
Do Not Resuscitate: Why Do Lawyers Need to Know about That?

Reference Manual
Volume No. 20-W031



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Vol. # 20-W031

1.0 CLE Credit Hour

Tuesday, April 28, 2020 at 1:00pm

Featuring:

Judith A. La Musga, Esq.; LaMusga Law Office, LLC; Beavercreek

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Speaker Biography

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Ms. LaMusga received her BS from The Ohio State University, her MEd from Wright State University, and her JD from the University of Dayton Law School, where she had a judicial externship with Alice O. McCollum of the Montgomery County Probate Court and was the founder and president of the Elder Law and Estate Planning Society. Ms. LaMusga opened her firm in January 2007 with the goal of “protecting the rights of people with disabilities and working for their families.” Previously, she worked on various projects for the Ohio Legal Rights Services and coordinated services for a person with disabilities attending law school. Ms. LaMusga also volunteered for The Dayton Foundation during the summer of 2004, where she researched website and jurisdiction issues, IRS and donor controlled funds, options for pooled trusts for individuals with disabilities, and SSI eligibility. Prior to opening her firm, she spent 35 years in public service before retiring. For additional information, please visit <http://lamusgalaw.com/index.html>.

Do Not Resuscitate: Why Do Lawyers Need to Know about That?

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Presentation to OSBA April 28, 2020

2019 revisions to O.A.C. 3701 – 62
Do Not Resuscitate Protocol
And the State of Ohio DNR Form
Effective September 1, 2019



Cardiopulmonary Resuscitation CPR

○ Components of CPR

- 1. administration of chest compressions;
 - 2. insertion of an artificial airway;
 - 3. administration of resuscitation drugs;
 - 4. defibrillation or cardioversion;
 - 5. provision of respiratory assistance;
 - 6. initiation of a resuscitative intravenous line;
and
 - 7. initiation of cardiac monitoring
-
- Rule 3701-62-01(J)



CPR works best when:

- If your body is healthy and CPR is started immediately after your heart or breathing stops
- Less successful if you are older, weak, or are living in a nursing home (about 2%)
 - In a hospital about 22%
- Will not improve the underlying reason your heart or breathing stopped
- Successful means living through CPR and leaving the hospital



DNR Do Not Resuscitate

- Directive that CPR should not be administered to person so identified.
- Do Not Resuscitate does NOT mean do not treat,

OAC 3701-62-01(N)
OAC 3701-62-01(O)



DNR codification

- ORC §2133.21 through § 2133.26
NO CHANGE
- Changes are to the rules only:
 - OAC §3701-62-01 through §3701-62-14

These rule changes were effective
September 1, 2019



OAC rule changes

One change is the definition of Health Care Provider
which now includes physicians, PA and APRN.

This presentation will center around:

- .01 Definitions (handout)
- .04 DNR identification
- .05 DNR Protocol
- .10 Relationship between legal documents and what
supersedes what including ORC §2133.03
(Handout)

And the new 1 page form (handout)



State of Ohio Do-Not-Resuscitate Comfort Care form

- Went from 3 pages (yes 3 pages) to one
- Delineates the difference between DNR Comfort Care – Arrest and DNR Comfort Care
- Lists the DNR protocol: what EMT's will and will not do if called
- Does not require the signature of the principal or Agent

- 
-
- Hold for form



3701-62-01 Definitions



Rule 3701-62-04

Do Not Resuscitate identification

- State of Ohio DNR form
- Bracelet with logo and backed by orders
- Wallet card with logo and backed by orders
- Valid Living Will Declaration: if declarant specifies on form that declarant wishes to use it as the DNR identification
- DNR form that has other orders written on it are not transportable and do not provide immunity




CAUTION

- Even though these rules permit a PA or APRN to sign a DNR form
- EMT laws require that they **ONLY** honor a DNR Comfort Care form when it is signed by a physician.
- They can only accept a physician order




Best practice

- If you and your physician agree that you should not have CPR performed on you, then you should have the DNR form signed by that physician
- That will assure that EMT's called to our home will honor our wishes
- You can also use that DNR form to obtain other identification like a bracelet, necklace or wallet card




