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May 2024 • Issue 620

From Classroom to Courtroom: High School Mock Trial Insights

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Articles

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On the Cover

Santa Barbara High School Mock Trial team

From the Editor

Richard Lloyd

Welcome to the May issue of the Santa Barbara Lawyer. While the sunshine may be taking a break this year, we have been working hard on bringing you a wide range of content on a variety of topics. For the Anglophiles among us, this month we are pleased to present a guest article from Tets Ishikawa of Lionfish Capital summarizing the British Post Office scandal—a matter described by the UK Criminal Cases Review Commission as "the most widespread miscarriage of justice" it had ever seen, and currently the subject of a four-part PBS Masterpiece documentary series titled Mr. Bates v. The Post Office.

Closer to home, enjoy perspectives from the County's most promising new legal talent and mock trial participants, Sienna Valentine of Dos Pueblos High School and Sophia Mills of Santa Barbara High School, and learn about navigating the intersection of divorce and death (yikes) from Cassandra Glanville and Carlos Ramirez, partners at Apex Family Law P.C. You will also hear from regular contributor, Robert M. Sanger, with his thoughts on Joseph Fischer v. United States, the case currently pending before the United States Supreme Court regarding the meaning of "corruptly obstructing an official proceeding", and its application to the events of January 6, 2021.

Finally, we'd like to formally (and belatedly) introduce the new "Well-Being" column by our new Director of Well-Being, Robin Oaks. In this profession, we are often faced with competing pressures from clients, colleagues and the Court, all while balancing our busy personal and professional lives. We encourage you all to take a few minutes out of your day to read this important column, where Ms. Oaks will be sharing her thoughts, insights, and articles on best practices for managing well-being and performing at the highest level.

Looking forward to bringing you more content through 2024.

- Richard Lloyd
  Editor

Santa Barbara Lawyer
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Articles should be submitted in Word format, including a short biography of the author. A high resolution photo of the author is desired. Articles should be 700 to 3,500 words in length.

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Dos Pueblos High School Mock Trial

By Sienna Valentine

High school students who participate in mock trial are given the opportunity to learn the basics of a criminal trial, evidence admissibility, public speaking, and more useful life skills. Students planning on attending law school are given a sneak peek into what a future would look like in the law field, with comprehensive coaching from current lawyers and experience putting on a trial inside a courtroom.

Dos Pueblos High School Mock Trial has found success in the last couple years at various competitions. In the fall of 2022, a team of nine students participated in the Empire competition in Baltimore, Maryland, taking home third place. The Empire Competition is a biannual international competition where the best mock trial teams in the country go to compete.

In the spring of 2023, Team A placed second in the State Competition put on by Teach Democracy. A few months later, a group of self-coached students won the Empire Spring Leagues Competition. And in March, the team won the County Competition and moved on to place seventh at the State Competition, out of over 400 teams total in the state.

For Amirsam Jabbari, the program's community has allowed him to become closer to different people on the team. "It's always been really welcoming and really tight knit," Jabarri said. "I can honestly say I'm very close with everybody on the team. And everybody on the team is really diverse, everybody's so different and I think that's what contributes to it. By spending so much time with them, getting to know them, you become really close with these different people. And it's really amazing, like through a shared goal."

Sienna Valentine

Confidence and speaking to large groups of people is often difficult for young students. But mock trial allows participants to hone these skills through the trials and practice. "It's helped a lot with my confidence and public speaking," junior Will Parisse said. "As well as that, I've made so many friends through mock trial, and met a ton of new people that I didn't think I would be close with. So that's probably the biggest way it's impacted me is just by meeting a lot of new people and not just at DP but throughout the entire state."

The coaching staff has left a lasting impression on team members through their dedication to the team and ability to prove feedback. Freshman Atticus Issacs has found that the coaches' approach to providing feedback is successful. "They've impacted it very positively by constantly giving positive reinforcement to help us generally be better students and be better at mock trial," Issacs said. "They've had really positive impacts by pushing us hard, but also not being rude about it or disheartening us."

Junior Sofia Elena Lara has found the coaching from practicing lawyers especially effective. "I think it's really interesting, because I think a lot of the times when you're learning something you may be reading a textbook about it, or a teacher has a college degree and is teaching about something," Lara said. "But this is something where the people who are teaching you are actually professionals in the field. And I think it just gives you a more … accurate picture of what it's like, and it's nice to have that real world experience in someone who's teaching you."

On top of finding success as a team at competitions, DP

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Dive into the dynamic world of legal education with the Santa Barbara County Education Office Mock Trial! A platform for budding legal minds, this competition empowers students to hone their advocacy skills, critical thinking abilities, and courtroom prowess under the guidance of seasoned mentors. From crafting compelling arguments to mastering the art of cross-examination, participants embark on a journey that transcends the classroom. If you're passionate about nurturing the next generation of legal talent or have questions, please reach out to Pat Noronha at pnoronha@sbceo.org to learn more about how you can get involved.

Santa Barbara High School Mock Trial

By Sophia Mills, Co-President, SBHS Trial Team

Our Mock Trial Team was reinstated last year after a long COVID-19 pause. Our teacher-mentors are led by Mr. Stark (AP Government teacher) joined by Mr. Tormey (Debate teacher) who does pre-trial, and our two dedicated local volunteer attorneys Anne Hayes, who specializes in criminal law, and Kraig Rice, who is an expert on immigration law. Together they are the force behind our Mock Trial team and are responsible for methodically training and mentoring us to learn how to navigate all the complex dynamics of a real case while understanding the role of every person involved in the courtroom.

Our team is a mix of all grade levels; all students are welcome to participate and commit to a role. The meetings are once a week and increase to twice a week as we get close to the day of the competition. Everyone is provided with a packet that contains all of the information relating to the case to read and analyze to start formulating and refining our questions, brainstorming possible arguments, working on testimonies, and objections, presenting evidence, and strategizing how to effectively present the case. Our coaches' guidance is key as we need to learn when and how to use legal terms and definitions to present ourselves professionally. As it all comes together and the case unfolds, Mock Trial provides us with great collaborative skills.

