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

THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.,	)	
Plaintiff,	)	Civil Action
v.	)	No. 1:08-cv-675-LY
THE TEXAS MEDICAL BOARD, *et al.*,	)	
Defendants.	)	

PLAINTIFF'S MOTION TO COMPEL DEFENDANT TEXAS MEDICAL BOARD TO COMPLY WITH PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

TO THE HONORABLE LEE YEAKEL:

Plaintiff Association of American Physicians & Surgeons, Inc., files this motion to compel Defendant Texas Medical Board (TMB) to comply with Plaintiff's First Request for Production of Documents and Things.

Defendant TMB has refused to produce documents responsive to Request Nos. 1, 2 and 4 based on a *state law* privilege that is not recognized in federal courts with respect to federal claims, such as the Section 1983 claims asserted here. The withheld documents are essential to Plaintiff's claims and prosecution of this action. Without discovery of these documents, Plaintiff would be deprived of its ability to prove its purely federal claims. There is no legitimate basis for Defendant to withhold these documents, and this Court should compel their production.

I. Background

The primary claim in the Complaint concerns unconstitutional acts by Defendants in manipulating anonymous complaints. Specifically, the Complaint alleges that Defendant Roberta Kalafut, the President of the TMB, has arranged for her husband to file anonymous complaints

against other physicians, including her competitors in Abilene, Texas. Compl. ¶¶ 33-34. Another member of AAPS has been subjected to an ostensibly anonymous complaint concerning his treatment of five patients from New York City, even though his patients were very pleased with his treatment. Compl. ¶ 35. Defendants have used the process of anonymous complaints to discipline physicians for improper reasons. Compl. ¶ 37.

The proof for this claim is almost exclusively in the complaints themselves that were filed with the TMB against the particular physicians. These complaints will likely disclose information indicating that Defendant Roberta Kalafut, or persons working under her supervision, filed numerous complaints against her competitors and adversaries as she served as president of the Texas Medical Board.

Defendant's primary objection is based on a state statute that has no application to federal discovery, as explained in Point III below. See Declaration of Andrew L. Schlafly ["Schlafly Declaration"] Exhibit A, at p. 3. Defendant also objects by claiming that these actual complaints are not "likely calculated to lead to the discovery of admissible evidence." *Id.* In fact, discovery of these complaints is central to Plaintiff's allegations of wrongdoing and violation of Section 1983 by Defendant Kalafut, President of Defendant TMB, as explained further in Point II below.

II. Factual Basis for Plaintiff's First Request

Statistics provided by the TMB itself show that less than 10% of Texas physicians are subjected to complaints each year.[1] But a far higher percentage of complaints have been filed against competitors of TMB President Roberta Kalafut, suggesting anticompetitive manipulation

[1] According to the TMB, the complaints-per-physician ratios were 1:9.9 in Fiscal Year 2006 and 1:7.7 in Fiscal Year 2007.

(Footnote cont'd on next page)

of the system by Defendant Kalafut in violation of constitutional rights of the victims. Indeed, the evidence is overwhelming that Defendant Kalafut, or someone acting under her direction, was responsible for these abusive complaints.

For example, in a letter by competitor Norman J. Dozier, M.D., to Texas State Senator Kyle Janek, which has been publicly released, Dr. Dozier wrote:

> Personally, I am the only doctor left in a 150 mile radius that is involved in Pain Management [Kalafut's specialty] in any form or fashion that has not been sanctioned by TMB one way or another, but God knows she [Kalafut] has been trying.

Schlafly Declaration Exhibit B.[2] Dr. Dozier explained how Kalafut "was screaming at other Board members over the phone to not exonerate Dr. Bennos because he represented competition to her since he was reading MRI's from a competitor's office." *Id.*

Defendant Kalafut's husband-partner, Ed Brandecker, even wrote a threatening letter to their ex-partner, Dan Munton, M.D., warning him not to return to their area (and thereby compete with them). In a widely publicized letter sent to the Governor, Dr. Munton described how he was immediately subjected to two frivolous complaints upon his return to practice in the area in competition with Kalafut. In addition, Munton's physician's assistant was even subjected to another complaint in further harassment. Munton explained:

> My name is Dr. Dan Munton, I am the former partner of Roberta Kalafut D.O. and her husband Ed Brandecker M.D. I voluntarily for ethical reasons resigned from their practice in 2004. I left Abilene to serve out a contractual non compete. Upon hearing of my planned return to Abilene, Ed Brandecker sent me a threatening letter stating that if I had stayed away they would have "let bygones be bygones". I shortly thereafter received my first of two "anonymous" complaints from the Texas Medical Board where Roberta sits as

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(Footnote cont'd from previous page.)

