Transcript of Jonathan DeRight, Ph.D.

Date: June 17, 2025
Case: Complaint Against Circuit Judge Pauline Newman, In Re:

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BEFORE THE JUDICIAL COUNCIL

OF THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

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IN RE: :

COMPLAINT NO. 23-90015 :

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Deposition of JONATHAN DeRIGHT, PH.D.

Washington, D.C.

Tuesday, June 17, 2025

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Pages: 1 - 179

Reported By: Karen Young

Deposition of JONATHAN DeRIGHT, PH.D., held at the offices of:

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Pursuant to notice, before Karen Young, Notary Public in and for the District of Columbia.

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(Deposition Exhibit Numbers 1 through 4 were marked for identification.)

JONATHAN DeRIGHT, PH.D.,

having been duly sworn, testified as follows:

EXAMINATION BY COUNSEL FOR JUDGE PAULINE NEWMAN

BY MR. VECCHIONE:

Q Can you state your full name for the record please?

A Yes, it's Jonathan DeRight, and last name is D-E-R-I-G-H-T.

Q And can you tell us your profession?

A I'm a clinical and forensic neuropsychologist.

Q All right. Have you been deposed before?

A Yes.

Q How many times?

A Probably about five times.

Q Okay. It's still new enough that I'll give you the full set of directions. I'm John Vecchione. I'll be representing Judge Newman, and my instructions and kind of how we're going to do

this so that we are all on the same page is you're under oath. You were just sworn in, and so it's as if you were testifying in court, and obviously everything you say has to be the truth, and this will be recorded for future use.

Are you taking any medications or experiencing any health issues today that might affect your ability to give accurate testimony.

A No.

Q All right. If I ask any -- a couple things. First, let's try not to talk over each other because the court reporter has a hard time typing both of what we're saying, so this is the instruction that is hardest to follow. I will try to follow it, and I ask you to as well. I'll try and wait until you're done answering the question before I ask the next one.

If you don't understand something I've asked, just ask me to clarify, and because we are doing this on the record, you have to respond orally. You can't nod your head like that, okay? And let's see. Unless you tell me otherwise, I'm

going to assume you understand my questions, so do ask for clarifications if you don't.

On occasion, your attorney may object to one of my questions. Wait until his objection fades away and then answer the question unless he instructs you not to answer. If you need to take a break, we'll take a break. We don't break in the middle of a question, but certainly in these depositions, we've been pretty easy about taking breaks. And do you have any questions about anything I've said so far?

A No.

Q Okay, all right. First thing I asked you was whether you'd been deposed before. You said about five times. What was the nature of those cases? Were you -- I'll withdraw that. Were you an expert in each of those cases?

A Yes.

Q All right, and what was the nature of those cases?

A They were all civil cases related to head injury. No, all but one. One of them was a

workplace-related suit.

Q Okay. Someone had an injury at work, and the question was the amount of injury or something of that nature?

A It was a wrongful termination suit.

Q Okay, and where were these? In what courts?

A The one I was just talking about, the wrongful termination, that was Southern District of New York. The rest have been either in, let's see, federal court in Western District of Virginia, Eastern District of Virginia, and a few local courts, one in North Carolina and I think one in Virginia as well.

Q All right, and did any of those go to trial?

A Two of them went to trial.

Q Two of them went to trial, and which ones were those?

A I can give you the names. One was Yvette Norman. That was in the Western District of Virginia, and let's see.

Q Versus who?
A I can't remember the -- it was a trucking company.
Q Okay.
A That was a head injury case.
Q So were you -- were you testifying on her behalf?
A I was on the defense in that case.
Q Ah, the trucking company.
A Yeah.
Q Okay, and the second one?
A That would be B.R., it was initials, versus Fairfax County School Board.
Q Got it.
A And that was in Eastern District of Virginia.
Q Was that a kid? Was that why it was B.R.?
A Yes.
Q All right, and you understand you've been designated as an expert witness in this case on behalf of the Special Committee for Judicial Council in the matter of Judge Newman?

A Yes.

Q All right, and so you told me about those five times where you were an expert. Have you been retained to be an expert in more cases than those five?

A Yes.

Q Okay, but you didn't give any testimony either by deposition or -- or trial in the other ones?

A I've testified in a lot of trials.

Q Oh, really?

A Yes.

Q Okay, as a fact witness?

A Expert witness. Most of them are criminal in nature. That's why there's not depositions.

Q Thank you. And -- okay, so for criminal matters, what's the nature of your testimony in those? What are you being asked to do?

A Usually it's either for competency to stand trial, sanity at the time of the offense or mitigation.

Q Got it. For the prosecution or the

defense?

A Almost always for the defense. Sometimes I'm an independent evaluator where a -- a judge or the State will ask me to evaluate someone, but most of the time it's on the defense.

Q Okay. Has any court excluded your testimony?

A No.

Q All right. Are you charging for your time for the deposition today?

A Yes.

Q And at what rate?

A 500 an hour.

Q All right, and is that the same rate you've charged the Special Committee?

A Yes.

Q What did you do to prepare for today's deposition?

A I read my report, my supplement to my report, I reviewed the medical records given to Dr. Filler, medical records given to Dr. Carney. I reviewed some parts of deposition transcripts

from Dr. Carney and Dr. Rothstein, and some of the articles that were in my report.

Q All right. For the medical records, were those the same records or group of the same records that you described in your supplemental report?

A Yes, sir.

Q Okay, and in the depositions of Dr. Rothstein and Dr. Carney, is there anything about their depositions that changed your opinion in any manner?

A No.

Q Okay. Did you -- did you come to any conclusions about their testimony when you read it?

A Think about that. Overall, no. It added more information to my previous conclusions.

Q Okay, I may ask more about that as we go along, but I wanted to see off the top of your head. All right, and besides counsel here, was there anyone else helping you with your preparation?

A No.

Q All right. Did you review any of the reports, again, Filler or Carney or Rothstein?

A No.

Q All right. When were you first contacted about working on this case?

A In April 2023.

Q How and by whom?

A A psychologist named Michael Gendel called me by phone.

Q Was that -- and said what?

A He -- he told me there was a need for a fitness for duty evaluation for a federal judge, and he asked for my availability.

Q Okay, and what happened subsequent to that?

A I gave him my availability. I believe I held a few dates on my calendar, and eventually a long time passed and he said we'll reach out to you if we end up scheduling anything.

Q All right, and they eventually did?

A A long time went by. I think I was next

contacted about the case by Mr. Philbin in October of 2024.

Q Okay. Have you ever been the subject of a Daubert hearing or a Frye hearing they're sometimes called as far as testing your credentials or opinions?

A Yes.

Q Okay. Where was that?

A That was in the District of Maryland federal court.

Q Criminal or civil?

A Criminal.

Q And do you remember that case?

A It was United States V Donnie, D-O-N-N-I-E, Amis, A-M-I-S.

Q How long ago was that? Do you know? Within the last five years?

A Yes.

Q Have you ever been a defendant in a medical malpractice case?

A No.

Q Ever been sued in general?

A No.
Q I take it not charged with a crime?
A Correct.
Q All right. Now, we'll be discussing cognitive impairment today, and I take it in most of these cases you've testified in, were they about cognitive impairment or something else?
A Most of the time when I'm evaluating someone, it has to do with some kind of cognitive impairment. Sometimes it's just psychiatric and -- and not cognitive, but it's almost always one of those two.
Q All right. We have marked as Exhibit 1 your report in this matter. Do you recognize that?
A Yes.
Q All right. In the civil matters you discussed, the five times before in the civil matters, did you prepare a report in each of those?
A I believe so.
Q Okay. How about the criminal matters?

A No, not all the criminal matters.

Q All right, and other than the five, have you prepared reports other than the five trials we talked about?

A Yes.

Q Okay, and how many times have you done that?

A Total forensic reports, probably over 500.

Q All right. When you were reviewing matters, you've told me what you reviewed. Did you review anything that's not in your report or your supplement besides the depositions you told me about?

A Yes, there was one article I reviewed about fitness for duty evaluations that was not in my report.

Q And the name of that?

A I can find you the exact name, but it's the AAPL, we call it "apple," guidelines.

Q And they are?

A The -- gosh, what's their term? American Academy of Psychology and the Law.

Q All right, and that was provided to you by the attorneys?

A No.

Q Why did you look at it?

A I was looking for a good way to explain what a fitness for duty evaluation was, and I wanted to check some additional sources as well as the ones that -- that I put in my report.

Q All right. When we take a break, we'll get the actual name of it.

A Sure, happy to provide that.

Q All right, we've talked about the depositions. Did you review anything else subsequent to submitting your second report that bears on your opinion that we haven't discussed?

A That we haven't discussed, no.

Q All right. And I'll just put -- in case you need to refer to this, I have marked your rebuttal report as DeRight 2, and do you recognize that document?

A Yes.

Q All right. And that's your signature at

the back of both of them, both Exhibit 1 and 2?

A Yes.

Q And just for completeness, I've marked the Filler report without attachments as Exhibit 3, and do you recognize that?

A Yes.

Q All right, if you need to refer to it for any reason. And finally, marked as 4 Dr. Filler's rebuttal, and do you recognize that?

A Yes.

Q Okay. So you've put -- you've stated your opinions about those two reports in your -- DeRight original Exhibit 1 and Exhibit 2, correct?

A I don't recall whether I -- I wrote about Dr. Filler's response.

Q Have you seen it?

A Yes.

Q Okay. When did you see it?

A I -- I don't think I saw it until after my supplement. I could be wrong on that.

Q Okay. Did anything in it change either the -- any of the opinions you have in either your

first or second report?

A No.

Q All right, let's look at Exhibit 1. All right, and this is dated January 27th, 2025?

A Correct.

Q And you have a summary of your expert qualifications on page 2.

A Yes.

Q All right, and so you're not a medical doctor in this matter.

A Correct.

Q So let's turn to page 2, which summarizes your qualifications, if you need to refer to it for my questions. What is a clinical psychologist as opposed to some other kind of psychologist?

A A clinical psychologist is the type of psychologist that does either treatment or assessment of different kind of psychological or psychiatric disorders.

Q Okay, what is clinical neuropsychology?

A Clinical neuropsychologist is a specialist in clinical psychology. Typically the

neuropsychologist is going to have to do additional educational training and a postdoctoral fellowship or residency related to that specialty.

Q All right, but you're not a neurologist or a neurosurgeon.

A Correct.

Q As part of your -- when you're not testifying, what's your -- what's your regular duties, your day job, if you will?

A I'm a clinical neuropsychologist.

Q Okay, and what does -- what do you do day to day? What type of things -- what do people come to you for?

A In my clinic, people are referred by their neurologist, psychiatrist, primary care physician, sometimes self-referred, usually with some kind of thinking problem. Sometimes it's only related to a mental health problem, but -- but that's more rare, and my job is to talk to them, give them tests, usually write a report and get them feedback about it.

Q Okay. Do you -- do you conduct and

evaluate Montreal assessment tests?

A You're referring to the MoCA?

Q I am.

A Yes, I typically do not use that unless there is a record where someone else has used it, and then I will give it to be able to compare the score, but it's typically something that's much less comprehensive than I'll be doing in my evaluation.

Q All right, so -- all right, and how about the 3-MS test, the Modified Mini-Mental Examination test?

A Same answer with that one. I would pretty much only give it if someone else had already given it.

Q All right, and do you often work with neurologists?

A What do you mean by work with?

Q In other words, do you consult with them, do they send people to you, do you send people to them? How's that work? What's your relationship to them between your -- your expertise and theirs?

A Usually they're sending people to me. Sometimes I will be sending them to them, but usually they're sending to me.

Q Okay, and so we talked a little about the MoCA and the 3-MS test. Would the normal course within a neurologist or someone like that examines someone, maybe gives one of those tests and decides that they need further testing and sending them to you?

A Yes.

Q All right, and in either your original opinion or your second opinion, is it fair to say you've set forth no opinion within a reasonable degree of medical certainty as to the cognitive fitness of Judge Newman for judicial duties?

A That's correct.

Q And both reports mainly are critiques of the examinations and opinions of Dr. Filler, and to a lesser extent, Dr. Rothstein and Carney?

A Yes.

Q What would you need to do to provide an opinion on Judge Newman's fitness for duty?

A I would need to conduct a fitness for duty evaluation.

Q What test would be apply in doing that?

A I wouldn't know the exact tests until I see her, but they would be comprehensive, much more comprehensive than a cognitive screening measure. I would be looking for evidence of significant decline from previous abilities. I would look at memory, language, problem-solving, executive functioning, and I would compare that to her job duties and information from other collateral sources to have a determination about whether she had a condition that was affecting the essential functions of her job.

Q Is there a range of tests you'd give? You say you don't know which ones, but what -- what's the menu?

A To give you an example of the types of tests I would give, one would be the WAIS-IV or WAIS-V, which is a measure of IQ, and the reason I give that is because we have a good way of testing someone's baseline abilities. There's a test

called the test of premorbid function that's a psychometrically valid test that can -- it's made by the same test maker as the WAIS, and it can give us a direct comparison about whether someone has had significant decline overall.

In addition, I would give something like the California Verbal Learning Test, which is a test where someone is read a long list of words, and they have to remember it later. I'd also give tests of story memory and visual memory as well as tests of language that includes something called confrontation naming, where you're shown a picture or described something and you have to come up with a word, verbal fluency, where you have to think of as many words from a certain letter or category as you can. I would look for visuospatial problems, tests of decision-making like the Wisconsin Card Sorting Test, for example, and processing speed.

Q And what's the last one, processing speed?

A That's thinking speed essentially.

Q Okay. Now, in these tests, are you

comparing -- well, withdrawn. I take it from your testimony that you're comparing, when you do this type of test on Judge Newman or anyone else to their present abilities to some past ability?

A On the one test I was trying, the test of premorbid function, that gives me a direct comparison for current abilities versus previous abilities, but unless there's previous neuropsychological testing, I can't say necessarily whether there's been decline. However, sometimes we will use logic to say okay, this person was really high functioning. Now they can't remember the name of a hammer, that's probably a significant decline.

Q Okay. So -- but you don't test the individual against some other individual. Like you couldn't test Judge Newman against Judge Moore. That would not be something you'd be doing.

A No.

Q You're testing her against some previous level. What is the level you're looking at, is --

was what the question is.

