California Bar Examination

Performance Tests and Selected Answers

February 1996

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 1996 CALIFORNIA BAR EXAM

This publication contains two performance tests from the February 1996 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The handwritten answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

People v. Lloyd and Miguel

People v. Lloyd and Miguel

Instructions

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Columbia is located within the jurisdiction of the United States Circuit Court of Appeals for the 15th Circuit.

3. You will have two sets of materials with which to work: a File and a Library. The File contains the factual information about your case. The first document is a memorandum containing instructions for the task you are to complete.

4. The Library contains the legal authorities needed to complete the task. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing from the Library, you may use abbreviations and omit volume and page citations.

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness and organization of your response.

OFFICE OF THE DISTRICT ATTORNEY
SAN CABO COUNTY
STATE OF COLUMBIA

MEMORANDUM February 27, 1996

To: Applicant
From: Kelly Trepuka, Supervisor, Special Prosecutions
Re: People v. Marshall Lloyd and Diego Miguel

I need assistance with an ethics issue involving ex parte contacts with a defendant. At our staff meeting today, I discovered that Deputy District Attorney Dole is scheduled to meet today with defendant Marshall Lloyd, without Lloyd's counsel's knowledge or consent. I told DDA Dole that I would let her know whether and how she should proceed with the meeting. There is considerable immediacy to this situation.

Based on Dole's memo to me describing the overall investigation, this sounds like good, aggressive and, with the life of a witness at stake, necessary police work. I'm concerned, however, about the proprieties of these contacts. As we all know, there is a rule of professional conduct which prohibits a lawyer from contacting a party who is represented by counsel. I recall the flap former Attorney General Richard Thornburgh touched off when he declared that federal prosecutors were authorized to talk to crime bosses and drug kingpins without asking permission from their lawyers.

I raised possible problems presented by the anti=contact rule at the staff meeting, and this led to a spirited discussion. As long as investigations were carried out exclusively by the police, the traditional rule forbidding direct contact with represented persons did not come into conflict with legitimate law enforcement activities. However, now the deputies in our office play an increasingly active role in supervising investigations. These often involve the wider use of law enforcement techniques which require the advice of lawyers. Complex white-collar and organized-crime investigations necessitate the intensive participation of deputies before grand juries. The need to ensure compliance with legal standards involves lawyers at the preindictment stage of investigations.

We need to have a legally trained professional closely supervising these activities, advising the investigators, and making the critical decisions. We don't want to be thwarted

in carrying out needed criminal investigations. A heightened application of the anti-contact rule along with the threat of disciplinary action could create a chilling effect on our prosecutors and drive lawyers out of supervisory roles in investigations.

On the other hand, I don't want to place one of our best prosecutors at risk of professional censure or discipline. DDA Dole is a hard-charging, hard-working lawyer who has won some high-profile prosecutions; she is also a very fair and highly ethical lawyer, who believes in public service.

I did a quick CompuLaw search and pulled up the Columbia cases and materials on the subject as well as the current federal regs. These are attached.

Would you please write a memorandum that identifies and discusses all issues under the Columbia Rules of Professional Conduct related to the investigation of Lloyd and Miguel by DDA Dole, and provides specific conclusions concerning the appropriateness of her past and proposed future actions.

MEMORANDUM February 27, 1996

TO: Kelly Trepuka, Supervisor, Special Prosecutions
FROM: DDA Liz Dole
RE: Continuing Investigation in People v. Lloyd & Miguel

As a follow-up to the discussion at today's staff meeting, I want to express the reasons why I believe it is ethically appropriate for the office to continue to have contact with and utilize the services of Marshall Lloyd in our effort to expand the investigation of Diego Miguel's involvement in criminal activities.

Background

The special task force on auto rackets, directed by Special Investigator Leon Friedman and me, has uncovered a couple of minor auto thieves, Marshall Lloyd and Diego Miguel. They surfaced in the course of our wide-ranging undercover investigation of phony insurance claims and auto repairs as well as dishonest insurance agents, doctors, repair shops, and auto dealers who bilk consumers and insurance companies by trading in stolen cars and parts through chop shops and fences.

The current investigation is not dissimilar to the situation we confront in many white-collar crime cases. The deputy prosecutors and their investigators regularly contact witnesses, suspects, and targets. The Lloyd-Miguel case is very much like those where counsel is provided by a senior member of a criminal enterprise to low-level participants. Often, such low-level players approach deputies and investigators expressing a willingness to cooperate. However, they are fearful that if their lawyers know of the cooperation, their criminal superiors will learn of it and their lives will be endangered.

As I pointed out at the staff meeting, our current investigation is focusing on a large insurance agency and a national auto repair chain. We have an undercover agent who is a lawyer and is working as an adjuster in the insurance agency, and we have an informant who is a supervisor in the auto chain. There are even pending criminal charges against some of the supervisor's co-workers. Our informant is talking to these defendants daily, documenting and in some cases tape recording their activities. The informant sits in meetings with coworkers some of whom are defendants, witnesses, current suspects or likely future targets.

She listens to and questions the witnesses and records the conversations surreptitiously, even when defendants and targets give incriminating evidence.

Both the insurance agency and the national auto repair corporation have lawyers. The individuals who have been charged are represented by lawyers who specialize in defending white-collar crimes and the auto and insurance industries in particular. The lawyers claim that they represent everyone who works for these corporations, and one of them has already written me stating that he has been retained to represent the employees, and that we are not to contact any of his clients without first notifying him and obtaining his permission. Our undercover agent works with this lawyer's clients. As of now, we are not getting the lawyer's consent before the undercover agent interacts with the clients. We do not believe that the mere retention of counsel effectively immunizes individuals from undercover investigation.

I am carefully monitoring these investigations, meeting with investigators, and the undercover agent and informant, to determine at what point we have sufficient information to bring charges and against whom. We will also seek a search warrant for corporate records; the sufficiency of cause for a warrant and its scope will almost surely be an issue, if not the major issue in the prosecution.

The Lloyd-Miguel Case

One of the local fences provided information about Lloyd and Miguel as part of the fence's plea bargain. Lloyd and Miguel were arrested, charged by information with receiving stolen property (Pen. Code § 496), and have hired William Taylor to represent them. Taylor is one of the lawyers who specializes in defending white-collar crimes in the auto and insurance industries. He first appeared for them at their arraignment.

Based on information we have obtained from Lloyd since originally charging him and Miguel, I expect to file amended charges to add vehicle theft (Veh. Code § 10851) and possibly attempted murder and obstruction of justice charges against Miguel.

While awaiting trial on the present charges, Lloyd called Friedman, whom he remembered as the arresting officer. That conversation was taped by Friedman. The transcript is attached, as is the transcript of the subsequent meeting that Lloyd had with

Friedman and me. Lloyd is cooperating with our office in the continuing investigation of the pending charges, additional auto thefts that he has confessed to, and a possible attempt by Miguel to kill one of the witnesses. Lloyd has arranged to meet Miguel tonight, and Lloyd has agreed to allow us to tape the meeting. Lloyd is first to meet with Friedman and me for instructions and to be fitted with a body transmitter.

It is imperative that you focus on the fact that Lloyd initiated contact with this office. In doing so, he emphasized that he did not want his attorney, William Taylor, to have knowledge of or participate in any way in his discussions with this office. Moreover, I took the precaution of having Lloyd execute a voluntary written waiver of the presence of counsel. Under these circumstances, I believe our contacts have been appropriate.

Also, you'll recall that at the staff meeting, two more arguments were raised. Although I've never looked into these issues, I think we may be able to argue that:

1. Lloyd's self-initiated and voluntary discussions with SI Leon Friedman and myself are exempt from the prohibition of Rule 2-100 Columbia Rules of Professional Conduct because, as public prosecutors, we are public officers covered by C(1).

2. In the event we are not exempt under Rule 2-100 C(1), the rule may be preempted and superseded by the officially issued regulations of the United States Justice Department. See AG Order No. 1903-94, 28 CFR Part 77, §77.12.

In the event that you do not agree that I am permitted to continue to have direct contact with Lloyd, I suggest that SI Friedman, who is not an attorney, be authorized to run this continuing investigation of Miguel, including meeting Lloyd this evening and setting up the body wire.

If you need additional information, please let me know promptly.

FRIEDMAN: ALL RIGHT. THE TAPE'S GOING. I'M SPECIAL INVESTIGATOR LEON FRIEDMAN. MARSHALL, LET ME SUM UP. YOU CALLED ME. I ASKED YOU IF YOUR LAWYER HAD SAID IT WAS O.K. FOR YOU TO TALK TO ME AND YOU SAID THAT YOU WERE DOING THIS ON YOUR OWN AND THAT YOU DIDN'T WANT YOUR LAWYER TO KNOW. I SAID THAT I'D DO IT ONLY IF I COULD RECORD OUR CONVERSATION, AND YOU AGREED. AND NOW I STARTED TAPING. IS THAT RIGHT, MARSHALL? (SILENCE) YOU HAVE TO ANSWER MARSHALL.

LLOYD: YEAH, YEAH. I DON'T WANT MY LAWYER TO KNOW BECAUSE IF HE DOES, THEN DIEGO WILL KNOW

FRIEDMAN: IF YOU DON'T TRUST YOUR ATTORNEY, THEN YOU NEED TO LET THE COURT KNOW, YOU KNOW. AND THE BEST WAY OF DOING THAT IS FOR YOU TO WRITE A SMALL LETTER, DOESN'T HAVE TO BE ANYTHING FANCY, JUST AH, A PARAGRAPH, STATING, YOU KNOW, YOU WISH TO CHANGE LAWYERS. AND EXPLAIN, YOU KNOW, THE PROBLEM, YOU'RE HAVING.

LLOYD: THAT WON'T HELP ME, MAN. LOOK, DIEGO'S TALKING CRAZY ABOUT SHUTTING EDDIE UP, AND I DON'T WANT NO PART OF WHAT'S GOING ON.

FRIEDMAN: EDDIE VETTER, THE GUY YOU WERE SELLING PARTS TO?

LLOYD: YEAH. YOU GUYS PUT EDDIES NAME ON A WITNESS LIST. DIEGO'S EVEN GOT EDDIES STATEMENT. READS IT TO ME ALL THE TIME ON THE PHONE. DIEGO'S REAL STOKED TO SHUT HIM UP. REALLY SMART, YOU COPS.

FRIEDMAN: THAT'S WHAT THEY CALL DISCOVERY, MARSHALL. WE DON'T HAVE ANY CHOICE, YOU KNOW.

LLOYD: WHATEVER. CAN YOU HELP ME? A DEAL? BUT DIEGO CAN'T KNOW OR HE'LL SNUFF ME T00.

FRIEDMAN: WE CAN HELP YOU. I THINK WE SHOULD TALK. I'LL TELL MY SUPERVISOR AND IF SHE, YOU KNOW, SAYS IT'S A GO, I'LL MEET WITH YOU.

LLOYD: IT'S GOT TO BE FAST MAN. DIEGO'S CALLING ME ALL THE TIME ABOUT WE GOT TO DO SOMETHING ABOUT EDDIE.

FRIEDMAN: NO PROBLEM. CALL ME TOMORROW AT THIS SAME TIME.

DOLE: THE TAPE RECORDER IS ON. I'M DEPUTY DISTRICT ATTORNEY LIZ DOLE. WITH ME IS SPECIAL INVESTIGATOR LEON FRIEDMAN. SAY WHO YOU ARE, MARSHALL.

LLOYD: MARSHALL LLOYD.

DOLE: ALRIGHT, MARSHALL. NOW, AS I UNDERSTAND IT, YOU CONTACTED OUR OFFICE AND YOU WANT TO TALK TO US, BUT YOU DON'T WANT YOUR LAWYER, WILLIAM TAYLOR, TO KNOW THAT YOU'RE COOPERATING. CORRECT?

LLOYD: YEAH.

DOLE: ALRIGHT. AND YOU DON'T WANT HELP GETTING ANOTHER LAWYER?

LLOYD: NEAR.

DOLE: MARSHALL, YOU KNOW ABOUT MIRANDA WARNINGS, DON'T YOU?

LLOYD: YEAH. YOU DON'T HAVE TO DO THAT AGAIN MAN. I KNOW'EM BY HEART NOW.

DOLE: N0, NOT AGAIN, BUT BEFORE WE CAN HELP YOU WITHOUT YOUR LAWYER'S PRESENCE, WE NEED FOR YOU TO READ AND SIGN A STATEMENT WHICH IS KIND OF LIKE THE MIRANDA WARNINGS. IT JUST SAYS THAT WHAT YOU'RE DOING, THIS IS YOUR IDEA, AND NO ONE'S MAKING YOU DO IT.

LLOYD: WILL DIEGO KNOW?

DOLE: N0. THIS IS JUST FOR MR. FRIEDMAN AND ME. HERE. READ IT. NO DON'T SIGN IT. READ IT FIRST. THEN, IF IT'S O.K., SIGN IT.

FRIEDMAN: GOOD. LET'S GET BACK TO WHERE WE WERE, MARSHALL. HAS DIEGO ACTUALLY SAID HE'S GOING TO KILL EDDIE?

LLOYD: IF I HELP YOU, YOU WON'T COME AFTER ME, RIGHT?

DOLE: IF YOU HAVEN'T DONE ANYTHING TO HELP DIEGO AS PART OF HIS PLAN AND YOU COOPERATE WITH US, YOU SHOULD NOT BE CHARGED.

LLOYD: WHAT ABOUT MY CHARGES?

DOLE: IF YOU WORK WITH US TO PRODUCE EVIDENCE AGAINST DIEGO, WE WOULD BE WILLING TO WORK OUT SOMETHING.

LLOYD: NO MORE JAIL TIME?

FRIEDMAN: HOW LONG WERE YOU IN BEFORE YOU MADE BAIL?

LLOYD: TWO (EXPLETIVE) WEEKS.

DOLE: I THINK WE CAN RECOMMEND CREDIT FOR TIME SERVED, BUT THERE WILL BE PROBATION.

LLOYD: JUST NO MORE LOCK UP, GOT IT?

DOLE: ALRIGHT. NOW WHAT ABOUT THE TWO POSSESSION OF STOLEN AUTOS CHARGES?

LLOYD: DID WE DO'EM?

FRIEDMAN: OF COURSE THAT'S WHAT SHE'S ASKING (EXPLETIVE).

LLOYD: YEAH, WE KNEW THEY WERE HOT.

FRIEDMAN: DID YOU AND DIEGO HEIST THEM?

LLOYD: YEAH. BOTH OF US. YEAH.

FRIEDMAN: AND WHAT OTHER CARS?

LLOYD: WELL, WHICH ONES DO YOU WANT TO KNOW ABOUT?

FRIEDMAN: DON'T PLAY GAMES, (EXPLETIVE).HOW MANY MORE VEHICLES DID YOU AND DIEGO RIP OFF?

LLOYD: WE WERE BOOSTING CARS FOR ABOUT 6 MONTHS, ABOUT ONE EVERY COUPLE OF WEEKS. IT'D TAKE US THAT LONG TO CUT IT UP FOR PARTS.

FRIEDMAN: SO, THAT'S ABOUT A DOZEN.

LLOYD: YEAH, ABOUT RIGHT. PLUS COUPLE OF CHERRIES, A BEEMER AND A 911, WE DIDN'T CHOP. SOLD THEM AS IS OVER IN NEVADA. REAL NICE.

FRIEDMAN: THE MUSTANG AND LEXUS WE CAUGHT YOU AND DIEGO WORKING ON WERE JUST THE LAST ONES?

LLOYD: YEAH. WE WERE JUST DONE STRIPPIN"EM WHEN YOU BUSTED IN ON US.

DOLE: BEFORE WE ARE DONE TODAY, MARSHALL, YOU HAVE TO MAKE A LIST OF THE DATES AND DESCRIPTIONS OF THE VEHICLES AND THE PLACES FROM WHICH YOU TOOK EACH VEHICLE.

LLOYD: I DON'T KNOW DATES, BUT I KNOW THE CARS AND WHERE WE GOT THEM.

FRIEDMAN: SO MAKE A LIST FOR US.

DOLE: WHAT ABOUT THE PLAN TO GET RID OF EDDIE?

LLOYD: YEAH. THAT'S WHAT I CALLED YOU ABOUT.

DOLE: TO COOPERATE, YOU'LL HAVE TO GET DIEGO TO SAY WHAT HE PLANS TO DO.

LLOYD: NO WAY. I AIN'T GETTING NEAR THAT CRAZY (EXPLETIVE).

FRIEDMAN: CALL HIM. RIGHT NOW. WE'LL TAPE IT ON THIS MACHINE.

DOLE: YOU HAVE T0, MARSHALL. OR WE DON'T HAVE SUFFICIENT EVIDENCE TO CHARGE WITH.

LLOYD: JESUS. WHAT DO I SAY?

DOLE: JUST LET HIM TALK, BE HIMSELF. DON'T TRY TO QUESTION DIEGO. DON'T SUGGEST INFORMATION AND DON'T GET INVOLVED IN DIEGO'S PLANS. JUST LISTEN.

LLOYD: JESUS. I DON'T WANT TO DO THIS.

FRIEDMAN: DO IT. HERE'S THE PHONE. IT'S THE ONLY WAY DIEGO WON'T BE BACK ON THE STREET BEFORE HE FORGETS WHO PUT HIM AWAY.

LLOYD: (EXPLETIVE.) (SILENCE. DIAL TONES.)

MIGUEL: Y0.

LLOYD: DEE. DUDE, WHAT'S HAPPENING?

MIGUEL: CHILLING, BRO. I'M COMING YOUR WAY, NEXT WEEK, MAYBE. SO WE CAN TALK, YOU KNOW, GET OUR STORIES TOGETHER. I GOT SOME BILL OF SALES FOR THE CAR PARTS THE COP FOUND IN THE GARAGE, YOU KNOW, FROM THE CONVERTIBLE AND THE BIG WHITE ONE.

LLOYD: THE BIG WHITE LEXUS AND THE MUSTANG? THAT'S WHAT YOU'RE SAYING?

MIGUEL: WHATEVER, BRO. YOU'RE THE MECHANIC. I DON'T KNOW'EM FROM NOTHING. I GOT A BILL OF SALE FOR THE MUSTANG. AND A BILL OF SALE FOR PARTS. SO, YOU KNOW, WHAT THE HELL? WHAT CAN THEY SAY?

LLOYD: YEAH, THE MECHANIC AND THE CHOPPER. YOU'RE THE FASTEST CHOPPER, FOR SURE.

