

No. 22-819

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In the  
Supreme Court of the United States

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FRANZ A. WAKEFIELD D/B/A  
COOLTVNETWORK.COM,

*Petitioner,*

v.

BLACKBOARD, INC. ET AL.,

*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Federal Circuit

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PETITION FOR REHEARING

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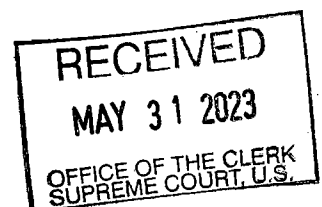
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## PETITION FOR REHEARING

Petitioner, Franz A. Wakefield, D|B|A, COOLTvNETWORK.COM, was denied Writ of Certiorari without opinion on May 1, 2023 (Docket No: 22-819), on his patent infringement matter. Petitioner requests reconsideration based on a *rare* intervening circumstance of substantial controlling effect and based on the surfacing of new evidence not previously presented that became public<sup>1</sup> after Petitioner filed the Writ of Certiorari on February 25, 2023.

Specifically, on or after March 24, 2023, Chief Judge Kimberly A. Moore, of The Federal Circuit, docketed an Order and began the formal investigative process under Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability proceedings against Judge Pauline Newman under the Judicial Conduct and Disability Act. The Order states in part:

I do so having *found probable cause* to believe that Judge Newman ‘has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts’ and/or ‘is unable to discharge all the duties of office by reason of mental or physical disability.’ 28 U.S.C. § 351(a).  
(*Emphasis Added*)

The Order further states:

On [REDACTED], 2022, Judge Newman fainted following an argument and was unable to

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<sup>1</sup> See. <https://news.bloomberglaw.com/ip-law/federal-circuit-confirms-complaint-against-95-year-old-judge> See. Reh.App.11a

walk without assistance. Following that event, Judge Newman agreed to further reduction in sittings. Despite these reductions in workload, judges and staff have brought to my attention concerns about Judge Newman's inability to perform the work of an active judge based on their personal experience. Judges and staff have reported extensive delays in the processing and resolution of cases. Concerns have also been raised that Judge Newman may suffer from impairment of cognitive abilities (i.e., attention, focus, confusion and memory) that render Judge Newman unable to function effectively in discharging case related and administrative duties. It has been stated that Judge Newman routinely makes statements in open court and during deliberative proceedings that demonstrate a clear lack of awareness over the issues in the cases.

*See, Reh.App.2a, 13a (Emphasis Added)*

On April 13, 2023, Chief Judge Kimberly A. Moore, issued another Order, which states in part:

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 to the judicial counsel.

On April 7, 2023, the Committee issued an order which concluded that based upon its investigation and direct observations of

Judge Newman's behavior, there is a reasonable basis to conclude she might suffer a disability that interferes with her ability to perform the responsibilities of her office.

*See, Reh.App.8a (Emphasis Added)*

Petitioner's appeal in the Federal Circuit, was heard on July 7, 2022, before Judges Pauline Newman, Richard Linn, and Raymond T. Chen. *See, Petitioner's Writ of Certiorari, App.1a.* Petitioner believes that because of the inclusion of Judge Pauline Newman, who was struggling with these issues at the time, "who may suffer from impairment of cognitive abilities (*i.e.*, attention, focus, confusion and memory)", and who was unanimously removed from being assigned new cases by the other judges in the circuit; that his appeal—hearing, deliberation process, and ruling, was succumb to *an unfair forum* that was a result of 1) bias, and 2) lack of quorum of capable judges which deprived him of his Due Process Rights under the 14th Amendment of The United States Constitution and equal protection under the law by invalidating United States Patent No: 7,162,696, which caused him serious injury. Petitioner believes that this new information raises serious concerns about the *fairness* and *impartiality* of the original hearing, and that it warrants a rehearing of the case. The Constitution guarantees to all litigants a fair and impartial hearing, and Petitioner believes that the presence of a judge with a mental disability on the appeal panel consisting of colleague judges who believe that she is disabled undermines this fundamental principle of fairness and impartiality.

The Supreme Court has long recognized the importance of having judges who are both physically and

mentally capable of performing their duties. On the date of June 20, 2011, this Court held in *Turner v. Rogers*, 564 U.S. 431, that a judge who presides over a civil contempt proceeding must have “the requisite procedural and substantive knowledge” to ensure the fairness of the proceeding. Petitioner believes that the same standard should apply in this case, and that the presence of a judge with a mental disability raises serious questions about the fairness of the original hearing.