Rule 3701-62-05 Do Not Resuscitate Protocol

- DNR Comfort Care-Arrest: treat patient like any other person without a DNR until heart of breathing stops then the DNR Comfort Care will take over.
- DNR Comfort Care _



Rule §3701-62-05 Do Not Resuscitate Protocol

- DNR Comfort Care-Arrest: treat patient like any other person without a DNR until heart of breathing stops then the DNR Comfort Care will take over.
- DNR Comfort Care (DNRCC): comfort care when
 - A. A valid DNR is issued
 - B. Living Will declaration states such and is operative



OAC §3701-62-10
~~Relationship between DNR orders~~
and HCPOA and LW
BUT first ORC §2133.03

- Before a LW can be used as a DNR if there is specific language to that effect, it must be operative
- Operative is defined in ORC §2133.03
- Question: how will EMT's know the LW is operative See Best Practice Slide (10)



OAC §3701-62-10
which document supersedes

- (A) if a known conflict btw the HCPOA and LW, the L supersedes;
- (B) absent substantial medical change, principal agreed to DN supersedes HCPOA;
- (C) Agent can change DNR status if Agent was original to request;
- (D) most recent LW supersedes;
- (E) most recent document supersedes.



Questions



Scenario #1

- EMS arrive to find an 83 year old male lying in bed, no pulse and not breathing. His wife states he had a long history of lung cancer, he has been in hospice care for 3 weeks, and she points to the Oho DNR Comfort Care bracelet he is wearing. She tells EMS he “went peacefully and that he wanted nothing done.” At this time, the patient’s son enters the room and loudly demands that EMS do everything they can for his dad. The son states that “Dad wouldn’t want to go like this. He would want to live longer.”
- What are the appropriate actions to take?



Answer to Scenario #1

- The patient has an approved and recognized Ohio DNR Comfort Care identification bracelet
- EMS personnel shall follow the Ohio DNR Comfort Care protocol
- EMS personnel shall attempt to explain to the son that the patient has a valid Ohio DNR Comfort Care bracelet and that EMS are bound by law to follow the expressed choices of the individual.



Scenario #2

- EMS find unresponsive 67 woman at a nursing home. She is pulseless and not breathing. Nursing staff is performing CPR on the patient. The staff believe the patient recently obtained a DNR order from her physician but they cannot find it. EMS takes over the CPR. Then a staff member comes into the room and states they found the Ohio DNR Comfort Care document. EM find that it is completed on a Ohio DNR Comfort Care form. It is signed by the physician but is not signed by the patient.
- What are the appropriate actions to take?



Answer to Scenario #2

- Once presented with the Ohio DNR Comfort Care document signed by the physician, EMS personnel shall discontinue resuscitative efforts and initiate the Ohio DNR Comfort Care protocol.
- The signature of the patient on the Ohio DNR Comfort Care Document is optional. The absence of a patient's signature does not invalidate the Ohio DNR Comfort Care document.



Scenario #3

- EMS is treating a 91 year old male for acute respiratory difficulty. In between labored breaths, he mentions that he has an Ohio DNR Comfort Care form and shows his wallet card. EMS note the box for "DNR Comfort Care Arrest" is checked. During initial treatment, the patient becomes unresponsive. EMS immediate assessment finds the patient's pulse is slowing and his respirations seem more difficult.
- What are the initial actions to be taken by EMS



Answer to Scenario #3

- The EMS initial actions are governed by the Ohio DNR Comfort Care Arrest protocol
- Initial actions: EMS will treat patient as any other without an Ohio DNR Comfort Care order until the patient has a cardiac arrest or a respiratory arrest



Scenario #3 continued

- A few minutes after going unresponsive, EMS notice that the patient's heartbeat has stopped.
- Now, what are their actions?



Answer to Scenario #3 continued

- At this point of cardiac or respiratory arrest, CPR will be stopped immediately and Ohio DNR Comfort Care measures will go into effect



Scenario #4

- EM arrive at the home of an 82 year old female. She is not breathing and her heard has stopped. EMS begin CPR per protocol as they must absent a DNR order. Son presents a Living Will and says "His attorney said this could be used as a DNR order.":
- What will be the response of EMS?




