

1 4. On August 20, 2007, after the Board began receiving additional patient
2 complaints, which led to the case at issue, it summarily suspended Dr. Greene's license
3 to practice allopathic medicine in the State of Arizona and referred the matter to the Office
4 of Administrative Hearings to conduct a fair hearing in due course.
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

1 5. On October 1-2, 2007, Dr. Greene voluntarily underwent Phase I of the
2 Physician Assessment and Clinical Education ("PACE") Program at the University of
3 California at San Diego ("UCSD"). On the December 19, 2007, PACE Program Director
4 William A. Norcross, M.D.¹ and Assistant Case Manager Aaron Alverson summarized the
5 results of the assessments as follows:

6 Overall Dr. Greene's performance varied on the evaluations
7 offered through Phase I. Dr. Greene performed in the below
8 average range on all four standardized exams created by the
9 National Board of Medical Examiners, however we do
10 understand that many of the questions on these exams are far
11 removed from Dr. Greene's current specialty. Dr. Greene
12 performed an adequate history and physical examination on
13 our mock patient. Dr. Greene performed above average on
14 the PRIMUM examination. He scored 89% on the written
15 component of Dr. Akeson's oral clinical exam. While these
16 examinations form the foundation of the Phase II assessment,
17 the PACE program believes that Dr. Greene would benefit
18 from additional evaluation.

19 As such we invite Dr. Greene to return for Phase II to further
20 evaluate his clinical skills and knowledge of orthopedics. . . .²

21 6. On January 2-4 and January 7-9, 2008, Dr. Greene attended his Phase II
22 program in orthopedic surgery at the PACE program, under the supervision of Wayne H.
23 Akeson, M.D., an Emeritus Professor of Orthopedics at UCSD and Chief of Orthopedics
24 at the VA San Diego Healthcare System since 1996.³ On February 22, 2008, Mr.
25 Alverson summarized the additional information provided by the Phase II evaluation:

26 During his time here, Dr. Greene participated in a number of
27 departmental activities including, but not limited to the
28 following: clinical sessions in orthopedic surgery, operating
29 room observations, orthopedic surgery grand rounds,
30 discussions of risk management, conference in morbidity and
mortality, and pathology. According to Dr. Akeson:

As I noted in my earlier letter, considering the nature of
Dr. Greene's complication record in spine surgery, it is
unreasonable to expect that he should be allowed to

¹ Dr. Norcross' curriculum vitae was Dr. Greene's Hearing Ex. 143. He is also a Clinical Professor of Family Medicine, Department of Family and Preventive Medicine at UCSD.

² Dr. Greene's Hearing Ex. 13.

³ Dr. Akeson's curriculum vitae was Dr. Greene's Hearing Ex. 144.

1 return to spine surgical practice in the near future.
2 However he has a strong understanding of general
3 orthopedics and should be able to engage in a general
4 orthopedic practice with the proviso that his surgical
5 cases be proctored for the first six months. In addition,
6 as I noted in the prior report, he should take the AAOS
7 review courses during the next year that emphasize the
8 current technology and its application in general
9 orthopedics such as: The AAOS/OTA course #3216
10 April 24-27, 2008, "Orthopedic Trauma Update" offered
11 in Saint Augustine, Florida. In addition he should be
12 engaged in a medical ethics review course or seminar
13 under the PACE program.

14
15 Upon completion of his Phase II Clinical Training, Dr. Greene
16 took and passed a written exam in orthopedics with a score of
17 97%. Dr. Akesson reported that Dr. Greene interacted well
18 with faculty, staff, residents and students, contributing to the
19 discussions of patients' care and adding his expertise to
20 ensuing medical conversations.