Moreover, Petitioner believes that the presence of a judge with a mental disability on the appeal panel may have affected the outcome of the case by biased deliberations. A judge with a mental disability may be more prone to making errors or exhibiting bias, and/or their ability to deliberate and convey a point or persuade in Petitioner’s favor, may be diminished by their cognitive disability; which could have affected the decision reached by the appeal panel. Given the importance of the issues at stake in this case, the Petitioner believes that it is essential that a full and fair hearing be held before a panel of judges who are physically and mentally capable of performing their duties. *See, Eastern Minerals & Chemicals Co. v. Mahan*, 402 U.S. 558 (1971), (Where this Court held that a patent owner is entitled to due process before a patent can be invalidated in a court proceeding. Holding that a patent owner must be given notice and an opportunity to be heard by a fair and impartial tribunal).

In the context of patent infringement, the Constitution guarantees to all litigants a fair and impartial hearing. The presence of a judge with a mental disability on an appeal panel raises serious con-



cerns about the fairness and impartiality of the appeal. Due process requires that the appeal be heard by a panel of judges who are physically and mentally capable of performing their duties.

The Federal Circuit requires a *quorum* of at least two judges on a panel of three judges, to hear an appeal. Therefore, if one of the three judges on an appeal panel has shown probable cause to having a mental disability, that affects their ability to perform their duties, it could potentially violate due process, because the panel would not meet the requirements for a *quorum of capable judges*. See, 28 U.S.C. § 46(b)-(d).

It is *rare* for a judicial committee to be formed to remove a Federal Circuit judge for a disability. The process for removing a federal judge is outlined in the Constitution, which requires a formal impeachment by the House of Representatives and a trial in the Senate.

In any case, if a judge on an appeal panel is unable to perform their duties due to a mental disability, it is important to ensure that the appeal is heard by a panel of judges who can perform their duties and can uphold the principles of due process. This may require the appointment of a replacement judge or the formation of a new appeal panel. See, *Quorum*. Federal Circuit Rule 47.11



## REASONS FOR GRANTING THE PETITION

### I. THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT IS A GUARANTEE.

Petitioner, Franz A. Wakefield, is a United States Citizen *doing business as* COOLTvNETWORK.COM. The Fourteenth Amendment, Section 1 of The United States Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In this matter outlined in Petitioner's Writ of Certiorari, the Federal Circuit has deprived Petitioner of his patent rights (*i.e.*, property) by upholding on appeal a decision made in the district court to invalidate United States Patent No: 7,162,696, which caused Petitioner serious injury. "For over 100 years patents have been considered personal property entitled to full protection under the U. S. Constitution." *See, Are Patents Property That Is Protected by the U.S. Constitution*, Published in LANDSLIDE, Vol. 14, No. 2, December/January 2022, by the American Bar Association. In *Oil States Servs., LLC v. Greene's Energy Grp., LLC.*, 138 S.Ct. 1365 (2018), the Supreme Court held that a patent is a particular type of property "a matter involving of public rights—specifically, the grant of a public franchise," subject to the protections of the 14th Amendment of the Constitu-

tion. See, *Golden v. United States*, 955 F.3d 981, 990 (Fed. Cir. 2020). “The Fourteenth Amendment’s procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.” (*Emphasis Added*) See, *Board of Regents v. Roth*, 408 U.S. 564 (1972).

The first step to prove a procedural due process violation is to show that the government has deprived Petitioner of either life, liberty, or property and it caused a serious injury. The balancing process mandates identification of the nature and weight of the private interest affected by the official action challenged. In this matter, the private interest affected is the granted '696 Patent, which is presumed valid under 35 U.S.C. § 282(a), in particular, Petitioner’s interest is in continued possession and use of his patent rights pending the outcome of a fair and impartial appeal which was due to him. This interest is a substantial one, because the government will not be able to make the Petitioner whole for any patent infringement damages lost by the invalidation of said patent by an erroneous invalidation of the patent through lack of a *fair and impartial* appeal—(hearing, deliberations, and ruling); due to a lack of quorum of capable judges by the inclusion of a mentally disabled judge on the appeal three judge panel, which became public after the appeal decision to uphold the district court’s order to invalidate the '696 Patent, and the filing of Petitioner’s Writ of Certiorari. Because the primary function of the legal process is to minimize the risk of erroneous decisions, the balancing process requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a

consequence of the procedures used. The balancing test requires the identification of the governmental function involved; also to weigh in the balance the government interests served by the procedures used, as well as the government burdens, if any, that would result from the substitute procedures sought, in this matter, an appeal—(hearing, deliberations, and ruling) by three capable judges. The Petitioner is constitutionally entitled to a fair and impartial appeal with three capable judges before his patent is invalidated and his patent rights taken away. This right outweighs the government's interests in not affording Petitioner a fair forum. *See, Mackey v. Montrym*, 443 U.S. 1 (1979).

