

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 May 16, 2023, the special committee composed of Chief Judge Moore, Judge Prost, and Judge Taranto (the Committee) ordered Judge Newman to undergo certain neurological and neuro-psychological examinations and to submit certain medical records to the neurologist selected by the Committee and also asked Judge Newman to appear for an interview with the Committee. The May 16 Order repeated, with clarifications, directives (and an interview request) issued by the Committee starting in early April. The May 16 Order established a deadline of 9:00 am on May 23, 2023, for Judge Newman to respond indicating whether she would agree: (i) to undergo the specified examinations; (ii) to provide the requested medical records; and (iii) to appear for an interview (with the examinations, the provision of records, and interview to occur at later dates). On May 22, the Committee extended the deadline to 9:00 am on May 26, 2023.

On May 25, Judge Newman responded through counsel and refused to comply with any aspect of the May 16 Order

(May 25 Response). Judge Newman indicated that she would not cooperate in any respect unless (i) she was immediately restored to the rotation of assignments for new cases *and* (ii) this matter was transferred to be considered by the judicial council of another circuit. May 25 Response at 3. If those demands were met, Judge Newman indicated that she intended to start over from the beginning by negotiating with a new Special Committee in the transferee circuit concerning “selecting medical providers” and “setting the appropriate parameters for any examination.” *Id*; see also May 9 Response (“Judge Newman reserves the right to request that the transferee council restart the entire process”).

On May 26, 2023, pursuant to Rule 13(a) of the Rules for Judicial Conduct and Disability Proceedings, the Committee requested that this investigation be expanded to consider whether Judge Newman’s refusal to cooperate constituted misconduct. The same day, Chief Judge Moore issued an order expanding the investigation to include that question of misconduct.

In light of the practical constraints that Judge Newman’s refusal to cooperate places on the Committee’s ability to proceed, this order narrows the focus of the Committee’s further investigation and establishes a timetable for further proceedings.

The Committee believes that Judge Newman’s refusal to comply with the Committee’s orders requiring her to undergo medical examinations and to provide medical records and its request for an interview significantly impairs the Committee’s ability to make a fully informed assessment of whether Judge Newman suffers from a disability that impairs her ability to perform the functions of her office and to make a recommendation to the Judicial Council on that issue. The Committee does have strong evidence suggesting such a disability—notably, information showing that

despite handling far less than an active judge's work, Judge Newman has abnormally, lengthy delays in issuing opinions ; and overwhelming evidence from the Court staff who interact with Judge Newman that Judge Newman has displayed troubling changes in behavior, including inability to focus, short term memory loss, confusion and agitation. But the Committee believes it important, in order to make a formal finding concerning a disability, to obtain the input it has specified from independent medical professionals after they have actually examined Judge Newman. In the *Adams* case, the Judicial Council of the Sixth Circuit concluded that it could not determine whether Judge Adams suffered from a disability that rendered him unable to discharge the duties of his office "because Judge Adams refused to undergo an evaluation by the forensic psychiatrist the Special Investigating Committee retained." Order & Mem., *In re Complaint of Judicial Misconduct*, No. 06-13-90009, at 27 (Sixth Cir. Judicial Council Feb. 22, 2016); see also Mem. of Decision, *In re: Complaint of Judicial Misconduct*, C.C.D. No. 17-01, at 36 (Committee on Judicial Conduct and Disability, Aug. 14, 2017) (noting that "input from an independent medical expert is necessary to fully and fairly assess [a judge's] mental condition and fitness to continue to serve as a judge"); see also *id.* at 37 (noting that the ability of the Sixth Circuit judicial council to make "findings with regard to Judge Adams's capability of discharging his adjudicative responsibilities" was "impeded by Judge Adams's refusal to submit to a mental health examination").

Accordingly, the Committee investigation will focus on the question whether Judge Newman's refusal to cooperate with the Committee's investigation constitutes misconduct. See Rule 4(a)(5) ("Cognizable misconduct includes refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules."). Given that the Committee

is narrowing its investigation at this time to whether the failure to cooperate constitutes misconduct, the Committee will likewise limit its consideration of any remedial action solely to remedies for such misconduct that do not require additional factual development. In that regard, the Committee directs Counsel's attention to the statement of the Committee on Judicial Conduct and Disability in the *Adams* case noting that "sanctions for [a judge's] continued failure to cooperate" with orders for a mental health examination may include a "prohibition of the assignment of new cases on a temporary basis for a time certain." Mem. of Decision, *In re: Complaint of Judicial Misconduct*, C.C.D. No. 17-01, at 39 (Committee on Judicial Conduct and Disability, Aug. 14, 2017).

Because narrowing the focus of further proceedings to the question of misconduct dramatically narrows the issues at stake, the Committee believes that this approach will also necessarily result in a more streamlined process. Most importantly, 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 established by the Committee's orders and Judge Newman's filed responses, along with any legal argument Judge Newman wishes to submit to justify her responses or otherwise establish "good cause shown" for her actions. There are no percipient fact witnesses to additional events that are relevant to the misconduct determination. As a result, the Committee currently believes that there is no need for a hearing pursuant to Rule 14 for the taking of testimony. Rule 14 itself makes clear that holding such a hearing is not required in every case. Instead, it states that the Committee "*may* hold hearings to take testimony and receive other evidence." Rule 14(a) (emphasis added). Where there is no need for taking live testimony, a hearing is not required. Similarly, although Rule 15(a)(2) states

that “[t]he subject judge may suggest additional witnesses to the special committee,” in this case there are no witnesses who could have relevant testimony bearing on the narrow issue of misconduct.

Rule 15 establishes that “[t]he subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at a reasonable stage of the investigation.” Rule 15(d). As explained below, the Committee will receive briefing from Judge Newman on the misconduct question and will hear argument from Judge Newman’s counsel.

To the extent that Judge Newman may seek to argue that her conduct was justified because the Committee lacked a reasonable basis for ordering her to undergo examinations and to provide medical records, it may be relevant for Judge Newman to have access to the evidence on which the Committee based its determinations. Accordingly, concurrent with the issuance of this order, the Committee is providing Judge Newman, through counsel, all affidavits and deposition transcripts that the Committee has gathered to date. These materials—which include information on Judge Newman’s lengthy delays in issuing opinions and her handling of far less than an active judge’s work—provided the basis for the Committee’s conclusion that Judge Newman should be ordered to undergo the examinations and to provide medical records.

Counsel are once again expressly cautioned concerning the confidentiality obligations imposed by the Judicial Conduct and Disability Act, the Rules, and by the Committee’s prior order. The Act states in unambiguous terms 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). Similarly, Rule 23(b)(1) provides that information about the Committee’s

consideration of a complaint “must not be publicly disclosed by any judge or judicial employee.” The Committee has taken care that prior public releases do not identify any witnesses who have provided statements to the Committee. Counsel are cautioned that any public release of information that is not already public regarding the Committee’s consideration of the matters before it—especially including the identity of any witnesses—will violate the Act, the Rules, and Committee’s order addressing confidentiality of May 16, 2023.

Accordingly,

IT IS ORDERED THAT:

(1) By 3:00 pm, Eastern Daylight Time on July 5, Judge Newman may 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 as described in the May 16 Order constitute misconduct and the appropriate remedy if the Committee were to make a finding of misconduct; the letter brief may be single spaced and is limited to 25 pages; and,

(2) the Committee will hear oral argument from counsel for Judge Newman on July 13, 2023 at 2:00 pm in courtroom 201. This argument will be confidential, members of the public will not be permitted. Counsel shall be allowed 45 minutes for argument.

SO ORDERED: June 1, 2023.