This is my second year participating in Mock Trial. I became president last year, as we rebuilt the team, and now co-president with a solid group of peers working on promoting and recruiting for the club. Both years my role has been as one of the defense attorneys. In the future, I plan to study law, so Mock Trial provides me with a perfect exercise requiring attention to detail and the opportunity to be exposed to the preparation needed to be ready for the dynamics inside of a courtroom. The time the team spends in the courtroom has helped me with my public speaking, debate, and organizational skills, along with dramatically improving my critical thinking.

Almost every high school in Santa Barbara has a strong Mock Trial team and the competition is serious! The setting of the gorgeous Santa Barbara Courthouse with a real judge, plus a group of lawyers evaluating each competitor and posing as a juror helps to simulate what being in court actually feels like. Behind the scenes the pressure is on and we're constantly reminding ourselves and our teammates to calm the nerves while rapidly going over all our questions. Whether we win or lose, we come prepared and we all want to give our best performance and our strongest arguments.

Sophia Mills

There are many benefits of being part of the Mock Trial team, it consistently challenges you to solve problems and teaches you time management, commitment, and teamwork. The whole process provides us with important tools that can be applied to any career path. It also adds a solid foundation to our learning life skills and is a gratifying experience that makes us all grow collectively. ■

Sophia Mills is a junior at Santa Barbara High School and is the past president and current co-president of the Santa Barbara High Mock Trial team. She's honed her skills as one of the defense attorneys over the past two years. Sophia's interest in law led her to complete a Stanford legal studies course, where she was appointed the role of lead attorney in their mock trial. She balances her studies with an internship that turned into a job at Santa Barbara Immigration Lawyers where she is gaining valuable real-world experience. She recently received a scholarship for a legal research program this summer at UCSB and she plans to major in political science and pursue law school.

Local judges and attorneys lend their time and expertise to help high-schoolers experience this important component of the legal profession.

Navigating the Intersection: Exploring Crossroads Between Family Law and Probate Issues

By Cassandra Glanville and Carlos Ramirez

Cassandra Glanville

Carlos Ramirez

Death and divorce are two profound life events that can have significant emotional, financial, and legal implications for individuals and their families. While they each have their own distinct issues, these events often intersect in complex ways within the legal realms of family law and probate. Both mark the end of relationships, whether through the dissolution of a marriage or the passing of a loved one. But what happens when one person dies during the pendency of the divorce action? Technically the parties are still married, yet they are not in an intact marriage. How does the court distribute the marital estate in this situation?

The answer, as usual, is it depends. The specifics of the party's estate planning and the procedural posture of the dissolution action intersect to determine the outcome.

Termination of Marital Status

After a Petition for dissolution of marriage or registered domestic partnership has been filed, but before a final Judgment has been entered, parties may request an early termination of their marital status. By bifurcating the issue of marital status and terminating it early, the parties are restored to the status of single persons while the rest of their dissolution case remains pending. In that situation, where the trial court has dissolved the parties' marriage and reserved its jurisdiction to determine property issues, the Family Court would retain jurisdiction.[1]

If, however, the parties' marital status has not been terminated and a party dies while the dissolution action is pending, the Family Court is divested of jurisdiction to make further orders regarding property rights, child support, spousal support, or attorney fees and costs.[2] In that situation, the Probate Court will step in and adjudicate the property rights of the deceased spouse. If there is no order or agreement for child or spousal support in effect when the spouse dies, the support of the surviving spouse is limited to those set forth in the Probate Code, such as probate homestead, probate set-asides, or family allowance.)[3] In order to obtain these protections, formal probate administration is required. The dissolution action pending in the Family Court should likely then be dismissed.

Death After the Court Has Entered Orders but Prior to Entering Judgment

Any agreements the parties reach prior to the final Judgment should be promptly memorialized and filed with the Family Court. This is because the death of a party to a dissolution proceeding abates the cause of action, and the court thus loses jurisdiction to make any further determination of property rights, alimony, costs, or attorneys' fees.[4]

However, the death of one of the parties does not prevent courts from taking action to enforce rights adjudicated prior to the death of one of the parties.[5] Citing *Darter v. Magnussen*[6], the *Newhall* Court stated:

> "…the death of one of the parties does not prevent the courts from taking action to enforce the rights adjudicated prior to the death of one of the parties. … As we have heretofore shown, the Court had full jurisdiction to enforce the terms of the interlocutory decree."[7]

Further, the Family Court's ability to enforce adjudicated property rights is enhanced by express reservations of jurisdiction. In *Darter*, the Court of Appeals held that the Court had no power to change the terms of an interlocutory decree.[8]

Given the foregoing, the best way to protect the rights of clients is to memorialize and file with the Family Court interim agreements reached by the parties and expressly

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Glanville and Ramirez, *continued from page 10*

reserve the Family Court's enforcement jurisdiction. Although this concept may seem self-evident as stipulations are commonly filed with the Family Court as they are agreed to, it is not difficult to imagine situations where agreements are not promptly memorialized or filed with the Family Court. For example, oral agreements reached in mediation prior to the completion of mediation or term sheets exchanged between counsel that are not filed with the Court. If the interim agreements are not memorialized and filed with the Family Court, clients may be faced with the delay, uncertainty, and expense of probate court proceedings before they receive their full portion of the community estate.

Trust Revocation

It is common for parties to establish a trust, especially after marriage, to control how assets are distributed after death and avoid probate. The presence of a trust may also affect how assets are distributed in the event of a death during the pendency of a dissolution.

After filing for dissolution and service of Summons, certain financial restraining orders come into place, often called Standard Family Law Restraining Orders ("SFLROs") or Automatic Temporary Restraining Orders ("ATROs"). These restraining orders are printed on the Summons form (FL-110) and also set forth in Family Code section 2040. While they restrain a party in a dissolution from creating or modifying a non-probate transfer without the written consent of the other party or court order, they do not prevent a party from revoking a will or revocable trust, pursuant to the trust instrument.[9]

Prudent family law counsel should advise their clients to revoke their one-half of any family trust when the dissolution action is filed, pursuant to the terms of the trust instrument. By doing so, the client avoids the possibility of their soon-to-be ex-spouse receiving their share of the marital estate in the event they die during the pendency of the action. After revoking your client's half of the trust, counsel should advise their client to create a new will as to their share of the marital estate, which would reflect your client's current wishes.

