New Civil Liberties Alliance

July 12, 2023

The Honorable the Members of the Special Committee of the
Judicial Council for the Federal Circuit
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

VIA EMAIL

Re: In re Complaint No. 23-90015 (Complaint Against Circuit Judge Pauline Newman)

Your Honors:

This letter responds to the Special Committee's Order of July 7, 2023, which directed Judge Newman's counsel to "submit to the Committee: (1) an unredacted copy of the report from Dr. Rothstein referred to on page 2 of the July 5 Letter Brief; (2) a copy of the actual MOCA [Montreal Cognitive Assessment] test administered to Judge Newman, showing all notations of scores on each subpart and the signature of the person who administered the test; and (3) a list and a copy of all written materials provided to, or consulted by, Dr. Rothstein to inform his evaluation of Judge Newman." July 7 Order at 3-4.[1] We are also responding to the Special Committee Order of July 11, 2023 which prohibited the New Civil Liberties Alliance's Summer Associates and Judge Newman's law clerks from attending the hearing.

I.

With respect to the Special Committee's July 7 Order, we are somewhat at a loss as to what relevance any of these materials has to a hearing that, by Special Committee's own orders of June 1, 2023, and June 20, 2023, will focus exclusively on the question "whether Judge Newman's refusal to comply with the Committee's orders seeking (i) neurological and neuropsychological testing, (ii) medical records, and (iii) an interview constitutes misconduct." June 20 Order at 4; *see also* June 1 Order at 3-6. We also find it odd for the Special Committee to request that counsel submit documents

[1] As with all other submissions to the Special Committee, and pursuant to Rule 23(b)(7) of Rules for Judicial-Conduct and Judicial-Disability Proceedings, we respectfully request, and Judge Newman explicitly consents to, the public release of this letter, the Letter Brief of July 5, 2023, the Special Committee's Orders of July 7, 2023, and July 11, 2023, and any Order or other response to the present submission.

that are either publicly available or else already in the Special Committee's possession. *See* July 7 Order at 1-2 (noting "Judge Newman has already made an *unredacted* copy of Dr. Rothstein's report available to the Committee.") (emphasis in original). Nevertheless, in hopes of bringing this saga to a speedier conclusion, but consistent with our previous objections, we are providing, to the extent possible and appropriate, the documents requested by the Committee.

First, we are providing, as requested, an unredacted copy of Dr. Rothstein's letter. Exh. A (filed under seal). The Special Committee is only authorized and requested to release the previously provided redacted version, as the unredacted version contains sensitive medical information, albeit irrelevant to the present investigation. Second, we are providing (though these documents are publicly available and easily obtainable) the articles by Professor Andrew Michaels at the University of Houston Law School, Exh. B, as well as an article in the *Washington Post*, Exh. C, that the Special Committee referenced. *See* July 7 Order at 3.

We are, however, respectfully declining to provide any other documents. With respect to the medical records considered by Dr. Rothstein, the Special Committee (once again) "has not explained why it believes that these records are relevant to its investigatory and deliberative processes." May 9, 2023 Letter from Gregory Dolin to the Special Committee at 4. Instead, it peremptorily asserted that it "*believes* that further information is required for the Committee to be able to assess the significance of Dr. Rothstein's report for these proceedings." July 7 Order at 2 (emphasis added). No basis for this "belief" has been stated. The Committee does not challenge Dr. Rothstein's credentials or assert that Dr. Rothstein, despite his decades of experience, somehow did shoddy work. Instead, it appears that the Special Committee is simply requesting medical records that Judge Newman has already, and with good cause, declined to provide. On this issue, we intend to stand on our prior submissions.

Furthermore, in its order of May 16, 2023, the Committee specified that "Judge Newman need not supply such records to the Committee itself but only to the neurologist whom the Committee has selected to conduct an evaluation of Judge Newman." May 16 Order at 6. The Committee has given no reason to deviate from this approach now. Dr. Rothstein received such records as he considered, in his professional judgment, necessary, and the Special Committee has no basis or expertise to second-guess the sufficiency of Dr. Rothstein's evaluations. To the extent that the Committee wishes that the professionals that it retained review the medical records, we refer the Committee to our prior position objecting to any evaluations by the Committee's supposed "experts." *See* July 5, 2023 Letter Brief at 3, 14. We are not willing to deviate from that principled position.

Nor does Judge Newman agree to provide "a copy of the actual MOCA test administered to Judge Newman, showing all notations of scores on each subpart and the signature of the person who administered the test." The letter prepared by Dr. Rothstein provides detailed information as to which parts of the Montreal Cognitive Assessment examination were and were not administered to Judge Newman. Specifically at the top of page 2, Dr. Rothstein notes that because Judge Newman is temporarily "unable to write and therefore cannot follow trail or draw a cube (each worth one point on the 30 point test)" those two, *and only those two* questions were omitted. Thus, instead of scoring the test out of 30 possible points, Judge Newman's test was scored out of 28 points. In the very same paragraph, Dr. Rothstein reports that but for "failing to remember 4 of 5 words after several minutes … [a]ll other aspects of the tests were precise and correct." It is hard to understand, and the Committee does not explain, what additional information the Special Committee (with its lack of

medical expertise) expects to glean from "the actual MOCA test administered to Judge Newman, showing all notations of scores on each subpart and the signature of the person who administered the test." To the extent that the Special Committee wishes to have its own hired medical professionals re-evaluate Dr. Rothstein's work, for reasons previously stated, we object to such proceedings, and will not facilitate them.

II.

