Futility: The Limits of Mediation

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Futility: The Limits of Mediation

In a recent issue of *CHEST* (December 2007), Burns and Truog[1] argue that the history of futility can be divided into three sequential periods: the definitional approach, the procedural approach, and the conflict resolution approach. We agree that attempts to define futility have failed and we agree that the Texas Advance Directives Act's procedural approach fails to accord necessary due process protections. But the last two stages in Burns and Truog's schema should be reversed. Recognition of mediation's limits at the end of life has given rise to procedurally-based legislative initiatives, not the other way around.

Although Burns and Truog acknowledge that "even impeccable efforts at negotiation may sometimes fail," they nonetheless point to mediation as the medical communities' last, best hope in dealing with the most difficult of surrogate requests for non-beneficial treatment. Their romantic embrace of mediation is, perhaps, unsurprising. Mediation has been touted in many quarters as the magic band-aid ideally constituted to solve bioethics' most confounding conflicts. But if by mediation we mean a process in which both sides work to find a creative solution that differs in some way from their initial starting points, then that is not happening in a significant and expanding subset of cases. Rather, in this subset of intractable futility cases, disputant bargaining invariably leads to a predictable outcome. Providers accede to surrogates' adversarial positioning and the patient receives the demanded treatment.

We must stop asking mediation to do more work than it is structurally equipped to handle. In most jurisdictions (other than Texas) the mediation of futility disputes occurs in the shadow of health care decisions law that gives vastly more bargaining power to surrogates. Normative uncertainty in the judicial realm buoys surrogates propelled by strong emotion and fierce moral conviction. The same uncertainty feeds providers' risk-aversion, leading them to back-down in the face of strongly-worded surrogate demands.[2]

Whether meant as historically descriptive or normatively prescriptive, Burns and Truog's evolution of futility inverts the order of the process. Mediate and accede is the status quo. Procedural approaches work to buttress clinical authority by strengthening providers' BATNA (best alternative to negotiated agreement) and supplying needed bargaining chips. If we want "real" mediation, then we must equalize the bargaining power between providers and surrogates by giving providers a clearly-defined statutory safe harbor to unilaterally refuse requests for inappropriate treatment.

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[1] Burns JP, Truog RD. Futility: a concept in evolution. Chest 2007; 132:1987-1993

[2] Pope TM, Waldman EA. Mediation at the end of life: getting beyond the limits of the talking cure. Ohio State J. on Dispute Resolution 2007; 22:143-194