May 9, 2023

The Honorable Kimberly A. Moore
Chief Circuit Judge
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)

Dear Chief Circuit Judge Moore:

We are in receipt of the special committee orders of May 3, 2023, one of which directs that both Judge Pauline Newman and her attorneys cease making public statements regarding the above-referenced matter, and another a) requesting that Judge Newman undergo neurological and neuropsychological examinations before physicians of the special committee's choosing; b) requesting that Judge Newman provide the special committee with medical records regarding a myocardial infarction and stent placements both of which allegedly occurred in 2021, and a fainting episode that allegedly occurred on May 3, 2022; and c) denying our prior request that you seek to transfer this matter to another Circuit's judicial council. This letter addresses these four issues. Before proceeding further, we must again note and object to the undue and unseemly haste with which the special committee is proceeding and with which it directs Judge Newman to respond. We have criticized previous orders which set three- and four-day deadlines to respond to special committee inquiries. The May 3, 2023 Order is slightly more generous, setting a seven-day deadline, but it is still proceeding, without any pressing need to do so, on a significantly more compressed schedule than would a similar matter that was governed either by the Federal Rules of Civil Procedure or Federal Rules of Appellate Procedure.

I.

We respectfully submit that the special committee's order of May 3, 2023 forbidding Judge Newman or her attorneys from publicizing the details of an ongoing investigation ("Gag Order") is unconstitutional and inconsistent with the requirements of the Rules for Judicial Conduct and Judicial Disability Proceedings ("Conduct Rules"). The special committee is correct that the Conduct Rules contemplate that the investigation of allegations of judicial misconduct or disability is meant to be confidential so as "to protect the fairness and thoroughness of the process by which a complaint is

filed or initiated, investigated ... and ultimately resolved," as well as to "protect identity of witnesses" from any possible intimidation.

At the outset, we note that neither Judge Newman, nor her attorneys, have even been apprised of the identity of any witnesses that the special committee has spoken to or intends to speak to. Thus, it is hard to see how anything Judge Newman or her attorneys might say could affect the "identity of witnesses" or "intimidate" these unknown individuals. (The very idea that Judge Newman could physically intimidate *anyone* is risible).

More to the point, however, the Conduct Rules, as the Gag Order itself recognizes, *see* p. 3, explicitly permit a judge that is subject to an investigation to release "any materials from the [investigation's] files ... to any person." R. 23(a)(7). To the extent that prior communications may not have been clear, you can construe the present letter as Judge Newman's explicit consent under Rule 23(a)(7). Granted, such right can be exercised only if the "chief judge consent[s] in writing" to such a course of action. *Id.* It appears from the Gag Order, *see* p. 3, that you do not intend to furnish such consent. If our understanding is correct, then we respectfully submit that such a refusal is contrary to the very Conduct Rules under which the process is being conducted. Specifically, Commentary to Rule 23 states that "[o]nce the subject judge has [pursuant to subsection (a)(7)] consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent *only* to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings." Comm. on R. 23 (emphasis added). Of course, neither Judge Newman nor her attorneys have any wish to breach the confidentiality interests of any witnesses, so Judge Newman explicitly consents to any redactions necessary to accomplish these goals. At the same time, we reiterate that a chief judge's blanket refusal to consent to release of materials under Rule 23(a)(7) violates both the letter and spirit of the rules.

Additionally, and to the extent that you decline to consent to release of materials under Rule 23(a)(7), the Gag Order raises significant constitutional problems. It is well settled that "gag orders" are prior restraints under the First Amendment, *Alexander v. United States*, 509 U.S. 544, 550 (1993). Hence, they bear "a heavy presumption against [their] constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and are subject to strict scrutiny, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Such orders cannot be justified even in judicial proceedings unless there is a likelihood that "publicity, unchecked, would so distort the views of potential *jurors* that [they could not] fulfill their sworn duty to render a just verdict exclusively on the evidence...." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976) (emphasis added). The Supreme Court's focus on *jurors* explains why gag orders are rarely, if ever, entered in appellate cases. Simply put, federal judges, who enjoy both life tenure and protection by federal law enforcement officials are unlikely to be swayed in their duty by any amount of publicity. Thus, the Gag Order does not serve a *compelling* governmental interest and therefore necessarily fails strict scrutiny.

The issue of the constitutionality of the confidentiality provisions has been previously addressed by the United States District Court for the District of Columbia in *McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 83 F. Supp. 2d 135 (D.D.C. 1999).[1] In that

[1] Although this opinion was vacated in part by the United States Court of Appeals for the District of Columbia Circuit, the First Amendment portion was neither appealed nor disturbed by the appellate

case, the Court held section 372(c)(14) of Title 28 on which Rule 23 is based to be unconstitutional. Admittedly, in *McBryde* the challenge to the required confidentiality arose after the proceedings against the late Judge John McBryde had concluded, whereas proceedings against Judge Newman are ongoing. However, the District Court's analysis did not depend on that distinction. Rather, it concluded that § 372(c)(14), which mandates confidentiality, is a prior restraint which cannot be justified by any legitimate state concerns, especially when witness identity remains protected.[2]

In light of the above, we respectfully ask that you either consent to the disclosure of materials as authorized by Rule 23(a)(7) or alternatively withdraw the Gag Order altogether, except insofar as necessary to protect any witnesses in the proceedings.

