A Massage Therapist’s Guide to Malpractice Prevention

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Today’s Objectives

- To expand the understanding of the elements of malpractice and professional liability insurance.

- To increase awareness of massage therapy liability risks.

- To provide risk control recommendations to manage professional liability risks.
Agenda

- Who is HPSO?
- What is Malpractice?
- Massage Therapy Claim Information & Metrics
- New Risk Management Resource for Business Owners
  - Healthcare Perspective
    - Policy and Procedure
    - Client Noncompliance
- Case Studies
- Key Risk Management Takeaways
Who is HPSO?

- Provider of malpractice insurance to healthcare professionals for over 26 years, to 95+ professions
- Over 350,000+ allied health individual customers
- Endorsed by over 45 national, state and specialty allied health professional associations
- Partner with AMTA to provide their members with coverage
What is Malpractice?

**Definition:** Negligence or failure to provide the degree of care required of a professional under the scope of license resulting in injury, death or damage.

- Malpractice is a type of negligence that pertains to professionals.

- Massage Therapists and other professionals can be sued for malpractice.
Elements of Malpractice

- Duty: Standard of care
- Breach: Duty/standard of care not followed
- Cause: Role that breach of duty played in the client suffering harm
- Harm: Damages
How does a client define malpractice?

- *Perception* of wrongdoing.
- Even excellent massage therapists fail to connect with their clients.
- If a client perceives he or she has been injured as a result of the care you provided, or failed to provide, that client could sue.
Who can allege malpractice?

- Injured Party
- Their Legal Counsel
- Parents/Guardians
- An Estate
What to expect

- Summons/complaint Letter
- Legal paperwork, or a demand for services or money
- Oral threat or complaint
- Notice of Arbitration

All alleging an act or omission in the rendering of professional services.
Types of damages

- Economic Damages
  - Medical expense
  - Loss of Income
  - Funeral expense

- Non-Economic Damages (aka Pain & Suffering)
  - Mental anguish
  - Pain and suffering
  - Loss of consortium
Your options as a Massage Therapist

1. Utilize AMTA member malpractice insurance through HPSO
2. Assume the Risk Yourself (go bare)
3. Rely on Employer Provided Coverage
   - No coverage for disciplinary actions
   - Malpractice coverage only pertains to allegations that arise out of your employment
Professional Liability Insurance

What is it? Insurance coverage purchased by massage therapists to cover the cost of being sued for malpractice.

– Provides protection for medical malpractice liability suits

– Legal representation

– Indemnity for economic & non-economic damages
Regulatory Board Complaint

What is a Disciplinary Action?

- A complaint filed with a state or federal administrative agency, licensing or regulatory authority responsible for regulating professional conduct.

- Massage Therapists, and other professionals, can have complaints filed against them.

- Anyone can file a complaint - employer, co-worker, client, parent, friend, etc.
Massage Therapy Claims

**Most Frequent Allegations**
1. Inappropriate behavior of clinician
2. Improper Performance of treatment
3. Equipment-related

**Most Frequent Injury**
1. Emotional distress resulting from sexual abuse/assault
2. Abrasion/irradiation/laceration
3. Fracture
4. Strain/Sprain

**Most Severe Injury Allegations**
1. Inappropriate behavior of clinician (Misconduct)
2. Abrasion/irradiation/laceration
3. Nerve/Spine
Summary – Massage Therapy Claims

- $8,803 Average Paid Indemnity
- $16,320 Average Paid Expense

*Professional Liability Closed Claims with Indemnity and/or Expense Payment, 2007 to present.*
Case #1: Case Summary

- The patient/client was a 30 year old male whose massage center intake form indicated he came to the center seeking his first massage for stress relief.
- The form further indicated that he had no medical problems, was taking no medications and also stated his preferred focus for treatment for his lower back and “anywhere else”.
  - *The form included bold type encouraging patients/clients to provide feedback to the therapist throughout the massage to describe how they were feeling.*
Selected Massage Therapy Claim Scenario

Case #1: Case Summary

- The therapist provided the patient/client with a 90 minute full body massage. The massage therapist’s treatment note indicated it was the client’s first massage and that he talked extensively during his treatment about his profession and stress.

