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A Black Robe and Healing Words: Constants in a Changing World

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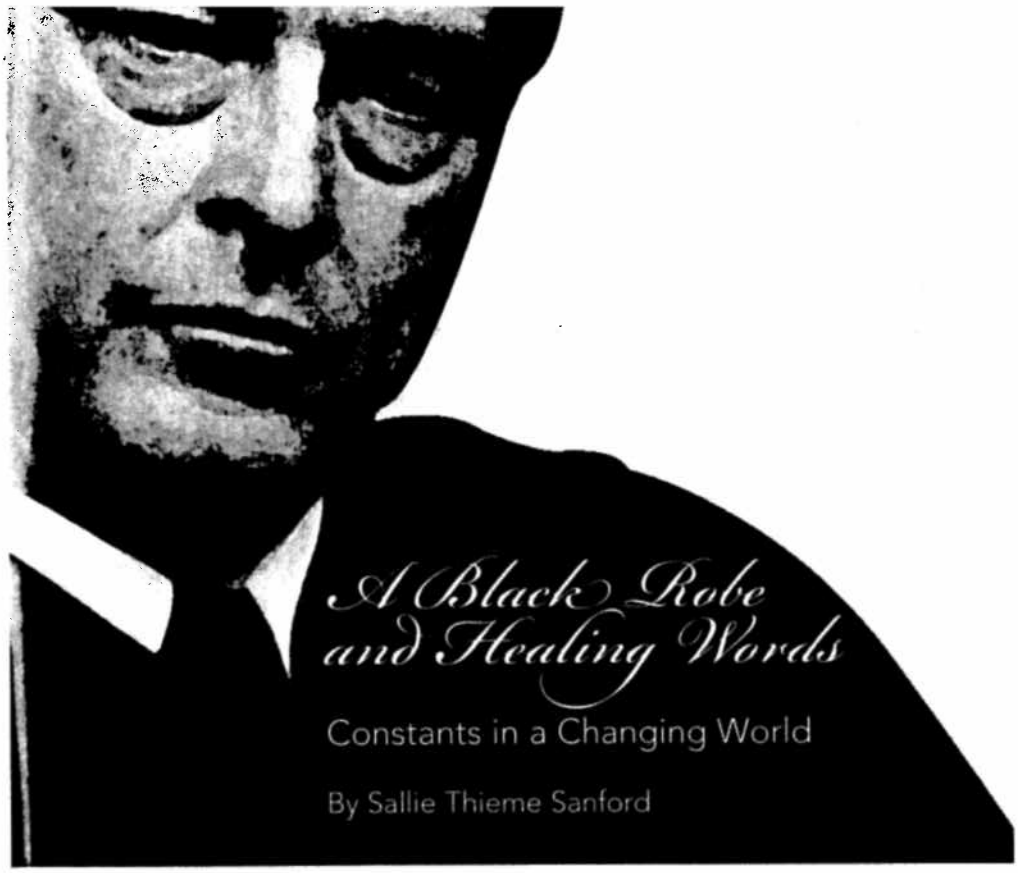

A Black Robe and Healing Words

Constants in a Changing World

By Sallie Thieme Sanford

The patient, a woman in her thirties, burned most of her back when her nightgown caught fire in the small apartment where she lived alone. An ambulance took her to Harborview Medical Center, a Level I trauma center in Seattle with a nationally prominent burn center. Days later, she remained highly agitated, yelling at the staff to leave her alone and adamantly refusing the recommended skin graft surgery.

Because of the size and depth of the burn, grafting was the only tenable option; not to graft would risk serious infection and massive scarring. Besides, the patient—I'll refer to her as Abby Johnson—seemed to have significant mental limitations, and she refused to give a reason for her refusal. Ms. Johnson refused, mostly, to talk to the myriad of people involved in her care—attendings, residents, nurses, social workers. She was also hostile to her sister and her sister's family, with whom she had had good relations.

Surgery: Who Makes the Decision?

The psychiatrist couldn't make a firm diagnosis (largely because Ms. Johnson would not talk to him), but he noted that the patient's sister, who managed a trust on her behalf, said that she had once attended a school for mentally retarded children and that "she's just slow and always has been." She probably also was terrified to find herself on the burn unit, with her arms tied to the bedrails (to stop her from peeling off her bandages), people going in and out, being told that she needed to have big pieces of her skin cut off. She insisted that she did not want the surgery.

What to do? As one of the attorneys representing Harborview, I was called with that question. It is well established, as Judge Cardozo wrote in 1914, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."[1] Ms. Johnson was of adult years; a court had never ruled that she was not "of sound mind." Her physicians and family believed, however, that she did not have the mental capacity to weigh the information about her burn and to decide what was to be done about it. She did have someone—her sister—in the state's statutorily defined list of surrogate decision makers. When a patient who lacks decision-making capacity agrees to a major surgery, the law provides a sound argument to the effect that the surgeon can note the patient's assent but can turn for actual informed consent to the designated surrogate.