Turning our attention to the order of July 11, 2023, we object to the Special Committee's unwarranted and baseless exclusion of the members of the NCLA's legal team from these proceedings. It is up to the attorneys and not administrative bodies (which the Judicial Council and its committees are, *see Chandler v. Jud. Council of Tenth Cir. of U. S.*, 398 U.S. 74, 86 n.7 (1970)) to decide how to staff cases. Attorneys routinely rely on staff to assist their work, including secretaries, administrative assistants, paralegals, and the like. All such individuals, whether or not members of the bar, are bound by the same requirements of confidentiality and have the same fiduciary duty to their clients. So too with our Summer Associates, who aid our work as attorneys by providing legal research and in other ways. Excluding members of our team from the hearing hampers our ability to represent Judge Newman and is unwarranted and not legally supportable.[2] Much the same applies to the Committee's decision to exclude Judge Newman's chambers staff from the hearing. These staff, though they do not serve as attorneys for Judge Newman, are in a position to know (and if necessary challenge) various allegations including Judge Newman's alleged delays, disclosure of allegedly confidential medical information about another judge, and the like. There is no basis to exclude the people on whom Judge Newman (like all other federal judges) relies to help with legal research from these proceedings. The Committee's most recent order further undermines confidence in its ability to adjudicate this matter in an objective and unbiased manner. We respectfully request that the Special Committee reconsider that portion of the July 11 Order which barred the attendance of NCLA's Summer Associates and Judge Newman's chamber staff. Furthermore, we respectfully request that we either be permitted to audio record the hearing or that an unedited recording of the hearing be provided to us as soon as technologically feasible following the hearing's conclusion.

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We wish to close by commending to the Special Committee's attention another publicly available article recently published by the Hon. Paul R. Michel, the former Chief Judge of the U.S. Court of Appeals for the Federal Circuit. Judge Michel (whose devotion to the rule of law and this Court are above reproach) says what Judge Newman has been saying all along—a situation where "the Chief Judge and the Special Committee are continuing to act as accuser, investigator, prosecutor, and judge … would not be acceptable in any other circumstance, and [he is] hard-pressed to see how it can be acceptable here." Paul R. Michel, *Chief Judge Moore v. Judge Newman: An Unacceptable Breakdown of Court Governance, Collegiality and Procedural Fairness*, IPWatchdog.com, https://tinyurl.com/3v3ay4uf (July 9, 2023), Exh. D. As NCLA has been saying from the very beginning, "transferring the investigation to the judicial council of a different circuit court seems most preferable, as opposed to continuing the horrific battle now raging in which everyone involved is getting further tarnished,

[2] Of course, to the extent required, all members of Judge Newman's legal team are willing to sign appropriate confidentiality documents.

including the court itself." *Id.* at 5. Former Chief Judge Randall R. Rader, echoed Judge Michel's sentiments in his comments on Judge Michel's article. *Id.* at 6-7. When two former Chief Judges of this Court have joined the unanimous chorus of legal ethicists who have called for this matter to be transferred, it is time for the Chief Judge, this Committee, and the Judicial Council to listen.

So, on behalf of Judge Newman, we once again call on Chief Judge Moore, the Special Committee, and the Judicial Council of the Federal Circuit to "end this to save the Court," *id.* at 5, restore Judge Newman to full participation in court panels immediately, and provide due process to Judge Newman by either ending this unnecessary investigation or else transferring it to another judicial council for resolution.

Respectfully submitted,
/s/ *Gregory Dolin, M.D.*
Senior Litigation Counsel
NEW CIVIL LIBERTIES ALLIANCE

Exhibit A

SEALED

Unredacted Report by
Prof. Ted Rothstein, M.D.
(Provided as a Separate Document)

Exhibit B

Judge Newman's Recent Dissents Show She Is Fit For Service

By **Andrew Michaels** (June 6, 2023)

Andrew Michaels

In recent months, the U.S. Court of Appeals for the Federal Circuit has instituted proceedings against Judge Pauline Newman under the Judicial Conduct and Disability Act, attempting to forcibly remove her from Article III service. The complaint claims that she "'has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts' and/or 'is unable to discharge all the duties of office by reason of mental or physical disability.'"[1]

The complaint faults Judge Newman for writing quantitatively fewer than average majority opinions, despite the fact that the court had at its own volition reduced her caseload, and importantly, without mentioning her numerous dissenting opinions.

Almost two-thirds of Judge Newman's legal opinions over the past year have been dissents. If the charge is that Judge Newman is not carrying her share of the workload, excluding her dissents from consideration is inappropriate.

The Constitution's grant of lifetime tenure for Article III judges is for good reason not made contingent on them agreeing with their colleagues. The fact that a judge may frequently dissent is itself no basis for removal, and the standard for involuntarily removing any Article III judge from service should be high.

Moreover, Judge Newman's role as a frequently dissenting voice on the Federal Circuit is not new, and has rightly been celebrated as an important one, particularly in light of the fact that the Federal Circuit has exclusive subject matter jurisdiction in patent law and thus does not benefit from the various viewpoints of conflicting circuit courts.[2]

Indeed, the U.S. Supreme Court has at times apparently been influenced by Judge Newman's dissents, citing them while reversing the Federal Circuit, for example in the consequential patent cases SAS Institute Inc. v. Iancu, and Commil USA LLC v. Cisco Systems Inc., in 2018 and 2015, respectively.[3]

This article will provide a qualitative analysis of Judge Newman's legal opinions over the past year, focusing primarily on some of her dissenting opinions. Judge Newman has issued at least 17 opinions in the past year, including six dissents in intellectual property cases.

The question here is not whether one agrees with Judge Newman. The relevant question should be whether her opinions indicate that she is so obviously unfit for service that she can be forcibly removed from her constitutionally protected role in judicial office.

I clerked for Judge Newman from 2010-2012, and based on the below analysis, I personally do not perceive a significant drop in the quality or thoroughness of her opinions over the past decade. But perhaps more to the point, nothing about Judge Newman's recent opinions suggests that she is no longer able to perform the duties of her judicial office.

Ethanol Boosting Systems v. Ford Motor

In the July 18, 2022, Ethanol Boosting Systems LLC v. Ford Motor Co. decision, Judge Newman disagreed with the majority on a patent claim construction issue, arguing forcefully that the majority gave insufficient weight to the context of the patent's specification.[4]

It has long been recognized that there is a tension in patent law between on the one hand, not reading limitations into patent claims that are not present in the claims themselves, and on the other hand, interpreting claims in light of the patent's specification.[5] This tension can and does often lead to disputes about how to best interpret a patent claim.

