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Sweisgood Dinner – a Time to Reflect

By Laura Lane

For the past 29 years, the SCBA has paid tribute to Father Peter Sweisgood by holding a dinner in his honor. A member of the Benedictine Order, Father Sweisgood was a recovering alcoholic that was instrumental in assisting many Long Island professionals suffering from alcoholism.

This year's dinner was held at the Watermill on March 23. Bill Porter, the past co-chair and founding member of the Lawyers Committee on Alcohol and Drug Abuse was honored.

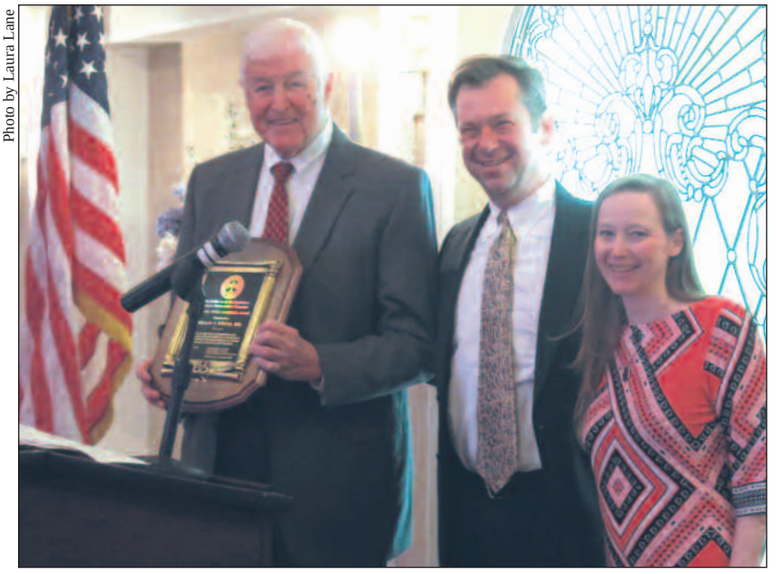
Mr. Porter has been sober for 30 years. "It's an ongoing challenge," Mr. Porter said. "And it's a lifelong journey of personal growth."

Michael Marran, who spoke at the dinner, knew Father Sweisgood. "When I went to my first AA meeting Peter was the speaker," Marran recalled. "At that stage in my life I didn't like Catholic priests or God. Peter gave me hope."

In fact, Father Sweisgood helped thousands of people get sober. "I'm one of them," said Mr. Marran. "Alcoholism is not a moral issue it is a medical one."

The Lawyers Helping Lawyers Committee is available to help any member of the SCBA that believe they may have a problem with alcohol or drug abuse.

Photo by Laura Lane



Rosemarie Bruno and James M. Marrin, co-chairs of the Lawyers Helping Lawyers Committee, honored Bill Porter, the past co-chair and founding member of the committee at the Peter Sweisgood Dinner. See more photos on page 20.

PRESIDENT'S MESSAGE

Once Again, Pride in the Profession

By John R. Calcagni

John Calcagni

Since this will be my final column written as President of the SCBA, I would like to finish by returning to the place of beginning. The theme I chose for my presidential year was "Pride in the Profession." My talented successor, Pat Meisenheimer, recently asked what led me to choose this theme. I didn't have a good answer for her at the time, but as I thought about her question later that day, I realized that it came from my firm and long-held conviction that we lawyers are members of the most challenging and honorable of all the professions.

My first column for *The Suffolk Lawyer* laid out the many reasons that lawyers should ig-nore the media's incessant and inaccurate demeaning slights that have seemingly cemented in the public's mind the image of lawyers as a rapacious lot.

For the truth is much different, as it is the lawyer who has played an indispensable role in shaping and maintaining the rule of law and the civil society in which the same media and others can function and thrive freely.

From the day when 25 courageous lawyers signed the Declaration of Independence pledging their "Lives," their "Fortunes" and their "sacred Honor" to the causes of liberty and freedom, and continuing until today, it

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BAR EVENTS

Charity Foundation fundraiser at Gateway
Friday, May 19, at 6 p.m.
Gateway Playhouse, Bellport

Rent, the rock musical with lyrics and book by Jonathan Larson, is loosely based on Giacomo Puccini's opera La Bohème. It won a Tony Award for best musical on Broadway. Price of $100 includes dinner under the tent on the grounds of the playhouse. Further information included in this issue.

Installation Dinner Dance
Friday, June 2, at 5 p.m.
The Larkfield, East Northport, N.Y.

Patricia M. Meisenheimer will be induced as the Association's 109th President. Officers, directors will all receive the Oath of Office and special recognition awards will be presented. Dancing to the music of Victor Lesser of Manhattan City Music.

