

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 26th November, 1998
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Angeles, Arnup, Bobesich, Chahbar, DelZotto, Gottlieb, Legge, MacKenzie, Puccini, Ross, Swaye, Topp, Wilson and Wright.

.....

The reporter was sworn.

.....

IN PUBLIC

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Ms. Ross introduced Ingrid Dicaire, Carlos Naldinho, Nacho Beltran and Anna Marcet, students from the Faculty of Law at the University of Western Ontario. The students who were taking a course on the "Legal Profession" taught by The Honourable Judge Eleanor Schnall were invited by the Treasurer to attend Convocation.

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Ms. Lesley Cameron, Senior Counsel-Discipline introduced Mr. Brian Heller who acted as Duty Counsel.

Re: Peter Michael MALONEY - Brampton

The Secretary placed the matter before Convocation.

Messrs. Topp, Wright and Chahbar withdrew for this matter.

Ms. Kathryn Seymour appeared on behalf of the Law Society and Mr. William Trudell appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 19th October, 1998, together with an Affidavit of Service sworn 2nd November, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 23rd October, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th November, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas J. P. Carey, Chair
Bradley H. Wright
Abdul A. Chahbar

In the matter of
The Law Society Act
and in the matter of

Kathryn Seymour
for the Society

PETER MICHAEL MALONEY
of the City
of Brampton
a barrister and solicitor

William Trudell
for the solicitor

Heard: June 2 and 3, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 4, 1997 Complaint D347/97 was issued, and on March 10, 1998 Complaint D25/98 was issued against Peter Michael Maloney alleging that he was guilty of professional misconduct.

The matter was heard in public on June 2 and 3, 1998, with medical evidence received *in camera*. The Committee hearing the matter was composed of Thomas J.P. Carey, Chair, Bradley H. Wright and Abdul A. Chahbar. The Solicitor attended the hearing and was represented by William Trudell. Kathryn Seymour appeared on behalf of the Law Society.

DECISION

The particulars of the Complaints issued against the Solicitor are as follows:

Complaint D347/97

2. a) Between May 24 and June 4, 1996, he misappropriated \$9,202.00, more or less, from the Estate of Mabel Alice Large; and

[For reasons given in the Decision, it was found that this particular was not made out, and the following particular was substituted:

"Between May 24 and June 4, 1996, he breached (14)(8)(c) of Regulation 708 under the Law Society Act by drawing \$9,202.00 more or less, in fees from the estate of Mabel Alice Large prior to issuing a fee billing."

- b) On April 8, 1996, he breached 14(8)(c) of Regulation 708 under the *Law Society Act* by drawing \$535.00 in fees from the Estate of Mabel Alice Large prior to issuing a fee billing.

Complaint D25/98

2. a) He failed to report to his mortgagee client, Scotiabank, in relation to a mortgage registered on July 15, 1996; and
- b) He failed to reply to the Law Society regarding a complaint by his client, Scotiabank, despite letters dated May 28, July 24, September 18, October 1, and November 14, 1997 and telephone requests made on May 26, June 12, June 20, June 27, and October 24, 1997.

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statement of Facts:

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D347/97 and D25/98 and is prepared to proceed with a hearing of these matters on June 2 and 3, 1998.

II. IN PUBLIC/IN CAMERA

2. The parties agree that these matters should be heard in public pursuant to Section 9 of the *Statutory Powers Procedure Act*, R.S.O. 1990 c. S.22.

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D347/97 and D25/98 and this agreed statement of facts with his counsel, William Trudell. The Solicitor admits that the particulars in the Complaints supported by the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

Complaint D347/97

4. The Solicitor is 52 years old and was called to the Bar in April, 1981. He practices as a sole practitioner in Brampton, Ontario and until 1996 in the area of Criminal Law. Since 1996 his practice has been a general one.
5. The Law Society commenced an audit of the Solicitor's practice on October 17, 1996.
6. Mabel Alice Large executed a will in August 1973. Under the terms of her will, she appointed her husband as beneficiary and executor. The will also provided that should her husband predecease her, Mrs. Large's daughters were to become the beneficiaries and executrices of their mother's estate (Tab 1, Document Book). The will was not prepared by the Solicitor. Mabel Large died on August 27, 1995 (Tab 2).

7. One of Mrs. Large's daughters, Alberta Phee, retained the Solicitor in 1995 to act as solicitor for her mother's estate.

8. During their first meeting, the Solicitor advised Mrs. Phee that the estate was not large, seemed straightforward, and that the will would likely not need to be probated. He advised her that the fee for doing the work would be between \$500.00 and \$1,000.00. The Solicitor's accounting indicates the total value of the Estate to have been \$40,863.12 (Tab 3).

9. The following reproduction of the client trust ledger card details the receipts and disbursements made by the Solicitor on behalf of the Estate:

Date	Particulars	Receipts	Disbursements	Balance
April 1/96	From Canada Trust (Tab 4) (A. Phee verifies this amount)	8,396.45		8,396.45
*April 8/96	PM - To Pay Account (Billed \$535. on <u>July 4/96</u>) (Tab 4)		567.10	7,829.35
May 16/96	To R/General - Repayment of GST		76.00	7,753.35
*May 24/96	PM - Transfer for Fees & Disbursements (recorded, but no account delivered) (Tab 4)		214.00	7,539.35
*May 26/96	PM - Transfer for Fees & Disbursements (recorded, but no account delivered) (Tab 4)		6,848.00	691.35
May 28/96	From Alberta Phee	2,283.33		2,974.68
June 2/96	To Correct Posting - A. PHEE (A. PHEE states that her cheque was not cashed)		2,283.33	
	From Royal Bank (A. Phee verifies this amount)	2,283.33		2,974.68
June 6/96	Royal Bank - Proceeds Canada Savings Bonds (A. Phee verifies this amount, as CSB's had been in her possession)	30,141.94		33,116.62
June 18/96	Brampton Hydro - Refund	41.40		33,158.02
*June 4/96	PM - Transfer for Fees & Disbursements (recorded, but no account delivered) (Tab 4)		2,140.00	31,018.02

Date	Particulars	Receipts	Disbursements	Balance
July 4/96	PM - Refund of Fees (Tab 5) Alberta Phee - one half share of estate proceeds Margaret Hewitson - one half share of estate proceeds	9,202.00	20,110.00 20,110.00	.02
July 11/96	Bell Canada Refund	7.22		7.24

10. The Solicitor contacted the client on or about April 1, 1996 and advised that he had received the \$8,396.45 from Canada Trust.

11. When the Solicitor disbursed \$567.10 from his mixed trust account to himself on April 8, 1996, the disbursement was recorded but he did not deliver an account to his clients until July 4, 1996.

12. The following chart summarizes the amounts from the trust account taken out of trust by the Solicitor on account of fees and disbursements, which amounts, although recorded, were never billed to the beneficiaries, yet were later repaid to the trust account by the Solicitor as a "fee refund":

Date	Amount Withdrawn
May 24, 1996	214.00
May 26, 1996	6,848.00
June 4, 1996	2,140.00
<i>Total</i>	9,202.00

13. On July 4, 1996, the Solicitor paid back \$9,202.00 to the estate from his general bank account (Tab 5). The Solicitor did not reflect the fee billings of May 24, May 26 and June 4, 1996 in the final Trust Ledger Statement he prepared (Tab 3), nor the fee refund of \$9,202.00.

14. On or about October 17, 1996, the Law Society commenced an audit of the Solicitor's practice on an unrelated matter.

15. On or about December 20, 1996, the Law Society's auditor, Janet Merkley, wrote to the Solicitor making a formal written request for a written explanation with respect to the refund of \$9,202 to the Large estate trust account (Tab 6).

16. By letter dated February 26, 1997, Ms. Merkley wrote a second letter to the Solicitor requesting a response to her letter of December 20, and to her phone calls of January 7 and February 18, 1997 (Tab 7).

17. By letter dated March 9, 1997, the Solicitor responded to the Law Society's specific questions from the letter of December 20, 1996, as follows:

There was never any written complaint to me about fees charged. I had just started back into general practice and I had recently completed work for the beneficiary of an estate of similar size in which the fees billed were similar in amount, but upon reflection I was not comfortable with charging the amount which you indicated. I kept waiting for completion of the estate, which I expected was imminent so that I could review the matter with the beneficiaries. When they finally called to come in and then did come in I sensed that this level of fee was not acceptable and I reviewed in my own mind what I had initially thought would be appropriate and even though we had spent more time on it than that, when they came in to wrap up the estate I refunded the fees, except for the original fee amount. (Tab 8)

18. In a subsequent letter to the Law Society dated June 23, 1997 (Tab 10), the Solicitor re-iterated that the impugned withdrawals from the Large estate trust account were for "fees, disbursements and related GST." With respect to the refunded amount of \$9,202, the Solicitor wrote:

"In the end I decided that I would rather be underpaid than to have these clients be a [sic] disappointed clients."

19. It would be the evidence of both Ms. Phee and her sister Margaret Hewitson, the beneficiaries, that they never had a discussion about nor were they aware of any removal of money from the trust account other than for which they had been billed and that there had been no discussion of further fees beyond the July 4, 1996 fee billing of \$567.10 they had received (Tabs 9, 10 & 11).

Complaint D25/98

20. On or about early July 1996, the Solicitor was retained by the Bank of Nova Scotia ("Scotiabank") in connection with the preparation and registration of a real property mortgage.

21. The mortgage was registered on July 15, 1996.

22. Subsequent to the transaction, Scotiabank made repeated requests of the Solicitor for the following documents:

- i) Final Report on Title (First and Second mortgage);
- ii) Registered Charge (First and Second mortgage);
- iii) Original Preliminary (First mortgage only); and
- iv) Ontario New Home Warranty Certificate of Possession and Completion (Signed off by the Builder).

23. Specifically, Scotiabank placed telephone calls to the Solicitor on November 26, December 9, December 16, 1996, January 6, and March 27, 1997; and sent facsimile messages to the lawyer on March 7 and March 19, 1997; and wrote to the Solicitor on April 14, 1997, requesting the reporting documentation (Document Book, Tabs 12, 13 and 14).

24. When Scotiabank did not receive the required documentation, Scotiabank wrote a letter of complaint to the Law Society dated May 14, 1997 (Tab 15).

25. The following table sets out a chronology of the Law Society's efforts to contact the Solicitor and obtain a response from him:

DATE	EVENT	RESULT
May 26, 1997	Telephone call to the Solicitor (Tab 16).	
May 27, 1997	Telephone call from the Solicitor leaving voice mail (Tab 16).	
May 28, 1997	Telephone call to the Solicitor (Tab 16).	
May 28, 1997	The Society wrote to the Solicitor providing him with a copy of the complaint and asking him to contact us (Tab 17).	No response.
June 12, 20 & 27, 1997	The Society telephoned the Solicitor and left messages asking him to call (Tab 18).	No response.
July 24 & September 18, 1997	The Society wrote to the Solicitor requesting he satisfy Scotiabank's request for documentation (Tab 19).	No response.
October 1, 1997	The Society wrote to the Solicitor enclosing a further letter of the complaint (Tab 20).	
October 24, 1997	The Society telephoned the Solicitor and left messages asking him to call (Tab 21).	
November 14, 1997	The Society wrote to the Solicitor via regular and registered mail advising that his response was not received within seven days the matter would be referred to the Chair and Vice-Chairs of the Discipline Committee (Tab 22).	No response.
November 19, 1997	The Acknowledgment of Receipt card was signed and returned to the Society (Tab 22).	

26. In the correspondence from the Law Society the matter was identified as the complaint of J. Wasyliv, a Scotiabank Branch Manager.

27. On March 29, 1998, the Solicitor completed the reports necessary and closed the file (Tab 23).

V. DISCIPLINE HISTORY

28. On April 12, 1989, the Solicitor was found guilty of professional misconduct and Reprimanded in Committee for failing to file his Forms 2/3 within six months of the termination of his fiscal years ending January 1, 1986, 1987 and 1988, contrary to s.16(2) of Regulation 708 under the *Law Society Act* (D97/88).

29. On November 27, 1997, the Solicitor was found guilty of professional misconduct and Reprimanded in Committee for failure to honour a financial obligation in connection with the practice of law (D298/96).

DATED at Toronto, this 2nd day of June, 1998."

REASONS FOR FINDING OF THE COMMITTEE

The Committee is unanimously of the view on the issue of misappropriation, that the Society has not proven on clear and convincing evidence that the Solicitor misappropriated the amounts alleged when he caused the amounts of money to be moved from the Large estate into his general account.

In coming to this finding, we considered the following: The transfer of funds was done in a transparent fashion with entries on his books, both general and trust ledgers, coinciding with fee billings. There was no issuance of a fee billing to Ms. Phee who is the executor of the Large estate, and that in itself constitutes misconduct. We also found the Solicitor to be candid and frank and direct in his answers and there was nothing in his evidence that caused us to disbelieve his evidence. As well, his evidence could reasonably be true.

We accept his evidence that he had little experience in estate matters, and was dealing with another estate for an adverse party to the executor of that other estate. In the course of dealing with that estate, which dealings were concurrent with his beginning the Large/Phee case, he became aware of the profitability of legal estate work and concluded, at least initially, that a fee in the range of twenty percent of the value of the estate would not be unreasonable. He conceded quite candidly that at the time that he caused the monies to be transferred and the notations to be made in his accounts, books and records, that he was under some financial pressure. He conceded that it was typical that at a certain time of the month he would look for matters to bill. This was a matter for which he billed over \$8,000 in a very short period of time. His evidence was that he had a number of calls from Ms. Phee concerning the estate, reminding him of his quote of "between five hundred and a thousand dollars for the fees". He thought more about it and concluded that \$8,000 was not a fit amount to bill. He concluded that it was a bill that was inflated, and that he simply could not live with that. He was concerned, as well, that the good will with this client was more important than the fees that he could, at some level, perhaps justify and hold on to.

He then decided to change the account and reversed the account on the day that he had the executor in. The entire period of time here was from May 24th to June 4th. The client never did have it brought to her attention that there had been a higher bill. It was argued by Ms. Seymour that this fact be used against the credibility of the Solicitor in that one would have thought he would take the opportunity to point out what a break the client was getting. His not doing this is consistent with his explanation that he had not made a career out of gouging clients and wasn't about to start. It wasn't his style to, in his words, "use smoke and mirrors to show what a good guy he was" by reducing the account.

It is clear on all of the evidence that the Solicitor has spent most of his career in volunteerism, in areas of practice that have not been remunerative to any great extent for him and that his net income in this period did not exceed \$40,000. It is also clear that although his practice had a very substantial cash flow, the margin of profit was not a high one.

For all of those reasons, we conclude that as to Complaint D347/97, the Solicitor is not guilty of particular 2(a), but we substitute for particular 2(a) the following:

"Between May 24 and June 4, 1996, he breached 14(8)(c) of Regulation 708 under the *Law Society Act* by drawing \$9,202.00, more or less, in fees from the estate of Mable Alice Large prior to issuing a fee billing".

We find the Solicitor guilty of 2(b) as set out.

In addition, there is Complaint D25/98 and we find on the Agreed Statement of Facts and the evidence of the Solicitor that both counts 2(a) and (b), that are related, and relate to the Scotiabank, are made out and there is a finding of professional misconduct on those counts as well as the previously referred to counts.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Peter Michael Maloney be suspended for a period of three months and that following his reinstatement (a) he remit quarterly trust comparisons to the Law Society, identifying all estate matters with accompanying trust ledgers, for a period of one year, and thereafter provided the Law Society has any continuing concerns; (b) he participate in the Practice Review Programme and abide by any recommendations arising therefrom; and (c) he pay costs of \$500.00 payable within six months.

REASONS FOR RECOMMENDATION

The Committee carefully considered the joint submission in light of the particular circumstances of the Solicitor. He is 52 years of age, a sole practitioner and has been practising since 1981. He has received various awards and recognitions of community work. At the time of this misconduct, he had been working primarily as a criminal lawyer and had recently begun a more general practice, having taken over a location in a mall in the Brampton area.

Except as to costs, the Committee accepted the joint submission as being within a reasonable range of penalty for this kind of matter. Although the misconduct is serious, it is important to note that the period of time during which the Solicitor had use of the monies that were improperly removed without accompanying accounts was short, only about five weeks. There was repayment. There was no upset, no inconvenience to the client, and everything was done in a transparent manner without any attempt to hide what was being done. He cooperated fully with the Law Society, and was straightforward, frank, and candid in giving his evidence.

As to costs, there was misconduct by the Solicitor and the Law Society's costs in pursuing the matter were considerable. Further, the Solicitor has been before the Law Society before and was not assessed costs. On the other hand, he did co-operate. Further, given that there was finding on a major issue other than that urged by the Law Society, the Solicitor was justified in proceeding to a hearing. Given the Solicitor's personal finances, the fact that the practice of law has never been particularly remunerative for him, and taking into account his cooperation, candor and partial success at the hearing, we feel costs of \$500.00 would be appropriate, and would allow him to pay those costs following his reinstatement over a six month period on whatever schedule is convenient to him.

Peter Michael Maloney was called to the Bar on April 10, 1981.

ALL OF WHICH is respectfully submitted

DATED this 19th day of October, 1998

Thomas J. P. Carey, Chair

Ms. Seymour drew to Convocation's attention that on pages 9 and 10 of the Report the Committee found that Particular 2(a) of Complaint D347/97 misappropriation was not supported by the evidence and was replaced with a finding of pretaking, taking fees before issuing a bill.

It was moved by Mr. Swaye, seconded by Mr. Wilson that the Report as amended be adopted.

Carried

The penalty of the Discipline Committee was that the solicitor be suspended for a period of 3 months and that following reinstatement that he remit quarterly trust comparisons to the Law Society, identifying all estate matters with accompanying trust ledgers for a period of 1 year, and thereafter provided the Society has any continuing concerns that he participate in the Practice Review Programme and abide by any recommendations arising therefrom and pay costs of \$500 payable within 6 months.

Both counsel made submissions in support of the recommended penalty and requested the suspension commence December 24th, 1998.

It was moved by Mr. DelZotto, seconded by Mr. Swaye that the solicitor be suspended for a period of 3 months commencing December 24th, 1998. Following his reinstatement the solicitor must remit quarterly trust comparisons to the Law Society identifying all estate matters with accompanying trust ledgers for a period of 1 year and thereafter so long as the Secretary of the Law Society has any continuing concerns. The solicitor must participate in the Practice Review Program and abide by any recommendations arising therefrom and in addition pay costs in the amount of \$500 within 6 months.

