

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE ASSOCIATION OF AMERICAN)	
PHYSICIANS & SURGEONS, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No. ____
)	
THE TEXAS MEDICAL BOARD (TMB),)	
ROBERTA M. KALAFUT, LAWRENCE)	
L. ANDERSON, MICHAEL ARAMBULA,)	
JULIE K. ATTEBURY, JOSE BENAVIDES,)	
PATRICIA S. BLACKWELL, MELINDA)	
S. FREDRICKS, MANUEL G. GUARJARDO,)	
AMANULLAH KHAN, MELINDA)	
McMICHAEL, MARGARET McNEESE,)	
CHARLES E. OSWALT, LARRY PRICE,)	
ANNETTE P. RAGGETTE, PAULETTE)	
BARKER SOUTHARD, TIMOTHY J.)	
TURNER, TIMOTHY WEBB,)	
IRVIN E. ZEITLER, DONALD PATRICK,)	
AND JOHN DOES 1-10 WHO ARE WORKING)	
FOR THE TMB, INDIVIDUALLY AND)	
IN THEIR OFFICIAL CAPACITIES,)	
)	
Defendants.)	
_____)	

The Association of American Physicians & Surgeons, Inc. (“AAPS”) seeks declaratory and injunctive relief as follows:

NATURE OF THE ACTION

1. AAPS brings this action to end the pervasive and continuing

violations of constitutional rights of its members by the Defendants, including the Defendant Texas Medical Board (“TMB”). On behalf of its members, AAPS complains about Defendants’:

- manipulation of anonymous complaints;
- conflicts of interest;
- violation of due process;
- breach of privacy; and
- retaliation against those who speak out.

2. Through their protected liberty interests in reputation and property interests in their medical licensing and economic affairs, AAPS members have been harmed by virtue of one or more of the foregoing violations of their constitutional or federal rights.

3. AAPS seeks declaratory and injunctive relief under 42 U.S.C. § 1983 to enjoin these continuing violations of its members’ rights.

THE PARTIES

4. Plaintiff AAPS is a not-for-profit membership organization incorporated under the laws of Indiana and headquartered in Tucson, Arizona. AAPS’s members consist of thousands of physicians nationwide, including many in Texas. AAPS members have constitutionally protected liberty interests in their reputation and privacy and property interests in their

medical licensing and economic well-being. Many of the members of AAPS have been harmed by disciplinary proceedings at the TMB that have violated their rights under the U.S. Constitution or federal law. The protection of AAPS members from arbitrary and unlawful government action is central to AAPS's mission on behalf of its members.

5. Defendant Texas Medical Board (TMB) is a state regulatory body that licenses and disciplines physicians.

6. Defendant Roberta M. Kalafut ("Kalafut") is President of the TMB.

7. Defendant Lawrence L. Anderson ("Anderson") is a member of the TMB and serves as its Chairman of the Disciplinary Process Review Committee.

8. Defendant Michael Arambula ("Arambula") is a member of the TMB.

9. Defendant Julie K. Attebury ("Attebury") is a member of the TMB.

10. Defendant Jose Benavides ("Benavides") is a member of the TMB.

11. Defendant Patricia S. Blackwell ("Blackwell") is a member of the TMB.

12. Defendant Melinda S. Fredricks (“Fredricks”) is a member of the TMB.

13. Defendant Manuel G. Guarjardo (“Guarjardo”) is a member of the TMB.

14. Defendant Amanullah Khan (“Khan”) is a member of the TMB.

15. Defendant Melinda McMichael (“McMichael”) is a member of the TMB.

16. Defendant Margaret McNeese (“McNeese”) is a member of the TMB.

17. Defendant Charles E. Oswald (“Oswald”) is a member of the TMB.

18. Defendant Larry Price (“Price”) is a member of the TMB.

19. Defendant Annette P. Raggette (“Raggette”) is a member of the TMB.

20. Defendant Paulette Barker Southard (“Southard”) is a member of the TMB.

21. Defendant Timothy J. Turner (“Turner”) is a member of the TMB.

22. Defendant Timothy Webb (“Webb”) is a member of the TMB.

23. Defendant Irvin E. Zeitler (“Zeitler”) is a member of the TMB.

24. Defendant Donald Patrick (“Patrick”) is the Executive Director of the TMB.

25. Defendant John Does 1-10 are members, employees, and/or agents of the TMB who have violated constitutional rights of members of AAPS.

