Writing a Professional Will

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Which would you rather do: go to a movie, buy life insurance, or write a will? It's a no brainer! Most of us would do almost anything else, rather than contemplate the possibility we may become incapacitated or die. Yet, we all care about our clients and would want the best for them in any crisis. Clinicians around the country are now biting the bullet and writing instructions for how to meet the needs of clients and tie up business matters, should the unthinkable happen. These instructions can be thought of as a "professional will," and can be attached to a personal will.

When is the right time for a clinician in private practice to write a professional will? When you open your practice! Most of us don't think seriously about mortality until middle age or later. When we are young, it is an abstraction, and at any age, it is a complicated and distressing proposition. Understandably, we prefer to believe we will stop working by choice and in a planned manner. We think about back-up arrangements only when we travel. Yet, misfortune can strike at any time, not according to a schedule. If you have a stroke or a serious car accident, someone—perhaps your spouse or partner, your best friend, or a colleague—will suddenly be thrust into the role of taking care of your practice. They will have to discover ways to access your practice, when they themselves are in shock. We owe it to our loved ones, our clients and ourselves to lay out an "emergency plan," instructions we hope will never have to be implemented.

You might think, "But I don't know how to make these preparations." In truth, the biggest hurdle is our distaste for considering such an event. It feels too terrible, not only for ourselves but for our loved ones and anyone else who depends on us. The most challenging aspect of writing up these instructions is deciding to do it.

Once you decide to forge ahead—despite your resistance—there are more hurdles that may cause you to abandon the project. You will be considering decisions that may cause you to shrink away. Probably the most difficult decision will be: who will you ask to take on these responsibilities? Won't this be a burden, too much to ask of anyone? Other decisions will take some teasing out, as well. Many questions will arise, including: how do you want your "practice executor(s)" to notify your clients? How will they get your client's contact information? Where will your estate store your records and for how long? (Your state will have requirements for the latter.) How long should your estate keep your phone in service? Will your estate compensate your professional executor(s)? Yet, all of these questions can be answered, and indeed will have to be answered by somebody else, if not by you.

After these decisions are made, the last hurdle that may yet deter you will be the sheer effort of addressing all these details and writing them up in a document. You will be describing aspects of your business such as where to find office keys, passwords to your voice mail and your computer, how you bill clients, where you bank, and a multitude of other matters. Covering these topics will take several hours. Some may require you right now to do some housekeeping and reorganization. Keep reminding yourself it is worth this effort. You will feel a sense of accomplishment—or at the very least, relief—when it is done. And in this case, you will hope it was all "much ado about nothing!"

Following are some aspects of your practice to address in writing these instructions.

Choosing an Executor and a Backup

Most likely you will want to choose a colleague or other mental health professional with whom you have a rapport. Also, it would be best to select either a backup or co-executors, in case one of them is unavailable or to share the tasks. Your professional executor(s) will probably be contacting your clients. They might be seeing your clients or referring them to other therapists for a brief consultation around this loss, or for on-going therapy. Your professional executor(s) will probably have some dealings with your family or your personal executor around matters such as disposing of office furniture and art, taxes, and any business effects or records kept at home. Once you have selected your executor(s) and written your instructions, it would be a good idea to meet with them to discuss any questions they might have.

Contacting Your Clients and Other Individuals or Organizations

Decide how you want your clients notified. Usually this is done by phone, but you might have some other preference. Provide detailed information about how to determine your current clients' names and contact information. If you keep your schedule or client information

on a computer, be sure to provide passwords, if needed. Alert your executor(s) to be careful about confidentiality if they are phoning clients or sending letters. A phone message meant for the client could be heard by another person who isn't meant to know that your client is in therapy with you.

Be sure also to list any other persons or organizations you regularly deal with. This list might include your suitemates, consulting jobs, your supervisor or supervisees, study groups, and membership organizations (such as your clinical social work society) where your serve. If you present at conferences, ask your executor(s) to scan ahead in your calendar for any such dates.

