



Counselor Spotlight: Informed Consent

Healthcare Providers Service Organization (HPSO), in collaboration with CNA, has published our *Counselor Liability Claim Report: 2nd Edition* (the “2019 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

This Counselor Spotlight focuses on our analysis and risk recommendations regarding one of the most significant topics in the report, issues related to informed consent.

According to professional standards, informed consent is an important element of the counseling process. Section A.2.a., American Counseling Association (ACA), *ACA Code of Ethics* (2014) advises that “Clients have the freedom to choose whether to enter into or remain in a counseling relationship and need adequate information about the counseling process and the counselor. Counselors have an obligation to review in writing and verbally with clients the rights and responsibilities of both counselors and clients.” Counselors must appropriately document discussions of informed consent throughout the counseling relationship. An inadequate informed consent process can severely affect the counselor’s legal defense in the event of a lawsuit, and it also may lead to a state licensing board imposing disciplinary action against the counselor’s license.

What is Informed Consent?

Informed consent is the process through which a client is provided sufficient information to make an informed, reasoned decision regarding the proposed treatment. The consent must be given without coercion or fraud, based upon the client’s reasonable understanding of what will take place.

This Spotlight addresses obtaining an informed consent regarding the proposed process between a counselor and the client. However, if the counselor is proposing treatment via distant counseling, additional consents that must be considered. For information on telebehavioral health, see the [Counselor Spotlight: Telebehavioral Health](#).

Through the years, numerous legal cases have affirmed the healthcare provider’s duty to obtain a client’s informed consent prior to treatment. The law applies the concept of informed consent to protect clients from making uninformed decisions about their welfare.

The informed consent process involves two main components:

- Discussion, including disclosure and client education
- Documentation in the client record, which often includes the use of a written informed consent form

The informed consent discussion represents the first step in managing the client’s expectations for treatment outcomes and reducing the possibility of a misunderstanding. In addition, documentation of the informed consent process provides the best defense against a client’s allegation that he or she was inadequately informed about the proposed treatment, the treatment, options available (including the option of declining treatment), or the potential for injury. Moreover, a client instituting a claim based upon “lack of informed consent” must prove that informed consent was not provided. Sound communication and documentation by the counselor will increase that burden and help to serve as a deterrent to allegations of a lack of informed consent in the event that a claim arises.

Informed Consent Discussion

Informed consent is a process, not a specific document. The process requires a verbal component regardless of whether a written form is used. As such, a client may give an oral informed consent.



An exclusively oral informed consent is valid in most jurisdictions. Nevertheless, individual state requirements govern, and a number of states require written informed consent. As a practical matter, a written informed consent form is advisable inasmuch as it memorializes and thus documents that the protocol was implemented. The goal of informed consent remains the same whether you have an oral discussion exclusively or also use a written form. Namely, the client must have an adequate understanding of the proposed treatment to provide you with the consent necessary to begin treatment.

Components of informed consent

When providing formal consultation services, counselors are obligated to review, in writing and verbally, the rights and responsibilities of both counselors and consultees. Counselors must use clear and understandable language to inform all parties involved about the purpose of the services to be provided, relevant costs, potential risks and benefits, including the ramifications of declining treatment, and the limits of confidentiality.

According to Section A.2.b. of the American Counseling Association (ACA), *ACA Code of Ethics* (2014), Types of Information Needed, counselors should inform clients about issues such as, but not limited to, the following:

1. The nature of all services provided;
2. The purposes, goals, techniques, procedures, limitations, potential risks, and benefits of services;
3. The counselor's qualifications, credentials, relevant experience, and approach to counseling;
4. Continuation of services upon the incapacitation or death of the counselor;
5. The role of technology and other pertinent information;
6. The implications of diagnosis and the intended use of tests and reports;
7. Fees and billing arrangements, including procedures for nonpayment of fees;
8. The client's right to confidentiality and an explanation of its limits (including mandated reporting and how supervisors and/or treatment or interdisciplinary team professionals are involved);
9. The client's right to refuse any services or modality changes and to be advised of the consequences of such refusal.

To be considered "informed," the client must be given sufficient information upon which to base a decision and understand that information. In order to assess both your level of disclosure and the sufficiency of the client's understanding, the client should have the ability to answer

three basic questions that relate to the primary components of informed consent. Ask the client:

1. What treatment is proposed and why has it been recommended?
2. What other options do you have?
3. What negative consequences may occur as a result of (or lack of) the proposed treatment?

The next step is for the patient to state his desire to either pursue or decline the proposed treatment. The patient has a legal right to decline your treatment recommendation and refuse care. (See "Informed Refusal" section for more information.)