Carried

The Treasurer withdrew for the following matter because of a conflict and Mr. MacKenzie took the Chair as Acting Treasurer.

Re: Gary Michael WELLMAN - Windsor

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Mr. Hugh Corbett appeared on behalf of the Society and Mr. Michael Royce appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 22nd September, 1998, together with an Affidavit of Service sworn 2nd October, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 30th September, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 9th October, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

William D. T. Carter

In the matter of
The Law Society Act
and in the matter of

Hugh Corbett
for the Society

GARY MICHAEL WELLMAN
of the City
of Windsor
a barrister and solicitor

Michael E. Royce
for the solicitor

Heard: August 25, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 1, 1998 Complaint D22/98 was issued against Gary Michael Wellman alleging that he was guilty of professional misconduct.

The matter was heard in public on August 25, 1998 before William Carter sitting as a single bench. The Law Society was represented by Hugh Corbett. The Solicitor was present at the hearing and was represented by counsel, Michael E. Royce.

FACTS

At the commencement of the hearing counsel for the parties tendered an Agreed Statement of Facts which I now set out below

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D22/98 and is prepared to proceed with a hearing of this matter on a date to be set by the Hearings Management Tribunal

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the *Statutory Powers Procedure Act*.

III. ALLEGATION OF PROFESSIONAL MISCONDUCT

3. The Solicitor obtained the release of funds which he purported to hold in trust, jointly, with another lawyer, without notifying the other lawyer or his client.

IV. ADMISSIONS

4. The Solicitor has reviewed Complaint D22/98 and this Agreed Statement of Facts with his counsel, Michael Royce and admits the particular and the facts respectively contained therein. The Solicitor further admits that the said particular together with the facts as hereinafter set out constitute professional misconduct.

V. FACTS

(i) Background and Summary

5. The Solicitor, Gary Wellman, was called to the Bar in 1979 and is a partner in the Windsor law firm of Kirwin, Gordon, Chapman, Wellman, Fullerton (now "Kirwin Partners").

6. The Complainant, Melvin Muroff was called to the Bar in 1969 and is a partner in the Windsor law firm of Muroff, Taub & Rohaly.

7. The Solicitor acted for Fred Mansour and his company, Discount Furniture Land Ltd. ("Discount Furniture"). The Solicitor advises that he had known Fred Mansour and Discount Furniture since approximately 1975 and had acted for them as a solicitor since approximately 1980.

8. The Complainant acted for Harry Roitberg and Jeannette Roitberg, the owners of the property known municipally as 2785 Howard Avenue, Windsor, Ontario.

9. In early 1988, the Roitbergs and Discount Furniture entered into negotiations concerning the construction of a 10,000 square foot building on the Howard Avenue property to be leased and occupied by Discount Furniture.

10. Pursuant to a leasehold agreement dated December 5, 1988 (the "Lease") (Sub-tab 53, Tab 1, Document Book), between the Roitbergs, as landlord, and Discount Furniture, as tenant, Discount Furniture agreed to lease the premises constructed at 2785 Howard Avenue (the "Leased Premises") for a term of five years, commencing September 15, 1988 and concluding on September 14, 1993, at the rate of \$108,000.00 per annum, payable in equal monthly installments of \$9,000.00.

11. Schedule "B" of the Lease contained, among other things, a rental guarantee clause (the "Rental Guarantee") which provided as follows:

Lessee agrees to guarantee the rent for the first five (5) year term of the within Lease with a bank letter of credit or by an assignment of a deposit certificate for One Hundred Thousand Dollars (\$100,000.00). This guarantee shall not be required during any renewal terms of this Lease.

12. As more particularly set out in the following paragraphs, in December 1988, Discount Furniture deposited approximately \$103,000.00 in satisfaction of the Rental Guarantee into an account opened jointly in the names of both the Solicitor's law firm and the Complainant's law firm, in trust, at a branch of the Toronto-Dominion Bank. Subsequently, on January 2, 1990, without notice to the Complainant or the Roitbergs, the Solicitor instructed the TD Bank to transfer these funds to an account belonging to Discount Furniture. Thereafter, on March 24, 1990, Discount Furniture vacated the Leased Premises without notice or warning to the Roitbergs, leaving an unexpired term on the Lease of approximately three and a half years and no funds in support of the Rental Guarantee.

(ii) Negotiation of the Lease

13. By way of letter dated March 9, 1988 (Sub-tab 2, Tab 1, Document Book), the Complainant provided the Solicitor with an Agreement to Lease in respect of the Leased Premises for review and execution by Discount Furniture. Schedule "D" of the Agreement to Lease contained the following rental guarantee clause:

Lessee agrees to guarantee the rent for the first FIVE (5) years of the Lease with a bank letter of credit for ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS to be forfeited to the Lessor in case of default of the Lease.

14. By way of letter dated March 11, 1988 (Sub-tab 4, Tab 1, Document Book), the Solicitor returned an amended version of the Agreement to Lease executed by Discount Furniture (Sub-tab 46, Tab 1, Document Book). The Solicitor had, among other things, changed the wording of the rental guarantee clause slightly and shifted it from Schedule "D" to Section 4 of the Agreement to Lease. The revised rental guarantee clause prepared by the Solicitor (which is the same as the Rental Guarantee ultimately included in the Lease) provided as follows:

The tenant agrees to guarantee the rent for the first five (5) years of the Lease with a bank letter of credit or by the assignment of a deposit certificate for One Hundred Thousand Dollars (\$100,000.00). This guarantee shall not be required during any of the renewal terms of the Lease.

15. By way of letter dated April 7, 1988 (Sub-tab 6, Tab 1, Document Book), the Complainant forwarded a draft version of the Lease for review by the Solicitor. The rental guarantee clause contained in Section 4 of the Agreement to Lease was repeated in the draft Lease.

16. Thereafter, as will be set out below, the Solicitor and the Complainant exchanged various drafts of the Lease as they negotiated on behalf of their respective clients.

17. By way of letter dated May 17, 1988 (Sub-tab 10, Tab 1, Document Book), the Solicitor advised the Complainant of several changes to the draft Lease required by Discount Furniture, none of which pertained to the Rental Guarantee. At the conclusion of this letter, the Solicitor stated the following:

With these amendments, and your providing a Schedule "A" Lot Plan, we are satisfied as to the lease.

18. By way of letter dated August 17, 1988 (Sub-tab 12, Tab 1, Document Book), the Complainant acknowledged receipt of the Solicitor's letter of May 17, 1988 and responded to the changes requested by the Solicitor. The Complainant requested that the Solicitor forward to him drafts of those sections of the Lease which the Solicitor wanted to change.

19. By way of letter dated August 23, 1988 (Sub-tab 14, Tab 1, Document Book), the Solicitor advised the Complainant that since the Offer (*sic*) to Lease provided that the Lease was to be prepared by the Landlord, the Complainant was responsible for drafting the changes to the Lease.

Section 9 of the Agreement to Lease did in fact provide as follows:

The Landlord shall deliver to the Tenant a Lease for the Demised Premises incorporating the terms of this Agreement to Lease prior to commencement of construction of the premises for review by the Tenant. The Landlord shall not be obligated to commence construction of the premises until such time as the Tenant and the Landlord have settled on the wording of the Landlord's Lease.

20. By way of letter dated September 15, 1988 (Sub-tab 16, Tab 1, Document Book), the Complainant forwarded a revised version of the Lease to the Solicitor for execution by Discount Furniture.

21. On September 15, 1988, Discount Furniture took possession of the Leased Premises (Sub-tab 49, Tab 1, Document Book). As of this date, the Lease had still not been executed by Discount Furniture nor had Discount Furniture provided the Roitbergs with the funds in support of the Rental Guarantee.

22. By way of letter dated September 21, 1988 (Sub-tab 17, Tab 1, Document Book), the Complainant again requested that the Solicitor return a copy of the Lease executed by Discount Furniture.

23. By way of letter dated September 22, 1988 (Sub-tab 18, Tab 1, Document Book), the Solicitor advised the Complainant of certain alleged deficiencies in the Leased Premises, such as the Landlord's alleged failure to provide two means of ingress and egress to the Leased Premises and to install outdoor lighting in accordance with the terms of the Agreement to Lease. The Solicitor concluded his letter of September 22, 1988 in respect of these issues by stating:

We hope to have this resolved before providing to you the written Lease which is otherwise acceptable.

24. By way of letter dated September 29, 1988 (Sub-tab 19, Tab 1, Document Book), the Complainant requested from the Solicitor, among other things:

...the following as per the commitment from your client in the Offer to Lease herein:

- (2) a bank letter of credit for the first five (5) years of the lease or an Assignment of Deposit of a GIC Certificate for \$100,000.00 in favour of my clients.
- (3) the executed lease returned in duplicate, which was submitted to you.

25. By way of letter dated September 29, 1988 (Sub-tab 20, Tab 1, Document Book), the Solicitor responded to the Complainant's letter by stating, among other things, the following:

Also enclosed is a copy advice from The Toronto-Dominion Bank that the Canadian Treasury Bill in the amount of \$108,588.48 in the name of Discount Furniture Land Ltd. matures December 9, 1988. We are sending appropriate forms to The Toronto-Dominion Bank as required by them with respect to making the satisfactory arrangements for the T-Bill to be assigned to the Landlord in accordance with the deposit requirements of the lease.

26. By way of letter dated October 18, 1988 (Sub-tab 23, Tab 1, Document Book), the Solicitor returned to the Complainant three copies of the Lease, as further amended and executed by Discount Furniture. The Solicitor requested that these copies in turn be signed by the Roitbergs, with an original signed copy returned to the Solicitor. In his letter, the Solicitor also advised that six minor matters "*remain to be dealt with*". However, none of these "minor matters" pertained to the Rental Guarantee. As a postscript to his letter, the Solicitor further advised that he was enclosing, among other things, the following:

1. Undertaking executed by Fred Mansour personally, respecting the \$100,000.00 Treasury Bill to be assigned to the Landlord.

27. The aforesaid undertaking (Sub-tab 50, Tab 1, Document Book) was executed by Fred Mansour on October 18, 1988. The Solicitor states that this undertaking was provided because it is not possible to assign a Treasury Bill during its currency. Mr. Mansour executed the undertaking on his own behalf and not on behalf of Discount Furniture and expressly undertook to both the Roitbergs and to the Complainant's law firm, Muroff, Taub & Rohaly, as follows:

THE UNDERSIGNED HEREBY UNDERTAKES that upon maturity of a Treasury Bill due December 9th, 1988, the undersigned shall cause Discount Furniture Land Ltd., the owner of such Treasury Bill, to deposit \$100,000.00 of the proceeds from same into a Term Deposit, which shall be assigned to the Landlord, Harry Roitberg and Jeannette Roitberg in accordance with the terms of an Offer to Lease premises at 2785 Howard Avenue, Windsor, Ontario.

28. By way of letter dated October 26, 1988 (Sub-tab 24, Tab 1, Document Book), the Complainant returned to the Solicitor three copies of the Lease as further amended by the Roitbergs. The Complainant requested that these copies be executed by Discount Furniture and then returned to the Complainant for execution by the Roitbergs. The Complainant also addressed the "minor matters" raised by the Solicitor in his letter of October 18, 1988. In closing, the Complainant stated:

I feel that you and your client are playing games with us and I would suggest that once and for all your client live up to his obligations....

29. By way of letter dated November 1, 1988 (Sub-tab 26, Tab 1, Document Book), the Solicitor conveyed the following offer to the Complainant in order to resolve the outstanding differences between their clients: In consideration for Discount Furniture agreeing to accept the Leased Premises with certain alleged deficiencies, the Roitbergs would agree to, among other things, the following change to the Rental Guarantee:

(4) The \$100,000.00 term deposit to be provided by assigning same to an Escrow Agent (we are content to utilize any Trust Company or Bank acceptable to the Landlord), the escrow terms to provide that the same is to be made available by the escrow agent to cover any arrears of rental or other payments in the nature of rent as called for pursuant to the terms of the Lease, as and when there is default in paying same by the Tenant. The same also to be available to the Landlord in the event of breach of the terms of the Lease giving rise to damages to the Landlord, following any judicial determination as to the damages the Landlord is entitled to.

30. In a letter dated February 5, 1997 to the Law Society (Tab 5, Document Book), the Solicitor described his letter of November 1, 1988, as follows:

By my correspondence to [the Complainant] of November 1, 1988, I made it clear that [Discount Furniture] requested the security requirements under the lease be satisfied by assigning security to a third party escrow agent and not directly to the Roitbergs. By Mr. Muroff's correspondence of November 4, 1988, this was acceptable.

31. By way of letter dated November 4, 1988 (Sub-tab 27, Tab 1, Document Book), the Complainant responded to the proposals set out in the Solicitor's letter of November 1, 1988 and confirmed that the Roitbergs are "*agreeable with your Items No. 3 & 4 on page two (2) of your letter*". [No. 4 being the proposed escrow arrangement for the Rental Guarantee as set out in paragraph 29 above]

32. By way of letter dated November 16, 1988 (Sub-tab 29, Tab 1, Document Book), the Solicitor responded by advising that Discount Furniture would execute the most recent draft of the Lease forwarded by the Complainant and also stated, among other things:

I appreciate your clients' agreement to Items No. 3 and 4 as set out in my letter of November 1, and I shall make appropriate arrangements with respect to the Escrow Agreement..."

33. By way of letter dated December 2, 1988 (Sub-tab 33, Tab 1, Document Book), the Solicitor forwarded three copies of the Lease as executed by Discount Furniture together with a "*Draft form of Escrow Agreement which I [the Solicitor] propose we utilize with respect to the \$100,000.00 term deposit that Mr. Mansour is required to deposit as security pursuant to the Lease. I would appreciate your reviewing the same, and determining if it is acceptable*". This version of the Lease was signed by the Roitbergs and became the final Lease.

34. The draft Escrow Agreement prepared by the Solicitor (Sub-tab 52, Tab 1, Document Book) provided that both Muroff, Taub & Rohaly and Kirwin, Gordon, Chapman, Wellman, Fullerton were to be appointed as "Trustee" and that "*it is the intent of this Agreement that each legal Partnership act in concert with the other in making any decisions as Trustee pursuant to this Agreement*". The Solicitor advises that this suggestion (ie. the two firms acting jointly as trustee) was made by the Solicitor because Discount Furniture objected to the fact that a financial institution, as contemplated in the letter referred to in paragraph 29 above, would charge a fee to act as escrow agent.

35. By way of letter dated December 12, 1988 (Sub-tab 34, Tab 1, Document Book), the Complainant advised the Solicitor that the form of the draft Escrow Agreement was not acceptable since it provided that the Solicitor's law firm was to act as "Trustee" jointly with the Complainant's law firm. The Complainant stated:

In regards to the Escrow Agreement, I advised you that I was prepared to act as Trustee under the Agreement, although I was not aware of the fact that your firm would likewise be a Trustee together with our firm.

I either would like the Term Certificate turned over as agreed in the lease of (*sic*) that our firm only be Trustee, named in the Escrow Agreement.

I see no reason why your firm is named as Trustee together with our firm in the Escrow Agreement.

If that is unsatisfactory, I would suggest that you obtain the Term Certificate as per the lease and turn it over to my client.

36. In a letter dated February 5, 1997 to the Law Society (Tab 5, Document Book), the Solicitor acknowledged that:

[the Complainant's] correspondence of December 12, 1988 indicated that he was not satisfied with the format of the escrow agreement and requested either the assignment of a term certificate as set out in the lease or an escrow agreement in which only his firm would be shown as the escrow agent.

37. By way of letter dated December 12, 1988 (Sub-tab 36, Tab 1, Document Book), the Solicitor wrote to the TD Bank, to the attention of Darlene Monette and gave Ms. Monette the following instructions:

Re: DISCOUNT FURNITURE LAND LTD.

Please arrange for the transfer of Treasury Bills in the name of Discount Furniture Land Ltd., in the amounts of \$103,000.00 and \$112,000.00, to be deposited as term deposits with your bank in names of Discount Furniture Land Ltd., in Trust for Kirwin, Gordon, Chapman, Wellman, Fullerton In Trust.

The same is in accordance with the instructions of Mr. Fred Mansour, President of Discount Furnitureland Ltd. We shall have further instructions prior to January 3, 1989, as to the manner in which these deposits should be subsequently be dealt with.

37.1 The Solicitor advises that the December 12, 1988 letter from the Solicitor to the TD Bank, referred to in paragraph 37 above, was written and sent before the Solicitor's receipt of the December 12, 1988 letter from the Complainant, referred to in paragraph 35 above. The Solicitor claims that following his receipt of the Complainant's letter of December 12, 1988, the Solicitor had discussions with the Complainant during which the Complainant stated that he anticipated that the Roitbergs would agree to the term deposit being held jointly in trust by the Solicitor's firm and the Complainant's firm.

37.2 The Complainant denies that he ever suggested or stated to the Solicitor that the Roitbergs would accept a joint escrow arrangement involving both firms. The Complainant advises that he had very few telephone conversations with the Solicitor during the course of their dealings and tried to ensure that all matters were dealt with by correspondence. There are no letters from either the Solicitor or the Complainant alluding to such a discussion or oral agreement pursuant to which the Roitbergs had agreed, or were expected to agree, to allow both firms to act jointly as trustee. The Complainant states that at no time did he suggest or state to the Solicitor that the Roitbergs would accept a joint trust arrangement involving both firms. In any event, the Roitbergs, through the Complainant's letter of December 12, 1988, had already expressly rejected just such a joint trust arrangement (see paragraph 35 above).

37.3 As set out in paragraphs 37.1 and 37.2 above, the Law Society and the Solicitor disagree as to what representations, if any, were made by the Complainant to the Solicitor in December 1988 concerning the willingness of the Roitbergs to enter into a joint trust arrangement which would include the Solicitor's firm. Thereafter, the following events transpired:

38. By way of letter dated January 4, 1989 (Sub-tab 37, Tab 1, Document Book), the Solicitor again wrote to Ms. Monette at the TD Bank and advised as follows:

Re: DISCOUNT FURNITURE LAND LTD.

Further to my instructions to you by letter of December 12, 1988 which were in error, and my subsequent telephone conversation with Mary of your department, please arrange for the transfer of the Treasury Bill in the name of Discount Furniture Land Ltd. in the amount of \$103,000.00 to a term deposit in the name of Kirwin, Gordon, Chapman, Wellman, Fullerton and Muroff, Taub & Rohaly in trust. Would you then provide evidence of such transfer to me in order that I might provide the same to the law firm of Muroff, Taub & Rohaly.