Referring Your Clients

Describe how you want referrals to be handled. Consider whether you want to make any requests, such as offering a free consultation, having your estate pay for the initial consultation, or asking the therapist to bill the client at your rate. You might want to suggest a list of colleagues who could meet with your clients.

Answering Machine, Mail, Website and Email

Ask your professional executor to change your phone greeting. A suitable message, suggested by Stephen K. Firestein, M.D., might be "(Your name)'s appointment schedule has been cancelled. Please telephone (designated person's name and number) for further information." A similar note should be posted on your office door, in case a client can't be reached before coming to an appointment. Be sure to give instructions and any codes needed to access messages on your answering machine.

Your executor(s) may want to have your mail forwarded to another address. If you use email with clients, provide information about accessing your email account. If you have a website, your executor(s) will need the information necessary to cancel it.

Access to Your Office and Records

Give detailed information about how to find your keys, how to access your office, desk and file cabinets. Include information about duplicate keys.

Billing and Taxes

Describe where you keep your billing records and how to determine balance due. Discuss your wishes regarding balances owed. Give information about billing procedures for any programs you might participate with such as insurance companies, EAP's, and Medicare or Medicaid.

Describe how you record expenses and receipts, where you keep receipts, and where you keep previous tax returns. Give contact information for your accountant, if you use one.

Other Financial Matters

Provide information about your bank account, business credit card, and credit card service if you accept payments by credit card. If you advertise, give your executor(s) information about how to cancel your ads. Similarly, ask them to remove your name from any directories of therapists where you have submitted a listing, either printed or online. Ask your executor(s) to cancel any magazine subscriptions.

Lease and Parking

Describe procedures for paying your rent, when it is due, and where to find a copy of your lease. If you share space with colleagues, give your executor(s) instructions regarding giving notice and covering your rent.

Compensating Your Executor(s)

Since closing your practice will involve many hours of work, some of it emotionally charged and much of it simply an effort, you may want to make provisions for paying your executor(s). If so, it would be a good idea to indicate this expense in your personal will, as well. Some executor(s) might not accept compensation, some would be more comfortable with a flat rate or a token, while others might prefer to have your estate make a donation to a charity. You might want to discuss this decision with your executor(s).

Canceling Your Malpractice Insurance, Business Insurance, and License

Give the information needed for canceling each of these items.

Maintaining Records

Your estate will need to maintain and store your records for a period of time specified by the state where you practice. The standards range from four to nine years. There are several reasons to maintain records. The client may want the estate to forward clinical information to a new therapist. Billing records will be necessary to settle any disputes about monies owed. Finally, the estate will need your records if a malpractice claim should be filed. When records can be disposed of, specify that they be shredded. Old appointment books and billing records should also be shredded.

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Professional Will, *continued from page 9*

Distributing Copies of Your Professional Will

In addition to your executor(s) and any other appropriate persons, be sure to provide a copy of your "professional will" to your personal attorney. If you plan to pay your executors from your estate, it would be a good idea to include this instruction in your personal will. You might want to have an attorney familiar with and experienced in mental health law review your "professional will," and advise you on how to authenticate it. Finally, include a list of all recipients of these instructions and their phone numbers.

Updating Your Professional Will

Bear in mind that your circumstances will most likely change over time. For example, you might move to a new location or change banks. Just as you would with a personal will, you will need to review these instructions for your practice periodically and distribute new copies to all the recipients.

