

United States Court of Appeals for the Federal Circuit

~~UNDER SEAL (NON-PUBLIC ORDER)~~

IN RE COMPLAINT NO. 23-90015

Before MOORE, *Chief Judge*, PROST and TARANTO, *Circuit Judges*.

PER CURIAM.

ORDER

By order of June 1, 2023, the special committee composed of Chief Judge Moore, Judge Prost, and Judge Taranto (the Committee) narrowed the focus of further proceedings in this investigation and established a schedule for briefing and hearing argument from Judge Newman's counsel. Specifically, the Committee determined that, for purposes of immediate further proceedings, it would narrow the focus of the investigation to the question whether Judge Newman's refusal to undergo medical examinations, to provide medical records, and to sit for an interview with the Committee (as ordered or requested by the Committee in its prior orders) constitutes misconduct. *See* June 1 Order at 3; *see also* Rule 4(a)(5) ("Cognizable misconduct includes refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules."). The Committee directed Judge Newman to file a brief by July 5 and set oral argument, closed to the public, for July 13.

Judge Newman, through counsel, has asked for clarification of the issues that should be addressed in briefing and at argument and has also asked that the argument set for July 13, 2023 be open to the public. *See* Letter of June 15, 2023 from Gregory Dolin to the Special Committee at 1 (June 15 Letter). This order addresses those requests.

A. Scope of Issues for Briefing and Argument

As counsel for Judge Newman has noted, after this Committee was initially appointed on March 24, 2023, this investigation was expanded several times.

On April 6 the investigation was expanded to include potential misconduct related to “Judge Newman’s disclosure of a confidential employment dispute matter and statements made in regard to that matter.” April 6 Order at 7. On April 13, the investigation was expanded to include both (i) potential misconduct related to Judge Newman’s refusal to comply with an Order of April 7 requiring that she undergo neurological and neuropsychological testing and (ii) potential misconduct for refusing to cooperate with the investigation by refusing to accept service of orders issued by the Committee. April 13 Order at 1-2. On April 20 the investigation was expanded to include potential misconduct related to “Judge Newman’s alleged retaliatory, unprofessional, and abusive behavior towards her own and other court staff” as described in incidents detailed in that order. April 20 Order at 10.

On April 17, the Committee issued an order that required Judge Newman to provide medical records and requested that she sit for an interview with the Committee. On May 3, the Committee responded to objections raised by Judge Newman and again ordered that she undergo testing and provide medical records. On May 16, the Committee issued yet another order recounting the Committee’s prior efforts to secure testing, medical records, and an interview with Judge Newman and reiterated the

requirements that Judge Newman must undergo neurological and neuropsychological testing and provide medical records and the request that she sit for an interview. After Judge Newman failed to comply with any of these orders, on May 26, 2023, the investigation was expanded to include potential misconduct based on Judge Newman's refusal "to engage with the ordered neurological evaluation and neuropsychological testing, to produce certain medical records, and to meet with the Committee for a recorded interview." May 26 Order at 2.

All the foregoing aspects of the investigation remain open and pending before the Committee. No part of the investigation has been terminated. In particular, the investigation into whether Judge Newman suffers from a disability that impairs her ability to perform the duties of her office remains ongoing.

Nevertheless, as the Committee explained in its June 1 Order, the Committee's investigation into whether Judge Newman suffers from such a disability has been seriously impeded by Judge Newman's refusal to undergo neurological and neuropsychological examinations, to provide medical records, and to sit for an interview with the Committee. Her refusal to cooperate in those respects impairs the ability of the Committee to gather sufficient information to come to a definitive conclusion and recommendation for the Judicial Council on the disability issue.

As a result, the Committee determined that, while it would not terminate any aspects of the investigation, it would be most efficient for the Committee to focus immediate proceedings on a more discrete issue on which the Committee could likely reach a conclusion and make a final recommendation to the Judicial Council despite Judge Newman's lack of cooperation. The Committee thus determined to narrow the focus of immediate further proceedings to the question whether Judge Newman's refusal to

undergo neurological and neuropsychological examinations, to provide medical records, and to sit for an interview with the Committee constitute misconduct. *See* June 1 Order at 3.

Accordingly, the only subject counsel should address in the brief due on July 5 (and at the hearing on July 13) is 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. As the June 1 Order stated, the brief should be “limited to addressing the question whether Judge Newman’s refusal to undergo examinations, to provide medical records, and to sit for an interview with the Committee as described in the May 16 Order constitutes misconduct.” June 1 Order at 6.

This does not mean, however, that the Committee’s orders of April 7, April 17, and May 3 (in which the Committee previously sought the testing, medical records, and interview) and Judge Newman’s responses to those orders are not relevant to the issues before the Committee now. The May 16 Order recited the history of those orders and Judge Newman’s objections to them. *See* May 16 Order at 1-2, 19-23. The entire history of the Committee’s efforts to obtain (i) neurological and neuropsychological examinations, (ii) medical records, and (iii) an interview with Judge Newman—and Judge Newman’s responses to those efforts—is relevant for consideration at this time pursuant to the briefing and argument required by the June 1 Order.

Counsel need not address, and the Committee will not at this time be considering: (i) the potential misconduct identified in the order of April 6, 2023; (ii) potential misconduct based on Judge Newman’s refusal to accept service of orders described in the order of April 13, 2023; and (iii) the potential misconduct described in the order of April 20, 2023. To the extent counsel believes that evidence bearing

upon those three issues of potential misconduct is also relevant to the issue of potential misconduct that is the subject of briefing and argument under the June 1 Order (i.e., Judge Newman's refusal to cooperate with medical testing, medical records, or an interview), counsel may, of course, refer to such evidence in the upcoming briefing and argument.