39. Notwithstanding the Complainant's letter of December 12, 1998 to the Solicitor, in which the Complainant advised the Solicitor that the draft form of Escrow Agreement was not acceptable to the Roitbergs, the Solicitor stated in his letter of February 5, 1997 to the Law Society (Tab 5, Document Book) that his instructions to the TD Bank contained in his letters of December 12, 1988 and January 4, 1989 "*were given on the expectation that the form of escrow agreement forwarded to Mr. Muroff in which both law firms would act as escrow agents would be acceptable*".

40. By way of letter dated January 18, 1989 (Sub-tab 38, Tab 1, Document Book), the Solicitor advised the Complainant as follows:

I enclose a deal contract with The Toronto-Dominion Bank with respect to a \$114,000.00 T-Bill which matures December 29, 1989, in the name of our firm and your firm in trust. These are the funds we wish to have held in accordance with an Escrow Agreement on the Discount Furniture Land Ltd. lease to Roitberg.

Please confirm that the form of draft Escrow Agreement forwarded to you is acceptable to your clients, and then advise us as to when we might be able to complete these matters.

41. Notwithstanding the Complainant's letter of December 12, 1988 to the Solicitor, in which the Complainant had already advised the Solicitor that the draft form of escrow agreement was not acceptable, the Solicitor stated in his letter of February 5, 1997 to the Law Society (Tab 5, Document Book) that after the Solicitor sent his letter of January 18, 1989, "*we were awaiting confirmation from [the Complainant] that the escrow agreement was satisfactory to him*".

42. The "deal contract" (Sub-tab 44, Tab 1, Document Book) enclosed in the letter of January 18, 1989 is dated January 3, 1989 and confirmed that the TD Bank had sold a Government of Canada treasury bill, maturing December 29, 1989, at a price of \$102,704.88, to "*Kirwin, Gordon, Chapman, Wellman, Fullerton and Muroff, Taub & Rohaly In Trust*".

43. By way of letter dated March 10, 1989 (Sub-tab 39, Tab 1, Document Book), the Complainant advised the Solicitor for a second time that the draft form of Escrow Agreement was not acceptable to the Roitbergs. However, the Complainant also advised that, consistent with the Solicitor's proposal in his letter of November 1, 1988 that Discount Furniture was "*content to utilize any Trust Company or Bank acceptable to the [Roitbergs]*" (see para 29 above), the Roitbergs would agree to a branch of the CIBC acting as Escrow Agent:

My clients have now returned from Florida and they have advised me that they are not content with the Term Certificate being in the name of your firm and my firm jointly.

He is prepared to allow the manager of the CIBC at Devonshire Shopping Mall being Murray Landrikan to be the Escrow Agent.

Would you kindly amend the Certificate naming Mr. Landrikan as Agent and prepare a new Escrow Agreement and forward the same to the writer for execution.

44. The Solicitor did not respond to the Complainant's letter and, in particular, did not forward a revised Escrow Agreement in accordance with the Complainant's request. The Solicitor advises that following receipt of the March 10, 1989 letter from the Complainant, the Solicitor entered into discussions with the CIBC with respect to the possibility of that bank acting as escrow agent, as reflected in his letters to the CIBC dated April 28, June 8, June 15, June 20, and June 28, 1989 (Tabs 24-28, Document Book). However, none of the aforementioned letters were copied to either the Complainant or the Roitbergs nor is there any evidence to suggest that they were aware of, or involved in, any such discussions between the CIBC and the Solicitor.

44.1 At some point, Discount Furniture elected not to pursue these discussions with the CIBC any further. The Solicitor wrote to Discount Furniture by way of letter dated September 1, 1989 (Tab 29, Document Book) confirming that Discount Furniture had instructed him to take no further steps with respect to a possible escrow agreement with the CIBC and had instructed the Solicitor to close out his file with respect to this matter. Again, the fact that these discussions were ongoing, or that Discount Furniture had decided to bring them to a close, were not known to either the Complainant or the Roitbergs.

45. Pending resolution of the specific terms of the Escrow Agreement, the Complainant and the Roitbergs relied on the executed Lease delivered by the Solicitor, Mr. Mansour's personal undertaking, and the Solicitor's written confirmation that sufficient funds had been deposited into the joint trust account, as assurances that the funds in support of the Rental Guarantee were in place.

46. By way of letter dated May 10, 1989 (Sub-tab 40, Tab 1, Document Book), the Complainant advised the Solicitor that he no longer represented the Roitbergs and requested that the revised Escrow Agreement be forwarded to the Roitbergs directly at the address noted in the letter:

Further to my letter to you of March 10, 1989 regarding the Escrow Agreement, please be advised that you may deal directly with Mr. Roitberg on this matter, as my services are no longer required by him. Kindly forward the documentation to him for his own execution....

46.1 After receipt of this letter, the Solicitor had no further communications with either the Complainant or the Roitbergs, or any successor counsel acting on their behalf, concerning the Rental Guarantee funds, prior to requesting that the TD bank turn those funds over to Mr. Mansour (as will be set out below).

46.2 Following receipt of the Complainant's March 10, 1989 letter, referred to in paragraph 43 above, the Solicitor states that it was apparent to him that no agreement could be arrived at between Discount Furniture and the Roitbergs as to any form of escrow arrangement involving his firm and/or that of the Complainant. The Solicitor was therefore of the opinion that no escrow arrangement or obligation attached to the Treasury Bill. The Solicitor claims that, at that point, the Roitbergs had to rely upon the personal undertaking given by Fred Mansour (referred to in paragraph 27 above) and the other terms of the Lease and, having rejected the escrow arrangements proposed by the Solicitor on behalf of Discount Furniture, could not reasonably rely upon any form of escrow arrangement involving the Solicitor. However, at no time after the Solicitor apparently came to this conclusion did he advise either the Complainant, the Roitbergs, or successor counsel acting on their behalf, in writing or orally that he was of this opinion.

46.2 Notwithstanding the inability of the parties to reach an agreement on the terms of an escrow arrangement at that time, Discount Furniture was never released from its fundamental obligation under the Lease to post a rental guarantee in the amount of \$100,000.00. To the extent a disagreement existed between the parties, it was with respect to the manner in which the Rental Guarantee was to be administered, not its existence as a term of the Lease. By this point in time, Discount Furniture had been in possession of the Leased Premises for approximately nine months and the Roitbergs reasonably relied on the fact that, notwithstanding the disagreement over the terms of the escrow arrangement, Discount Furniture had put the funds in place in satisfaction of the Rental Guarantee.

(iii) Transfer of Rental Guarantee Funds and Subsequent Departure from Leased Premises

46.3 The Solicitor advises that in late December 1989, Mr. Mansour contacted him for the first time since August 1989 concerning this matter, reminded the Solicitor that no agreement had been arrived at with respect to escrow arrangement, pointed out that the Treasury Bill matured as of December 27, 1989 and instructed the Solicitor to provide the TD Bank with a letter instructing it to transfer the proceeds of the Treasury Bill into the account of Discount Furniture because no escrow arrangement had ever been agreed upon with respect to those funds.

47. By way of letter dated January 2, 1990 (Sub-tab 44, Tab 1, Document Book), the Solicitor wrote to Ms. Monette of the TD Bank and provided the following instructions:

RE: TERM DEPOSIT -
KIRWIN, GORDON, CHAPMAN, WELLMAN, FULLERTON
and MUROFF, TAUB, ROHALY IN TRUST
In the amount of \$114,000.00

By letter dated January 4, 1989, a copy of which is attached, we directed the transfer of a T-Bill into a Term Deposit in the names of the two law firms in trust.

I understand the same has matured as of December 27, 1989 and has been in a daily interest term deposit since. It would be our wish to arrange for the transfer of same at this point to the client, DISCOUNT FURNITURE LAND LTD., in that the terms of the Trust between our firm and Muroff, Taub & Rohaly were never completed.

Could you please, based on this direction, arrange for the transfer of these funds to Discount Furniture Land Ltd. and obtain further instructions as to their deposit or otherwise directly from Mr. Fred Mansour, President of Discount Furniture Land Ltd.

48. The Solicitor sent a copy of his letter of January 2, 1990 to Ms. Monette of the TD Bank to Discount Furniture but did not provide a copy to either the Complainant or the Roitbergs. Unlike the Solicitor's earlier letter of January 4, 1989 concerning the initial deposit of the funds, the Solicitor did not request that the TD Bank give him evidence of the transfer "in order that he might provide same to the law firm of Muroff, Taub & Rohaly". Neither the Roitbergs nor the Complainant were given any notice or warning that the Rental Guarantee funds in the joint account were being transferred to Discount Furniture's own account.

48.1 The Solicitor is unable to account for the fact that he chose not to notify the Complainant or the Roitbergs of his request that the TD Bank release the funds to Mr. Mansour, even though the funds were the proceeds of a Treasury Bill which itself had been purchased in the name of both the Solicitor's and the Complainant's law firms, in trust (see paragraph 42 above).

48.2 By way of letter dated January 8, 1990, from the Solicitor to Discount Furniture (Tab 30, Document Book), the Solicitor advised Discount Furniture of the present status of the \$100,000.00 rent guarantee and specifically reminded Discount Furniture of its obligations, and the personal obligation of Mr. Mansour, with respect thereto. The Solicitor advised Mr. Mansour that Discount Furniture's failure to provide the rental deposit may be viewed as a breach of the Lease.

48.3 In February, 1990, the Solicitor states that he was advised by Fred Mansour that he was going to rebrand the store under a new name, using a new corporation which would be owned by himself, since he felt that a new name and marketing plan was necessary because sales had not been good since his relocation of the business to this location. The Solicitor took steps to incorporate a new entity for Mr. Mansour to operate the store from that location. However, a new corporation could not have assumed occupancy of the Leased Premises without the Roitbergs' consent to an assignment of the Lease.

48.4 At the end of February or in early March, 1990, the Solicitor states that he was advised by Fred Mansour that he had entered into an agreement with Wayne, Faith and Norman Fowler (who carried on a business under the name of "Wayne's Furniture") to purchase the assets of Discount Furniture, assume the Lease and acquire the new corporation that Mr. Mansour had formed, in order to carry on their furniture business from the Leased Premises. Copies of the Agreement of Purchase and Sale and correspondence surrounding the purchase transaction are attached (see Tabs 31-34, Document Book).

48.5 The Solicitor states that the Agreement of Purchase and Sale was prepared by the Solicitor after Wayne Fowler had visited the Roitbergs in Florida during their winter vacation and had returned to Windsor claiming that he had worked out an agreement with the Roitbergs concerning the rental guarantee which was dealt with in the Agreement of Purchase and Sale. The Agreement of Purchase and Sale was prepared and signed and the Consent of the Roitbergs as landlord to an assignment of the Lease was forwarded to the Solicitor for the Roitbergs for consent. The Solicitor states that at that time, the Roitbergs reneged on the proposed substitute Rental Guarantee arrangement, with the result that the purchase did not proceed.

48.6 There is no evidence that the Roitbergs "reneged" on any commitment to assign the Lease, as the Solicitor alleges. In fact, the Roitbergs, through their successor counsel, provided their consent to an assignment of the Lease on the same terms as it was originally executed. In contrast, the assignment proposed by Discount Furniture, through the Solicitor, called for the Roitbergs to- inexplicably- agree to reduce the Rental Guarantee from a \$100,000.00 deposit of funds to a \$50,000.00 guarantee, without any funds in support of it. The Roitbergs refused to assign the Lease on these terms since the proposed amendment to the Rental Guarantee would adversely affect their ability to recover under the Lease.

49. On or about March 24, 1990, Discount Furniture vacated the Leased Premises without notice or warning to the Roitbergs. At the time that Discount Furniture vacated the Leased Premises, the unexpired term on the Lease was approximately three and a half years and no funds were in place in support of the Rental Guarantee.

49.1 The Solicitor advises that he had known Fred Mansour and Discount Furniture since approximately 1975 and had acted for them as a solicitor since approximately 1980. Throughout that time, the Solicitor regarded Mr. Mansour as being an ethical and honourable individual, and, until the events of late March, 1990, the Solicitor claims that he had no reason whatever to believe that Mr. Mansour would not honour his personal Undertaking with respect to the Rental Guarantee. The Solicitor states that he had no prior knowledge of Discount Furniture's intention to vacate the Leased Premises and has produced an affidavit from Mr. Mansour in which Mr. Mansour deposes that "at no time prior to the vacating of the premises by Discount Furniture Land Ltd., did I disclose to Gary Michael Wellman that it was my intent to vacate the premises. It was in fact not my intent to vacate the premises at all, until the time the landlord refused to consent to an assignment of the lease to Wholesale Furniture Outlet (Windsor) Inc.". However, the facts set out in Mr. Mansour's affidavit were not subject to cross-examination by the Society nor did the Society have an opportunity to assess Mr. Mansour's credibility.

50. In 1991, the Roitbergs commenced an action for damages against, among others, the Solicitor, Discount Furniture, Fred Mansour and the Complainant. In late 1996, the action was settled, with LPIC (on behalf of the Solicitor, not the Complainant) and the TD Bank agreeing to contribute equally to a settlement payment for the value of the Rental Guarantee plus accrued interest.

VI. DISCIPLINE HISTORY

51. None.

DATED at Toronto this 25th day of August, 1998."

DECISION

The following particular of professional misconduct was found to have been established:

Complaint D22/98

2. a) He obtained the release of funds which he purported to hold in trust, jointly, with another lawyer, without notifying the other lawyer or his client.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Gary Michael Wellman be reprimanded in Convocation; Convocation accept the Solicitor's undertaking as to how the Solicitor will manage funds in the future (as set out in Exhibit 5); and, the Solicitor pay to the Law Society the sum of \$500.00 as costs of this investigation.

REASONS FOR RECOMMENDATION

The Solicitor has been practising as a commercial lawyer in the City of Windsor since his call to the Bar in 1979. The circumstances giving rise to this Complaint are set out in considerable detail in the Agreed Statement of Facts. The Complaint arises out of the manner in which the Solicitor dealt with funds on deposit in the joint name of the Solicitor's law firm and the Complainant's law firm.

In 1988 the Solicitor negotiated a commercial lease for his long-standing client, Discount Furniture. Although the lease which was eventually executed in December of 1988 contained a provision that "Lessee agrees to guarantee the rent for the first five (5) year term of the within Lease with a bank letter of credit or by an assignment of a deposit certificate for One Hundred Thousand Dollars (\$100,000.00). This guarantee shall not be required during any renewal terms of this Lease." (Paragraph 11 Agreed Statement of Facts).

Subsequent to the execution of the Lease there was considerable correspondence between the Solicitor and the Complainant who was acting for the Lessors concerning the manner in which the \$100,000.00 "guarantee" was to be arranged. On January 18, 1989 the Solicitor advised the Complainant that the Toronto-Dominion Bank was holding a One Hundred and Fourteen Thousand Dollars (\$114,000.00) Treasury Bill "in the name of our firm and your firm in trust. These are the funds we wish to have held in accordance with the Escrow Agreement on the Discount Furniture Land Ltd. Lease to Roitberg." (Paragraph 40 Agreed Statement of Facts).

It should be noted that prior to the execution of the Lease Mr. Mansour, a principal of Discount Furniture had personally undertaken to the Lessor and its counsel that he would cause Discount Furniture to cause the proceeds of a Treasury Bill owned by Discount Furniture to be deposited in a term deposit "which shall be assigned to the landlord, Harry Roitberg and Jeannette Roitberg, in accordance with the terms of an Offer to Lease premises..." (see paragraph 27 Agreed Statement of Facts).

After execution of the Lease the precise terms and mechanism by which the \$100,000.00 deposit "guarantee" were to be arranged was never finally agreed upon. It was apparent, however, the \$100,000.00 was on deposit in an account at the Toronto-Dominion Bank in the joint name of the Solicitor's law firm and Complainant's law firm. Although the precise terms under which the sum was being held was never clearly articulated, it was understood by all concerned that the monies had been deposited to meet the obligations of the Lease (see paragraph 46.2 Agreed Statement of Facts).

When the Treasury Bill matured at the end of December 1989 Mr. Mansour of Discount Furniture instructed the Solicitor to direct the Toronto-Dominion Bank to transfer the proceeds of the Treasury Bill into the account of Discount Furniture. The Solicitor did as he was instructed by his client, however, gave no notice to the Complainant or Mr. and Mrs. Roitberg of this instruction to the bank. On March 24, 1990 Discount Furniture vacated the leased premises without notice or warning to the Roitbergs. At that time the unexpired term of the Lease was approximately three and a half years and no funds were in place to support the guarantee referred to in the Lease (see paragraph 49 Agreed Statement of Facts).

The parties concede that the Solicitor's conduct constitutes professional misconduct. By directing the bank to transfer the proceeds of the deposit to the account of his client, he induced the bank to breach its obligation not to deal with the monies on deposit without directions from both law firms. Although the Complainant had indicated to the Solicitor that as of May 10, 1989 he was no longer representing the Roitbergs in this matter, this fact was not communicated to the Toronto-Dominion Bank. Furthermore, the Solicitor knew that the Complainant and the Roitbergs believed that the deposit "guarantee" remained in place. In all of the circumstances, it is the view of this Committee that the Solicitor's conduct is unbecoming a member of the legal profession.

It should be noted, however, that this is not a case of breach of trust, nor of any personal enrichment on the part of the Solicitor.

In the circumstances, the Committee was prepared to accept the joint submission of counsel that a reprimand in Convocation was an appropriate penalty. It should also be recognized that the events giving rise to this Complaint occurred approximately 10 years ago and that the Solicitor has an unblemished discipline record.

In the course of the submissions as to penalty counsel filed an undertaking (Exhibit 5), a copy of which is appended to this report, concerning the manner in which the Solicitor intends to deal with funds under his control in the future. While the second paragraph of the undertaking appears not to add anything to a Solicitor's usual obligations, the first paragraph of the undertaking appears to elevate what would otherwise be normal prudence to a somewhat higher status.

For the reasons expressed herein, I recommend to Convocation the adoption of the penalty set out above.

Gary Michael Wellman was call to the Bar on April 11, 1979.

