

United States Court of Appeals for the Federal Circuit

IN RE COMPLAINT NO. 23-90015

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

PER CURIAM.

ORDER

After requesting that the transcript of the oral argument in this matter be made public, Judge Newman objects to releasing the transcript in a redacted form that has been agreed to in all but one respect. She objects to the insertion of the generic descriptor “cardiac condition” as a substitute for a more specific phrase that both the Committee and Judge Newman propose to black out. The Committee understands her objection to mean that, unless that generic-descriptor substitute for the hidden phrase is deleted from the transcript proposed for public release, she wishes to withdraw her request pursuant to Rule 23(b)(7) to make the transcript public.

For the reasons explained below, the Committee has determined, pursuant to Rule 23(b)(8), that releasing the transcript with the generic descriptor “cardiac condition” in place of the hidden, more specific phrase is warranted along with this order “in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding.” Rule

23(b)(8) cmt. Judge Newman and her counsel have publicly demanded maximal release of Committee materials, with particular reference to this transcript. The only dispute is use of a generic substitute for hidden words, and use of such substitutes is standard practice for redactions, particularly in this court. This particular generic descriptor, moreover, reflects what is already revealed by Judge Newman's own public submissions in this matter and by transcript text to which she does not object. And use of the generic descriptor here avoids leaving any misleading impression that Judge Newman suffers from no cardiac condition whatsoever that may be relevant to observed incidents suggesting cognitive decline. Accordingly, the Committee will release the transcript with the generic descriptor "cardiac condition" in place of the hidden phrase at issue along with this order.

BACKGROUND

On June 15, 2023, in keeping with a pattern of requests seeking to make public all aspects of the proceedings in this matter,¹ Judge Newman requested that the oral argument scheduled for July 13, 2023, should be open to the public.

¹ In both her July 5 Brief and her July 12 Letter, Judge Newman requested the public release of those briefs (and "all other submissions to the Special Committee") and "any Order or other response to the present submission." July 12 Letter at 1 n.1; July 5 Brief at 1 n.1 ("we respectfully request, and Judge Newman explicitly consents to, the public release of this letter and any Order or communication issued in response thereto"). Judge Newman thus requested that everything, even future orders or responses by the Committee be made public. Following Judge Newman's written request, the Special Committee Report and Recommendation was made public which was a response to both her July 5 Brief and her July 12 Letter.

By order of June 20, the Committee reaffirmed its decision that the argument should be closed to the public to ensure that the Committee and counsel could freely discuss any information that should remain confidential but indicated that the Committee would release a transcript with appropriate redactions to protect confidential material. June 20 Order at 8.

On July 27, the Committee transmitted a transcript to Judge Newman's counsel so that they could propose redactions for any confidential information that Judge Newman did not want publicly released. On August 8, counsel for Judge Newman suggested redactions that included, *inter alia*, redacting language that specified a cardiac condition that Judge Newman has. On August 9, the Committee sent counsel for Judge Newman a copy of the transcript narrowing some of counsel's proposed redactions and, in four places at which a specific phrase appears, hiding that phrase and inserting in brackets "[a cardiac condition]" the first time and (with a definite article to refer back) "[the cardiac condition]" the remaining three times. The first time, unredacted words immediately following the substitute indicate that what the hidden phrase refers to was "being treated by – with a Pacemaker" and is a "heart-related problem." Tr. 17. The second time, unredacted words surrounding the hidden phrase indicate that that the subject was a "cardiac issue[], which . . . could result in [various symptoms including] confusion, . . . fatigue, . . ." Tr. 19.

Judge Newman's counsel responded by objecting to the transcript version proposed for release by the Committee on only one ground. The sole objection was to the insertion of these generic descriptors, not to anything else, including retention of the surrounding words just noted. The stated ground was that, "[i]n our experience with redactions, inserting alternative language is not an accepted practice" and that "the substituted language would be unfair to Judge Newman." August 9, 2023 Email from Andrew

Morris to Jarrett Perlow. The Committee has interpreted this objection to indicate that, if the generic descriptor “cardiac condition” is inserted in the transcript, Judge Newman withdraws her request pursuant to Rule 23(b)(7) to have the transcript made public.

