OPINION NO. 93-062

Syllabus:

1. Existing statutes and case law do not expressly authorize a member of a rescue squad, acting in an emergency situation and without the direction of a physician, to honor the request of a relative of a resident of a rest home to provide no extraordinary care to the resident.

2. The statutes governing living wills and durable powers of attorney for health care do not provide for the application of those documents when a rescue squad is acting in an emergency situation and without the direction of an individual's attending physician.

3. Rescue squad personnel who come within the immunity provisions of R.C. 2305.23 or R.C. 4765.49 are, in the administration of emergency medical care or treatment, liable only for willful or wanton misconduct.

To: Anthony G. Pizza, Lucas County Prosecuting Attorney, Toledo, Ohio
By: Lee Fisher, Attorney General, December 21, 1993

You have requested an opinion "on the legal requirements for rescue squad personnel who encounter situations where they are asked to honor a family member's request to provide no extraordinary care to a rest home resident." You ask specifically for consideration of this question in light of the creation of the Ohio Emergency Services Board and in light of legislation that has since been enacted concerning living wills.

Right to Refuse Medical Treatment

Ohio law governing the right of an individual to refuse medical treatment was addressed in *Estate of Leach v. Shapiro*, 13 Ohio App. 3d 393, 469 N.E.2d 1047 (Summit County 1984). The *Leach* case set forth the following general principles: (1) a physician who treats a patient without informed consent commits a battery, even if the treatment is harmless or beneficial; (2) absent legislation to the contrary, the patient's right to refuse medical treatment is absolute until the quality of competing interests is weighed in a court proceeding; (3) if a patient is not

competent to consent to medical treatment, an authorized person may consent on the patient's behalf; (4) the patient's consent will be implied if the patient is unable to consent and there exists an emergency requiring immediate action to preserve the life or health of the patient; (5) consent to emergency medical treatment will not be implied if the patient has refused treatment in a manner that satisfies the same standards of knowledge and understanding required for informed consent; (6) the existence of consent to medical treatment is a question of fact. The court stated:

> We conclude that a patient has the right to refuse treatment, and that this refusal may not be overcome by the doctrine of implied consent. Before this refusal can controvert the implied consent of a medical emergency, however, it must satisfy the same standards of knowledge and understanding required for informed consent.

Id. at 397, 469 N.E.2d at 1053. The court remanded the case for consideration of questions of consent and liability with respect to a patient who had been held on life support systems while in a chronic vegetative state. The *Leach* case involved the physician-patient relationship and did not address non-physician rescue personnel. *See also Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (C.P. Summit County 1980) (earlier proceeding, in which the court balanced the constitutional right to privacy against various state interests and granted the guardian's request for an order to remove the respirator).

Later, in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the United States Supreme Court assumed for the purposes of that decision that a patient has the right to refuse lifesaving hydration and nutrition, based on the liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court held, however, that a state may require clear and convincing evidence of a patient's desires.

The question of refusing or terminating life-sustaining treatment was also addressed in the case *In re Guardianship of Crum*, 61 Ohio Misc. 2d 596, 580 N.E.2d 876 (P.Ct. Franklin County 1991). There, the Probate Court of Franklin County held that a competent person has a constitutionally protected liberty interest in refusing medical treatment, but that relevant state interests may be sufficiently compelling to outweigh the constitutional right to refuse treatment. Thus, the court imposed a balancing test comparing a patient's rights with the various interests of the state. The *Crum* decision found that a probate court is empowered to authorize the withdrawal of nutrition and hydration of a minor in appropriate circumstances, and granted the guardians in that case the authority to withdraw nutrition and hydration from their incompetent ward, who was in a chronic vegetative state.

In re Guardianship of Myers, 62 Ohio Misc. 2d 763, 610 N.E.2d 663 (C.P. Summit County 1993), recently reached a similar result. In *Myers*, the court considered the withdrawal of nutrition and hydration from a minor who was in a persistent vegetative state and adopted the best interest test applied in *Crum*, rather than the substitute judgment test used in *Leach*.

