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# Consultectonics: Ethics Committee Case Consultation as Mediation

by Don F. Reynolds

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*Ethics committee case consultation is a trustworthy process and a safe place to handle health care impasses. Following appropriate rules and guidelines, such mediation forums provide a safe place for health care problems to be heard.*

*Some say that my teaching is nonsense. Others call it lofty but impractical. But, to those who have looked inside themselves this nonsense makes perfect sense. And to those who put it into practice, this loftiness has roots which go deep. I have just three things to teach: simplicity, patience, compassion. — Tao Te Ching*

The lessons I learned mediating more than 500 commercial, policy, and family impasses are simple, powerful truisms: be reliable, be patient, be creative, help participants get what they want. Based on that experience I believe that

- an optimum solution to a health care impasse emerges when people affected by the impasse become constructively engaged in resolving it.
- people can obtain an optimum resolution of a health care impasse if they understand what their plausible responses are, if the resolution realizes their values, and if they are personally involved in selecting the resolution.
- the quality of a resolution reflects the extent to which the participants know and have expressed their interests.
- people immersed in a complex, multi-party, emotionally charged health care impasse may neither recognize nor articulately express their interests.
- in such cases, a neutral mediator may help.

There are at least three powerful reasons why it is time to acknowledge explicitly that an ethics committee case consultation is a mediation:

- to prevent misdirected criticism by attorney-ethicists from ruining something which is almost right
- to ensure that ethics committee case consultations are confidential
- to position ethics committee case consultation as a venue of choice for resolving ethical disputes which emerge from the corporate context of modern health care organizations

In the May, 1994, issue of *Hospital and Health Networks*, George Annas wrote that ethics committee case consultations cannot succeed because ethics committees lack expertise, lack legal authority, and reflect institutional bias. When case consultations are acknowledged to be mediations, the hollowness of Annas's concern is revealed.

Case consultations, like other mediations, succeed because their process encourages accord among participants with respect to actions which have always been available to them and known by them—that is, the agreed action resonates with each participant's historic interests. The substantive expertise of third par-

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ties is not part of an equation whose essential elements are access to the mediation process and a safe place in which to mediate. Explicitly acknowledging that case consultation is mediation establishes the consultation as such a safe place.

The legal authority that sustains mediation is the participants' private agreement to mediate. Wrapping case consultation in the public sanction of regulatory due process chokes the voluntary essence of mediation.

Neutrality is one of three seminal traits which characterize mediation (confidentiality and voluntariness are the others). A biased case consultation would be a perverse event, not evidence of systemic weakness of the mediation process.

In her 1991 *Maryland Law Review* article, Susan Wolf characterized ethics committee case consultations as a "due process wasteland." But case consultations which are recognized as mediations and conducted within mediation's usual architecture—pursuant to written rules and written agreements to mediate in confidentiality—are the opposite of a "due process wasteland." Case consultation as mediation is a trustworthy process and a safe place, exactly what states encourage citizens to find and use.

Annas and Wolf are not strangers to bioethics. They have contributed as much to its literature as any attorneys. But with respect to ethics committee case consultations their concerns are empty. Perhaps by failing to recognize that case consultations are mediations and, therefore, not tacking down their framework with sufficient rigor, the proponents of case consultation may have abetted Wolf's and Annas's phantom concerns.

The sponsors of a case consultation, one acknowledged to be a mediation and conducted pursuant to a written agreement of confidentiality, need not be concerned that the traditional health care basis for confidentiality may be insufficient to protect their event. Mediation has a fully developed, independent claim to confidentiality. In this context, confidentiality means that

- the statements made by participants in a case consultation cannot be used as evidence in a subsequent legal proceeding, and
- the records of a mediation are not open to public inspection or for use in subsequent litigation.

The pioneering engagements of case consultation were in clinical cases, often involving surrogate decision makers and issues of life-prolonging care. In recent years, the number of consultations has been smaller than expected, probably a reflection that cases have become less difficult—not because the situations are less arduous for participants, but participants' confidence in their ability to find their own way has matured.