The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by procedures provided for its deprivation any more than can life or liberty. The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [a public franchise . . . ] it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' (*Emphasis Added*) *See, Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

## II. THE RIGHT TO A PROPERLY CONSTITUTED COURT OF APPEALS IS STATUTORY.

28 U.S.C. § 46—Assignment of judges; Panels; Hearings; and Quorum states:

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by *separate panels, each consisting of three judges*, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, *not less than three, who constitute a panel. (Emphasis Added)*

In *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1053-55 (5th Cir. 2010) (en banc), “a Fifth Circuit Judge’s recusal—a procedural tool designed to ensure fairness and impartiality—led to the violation of appellants’ absolute, statutory right to appeal. [T]he court in *Murphy Oil* effectively eliminated the statutory right to appeal by voting to hear an appeal en banc and then later deciding it could not consider the appeal

due to quorum issues as a result of one judge's recusal." See, *Reconsidering Recusals: The Need For Requirements For When Not To Recuse*, By Mason E. Lowe, William & Mary Law School Full-time Faculty.

This Court in *Evitts v. Lucey*, 469 U.S. 387, 393 (1985), explained that "[t]he right of appeal is statutory, and the grant is subject to due process requirements". (*Emphasis Added*) Even so, the en banc court in *Murphy Oil* held that, because there was not a quorum once Judge Elrod recused herself, the court could not conduct judicial business on this case. "Absent a quorum, no court is authorized to transact judicial business." (*Emphasis Added*). See, *Comer v. Murphy Oil USA*, 607 F. 3d 1049, 1053-55 (5th Cir. 2010) (en banc).

Petitioner's appeal in the Federal Circuit, was heard on July 7, 2022, before Judges Pauline Newman, Richard Linn, and Raymond T. Chen. See, Petitioner's Writ of Certiorari, App.1a. Petitioner believes that because of the inclusion of Judge Pauline Newman on his appeal panel, who struggled with these disability issues outlined by Chief Judge, Kimberly A. Moore, as "suffer[ing] from impairment of cognitive abilities (*i.e.*, attention, focus, confusion and memory)", who was unanimously removed from being assigned new cases by the other judges in the circuit, and who was struggling with these issues during the pendency of Petitioner's appeal; that his appeal—hearing, deliberation process, and ruling, was succumb to *an unfair forum* that was a result of 1.) bias, and 2.) lack of quorum of capable judges; which deprived him of his Due Process Rights under the 14th Amendment of The United States Constitution and equal protection

under the law, by invalidating United States Patent No: 7,162,696, which caused him serious injury.

This Court has ruled in *Nguyen v. United States*, 539 U.S. 69, (2013), that even though there is “the presence of a quorum of two otherwise-qualified judges on the panel” it is insufficient to support the decision below for two reasons. This Court ruled in *Nguyen v. United States*, that:

The federal quorum statute, 28 U.S.C. § 46(d), has been on the books (in relevant part essentially unchanged) for over a century, yet this Court has never doubted its power to vacate a judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal. See, e.g., *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685. Moreover, the statute authorizing courts of appeals to sit in panels, § 46(b), requires the inclusion of *at least three* [capable] judges in the first instance. Although the two [capable] judges who took part below would have constituted a quorum had the original panel been properly created, it is at least *highly doubtful whether they had any authority to serve by themselves as a panel. (Emphasis Added)*

In a recent Order dated May 16, 2023, the Special Committee states the following:

This investigation has included more than twenty interviews with court staff and discussions with Dr. [REDACTED]. These form the basis for the Committee’s conclusion that there is a reasonable basis for the required

neuro-psychological testing and neurological evaluation recommended by Dr. [REDACTED] in order to determine whether Judge Newman has a disability that renders her unable to perform the functions and duties of her office.

Staff reported that Judge Newman often forgets how to do simple tasks that she previously had no difficulty performing, such as logging into our court system or network, remembering where she put court material, and bringing her briefs and case materials to court on court days.

One staff member relayed a recent episode in which Judge Newman indicated that she was not required to comply with a court rule that required circulating votes on opinions within 5 days. This rule was unanimously adopted by the court (including a vote by Judge Newman) in March 2018. The staffer recounted that Judge Newman said that she did not have to comply with this rule because Chief Judge Markey told her she could take 30 days to vote. Chief Judge Markey has been dead for almost 17 years and has not been a member of the court for 32 years.

*See. Reh.App.19a, 20a, 22a*





**CONCLUSION**

In light of the intervening circumstance of a substantial and controlling effect presented by this Petition hereto, Petitioner respectfully request that this Honorable Court grant this Petition for Rehearing. Petitioner believes that this is necessary to uphold the integrity of the judicial system and Petitioner's Due Process rights under the 14th Amendment of the United States Constitution.

Respectfully submitted,

A handwritten signature in cursive script that reads "Franz A. Wakefield".

