

# 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 to report its findings and recommendations with respect to, a complaint identified against Judge Newman raising, *inter alia*, a concern that she may have a mental or physical disability that renders her unable to discharge the duties of her office.<sup>1</sup>

In orders dated April 7, 2023, April 17, 2023, and May 3, 2023, the Committee ordered Judge Newman to undergo

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<sup>1</sup> Chief Judge Moore did not file a complaint nor is she a complainant. Instead, Chief Judge Moore *identified* a complaint pursuant to Rule 5, which allows a Chief Judge to initiate the complaint when others have presented allegations establishing probable cause to believe a disability exists. Rule 5 permits witnesses and complainants to remain confidential during the initial stages of the proceedings.

a neurological evaluation and neuropsychological testing to determine whether she suffers from a disability and ordered her to provide medical records. The unanimous Judicial Council issued its own order on May 3, 2023 supporting the Committee’s decision to require the examinations (the evaluation and testing) and the provision of medical records. Judge Newman has not complied with those orders. Instead, on May 10, 2023,<sup>2</sup> counsel for Judge Newman submitted a letter brief refusing to provide medical records related to an alleged cardiac event and a separate fainting episode on the ground that they are supposedly “irrelevant” to any medical or psychological professional’s evaluation of whether Judge Newman may now suffer from a cognitive impairment. Judge Newman also raised objections to the examinations the Committee had ordered, arguing (among other things) that she should select the professionals who would conduct them and that limits should be placed on the examinations before she would agree.

In this order, we address Judge Newman’s objections and more clearly define our requests for medical records. We further address her objections and more clearly define and stage the examinations that the Committee requires Judge Newman to undergo. We also set out once more the accumulated and growing body of evidence providing the Committee a reasonable basis for concluding that the examinations it ordered are necessary at this juncture to enable a fully informed determination of whether Judge Newman suffers from a disability. As explained again below, there is overwhelming evidence raising concerns about whether Judge Newman currently suffers from a disability that makes her unable to efficiently perform the duties of

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<sup>2</sup> 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.

her office. Put simply, when the incontrovertible data from the Clerk's Office establish that Judge Newman (despite having a reduced workload) is unable to complete her work in a timely fashion; when multiple court staff members have reported concerns that Judge Newman cannot remember from day to day how to perform simple tasks such as logging into the computer network or remembering where files have been saved (and in seeking help on these matters she has appeared "paranoid" and repeatedly insisted her devices are hacked and bugged); when two of the five members of Judge Newman's staff recently resigned from her chambers and requested no further contact with Judge Newman; when multiple witnesses report that Judge Newman has threatened to have one staff member arrested and removed from the building; and when Judge Newman's [third staff member] refuses to answer basic questions about her role and responsibilities in chambers and instead—on advice of counsel—asserts her Fifth Amendment right to remain silent to avoid incriminating herself, it is crucial for the Committee to secure professional examinations of whether Judge Newman is suffering from a cognitive or other impairment making her unable efficiently to carry out the duties of her office.

It is also long past time for Judge Newman to begin cooperating with the Committee's inquiry. Judge Newman has repeatedly asserted through counsel that she suffers no cognitive impairment. To demonstrate that, Judge Newman should take this opportunity to meet with the neutral, independent neurologist and neuropsychologist selected by the Committee to address, through the examinations they deem appropriate, the many concerns that have been expressed. The litigants whose rights are at stake in the cases before this court deserve to have confidence that the judges ruling on their cases do not suffer from a cognitive impairment. The Committee and the Judicial Council have an overriding duty to ensure that the

judges resolving litigants' cases are able-minded and capable of performing their jobs. When serious concerns are raised about a judge's fitness, they must be taken seriously and addressed expeditiously. The Judicial Conduct and Disability Act of 1980 (the Act) and the Rules require the judge in these proceedings to cooperate. Rule 13. Judge Newman should be willing to cooperate and undergo the necessary and standard examinations to remove the cloud that will linger over all cases in which she participates while such concerns exist.