A Sure, and in fitness for duty terms, we often call that a threshold level, but usually when we give a standardized test, we're comparing it to a group of people who have been administered that same test in the same exact way, so it's very important in the standardized test that the test is administered in the same way every time using the same rules. That's so we can compare apples to apples.

Usually it's at least adjusted for age, often for age, sex and education. In unique cases, such as pilots, for example, they don't just adjust for age because you wouldn't feel very comfortable saying don't worry, everyone, we have the finest 100-year-old pilot we could find, right? So we want to make sure that the person is meeting a -- a certain threshold in that case for the FAA.

So in -- in this case, it wouldn't necessarily be a comparison to other 97-year-olds. That would be one thing I do, but it would also be

a comparison to a -- some other known group that I would be able to find.

Q All right, so you talked about apples to apples. Are these objective tests?

A The ones I was describing?

Q Yeah.

A Yes.

Q So if they're performed properly, every clinical psychologist performing this test would come to the same conclusion?

A No.

Q Why not?

A Well, if they're performed correctly, every clinical psychologist would get the same score, but whether they come to the same conclusion, that's where clinical judgment comes in. So if you compare it to an MRI, for example, assuming that the two machines are functioning properly, they should give the same scan, but the person interpreting the scan may come up with different conclusions.

Q All right. So what score or objective

measure would cause you to declare Judge Newman fit for duty?

A If she did not show evidence of significant decline from her baseline abilities and otherwise did not show reliable and valid cognitive test scores that indicated that she could not perform the essential functions of her position.

Q All right. Well, and what are those?

A The essential functions of her position? I would have to see a job description, so that's part of a fitness for duty evaluation, is the employer refers you for the evaluation and gives you a job description, and that's what you have to consult.

Q All right, and how do you compare -- this is -- so her job description -- there's other judges in the country, right? There's other federal judges. Does she have to come within some median of that group, the bottom of that group, the top of that group? How do you declare if they're fit for duty?

A Well, it would be wonderful if I had a group of federal judges to compare cognitive test scores to. That's never going to be an option, so it's -- it's not that she has to be in the middle. The question is is there a condition that's getting in the way of her essential job functions. I know I keep repeating that, but let me give you an example.

Let's say that she can't remember a conversation from five minutes earlier, a story that was read to her. That might be something that could impair her essential job functions. It also might not. Maybe there's something in her job description that -- that says that there is a legal assistant or something that -- that is -- is helping. There's a lot of different things that could happen, and part of the evaluation is not necessarily just can she work or not. It's is there a significant limitation or accommodation that needs to be made.

Q All right. If you could turn to page 4 of your opinion -- first opinion, Exhibit 1, and

there you have a summary of your views of Filler's reports and opinions, right?

A That's my summary of his opinions.

Q Yes.

A Yes.

Q And in the last paragraph, you say that after reviewing it -- I'll quote it. "It is my opinion that Dr. Filler's evaluation of Judge Newman did not adhere to standard practices in the field for diagnosing cognitive impairment, and the methods that he did use lacked comprehensiveness and scientific credibility to assess possible cognitive impairment in Judge Newman," correct?

A Yes.

Q All right. That doesn't mean that he's wrong in his -- in his judgment. It's just you disagree with his methods. He could be correct.

A You're asking if it's my opinion that he could be correct?

Q Yeah.

A I would disagree with that.

Q Where in your opinion do you say that he

couldn't be correct?

A Well, I think if you don't have scientifically credible methods for your opinion, then the opinion cannot be correct even if it's -- well, no, it can't be correct.

Q Okay. Why not?

A Because you -- you don't have the right methods to get there.

Q Well, let's look at that a little bit. Turn the page to page 5. Now, you note in -- on page 5 some contradictions or discrepancies between Dr. Filler's exams and certain things about immediate memory, but then you say, "Despite this contradiction, Dr. Filler opined that Judge Newman," quote, "demonstrated appropriate personal insight." Now, he stated that from his examination of her and speaking to her that day, correct?

A I'd have to look.

Q All right. It's a consultation report at page 27, so take a look at Dr. Filler's report at page 27.

MR. PHILBIN: Which exhibit is this? Three?

MR. VECCHIONE: It's Exhibit 3.

MR. PHILBIN: And where are we, Counsel?

MR. VECCHIONE: He said he'd have to look, and page 27 is where he says that.

THE WITNESS: Section 11 under demeanor. Okay, I'm ready to answer.

BY MR. VECCHIONE:

Q And your answer is?

A Yes, that was his evaluation of her at that time.

Q All right. All right, so -- and he also said at the same time she was oriented to person, place, time and situation, correct?

A Yes.

Q What does that mean?

A That means she knew who she was, where she was and -- and when she was.

Q All right, and that she was being examined.

A Yes.

Q And then you say and the situation's not nearly the level of scrutiny expected for an evaluation of possible cognitive impairment for a person in a position with significant responsibilities of a federal judge. Dr. Filler didn't find anything wrong after his examination of her in the way she spoke, in the way she presented herself, any of that. If no other signs -- well, I'll withdraw it. We spoke earlier of the fact that neurologists and other doctors refer people to you after they've examined them, correct?

A Yes.

Q All right. Well, if they examine them and they don't think anything's wrong with them that needs further testing, they don't send them to you, do they?

MR. PHILBIN: Objection, form.

A Yes.

Q So I also -- the other thing about page 5 that I want to ask you about, you state often that -- that Dr. Filler relied only on Judge Newman's

self-reporting of her various memory and all that, but didn't Dr. Filler review medical records?

A Yes.

Q And you've seen them.

A Yes.

Q And we'll discuss those medical records later, but he did review those, correct?

A Yes.

Q Now -- and he also had argued cases before her earlier in her life, correct?

A Yes.

Q And so he had at least some familiarity with how she responded in normal situations in the past, correct?

A That's what he said, yes.

Q All right. Do you have any reason to disagree with that?

A I would disagree with it from a -- the perspective of whether it's appropriate or scientifically valid to use that in your opinion, but of course, if he argued cases in front of her, he had experience with her.

Q Right, and let's talk about that argument then. One of your opinions is that having prior experience with the person in a professional setting is a detriment to deciding whether or not they've deteriorated some years later?

A If you're going to be the evaluator of that, absolutely.

Q Why?

A It -- it's standard practice in the field because it can impair impartiality and judgment, and there's countless sources about why it's improper for a -- someone who has a previous personal, social or business relationship with someone to be the evaluator.

Q We spoke earlier about when cases get referred to you by other neurologists or other professionals. Isn't one of the things we rely on general practitioners to do is when they see a deterioration in a patient they've had for a long time, to send them for further testing to specialists?

MR. PHILBIN: Objection, form.

A That's one thing that happens.

Q And the reason that's one thing that happens is because these doctors have long experience with a person and can have professional judgment when something has gone wrong with them, correct?

A They could.

Q And at least in that case, medical profession, and even you rely on that medical judgment because of their prior experience with this person.

A Yes. I would say that's fairly uncommon. Most of the time people don't have such a longstanding relationship, especially in modern medicine, and even then, they're still going to be given some kind of measure of -- of cognitive screening. I would say -- I would also add that if I had a practitioner saying three years ago I gave them the MoCA and they had a 29, now they have a 25, that is much more important to me than if that same neurologist said I've been seeing this person for 30 years, and they used to be a

lot brighter. That -- that holds much less weight in my opinion.

Q All right. All right, next, I want to go back to page 5 of your report. You say that Dr. Filler's handwritten notes indicate that Judge Newman denied having changes in face recognition, recalling words to songs and recalling landmarks. However, this was again based on her self-report only, and these type of impairments would not be likely to be prominent in the early course of neurodegenerative disease process, right?

A Yes.

Q And what is neurodegenerative disease process?

A A neurodegenerative disease is a disease that causes the brain to degrade in some way, and it's a progressive disease over time. The most common example is Alzheimer's disease, but there's many other ways.

Q And I take it from that that you'd expect that without some intervention or treatment, it would continue to degenerate.

A If it indeed was a neurodegenerative disease process, it would continue to degenerate despite treatment, but the time in which it's going to do that is -- is not standardized. It's different for different people.

Q All right. Then you say in the same part here, can you read overlearned information, what you say there, that last sentence in that paragraph? And please read it out loud.

A "Overlearned information, e.g., knowing landmarks, and behaviors, e.g., engaging in a debate, are much less susceptible to the effects of cognitive decline than is the processing of novel information, and this series of questioning was not an effective way to explore possible cognitive deficits."

Q I want to focus here, Doctor, on engaging in debate. How is engaging in debate an overlearned information?

A It's overlearned in a federal judge who's been practicing for 40 plus years, it's -- overlearned means it's a task that you've been

doing over and over and over again and don't really have to think about it.

Q On different topics though, correct?

A Correct.

Q So each debate could be on a different topic, and the person would have to know and recall facts in order to debate, correct?

A In that immediate time, I would -- I would have to only remember what you said in the last sentence you said and then say something. It's like saying well, someone could be driving different cars, but we're talking about their ability to drive, not -- not the car.

Q Okay. All right, let's go to page 6 of your report, next page, and find it. Oh, okay, the first full paragraph there, can you read the first sentence of that first full paragraph?

A "It is well known that individuals with higher levels of education are more likely to be able to mask clinical manifestations of cognitive impairment, potentially leading to faster objective decline once symptoms appear."

Q All right. So what is the date on Dr. Filler's examination of Judge Newman?

A August 24th, 2024.

Q Okay, so if this -- if this sentence is accurate, you would expect Judge Newman to be worse now if she was masking cognitive impairment through higher education.

A Possibly.

Q But not certainly?

A No, my sentence says potentially, but even August 24th, 2024 compared to now in neurodegenerative disease process time is a pretty short amount of time.

Q And what is a reasonable time to expect this kind of cognitive decline?

A Generally within a few years, but I've seen exceptionally bright people that are able to hang on to their sensible abilities for many years, so it's not a hard and fast rule.

Q Okay, and let's see. At the bottom of the boxed page I'll call it, you take issue with the idea that there can be a defense neuropsychology

report and a plaintiff neuropsychology report, but there's no defense CT scan and plaintiff CT scan, but isn't that correct?

A I took issue with him saying it's -- there's a defense neuropsychology report and plaintiff neuropsychology report, but there's -- there's not that for imaging, yes, I take issue with that.

Q Earlier, I was asking you about -- different question. You said that there could be two MRIs, right, and the radiologist looks at it could come to different conclusions about that MRI.

A Correct.

Q All right. Is that what you mean about the CT scans, but there's not a different CT scan for the defense and the plaintiff's side. They're both looking at it.

A There's also not different test scores for the neuropsychologists. It's the opinion based on that data. Whether it's a scan or test scores, it's the same thing.

Q All right. Well, in this case, let's take Dr. Rothstein. I take you read his deposition where he -- since Judge Newman's wrist was broken, he asked her to describe the clock hands?

A Yes.

Q All right, so that's how he provided the test when -- when her physical infirmity didn't allow her to do the written part of it. Wasn't that a valid use of the test?

A No.

Q Why not?

A Dr. Rothstein improperly and invalidly administered the MoCA. The instructions that he gave for the clock is not a standard way to administer the test, and it's not as though there weren't countless other tests available for him to use. So instead of choosing a different test that didn't require her to use her hand, he chose one and modified it with his own instructions. The only usable parts of that test are the parts that were administered in the standard way, but the overall score is not valid.

Q So you would agree that Dr. Rothstein has a long experience in this area?

A It appears so.

Q Okay, and -- and you know his testimony is that in all that experience, nobody who could verbally say where the clock hands were had ever misidentified any other part of that clock test?

A I saw him say that, yes.

Q Do you have any reason to disagree with that?

A Yes, I'm wondering what the scientific studies there are for that because again, he's administering a standardized test in a non-standardized way and trying to make a standardized conclusion from it. It's improper.

Q I see, so -- but earlier, you said that different clinical psychologists could use their clinical judgment in coming to a conclusion about a patient, right?

A Assuming that the data is valid, yes.

Q And let's see. Let's go to -- I want to go to 1.4. It's on page 12. So when you're

discussing -- so just in the first page, first full sentence there, you -- you have in the parenthetical neuropsychological testing. Is that the testing you described to me earlier, you went through a series of things you might do for Judge Newman, or is that -- what are you referring to?

A Yes, that's what I'm referring to.

Q Okay, and then later on down the page, you say that once again, you use neuropsychological testing as recognized as an essential component. Do you see that? It's -- right under section 1.4, the last full sentence.

A Yes.

Q Same type of testing?

A Yes.

Q Okay. Now, in the same part, you talk about Alzheimer's. You don't have an opinion that Judge Newman has Alzheimer's.

A Correct.

Q All right, and in the medical records you reviewed, none of the doctors diagnosed her with Alzheimer's.

A Correct.
Q All right, and on page 14, you use the examples of the FAA and the OPM regulations?
A Yes.
Q And you're aware that federal judges aren't subject to FAA or OPM regulations?
A Yes.
Q And in fact, they serve for life for good behavior?
A I'm -- I'm not an expert on that.
Q Okay, but if the Constitution says that, you have no reason to disagree with it.
A Sure.
Q All right, on page 16, here you discuss DSM-5-TR criteria. What is that? Why don't you explain what that is.
A So the DSM-5-TR, the TR is text revision, that's a group of criteria we use to diagnose different kinds of mental disorders.
Q How is it administered or how do you get one?
A It's a book. You can buy it at Barnes &

Noble, but it's used by primarily psychologists and psychiatrists to diagnose different conditions.

Q All right, and how -- how do you do that for an individual patient?

A Well, there's -- it depends on the disorder that you're looking for. So in pretty much any disorder, you're going to be doing an interview with someone, and then depending on the nature of what you're looking for, there may be additional information that needs to be done. For example, in the neurocognitive disorders, which I have on page 16, the criteria talk about administering standardized neuropsychological testing when that is at issue.

Q All right, and -- and -- so if you look at table 1.6.1 --

A Yes.

Q You have evidence of modest, mild NCD, or significant, major NCD, cognitive decline from a previous level of performance in one or more cognitive domains, and then you have the domains

there, right?

A Yes.

Q And then you say, "Concern of the individual or knowledgeable informant or the clinician that there has been a mild NCD or significant, major NCD, decline in cognitive function," correct?

A Yes.

Q And you need that -- that's usually what you have before someone's sent off to have a DSM-5-TR.

A I don't know what you mean by that.

Q In other words, why would you go about this? These are the criteria of why you would go about it.

A So if someone comes in my office, either they have a concern, their family member has a concern or their clinician has a concern or I have a concern.