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MAY 24, 2023



**RULE 44.2 CERTIFICATE**

I, FRANZ A. WAKEFIELD, petitioner pro se, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the following is true and correct:

1. This petition for rehearing is presented in good faith and not for delay.

2. The grounds of this petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

  
\_\_\_\_\_  
Franz A. Wakefield

Executed on May 24, 2023

**REHEARING  
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Reh.App.1a

**ORDER OF FEDERAL CIRCUIT CHIEF  
JUDGE, KIMBERLY A. MOORE,  
REDACTED PUBLIC ORDER  
(MARCH 24, 2023)**

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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: Kimberly A. MOORE, Chief Judge.

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**ORDER**

Pursuant to Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, I identify a judicial complaint against Judge Pauline Newman under the Judicial Conduct and Disability Act. I do so having found probable cause to believe that Judge Newman “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts” and/or “is unable to discharge all the duties of office by reason of mental or physical disability.” 28 U.S.C. § 351(a).

In the summer of 2021, Judge Newman, at the age of 94, was [REDACTED] and having to [REDACTED]. Because those health issues rendered Judge Newman unable to discharge the duties of an active circuit judge, Judge Newman agreed to being taken off motion panels, which are a routine re-

## Reh.App.2a

sponsibility of all active judges and her sittings were reduced compared to her colleagues. While Judge Newman was able to recover to the point of being able to again participate at oral argument, on [REDACTED], 2022, Judge Newman fainted following an argument and was unable to walk without assistance. Following that event, Judge Newman agreed to further reduction in sittings.

Despite these reductions in workload, judges and staff have brought to my attention concerns about Judge Newman's inability to perform the work of an active judge based on their personal experience. Judges and staff have reported extensive delays in the processing and resolution of cases. Concerns have also been raised that Judge Newman may suffer from impairment of cognitive abilities (*i.e.*, attention, focus, confusion and memory) that render Judge Newman unable to function effectively in discharging case-related and administrative duties. It has been stated that Judge Newman routinely makes statements in open court and during deliberative proceedings that demonstrate a clear lack of awareness over the issues in the cases. These concerns were communicated directly to Judge Newman by several judges on March 7, 2023. On March 9, 2023, another judge met with Judge Newman to articulate concerns and urged her to consider senior status. [That judge] reported that she became angry and ended the meeting. That judge followed up with an email to Judge Newman and myself detailing [REDACTED] concerns on March 14, 2023. Judge Newman did not respond. Several other judges have reported to me that they sought to meet with Judge Newman to express their concerns, but she has not responded to their calls or emails.

### Reh.App.3a

After concluding that the information provided me constituted reasonable grounds for inquiry into whether Judge Newman has engaged in misconduct or has a disability, I conducted a limited inquiry and was informed of the following additional information:

- From June 2022 to the present, Judge Newman participated in only 60 cases whereas the average active judge participated in 116. Judge Newman's case participation during this period was approximately 3.5 standard deviations below the mean.
- From October 2020 to September 2021, the average total number of majority opinions authored by active judges (who were present during that period) was 39.5. Judge Newman authored 9 opinions. The next closest judge authored 34 opinions. During this period, the average time between assignment of a case to an authoring judge and issuance of the opinion was 70 days. Judge Newman's average time after assignment to issuance of an opinion was 249 days.
- From October 2021 to the present, Judge Newman authored only 8 majority opinions whereas the average active judge on the court during this same time authored 51. The next closest judge authored 42. During this period the average time between assignment of a case to an authoring judge and issuance of the opinion was 60 days. Judge Newman's average time after assignment to issuance of an opinion was 199 days.

## Reh.App.4a

- Our court rules require judges to vote on other judges' opinions within 5 business days and suggest "voting be given priority in each chambers over other matters." Federal Circuit Clerical Procedures #3, ¶ 7. It has been reported by judges and court staff that Judge Newman frequently takes 30 days or more to vote on colleagues' opinions.
- Despite the reduction in Judge Newman's caseload since at least [REDACTED] 2022, her time to issuance has not improved. For example, as of September 30, 2022, Judge Newman had only three cases pending, all of which were older than 90 days. One of those cases [REDACTED] was not circulated until [REDACTED] 2023, 452 days after submission. It was reported that the opinion had to be substantially rewritten by her panel members prior to its issuance. The other two [REDACTED] ultimately were reassigned to other judges after extremely lengthy delays.

There have also been a number of cases which had to be reassigned after lengthy delays:

- Judge Newman assigned herself [REDACTED], a pro se submitted case, on [REDACTED], 2020. The case was reassigned to on [REDACTED], 2022, after it had been pending for 624 days. After reassignment to [REDACTED], the case was resolved [within one month].
- Judge Newman assigned herself [REDACTED], an argued case, on [REDACTED], 2020. The case was reassigned to [REDACTED] on [REDACTED], 2021, after it had been pending for 380 days.

