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Immigration 'Fix' Eases Path to Green Card

By David M. Sperling

A proposal to fix a notorious snag in immigration law could open the door for hundreds of thousands of illegal immigrants to obtain a green card in the United States. The proposal, announced by the Obama administration on Jan. 6, would fix a bureaucratic Catch-22 that has kept immigrant spouses and children of U.S. Citizens in illegal status.

The new rule, which is expected to take effect in about a year, will now allow certain undocumented "Immediate Relatives" of U.S. Citizens to apply for a provisional waiver for "unlawful presence" in the United States. The term "Immediate Relatives" include spouses of U.S. Citizens, children (unmarried and under 21) of U.S. Citizens, and parents of adult U.S. Citizens. 22 CFR § 42.21.

The law now requires immigrants who "entered without inspection" (EWI) to return to their home countries to attempt to obtain legal status through consular processing. However, that route was fraught with so many risks that the vast majority of EWI entrants chose to stay in the United States illegally rather than face the possibility that they would be stranded

in their home countries and separated from their families if the visa waiver was denied.

The problem arose because of the perverse consequences of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, also known as IIRAIRA. This harsh law imposed 3- and 10-year bars to re-entry for anyone who was "unlawfully present" in the United States for six months or more and then departed. INA Sec. 212(a)(9)(B). (Foreign nationals



David M. Sperling

who overstay their visas and subsequently marry U.S. Citizens are not subject to these restrictions. They can simply apply for "adjustment of status" in the United States to obtain a green card. INA Section 245(a).)

Any EWI immigrant married to a U.S. Citizen would have to return to his or her home country and demonstrate "extreme hardship" to the spouse (or U.S. Citizen or Legal Permanent Resident) to obtain the spouse (or U.S. Citizen or Legal Permanent Resident) status. (Continued on page 23)

Judicial Swearing-In and Robing Ceremony

Supervising Judge of the District Court Madeleine A. Fitzgibbon swore in re-elected District Court Judges John Iliou, Gigi A. Spelman, newly elected District Court Judges David A. Morris and Vincent J. Martorana at the Judicial Swearing-In and Robing Ceremony held at Touro Law Center on Jan. 9.



Photo by Barry Siroshovitz

PRESIDENT'S MESSAGE

SCBA Sponsors Judicial Swearing-In and Robing Ceremony

By Matthew E. Pachman



Matthew Pachman

While the job of SCBA president is certainly time consuming, there are, besides the satisfaction of representing lawyers and our profession, some nice benefits. For example, on January 9 I was privileged to be a part of the 2012 Judicial Swearing-In & Robing Ceremony. The following is an excerpt of the remarks I made that day:

Good morning. On behalf of our Officers, Directors and members, we thank you for joining us for the 2012 Judicial Swearing-In & Robing Ceremony.

Historically, January symbolizes the beginning of a new year with new dreams and expectations. It marks the commencement of continued terms of re-elected judges and first terms of those newly elected.

The development of the close relationship and alliance enjoyed today with our bench is the result of the joint efforts of the Suffolk County Bar Association and the members of the judiciary. We are all lawyers who are devoted to elevating the quality of the legal system including the bench and the advocates who appear before it.

It is in this tradition that the Suffolk County Bar Association has, over the years, sponsored this ceremony. What began as a modest program has grown to what we see today. It is the hope of the members of our association that justices and judges being sworn in today realize the hopes, and aspirations of bringing excellence, honor, distinction and most of all revitalized respect to the legal system, to the judiciary, and to the entire legal profession.



BAR EVENTS

Cohalan Cares for Kids

Thursday, Feb. 2, 6 to 8 p.m.

Bar Center

An evening of wine and cheese and music to benefit the Cohalan Court Children's Center. Wine tasting by Martha Clara Vineyard and music by Gerard Donnelly, Esq. and Rafael Penate, Esq. Tickets are \$50. Hosted by the SCBA

Law in the Workplace Conference

Friday, February 10, 8:30 a.m.-4:00 p.m.

