

1 **BEFORE THE ARIZONA STATE BOARD OF**
2 **PODIATRY EXAMINERS**

3 In the Matter of:) **CASE NO. 17-14-C**
4)
4 **KEVIN O'BRIEN, DPM**)
Holder of License No. **0541**) **CONSENT AGREEMENT AND**
5) **ORDER**
6 For the Practice of Podiatry)
In the State of Arizona)
7 _____)

8 **CONSENT AGREEMENT**

9 **RECITALS**

10 In the interest of a prompt and judicious settlement of the above-captioned matter before
11 the Arizona State Board of Podiatry Examiners ("Board"), and in the interest of protecting the
12 people of the State of Arizona, consistent with the statutory requirements and responsibilities of
13 the Board pursuant to A.R.S. § 32-801, *et seq.* and A.R.S. § 41-1092.07 (F)(5), Dr. Kevin O'Brien,
14 DPM ("Respondent"), holder of license number 0541 to practice podiatry in the State of Arizona,
15 and the Board enter into the following Consent Agreement, Findings of Fact, Conclusions of Law,
16 and Order for Practice Restriction, Continuing Education, and Civil Penalty ("Consent
17 Agreement") as the final disposition of this matter.

18 1. Respondent has the right to consult with an attorney prior to entering into this
19 Consent Agreement. Respondent has read and understands this Consent Agreement as set forth
20 herein, and has had the opportunity to discuss this Consent Agreement with an attorney or has
21 waived the opportunity. Respondent voluntarily enters into this Consent Agreement for the
22 purpose of avoiding the expense and uncertainty of an administrative hearing.

23 2. Respondent understands that he has a right to a public administrative hearing
24 concerning each and every allegation set forth in the above-captioned matter, at which time
25 Respondent could present evidence and cross-examine witnesses. By entering into this Consent
26 Agreement, Respondent freely and voluntarily relinquishes all rights to such an administrative
hearing, as well as all rights of rehearing, review, reconsideration, appeal, judicial review, or

1 any other administrative, and/or judicial action concerning the matters set forth herein.
2 Respondent affirmatively agrees that this Consent Agreement shall be irrevocable and any
3 modifications to this original document are ineffective and void unless mutually approved by the
4 parties in writing.

5 3. Respondent agrees that the Board may adopt this Consent Agreement or any part
6 of this agreement under A.R.S. §§ 32-852 and 32-852.01. Respondent understands that the Board
7 may consider this Consent Agreement or any part of it in any future disciplinary action against
8 him.

9 4. Respondent understands that this Consent Agreement does not constitute a
10 dismissal or resolution of other matters currently pending before the Board, *if any*, and does not
11 constitute any waiver, express or implied, of the Board's statutory authority or jurisdiction
12 regarding any other pending or future investigation, action, or proceeding.

13 5. All admissions Respondent makes in this Consent Agreement are made solely for
14 the final disposition of investigation number 17-14-C, and any related administrative proceedings
15 or civil litigation involving the Board and Respondent. Respondent further understands that
16 acceptance of the Consent Agreement does not preclude any other agency, subdivision, or officer
17 of this state from instituting other civil or criminal proceedings with respect to the conduct that
18 is the subject of this Consent Agreement.

19 6. The Consent Agreement shall be subject to adoption by the Board and shall be
20 effective only when signed by the President of the Board, or the Executive Director of the Board,
21 on behalf of the President. In the event that the Board does not adopt this Consent Agreement, it
22 is withdrawn and shall be of no evidentiary value and shall not be relied upon nor introduced in
23 any action by any party. The parties agree that if the Board rejects this Consent Agreement and
24 this case proceeds to hearing, Respondent shall assert no claim that the Board was prejudiced by
25 its review and discussion of this document or any other records relating thereto.

26

1 7. Respondent understands that a Practice Restriction and Civil Penalty constitute
2 disciplinary actions. Respondent further understands that any disciplinary action taken against a
3 licensee by the Board must be reported to the National Practitioner Data Bank, in accordance
4 with federal regulations.

5 8. Respondent understands that this Consent Agreement is a public record that may
6 be publicly disseminated as a formal action of the Board.

7 9. Respondent understands that any violation of this Consent Agreement could be
8 grounds for further disciplinary action by the Board pursuant to A.R.S. § 32-854.01(21).

