

# United States Court of Appeals for the Federal Circuit

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

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IN RE COMPLAINT NO. 23-90015

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

PER CURIAM.

## ORDER

By order of March 24, 2023, a special committee composed of Chief Judge Moore, Judge Prost, and Judge Taranto (the Committee) was appointed to investigate and report its findings and recommendations with respect to a complaint identified against Judge Newman raising, *inter alia*, a concern that she has a mental or physical disability that renders her unable to discharge the duties of her office. Despite repeated requests and orders, Judge Newman has thus far not cooperated with the Committee's investigation.

In particular, in orders dated April 7, 2023 and April 17, 2023, the Committee ordered Judge Newman to undergo medical evaluation and testing to determine whether she suffers from a disability and ordered her to provide medical records. Judge Newman did not comply with those orders. In a recent letter, however, Judge Newman's counsel has indicated that Judge Newman may now be willing to cooperate. *See* April 21, 2023 Letter from Mark Chenowith to The Hon. Kimberly A. Moore, Chief Judge,

United States Court of Appeals for the Federal Circuit, at 2 (hereinafter “Letter Motion”). Accordingly, in the hope that Judge Newman will now cooperate with its investigation, the Committee is reissuing its orders regarding medical evaluation and testing and medical records and establishing new deadlines for compliance.

In addition, counsel for Judge Newman has asked that the Chief Judge or the Committee request that the Chief Justice of the United States transfer this matter to another circuit. As explained below, that request is denied at this time without prejudice to refile after Judge Newman has complied with the Committee’s orders concerning medical evaluation and testing and medical records.

## **I. Required Medical Testing and Medical Records**

### **A. Background**

On April 7, 2023, the Committee issued an Order requesting that Judge Newman inform the Committee by April 11, 2023 whether she would make herself available for ordered medical evaluation and testing (to be conducted at a later date). The April 7 Order informed Judge Newman that her failure to respond by that deadline would be deemed failure to comply and that her failure to comply without good cause shown could result in an expansion of the scope of the investigation to include whether her non-cooperation amounted to misconduct. Judge Newman never responded. At the Committee’s request, the Chief Judge, on April 13, 2023, expanded the investigation to include the failure to respond.

On April 17, 2023, the Committee issued an Order requiring that Judge Newman provide certain medical information to the Committee “by May 5, 2023 (subject to an extension for good cause)” and also that she sit for an interview with the Committee “thereafter at a mutually agreeable time and date.” The April 17 Order asked that

Judge Newman, by 9:00 am April 21, 2023, “(1) inform the Committee in writing (email response is acceptable) as to whether (a) she will provide the Committee with the identified medical information; and (b) she will consent to the proposed interview or (2) provide good cause why an extension of time is needed to respond to this Order.” The Order stated that “[f]ailure to respond by 9:00 am April 21, 2023 will be deemed failure to comply and be treated by the Committee as a refusal to cooperate.” Again, Judge Newman failed to respond.

Notwithstanding Judge Newman’s prior refusals to cooperate, her counsel indicated on April 21, 2023 that Judge Newman is now prepared to cooperate. Thus, the Committee issues this new Order.

### **B. Medical Testing**

Since the Committee originally issued an order on April 7, 2023 requiring that Judge Newman undergo medical evaluation and testing, the Committee’s investigation has developed further information that reinforces the Committee’s conclusion that such evaluation and testing are necessary. Based on its investigation to date, the Committee has determined that there is a reasonable basis to conclude that Judge Newman might suffer a disability that interferes with her ability to perform the responsibilities of her office. This investigation has included more than a dozen interviews with court staff and discussions with Dr. [REDACTED], MD, whom the Committee retained to assist in this matter. These form the basis for the Committee’s conclusion that there is a reasonable basis for the required testing and evaluations recommended by Dr. [REDACTED] in order to determine whether Judge Newman has a disability that renders her unable to perform the functions and duties of her office.

