



Counselor Spotlight: Responding to a Subpoena

Healthcare Providers Service Organization (HPSO), in collaboration with CNA, has published the *Counselor Liability Claim Report: 2nd Edition*. This resource includes statistical data and case studies from CNA claim files, as well as risk management recommendations designed to help counselors and other behavioral health professionals reduce their malpractice exposures and improve client safety.

You may access the complete report, and additional Risk Control Spotlights, at www.hpso.com/counselorclaimreport.

This Counselor Spotlight focuses on our analysis and risk recommendations regarding one of the most significant topics in the report: Responding to a Subpoena.

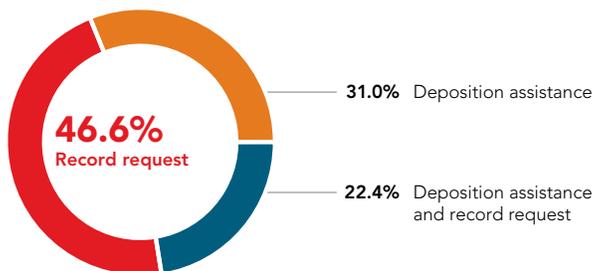
Counselors may be subpoenaed to provide a deposition or court testimony under oath, produce client records, or provide a deposition and produce client records in matters where they are not a defendant. There are two common types of subpoenas. The first is a *subpoena ad testificandum*, which is a Latin term for the “ordinary” subpoena and orders a person to testify or provide a deposition or a court testimony under oath. The second type, a *subpoena duces tecum*, requires a person to appear at a specific time and place to testify and to bring specified documents such as healthcare records or educational certificates. Counselors should understand that both types of subpoena are issued by a state or federal court and **should never be ignored**.

The *Counselor Liability Claim Report: 2nd Edition*, published in 2019, demonstrated that subpoenas for depositions and healthcare record request matters increased more than 450 percent since the 2014 CNA/HPSO claim report. While this increase involves multiple factors, more than half of these matters were related to child custody and divorce.

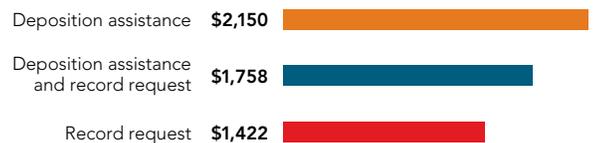
The report also revealed that almost two-thirds of all subpoenas received involved the assessment and/or treatment of a client who was involved in a legal action, such as child custody or support, marital, divorce or client employment issues.

The following charts represent the distribution of closed claims subpoena coverage types: deposition assistance, record requests and depositions assistance, and record requests. Unlike professional liability claims, closed claims involving deposition assistance, record requests and depositions assistance, and record requests involve expenses solely related to attorney fees and other administrative costs.

13 Distribution of Deposition Assistance and Record Request



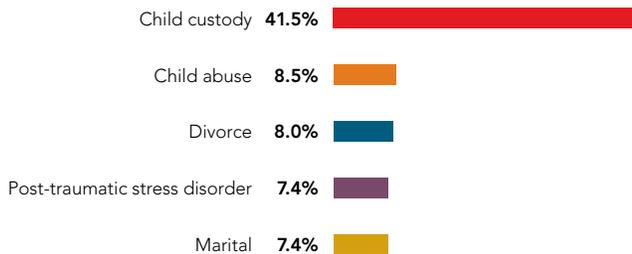
14 Severity of Deposition Assistance and Record Request



Top Five Distribution of Deposition and Record Request by Underlying Matter

Figure 17 is an analysis of subpoena assistance that involved counselors required to provide depositions and record requests. Many of these requests are related to children, including parental fitness assessments, child custody or support matters, child abuse/neglect allegations, and demands for visitation and/or records from noncustodial parents. Other deposition and records request examples include divorce actions; mental illness; employment issues; and child physical, emotional and/or sexual abuse.

17 Top Five Distribution of Deposition Request and Record Request by Underlying Matters



WHEN A COUNSELOR RECEIVES A SUBPOENA

- ❑ **Never ignore a subpoena**, whether it involves releasing clinical records, appearing for a deposition or testifying in court.
- ❑ **Consult with an attorney** knowledgeable about health law and request guidance about potential conflicts between legal mandates and client privacy rights when responding to a subpoena.
- ❑ **Maintain complete and accurate documentation** in the client's clinical record.



CASE STUDY: Deposition Request Involving a Custody Dispute

An insured marriage and family counselor provided individual therapy for two minor children and their mother. The focus of the therapy was to deal with stressful family issues and the children's underlying mental health conditions. Initially, the mother saw the insured for counseling, but she was subsequently transferred to another therapist in the office. A total of 11 sessions took place with each of the children for more than six months.

Three years before the children started therapy, the parents went through a very contentious divorce proceeding and the mother was awarded custody of the children. However, the father later took the ex-wife back to court, at which time our insured testified at the request of the mother/ex-wife and not by way of a court ordered subpoena. At the hearing, the insured apparently expressed her view voluntarily testified that the children would be better served by remaining in the custody of the mother. The court disagreed and granted custody to the father.

Following the hearing, the father continued to have his children see the insured for a brief time before switching to another provider in the area. The father, initially through his attorney and then on his own, requested copies of his children's healthcare records from the insured. However, the insured was reluctant to turn over the files due to the sensitive nature of the children's records. At the time of the initial request, the father and his attorney did not provide guardianship documentation. The insured, therefore, believed that the father did not have a right to obtain copies records.