More Information and References

Stephen Ragusea, PhD, has developed a template to use in writing a professional will. You can obtain a copy by contacting him at 1901 Fogarty Avenue, Suite 5, Key West, FL 33040, (305) 294-2500, or going to the following website: *www.division42.org/MembersArea/PracticePerfect/ProfessionalWill.htm.* Kenneth S. Pope, Ph.D., ABPP and Melba J. T. Vasquesz, PhD, have included a chapter on writing a professional will in their book *How to Survive & Thrive as a Therapist: Information, Ideas & Resources for Psychologists in Practice,* American Psychological Association, 2005. This chapter is also available at Dr. Pope's website, *www.kspope.com/therapistas/will.php.* Finally, I have also drawn on an article by Stephen K. Firestein, M.D., published in *The American Psychoanalyst,* Volume 41, No.3, Fall, 2007. This article can also be accessed online at *www.apsa.org/portals/1/docs/tap/vol41no3.pdf.* ❖

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CONTINGENCY PLANNING

I. What is a "Professional Will"?

A. A Professional Will is not a legal document. In concept, reference to a Professional Will generally means to the written plan of a mental health practitioner to address the event of his/her death or incapacity (i.e. a "contingency plan").

B. Professional Wills are not expressly contemplated by Nebraska laws; however, mental health practitioners generally have ethical duties to plan for continuity of services in the event of their unexpected incapacity or death (for psychology, see Title 172, Chapter 157 of the regulations for the Health and Human Services System and Standard 3.12 of the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct) (see also Neb. Rev. Stat. § 38-2138).

C. For the purposes of guidance only, see the attached Checklist and proposed Professional Will, which were prepared by the Professional Wills Committee at the NYU Postdoctoral Program in Psychotherapy and Psychoanalysis.

D. Because a Professional Will is not a legal document and is not specifically addressed by Nebraska laws, there are many legal issues and concerns in preparing and relying upon such a document. Regardless, the attachments provide helpful guidance in identifying the many aspects of a practitioner's practice that should be considered when planning for his/her unexpected incapacity or death.

II. What should be included in the scope of a practitioner's "contingency plan"?

A. A signed document from the patient, which includes such provisions as:

(1) An authorization and consent from the patient to the transfer and release of his/her file by the practitioner's legal representative (e.g. guardian, conservator, power of attorney, personal representative, etc.) to whomever the practitioner designates for the purpose of informing the patient of the practitioner's incapacity or death;

(2) A HIPPA compliant release (to the extent possible);

(3) The patient's contact information and a warranty by the patient that he/she will promptly notify the practitioner of any change thereto;

(4) A statement in which the patient acknowledges that the patient's file may be destroyed after the passage of a certain time period if the patient cannot be located; and

(5) The patient's indemnification of the practitioner for any damages that might occur as a result of the authorized transfer and release of the patient's file.

B. Consider a Business Associate Agreement per HIPAA:

(1) This is a binding agreement between a practitioner and a "business associate" with respect to providing services to the practitioner.

(2) HIPAA defines "business associate" as a person or entity, other than a member of the practitioner, who performs functions or activities on behalf of, or provides certain services, to the practitioner that involve access by the business associate to protected health information. It also can be a subcontractor that creates, receives, maintains, or transmits protected health information on behalf of another business associate.

(3) A business associate could be another practitioner in whom you have trust and confidence.

(4) Such an agreement could be broadly or narrowly tailored with respect to defining the scope of the business associate's duties, and generally must:

(i) establish the permitted and required uses and disclosures of protected health information by the business associate;

(ii) provide that the business associate will not use or further disclose the information other than as permitted or required by the agreement or as required by law;

(iii) require the business associate to implement appropriate safeguards to prevent unauthorized use or disclosure of the information;

(iv) require the business associate to report to the practitioner any use or disclosure of information not provided for in the agreement;

(v) require the business associate to disclose protected health information as specified in the agreement to satisfy the practitioner's obligation with respect to a patient's request for copies of his/her file;

(vi) to the extent the business associate is to carry out a practitioner's obligation under the Privacy Rule, require the business associate to comply with the applicable requirements;

(vii) require the business associate to make available to HHS its internal practices, books, and records relating to the use and disclosure of protected health information received from, or created or received by the business associate on behalf of, a practitioner for purposes of HHS determining the practitioner's compliance with the HIPAA rules;

(viii) at termination of the agreement, if feasible, require the business associate to return or destroy all protected health information;

(ix) require the business associate to ensure that any subcontractors it may engage on its behalf that will have access to protected health information agree to the same restrictions and conditions that apply to the business associate under the agreement; and

(x) authorize termination of the agreement by the practitioner if the business associate violates a material term of the agreement.

