

10-1-2011

The Path Between Sebastian's Hospitals: Fostering Reconciliation After a Tragedy

Jonathan R. Cohen

University of Florida Levin College of Law, cohenjr@law.ufl.edu

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>

 Part of the [Health Law Commons](#), [Law and Society Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Jonathan R. Cohen, *The Path Between Sebastian's Hospitals: Fostering Reconciliation After a Tragedy*, 17 *Barry L. Rev.* 89 (2011), available at <http://scholarship.law.ufl.edu/facultypub/166>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

THE PATH BETWEEN SEBASTIAN'S HOSPITALS: FOSTERING RECONCILIATION AFTER A TRAGEDY

*Jonathan R. Cohen**

INTRODUCTION

On October 8, 2007, Horst and Luisa Ferrero brought their healthy, but short, three-year-old son Sebastian to a university hospital for a “routine” test to determine whether he lacked human growth hormone.¹ Two days later, following a tragic string of errors, Sebastian was pronounced brain dead. Approximately two weeks later, the hospital offered a detailed public apology to the parents for Sebastian’s death. Several months after the apology, the parents began working collaboratively with the hospital to improve patient safety at the hospital and to advocate for a new children’s hospital in their community. This article is a case study of these events, both the tragic events that led to Sebastian’s death and his parents’ inspiring response to that tragedy. Based upon extensive interviews conducted with people on both sides of the case (including the bereaved family, their attorneys, and their friends, as well as hospital physicians, administrators, and risk managers), I use this case to illustrate three fundamental lessons related to client service. These are (i) the role of community in healing and legal decision-making, (ii) the centrality of caring to the vocation of lawyering, and (iii) the importance of non-monetary interests, in particular meaning-making, to many clients. There are other important lessons to be found in this case as well, including the importance of listening in law and medicine, the positive effect that taking rather than denying responsibility for errors can have on preventing future errors, and, most fundamentally, the transformative potential of reconciliation. Yet here I focus on the three lessons mentioned above, for this case illustrates them powerfully.

The structure of this paper is as follows: Part I begins with some background on Sebastian and his family. It then turns to Sebastian’s medical history prior to the test, the tragic test, the hospital’s public apology, and the Ferrero family’s decision to work for greater patient safety at the hospital and to work to build a new children’s hospital in their community. Part II explores in greater detail the events following Sebastian’s death through the lens of the three legal lessons mentioned above. Part III briefly suggests several other legal lessons found in this case. At the

* Professor of Law, University of Florida, Levin College of Law, Gainesville, Florida. A.B., J.D., and Ph.D., Harvard University.

1. Except as otherwise noted, the information regarding the Ferrero family in the following section is based upon an interview with Horst and Luisa Ferrero, in Tioga, Fla. (Oct. 10, 2008).

article's end, I offer some concluding reflections on Sebastian's case, as well as the story of a young man who was particularly touched by it.

I. THE PEOPLE AND EVENTS

A. Sebastian and His Family

Sebastian Alejandro Ferrero Cannella, the oldest child of Horst and Luisa Ferrero, was born on March 20, 2004. By all accounts, Sebastian was a joyful, vibrant child, whose ready laugh and smile elicited much joy from those around him. Sebastian was also a talented child, capable of understanding and communicating in three languages. While Sebastian was raised in the United States, his parents had emigrated from Venezuela. Horst spoke to Sebastian mostly in Spanish. Luisa spoke to Sebastian primarily in Italian, the language she had learned as a child in Venezuela from her Italian-born parents. Sebastian learned English in large part at his pre-school. When he was born, Horst and Luisa had chosen to name him "Sebastian" because Saint Sebastian was the patron saint of Horst's birth city of San Cristo, and also because Sebastian was an international name easily translated in different Romance languages: "Sebastiano" in Italian and French, and simply "Sebastian" in English and Spanish. Had Sebastian not died so young, he may well have led a cosmopolitan life. In his three short years, Sebastian had traveled with his family to no fewer than thirty countries and had taken cruises on the Baltic, Mediterranean, and Caribbean Seas. Though ultimately Horst hoped that Sebastian would follow a career of Sebastian's choosing, Horst imagined that with Sebastian's multi-cultural background and linguistic skills, Sebastian might grow someday to be a diplomat or ambassador. At the time of his death, Sebastian had only one sibling, a younger brother named Sergio. In 2008, Luisa gave birth to their third son, Santiago.

Horst and Luisa each came from very prominent Venezuelan families. One of Horst's grandfathers had served as President of the Venezuelan Congress and as Governor of a Venezuelan state. His other grandfather had been an appellate judge. Horst's father, Horst Ferrero Sr., was a lawyer, and his mother, Isaura Jaimes, was a diplomat. Luisa's father, Filippo Cannella, was an extremely successful businessman and a very generous philanthropist. Mr. Cannella was, among other things, the exclusive distributor of Yamaha musical instruments in Venezuela, owning some sixty stores. As a philanthropist, he funded schools to help underprivileged children learn to play musical instruments, an approach which helped trigger a revolution in Venezuelan classical music and has since become a model for the world.² Mr. Cannella died unexpectedly in 1994, and Luisa, then only eighteen years old, began helping her mother run the family business. Horst, trained as a lawyer in Venezuela, later received an L.L.M. in international business

2. On Venezuela's groundbreaking music program for underprivileged children, see generally *60 Minutes: El Sistema: Changing Lives Through Music* (CBS News television broadcast Apr. 13, 2008), available at <http://www.cbsnews.com/video/watch?id=4011959n&tag=mncol;lst;1>.

law from American University in Washington and an M.B.A. from the University of Florida.

Horst and Luisa met in their early twenties, and were married in 2001. In 2003, they immigrated to the United States, largely in response to the Chavez regime. In Venezuela, Horst had served as the general counsel and secretary of a large corporation (a joint venture between the Venezuelan government and an American parent company SAIC) that provided high-tech security services to much of the Venezuela oil industry. In the course of nationalizing the oil industry, Venezuelan President Chavez accused Horst's corporation of being a front for the CIA and threatened to jail its executives.³ At the time of the threat, Horst was traveling in the United States, where he opted to remain. Luisa soon joined him in America. They chose to settle in Gainesville, Florida because of their connections, both socially and in business, to the Diaz family. Miguel Diaz, now a man in his seventies, had been a close friend and business partner of Luisa's father, Filippo. One of their joint ventures was a large development on the outskirts of Gainesville called Town of Tioga, an award-winning, residential community containing roughly three hundred homes and two dozen businesses.⁴ At the time of Sebastian's death, Horst and Luisa worked together with the Diaz family as co-owners of the development, running the operation and overseeing its many business decisions.

Horst and Luisa were deeply devoted to their son, and from the time he was born, Sebastian was at the center of their lives. The Town of Tioga offices, where Luisa worked, were not far from their home, and as she put it:

I would leave anything just to be with [Sebastian]. I would just go home with joy and [couldn't] wait to be with him. Weekends would come and that was the best because I knew that I wouldn't have to work and did not have anything to do but just to be with him.

Horst was a tremendously devoted father who relished spending time with Sebastian, frequently with camera in hand.⁵ Many parents take pictures of their children, but in the course of interviewing Horst and Luisa, I learned that they (primarily Horst) had taken approximately three thousand images of Sebastian. I never knew Sebastian, but I have seen some of the images and video footage of

3. For background on the Chavez-SAIC conflict, see Bruce V. Bigelow, *SAIC to Recoup Some Losses in Venezuela Deal*, SAN DIEGO UNION-TRIBUNE (July 20, 2004), available at http://www.signonsandiego.com/uniontrib/20040720/news_1b20saic.html.

4. See Tioga Town Center Home Page, <http://tiogatowncenter.com> (last visited Dec. 16, 2010); <http://townoftioga.com/newsletter-new/Spring06.pdf>; see Tioga Town Center Home Page, <http://tiogatowncenter.com> (last visited Dec. 16, 2010); Town of Tioga Awards, <http://tiogatowncenter.com/awards.php> (last visited Nov. 6, 2011); Town of Tioga Master Plan, <http://townoftioga.com/town-tour/master-plan> (last visited Nov. 6, 2011); Town of Tioga Business Listing, <http://tiogatowncenter.com/ShopsAndBusinesses.php> (last visited Nov. 6, 2011).

5. Interview with Gilbert Levy, in Tioga, Fla. (Aug. 26, 2009).

him.⁶ Throughout, Sebastian appears as a boy beaming with joy, vitality and laughter, often surrounded by one if not both of his loving parents.

The first time I interviewed Horst and Luisa together was on October 10, 2008, one year to the day after Sebastian died. As we spoke in their home, I asked Luisa at one point how she tried to parent Sebastian. She shared with me a story from the last time she picked up Sebastian from pre-school and drove him home in the back seat of their car:

It was raining and I opened the window [a bit] and the rain started coming in and he loved it. And you know how it used to be, “Don’t get wet [because] you’re going to get cold,” or, “You know it’s not good to get wet,” or, “You know it’s not good to go out because it’s raining.” And so I shut the window. And he started crying because he wanted the rain and he said, “Why not?” So all the way home I kept the window open and he loved it and it was like—it’s like I would think to myself, “Man, if another mom would see me doing this she would think I am crazy.” But now I am so glad I did this because we were laughing in the car and he was just enjoying the rain which is something so simple. And so when we got home I told him, “Don’t tell Dad.” And so I just dried him up and it was just that moment that you actually enjoyed . . . what life is about.⁷

B. The Medical History

On February, 27, 2006, one month shy of Sebastian’s second birthday, Horst and Luisa brought Sebastian to the University of Florida’s teaching hospital, Shands at UF, for evaluation. Referred by Sebastian’s pediatrician, they arrived at the outpatient pediatric clinic where Sebastian was seen by Dr. Donald Novak, the pediatric department’s vice-chair for clinical affairs and medical director of that clinic. Dr. Novak examined Sebastian and found that while he was a “happy, well-appearing child in no distress,” he was also, “a youngster who clearly has fallen off of his growth curve.”⁸ Dr. Novak referred Sebastian for further evaluation by Shands’ Department of Pediatric Endocrinology, a national leader in the field.⁹ Sebastian was seen by Dr. Janet Silverstein, a highly-accomplished, experienced physician and chief of the pediatric endocrinology department.¹⁰ Over the next year and a half, Sebastian was evaluated three times and consistently appeared a happy and healthy, but small, child. Sebastian’s height of 86.7 centimeters (34.1 inches)

6. See Sebastian Ferrero Foundation, <http://www.sebastianferrero.org/videos.php> (last visited Jan. 23, 2012).

7. Interview with Horst and Luisa Ferrero, *supra* note 1.

8. Clinical Note of Dr. Donald Novak (Feb. 27, 2006) (on file with author).

9. See Diane Chun, *Shands at UF Ranks 12th Nationally in Pediatric Endocrinology Programs*, GAINSEVILLE SUN (June 4, 2010) available at <http://www.gainesville.com/article/20100604/articles/6041019>.

10. See About Janet Silverstein, MD, <http://diabetes.ufl.edu/research/research-2/janetsilverstein/> (last visited Jan. 23, 2012).

put him below the first percentile for a child of his age, and his weight of 11.5 kilograms (25.4 pounds) put him at the third percentile. Further, his growth velocity of 4.1 centimeters per year was “3 standard deviations below the mean” and judged to be “inadequate.” On August 20, 2007, Dr. Silverstein ordered that Sebastian be tested for a deficiency of human growth hormone (HGH). It was not that Sebastian was currently ill, but an HGH deficiency could produce medical problems later in life, problems which might be averted through HGH supplementation.

C. The Medical Tragedy

On the morning of Monday, October 8, 2007, Horst and Luisa brought Sebastian to the hospital’s outpatient pediatric clinic for testing. Human growth is controlled principally by the pituitary gland. The test was to work by giving Sebastian an intravenous infusion of a synthetic version (“R-Gene”) of arginine, a naturally-occurring amino acid. The presence of arginine in the bloodstream indirectly triggers a reaction of the pituitary gland.¹¹ By judging the extent of the pituitary’s reaction, the question of whether Sebastian lacked HGH could be determined.

As mentioned, three-year-old Sebastian weighed 11.5 kilos (25.4 pounds), and Dr. Silverstein had ordered that Sebastian be given 5.75 grams of arginine, the proper amount for a boy his weight. However, at the clinic where the test was to be performed, two bottles of arginine arrived from the hospital’s pharmacy bearing confusing labels. The bottles did indicate that Sebastian was to receive 5.75 grams of arginine, but the bottles labeled “1 of 2” and “2 of 2” contained a combined total of 60 grams of arginine, more than ten times what was necessary for the test. (Why so much arginine was sent from the hospital’s pharmacy to the outpatient pediatric clinic is itself a complex story involving both an unusual series of events and poor system design. Though it has since been changed, at the time, the hospital had nurses calculate dosage levels on the clinic floor rather than employing “unit dosing,” which requires the pharmacy to dispense only the amount the patient is to receive.)

Perhaps it was a mother’s intuition, or perhaps it was simply seeing the large amount of arginine sent—the 60 grams of arginine (600 milliliters in a 10% solution) amounted to slightly more than two and one half cups of fluid—but before the test began Sebastian’s mother Luisa asked the nurse whether the two full bottles were the right amount to be given to her small child.¹² The nurse, who had only administered such a test once before, assured her that both bottles were to be given, for they bore the labels “1 of 2” and “2 of 2”, and proceeded on that basis.¹³ As Luisa recalled, “I questioned the nurse because it seemed like two bottles was a lot of medicine for a 3-year-old. The nurse checked and thought she was doing the

11. Interview with Dr. Janet Silverstein, in Gainesville, Fla. (Mar. 8, 2009).

12. Horst Ferrero, Chronological History of Errors and Events Surrounding the Death of Sebastian Ferrero 10/10/2007, Feb. 26, 2008 (unpublished manuscript) (on file with author).

13. *Id.*

right thing and started doing the test. As a mom, I questioned her but trusted what she told me.”¹⁴

As the test progressed, Sebastian complained that his head hurt, and his parents again asked whether the test was being conducted properly. The nurse assured them that it was. Three quarters of the way through the test, Sebastian was showing sufficient signs of distress that Horst insisted that the test be stopped and a doctor be called to double-check the procedure. The attending physician on the floor—not the boy’s pediatric endocrinologist Janet Silverstein—arrived. The physician did not enter the room to examine what infusion Sebastian was actually receiving.¹⁵ Instead, she examined the boy’s medical chart on the wall outside the room and asked the nurse what the boy was being given. The chart and nurse both indicated that 5.75 grams of arginine were to be administered. The attending physician told the family that this was the right amount for a child Sebastian’s size. She stated that headaches were a normal side effect of the test.¹⁶ She stated further that while they could stop the test, if they did, the results would be invalid, which would mean they would have to bring Sebastian back to be tested a second time, which would again cause him headaches. Horst and Luisa consented to resuming the test, and all 60 grams of arginine were administered.¹⁷

When used properly, arginine is an effective and safe diagnostic agent. The level Sebastian was given, however, was anything but safe. Over the next four hours in the hospital, Sebastian exhibited a number of symptoms, including frequent urination, fatigue, rolling his eyes back, and headache.¹⁸ The nurse told the parents that these were normal side effects of the test, and in the early afternoon, Sebastian was discharged from the hospital and his parents took him home. As the day continued, Sebastian’s symptoms worsened to include severe vomiting and strange, rigid body posturing.¹⁹

At approximately 11:30 p.m. that evening, Horst and Luisa brought their son to the emergency room at Shands AGH, another hospital within the Shands system where access to medical treatment would be faster than at the main Shands hospital

14. Statement of Luisa Ferrero, as quoted in Karen Dooley, *How One Boy Changed the College of Medicine*, FLORIDA PHYSICIAN, Fall 2008, available at <http://floridaphysician.med.ufl.edu/2008/12/features/how-one-boy-changed-the-college-of-medicine/>.

