

Lessons of the Schiavo Case

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The Terri Schiavo case has brought a lot of attention to the need for health care directives, and our state lawmakers have responded.

On June 9, 2006, Governor Mark Sanford signed an important piece of legislation revising the health care power of attorney form for the second time in the past two years. A joint effort of the Elder Law Committee of the South Carolina Bar and the South Carolina Chapter of the National Academy of Elder Law Attorneys, this act revised the statutory health care power of attorney and for the first time, incorporated a Health Insurance Portability and Accountability Act (HIPAA) privacy release as a part of the statutory form.

Essentially, the health care power of attorney is a simple legal document that allows you to choose someone to make medical decisions for you, if, for any reason, you are unable to make these decisions yourself, whether as a result of an accident or severe illness, or otherwise. Should you unexpectedly be in a position where you cannot speak for yourself, this directive names an agent and gives him or her authority to make decisions regarding your health care. It also allows you to state your desire to be allowed to die a natural death and not be kept alive by medical treatment, artificial means, or heroic measures if your condition is terminal or you are in a state of permanent unconsciousness.

The most important aspect of the 2006 act is the addition of a HIPAA consent authorization. HIPAA is a federal statute that provides for confidentiality of medical records and prohibits health care providers from sharing your medical information without authorization. The new act addresses the situation when you are not competent to give consent for your medical records to be released, and provides that the agent can give the consent required by HIPAA to disclose health-related information to your agent. Among other things, this would help your

agent to determine if his or her power under the health care directive to make health-related decisions for you has been triggered. Thus, as our statute appears to allow use of both the new statutory form and also other forms such as the Five Wishes document.

In the more prosperous times of our lives, even after we have signed our directives, these important documents are often the furthest from our minds, especially when we are vacationing in the Bahamas or out of state attending our grandchildren's graduation. This raises a very important issue: in the event of a medical emergency while away from home, how would your last wishes find their way to an unfamiliar hospital? Services are now available that store copies of health care directives and with a simple phone call, these services will furnish them by fax or email within minutes to hospitals across the country and around the world. This service provides a practical solution to a very important problem and also offers an alternative to the unrealistic notion of carrying the documents around with you. In our office, we are currently offering this service to everyone who signs health care directives in our office and it has thus far been well received.