

Understanding the Consensus Recommendations from a Legal Standpoint

An interview with Ronald Bush, ESQ.

BY ROBERT J. SNYDER, DPM

Treating neuropathic foot ulcers in patients with diabetes requires vigilance and an appropriate algorithm to facilitate healing. The recently published Consensus Recommendations on Advancing the Standard of Care for Treating Neuropathic Foot Ulcers in Patients with Diabetes created a user-friendly and pragmatic approach based upon current evidence. In this interview, Ronald Bush, ESQ discusses the document from a legal perspective and advises how the recommendations can create a positive impact on your practice.

Snyder: Tell us about yourself.

Bush: In 1984, I received my Juris Doctor degree, cum laude, from Fordham University School of Law in New York City. I am AV rated by Martindale Hubbell and a member of the American Board of Trial Advocacy. I am admitted to practice law in New York, Washington, DC, and Florida. Currently, I am the managing shareholder of the Tampa, FL, law firm, Bush Graziano & Rice, P.A. For the better part of the past 27 years, I have devoted my professional life to defending healthcare providers in professional liability matters.

Snyder: What is the legal definition of standard of care?

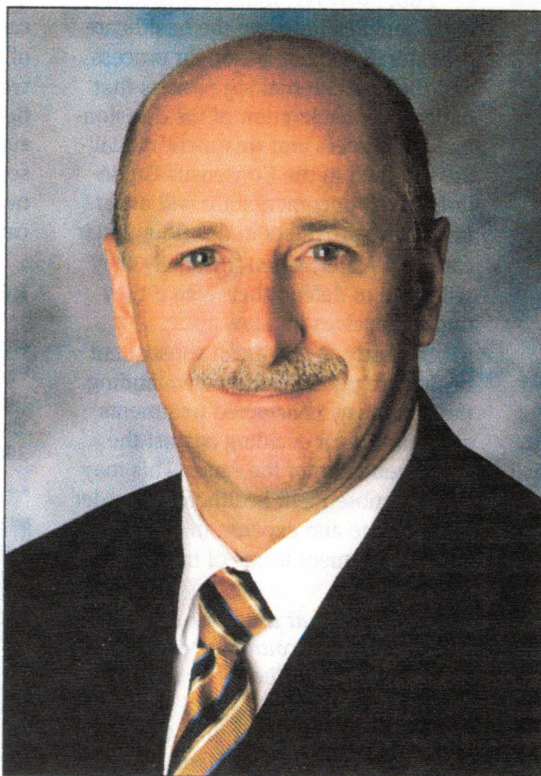
Bush: Sometimes it is easier to understand the Standard of care by understanding what the Standard of care does not require. While the technical definition of the Standard of Care may be slightly different from state to state,

typically it does not require a health provider to deliver the best care possible. The standard of care is not defined as whether a particular healthcare provider would have done something different than the healthcare provider under question.

The standard of care is typically a negligence-based standard. The next step in understanding the standard of care is to understand the definition of negligence in the healthcare arena. Paraphrasing the Florida Standard Jury Instructions:

Negligence is the failure to use reasonable care. Reasonable care on the part of a physician is typically defined as that level of care and skill which, in light of all relevant surrounding circumstances, is deemed acceptable by similar reasonably careful healthcare providers.

The language in the Florida Standard Jury Instructions seems fairly typical with respect to defining the standard of care expected of practicing healthcare providers. The standard of care is actually intended to identify a floor below which acceptable healthcare should not fall. It is intended to set the absolute minimum level of acceptable healthcare. However, as with any similarly based standard, there is a



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great deal of subjectivity in determining the course of treatment any reasonably careful healthcare provider would employ in a given situation. Many times "reasonableness" is in the eye of the beholder. What may seem reasonable to some, especially when employing 20/20 hindsight, may not have seemed reasonable to the healthcare provider when making purely prospective judgment calls.