Bar Center

22nd annual labor-employment law conference for lawyers, HR professionals, labor and management representatives from public and private sectors. This year's focus is on trends in employment discrimination. Tuition: \$175. Call the Academy (631-234-5588) to enroll.

Courting Justice

Tuesday, February 28, 6 p.m.

Bar Center

Filmmaker Ruth Cowan will speak at a screening of *Courting Justice*, a film that tells the story of women who became judges in South Africa's fledgling democracy. Co-sponsored by the Bar Association and Suffolk Academy of Law. Complimentary admission; reservations requested.

Pro Bono Recognition Night

Thursday, March 22, 6 p.m.

SCBA Pro Bono Attorneys recognized at annual dinner.

FOCUS ON
ELDER LAW &
ESTATE PLANNING
SPECIAL EDITION

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

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



Caroline A. Sullivan

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 *Schrenpf 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 *Schrenpf* 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

(continued on page 22)

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 con-

ducted 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.

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



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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. L.F.XIS 366 (Sur. Ct., Nassau County Jan. 21, 2011); *Matter of Gross*, 2006-4234, NYLJ 1202536863104 (Sur. Ct., New York County Dec. 12, 2011).

Mental Health Providers and Potential Duty to Non-Patients (Continued from page 1)

morning. Plaintiff sued several health care providers of the patient arguing that they were negligent and careless in the medical and psychiatric treatment rendered to the patient and that they failed to practice according to generally accepted medical and psychiatric standards.

The defendants argued that as a bright line rule, providers of health care and other services for the mentally ill owe no duty of care to the general public arising from the care of an outpatient who is receiving treatment on a voluntary basis. However, the court held that there is no such bright line rule, and that the existence of a duty of care to the general public arising from the treatment of an outpatient turns on the facts. The court noted that while a defendant generally has no duty to control the conduct of a person to prevent him from causing harm to others, where a special relationship may exist between the defendant and a third person such that the defendant is required to control the third person to protect others, such a duty has been imposed. The court compared the duty of a mental health practitioner to that of a physician and noted that the mental health practitioner has the same general duty of physicians to exercise "professional judgment" and treat patients using a "proper medical foundation." However, the court held that with mental health professionals, in certain circumstances the duty is owed not only to patients and the narrow category of individuals the physician could expect to be affected by the treatment, but to the outside public⁹ as well (emphasis added).¹⁰

Citing *Winters* and *Schrempf*, the court in *Rivera* held that a mental health provider may be liable for failing to control a voluntary outpatient who later harms a member of the public. The court acknowledged that where the individual involved is a voluntary psychiatric outpatient, the institution's control over the patient, and thus its duty to prevent the

patient is more limited. However, the duty does not disappear, and the institution may be held liable if the failure to place the patient on inpatient status resulted from something other than an exercise of professional judgment (emphasis in original).¹¹ In the absence of such a bright line rule, the court denied the mental health providers' motion to dismiss.

Subsequent cases have continued to hold that a physician or health care provider does not have a duty to a person who is not his or her patient, unless there is a special relationship. For example, in *Pingtella v. Jones*, the Fourth Department held that the defendant psychiatrist owed no duty of care to his patient's son.¹² In *Pingtella*, the defendant psychiatrist was treating his patient on an out-patient basis. The patient stabbed her son, and later killed herself. The court initially noted that although a physician's duty of care has been extended to patient's family members, the courts have been especially circumspect in doing so. In order for the defendant to have a duty to the son, there would have had to been a special relationship between the defendant and his patient such as would require the defendant to control the patient for the benefit of the child. As the patient did not seek treatment from the defendant to prevent injury to her son, but to improve her mental health, the court could not find such a relationship existed. Further, the court noted that the defendant had no control over his patient's conduct and that she had no history of violence.¹³ Like the court in *Fox*, the court held that in the absence of the doctor-patient relationship, the defendant could not be liable to the plaintiff.¹⁴

Whether a mental health care provider or facility has a duty to a third party who is injured by a patient is a difficult question. The *Fox* decision illustrates however, that there is a cognizable cause of action for negligence under circumstances where

the defendant has the necessary authority or ability to exercise control over the patient's conduct such as to give rise to a duty to protect a member of the general public.¹⁵ As the degree of control the defendants had over Marshall was unclear, the court held that there was a cause of action for negligence against the SLS defendants and SLS employees.

