

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 5, 2023, Judge Newman, through counsel, submitted a brief as required by the Committee’s order of June 1, 2023. The brief asserts that Judge Newman was recently evaluated by a neurologist (Ted L. Rothstein, M.D.), that his examination “revealed no significant cognitive deficits,” and that “[t]his examination should obviate the need for any further testing and bring these proceedings . . . to a speedy conclusion.” July 5 Letter Brief at 2. Despite the asserted importance of this evaluation, the Letter Brief fails to provide any further description of Dr. Rothstein’s examination of Judge Newman and counsel did not even submit a copy of Dr. Rothstein’s report along with the Letter Brief. After the Committee requested that a copy of the report be submitted for the record, on July 6, 2023, counsel submitted only a redacted version of the report.

Because these proceedings are presumptively confidential and kept under seal—and because Judge Newman has already made an *unredacted* copy of Dr. Rothstein’s report available to the Committee members by proposing to file it

under seal in her pending district court action—the Committee does not believe there is any plausible basis for refusing to file an unredacted copy of Dr. Rothstein’s report as part of the record in this proceeding. Accordingly, counsel shall submit an unredacted copy of Dr. Rothstein’s report for the record no later than 9:00 a.m. on Wednesday, July 12. To the extent that Judge Newman desires to keep part or all of Dr. Rothstein’s report confidential, counsel should make clear in that submission which portions of the report, if any, may be made public pursuant to Judge Newman’s prior request under Rule 23(b)(7) that her July 5 submission should be made public. *See* July 5 Letter Brief at 1 n.1.

In addition, the Committee believes that further information is required for the Committee to be able to assess the significance of Dr. Rothstein’s report for these proceedings.

First, Dr. Rothstein states that a “partial MOCA examination” was performed on Judge Newman. A MOCA examination refers to the Montreal Cognitive Assessment, which is a one-page test, the current version of which is attached as Exhibit 1 to this order. The test has several subparts and typically requires the person administering the test to check boxes and tally up points on each sub-part. Because the MOCA examination appears to form a central part of Dr. Rothstein’s evaluation, and only part of the test was administered, the Committee believes it is essential that the Committee have before it in the record the actual test administered to Judge Newman showing the scoring on each part. Accordingly, by no later than 9:00 a.m. on Wednesday, July 12, counsel shall submit a copy of the MOCA test administered to Judge Newman, showing the markings on the test and scores for each subpart and the signature of the person who administered the test. Counsel should also be prepared to address at argument the

scoring of Judge Newman's MOCA test as described on page 2 of Dr. Rothstein's report.

Second, Dr. Rothstein's report refers to an analysis of Judge Newman's recent opinions by Professor Andrew Michaels at the University of Houston Law School, which Dr. Rothstein apparently considered as part of his evaluation of Judge Newman. His report also refers to articles in the Washington Post. It is important for the Committee to understand the full body of materials that was submitted to Dr. Rothstein to inform his assessment of Judge Newman. Accordingly, by no later than 9:00 a.m. on Wednesday, July 12, counsel shall submit a complete list of all materials provided to, or consulted by, Dr. Rothstein in his evaluation of Judge Newman and a copy of all such materials. To the extent Judge Newman objects to providing copies of any such materials (such as, for example, medical records, if any, that were provided to Dr. Rothstein), counsel should describe the type of materials that were provided (*e.g.*, medical records from a treating cardiologist) and note that Judge Newman objects to providing a copy of the records themselves. To the extent that Judge Newman objects to even describing the type of materials provided to Dr. Rothstein, counsel must make clear in any submission that materials were provided to Dr. Rothstein and that Judge Newman refuses to describe them.

Accordingly,

IT IS ORDERED THAT:

By 9:00 a.m. on Wednesday, July 12, counsel shall submit to the Committee:

(1) an unredacted copy of the report from Dr. Rothstein referred to on page 2 of the July 5 Letter Brief;

(2) a copy of the actual MOCA test administered to Judge Newman, showing all notations of scores on each subpart and the signature of the person who administered the test; and

(3) a list and a copy of all written materials provided to, or consulted by, Dr. Rothstein to inform his evaluation of Judge Newman.

SO ORDERED: July 7, 2023.

Exhibit 1

MONTREAL COGNITIVE ASSESSMENT (MOCA®)

Version 8.1 English

Name:
Education:
Sex:

Date of birth:
DATE:

VISUOSPATIAL / EXECUTIVE												
	 Copy cube	Draw CLOCK (Ten past eleven) (3 points)					POINTS					
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
<div style="display: flex; justify-content: space-between;"> Contour Numbers Hands </div>									___/5			
NAMING												
 <input type="checkbox"/>			 <input type="checkbox"/>			 <input type="checkbox"/>				___/3		
MEMORY												
Read list of words, subject must repeat them. Do 2 trials, even if 1st trial is successful. Do a recall after 5 minutes.		FACE	VELVET	CHURCH	DAISY	RED	NO POINTS					
1 ST TRIAL												
2 ND TRIAL												
ATTENTION												
Read list of digits (1 digit/ sec.).		Subject has to repeat them in the forward order.				<input type="checkbox"/> 2 1 8 5 4				___/2		
		Subject has to repeat them in the backward order.				<input type="checkbox"/> 7 4 2				___/2		
Read list of letters. The subject must tap with his hand at each letter A. No points if ≥ 2 errors		<input type="checkbox"/> F B A C M N A A J K L B A F A K D E A A A J A M O F A A B								___/1		
Serial 7 subtraction starting at 100.		<input type="checkbox"/> 93		<input type="checkbox"/> 86		<input type="checkbox"/> 79		<input type="checkbox"/> 72		<input type="checkbox"/> 65		___/3
		4 or 5 correct subtractions: 3 pts, 2 or 3 correct: 2 pts, 1 correct: 1 pt, 0 correct: 0										
LANGUAGE												
Repeat: I only know that John is the one to help today.		<input type="checkbox"/>								___/2		
The cat always hid under the couch when dogs were in the room.		<input type="checkbox"/>								___/2		
Fluency: Name maximum number of words in one minute that begin with the letter F.		<input type="checkbox"/> _____ (N ≥ 11 words)								___/1		
ABSTRACTION												
Similarity between e.g. banana - orange = fruit		<input type="checkbox"/> train - bicycle		<input type="checkbox"/> watch - ruler						___/2		
DELAYED RECALL												
(MIS)	Has to recall words WITH NO CUE	FACE	VELVET	CHURCH	DAISY	RED	Points for UNCUED recall only			___/5		
X3		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				___/5		
X2	Category cue									___/5		
X1	Multiple choice cue									___/5		
Memory Index Score (MIS)		MIS = ___/15										
ORIENTATION												
<input type="checkbox"/> Date		<input type="checkbox"/> Month		<input type="checkbox"/> Year		<input type="checkbox"/> Day		<input type="checkbox"/> Place		<input type="checkbox"/> City		___/6
© Z. Nasreddine MD		www.mocatest.org				MIS: /15						
Administered by: _____						(Normal ≥ 26/30)						
Training and Certification are required to ensure accuracy						Add 1 point if ≤ 12 yr edu		TOTAL		___/30		