SOME FURTHER OBSERVATIONS ON USING THE PERVASIVE METHOD OF TEACHING LEGAL ETHICS IN PROPERTY COURSES

ALAN M. WEINBERGER*

A report released by the Carnegie Foundation in spring 2007 cited inadequate concern with professional responsibility as one of the two major limitations of contemporary American legal education.[1] The importance of joining professionalism with legal analysis from the very beginning was one of the principal recommendations that emerged from a two-year intensive study.[2] The Carnegie Foundation thus becomes the most recent authority to call into question the efficacy of the required upper-division professional responsibility course, joining a debate which began in 1972 when the American Bar Association first made satisfactory performance in a course in the duties and responsibilities of the legal profession a requirement for all J.D. degree candidates.[3]

As part of its continual process of curricular reform, the faculty at Saint Louis University School of Law once conducted a survey of alumni. Respondents were asked the following question: "Most attorneys from time to time encounter questions of legal ethics and professional responsibility. How would you rate the importance of the following factors in helping to resolve issues of legal ethics and professional responsibility which arise in your practice: (1) law school consideration of these topics; (2) observation of or advice from other lawyers in your firm or office; (3) observation of or advice from other lawyers not in your firm or office; (4) advice from persons other than lawyers?" Only twenty-four percent identified law school consideration

* Professor of Law, Associate Dean for Faculty, Saint Louis University School of Law.

1. *See* WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

2. *Id.* at 9 ("The existing common core of legal education needs to be expanded to provide students substantial experience with practice as well as opportunities to wrestle with the issues of professionalism."). The other major limitation was the casual nature of the attention given by most law schools to direct training in professional practice. *See id.*

3. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 200 (2000). Professor Rhode is a leading exponent of the pervasive method. *See, e.g.*, DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998); Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139 (1995).

as "very important." Thirty percent rated law school consideration "not important at all."

The results of this survey, which correspond to the findings of similar surveys described in the law school curriculum literature, suggest the following:

(1) Legal ethics may simply not lend itself to being studied in a law school course. Legal ethics may be more about values formed during general upbringing that occurs long before matriculation. One should not, therefore, expect a required course to make much of a contribution to the practitioner's resolution of these problems.

(2) The legal ethics course may be perceived by students as having a low status in the law school hierarchy for various reasons (e.g., because of its required status, because of the fact that it may not be taught by the same rigorous Socratic method as other courses, or because separating doctrinal and ethics courses suggests that one may be subordinate to the other).

(3) The course in legal ethics bears little relationship to the problems faced by most practitioners. Specifically, transactional real estate practitioners, like "office lawyers" generally, tend not to become enmeshed in the judicial system or in taking on administrative agencies. Such lawyers are not so much engaged in what legal academicians tend to regard as "traditional" lawyerly pursuits of interpreting statutes, reconciling cases, and advising what is legal and what crosses over the line. Such lawyers are increasingly engaged in negotiation, strategizing, and business decision-making.

The so-called "pervasive method" for teaching professional responsibility has been proposed, not as an alternative to the required legal ethics course, but as a means of augmenting it.[4] The pervasive method involves the introduction and integration of ethics into each area of the curriculum.[5] It is based upon the philosophy that

> [e]thics is not just an appendage to law, it is at the very heart of the matter, and must become part and parcel of the entire program. . . . The professor in corporations law, in addition to teaching the substance and procedure of a

4. AMERICAN BAR ASS'N, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE 18 (1996) [hereinafter *Teaching and Learning Professionalism*]. A decade has now passed since the Professionalism Committee of the American Bar Association's Section of Legal Education and Admissions to the Bar recommended that "the pervasive method of teaching legal ethics and professionalism should be seriously considered by every law school." *Id.* Midway through the decade, one observer noted that "the pervasive approach is pervasive only in the long list of schools in which professional responsibility remains locked in a single classroom." Stephen H. Goldberg, *Bringing* The Practice *to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414, 419 (2000).

