

Federal Judicial Center
Dementia and the Law: One State's Approach
Interview with Chief Justice Mary Jane Theis and Scott Block
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Chief Justice Theis: Hello. I'm Chief Justice Mary Jane Theis of the Illinois Supreme Court. Welcome to this presentation of the Federal Judicial Center's Dementia Project. According to the United States Census Bureau, as of July 2022, Illinois has 12.5 million citizens, and 17.2 percent of that population, approximately 2.15 million people, are currently 65 years of age or older. As my baby boom generation reaches that age group in greater numbers, the future of Illinois is looking grayer.

A vitally important topic in both federal and state courts is dementia. Dementia and the little concerns it raises are expected to become more prevalent in the coming years. The Alzheimer's Association 2023 Disease Facts and Figures Special Report estimates that 6.7 million Americans, 65 and older, have dementia, and one-third of Americans, 85 and older, suffer from that disease. By 2060, the number of people with Alzheimer's disease is expected to reach 13.8 million.

In Illinois, we're projected to have a 13 percent increase of individuals with the disease by 2025. And Alzheimer's disease and dementia disproportionately affect minorities. That disease is more prevalent in females, as well as people of

color. And members of sexual and gender minority groups may face an increased dementia risk due to pervasive exposure to systematic bias, exclusion, and marginalization from social institutions and networks. Clearly, those demographics show that more and more people here and across the country will be impacted by dementia in the near future.

So, what is dementia? In the simplest terms, dementia has been described by medical professionals as a decline in mental function - thinking, remembering, and reasoning - that is usually irreversible. As noted by Dr. James Noble in another segment in the series, the general phrase encompasses several disorders that cause chronic memory loss, personality changes, or impaired reasoning, all of which can lead the persons affected to have contact with the courts in civil and criminal contacts.

As the bench and bar strive to serve the aging population ethically and effectively, the practice of elder law has evolved into a field of expertise and specialization.

Elder law encompasses a wide range of legal matters that affect elderly clients and their families, including the potential for financial and physical abuse and fraud, estate planning, tax law implications, health care and long-term care planning, and guardianship.

When disputes over such matters happen, the courts must be well-informed in the ways that dementia may affect various proceedings that are made at the vanguard of resolving emerging elder law issues.

For example, courts frequently preside over cases involving elder abuse, a complex civil and criminal issue. Some of the risk factors, particularly social isolation and mental impairment, make it difficult for the justice system and professionals to initially identify the problem and to follow up with appropriate remedies. Additionally, cases of financial abuse that target the elderly specifically, for example, consumer scams and telemarketing fraud, often cross traditional legal jurisdictions, creating challenges for limited jurisdiction courts "in states that lack unified court systems".

As the aging population grows, so does the practice of assisting people with dementia as they plan for their future. Often, that planning will include the development of advanced directives, such as a power of attorney for health care, living wills, wills, and guardianships.

A power of attorney for health care allows a person living with dementia to name an agent to make health care-related decisions on the person's behalf when the person becomes incapable of doing so. Those decisions can include choosing

doctors and other health care providers, treatments, and care facilities.

A living will is a document that expresses how a person who is physically or mentally incapacitated wishes to be treated in certain medical situations. Some states may require a particular form for a living will. In others, it may be drafted by the person's attorney. A will, by contrast, is a document identifying whom a person has chosen to manage and receive assets from the estate.

A person diagnosed with dementia should have a signed will put in place as soon as possible while the person is still able to make decisions. Of course, the validity of a will varies from state to state. As those laws change in response to societal needs, many courts are seeing the direct impact of technology.

For example, a recent change to the Illinois Electronic Wills and Remote Witnesses Act now allows video streaming to fulfill the witness' requirements of executing and witnessing wills under Illinois law. Previously, under Illinois law, for a will to be valid, the testator had to sign the will in front of the witnesses.

Finally, a guardian is appointed by a court to make decisions about a person's care and property. Guardianship is generally considered when a person with dementia is no longer

able to provide for herself or himself, and either the family is unable to agree upon the type of care needed or there is no family to make those decisions.

As you can see, fair and just elder law solutions require innovative approaches and coordinated responses from judges, attorneys, and various other justice partners. As chief justices, we are responsible for the administration of justice in our states, and we set education and training protocols.

Effective January 1, 2016, the Illinois Judicial College of the Supreme Court of Illinois was created. The Illinois Judicial College, consisting of a board of trustees and six standing committees, services the governance structure to provide educational training and professional development programs to improve the skills, knowledge, and competence of judges and other justice partners of the Illinois judicial branch.

In working with the aging population, judges and attorneys are often confronted with the indication or existence of cognitive decline or impairment. The Comprehensive Adult Guardianship Curriculum under development anticipates the inclusion of a course to provide information about identifying and navigating cognitive impairments in elder litigants. Another course will overview the common challenges to elder litigants' decision-making capacity.

As these initiatives in Illinois demonstrate the growing aged population and its potential for litigation continues to push our state courts to advance our ability to administer fair and just treatment for this vulnerable group. The variety of legal issues confronted by seniors with dementia across the nation has increased, and so has the demand for state courts to use their powers to convene, examine, educate, and advocate for improved responses.

Here, in my home state of Illinois, our Supreme Court has recognized this need and formed a Commission on Elder Law. From the outset, the court focused on bringing together a diverse group of professionals to create this multi-disciplinary and cross-system commission that is comprised of judges, attorneys, and health care professionals. The broad scope of a commission includes the following charges, which illustrate the complexities of the mounting scope and practice of elder law.