MIGUEL: YEAH, BRO. BUT WE NEED TO GET TOGETHER. ON OUR STORIES, YOU KNOW.

LLOYD: YEAH, RIGHT. I NEED YOU TO HELP ME.WITH SOME DATES. ONE DATE I CAN'T REMEMBER, DEE, JUST CAN'T REMEMBER, I KNOW IT WAS ABOUT 3 MONTHS AGO, WHAT NIGHT DID WE BREAK INTO THAT GARAGE FOR THAT BEEMER CONVERTIBLE? WHAT DATE?

MIGUEL: I DON'T KNOW, BRO. WE AIN'T GOIN' TO TELL'EM THAT.

LLOYD: RIGHT. SURE. THAT'S JUST BETWEEN US. LIKE, THAT NIGHT WE SLIPPED INTO LOTHROP FORD FOR PARTS AND TOOK THAT BRAND NEW TAURUS. THE COPS DON'T EVEN KNOW ABOUT THAT ONE. REMEMBER THAT ONE?

MIGUEL: YEAH.

LLOYD: WHAT NIGHT WAS THAT?

MIGUEL: DON'T KNOW.

LLOYD: HOW MANY LOCKS DID WE HAVE TO DRILL TO GET IN?
MIGUEL: SO WHAT.
LLOYD: YEAH. SO WHAT. IT WAS SO RAD, EVEN THOUGH WE COULDN'T SELL THE NEW CAR. REMEMBER DUMPING IT IN GASTON. SO CHOSE TO WATCH IT FLOAT ON THE LAKE.
MIGUEL: YEAH BRO, RAD. I DIDN'T THINK IT WAS EVER GOING TO SINK.
LLOYD: RAD. LIKE THAT 4 WHEELER YOU DROVE OUT OF THE PARKING GARAGE RIGHT PAST THAT STUPID ATTENDANT. LIKE WE WERE GOING TO PAY FOR THE GUY'S PARKING TO STEAL HIS CAR. DUMB. REMEMBER?
MIGUEL: HE PUT UP HIS HANDS TO STOP US.
LLOYD: RAD. THAT WAS A SATURDAY NIGHT, WASN'T IT?
MIGUEL: WHO CARES. GUESS SO. MAYBE. LISTEN HAVE YOU GOTTEN EDDIES STATEMENT FROM THE LAWYER. THIS IS A BIG JOKE MAN.
LLOYD: YEAH. WHAT WE GOIN' TO DO?
MIGUEL: YOU KNOW I THOUGHT OF A WAY TO ELIMINATE HIM. REMEMBER WE WERE TALKING ABOUT IT BEFORE?
LLOYD: YOU THOUGHT OF A WAY?
MIGUEL: YEAH, BUT AH, I DON'T THINK WE OUGHT TO GO FOR IT.
LLOYD: WELL, LET ME HEAR IT.
MIGUEL: WELL YOU KNOW THOSE AIR GUNS. THEY MAKE LITTLE DARTS FOR THOSE, LITTLE FEATHER BACK DARTS THAT YOU CAN PUT IN THERE. YOU'VE SEEN'EM. THOSE LITTLE DARTS, THOSE LITTLE THINGS ABOUT THAT LONG. I WAS THINKING JUST HOLLOW THE TIP OUT LIKE A NEEDLE AND JUST PUT LITTLE HOLES ON THE SIDE, AND YOU FILL IT WITH A LETHAL INJECTION AND THE SHOOTING IMPACT WOULD SHOOT ALL THE STUFF OUT OF IT INTO THE BODY. POISON'EM. THERE WOULD BE NO NOISE.
LLOYD: JESUS.
MIGUEL: THAT'S THE ONLY THING THAT RUNS THROUGH MY BRAIN. YOU HAVE A PUNCTURE WOUND, PROBABLY TAKE ABOUT 20 OR 30 MINUTES TO KICK OFF, YEAH, AND THE OTHER PROBLEM IS THE POISON, WHERE ARE YOU GOING TO GET SOME POISON? SMALL BOTTLES
LLOYD: WHAT WAS THE STUFF YOU TOLD ME ABOUT ONCE?
MIGUEL: CALCIUM CHLORINE. YEAH SOMETHING LIKE THAT, JUST A SMALL DROP WILL MAKE YOU LOOK LIKE YOU HAD A HEART ATTACK AND YOU'D NEVER, NEVER, FIND IT UNLESS YOU WERE LOOKING EXACTLY FOR THAT DRUG. STOPS YOUR HEART.

LLOYD: WHERE YOU GOING TO GET THE POISON?

MIGUEL: DON'T KNOW.

LLOYD: WHAT ABOUT MY COUSIN? HE'S A CHECKER AT BOB'S DRUGS. I BET HE CAN GET WHAT WE NEED. HE'S AN ALRIGHT DUDE. I'LL CALL HIM. WHAT ELSE DO WE NEED?

MIGUEL: I GOT A FRIEND. USED TO BE IN A MOTORCYCLE GANG. HE'S GOT SOME MAGAZINES THAT SHOW HOW TO DO IT. THIS GUY KNOWS, HE'S PROBABLY SNUFFED ONE OR TWO PEOPLE.

LLOYD: JESUS.

MIGUEL: WE'LL HAVE TO GET TOGETHER TO, SOMETIME, TO WORK OUT THE DETAILS.

LLOYD: WHEN WE GOT TO DO IT?

MIGUEL: SOON. BEFORE THE TRIAL, IF WE CAN, I GUESS. DON'T KNOW. THE PLAN'S NOT FOOLPROOF. YEAH, BUT I DON'T THINK WE OUGHT TO GO FOR IT.

LLOYD: I LIKE IT. IT'S FAIRLY FOOLPROOF.

MIGUEL: I DON'T KNOW. MY FRIEND SAYS THE MAGAZINES EVEN SHOW HOW TO MAKE BOMBS. MAYBE WE COULD DO THAT.

LLOYD: RAD. HOW ABOUT ACID IN THE FACE?

MIGUEL: YEAH. N0, NO. DAMN THAT EDDIE. DON'T KNOW.

LLOYD: WE, YOU, NEED A PLAN. THEN EDDIES HISTORY.

MIGUEL: YEAH. GOT TO GO. CALL YOU IN A COUPLE OF DAYS ABOUT COMIN' THERE. LATER, DUDE.

LLOYD: LATER. (DIAL TONE)

LLOYD: OH, THAT WAS RAD. THAT'S IT? YOU GONNA ARREST HIM NOW?

FRIEDMAN: FIRST YOU MAKE THE LIST OF EVERY CAR AND LOCATION**.** THEN WE'LL SEE. WHAT DO YOU THINK, LIZ?

DOLE: WE NEED AN OVERT ACT TO NAIL HIM ON ATTEMPT OR OBSTRUCTION. LEON, WE'LL HAVE TO DISCUSS WHAT REMAINS TO BE DONE.

FRIEDMAN: YES. AND NEXT TIME (EXPLETIVE), DON'T OFFER TO BUY THE (EXPLETIVE) POISON.

LLOYD: NEXT TIME? NEXT TIME? NO, NO, NO. THAT'S IT. WE GOT A DEAL.

FRIEDMAN: YEAH, YEAH. MAKE THE LIST AND LET US KNOW IF YOU HEAR FROM DIEGO. I'LL BE BACK TOMORROW FOR IT.

DOLE: LEON, TURN OFF THE TAPE.

END.

WAIVER OF THE RIGHT TO COUNSEL

I, MARSHALL LLOYD, state that the following is true and correct:

I have been informed of my right to the assistance of counsel in my communications with prosecutors and investigators.

I voluntarily and knowingly have decided to waive my right to the presence of counsel.

Executed this 22nd day of February, 1996.

Marshall Lloyd

FRIEDMAN: O.K. MARSHALL. I'M GLAD YOU CALLED. THIS IS LEON FRIEDMAN. I'VE GONE OVER THE LIST OF CARS. THE DEPUTY DA THINKS THERE ARE SOME PROBLEMS SHE WANTS TO DISCUSS. THERE HAVE TO HAVE BEEN SOME OTHER PEOPLE INVOLVED. EDDIE CLAIMS HE DOESN'T KNOW ABOUT MOST OF THESE CARS. OH, JUST SO YOU KNOW THE TAPE RECORDER IS ON AGAIN. IS THAT O.K.?

LLOYD: SURE, WHATEVER. BUT LISTEN. DIEGO CALLED. HE'S GOING TO BE HERE TOMORROW NIGHT. JESUS.

FRIEDMAN: DID HE SAY ANYTHING ABOUT THE PLAN TO KILL EDDIE?

LLOYD: NO. HE ONLY TALKED ABOUT WHAT WE'RE GOING TO SAY AT THE TRIAL. HE SAID THAT HE IS GOING TO MEET WITH TAYLOR AND THEN COME SEE ME. HOW ARE YOU GOING TO GET ME OUT OF THIS? YOU SAID THAT YOU WERE GOING TO HELP ME.

FRIEDMAN: HE'S COMING TO YOUR PLACE?

LLOYD: HE SAID HE'D PICK ME UP THERE. MAYBE HE WANTS TO GO SOMEWHERE ELSE. I DON'T KNOW. BUT IF I SAY, N0, MAYBE HE'LL FIGURE THAT SOMETHING'S WRONG. WHY DON'T YOU ARREST HIM AT THE LAWYER'S OFFICE?

FRIEDMAN: WE NEED MORE EVIDENCE, AND WE HAVE TO KNOW WHO ELSE IS INVOLVED. BUT WE CAN PROTECT YOU WHEN YOU MEET WITH HIM.

LLOYD: NO WAY. THIS HAS GOT TO STOP. NO MORE. I WON'T HELP YOU ANY MORE. I DON'T CARE WHAT YOU SAY OR D0.

FRIEDMAN: LOOK, MARSHALL, STOP WHINING. YOU KNEW WHAT YOU WERE GETTING INTO. YOU WANTED TO TURN AND MAKE A DEAL FOR YOURSELF THAT LEFT DIEGO TO TAKE THE HIT ALONE. YOU CAN BACK OUT NOW, IF YOU WANT. WE'LL STILL CHARGE YOU AND DIEGO WITH THE OTHER THEFTS YOU CONFESSED TO, AND IF DIEGO DOES ANYHING TO EDDIE, WE'LL EVEN CHARGE YOU AS AN ACCOMPLICE. A DOZEN CAR THEFTS WILL LAND BOTH YOU AND DIEGO IN STATE PRISON, TOGETHER. YOU GUYS CAN DOUBLE-CELL. HOW WOULD YOU LIKE THAT? OR MAYBE THEY'LL KEEP YOU IN PROTECTIVE CUSTODY FOR FIVE TO TEN. I'VE GOT ENOUGH ON BOTH OF YOU TO PUT YOU IN STATE PRISON.

LLOYD: WHAT MORE DO YOU NEED THEN, SO THAT I CAN GET OUT OF THIS?

FRIEDMAN: WE NEED TO KNOW EVERYTHING DIEGO HAS DONE ON HIS PLAN TO GET RID OF EDDIE. HAS HE BOUGHT THE POISON? OR THE AIR GUN? WHAT'S HIS FRIEND'S NAME,

THE ONE IN THE MOTORCYCLE GANG? WHAT'S HIS DEAL? WHY IS HE HELPING DIEGO? IS DIEGO PAYING HIM?

LLOYD: JESUS. YOU DON'T WANT MUCH. HOW THE (EXPLETIVE) DO I GET DIEGO TO TELL ME WHO THIS BIKER IS?

FRIEDMAN: OH, YOU CAN DO IT. REMEMBER I'VE HEARD YOU IN ACTION. YOU CAN DO IT.

LLOYD: THANKS. BUT THAT'S GOT TO BE IT.

FRIEDMAN: ALMOST. THE LAWYER, TAYLOR. WE HAVE TO KNOW WHAT TAYLOR'S PART IS. DOES HE KNOW ABOUT DIEGO'S TALK TO OFF EDDIE? HE MUST KNOW THAT DIEGO'S GOT SOME BOGUS BILLS OF SALE. WHENEVER DIEGO TELLS YOU WHAT YOU SHOULD DO OR SAY AT TRIAL, JUST ASK HIM IF HE CLEARED THAT WITH TAYLOR. YOU KNOW, PRETEND THAT YOU JUST WANT TO BE SURE THAT IT'S O.K. WITH THE LAWYER. THAT SHOULD BE NO SWEAT.

LLOYD: IF IT'S SO EASY WHY DO YOU NEED ME?

FRIEDMAN: WE'LL PUT A WIRE ON YOU AND BE RIGHT OUTSIDE. OR IF YOU TWO GO SOMEWHERE, WE'LL FOLLOW. IF ANYTHING GOES WRONG, WE'LL STEP IN AND GRAB HIM.

LLOYD: OH YEAH. ARE YOU FASTER THAN A SPEEDING BULLET? (EXPLETIVE) O.K. WHAT DO I DO?

FRIEDMAN: COME OVER AT 5 O'CLOCK TOMORROW. WE'LL SET YOU UP. DON'T WORRY IT WILL GO DOWN FINE. AND THEN YOU WALK. SEE YOU TOMORROW?

LLOYD: YEAH. I GUESS. LATER, MAN.

TUESDAY AFTERNOON
FEBRUARY 27, 1996

California Bar Examination

Performance Test A LIBRARY

People v. Lloyd and Miguel

LIBRARY

Columbia Rules of Professional Conduct

Rule 2-100

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body;

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law overrides the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

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RULES and REGULATIONS

DEPARTMENT OF JUSTICE

28 CFR Part 77

[AG Order No. 1903-94]

Communications With Represented Persons

Thursday, August 4, 1994

AGENCY: Department of Justice. ACTION: Final rule.

Rulemaking History

On November 22, 1992, the Department of Justice published in the Federal Register a proposed rule regarding communications with represented persons (which has generally been called the Thornburgh Memorandum). 57 FR 54737. This rule supersedes and supplants the November 22, 1992 proposed rule.

PART 77--COMMUNICATIONS WITH REPRESENTED PERSONS

§77.1 Purpose and authority. (a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards.

The purpose of this part is to provide a comprehensive, clear, and uniform set of rules governing the circumstances under which Department of Justice attorneys may communicate or cause others to communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. This part ensures the Department's ability to enforce federal law effectively and ethically, consistent with the principles underlying Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, while eliminating the uncertainty and confusion arising from the variety of interpretations given to that rule and analogous rules by state and federal courts and by bar association organizations and committees.

The rule establishes, prospectively, a general prohibition, subject to limited enumerated exceptions, against contacts with "represented parties" without the consent of counsel. This prohibition derives from the American Bar Association Code of Professional Responsibility and its successor, the ABA Model Rules of Professional Conduct. The rule, on the other hand,

generally permits investigative contacts with "represented persons":
that is, individuals or organizations that are represented by counsel but that have not yet been named as defendants in a civil or criminal enforcement proceeding or arrested as part of a criminal proceeding. However, the rule does not permit contacts with represented persons without the consent of counsel for the purpose of negotiating plea agreements, settlements, or other similar legal arrangements.

* * * * * * * * * *

§77.3 Represented party; represented person.

(a) A person shall be considered a "represented party" within the meaning of this part only if all three of the following circumstances exist:

(1) The person has retained counsel or accepted counsel by appointment or otherwise;

(2) The representation is ongoing and concerns the subject matter in question;

(3) The person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation.

(b) A person shall be considered a "represented person" within the meaning of this part if circumstances set forth in paragraphs (a) (1) and (2) of this section exist, but the circumstance set forth in paragraph (a)(3) does not exist.

* * * * * * * * * *

§77.5 General rule for civil and criminal enforcement; represented parties.

Except as provided in this part or as otherwise authorized by law, an attorney for the government may not communicate, or cause another to communicate, with a represented party who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such party.

§ 77.6 Exceptions; represented parties.

An attorney for the government may communicate, or cause another to communicate, with a represented party without the consent of the lawyer representing such party concerning the subject matter of the representation if one or more of the following circumstances exist:

(a) Determination if representation exists. The communication is to determine if the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

* * * * * * * * *

(c) Initiation of communication by represented party. The represented party initiates the communication directly with the attorney for the government or through an intermediary and:

(1) Prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the client's right to speak through his or her attorney and/or to have the client's attorney present for the communication, manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed and, if willing to do so, signs a written statement to this effect; and

(2) A federal district judge, magistrate judge or other court of competent jurisdiction has concluded that the represented party has: (i) Waived the presence of counsel and that such waiver is voluntary, knowing, and informed; or (ii) Obtained substitute counsel or has received substitute counsel by court appointment, and substitute counsel has consented to the communication.

* * * * * * * * *

(e) Investigation of additional, different or ongoing crimes or civil violations. The communication is made in the course of an investigation, whether undercover or overt, of additional, different or ongoing criminal activity or other unlawful conduct. Such additional, different or ongoing criminal activity or other unlawful conduct may include, but is not limited to, the following:

(1) Additional, different or ongoing criminal activity or other unlawful conduct that is separate from or committed after the criminal activity for which the represented party has been arrested or charged or for which the represented party is a defendant in a civil law enforcement proceeding; or

(2) Criminal activity that is intended to impede or evade the administration of justice including, but not limited to, the administration of justice in the proceeding in which the represented party is a defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution.

(f) Threat to safety or life. The attorney for the government in good faith believes that there may be a threat to the safety or life of any person; the purpose of the communication is to obtain or

provide information to protect against the risk of injury or death; and the attorney for the government in good faith believes that the communication is necessary to protect against such risk.

§77.7 Represented persons; investigations.

Except as otherwise provided in this part, an attorney for the government may communicate, or cause another to communicate, with a represented person in the process of conducting an investigation, including, but not limited to, an undercover investigation.

§77.8 Represented persons and represented parties; plea negotiations and other legal agreements.

An attorney for the government may not initiate or engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the attorney representing such person or party.

* * * * * * * * * *

§77.12 Relationship to state and local regulation.

Communications with represented parties and represented persons pursuant to this part are intended to constitute communications that are "authorized by law" within the meaning of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, DR 7-104(A)(1) of the ABA Code of Professional Responsibility, and analogous state and local federal court rules. In addition, this part is intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the federal government, and those acting at their direction or under their supervision, with represented parties or represented persons in criminal or civil law enforcement investigations or proceedings; it is designed to preempt the entire field of rules concerning such contacts.

Dated: July 30, 1994.

