

Mary Vandennack provides the transcript from Legal Visionaries podcast on Professional Wills for Mental Health Practitioners

## TRANSCRIPT:

**Mary:** On today's episode, Cheri Duryea has graciously agreed to act as an interviewer, and she's going to interview me about the topic of professional wills for mental health practitioners. Thanks for helping me today by the role reversal, Cheri.

**Cheri:** Absolutely, Mary. Glad to help. So, let's just jump right in. Mary, can we start by having you explain what a professional will is in the context of mental health professionals?

**Mary:** And I almost dislike the word that gets used in the ethical rules regarding professional wills, because it's really a document that covers both incapacity and sudden death of a mental health professional. And I'm going to mention that while I'm focusing a little today on mental health professionals, the ethical rules of most professions actually provide that a professional needs to have a plan for the continuation of practice.

So, in the legal field, if I'm a solo practitioner and I'm suddenly incapacitated or die, what happens to the clients? Let's say I have a hearing tomorrow on a particular matter, and I fall off the face of the earth that night, and no one knows that that needs to be covered. So, it's really an important concept for professionals in general. But what the document does is creates a plan. This is what happens in the event I'm either suddenly incapacitated or dies.

In the mental health profession, a lot of times we're looking at having a successor mental health practitioner who is going to step in, but the most important thing is there needs to be a notification process and there needs to be something... If let's say a mental health practitioner has six appointments tomorrow, who's going to notify them? But even if, let's say, Cheri, we designate you as the person who's going to notify, but you and I aren't in contact on a regular basis, how do we make sure that someone actually knows that a notification needs to occur?

And that's what I often talk with professionals about. You can have a spouse or a family member or a friend who's your personal executor. It's really important that if you're incapacitated, somebody notifies, what I call, the notifier.

**Cheri:** Yeah. So why has the concept of this become an issue lately?

**Mary:** It's gotten a lot of attention due to a couple of recent cases. There's a focus currently on the mental health, generally, wellbeing generally. It's again, been something that's always or long been part of the ethical rules for most professions. But there's been some particular cases of note.

Recently, there was one case where a man who is struggling with depression showed up at his therapist's office. Nobody's there. Calls. The voice message hadn't been changed. This particular gentleman ultimately committed suicide. Is not notified of that.

So that's one. And there's a couple other cases similar to that where somebody showed up and the door was closed, they couldn't get in. And there had been no notification, no change of the voice message, nothing like that, that alerted the mental health patient that the practitioner had become suddenly ill or passed away.

**Cheri:** Okay. So what are some key elements that the listeners need to know about a professional will?

**Mary:** Well, there's several of those, but again, what I mentioned that's most important is someone needs to notify. And I say it's kind of a two-step notification process. Somebody needs to notify the notifier, because if I name a spouse or friend as my personal rep and I let them know hey, I have a practice and somebody needs to step in, he or she may not qualify to be able to look at the records of patients.

So, we have the HIPAA rules which say patients, in general, and this is for all healthcare issues in general, but there's more protections when it comes to mental health. So that particular person that's maybe the person who's with me as I'm ill or dead, may not actually have the legal ability to access my patient records and notify patients. So, I want to make sure somebody close to me knows hey, if something happens to me, it's important to let Janie, who's going to do the notifying, know as soon as possible so that she can actually notify my patients.

**Cheri:** So, as I understand it, there's significant confidentiality rules related to mental health. Does this come into play in terms of notifying the patient?

**Mary:** And those are the HIPAA privacy rules, so that is kind of where I've given the example of the notice gives the notifier, a higher level of care does apply to the mental health care practitioner. But one of the things,

there is an exception in the HIPAA rules that runs to certain people that are authorized to provide or certain covered entities.

One of the things that I talk about to my mental health professionals is that they consider naming a covered entity. So oftentimes a practice might have a practice manager, or they might contract with a third party who might be able to access the records for the purposes of notification without violating those rules.

**Cheri:** So, let's run through what should be included in the will.

**Mary:** So, the first thing is, who is the mental health therapist and contact information. And then we start talking about the designated professional. And again, if you simply designate a mental health professional that you see now and then, that could be a challenging thing. So, I've already talked about that. But it is not an uncommon practice for me to see when I'm reviewing a professional will, somebody has simply named another mental health practitioner. That's not necessarily a problem as long as we're making sure that the mental health practitioner will know of the incapacity or death so that that person can step in to take care of the notification.

