

No. FC-23-90015

**In the Judicial Council of the
United States Court of Appeals for the Federal Circuit**

***In re Complaint No. 23-90015
(Complaint Against Circuit Judge Pauline Newman)***

**RESPONSE TO SPECIAL COMMITTEE'S ORDER OF
OCTOBER 21, 2024**

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December 2, 2024

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On September 25, 2024, Judge Newman filed a Motion to Reconsider and Rescind Judicial Council's Order of September 6, 2024 which suspended her from judicial service for an additional one-year period. As the basis for that Motion, Judge Newman proffered an expert report by Aaron G. Filler, MD, PhD, JD, FRCS. On October 21, 2024 the Special Committee issued an Order in response to the Motion directing Judge Newman to produce three sets of items for the Committee's review: 1) All of Judge Newman's medical records reviewed by Dr. Aaron G. Filler; 2) All medical records related to the CT perfusion scan that were provided to Dr. Filler; and 3) 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. Additionally, the Committee requested Judge Newman to "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.” October 21, 2024 Order at 8 (“Oct. 21 Order”). Judge Newman now responds.¹

Most of the Committee’s requests are entirely unobjectionable and Judge Newman is happy to comply with them. Accordingly, attached to this brief are a certification from Judge Newman and a declaration of Judge Newman’s law clerk, [REDACTED], certifying which records were provided for Dr. Filler’s review. Next, are Dr. Filler’s contemporaneous notes and an affidavit explaining his note-taking process and attesting

¹ Pursuant to Rule 23(b)(7) of Rules for Judicial-Conduct and Judicial-Disability Proceedings, Judge Newman requests and consents to the *immediate* release of this submission, as well as her September 25, 2024 Motion for Reconsideration, and the Committee’s October 21, 2024 Order. Judge Newman reminds the Council that the Commentary to Rule 23 states that “[o]nce the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent *only* to the extent necessary to protect the confidentiality interests of the complainant or of witnesses.” R. 23. Comm. (emphasis added). Concurrent with the present filing, Judge Newman is submitting proposed redactions to these documents. Judge Newman also advises the Committee that these documents are relevant to her pending appeal in the D.C. Circuit (No. 24-5173), and that, absent the Committee’s *immediate* release of these documents, she will be forced to include these documents (as redacted) as part of the publicly available Joint Appendix that will be filed on December 5, 2024. Judge Newman does not request the public release of accompanying affidavits.

that no additional materials (such as video or audio recordings) are in his possession. Dr. Filler is also providing original images from the scan which can be located at <https://tinyurl.com/2xb9zacr>. Finally, enclosed is a full copy, including the “missing” second page, from the George Washington University Hospital’s report of Judge Newman’s CT scan.²

However, Judge Newman must object to the Committee’s request to turn over the *entirety* of her medical records for the last three and half years. As an initial matter, this request is an enormous and unjustified expansion of the Committee’s prior demand for “hospital, medical, psychiatric or psychological, and other health-professional records that relate to Judge Newman’s alleged cardiac issues and fainting episode” and “hospital, medical, psychiatric or psychological, or other health-professional records from any treatment provider in the last two years regarding mental acuity, attention, focus, confusion, memory loss,


² We do, however, take exception to the insinuation that this document was somehow improperly withheld from the Committee. As the Committee can now see, the “missing” second page of the faxed document contains nothing except a black-and-white reproduction of some of the images of the scan. These images were reproduced, in color, in Dr. Filler’s report. We also note that the Order’s requirement that Judge Newman personally submit a certification, instead of crediting the word of Judge Newman’s counsel—all officers of the Court—is itself gratuitous.

fatigue, or stamina.” May 16, 2023 Order at 4 (“May 16 Order”). The Committee explained that “[s]uch records are obviously relevant to the Committee’s inquiry into whether Judge Newman has a disability related to mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina that affects her ability to perform the functions of her job.” *Id.* According to the Committee (and its expert), “records related to a cardiac event and a fainting episode—like records directly addressing mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina—may very well shed light on the observed changes in Judge Newman’s behavior and the issues of impairment of cognitive and other functioning the Committee is investigating.” *Id.* at 5.³

