive to provide quality services to help your clients in these difficult situations.

Despite your best intentions, however, if you don't follow established standards of practice and take precautions, you could be named in a lawsuit. In fact, according to the 2014 claim report by CNA/HPSO, *Understanding Counselor Liability Risk*, marital discord was the most common reason (31.7%)

clients involved in liability actions were seeking counseling. These actions resulted in an average paid indemnity of \$86,248.

Here is how you can help reduce your risk of becoming involved in legal action related to marital discord counseling.

Nature of the risk

The 2014 counselor liability claim report examined closed claims from January 1, 2003, through

December 31, 2012. Marriage and family counselors accounted for the largest percentage of closed claims (27%), with an average paid indemnity of \$139,181, higher than the overall average paid indemnity of \$128,220.

The most frequent allegation (39.7%) made by all claimants was an inappropriate sexual/romantic relationship with the client or the client's spouse/partner or family member. The claims resulted in indemnity payments of \$2.2 million.

Most inappropriate relationships occurred with the client. In these situations, the person or persons seeking treatment were the client; the spouse and the client; or the spouse, the client, and children. The average paid indemnity for these situations was \$89,177.

Standards of care

Inappropriate relationships are explicitly forbidden by the American Counseling Association (ACA) Code of Ethics. Standard A.5.a states, "Sexual and/or romantic counselor-client interactions or relationships with current clients, their romantic partners, or their family members are prohibited." The standard applies to both in-person and electronic interactions.

The ban on inappropriate relationships continues after the counseling relationship has ended. The code of ethics states that five years should elapse from the last professional contact to initial consideration of an intimate relationship with a former client, a client's romantic partners, or a client's family member. It's important to evaluate whether embarking on the relationship will cause harm. In general, it's best to avoid contact with past clients. Also be aware of relevant guidelines in your state's practice act and information in your employer's policy in this area. Remember that you are responsible for maintaining appropriate boundaries in the relationship.

Nondiscrimination

Clients don't have to be in a legally recognized marriage to experience "marital" discord. Nonmarried couples who are in committed relationships may also seek counseling. Be sure to follow the ACA Code of Ethics guidelines on nondiscrimination, which state that counselors should not "condone or engage in" discrimination, including discrimination related to sexual orientation and marital/partnership status.

Tips for avoiding litigation related to marital discord

Follow these tips to avoid potential legal situations related to counseling clients and their spouses and children involved in marital discord.

- Do not engage in sexual activity with clients or their spouses and children.
- Manage transference or countertransference with appropriate counseling techniques, seeking assistance as needed and transferring the client to another counselor if necessary. Document transference or countertransference in the client's clinical record.
- Avoid participating in social, personal, or family activities outside of the treatment setting. Document requests to do so and your responses in the client's record. If you do decide to participate, document your rationale for doing so and the client's response.
- Practice according to codes of ethics, standards of care, and your state's practice act.

Source: CNA, HPSO. 2014 *Understanding Counselor Liability Risk*.

The Association for Lesbian, Gay, Bisexual, and Transgender Issues in Counseling has published *Competencies for Counseling with Lesbian, Gay, Bisexual, Queer, Questioning, Intersex, and Ally Individuals*. This publication, available for free online at www.ceunits.com/trainings/pdf_download/182/, can be a resource for ensuring that you provide appropriate counseling services to this client population. Failure to do so could leave you open to litigation and result in patient harm.

Transference and countertransference

Despite your best efforts, you may be involved in transference or countertransference with a client while counseling for marital discord. If you cannot resolve the situation through counseling, you should discuss the issue with the client (in the case of transference), seek assistance from a supervisor and, if necessary, transfer the client to another counselor.

Counselors should be aware of red flags indicating that they are attracted to a client. These include thinking often about the client while not in session, wanting to touch the client, having trouble focusing during the therapeutic session, and dressing

or grooming in an uncustomary or self-conscious fashion on the client's appointment day. Counselors should not discuss the attraction with the client. Counselors should also be alert to subtle signs that clients are becoming attracted to them, such as use of inappropriate language or touching.

Effective documentation

Documentation is always a key strategy for protecting yourself in the event of a lawsuit. In the case of clients with marital discord, it's particularly vital to document your discussions with the client regarding transference and boundary issues. Include actions you took to obtain clinical supervision or assistance and the steps you took to transfer the patient to another counselor.

In addition to documentation, be sure your professional liability insurance provides sufficient coverage. Don't make the mistake of relying only on employer-provided coverage, which may be inadequate.

Taking precautions

Liability resulting from counseling related to marital discord can permanently harm your career and even result in loss of licensure. To protect yourself, maintain appropriate boundaries, follow standards of care, and document issues (and actions taken) in the client's record.

RESOURCES

American Counseling Association. 2014 ACA Code of Ethics. <http://www.counseling.org/docs/ethics/2014-aca-code-of-ethics.pdf?sfvrsn=4>.

CNA, HPSO. 2014 Understanding Counselor Liability Risk.

Association for Lesbian, Gay, Bisexual, and Transgender Issues in Counseling. Competencies for counseling with lesbian, gay, bisexual, queer, questioning, intersex, and ally individuals. <http://www.counseling.org/docs/competencies/algbtic-competencies-for-counseling-lgbqia-individuals.pdf?sfvrsn=6>. Accessed April 17, 2014.

Koocher GP, Keith-Spiegel P. High-risk temptation and the ethics of multiple role relationships. *ContinuingEdCourses.Net*. 2014. <http://www.continuingcourses.net/active/courses/course065.php>.



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