ALL OF WHICH is respectfully submitted

DATED this 22nd day of September, 1998

William D.T. Carter

Mr. Corbett asked that the following corrections be made to the Report:

- page 3, beginning of paragraph 14 - should read "By way of letter dated March 11, 1988" not 1998.
- page 19, last paragraph, second sentence - the word "Although" be deleted - the sentence should then read "The lease which....".

There were no submissions.

It was moved by Mr. Swaye, seconded by Ms. Puccini that the Report as amended be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation and abide by his undertaking in the handling of funds in the future as set out in the Report. In addition the solicitor is to pay costs in the amount of \$500.

Both counsel made submissions in support of the joint submissions made before the Discipline Committee of a reprimand in Convocation.

It was moved by Mr. Swaye, seconded by Mr. Chahbar that the recommended penalty be adopted.

Carried

The Acting Treasurer administered the reprimand.

The Treasurer returned to Convocation.

Re: Thom Warren ARTHUR - Ridgeway

Mr. Topp did not participate.

Ms. Seymour appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Ms. Seymour advised that she had received a letter from Mr. Neil Campbell written on the solicitor's behalf requesting an adjournment.

Ms. Seymour advised that the solicitor was still in the hospital and the Society was not opposed to the request.

The matter was adjourned to the Discipline Convocation in March 1999.

Re: Robert Jack FALKINS - Sault Ste. Marie

Messrs. Topp, Wilson and Swaye did not participate.

Mr. Corbett appeared on behalf of the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation was advised that the solicitor was involved in a lengthy trial and requested an adjournment to January 1999. The Society was not opposed.

The matter was adjourned to the Discipline Convocation in January 1999.

Re: Clifford Paul MOSS - Willowdale

Messrs. DelZotto and Bobesich did not participate.

Ms. Amanda Worley appeared on behalf of the Law Society and Mr. Brian Heller, Duty Counsel appeared for the solicitor. The solicitor was not present.

Ms. Worley advised that the solicitor had contacted her by telephone requesting an adjournment due to ill health and that he was unable to complete the outstanding requirements. A letter was received dated November 24th, 1998 from a doctor at the York Central Hospital stating that the solicitor was required to stay off work for a day or two.

The Society was not opposed to this adjournment but wanted it made clear to the solicitor that the Society would not consent to any further adjournments except for exceptional circumstances.

The adjournment was granted to the Discipline Convocation in January, 1999 peremptory to the solicitor.

Re: David Mark MARCOVITCH - Toronto

Messrs. Topp and Wilson did not participate.

Ms. Catherine Braid appeared on behalf of the solicitor and Mr. Heller appeared for the solicitor who was present.

Ms. Braid advised that the solicitor was seeking an adjournment.

The matter was stood down so that Duty Counsel could receive instructions from the solicitor.

The Treasurer withdrew for the following matter and Mr. MacKenzie took the chair as Acting Treasurer.

Re: Gerald Nicholas KUZAK - Windsor

The Secretary placed the matter before Convocation.

Mr. Topp and Ms. Angeles withdrew for this matter.

Ms. Seymour appeared for the Society and Mr. Heller appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 15th October, 1998, together with an Affidavit of Service sworn 21st October, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 16th October, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 5th October, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Mary Eberts, Chair
David W. Scott, Q.C.
Nora Angeles

In the matter of
The Law Society Act
and in the matter of

GERALD NICHOLAS KUZAK
of the City
of Windsor
a barrister and solicitor

Kathryn Seymour
for the Society

Steve Rogin
for the solicitor

Heard: April 15, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 31, 1997 Complaint D345/97 was issued against Gerald Nicholas Kuzak alleging that he was guilty of professional misconduct.

The matter was heard in public on April 15, 1998 before this Committee composed of Mary Eberts, Chair, David Scott, Q.C. and Nora Angeles. The Solicitor attended the hearing and was represented by Steve Rogin. Kathryn Seymour appeared on behalf of the Law Society.

DECISION

The following particular of professional misconduct was found to have been established:

Complaint D345/97

2. a) He acted for both the vendor and purchasers in a real estate transaction and took action to advance the interests of the vendor over those of the purchasers after a contentious issue arose between the parties.

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D345/97 and is prepared to proceed with a hearing of this matter on April 15 and 16, 1998.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act, R.S.O. 1990 c. S.22.

III. FACTS

3. The Solicitor was called to the Bar in March, 1975. He is a partner in the law firm of Bondy, Kuzak, Riggs & Cervi in Windsor, Ontario.
4. The Solicitor was retained by Mr. John Viecelli, president of Via Custom Home Builders Inc. ("VIA"), sometime during the course of 1993 (Document Book, Tab 1).

5. Mr. Viecegli was a neighbour and good friend of the complainants, Mark and Brenda Kelso. Sometime in early June, 1995, the complainants entered into an agreement with VIA whereby the complainants agreed to purchase a vacant lot from VIA and, in turn, VIA agreed to construct a new home for the complainants on the lot at cost, plus 10%. The text of the agreement in its entirety (which was undated and signed only by the complainants) states:

"We, Mark and Brenda Kelso agree to be responsible as of June 30/95. for the property at 1752 Ferndale, Windsor, Ont., also we agree to pay all materials and labour for building new home at above address to Via Custom Home Bldrs., including all permits' required to build, +10% of cost of the house." (Tab 2)

6. The substance of the agreement between VIA and the complainants was formalized in an Agreement of Purchase and Sale dated June 10, 1995 (Tab 3).

7. While the Solicitor's name appears on the Agreement of Purchase and Sale as the "vendor's solicitor", both VIA and the complainants state that there was a consensus between them that the Solicitor would represent both of their interests as vendor and purchasers in the sale of the vacant lot at 1752 Ferndale Ave. ("Ferndale") (Tabs 4, 1 and 5).

8. The Solicitor admits that he acted for both sides in the transaction. The Solicitor further admits that he did not obtain the written consent of the parties to his acting on both their behalfs; nor did he provide the parties with a written document advising them of the potential conflict of interest and the attendant risks therein, and recommending that they obtain independent legal advice or acknowledge to him in writing that they were waiving their respective rights to independent legal advice.

9. The complainants had also retained the Solicitor's services with respect to an independent transaction, being the sale of their home at 1875 Jane Court, Windsor, Ontario ("Jane Court") (Tabs 4 and 5). The complainants were selling their home at Jane Court in order to move into the new home that had been constructed for them by VIA on the lot at Ferndale.

10. The closing of the complainants' purchase of the vacant lot at Ferndale took place on July 7, 1995. The closing of the complainants' sale of their home at Jane Court took place on or about September 22, 1995 (Tabs 6 and 7).

11. As stated above, the closing of the sale transaction with respect to Ferndale took place on July 7, 1995, for the purchase price of \$53,500. The Transfer/Deed of Land was registered on July 7, 1995 as Instrument No. 1313654. The Land Transfer Affidavit attached to the registered Deed indicates the Solicitor as the transferees' (ie. the complainants') solicitor, and that there was a mortgage back to the vendor due on September 10, 1995 (Tab 6).

12. The Solicitor also prepared a Charge/Mortgage of Land on behalf of the complainants for \$52,500 in favour of VIA and registered the mortgage that same day against title to the property known as 1752 Ferndale as Instrument No. 1313655 (Tab 8). The mortgage for \$52,500 in favour of VIA was also registered against title to the complainants' property known as 1875 Jane Court by Instrument No. 185782 (Tab 9).

13. The mortgage, as prepared by the Solicitor, was subject to the following specific terms:

"This mortgage is due and payable in full with interest either on September 29, 1995 or on the sale of the mortgagor's home located at 1875 Jane Court, Windsor, Ontario, whichever comes first, described as Lot 39 on Plan 12M-255.

The mortgagors shall have the privilege of paying the whole or any part of the unpaid balance at any time without notice or bonus.

The mortgagors shall pay a further sum of fifteen thousand dollars \$15,000 due on the completion of the roof on the premises located at 1752 Ferndale Avenue, Windsor, Ontario." (Tab 8)

14. Subsequent to the closing of the sale of Ferndale, the Solicitor issued his account, dated July 19, 1995, to the complainants for the total amount of \$1,021.68 (Tab 10).

15. On or about August 2, 1995, the Solicitor prepared his reporting letter with respect to the complainants' purchase of Ferndale which reported, at page 3, under the heading "Comments" that the complainants' mortgage in favour of VIA was registered against both the Ferndale property and the complainants' home at Jane Court (Tab 11).

16. At the time of the closing of the sale of the complainants' home, on or about September 22, 1995, the mortgage for \$52,500 in favour of VIA was discharged as against title to the Jane Court property by Instrument No. 188689 (Tab 12). Also as at September 22, 1995, the complainant's moved into their new home on the Ferndale property. Accordingly, the roof was completed at that time.

17. Subsequent to the closing of the sale of the complainants' home, Jane Court, the Solicitor rendered his account to the complainants dated September 30, 1995 for the total amount of \$449.44 (Tab 13). On or about October 2, 1995, the Solicitor prepared his closing report with respect to the sale of Jane Court (Tab 14).

18. Pursuant to the closing of the sale of Jane Court, the Solicitor - acting on his understanding of the complainants' verbal instructions to him - directed the sale proceeds that he had received in trust on behalf of the complainants on closing to VIA. In one of the Solicitor's letters to the Law Society dated March 6, 1996, the Solicitor explained that:

"With respect to the handling of his [the complainants'] sale transaction, the mistake I made in that matter was believing him when he told me that I was to apply the proceeds of the sale of his house toward the amount owing to Mr. Viecelli for the construction of the house. I did not obtain these instructions in writing and when the time came to pay the money, I did so to Mr. Viecelli, however Mr. and Mrs. Kelso [the complainants] then became quite agitated and insisted that the money be paid to them, notwithstanding the fact that they had told me directly in my office that the money should be applied toward the house construction since Mr. Viecelli was paying for all of the materials and labour and that they would owe him the money in any event." (Tab 15)

19. With respect to the Solicitor's direction of the closing proceeds to VIA, the complainants wrote the following in their letter of complaint to the Law Society dated January 24, 1996:

"When questioned about the balance of monies from the sale of our home, Mr. Kuzak stated he was very embarrassed and apologized for having arbitrarily given the monies to his client (the builder).

We questioned how he could make this decision without having any direction from ourselves. He stated once again that he was sorry and that he shouldn't have taken direction (from the builder) without checking with us, however he thought the arrangement was something agreed upon with the builder and ourselves. We queried what would make him think this since he didn't bother to consult us.

Mr. Kuzak was told at this point that this was totally unacceptable and we wished our monies to be returned immediately." (Tab 4).

20. On the issue of the direction of the closing proceeds, the Solicitor states that he was embarrassed because the complainants had changed their minds and he was obligated to go back to VIA and request the return of the monies. The Solicitor states that VIA objected to the return of the monies as the agreement between VIA and the complainants provided that VIA would be paid \$15,000 by the complainants upon the completion of the roof at 1752 Ferndale Avenue, as per the Schedule to the Charge at Tab 8.

21. Upon learning from the complainants that he had erred in the direction of the closing proceeds, the Solicitor took steps to obtain the funds back from VIA and to the complainants. In one of his response letters to the Law Society dated May 10, 1996, the Solicitor explained that:

"The money that was given to Mr. Viecelli from my trust account with the consent of the Kelso's [the complainants] was returned to the Kelso's after they complained to me. The reason for the delay was that Mr. Viecelli was given the money and that was apparently the agreement between the parties according to Mr. Viecelli. He was stunned to receive my telephone call requesting that the money had to be paid back since he had already commenced construction of the property and had had no payment whatsoever from Mr. and Mrs. Kelso despite the fact that they agreed to give Mr. Viecelli the balance of funds from the sale of their house (the funds I gave to Mr. Viecelli)." (Tab 2).

22. With respect to the return of the sale proceeds to the complainants, the complainants wrote in their letter of complaint to the Law Society that:

"Mr. Kuzak later called that same day, September 29, 1995 stating the builder will be bringing the cheque to his office and we could pick it up Monday, October 2, 1995.

On October 2, 1995, Mr. Kuzak stated he would get a hold of the builder once again. He called later in that day to say we could pick up the money at the builder's home. It was quite evident at this point, Mr. Kuzak was not trying to rectify the situation in our favour since this was his mistake and not ours.

On October 3, 1995, we went to the builder's home to pick up the monies which belonged to us...." (Tab 4).

23. In a letter to the Solicitor dated July 9, 1996, Mr. Viecelli, on behalf of VIA, described the circumstances with respect to the return of the sale proceeds to the complainants as follows:

"- Mr. Kelso [the complainant] again indicated to me that when the sale of the house would close, I would receive the balance of money left over from the sale, and also would receive the rest of my money when Mr. & Mrs. Kelso would re-mortgage their new house.

- When I called Mr. Kuzak again, I was informed that the cheque for the proceeds was ready and I went to his office to pick it up.

- A few days later, I received a call from Mr. Kuzak saying that the Kelso's demanded their money back, and that I must return the money to him.

- I was very upset with this turn of events and took a few days to return the cheque, as this was not the agreement the Kelso's and I had.

- I talked to them personally and was told that they wanted the money back, and they would not pay me the amount owing to me.

- Shortly after I brought the money directly to Mr. & Mrs. Kelso as advised by Mr. Kuzak to do, and he also suggested I should attempt to settle the dispute directly with them." (Tab 1).

24. The Solicitor states that, at that time, the house was almost completed by VIA, yet the \$15,000 owed to VIA by the complainants had not been paid.

25. The Complainants date the return of the sale proceeds from VIA to them as occurring on or about October 3, 1995 (Tab 4).

26. On or about October 12, 1995, the Solicitor registered a claim for lien in the amount of \$110,000 on behalf of VIA against the complainants' interest in Ferndale, as Instrument No. 13235 (Tab 16). On or about that same day, October 12, 1995, the complainants' new lawyer, Christos Kyrtasakos, wrote to the Solicitor and requested a copy of the registered VIA lien and "*all of Mr. and Mrs. Kelso's files with respect to the purchase of the Ferndale property and also on the sale of Jane Court*" (Tab 17).

27. Mr. Viecelli, on behalf of VIA, indicates in his summary of the facts relating to VIA's dispute with the complainants, dated July 9, 1996, that, subsequent to the registration of the construction lien, "*Mr. Kuzak has advised me that he could not deal with this case any more, and has not be [sic] acting on my behalf for at least the last two ½ months. I have told him to refer the file to John Corrent Law Firm, which I had used before*" (Tab 1).

28. On or about January 24, 1996, the complainants directed their letter of complaint to the Law Society which was received on January 25, 1996 (Tab 4).

29. The ensuing lien litigation, Court File No. 95-GD-34800, between Mr. Viecelli (plaintiff) and the complainants (defendants) has been tentatively settled pursuant to Minutes of Settlement dated April 03, 1998. To date, Mr. Viecelli has not received any payments from the complainants.

DATED at Toronto, this 15th day of April, 1998."

FINDING OF THE COMMITTEE

The Committee is of the view that a finding of professional misconduct should be made. There was professional misconduct contrary to Rule 5, and particularly as that Rule is elaborated in Commentary 13.

The Law Society has stipulated that the complaint allegation that the Solicitor acted for both the vendor and purchasers in a real estate transaction and took action to advance the interests of the vendor over those of the purchasers after a contentious issue arose between the parties, really focuses down on the filing of a lien for non-payment of the contract price for the house. And, on the basis of the submissions before us, we have found it significant that the lien claim for \$110,000 does include the sum of \$15,000 which had been rather hotly in contention between the parties as a result of the application of the proceeds of the sale of the Jane Court property.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Gerald Nicholas Kuzak be reprimanded in Convocation and that he pay costs of the Law Society in the amount of \$1500. The Committee also recommends that the Solicitor participate in the Practice Review Program.

REASONS FOR RECOMMENDATION

The Committee believes that the circumstances of this violation require that the Solicitor be reprimanded in Convocation and pay the costs of the Society in the amount of \$1500.

We also believe that it is important for him to participate in the Practice Review Program, because in light of his discipline history, it is apparent that he has a problem recognizing conflicts of interest and taking appropriate action to forestall getting into the problem, and also the unfortunate consequences to clients.

In the present state of our legislation, we will make the reprimand in Convocation conditional upon the Solicitor going into the Practice Review Program.

We decline to follow the Law Society's submission of the one month suspension because, in this circumstance, there was no personal gain to the Solicitor and, in the result, no one was harmed by the alleged conflict; namely, the filing of the lien. It appears to us as if there was going to be a lien action anyway. The reason being that the purchasers, who had arranged to have the house built for them, were steadfastly refusing to pay for it and there was nothing in what the Solicitor did that provided the precipitating factor in the builder having to go to a lien claim.

We have reviewed the prior finding that gave rise to a prior reprimand in Convocation and we do not see the need, in light of the circumstances of that case compared with the circumstances of this case, to follow a form of progressive discipline, because there is sufficient distinction between the circumstances of the prior case and this one, so that we are not in a situation, we consider, where this is a more serious violation of the rule.

We have also considered the Law Society's arguments with respect to general and specific deterrence. We believe that a constructive approach to specific deterrence is for the Solicitor to participate in the Practice Review Program.

As far as general deterrence is concerned, the publicity that may result from this case getting to Convocation may be sufficient to re-alert for the profession that they must be concerned about the conflict provisions of the Rules of Professional Conduct.

Gerald Nicholas Kuzak was called to the Bar on March 21, 1975.

ALL OF WHICH is respectfully submitted

DATED this 15th day of October, 1998

Mary Eberts, Chair

There were no submissions.

It was moved by Mr. Wilson, seconded by Ms. Ross that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation, pay costs in the amount of \$500 and recommends that the solicitor participate in the Practice Review Program.

Both counsel made submissions in support of the recommended penalty.

It was moved by Mr. Ross, seconded by Mr. Gottlieb that the recommended penalty be adopted.

Carried

The Acting Treasurer administered the reprimand.

The Treasurer returned to Convocation.

Re: Alexander Ian McMahon - Toronto

The Secretary placed the matter before Convocation.

Mr. Corbett appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 15th October, 1998, together with an Affidavit of Service sworn 21st October, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 16th October, 1998 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

W. Michael Adams

In the matter of
The Law Society Act
and in the matter of

Audrey Cado
for the Society

ALEXANDER IAN MCMAHON
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: September 29, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 20, 1997 Complaint D357/97 was issued against Alexander Ian McMahon alleging that he was guilty of professional misconduct.

The matter was heard in public on September 29, 1998 before W. Michael Adams sitting as a single bencher. The Solicitor did not attend the hearing nor was he represented. Audrey Cado appeared on behalf of the Law Society.

