

# DNR Under Ohio Law

## Navigating a Complex, Chaotic and Emotional Environment

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The environment in which DNR protocol is initiated can be chaotic, complex and emotional. Patients and family members are dealing with difficult decisions often surrounding a terminal disease or life-threatening procedure. Health care providers are faced with medical, ethical and legal considerations. Understanding Ohio law in this area will help families and health care providers navigate the environment.

### I. THE COMPLEXITIES OF THE PROCESS

The complexities of the DNR process are well illustrated in the case of *Wheelock v. Doers* 2010 Tenn.App. LEXIS 570 (Tenn. Ct. App. Sept. 14, 2010). In this case, a patient with a complicated medical history was admitted to the hospital with chest pain. The patient had previously executed a Living Will which did not contain DNR identification but nominated his adult son as health care proxy. The patient needed to undergo surgery. With the patient's wife and adult children present, the physician informed the patient about the available options and serious risks of the procedure, including death. The physician questioned whether the patient wanted to be resuscitated with all possible measures if he went into cardiac arrest during the surgery. The patient responded: "No, do not resuscitate me if something happens during my surgery." The family verbalized their understanding and the physician noted the conversation, the patient and families understanding and a DNR order in the chart.

During surgery, the patient went into cardiac arrest. The physician instructed the medical staff not to administer CPR because of the patient's DNR identification and order in his chart. The patient's son and health care

proxy, shouted "I'm his health care proxy, give him CPR now!" The physician did not revise his order, CPR was not administered and the patient died. A wrongful death lawsuit ensued. Ultimately, the Court held the physician was immune from liability under Tennessee's statutory immunity for compliance with a DNR order. Even though the patient had a prior Living Will and health care proxy, the DNR identification and order was valid. The Living Will was created years prior to the surgery and when presented with new information about the severity of his condition, the patient declined extraordinary measures to resuscitate him. The physician's actions were in compliance with the statutory guidelines for DNR identification and orders.

### 2. THE PROCESS

#### a. DNR Identification

Like the above-cited case, the Ohio Revised Code and Ohio Administrative Code establish guidelines, which, if followed and documented, allow qualified medical personnel to identify and issue a DNR order with little fear of legal liability. The first step in the process is DNR identification. The requirements for DNR identification are specifically set forth in section 2133.21 of the Ohio Revised Code. DNR identification is a statement of a patient's preferences, but it is not an order. Without identification, medical personnel cannot issue the order to withhold CPR.

DNR identification can be made verbally or non-verbally. Persons can create DNR identification by executing a declaration that authorizes the withholding or withdrawal of CPR in a Living Will or other qualifying document. If the patient has not recorded their wishes in a declaration, R.C. 2133.21 defines

DNR identification as a standardized identification card, form, necklace, or bracelet that is of uniform size and design approved by the Ohio Department of Health pursuant to R.C. 2133.25. Tattoos, stickers, or other displays of the words "Do-Not-Resuscitate" do not function as a valid DNR identification. A patient may also express their preference to a health care provider.

#### b. DNR Orders

When a valid DNR identification has been recognized, a DNR order may be issued. A physician, certified nurse practitioner and clinical nurse specialist may issue a DNR order. A DNR order is a medical order identifying the patient and specifying that CPR should not be administered. The grounds for a DNR order depend on the type of identification: "DNR Comfort Care" or "DNR Comfort Care — Arrest." DNR Comfort Care identification requires that only comfort measures be administered before, during and after the time a person's heart or breathing stops. Comfort measures include nutrition, hydration or any other medical procedure that diminishes pain or discomfort of the patient, but not postponement of their death. R.C. 2133.02(C). DNR Comfort Care — Arrest, on the other hand, permits the use of life-saving measures before a person's heart or breathing stops. After a patient's heart or breathing stops, only comfort care may be provided. Other personalized DNR orders can be crafted by the physician and patient.

Health care providers must be able to recognize the grounds for issuing a DNR order. A DNR order is appropriate when there is a determination that resuscitation would be futile. Resuscitation is futile when it does not achieve its physiological objective, offers no benefit to the patient or violates reasonable medical standards. This highlights the need

for the health care provider issuing a DNR order to carefully and thoroughly document the grounds for the order to preserve immunity in the event death or injury results.

