

ACCESS TO RECORDS VS SUBPOENA FOR RECORDS

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I have spoken with practitioners who have conflated the laws that deal with a patient's access to records and the laws that govern the practitioner's reaction to a subpoena for records issued by the attorney for a party adverse to the interests of the patient. Perhaps the practitioner receives a subpoena for a patient's records from the attorney for the person or entity (e.g., a former employer or health care practitioner) that the patient is suing. Part of the lawsuit alleges that the defendant negligently or intentionally caused emotional or psychological harm to the patient. Some practitioners mistakenly think that in such situations they have the option to provide a summary of the records in lieu of the complete record, especially when the patient is reluctant for the treatment records to be released.

The right of a mental health practitioner to provide a summary of the records becomes relevant when a patient requests (usually a written request) a copy of the treatment records – not when a properly issued subpoena for records has been served on behalf of a party adverse to the interests of the patient. When there is litigation initiated by the patient, the defendant may (depending upon the specific allegations) be entitled to the complete treatment record of the patient. It is possible for the patient's attorney to seek a protective order to protect certain portions of the record from disclosure, but protective orders are not easily obtained and, if granted, tend to be limited in scope.

Once a patient puts their mental or emotional condition into issue in a lawsuit by alleging mental or emotional harm, Justice requires that the plaintiff (the patient) prove the harm or damage alleged and that the defendant be allowed to fully contest the allegations. The psychotherapist-patient privilege is waived as a matter of law. Production of the records is necessary in order to ensure a fair proceeding and a just result. In the absence of an agreement between the parties or a protective order (both rare), there are no summaries allowed in this scenario!