In Ethanol, the district court had construed the patent claims in light of the specification, including consideration of the patent's title "Optimized Fuel Management System for Direct Injection Ethanol Enhancement of Gasoline Engines," to require that the direct fuel injection system used a mixture of gasoline and ethanol.

Judge Newman agreed with the district court, including on the point that the title of the patent "is a factor in the construction of claims." But the panel majority disagreed, reversing the district court and finding that "the patents' titles do not support the district court's imported claim requirement of two different fuels."[6]

In Judge Newman's characteristically well-researched and persuasively written dissent, she cites and discusses various Federal Circuit cases where the title of the patent was in fact used as an interpretive aid in construing the patent's claims.[7] Reasonable people could disagree about the correct claim construction in this case, as they can on many claim construction issues, but Judge Newman's position — which was shared by the district court — is not an unreasonable one.

LG Electronics v. Immervision

The LG Electronics Inc. v. Immervision Inc. case presented the interesting and unusual issue of whether a prior art reference should be excluded from consideration because it contained a typographical error.[8] The appeal was from the Patent Trial and Appeal Board, which in inter partes review proceedings had excluded certain prior art for containing typographical errors.

To find the applicable legal standard, given the rarity of this issue, the court was forced to reach back to the 1970 U.S. Court of Customs and Patent Appeals case of In re: Yale, which

> held that where a prior art a prior art reference includes an obvious error of a typographical or similar nature that would be apparent to one of ordinary skill in the art who would mentally disregard the errant information as a misprint or mentally substitute it for the correct information, the errant information cannot be said to disclose subject matter.[9]

The PTAB concluded that "the aspheric coefficients in Tada's Table 5 were an obvious error of a typographical or similar nature that would have been apparent to a skilled artisan," and the panel majority found this to be supported.

Although agreeing with the majority about the relevant legal standard, Judge Newman was of the view that the standard had not been met in this case, stating in the July 11, 2022, decision that she "cannot agree that this error is typographical or similar in nature, for its existence was not discovered until an expert witness conducted a dozen hours of

experimentation and calculation."[10]

Thus, in Judge Newman's view, this error was not one that would have been readily apparent to a reader of ordinary skill in the art, as required by the Yale standard.

Judge Newman's opinion goes into meticulous detail about the history of the patent at issue and the complex process by which the allegedly obvious error was finally discovered by an expert witness, citing to various parts of the expert's deposition, as well as various other documents from the IPR record before the PTAB.[11]

Again, this seems like an issue on which reasonable minds could disagree, but Judge Newman's opinion is reasonable and thorough.

POP Top Corp. v. Rakuten Kobo Inc.

In the July 14, 2022, POP Top Corp. v. Rakuten Kobo Inc. decision, the panel majority found that the patent plaintiff's appeal was frivolous and that the arguments advanced by counsel on appeal were baseless, sanctioning the plaintiffs by awarding over $100,000 in fees and costs to the defendant, and even holding the plaintiff's counsel jointly and severally liable for the sanctions award.[12]

Judge Newman persuasively dissented from this rather extreme sanction to the attorneys, explaining that the "United States has continually rejected the 'loser pays' philosophy of many countries," citing and discussing various cases elaborating on this principle.[13]

Judge Newman agreed that the plaintiffs "did not have a winning case," but in her view, the "judicial burden of reviewing a weak appeal or receiving one-sided argumentation does not warrant the sanction of award of attorneys' fees," for the "right of appellate review applies even for weak cases."

Although she agreed that sanctions may sometimes be appropriate, "as for deliberate misstatements or intentional misrepresentation," Judge Newman's well-researched dissent pointed out that other Federal Circuit panels have shared the concern that "sanctions should not be imposed so freely as to make parties with legitimately appealable issues hesitant to come before an appellate court."[14]

SAS Institute v. World Programming

The April 6 SAS Institute Inc. v. World Programming Ltd. decision involved a claim for software copyright infringement. The U.S. District Court for the Eastern District of Texas determined that the plaintiff failed to establish copyrightability of the allegedly protected software elements, and the panel majority agreed.[15]

Judge Newman disagreed with the holding of uncopyrightability. Her lengthy dissent detailed the legislative history of Congress' determination that software programs were subject to copyright protection, as codified in the 1976 and 1980 amendments to the Copyright Act.

Judge Newman's dissent discussed many cases supporting the notion that the "selection and arrangement," or "choice and ordering" of known elements may be a proper subject of copyright protection.[16]

In Judge Newman's view, the defendant had not met its burden to prove uncopyrightability,

and the merger and scenes a faire doctrines did not apply because the allegedly copyright protected code did not contain the only way of expressing the idea at issue.[17]

Judge Newman also pointed out the unfairness inherent in the district court's decision to find uncopyrightability established by the defendant's expert testimony because it was unrebutted, after the court had excluded the plaintiff's expert's testimony on the issue in its entirety.

Other Recent Opinions by Judge Newman

Aside from the four opinions discussed above, Judge Newman has authored over a dozen additional opinions in the past year, including two additional dissents in patent cases: one a well-researched dissent on a jurisdictional issue in the Dec. 29, 2022, Modern Font Applications LLC v. Alaska Airlines Inc. decision[18] and the other on the notoriously disputable issue of patent nonobviousness in the March 31 Roku Inc. v. Universal Electronics Inc.[19]

She has also authored five dissents in non-IP cases, including a rigorous and technically detailed Aug 30, 2022, dissent in a tax case, Bishay v. United States, and a substantial and lucid dissent issued just this month in Department of Transportation v. Eagle Peak Rock & Paving, an appeal from the Civilian Board of Contract Appeals, where Judge Newman argued that the majority should have simply affirmed the board decision rather than send the case back to the Board "for redetermination of the same issue on the same record – to the delay, burden, and cost of both sides."[20]

Additionally, Judge Newman has authored at least six majority opinions in the past year, including a unanimous precedential Aug. 29, 2022, opinion reversing the Court of International Trade on an issue of statutory interpretation in YC Rubber Co. v. United States.[21]

Conclusion

Whether one agrees with Judge Newman or not, it would be difficult to argue that her legal opinions over the past year are of sub-par quality, and nearly impossible to argue that they are so clearly deficient as to justify forcible removal from constitutionally protected office.