9 **FINDINGS OF FACT**

10 1. The Arizona State Board of Podiatry Examiners is the duly constituted agency for
11 licensing and regulating the practice of podiatry in the State of Arizona and has jurisdiction over
12 Respondent and the subject matter pursuant to A.R.S. § 32-801, *et seq.*

13 2. Dr. Kevin O'Brien, DPM, is the holder of License Number 0541, which enables
14 him to practice podiatry in the State of Arizona.

15 3. Respondent has been continuously licensed to practice podiatry in the State of
16 Arizona since May 1, 2001. Respondent's license to practice podiatry was renewed on July 20,
17 2017 and is effective until August 31, 2018.

18 4. On or about August 13, 2014, Respondent was placed on Probation by the Board
19 and restricted from performing any surgical procedures involving fusions, open or closed wedge
20 osteotomies of the first metatarsal, subtalar implants, or any ankle surgery. Respondent's practice
21 restriction was lifted on March 9, 2016, but pursuant to the existing Order in Case Numbers 09-
22 20-C and 11-01-C, Respondent's Probation was continued for an additional eighteen months and
23 Respondent was required to submit a written request for the termination of Probation in order to
24 restore full privileges, which he did not. In addition, the Board issued a notice on March 24, 2016
25 that required Respondent to report to the Board any future procedures he planned to perform that
26 were previously restricted.

1 5. On or about December 9, 2016, the Board received a complaint from a former
2 employee of Respondent, A.T., identifying several patients of concern and alleging that
3 Respondent had performed amputations and other surgeries in a non-sterile office setting on these
4 patients. Respondent's office is not a certified surgical center and does not have proper monitoring
5 for sterility of equipment or infection control reports.

6 6. A.T. also alleged that in mid-2016, Respondent erred in the treatment of a minor,
7 D.G., when he improperly placed, removed, and replaced a subtalar implant, resulting in D.G.
8 undergoing three surgeries and having two subtalar implants improperly placed in the left foot
9 simultaneously. After unsuccessfully attempting to remove the two implants in office, Respondent
10 did not notify D.G. that Respondent had improperly placed two implants in his foot and that
11 Respondent was unable to remove one, resulting in the need for a fourth surgery. A second
12 complaint was filed on February 9, 2017 by the mother of the minor, D.G., alleging the same.
13 Respondent believed he notified the Board in writing of his intention to perform a subtalar implant
14 on D.G., however the Board never received any communication from Respondent regarding this
15 planned procedure. Dr. O'Brien believed he removed the biodegradable implant and that the
16 implant had either come out in fragments or had prematurely dissolved. After Dr. O'Brien
17 discovered the remains of the biodegradable implant, he provided the removed implant to D.G.'s
18 mother and believed he explained to her that the patient would need to go to the hospital to have
19 the remaining implant removed. The radiographs taken during this time confirmed that the
20 biodegradable implant was not visible on film.

21 7. Patient J.S.'s medical records show that Respondent may have improperly closed a
22 draining and infected hallux wound on the right foot but Respondent charted in error, clarifying
23 J.S.'s hallux wound was not infected and that the infection was actually in the left midfoot. Patient
24 J.S. was contacted and had no complaints regarding Dr. O'Brien's care and continues to seek care
25 and treatment from him. All wounds referenced above resolved without issue.

26 8. Patient C.B.'s medical records show that on November 9, 2016, Respondent
performed an Achilles tendon repair in a non-surgical office setting. No attempt was made by

1 Respondent to regain length of the Achilles to address the 3cm gap needed to properly re-
2 approximate the tendon and achieve a positive result. Dr. O'Brien disputes this characterization
3 made by the Board's investigator as he believes the tendon repair was complete and the patient
4 had a successful outcome.

5 9. Upon a review of the medical records provided by Respondent, the Board's
6 investigator found that the records were lacking, inconsistent, and contained errors, and that the
7 billing codes utilized did not always meet the level of documentation required to support the use
8 of those codes. In the case of patient P.T., Respondent utilized high level evaluation and
9 management codes although the medical records reflect that Respondent copied and pasted
10 information from previous encounters with minimal changes. Respondent also billed P.T. for
11 radiographs on November 8, 2016 but could not produce them for review. In most instances, Dr.
12 O'Brien did not charge his patients at all for follow up visits. Dr. O'Brien also never billed D.G
13 for services. Dr. O'Brien has also changed billing and coding software and companies to improve
14 on his overall billing process.