JURISDICTION AND VENUE

26. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331, as this action arises under the First, Sixth and Fourteenth Amendments to the United States Constitution and federal law; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state law, of rights, privileges and immunities secured by the United States Constitution.

27. Venue is proper in the United States District Court for the Eastern District of Texas under 28 U.S.C. § 1391(b) in that plaintiff AAPS has members located within this District who are suffering continuing injury from Defendants’ conduct, and Defendants are subject to venue here. All acts alleged herein of Defendants, its officers, agents, servants, employees, or persons acting at its behest or direction, were done and continue to be done under the color of state law.

Standing

28. AAPS members have suffered actual and threatened injury in the form of disciplinary procedures, breaches of confidentiality and privacy, denial of due process, and retaliation by the TMB and the other Defendants which violate the U.S. Constitution. The declaratory and injunctive relief will prevent ongoing and imminent future injury and enable AAPS members to redress past injury by re-opening tainted TMB proceedings. The requested declaratory and injunctive relief does not require the participation of individual AAPS members. The protection of its members from arbitrary and improper government actions is central to AAPS's purpose.

29. AAPS members justifiably fear retaliation if they individually sue the TMB. At the legislative hearing on October 23, 2007, several physicians testified about retaliation, and fear of retaliation, by the TMB against them.

30. Representative Corbin Van Arsdale, who served on the legislative panel that heard testimony from physicians on October 23, 2007, commented that "I've heard about the fear of the doctors being sort of retaliated against by the board."

FACTUAL BACKGROUND

31. As set forth in detail below, Defendants have abused process in allowing anonymous complaints; operated with improper conflicts of interest; arbitrarily rejected administrative decisions; breached the privacy of targeted physicians; and retaliated against those who speak out.

Anonymous Complaints

32. Defendant TMB accepts, and acts upon, many anonymous complaints against physicians.

33. Defendant Kalafut has arranged for her husband to file anonymous complaints against other physicians, including her competitors in Abilene, Texas.

34. Defendant Kalafut then worked inside the TMB, with other Defendants, to discipline physicians based on anonymous complaints filed by her physician husband.

35. A member of AAPS has been subjected to an ostensibly anonymous complaint concerning his treatment of five patients from New York City, all of whom were very pleased with his treatment.

36. Upon information and belief, the foregoing anonymous complaint was orchestrated by a New York insurance company that did not want to reimburse patients for their expenses to see this physician.

37. Defendants have used the process of anonymous complaints to discipline physicians for improper reasons.

Conflict of Interest

38. Keith Miller (“Miller”) is a former member of the TMB, and former Chairman of its Disciplinary Process Review Committee.

39. Miller served as a witness for plaintiffs in up to 50 malpractice cases while he served on the TMB, without disclosure to the public or to the physicians subjected to his discipline.

40. Miller had this conflict of interest as he served as Chairman of its Disciplinary Process Review Committee.

41. Officials of the TMB, including Defendants Kalafut and Patrick, admitted at a legislative hearing on October 23, 2007, that this was a conflict of interest.

42. Defendants Kalafut and Patrick falsely understated their knowledge of the extent to which Miller was serving as a witness for plaintiffs in malpractice cases. Upon information and belief, Defendants Kalafut and Patrick knew that Miller was serving as a witness for plaintiffs in malpractice cases while Miller served on TMB’s Disciplinary Process Review Committee.