Beyond the legal opinions she has written in the past year, it also seems worth noting that Judge Newman authored the lead article in the March 2023 issue of the American Intellectual Property Law Association Quarterly Law Journal, titled "The Birth of the Federal Circuit."[22]

Judge Newman was herself involved in the creation of the Federal Circuit, and has undeniably been a leading voice on the court since being the first judge directly appointed to it in 1984.

One might think that Judge Newman's long-standing exemplary service to this institution that she helped to create should entitle her to some degree of respect from the institution's current members, absent some egregious misconduct or clear inability to continue.

Yet that very institution charges ahead with its Kafkaesque investigation; the focus now apparently having shifted to Judge Newman's alleged failure to sufficiently cooperate with the investigation itself.[23]

The Constitution's guarantee of lifetime service for Article III judges during good behavior was meant precisely to ensure that judges are of independent mind; that they have the freedom to decide disputes in whatever way best comports with their earnest view of the law and facts of each case, even if that may be contrary to majority view.[24]

And whatever else one might say about Judge Newman, she remains as she has always been: of independent mind.

Andrew C. Michaels is an assistant professor of law at the University of Houston Law Center.

[1] See In Re Complaint No. 23-90015 (Fed. Cir. Mar. 24, 2023).

[2] See, e.g., Darryl Lim, I Dissent: The Federal Circuit's 'Great Dissenter,' Her Influence on the Patent Dialogue, and Why It Matters, 19 Vand. J. Ent. & Tech. 873 (2017).

[3] See SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1354 (2018) (reversing the Federal Circuit on an issue of statutory interpretation relating to inter partes review, noting the "vigorous dissent by Judge Newman"); Commil USA LLC v. Cisco Sys., 575 U.S. 632, 638, 644 (2015) (quoting and agreeing with Judge Newman's dissent on the point that "a defendant's good-faith belief in a patent's invalidity is not a defense to induced infringement").

[4] Ethanol Boosting Sys. LLC v. Ford Motor Co., 2022 U.S. App. LEXIS 19701 (Fed. Cir. 2022).

[5] See, e.g., Phillis v. AWH Corp., 415 F.3d 1303, 1323 (Fed. Cir. 2005) (en banc) ("we recognize that the distinction between using the specification to interpret the meaning of a claim and importing limitations from the specification into the claim can be a difficult one to apply in practice"); id. at 1328-29 (Lourie, J., concurring) ("claims need not necessarily be limited to specific or preferred embodiments in the specification, although they are limited to what is contained in the overall disclosure of the specification").

[6] Ethanol Boosting, 2022 U.S. App. LEXIS 19701 at *8.

[7] Id. at *12 (Newman, J., dissenting).

[8] LG Elecs. Inc. v. Immervision Inc., 39 F. 4th 1364 (Fed. Cir. 2022).

[9] Id. at 1372 (citing In re Yale, 434 F.2d 666, 669 (C.C.P.A. 1970)).

[10] Id. at 1374.

[11] Id. at 1376.

[12] POP Top Corp. v. Rakuten Kobo Inc., 2022 U.S. App. LEXIS 19408 (Fed. Cir. 2022).

[13] Id. at *6-7 (Newman, J., dissenting).

[14] Id. at *7 (quoting Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1578 (Fed. Cir. 1991)).

[15] SAS Inst. Inc. v. World Programming Ltd., 64 F.4th 1319 (Fed. Cir. 2023).

[16] Id. at 1337-38 (Newman, J., dissenting).

[17] Id. at 1340-41.

[18] Mod. Font Applications LLC v. Alaska Airlines Inc., 56 F. 4th 981, 987 (Fed. Cir. Dec. 29, 2022) (Newman, J., dissenting) ("the question concerning this particular protective order is within our jurisdiction and subject to our discretion to review and resolve").

[19] Roku Inc. v. Universal Elecs. Inc., 63 F. 4th 1319, 1326 (Mar. 31, 2023) (Newman, J., dissenting); see also Kirsch Mfg. Co. v. Gould Mersereau Co., 6. F.2d 793, 794 (2nd Cir. 1925) (L. Hand, J.) ("There comes a point when the question must be resolved by a subjective opinion as to what seems and easy step and what does not.").

[20] Department of Transportation v. Eagle Rock & Paving, Inc., No. 21-1837, *1, 13 (Fed. Cir. June 6, 2023) (Newman, J., dissenting) ("There is no need to repeat this administrative proceeding, for the record is complete, both sides have been fully and fairly heard, and the Board has explained the reasons for its determination."); Bishay v. United States, 2022 U.S. App. LEXIS 24399, *12-24 (Aug. 30, 2022) (Newman, J., dissenting) ("The court today expels Mr. Bahig Bishay from the fourth court in which he has sought review of a lien that the IRS placed on his property in 2013."); see also Cal. Steel Indus. v. United States, 48 F. 4th 1366 (Fed. Cir. Sept. 8, 2022); May v. McDonough, 61 F. 4th 963 (Fed. Cir. Mar. 6, 2023); Rudisill v. McDonough, 55 F.4th 879 (Fed. Cir. Dec. 15, 2022).