15. *Id.*

16. *Id.*

17. *Id.* I have occasionally been asked whether the Ferreros’ ethnic or linguistic background (while both Horst and Luisa are fluent in English, English is their second language) influenced Sebastian’s treatment, e.g., would their concerns have been heeded if they had been white, native-English speakers? At one public forum, an audience member posed this very question to Horst and Luisa, viz., “Do you feel like ethnicity or your English as a second language played any role in the communication breakdown with the healthcare providers?” Horst answered, “It’s a very good and valid question,” and then proceeded to describe a lecture he had attended at the invitation of the medical school dean in which statistical research on the role of race and ethnicity in disparate medical care was presented. Horst did not specifically answer whether he thought such factors played a role in Sebastian’s case, but stated that he hoped “that a new generation of doctors will be able to eliminate bias based on appearance, based on race, based on ability to speak a language.” Following Horst, Luisa made clear that she did not believe Sebastian’s mistreatment was related to English being their second language. “In our case,” said Luisa, “English was not a problem. It was not a miscommunication in language.” Horst and Luisa Ferrero, Remarks at the University of Florida College of Medicine Patient Safety Grand Rounds (Oct. 29, 2008).

18. *Id.*

19. *Id.*

where the test had been performed. A number of additional mishaps occurred over the next two days, but, in the view of Dr. Silverstein, once the 60 grams of arginine had been infused, “the die had been cast.”²⁰ Even had the healthcare providers instantly recognized the arginine overdose—which they did not—and immediately taken remedial measures such as starting dialysis to remove arginine from his blood or administering an alkaline agent to counteract the acidosis the arginine produced, Dr. Silverstein, who worked nearly round the clock over the next two days caring for Sebastian and attempting to establish what had happened to him, did not believe they could have prevented the boy’s death.²¹ At the dosage level given, arginine causes a strong inflammatory reaction at the cellular level.²² That reaction produced a severe swelling of the brain tissue, causing the brain to push down toward the spinal cord and herniate at its base.²³ At approximately 4:00 a.m. on the morning of Wednesday, October 10, Sebastian’s pupils became fixed and dilated.²⁴ Several hours later, he was declared brain dead. Horst and Luisa consented to donate Sebastian’s organs, and on the following day, Thursday, October 11, he was removed from life support.

D. In the Aftermath of Sebastian’s Death

There is little doubt that the death of a child is among the most traumatic things a person can experience. How is it that people can go forward after that? I doubt there is one answer to that question. Just as with ordinary losses, different people cope with extraordinary losses in different ways. Later I shall describe in more detail how the Ferrero family, assisted by their family and friends, coped with Sebastian’s death, both in the immediate aftermath of the loss and in the years ahead. For now, however, let me begin with some of the significant events that followed in the aftermath of Sebastian’s death. Some of these events concern actions of the hospital, and some concern actions of the Ferrero family.

On the early morning of Wednesday, October 10, Sebastian was declared brain dead, but despite numerous attempts, which I will not detail here, it was not until shortly thereafter that Dr. Silverstein could establish the cause, namely, the arginine overdose. At that point, before she met with the bereaved family, Dr. Silverstein phoned the University’s Self-Insurance Program (“SIP”) to inform them of and discuss the tragedy.²⁵ Attorney Kemal (“Kim”) Yozgat, Senior Associate

20. Interview with Dr. Janet Silverstein, *supra* note 11.

21. *Id.*

22. *Id.*

23. *Id.*

24. Ferrero, *supra* note 1.

25. This step of the physician contacting risk management prior to disclosure to the patient was in keeping with SIP’s overall approach. *See* Disclosure of Adverse Events and Accountability in Medical Care, (Univ. of Fla. Self-Insurance Program, Dept. of Risk Mgmt. and Loss Prevention, 2008) (on file with author) (listing consultation with risk management as the first step in the disclosure process). Such pre-disclosure consultation with risk management should not be misinterpreted as a policy of silence. In the views of both the SIP’s Director Martin Smith and Associate Director Attorney Kim Yozgat, the SIP has long taken a pro-disclosure approach following investigation. Interview with Martin Smith, in Gainesville, Fla. (Nov. 4, 2008); Interview with Kim Yozgat, in Gainesville, Fla. (June 19, 2009). For example, the Self-Insurance Program’s brochure for medical

Director of the SIP, spoke with her. Dr. Silverstein told him that Sebastian's death was caused by an arginine overdose. "Are you sure it's an arginine overdose?" Yozgat asked. She told him it was. "If so," he counseled, "then tell them everything we know."²⁶ Yozgat's advice was consistent with Florida law, which requires hospitals and health care providers to disclose adverse incidents resulting in serious harm to patients and, in cases of death, to their loved ones.²⁷ It was also consistent with the growing national trend toward disclosure and apology after medical error.²⁸ Unlike many lawyers and risk managers who, historically at least, adopted the approach of "deny and defend,"²⁹ the pro-disclosure message from Yozgat was clear: be candid about what occurred.³⁰

personnel on responding to adverse events reflects a pro-disclosure stance, discussing the legal and ethical duties of disclosure, steps to take when disclosing, and the possible benefits of disclosure (e.g., "Patients not only want to know the truth about adverse outcomes of care, they have a right to know. What do they want? —the "Five A's": Acknowledgement, Apology, All the facts, Assurances and in some cases, Appropriate compensation. They also want to know how it will affect them in the future and what will be done to prevent it from happening again."); see Disclosure of Adverse Events and Accountability in Medical Care.

26. Yozgat, *supra* note 25.

27. See FLA. STAT. ANN. §§ 395.1051, 456.0575 (West 2003) (requiring hospitals and health care providers to notify patients of "adverse incidents that result in serious harm to the patient" while simultaneously providing that such a disclosure "shall not constitute an acknowledgment or admission of liability, nor can it be introduced as evidence.")

28. While disclosing errors to patients has long been consistent with, if not required by, medical ethics, it is only within the last decade that a concerted effort has been made to move actual practice closer to that ideal. On the growing use of disclosure and apology within medicine, see, e.g., Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 *FORDHAM URB. L.J.* 1447, 1464–69 (2000); Thomas H. Gallagher & Wendy Levinson, *Disclosing Harmful Medical Errors to Patients: A Time for Professional Action*, 165 *ARCHIVES OF INTERNAL MED.* 1819 (2005); Thomas H. Gallagher, David Studdert & Wendy Levinson, *Disclosing Harmful Medical Errors to Patients*, 356 *NEW. ENG. J. MED.* 2713, 2713 (2007); Marlynn Wei, *Doctors, Apologies and the Law: An Analysis and Critique of Apology Laws*, 40 *J. HEALTH L.* 107, 110–13 (2007); Lucinda E. Jesson & Peter B. Knapp, *My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors and Medical Apologies*, 35 *WM. MITCHELL L. REV.* 1410, 1417 (2009); Maria Pearlmutter, *Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence*, 72 *OHIO ST. L.J.* 687 (2011); see also Sorry Works! Coalition Home Page, www.sorryworks.net (last visited Mar. 19, 2012) (describing the efforts of the Sorry Works! Coalition, a national advocacy organization for open disclosure and apology after medical error). Where errors are catastrophic in nature, a proactive approach of early open disclosure and apology seems particularly appropriate, see Jim Golden, H. Abigail Moy & Adam Lyons, *The Negotiation Counsel Model: An Empathetic Model for Settling Catastrophic Personal Injury Cases*, 13 *HARV. NEGOT. L. REV.* 211 (2008). Mandatory notifications laws such as Florida's notwithstanding, *supra* note 27, helping hospitals and physicians to embrace apology is no simple task. For some excellent training materials designed for medical and other professionals, I recommend the video series "First, Do No Harm" created by the Partnership for Patient Safety. See Partnership for Patient Safety, http://www.p4ps.org/FDNH_Films.html (last visited Mar. 25, 2012). Finally, I should note that the logic of proactively taking rather than denying responsibility for errors is by no means limited to medical errors. See generally Jonathan R. Cohen, *Advising Clients to Apologize*, 72 *S. CAL. L. REV.* 1009 (1999); Jonathan R. Cohen, *The Culture of Legal Denial*, 84 *NEB. L. REV.* 247 (2005).

29. On the history of the "deny and defend" employed by many medical defendants and insurers, see Thomas H. Gallagher, *A 62-Year-Old Woman with Skin Cancer Who Experienced Wrong-Site Surgery: Review of Medical Error*, 302 *JAMA MED. ASS'N* 669, 670 (2009) ("Widespread consensus [now] exists that [patients who suffer from medical errors] should receive prompt, full disclosure of the error and a sincere apology, a marked departure from the profession's historical 'deny and defend' response.") and citations therein; Albert Wu, I-Chan Huang, Samantha Stokes & Peter J. Pronovost, *Disclosing Medical Errors to Patients: It's Not What You Say, It's What They Hear*, 24 *J. GEN. INTERN. MED.* 1012, 1012 (2009) ("Research suggests that following an adverse event, patients want an apology, an explanation of what happened and someone to take responsibility. Practice appears to fall short of this, with less than a third of patients even told about harmful errors, and wide variation in what physicians choose to disclose.") and citations therein; Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 *SAN DIEGO L. REV.* 137, 154–55 (2009). For a rich narrative example where full disclosure after medical error was not forthcoming and the associated harm

Silverstein soon met with Horst and Luisa, and their close friend Miguel Diaz, to tell them that Sebastian's death had been caused by an arginine overdose. "I felt that I [needed to do this] because I was his doctor," said Silverstein.³¹ Together with the family, Silverstein wept. An experienced physician, Silverstein had seen patients die before, but facing Horst and Luisa after Sebastian's death was, "the hardest experience of my life."³² Later that day, Arlene Smillov, a former nurse now working at the SIP, arrived and told the family that they were sorry, that they took "full responsibility" for what happened, and that they would investigate the case fully.³³ In the ensuing weeks and months, numerous hospital officials—but not the pharmacist, nurse or attending physician³⁴—would offer their sympathies to the Ferrero family. This included condolences from the highest ranking members of the hospital, including Shands CEO Timothy Goldfarb, University of Florida College of Medicine Interim Dean Michael Good, and University of Florida Senior Vice President for Health Affairs Douglas Barrett.³⁵

On Thursday, October 25, just two weeks after Sebastian's death and after intense and rapid internal deliberations, the hospital, with the consent of the bereaved family, held a press conference. A panel of somber hospital officials watched as Dr. Donald Novak, the medical director of the outpatient pediatric

of non-disclosure to the decedent's widow, see SANDRA GILBERT, *WRONGFUL DEATH: A MEMOIR* (1997) (describing the largely-fruitless attempts of a widow to learn through litigation the details of her husband's death after a routine medical procedure).

30. While in retrospect it may seem almost unimaginable for Dr. Silverstein, and later the hospital publicly, *not* to have candidly disclosed the details of and apologized for Sebastian's death, accidental injuries, even those resulting in death, are not always dealt with through candid disclosure and apology. The history of the first "apology law" [viz., Massachusetts General Law chapter 233, Section 23D ("Admissibility of Benevolent Statements, Writings, or Gestures Related to Accident Victims")] designed to exclude an apologetic expression of sympathy after an accident from admissibility into evidence, is telling. As Lee Taft describes:

In the 1970s a Massachusetts legislator's daughter was killed while riding her bicycle. The driver who struck her never apologized. Her father, a state senator, was angry that the driver had not expressed contrition. He was told that the driver dared not risk apologizing, because it could have constituted an admission in the litigation surrounding the girl's death. Upon his retirement, the senator and his successor presented the legislature with a bill designed to create a "safe harbor" for would-be apologizers.

Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 *YALE L.J.* 1135, 1151 (2000). For further discussion of such laws, including laws that exempt fault-admitting apologies from evidentiary admissibility, see Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 *U. CIN. L. REV.* 819 (2002). Such laws have since spread, particularly in the medical malpractice realm, where some states have adopted special provisions to exempt even fault-admitting apologies, rather than just apologetic expressions of sympathy, in cases of medical error. See Jonathan R. Cohen, *Toward Candor after Medical Error: The First Apology Law*, 5 *HARV. HEALTH POL. REV.* 21 (2004) (discussing the first such law); Jennifer K. Robbennolt, *Apologies, Attorneys, and Settlement Negotiation*, 13 *HARV. NEGOT. L. REV.* 349, 356–57 (2008) (categorizing different enacted apology laws and analyzing their import for legal practice).

31. Interview with Silverstein, *supra* note 11.

32. *Id.*; see also *infra* note 39.

33. Indeed, Smillov was responsible for securing the two poorly labeled bottles that led to Sebastian's death. Interview with Arlene Smillov, in Gainesville, Fla. (Nov. 4, 2008).

34. Though the hospital issued a public apology to the Ferreros, when I asked her approximately two years after Sebastian's death, Luisa stated that she and Horst had never received apologies from the pharmacist, nurse or attending physician, a fact she still found painful. Interview with Horst and Luisa Ferrero, in Tioga, Fla. (Aug. 26, 2009). That silence from those principally involved notwithstanding, the Ferreros still found a way to reconcile with the hospital as an organization.

35. Interview with Dr. Douglas Barrett, in Gainesville, Fla. (May 28, 2009).

clinic and the physician who had originally evaluated Sebastian at Shands, explained the details of Sebastian's death and publicly apologized to Sebastian's parents. The apology was a "negotiated" one—the text had been worked out in advance between the Ferrero family and the hospital—nevertheless, the apology was sincere. "To his mom, dad, younger brother and other family members," said Dr. Novak, "we extend our prayers, thoughts, and deepest sympathies. We take full responsibility for Sebastian's death and we are very, very sorry."³⁶ The apology itself was a full one rather than a half-baked one: the details of the tragedy were described and responsibility was accepted completely. Later I interviewed Dr. Novak and asked him how it felt to make the apology, specifically, whether he felt any better after making the apology. "No," he said. "It needed to be done—the right thing to do. The parents deserve[d] a lot more, but they deserve[d] at least that. But no, you don't feel any better [once the apology is made]."³⁷ Sebastian was still dead. Horst and Luisa had still lost their son.

On Tuesday, October 30, five days after the hospital's apology press conference (and less than three weeks after their son had died), Horst and Luisa wrote an extraordinary op-ed piece in Gainesville's primary newspaper describing their son Sebastian and the legacy they wanted to build for him.

On Oct. 10, we lost our beloved three year old son, Sebastian Ferrero . . . For the rest of our lives, we will thank God that we enjoyed Sebastian fully, while he was on loan to us and he lived an intense life filled with love and joy. It was almost as if we knew that he was going to last for such a short time on this earth. This tragedy has taught us that we need to live like him, genuinely and intensely, because we are here just in transit.³⁸

Their editorial, however, did not stop there. After relaying the circumstances under which Sebastian died, they *thanked* Shands for the manner in which Shands had dealt with them following Sebastian's death. "[The administrators at Shands] conducted their investigation in an ethical and thorough manner and we appreciate their honesty and expressions of sincere condolences." Further, they expressed their dream of building a legacy for Sebastian, a two-fold legacy that would include both improving patient care at the very hospital where their child died and building a "state of the art free-standing children's hospital" in Gainesville. Gainesville had no children's hospital, and the Ferreros believed that had Sebastian been treated at a children's hospital, the series of errors which led to his death might not have

36. Diane Chun, *Shands Issues Apology over Death of Boy*, GAINESVILLE SUN, Oct. 26, 2007, available at <http://www.gainesville.com/article/20071026/NEWS/710260328><http://www.gainesville.com/article/20071026/NEWS/710260328>.

37. Interview with Dr. Donald Novak, M.D., Shands at UF, in Gainesville, Fla. (May 4, 2009). Dr. Douglas Barrett, who also attended the press conference on behalf of the hospital, expressed a similar sentiment. "There's no relief [after making the apology]. . . . [Rather] it's what you do. . . . It is a responsibility that you have [in] this sort of position and [also] what as a human being you do." Barrett, *supra* note 35.