Q And then the next two, a modest, substantial -- a modest or substantial impairment in cognitive performance, and it says preferably

documented by a standard neuropsychological testing, and what is that? Is that the MoCA or is that what you were discussing earlier?

A That's not the MoCA. That's going to be -- it's referring to more comprehensive testing that I was referring to earlier.

Q When someone's referred to you.

A Yes.

Q You discussed almost -- earlier in this deposition.

A Yes.

Q Okay. Well, in this case, Judge Newman, the three physicians who examined her in this case didn't have any of these concerns, at least Filler, Carney and Rothstein, and in the medical records, nobody referred her for these even with all the doctors she saw, correct?

MR. PHILBIN: Objection. That misstates the testimony.

A Am I answering that?

Q Yeah.

A I'm sorry, could you ask it again?

Q Okay, she's seen a lot of doctors in her medical records. None of them referred her for one of these, right?

MR. PHILBIN: Objection. Counsel, you're misrepresenting testimony.

BY MR. VECCHIONE:

Q All right.

A She was referred for a fitness for duty evaluation by a knowledgeable informant.

Q Who's that?

A Her employer.

Q Okay, who is on the other side of the V in this -- in this -- in this litigation, correct?

A Well, at that time, there wasn't a case, but -- but yes, and in reviewing some of the affidavits, there are several knowledgeable informants that have concerns about a decline in her function.

Q Okay, and all of those reliable informants work for the Judicial Council, right?

A I said knowledgeable informant, not reliable.

Q Okay.
A But yes.
Q Let's go to page 17. So section 1.6, "Dr. Filler's opinion about Judge Newman's ability based on his analysis of her activity during his oral arguments in front of her in 2019 and 2022 is subjective and improper. It is not a tested technique, has not been subject to peer review, has no known potential error rate and has no standards control its operation. It does not have widespread acceptance within the relevant scientific community," correct?
A Couldn't have said it better myself.
Q But you did say it, but you also earlier said that clinicians use logic in their -- in their assessment, right?
A It can be and often is a part of the diagnosis, but it can't be a -- a large part of it. It can't be a very significant part of their reasoning.
Q And in your earlier testimony, you also said that there's no large body of scientific

evidence of exactly how all the federal judges relate in cognitive ability, correct?

A Can you tell me more what you mean by that?

Q Yes, I asked a question about the judges being like FAA with pilots and OPM, has various standards, and the judges didn't come under any of those, correct?

A Yes.

Q And then I asked whether or not you're comparing Judge Newman to Judge Moore or the high-level judge or the low-level judge, and I think what you said, and we can go back and check it, but it was something in the nature of I wish we had a database, and we don't have such a database, do we?

A Right, it would be great if we had that. We don't. I'll say I've done a lot of fitness for duty evaluations. Many of them have not been about the same job. So essentially each time there's a new job that I'm looking at, and each time I don't need to compare the person to other

people of their same job. I need to do an interview and administer tests to see if that individual has deficits that affect their job.

Q My point being that given the nature of what there is as far as federal judges go, isn't the experience of actually arguing before a judge and seeing the written opinions reasonable use of what data you have to make a judgment as to fitness?

A Pretty much any publication about what a fitness for duty evaluation is would disagree with that.

Q All right. And let's go 1.7, right after that, page 17. Once again, you say, "With regard to possible memory problems, Dr. Filler primarily relied on Judge Newman's self-report." Now, again, you say that, but let's take a look at what Dr. Filler relied on. He relied on the medical records he reviewed, correct?

A He reviewed medical records, yes.

Q Right. He reviewed -- he relied on his interview with her on that day, correct?

A Yes.
Q And then he relied on the previous experience with her, which you don't -- you don't think that butters any parsnips, right?
A Correct.
Q So then you have -- and then you have the scans. So you've dismissed some of those, but he's not just relying on Judge Newman's self-report on these things, is he?
A With regard to whether or not she has memory problems, which is what the sentence says.
MR. VECCHIONE: Okay, all right. It feels like about an hour --
MR. PHILBIN: Yeah.
MR. VECCHIONE: -- if you want to take a break?
THE WITNESS: Sure.
MR. VECCHIONE: Is that good?
(Recessed at 10:07 a.m.)
(Reconvened at 10:20 a.m.)
BY MR. VECCHIONE:
Q Let's go back to page 7 of your report.

So on page 7, you go through some limits of neuroimaging, like the first one says, "A brain abnormality does not necessarily imply dysfunction. Most current data allows only correlation, not causality be inferred," right?

A Yes.

Q Now, why in this case for fit for duty, why does causation matter? Isn't the question whether she's impaired or not? Isn't that the question of a fitness for duty report?

A Well, I would say yeah, neuroimaging doesn't have a particularly good role in -- in this evaluation, but specifically when we're looking at neuroimaging, there could be a lesion that's been there for 30 years, and in that case, that is unlikely to be contributory to the problem, versus something that's new.

Q But whether or not she's -- in this case Judge Newman is fit for duty is the question, not what the cause of it is, if there is one.

A The question is fit for duty, but it's a little more nuanced than that because let's say

she has cognitive impairment due to a B12 deficiency, which is a very common reversible cognitive impairment in the elderly. That is a different answer than there's significant signs of a neurodegenerative disease, which is what other testing could show. So that's an important distinction because one of them is essentially fixed by giving someone a vitamin, and the other is unlikely to improve.

Q Okay. Let's go back -- let's go back to the DSM-5-TR criteria.

MR. PHILBIN: Page 16?

BY MR. VECCHIONE:

Q Page 16. And you use this in your practice for diagnosis?

A Yes.

Q Okay, and -- and are you aware of some in your profession who do not give great credence to the DSM-5-R criteria?

A Yes.

Q Do you know why that is?

A It depends on the person. I know where I

did my residency at Johns Hopkins, a lot of people did not like or use the DSM a lot, especially in psychiatry. However, a lot of people on the committees from the DSM also came from there, so you know, they -- they contributed to the creation of the criteria. I think some of the problems with the DSM-5, and it's certainly not an infallible document, but some of the problems with it are when it can be used as a checklist, and in that case, it would be being misused, and especially in -- in forensic settings, they even have a cautionary statement in the beginning of the DSM-5 that says be careful using this in forensic contexts.

So yeah, I'm aware. It's certainly not without criticism, but the -- my point in including it is that we have standard ways of determining cognitive impairment, and that's not only the DSM-5. In my report I discussed several other what are called consensus criteria where a group of experts in the field get together at a conference and create a list of -- of criteria.

That's very analogous to the DSM-5 but a little different.

Q All right. What do you mean, forensic, when you -- when you use that term in this context, what are you talking about?

A Anything related to courts.

Q And I'll just -- with that caveat, I'll just go on to take a look at this. Number 2, section 2 of the 1 point -- 1.6.1 that you've put in here, it says, "After a modest or substantial impairment in cognitive performance," quote, "Preferably documented by standardized neuropsychological testing, or in its absence, another quantified clinical assessment." What do you take that to mean?

A That means something like a cognitive screening measure. So you -- it's not saying you can't diagnose someone with mild cognitive impairment by giving them a MoCA, for example, but if you're going to do so in a forensic setting or an official setting like this, you're going to want to have the preferable part of this, which is

the documented standardized neuropsychological testing.

Q Okay, and we've also been talking today, there's been talk about cognitive decline. Could a person be subject to cognitive decline and still fit for duty?

A Yes.

Q And is there some measure of where that line is when the decline becomes unfit for duty?

A Well, I'll -- it's analogous to the line when it becomes major versus mild cognitive disorder, and that line is that the person has difficulty performing daily tasks by themselves, and so from -- if we translate that into the work domain, it's the person has significant problems doing things that they need to do for their job, whatever that is.

Q All right. We discussed section 1.6 of yours, it's on page 17, a little bit earlier, but you have given great credence to the various affidavits in this -- in this matter. If Dr. Filler had not done an analysis and report,

but had said I'm a lawyer, I've been before her on all these dates, she seems very sharp, would that be criteria that you'd look at for cognitive decline?

A If he was the physician charged with evaluating her, I think that's improper. If he was one of her co-workers or if it was another source of information, so if it was just an affidavit saying I've worked -- I've argued cases in front of her before, she still seems sharp to me and I'm not the evaluator of it but that's it, I would take that into equal account, but it's not a valid way to objectively assess someone from a physician standpoint.

Q So Dr. Filler puts on his lawyer hat and he's doing lawyering in front of her. That would be a data point you would use, but your criticism here is that he's the evaluator.

A Yeah, and I guess my criticism would be why is that being written as well. I mean, the affidavits of the co-workers make sense because they're people that interact with her every day.

If he just volunteered to write an affidavit that -- it's a different process.

Q All right, and you didn't see any declarations or affidavits from any of the judges on the Judicial Council, did you?

A Not that I recall.

Q Seem odd to you?

A I don't know what I don't know. It didn't strike me as odd.

Q Okay. Would their declarations as to what occurred be helpful to you?

A I don't know.

Q On page 18, you go about careful history taking, and in the middle, you say, "The lack of awareness of illness is indeed a known symptom of Alzheimer's disease and other dementias and is referred to as anosognosia."

A Yes.

Q All right, but you don't have an opinion in this case whether Judge Newman has that, do you?

A Correct.

Q And once again, we come to the various affidavits that were compiled in this case. Do you know how they were compiled, who wrote them?

A I don't.

Q Does it matter for your analysis who's creating them and how they were created?

A I can't rule that out, but nothing comes to mind about why.

Q Okay, all right, but you would agree with me that every one of those declarations was put in by someone who works for the Judicial Council or reports to Judge Moore, correct?

A That's standard in a fitness for duty evaluation. The way the evaluation works is the employer has a concern based on something that happened, and they send me information. It's usually -- for example, I just had a fitness for duty evaluation yesterday, and I saw the person, I interviewed them, I gave tests, and then I also am asked to speak to her boss, someone at HR and another co-worker, so I'm trying to get multiple sources of information. That's standard.

Q All right, and in each of these affidavits though it's standard for the person who can fire or stop the progress in employment of all the people putting in affidavits to gather those affidavits?

MR. PHILBIN: Objection.

A I can't see another way to collect them.

Q Okay, all right, all right. So in this case, there were some affidavits from I.T. people?

A Yes.

Q All right, and some clerks?

A Yes.

Q All right. Is it your understanding that Judge Newman appears and interacts with large groups of lawyers at conferences even today?

A I have no knowledge of what she does.

Q Okay, so you haven't obtained the views of any other attorneys who work with her other than the affidavits in this case.

A Correct.

Q So other than Dr. Filler, who we've talked about, you haven't seen any statements from

lawyers who were before her.

A Correct.

Q All right, and you -- do you know [redacted] was deposed under oath in this case, her long-term clerk?

A I didn't know that.

Q And if she had stated that she hadn't seen any changes in cognitive abilities of Judge Newman over the last five years, would that affect your opinion at all?

A Possibly. I would take that into account with other information.

Q All right. All right, so I think we've gathered -- let's make sure we're clear. You don't know how these affidavits and declarations were gathered.

A Other than that they were gathered by the Special Committee, I don't know anything.

Q So you don't know the level of pressure that was put on anyone to do this?

A No.

MR. PHILBIN: Objection.

BY MR. VECCHIONE:

Q The level of pressure, if any, that was put on anyone?

A I don't know that.

Q And does it matter to your opinion at all?

A I would say no because in the absence of those affidavits, I would still have my -- my same overall conclusion.

Q Simply from the medical records?

A My -- my conclusion is that there's insufficient -- there -- there has not been a sufficient evaluation done to make the conclusions that the doctors that have made opinions have -- have made.

Q Okay, all right. And I just want to get to this idea. I'm not saying you've seen any of these or that any exists, but how about people who frequently see the subject in social functions, is their testimony or observations important?

A It could be. When I do these evaluations, I typically am not charged with seeking out the information. I'll be given people to contact.

Sometimes it is related to social abilities. For example, one of the -- the co-workers that I'm supposed to talk to about my evaluation from yesterday is mainly talking about how the person acts in a social setting.

Q Okay. All right. Before you did your report, then let's talk about that, did you ask to review anything in particular when you were doing your report? Did you say I want to say this, this and this, and what were those things?

A No, it was not my role to ask for things. It was -- in the beginning, I'll say please give me all, you know, relevant information that you want me to opine on. If I were evaluating her, then I would be in the role of asking for information, because then it's -- it's me saying here's what I need to make my conclusion, but in the situation for this report, it was here is the information, give your opinions on the information.

Q So if I can boil that down, your charge here was to see whether these other physicians had

performed proper fitness for duty examination, and not to do one yourself?

A Well, but that wasn't the specific question. The specific question --

Q What was the specific question?

A Yeah, it was read these over and let us know if you have an opinion about these evaluations that have been done.

Q Okay. Let's go to page 19. At the -- I want to direct your attention to the bottom of the square here where you go through various things that can cause cognitive impairment, if it exists, other than dementia, and I want to go through, and I believe some of these would show up on scans if they were present, and so not depression, not adverse effects of medication, drug or alcohol abuse. Space-occupying lesions, those would show up on scans, or we'd hope that they would.

A Almost definitely, yes.

Q Normal pressure hydrocephalus?

A That would very likely, almost by definition would show up on a scan, yes.

Q Okay. Hypertension would be tested in other ways, but it probably wouldn't show up on the scans.

A Correct, the cognitive effects of that would not show up on a scan.

Q All right, and I'll go -- now, then you go through Dr. Filler stated that Judge Newman was prescribed medications for several conditions, and you go through it all here, has a history of chronic kidney disease, and then you say which are all associated with a high risk for cognitive impairment, and all these are in her medical records as well. We can look through those and see that these things are in there, correct?

A Yes.

Q And none of the physicians who put together those medical records diagnosed her with cognitive impairment from any of those things. Would you agree with me there?

A Someone diagnosed her with memory impairment, but it's unclear where that came from.

Q All right, and it resolved.

A All I can say is that it eventually was not on her list. I don't know what the nature of it was, how it resolved, who took it off. I just know that eventually, it was taken off the list.

Q Okay. Another thing -- well, you're aware that during the time Judge Newman was being accused by the Judicial Council of cognitive impairment, she wrote a dissent that was upheld by the Supreme Court?

A I'm not aware of that.

Q But from let's say 2022 to 2023, are you aware that she was writing opinions?

A Yes.