FOCUS ON
COMMERCIAL DIVISION
SPECIAL EDITION

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Administrator cta

Before the Surrogate's Court, Kings County, in *In re Waxman*, was an application, pursuant to the provisions of SCPA 1418, for letters of administration cta by the decedent's sole distributee, who had been specifically disinherited under the propounded will. Seven of the eight residuary beneficiaries under the instrument renounced their right to serve and consented to the relief requested by the petitioner.

Objections to the application were filed by the public administrator, who had previously been appointed temporary administrator of the estate, alleging that the petitioner was ineligible to serve since she was not a beneficiary under the propounded will, and therefore, was not a person interested in the estate, as required by the provisions of SCPA 1418 (1)(c); and she had failed to obtain the consent of all those beneficially interested in the estate, pursuant to SCPA 1418(6). The petitioner moved to dismiss the objections, which motion was converted to one for summary judgment.

In support of her application, the petitioner maintained that despite her disinheritance, she was a "person interested" in the estate, and, thus, qualified to serve pursuant to SCPA 1418, since she would be entitled to a share of the decedent's estate if the propounded will was denied probate. In addition, she claimed that the interest in the estate of the beneficiary whose consent she had not obtained was de minimis, and in any event, that beneficiary had defaulted in the proceeding. In opposition, the objectant contended, *inter alia*, that the petitioner was not a "person interested" in the estate, as defined in SCPA 103(39), and that the provisions of SCPA 1418 expressly required the consent of *all* beneficiaries of the estate in order for the petitioner to be appointed.


Ilene S. Cooper

The court agreed with the objectant, finding that the petitioner was not a "person interested" in the estate "entitled or allegedly entitled to share as a beneficiary" thereof, and thus, was not entitled to letters of administration cta, pursuant to the provisions of SCPA 1418(1) (c). The court rejected the petitioner's argument that as an intestate distributee she was a "person interested," concluding that while her status would entitle her to object to probate, it would not qualify her as a "person interested" for purposes of SCPA 1418, which required the fiduciary to have an interest in the property to be administered.

Moreover, the court noted that although petitioner could, in its discretion, be appointed administrator cta, the exercise of that discretion was dependent upon her filing acknowledged consents of all the beneficiaries. The court found that the absence of one such consent was fatal to the petitioner's application.

Accordingly, letters of administration cta were issued to the public administrator, pursuant to the provisions of SCPA 1418(2).

In re Waxman, NYLJ, Dec. 9, 2016, at p. 35 (Sur. Ct. Kings County).

Eligibility of fiduciary

In *In re Srybnik*, the petitioner, the decedent's spouse and preliminary executor of the estate, sought admission of the decedent's will to probate, but objected to letters testamentary issuing to the respondent, the co-executor nominated under the instrument, on the grounds of "want of understanding", pursuant to SCPA 707(1)(e). Alternatively, the petitioner sought an order directing an independent medical evaluation of the co-executor or an immediate hearing on his eligibility. The respondent was the decedent's brother and lifetime business partner.

Following the filing of the probate petition, the petitioner, individually and ex parte, requested the issuance to her of preliminary letters testamentary. In support of that application, the petitioner's counsel alleged, upon information and belief, that the respondent was ineligible to serve as fiduciary, on the grounds that he was 99 years of age, infirm, and lacked the requisite understanding to fulfill his duties. Although the respondent subsequently sought the revocation of the petitioner's preliminary letters, that application was later withdrawn.

Depositions of both the petitioner and respondent were directed, and thereafter, petitioner moved for summary judgment.

The court noted that the phrase "want of understanding" has been defined as a lack of intelligence sufficient to understand the nature and extent of fiduciary duties, rather than a lack of information, business experience or legal knowledge. That is, disqualification on this contemplates that the fiduciary is likely to jeopardize estate assets and put the interests of the beneficiaries at risk.

Because the testator's selection of a fiduciary is entitled to great deference, the burden of proving ineligibility rests with the party asserting the claim. To

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CYBER

Cybersecurity is Not Just an Oxymoron

By Victor John Yannacone Jr.

Cybersecurity is a siren call to malpractice and professional liability. Privacy and cybersecurity are areas where every attorney is vulnerable. Failure to understand the risks and take the action necessary to mitigate those risks can lead to catastrophic and often uninsured or uninsurable loss. The economic losses can be recovered, but damage to your image as a lawyer may never be repaired.

No attorney feels comfortable unless they can be reasonably sure that their personal privacy and the privacy of the materials they send and receive on the internet and the information they obtain from the web are protected.

This column is a shameless promotion for the Cybersecurity CLE program at our Academy of Law on the evening of May 10, 2017.