The Committee admitted that “the records may not end up shedding such light.” *Id.* The Committee’s current order seeks to greatly expand the scope of records sought. Now, the Committee seeks not records solely related to “hospital, medical, psychiatric or psychological,

³ However, as the Committee has been repeatedly advised, the allegations that Judge Newman suffered a “heart attack” (or any other “cardiac event”) with hospitalization for insertion of stents and subsequent absence from hearings and a fainting episode in the courthouse are false and have no basis in fact.

and other health-professional records that relate to Judge Newman’s alleged cardiac issues and fainting episode” and “hospital, medical, psychiatric or psychological, or other health-professional records from any treatment provider in the last two years regarding mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina,” but *all* medical records for the past three-and-a-half years, covering such irrelevant issues as Judge Newman’s treatment for an infection, her blood work, her kidney function, and the like. The Committee does not explain what possible relevance such records may have to its investigation into Judge Newman’s alleged “disability related to *mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina* that affects her ability to perform the functions of her job.” *Id.* All the Committee states is that such records are necessary to evaluate Dr. Filler’s expert report. Oct. 21 Order at 6 (asserting that “[t]o assess the weight to be accorded this opinion, the Committee must be provided the facts upon which it is based.”). But Dr. Filler’s opinion as to Judge Newman’s *mental* abilities is *not* (nor could it be) based on his consideration of whether Judge Newman suffers from, for example,



As the Committee’s order itself acknowledges, courts require expert witnesses and litigants “to produce underlying medical records *pertaining to* Plaintiff’s alleged injuries,” not *all* medical records that a given litigant may have. *Id.* at 5 (quoting *Vadnais v. United States*, 2023 WL 6504861, at *4–5 (S.D.N.Y. Oct. 5, 2023)) (emphasis added). There is absolutely no plausible argument as to how any of the medical issues noted in the medical records are “pertaining to” any of Judge Newman’s alleged (though non-existent) problems with “mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina,” May 16 Order at 4.

The Committee also relies on *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993), and Fed. R. Civ. P. 26(a)(2), to request the entirety of Judge Newman’s medical records, on the premise that the requested records were “considered” by Dr. Filler in forming his opinion as to Judge Newman’s mental competence. However, the Committee is mistaken in its premise. Dr. Filler reviewed these records not with a view of “considering” them, but to provide an independent verification that ~~some of~~ the records previously demanded by the Committee simply do not exist.

We repeat, and as Judge Newman has explained to the Committee on multiple occasions, she has never had a heart attack (or a “cardiac event”) and never fainted in the courthouse. Therefore no records, medical or otherwise, related to these non-events exist. As contemplated by the Committee’s May 16 Order, Judge Newman permitted Dr. Filler—an independent and disinterested expert—to review her entire medical file to satisfy himself that there was no evidence that such events occurred. Access to the entire file also permitted Dr. Filler to assure himself that there are no relevant records with respect to any problems as to Judge Newman’s “mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina.” Having so satisfied himself, Dr. Filler did not “consider” the irrelevant records in forming his opinion as to Judge Newman’s mental health and competence. Instead, Dr. Filler conscientiously reviewed those records and summarized them for the Committee. See Filler Rep. at 18-24. This summary provides the Committee with more information than it actually requested in its May 16, 2023 Order (which did not ask Judge Newman to identify all of the issues for which she has sought medical attention), thus allowing the Committee to also assure itself that the previously requested records do

not exist. However, instead of recognizing Judge Newman's extraordinary openness on the issue, the Committee seeks to penalize Judge Newman for this very openness—seeking records that did not provide any bases for Dr. Filler's opinion and that have nothing to do with the issues it is investigating or her ability to fully perform judicial functions. This is inconsistent with the practice in federal courts in judicial disciplinary proceedings, as illustrated in precedent.