Answer to Scenario #4

- A valid Living Will is not a DNR order unless the following is present:
- The Living Will specifically states if the principal wishes this to be a DNR Comfort Care or a DNR Comfort Care Arrest
 - AND there is proof that the Living Will is operative
 - What can be the proof that the Living Will is operative per §ORC2133.03 that EMS can follow
 - The only good proof is the Ohio DNR Comfort Care order,



Question

- Do we attorneys continue to push the Living Will or explain it to our clients and allow them to make the decision?
- Have you read the Living Will carefully?



- Thank you for your presence.
- Any Questions?



ACTION: Final **DNR** COMFORT CARE

AMENDED
Appendix
3701-62-04

DATE: 04/22/2019 11:46 AM
DNR ORDER FORM

A printed copy of this order form or other authorized DNR identification must accompany the patient during transports and transfers between facilities.

Patient Name:	Patient Birth Date: / /
Optional Patient or Authorized Representatives Signature	
Printed name of Physician, APRN, or PA*	Date
REQUIRED Signature of Physician, APRN, or PA	Phone
REQUIRED for APRN or PA: Name of the supervising physician (PA) or collaborating physician (APRN) for this patient and the physician's NPI, DEA, or Ohio medical license number.	

CHECK ONLY ONE BOX BELOW

DNR Comfort Care – Arrest: Providers will treat patient as any other without a DNR order until the point of cardiac or respiratory arrest at which point all interventions will cease and the DNR Comfort Care protocol will be implemented.

DNR Comfort Care: The following DNR protocol is effective immediately.

DNR PROTOCOL

<p>Providers Will:</p> <ul style="list-style-type: none"> • Conduct an initial assessment • Perform Basic Medical Care • Clear airway of obstruction or suction • If necessary for comfort or to relieve distress, may administer oxygen, CPAP or BiPAP • If necessary, may obtain IV access for hydration or pain medication to relieve discomfort, but not to prolong death • If possible, may contact other appropriate health care providers (hospice, home health, physician, APRN, or PA) 	<p>Providers Will Not:</p> <ul style="list-style-type: none"> • Perform CPR • Administer resuscitation medications with the intent of restarting the heart or breathing • Insert an airway adjunct • Defibrillate, cardiovert, or initiate pacing • Initiate continuous cardiac monitoring
--	--

Physicians, emergency medical services personnel, and persons acting under the direction of or with the authorization of a physician, APRN or PA who participate in the withholding or withdrawal of CPR from the person possessing the DNR identification are provided **immunities under section 2133.22 of the Revised Code**. This DNR order is effective until revoked and may not be altered. Any medical orders, instructions, or information, other than those required elements of the form itself, that are written on this order form are not transportable and are not provided protections or immunities.

* A DNR order may be issued by an Advanced Practice Registered Nurse (APRN) or Physician Assistant (PA) when authorized by section 2133.211 of the Ohio Revised Code. Form HEA 1930 Revised 09/01/2019

3701-62-01. [Effective 9/1/2019] Definitions.

Ohio Administrative Code

3701. Department of Health - Administration and Director

Chapter 3701-62. Do Not Resuscitate (DNR) Protocol

Current through All Regulations Passed and Filed through July 12, 2019

3701-62-01. [Effective 9/1/2019] Definitions

As used in this chapter, unless the context clearly requires otherwise:

- (A) "Authorized health care provider" means a health care provider that is authorized to sign a do-not-resuscitate order form for a person and is limited to the person's:
 - (1) Attending physician as defined in paragraph (C) of this rule;
 - (2) Advanced practice registered nurse as defined in paragraph (B) of this rule and the action is taken by:
 - (a) A certified nurse practitioner, certified nurse midwife, or clinical nurse specialist pursuant to a standard care arrangement with a collaborating physician; or
 - (b) A certified registered nurse anesthetist under the supervision and direction of a physician.
 - (3) Physician assistant as defined in paragraph (U) of this rule and the action is taken pursuant to a supervision agreement with a supervising physician pursuant to section 4730.19 of the Revised Code or the policies of a health care facility in which the PA is working.
- (B) "Advanced practice registered nurse" or "APRN" means a licensed registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner as provided in division (O) of section 4723.01 of the Revised Code.
- (C) "Attending physician" means the physician to whom a person, or the family of a person, has assigned primary responsibility for the treatment or care of the person or, if the person or the person's family has not assigned that responsibility, the physician who has accepted that responsibility.
- (D) "Cardiac arrest" means the loss of discernible audible and palpable pulse, with or without the loss of cardiac action/rhythm if on a cardiac monitor, or the sudden abrupt loss of heart

