TESTIMONY OF THE STAMFORD HOSPITAL, HOSPITAL OF SAINT RAPHAEL, and CONNECTICUT SOCIETY FOR HEALTHCARE RISK MANAGEMENT

SUBMITTED TO THE JUDICIARY COMMITTEE
Wednesday, March 7, 2012

SB 243, An Act Concerning Certificates of Merit

The Stamford Hospital ("TSH"), Hospital of Saint Raphael ("HSR"), and Connecticut Society for Healthcare Risk Management ("CSHRM") hereby submit testimony concerning **SB 243, An Act Concerning Certificates of Merit** (hereinafter the "Raised Bill" or "SB 243"). For the following reasons, TSH, HSR, and CSHRM all oppose the Raised Bill.

Seven years ago law makers in this state decided that they needed to address the widespread withdrawal of physicians -- and the insurance companies who insure them -- from this state. Medical providers and insurance companies alike were being driven from the state by high insurance premiums, fueled by rising litigation costs. See Judiciary Testimony April 8, 2005 (005406). Many indicated that if significant tort reform was not implemented, they had no interest in continuing to do business in this state. See Judiciary Testimony April 8, 2005 (005396). It was deemed by many to be a health care crisis.

As a result of this and other concerns, Public Act 05-275, "An Act Concerning Medical Malpractice", was passed. PA 05-275 was the subject of lengthy debate and numerous public hearings. Physicians, insurance companies, and both plaintiff and defense bars voiced their opinions. PA 05-275 addressed those concerns in comprehensive fashion. It required: 1) that an attorney filing suit attach to the complaint a written opinion of an expert in the field of medicine; 2) that the expert rendering the opinion be a "similar healthcare provider" to the defendant(s); and 3) that he/she provide a "detailed basis for the formation" of the opinion that there "appeared to be evidence of medical negligence." It contained a dismissal provision if a plaintiff failed to obtain a written report that met the terms of the statute prior to filing suit. PA 05-275 also addressed the concerns of the plaintiff's bar, in that it permitted: 1) that the written opinion be submitted anonymously; 2) that it need not contain any opinion regarding causation; and 3) that the time frame for performing such investigation could be extended for up to 90 days after the Statute of Limitations had expired.

One of the issues extensively discussed at the hearing before the Judiciary Committee was the fact that at that time the statutory scheme did not adequately ensure that an attorney filing a medical malpractice action had a reasonable basis to bring the claim. It was noted that the

bill considered at that time and ultimately passed by the legislature was necessary to "help eliminate some of the more questionable and meritless claims." Senator Kissel remarked that the purpose of attaching a physician's report to the Complaint was "so that . . . defense counsel can review the nuts and bolts of what's in there [the claim] and make a reasonable determination. . . . I think that's a great reform, as opposed to the current attorney just sort of signing off in good faith."

In the experience of TSH and HSR, the key component of PA 05-275 is the pre-litigation inquiry. Less than a handful of cases filed against both institutions in the last 7 years have been dismissed for insufficiency of the written report. But statewide, PA 05-275 has resulted in a 10%-20% reduction in the overall number of medical malpractice lawsuits filed in the last 7 years. The import is clear: when plaintiff's lawyers follow the terms of the statute, their suits remain in the system until they are addressed on their merits. But importantly, requiring a plaintiff to seek out experts who are objectively familiar with the standards that govern the care rendered by a given defendant probably reduces the number of frivolous suits that find their way into the courthouse without such a requirement. If experts in the same field as a defendant do not think there is a violation of the standard of care, then a plaintiff cannot obtain a written opinion letter, a suit cannot be filed, and the costs of a vexatious claim are avoided. That is, simply put, the way it should work, and the way it does work.

With SB 243, the plaintiff's bar now seeks to undo entirely the protections afforded by PA 05-275. If passed, the Raised Bill would eviscerate the comprehensive scheme established by PA 05-275 (as codified under C.G.S. Section 52-184c and C.G.S. Section 52-190a). It eliminates the ability of a defendant to obtain a dismissal based on an insufficient written report; changes the requirement that a "similar healthcare provider" author the pre-litigation expert opinion to a watered down requirement that the author be a "qualified" health care provider; and allows an action that was not properly filed under the statute to be remedied within 60 days of dismissal of the action. If these changes are enacted, they would effectively eliminate the protections afforded to healthcare providers under Section 52-190a while leaving intact the corresponding concessions given to the plaintiff's bar. It returns medical malpractice litigation to a time when the subjective opinion of a lawyer was all that was necessary to file a lawsuit against a physician or hospital.