**Cheri:** So what else should be included?

**Mary:** Well, this notification, I think I've used that word a million times here, but it's super important, right? So the question next is, who do we notify? And the first thing that needs to happen is this case where the guy showed up for his appointment. If somebody currently has an appointment on the books, that would be the first priority as to notification.

And so the instructions, the professional will, should actually lay out the notification process. And part of that is how do you access the information about who currently has appointments? Because that is where we're going to need to start. And another part of that process is, please change the voicemail so that if somebody calls my cell phone number or whatever contact number, I have given them, that they're going to get a message about the incapacity and who to contact for care.

Because it's not just notification that we're concerned with. It is continuation of care. So that's why, while we can name a professional or a third party, we also do want to have another trusted mental health professional or someone who can provide continuing care or make sure that patients have access to continuing care.

**Cheri:** And are there other practice issues that could be considered?

**Mary:** So, a lot of the other issues are what I call administrative. So, when I'm working on professional will, I talk a lot about, let's make sure that we take care of these notification and continuing care. But there might be staff members who are going to show up for work not knowing that the professional has been incapacitated. There might be institutions and associations that are involved. Some mental health professionals have the right to prescribe medications, and there might be medication samples or prescription blanks that are sitting around. So, arrangements need to be made for disposal.

There's typically a billing company. Some mental health practitioners do their own billing, but most use a billing company or some type of service. That notification's going to be required. Most mental health providers will also have accounts with various provisions that will need to be addressed. And very importantly, the medical malpractice carrier and other insurance providers are going to need to be notified.

**Cheri:** So do those types of tasks need to be included in the professional will?

**Mary:** The way I like to do it, and I will see some professional wills that list all of that out, but as I've mentioned, the most important things are who's going to notify and how is continuing care going to be provided? These other matters are administrative, and they should be addressed, but I typically do them in a separate checklist that I attach to the professional will.

And the reason for doing that is you might change your malpractice carrier from year to year. You might change your employees, you might change your billing service, you may change associations. All of those change, and rather than going through the process of changing your core legal document of the professional will, a separate checklist you can update without going through the formalities of a legal agreement. But the checklist is very helpful in terms of here's all the stuff that needs to be taken care of.

I mean, imagine agreeing. So, I've had partners who we've lost for various reasons, and it's always very disruptive. So, if somebody's incapacitated or dies and you're stepping in to try and help out and cover patients struggling with mental illnesses, it's a lot. So, the more you have everything laid out, the simpler that process becomes, and it's a way of continuing to take care

of your patients. When we do the professional wills, we actually include, here's the email we want to go out. This is what the voice message should say. Here's a letter that should go out and just kind of try and lay it out for the person who's going to step in and make it as easy as possible.

**Cheri:** That makes perfect sense. Well, as we come to the end of the episode, any last thoughts?

**Mary:** I do think I've talked about the confidentiality issue with the mental health and health in general. So, it is usually the person you designate, you can come up with somebody who probably has the right to access patient information, but we want to be very protective of the professional who's going to step in for you in the case of your incapacity or death.

So, the American Psychological Association actually has some recommended language that it suggests being included in the patient's initial consent. Typically, a professional has forms when you come in to see them that you sign. And I like this language that they use. I use a little variation of it, but this is their recommended language, which states, in case I am suddenly unable to continue to provide professional services or to maintain client records due to incapacity or death, I have designated a colleague who is a licensed psychologist as my professional executor.

If I die or become incapacitated, my professional executor will be given access to all of my client records and may contact you directly to inform you of my death or incapacity, to provide access to your records, to provide psychological services if needed, and/or to facilitate continued care with another qualified professional if needed. If you have any questions or concerns about this arrangement, I'm glad to discuss those with you.

I do a modification of that because in some cases what we do is have the person notify, be it the third-party managing group, so there's often a company that's providing office services management. And what we do is kind of split this and say, this particular person will have access to the extent of notification and will assist you in finding ongoing care.

Because again, if you have a busy mental health practitioner, it's unlikely that one mental health practitioner can take on the entire practice of another. So sometimes it may actually be a few providers who are going to step in, which is what would happen in our legal business.

Well, Cheri, thanks for helping me out today with this. As we reach the end of our episode, I want to thank our sponsors, Interactive Legal, Foster Group, Veterans Victory, and Carson Private Client.

That's all for now. Thanks for listening to today's episode and stay tuned for our future releases.