Principles discussed in the *Leach* case were applied in *Anderson v. St. Francis - St. George Hospital*, 83 Ohio App. 3d 221, 614 N.E.2d 841 (Hamilton County 1992), *motion to certify overruled*, 66 Ohio St. 3d 1459, 610 N.E.2d 423 (1993). In that case, a physician, after discussion with a patient, entered an instruction in the hospital record that the patient not be resuscitated. During subsequent treatment at the hospital, the patient suffered a ventricular fibrillation and a nurse resuscitated him. The patient claimed that the resuscitation was a battery and that resuscitation contrary to the physician's order constituted negligence. The patient also claimed that he suffered physical and emotional injury and medical expenses as a result of the

resuscitation. The court rejected the patient's claim that he should receive damages for having his life wrongfully prolonged, stating that under existing Ohio law "there is no cause of action for wrongful living." *Id.* at 227. The court did, however, find that there were factual questions as to whether the hospital was liable for battery or negligence and, if so, what damages should be awarded. As in *Leach*, the court in *Anderson* recognized the authority of a potential patient to expressly refuse emergency treatment. Neither *Leach* nor *Anderson*, however, addressed the situation of rescue personnel acting in an emergency outside a hospital and without the direction of a physician.

The existing case law does not provide a clear analysis of the role of non-physician rescue personnel in a situation in which a relative seeks to refuse emergency medical care for a rest home resident. It does not appear that Ohio courts have recognized the right of a member of a rescue squad, acting in an emergency situation and without the direction of a physician, to honor the request of a relative of a resident of a rest home to provide no extraordinary care to the resident.

Durable Power of Attorney for Health Care

R.C. 1337.12 permits an adult who is of sound mind to create a durable power of attorney for health care, authorizing an attorney-in-fact to make health care decisions for the principal at any time that the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for himself. The attorney-in-fact may be authorized to give, refuse, or withdraw informed consent to health care, with certain exceptions. R.C. 1337.12. The attorney-in-fact cannot refuse or withdraw informed consent to life-sustaining treatment unless the principal is in a terminal condition or in a permanently unconscious state as determined by the attending physician and a consulting physician. R.C. 1337.13(B); R.C. 1337.16(D). In such circumstances, notification must be given to the guardian, if any, or to certain relatives, and a forty-eight hour period must be allowed for objections to the proposed action. Any such objections must be filed in court for evaluation through judicial proceedings. R.C. 1337.16(D). The attorney-in-fact cannot refuse or withdraw informed consent to comfort care, and may in only very limited circumstances refuse or withdraw informed consent to the provision of nutrition or hydration to the principal. R.C. 1337.13(C), (E). Limitations apply to the refusal or withdrawal of informed consent to health care for a pregnant individual and to the withdrawal of informed consent to health care to which the principal previously consented. R.C. 1337.13(D), (F). The attorney-in-fact is, in general, required to act consistently with the desires of the principal or, if those desires are unknown, in the best interest of the principal. R.C. 1337.13(A)(1). A durable power of attorney for health care may be revoked at any time. R.C. 1337.14.

Related provisions of R.C. Chapter 1337 provide immunity from criminal prosecution, professional disciplinary action, and tort and other civil claims in certain circumstances. In general, physicians, employees or agents of a health care facility, and health care personnel acting under the direction of the attending physician are immune for actions taken under R.C. 1337.11-.17 in good faith, within the scope of their authority, and in accordance with statutory requirements. R.C. 1337.15.

It is assumed for purposes of this opinion that a rescue squad does not include a physician and does not constitute a health care facility for purposes of R.C. 1337.11-.17.[1] Members of

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[1] R.C. 1337.11(H) defines "health care facility" to mean any of the following:

(1) A hospital;

(2) A hospice care program or other institution that specializes in comfort care of patients in a terminal condition or in a permanently unconscious state;

a rescue squad may, however, be "health care personnel" as that term is defined in R.C. 1337.11(I):

> "Health care personnel" means physicians, nurses, physician's assistants, emergency medical technicians-ambulance, advanced emergency medical technicians-ambulance, emergency medical technicians-paramedic, medical technicians, dietitians, other authorized persons acting under the direction of an attending physician, and administrators of health care facilities.

Health care personnel acting under the direction of the attending physician of a principal are granted immunity for actions taken under R.C. 1337.11-.17 in good faith, within the scope of their authority, and pursuant to the direction of the attending physician. R.C. 1337.15(E).

If a resident of a rest home has in effect a durable power of attorney for health care, and if the resident's attending physician has determined that the resident has lost the capacity to make informed health care decisions for himself, then the attorney-in-fact is authorized to make such decisions and the decisions must be honored in accordance with R.C. 1337.11-.17. Those provisions, however, do not directly address the legal obligation of members of a rescue squad to provide emergency care or the capacity of members of a rescue squad to determine when life-sustaining treatment is properly refused. Instead, they focus on determinations made by physicians and other health care personnel in non-emergency situations.

