

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

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. On May 3, 2023, the Committee issued an order reminding Judge Newman and her counsel that both the Judicial Conduct and Disability Act of 1980 (the Act) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the Rules) impose confidentiality obligations on Judge Newman and her counsel with respect to this proceeding (the Confidentiality Order).

In response, on May 10, 2023,¹ Judge Newman's counsel submitted a letter brief. That letter misstated the requirements of the Confidentiality Order and relied on that

¹ The letter response submitted by Judge Newman's counsel is dated May 9, 2023, but it was not submitted to the Court until 8:38 am on May 10.

misstatement in objecting to the order on First Amendment grounds. It also requested, for the very first time, pursuant to Rule 23(b)(7),² that Judge Newman be permitted to publicly disclose information concerning the Committee’s consideration of this matter.³

This Order addresses the First Amendment issues that have been raised in Judge Newman’s letter brief and Judge Newman’s request pursuant to Rule 23(b)(7).

I. Confidentiality Requirements for Judicial Conduct and Disability Proceedings and the First Amendment

A. The Scope of the Confidentiality Order.

At the outset, it is important to reiterate what the Confidentiality Order actually required. By its terms the order set out to “remind the parties . . . of the confidentiality obligations imposed by the terms of [the Act] and [the Rules].” Confidentiality Order at 1. The Act states 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). Rule 23(b) states 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

² The letter brief repeatedly mis-cites this provision as Rule 23(a)(7).

³ The same day, without awaiting a response to that request, Judge Newman sued the judges of the Committee and the entire Judicial Council of the Federal Circuit in federal district court asserting claims, *inter alia*, on First Amendment grounds. See Complaint in *Newman v. Moore*, No. 1:23-cv-01334 (D.D.C.).

any judge or judicial employee.” Rule 23(b)(1). The Confidentiality Order went no further than the express requirements of the Rules that apply to a subject judge and her counsel acting unilaterally. The ordering clause tracked exactly the terminology of Rule 23(b)(1) by directing Judge Newman and her counsel to “refrain from publicly disclosing information about the Committee’s consideration of and investigation into the complaint identified against Judge Newman.” Confidentiality Order at 4. The restriction on “publicly disclosing information” is necessarily limited to disclosing (i.e., uncovering and making public) information that was not already public. As the Committee noted, certain prior orders had already been publicly disclosed. The Confidentiality Order imposed no restriction on discussion of those orders or other aspects of the proceeding that were already public, as long as no other confidential information is disclosed in such a discussion. Indeed, the order made it express that the Committee’s intention was to ensure that “[g]oing forward . . . there will not be *further releases* of information relating to the Committee’s consideration of the complaint identified against Judge Newman.” Confidentiality Order at 4 (emphasis added).

Accordingly, the suggestion in the first sentence of Judge Newman’s letter brief that the Confidentiality Order directed her and her counsel to “cease making public statements regarding the above-referenced matter,” May 10 Letter at 1, misstates the requirements of the order. To the extent Judge Newman and her counsel wish to publicly discuss aspects of this proceeding that have already been made public, the Confidentiality Order placed no restriction on them.⁴

⁴ Judge Newman, of course, remains bound by Canon 2A of the Code of Conduct for United States Judges. The Committee expresses no view at this time on whether that

B. The Confidentiality Requirements Imposed by the Rules and the Confidentiality Order Do Not Run Afoul of the First Amendment

What is at issue at present is disclosure during the initial, investigative stage of this proceeding. The confidentiality requirements imposed by the Act, by the Rules, and by the Confidentiality Order (which is coterminous with the Rules) on disclosure during this stage have been widely held to be compatible with the First Amendment. Multiple courts have recognized that compelling interests served by preserving the confidentiality of judicial misconduct and disability proceedings are sufficient to outweigh any First Amendment interest that participants in those proceedings may have in speaking publicly about information learned during the proceedings at least while they are under way.

