

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of Best Doctors, Inc.'s	)	
Petition for Declaratory Ruling	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telecommunications Consumer Protection	)	
Act of 1991	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338

**COMMENT TO PETITION FOR DECLARATORY RULING**

**DR. KENNETH A . THOMAS MD, LLC**

Avi R. Kaufman

KAUFMAN P.A.  
400 Northwest 26<sup>th</sup> Street  
Miami, Florida 33127  
(305) 469-5881

*Its Attorney*

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Dr. Kenneth A. Thomas MD, LLC, by its attorney, hereby responds to Best Doctors’ petition for declaratory relief.<sup>1</sup> The Commission should apply its rules and precedents to find that Best Doctors’ faxes are unsolicited advertisements under the Telephone Consumer Protection Act, and to otherwise deny Best Doctors’ petition in its entirety.

Under the Commission’s rules, a fax is an “unsolicited advertisement” if it is a pretext or precursor to a future commercial solicitation. By definition, and as a matter of Commission precedent, the fax-as-pretext inquiry necessarily requires examining facts beyond the fax itself to determine whether the fax is an unsolicited advertisement. Best Doctors’ petition, which seeks to limit the fax-as-pretext inquiry to examining only the fax itself, is nothing more than a backdoor attempt to have the Commission repudiate the fax-as-pretext rule in an effort to avoid potential liability in a pending TCPA action against it.

More narrowly, Best Doctors’ petition effectively concedes that if the Commission applies the fax-as-pretext rule to Best Doctors’ faxes – and examines facts beyond the faxes themselves – Best Doctors’ faxes are unsolicited advertisements. Commission precedent

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<sup>1</sup> Dr. Kenneth A. Thomas MD, LLC is a recipient of Best Doctors’ unsolicited fax advertisements. *See, e.g.*, Petition at n.2.

confirms that the logic of the fax-as-pretext rule requires examining facts beyond Best Doctors' faxes themselves, including the variety of non-fax advertisements that Best Doctors directs to fax recipients immediately after the fax recipients respond to Best Doctors' faxes.

Therefore, based on the fax-as-pretext rule, because they are, at a minimum, preludes to advertisements to the fax recipients, Best Doctors' faxes are unsolicited advertisements. And this is true regardless of whether Best Doctors' faxes are advertisements on their face, an issue the Commission does not need to address to resolve the petition.

## **I. BEST DOCTORS' FAXES**

Best Doctors is a for-profit company that (1) sells health programs and services to consumers and organizations, (2) sells "Best Doctors" branded goods to doctors listed in the Best Doctors directory, and (3) solicits Best Doctors listed in the directory to provide their services for pay. As part of an overall marketing plan to advertise its programs, services, and goods, Best Doctors sends to doctors, doctors' offices, and other medical facilities unsolicited faxes offering free listings in the Best Doctors directory.<sup>2</sup>

These faxes offering free directory listings, subject only to verification that the doctor-fax recipients are still accepting patients, constitute advertisements for at least four different reasons.

First, the unsolicited faxes advertise the commercial availability and quality of the Best Doctors "programs and services" Best Doctors provides to its "members" for a fee built into their employee benefits package or health insurance policy, including Best Doctors' Find a Best Doctor<sup>TM</sup> service and its InterConsultation® service. As stated in the faxes, the Find a Best Doctor service allows "members [to] request names of Best Doctors who treat their specific

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<sup>2</sup> A copy of one of the faxes Best Doctors sent to Dr. Kenneth A. Thomas MD, LLC is attached as Exhibit 1 to the petition and reattached to this response.

condition and who are in their geographic location.” Similarly, Best Doctors’ “virtual medical review service called InterConsultation®” makes use of the Best Doctors database of physicians.

As explained on Best Doctors’ website, “[t]he Best Doctors network includes over 50,000 of the world’s top medical experts. Each has been designated as among the best by other doctors through an exclusive, Gallup®-certified process.”<sup>3</sup> These are the same qualities of the Find a Best Doctor and InterConsultation services described in Best Doctors’ fax advertisements, which explain “clinicians selected for the newest Best Doctors database ... are included based on the result of our extensive, confidential peer review process” and based on Best Doctors’ “process ... to confirm that [physicians in its newest database] are currently seeing patients [and] to insure the accuracy of [physicians’] information” in Best Doctors’ database.

Fax recipients, like Dr. Thomas’ office, are potential direct consumers of Best Doctors’ Find a Best Doctor and Interconsultation services, which are frequently included as part of employee benefits packages. In fact, doctors that ultimately respond to Best Doctors’ faxes and are listed in Best Doctors’ directory are provided “complementary benefits” including access to the list of Best Doctors for their “professional or personal use” while they remain Best Doctors.<sup>4</sup>

Second, in addition to advertising the commercial availability and quality of Best Doctors’ programs and services, the faxes also serve as a pretext to advertise Best Doctors branded goods to doctors. The Best Doctors branded goods consist of three different types of plaques commemorating doctors who respond to Best Doctors’ faxes and obtain free listings in Best Doctors’ directory.

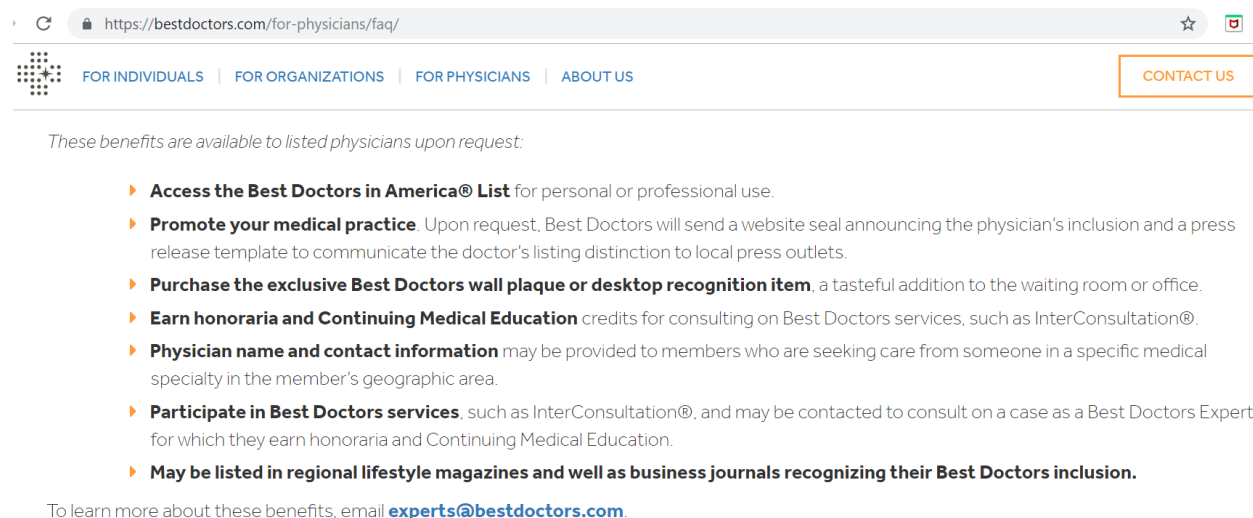
The faxes are a pretext because they identify Best Doctors’ webpage for physicians

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<sup>3</sup> Best Doctors, *How it Works* (<https://bestdoctors.com/for-individuals/how-it-works/> (last accessed Apr. 19, 2018)).

<sup>4</sup> See Best Doctors’ information packet sent to all fax recipients that accept Best Doctors’ offer for a free directory listing, attached as Exhibit 2.

(<http://bestdoctors.com/for-physicians>) that serves only three express purposes: (1) to explain the process for the Best Doctors poll, (2) to sell Best Doctors branded goods (on a linked webpage titled “Plaques”), and (3) to respond to questions frequently asked by physicians. Notably, in addition to the multiple solicitations and plaque order form included on the “Plaques” webpage, the frequently asked questions page for physicians also includes a solicitation to purchase Best Doctors plaques:



The screenshot shows a web browser window with the address bar displaying <https://bestdoctors.com/for-physicians/faq/>. The website header includes a logo on the left and navigation links: [FOR INDIVIDUALS](#), [FOR ORGANIZATIONS](#), [FOR PHYSICIANS](#), and [ABOUT US](#). A [CONTACT US](#) button is located on the right. Below the header, a section titled "These benefits are available to listed physicians upon request:" contains a bulleted list of benefits:

- ▶ **Access the Best Doctors in America® List** for personal or professional use.
- ▶ **Promote your medical practice.** Upon request, Best Doctors will send a website seal announcing the physician's inclusion and a press release template to communicate the doctor's listing distinction to local press outlets.
- ▶ **Purchase the exclusive Best Doctors wall plaque or desktop recognition item,** a tasteful addition to the waiting room or office.
- ▶ **Earn honoraria and Continuing Medical Education** credits for consulting on Best Doctors services, such as InterConsultation®.
- ▶ **Physician name and contact information** may be provided to members who are seeking care from someone in a specific medical specialty in the member's geographic area.
- ▶ **Participate in Best Doctors services,** such as InterConsultation®, and may be contacted to consult on a case as a Best Doctors Expert for which they earn honoraria and Continuing Medical Education.
- ▶ **May be listed in regional lifestyle magazines and well as business journals recognizing their Best Doctors inclusion.**

To learn more about these benefits, email [experts@bestdoctors.com](mailto:experts@bestdoctors.com).

The faxes are also a pretext because Best Doctors faxes are a prelude to subsequent, explicit solicitations to fax recipients to purchase plaques. In fact, the information packet provided to every fax recipient that responds to the fax and obtains a free listing in Best Doctors’ directory includes multiple solicitations for Best Doctors plaques, including a full-page plaque order form:

## The Best Doctors in America® Commemoratives

At the request of Best Doctors physicians, we offer customized recognition items to any physician who has ever been selected as a Best Doctor. These items make a handsome addition to any lobby, waiting room or home office to tastefully showcase your accomplishment.

All items feature the physician's name in preferred format: John Sample, MD or Dr. John Sample.



### STANDARD PLAQUE

Features the Best Doctors logo, your name and appropriate inclusion years on a polished brass plate mounted on beautifully crafted, hand-finished solid cherry.

**\$265**

### 1ST YEAR INCLUSION PLAQUE

Same as the standard, this one is designed for physicians who have been selected for multiple years and is customized to display both the first year of selection and the current listing years.

**\$290**



### DESKTOP COMMEMORATIVE

For those who prefer, this is a stylishly curved, clear acrylic with light catching gold accent and a flat base.

**\$265**

Please allow a minimum of 8 weeks for customization and delivery. Delivery times may be longer during peak demand.

## ORDER YOURS ONLINE

usplaques.bestdoctors.com  
Contact us at [plaques@bestdoctors.com](mailto:plaques@bestdoctors.com)  
or 617.963.1167 with questions



## HOW TO ORDER YOUR BEST DOCTORS PLAQUE

**Online with Credit Card**—Order at [usplaques.bestdoctors.com](http://usplaques.bestdoctors.com) (For your security we do not accept credit card orders by fax or U.S. Mail).

**By Mail**—complete this form and mail with check to Best Doctors, Inc. at the address noted below.

**By Purchase Order**—fax this form with the Purchase Order to 866.904.0913 or mail both to the address noted below.

Contact us for discounts on multiple orders.

## ORDER FORM

I would like to purchase:

Qty. x Desktop Commemorative(s) \$265

Qty. x Standard Plaque(s) \$265

Qty. x 1st Year Inclusion Plaque(s) \$290

Name as it should appear on the plaque (Dr, MD or DO)  
(up to 28 characters)

Shipping Address (UPS/FedEx Delivery. Physical address required.)

Attn:

City

State

Zip

Telephone

Email (required for order confirmation)

Payment Information: (Prices include Shipping & Handling)

Check #

Purchase Order #

We are required to collect sales tax in the following states where Best Doctors, Inc. is located: FL, IL, MA, MD, SC.

Tax exempt facilities must provide a current legible copy of the tax exempt certificate.

Best Doctors, Inc. | Polling & Research  
5230 Woodside Executive Court | Aiken, SC 29803  
Phone 800.675.1199 | Fax 866.904.0913

Best Doctors, Inc. | Polling & Research

5230 Woodside Executive Court | Aiken, SC 29803 | Tel: 800.675.1199 | Fax: 803.643.0315 | [www.bestdoctors.com](http://www.bestdoctors.com)

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Best Doctors also solicits fax recipients to purchase plaques in the press releases Best Doctors issues in connection with the selection of new Best Doctors.<sup>5</sup> For example, in Best Doctors’ press release identifying “Connecticut’s Best Doctors 2018,” which, likely would have included Dr. Thomas if he had responded to Best Doctors’ faxes, Best Doctors solicits doctors listed in the directory to purchase *exclusive* Best Doctors branded plaques, stating:

*Best Doctors, Inc. is the only authorized source of the official Best Doctors in America® plaque and other recognition items. Best Doctors does not authorize, contract with or license any organization to sell recognition items for Best Doctors, Inc. Please contact Best Doctors at [plaques@bestdoctors.com](mailto:plaques@bestdoctors.com) with any questions. For more information or to order visit [usplaques.bestdoctors.com](http://usplaques.bestdoctors.com) or call 617-963-1167.*<sup>6</sup>

Best Doctors also expressly solicits recipients of faxes who are then listed in Best Doctors’ directory to purchase plaques as part of their registration for Best Doctors celebratory events:

The screenshot shows a web page for registering for the 2018 Best Doctors celebration in Wichita. At the top, there is a navigation bar with links: Back to Top, Register (highlighted in red), Information, and Sponsors. Below this is a large 'Register Now' button. A countdown timer indicates 29 days, 4 hours, 57 minutes, and 49 seconds until the event starts. Below the timer is a table of ticket options:

Ticket Type	Price	Quantity	Fee	Total
Table of 10 (10 ticket package)	\$1,200.00	0	\$0.00	\$0.00
Table of 10 (10 ticket package)	\$950.00	0	\$0.00	\$0.00
Single Ticket	\$95.00	0	\$0.00	\$0.00

Below the table, there is a link that says 'Click to unlock hidden ticket'. At the bottom of the page, there is a red 'Checkout' button. A red circle highlights the 'Custom Plaque of Honoree' option in the first row of the table.