If an allegedly incompetent patient objects to major surgery, however, the procedures become more complicated. The Washington Supreme Court considered such a situation in a precedent-setting case in 1984.[2] Opal Ingram, 66, had cancer of the larynx as well as other medical problems. The accepted treatment methods for the cancer were either radiation therapy or removal of the vocal cords. The latter method had a much higher success rate but carried with it the complete loss of the ability to speak. And even if the chosen treatment cured the cancer, her life expectancy was probably less than five years anyway, due to advanced lung disease.[3]

Ms. Ingram's doctors and her family believed she was incapable of making the decision. She suffered from dementia, had a long history of paranoia and delusions, and believed her throat problems were caused by the heater in her apartment. Her son said he did not know what she would want if she were competent, but he believed the surgery was in her best interest and wanted her to have it, as did all the other members of her family.

The doctor testified that 99 percent of his patients selected surgery, although he had had a blind patient who opted for radiation. He was not sure what should be done in Ms. Ingram's case, given her mental limitations and the particular difficulties she would likely face following surgery. Ms. Ingram repeatedly expressed fear of losing her voice and said that "she would not approve surgery, even in order to avoid death."[4]

The trial court ruled that Ms. Ingram was incompetent, appointed her son as guardian, and ordered the surgery. The Washington Supreme Court reversed the surgery order. The court ruled that it was appropriate to turn to the judicial system here, given the requirements of the guardianship statute in effect at the time and the "highly intrusive, irreversible" nature of the treatment, as well as Ms. Ingram's expressed opposition to it. When they are called on

to exercise substituted judgment on behalf of incompetent patients, the court ruled, judges should weigh a number of factors.

The Patient's Wishes

Key among those factors are the patient's expressed wishes. The patient's wishes are to be given substantial weight even if spoken while the patient is incompetent and even if the patient does not understand her medical condition. To ascertain the patient's wishes, the court continued, the judge should, if possible, interview the patient and observe her physical and mental condition.[5]

There is room for honest disagreement, from both a legal and ethical perspective, about precisely when a court order is required for treatment and when a surrogate's decision will suffice. In the case of the Harborview burn patient, though, I believed that it was appropriate to seek a court order for surgery and that it would be inappropriate to rely on the patient's desire to forgo surgery. Whatever the decision, I believed that a judge ought to be involved.

On behalf of Harborview, I filed a petition for a court order on an expedited basis. It was not an emergency situation, but urgent, with delay likely to serve no purpose except to increase the risk of medical complications. The judge was assigned, the guardian ad litem was appointed, an attorney to represent Ms. Johnson was designated, documents were drafted, and members of the medical staff were notified that they would be needed to testify at a bedside hearing. Ms. Johnson's primary social worker, who had had some luck at connecting with her, took the lead in coordinating the logistics for the hearing. Although the hearing happened years ago, and I have forgotten some of the details, many of the statements made during the hearing remain vivid.

In advance of the hearing, Ms. Johnson's court-appointed attorney attempted to talk to her. The nurse ushered the attorney into the room and introduced her. "Get out of here," yelled Ms. Johnson to the nurse, "and take that slut with you!" The attorney was unable to communicate with her client. She went into the hearing prepared to argue that her client did not want surgery and that her client had a right firmly grounded in constitutional as well as common law principles to refuse to undergo surgery even if that meant she would recover poorly from the burns, or worse.

Judge Mertel explained that, although he was going to make the decision, he wanted to know what the patient thought.

A Good Sermon?

As the time of the hearing approached, Judge Charles W. Mertel of the Washington State King County Superior Court arrived on the burn unit. When he walked into the hospital room in his black judicial robes, Ms. Johnson visibly calmed. She said he put her in mind of her childhood minister and asked if he gave a good sermon. Judge Mertel explained that he was not a minister, but a judge, and he said that he was there to preside over the hearing. She nodded and did not yell.

During the hearing, it came out that Ms. Johnson lived independently, with her sister handling her bills. Most days she went to the neighborhood grocery store, bought lunch, talked to the grocery clerks, and watched wrestling on TV. She was a big fan of wrestling and sometimes went to the local high school's wrestling matches. She had lied when she told the social worker that her nightgown caught fire as she was making dinner; actually she had been cold and had sat on the stove to warm up without realizing the burner was on.

After several people testified, Ms. Johnson was asked directly why she did not want the surgery. She responded that she understood that they would have to take skin from her thighs and buttocks. Was that true, she asked the judge. Yes, he replied. "Well," I recall her saying, "that's my best feature." The judge nodded thoughtfully and said something to the effect of "we all have our vanities, but sometimes trade-offs need to be made."

Following more discussion about the surgery, the usual course of recovery, and the expected aesthetic results, Judge Mertel called a recess. He told me, Ms. Johnson's attorney, and the guardian ad litem that he did not think she was capable of making a decision about the surgery, that the surgery was in her best interest, and that he was going to order it. He believed, however, that Ms. Johnson might do better if she could be brought into agreement as well, and he was thus going to resume the hearing.