With respect to emergency care, the provisions governing durable powers of attorney for health care say only that R.C. 1337.11-.17 and durable powers of attorney for health care created under R.C. 1337.12 "do not affect or limit, and shall not be construed as affecting or limiting, the authority of a physician or a health care facility to provide or not to provide health care to a person in accordance with reasonable medical standards applicable in an emergency situation." R.C. 1337.16(C). According to these statutory terms, a physician or a health care facility is expected, in an emergency, to act in accordance with reasonable medical standards. A rescue squad is given no statutory directive concerning its emergency powers. Thus, the statutory provisions governing durable powers of attorney for health care do not affect the duties of a rescue squad to provide emergency care, although they do grant immunity to health care personnel acting pursuant to R.C. 1337.11-.17 in good faith and under the direction of the attending physician.

Declarations (Living Wills) and Non-Declarants Under R.C. Chapter 2133

R.C. Chapter 2133, enacted by Am. Sub. S.B. 1, 119th Gen. A. (1991) (eff. Oct. 10, 1991), provides for the creation of living wills. Pursuant to R.C. 2133.02, any adult of sound mind may execute a declaration, or living will, indicating his wishes with respect to the use or continuation, or the withholding or withdrawal, of life-sustaining treatment (including, if desired, the withholding or withdrawal of nutrition or hydration) in the event that he is in a terminal condition or a permanently unconscious state. *See also* R.C. 2133.12(E). A declaration may be revoked at any time. R.C. 2133.04. A declaration does not become effective until a

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(3) A nursing home;
(4) A home health agency;
(5) An intermediate care facility for the mentally retarded.

See also R.C. 1337.11(V) (defining "physician").

determination is made that the individual is in a terminal condition or a permanently unconscious state and is unable to make informed decisions regarding the administration of life-sustaining treatment. Before a physician may take action pursuant to a declaration, notice must be given to the appropriate relatives or other individuals, who are given a forty-eight hour period to object to the proposed action. To pursue an objection, it is necessary to file a complaint in court; the court must conduct a hearing and make findings. R.C. 2133.05.

When there is no living will or durable power of attorney for health care, R.C. 2133.08 permits a guardian or appropriate relative or relatives to consent to the withholding or withdrawal of life-sustaining treatment of an adult individual who is in a terminal condition or has been in a permanently unconscious state for at least twelve months and who is unable to make informed decisions regarding the administration of life-sustaining treatment. A forty-eight hour period is allowed for objecting to a consent to the use or continuation, or the withholding or withdrawal, of life-sustaining treatment. To challenge the consent, an individual must file a complaint in court. A hearing must be held and determinations made by the court. R.C. 2133.08-.09. It has been held that the twelve-month waiting period is not applicable to all cases of removal of life supports. *See In re Guardianship of Myers* (permitting withdrawal of nutrition and hydration from a minor who had been in a vegetative state for only three months); *see also In re Guardianship of McInnis*, 61 Ohio Misc. 2d 790, 791-92, 584 N.E.2d 1389, 1390 (P. Ct. Stark County 1991) (stating the opinion of the court that "the spouse, individually and without the intervention of the court, without the appointment of a guardian, has [authority to discontinue life-sustaining treatment] under the common law," and that, in the absence of advance directives, such a determination "should be based upon medical expertise, consistent with the patient's wishes, as they are expressed by family members").

Immunity from civil or criminal liability or professional disciplinary action is provided to physicians, health care facilities, and health care personnel acting under the direction of an attending physician when action is taken pursuant to R.C. Chapter 2133 and within the scope of an individual's authority. Certain restrictions apply. R.C. 2133.11-.12.

The provisions of R.C. Chapter 2133 require time for appropriate notification and consideration and do not directly address the legal obligation of members of a rescue squad to provide emergency care. Portions of R.C. Chapter 2133 relating to emergency care state that R.C. Chapter 2133 and declarations executed pursuant to that chapter "do not affect or limit, and shall not be construed as affecting or limiting, the authority of a physician or a health care facility to provide or not to provide life-sustaining treatment to a person in accordance with reasonable medical standards applicable in an emergency situation." R.C. 2133.12(C)(4). This language is similar to the language appearing in R.C. 1337.16(C) that relates to durable powers of attorney for health care. Like that language, this provision recognizes the authority of a physician or health care facility to act, in an emergency, in accordance with reasonable medical standards.