Q And you're not aware that one of those opinions was upheld by the Supreme Court, reversing some of her colleagues?

A Well, now I am.

Q Does -- does that strike you as a data point for cognitive impairment or the reverse?

A When I do fitness for duty evaluations, I don't say show me your latest work product because I don't know what -- what went into that product.

I don't know who was helping the person, I don't know whether it was hardly changed from a previous document. I'm not saying that this is what she did in this case, but what I'm saying is what I can do is perform an objective test where I can take her score, compare it to known groups of other people with high levels of education and say here's where these abilities are, and that is a much more scientifically valid way to assess someone's abilities than to say show me a work sample, because there's a lot of sources of error in the work sample that could be there, including who did a lot of the work, who did the writing. Maybe she was the one that -- that had the main ideas but she didn't do a lot of the writing. That would still be important.

Q Now, in performing a fitness for duty exam, if you were to do one, how would you create the duties of a federal judge? Where would you get that information? How would you get that assessment?

A If -- preferably a standardized document

that had a job description saying here is what needs to be done, and then alternatively or in addition, it would be from the employer saying here is the specific things we're having concerns with because the most important parts are what are you having concerns with, and it's not my job to decide if that's a essential function of the job, but I can decide if there's a deficit related to that concern, so I can give that information back to the employer because I don't necessarily decide if someone goes back to work. I give an opinion about whether they have deficits that could get in the way of that, and it's up to the employer to decide what to do with it.

Q All right, but in this case -- so you would get the functions -- well, how about this. Have you ever done a fitness for duty assessment of a federal judge before?

A A federal judge, no.

Q All right. What kind of judge have you done one for?

A I don't want to get into the specifics --

Q Don't have to say names or anything.
A Okay.
Q But just generally in this area.
A I would say a state-level judge.
Q Okay. One?
A Two.
Q Okay, and where did you gather the duties of those jobs from?
A I was given a kind of generic job description, and I supplemented that with the possible concerns that were relating to the referral.
Q But were they created by the judiciary or whoever this was?
A Possibly. I mean, they were also kind of common sense.
Q Okay.
A You know, that this person may have had problems remembering what something -- a basic legal thing was during a testimony or something like that.
Q Okay. All right, and I'll just ask, on

page 22, conclusions from section 1, this is a summary of your conclusions on Dr. Filler's report, correct?

A Yes.

Q And then you talk about the additional materials, which is primarily -- let's see here. All right, these are the various affidavits that you examined. Did you examine any declaration by a clerk named Horowitz?

A Can I check?

Q Yes, oh, yes, of course.

A I don't see that listed here.

Q Okay, all right. And except -- which we'll get to. Except for the medical records that said some memory impairment, are you surprised that Judge Newman's medical records don't include any cognitive impairment of the sort that was compiled by the Judicial Council?

A Not necessarily.

Q But you sometimes would be.

A Well, I'll tell you I've had many cases where someone is referred for a fitness for duty

eval, and they have no indications at all from long medical records of having anything, and then they do, and there's other ones where there are indications. So it doesn't really tell me much.

Q Okay, but you'd agree with me that Judge Newman saw a lot of doctors over this two- or three-year period.

A I'm not sure what a lot means.

Q More than four?

A Yes.

Q All right. And so how would you respond to the criticism that you're relying on the declarations created for litigation as more probative than her medical records?

A Well, I wasn't charged with doing an evaluation of her, so in that sense, I don't have control over what information I do and don't have, and I wouldn't say I gave it -- I said it's more probative. One thing about the medical records is you can't find what you're not looking for, so if she's not going to a doctor due to concerns about cognition, no one's going to be looking for it or

commenting on it.

Q And does Judge Newman strike you as someone who's not gone to doctors?

A I don't know Judge Newman.

Q But you've seen her medical records. There's a lot of doctor visits, aren't there?

A Well, you know, if you -- if you go get one surgery, you're going to end up with 800 pages of medical records.

Q Okay.

A So I can't charge -- I can't say that just by the number of pages of medical records.

Q All right. All right, let's go to Dr. Rothstein, which is at page 24. And once again, you start that -- and your opinion is that Dr. Rothstein's report does not effectively rule out the presence of possible cognitive decline, right?

A Yes.

Q But shouldn't -- before a federal judge is removed from a lifetime appointment, shouldn't cognitive decline have to be proved rather than

she's removed before it's proved?

MR. PHILBIN: Objection, outside the scope of his testimony.

A I'm not an expert in that. What I would say is that the exact nature of -- of what's happening here shows that she does need more comprehensive testing. I talked about this in my section with Dr. Filler, but if his scans said I'm seeing significant signs of dementia, and therefore, she can't do her job anymore, I would have written essentially the same section saying you can't just give a scan and say she can't do her job. So you can't say she can or can't just by a scan. Similarly, in this situation, you need more of a comprehensive evaluation. If -- if I was told that she was going to be removed from her office just because of a MoCA score, I would say that's improper.

Q So the first thing here in this section, page 24, you say -- you described her medical history as relevant for a pacemaker, hypertension, hyperlipidemia and hyperthyroidism. As described

above, these conditions can be related to cognitive impairment in their own right, but once again, in the medical records, we don't see any doctors diagnosing her with any decline caused by any of these things.

A There was the one mention that we talked about.

Q Which we'll get to.

A But otherwise, no.

Q All right, and we've talked about the MoCA test he -- he administered, and you explained your criticisms of that. As a psychological matter, isn't it more difficult to picture a clock in your head and say where the hands are than to draw it out?

A No.

Q It isn't. So -- sure is for me. So you're saying that one -- is one more difficult than the other or are they equal?

A The most appropriate way to assess a clock is to have --

Q I didn't ask you that.

A -- someone to draw it.

Q I didn't ask you that. I asked you as a matter of mental acuity, is it easier or harder to picture a clock in your head and say where the hands are than to draw when asked to.

A I don't know the answer to that. I don't know if there's a scientific answer to that. What I do know is that there's a scientifically way -- a scientific way to measure someone's ability to draw a clock that's been used for decades, and it's always by someone drawing a clock.

Q And if someone couldn't draw it, what would you do?

A I would do a different test that didn't require them to draw.

Q Such as?

A Well, I don't usually use a lot of the cognitive screening measures. If I was just limited to a cognitive screening measure, there's an abbreviated version of the MoCA that does not use any drawing. For example, they have a version for blind people. There's one called the

Mini-MoCA, which could essentially have done most of the things that Dr. Rothstein did in his version of the MoCA, but it was a more standardized way, and if you applied Judge Newman's score to the Mini-MoCA, it would have been below, as in worse, than the threshold for cognitive impairment.

Q All right. The other thing that Dr. Rothstein used in his analysis was -- in my opinion in his opinion was the legal analysis of Judge Newman's opinions over time by Mr. Michaels. Did you see that?

A I don't recall that.

Q All right. And you haven't seen the analysis by Mr. Michaels of Judge Newman's opinions over time?

A If it's in one of the reports I reviewed, I have seen it. It's not coming to mind.

Q Okay. Well, let's go to Dr. Carney. All right, and you described Dr. Carney as a forensic psychiatrist under 2.3 on page 28?

A Yes.

Q Can you -- what's a forensic psychiatrist?
A It's a psychiatrist that applies knowledge of psychiatry to something related to the courts.
Q Okay, and if you page -- if you turn to page 29, you note that Dr. Carney was concerned about advanced educational attainment masking and verbal fluency masking her -- a possible cognitive defect?
A Yes.
Q All right, and then she applied the Modified Mini-Mental Status Exam, right, 3-MS?
A Yes.
Q Now, do you have any criticism of the score that she achieved on that?
A No.
Q You merely think that it is not the proper diagnostic tool for getting around those problems?
A Yes.
Q Why's that?
A Well, for example, this is the kind of test that's used in nursing homes. That's the level of decline that someone is that they're

going to perform poorly on this test. So it's testing things like can you count backwards from five, do you know where you are, point to your shoulder. That's not the kind of cognitive problems that have been brought about by the concerns about Judge Newman.

Q So it says a screening measure of this type is not appropriate for definitive and comprehensive exploration of cognitive difficulties, but isn't Dr. Carney trying to see if there are cognitive difficulties in the first instance?

A She -- she claims to be doing that. I don't know what her intentions are, but a 3-MS score that's not impaired does not necessarily give someone a clean bill of cognitive health with regard to the fitness for duty complaints.

Q Now, but in the 3-MS test, they did test her -- Judge Newman's memory again, right, and -- and once again, you don't disagree that the scores that she achieved are the scores she achieved.

A Correct, it appears to be -- it appears to

have been scored correctly, and I don't have a reason to believe it was administered incorrectly.

Q Okay. So once again, the 3-MS may be appropriate for a general patient in a neurology office but is insufficient to administer this measure in place of comprehensive neuropsychological evaluation in the present matter, but that's only true if you believe the affidavits that there's something wrong with Judge Newman, right?

A No.

Q Why?

A It's not true because it's a insufficient amount of information to answer a question. So if you're saying I broke my ankle because of a workplace fall, and then you go to a doctor and they -- they say can you move it, and they said yes, I can move it, therefore, it's not broken, that's not enough information to say the person does or does not have that condition. So it does depend on the context.

Q And what's the -- what's the purpose of

these screening tests? Isn't -- I'll withdraw. Isn't the purpose of these screening tests to see if further evaluation's necessary?

A In general, yes, but the context also matters. So we all remember taking those terrible COVID tests, right? If you were someone who had a very severe medical problem, if you got COVID, it was probably going to kill you, you're not just going to take that rapid test at home and say whew, that's fine, I don't have it, if you were exposed to someone. You're going to want to do the full PCR analysis, right? So the context matters.

Q All right, and you also note here on page 29, Dr. Carney also administered the Alzheimer's disease clinical dementia rating. Did she perform that test accurately?

A I -- same answer as before. I have no reason to believe that -- that she didn't. However, the -- the way that the -- the clinical dementia rating, the CDR works is it's essentially all opinion. So do you think there's evidence of

X, Y and Z, and if they're all no, it's a score of zero, which is what she gave her.

Q And -- and then you say, "The 3-MS can be used for screening, but a definitive diagnosis of cognitive impairment requires additional evaluation." How about a definitive diagnosis of no cognitive impairment? What does that require?

A The same. I can say it's very very common in my office to have someone to come in and say hey, I went to my neurologist, they gave me one of those tests. I missed one memory item but they wanted me to come in anyway, and then lo and behold, they have significant cognitive impairment. So even though they passed that cognitive screening measure, they have severe cognitive impairment on the tests that can be adjusted for things like their educational attainment. So the -- the screening test is just that. It's a screening. It's -- it's wrong a lot of times, and that's just the -- the nature of it.

Q All right, but we do have in this case the Rothstein MoCA, we have these tests that were

provided. I think in the medical records, there's a Mini-MoCA, and nothing came of it. All these screening tests, whatever your criticisms are, you would agree with me that none of the doctors -- put Rothstein aside for a second. None of the other doctors said go get more testing from any of this.

A Well, I don't know whether she had pain in her finger or not too because if she's not going to the doctor saying there's pain in my finger, they're not going to look for it or comment on it. So absence of evidence is not evidence of absence. I can't make those conclusions based off of what's not in the records.

Q Okay. All right. So until we get to your second report, the three doctors who had examined her, Carney, Rothstein and Filler, all spoke to her, all right? All of them had the view that within reasonable degree of medical certainty, that she was not suffering cognitive impairment, correct?

A Correct.

Q And you haven't examined her. You've only examined their reports, right?

A Correct.

Q And I think I've -- I think I've demonstrated, none of the medical records recommended that she take any further tests for -- for memory impairment or any other mental disease, correct?

A I think that's a little misleading. The records didn't say we don't recommend further testing. The records just don't -- aside from the memory impairment being on her problem list and then taken away, there's not much mention on there.

Q All right. Well, that could be because she got enough B12, right?

A It could be. It also could be because it was never brought up.

Q Okay. Let's take a look at your supplemental report. I think it's Exhibit 2. In my prepared remarks, it's Exhibit 3, but I don't think that's right. Give me a minute. All right,

is that Exhibit 2, your supplemental report?
A Yes.
Q Okay. Now we're on the right page. Okay, so here you explain that you hadn't seen the medical records prior to your supplemental, right?
A Yes.
Q And then you were given the set, and you prepared this second report, and you give the Bates stamp numbers, right?
A Yes.
Q All right, and then you go through which ones you think are -- that were not properly assessed by Dr. Filler?
A Yes.
Q All right, and on page 2 of that report, you note memory impairment, and in footnote 2, you say where that is. Do you know whether that was self-reported or something observed by the doctor?
A I don't.
Q All right, and you do note that it resolved on 11/5/2023.
A It was said to have resolved. I believe

in a later medical record that I've seen since writing this report, it had still been on there.

Q Did you finish?

A Yes.

Q Okay. Do you -- do you have any view on what the extent of that memory impairment was?

A I don't. I know the way that problem lists work is that whatever physician is seeing the person can add and remove at any time, so sometimes people will take it upon themselves to clean up the problem list and they'll add and remove things, so it's plausible -- I'm not at all saying this happened, but it's plausible that a patient can say oh, that was just added one time when I had a little blip, that wasn't anything, and then the provider removes it.

So the possibility that that could happen makes me question whether it actually resolved or what, but I don't know the nature of it.

Q All right, and then you notice certain comments in the medical records of being forgetful, right?

A Yes.

Q And once again, you don't know the nature or level of any forgetfulness?

A No, I can surmise that it was significant enough for the person to put it in the mental status exam, but that's all.

Q All right, and then you have syncopal episodes. What are those?

A A syncopal episode is fainting.

Q Right. The -- under significant unintentional weight loss, you speculate that forgetting to eat is a sign of mental -- can be a symptom of mental decline.

A Yes.

Q Is there any evidence that she forgot to eat?

A The evidence is that she said she didn't eat, but no, there's no evidence that she forgot to eat. I wasn't implying that there was.

Q As far as we know from the medical records, no doctor recommended anything, had any follow-up about this mental impairment. Does that

impact your judgment on its nature or severity in any way?

A No.

Q Why not?

A I don't know the -- the nature of how it got on there, how it was removed. Again, if -- if you're not asking for people to look for something, they're generally not going to look for it, so I can't make definitive determinations about that.

Q All right, and -- and then there's notations about a legal guardian or caregiver, including emergency contact. Does the fact that someone has an emergency contact mean that they can't take care of themselves?

A No.

Q All right. Why did you mention that?