<sup>5</sup> See Exhibit 2 at p. 2, describing “**Recognition in local media**” as one of the “benefits” of being listed in the Best Doctors directory, and Best Doctors’ webpage with frequently asked questions for physicians (embedded above), identifying local media listings as a benefit of being listed in the directory.

<sup>6</sup> *Connecticut’s Best Doctors 2018 press release*, Connecticut Magazine ([http://www.connecticutmag.com/article\\_af095394-27da-11e8-b933-9b11a0051c15.html](http://www.connecticutmag.com/article_af095394-27da-11e8-b933-9b11a0051c15.html) (last accessed Oct. 31, 2018)).

<sup>7</sup> *Wichita Best Doctors celebration registration*, Wichita Business Journal

Notably, if every doctor listed in Best Doctors' directory were to purchase one Best Doctors plaque, Best Doctors would net over \$13 million in revenue every time it issued a new directory. More remarkably, Best Doctors offers bulk pricing, suggesting that some doctors listed in Best Doctors' directory purchase "30 or more" plaques at a time:

[https://usplaques.bestdoctors.com/BulkDiscounts.asp?ProductID=10&ProductCode=BD-PLI&Orig\\_Price=290](https://usplaques.bestdoctors.com/BulkDiscounts.asp?ProductID=10&ProductCode=BD-PLI&Orig_Price=290)

Discount10		
Buy...	Save...	New Price...
10 - 19	5%	\$275.50 per order
Discount20		
Buy...	Save...	New Price...
20 - 29	10%	\$261.00 per order
Discount30		
Buy...	Save...	New Price...
30 or more	15%	\$246.50 per order

Third, in addition to being a pretext because they direct fax recipients to Best Doctors' website and because they are a precursor to further solicitations to purchase Best Doctors plaques, the faxes are advertisements because they are part of an overall marketing campaign to make Best Doctors' health plans and Best Doctors branded plaques more desirable to consumers by growing Best Doctors' directory of providers and making Best Doctors' brand more renowned.

Fourth, and finally, the faxes are advertisements because they solicit physicians' services for pay, and/or were a precursor to soliciting physicians' services for pay. Although being listed in Best Doctors' directory is free, one of the touted "benefits" of being a Best Doctor is the opportunity to "**Earn honoraria**" and to otherwise "participate in other Best Doctors programs such as ... Interconsultation," for which Best Doctors also pays the fax recipients "a fee for the[ir] Services."<sup>8</sup>

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(<https://www.bizjournals.com/wichita/event/162110/2018/2018-best-doctors> (last accessed Oct. 31, 2018)).

<sup>8</sup> See Exhibit 1; Exhibit 2 at p. 2; exemplar Agreement for Expert Consulting Services between physicians and Best Doctors describing the independent contractor relationship and compensation between the parties, attached as Exhibit 3, at pp. 1, 3.



Accordingly, Best Doctors' faxes offering free directory listings are advertisements.

## II. THE COMMISSION'S RULES AND PRECEDENTS

### A. The Fax-As-Pretext Rule

"The facsimile advertising rules apply to a fax communication that constitutes an 'unsolicited advertisement' as defined in the TCPA."<sup>9</sup> "[F]acsimile messages that promote goods or services even at no cost ... are unsolicited advertisements under the TCPA's definition" if they are "part of an overall marketing campaign to sell property, goods, or services" because they "serve as a pretext to advertise commercial products and services."<sup>10</sup> Faxes that are a prelude or precursor to an advertisement similarly constitute unsolicited advertisements under the TCPA because they "serve as a pretext to an advertisement."<sup>11</sup>

In contrast, purely informational faxes are not unsolicited advertisements under the TCPA.<sup>12</sup> Informational faxes are faxes "that contain only information, such as news articles, legislative updates, or employee benefit information."<sup>13</sup> For informational faxes, "[a]n incidental advertisement ... does not convert the entire communication into an advertisement" unless "the primary purpose" of the faxes is "to promote commercial products" as opposed to "informational" – i.e., unless the faxes serve as a pretext to an advertisement.<sup>14</sup>

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<sup>9</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, ¶ 44 (2006).

<sup>10</sup> *Id.* at ¶ 52.

<sup>11</sup> *Id.* at ¶ 54. The fax-as-pretext rule is consistent with other TCPA rules and other agencies' rules, which recognize that in evaluating whether something is marketing *what comes next* matters. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14012, n.14 (2003) ("Such calls may be prohibited if they serve as a relationship."); *Regulation S-AM: Limitations on Affiliate Marketing*, Final Rule, 74 FR 40398, 40405 (SEC 2009) (defining "marketing solicitation" to include "activities [that] may be ... a prelude to... a marketing solicitation"); *Fair Credit Reporting Affiliate Marketing Regulations*, Final Rules, 72 FR 62910, 62919 (OCC 2007) (same).

<sup>12</sup> *Id.* at ¶¶ 49-50, 53.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at ¶ 53.

When read together, under the FCC’s fax-as-pretext rule, faxes that may appear to be informational constitute unsolicited advertisements if (1) they are sent as a prelude to a subsequent solicitation to the fax recipient *or* (2) if they are sent primarily for a commercial purpose, even if they are not preludes to further solicitations.

## **B. The Pretext Inquiry**

The Commission has conducted a fax-as-pretext inquiry on at least three occasions to determine whether faxes that ostensibly did not promote a specific transaction between the sender and recipients were pretexts under either the prelude to a solicitation theory or the commercial purpose theory (*i.e.*, if the faxes were a pretext even if they were not a prelude to further solicitations). In each of these instances, the Commission examined the same types of facts beyond the faxes themselves to determine whether they were pretextual, including what came before and after the faxes.

### ***i. Presidential Who’s Who***

In *Presidential Who’s Who*, the Commission evaluated faxes offering free directory listings sent by a company that (1) maintained a directory of business and professional achievers and (2) sold products commemorating inclusion in the directory, including “commercial directories and plaques.”<sup>15</sup> On their face, the faxes “invite[d] individuals to share information and give their permission to have it included in its publication.”<sup>16</sup> Some or all of the faxes did not include any advertisement whatsoever for the commemorative products that the company intended to later sell to fax recipients that accepted the company’s offer for a free directory listing.<sup>17</sup>

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<sup>15</sup> *Presidential Who’s Who dba Presidential Who’s Who, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13759 (2010).

<sup>16</sup> *Id.* at 13762.

<sup>17</sup> Copies of the two representative faxes in the Commission’s files associated with *Presidential Who’s Who* (case

In determining whether the company's faxes were a pretext to an advertisement, including those that did not include any advertisement for commemorative products, the Commission expressly relied on facts beyond the faxes themselves. The Commission stated that "[a]lthough there is no cost for inclusion in the publication, the products associated with the publication, such as professional directories or plaques, are later commercially available."<sup>18</sup> There was also evidence that, after it sent the faxes, the company attempted to sell fax recipients the commemorative products "at a ridicu[lous] price" by telephone.<sup>19</sup>

Applying its rules to the facts beyond the faxes themselves, the Commission explained that it "has found that when promotions for 'free' services serve as pretext for later solicitations, the original promotional fax constitutes an advertisement" because "'free' publications are 'often part of an overall marketing campaign to sell property, goods, or services.'"<sup>20</sup> The Commission therefore found under the fax-as-pretext rule that the faxes offering free directory listings were unsolicited advertisements -- regardless of whether the faxes included a solicitation for directory related commemorative products, and the fact that subsequent solicitations for directory related products to fax recipients were not made by fax.<sup>21</sup>

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no. EB-08-TC-2507) produced by the Commission in response to a Freedom of Information Act request, and the letter from the Telecommunications Consumers Division Enforcement Bureau transmitting the faxes are attached as Exhibit 4. Based on the FOIA response, it does not appear that the Commission reviewed any Presidential Who's Who faxes offering free directory listings that also included a solicitation to purchase commemorative products before concluding that the faxes were precursors to further commercial solicitations, and therefore constituted unsolicited advertisements.

<sup>18</sup> *Presidential Who's Who*, 25 FCC Rcd at 13762.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> The Commission twice reaffirmed its findings as to the application of the fax-as-pretext rule to faxes offering free directory listings that serve as a precursor to later, non-fax solicitations for directory related commemorative products. See *Presidential Who's Who dba Presidential Who's Who, Inc.*, Forfeiture Order, 29 FCC Rcd 3451 (2014) ("The faxes at issue offer entry in the publication ... and advertise that publication either explicitly or in conjunction with follow-up telephone calls from Presidential Who's Who. At best, the faxes serve as part of an 'overall marketing campaign to sell property, goods, or services'; thus, for purposes of the junk fax rules, they are unsolicited facsimile advertisements."); *Presidential Who's Who dba Presidential Who's Who, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8989 (2011) (the faxes were unsolicited advertisements because they

## ii. *iHire* and *Kohll's Pharmacy*

Since *Presidential Who's Who*, the Commission has conducted at least two additional fax-as-pretext inquiries, both of which involved examining whether the faxes were sent for purely informational purposes.<sup>22</sup> In the first, *iHire*, a company that brings together employers and job candidates sent faxes that purportedly contained summary resume information for various job candidates in response to a prospective employer's job posting. In the second, *Kohll's Pharmacy*, a pharmacy sent unsolicited faxes advising employers of the benefits of providing flu shots for employees.

In both instances, the company argued that the faxes were informational, and the Commission conducted a fax-as-pretext inquiry into the purpose of the faxes.<sup>23</sup> And in both instances the Commission looked at facts beyond the faxes themselves to evaluate the primary purpose for sending the faxes – *i.e.*, to determine whether the faxes were pretexts to advertisements.

In *iHire*, the Commission evaluated (1) the job posting that the faxes were sent in response to; (2) the full resumes for the candidates regarding which the faxes included summary information; (3) the docket from TCPA litigation arising from the faxes; and (4) the company's website describing its business model.<sup>24</sup> In *Kohll's Pharmacy*, the Commission looked at “[t]he company's actions before and after sending out the fax,” including internal emails referring to the faxes as “fax advertisements” and otherwise discussing the faxes' marketing intent.<sup>25</sup> And in

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“serve[d] as a prelude to” the company's “attempts to sell the publication in follow-up calls”).

<sup>22</sup> *Kohll's Pharmacy & Homecare, Inc. Petition for Declaratory Ruling*, Order, 31 FCC Rcd 13289 (2016); *iHire, LLC Petition for Declaratory Ruling*, Order, 30 FCC Rcd 8628 (2015).

<sup>23</sup> *Kohll's Pharmacy*, 31 FCC Rcd at 13290; *iHire*, 30 FCC Rcd at 8629, 8631.

<sup>24</sup> *iHire*, 30 FCC Rcd at 8630.

<sup>25</sup> *Kohll's Pharmacy*, 31 FCC Rcd at 13292-93.

both instances these facts beyond the faxes themselves supported the Commission's conclusions that the faxes were unsolicited advertisements.<sup>26</sup>

Accordingly, with reference to Best Doctors' faxes, while it appears more appropriate to only apply only the fax-as-pretext rule for faxes that are a prelude to later solicitations, as in *Presidential Who's Who*, the Commission would evaluate the same facts beyond Best Doctors' faxes themselves and reach the same conclusion that Best Doctors' faxes are unsolicited advertisements if it approaches the fax-as-pretext inquiry as it did in *iHire* and *Kohll's Pharmacy*.

### iii. Federal Courts

Federal courts consistently approach the fax-as-pretext inquiry in the same manner that the Commission does: by evaluating facts beyond the faxes themselves.<sup>27</sup>

In fact, less than three months ago, the Sixth Circuit Court of Appeals addressed the precise question Best Doctor's petition poses: should a district court's consideration of TCPA fax claims be confined to the four corners of the fax?<sup>28</sup> Acknowledging the Commission's fax-

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<sup>26</sup> *Kohll's Pharmacy*, 31 FCC Rcd at 13290 ("The company's actions before and after sending the fax illustrate that the fax's primary purpose was to advertise flu vaccines."); *iHire*, 30 FCC Rcd at 8632 ("provision of instructions on how to access iHire's website ... to expose them to advertising and offers for iHire's other for-fee services.").

<sup>27</sup> See, e.g., *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 95 (2d Cir. 2017) ("The district court interpreted the Rule as 'requir[ing] plaintiffs to show that the fax has a commercial pretext -- i.e., that the defendant advertised, or planned to advertise, its products or services at the seminar.' We do not disagree. ... The defendant can rebut such an inference by showing that it did not or would not advertise its products or services at the seminar.... This interpretation comports with the 2006 Rule."); *Mussat v. Enclarity, Inc.*, No. 16-CV-07643, 2018 U.S. Dist. LEXIS 35142, at \*13 (N.D. Ill. Mar. 5, 2018) ("The point of the pretext doctrine is that a fax that prompts a recipient to take action that necessarily exposes the recipient to advertising of the sender's goods or services falls within the ambit of the communications prohibited by the statute, even if that fax does not itself provide information about the commercial availability or quality of the sender's goods or services."); *Drug Reform Coordination Network, Inc. v. Grey House Publ'g., Inc.*, 106 F. Supp. 3d 9, 13-15 (D.D.C. 2015) ("[O]n its face the Fax is not an 'unsolicited advertisement.' But a different conclusion obtains when the Fax is read together with the three direct solicitation emails that followed. [Therefore, I]like the *Presidential Who's Who* facsimiles, the Fax offered a free listing, which allegedly served as a prelude to later solicitations to purchase the Directory."); but see *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 469 (4th Cir. 2018) (holding that faxes that offer free goods or services on their face are unsolicited advertisements).

