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 September 25, 2024, Judge Newman filed a Motion for Reconsideration of the Judicial Council's Order of September 6, 2024 (Motion). Judge Newman attached a report dated September 17, 2024 prepared by Dr. Aaron G. Filler (Filler Report) which, according to Judge Newman, "*conclusively* establishes that Judge Newman does not suffer from any mental disability that impairs her ability to fulfill the duties of her office." Mot. at 3 (italics in original). On September 30, 2024, the Judicial Council referred the motion to this Committee for its consideration.

Judge Newman argues in her Motion that "Dr. Filler's report obviates the need for further testing and permits the committee and the council to reach an informed decision regarding Judge Newman's abilities." Mot. at 9. In his report, Dr. Filler concludes that "to a reasonable degree of medical certainty, based on the combined test results there is no evidence that Judge Newman suffers from any cognitive impairment, and she is fully able to discharge the duties of her office." Filler Rep. at 5. Dr. Filler states that, in

reaching his conclusion, he reviewed the results of a perfusion CT scan, Judge Newman's medical history dating back to 2021, select work product of Judge Newman's, and the evidence compiled by the Special Committee. Filler Rep. at 4–5, 25. Dr. Filler also states that he conducted a neurological evaluation and an interview with Judge Newman. *Id.* at 4. Dr. Filler did not conduct the neuropsychological testing that the Committee had ordered.

Dr. Filler opines that the perfusion CT scan performed at his request in August 2024 at George Washington University Hospital (GW Hospital) is "central" to his report. *Id.* at 8. He includes several images from the scan, along with a partial print-out of a document from GW Hospital providing a neuroradiologist's report on the scan, the print-out indicating that it shows only page one of a two-page document. *Id.* at 10–12.

Dr. Filler states that he completed a review of medical records for Judge Newman "spanning the last two years" and consisting of "more than 2,000 pages." *Id.* at 18. The records included records from GW Hospital and Virginia Hospital Center; One Medical Group; Jenna Byorek AGNP-BC and John Geigert, MD; and LabCorp reports. *Id.* In total, Dr. Filler lists [redacted] separate hospitalizations or medical visits over the three-and-a-half year period from February 26, 2021 to August 22, 2024.

Dr. Filler also notes, in a "Problem List as of August 22, 2024," twenty medical problems that affect Judge Newman, including [redacted]. *Id.* at 23. He also lists thirteen "Medications as of 8/22/2024." *Id.* at 22–23.

Dr. Filler concludes that, in his opinion, "none of Judge Newman's medical conditions revealed by her records are ultimately contributory or relevant to her current mental

state, and none suggest cognitive decline or neurological deficits." *Id.* at 18.

As Judge Newman's counsel are well aware, no decision-making body, including this Committee, can simply accept a proffered expert opinion without taking steps to evaluate the reliability of that opinion. It is well established, for example, that courts play a vital role in assessing whether an expert's proffered opinion is reliable and otherwise sufficiently well-grounded even to be admitted into evidence, much less to be ultimately credited. *See* FED. R. CIV. P. 26(a)(2)(B); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) ("[U]nder the [Federal] Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); *Libas, Ltd. v. United States*, 193 F.3d 1361, 1366 (Fed. Cir. 1999) ("[I]f a trial court relies upon expert testimony, it should determine that the expert testimony is reliable."). "[I]n deciding whether a step in an expert's analysis is unreliable . . . the district court should undertake a *rigorous examination* of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 702.05[2][a] (Mark S. Brodin, ed., Matthew Bender 2d ed. 2024) (WEINSTEIN) (emphasis in original) (quoting *Coning v. Bayer Pharma AG* (*In re Mirena Ius Levonorgestrel-Related Prods. Liab. Litig.*), 982 F.3d 113, 123 (2d Cir. 2020)).

To facilitate evaluation of expert opinions, Federal Rule of Civil Procedure 26(a)(2)(B) requires that an expert report must contain, among other items, "the facts or data considered by the witness in forming [the proffered opinions]." Fed. R. Civ. P. 26(a)(2)(B)(ii). As the Advisory Committee Notes to Rule 26 explain: "[T]he intention is that 'facts or data' be interpreted broadly to require disclosure

of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert." FED. R. CIV. P. 26(a)(2)(B) Advisory Committee Notes (2010). "[T]he prevailing interpretation of the rule came to be that counsel should expect that any written or tangible data provided to testifying experts will have to be disclosed." 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2031.1 (3d ed. 2010).

Courts have repeatedly held that the facts and underlying data relied upon by an expert must be produced to enable a decisionmaker to assess the reliability, and adequacy of grounding in facts, of the expert testimony. As the Supreme Court has made clear:

> [I]n federal court . . . an expert witness must produce all data she has considered in reaching her conclusions.

Biestek v. Berryhill, 587 U.S. 97, 104 (2019); *see also In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) ("[Rule 26] proceeds on the assumption that fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony."); *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 717 (6th Cir. 2006) ("Rule 26 creates a bright-line rule mandating disclosure of all documents . . . given to testifying experts."); *Republic of Ecuador v. Mackay*, 742 F.3d 860, 869 (9th Cir. 2014) ("[T]he disclosure obligation extends to any facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert.").