21
22 Although Dr. Greene demonstrated a sound fund of medical
23 knowledge, there still remain concerns regarding his current
24 approach to orthopedics. Therefore, the PACE Program
25 recommends that Dr. Greene discontinue practicing
26 orthopedic spine surgery and limit his practice to general
27 orthopedics. In order to facilitate his transition into general
28 orthopedics, a proctor should supervise Dr. Greene's
29 surgeries for the next six months. Finally Dr. Greene should
30 attend a course in medical ethics such as the Institute for
Medical Quality's course titled, "IMQ Professionalism Program
for Physicians" as well as the "orthopedic Trauma Update"
offered through the AAOS.⁴

7. In the meantime, the Board continued to receive complaints, which it
designated with additional case numbers. The Board received the last of the complaints
in March 2008.

8. On March 11, 2008, the Board issued a second amended complaint that
charged Dr. Greene with statutory violations in his care of 13 patients.

⁴ Dr. Greene's Hearing Ex. 13.

1 9. A hearing was held on April 9, 10, 11, 16, and 17, 2008 and June 11, 2008.
2 The Administrative Law Judge held the record open until June 23, 2008 to allow the
3 parties' attorneys to file written closing memoranda.

4 10. During the hearing of this matter, Dr. Greene admitted and the Board found
5 that he should have disclosed some of the complications that he encountered in his
6 surgeries on some of the 13 patients to the Board at the August 9, 2007 informal
7 interview.

8 11. Dr. Norcross testified at the hearing in relevant part as follows. The PACE
9 program evaluates its attendees critically because it knows that licensing boards are
10 relying on its judgment. Dr. Greene had shown an excellent attitude and demeanor
11 toward his participation in the PACE program. A physician's PACE evaluations are a
12 good predictor of future behavior.

13 12. Dr. Norcross admitted that the PACE program had not been provided any
14 information regarding the 13 patient complaints at issue in this case. Dr. Norcross
15 admitted that the additional complaints may have affected his and Dr. Akeson's opinions
16 of Dr. Greene's safety to practice.

17 13. On August 8, 2008, the Board substantially adopted the undersigned
18 Administrative Law Judge's recommended decision in this case and ordered that Dr.
19 Greene's license be revoked.

20 14. Of the 13 patients whose care was at issue in this matter, the Board's final
21 decision found that Dr. Greene's care of seven patients was deficient in all respects
22 alleged and violated all the statutes initially charged,⁵ that his care of three of the patients
23 was deficient in some of the respects alleged and violated some but not all of the statutes
24 initially charged,⁶ and that his care of three of the patients was not deficient in any of the
25 respects alleged and did not violate any statute.⁷

26 15. The Board acknowledged that Dr. Greene's practice involved high risk
27 patients and procedures.

28
29 ⁵ These patients were identified as DE, MB, DC (Case No. MD-07-0738A), RW, AZ SN, and DK.

30 ⁶ These patients were MC, RJ, and CD.

⁷ These patients were WR, TB, and DC.

1 16. As a factor in aggravation of the penalty, the Board considered the "sheer
2 volume" of cases, which had occurred over a short period of time, in which a violation had
3 been found. These violations viewed alone could be viewed as the kind of result that
4 might occur once in a surgeon's career.

5 17. As another factor in aggravation, the Board considered the prior discipline in
6 Case No. MD-06-1043A, which had involved five patient complaints that involved similar
7 complications to some of the 13 complaints at issue, and Dr. Greene's failure to disclose
8 any of the 13 cases as surgical complications at the August 9, 2007 informal interview.

9 **ADDITIONAL PACE EVALUATIONS AND THE PARTIES' ARGUMENTS ON REHEARING**

10 18. After the hearing record in this case was closed but before the Board
11 rendered its final decision, Dr. Greene had requested the opportunity to return to the
12 PACE Program for an evaluation that could specifically assess his clinical knowledge of
13 orthopedic spine surgery. Between July 14-18, 2008, Dr. Greene attended Phase II under
14 the supervision of Choll Kim, M.D., Associate Clinical Professor of Orthopedic Surgery at
15 UCSD.⁸ Dr. Kim reported in relevant part as follows:

16 During this period I observed [Dr. Greene] interacting with
17 medical students, fellows and the staff greeting patients. In
18 terms of his clinical knowledge base as well as judgment in
19 spine surgery, I was able to assess this through our
20 discussions of various cases, both during clinic and during
21 surgery, along with discussion of the surgical cases on
22 Tuesday and Thursday. Because this was an observational
23 program, I was not able to assess any of his technical skills in
24 the operating room.