Privacy and security

It all begins with "privacy." Whatever that is. An Executive Order has just eliminated the last vestige of legal protection for personal data, which is now on the internet in the hands of communication carriers such as Verizon and AT&T, as well as all the smaller carriers and the cable companies.


Victor Yannacone Jr.

Companies and hackers throughout the world are salivating over the new data they will be able to purchase from the common carriers and internet service providers (ISPs). That information will reveal the personal lives of its subscribers gathered from the insecure and unprotected keystrokes, conversations, browsing, and viewing, as well as their personal photos and videos.

Data Analytics — mining the troves of personal information freely made available by individuals through their electronic communications — caused widespread public outcry when done in the name of national security by the NSA, but the same intrusions now seem to be acceptable when done in the name of commercial advertising, marketing, promotion, and sale of goods and services.

Should we be concerned about cybersecurity?

Consider all of these points before you shrug off your need to be concerned about cybersecurity.

There is an ethical obligation upon you as an attorney to maintain a "reasonable" level of cyber sophistication. All attorneys face both ethical and liability risks from cyber security breaches. There is a potential for absolute or strict liability to your clients from cyber security breaches. That liability may not be fully insurable. There may be significant limitations in conventional professional liability policies.

Questions attorneys need to answer

If you are to continue in the active independent private practice of law, you have a non-delegable professional obligation to protect client data.

- Do you have a basic understanding of encryption and the process of encrypting data?
- Do you know how to search the World Wide Web, the internet, anonymously?
- Do you know how to protect yourself and your firm as you search the web and conduct online research?
- Do you provide end-to-end encryption and security for all your email communications?
- Do you know how to provide "Endpoint" security? Do you know what the endpoints are?
- Is end-to-end security possible? Can you afford it? Can you afford to practice law without it?
- Are you aware of all the sophisticated forms, types, and kinds of malware which are continuously mounting relentless attacks on all your electronic devices of all kinds in all places?
- Are you protecting your office, your home, your mobile devices, and your "IOT" (Internet of Things) from malware? Do you know how?
- Are you prepared to manage, respond to, and survive the inevitable data breach?

Security?

Consider the seemingly simple problem of transmitting documents safely and securely over the internet. Can the internet and the cloud ever be secure? That is no longer just a ques-

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Trusts and Estates Update (Continued from page 18)

that extent, the court found that the petitioner had satisfied, prima facie, her entitlement to summary judgment, based upon the respondent's videotaped deposition, together with the affidavit of a physician who reviewed the tape and transcript. Nevertheless, the court concluded that the respondent had raised an issue of fact as to his eligibility to serve, based upon the affidavit of a physician and counsel's affirmation, both of which called into question the medical opinion of the physician retained by petitioner.

Accordingly, the court denied petitioner's motion for summary judgment, and scheduled a hearing in order to fully develop the record before it determined whether the respondent was capable of understanding and performing his duties as fiduciary.

In re Srybnik, NYLJ, Jan. 23, 2017, at p. 29 (Sur. Ct. New York County)(Mella, S.).

Surcharge

In *Matter of Billmyer,* the Appellate Division, Second Department, affirmed an Order of the Surrogate's Court, Kings County (Lopez Torres, S.), which surcharged the executor for selling certain real property of the estate below fair market value.

The decedent died with a brownstone residence, located in Brooklyn, New York, valued at approximately $1.5 million. In her will, she named four Lutheran charities and Adelphi University as residuary beneficiaries of her estate.

Two years after the decedent's death, the executor entered a contract for the sale of the Brownstone residence to an acquaintance of his for the sum of $670,000. Prior to the closing, the purchaser assigned his rights under the contract to an LLC, and the sale was consummated shortly thereafter between the estate and the LLC. Three days after this sale, the LLC sold the subject property to an unrelated third party for the sum of $1,300,000, pursuant to the terms of a contract dated *one month prior* to the date of the contract that it had entered with the estate.

The executor then accounted, and objections were filed by the charitable beneficiaries and the Attorney General of the State of New York, as the statutory representative of the charities. Following depositions, Adelphi University and the Attorney General moved for summary judgment determining that the sale of the real property was for less than its fair market value, and surcharging the executor accordingly. The executor opposed, alleging that the property required extensive repairs prior to its initial sale, albeit without an explanation as to how the property resold three days later for almost twice the price. The Surrogate's Court granted the motion, and surcharged the executor in the sum of $630,000, plus 6 percent interest from the date of the estate's sale to the date of remittance.

The Appellate Division affirmed, opining that in performing his fiduciary duty, the executor was required to employ good business judgment. Further, the court explained that to the extent the executor failed to satisfy this standard in the sale of estate property, he could be surcharged. However, the court cautioned that a surcharge did not result simply upon a showing that the estate fiduciary did not obtain the highest price obtainable for an asset. Rather, it had been demonstrated that the executor "acted negligently, and with an absence of diligence and prudence, which an ordinary [person] would exercise in his [or her] own affairs." *Billmyer, citing Matter of Lovell*, 25 AD3d 386, 387 [2005].