Reh.App.5a

- Judge Newman assigned herself [REDACTED], a pro se submitted case, on [REDACTED], 2022. The case was reassigned to [REDACTED] on [REDACTED], 2023, after it had been pending 374 days. After reassignment to [REDACTED], the case was resolved in just three days.
- Judge Newman assigned herself [REDACTED], a pro se submitted case, on [REDACTED], 2020. The case was reassigned to [REDACTED] on [REDACTED], 2021, after it had been pending for 302 days. After reassignment to [REDACTED], the case was resolved in a couple of weeks.
- Judge Newman assigned herself [REDACTED], an argued case, on [REDACTED], 2022. The case was reassigned to [REDACTED] on [REDACTED], 2022, after it had been pending 269 days. After reassignment, the case was resolved [within three months].
- Judge Newman assigned herself [REDACTED], a pro se submitted case, on [REDACTED], 2022. The case was reassigned to [REDACTED] on [REDACTED], 2023, after it had been pending 126 days. After reassignment, the case was resolved [within two months].

I have also been made aware of allegations that Judge Newman has exhibited inappropriate behavior in managing staff by permitting one of her law clerks to exhibit unprofessional and inappropriate behavior which has been reported to Judge Newman. On Monday, March 6, 2023, one of her staff reported that Judge Newman also disclosed sensitive medical information about [REDACTED] to her staff.



Reh.App.6a

Based on the above-identified information, I conclude that there is probable cause to believe that Judge Newman's health has left her without the capacity to perform the work of an active judge and that her habitual delays are prejudicial to the efficient administration of justice. *See* Judicial-Conduct Rule 4(b)(2) and Commentary (indicating that habitual delay in a significant number of cases may constitute cognizable misconduct).

I have attempted to see whether a satisfactory informal resolution could be reached to resolve these concerns. I met with Judge Newman for approximately 45 minutes where I outlined the concerns about her inability to perform the work of an active judge and the concerns which had been expressed about her mental fitness. She refused to consider senior status saying that she was the only person who cared about the patent system and innovation policy. She acknowledged only that she was slow in resolving cases. Despite half of the active judges of the court having expressed their concerns to Judge Newman or trying to express their concerns, Judge Newman appears unwilling to participate in any informal resolution. I provided Judge Newman with a copy of this order on March 17, 2023 and informed her that it would not be docketed until March 24, 2023 so that she would have an opportunity to review it. I again requested that we attempt to resolve these concerns by informal resolution. She refused to meet with me and has not responded to my repeated attempts to discuss informal resolution.

In summary, the accumulation of these concerns, having been expressed to me by judges and court staff, give me probable cause to identify a complaint

Reh.App.7a

against Judge Newman regarding disability and misconduct to begin the review process provided in Rule 11 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

IT IS SO ORDERED.

/s/ Kimberly A. Moore

Chief Judge

Date: 3/24/2023

**ORDER FROM FEDERAL CIRCUIT  
CHIEF JUDGE, KIMBERLY A. MOORE,  
REDACTED PUBLIC ORDER  
(APRIL 13, 2023)**

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UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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

---

IN RE COMPLAINT NO. 23-90015

---

Before: Kimberly A. MOORE, Chief Judge.

---

**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 to the judicial council.

On April 7, 2023, the Committee issued an order which concluded that based upon its investigation and direct observations of Judge Newman's behavior, there is a reasonable basis to conclude she might suffer a disability that interferes with her ability to perform the responsibilities of her office. The Committee retained an expert who recommended that Judge Newman undergo medical testing and evaluation. The Committee found that such an examination is warranted to facilitate the Committee's investiga-

Reh.App.9a

tion. An opportunity to consult with the expert was provided to Judge Newman. The Committee requested that Judge Newman inform the Committee by April 11, 2023 whether she would comply and make herself available for the needed examination to secure expedited medical appointments. The Order further informed Judge Newman that “[f]ailure to respond to this order by 3:00 pm on April 11, 2023, will be deemed failure to comply.” And further that failure to comply without good cause shown may result in the Committee seeking to expand the scope of the investigation to include an inquiry into whether the subject judge’s non-cooperation constitutes misconduct under Rule 4(a)(5) of the Rules for Judicial Conduct and Judicial Disability Proceedings. Judge Newman failed to respond to the Committee’s order.

Judge Newman has also refused to accept service of orders issued under Rule 15(a)(1)(b), stating that she “was not interested in receiving any documents” regarding this matter. She likewise instructed the mailroom at her residence to refuse to accept the orders. The Committee has referred these refusals to be included in the investigation regarding Judge Newman’s failure to cooperate.