See http://www.tmb.state.tx.us/townhall/2008/Houston_07-15-08.htm (viewed 9/22/08).

[2] http://www.txppr.org/newsletter.cfm?NewsletterID=28&CategoryID=0 (viewed 9/22/08).

> President. Then Vince Viola, my physician assistant, who previously worked for them, was also turned into the board "anonymously". I don't feel this was all just coincidence. It has cost me countless hours and thousands of dollars to defend myself from these fraudulent complaints.[3]

Debbie Crawford, D.O., was the only designated doctor in Brown County in competition with Defendant Kalafut's husband-partner, Brandecker, and she was subjected to a complaint that could have only originated from Kalafut and Brandecker's offices. Dr. Crawford wrote to the Travis County District Attorney describing how she had two patients, one who saw Dr. Kalafut and one who saw Dr. Brandecker. "Shortly after each patient was seen I received a complaint from the Texas Medical Board naming both patients." Schlafly Declaration Exhibit D, at 2. Neither patient had suffered harm, and "there is no other way this complaint could have been filed without the involvement of Dr. Brandecker and Dr. Kalafut working together." *Id.* at 4. Dr. Crawford concluded that "Dr. Kalafut uses her position at the board to influence outcomes of complaints, that she was involved to some degree in initiating for apparent financial gain." *Id.*

In sworn testimony at a legislative hearing on October 23, 2007, Defendant Kalafut first denied that she had arranged for the filing of complaints against others, then later admitted it, and then the third time refused to answer:

FIRST KALAFUT'S DENIAL UNDER OATH:

Rep. Corbin Van Arsdale:	Dr. Kalafut, do you know of any Board member, or Board member's family member that filed anonymous complaints against physicians?
Kalafut:	I do not.

BUT AFTER A BREAK, KALAFUT SWORE TO THE OPPOSITE:

[3] http://txppr.com/editorial.cfm?EditorialID=27&CategoryID=0 (viewed 9/22/08). See Schlafly Declaration Exhibit C.

Rep. Debbie Riddle:	Have you ever had your physician husband file an anonymous complaint for you?
Kalafut:	(pause) Yes. Not for me, but he has filed one on his own.

FINALLY, KALAFUT'S IMPROPER REFUSAL TO ANSWER:

Rep. Riddle:	Have you asked your husband or any other person to file an anonymous complaint against Dr. Dan Munton, your former partner?
Kalafut:	I don't have the right to, I don't - have the right to disclose that.
Riddle:	You cannot disclose that?
Kalafut:	Yes, I'm told now ….
Mari Robinson:	No, she - we cannot disclose the name of anyone who complains. …

Schlafly Declaration Exhibit E, Tr. p. 40, 87, 88.[4] The objection raised by TMB attorney Mari Robinson was unjustified: there is no privilege concealing wrongdoing and manipulation of the complaint system that would prevent Kalafut from saying whether she asked someone else to file a complaint against her ex-partner.

Defendant Kalafut's husband Brandecker, for his part, decided to duck questions about the complaints against competitors by absurdly testifying that he has no competitors. This Q&A was with Brandecker in his deposition in this action:

Q. Who are your competitors?
A. I -- I think our practice is unique.
Q. All right. Are you saying you don't have any competitors?
A. I think the focus of our practice is unique and therefore distinguishes us from what other people do.
Q. But surely you have competitors, don't you?
A. I think you need to define what you mean.
Q. By competitor I mean an individual who has business that could go your way if that individual was not there?
A. So can you repeat your question?

[4] http://www.aapsonline.org/tmb/tmb-transcript.pdf (full transcript available online).

Q. Do you have any competitors?
A. There are some physicians who provide some similar services.
Q. I would like to introduce as Exhibit 1 a health care provider summary of designated doctors in Brown County.