- However, he also provided positive feedback to the therapist and made no complaints at any time during or immediately after the massage session.
The client alleged that by the next morning his triceps areas in both arms were severely pain and swollen. The client called his primary care physician who advised him to seek emergency department care if the pain and swelling persisted.

Six days after the massage, the client notified the massage center that he believed the massage had caused his arm injuries but made no specific complaints about the technique used in his therapy.

On the seventh post-massage day, the client went to his local emergency department where he was diagnosed with bilateral contusions to both upper arms and was referred to an orthopedist.
Selected Massage Therapy Claim Scenario

Case #1: Case Summary

- The orthopedist diagnosed trauma with injury to the subcutaneous fat layer (fat necrosis) in both arms from deep tissue massage. An MRI confirmed the diagnosis of tissue necrosis. The radiologist opined that the injuries were associated with possible trauma, nonspecific edema, inflammation and cellulitis.

- The pain and swelling in the client’s arms persisted and he was further distressed that his triceps areas appeared “disfigured”. He complained that the pain was so great that he had missed more than a week of work and that it had interfered with his personal life and his marriage.

- The client was referred to a plastic surgeon, but there is no evidence that the client sought surgical treatment.
Selected Massage Therapy Claim Scenario

Case #1: Case Summary

- The client and his wife sued the massage therapy center, the center owner and the massage therapist alleging pain and suffering, lost wages, medical costs and loss of consortium.
Selected Massage Therapy Claim Scenario

Was the Massage Therapist Deemed Negligent?
What Payments Were Made on Behalf of the Massage Therapist?

- Indemnity payment – Mid four-figure range
- Expense payment - in excess of $15,000

(These amounts reflect payments made on behalf on the HPSO-CNA insured massage therapist. Payments made on behalf of co-defendants is not available.)
Selected Massage Therapy Claim Scenario

Risk Management Comments

- This was the first massage for the client and he may not have known what to expect in terms of the depth of massage. While the therapist believed there was no deviation from customary practices or from the standard of care, the client was injured and suffered significant pain and swelling.

- Defense experts deemed that the massage was an unlikely source of the client’s injuries. However, given the treating orthopedist’s diagnosis of trauma from deep tissue massage and MRI evidence of trauma, tissue necrosis and edema, defense experts were unable to provide a possible alternative source for the client’s injuries. In view of these findings, the decision was made to settle the matter.
Selected Massage Therapy Claim Scenario

Risk Control Recommendations

- Ensure the client intake form queries the client’s medical conditions and current medications, including the specific reason for seeking massage.

- Educate each client regarding the steps involved in the massage process, as well as the client’s responsibility to notify the therapist of any condition, unusual or unpleasant sensation or feeling of discomfort during the massage procedure.
Selected Massage Therapy Claim Scenario

Risk Control Recommendations

- Require clients to provide signed informed consent for massage treatment that, at a minimum, includes statements that
  - Massage therapy does not constitute medical treatment.
  - The client was provided with the opportunity to discuss any potential adverse or unpleasant effects of massage and verifies that the potential risks have been accepted.
  - The client understands he/she is responsible to reveal his/her medical history including any areas of pain and tenderness, and current medication.
  - The client understands that he/she is responsible to alert the massage therapist to any concerns or discomfort before, during, and after the massage treatment.
Selected Massage Therapy Claim Scenario

Risk Control Recommendations

- Proactively seek periodic feedback from the client regarding his/her comfort and if he/she would prefer (within the standard of care) lighter or deeper massage.

- Obtain emergency medical assistance, as needed, for any acute injury occurring while the client is in the massage therapy area.