38. Horst and Luisa Ferrero, *Sebastian's Legacy*, GAINESVILLE SUN, Oct. 30, 2007, available at <http://www.gainesville.com/article/20071030/OPINION03/710300301>.

occurred. For example, had Sebastian been tested at a children's hospital, the pharmacist or the nurse might have been more sensitive to appropriate dosages for children versus adults. They hoped that a children's hospital would, "ensure that what happened to our child does not ever happen to any other child." They hoped too that there would be many others from the community who would be "willing to help us in that cause."

As I shall later describe in greater detail, over the next several months, in conjunction with the legal settlement, Horst and Luisa established the Sebastian Ferrero Foundation ("SFF"), a non-profit organization dedicated to pursuing that two-fold legacy. Indeed, they took the very money they received from the hospital in settlement of their son's death and donated it to that cause. More fundamentally, they also began devoting much of their time and energy to pursuing those dreams. Rather than narrating those events (i.e., the settlement of the case and its aftermath) directly, I shall now switch gears and present those events through the lens of the three legal lessons mentioned above. The reasons for this are essentially two-: First, looking at these events through more abstract lenses can help us better understand why these events unfolded as they did. Second, this approach helps to highlight some fundamental legal lessons this case may hold for other disputes.

II. THREE LEGAL LESSONS

This Part examines three fundamental legal lessons this case may hold for other disputes, namely, the role of community in healing and legal decision-making, the centrality of caring to the vocation of lawyering, and the importance of non-monetary interests, in particular meaning-making, to many clients. Before entering that analysis, however, it may be helpful to briefly discuss two issues. One concerns the hospital's organizational and legal structure, and the other concerns what one might call the highly atypical nature of this case.

Technically speaking, what I have referred to above as "the hospital" is not one legal entity but two interwoven ones: (1) a private, not-for-profit hospital ("Shands at UF") which is part of the Shands HealthCare system and (2) different divisions of the University of Florida, including, in particular, its College of Medicine. For example, many of the doctors who work at Shands are employed by the University's College of Medicine rather than the Shands Healthcare system. (Part of what promotes that complex employment structure is the legal doctrine of sovereign immunity, which provides protection in suits against the government and its employees.) So too, Shands and the University of Florida's College of Medicine have different governing and managerial structures, different internal promotion systems, and somewhat different cultures as well. Why then do I usually refer in this paper to "the hospital" rather than analytically separating these two entities? Though at times I will make such distinction (e.g., when speaking of curricular reform efforts following Sebastian's death in the College of Medicine's training of medical students), on the whole, I will not. Partly this is because, functionally speaking, the University and the not-for-profit Shands are so deeply interwoven. More fundamentally, it is because vis-à-vis the issues of legal counseling and

reconciliation examined here, the distinction between these two legal entities is, in my view, largely inconsequential.³⁹ For example, when Dr. Novak issued the hospital's public apology to the family for Sebastian's death, I believe that it was essentially irrelevant to the Ferrero family (and to the public at large) whether, in a legal sense, he was speaking as a representative of the Shands hospital, the College of Medicine, or both.

The second issue—that this case is a very atypical one—also merits some discussion at the start. To begin, the depth of the tragedy was enormous. Iatrogenic harm (i.e., harm produced by medical treatment) had led to the death of a healthy, three-year-old child.⁴⁰ The significance of this context cannot be overstated. Most everyone I interviewed on both sides was deeply touched by the depth of that tragedy, and reacted to Sebastian's death, first as a human being and second in their professional capacity, assuming they had one.⁴¹ As will be discussed further below, other factors too made the case quite atypical. (1) There was at root no question about the hospital's fault. While there could be arguments over how to apportion fault within the hospital (e.g., to what degree to blame the pharmacist, the nurse, the attending doctor, or even the hospital's system of clinical infusions)⁴², between

39. When assessing the Ferrero case, Dr. Douglas Barrett, Senior Vice President for Health Affairs at the University of Florida, expressed a similar view. Though cognizant of the organizational and legal differences between the Shands hospital and the University of Florida College of Medicine, Barrett believed that, in the final analysis, this distinction was largely irrelevant. "The fact that we are two separate organizations . . . the world doesn't care about it. They don't care one twit. And so we need to respond to these things as if none of that matters . . . [T]hat's just the way I approach these things." Barrett, *supra* note 35.

40. As Dr. Silverstein, *supra* note 11, expressed:

[Sebastian] wasn't sick, you know, he wasn't sick. It's something that . . . as a system we did. [It was a series of] errors. You know, I can't imagine. I once had a child die [from] a heart disease, [but] that child wasn't going to live anyway. We've had patients with diabetes and cystic fibrosis who died, but they're not going to live. They had illnesses, but [Sebastian] was not sick. He was short. The test showed he had growth hormone deficiency, so it was real, but you know, growth hormone deficient people they do die younger, but they don't die at three.

41. Martin Smith, Director of the SIP, expressed that, in his more than thirty years of working at the SIP, Sebastian's case was among the five most tragic he had seen. Smith, *supra* note 25. "[There was] nobody that I met with," said Smith, "that didn't start crying." *Id.* Attorney Kim Yozgat, who had worked at the SIP for more than a decade, stated: "[Sebastian's case] affected our personalities more than any other case [I've encountered.]" Yozgat, *supra* note 25.

42. In my investigation of the case, I contacted the pharmacist, nurse, and attending physician in an attempt to interview each. Neither the pharmacist nor the attending physician responded to my queries. The nurse did respond, indicating that she did not wish to be interviewed. At one point, I did speak with the pharmacist's attorney Brian Kahan and gained something of the pharmacist's view of the case. He, however, was not willing to speak on the record, and so I will not relay his specific comments. As discussed below, while I do not know all of the details of the process, the pharmacist's employment at Shands Healthcare ended not long after Sebastian's death. See *Shands Pharmacist Fined \$1,000 After Fatal Prescription*, *infra* note 72. As indicated by the University's online directory, as of May 9, 2011, the nurse and attending physician remain employed at Shands. See UNIVERSITY OF FLORIDA PHONEBOOK, available at <https://phonebook.ufl.edu/> (last visited May 9, 2011). Finally, I should note that, while readers of this article wishing to know the identities of these persons can likely establish them through independent research, I have opted not to disclose them here, because, among other reasons, I do not think those identities are essential to this article. Medical errors resulting in serious losses can be devastating experiences for the healthcare workers involved. See Theresa Brown, *Big or Small, Nurses' Mistakes Reverberate*, N.Y. TIMES, July 12, 2011, at D6 (describing an experienced nurse's suicide following a medication overdose that contributed to an infant's death); see also Kevin B. O'Reilly, *Revealing Their Medical Errors: Why Three Doctors Went Public*, 54 AMER. MED. NEWS 21 (Aug. 15, 2011) (describing the anguish faced by medical

the Ferrero family and the hospital, there could be no dispute over fault: medical error had clearly killed Sebastian. (2) Statutory provisions essentially determined the amount of the settlement (see p. 110, *infra*), thus helping to prevent a dispute over the amount of the recovery. (3) The hospital fully and publicly apologized. (4) The Ferrero family was wealthy, and, in settling the case, monetary considerations were not central to them. Rather, their essential aims were the forward-looking ones of preventing future harm through medical error to children and establishing a children's hospital. In important ways, this case *is* quite different from many legal disputes. This is a case where the severest of tragedies was followed by the noblest of responses. However, the fact that this case is different from other cases does not mean that there is little we can learn from it. To the contrary, it is in part because this case is highly unusual that it has much to teach. Extreme cases and ordinary cases do share many common themes, and sometimes extreme cases can put into sharp relief issues present but less salient in ordinary cases.

A. The Role of Friends and Community

It is common in American life to think of people as independent individuals, like the mythic lone ranger who braves the world by himself. In truth, almost none of us live in such isolation. As the poet John Donne famously put it, "No man is an island entire of itself; every man is a piece of the continent, a part of the main."⁴³ For most of us, our lives are interwoven with the lives of others. This is not just a description of how the world works, it is also normatively valuable. Loved ones, friends, and community enrich our lives in times of joy and help us persevere in times of struggle.

Lawsuits are for many people times of struggle. In part this is true because the litigation process can be very stressful (think, for example, of the discomfort of undergoing a deposition), but in larger part this is true because the events underlying lawsuits are often highly traumatic. Divorces, deaths, bodily injuries, financial harms—these are among the most difficult events in people's lives.

When we in legal academia think of lawsuits, we generally focus on two basic roles: lawyer and client. Sometimes we broaden the picture to think about neutrals such as judges, jurors, and mediators, but usually the focus is on lawyers and their clients. What does the client want? How should I counsel the client? What are the strengths of this case? What are the weaknesses? For many cases, that two-player picture is adequate. In some cases, it is deficient. The community of support that surrounds a client, be they family, friends, or others, also can be critical to how a client deals with a legal dispute. Friends can help clients find perspective when their vision is clouded. Loved ones can help clients find courage when their courage has faltered. Community members can help clients achieve solutions to problems that they could not achieve on their own.

providers who commit errors resulting in serious harm, as well as the trend from silence toward greater disclosure), available at <http://www.ama-assn.org/amednews/2011/08/15/prsa0815.htm>.

43. JOHN DONNE, *Mediation # 17*, DEVOTIONS UPON EMERGENT OCCASIONS (1623).

A physician or nurse discharging a patient from the hospital after major surgery would be remiss not to have some understanding of whether there will be friends and family to assist the patient in the recuperation ahead. So too, lawyers should think seriously about whether a client will have support during the course of a suit and whether some of that support may help in resolving the client's situation.⁴⁴ In certain cultures, "circling"—the process of having not just the parties but family members, friends, community elders, and others sit together in a circle to see how a conflict might be resolved—is an ancient and valued approach.⁴⁵ Perhaps the wrongdoer's aunt can help him see the inappropriateness of what he has done. Perhaps a businessperson can offer a job to help the wrongdoer get on a better path. Indeed, beyond helping to resolve the instant case, circles may help to produce a better society over time. Being part of the discussion may lead circle members to consider what they could have done to prevent what occurred, and what they might do to prevent similar events in the future.

In stressing the importance of the client's community, I do not mean to suggest that lawyers should see themselves as serving the client's community. The lawyer's essential fiduciary duty is to the client, and lawyers should be careful to avoid conflicts of interest. My claim is simply that lawyers should be sensitive to the role community does play, and can play, in helping clients through conflict. If one wants to understand how Horst and Luisa Ferrero so rapidly were able to adopt a constructive response to their son's death, it is important to appreciate the comfort and guidance they received from their community. Below, I describe three people who played particularly important roles in that process: Gilbert Levy, Miguel Diaz and Victor Badell. In reading these examples, keep in mind that, as with many family-run businesses, there was no bright line separating business from family. For example, the Town of Tioga office where Horst and Luisa worked was a joint venture between the Diaz and Cannella/Ferrero families. The members of these families both worked together and also cared deeply about one another. So too did some of the non-family members who worked with them.

1. Gilbert Levy

At the time of Sebastian's death, Gilbert Levy, age 49, was finishing his third year as president of Tioga Town Center LLC.⁴⁶ Prior to working at Tioga, Levy was a senior lender at Gainesville's Millennium Bank. Miguel Diaz had helped to

44. The possibility of referring the client to another professional for counseling, such as a psychologist, minister, or economic advisor, should not be overlooked. Recall that, in coming to the attorney, the implicit classification of the client's problem as legal in nature was made by the client. The roots of the client's problems may lie elsewhere. See Walter Otto Weyrauch, *Foreword: Legal Counseling as an Intellectual Discipline*, 42 FLA. L. REV. 429, 432 (1990).

45. See, e.g., Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994) (describing Navajo conceptions of justice and associated peacemaking circles); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 107 (1999) (examining the use of peacemaking circles in Navajo domestic violence cases and cautioning against simple cross-cultural appropriation of dispute resolution approaches without careful consideration of cultural differences).

46. Levy, *supra* note 5.

found Millennium Bank years earlier, and through that work had gotten to know Levy. In 2004, the Diaz and Cannella/Ferrero families interviewed Levy for the Tioga position. They sought a neutral, professional, and full-time manager who, “was not part of either family so as to operate the company not on behalf of either family but more as for the company itself.” In his three years at Tioga, Levy, fluent in both English and Spanish, grew to know the Diaz and Cannella/Ferrero families well. Indeed, Levy, a married man with children, was fond of Sebastian, for he would often see the boy when his father or mother would bring him to the Tioga offices.

Sebastian’s testing began on Monday morning, and he was discharged later that day. At approximately 11:30 p.m. that evening, Horst and Luisa took Sebastian to the emergency room. On Tuesday morning, Levy received a call at the Tioga offices from Luis Diaz, a son of Miguel Diaz and a contemporary and good friend of Horst and Luisa. Diaz told Levy that Sebastian was very ill. Levy then called Luisa on her cell phone and asked whether there was anything he could do to help. Luisa replied, “No, not at this point,” but added that Sebastian was “very, very sick and we don’t really know what’s going to happen.”

Levy did not initially rush to the hospital for fear of intruding on the family. However, over the ensuing hours he received from Luisa a string of heart-wrenching text messages. Luisa, he believed, was reaching out to him, both because he was older and because he was not a family member, and thus, had a comparative calmness amidst the crisis. Levy phoned Miguel Diaz, who was with Horst and Luisa at the hospital, and asked if Diaz thought it would be helpful for Levy to come to the hospital. Diaz responded, “I think they would like to see you.”

At the hospital, Levy met Horst and Luisa. Sensing Luisa’s emotional state, he took Luisa aside to speak privately. Levy said he believed Luisa saw in him, “something that I don’t think she saw in anyone else.” Levy then performed one of the most profound acts one can perform toward another in pain: *he listened*.

I could see she wanted to talk... So I sat with her, two chairs, face to face . . . and all I did was listen. She wanted someone that would listen and not say anything, which was kind of difficult for everybody else who was so emotionally involved. After listening to her, I said a few things to soothe her.

As night approached, Levy went to his home. On Wednesday he returned to the hospital. Just a few hours earlier, Sebastian had been declared brain dead. Once again, he sought to comfort Luisa:

As soon as I [arrived in the room, Luisa] came over and gave me a big hug and started to cry. I mean [her tears were] just pouring out. Then she retreated to a corner which is when I really started to get concerned. Anger. Pain. [It was as though] the seven stages [of grieving were] all compressed into one. “Why me?” [Luisa cried.] “Why does this have to happen to me?” “Why is my child

subjected to this?” “What did I do wrong for my child [for this to happen?]” “Why would God do this?” . . .

So, we talked very closely, very quietly. Her mother was sitting in a corner, and Mrs. Diaz kept walking in and out. But they knew, they left us alone and we spoke and my message to her was, “You have another child that needs you and you have to be clear and focused, and yes, you are going to have to grieve, and grieving is a good thing, but you also have to keep in mind that Sergio [Sebastian’s one year-old brother] needs you. He needs you to be clear-minded and he needs for you to be a complete mother for him and you need to focus on that because focusing on Sergio will also help you with the grieving process.”

As Levy spoke those words to Luisa, he could “see her turning”—he could see Luisa deciding to go forward with life. That, said Levy, was Luisa’s gift *to him*. “My gift from her to me was to see her turning.”