25 In terms of his medical knowledge in the field of spine surgery
26 he seemed to show adequate knowledge and understanding
27 of the various disease states. In particular, we saw patients
28 with spinal stenosis, herniated disks, spondylolisthesis,
29 degenerative scoliosis as well as adjacent level degeneration
30 following prior surgery. He also observed a patient where I
performed a removal of hardware, and this was a complex
patient with multiple pain complaints, and we were able to
discuss rationale for such treatment. He showed a sound
knowledge base and sufficient understanding of all of these
disease states.

⁸ Dr. Kim's curriculum vitae was Dr. Greene's Rehearing Ex. 3.

1 In terms of our discussion of various treatment options, he
2 showed good judgment in delineating the various steps of
3 treatment as it progressed from non-operative to operative
4 treatment. He was able to articulate the indications for
5 surgery, as well as the various surgical treatment options. I
6 also observed him interacting with the medical students,
7 where he was allowed to explain physical exam findings, as
8 well as imaging study findings related to specific patients. He
9 has good understanding of the physical exam of the upper
10 and lower extremities and description of the imaging findings.

11 Based on these findings, I believe that he is capable [of]
12 providing spinal care in the context of diagnosis and
13 suggested treatments. I see no obvious deficiencies related
14 to non-operative care of spine patients. To make any
15 recommendations in terms of allowing him to participate in
16 surgical procedures, this would require more in-depth analysis
17 of his case log and possibly proctorship of cases by an
18 experienced spine surgeon.⁹

19 19. After the Board rendered its final order, Dr. Greene submitted its 51-page
20 Findings of Fact, Conclusions of Law, and Order to the PACE program for reconsideration
21 of its opinion on his safety to practice.

22 20. On August 13, 2008, Dr. Norcross informed Dr. Greene's attorney that the
23 PACE case managers had met to discuss Board's decision and final order. After
24 discussion, the PACE evaluators and case managers had decided that the additional
25 information did not change their original opinion, in relevant part as follows:

26 The additional information provided concerns cases in which
27 Dr. Greene performed spinal surgery. The PACE faculty and
28 staff, in our assessment report, stated that it is our belief that
29 Dr. Greene should no longer perform spinal surgery;
30 therefore, the additional cases supported our original
contention. However, it was also the determination of our
faculty and staff that Dr. Greene, based on the results of our
assessment, was competent to practice general orthopedics.
We also expect that his practice would be evaluated by a
reasonable period of monitoring.¹⁰

⁹ Dr. Greene's Rehearing Ex. 2.
¹⁰ Dr. Greene's Rehearing Ex. 1.

1 21. On October 8, 2008, the Board granted Dr. Greene's request for rehearing to
2 consider newly discovered material evidence under A.A.C. R4-16-103(D) and referred the
3 matter back to the Office of Administrative Hearings.

4 22. Dr. Greene noted that PACE is the "gold standard" of physician assessments,
5 on which the Board in Arizona and its equivalent agencies in other states routinely rely to
6 assess physicians' knowledge and clinical judgment. It would have been easy for the
7 physicians at PACE to change their opinion based on the Board's decision on the 14
8 cases at issue in this case. But PACE had reviewed the Board's decision thoroughly, had
9 evaluated Dr. Greene over a year for a total of almost two weeks, and still opined he was
10 safe to practice general non-surgical orthopedics, based on Dr. Akeson's and Dr. Kim's in-
11 depth evaluations.