Death Without an Estate Plan

It is best practice to advise Family Law clients to establish an estate plan that avoids probate (generally a trust) as to their share of the marital estate which reflects their current wishes. This is because if a party dies without a trust before entry of Family Law judgment, then the Family Court no longer has jurisdiction to continue with the matter, the Family Law matter is dismissed and probate proceeds on the estate of the deceased. Like Family Courts, California Probate Courts are overworked and under-resourced. As a result, it can take years before the deceased estate is distributed to their heirs. Such a delay can unnecessarily add stress and financial hardship to the client's heirs.

The other benefits of a trust include:

1. The ability for the client to choose who will manage their assets upon their death.
2. The ability for the client to decide in advance how to distribute their assets rather than relying on the probate laws.
3. The client maintaining privacy over their estate in lieu of the probate process, which is publicly available.
4. Avoiding probate fees, which are based on the size of the estate not the amount of work the attorney performs.

Given the foregoing, properly serving Family Law clients includes advice regarding the benefits of estate planning and the dangers of dying during dissolution proceedings without an estate plan that avoids probate.

Conclusion

The foregoing describes just a few of the issues that may arise when death and divorce cross paths. However, through early termination of marital status, prompt memorialization of agreements, trust revocation, or estate planning, proactive measures can mitigate uncertainty and delay. ■

Cassandra Glanville and Carlos Ramirez are partners at Apex Family Law, P.C., a family law and trusts and estates litigation firm with attorneys in Santa Barbara, San Francisco, Los Angeles, and Sacramento. Both Ms. Glanville and Mr. Ramirez are expanding their law practices to include mediation services and completed the Program on Negotiation—Mediation Intensive at Harvard Law School in June 2023.

Ms. Glanville has been practicing family law since 2013 and focuses on a range of sensitive matters including dissolution and divorce, custody disputes, child and spousal support, domestic violence issues, and post-judgment modifications. She is particularly adept at untangling complex financial issues that accompany high-asset family law proceedings and provides strategic counsel to sophisticated clients such as successful professionals, entrepreneurs, business leaders, individuals with legacy wealth, and their significant others. She has been a board member of the Santa Barbara Women Lawyers Foundation since 2016 and a board member of the Santa Barbara County Bar Association since 2023.

Mr. Ramirez is based in San Francisco and has been practicing exclusively family law since 2014. Mr. Ramirez represents Bay Area entrepreneurs and professionals in a variety of family law matters including dissolution, legal separation, resolution of parenting and custody, determination of support, division of income and assets, premarital and post marital agreements, and trials. Mr. Ramirez has extensive experience resolving disputes regarding the characterization and disposition of complex compensation including stock options, Restricted Stock Units, carried interest, management fees, and deferred compensation. Mr. Ramirez volunteers as a settlement officer in San Francisco Superior Court, assisting parties in settling family law matters.

ENDNOTES

1 *Marriage of Hilke* (1992) 4 Cal.4th 215, 220.
2 *Marriage of Shayman* (1973) 35 Cal.App.3d 648, 651.
3 *Jacobs v. Gerecht* (1970) 6 Cal.App.3d 808.
4 *Shayman*, *supra*, 34 Cal.App.3d at p. 651.
5 *Newhall v. Melone* (1962) 199 Cal.App.2d 121.
6 *Darter v. Magnussen* (1959) 172 Cal.App.2d 714.
7 *Newhall, supra,* 199 Cal.App.2d at p. 124 (internal citations omitted).
8 *Darter*, *supra,* 172 Cal.App.2d at pp. 717-718.
9 Fam. Code § 2040, subd. (b).

Litigation Finance and the Post Office

By Tets Ishikawa

Imagine settling in at the movie theatre, popcorn in hand, ready for the feature to begin. The deep opening note from a Hans Zimmer score marks the start of a Don LaFontaine-voiced trailer.

"In a world of peace and harmony, BigCorp is the Government's beacon of fairness, social goodness and justice. So when they discover they have been defrauded by their own people, justice is served and the criminals are locked away. But the criminals maintain their innocence. As they fight back, all is not what it seems. BigCorp must defend their reputation and wealth. In a high stakes battle, just how far will they go and will the truth come out?"

Sadly, this is no movie but the story of the UK Post Office scandal which only unravelled because of a court case that was made possible by litigation funding.

How it started

The Post Office ("PO") is the UK Government-owned postal service with over 10,000 branches run by sub-postmasters.

In 1999, PO rolled out Horizon, a new accounting and stocktaking software made by Fujitsu, across their branches. Many complained of software bugs but doubts over its integrity were ignored. When Horizon identified unexplained shortfalls in the accounts of over 4,000 sub-postmasters, PO took action. Between 1999 and 2015, over 900 sub-postmasters were convicted of theft, fraud and/or false accounting with 236 imprisoned. Others settled and had their contracts terminated. The suffering wasn't just financial though. Many were at the heart of their communities and were ostracised and forced to move. Worse still, the nightmare was too much and turned to suicide.

"Nightmare" because these losses were unexplained. All maintained their innocence, arguing Horizon was to blame. But they were ignored because PO asserted, and everyone believed, that remote interference in Horizon was impossible. Of course, they could in theory fight back but who realistically was going to fight the might of PO and the weight of public judgment?

Luckily, some refused to keel. In 2003, when Lee Castleton was ordered to repay a shortfall, he refused and was promptly sacked. PO brought a civil case against Mr. Castleton who counterclaimed for wrongful termination of his contract[1]. However, the court found in favour of PO on both counts, stating that his branch "*was not properly managed at the material time.*"[2] Mr. Castleton was unable to meet the damages and costs and went bankrupt. (In September 2023, the lawyer acting for PO told the Post Office Inquiry that the motive was to send "*a message that they were willing to defend the system against somebody pursuing them for a large counterclaim*".)[3]

Tets Ishikawa

In 2003, another sub-postmaster, Alan Bates, also had his contract terminated. He contacted Computer Weekly in 2004, but only when Mr. Castleton contacted them in 2008 did they investigate further, leading to a 2009 article highlighting potential flaws in Horizon[4]. This led to more sub-postmasters contacting Mr. Bates which in turn led him to founding the Justice for Subpostmasters Alliance (JFSA)[5].