It is assumed for purposes of this opinion that a rescue squad does not include a physician and does not constitute a health care facility for purposes of R.C. Chapter 2133, though members of a rescue squad may be "health care personnel" under R.C. 2133.01(J).[2] The language of R.C. Chapter 2133 does not apply directly to a rescue squad, but does suggest that

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[2] The definitions of "health care facility," "health care personnel," and "physician" contained in R.C. 2133.01(I), (J), and (W) parallel those contained in R.C. 1337.11(H), (I), and (V). *See* note 1, *supra*.

reasonable medical standards continue to cover an emergency situation, even if there is a living will in existence. R.C. Chapter 2133 does not give a rescue squad acting in an emergency situation the authority to honor any provisions of a living will or consent executed under R.C. Chapter 2133, but it does grant immunity to health care personnel acting pursuant to R.C. Chapter 2133 in good faith and under the direction of an attending physician.

State Board of Emergency Medical Services

Your letter asks specifically about the effect of the Ohio Emergency Services Board on the duties of a rescue squad in emergency situations. Legislation enacted in 1986, *see* 1985-1986 Ohio Laws, Part II, 2704 (Am. Sub. H.B. 222, eff. Feb. 13, 1986), created the Ohio Emergency Medical Services Agency in the Department of Education, and also created the Ohio Emergency Medical Services Board. More recent legislation renamed the Department of Highway Safety the Department of Public Safety, created a Division of Emergency Medical Services within the Department of Public Safety, changed the Ohio Emergency Medical Services Board to the State Board of Emergency Medical Services ("Board"), and transferred the Board to the Division of Emergency Medical Services of the Department of Public Safety. *See* R.C. Chapter 4765; Am. Sub. S.B. 98, 119th Gen. A. (1992) (eff. Nov. 12, 1992). The Board is responsible for the accreditation of emergency medical services training programs and for the certification of a trained individual as an emergency medical technician-ambulance ("EMT-A"), advanced emergency medical technician-ambulance ("ADV EMT-A"), or emergency medical technician-paramedic ("paramedic"). R.C. 4765.15-.33. The Board is required to prepare a statewide emergency medical services plan and also to divide the state into prehospital emergency medical services regions for purposes of overseeing the delivery of prehospital emergency medical services. R.C. 4765.05, .08. The Board has authority to adopt rules that establish standards for the performance of emergency medical services by certified individuals. *See* R.C. 4765.11. In addition, the Board has certain advisory responsibilities, *see, e.g.*, R.C. 4765.04, .10, and it is required to prepare recommendations for the operation of ambulance service organizations and emergency medical service organizations, including such matters as the design, equipment, and supplies for ambulances, the minimum number and type of personnel for ambulances, and the communication systems necessary for the operation of ambulances. R.C. 4765.09.

R.C. 4765.40 requires the medical director or cooperating physician advisory board of each emergency medical service organization to establish written protocols to be followed by an EMT-A, ADV EMT-A, or paramedic in performing emergency medical services "when communications have failed or the required response time prevents communication and the life of the patient is in immediate danger." R.C. 4765.37, 4765.38, and 4765.39 permit an EMT-A, ADV EMT-A, or paramedic, in specified circumstances, to perform certain services in accordance with such protocols and without the authorization of a physician that would otherwise be required. The statutes do not directly address the question whether, or in what circumstances, an EMT-A, ADV EMT-A, or paramedic acting in an emergency situation may grant a request not to provide certain medical services.

The potential liability of an EMT-A, ADV EMT-A, or paramedic is addressed by R.C. 4765.49, which states that such an individual "is not liable in damages in a civil action for injury, death, or loss to person or property resulting from his administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct." R.C. 4765.49(A). Immunity, except for instances of willful or wanton misconduct, is also granted to political subdivisions, joint ambulance districts, other public agencies, and officers or employees of public agencies or private organizations operating under

contract or in joint agreement with public entities to provide emergency medical services. R.C. 4765.49(B).

The provisions that establish and govern the State Board of Emergency Medical Services do not directly address the responsibilities of a rescue squad in an emergency situation in which a family member asks that certain types of medical care not be provided to a rest home resident, nor do any existing rules address that issue. R.C. 4765.49 does, however, indicate that an EMT-A, ADV EMT-A, or paramedic will not be liable for damages resulting from the provision of emergency medical services in such circumstances, unless the services are administered in a manner constituting willful or wanton misconduct.