**THE TRANSCRIPT SHALL BE RELEASED USING
THE GENERIC “CARDIAC CONDITION”
DESCRIPTOR IN PLACE OF THE HIDDEN
TERMINOLOGY**

Pursuant to Rule 23(b)(8), the Committee has determined that, even if Judge Newman withdraws her request to have the transcript made public, the redacted transcript—with the term “cardiac condition” inserted in place of more specific terminology that has been redacted—should be made public “in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding.” Rule 23(b)(8) cmt.² Several considerations support our decision.

First, the public assurance policy of Rule 23(b)(8) would be undermined by withholding the argument transcript in its entirety simply because Judge Newman has withdrawn her request under Rule 23(b)(7). At Judge Newman’s request (indeed, her repeated requests), virtually the entire record in this proceeding (with limited redactions) has been made public. That has enabled the public to see exactly how the Committee has proceeded in this matter, which has been important for ensuring public confidence in the mechanism Congress created for the judiciary to police itself on matters of disability. Shrouding the oral argument in secrecy at this point would only raise questions and speculation about what could have been discussed at the argument that warranted keeping the entire transcript secret.

² This is also the determination of the Chief Judge pursuant to Rule 23(b)(8).

All the more so because Judge Newman’s counsel publicly complained about being under a secrecy order and therefore unable to discuss the hearing (at a time the Committee had already provided him the transcript and was awaiting his proposals for redaction, pursuant to the agreed-to process). *Exclusive Interview with Judge Pauline Newman’s Attorney Greg Dolin, Clause 8*, at 34:32–39 (Aug. 1, 2023), <https://clause8.libsyn.com/exclusive-interview-with-judge-pauline-newmans-attorney-greg-dolin> And creating such doubts would be wholly unjustified, because there remains only one focused dispute, concerning the generic-descriptor substitute for a hidden phrase, and, as explained next, the Committee’s resolution of that dispute is proper.

Second, the suggestion from Judge Newman’s counsel that, when redactions are made, “inserting alternative language is not an accepted practice,” is simply incorrect. Our court has a rule governing redaction in filings (*e.g.*, briefs, motions, etc.), and it expressly provides in mandatory terms that, in the public (nonconfidential) version of a filing in which redactions have been made, “an adequate, general descriptor of the material *must* appear over the deletion or redaction.” Fed. Cir. Rule 25.1(e)(1)(B) (emphasis added). The practice notes to this rule explain that “[w]hen including a general descriptor of redacted information, that description must appear in place of the redacted information, *e.g.*, ‘dollar amount,’ ‘number of items,’ ‘chemical name.’” Practice Note, Fed. Cir. Rule 25.1(e)(1)(B). That rule reflects the commonsense approach that, when material has been redacted in the public version of a filing, it aids public understanding to include some descriptor indicating the general nature of the redacted information.

Our court is far from alone in using this practice. Numerous cases reflect the practice of replacing redacted material with some more generic descriptor to ensure that, even where specific terms are redacted, the document is still intelligible and accurately conveys to the reader the

meaning of the document. *See, e.g., Linc Gov't Servs., LLC v. United States*, 96 Fed. Cl. 672, 685–86 (2010) (“First, the SSA noted that, while GLS had received moderate to poor overall ratings of [number redacted] and [number redacted]”), *abrogated on other grounds by Safeguard Base Operations, LLC v. United States*, 989 F.3d 1326 (Fed. Cir. 2021); *see also MSC Indus. Direct Co. v. United States*, 126 Fed. Cl. 525, 525 n.1 (2016) (“The court adopted the parties' suggested redactions, removed the information, and inserted brackets to replace the redacted content.”); *ACLU v. Dep't of Def.*, No. 04 CIV. 4151 AKH, 2009 WL 8739232, at *1 (S.D.N.Y. Dec. 29, 2009) (“[T]he Court orders that specific words be inserted in brackets to replace the actual text of the documents in certain limited instances.”), *adhered to on reconsideration*, 723 F. Supp. 2d 621 (S.D.N.Y. 2010), *aff'd in part, rev'd in part sub nom. Am. C.L. Union v. Dep't of Just.*, 681 F.3d 61 (2d Cir. 2012); *CBY Design Builders v. United States*, 105 Fed. Cl. 303, 308 n.1 (2012) (“Redacted names are replaced by pseudonyms (within brackets).”).

