

 New Civil Liberties Alliance

June 15, 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, NW  
Washington, DC 20439

VIA EMAIL

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

Your Honors:

This letter is in response to the Special Committee’s orders of June 1, 2023, which stated that “the Committee investigation will focus on the question whether Judge Newman’s refusal to cooperate with the Committee’s investigation constitutes misconduct,” and that it “will likewise limit its consideration of any remedial action solely to remedies for such misconduct that do not require additional factual development.” Order at 3-4. Furthermore, the Special Committee directed Judge Newman to “submit a brief *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 ... constitute [*sic*] misconduct and the appropriate remedy if the Committee were to make a finding of misconduct ...” *Id.* at 6 (emphasis added). Finally, the Special Committee ordered that oral argument, which is scheduled to be held on July 13, 2023, be closed to the public. *Id.*

The purpose of this letter is two-fold. First, we respectfully seek clarification of the Special Committee’s order as to the scope of investigation and the hearing. Second, we request, pursuant to Rule 23(b)(7), that the hearing be open to the public.<sup>1</sup>

With respect to the clarification request, we respectfully note that between the time of the initial order initiating disciplinary proceedings against Judge Newman and the June 1 Order, Chief Judge Moore issued several additional orders expanding the scope of the investigation. Thus, on April 6, the investigation was expanded to cover Judge Newman’s alleged conduct with respect to an “employment dispute” within her chambers. On April 13, 2023, Chief Judge Moore further expanded the investigation to cover Judge Newman’s alleged failure to cooperate with the Special Committee

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<sup>1</sup> Pursuant to the same rule, Judge Newman consents (subject to necessary redactions) to the public release of the present letter and any Order or other communication issued in response thereto.

stemming from Judge Newman's alleged refusal "to accept service of orders issued under Rule 15(a)(l)(b)."<sup>2</sup> On April 20, 2023, Chief Judge Moore yet again expanded the scope of the Special Committee's investigation to include 1) Judge Newman's alleged "retaliatory statements and conduct toward and about" one of her chambers staff members, 2) Judge Newman's alleged refusal to permit one of her law clerks to "to be reassigned to work with a different judge" and requiring said law clerk "to stay or resign," and 3) "Judge Newman's alleged conduct towards the Court's IT Department." Finally, on May 26, 2023, Chief Judge Moore again expanded the investigation to cover Judge Newman's alleged refusal to cooperate with the investigation by refusing to submit to "the ordered neurological evaluation and neuropsychological testing, to produce certain medical records, and to meet with the Committee for a recorded interview." Thus, the pending complaints against Judge Newman can be grouped into three general categories, *viz.*, 1) the allegation of mental or physical disability; 2) the allegation of improper behavior toward staff; and 3) the allegation of failure to cooperate.

The June 1 Order suggests that the Special Committee, "[i]n light of the practical constraints that Judge Newman's [alleged] refusal to cooperate places on the Committee's ability to proceed" will not, "at this time" pursue the allegations regarding Judge Newman's mental or physical disability. However, the June 1 Order is silent with respect to the second category of allegations, although the directive that Judge Newman's submission to the Special Committee 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 ... constitute[s] misconduct" strongly suggests that the Special Committee has abandoned (at least for the time-being) that line of inquiry as well. Nevertheless, out of an abundance of caution and to protect Judge Newman's rights, we are seeking a formal clarification from the Special Committee as to whether our understanding of the June 1 Order is correct.

Similarly, the June 1 Order was silent as to whether the Special Committee is continuing its investigation into Judge Newman's alleged failure to cooperate with the investigation on the basis of Judge Newman's alleged refusal "to accept service of orders issued under Rule 15(a)(l)(b)." Again, in our view, the June 1 Order, which limits Judge Newman only to addressing the question whether the "refusal to undergo examinations, to provide medical records, and to sit for an interview with the Committee" is misconduct within the meaning of the Rules for Judicial Conduct and Disability Proceedings, necessarily means that the allegation of failure "to accept service of orders issued under Rule 15(a)(l)(b)" is not being pursued at least "at this time." Accordingly, and in order to avoid any prejudice to Judge Newman's rights, we would appreciate a further clarification from the Special Committee.

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<sup>2</sup> This order also covered Judge Newman's alleged failure to comply with a prior order requiring Judge Newman to submit to medical testing. It is our understanding that at least that portion of the order was vacated by the Order of May 3, 2023, which "reissu[ed] [the Special Committee's prior] orders regarding medical evaluation and testing and medical records and establish[ed] new deadlines for compliance." If our understanding is incorrect, we would appreciate a further clarification about the import of the May 3 Order and its effect on the orders that were issued prior to Judge Newman's obtaining legal representation.

Finally, we respectfully request that the Special Committee permit public attendance at the oral argument in this matter, currently scheduled for 2:00pm on July 13, 2023. In its June 1 Order, the Special Committee stated that “[t]here are no percipient fact witnesses to additional events that are relevant to the misconduct determination.” The Special Committee further opined that “the question whether Judge Newman’s responses to the Committee’s orders constitute ‘refusing, without good cause shown, to cooperate in the investigation,’ Rule 4(a)(5), can be determined based upon the paper record ... along with any legal argument Judge Newman wishes to submit ....” We agree with this assessment. Because “the paper record” has already been released to the public, there appears to be no weighty reason to close the hearing to the members of the public or the press.<sup>3</sup>

The Supreme Court has reminded us that all participants in judicial proceedings “will perform their respective functions more responsibly in an open court than in secret proceedings.” *Waller v. Georgia*, 467 U.S. 39, 46 n.4 (1984) (quoting *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring)). Though good reasons may exist for keeping disciplinary proceedings secret, when exposing such proceedings to the public may intimidate witnesses or unnecessarily cast doubts on the honorable service of an accused judge, the upcoming hearing raises no such concerns. As the Special Committee itself acknowledged, there will be no witnesses and the argument will focus solely on a legal question—whether Judge Newman had “good cause” for her alleged failure to comply with orders to undergo medical examinations, turn over medical records, and sit for a video-taped interview with the Special Committee. Nor will permitting the public to attend the hearing cast an unnecessary cloud over Judge Newman. After all, the sum and substance of the allegations have already been released to the public. Permitting public participation in the upcoming hearing will therefore serve only to increase the public’s confidence in Judge Newman’s abilities and the disciplinary process.

For the foregoing reasons we respectfully request that the Special Committee clarify its June 1, 2023 Order, and vacate that portion of said Order which prohibits public attendance at the July 13 hearing.

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

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<sup>3</sup> Of course, Judge Newman and her counsel fully commit not to disclose the names of any witnesses or any information that has not already been made public.