

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THE ASSOCIATION OF AMERICAN)
PHYSICIANS & SURGEONS, INC.,)
) Civil Action
Plaintiff,)
)
vs.) No. A-08-CV-675-LY
)
THE TEXAS MEDICAL BOARD (TMB),)
ROBERTA M. KALAFUT,)
MICHAEL ARAMBULA, JULIE K.) **AMENDED**
ATTEBURY, PATRICIA S. BLACKWELL,) **COMPLAINT**
MANUEL G. GUAJARDO,)
MELINDA McMICHAEL, MARGARET)
McNEESE, CHARLES E. OSWALT,)
PAULETTE BARKER SOUTHARD,)
TIMOTHY J. TURNER, TIMOTHY WEBB,)
IRVIN E. ZEITLER, AND JOHN DOES)
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 and/or confidential complaints;
- conflicts of interest;
- violation of due process; 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 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 a former President of the TMB who continues to serve on the District 3 Review Committee of the TMB.

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

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

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

10. Defendant Manuel G. Guajardo ("Guajardo") is a member of the TMB.

11. Defendant Melinda McMichael ("McMichael") is a member of the TMB.

12. Defendant Margaret McNeese ("McNeese") is a member of the TMB.

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

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

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

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

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

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

JURISDICTION AND VENUE

19. 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.

20. Venue is proper in the United States District Court for the Western District of Texas under 28 U.S.C. § 1391(b) in that Defendant TMB resides here and a substantial part of the events or omissions giving rise to

the claims occurred 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

21. AAPS members have suffered actual and threatened injury in the form of disciplinary procedures, denial of due process and equal protection of the law, 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.

22. 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.

23. 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

24. As set forth in detail below, Defendants have abusively allowed anonymous and/or confidential, bad faith complaints; operated with improper conflicts of interest; and retaliated against those who speak out.

Anonymous and/or Confidential Complaints

25. Defendant TMB accepts, and acts upon, many anonymous and/or confidential complaints filed in bad faith against physicians.

26. Defendant Kalafut arranged for someone else to file anonymous and/or confidential complaints against other physicians, including her competitors in Abilene, Texas, who include at least one AAPS member.

27. Defendant Kalafut then worked inside the TMB, with other Defendants, to discipline physicians based on anonymous and/or confidential complaints filed under her direction.

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

29. Upon information and belief, the foregoing anonymous and/or confidential complaint was orchestrated by a New York insurance company

that did not want to reimburse patients for their expenses to see this physician.

30. Defendants have used the process of anonymous and/or confidential complaints to discipline physicians for improper reasons.

Conflict of Interest

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

32. 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.

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

34. Officials of the TMB, including Defendant Kalafut and then-Executive Director Donald Patrick, admitted at a legislative hearing on October 23, 2007, that this was a conflict of interest.

35. Defendant 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, Defendant 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.

36. Miller generated malpractice cases by improperly disciplining physicians.

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

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

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

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

41. 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.

42. A 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.

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

process.

44. 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.

Free Speech

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

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

47. A listener to one radio program that included criticism of the TMB called the TMB during or after the show and spoke to a TMB representative Defendant John Doe.

48. This Defendant John Doe, representing the TMB, responded to the call with baseless attacks on the physician, who is a member of AAPS.

49. This Defendant John Doe referred the caller to a defamatory website named “www.quackwatch.com”.

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

51. 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.

52. 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 USE OF ANONYMOUS AND/OR CONFIDENTIAL
COMPLAINTS)**

53. Plaintiff incorporates herein all statements and allegations contained in paragraphs 1 through 52 above.

54. 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 and/or confidential complaints violated the constitutional rights of Plaintiff AAPS.

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

56. Plaintiff AAPS is entitled to an injunction preventing the TMB from processing anonymous complaints.

57. Plaintiff AAPS is entitled to an injunction compelling the TMB to provide a copy of the complaint to the accused physician, without redaction, so that he may properly defend against it.

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

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

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

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

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

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

63. Plaintiff incorporates herein all statements and allegations contained in paragraphs 1 through 62 above.

64. 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.

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

66. 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.

67. Plaintiff AAPS is entitled to an injunction against all conflicts of interest by TMB members with respect to physicians being subjected to discipline by them.

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

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

69. Plaintiff incorporates herein all statements and allegations contained in paragraphs 1 through 68 above.

70. 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.

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

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

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

Jury Demand

74. 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: May 31, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2011, I electronically filed the foregoing “Amended Complaint” with the Clerk of the Court using the Electronic Case Filing system, which I understand to have caused service of Assistant Attorneys General Nancy K. Juren and Eric Vinson of the Office of the Attorney General of the State of Texas, on behalf of all Defendants.

/s/ Andrew L. Schlafly
Andrew L. Schlafly