However, the absence of a doctor-patient relationship between the decedent and the SLS defendants and the psychiatrist precluded a cause of action for medical malpractice. The general rule is that for medical malpractice causes of action, only in limited circumstances will a duty be extended to a specific individual, such as an immediate family member. The physician's duty will not extend to the general public. In this regard, the court noted that "while moral and logical judgment are significant components [in determining the duty owed by one member of society to another], [the courts] are also bound to consider the larger social consequences of [their] decisions and to tailor [their] notion of duty so that 'the legal consequences of wrongs [are limited] to a controllable degree.'"¹⁶ The court also noted that a greater risk of liability would negatively impact the medical treatment of mental health patients, and speculated that mental health care providers may be reluctant to undertake treatment of those who are in most need of their services, or opt for unnecessary confinement of their patient.¹⁷ While the previous decision in *Rivera*, seemed to impose a greater duty on the mental health care provider, the decision in *Fox* appears to narrow the duty by holding that unless the victim is an immediate family member, a physician will not be liable for medical malpractice.

Note: Caroline A. Sullivan is an associate at Kaufman Borgeest & Ryan LLP working in the Garden City, Long Island office. She

specializes in professional liability defense and can be reached at csullivan@kbrny.com

1. 70 N.Y.2d 175, S 18 N.Y.S.2d 608 (1987)
2. Id. ("Foreseeability of injury does not determine the existence of duty."); *Ellis v. Peter*, 211 A.D.2d 353, 627 N.Y.S.2d 707 (2d Dept 1995) ("Here there is no duty and thus we do not reach the issue of whether the wife's tubercular condition was a foreseeable result of the physician's alleged failure to diagnose the disease in her husband.")
3. Id.
4. *Fox v. Marshall*, — N.Y.S.2d —, 2011 WL 3505902, 2011 N.Y. Slip. Op. 06214 (2d Dept 2011)
5. Id.
6. 66 N.Y.2d 289 496 N.Y.S.2d 973 (1985).
7. Id.
8. 223 A.D.2d 405, 636 N.Y.S.2d 320 (1st Dept 1996).
9. 191 F.Supp.2d 412 (S.D.N.Y. 2002).
10. Id.
11. Id., citing *Webdale v. North General Hosp.*, No. 111310/99, slip op. (S. Ct. N.Y. Co. June 13 200). ("Defendants' contention that there is no duty, as a matter of law, in the voluntary outpatient context, is simply erroneous... as is the suggestion that the duty does not run to the public at large, but only in favor of the patient or the patient's relatives...")
12. 305 A.D.2d 38, 758 N.Y.S.2d 717 (4th Dep't 2003).
13. Id.
14. Id. Note however, in *Fox v. Marshall*, the Court did note that in the case of an immediate family member of the patient, the Defendant could be liable to the Plaintiff. *Fox*, supra.
15. *Fox*, supra.
16. Id. Citing *Waters v. New York City Housing Authority*, 69 N.Y.2d 225, 505 N.E.2d 922 (1987).
17. Id.

BOOK REVIEW

They Would Always Have Paris

By William E. McSweeney

"If you are lucky enough to have lived in Paris as a young man, then wherever you go for the rest of your life, it stays with you, for Paris is a moveable feast."

— Ernest Hemingway.

In 1833 Oliver Wendell Holmes, then attending Paris's prestigious *Ecole de Medicine* wrote to his father in Boston, setting forth the impressions he had both of France and of his fellow medical students: "I have lived," he wrote.