The commission was developed to collect experiential information regarding attempts to defraud seniors in Illinois and make recommendations for the judicial branch policies, procedures, and Supreme Court rules to aid in reducing such attempts and mitigating their effects; examine adult guardianship proceedings in the state and make recommendations for the revision of policies, procedures, and Supreme Court rules to ensure due process; accurate and timely reporting,

including financial reporting, and improved outcomes for wards; study the programs of other states in their respective judicial branch approach to tackling elder law issues; and, work in conjunction with the Illinois Mental Health Task Force to develop standards related to senior attorneys, including standards related to continuing education and fitness to practice.

To effectuate its charges, the Elder Law Commission has divided into four sub-committees focusing on improving rules and practices related to financial exploitation, guardian ad litem, guardianship and ethics, and fitness to practice. With the hope to engage diverse stakeholders and to ensure that multi-disciplinary insights are considered, the commission has chosen to host listening sessions within each of Illinois' five appellate districts. The listening session's format invites an audience of elder law attorneys, general practice attorneys, justice professionals, guardians, health care and social service professionals, caregivers, and family members to address a variety of legal issues confronted by seniors in Illinois.

The collection of experiential information will form the Elder Law Commission's efforts to enhance the experience of senior court users and their counselors and to improve the responsiveness of Illinois courts.

Until now, my comments focused on the legal system in response to the increasing stresses that aging populations and litigants with dementia have placed on the judicial system. But it is just as important to turn the lens within. As Americans are generally healthier, more educated, more financially secure, and more active today than in previous generations, life expectancy continues to increase, and along with it, the length of our careers as lawyers and judges.

In Illinois, Rule 1.1 of the Court's Rules of Professional Conduct requires that all Illinois attorneys shall provide competent representation to a client. With larger numbers of lawyers now practicing beyond the traditional retirement age of 65, issue of spotting, and more importantly, reporting a potential cognitive impairment problem among peers has emerged as a very sensitive and significant subject.

Together with our Lawyers' Assistance Program, the Attorney Registration and Disciplinary Commission, the Minimum Continuing Legal Education Board, and the Illinois Mental Health Task Force, the Supreme Court has assigned the Elder Law Commission and the Committee on Professional Responsibility the task of advising and making recommendations on matters relating to a lawyer's cognitive impairment. In doing so, the court recognizes that the commission may propose rule amendments or create new rules that will require action when a lawyer's

performance is impacted or suspected to be impacted due to cognitive impairment or dementia.

Additionally, and no less significantly, the Illinois Supreme Court has hired Scott Block as its statewide behavioral health administrator. I would like to introduce you to Scott who will discuss his new role and how it impacts the issues that we've already mentioned.

Scott Block: As Chief Justice Theis stated, the Illinois Supreme Court's Elder Law Commission was tasked to work in conjunction with the Illinois Mental Health Task Force to develop recommendations related to improving the practice of elder law and our court response to individuals with dementia.

My name is Scott Block and I'm privileged to serve the Illinois Supreme Court as its inaugural statewide behavioral health administrator and project director of the Illinois Mental Health Task Force.

In this dynamic role, I provide the Illinois judicial branch with a dedicated voice and resource committed to furthering local, state, and national behavioral health and justice initiatives as they affect the courts. While my work focuses on the State of Illinois, the general concepts and need for a better understanding of behavioral health are relevant nationwide and for both state and federal courts.

At the national level, state court leadership has recognized the important role courts play in addressing mental illnesses and related behavioral health needs of justice-involved individuals and the mental well-being of justice professionals. In fact, the conference of chief justices and conference of the state board administrators has stated that court leaders can and must address the impact of behavioral health systems on the nation's courts. Just as the term dementia is used to generalize a vast array of cognitive disorders, behavioral health, according to the Substance Abuse and Mental Health Services Administration, is a broad overarching term that includes a wide range of conditions related to a person's well-being, emotions, behaviors and ability to function in everyday life.

As such, behavioral health concerns are common among people with dementia and may result from functional impairment, mood disorders, or even psychosis. Just like physical health, behavioral health has trained providers who can help you much like a physical health care provider would. To assist the courts, I'd like to briefly explain the different roles of trained professionals who serve our aged population and might appear before the court or submit evaluations or reports relevant to proceedings in both federal and state courts.

Perhaps the most familiar and commonplace are social workers. The role of a geriatric social worker is dynamic and case-specific, yet typically includes assessing a patient's social and health-related needs, empowering older adults and their families to engage in services, providing counseling and support, and coordinating care in a variety of settings, including hospitals, community health clinics, long-term and residential health care facilities, hospice settings, and outpatient daytime health care programs.

As people age, they may become increasingly susceptible to cognitive decline, thus requiring assessment and treatment from a psychiatrist and/or a neurologist. Both are medical specialties that relate to the brain, but they have separate and distinct areas of focus. A psychiatrist is a medical doctor who focuses on identifying, diagnosing, and treating mental illnesses and psychological disorders. Their treatment includes counseling, behavioral therapy, and psychiatric medication, and they may refer their patients to receive comprehensive neurological care when needed.

A neurologist is a type of specialty physician who treats conditions related to the nervous system, brain, spine, and nerves. Neurologists conduct cognitive tests to identify, diagnose, and treat brain-based disorders. Neurological

treatments can include lifestyle changes, rehabilitation therapy and medication.

Regardless of the care professionals involved, the bench and bar often require the assistance of health care providers in the medical field to help resolve litigation matters and shape policy aimed at improving the court's response to aging populations.

Chief Justice Theis: Thank you, Scott. As we have heard in this presentation, the potential challenges that dementia brings to the bench and bar are wide and varied. Those challenges, however, provide us all with an opportunity to create new and creative approaches to best serve some of our most vulnerable citizens.

Mental health has been, and during my tenure as chief justice, will continue to be a priority for the Illinois judiciary.

On behalf of the third branch, I look forward to the next steps that we take together.

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