A I thought it was relevant that it was all the same person, but you're right, that doesn't imply that they can't take care of themselves.

Q All right, and you read the Rothstein's report, Carney report and Filler's report.

A Yes.

Q And in all of those cases, they spoke to Judge Newman alone when they did their examination, correct?

A I presume so.

Q Let's go to concern about dressing inappropriately for the weather. This was one incident, right?

A Yes.

Q Do you know what Judge Newman was suffering from -- withdrawn. Do you know what Judge Newman was suffering from on that date that might lead her to dress warmly?

A It was after a hospitalization for sepsis.

Q I have to get a pronunciation. All right, on that day, did you see any medical records that she was hypotensive?

A I don't recall exactly.

Q What is hypotensive?

A Low blood pressure.

Q And what -- can that lead to chills?

A It can.

Q And it could make a person feel cold?
A It can.
Q All right. So did you see any other indication that Judge Newman was dressing oddly in any other day?
A Not that I can recall. I do think it's important to add that she didn't feel like she was overdressed. That shows the lack of -- a possible lack of understanding about the problem of it, not just -- I guess the alternative is she could just say I'm really cold now, and instead, she said I don't think I'm overdressed, but I can't read too much into that. I haven't seen her.
Q Okay. And once again, we have the kidney disease, that she's had kidney disease for some time according to the medical records?
A Yes, advanced kidney disease.
Q All right, and it's treated by her doctors?
A Yes.
Q And once again, the medical records don't anywhere diagnose her with cognitive impairment

from her kidney disease, correct?

A Right. I don't know that they rule it out either. I don't know if it was looked for.

Q All right, now, let's talk about the mini-cog administered to Judge Newman. This was administered on 10/31/2023?

A Yes.

Q All right, and as you said, it wasn't available for review, but in any event, nothing indicates that whoever took it, or when they then referred her for further analysis, correct?

A No, I don't think so, so yeah, it indicates that there was some kind of record that's not here, but as I also mentioned in that paragraph, it's -- it's incorrect 33 percent of the time, so a third of people that take that and get a normal score go on to have cognitive impairment.

Q Okay. Is that each time? Like in other words, here's my question. So she had a mini-cog on 10/2023. She's had the MoCA by Rothstein, she's had Carney's examination. Are they all off

a third?

A No, each test, when it's given in a standardized way, has its own error rate, and that's why it's really important to give tests in a standardized way. So Dr. Rothstein's MoCA, I don't have an error rate for it because he made up test instructions, but what you can surmise from the score of it is it is indicative of possible impairment. It's below that threshold of -- of normal, and the other tests that were given, including the -- the mini-cog and the 3-MS, they are so basic that a normal score on them does not rule out something remotely serious going on.

MR. VECCHIONE: All right. All right. I want to take a break to mark the medical records, so we'd like ten minutes and I'll --

MR. PHILBIN: Okay.

(Recessed at 11:20 a.m.)

(Reconvened at 11:44 a.m.)

(Deposition Exhibit Numbers 5, 6, 7, 8 and 10 were marked for identification.)

BY MR. VECCHIONE:

Q So we talked a little bit about the various examinations you'd give if you were doing a report on -- on fitness for duty in this case for Judge Newman. Would you ask for anything, any statements from other co-workers, were you to do such an evaluation?

A I might have a -- kind of a blanket question to the employer saying, you know, please direct anyone that has relevant information to me, but -- but I don't know all the employees, so --

Q Right.

A -- I don't know what to ask.

Q All right, but it could be her fellow judges, for instance.

A It could be.

Q All right. Would you agree with me that we have insufficient data to determine whether there's a cognitive decline of anyone in this room?

A Yes. Well, I'll -- I have insufficient data. I don't know what --

Q Okay, fair enough. So we don't have to go

get psychological testing, do we?

A I don't know.

Q Okay. What is the trigger level that would require us, or recommend us to go do those things?

A It could be from -- in a fitness for duty aspect, it could be from three areas. It could be the person is feeling like they're having a problem, which I've had referrals like that before. It could be a co-worker or boss or something else has a worry about a problem, and it could be the employer itself having a concern about a problem, but some kind of documented concern.

Q All right, and as for the type of testing you do, let's say a comprehensive test, is there a score on it or a level when someone is fit for duty? How do you create that line?

A It really depends on the nature of their job. So for example, the -- I'll use an IQ test because that's something everyone knows pretty well. If someone is coming up with an 80 on the

IQ, which is on the lower side of normal, but their job is working in a factory, and also shows that there hasn't been a decline, that might not be significant. But if a physician has an 80 IQ, which I've also seen before, that is evidence of significant decline, and that has more bearing on their ability to do their job.

Q Is there any way -- I'm going to get a neuropsychology exam. Is there any way I can know beforehand how I'm going to pass the test?

A It's pretty difficult to do that with a neuropsych exam because there are so many tests. It's pretty easy to do that with something like the MoCA or the 3-MS. They're publicly available. You know, you can go and see what the questions are. You can even know the words that they're going to ask you, so that is easier to prepare for. It's more difficult to prepare for so many tests.

Q All right, God willing and the creeks don't rise, these are all in order. So I'm going to hand you what is called PN -- you've reviewed

them before you. This is the Bates stamp number, PN 001230 that I've labeled Exhibit 5. What was the number at the bottom?

A 1230.

Q Oh, good, all right, good. All right, and could you just page through it and just generally describe it to me?

A These are medical records from One Medical from her cardiologist, [redacted]. It's [redacted].

Q And what's the date?

A The date is December 11th, 2023.

Q All right, and I'd like you to turn to page -- it says 3 of 6, but it also has a PN number of 1233 on the bottom.

A Okay.

Q And if you look under neurological, what is neurological?

A Brain.

Q It says general, no focal deficit present. What does that mean?

A That means the cardiologist is saying

there's no obvious signs of a specific problem in her brain.

Q Is that -- how -- what do you do to make that determination?

A Usually they're talking about a cranial nerve sign, so for example, are their eyes tracking where they're supposed to be or things like that. I don't know exactly what we did. I'll say in a lot of mental status exams like this, you will come across a term WNL, which means within normal limits, but the joke in medicine is that it's called we never looked because when people put normal things in mental status, it doesn't necessarily mean we looked at everything and it's normal. Often it's meaning there's no indication that I'm seeing anything abnormal. But I don't know for sure. I don't know whether that happened here, but just to give you a sense.

Q All right, and mental status, can you read that for the record?

A She is alert and oriented to person, place and time, mental status is at baseline.

Q All right, so I think we've talked about alert and oriented to person, place and time. I think you've described that as knowing who she is, where she is and what she's doing?

A Yes.

Q All right, and what's mental status at baseline? What is your understanding of that?

A I don't think that's an official term. My understanding of that is she seems the same as always.

Q All right, and under psychiatric, do you see that?

A Yes.

Q Mood and affect, what's mood and affect?

A If either -- mood is often her stated mood, so depressed, normal, okay, and -- and affect is how they appear as far as their mood.

Q All right, and it has mood, normal?

A That's what it says.

Q And behavior, normal?

A That's what it says.

Q All right. And then again, if you turn

the page, you see instructions at the end, what she's supposed to do?

A Yes.

Q None of those are recommendations for further analysis of her mental state, correct?

A Yes.

Q So on that date, no -- no indication from this medical record of mental impairment, right?

A Right, the cardiologist did not report any indication of cognitive impairment.

Q All right, the next one is Exhibit 6, prelabeled, and same, if you could describe what this medical record is and the date of it?

A This is records from [redacted]. The date is July 11th, 2024.

Q All right, and if you turn the page to the second page, which is PN_0982 --

A Okay.

Q And once again, we go down to neurologic, can you read what it says there under neurologic?

A No focal motor or sensory deficit. Cranial nerves intact, normal gait, no abnormal

mental status.

Q All right. There's the cranial nerves you discussed earlier. What is that?

A What is the cranial nerves?

Q Yeah.

A They are nerves that are part of the brain stem that have very easy to measure signs. So I mentioned the one with your eyes following a pen. There's also ones related to anything from balance to eye opening to whether there's symmetry in the person's facial muscles, things like that.

Q So this is a little more detailed. It looks like they checked here.

A Yeah, a lot of modern medical records have something that you just check boxes or leave checked or don't uncheck. I don't know the thought process that went into this or anything.

Q And for leave checked, that could also be for memory impairment, right?

A Not usually. Usually the way a medical record works is you have to put in what's called a pertinent positive. So by default, most things

are going to be negative or normal, and then you have to change it, but I don't know for sure what went on in this person's --

Q All right, and under psychiatric, what does it say?

A Oriented to person, time and place, mood and affect appropriate to situation. Appropriate judgment and insight. Memory intact.

Q So at least at this time, this physician believed that her memory was intact, correct?

A That's what they said.

Q And again, under instructions, it's under plan in this one on the last page --

A Okay.

Q Once again, no checking of her mental state, no further recommendations?

A Yes, this doctor did not indicate that.

Q All right, and then it says send a copy of the note to, and it has about four doctors there.

A Yes.

Q And two -- three of them are referring doctors?

A Yes.

Q All right. So at least this report was sent to a number of her physicians.

A Yes.

Q You can put that aside. I'm going to give you what's been pre-marked Exhibit 7, and can you again describe for the record what this is?

A These are One Medical records of Judge Newman. The date, it says summarization of episode note, January 30th, 2024.

Q Okay. In this one, I'd like you to go to -- it's hard to count the pages. I would just go to the bottom, it says PN_001175.

A Okay.

Q Can you read what it says under neurologic?

A Awake, alert and oriented to person, place and time. Cranial nerves 2 through 12 are grossly intact. Sensation to light touch intact, no focal motor deficits, strength and sensation are intact without any focal deficit.

Q All right. Well, I think you've told us

about a person, place and time. What does awake and alert mean to you?

A She was not sleeping, and she was attending to whatever was happening.

Q All right, and I'm not -- what are cranial nerves 2 to 12? Do you know? What are they?

A Well, it's leaving out cranial nerve 1, which is the olfactory nerve, which is smell.

Q Okay.

A Sometimes they will take like coffee or soap and say what is this.

Q Okay.

A But usually they don't test it.

Q All right, but are there -- is that how many there are? Twelve?

A There are 12, yes.

Q All right. Sensation to light touch intact, that means if you can feel things?

A She can feel a very light touch on her skin.

Q All right, and no focal motor deficits. What are those?

A Those would be facial drooping or some kind of limp in your gait or numbness in your hand or something like that.

Q All right, and then in strength and sensation are intact without any focal deficit, what does that mean?

A That probably means that they had her squeeze the doctor's fingers with both hands, and it felt about the same on both.

Q Okay, and then psychiatric, can you read that?

A "Cooperative, appropriate mood, affect and thought."

Q And what does that indicate?

A That indicates that they said she was not giving them a hard time, she seemed fine.

Q Okay, all right, and you can -- again, on this date, there was no referral for any further psychological or psychiatric examination?

A That's correct.

Q All right, all right. This is going to be Exhibit 8, prelabeled, and could you describe this

for the record, Doctor?

A This is a medical record from MedStar Health that was sent to One Medical. The date of service is January 30th, 2024.

Q And if you turn to the second page, which is 1207 --

A Okay.

Q Again, neurologic, can you read that for the record?

A No headache, no paresthesia, that's P-A-R-E-S-T-E-S-I-A, no limb weakness, alert and oriented times three, which is what we talked about before, person, place, time.

Q That's what the times three means?

A Yes.

Q All right, and then what's paresthesia?

A Numbness.

Q Okay, and then for psychiatric?

A No anxiety, no depression, no suicidal ideation.

Q All right. And if you turn to page 1208, PN 1208, it says attending attestation?

A Yes.
Q They say that they spent about 50 minutes with the patient?
A Yes.
Q And that's enough time to make those assessments of neurologic and psychiatric state?
A I don't have enough knowledge about what else they were doing to answer that.
Q Okay, but once again, we don't see any indication of mental problems, and we certainly don't see any referral for further analysis, right?
A Correct.
Q And then finally, I think we discussed this one earlier. I should give it to you to do that, see if these -- my clerk has made it double-sided, which I highly dislike, but it's all here.
A I tend to agree with you.
Q Exhibit 10. Again, Doctor, if you would, describe what this one is.
A This is a list of encounters, office

visits and telephone calls.

Q And who's it by?

A I don't know.

Q Okay, but at least the first one at the top is [redacted]?

A Yes. I don't necessarily think that's who prepared this, but that's -- that's -- this is a collection of --

Q Okay, at various times and dates, right?

A Yes.

Q I'd like to direct your attention to the November 5th, 2023 hospital encounter.

A I see that.

Q And you see that at the end, it has discharge to home or self-care?

A Yes.

Q If you turn the page, 3, this is where we have the summary, memory impairment. Do you see that?

A Yes.

Q And it has memory impairment from 4/27/2022 to 11/5/2023, correct?

A Yes.

Q All right. So when she was discharged, at least under this medical record and these physicians, they did not believe she had memory impairment after that date, correct?

A So -- so what this is telling me on 11/5/2023, which presumably is this hospital encounter on the previous page, that's telling me they probably cleaned up their problem list and took things off. It doesn't give me a strong indication that they comprehensively went through everything and had necessarily a good reason to add or remove things, but -- but that's all I can tell you.

Q All right, and so we've seen some other documents we've just gone through that -- some were from 2024, and we didn't see memory impairment again, did we?

A As I mentioned earlier, I think there is one more recently than November 5th, 2023.

Q All right.

A But I can't think of it off the top of my

head.

Q All right. All right, and -- but once again, we haven't seen anything in any medical record either today or -- or in the ones you reviewed earlier for your second report that recommended psych testing for Judge Newman.

A Other than the referral for the fitness for duty, yes, that's accurate, but that doesn't really mean so much to me from a concern standpoint.

Q All right. Now, let's take this just for --

MR. DOLIN: Can we actually take a break before that? There are things that I --

MR. VECCHIONE: Yes.

MR. DOLIN: -- reviewed and pointed out.

MR. VECCHIONE: Can we take ten minutes?

MR. PHILBIN: Sure.

(Recessed at 12:08 p.m.)

(Reconvened at 12:22 p.m.)

(Deposition Exhibit Number 9 was marked for identification.)

BY MR. VECCHIONE:

Q We're back on the record, and Dr. DeRight, I think during the break, we found that we had not shown you one of the exhibits, and we've labeled that Exhibit 9. Do you have that in front of you?