2. Miguel Diaz

Miguel Diaz, patriarch of the Diaz family, is an unusual man. Born in Spain’s Canary Islands off the northwest coast of Africa, Diaz left home at age sixteen and voyaged by ship to Venezuela to make his way in the world.⁴⁷ The reason for his departure was not that he came from a dysfunctional family—he came from a very loving home—but rather that he had read a Spanish translation of *The Autobiography of Benjamin Franklin*, and profoundly influenced by Franklin’s life and ideas, he sought to make his way in the world on his own as a young man as Franklin had. Arriving in Venezuela, Diaz began by tending bar at his uncle’s restaurant where he also slept on the floor at night. His uncle did not treat him well, and Diaz left the restaurant to become a self-taught truck driver. In time, Diaz found work as an entry-level employee at Shell Oil. Over the next decade, through hard work, ingenuity and intelligence, Diaz rose to Shell’s highest echelon of management. He also maintained his love of learning, delighting in books of practical wisdom, like Franklin’s *Poor Richard’s Almanac*, as well as those of profound reflection, including Lao Tzu’s *Tao Te Ching*.

When living in Caracas, Diaz befriended Filippo Cannella, also an immigrant to Venezuela and also a fellow entrepreneurial spirit. Cannella worked for himself, and Diaz eventually opted to leave Shell to work as a business partner with Cannella in Venezuela and eventually in Florida. Diaz and Cannella were extremely close, as were their wives Maria and Pasqua and also their children (Diaz had four, and Cannella had one, Luisa). Technically, Diaz held the honorific title of being Luisa’s godfather, but from the time she was a young girl, Luisa

47. Except as otherwise noted, the information in this section is based upon Interview with Miguel Diaz, in Tioga, Fla. (Sept. 2, 2009).

called Diaz “Tío,” the Spanish word for “Uncle,” (Later, Sebastian too would call him “Tío”.) Luisa’s father Filippo died an early death, and when Luisa and Horst were married, it was Diaz who escorted Luisa down the aisle.

In 1980, Diaz, already a wealthy and established man, chose to move from Venezuela to the United States. In part he was drawn by the economic opportunities here, but even more deeply, he was inspired to live in the land of his boyhood hero Benjamin Franklin. Notwithstanding the change of geography and language, Diaz and Cannella continued their business partnership. Together they began investing in real estate, first in South Florida and then later in Gainesville, moving into the Town of Tioga. The families remained close. For example, in 1980—the year Diaz and his family moved to Gainesville—Filippo and Pasqua brought Luisa to Gainesville, where together the families celebrated Luisa’s fifth birthday in the Diaz home.

When Horst and Luisa immigrated to America in 2003, they naturally chose to live in the Town of Tioga. Diaz lived nearby and saw Horst and Luisa very often. Once Sebastian was born, Diaz saw him very often too. The adults all worked together in their joint business, and together members of the Diaz and Cannella/Ferrero clans celebrated birthdays, took trips, and, most fundamentally, shared life. Diaz adored Sebastian as he adored his own grandchildren. As he expressed approximately two years after Sebastian’s death, “Sebastian will be my grandchild all my life.” While below I briefly describe some ways Diaz helped Luisa and Horst cope with Sebastian’s death, it is important to note that Sebastian’s death was personally devastating to Diaz as well. Sebastian was not a child he knew casually. Sebastian was an important part of Miguel Diaz’s daily life.

Sebastian’s test occurred on Monday morning, and when Horst and Luisa took Sebastian to the emergency room that night, Diaz accompanied them. He returned home later that night, but then came back to the hospital the next day. On Wednesday, when Dr. Silverstein asked Horst and Luisa to come to a private room where she would inform them that Sebastian was brain dead, Diaz went with them to offer support. It is hard to capture all of the ways that a loved one’s caring can help in a time of tragedy. I suspect that the simple act of just “being there” is one of the greatest gifts. Throughout their trials, Diaz was “there” for Horst and Luisa.

Soon a hospital employee arrived to talk with Horst and Luisa about organ donation. Diaz’s advice helped Horst and Luisa in their decision-making. “We need to get something good out of Sebastian,” he told them. Horst and Luisa agreed to the donation. Diaz’s reward for that advice came in the form of Luisa’s tears. “Tío,” she said to him, “I feel good that somebody is going to be living.”

In the months and years ahead, Diaz would continue to offer his counsel to Horst and Luisa. The Sebastian Ferrero Foundation was in essence a start-up, non-profit foundation. Developing any new enterprise is a challenge. There are numerous business decisions to be made. Personal contacts must be made and relationships fostered. Add to that what one might call the “political” complexity of the foundation’s mission of persuading the existing hospital to embrace the need

for a new children's hospital, and the value of good business judgment is even more apparent.⁴⁸ I am not suggesting that Horst and Luisa were not themselves skilled in conducting business—they certainly were—but the business acumen and life wisdom of the elder Diaz were undoubtedly of aid. Most importantly, Diaz was a source of stability, support and love for Horst and Luisa at a time of tremendous crisis. If family is ultimately defined by function rather than birth, then there can be no doubt the three were family. It was as family, I believe, that Diaz ultimately helped them most.

3. Victor Badell

Victor Badell first met Horst in 1998 when each was pursuing an LL.M. degree at American University in Washington, D.C.⁴⁹ They became fast friends almost instantly. Both Victor and Horst were from Venezuela, and both were attorneys. When Horst and Luisa later married, Victor attended their wedding. Soon after Sebastian was born, Victor was appointed to be Sebastian's godfather at Sebastian's baptism in Caracas. After finishing his LL.M. degree, Victor worked in Washington, D.C. for several years, but then moved to Gainesville, in part to pursue an LL.M. degree in international taxation at the University of Florida, and in part because he wished to live near Horst, Luisa and Sebastian. In Gainesville, he intentionally rented an apartment without a washer and dryer so the need to do laundry would give him an excuse to be at the Ferreros' home "all the time." Victor adored playing with Sebastian and taking part in Horst and Luisa's family life. Once his studies in Gainesville were finished, Victor returned to Venezuela to teach and practice law. That distance notwithstanding, he remained in close contact with Horst and Luisa.

Sebastian's test began on Monday morning, and late that night, Horst and Luisa brought Sebastian to the emergency room. At approximately 2:00 a.m. on Tuesday morning, Horst called Victor (who knew of the testing) to inform him that Sebastian was in distress. Victor immediately responded to Horst's call for aid. Seven hours later, at approximately 9:00 a.m., Victor escorted Sebastian's two elderly grandmothers on a flight from Caracas to Miami. From Miami, they took another plane to Orlando, and then Victor drove them directly to the Shands hospital in Gainesville. Victor stayed with Horst and Luisa through the harrowing

48. For example, in December, 2007—less than two months after Sebastian's death—Horst and Luisa met with the highest hospital officials to begin discussing a new children's hospital. *See, e.g.*, Letter from Dr. Michael Good, M.D., Senior Assoc. Dean of the College of Medicine, to Horst and Luisa Ferrero (Dec. 10, 2007) (on file with author); Letter from Dr. Douglas Barrett, M.D., Senior Vice President for Health Affairs, Univ. of Fla., to Horst and Luisa Ferrero (Dec. 19, 2007) (on file with author); Letter from Timothy Goldfarb, CEO of Shands HealthCare, to Horst and Luisa Ferrero (Dec. 18, 2007) (on file with author). However, it was not until almost three years later (September, 2010) that the announcement was made that a Shands hospital for children would be created. Instrumental in that decision was a report from the independent health care consulting firm Sg2—jointly commissioned by the SFF and the hospital—assessing the fiscal viability of a new children's hospital. *See* Diane Chun, *Shands Plans Hospital for Children, Women*, GAINESVILLE SUN, Sept. 23, 2010, <http://www.gainesville.com/article/20100923/articles/9231028>.

49. The information in this section is based upon Interview with Victor Badell, in Gainesville, Fla. (Mar. 24, 2009).

hours ahead. When Sebastian was officially pronounced dead, Sebastian's godfather Victor served as a witness. When a member of the Shands risk management team came with tears in his eyes to apologize to Horst, Victor stood at Horst's side.

Sebastian's funeral took place on Saturday, October 13, 2007. After a brief rest, Horst wanted to address promptly the legal aspects of the case. At Horst's request, Victor remained in Gainesville for the next several days so that he could assist Horst and Luisa in deciding how they would proceed with the case. Victor was devastated by Sebastian's death; however, he was not as devastated as Horst and Luisa. Together they held meetings with Marcia Davis and Tanya Cruz, the two individuals who would serve as the Ferreros' attorneys. While the decisions about how the case would be handled were principally made by Horst (who, after all, is an attorney) and Davis, Victor played a vital role in helping the Ferreros think through their options.

Davis was the one to first raise the idea of creating some kind of legacy for Sebastian (see p. 111, *infra*), and Victor encouraged Horst and Luisa to follow that route. "We understood first of all," said Victor, "that we were not interested in a simple recovery of money, which in this case [was not critical. Rather we thought about] what we can do with that money [to create a legacy for Sebastian.]" Victor also helped dissuade the Ferreros from embarking on the adversarial path of litigation. "I talked to Luisa [and said], 'How willing are you to go to court, to go through a painful process?'" In Victor's mind, litigation was a poor option. "[Luisa] was just so devastated, so tired that she couldn't think of going through a lengthy process, a painful [litigation] process kind of like reliving everything again. She didn't feel like it. She understood the options."

It is easy for lawyers to forget how important other people can be in helping clients cope with legal situations. Lawsuits often reflect crises in people lives, and at times of crisis people turn to friends and family for guidance and support. Gilbert Levy, Miguel Diaz, and Victor Badell all played important roles in helping Horst and Luisa cope with the immediate aftermath of Sebastian's death. As friends, they supported them, and as counselors, they guided them. Whether without such support and guidance Horst and Luisa would have ultimately chosen the constructive path, including the constructive legal path, they chose, I cannot say. What is clear is that such guidance and support was of tremendous aid to them when they needed it most.

B. Lawyer as Helper: Marcia Davis

Marcia Davis is a small-town lawyer with a big heart and a keen mind. The oldest of four daughters, Davis was raised in the Florida Panhandle, where her father's family had lived for generations.⁵⁰ Davis attended college on a leadership scholarship at Troy University in Alabama, and finished after two and one half

50. Except as otherwise noted, the information in this section is based upon Interview with Marcia Davis, in Alachua, Fla. (Jan. 7, 2009).

years. “My motivation,” she explained, “was . . . to get out of college as quick as I could and get into law school as fast as I could because my sisters [were] right behind me, and my parents [were] school teachers and [couldn’t afford] having all of us in school at the same time.”

Following law school, Davis worked for three years in the U.S. Army Judge Advocate General’s Office and then for one year as a prosecutor in Virginia. She then entered private practice as an insurance defense lawyer. For approximately ten years she worked in Panama City, Florida. In 1997, Davis moved to Alachua, a small town just north of Gainesville, where she eventually joined the Bice Cole law firm as a partner. Although she mostly does insurance defense work, Davis is also a certified mediator. With more than twenty-five years of legal experience, Davis’s work now focuses on complex cases. Previously, Davis handled many medical malpractice cases, but as fewer insurance companies offered coverage in Florida, her work shifted to wrongful death cases arising from serious automobile accidents and other insurance matters. “At this stage in my career,” reports Davis, “everything I handle is a big mess. I don’t do simple auto cases anymore.”

Davis’s connection to the Ferreros came through their mutual love of horses. Davis lives on a family farm on the outskirts of Alachua, where she raises Paso Fino horses. She has served as president of the International Paso Horse Federation and has chaired the Paso Fino Horse Foundation, an organization offering college scholarships to assist Paso youth riders. Adjacent to Davis’s farm live José and Monica Ochoa on their own farm. José, a professional trainer, rears Paso Fino horses. The Ochoas have a daughter Isabela, who is of Sebastian’s age, and Davis is her godmother. The Ferreros also enjoy horses and keep several at the Davis and Ochoa farms. Horst and Luisa often brought Sebastian to the Ochoa farm, where he might sit atop a horse or play with Isabela. Through these visits, Davis had grown to know Sebastian and his parents.

The day before the fateful test, Sunday, October 7, Sebastian was at Davis’s farm playing with Isabella. From her driveway, Davis watched Sebastian and Isabela chase each other up and down the ramp leading to the horse barn. “You could hear Sebastian laughing from a hundred yards away,” she recalled. “He was always laughing and he was always giggling.”

The Ochoa and Ferrero families were quite close, and on Tuesday, October 9, Davis received two telephone calls from José, who was at the hospital with Horst and Luisa, updating her on Sebastian’s health. On Wednesday, October 10, at approximately 6:00 p.m., Davis received another call from José on behalf of Horst. Horst requested that Davis come to the hospital so he could speak with her. (Recall that though Sebastian was still on life support, he was by that time brain dead.)

Approximately an hour later, Davis arrived at the hospital and headed to the pediatric intensive care unit. She offered her support to Horst and Luisa. “I didn’t go as Marcia the lawyer. I went as Marcia the friend, and I went to see if there was anything I could do [to help].” She told Horst and Luisa that, “if they needed me to talk to anybody or deal with anybody I would be glad to do that.” The Ferreros appreciated her offer of support. Davis remained with them until approximately 11:00 p.m. and then headed home. The following morning, Davis’s “lawyer brain”

kicked in, and she faxed a letter to Randall Jenkins, an attorney with the University of Florida Self-Insurance Program. In her letter, Davis said that she was representing the Ferreros and she requested that all evidence be preserved. “I wanted to make sure that everything was retained, that nothing got thrown away, that the records got assembled, [and that] the bottles got found and got kept.”

There are many images of what it means to be an attorney. Sometimes we think of lawyers as public citizens, a group entrusted with the responsibility of maintaining a just society.⁵¹ Sometimes we think of lawyers as advocates, zealously engaged in courtroom debate and battle.⁵² Sometimes we think of lawyers as counselors, a person on your side, there to help you think through the legal dimensions of your problem.⁵³ For Marcia Davis, the reason to become a lawyer was quite clear. “I became a lawyer to help people. That’s why I became a lawyer. I’m never going to be rich, but I think I enjoy a good reputation. I think I do a good job for my clients, and I try to help people if I can.”

Part of how Davis helped the Ferreros in the months ahead involved traditional legal work. She met with the Ferreros to understand their goals. She spoke with the Ferreros’ other attorney Tania Cruz to discuss different aspects of the case.⁵⁴ Most fundamentally, after she and Cruz had analyzed the applicable law, she rapidly worked out a settlement with the hospital’s attorneys, people with whom she was already familiar.⁵⁵ Under Florida law, the hospital had the right to take the case to non-binding arbitration.⁵⁶ In arbitration (as in court), statutory caps would essentially limit the amount of recovery for the wrongful death. The final

51. MODEL RULES OF PROF’L CONDUCT pmbl. (2010) (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

52. *Id.* (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

53. *Id.* (“As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.”).

54. While Horst, in consultation with Victor Badell, played a significant role in shaping the Ferreros’ legal response to Sebastian’s death, neither he nor Victor were, of course, the Ferreros’ legal counsel in the case. Rather that role was essentially played by Marcia Davis. Before describing Davis and the role she played, the work of two other attorneys representing the Ferreros should also be noted. The first was Alvin Davis. When working in Venezuela for SAIC, Horst had befriended Juan Carlos Varela, a lawyer at the international law firm of Squire, Sanders & Dempsey, LLP (“Squire Sanders”). Following Sebastian’s death, Varela recommended that Horst speak with Alvin Davis. Telephone Interview with Tania Cruz, Senior Associate, Squire, Sanders & Dempsey, LLP, in Miami, Fla. (May 9, 2009). Alvin Davis (no relation to Marcia Davis) was a nationally-prominent litigator and partner in Squire Sanders’ Miami office. Alvin Davis was involved with the case only briefly before transferring it to Tanya Cruz, an associate in the Miami office. However, as Horst recalled, before Alvin Davis passed the case to Cruz, he advised Horst to think carefully about the non-monetary aspects of the case and see the case, “not only . . . from a monetary point of view—from a damages point of view—but of wanting to fulfill my desire of going beyond that to do something more meaningful in the memory of Sebastian.” Interview with Horst and Luisa Ferrero, in Tioga, Fla. (Jan. 20, 2009). Tania Cruz was a third-year associate at Squire Sanders specializing in high-powered commercial litigation and international dispute resolution. Roughly put, Horst’s thinking was that Cruz would provide the “muscle” for litigation, and Marcia Davis would act in a settlement role. Cruz did do research into a number of areas, including both the applicable state law (under which statutory limits would cap the Ferreros’ recovery) and whether it might even be possible to change that state law (not very likely, in her view, due to the strength of the medical insurance lobby.) Cruz, *supra*. Cruz also came to Gainesville to participate in the settlement negotiations with the Shands risk management team. *Id.* All that said, as will be discussed further below, the Ferreros’ legal case was essentially handled by Marcia Davis.

