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

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

DECLARATION OF ANDREW L. SCHLAFLY IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' RULE 12(B)(1) MOTION TO DISMISS CLAIMS FOR LACK OF STANDING

I, Andrew L. Schlafly, hereby declare and state as follows:

1. I am over the age of 18, and reside in Chester Township, New Jersey.

2. I am an attorney representing Plaintiff The Association of American Physicians & Surgeons, Inc. ("AAPS"), in the above-captioned action.

3. Attached as Exhibit A is a true copy of my testimony, as General Counsel of AAPS, which was submitted to the New York State Assembly, Committees on Health, Higher Education, and Codes, on January 31, 2002, demonstrating the germaneness of misconduct by a state medical board to the mission of AAPS, dating back at least until 2002. This testimony is available at: http://www.aapsonline.org/testimony/schlaflytestimony.htm .

4. Attached as Exhibit B is a true copy of my testimony, as General Counsel of AAPS, before the Texas House Appropriations Subcommittee on Regulatory, on October 23, 2007, demonstrating the germaneness of misconduct by the Texas Medical Board to the mission of AAPS, as made available at: http://www.aapsonline.org/tmb/tmb-transcript.pdf (pp. 189-192).

5. I have personal knowledge of the foregoing and am competent to testify to it at

trial.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 24th day of October, 2008.

Andrew L. Schlafly

EXHIBIT A

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Association of American Physicians and Surgeons, Inc.
A Voice for Private Physicians Since 1943
Omnia pro aegroto

New York State Assembly, Committees on Health, Higher Education, and Codes. January 31, 2002.

Good afternoon. I'm Andy Schlafly, General Counsel for the Association of American Physicians and Surgeons ("AAPS"). I am a member of the New York Bar, and specialize in administrative law.

AAPS is a nonprofit national group of thousands of physicians, including many practicing in New York. We were founded in 1943 and are dedicated to promoting the ethical practice of medicine and defending the patient-physician relationship. AAPS is almost exclusively membership-funded. We file amicus briefs in defense of physicians who are unfairly treated in disciplinary proceedings, as in the case of *Dr. Dan Alexander v. State Board for Professional Medical Conduct,* Civ. No. 89006 (N.Y. App. Div. 3rd Dept. 2001).

We have many physician members in New York who feel pressured and intimidated to protect their own licenses by altering their care to patients. They are faced with the choice between avoiding the wrath of insurance companies and delivering the best possible care to their patients. This intimidation interferes with the ethical practice of medicine, and ultimately hurts patients.

Physicians feel threatened because they have fewer rights than almost anyone else in a judicial proceeding. Physicians can lose their license based on very little proof, and inadequate due process. Physicians are vulnerable to manipulation of the process for economic reasons, rather than true concern for patient health.

For example, we see unexplained targeting of certain types of physicians for discipline. Physicians who treat Lyme Disease are frequent victims of investigations, but not due to any complaints by their patients. Third-party payers, who find the aggressive treatment of Lyme Disease costly, have too much influence over the disciplining of a physician.

AAPS has a member in New York who even predicted that he would be investigated because of his proactive treatment of Lyme Disease, and he was. His patients love him because his treatments are so effective. But those who pay for the treatments find it profitable to delicense physicians who are costly. Economic harm should not be a basis for revoking or restricting a

physician's license. A clear showing of medical harm to patients should be required.

If an insurance company is unhappy with a physician, then it has full recourse to our court system to bring a lawsuit, whereupon the physician-defendant would have the safeguards of due process rights essential to the fair administration of justice. These rights include meaningful prior notice of the charges against him, right to a public hearing, right to full cross-examination of witnesses, right to a decision based only on information in the record, and right to a meaningful appeal. But these basic due process rights, which are so fundamental to fairness, are glaringly absent from disciplinary hearings. Third party payers alleging economic harm can more easily delicense a physician than prevail in litigation against him.

It is ironic, and unjustified, that a physician enjoys greater rights in defending a fraud action than he does in a disciplinary proceeding with his license at stake. It is likewise irrational that a physician enjoys greater rights in contesting a simple speeding ticket than in a disciplinary proceeding threatening his livelihood. If a physician is sued by a patient, an employee, or a neighbor, he enjoys the due process rights we all find essential. But if he is subjected to a disciplinary proceeding, the most essential due process rights are not there to protect him.