The above list is not comprehensive and an attorney should be consulted when preparing such an agreement to ensure it is legally binding and appropriate for your circumstances.

(5) Such an agreement could be very useful for authorizing someone (presumably a fellow practitioner) to handle a practitioner's files in the event of the practitioner's incapacity or death, especially if a patient has not previously signed a consent/release (see above).

C. Regardless if a practitioner has a Business Associate Agreement in place, it is still recommended to make available other relevant information about his/her practice in case of emergency (see the attached example Professional Will).

III. What if a practitioner does not have a contingency plan and becomes incapacitated or dies?

A. The options are not clear, but it would likely be necessary for a court to appoint a "fiduciary", such as a guardian or conservator (if the practitioner is alive) or a personal representative or special administrator (if the practitioner is deceased).

Checklist for Preparing a Professional Will

— Name a Professional Executor and 3 co-Executors

— Make list of patients to be contacted (names, phone numbers and addresses). Update list as often as necessary. Leave specific instructions for some patients (i.e., name of possible referral therapist(s), information useful to contact and handle patient(s), as well as names and phone numbers of collaborating professionals)

— Tell family about existence and location of Professional Will

— Give family names and phone numbers of Professional Executor and co-Executors to contact immediately in case of emergency

— Meet with Professional Executor and co-Executors, show them office and location of specifics that they need access to (i.e., keys, files, answering machine). Discuss concerns, wishes, specific instructions (i.e., how to notify patients) and convey the spirit of your practice (i.e., which approach will work best for your individual practice based on the relationship that you have with your patients)

— Organize appointments books, patients' files, billing and financial records. rganize important documents(i.e., license, malpractice insurance, personal will)

— List of colleagues to be personally contacted.

— List insurance companies (names, addresses, phone numbers) that you participate in.

— File instructions for access to answering machine or answering service, as well as access to your professional website

— Leave specific instructions (i.e., how to open front door and security system)

— If you practice in a doorman building leave instructions regarding what you want the doorman to say to patients who haven't been contacted and come to their appointment as usual

— Leave specific instructions regarding patients' attendance to funeral or memorial services

— Make copies of Professional Will and distribute to Professional Executor and co-Executors, attorney, spouse or any significant other

— Review Professional Will regularly (i.e., once a year) and update whenever necessary

— Review HIPPA practice guidelines, consider including note regarding practice will on that form.

PROFESSIONAL WILL

I, _____, residing at

_____

_____declare this to be my Professional Will. This supersedes all prior Professional Wills in the event that there are any.

This is not a substitute for a personal last will and testament, nor is this a legally binding document. It is a formalized set of detailed instructions intended to give authority and direction to my Professional Executors regarding my professional practice, and in particular to ease the transition for my patients in the event of my incapacitation or death.

FIRST

I am a licensed _____, (*state*)_____ License # _____, and (S*tate*) _____License#_____ in private practice. My office address is:_____

_____

I also maintain an office at:

_____

_____

SECOND

In the event of my death or incapacitation, I appoint_____

as my Professional Executor, whose phone number is:_____ and whose office is located

at:_____. I also appoint the following colleagues to serve as my team of Professional Co-Executors who will assist my Executor in any matter deemed necessary to properly administer this Professional will.

They include:

(*Name*)_____ Phone number

_____

Office address

_____

_____

_____

(*Name*)_____ Phone number

_____

Office address

_____

_____

_____

(*Name*)_____ Phone number

_____

Office address

_____

_____

_____

In the event that my primary Executor is unavailable or unable to perform this function, I hereby appoint _____ from my team of Co-Executors, as a backup Professional Executor. I also authorize my Professional Executor to name any colleagues in my profession, in addition to the Co-Executors already mentioned, to help carry out any tasks related to my practice.