[21] See YC Rubber Co. (N. Am.) LLC v. United States, 2022 U.S. App. LEXIS 24259, *9 (Aug. 29, 2022) ("We conclude that Commerce's interpretation is contrary to the statute's unambiguous language."); see also Chae v. Yellen, 2023 U.S. App. LEXIS 9925 (Fed. Cir. Apr. 25, 2023); Gonzalez v. McDonough, 2022 U.S. App. LEXIS 22395 (Fed. Cir. Aug. 12, 2022); Hawkins v. United States, 2022 U.S. App. LEXIS 23359 (Fed. Cir. Aug. 22, 2022); Hyundai Elec. & Energy Sys. v. United States, 2022 U.S. App. LEXIS 22235 (Fed. Cir. Aug. 11, 2022); Military-Veterans Advocacy Inc. v. Sec'y of Veterans Affs., 63 F. 4th 935 (Fed. Cir. Mar. 22, 2023).

[22] Judge Pauline Newman, The Birth of the Federal Circuit, 50.4 AIPLA Q. J. 1 (2023).

[23] See In Re Complaint No. 23-90015, at *3 (Fed. Cir. Mar. 24, 2023) (Fed. Cir. June 1, 2023) ("Accordingly, the Committee investigation will focus on the question of whether Judge Newman's refusal to cooperate with the Committee's investigation constitutes misconduct.").

[24] See, e.g., Alexander Hamilton, Federalist No. 78 (1788) ("The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is no less excellent barrier to the encroachments and oppressions of the representative body.").

Exhibit C

The Washington Post
Democracy Dies in Darkness

LEGAL ISSUES

Colleagues want a 95-year-old judge to retire. She's suing them instead.

Fellow judges have accused Pauline Newman of misconduct, saying she can no longer do her job even if she's appointed for life. The country's oldest active federal judge won't go.

By Rachel Weiner

Updated June 6, 2023 at 12:45 p.m. EDT | Published June 5, 2023 at 6:00 a.m. EDT

Pauline Newman specializes in dissent. In her 40-year career as a federal judge, she has written more than 300 dissenting opinions. So when the chief judge of the U.S. Court of Appeals for the Federal Circuit said she thought it was high time for the 95-year-old to retire, Newman offered a differing view:

Nope.

The oldest active federal judge in the nation has instead sued her colleagues and accused them of violating the Constitution, which says nothing about mandated retirement for lifetime appointees. Those colleagues have accused her of misconduct, saying she can no longer do the job she is guaranteed for life.

Newman is working steadily from her light-filled office on Lafayette Square, overlooking the White House and the Washington Monument. She is surrounded by glass awards and photographs with Supreme Court justices; her court handles patent cases, and so there are diagrams of inventions, including her own. Newman, who turns 96 in June, has no interest in going anywhere.

"It's important to the nation, if I can say so," Newman said. "If I really were debilitated, as they say, physically and mentally, I hope I'd have the sense to step down. But as it is, I feel that I can make a contribution and must. That's what I was appointed to do."

Now there's a standoff.

The court is no longer assigning Newman new cases.

Newman claims she was also stripped of her assistant, a law clerk and an office computer. Kimberly Moore, the Federal Circuit's chief judge, has written that the staffers chose to leave and that Newman's failure to understand the situation is a sign of her decline.

Some of Newman's fellow judges in court orders have accused Newman of "paranoid" and "bizarre" behavior. Newman says she's fine and it's her colleagues who have lost their minds.

The Federal Circuit is an obscure court whose rulings on patents can have seismic impacts on financial markets, but the dispute over Newman's refusal to step down joins one of many debates over how old is too old for a public official to do a job. Our federal judges are older than ever, as are the presidential candidates vying to nominate them and the senators who confirm them. Sen. Dianne Feinstein (D-Calif.) is facing pressure to resign from Democrats who say the 89-year-old's health issues delayed efforts to hold the lifetime appointees on the Supreme Court accountable. Critics say Newman is an example of unhelpful egoism. She feels that in a world of rapid technological change, her long view is more important than ever.

'Heroine of the patent system'

Newman came of age just after World War II, an era of mechanical invention she embraced enthusiastically. She learned to fly planes, drive racecars and ride motorcycles. She became a chemist and eventually a patent attorney. She helped create the Federal Circuit in 1982 as part of a presidential committee on industrial stagnation, then was appointed by Ronald Reagan to serve on it.

"There can be no doubt that Judge Newman is the heroine of the patent system," Moore, the chief judge, said in remarks published earlier this year. She said that "a lesson I have taken to heart" is that "Judge Newman once told me that her only regret was when she held her tongue and that I should never be afraid to say what I think is right."

So perhaps it's not surprising that in March, when Moore urged Newman to retire or take lighter "senior" status, Newman said she could not because she was "the only person who cared about the patent system and innovation policy" on the court, according to Moore.

"Perhaps it was a bit of an overstatement," Newman told The Washington Post with a smile. But she didn't mind seeing the assertion memorialized (albeit in a court order accusing her of misconduct). A committee made up of Moore and two other judges subsequently expanded its investigation to include the allegation that Newman is refusing to cooperate. Her clerks have been subpoenaed and deposed.

Moore did not respond to requests for comment, but the court has made public nearly a dozen orders issued by the committee formed to investigate Newman's competence. Those filings allege that Newman has shown "significant mental deterioration" since suffering a heart attack in 2021. Newman takes far longer than other judges to decide cases, they say, and writes fewer opinions. She could not complete recent online security training and blames hackers when she cannot find a file on her computer, according to the committee.

She allegedly forgot a court rule in place for the past five years, instead referring to a long-dead chief judge. She is also accused of mishandling a serious dispute between two of her staffers and threatening to have the complaining employee arrested. "Staff described her as being in attack mode," Moore wrote in April. One is quoted as saying, "I believe Judge Newman is simply losing it mentally."

Newman called the allegations "either false or grievously distorted." They are also "disconcerting," she said, coming from colleagues "that I've known for many years as straightforward, decent people." Two other active judges on the court are in their 80s; most have served with Newman for at least a decade. She denies that she ever had a heart attack and says she is not conferring with ghosts of past judges. Her hacking concern, she says, is well-founded: "The judiciary's administrative arm is constantly warning us about hacks and scams."