55. Davis also represented the Ferreros at the pharmacy board hearing. *See infra* note 72.

56. FLA. STAT. § 766.107 (2007).

settlement amount of \$869,747 was derived from a combination of non-economic damages (\$500,000),⁵⁷ a statutorily-permitted limited waiver of sovereign immunity (\$200,000),⁵⁸ as well as various fees (*e.g.*, estimated legal fees to the hospital of arbitrating the case) and expenses (*e.g.*, the funeral).⁵⁹ Although the settlement agreement was not executed until several months later (Jan. 14, 2008), within two weeks of Sebastian's death, the case was essentially settled.⁶⁰ The hospital would offer the maximum recovery under the statutes, plus various fees and expenses, which the Ferreros accepted.⁶¹ Unlike many disputes, there was no acrimony to the settlement process. The high level of trust between Davis and the hospital's attorney Kim Yozgat was key to that,⁶² but other factors too were significant. First, though there could be debates about exactly who (*e.g.*, the nurse, pharmacist, or attending physician) or what (*e.g.*, the lack of a unit dosing system) within the hospital was at fault for Sebastian's death, the fact that the hospital was at fault was crystal clear. Second, there was a statutory system in place essentially specifying the amount of the recovery. Third, following intense and rapid deliberation about what path to take, the hospital rapidly chose to admit its fault, and did so both publicly and privately. While certainly aware of both legal and public relations considerations (*e.g.*, the news of Sebastian's death would undoubtedly come out in the press, and apologizing would put a better "spin" on it for the hospital than denying), the hospital did this in large part because apologizing was the right thing to do.⁶³

Part of how Davis helped the Ferreros was more in what might be called the realm of friend rather than of lawyer.⁶⁴ In the immediate wake of Sebastian's death, funeral arrangements needed to be made. Davis recommended to Horst a funeral

57. FLA. STAT. § 766.118 (2007).

58. FLA. STAT. § 768.28 (2007).

59. Yozgat, *supra* note 25.

60. Interview with Kim Yozgat, in Gainesville, Fla. (Nov. 4, 2008); Interview with Marcia Davis, in Gainesville, Fla. (Nov. 4, 2008).

61. Yozgat, *supra* note 25.

62. As Yozgat, who had spent more than ten years working as a lawyer in that office expressed, "The reality is that much of lawyering is a bad business. By contrast, in this case, there was a lawyer on the other side where her word is her bond. . . . Law schools are producing too few Marcia Davises." *Id.*

63. I asked Dr. Douglas Barrett, Senior Vice President for Health Affairs and an active participant in the intense conversations about how to handle Sebastian's case, to what extent he believed the hospital's public apology was motivated by strategic legal or public relations concerns, and to what extent it was motivated by the basic human morality. While one cannot, of course, put exact numbers on such things, in Barrett's view, the former strategic, motivations accounted for "thirty percent" of the decision and the latter moral motivation accounted for about "seventy percent". In this vein, both Martin Smith, Director of the Self-Insurance Program, and Attorney Kim Yozgat, Associate Director of the Self-Insurance Program, indicated how powerfully the case touched those involved at a human level. Medical error had resulted in the death of a healthy, three-year-old child. To paraphrase their statements, people reacted to the case first as human beings and second in their professional capacity. Smith, *supra* note 25; Yozgat, *supra* note 25.

64. Years ago, by way of defending partisan zealous advocacy norms, Charles Fried argued that we should think of the lawyer as the client's friend. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1074-76 (1976). Edward Dauer and Allen Leff offered important critiques of Fried's position (what type of friend, after all, does one pay to be one's friend?). See Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 579 (1976). To me, the acts Marcia Davis, a true friend-lawyer, undertook illustrate that the deepest meaning of friendship is not partisanship but caring.

parlor close to the Ferreros' home, and put him in touch with the funeral director, whom she knew. In no way did Davis see this as being in conflict with her role as an attorney. As she put it, "I was [going] to make sure that what had to be done got done, and if that mean[t] I need[ed] to help them plan a funeral, then I would." The funeral, which Davis attended, occurred on Saturday, October 13.

Some of Davis's work fell somewhere between what it means to be a lawyer and what it means to be a friend, involving elements of both. Let me give two examples.

As she was driving home to Alachua the day after Sebastian's funeral, Davis received a call from Horst and Luisa. Initially, they talked about the funeral. Luisa had delivered a very powerful and beautiful eulogy about what people could learn from Sebastian's life. Davis told Luisa that what she had said had been perfect, thanking Luisa for her words. As the conversation continued, Davis talked with Horst and Luisa about going forward from there, more specifically, the need to understand what had happened, to see that it never happens again, and also the possibility of trying to create some kind of legacy for Sebastian.

One week later, on Saturday, October 20, Davis attended a conference in Orlando with her aunt. Serendipitously, her aunt spotted a married couple from Gainesville, Howard and Laurie Freeman, and wanted to introduce Davis to them. Out of the blue (for she did not know Davis was the Ferreros' friend, let alone attorney), Laurie Freeman asked if Davis had heard about the boy who had died at Shands. Davis, feeling goose bumps on her body, replied that she had heard about the boy. The Freemans then explained that they had lost a daughter to cancer a number of years ago, and had started a foundation, Stop Children's Cancer!, which worked with Shands at preventing children's cancer. Howard Freeman suggested to Davis that Sebastian's case could be a catalyst for a new children's hospital in Gainesville. The following day, Davis arranged a meeting between the Ferreros and the Freemans. "The [four of them immediately] shared a common bond because of the loss of a child." As the meeting progressed, the two families discussed together the need for a children's hospital in Gainesville.⁶⁵

In time, these initial conversations, among others, would give rise to the Sebastian Ferrero Foundation, a foundation dedicated both to improving patient safety and toward building a new children's hospital. Equally important, working toward those goals would become major aspects of first Horst's and then Luisa's life. Davis, of course, did not make the ultimate decisions about the direction Horst's and Luisa's lives would take after Sebastian's death. However, at a time when they needed to make fundamental choices about how to proceed with life, Davis's counsel helped guide Horst and Luisa. At one point, I asked Davis why she steered them in that direction. Her response was personal: "I had a close friend that lost a child, and she said to me . . . that, '[t]here comes a point where you either

65. The Freemans' support of the Ferreros continued in the months ahead. For example, when in the spring following Sebastian's death the Ferreros held a press conference to announce they would match dollar for dollar contributions made to the SFF up to \$1million, Howard Freeman was on hand. Stated Freeman, "Laurie and I are amazed that [Horst and Luisa] have been able to turn a tragedy into something so positive." Diane Chun, *From Grief, a Hospital for Children Arises*, GAINESVILLE SUN, Mar. 27, 2008 at A1.

become bitter or else you become better.’ I knew that there was going to come a point in time like that [for Horst and Luisa].” Davis believed focusing on “something positive” could help “get [Horst and Luisa] better faster.” Davis saw her job as handling the “legal mess” so that Horst and Luisa could begin the journey that lay before them.

One might perhaps think that it was in this capacity as a counselor that Davis helped Horst and Luisa most, but it is important to recognize how essential Davis’s role as a dispute settler was too.⁶⁶ To work to improve patient safety at the hospital that had killed their son, and to advocate successfully for a new children’s hospital, it was imperative that the Ferreros resolved their dispute with the hospital quickly and amicably. Thus, the roles of lawyer-as-counselor and lawyer-as-dispute-processor went hand in hand. I note too that by quickly settling their case, Davis helped give the Ferreros the time they would need for healing rather than becoming mired in litigation. A lawsuit is by nature a backward-looking device whose central aim is to determine whether a past set of events involved a legal violation. However, *psychologically-speaking*, lawsuits can sometimes be destructive devices for looking at those events. When significant events happen in people’s lives, people must “process” those events. Horst and Luisa would of course think again many times about the events that led to Sebastian’s death. But they wouldn’t need to do that through a lawsuit. They could do it through more psychologically-constructive and healing means. By no means do I intend to suggest that in all cases litigation is a psychologically harmful way to process the past—some litigation is no doubt psychologically beneficial to at least one of the parties—but I have little doubt that, for the Ferreros, the path they chose was much more healing.

Yet the deepest lesson I take from Davis’s example is not about the particular roles that lawyers play (e.g., as advocate, as dispute settler, as counselor, etc.) but rather is about the heart that lies behind those roles. Lawyering is at root a service profession, and the sine qua non of lawyers who perform that service well is that they *care* about serving their clients.⁶⁷ There are, of course, different reasons that lawyers care about serving their clients. For some lawyers, the compensation they derive from their work is the essential incentive. Indeed, without the financial rewards lawyers derive from their work, much legal representation as we know it would grind to a halt. For some lawyers, it is because they believe in their client’s cause (think of a prosecutor motivated to help keep society safe), while for other lawyers, it is simply a matter of professionalism. In the Ferreros’ case, along with her inherent professionalism, Davis’s deep dedication to serving her clients well

66. Recall that settling disputes is also one of the lawyer’s roles. See MODEL RULES OF PROF’L CONDUCT pmbl. (2010) (“As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.”).

67. Is it possible for lawyers to care about their clients too much, to be overly-invested in their clients’ fates? Yes. Maintaining appropriate boundaries is important in lawyering as in many professions. One of the keys to this is the lawyer’s own emotional competency. For a fine discussion, see Marjorie A. Silver, *Emotional Competence and the Lawyer’s Journey* in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 5, 17–28 (2007) (on the challenges that transference and counter-transference can raise in the lawyer-client relationship).

came both from her personal friendship with Horst and Luisa and her tremendous sympathy for their loss.

Not every lawyer will, of course, care about helping his or her clients in the way Marcia Davis cared about helping the Ferreros. Indeed, it is the atypical rather than the typical case in which the lawyer represents pre-existing friends, and the even more atypical case where the lawyer represents those friends after a tragedy. Nevertheless, such a case can remind us of some fundamental aspects of excellent lawyering. Excellent lawyers are diligent and dedicated. Excellent lawyers are also insightful and creative. They keep in mind that the ultimate end of legal representation—assisting their clients—can be promoted through a variety of means. There is no pre-written form one can pull out of a book on pleadings that would instruct a lawyer to arrange a meeting between one's clients and another couple who had lost a child. There is no manual that suggests advising clients to create a foundation to improve patient safety and build a children's hospital when those clients have lost a child to medical error. These are the kinds of steps a lawyer deeply dedicated to serving her clients takes. With the ultimate end of legal representation in mind, lawyering becomes a more creative endeavor, and also a more worthy endeavor. Davis's goal was not simply to "sue the hospital" nor was it simply to "settle the case." Her ultimate goal was to assist the Ferreros.

There is a wonderful quotation often attributed to the late actor George Burns: "The secret of acting is sincerity. If you can fake that, you've got it made."⁶⁸ Feigning an emotion may be critical when acting, but in lawyering, and in many other professions too, I suspect the opposite is true. The lawyer's genuine caring is critical. In addition to fostering diligence and creativity, caring also leads to trust. A client who feels supported by his lawyer is more likely to share the (sometimes embarrassing) details of his life with the lawyer and is more likely to listen to the lawyer's advice. The fiduciary relationship, in other words, is built upon the lawyer's concern for the client. Caring animates lawyers to serve their clients well, which in turn leads clients to trust their lawyers.

C. The Importance of Non-Monetary Client Interests

Years ago, while attending a professional conference, I heard an exchange between two lawyers that went like this. One lawyer asked the other, "How's business?" The second lawyer responded, "Good. I recently settled several large, six-digit cases." Business was good, in other words, because the lawyer was earning a sizeable income. That anecdote is about lawyers rather than clients. However, I fear it is reflective of how many lawyers understand not only their own careers, but, even more significantly, how they see their clients' cases.⁶⁹ Lawsuits

68. See Quotes DB, <http://www.quotedb.com/quotes/1773> (last visited Jan. 23, 2012).

69. Tamara Relis's recent empirical research into the discrepancy between what plaintiffs in medical malpractice cases say they want and what attorneys on both sides of those cases believe those plaintiffs want is particularly telling in this regard. See TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES (2009). Empirical research has long helped document that, while monetary compensation is important to plaintiffs in medical malpractice cases, very important as well to

are about money, and what matters to the lawyers and *what matters to their clients* is the money.

No doubt many lawsuits are essentially about money. To some clients (think, for example, of an insurance company defending a routine claim) the only significant interest may be monetary. However, that is not true of every case. Indeed, the *root* question most clients face is not, “How can I best serve my financial interests?” but rather, “How can I best go forward given the situation I am in?” Sometimes that second question will devolve into the first one, but not always. In some cases, non-monetary interests can be as important as, if not more important, than, monetary ones.⁷⁰

As discussed previously, the Ferreros’ attorney Marcia Davis recognized from the start that money was not the main concern for the Ferreros. In part, this was because the Ferreros were wealthy people, but in larger part, I believe this was because the essential challenge the Ferreros faced was how to cope with the death of their beloved child. As Horst stated regarding their decision to donate the settlement money toward their foundation’s mission, “Our family didn’t need the money, we needed Sebastian.”⁷¹

If money was not tremendously important to the Ferreros, what was? Below let me suggest four interests the Ferreros had in the aftermath of Sebastian’s death, one largely instrumental and three essentially intrinsic. The instrumental interest was maintaining, or constructing, a good relationship with the hospital. The intrinsic interests were preventing injuries to other children from medical error,

plaintiffs are factors such as explanations of what occurred, admissions of responsibility, promises such events will not recur, and apologies. *See, e.g.*, Gerald B. Hickson, Ellen Wright Clayton, Penny B. Githens & Frank A. Sloan, *Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992), Charles Vincent, Angela Phillips & Magi Young, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994), Amy B. Witman, Deric M. Park & Steven B. Hardin, *How Do Patients Want Physicians to Handle Mistakes*, 156 ARCH. OF INTERN. MED. 2565, 2568 (1996). Relis’s study highlights how inaccurate attorneys’ perceptions of clients’ interests can be, more specifically, how much attorneys may underestimate the significance of non-monetary client interests. Though admittedly Relis’s study is of a small sample (18 or fewer respondents per question), it is extremely suggestive. When asked to describe the plaintiff’s interests, attorneys on both sides of such cases dramatically underestimated the extent to which plaintiffs were motivated by non-monetary interests. In her study, 90% of physician’s lawyers, 67% of hospital lawyers, and 67% of plaintiff’s lawyers believed the plaintiff’s central aim in litigation was either solely or primarily monetary. RELIS, *supra* at 37–40. In contrast, only 18% of plaintiffs reported that their aim was primarily monetary. Writes Relis, “Plaintiffs’ articulated litigation aims were thickly composed of extralegal objectives of principle [such as receiving an admission of fault (59% of plaintiffs) and making sure the mistake would not happen again (59%). 41% of plaintiffs did not mention monetary compensation as a litigation aim at all,] 35% viewing it as being of secondary importance, 18% describing money as their primary objective in suing, and 6% (only one person) saying it was money alone.” *Id.* at 43.