Patients are the ultimate victims of this vulnerability of their physicians. Patients deserve the undivided attention and care of their physicians, without intimidation by third parties. Instead, the unfair disciplinary process creates a conflict-of-interest for physicians, such that they must choose between taking precautions to defend their license versus acting in the best interest of the health of their patients. When those choices are in conflict, the patient's health suffers. In some cases, patients lose their trusted physician entirely based on an unfair proceeding that is shielded from the accountability of public scrutiny.

Specific Proposals.

Physicians should have the right to request a public hearing to obtain the benefits of public scrutiny. The interests of hundreds of patients are at stake when suspension or termination of a physician's license is adjudicated. Physicians should be able to invite their patients to attend the proceedings, and physicians should have the right to open the proceedings to the entire public. Defendants have a right to public trial. Why should a physician's rights be any less?

Physicians should have the right to full cross-examination of the witnesses testifying against him. Currently, the Administrative Law Judge (ALJ) can and does limit cross-examination. Rules of Evidence, essential to protecting the rights of the accused, are not followed. They should be. Cross-examination is the best defense against perjury. Without public scrutiny, and with cross-examination often limited, the essential safeguards against perjury are missing.

In one case, a physician lost his New York license to practice because the ALJ cut off cross-examination of witnesses on issues crucial to the disciplinary hearing. Defendants in legal proceedings have full rights of cross-examination. Why should a physician's rights be any less?

The burden of proof in a disciplinary proceeding to revoke a physician's license is shockingly low. The standard is the lowest "preponderance of evidence" test, which simply requires that

something be considered more likely than not. That standard is much lower than the criminal "beyond reasonable doubt" standard, and also lower than the "clear and convincing evidence" requirement for many civil actions, such as fraud.

It is unconscionable that a physician can lose his license, and hundreds of patients lose their doctor, without a showing of "clear and convincing" proof of wrongdoing. If there is a 49% chance that the physician did nothing wrong, then he and his patients should receive the benefit of the doubt. Yet in one case, revocation of a physician's license was imposed even though the factfinder admitted that there was a substantial chance the physician acted properly. The New York State Board for Professional Medical Conduct expressly based its decision to revoke the physician's license, destroy his livelihood, and deprive hundreds of patients their trusted physician, on a mere "51%" probability. Given this low standard, a physician could win a case in court and yet still lose his license in a disciplinary proceeding. That injustice must end.

The low standard of proof jeopardizes the traditional reliance by physicians on chaperones in the examining room to defend against baseless allegations. A New York physician lost his license when a patient contradicted the testimony of a chaperone that nothing improper happened in the examining room. The State Board claimed that the chaperone was biased because she had been retained by the physician. The reliance by physicians, including many members of our organization, on chaperones to defend against allegations is now in doubt. If the standard were "clear and convincing evidence," then chaperone testimony could not be so easily rejected.

Physicians should not lose their license when their own accusers, and family members of accusers, continue to see the physicians for care with full knowledge of the disciplinary proceedings. Uninterrupted use of a physician by patient or patient's family should create a presumption that the patient is satisfied with the physician's services. Nor should the State be interfering with the patient-physician relationship by restricting or terminating the physician's license while the relevant patients continue to demand the doctor's services.

The standard for judicial review of these disciplinary proceedings is also far too deferential. The courts assume that physicians have benefited from full due process, when in fact they have not. The findings of fact are assumed to be true on appeal, when in many cases they should be reviewed de novo. For example, any findings in a decision revoking or restricting a physician's license, which are not supported in the record, should require a remand rather than affirmance. On at least one occasion, the Hearing Committee declared that the physician had a "deep seated psychological problem," without anything in the record to support that psychoanalysis. Despite this and other errors in the factual finding, the revocation in that case was nevertheless affirmed. A remand should be required, as in other areas of administrative law.

The government should not be permitted to shop around for experts until it finds someone willing to testify against the physician. Rather, government experts at these disciplinary proceedings should be selected from an objective group of physicians, as juries are. There should be guidelines requiring that those experts review information by both sides to the dispute.

If the government expert feels that there is no case against the physician, then that should dispose of the matter. Instead, the government can and does simply look for additional experts until it

finds one of its liking. We have even seen the government fire one of its experts because he, after reviewing the facts, testified for an accused physician. This government manipulation of experts is inconsistent with the objectivity and high standards that should be required before revoking a physician's license.

