

7-1-2011

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Ryan J. Maerz, *Connecticut Forces Litigious Patients to Play Nice with Doctors, Mandates Mediation for All Medical Malpractice Claims*, 3 250 (2011).

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CONNECTICUT FORCES LITIGIOUS PATIENTS TO PLAY NICE WITH DOCTORS,
MANDATES MEDIATION FOR ALL MEDICAL MALPRACTICE CLAIMS

By
Ryan J. Maerz*

I. THE MEDIATION COMPONENT OF PUBLIC ACT NO. 10-122 IN A NUTSHELL

A. *Preface: Medical Malpractice*

Connecticut is not the first state to mandate mediation of medical malpractice claims prior to judicial adjudication. Wisconsin, for example, requires that claimants have their claims assessed by a mediation panel consisting of “a lawyer, a healthcare provider, and a layperson” so as to determine the strength of the claim.¹ Wisconsin reasons that the early, neutral evaluation these panels provide “can reduce litigation costs by identifying claims without merit as early as possible and by expediting the resolution of those claims that do have merit.”²

Critics of compulsory mediation laws opine that the mandate, in the context of medical malpractice, is pragmatically futile because (1) practitioners are rarely willing to settle a case that carries an implied concession of error on their part,³ and (2) such mediation would keep only two types of claims out of court: those with trivial amounts in controversy, and those exhibiting patent liability and

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¹ Wisconsin Court System, *Medical Mediation Panels*, <http://www.wicourts.gov/about/organization/offices/mmp.htm> (last visited Nov. 1, 2010).

² *Id.*

³ Rich Meehan, *Mandatory Mediation of Medical Malpractice Claims*, July 1, 2010, <http://blog.ctnews.com/meehan/2010/07/01/mandatory-mediation-of-medical-malpractice-claims/>; Tooher Woel & Leydon, LLC, *Mediation Now Mandatory in Connecticut Medical Malpractice Cases*, <http://www.tooherwoel.com/CM/Custom/Mediation-Now-Mandatory-in-Connecticut-Medical-Malpractice-Cases.asp> (last visited Nov. 27, 2010).

damages.⁴ Nevertheless, Connecticut legislators appear to be optimistic of the program, as Public Law 10-122 went from introduction to bicameral approval in less than ten weeks.⁵

B. Public Act No. 10-122

Introduced as Substitute Senate Bill No. 248, Public Act No. 10-122 (the “Act”) was signed into law by Connecticut Governor M. Jodi Rell on June 8, 2010.⁶ The bulk of the Act, as its title suggests, is geared towards “the reporting of adverse events at hospitals and outpatient surgical facilities and access to information related to pending complaints filed with the department of public health.”⁷ Nevertheless, a new provision on mediation made its way into the tail end of the Act; a provision that holds more significance than its relative placement would suggest.

Section 5, which went into effect on July 1, 2010,⁸ requires the mandatory mediation of all medical malpractice claims. Subsection (a) thereunder provides that “[t]here shall be mandatory mediation for all civil actions brought to recover damages resulting from personal injury or wrongful death, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider.”⁹ The scope of this Section is considerable, as “any person, corporation, facility or institution licensed by [the] state to provide

⁴ Russell A. Green, *Hospital Reporting Requirements Help Consumers, Litigators*, CONNECTICUT LAW TRIBUNE, Nov. 8, 2010, available at <http://www.ctlawtribune.com/getarticle.aspx?ID=38807>.

⁵ Connecticut General Assembly, S.B. No. 248, Bill History, available at http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=248&which_year=2010&SUBMIT1.x=0&SUBMIT1.y=0&SUBMIT1=Normal (last visited Nov. 27, 2010).

⁶ *Id.*

⁷ 2010 Conn. Pub. Acts 10-122 at 1, available at <http://www.cga.ct.gov/2010/ACT/Pa/pdf/2010PA-00122-R00SB-00248-PA.pdf> (last visited Nov. 27, 2010) (capitalized in original).

⁸ *Id.* at 18-20, § 5.

⁹ *Id.* at 18, § 5a.

health care or professional services, or an officer, employee or agent thereof acting in the course and scope of his employment”¹⁰ qualifies as a “health care provider.”¹¹

Subsection (a) further states that each civil action falling under the Act, which has been certified, shall be referred to a 120-day mandatory mediation process pursuant to Subsection (b) of Section 5, “unless the civil action is referred to another alternative dispute resolution program agreed to by the parties.”¹² This provision allows the two sides to consider their mutual options, and the State appears thereby to yield to the parties’ freedom of contract. It is quite possible that the parties may decide, at this stage, that another dispute mechanism such as arbitration would be preferable over spending time and resources on non-binding mediation, and consequent judicial adjudication if mediation proves unsuccessful. Nevertheless, as Subsection (b) provides, the presiding judge must stay the civil proceeding and “refer the action to mandatory mediation or any other alternative dispute resolution program agreed to by the parties” prior to the close of pleading.¹³

The parties must then begin alternative dispute resolution within twenty business days of referral.¹⁴ The presiding judge, or, at his or her discretion, another judge or a judge trial referee, will conduct the first mediation session, wherein a determination is made as to whether resolution is possible or whether the parties want to continue mediating the dispute.¹⁵ In the event that the dispute is not resolved at the first session and the parties refuse to continue the process,

¹⁰ CONN. GEN. STAT. § 52-184b (2010) (emphasis added).