<sup>28</sup> *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 907 F.3d 948 (6th Cir. 2018).

as-pretext rule, the appellate court concluded that “[a] court could not possibly resolve a claim that a fax was pretextual if it confined its evaluation to the fax itself” – *i.e.*, the court must evaluate “what came after the fax.”<sup>29</sup>

Before the Sixth Circuit’s recent pronouncement, the district court in one of the few cases Best Doctors identifies as limiting its evaluation of the fax-as-pretext question to the fax itself came “out against putting on evidentiary blinders in deciding whether a particular fax amounts to an advertisement.”<sup>30</sup> The New Jersey District Court reached its conclusion “in light of the FCC’s reasoning in classifying faxes that notify recipients of free goods and services as advertising, in part because ‘free’ publications are usually part of an overall marketing campaign, a fact that is not necessarily evident from the four corners of the fax itself.” (citing 2006 TCPA order.)<sup>31</sup>

And in the TCPA litigation against Best Doctors pending in the Massachusetts District Court, Best Doctors has expressly acknowledged that the district court is required to look at facts other than Best Doctors’ faxes to conduct a fax-as-pretext inquiry, regardless of whether the inquiry is directed to whether the faxes were a precursor to solicitations or whether they were pretextually informational.<sup>32</sup>

Therefore, further guidance from the Commission is not needed for the courts -- including

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<sup>29</sup> *Id.* at 953; *see also id.* at 955, in which the dissent notes that, by confirming the court’s ability to look beyond the face of the fax, the court was not altering the requirement to plead non-conclusory facts to support the fax-as-pretext theory and state a claim under the Federal Rules of Civil Procedure.

<sup>30</sup> *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, No. 12-2132 (FLW-TJB), 2015 U.S. Dist. LEXIS 79712, at \*10 (D.N.J. June 19, 2015).

<sup>31</sup> *Id.* at \*11-12. *See also St. Louis Heart Ctr., Inc. v. Forest Pharm., Inc.*, No. 4:12-CV-02224, 2013 U.S. Dist. LEXIS 35563, at \*1 (E.D. Mo. Mar. 13, 2013), the other case Best Doctors cites for the proposition that courts are unclear regarding whether the fax-as-pretext inquiry should be limited to the face of the fax itself, in which the district court concluded that the face of the fax itself supported the plausible conclusion that the fax was an advertisement without otherwise discussing whether that analysis was or should have been limited to the fax itself.

<sup>32</sup> *See* excerpts of transcript of October 17, 2018 hearing, attached as Exhibit 5, at 30:18-31:4, 31:15-24.

the district court overseeing the TCPA litigation regarding Best Doctors' faxes -- to correctly evaluate whether Best Doctors' faxes were unsolicited advertisements under the fax-as-pretext rule.

### III. ARGUMENT

#### A. **Best Doctors' Faxes are Unsolicited Advertisements under the Fax-as-Pretext Rule because they are Precursors to Further Solicitations**

Best Doctors' faxes are unsolicited advertisements because, at a minimum, they are intended as a precursor to a variety of further solicitations to fax recipients that respond to Best Doctors' offer for a free directory listing. A comparison of Best Doctors' and Presidential Who's Who's faxes and business practices dictates this conclusion.

First, for purposes of the fax-as-pretext analysis, Best Doctors' and Presidential Who's Who's faxes are substantively identical.<sup>33</sup> All of the faxes offer recipients free directory listings – i.e., they invited individuals to share information and give their permission to have it included in the directory. None of the faxes include express solicitations to purchase commemorative products relating to the directory.

Second, although there is no cost for inclusion in either directory, both Best Doctors and Presidential Who's Who sell commemorative products associated with the directory that are later commercially available.

Third, it is undisputed that after sending the faxes offering free directory listings, both Best Doctors and Presidential Who's Who make almost immediate, subsequent attempts to sell directory related commemorative products to fax recipients that accept offers for free directory listings. And in both instances, the commemorative products are offered at ridiculous prices.

Therefore, as in *Presidential Who's Who*, the Commission should find that Best Doctors'

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<sup>33</sup> Compare Exhibit 1 and Exhibit 4.

faxes are unsolicited advertisements because they are a pretext for later solicitations.<sup>34</sup>

**B. Alternatively, the Commission should Dismiss the Petition because it Fails to Identify a Controversy to Terminate or Uncertainty to Remove**

Best Doctors has conceded in the TCPA matter pending against it giving rise to this petition that the district court is required to examine facts beyond Best Doctors' faxes themselves to conduct the fax-as-pretext inquiry, including facts relating to "some future solicitation" by Best Doctors.<sup>35</sup> This is consistent with the Commission's approach and the resulting approach of federal courts, which are well suited to evaluate whether a fax is pretextual under the Commission's rules and precedents.<sup>36</sup> The clarification Best Doctors seeks, precluding courts from evaluating facts beyond a fax to determine pretext, would render the fax-as-pretext rule meaningless.<sup>37</sup>

Best Doctors therefore fails to identify a controversy to terminate or uncertainty to remove in connection with the fax-as-pretext inquiry, and the Commission should dismiss the petition in its entirety.<sup>38</sup>

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<sup>34</sup> This conclusion remains the same even if the Commission looks at the same types of facts it evaluated in *iHire* and *Kohll's Pharmacy*, because Best Doctors' actions before and after sending the faxes illustrate that Best Doctors sent the faxes intending to sell plaques to fax recipients that accepted the offer for a free directory listing. Notwithstanding, if the Commission finds that it cannot reach this conclusion based on the record presented, it should solicit additional information from Best Doctors, including, at a minimum, information reflecting Best Doctors' internal emails relating to the marketing of the plaques and revenues from the sale of plaques. *See* excerpt of transcript (Exhibit 5) at 31:20-24, in which Best Doctors acknowledges "there's an FCC test on what would be incidental when it comes to looking at the fax, where the advertising is located, probably the amount of revenues, things of that nature."

<sup>35</sup> *See* excerpt of transcript (Exhibit 5) at 31:2-32:17.

<sup>36</sup> *See, e.g., Drug Reform Coordination Network*, 106 F. Supp. 3d at 13-15 ("[O]n its face the Fax is not an 'unsolicited advertisement.' But a different conclusion obtains when the Fax is read together with the three direct solicitation emails that followed. [Therefore, I]like the *Presidential Who's Who* facsimiles, the Fax offered a free listing, which allegedly served as a prelude to later solicitations to purchase the Directory.").

<sup>37</sup> *But see Carlton & Harris Chiropractic*, 883 F.3d at 469 (holding that faxes that offer free goods or services on their face are unsolicited advertisements).

<sup>38</sup> *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 29 FCC Rcd 13998, 14001 (2014) ("In 2012, the Bureau dismissed Anda's petition. In so doing, the Bureau concluded that Anda had identified no controversy to terminate or uncertainty to remove, a condition precedent to the Commission issuing a declaratory ruling. Specifically, the Bureau responded that the Commission had cited in the *Junk Fax Order* statutory authority, including section 227, to adopt the rule at issue. The Bureau also found that the

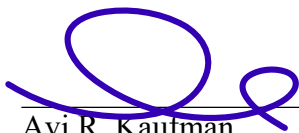


#### IV. CONCLUSION

Best Doctors' petition seeks a ruling directly at odds with the Commission's fax-as-pretext rule and precedents, which are consistently applied by federal courts, as an end around to potential liability in pending TCPA litigation. But Best Doctors' faxes are unsolicited advertisement, at a minimum, because they are a precursor to future solicitations to fax recipients. The Commission should therefore find that Best Doctors' faxes are unsolicited advertisements, or, in the alternative, dismiss Best Doctors' petition for failing to raise a justiciable controversy.

Respectfully submitted,

**DR. KENNETH A . THOMAS MD, LLC**



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Avi R. Kaufman  
KAUFMAN P.A.  
400 Northwest 26<sup>th</sup> Street  
Miami, Florida 33127  
(305) 469-5881

*Its Attorney*

January 29, 2019

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Commission had clearly set forth the rule's requirement. The Bureau thus found no controversy to terminate or uncertainty to remove.”).

# EXHIBIT 1



# Fax

<b>Attention of:</b> Dr. Kenneth A. Thomas	<b>Fax No:</b> 203-377-6497
<b>From:</b> Tommysina Bryant (return fax: 866-904-0913)	<b>Date:</b> 5/16/2017
<b>Ref:</b> Review your Best Doctors inclusion data	<b>Pages (including cover):</b> 1

Dear Dr. Thomas,

Best Doctors® is preparing to notify the clinicians selected for the newest Best Doctors database. Physicians are included based on the result of our extensive, confidential peer-review process. As you may know, we accept no fees from doctors in exchange for a listing in our database. Physicians not currently seeing patients, even though selected by their peers to be a Best Doctor, will not be included in our Best Doctors in America List.

One step in this process is to verify and update your clinical address and to confirm that you are currently seeing patients to insure the accuracy of your information and to facilitate delivery of your formal inclusion letter this summer.

Please review the information below and either confirm its accuracy or indicate required corrections or additions. In particular, please let us know if the clinical address below is incomplete, or if it is not the address where you see patients.

**To help us meet our deadline, please respond within 7 days of your receipt of this request.**

<b>CLINICAL ADDRESS**</b> Dr. Kenneth A. Thomas 305 Boston Ave, Ste 205  Stratford, CT 06614	<b>MAILING ADDRESS (if different)</b>
--	---------------------------------------

**Appointment Phone:** 203-377-7670    **Administrative Fax:** 203-377-6497  
**Email address:**

Thank you for taking the time to update this information. If you have any questions or concerns, please do not hesitate to contact me at the number or email listed below. You will find some helpful information about us at <http://bestdoctors.com/for-physicians>.

Sincerely,

Tommysina Bryant  
Best Doctors, Inc. | Polling and Research Division  
5230 Woodside Executive Court  
Aiken, SC 29803  
ph: 800-675-1199 x3201 | fax: 866-904-0913  
[research@bestdoctors.com](mailto:research@bestdoctors.com)

147420

<b>CURRENTLY SEEING PATIENTS?</b> <input type="checkbox"/> YES <input type="checkbox"/> NO
If YES, are you accepting NEW patients?
<input type="checkbox"/> Yes, all patients <input type="checkbox"/> Yes, referral required <input type="checkbox"/> Not accepting new patients
If NOT currently seeing patients, what is the reason?
<input type="checkbox"/> Administrative only <input type="checkbox"/> Research only <input type="checkbox"/> Retired <input type="checkbox"/> Other (explain:)

\*\*The information you provide at this time will be used by Best Doctors to determine your eligibility for inclusion in the Best Doctors in America list. If you are not accepted for inclusion, Best Doctors will not use or disclose the information you provide any further. If you are accepted as a Best Doctor and included in the Best Doctors in America list, we may use and disclose your information as follows: Best Doctors will use, and may disclose to subcontractors, your contact information only for purposes of administering our programs and services. Best Doctors may list your name, clinical address and affiliation, and specialty in local and regional magazines and newspapers as recognition of your inclusion in the Best Doctors in America® List. Prior to any publication, we will notify you and provide you with the ability to opt out of your inclusion in such publication. We may disclose your name, clinical address, and specialty to our members as part of our Find a Best Doctor™ service in which members request names of Best Doctors who treat their specific condition and who are in their geographic location. Finally, we may reach out to you from time to time to invite you to participate in other Best Doctors programs such as our virtual medical review service called InterConsultation®.

Best Doctors® and the star-in-cross logo are registered service marks of Best Doctors, Inc., in the United States and other countries.

# EXHIBIT 2



The Best Doctors in America®  
PEER SELECTED 2017-2018

## Information for Best Doctors Physicians, Hospitals & Large Medical Practices

2017 – 2018



### Mission and Vision

#### **We Solve the Unsolvable in Healthcare.**

We identify and solve the most complex, critical and costly problems in healthcare by combining expert clinical analysis and data analytics with a premium patient experience across a global network.

By combining expert clinical services with analytics, Best Doctors can help individuals make the best decisions, experience the best outcomes and make the best use of healthcare resources.

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# ABOUT BEST DOCTORS, INC.

## Who is Best Doctors?

Founded in 1989 by Harvard Medical School physicians, Best Doctors, a division of Teladoc, Inc., is the world's leading medical consultation company. We connect individuals facing difficult diagnostic or medical treatment decisions with the best doctors, selected by impartial peer review in over 450 subspecialties of medicine, to review their diagnosis and treatment plans. Best Doctors serves more than 40 million members worldwide, utilizing access to the brightest minds in medicine, analytics and technology to deliver improved health outcomes while reducing costs. A Best Doctors expert opinion led to a change or refinement of diagnoses in 45% of cases that the company reviewed, as well as a change or improvement of treatment plans in 75% of cases. With every service offered, the goal remains the same: **to help people in need get the right diagnosis and treatment, significantly improving health outcomes while reducing costs.**

## Who are members of Best Doctors?

Members are individuals and their families who can access Best Doctors services as a benefit through their employer or insurer.

Best Doctors is an employer-provided benefit that gives over 12 million eligible members in the U.S. and an estimated 40 million members worldwide a unique suite of services designed to do one thing: **eliminate medical uncertainty in a very uncertain landscape.**

Best Doctors not only identifies the very best clinicians, we partners with them to review members' medical diagnoses and treatment plans, as well as answer any questions a member may have—providing unparalleled clinical quality as an integral part of employers' benefits offerings.

## Services offered to Best Doctors members

### InterConsultation®

Best Doctors collects members' medical records and has them reviewed by world-renowned expert physicians to ensure the diagnoses and treatment recommendations are accurate.

### Critical Care Support™

If members experience serious medical events, like an emergency or extended hospital stay, Best Doctors immediately gets experts involved and works with local treating teams to ensure the best care.

### Ask the Expert™

When members have questions about medical conditions, treatment options or symptoms that do not require the extensive medical record collection and review of an InterConsultation, we utilize Ask the Expert. Through this service, expert physicians provide a succinct, personalized responses to member questions based upon clinically written vignettes.

### FindBestDoc®

If members need to visit a specialist, we search for an appropriate doctor from among the physicians in our global database to meet their needs and may provide your clinical contact information to the member. Our proprietary database contains nearly 50,000 physicians globally, including close to 40,000 physicians in our Best Doctors in America® database.

### Treatment Decision Support™

Members have free access to one-on-one coaching and interactive, online educational modules with information about specific conditions, giving members the tools to confidently make medical decisions.

### Medical Records eSummary™

Best Doctors collects and organizes members' medical records and creates personal Health Alert Summaries. Everything is provided on easy-to-access USB drives or secure digital files.