#### **A. Medical Records**

In its orders of April 17, 2023 and May 3, 2023, the Committee required that Judge Newman provide hospital, medical, psychiatric or psychological, and other health-professional records that relate to Judge Newman's alleged cardiac issues and fainting episode. The Committee also required production of hospital, medical, psychiatric or psychological, or other health-professional records from any treatment provider in the last two years regarding mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina.

In the letter brief submitted on May 10, Judge Newman provided no rationale for refusing to provide records in the second category, *i.e.*, records related to treatment or consultation she has had in the last two years regarding mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina. Such records are obviously relevant to the Committee's inquiry into whether Judge Newman has a disability related to mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina that affects her ability to perform the functions of her job. To the extent that Judge Newman suggests that requiring the production of such records is an unwarranted invasion of her privacy, the Committee notes that the Rules expressly contemplate that the Committee may require the

production of medical records. *See* Commentary to Rule 13. And these records are directly relevant to the Committee's inquiry.

The only objection Judge Newman explained in her letter brief relates to the Committee's request for medical records concerning her apparent cardiac event and a fainting episode. According to Judge Newman, such records are irrelevant—and, she claims, the Committee has not explained how such records are relevant—to any inquiry into whether Judge Newman suffers from a disability related to cognitive function.

As detailed below, the Committee's investigation has shown that there are significant concerns that Judge Newman is currently unable to efficiently execute the obligations of her office. Despite enjoying a significantly reduced workload, Judge Newman shows abnormal delays in issuing opinions compared to the other active judges of the court. In addition, numerous personnel who interact with Judge Newman in the course of the court's business have raised concerns about her comprehension, confusion, short term memory loss, agitation, and lack of focus.

Dr. [REDACTED], whom the Committee retained to consult in this matter, has informed the Committee that medical records related to a cardiac event and a fainting episode—like records directly addressing mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina—may very well shed light on the observed changes in Judge Newman's behavior and the issues of impairment of cognitive and other functioning the Committee is investigating. To be sure, the records may not end up shedding such light. But the Committee (and the medical professionals the Committee has asked to evaluate Judge Newman) cannot know the significance of those records until the medical professionals have seen them. And the Committee cannot conduct a responsible investigation by failing to

gather information that, according to the Committee's medical consultant, may shed light on conditions relevant to the issue of disability. Dr. [REDACTED] has informed the Committee that it would be standard practice for a treating neurologist to consider such records in evaluating impairment issues like those presented here.

To address any concerns about privacy, the Committee hereby limits its requirement concerning the records at issue so that Judge Newman need not supply such records to the Committee itself but only to the neurologist whom the Committee has selected to conduct an evaluation of Judge Newman. Accordingly, Judge Newman is ordered to provide the above-mentioned records and a list of current medications to the office of Dr. [REDACTED] within 30 days. The Committee requests that Judge Newman notify the Committee by 9:00 am May 23, 2023 whether she will comply with this direction.

Refusal to provide the requested medical records hinders the Committee's investigation into whether Judge Newman suffers from a disability. The Committee has now made multiple attempts to explain to Judge Newman the importance of providing these records. If Judge Newman continues to refuse to provide these records, this investigation may be expanded to determine whether her noncooperation is an act of misconduct. The Rules expressly contemplate that the Committee may review medical records as part of its investigation, Commentary to Rule 13(a), and that "refusing, without good cause shown, to cooperate in the investigation" is an act of misconduct. Rule 4(a)(5).

**B. Testing and Evaluation (Examinations)**

Based on its investigation to date, the Committee has determined that there is a reasonable basis for concern that Judge Newman may suffer from a disability that interferes with her ability to perform the responsibilities of her office. This investigation has included more than

twenty interviews with court staff and discussions with Dr. [REDACTED]. These form the basis for the Committee's conclusion that there is a reasonable basis for the required neuropsychological testing and neurological evaluation 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.