Pursuant to Rule 13(a) of the Rules for Judicial Conduct and Judicial Disability Proceedings, the Committee has requested that the scope of the investigation be expanded to investigate whether Judge Newman has failed to cooperate in violation of the Rules. *See* Rule 4(a)(5) of the Rules for Judicial Conduct and Judicial Disability Proceedings (“Cognizable misconduct includes refusing, without good cause shown, to cooperate in the investigation

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of a complaint or enforcement of a decision rendered under these Rules”).

Based on this information, I conclude there is sufficient cause to believe that Judge Newman has failed to cooperate constituting additional misconduct. I accordingly expand the scope of the investigation to include an investigation into this newly identified matter. Pursuant to Rule 15(a)(1)(B), a copy of this email will be mailed to Judge Newman.

IT IS SO ORDERED.

/s/ Kimberly A. Moore  
Chief Judge

Date: 4/13/2023

**BLOOMBERG LAW ARTICLE:  
MENTAL FITNESS CONCERNS DRIVE  
BID TO OUST 95-YEAR-OLD JUDGE  
(APRIL 17, 2023)**

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**Riddhi Setty**  
Reporter



**Michael Shapiro**  
Correspondent



- Judge Newman allegedly is unable to carry out duties
- Proceedings could lead to vacancy on Federal Circuit

A 95-year-old Federal Circuit judge is facing the unusual prospect of being ousted over concerns that she's no longer fit to do her job.

The US Court of Appeals for the Federal Circuit on Friday confirmed that Chief Judge Kimberly A. Moore had filed a misconduct complaint against Judge Pauline Newman, the most prolific writer of dissents in the history of the court and a champion of strong patent rights. A statement from the court said an investigation process is underway into what court documents describe as Newman's potential cognitive impairment.

The announcement from what's commonly considered the nation's top patent court is unusual because the federal judiciary has traditionally resolved issues associated with deteriorating health of judges privately and informally. It also highlights the complexities of an aging bench as senior jurists with life tenure push off retirement or senior status.

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The Friday statement said that the chief judge was “carrying out her obligations to the judiciary and the public” under the Judicial Conduct and Disability Act of 1980, “based on the determinations that there was ‘probable cause to believe that misconduct has occurred or that a disability exists.’”

Reports of the complaint, which could lead to Newman’s ouster, surfaced earlier this week, with some legal observers telling Bloomberg Law that the proceedings were “unprecedented.”

Complaints about a district or circuit judge’s alleged lack of fitness often center on claims of misconduct such as sexual harassment or ethics violations. By contrast, the complaint against Newman alleges that physical and mental health issues have left her unable to perform her duties. Newman allegedly took hundreds of days to issue opinions.

The US Court of Appeals for the Federal Circuit on Friday also released two orders from the proceedings that were previously under seal.

The first order, issued March 24, said Newman agreed to be taken off of motion panels due to a 2021 health issue. It added that Newman later agreed to further take on fewer oral arguments after she fainted following an argument and was unable to walk without assistance.

Newman was nominated to the Federal Circuit by former President Ronald Reagan and confirmed in 1984. Former President George W. Bush nominated Moore, now age 54, to the appeals court in 2006. She took the position of chief judge in 2021.

Judicial Conduct and Disability Act proceedings can result in consequences ranging from a reprimand to referral to Congress for potential impeachment proceedings.

If Newman agrees to senior status or is removed from the circuit, it would create a vacancy on the influential Federal Circuit, which has exclusive appellate jurisdiction over patent cases.

### **Health Issues**

The March 24 order, signed by Moore, said Newman had an unspecified health event in the summer of 2021 and agreed at the time take on a reduced workload.

After Newman fainted after oral argument, her workload was reduced again, according to Moore's order. "Despite these reductions in workload, judges and staff have brought to my attention concerns about Judge Newman's inability to perform the work of an active judge based on their personal experience."

Specifically, Moore wrote she heard concerns that Newman "may suffer from impairment of cognitive abilities (i.e., attention, focus, confusion and memory) that render Judge Newman unable to function effectively in discharging case-related and administrative duties."

Moore further stated in the order that she has been told Newman "routinely makes statements in open court and during deliberative proceedings that demonstrate a clear lack of awareness over the issues in the cases."



Several judges, Moore wrote, spoke to Newman including on March 7 to communicate those concerns. A single judge then spoke to her two days later to urge her to take senior status, but Newman allegedly “became angry and ended the meeting.”

“Several other judges have reported to me that they sought to meet with Judge Newman to express their concerns, but she has not responded to their calls or emails.”

### **Productivity**

Moore’s March order also included statistics comparing Newman’s productivity compared with the average judge on the Federal Circuit.