## Who is Teladoc, Inc.?

Teladoc, Inc. (NYSE:TDOC) is the nation's first and largest telehealth platform. Recognized by MIT Technology Review as one of the "50 Smartest Companies," Teladoc is forging a new healthcare experience with an innovative portfolio of virtual care delivery solutions. Currently, Teladoc serves more than 7,500 clients – from payers to providers to employers – and more than 20 million members who connect within minutes to Teladoc's network of more than 3,100 board-certified, state-licensed physicians and therapists, 24/7. Teladoc's services and solutions marry a highly engaged consumer experience with the latest in data and analytics, and a highly flexible technology platform. Teladoc has delivered more than 2.5 million medical visits for general medical, dermatology, counseling, psychiatry, sexual health and tobacco cessation. To learn more, go online to [www.teladoc.com](http://www.teladoc.com).



# THE BENEFITS & HOW TO GET INVOLVED

## The benefits of being a Best Doctors physician

As a physician-founded and clinically focused organization, we are privileged to conduct our poll to recognize outstanding physicians like you and provide these unique, complementary benefits:

- **Promote your practice**—Upon request, we will send you or your PR/marketing department a website seal announcing your inclusion and a press release template to communicate your distinction as a Best Doctor to local press outlets.
- **Recognition in local media**—Inclusion on our list means your name and clinical location may be published in a major publication in your area.
- **Request a referral list** of Best Doctors physicians for your professional or personal use.
- **Purchase the exclusive Best Doctors wall plaque or desktop commemorative**, a tasteful addition to your waiting room or office.
- **Earn honoraria** and **Continuing Medical Education** credits for consulting on cases.
- **Participate in our next poll**—Only current Best Doctors physicians are eligible to participate in our next biennial poll. Your opinions are vital to recognizing other exceptional physicians.
  - **Nominate** physicians you believe should be considered in our next poll. Request a nomination form by emailing [experts@bestdoctors.com](mailto:experts@bestdoctors.com).
  - **Vote** in our next poll, which will be conducted in late 2018.

Learn more about each of these benefits by emailing [experts@bestdoctors.com](mailto:experts@bestdoctors.com) or by calling 800.675.1199.

## How to get involved in our in-depth medical review service

**Guide members and their physicians to find the right diagnosis and treatment.**

As a Best Doctors expert, you have the outstanding opportunity to participate in our InterConsultation® service for people around the world who are struggling with complex or chronic cases. We provide you with the information you need—a concise, physician-written clinical summary and access to the primary imaging and other diagnostics via our web-based platform. Then you can do the clinical work you enjoy most—thinking about challenging cases and utilizing your knowledge and experience to provide guidance about diagnosis and treatment.

There is no cost to the members we serve. Individuals and families receive free access to Best Doctors as a benefit through their employer or insurer.

Through this work, we are empowering members and their treating physicians, but you are never providing care directly. Our experts earn honoraria and CME credits, but far more important, you have the satisfaction of meaningfully helping members in need and providing access to clinical expertise they otherwise would not have.

## How our process works:

1. The Best Doctors medical team compiles a concise but thorough case summary, including member records, lab results, pathology and imaging for a case in your clinical area of interest.
2. You provide your opinion on the diagnosis and/or treatment plan.
3. Best Doctors shares your report and recommendation with the member and treating physician.
4. You earn an honorarium and Continuing Medical Education credit for each case.

Please consider helping members by consulting on these cases. If you would like to learn more about consulting on cases with Best Doctors, we would be happy to answer your questions. Contact our Physician Services Department at [physicianhelp@bestdoctors.com](mailto:physicianhelp@bestdoctors.com).



# PROFESSIONAL PROFILES

Best Doctors, Inc. develops and maintains detailed profiles of physicians in the database through in-depth, ongoing research.

## What is your professional profile?

Your professional profile is the information we have in the Best Doctors database about your practice, education and training, hospital and academic affiliations, diagnoses and procedures in your expertise, board certifications, publication topics and special areas of medical research.

We are pleased to announce our new, online professional profile tool to replace the paper form we have used in the past. Our goal is to provide a better experience for you.

Your online profile is populated with information we have on file. We ask physicians to review, complete and submit their updates to ensure we have current information in our database. This helps our clinical staff match members who are in need of a physician within your specialty. Best Doctors may refer members to you through the FindBestDoc® service.

## When are professional profiles sent to Best Doctors?

An invitation to complete your professional profile will be emailed to you a few weeks after you receive your inclusion packet with a link and your login information to update and complete your profile. We rely on you to review, complete and submit your updated profile to ensure we have current information in our database.

Please check the email address on your welcome letter and contact us if it is not correct. Please direct any questions to: [profiles@bestdoctors.com](mailto:profiles@bestdoctors.com).

*"I have had the privilege of working with Best Doctors for the past six years, both providing Best Doctors evaluations and receiving them and am continually impressed by the excellence of service to the patient, their families and all healthcare providers involved in the patient's care."*

**Dr. Neal Futran**

Director of Head and Neck Surgery  
Chair of the Department of Otolaryngology  
University of Washington Medicine

Selected a Best Doctors physician since 1998  
Otolaryngology/General and Head and Neck Surgery;  
Surgery/Head and Neck Surgery

## Data collection and use

Best Doctors will use, and may disclose to subcontractors, your contact information only for purposes of administering our programs and services. We may disclose your name, clinical address and specialty to our members as part of our FindBestDoc® service, in which members request names of Best Doctors who treat their specific condition and who are in their geographic location. Best Doctors may also list your name, clinical address and affiliation, and specialty in local and regional magazines and newspapers as recognition of your inclusion in the Best Doctors in America® List. Prior to any publication, we will notify you and provide you with the ability to opt out of your inclusion in such publication. Finally, we may reach out to you from time to time to invite you to participate in other Best Doctors programs, such as our in-depth medical review service called InterConsultation® or the telemedicine programs of our parent company, Teladoc, Inc.

# HOW DOES BEST DOCTORS SELECT EXPERT PHYSICIANS?

## The doctors other doctors trust most

Since 1989, Best Doctors has conducted one of the largest ongoing peer physician polls in healthcare to identify the physicians other physicians trust most. We start by asking: **“If you or a loved one needed a physician in your specialty, to whom would you refer?”**

All listed Best Doctors have received consensus of their peer physicians’ support. Physicians who receive peer consensus are then researched and verified for clinical activity, licensure and disciplinary actions.

A selected Best Doctor doesn’t remain in the database forever. The peer-review process requires that every listed Best Doctor physician be re-evaluated by their peers in each poll. Best Doctors does not pay physicians to be included in the database, nor can physicians or their organizations pay Best Doctors. A physician cannot apply to become a Best Doctors physician. The only way for a physician to be selected to the database is to be nominated by and then receive voting consensus from current Best Doctors physicians.

As a result, Best Doctors has a proprietary, global database of physicians – free from commercial and financial bias – numbering nearly 50,000 in over 450 specialties and subspecialties worldwide. There are close to 40,000 Best Doctors in the U.S.

Best Doctors is not a list company and does not publish a directory of the database.

## Why Best Doctors is unique

- Only currently listed Best Doctors physicians are eligible to submit nominations and vote in the poll. Best Doctors does not survey the medical community randomly or in its entirety.
- The large pool of voting physicians helps eliminate the commercial, financial and other biases of smaller-scale surveys and the potential distortion that results from a random survey of the entire physician community.
- Each physician votes a custom ballot, generated to include a mix of candidates at their own and other area medical facilities and practices, as well as candidates with national reputations.
- Best Doctors has developed proprietary software that analyzes the votes and provides an aggregate score for each physician candidate. This yields a preliminary set of physicians who meet the initial criteria for inclusion.
- Only physicians who earn consensus of their peers and meet all additional criteria are selected to the database.
- Best Doctors verifies all physicians in its database for clinical activity and medical licensure.
- Best Doctors never accepts compensation of any kind from physicians or hospitals in return for listing physicians in the database, nor does Best Doctors pay physicians to participate in the poll.
- A physician cannot apply to become a Best Doctor. The only way to be selected to the database is to be nominated and voted on by other Best Doctors physicians.
- No one is a Best Doctors physician for life. Every physician must be reselected in each biennial poll.
- Best Doctors is not a list company and does not publish a paper or electronic directory of the database.
- Best Doctors develops and maintains detailed profiles of each physician in the database through in-depth, ongoing research. The profile includes education and training, diagnoses and procedures in the doctor’s expertise, publications, special areas of medical research and experience and board certifications.

*Gallup® has audited and certified Best Doctors, Inc.’s database of physicians, and its companion Best Doctors in America® List, as using the highest industry standards, survey methodology and processes.*



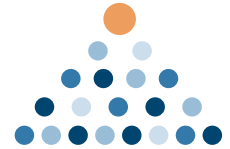
Nearly 50,000  
leading doctors  
worldwide



Close to 40,000  
in the U.S. alone



Covering  
450+ medical  
specialties and  
subspecialties



Peer-selected as  
the best 4% of  
U.S. physicians

Polling & Research  
Staff continually  
verify the following  
for Best Doctors  
physicians:

- Clinical activity
- Current clinical address at which patients are seen
- Medical license: number, expiration date and any restrictions
- DEA number and expiration date
- Hospital affiliations and titles
- Academic affiliations and titles
- Board certifications and sub-certifications
- Education
- Training: internship, residency and fellowship
- Research
- Publications
- Diagnoses and procedures

## Independent credentialing and verification

All physicians who receive consensus of peer support through voting are subject to additional qualifying criteria before inclusion in the database. All physicians in the Best Doctors database must be accessible to current and/or new patients and have an active medical license free from any disqualifying disciplinary actions.

Best Doctors Polling & Research staff maintains and updates information on each physician. This ongoing verification process includes updates to clinical contact and other information to ensure an accurate profile of each specialist. Physicians who retire, are no longer clinically active, go on sabbatical or other leave or have a disqualifying disciplinary action on their medical license are removed from the database.

## Quality and collaboration on member cases

Because a physician's ability to positively impact care through remote consultation is our highest priority, we take great care in matching the member's case to a Best Doctors physician in our database using criteria directly related to the member's specific medical condition, such as:

- Research influence—we review the published research of the physician and the extent to which other physicians have cited the physicians' work.
- Affiliation with Centers of Excellence renowned for leading care in the member's condition.
- Degree of medical leadership as demonstrated by the physician's faculty appointments at academic centers and medical schools.

The process of ensuring quality doesn't end with the case review. After a Best Doctors expert physician completes the member's case report, our supervising physicians critically review and score the report. This ensures physicians who are most highly skilled in remote consultation and diagnostic decision support are consistently engaged in service to our members.

Finally, our commitment to supporting all physicians in providing the highest quality of care includes partnership with the treating physicians of our members to develop the best clinical roadmap for any condition.

# MORE ABOUT THE SELECTION PROCESS

## How does Best Doctors, Inc. determine who to include on the Best Doctors in America® List?

Every two years, Best Doctors undertakes the largest, continuous, peer-to-peer survey of the medical profession to develop the Best Doctors in America® List.

Doctors have a unique, professional perspective about who's at the top of their profession, who's up on the latest advances in their field and therefore, where they personally would turn for state-of-the-art care when faced with a serious medical problem.

## What is the process for a physician to be on the Best Doctors in America® List?

A physician must be nominated by a current listee to be considered for inclusion. The doctor then must go through the evaluation process.

During the evaluation process, currently listed Best Doctors confidentially evaluate other Best Doctors, as well as nominees in their own and related medical specialties. Once a consensus of peer support is achieved, the physicians are subject to additional qualifying criteria, including verification of clinical activity, accessibility to existing and/or new patients and an active medical license with no disqualifying disciplinary actions.

## How does a Best Doctors physician nominate other physicians?

Only currently listed Best Doctors are eligible to submit nominations.

Each biennial poll begins with a formal, online nomination phase. A Best Doctor may also nominate by requesting an official nomination form.

We limit nominations to ten physicians per two-year period, but not by specialty or geographic area. We ask only that doctors recommend others to whom they would personally refer for care. All nominees and listees are subject to the biennial evaluation process.

Requests for nomination forms must be made by the physician to [experts@bestdoctors.com](mailto:experts@bestdoctors.com) or 800.675.1199.

## How important is the voting portion of the process?

The knowledge and expertise of currently listed doctors is integral to our polling process. Listed physicians are uniquely qualified to provide their assessment of their peers.

We appreciate any assistance hospital, practice PR and marketing contacts can provide in encouraging polling participation by listed Best Doctors at their institution.

## What are the clinical requirements for a Best Doctor?

In addition to receiving consensus of peer support, listed Best Doctors must be accessible to existing and/or new patients and have a current medical license free from any disqualifying disciplinary actions.

## How does Best Doctors avoid reflecting bias in the database?

Enough doctors participate in the polling process to eliminate commercial, financial and other biases. Each physician votes a custom ballot. Some of the most critical evaluations come from doctors evaluating others within their own facility.

Best Doctors has developed proprietary software that analyzes the votes and provides an aggregate score for each physician. This yields a preliminary set of doctors who meet the initial criteria for inclusion. Only doctors who earn consensus of their peers and meet all additional criteria are selected for the list.

*Gallup® has audited and certified Best Doctors, Inc.'s database of physicians, and its companion Best Doctors in America® List, as using the highest industry standards survey methodology and processes.*

## How are doctors selected for your list notified of their inclusion?

Upon completion of the poll and research, all physicians selected to the list are notified by inclusion packet via U.S. mail.

# THE 2017-2018 BEST DOCTORS IN AMERICA® LIST

## What is the Best Doctors in America® List?

The Best Doctors in America® List is the companion to the Best Doctors proprietary database of close to 50,000 global physicians in over 450 specialties and subspecialties.

Only physicians who are peer-selected in our biennial poll and are clinically active are included. The list is comprised of physicians from whom other physicians would seek care for themselves and loved ones—approximately 4% of U.S. physicians.

## How many U.S. physicians are on the Best Doctors in America® List?

Approximately 4% of doctors practicing in the U.S. are selected for the Best Doctors list. There are currently close to 40,000 Best Doctors in the U.S.

## Do you recognize physicians from all states on the Best Doctors in America® List?

Best Doctors are selected in every state via our poll. However, cities tend to have more Best Doctors than rural areas. Major universities, hospitals and large healthcare provider networks typically attract doctors with the level of expertise we identify on our list and therefore usually yield a higher number of Best Doctors. See the maps on pages 8-10 for additional information.