For example, in *Vasconcellos v. Cybex Int'l, Inc.*, 962 F. Supp. 701 (D. Md. 1997), defendant sought production of all of plaintiff's psychological records because plaintiff in that case alleged that as a result of an assault she suffered psychological damages for which a mental health professional was treating her. The court quashed the subpoena holding that the plaintiff "has a right to have discovery limited to information that is *directly relevant* to the lawsuit." *Id.* at 709 (emphasis added). Similarly, in *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216 (S.D.N.Y. 1994), plaintiffs brought a claim for intentional infliction of emotional distress and defendant sought discovery, under Fed. R. Civ. P. 26(b), "about plaintiffs' psychological histories ... and [of] their medical records [arguing that] such information is necessary and

relevant to defendants' ability to defend themselves against plaintiffs' allegations." *Id.* at 222. The district court held that while on one hand, since the plaintiffs put their mental status at issue, "defendants will be permitted to inquire into plaintiffs' personal histories," but on the other hand, cautioned that "defendants may not engage in a fishing expedition by inquiring into matters *totally irrelevant to the issue of emotional distress.*" *Id.* at 223 (emphasis added). (By way of an example, the *Bridges* Court stated that "it would be inappropriate for defendants to question plaintiffs about their past sexual histories" when addressing claims of mental anguish). *Id.* at 223 n.5.

Continuing with the theme, in *Cappetta v. GC Servs. Ltd.*, plaintiff alleged damages for emotional and mental anguish and the defendant subpoenaed "[t]he complete medical records, including, but not limited to, all written documents, reports, any and all correspondence, patient questionnaire(s), memoranda, x-ray reports, invoices and billing information, etc., excluding nothing, regarding the plaintiff herein" for the preceding 10 years. 266 F.R.D. 121, 123 (E.D. Va. 2009). The court quashed the subpoena, finding it "to be overbroad." *Id.* at 126. The court explained that "[t]he scope of discovery 'must be limited to whether, and

to what extent,' Defendant's actions caused Plaintiff to suffer emotional harm." *Id.* (quoting *Vasconcellos*, 962 F.Supp. at 709). According to the court, a request for "all medical records, regardless of content," *id.* (emphasis in original), far exceeded what was "essential to a fair trial," *id.* (quoting *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 224 (D.N.J. 2000)). Accordingly, the court limited the subpoena to "only those medical records relating to Plaintiff's emotional distress claims." *Id.*

The Committee's citation to the *Adams* case is, at best, incomplete. The Committee is correct that in that case, the Special Committee of the Sixth Circuit refused to consider the report submitted by Judge Adams's psychiatrist. But it did so "because Judge Adams refused to produce *any* of the records underlying his psychiatrist's evaluation." *In re Complaint of Judicial Misconduct*, C.C.D. No. 17-01 at 13 (U.S. Jud. Conf. Aug. 14, 2017) (emphasis added). In other words, Judge Adams sought to introduce an entirely conclusory opinion, which was correctly excluded. The Committee's order misleads by omitting the key word "any." *See* Oct. 21 Order at 5.

Unlike what occurred in the *Adams* case, Dr. Filler has provided the Committee with a wealth of underlying data, including the protocol

of the perfusion CT scan, the images obtained from this study, the results of the full neurological examination, the narrative of testing of Judge Newman's legal reasoning, the analysis of Judge Newman's past and more recent writing, and finally, the summary of all of Judge Newman's medical conditions and medications taken. In addition, Dr. Filler is now providing the Committee with his contemporaneous interview notes. Thus, Dr. Filler's submission can in no way be analogized to the incomplete submission proffered by Judge Adams.

