

## When is Your Treating Doctor an Expert in Court?

— Ted Schmidt

Two recent cases significantly changed the landscape regarding when a doctor is considered an “expert witness” in litigation. Traditionally, when a doctor was called to testify in a case, even as a treating physician, she was entitled to be compensated for her time at expert witness rates. **On the other hand, a treating doctor needed not to author an expert report before she could testify at trial.** Both these standard practices were put on their head by recent decisions from the Arizona Court of Appeals and Ninth Circuit Court of Appeals.

First, in *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011), the court found that where the plaintiff in a slip and fall case called his treating doctor to testify that the fall caused his orthopedic problems, the doctor was an expert requiring the timely filing of an expert witness report under 26 (c) of the Federal Rules of Civil Procedure. The court found that if the doctor is called only to testify for the plaintiff, regarding her care and treatment, then a report would not be required. Where, as here, the doctor was provided records by the plaintiff’s attorney that he did not otherwise have and was asked to opine regarding causation, which was not part of his care and treatment of the patient, an expert report was required. Failure to timely file such a report resulted in exclusion of the causation testimony at trial.

More recently, in *State v. Whitten*, 228 Ariz. 17, 262 P.3d 238 (App. 2011), the Arizona Court of Appeals held that a treating physician who



only testified regarding her care and treatment of a defendant is not testifying as an expert and therefore is not entitled to be paid expert witness fees for her time testifying. The court specifically noted this was a criminal matter, and this ruling did not necessarily apply in civil cases. The logic behind this ruling however, and the ruling in *Goodman* strongly suggests that even in civil cases doctors are only experts when they testify on issues beyond their care and treatment and then, expert witness disclosures are required.

Practically speaking, these rulings portend even greater difficulty for folks involved in litigation over their injuries. **We have already seen an increasing number of doctors who refuse to treat patients involved in litigation.** The doctors simply do not want to get involved in the litigation process. When treating doctors learn that by offering causation testimony they may also have to author a detailed expert report or they may not get paid, their reluctance to help patients involved in litigation will likely increase dramatically.

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# Three Tips for Doctors:

A fair number of physicians and other health care providers read our newsletters. We always appreciate hearing from them, and we believe we share a singular goal – making sure patients get appropriate, reasonable and safe care. One common complaint, though, that we hear from our friends in the health care field is that they fear liability in daily patient encounters. More specifically, they fear getting sued.

Here are three simple tips they, and really anyone who serves patients or clients, can do daily to help protect from liability and risk.

1

## A Successful Patient Encounter.

Good bedside manner can go a long way toward reducing medical malpractice risk. There are several small things a physician can do to set the scene for a positive patient encounter. First, reduce distractions during the visit – put your pager or phone on vibrate and ask to be interrupted only if essential. Second, say, “Hello” when you walk in to the exam room and make eye contact during the visit. A real, genuine human interaction can go a long way. Third, make sure you write down any follow up instructions (referrals, follow up appointments, medications) and make sure both the patient and your office staff understand the next steps.

2

## Ask for and Answer Questions.

Study after study has shown that satisfied patients are less likely to sue for medical malpractice. And, often, asking this one, simple question can head-off a later phone call or e-mail. Take the time to affirmatively pause and ask the patient if he has any questions. And answer them directly.



3

**Keep Complete Charts.** In any investigation of a potential medical malpractice claim, the patient's records become Exhibit 1. The chart is the single most important piece of evidence. Remember what you learned in medical school...if it's important, chart it. You do not want to have to rely on your memory to fill in the gaps. And you do not want to have to explain away the absence of a key finding. Make charting and record keeping a priority.



# How To Choose A Doctor

— Jim Campbell

You are sick, you just broke your arm, or you just received news your child has a problem that requires a specialist. You need to find a good doctor to handle this serious problem. While most doctors are really good and caring, a minority of doctors are not.

So what do you do to try to find an effective and caring doctor? First, ask your primary care doctor whom he or she recommends. Often, they will steer you toward physicians they have come to know and trust.

Second, ask your friends and family. It is important to pay special attention to comments about a doctor's demeanor. There is a strong correlation how a doctor treats his patients, and whether he or she provides good care. Often, rude or dismissive doctors are the same doctors that make repeated serious mistakes.

