

Subpoena for Records and Notes

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... Suppose the therapist's mental health records and notes regarding the patient are subpoenaed by the defendant (the former employer) during the patient's civil suit against her former employer. The patient alleges that the employer's sexual harassment and other wrongful conduct caused her to suffer mental and emotional distress. Suppose further that you are covered by HIPAA regulations ("The Privacy Rule") and that your patient and her attorney tell you that they are waiving the psychotherapist-patient privilege and that they want you to comply with the subpoena. Is the defendant entitled to the "psychotherapy notes" as well as the "psychotherapy records"?

The general answer is "yes," but therapists should first talk with the patient and the patient's attorney in order to get clarity on what the waiver of privilege includes. Although there are exceptions that may apply, the general rule is that the defendant will be entitled to such "records" and "notes" if the subpoena is broad enough and is properly issued and served. The protected status of "psychotherapy notes" under HIPAA does not generally extend to civil litigation brought by the patient where the health records may contain relevant evidence and where the privilege has been waived (e.g., where the patient is suing for alleged mental or emotional distress). Of course, if the psychotherapist-privilege is not waived by the patient and the patient's attorney, the therapist will likely be asserting the privilege on behalf of the patient and resisting release of the records.