MEDICAL MALPRACTICE

Mental Health Providers and Potential Duty to Non-Patients

By Caroline A. Sullivan

Note: This is part two of a two part series.

In the mental health context, the courts have also previously held that a physician's duty does not extend to the general public. In a case with a similar fact pattern to *Fox,* the Court of Appeals again confronted the question of whether a physician could be liable to members of the general public for a violent attack committed by his patient. In *Eiseman v. State of New York* (1987), a university college student was raped and murdered by an ex-felon with a history of drug abuse and criminal conduct.[1] The family of the victim commenced a lawsuit against a prison physician alleging that he inaccurately completed a health report by indicating that there was no evidence of emotional instability. The court held that even assuming that the physician did not accurately complete the health report that was sent to the university, the doctor's duty was only to his patient and in no way extended to all the students of the college individually. The court noted that the duty owed by one member of society to another is a legal issue for the courts, and that the foreseeability of injury does not determine the existence of that duty.[2] In deciding that there was no duty, the court recognized the absence of a physician-patient relationship and held that the physician plainly owed a duty of care to his patient and to persons he knew or reasonably should have known were relying on him for this service to his patient. He did not undertake a duty to the community at large. Further, the court noted that there was no evidence that the physician was aware or should have been aware that this form would be relied on by the decedent or other students as his representation of his patient's medical history.[3]

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Likewise, in the *Fox* decision, following the rationale of *Purdy*, and *Eiseman*, the court recognized that Mrs. Fox's family could not have a viable cause of action for medical malpractice. In treating Mr. Marshall, the defendants did not undertake a duty to the community at large, only to their patient. While the court recognized that under certain circumstances the law implies a duty of care by a doctor to non-patients in a medical malpractice context, there was no sufficient relationship between Mrs. Fox and the defendants or Mrs. Fox and Mr. Marshall on which liability could be based.[4] The court concluded that under the circumstances, the extension of a physician's duty of care beyond a narrow class of potential plaintiffs, such as immediate family members, cannot be supported under any analysis of duty. It noted that medical professionals should not be singled out to be subjected to liability to a limitless class of potential plaintiffs. The court concluded that regardless of any sense of outrage evoked by the actions of Mr. Marshall, society's interest would not be best served by concluding that a doctor who treats a patient, within a context of mental health, undertakes a duty to the public at large.[5]

The court dismissed the medical malpractice causes of action against the various defendants. However, it should be noted that the court found that there was a viable cause of action for negligence against the defendants as there was a question as to the control the defendants had over Mr. Marshall. In doing so, the court cited several cases that held the duty of a psychiatrist or mental health practitioner could be extended beyond the doctor-patient relationship. For example, in *Schrempf v. State of New York*, the plaintiff's husband was stabbed and killed by a mental patient who had been released from a state institution and was still receiving outpatient care for the facility.[6] The patient had been admitted for treatment at the facility on six occasions; three of the admissions involved commitments as an inpatient, three were on outpatient status, and the last admission was voluntary.

Plaintiff argued that the state had been negligent in the care and treatment of the patient by releasing him and allowing him to remain on outpatient status, especially after his psychiatrist had reason to believe he was not taking his medication. While the Court of Appeals dismissed the case, it did not set forth a bright line rule. Rather, the court held that the decision to release the patient and for failing to intervene when it became known that he was not taking his medication was as exercise of professional judgment for which the state could not be held liable.[7] Likewise, in the 1996 case of *Winters v. New York City Health & Hosps. Corp.,* the First Department held that a question of fact existed as to whether the defendant hospital's decision to release a psychiatric patient who later killed the decedent was based on professional medical judgment for which it could not be liable for negligence.[8] As it was not clear whether a careful psychiatric examination of the patient was performed, defendant's motion for summary judgment was denied.

In the 2002 case of *Rivera v. New York City Health and Hospitals Corporation*, the Southern District of New York cited both *Schrempf* and *Winters*, in holding that a psychiatrist or mental health practitioner owes a duty not only to patients and the narrow category of individuals the physician could expect to be affected by the treatment, but to the outside public as well.[9] In *Rivera*, the plaintiff was pushed into the path of a subway train by a mentally ill outpatient who had been examined by a physician that same

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Part One of this article discussed the recent Second Department case, *Fox v. Marshall*, and the court's reluctance to extend a physician's duty to anyone other than his or her patients except in limited circumstances.

