



# Counselor Spotlight: Preparing for a Deposition

Healthcare Providers Service Organization (HPSO), in collaboration with CNA, has published the 2nd Edition of our *Counselor Claim Report*. It includes statistical data and legal 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 patient safety.

You may access the complete report, and additional Risk Control Spotlights, at: [www.hpso.com/counselorclaimreport](http://www.hpso.com/counselorclaimreport)

Counselors may be subpoenaed to provide a deposition or court testimony in matters where they are not a defendant, but are or were involved in the assessment and/or treatment of a client who is involved in a legal action. Being deposed in a professional liability lawsuit is potentially one of the most stressful events a

counselor can encounter. Depending upon the facts and information revealed, deposition testimony can directly influence the outcome of a case. This spotlight provides an overview of the legal process relating to depositions and imparts helpful tips on how to prepare for and provide deposition testimony. We examine 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 2nd Edition of the HPSO/CNA *Counselor Liability Claim Report: 2nd Edition* observed that deposition assistance only requests comprised approximately one-third, 31 percent, of all deposition and records request closed claims, and reflected an average cost of \$2,150.

The following chart represents the 2019 distribution of closed claims and average total expenses by the coverage types of **deposition assistance, record request**, as well as **deposition AND records request**. The average total expense represents the claim expenses, including attorney fees and other administrative costs.

## Analysis of Deposition Assistance, Record Requests and Deposition Assistance, AND Records Requests, by Average Total Expense

Coverage type	Percentage of deposition and record request closed claims	Average total expense
Deposition assistance	31.0%	\$2,150
Deposition assistance and record request	22.4%	\$1,758
Record request	46.6%	\$1,422



## Top Six Deposition Requests by Underlying Matter

Counselors who worked with clients involved in child custody matters were most likely to receive a subpoena for deposition. Many of these requests are related to children, including parental fitness assessments, child custody or support matters, child abuse/neglect allegations, or demands for visitation and/or records from noncustodial parents. Emotional matters related to physical injury/condition represented the second highest percentage of deposition requests. These matters frequently involved the insured counselor's treatment of a client's depression and/or anxiety suffered after being involved in medical incidents or motor vehicle accidents. Other deposition request examples include divorce actions; mental illness; employment issues; and child physical, emotional, and/or sexual abuse. An example of a claim with the highest frequency of deposition requests includes the following case:

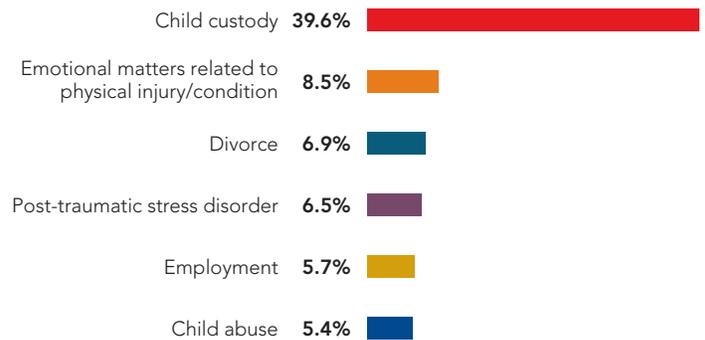
### Case Study: Deposition Request involving a Custody Dispute

This case involved a child custody dispute between a divorced couple based upon allegations by the father that his daughter had been sexually abused by a relative of the child's mother. A counselor was appointed by the court to make a report of her findings and recommendations and gave a deposition three months later. The child also was examined by a physician, an investigator from the Department of Human Services and another counselor retained by the mother. The physician concluded that it was highly probable that the child had been sexually abused.

As a result of this diagnosis, a criminal investigation of the relative was initiated. Shortly thereafter, the mother filed a motion requesting that the court disqualify the counselor from serving as the court's appointed expert. The court disagreed and ordered that the child be placed with the father. In addition, the court ordered that all future visits by the mother be directed by the counselor.

The mother then filed a board complaint and a lawsuit against the counselor, contending that the counselor had overstepped the boundaries established by the court in making her recommendations. The mother also alleged that the counselor was not qualified to testify as an expert and that the counselor's unqualified testimony had resulted in custodial loss of her child.

## Top Six Deposition Requests by Underlying Matters



### Risk Management Comments

Counselors must take seriously their responsibility to protect their clients' private and confidential information. They also should be cognizant of and comply with evolving and expanding state and federal confidentiality and privacy laws and regulations. In addition, the counselor must understand and recognize situations that may require disclosure of sensitive client information, e.g., when a client appears to present a danger to self or others, or when there is evidence of child abuse and/or neglect. Counselors must obtain client authorization prior to releasing confidential and private information, where federal and state laws and regulations permit such release pursuant to client authorization. Consult an attorney conversant with applicable guidelines, including the required content of the authorization. In some jurisdictions, counselors also may be responsible for informing clients of possible situations where confidential information may be released without client authorization. Discuss privacy issues at the outset of counseling and periodically thereafter, and clearly document these discussions in the client's clinical record, including the client's acknowledgment and signature, when possible.