## How many doctors are selected per specialty or per metro area?

We do not have quotas or choose a certain number of doctors per specialty or geographic area. Each doctor is evaluated individually with selection based on meeting all qualifying criteria. See the maps on pages 8-10 for additional information.

*“This list of physicians is unique in that it is peer recognized. No one knows another physician’s skill set like we do of each other. I appreciate the service Best Doctors offers.”*

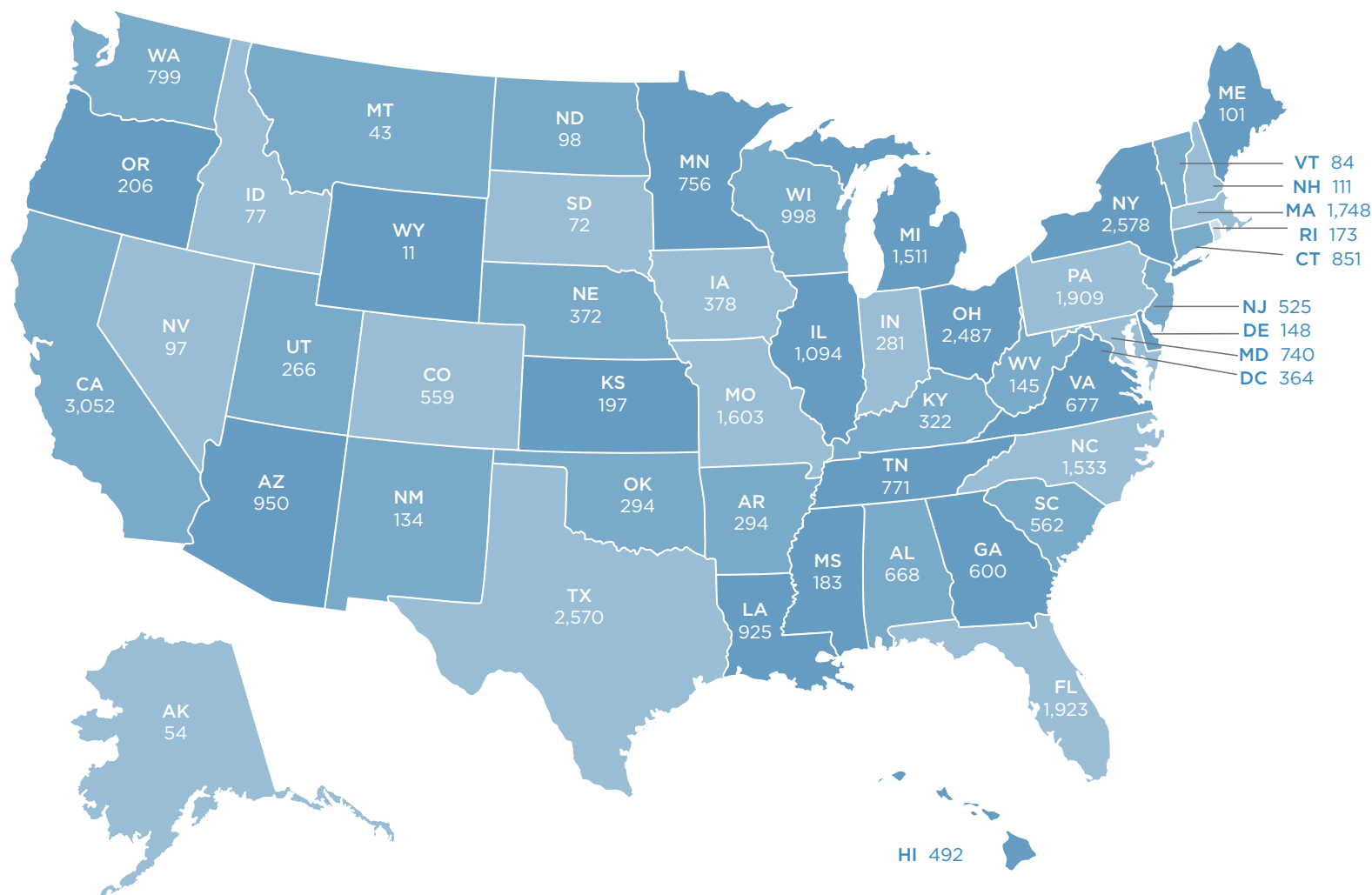
**Dr. Paul Lewis**  
Turley Family Health Center, Clearwater, FL

Selected a Best Doctors physician since 2007  
Family Medicine/General Family Practice



# Best Doctors in America® List 2017-2018

Location of close to 40,000 physicians selected by their peers



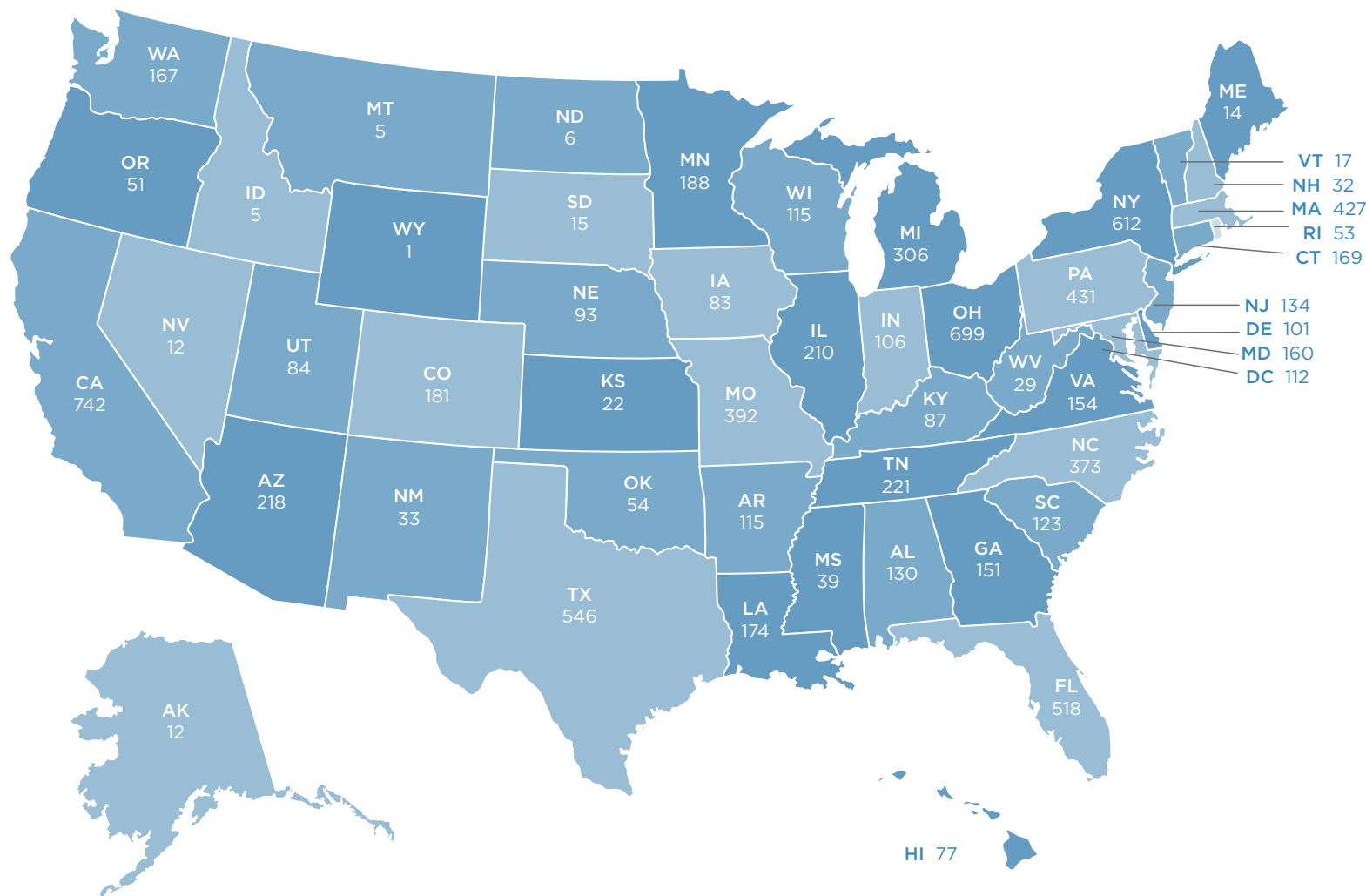
## U.S. Best Doctors physicians by specialty

Addiction medicine	45	Hepatology	196	Pediatrics	1,914
Allergy and immunology	389	Infectious disease	714	Pediatric specialist	7,018
Anesthesiology	687	Internal medicine	2,058	Physical medicine & rehabilitation	512
Cardiovascular disease	1,713	Medical genetics	128	Plastic surgery	544
Clinical pharmacology	27	Medical oncology & hematology	1,481	Psychiatry	1,585
Colon & rectal surgery	200	Nephrology	550	Public health & preventative medicine	2
Critical care medicine	723	Neurological surgery	563	Pulmonary medicine	842
Dermatology	948	Neurology	1,544	Radiation oncology	431
Eating disorders	15	Nuclear medicine	135	Radiology	1,080
Emergency medicine	153	Obstetrics & gynecology	2,326	Rheumatology	521
Endocrinology & metabolism	577	Occupational medicine	20	Sleep medicine	143
Family medicine	1,359	Ophthalmology	1,726	Surgery	842
Gastroenterology	785	Orthopedic surgery	1,373	Surgical oncology	426
Geriatric medicine	377	Otolaryngology	911	Thoracic surgery	391
Hand surgery	260	Pathology	514	Urology	656
				Vascular surgery	312

\*Numbers from 2017-2018 poll results and additional research.

# Pediatrics only: Best Doctors in America® List 2017-2018

Location of close to 9,000 pediatricians and pediatric specialists selected by their peers



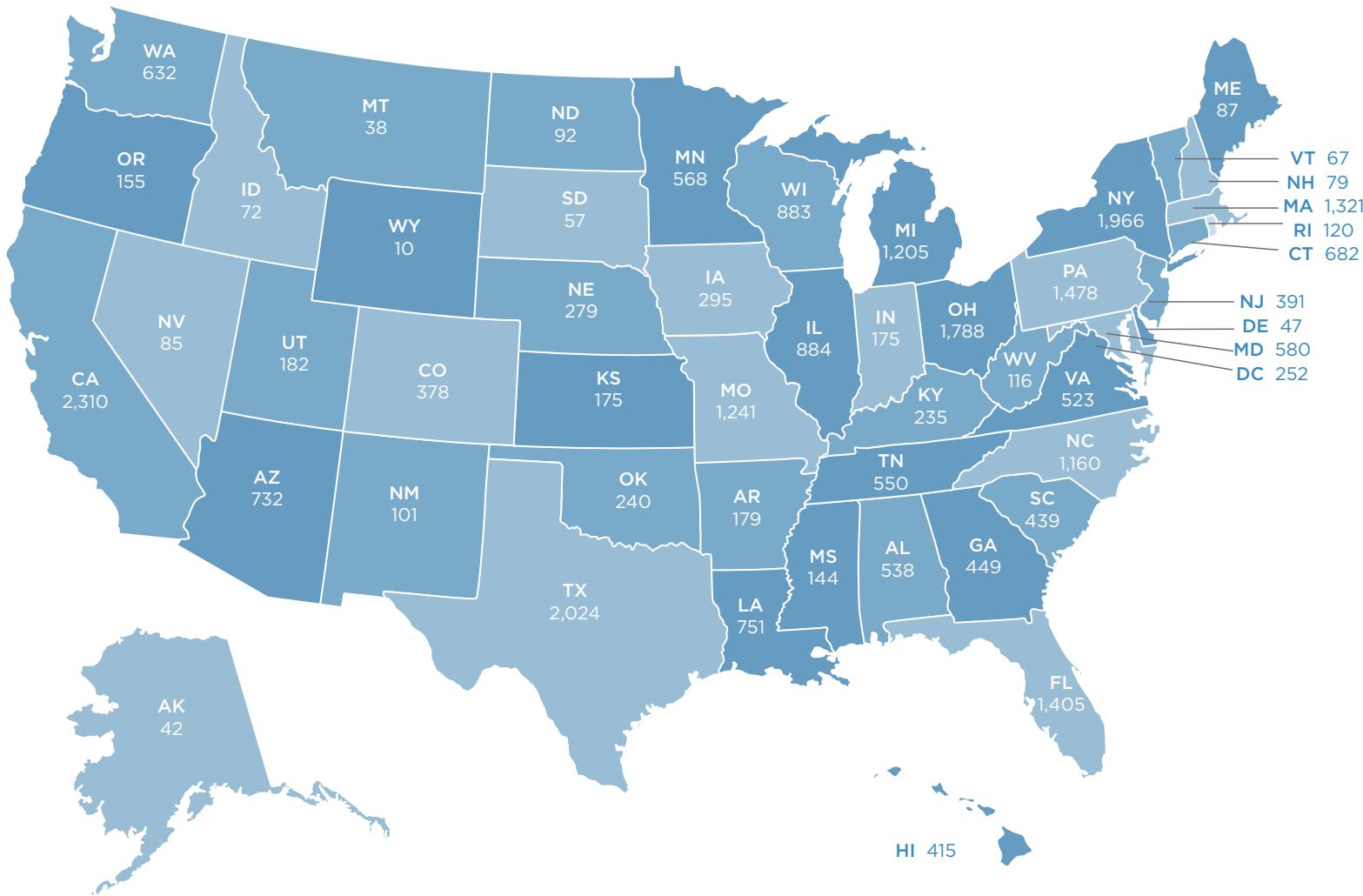
## Pediatrics only: U.S. Best Doctors by specialty