However, high-tech medicine is not the only aspect of health care that is seen through a window frequently smudged by unresolved ethical issues. Corporate issues inherent in the concept of managed care and complex health care providing organizations abound. Lest it become anecdotal, health care ethics needs to establish itself as the calculus of choice when the question is, "What, all things considered, ought we do with respect to these cases?" An ethics committee case consultation is a venue in which this calculus may be applied.

The ancient tradition of the caring part of health care which honors clinical consultation and rapid-fire clinical decision making does not highly value the "i" dotting and "t" crossing of written rules and agreements. However, such rules and agreements are the icons of prudence that health care providing organizations honor. Proponents of ethics committee case consultation cannot expect the activity to flourish and be integrated into this corporate environment unless it has corporate trappings.

For the purpose of this article, the argument that case consultation actually is mediation is presented as a brochure that an ethics committee might use to publicize its case consultation service. Appended to this article are 1) written rules which a committee might adopt to govern its case consultation, and 2) a sample of the interlocking written requests and agreements by which case consultation might be engaged.

## Introducing Ethics Committee Case Consultations: A Mediation Service

Ethics committee case consultation is a mediation service that the ethics committees of this hospital [and many other health care providing organizations throughout the country] make available to patients, families and staff.

Upon admission, we inform our patients that case consultation is available upon request should there be an impasse with respect to a health care action.

During initial staff orientations and through continuing staff education, we provide similar information to our staff.

### *What is ethics committee case consultation?*

It is a mediation in which participants use a neutral third party to help them work through an impasse, adopt a care plan, or negotiate a health care problem's resolution. Mediation encourages candid give-and-take, which may include venting feelings, articulating interests, gathering facts, thinking creatively, clarifying disagreements, and finalizing agreements.

Patients, their families and health care professionals often request case consultations because they are unsure, or disagree, about the right course of action. There could be many reasons for this, including

- multiple parties involved in the impasse
- a clinically complex health care situation
- an impasse burdened with emotional intensity

### *Additional facts about ethics committee case consultation:*

**It's free.** The ethics committee provides its case consultation service without charge to patients and staff.

**It's private and confidential.** From start to finish, noth-

ing a participant, the mediator or a participant's representative says, nor the documents they share during case consultation, can be used in court.

**It's voluntary and non-binding.** No one is obliged to mediate, and those who do can withdraw at any time. Mediators don't judge cases or impose outcomes. Case consultation doesn't force patients, staff, or family members to change their minds. When case consultation works, it's because the participants have allowed it to.

**It's neutral.** Neither the ethics committee nor the mediators who conduct the consultation have any stake in the outcome of mediated cases, and the mediating process itself is fair.

**It's informal, flexible and harmonizing.** Case consultation handles large and small, simple and complex cases efficiently and inexpensively. Because it's flexible, participants may devise more customized solutions than they would obtain in court. Mediation's harmonizing quality lends itself to re-establishing working family and professional relationships.

### *When does case consultation work?*

Case consultation doesn't produce miracles, but it has proved useful in resolving many impasses involving patients, their families, and health care providers. Case consultation has proved particularly useful in cases where the participation of several people is crucial, where the clinical facts are especially complicated, where the impasse reflects differing values, or when there are particularly hard feelings among family members or between a patient and health care provider.

### *How does case consultation work?*

Usually requests to mediate are made when a patient or her surrogate and her health care providers cannot agree on a course of care or a specific health care action. However, a case consultation may be requested at any time by a patient, a patient's surrogate decision-maker, or a staff member of the hospital. Once requested and agreed to, the procedure works as follows:

- The Ethics Committee Case Consultation Rules refer to the individual who requests mediation and the person(s) with whom the impasse exists as necessary participants. Other family and staff members may be invited to participate. Patients, or their surrogate decision makers, and primary care providers are frequently invited.
- During pre-consultation interviews, the participants provide the case consultation service with enough clinical and ethical information to introduce their impasse.
- Using information obtained in these interviews, the case consultation service prepares a brief statement of the situation for the participants.
- The ethics committee hosts a meeting of the participants at a mutually convenient time and place. Members of the ethics committee, serving as co-mediators, conduct this face-to-face meeting. Although representation isn't required, if a participant wants an advisor to be present, they're welcome. Usually, the impasse is resolved, agreements are reached, and the consultation is wrapped-up in one meeting. Follow-up sessions may be held. Occasionally a consultation concludes without agreement.