5. TEACHING AND LEARNING PROFESSIONALISM, *supra* note 4, at 14.

> securities transaction, should also discuss the ethical dilemmas posed by that situation.[6]

By infusing professional responsibility throughout the curriculum, the pervasive method responds directly to the Carnegie Foundation's call for joining professionalism with legal analysis from the beginning of students' legal education.[7]

Professor Thomas L. Shaffer of the Notre Dame Law School has previously made a compelling argument in this law journal's "Teaching" series for use of the pervasive method in the first-year introductory course in property law.[8] The first-year property course may well be the ideal vehicle for the early introduction of students to ethical considerations facing lawyers for a variety of reasons.[9] For one thing, transactional real estate practice generates a greater proportion of legal malpractice claims than any other field (twenty-five percent).[10] The role and function of lawyers in real estate transactions and the land development process have evolved rapidly within the last generation.[11]

6. David T. Link, *Law Schools Must Lead Legal Profession Back to its Roots*, CHI. TRIB., Sept. 1, 1995, at 27.

7. *See supra* note 2 and accompanying text.

8. Thomas L. Shaffer, *Using the Pervasive Method of Teaching Legal Ethics in a Property Course*, 46 ST. LOUIS U. L.J. 655 (2002). Professor Shaffer has been described by my colleague and co-author Professor Sandra Johnson as one of the leading lights in the field of professional ethics. Sandra Johnson, *Introduction*, 46 ST. LOUIS U. L.J. 561, 563 (2002).

9. *See* SANDRA H. JOHNSON ET AL., PROPERTY LAW: CASES, MATERIALS, AND PROBLEMS v (3d. ed. 2006).

10. William H. Gates, *The Newest Data on Lawyers' Malpractice Claims*, ABA J., Apr. 1984, at 78, fig. 1. Personal injury practice runs a close second with twenty-four percent. *Id.* The most common causes of client complaints against real estate lawyers were counseling outside of their area of expertise, failure to advise of business risks (e.g., not advising a landlord against signing a lease with the shell subsidiary of a credit-worthy parent who had not signed or guaranteed the lease), and multiple representation of clients with conflicting interests. GERALD KORNGOLD & PAUL GOLDSTEIN, REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE 26 (4th ed. 2002) (citing Stephen M. Blumberg, *Avoiding Malpractice in Real Estate Law Practice*, 2 CAL. REAL PROP. J. 1 (1984)). *See generally* Debra T. Landis, Annotation, *Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Matters Involving Real Estate Transactions as Ground for Disciplinary Action—Modern Cases*, 65 ALR 4TH 24 (1988).

11. As Nessen and Rogalevsky explain:

> Back in the 1940's and 1950's real estate lawyers were expected to know little more than how to complete a conveyancing or traditional mortgage financing . . . [R]eal estate practice was something of a sub-profession. In fact, many of the most prestigious firms (especially the so called "Wall Street" firms) either stayed away from real estate altogether or submerged it almost to the point of invisibility. Many senior members of the bar eschewed real estate as an insignificant and barely respectable backwater of legal practice. To the extent that a firm engaged in real estate at all, it was done almost surreptitiously. All of this has changed radically over the past thirty years. Even among the most "respectable" firms, real estate has become an integral part, if not the

Real estate lawyers have been under pressure to become involved in matters ranging far beyond traditional routine into financial advising, strategic planning, and networking. Like accountants and bankers before them, real estate lawyers have needed to broaden their scope from that of scrivener to advisor to consultant. Role transformation involving changing norms and standards may be a source of confusion and uncertainty.

Professor Shaffer's essay described the objectives of the pervasive method of teaching legal ethics and provided specific examples of cases drawn from material typically covered in the first semester.[12] In this essay, I will provide examples of two cases that might be covered in the second semester of a two-semester Property course or in an upper-level course in Real Estate Transactions or Land Finance Law. Both cases involve seasoned real estate lawyers engaged in transactional practice in Washington, D.C. in the 1980s. I believe it is instructive for students to see how attorneys of considerable ability and experience can find themselves embroiled in disputes involving issues of professionalism.