Abused children	66	Pediatric & adolescent gynecology	56	Pediatric neuroradiology	15
Adolescent & young adult medicine	143	Pediatric anesthesiology	281	Pediatric nuclear medicine	6
Carcinoid/neuroendocrine tumor	9	Pediatric cardiac surgery	51	Pediatric nutrition	26
Child & adolescent psychiatry	457	Pediatric cardiology	529	Pediatric obesity	5
Hospice & palliative medicine	17	Pediatric cardiovascular anesthesia	63	Pediatric ophthalmology	222
Neonatal-Perinatal medicine	567	Pediatric clinical genetics	17	Pediatric orthopaedic surgery	228
Neurology, clinical neurophysiology	1	Pediatric critical care	433	Pediatric otolaryngology	221
Neurology, epilepsy	99	Pediatric dermatology	108	Pediatric pain management	18
Neurology, general	226	Pediatric developmental & behavior problems	105	Pediatric pathology	30
Neurology, HIV/AIDS	1	Pediatric emergency medicine	95	Pediatric physical medicine & rehabilitation	48
Neurology, inherited biochemical disorders	3	Pediatric endocrinology	310	Pediatric plastic surgery	40
Neurology, movement disorders	14	Pediatric gastroenterology	305	Pediatric pulmonology	295
Neurology, muscular dystrophy	7	Pediatric general hepatology	39	Pediatric radiation oncology	35
Neurology, neonatal neurology	12	Pediatric hematology-oncology	501	Pediatric radiology	116
Neurology, neuro-oncology	15	Pediatric infectious disease	304	Pediatric rheumatology	94
Neurology, neurodevelopmental disabilities	8	Pediatric interventional radiology	6	Pediatric sleep medicine	45
Neurology, neuromuscular disease	20	Pediatric medical genetics	45	Pediatric sports medicine	20
Neurology, pediatric metabolic diseases	11	Pediatric medical toxicology	6	Pediatric surgery	294
Neurology, sleep medicine	5	Pediatric metabolic diseases	62	Pediatric thoracic surgery	23
Neurology, vascular neurology	1	Pediatric nephrology	191	Pediatric transplant hepatology	20
Pediatric allergy & immunology	200	Pediatric neurodevelopmental disabilities	6	Pediatric urology	146
		Pediatric neurological surgery	106	Pediatrics, general	1,914

*\*Numbers from 2017-2018 poll results and additional research.*

# Adults only: Best Doctors in America® List 2017-2018

Location of close to 31,000 adult physicians selected by their peers



## Adults only: U.S. Best Doctors physicians by specialty

Addiction medicine	45	Hepatology	196	Physical medicine & rehabilitation	512
Allergy and immunology	389	Infectious disease	714	Plastic surgery	544
Anesthesiology	687	Internal medicine	2,058	Psychiatry	1,585
Cardiovascular disease	1,713	Medical genetics	128	Public health & preventative medicine	2
Clinical pharmacology	27	Medical oncology & hematology	1,481	Pulmonary medicine	842
Colon & rectal surgery	200	Nephrology	550	Radiation oncology	431
Critical care medicine	723	Neurological surgery	563	Radiology	1,080
Dermatology	948	Neurology	1,544	Rheumatology	521
Eating disorders	15	Nuclear medicine	135	Sleep medicine	143
Emergency medicine	153	Obstetrics & gynecology	2,326	Surgery	842
Endocrinology & metabolism	577	Occupational medicine	20	Surgical oncology	426
Family medicine	1,359	Ophthalmology	1,726	Thoracic surgery	391
Gastroenterology	785	Orthopedic surgery	1,373	Urology	656
Geriatric medicine	377	Otolaryngology	911	Vascular surgery	312
Hand surgery	260	Pathology	514		

\*Numbers from 2017-2018 poll results and additional research.



# HEALTHCARE FACILITIES & PRACTICE RESOURCES

## How to promote your facility's Best Doctors physicians.

### How can a physician's hospital or practice receive information for recognition purposes?

We are pleased to work with hospitals and other healthcare provider organizations to recognize physicians selected to the Best Doctors in America® List. We provide list information, logos, web seals, press release templates and statistical information to doctors and PR contacts for internal or external recognition purposes. They are available at any time and at no charge upon request from [experts@bestdoctors.com](mailto:experts@bestdoctors.com). We provide periodic updates as needed.

### What is the Hospital List?

The Hospital List is a list of Best Doctors physicians affiliated with a specific hospital or healthcare system.

### Do all listed Best Doctors affiliated with a medical facility name appear on the Hospital List?

We send all Best Doctors physicians a Professional Profile that asks specific questions about their practice, including hospital affiliations. Due to incomplete reporting from doctors who may have multiple affiliations, it is important for PR contacts to review the Hospital List carefully so all Best Doctors are properly listed and appropriately recognized by their hospital. We appreciate any assistance PR and marketing contacts may be able to provide in identifying doctors included in the Affiliation Unreported section, as well as any other necessary revisions.

### Are hospital affiliations for the doctors provided to the publications?

Best Doctors includes the hospital name only if a doctor's primary clinical address is at a hospital. Due to the number of doctors with multiple affiliations, as well as incomplete reporting, hospital affiliations are not included on lists sent to publications.

The Best Doctors in America® List is not available to the general public, so this is a great way for a medical facility or practice to publicize the Best Doctors at their facility. We welcome recommendations regarding any publications you think would be appropriate for us to contact.

### How current is the Best Doctors database?

The database is constantly updated by our research staff to reflect doctors' geographical moves, retirement, death, changes in clinical activity and other criteria with data we receive from listed Best Doctors, their professional profiles, PR contacts in the medical community and publicly available information like licensing. If a PR or marketing contact receives information from us in January and decides to run a second press release later in the year, we recommend that they contact us for a new list that will include any changes occurred on the Hospital List during the interim.

### Do we need to have press releases and advertisements approved by Best Doctors, Inc.?

Best Doctors must approve all advertisements and press releases utilizing the Best Doctors name and/or logo in advance of release in any public media in compliance with our Trademark Usage Requirements (page 15). Send requests to [experts@bestdoctors.com](mailto:experts@bestdoctors.com). The turnaround time for approval is 3 to 5 business days. If you are working on a deadline, we will do our best to accommodate your timeline.


# PR & MARKETING CONTACTS

## How do PR and marketing contacts ensure receipt of the Best Doctors in America® List information, as well as future updates?

We will add contact and request information to our PR Directory upon receipt of the completed Request for Information form on page 15. This will ensure you receive current information and additional updates as they become available. Please be assured that contact data is only used by Best Doctors and is never sold or shared. Removal from the PR Directory may be made by request at any time.

## Can you tell which hospital has the most listed Best Doctors in a state or metro area?

These statistics are not exact due to the fact that many listed Best Doctors have not provided their hospital affiliations to us. We appreciate any encouragement PR and marketing contacts can give to physicians to complete their professional profiles.



**“Without a doubt, Best Doctors is a simple and transparent way of providing high-quality expert second opinions to patients in difficult situations, in a way that benefits both the patient and the doctor.”**

**Dr. Luís Costa**  
*Professor of Medicine and Director of Oncology  
Hospital de Santa Maria  
Lisbon, Portugal*

# REQUEST FOR INFORMATION

Please complete and submit this form to be added to our PR Directory to receive information and updates to your Hospital List.

Name and Title:

Institution:

Address:

Telephone:

Fax:

E-mail:

Other institutions/clinics also affiliated with location listed above (please use complete, official names of institutions) and their location (city/state):

Requesting information on physicians located in:

State/Metro/City

Names of the physicians listed in

Hospital

Additional List(s) or Cities requested:

In exchange for this information, I agree that Best Doctors, Inc. requires approval of all advertisements and/or press releases utilizing the Best Doctors name and/or logo, in advance of their release to any public medium, and that I must contact Best Doctors and provide a sample of any materials using the Best Doctors Marks and obtain the written approval of such sample by Best Doctors prior to distributing any materials containing a Best Doctors Mark in any form.

expressly permits Best Doctors to reproduce the provider's press release and/or advertisement for promotional purposes.

Signature

Date

**Note: Please return this form by email to [clyon@bestdoctors.com](mailto:clyon@bestdoctors.com) or fax to 803.643.0315.**

# LICENSE TO USE NAME & WEB SEAL

Best Doctors, Inc. grants \_\_\_\_\_ a license for **one-time reproduction** rights for the Best Doctors, Inc. name and web seal. This limited license extends solely to the production and distribution of one promotional advertisement (web site) and will automatically expire upon the production and distribution of such advertisement.

In consideration for this **one-time grant of rights**, \_\_\_\_\_ agrees to pay to Best Doctors a fee of \$1.

The promotional advertisement shall display the Best Doctors name and web seal in strict compliance with the Best Doctors, Inc. Trademark Usage Requirements.

In addition, \_\_\_\_\_ agrees that this work will not be presented in any manner that might lead to confusion about its source or be presented as the work product of anyone other than the \_\_\_\_\_. \_\_\_\_\_ also agrees that the Best Doctors web seal will be presented “as is,” without changes, cuts, additions, edits or emendations and will not remove or alter any copyright or trademark ownership notices appearing on the promotional piece. Only official logos and web seals obtained directly from Best Doctors under this license are permitted for use.

Finally, \_\_\_\_\_ understands and agrees that it cannot print or reprint versions of these materials without the prior participation and written permission from Best Doctors, Inc.

## ACCEPTED AND AGREED TO:

Signature

Email Address

Please print name

Date

Best Doctors, Inc.

Date:

### Email or fax form to:

Christy Lyon

Phone: 800.675.1199 x3318

Fax: 803.643-0315

Email: clyon@bestdoctors.com

# TRADEMARK USAGE REQUIREMENTS

**All logos, dated logos and web seals must be obtained from Best Doctors under license. Use of logos and web seals obtained from other sources is not permitted.**

Best Doctors print logos and web seals are available to listed Best Doctors physicians and their facilities upon request.



**Note:** Print logos can be sized according to your needs. Logo may not be altered in design.

Web seals may be reduced in size if necessary but not enlarged in order to maintain resolution quality. Web seals may not be altered in design or date.



For additional information or requirements on logo usage,  
please contact [experts@bestdoctors.com](mailto:experts@bestdoctors.com) or phone 800.675.1199.



# The Best Doctors in America® Commemoratives

At the request of Best Doctors physicians, we offer customized recognition items to any physician who has ever been selected as a Best Doctor. These items make a handsome addition to any lobby, waiting room or home office to tastefully showcase your accomplishment.

All items feature the physician's name in preferred format: John Sample, MD or Dr. John Sample.



## STANDARD PLAQUE

Features the Best Doctors logo, your name and appropriate inclusion years on a polished brass plate mounted on beautifully crafted, hand-finished solid cherry.

**\$265**

## 1ST YEAR INCLUSION PLAQUE

Same as the standard, this one is designed for physicians who have been selected for multiple years and is customized to display both the first year of selection and the current listing years.

**\$290**



## DESKTOP COMMEMORATIVE

For those who prefer, this is a stylishly curved, clear acrylic with light catching gold accent and a flat base.

**\$265**

Please allow a minimum of 8 weeks for customization and delivery. Delivery times may be longer during peak demand.

## ORDER YOURS ONLINE

[usplaques.bestdoctors.com](http://usplaques.bestdoctors.com)

Contact us at [plaques@bestdoctors.com](mailto:plaques@bestdoctors.com)

or 617.963.1167 with questions



## HOW TO ORDER YOUR BEST DOCTORS PLAQUE



**Online with Credit Card**—Order at [usplaques.bestdoctors.com](http://usplaques.bestdoctors.com) (For your security we do not accept credit card orders by fax or U.S. Mail).



**By Mail**—complete this form and mail with check to Best Doctors, Inc. at the address noted below.



**By Purchase Order**—fax this form with the Purchase Order to 866.904.0913 or mail both to the address noted below.

Contact us for discounts on multiple orders.

## ORDER FORM

I would like to purchase:

- ☐ Desktop Commemorative(s) \$265
- ☐ Standard Plaque(s) \$265
- ☐ 1st Year Inclusion Plaque(s) \$290

Name as it should appear on the plaque (Dr, MD or DO)  
(up to 28 characters)

Shipping Address (UPS/FedEx Delivery. Physical address required.)

Attn:

City

State

Zip

Telephone

Email (required for order confirmation)

**Payment Information:** (Prices include Shipping & Handling)

Check #

Purchase Order #

We are required to collect sales tax in the following states where Best Doctors, Inc. is located: FL, IL, MA, MD, SC.

Tax exempt facilities must provide a current legible copy of the tax exempt certificate.

Best Doctors, Inc. | Polling & Research  
5230 Woodside Executive Court | Aiken, SC 29803  
Phone 800.675.1199 | Fax 866.904.0913

# PUBLICATION PARTNER PROGRAM

## Does Best Doctors publish physician information?

While we are not a list company and do not publish a print or electronic directory, Best Doctors does partner with newspapers and magazines across the country to recognize current Best Doctors. We verify clinical activity and address information with each physician prior to publication to provide accurate information to readers.

Consequently, physicians will know in advance that they will be published, at which time they can opt out. Only Best Doctors whose clinical activity and address have been verified in advance will be printed in a publication.

It is Best Doctors' policy to confirm clinical and address information directly with each individual physician. We do not verify information with any other outside source.

Best Doctors provides statistical support and graphics, but is otherwise not involved in advertising agreements between a publication and individual doctors or a healthcare facility. All advertising arrangements are strictly between the ad purchaser and the publication.

**Any advertisements with Best Doctors mention and/or using the Best Doctors logo, Best Doctors in America® logo or web seal must be obtained via license and approved by Best Doctors, Inc. prior to publication or other use.**

Best Doctors protects the use of its Intellectual Property, and as such, we require that doctors and healthcare facilities comply with our **Trademark Usage Requirements** (page 15) and submit all advertising, media and/or press releases for compliance approval prior to release.

Please contact [experts@bestdoctors.com](mailto:experts@bestdoctors.com) for further information.

## What information does Best Doctors send to publications?

Best Doctors provides information to select magazine and newspaper partners to recognize the doctors selected in a state or metro area and to provide readers a reference list of local medical specialists. Best Doctors provides publications with specialties, the primary clinical address where patients are seen and the appointment phone. We never share fax numbers, email or mailing addresses. Only doctors whose clinical activity and address have been verified in advance will be printed in a publication.

## Are hospital affiliations for the doctors provided to the publications?

Best Doctors includes the hospital name only if a doctor's primary clinical address is at a hospital. Due to the number of doctors with multiple affiliations, as well as incomplete reporting, hospital affiliations are not included on lists sent to publications.