- Use caution in areas of tenderness, stress or prior injury/treatment.
Selected Massage Therapy Claim Scenario

Risk Control Recommendations

- If there is a question of the client’s medical suitability for massage, require a physician’s clearance for massage in areas of instability, known injury or recent surgical treatment.

- Direct clients to contact the therapist and their primary care physician if they experience pain, swelling, or other discomfort following massage therapy.

- Written policies and procedures primarily seek to improve client outcomes. Organizations that lack formal protocols or diverge from written policy may find themselves at a disadvantage when it comes to providing a legal defense. In this issue, business owners will find a range of guidelines designed to support policy and procedure development and review, including:

  - The mechanics of policy development: research, writing, review/approval and maintenance

  - Policy-drafting guidelines: tips for drafting practical, user-friendly policy statements

  - The role of policy in litigation: allegations of noncompliance with written policies & procedures
Policy and Procedure

- Written policies and procedures serve as an operating framework within which healthcare business owners can accomplish essential clinical and administrative tasks in a systematic and consistent manner.

- The term *policy* refers to the governing principles that reflect an organization’s mission, philosophy and goals, while *procedure* denotes the measures required to implement the policy. Every policy statement should include an accompanying procedure.

- Organizations that lack formal practice parameters or that diverge from written policy may find themselves at a disadvantage in the areas of legal defense, accreditation and/or regulatory compliance.
Policy and Procedure

- Not only do sound policies aid in reducing practice variation and errors, but they also serve the following vital purposes:
  - *Enhancing continuity of care* by promoting a consistent, sequential approach.
  - *Serving as a written reference* for regulatory agencies and accrediting bodies.
  - *Establishing clear lines of authority* and facilitating delegation of responsibility.
  - *Instituting defined, objective parameters* for evaluating employee performance.
  - *Facilitating orientation of new employees* and education of veteran staff about changes.
  - *Strengthening leadership* by fostering compliance with directives.
  - *Supporting defense efforts* in lawsuits involving standard of care issues.
Policy and Procedure

- Written policies and procedures primarily seek to improve patient/client outcomes. Thus, most organizations focus initially on clinical practices associated with the delivery of client care and gradually move toward standardization of administrative functions.

- Sound policies and procedures result from a thorough process of research, drafting/writing, review and maintenance.
Research

- The following guidelines address the mechanics of policy development:
  - **Research.** Policy development begins with an assessment of the strengths and weaknesses of existing processes in light of changing conditions and organizational goals. By assembling a policy and procedure working group that includes department managers, senior leaders and clinical staff, business owners can ensure that written policy is aligned with the organizational structure and that affected areas are not taken by surprise.
  - The working group or committee should view policy development as a means of analyzing and responding to an evolving legal and regulatory environment, as well as ensuring that clinical and administrative processes embody industry-wide best practices.
The working group is responsible for examining both changing external factors and the organization’s own capabilities, resources, liability experience and performance survey findings. The following questions can help initiate the policy development discussion:

– *Would the organization as a whole benefit* from the proposed policy?
– *Who should be consulted* when framing policy in this specific area?
– *Does the proposed policy raise legal or regulatory issues,* and would it potentially affect accreditation or certification status?
– *Can the policy be implemented with minimal disruption to current practices* and without hindering client safety and operational efficiency?
Influencing Factors

Policy Statements and Procedures

- **Regulatory**
  - OSHA
  - EPA
  - CMS

- **Organizational**
  - Quality control
  - Performance improvement
  - Risk management
  - Process safety

- **Legal/liability**
  - Claim analysis
  - Case law precedent
  - Expert witness testimony
  - Best practice standards

- **Legislative**
  - State statutes
  - Federal programs

- **Accreditation**
  - Standards
  - Patient safety goals
  - Survey reports
Policy Drafting/Writing

- Written policies and accompanying procedures are *teaching documents* designed to help staff members better understand and perform their duties. Therefore, those involved in the drafting process should focus on creating policy statements that are:
  - *Informative* and self-explanatory.
  - *Authoritative* and unambiguous.
  - *Practical*, useful and realistic.
  - *Clear* and understandable even by non-experts.
  - *Quality-focused* and aligned with risk-reduction goals.
  - *Compliant* with federal and state laws, regulations and accreditation requirements.