70. On the importance of lawyers recognizing *both* the client’s monetary *and* non-monetary interests, see Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 801–04 (1984). The failure of lawyers to adequately think about clients’ non-monetary interests may stem in part from their litigation-oriented training and mindset. As Menkel-Meadow writes elsewhere, “Statutes and common law limit the courts’ ‘imagination’ to the powers of granting monetary damages or injunctions.” Carrie Menkel-Meadow, *The Trouble with the Adversarial System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 7 n.9 (1996). If judicial remedies are largely limited to monetary damages and injunctions (and, I would note too, incarceration in criminal cases), it is easy to understand why lawyers’ imaginations may also be limited. On the need to broaden lawyers’ imaginations, see Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43 (1982) (describing “the lawyer’s standard philosophical map” and advocating its expansion).

71. Statement of Horst Ferrero, as quoted in Dooley, *supra* note 14, at 8.

grieving Sebastian's death constructively, and trying to construct new meaning in their lives through creating a legacy for Sebastian. These interests, and the pursuit of them, were of course interrelated. For example, through maintaining a good relationship with the hospital, the Ferreros could best work at preventing future injuries to children there. For analytical purposes, however, it is helpful to examine them one by one.

1. Relational Interests

As mentioned, many lawyers see their clients' essential interests as monetary. For some clients, other interests are far more important. To begin, many legal disputes occur in relational contexts (e.g., marriages, employment, business, etc.), and often those relationships are important to clients. In part this is true because relationships are of intrinsic value to people. In part this is true because good relationships help foster future business. It is also true because relational dynamics strongly influence how legal disputes evolve. Most legal disputes involve both the question of whether a violation of a legal right has occurred and a broken relationship between the parties. Indeed, were there not a relational breakdown, the parties would likely have resolved the dispute on their own. (As a whole, our law schools do a fine job in training students to analyze whether a legal violation has occurred, but a comparatively poor job in training them to think seriously about broken relationships and how they might be mended.)

In this case, maintaining a relationship with the hospital was critical to the Ferreros in pursuing their goals. If one of their main goals was to improve patient safety at Shands so as to prevent what happened to Sebastian from happening to another child, they would be much more effective if they could achieve a cooperative rather than antagonistic relationship with the hospital. So too, if a new children's hospital were to be built in Gainesville, in all likelihood it would have to be a part of the UF/Shands system. Developing a rival hospital to treat children would be almost inconceivable. The task, then, was the challenging one of persuading the existing hospital that a new children's hospital should be added to it. For such persuasion to occur, a cooperative relationship would be critical.

The Ferreros' desire to work constructively with UF and Shands did not mean that they did not want accountability for what had happened to their son. For example, slightly less than a year after Sebastian died, Horst and Luisa petitioned the State's pharmacist licensing board, seeking an enhanced punishment for the pharmacist who had dispensed the poorly-labeled bottles leading to their son's death.⁷² Even more fundamental was the Ferreros' decision to take the case public.

72. In the aftermath of Sebastian's death, the pharmacist who filled the fatal prescription eventually ceased her employment at Shands HealthCare. See Jacquelyn Weiner, *Shands Pharmacist Fined \$1,000 After Filling Fatal Prescription*, THE INDEPENDENT FLORIDA ALLIGATOR, Aug. 25, 2008, available at http://www.alligator.org/news/local/article_e390ba39-48ab-5d03-b9e4-304fc424ed05.html. Additionally, the Florida Board of Pharmacy (i.e., the state's pharmacy licensing board) fined that pharmacist \$1000, ordered her to pay \$2460 in investigation costs, and ordered her to attend an eight-hour pharmacy course. According to one reporter, the Pharmacy Board members said "blame did not lie with [the pharmacist] alone, instead saying a 'system breakdown' led to the child's death." Sarah Larimer, *Pharmacist Fined for Role in 3-Year-Old's Death*, JACKSON COUNTY FLORIDIAN,

I asked Horst about their initial decision to make the case such a public one. (For HIPAA⁷³ and other reasons, the hospital could not have discussed the case publicly without the Ferreros' consent.) Part of their motivation, Horst said, was a strategic one, namely, that greater accountability for those involved with his son's death would be achieved through publicity than through a quiet, private settlement.⁷⁴ He did not want his son's death simply to become a line item in the hospital's legal expenses budget. He wanted the people in the hospital involved with his son's care to think about and remember what had happened.

2. Preventing Future Harm to Children

As previously mentioned, one of the Ferreros' central interests following Sebastian's death was preventing what happened to Sebastian from happening to other children in their community. As Luisa expressed, "It's so painful . . . to lose a child like this . . . I wouldn't want another mom to go through something so horrible."⁷⁵ What the world had not given them—safe medical care for their child—they hoped to provide for others.⁷⁶ This approach of repairing our world's defects is a deeply noble and healing one, healing both for themselves and for our world.⁷⁷ I am reminded of an award-winning documentary, *Encounter Point*, I saw years ago concerning Palestinians and Israelis who, having lost loved ones, including children, to that conflict, joined together to advocate for an end to that conflict.⁷⁸ By no means do all who experience such losses try to channel their grief for the public good, but when that happens, a deep type of repair occurs. In part this relates to taking a pro-active posture toward life, to "be the change one wants to see in the world."⁷⁹ In part this relates to the civic-mindedness of the effort. To paraphrase Rabbi Hillel, one of the most basic choices a person faces is whether to

Aug. 14, 2008, available at http://www2.jcfloridan.com/news/2008/aug/14/pharmacist_fined_for_role_in_3_year_olds_death-ar-60081. The Ferreros, who were unable to attend the pharmacy hearing due to the recent birth of their third child, believed the sanction was too light. Stated Horst, "I think [the sanction] is out of proportion to [the] damage inflicted, to what happened." *Id.* The Ferreros' request to the board for a postponement of the hearing so they could make a personal presentation prior to determining the sanction was denied. *Id.*

73. Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936.

74. Interview with Horst Ferrero, in Tioga, Fla. (June 5, 2008). The linkage between publicity and accountability is a very important one. One might think of the work of the South African Truth and Reconciliation Commission, which, briefly put, granted amnesty in exchange for full public disclosure of those who had committed politically-motivated crimes during the apartheid regime. While that grant of amnesty was, in the words of the Commission's chairman Archbishop Desmond Tutu, "a very high price to ask the victims to pay," DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 55 (1999), it would be a mistake to think that offenders went entirely unpunished. Publicity was the true punishment offenders received. "Virtually all the applications [for amnesty] have been considered in public in the full glare of television lights. Thus, there is the penalty of this public humiliation and exposure for the perpetrator." *Id.* at 51.

75. Dooley, *supra* note 14.

76. For a similar response by another family who had lost a child through medical error, see *infra* note 93 (describing the evolution of the Josie King Foundation).

77. In my own religious tradition of Judaism, this value is called *tikkun olam*, literally, repairing the world.

78. See ENCOUNTER POINT (Just Vision 2006); see also *Encounter Point*, JUSTVISION.ORG, <http://www.justvision.org/encounterpoint> (last visited May 24, 2011).

79. This quotation is commonly attributed to Mahatma Gandhi, though exactly when Gandhi made the statement seems unclear. See Keith Akers, *Be the Change: Did Gandhi Really Make this Statement?*, COMPASSIONATESPIRIT.COM (June 5, 2009), <http://www.compassionatespirit.com/Be-the-Change.htm>.

lead life simply for oneself or whether also to lead it for others.⁸⁰ In seeking to prevent what happened to them from happening to others, Horst and Luisa Ferrero were opting to lead their lives for others. As they did this, I suspect they themselves found a measure of healing. Narrowly focusing solely on one's own life can be a very lonely experience. Working to help others may have helped Horst and Luisa by moving them beyond themselves. In writing that, in no way do I intend to criticize those who do not follow that path. Rather, I simply wish to highlight the generosity of spirit such an approach reflects.

3. Using Grief Constructively

Grieving, especially grieving a loss as great as that of a child, is a highly individual process.⁸¹ Each person grieves in his or her own way.⁸² For Horst and Luisa, much of their grieving occurred in private. As Luisa explained:

I tend to grieve at home. I don't use the foundation as grieving. I could be out, I could be talking to you about what happened and all that, but when I go back home, that's where I crash and when I feel the pain. Somehow that's how it's working for me. If I mix my feelings with the foundation, I can't work, I can't go on. I just want to quit if that makes sense.⁸³

Instead of being a direct mechanism for grieving, what the foundation did was help Horst and Luisa *channel* their grief constructively. After establishing the foundation a few months after Sebastian's death, Horst began devoting himself to that work immediately, giving somewhere between fifty and ninety percent of his working hours to the foundation.⁸⁴ At first, Luisa had little involvement, in part because her grieving path differed from Horst's and in part because of caring for their second son Sergio and her pregnancy with their third son Santiago. Yet over time Luisa's involvement in the foundation grew, and by one year after Sebastian's

80. As Rabbi Hillel put it, "If I am not for myself, who will be for me? If I am for myself alone, what am I? And if not now, when?" PIRKE AVOT (1:14), *as quoted in* SIDDUR SIM SHALOM 607 (Jules Harlow trans., 1985).

81. There are many writings on grieving and death, and I will not attempt a detailed bibliography here. On grieving and death generally, two excellent works are ELIZABETH KUBLER-ROSS, *ON DEATH AND DYING* (1969) (explaining the stages of grieving) and DAVID WOLPE, *MAKING LOSS MATTER: FINDING MEANING IN DIFFICULT TIMES* (1999) (exploring spiritual counseling for the bereaved). On the death of a child particularly, I highly recommend DOROTHY BECVAR, *IN THE PRESENCE OF GRIEF: HELPING FAMILY MEMBERS RESOLVE DEATH, DYING, AND BEREAVEMENT ISSUES* (2001). I should note too that, apart from the issue of grieving, death itself is a very difficult subject for many to discuss. *See generally* ERNEST BECKER, *THE DENIAL OF DEATH* (1973).

82. I am reminded of the words of Harvard Law School Dean Martha Minow concerning victims of horrific trauma: "Individual human beings are just that, individual human beings, both before and after anyone is victimized and then labeled a victim. Individuals respond uniquely and differently to horror. At least their responses are their own. To demand differently may be . . . [a] denial of their very being." MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 20 (1998).

83. Interview with Horst and Luisa Ferrero, *supra* note 34.

84. *Id.*

death, she too devoted much time and energy to the foundation, roughly on par with Horst.⁸⁵

For both of them, the foundation work was deeply fulfilling and uplifting. “It makes you want to keep going,” Luisa said.⁸⁶ As Horst expressed, “You have a different set of emotions [when doing the foundation work than when grieving. It is] gratifying seeing [a new children’s hospital] now being born little by little, or at least with more possibilities of becoming a reality.”⁸⁷ They also derived much pleasure from the relationships they developed with others through their foundation work. “Beautiful people,” said Luisa, “have helped us [through] just being involved and just being there.”⁸⁸ “So many good things come out of [the foundation’s work that it] makes you feel [like] wanting to do more. It makes you feel more involved. [That] happens also to friends [and] volunteers.” Horst’s experience was similar. “Instead of [staying] inside your room and not leaving the house and being bitter by what happened, [doing the positive foundation work] and seeing how people react positively makes us feel good.”⁸⁹

Much of the work of the foundation was what one might consider the work of any new business (e.g., developing a mission statement, choosing a board, forming strategic plans, meeting with people, etc.) and, as people experienced in developing a business, Horst and Luisa brought much professional expertise to that process. They also brought a tremendous amount of heart. Let me share one example, for it so dramatically demonstrates both how grieving can be turned into something positive and simultaneously the interwoven nature of the Ferreros’ multiple interests.

On October 29, 2008, just over a year after Sebastian’s death, Horst and Luisa spoke at the hospital’s first annual Patient Safety Grand Rounds. Approximately five hundred people sat in the hospital’s auditorium, including one hundred and thirty-five first-year medical students and several hundred more medical professionals. They listened attentively as Horst and Luisa told the riveting story of Sebastian’s death, and they listened attentively too as Horst and Luisa offered their thoughts on what medical professionals could do to help improve patient safety. I attended this presentation, as well as a similar event the following year targeted just for medical students. Both presentations were extremely powerful. As medical student Omayra Marrero expressed, “I want the family to know that their story will leave a mark. It has for me ... and will in my practice for the next thirty years.”⁹⁰ Indeed, while the presentations did not limit themselves to the Ferreros’ remarks, it is hard to imagine a more pedagogically effective way to impress upon doctors and future doctors the need for patient safety than for a family that has lost their child through preventable medical errors to share their story directly.

85. *Id.*

86. *Id.*

87. *Id.*

88. Interview with Horst and Luisa Ferrero, *supra* note 34.

89. *Id.*

90. Dooley, *supra* note 14, at 8.

This same process that helped educate medical professionals also helped, I believe, in Horst and Luisa's grieving.⁹¹ For both presentations, Horst read the account of the events leading to Sebastian's death from a prepared text, explaining that he did this because speaking of these things was not easy for him to do. Even so, from time to time as he read, he would have to pause to collect himself. So too for Luisa these events were both difficult and healing. After the first presentation, I asked Luisa how it felt to do it. She told me it was difficult. She had been up almost the entire night before, partly because she was not particularly comfortable with public speaking, and here she would be speaking before hundreds of people about her son's death. At the same time, she had no regret at all about doing it. She felt good about doing it.⁹²

It is worth mentioning by way of contrast how very different the impact upon the Ferreros would in all likelihood have been had their retelling of their story occurred in the context of an antagonistic lawsuit or trial. For approximately a decade, I have taught to my seminar students the book, *Wrongful Death: A Medical Tragedy*, by Sandra Gilbert. Gilbert begins by recounting the tale of her husband's tragic and mysterious death while undergoing a routine prostate procedure at a university hospital. She then describes the nightmare that ensued as she struggled in vain to obtain through a lawsuit answers to why he died. Not only did she fail to get answers (in contrast to the Ferreros' case, the hospital "closed ranks"), but the litigation process—being deposed by the defense counsel, answering the defense counsel's interrogatories, waiting with uncertainty as trial approached—was highly traumatic. Trial never did occur in her case as the parties struck a last-minute settlement, but from the perspective of healing, the lesson was very clear. Therapeutically speaking, as a way of processing the past, litigation can be horrible. Settlement, by contrast, can be much more positive. Luisa put it thus:

In our case, by going through the settlement we were able to save the time and effort by not going through litigation and use that time and effort for something positive like the foundation. Of course that doesn't mean that you are not human and have no anger, because you are still human and angry. . . . But this was a positive way of telling the story and also letting people know about what happened. [Further, settling the case let us take] positive steps in making things better for kids and for everybody, [but to accomplish that we needed] to work in cooperation with UF and Shands.

91. Sharing their story can be a profoundly healing act for bereaved parents. Writes Dorothy Becvar, "When working with or seeking to help parents who have lost a child, one of the most important factors . . . is the need they generally feel to be able to talk about what has happened. Indeed, as noted by one bereaved parent, 'The most essential ingredient, in fact, in surviving well—besides facing reality—is to speak of the child unashamedly.'" BECVAR, *supra* note 80, at 112 (citations omitted).