II.

We respectfully object to the special committee's request for Judge Newman's medical records concerning a myocardial infarction and stent placements, both of which allegedly occurred in 2021, and a fainting episode that allegedly occurred on May 3, 2022. We are at a loss as to how such records may be relevant to any determination of Judge Newman's physical, much less mental, health. Exercising judicial functions does not require much physical exertion, and there are judges who continue to serve even with severe physical limitations.[3] It is therefore hard to understand how any records of an alleged myocardial infarction could shed any light on Judge Newman's fitness to continue her work as a federal judge.

Much the same can be said about the special committee's request for Judge Newman's medical records related to a fainting episode that allegedly occurred on May 3, 2022. Fainting episodes are not uncommon. "Syncope [*i.e.*, fainting] is a common medical problem, with a frequency between 15% and 39%." Rose M. F. L. da Silva, *Syncope: Epidemiology, Etiology, and Prognosis*, 5 Frontiers in Physiology 1 (2014). A full *50%* of women over the age of 80 experience a syncopal episode. *See* Rose Anne Kenny, *et al.*, *Epidemiology of Syncope/Collapse in Younger and Older Western Patient Populations*, 55 Progress in Cardiovascular Diseases 357 (2013). Given how often syncopal episodes occur in the general

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court. *See McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001) ("On cross motions for summary judgment, the district court agreed with Judge McBryde's First Amendment argument but rejected the rest. Only Judge McBryde appealed....") (internal citation omitted).

[2] Indeed, the District Court concluded that once disciplinary proceedings had run their course, even the protection of witness identity was not a sufficiently weighty interest to justify prior restraint. *See* 83 F. Supp. 2d 177-78. To the extent that protection of witness identities while an investigation is pending constitutes a legitimate state interest, that concern is satisfied by Judge Newman's consent to withholding identities of the witnesses from any public disclosure of information.

[3] For example, Judge Ronald M. Gould of the United States Court of Appeals for the Ninth Circuit has been diagnosed with multiple sclerosis—a disease that "has taken away [the] use of his arms and his legs"—requiring him to use a wheelchair as a result. *See* Admin. Office U.S. Courts, *Focus on What You Can Do, Advises Judge with MS*, available at https://bit.ly/3nDMWoQ (2013). Yet, Judge Gould continues to serve with distinction on his Court and remains in active status.

population (and especially in the population of elderly women), any medical records regarding that episode are no more relevant than medical records regarding treatment for a common cold. The special committee has not explained why it believes that these records are relevant to its investigatory and deliberative processes. Given the medical data, it is unlikely to be able to do so.

In short, the special committee seeks to invade Judge Newman's medical privacy without any showing that such an invasion is necessary or even helpful to resolving any of the issues before the special committee. Accordingly, at this time, Judge Newman (without conceding that such records even exist) respectfully declines to provide the requested records as they are irrelevant to any legitimate inquiry into her mental or physical abilities.

III.

We also respectfully object to the special committee's request that Judge Newman submit to neurological and neuropsychological examinations before physicians of the special committee's choosing. Judge Newman recognizes that the Conduct Rules permit the special committee to "request the judge [being investigated] … undergo a medical or psychological examination." Commentary to R. 13(a). However, the rules do not suggest that the special committee is permitted to select the medical provider (much less do so without even seeking the subject judge's input) or set the scope of medical testing and examinations exclusively as it sees fit. To the contrary, the rules contemplate a *cooperative* process, *i.e.,* a process constituting "working or operating *together*" and a "*joint* operation." Webster's Second New International Dictionary at 402 (emphasis added). It is for that reason that the rules suggest that a special committee consider "enter[ing] into an agreement with the subject judge as to the scope and use that may be made of the examination results." Commentary to R. 13(a). The special committee's demand that Judge Newman undergo neurological and neuropsychological examinations of unknown duration and scope with the "use that may be made of the examination results" remaining undefined, all after Judge Newman suggested negotiating the matter pursuant to the rules, indicates not a *cooperative* process, but one where the special committee expects Judge Newman's blind submission to its imperious demands. Respectfully, such a process is not consistent with the Conduct Rules.