12 23. Dr. Greene acknowledged that the Board's primary responsibility was to
13 protect the public. But he argued that the Board also had a duty to rehabilitate physicians
14 if possible.

15 24. The Board's attorney argued that the new information from PACE was only
16 new evidence because Dr. Greene had not disclosed the pending 13 complaints before
17 the Board to PACE. The Board argued that Dr. Greene's failure to disclose was further
18 evidence of Dr. Greene's "misleading nature." It was further evidence of the difficulty of
19 regulating Dr. Greene.

20 25. The Board also pointed out that the initial PACE evaluation of Dr. Greene
21 based on the October 1-2, 2007 evaluation had noted his "areas of relative weakness on
22 elder adult patients populations over 74,"¹¹ many of whom are orthopedic spinal patients.

23 26. Dr. Greene's attorney argued that, if Dr. Greene's alleged failure to disclose
24 the 13 pending complaints to PACE was blameworthy, it was solely the fault of his
25 attorney. Until the Board entered its final order, there was nothing to disclose. The
26 Board's attorney in his cross-examination of Dr. Norcross at the hearing had not
27 suggested that PACE should have considered Dr. Greene's alleged failure to disclose the
28 13 complaints at issue as evidence of moral unfitness to practice medicine.
29

30

¹¹ Dr. Greene's Hearing Ex. 13 at 4.

CONCLUSIONS OF LAW

1 1. The Board retains jurisdiction over this matter.¹²

2 2. Dr. Greene bears the burden of proof to establish by a preponderance of the
3 evidence that, because the penalty of revocation is not required to protect the public, a
4 lesser sanction is appropriate for his proven statutory violations.¹³

5 3. Dr. Greene's attorney is correct that the Board at the initial hearing did not
6 suggest in his cross-examination of Dr. Norcross that Dr. Greene's failure to disclose
7 the 13 pending complaints to the PACE program was evidence of his duplicity and
8 moral unfitness to practice. Nor can such an inference be properly drawn.

9 4. After presentation of evidence over six days of hearing and extensive legal
10 argument, the Board did not sustain its burden of proof to establish all the statutory
11 violations charged in the second amended complaint against Dr. Greene in his
12 treatment of the 13 patients. The purpose of the PACE program is to assess
13 physicians, not to adjudicate complaints. Because, until the Board entered its final
14 order in this matter, there was nothing to disclose to the PACE program, no inference
15 can be drawn from Dr. Greene's failure to disclose complaints that have not yet been
16 adjudicated to the PACE program evaluators.

17 5. Dr. Greene should not be punished for putting the Board to its proof, rather
18 than admitting to the PACE program evaluators or at hearing all the violations that the
19 Board charged in the second amended complaint. With the exception of Dr. Greene's
20 failure to inform the Board of surgical complications at the August 9, 2007 formal
21 interview, which occurred early in the process, Dr. Greene has been forthcoming and
22 cooperative with the Board in this matter.

23 6. The Board's investigation and prosecution of these 13 complaints and Dr.
24 Greene's participation in the PACE program over a period of more than a year also
25 shows an evolution of Dr. Greene's career choices and options. The PACE program
26 evaluators attributed most of the deficiencies noted based in their observation of Dr.
27 Greene in October 2007 to his absence from a general orthopedic practice. The PACE
28 program evaluators opined that a general orthopedic practice would not present the
29

30 ¹² A.R.S. § 32-1401 *et seq.*; A.A.C. 16-103(D)(4).

¹³ A.A.C. R2-19-119(B)(3).

1 same risks as an orthopedic spinal surgical practice and that all of Dr. Greene's
2 observed deficiencies could be remedied by courses to update his training. Dr.
3 Greene's scores were much higher and the PACE program evaluators' comments on
4 his skills and judgment were much more favorable after the January 2008 and July 2008
5 evaluations.