92. Interview with Luisa Ferrero, in Gainesville, Fla. (Oct. 29, 2008).

Horst, by profession an attorney and whose father was a lawyer and grandfather a judge, also thought settlement had served them far better than litigation would have.⁹³ Given that there was no ambiguity over fault, and given that damages were capped by law, he saw little value in litigation here. Settlement helped them avoid wasting “time and effort on something that would [have had no point]” and, most fundamentally, permitted them to find an effective way to honor their son’s memory.⁹⁴

4. Meaning-making

Psychologist Victor Frankl taught that one of the basic human needs is to find meaning in life, a sense of purpose or coherence that helps guide a person through times both good and bad.⁹⁵ Many people undergo experiences that challenge their sense of meaning, but few undergo experiences that challenge that sense as profoundly and acutely as the death of a child. Why did this happen? Does God exist? How could a good God allow something like this to happen to an innocent child?⁹⁶ Is our child now in heaven or is his life simply over? When the natural

93. On several occasions I have been asked whether the Ferreros’ settle-rather-than-litigate approach was influenced by their Latin background. When analyzing a single case, ultimately, it is difficult to know exactly why people made the decisions they did, and hence, it is difficult to know to what extent culture may have played a role in the decision. I note, however, that Horst is an attorney with both Venezuelan and American legal training. Further, and more importantly, the choice of litigation versus settlement was one the Ferreros and their attorneys considered explicitly, so even if, *arguendo*, Venezuelan culture leans more toward settlement than American culture, the Ferreros’ decision to settle was most likely more a product of conscious choice than cultural reflex. In my view, more significant external factors than culture in understanding the path the Ferreros chose were their social status, wealth, and the privately-owned, family-directed business at which they worked. Who, after all, thinks of *building a new hospital* as a response to a personal family loss? Further, who has the “luxury” of being able to delegate much of their regular work to others and devote their energies elsewhere? For people involved in developing large projects such as the Town of Tioga (*see supra* note 4), and whose families had engaged other significant public projects, the idea of putting their energies into building a hospital might not seem as unimaginable as it might for many. All that said, the core of Horst and Luisa’s desire to build a new children’s hospital no doubt came not from their ethnicity or social status but from their desire to prevent what happened to Sebastian from happening to other children. This response is analogous to the efforts of the Josie King Foundation, a private, non-profit foundation devoted to improving patient safety established by the parents of Josie King, an 18-month-old burn victim who died from medical error while being treated at The Johns Hopkins Hospital. For further information, see Josie King Foundation, <http://www.josieking.org> (last visited May 23, 2011); *see also* PETER PRONOVOST & ERIC VOHR, *SAFE PATIENTS, SMART HOSPITALS* vii–xxi (2010) (describing Josie King’s death, her parents’ response to it, and improvements to patient safety spawned by that response). As with Sebastian’s case, it took a child’s death to galvanize patient safety initiatives at the hospital, and, as with Sebastian’s case, Josie’s parents applied money they received through the legal settlement toward those safety initiatives. *Id.* at 9, 12. Replace the word “Hopkins” with “Shands”, and the words of Josie’s mother Sorrel in describing the Kings’ motivation could well have been the words of Horst or Luisa: “Hopkins gave us money for what they did to Josie. We want to use that money to do something so this does not happen again. . . . We want to do something that will [help] save lives [by preventing medical errors.]” *Id.* at 10.

94. Interview with Horst and Luisa Ferrero, *supra* note 54.

95. *See generally* VICTOR FRANKL, *MAN’S SEARCH FOR MEANING: AN INTRODUCTION TO LOGOTHERAPY* (1962); VICTOR FRANKL, *MAN’S SEARCH FOR ULTIMATE MEANING* (2000).

96. The death of an innocent child raises what theologians refer to as the question of theodicy, i.e., why would an omniscient, omnipotent, and benevolent God allow the innocent to suffer? For one very thoughtful response, which was produced following his own son’s death, see HAROLD KUSHNER, *WHEN BAD THINGS HAPPEN TO GOOD PEOPLE* (1981).

order of parents pre-deceasing children is reversed, the existential questions are profound.⁹⁷ As Judith Bernstein writes:

When an aged parent dies, though we may grieve deeply for the personal loss, the world is not turned upside down. Nature's plan, the predictability of the universe, remains intact. When a child dies, the very ground on which we depend for stability heaves and quakes and the rightness and orderliness of our existence are destroyed. Nothing in life prepares us; no coping skills were learned. Parents who lose children are thrown into chaos. The loss of a child is shattering, unique among losses.⁹⁸

Approximately sixteen months after Sebastian's death, I asked Horst and Luisa about their religious beliefs, and how Sebastian's death had affected those beliefs. Though raised as Catholics, Horst said that he and Luisa did not "completely share everything that is said to Catholics" and that they had not "found an answer in any other religion either."⁹⁹ They expressed a good measure of agnosticism on questions of God and the afterlife. "What I used to believe," said Luisa, "I don't believe anymore." For example, as a child Luisa was raised to say a prayer before going to bed, believing that something like a guardian angel would protect her and that nothing bad could happen to her. "I was very wrong," she said. "How can I do the same kind of prayers and thoughts with [my second son] Sergio? I can't do that."¹⁰⁰ Horst too said his beliefs had been deeply challenged by Sebastian's death:

It might be [that there is] a reason for something and maybe God is behind those reasons for everything. But at the same time those reasons don't make much logic to myself. Like why [would God take] a three year old versus an eighty year old who is causing problems for his country like Fidel Castro . . . ? Why does God take one versus the other, or was God protecting the other by giving them the kind of life that they were given . . . ? It's hard.

97. Sometimes people attempt to give a positive, optimistic "spin" to unfortunate events (*e.g.*, "Everything works out for the best," "God has reasons—even if we don't understand them—for what He does," "Look at the good the Ferreros have done by helping to create a new hospital," etc. . . .) When a child has died, such responses can seem empty. As Dorothy Becvar wrote shortly after her son's death, "All of my life I have been able to make positive interpretations out of the most tragic events, to find some good even in the darkest moments. For 2 weeks I have struggled to do this with the death of my son. I have decided, at this point at least, that there is absolutely nothing good about the fact that my son has died." BECVAR, *supra* note 80, at 105. To be clear, I do not mean to suggest that people cannot respond to a tragedy in positive and healing ways, but such does not erase the reality of the tragedy itself.

98. JUDITH R. BERNSTEIN, *WHEN THE BOUGH BREAKS: FOREVER AFTER THE DEATH OF A SON OR DAUGHTER* 3 (1998), *as quoted in* BECVAR, *supra* note 80, at 110.

99. Interview with Horst and Luisa Ferrero, *supra* note 54.

100. *Id.*

You challenge yourself and you challenge your belief and you challenge logic when . . . something like this happens to you.¹⁰¹

Both Horst and Luisa were also agnostic regarding the afterlife. “We never know what happens after life. You never know if they can really see from above and sense what we are doing or not,” said Horst. “[Perhaps Sebastian is in heaven as a child] having fun with other kids . . . and not worrying about the foundation or the fund raising. [Or perhaps he is in heaven as an adult and] can see the positive [work of the foundation] and what is going on in his name.”¹⁰² Rather than determining whether Sebastian was now in heaven, what was most important to Horst and Luisa was that Sebastian remained a part of their lives. One of the most powerful, beautiful statements I have ever heard on the question of life after death came to me from Luisa by route of her close friend, Linda Michalisin. Michalisin has a son, Liam, who is a playmate of the Ferreros’ second child, Sergio. At times, Sergio would ask Luisa, “Where is Sebastian?” Luisa, wanting Sergio to know that he always has a big brother, would respond that, “Sebastian is always going to be in our heart. I never want to say that he’s in heaven because for me that’s too far away.”¹⁰³

The approach of keeping Sebastian with them—of allowing the joyful presence that he was to remain a part of their lives—is a powerful one, both for the healing role it played in their lives and for the way it animated their foundation work. Rather than somehow attempting to disassociate from the tragic loss of Sebastian, the Ferreros maintained Sebastian’s presence actively in their lives.¹⁰⁴ “What we are doing [through the foundation] is important, meaningful, and for a good reason,” said Horst. “Although it was born of course of the most horrible tragedy that anyone could have, at the same time it’s been done with the love for Sebastian, the love that we still have for him.”

A number of times, I asked Horst and Luisa why they chose the route they did. Part of their answer was to improve healthcare for other children. They did not want what happened to Sebastian to happen to another child. Another part of their answer is that they wanted to honor Sebastian by creating a legacy for him. As Horst explained, Sebastian was “happy, healthy, and full of life.” Had he lived beyond age three and a half, “He would have probably been able to accomplish a lot of things in his life.” Though Sebastian had deeply touched many people in his all-too-brief life, he could not, of course, build his own legacy. Through the work of their foundation, Horst and Luisa could construct a legacy for Sebastian, a legacy that would honor both “his memory and his name.”¹⁰⁵

Each of us must ultimately face questions of meaning on our own terms. One person may find meaning in following one route, and another person may find

101. *Id.*

102. *Id.*

103. Interview with Linda Michalisin, in Gainesville, Fla. (Sept. 10, 2009).

104. Miguel Diaz also described the approach of keeping Sebastian as an active, joyful presence in his life, rather than trying to disassociate from his memories of Sebastian, as critical to Diaz’s healing. Diaz, *supra* note 47.

105. Ferrero, *supra* note 54.

meaning in following another route. While I would not expect that many parents who had lost children through medical error would have followed the route Horst and Luisa followed, it certainly seems a plausible one in terms of making some positive meaning out of their loss.¹⁰⁶ For most legal clients, the challenges of finding meaning, purpose and coherence are, of course, of far lesser magnitude than they were for the Ferreros. Nevertheless, many clients do face such challenges. Lawsuits frequently reflect times of crisis and transition in people's lives. At such times, the human need for meaning-making often comes to the fore.

The basic lesson for legal practice is straightforward. Many clients have significant non-monetary interests, and often those non-monetary interests can be better served through settlement than through litigation. But for the swift and amicable settlement with the hospital, the Ferreros' goals of improving patient safety and constructing a children's hospital would have been far more difficult to achieve. I think it highly unlikely that a protracted lawsuit could have set the stage for the Ferreros to follow the deeply meaningful path they did. An amicable settlement did.

III. SEVERAL OTHER LESSONS

Before concluding, I would like to briefly mention three other lessons this case holds for legal and medical practice, namely, the importance of listening to others, the positive effect that taking rather than denying responsibility for errors can have on preventing future errors, and, most fundamentally, the transformative potential of reconciliation. I would also like to inform the reader of what became of the Ferreros' dreams of improving patient safety and building a new children's hospital in their community.

A. The Importance of Listening

One of the most tragic features of Sebastian's story is that his parents repeatedly spoke up and raised their concerns about the arginine test, but their concerns were not truly heard. As described earlier, prior to the commencement of the test, Luisa asked the nurse administering the arginine whether the two full bottles containing approximately two and one half cups of fluid were the right amount to be given to her twenty-five pound boy. Approximately three-quarters of the way through the test, Horst insisted that the test be stopped and that a doctor be called to double-check the procedure. In each instance, on one level the Ferreros were heard—the nurse did respond to Luisa and a doctor was brought in to double-check the procedure—but on a deeper level, they were not truly heard. Though the medical professionals did physically hear the Ferreros' words, either they did not

106. See *supra* note 93 (describing the work of the Josie King Foundation). The Michael J. Woods Foundation at Kent Hospital, also dedicated to reducing medical error, established by actor James Woods following the hospital's apology for the death of his brother Michael is of similar vein. See *James Woods and Hospital Settle Wrongful Death Lawsuit* (Dec. 3, 2009), <http://www.lawyersandsettlements.com/blog/tag/hospital-error> (last visited Mar. 25, 2012).

truly absorb their content, or, if they did, they did not process that information correctly.

Approximately a year and two thirds after Sebastian died, I interviewed Dr. Novak and asked him what lessons he learned from Sebastian's case. "More than anything what I take away from this in terms of being a doctor is listening," he replied. "The one thing about this whole tragedy that struck me most was just that people didn't listen."¹⁰⁷ He continued to discuss the case with medical students, staff, and fellow faculty, and when he did, the importance of listening was what he tried to impart.

On one level, listening is one of the simplest parts of life. We all listen to others almost every day. On another level, listening with an open mind, that is, with a willingness to change one's view of things based upon what one hears, is one of the most difficult things we do. In Sebastian's case, that failure to listen cost a young boy his life.

B. Taking Responsibility Helps Prevent Future Mistakes

In the ongoing discussion of how hospitals should respond to medical errors—whether, for example, they should after adequate investigation openly disclose and admit errors to patients—one of the most important issues is how such a policy of disclosure will affect the incidence of future mistakes. One case cannot, of course, prove an argument, yet I take Sebastian's case as a powerful example of the rather common-sense idea that an organization that openly discloses and admits errors will be better able to prevent future errors than one that does not.¹⁰⁸

Slightly over one year after Sebastian died, the University of Florida's College of Medicine published in its quarterly magazine a cover story titled, *How One Boy Changed the College of Medicine*.¹⁰⁹ The magazine's cover showed a picture of a smiling Sebastian standing in a bed of flowers. Inside, the article detailed multiple, significant changes at the hospital prompted by the Ferrero family's efforts to improve patient safety. New processes had been established for dispensing medications and administering infusions. Electronic medical records were replacing paper records to promote better access to information. A process called "Condition H" had been adopted throughout the hospital whereby patients and/or their families could call on a "rapid cycle team" not involved in the patient's care to investigate promptly if they believed an error was being made.¹¹⁰ New educational efforts were undertaken as well. Despite the assessment that medical errors kill between 44,000 and 98,000 Americans per year (more, for example, than

107. Novak, *supra* note 37.

108. On the possible linkage between openly disclosing mistakes and preventing future ones, see generally Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 941-42 (2005). On that linkage within medicine specifically, see Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, *supra* note 28, at 1464-68.

109. See Dooley, *supra* note 14, at 3.

110. *Id.* at 9.

motor vehicle accidents, breast cancer, or AIDS),¹¹¹ prior to Sebastian's death, the College of Medicine had no formal educational component devoted to patient safety.¹¹² In the aftermath of Sebastian's death, the College of Medicine designed and implemented an extensive, four-year medical student educational program on patient safety, a program that may potentially become a model for other medical schools.¹¹³ In the words of Interim Dean Michael Good, "Sebastian Ferrero has changed the College of Medicine forever."¹¹⁴ Dr. Donald Novak described the hospital's cultural change thus:

Throughout everything, throughout the medical center, throughout the hospital, [Sebastian's death] has really, in a horrible way, energized [patient safety] activities and made people continue to focus on safety every day...¹¹⁵ No one argues anymore. If there's a safety change that needs to be made, people don't argue. They say, 'okay'. They don't find reasons to nitpick. People are incredibly cognizant. Students are incredibly cognizant.¹¹⁶

C. The Transformative Potential of Reconciliation

In the years following Sebastian's death, the SFF engaged in numerous efforts large and small (e.g., fundraising projects in schools, carnivals, concerts, art shows, Zumbathons™, hop-a-thons, trot-for-tots run/walks, etc.) to foster awareness of the need for a new children's hospital in Gainesville and to raise money toward that end.¹¹⁷ The largest gift to their foundation—five million dollars—came from Google millionaire Craig Silverstein.¹¹⁸ Silverstein, a Gainesville native, is the son of Sebastian's main physician Janet Silverstein, the doctor who had ordered Sebastian's test and who had wept with the family at the time of his death. Craig's gift meant a great deal to the SFF and also to Janet Silverstein personally. "I was very proud of Craig for his contribution and the commitment to this issue it represented," wrote Silverstein. "It is important to my husband and to me, and I know this impacted Craig as well. It says a lot about the kind of person Craig is and ... makes me very proud as a mother."¹¹⁹

111. INSTITUTE OF MEDICINE, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1* (Linda T. Kohn, Janet M. Corrigan & Molla S. Donaldson eds., 2000). Some describe the 44,000 to 98,000 figures as conservative estimates. See Susan Brink, *'It's Never Just One Thing' That Leads to Serious Harm*, LA TIMES, Jan. 28, 2008, at F1.

112. Interview with Dr. Marvin Dewar, Associate Dean for Continuing Medical Education, University of Florida College of Medicine, in Gainesville, Fla. (Oct. 27, 2008).

