



# Counselor Spotlight: Release of Records

## *An issue of confidentiality and privilege*

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.hpsso.com/counselorclaimreport](http://www.hpsso.com/counselorclaimreport)

This Counselor Spotlight focuses on risk recommendations regarding one of the most significant topics in the report: Release of Records.

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. Similarly, they may receive subpoenas or requests for clinical healthcare records.

A 2019 analysis of closed professional liability claims affecting counselors concluded that assistance for a counselor’s deposition and/or record request increased 456 percent since a similar analysis was conducted in 2014.

The distribution of closed claims in the following chart represents the 2019 claims analysis and database.

The chart displays the percentage of closed claims and average total expenses by the coverage types of **deposition assistance, record request and deposition AND records request**. The average total expense represents the claim expenses including fees for attorneys and other administrative costs.

A counselor may receive nonparty deposition and record request subpoenas for various reasons. However, the majority of the subpoenas in the 2019 database were related to the underlying matters of **child custody or support, divorce actions, or client employment issues**.

### 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

## Legal and Ethical Considerations

Compliance with subpoenas for deposition and record requests is important from legal, ethical, and risk management perspectives.

**Ignoring deposition or record requests will not make the subpoena “go away,” and failure to comply with a request can actually result in legal ramifications for the counselor.** As part of the American Counseling Association (ACA) *2014 ACA Code of Ethics*, the ACA delineates parameters for counselors to provide culturally competent treatment in a confidential manner. These include:

- (B.1.c.) *Respect for Confidentiality*: Counselors have the responsibility to protect the confidential information of prospective and current clients and should disclose information only with appropriate consent or with sound legal or ethical justification.
- (B.2.d.) *Court-Ordered Disclosure*: When ordered by a court to release confidential or privileged information without a client’s permission, counselors seek to obtain written, informed consent from the client or take steps to prohibit the disclosure or have it limited as narrowly as possible because of potential harm to the client or counseling relationship.
- (B.5.c) *Release of Confidential Information*: When counseling minor clients, or adult clients who lack the capacity to give voluntary consent to release confidential information, counselors seek permission from an appropriate third party to disclose information. In such instances, counselors inform clients consistent with their level of understanding and take appropriate measures to safeguard client confidentiality.
- (B.6.b.) *Confidentiality of Records and Documentation*: Counselors ensure that records and documentation kept in any medium are secure and that only authorized persons have access to them.
- (B.7.b.) *Disclosure of Confidential Information*: When consulting with colleagues, counselors do not disclose confidential information that reasonably could lead to the identification of a client or other person or organization with whom they have a confidential relationship unless they have obtained the prior consent of the person or organization or the disclosure cannot be avoided. They disclose information only to the extent necessary to achieve the purposes of the consultation.

Client healthcare record and deposition requests often present a range of legal and ethical challenges. Failure to respond to a legal subpoena may result in the imposition of sanctions, including issuance of a warrant from the court for the counselor’s arrest. Knowing the various types of record requests and how to respond to such requests may help to minimize the risk of actions taken against a counselor.

To further minimize risks, counselors should establish policies and procedures that meet local, state and federal regulations, to standardize the release of records process. This standardization provides a uniform response, thus minimizing liability risks. Knowing that each state’s requirements for releasing records may differ, it is the responsibility of the counselor to know and understand state and federal requirements for releasing records and comply with the most stringent.

## Types of Record Requests

The first step in releasing records is to ascertain who is making the request. The issues to consider include protecting a client’s confidentiality, compliance with state privacy requirements and federal HIPAA regulations, and upholding counselor-client privilege if the request is made in the context of a legal proceeding.

The following examples of record requests that a counselor may encounter include:

**Client Request.** Under various state laws and regulations and federal HIPAA law, as well as the *ACA Code of Ethics*, clients have the right to access a copy of their own records. A counselor should require the client to submit a written request for records. If there is a strong reason for denying direct client access to the records (i.e. the information in the record would be detrimental to the client’s physical or mental health), seek legal advice to determine if there is an applicable exception in that particular situation. If access to a healthcare record is being denied, an in-person meeting with client to discuss your rationale for not releasing the record may be prudent. The ethical decision-making process for denying the client access and conversations with the client should be documented in the healthcare record.

**Healthcare Provider Request.** A counselor may receive a request for records from a healthcare provider who is also caring for the client. While HIPAA permits the sharing of protected health information (PHI) among providers, various state laws mandate written client authorization. Therefore, the counselor should obtain client authorization prior to sharing PHI among providers as well. If there is an emergency situation (e.g., a client is missing and left a suicide note), it may be necessary to share limited information about the client with another healthcare provider, and/or law enforcement.