Ideally, the health care provider discusses the DNR protocol with the patient while the patient is competent. In non-emergency situations, if the patient is incapacitated, the physician will look to the advance directives of the patient. Where advance directives do not exist, the provider will discuss the DNR order with a patient's surrogate or the first available person identified as the patient's legal guardian, spouse, majority of adult children, parents, majority of adult siblings or nearest adult relative. Sensitivity to family discord over the decision is advised, because where there are disgruntled family members in disagreement with DNR consent, there is potential for litigation. Again, careful and thorough documentation is essential.

### 3. Conflict with Advanced Directives

As the *Wheelock* case illustrates, there can be conflict between a patient's current preference and a prior Living Will. R.C. 2133.02 addresses this conflict. R.C. 2133.02(B) provides that a "declaration," such as a living will, supersedes any general consent form executed by the patient and any instruction from the health care attorney-in-fact that conflicts with the declaration. DNR identification will only be superseded by a declaration when DNR identification is based upon a prior inconsistent declaration. R.C. 2133.02(B). In other words, the most recent DNR identification, even if made verbally to the health care professional, will take priority over any other declaration in existence.

### 4. Immunity from Legal Liability

Medical personnel immunity arises from the Modified Uniform Rights of the Terminally Ill Act, Section 2133, *et seq.* of the Revised Code ("Act"). Currently, valid DNR orders may only be issued by physicians, certified nurse practitioners or clinical nurse specialists. The foregoing medical personnel will be immune from criminal prosecution, liability in damages in a tort or other civil action for injury, death, or loss to person or property, or from professional disciplinary action arising out of or in relation to the withholding or withdrawal of CPR from a person after a DNR identification belonging to the patient is discovered in the patient's possession. R.C. 2133.22. New legislation, effective March 22, 2013 expands the group of medical professionals authorized to ex-

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ecute DNR orders under R.C. 2133.211 to include physician's assistants. Physician's assistants who take DNR action pursuant to the physician's supervisory plan or the policies of the health care facility are also immune from liability for patient death from withholding CPR.

Medical personnel may also be immune from liability for administering CPR when a patient has a valid DNR identification. In an emergency situation, emergency medical services personnel are not required to search a person to determine if they possess a DNR identification where the personnel "do not know and do not have reasonable cause to believe" there is DNR identification. R.C. 2133.22. In the absence of DNR identification, CPR is required.

Medical personnel are also afforded immunity for refusing "to comply or allow compliance with the patient's declaration on the basis of a matter of conscience or on another basis." R.C. 2133.02(D). Personnel who refuse to comply with DNR identification are required to immediately transfer the patient and DNR order to another physician or facility. R.C. 2133.23. A documented conversation prior to the medical procedure is critical to preserving immunity for a physician who cannot morally comply with the DNR order, to avoid having to transfer a patient in the midst of an emergency situation and risk a violation of the patient's rights.

### 5. Evolution of DNR Counseling

The modern trend is to encourage, or require patients of a certain age, or undergoing certain procedures to have a consultation with their physician about the risks and rewards of DNR identification. Termed by some as "death panels," there is concern that a consultation of this nature is designed to encourage patients to decline life-saving measures as a cost-cutting strategy. *The Re-*

*view From Advanced Care Planning*, Mary E. Tinetti, MD, *Journal of the American Medical Association*, March 7, 2012, Vol. 307, No. 9. "Death panels" are not yet part of a required treatment plan, but as protection against liability, physicians are already having frank and documented conversations about whether or not resuscitation is desired. Physicians have identified ethical issues with the absence of a consultation of this nature, because the psychological implications of defaulting to CPR in the absence of advance directives ignores the fact that resuscitation can lead to a damaging result such as a vegetative state or other severe detriment to the patient's comfort and quality of life. *Time to Revise the Approach to Determining Cardiopulmonary Resuscitation Status*, Craig Blinderman, M.D., *Journal of the American Medical Association*, March 7, 2012, Vol. 307, No. 9.

Understanding the health care provider's role and responsibilities under Ohio DNR law can help families and the health care provider together navigate the complex environment surrounding DNR protocol. Please direct any further inquiries on this subject to Reminger Co., LPA's health care law section at (216) 687-1311.



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