- After the face-to-face meeting is completed the ethics committee members who co-mediated will prepare:

-- a confidential, written "Basic Understanding" that describes any agreements reached. The participants can use the "Basic Understanding" as a guide when they complete whatever documentation is needed.

-- a non-confidential, written "Summary of Face-to-Face Consultation" which establishes the consultation's termination point, establishes a time line for actions described in the "Basic Understanding," and identifies the person whom the participants have agreed will be responsible for overseeing implementation of their agreement.

#### *How formal is case consultation?*

As previously mentioned the consultation process is very flexible, and its setting is informal. However, to insure that it is a confidential, voluntary, and non-binding event, each consultation begins with a written request, everyone who agrees to participate does so in writing, and every consultation is governed by the Ethics Committee Case Consultation Rules.

## Appendix A

### *Ethics Committee Case Consultation Rules*

#### 1. Setting

The ethics committee of this hospital operates a mediation service for the benefit of its patients, their families, and its staff (the participants). The service is known as ethics committee case consultation.

#### 2. Case Consultation = Mediation

Case consultations are mediations which begin when the ethics committee receives a written request. The person making the request and the person(s) with whom the requesting person is at an impasse are nec-

essary participants. (Frequently patients or their surrogates, their primary care providers, and family members are necessary participants.) Since case consultation is voluntary, a necessary participant may terminate it at any time. When not terminated earlier, case consultation continues through the termination point recited in the Summary of Consultation (the Summary) which is described below in paragraph 15.

#### 3. Agreement of Participants

When participants engage the ethics committee's case consultation service to mediate an impasse, these rules are part of and govern the engagement.

#### 4. Initiation of Mediation

A case consultation is initiated by a participant's written request directed to the ethics committee.

#### 5. Request for Case Consultation

Requests for case consultation affirm an impasse among participants.

#### 6. Panel of Mediators

The ethics committee members comprise a panel of mediators. The ethics committee engages two or more panelists to co-mediate face-to-face consultations; at least one co-mediator will be a clinician.

#### 7. Neutrality of the Mediator

Neither the ethics committee nor any co-mediating panelist has a financial or personal stake in a case consultation. Should circumstances adversely affect a panelist's perceived neutrality, the ethics committee may engage another panelist.

#### 8. Vacancies

If a panelist is unwilling or unable to serve, the ethics committee will engage another. If circumstances adversely affect a panelist's ability to promptly convene a face-to-face consultation, the ethics committee may engage another panelist.

#### 9. Representation

Participants may elect to have a representative present at their case consultation by identifying the representative(s) to the ethics committee. To encourage representation at case consultations, these rules are intentionally permissive concerning acceptable representatives and their roles.

#### 10. Time and Place of Case Consultation

Face-to-face consultations are scheduled for times and places mutually agreed upon by the participants.

#### 11. Identification of Impasse

Prior to face-to-face consultation, the case consultation service provides the participants, representatives and panelists with an Overview of impasse (the overview) that places the impasse in a clinical context and identi-

fies issues that need to be resolved. The Overview is the product of the case consultation service's acquisition and exchange of relevant information from and among the participants. Prior to face-to-face consultation, the participants will provide sufficient information for the case consultation service and the panelists it has engaged to understand the issues. Panelists may seek expert advice concerning clinical aspects of an impasse; arrangements for obtaining such advice are made by the ethics committee.

#### 12. Authority of Mediator

*Neither the ethics committee nor any panelist is authorized to resolve an impasse.* However, to help the participants resolve their impasse, panelists may caucus with them and suggest possible actions.

#### 13. Privacy

Face-to-face consultation is private. However, if every participant consents, persons other than participants and their representatives (such as a family pastor) may attend.