DECISION

The following particular of professional misconduct was found to have been established:

Complaint D357/97 (as amended)

2. a) He failed to file the forms prescribed by the Rules and the Reports completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*, since the commencement of his practice on or about October 1, 1993.

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statement of Facts:

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D357/97 and is prepared to proceed with a hearing of this matter on June 10, 1998.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D357/97 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 24, 1972. He called the Law Society on December 31, 1994, and indicated that he was withdrawing from the practice of law.

5. The Solicitor indicated to the Law Society, by memo received by the Law Society on February 11, 1994, that he was commencing practice as a sole practitioner as of October 1, 1993. (Document Book, Tab 1) The Solicitor's last filing was for the fiscal year ended November 30, 1993 (Document Book, Tab 2). As a sole practitioner during the his fiscal year ended November 30, 1994, the Solicitor was required by s.16(2) of Regulation 708 under the Law Society Act, as it was at that time, to file a Form 2 and Form 3 within six months of the termination of the fiscal year ended November 30, 1994, that is, by May 30, 1995. The Solicitor did not make his required filing by May 30, 1995.

6. The Solicitor met with Jim Yakimovich, Director of Audit and Investigations, of the Law Society on January 8, 1996 and advised he would file his forms by the end of January 1996 (Document Book, Tab 3).

7. By letter dated February 2, 1996 (Document Book, Tab 4) the Law Society advised the Solicitor that he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act. The Solicitor was advised the last filing received from him by the Law Society was for the period ended November 30, 1993. The Solicitor was requested to contact the Law Society should he believe that his filing had already been made. The Solicitor did not contact the Law Society.

8. By letter sent registered mail, dated April 4, 1996 (Document Book, Tab 5), the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised that failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention.

9. On April 10, 1996, the Solicitor telephoned the Law Society and spoke with a staff employee. He expressed concern with the tone of the Law Society's second Notice to him regarding default in his annual filings. He had questions which needed to be answered by someone in authority before his filings could be made. He advised of his meeting with Jim Yakimovich and that he had attempted to reach the Treasurer by phone and letter. The staff employee assured the member that the Annual Filing Department would not seek disciplinary action until instructions were received from the Treasurer. (Document Book, Tab 6)

10. The Law Society received a telephone message dated October 22, 1996 providing the Solicitor's telephone number. A staff employee of the Law Society spoke with the Solicitor on November 26, 1996. He indicated at this time that his filing was not complete and that he would call the Law Society the following week. (Document Book, Tabs 7 and 8)

11. A staff employee of the Law Society spoke with the Solicitor on December 6, 1996. He indicated that he was resigning from practice later that year, and would be filing his forms. He also indicated that he still had two to five clients out-standing. Four clients owed him money which he did not expect to be paid and he retained unclaimed trust monies for two more clients. He stated that he would provide his filing to the Law Society that month (Document Book, Tab 9).

12. The Solicitor provided written submissions, dated December 18, 1997, to the Law Society by way of explanation for his late filing. (Document Book, Tab 10)

13. By letter sent via registered mail, dated March 6, 1998, (Document Book, Tab 11) the Law Society advised the Solicitor that on February 27, 1998 Convocation had adopted the Professional Regulation Committee's recommendation permitting the Law Society to accept a Private Practitioner's Report in fulfilment of the filing requirement for members in default of their filing requirement for previous years, against whom a formal complaint is either pending hearing or has proceeded to a hearing and is pending Convocation. The Solicitor was advised that, as a result, he was no longer obliged to file a Public Accountant's Report to comply with the filing requirement. The Law Society enclosed with its letter a blank Private Practitioner's Report for the Solicitor's 1994 fiscal year so that he could avail himself of the self-reporting process.

14. To date, the Solicitor has not provided the outstanding filing.

V. DISCIPLINE HISTORY

15. The Solicitor does not have a discipline history."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Alexander Ian McMahon be reprimanded in Convocation if his filings have been completed by the time this matter reaches Convocation, failing which, that he be suspended for a period of thirty days beginning at the end of the member's administrative suspension and continuing thereafter until the required filings have been made.

REASONS FOR RECOMMENDATION

The Society cannot fulfil its role of protecting the public if members fail to file their forms as prescribed by the Rules. Members who fail to file their forms cause other members to bear the Society's resulting extra investigation and administrative costs. The efficiency of the system depends on the compliance of all members. While this member did show some sympathetic circumstances, no medical evidence was produced that would take this case out of the usual disposition. However, given his circumstances, the Society's request for costs in the amount of \$850 is denied.

Alexander Ian McMahon was called to the Bar on March 24, 1972.

ALL OF WHICH is respectfully submitted

DATED this 15th day of October, 1998

W. Michael Adams

Mr. Corbett read a letter dated November 25th, 1998 from the solicitor advising that he would not be attending Convocation. Mr. Corbett further advised that the solicitor had not completed his filings.

The letter was filed as Exhibit 2.

It was moved by Ms. Ross, seconded by Mr. Topp that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 30 days, such suspension to commence at the end of the solicitor's administrative suspension and continue thereafter until the filings were made.

Counsel for the Society made submissions in support of the recommended penalty.

It was moved by Ms. Ross, seconded by Mr. Arnup that the recommended penalty be adopted.

Carried

Re: Giuseppe ZITO - Sudbury

The Secretary placed the matter before Convocation.

Messrs. Topp and Bobesich withdrew for this matter.

Mr. Glenn Stuart appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 9th September, 1998, together with an Affidavit of Service sworn 15th September, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 11th September, 1998 (marked Exhibit I). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas J. P. Carey

In the matter of
The Law Society Act
and in the matter of

Glenn Stuart
for the Society

GIUSEPPE ZITO
of the City
of Sudbury
a barrister and solicitor

Not Represented
for the solicitor

Heard: June 3, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 11, 1996 Complaint D177/96 was issued against Giuseppe Zito alleging that he was guilty of professional misconduct and conduct unbecoming a barrister and solicitor, and, on March 6, 1997 Complaint D82/97 was issued alleging that the Solicitor was guilty of professional misconduct. Complaint D22/97 issued on February 7, 1997 was withdrawn on consent.

The matter was heard in public on June 3, 1998, with part of the documentary evidence being received *in camera*., Thomas J.P. Carey heard the matter sitting as a single bencher on consent of both parties. The Solicitor attended the hearing but was not represented by counsel. Glenn Stuart appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct and conduct unbecoming a barrister and solicitor were found to have been established:

Complaint D177/96

2. a) He breached section 14(12) of Regulation 708 under the *Law Society Act* by failing to maintain sufficient balances in his trust account to meet all his obligations with respect to money held in trust for clients, as follows:
 - (i) As at January 31, 1994 the trust shortage in his client mixed trust account totalled \$595,148.10;
 - (ii) As at October 30, 1992, the trust shortage in a separate interest bearing account belonging to his client Pauline Witkowski, totalled \$42,421.71.

- (b) He breached his fiduciary duty to his clients by failing to maintain sufficient control over the use of his trust account cheques in that he delegated responsibility for his trust accounts and transactions related to them, to his office manager, Tim Lachappelle, and by doing so he has failed to properly supervise his staff, contrary to the provisions of Rule 6 of the Rules of Professional Conduct.
3. (a) On March 11, 1996, the Solicitor was convicted of the offence that he between May 30, 1994 and June 2, 1994 did as an accessory contrary to Section 21(1)(b) of the Criminal Code of Canada do acts to aid and assist Michael Ceccolini in attempting to defraud the Halifax Insurance Company of monies exceeding \$1,000.00 contrary to the Criminal Code of Canada section 463(b).

Complaint D82/97

2. (a) In or about March 1994, he misapplied, more or less, \$63,379.12 of funds to be paid to National Trust.
- [Particular 2(b) was found in the alternative and 2(c) was withdrawn at the hearing.]

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D177/96 and D82/97 and is prepared to proceed with a hearing of this matter on June 3, 1998.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the *Statutory Powers Procedure Act*.

III. ADMISSIONS

3. The following admissions are for the purpose of these proceedings only and in lieu of *viva voce* evidence thereof. The Solicitor has reviewed Complaints D177/96 and D82/97 and this Agreed Statement of Facts and admits the particulars of those Complaints and the facts contained in this Agreed Statement. The Solicitor also admits that the facts alleged in particulars 2(a) (i) and (ii) and 2(b) of Complaint D177/96 and the particulars of Complaint D82/97, supported by the facts as hereinafter stated, constitute professional misconduct and that the facts alleged in particular 3(a) of the Complaint, supported by the facts as hereinafter stated, constitute conduct unbecoming a barrister and solicitor.

3. The Solicitor agrees that the misconduct which is the subject of these Complaints warrants his disbarment and jointly submits with the Law Society that he should be disbarred on the basis of these Complaints.

IV. FACTS

4. The Solicitor was called to the Bar on March 25, 1977. For a time the Solicitor practised as a partner in the firm Zito, Anzil, Barristers & Solicitors. The firm was dissolved on December 7, 1990 by virtue of the bankruptcy of Mr. Anzil. The Solicitor continued to practice under the firm name until May 30, 1995 when he began practice as a sole practitioner.

Complaint D177/96

- Particulars 2(a) He breached section 14(12) of Regulation 708 under *The Law Society Act* by failing to maintain sufficient balances in his trust account to meet all his obligations with respect to money held in trust for clients, as follows:
- (i) As at January 31, 1994 the trust shortage in his client mixed trust account totalled \$595,148.10.
- 2(b) He breached his fiduciary duty to his clients by failing to maintain sufficient control over the use of his trust account cheques in that he delegated responsibility for his trust accounts and transactions related to them, to his office manager, Tim Lachapelle, and by doing so he has failed to properly supervise his staff, contrary to the provisions of rule 6 of the Rules of Professional Conduct.

5. As a result of his general account being garnished by Revenue Canada, after March 1993, the Solicitor began to use a client trust ledger account, #13228, as his general account. This ledger had been created in 1989 but was not used substantially prior to March 1993. Fees were posted to this account and draws, salaries and office expenses, among other items, were debited from this account. The client trust listing of this ledger account, referred to as "Joe Zito's account" (Tab 1, Document Book), established that the overdrawn balance of this account steadily increased from \$14,928.72 in February 1993 to \$581,884.64 in January 1994.

6. As of January 31, 1994, there was a shortage in the Solicitor's mixed trust account at the CIBC of \$595,148.10. This amount is calculated by adding the following:

- (i) an overdraft of \$181,351.36 in the trust account at CIBC as shown by the January 27, 1994, bank reconciliation for that account (Tab 2, Document Book) and the trust account bank statements for the same time period (Tab 3, Document Book); and,
- (ii) the total of the cumulative positive balances, being \$413,796.74, as shown on the listing of the client mixed trust account as at January 31, 1994 (Tab 4, Document Book).

The trust shortage was not the result of outstanding deposits and cheques, but rather, was an actual trust shortage representing the amount by which the Solicitor could not meet his liabilities to clients from his trust account.

7. The Law Society auditor prepared a summary (Document Book, Tab 5) of the transactions in this ledger during the period of time from April 1993 to November 1993, inclusive, which lists the withdrawals from this account and allocates them with reference to whether they represent the payment of office expenses or whether they were payments on behalf of the Solicitor or his office manager, Tim Lachapelle. Approximately \$119,000 was paid from the trust account to the benefit of the Solicitor during this period.

8. Although all of the cheques on the trust account bear the Solicitor's signature, many of those cheques were actually signed by Mr. Lachapelle at the Solicitor's request, or signed in blank by the Solicitor. The Solicitor authorized Mr. Lachapelle to make payments for various law firm expenses from the trust account in this way.

9. The Solicitor did not review each payment made by Mr. Lachapelle. The Solicitor also did not review the client trust listings, trust reconciliations or other book and records while authorizing Mr. Lachapelle to use the trust account to pay various expenses, although he was aware during at least part of 1993 that there were problems in the account.

10. Subsequent to the auditor's initial visit at the Solicitor's office, the Solicitor fired Mr. Lachapelle. The Solicitor admits that he was ultimately responsible for failing to properly supervise Mr. Lachapelle in the handling of this account.

11. The overdrawn balance in the Zito client trust account was reduced in February 1994 by a deposit of \$185,000 which the Solicitor borrowed from CIBC. The overdrawn balance was further reduced by an additional loan in the amount of \$296,313 in May 1994. Also in May 1994, the Solicitor's bookkeeper made several adjusting entries which further reduced the overdrawn balance in the Zito trust account and eliminated the shortage.

Complaint D177/96

- Particulars 2(a) He breached section 14(12) of Regulation 708 under *The Law Society Act* by failing to maintain sufficient balances in his trust account to meet all his financial obligations with respect to money held in trust for clients as follows:
- (ii) As at October 30, 1992, the trust shortage in a separate interest bearing account belonging to his client Pauline Witkowski, totalled \$42,421.71.
- 2(b) He breached his fiduciary duty to his clients by failing to maintain sufficient control over the use of his trust account cheques in that he delegated responsibility for his trust accounts and transactions related to them, to his office manager, Tim Lachappelle, and by doing so he has failed to properly supervise his staff, contrary to the provisions of rule 6 of the Rules of Professional Conduct.

12. In 1989, the Solicitor acted for Mrs. Pauline Witkowski, an elderly woman who resides in a retirement home. The Solicitor received the proceeds of the sale of Mrs. Witkowski's home, in the amount of \$32,946.71, into trust. This money was to be kept in trust in a separate interest bearing account until Mrs. Witkowski's death, when the money was to be distributed to her beneficiaries.

13. These funds were subsequently removed from the separate interest bearing trust account established by the Solicitor and deposited into his mixed trust account to the credit of his personal client trust ledger.

14. The sum of \$42,421.71 was ultimately repaid to Mrs. Witkowski's son, Fred Witkowski, in June 1995, after the Solicitor had repaid these monies to his trust account at National Trust.

15. The \$42,421.71 trust shortage did not form part of the \$595,148.10 trust shortage in the Solicitor's mixed trust account, detailed in Particular 2 (a)(i).

Complaint D177/96

- Particular 3 (a) On March 11, 1996, the Solicitor was convicted of the offence that he between May 30, 1994 and June 2, 1994 did as an accessory contrary to Section 21(1)(b) of the *Criminal Code of Canada* do acts to aid and assist Michael Ceccolini in attempting to defraud the Halifax Insurance Company of monies exceeding \$1,000.00 contrary to the *Criminal Code of Canada* section 463(b).

16. On March 11, 1996, the Solicitor appeared before His Honour Judge W. Cohen in the Ontario Court of Justice Provincial Division, Sudbury, Ontario. The Solicitor entered a plea of guilty to the charge of acting as an accessory to a criminal offence. The Solicitor was convicted and received a fine of \$5,000.00. A copy of the certificate of conviction is contained at Tab 6 of the Document Book. All other criminal charges were withdrawn. Counsel for the Solicitor indicated that the facts entered by the Crown were substantially correct. A copy of the transcript of the proceedings, including the facts read in by the Crown, is contained at Tab 7 of the Document Book.

Complaint D82/97

- Particular 2(a) In or about March 1994, he misapplied, more or less, \$63,379.12 of funds to be paid to National Trust;

17. In March 1994, Jean-Guy and Sylvie Paquette purchased for \$69,000 a vacant lot known municipally as 1346 Mount Attlee, Sudbury from Biser Inc. Normand Forest ("Forest"), a Sudbury lawyer, represented Paquette and the Solicitor represented Biser Inc. The purchase closed on March 31, 1994.

18. On closing, the Solicitor undertook in writing (Document Book - Tab 8) to Forest and his clients Paquette to forthwith forward a certified cheque to National Trust, which held a blanket mortgage over the subdivision, and to obtain and register a proper form of partial discharge of the National Trust blanket mortgage on the Paquette's property. Zito also signed an undertaking as attorney for Bernard Langlois, President of Biser Inc., authorizing and directing Forest to pay \$63,379.12 to National Trust Company, \$12.53 to the City of Sudbury and \$9,938.35 to Zito Associates (Document Book - Tab 9).

19. On the closing date of March 31, 1994, Forest prepared a certified cheque payable to National Trust Company in the amount of \$63,379.12 (Document Book - Tab 10). This cheque represented the amount necessary to obtain a partial discharge of the National Trust mortgage on the Paquette's property. Forest issued another cheque payable to Zito Associates In Trust in the amount of \$9,938.30 (Document Book - Tab 11). Forest forwarded all three cheques to the Solicitor's office.

20. The cheque made payable to National Trust Company was deposited into the Solicitor's trust account at the CIBC, account #9901019. The deposit of these funds was recorded in the client trust ledger account, described above, which the Solicitor used to operate general account transactions through the trust account (Document Book, Tab 12). The deposit, in the amount of \$64,265.32, was entered on April 6, 1994, and is identified as "Interbranch Payment re: Biser - no file yet assigned." As indicated above, a trust ledger had been established for this transaction.

21. As reflected in the client trust ledger (Document Book, Tab 12), the balance generated in the trust account by this deposit was subsequently paid out in its entirety.

22. The Solicitor did not at any time deliver either the original cheque or a replacement cheque to National Trust.

23. Paquette, by his counsel Forest, subsequently commenced litigation against National Trust, Giuseppe Zito, Zito Associates, and CIBC. Ultimately, CIBC paid the amount due on the mortgage to National Trust.

24. In the interim, the Solicitor had entered into an agreement with the principal of Biser Inc., Bob Nikolic ("Nikolic"). Nikolic was a client for whom the Solicitor had performed a large amount of work and who owed him, according to the Solicitor, as much as \$100,000 in legal fees at the time. Pursuant to the written agreement, dated May 15, 1995 (Tab 13, Document Book), Nikolic agreed to assume responsibility for paying the outstanding amount owing on the National Trust mortgage on the Paquette property, and the Solicitor would credit this amount against fees owed by Nikolic to Zito Associates.

V. DISCIPLINE HISTORY

25. On February 7, 1995, the Solicitor was found guilty of professional misconduct for failing to file for the fiscal year ending August 31, 1993, and for failing to reply to the Law Society's requests for information in relation to his accounting records, and was reprimanded in Committee.

DATED at Toronto this 3rd day of June, 1998."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Giuseppe Zito be disbarred.

REASONS FOR RECOMMENDATION

As to penalty, there is a joint submission that has been arrived at by counsel for the Law Society and Mr. Zito, who has had legal advice. That joint submission is for disbarment.