15 CONCLUSIONS OF LAW

16 1. The conduct described in the Findings of Fact constitute grounds for disciplinary
17 action pursuant to A.R.S. §§ 32-852 and 32-852.01 and violates the provisions of A.R.S. § 32-
18 854.01(11) which states, "Failing or refusing to maintain adequate records on a patient for at least
19 seven years or failing or refusing to make the records available to a physician or another podiatrist
20 within twenty-one days after request and receipt of proper authorization."

21 2. The conduct described in the Findings of Fact constitute grounds for disciplinary
22 action pursuant to A.R.S. §§ 32-852 and 32-852.01 and violates the provisions of A.R.S. § 32-
23 854.01(16) which states, "Gross malpractice, repeated malpractice, or any malpractice resulting in
24 the death of a patient."

25 3. The conduct described in the Findings of Fact constitute grounds for disciplinary
26 action pursuant to A.R.S. §§ 32-852 and 32-852.01 and violates the provisions of A.R.S. § 32-

1 854.01(18) which states, "Violating any federal or state law applicable to the practice of
2 podiatry."

3 4. The conduct described in the Findings of Fact constitute grounds for disciplinary
4 action pursuant to A.R.S. §§ 32-852 and 32-852.01 and violates the provisions of A.R.S. § 32-
5 854.01(20) which states, "Any conduct or practice that is or might be harmful or dangerous to
6 the health of the patient."

7 5. The conduct described in the Findings of Fact constitute grounds for disciplinary
8 action pursuant to A.R.S. §§ 32-852 and 32-852.01 and violates the provisions of A.R.S. § 32-
9 854.01(21) which states, "Violating any formal order, probation or stipulation issued by the
10 board pursuant to this chapter."

11
12
13 DATED: 10/31/17 SIGNED: 
14 Kevin O'Brien, DPM

15 APPROVED AS TO FORM: 
16 Kimberly Kent
17 Attorney for Respondent

18 **ORDER**

19 Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY**
20 **ORDERED THAT** Dr. Kevin O'Brien, DPM, holder of license number 0541, shall be subject
21 to the following:

22 1. **PRACTICE RESTRICTION.** Respondent shall be placed on a practice
23 restriction for a term of NO LESS than THREE (3) YEARS during which time Respondent is
24 prohibited from performing any and all surgeries enumerated in Appendix A. Respondent may
25 continue to perform the procedures enumerated in Appendix B.

26 2. During the three (3) years and before Respondent seeks any modification of
restrictions, he must develop and complete a remediation program approved by the Board or its

1 designee that includes both didactic and clinical medical education followed by a Board approved
2 supervisor observing and approving each of the procedures outlined in Appendix A. If at any
3 time after three years, Respondent wishes to partially or fully lift any restriction stated in Order
4 paragraph number one (1), he must first submit a written request, appear before the Board, and
5 receive affirmative approval from the Board. In order to lift the restriction, Respondent must
6 provide evidence of minimal competency in performing bone surgeries. The Board may require
7 Respondent to submit any combination of assessments, evaluations, examinations, or interviews
8 it finds necessary to assist in determining whether Respondent is able to safely resume such
9 practice.

10 3. If Respondent requests and receives approval from the Board to lift any restriction
11 stated in Order paragraph number one, his license will be placed on Probation for an additional
12 period of three (3) years during which time he must submit to the Board for review, on a monthly
13 basis, complete copies of all charts for any procedure performed that was previously restricted.

14 4. If Respondent requests and receives approval from the Board to lift the restriction,
15 and commences with the additional Probation for previously restricted surgeries, Respondent
16 must submit a written request to terminate the additional Probation. Respondent may request
17 early termination of the additional Probation in writing after completing two (2) years of the three
18 (3) year period of additional Probation without issue, which will be approved or denied at the
19 sole discretion of the Board.

