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TESTIMONY IN OPPOSITION TO RAISED BILL 243
JUDICIARY COMMITTEE PUBLIC HEARING MARCH 7, 2012

Members of the Judiciary Committee

I am a lawyer whose practice is substantially devoted to the representation of physicians in medical malpractice cases at the appellate level. I am co-author of Connecticut Medical Malpractice - a book devoted to the subject of medical malpractice law in Connecticut. On behalf of myself and many of the physicians we represent, I would urge the Committee to reject Raised Bill 243.

There are many reasons to reject this bill. Doctors are sued at a rate that is significantly higher than other professionals in the State of Connecticut. This is not because Connecticut is uniquely inhabited by a group of negligent doctors. It is because of a combination of factors in our health care and legal systems that make doctors easy targets. Bills such as this are not good policy because it makes them easier targets. Notwithstanding the individual cases that are sometimes recounted to capture the attention of this body, a state of affairs in which doctors are rendered even easier targets contains a wide variety of adverse consequences for the provision of health care to the population as a whole.

I shall assume that some of these policy reasons will be covered in the testimony of others and confine my testimony to the following specific legal points:

1) Since its enactment in 2005, the statute in question has been the subject of many interpretive judicial decisions. These include Shortell v. Cavanaugh, 300 Conn. 383 (2011) which held that a letter is not needed in informed consent cases; Bennett v. New Milford Hospital, 300 Conn. 1 (2011) which held that any dismissal would be without prejudice; Wilcox v. Schwartz, 303 Conn. 630 (2012) which arguably established a rather permissive standard for the contents of the letter; and Plante v. Charlotte Hungerford Hospital, 300 Conn. 33 (2011) which held that most dismissed cases could be revived under the Accidental Failure of Suit Statute. The cumulative effect of these decisions is that meritorious cases will not be denied entry into the system for "legal technicalities". Since the existing statute has been so widely interpreted, the level of litigation is likely to substantially abate. If, by contrast, the statute is amended again, there may be the unintended consequence of yet more litigation to define what the new changes mean.

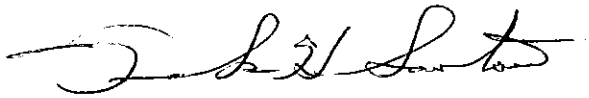
2) The ostensible purpose of Raised Bill 243 is to overrule that part of Bennett v. New Milford Hospital, 300 Conn. 1 (2011) which held that the author of the opinion letter must be of the same medical specialty as the doctor being sued. The stated goal is to permit doctors of different specialties to write the letter if they are deemed "qualified". While this seems reasonable on the surface, the new language contains a hidden trap when construed in light of three other features of the language of the statute: the identity of the letter writer is a secret, the determination of the good faith of the certificate is not made until the completion of discovery, and there is no provision to challenge any self-serving statement by the letter writer that he or she is "qualified". As a practical matter, this means that entry into the judicial system is dependent on the *ipse dixit* of the opinion writer. In the absence of some sort of statutory provision allowing a contemporaneous hearing in the event of any challenge to the qualifications of the opinion writer, Raised Bill 243 would reduce the certificate of merit process to an empty formality.

3) One often hears that the purpose of Section 52-190a of the General Statutes is to weed out "frivolous" cases from the system. While this statement is undoubtedly true, it does not capture the full meaning of the amendments to the statute enacted in 2005. An additional purpose of those amendments was to reinforce the longstanding rule that a doctor in a malpractice case is to be judged by the standards of his or her own specialty. If Raised Bill 243 is passed in its current form, it will turn over the keys to the courthouse on this issue to the plaintiff. The doctor being sued will have no say until many years later.

I hope that these comments are useful. I appreciate the opportunity to testify and thank the Committee for its consideration.

Sincerely,

DANAHERLAGNESE, PC



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