

Counselor Spotlight: Identifying Your Client

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 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: Identifying Your Client.

During a contentious divorce or custody battle, counselors may become involved if they are drawn into the fray, with potentially deleterious consequences. In order for counselors to serve their clients' best interests and avoid potential liability, they should understand their legal and ethical responsibilities.

When multiple parties are involved, as with couples or family counseling, counselors are expected to clearly define who is considered the "client." In the *2014 American Counseling Association (ACA) Code of Ethics, A.8. Multiple Clients* states that "when a counselor agrees to provide counseling services to two or more persons who have a relationship, the counselor clarifies at the outset which person or persons are clients and the nature of the relationships the counselor will have with each involved person." Moreover, with respect to issues of privacy and confidentiality in couples and family counseling, Section B.4.b. states that counselors are expected to "clearly define who is considered 'the client' and discuss expectations and limitations of confidentiality."

In the *CNA/HPSO Counselor Liability Claim Report: 2nd Edition*, the average total incurred for all professional liability claims against a counselor was **\$113,642**. However, the average total incurred for closed claims against a counselor for failing to obtain a client's consent for the change from individual to family or couple counseling or vice versa was **\$178,882**.

Below is an example of a professional liability claim against a counselor who failed to identify a client.

The insured marriage and family counselor began seeing two minor children due to the sudden loss of their father. The initial client intake forms listed only the children as the clients. However, the mother attended and participated in every session for the next three years. At some point, the mother and insured entered into a business relationship. Over several months, the business relationship deteriorated between the mother and the counselor. The mother believed the counselor owned her money and made several attempts to collect. The counselor refused to pay the mother and, when the relationship became strained, refused to allow the mother to attend or participate in the children's therapy sessions.

The mother filed both a professional liability lawsuit and license board complaint against the counselor for abandonment and extending counseling boundaries. The counselor never believed that the mother was a client and therefore, did not believe a conflict arose by entering into a business relationship with her.

During its investigation, the licensing board requested the insured's client healthcare records on the children. Overall, the licensing board determined that the healthcare records were insufficient and failed to meet professional standards regarding documentation. After reviewing the healthcare and billing records and interviewing the mother, as well as the staff of the counselor, the board concluded that the mother was a client. The board also determined that the counselor provided treatment to the children and mother and failed to safeguard the integrity of the counselor-client relationship. The counselor entered into a consent agreement to complete 80 hours of ethics continuing education and to receive supervision from a board-approved marriage and family counselor for two years. The cost to defend the board complaint was more than \$13,000, excluding the out-of-pocket costs of the ethics education.

With the board's findings against the counselor, it was determined that a defense verdict in a malpractice trial would be less than 10 percent. The professional liability claim was settled in the low six-figure range.

In addition to the professional liability analysis, the CNA/HPSO *Counselor Liability Claim Report: 2nd Edition* determined that counselors also may be subject to a licensing board complaint for failing to identify the client. The average payment to defend a counselor against a license defense claim is **\$5,454**.

Although the license protection matters did not reflect the highest distribution or highest severity, licensing board allegations related to alleged breaches of the ACA *Code of Ethics* Section A.8 included failure to clearly define the identified "client" within a couple or group, which demonstrated an average expense of **\$5,440**, and failure to clarify the nature of the relationships the counselor will have with each involved person, which represented an average expense of **\$8,853**. Allegations related to Section B.4.b. of the *Code of Ethics* involving alleged breaches of confidentiality related to couples and family counseling had an average expense of **\$4,295**.

Risk Management Recommendations: Identifying Your Client

Knowing the person or persons who are your clients can be challenging, especially when providing couples and family counseling. Managing the complexities of privacy, privilege and confidentiality during couples and family counseling can be especially difficult, especially when children and adolescents are involved.

In situations involving children and adolescents therapy, the counselor must identify the client or clients. The counselor should know if the client is the child/adolescent, the child/adolescent plus parent(s), or one/both parents. Knowing the reasons that brought the child/adolescent to therapy can provide assistance on identifying the client or clients. Note that when counselors have a prior or existing treatment relationship with any member of a family, whether for individual, couples or family counseling, the counselor should not make recommendations pertaining to custody or visitation. These types of recommendations should be made by a qualified, independent mental health professional.

References and Additional Resources

- Wheeler, A. M. & Bertram, B. (2019). *The Counselor and the Law: A Guide to Legal and Ethical Practice*. 8th ed. Alexandria, VA: American Counseling Association (ACA).
- American Counseling Association. *2014 ACA Code of Ethics*, 2014.
- Cottone, R. R. & Tarvydas, V. M. (2016). *Ethics and Decision Making in Counseling and Psychotherapy, Fourth Edition*. New York, NY: Springer Publishing Company, LLC.
- Forester-Miller, H., & Davis, T. E. (2016). *Practitioner's guide to ethical decision making (Rev. ed.)*. Retrieved from <http://www.counseling.org/docs/default-source/ethics/practitioner's-guide-toethical-decision-making.pdf>
- American Counseling Association. (2016). *Ethical Decision Making Model for Counselors*. Retrieved from <https://www.counseling.org/knowledge-center/ethics/ethical-decision-making>

Irrespective of the reasons a client presents for therapy, the counselor must establish parameters at the outset. Guidelines should include obtaining all necessary releases prior to starting treatment. In the case of a child/adolescent treatment, the counselor should establish parental rights and obtain copies of court orders of guardianship in cases of divorce or custody disputes, as necessary. If a parent/guardian insists on being present during a child's therapy sessions, ensure that the parent/guardian understands that the client is the child/adolescent, rather than the parent/guardian.