### Resolution

This case took over a year to defend, however, counsel succeeded in having the claim dismissed against the counselor.

## Risk Management Recommendations: Preparing for a Deposition

When determining whether or not to release confidential information after receiving a subpoena to provide a deposition, consider the following guidelines:

- 1. Know and practice within the state scope of practice act**, and in compliance with the standard of care and state licensing/certifying board requirements.
- 2. Review state and federal laws, regulations and requirements**, as well as employer policies regarding client healthcare information confidentiality and privacy, and act accordingly. When multiple requirements exist, comply with all requirements, especially focusing upon the most stringent of those that apply.
- 3. Preserve client confidentiality with spouses and/or family members**, and explain and consistently maintain practice boundaries (including privacy) with every client.
- 4. Follow state and federal requirements and exemptions regarding unauthorized release of private healthcare information**, including the duty to warn if clients are a danger to themselves or others, as well as the requirements for reporting known or suspected child abuse.
- 5. Review with each client all applicable confidentiality/privacy regulations and protections**, as well as any exceptions to those protections. Explain practice policies when initiating treatment, and obtain a written acknowledgment from each client confirming the understanding and acceptance of these conditions.
- 6. Understand and comply with the ACA Code of Ethics ([www.counseling.org](http://www.counseling.org))** and other relevant ethics codes from other professional organizations or licensure/certification boards related to client confidentiality and privacy.
- 7. 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.
- 8. Engage a healthcare attorney to prepare for 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.
- 9. Maintain complete and accurate documentation in the client's clinical record** regarding the clinical decision-making process, the client's response to treatment, discussions with clients about confidentiality/privacy regulations and exceptions, and any client-related correspondence.

### 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](#)
- [What to Do if you Receive a Subpoena](#)

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Never ignore a subpoena. Ignoring subpoenas will not make them “go away”. Moreover, failure to comply with a request can result in legal ramifications for the counselor.

To help counselors understand the deposition process, this section provides a brief overview of what is a deposition, what actions counselors should take if they receive a subpoena, 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.

## **WHAT IS A DEPOSITION?**

A deposition is a question-and-answer session conducted under oath for the purpose of compiling information from an individual who is either named in a lawsuit (i.e., a named defendant) or is a witness to the matter being litigated. An attorney will ask the witness questions while a court reporter records the testimony verbatim. In some cases, the deposition may be videotaped.

## **WHAT ACTIONS SHOULD BE TAKEN FOLLOWING RECEIPT OF A SUBPOENA?**

The first action counselors should take is to inform their professional liability insurance provider and employer's risk manager or legal counsel of the deposition notice. Together, these professionals help ensure that a proper response is filed, while also counseling clinicians against the unauthorized release of information in their response. In advance of the deposition date, legal counsel will meet with the witness regarding the litigation in order to outline the defense, as well as discuss the anticipated line of questioning.

## **WHAT ARE THE OBJECTIVES OF THE PRE-DEPOSITION MEETING WITH YOUR ATTORNEY?**

The pre-deposition meeting serves to inform the witness about the details of the lawsuit, including the specific allegations being asserted. It should be a face-to-face meeting with defense counsel and held well in advance of the deposition date, in order to allow sufficient time for preparation. A primary objective of the meeting is to outline the legal arguments for the defense. Often, counsel may construct a defense theme that will resonate throughout the litigation process. The preparation meeting also serves to discuss the questioning process. Defense counsel will review standard guidelines designed to help witnesses provide truthful responses. For additional deposition guidance, see "12 Essential Deposition Tips for Conveying Confident Responses."

## **WHAT MEASURES ARE REQUIRED BEFORE THE PRE-DEPOSITION MEETING?**

Before the pre-deposition meeting, a witness should thoroughly review any pertinent documents, including the client's healthcare information record, personal notes and any medical literature consulted during treatment, carefully comparing the facts of care to the allegations asserted in the lawsuit. Any concerns or issues raised during the review should be shared with defense counsel at the meeting, in order to ensure that the witness has an accurate recall regarding the incident in question.