TRUSTS & ESTATES

Filing Probate Objections

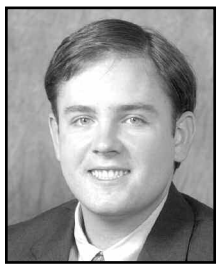
By Robert M. Harper

The taking of pre-objection examinations, pursuant to Surrogate's Court Procedure Act ("SCPA") § 1404, is one of the first steps in a will contest. At the conclusion of the exams, there remains much work to be done, most notably the timely filing of objections. This article discusses when objections to probate must be filed; the potential consequences of failing to timely file objections; and the recourse that may be available to an attorney who finds him or herself in the unenviable position of having to file untimely probate objections.

The time period for filing objections

Under SCPA § 1410, probate "objections must be filed on or before the return day of the process or on such subsequent day as directed by the court..."[1] However, if a party takes pre-objection examinations pursuant to SCPA § 1404, probate objections must be filed "within 10 days after the completion of such examinations, or within such other time as is fixed by stipulation of the parties or by the court." In Suffolk County, the parties typically fix the date by which objections to probate must be filed in a stipulation that is so-ordered by the Surrogate.

The failure to timely file probate objections may prove fatal to a potential objectant's case, as evidenced by the Third Department's decision in *Matter of Esteves*.[2] In *Esteves*, the petitioner, the nominated executor, offered the decedent's Last Will and Testament for probate. The respondents, two of the decedent's children, appeared in the proceeding and conducted 1404 examinations through counsel. Their counsel served the respondents' objections to probate on the petitioner's attorney and mailed the objections to the Surrogate's Court, Columbia County, for filing on the tenth day after the examinations concluded. The objections were not received by the Surrogate's Court until the eleventh day after the examinations ended.



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Shortly thereafter, the petitioner's attorney wrote a letter to the Surrogate's Court, requesting that the objections be rejected as untimely. After considering the letter that the respondents' counsel wrote in opposition to the petitioner's request, the Surrogate's Court rejected the objections as untimely; admitted the propounded will to probate; and issued Letters Testamentary to the petitioner.

On appeal, the Third Department affirmed, noting that the objections were not received by the Surrogate's Court until more than 10 days after the 1404 examinations concluded. The Appellate Division found that the objections were untimely, as "papers are not deemed filed until received by the Clerk of the Court;" probate objections "must statutorily be filed within 10 days of an SCPA 1404 examination, unless otherwise ordered by the court or agreed upon by stipulation;" and there was no court order or stipulation setting another due date for the objections. Accordingly, the Third Department held that the objections were properly rejected by the Surrogate's Court.

In light of *Esteves*, attorneys should take great care to ensure that their clients' probate objections are received by the Surrogate's Court by the deadline for filing objections, whether it be the 10-day period prescribed by the SCPA; a date ordered by the court; or some other date to which the parties have stipulated. Yet, even in those unfortunate circumstances when an attorney has failed to timely file probate objections on behalf of a client, the attorney may be able to avoid further embarrassment by making a motion to permit the untimely filing of objections.

The filing of untimely objections

Cases decided in 2011 demonstrate that the Surrogate's Court has discretion to authorize the untimely filing of probate objections.[3] This discretion is premised upon the obligation of the Surrogate's Court "to determine that a will offered for probate is valid."

In *Matter of Gross*, the petitioner moved for summary judgment dismissing the objections to probate. It then came to light that the objections, which were timely served upon the petitioner's counsel, had not been filed with the Surrogate's Court. As the petitioner's counsel refused to consent to the late filing of the objections, the objectants moved for an order extending their time to file the objections.

In granting the objectants' motion, New York County Surrogate Nora S. Anderson concluded that there was "no basis upon which to deny" it. The petitioner had notice of the objections; proceeded with the litigation in due course, participating in discovery; and moved for summary judgment dismissing the objections. In addition, there was ample reason to permit "further inquiry into the circumstances surrounding the execution of the will," since the propounded instrument disinherited two of the decedent's three children and was drafted by the sole beneficiary's neighbor and attorney.

Accordingly, Surrogate Anderson granted the objectants' motion for an order extending their time to file objections.

Attorneys should take every step possible to ensure that their clients' objections to probate are timely filed with the Surrogate's Court. However, to the extent that the court does not timely receive the probate objections, an attorney may be able to remedy the situation by successfully moving to extend the time period for filing the objections.

Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in estate and trust litigation. Mr. Harper serves as Co-Chair of the Suffolk County Bar Association's Member Benefits Committee and a Vice-Chair of the Governmental Relations and Legislation Committee of the New York State Bar Association's Trusts and Estates Law Section.

1. SCPA § 1410.

2. *Matter of Esteves*, 31 A.D.3d 1028 (3d Dept 2006).

3. *Matter of Gilmore*, 2011 N.Y. Misc. LEXIS 366 (Sur. Ct., Nassau County Jan. 21, 2011); *Matter of Gross*, 2006-4234, NYLJ 1202536863104 (Sur. Ct., New York County Dec. 12, 2011).