- Both new and revised policy statements should utilize a template to streamline the drafting process and enhance consistency.
Review and Approval

- Ask reviewers to verify that the policy:
  - *Is aligned with the organization’s mission, vision, values and goals.*
  - *Complies with federal and state laws,* as well as applicable regulations.
  - *Satisfies state survey requirements* and accreditation standards.
  - *Conforms to organizational expectations* regarding format and style.

- Leadership – including the medical and clinical director when appropriate – must approve all policies and procedures prior to implementation. This final executive-level review typically follows several rounds of revision by the working group.
Maintenance

- Federal and state regulations may require review of policies and procedures on an annual basis. When a policy statement undergoes review, the date of the review and any alterations should be noted in a centralized database. Revisions also may occur in response to external legal or regulatory changes. In such cases, the revision date should be noted, but the regular policy review cycle should not be altered.

- For ease of access, new and revised policies and procedures should be filed in a central location or computerized database. Note that when a policy is modified or retired from practice, the original policy must be secured, in the event that the organization is sued and must establish the standard of care in effect at the time of the occurrence.

- The statute of limitations for professional liability claims typically dictates the minimum length of time that a modified or retired policy and procedure should be retained. Generally, the statute of limitations is two to three years, but it may be much longer when the litigation involves care provided to children. In addition, internal document retention guidelines, based upon relevant state statutory and/or regulatory requirements, should be followed.
The Role of Policies in Litigation

- Many professional liability lawsuits – especially those involving issues of inadequate training and/or substandard care – include allegations of noncompliance with written policies and procedures.

- Policy statements are often requested during the discovery phase of a trial, where they may be used to establish whether an organization has instituted and adhered to appropriate guidelines. In this situation, an organization’s best defense is to prove that the care in question was undertaken in good-faith compliance with established procedures.

- Producing the written policies in force at the time of the adverse event and showing that staff were instructed and trained to follow these established practices can significantly enhance legal defense.
The Role of Policies in Litigation

- At a minimum, organizations should be prepared to produce evidence that the relevant policies were:
  - *Approved by the governing board*, executive leadership and medical/clinical director, if appropriate.
  - *In effect* at the time of the incident.
  - *Incorporated into staff orientation* and professional development programs.
  - *Included in staff handbooks* and organizational manuals.
  - *Reviewed and revised* on a scheduled basis.

- The defendant organization bears the burden of proving that a request for written policies and procedures is unreasonable. Responding that an obsolete policy cannot be accessed weakens the defense position. To prevent such situations from occurring, properly archive outdated or modified policies, preferably in a computerized system that complies with retention guidelines and timelines.
The Role of Policies in Litigation

- Organizations should be able to retrieve the following information in a timely manner:
  - *Dates* when the relevant policies and procedures were created, revised and/or canceled.
  - *Location* of outdated policies, in compliance with jurisdictional requirements.
  - *Names* of those requesting policy revision or elimination.
  - *Reasons* for policy revision or elimination.

- Useful, well-drafted, regularly reviewed policies and procedures are an essential component of any risk control program. By formalizing organizational standards and expectations, written policy statements can help promote quality of care, clarify staff roles and responsibilities, and shield the assets and reputation of a healthcare business in the event of litigation.
Case Study
Case #2: Case Summary

- The client was a 60 year-old male who came to the massage center seeking a massage for neck, shoulders, arms, hips, thighs, calves and feet pain.

- The informed consent form was not signed and the intake form was incomplete as to medications and past medical history, but during the initial massage the client mentioned that two years prior he had surgery to repair a torn rotator cuff for his right shoulder.