20 5. **CONTINUING EDUCATION.** Respondent shall take and complete at least
21 twenty five (25) hours of pre-approved continuing medical education (“CME”) hours in the areas
22 of: (a) medical billing and coding, (b) medical recordkeeping and documentation, and (c)
23 professional ethics. Courses shall consist of a minimum of five (5) CME hours in each subject
24 area. Respondent must submit a CME plan to the Board for pre-approval by the Board or the
25 Board’s Designee. Respondent shall complete the ordered CME hours within one (1) year from
26

1 the effective date of this Order. These CME hours shall be in addition to the twenty five (25)
2 hours required by the Board for license renewal.

3 6. **CIVIL PENALTY.** Respondent shall pay a CIVIL PENALTY in the amount of
4 TWO THOUSAND AND 00/100 DOLLARS (\$2,000.00). This CIVIL PENALTY shall be paid
5 to the Arizona State Board of Podiatry Examiners no later than one (1) year from the effective
6 date of this Order. Payment may be in the form of a lump sum or payments over time, but the
7 total amount must be paid no later than one (1) year from the effective date of this Order.

8 If Respondent is noncompliant with this Order, Respondent shall immediately surrender
9 his license to the Board. Respondent bears all costs associated with complying with the terms of
10 this agreement. This Order becomes effective as of the date stated below.

11 DATED THIS 15TH DAY OF NOVEMBER 2017.

12 ARIZONA BOARD OF PODIATRY EXAMINERS

13
14
15 By: Barbara A. Campbell O.P.M.
16 Barbara A. Campbell, Board President

17 Original Consent Agreement filed this
18 15th day of November 2017 with the:

19 Arizona State Board of Podiatry Examiners
20 1400 West Washington Street, Suite 201
Phoenix, Arizona 85007

21 Copy of the foregoing send by Electronic
22 and Regular mail this
15th day of November 2017 to:

23 Kevin O'Brien, DPM
24 297 S. Lake Havasu Avenue, Ste. 106
Lake Havasu City, AZ 86403
drkevinjobrien@yahoo.com

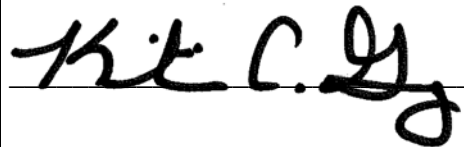
25 ///

26 ///

1 Copy of the foregoing sent by electronic mail
this 15th day of November 2017 to:

2 Frankie Shinn-Eckberg, Assistant Attorney General
3 Office of Arizona Attorney General
4 1275 W. Washington
Phoenix, AZ 85007
frankie.eckberg@azag.gov

5 Kimberly Kent, RN, JD
6 341 E. Camelback Street, Ste. 100
Phoenix, AZ 85012
7 kkent@klgaz.com

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1 APPENDIX A

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3 SURGERY RESTRICTIONS:

- 4 1. First metatarsal osteotomies and exostectomy
- 5 a. First metatarsal head procedures: Austin, Reverdin bunionectomy
- 6 b. First metatarsal base procedures: opening and closing wedge osteotomies
- 7 2. Lesser metatarsal osteotomies and exostectomy
- 8 a. Weil osteotomy
- 9 3. Any fusion procedure
- 10 a. Lapidus, Hallux, lesser digital, ankle
- 11 4. Calcaneal procedures
- 12 a. Haglund's deformity, Evans osteotomy
- 13 5. Digital procedure
- 14 a. Hammertoe repair/arthroplasty, tenotomy
- 15 6. STJ procedures
- 16 a. Implants/arthroesis
- 17 7. Fracture repair
- 18 8. Tendon procedures
- 19 a. Achilles tendon repair, tendon lengthening procedures, gastrocnemius recession
- 20 9. Amputations
- 21 10. Plastic surgery procedures
- 22 a. Skin plasty to treat contractures
- 23 11. Excision of ganglionic cysts or other deep soft tissue masses
- 24 12. Excision of deep foreign body
- 25 13. Complicated incision and drainage
- 26

APPENDIX B

UNRESTRICTED:

1. Removal of ingrown toenails
2. Biopsy of skin and nail lesions
3. Wound care/debridement
4. Nail debridement
5. Excision of verruca (wart)
6. Nerve fiber biopsy
7. Removal of superficial foreign body
8. Excision of porokeratosis
9. Simple incision and drainage