Surveying these (and other) cases, it is clear that a free-wheeling inquiry into a party's medical records, unconstrained by the actual matter in dispute, is not, and has never been permitted. Accordingly, the Committee's request for "*all* medical records, regardless of content," *Cappetta*, 266 F.R.D. at 126, is overbroad. Additionally, and putting aside the overbreadth of the Committee's request, the demand is wholly inconsistent with the Committee's prior order. In its May 16, 2023 Order, the Committee recognized that Judge Newman has legitimate privacy concerns with respect to the disclosure of her medical records to her colleagues. Accordingly, the Committee wrote 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.” *Id.* at 6 (emphasis added). The Committee further stated that it “cannot know the significance of those records until the *medical professionals* have seen them.” *Id.* at 5 (emphasis added). The October 21 Order is a complete about-face. It now discards any concern about Judge Newman’s privacy and seeks the records to be reviewed by the Committee itself, even though none of the Committee’s members are “medical professionals.” To make matters worse, the Committee does not even attempt to meaningfully limit the universe of people who would have access to these private records, writing only that it will “restrict access [to the records] solely to those persons who need access for the Committee to perform its evaluation.” Oct. 21 Order at 7. Presumably, that “need” will be defined at the sole discretion of the Committee, and can, if the Committee so chooses, include law clerks, secretaries, Office of the Circuit Executive, and any other persons that the Committee in its sole and unreviewable judgment determines “needs” such access. For obvious reasons, Judge Newman cannot accede to such unconstrained dissemination of her private and sensitive medical information. Consequently, to the extent that the Committee is entitled to any records

at all, the request should be modified and limited only to those records relevant to the Committee's inquiry into Judge Newman's "mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina." May 16 Order at 4.

According to the October 21 Order, medical records are relevant to enable the Committee "to assess the reliability, and adequacy of grounding in facts" of Dr. Filler's opinion, Oct. 21 Order at 4, including to "evaluate Dr. Filler's conclusions," *id.* at 5. The Committee does not explain how or why the records it seeks are relevant to its inquiry, nor can it do so. As Dr. Filler explained in his report, the perfusion CT scan is a scientific and objective improvement over the "full battery of neuropsychological testing," conducted by a "neuropsychologist." *See* Filler Rep. at 3, 8, 15, 16, 17, 32, 36, 40 and 41. Since under the Committee's own prior orders, Judge Newman's medical records would have never been made available to the Committee-selected neuropsychologist and therefore could not have formed a basis of his or her opinion, it necessarily follows that those records are irrelevant to the question of whether the results of Judge Newman's perfusion CT scan

are an adequate substitute for the “full battery of neuropsychological testing.”⁴

Moreover, the whole point of the perfusion CT scan is that this study “is completely objective requiring little if any subjective interpretation.” Filler Rep. at 3. The Committee, of course, has access to the data underlying the perfusion CT, as well as the conclusions of two independent medical experts that the study shows a “completely normal” brain. Because of the objective nature of the study itself, any pre-existing medical records are simply irrelevant to the study’s interpretation. *Id.* Thus, it is hard to understand what information the Committee expects to glean from Judge Newman’s medical records that would be relevant to its analysis of reliability or the outcome this study.

At most, the Committee’s stated purpose for reviewing the records, *see* Oct. 21 Order at 4, may warrant review of *relevant* medical records by a qualified medical expert, but it does not warrant review of Judge

⁴ Judge Newman’s medical records, according to the Committee’s prior order, were supposed to have been provided *only* to the *neurologist* who would conduct a neurological examination. May 16 Order at 5, 22. Dr. Filler conducted such an examination, *see* Filler Rep. at 28-31, and thus, the records in question are only relevant (if at all) to evaluate *that* portion of his report.

Newman's *entire* medical file nor review by members of the Committee. The October 21 Order cites *Daubert* and related authorities; however, nothing in *Daubert*-related law justifies review of technical expert material by an opposing party who is not an expert. Because Committee members are not medical experts, no legitimate purpose is served by permitting them to pick through the pages of Judge Newman's medical records.

Not only do Committee members themselves have no need to see Judge Newman's medical records, but these records warrant special protection from disclosure absent specific needs. Individuals have a recognized privacy interest in their personal medical records. *See, e.g., Gordon v. Countryside Nursing and Rehabilitation Center, LLC*, 2012 WL 2905607, at *2 (N.D. Ill. July 16, 2012) (discussing privacy interests in medical records). And, of course, it is common to protect highly confidential material, specifically including medical records, by limiting access to designated attorneys and qualified experts. *See, e.g., id.* at *2 (issuing "attorney's eyes only" protective order for medical records); *Lynum v. City of Zanesville*, 2016 WL 4435214, at *2 (S.D. Ohio Aug. 23, 2016) (same); *cf. Mynette Technologies, Inc. v. United States*, 170 Fed. Cl.