Furthermore, the Conduct Rules contemplate that "in the alternative [to the medical examination], the special committee may ask to review existing records, including medical records," *id.*, meaning that a judge being investigated may, as an alternative to being seen by physicians hand-picked by the special committee, instead choose to be seen by another qualified provider and submit those records. Judge Newman reserves this possibility and is willing to discuss it with the special committee provided that the boundaries as to the scope of testing and the use of the test results are established in advance. In other words, Judge Newman is willing to "*cooperate*" with the investigatory process, but she is not willing to simply "*submit*" to demands that are not reasonable in either scope or manner of execution.[4]

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[4] While we appreciate the special committee's assurances that should Judge Newman agree to undergo the requested neurological and neuropsychological examinations before physicians of the special committee's choosing, the special committee would bear the cost of such exams, we note that these assurances are not necessary. As a federal employee, Judge Newman has access to the best health care

For the above reasons, at this time, Judge Newman respectfully declines to submit to the neurological and neuropsychological examinations before physicians of the special committee's choosing. This decision is without prejudice to a negotiated solution within the parameters outlined above.

IV.

Next, we wish to express our surprise and disappointment at your refusal to request a transfer of this matter to a judicial council of another circuit despite the near-unanimous view of experts in legal ethics that the circumstances warrant such a transfer. Although the May 3, 2023 Order denying the transfer contains several factual inaccuracies, we need not dwell on those here. The important point is that each and every member of the Federal Circuit Judicial Council is expected to be a *witness* in this matter. You may construe this letter as our notice of intent to call you personally, as well as all of your colleagues (including Judge Newman) as witnesses in any hearing held under Rule 14 of the Conduct Rules. *See* R. 15(c) ("At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents.").

In light of the fact that each and every member of the Judicial Council is expected to be a *witness* in this process, it is difficult to understand how these individuals would not be disqualified from serving as *adjudicators* in the same process. Indeed, federal law requires judges to disqualify themselves whenever they have "personal knowledge of disputed evidentiary facts concerning the proceeding." Judge Newman's ability to complete her work, her interpersonal behavior vis-à-vis her colleagues, her comments during deliberation over cases, etc., are all "disputed evidentiary facts" over which members of the Federal Circuit Judicial Council have "personal knowledge." In this situation, disqualification appears to be mandatory for each and every member of the Judicial Council. Commentary to Rule 26 of the Conduct Rules in turn states that "transfers may be appropriate … in the case of a serious complaint where there are multiple disqualifications among the original judicial council." Given that the entire Federal Circuit Judicial Council seems obligated to recuse, transfer appears to be the only appropriate option, and the only one consistent with constitutional due process requirements.

We also note that the special committee's and Judicial Council's invitations to raise the question of transfer anew once Judge Newman complies with the special committee's request to provide medical information and undergo neurological and neuropsychological examinations before physicians of the special committee's choosing, fails to understand not only the purpose, but also the effect of the transfer. Commentary to Rule 26 states that once a transfer is ordered, "the transferee judicial council shall determine the proper stage at which to begin consideration of the complaint—for example, reference to the transferee chief judge, appointment of a special committee, etc." In other words, once the transfer is made, the transferee council is not bound by any evidence, reports, or decisions made by the transferor council. This means that a late transfer will simply delay the resolution of the matter (as Judge Newman reserves the right to request that the transferee council restart the entire process) without any added benefit to either Judge Newman, the Court, or the public.

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and health insurance coverage and therefore can meet any financial obligations associated with the required testing.

We therefore strongly urge you and the Judicial Council as a whole to reconsider the denial of our request that you invite the Chief Justice of the United States to transfer this matter to the judicial council of another circuit.

V.

Finally, we note that neither you nor the special committee nor the Judicial Council responded to our request to immediately restore Judge Newman to her full role as an active member of the Court, including assigning her to panels to hear cases and providing her with the same administrative support as other judges of the Court—support to which she is statutorily entitled. As we explained in our letter of April 21, 2023, an action "preclud[ing] Circuit Judge Newman from being assigned new cases prior to the adjudication of your 'identified complaint' [lacks] any legal authority or basis…." This remains as true today as it was three weeks ago. We therefore once again respectfully urge you and the Judicial Council to cease interfering with Judge Newman's exercise of her constitutional office at least until such time as the current proceedings against her are concluded.

CONCLUSION

We wish to reiterate that Circuit Judge Pauline Newman, whose unblemished and illustrious service to the American public as a Circuit Judge of the United States Court of Appeals for the Federal Circuit is now in its 40th year, stands ready to cooperatively resolve her colleagues' concerns. However, in doing so, she does not intend to surrender her constitutional and statutory rights, or the office to which she was unanimously confirmed by the United States Senate. It is our sincere hope that the Judicial Council of the Federal Circuit is also willing to resolve this matter in a cooperative manner and consistent with the Constitution and laws of the United States.

Sincerely,

/s/ *Gregory Dolin, M.D.*

Senior Litigation Counsel