Connecticut Bar Association

30 Bank Street
New Britain, CT 06051
T. (860) 223-4400
F. (860) 223-4488

www.ctbar.org

Testimony of Scott M. Harrington
Connecticut Bar Association
Litigation Section

in OPPOSITION to
HB5525 "An Act Concerning Court Authority to Impose Sanctions in Civil Actions"

Judiciary Committee
March 18, 2016

My name is Scott Harrington. I am a partner in the law firm of Diserio Martin O'Connor & Castiglioni, LLP located in Stamford, Connecticut. I was admitted to the Connecticut Bar in 1987, and since my admission my practice has consisted almost entirely of handling civil litigation matters in the Connecticut state and federal courts. I presently serve as Chair of the Litigation Section of the Connecticut Bar Association, having previously served two years as Secretary/Treasurer and two years as Vice Chair. Approximately 798 members of the Connecticut Bar Association currently are members of the Litigation Section.

I submit this testimony, in my official capacity as Chair, and on behalf of the Litigation Section of the Connecticut Bar Association, in opposition to House Bill No. 5525, "An Act Concerning Court Authority to Impose Sanctions in Civil Actions" (the "Bill"). The Bill essentially incorporates the complete language of Rule 11 of the Federal Rules of Civil Procedure, which is applicable to the pleadings and motions filed in the federal court system. The Bill contains several provisions, which are summarized as follows:

Section 1(a) – Requiring that all pleadings and motions be signed by an attorney of record or a self-represented party;

Section 1(b) – Directing that by filing a pleading and motion, or later advocating for same, the attorney or self-represented party is certifying that: (1) the document is not being presented for an improper purpose, such as to harass, delay or increase the cost of the litigation; (2) that the assertions in the document are warranted by existing law, by non-frivolous argument for modification of existing law or establishment of new law; (3) that the factual allegations have evidentiary support, or will have evidentiary support following discovery; and (4) that any denials of factual allegations are warranted by the evidence or reasonably based on a lack of information;

Section 1(c) – Directing that the court may sanction a party or attorney, after notice and an opportunity for a hearing, if there is a violation of the mandates in Section 1(b);

Section 1(d) – Directing the procedure for filing a motion for sanctions;

Connecticut Bar Association

30 Bank Street
New Britain, CT 06051
T. (860) 223-4400
F. (860) 223-4488

www.ctbar.org

Section 1(e) – Directing that the court on its own may order a party or attorney to show cause why it should not be sanction for violating the directives in Section 1(b);

Section 1(f) – Directing the type of sanctions that may be imposed;

Section 1(g) – Directing the types of violations of Section 1(b) for which sanctions may be imposed on counsel and which may be imposed on a party;

Section 1(h) – Directing that if a sanction is imposed, the court must describe the conduct sanctioned and the basis for the sanction;

Section 1(i) – Providing that the statute will not apply to the discovery process; and

Section 2 – Repealing Section 52-99 of the Connecticut General Statutes.

The Litigation Section opposes this Bill because the Legislature is attempting to establish rules and procedures for the Courts regarding the manner in which the Courts oversee the conduct of pending cases. The rules and procedures which guide the conduct of litigants and attorneys handling cases in the Superior Court are set forth in the Connecticut Rules of Court, which are drafted, voted on, and adopted by the judges after an opportunity for interested parties to be heard. The establishment of rules governing the conduct of cases in the Courts, and the modification of existing rules, is within the sole authority of the Judicial Branch. Rules regarding the procedures for conducting cases in the Courts should not, and cannot, be established by the Legislature. It is likely that this statute, if adopted, would violate the Connecticut Constitution.

Article Second of the Connecticut Constitution contains an explicit separation of powers provision, wherein each of the three branches of the state government – legislative, executive and judicial – are assigned the powers over its branch. Article Fifth, Section 1 of the Constitution provides that the "judicial power of the state shall be vested in a supreme court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish." Interference by the Legislature with judicial power vested in the Judicial Branch has been found to violate the separation of powers provisions in the Constitution when the Legislature attempts to impose non-judicial duties on the courts, as discussed in *Adams v. Rubinow*, 157 Conn. 150 (1968), or when the Legislature seeks to exercise the power of the judiciary, as addressed in *State Bar Association v. Connecticut Bank & Trust Co.*, 145 Conn. 222 (1958).

The Legislature "...lacks any power to make rules of administration, practice or procedure which are binding on either the Supreme Court or the Superior Court." (internal citations omitted). *State v. Clemente*, 166 Conn. 501, 507 (1974). The Bill, by directing the conduct of parties and attorneys who appear in Court in connection with pending cases, by mandating sanctions to be imposed based upon the manner in which they conduct themselves, and by establishing the method by which one can seek such sanctions, is an attempt to exercise the powers reserved by the Connecticut Constitution to the

Connecticut Bar Association

30 Bank Street
New Britain, CT 06051
T. (860) 223-4400
F. (860) 223-4488

www.ctbar.org

Judicial Branch. For this reason, the Litigation Section of the Connecticut Bar Association opposes the passage of HB5525.

The Courts of the State have the inherent authority to oversee the conduct of litigants and attorneys who appear in Court in pending litigation, including the power to impose sanctions even in the absence of violation of a specific rule, after notice and an opportunity to be heard. See *Fattibene v. Kealey*, 18 Conn. App. 344, 358-359 (1989). Furthermore, the Courts previously have considered, and have adopted, several rules that address the subject matter raised in the Bill. The following are already contained within the Rules of Practice:

> Practice Book Section 1-25 – Sets forth the conditions upon which the Court may impose sanctions, including attorneys' fees, for asserting claims or defenses which are frivolous, have no basis in law or fact, or which are not based on a good faith argument for the modification of existing law.
>
> Practice Book Section 4-2 – Requires that all pleadings and other documents filed in Court be signed by an attorney of record or a self-represented party.
>
> Practice Book Section 10-5 – Provides for the taxation of costs and attorneys' fees not to exceed $500 if any allegations or denials are made in pleadings without reasonable cause and found to be untrue.

The language in Practice Book Section 10-5 is virtually identical to the language of Connecticut General Statutes Section 52-99 (which Section 2 of the Bill proposes to repeal), except that the maximum attorneys' fees allowed in the Rule is $500 while it is $10 in the statute.

Most of the members of the Litigation Section do not see a problem with the manner in which the judges regulate the conduct of counsel and litigants through the Rules of Practice. By opposing this Bill, the Litigation Section does not take a position whether a change in the existing Rules of Practice regarding the imposition of sanctions is warranted or advisable at this time. However, if such a change in the Rules of Practice is to be adopted, it should be proposed and presented to the Rules Committee of the Superior Court and should only take effect if voted on and adopted as a rule by the judges. Section 1-9 of the Rules of Practice sets forth how Court rules are adopted, including publication in the Connecticut Law Journal and an opportunity for any interested person to present their views in support or opposition thereto.

Thank you for the opportunity to submit this testimony in opposition to HB5525 on behalf of the Litigation Section of the Connecticut Bar Association.