- (E) "Comfort care" means any of the following:
- (1) Nutrition when administered to diminish the pain or discomfort of a declarant or other patient, but not to postpone the declarant's or other patient's death;
 - (2) Hydration when administered to diminish the pain or discomfort of a declarant or other patient, but not to postpone the declarant's or other patient's death;
 - (3) Any other medical or nursing procedure, treatment, intervention, or other measure that is taken to diminish the pain or discomfort of a declarant or other patient, but not to postpone the declarant's or other patient's death.
- (F) "CNP" means an advanced practice registered nurse who holds a current, valid license issued by the board of nursing under Chapter 4723. of the Revised Code and is designated as a certified nurse practitioner in accordance with section 4723.42 of the Revised Code and the rules adopted by the board of nursing.
- (G) "Certified nurse-midwife" means an advanced practice registered nurse who holds a current, valid license issued by the board of nursing under Chapter 4723. of the Revised Code and is designated as a certified nurse midwife in accordance with section 4723.42 of the Revised Code and the rules adopted by the board of nursing.
- (H) "CNS" means an advanced practice registered nurse who holds a current, valid license issued under Chapter 4723. of the Revised Code and is designated as a clinical nurse specialist in accordance with section 4723.42 of the Revised Code and the rules adopted by the board of nursing.
- (I) "Certified registered nurse anesthetist" means an advanced practice registered nurse who holds a current, valid license issued by the board of nursing under Chapter 4723. of the Revised Code and is designated as a certified registered nurse anesthetist in accordance with section 4723.42 of the Revised Code and rules adopted by the board of nursing.
- (J) "CPR" means cardiopulmonary resuscitation or a component of cardiopulmonary resuscitation, but it does not include clearing a person's airway for a purpose other than as a component of CPR. "Component of CPR" means any of the following:
- (1) Administration of chest compressions;
 - (2) Insertion of an artificial airway;
 - (3) Administration of resuscitation drugs;
 - (4) Defibrillation or cardioversion;
 - (5) Provision of respiratory assistance;
 - (6) Initiation of a resuscitative intravenous line; and

- (7) Initiation of cardiac monitoring.
- (K) "Declarant" means any adult who has executed a living will declaration in accordance with section 2133.02 of the Revised Code.
- (L) "Declaration" or "living will declaration" means a written document executed in accordance with section 2133.02 of the Revised Code.
- (M) "Do-not-resuscitate identification" or "DNR identification" means a standardized identification card, the DNR order form, necklace, or bracelet that has been approved by the department of health pursuant to section 2133.25 of the Revised Code and listed in rule 3701-62-04 of the Administrative Code, and that signifies either of the following:
- (1) That the person who is named on and possesses the card, DNR order form, necklace, or bracelet has executed a declaration that authorizes the withholding or withdrawal of CPR and that has not been revoked pursuant to section 2133.04 of the Revised Code; or
 - (2) That the authorized health care provider of the person who is named on and possesses the card, DNR order form, necklace, or bracelet has issued a current do-not-resuscitate order, in accordance with the do-not-resuscitate protocol adopted by the department of health pursuant to section 2133.25 of the Revised Code, for that person and has documented the grounds for the order in that person's medical record.
- (N) "Do-not-resuscitate order" or "DNR order" means a directive issued by an authorized health care provider, that identifies a person and specifies that CPR should not be administered to the person so identified. The do-not-resuscitate-order shall be implemented in accordance with the do-not-resuscitate protocol.
- (O) "Do-not-resuscitate protocol" or "DNR protocol" means the standardized method of procedure for the withholding of CPR by physicians, APRNs as provided in rule 3701-62-02 of the Administrative Code, physician assistants as provided in rule 3701-62-02 of the Administrative Code, emergency medical service personnel, and health care facilities that is adopted in the rules of the department of health pursuant to section 2133.25 of the Revised Code. The do-not-resuscitate protocol is specified in rule 3701-62-05 of the Administrative Code. Treatment other than resuscitative, shall continue to be provided or modified as the individual's condition warrants, in keeping with the individual's treatment plan goals.
- (P) "Emergency medical services personnel" means paid or volunteer firefighters, law enforcement officers, first responders, emergency medical technicians-basic, emergency medical technicians-intermediate, emergency medical technicians-paramedic, medical technicians, or other emergency services personnel acting within the ordinary course of