It said that from June 2022, Newman participated in almost half as many cases as the average active judge.

From October 2021, Newman authored eight majority opinions, according to Moore, compares with an average of 51; the next closest judge penned 42 majority opinions. It also took Newman longer to issue the opinions she did write, Moore wrote: On average judges on the court took 60 days to issue their opinions after getting tapped to write for the majority, but Newman averaged 199 days.

The order further described one case where Newman’s opinion wasn’t circulated to her fellow panel judges until 452 days after a case was heard or the briefs were submitted, as well as a series of cases that were initially assigned to Newman but had to be re-assigned after 126, 269, 302, 374, 380, and, in one case, 624 days.

Finally, Moore described an allegation that Newman allowed “one of her law clerks to exhibit unprofessional and inappropriate behavior” which had been reported to her.

Moore wrote that she attempted to informally hash out the issues with Newman ahead of filing a formal complaint, but Newman “refused to meet with me and has not responded to my repeated attempts to discuss informal resolution.”

### **Judicial Council Process**

According to the Judicial Council’s statement, the ongoing process for investigating and adjudicating these allegations provides opportunities for voluntary resolution as well as introduction of additional allegations. A special committee of judges within the Federal Circuit was tapped to conduct an initial investigation of the issues raised in the complaint.

The second order, issued April 13, said that a committee of three Federal Circuit judges—Sharon Prost, Richard G. Taranto, and Moore—was appointed and found there to be reasonable basis to conclude that Newman might “suffer a disability that interferes with her ability to perform the responsibilities of her office.”

According to that order, that committee also sought a recommendation from an expert who advised that Newman should “undergo medical testing and evaluation” to facilitate its investigation. Newman was contacted and given opportunity to consult the unnamed expert by April 11 but “failed to respond.”

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Newman, according to the order, refused to accept service of the orders issued related to the complaint and “likewise instructed the mailroom at her residence to refuse to accept the orders.”

Moore wrote that that committee then expanded its investigation to include Newman’s lack of cooperation, which can also qualify as misconduct under the Rules for Judicial Conduct and Judicial Disability Proceedings.

The statement attributed to the court’s Judicial Council followed news reports on the complaint and said that it decided to confirm the existence of the proceeding to maintain public confidence that “the judiciary is acting effectively and expeditiously” in addressing the complaint proceeding.

“The Chief Judge, the Special Committee, and the members of the Council, who all recognize and admire the lifelong contributions of the justly esteemed Judge Newman, are committed to fulfilling their difficult obligations in this process,” its statement said.

(Updated to clarify potential remedies under the Judicial Conduct and Disability Act. The story originally published April 14.)

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**ORDER FROM  
FEDERAL CIRCUIT APPOINTING  
SPECIAL COMMITTEE,  
REDACTED PUBLIC ORDER, EXCERPTS  
(MAY 16, 2023)**

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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.

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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 to 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.<sup>1</sup>

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<sup>1</sup> Chief Judge Moore did not file a complaint nor is she a complainant. Instead, Chief Judge Moore *identified* a complaint pursuant to Rule 5, which allows a Chief Judge to initiate the complaint when others have presented allegations establishing

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In orders dated April 7, 2023, April 17, 2023, and May 3, 2023, the Committee ordered Judge Newman to undergo . . .

[ . . . ]

. . . gather information that, according to the Committee's medical consultant, may shed light on conditions relevant to the issue of disability. Dr. [REDACTED] has informed the Committee that it would be standard practice for a treating neurologist to consider such records in evaluating impairment issues like those presented here.

To address any concerns about privacy, the Committee hereby limits its requirement concerning the records at issue so that Judge Newman need not supply such records to the Committee itself but only to the neurologist whom the Committee has selected to conduct an evaluation of Judge Newman. Accordingly, Judge Newman is ordered to provide the above-mentioned records and a list of current medications to the office of Dr. [REDACTED] within 30 days. The Committee requests that Judge Newman notify the Committee by 9:00 am May 23, 2023 whether she will comply with this direction.

Refusal to provide the requested medical records hinders the Committee's investigation into whether Judge Newman suffers from a disability. The Committee has now made multiple attempts to explain to Judge Newman the importance of providing these records. If Judge Newman continues to refuse to

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probable cause to believe a disability exists. Rule 5 permits witnesses and complainants to remain confidential during the initial stages of the proceedings.

provide these records, this investigation may be expanded to determine whether her noncooperation is an act of misconduct. The Rules expressly contemplate that the Committee may review medical records as part of its investigation, Commentary to Rule 13(a), and that “refusing, without good cause shown, to cooperate in the investigation” is an act of misconduct. Rule 4(a)(5).

