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**Testimony of William J. O'Sullivan, Esq.
Vice-Chair, Litigation Section
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**In SUPPORT of
HB 5259 "An Act Concerning the Adoption of the Connecticut
Uniform Limited Liability Company Act"**

**Judiciary Committee
February 29, 2016**

My name is William J. O'Sullivan. I have been an attorney in private practice since 1990, and am a shareholder in the Wethersfield law firm O'Sullivan McCormack Jensen & Bliss PC.

I am vice-chair of the Litigation Section of the Connecticut Bar Association, which has formally voted to endorse House Bill No. 5259 ("New Act"). I submit this testimony to supplement that of Attorney Marcel Bernier on behalf of the CBA's Business Law Section, which also supports the New Act.

My practice is devoted primarily to business litigation. Most of my cases involve limited liability companies, and as such I frequently litigate issues that arise under Connecticut's current Limited Liability Companies Act ("Current Act"). The Current Act was adopted in 1993, when the LLC business form was a relatively new concept, and leaves many gaps that I believe the New Act capably addresses. Following are some of those issues that are frequently encountered by business litigators.

1. Dissociation. The Current Act does not specifically provide that a member may be deemed to dissociate from the LLC based on bad behavior. The New Act creates, at section 602, a mechanism by which the LLC or a member can seek a judicial order expelling a member based on, inter alia, "wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the company's activities and affairs." This clarification is very helpful.
2. Fiduciary duty. The Current Act requires LLC members to perform their duties "in good faith" but does not expressly state that they owe a fiduciary duty to the company. Connecticut's courts are split on this. The New Act specifically provides, at section 409, that members owe a "fiduciary duty of loyalty" to the company.
3. Grounds for dissolution. The Current Act identifies only one ground for judicial dissolution of an LLC, at C.G.S. § 34-207: "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." This provides very little guidance in many member-dispute cases, including those alleging illegality and/or oppression. The New Act, at section 701(a)(5), specifically allows members to apply for dissolution based on illegality or oppression.



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4. Buyout in lieu of dissolution. Connecticut's stock corporation act provides, at section 33-900, that in a shareholder action for judicial dissolution, the corporation (or other shareholders) can avoid dissolution by invoking a right to buy out the petitioning shareholder. But the Current Act contain no such provision for LLCs. The New Act provides, at section 701(b), that in an action to dissolve an LLC based on illegality, fraud, or oppression, "the court may order a remedy other than dissolution." While this is less detailed than the buyout provision in the corporate statutes, it also gives the court a great deal of latitude to fashion an equitable remedy.

5. Derivative actions. The Current Act does not provide for members to pursue derivative actions on behalf of the LLC. Our judges have had to borrow from the corporate statutes. The New Act specifically provides for derivative actions, in sections 802 and 803, and clarifies who is a proper plaintiff.

6. Special litigation committees. Our corporate statutes provide, at C.G.S. § 33-724, a mechanism to quash meritless derivative actions through the appointment of a special litigation committee to investigate the claims and, when appropriate, recommend dismissal, which is binding on the courts (if the investigation is performed properly). Since the Current Act doesn't address derivative actions at all, obviously it contains no such provision. The New Act does, at section 805.

7. Charging orders. The Current Act allows a judgment creditor of an LLC member to obtain a charging order directed to all "distributions" (a term that is not defined under the Current Act) that the LLC makes to the member. The meaning is clear when the LLC is a passive investment, but significant (and unresolved) issues arise when the member pursues his or her livelihood through an LLC: namely, is all of the income that the member obtains from daily labor subject to execution by a creditor? Wage income under the corporate form receives significant protection from execution, and it does not make sense for people who work under the LLC form to have all of their earning exposed to execution. The New Act implicitly addresses this, at section 102(8), in its definition of "Distribution" which excludes "amounts constituting reasonable compensation for present or past service..."

Also, the Current Act's section on charging orders, C.G.S. § 34-171 is bare bones in the extreme, providing no guidance on mechanics; the New Act, at section 503, provides a great deal of detail and is a vast improvement.

In sum, on behalf of the CBA's Litigation Section, I believe the proposed New Act will be a great help to business litigators, clients and the judiciary, reducing many areas of uncertainty under existing law. I urge the committee to support House Bill No. 5259.