

**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

On July 31, 2023, the Committee issued its Report and Recommendation (R&R) to the Judicial Council finding that Judge Newman had engaged in misconduct related to the disability component of a proceeding initiated against her under the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules). The misconduct finding was that Judge Newman failed to cooperate with, and thereby stymied, the Committee's investigation into disability by refusing to undergo specified medical examinations, to furnish specified medical records, and to sit for an interview, as provided for in Committee orders. As the basis for the orders at issue, the Committee relied on extensive evidence of interactions with staff reasonably raising concerns about disability (R&R at 33–50), evidence from court records showing Judge Newman's outlier deficiencies in resolving cases, in timeliness and volume (R&R at 50–58), and the recommendation of the Committee's medical-expert consultant (R&R at 58–59).

Two weeks later, on August 14, after approximately half the time had expired for Judge Newman to prepare any response to the R&R that she wished to submit to the Judicial Council, counsel for Judge Newman submitted a letter asking the Committee for further information from court records concerning the second category—statistics and case-specific records indicating significant deficiencies in resolution of cases attributable to Judge Newman. Counsel for Judge Newman asserted: “[W]e need to conduct our own analysis of the data relied on by the Special Committee, as well as analyze whether such reliance is appropriate in the first place.” August 14 Letter at 1. Counsel indicated that Judge Newman intends to have a “consultant” analyze the data and, presumably, provide a report with his own analysis of the data. *Id.*

We deny the request as untimely, waived, and unjustified. Judge Newman had ample notice of the court-record information, which was supplied long ago with statistical details and supporting records, and she never sought additional records before filing her brief to the Committee on July 5, 2023, or even before the July 13, 2023 oral argument. She expressly agreed before July 5, 2023, that the court could proceed on the paper record to decide the non-cooperation issue to which the Committee narrowed its focus. And she has provided no basis whatever for questioning the court-record information, much less in a way that could undermine its use by the Committee as one component (showing outlier deficiencies in case processing) of the overall basis for concern about disability that justified the orders with which Judge Newman has not complied.

BACKGROUND

Judge Newman has been on notice that information about her delays in processing cases is at issue in this proceeding since the identification of the complaint on March 24, 2023. *See* March 24 Order at 2–5. Judge Newman

recognized in her July 5 brief that the issue was raised in that Order and the Committee's May 3 Order (at 7), May 16 Order (at 5), and June 1 Order (at 3). *See* July 5 Letter Brief at 14 (citing those passages). In particular, in its May 16 Order, the Committee set out in detail data from Clerk's Office records that demonstrated Judge Newman's extraordinary delays in processing cases. *See* May 16 Order at 13–18.

On June 1, the Committee issued an order that narrowed the present focus of the proceeding to the question of misconduct based on refusal to comply with the orders concerning medical examinations and records and an interview and set a date for Judge Newman's written response (July 5, more than a month later) and for oral argument (July 13). The Committee supplied Judge Newman, among other things, all affidavits it had gathered, which included those from the current Clerk of Court which laid out the court-record information at issue and attached more than 80 pages of detailed supporting data and docket sheets. *See* June 1 Order at 5; Perlow May 31 Statistics Aff.; Perlow April 6 Aff.. The Committee explained that it was providing Judge Newman "access to the evidence on which the Committee based its determinations" in order to enable her to argue, if she wished, that the "Committee lacked a reasonable basis for ordering her to undergo examinations and to provide medical records." June 1 Order at 5.

In the same order, the Committee stated its belief that the issue to which the matter had been narrowed (for the present) could "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." June 1 Order at 4. On June 15, Judge Newman's counsel informed the Committee: "We agree with this assessment." June 15 Letter at 3. Consistent with that agreement, Judge Newman made no request for additional information related to any of the

affidavits on which the Committee had relied, either before filing the July 5 brief, before appearing at the July 13 argument, or before the Committee issued its R&R on July 31 based on the record developed during the investigation.

The due date for Judge Newman to make any submission to the Judicial Council in response to the R&R was and is August 31 (based on an extension granted in early August). On August 14, after roughly half the time for preparing any response had already expired, Judge Newman's counsel submitted a letter to the Committee seeking access to raw data from the Clerk's Office related to case processing. According to Judge Newman's counsel, "we need to conduct our own analysis of the data relied on by the Special Committee, as well as analyze whether such reliance is appropriate in the first place." August 14 Letter at 1. The letter makes clear that Judge Newman seeks confidential data— that is, "data which has not been publicly released"—based on the rationale that it is needed for her "consulting expert" to "conduct a proper analysis." *Id.* The letter seeks not only access to data on which the Committee had relied, which dates back to 2020, but also additional data going back a further two years to 2018.

**JUDGE NEWMAN'S REQUEST FOR DATA IS
UNTIMELY, WAIVED, AND UNJUSTIFIED**

Judge Newman's request for data is untimely. Judge Newman was on notice at least since the Committee's May 16 Order not only that the Committee had developed data from the Clerk's Office showing her extraordinary delays in processing cases, but also what that data showed, that the Committee was relying on that data as part of its basis for the concerns justifying its orders regarding medical examinations and records and an interview, and that public data cited by others did not contain information contained in data from the Clerk's Office and as a result was inherently unreliable for determining the delays attributable to

individual judges. May 16 Order at 13–18. In her May 25 response to that Order, Judge Newman did not question any of the data on which the Committee had relied and made no effort to suggest that there were errors in that data or that she needed access to underlying information to conduct her own analysis.