A Yes.

Q And can you state for the record what the Bates stamp number is down at the bottom?

A PN_001636.

Q All right, and what's -- what is this document and what's the date on it?

A This is an emergency department to hospital admission to [redacted] Hospital. It's about Judge Newman. The date is April 19th, 2023.

Q All right, and here, the first thing on the first page in the middle is cognition.

A Yes.

Q What does it say for overall cognitive status?

A Intact.

Q What's that mean?

A That means whoever filled this out says they think it's fine.

Q All right, and arousal slash alertness, what's it say there?

A Appropriate responses to stimuli.

Q What's that mean?

A Means she's reacting normal to maybe something like air in her eye might cause someone to blink, something like that.

Q All right, attention span, what's it say there?

A Appears intact.

Q All right, and memory, what does it say there?

A Appears intact.

Q All right. Orientation level. Now it says oriented times four. Why does it say four? What's the fourth one?

A When it says times three, it's person, place, time. When it says times four, it also adds situation.

Q Okay. Following commands, what's it say

there?

A Follows all commands and directions without difficulty.

Q All right. Awareness, what does it say there?

A Patient is aware of deficits.

Q What's that means?

A It means she's aware she has some kind of problem.

Q All right, and problem-solving?

A Able to problem-solve independently.

Q And what does that mean?

A It means they're -- they're saying she can solve problems. There's no indication of whether that's from any kind of objective finding, but that's what the page says.

Q All right. On page 19 -- excuse me, the next one -- it's page 19 or PN 001637, right?

A Yes.

Q We have self-care?

A Yes.

Q And does it appear she's independent and

dressing upper, lower body and toileting?

A That's what it says.

Q All right. And then functional outcome measures, what does it say there?

A Patient independent in all ADLs, that's activities of daily living, and functional transfers.

Q Meaning?

A It says she can do any daily activity that she needs to do, although below, it does say she may need a transfer belt. I'm not sure why that wasn't integrated into that.

Q All right. And once again on the next page, on page 20, there is an assessment for sync -- S-Y-N-C-O-P-E?

A Syncope, yes.

Q Syncope episode, and you discuss that in your report?

A Yes.

Q And what's the assessment of this episode?

A Would you like me to read the summary?

Q Just the end, the last one. Yeah, patient

status and skilled OT. That's what I'm looking at.

A "Patient is able to complete basic self-care and functional mobility with modified independence. Skilled OT services not needed at this time due to patient independence in ADLs and functional transfers."

Q All right, and then under recommendations, there's no recommendation for any psychiatric testing, correct?

A Correct.

Q All right, and --

A Although on problems on the next page, 1639, it says risk for neurological impairment, and it says the outcome was met, but that there's some indication that there was a problem with neurological status.

Q Okay, but no further testing was recommended, correct?

A Correct.

Q And you can put that aside. Now, early -- early in this deposition, you told me about the

AAPL practice guidelines. That's forensic evaluation of psychiatric disability?

A Yes.

Q And your attorney has provided us a copy of this. I would like to label this as the next exhibit, which I believe is 11.

(Deposition Exhibit Number 11 was marked for identification.)

THE WITNESS: Thank you.

BY MR. VECCHIONE:

Q Now, can you describe what this document is for the record, Doctor?

A Yes, this is a compilation of practice guidelines made by forensic psychiatrists for forensic psychiatrists doing different types of disability and fit for duty evaluations.

Q Before you reviewed it in preparation for this deposition, had you seen it before?

A Yeah, I think so.

Q Is it -- is it used in your profession in any manner?

A It is used usually to have some kind of

objective basis to say whether something was or was not appropriately done, in this case for psychiatrists.

Q And what did -- upon your review of it for this -- preparation for this deposition, did it help you in any way in support or in detriment of your opinions already stated?

A Well, one of the reasons I wanted to look at this was to be able to better delineate the difference between a disability independent medical evaluation and a fitness for duty evaluation, and that's primarily what I was using it for.

Q And what is the difference?

A Well, a disability independent medical evaluation or IME, which is what Dr. Carney said that she did, is -- has a much different scope than a fit for duty evaluation. So a disability evaluation is generally brought on by the individual. It's usually looking at causation, diagnosis, whether there is significant evidence of limitations, but whether those meet some

criteria for a disability status, whereas a fitness for duty evaluation comes from concerns related to the employer specifically about someone's ability to do their job.

Q All right. Anything else in here that's of use to you in this or that you'll refer to in discussing your opinion?

A I don't necessarily have something planned --

Q Okay.

A -- to discuss. I was told to send anything else that I reviewed that -- that was not in there.

Q Okay.

A So I sent that. I do -- there is one more thing that I remember reading from this that talked about that neuropsychological testing should be done when there's concern about a cognitive impairment in a fitness for duty evaluation.

Q All right. Then there's some other warnings to the psychiatrist in here, right? So

if you turn to page S10 --

A Yes.

Q Under section 4, forced employee evaluations?

A Yes.

Q An employer may attempt to force an employee to undergo a psychiatric examination for non-psychiatric reasons, correct?

A That's what it says.

Q And is that true? Can that happen?

A I'm assuming so. I don't know.

Q All right. In the event of a workplace conflict, an employer may attempt to discredit or even terminate an employee by claiming that employee is mentally unstable, and that can happen, can't it?

A That could.

Q "In the course of such conflict, the employee who poses a problem for reasons other than mental health may be forced to undergo a fitness for duty evaluation," and that's what this journal reports, right?

A Yes.
Q No reason to disagree with that.
A Correct.
Q And then lower down, it says, "The stigma attached to a psychiatric evaluation may itself be used to discredit the employee," and that can happen too, can't it?
A Yes.
Q And then it says in the next page, "Such employer practices are potentially damaging to the employee and represent a misuse of psychiatry," correct?
A Yes.
Q And then later on, it says, "An individual may feel stigmatized and narcissistically wounded by having to undergo a psychiatric evaluation," and that can happen as well, correct?
A Yes.
Q And the nature of such evaluations is often intrusive and distressing?
A Yes. However, I will say the difference between a -- another difference between an IME and

a fitness for duty evaluation is that the scope is much narrower in a fitness for duty, so you're -- you're only asking about the most relevant parts to the person's job functioning, but the statement is true.

Q All right, and -- but when you were describing this examination to me earlier, it seemed much more extensive than the IMEs.

A It's extensive in the sense of the cognitive testing that's done, but it's less extensive in terms of the clinical interview that's done. So for a disability evaluation, the clinical interview is much more comprehensive. You're essentially asking about anything and everything, and with the fitness for duty, I have a much narrower scope. I do a lot of both of them.

Q Okay, and -- and then it says, "Moreover, such referrals," meaning from such employers that we've been discussing, "raise questions of ethics that are not easily answered, given the assessments under these circumstances may be

inherently unethical, analogous in many respects to the performance of unnecessary surgery," and that can happen as well, can't it?

A Yes.

Q Then I'd like you to turn to page S39. Now, here it has 2, forced FFD evaluations. Is your understanding that means forced fitness for duty evaluations?

A That's correct.

Q All right. And it says forced fitness for duty, FFD evaluations lend themselves to misuse by employers, as noticed previously in the discussion regarding ethics that we've already used, correct?

A Yes.

Q "In the context of a workplace conflict, an employer may try to discredit or even terminate an employee by raising the question of mental instability," correct?

A Yes.

Q "During such conflicts, an employee who poses problems for reasons other than mental health may be referred for forced FFD

evaluations," correct?

A Yes.

Q And it says that the psychiatrist should therefore be alert for possible misuse of the FFD evaluation process.

A Yes.

Q Now, in this -- I asked you if you knew whether any force or intimidation had been used in obtaining the affidavits, and you said you did not.

A I did not know that, correct.

Q And if -- if there was such force or intimidation, that would be a factor on whether or not -- that you should be alert to for possible misuse, correct?

A It's a factor to consider, which is what the document says. It's to ensure that -- it's to keep that in mind, that it could happen. I would -- I would say it's pretty unlikely that it would happen, but it certainly could happen. It's something to keep in mind.

Q And then there's -- and under 3 on the

next page --

A Yes.

Q Key points in conducting FFD evaluations, you see that?

A Yes.

Q And it has the various things that you should do. I'd like to look at the last two sentences. One of the things it says, "Perform a standard psychiatric examination with focus on the evaluee's ability to perform relevant work functions as explained in job description and other relevant referral questions." Then it says, "Obtain psychological testing if clinical information indicates a need for such data for the psychiatrist to reach or support a conclusion." What does that mean?

A That means that a psychiatrist doing a fitness for duty evaluation should get testing if there's something that indicates that there could be a problem.

Q What kind of testing are they discussing there?

A Psychological testing.
Q Okay. What's the clinical information that indicates this?
A That's a pretty generic term, but it essentially means any information that the psychiatrist has as part of their evaluation. That could be records, it could be things they see in the evaluation.
Q All right, and at least in the medical records we've seen here, there wasn't an independent referral from the medical records to get further evaluation, right?
A Right. It doesn't necessarily mean anything, but yes.
Q So from my client's perspective, Judge Newman's perspective, her view is that this is a workplace dispute. Does that view impact your assessment in any way of the need for psychiatric evaluation?
MR. PHILBIN: Objection.
A No.
Q Okay.

MR. PHILBIN: And Counsel, just so it's clear, my objection is because he's never suggested she should have psychiatric evaluation --

MR. VECCHIONE: Ah.

MR. PHILBIN: -- which is what you said.

BY MR. VECCHIONE:

Q Got it. Should have further neurological evaluation.

A No.

Q Okay. Thank you for that. We just discussed some of the things from the APPL. If -- would it be better from a professional aspect if the referral was from a neutral arbiter who wasn't in conflict with Judge Newman?

A That is not how a fitness for duty evaluation is done. I should add too the section we were going through is about general fitness for duty evaluations, and there's a completely separate section on fitness for duty for physicians and police officers, and that's because they have a higher power essentially and an

ability to cause much more harm than a general evaluation. So there are different nuances to that, but the CEO of a hospital might be referring a physician for a fitness for duty evaluation. They have a financial interest. They could get sued if this person messes up and has malpractice. So that's just -- it's built into these evaluations, but the independent person is the evaluator. So I don't think it's feasible for the referral source to be independent, but what does happen in some cases is both sides will agree to have a single or multiple experts evaluate them, and then they're not hired by either side. That's the appropriate way in my opinion.

Q All right. So just from your testimony today, so in this case, you have criticism of the three physicians' analysis of Judge Newman. Have you seen any opinion that she does have mental impairment or decline from a physician?

A I don't think so.

Q All right, and as we've said, you have concerns in the record about forgetfulness, her

syncopal episodes, but you again have not seen any diagnosis in the medical records of mental impairment or decline from that.

A I have not seen any comprehensive and appropriate evaluation of such symptoms.

Q Okay, and then finally, you have no opinion at all as to whether Judge Newman has experienced cognitive decline or is mentally fit to continue on the bench.

A Correct, I have not had the ability to evaluate her yet or if ever, but when we're talking about fitness for duty, the question is is this vehicle safe to drive, for example, and you can say I brought it to Jiffy Lube, I brought it to a body shop, I brought it to Firestone. They all said it's fine, but none of those looked for the engine problem that someone was complaining about that might be a problem, and maybe if the question is okay, that vehicle is just driving one person and they're just going back and forth in town, you can say it's safe to drive, but if that vehicle is carrying the president, then you're

going to hold it to a higher standard, right?

So the question of whether the evaluation is comprehensive enough is much more than does it just not show something. We have to -- we have to -- when there's concerns that in my opinion are present, we have to do the appropriate standardized way to assess that.

Q All right, and as you said here, you didn't know that the Supreme Court had affirmed a dissent of Judge Newman during the time she's been accused of having mental impairment by the Judicial Council?

A No, but that would be like getting a piece of information saying just so you know, this car drove a hundred miles an hour the other day. It was fine.

Q And you did not see the analysis of her judicial opinions that Dr. Rothstein relied upon by an independent attorney.

A Right, that's like the driver saying I've been driving it every day, it seems fine to me.

MR. VECCHIONE: All right. I don't have

any further questions.

MR. PHILBIN: Okay, should we break for lunch?

MR. VECCHIONE: We should.

(Recessed at 12:46 p.m.)

(Reconvened at 1:53 p.m.)

EXAMINATION BY COUNSEL FOR THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT

BY MR. PHILBIN:

Q Dr. DeRight, I'm going to ask you a few questions now following up on some of the things Mr. Vecchione discussed. One is that at one point, Mr. Vecchione was asking you about are you comparing Judge Newman's results in neuropsychological testing to other judges. Do you remember that?

A Yes.

Q And is it fair to say that the point of neuropsychological battery of tests is that they're standardized tests that have been done with large numbers of people, and that in -- with those large numbers, the results have been

recorded with respect to sex, age, level of education; is that correct?

A Yes.

Q So that you can compare the results of one person with a cohort of other people who have taken those tests that are the same age and same level of education; is that correct?

A Yes.

Q And so that's how you get an accurate comparison for someone. You don't need to know their particular occupation and whether those people have been tested, but things like level of education; is that correct?

A Yes.

Q And I think we discussed earlier the Montreal Cognitive Assessment. Do you remember that?

A Yes.

Q And is that a standardized test?

A Yes.

Q Is it important for it to be administered in a standardized way?

A Yes.

Q And why is that?

A When you have a result from a test that's standardized, you're assuming that it was administered in the same way every time. That's so one result can be equally compared to another. So if they're all given in different ways, even if they're mildly different, it changes the comparison to the standardization sample in which everyone was given it the same way.

MR. PHILBIN: Okay. Could we mark this and we'll just go in order. This will be 12.

(Deposition Exhibit Number 12 was marked for identification.)

BY MR. PHILBIN:

Q And I'll represent to you that this is an excerpt from the deposition of Dr. Rothstein. Do you recognize this?

A Yes.

Q Did you have -- if you look, it starts at page 78 of the transcript. Did you have a chance to review this --

A Yes.

Q -- before your deposition? Okay, and take a minute just to look at page 78 and page 79.

A Okay.

Q And is this describing how Dr. Rothstein administered the MoCA test?

A Yes.

Q Okay, on page 79, around lines 5 to 8, could you just read those lines?

A Line 5 starts with, "Okay, and because each one of those parts is worth one point, you reported her score on MoCA out of a total of 28 points; is that correct?" Answer: "That's right."