- Our insured performed an initial 90-minute full body massage without complaints. After the initial massage, the client scheduled three 60-minute massages in two weeks increments.
Selected Massage Therapy Case Study

Case #2: Case Summary

- During the first 60-minute massage, our insured performed a full body massage and added two stretches to each arm. While performing the right arm stretch, the client reported discomfort so the insured stopped the stretches and completed the massage by working on his neck and head.
- Following the massage, the client stated he felt relaxed but a little sore in his neck and back.
- Two days later, the client called and cancelled his two subsequent massages because he was planning to seek the care of a chiropractor.
Selected Massage Therapy Case Study

Case #2: Case Summary

- Approximately three weeks after the massage, the client sent the massage center an email requesting that the therapist contact him due to pain in his right shoulder.
- When the client did not get a response from the email he sent a letter to the center alleging the therapist over stretched his right arm causing further damage to his right shoulder.
- Because the therapist was a contract employee, he does not access the business emails and did not know about the complaint until the client sent a letter to the massage center a week later.
Selected Massage Therapy Case Study

Was the Massage Therapist Deemed Negligent?
Selected Massage Therapy Case Study

What Payments Were Made on Behalf of the Massage Therapist?

- Indemnity payment - Between $9,000 and $10,000
- Expense payment - Less than of $2,000

(These amounts reflect payments made on behalf on the HPSO-CNA insured massage therapist. Payments made on behalf of co-defendants is not available.)
Risk Management Comments

- Defense experts reviewed the therapist’s treatment notes and could not find any breach of care, but were concerned that the notes appeared to be a subsequent narrative explanation and defense of the complaint instead of the actual session notes done at time of treatment.

- Defense experts deemed this as troubling since a subsequent narrative is less convincing as a record of actual occurrences and is subject to “selective” memory and makes it much harder to take the information at face value.

- Due to the material fact dispute, the decision was made to settle the claim.
Selected Massage Therapy Case Study

Risk Control Recommendations

- Educate each client regarding the steps involved in the massage process, as well as the client’s responsibility to notify the therapist of any condition, unusual or unpleasant sensation or feeling of discomfort during the massage procedure.

- Require clients to provide signed informed consent for massage treatment that, at a minimum, includes statements that
  - The client was provided with the opportunity to discuss any potential adverse or unpleasant effects of massage and verifies that the potential risks have been accepted.
  - The client understands that he / she is responsible to alert the massage therapist to any concerns or discomfort before, during and after the massage treatment.
Risk Control Recommendations

- **Assure clients complete all intake forms** to include a medical history, current medications and informed consents. If blanks are noted, therapist should ascertain the information from the client prior to providing any treatment.

- **Provide accurate, complete and current documentation**, in order to enhance continuity of client treatment by another authorized therapist or healthcare provider. Documentation should support the treatment plan discussed with the client.

- **Document treatment contemporaneously.** Do not alter entries in any way once legal or regulatory action is initiated.

- **Respond to all client complaints immediately** in an attempt to mitigate risk exposures.
Client Noncompliance
Client/Patient Noncompliance: Reduce Risk by Strengthening Communication

Client noncompliance can come in many forms: unwillingness to follow a course of therapy, repeated missed appointments, rejecting treatment recommendations, reluctance to take medications, refusal to provide information or chronic late payments. If left unchecked, such conduct may result in litigation. In this issue, you’ll find several sound business techniques for dealing with noncompliant clients, including:

- **Sound documentation**: how it helps defend against allegations of negligence or abandonment
- **Missed appointments**: formulating a written policy and putting procedures in place behavior
- **Communications**: risk management recommendations for written communications
- **Refusal-to-consent form**: having the client acknowledge in writing the dangers of noncompliance
- **Terminating the client-provider relationship**: suggested steps to follow to protect your practice
Sound Documentation

- Sound documentation and timely intervention are critical to limiting the consequences of defiant, recalcitrant or passive-aggressive client behavior. A carefully documented record may prove invaluable in defending against allegations of negligence or abandonment.