The Best Doctors in America® List is not available to the general public, so this is a great way for a medical facility or practice to publicize the Best Doctors at their facility.

We welcome recommendations regarding any publications you think appropriate for us to contact.

# BEST DOCTORS CONTACT INFORMATION

## How can physicians update contact and other information?

Physicians can contact us at any time to update their clinical address, email, phone and other information. This ensures that they do not miss the opportunity to participate in the nomination and voting processes or be included in publications. Contact us at [research@bestdoctors.com](mailto:research@bestdoctors.com).

It is important that we have Best Doctors physicians' current, complete contact information to invite participation in our poll and to list correctly in regional lifestyle and business publications. If contact or other information changes, please let us know immediately at [expertupdate@bestdoctors.com](mailto:expertupdate@bestdoctors.com).

## Who to contact regarding:

**Your benefits** as a selected Best Doctor – [experts@bestdoctors.com](mailto:experts@bestdoctors.com)

**Recognition items** – [plaques@bestdoctors.com](mailto:plaques@bestdoctors.com)

**Consulting on medical cases** for our members and earning an honorarium and Continuing Medical Education credits – [physicianhelp@bestdoctors.com](mailto:physicianhelp@bestdoctors.com)

**Request a nomination form** to recommend physicians for consideration in our next poll – [experts@bestdoctors.com](mailto:experts@bestdoctors.com)

**Information** about your inclusion years and CV citations – [experts@bestdoctors.com](mailto:experts@bestdoctors.com)

**PR and marketing contacts** at your hospital or practice – [experts@bestdoctors.com](mailto:experts@bestdoctors.com)

**Physician referral list** for your personal or professional use – [experts@bestdoctors.com](mailto:experts@bestdoctors.com)

**Professional profile** for login information to update your professional profile – [profiles@bestdoctors.com](mailto:profiles@bestdoctors.com)



Please visit [bestdoctors.com](http://bestdoctors.com) to learn more.

Best Doctors, Inc. | Polling & Research  
5230 Woodside Executive Court | Aiken, SC 29803  
p: 800.675.1199 | f: 866.904.0913



# EXHIBIT 3

## Agreement for Expert Consulting Services

This Agreement for Expert Consulting Services is made by and between Best Doctors, Inc. ("**Best Doctors**") and [DOCTORS NAME] ("**You**"), on [05/28/2013]. This Agreement constitutes the entire agreement between the Parties and supersedes any prior agreements between the Parties with respect to such subject matter.

1. **What We Ask You to Do:** Best Doctors may request that you provide a written report on our behalf regarding a medical condition that a member of the Best Doctors program wants to better understand or analyzing certain medical information of a member (the "**Services**"). In certain circumstances, we may ask You to speak with one or more of the doctors and nurses who work for Best Doctors regarding your findings. In some cases, You may wish to or be asked to speak with the doctor treating the member. We may request in the future that you perform additional services to us pursuant to a written request and any such services shall be considered "Services" for purposes of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, none of the Services shall require You to provide medical care or treatment or make medical decisions concerning any individual patients or establish a doctor-patient relationship with a member.

2. **What We Require from You:** Because we provide a very high quality service, we expect that you will spend the time required to thoughtfully review the material presented and give us appropriate insights as a result. For this reason, we require everyone we work with to agree that they will comply with the laws that apply to them while they are working with us, and we expect the same from You. For example, we understand that You are licensed to practice medicine in the State in which you live or practice, and we require that You stay licensed during your performance of services under this agreement. If you have reason to believe your license is in jeopardy, you are expected to notify Best Doctors and stop performing services under this agreement. In addition, we require that any report You deliver contain only true and original material that You prepared and, to the best of Your knowledge, is not anyone else's material.

You agree to complete Best Doctors' Application for Expert Services (attached as Exhibit A) so that Best Doctors can review your credentials and qualifications. You attest that all information you provide in the Application for Expert Services is accurate and complete and if any information changes or becomes inaccurate, You will notify Best Doctors prior to performing additional Services for Best Doctors. You hereby consent to the disclosure, inspection and copying of information and documents relating to my credentials, qualifications, and performance by and between Best Doctors and other healthcare organizations.

You understand and acknowledge that federal and state laws provide immunity protections to certain individuals and entities for their acts and/or communications in connection with evaluating the qualifications of healthcare providers. You hereby release all persons and entities, including Best Doctors, engaged in quality assessment and expert approval on behalf of Best Doctors, and all persons and entities providing expert approval information to Best Doctors, from any liability they might incur for their acts and/or communications in connection with the evaluation of Your qualifications for participation in Best Doctors programs, to the extent that those acts and/or communications are protected by state or federal law.

3. **You Are Not Our Employee:** Obviously, we are not hiring You as an employee of Best Doctors. In performing the Services, You are doing work for Best Doctors as an "independent contractor." This means You have complete control over where and when and how You do Your work for us. In addition, we will not withhold any taxes from our payments to You, and instead You are responsible for all of Your own federal, state and local tax obligations related to what we pay You.

4. **Who owns the Reports.** As Best Doctors is paying You a fee for the Services, the reports shall become Best Doctors property, and You give Best Doctors or an affiliate the right to copyright the Report as a "work made for hire". You give Best Doctors the right to the materials included in the Report so that Best Doctors may give it to members of the Best Doctors program and use for its own business purposes.

5. **We Will Insure You:** Some doctors ask if their own insurance will cover them for the work they perform for Best Doctors. It may. But to be sure, Best Doctors has obtained and shall continue to provide to You insurance under Best Doctors' standard errors and omissions insurance policy to insure against a contingent medical malpractice liability claim against You for Your performance of the Services. Of course, this insurance would not cover You if You were to actually treat the member as a patient at some point in the future, nor will it cover You against medical malpractice claims from Your own patients. You represent and warrant that You currently have in place, and will maintain on an ongoing basis, Your own medical malpractice insurance coverage to insure You in the event one of Your own patients files a claim against You. You agree to provide, upon request, periodic attestations to Best Doctors that such malpractice insurance policy is in place.

6. **Confidentiality of Proprietary Information:** As You perform the Services on behalf of Best Doctors, You will have access to and gain knowledge of our processes, strategies, policies, and how we perform the Services, all of which is valuable to our business and is considered Proprietary Information. You agree to only use Proprietary Information for purposes relating to

Your performance of the Services and You agree that You will not disclose the information or use it for any other purpose without the express written consent of Best Doctors.

**7. Confidentiality of Protected Health Information:** Both of us have obligations under the law to maintain the privacy and security of Member's protected health information ("and not to use such information for any purpose other than to perform the Services. By performing the Services on Best Doctors' behalf, You are our Subcontractor, as that term is defined by the Health Insurance Portability and Accountability Act's Privacy, Security, Breach Notification, and Enforcement Rules at 45 C.F.R. Part 160 and Part 164 ("HIPAA Rules"). As such, with respect to protected health Information You receive from, or create on behalf of Best Doctors ("PHI") You agree to:

- a. use and disclose PHI only as necessary for you to perform the Services or as required by law;
- b. not use or disclose PHI in a manner that would violate the HIPAA Rules if done by Best Doctors;
- c. use, disclose and request only the minimum amount of PHI necessary to perform the Services;
- d. use commercially reasonable and appropriate safeguards, and comply with Subpart C of 45 C.F.R. Part 164 with respect to electronic PHI to prevent use or disclosure of PHI other than as provide for by this Agreement. More specifically you agree to:
  - i. Send PHI via email only when the email is encrypted or otherwise secure (e.g. via Best Doctors' secure physician portal); and
  - ii. Save PHI to a laptop or other mobile device only if the laptop or mobile device is fully encrypted.
- e. in accordance with 45 C.F.R. § 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, to ensure that any Subcontractors that create, receive, maintain, or transmit PHI on your behalf agree to the same restrictions, conditions, and requirements that apply to You herein..
- f. report, within thirty (30) days of becoming aware, to Best Doctors any use or disclosure of the PHI not provided for by this Agreement, any breaches of Unsecured PHI as required at 45 C.F.R. 164.410, and any Security Incident of which You becomes aware.
- g. make available PHI in a Designated Record Set to Best Doctors as necessary to satisfy Best Doctors' obligation under 45 C.F.R. § 164.524.
- h. make any amendment(s) to PHI in a Designated Record Set as directed or agreed to by Best Doctors pursuant to 45 C.F.R. § 164.526, or take other measures as necessary to satisfy Best Doctors' obligations under C.F.R. § 164.526.
- i. maintain and make available the information required to provide an accounting of disclosures to the Individual as necessary to satisfy Best Doctors' obligations under 45 C.F.R. § 164.528.
- j. comply with the requirements of Subpart E of 45 C.F.R. Part 164 to the extent You carry out one or more of Best Doctors' obligations under Subpart E of 45 C.F.R. Part 164.
- k. make Your internal practices, books, and records available to the Secretary for purposes of determining compliance with the HIPAA Rules.

**8. Medicare Rules and Regulations:** You may, at times, be asked to perform Services for members who are in Medicare Advantage or Medicare Fee for Service plans. Both of us have obligations under the law and by contract to comply with applicable Medicare rules and regulations while performing the Services for such members. Such applicable laws and regulations include, but are not limited to, CMS instructions relating to the prevention or detection of fraud, waste and abuse, the privacy and security provisions set forth at 42 C.F.R. Section 422.118, federal laws, rules and regulations designed to prevent or ameliorate fraud, waste, and abuse, including, but not limited to, applicable provisions of federal criminal law, the False Claims Act (31 U.S.C. §§ 3729 et seq.), and the anti-kickback statute (section 1128B(b) of the Social Security Act), and any other laws applicable to recipients of federal funds. Additionally, You:

- a. represent You have not been excluded from participation in any federal- or state-funded health program; or You have not been listed in the National Practitioner Data Bank, the Healthcare Integrity and Protection Data Bank, or the OIG or GSA exclusion lists. You agree to provide, upon request by Best Doctors, an attestation of ongoing compliance with this section 8(a);

- b. represent You have taken, and will continue to take on an annual basis, a Medicare compliance education and training program course that meets, at a minimum, the education and training requirements adopted by CMS. You agree to provide, upon request by Best Doctors, an attestation of completion of such Medicare compliance education and training program.
- c. agree that You will not, in any event, including without limitation, non-payment by Best Doctors, insolvency of Best Doctors or breach of this agreement by Best Doctors, bill, charge, collect a deposit from, seek remuneration or reimbursement from, or have any recourse against any member
- d. understand that Best Doctors and/or CMS as applicable, has the right of inspection, evaluation and audit of documentation related to Services rendered to Medicare members.

9. **Payment Terms:** As an “independent contractor” doing work for Best Doctors, You will be paid for the Services on a per case basis. Fee structure for each case may differ depending on the nature of the case assigned. Every reasonable effort will be made so that fees are paid within ten (10) days of the date on which the Services performed are confirmed by Best Doctors personnel. In order to ensure timely payment, we require that the attached Form W-9 be completed before payments can be made so that we have proper record of the payee (name & address) to be paid and the tax id for which tax records will be sent. In addition, we recommend completion of the attached direct deposit form which will allow us to deposit your funds directly into a specified bank account. An electronic payment remittance will be sent to a specified email address at the time of deposit which will detail the case fees being paid. If the direct deposit form is not completed, You will be paid via check which will result in additional processing time as the result of sending the check via regular mail.

10. **Term:** This Agreement will remain in effect until terminated in writing by either Party.

11. **Termination:** This Agreement may be terminated by either Party for any reason upon thirty (30) days written notice.

12. **Effect of Termination:** Upon termination of this Agreement, You agree to return to Best Doctors all PHI and retain no copies of such PHI.

**Best Doctors, Inc.**

By: \_\_\_\_\_

Name: Lewis Levy  
Title: Medical Director

\_\_\_\_\_  
Name: [DOCTORS NAME]

**EXHIBIT A****Application for Expert Consulting Services**

Thank you for your interest in participating in Best Doctors InterConsultation™ and Ask the Expert™ programs. In order to approve you for participation in our programs, we ask that you complete the following form and sign the following agreement.

Please review the information below and confirm its accuracy:

Name: \_\_\_\_\_ NPI: \_\_\_\_\_  
Primary Clinical Address: \_\_\_\_\_ DEA Number: \_\_\_\_\_  
Medical License Number: \_\_\_\_\_

Primary Hospital Affiliation(s): \_\_\_\_\_  
\_\_\_\_\_

Board Certification: \_\_\_\_\_

- ☐ The information above is accurate and complete  
☐ The information above is not accurate and complete. Corrected information:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Please indicate your attestation to the following by checking the box:

- ☐ I am currently engaged in active clinical practice.  
☐ I have never had a medical license refused, restricted, suspended, or revoked by any state licensing authority or surrendered my medical license while a formal disciplinary proceeding was pending before a state licensing authority.  
☐ I have never had a revocation or suspension of an accreditation.  
☐ I have never had any suspension or exclusion from participation in, or any sanctions imposed by, a Federal or State health care program, or any debarment from participation in any Federal Executive Branch procurement or non-procurement program.  
☐ I have never had a Medicare payment suspension under any Medicare billing number.  
☐ I have never had an action taken against me by the Licensing Board of any state and I am not, to the best of my knowledge, currently under investigation by a Licensing Board of any state.  
☐ I have never had my license to prescribe or dispense narcotics refused, suspended, or revoked.  
☐ I have never resigned from or had my privileges suspended, restricted, or revoked by any hospital (other than for medical records, administrative rules and regulations).

- ☐ I have never been reprimanded by or had my membership refused, suspended or revoked by any professional organization.
- ☐ I have never had my malpractice insurance cancelled, suspended, not renewed, restricted, or specially rated.
- ☐ I have never had any felony conviction under Federal or State law, regardless of whether it was health care related.
- ☐ I have never had any misdemeanor conviction, under Federal or State law, related to:
  - the delivery of an item or service under Medicare or a State health care program,
  - the abuse or neglect of a patient in connection with the delivery of a health care item or service,
  - theft, fraud, embezzlement, breach of fiduciary duty, or other financial misconduct in connection with the delivery of a health care item or service,
  - the interference with or obstruction of any investigation into any criminal offense described in 42 C.F.R. Section 1001.202 or 1001.201, or
  - the unlawful manufacture, distribution, prescription or dispensing of a controlled substance.
- ☐ I am not currently engaged in the illegal use of drugs.
- ☐ I have never been assessed a civil penalty by anyone for false or fraudulent submittal of claims for payment, or other violation of payment practice standards.
- ☐ I have never, to the best of my knowledge, been the subject of investigation by any peer review Committee.