For example, in *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994), the Second Circuit considered the confidentiality restrictions imposed in Connecticut’s judicial misconduct proceedings. Applying strict scrutiny, the court concluded that the State had compelling interests supporting broad confidentiality requirements that prohibited, among other things, disclosure by any person of information gained through interaction with the investigating body. *Id.* at 111. Most relevant here, the court pointed out as a compelling interest the “value of confidentiality in facilitating the investigative process,” and explained that “a common result of publication will be that witnesses otherwise willing to speak candidly will decline to do so, in the knowledge that the media and others will pursue them to inquire whether they have in fact testified.” *Id.*

canon may impose restrictions on Judge Newman’s conduct in this context.

Similarly, in reviewing First Amendment objections to the confidentiality restrictions in Pennsylvania’s judicial misconduct proceedings, the Third Circuit ruled that the “confidentiality requirement is reasonable and may be enforced insofar as it would prevent a person, whether a Board member, employee, or counsel, from disclosing proceedings taking place before the Board.” *First Amendment Coalition v. Judicial Inquiry & Review Board*, 784 F.2d 467, 479 (3rd Cir. 1986). After highlighting the importance of confidentiality in the investigative process, the court concluded that “the state interest in this respect, as in the grand jury setting, is sufficiently strong to support such a ban.” *Id.*; accord *Adams v. Committee on Judicial Conduct & Disability*, 165 F. Supp. 3d 911, 929 (N.D. Calif. 2016) (“[C]ourts have found that confidentiality in judicial misconduct proceedings serves the important functions of: encouraging the filing of complaints; obtaining complete and candid testimony; [and] increasing cooperation with [an] investigation . . .”).

It also bears noting that “[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*, 784 F.2d at 475. In 1978, the Supreme Court observed that 47 States, the District of Columbia, and Puerto Rico all had some procedures for judicial misconduct inquiries, and all but Puerto Rico included confidentiality requirements at least through the investigative stage. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 834 (1978). The Court noted that “the substantial uniformity of the existing state plans suggests that confidentiality is perceived as tending to insure the ultimate effectiveness of the judicial review commissions.” *Id.* at 835; cf. *Bradbury v. Idaho Judicial Council*, 28 P.3d 1006, 1015 (Idaho 2001) (“[T]he language in *Landmark* supports the idea that judicial disciplinary

proceedings may be confidential.”)⁵ In subsequent years, it appears that uniformity in this approach only grew. In 1980, Congress enacted the Judicial Conduct and Disability Act, which imposes its own strict confidentiality requirement for federal procedures. *See* 28 U.S.C. § 360(a). And in 1994, commentators observed that all 50 States had judicial conduct and disability procedures that included confidentiality requirements and that “every jurisdiction protects preliminary investigations from public access.” Bryan E. Keyt, *Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment: A Justification Based Analysis*, 7 *Geo. J. Legal Ethics* 959, 960 (1994).

Judge Newman’s letter brief points to the district court decision in *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders*, 83 F. Supp. 2d 135 (D.D.C. 2001), to argue that a prior restraint prohibiting a judge who is the subject of a misconduct or disability proceeding from publicly discussing any aspect of the

⁵ In *Landmark*, the Supreme Court held that it would violate the First Amendment to impose criminal penalties on a *third party* (not a participant in the proceeding) for publishing information it had acquired about a judicial misconduct proceeding. *See* 435 U.S. at 837-38; *id.* at 837 (“We do not have before us any constitutional challenge to a State’s power to keep the Commission’s proceedings confidential or to punish participants for breach of this mandate.”). That ruling has no application here. Judge Newman and her counsel are participants in the proceedings and under the Rules and the Confidentiality Order they are prohibited only from publicly disclosing “information about the Committee’s ongoing consideration” of the complaint against her, Confidentiality Order at 4—which is necessarily information gained through interaction with the Committee in the course of its proceedings.

proceeding violates the First Amendment. *See* Letter Br. at 2-3. But *McBryde* held nothing so broad. Instead, the holding there was limited to the situation where the entire proceeding had ended and the judge had already been publicly reprimanded. The court summed up its holding: “The interest in shielding witnesses from publicity and encouraging complainants to come forward in the future, while legitimate, is insufficient to justify the restriction on Judge McBryde’s open and frank discussion of the proceedings *once they have concluded and sanctions have been imposed.*” 83 F. Supp. 2d at 178 (emphasis added). Throughout its discussion, the court made clear that its analysis relied on the fact that the proceeding had ended and that Judge McBryde had suffered a public reprimand. The court reasoned that “*at the point where the proceedings have long since concluded and Judge McBryde has undergone a public reprimand and sanctions, this interest [in witness privacy] loses much of its significance.*” *Id.* at 177-78 (emphasis added); *see also id.* at 176 (noting that while all jurisdictions impose confidentiality requirements on judicial conduct proceedings, no jurisdiction does so “in perpetuity”).