Unravelling the Truth

Still, few believed them. In 2010, Mr. Bates wrote to the then Post Office Minister Sir Ed Davey (now the Liberal Democrats leader) highlighting flaws in Horizon. Mr. Davey refused to meet Mr. Bates initially before agreeing to do so for "presentational reasons"[6].

However, Mr. Bates persevered. Following discussions between PO, James Arbuthnot MP and JFSA, Second Sight Support Services Ltd was instructed to carry out a review into Horizon[7]. In a 2013 preliminary report, they highlighted potential concerns and defects with Horizon. (It has since been revealed that PO senior management were made aware at the time that remote interference was possible, but nonetheless decided to keep this under wraps[8].)

Finally in 2015, PO admitted that their accounts could be altered remotely[9]. Strikingly, in a Parliamentary debate, Andrew Bridgen MP revealed that one sub-postmaster had visited PO headquarters and "*was shown in error a room where operatives had remote access to the Horizon software*"[10]. This was further supported by a Fujitsu whistleblower Richard Roll, who, on a 2015 BBC investigatory programme, confirmed the same[11].

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Isikawa, *continued from page 14*

Despite this information, no actual or legal accountability fell on PO. This changed when Mr. Bates launched a group action on behalf of 555 sub-postmasters in 2017. This group had limited resources and was made possible only because a law firm acted on partial contingency, along with litigation finance and ATE Insurance (to cover PO's costs in an unsuccessful outcome).

This was no mean feat. Despite the increasingly supportive factual matrix, this litigation (like any other) was still risky, involving a defendant who not only had the financial resources but the willpower to defend at all costs. Indeed, PO adopted scorched-earth tactics, spending over £100m defending the claim, including £24m on disclosure which excluded a 2017 Deloitte report commissioned by PO which undermined their defence[12]. For good measure, the PO also filed an unsuccessful application for the judge to recuse himself[13].

After a common issues trial in 2019, the judge found that there were "bugs, errors or defects" that undermined Horizon's integrity and only after permission to appeal was refused, did PO finally settle for a total recovery of £58m[14].

With accountability finally established, convictions started being quashed. Public interest and awareness however remained limited largely to the legal industry until January 2024 when a four-part drama series, titled *Mr. Bates vs The Post Office*, aired, bringing the scandal to the mainstream as what many call the gravest miscarriage in British legal history[15].

The public interest has not only kept PO scandal front page but led to rapid Government action, including proposed legislation to quash *en masse* hundreds of convictions and a compensation scheme for the sub-postmasters in addition to the action.

But it has also reignited the debate about litigation finance in the UK, in particular the uncomfortable reality that of the £58m recovered, the 555 sub-postmasters only received approximately £12m of the damages.

Litigation Finance

This action was only made possible with litigation finance, alongside a law firm and an ATE insurer willing to take on the downside risks. Without any of these three components, PO would have been able to continue evading accountability.

The reality is that not all litigation funders, or their institutional investment backers, would have supported financing a claim against a Government-owned entity with deep resources and willpower to defend at all costs, including using the most popular of defence strategies—"outspend the plaintiffs".

And despite a piece by Mr. Bates in the Financial Times articulating why litigation finance was critical, litigation finance has been criticised for its cost, with some implicitly suggesting that a cheaper alternative than litigation finance should have been used[16].

What alternatives though? And herein lies the issue with debates around litigation funding. It has become polarised around over-simplified narratives that ignore the nuances and realities of litigation and litigation finance.

For example, if both sides had agreed to a £5 million budget cap in this case, the 555 sub-postmasters would have walked away with considerably more, because the litigation finance element would have been proportionately smaller.

One could also argue that this is the product of a jurisdiction with no scope for punitive damages. If the case had played out in the US, punitive damages would have been available to make the 555 sub-postmasters more than "whole".

Another nuance is the "loser pays" principle in the UK, meaning for every dollar spent by the opponents, a litigation funder could be ordered to pay those costs if the case was lost. This helps rationalise the scorched-earth strategy run by PO—because financial muscle not only means the costs of litigation increase but it forces funders to increase their funding commitment while simultaneously increasing the costs they may be forced to pay if the case is unsuccessful.

Some have suggested that funder returns should be capped, but this cannot be considered in isolation. In Florida, Litigation Investment Safeguards and Transparency Act has effectively proposed a 50% cap on returns[17]. Where punitive damages apply, this seems practical and sensible. But in the UK, the only way to make this workable is for all the costs of litigation (being lawyer uplift, insurer premiums and funder returns)) to be recoverable. Ironically, this principle was applied in 2021 in Delaware, in Shareholder Representative Services LLC v Shire US Holdings, Inc., where the winning party was awarded the full $20m of the law firm's contingent fees, including the uplift[18].

The regulation debate warrants a much deeper discussion. But the very fact that PO has triggered this debate in the UK is because the litigation finance industry is evolving, maturing and has proven its worth in facilitating justice that would otherwise have remained undiscovered. ■

Tets Isikawa started his career as a derivatives structurer and securitisation banker at ABN AMRO, Goldman Sachs and Morgan Stanley pre-2008. He has since founded, invested in, advised and ran a wide range of businesses across finance, technology,

aviation, commercial agriculture, sports and chemicals. He is currently a NED and Adviser to Brickflow, a real estate loan sourcing software company.