Janet Reno,
Attorney General.
United States of America

UNITED STATES of America, Plaintiff,

v.

Lopes, et al., Defendants.

United States District Court,

N.D. Columbia.

May 24, 1991.

PATEL, District Judge.

INTRODUCTION

The past decade has witnessed a rapidly growing concern regarding the ethical conduct of lawyers. More and more citizens are lodging complaints alleging misconduct by attorneys, and state bar associations are becoming increasingly active in investigating and addressing such complaints.

Rather than evading the new focus on lawyer misconduct, government attorneys and prosecutors often have found themselves at the center of it. In the midst of these developments, the Attorney General has issued a policy directive which purports to exempt Federal Department of Justice attorneys from one of the most widely-accepted and time honored ethical rules governing the conduct of attorneys involved in litigation. The implementation of the Attorney General's policy in this case has resulted in the motion to dismiss now before the court.

BACKGROUND

Defendant Joseph Lopes and co-defendants Anthony Evans and Alfred Olivo were indicted on December 15, 1989. Lopes, Evans and Olivo were charged with violations of 21 U.S.C. § 841(a)(1) (distribution of cocaine and heroin); 21 U.S.C. § 846 (conspiracy to distribute cocaine and heroin); and 18 U.S.C. § 2 (aiding and abetting). Lopes and Evans were denied bail and were detained at the Federal Correctional Institution at Pleasantville.

Lopes retained attorney Barry Tarlon to represent him. Tarlon informed Lopes that he believed that the defendants had a viable entrapment defense and that, in any case, it was his general policy not to negotiate a plea with the government in exchange for cooperation. Attorney James Bird, who represented Evans, had agreed with Tarlon to coordinate a joint investigation on behalf of the defendants. In doing so, he often spoke with both Evans and Lopes by telephone and at Pleasantville. At the outset of the case, Bird discussed possible disposition of the charges

against Lopes and Evans with Assistant United States Attorney ("AUSA") John Lynn, who was assigned to the case.

While awaiting trial, Evans contacted Bird by telephone and expressed interest in reopening discussions with the government concerning the possibility of plea agreements. Concerned about his children, Lopes was anxious to be released from Pleasantville, and thus echoed Evans' interest in a possible plea bargain.

Without informing Tarlon, Bird twice traveled to Pleasantville to discuss the possibility of a plea bargain with Evans and Lopes. Lopes did not want to retain another lawyer to negotiate with the government because he feared that doing so would cost him Tarlon's services, and Lopes wanted Tarlon to represent him in the event the case went to trial, because the defendant believed Tarlon was a good lawyer. Lopes agreed to meet with the government to discuss a possible plea agreement in order to obtain early release and to be closer to his children.

Bird also apparently represented to Lopes that Lynn believed it would be easier to reach a plea agreement if Tarlon were not present. Bird conceded that he warned Harold Rosen, counsel for co-defendant Olivo, not to inform Tarlon of the meetings because that would "mess up the deal."

Bird did indeed contact AUSA Lynn on behalf of Lopes and Evans. Lynn asserts that when Bird contacted him, Bird explained that Lopes did not want Tarlon present at any meetings with the government because "Tarlon didn't represent his best interest in this particular context." Lynn claims he did not ask Bird to explain further. Instead, the prosecutor hypothesized that Lopes was connected to a drug ring which was paying Tarlon's fees, and Lopes feared that if Tarlon learned of the negotiations with the government, Lopes's family would be endangered.

Bird alleges that, upon contacting Lynn, he informed the AUSA that Lopes did not want Tarlon present because Lopes believed Tarlon would no longer represent him if he considered a ,guilty plea and because Lopes wanted Tarlon to take the case to trial if no plea agreement was reached. Bird insists that he explicitly told Lynn during their first telephone conversation and on numerous occasions thereafter that, to his knowledge, "nobody that Lopes supposedly worked for or with was paying any of his fees", and that Lopes did not believe his safety or that of his family would be jeopardized if Tarlon were to learn of the plea negotiations.

Lopes, along with Evans and Bird, met with Lynn in the prosecutor's office. Lynn warned Lopes of the dangers of self-representation, informed him that he could have other counsel and

advised that Bird was there to represent Evans. Lopes insisted on going ahead with the meeting, and signed a waiver, which stated that Lopes was represented by Tarlon, that he wished to speak to the government without Tarlon present, that he did not believe Tarlon represented his best interests in the matter, and that he waived his right to have Tarlon's assistance at the meeting.

Following the meeting, Lynn sent Bird a proposed plea agreement for Evans and indicated that, while the same type of deal might be available for Lopes, Lopes would have to obtain a lawyer. Bird discussed the plea agreement with Lopes and Evans; he eventually contacted Lynn and told the prosecutor that both Lopes and Evans had rejected the plea agreement.

Harold Rosen, attorney for co-defendant Alfred Olivo, during a conversation with Lynn discovered that the government had been negotiating a potential plea agreement with Lopes and Evans without Tarlon's presence, consent, or knowledge. Rosen notified Tarlon. Tarlon quickly filed papers with the court indicating that he had learned of the secret meetings between his client and the government, and he was permitted to withdraw.

Defendant Lopes has now filed his motion to dismiss the indictment as to him, alleging that the government violated both his Sixth Amendment right to counsel and rules of professional conduct, which prohibit an attorney from communicating with an opposing party without the knowledge and consent of the opposing party's counsel.

DISCUSSION

I. Ethical Requirements

Rule 2-100 of the Rules of Professional Conduct of the State Bar of Columbia tracks the language of American Bar Association Disciplinary Rule ("DR") 7-104(A)(1) and ABA Model Rule of Professional Conduct 4.2. This court, through its Local Rules, has adopted the State Bar's Rules of Professional Conduct as the applicable standards of professional conduct for the Northern District of Columbia.

In the case at bar, the prosecutor essentially takes the position that he is exempt from Rule 2-100, because of a policy directive issued by Attorney General Richard Thornburgh, which declares that Department of Justice ("DOJ") attorneys engaged in law enforcement activity are not bound by the strictures of Rule 2-100 or DR 7- 104.

The government's position, however, is wholly unsupported by Columbia case law and other relevant authority, which has explicitly and repeatedly found that the ethical prohibition is

applicable to prosecutors in criminal cases. Triple *A Machine Shop, Inc. v. State of Columbia,* Col. Ct. 1989 (rule prohibiting communication with represented individual in absence of opposing counsel applies to criminal as well as civil cases); *People v. Sharp,* Col. Ct. App. 1983 (rule applies in pre-indictment criminal investigation); State Bar of Columbia, Formal Opinion No. 1979-49 (rule applies to prosecutors).

The Department asserts that government attorneys involved in criminal investigations are "authorized by law" to make contact with represented individuals by virtue of federal statutes which empower the Attorney General to investigate and prosecute criminal violations. The government reasons that federal prosecutors operate pursuant to a "statutory scheme" that permits them to communicate with represented parties in order to detect and prosecute federal offenses. Rule 2-100(C)(3). The Rule's "authorized by law" exception requires that a statutory scheme expressly permit contact between an attorney and a represented party. The federal statutes that authorize Department attorneys to conduct criminal investigations are nothing more than general authorizing statutes. None expressly or impliedly authorize government attorneys either to disregard court-adopted rules or to violate ethical rules regarding contact with represented individuals. There is no federal statute which authorizes government attorneys to question represented parties in the absence of counsel, such as statutes which expressly permit an offer of judgment to be served directly upon an adverse party.

This court has attempted without success to locate *any* authority for the proposition that Rule 2-100 or DR 7-104 do not apply to a government attorney who communicates with a represented individual under indictment. This, of course, is not surprising in light of the tortured logic of the Attorney General's policy. The implications of this assertion are alarming, since nearly all conceivable action taken by a prosecutor involve these activities. Indeed, the entire post-indictment conduct of a prosecutor is driven by the goal of completing the prosecution. Were this court to accept the Department's argument in this regard, it is not clear that there would be *any* conduct the prosecutor could not undertake, as long as it was pursuant to his or her responsibility to investigate and prosecute crimes.

The Attorney General's "authorized by law" theory thus has no foundation. To the extent that the Thornburgh Memorandum instructs federal prosecutors to the contrary, it is misguided and not premised on sound legal authority.

Nor is the prosecutor's conduct excused by the fact that the defendant initiated contact

with the government. The Discussion text following Rule 2-100 explicitly states that it is irrelevant whether an attorney is contacted by the opposing party. Moreover, as the ethical prohibition applies to attorneys and is designed in part to protect their effectiveness, a represented party may not waive it. The rule against communication with represented parties is fundamentally concerned with the *duties* of attorneys, not with the rights of parties. Ethical obligations are personal and may not be waived.

Further, the result would be the same under the Sixth Amendment, upon which Lopes also bases his motion to dismiss. Government interference with a defendant's relationship with his attorney may render that attorney so ineffective as to violate the defendant's Sixth Amendment right to counsel. In *Massiah-Mou/ton v. United States, U.S.* Supreme Court, 1963, Massiah-Moulton was indicted, along with a man named Colson, for conspiracy to possess and to distribute cocaine. Massiah-Moulton retained a lawyer, pleaded not guilty and was released on bail. Colson, meanwhile, decided to cooperate with Government agents in their continuing investigation of the narcotics activity in which Massiah-Moulton and others were thought to be engaged. Colson permitted a Government agent to install a radio transmitter under the front seat of his automobile. Massiah-Moulton held a lengthy conversation with Colson in this automobile while a Government agent listened over the radio. Massiah-Moulton made several incriminating statements, and these were brought before the jury through the testimony of the Government agent. The Supreme Court reversed Massiah-Moulton's conviction finding that the Government had "deliberately elicited" incriminating statements from Massiah-Moulton. The Court held, "[b]y intentionally creating a situation likely to induce [defendant] to make incriminating statements without the assistance of counsel, the Government violated [defendant's] Sixth Amendment right to counsel."

The government here argues that the Sixth Amendment should not be applied because the prosecution was seeking evidence of other crimes committed by Lopes and other possible individuals who were involved in the sale and distribution of drugs. In *Massiah-Moulton,* the Government also contended that incriminating statements obtained as a result of its deliberate efforts should not be excluded because law enforcement agents had "the right, if not indeed the duty, to continue their investigation of [Massiah-Moulton] and his alleged criminal associates...." The Court rejected this argument, and held:

We do not question that in this case, as in many cases, it was entirely proper to continue an

investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. The police have an interest in the thorough investigation, of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial of either crime. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right .... Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

However, not all government action which arguably interferes with the attorney client relationship violates the Sixth Amendment. Where a defendant is not prejudiced, there is no Sixth Amendment violation.

In the case at bar, the government conducted secret meetings with defendant Lopes and concealed them from Lopes's lawyer, Barry Tarlon. However, it does not appear that Lopes made any incriminating statements, and if he did, this court can exclude them at trial. Subsequent to Tarlon's withdrawal from the case, Lopes found new counsel. There is no question that Lopes's new counsel is very able and will provide him with outstanding representation. Therefore, this court is compelled to find that the government misconduct at issue here does not constitute a Sixth Amendment violation.

The Government should take little solace from the conclusion the court has reached on this issue. This court has no difficulty in finding that the government misconduct at issue here was egregious and in flagrant violation of Rule 2-100. What is worse, the prosecutor's actions are not those of a renegade. Instead, AUSA Lynn relied on a memorandum from the Attorney General which instructs attorneys of the Department of Justice to disregard the ethical rule concerning contact with represented individuals.

The court also must consider whether means more narrowly tailored to deter the government misconduct at issue here are available. First, suppression is clearly not an effective remedy in a case such as this. Nor does the court find it appropriate to hold the prosecutor in

contempt of court or to refer the prosecutor to the state bar for disciplinary proceeding. While the court has found egregious and flagrant government misconduct in this case, it also recognizes that AUSA Lynn was following the dictates of a policy pronounced by the Attorney General. Under these circumstances, punishing the prosecutor with either contempt or referral to the state bar for disciplinary proceedings would be unfair to Lynn and would deflect attention from those responsible for the policy itself. The court is deeply skeptical about the deterrent effect of verbally admonishing the prosecutor or the Government in this case. Others, including the Conferences of Chief Justices, have roundly condemned the Attorney General, all to no effect. There is no reason to believe that one more admonishment is likely to deter the Department of Justice from continuing to espouse prosecutorial misconduct through the Thornburgh Memorandum.

The court finds that there are no remedies other than dismissal which are likely to serve as an effective deterrent to the type of government misconduct which occurred in this case. Therefore, the court hereby exercises its supervisory power and DISMISSES the indictment as to Joseph Lopes.

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PEOPLE of the State of Columbia. Plaintiff and Respondent,

v.

Harry Arthur SHARP, Defendant and Appellant.

A018067.

Court of Appeal, First District,

Dec. 21, 1983.

Defendant Sharp appeals from convictions for robbery (Pen. Code, § 211) of a bank, a finance company and a wine shop on the grounds he was denied his constitutional right to counsel at a corporeal lineup which took place after he was arrested, charged and had obtained counsel for the bank robbery, but before any formal charges had been filed in the other crimes. We conclude that, under the circumstances presented, evidence of the uncharged offenses obtained at a lineup conducted without notice to and in the absence of his attorney, was obtained in violation of defendant's right to counsel.

At the time of the robbery of the Pittsfield branch of Crocker Bank on June 24, 1981, defendant was suspected in several other robberies in the Pittsfield area. Defendant was arrested for the bank robbery on July 3 and arraigned on July 6, at which time he requested the services of an attorney and was referred to the public defender. Following defendant's arrest, Pittsfield Police Detective White discussed with a deputy district attorney the possibility of a lineup while they were reviewing the bank robbery complaint. Detective White was uncomfortable about conducting the lineup in the absence of or without notice to defendant's attorney, but he went ahead with it because the deputy district attorney told him to proceed and complete it as soon as possible. Detective White believed a lineup would be much easier to conduct if defendant was in custody, as he then was.

The lineup was held July 9, 1981, before 17 witnesses, two of whom were witnesses to the bank robbery; the rest witnessed other robberies of which defendant was suspected. Defendant's attorney, who was not notified, was not present at the lineup, although defendant complained to the authorities that he wanted his attorney present.

On the basis of testimony from witnesses at the lineup, the district attorney filed an amended complaint charging defendant with four additional robberies.

Defendant contends the lineup was constitutionally defective under the *WadelGilbert* rule

and in violation of his right to counsel and, therefore, that the trial court committed reversible error in allowing the jury to consider identification testimony stemming therefrom. In *United States v. Wade, 1967,* the Supreme Court held that a post-indictment lineup is a critical stage of the criminal prosecution and that such a lineup without the presence of defense counsel denies the accused his Sixth Amendment right to counsel. The companion case, *Gilbert v. California, 1967,* held that testimony at trial to the effect that witnesses identified the accused at a post-indictment lineup held in violation of his right to counsel was inadmissible.

In the instant case, no adversarial proceedings had been initiated against defendant at the time of the lineup for any crimes other than the bank robbery. The People contend that as no right to counsel had yet attached as to other crimes, the lineup was therefore constitutionally valid as to those robberies, and testimony as to those robberies obtained from the lineup was admissible at trial.

The error in the instant case occurred as a result of the contact initiated with the defendant without the express consent of his attorney. An accused person who is represented by counsel cannot be interrogated without the express consent of his or her attorney. While a lineup is not an interrogation, it is nonetheless a critical stage of the prosecution.

In the instant case, the offenses were related; all counts charged robbery in violation of Penal Code section 211, they occurred in the same general area in the same county, were prosecuted by the same district attorney, charged in the same information and defended by the same public defender's office. Since it is the right to counsel which is in issue, and since that right is not limited to interrogation situations, logic dictates that the prohibition is equally applicable to lineups.

Rule 2-100 of the Rules of Professional Conduct provides, in pertinent part: "A member of the State Bar shall not communicate directly or indirectly about the subject of the representation with a party whom the member knows to be represented by another lawyer, unless the member has the consent of the other lawyer." In a formal ethics opinion, No. *1979-49,* the Standing Committee on Professional Responsibility and Conduct of the State Bar construed Rule 2-100 in a situation analogous to the one at hand. They concluded that a district attorney may not communicate with a criminal defendant he knows to be represented by counsel, even if that communication is limited to an inquiry into conduct for which the defendant has not been charged. Ethics opinions are advisory only and obviously not binding on the courts, but this one

exemplifies a practical application of the rule. Because the prosecutor's position is unique--he represents authority and the discretion to make decisions affecting the defendant's pending case--his contact carries an implication of leniency for cooperative defendants or harsher treatment for the uncooperative. Such contact intrudes upon the function of defense counsel and impedes his or her ability to negotiate a settlement and properly represent the client, whose interests the rule is designed to protect. Hence, when the prosecutor in the instant case directed his agents to conduct the lineup without insuring that defense counsel was properly notified, he obtained evidence violative of his professional ethical responsibilities by interfering with the defendant's right to the effective assistance of counsel.

A conviction based upon evidence obtained in deprivation of the right to counsel cannot be sustained unless the error is harmless beyond a reasonable doubt. As to the bank robbery (count 11, the witnesses to that offense who attended the lineup were not asked about it at trial and did not make identifications of defendant. Thus, no error appears. With regard to the non-bank robberies (counts IV and V), a hearing was held outside the jury's presence to determine whether the lineup procedure was unduly suggestive. However, the witnesses were never asked whether their in-court identifications of the defendant were based upon their observations at the lineup or upon independent sources, and the court made no finding thereon. They testified in front of the jury about their observations at the lineup, and identified defendant as being the perpetrator of the other crimes. Under these circumstances, the error was not harmless beyond a reasonable doubt. The judgment in count I is affirmed. The judgments in counts IV and V are reversed and remanded.

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OFFICE OF THE ATTORNEY GENERAL

State of Columbia

Opinion No. 91-1205

October 8, 1992

THE HONORABLE MARY T. GLANCEY, DISTRICT ATTORNEY, COUNTY OF ISLA GRANDE, has requested an opinion on the following question:

During the investigative phase of a criminal or civil law enforcement proceeding, does Rule 2-100 of the Columbia Rules of Professional Conduct prohibit a public prosecutor, or an investigator under the direction of a public prosecutor, from communicating with a person known to be represented by counsel, concerning the subject of the representation, without the consent of such counsel?