I. *IN RE AUSTERN*

Real estate lawyers are regularly asked to serve in the capacity of escrow agent. When escrow instructions are well-drafted and the conditions are objectively verifiable, the escrow agency function is mechanical and non-discretionary.[13] No exercise of judgment by the escrow agent on any point need be involved.[14]

Nevertheless, even for the most experienced and ethically mindful real estate lawyers, the role of escrow agent is fraught with danger, especially when a lawyer serves as escrow holder in addition to representing one of the parties.

> centerpiece, of their success. Real estate practitioners have been taken out of the shadows, allowed to wear three-piece suits, and even permitted to meet with their firms' most valued clients.

Robert Nessen & Stanley Rogalevsky, *The Changing Role of Lawyers in Real Estate Transactions*, REAL EST. FIN., Spring 1988, at 32–33.

12. Shaffer, *supra* note 8, at 656–58.

13. KORNGOLD & GOLDSTEIN, *supra* note 10, at 169.

14. As noted by Korngold and Goldstein:

> Thus, instead of the judgmental direction to the escrow holder, "You are to close this escrow upon seller's delivery of marketable title," the instructions might read, "You are to close this escrow when there has been deposited into this escrow an irrevocable commitment by the Union Title Insurance Company to issue to Buyer an A.L.T.A. Owner's Policy, Form B-1970 naming buyer as owner in fee simple absolute of the Property described above, and insuring title in fee simple absolute of said property in the amount of $200,000, subject only to a first lien mortgage held by Surety National Bank, in the amount of $160,000, and to taxes for the fiscal year 1985, which are a lien but not delinquent."

Id. at 169.

For example, the attorney's duty to safeguard client confidences may conflict with the fiduciary obligation he or she undertakes as escrow agent to make full disclosure of all material facts to *both* parties. Such was the case in *In re Austern*.[15]

David T. Austern was not only an experienced and highly respected real estate practitioner, but was also an adjunct professor at Georgetown University Law School where he taught an ethics course for nineteen years and served as the author of an ethics column for the Association of Trial Lawyers of America.[16] Mr. Austern represented Milton Viorst, who had previously acquired several apartment buildings which he had converted to condominiums and was in the process of closing on the sale of units.[17]

Some work necessary to bring the units into compliance with the District of Columbia Housing Code had not been completed as of the scheduled closing date.[18] Under such circumstances, postponing closing until the work is performed may be more than an inconvenience.[19] Time is often of the essence if, for example, the buyer's financing commitment is about to expire.[20] The typical solution is to close the transaction as previously scheduled while establishing a contingency escrow.[21] Accordingly, the purchasers agreed to proceed with closing, but only if the seller deposited $10,000 into an escrow account to secure his willingness to complete the necessary repairs.[22]

On the evening scheduled for the mass closing of units to their existing occupants,[23] Mr. Austern was running late.[24] The closing was already in

15. 524 A.2d 680 (D.C. 1987).

16. *See generally* TRIAL, Feb. 1987, at 3, 6, 17–18.

17. *In re Austern*, 524 A.2d at 681. If class time permits, I explain how federal income tax considerations would have prevented the original landlord from converting his or her rental property to the condominium form of ownership and created the need and opportunity for a condominium converter like Mr. Viorst. Because they are seen as extracting profits from a market to which they add little in terms of value, condominium converters tend to be unsympathetic figures. This may explain, at least in part, the strained attorney-client relationship which existed between Messrs. Austern and Viorst, and which may have compromised Mr. Austern's exercise of professional judgment and served to mitigate the sanction he received from the court.

18. *In re Austern*, 524 A.2d at 681.

19. ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 227 (2d ed. 2002).

20. *Id.*

21. *Id.* at 226–27.

22. *In re Austern*, 524 A.2d at 681.

23. Condominium converters typically offer a discount to existing tenants in the hope of encouraging as many tenants as possible to purchase the units they occupy. In this way, the converter avoids incurring the expense of carrying costs and upgrades necessary to market units for sale to the public.