Tets has been involved in litigation finance in 2011, raising capital for impecunious plaintiffs and advising Acasta, an ATE insurer, on litigation funding, culminating in the founding of Sparkle Capital in 2014. Tets subsequently joined Acasta's senior management team, with day to day responsibility for the ATE business and Sparkle Capital. In 2020, Tets was hired by RBG Holdings plc to found LionFish as a principal investment business. In 2023, LionFish was acquired by funds managed by Foresight, a £12bn+ AUM private equity business. For more information on his practice area, visit Tets' LinkedIn (https://www.linkedin.com/in/tetsuya-ishikawa-lionfish/) or LionFish Litigation Finance's website at https://www.lflf.co.uk/

Endnotes

1 https://www.postofficescandal.uk/post/post-office-v-castleton-a-second-category-abuse-of-process/
2 See https://www.bailii.org/ew/cases/EWHC/QB/2007/5.html
3 See generally, https://www.postofficehorizoninquiry.org.uk/
4 https://www.computerweekly.com/news/2240089230/Bankruptcy-prosecution-and-disrupted-livelihoods-Postmasters-tell-their-story
5 https://www.jfsa.org.uk/
6 https://www.bbc.com/news/uk-politics-68222915
7 https://www.jfsa.org.uk/uploads/5/4/3/1/54312921/pol_interim_report_signed.pdf
8 See https://www.youtube.com/watch?v=QFvE2Bk9GSo
9 https://hansard.parliament.uk/commons/2015-06-29/debates/1506308000001/PostOfficeHorizonSystem
10 Ibid.
11 https://www.bbc.co.uk/news/uk-67884743
12 https://www.postofficehorizoninquiry.org.uk/evidence/pol00028070-deloittes-bramble-draft-report
13 https://www.bailii.org/ew/cases/EWHC/QB/2019/871.html
14 https://www.judiciary.uk/wp-content/uploads/2019/12/bates-v-post-office-judgment.pdf
15 "Mr. Bates vs. the Post Office" is currently airing as a "Masterpiece" documentary on PBS, which can be viewed online at https://www.pbs.org/wgbh/masterpiece/shows/mr-bates-vs-the-post-office/
16 https://www.ft.com/content/1b11f96d-b96d-4ced-9dee-98c40008b172
17 https://www.flsenate.gov/Session/Bill/2024/1276
18 https://courts.delaware.gov/Opinions/Download.aspx?id=319550

Valentine, *continued from page 8*

Mock Trial also has a cohesive atmosphere and community. Sophomore Milena Rodriguez finds that she can be herself among the team and the atmosphere is welcoming. "The environment in mock trial is such a friendly, fun, [and] caring place that makes me feel comfortable to be myself," Rodriguez said. "Mock trial has allowed me to meet a lot of cool people with all different interests and backgrounds and has made me feel comfortable at high school and feel like I'm contributing [to] something."

During the Empire competition in Baltimore, the team placed third overall, but also connected with teams all around the country. For junior Luna Avolio, traveling as a team has broadened her horizons to a larger mock trial community. "So the Baltimore trip, I think the biggest advantage for me was getting to see you there was a wider mock trial community," Avolio said. "I didn't really know that was a thing until then. And at the same time, getting much more involved with our school's team. It was nice to get to know a lot of the seniors."

Along with having a positive team connection, students are also learning more about the legal system and what they would like their future professions to look like. Lara has found her passion for law through the mock trial program. "I don't think I have a specific field in mind yet I just know that mock trial has really made me fall in love with law," Lara said. "I think [it's] really just the format of actually learning and doing things really similar to a profession."

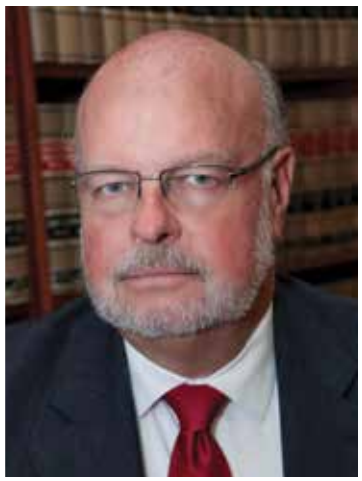
Freshman Ethan Gardiner also enjoys the process of arguing objections and thinking on his feet. "Well, since I've started mock trial, I really enjoyed the whole process of being in the trial and making objections, also, just thinking on my feet in general," Gardiner said. "I think that's furthering my wanting to be a lawyer, because I just found the whole experience to be really fun, preparing the case, writing arguments for the case, and thinking about things from a legal standpoint, and how all the different legal concepts come together to form the justice system that we have."

For many students, DP Mock Trial has taught them how to form relationships with their peers while learning more about the justice system. Avolio has enjoyed exploring new interests and finding a community in mock trial. "I think it's just been a really neat opportunity to do something that I probably wouldn't have suspected would be my biggest interest," Avolio said. "I love it and [it's] definitely broadened my horizons of things that I could do in my future and what I want to focus on in college and the rest of life." ■

Sienna Valentine is currently a junior at Dos Pueblos High School. They have been on the mock trial team since their freshman year and have won four outstanding witness awards during their time on mock trial. Sienna is also the Copy Editor of the Charger Account and upcoming Co-Editor-in-Chief of the yearbook team. They enjoy writing, reading, and walking on the beach with their dog to collect sea glass and shells.

Shredded Fish, Part Trois

By Robert M. Sanger



Robert M. Sanger

The United States Supreme Court is scheduled to hear arguments in *Joseph Fischer v. United States*, Tuesday April 16, 2024.[1] There has been much discussion in the popular press about this case and more will come before this article is published. *Fischer* is the case which will allow the Court to determine whether 18 U.S.C. section 1512(c), which prohibits corruptly obstructing an official proceeding, can be used to prosecute rioters for obstructing the certification of the Electoral College results on January 6, 2021. Certain rioters were convicted of this offense which had more serious sentencing consequences than some of the other charges brought against them and other J6 defendants.[2]

This has been politically polarizing since, among other things, a ruling that the statute cannot be used for that purpose might benefit Donald Trump in his criminal proceedings. In the popular press, this is sometimes characterized as the opportunity for the hard-right Supreme Court Justices, some of whom were appointed by Trump, to give him an unwarranted benefit. The government is arguing that the statute applies and the J6 defendants are arguing that it does not. Well, I am with the defendants on this and have a history of taking that position in print, including the Santa Barbara Lawyer Magazine *Criminal Justice* columns of June 2014 and May 2015, titled, "*Shredded Fish*" and "*Shredded Fish Redux*" respectively. Hence, this article, "*Shredded Fish, Part Trois*."