THIRD

(optional)

The attorney for my professional practice is:_____, whose phone number is_____ and whose offices are located at: _____

_____

_____

The attorney for my Estate is _____, whose phone number is _____and whose offices are located:_____

_____

_____

FOURTH

The executor of my personal last will and testament is :

_____ _____,whose phone number is:_____, and who is located at

_____

_____.

FIFTH

*Include specific address and whereabouts

A. My current patient records are located at:

_____

_____

_____

_____

_____

_____

B. My past patient records are located at:_____

_____
_____
_____
_____
_____
_____.

C. Billing and financial records related to my professional practice are located at:_____

_____
_____
_____
_____
_____
_____.

D. Some or all of my patient, billing and financial records are on a computer, located at:_____

_____
_____
_____
_____.

The password to access my computer is _____and the program that houses these records is_____.

E. My appointment book and patient phone numbers are located at:_____

_____
_____

_____

_____

_____

_____

(optional)

F. My professional e-mail address(es)_____ and the password (s) to access my e-mail accounts_____

Instructions for amending my professional website_____

_____

_____

G. My office phone number(s) is:_____, and the code(s) to access my voice mail is:

_____

_____

_____

_____

H. Any necessary keys you will need for access to my office, filing cabinets, storage facilities, etc. are located at:

_____

_____

_____

I. For assistance in locating/ accessing my records you may contact:

_____,

whose phone number is:_____, and whose address is:_____

_____

_____

In addition, the following person(s) may be helpful in locating/accessing my records:_____

_____

_____

_____

_____

_____

SIXTH

My specific instructions for my Professional Executors are:

A. First of all I would like to express my deep appreciation for your willingness to serve as the Professional Executors for this will.

B. There are four copies of this Professional Will. They are located as follows:

1. One is in your possession.
2. One is with my personal will.
3. One is with my professional liability insurance policy.
4. One is in the possession of my attorney (optional).
5. Other _____ _____

C. A list of current and past patients and their phone numbers who are to be notified about my death and any planned memorial services (as defined in my will) is located with the copy of my Professional Will and relevant documentation of my professional liability insurance policy. This file is located at

_____

_____

Additionally names and phone numbers of other professionals (if any) who collaborate in providing patient care will be noted in the patient's file.

1) If possible please notify my current and past patients by phone, offering face-to-face meetings with those who wish to do so. My team of Co-Executors and anyone else the Executor appoints may help with these meetings. Please offer referrals to those patients for whom I have not already provided referrals. You may refer patients to yourself.

2) Any patient who cannot be reached by phone should be contacted by mail. Each patient should be informed in the letter that I have become unable to continue my practice and that he/she should contact one of the (above mentioned) Co-Executors for further information and assistance in arranging for alternative treatment.

3) In the event of my death or serious impairment for which recovery is unlikely, patients should be provided with as much information as directly as possible with obvious consideration for tact, timing and discretion particular to the situation. In the event that I am impaired with an indeterminate prognosis, greater care should be exercised in how much information is disclosed with the promise of providing additional details as the situation unfolds and becomes clearer.

4) Following are specific instructions about what should be communicated to my patients:

D. My professional liability insurance is currently provided by:_____,

whose phone number is:_____, and whose address is

_____

_____

_____

My policy # is_____.

Please notify my professional liability carrier in writing of my death as expeditiously as possible and arrange for any additional coverage that may be appropriate. Please also notify the State Licensing Board(s) at ( ) - , ( ) - , and the following professional organizations and listservs of which I am a member:

_____

_____

_____

_____

_____

Please notify colleagues indicated on my contact list which is located in_____

_____

_____

E. Please arrange for copies of patients' records to go to their new therapists upon receipt of a written request for those records and signed release from the patient.

