

So how's it feel to be in breach of the APA ethics code and California law?
Professional Wills: The Ethics Requirement You Haven't Met

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It's unfortunate, but true: the vast majority of psychologists reading this article are not in compliance with a significant provision of the APA ethics code.

Most psychologists aspire to have a fairly good record-keeping system, as well as procedures for maintaining the confidentiality of those records. As a profession, psychologists tend to be quite concerned about record keeping. This concern is appropriate. Unlike some businesses, the information contained in practice-related records is highly sensitive and deserving of great care.

It is distressing, then, that many psychologists have not made arrangements for the care of these records if the psychologist is suddenly and unexpectedly unable to continue to practice, such as when the psychologist dies or is disabled. This may be due to a number of factors, such as a general reluctance on the part of many people to engage in end of life planning, communicate advanced medical directives, write wills, find colleagues who will become executors of the professional will, etc. But procrastinate or not, this is something that we all must do,

While some states, such as Oregon, specifically direct psychologists to prepare a professional will, California is not as explicit. Rather, the direction for psychologists to prepare for emergencies can be found in the profession's code of ethics. The American Psychological Association code of ethics does not specifically direct psychologists to have a "professional will." Psychologists are instead expected to "make reasonable efforts to plan for facilitating services in the event that psychological services are interrupted by factors such as the psychologist's illness, death, unavailability, relocation, or retirement or by the client's/patient's relocation or financial limitations." (APA 2002 Ethics Code 3.12) Psychologists are also directed to "make plans in advance to facilitate the appropriate transfer and to protect the confidentiality of records and data in the event of psychologists' withdrawal from positions or practice." (APA 2002 Ethical Principles of Psychologists and Code of Conduct 6.02(c))

The presence of these instructions in the ethics code is significant because the California Board of Psychology has codified the APA Code of Ethics as the standard for the determination of misconduct and the standard of care. Yes, that's right: the APA Code of Ethics is part of California law for psychologists. If you aren't abiding by it you are breaking the law. It is true that once you are dead the threat of disciplinary action isn't likely to motivate you to draw up a plan. However, there are important reasons for making some advance plans that have little if anything to do with licensing boards.

Reason number one is that it's just plain easier. After a death or major accident the last thing anyone (especially a grieving family member) wants to have to deal with is the thorny issue of confidential records, office leases, office furniture, obtaining releases from patients/clients to make referrals, etc.

Reason number two is that it is good for your patients/clients. The death of a therapist is likely to be very difficult for patients/clients, and the designation of a colleague to manage professional affairs is likely to help the transition and grieving process.

Reason number three is that it's a good thing to do for your colleagues. Occasionally a trusted colleague is asked to help sort out professional affairs, and a lack of instructions, access to office and file keys, computer codes, etc., can make her/his job quite difficult.

Reason number four is that even if you are incapacitated or dead, your work survives you. If you are incapacitated you might one day return to work; hopefully your license will be unencumbered by Board action. Further, there is exposure on the part of your estate if an angry patient/client wishes to file a malpractice case against you for not anticipating your current condition. Your malpractice insurance would defend you, as long as such a suit was filed within the statute of limitations, but there will be a point at which the policy will not cover, at which time the costs come out of your estate, involving your family.

Clearly, this is a big issue. If you are like the overwhelming majority of all psychologists in California, this is unaddressed. If denial and/or anxiety hasn't yet caused you to turn the page and move to another article, please do read on. This is a solvable problem.

We are aware of a number of resources available for psychologists interested in putting together a professional will or contingency plan. Local professional associations sometimes have standing committees on these matters. One such example is the San Diego Psychological Association, which has been assisting members through its "Psychologist Retirement, Incapacitation or Death" committee. This is a valuable resource for psychologists in San Diego, and possibly for psychologists throughout California. Other local associations may have similar resources, and this is yet another reminder to join your local association. This service, by itself, is worth the cost of membership.

While local organizations can provide useful templates and how-to guides, psychologists don't necessarily have to go through these organizations to construct a valid professional will¹. Psychologists may choose to work with a colleague to achieve much the same result. Professional wills are essentially a list of instructions that answer the following questions:

- 1.) In the event you are unable to fulfill your professional responsibilities, either through incapacitation or death, who is the professional colleague you designate to assume responsibility for your practice? This should be someone you trust and who you feel comfortable discussing professional matters with your patients/clients. Because your designate will need to make professional communications, they should be similarly licensed.

- 2.) What administrative tasks does your designee need to know to be able to wind down or pause your practice? Where are your keys? What are the passwords on your computer(s)? Where do you keep patient information? How do you manage billing and what critical financial transactions must be completed (e.g., rent, communications with 3rd party payors, etc.)? For forensic practitioners, do you have retainer balances that should be returned? Do you have a password on your voicemail?

- 3.) How do you want your designee to communicate this information to your patients/clients? Should the notifications be made in person, letter, and/or email? Remember that these notifications must be made sensitively.
- 4.) Are there colleagues you want your designee to contact? Who is your professional liability carrier and how should they be notified? How about any managed care panels on which you serve?
- 5.) Do you have an attorney for your practice? If so, and if your attorney does not already know about your incapacitation and/or death, he/she should be notified immediately.
- 6.) How is your designee to be paid? Have you set aside funds to help your designee with these time-consuming tasks? Consider purchasing a very small life insurance policy with your designee as the beneficiary and/or set aside some funds from your estate for this purpose, with instructions to your estate planning attorney to make the funds available as soon as possible.
- 7.) If your designee cannot be found or is unavailable, who are your second and third backups? Do they know they have been named?
- 8.) What are the circumstances under which your professional will springs into effect? Death surely springs your professional will, but what about injury? How will your designee be notified that s/he is “on duty?”

Other things to remember:

- A.) If you have any questions, your professional will should be reviewed by an attorney experienced in mental health law to ensure that your professional will does not conflict or expose your personal will.
- B.) You should periodically review your professional will with your designee to make sure the information contained in it is current.
- C.) Your professional will should be signed by you and your designee(s).

In the coming months, you will hear increasingly about the Professional Will obligation and ways to cope with it. Many of our colleagues are aging and moving toward retirement. Do yourself, your family and your patients/clients a favor: take care of it.

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ⁱ Ken Pope's wonderful website (www.kspope.com) has a section dedicated to professional wills; it is a gold mine of information. In addition, the Steve Frankel Group, LLC (www.sfrankelgroup.com), is in the process of designing a service psychologists can purchase to assist in these matters.