Informed consent discussion suggestions

It has been noted that how something is said is equally as important as what is said. We recommend that counselors lead the discussion when obtaining informed consent and consider the following suggestions:

- The oral discussion with the client should be approached with empathy and reason and should be tailored to the needs of each individual.
- Use basic, uncomplicated language that the client will understand. If you use technical terms, provide explanations. Limited oral health literacy is a significant barrier to effective informed consent discussions.
- Present your need to obtain informed consent as a benefit to the client. When clients understand that the discussion is for their own best interests, they will be more receptive and cooperative with the process.
- Treatments that are within the understanding of the client, either through experience or general knowledge, may not require as much detailed explanation.
- Give the client every opportunity to ask questions. You should answer the questions as clearly and thoroughly as possible, and evaluate — and correct, if necessary — the client's understanding of your replies.
- When treating a minor, obtain the informed consent of the parent or guardian prior to beginning treatment. A minor cannot consent to his or her own treatment unless legally declared emancipated by the court or determined to be emancipated pursuant to state law.
- Secure the client's informed consent at an appointment prior to the treatment visit whenever possible. The return on the date of treatment is further validation of the desire to receive the recommended treatment.

- It is ultimately the responsibility of the counselor to ensure that the client understands what has been presented. Always ask the client, "Do you have any questions about the information you have been given or about the proposed treatment?"
- Counselors should discuss the required limitations upon confidentiality when working with clients who have been mandated for counseling services through judicial or administrative orders.

Informed Consent Documentation

In professional liability litigation, the defendant counselor often must present documented (verbal, written, or recorded) evidence in court to prove that an informed consent discussion was conducted. Whether supplied orally or in writing, receipt of the client's informed consent must be documented in the healthcare record. A written description of the informed consent discussion, signed and dated by the client or mandated client, serves as the best evidence of this discussion. Your documentation should include:

- What was discussed
- What questions were asked
- What answers were given
- Who was present, including staff and friends and /or family members of the client
- What documents, brochures, or handouts were given to the client and /or what client information videos were viewed
- That informed consent was given by the client
- What was discussed regarding the required limitations upon confidentiality when working with a mandated client

Informed Refusal

An informed refusal is essentially the opposite of an informed consent in that the client has said "no" to treatment instead of "yes." The information presented to the client is the same for both processes, until the client declines the recommendation.

The client has a legal right to decline your treatment recommendation and refuse care. If the client rejects treatment, you must explain to the client the consequences and foreseeable risks of refusal. Also ask about the client's reasons for refusing care. If the client states, or if it appears, that the refusal is due to a lack of understanding, re-explain your rationale for the procedure or treatment, emphasizing the probable consequences of the refusal.

Documentation of Informed Refusal

Refusals of care represent an increased liability risk and require greater diligence on your part to manage that risk.

The most effective technique is to comprehensively document the informed refusal process. Criteria for documenting informed refusals are similar to, but also go beyond, those for informed consent. Following a discussion of the consequences, a comprehensive progress note, as well as the use of a written form documenting the refusal, is strongly recommended.

Your progress note should document:

- Who was present (including professional American Sign Language (ASL) or language translators)
- The treatment discussed
- The educational documents, brochures, handouts, or presentations given to or viewed by the client
- The questions asked and answers given by both parties
- The client's refusal of the recommended care
- That the client was informed of the risks of not following your recommendations (list the specific risks you stated)
- The client's reasons for refusal

Special Considerations in Informed Consent

For counselors working in specific settings, or with certain client groups, special considerations for obtaining informed consent apply. It is recommended that counselors refer to the following sections of the American Counseling Association (ACA), *ACA Code of Ethics* (2014) for more information on informed consent in the following circumstances:

- Informed Consent When the Client is Unable to Give Consent, Section A.2.d.
- Decision Making, Consent, and Mental Capacity, Section B.5
 - Responsibility to Clients, Section B.5.a.
 - Responsibility to Parents and Legal Guardians, Section B.5.b.
- Supervision, Section F.1.c.
- Role Changes in the Professional Relationship, Section A.6.d.
- Distance Counseling, Social Media, and Technology in the Counseling Process, Section H.2.a
- Client Participation in Research Activities, Section G.2.c
- Mandated clients, Section A.2.e

- That the consequences of refusal were re-explained, and that the client continued to refuse the recommended treatment. Emphasize that the client understood the risks of refusing care.
- The client's signature on the informed refusal document.