(Brandecker Exhibit 1 marked [showing Debbie Crawford as the only designated doctor in Brown County other than Ed Brandecker].)

Q. After looking at Exhibit 1, would you agree that Debbie Crawford is a competitor of yours?
A. I disagree.

Schlafly Declaration Exhibit F, Tr. at p. 8. Note that Brandecker had his former partner Munton sign a non-compete as referenced by Munton's letter above, which would be inappropriate if Brandecker had no competitors. In fact, Munton returned to Abilene after expiration of the non-compete period and was quickly subjected to frivolous complaints almost certainly arranged by Defendant Kalafut and Brandecker.

III. As in Peer Review, TMB Complaints Are Discoverable in Federal Court

In a prior, unsuccessful motion by Defendant TMB for an order by the district court (in Texarkana) to quash Plaintiff's subpoenas for complaints filed with the TMB, Defendant TMB argued that there is "a discovery issue analogous to that presented in the instant situation—whether documents relating to medical peer review committee communications and findings, requested in a document subpoena issued to non-parties, were protected from production by statutory privileges created by the Texas Legislature." Defendants' Objections to and Motion to Quash Five Document Subpoenas, or, Alternatively, Motion for Protective Order [hereinafter, "Defs. Motion to Quash"], dated June 13, 2008.

The TMB's own analogy requires production here. In *Vezina v. United States*, 2008 U.S. Dist. LEXIS 24437 (W.D. La. Mar. 27, 2008), the court considered – and rejected – a privilege asserted under a state statute analogous to the state law relied upon by the TMB here. The court

found that "principles of federal common law apply to privilege issues" in an action in federal court based on a federal claim. *Id.* at *2. The court concluded that "Louisiana privilege law (La. R. S. 13:3715.3) concerning production of patient information, physician files, credentials, and peer review data does not apply in this case. Moreover, there is no federal law prohibiting the production of this information." *Id.* at *3 (citation omitted). The court then ordered production of the materials, just as this court should. *See also Dorsten v. Lapeer County General Hospital*, 88 F.R.D. 583, 586 (E.D. Mich. 1980) (ordering disclosure and noting that "it is clear that despite the existence of the state statutory privilege, in cases arising under federal law there is no constitutional inhibition to abrogation of state created privileges either in connection with the admission of evidence or in connection with pretrial discovery") (citing Moore's Federal Practice P 26.69(7) at n. 6a).

Numerous other courts within the Fifth Circuit and elsewhere have held likewise. In *Poliner v. Texas Health Systems*, 201 F.R.D. 437 (N.D. Tex. 2001), *rev'd on other grnds*, 2008 U.S. App. LEXIS 15580 (5th Cir. Tex. July 23, 2008), the court ordered discovery of information with respect to the conduct of a peer review committee, despite assertions of statutory privilege based on both federal and state law, including Tex. Occ. Code Ann. § 160.007(a), *et seq.* The Court explained that while in cases predicated solely on Texas state law, the Texas Supreme Court had held that such information and related records was privileged and not subject to discovery, the action before the Court included a federal claim, just as the claims here do. "[T]herefore," the Court held, "the Texas Supreme Court's decisions are not determinative of the scope of discovery." *Id.* at 438. Upon review and consideration of the applicable federal law, the Court concluded that it did not create an inviolate bar to discovery of materials relating to peer review committees. Further, the Court reasoned, "were such a privilege recognized, it would

effectively foreclose a wrongfully disciplined physician from being able to show that a peer review committee acted with malice because he would be precluded from showing that the data on which the committee acted did not support the sanction imposed." *Id.* If required by this Court, Plaintiff could agree to some limited protections for truly confidential information, as was ordered in the *Poliner* decision.

In *Rdzanek v. Hosp. Serv. Dist. # 3*, 2003 U.S. Dist. LEXIS 19336 (E.D. La. Oct. 29, 2003), a federal court held that peer review materials must still be disclosed in discovery, rejecting defendants' argument that peer review material could be withheld:

> The Court declines to recognize a new peer review privilege in this case. Here, Magistrate Wilkinson ordered that the information produced be subject to a protective order designed to keep the information confidential. The protective order limits the use of the information to this litigation. The Court finds that the importance of protecting peer review information to any greater extent than that provided by the protective order is outweighed by the truth seeking function of the federal courts.