### **1. Court Staff Concerns about Judge Newman's Fitness**

Court staff from the Clerk's Office, from the Information Technology (IT) and Human Resources (HR) offices, and from Judge Newman's own chambers have reported that, in their interactions with Judge Newman over the course of the last year, Judge Newman has exhibited behavior that indicates significant mental deterioration, including memory loss, lack of focus, confusion, uncharacteristic paranoia, and the inability to understand and execute simple tasks she was once capable of completing. Some of the concerns raised by staff are detailed below.

Several court staff members reported to the Committee that over the last year Judge Newman frequently claimed that her email and computer were being hacked—also, at times, that her phones were being bugged—and that her complaints have increased from once or twice a week to almost daily or every other day. They describe her demeanor in their encounters with her over these matters as “agitated” and “paranoid” and the conversations themselves as “bizarre” and “nonsensical.” Staff reported that, in the past, Judge Newman claimed that the culprits who were hacking and bugging her devices were bloggers and the media who were out to get her and bring her down. More recently, staff reported that she is claiming that it is the court itself hacking and bugging her devices. In each instance, IT staff scanned her devices and found no evidence to

support Judge Newman's concerns. Staff indicated that her claims about hackers usually stemmed from her having forgotten where she saved a file or email, and even after the IT staff would locate the file or email for her (on her desktop or in one of her folders) she would continue to allege that hackers were responsible for hiding the file.

IT staff also reported that the last time Judge Newman participated in the court's mandatory security awareness training she was unable to complete it. The training amounts to watching a 10-20 minute video and answering a small number of multiple choice questions about the video. IT staff indicated that Judge Newman repeatedly failed the test. She was unable to get the multiple-choice questions correct even after watching the short video several times—even though, staff indicated, retesting involves presentation of the same multiple-choice questions each time. Ultimately, an IT staff member sat with Judge Newman and watched the video with her, after which she was still unable to answer the same questions. He reported having to feed her the answers in order for her to pass and that she was simply unable to retain the information she had just watched multiple times. This staff member indicated that he has worked with Judge Newman for many years and that he was amazed at how quickly and easily she picked things up when she was in her 80s. Over the last few years, he noticed a change observing that she now gets easily confused, has trouble retaining information, and forgets how to perform basic tasks that used to be routine for her.

Staff reported that Judge Newman often forgets how to do simple tasks that she previously had no difficulty performing, 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 repeatedly with the same tasks, as she seems unable to remember how to perform them from one day to the next, though she performed them independently for years without 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 a recent episode in which Judge Newman indicated that she was not required to comply with a court rule that 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 recounted that Judge Newman 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.

Recently, a staff member raised a matter related to events in Judge Newman’s chambers pursuant to the confidential Employment Dispute Resolution (EDR) process. Judge Newman refused to participate in the EDR proceeding to resolve the employee’s concerns. She also sent an email to 95 individuals at the court disclosing that confidential matter (including the identity of the employees). This conduct raises concerns about Judge Newman’s ability to remember or understand important confidentiality requirements and to manage the administration of her chambers. Judge Newman’s refusal to participate in our court’s EDR proceedings when they involved her chambers staff—and even when they involve complaints about her by her chambers staff—raises concerns about Judge Newman’s ability to follow rules and manage staff, which may be related to a potential cognitive impairment.

Until recently, Judge Newman's chambers had five employees. 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 law clerks 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 her clerk's resignation was "appropriate" and that the clerk's separation from her chambers should be expeditiously processed. Yet eight days later, on April 27, 2023, Judge Newman sent an email to all judges on the court indicating that she had not "released" the law clerk and that his continued service at the court in another chambers was "in violation of my right to law clerk services."