For good reason, courts routinely exclude the opinions of experts who refuse to disclose the information they considered in reaching their opinions. Fed. R. Civ. P. 37(c)(1);

see, e.g., *MLC Intell. Prop., LLC v. Micron Tech., Inc.*, 10 F.4th 1358, 1369, 1373 (Fed. Cir. 2021) (expert could not opine on damages where party "had failed to disclose in discovery all of the evidence that [the expert] relied on in support of that opinion"); *Vadnais v. United States*, No. 1:21-CV-0012-KHP, 2023 WL 6504861, at *4–5 (S.D.N.Y. Oct. 5, 2023) (precluding plaintiff from relying on its medical expert, in part, for "failing to produce underlying medical records pertaining to Plaintiff's alleged injuries within the fact discovery deadlines"); *Lopez v. Mulligan*, No. CV 12-4976 (SRC), 2018 WL 297582, at *8 (D.N.J. Jan. 3, 2018) ("[T]his Court grants Defendants' motion to bar the introduction of evidence or testimony regarding any and all medical records and reports that were not previously disclosed during discovery.").

The same principle has been applied in proceedings under the Rules governing Judicial Conduct and Disability Proceedings. In the *Adams* case, a Special Committee of the Sixth Circuit refused to accept expert testimony from a psychiatrist proffered by Judge Adams because the psychiatrist had refused to provide "the records underlying the psychiatrist's evaluation." *In re Complaint of Judicial Misconduct*, C.C.D. No. 17-01 at 13 (U.S. Jud. Conf. Aug. 14, 2017).

Judge Newman asks that we credit the opinion of Dr. Filler and has offered Dr. Filler for a deposition. Mot. at 17 n.9. To evaluate Dr. Filler's conclusions under the recognized standards—and even to formulate questions for a potential deposition, should one become necessary—the Committee must be able to review the materials that Dr. Filler reviewed in forming his opinions.

The underlying facts on which Dr. Filler based his opinion are highly relevant to assessing Dr. Filler's assertion that a perfusion CT scan can reliably rule out the

possibility that Judge Newman is suffering from any cognitive impairment.

The Committee ordered a full battery of neuropsychological testing, which provides comprehensive testing of cognitive ability. As the Committee explained, "[t]he 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." May 16, 2023 Order at 22. Judge Newman has now presented expert testimony asserting that there is no need for such testing because, after a review of her medical records and a CT perfusion scan, it can be established that she does not suffer from a cognitive impairment and that nothing in her records or the scan suggest any medical condition that could contribute to a cognitive impairment. To assess the weight to be accorded this opinion, the Committee must be provided the facts upon which it is based.

Therefore, to enable the Committee to evaluate Dr. Filler's Report—and consistent with the standards of Federal Rule of Civil Procedure 26(a)(2)—the Committee orders Judge Newman to submit to the Committee all materials that Dr. Filler considered in reaching his opinions. Based on the description in the Filler Report, that includes at least three categories of materials.

First, it includes Judge Newman's medical records reviewed by Dr. Filler. Dr. Filler indicates that "after review, all records were returned to Judge Newman." Filler Rep. at 18 n.13. The required records include *all* medical records reviewed by Dr. Filler, including, but not limited to, those from GW Hospital, Virginia Hospital Center, One Medical Group, and LabCorp.

We understand Dr. Filler's report to state that he reviewed *all* of Judge Newman's medical records dating back

to February 26, 2021.[1] To ensure that this understanding is correct, and to clarify whether there are other medical records from that time period that were not provided to Dr. Filler,[2] we order that Judge Newman either (i) certify that Dr. Filler was provided *all* of Judge Newman's records from all healthcare providers during the time period from February 26, 2021 through August 2024, or (ii) explain what records were not provided to Dr. Filler and why.

The Committee, of course, will keep Judge Newman's medical records confidential and restrict access solely to those persons who need access for the Committee to perform its evaluation.

Second, the materials to be produced include medical records related to the perfusion CT scan performed in August 2024 at Dr. Filler's direction. That includes the full results of the scan and the full report provided by the neuroradiologist at GW Hospital, which appears to be only partially reproduced at page 12 of the Filler Report.

Third, the materials to be produced include all records of Dr. Filler's own neurological examination and interview with Judge Newman. Dr. Filler relies upon his own

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[1] Filler Rep. at 18 ("Prior to preparing this report, I reviewed Judge Newman's medical records dating back to early 2021"); *id.* ("I have also been given an opportunity to review Judge Newman's medical records spanning the last two years in detail and have completed that review."); *id.* at 4 ("I have also reviewed Judge Newman's medical history dating back to 2021").

[2] Although Dr. Filler reports a number of diagnosed health problems as of November 2022 affecting multiple organs (kidney, lung and heart), there are almost no medical visits disclosed in his report between November 2022 and October 2023.

interview with Judge Newman, which apparently included a discussion of "three patent and technology scenarios" that he created. Filler Rep. at 37. We order the production of any documents used to present these scenarios to Judge Newman during the interview and any audio or video recordings of the interview, notes made during or after the interview to memorialize what occurred and/or Dr. Filler's assessment of the interview, and other materials used in conducting the interview.

IT IS ORDERED THAT:

(1) By December 2, 2024, Judge Newman shall produce to the Committee:

   a. All of Judge Newman's medical records reviewed by Dr. Filler;

   b. All medical records related to the CT perfusion scan that were provided to Dr. Filler;

   c. All records of Dr. Filler's neurological examination and interview with Judge Newman, including, but not limited to, any audio or video recordings of the interview, notes made during or after the interview to memorialize what occurred and/or Dr. Filler's assessment, and other materials used in conducting the interview.

(2) By December 2, 2024, Judge Newman shall either (i) certify that Dr. Filler was provided *all* of Judge Newman's records from all healthcare providers for the time period from February 26, 2021 through August 2024, or (ii) explain what records were not provided to Dr. Filler and why.

(3) Failure to comply with this Order may result in the exclusion of Dr. Filler's report from consideration.

SO ORDERED: October 21, 2024.