The judge is being represented by the conservative nonprofit New Civil Liberties Alliance (NCLA), which says it is unconstitutional to force a federal judge to share medical records or undergo psychiatric testing or to indefinitely take her off cases.

"It's one thing when your colleagues are saying, 'You're being naughty, and the public ought to know that you're being naughty,' and then Congress can do what they wish," said Greg Dolin, a former Newman clerk at the NCLA. "It's quite another when judges say, 'We think you're misbehaving, so we're not going to let you be a judge in anything but name.'"

Dolin helped arrange for the nonprofit to represent Newman. He sees Newman's challenge as in line with the group's conservative views on government regulations alongside its challenges to covid mandates, student loan forgiveness and gun bump stock bans. Term limits for federal judges might make sense, Dolin said, but "this is the system we've created … and we have to abide by it."

The lawsuit also argues Newman is not notably slower or less productive than her colleagues and doesn't write many majority opinions because her specialty is the dissent. A 2017 study found that Newman dissented in patent cases 290 times in her career, more than three times as often as the next-closest judge on the court.

"She takes more time because she cares so much," said Janice Mueller, a patent attorney who has known Newman for 30 years and says the judge has always been a slow writer. Being a skilled and vociferous dissenter is "a very important, impactful role to play."

It's particularly important now, her allies say, as the U.S. Supreme Court has begun weighing in on intellectual property cases more often. As a staunch defender of the patent system, Newman "feels it's even more important for her to dissent," Fordham University law professor Hugh Hansen said. "This particular point of view might be lost if she doesn't."

Fit for the job?

Newman's refusal to quit on anyone else's terms served her early in her career. Three decades after her mother marched for the right to vote, Newman decided she would be a doctor. No medical school accepted her. She went to graduate school at Yale for chemistry instead; no chemical firm would hire her except American Cyanamid. She was the only female research scientist there, and her bosses tried to force her into becoming a librarian until she threatened to walk out.

She would later receive her own patents for colorful, dirt-resistant synthetic fabric she helped invent. But after three years, Newman took her savings and bought a ticket on a boat to Paris, where she supported herself by mixing drinks on the Île Saint-Louis.

Six months later, "totally destitute," Newman came back to the United States and found "a job that I knew no respectable scientist would take, and that was writing patent applications," she told female law students at New York University in 2013. Soon, she was a patent lawyer. The next time she went to Paris, it was as a science policy specialist for the United Nations, again the only woman in her professional association. On her office desk sits a mug from a bar she could not enter during her time at NYU Law — it reads "Good ale, raw onions, and no ladies."

U.S. Supreme Court Justice Ruth Bader Ginsburg praised Newman in 2015 for having "given courage" to young women with "her intelligence, her diligence, her devotion to a very difficult area of the law."

The U.S. Constitution says federal judges serve "during good behaviour," generally understood to mean "for life." Some academics argue that judges can be taken off the bench for behaving badly, but that is an untested legal theory. Under a 1980 law, the active judges of a circuit court can agree to punish a judge after a formal investigation, but that punishment cannot be removal from office or indefinite suspension. If the judges deem their colleague disabled, another judge can be appointed by the president, but the disabled judge still cannot be forced to retire.

"The vast majority of the time, the law is the shotgun behind the door," said Charles Geyh, a law professor at Indiana University who specializes in judicial ethics and procedures. Threatened with public embarrassment, judges usually step down. But, he said, "for judges who want to die with their boots on, telling them to retire is like giving them the death penalty."

Laws of probability

Newman's attorneys argue that the Federal Circuit committee has defied the law's process by taking her off cases and is too conflicted to handle this investigation itself. The committee says it will only consider transferring the probe to a different circuit if Newman first undergoes a medical examination; she says she will undergo the exam only if she is put back on cases and the probe is transferred.

In an order unsealed Monday, the court said it was narrowing its investigation to misconduct because of Newman's rejection of a medical exam. She is still barred from hearing new cases, which the court says is justified based on her backlog alone.

Moore suggested going "senior," a part-time status for older judges. Veterans of the court say that would give the chief judge control over Newman's caseload.

Randall Rader, a former chief judge on the Federal Circuit, said he has spoken with Newman recently and found her to be "the same Polly I knew 10 or 20 years ago — as sharp as ever."

The court also "has a record of dealing with its aging members with great compassion, without any jeopardy to their work" by giving them more assistance, Rader said. Judge Giles Rich, like Newman one of the first judges appointed to the Federal Circuit, served until his death at age 95. At the time, he was the oldest active federal judge in U.S. history.

Not everyone favors that precedent.

Gabe Roth of Fix the Court, which advocates for a more accountable federal court system, said active members of a federal appeals court should be "on the ball 100 percent of the time." He also compared Newman to Ginsburg, not favorably.

"There's this idea that I think permeates the judiciary, that 'only I can do the job.' It's this hubris that is really pernicious," he said. "It's anti-democratic and monarchical in a way that is not helpful for the ongoing trust of our fleeting democracy."

"I hate calling out older women, being a younger guy," said Roth, who is 40. "But that's the situation."

Ginsburg's decision to stay on past 2016 helped pave the way for a conservative Supreme Court. Patent politics are harder to parse. In one momentous recent Supreme Court decision in the field of patents, Justice Clarence Thomas voted with the court's liberal judges against Justice Neil M. Gorsuch and Chief Justice John G. Roberts Jr.

Dennis Crouch, a patent attorney and law professor at the University of Missouri, said the dispute does not seem ideological to him. He has crunched the numbers, and while Newman is the most patent-friendly judge on the Federal Circuit, Moore is close behind.

"Moore's order says other judges are concerned about Judge Newman's health; I think that's real," he said. He suggested Moore, a former electrical engineer for the Naval Surface Warfare Center, "wants to run a tight ship."