There was a nearly identical exchange about [Newman chambers staff member]. As the Committee's order of April 20, 2023, detailed, Judge Newman's [chambers staff member] alleges that Judge Newman threatened to terminate him on the morning of April 19, 2023 for his use of interim relief that had been granted under the court's EDR program (relocation outside chambers, while continuing to perform his job for Judge Newman). 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 [Newman chambers 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 on April 27, 2023 (again just 8 days later), Judge Newman sent an email to all judges stating: "I never released [Newman

chambers staff member] [] from my chambers staff. His movement to your staff, without consultation with me, violates his confidentiality and other obligations to me.” This former Newman employee now works in our [REDACTED] Office. Despite being repeatedly told that he chose to leave her chambers because of her alleged abusive treatment of him, Judge Newman thereafter accused the court, the Chief Judge, and our Deputy Clerk of Court on multiple occasions by email of having improperly taken [Newman chambers staff member] and/or depriving her of [REDACTED] services.

Judge Newman has a[n employee] in her chambers who was unwilling to provide any testimony to the Committee about Judge Newman’s ability to perform the duties of her job. In fact, in response to questions seeking basic information about her own duties, the [employee]—on advice of counsel—invoked her Fifth Amendment right to remain silent to avoid incriminating herself. For example, when asked, “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 right 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 right when asked about her perceptions of Judge Newman’s ability to carry out her job. [REDACTED]

Staff also reported that during conversations or email exchanges Judge Newman would ask the same questions

over and over, requiring provision of the same answer over and over. Staff indicated that at times she seems confused and suspicious and to be struggling to comprehend what she is being told.

For example, a member of the court's Human Resources team (HR) has tried for weeks to work with Judge Newman to replace [Newman chambers staff member]. As emails from HR indicate, Judge Newman was informed on April 24, 2023 that she could rehire her former [employee] on a temporary basis (as Judge Newman had requested), and then on April 27, 2023, Judge Newman was informed that she could advertise to hire a new permanent [employee].<sup>3</sup> From that point, HR tried repeatedly to work with Judge Newman both to bring back her requested temporary [employee] and to post to hire a new permanent person. HR reported exchanges in which Judge Newman would ask the same questions over and over, requiring the same answer to be given repeatedly.<sup>4</sup> HR reported that any

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<sup>3</sup> For multiple reasons, including the pending EDR proceeding concerning Judge Newman's treatment of [Newman chambers staff member], the Judicial Council had initially placed a pause on hiring new personnel for Judge Newman's chambers on April 20, 2023. Four days later, on April 24, 2023, the Judicial Council approved Judge Newman's request to bring back, on a temporary basis, the person who served as her [employee] until [REDACTED] ago.

<sup>4</sup> For example, Judge Newman asked HR whether her former [employee] (a retired annuitant) would face a salary offset to her pension if she returned. HR informed her in writing that her [employee] would receive both her full pension AND salary for hours worked at the court. Judge Newman responded 30 minutes later, "To be clear: Are you saying she would receive no additional pay for working at

delays in acquiring the approved support services is entirely due to Judge Newman not giving her permission to move forward to fulfill her own request. Judge Newman's communications and interactions regarding the process of replacing [Newman chambers staff member] who resigned raises further concern about possible memory loss and confusion.

## **2. Judge Newman's Significant Delays in Resolving Cases**

In addition to the alleged conduct described above, Judge Newman's significant delays in resolving cases raise concerns that she may suffer from a disability that prevents her from effectively and expeditiously carrying out the duties of her office. The Committee has conducted further investigation into Judge Newman's ability to efficiently manage her caseload. This investigation has provided further evidence that Judge Newman may suffer from cognitive or other impairments that render her unable to effectively discharge her duties.

Between October 1, 2021 and March 24, 2023, Judge Newman authored only 10 majority opinions compared to an average of approximately 58 for the other active judges on the court. Even accounting for dissents and concurrences, during this time period, the average active judge authored 61 opinions, whereas Judge Newman authored 28. At the same time, Judge Newman took more than three times as long to issue her opinions. Other active judges averaged approximately 53 days to issue an opinion after assignment. In contrast, Judge Newman's average time to issuance was approximately 199 days. The next closest judge authored 55 opinions (43 majority opinions and 12 dissents/concurrences) and had an average time from

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the court?" In the same 24-hour period, HR reported having to answer this same question four separate times.

assignment to issuance of 106 days. The next closest judge thus wrote approximately twice as many opinions in approximately half the time.