201, 204-05 (Fed. Cl. 2024) (illustrating the use of “attorneys’ eyes only” restrictions in a patent dispute).

Without waiving her rights to privacy or receding from any of the above-stated objections, but in order to expedite the conclusion of this improper action, Judge Newman is willing to produce all medical records Dr. Filler was given access to for review by a qualified medical expert (“expert”) designated by the Committee.

The medical records will be provided in accordance with standard confidentiality practices. To tailor those practices to this case (where the Committee acts as its own attorney), Judge Newman will produce the medical records on a “qualified medical expert’s eyes only” basis. The expert shall not duplicate, retain, disclose, reveal, or discuss the medical records or any information obtained from the medical records, with any person or party, including, but not limited to, members and staff of the Special Committee, except as follows.⁵

⁵ To ensure that these conditions are complied with, the review shall occur only in the presence of Judge Newman’s attorney or another individual designated by Judge Newman. Recognizing that any expert’s time is valuable and that the expert’s calendar may well be busy, Judge Newman (and her attorneys) will do their level best to accommodate the expert’s time constraints.

If the medical expert reviews the medical records and can show that specific information contained in such records is essential to supporting a challenge to the reliability or adequacy of Dr. Filler's report, the expert would then be permitted to disclose to members of the Committee such specific information that is essential to the challenge or challenges. The expert shall not disclose any other information from the medical records.

These limitations extend to any deposition of Dr. Filler. In connection with the deposition, the Committee's medical expert may disclose to the Committee only information from the medical records that is essential to supporting a challenge to the reliability or adequacy of Dr. Filler's report. If any portion of the medical records is used at the deposition, the medical expert shall redact any information that does not meet the above-specified requirements and limitations.

Any questions or testimony that discloses information from the medical records shall be maintained as confidential. The Committee shall not disclose any information from the medical records, including in the Committee's publicly available orders or opinions, without Judge Newman's consent.

Additionally, to the extent that the Committee believes that an independent review of the records is warranted to ensure that no information was omitted, Judge Newman is willing to provide her records to a neutral referee (such as a retired federal judge) agreed to by both parties who would then conduct such a review.

As Judge Newman has stated from the beginning, the attack on her physical and mental abilities is groundless. The Committee now has an opportunity to put a prompt end to this unwarranted proceeding. It should seize it.

/s/ Gregory Dolin
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December 2, 2024

Attachment A

No. FC-23-90015

**In the Judicial Council of the
United States Court of Appeals for the Federal Circuit**

*In re Complaint No. 23-90015
(Complaint Against Circuit Judge Pauline Newman)*

DECLARATION OF AARON G. FILLER, MD, PHD, JD, FRCS.

December 1, 2024

Declaration of Aaron G. Filler of December 1, 2024

I, Aaron G. Filler, MD, PhD, JD, FRCS, am over the age of 18 and make this Declaration as to the record of my medical evaluation of Hon. Pauline Newman which took place on August 24, 2024.

1. I did not make any audio or video recording of my examination and evaluation of Hon. Pauline Newman and did not seek any consent to make any recording.
2. As is my usual practice – I prepare a page in Microsoft OneNote using a template I developed – for taking notes during the interview portion of the examination and a second page for the physical exam portion using a neurological exam template I developed for that purpose. I make the two separate pages so I can go back and forth more rapidly if any history information arises during the examination, with the objective of putting both pages into a status that I can then read through linearly as I prepare the report.
3. The two OneNote documents are opened and identified with the patient’s name and show a time stamp. The iPad I used for the notes showed Pacific Time – around 9:00 a.m., but the exams commenced shortly after noon Eastern Daylight Time.
4. Generally, in the practice of medicine and in my own practice – it is not usual to make a video or audio recording of a medical visit.
5. Microsoft OneNote does not have an efficient option for making an output for Word or Acrobat on a paginated basis. When I am deposed as to an examination that is the subject of a medico-legal evaluation, if my notes are requested, I will use the email output function of OneNote – but this makes a single multipage PDF, many pages in length, with no page breaks. This can be provided, but it is not amenable to being efiled or otherwise filed in a Court without splitting the long page into segments that can be placed in 8.5 x 11 sheets as I have done here to comply with the Judicial Council’s request. I made these pages on November 30, 2024 and applied my signature to the last page of each of the two documents at that time.
6. I am prepared to testify under oath as the accuracy and completeness of these records as to the written basis for the examination and interview aspects of my evaluation report.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ 