24. *In re Austern*, 524 A.2d at 681.

progress by the time he arrived.[25] The parties had agreed upon an escrow arrangement to secure performance by Mr. Viorst of his promise to complete the unfinished construction work,[26] and Mr. Austern found himself drafted into service as escrow agent.[27] He would later say that he agreed reluctantly, yielding only (as he described it) after being put under considerable pressure.[28] The basis for his reluctance is unclear. Perhaps he was aware that title insurance companies report that they suffer more losses in connection with the performance of escrow services than for insured losses under policies of title insurance.[29] Perhaps he was well aware of his client's capacity for deception and the danger of his becoming complicit. Or, perhaps he simply knew that he stood no chance of receiving compensation for services performed post-closing and preferred to move on to remunerative legal work.

Sometime after Mr. Austern arrived at the closing, Mr. Viorst wrote out a check in the amount of $10,000, which was intended to fund the escrow account.[30] This check was exhibited to the purchasers and their attorney.[31] Thereafter, Mr. Austern and his client stepped into the hallway where, outside the hearing of the others, Mr. Viorst privately informed Mr. Austern that there were insufficient funds to cover the check in the account upon which it was drawn, and he should not try to deposit the check.[32] Mr. Austern concealed this information from the purchasers and their attorney, thereby lulling them into a false sense of security that the promised repairs were fully funded.[33]

The Board on Professional Responsibility concluded that Mr. Austern actively and affirmatively assisted his client in perpetrating a fraud.[34] Mr. Austern should have exposed his client's dishonesty by withdrawing from the case as soon as he became aware of the fraudulent conduct. Mr. Austern argued that his duty of confidentiality to his client outweighed his duty to withdraw from the case to avoid furthering the fraud.[35] The District of Columbia Court of Appeals agreed with the Board and publicly censured Mr. Austern,[36] whose ethics course was subsequently "de-listed" by Georgetown University. "When the attorney is presented with a situation where the client's

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. KORNGOLD & GOLDSTEIN, *supra* note 10, at 50.
30. *In re Austern*, 524 A.2d at 683.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 684.
35. *In re Austern*, 524 A.2d at 682–83.
36. *Id.* at 684.

wishes call for conduct that is illegal or fraudulent, the attorney is under an affirmative duty to withdraw from representation."[37]

In fact, Mr. Austern was lucky. The D.C. Bar had asked for a six-month suspension by way of punishment.[38] Chief Judge Pryor believed that a public censure was more appropriate, after taking into account as mitigating factors Mr. Austern's notable contributions to the field of legal ethics, the fact that his conduct was not motivated by a desire for personal gain, and that no purchaser suffered pecuniary injury.[39] The court also took notice that Mr. Austern's judgment seemed to have been compromised by the extreme animosity which apparently existed between himself and his client.[40] To overcompensate for this ill will, and anxious to bring a dysfunctional attorney-client relationship to a speedy conclusion, Mr. Austern may have bent over backwards in his client's favor by taking part in the fraudulent transaction.[41] It is important that students understand how personal animosity is at least as common, and potentially every bit as compromising of professional judgment, as a social relationship or business association between attorney and client.

In determining the appropriate sanction, Judge Pryor described Mr. Austern's misconduct as comparatively less serious than the case of a litigator who misrepresented facts to a court, which he described as a "subversion of the judicial process."[42] In my opinion, such a view seriously underestimates both the importance of the role played by transactional lawyers in shaping the law[43] and the potential for ethical lapses in transactional practice.[44]

37. *Id.* at 683.

38. *Id.*

39. *Id.* at 684. Mr. Viorst delivered good funds into the escrow account about two months after the closing and before any claim to the escrowed funds was made. *Id.* at 682.

40. *In re Austern*, 524 A.2d at 684.

41. *Id.*

42. *Id.* at 683.