Q And is he describing there how he dealt with the fact that with a broken wrist, she couldn't follow, trail or draw a cube?

A Yes.

Q And I'd like you to go to page 80. At the top, there's a question that says, "Well, a minute ago, Dr. Rothstein, you testified she'd not been able to draw the clock. Is that true?" Do you

see that?

A Yes.

Q Okay. Can you read the first paragraph of the answer starting in line 5?

A "She couldn't draw it, but what I did under the circumstances, I said if you had to draw a clock and put the hands of the clock at 3:45, where would you put the minute hand and where would you put the hour hand, and she correctly said I would put the minute hand on the 9 and the hour hand on the 3. That seemed to me satisfied what we usually see as a stage 1, stage 1 success."

Q Okay, in your opinion, is that -- and I think we might have covered this earlier, but just so the record's clear, in your opinion, is that a valid way of administering the MoCA?

A No.

Q And as a result, in your opinion, should the score that Dr. Rothstein gave Judge Newman be considered valid?

A No.

Q And is that because he didn't administer it in a standard way?
A Yes.
Q Have you ever heard of anyone administering the clock drawing test this way?
A No.
MR. PHILBIN: All right. Then I'd like to have this marked as Exhibit 12. No, 13.
(Deposition Exhibit Number 13 was marked for identification.)
BY MR. PHILBIN:
Q And this is another excerpt from Dr. Rothstein's deposition, and I'd ask you to go to page 41, and starting at line 3, could you just read the question and answer there?
A Question: "Okay, you mentioned earlier that you knew Judge Newman personally before she came to you seeking a professional opinion in 2023; is that correct?" Answer: "Yes."
Q Okay, and then if we could skip to page 43, do you see in line 4, there's a sentence that starts with "But"?

A "But Judge Newman was helpful in having my wife appointed to the position as director of the Federal Judicial Center Because I believe that Judge Newman was on the board that helped select candidates for this position."

Q Okay, so does this indicate to you that Dr. Rothstein had a longstanding personal relationship with Judge Newman?

A Yes.

Q And we talked a bit earlier, I think there was some questions from Mr. Vecchione about Dr. Filler using his personal experiences with Judge Newman as an evaluator. Do you think it's problematic for Judge -- for Dr. Rothstein to act as an evaluator here, given his personal relationship with Judge Newman?

A Yes, I would say it's at the very least not recommended, and also could be problematic.

Q Okay. Then I think -- is this 14?

(Deposition Exhibit Number 14 was marked for identification.)

BY MR. PHILBIN:

Q Okay, and this is another excerpt from Dr. Rothstein's deposition. I'd ask you to go to page 111, 111, and in line 16, there's a question that says, "And I think you mentioned earlier that neuropsychological testing also would have been helpful; is that correct?" And what's the answer there?

A Yes.

Q Okay. We skip to the top of the next page, could you read the question and answer starting at line 1?

A Question: "Okay, did you suggest to Judge Newman that she should undergo neuropsychological testing?" Answer: "Yes, I did."

Q Okay, so earlier today, I think Mr. Vecchione represented to you as part of a question, the three doctors, Dr. Filler, Dr. Carney and Dr. Rothstein, who had seen Judge Newman, that none of them recommended neuropsychological testing. Do you remember that?

A Yes.

Q So does this show you that --

MR. VECCHIONE: Objection, misstates the question, but go ahead.

BY MR. PHILBIN:

Q Does this show you that Dr. Rothstein did in fact recommend that Judge Newman have neuropsychological testing?

A Yes.

Q Sorry, let me state that question again because I got lost in my own head. Does this show to you that Dr. Rothstein did in fact recommend to Judge Newman that she should have neuropsychological testing?

A Yes.

Q Okay, and does that -- knowing that Dr. Rothstein recommended that she should have neuropsychological testing, does that in any way affect your opinions in this case? Does it bolster or detract from them?

A It's another data point indicating to me that a more comprehensive evaluation is necessary.

Q All right, then if we could go back to, I think it's Exhibit 1 -- sorry, no, Exhibit -- the

supplement -- your own supplemental report, which --

MR. VECCHIONE: Two.

BY MR. PHILBIN:

Q Exhibit 2. All right, in Exhibit 2, at the top of page 2, in the bullet points, there you note that there were multiple notations and medical records of memory impairment on a problem list; is that right?

A Yes.

Q And did you think that was significant?

A Yes.

Q Why?

A Because of the nature of the complaint, anything in the medical records that mention memory impairment or forgetfulness would be important to at the very least mention in a report.

Q Okay, and did you give an opinion as to whether Dr. Filler should have noted this or followed up on it?

A Yes.

Q And -- and what was your opinion?
A My opinion was that it merited at least a mention and follow-up from Dr. Filler.
Q Okay. Now, I'm going to want to ask you about Dr. Carney, so -- but let me hand you Exhibit -- what are we? Fifteen now? No?
A Yes, that's what I have.
MR. PHILBIN: Exhibit 15.
(Deposition Exhibit Number 15 was marked for identification.)
BY MR. PHILBIN:
Q Okay, and I'll represent to you this is an excerpt from Dr. Carney's deposition. Does this look familiar to you?
A Yes.
Q Did you have a chance to review this excerpt before your deposition?
A Yes.
Q Okay. I'd like you to look at page 149 and read from line 9 just to the end of that page.
A Question: "Okay, so would it be significant to you if her medical records showed

that one of her medical providers noted a memory impairment?" Answer: "I -- I saw that medical record, so yes." Question: "You did see that medical record?" Answer: "Yes, I believe I did." Question: "Okay. Did you note that in your report?" Answer: "I did not put it in the report because it was later. It was never followed up, and nothing ever came of it." Question: "Okay, so were you aware at the time you drafted the report that there was a note of memory impairment in the medical record?" Answer: "Yes."

Q Okay, so Dr. Carney testified that she saw a medical record noting the memory impairment.

A Yes.

Q And she said that she did not put it in her report.

A Yes.

Q And around line 16, it says, "I did not put it in the report because it was later. It was never followed up, and nothing ever came of it." You saw that.

A Yes.

Q Is that a valid opinion in your opinion for not mentioning these memory impairment records?

A No.

Q And why not?

A There are different kinds of cognitive problems. Some of them are more transient in nature where someone will have a problem at one time and then not at another. So even if something is marked as resolved, it doesn't necessarily mean the problem has completely gone away or was unfounded.

Q Okay, and then -- yes, so I'm going to hand you what's Exhibit 16.

(Deposition Exhibit Number 16 was marked for identification.)

BY MR. PHILBIN:

Q And I'll represent to you that this is the entire set of medical records that Dr. Carney said she reviewed that have been Bates stamped CARNEY 1 through CARNEY 66. Does this look familiar to you?

A Yes.
Q Did you have a chance to review this set of records before your deposition?
A Yes.
Q Okay, and in this set of medical records, did you find any record referring to memory impairment --
A I didn't.
Q -- in the problem list?
A No.
Q Let me state that because we were speaking over each other. Did you find any record in here referring to memory impairment on her problem list?
A No.
Q Or to memory impairment?
A No.
Q And -- okay. I'd like to go back to what I think is Exhibit 10. So Exhibit 10 was the sheet that's got blue and white bars on it, the encounter list.
A Yes.

Q All right. Actually, I'll go to the reverse side of that first, the one that's got the Bates number PN 3, and this was one of the medical records that had memory impairment listed on it, and it gave the date, it was noted as 4/27/2022. Do you see that?

A Yes.

Q And we go back to the first page of Exhibit 10, the front page, okay, hold on one second. Let me introduce another exhibit. So what are we up to?

A Seventeen.

MR. PHILBIN: All right, this will be Number 17.

(Deposition Exhibit Number 17 was marked for identification.)

BY MR. PHILBIN:

Q Okay, so on Exhibit 17, if you go -- this is -- well, can you describe what this is?

A This is a list of encounters inclusive of the ones shown in Exhibit 10, but also dates before and after that.

Q Okay, and if you go to the page that's marked 126, PN_126 down in the bottom right-hand corner --

A Yes.

Q Do you see there towards the middle of the page an office visit dated 4/27/2022?

A Yes.

Q Okay, so does that date correspond to the date on which the memory impairment was listed as being noted in Exhibit 10?

A Yes.

Q Okay, but in the medical records that you were provided, was there anything else, any record of that office visit on April 27th, 2022?

A I don't think so.

Q Okay. You looked for it?

A Yes.

Q And you weren't able to find it.

A Correct.

Q Okay, so does that suggest to you that there are other medical records in this time period that were not in the set that was provided?

A It seems to be.

Q And going back to Exhibit 10, I think Mr. Vecchione asked you on the front page about a hospital visit on November 5th, 2023?

A Yes.

Q Because that date corresponds with the date that the memory impairment was removed from the problem list or it was resolved on the problem list?

A Yes.

Q But can you tell from the medical records you had anything about who said the problem was resolved?

A No.

Q Or why it was resolved?

A No.

Q Or how or why it got removed from the problem list?

A No.

Q Okay. Would you want to know that?

A Yes.

Q All right. Then -- all right, we'll have

to come back to that. Okay, okay, I think we're up to 18.

(Deposition Exhibit Number 18 was marked for identification.)

BY MR. PHILBIN:

Q And could you just tell us what this is?

A These are One Medical records about Judge Newman with the date April 21st, 2024.

Q And if you could go to in the page that's number 1133 in the lower right-hand corner, and on this one, there might be -- I think the date you gave, if you look at the front page, April 21st is the date this was signed; is that correct?

A That's correct.

Q Okay.

A Date of service was April 18th.

Q Okay, and if we look at page 1133 at the top, there's a line that says 4/17/2024. Do you see that?

A Yes.

Q Okay, and then on that page, the first thing on the page is a list of reviewed problems;

is that correct?
A Yes.
Q And towards the end of that list, is memory impairment on this list?
A Yes.
Q So does that indicate to you that memory impairment is back on the problem list as of April of 2024?
A Yes.
Q But were you able to see anything in the records about why?
A No.
Q Or who put it there?
A No.
Q Would you want to know that?
A Yes.
Q Okay, we talked a bit earlier about fitness for duty reports and independent medical evaluations, correct?
A Yes.
Q Okay. Do you do fitness for duty reports?
A Yes.

Q And independent medical evaluations?
A Yes.
MR. PHILBIN: Okay. Okay, I think this is Exhibit 19.
(Deposition Exhibit Number 19 was marked for identification.)
BY MR. PHILBIN:
Q And this is an excerpt from the deposition of Dr. Carney. Take a minute to look at that. Does that look familiar to you?
A Yes.
MR. VECCHIONE: Hold it. Did we just -- I just got handed -- that's 19. Let me just make sure. Yes, it starts at page 41 when you flip it over?
THE WITNESS: That's right.
MR. VECCHIONE: Okay, thank you.
BY MR. PHILBIN:
Q Yeah, okay. Okay, I'd like to direct your attention to page 45. Okay, about the middle of the page at line 9, there's a question that says, "Let's say you were asked to evaluate Judge

Newman's fitness for duty with respect to issues related to attentiveness, decision-making, stamina and judgment. What would you have done?" Do you see that question?

A Yes.

Q And could you read the answer starting at line 14?

A "We have tests that can be done for attention span and memory. In terms of stamina, the -- this battery of tests is quite lengthy, although some -- some of these items can be approximated by my evaluation. I would not say that they are fitness for duty answers. For complex decision-making, we can offer specific tasks and specific memory tests, also some design manipulation. So there are some specific tests that can be used to address those types of cognitive skills."

Q In your opinion, is what is being described here in that answer, is that neuropsychological testing?

A Yes, it is.

Q Then -- no, okay, do you recall Dr. Carney's opinion in this matter?
A Yes.
Q And the conclusion that she reached?
A Yes.
Q And in your view, was the conclusion that she stated in this matter an opinion on fitness for duty?
A Yes.
Q Do you believe that she did the analysis necessary to come up with a fitness for duty conclusion?
A No.
Q Okay, and in fact, in this excerpt that we've been discussing, did she say that she was not intending to do a fitness for duty evaluation?
A Yes.
Q Okay, I think Mr. Vecchione asked you at one point about [redacted], and do you know who [redacted] is? Is that name familiar?
A Yes.
Q And who was she?

A Judge Newman's law clerk.

Q And does her name show up in a fair number of the medical records?

A Yes.

Q If [redacted] -- and I believe Mr. Vecchione asked a question of something along the lines of if [redacted] had put in an affidavit or declaration saying that Judge Newman is fine, hasn't changed in five years, would that affect your opinion, so I want to ask you if -- if [redacted] had put in a declaration saying that Judge Newman's perfectly fine, I haven't seen any change in five years, would that change your opinion in this case about whether the other three physicians have done a sufficient evaluation?

A No.

Q And it is your opinion in this case is focused on whether those physicians had done sufficient evaluation to render their opinions, correct?

A Yes.

Q And also your opinion is that

neuropsychological testing, given the information available, is warranted for Judge Newman.

A Yes.

Q And if [redacted] had said, again, everything is fine, would that change your opinion on whether neuropsychological testing for Judge Newman is warranted?

A No, that's relatively common actually.

Q Okay, relatively common to have someone who knows the person say that everything is fine?

A Yes.

MR. PHILBIN: Okay, so I'm going to -- are we up to 20?

MR. VECCHIONE: That's what I have.

(Deposition Exhibit Number 20 was marked for identification.)

BY MR. PHILBIN:

Q I've handed you what's been marked as Exhibit 20, which is the deposition transcript -- oh, sorry. I think somehow -- I don't have a copy.

MR. VECCHIONE: I kind of need this one.

MR. PHILBIN: All right.

MR. DOLIN: You can have mine.

BY MR. PHILBIN:

Q Thanks. Is this something that you had a chance to review?

A Yes.

Q And --

MR. VECCHIONE: Objection. When? He said he hasn't seen it.

BY MR. PHILBIN:

Q Did you have a chance to review this during the lunch break?

MR. VECCHIONE: Okay.

THE WITNESS: Yes.

BY MR. PHILBIN:

Q And did you see any place in here where [redacted] gives the opinion that Judge Newman is fine and nothing's changed?

A No.

Q In fact, does [redacted] answer most substantive questions by taking the Fifth

Amendment?

A Yes.

Q Okay. And having seen that, does -- is [redacted] someone that you mentioned in your report as someone that Dr. Filler should have wanted to speak to?

A I think so.

Q And why was that?

