NEXT CHALLENGE. NEXT LEVEL.

NEXSEN PRUET

ADVANCE DIRECTIVES

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This presentation was drafted to present as an educational offering to the SCHA staff and is not to be considered legal advice. This presentation was intended to be an outline only of some of the major provisions related to healthcare decision-making and advance directives in South Carolina. It was intended to be reviewed in conjunction with additional verbal information and with copies of the referenced advance directive statutory forms. Please confer with an attorney experienced in estate planning or advance directives regarding any questions you may have about advance directives.
South Carolina Hospital Association
Healthcare Decision-Making and
Advance Directives
Healthcare Decision-Making

- Healthcare decision-making is a matter of State law.
- An individual makes his or her own healthcare decisions:
  - Adults 18 years of age
  - Minors 17 years of age (abortion)
  - Minors 16 years of age (except surgery)
- Minors less than 18 years of age (with the two above-referenced caveats)- parents and legal guardians are the healthcare decision-makers.
Healthcare Decision-Making

- Alternative Decision-Making = Legal process:
  - Adult Health Care Consent Act
  - Emergency Medical Services Do Not Resuscitate Order
  - Living Will
  - Durable Power of Attorney
  - Health Care Power of Attorney
**Adult Health Care Consent Act**

- Provides for the priority of healthcare decision-makers if an individual is “unable to consent”
  - “Unable to consent” means unable to appreciate the nature and implications of the patient's condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to communicate that decision in an unambiguous manner.
- Must be certified by 2 licensed physicians
- In an emergency, may be certified by the health care professional responsible for the care of the patient if a delay would be detrimental to the patient’s health
Adult Health Care Consent Act

Order of priority:

- Guardian appointed by a court if within the scope of the guardianship order
- Durable power of attorney
- Person given priority to make health care decisions for the patient by another statutory provision
- Spouse (with exceptions)
- Parent or adult child
- Adult sibling, grandparent, or adult grandchild
- Any other relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship
- Person given authority to make health care decisions for the patient by another statutory provision
Health Care Decision Making: Advance Directives

- Emergency Medical Services Do Not Resuscitate Order Act
- Living Will
- Durable Power of Attorney
- Health Care Power of Attorney
Emergency Medical Services Do Not Resuscitate Order

- EMS DNR - a document to prevent EMS personnel from employing resuscitative measures or any other medical process that would only extend the patient's suffering with no viable medical reason to perform the procedure
- Must be substantially in the statutory form
Emergency Medical Services Do Not Resuscitate Order

- Limited in scope
- Applies only to EMS personnel/first responders
- The following criteria must be met:
  - the patient must have a terminal condition; &
  - the terminal condition has been diagnosed by a health care provider and the health care provider's record establishes the time, date, and medical condition which gives rise to the diagnosis of a terminal condition
Living Will

- “Declaration of a Desire for Natural Death”
- Narrow, inflexible
  - Applies only to patients once they are terminally ill or permanently unconscious
  - Applies only to withholding or withdrawal of life support
  - Doesn’t allow consideration of particular circumstances
Durable Power of Attorney


- Traditional POA: authorizes the agent to act for the principal even if the principal becomes incompetent

- May or may not affect health care decisions: the document must define the agent’s authority

- In order to be “durable” must contain certain language indicating that the POA is not affected by principal’s physical disability or mental incompetence

- Must be executed and attested to with the same witness formalities as a will and recorded like a deed

- Can define procedure to determine competency (if not, use the Adult Health Care Consent Act)
Health Care Power of Attorney

- Authorizes the “attorney-in-fact” to make health care decisions for the principal when the principal is adjudged incompetent or if the person is “unable to consent.”
- Like a durable POA because it survives the incompetence of the principal; but does not need to be notarized or filed like a deed
- More flexible than living will
- Must be in writing and substantially in the form as provided in the statute
- S.C. Code Ann. § 62-5-504 (D) contains the form Health Care Power of Attorney
Health Care Power of Attorney

The 2006 legislation added a new provision, “HIPAA Authorization” that purports to provide for the following:

- all individually identifiable health information covered under HIPAA shall be released without restriction to the principal’s health care agents and/or alternate agents;

- lists various types of health information including HIV/AIDS, mental health, drug and alcohol abuse treatment records;

- includes “any written opinion related to my health that such health care agent(s) and/or alternate agents may have requested”;

- Purports to be effective whether the principal is or is not mentally competent.
Health Care Power of Attorney

- A “HIPAA Authorization” is not necessary for a healthcare provider to disclose PHI to the agent when the Health Care Power is effective.

- Privacy Standards provide:
  - Any person who is authorized under state law to make healthcare decisions for another individual is treated as a personal representative of that individual. 45 C.F.R. § 164.502(g)
  - An agent under a Healthcare Power of Attorney is authorized by law to make healthcare decisions for the principal.
  - An agent under a Health Care Power of Attorney is, for HIPAA purposes, the personal representative of the principal and, consequently, entitled to full access to the principal’s protected health information.
Health Care Power of Attorney

Problems:

- the new provision is not a HIPAA compliant authorization and consequently is invalid under 45 C.F.R. § 164.508;

- the new provision is contrary to the Privacy Standards as it purports to provide the health care agent and the alternate agent with the principal’s individually identifiable health information without the appropriate authorization of the principal as described under the Privacy Standards;

- consequently, this new provision is preempted under the HIPAA preemption provisions.
Solution: Legislative change:

- Delete the “HIPAA Authorization” provision from the Health Care Power form.
- Reference the applicable HIPAA Privacy Standard personal representative provisions in the Health Care Power form and provide for an affirmative statement in the Health Care Power form that the HIPAA Privacy Standards allow the disclosure of PHI to the agent when the Health Care Power is effective.
Health Care Power of Attorney

Other potential solutions:

- Obtain a HIPAA compliant authorization to support the disclosure as provided in 45 C.F.R. § 164.508; or

- A covered healthcare provider may disclose to a family member, other relative, or a close personal friend of the individual or any other person identified by the individual individually identifiable health information directly relevant to such person’s involvement in the individual’s care with the individual’s agreement. 45 C.F.R. § 164.510(b).
Five Wishes

An increasingly popular advance directive is the Five Wishes form – an advance directive that is written in “everyday language” and intended to “start and structure important conversations about care in times of serious illness.”

Five Wishes lets your family and doctors know:

- Who you want to make health care decisions for you when you can't.
- The kind of medical treatment you want or don't want.
- How comfortable you want to be.
- How you want people to treat you.
- What you want your loved ones to know.
Five Wishes

- Five Wishes was written with the help of the American Bar Association’s Commission on Law and Aging and is drafted to be very user-friendly

- Importantly, it meets the legal requirements for an advance directive in South Carolina once the signature and witness formalities have been completed.

- Additional information
  - Five Wishes Website - http://www.agingwithdignity.org/five-wishes.php
  - Sample Form - http://www.agingwithdignity.org/forms/5wishes.pdf