Fish

The Sarbanes-Oxley Act of 2002 imposed criminal liability on anyone who "knowingly . . . destroys . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States."[3] The reader may recall that Yates, a captain of a fishing boat, was boarded at sea by a federally cross-deputized state Fish and Game agent. The agent measured some of the catch and determined that certain fish were not of the required length. The agent instructed the captain to preserve the evidence of undersized fish so that he could do a civil investigation upon docking. Evidently, someone on board, perhaps at the direction of the captain, jettisoned the undersized fish which prevented the government from pursuing a civil fine and possibly a suspension of the captain's fishing licenses.

Not satisfied with the fact that the undersized fish were no longer available for a civil proceeding, the agent referred the matter to the Criminal Division of the United States Attorney's Office for federal prosecution under the Sarbanes-Oxley Act which could result in a felony conviction and imprisonment for up to 20 years. The code section, however, was enacted in response to the Enron prosecutions. In those cases, accountants and Enron executives, knowing that there was a federal investigation into criminal activity, ordered the mass shredding of documents that may have incriminated them. Hence, a statute was created to punish shredding of financial documents. In *Yates* it was being used to punish the destruction of undersized fish.

This author was critical of the case in the 2014 article "*Shredded Fish*" while the *Yates* case was pending briefing before the United States Supreme Court. And, when the opinions (there was a plurality opinion, concurrences and a dissent) came down from the Supreme Court in *Yates v. United States*,[4] it was analyzed in the 2015 article "*Shredded Fish Redux*." The main issues raised in those pages was the failure to abide by the rule of lenity. In other words, the Court was asked to interpret a code section in a broad fashion even though its language and intent were limited. Criminal statutes should be construed strictly so that government officials, the public, lawyers, and courts have notice of what is prohibited. Using an expansive interpretation of statutory language to criminalize behavior that is not clearly within the meaning of the statute is unfair, a denial of due process.

The opinions in *Yates* explored statutory interpretation, dictionary definitions, rules such as *noscitur a sociis*—a word is known by the company it keeps—and *ejusdem generis*—"Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects

enumerated by the preceding specific words."[5] Oddly, perhaps, Justice Scalia, a proponent of the rule of lenity, joined the dissent. In one sense, this is a precursor to the ever more prevalent argument between purported originalists or textualists on the one hand and the pragmatic or purpose-oriented jurisprudence on the other. Dean Erwin Chemerinsky has bluntly dispatched with the originalist/textualist approach as a cover for political result-oriented decisions.[6] Retired Justice Stephen Breyer was much more diplomatic but examined his preference for pragmatic or purpose-oriented interpretation in his book just release this month.[7]

Fischer

The *Fischer* case[8] is related to *Yates* in that a different section of the Sarbanes-Oxley act is being used to prosecute and punish J6 defendants including, possibly, Donald Trump. Fischer involves title 18 of the United States Code section 1512(c)(2) which was added after section 1519, the subject of *Yates*. Nevertheless, the context for both was found in the overall purpose of Sarbanes-Oxley which was designed to deal with interference with the ongoing criminal investigation of Enron and, in the case of 1512(c)(2), the act of corruptly "obstruct[ing], influenc[ing], and imped[ing]" an official proceeding. Once again, the parties are briefing the various rules of statutory construction, including *noscitur a sociis* and *ejusdem generis*. They are talking about the rule of lenity but also focusing on dictionary definitions[9] and other semantic devices.

It seems that the larger jurisprudential issue is that there is no real federal criminal code based on the policing of wrongdoing. Federal jurisdiction has expanded with J. Edgar Hover's ambition, the Mann Act, and the interstate transportation of stolen vehicles, leading to mail fraud, wire fraud, theft of honest services, money laundering, RICO and a host of other random statutes. Sarbanes-Oxley probably filled a need to avoid big nationwide or international frauds. However, there is nothing coherent about the federal criminal laws contained in Sarbanes-Oxley or the other criminal laws scattered through all titles of the United States Code. As a result, federal prosecutors have tremendous discretion to treat conduct that may or may

not be criminal under state laws and may or may not have been contemplated by legislators as some sort of federal criminal violation. In the January 6 cases, there are specific criminal statutes that pertain to trespass on federal property, the Capitol in particular, and pertain to assaulting people, including police officers.

The complaint here is that federal prosecutors are using statutory language to prosecute people for something in addition that was not intended by the legislature and was not something that people would have thought was a violation in advance. This has nothing to do with how anyone feels about the insurrection at the Capitol or whether J6 defendants should be prosecuted for violation of specific criminal statutes. The question is whether overcriminalization and over-federalization of criminal law should be allowed to expand unchecked at the whim of creative members of the Department of Justice.

Conclusion

We will see what the Supreme Court does with the *Fischer* case. The line-up of Justices on *Yates* was fascinating. Will liberal, conservative and far-right Justices all agree, will they have different reasons, will they form unusual alliances? There is a real possibility for any or all of that. I submit though that, if the rule of lenity is followed, other criminal laws, but not Sarbanes-Oxley, will be used to prosecute crimes at the Capitol. And, if there is a question or a need, Congress can step in for future cases and pass legislation that clearly makes attempting to interfere with the Electoral College count illegal. ■

Robert Sanger is a Certified Criminal Law Specialist (Ca. State Bar Bd. Of Legal Specialization) with the Sanger Law firm, P.C., and has been a practicing litigator in Santa Barbara for over 50 years. Mr. Sanger is a Fellow of the American Academy of Forensic Sciences (AAFS). He is a Professor of Law and Forensic Science at the Santa Barbara College of Law. Mr. Sanger is an Associate Member of the Council of Forensic Science Educators (COFSE). He is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization.

The opinions expressed here are those of the author and do not necessarily reflect those of the organizations with which he is associated. ©Robert M. Sanger.

ENDNOTES

1 Joseph W. Fischer, Petitioner v. United States, Docket No. 23-5572, on petition for certiorari from the United States Court of Appeals, District of Columbia Circuit, 64 F.4th 329 (2023).

2 There is also a petition for certiorari filed in Edward Lang v. United States, Docket No. 23-32, on petition for certiorari from the United States Court of Appeals, District of Columbia Circuit, 64 F.4th 329 (2023). Lang was one of three appellants who lost in the D.C. Circuit Court along with Joseph Fischer and Garret Miller but, in the words of his Petition, he "breaks ranks with the other appellants" by filing his own petition.