"among a great and glorious people. I have thrown my thoughts into a new language. I have received the shock of new minds and new habit. I have drawn closer the ties of social relations with the best formed minds I have been able to find from my own country.... I hope you do not think your money wasted."

The money was scarcely wasted on the scholar that was Holmes, though some of it might indeed have been diverted from its intended purposes—tuition, books, and lodging. At day's end, Holmes and his colleagues delighted in such *divertissements* as cafes, cognac, and music halls. These arguably corrupting influences on their young are precisely what faraway parents feared!

They needn't have worried. The men

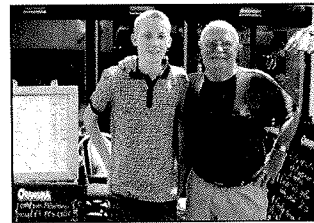
and women profiled in David McCullough's outstanding volume *The Greater Journey: Americans In Paris* had in common one overriding goal: education—in its narrowest sense, in its broad-

The Greater Journey: Americans In Paris
By David McCullough
Simon & Schuster
558 pp. illustrations and index
ISBN#978-1-4165-7176-6

est sense, the latter being *l'apprentissage de la vie*. And what a group of men and women they were!

At the threshold, consider their bravery. Their passage to France involved weeks of continual battering by the ever-menacing waves of the Atlantic, aboard sailing vessels that perpetually leaked and were lashed by spindrift, in quarters that were dank and cramped; they ate food that was barely edible, were rained on coldly from sky and sea, suffered seasickness to the point of the dry heaves. And yet this was the lesser journey!

Upon attaining Paris, they undertook the greater journey, the Conradian one, the journey within: the discovery of self-purpose, the imposition of self-discipline, the attainment of self-satisfaction; but unlike Joseph Conrad's narrator, Marlow, he who entered into the Heart of



Les Americains, grand-pere Bill et son petit-enfant Daniel, Paris, summer of '09.

Darkness, they—in the City of Light—entered into the Heart of Light.

Architecture, art, drama, literature, music, science—all flourished within the great capital. Yet even to be oblivious to these enhancers of life, to be merely passive, to merely absorb the city-as-city, was to nonetheless be enriched. The new arrivals marveled, variously, at the sparkling, meandering Seine, now and again overarched along its Parisian course by magnificent *ponts*; at the green spaciousness of its *jardins publics*; at the stone solidity of its wide-open *places*; at the low mansard-topped buildings—a whimsical *mélange* of the commercial and residential—buildings so low that they

enabled the bright sunlight to stream evenly throughout every *quartier* of the city; and at the ubiquitous towering

memorial monuments, the heroic statuary, all attesting to *l'histoire, la gloire* of this ancient civilization. As for the active, the ambitious: Paris's beauty was the osmotic dividend to be drawn by those pilgrims with affirmative purpose, those who had come to study within its *quartiers*. None stated it better than Philadelphia-born artist Cecilia Beaux. "The immense value to the student in Paris," she wrote, "lies in the place itself."

Stretching across the decades of the mid- to late-nineteenth century, concluding with *L'Exposition Universelle* of 1900, the cavalcade of ambitious Parisian sojourners that McCullough profiles is nothing if not a fascinating lot: Holmes and his brethren, who deepened their knowledge of medicine, and discovered cafes and cognac; writer James Fenimore Cooper, who enjoyed his celebrity as novelist of the American frontier, a subject ever-fascinating to Parisians; and, in counterpoint to the settled Cooper, the struggling Samuel B. Morse, fine artist and future inventor, who worked assiduously, principally to define himself. Novelist Henry James, fine artists Mary Cassatt and John Singer Sargent, sculptor Augustus Saint-Gaudens, architect Louis Sullivan: all spent their formative years in Paris; more, all were fully formed by Paris. All would be forever changed.

(Continued on page 27)