43. Daniel Bogart argues:

> Transactional lawyers—not just litigators, legislators, and judges—make law. To some, this may seem a novel thought. The regimen of law school study, and the manner in which the law, courtrooms, lawyers, and judges are portrayed in the media, sometimes distort our view of how "the law" is created, renewed, and destroyed. Even lawyers are subject to these misperceptions. Lawyers, too, often envision the law as resulting solely from enactments of legislatures, or from courtroom battles where two or more sides argue their positions and a judge renders an opinion. Those of us who have practiced "telephone law" know the fallacy of this view, however. We also "make" law. We make law when we convince our opponents to concede a point where the case law underlying the negotiation is unclear and unresolved. And when enough similarly situated attorneys arguing on behalf of their clients about a contractual provision convince some adequate number of opponents, also similarly situated, that the "law" is on their side, at some point negotiations cease and custom or practice takes over. This transactional law is conveyed in its unique way, across jurisdictional boundaries, as one lawyer incorporates the innovation of another in his or her own contracts and documents.

II. *PENTHOUSE INTERNATIONAL, LTD. V. DOMINION FEDERAL SAVINGS AND LOAN ASSOCIATION*

Notwithstanding its daunting complexity and length,[45] *Penthouse International, Ltd. v. Dominion Federal Savings and Loan Association*[46] is an excellent teaching case for the reason, inter alia, that it provides an opportunity to evaluate the sometimes perilous nature of the role of lawyers in sophisticated transactional practice.[47] It illustrates how an attorney engaged in fulfilling his responsibility to be a zealous advocate for his client's cause, and in providing absolute and unyielding loyalty to the client, can find his status to be that of defendant.[48]

Sometime after gambling was legalized in New Jersey, Robert Guccione, the President of Penthouse International Ltd., conceived the idea of a Penthouse casino-hotel complex on the Boardwalk in Atlantic City.[49] Initially unsuccessful in obtaining outside financing, Penthouse commenced construction using internal resources.[50] After investing about $70 million in the project, Penthouse ran out of money in 1983.[51] Construction work halted with only the steel superstructure erected.[52] In 1983 Penthouse obtained a $97 million mortgage commitment from Queen City Savings and Loan Association

Daniel Bogart, *Games Lawyers Play: Waivers of the Automatic Stay in Bankruptcy and the Single Asset Loan Workout*, 43 UCLA L. REV. 1117, 1118 (1996).

44. Professor Shaffer notes:

> As an advocate in open court, the lawyer faces the opposition of a presumably equally able and well-prepared advocate whose counter-partisanship will offset his own. . . . But when the lawyer is in his office devising a course of business conduct, a standard form contract, or a complex scheme of land acquisition and development, no opposing lawyer is there to represent the equities of the many persons who may be affected by the lawyer's plans, no judge is present to monitor the fairness of the arrangements, and there are no fires of controversy to keep the counselor honest and purge his client's specifications of over-reaching self-interest. Is there a lawyer anywhere who has not felt the twinges of ethical uneasiness in so hidden and ex parte a professional context?

THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS AND DISCUSSION TOPICS 440–41 (1985).

45. In two casebooks in which it appears, the edited versions run twenty-four and thirty pages. If time permits, I assign the district court opinion as well, to give students an opportunity to compare and contrast the attitude of both courts to Mr. Gorelick's conduct in the transaction. *See* Penthouse Int'l, Ltd. v. Dominion Fed. Sav. & Loan Ass'n, 665 F. Supp. 301 (S.D.N.Y. 1987).

46. 855 F.2d 963 (2d Cir. 1988), *cert. denied*, 490 U.S. 1005 (1988).

47. *See generally* Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53 (1993).

48. *Id.* at 54–55.

49. *Penthouse Int'l*, 855 F.2d at 964.

50. *Id.* at 965.