## **WHAT CAN A WITNESS CAN ANTICIPATE DURING DEPOSITION QUESTIONING?**

Depositions may appear, on the surface, to be more informal than testifying in court because they are typically conducted in an attorney's office without a judge present, and attorneys may dress casually and appear relaxed. However, depositions are equally as important to the case as the court trial and should not be taken lightly. Plaintiff attorneys will often try to restrict witnesses to one version of the incident, forcing them to be as accurate and precise as possible in their responses. During depositions, the claimant's attorney may use complex or aggressive questioning techniques, and the counselor must be able to answer all questions truthfully, without divulging additional or extraneous information. It's important for a witness to remain calm during questioning and permit the defense attorney time to interject or object to an improper question.

## 12 Essential Deposition Tips for Conveying Confident Responses

Notwithstanding thorough preparation, giving a deposition can be an anxiety provoking and uncomfortable experience. The following tips can help witnesses to convey a professional demeanor and confident responses:

1. Listen carefully and think before you speak. Don't be pressured into rushing a reply.
2. Speak slowly and clearly, and answer in a courteous manner.
3. If you need to consult the medical record, ask to do so.
4. If your attorney objects, stop speaking.
5. Do not look at your attorney when a question is asked. It is your testimony.
6. If you do not know the answer to a question, do not guess.
7. If you do not remember something, say so.
8. If you do not understand a question, ask for clarification or rephrasing.
9. Answer only the question asked and do not anticipate further questions.
10. Understand the theme of the defense and assert it in response to allegations being made against you.
11. If you need a break, ask for one.
12. Always tell the truth.

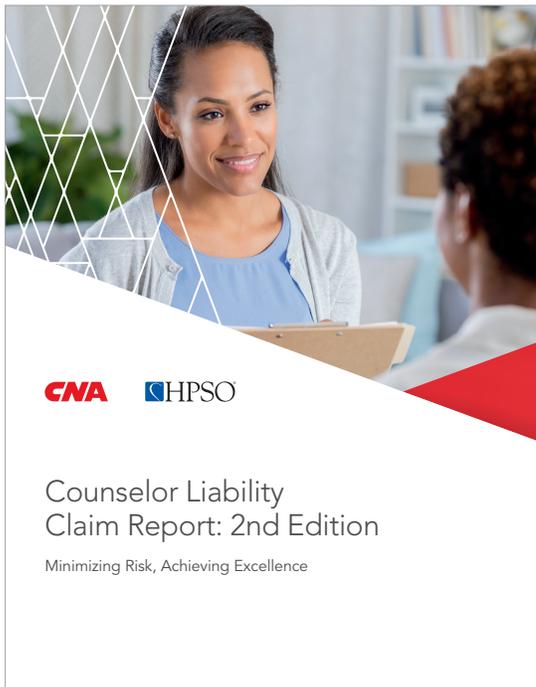
Compliance with subpoenas for deposition is important from legal, ethical, and risk management perspectives. **Ignoring deposition requests will not make the subpoena "go away". Moreover, failure to comply with a request can result in legal ramifications for the counselor.**

## In the event of legal action

If you've received a subpoena to provide a deposition or court testimony as a named defendant, or if you are or were involved in the assessment and/or treatment of a client who is involved in a legal action, adequate preparation is critical to a successful outcome. The following measures can serve as a guide on how to prepare for and provide deposition testimony, and avoid potential missteps in the pivotal first phases of a lawsuit:

- **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.
- **Do not discuss the case with anyone** except your defense attorney and your professional liability insurance provider.
- **Do not accept or sign any documents related to the claim** from anyone without obtaining approval from your professional liability provider.
- **Avoid discussing, commenting upon or taking issue with any information you receive** regarding judicial or administrative proceedings.
- **Do not admit to liability, consent to any arbitration or judgment, or agree to any settlement proposal without consulting with your defense attorney.**
- **Contact your attorney or professional liability insurance provider before responding to calls or emails** from other parties involved in the case.
- **Report any communication you receive from the client, client's attorney or any administrative, licensing or regulatory authority to your professional liability insurance provider.**
- **Promptly return calls from your attorney and professional liability insurance provider.**

This information is designed to help counselors evaluate risk control exposures associated with their current practice. It is not intended to represent a comprehensive listing of all actions needed to address the subject matter, but rather is a means of initiating internal discussion and self-examination. Your clinical procedures and risks may be different from those addressed herein, and you may wish to modify the tool to suit your individual practice and patient needs. The information contained herein is not intended to establish any standard of care, serve as professional advice or address the circumstances of any specific entity. These statements do not constitute a risk management directive from CNA. No organization or individual should act upon this information without appropriate professional advice, including advice of legal counsel, given after a thorough examination of the individual situation, encompassing a review of relevant facts, laws and regulations. CNA assumes no responsibility for the consequences of the use or nonuse of this information.



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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](http://www.hpso.com). These publications are also available by contacting CNA at 1.888.600.4776 or at [www.cna.com](http://www.cna.com).

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