CONCLUSION

During the investigative phase of a criminal or civil law enforcement proceeding, Rule 2-100 of the Columbia Rules of Professional Conduct does not prohibit a public prosecutor, or an investigator under the direction of a public prosecutor, from communicating with a person known to be represented by counsel, concerning the subject of the representation, without the consent of such counsel

ANALYSIS

In order to protect the public and to promote respect for and confidence in the legal profession, the Board of Governors of the State Bar of Columbia, with the approval of the Supreme Court, is authorized to formulate and enforce rules of professional conduct.(Bus. & Prof. Code, § 6076; Rules Prof. Conduct, Rule 1-100.) The rules are binding upon all members of the State Bar, including public prosecutors, and apply in civil and criminal cases alike.

The focus of this opinion is upon Rule 2-100. The issue presented for resolution is whether a public prosecutor, or an investigator under the direction of a public prosecutor, is " authorized by law" within the meaning of subparagraph (C)(3), to communicate, during the course of a criminal or civil law enforcement investigation, with a person the prosecutor knows to be represented by another lawyer in the matter, without the consent of the other lawyer. We conclude that the prosecutor would be so authorized by law.

A State Bar ethics opinion construed the rule as applying to a district attorney who knew that the defendant was represented by counsel even when no formal action had been filed. Specifically, in People v. Sharp, 1983, the court relied on the opinion to conclude, "a district attorney may not communicate with a criminal defendant he knows to be represented by counsel, even if that communication is limited to an inquiry into conduct for which the defendant has not been charged."

However, we believe that Rule 2-100, including its subparagraph(C)(3), requires a different analysis.

Public prosecutors are frequently involved in the conduct of investigations, including the creation of investigative plans, the supervision of investigative personnel, the execution of search warrants, as well as the interview of witnesses. The investigation of criminal and criminal-related conduct constitutes an inherent aspect of prosecution which is clearly authorized. In *Hicks v. Board of Supervisors, 1977, Col.* Ct .App., for example, the court stated:

> "Investigation and the gathering of evidence relating to criminal offenses is a responsibility which is inseparable from the district attorney's prosecutorial function. That the district attorney is charged with the duty of investigating as well as prosecuting criminal activity has been recognized by an unbroken line of Columbia cases."

Consequently, a public prosecutor is authorized to investigate criminal matters and certain civil law enforcement cases. Clearly, an integral element of an investigation consists of interviewing witnesses. The pertinent issue, therefore, as previously set forth in the "discussion" attendant to Rule 2-100, is whether the communications in question are "limited by the relevant decisional law."

In connection with the Sixth Amendment right to counsel, an accused may not be interrogated without counsel when a criminal charge has been filed and the accused has retained counsel. *(Massiah-Moulton v. United States, U.S.S.C.,* 1964) However, the right attaches only when adversarial judicial proceedings have been initiated, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. The right to counsel does not attach before the government's role shifts from investigation to accusation.

The foregoing is not intended to comprise a comprehensive summary of the law respecting the right to counsel. It is, instead, sufficient to note that criminal and civil

investigations by public prosecutors are both authorized and limited by law. However, they are not limited by either the Fifth or Sixth Amendment prior to the initiation of the accusatory stage. In our view, then, investigatory interrogations are "communications otherwise authorized by law" within the meaning of subparagraph (C) (3) of Rule 2-100.

In our view, Rule 2-100 does not apply to a custodial interrogation during the investigatory stage of the proceeding. In the absence of constitutional limitations, as previously discussed, a prosecutor is authorized by law to employ all legitimate means to investigate crime. Interrogation of suspects is a legitimate method of investigation. Such interrogations are "communications otherwise authorized by law" as provided in subparagraph (C)(3), which makes no distinction respecting custody, and are therefore expressly exempt from Rule 2-100's general prohibition.

ANSWER 1 TO PERFORMANCE TEST A

To: Kelly Trepuka
From: Applicant
Re: People v. Marshall Lloyd and Diego Miguel;
propriety of continuing criminal investigation w/party represented by counsel

ISSUE: MAY THE OFFICE OF THE DISTRICT ATTORNEY INTERROGATE AND USE IN AN ONGOING UNDERCOVER INVESTIGATION AN INDIVIDUAL WHO IS A CHARGED DEFENDANT IN THE UNDERLYING CASE?

BRIEF ANSWER: N0. A PERSON WHO HAS BEEN CHARGED HAS A RIGHT TO COUNSEL WHICH CANNOT BE WAIVED UNDER THESE CIRCUMSTANCES. THUS, ANY CONTACT WILL BE A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT AND MAY SUBJECT THE VIOLATING MEMBER TO DISCIPLINE.

Introduction
This case presents the above-addressed main issue in a variety of ways. Understandably, the DDA seeks to be given the authority to pursue and expand the ongoing investigation. In support of this, she has advanced several theories which she hopes will allow her to continue. This memo will address each of the theories she has specifically advanced, as well as ones which appear to be implied by her line of argument. It will also discuss the propriety of both actions she has already taken or been a party to, and measures which she has proposed.

A. Is the Office of the District Attorney exempt from the prohibition of Rule 2-100, barring attorneys from contacting or communicating with an adverse party who is represented by counsel?

Discussion: Rule 2-100 prohibits a member from communicating directly or indirectly with a represented party, unless the lawyer representing that other party has consented to such contact. There are exceptions, however, for communications with "public officers", parties seeking advice or representation from an independent lawyer, or communications otherwise authorized by law.

Public officer exception: DDA Dole's memo raised a possibility that she and SI Friedman might be exempt from Rule 2-100 as public officers. Although the exact point has not been addressed in any of the opinions in the file, I believe that no good argument can be made for Dole's interpretation of the Rule. On the other hand, I believe that the Rule clearly prohibits the type of conduct which the DDA wants to pursue.

The discussion following Rule 2-100 explains that contact is forbidden unless allowed by statutory scheme or case law. Most of the statutory schemes mentioned are of a different scope than DDA Dole is proposing here. They address such topics as labor and work conditions, not ongoing criminal investigations of a defendant and his codefendants. Although mentioned, the ability of prosecutors to conduct criminal investigations is clearly subjected to the limitations imposed by case law. It is at this point that DDA Dole's analysis fails.

First and foremost, this activity is generally forbidden by Massiah-Moulton v. U.-El, which is referenced in U. S. v. Loges (U.S. Dist. Ct., 19911. The facts of Massiah were quite similar

to the instant case: the government used a cooperative codefendant to obtain incriminating statements from another codefendant who was represented by counsel. In overturning the resulting conviction, the Supreme Court held that the defendant's Sixth Amendment Right to Counsel had been violated.

Here, Lloyd and Miguel have already been arraigned, so the right to counsel has attached. As Lopes makes clear, however, Massiah held that incriminating statements pertaining to other crimes may be admissible. This is a narrow exception, which if pushed might find supportable any information developed regarding Miguel's plans to kill Eddie. However, it seems that because the bulk of the information which Dole and Friedman have been developing concerns the various theft charges, all information would be barred by the exclusionary rule. This would include the substantial admissions which Miguel made in the taped conversations with Lloyd.

This same result would pertain under People v. Sharp, (1983), and Triple A Machine Shop v. Columbia (1989) [referenced in Lopes. In both of these cases, the courts of Columbia construed the statute at issue to bar communications by prosecutors in criminal cases. In Sharp, adversarial proceedings had not yet been instituted against the defendant, but the violation of the right to counsel still applied and resulted in a reversal and remand of the case. I do not see how that same result could be avoided in the instant case.

Other exception to Rule 2-100

Rule 2-100 (C) also contains exceptions for a party seeking advice or representation from an independent lawyer of the party's choice, and for communications "otherwise authorized by law." Neither of these exceptions apply to permit Dole to continue her contact with Lloyd.

The "independent lawyer" exception doesn't apply for obvious reasons: it is intended to provide a represented party with a means of obtaining alternative counsel. As the discussion makes clear by example, however, that precludes speaking with opposition counsel. Thus, this section will not allow continued contact.

Furthermore, the "communications authorized by law" does not apply. Although the 1992 Opinion of the Columbia Attorney General made a strong argument for contact during the course of an ongoing investigation, there are several major problems with application of that opinion to the instant case.

First and foremost, the opinion is only advisory. Second, it is easily distinguished on its facts: it applies to the "investigative phase" of a proceeding. The opinion correctly notes that the right to counsel attaches only when a criminal charge has been filed and adversarial proceedings have been initiated. The language of the opinion is also significant in its implicit recognition of the difference between the interrogation of suspects and defendants. The opinion confines itself to a discussion of the investigatory stage of a proceeding, whereas in the instant case there are defendants whose interests are represented by counsel.

B. Is Rule 2-100 preempted by 28 CFR , § 77.12?

By its terms, 28 CFR 77 does not apply to this case -- it is limited to cases which are being handled by the Federal Department of Justice attorneys. See, §77.1, 12 (Purpose and Authority); also see, §77.12 (Relationship to state and local regulation).

On the other hand, the A.G.'s order does provide some guidelines which reinforce my conclusion

that DDA Dole's conduct in this case is not ethically acceptable. Section 77.3 clearly defines a "represented person", and it is plain from the text that Lloyd falls into the category thus established. Additionally, it states that contact with represented persons for the purpose of negotiating plea agreements is not permitted. A review of the transcripts will show that this has been the major tool which Dole has used on Lloyd to persuade him to cooperate. See, § §77.1 and 77.8.

Although paragraphs (e) and (f) of §77.6 would apparently permit contact if this investigation and the proceedings were being handled by the feds, there does not appear to be any federal component of the action at this time. I have noted that all of the crimes which the defendants have been charged with are violations of the Columbia Penal Code.

C. Lloyd's Sixth Amendment Rights to Counsel cannot be waived

Dole's memo indicates that she has placed great emphasis on the voluntary nature of Lloyd's initial contact. Furthermore, the transcripts indicate a significant emphasis on this aspect, including the obtaining of a written waiver of counsel.

Unfortunately for this office, this was addressed in the Lopes case. In interpreting Rule 2-100, Judge Patel explicitly noted the discussion which follows the Rule. On substantially the same type of fact pattern, the opinion pointedly called into focus the purpose of the Rule: "[A]s the ethical prohibition applies to attorneys and is designed in part to protect their effectiveness, a represented party may not waive it. The rule against communication with represented parties is fundamentally concerned with the duties of attorneys, not with the rights of parties. Ethical obligations are personal and may not be waived." [emphasis original].

The right concerned is one arising under the U.S. Constitution. If DDA Dole's suggested course of conduct is followed and a conviction is obtained, it would certainly go up on appeal to the state courts, with a habeas proceeding in federal court if the appeal was unsuccessful. I do not believe that our office would prevail in an appeal, and I am even more convinced that we would lose on habeas.

ISSUE: MAY AN INVESTIGATOR WHO IS ASSOCIATED WITH THE OFFICE OF AN ATTORNEY ENGAGE IN CONDUCT THAT THE ATTORNEY IS PROHIBITED FROM TAKING?

BRIEF ANSWER: N0. AN INVESTIGATOR WHO IS WORKING FOR AN ATTORNEY IS THE ATTORNEY'S AGENT, AND IS BOUND BY THE SAME RULES OF ETHICS AS THE ATTORNEY.

DDA Dole has asked that SI Friedman be permitted to continue the investigation which they have been jointly working on. Although I do not have direct authority in the file supplied, I know that case law and other Rules of Professional Conduct create a vicarious liability type of situation for an attorney. Simply put, Dole and this office will be responsible for any actions taken by Friedman which violate the ethics standards.

ISSUE: DOES THE OFFICE NEED THE CONSENT OF THE ATTORNEY FOR THE CORPORATIONS BEFORE UNDERCOVER INVESTIGATORS CAN PROCEED WITH THEIR INVESTIGATIONS?

BRIEF ANSWER: IT DEPENDS. AN UNCHARGED SUSPECT MAY BE INVESTIGATED WITHOUT ADVISING HIM, BUT A CHARGED AND REPRESENTED SUSPECT MAY NOT.

Although an uncharged suspect may be investigated, those parties who are defendants cannot be surreptitiously interrogated as was done in Massiah. This portion of Dole's plan is as improper as to the other defendants as it is to Miguel.

ANALYSIS OF ACTIONS ALREADY TAKEN BY DOLE AND/OR FRIEDMAN, AND ACTIONS PROPOSED.

Dole and Friedman appear to have violated both Rule 2-100 and other rules of conduct. Much, if not all, of the information which they have obtained will not be usable in court. Furthermore, as explained above, the actions which Dole proposes to allow Friedman to engage in will also result in evidence which will not be admissible.

Of greater concern here, however, is the ethical problem. With the possible exception of information which has been developed regarding the possible murder of Eddie, none of the actions taken by Dole appear to have been within the bounds of ethics.

As a member of the bar, and as the supervisor of this office, you are responsible for the actions which your subordinates take with your knowledge. I believe that under the present circumstances, you will have an obligation to make a report of the information which you are aware of to the State Bar. This will have to include the conversations between Lloyd and Dole, Lloyd and Friedman, and Lloyd and Miguel. I believe that the threats Friedman made -to arrange for a shared cell in the state prison by Lloyd and Miguel -- as well as the clear implications of this office's being willing to "deal" will be especially damaging.

At the same time, it is possible that we can control the damage and possibly salvage something from this situation. I believe that it is imperative to first put a complete stop to this operation. After that, it will be necessary and appropriate to consider whether any of the information obtained can be used. As I have indicated, I do not believe that the information relating to the present theft charges can be used. At the same time, the information developed regarding Miguel's plan to silence a witness -- conspiracy to obstruct justice and conspiracy to commit murder -- might be worthy of a second look. If we end up having to dismiss the auto theft charges as the price for obtaining convictions on these other charges, it will probably be well worth it.

Please let me know if I can be of any further assistance on this matter.

Respectfully submitted,

Bar Candidate

ANSWER 2 TO PERFORMANCE TEST A

MEMORANDUM

TO: Kelly Trepuka, Supervisor, Special Prosecutions
From: Applicant
Re: People v. Marshall Lloyd and Diego Miguel

As you have requested, I have reviewed and analyzed the continuing investigation regarding Marshall Lloyd and Diego Miguel to determine the ethical issues raised by the past and proposed investigatory actions, namely the continued communication with Marshall Lloyd, as well as the other contacts.

I. Background

A. Communication with Rel2resented Parties:

Rule 2-100 of the Columbia Rules of Professional Conduct states that a lawyer representing a client shall not communicate directly about the subject of that representation with someone whom the lawyer knows is represented by an attorney in that matter without the attorney's consent. Under Rule 2-100 (C) there are three enumerated exceptions to this limitation:

(1) where the lawyer is communicating with a public officer, board, committee or body;

(2) where the lawyer is approached by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) where the communication is otherwise authorized by law.

B. As Applied , to Prosecutors

In both People v. Sharp and U.S. v. Lopes the courts found that attorneys working on behalf of the government, whether federal or Columbia, were bound by the ethical duties enumerated in Rule 2-100. As the court stated in U.S. v. Lopes, "the rule against communication with represented parties is fundamentally concerned with the duties of attorneys ...Ethical obligations are personal and may not be waived." (p.10) Further, both courts found where such contact was in violation of the defendant's 6th Amendment rights, and any evidence retrieved during these communications was inadmissible.

The court also disregarded the U.S. Attorney General's interpretation that government attorneys involved in criminal investigations are "authorized by law" to make contact with represented individuals by virtue of federal statutes which empower the Attorney General to investigate and prosecute violations. The court stated that "authorized by law" under the Rule "requires that a statutory scheme expressly permit contact between an attorney and a represented party." Such express instructions are evidenced by the Final Rule adopted by the Department of Justice on August 4, 1994. No such express rules control in Columbia.

C. Federal Rule as Applied to Columbia Prosecutors

Ms. Dole asks whether the regulations of the U.S. Justice Department supersede and control the actions of the state prosecutors. While the opinion clearly indicates the regulations are meant to supersede previous ethical rules, it also clearly states such application is to be conducted by federal government attorneys. It is unlikely we could assert our ethical duties as state prosecutors under Columbia Rules if superseded by Federal Rule.

D. "Public Officer" under C111

Ms. Dole also asks whether the communications between herself and Marshall Lloyd will be exempt under Rule 2-100 C(1). That exemption deals with the communications between an attorney and a public officer, not communications with an attorney who is a public officer.

E. State Attorney General's Opinion

In 1992, the Attorney General of Columbia issued, in direct conflict with an ethics opinion, that statutory Rule 2-100 even applies when a DA approaches a party about conduct for which the defendant is not yet charged, an opinion that investigatory interrogations are an integral element of prosecution which falls within the meaning of "authorized by law" and thus exempts communications between public prosecutors and a represented party in the absence of that party's counsel so long as no such interrogatories take place during the investigatory stage of the proceeding.

F. Duty of Public Prosecutors and Constitutional Rights

As public prosecutors, we must follow policy as put forth by our superiors, but when such policy is a violation of ethics, we must refrain from so acting. The AG has interpreted the inherent powers of the prosecutor broadly, just as U. S. AG Thornburgh did, and it is unclear if such an interpretation would be upheld in court. Thus one must consider that as attorneys we have an ethical duty to abide by the Rules of Ethics, and as prosecutors we have further duties to ensure that the constitutional rights of the defendants are maintained.

With this background in mind, let us turn to the investigation procedures thus employed and proposed:

II. Specific Actions

A. Lloyd's Initial Contact

Lloyd's initial contact with SI Friedman was initiated by Lloyd, and he clearly indicated he did not want his attorney involved in the matter. The information gathered during this conversation can be used in the further investigation of the matter.

B. Lloyd's meeting with Ms. Dole and SI Friedman

1. Waiver

Ms. Dole knew Lloyd has an attorney regarding the auto rackets. Although she received a waiver from Lloyd as to having his attorney present, such waiver is of little value. As stated above, the ethical duties imposed on attorneys are so imposed to control the conduct of the attorneys, not to protect the rights of the clients. Ethical duties are personal to the attorneys and may not be waived. Thus, unless Ms. Dole can effectively assert that Lloyd had decided not to have representation concerning the additional thefts, she should not have discussed the matter with him. Further, although acting in good faith, she has essentially discussed a plea bargain with him regarding his prior charges, which, as in the case of U.S. v. Lol2es was found to violate the ethics code.

2. Conversation with Diego

Information including the taped conversation with Diego Miguel is similarly inappropriately gathered in violation of his 6th Amendment rights. Miguel has an attorney, and Lloyd, at the request of Friedman, asked questions which would likely elicit responses concerning their "crimes." Pursuant to the holding in Massiah-Moulton, such action is a violation of Miguel's 6th Amendment right to counsel. Thus, the action is also a violation of ethics by Ms. Dole to take part in the investigation.