Similarly, between October 1, 2020 and September 30, 2021, Judge Newman authored only 9 majority opinions while the other active judges authored on average 42. The other active judges averaged 61 days from assignment to issuance, whereas Judge Newman’s average time to issuance was 249 days—more than four times the average.

Time Period	# of Maj. Op. PN	Assign-ment to Issuance PN Opinions	# of Maj. Op. Other Judges	Assign-ment to Issuance Other Judges
10/20-9/21	9	249 days	42	61 days
10/21-3/23	10	199 days	58	53 days

Judge Newman’s extended delays relative to her colleagues, coupled with her considerably lower productivity during the same period, is cause for concern.

In addition, there have also been a number of recent instances in which cases have been reassigned from Judge Newman to another judge following abnormally lengthy delays. See March 24, 2023 Order at 4–5. To reiterate just a few examples: (1) ██████████ ██████████, a pro se case submitted on the briefs without oral argument, was reassigned after it had been pending 374 days and was resolved within 3 days of reassignment; (2) ██████████ ██████████, also a pro se

submitted case, was reassigned after it had been pending 624 days and was resolved within a month of reassignment; and (3) [REDACTED], also a pro se submitted case, was reassigned after it had been pending 302 days and was resolved within a couple of weeks of reassignment.

These statistics demonstrate that there is serious cause for concern regarding Judge Newman's ability to carry out her duties. Considered together with the other evidence described above, it confirms that there is a reasonable basis to believe that Judge Newman may suffer from a disability preventing her from expeditiously performing her duties as a judge.

Judge Newman's only response to the evidence of abnormal delay despite lower productivity is that during the summer of 2021, Judge Newman sat on 10 panels. Our research demonstrates that during this time period, when arguments were conducted by telephone because of COVID, these 10 panels considered 51 cases. Judge Newman presided over 9 of the 10 panels and assigned herself just one opinion. (She also had 5 dissents in whole and in part during that period.) This compares to 33 opinions that were assigned to the other two members of those panels for cases heard during that period. (The remainder were decided under Rule 36, a summary affirmance.) The one opinion she assigned to herself took her 234 days (from the date of oral argument to issuance). Thus, while Judge Newman was still paneled on a similar number of cases to her active colleagues during the summer of 2021, her productivity as measured by opinions and timeliness was much, much lower.

Judge Newman's lower productivity is indicated in three ways: (1) she does not assign herself her share of opinions (even considering her higher rate of dissenting) and takes unreasonable lengths of time to complete opinions she does assign herself (as detailed above); (2) she does

not participate in motions panels, an important and time-consuming task required of active judges;<sup>5</sup> and, (3) Judge Newman's participation in cases has substantially slowed over the last year: May 2022-April 2023. From May 2022 through April 2023, the average Federal Circuit judge participated in deciding 128 cases; Judge Newman in contrast participated in deciding only 65 cases. Despite participating in fewer cases, assigning herself fewer opinions to write, and not participating in motions practice, Judge Newman still takes an unreasonably long period of time compared to her colleagues to issue opinions. This dramatic reduction in productivity causes the Committee to be concerned that Judge Newman may suffer from a disability which renders her unable to fulfill the obligations of her job as an active judge.

The Committee is aware that analyses based on publicly available data have been presented elsewhere purporting to show that Judge Newman's productivity does not deviate significantly from that of other judges. The Committee notes that public data regarding the resolution of cases is materially incomplete in ways that significantly obscure the exact information the Committee needs to analyze. For example, public data does not (and cannot) reflect which judges authored per curiam opinions. This omission is significant as 31.6% of opinions issued by the court are per curiam. From October 1, 2021 through March 24, 2023, 616 opinions were issued and 195 (or 31.6%) were

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<sup>5</sup> In recent years, each active judge generally acts as Lead Motion's judge one month a year and participates in motions panels 4 months a year. In 2023 to date, there have been an average of 69 motions resolved by written opinions each month. In 2022, there were an average of 63 motions resolved by written opinion each month. Judge Newman has not participated in motions panels since January 2021.



per curiam. Only 1 of the 195 per curiam opinions was authored by Judge Newman. Data that neglects authorship of per curiam opinions therefore materially distorts conclusions about a judge's productivity and delay. The court's internal data maintained by the Clerk's Office, from which the above statistics have been derived, accounts for authorship of every opinion.