Physicians need discovery rights with respect to the experts and hearing committee members, who effectively determine the outcome. Like true defendants, physicians need to be able to explore and eliminate possible conflicts-of-interest that create bias in the proceedings. Judges have broad duties to publicly disclose information about themselves. So should experts and those who sit on these disciplinary hearing committees. There should be an analog to the voir dire in jury trials to eliminate potential bias.

Rarely should the State be telling patients that they cannot see a particular physician because his license has been restricted, suspended, or terminated. Only the most egregious, documented cases of violation of trust should be candidates for license revocation. Patients should have as broad and diverse selection of physicians as possible, without government or third party interference.

Conclusion.

The Association of American Physicians and Surgeons opposes the intimidation of physicians through deprivation of their rights at disciplinary proceedings. This interference destroys the integrity of the patient-physician relationship and the ethical practice of medicine. Please consider the reforms suggested by AAPS and others at this hearing.

Thank you.

Andy Schlafly, Esq., AAPS General Counsel, 908-719-8608

EXHIBIT B

Dr. Garcia: You made that comment at the beginning.

Brown: Well, yeah I'm talking about on these minor infractions about an express lane, so to speak, that you can get into that wouldn't put doctors in this nine month torture from hell.

Dr. Garcia: Representative Brown, I'm just a cardiologist. You know I'm tempted to say yes, go ahead and get on an express lane but when you hear the report that you all just heard just a few minutes ago, you need a strong state board to really look into that, have processes that are fair and really investigate really tough issues. And confidentiality is important. And I noticed you were willing to sign that. And if I had family living in - and I'm originally from [Jim Willis ??] County, you have to have some confidentiality to it. But, I'm not an expert in that but my temptation is to say it seems like a good idea if it's just minor infractions.

Brown: Yes sir.

Chairman: Members any other questions? Doctor thank you so much for coming.

[Applause.]

Dr. Garcia: Thank you very much. And Mr. Finch has a copy of this if you need it.

Chairman: Thank you. The Chair calls Andrew Schlafly. I didn't notice until just now that you're from New York, New York. You've got a long commute home, don't you?

Schlafly: I avoided the commute there, too.

Chairman: Yes, sir.

Schlafly: Thank you, I'm Andrew Schlafly, general counsel for the Association of American Physicians and Surgeons or AAPS, which is an independent national physician's group founded in 1943. We thank Mr. Chairman and other committee members for holding this very important hearing today.

We hear from our members all around the country about medical boards, but by far, the most complaints and the most examples of injustices come from the Texas Medical Board. This room today is just the tip of the iceberg. Please allow me to give another example that is not in this room.

We heard from a victim of the abuse of power by the TMB from a doctor who was serving uninsured patients. He charged only $40.00 for an office visit. After hurricane Katrina displaced many citizens this doctor was the only one that many poor patients could afford and they were minorities.

The doctor prescribed cough syrup to some of these patients for what became known as Katrina cough. A pharmacy however, did not like having these poor patients come into his store to fill these prescriptions. Sometimes the patients would bring in the prescriptions and they didn't have the money to pay for it. Sometimes a lot of the patients would come into the store and the store didn't like having a lot of these poor minorities in their store. So apparently the pharmacy filed a complaint against this doctor with the TMB.

And as we've seen in so many examples today, the TMB has a presumption of guilt against the doctor. The TMB never looked at it objectively, never wondered why a pharmacy was complaining about cough syrup. And instead the TMB repeatedly threatened this doctor with revocation of his license.

They went to the ISC. The ISC was extremely abusive. The board member on the ISC repeatedly said that he was going to revoke his license and it was only, apparently because a public member on the ISC stood up for the doctor, that he was able to save his license but he did lose his ability to prescribe medication. And he got sanctions and the penalties and all that stuff texted into the data bank and texted into the insurance list and then he has to fight being delisted by insurance companies, etcetera.

In addition, after the ISC panel had met and after the public member and the board member had agreed on a particular penalty, the board member then added a new requirement so that when the doctor had his final signature, there was a new requirement that he could no longer supervise a physician's assistant. And, that was never brought up at the ISC hearing.

I'd like to comment now on some of the testimony by the board members and officers earlier today. The board members talk in terms of one instance of testimony by Dr. Keith Miller. Our information is that Dr. Keith Miller has testified as a plaintiff's expert in about 50 case, fifty, five – zero. Now do you really think that no one on the board knew that one of their key members testified in 50 malpractice cases as an expert for the plaintiff? With all the scheduling that they do with ISC hearings, with all the board meetings, do you really think that no one was aware of that until April, someone heard about one case? I find that implausible, with all due respect. I just find it implausible. If it is true, if the board members know so little about a fellow board member, how can they expect us to believe that they know so much about a doctor they are trying to discipline?