- Early identification of the signs of noncompliance is critical to reducing risk, permitting healthcare business owners to take action before the situation worsens.
Documenting Missed Appointments

- Too often, healthcare practices treat a missed appointment merely as an annoyance and fail to note the occurrence in the client healthcare information record.

- However, as missed appointments may indicate potential noncompliance, they require thorough follow-up and documentation. Healthcare businesses should have a formal written policy for managing missed appointments, which includes the following procedures, among others:
  - *Prepare a daily list of missed appointments* by client name and medical identification number.
  - *Document the occurrence of missed appointments* in the progress notation of the client healthcare information record.
Documenting Missed Appointments

– *Utilize a special template for electronic record systems or preprinted stickers for paper records.* Ready-made formats or notes facilitate documentation of missed appointments and prompt appropriate follow-up orders, such as:

• Call client today to reschedule.
• Send reminder card to reschedule.
• Send certified/return receipt letter regarding the need to reschedule.
• Document all client follow-up efforts and place a copy of any written correspondence to or from the client in the client healthcare information record.
Communicating with Non-compliant Clients

- When treating uncooperative clients, even basic expectations must be spelled out. Standardized educational materials, appointment reminders, and other teaching and memory aids can help foster a better rapport with such clients. If written reminders fail to improve compliance, schedule a face to-face discussion with the client regarding mutual concerns and expectations, and document this meeting in the healthcare record.
Communicating with Non-compliant Clients

- Follow up with a letter to the client, explaining that the primary goal of the practice is to deliver quality care and emphasizing that noncompliance with recommended treatment precludes optimal results. Both spoken and written messages to the client should be clear, direct, polite and sympathetic.
Communicating with Non-compliant Clients

- When communicating with noncompliant clients by letter, consider the following risk management recommendations:
  - *Send the letter by certified mail* and place a copy in the client’s healthcare information record.
  - *In the letter, instruct the client on how to contact the office*, in order to reschedule missed appointments or otherwise rectify the situation. Emphasize that one wishes to improve the relationship and continue to provide treatment.
Informed Refusal

- Persistent failure to heed medical advice can lead to less than desirable results for the client, as well as potential liability exposure for providers. Business owners can counter this risk by adopting a standardized refusal-to-consent form, which serves to confirm in writing that the provider fully disclosed to the client the risks of forgoing the proposed test, treatment or procedure. By signing the form, clients acknowledge that they have discussed the proposed course of care with their practitioner and understand that failure to follow medical recommendations can have serious or even life-threatening consequences.

- The completed refusal-to-consent form should be placed in the healthcare information record. If the client subsequently experiences a downturn, the documentation can help protect the provider, as well as the practice or business, by demonstrating that the client’s own behavior and actions contributed significantly to the negative outcome.
A Sample Informed Refusal of Care Form for Healthcare Business Owners

Patient name: ______________________   ID: ______________________   Date: ______________________

This is to certify that, Patient Name, a patient at Healthcare Outpatient, am knowingly refusing treatment against the medical advice of Provider Name.

I am refusing the following:

☐ Medical Examination

☐ Continuation of Care After Medical Screen

☐ Test or Treatment

☐ Remaining at the Facility

☐ Other: ______________________

I understand that my refusal of treatment and care has been documented in my medical record.  I have been informed of the risks involved, including a potential worsening of my medical condition.  I accept all risks of this action and release my treating providers from all responsibility and liability for any adverse effects that may result from such refusal of treatment and care.

Patient signature: ______________________   Date: ______________________

Witness: ______________________

Witness: ______________________

I declare that I have personally explained to the patient the risks and potential consequences of his/her decision, described the benefits of treatment and presented alternative therapeutic possibilities, if any exist.