All the remaining patient records should be maintained according to the relevant federal, state, and local laws and regulations governing record retention. For example in NY, state regulations for Psychologists require that patient records must be maintained for at least 6 years after last contact and records of minor patients must be retained for at least 6 years and until one year after the minor patient reaches the age of 21 years. In NJ, state regulations for Psychologists require that patient records be kept for 7 years after last contact and 3 years after the minor patient reaches the age of 18 years.

1) All of these records are absolutely confidential and are to be read by no one unless compelling legal authorization is provided. In the event of such authorization the records should be copied and sent. In addition to my charts there may be process notes. These notes are not to be considered part of the chart and should not be released to anyone for any reason except in the event of the need to defend myself or my estate against a lawsuit.

2) All records, active and inactive, are to be maintained safely and securely, with properly limited access. They must be able to be retrieved in a timely manner at the discretion of (name executor) _____ or a person he/she designates as custodian of my records. Any such designee must understand and agree to abide by these instructions. It is also suggested that any records of individuals where there has been or is likely to be legal action(s) should be retained indefinitely. This will be indicated on my patient list.

When disposing of outdated records, process notes and personal notebooks please ensure it is done in a manner that destroys all materials that could identify the patient, e.g. burning or shredding.

F. Make appropriate changes to the outgoing message on my telephone answering machine. Dial_____to access my answering service. The password(s) to access messages and make changes to the outgoing message is _____. The mailbox number is ( ) - .

G. If you need any further information or an update of requirements, you can contact my professional association _____ e.g.: the NYSPA number is 800-732-3933, the NJPA number is 973-243-9800, and the APA number is (800) 374-2721.

H. My team of executors and I have agreed upon the following compensatory arrangements for time and other expenses incurred in executing these instructions (indicate if this is a voluntary arrangement or whether the executors are to be paid and if so at what rate):

_____

_____

_____

_____

I. Following are some additional thoughts I would like to share (optional)

I declare under the laws of the State of _____ that the foregoing is true and correct.

Executed at _____, on _____.

Location Date

_____

Signature

WITNESSES:

Printed Name: _____

Signature:_____

Residing

at:_____

Printed Name:_____

Signature:_____

Residing

at:_____

Professional Executor Checklist

1) Meeting with the Professional
   a. Learn the location and instructions for using:
      ___ keys
      ___ file
      ___ answering machine (with number and code or password)
      ___ appointment book
      ___ current patient list with contact info
      ___ past patient list with contact info
      ___ billing and financial info
      ___ professional will
      ___ license
      ___ malpractice insurance
   b. Learn the spirit of the professional's practice and his/her wishes, in the event of his/her death regarding:
      ___ what doorman should tell patients
      ___ what executor and co-executors should tell and offer to patients
      ___ whether or not patients should be invited to the funeral or memorial services
   c. Get names and contact info for:
      ___ attorney for professional practice (if there is one)
      ___ family contact person
      ___ insurance companies

2) In the event of the professional's death
      ___ a. review the professional will
      ___ b. obtain patient lists, appointment book, billing and financial info, license, and malpractice insurance
      ___ c. contact and inform patients, preferably by phone, according to instructions in the will, offering them face-to-face meetings and referrals, if they wish If the executor and/or the co-executors end up meeting with the professional's patients, request

that the patients sign a consent form authorizing me and co-executors to have access to their charts.

___ d. advise other professionals (if any) who may be collaborating in the patient's care.

___ e. inform the professional's liability insurance carrier in writing of his/her death.

___ f. inform the state licensing board and any professional organizations and listservs with which the professional was affiliated.

___ g. personally notify individual colleagues

___ h. make appropriate changes to the professional's answering machine.

___ i. maintain patient records according to relevant federal, state, and local laws and regulations.

___ j. records are to be kept confidential and to be maintained safely and securely, with properly limited access.

___ k. process notes are not to be considered part of the patient's chart and are not to be released to anyone.

___ l. when disposing of outdated records, process notes, and personal notebooks, destroy completely all materials that could identify the patient, e.g. shredding or burning.