C. Subsequent Conversation between Lloyd and Friedman

Friedman's subsequent conversation with Lloyd was in the absence of Ms. Dole and thus not in violation of the ethics code, but to the extent he is, at Ms. Dole's request, seeking information concerning the advice of Taylor to Miguel, there is a gray area of concern. Much of the conversation will involve confidential attorney-client information which would also extend to Lloyd as a co-client with Miguel. To the extent Taylor's advice is not criminal, (i.e., does not appear to suggest criminal activity) the communication of such confidential information would be a violation of Miguel's 5th Amendment attorney-client privilege and should be strongly considered. However, to the extent the office is seeking to determine if attorney Taylor is part of the crime ring, such information would be helpful towards probable cause.

D. Undercover Agent/Attorney

The undercover agent/attorney is in contact with potential defendants of pending criminal charges. Although the office knows of the attorney representing them, it is unclear if the investigation is at an end. However, the attorney clearly does not want any communication between the office and his clients without him present. As such, even though there are no official charges, thus raising the question of 6th Amendment rights, an attorney may not communicate with these parties.

However, the undercover agent may be able to assert that he was not, at any time, acting in the capacity as an attorney. This would have a clearer chance of fitting within the boundaries of conduct in an investigatory manner.

E. Supervisor Informant

The informant, who continues to provide information drawn from the potential defendants is likely fine. As a non-attorney, the ethical considerations of Rule 2-100 are not involved. Further, as these defendants are not yet charged, they do not have 5th or 6th

Amendment considerations concerning their communications.

III. Further Action

Any further communication between Lloyd and the office should not occur in Ms. Dole's or another attorney's presence to safeguard against the information being later thrown out. If Lloyd will not discontinue Taylor's representation, there is little that may be done by means of approaching him.

The meeting between Lloyd and Miguel should be monitored by Friedman only, but bear in mind, Massiah-Moulton may control and throw out any of the evidence retrieved. It may be better to proceed against Miguel based on Lloyd's testimony as that may be convincing enough evidence and not have such dire results as a dismissal of the charges, or suppression of the evidence. As attorneys we must carefully weigh our ethical duties, our duties as prosecutors to the state and our duties as prosecutors to the defendants.

THURSDAY AFTERNOON
FEBRUARY 29, 1996

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

Micas v. Eisen

Micas v. Eisen

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Columbia is located within the fictional United States Court of Appeals for the Fifteenth Circuit.

3. You will have two sets of materials with which to work: a File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

4. The Library contains the legal authorities needed to complete the tasks. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit citations.

5. Your answer must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. In grading the answers to this question, the following, approximate weights will be assigned to each part:

Memorandum: 70%
Jury Instructions: 30%

Finley, Frost and Van Cleave
Attorneys at Law
7814 Harrowgate
Clinton, Columbia

MEMORANDUM February 29, 1996

T0: Applicant

FROM: Sara Finley

RE: Micas v. Eisen & Associates

We are in trial in this slip-and-fall case. Our client, Eisen & Associates is being sued by plaintiff, Stephanie Micas. Micas completed her case-in-chief this morning. Because her medical experts were credible, she has established her prima facie case on damages. However, I believe that there is real doubt about the sufficiency of the evidence on our client's liability. First thing tomorrow I will make a motion to dismiss based on her failure to present sufficient evidence. I have attached the relevant portions of her transcript.

We must assume that the motion to dismiss will be denied and therefore prepare our proposed jury instructions. The judge has said that she will give the standard general instructions, such as duty of judge and jury, weighing conflicting evidence, credibility, burden of proof, damages, etc. We then reached agreement on all other instructions (e.g., contributory negligence, assumption of the risk, constructive notice) except defendant's duty and plaintiff's burden to show a breach of that duty. The judge directed each side to submit proposed instructions on the defendant's duty and breach of duty, and stated that she will either pick one of those, or if dissatisfied with the plaintiff's and defendant's versions, prepare her own. I have attached the plaintiff's proposed instructions on duty and breach of duty.

I need you to do two things:

1. Please write the persuasive memorandum of points and authorities in support of our motion to dismiss based on insufficiency of the evidence.

2. Please draft the jury instructions that go to the duty of Eisen & Associates and plaintiff's burden to show a breach of that duty.

Finley, Frost and Van Cleave
Attorneys at Law
7814 Harrowgate
Clinton, Columbia

MEMORANDUM January 22, 1994

TO: Attorneys
FROM: Lynda Frost
RE: Persuasive Briefs and Memoranda

To clarify the expectations of the office and to provide guidance to all attorneys, all persuasive briefs or memoranda such as memoranda of points and authorities to be filed in state court shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our position.

Following the Statement of Facts, the Argument should begin. This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. Each argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, Improper: defendant had sufficient minimum contacts to establish personal jurisdiction. Proper: A radio station located in the State of Franklin that broadcasts into the state of Columbia, receives revenue from advertisers located in the state of Columbia, and holds its annual meeting in the state of Columbia, has sufficient minimum contacts to allow Columbia courts to assert personal jurisdiction.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Associates should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

Finley, Frost and Van Cleave
Attorneys at Law
7814 Harrowgate
Clinton, Columbia

MEMORANDUM January 22, 1994

TO: Attorneys
FROM: Lynda Frost
RE: Jury Instructions

This firm follows the policy of insuring that jury instructions are viewed as an integral part of our persuasive presentation. As such, the instructions must be carefully crafted to present the law to the jury in a clear and understandable manner consistent with the theory of our case. To accomplish this, jury instructions must conform to the following standards:

The instructions must be understandable by the average layperson. Remember the instructions will be read by the judge to the jury. You, for example, may have had months to learn torts; the jury may have minutes.

The instructions must be clear.

The instructions must be particularized to the specific case being litigated. The jury will have sat through the entire trial having heard about specific people, corporations, transactions and occurrences. The instructions, therefore, will be more easily understood and will provide much more guidance if they refer to the specific people, corporations, transactions, or occurrences involved in the law suit.

Since the instructions must be adopted and delivered by the judge as a neutral third party, they cannot be argumentative, or misstate or distort the controlling legal authority. The objective is to fairly state the law while emphasizing factors that support a favorable result for our client.

The jury instructions must fairly state the law, yet be consistent with the legal and factual theory of your case. For example, the fact that we may represent a defendant in a personal injury action does not mean that we do not submit a jury instruction that addresses

the plaintiff's obligation to establish a prima facie case. We will draft our version and then argue to the court why it is more appropriate than plaintiff's version.

While form instructions are often helpful, they can do no more than provide a general guide. Form instructions, given their generality, will never have sufficient particularity to the facts of our specific case.

The following instructions are examples that meet the above standards. They are taken from several of our cases involving negligent infliction of emotional distress.

- The plaintiff, Nancy Crater, is entitled to recover damages for serious emotional distress if a cause of such serious emotional distress was the negligent conduct of the defendant, Stanley Manufacturing, Inc. Serious emotional distress is an emotional reaction which is not an abnormal response to the circumstances. It is found where a reasonable person would be unable to cope with the mental distress caused by the circumstances. The elements of a cause of action for negligent infliction of serious emotional distress are:

    1. The defendant engaged in negligent conduct;
    2. The plaintiff suffered serious emotional distress;
    3. Such negligent conduct of the defendant was a cause of the serious emotional distress.

- If you find that Harry Jones, as an adjacent landowner to the Chesterfield airport, suffered emotional distress as a result of the noise from aircraft landing, taking off and in-flight, you may award damages to the plaintiff.

- If you find that the employee of the defendant, Speedy Process Service, made an invalid service of the writ on Mary Williams and thereafter knowingly filed a false affidavit of valid service, you may award damages to the plaintiff for negligent infliction of emotional distress.

IN THE CIRCUIT COURT OF THE CITY OF CLINTON
CIVIL DIVISION

Stephanie Micas	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 1945N
	:	
Eisen & Associates, Incorporated	:	
	:	
Defendant	:	

COMPLAINT

1. Plaintiff is a resident of the City of Clinton, Columbia.
2. Defendant, Eisen & Associates, Incorporated, is a corporation that regularly conducts business in the City of Clinton, Columbia and owns a building known as Eisen Center West.
3. On May 3, 1993, Plaintiff was an invitee of the defendant at defendant's building, Eisen Center West.
4. On May 3, 1993, Plaintiff slipped and fell on water that had accumulated in the lobby of the defendant's building, Eisen Center West.
5. Plaintiff's fall was a direct and proximate result of the defendant's failure to maintain its premises in a reasonable and safe condition and to warn the plaintiff of the unsafe condition.
6. The defendant knew, or should have known, that an accumulation of water on the floor would cause an invitee to suffer a fall similar to that which the plaintiff suffered.
7. As a direct and proximate result of the defendant's negligence, the plaintiff suffered severe injuries to her back, legs, right shoulder, and multiple contusions; has incurred substantial medical bills, lost wages and earning capacity; has experienced severe pain and suffering, mental anguish, and inconvenience; and has suffered permanent injury.

Wherefore, plaintiff demands judgment against defendant for the sum of $1,250,000, interest, and costs.

Signed: Sharon Ten

Sharon Ten
Attorney for Plaintiff
207 Williams Dr.
Richland, Columbia

IN THE CIRCUIT COURT OF THE CITY OF CLINTON
CIVIL DIVISION
CHASE COURTS BUILDING

Stephanie Micas	:	
	:	
Plaintiff,	:	
v.	:	
	:	
	:	
Eisen & Associates, Incorporated	:	C.A. No. 1945N
	:	
	:	
Defendant	:	

ANSWER

1. Defendant has insufficient information to form a belief as to the truth of the allegation contained in paragraph 1.

2. Defendant admits that Eisen & Associates, Incorporated, is a corporation that regularly conducts business in the City of Clinton, Columbia. It further admits that it owns a building known as Eisen Center West.

3. Defendant admits the allegation contained in paragraph 3 of plaintiff's complaint.

4. Defendant admits that plaintiff fell, but denies the allegation in paragraph 4 of plaintiff's complaint that the slip and fall was on water that had accumulated in the lobby of the defendant's building, Eisen Center West.

5. Defendant denies each and every allegation contained in paragraphs 5, 6, and 7 of plaintiff's complaint.

Affirmative Defenses

6. If the floor was wet, as plaintiff alleges, that condition was open and obvious, and plaintiff was guilty of contributory negligence, that caused any of the alleged injuries or damages.

7. If the floor was wet, as plaintiff alleges, that condition was open and obvious, and plaintiff assumed the risk of falling.

EISEN & ASSOCIATES, INC.

By Counsel

Signed: *Sara Finley*

Sara Finley
Finley, Frost and
Van Cleave
Attorneys at Law
7814 Harrowgate
Clinton, Columbia

IN THE CIRCUIT COURT OF THE CITY OF CLINTON
CIVIL DIVISION
CHASE COURTS BUILDING

Stephanie Micas Plaintiff, v. Eisen & Associates, Incorporated Defendant	: : : : : : : : : : :	C.A. No. 1945N

Joint Stipulation

The parties stipulate as follows:

1. The records of the National Weather Service reflected "precipitation at the airport," which consisted of 15/100th of an inch of rain between 6:00 p.m. and 10:00 p.m. on May 2, 1993. No rain fell between 10:00 p.m. on May 2 and 5:00 or 6:00 a.m. on May 3, and only a "trace of fog and drizzle," amounting to less than 1 /100th of an inch, fell between 5:00 or 6:00 a.m. and 9:00 a.m. on May 3.

2. The airport is located 12 miles east of the Eisen Center.

EISEN & ASSOCIATES, INC.
By Counsel

Signed: Sara Finley

Sara Finley
Finley, Frost and Van Cleave
Attorneys at Law

STEPHANIE MICAS
By Counsel

Signed: Sharon Ten

Sharon Ten
Attorney for Plaintiff

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IN THE CIRCUIT COURT OF THE CITY OF CLINTON
CIVIL DIVISION
CHASE COURTS BUILDING

Stephanie Micas :
:
Plaintiff, :
:
v. :
:
Eisen & Associates, : C.A. No. 1945N
Incorporated :
:
Defendant :

TRANSCRIPT OF TRIAL PROCEEDINGS, FEBRUARY 29, 1996

STEPHANIE MICAS was sworn and testified as follows:

BY MS. TEN:

Q: Would you state your full name please?

A: Stephanie Micas.

Q: Do you work?

***

Q: Were you employed May 3, 1993?

A: Yes.

Q: Where?

A: Columbia State Bank & Trust.

Q: Where is that located?

A: In the Eisen Center West, here in Clinton.

Q: Did you go to work on May 3, 1993?

A: Yes.

Q: Do you remember what day of the week that was?

A: Yes. It was a Monday.

Q: How did you arrive at work that morning?

A: I came by bus. I always went to work by bus.

Q: What time did you arrive that day?

A: Well normally we were due at work from 8:30-5:00, and my schedule was a little different because I get to work at 7:30 in the morning and work straight through. But this morning, because the weather was bad, I came about 15 minutes later.

Q: What were the weather conditions when you arrived at work?

A: It had been raining.
Q: For how long?
A: It had been raining all weekend.
Q: Was it raining when you arrived at work?
A: It was a generalized rain when I arrived at the building.
Q: Did you have an umbrella?
A: Yes.
Q: What happened when you arrived at the building?
A: I shook the umbrella out.
Q: Where did you do this?
A: Outside the building.
Q: Then what happened?
A: I went through the revolving doors and I stepped on the mat that they had there. The mat was soaked with water, and beyond the mat there was water too.
Q: What did you do then?
A: I took two or three steps off the mat, and that is when I slipped and fell in the puddles of water that had gathered there.
Q: Did you see the water?
A: I saw the water after I fell. If I had seen it before, I naturally would have avoided it. Common sense would tell you to avoid danger.
Q: Would you describe the floor area in terms of texture?
A: It's a marble floor. Always very shiny, and naturally, when it rains outside, people track the water in on their feet and it's very dangerous, like a glassed area.
BY MS. FINLEY: Objection.
BY MS. TEN: Permissible lay opinion, your honor. She said dangerous, not defective.
BY THE COURT: Overruled.
Q: Now, would you describe to the jury how you fell?
A: When I walked off the mat two or three steps, I slipped in the puddles of water.
Q: Did you fall forward or back?
A: I fell forward and tried to brace myself, and then I went backward. It knocked my shoes off my feet.
Q: How did you land?

A: I landed on my side, on my shoulder, backward.
Q: Did anyone assist you?
A: Yes. The general manager of Eisen, Mr. Thompson, and Selma Owens, the security guard, they were very kind, and they ran over to help me.
Q: Did they say anything to you?
A: Mr. Thompson asked if I was hurt.
Q: What did you say?
A: I told him I didn't think so.
Q: Then what happened?
A: I got up and brushed my clothes off, they were dirty, and they were wet from falling on the floor, and I looked down at the floor, and there were these puddles of water.
Q: How long were you on the floor?
A: Not very long. They came right over to help me.
Q: Were there other people around?
A: Yes. People in front and behind me.
Q: Did you know any of these people?
A: No. There are so many tenants in that building, so many different people going to work.
Q: Did you have anything with you when you fell?
A: I had my purse, and I had my manila envelope with material that I work with at the bank.
Q: Did you see any caution or warning cones or signs or anything at all?
A: No.
Q: Did you receive any verbal warnings from anyone standing around at all?
A: No.
Q: When you got off the bus, how far did you have to walk to get to the building?
A: About one-half block.
Q: Did you go past any dirt or mud?
A: No. It was pavement all the way. There's no way there could have been mud or dirt on my shoes.
Q: Prior to this event, did you wear any special medical devices or appliances?
A: No.

Q: Do you wear anything now?

A: Yes. Since the accident I have to wear sneakers to brace myself when I walk, because of the sharp pain in my spine. It jostles my spine when I walk. I have had to wear sneakers since the accident occurred.

Q: When did you actually start to have the pain?

A: Well the next day, that's when the severe pain started and I went to the family doctor.

***

CROSS-EXAMINATION

BY MS. FINLEY:

Q: The entrance to the building has an awning, doesn't it?

A: It's been three years, and I'm not sure.

Q: You don't work there any more, do you?

A: No.

Q: In fact you were fired from your job with Columbia State Bank and Trust, right?

A: Yes.

Q: In fact, you were fired because you had lied on your resume when you first applied for the job, isn't that right?

A: There was a misunderstanding.

Q: You lied.

A: Well, you could say that.

Q: Let me show you a picture, Joint Exhibit 27, that's the building, correct?

A: It looks like it.

Q: In fact, that's the side of the building you entered that day, right?

A: It looks like it.

Q: There is an awning across the entire building, right?

A: In that picture.

Q: You worked in that building for 2 years, didn't you?

A: About.

Q: You said on direct that you saw the mat was soaked?

A: Yes.

Q: You knew the mat was soaked as soon as you entered the building?

A: Yes.

Q: And you walked across the mat, and the water, and then off that mat for two or three steps. Is that correct?

A: Yes.

Q: Now when you landed, you didn't land on the mat, did you?

A: No.

Q: There was plenty of room behind you so that when you fell you were well away from the mat, correct?

A: Two or three steps, yes.

***

Q: Did you report this accident to your supervisor at the bank?

A: My supervisor was out, so I reported it to the security guard supervisor.

Q: The bank's security director?

A: Yes.

***

Q: Were you wearing a rain coat?

A: Yes.

Q: In fact, you were wearing it when you fell?

A: Yes.

***

JERRY THOMPSON was sworn and testified as follows:

BY MS. TEN:

Q: Would you please state your name?

A: Jerry Thompson.

****

Q: Are you employed?

A: Yes, at Eisen & Associates, Eisen Center.

Q: How long have you been employed by Eisen and Associates?

A: Seven years.

Q: What are your job duties?

A: I am general manager of the center. I run the operations department.

Q: How many years experience do you have in managing properties?

A: 16 or 17.

***

Q: Would you describe the Eisen Center for the members of the jury?

A: It's really more than just one building. There are actually three office towers connected by a retail atrium with associated parking and infrastructure.

***

Q: Are you aware of an incident involving the plaintiff that occurred May 3, 1993.

A: Yes.

Q: Where did this incident occur?

A: The Ninth Street Entrance to the West Tower.

Q: Let me show you Joint Exhibit 27. Do you recognize it?

A: That's a picture of the West Tower.

Q: Which side?

A: Ninth Street.