Aaron G. Filler, MD, PhD, FRCS, JD

Attachment B

No. FC-23-90015

**In the Judicial Council of the
United States Court of Appeals for the Federal Circuit**

*In re Complaint No. 23-90015
(Complaint Against Circuit Judge Pauline Newman)*

DECLARATION OF [REDACTED]

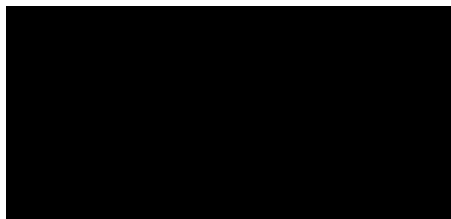
November 23, 2024

DECLARATION OF [REDACTED]

1. I, [REDACTED], am over the age of 18 and make this Declaration on the basis of my personal knowledge.
2. I am a career law clerk to the Hon. Pauline Newman, United States Circuit Judge for the United States Court of Appeals for the Federal Circuit.
3. I am admitted to practice law in New York, Massachusetts and Washington, D.C. and I am a member of the Supreme Court Bar and the Federal Circuit Bar.
4. On or about August 22, 2024, Judge Newman authorized me to access and download onto USB drives her medical records from Virginia Hospital Center, One Medical Group, and Jenna Byorek AGNP-BC and John Feigert, MD.
5. Judge Newman further authorized me to provide the records referred to in the preceding paragraph to Dr. Aaron G. Filler who, during that same week, examined Judge Newman.
6. Pursuant to Judge Newman's authorization, I accessed and downloaded the records referred to in Paragraph #4 onto USB drives and delivered said USB drives to Dr. Filler via UPS. The receipt for this mailing is attached to this Declaration as Exhibit 1.
7. On or about September 23, 2024, Dr. Filler returned the USB drives referred to in the preceding paragraph. The receipt for this mailing is attached to this Declaration as Exhibit 2.
8. On information and belief, the USB drives referred to in Paragraph #6 are currently in Judge Newman's possession.
9. I make this Declaration based on personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed On: November 23, 2024



Attachment C

No. FC-23-90015

**In the Judicial Council of the
United States Court of Appeals for the Federal Circuit**

*In re Complaint No. 23-90015
(Complaint Against Circuit Judge Pauline Newman)*

Certification of The Honorable Pauline Newman

November 22, 2024

CERTIFICATION BY THE HON. PAULINE NEWMAN

I, Pauline Newman, a United States Circuit Judge of the United States Court of Appeals for the Federal Circuit, certify that on or about August 22, 2024, I directed [REDACTED] to download all my medical records from the Virginia Hospital Center, One Medical Group, and my hematology providers, Jenna Byorek AGNP-BC and John Feigert, MD, onto USB flash drives or other similar storage devices and to provide the entirety of such records to Dr. Aaron G. Filler. At my direction, [REDACTED] has done so.

Additionally, Dr. Filler received my medical records from the George Washington University in his capacity as a referring physician for my perfusion CT study. Furthermore, my attorneys provided Dr. Filler with copies of the prior evaluations conducted by Dr. Ted L. Rothstein and Dr. Regina M. Carney.

Records from my ophthalmologist were not included as irrelevant. Records from other specialists were not separately included because they are duplicated in and are parts of the records of One Medical Group.

After review, Dr. Filler returned the USB flash drives, and I currently have possession of these devices.

Executed On: November 22, 2024



Pauline Newman