The June 1 Order focused the proceeding on Judge Newman’s refusal to comply with the May 16 Order and provided the data to Judge Newman through affidavits of the now Clerk of Court, with extensive supporting material, so that Judge Newman could challenge the basis for the May 16 Order (in her brief due July 5). But before submitting her July 5 brief, Judge Newman once again did not ask for access to any raw information from the Clerk’s Office. And in her July 5 brief, Judge Newman did not complain of denial of access to more court-record data than the Committee had already supplied (no such additional access having been requested), but presented an assessment of public data performed by Ron Katznelson. *See* July 5 Brief at 14. Judge Newman decided to take that route even after the Committee had already explained in its May 16 Order that publicly available data do not contain much of the information contained in data from the Clerk’s Office and thus necessarily provide an inaccurate picture of delays attributable to individual judges on the court.

After Judge Newman submitted her brief on July 5 (and the follow-up submission a few days later responding to the Committee’s request based on the July 5 brief), and after the Committee heard argument on July 13, the Committee was charged with preparing a report for the Judicial Council, “including findings and recommendations for council action,” Rule 17, and doing so “expeditiously,” 28 U.S.C. § 353(c). Yet neither before the July 5 brief was filed, nor before the July 13 oral argument was held, nor before the July 31 Report and Recommendation was issued, did Judge Newman seek the information she now

seeks. Judge Newman thus bypassed all pre-R&R opportunities for shaping the record concerning the Clerk's Office information at issue, despite clear notice of its content and contemplated use. Allowing such a request after the fact, in the face of bypassed opportunities, undermines an elementary, routine, important, and familiar principle of legal procedure.

In addition to being untimely, Judge Newman's request for access to raw data from the Clerk's Office to reopen the record and add additional data—and apparently a report from a “consulting expert” as well—is improper because it was waived. Judge Newman *expressly agreed* in this case that there was no need for further factual development for the Committee (and the Judicial Council) to reach a decision on the question whether Judge Newman had committed the misconduct now at issue (refusal to comply with the orders concerning medical examinations and records and an interview). The Committee explained in its June 1 Order that it had determined that the misconduct question could be determined without any further factual development “based upon the paper record ... along with any legal argument Judge Newman wishes to submit.” June 1 Order at 4. Judge Newman did not object to that conclusion. To the contrary, on June 15, Judge Newman's counsel expressly informed the Committee: “We agree with this assessment.” June 15 Letter at 3. Judge Newman thus waived the ability to argue that she should be allowed to submit additional data or other factual material by expressly agreeing that no further factual development was necessary to decide the issue of misconduct through non-compliance.

Finally, Judge Newman has not provided any justification for taking the extraordinary step of reopening the record to permit additional factual development at this late stage in the proceedings. Her counsel do not point to any information suggesting any defect or error in the statistics

provided by the Clerk's Office pursuant to a sworn affidavit from the Clerk of Court. All they offer is their bare assertion that, now, "we need to conduct our own analysis." August 14 Letter at 1. They do not identify any reason to think that there is an error at all. More specifically, Judge Newman's counsel do not identify any reason to think that there is an error whose correction could undermine the sole point for which the Committee used the court-record information: Namely, it shows outlier deficiencies (compared to other active judges) in Judge Newman's resolution of cases, relevant as one component, along with staff-interaction evidence and an expert recommendation, of the reasonable basis for concern about disability that justified the orders with which Judge Newman has refused to comply. Even if we assumed that an exception to the untimeliness and waiver could be justified on a concrete showing of error material to the challenged result, we could not find this to be a case to apply such an exception: There is nothing even close to such a showing.¹

¹ Counsel's request for data going back to 2018 is especially misplaced. The only question before the Committee—and now before the Judicial Council—is whether the information the Committee relied upon provided a reasonable basis for the Committee's orders on medical examinations, medical records, and an interview. The Committee relied on data dating back only to 2020, showing outlier deficiencies of Judge Newman compared to other active judges during this period. The question is whether the evidence relied on in the R&R, of which the data was only one part, provided a reasonable and sufficient basis for the Committee's decisions, which are focused on the evaluation of current disability. Judge Newman's counsel have not laid out a persuasive explanation of how data from an earlier time period (from 2018 to 2020) could undermine the

The time for counsel to hire a consultant (if they wished) and to conduct their “own analysis” of the data was before they submitted their July 5 Brief and before the record closed. If they needed more time to prepare such an analysis, they should have asked for it then. At this point, after the Committee has already made its findings and the record has long been closed, after employees have been put through troubling interactions and come forward with their accounts (not challenged), it is far too late for Judge Newman to request reopening the record without offering a compelling justification for taking such an extraordinary step. Nothing close to such a justification is offered here.

For the foregoing reasons, Judge Newman’s request for access to confidential raw data on case processing from the Clerk’s Office is denied.

SO ORDERED: August 17, 2023.

Committee’s basis for its orders designed to assess current disability.