Q: How many tenant companies are there in this particular building?

A: Approximately 16.

Q: Do you have an estimate of how many people enter this building on a daily basis?

A: Approximately 1200.

Q: When do most of them enter and leave the building?

A: The vast majority of people work in the building, and most of them work during the day. So, the vast majority enter the building in the morning and leave in the afternoon.

Q: Now do most of the people entering the West Tower enter through the Ninth Street side?

A: No. Most enter from Cary Street.

Q: Why is that?

A: Well the Cary Street entrance is the atrium that connects all three towers. Also, I believe it is closer to most of the parking lots in the area.

Q: Can you estimate how many people actually use the Ninth Street entrance?

A: No more than 10 percent.

Q: On May 3, 1993, were you employed in your present position?

A: Yes.

Q: Who is charged with supervising common areas in the Center?

A: We don't have a specific person. Different people have different tasks, but no one who supervises the entranceways, for example.

Q: Are the common areas within your areas of responsibility?
A: Yes.
Q: Would there be someone else in a supervisory position that would be responsible for common areas?
A: Yes, Anne Paul, Assistant General Manager.
Q: Was she employed in that position on May 3, 1993?
A: Yes.
Q: What type of floor is there in the building as you enter?
A: Marble.
Q: Is it shiny?
A: Yes.
Q: If it is wet, is it slippery?
A: Yes.
Q: What type of maintenance do you use on the floor?
A: We have a process that is called crystallization, where the surface of the marble is crystallized. Our maintenance is steel wool and buffing, then mopping.
Q: Do you use a high speed buffer?
A: Yes.
Q: Does the marble get shiny and slick?
A: I would say shiny, not slick.
Q: This is the same surface that was on the floor on May 3, 1993?
A: Been there since the building was put up 7 years ago.
Q: How often did the floor get buffed?
A: Nightly, Monday through Friday.
Q: So the last floor maintenance before the accident was the previous Friday night?
A: That would have been the routine, yes.
Q: What safety precautions are taken in the event of wet weather?
A: We put out rain mats in front of our entrances.
Q: Are these mats used at any other times?
A: Only rain or snow.
Q: Are there any other precautions?
A: When we have a lot of rain for a long period of time, we put out safety cones and caution signs.

Q: Now, who makes the decision whether to place cones and signs?
A: That is the decision of the security officer at that location.
Q: Who would that have been on the morning of May 3?
A: That particular day it was Selma Owens.
Q: Are there standards by which that decision should be made?
A: It's a judgment call.
Q: Then there are no guidelines?
A: No, there are guidelines. The cones and signs are to be placed during heavy rain.
Q: Are there any other precautions that you take?
A: If it's needed we will have our janitorial service standing by ready to mop the floors.

***

Q: Were you working on May 3, 1993?
A: Yes.
Q: What time did you arrive at work?
A: Approximately 7:30 a.m.
Q: Is that your normal arrival time?
A: Yes.
Q: What were the weather conditions?
A: Wet and drying. It had been raining, but had stopped and begun to dry out.
Q: Were there mats at the entranceways when you arrived?
A. Yes.
Q: When you arrived, what did you do first?
A: I went to the security desk.
Q: Did you see Ms. Micas enter?
A: Yes.
Q: What specifically did you see?
A: I saw her come in through the revolving door. I saw her step out of one of her shoes, take one or two steps forward and then fall forward.
Q: What did you do?
A: I ran to assist her.
Q: Did you say anything before you went to assist?
BY MS. FINLEY: Objection.

BY THE COURT: Overruled.

BY MS. TEN: Go ahead.

A: As a matter of fact, I mentioned to Selma Owens that she had stepped out of her shoe.

Q: Then what happened?

A: I ran over and helped her get up.

Q: Did you say anything to Ms. Micas?

A: I asked her if she was hurt. She said she didn't think so.

Q: Did you ever contact the janitorial service to come mop the floor?

BY FINLEY: Objection. May we approach, your honor?

BY THE COURT: Yes.

(The following was had outside of the hearing of the jury.)

BY FINLEY: Your honor, I believe we are getting into an area that is precluded as a subsequent remedial measure.

BY THE COURT: What do you expect the answer to be?

BY MS. TEN: The witness will testify that he contacted the service to have them come look at the floor. But, I believe it is implicit in the testimony of the agent of defendant that defendant is asserting that everything reasonably possible was done. This testimony will, therefore, go to show feasibility of precautionary measures.

BY THE COURT: Step back. Objection sustained.

BY MS. TEN: No further questions.

BY MS. FINLEY: I have no questions at this time. We will be calling Mr. Thompson in our case, but won't need him any further today.

BY THE COURT: Very good. You may step down.

(Witness excused.)

TIMOTHY MIDDLETON was sworn and testified as follows:

BY MS. TEN:

Q: Would you please state your full name?

A: Timothy Middleton.

***

Q: Are you employed?

A: Yes.

Q: Where?

A: Eisen and Associates.
Q: What is your job title?
A: I am a day porter.
Q: What are your duties?
A: General cleaning around the lobby.
Q: Is part of your job to make sure that the floors are not wet?
A: Yes.
Q: Did you have this position on May 3, 1993?
A: Yes.
Q: Were you working that day?
A: Yes.
Q: In your job as day porter on May 3 of that year, did you have any responsibility for the entrance lobby of the Ninth Street entrance to the West Tower?
A: Yes.
Q: What was that responsibility?
A: Like I said, general cleaning.
Q: And to keep the floors dry?
A: Yes.
Q: What time did you arrive at work on May 3, 1993?
A: 7:00 a.m.
Q: And what did you do when you arrived at work?
A: I just went on with my general duties.
Q: What was the first thing you did?
A: Mop the lobby.
Q: That's in the West Tower?
A: Yes. That's the only tower I work in. It has two general entrances. The Ninth Street side where there is the lobby and the Cary Street side with the Atrium. I don't have any responsibility for the Atrium.
Q: How long were you in the lobby working?
A: Until about 7:30.
Q: Where did you go after that?
A: To other parts of the building.
Q: Did you ever return to the lobby that day?
A: I don't specifically remember going back.

Q: Were you ever requested or to return to the lobby?

BY MS. FINLEY: Objection. We've already been through this, your-honor.

BY MS. TEN: I'll rephrase.

Q: Between 7:30 and 8 were you in the lobby?

A: No.

Q: Between 7:30 and 8 were you ever requested to mop the lobby floor?

A: No.

Q: Are you familiar with the Eisen policy of putting down mats when it is raining?

A: No.

***

CROSS-EXAMINATION

BY MS. FINLEY:

Q: First thing you do at work is mop the lobby, is that right?

A: Yes.

Q: You were in the lobby at 7:00 a.m. on May 3, 1993, right?

A: Yes.

Q: You were there from 7:00 a.m. to at least 7:30 a.m., right?

A: Yes.

Q: And you didn't see any water on the floor when you came in and mopped it, did you?

A: No.

Q: If there had been any water, you would have cleaned it up, wouldn't you?

A: If I'd seen it, I would have mopped it up.

Q: Isn't it true that the only time you have water problems in the lobby is when you've got a big, driving, heavy rain?

A: Yes.

Q: Are you aware of how the water gets on the floor during heavy rains?

A: People bring it in on umbrellas, raincoats, a bit on their feet.

***

(Witness excused.)

By the Court: The Joint Stipulation on weather conditions will now be read to the Jury.

BY MS. TEN: Plaintiff rests, your honor.

BY THE COURT: Given the lateness of the hour, we will recess until morning. I assume we will be entertaining a motion in the morning?

BY MS. FINLEY: Yes, your honor.

***

IN THE CIRCUIT COURT OF THE CITY OF CLINTON
CIVIL DIVISION
CHASE COURTS BUILDING

Stephanie Micas	:	
	:	
Plaintiff,	:	
v.	:	
	:	
	:	
Eisen & Associates, Incorporated	:	C.A. No. 1945N
	:	
	:	
Defendant	:	

PLAINTIFF'S JURY INSTRUCTIONS ON DEFENDANT'S DUTY OF CARE AND BREACH OF DUTY

1. Eisen and Associates, as the owner of Eisen Center West, is under a duty to exercise ordinary care in the maintenance of such premises in order to avoid exposing persons to an unreasonable risk of harm. Such duty exists whether the risk of harm is caused by the natural condition of the premises or an artificial condition created on the premises.
2. Eisen and Associates, as the owner of the premises, is liable for the injuries suffered by the plaintiff, Stephanie Micas, if her injuries resulted from a dangerous or defective condition at the Eisen Center West. Knowledge of a defective or dangerous condition created by Eisen and Associates, or its employees acting within the scope of their employment, is imputed to the owner as a matter of law from the time of its creation.
3. On the issue of negligence, one of the questions for you to decide in this case is whether the injury involved occurred under the following conditions:

   First, that it is the kind of injury which ordinarily does not occur in the absence of someone's negligence;

Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant; and

Third, that the accident was not due to any voluntary action or contribution on the part of the plaintiff which was the responsible cause of her injury.

If you find all these conditions to exist, you must find that a cause of the occurrence was some negligence on part of the defendant.

Signed: Sharon Ten

Sharon Ten
Attorney for Plaintiff
207 Williams Dr.
Richland, Columbia

THURSDAY AFTERNOON
FEBRUARY 29, 1996

California Bar Examination

Performance Test B
LIBRARY

Micas v. Eisen

LIBRARY

Shiflett v. M. Timberlake Incorporated

Supreme Court of Columbia (1964)

Doris L. Shiflett (plaintiff) filed a complaint against M. Timberlake, Incorporated (defendant) the operator of a drugstore to recover damages for injuries sustained when she slipped and fell to the floor while visiting the drugstore as a customer. She alleged that her fall and injuries were caused by the negligence of the operators of the store in failing to exercise ordinary care to keep the premises in a reasonably safe condition and in failing to warn her of the dangerous condition thereof.

The jury returned a verdict of $10,000 in favor of the plaintiff. On motion of the defendant the lower court set aside the verdict and entered a final judgment for the defendant.

The standard the trial court applies to set aside a jury verdict is the same as when defendant files a motion to dismiss based on plaintiff's failure to present a prima facie case. The question presented on appeal therefore is whether the evidence, considered in the light most favorable to the plaintiff, was sufficient to support the finding of the jury that the defendant was guilty of negligence which was a proximate cause of the plaintiff's injuries and that she was free of contributory negligence.

Stated in the light of the verdict favorable to the plaintiff, the facts are these: On Saturday, December 23, 1961, shortly before 3:00 P.M., Mrs. Shiflett entered the defendant's drugstore intending to buy a sandwich and a cup of coffee. It was then snowing and had been since early morning and there was slush on the sidewalks. She was wearing spike high-heel shoes, but no overshoes, and was carrying several packages.

Mrs. Shiflett entered the main entrance to the drugstore, on the outside of which was a rubber mat. She walked down the aisle in a normal manner toward the luncheonette in the rear and was looking at a bright display on the middle counter. She said that after she had taken about six or seven steps her feet "suddenly shot out from under" her and she fell, landing on her left hip, and was "knocked unconscious." In a short while she was taken to a hospital. En route there she regained consciousness and noticed that her clothes in the back from the waist down were quite wet.

The plaintiff testified that prior to her fall she "could see nothing on the floor" which caused her to fall. However, Mrs. Ruth V. Lewis, who at the time was employed as a fountain girl in the drugstore, testified that she was near the front of the store and saw Mrs. Shiflett enter and later fall. Mrs. Lewis stated that there was water on the floor at the place where Mrs. Shiflett fell.

John R. Ponton, one of the owners of the drugstore, testified that when the weather is inclement and it is noted that dampness is being tracked into the store and water is accumulating on the floor, it is mopped. Moreover, he said, a 5 by 3 cocoa mat is put inside the entrance for the purpose of removing water from the feet of the customers. Ponton further testified that about an hour before Mrs. Shiflett's visit he observed that water was being tracked in by the customers and that the floor was "getting damp." He said that while three porters were available for mopping the floor when necessary, there was no accumulation of water at that lime and it was not mopped, but that he brought the cocoa mat from the basement of the store and placed it just inside the door and that it was there when Mrs. Shiflett entered the drugstore.

Mrs. Lewis, the witness for the plaintiff, testified positively that this cocoa mat was not there at the time Mrs. Shiflett came into the drugstore. In her testimony, Mrs. Shiflett said nothing about this mat, but recalled the rubber mat outside the door.

The floor at the scene of the accident has a standard Armstrong plastic covering customarily used in commercial and mercantile buildings. There was no defect in the floor, but there is evidence on behalf of the plaintiff that such covering becomes slippery when wet and that the proprietors of the drugstore were aware of this.

Judy Shiflett, a daughter of the plaintiff, testified that a day or two after the accident she called the drugstore to inquire as to what had become of the packages which her mother was carrying at the time of her fall. She said that she talked to Samuel T. McAtee, one of the owners, and that during the conversation McAtee expressed his regret at the accident, saying that "he was sorry and he should have had the floor mopped up or a mat down because the combination of the floor and water made a very slippery substance."

While McAtee admitted having had a conversation with Miss Shiflett about the packages, he denied having told her that the floor was slippery or that it should have been mopped or that the mat was not in the proper place.

Without objection, the lower court instructed the jury that the plaintiff occupied the status of an invitee in the store; that the defendant owed her the duty to exercise ordinary care to have its premises in a reasonably safe condition at the places she had a right to be; and that it owed her the duty to give an effective and timely warning of the existence of a hazardous condition, if any, on the premises which was or should have been known to the defendant and was unknown to the plaintiff.

Likewise without objection, the jury were further told that if they found from the evidence that the floor of the drugstore was slippery and dangerous or unsafe at the time of the plaintiff's visit, that the defendant knew, or in the exercise of reasonable care should have known, that fact and failed to correct such situation within a reasonable time thereafter, and that the condition of the floor proximately caused the plaintiff's injuries, they should find a verdict in her favor unless they found from a preponderance of the evidence that she was contributorily negligent. Such instructions are within the principles long recognized by us.

The gist of the plaintiff's case is that the evidence warranted the jury in finding that the floor of the drugstore had become wet and slippery because of water tracked in by customers prior to the plaintiff's visit there; that the defendant knew or should have known of this condition; and that the defendant was negligent in failing (1) to place a mat inside the door to absorb the water from the feet of the customers, (2) to mop the floor where the water was accumulated, and (3) to warn her that the floor was slippery. Moreover, the plaintiff contends that it was for the jury to say whether, at the time of the accident, she was guilty of contributory negligence. We agree with this position of the plaintiff.

One of the main contentions of the defendant is that, according to what it says is the "majority view," a storekeeper is not liable to an invitee who falls on a floor made wet and slippery by moisture tracked in by customers during inclement weather. There are cases which support this view for the stated reasons that a storekeeper is not responsible for weather conditions, that it is practically impossible to prevent this situation, and that the situation is as well known to the invitee as to the storekeeper.

However, many courts take the opposite, and what we think is the better, view that a storekeeper is not exempt from liability to an invitee who falls on a floor made wet and slippery by moisture tracked in by customers during inclement weather. In our view, the liability of a storekeeper in this type of case does not turn on whether the water on or dampness of the floor was tracked in by other customers. It turns on whether, under the circumstances, the storekeeper has exercised ordinary care to prevent a hazardous condition on his premises, or, if there was such condition, whether he exercised ordinary care to correct it after he knew, or by the exercise of ordinary care should have known, of its existence. As we said in Great Atlantic & Pacific Tea Co. v. Rosenberger, "where the danger consisted of a foreign substance on the floor, although caused by the act of another customer, the defendant was required to remove the substance without unreasonable delay after it knew, or should have known, of its presence."

In the present case there is evidence which supports the finding of the jury that the floor had become wet and slippery because of the accumulation of water thereon before Mrs. Shiflett arrived there. As has been said, Ponton, one of the owners, was aware of this. Moreover, this witness set the standard of care required in such a situation when he testified that in inclement weather it was the practice of the store to mop the floor when water accumulated on it and to place a mat at the entrance. Whether he should have taken these precautions on this occasion, and whether he did so, were questions for the jury.

It is true that the testimony of Mrs. Lewis, that there was an accumulation of water on the floor, that the cocoa mat had not been placed near the entrance, and the manner in which the plaintiff fell, was contradicted by several witnesses. There was also evidence that this witness, a former employee of the defendant, was biased and prejudiced against it because of the unsatisfactory outcome of a workman's compensation claim which she had against the defendant. These circumstances do not render the testimony of this witness incredible or unworthy of belief, as the defendant argues. On the contrary, her credibility and the weight to be given her testimony were peculiarly within the province of the jury.

The lower court instructed the jury that the defendant owed the plaintiff the duty to give an effective and timely warning "concerning the existence of a hazardous condition, if any, on the premises which were, or should have been, known to the defendant ... and ... were

unknown to the plaintiff." Admittedly, no such notice or warning was given and the jury had the right to find that this, too, constituted negligence on the part of the defendant.

Whether the plaintiff was contributorily negligent under the related circumstances was likewise a question for the jury. She testified that she entered the store and walked toward the rear in a normal manner. Her attention was attracted to a bright display on a nearby counter, and, as she said, "with the normal scope of my vision I could see nothing on the floor."

Being an invitee in the drugstore the plaintiff had the right to assume that the premises were reasonably safe, and in the absence of knowledge or warning of danger, was not required to be on the lookout for it. Whether the situation was so open, obvious and patent to the plaintiff that in the exercise of ordinary care she should have observed it, was likewise for the jury.

The jury having resolved in favor of the plaintiff these issues under proper instructions, the lower court should have entered judgment on the verdict. Accordingly, the judgment is reversed, the verdict reinstated, and final judgment in favor of the plaintiff entered thereon. Reversed and final judgment.

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Fobbs v. Webb Building Limited Partnership

Supreme Court of Columbia (1986)

Maude Fobbs sued Webb Building Limited Partnership (Webb Building) to recover damages for injuries resulting from a fall. A jury returned a verdict in favor of Fobbs for $ 17,500. The trial court set aside the verdict, ruling that the evidence was insufficient as a matter of law to establish negligence, and entered judgment in favor of Webb Building. This appeal ensued. The standard the trial court applies to set aside a jury verdict is the same as when defendant files a motion to dismiss based on plaintiff's failure to present a prima facie case. We must determine whether sufficient evidence exists to support a jury's finding that the defendant was negligent.

Webb Building, owner of an office building, leased office space to the Navy Department. Fobbs, a Navy Department employee, entered the building shortly before seven o'clock on the morning of the accident. Rain was falling when Fobbs entered the building and had been falling during the previous night.