If you are unable to attest to any of the statements above, please explain:

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# EXHIBIT 4



**FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

July 8, 2014

VIA ELECTRONIC MAIL

Peter Bennett, Esq.  
1880 Columbia Road, NW #202  
Washington, DC 20009  
peterbennettlaw@gmail.com

Re: Freedom of Information Act (FOIA) Request No. 2014-478

Dear Mr. Bennett:

This responds to your Freedom of Information Act (FOIA) request, dated June 10, 2014, to the Federal Communications Commission (FCC or Commission), for copies of the offending faxes which formed the bases for the following FCC case: File No. EB-08-TC-2507 "In the Matter of Presidential Who's Who dba Presidential Who's Who, Inc." (Presidential Who's Who). You indicated that you would pay a maximum fee of \$50 to process your FOIA request.

On June 24, 2014, we sent you a letter explaining that the fee to process your FOIA request (FOIA 2014-478) would exceed the \$50 that you had agreed to pay.<sup>1</sup> In that letter, we also stated:

To process your FOIA request, we require you to provide "satisfactory assurance" that you will make "full payment" of the estimated FOIA fees. We will not begin to process your request until we have received this assurance. Alternatively, pursuant to Section 0.467(e) of the Commission's rules, you may confer with us "with the object of revising or clarifying the request." If you wish to discuss this matter, you may contact Johnny Drake at (202) 418-7328 or Stacey Weiss at (202) 418-0254. If you revise or clarify your request, we will re-estimate the charges and advise you accordingly.<sup>2</sup>

On June 25, 2014, you spoke by telephone to Johnny Drake of the Telecommunications Consumers Division (TCD), FCC Enforcement Bureau, to discuss the estimated processing fee.<sup>3</sup>

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<sup>1</sup> Letter from Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Peter Bennett (June 24, 2014).

<sup>2</sup> *Id.* (citations omitted).

<sup>3</sup> Telephone call from Peter Bennett to Johnny Drake, Telecommunications Consumers Division, FCC Enforcement Bureau (June 25, 2014).



Peter Bennett, Esq.  
July 8, 2014  
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During that conversation, you amended your FOIA request, asking for one copy of each representative fax in case number EB-08-TC-2507. You also asked that the copies of the responsive faxes be sent by e-mail, if possible.<sup>4</sup>

We have searched our files and located two records, totaling two pages, which are responsive to your amended FOIA request. The records, generally described, are (1) a representative fax from Presidential Who's Who in case number EB-08-TC-2507; and (2) a second representative fax from Presidential Who's Who in case number EB-08-TC-2507.

The two faxes are appropriate for release, with redactions made, pursuant to FOIA Exemptions 6 and 7(C), 5 U.S.C. §§ 552(b)(6) and (7)(C), which permit us to withhold material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. None of the redacted information (which includes an individual's name and an individual's fax number) is appropriate for discretionary release. The redacted records are attached.

Please note that while informal complaints allege violations of the Communications Act of 1934, as amended (Act), and pertinent FCC rules and orders, the Commission receives many informal complaints that do not involve violations of the Act and FCC rules and orders. Thus, the existence of complaints filed with the Commission does not necessarily indicate wrongdoing by the companies involved.

Your request was categorized as a "Commercial Use Request."<sup>5</sup> Commercial use requesters must pay all direct costs of fulfilling the FOIA request.<sup>6</sup> In an e-mail to you on June 26, 2014, we quoted a revised estimated cost of \$81.46 to process your amended FOIA request.<sup>7</sup> You responded by e-mail on June 26, 2014, agreeing to pay this amount.<sup>8</sup> The fee to process your amended FOIA request, which is comprised of review costs, is \$81.46. The Office of the Managing Director, Financial Operations Division, will bill you within 30 days of the date of this letter. We must receive your check in the amount of \$81.46, made payable to the FCC, within 30 days of the billing date.

Pursuant to Section 0.461(j) of the Commission's rules, you may choose to file an administrative application for review of this decision. If you elect to file an application for

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<sup>4</sup> *Id.*

<sup>5</sup> See 47 C.F.R. § 0.466(a)(4).

<sup>6</sup> See 47 C.F.R. § 0.470(a)(1).

<sup>7</sup> E-mail from Stacey Weiss, Telecommunications Consumers Division, FCC Enforcement Bureau, to Peter Bennett (June 26, 2014).

<sup>8</sup> E-mail from Peter Bennett to Stacey Weiss, Telecommunications Consumers Division, FCC Enforcement Bureau (June 26, 2014).

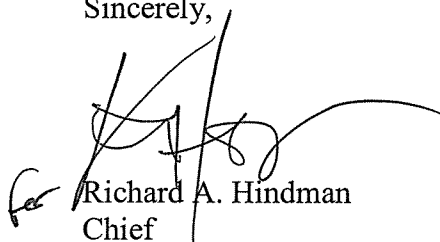
Peter Bennett, Esq.

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review, the application and the envelope containing it should be captioned, "Review of Freedom of Information Action," and must be filed within thirty (30) calendar days of the date of this letter.<sup>9</sup> The application should be sent to the Office of General Counsel, Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Hindman", is written over the printed name.

Richard A. Hindman  
Chief

Telecommunications Consumers Division  
Enforcement Bureau

Attachments

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<sup>9</sup> See 47 C.F.R. § 0.461(j).

To

From: Presidential Who's W

08/03/2010 8:46 AM

P. 1 of 1



# PRESIDENTIAL WHO'S WHO

AMONG BUSINESS AND PROFESSIONAL ACHIEVERS

REMEMBER THE PAST, CHALLENGE THE FUTURE

Dear Company Owner,

It is my pleasure to inform you that on July 15, 2010, your information was reviewed and accepted for inclusion in the 2011 edition.

**Presidential Who's Who** each year recognizes and selects key executives, professionals and organizations in all disciplines and industries for outstanding business and professional achievements.

Those who have reached a distinguished level of success in their chosen profession share this recognition.

Please take a moment to complete the invitation form below. We would also ask that you write clearly, as our editorial department will review this document.

As a reminder, **Presidential Who's Who** is pleased to inform you that there are no fees or dues to be included in the publication.

On behalf of the CEO and our esteemed staff, we wish you continued success.

Sincerely,  
MarkAnthony McGuiness  
Chief Operations Officer  
**Presidential Who's Who**  
(516) 368-9910

Please fax this form back to **(866) 676-5744** by **Aug. 14**

## *PRESIDENTIAL WHO'S WHO among Business and Professional Achievers*

NAME (FIRST, MIDDLE INITIAL, LAST)

JOB TITLE

COMPANY NAME

BEST TIME TO CALL, DAY/TIME

COMPANY ADDRESS

CITY

STATE

ZIP

BUSINESS PHONE # EXT

HOME OR MOBILE # (NOT PUBLISHED)

FAX # (BUSINESS)

SIGNATURE

PLEASE TELL US MORE ABOUT YOUR ORGANIZATION

INDUSTRY (MEDICINE, LAW, ENGINEERING, ETC)

PRINCIPAL PRODUCT OR SERVICE

PERSONAL SPECIALTY

TYPE OF BUSINESS

If you would like to be removed from any further faxes, please call (866) 686-7957 and enter your ten-digit fax number.

To: [REDACTED]

From: WVEPE

2-24-10 11:43am p. 1 of 1

# WHO'S WHO

February 23rd, 2010

FACSIMILE

OF EXECUTIVES PROFESSIONALS &amp; ENTREPRENEURS

TO: [REDACTED]

FROM: Office of Public Affairs (Jennifer Crowley)

We are pleased to inform you that you and your business/organization have been selected to be published for free in the 2010/2011 Edition of Who's Who of Executives, Professionals & Entrepreneurs.


On February 22nd, your candidacy was approved. Your prompt response is needed to ensure your correct information is published. For accuracy purposes, please be sure to fill out the information below and FAX it back to 609-613-5917 at the earliest opportunity.

The office of the Managing Director appoints individuals based upon a candidate's current position, and usually with information obtained from researched executive and professional listings. The Director thinks that you may make an interesting biographical subject, as achievement is what Who's Who is all about.

Upon final confirmation, you will be listed among thousands of accomplished individuals. Remember, there is no cost to be included.

On behalf of the Managing Director, we look forward to your appearance in this year's edition. Best wishes for continued success.

Sincerely,



Jennifer Crowley  
Editor

BFUS2010-400M-A14

Please complete and fax back to 609-613-5917

First Name

Last Name

Title

Company/Organization

Street Address

City

State

Zip

Bus. Phone

Mobile

Home

Email

Website

Type of Business

If you have received this fax in error or would like to be removed from the list, please dial 888-833-1296

# EXHIBIT 5

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MASSACHUSETTS

3  
4 DR. KENNETH A. THOMAS, M.D., )  
5 LLC, )  
6 Plaintiff, ) No. 1:18-cv-10957-DPW  
7 vs. )  
8 )  
9 BEST DOCTORS, INC., )  
10 Defendant. )

11 BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK  
12

13 MOTION HEARING  
14

15  
16 John Joseph Moakley United States Courthouse  
17 Courtroom No. 1  
18 One Courthouse Way  
19 Boston, MA 02210  
20 Wednesday, October 17, 2018  
21 2:00 p.m.

22 Brenda K. Hancock, RMR, CRR  
23 Official Court Reporter  
24 John Joseph Moakley United States Courthouse  
25 One Courthouse Way  
Boston, MA 02210  
(617) 439-3214

1  
2 APPEARANCES:

3 KAUFMAN P.A.  
4 By: Avi R. Kaufman, Esq.  
5 400 NW 26th Street  
6 Miami, FL 33133  
7 On behalf of the Plaintiff.

8 GREENBERG TRAURIG, LLP  
9 By: David G. Thomas, Esq.  
10 One International Place  
11 20th Floor  
12 Boston, MA 02110  
13 On behalf of the Defendant.  
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1 to wear the baseball cap or have the plaque or the lapel pin?

2 MR. THOMAS: I think the way the Court should look at  
3 it is look at the fax on its face. I think this fax doesn't  
4 sell or promote anything. Is there any evidence of pretext on  
5 the fax or alleged in the complaint that would lead you to  
6 believe that there is some kind of inference this is part of a  
7 broader scheme to sell something to Dr. Thomas?

8 THE COURT: So, what do I do to your brother's  
9 suggestion that he can plead that?

10 MR. THOMAS: I don't believe he can plead that. I'm  
11 not familiar with the press releases.

12 THE COURT: Well, but let's say he says he can. So,  
13 isn't there any reason why I shouldn't permit him to plead it?

14 MR. THOMAS: Other than the fact this would be the  
15 third bite at the apple, if he can amend the pleading to  
16 present well-pleaded facts that would show pretext that would  
17 put this into the FCC rule --

18 THE COURT: Let's assume that he can. Let's assume  
19 that he's got something here. I have not permitted him to tell  
20 me precisely what that is, but he says he has something that he  
21 can properly plead in this setting that says, "Congratulations,  
22 you've made the first step. Now you are a Best Doc, and among  
23 the special joys of being a Best Doc is the opportunity to  
24 purchase stuff from us."

25 Now, if that happened, if that were the case, doesn't

1 it survive?

2 MR. THOMAS: That would survive 12(b)(6), we would  
3 concede, if he's able to plead facts to show that there was  
4 some future solicitation of Dr. Thomas. He has to have,  
5 obviously, standing to bring the claim, or that this really was  
6 part of a scheme to sell something to Dr. Thomas, I think he  
7 gets past 12(b)(6). But I think what reasonably can be derived  
8 from this is that there is an underlying profit motive  
9 with respect to employers in having this database, and that  
10 really gets into what we see as a jurisdictional split. I  
11 mean, the FCC has recognized, and this is mentioned in the  
12 Vertex case, there can be non-advertisement messages, which in  
13 our mind this is, that have an incidental amount of  
14 advertising, and that doesn't throw you into the realm of --

15 THE COURT: But how can I make that determination?  
16 Let's assume I go forward on this. Let's assume that you have  
17 both of these things; it's like Certs: it's both a breath mint  
18 and a candy mint. At that point I have to let some factfinder  
19 decide is that really incidental?

20 MR. THOMAS: Well, there's an FCC test on what would  
21 be incidental when it comes to looking at the fax, where the  
22 advertising is located, probably the amount of revenues and  
23 things of that nature, but none of that is pleaded in the  
24 complaint.

25 THE COURT: All right. So, the question is what does

1     it take to get over 12(b)(6), and what is suggested here is  
2     there is more that could be pled if there is a problem. Now, I  
3     am not a big fan of what I will call "Scheherazade pleading,"  
4     the idea that a new story is enunciated each evening when it  
5     looks like death is imminent, and so I have got this suggestion  
6     that there is more to be pled, but the "more to be pled" sounds  
7     to me like it can make it over 12(b)(6).

8             MR. THOMAS: Again, I would like to look at the "more  
9     to be pled."

10            THE COURT: Sure.

11            MR. THOMAS: But, in our view, your Honor, he's got to  
12     meet Twombly now, and if he doesn't meet Twombly it should be  
13     dismissed. But to answer your question more directly, to plead  
14     this case correctly, with additional facts to get past  
15     12(b)(6), he would have to include something, some further  
16     communication between Best Doctors and Dr. Thomas with respect  
17     to the sale of some product.

18            THE COURT: Well, it doesn't have to be actual further  
19     communications. It is the prospect that this developing  
20     relationship is going to lead to further communications, right,  
21     or not? For instance, another way of describing what you have  
22     just said is to say maybe someday he will be able to prove one  
23     of these cases, but it is premature, because all they got was  
24     this, "Would you like to be a Best Doc?"

25            MR. THOMAS: And I haven't really noodled this around