Court staff, including some of Judge Newman’s own chambers staff, have reported that over the course of the

last year the Judge has experienced significant mental deterioration including memory loss, lack of focus, confusion, and the inability to understand and execute simple tasks she was once capable of completing. Court staff members have reported to the Committee that Judge Newman frequently claims that her email and computer are being hacked and at times that her phones are being bugged and that her complaints to Information Technology have increased from once or twice a week to almost daily or every other day. They describe her demeanor in these encounters as agitated and paranoid and the conversations themselves as bizarre and nonsensical. In each instance, Information Technology staff found no evidence to support Judge Newman's concerns. Staff reported that in the past Judge Newman claimed that it was bloggers and the media who were out to get her and bring her down who were hacking and bugging her devices. More recently, staff report that she is claiming that it is the court itself hacking and bugging her devices.

Staff reported that Judge Newman now routinely forgets how to do simple tasks that she never previously had difficulty doing, such as logging into our court system or network, remembering where she put court material, and bringing her briefs and case materials to court on court days. Staff reported that Judge Newman has trouble recalling events and information just days after they occur and at times seems lost and confused. Staff reported that they have to assist her over and over with the same tasks which she seems unable to remember from one day to the next—tasks which she had previously performed independently for years without any difficulty. One staff member stated, "Though it is difficult to say this, I believe Judge Newman is simply losing it mentally."

One staff member relayed an instance recently in which Judge Newman indicated that she was not required to comply with a court rule which required circulating

votes on opinions within 5 days. This rule was unanimously adopted by the court (including a vote by Judge Newman) in March 2018. The staffer claimed that Judge Newman recently said that she did not have to comply with this rule because Chief Judge Markey told her she could take 30 days to vote. Chief Judge Markey has been dead for almost 17 years and has not been a member of the court for 32 years.

Judge Newman's sharing of the contents of a confidential Employment Dispute Resolution (EDR) matter to 95 court staffers also raises concerns about her ability to remember or understand important confidentiality requirements and to manage the administration of her chambers.

Two of Judge Newman's chambers staff ended their employment in her chambers on April 19, 2023. Recent emails sent by Judge Newman related to these events suggest potential confusion or memory loss. For example, on April 19, 2023, an email was sent to Judge Newman and her chambers staff indicating that one of her [chambers staff] resigned effective that day and did not wish to be contacted by any member of the chambers including the Judge. Judge Newman acknowledged receiving the email and indicated it was "appropriate" and that his separation from her chambers should be expeditiously processed. Yet eight days later, on April 27, 2023, Judge Newman sent an email to all judges indicating that she had not "released" the [staff member] and that his continued service at the court in another chambers was "in violation of my right to [staff] services."

There was a nearly identical exchange about her former [staff member]. As the April 20 Order in this matter detailed, Judge Newman's [staff member] alleges that Judge Newman threatened to terminate him on the morning of April 19, 2023 for seeking relief under the court's EDR program. Multiple staff members reported that on

April 18, 2023 Judge Newman stated her intention to have him forcibly removed from the building and arrested. *See* April 20 Order. In light of these events, an email was sent to Judge Newman and her chambers staff on April 19, 2023 informing them that the [staff member] was no longer a member of the Newman chambers and that he wished for there to be no further communication to him by any member of the Newman chambers including the judge herself. Yet again, on April 27, 2023, Judge Newman sent an email to all judges stating: “I never released my [staff member] from my chambers staff. His movement to your staff, without consultation with me, violates his confidentiality and other obligations to me.”

Judge Newman has a[n employee] in her chambers who was unwilling to provide any testimony about Judge Newman’s ability to perform the duties of her job. In fact, the [employee] exercised her Fifth Amendment right to remain silent to avoid incriminating herself. For example, “Q. We understand that you are her [employee]. Can you tell us about that role and what your responsibilities are? A. I am going to invoke my right under the Fifth Amendment to avoid self-incrimination.” She likewise asserted the Fifth Amendment in response to questions about whether she has prepared any bench memos or draft opinions in the last year and whether she is currently working on any pending cases at the court. She further invoked the Fifth Amendment when asked about her perceptions of Judge Newman’s ability to carry out her job. [REDACTED]

[REDACTED]

[REDACTED]

The Committee's consultant, Dr. [REDACTED], has recommended that Judge Newman undergo a neurological evaluation and a complete neuropsychological battery of tests to determine whether she suffers from a disability, and if so, its nature and extent.