Back in the hospital room, the judge asked her if she had any questions. She had good ones: What did her burn look like? How big was it compared to the TV in her room? Had the judge been to college? What did he think she should do? With the help of the doctors, he answered her questions. Judge Mertel explained that although he was going to make the decision, he wanted to know what she thought.

One Condition

Ms. Johnson said she would agree to the surgery, but "on one condition." The whole room—her family, law clerk, doc-

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tors, social worker, medical student, lawyers—leaned in to hear her one condition. It was then that I realized Judge Mertel, distinguished-looking in his robes and bow tie, eye-to-eye with the patient, was sitting on the portable toilet.

"I'll have the surgery," she said and paused, looking at the judge, "if *you* will do it."

"I don't know how," he responded levelly. "But I've met your doctors; they're skilled surgeons." Then he added, in a bit of odd phrasing, "I stand by them."

"Okay," she said, "so that means you'll be in the operating room, making sure they do it right."

"No, I meant I stand by their decision. I won't be there, but I'll be thinking about you."

"Okay," she said.

The patient was calm and cooperative throughout the rest of her hospital stay, the surgery was a success, and her recovery uneventful. This good outcome was due in part, I believe, to the respect and thoughtfulness Judge Mertel had exhibited toward Ms. Johnson during that hearing. The judge entered an order authorizing surgery. He had, though, done much more than that.

Postscript

Hon. Charles W. Mertel joined the State of Washington King County Superior Court in 1992. He served four terms, all unopposed, and retired from the bench in December 2008. In announcing his retirement, Judge Mertel urged voters to cast their ballots for judicial positions wisely, noting that "this Superior Court position is very powerful. We change people's lives." ■

Endnotes

1. Schloendorff v. Society of New York Hospital, 105 N.E. 92, 93 (N.Y. 1914).
2. *In re* Ingram, 102 Wash. 2d 827 (1984).
3. *Id.* at 828–32.
4. *Id.* at 830.
5. *Id.* at 838–39.

Crystal Ball with Rearview Mirror

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judicial education. On behalf of The National Judicial College, I am especially grateful. A 1962 American Bar Association Commission chaired by then-U.S. Supreme Court Justice Tom C. Clark determined that, while judges are part of the legal profession, judging was different enough from lawyering to warrant judicial education. This observation led to the creation of The National College of the State Judiciary, which became The National Judicial College. From the beginning, the NCSTJ and its members have been an integral part of the NJC and have made invaluable contributions to its success. The first course created was what is now known as "General Jurisdiction for State Trial Judges." NCSTJ members each year attend "General Jurisdiction" and other courses. Additionally, NCSTJ members have supported NJC through service as faculty and as members of the NJC's Faculty Council and Board of Trustees. NCSTJ and the other conferences of the Judicial Division have made many contributions to the more than forty-five years of NJC efforts to advance justice through judicial education.

When it comes to an entity such as the NCSTJ, there are numerous reasons to belong. These include fellowship, sharing professional concerns or achievements, exploring issues and solutions, prestige, opportunities for professional advancement, being able to make a difference in society and in the profession, and, of course, education. Beginning in 1978 and continuing through the present, the NCSTJ offered me all of this and much more. It continues to offer all of us the opportunity to work together to address the challenges facing today's courts.

In a recent discussion, Ed and I made the following observations about those challenges.

Courts are not prime movers but are, rather, mainly reactors to what is given them by societal evolution, other branches of government, and the impact of technology. What are the implications of these influences for caseflow management?

Clearly judges have evolved from those who capped their successful careers through judicial service. Younger "career judges" now rise to the bench. How do we meet their education and training needs?

While the pendulum of change often swings back and forth, it seems that, for the bench, it has become stuck in a forward position calling for new, different, cutting-edge solutions. Is it time for the pendulum to swing back and for judges to reflect on what should be the work of the judicial profession?

In the past, U.S. Supreme Court Chief Justice Warren Burger, Harold Heflen, New Jersey Supreme Court Chief Justice Arthur Vanderbilt, Ernie Friesen, Dr. Barry Mahoney, Dale Sipes, Maureen and Harvey Solomon, Judge Robert Broomfield, and Judge Hilda Gage, to name a few, stimulated a discussion on justice improvement. Who will do so in the twenty-first century?

Ed forewarned that "court centralization and uniformity" would continue. However, we agreed that it is essential that there be maximum delegation of authority and responsibility to judges and administrators at the local level to promote innovative initiatives. Perhaps NCSTJ members should ask, "Is local authority lost, and should we stand up to see that it is restored?"

Has an agenda for NCSTJ for the next twenty-five years been partially defined? What else lies ahead? What should be the role of NCSTJ?

The articles in this issue of *The Judges' Journal* illustrate ways in which judges around the country have contributed, through initiative and problem solving, to the advancement of justice in modern courts. Theirs has been the long view. They have looked to past accomplishments and future possibilities. I am pleased to introduce them, and it is my hope that you take from them ideas for your own courtrooms and that they spur further discussion about solutions to the challenges we will continue to face in this new century. ■