

**TESTIMONY OF  
STAMFORD HOSPITAL  
SUBMITTED TO THE  
JUDICIARY COMMITTEE  
Friday, March 4, 2011**

**HB 6487, An Act Concerning Certificates of Merit**

Stamford Hospital ("SH") hereby submits testimony concerning **HB 6487, An Act Concerning Certificates of Merit**. For the following reasons, SH opposes this bill.

Six 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. Many providers and insurance companies indicated that if significant tort reform was not implemented they had no interest in returning. See Judiciary Testimony April 8, 2005 (005396). As a result of the unwillingness of insurance companies to insure in this state and as a result of rising insurance premiums, good healthcare providers were closing their doors, leaving Connecticut creating access issues for patients seeking care. See Judiciary Testimony April 8, 2005 (005406). 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 the plaintiff's and defense bars voiced their concerns and opinions about the then-current state of medical malpractice litigation in Connecticut. PA 05-275 addressed those concerns in comprehensive fashion. It: 1) required that an attorney filing suit attach to the complaint a written opinion of an expert in the field of medicine; 2) required that the expert rendering the opinion be a "similar healthcare provider" to the defendant(s) and that he/she provide a "detailed basis for the formation" of the opinion that there "appeared to be evidence of medical negligence"; and 3) 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, permitting: 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 (and thereby tolling the statute of limitations) 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."

Clearly, the plaintiff's bar now seeks to undo the protections afforded by PA 05-275. If passed, HB 6487 would undermine, if not eviscerate, the comprehensive scheme established by PA 05-275 (as codified under C.G.S. 52-184c and C.G.S. 52-190a). The Raised Billed would effectively eliminate the protections afforded to healthcare providers while leaving intact the corresponding concessions given to the plaintiff's bar.

For example, the Raised Bill would modify C.G.S. 52-184c(d) and add subsection (f) to C.G.S. 52-190a to expand the definition of a similar healthcare provider. The result is objectionable for two 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 has opined that there are grounds for a medical negligence action. 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, but rather whom they believe subjectively may have the necessary experience to render such an opinion. 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 -- an neurologist, internist, emergency room physician -- if that physician 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 would not ultimately be qualified to render an opinion against the defendant medical provider at time of trial.

Second, this change would prejudice the ability of the defendant provider to challenge the qualifications of the opining "expert" in a motion to dismiss. Indeed, under the Raised Bill, a defendant trying to mount such a challenge will 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. Moreover, the legislation gives the courts no guidance as to how to determine whether a purported expert is qualified which will only result in uncertainty on the part of litigants and lack of predictability as to rulings by the courts, all of which will only increase litigation. This type of protracted process is costly and would likely sap judicial resources, which in Connecticut are already stretched perilously thin.

What is more, the Raised Bill would mandate that challenges to the qualifications of the similar healthcare provider be raised "only after the completion of discovery." This provision effectively renders the protections of the current statute meaningless. C.G.S. 52-190a was passed to prevent the cost and expense of litigating meritless claims; if the Raised Bill is passed, it will mean years of costly discovery before a challenge to the qualifications of the similar health care provider can be mounted. Thus, even if a defendant medical provider manages to overcome the more relaxed standards for determining who is or is not a

similar healthcare provider, they will have already incurred significant expense litigating the case before obtaining a dismissal.<sup>1</sup>

In addition, not only will HB 6487 remove the objective standards regarding qualified experts, but it also would modify C.G.S. Section 52-190a(c), by removing the penalty of possible dismissal for failure to obtain a good faith certificate. The Raised Bill would permit those who did not undertake the requisite pre-suit inquiry to submit a written opinion letter within 30 days after being “ordered to do so by a court,” and changes the penalty language from “shall” be grounds for dismissal to “may” be grounds for dismissal. It therefore ceases to be a “pre-suit” requirement, and instead becomes a discretionary process that, based on the new language, can potentially be undertaken weeks if not months after suit has been filed. As proposed, there will be virtually no reason for a defendant to ever challenge the lack of a good faith certificate, because the terms of the Raised Bill vitiate the only enforcement provision contained in C.G.S. 52-190a.

The Raised Bill attempts to limit any inquiry under C.G.S. 52-190a(a)(3) into the good faith basis upon which the pre-suit inquiry was conducted to the four corners of the document attached to the complaint. This limitation prevents a substantive investigation into the good faith with which the pre-suit inquiry has been conducted. Without the power to look beyond the document itself, acts of bad faith may never be uncovered. This provision is obviously a response to the recent case of Plante v. Charlotte Hungerford Hospital, 300 Conn. 33 (2011), in which the Supreme Court affirmed a finding that plaintiff’s counsel had engaged in “blatant and egregious” conduct in utilizing an “expert” who was obviously unqualified to render opinions against the named defendants. Any legislative attempt to allow the kind of “blatant and egregious” conduct criticized in Plante should be rejected.

HB 6487 attempts to change more than the terms of the pre-suit inquiry. It attempts to carve out without explicit definition “cases involving assault, lack of informed consent, and ordinary negligence unrelated to the provision of medical care” from the requirements of C.G.S. 52-190a. Yet many cases include allegations of medical negligence and lack of informed consent, or ordinary negligence, or assault. The line, for example, between what constitutes medical negligence or ordinary negligence is not often well demarcated, and the characterization of a cause of action as one or the other is a question of law for the court. The Raised Bill may deprive the courts of that essential gate-keeping function while

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<sup>1</sup> Moreover, the Raised Bill appears to be inherently flawed as its terms are conflicting. On one hand it purports to limit defendant’s ability to file a motion to dismiss challenging the written opinion to the initial 60 day period after the return date (see proposed § 52-190a (d)) and on the other states that challenges to the written opinion may only be asserted after the close of discovery (see proposed section § 52-190a (a)(2)). Discovery is rarely, if ever, completed within the first 60 days following the return date. Accordingly, a defendant wishing to make a § 52-190a challenge would rarely, if ever, be able to meet both obligations of filing a motion to dismiss within the first 60 days after the return date and ensuring that discovery had been completed prior to the challenge. Additionally, from a practical standpoint what constitutes the completion of discovery is amorphous and an inappropriate benchmark to determine the timeliness of a § 52-190a challenge.

encouraging the plaintiff's bar to avoid the requisite pre-suit inquiry by including claims of "ordinary negligence" or "lack of informed consent" in their complaints, or by characterizing the conduct at issue as involving "ordinary negligence."

Additionally, by seeking the inclusion of C.G.S. 52-190a(e), the Raised Bill seeks to alter the rules of trial evidence, limit the right of cross-examination of expert witnesses, and remove defense arguments, evidence and motions directed at the plaintiff's case if the plaintiff changes his theory, allegation, or expert opinion. These changes would be a stunning departure from current practice and will result in an unlevel playing field for litigants.

Finally, since the passage of PA 05-275, SH has been served with at least 30 cases sounding in medical malpractice. None of those cases has been dismissed on the grounds that plaintiff failed to file a written opinion that complied with the current statute. Any assertion that the statute as written has prevented the prosecution of meritorious malpractice actions is misplaced, at least in this Hospital's experience.

For the foregoing reasons, Stamford Hospital opposes HB 6487, and urges the committee to reject this attempt to eliminate the current protections afforded to medical providers under the current version of C.G.S. 52-190a.

Thank you for your consideration of our position.