

## Waiver

### Avoiding Liability Bulletin - October 2005

... Typically, the holder of the privilege is the patient and not the therapist or counselor. Thus, the privilege can be claimed (asserted) by the patient or can be waived (given up) by the patient. Sometimes the patient waives the privilege as a matter of law and without knowing it. This typically happens when the patient, through his or her attorney, brings a lawsuit against another (the defendant) alleging physical and emotional harm suffered as the result of the negligent or intentional conduct of the defendant.

Sometimes the primary injury suffered may be physical in nature, but somewhere in the pleadings it is alleged that the plaintiff (your patient) also suffered emotional harm. This allegation may be enough to allow the defendant to subpoena and obtain the mental health records of the patient, who may then be concerned and surprised by the likelihood that very personal information may have to be revealed. In such a circumstance, the therapist must make sure that the patient's waiver of the privilege or claim (assertion) of privilege is documented in the records. The records should reflect not only the patient's position, but the position of the attorney for the patient as well.

The patient and his or her attorney must be in agreement with each other before the therapist can safely act – that is, respond to a subpoena for records. The attorney for the patient can often convince the patient that the disclosure of the mental health records is necessary in order for the lawsuit to be successful. Under some circumstances, the attorney for the patient may be able to apply for and obtain a protective order, allowing some portion of the records to be excluded from disclosure.

**Author:**  
Richard Leslie