Consent for Minors

As defined by statutory law, a minor is a person under the age of legal consent, otherwise called the age of majority, which is typically younger than 18 years of age. Counselors are responsible for ensuring that legal authorization to treat a minor client is obtained from the proper individual and documented in the client's healthcare information record. Certain state and other applicable laws permit counselors to obtain informed consent from the minor client, rather than their parent or legal guardian, for counseling with respect to mental health disorders or treatment for substance abuse. However, in most cases, counselors are required to obtain informed consent of a parent or legal guardian before treatment is rendered. Once consent is obtained from a parent or legal guardian, counselors must seek assent from the minor for treatment, as appropriate. Adult siblings, grandparents, and other adult caretakers are not legally authorized to provide consent unless they have been granted legal guardianship by the court.

Counselors should require a parent, guardian, or other individual legally authorized to make healthcare decisions on the minor's behalf attend the initial appointment with the minor client. In addition, counselors should document both their presence and relationship to the client in the client's healthcare information record. Counselors also should contact a parent or guardian prior to making any change to the client's plan of care if the minor client is present for care without a parent or guardian.

Children of divorced or separated parents

In obtaining informed consent, the parent granting consent must be legally authorized to do so. In situations of parental divorce, blended families, or where a minor client is not living with the parent(s), it can be difficult to discern who is authorized to make healthcare decisions on behalf of the minor. Divorces may be highly contentious, such that some divorce decrees stipulate termination of parental rights of the non-custodial parent. If a natural parent has no parental rights, that individual is precluded from granting consent on behalf of his or her child.

The right to legally grant consent for a minor child is independent of any financial obligations or arrangements that may have been made during divorce proceedings.

Consequently, the parent paying your fees may or may not be legally authorized to grant consent. In the best interest of the minor patient, discuss and probe these issues, as necessary, before treatment begins in order to effectively mitigate miscommunication risks. If the minor's parents are separated or divorced, the counselor should ask for a copy of the custody agreement. For example, although one parent may have residential custody of the minor, the parents may have joint legal custody, which would mean they have equal rights regarding healthcare decision-making.

Occasionally, divorced parents will disagree regarding the granting of consent for their child's treatment. From a practical perspective, it would be inadvisable to proceed until someone — either a parent or other responsible party — first assumes financial responsibility for the care. Consider that one of the most effective risk management techniques is to simply say "no" to unreasonable requests from patients and parents. Empathetically inform parents (divorced or otherwise) that you understand that disagreements may arise, but that it is essential to obtain clear direction and informed consent before proceeding with treatment of a minor patient. The counselor's role does not include arbitration of family disputes.

For additional risk control recommendations related to caring for minor clients, including parent/guardian consent requirements and exceptions, privacy rights of minors and confidentiality protections when transferring their healthcare information records, access the HPSO and CNA publication, [Adolescent Patients: Safeguards Protect Rights and Help Minimize Liability](#).

COUNSELOR SPOTLIGHT

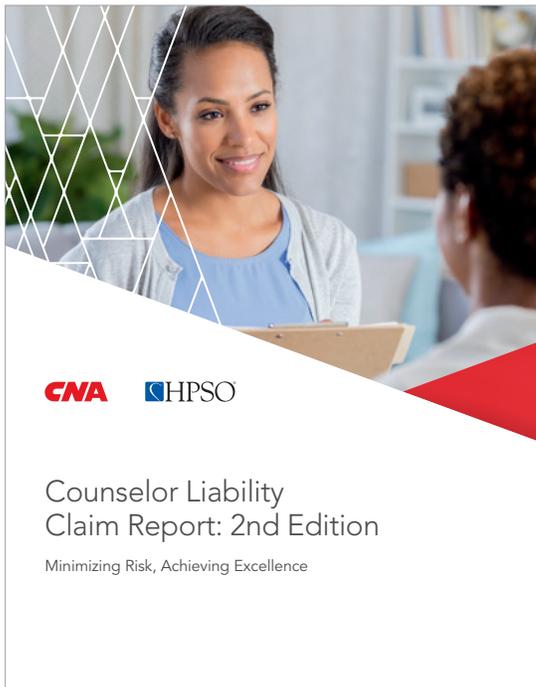
For more risk control resources and top findings from the 2nd Edition of the *Counselor Liability Claim Report*, please review additional Counselor Spotlights on the following topics:

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

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This information is designed to help counselors evaluate risk control exposures associated with their current practice and client communication. 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 client needs. The information contained herein is not intended to establish any standard of care, legal advice, serve as professional advice, address the circumstances of any specific entity, or to provide an acknowledgement that any given factual situation is covered under any CNA insurance policy. The material presented is not intended to constitute a binding contract. 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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