

Privileged Communications

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... If you are covered by the psychotherapist-patient privilege or a similarly titled privilege, be sure to find out if the privilege exists in criminal proceedings as well as civil proceedings. This is most important in cases where the patient may be the victim of a rape. If the privilege applies, the defense attorney should have a difficult time obtaining psychotherapy records, even upon subpoena. While there are times when a judge may rule that the privilege must give way, the general rule is that as long as the patient hasn't put her mental condition into issue in the legal proceedings, the privilege applies.

Suppose the patient begins to see a therapist after the rape and in order to deal with the emotional harm caused by the criminal act. In such a case, the defendant's attorney may seek the treatment records in order to see if they contain any information that may assist in the defense of the accused. If the privilege exists in criminal proceedings, the defense attorney should generally be unable to obtain either the treatment records or the testimony of the therapist.

If the patient was in therapy before the rape occurred, the privilege should still exist, although in some cases (such as where the patient suffers from a serious mental disorder) the defense will argue that the records may contain proof that the patient cannot distinguish between fact and fantasy, and that the privilege has to give way to the constitutional right of a defendant to confront the witnesses against him. Until the court rules on the question, the therapist must be ready to assert the privilege on behalf of the patient. The prosecutor's office will often be helpful, since they typically don't want to see their key witness come under attack by the defense.