These reports of memory loss, confusion, and an increasing inability at times to perform simple, routine tasks necessary to carry out her duties as a judge, combined with Dr. [REDACTED] recommendation and Judge Newman's backlog and delays in the processing of cases and circulation of opinions compared to her colleagues, *see* March 24 Order, have caused the Committee to conclude that the recommended medical testing and exams are necessary to determine if Judge Newman has a disability. The Committee finds there is a reasonable basis to conclude that such evaluation and testing is necessary to facilitate the Committee's consideration of whether Judge Newman suffers a disability that prevents her from performing her duties as a judge. *See* Rule 13(a) of the Rules for Judicial Conduct and Judicial-Disability Proceedings (Rules). To be clear, the Committee has made no fact findings at this time regarding the allegations reported herein, but rather finds that these allegations individually and collectively give the Committee a reasonable basis to order the identified medical exams and testing. *See* Rule 13(a).

Judge Newman's counsel suggested by letter dated April 21, 2023, that they may wish to "engage in negotiation as to the scope of the requests as provided by the Commentary to Rule 13." The statute, rules, and commentary delegate to the Committee the authority to order the testing it deems necessary. Section 353(c) authorizes the Committee to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. § 353(c). The Rules reinforce that "the special committee should take steps to determine the full scope of the potential [ ] disability." Rule 13(a). Commentary to Rule 13 expressly recognizes the

Committee's authority under the statute and rules to order the medical testing it deems necessary in order to ascertain the nature and scope of the potential disability. Rule 13 cmt. Finally, the Rules authorize the Committee to "determine the appropriate extent and methods of its investigation in light of the allegations." Rule 13(a). Based on reports from court staff identified herein and consistent with the recommendation of Dr. ██████, the Committee has concluded that the above identified testing and evaluations are necessary.

Dr. ██████ has identified a qualified neurologist, Dr. ██████, who is willing to perform the necessary neurological testing on an expedited basis, and a qualified neuropsychologist, Dr. ██████, who is willing to conduct the neuropsychological testing on an expedited basis. Dr. ██████ and Dr. ██████ shall be provided with any material from the Committee and from Judge Newman that they deem appropriate and necessary to perform the tests and evaluations deemed necessary to ascertain the nature and scope of any potential disability.

A judge's sound mental health is essential to her fulfillment of all judicial duties. Judges must fairly, justly, and expeditiously resolve the cases before them. Litigants are entitled to sound-minded judges capable of fully executing the responsibilities of their job. Judges also must be capable of managing the administration of their chambers to effectively carry out their duties. Public confidence in the judiciary depends critically on the fitness of judges who adjudicate their cases. Given the importance of these concepts and the seriousness of the allegations made by court staff, the Committee believes it imperative that the required evaluation and testing be performed on an expedited basis.



### **C. Medical Records**

In addition, the Committee, by the present Order, requires that Judge Newman provide hospital records, medical, psychiatric or psychological, and other health-professional records that relate to the incidents of 2021 and 2022 described in the second paragraph of the Order dated March 24, 2023. These include records of treatment as well as consultation about those incidents, whether from a time contemporaneous with the incidents or later.

The Committee also requires production of hospital records and medical, psychiatric or psychological, or other health-professional records by any treatment provider of any treatment or consultation in the last two years regarding mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina. These are the same records that the Committee requested on April 17, 2023. The Committee proposes Judge Newman provide such medical records by May 23, 2023.