43. Miller generated malpractice cases by improperly disciplining

physicians.

44. Upon information and belief, Defendant John Does at the TMB had knowledge and complicity in Miller's actions.

45. In the case of one member of AAPS, Miller falsely stated that the disciplined physician had killed a patient.

46. That false statement led to a malpractice case against the physician.

47. The judge in that malpractice case ultimately held, after much harm to the physician, that the malpractice case was frivolous.

48. While on the TMB, Miller also served on behalf of an insurance company, Blue Cross-Blue Shield, which has financial interests often in conflict with the interests of patients seeking additional care and physicians caring for those patients.

49. Another member of AAPS was subjected to discipline by an Informal Show Compliance and Settlement Conference (ISC) panel led by Miller, despite his conflicts of interest.

50. Yet another member of AAPS was subjected to an unjust ISC proceeding led by Miller, after which the targeted physician agreed to the terms as approved by the two-person ISC panel.

51. However, Miller later imposed an additional requirement on the

settlement after the ISC panel had adjourned, forcing the physician to cease all use of physician assistants and advanced nurse practitioners in his practice.

52. Miller sat on a disproportionately high percentage of ISC panels, thereby exercising an inordinate amount of influence over the process.

53. Defendant TMB and its officials refuse to reopen the disciplinary decisions against AAPS members that were made by Miller while he was tainted by a conflict of interest.

54. Some of these disciplinary decisions have caused other state medical boards, under the doctrine of reciprocity, to automatically take action against the licenses of physicians, including at least one member of AAPS, in the other states without examining the underlying facts.

Arbitrarily Rejects Administrative Rulings

55. A member of AAPS used the hospital rate in requesting \$81 from a patient as a copying charge to comply with her request for a copy of her medical records.

56. The patient filed a complaint against the physician with Defendant TMB.

57. Miller presided over consideration of the complaint at the

physician's ISC.

58. Miller did not allow the member's attorneys to present a defense, and instead Miller made abusive remarks like, "Son, don't you know who gives you your license?"

59. Defendant TMB insisted, without proper legal authority, that the physician could not charge more than \$39 for copying these records, a difference of only \$42.

60. The TMB's ISC, lasting a mere five (5) minutes, resulted in a demand by Miller, on behalf of the ISC, that the physician pay a \$1000 fine.

61. Such fine would be a publicly reportable event that would likely lead to insurance companies dropping coverage for the physician based on his being disciplined by the TMB.

62. The physician could also be removed from hospital staffs based on his being disciplined by the TMB.

63. The physician appealed this decision to the State Office of Administrative Hearings (SOAH), where Administrative Law Judge Wendy Harvel presided over his case.

64. Judge Harvel held that there was no authority or basis for the TMB to discipline a physician for this reason.

65. On August 24, 2007, Judge Harvel took the extraordinary step

of appearing at the scheduled meeting of the TMB to explain that it lacked authority and basis for disciplining this physician.

66. In retaliation for the physician's having successfully appealed its initial decision, Defendant TMB then rejected the administrative decision and imposed an even harsher penalty of \$2000 on the physician, and ordered him to attend a course on jurisprudence at his expense.

67. The physician spent tens of thousands of dollars in legal fees and never even collected the copying charge for the records that he provided to the patient.

68. This discipline and sanction were reported to the National Practitioners Data Bank (NPDB) and became known to insurance companies and hospitals, to the detriment of the physician.

Breach of Privacy

69. A member of AAPS was involved in a private dispute with a private hospital.

70. Defendant Anderson traveled to the physician's town and delivered confidential records about this physician to the hospital in an attempt to interfere with its relationship with the physician.

71. Defendant Anderson repeated unproven allegations about this physician to the hospital.

72. The physician was not given any opportunity by the TMB to rebut the allegations and disprove the false statements.

73. The hospital then acted to the financial detriment of the physician by relying on these confidential, unproven allegations.