Similarly, public data reflecting the time between an appeal being docketed and terminated does not indicate the time between when a judge is assigned an opinion and when the opinion issues—the relevant metric for assessing delay attributable to the judge. The Court's internal data accounts for when authorship is actually assigned, providing an accurate picture of the fraction of an appeal's pendency that is attributable to delay by a judge in producing an opinion.

The Court's internal data also accounts for delays in authorship attributed to stays or reassignments. Again, the public data looking only at the time between docketing and termination does not account for delays for administrative reasons and delays in authorship. Nor does public data reflect when cases have been reassigned to another judge. For example, in [REDACTED] [REDACTED], Judge Newman did not circulate a draft opinion until 624 days after argument. The case was reassigned to another panel member and the opinions issued within a month. Publicly-available data would attribute the entire period of 650+ days from argument to issuance to the judge ultimately listed as the author of the majority—when in fact Judge Newman was responsible for 624 of those days and the authoring judge was only responsible for about a month. Only data from the Clerk's Office, which takes into account such reassignments, can accurately attribute delay to the proper judge. Public databases cannot do so.

Finally, statistics that attribute the time between docketing and termination to all three judges on a panel will also obscure delays attributable to any individual judge. Again using ██████████ ██████████ as an example, Judge Newman failed to produce an opinion for 624 days before the case was reassigned to another judge. After reassignment, the case was resolved within a month. Panel-based statistics will inaccurately attribute the 624 day-delay to all three judges on the panel, despite the fact that this delay was entirely attributable to Judge Newman. Conversely, panel-based statistics will also artificially decrease a non-authoring judge's average time for resolution when he or she sits on a panel with an expeditious author.<sup>6</sup> This metric provides no basis at all for ascertaining delay attributable to individual judges.

### **3. Recommendation of the Committee's Expert Consultant**

The Committee's consultant, Dr. ██████████, has recommended that Judge Newman undergo a neurological evaluation and a complete neuropsychological battery of tests to determine whether she suffers from a disability impairing her functioning, and if so, its nature and extent. Dr. ██████████ has reviewed materials discussed herein regarding the staff's interactions with Judge Newman and informed the Committee that he believes that the ordered evaluation and testing are necessary.

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<sup>6</sup> Not surprisingly, panel-based data often results in roughly comparable statistics for every judge. Because panels are randomly assigned, each active judge sits with every other active judge with roughly equal frequency. This will necessarily result in panel-based statistics appearing similar for every judge because fluctuations above or below the mean will average out.

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

#### **4. Committee Conclusion Regarding the Need for Medical Testing**

The reports to the Committee 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 Judge Newman's backlog and delays in the processing of cases compared to her colleagues and Dr. [REDACTED] recommendation, have caused the Committee to conclude that the recommended medical evaluation and testing are necessary to determine if Judge Newman has a disability that prevents her from performing her duties as a judge. *See* Rule 13(a). To be clear, the Committee has made no fact findings at this time regarding the allegations made by court staff, but rather finds that these allegations individually and collectively combined with the evidence of significant delay give the Committee a reasonable basis to order the identified examinations. *See* Rule 13(a).

#### **5. Judge Newman's Objections**

Judge Newman raises three concerns about the ordered examinations: (1) she asserts that she should be permitted to choose the professional(s) who conduct any evaluation and testing; (2) she states that she will not agree to testing of unknown scope and duration; and (3) she objects to the lack of any defined limitation on the use of

the examination results. We address those concerns in order.

**(a). The Committee has the authority to require medical evaluations and testing conducted by professionals selected by the Committee.**

The Act and the Rules give the Committee the authority to order the examinations 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 examinations 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).