Ground rules established at the outset of the counseling relationship also should address how privately disclosed information will be handled in the context of family or couples counseling. It can be ethically and legally compromising for a counselor to continue relationship or family counseling if the information that a member of a couple or family privately reveals is integral to the counseling objectives, or if the information involves abuse or an illegal or dangerous activity. Counselors should examine their licensure statutes and any ethical standards either referenced in those statutes, and the ACA *Code of Ethics*, in order to determine how confidentiality issues should be addressed in the context of couples or family therapy. For assistance in evaluating a specific situation and deciding on a plan of action, counselors should also refer to the ACA resource *Practitioner's Guide to Ethical Decision Making* for guidance.

At the outset of therapy, discussions about the person or persons who are the clients can provide clarification on privacy, privilege and confidentiality. These discussions and appropriate signed acknowledgments should be maintained in the client's healthcare information record. Periodically, as therapy continues, counselors may find it necessary to reiterate the person or persons who are the clients.

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](#)
- [Reporting to Third Parties](#)
- [Boundaries](#)
- [Supervision](#)
- [Release of Records](#)
- [Telebehavioral Health](#)
- [Documentation](#)
- [Preparing for a Deposition](#)
- [What to Do if you Receive a Subpoena](#)

Visit www.hpsoc.com/counselorclaimreport



Self-assessment Checklist: Identifying Your Client

This checklist is designed to assist counselors in evaluating risk control exposures associated with their current practice. For additional risk control tools or to download the *Counselor Liability Claim Report 2nd Edition*, visit Healthcare Providers Service Organization www.hpso.com or CNA Healthcare www.cna.com.

Self-assessment Topic

Identifying Your Client	Yes/No	Comments/Action Plans
<p>I create and maintain records and healthcare documentation necessary for rendering professional services.</p> <p>In situations of couples and family counseling, counselors, I clearly define who is considered “the client” and discuss expectations and limitations of confidentiality.</p>		
<p>I have clients acknowledge treatment agreements and I document in writing such agreement among all involved parties regarding the confidentiality of information discussed during therapy.</p> <p>In the absence of a treatment agreement during couple or family therapy, I considered all individuals involved to be the client.</p>		
<p>I periodically review treatment agreements with care plans to determine if the counselor-client has changed and if so, I update all documents as needed.</p>		
Minor Clients	Yes/No	Comments/Action Plans
<p><i>General Policy Considerations</i></p> <p>Does written policy define the period of adolescence in conformity with state law, especially in relation to the state statutory definition of a minor (e.g., 13 to 17 years of age)?</p>		
<p>Is “emancipated minor” defined in accordance with state law, e.g., a youth who is:</p> <ul style="list-style-type: none"> • Emancipated by court order? • Legally married? • Independent of parental financial support and/or living apart from parents? • Pregnant or seeking treatment for possible pregnancy? • A parent of a minor? 		
<p>Are unemancipated minor clients and their parents/guardians informed in writing about basic healthcare provider-clients issues, including:</p> <ul style="list-style-type: none"> • The limits of confidentiality between providers, clients and their parents/guardians? • The limits of informed consent requirements? • Care compliance expectations? 		

Self-assessment Checklist: Identifying Your Client, *continued.*

Minor Clients	Yes/No	Comments/Action Plans
<i>General Policy Considerations</i>		
Does the employee orientation program cover minor-related issues and policies , including confidentiality, parental notification, consent and client education?		
Are minor clients who legally have the right to consent to their healthcare informed in the same manner as adult clients of payment requirements, including the offering of options other than insurance billing?		
Does written policy address treatment provisions for the unaccompanied homeless minor , including consent to routine medical care and any state-imposed reporting requirements		
I require a parent, guardian, or other person acting <i>in loco parentis</i> attend the initial appointment with the minor patient/client, and document both their presence and relationship to the patient/client in the healthcare information record.		
I request a copy of the guardianship decree from divorced parents or a legal guardian prior to initiating treatment and place a copy of that document in the minor's healthcare information record.		
I contact a parent, guardian, or other person acting <i>in loco parentis</i> prior to making any change in the plan of care when minors present for care without a parent/guardian.		
Are minor clients apprised of the information that will be shared with parents/guardians, as well as the rationale for such information sharing – e.g., a clear and specific intent to cause harm to self or others, an instance of reportable abuse (physical, sexual or emotional) or the presence of a communicable disease?		

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.



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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