Provider: ______________________   Date: ______________________
Terminating the Client-Provider Relationship

- If compliance remains an issue despite a determined effort to educate and communicate with the client, it may become necessary to take decisive action. The decision to unilaterally end a client-provider relationship can have legal repercussions and should not be made without proper deliberation. Irrespective of the circumstances preceding termination, providers must ensure that the client’s health status is not compromised. Treatment should continue until procedures already begun are completed and the client is medically stable.
Terminating the Client-Provider Relationship

- If the provider ends the relationship without providing reasonable notice, the client may sue on grounds of abandonment. To prevent such allegations and satisfy ethical and professional obligations, the treating provider should observe the following safeguards:
  - Check the termination policies of the client’s health plan prior to initiating any action.
  - Send the termination letter by certified mail after communicating the reasons for the decision via face-to-face discussion.
  - Indicate the client’s current health status and include any recommendations for immediate medical care.
  - Note the date the relationship will end. Thirty days from receipt of the letter is customary.
  - Agree to provide emergency care until the stated date of termination.
  - Suggest the client locate another provider by contacting the health plan’s member services department or the local medical society. Provide telephone numbers or other contact information, as necessary.
Terminating the Client-Provider Relationship

– Offer to send a copy of the client healthcare information record to the subsequent treating provider after the client has executed a form authorizing release of information. Enclose such a form with the termination letter, along with a self-addressed stamped envelope.

– Retain a copy of the termination letter in the client healthcare information record and carefully document any subsequent correspondence with the client.

• Client noncompliance is too serious a risk to ignore. Healthcare business owners can help minimize liability exposure by ensuring that providers and staff respond promptly to missed appointments, communicate expectations clearly and document clients’ refusal of recommended treatment. If it eventually becomes necessary to terminate a chronically noncompliant client, the measures indicated herein can help prevent disruption of care and subsequent allegations of abandonment.
The client was a 30 year-old female who had received multiple massages from our insured over the past year without complaints.

On the day of the incident, the therapist had the client turn over on her back and he accidentally touched the client’s breast.

Following the incident, our therapist immediately re-draped the client, apologized and continued with the massage.

While the client was on her back, the client’s draping accidentally slide off her and when therapist grabbed the sheet he unintentionally touched her pubic area.

Again, the therapist apologized and continued with the massage.
Selected Massage Therapy Case Study

Case #3: Case Summary

- After the massage, the client thanked the therapist for the massage and left a tip.
- The therapist informed his employer of the incidents and documented the events in an incident report.
- A few days after the incidents occurred, the client called the massage center and informed the owner that she had retained an attorney because the therapist intentionally pulled the sheet off of her and repeatedly touched her pubic area (four to five times).
- Client claimed the incident was assault, battery and caused her emotional distress.
Selected Massage Therapy Case Study

Was the Massage Therapist Deemed Negligent?
What Payments Were Made on Behalf of the Massage Therapist?

- Indemnity payment - Between $12,000 and $13,000
- Expense payment - More than $98,000

(These amounts reflect payments made on behalf on the HPSO-CNA insured massage therapist. Payments made on behalf of co-defendants is not available.)
Selected Massage Therapy Case Study

Risk Management Comments

- The therapist admitted he accidently touched the client’s breast and pubic area, but denied that he repeatedly touched her.
- The therapist’s employer had excellent reference letters from previous employers for the therapist as well as compliment cards from other clients regarding the professionalism of the therapist.
- Defense of the claim lasted four years and settled for a nuisance value at the request of the massage therapist.
Selected Massage Therapy Case Study

Risk Control Recommendations

- Use appropriate draping to protect the client’s physical and emotional privacy.
- Be aware of touching that client could perceived as sexual in nature. *If client’s genitalia is inadvertently touched, be respectful of the client and avoid any further unintentional contact.*
- Report any unanticipated events, *document events according to facility requirements.*
- Maintain client compliment cards.
Our insured massage therapist (defendant) worked as an independent contractor in a physical therapy firm, whose main clientele consisted of clients with sports injuries. The client (plaintiff) had an order by a physician for a deep tissue massage therapy once a week for one month as a result of a worker's compensation injury to her shoulder.
During the intake process the massage therapist completed a thorough history of the client and noted her to be an obese, African American female with shoulder pain. The massage therapist also documented that the client adamantly refused to allow the therapist to use lotion during massages as she was allergic to "most all of them". In order to comply with the client’s request, the massage therapist would only use lotion on his hands during the massages.
Case #4: Case Summary