Newman agrees that "there's a lot to be said about term limits" but thinks they would have to account for increasing life expectancy and new technology making it easier to work into old age, plus good old-fashioned genetic flukes. "I'm defying the laws of probability, or at least my DNA is," she said. Her parents lived into their 90s; her sister "died too young" at 89.

She never married; she has no grandchildren but many grandclerks. She is still excited by the role of new technology in global conflict or the possibility of lawsuits over coronavirus vaccines. Still, if she had known she would live so long, maybe she would have retired from the court and tried another career.

“Would I be a litigator? Would I be an artist? Who knows,” she mused. “But at this stage, I no longer think about what I would do in retirement. I want to spend my last five years correcting my colleagues’ mistakes.”

Exhibit D

IPWatchdog

Chief Judge Moore v. Judge Newman: An Unacceptable Breakdown of Court Governance, Collegiality and Procedural Fairness

JUDGE PAUL MICHEL (RET.)

JULY 9, 2023, 01:15 PM 19

"The investigation…is fast becoming a credibility issue for the Chief Judge and the court as a whole…. No one questions the responsibility of a court to police itself, if it can. But when, as here, that involves a conflict and the internal process appears to be failing, another path should be pursued."

Anyone reading this by now knows of the current situation with Judge Pauline Newman and the investigation initiated by Chief Judge Kimberly Moore. As a former chief judge of the Court of Appeals for the Federal Circuit, I understand the challenges of overseeing smart, independent, and strong-willed judges, and I've gained a somewhat unique perspective on the ongoing saga, albeit as an outsider.

As an outsider no longer privy to inner court workings, I've refrained from publicly commenting on Judge Newman's situation. It's not my position, after all, to opine without knowing the facts, or to reflexively second-guess Chief Judge Moore, the Special Committee, or the Federal Circuit

Judicial Council.

Events have now reached a point, though, where I feel compelled to publicly ask why the court isn't taking what seems to be the wiser, less disruptive path for resolving the situation. Four other chiefs preceded me, and three followed. This is the first time in the history of the Federal Circuit where an internal dispute has been allowed to mushroom into an unprecedented public fight.

The Concern: Integrity, Justice, Fairness

To be clear, my concern is three-fold: First, the integrity of the court; second, the interests of parties seeking justice at the Federal Circuit; and third, procedural fairness and balance to Judge Newman, as well as the other Federal Circuit judges. All are of equal concern, and continuing the status quo is no way to ensure swift and efficient justice, which depends on litigants and the public having confidence and trust in the court and its judges.

As to the issue of fairness, consider that, contrary to established norms that alleged sanctionable conduct must be judged by an impartial judge, here the Chief Judge and the Special Committee are continuing to act as accuser, investigator, prosecutor, and judge. That would not be acceptable in any other circumstance, and I'm hard-pressed to see how it can be acceptable here. It cuts against the very foundation of due process, as well as raising thorny constitutional concerns. An unfair process risks damaging the legacy of all the current judges agreeing to what appears to be a conflicted process.

Although this conflict of roles was noted early in the investigation in an article in IP Watchdog by its publisher, Gene Quinn, the Chief Judge and the Special Committee still have not changed course. As the Supreme Court said in *In re Murchison* in 1955, "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations."

The investigation, initiated by the current Chief Judge against the court's longest serving member, is fast becoming a credibility issue for the Chief Judge and the court as a whole. It has already become a personal tragedy for the target of the investigation, Judge Newman. Initially, she was charged with physical and mental disability—the latter being perhaps the most serious accusation one can make against a fellow judge. Now, she is also charged with alleged misconduct for not complying with the Special Committee's orders to produce medical records, to undergo "a neurological examination and a complete neuro-psychological battery of tests," and to sit for "a video-taped interview" with the Special Committee.

The Court Cannot Fix This Itself

The fight is now very public, already an embarrassment to the court and, potentially, later to the entire federal judiciary. On top of the numerous news stories, dozens of documents (all publicly filed in a lawsuit in federal court in the District of Columbia, after being released by the court) lay bare the extensive details of the allegations against Judge Newman and her responses to the allegations.

Judge Newman denies the key allegations made by the Chief Judge and endorsed by the Special Committee (which is composed of the Chief Judge, as well as Judges Prost and Taranto, who were appointed by the Chief). So far at least, their actions have been backed by the court's Judicial Council, which includes all its active judges (minus Judge Newman).

Like the Chief Judge and the Committee, the Council has also declined requests by Judge Newman's lawyers to transfer the matter to another Circuit's Judicial Council. Their members, unlike the Federal Circuit's, would be able to make a disinterested assessment of the facts about the alleged disability, without being entangled as witnesses at a final hearing. Those judges would also be free of any subconscious pressure from their chief or colleagues.

One must also ask: when do the accused's lawyers get to cross-examine the witnesses against her and present evidence on her side? Along with an impartial adjudicator, that seems the essence of fairness in our system. In the words of Professor Wigmore, "Cross-examination is the greatest legal engine ever invented for the discovery of truth."

At this point, only one thing is clear: Chief Judge Moore and Judge Newman flatly disagree about the most basic and critical facts about the alleged impairments. Each accuses the other of having the facts all wrong. I do not know the true facts. No way I could.

The Broader Impact

What I care most about, however, are the court itself as an important institution and the negative effects on parties with pending and upcoming cases. This unseemly, bitter, and public controversy is, I believe, hurting the court and alarming companies, innovators, veterans, government employees, and others with business before the court. As the infighting grinds on and as emotions continue to flare on each side, it could ultimately besmirch the entire Judiciary.

The controversy has been featured in the legal press on numerous occasions, and has even found its way, not surprisingly, into the *Washington Post*. Additional press attention can be expected. By all accounts, the court appears in serious disarray.

Speaking from experience, an internal court matter such as this is almost certainly having an impact on the adjudication of cases before the court. Even if not, it undermines the public's confidence in the court. Our judicial system falls apart if the public does not trust the process and the judges.