74. Another member of AAPS was victimized by a leak by a Defendant John Doe No. 1 of the TMB of its complaint against him to the *Houston Press* on or about August 24th, four days before his own attorney received the Complaint.

75. The *Houston Press* then smeared the good physician based on the one-sided and unproven allegations leaked to it by a Defendant John Doe No. 1 on behalf of the Defendant TMB.

Free Speech

76. AAPS members have expressed criticism of the TMB in the media and on the internet.

77. Defendants, and/or their agents, closely monitor the media to ascertain which physicians are talking about the TMB, and what they are saying.

78. A listener to one radio program that included criticism of the TMB called the TMB during or after the show and spoke to TMB

representative John Doe No. 2.

79. Defendant John Doe No. 2, representing the TMB, responded to the call with baseless attacks on the physician, who is a member of AAPS.

80. Defendant John Doe No. 2 referred the caller to a defamatory website named “www.quackwatch.com”.

81. Defendants have also retaliated with disciplinary procedures against physicians who have criticized it.

82. With respect to a member of AAPS who had moved to another state, who had been critical of the TMB, Defendant Kalafut, acting on behalf of the TMB, declared to a newspaper that it was unsafe for him to practice medicine.

83. When another AAPS member testified at the legislative hearing on October 23, 2007, a TMB official responded by falsely smearing him in public with respect to a sexual allegation asserted by the TMB. Her smear of that physician continues to be available by video over the internet.

**FIRST CLAIM FOR RELIEF
(UNDER SECTION 1983
FOR ABUSE OF ANONYMOUS COMPLAINTS)**

84. Plaintiff incorporates herein all statements and allegations contained in paragraphs 1 through 83 above.

85. By impairing the liberty interests in reputation, the property

interests in medical licensing, and the economic well-being of Plaintiff's members, Defendants' abuse of anonymous complaints violated the constitutional rights of Plaintiff AAPS.

86. Members of Plaintiff AAPS also justifiably fear the misuse of anonymous complaints against them if they speak out, engage in competition, or stand up for the rights of their patients.

87. Plaintiff AAPS is entitled to an injunction preventing the TMB from accepting or soliciting anonymous complaints.

88. Plaintiff AAPS is entitled to an injunction preventing TMB officials from using anonymous complaints to harass and intimidate their competitors and adversaries.

89. Plaintiff AAPS is entitled to a declaratory judgment that anonymous complaints, as used at the TMB, violate the Confrontation Clause of the Sixth Amendment of the U.S. Constitution.

90. Plaintiff AAPS is entitled to a declaratory judgment that anonymous complaints, as used at the TMB, violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

91. Plaintiff AAPS is entitled to a declaratory judgment that anonymous complaints, as used at the TMB, violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

92. Plaintiff is entitled to attorneys' fees under 42 U.S.C. § 1988(b).

**SECOND CLAIM FOR RELIEF
(UNDER SECTION 1983
FOR CONFLICTS OF INTEREST)**

93. Plaintiff incorporates herein all statements and allegations contained in paragraphs 1 through 92 above.

94. By impairing the liberty interests in reputation, the property interests in medical licensing, and the economic well-being of Plaintiff's members, Defendants' allowance of Miller's conflict of interest violated the constitutional rights of Plaintiff AAPS.

95. Plaintiff AAPS is entitled to a declaratory judgment that the TMB must reopen and reconsider the cases handled by Miller at the TMB.

96. Plaintiff AAPS is entitled to a declaratory judgment that the conflict of interest allowed by the TMB violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

97. Such declaration is still necessary as physicians injured by the conflict of interest must defend their licenses in other states, which are disciplining these physicians based on automatic application of the doctrine of reciprocity to the discipline imposed by the TMB.

98. Plaintiff is entitled to attorneys' fees under 42 U.S.C. §

1988(b).