6 7. Drs. Norcross, Akesson, and Kim are well-qualified to assess physicians'
7 clinical knowledge and judgment. The Board's past practice has relied upon the PACE
8 program to evaluate physicians' safety to practice. There is no reason in this record
9 why they should not rely on the PACE program evaluators' opinions in this case, if
10 adequate measures of taken to protect the public.

11 **RECOMMENDED ORDER**

12 Based on the foregoing, it is recommended that the Board, as a result of the new
13 evidence that Dr. Greene provided on rehearing, order that License No. 32747 for the
14 practice of allopathic medicine issued to David L. Greene, M.D. be revoked. However,
15 the revocation should be stayed and Dr. Greene placed on probation for a period of ten
16 years subject to the terms and conditions enumerated below.

17 1. As a condition of any probationary practice, Dr. Greene must complete
18 continuing medical education in Orthopedic Trauma Update through the PACE program
19 or another provider satisfactory to the Board, as well as other courses that the Board
20 deems necessary to prepare Dr. Greene for a non-surgical, general orthopedic practice.

21 2. Dr. Greene's practice is restricted indefinitely in that he shall not perform any
22 general orthopedic or orthopedic spine surgeries. Dr. Greene may petition the Board to
23 lift this restriction in whole or part after one year of the probationary period and he must
24 demonstrate to the Board's satisfaction that he is competent to resume surgical
25 practice. This restriction does not extend to performing non-surgical procedures such
26 as those routinely performed by emergency medicine physicians, hospitalists and
27 interventional pain management physicians.

28 3. Dr. Greene shall be subject to periodic chart reviews by Board staff. Dr.
29 Greene shall fully cooperate with Board staff and provide the charts when requested.

30 4. Dr. Greene shall submit quarterly declarations under penalty of perjury,
describing his medical practice activities and stating whether there he has complied with

1 all conditions of probations. The declarations must be submitted on or before the 15th of
2 March, June, September, and December of each year.

3 5. Dr. Greene shall obey all federal, state, and local laws and all rules governing
4 the practice of medicine.

5 6. In the event Dr. Greene should leave Arizona to reside or practice outside the
6 state or for any reason should Dr. Greene stop practicing medicine in Arizona, Dr.
7 Greene shall notify the Board's Executive Director in writing within ten days of his
8 departure and return or the earliest date of non-practice within Arizona. Non-practice is
9 defined as any period of time exceeding thirty days during which Dr. Greene is not
10 engaging in the practice of medicine. Periods of temporary or permanent residence or
11 practice outside Arizona or of non-practice within Arizona will not apply to the reduction
12 of the probationary period.

13 7. Dr. Greene shall not maintain a sole practice of allopathic medicine. Dr.
14 Greene shall inform his employer or partners of the probationary status of his license
15 and the terms of the Board's order of probation.

16 8. Pursuant to A.R.S. § 32-1451(M) and 41-1007, Dr. Greene shall reimburse
17 the Board's administrative costs of the hearing and rehearing within six (6) months of
18 receiving notification of the amounts due.

19 9. After five years of the probationary period, Dr. Greene may petition the Board
20 to have the remaining five years of probationary period terminated.

21 10. Upon any alleged violation of a probationary term, Dr. Greene shall be given
22 notice and an opportunity to be heard on the alleged violation. If the violation is proven,
23 the Board shall terminate the probation and revoke Dr. Greene's license. If an
24 investigation involving an alleged violation of the probation is initiated, but not resolved,
25 prior to the termination of the probation, the Board shall have continuing jurisdiction and
26 the period of probation shall extend until the alleged violation is resolved.

27 Done this day, December 17, 2008.

28 _____
29 Diane Mihalsky
30 Administrative Law Judge

1 Original transmitted by mail this
2 ____ day of December, 2008, to:

3 Arizona Medical Board
4 Lisa Wynn, Executive Director
5 9545 East Doubletree Ranch Road
6 Scottsdale, AZ 85258

7 By _____
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30