The facts reveal serious repeated misconduct involving the misuse of a trust account with a trust shortage of almost \$600,000 with a misapplication of funds of over \$63,000 from National Trust, as well there is a criminal conviction for assisting in an attempted fraud.

These are serious repeated violations of the trust placed in a member of the profession, and the confidence that the public has in the ability of the profession to govern itself and to provide the public with competent and ethical lawyers, would be shaken badly if the Law Society, through Convocation, were to apply anything other than its most serious sanction to the Solicitor. It must accordingly be my recommendation that he be disbarred.

Having said that, it should be recognized that the Solicitor co-operated, although somewhat at the end, in terms of putting together an Agreed Statement of Facts, that co-operation saved considerable time. There were a lot of witnesses released. As well, and not the least in importance, there has been restitution made of all of the monies that relate to the complaints here, and that should be noted in his favour, although these acts do not balance off to relieve the Solicitor of the penalty.

The recommendation then is that he be disbarred and his name struck from the rolls.

Giuseppe Zito was called to the Bar on March 25, 1977,

ALL OF WHICH is respectfully submitted

DATED this 9th day of September, 1998

Thomas J. P. Carey

Mr. Stuart read to Convocation a letter received by fax from the solicitor dated November 25th, 1998 who advised that he would not be attending Convocation and that he consented to the matter proceeding in his absence.

The letter was filed as Exhibit 2.

It was moved by Mr. Wright, seconded by Ms. Ross that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be disbarred.

It was moved by Mr. Swaye, seconded by Mr. Wilson that the recommended penalty be adopted.

Counsel, the reporter and the public withdrew.

The Swaye/Wilson motion to disbar the solicitor was voted on and adopted.

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be disbarred.

Re: James Allan MILLARD - Etobicoke

The Secretary placed the matter before Convocation.

Messrs. DelZotto, Bobesich and Topp withdrew for this matter.

Ms. Braid appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 25th September, 1998, together with an Affidavit of Service sworn 2nd October, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 30th September, 1998 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Elvio L. DelZotto, Q.C., Chair
Gordon Z. Bobesich
Kim Carpenter-Gunn

In the matter of
The Law Society Act
and in the matter of

Janet Brooks
for the Society

JAMES ALLAN MILLARD
of the City
of Etobicoke
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 17, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 9, 1997 Complaint D355/97 was issued against James Allan Millard alleging that he was guilty of professional misconduct.

The matter was heard in public on March 17, 1998 before this Committee composed of Elvio DelZotto, Q.C., Chair, Gordon Bobesich and Kim Carpenter-Gunn. The Solicitor attended the hearing and represented himself. Janet Brooks appeared on behalf of the Law Society.

DECISION

The following particular of professional misconduct was found to have been established:

Complaint D355/97

2. a) He breached an Order of Convocation dated December 31, 1995 suspending his rights and privileges to practise law by continuing to practise during the period January 1, 1996 to July 22, 1996.

RECOMMENDATION AS TO PENALTY

The majority of the Committee recommends that James Allan Millard be disbarred.

REASONS FOR RECOMMENDATION

This matter did not proceed on the basis of an Agreed Statement of Facts. Accordingly, it was necessary for the Law Society to call evidence to prove the alleged misconduct.

We find that the Solicitor continued to practise from January 1, 1996 to July 22, 1996 while his rights and privileges had been suspended by an Order of Convocation dated December 31, 1995.

It is clear, and acknowledged by the Solicitor, that he has no intention of complying with the Order of Convocation and admits that he has practised law while suspended. The Solicitor has acknowledged the truth of the material filed in the extensive Document Brief, containing 107 Tabs. This Document Brief contains clear evidence of the Solicitor's defiant, deliberate and unrepentant disregard for his obligations to the Law Society.

The Solicitor called no evidence to contradict the four Law Society witnesses and did not give evidence on his own behalf. He declined to avail himself of the services of Duty Counsel.

The four Law Society witnesses gave compelling evidence to show that the Solicitor was practising while under suspension during the period of January 1, 1996 to July 22, 1996. The Solicitor cross examined all of the witnesses called on behalf of the Law Society.

Mr. Jay Holden Blair gave evidence on behalf of the Law Society. He is a practising solicitor and was acting on a matrimonial matter during the period at issue. Mr. Millard was representing the interests of the opposing party. Evidence was given of Mr. Millard misrepresenting his status as a solicitor to other counsel and to the Court during his period of suspension. Mr. Blair's evidence was clear and uncontradicted.

In another matter, evidence was put before the panel that Mr. Millard acted for Julie Allan at a Trial conducted at General Division, in Toronto, during the period of suspension. Evidence was before the panel of Mr. Millard serving Notices of Examination, Commissioning Affidavits as a solicitor, and holding himself out as a Barrister and Solicitor during the relevant time.

Mr. Millard clearly stated, both verbally and in the documents filed, that he does not want to be a member of the Law Society.

We heard evidence that on December 10, 1997 the Solicitor briefly appeared before a Committee composed of a single Benchler, with respect to a fail to file with the Society within six months of his fiscal year end, May 31, 1996. The Report of that Committee, dated February 23, 1998 was filed as an exhibit before this Committee. Likewise, the transcript of the December 10, 1997 proceedings was filed as an exhibit with this Committee. It is clear from that earlier report that the Solicitor had no intention of ever filing the required forms.

The recommendation as to penalty for that earlier matter was that Mr. Millard be suspended for a definite period of three months and thereafter from month to month until such time as he has completed his filings to the satisfaction of the Law Society. This earlier matter had not yet gone to Convocation when the present matter was heard.

Mr. Millard provided no mitigating reasons for his obstinate disregard for his obligations as a member of the Law Society.

It is conceded that the usual penalty for practising under suspension is a period of suspension equal to the period during which the impugned practice occurred, plus an additional month. However, this penalty is not appropriate on the individual circumstances of this case.

The Solicitor has stubbornly held to the position that his problems stem from the manner in which he believes that the Law Society has governed and that he does not respect the Law Society's authority over him.

In defiance of the order to cease practising, he has set himself up as a paralegal, and on his letterhead he holds himself out as a lawyer by stating at the top of the letterhead, "Sole Practitioner, 1982-1995" with no disclaimer that he is no longer a practising lawyer.

Notwithstanding his new purported status as a paralegal, he continued to use his legal letterhead in some matters and continued to bill Legal Aid for work performed while under suspension. In fact, he submitted seven bills to Legal Aid during the period wherein he was under suspension. Two of the accounts used his full legal letterhead, and on five he drew a line through 'Barrister, Solicitor & Notary Public, Avocat et Notaire'.

The Law Society witness, Tina Perryman, testified that she had a conversation with Mr. Millard on January 26, 1996, supported by a memo of the same date which was filed in evidence. In this memo Mr. Millard admitted to practising while under suspension and that he could be in trouble. He also stated that he would have to pay before he resigned. Tina Perryman's evidence was uncontested. The Solicitor deliberately chose to disregard his knowledge of his administrative suspension.

The Law Society, throughout this period of defiance, clearly outlined to him his obligations and his rights as a paralegal and indicated to him in what areas he could practise as a paralegal. The Solicitor voluntarily chose to breach those guidelines. It is clear that this Solicitor is ungovernable.

In cases of a finding of ungovernability, such as in Wickham, the appropriate penalty is disbarment.

Our obligation is the protection of the public and to ensure that similar conduct is deterred with respect to other solicitors.

James Allan Millard was called to the Bar on April 7, 1982.

ALL OF WHICH is respectfully submitted

DATED this 13th day of August, 1998

Elvio L. DelZotto, Q.C., Chair

DISSENTING REASONS

REASONS FOR DISSENT

Although the Solicitor did practise law from June 1, 1996 to July 22, 1996 while suspended, the actions complained of are no different or more aggravating than how others have breached this same prohibition.

There is no reason, that I can see, why the usual penalty for practising under suspension, that being a period of suspension equal to the period during which the impugned practice occurred plus an additional month, should not follow.

The Solicitor has maintained that his problems stem from the manner in which the Law Society handled alleged negligent claims against him, that is settling them without his knowledge or authority, and then increasing his premiums to the level where he was forced to discontinue his practice. There was no evidence called to dispute his position. This is in my view mitigating.

ALL OF WHICH is respectfully submitted

DATED this 25th day of September, 1998

Gordon Zlatko Bobesich

Ms. Braid advised that the solicitor had been served in accordance with the Act.

It was moved by Ms. Legge, seconded by Ms. Ross that the Report be adopted.

Carried

The majority recommended penalty of the Discipline Committee was that the solicitor be disbarred and the minority recommended penalty be a period of suspension.

Ms. Braid made submissions in support of the majority recommended penalty of disbarment.

There were questions from the Bench.

The period of suspension set out in the minority recommended penalty on page 6, first paragraph was corrected to state that the solicitor practised law from January 1, 1996 to July 22, 1996.

A letter to the solicitor from Ms. Janet Brooks dated January 13th, 1998 re: Complaint D355/97 was filed as Exhibit 2.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Gottlieb, seconded by Mr. Swaye that the solicitor be suspended for a period of 12 months.

Lost

It was moved by Mr. Wright, seconded by Mr. Chahbar that the solicitor be granted permission to resign by December 31st, 1998 failing which he would be disbarred.

Carried

Counsel, the reporter and the public were recalled.

Convocation's decision was that the solicitor be granted permission to resign by December 31st, 1998 failing which he would be disbarred.

Resumption of the Marcovitch matter

Mr. Heller advised that the solicitor had sent materials to the Society but they were incomplete.

Mr. Heller made submissions that the solicitor was under stress due to personal problems and requested an adjournment on the solicitor's behalf to allow him more time to provide the remaining documents.

There were questions from the Bench.

The matter was stood down.

Convocation took a brief recess at 11:15 a.m. and resumed at 11:30 a.m.

Re: Joseph Maciel AMORIM - Toronto

The Secretary placed the matter before Convocation.

Messrs. Topp, Wilson and MacKenzie withdrew for this matter.

Ms. Braid appeared for the Society and Mr. Heller appeared on behalf of the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 25th June, 1998, together with an Affidavit of Service sworn 21st July, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 13th July, 1998 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Clayton C. Ruby

In the matter of
The Law Society Act
and in the matter of

Catherine Braid
for the Society

JOSEPH MACIEL AMORIM
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: May 15, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

The following Complaints were issued against Joseph Maciel Amorim alleging that he was guilty of professional misconduct: on November 8, 1996 Complaint D267/96; on July 23, 1997 Complaint D267/97; and on October 15, 1997 Complaint D332/97.

The matter was heard in public on May 15, 1998 before Clayton C. Ruby sitting as a single bencher. The Solicitor did not attend the hearing, nor was he represented by counsel. Catherine Braid appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D267/96

2. a) He communicated with another lawyer, Orlando Da Silva Santos, in a manner which was offensive, discourteous and lacking in good faith;
- b) He breached solicitor/client confidentiality by disclosing information received from his client, Manuela Santos, to her husband without authority;
- c) He acted in a conflict of interest by continuing to communicate with and advise Mr. and Mrs. Constancio, at a time when he and Mr. and Mrs. Constancio were being sued by Mrs. Ferreira in a claim arising from a transaction in which he acted for both Mr. and Mrs. Constancio as mortgagors and Mrs. Ferreira as mortgagee;
- d) He failed to fulfill his obligations as an officer of the court and brought the administration of justice into disrepute by:

- i) failing to ensure that, as solicitor of record for the defendants Henrique Da Silva and 562675 Ontario Inc. in the claims against them by Tony Dutra, he or a properly instructed agent on his behalf appeared at court;
- ii) causing unnecessary delay in the said action before the court; and
- iii) failing to take appropriate steps to remove himself as solicitor of record in the said action in circumstances where he knew or ought to have known that his position as counsel conflicted with his obligations to fellow counsel and the court.

Complaint D267/97

2. a) He failed to produce the books and records of his practice despite requests from the Law Society, contrary to S. 18 of Regulation 708.

Complaint D332/97

2. a) He failed to account to his clients Mr. and Mrs. M. Cunha for services rendered between February 1993 and January 1995; and
- b) He misappropriated \$6,000.00 more or less from his clients Mr. and Mrs. Cunha on or about July 28, 1993.

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statements of Facts:

Re: Complaint D267/96

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D267/96 and is prepared to proceed with a hearing of this matter on a date to be set.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D267/96 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 6, 1983. He practises as a sole practitioner.

Particular 2a) He communicated with another lawyer, Orlando Da Silva Santos, in a manner which was offensive, discourteous and lacking in good faith.

Particular 2b) He breached solicitor/client confidentiality by disclosing information received from his client, Manuela Santos, to her husband without authority.

Particular 2c) he acted in a conflict of interest by continuing to communicate and advise Mr. and Mrs. Constancio, at a time when he and Mr. and Mrs. Constancio were being sued by Mrs. Ferreira in a claim arising from a transaction in which he acted for both Mr. and Mrs. Constancio as mortgagors and Mrs. Ferreira as mortgagee.

5. Mrs. Ferreira retained the Solicitor to complete a second mortgage transaction. The Solicitor also acted for the mortgagors, Mr. and Mrs. Constancios. The Constancios defaulted on the mortgage and power of sale proceedings were commenced by a solicitor, Orlando Da Silva Santos, on behalf of Mrs. Ferreira. The property was sold for an amount less than the mortgage. On October 22, 1993, the Constancios were sued for the amount of the shortage on the mortgage, approximately \$8,000.00, and the Solicitor was added as a party to the action. The Solicitor was served with the statement of claim and on November 18, 1993 he served Mr. Santos with a Notice of Intent to Defend. Michael Rhude, a lawyer with Mr. Santos' firm, was solicitor of record in this matter.

6. By letter dated November 19, 1993 (Tab 1, Document Book), the Solicitor wrote to Mr. Santos stating that the law suit against him was unwarranted. The Solicitor further stated that if he was forced to defend the action, he would expect to receive costs on a solicitor/client basis. The Solicitor indicated that he would embarrass and humiliate Mr. Santos. The Solicitor then advised Mr. Santos that he would raise the fact that he had previously acted for Mr. Santos' wife who had divulged her personal life to him. The Solicitor indicated that Mrs. Santos and others had advised him that Mr. Santos had ill feelings toward him and his success as a lawyer. The Solicitor also advised that if Mr. Santos continued to act for Mrs. Ferreira, he would bring a motion to remove him for reasons of conflict. The Solicitor provided Mr. Santos with his account for services rendered on behalf of Mrs. Santos, detailing their discussions. The Solicitor concluded the letter by stating that, if the action was pursued, other parties would become aware of the said letter and facts surrounding this matter.

7. By letter dated November 19, 1993 to the Solicitor (Tab 2, Document Book), Mr. Santos indicated that the conversations Mrs. Santos had had with him were privileged and were not to be divulged to Mr. Santos. Mr. Santos advised that both he and his wife were humiliated by his letter and that the same was seen by his office staff.

8. By letter dated November 19, 1993 (Tab 3, Document Book), Mr. Santos made a complaint to the Law Society regarding the Solicitor's actions. This matter was also reported to the Lawyer's Professional Indemnity Company ("LPIC").

9. By letter dated November 22, 1993 (Tab 4, Document Book), the Solicitor advised Mr. Santos that as the opposing party regarding a legal separation and possible divorce proceeding, it would be necessary for the Solicitor to contact him about the same. Mr. Santos was reminded that it was he who contacted the Solicitor first to discuss the matter. The Solicitor advised that it was on Mrs. Santos' instructions that the Solicitor had contacted and forwarded the account to Mr. Santos. The Solicitor indicated that since he was a party to an action commenced by Mr. Santos, privilege no longer existed and the Solicitor could use any information he believed to be relevant to defend himself. With respect to Mr. Santos' staff reading the letter addressed to Mr. Santos dated November 19, 1993, the Solicitor advised that he did not intend for anyone but Mr. Santos to receive same and it was not intended to humiliate him.

10. By letter dated November 29, 1993 (Tab 5, Document Book), the Solicitor advised Mr. Rhude that Mr. & Mrs. Constancio offered to pay a reasonable short fall to Mrs. Ferreira. The Solicitor requested that Mr. Rhude have Mrs. Ferreira consider the proposal and get back to him. The Solicitor further advised that the Constancios had paid into court \$10,000.00 for the Ferreira's son on a transaction which had never been completed. Mr. Constancio was willing to assign his interest in those funds to these proceedings. The Solicitor indicated that since they were negotiating, he would not file a statement of defence and requested that he be notified when Mr. Rhude wanted his pleadings.

11. By letter dated December 3, 1993 (Tab 6, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Mr. Santos' letter dated November 19, 1993 and requested his comments within two weeks.

12. By letter dated December 29, 1993 (Tab 7, Document Book), the Solicitor advised the Law Society that:
- a. there was a short fall after the property sold, however, the mortgagors had never refused to pay same;
 - b. the mortgagees did not have to enforce the power of sale proceedings;
 - c. the only reason he had been included in the law suit was as a personal vendetta by Mr. Santos;
 - d. the Constancios were willing to settle and that during a telephone conversation with Mr. Santos, he was advised that Mrs. Ferreira was willing to settle for \$10,000.00;
 - e. he met with Mr. Constancio on November 30, 1993 who indicated that he had not been served with the claim but he was agreeable to settling once he received an accounting as to how the figures were arrived at; and
 - f. Mr. Rhude agreed to provide the Solicitor with an accounting as to the short fall figures.

13. By letter dated January 20, 1994 (Tab 8, Document Book), the Law Society advised the Solicitor that it was concerned about the "threat" of revealing the contents of the November 19, 1993 letter to the parties in the law suit if Mr. Santos continued to pursue a claim against the Solicitor. The Law Society further advised the Solicitor that he breached solicitor/client confidentiality by providing Mr. Santos with information he obtained while acting for Mrs. Santos. The Solicitor was advised that the matter would be referred to the Chair and Vice-Chairs of the Discipline Committee for advice, however, the Solicitor was invited to provide further comments.

14. By letter dated February 22, 1994 to the Solicitor (Tab 9, Document Book), the Law Society advised that Messrs. Rhude and Santos were concerned about his providing advice to the Constancios when he was a co-defendant in the action. The Solicitor was asked to provide an explanation as to why he did not feel he was acting in a conflict respecting the Constancios. The Law Society further inquired as to the reasons why the Solicitor had provided confidential information to Mr. Santos about Mr. Constancio without his knowledge.