Next, look up any prospective doctor on the Arizona Medical Board's website — <http://azmd.gov/GLSPages/DoctorSearch.aspx>. Several important pieces of information can be obtained from this site.

First, you will find out if a doctor is "board certified" in a specialty. **Board certification means a doctor took special tests and has been approved by a national board of his peers.** For example, if you need a cancer doctor (otherwise known as an oncologist), you want a board certified oncologist. It seems obvious, but many doctors are practicing in fields for which they are NOT board certified. (Plastic surgery is renowned for this problem.)

Next, the Arizona Medical Board site will tell you whether a doctor has a history of lawsuits or disciplinary problems. The settlement of a suit does not necessarily mean a doctor is a bad doctor, but multiple settlements is a red flag. Similarly, repeat disciplinary actions by the board are problematic. This is especially true if the doctor's license was suspended he was put on probation. These actions are taken only for the most serious lapses of judgment.

A word of caution about doctors assigned to you from the Emergency Department. The only way some less than stellar physicians keep their practice going is by accepting many Emergency Department patients. You have no obligation to return to this doctor. **Do your own independent search after you have gotten out of the Emergency Department to find a qualified doctor.**



Finally, if you see a doctor and you get a bad feeling from the encounter, find another. If the doctor does not appear to listen to you or is rude, then switch doctors. Trust your instincts; they are probably telling you something you should not ignore.

## Be an advocate. Be assertive.

In the June issue of our newsletter Jim Campbell wrote an article explaining how you can help a loved one who is in the hospital. His main point? Be an advocate. Be assertive. Doctors do all they can to help those under their care recover, but unfortunately patients can fall through the cracks. **It is often up to family and friends of a patient to push for the doctor's attention or care.** Recently others have begun to see this need, especially those with a background in the medical system.

Sometimes an Average Joe has trouble understanding the ins and outs of our complex medical system, much less the medical terminology and processes. That is where groups such as RN Patient Advocates come in. Over the last seven years, this national business has provided registered nurses to work with patients in our very own Tucson. **Because the company only hires nurses who are certified, they have the knowledge and experience to be able to understand a patient's medical history, current treatments, and future plans.** The work they do can include combing through your medical history for overlooked problems or researching new treatments for medical conditions. They will also disseminate your medical information so each doctor working with you knows what the others are doing. These professionals ask questions you would not know. The goal is for the advocate to be a safety net beneath all the doctors and treatments, working to quiet the cacophony of an unsynchronized system, and bring it to the purring of a well-oiled machine where all parts work as one.

**RN Patient Advocates** is unique in that it only hires RNs, partnering with the College of Nursing at the University of Arizona. Because of the quality of

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# advocate

## Continued

education required of their employees, RN Patient Advocates is somewhat expensive. They are working to have their services covered by insurance companies, but until then, it will remain a service for those who can pay \$100 an hour. They point out that the costs out of pocket generally result in huge long-term saving for additional medical treatment. For more information on RN Patient Advocates, you can visit them at 3400 West Goret Road, Tucson, AZ 85754 or may contact them on their website at [www.patientadvocates.com](http://www.patientadvocates.com).

There are other options for those in Tucson looking for a medical advocate. Companies such as Patient Care Advocates offer many similar services as well as home care. St. Joseph's Hospital offers a Patient Advocate upon request, as does the Southern Arizona Veterans Affairs Health Care System.

**The bottom line is that if you want to receive the best health care possible you need to be proactive.** If you feel lost and helpless in our healthcare system, looking into a medical advocate may be a great idea for you. An advocate will keep you informed, work to get you the best care possible, and hopefully have you back on your feet before you even realize you were falling through a healthcare crack.

## decide to bring a lawsuit

— Matt Schmidt

If you ever get hurt due to the wrongdoing of someone else and decide to bring a lawsuit, your lawyer will rely heavily on your medical records because they provide a clear and thorough account of your injuries from unbiased and reliable medical professionals who know what they are talking about. For this reason, it is important to follow these important steps in your medical care.



### 1. See a Doctor as Soon as Possible

It's imperative you seek medical treatment if you are injured. Otherwise, failure to see a doctor suggests the injuries must not be very serious. Additionally, people will blame you, reasoning the pain could have been easily minimized or prevented all together with effective medical diagnosis and treatment. Finally, lack of treatment means lack of medical documentation, which means people are forced to evaluate your injuries based solely on your biased opinion and limited perspective — not a good thing.