A She seems to have a lot of close personal knowledge to Judge Newman, and it would be one important data point to explore.

Q And this -- this deposition transcript shows that there was an effort to explore what she knew. Isn't that fair?

A Yes.

Q Okay. Okay, I think Mr. Vecchione, towards the end of our morning session, showed you a number of medical records from various providers, cardiologists, I think pulmonologists, others, that included in them mental status examination reviews. Do you recall that?

A Yes.

Q Okay. On a scale from perfunctory to comprehensive, in your experience, in encounters with physicians like that, is the mental status exam something that's perfunctory or in depth?

A Perfunctory. Unless something's glaringly obvious, it's usually not going to be put on there.

Q And in your professional experience, do you have patients come to you who had encounters with other physicians who similarly have mental status exams in those encounters that show nothing, but then you find that there is a significant cognitive impairment?

A Yes.

Q Does that happen frequently?

A Yes.

Q Okay, and then let's go back to Exhibit -- I think it was Exhibit 11, the article, or the AAPL practice guide for the forensic evaluation of psychiatric disability.

A Yes.

Q Do you recall that? And Mr. Vecchione

asked you a couple of questions about forced fitness for duty evaluations?

A Yes.

Q Do you remember that?

A Yes.

Q This practice guide is specifically directed at psychiatrists; is that correct?

A Correct.

Q And a fitness for duty evaluation's related to a mental illness. Is that correct?

A Typically, yes.

Q And in your experience, would concern be different for an employer potentially raising fitness for duty issues based on mental illness rather than cognitive impairment? Is it more of a concern that this is something that is just a work conflict in a psychiatric realm as opposed to cognitive impairment realm?

A Typically psychiatric concerns are much more subjective such that a cognitive concern is typically going to be more grounded in someone's performance or -- or e-mails or -- or something

else. So it's -- it's harder to make it up.

Q Okay. I'd like to go back to Exhibit 1, which is your report, and if you go to page 33 of 33, it's the list of materials reviewed, and I think it lists here -- I was counting up, affidavit of [redacted], declaration of [redacted], affidavit of [redacted], affidavit of [redacted], affidavit of [redacted], affidavit of [redacted], affidavit of [redacted], affidavit of [redacted]. So is that -- if I'm counting correctly, is that eight different people?

A Did you have [redacted] on there?

Q I might have skipped him. Yeah, you're right, I did. So it's nine different people. Is that right?

A Yes.

Q And some of them, like [redacted], had two affidavits; is that correct?

A Yes.

Q Okay. And then in addition to the affidavits, there are a number of e-mails listed here; is that correct?

A Yes.
Q And you reviewed those e-mails?
A Yes.
Q And relied on them in part in forming your conclusions.
A Yes.
Q And did those e-mails include direct e-mail exchanges with Judge Newman?
A Yes.
Q And did Judge Newman's behavior in those e-mail exchanges raise concerns that supported your view that neuropsychological testing is warranted?
A Yes.
Q Okay, so given that there was this many corroborating e-mail -- corroborating affidavits, and the e-mail evidence directly from Judge Newman, did you have any concern that this was a situation in which cognitive impairment issues were being raised in a contextual way?
A No, it did not seem to me that there was a fabricated attempt at saying she had cognitive

impairment. On the contrary, it seemed like multiple sources were indicating concerns.

Q Okay, and to have declarations or affidavits from nine different people who are co-workers, in your experience, is that something that's a lot of information that's available or not a lot? Where in the spectrum in terms of cases that you see would that fall?

A I would say it's more than usual.

Q Mr. Vecchione I think asked you a couple times about a law review article that was mentioned in Dr. Rothstein's report. Do you remember that?

A Yes.

Q And it's a law review article by a person named Michaels, and I'd like you to assume that --

MR. DOLIN: Last name Michaels?

BY MR. PHILBIN:

Q Yes, last name Michaels. It's Law Professor Michaels wrote the article, and I'd like you to assume that this article says -- and I'll represent to you that Professor Michaels is a

former clerk of Judge Newman's. I'd like you to assume that this article says Judge Newman's opinions are great, these opinions continue to show high quality. Would that in any way affect your opinions in this case?

A No.

Q Okay. Why not?

A It's -- well, similar to my answer earlier, it's not an objective determination of her abilities. There's no way to determine objectively any deficits from that. Also, there's a preexisting relationship that can introduce a lot of bias into the person's opinion.

MR. PHILBIN: Okay. Okay, I think we're on Exhibit 21.

(Deposition Exhibit Number 21 was marked for identification.)

BY MR. PHILBIN:

Q Okay, I've handed you what's been marked as Exhibit 21, which is the affidavit of [redacted]. Do you recognize this?

A Yes.

Q And this is one of the affidavits listed on page 33 of your report, is it not?

A That's correct.

Q I'd like to direct your attention to page 9, paragraph 37. Could you read the first sentence?

A It reads, "I would like to say that I love, revere and admire Judge Newman personally and professionally for all her accomplishments and who she is as a person, which makes the last few months so much more difficult."

Q Okay, and did that have any bearing on your assessment of whether these affidavits were being fabricated or being gemmed up by people as part of a workplace conflict?

A That -- that makes it less likely that it's simply a result of a workplace conflict or a forced evaluation.

MR. PHILBIN: Okay. I think those are all the questions that I have.

FURTHER EXAMINATION BY COUNSEL FOR JUDGE PAULINE NEWMAN

BY MR. VECCHIONE:

Q All right, a few follow-ups from me. First, Dr. Carney gave Judge Newman a memory test, and she didn't miss any of the words, correct?

A Judge Carney asked her to --

Q Dr. Carney. Judge Newman, I've been doing it all day too. Go ahead.

A Thank you. Dr. Carney asked her to remember some words, and she had to repeat them a few minutes later, correct.

Q All right, and all right. In Dr. Rothstein's testimony, he said that -- or assume he said -- I'm not going to read it again, that he had had his encounters with Judge Newman something like 20 years before. Does that change your opinion in any way?

A No.

Q Okay, and so contact with her decades before still does something to make his opinions suspect?

A Well, it seems like the contact with his wife was more recent, so it's kind of a important

proxy relationship that is still considered personal in my view.

Q All right. Now, so you were just asked by your attorney the questions about the practice guide being for psychiatrists, but the parts I read to you about concerns about doing a forced exam for fitness, fitness for duty exam, those apply whether it's psychiatry or psychology, don't they?

A Correct, but in the article, you can see when they're talking about neuropsychological testing, they do differentiate it.

Q Okay. Now, so I think we've just gone through, you believe that neuropsychological testing's warranted because of these affidavits and because of the e-mails you've seen, correct?

A Those are some of the reasons, yes.

Q Okay. Now, I asked you earlier -- well, I'll put it this way. Those declarations were all obtained by the Judicial Council, who reports to Judge Moore in one way or another, and I have seen those affidavits, and I have seen your opinion

that certain of these other examinations weren't done up to standards you approve of, but I haven't seen anyone who doesn't work for the Judicial Council put in any information that Judge Newman is not up to her job or needs further evaluation. Have you seen anything?

A Yeah, I would disagree with that.

Q Why's that?

A Judge Newman put information that showed concern in her own e-mails where she's showing very significant memory problems from days earlier.

Q Okay, from the -- from the e-mails you saw and from how they were characterized to you, you think those were memory problems.

A Yes.

Q Okay. Now -- so in this case, are you aware that the case of every other judge who's ever been -- federal judge who's ever come to this level of investigation for either psychiatric or dementia problems, cognitive problems, that the inquiry has been referred to another circuit

rather than the one that she sits on?

A No.

Q And you weren't aware of that.

A No.

Q And the fact that every other time this has happened, that judicial circuit has moved it to another judicial circuit gives you no pause as to whether or not -- whether or not the inquiry is unbiassed or not?

MR. PHILBIN: Object.

A That's not my area of expertise. My expertise is determining in this case whether there's been a sufficient investigation from a cognitive standpoint to conclude that she does not need any further testing, and my opinion is that there needs to be further testing in this case.

Q All right, and if there is further testing, who's the judge of whether she comes off of this disability that has been inflicted upon her?

MR. PHILBIN: Objection, misstates the facts.

A Like any fitness for duty evaluation that I do, the job or me or anyone that's doing it in a ethical way would be to give the opinion, and the decisions made after that are not my or the evaluator's to do, so we give an opinion, and -- and that's where it goes.

Q All right. You were asked at the beginning of your redirect when your lawyer started asking you questions, you were asked about what you were comparing the judge to, and it's this large group of people by age and sex and things like that. In this case, would you be comparing her to people of her -- is she like the pilots, or is -- is she like a regular fitness for duty?

A So this is a very unique case. I have seen people in their 90s and people over 100 before. Given what we're doing here, it's important to do more than one thing. So the answer's yes to all of those. So I would compare her scores to other people of her same age and education, and preferably I'd also like to have

another group of highly educated people to compare it to. There wouldn't necessarily be definitive determinations from that, but it would be part of the -- the clinical answer.

Q All right, and I think we asked about the affidavits we have seen, but certainly for this inquiry and figuring out what the job of a judge is, would you take statements from the other judges who sit with her on what those duties are?

MR. PHILBIN: Objection.

A I don't know how I would know any information otherwise.

Q And I could have sworn I had Rothstein. One second. Do you have a Rothstein? I have it. I have it here. All right, I'd like you to turn to -- pardon me. It's a new phone, but I don't know how to turn off the sound yet. I got it two days ago. All right, I think it's Exhibit 14, deposition of Rothstein.

MR. PHILBIN: Which page?

BY MR. VECCHIONE:

Q It's Number 14, and it starts with page

112.

A Okay.

Q So 14, on page 112, just to show the first -- the last page of the -- of Exhibit 14 --

A Yes.

Q He's asked his opinion on page 112, lines 6 to 12. It says, "So in your report, let's look at that on page 2, the second to last paragraph. It's the last clause of the paragraph. Could you read that?" Answer: "She could have a more detailed neuropsychological evaluation as part of her neurological assessment," right?

A Yes.

Q But he didn't say she had to, correct?

A Yes, it's very strange wording.

Q Okay. All right, and my -- so you have throughout your testimony, is that you have said that the fact that the Supreme Court reversed her fellow judges and upheld her decision, the fact that another practitioner besides Dr. [redacted] did an analysis of her opinions and found that they have not deteriorated in quality, and the fact

that Dr. Filler, who's appeared before her, has seen no change in her judicial demeanor or the way she judges or her cognitive abilities, that all those people who know about the law and what judges do, their contributions are not properly cognizable, but the affidavits found by -- submitted by the Judicial Council after Judge Moore asked for them are. Is that correct?

MR. PHILBIN: Objection, form.

A Well, the -- the initial part of your question, all the people that saw her and looked at her opinions, that's not an objective way to look at things. The question is not have her opinions declined in quality. The question is does she have a disabling condition that could affect her ability to do her job. The best way to measure that is from objective tests that limit sources of error as much as possible that could be compared to other known groups that can directly assess things like memory and problem-solving and provide an answer that way.

Q So for a judge, as a baseline here, it's

more important that they don't have forgetfulness in their medical records than that their judicial opinions are upheld by the Supreme Court?

A As I mentioned earlier, there's not a good way of knowing what went into that judicial opinion. Countless people work on them at that level, I'm assuming, and looking at someone's work product is not a good way to do that.

MR. VECCHIONE: I don't have any further questions.

FURTHER JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT

BY MR. PHILBIN:

Q Okay, just quickly, on the excerpt from the Rothstein deposition that Mr. Vecchione pointed you to, I think it was Exhibit 14.

A Yes.

Q And it's page 112, and he had you -- he pointed out to you that Dr. Rothstein said in his report she could have a more detailed neuropsychological evaluation as part of neurological assessment. Do you see that?

A Yes.

Q But then what is the next question and answer?

A Question: "And you recommended to her that she should do that?" Answer: "Yes, I did."

Q So he did recommend that she should have neuropsychological testing. Isn't that right?

A Yes.

Q Okay, and does it -- the fact that Dr. Rothstein, who had a personal relationship with her, had known her for a long time, did recommend that she should have neuropsychological testing alleviate any possible concern in your mind that this is something that is just created in the workplace or workplace conflict created against Judge Newman?

A It certainly makes it less likely.

Q And Mr. Vecchione suggested a couple times that if Judge Newman's opinions are -- other people evaluate her opinions as being fine, that that should carry great weight. I just want to explore that for a second, because one of the issues with that, that there's no way of knowing

how much other people contribute to the opinions?

A Yes.

Q And you understand that [redacted] is one of her law clerks.

A Yes.

Q Correct? And so law clerks may be doing first drafts of opinions for the judges, for all you know, correct?

A Yes.

Q Okay, and there's no way then to sort out how much work has been done by a clerk or in reviewing the opinion or how much is directly from Judge Newman; is that right?

A Right, that's one thing I've done before. At least one previous judge that I evaluated, after the evaluation, I went back to the committee that referred the judge and asked questions about the ins and outs of what that judge was going to be doing. So the answer one of the questions earlier too, it's not necessarily just the job description. It's I as the evaluator have the option, the ability to ask the committee more

questions about what's done.

Q Okay, and you saw the transcript of the deposition of [redacted], correct?

A Yes.

Q So is it fair to say that there's -- attempts were made to find out from her about what she knows about Judge Newman, what work she does for Judge Newman, yes?

A Yes.

Q But she refused to answer.

A Correct.

MR. PHILBIN: Okay.

FURTHER EXAMINATION BY COUNSEL FOR JUDGE PAULINE NEWMAN

BY MR. VECCHIONE:

Q I just have one other question. We don't know what Judge Moore or anyone else on the federal circuit used their clerks for or how much they write their opinions either, do we?

A Correct.

MR. VECCHIONE: I think I have no further questions.

MR. PHILBIN: Nothing further from us either.

MR. VECCHIONE: Thank you, Doctor.

MR. PHILBIN: We would like to review and sign.

(Off the record at 2:51 p.m.)

ACKNOWLEDGMENT OF DEPONENT

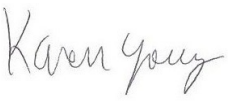
I, Jonathan DeRight, Ph.D., do hereby acknowledge that I have read and examined the foregoing testimony, and the same is a true, correct and complete transcription of the testimony given by me, and any corrections appear on the attached errata sheet signed by me.

(DATE) (SIGNATURE)

CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Karen Young, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for or related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 26th day of June, 2025.



NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

My commission expires:
September 14, 2029

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