In fact, it has been the Committee's practice throughout this proceeding, when publicly releasing orders at Judge Newman's request, to substitute generic language in the place of redacted material. *See, e.g.*, March 24 Order at 4-5; April 6 Order at 1-2, 4-6; April 20 Order at 1-9; May 16 Order at 3, 10-13. Judge Newman has never raised any objection to this practice in the past.

Third, following that practice here, with use of the particular proposed general descriptor, is entirely justified. It is not “unfair” to Judge Newman, because it merely makes more immediately intelligible certain transcript references to material already revealed by disclosures made, or now accepted, by Judge Newman (through counsel). Along with her July 5 Brief, Judge Newman submitted for the public record a redacted version of a report from a neurologist. That public document disclosed that Judge Newman has “a

cardiac pacemaker,” thus indicating that she has a cardiac condition that requires medical intervention. *See* Rothstein Report at 2. Using the term “cardiac condition” to replace more specific language in the transcript thus will reveal nothing that a careful reading of Judge Newman’s public document has not already revealed.³ And as indicated above, Judge Newman, in limiting her objection to the Committee-proposed version of redaction to the insertion of the generic-descriptor substitute, has accepted surrounding words that also reveal that the hidden phrase refers to a cardiac (heart-related) condition treated with a pacemaker—indeed, one having symptoms such as confusion and fatigue. In these circumstances, use of the “cardiac condition” substitute serves the customary intelligibility-adding purpose of such a substitute without disclosing what otherwise remains unrevealed.

Fourth, adding the generic-descriptor substitute also reduces a risk of public misunderstanding that is real in this matter. In public media, including by making the narrow denial that Judge Newman had a “heart attack,” Judge Newman and her counsel have repeatedly promoted the broader notion that she has no heart-related medical condition relevant to the functional disabilities under investigation or, more specifically, to the justification for the Committee’s ordering of medical examinations and furnishing of medical records. *See, e.g.,* Dani Kass, *Judge Newman’s Not Sure the Fed. Cir. Can Be Salvaged*, <https://www.law360.com/articles/1698074> (July 12, 2023); Greg Dolin & Philip Hamburger, *Judges Attack*

³ In fact, the same redacted version of the Rothstein Report, also disclosing that Judge Newman has “a cardiac pacemaker,” is on the public docket in the lawsuit Judge Newman has filed against the Committee. *See Moore v. Newman et al.*, No. 1:23-cv-01334-CRC, Dkt. 10-1 (D.D.C. June 27, 2023).

Judicial Independence, Wall St. J. (Aug. 10, 2023); Report and Recommendation at 81–82. The latter in no way follows from the former, and it is not the occurrence of a heart attack, but the presence of a heart condition with confusion and other symptoms of clear relevance to the disability inquiry, on which the Committee, after investigation, has relied for its findings and recommendation. That distinction is important to accurate public understanding—both of the facts and of the integrity of the Committee’s investigation.

The Committee-proposed generic-descriptor substitute, by adding intelligibility to the transcript, furthers an accurate public understanding, which is important in the face of a contrary view that may have been fostered by public statements of Judge Newman and her counsel. In this way, the policy of Rule 28(b)(8) is specifically advanced by use of the generic-descriptor substitute at issue. When a selective public release of materials would create a misperception in the public about a judicial conduct or disability proceeding, Rule 23(b)(8) exists to remedy that situation. Indeed, it was for a similar reason that the Judicial Council began publicly releasing materials in this case on April 14, 2023, after other selective public disclosures. And the importance of invoking Rule 23(b)(8) is further enhanced by the fact that Judge Newman and counsel have attacked the integrity of the Committee investigation. Rule 23(b)(8) is properly invoked where, as here, disclosure is “in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding.” Rule 23(b)(8) cmt.

For all these reasons, the Committee finds that, to present an accurate picture of this proceeding to the public, the generic descriptor “cardiac condition” should appear in the publicly released version of the argument transcript in the place of redacted language more specifically describing Judge Newman’s condition.

IT IS ORDERED THAT:

(1) Pursuant to Rule 23(b)(8), the Committee and the Chief Judge determine that the generic descriptor “cardiac condition” should appear in the publicly released version of the argument transcript in the place of redacted language more specifically describing Judge Newman’s condition.

SO ORDERED: August 16, 2023.