3 18 U.S.C. §1519.

4 Yates v. United States, 574 U.S. 528 (2015), Ginsburg, J., announced the judgment of the Court and delivered an opinion, in which Roberts, C. J., and Breyer and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Kagan, J., filed a dissenting opinion, in which Scalia, Kennedy, and Thomas, JJ., joined.

5 Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003).

6 Erwin Chemerinsky, WORSE THAN NOTHING, (Yale University Press, 2022).

7 Stephen Breyer, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM NOT TEXTUALISM, (Simon & Schuster, March 26, 2024).

8 Resisting the urge to make a fish pun, shredded or otherwise, based on the name of the Petitioner.

9 By the way, the use of dictionaries to argue meaning of statutes is flawed on many levels. See, e.g., Breyer, supra. However, the selection of dictionaries to rely upon is sometimes bizarre. To determine the meaning of a word used in 2008,why would one rely on BLACK'S LAW DICTIONARY, an inherently untrustworthy volume that has cribbed from dictionaries of the nineteenth century, or WEBSTER'S INTERNATIONAL UNABRIDGED DICTIONARY SECOND EDITION published in 1932 or some unscholarly dictionary using the "Webster" name only because George and Charles Merriam did not trademark the name Webster when they took over publication from Noah Webster himself. This is an article for another day.

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Valuing Breath

By Robin Oaks

Robin Oaks

We all know that breath is necessary for life, but let's explore how valuable our breath is to our effectiveness as legal professionals. I'm advocating that we make awareness about breathing a part of our legal toolkit because of its benefits for emotional, mental, and cognitive functioning. Today, as I've been glued to a computer screen writing a report, my energy became drained and my posture had slumped, constricting movement of my diaphragm, which causes shallow breathing. Even worse, I realized that I had been holding my breath! Well, not so long that I fainted, but I was freezing my breathing likely because I was intensely thinking and felt time pressure—and my body mirrored this inner tension. This common breathing habit of holding one's breath while looking at computer screens has a name: "email or screen apnea."

Dr. Margaret Chesney, a "breathing" researcher at UC San Francisco, who studies the physiology of optimal breathing practices, raises awareness about how habits of shallow breathing and breath-holding can cause a range of negative effects on thinking, energy, and physical and mental health.

So, what can we do to breathe well?

EXERCISE

1. Take a moment and tune into your breathing—remembering: Nose—Slow—Exhale—Low.
2. Breathe through your *nose* only. Comfortably *slow* down your breathing rate.
3. Practice gently letting your *exhale* become longer than your inhale.
4. Bring your breathing *low*, allowing your diaphragm to move and your abdomen to rise and fall.
5. Set a reminder to tune into your breathing patterns, especially when thinking and staring at a screen. Become a legal life partner with your breath and value how optimal breathing can benefit your work and well-being.

Nose, Slow, Exhale, Low

Key characteristics of optimal breathing can be remembered by thinking of the words: Nose, Slow, Exhale, Low. First, healthy breathing is always through the *nose*. Close your mouth, especially during inhalation. *Slow*, rhythmic breathing patterns (not fast or erratic) signal specialized neurons in the brain that we don't feel threatened, which then causes our nervous system (via the vagus nerve) to restore balance and promote a calm demeanor. Beneficial breathwork practices typically suggest making one's *exhale* longer than the inhale, and to breathe *low* by engaging the diaphragm, not the upper body muscles, to expand the lungs.

In his book, *Breath, The New Science of a Lost Art*, James Nestor notes that like the ocean's ebb and flow, the diaphragm's movement during breathing acts as a thoracic pump, creating a negative pressure drawing blood into the heart during inhalation and during exhalation causing blood to flow outwards. Many humans use only ten percent of the diaphragm's movement capacity, which overburdens the heart, elevates blood pressure, and contributes to disease.

Dr. Sundar Balasubramanian has authored numerous books about breathing (ancient "pranayama" practices) and works with the Department of Radiation Oncology at the Medical University of South Carolina. His research established that certain breathing practices stimulate changes in salivary biomarkers related to immunity, which has important implications for prevention and management of various illnesses, including cancer.

One amazing characteristic of breathing is that it is both an automatic and voluntary process. Our capacity to change our breathing at will provides us with a priceless opportunity to self-regulate our nervous system, circulatory, respiratory, and cognitive functions to our advantage. Current cutting-edge research, ancient wisdom traditions, and spiritual/ritual practices around the world recognize the power of breathwork to reduce stress, anxiety, and illness,

and enhance energy, focus, memory, stamina, cognition, and consciousness. ■

Robin Oaks has been an attorney for nearly forty years, and for twenty-five years has provided legal services focused on independent workplace investigations and mediation. She is certified in and has studied a wide range of healing, emotional intelligence, cognitive fitness, and mind-body practices. She is a well-being consultant and offers confidential professional life coaching sessions for legal professionals seeking to optimize potential, restore balance, and thrive during stressful life changes and challenges. Contact: Robin@RobinOaks.com or 805-685-6773.

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Superior Court, County of Santa Barbara

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March 12, 2024

REDUCTION OF COURT REPORTER SERVICES

Effective Monday, March 25, 2024, the Santa Barbara Superior Court will ***no*** longer provide court reporters for the following types of proceedings:

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Probate – Evidentiary Hearings and Court Trials

At their own expense, any party may arrange for a reporter to be present at a hearing listed above. A party that has been granted a fee waiver may make a written request for a court reporter, in advance, for a hearing listed above. (See Cal. Rules of Court, rule 2.956(c) for more information).

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What Every Attorney Must Know Now About 2024 Long Term Care Medi-Cal
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Friday, June 14, 2024

Time:

2:30 p.m. until 4:30 p.m.—Note earlier start time, so more material can be covered, and more questions answered!

Place:

Santa Barbara County Superior Court, Department Five

Speakers and Topic:

The Hon. Colleen Sterne will briefly discuss the court's role and process in evaluating petitions for creation/modification of irrevocable trusts related to preservation of eligibility for public benefits.

