From Philosopher in Residence to Healthcare Mediation

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It is such a treat and a privilege to have been at the "Defining Health Law for the Future" symposium and to have met Charity's family. She was dear to me.

I begin with a story. My friend and colleague, Paul Lombardo, asked what my title was when I started at the University of Virginia College of Medicine, way back in 1980. A few of us had rounded up some start-up funds to bring medical ethics into the hospital — to do bioethics in the clinical rather than the usual classroom setting. I had never actually seen this done, though, and only a small handful of people in the country were venturing onto the clinical floors back then. This job was strictly make-it-up-as-you-go-along, and I wasn't even sure what to call it. Then I noticed a title used by the late John Arras, who was an early pioneer of clinically-based ethics up in New York[1]: Philosopher in Residence. I thought "okay, that must be what I should call myself." Oh, dear. Terrible mistake. It was my very first day on the job. First. Day. I'm wearing my name tag declaring, in bold letters, "Philosopher in Residence." I get on the elevator to go up a few floors. I'm the only one in the car. And then the doors open, and a surgery resident gets on. He kind of bends down and looks at the nametag. Then bursts out laughing. Elevator doors open, he's absolutely guffawing, all the way down the hall, as the doors close. Rest assured, I did not use that nametag again.

Another feature of those early days carried a far more important impact. As I accompanied residents and attendings on regular rounds, one of the first things I noticed is that, when a bioethics issue cropped up, it mostly was not about ethics. In the clinical setting, most bioethics questions do not actually concern genuine moral puzzlement, where people really are not sure what is the right thing to do. Rather, unless the problem is miscommunication or a need for further information, most ethics consults are about conflict. People on both sides of an argument may feel very confident they know the right thing to do, so they want help to persuade the other side to change their minds — "let's get an ethics consult." Separately, I also noticed how deeply my physician colleagues dreaded

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the possibility, the very thought of a malpractice suit, even in the absence of any plausible likelihood of litigation. As a result, we sometimes see defensive medicine — unnecessary tests and treatments — where good conversation could often go so much farther to resolve difficult situations and actually avoid litigation. As a result, conflict resolution became an early interest of mine because a good ethics consult so often required, not profound moral contemplation, but rather what I like to call "collaborative problem-solving."

Fast-forward a quarter-century. I had been publishing articles in law reviews for quite a few years, on such issues as the malpractice standard of care in the setting of resource constraints, federal ERISA law, and various other legal topics. So I finally decided to go to law school. Loved every minute. Champagne through a fire hose. Quickly it became obvious that the next addition should be training in mediation. I had already seen that bioethics consults are mostly about conflict, and that malpractice lawsuits are often not the best way to manage adverse events and relationship breakdowns in healthcare. Hence, I became what, in my state, is called a "Tennessee Supreme Court Rule 31-listed mediator"[2] for both civil and family litigation. And in the process, I have become, unabashedly, a "mediation junkie."

An attorney colleague and I began co-mediating, *pro bono*, a variety of lawsuits filed in Tennessee's General Sessions court — matters under $25,000. Everything from home-reno-gone-bad, to prom-dress-gone-bad, wedding-caterer-didn't-show, to fender-benders and replevin.

My colleague then became accredited to teach the 40-hour course to train people, mostly lawyers, to become Rule-31 listed mediators. I co-taught that course with him a half-dozen times. Meanwhile, I developed a parallel training in conflict resolution and mediation for healthcare. Here, the focus was not on the kinds of disputes that end up in litigation, but rather on the distinctive kinds of conflict that arise in healthcare, in all their factual and emotional complexity. As I assisted him on the 5-day Rule-31 course, he assisted me on the 3-day healthcare training.

A few years later it made sense to separate these two and place them under different organizational umbrellas. The looming question then was, whom could I trust to do this with me, and do it well? I needed a partner who understood healthcare, not just conflict resolution.

Charity Scott popped immediately into mind. I phoned her. She said yes, and I was thrilled. Charity helped me put together my little LLC, reminded me I would need a separate bank account, and helped with all those details I would otherwise have missed. As I got busy creating a website, I shared various iterations and questions with Charity. Her ideas were, of course, spot-on. The result was the Center for Conflict Resolution in Healthcare L.L.C.[3]

> We should not underestimate the importance of her bringing broader attention to peaceful conflict resolution in the context of health law. Yes, medical malpractice suits were sometimes mediated toward settlement. But medmal litigation is not health law. Charity brought markedly greater consideration to the value and potential especially of mediation, not just arbitration, to address health law's distinctive and pervasive clashes — payer-provider disputes, medical staff-administration conflicts, and a host of other matters.

And so we launched our 3-day on-site trainings in Memphis. I flew Charity in from Atlanta, and we did two of these each year for several years. I cannot emphasize enough what a joy it was.

The first part of the course is didactic, introducing some basic concepts, skills, and strategies. We shared that part evenly, though she presented her part better than I did mine. And then the great majority of the training is based on an insight from Aristotle: "For the things we have to learn before we can do them, we learn by doing them." And so the bulk of the training is mediate-and-debrief, mediate-and-debrief, doing eight or more mock mediations over those several days. Every participant gets to be mediator at least twice, and the rest of the time s/he will play one or another character. As we typically run multiple mock mediations simultaneously, Charity would shepherd one group while I monitored another. Each of us took notes for debriefing and occasionally provided coach-

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ing for a bewildered "mediator." As you can imagine, Charity was masterful. I daresay I learned more from her debriefings than the students did.

During each day we would also provide, as I call them, "intermezzo" sessions, from the musical term for "a movement coming between the major sections of an extended musical work (such as an opera)."[4] They provided some diversion and a different sort of content from high-concentration mediations. I freely imposed on Charity for these. She often did improv sessions, a specialty of hers. She was spectacular, of course, and everyone loved these as well as the mindfulness sessions she led.

Charity also opened an important door for me. One day as we were on the phone planning the next training, she said something about heading to Denver for a meeting of the American Bar Association's Health Law Section leadership. So I ventured an idea. Any chance I could worm my way into that group? I was keenly interested to bring this fairly distinctive sort of conflict resolution to the health law community. Charity made a phone call. And lo, the next thing I knew, I was on a plane to Denver. I served as a vice-chair, then chair of that section's Alternative Dispute Resolution (ADR) Task Force for a half-dozen years. She had initiated the ADR task force several years earlier and was ready to hand the reins to others. All this led in turn to a similar involvement with the ABA's Dispute Resolution section, Healthcare Committee. Charity made it all happen.

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As everyone here can well appreciate, it was completely a joy and an honor to work with Charity, and to learn from her. I miss her.

Note

The author has no conflicts of interest to disclose.

References

1. R. Sullivan, "Hospitals Turn to Philosophers on Life Issues," *New York Times*, March 19, 1982, at 1, *available at* <https://www.nytimes.com/1982/03/19/nyregion/hospitals-turn-to-philosophers-on-life-issues.html> (last visited June 10, 2024).
2. See Tennessee Supreme Court Rule 31, *available at* <https://tncourts.gov/rules/supreme-court/31> (last visited June 10, 2024).
3. See Center for Conflict Resolution in Healthcare, *available at* <www.healthcare-mediation.net> (last visited June 11, 2024).
4. Merriam Webster Online Dictionary, *available at* <https://www.merriam-webster.com/dictionary/intermezzo)> (last visited June 10, 2024).

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