#### 14. Confidentiality

The information which participants disclose during a case consultation is confidential. Any records, reports, and other documents received are confidential. Neither the ethics committee nor a panelist may be compelled to divulge such records or testify concerning a case consultation in an adversary proceeding or judicial forum. Neither the ethics committee nor any panelist shall cause information provided by a participant to be shared without the participant's prior consent. *However, no independently discoverable fact shall be immune from discovery by virtue of its having been disclosed in a case consultation.*

Participants maintain and respect the consultation's confidentiality in the following ways:

- (a) They shall not rely upon, introduce as evidence in an arbitral, judicial, administrative or other proceeding, or adopt for purposes of regulatory compliance:

- (i) another participant's views or suggestions concerning an impasse's possible resolution;
- (ii) admissions made by another participant in the course of the consultation;
- (iii) suggestions or views expressed by the ethics committee or by a panelist;
- (iv) statements concerning another participant's indicated willingness or unwillingness to accept suggestions made by a panelist;
- (v) an overview or "Basic Understanding" produced as part of the case consultation service.

- (b) They shall not seek to discover the records, reports or other documents received by the ethics committee or by a panelist.
- (c) They shall not seek to compel the ethics committee or a panelist to testify concerning the consultation.
- (d) They shall not reveal records, reports, documents or other information arising out of the consultation to any non-participant, except their own attorney, unless there is a court order ordering disclosure, or unless the participants agree in writing to a disclosure.

#### 15. Summary of Face-to-Face Consultation

At the conclusion of a face-to-face consultation, the panelists prepare a summary. The summary's purpose is to establish, in a reliable document, the consultation's termination point, to fix responsibility for implementation oversight and to establish an implementation time line. The summary is specifically declared exempt from these rules' provisions concerning privacy and confidentiality.

#### 16. No Stenographic Record

No stenographic or other verbatim record shall be made of a case consultation.

#### 17. Termination of case consultation

Consultations are terminated:

- (a) upon the participants' agreement;
- (b) upon determination by the case consultation service or a panelist that further efforts to mediate are not worthwhile;
- (c) upon a necessary participant's withdrawal from the consultation; or
- (d) as provided in the summary.

#### 18. Exclusion of Liability

Neither the ethics committee nor any panelist is a necessary party in judicial proceedings relating to a consultation conducted under these rules. Neither the ethics committee nor any panelist shall be liable to a participant for any act or omission in connection with a consultation conducted under these rules.

#### 19. Interpretation and Application of Rules

Panelists interpret and apply the rules insofar as they relate to their duties and responsibilities. Otherwise, the ethics committee interprets and applies the rules.

#### 20. Expenses

Participants are responsible for their costs of participating in a case consultation. The ethics committee is responsible for all other case consultation costs.

## Appendix B

### *Patient's Request for Case Consultation*

To the Hospital Ethics Committee:

1. I am a patient (or the surrogate for a patient) of the hospital.
2. \_\_\_\_\_ (member(s) of the hospital's staff or member(s) of my family) and I are at an impasse with respect to a health care action.

3. The ethics committee operates a mediation service for the benefit of the hospital's patients, their surrogates, and families and hospital staff (collectively, participants). The service is known as a case consultation service.

4. The ethics committee members comprise a panel of mediators. The ethics committee engages members of this panel to conduct its case consultations.

5. I request that the ethics committee arrange and conduct a case consultation with me and the person(s) named in paragraph 2.

6. I authorize the ethics committee to invite others to be participants in the case consultation whom it thinks will be helpful in resolving the impasse.

7. I authorize the ethics committee to solicit, obtain and verify whatever information and documents relating to his/her health care situation which the ethics committee deems useful in preparing for the requested consultation.

8. I authorize my health care providers to provide requested information to the ethics committee.

9. I authorize the ethics committee to share information and documents obtained pursuant to paragraphs seven and eight with the other participants in the requested consultation.

10. I agree to respect the confidentiality of the case consultation process by:

(a) not seeking to discover the records, reports, or other documents received by the ethics committee or by a panelist;

(b) not seeking to compel the ethics committee or any panelist to testify concerning the consultation; and

(c) not relying upon or using as evidence: proposals or opinions concerning the impasse's

resolution whether expressed by another participant, by the ethics committee, or by a panelist; the responses to such proposals and opinions; or the admissions of other participants.

11. The ethics committee has published Ethics Committee Case Consultation Rules. I acknowledge receiving a copy of the rules, which are incorporated by reference into and made part of my request for case consultation.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Patient's Signature

## THE FAR SIDE

By GARY LARSON



As his eyes grew accustomed to the dark, Death suddenly noticed his girlfriend sitting with Dr. Jack Kevorkian.

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