### 2. Do Exactly What Your Doctor Says

Nothing more and certainly nothing less. If your doctor tells you to follow up with an orthopedic surgeon within a week, follow up with an orthopedic surgeon immediately, not a chiropractor after a few months have gone by. If your doctor tells you to take two vicodin a day, take two vicodin a day, not Advil when you feel like it. If your doctor tells you not to drive for a week, don't even think about getting behind the wheel. Following your doctor's orders shows you are doing everything in your power to get better, while going off the beaten path allows others to question whether you would have gotten better sooner had you followed the advice of a medical expert.

### 3. Be Honest and Thorough

This goes both ways. Don't play the tough card and act like nothing hurts if something in fact hurts, but don't exaggerate pain that doesn't exist. It is important for you to have an honest, thorough and open conversation with every doctor you see—explaining where, what, why, when and how something hurts—so she can keep a detailed record of your injuries, diagnose them with accuracy and provide the most effective treatment.

### 4. Take Notes and Ask Questions

Don't be shy. If you don't fully understand what your doctor is telling you, speak up (politely, of course). Bring your questions on a piece of paper, take notes or bring a family member to the appointment. Tell your doctor if a treatment plan is working, and if it isn't, ask them if there are other options available you should try. It is essential for you and your doctor to be on the same page. That way, your version of the story will be consistent with what the medical records say, and you will be able to follow your doctor's treatment plan correctly.





# happenings

**Dev Sethi** recently appeared on the Mrs. Green radio program to talk about Ben's Bells, its work in Tucson and the organization's trip to Newtown, CT in the wake of the December shootings. Ben's Bells hung over 1,000 bells in Newtown on January 8, and volunteers will return to Newtown this spring to work with the children and families in that community.



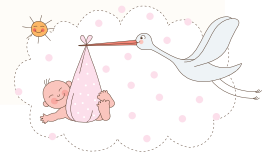
Dev has also been invited to join Angel Charity for Children's Advisory Board. For 30 years Angel Charity has worked to make major, transformative grants to organizations serving children in Southern Arizona. To date, Angel Charity has awarded over \$28 million in grants. Dev served as president of Children's Museum Tucson in 2011, when Angel Charity awarded it a \$250,000 grant to develop and install an all new science, technology, engineering and math (STEM) based exhibit.



**Jim Campbell** was inducted into the Hall of Honor for the Sigma Chi Fraternity at the University of Arizona. This is the highest honor given to members of the UA's Sigma Chi Fraternity, and is in recognition of his professional success, community service, and work on behalf of the fraternity. Jim is also coaching the varsity boys' basketball team at St. Cyril's School.



We are happy to announce that **Matt Schmidt** and his wife Maggie Schmidt will be expecting their first baby daughter in late February. There is no doubt baby Annie will soon become as passionate an Arizona Wildcat fan as her parents.



**Dawña Argenbright** is a 2011 graduate of the James E. Rogers College of Law at the University of Arizona and a member in good standing of the Arizona State Bar. She has clinical experience in family law and completed a Fellowship at the Tucson City Prosecutor's Office before joining our firm. As a law student, Dawña distinguished herself as an Articles Editor for the Arizona Journal of International and Comparative Law.

**Eileen Fernstrom, R.N.** comes to us from the surgical/trauma intensive care unit at University Medical Center in Tucson, Arizona. Before graduating from the Nursing Program at Pima Community College, Eileen worked as a legal secretary for more than 22 years. She is now the resident Nurse

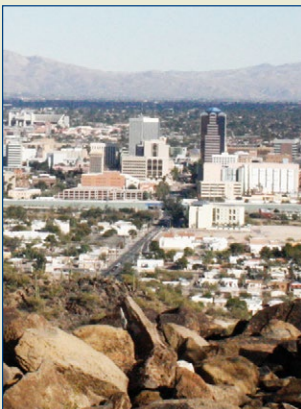
Paralegal for the firm where she is able to combine both careers, each with its own experience and expertise. You, also, may have seen her out in the community singing in her acappella quartet, Havin'a Blast. Her quartet has been singing and performing in the community for the last 13 years.





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