15. By registered mail dated March 8, 1994 (Tab 10, Document Book), the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was signed for and delivered on March 9, 1994.

16. By letter dated March 8, 1994 (Tab 11, Document Book), the Solicitor advised the Law Society that since it appeared that the matter was being referred to the Chair and Vice-Chairs of Discipline, there was no reason for him to provide a further response. The Solicitor requested the Law Society to advise him within seven days if he should forward a response. The Solicitor further advised that the situation was about a personal conflict between Mr. Santos and himself.

17. By letter dated March 14, 1994 (Tab 12, Document Book), the Solicitor advised the Law Society that Mr. Santos commenced a law suit against him as a result of a personal vendetta and that the action was without merit. The Solicitor provided the Law Society with the following reasons as to why the action had no merit:

- a. the plaintiffs never pursued the action against him;
- b. the plaintiffs moved for default judgment against the Constancios but not against the Solicitor;
- c. the Solicitor had not filed a statement of defence and default judgment had not been obtained against him;
- d. the Constancios admitted the debt and agreed to pay the same;
- e. the Law Society's adjuster determined that the Solicitor was not liable; and
- f. the power of sale proceedings were unnecessary.

The Solicitor advised further that when this matter arose, he wrote to Mr. Constancio suggesting that he retain other counsel as he had acted for both the Ferreriras and the Constancios. Mr. Constancio then retained Mr. Costas. The Solicitor advised further that he was entitled to defend himself by bringing forth what he believed were relevant facts. The Solicitor advised that he was instructed by Mrs. Santos to contact Mr. Santos to discuss the matrimonial matter and was only following his client's instructions. He indicated that confidentiality applied to not disclosing information to others but not to the person being sued. The Solicitor indicated that upon receipt of the claim, he may have overreacted and regretted his actions as he

wished to resolve this matter. The Solicitor advised that the action had settled and that the Ferrerias would receive their monies.

18. The Solicitor wrote a second letter to the Law Society dated March 14, 1994 (Tab 13, Document Book), in which he advised that he at no time disclosed confidential information to Mr. Santos' office about Mr. Constancio. The Solicitor advised that he did not act for the Constancios, but only assisted them in settling this matter. The Solicitor further advised that he did not disclose any confidential information about Mr. Constancio. He stated that he advised the Constancios that he was in a conflict and wrote them on May 21, 1993 suggesting they seek other counsel. A copy of the May 21, 1993 letter is also attached at Tab 13.

19. On June 24, 1996, the Law Society called Mrs. Santos to inquire about her discussions with the Solicitor about her marital situation and her instructions to him. Mrs. Santos advised that she first met with the Solicitor in May or June 1993. She advised further that after their meeting, she told the Solicitor that she would contact him in the next few days with her intentions. Mrs. Santos indicated that she did not call the Solicitor subsequent to their initial meeting. Mrs. Santos indicated that she did not discuss her meeting with the Solicitor with her husband. Mrs. Santos thought that the matter had been closed until her husband had received the November 19, 1993 letter. Mrs. Santos advised that she did not give the Solicitor permission to disclose the discussions between herself and the Solicitor. A copy of the notes of the telephone conversation with Mrs. Santos is contained at Tab 14 of the Document Book.

Particular 2d) He failed to fulfill his obligation as an officer of the court and brought the administration of justice into disrepute.

20. Tony Dutra had provided services to Etobicoke City Bakery and its owner, Henrique Da Silva, payment for which remained unpaid. Mr. Dutra initially retained Douglas Black to commence legal proceedings against Mr. Da Silva and his company. Separate statements of claim were issued on July 10, 1991. Mr. Da Silva was represented by the Solicitor. The action settled and Mr. Da Silva agreed to pay the debt and provided Mr. Black with a series of post-dated cheques. Mr. Da Silva subsequently defaulted on the payments. Mr. Dutra then retained Jerome Cusmariu and a pre-trial was scheduled for April 19, 1994. The Solicitor's wife appeared at the pre-trial and advised the court that the Solicitor would be bringing a motion to remove himself as solicitor of record. Costs were awarded against the defendant.

21. In May 1994, the actions were placed on the assignment court list and subsequently on the trial list. The Solicitor did not appear for these matters. A trial date of October 7, 1994 was then set. By facsimile dated October 6, 1994 (Tab 15, Document Book), the Solicitor advised Mr. Cusmariu that Mr. Da Silva had attended at his office and requested that he continue representing him. The Solicitor further advised that he would be requesting an adjournment in the matter as he would be on a trial the following day.

22. On October 7, 1994, the Solicitor's wife attended at the court to request the adjournment. The matter was put over to November 16, 1994 for trial peremptory to the defendant. Costs were also awarded to the plaintiff and ordered to be paid by November 1, 1994 failing which the plaintiff might move to strike the defence. A copy of the endorsement is contained at Tab 16 of the Document Book.

23. On November 10, 1994, the plaintiffs brought a motion to strike the defendant's pleadings for failure to pay the costs. The Solicitor was not present, however, Mr. Da Silva attended and provided a receipt showing that the monies were paid into court rather than directly to Mr. Cusmariu. The judge ordered the Solicitor to pay for the costs of the motion in the amount of \$400.00. A copy of the order is contained at Tab 17 of the Document Book.

24. On November 16, 1994, Mr. Cusmariu and his client attended at the court for trial. The Solicitor and his client did not attend. The court had received a message advising that Mr. Da Silva would not be in attendance as his father had recently passed away. There was no message from the Solicitor. Mr. Cusmariu was asked by the court to call the Solicitor's office and upon doing so was advised that he was at a bail hearing and could not be reached. The judge then ordered the Solicitor to appear before him the following day to explain his actions.

25. By facsimile dated November 16, 1994 (Tab 18, Document Book), Mr. Cusmariu advised the Solicitor, as per the judge's request, that the Solicitor and his client were to appear in court the following day at 3:00 p.m. Mr. Cusmariu also notified Mr. Da Silva by letters of the same date (Tab 19, Document Book).

26. On November 17, 1994, the Solicitor attended before the court and advised that he thought his client would explain why he was not in attendance. The Solicitor requested to be removed as solicitor of record. The judge denied his request and told him to bring the appropriate motion. Mr. Da Silva also appeared and advised that he could not attend as a result of his work. The judge ordered costs in the amount of \$1,500.00 to be paid within 15 days of the order failing which the statement of defence might be struck. The Solicitor was ordered to repay one half of the costs to his client. A copy of the Orders is contained at Tab 20 of the Document Book.

27. By letter dated December 5, 1994 (Tab 21, Document Book), the Solicitor advised Mr. Cusmariu that he assumed that, as his client had not paid the costs in the amount of \$1,500.00, his pleadings were struck. The Solicitor advised that as a result, he would no longer be solicitor of record.

28. By facsimile dated December 5, 1994 (Tab 22, Document Book), Mr. Cusmariu advised the Solicitor that the Motion Records were served upon him at about noon as a result of Mr. Da Silva's failure to pay the costs ordered. Mr. Cusmariu advised the Solicitor that the endorsement read that in the event the costs were not paid, the statement of defence and counterclaim shall be struck and not shall be deemed to be struck. Mr. Cusmariu indicated that for this reason the motion to strike the pleadings was necessary. Mr. Cusmariu reminded the Solicitor that he was personally ordered to pay costs, however, he had not paid the same. The Solicitor was asked to advise Mr. Cusmariu as to whether he intended to honour the Orders.

29. By letter dated December 6, 1994 (Tab 23, Document Book), the Solicitor advised Mr. Cusmariu that the endorsement did not state that a Motion was necessary to strike the pleadings. The Solicitor indicated that costs were ordered in such a way so that it was not necessary for either the defendant or he to appear further if the costs were not paid. The Solicitor further indicated that the Motion was not necessary and, as a matter of courtesy, it would have been appropriate to select a date mutually convenient to both parties. The Solicitor advised that he was not available on December 8, 1994 due to another trial.

30. On December 8, 1994, Mr. Cusmariu attended at court and obtained an order striking the defendant's pleadings and awarding costs against the Solicitor and the defendants in the amount of \$300.00. The court stated the following of the Solicitor: "... the court having found that neither the Defendant nor his counsel complied with the orders of this court to make payment of the costs previously awarded, and this court having found that the Defendant's solicitor failed to appear at the motion thereby completing a long history of indifference, bordering on contempt, to court orders, on finding that none of the costs ordered against the said solicitor amounting to \$1,202.50 has been paid by him...." A copy of the Order is contained at Tab 24 of the Document Book.

31. On February 2, 1995, default judgments were obtained on each matter, copies of which are contained at Tabs 25 and 26 of the Document Book.

32. By letter dated April 18, 1995 (Tab 27, Document Book), Tony Dutra made a complaint to the Law Society regarding the foregoing.

33. By letter dated May 16, 1995 (Tab 28, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Mr. Dutra's letter dated April 18, 1995 and requested his comments within two weeks.

34. By letter dated May 18, 1995 (Tab 29, Document Book), the Solicitor advised the Law Society that he believed that he was entitled to contact Mr. Dutra directly and would like to do so as he felt Mr. Dutra was only after the money.

35. By letter dated June 1, 1995 (Tab 30, Document Book), the Law Society advised the Solicitor that if Mr. Dutra was still a represented party, he should not be contacted directly and the Solicitor should exercise caution in this regard. The Law Society requested the Solicitor to provide his written response to Mr. Dutra's complaint within seven days.

36. By letter dated June 12, 1995 (Tab 31, Document Book), the Solicitor advised the Law Society that he committed no professional misconduct against Mr. Dutra. The Solicitor requested that the investigation be deferred as it was similar to the subject matter of the litigation and the Court would be a better forum to dispose of the issues. The Solicitor further advised that he had no knowledge of the defendant's bankruptcy. The Solicitor further advised that the costs ordered against him had been paid.

37. By letter dated December 21, 1995 (Tab 32, Document Book), the Law Society asked the Solicitor to explain his actions concerning his non-attendance in court on several dates and the various costs awarded against him and his client. In particular, the Law Society asked the Solicitor whether he advised his client of the consequences of these non-attendances and the possibility that costs would be awarded against him as a result. The Solicitor was advised that the Law Society was concerned about the judge's order referring to the Solicitor's actions as "a long history of indifference, bordering on contempt, to court orders." The Solicitor was asked for his comments regarding the foregoing.

38. By registered mail dated February 16, 1996 (Tab 33, Document Book), the Law Society reminded the Solicitor of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was signed for and delivered on February 19, 1996.

39. By letter dated February 26, 1996 (Tab 34, Document Book), the Solicitor advised the Law Society that he was consulted by Mr. Da Silva on August 1, 1991 and was provided with two cheques dated August 7 and August 15, 1991 as his retainer, both of which were returned "NSF". The Solicitor advised further that Mr. Da Silva would continue to pay small amounts but the Solicitor's account remained in default. The Solicitor advised that he had issued the statement of defence and counterclaim in both actions on September 4, 1991. The Solicitor did not receive the defence to the counterclaim during the required time period and contacted Mr. Dutra's solicitor to request the same. For approximately one year, no action was taken by the plaintiff or his counsel. Subsequently, the Solicitor arranged Examinations for Discovery which were completed of Mr. Da Silva on May 28, 1992. Mr. Dutra did not attend. Attempts were made to settle by the Solicitor but without success. Again, one year passed without action which resulted in receipt of a notice for a status hearing.

40. The action was not dismissed and on or about March 24, 1994, the Solicitor received a fax from Mr. Dutra advising of the pre-trial on April 19, 1994. The Solicitor advised Mr. Da Silva that he could no longer represent him without payment. Mr. Da Silva wanted to keep costs down and instructed the Solicitor not to attend. The Solicitor further advised that his client was aware of the cost consequences. The Solicitor wrote to Mr. Da Silva several times about payment of his outstanding account and retaining other counsel. Copies of the Solicitor's letters dated April 22, June 21 and September 19, 1994 are also contained at Tab 34. On October 6, 1994, Mr. Da Silva provided \$600.00 and confirmed that he wanted the Solicitor to continue acting for him and proposed a settlement which was rejected by Mr. Cusmariu's client.

41. The Solicitor's wife and Mr. Da Silva attended at the trial on October 7, 1994 and obtained an adjournment to November 16, 1994. Costs were ordered to be paid by November 1, 1994. By letter dated October 7, 1994, the Solicitor advised Mr. Da Silva that unless he provided a certified cheque in the amount of \$2,000.00 by November 15, 1994, he would not represent him. Mr. Da Silva failed to provide payment.

42. The Solicitor was served with a Motion Record on November 3, 1994 returnable on November 10, 1994. Mr. Da Silva attended and advised the court that he paid the monies into court on November 3, 1994 and advised the Solicitor of the same. The Solicitor advised that his client lied to the court as the Solicitor was not advised by his client of the payment. For this reason, costs were awarded against the Solicitor.

43. The Solicitor advised that Mr. Cusmariu never cleared any dates with him as to his availability or chose a mutually convenient time for all parties to proceed with the matters. The Solicitor further advised that he regretted his handling of this matter and had now paid the price by way of costs which had been paid by him.

44. By letter dated March 13, 1996 (Tab 35, Document Book), the Law Society advised the Solicitor that he should have removed himself as solicitor of record which might have avoided the situation. The Solicitor was advised that the matter would now be reviewed.

V. PRIOR DISCIPLINE

45. On March 9, 1988, the Solicitor was reprimanded in Committee for failing to reply, failing to produce and failing to maintain books and records. The Solicitor was also ordered to pay costs in the amount of \$1,000.00.

46. On March 2, 1993, the Solicitor was reprimanded in Committee for misrepresenting to an agent of the defendant that a claim had been issued within the limitation period, obtaining an ex parte order extending time for service of the claim without disclosing relevant information, failing to respond to the defendant's solicitor and failing to serve the ex parte order and default judgement on the defendant or its solicitor. The Solicitor was also ordered to pay costs in the amount of \$3,000.00.

47. On April 13, 1993, the Solicitor was reprimanded in Committee for breaching his duty to the court while representing the petitioner by failing to inform the court before obtaining judgment of errors in the divorce petition, relying on a false affidavit sworn by his client, delegating to non-lawyers on his staff the responsibility of the divorce without proper supervision and failing to answer with reasonable promptness telephone communications from the respondent's solicitor. The Solicitor was also ordered to pay costs in the amount of \$2,000.00 within 60 days and it was recommended that he participate in the Practice Review Programme.

DATED at Toronto, this 15th day of December, 1996.”

Re: Complaint D267/97

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D267/97 and is prepared to proceed with a hearing of this matter on [*a date to be set*].

II. IN PUBLIC / IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the *Statutory Powers Procedure Act*.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D267/97 and this agreed statement of facts and admits the particular contained therein. The Solicitor also admits that the particular alleged in the Complaint supported by the facts as set out below constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 6, 1983 and practises as a sole practitioner.

5. As a result of a complaint lodged with the Law Society by two of the Solicitor's clients, Manuel and Maria Cunha [“the Cunhas”], an investigation under ss. 9 and 18 of Regulation 708 of the *Law Society Act* was authorized on February 20 and February 28, 1997, respectively.

6. On March 13, 1997, Andrew Cawse, Investigation Auditor with the Audit & Investigation Department, telephoned the Solicitor to discuss the Complaint and its status within the Law Society. In that telephone conversation, Mr. Cawse requested access to the Solicitor's client files on the matter and his accounting records maintained under s. 15 of Regulation 708. The Solicitor stated that he would arrange a day and would call Mr. Cawse back. (Tab 1 of the *Document Book*)

7. In a letter to Mr. Cawse dated March 17, 1997 (Tab 2 of the *Document Book*), the Solicitor sought further information with regard to the nature and reason for the investigation. In the course of the letter, the Solicitor suggested that the investigation was a fishing expedition. He further advised that there was pending litigation between the Cunhas and him and characterized the Cunha complaint as one of a dispute over fees.

8. In a letter to the Solicitor dated March 26, 1997 (Tab 3 of the *Document Book*), Mr. Cawse provided further explanation with regard to the history and background of the Cunha complaint. He also discussed Law Society procedures, the authorization of the investigation and the Solicitor's professional obligations to provide the information requested (paragraph 8 of the letter). In paragraph 11 of the letter, Mr. Cawse recognized that the Law Society often found it practical and expeditious to defer to civil proceedings. However, he noted that the Cunha complaint alleged misuse of trust funds and therefore, access to the client file and accounting records became more imperative to ensure that the client funds were preserved. Mr. Cawse also reiterated his request to review the Solicitor's client file on the Cunha matter and to audit the Solicitor's accounting books and records which are required to be maintained under s. 15 of Regulation 708.

9. On April 10, 1997, Mr. Cawse left a telephone message for the Solicitor which was returned on April 11, 1997. The Solicitor telephoned Mr. Cawse again on April 14, 1997, which was returned by Mr. Cawse on April 15, 1997. A further call was placed by Mr. Cawse to the Solicitor on April 16, 1997. (Tab 5 of the *Document Book*) On April 18, 1997, in a telephone conversation between the Solicitor and Mr. Cawse, the Solicitor inquired what would occur if the Cunhas withdrew the complaint after he settled with them. Mr. Cawse advised the Solicitor that even if this should occur, the Law Society may still pursue the matter and the Law Society would become the complainant. The Solicitor indicated that he would review Mr. Cawse's March 26, 1997 letter and would call him back. (Tab 5 of the *Document Book*)

10. In a letter to Mr. Cawse dated April 23, 1997 (Tab 6 of the *Document Book*), the Solicitor advised that he was assembling the requested information and indicated that he should have it ready within the next day or two.

11. In a letter to Mr. Cawse dated April 28, 1997 (Tab 7 of the *Document Book*), the Solicitor advised that he would contact Mr. Cawse in the next day or two to either provide the information he had requested or to set a time to meet with Mr. Cawse that week.

12. In a letter to the Solicitor dated May 1, 1997 (Tab 8 of the *Document Book*), Mr. Cawse noted that one and a half months had elapsed since his first contact with the Solicitor on March 13, 1997. Mr. Cawse requested that the Cunha client file and the Solicitor's s. 15 records be provided by May 9, 1997 or the matter would be referred to the Discipline Department.