- (Q) "Health care facility" means any of the following:
- (1) A hospital as defined in section 2108.01, 3701.01, or 5122.01 of the Revised Code;
 - (2) A hospice care program, as defined in section 3712.01 of the Revised Code, or other institution that specializes in comfort care of patients in a terminal condition or in a permanently unconscious state;
 - (3) A nursing home or residential care facility, as defined in section 3721.01 of the Revised Code;
 - (4) A home health agency, as defined in section 3701.881 of the Revised Code, and any residential facility where a person is receiving care under the direction of a home health agency;
 - (5) An intermediate care facility for the individuals with intellectual disabilities (ICF/IID).
- (R) "Life-sustaining treatment" means any medical procedure, treatment, intervention, or other measure that, when administered to a qualified patient or other patient, will serve principally to prolong the process of dying.
- (S) "Permanently unconscious state" means a state of permanent unconsciousness in a declarant or other patient that, to a reasonable degree of medical certainty as determined in accordance with reasonable medical standards by the declarant's or other patient's attending physician and one other physician who has examined the declarant or other patient, is characterized by both of the following:
- (1) Irreversible unawareness of one's being and environment; and
 - (2) Total loss of cerebral cortical functioning, resulting in the declarant or other patient having no capacity to experience pain or suffering.
- (T) "Physician" means a person who is authorized under Chapter 4731. of the Revised Code to practice medicine and surgery or osteopathic medicine and surgery.
- (U) "Physician assistant" or "PA" means a person who holds a license to practice as a physician assistant issued under Chapter 4730. of the Revised Code.
- (V) "Principal" means a person who has executed a durable power of attorney for health care under sections 1337.11 to 1337.17 of the Revised Code.
- (W) "Professional disciplinary action" means action taken by the board or other entity that regulates the professional conduct of health care personnel, including but not limited to the state medical board, the board of nursing, and the state board of emergency medical, fire, and transportation services.

agonal breathing.

- (Y) "Standard care arrangement" has the same meaning as defined in division (N) of section 4723.01 of the Revised Code.
- (Z) "Terminal condition" means an irreversible, incurable, and untreatable condition caused by disease, illness, or injury from which, to a reasonable degree of medical certainty as determined in accordance with reasonable medical standards by a declarant's or other patient's attending physician and one other physician who has examined the declarant or other patient, both of the following apply:
- (1) There can be no recovery; and
 - (2) Death is likely to occur within a relatively short time if life-sustaining treatment is not administered.
- (AA) "Tort action" means a civil action for damages for injury, death, or loss to person or property, other than a civil action for damages for breach of a contract or another agreement between persons.

Cite as (Casemaker) Ohio Admin. Code 3701-62-01

History. Effective: 9/1/2019

Five Year Review (FYR) Dates: 2/27/2019 and 09/01/2024

Promulgated Under: 119.03

Statutory Authority: 2133.25

Rule Amplifies: 2133.21, 2133.211, 2133.22, 2133.23, 2133.24, 2133.26

Prior Effective Dates: 05/20/1999, 06/11/2009, 02/13/2014

§ 2133.03. When declaration operative.

Ohio Statutes

Title 21. COURTS - PROBATE - JUVENILE

Chapter 2133. MODIFIED UNIFORM RIGHTS OF THE TERMINALLY ILL ACT AND THE DNR IDENTIFICATION AND DO-NOT-RESUSCITATE ORDER LAW