B. The Argument on July 13 Shall Not Be Open to the Public.

Counsel for Judge Newman also requests that the argument scheduled for July 13 be open to the public. For the reasons below, the Committee has determined that the ordinary rule of confidentiality established by the Judicial Conduct and Disability Act of 1980 (the Act) and by the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the Rules) should apply and that the argument should be closed to the public. The Committee will consider, however, releasing a transcript after the hearing, with appropriate redactions for material that should remain confidential, such as information that may identify witnesses.

The Committee begins with a strong presumption that all proceedings that form part of the Committee's investigation should be confidential. Section 360(a) of the Act, entitled "Confidentiality of proceedings," directs in mandatory language that "all papers, documents, and records of proceedings related to investigations conducted under this chapter shall be confidential and shall not be disclosed *by any person.*" 28 U.S.C. § 360(a) (emphasis added). The Rules echo the confidentiality requirement and provide that "[t]he consideration of a complaint by a chief judge, a special committee, a judicial council or the Committee on Judicial Conduct and Disability is confidential" and that "[i]nformation about this consideration must not be publicly disclosed by any judge or judicial employee."

Rule 23(b)(1). As the Committee has explained, confidentiality facilitates the investigative process and “[t]he notion that the effectiveness of judicial disciplinary boards depends to a large extent on confidentiality . . . has been almost universally accepted.” *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 475 (3d Cir. 1986).

Although a great deal about the current proceeding has been made public pursuant to Judge Newman’s prior requests, the Committee has taken particular care to ensure that publicly released material does not identify witnesses or confidential details of witness statements and that the public releases would not compromise the investigative process.

The Committee believes that opening the July 13 argument to the public carries a grave risk of precisely the harms the Committee has carefully avoided up to this point—namely, inadvertent disclosure of both witnesses’ identities and confidential details of witness statements and impairing the investigative process. As the Committee’s June 1 Order explained, Judge Newman’s counsel has been provided with complete copies of all the affidavits and deposition transcripts on which the Committee relied in seeking medical testing, medical records, and an interview with Judge Newman. Those documents and the details that they include have not been made public. It is likely that there will be discussion of these materials at the argument, because they provided the basis for the Committee’s orders. And any such discussion could easily reveal witnesses’ identities or confidential details from the witness statements. Making the argument public would risk such disclosures and simultaneously impair the usefulness of the argument as the participants attempt to avoid making such disclosures. In the Committee’s view, counsel will be unable to argue points effectively—and the Committee will not be able to question counsel effectively—if all the

participants in the argument must attempt to censor themselves in real time to avoid disclosing details that might publicly identify witnesses or disclose confidential aspects of their statements. Making the argument public would thus undermine the usefulness of the argument itself as part of the investigative process, because it would mean that all the participants would not be able to freely discuss the record and instead would have to monitor themselves to avoid inadvertent disclosures.

For all of these reasons, the ordinary rule of confidentiality will apply to the argument on July 13 and it shall remain closed to the public. Judge Newman's asserted grounds for opening the argument to the public do not outweigh these considerations.

First, counsel for Judge Newman cites *Waller v. Georgia*, 467 U.S. 39, 46 n.4 (1984), to argue that participants in a judicial proceeding will perform their functions more responsibly in open court than in secret. June 15 Letter at 3. *Waller* is inapposite here. It involved a criminal defendant's Sixth Amendment right to a public trial and the question whether that right extended to a hearing to suppress evidence. *See id.* at 44-45. The Court's discussion in *Waller* revolved largely around the long history of public trials in criminal cases and the purposes public trials serve in the criminal context. That analysis does not apply here.

Indeed, to the extent *Waller* discussed broader principles supporting public access to trials (civil or criminal), it is still inapposite. As the Third Circuit explained, "the cases defining a right of access to trials are, at best, of limited usefulness in the context of the fundamentally different procedures of judicial disciplinary boards." *First Amendment Coalition*, 784 F.2d at 472. That is so primarily because judicial disciplinary proceedings "do not have a long history of openness." *Id.* In fact, as the Committee noted in its order of May 16, 2023, the history of judicial

disciplinary proceedings shows the opposite—it shows a near universal agreement that such proceedings benefit from being conducted confidentially. May 16 Order.

Second, counsel for Judge Newman notes that the Committee can make its determination of misconduct based on the paper record and asserts that the “paper record” has already been released to the public” and thus that there can be no concern about disclosing information at a public hearing. June 15 Letter at 3. That is not correct. As explained above, the entire record has not been made public. The Committee has provided Judge Newman’s counsel all the affidavits and depositions on which the Committee relied in issuing its prior orders, and those materials are not public. The Committee believes the hearing may include references to these materials and that discussion may disclose information that would identify witnesses or confidential details of witness statements.

The Committee believes that a better approach to permitting some public transparency pursuant to Judge Newman’s request under Rule 23(b)(7) would be for the Committee to consider releasing a redacted transcript *after* the argument has been completed. Reviewing the transcript after argument will allow a more considered approach to redacting material that might identify witnesses or otherwise disclose confidential details and it will not hamper the efficiency of the Committee’s investigation by impeding the flow of the argument itself. That approach is more consistent with the usual practice when an argument may involve some matters that remain under seal. It is also more consistent with the text of Rule 23(b)(7), which does not suggest that a subject judge may request to have live proceedings made public in real time. Instead, it permits a subject judge solely to consent to disclosure of “materials from the files” in a case. Rule 23(b)(7).

Accordingly,

IT IS ORDERED THAT:

- (1) The hearing scheduled for July 13, 2023 at 2:00 p.m. shall not be open to the public;
- (2) In response to Judge Newman's request, pursuant to Rule 23(b)(7), this order as well as Judge Newman's June 15 Letter will be publicly released.

SO ORDERED: June 20, 2023.