Importantly, Section 52-190(a) has already been narrowed by a number of recent judicial decisions. For example, the Connecticut Supreme Court has already greatly truncated the time frame in which a defendant can challenge the sufficiency of the written opinion, recently holding that a Motion to Dismiss under the statute must be filed within 30 days of the defendant's official appearance in the action, or the ability to challenge the sufficiency of the written opinion is waived. See Morgan v. Hartford Hospital, 301 Conn. 388 (2011). The Court has also largely taken the teeth out of the dismissal provision of the statute, holding that a suit dismissed under the statute may qualify for re-filing under Connecticut's Accidental Failure of Suit Statute, thereby giving the plaintiff a proverbial second bite at the apple barring gross negligence or other egregious conduct. See Plante v. Charlotte Hungerford Hospital, 300 Conn. 33 (2011).

The proposed changes nullify the protections of the current statute. The most alarming is that SB 243 takes away any meaningful enforcement mechanism for the pre-litigation investigation; indeed, it essentially eliminates the need for a pre-litigation investigation altogether. For example, the language of the proposed Section 52-190a(2) eliminates the ability of a court to dismiss a case for insufficiency of the written report. Instead it only authorizes dismissal where plaintiff fails to attach the report to the complaint. Moreover, it virtually eliminates the necessity of a pre-litigation investigation, which was the *raison d'etre* of PA 05-275. Instead, it allows a plaintiff 60 days from dismissal to remedy any failure to attach the written opinion of the "qualified" expert. (This is tantamount to yet another extension of the Statute of Limitation as well.) As drafted, SB 243 can be interpreted to allow a plaintiff to conduct the pre-litigation investigation after the suit is commenced. (Even the statutory regime in place prior to 2005 required a good faith inquiry *before* the suit was filed.) This Committee should reject the notion that dismissal is only warranted where there is a complete failure to conduct a pre-litigation inquiry and/or to attach a written report. It should re-affirm the right of a defendant to challenge the sufficiency of the written report in a Motion to Dismiss.

Even if this Committee does affirm the ability of a defendant to file a motion to dismiss on sufficiency grounds, the remainder of Raised Bill still dilutes the protections of the current statute. The Raised Bill eliminates the requirement under Section 52-190a(a)(1) that the author of the opinion be a "similar healthcare provider", which under the current state of the law means that the author must actively practice in or, in the case of a board certified defendant, be board certified in the same specialty as the defendant. Instead of this objective requirement, SB 243 allows the opinion of a "qualified" healthcare provider (as defined under C.G.S. Section 52-584c, which essentially governs the admissibility of testimony at trial). See SB 243, Section (a)(4)(d). The result is objectionable for three reasons:

First, the inquiry ceases to be objective, in that under the current statutory scheme defendant medical providers – and reviewing courts -- can determine with relative certainty that a "similar healthcare provider" is in fact a similar provider who has knowledge of and experience in the standards of care that govern the conduct of the defendant. Instead, the Raised Bill encourages plaintiff's attorneys to retain reviewing experts who may not be board certified or objectively qualified in a defendant's field of expertise. In other words, if the defendant is a neurosurgeon, plaintiff's counsel is no longer required to obtain the opinion of a neurosurgeon, but rather can obtain an anonymous opinion from any medical provider – a neurologist, internist, emergency room physician – if that physician subjectively asserts that he/she is familiar with the standards of care that govern the care at issue. The Raised Bill has the effect of allowing such an "expert" to issue a written opinion even if they may or may not know or practice the standards that actually govern the care and treatment at issue.

Second, assuming that this Committee continues to adhere to the current ability of defendants to challenge the sufficiency of the written opinion, this change would prejudice that ability. Under the Raised Bill, a defendant trying to mount such a challenge would likely need a full blown hearing -- akin to the process undertaken immediately prior to or during a trial, where the trial court conducts a hearing to determine whether a disclosed expert is sufficiently

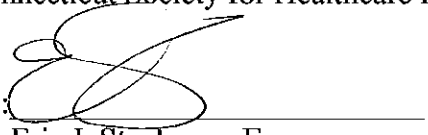
qualified to render opinions before the jury. This type of protracted process is costly and would likely sap judicial resources, which in Connecticut are already stretched perilously thin.

Third, the requirement of anonymity under Section 52-190a(a)(2) would of necessity need to be abridged if the qualifications of the "qualified" provider are to be challenged. A defendant cannot mount any meaningful challenge to the qualifications of the purported expert, especially in a hearing on the motion to dismiss, if it does not have access to the purported expert's identity. If the Raised Bill is passed without modification in this regard, it would produce incongruous results.

For the foregoing reasons, The Stamford Hospital, Hospital of St. Raphael and Connecticut Society for Healthcare Risk Management oppose SB 243, and urge the Committee to reject this latest attempt to eliminate the current protections afforded to medical providers under C.G.S. Section 52-190a. As proposed, SB 243 undoes all the protections that were won in 2005, and returns Connecticut to an environment where frivolous lawsuits against medical providers are once again condoned.

Thank you for your consideration of our position.

The Stamford Hospital
Hospital of St. Raphael
Connecticut Society for Healthcare Risk Management

By: 

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