After entering the building, Fobbs proceeded down a hallway toward a bank of elevators. The surface of the hallway floor had a standard terrazzo finish. When Fobbs arrived at the elevators, she pushed the elevator button, and then, as she "made one or two steps to go into the elevator ... [her] foot went from under [her] and [she] just went down." Fobbs testified that she "stepped on something which was very slippery," but she did not know what it was.

Shortly after Fobbs fell, Edna Mahan, who had entered the building earlier that morning, arrived on the scene in response to a telephone call requesting her assistance. Mahan saw Fobbs lying in front of the elevator and observed water on the floor "lying around" Fobbs. Glancing down, Mahan told Fobbs, "I see what you did. You fell in the water ...." Within a few minutes, David Stebbins, a paramedic, arrived to render assistance to Fobbs. He also saw Fobbs lying on the floor by the elevator. As he knelt beside Fobbs, Stebbins saw water on the floor near Fobbs' feet.

Mahan also testified that when she arrived at the building between 6:00 and 7:00 a.m., rain was falling and she noticed "an awful lot of water" between the two sets of double doors at the front entrance of the building. As Mahan walked toward the elevators, she saw water in

front of the elevators and near the security guard's desk. She described it as "a glistening of water ... like people dragging their feet or something in front of that elevator."

As owner, Webb Building was responsible for floor maintenance. One of its employees inspected the elevator area daily and had last inspected it the evening preceding Fobbs' fall. Another employee was responsible for removing foreign matter from the floor, but "he had not assumed his duty hours at the time of the accident." Navy Department employees had access to the building 24 hours a day and had entered the building throughout the rainy night.

The parties stipulated that Fobbs occupied the status of Webb Building's invitee. An owner of premises owes a duty to its invitee (1) to use ordinary care to have the premises in a reasonably safe condition for the invitee's use consistent with the invitation, and (2) to use ordinary care to warn its invitee of any unsafe condition that was known, or by the use of ordinary care should have been known, to the owner; except that the owner has no duty to warn its invitee of an unsafe condition which is open and obvious to a reasonable person exercising ordinary care for his own safety.

A trial court may set aside a jury verdict and enter final judgment only when the verdict is plainly wrong or without credible evidence to support it. A jury weighs the testimony of witnesses and resolves conflicting evidence. If reasonable minds can differ in the conclusions of fact to be drawn from the evidence, a jury is the proper tribunal to draw the conclusion. A trial judge cannot substitute his conclusion for that of a jury merely because he would have voted differently had he been on the jury.

When the sufficiency of a plaintiff's evidence is challenged by a motion to dismiss or a motion for a directed verdict, the trial court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the plaintiff and resolve any reasonable doubt as to its sufficiency in plaintiff's favor. The trial court should grant the motion only when it conclusively appears that the plaintiff has proved no cause of action against the defendant, or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it. Yet, in drawing inferences the court can draw only such inferences as a jury might have fairly drawn from the evidence. The court is not bound to draw inferences that are strained, forced, or contrary to reason. When

fair minded people cannot be of two opinions as to the inferences then the matter is for the court and not for the jury. The standard applied on appeal is the same.

Obviously, facts need not be proved by direct evidence, but instead, may be established by circumstantial evidence. Indeed, a jury may draw all reasonable inferences and deductions from the evidence adduced. However, if a jury bases its conclusions and inferences on speculation and conjecture, a plaintiff's case fails.

Webb Building contends that Fobbs failed to produce "direct" evidence of what caused her to fall or any evidence whatsoever that "the condition of the floor was unsafe, dangerous or hazardous and that this condition proximately caused her injuries." Webb Building likens Fobbs' case to Williamsburg Shop v. Weeks (Columbia 1959). In Williamsburg Shop, we set aside a verdict and judgment for the plaintiff because the plaintiff failed to produce any evidence, direct or circumstantial, that the stairway or landing where she fell was wet or slippery. Thus, we said the jury based its verdict on speculation and conjecture. We conclude, however, that the present case is more similar to Shiflett v. Timberlake (Columbia 1964), where the plaintiff proved with direct evidence that the store's proprietor knew that water had accumulated on the floor and that the floor became slippery when wet.

In the present case, evidence showed that rain had been falling for a protracted period of time before the accident, causing "an awful lot of water" to accumulate between the two sets of double doors at the entrance of the building. Persons had entered the building throughout the night. Water, tracked by persons entering the building, had accumulated on the terrazzo floor in the area where Fobbs slipped and fell. The employee responsible for removing foreign matter from the floor had not reported for work at the time Fobbs fell.

Although Fobbs could not say what caused her fall, she did testify that she "stepped on something which was very slippery." Other witnesses testified that both before and after she fell, they observed water on the terrazzo floor in the vicinity of her fall.

From this direct and circumstantial evidence, the jury reasonably could have found that the accumulation of water on the terrazzo floor in the vicinity of the elevators constituted a hazardous condition that caused Fobbs to fall. The jury also reasonably could have concluded that Webb Building knew or, in the exercise of ordinary care, should have known of the

condition and failed to use ordinary care to correct the hazard or to warn Fobbs of the danger.[1] Thus, we cannot say that the jury's verdict was plainly wrong or without any credible evidence to support it. Consequently, we conclude that the trial court erred in setting aside the jury verdict. Accordingly, we will reverse the court's judgment, reinstate the verdict, and enter final judgment for Fobbs.

Reversed and final judgment.

[1] In oral argument, Webb Building conceded it had constructive knowledge that water was tracked into the building. Webb Building contended, however, that it had no knowledge of the existence of a hazardous condition. But, as previously noted, whether a hazardous condition existed was an issue to be decided by the jury from all the facts and circumstances of the case.

Memco Stores, Inc. v. Yeatman

Supreme Court of Columbia (1986)

This is a defendant's appeal from a judgment awarding the plaintiff $1 87,000 in damages in a slip-and-fall case. The trial court denied the defendant's motion to set aside the verdict and entered final judgment for the plaintiff. The defendant assigns error to the jury instructions and to the admission of evidence of a witness's extra-judicial statements. The defendant maintains that, absent such evidence, the plaintiff failed to prove primary negligence.

Sometime between 2:00 p.m. and 4:00 p.m. on June 9, 1979, plaintiff Barbara W. Yeatman and her young daughters, Lisa and Wanda, entered a store operated by defendant Memco Stores, Inc., and walked down the main aisle toward the pharmacy. The store was well-lighted, and the floor was light in color. Lisa and her mother were walking abreast behind Wanda who was pushing a shopping cart. As they passed the pharmacy, the plaintiff waved to a friend, her foot slipped, and she fell to the floor.

The plaintiff testified that Memco's pharmacist, Charles E. Clark, Jr., "came over and helped get me up and went in the pharmacy and got a rag and cleaned up the floor and cleaned my shoe off." "It was a green slimy substance," she said, and "the pharmacist ... said it was a plant leaf."

Following her fall, the plaintiff attempted to continue shopping but became nauseated and was unable to make any purchases. She reported the accident at the Memco credit office. As she and her daughters were leaving the store, Wanda called her mother's attention to several plant leaves on the floor "in the same general area" where the accident had occurred.

The plaintiff called the pharmacist as a witness and asked him if he recalled Mrs. Yeatman's accident. Clark replied, "I really don't remember." The plaintiff then asked if he remembered talking to Mrs. Yeatman's former lawyer in October following the June accident. Clark said that he remembered "talking with him and telling him that I helped her up" and that he had cleaned a substance from her shoe and the floor. The defendant objected on the ground that counsel was "cross-examining his own witness". The trial court ruled that Clark was an "adverse" witness and overruled the defendant's objection. The plaintiff then asked the witness if he had told the lawyer that he had seen a leaf on the floor and on Mrs. Yeatman's

shoe, that it was a peperomia plant leaf, and that the plants were on display at the point the plaintiff fell. Clark answered in the affirmative, and the defendant renewed its objection.

Following argument by counsel out of the jury's presence, the trial court instructed the plaintiff's attorney "from this moment on [to] ask the witness what his testimony is". When the jury returned, the plaintiff's attorney resumed the interrogation and the witness responded as follows:

Q. Do you recall whether there was a display to the right of where she fell?
A. There is always a display there.
Q. Do you think it was office furniture, desks, etc.?
A. That's what I think it was, yes.
Q. On this display of furniture, was there a peperomia plant?
A. What I remember is, books, plants and lamps.
Q. Do you recall a peperomia plant being there?
A. Yes.

Debbie Worsham, a Memco employee, testified that she worked in the warehouse and in the "patio" where the store sold its plants, and that "when [she] worked in the plants, the plants were watered every day." Asked "whether the plants were ever displayed in the store out of the patio", she said that they were, but she had no knowledge whether there was such a display on the date of Mrs. Yeatman's accident. A "DAILY SWEEPING RECORD" introduced as an exhibit during Worsham's testimony showed that, on the day of the accident, the floors in the store had been swept at 10:00 a.m. and at noon but not again until 5:00 p.m.

Dr. Robert D. Decker, a botany professor, qualified as an expert witness for the plaintiff. Dr. Decker described a peperomia as a "succulent plant". Asked what would cause such a plant to shed its leaves, he replied: "Age of the plant, certain kinds of stress, such as temperature changes, overheating, underheating, and light. Sometimes things such as changing locations will cause a plant to lose its leaves and go into a stress period, and cause loss of leaves." He added that "a peperomia plant ... if it is watered once a week, it rots" and the leaves remain moist after they shed "for quite a while."

On appeal, Memco contends that the evidence of Clark's extra-judicial statements was inadmissible, and that, absent such evidence, the plaintiff failed to prove negligence. We need not decide whether the evidentiary ruling was correct, for we are of opinion that Clark's in-court testimony, considered in context with all the evidence adduced at trial, was sufficient to support the instruction and to raise a jury question of primary negligence. We review the evidence in the light most favorable to the plaintiff.

A "slimy" leaf on the floor where Memco's business customers were invited to walk was the cause of the plaintiff's fall, the injuries she suffered, and the damages she sustained. Memco suggested in argument at bar that this leaf may have dropped from the shoe of some customer who had visited the "patio" where plants were sold. In light of the evidence that this was one of several leaves found on the floor, all in the same general area, the jury could have rejected this theory as an unlikely coincidence.

Entirely apart from Clark's extra-judicial statements, his substantive testimony at trial supports a more logical explanation. He testified expressly that Memco had located a furniture display beside the aisle where Mrs. Yeatman fell and that books, lamps, and a peperomia plant were placed on the furniture. Worsham confirmed the fact that plants were sometimes taken from the "patio" and used for such purposes. Memco points out that Clark also testified that the plant was "set further back on the furniture, so if a leaf fell, it would have stayed on the furniture." But the jury was not required to accept what was essentially an opinion of the witness.

The plaintiff produced evidence to show that several factors could cause succulent plants to shed their leaves. Dr. Decker testified that changes in location and the consequent changes in temperature and light are harmful to such plants and that when a peperomia is watered too often, the plant rots and the leaves it loses retain their moisture after they fall "for quite a while." Such evidence fully supports the conclusion that the leaf which caused Mrs. Yeatman to slip in the aisle had dropped there from a peperomia plant which Memco had placed too near the edge of furniture located beside the aisle. The question remains whether the evidence was sufficient to show that Memco violated the duty it owed to its customers.

As we understand the defendant's view of the case law, a storekeeper is liable for injuries sustainedby a customer as a result of a hazardous object on the floor only when the customer proves

that the storekeeper had notice of its presence in sufficient time to remove it and failed to do so. Memco misinterprets the case law.

The defendant owed the plaintiff the duty to exercise ordinary care toward her as its invitee upon its premises. In carrying out this duty it was required to have the premises in a reasonably safe condition for her visit; to remove, within a reasonable time, foreign objects from its floors which it may have placed there or which it knew, or should have known, that other persons had placed there; to warn the plaintiff of the unsafe condition if it was unknown to her, but was, or should have been, known to the defendant.

Hence, Mrs. Yeatman was not required to prove that the defendant had actual notice of a hazardous object on its floor in time to remove it. It was sufficient to prove constructive notice. If an ordinarily prudent person, given the facts and circumstances Memco knew or should have known, could have foreseen the risk of danger resulting from such circumstances, Memco had a duty to exercise reasonable care to avoid the genesis of the danger.

Although we do not approve the form of instruction used, set out in the margin,[1] we believe it was a fair exposition of the standard of care defined in Pulley. Applying the instruction to the facts in evidence, the jury could have found that Memco, a merchandiser of peperomia plants, should have known that a change in location, temperature, and light would cause such

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[1] The tests of a charge are its accuracy in law, its adaptability to the issues, and its sufficiency as a guide to the jury in reaching a correct verdict. Though very poorly drafted, the charge did meet these minimal requirements:

> If a store displays plants in such a way that the leaves may be caused to fall to the floor, and if such conduct creates a foreseeable risk of harm to customers, then the store is doing business which requires the storekeeper to use reasonable care to avoid the falling of leaves on the floor and if such leaves did fall then to discover and remove the leaves from the floor. And if you believe from the greater weight of the evidence that the defendant so displayed its plants and that such conduct created a foreseeable risk of harm to the plaintiff, then there was a duty upon the defendant to use reasonable care to avoid the falling of leaves from its plant to the floor and when such leaves fall to the floor to use reasonable care to remove the leaf or leaves from the floor. If you believe from the greater weight of the evidence that the defendant violated this duty, then it is guilty of negligence. If you further believe from such evidence that such negligence was a proximate cause of the injuries sustained by the plaintiff, she exercising reasonable care for her own safety on her own behalf, then you shall find your verdict for the plaintiff.

a succulent plant to shed moist leaves; that Memco positioned the plant on the furniture display in such a manner that the leaves could and did fall in the aisle; that Memco should have foreseen that this would create a risk of harm to customers using the aisle; that Memco violated its duty to have its premises in a reasonably safe condition; and, consequently, that Memco was guilty of negligence which was the proximate cause of the injuries Mrs. Yeatman suffered. We hold, therefore, that the evidence was sufficient to support the jury's verdict, and we will uphold the trial court's ruling denying Memco's motion to set it aside. Affirmed.

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Winn-Dixie Stores, Inc. v. Parker
Supreme Court of Columbia (1990)

In this slip-and-fall case, a jury awarded the plaintiff, Nancy Joyner Parker, a verdict for $1 35,OOOagainst the defendant, Winn-Dixie Stores, Inc. The trial court entered judgment on the verdict, and we granted this appeal limited to the question whether Parker established a prima facie case of negligence against Winn-Dixie.

Parker entered Winn-Dixie's store in the City of Suffolk about 5:15 p.m. on June 4, 1985, to make some purchases. After selecting several items in other parts of the store, she proceeded to the produce section, where she picked up an eggplant and placed it on a scale. Moving to her right approximately four steps to check the price of the eggplant, she slipped and fell to the floor. While waiting for the rescue squad to arrive, she saw a snap bean under her left foot. Referring to the bean, she said: "That was the damn thing I fell on--slipped on." She did not see the bean before she fell.

Parker called as an adverse witness Raymond B. Hall, an employee of Winn-Dixie on duty in the produce and frozen food sections at the time of Parker's accident. He testified that shortly before Parker fell, he swept the floor in his sections, using a dry mop approximately two and one-half to three feet wide. He mopped the produce aisle from the rear of the store to the front, circled through the frozen food section, and then mopped from the front to the rear of the store, again passing through the produce section. He saw nothing "on the floor like a green bean."

When he finished mopping, Hall took his mop to the produce storeroom, then returned to the store, and saw that Parker had fallen in the produce section. He observed a piece of snap bean near Parker's foot at the end of a smudge mark. Two minutes or less elapsed between the time Hall mopped past the spot where Parker fell and the time he returned to the main part of the store.

Snap beans were displayed loose in a sloping bin some distance from the spot where Parker fell. In response to a question from Parker's counsel, Hall stated that he and others working in the produce section were "concerned" about whether items displayed in a loose condition might "get on the floor" after handling by customers.

The rules applicable to slip-and-fall cases are well settled. In Colonial Stores v. Pulley, (1962), we said:

> The [store owner] owed the [customer] the duty to exercise ordinary care toward her as its invitee upon its premises. In carrying out this duty it was required to have the premises in a reasonably safe condition for her visit; to remove, within a reasonable time, foreign objects from its floors which it may have placed there or which it knew, or should have known, that other persons had placed there; to warn the [customer] of the unsafe condition if it was unknown to her, but was, or should have been, known to the [store owner].

Parker maintains that Memco Stores, Inc. v. Yeatman, (1986), controls the disposition of this case. In Yeatman, the plaintiff fell when she slipped on the leaf of a peperomia plant on display in the defendant's store. Several leaves from the plant were found on the floor in the area where the fall occurred. Expert evidence showed that a number of factors, including changes in location, can cause peperomia plants to shed their leaves. The defendant contended that it could be held liable only if it had actual notice of the leaf's presence on the floor in sufficient time to remove it. Affirming a verdict in favor of the plaintiff, we said:

> [The plaintiff] was not required to prove that the defendant had actual notice of a hazardous object on its floor in time to remove it. It was suffic.ient to prove constructive notice. If an ordinarily prudent person, given the facts and circumstances Memco knew or should have known, could have foreseen the risk of danger resulting from such circumstances, Memco had a duty to exercise reasonable care to avoid the genesis of the danger.

Here, Parker argues that Hall's testimony about the concern of store employees for loose items "shows constructive notice on the part of Winn-Dixie ... that various items of food, for whatever reason, end up on the floors of grocery stores." Citing Thomason v. Great Atlantic and Pacific Tea Company, (4th Cir. 1969), Parker maintains that it would be unreasonable to require an injured customer to establish "precisely how items of food [get] onto [a] store's floor."[1] In this case, Parker says, the fact remains that, "[f]or whatever reason," the bean "did end up on Winn-Dixie's floor," creating "a dangerous and hazardous condition" which

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[1] In Thomason, the Fourth Circuit held that a customer may maintain an action for damages in a slip-and-fall case "when the storekeeper is without actual or imputed knowledge of [the] menacing presence [of a foreign object]," if "it is reasonably foreseeable that a dangerous condition is created by, or may arise from, the means used to exhibit commodities for sale. " We do not adopt "the method-theory," embraced by the Thomason court.

Winn-Dixie knew or should have known about, thus placing upon Winn-Dixie the duty to remove the dangerous object.