Id. at *12-13. *See also Sabatier v. Barnes*, 2001 U.S. Dist. LEXIS 2240, *21 (E.D. La. Feb. 21, 2001) (ordering production of peer review material pursuant to a protective order to be drafted by both parties).

Virtually all other jurisdictions have held likewise. *See, e.g., Adkins v Christie*, 488 F.3d 1324 (11th Cir. 2007) (holding that there is no peer review privilege limiting discovery in a lawsuit under 42 U.S.C. § 1983, and overturning summary judgment based on an improper limitation on discovery); *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir.), *cert. denied*, 546 U.S. 958 (2005) (declining to create a peer review privilege as a matter of federal common law, despite existence of a privilege under Arizona law); *Davila v Patel*, 415 F. Supp 2d 528 (E.D. Pa. 2005) (granting motion to compel production because only federal privilege law applied to federal claims, and federal common law does not recognize any peer review privilege); *Syposs v United*

States, 63 F. Supp 2d 301 (W.D.N.Y. 1999) (holding that neither reason nor experience justifies extending a privilege against disclosure in federal cases to medical peer review records); *Jackson v County of Sacramento*, 175 F.R.D. 653 (E.D. Cal. 1997) (holding that there is no recognized federal peer review privilege that precludes discovery requested by a physician, despite the existence of a California physician-patient privilege); *Hansen v. Allen Memorial Hosp.*, 141 F.R.D. 115 (1992) (ordered production despite statutory protection); *Orbovich v. Macalester College*, 119 F.R.D. 411 (D. Minn. 1988) (ordered production). The only time when a state statutory privilege is used to deny disclosure in federal court is when the requested records related to state claims in federal court, which is not the case here. *See, e.g., Garza v Scott & White Mem. Hosp.* 234 F.R.D. 617, 624-25 (W.D. Tex. 2005).

IV. Suitability of a Protective Order

To the extent there is any legitimate privilege, it can be easily and adequately addressed by a protective order. Defendants themselves appeared to accept this in their unsuccessful Motion to Quash dated June 13, 2008, by arguing in the alternative that **"**should the Court determine that the information at issue here is not protected and must be produced, Defendants ask that measures be taken to place strict limits on who may view the materials produced. … Defendants therefore alternatively move this Court to issue a protective order setting out such limits should production of such information be allowed or required. Fed. R. Civ. P. 26(c)(1)." Defs. Motion to Quash, *supra*, at 6.

Plaintiff will certainly not embarrass anyone protected by proper application of Section 164.007(c). But Section 164.007(c) should not be applied to conceal any potential wrongdoing, such as complaints filed against competitors and manipulated by Defendants. The victimized physicians have themselves publicly criticized the complaints against them that are at issue here.

The proper scope of a protective order should be to protect innocent victims of disingenuous complaints, not wrongdoing by members of the TMB or persons acting under its direction.

V. Conclusion

Plaintiff's motion to compel Defendant Texas Medical Board (TMB) to comply with Plaintiff's First Request for Production of Documents and Things, and specifically with respect to Request Nos. 1, 2 and 4, should be granted.

Dated: September 22, 2008 Respectfully submitted,

/s/ Andrew L. Schlafly
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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2008, I electronically filed the foregoing "Plaintiff's Motion to Compel Defendant Texas Medical Board to Comply with Plaintiff's First Request for Production of Documents and Things" and the supporting Declaration of Andrew L Schlafly (with attached exhibits) 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/ Karen Tripp
Karen Tripp

CERTIFICATE OF CONFERENCE

I, Andrew L. Schlafly, hereby certify that on September 3, 2008, I conferenced with the Office of the Attorney General for the State of Texas concerning this Plaintiff's Motion to Compel Defendant Texas Medical Board to Comply with Plaintiff's First Request for Production of Documents and Things, and Eric Vinson for that Office disagreed on behalf of Defendants. Therefore this motion is considered opposed.

/s/ Andrew L. Schlafly
Andrew L. Schlafly

Dated: September 22, 2008.