

A Common Waiver

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... The psychotherapist-patient privilege is an important aspect of patient privacy. As has previously been written about in these pages, the privilege generally “belongs” to the patient and can be claimed (asserted) or waived by the patient. It is different from confidentiality. Privilege involves the right to withhold testimony in a legal proceeding. The privilege, however, is not absolute. Thus, there are times when the privilege may not apply – such as, when the patient has put into issue in a lawsuit his or her mental and emotional condition. This typically occurs when the patient alleges that he or she suffered mental and emotional distress as a result of the negligence of the defendant.

While this is primarily a legal issue affecting the introduction of evidence, it is important for practitioners to be aware of this exception. Patients or clients will often be surprised when they learn that a subpoena has been served for their records or the therapist’s testimony, and when they are for the first time informed that they have waived the privilege by making the assertions they make in the complaint (the formal pleading). They will sometimes call and express concern or outrage. The practitioner may need to encourage the patient to talk with the patient’s attorney to fully understand why it may be necessary to divulge what was thought to be protected and private. Also, the practitioner may want to alert the patient or the patient’s attorney to the existence of material in the file that may be “highly charged.”

In most, if not all, states, it is possible for the patient’s attorney to seek a protective order in order to suppress disclosure of particularly sensitive matters. This can be done in situations where the information is highly embarrassing or prejudicial, but of little probative value. While each case is different, be assured that the lawyer on the other side of the issue will likely argue against the issuance of a protective order. In such situations, it is important for the practitioner to be aware of the content of his or her records, and to alert the patient to the fact that disclosure may be compelled because of the apparent waiver of the privilege by the allegation in the lawsuit of mental and emotional distress or psychological harm.