Parker opines that it was a jury question whether Winn-Dixie breached its duty to remove the snap bean. She concludes that the question was correctly decided in her favor because the jury "could reasonably infer [Hall] was negligent in dry-mopping the floor, since it was obvious he missed the snap bean."

We think Yeatman is distinguishable on its facts, and we disagree with Parker's arguments. Nothing in the record even suggests that anyone connected with Winn-Dixie placed the bean on the floor, and it is not "obvious" from any evidence in the case that Hall missed the bean when he mopped through the produce section. Nor could the jury have inferred that Hall must have missed the bean simply because it was present on the floor when Parker fell.
To countenance such an inference would ignore the likelihood that the bean found its way to the spot where Parker fell as the result of some action taken by another customer after Hall finished mopping the produce section.

Because Parker failed to establish that Winn-Dixie placed the bean on the floor or that Hall missed it during his mopping, it became Parker's burden to prove that Winn-Dixie had either actual or constructive notice of the bean's presence and failed to remove it. With the substitution of the names of the parties and the identity of the offending foreign object, we can dispose of this aspect of the case by repeating what we said in Pulley on the question of actual or constructive notice:

> There is no evidence in this case that [Winn-Dixie] knew of the presence of the [bean] on the floor, nor is there any showing of the length of time it may have been there. It is just as logical to assume that it was placed on the floor an instant before [Parker] struck it as it is to infer that it had been there long enough that [Winn-Dixie] should, in the exercise of reasonable care, have known about it.

We hold that Parker failed to make out a prima facie case of negligence. The trial court erred, therefore, in submitting the case to the jury. The judgment appealed from is reversed, the jury verdict set aside, and final judgment entered here in favor of Winn-Dixie.

ANSWER 1 TO PERFORMANCE TEST B

I. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OF DEFENDANT EISEN & ASSOCIATES. INC.

Defendant Eisen & Associates, Inc. respectfully submits this memorandum of points and authorities in support of its motion to dismiss. Defendant requests that judgment be entered in its favor as a matter of law.

STATEMENT OF FACTS

The plaintiff in this case, Stephanie Micas, alleges that she was injured after falling in the lobby of defendant's building, Eisen Center West, on May 3, 1993. Ms. Micas was employed, at that time, by Columbia State Bank & Trust, a tenant of the Eisen Center West. Ms. Micas was subsequently fired by the bank for having lied on her resume when she first applied for the job. Ms. Micas seeks more than $1,250,000 from the jury in this case.

Plaintiff has now rested its case-in-chief. The evidence has shown the following. On the weekend preceding Monday, May 3, 1993, the floors of the lobbies of the Eisen Center West were cleaned and buffed. On the morning of May 3, Mr. Timothy Middleton was on duty as a porter, responsible for general cleaning of the lobby in the West Tower on the side of the Ninth Street entrance. Mr. Middleton was in the lobby from approximately 7:00 a.m. until 7:30 a.m. At 7:00 a.m., Mr. Middleton mopped the lobby floor. Between 7:00 and 7:30, Mr. Middleton did not see any water on the lobby floor.

Mr. Middleton also testified that the absence of water in the West Tower lobby was consistent with the fact that on May 3 there was not much of a rain storm. Indeed, the parties have stipulated that on the morning of May 3 there was only a "trace of fog and drizzle." Moreover, roughly 90% of the tenants and other visitors to the building use the Cary Street entrance, not the Ninth Street entrance, which further explains the dry condition of the lobby on the morning of May 3.

At approximately 7:45 a.m., Ms. Micas entered the Eisen Center West from the Ninth Street entrance through the revolving door. When she entered the building she was wearing a wet raincoat and carrying a wet umbrella, a purse and a manilla envelope. Ms. Micas came through the revolving door, stepped completely out of one of her shoes causing her to lose her balance and take one or two steps forward to try to brace herself, and finally fell forward.

After being offered assistance by building personnel, Ms. Micas picked herself up and brushed herself off, causing water to fall on the floor from her clothes and belongings. Ms. Micas told the building manager, Mr. Thompson, that she did not think she was hurt. Eisen & Associates did not hear from Ms. Micas again until this lawsuit was served in which Ms. Micas demands more than $1,250,000.

ARGUMENT

This case is ripe for dismissal because the plaintiff has offered no evidence that Eisen & Associates either created the allegedly dangerous condition (a puddle of water) or that Eisen & Associates had actual or constructive notice of the allegedly dangerous condition prior to the time plaintiff fell on the morning of May 3. Accordingly, defendant is entitled to judgment

as a matter of law.

STANDARD OF REVIEW

In order for plaintiff to avoid dismissal in this case the evidence, considered in the light most favorable to the plaintiff, must be sufficient to support the finding that the defendant was guilty of negligence which was a proximate cause of plaintiff's injuries and that she was free of contributory negligence. Shiflett v. M. Timberlake, Inc., at 1. In other words, the motion to dismiss should be granted when it conclusively appears that "plaintiff has proved no cause of action against defendant or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it." Webb Building L. P. at 7. In deciding this motion, the court should be mindful that reasonable inferences should be drawn from the evidence in the light most favorable to plaintiff, the "court is not bound to draw inferences that are strained, forced, or contrary to reason."

THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFF HAS OFFERED NO EVIDENCE THAT DEFENDANT EITHER CREATED THE ALLEGEDLY DANGEROUS CONDITION OR HAD NOTICE OF IT

Defendant's evidence in this case is that the plaintiff fell on her own and that no "puddle of water" was present in the lobby of its building on the morning of May 3. Plaintiff herself was clear in her testimony that she only saw the puddle of water after she fell: "If I had seen it before, I naturally would have avoided it." (Tr. at 12, lines 19-20). Consequently, plaintiff has offered no evidence that the allegedly dangerous condition existed prior to her arrival at the building.

This case is on all fours with the Columbia Supreme Court's decision in Winn-Dixie v. Parker. In Parker, defendant successfully appealed a verdict in plaintiff's favor when the injured plaintiff failed to prove that Winn-Dixie created the dangerous condition (a bean on the floor on which Parker slipped) or had actual or constructive notice of the condition and failed to repair it.' In so ruling, the court observed that plaintiff failed to show any involvement on the part of defendant in the bean becoming present on the floor. Likewise, the court refused to infer defendant's employee had missed the bean while mopping. Similarly, the court in, Parker found the plaintiff failed its burden to show defendant's actual or constructive notice of the condition. The facts here could not be more similar.

THERE IS NO EVIDENCE THAT DEFENDANT CREATED THE ALLEGED "PUDDLE OF WATER"

Plaintiff has offered no evidence that Eisen & Associates is somehow responsible for the "puddle" in which she claims to have slipped. Generalized evidence of wet conditions is, of course, insufficient. Unless evidence of water at the specific location where plaintiff fell is introduced, any jury verdict would be based on mere speculation and would have to be set aside. Williamsburg Shop cited in, Webb Building L.P. at 8.

'Defendant has admitted in its answer that the plaintiff here was an invitee. The Pulley decision, and its progeny, therefore, govern the applicable standard of care for defendant's duty.

In this respect, the Yeatman case is distinguishable. In that case, plaintiff offered expert testimony to show that the defendant actually created the dangerous condition by moving a plant to a different part of the store. Ms. Micas has offered no similar evidence here.

THERE IS NO EVIDENCE OF ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF DEFENDANT EISEN & ASSOCIATES

Under Parker, since plaintiff cannot show that Eisen & Associates created the dangerous condition, plaintiff must show Eisen's actual or constructive knowledge of the alleged "puddle" in order to avoid dismissal. Plaintiff has offered no such evidence.

Indeed, because the evidence shows that the floors were clean just moments before Ms. Micas entered the building, it is just as logical to assume that the puddle (if it ever was there before Ms. Micas fell) came to be placed on the floor an instant before Ms. Micas stepped in it, as it would be to infer that in the exercise of reasonable care Eisen & Associates should have somehow known about the alleged puddle of water. Compare Parker (citing Pulley) at p. 17.

Fobbs is clearly distinguishable because the defendant there conceded constructive knowledge (at 9). Defendant disputes vigorously any constructive knowledge here. Likewise, M. Timberlake. Inc., is inappropriate because defendant also admitted knowledge (there actual knowledge) of the wet conditions at their premises. (Timberlake at 2 and 4). Instead, Parker is dispositive, and defendant's motion to dismiss should be granted.

II. DEFENDANTS PROPOSED JURY INSTRUCTIONS ON DEFENDANT'S DUTY OF CARE AND PLAINTIFF'S BURDEN TO SHOW BREACH OF DEFENDANT'S DUTY

1. The plaintiff in this case, Stephanie Micas, was owed a duty of care by the defendant, Eisen & Associates, Inc., to exercise ordinary care toward her while she was on its premises, Eisen Center West.

2. Ms. Micas has alleged that the condition of the lobby of the Eisen Center West was made unsafe by the presence of a puddle of water. In carrying out its duty of care, Eisen & Associates was required to leave the premises in a reasonably safe condition for her arrival; to remove, within a reasonable time, water from its floors which it may have placed there or which Eisen & Associates knew, or should have known, that other persons had placed there; to warn Ms. Micas of the unsafe and wet condition if it was unknown to her, but was, or should have been known to Eisen & Associates.

3. Ms. Micas, as the plaintiff, bears the burden of proving by a preponderance of the evidence that Eisen & Associates breached its duty of care to her. She may show this if she can prove that Eisen & Associates actually knew there was a puddle of water at the exact location where she claims to have slipped before she slipped.

4. Alternatively, if she cannot prove actual notice, Ms. Micas must prove by a preponderance of the evidence that an ordinarily prudent person, given the facts and circumstances that Eisen & Associates knew or should have known, could have foreseen the risk that Ms. Micas would fall in the part of the West Tower lobby where she fell. If not, you should return a verdict for defendant Eisen & Associates.

5. If you find that Eisen & Associates breached its duty of care, you should consider next whether Eisen & Associates failure to warn Ms. Micas or failure to mop up the puddle was the proximate cause of her injuries, or whether they resulted, in whole or in part from some other cause. You must find such injuries were proximately caused by Eisen & Associates by a preponderance of the evidence or you should return a verdict for defendant.

ANSWER 2 TO PERFORMANCE TEST B

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR INSUFFICIENT EVIDENCE

Statement of Facts

Defendant Eisen & Associates, Inc. is the defendant in a suit by Stephanie Micas, plaintiff, seeking damages for defendant's alleged negligence. Plaintiff has established the following facts, which defendant does not dispute for purposes of this motion.

Defendant is the owner of Eisen Center, which includes Eisen Center West. Plaintiff was injured on Monday, May 3, 1993, immediately after entering the Ninth Street entrance to the tower. Defendant has admitted that plaintiff was an invitee.

At 7:00 a.m. that Monday morning, Timothy Middleton, a day porter for Eisen & Associates, arrived at work as scheduled and mopped the lobby, including the lobby in front of the Ninth Street entrance. Mr. Middleton did not see any water when he mopped, and was in the lobby until 7:30. It had rained over the weekend, but the parties have stipulated, and testimony agrees, that there was very little rain the afternoon before (Sunday), no rain over night, and only a light drizzle that Monday morning. Mr. Middleton testified that water becomes a problem only when there is heavy rain.

At 7:45 a.m., plaintiff arrived at Eisen Center West after walking one half block in her raincoat with her umbrella. She walked into the building, saw that a mat in front of the door was wet, and continued two or three steps. At that point she fell over. She was helped up, brushed herself off, and looked down and saw a puddle of water. Plaintiff later went to the doctor.

Mr. Jerry Thompson, General Manager of Eisen Center, testified that warning cones for wet floors are normally put out when there has been or is heavy rain; mats, however, are put out in any wet weather. The Ninth Street entrance is used by only 10% of the 1,200 people who work in the building. In addition, an awning runs across the building on the Ninth Street side.

Argument

A. This court should grant defendant's motion to dismiss if plaintiff has not produced evidence from which a jury could find each element of negligence - legal standard.

The standard for a motion to dismiss is that the motion should be granted if the evidence, when considered in a light favorable to the plaintiff, is sufficient to allow a jury reasonably to find negligence.

Fobbs v. Webb Building Limited Partnership (Col. S. Ct. 1986). The court should not, however, draw inferences that are strained, forced, or contrary to reason. Id. Defendant contends below that plaintiff has not produced sufficient evidence that defendant breached any duty to plaintiff.

B. When a building owner mops not less than thirty minutes before an alleged fall, and other circumstances don't indicate a need to inspect. a jury cannot find that the building owner had constructive notice of water at a little-used entrance.

The most recent Columbia Supreme Court disposition of a case such as this is Winn-Dixie Stores, Inc. v. Parker (Col. S. Ct. 1990). That case reaffirmed the general notion that a property owner has a duty of reasonable care toward an invitee which includes a duty to inspect and take corrective measure. Id. However, where a building owner has taken protective measures and an accident still occurs, the building owner will not be liable.

Plaintiff herself established that the lobby floor was mopped not less than 30-45 minutes before she fell. In addition, there was no evidence that defendant intentionally placed water on the floor or missed water while mopping. Winn-Dixie presented a similar case. In Winn-Dixie, plaintiff slipped on a bean. A Winn-Dixie employee had just swept. The court held that, because an employee had just swept, and because there was no evidence that WinnDixie placed the bean on the floor or the employee missed the bean while sweeping, plaintiff had to prove actual or constructive notice of the existence of the bean. Winn-Dixie. This case is virtually identical - plaintiff has not contended that defendant put water on the floor; nor has plaintiff contended that Mr. Middleton's mopping was negligent. Thus, plaintiff must prove actual or constructive notice. There are no facts showing actual knowledge.

Plaintiff has not proven constructive notice for several reasons. First, the entrance was lightly used, so defendant had no reason to believe that a great amount of water would be tracked in. Second, defendant had just mopped. Third, it was not raining heavily. Fourth, the defendant had an awning outside the building to prevent water from seeping in. Finally, defendant had placed a mat at the door. Given these facts, plaintiff has not proven that defendant had reason to know of the alleged existence of water.

Fobbs is distinguishable on this point, since in that case the parties conceded constructive notice. In addition, in that case it had been raining heavily, and that morning rainwater had accumulated outside the building, and people had been entering and leaving throughout the night. Thus, the facts for constructive notice were much stronger.

Memco is also distinguishable. In that case, a plant frequently shed its leaves, and the shop owner knew it. In addition, no one had swept for at least two hours before the accident; here, Mr. Middleton had swept no more than 30-45 minutes before plaintiff fell.

In light of the facts, the court would be "forcing" the inferences to conclude that defendant had constructive notice of the alleged existence of water.

C. A person that ste sip onto a wet mat and sees water directly in front of it cannot claim that she did not know of the dancer she faced and, therefore, canno claim that anyone hail a duty to warn her.

Plaintiff alleges that defendant breached its duty to warn her. First, defendant's duty

to warn would only arise if defendant had actual or constructive knowledge; defendant contends above that no such knowledge existed. Second, defendant's duty to warn arises only when the danger is unknown to the plaintiff: Fobbs; Memco.

A danger is known to the plaintiff if it is open and obvious to a reasonable person exercising reasonable care for her own safety. Fobbs. Although Shifflet v. M. Timberlake, Inc. (Col. S. Ct. 1964) states that an invitee has no duty to look for danger, see Id. this holding is overruled by the Supreme Court's later holding in Fobbs.

In this case, plaintiff encountered what would be "open and obvious" to any reasonable person. It was a drizzly day. She walked in a building, looked down, saw a wet mat and water, and kept walking. Clearly, a warning was not required to warn her of the water - she saw it - although, by her own admission, she did not see the water she slipped in. Thus, plaintiff was "on notice" that there might be water on the floor, and defendant was under no duty to warn her.

D. A plaintiff that produces no direct evidence of the existence of water she allegedly slipped on cannot rig evail.

It is well-settled that, where a plaintiff can't prove the existence of the condition she alleges, her case fails. See Williambsbura Shoo. Here, plaintiff testified she did not see the water she allegedly slipped in. Defendant urges the court to carefully read plaintiff's testimony. She testified that she:

1. fell;
2. stood up;
3. brushed off;
4. looked down; and
5. saw water.

Plaintiff was wearing a raincoat. It is likely that when she brushed off, she spread water at her feet. No testimony was given that the water actually existed.

This case is distinguishable from Fobbs in which there had been protracted rain, an awful lot of water "tracked in," and people had entered throughout the night. In this case, it was early morning, and the entrance was not used by more than about 120 people who arrived between 8:00 and 8:30. To find that there was water at plaintiff's feet would strain and force the facts.

Conclusion

For the reasons above stated, defendant urges the court to grant its motion to dismiss.

DEFENDANT'S JURY INSTRUCTIONS ON DEFENDANT'S DUTY OF CARE AND BREACH OF DUTY

1. Eisen & Associates, Incorporated, as the owner of Eisen Center West, is under a duty to maintain its building in a reasonably safe condition. This duty includes the duty to remove foreign objects which it:

a. placed there;
b. knew of; or
c. should have known of.

The duty also includes the duty to warn occupants and others of unsafe conditions of which it knows or should, under reasonable circumstances, know, but the duty to warn does not arise if the danger is easy to see or notice and a reasonable person should see or notice it.

2. Eisen & Associates, Incorporated, has breached its duty to Stephanie Micas to maintain safe premises only if you find more likely than not that:

a. there was water on the floor; and
b. Eisen & Associates, incorporated, or one of its employees, should have known of the water at or before the time of Stephanie Micas' fall.

In determining whether Eisen & Associates, Incorporated, should have known of the water, you are to consider the reasonableness of the policies, procedures and practices of Eisen & Associates, Incorporated in light of the conditions on Monday, May 3.

3. Eisen & Associates, Incorporated, breached its duty to warn and is liable to Stephanie Micas only if you find more likely than not, that:

a. Eisen & Associates, Incorporated, or one of its employees, should have known of the danger of water; and
b. the water on the floor was not open and notorious to a person who is being careful as a reasonable person would.

In determining whether Eisen & Associates, Incorporated, should have known of the danger, and in determining whether the water was an open and notorious hazard, you should consider:

a. the conditions on Monday, May 3; and
b. facts known to Stephanie Micas.

In other words, you are to consider whether a reasonable person who had observed what Stephanie Micas observed would have realized the danger of slipping on water.

4. You may find a breach of duty by Eisen & Associates, Incorporated, only if you find more likely than not that Stephanie Micas slipped on water in the lobby of Eisen Center West.