**Third-party or Payer Request.** A counselor may receive requests for records from a client’s school, employer, life or health insurance company, or a government agency conducting a security clearance. In these situations, the client’s or clients’ written authorization should be current and not expired and, whenever possible, the counselor should verify the request. When counseling a couple, a counselor should obtain written authorization from both clients. In addition, if engaged in substance abuse counseling, specific authorization that complies with federal law may be required.

**Legal Request.** A counselor also may receive a request for records in the context of a legal proceeding. The counselor is obligated to protect a client’s confidential communications – which are typically protected by counselor-client “privilege” laws and ethical codes when a lawsuit is involved. If a legal request is received, contact legal counsel to assist in the response.

As indicated previously, a counselor may be served with a subpoena to produce client records AND provide a deposition. Providing a deposition under oath requires scrupulous preparation and professional guidance. The counselor should contact an attorney or the professional liability insurer to obtain any legal or

risk management services available.

**Releasing of Minor Records.** Most counselors are well-versed in requirements for consent, privacy and confidentiality in the care of adult clients. However, when caring for minors, many counselors can find themselves in unfamiliar territory with respect to these important patient rights. In order to minimize potential liability it is imperative that counselors know and confirm, via documentation, who has the authorization to make healthcare decisions for a minor. This is especially important in situations of divorce and court appointed guardianship. Counselors should do their due diligence to ensure the proper person signing any consent of treatment or release of healthcare records has authorization to do so.

### **CASE STUDY: Failure to Release Records**

An insured marriage and family counselor received a subpoena for client healthcare records of two minor children of the same family. The clients had received treatment due to their parents’ contested divorce and custody battle, but had not been seen by the insured in more than two years. The insured’s employer received the request for the clients’ records from the father in February, although it was addressed to the custodial record keeper. The insured did not learn about the request for several weeks and did not want to produce any records as she believed that her clients’ healthcare records were confidential. Two months later, rather than producing the records, the insured provided a handwritten summary of the records.

A few weeks after producing the summary, the insured received a telephone call from the father’s attorney. The insured reiterated that she could not forward the records due to client privilege and because the request was not a court-ordered subpoena. Despite the attorney providing the insured with a record release signed by the mother, who had legal custody of the children, the insured did not produce the records. The insured stated that she would review

the records again, update her summary, and provide excerpts from the records.

In June, the insured received a second subpoena for records, a request for deposition, and a motion for sanction (penalties when improper conduct is employed during litigation). It was only after she received the motion for sanction that she contacted HPSO for legal assistance.

CNA, the underwriter for the HPSO program, provided legal counsel to the insured to assist her with this matter. The attorney was able to help the insured with production of records and was successful in achieving a dismissal of the motion for sanctions. From the time the insured was aware of the record request, until the time the motion for sanctions was dismissed, the insured spent 10 months confronting this issue. Much of this time could have been avoided if the insured had contacted HPSO/CNA earlier to assist with guidance on releasing the clients’ healthcare records. Expenses paid were greater than \$9,000.

## **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](#)
- [Telebehavioral Health](#)
- [Documentation](#)
- [Preparing for a Deposition](#)
- [What to Do if you Receive a Subpoena](#)



Visit [www.hpso.com/counselorclaimreport](http://www.hpso.com/counselorclaimreport)

## Self-assessment Checklist: Provider-Release of Records

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](http://www.hpso.com) or CNA Healthcare [www.cna.com](http://www.cna.com).

Release of Records	Yes/No	Comments/Action Plans
<b>I read my state practice act and/or the jurisprudence section of my licensure at least once a year.</b>		
<b>I understand that I am responsible for protecting my client's private confidential information.</b>		
<b>I am cognizant of and comply with evolving and expanding state and federal confidentiality and privacy laws and regulations.</b>		
<b>I 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/neglect.</b>		
<b>I discuss privacy issues at the outset of counseling and periodically thereafter</b> and clearly document these discussions in the client's healthcare information record, including the client's acknowledgement and signature when possible. If using electronic signatures, some states have specific requirements. A professional counselor should make sure the records and signatures are compliant with local and federal standards.		
<b>At the onset of counseling, and as required by state or federal jurisdictions, I inform clients of possible situations where confidential information may be released without client authorization, e.g. when a client appears to present a danger to self or others, or when there is evidence of child abuse/neglect.</b>		
<b>I obtain client authorization prior to releasing confidential and private information, where state and federal regulations permit such release.</b>		
<b>I consult an attorney conversant with applicable state and federal healthcare records release guidelines, if I have questions regarding the release of client healthcare information record.</b>		

This checklist is designed to assist counselors with evaluating 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](http://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](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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