113. Dooley, *supra* note 14, at 9.

114. Dooley, *supra* note 14, at 8.

115. Interview with Dr. Donald Novak, *supra* note 38.

116. *Id.*

117. For listings of some of these events, see <http://www.sebastianferrero.org/events/> (last visited Mar. 30, 2012).

118. See Diane Chun, *Google Exec Gives \$5M to Sebastian Ferrero Foundation*, GAINESVILLE SUN, Sept. 2, 2009, available at <http://www.gainesville.com/article/20090902/ARTICLES/909029932/1002?Title=-5M-gift-to-Gainesville-foundation>.

119. E-mail from Dr. Janet Silverstein to author (July 15, 2010, 10:57 PM) (on file with author).

Over time, the work of the foundation became a community-wide effort. For example in 2008, the SFF sponsored its first annual signature fundraiser, “Noche de Gala,” an evening of splendid entertainment combined with education about and advocacy for the SFF’s mission. In both 2009 and 2010, approximately one thousand guests attended that fundraiser and approximately two hundred people volunteered their time to make that gala happen.¹²⁰ Why did so many people join in the Ferreros’ mission? Part, no doubt, was the way they had been touched by the tragic death of a child.¹²¹ Part, no doubt, was the belief, among both medical professionals¹²² and the public¹²³, that a children’s hospital was needed for the children of their community. Yet an important part too, in my view, related to what had taken place between the Ferreros and the hospital. The hospital had fully apologized for Sebastian’s death, and the family had then begun working together constructively with them. The Ferreros sought to give back to the world the very thing—a safe hospital for children—that the world had not given to them. For many, I believe, that story of healing was an inspiring one.

And as to their dream of a new children’s hospital? In September of 2010, following a year-long strategic planning process triggered by the SFF, Shands Healthcare and the University of Florida announced that they would commit nearly \$100 million over the next five years to create a children’s hospital at Shands. Due to excess existing hospital-bed capacity within the Shands/UF system, this project would begin not by building a new free-standing structure, but rather would come from restructuring and reconfiguring existing hospital space. Nevertheless, for Horst and Luisa, this was a dream come true. As Horst expressed, “Being able to

120. See *Noche de Gala 2009*, GAINESVILLE SUN, Oct. 11, 2009, at 6A; *Noche de Gala: The Grand Ball*, GAINESVILLE SUN, Oct. 30, 2010, at 7A.

121. The involvement of University of Florida basketball coach Billy Donovan is illustrative. Donovan served as the celebrity chair for the 2010 Noche de Gala, starred in a television commercial for the SFF, and even won a national charity-fundraising contest by college basketball coaches, yielding a \$100,000 donation for the SFF. See respectively *Noche de Gala: The Grand Ball*, *supra* note 118, at 7A; *Billy Donovan—Sebastian Ferrero Foundation*, <http://www.youtube.com/watch?v=WktOQn1tJeo> (last visited May 17, 2011); *Infiniti Presents University of Florida’s Billy Donovan’s Designated Charity with \$100,000 Check for Winning the Inaugural Coaches’ Charity Challenge*, PR NEWSWIRE: UNITED BUSINESS MEDIA, May 2, 2011, <http://www.prnewswire.com/news-releases/infiniti-presents-university-of-floridas-billy-donovans-designated-charity-with-100000-check-for-winning-the-inaugural-coaches-charity-challenge-121107074.html>. Donovan and his wife Christine had lost a stillborn child approximately seven years prior to Sebastian’s death, and much appreciated the community support they received. Stated Donovan, “My wife and I, we lost a child, and I think you can identify inside a community different things that happen to families. I think what keeps a community together and a family together is the support you get from the community.” Kevin Brockway, *Ferrero Foundation Hits Home for Donovan*, GAINESVILLE SUN, Oct. 27, 2010, at 1A, 5A.

122. In the aftermath of Sebastian’s death, over 150 pediatricians and pediatric specialists from the local area signed an open letter calling for a new children’s hospital in Gainesville. See Open Letter Advertisement, GAINESVILLE SUN, June 5, 2008, at 7A. Note, however, that the idea of building a children’s hospital in Gainesville was certainly not new. “Building a children’s hospital has been a dream for us for twenty years,” stated Dr. Richard Bucciarelli, Chair of the Department of Pediatrics, University of Florida. Interview with Dr. Richard Bucciarelli, in Gainesville, Fla. (Mar. 18, 2009). In Bucciarelli’s view, Sebastian’s death and his parents’ response to it, “galvanized the community in a way we couldn’t in twenty years to say we needed a children’s hospital.” *Id.* (emphasis added).

123. As Kirsten Rowe, mother of two small children, expressed, “I think it’s an amazing thing that [the Ferreros] are doing by building the children’s hospital. It is something we really, really need. . . . Most other large communities have one, and we don’t. It’s almost a disservice to our community.” *as quoted in* Jennifer Bate, *Sebastian Ferrero Benefit Draws a Crowd to Tioga Town Fair*, GAINESVILLE SUN, Sept. 13, 2009, at B4.

move the needle from this (children's hospital) being something that was mentioned as a dream to a project that is a priority for UF and Shands brings us a lot of satisfaction and joy."¹²⁴ The first step toward this new hospital would be a dedicated pediatric emergency room, to be opened July 1, 2011. With monies raised at the 2010 Noche de Gala fundraiser, the SFF donated \$500,000 toward that new pediatric emergency room.

Sebastian's case vividly illustrates how *transformative* reconciliation can be. There are things, of course, that reconciliation cannot achieve. Reconciliation cannot bring to justice a wrongdoer who refuses to accept responsibility for what she or he has done. Yet when it works, reconciliation can produce incredible results. Paradoxical though it may at first sound, the relationship between the injured and the injurer often holds great potentiality within it. It is only the injurer who can apologize to the injured. Beliefs about Divine forgiveness aside, it is only the injured who can forgive the injurer. When reconciliation occurs, tremendous growth can also occur. Healing a relational wound, in other words, can be pivotal in building a better future. At a very basic level, the storyline of what took place in this case is both remarkably simple and yet extraordinary. A hospital accidentally killed a healthy child through a series of medical errors. Rather than denying responsibility, the hospital apologized fully. Rather than seeking vengeance, the bereaved family sought to work constructively with the hospital. Through reconciliation, the hospital was made safer, and a new hospital for children is being created. Through reconciliation, the family experienced much healing and found much meaning. None of that, of course, diminishes the great tragedy of Sebastian's death, but it does show how transformative the process of reconciliation can be.

CONCLUSION

Reconciliation is a powerful process, but it is not a process that occurs accidentally. Part of what permitted reconciliation to work in this case was the hospital's decision to take responsibility for what it had done. Part—indeed the most inspiring part—of what permitted reconciliation to take place was Horst and Luisa's decision to be forward-looking, and try to prevent what happened to their son Sebastian from happening to another child. Part too of what permitted reconciliation here was the work of others: friends such as Miguel Diaz, Victor Badell and Gil Levy who helped support Horst and Luisa Ferrero in the midst of their crisis, and an attorney, Marcia Davis, who instantly recognized that Horst and Luisa's core interest after Sebastian's death was not in money but in going forward with life. For Horst and Luisa, that meant constructing a legacy for their son Sebastian, a legacy of improved patient safety and medical care for other children. To build that legacy, constructively reconciling with the hospital was essential.

When I first began researching this case, as a way of trying to understand what the Ferreros had done, I asked myself the question, "What does one do with the love for a child one can no longer express?" To me, it seemed Horst and Luisa had

124. Brockway, *supra* note 121, at 5A.

taken some of their love for Sebastian and applied it toward other children by trying to make hospitals safe for other children. At one point I was discussing the case with Marcia Davis, and she put it in a somewhat different light. “Sometimes people live their whole life and they don’t know what their passion is ... I think that [in doing the work of their foundation] Horst and Luisa found their passion.” And where did that passion come from? “I think,” said Davis, “that [when he died] the passion that Sebastian had for life just transferred into Horst.”¹²⁵

I shall end with a story. As mentioned earlier, on October 29, 2008, slightly more than a year after Sebastian died, Horst and Luisa told their story to the hospital community as part of the Patient Safety Grand Rounds. Among the hundreds of medical professionals in the audience were the first-year medical students. About two weeks later, I spent several hours interviewing one medical student who had been especially touched by the Ferreros’ story. To maintain his anonymity, I will refer to him as “John Doe.”¹²⁶ At the time of our interview, Doe was twenty-one years old and had come directly to medical school after college.

As I suspect was true with most of the people in the room, the Ferreros’ presentation very powerfully conveyed to Doe the message of patient safety, and much of our conversation addressed that topic. “You can hear the statistics [on patient safety, and] you can hear what needs to be resolved to better patient safety, but there is nothing more real than what happened with the Ferreros,” said Doe. Yet there was a second, different reason behind why the Ferreros’ story touched him.

Doe was from a close-knit, Southern family. Approximately a decade earlier, Doe’s paternal grandfather had died from prostate cancer. Doe’s widowed grandmother, a woman in her mid-seventies, was devastated by her husband’s death. Soon she began to develop a serious mental illness. Her illness grew to the point where it was believed she posed a risk to herself, and she was involuntarily committed to a hospital’s psychiatric facility for her own safety. At the hospital, she was placed on a “suicide watch,” an intensive monitoring process to ensure the patient’s safety. At one point during the monitoring, the watchman inappropriately left and took a fifteen minute break. During that break, the grandmother took steps which soon led to a coma.

With the grandmother in a coma, much of Doe’s extended family arrived at the hospital. They met with the watchman, who “felt an extreme amount of guilt and of course responsibility for what had occurred.” Indeed, said Doe, “The whole healthcare team [was] extremely apologetic.”

The grandmother died within several hours. The extended family then faced the question of what to do. Should they sue the hospital and the watchman? There was disagreement among the family. Some members argued that they should simply accept what happened. Doe explained their reasoning thus: “[They said that

125. Interview with Marcia Davis, *supra* note 50.

126. The information and quotations in this section come from Interview with University of Florida Medical Student “John Doe”, in Gainesville, Fla. (Nov. 11, 2008). Mr. “Doe” consented to my relaying his story, but, for reasons discussed below, desired anonymity.

this] was the plan that God had in store for her, so instead of viewing it in [the light of] medical negligence [and] placing blame on the watchman, they viewed it that this was what she wanted.” In these family members’ minds, “[Death] is what she wanted . . . [for she] wanted to be up in heaven with [her husband] and . . . would have attempted whatever was in her own will to do so.” Factoring into the equation too, explained Doe, was the family’s desire for privacy. A lawsuit could bring unwanted publicity to the facts of the grandmother’s mental illness and her suicide. They did not want her to be remembered that way.

Other family members argued that they should sue. Should not there be accountability for what occurred? The family deliberated for about an hour, and concluded that they should accept the situation. “I think that our Christian faith [gave us] guidance to really seek solace in the fact that this was what God’s plan was,” said Doe. The family even went beyond acceptance and expressed a measure of forgiveness to the watchman, telling him that this was God’s will, and not to feel guilty about what occurred.

As a young teen, Doe disagreed with his family’s approach. In part, he disliked the stigmatization of mental illness and suicide that prompted their impulse toward privacy. In part, he didn’t understand why the hospital shouldn’t be held liable for its actions. Over the ensuing years, Doe struggled with the choice his family had made. Part of him saw “the wisdom” of that choice, but part of him remained troubled by it.

As Doe listened to the Ferreros’ story, he recalled his own family’s choice and felt better about the decision his family had made. Though of course the death of a child was very different from the death of a grandparent, the issue of how to respond where a hospital’s negligence had led to a loved one’s death was similar. As he listened to the Ferreros’ story, Doe was moved. “I [have] an extreme amount of respect for how the Ferreros have handled the situation,” he explained. The Ferreros, he said, had turned their son’s death into a “learning situation” for the hospital and the community. “I don’t know every detail of the Ferrero story,” he said, “but from [an] outsider’s perspective, it seemed to be a situation that was turned into a positive manner.” In part due to the social stigmatization of mental illness and suicide, his family had not been able to use the tragedy of his grandmother’s death for the betterment of society as had Horst and Luisa. Thus, he especially appreciated what Horst and Luisa had done.

By choosing the path of reconciliation, Horst and Luisa Ferrero were able to create an important legacy for their son. The core of that legacy lies no doubt in the world of medicine: the changes made at the hospital to promote and teach greater patient safety, and even more dramatically, the new children’s hospital that is being created in phases. Perhaps a small piece of that legacy too may lie in the world of law: lessons about the role of community in healing and legal decision-making, the centrality of caring to the vocation of lawyering, and the importance of meaning, and not just money, to many clients.

Three-year-old Sebastian Ferrero’s death from medical error was profoundly tragic. His parents’ response to it was deeply inspiring. That inspirational response

does not, of course, erase the tragedy of the loss. But it does contain within it lessons that both lawyers and clients can take to heart.

ACKNOWLEDGMENTS

I am indebted to many people for their help with this project.

First are Horst and Luisa Ferrero, both for consenting to the project and for their willingness to share very personal aspects of their lives during interviews. I do not believe that either Horst or Luisa are by nature public people. They are, however, extremely public-minded people. I believe their willingness to share of their tragedy stems in significant part from their desire to help others, more specifically, to prevent other children from being lost due to medical error. It is a deeply noble impulse. My thanks as well to Horst Ferrero for his careful reading of and comments upon this article.

Numerous professionals involved with the case, often professionals with very busy lives, generously gave of their time in allowing me to interview them at length for the project. My deep thanks go to: Doctors Janet Silverstein, Donald Novak, Marvin Dewar, Douglas Barrett and Richard Bucciarelli; Kim Yozgat, Martin Smith and Arlene Smilov of the University of Florida's Self-Insurance Program; and the Ferreros' attorneys Marcia Davis and Tania Cruz. My thanks go as well to Ferrero family friends Miguel Diaz, Victor Badell, Gilbert Levy, and Linda Michalisin for sharing so generously of their time and of their lives, and the University of Florida medical student who, for reasons of family privacy, desired to remain anonymous.

Colleagues helped me throughout this project. I cannot name them all, but I especially appreciated the advice of Iris Burke, Dennis Calfee, Robin Davis, Nancy Dowd, Allyson Flournoy, Berta Hernandez-Truyol, Joe Little, Charlene Luke, Pedro Malavet, Juan Perea, Don Peters, Traci Reid, Len Riskin, Elizabeth Rowe, Sharon Rush, Katheryn Russell-Brown, Michael Seigel and Danny Sokol. Barbara Noah of Western New England College School of Law was also quite gracious with her advice. I am grateful too to Dean Robert Jerry for his support. I presented early versions of this paper at an AALS dispute resolution conference at Harvard Law School and also here at the University of Florida, and both times received valuable feedback. I appreciate too the suggestions I received from my seminar students. While the responsibility for errors is mine alone, I am grateful for all the helpful advice I received.

My secretary Betty Donaldson and research assistant Christine Wang were both of tremendous aid. Betty's on-going encouragement and technical assistance were of great support. Christine's persistence, judgment and dedication to producing high-quality work whatever the task—many quite onerous—made working with her a joy. Financial support was provided in part by the University of Florida Levin College of Law summer research fund, for which I am grateful.

A special word of thanks is due to Julie Barnes. Julie is an executive secretary at our law school. On Saturday, October 27, 2007 (two and a half weeks after Sebastian died) Julie's only child, a delightful thirteen-year-old girl named Amber,

was struck and killed by a car while crossing a major road. Having no professional background in working with bereaved parents, before conducting my first interview with Horst and Luisa, I asked Julie if I might interview her about her experience of having lost a child and of then trying to go forward with life. Julie very generously agreed (for discussing the loss of one's child in itself can be very difficult). While I will not report the contents of that interview here, let me simply say that Julie's candor, courage and thoughtfulness laid a very important foundation for this project. She has my great appreciation.

Last but certainly not least I must thank my family. This includes my parents, step-parents, in-laws, and children, and above all my wife Karen. To describe in detail the many ways she helped me on this project would itself produce a not-so-short article. Briefly, it is no overstatement to say that without her love, support and advice this paper could never have been written.