Within this context, the court noted that the executor chose a real estate agent for the sale of the brownstone, who was based in Staten Island, had no knowledge about the Brooklyn real estate market, and did not actively market the property for sale. Moreover, the record indicated that the executor did not obtain an appraisal of the property at the time of sale or learn the fair market value of comparable properties, failed to visit the property for an extended period prior to sale, and was unaware of how the property was being marketed. Moreover, he sold the property to an acquaintance of his, when there was an unrelated third party ready and willing to buy the property for nearly double the price paid by the LLC.

In view thereof, the court found that the objectants had established, prima facie, that the executor had breached his fiduciary duty and acted negligently with respect to the sale of the property. Further, it concluded that the executor had failed to submit evidence in opposition sufficient to raise a triable issue of fact. Finally, the court held that the Surrogate's Court had properly exercised its discretion in awarding interest upon the surcharge, based upon proof that three days after the executor had sold the property, it was resold for nearly twice the original purchase price.

Matter of Billmyer, 142 AD3d 1000 (2d Dep't 2016).

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is past-Chair of the New York State Bar Association Trusts and Estates Law Section, and a past-President of the Suffolk County Bar Association.

Direct Testimony by Affidavit (Continued from page 9)

tices are effectively leaving the mechanics of implementation for the parties and the court to collectively work out on a case-by-case basis.

Justice Driscoll in Nassau County leaves it entirely up to each party whether to employ affidavits in lieu of trial testimony. The affidavits may be used for fact, expert or even third-party witnesses. However, in Judge Driscoll's part, all trials are timed. Each side is allotted, at the outset, a certain number of hours which apply to both direct and cross-examination. By using affidavits for the direct testimony, a lawyer in Judge Driscoll's part uses up less time on the clock, which allows both the opportunity to present more witnesses and for longer cross-examinations of the other side's witnesses. This serves as an obvious incentive to employ the procedure. As for the mechanics, affidavits are exchanged one month before trial, and objections to the affidavits are due two weeks after that. Judge Driscoll then holds a pretrial conference at which rulings on the objections are made and the final form of the affidavit to be admitted at trial is settled.

Using affidavits in lieu of direct testimony is a device which, Justice Emerson notes, "can customize the process to fit the litigation before you." This can be of particular value in a complex commercial case. However, as long as the practice will only be implemented in Suffolk County on a consent basis, and as long as nonjury trials are not time limited to encourage the practice, it is largely up to counsel whether to take advantage of the potential benefits that, in the right case, direct testimony affidavits may offer both the courts and the litigants. As Justice Emerson puts it, "The more the parties buy into it, the better the result."

Note: Richard Hamburger is a partner in the Melville law firm of Hamburger, Maxson, Yaffe and McNally, LLP. He is a graduate of Cornell Law School, has clerked at the New York State Court of Appeals, and has served as an assistant district attorney in Manhattan. Mr. Hamburger is currently a member of the New York State Bar Association Committee on Professional Ethics and the Magistrate Judge Merit Selection Panel for the Eastern District of New York. He is a founder of the Long Island Children's Museum and a former Chair of the Suffolk County Bar Association Judicial Screening Committee. He has been a speaker or moderator at numerous State Bar and Suffolk Academy of Law presentations.

Cybersecurity (Continued from page 18)

tion for existential philosophers.

How can you maintain the security and data integrity of your firm website or your personal blogsite?

How can you be sure that your use and implementation of online and cloud-based applications is secure?

Consider for a moment, just a few of the elements of all the systems you take for granted as you conduct your practice and live your life every day — computers, mobile devices, and the Internet of Things (IoT). The networks — public, private, sort of private and, of course, the internet and the World Wide Web.

How can a practicing lawyer make informed and cost-effective decisions about purchasing hardware, software, and applications? You can't unless you are aware of the problems inherent in mixing operating systems and platforms — Windows, Mac, and LINUX— and the idiosyncrasies of attempting to operate legacy software on new hardware or new software on old hardware.

There has been a sea change and paradigm shift in litigation wrought by E-discovery. E-discovery, however, requires understanding the nature of electronically stored information (ESI) and the process of communications and transactions on, over, through, and by means of the internet and the World Wide Web. More on that in the next column.

Some of the answers to many of these rhetorical questions will be provided at the May 10 Academy program from 5:30 to 8:30 p.m. on Cybersecurity. Those who attend should sleep easier that night than they do tonight.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. Mr. Yannacone can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.