## **B. Testing and Evaluation (Examinations)**

Based on its investigation to date, the Committee has determined that there is a reasonable basis for concern that Judge Newman may suffer from a disability that interferes with her ability to perform the responsibilities of her office. This investigation has included more than twenty interviews with court staff and discussions with Dr. [REDACTED]. These form the basis for the Committee’s conclusion that there is a reasonable basis for the required neuropsychological testing and neurological evaluation recommended by Dr. [REDACTED] in order to determine whether Judge Newman has a disability that renders her unable to perform the functions and duties of her office.

### **1. Court Staff Concerns about Judge Newman’s Fitness**

Court staff from the Clerk’s Office, from the Information Technology (IT) and Human Resources (HR) offices, and from Judge Newman’s own chambers have reported that, in their interactions with Judge Newman over the course of the last year, Judge Newman has exhibited behavior that indicates significant mental deterioration, including memory loss, lack of focus, confusion, uncharacteristic paranoia,

## Reh.App.20a

and the inability to understand and execute simple tasks she was once capable of completing. Some of the concerns raised by staff are detailed below.

Several court staff members reported to the Committee that over the last year Judge Newman frequently claimed that her email and computer were being hacked—also, at times, that her phones were being bugged—and that her complaints have increased from once or twice a week to almost daily or every other day. They describe her demeanor in their encounters with her over these matters as “agitated” and “paranoid” and the conversations themselves as “bizarre” and “nonsensical.” Staff reported that, in the past, Judge Newman claimed that the culprits who were hacking and bugging her devices were bloggers and the media who were out to get her and bring her down. More recently, staff reported that she is claiming that it is the court itself hacking and bugging her devices. In each instance, IT staff scanned her devices and found no evidence to support Judge Newman’s concerns. Staff indicated that her claims about hackers usually stemmed from her having forgotten where she saved a file or email, and even after the IT staff would locate the file or email for her (on her desktop or in one of her folders) she would continue to allege that hackers were responsible for hiding the file.

IT staff also reported that the last time Judge Newman participated in the court’s mandatory security awareness training she was unable to complete it. The training amounts to watching a 10-20 minute video and answering a small number of multiple choice questions about the video. IT staff indicated that Judge Newman repeatedly failed the test. She was

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unable to get the multiple-choice questions correct even after watching the short video several times—even though, staff indicated, retesting involves presentation of the same multiple-choice questions each time. Ultimately, an IT staff member sat with Judge Newman and watched the video with her, after which she was still unable to answer the same questions. He reported having to feed her the answers in order for her to pass and that she was simply unable to retain the information she had just watched multiple times. This staff member indicated that he has worked with Judge Newman for many years and that he was amazed at how quickly and easily she picked things up when she was in her 80s. Over the last few years, he noticed a change observing that she now gets easily confused, has trouble retaining information, and forgets how to perform basic tasks that used to be routine for her.

Staff reported that Judge Newman often forgets how to do simple tasks that she previously had no difficulty performing, such as logging into our court system or network, remembering where she put court material, and bringing her briefs and case materials to court on court days. Staff reported that Judge Newman has trouble recalling events and information just days after they occur and at times seems lost and confused.

Staff reported that they have to assist her repeatedly with the same tasks, as she seems unable to remember how to perform them from one day to the next, though she performed them independently for years without difficulty. One staff member stated, “Though it is difficult to say this, I believe Judge Newman is simply losing it mentally.”



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One staff member relayed a recent episode in which Judge Newman indicated that she was not required to comply with a court rule that required circulating votes on opinions within 5 days. This rule was unanimously adopted by the court (including a vote by Judge Newman) in March 2018. The staffer recounted that Judge Newman said that she did not have to comply with this rule because Chief Judge Markey told her she could take 30 days to vote. Chief Judge Markey has been dead for almost 17 years and has not been a member of the court for 32 years.

Recently, a staff member raised a matter related to events in Judge Newman's chambers pursuant to the confidential Employment Dispute Resolution (EDR) process. Judge Newman refused to participate in the EDR proceeding to resolve the employee's concerns. She also sent an email to 95 individuals at the court disclosing that confidential matter (including the identity of the employees). This conduct raises concerns about Judge Newman's ability to remember or understand important confidentiality requirements and to manage the administration of her chambers. Judge Newman's refusal to participate in our court's EDR proceedings when they involved her chambers staff—and even when they involve complaints about her by her chambers staff—raises concerns about Judge Newman's ability to follow rules and manage staff, which may be related to a potential cognitive impairment.

[...]

(6) The request to reconsider a transfer is denied. The judicial council unanimously determined in its May 3, 2023 order that Judge Newman was required to first comply with the Committee's request for medical

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records and the Committee-ordered neurological and neuro-psychological evaluations and testing.

SO ORDERED: May 16, 2023.