Throughout the spring, Judge Moore and the Special Committee repeatedly added charges and factual allegations, also barring Judge Newman from hearing new cases.

In turn, Judge Newman stepped up her response by filing her lawsuit in federal court in Washington, D.C. Then, on June 27, her lawyers sought a preliminary injunction to stop the investigation, which they argue has no factual or legal basis and violates due process and the applicable statute in disability and misconduct.

Reports now indicate that Judge Newman, at her own volition, underwent an independent neurological examination (by Ted L. Rothstein, MD—a board-certified neurologist and a full Professor of Neurology and Rehabilitation Medicine at the George Washington University School of Medicine & Health Sciences). According to those reports, Judge Newman was found to be medically and mentally fit to "participate in court proceedings."

That reporting comports with the clarity of her talk at the Fordham conference in April which I, among many others, heard. Oral argument recordings during the period under investigation do not seem to indicate any perceptible change in her typical approach to questioning advocates. Others who have talked with her privately say much the same. These reports only deepen the chasm between the two sides—further calling out for a neutral arbiter of the dispute.

Several people have called me saying they are aghast at how this matter is being handled by the Chief and the court. But practically no one is willing to say so publicly. And of course, we don't know the facts, so the Chief Judge's allegations may well be adequately supported by internal evidence.

Better Options

At any point, the matter could have been transferred to the council of another circuit court. It still can be. Judge Newman's case seems to be a textbook example warranting transfer. Her district court motion asserts that, since 2006, "every single complaint of misconduct against a circuit judge that was not summarily dismissed has been transferred to another circuit's judicial council for investigation."

Transfer would allow judges in another circuit, say the council of the D.C. Circuit or the Fourth Circuit, to review the allegations, pursue the investigation, and conduct factfinding, all without being tainted as factual witnesses about the alleged impairment and without being swayed by inherent and subconscious personal biases.

The matter could theoretically be resolved by some neutral person, perhaps a mediator. After all, judges routinely order litigants to proceed through mediation. While that would require the consent of both sides, which has appeared unlikely to this point, a development in the district court action may be a ray of light. On Thursday, July 6, U.S. District Judge Christopher Cooper (who was assigned the district court case) recognized that the dispute "is obviously of great sensitivity as well as importance to both the Federal Circuit bar and the public in the courts more generally." According to reporting, Judge Cooper remarked that "this case really cries out for some type of mediation."

If the Federal Circuit Judicial Council remains steadfast in not requesting transfer to another circuit, perhaps Chief Justice Roberts, the Judicial Conference's conduct committee, or the Judicial Conference itself could step in—to avoid further reputational damage to the judiciary and to minimize the concerns of litigants.

No one questions the responsibility of a court to police itself, if it can. But when, as here, that involves a conflict and the internal process appears to be failing, another path should be pursued.

Time stops for no man or woman, and we all live with certain inevitabilities. Not all, but some of us will have the good fortune to be blessed with clarity of mind through the end. No one, for instance, ever reasonably accused Justice Ginsburg of being mentally unfit to remain on the bench, despite her declining physical stature. Perhaps that is true here.

Let's End This to Save the Court

The most important point, ultimately, is that the warring parties seem stuck on a path of mutually destructive and seemingly endless struggle. There is also the issue of procedural fairness to Judge Newman. At this point, transferring the investigation to the judicial council of a different circuit court seems most preferrable, as opposed to continuing the horrific battle now raging in which everyone involved is getting further tarnished, including the court itself.

Image Source: Deposit Photos
Image ID: 24070441
Author: viperagp

JUDGE PAUL MICHEL (RET.)

The Honorable Paul Redmond Michel was appointed to the United States Court of Appeals for the Federal Circuit in March of 1988 by President Ronald Reagan. On December 25, 2004, he [...see more]

Randall R Rader
July 10, 2023 11:06 pm

As one of the three Chief Judges to follow Chief Judge Michel, I commend his thoughtful and thorough analysis of the embarrassing and damaging petition challenging Judge Newman's competency and compliance with Judicial Council orders. I would guess that all of those Chief Judges, including me, dealt with delicate issues involving aging colleagues, yet these occasions did not engender vast controversy and violations of medial privacy. I wished to add just a few thoughts from my perspective.

Shortly after learning of the petition questioning Judge Newman"s competence, I called her directly. We spoke of old memories and new developments, old cases and new cases, doctrinal divisions and directions at the Federal Circuit. In sum, within five minutes, I could easily and confidently assess that Judge Newman was as mentally sharp and capable as she had been for more than 40 years that I have known her well. Indeed since that conversation, we have spoken at least once a week at all times of the day and evening. In all of those conversations, including a couple in person meetings, I have not detected the slightest slippage in her mental acuity. Judge Newman's current colleagues must have the same opportunities to assess for themselves her abilities. Thus, this prolonged proceeding, especially in the face of her entirely successful cognitive medical examination, becomes even more puzzling.

As Judge Michel notes, this case would be more fairly adjudicated in another court whose only motivation would be to protect the public performance and image of the federal judiciary. The district court's suggestion of a mediator might also provide the neutrality and perspective necessary for a fair resolution. I might suggest, however, that the better outcome would be a few face-saving procedures to permit the court to say it has addressed the petition followed by a unanimous rejection of the petition as contrary to Judge Newman's demonstrated competence.

By the way, in the course of those face-saving proceedings, I would urge the Federal Circuit to refrain from releasing medical speculation and other open assertions violative of basic privacy rights. Nothing is more unseemly than the release of accusations about private medical conditions, especially when other facts contradict and impeach those charges. Judges, above all other responsibilities, must respect and defend individual rights, including medical privacy. Moreover if the court sees the wisdom of taking the most expeditious approach of rejecting the petition, the court should at that time take the opportunity to apologize to Judge Newman for compromising her privacy rights.

Meantime the court's reputation continues to hemorrhage. It is time for the court to stop the bleeding and to welcome its most senior judge back to her revered place at head of the other judges.