51. *Id.*

52. *Id.*

to complete the project and provide permanent financing.[53] The commitment contained twenty paragraphs of conditions requiring, among other things, approval of plans and specifications, access to utilities, receipt of governmental approvals, and a license to operate from the New Jersey Casino Control Commission.[54] Queen City in turn sold a $35 million participation to Dominion Federal Savings and Loan Association.[55] Because this was twice the maximum amount that Dominion could legally lend to a single borrower under federal banking regulations, Dominion intended to sell half of its participation to Community Savings and Loan Association.[56]

On February 8, 1984, less than a month before the scheduled closing date, the president of Dominion called Philip Gorelick, a partner in the law firm of Melrod, Redman & Gartlan, asking him to attend a pre-closing meeting scheduled in New York the following day.[57] By this time, Dominion was aware that Community had begun to express reticence about serving as a sub-participant in a casino loan, perhaps for moral reasons.[58] Finding itself in the awkward position of having committed to lend more than the amount it was legally permitted to lend, Dominion faced the prospect of breaching its commitment.[59] "Recognizing the potential liability they were incurring, [Dominion's officers] sought a cover-up. In this plot they found a willing tool in Gorelick."[60] In what the trial judge described as "deliberate efforts to sabotage the deal," Mr. Gorelick made a series of demands for documents and assurances from Penthouse, among other dilatory tactics.[61] He described the existing draft documents as "idiotic," and the loan as not "in a position to close at any time."[62] He insisted that "everything presented was unacceptable" and had to be completely redrafted by him.[63] He demanded that Penthouse commit to pay a $150,000 bonus upon closing (characterized by the trial judge as "extortion") for clearing his desk in order to give priority to the loan.[64] (Mr. Gorelick never disclosed this fee arrangement to Dominion.[65]) The closing

53. *Id.*

54. *Penthouse Int'l*, 855 F.2d at 965.

55. Penthouse Int'l, Ltd. v. Dominion Fed. Sav. & Loan Ass'n, 665 F. Supp. 301, 303 (S.D.N.Y. 1987).

56. *Id.*

57. *Id.* at 306.

58. *Id.* at 305.

59. *Id.* at 310.

60. *Penthouse Int'l*, 665 F. Supp at 306.

61. *Id.* at 308.

62. *Id.* at 307.

63. *Id.*

64. *Id.* at 308.

65. *Penthouse Int'l*, 665 F. Supp at 306 n.1.

date came and went, and the deal fell apart.[66] "Gorelick brought about its demise," according to the trial judge.[67]

Mr. Gorelick was called as a witness during the three-week bench trial before U.S. District Court Judge Kevin Duffy.[68] He denied having been told anything about the problems Dominion was experiencing with Community.[69] The trial judge found Mr. Gorelick's testimony "totally incredible."[70]

> Gorelick took the stand and attempted brazenly to lie to the court. During cross-examination, the crucible of truth, Gorelick continuously shifted uneasily in the chair, sweated like a trapped liar, and the glaze that came over his shifty eyes gave proof to his continuing perjury. His total lack of veracity was shown not only by his demeanor but by the shady practices he seemingly reveled in.[71]

The trial court agreed with Penthouse's claim that Dominion had engaged in bad faith and anticipatorily breached the mortgage commitment, assessing damages against Dominion and the Melrod law firm, jointly and severally, in the sum of $128.7 million.[72] The award against the firm had not been sought by Penthouse in its proposed judgment.[73] It was added by the trial judge sua sponte on the grounds of fraud in that Gorelick had failed to disclose his role as the lender's "hatchet man intent on destroying the deal."[74] In his order, Judge Duffy explained his rationale as follows:

> [T]he firm did not disclose the true nature of the agency which it undertook; and, the actions of the firm through its partner constituted active fraud. The analogy that comes to mind . . . is that of a hoodlum enforcer for a loan shark . . . . In this case the Melrod firm did not disclose the true nature of its agency, i.e., to scuttle the deal . . . .[75]

In retrospect, defendants' trial strategy appears overconfident. Expecting to prevail on the liability issue, they introduced no witnesses to rebut the damages testimony Judge Duffy allowed Penthouse to introduce into evidence. As a result, speculative estimates of the profits likely to be generated by Penthouse's entry into a highly competitive industry and market went unchallenged. Dominion and Melrod appear to have taken the appeal more

66. *Id.* at 309.