### **II. Request to Transfer**

The Letter Motion from counsel for Judge Newman also asks, pursuant to Rule 26, that the Chief Judge or the Committee request that the Chief Justice of the United States transfer the above-captioned matter to the judicial council of another circuit. Letter Motion at 3. For the reasons explained below, the Letter Motion is denied at this time without prejudice to renewing the request for a transfer after Judge Newman has complied with orders of the Committee requiring that she provide medical records and undergo neurological and neuro-psychological testing conducted by physicians selected by the Committee.<sup>1</sup>

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<sup>1</sup> Pursuant to Rule 26 only the chief judge or the judicial council may ask the Chief Justice for a transfer. By this order, both the chief judge and the Committee deny the

The Rules make clear that transfer of a matter involving an investigation into judicial misconduct or disability is warranted only in “exceptional circumstances.” Rule 26. The commentary to Rule 26 identifies several factors that may counsel in favor of transfer, such as “where there are multiple disqualifications among the original judicial council,” where “the issues are highly visible and a local disposition may weaken public confidence in the process,” or where there are “internal tensions” in the local judicial council. Commentary on Rule 26. None of those circumstances applies here. The concern in a highly visible case involving serious charges of misconduct is that a local judicial council may be perceived as proceeding too leniently. Because this case is rooted in concerns about a judge’s disability it does not raise similar concerns. In addition, the Breyer Committee Report—which informed the drafting of the Rules—suggests that this case involves many of the factors that counsel *against* transfer. *See* Implementation of the Judicial Conduct and Disability Act of 1980, Report to the Chief Justice of the Judicial Conduct and Disability Act Study Committee, 239 F.R.D. 116, 215 (Sept. 2006) (“Breyer Committee Report”). In this case, the “relative ignorance” of judges in another circuit of “local circumstances and personalities might make them less able to gauge what corrective action would be effective and appropriate,” judges in another circuit would likely be “in a poor position to persuade a judge whom they do not know well to take the action they believe is necessary,” and a transfer would

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request for transfer at this time without prejudice to refiling after Judge Newman produces the requested medical records and undergoes the ordered medical exams and testing. The judicial council has, in a companion order issued this same day, likewise denied without prejudice to refiling any such request to transfer and requires the same medical testing and evaluations and disclosure of medical records.

undoubtedly “increase time and expense” involved in resolving this matter, with little apparent benefit. *Id.* As discussed throughout, the Committee has already conducted more than a dozen interviews in this matter and worked extensively with its expert consultant. In short, this is a case in which the general preference in the Rules for local resolution of judicial misconduct or disability proceedings squarely applies.

The suggestion in the Letter Motion that “transferring a complaint about a circuit judge appears to be standard practice within the regional circuits,” Letter Mot. at 3, is simply incorrect. The Letter Motion cites only three examples of such transfers over the last decade. And the actual data for complaints involving judicial misconduct or disability establish that such inter-circuit transfers remain—as the Rules intended—exceptional. In the twelve-month period ending September 30, 2022, there were 375 complaints involving circuit judges, but only 2 complaints involving judges at any level were transferred from one circuit to another. See Table S22, *Judicial Complaints—Complaints Commenced, Terminated, and Pending with Allegations and Actions Taken Under Authority of 28 U.S.C. 351-364 During the 12-Month Period Ending Sept. 30, 2022*, available at [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_s22\\_0930.2022.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2022.pdf). In the prior twelve month period ending September 30, 2021, there were 319 complaints relating to circuit judges and zero transfers from one circuit to another. See Table S22, *Judicial Complaints—Complaints Commenced, Terminated, and Pending with Allegations and Actions Taken Under Authority of 28 U.S.C. 351-364 During the 12-Month Period Ending Sept. 30, 2021*, available at [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_s22\\_0930.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2021.pdf)