- The client would complement the massage therapist at the end of each massage session and told him that her pain and tension level had decreased significantly. The client never indicated displeasure in the massages and in fact indicated that she was very satisfied with her overall therapy on her satisfaction surveys.
Ten days after the last massage, the massage therapist followed-up on a message he received from the client. The client advised him that she had experienced an allergic reaction to the lotion and "her injury" was worse than ever. She advised that she took more time off from work due to "extreme" pain and that her shoulder was killing her. She also indicated that she had her boyfriend had taken pictures of the injury. The massage therapist instructed the client to see her referring physician and keep him updated on her pain.
Case #4: Case Summary

- The massage therapist did not hear back from the client until approximately four months later, when he received a letter from an attorney indicating the plaintiff had suffered a severe scratch to her scapula area causing pain and suffering and permanent pigment damage to her skin.
- The client accused the insured of "pinching" her skin resulting in a "superficial wound" on her scapula on the last massage session.
The letter further reported that the client was seen by her doctor the day after her last massage because the scratch on her shoulder was extremely painful and due to the pain she lost two days of work. The client produced photos of her scratched area and there was a definite difference in pigmentation of the skin on the scapula.
Was the Massage Therapist Deemed Negligent?

- Do you believe that an indemnity and/or expense payment was made on behalf of the massage therapist?
- If yes, how much?
Selected Massage Therapy Case Study

What Payments Were Made on Behalf of the Massage Therapist?

- Indemnity payment – $11,000
- Expense payment - $57,000

(These amounts reflect payments made on behalf on the HPSO-CNA insured massage therapist. Payments made on behalf of any co-defendant is not available.)
Risk Management Comments

- Defense expert review indicated that no informed consent explaining the risk and benefits of a deep tissue massage was performed or documented during the intake process, even though the massage therapist completed a thorough intake.

- Our position during the legal process was that minor skin abrasions can and do occur with deep tissue massage and that their appearance is no indication of substandard treatment.

- The defense dermatologist indicated that a superficial skin wound would typically heal without residual on the vast majority of people. Unfortunately, the healing of this minor skin wound resulted in 1 1/4" permanent skin discoloration for this client.
Selected Massage Therapy Case Study

Risk Management Comments

- The defense counsel deemed successful defense of the claim to be less than 20% due to the missing informed consent process.
- The massage therapist expressed interest in settlement and mediation was attempted. The plaintiff demanded $50,000 at mediation which was quickly rejected by our massage therapist ending the mediation.
- Our experts advised the continued cost of defense could be more than the value of the injury.
- Because of both of these reasons, two days later, the claim was resolved.
Selected Massage Therapy Case Study

Risk Control Recommendations

- **Require clients to provide signed informed consent for massage treatment that, at a minimum, includes statements that**, “The client was provided with the opportunity to discuss any potential adverse or unpleasant effects of massage and verifies that the potential risks have been accepted”.

- **Educate each client regarding the steps involved in the massage process**, as well as the client’s responsibility to notify the therapist of any condition, unusual or unpleasant sensation or feeling of discomfort during the massage procedure.
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Risk Control Recommendations

- Inspect the client’s skin prior to, during and after to ensure the skin is healthy and that the client is not experiencing any discomfort during the massage and there is no evidence of redness or irritation before, during and after the treatment.

- Document objective findings and observations related to skin condition and client expressed comfort level before, during and after the massage.
Protecting Yourself – Key Takeaways

- Know and comply with your state scope of practice requirements, massage therapy practice act, and facility policies, procedures and protocols.

- Follow documentation standards established by professional organizations and comply with your employer’s standards.

- Develop, maintain and practice professional written and spoken communication skills.

- Emphasize ongoing client assessment and monitoring.
Questions?

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