Ms. Atkins will review the recent change in law effective January 1, 2024, as follows:

Starting 1/1/2024, California eliminated all property limits for eligibility for Long Term Care (LTC) Medi-Cal in skilled nursing facilities. There are no denials of LTC Medi-Cal based on the values of any real property(ies) and the value of any financial accounts. For the first time, clients do not have to spend down any of their assets to qualify for benefits. Nor must they set up irrevocable trusts to hold their assets.

With your client's assets off the table entirely, there remain only three issues:

• History of Gifting in the 30 months prior to the application for Long Term Care Medi-Cal: Did the Medi-Cal applicant already give gifts that could potentially penalize the applicant with a delay in benefits? If so, what would the penalties be, have those penalties expired, and when would eligibility start? And, are there certain categories of gifts that do not create any penalties? Learn how to advise your clients on the impact, if any, of gifts in the prior 30 months.

• Estate Recovery: Ever since 2017, if there is a surviving spouse and/or no probate estate at the death of the client, there is no estate recovery by the California Department of Health Care Services. Any trust and any account with a designated beneficiary or a joint owner is not subject to estate recovery (pay-back of benefits to the State).

• Income and Share of Cost (Co-Pay to Skilled Nursing Facility): This monthly co-pay is easy to estimate for individuals in skilled nursing facilities with no living spouse, or when both spouses are in a skilled nursing facility. For married couples with only one spouse in skilled nursing facility, there are federal and state protections to prevent the impoverishment of the spouse who does not live in a skilled nursing facility. It will benefit all attorneys to know the basics on this so that they do not convey misinformation to the client(s). Some spouses in skilled nursing facilities may even qualify for Zero Share of Cost.

Lori A. Lewis, Chair of Probate Section, and Lawrence T. Sorensen, Mediator, will act as moderators.

Questions are welcome for submission and review prior to meeting; please submit to Lori A. Lewis at llewis@mullenlaw.com.

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May 2024

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			1	2	3	4
5 Cinco de Mayo	6	7	8	9	10 Santa Barbara Barristers Presents: 2024 Swearing-In Ceremony	11
12 Mother's Day	13	14	15	16 SBCBA Presents: Past President's Luncheon	17	18
19	20	21	22 Harvey Milk Day	23	24	25
26	27 Memorial Day	28	29	30	31	

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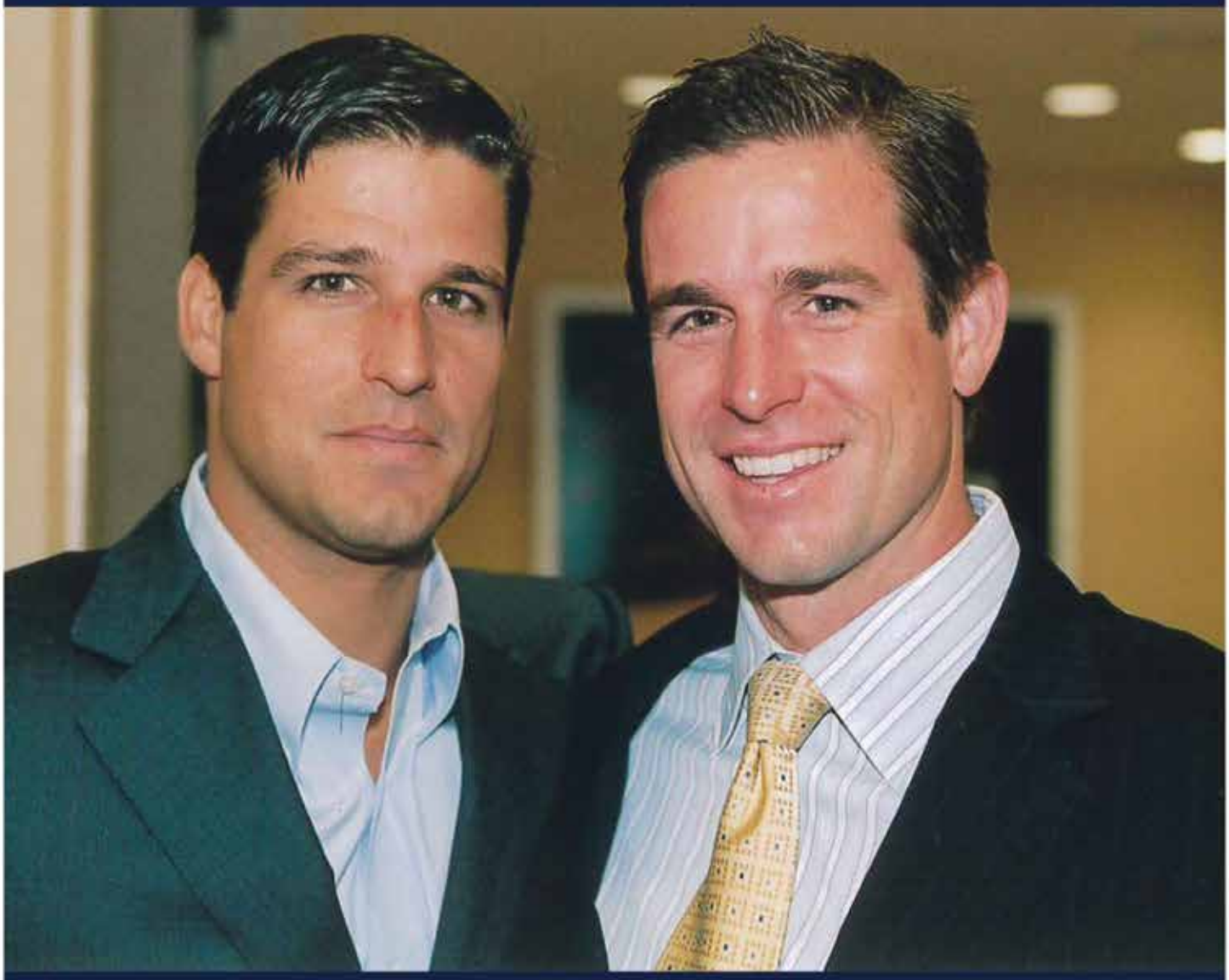

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