67. *Id.* at 308.

68. *Id.* at 302.

69. *Id*. at 306.

70. *Penthouse Int'l*, 665 F. Supp at 306.

71. *Id.* at 306 n.1.

72. Penthouse Int'l, Ltd. v. Dominion Fed. Sav. & Loan Ass'n, 855 F.2d 963, 964 (2d Cir. 1988).

73. *Id.*

74. *Penthouse Int'l*, 665 F. Supp at 308. "Dominion hired Gorelick to bully and intimidate the plaintiffs into delaying the loan until Community could be replaced or failing that, to delay until the Commitment expired and Dominion was released from its obligation." *Id.* at 307.

75. *Penthouse Int'l*, 855 F.2d at 984.

seriously, retaining Arthur Liman, a "big trouble" lawyer,[76] to represent Dominion before the Second Circuit, and enlisting the Federal Home Loan Bank Board as amicus curiae.[77]

The judgment against the Melrod firm was categorically reversed on appeal.[78] A Second Circuit panel concluded that, by the time Mr. Gorelick joined the negotiations as Dominion's lawyer, it was apparent that Queen City's attorney was in over his head.[79] The documentation for a $97 million loan had been prepared using a standard "plain language" form imprinted with the warning "[c]onsult your lawyer before signing this mortgage—it has important legal consequences."[80] In order to close the loan, Queen City was willing to waive compliance by Penthouse with several of the most essential conditions of the commitment, including unresolved title issues, and the absence of plans, specifications, utility arrangements, and casino license. The court cited expert testimony supporting Mr. Gorelick's position that the loan was not in a position to close any time in the near future. From the court's perspective, Mr. Gorelick had fulfilled his role "to ensure that the interests of his client were protected. In so doing, he insightfully observed serious problems with the transaction and promptly raised his objections."[81]

With the Supreme Court's denial of certiorari, the Second Circuit had the last word, reversing Judge Duffy's findings of perjury and fraud.[82] In fairly assessing the quality of Mr. Gorelick's representation of Dominion in this transaction, a negative inference about the quality of the credit may be drawn from the fact that, after the Queen City deal so spectacularly fell through, Penthouse was never able to secure replacement financing for its project from any other lender.[83]

76. ARTHUR L. LIMAN, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY 94 (1998).

77. *Penthouse Int'l*, 855 F.2d at 981.

78. *Id.* at 987. The Second Circuit also reversed the judgment against Dominion on the ground that Penthouse was not ready, willing, and able to perform at the time of the lender's alleged breach. *Id*.

79. *Id.* at 978.

80. *Id*. at 969.

81. *Id.* at 979.

82. In reversing the trial court's holding that Gorelick committed fraud by falsely representing to Penthouse that Dominion intended to fulfill its obligations under the loan commitment at a time when it no longer intended to perform, the Second Circuit cited Judge Duffy's failure to make specific factual findings on each element of the fraud cause of action. *Id.* at 986. The Second Circuit likewise reversed the holding that Gorelick committed perjury for the reason that it was not based upon clear and convincing proof. *Id.* at 987.

83. Penthouse eventually sold its property on the Boardwalk, which is now part of Trump Plaza. *See* UNLV Center for Gaming Research, Jurisdiction Summary: Atlantic City, New Jersey, http://gaming.unlv.edu/subject/atlanticcity.html (last visited May 25, 2007).

Ultimately Mr. Gorelick came out a winner although, after four years of litigation and being described by his own counsel as "obnoxious" and "aggressive,"[84] one suspects he may have felt more like a survivor. The *Penthouse* case demonstrates an idiosyncratic style of transactional practice characterized by the use of inflammatory hyperbole to belittle co-counsel and intimidate opponents, and by concealing information from one's own client. In the noble cause of restoring the lost values of civility and courtesy to law practice, it is instructive that students see the consequences.

84. *Penthouse Int'l*, 855 F.2d. at 973.