Good Samaritan Statute

Ohio's Good Samaritan Statute, R.C. 2305.23, applies generally to persons who administer emergency care or treatment "at the scene of an emergency outside of a hospital, doctor's office, or other place having proper medical equipment," without remuneration or the expectation of remuneration. The statute states that persons covered by its provisions are not liable in civil damages for administering emergency care or treatment, unless such acts constitute willful or wanton misconduct. R.C. 2305.23 specifies that the administering of such emergency care or treatment by a person as part of his duties as a paid member of an organization of law enforcement officers or firefighters does not cause it to be a rendering for remuneration or expectation of remuneration. Thus, law enforcement officers or firefighters who serve as rescue squad personnel come under the protection of the Good Samaritan Statute.

Medical Standards Applicable in Emergency Situations

As discussed above, the statutes governing living wills and durable powers of attorney for health care do not directly provide for the application of those documents to situations in which a rescue squad is providing emergency care. It appears, instead, that emergency situations are, in general, governed by the principle that reasonable medical standards apply. Clearly, protocols adopted pursuant to R.C. 4765.40 govern those situations to which they apply. In addition, certain patients and physicians have attempted to provide for the refusal of emergency care by the execution of a "Do not resuscitate" ("DNR") order, indicating that the patient does not consent to resuscitation in the event of an emergency. *See generally Anderson v. St. Francis - St. George Hospital*; F. Woodside, N. Lawson, D. Lydon, J. Peters, K. Fineberg & D. Kroll, *The Law of Medical Practice in Ohio* §8:18 (1989 & Supp Sept. 1993). Whether a rescue squad member who is not a physician may, under Ohio law, honor such an order is not clear. *See generally* Am. Sub. S.B. 1, 119th Gen. A. (1991) (eff. Oct. 10, 1991) (section 5, uncodified) (in initially enacting the provisions authorizing a durable power of attorney for health care, *see* 1989-1990 Ohio Laws, Part I, 319 (Am. Sub. S.B. 13, eff. Sept. 27, 1989), the General Assembly did not intend "to affect the ability of competent adults or the guardians of incompetents or minors to make informed health care decisions for themselves or their wards"). Where, as in the case you describe, a family member is making the request that extraordinary care not be provided, additional questions arise concerning the authority of that person to make a medical decision on behalf of the rest home resident. There may also be questions as to the meaning of "extraordinary care." No statutes or judicial decisions provide a clear statement of the duties of rescue personnel who encounter such a situation.

In certain communities within Ohio, the medical community and rescue squad personnel have adopted protocols providing for the manner in which a DNR order may be executed and enforced within that community. The adoption of such a protocol provides rescue personnel with standards to apply and procedures to follow when requests are made that emergency

services not be provided, and it may be argued that provisions of such a protocol establish reasonable medical standards that permit rescue personnel to honor a DNR order in accordance with its provisions. R.C. 4765.40 provides for the establishment of written protocols; it does not, however, expressly discuss the matter of honoring a request not to provide services in certain circumstances. It does not appear, under existing law, that a rescue squad is authorized to take unilateral action to honor a DNR order. Whether a rescue squad may take such action in accordance with a protocol, or upon communication with a base hospital or physician, has not yet been finally determined.

Conclusion

The question whether rescue squad personnel may ever honor a family member's request to provide no extraordinary care to a rest home resident whom they have been summoned to aid remains unsettled under Ohio law. The statutory provisions governing living wills and durable powers of attorney for health care do not directly address this issue, nor is it clear whether rescue squad personnel may be empowered by the adoption of a protocol or through consultation with a physician or hospital to honor a DNR order or similar document.

As discussed above, however, it is clear that rescue squad personnel who come within the immunity provisions of R.C. 4765.49 or R.C. 2305.23 are, in the administration of emergency medical care or treatment, liable for only willful or wanton misconduct. The immunity provisions of R.C. 4765.49 apply to any EMT-A, ADV EMT-A, or paramedic; the immunity provisions of R.C. 2305.23 include all members of an organization of law enforcement officers or firefighters. When such individuals administer emergency services in good faith and without violating clearly established standards, policies, or procedures, liability should not attach.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. Existing statutes and case law do not expressly authorize a member of a rescue squad, acting in an emergency situation and without the direction of a physician, to honor the request of a relative of a resident of a rest home to provide no extraordinary care to the resident.

2. The statutes governing living wills and durable powers of attorney for health care do not provide for the application of those documents when a rescue squad is acting in an emergency situation and without the direction of an individual's attending physician.

3. Rescue squad personnel who come within the immunity provisions of R.C. 2305.23 or R.C. 4765.49 are, in the administration of emergency medical care or treatment, liable only for willful or wanton misconduct.