**THIRD CLAIM FOR RELIEF
(UNDER SECTION 1983
FOR ARBITRARILY REJECTING
ADMINISTRATIVE RULINGS)**

99. Plaintiff incorporates herein all statements and allegations contained in paragraphs 1 through 98 above.

100. By impairing the liberty interests in reputation, the property interests in medical licensing, and the economic well-being of Plaintiff's members, Defendants' arbitrary discipline in rejecting administrative rulings has violated the constitutional rights of Plaintiff AAPS.

101. Defendants' arbitrary rejection of administrative rulings and retaliation for appealing TMB's actions deter physicians from spending the time and money to appeal ISC decisions in an administrative hearing.

102. Plaintiff AAPS is entitled to an injunction preventing the TMB from arbitrarily rejecting administrative rulings.

103. Plaintiff AAPS is entitled to a declaratory judgment that the arbitrary procedures used by the TMB to reject administrative rulings violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

104. Plaintiff AAPS is entitled to a declaratory judgment that the arbitrary procedures used by the TMB to reject administrative rulings violate

the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

105. Plaintiff is entitled to attorneys' fees under 42 U.S.C. § 1988(b).

**FOURTH CLAIM FOR RELIEF
(UNDER SECTION 1983
FOR BREACH OF PRIVACY)**

106. Plaintiff incorporates herein all statements and allegations contained in paragraphs 1 through 105 above.

107. By impairing the liberty interests in reputation, the property interests in medical licensing, and the economic well-being of Plaintiff's members, Defendants' breach of the privacy of investigated physicians has violated the constitutional rights of Plaintiff AAPS.

108. Plaintiff AAPS is entitled to an injunction preventing the TMB from breaching the privacy of its members.

109. Plaintiff AAPS is entitled to a declaratory judgment that the procedures used by the TMB to ensure privacy are inadequate and in violation of federal law, including the Health Insurance Portability and Accountability Act (HIPAA).

110. Plaintiff AAPS is entitled to a declaratory judgment that the foregoing violation of privacy violates the Equal Protection Clause of the

Fourteenth Amendment of the U.S. Constitution.

111. Plaintiff is entitled to attorneys' fees under 42 U.S.C. § 1988(b).

**FIFTH CLAIM FOR RELIEF
(UNDER SECTION 1983
FOR FREEDOM OF SPEECH)**

112. Plaintiff incorporates herein all statements and allegations contained in paragraphs 1 through 111 above.

113. Defendants' retaliation has chilled the free speech rights of members of AAPS, in violation of their rights under the First and Fourteenth Amendments of the U.S. Constitution.

114. Plaintiff AAPS is entitled to an injunction preventing the TMB from retaliating against physicians for exercising their rights of free speech.

115. Plaintiff AAPS is entitled to a declaratory judgment that retaliation by the TMB, based on speech by physicians, is unconstitutional.

116. Plaintiff is entitled to attorneys' fees under 42 U.S.C. § 1988(b).

Jury Demand

117. Plaintiff requests a trial by jury for all issues triable by jury.

Prayer For Relief

Wherefore, Plaintiff respectfully requests the following relief:

- (i) Declaratory and injunctive relief for violation of 42 U.S.C. § 1983;
- (ii) reasonable attorneys' fees and costs under 42 U.S.C. § 1988(b);
and
- (iii) such other relief as the Court may deem appropriate.

Respectfully submitted,

/s/andrew l. schlafly
Andrew L. Schlafly
General Counsel
Association of American Physicians
and Surgeons, Inc.
New Jersey Bar No. 04066-2003
939 Old Chester Rd.
Far Hills, NJ 07931
Phone: (908) 719-8608
Fax: (908) 934-9207

Karen Tripp
Attorney at Law
Texas State Bar No. 03420850
P.O. Box 1301
Houston, TX 77251
(713) 658-9323
(713) 658-9410

ATTORNEYS FOR PLAINTIFF

Dated: December 20, 2007