

United States Court of Appeals for the Federal Circuit

~~UNDER SEAL (NON-PUBLIC ORDER)~~

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 may have a mental or physical disability that renders her unable to discharge the duties of her office.

The Committee issues this Order to remind the participants in this proceeding—including Judge Newman and her counsel—of the confidentiality obligations imposed both by the terms of the Judicial Conduct and Disability Act of 1980 (the Act) and by the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the Rules).

The Act states in unambiguous terms that, with certain exceptions not applicable here, “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). This extends to filings made by Judge Newman or her counsel as well as orders of the Committee. Indeed, the Act draws a critical distinction between the investigative stages of a proceeding and decisions ultimately issued by the Judicial Council or the Judicial Conference, which must be made public. *See id.* § 360(b).

The Rules reflect the same requirement of confidentiality. Rule 23(b) unambiguously 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 any judge or judicial employee.” Rule 23(b)(1). That is why the Committee’s prior orders in this matter were prominently marked “UNDER SEAL (NON-PUBLIC ORDER).”

These confidentiality requirements do not exist solely to protect the judge subject to a complaint. Instead, Rule 23 makes it express that “[c]onfidentiality under these Rules is intended to protect the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated . . . , and ultimately resolved.” Rule 23(a). In particular, confidentiality protections exist, among other reasons, to protect the identity of witnesses and to ensure that a thorough investigation may be conducted without potential witnesses being intimidated by efforts to try the matter in the press while an inquiry is still underway. Accordingly, the commentary to the Rules makes clear that the confidentiality obligation “includes subject judges.” Commentary on Rule 23.

Similarly, in keeping with the broader goals served by the confidentiality requirements, the Rules do not permit a subject judge any unilateral right to disclose aspects of an investigation under the Rules. Instead, Rule 23(b)(9) permits a subject judge solely to acknowledge publicly that he or she is the judge referred to in documents made public

under Rule 24 *after a final decision in a matter has been entered*. And Rule 23(b)(7) permits disclosure of information where both the subject judge and the chief judge consent in writing. The chief judge is not required to consent to any such disclosure and must ensure, as appropriate, that the identity of witnesses is protected and that the integrity of an ongoing investigative process is not otherwise compromised by piecemeal releases of information in the midst of the investigation.

The Committee intends that this reminder of confidentiality obligations will ensure that this investigation may proceed expeditiously and confidentially as provided under both the Act and the Rules.

Earlier in this proceeding there have been lapses in adherence to the confidentiality provisions in Act and the Rules. On April 21, 2023, counsel for Judge Newman publicly released a letter that was itself a filing in this proceeding (and hence part of the Committee's consideration of this matter that should remain confidential) and that disclosed the details of at least one prior order of the Committee that was not public. *See* April 21, 2023 Letter from Mark Chenowith to The Hon. Kimberly A. Moore, Chief Judge, United States Court of Appeals for the Federal Circuit, at 2.

Prior to that letter, other information that was subject to the confidentiality provisions outlined above was also released to the press. That release prompted the Judicial Council to take action pursuant to Rule 23(b)(1) and Rule 23(b)(8) to release certain materials pertaining to this proceeding. Rule 23(b)(1) provides that a Judicial Council "may disclose the existence of a proceeding under these Rules when necessary or appropriate to maintain public confidence in the judiciary's ability to redress misconduct or disability," and Rule 23(b)(8) provides that a Judicial Council "may authorize disclosure of information about the

consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act.” The commentary to Rule 23(b)(8) explains that, “where a complainant or other person has publicly released information regarding the existence of a complaint proceeding,” the Judicial Council may release materials “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).

The Judicial Council should not repeatedly be placed in the position of needing to address “special circumstances” created by improper public releases of information in violation of the Act and the Rules—thereby forcing further piecemeal, official releases of information about this proceeding and undermining the entire structure of confidentiality the Act and the Rules are intended to establish. Going forward, the Committee expects that, with this reminder of the confidentiality obligations imposed by the Act and the Rules, there will not be further releases of information relating to the Committee’s consideration of the complaint identified against Judge Newman in violation of the Act or the Rules.

Accordingly,

IT IS ORDERED THAT:

(1) In accordance with 28 U.S.C. § 360(a) and Rule 23(b)(1), Judge Newman and her counsel shall refrain from publicly disclosing information about the Committee’s ongoing consideration of and investigation into the complaint identified against Judge Newman;

(2) Failure by Judge Newman to comply with this Order or the Rules may result in the Committee seeking to

expand the scope of the investigation to include an inquiry into whether Judge Newman's violation of this Order or Rule 23(b) constitutes misconduct under Rule 4(a)(5); and

(3) Violation of this Order or Rule 23 by counsel may result in an appropriate sanction.

SO ORDERED: May 3, 2023.