Each of the three examples of a transfer cited in the Letter Motion also involved circumstances wholly unlike

the situation presented in this case. Each case was focused on highly publicized allegations of misconduct. This proceeding, by contrast, is rooted in the fundamentally different question whether, after decades of extraordinary and distinguished service, Judge Newman now suffers at the age of 95 from a disability that has rendered her unable to perform her duties. This case simply does not raise the same concerns that the colleagues of a subject judge may take too lenient an approach in a case involving highly publicized charges of misconduct and that public confidence will be bolstered by transferring the matter to another circuit. Instead, we believe this is precisely the sort of proceeding that the Breyer Committee Report contemplated benefiting from local handling in the circuit where it arises. The most relevant precedent for this matter appears to be the proceeding conducted by the Sixth Circuit concerning District Judge John R. Adams and an investigation into whether he suffered from a mental or emotional disability in which the Sixth Circuit twice denied motions from Judge Adams requesting a transfer of the proceeding to another circuit. *See* Order and Memorandum at 4, *In re Complaint of Judicial Misconduct*, No. 06-13-90009 (Judicial Council of the Sixth Circuit Feb. 22, 2016) (recounting that Chief Judge Cole of the Sixth Circuit twice rejected requests to transfer because the case did not raise any “exceptional circumstances” warranting such action).

To the extent the Letter Motion anticipates that the Committee may conduct an evidentiary hearing at a later point in this proceeding and speculates that witnesses at any such hearing “likely would include” members of the Circuit, Letter Motion at 3—and argues that such an eventuality could raise questions about those judges serving as adjudicators in this matter—those concerns are premature at this stage of the proceedings. The Committee has determined to proceed in a cautious, deliberate, and step-wise fashion in this matter. Based on (i) data related to Judge

Newman's caseload and the time it takes her to issue opinions, (ii) descriptions detailed extensively above from multiple staff members, including Judge Newman's own chambers staff, who report that over the last year Judge Newman has experienced significant mental deterioration including memory loss, lack of focus, confusion and the inability to understand and execute simple tasks she was once capable of completing, and (iii) the recommendation of an independent expert, the Committee has determined that the most important next step in this investigation is for Judge Newman to provide medical records and to undergo psychiatric and neurological evaluations conducted by neutral physicians selected by the Committee. Information from these records and evaluations will serve an important gating function in determining the appropriate next steps in the Committee's investigation.

Accordingly, the Letter Motion asking the Chief Judge or the Committee to make a request to the Chief Justice to transfer this matter to the Judicial Council of another circuit is denied without prejudice to renewing the motion after Judge Newman has complied with this order requiring that she provide medical records and undergo neurological and neuro-psychological evaluations.

Accordingly,

IT IS ORDERED THAT:

(1) Judge Newman is directed to undergo the above-identified evaluation and testing;

(2) Given the willingness of the physicians to handle this matter on an expedited basis, the fact that these tests were previously ordered on April 7, 2023 and the need to retain the physicians and allocate funds, a prompt response is necessary to secure the appointments. Judge Newman is therefore directed to inform the Committee by 9:00 am on May 10, 2023 (email response is acceptable) as

to whether she will comply with this Order and make herself available for the above needed evaluations and tests;

(3) Judge Newman is also directed to inform the Committee in writing (email response is acceptable) by 9:00 am on May 10, 2023 as to whether she will provide the Committee with the identified medical information (the same information previously requested on April 17, 2023) by May 24, 2023. Judge Newman may seek an extension for any medical records that she is unable to obtain in this time frame;

(4) Refusal to comply with this Order without good cause shown may result in the Committee seeking to expand the scope of the investigation to include an inquiry into whether Judge Newman's further non-cooperation constitutes misconduct under Rule 4(a)(5). Failure to respond to this Order by the deadlines specified in ordering clauses (2) and (3) above will be deemed failure to comply; and

(5) The request for the Chief Judge or the Committee to request transfer to the judicial council of another circuit is denied without prejudice to refile after Judge Newman has complied with the Committee's order concerning medical records and has undergone the neurological and neuropsychological evaluations ordered by the Committee. The judicial council has unanimously entered an order this same day similarly denying the transfer request without prejudice to refiling after compliance with this Committee's requests for medical records and the Committee-ordered neurological and neuro-psychological evaluations and testing.

SO ORDERED: May 3, 2023.