That reasoning is inapplicable here. When the Committee issued the Confidentiality Order on May 3, it was still in the investigative stage of this proceeding—a stage at which the need for encouraging witnesses to come forward is at its height. The assertion from Judge Newman’s counsel that the analysis in *McBryde* “did not depend” on the fact that the “proceedings against the late Judge John McBryde had concluded,” Letter Br. at 3, is incorrect.

The Committee’s view that there is a compelling need for confidentiality to facilitate the investigative process is buttressed by experience in this very proceeding—in which the Committee believes that adherence to confidentiality requirements has encouraged witnesses to come forward and to speak candidly. Despite earlier releases of some

information about this investigation, the Committee has conducted multiple interviews with witnesses and has informed them of the confidentiality protections of Rule 23, especially those applicable at this stage of the proceedings. Within the last two weeks—since the Confidentiality Order was issued—additional witnesses have come forward to volunteer that they have relevant information. Such witnesses might not have been willing to volunteer, or to speak as freely, if they believed they would immediately be dragged into a public media storm.

Judge Newman’s letter brief attempts to dismiss any concern for discouraging witness participation by suggesting that it is “risible” to think that Judge Newman “could physically intimidate anyone” and that she and her counsel have not even been apprised of the identity of any witnesses. Letter at 2. Those assertions fundamentally misunderstand the way in which witnesses may be discouraged from participating in this process and misstate the facts.

As the Second Circuit pointed out in *Kamasinski*, if people believe that their names will be publicly disclosed and they will be drawn into a media circus, they are less likely to volunteer information. *See* 44 F.3d at 111. It is the threat of public disclosure itself that may hamper an investigation without any other form of “intimidation.” Potential witnesses may be intimidated by the fear of unwanted publicity in itself.

In addition, counsel’s suggestion that Judge Newman could not *physically* intimidate anyone ignores the obvious power that Judge Newman, as a circuit judge, has over the lives and livelihoods of employees in a federal courthouse. Indeed, some of the events witnesses have described in this proceeding highlight that authority and the fear it may engender in employees who feel subject to Judge Newman’s authority. The Committee has received information that,

on one recent occasion, Judge Newman ordered an employee who had moved from her chambers pursuant to the court's Employment Dispute Resolution plan to return to her chambers by 11:00 am or else she would effectively end his employment at the court. That employee then went to the Special Committee and the Director of Workplace Relations fearing that he was about to lose his job. Judge Newman also stated to multiple court staff members a threat to have the employee arrested and removed from the building. In short, a federal judge can exercise enormous authority over the livelihoods of employees in a federal courthouse. And, unfortunately, Judge Newman's recent conduct has already given employees cause for concern that, in her current mental state, she will attempt to wield that power against them when she feels that they have been disloyal. The Committee has endeavored to collect information quickly and in confidence in part out of concern for the protection of the employees in our courthouse.

Counsel asserts that Judge Newman and her lawyers have not been apprised of the identity of any witnesses. But even if we assume the correctness of the assertion, we see no explanation by counsel of why the First Amendment gives a right to obtain the identity of persons giving statements to the Committee at this investigatory stage or a right to disclose such information publicly. Of course, to ensure a fair process, the Rules provide for notice and response rights later in the proceeding. In any event, counsel's assertion is not true. On May 3, the Committee issued an order under seal that described many of the statements that witnesses had provided the Committee. Although the order did not refer to any witnesses by name, the incidents it described are known to Judge Newman, and given the small number of participants in some of the events, it will necessarily be obvious to Judge Newman who some of the witnesses are. The Committee thus believes that Judge Newman has been provided sufficient information that she

would be able to determine the identity of at least some witnesses.