There is no question that the Committee is entitled to determine the scope of the necessary investigation and, in doing so, to determine the necessary examinations and to choose independent professionals to perform them. This issue was litigated extensively in the *Adams* case arising in the Sixth Circuit. There, Judge Adams refused to undergo examination by the expert medical provider chosen by the Special Committee. *See* Order and Memorandum at 21, *In re Complaint of Judicial Misconduct*, No. 06-13-90009 (Judicial Council of the Sixth Circuit Feb. 22, 2016). The scope of the investigation was expanded, and the Judicial Council found it an act of misconduct for Judge Adams to refuse the examination by its selected medical provider. *See id.* at 21, 27. The Judicial Council found “Judge Adams’s refusal to cooperate with the Special Committee’s request that he undergo a mental health examination with a

psychiatrist selected by the Special Committee constituted misconduct.” *Id.* at 27. On appeal, the Judicial Conduct and Disability Committee agreed with the Sixth Circuit Judicial Council, explaining that “[w]e share the Judicial Council’s view that input from an independent medical expert is necessary to fully and fairly assess Judge Adams’s mental condition and fitness to continue to serve as a judge.” *In re Complaint of Judicial Misconduct*, C.C.D. No. 17-01, at 36 (U.S. Jud. Conf. 2017). As the Judicial Conduct and Disability Committee explained: “While Judge Adams has expressed a preference for being evaluated by an expert of his choosing and an opportunity to direct to some extent the nature of the examination, we conclude that the Special Committee and the Judicial Council appropriately exercised their discretion in determining that an examination by an independent expert is necessary to ensure accuracy and reliability of the procedures and examination results.” *Id.* at 32.

In this case, the Committee has similarly determined that examinations by independent, neutral professionals chosen by the Committee are necessary. The Committee has identified independent professionals in the local area who are willing to expedite their examinations of Judge Newman. Judge Newman has articulated no sufficient basis for refusing the testing with these independent medical providers.

**(b). Defined scope of examinations.**

Judge Newman expressed concern that there should be a clearer definition and limitation of the examinations that are being required. The Committee therefore is providing a clearer definition of the limited testing it is requiring under this order. Based on recommendations from the Committee’s consultant, the Committee is requiring two forms of examination at this time.

First, the Committee requires that Judge Newman meet with the neurologist, Dr. [REDACTED], for an in-person examination which should last 30-45 minutes. This initial intake appointment will not require any invasive procedures (such as blood work or imaging studies). If the neurologist believes such additional procedures are necessary for assessing whether Judge Newman suffers a cognitive impairment, such testing can be the subject of further discussion between the Committee and Judge Newman after this initial examination has taken place.

Second, the Committee requires that Judge Newman see the neuropsychologist, Dr. [REDACTED], for a full battery of neuropsychological testing. This process involves a clinical interview, the administration of questionnaires related to personality and mental health symptoms, and cognitive testing. The clinical interview is designed to provide a basic understanding of the individual's social, educational, occupational, medical, and psychiatric history. The cognitive testing is designed to test all major areas of neurocognitive functioning, including attention, processing speed, working memory, executive functioning, spatial abilities, memory, and language. No aspect of this process is physically invasive; the process consists of answering questions or performing tasks that test cognitive function. The entire examination, including all cognitive testing, is likely to take up to six hours. According to Dr. [REDACTED] and Dr. [REDACTED], this can be split into two sessions if necessary; however, in situations in which a job requires lengthy periods of cognitively demanding tasks, it is better for the evaluation to be completed in a single day.

Judge Newman has suggested that she may be willing to provide medical records as an alternative to the examinations just described. The Committee concludes that the seriousness of the concerns which have been raised by so many different court staff members combined with Judge Newman's lengthy delays in processing cases makes the

just-described examinations necessary for the Committee, at this juncture, to make a fully informed determination of the nature and extent of any potential impairment.