Once the appropriate documents were received, the insured provided a summary of the children's sessions. However, the father insisted on having copies of the insured's actual therapy notes and even threatened to make a complaint against the insured to the state licensing board. Copies of the children's healthcare records were provided approximately three months after the initial request, and the expense associated with this matter was greater than \$16,000.

Responding to a Subpoena

Before releasing confidential information after receiving a subpoena or providing deposition testimony, it is critical to engage with an attorney. When you meet with the attorney, consider the following:

1. **How should I respond after receiving a subpoena?** Never ignore a subpoena, whether it involves releasing clinical records, appearing for a deposition or testifying in court. Failure to respond to a subpoena could result in fines, penalties or waiver of your rights.
2. **What should I do with this patient's records?** Do not alter entries in the client's clinical record once legal or regulatory action is initiated, even if you are not a named party.
3. **Should I contact my professional liability insurer?** If you carry your own professional liability insurance and receive a subpoena, immediately contact your insurer.
4. **How do I know what to do in response to the subpoena?** Engage an attorney who specializes in matters pertaining to healthcare information to prepare for releasing any healthcare records or attending any deposition or testimony under oath. The preparation should minimally include a scrupulous review of clinical records, as well as practice in responding to questions truthfully and accurately, without providing information that is not sought.
5. **What information am I permitted to release?** Follow state and federal requirements and exemptions regarding unauthorized release of private healthcare information, even in response to a subpoena. Consult with an attorney knowledgeable about health law and request guidance about potential conflicts between legal mandates and client privacy rights when responding to a subpoena.
6. **May I speak to anyone else about this matter?** Discuss the subpoena or information about the case only with your attorney. Any information discussed outside the presence of your attorney can be discoverable.
7. **What if another party asks me to be a witness on their behalf?** If asked to be a witness or provide testimony under oath, it is not advisable to voluntarily agree to be a witness or provide testimony under oath if you have not been subpoenaed. Being subpoenaed can help to protect a counselor from appearing biased to one party or the other.
8. **What other guidance is there specifically for counselors?** Understand and comply with the ACA Code of Ethics (which can be found at counseling.org) and other relevant ethics codes from professional organizations or licensure/certification boards related to client confidentiality and privacy.
9. **Should I retain any records related to this matter?** Copy and retain the subpoena and any accompanying summons, complaint and/or attorney letters for your records. Also copy and retain all documents and records that are produced in response to the subpoena.

To help counselors understand the deposition process and releasing client healthcare records, see the **Counselor Spotlights** on [Preparing for a Deposition](#) and [Release of Records](#).

The **Counselor Spotlight** on [Preparing for a Deposition](#) includes resources, such as a brief case scenario, risk control recommendations, a self-assessment checklist, a brief overview of a deposition, what actions counselors should take if they receive a subpoena for a deposition, and associated expectations. It also imparts helpful tips on how to prepare for and provide deposition testimony, including objectives of the pre-deposition meeting with your attorney, what a witness can expect during deposition questioning, and essential tips for conveying confident responses.

The Counselor Spotlight on [Release of Records](#) includes resources, such a closed claim analysis involving record requests and the corresponding underlying matters, a brief case scenario, risk control recommendations list on releasing client healthcare record. Knowing the various types of record requests and how to respond to such requests can minimize the risks of legal actions taken against a counselor.

COUNSELOR SPOTLIGHT

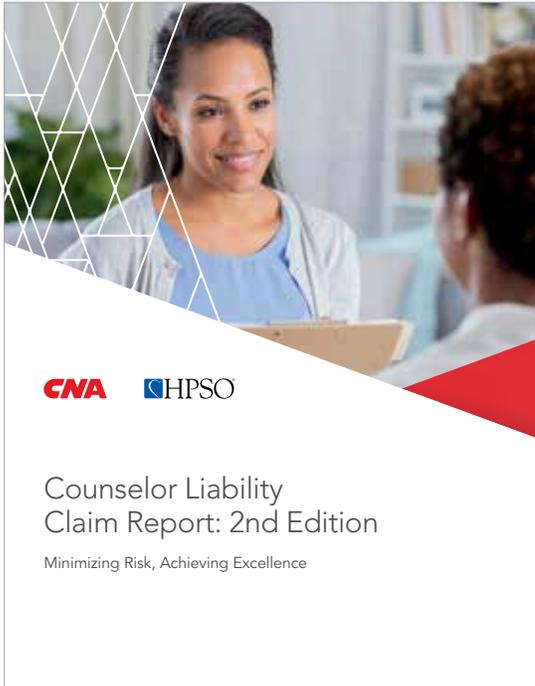
For more risk control resources and top findings from the 2nd Edition of the *Counselor Liability Claim Report*, please review additional Counselor Spotlights on the following topics:

- [Informed Consent](#)
- [Identifying Your Client](#)
- [Reporting to Third Parties](#)
- [Boundaries](#)
- [Supervision](#)
- [Release of Records](#)
- [Telebehavioral Health](#)
- [Documentation](#)
- [Preparing for a Deposition](#)

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This information was excerpted from HPSO and CNA's full report, *Counselor Liability Claim Report: 2nd Edition*. www.hpso.com/counselorclaimreport



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In addition to this publication, CNA and Healthcare Providers Service Organization (HPSO) have produced numerous studies and articles that provide useful risk control information on topics relevant to counselors, as well as information relating to counselor professional liability insurance, at www.hpso.com. These publications are also available by contacting CNA at 1.888.600.4776 or at www.cna.com.

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