For all the reasons above, the Committee concludes that—at least for purposes of this investigative stage of the proceedings—the confidentiality obligations imposed by Rule 23 (and reiterated by the Confidentiality Order) are consistent with the First Amendment.

II. Judge Newman’s Request Under Rule 23(b)(7) to Disclose Information Concerning the Committee’s Consideration of this Matter

Judge Newman’s May 10 letter brief also presented, for the first time, a request pursuant to Rule 23(b)(7) that the Chief Judge consent to the public release of information concerning the Committee’s consideration of this matter. That request calls for a judgment by the Chief Judge about whether, and the extent to which, confidentiality should be lifted. The Chief Judge recognizes that the judgment depends on the state of the Committee’s investigation. Therefore, the full Committee (which includes the Chief Judge) has considered the request.

The Chief Judge and the Committee believe that, especially while a proceeding remains in the investigative stage, such a request raises significant policy issues. On one hand, a confidentiality restriction implicates the First Amendment and thus requires justification. On the other hand, for the reasons explained above, confidentiality is generally essential for the investigative process. A request for disclosure that would undermine that process—for example, by creating publicity that would potentially discourage witnesses with relevant information from coming forward or speaking candidly—should not be granted.

In this case, the Committee has been moving expeditiously to gather information. At this point, the Committee believes the investigation is reaching the stage at which

there is a diminished concern that public disclosures will discourage witnesses from volunteering information. The Committee believes that most employees who may have relevant information have likely already come forward. At this point, the most critical information the Committee lacks is information from appropriate neurological and neuro-psychological examinations of Judge Newman, which Judge Newman has so far refused. Disclosing much of the information already in hand will not deter the experts performing those examinations, should they occur, from supplying their results to the Committee.

In addition, there is an important further consideration favoring additional disclosures at this point. Inaccurate and distorted information about this proceeding has already been the subject of public discussion. The Rules themselves acknowledge that the Chief Judge or the Judicial Council may disclose information about the consideration of a complaint “in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding.” Commentary to Rule 23(b)(8).

Given the importance of properly balancing these considerations before establishing any precedent that could affect the functioning of the Rules in future cases, the Chief Judge and the Committee referred Judge Newman’s request to the Judicial Council. The Judicial Council has voted unanimously to publicly disclose prior orders issued by the Committee and by the Judicial Council and Judge Newman’s Letter Responses, with appropriate redactions to protect the identity of witnesses.

The Confidentiality Order and the Rules, however, shall remain in effect with regard to all future filings in this matter. Judge Newman and her counsel are free to discuss information that has been publicly released pursuant to this order and prior orders of the Judicial Council,

but they shall remain bound by Rule 23 not to disclose other information about the Committee's consideration of this matter that remains confidential. This means, for example, that to the extent Judge Newman and her counsel may be able to identify witnesses even from the redacted material that is released, they are not permitted to disclose witnesses' names publicly. In addition, going forward, Judge Newman and her counsel are still bound by the requirement of Rule 23 that they may not unilaterally make public disclosures of information that has not yet been made public about the Committee's consideration of this matter. To the extent Judge Newman believes that future orders of the Committee or other information about the Committee's consideration of this matter (including her future filings) should become public, she may make requests for disclosure pursuant to Rule 23(b)(7).

Accordingly,

IT IS ORDERED THAT:

(1) In response to Judge Newman's request pursuant to Rule 23(b)(7) and 23(b)(8), prior orders of the Committee and the Judicial Council as well as Judge Newman's Letter Responses to date will be publicly released, with appropriate redactions to protect the identity of witnesses;

(2) To the extent Judge Newman and her counsel are able to identify witnesses from information included in such orders, they are prohibited from publicly disclosing the names of witnesses;

(3) Judge Newman and her counsel remain bound by Rule 23 and the Confidentiality Order with regard to information not publicly disclosed by the Court such as future orders and filings; and

(4) Disclosures by counsel that appear to be in violation of Rule 23, the Confidentiality Order, or this Order may result in issuance of an order to show cause why counsel should not be held in contempt.

SO ORDERED: May 16, 2023.