**(c). Limitations on use of examination results.**

Finally, Judge Newman expressed concern over the use that will be made of the examination results. The results will be maintained as confidential to the extent permitted by the rules of these proceedings. The Committee will use the results solely to aid its determination of whether Judge Newman has a disability that renders her unable to perform the duties of her office and for the preparation of its report and recommendation to the Judicial Council. This is the Committee's sole purpose regarding the disability inquiry—determining whether Judge Newman has a disability and if so the nature and scope and its impact on her ability to perform the functions of her job.

The Committee requests that Judge Newman inform the Committee by 9:00 am May 23, 2023 if she is willing to meet with the neurologist and the neuropsychologist as described above. This request must be answered independently of any objection to the requests regarding medical records made above. As Judge Newman is continuing to resolve cases in her existing docket, it is imperative that these examinations be conducted on an expedited basis. The Committee will make every effort to acquire examination dates as quickly as possible.

**C. Interview with Judge Newman**

Judge Newman has suggested that the Committee's prior orders contain errors of fact, but she has not identified any specific errors. We have previously invited Judge Newman to meet with the Committee for an interview in which she could provide the Committee with information relevant to the Committee's investigation, including

correcting any error of fact. April 17, 2023 Order. We again request that Judge Newman participate in a videotaped interview with the Committee which will provide her with an opportunity to clarify these matters. The Committee is available to meet with Judge Newman at 2:00 pm June 6, 7, or 8. Please inform the Committee by 9:00 am May 23, 2023 as to which date Judge Newman is available.

**D. The Importance of Expeditious Resolution of This Proceeding**

Finally, Judge Newman criticizes the Committee for setting deadlines for compliance that are shorter than the deadlines provided for in various rules governing proceedings other than these conduct and disability proceedings. The Act that governs these proceedings declares that the Special Committee shall “conduct an investigation as extensive as it considers necessary, and shall *expeditiously* file a comprehensive written report thereon with the judicial council.” 28 U.S.C § 353(c) (emphasis added). Congress made clear its intent for the proceedings under this Act to be expeditious. “It is required, however, that upon receipt of the complaint, the judicial council is required to take final action on each complaint in an expeditious manner. The Committee is of the view that this will not take more Than 90 days in the usual case.” Sen. Rep. No. 96-362, at 2 (1979). “The committee must satisfy its investigative responsibilities as expeditiously as possible, and then must file a comprehensive written report thereon with the full judicial council of the circuit.” H.R. Rep. No. 96-1313, at 11 (1980). Moreover, despite the concerns about Judge Newman’s mental fitness, she is continuing to participate in cases currently on her docket, petitions for rehearing and rehearing en banc, and en banc proceedings of the court. The litigants in these proceedings deserve to have this court resolve concerns about Judge Newman’s fitness as expeditiously as possible.



Accordingly,

IT IS ORDERED THAT:

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

(2) Given the willingness of the expert professionals to handle this matter on an expedited basis, the fact that these examinations have now been ordered three times dating back to April 7, 2023, and the need to retain the expert professionals and allocate funds, a prompt response is necessary to secure the appointments. Judge Newman is directed to inform the Committee by 9:00 am on May 23, 2023 (email response is acceptable) whether she will comply with this Order and make herself available for the above needed evaluations and tests;

(3) Judge Newman is directed to inform the Committee in writing (email response is acceptable) by 9:00 am on May 23, 2023 as to whether she will provide the neurologist with the medical records identified above and list of current medications. The records would be due to the neurologist within 30 days of this Order.

(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.

(5) The Committee again requests that Judge Newman appear for an in-person, video-taped interview with the Committee to take place any afternoon from June 6-8 at 2:00 pm. Judge Newman is directed to inform the Committee, through counsel, by May 23, 2023 at 9:00 am whether she will make herself available for an interview on one of those dates.

(6) The request to reconsider a transfer is denied. The judicial council unanimously determined in its May 3, 2023 order that Judge Newman was required to first comply with the Committee's request for medical records and the Committee-ordered neurological and neuro-psychological evaluations and testing.

SO ORDERED: May 16, 2023.