¹¹ 2010 Conn. Pub. Acts 10-122 at 18-19, § 5(a); *see* CONN. GEN. STAT. §§ 52-184b, 20-7b(b), & 19a-490 (2010) (Providers listed are included within the Act’s definition of “health care provider”).

¹² 2010 Conn. Pub. Acts 10-122 at 18-19, §§ 5(a) & (b).

¹³ *Id.* at 19, § 5(b).

¹⁴ *Id.* at 19, § 5(c).

¹⁵ *Id.*

mandatory mediation will end.¹⁶ If the parties agree to continue mediating, the presiding judge refers the action to an attorney seasoned in such civil actions for further proceedings.¹⁷ The cost of mediation, at least initially, is split evenly between the two parties.¹⁸

II. RELEVANT IMPLICATIONS

There are mixed feelings as to the necessity of the Act.¹⁹ Some argue that a mandatory mediation process for malpractice claims primarily serves to lower the costs of insurance companies and other medical programs.²⁰ The premise is slightly cynical, though hardly debatable given that Connecticut is coincidentally home base to over one hundred insurance companies.²¹ On the other hand, critics question whether requiring claimants to mediate is much of a change at all.²² As reported by Mills Law Firm, according to former Connecticut Superior Court Judge Joseph Mengacci, “[i]f I’m reading this correctly, and the parties both have to agree to go to [the second stage of mediation], I don’t see how that’s any different practically than what we have right now.”²³ While Judge Mengacci is not incorrect in his assertion that parties could previously agree to mediate medical malpractice claims, the purpose of the Act is to encourage the settlement of medical malpractice actions through the compelled use of mediation processes that claimants may not have otherwise pursued.²⁴ As articulated by Mills Law Firm,

¹⁶ *Id.*

¹⁷ 2010 Conn. Pub. Acts 10-122 at 19-20, § 5(c).

¹⁸ *Id.* at 20, § 5(c).

¹⁹ Mills Law Firm, LLC, *Connecticut Mandates Mediation for Medical Malpractice Cases*, (2010), <http://www.millslawfirm.org/CM/Articles/Connecticut-Mandates-Mediation-for-Medical-Malpractice-Cases.asp> (last visited Nov. 2, 2010).

²⁰ *Id.*

²¹ Connecticut State Library, *About Connecticut*, <http://www.ct.gov/ctportal/cwp/view.asp?a=843&q=246434> (last visited Nov. 15, 2010).

²² Mills Law Firm, *supra* note 19.

²³ *Id.*

²⁴ *See* 2010 Conn. Pub. Acts 10-122 at 18, § 5(a).

“[t]he hope is that medical malpractice cases that have very clear liability issues or are not meritorious to begin with will be settled before they incur the expenses of trial.”²⁵

The requirement to mediate is particularly beneficial in the context of medical malpractice. “The litigation process discourages communications [between the parties],”²⁶ explains the Honorable Robert L. Harris, Sr. (Ret.) and Mark E. Rubin, “the physician receives advice from his insurer and attorney that he should not speak to the patient or anyone else . . . Thus, the physician is thrown into an adversarial system . . .”²⁷ In mediation, however, the parties are necessarily encouraged to speak to each other, in a neutral setting, and in an effort to illuminate facts and theories that may well result in mutual agreement to settle the case.²⁸

III. CONCLUSION

With the enactment of Public Act No. 10-122, medical malpractice claims brought in the State of Connecticut are now subject to mandatory mediation.²⁹ The purpose of the new law is to achieve prompt resolution of such claims,³⁰ thereby diverting them from costly litigation.³¹ While the Act has its critics,³² it will most likely serve to reduce courts’ dockets, thereby saving taxpayer dollars. Most importantly, requiring the mediation of medical malpractice claims will be

²⁵ Mills Law Firm, *supra* note 19.

²⁶ Hon. Robert L. Harris and Mark E. Rubin, Esq., *Mediation: Better Resolution of Medical Malpractice Claims, Ramifications* (2003 ed.), available at <http://www.mccammongroup.com/articles/medical-malpractice-mediation.asp> (last visited Nov. 2, 2010).

²⁷ *Id.*

²⁸ *Id.*

²⁹ See 2010 Conn. Pub. Acts 10-122 at 18-20, § 5(a)-(c).

³⁰ *Id.* at 18, § 5(a).

³¹ See e.g. Mills Law Firm, *supra* note 19.

³² See *Id.*

conducive to the maintenance of long and amicable relationships between patients and physicians throughout the Constitution State.