Why hasn't the cases that Dr. Miller worked on at the board been reopened and re-examined? When there is a rogue prosecutor at the Department of Justice and he's discovered the Department of Justice will

then go and look at the cases he handled. Why isn't the TMB doing that? Why aren't they looking at the cases Dr. Keith Miller sat on? He sat on quite a few. He was the driving force in high discipline on that board for a number of years. Why hasn't the TMB initiated a complaint against Dr. Keith Miller?

Now earlier today the TMB officers used statistics to downplay the misuse of the complaint process as in the case of insurance companies and competitors. An insurance company is not going to stamp insurance company all over its complaint. The TMB really has no idea how many of those complaints are being initiated by insurance companies. Complaints are typically filed by an individual. The TMB has no way of knowing what the relationship between that individual is with a competitor or with an insurance company. There is no way the insurance - the TMB can say with any credibility, the insurance companies are responsible for only one percent of the complaint. They have no idea. In fact we heard testimony earlier today that one of the key board members of the TMB apparently initiated a complaint by having her husband file it against a former partner and yet the fellow TMB members didn't know that. If they don't know what their own board member is doing, how could they possibly know what these insurance companies are doing in manipulating the process?

You heard earlier today repeated references that somehow anonymous complaints are required by the legislature. How? There's no statute that requires allowing these anonymous complaints in this abusive process. Apparently there is an administrative code that's cited, but that's not a statute that was passed by this legislature.

One helpful reform would be to require that when someone files a complaint that person has to disclose his status, his connection with the competitor or the person he is complaining about. Is he the spouse of a competitor of the physician? Does he work for an insurance company? We have all of these campaign finance laws that when you give $100.00 to a candidate you have to disclose who you work for and that goes into public records and public disclosure. Well if that's required for something as inconsequential as a $100.00 donation to a candidate, why isn't that required for a complaint that may end the career of a doctor? We should know what the status is of the person who is complaining. Is it someone who works in the office of a competitor? I mean that should be right there. There is no reason not to require that. It should be under penalty of perjury. It doesn't accomplish anything to hide that information.

The ISC panels, we've learned a lot today, but we did not learn how those ISC panels are manipulated and who sits on them. We got all of this data today from the TMB but they withheld one key piece of data and that is who is sitting on these ISC panels and with what frequency. Now, what

I've heard at AAPS is that in virtually every important case I've heard about is either Dr. Kalafut or Dr. Miller who has sat on the ISC panel that urged discipline for the doctor. I am confident that it is not an even or random distribution of board members sitting on the ISC panels.

Why isn't that data disclosed? It is simply a matter of going through those ISC panels, it would take a clerk a half a day's effort and you will find, I'm confident, that those ISC panels are manipulated and that there are just two or three people who sit on the vast majority of those ISC panels that are urging discipline to key doctors.

The confidentiality of the ISC panels is misused to conceal the abuse that occurs in them. The confidentiality is supposed to protect the doctor. Well if it protects the doctor the doctor should be able to waive it and there should be some scrutiny by a judge of what's really happening at these ISC conferences or hearings. So that would be a good reform, to allow the doctor of waive the confidentiality, to have a reporter there. If there is any patient names they can be taken out and have a judge review and see what really goes on there and those ISC panels would change overnight. The abuse would immediately stop.

Finally, the patients are the real losers when a medical board abuses its power. When a doctor is eliminated from the medical profession 1,000 patients are hurt. Please curb the abuse of power by the Texas Medical Board. Thank you.

[Applause.]

Chairman: Members are there any questions? Could we have a copy of that testimony if you have that?

Schlafly: I'll have to type it up.

Chairman: Okay, thank you so much. The Chair calls Dr. James Mahoney.

Dr. Mahoney: Good evening. I will keep it ultra brief. Thank you very much for staying so late. I am James Mahoney, I am an osteopathic physician from Southlake, Texas.

In March of 2006 the board sent me a note and said, "Dr. Mahoney, you have prescribed Vodka drops to a patient with a homeopathic compound in Everglade, [Rio Gravo ??], lots of foreign countries." And I thought, "Wow that's unusual. I can't really remember doing that and I think I might if I had."