Snyder: *How is the standard of care established in a lawsuit?*

Bush: Typically, the standard of care, whether the healthcare provider under question used reasonable care, is a fact question to be determined by a jury. However, the jury will receive testimony from expert witnesses to assist them in making this decision.

Typically, the expert witnesses will be similarly licensed healthcare providers. The expert(s) testifying against the healthcare provider under question are typically hired by the attorney representing the dissatisfied patient of the healthcare provider under question. These experts can be handsomely compensated and are given great latitude in reaching opinions under the "reasonable care" standard discussed earlier.

Snyder: *How can a document like the Consensus be of benefit to the clinician?*

Bush: Consensus guidelines provide the physician treating diabetic patients with neuropathic ulcers concrete markers to assist in diagnosis, stimulate the thought process when deciding on treatment modalities, and guide posts when evaluating the effectiveness of implemented treatment modalities or re-evaluating previously implemented treatment modalities. While no guideline is a substitute for good clinical judgment implemented to address the unique circumstances of each individual patient, guidelines can assist the healthcare provider in implementing an orderly decision-making process.

Additionally, when a healthcare provider has the benefit of any Consensus Guideline against which to

measure care and the decision-making process, it becomes more difficult for some other healthcare provider (i.e., an expert physician hired by or on behalf of a dissatisfied patient) to substitute a retrospective view of care for the prospective decisions made by the healthcare provider under question. Simply stated, when properly used, consensus guidelines can be the healthcare provider's best friend.

Snyder: *What are the essentials in documentation to protect both the patient and doctor against litigation?*

Bush: A healthcare provider should strive to document accurate information regarding patient assessment, care, and treatment. I do not believe it is necessary for a healthcare provider to blindly follow every step or recommendation contained in the Consensus Guidelines. Similarly, I do not believe it is necessary for a healthcare provider to implement every treatment modality identified in the Consensus Guideline, or to necessarily implement treatment modalities along the time continuum identified in the Consensus Guidelines.

I do, however, think it is exceedingly beneficial to have the healthcare provider document a thought process and the decision-making process that indicates consideration of the decision-making process and treatment modalities outlined in the Consensus Guidelines. Such documentation will assist healthcare providers in defending their care years later, when it is likely they will have to defend their care if they find themselves in a lawsuit.

Similarly, it will assist subsequent healthcare providers in understanding the previously considered treatments and reasons for deciding against the implementation of the same. This may allow a subsequent healthcare provider to save time and expense in deciding upon subsequent forms of treatment.

Snyder: *What are some of the pitfalls you have encountered and how can doctors avoid them?*

Bush: A common pitfall that creates problems for physicians is the lack of documentation and/or inaccur-

rate documentation. Absent proper documentation, it is difficult to establish the basis for proper care. Healthcare providers are rarely questioned about their care in the days following the delivery of such care and/or treatment. Most often, healthcare providers are called upon to defend their care and/or treatment years after delivery of the same. In the absence of proper documentation, it will be very difficult, if not impossible, for healthcare providers to credibly defend their care and/or treatment.

An additional common pitfall is the simple reliance upon the alleged non-compliance of a dissatisfied patient. Many times, a physician will attempt to rely upon the alleged non-compliance of a patient to explain a less than excellent treatment result. However, many healthcare providers, attempting to rely upon the alleged non-compliance of their patients, have no documentation to establish that the patients had been properly educated concerning the likely result of non-compliance. Absent such documented education, non-compliance can actually be used as further evidence of the healthcare provider's alleged negligence. If a reasonably careful healthcare provider would have been aware of such potential non-compliance, and would similarly have advised the patient of the likely consequences of such non-compliance, the failure to do so may actually be further support of negligence on the part of the healthcare provider under question. PM

Reference

Snyder RJ, Kirsner RS, Warriner RA, et al. Consensus recommendations on advancing the standard of care for treating neuropathic foot ulcers in patients with diabetes. *Ostomy Wound Management*. 2010;56(suppl 4):S1-S24.



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