Current through the 133rd Legislative Session

§ 2133.03. When declaration operative

- (A) (1) A declaration becomes operative when it is communicated to the attending physician of the declarant, the attending physician and one other physician who examines the declarant determine that the declarant is in a terminal condition or in a permanently unconscious state, whichever is addressed in the declaration, the applicable requirements of divisions (A)(2) and (3) of this section are satisfied, and the attending physician determines that the declarant no longer is able to make informed decisions regarding the administration of life-sustaining treatment. When the declaration becomes operative, the attending physician and health care facilities shall act in accordance with its provisions or comply with the provisions of section 2133.10 of the Revised Code.
- (2) In order for a declaration to become operative in connection with a declarant who is in a permanently unconscious state, the consulting physician associated with the determination that the declarant is in the permanently unconscious state shall be a physician who, by virtue of advanced education or training, of a practice limited to particular diseases, illnesses, injuries, therapies, or branches of medicine or surgery or osteopathic medicine and surgery, of certification as a specialist in a particular branch of medicine or surgery or osteopathic medicine and surgery, or of experience acquired in the practice of medicine or surgery or osteopathic medicine and surgery, is qualified to determine whether the declarant is in a permanently unconscious state.
- (3) In order for a declaration to become operative in connection with a declarant who is in a terminal condition or in a permanently unconscious state, the attending physician of the declarant shall determine, in good faith, to a reasonable degree of medical certainty, and in accordance with reasonable medical standards, that there is no reasonable possibility that the declarant will regain the capacity to make informed decisions regarding the administration of life-sustaining treatment.

(B) (1)

- (a) A declaration supersedes any general consent to treatment form signed by or on behalf of the declarant prior to, upon, or after the declarant's admission to a health care facility to the extent there is a conflict between the declaration and the form, even if the form is signed after the execution of the declaration. To the extent that the provisions of a declaration and a general consent to treatment form do not conflict, both documents shall govern the use or continuation, or the withholding or withdrawal, of life-sustaining treatment and other medical or nursing procedures, treatments, interventions, or other measures in connection with the declarant. Division (B)(1)(a) of this section does not apply if a declaration is revoked pursuant to section 2133.04 of the Revised Code after the signing of a general consent to treatment form.
 - (b) A declaration supersedes a DNR identification, as defined in section 2133.21 of the Revised Code, of the declarant that is based upon a prior inconsistent declaration of the declarant or that is based upon a do-not-resuscitate order, as defined in section 2133.21 of the Revised Code, that a physician has issued for the declarant and that is inconsistent with the declaration.
- (2) If a declarant has both a valid durable power of attorney for health care and a valid declaration, the declaration supersedes the durable power of attorney for health care to the extent that the provisions of the documents would conflict if the declarant should be in a terminal condition or in a permanently unconscious state. Division (B)(2) of this section does not apply if the declarant revokes the declaration pursuant to section 2133.04 of the Revised Code.

Cite as (Casemaker) R.C. § 2133.03

History. Effective Date: 07-09-1998 .

3701-62-10. [Effective 9/1/2019] Relationship of DNR orders and identification with living will declarations and durable powers of attorney for health care.

Ohio Administrative Code

3701. Department of Health - Administration and Director

Chapter 3701-62. Do Not Resuscitate (DNR) Protocol

Current through All Regulations Passed and Filed through July 12, 2019

3701-62-10. [Effective 9/1/2019] Relationship of DNR orders and identification with living will declarations and durable powers of attorney for health care

- (A) To the extent that a known conflict exists between a valid durable power of attorney for health care and a valid living will declaration that is known to be operative in accordance with section 2133.03 of the Revised Code, the living will declaration supersedes the authority of the durable power of attorney for health care and the agent or agents named therein.
- (B) Absent substantial change in the principal's medical condition as assessed by the principal's authorized health care provider, DNR identification based upon a valid DNR order to which the principal consented supersedes the authority of a durable power of attorney for health care and the agent or agents named therein.
- (C) The authority of a durable power of attorney for health care and the agent or agents named therein supersedes DNR identification that is based upon a DNR order to which the agent or agents named in the durable power of attorney for health care previously consented or to which an individual or individuals consented to in accordance with section 2133.08 of the Revised Code.
- (D) To the extent that a known conflict exists between DNR identification based upon a previously executed living will declaration and a more recent valid living will declaration that is operative in accordance with section 2133.03 of the Revised Code, the most recent living will declaration supersedes the previous DNR identification and living will declaration.
- (E) To the extent that a known conflict exists between DNR identification based upon a valid DNR order to which the principal consented and a valid living will declaration, the more recent document supersedes.

Replaces: 3701-62-10

Cite as (Casemaker) Ohio Admin. Code 3701-62-10

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