13. On May 9, 1997, in a telephone conversation with the Solicitor, it was agreed that the requested records would be produced on May 15, 1997. On May 14, 1997, the Solicitor cancelled the meeting to be held on May 15, 1997 and, instead, sent a package to the Law Society. In a letter dated May 14, 1997 and addressed to Mr. Cawse (Tab 9 of the *Document Book*), the Solicitor advised that the package contained all of the Cunha client files that he could provide along with his accounting records specifically for the Cunha transactions. The Solicitor stated that he could not provide his other accounting records, such as trust reconciliations, as providing that information would breach solicitor/client privilege. The Solicitor also indicated that the police had seized some of his accounting records as part of an investigation into another matter. Finally, the Solicitor also advised that he had decided to commence legal proceedings against the Cunhas for defamation.

14. In a letter to the Solicitor dated May 15, 1997 (Tab 10 of the *Document Book*), Mr. Cawse reiterated the Law Society's position with regard to the Solicitor's professional obligations to cooperate with the audit investigation and provide unrestricted access to the records maintained under s. 15 of Regulation 708. Mr. Cawse also sought clarification with regard to the part of the Cunha file that had been provided. With regard to the accounting records seized and sealed by the police in the course of a criminal investigation, Mr. Cawse advised that the Law Society representative who had accompanied the police during the search of the Solicitor's office had indicated that the period involved was between April 25, 1996 and November 1, 1996 and that copies were made of trust disbursements, receipt and reconciliation records. Finally Mr. Cawse advised the Solicitor that he would refer the matter to the Discipline Committee by way of an Authorization Memorandum, alleging that he had failed to provide the requested books and records.

15. To date, the Solicitor has not produced to the Law Society his accounting records required to be maintained under s. 15 of Regulation 708.

V. DISCIPLINE HISTORY

16. On March 9, 1988, the Solicitor was reprimanded in Committee for failing to reply, failing to produce and failing to maintain books and records. The Solicitor was also ordered to pay costs in the amount of \$1,000.00.

17. On March 2, 1993, the Solicitor was reprimanded in Committee for misrepresenting to an agent of the defendant that a claim had been issued within the limitation period, obtaining an ex parte order extending time for service of the claim without disclosing relevant information, failing to respond to the defendant's solicitor and failing to serve the ex parte order and default judgement on the defendant or its solicitor. The Solicitor was also ordered to pay costs in the amount of \$3,000.00.

18. On April 13, 1993, the Solicitor was reprimanded in Committee for breaching his duty to the court while representing the petitioner by failing to inform the court before obtaining judgment of errors in the divorce petition, relying on a false affidavit sworn by his client, delegating to non-lawyers on his staff the responsibility of the divorce without proper supervision and failing to answer with reasonable promptness telephone communications from the respondent's solicitor. The Solicitor was also ordered to pay costs in the amount of \$2,000.00 within 60 days and it was recommended that he participate in the Practice Review Programme.

DATED at Toronto, this 15th day of December, 1997."

Re: Complaint D332/97

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D332/97 and is prepared to proceed with a hearing of this matter on [*a date to be set*].

II. IN PUBLIC/ IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the *Statutory Powers Procedure Act*.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D332/97 and admits the particulars contained therein. The Solicitor admits that the said particulars together with the facts as set out below constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the bar on April 6, 1996. He currently practises law as a sole practitioner.
5. On May 12, 1992, Luis Cunha, the sixteen year old son of Manuel and Maria Cunha [“the Cunhas”], was killed in an industrial accident at his workplace at Eglinton Square Shopping Centre in Scarborough when he became trapped in a garbage compactor. At the time, Luis Cunha was employed by Hurley Corporation who maintain corporate properties.
6. On December 24, 1992, the Cunhas received an unsolicited payment of \$11,417.00 from Hurley Corporation and its employees, as an expression of sympathy for their loss. (Tab 2 of the *Document Book*)
7. Initially, the Cunhas retained the law firm of Soloman and Soloman to represent them at the coroner’s inquest into their son’s death. Joseph Soloman and Melville Raskin of that firm provided representation to the Cunhas until approximately February 16, 1993, when the inquest was adjourned for 30 months. As indicated in a account dated January 29, 1993, the Cunhas were charged \$2,612.27 for legal services provided by Messrs. Soloman and Raskin. (Tab 3 of the *Document Book*)
8. As the Cunhas speak very little English, they decided to retain the Solicitor who speaks their native language, Portuguese. They first contacted the Solicitor on February 19, 1993. In a letter dated February 26, 1993, the Solicitor notified Joseph Soloman and Melville Raskin that he had been retained by the Cunhas and requested that the Cunhas entire file be forwarded to him. (Tab 4 of the *Document Book*)
9. On March 2, 1993, the Cunhas paid the Solicitor a retainer of \$10,700.00 which the Solicitor deposited into his general account. (Tab 5 of the *Document Book*) According to the Cunhas, the retainer of \$10,700.00 was to “start the case against the companies” involved in their son’s death, including gathering information about civil suits, workplace legislation charges and the inquest and to assist with the Workers’ Compensation Board [“the WCB”]. Their understanding was that \$10,700.00 was the initial payment and that the Solicitor would require a further \$10,000.00 if he completed the civil proceedings against a third party. (Tabs 1, 7 and 8 of the *Document Book*).
10. On April 2, 1993, the Solicitor wrote to the WCB requesting, in part, that the Cunhas be reimbursed for their son’s funeral expenses. Copies of invoices totalling \$11,880.61 were enclosed. The Solicitor also requested reimbursement for the Cunhas’ legal costs in the amount of \$1,070.00. (Tab 15 of the *Document Book*)
11. On April 14, 1993, payment for the burial expenses was authorized by Maria Santo, Senior Claims Adjuster with the WCB. (Tab 16 of the *Document Book*) Two cheques were subsequently issued for \$6,000.00, one on April 19, 1993 and the other on June 2, 1993. (Tabs 17 and 19 of the *Document Book*) The amount of \$6,000.00 represented the maximum payable for burial expenses. (Tab 24 of the *Document Book*) Both cheques were made payable to “Mr. & Mrs. M. Cunha” and sent to the Solicitor’s address. These two cheques were cancelled by the WCB on June 6, 1993 and June 21, 1993, respectively. (Tabs 18 and 20 of the *Document Book*) According to the WCB, the cheques “were returned to the Board by the post office due to some missing information on the mailing address” and were, therefore, automatically cancelled. (Tab 24 of the *Document Book*) The Solicitor denied receiving either of these cheques and believed they were returned to the WCB because of address problems, (Tabs 6 and 14 of the *Document Book*)
12. In a letter to the WCB dated July 9, 1993, the Solicitor advised that the Cunhas had instructed him not to pursue the matter further with the WCB. The Solicitor indicated that, although he had been advised that a cheque for burial expenses had been forwarded but returned to the WCB, his clients had not received a cheque at any time. He requested that, if his clients were entitled to reimbursement of the burial expenses, a cheque be forwarded to them. The Solicitor also wrote to the Cunhas on that same date, confirming the above information. (both letters enclosed at Tab 6 of the *Document Book*)

13. On July 19, 1993, Maria Santo of the WCB telephoned the Solicitor's office. She confirmed receipt of the Solicitor's July 9, 1993 letter and the fact that two cheques to cover the burial expenses had previously been sent out in care of the Solicitor but that both had been returned. In a telephone conversation later that same day, the Solicitor's secretary advised Ms. Santo that the Solicitor asked for the cheque to be "redirected to him in c/o him". (Tabs 21 and 24 of the *Document Book*) On July 20, 1993, Ms. Santo authorized the payment to be issued "to the parent's solicitor Mr. Joseph Morin (sic)". (enclosed at Tab 1 of the *Document Book*)

14. A cheque dated July 22, 1993, was sent to the Solicitor payable to "18517276 c/o Joseph Morin (sic)". (Tab 22 of the *Document Book*) According to Ms. Santo, it was never the intention for the funds to be remitted to the Solicitor in trust and that the wording on the cheque was to facilitate an accurate address. (Tab 24 of the *Document Book*) The cheque was deposited into the Solicitor's trust account on July 27, 1993 and then transferred to the Solicitor's general account on July 28, 1993. (Tabs 22 and 25 of the *Document Book*)

15. After becoming dissatisfied with the Solicitor, the Cunhas retained Mr. Bart Lackie on January 26, 1995. In a letter to the Solicitor dated January 26, 1995, Mr. Lackie advised that he had been retained and asked for the Cunhas' file to be forwarded. (Tab 27 of the *Document Book*) Mr. Lackie was to provide limited assistance to the Cunhas at the inquest into their son's death, which concluded on February 9, 1995, and also to determine how the Cunhas should proceed. Mr. Lackie sent the Cunhas a report on March 1, 1995 in which he provided his opinion regarding the various options available to them and the merits of their case. (Tab 9 of the *Document Book*) After contemplating pursuing a claim against the WCB and/or the Solicitor, the Cunhas limited Mr. Lackie's mandate to taxing the Solicitor's account. (Tab 10 of the *Document Book*).

16. On January 18, 1996, Mr. Lackie submitted a Notice of Application requesting the assessment of the Solicitor's fees to the Ontario Court (General Division). (Tab 31 of the *Document Book*) In February, 1996, Mr. Lackie negotiated a reduction of \$2,250.00 in the Solicitor's bill, which was originally set at \$10,749.40. (Tab 11 of the *Document Book*) However, this amount was not repaid as the Cunhas did not sign the Release. Mr. Lackie charged the Cunhas \$2992.55 for his services. (Tabs 12 and 13 of the *Document Book*)

(a) Failing to Account

17. As part of the taxation process, the Solicitor provided Mr. Lackie with a bill dated January 25, 1995 for fees of \$9,500.00, disbursements of \$569.70 and GST of 679.70 for a total of \$10,749.40. The bill provides a detailed description of the work performed by the Solicitor from February 19, 1993 until January 25, 1995. The bill indicates that \$10,700.00 had been received by the Solicitor and \$49.40 was still owing. (Tab 30 of the *Document Book*) No other bill was received by Mr. Lackie.

18. While the Cunhas did receive the January 25, 1995 bill, outlined in the paragraph above, the first time they saw the bill was when the Solicitor sent a copy to Mr. Lackie as part of the taxation process. The Cunhas did not give permission to the Solicitor to take any further fees beyond the initial retainer and did not receive any status report from the Solicitor on the case. (Tab 7 of the *Document Book*)

19. Two other bills for the Cunhas were found in the Solicitor's client file. The Cunhas did not receive either of these bills:

- (a) The first, dated February 25, 1993, was for \$10,700.00 for fees of \$10,000.00 and GST of \$700.00. It covers services rendered by the Solicitor between February 19, 1993 and February 25, 1993 and advises that the full amount has been paid. (Tab 28 of the *Document Book*)
- (b) The second bill, dated July 26, 1993, is for fees of \$9,500.00, disbursements of \$569.70 and GST of \$679.70 for a total of \$10,749.40. The bill indicates that \$10,700.00 had been received and \$49.40 was still owing. The bill provides a detailed description of work performed up to July 26, 1993. (Tab 29 of the *Document Book*)

20. Contrary to s. 14(8)(c) of Regulation 708, the Solicitor did not render a bill to the Cunhas prior to depositing the \$10,700.00 retainer into his general account on February 28, 1993 or before transferring the \$6,000.00 received from the WCB on behalf of the Cunhas from his trust account to his general account on July 28, 1993.

(b) Misappropriation of \$6,000.00

21. During the fee taxation negotiations with the Solicitor, Mr. Lackie did not know that the Solicitor had received \$6,000.00 from the WCB. According to Mr. Lackie, "[a]t no time did [the Solicitor] disclose the receipt by him of \$6,000.00 nor was the same applied towards his account." (Tab 26 of the *Document Book*)

22. The Solicitor advised the Law Society that the \$6,000.00 was used for fees and disbursements and that the Cunhas had told him "that the funds should be used to pay for the fees" he had quoted to them. (page 3, Tab 6 of the *Document Book*) However, according to the Cunhas, the Solicitor did not inform them of the WCB payment. They only became aware that the payment had been made when they reviewed their son's WCB file. This occurred after the Cunhas retained Calcago Consultants in and around May of 1996. The Cunhas also advised the Law Society that they never gave the Solicitor permission to take any fees beyond the initial retainer. (Tabs 1, 7 and 8 of the *Document Book*)

23. The bill provided by the Solicitor to Mr. Lackie, dated January 25, 1995 (Tab 30 of the *Document Book*) comprehensively details the work completed by the Solicitor from the time he was retained until the day before he was replaced by Mr. Lackie as the Cunhas' lawyer. The bill details the Solicitor's:

- communications with his clients
- preparation for the inquest
- liaison with police and other provincial authorities
- negotiations with the WCB
- investigations of Family Law claims, and
- representation at the provincial offence trials.

As noted on the final page of the bill, the total amount for fees, disbursements and GST is \$10,749.40. Considering the range of time and services described in the bill, little scope is available for further billing by the Solicitor.

24. The Solicitor therefore misappropriated the \$6,000.00 he received from the WCB for the benefit of the Cunhas by failing to advise them of its receipt and by transferring the funds for his personal benefit, without notification to or permission from his clients and without being in any way entitled to the funds.

V. DISCIPLINE HISTORY

25. On March 9, 1988, the Solicitor was reprimanded in Committee for failing to reply, failing to produce and failing to maintain books and records. The Solicitor was also ordered to pay costs in the amount of \$1,000.00.

26. On March 2, 1993, the Solicitor was reprimanded in Committee for misrepresenting to an agent of the defendant that a claim had been issued within the limitation period, obtaining an ex parte order extending time for service of the claim without disclosing relevant information, failing to respond to the defendant's solicitor and failing to serve the ex parte order and default judgement on the defendant or its solicitor. The Solicitor was also ordered to pay costs in the amount of \$3,000.00.

27. On April 13, 1993, the Solicitor was reprimanded in Committee for breaching his duty to the court while representing the petitioner by failing to inform the court before obtaining judgment of errors in the divorce petition, relying on a false affidavit sworn by his client, delegating to non-lawyers on his staff the responsibility of the divorce without proper supervision and failing to answer with reasonable promptness telephone communications from the respondent's solicitor. The Solicitor was also ordered to pay costs in the amount of \$2,000.00 within 60 days and it was recommended that he participate in the Practice Review Programme.

DATED at Toronto this 15 day of December, 1997."

RECOMMENDATION AS TO PENALTY

It is recommended to Convocation that Joseph Maciel Amorim be suspended for a period of nine months, to be continued thereafter until his books and records are brought up to date and presented in a form satisfactory to the Society and that he pay Law Society costs in the amount of \$5,000 payable within six months.

REASONS FOR RECOMMENDATION

There were extensive pre-hearings in this matter. The position of the Law Society was that it would agree to a joint submission that a suspension of ninety days was appropriate provided that the solicitor: 1) acknowledge professional misconduct in regard to the three matters at issue: this has been done; 2) sign the Agreed Statements of Facts with respect to those three matters: that has been done; 3) pay the Cunhas the six thousand dollars (\$6,000) which was owed to them: that was done in December last; 4) provide cogent medical evidence which would support the solicitor's position, that the emotional and psychological difficulties he experienced during the relevant time periods significantly impaired his ability to function: this is the issue which remains for determination at this hearing.

The Solicitor, having chosen not to appear, has provided me with a medical brief. That brief discloses that, starting in 1992, the Solicitor became concerned about certain skin lesions and there was a recommendation that one should be removed, made on December 14, 1992. It may well be, as he implies, that there was a concern about whether these were cancerous, but it does not appear that this danger was viewed by the doctors as one of high risk since the lesion in question was not excised until June 27, 1995.

Most significantly, there appears to be a course of inexplicable pain which resulted in admissions to Mount Sinai Hospital, for example, on June 3, 1993; and neurological examinations shortly thereafter, which do not appear, despite considerable testing in June of 1993, to have ever produced a diagnosis or cure. (The Cunha matter occurred in July of 1993, though as counsel for the Society points out, the repayment was not made until much later. The Santos matter occurred in November, 1993.)

Again, in March of 1994, Mr. Amorim was admitted to Emergency at Mount Sinai Hospital, this time with chest pains and nausea. It does not appear that any cause or cure revealed itself though the examination revealed sternal costochondritis. (The Dutra matter occurred between May and December of 1994.)

Again, in 1997, mysterious chest pains recurred, no doubt causing in him, as Mr. Amorim indicates in his documents, anxiety as well as pain. Electrocardiograms showed an abnormal ECG, but nothing seems to have been emerging at the end, in terms of the chest pain. Mr. Amorim himself regards it as, "chronic". No solution or explanation for the pain appears to have been forthcoming from the doctors. Mr. Amorim indicates that the chest pains caused at times severe pain which itself caused significant insomnia and discomfort.

The Society takes the position that it is entitled on this medical evidence to abjure the joint submission and seek a penalty of nine to twelve months suspension to continue indefinitely until the books and records are produced on the basis that this medical record does not meet the standard of "cogency" referred to in pre-hearing conferences.

In particular, they take the position that there is nothing in the materials related to the period surrounding the letter to Mr. Santos of November 19, 1993, nor any medical evidence that would impact on the period relating to the Dutra complaint; i.e. early 1994, early 1995.

They also say that there is nothing in the medical evidence that would provide an explanation for the ongoing failure to return the money to the Cunhas or the failure to deal with the request for books and records.

The Society accepts that the period in July of 1993 when the misappropriation itself occurred, does correspond with visits for pain. There was nothing in the medical evidence which would suggest a nexus between the two events.

There is no evidence to support the assertion made in pre-hearing conferences that there were ongoing marital difficulties, but even despite the absence of the Solicitor, I am prepared to accept that it would not be surprising if these kinds of medical conditions caused marital difficulty.

The problem with the material presented, however, is that it is in fact not sufficiently cogent to provide an explanation for this conduct and I therefore permit the Society to take the position that it does and seek a higher penalty.

The next question becomes, what is the appropriate penalty in this case? It is important to realize that the complaints admitted here involve threats to disclose material obtained in confidence during a solicitor/client relationship, a misappropriation in the amount of \$6,000 which was repaid only after the disciplinary process began, an incident which can fairly be characterized as inappropriate conduct within the judicial process itself, and the failure to maintain books and records. The latter is not the first offence. Indeed, the discipline record of the Solicitor reveals a number of previous incidents as follows:

On March 9, 1988, the Solicitor was reprimanded in Committee for failing to reply, failing to produce and failing to maintain books and records. The Solicitor was also ordered to pay costs in the amount of \$1,000.

On March 2, 1993, the Solicitor was reprimanded in Committee for misrepresenting to an agent of the defendant that a claim had been issued within the limitation period, obtaining an ex parte order extending time for service of the claim without disclosing relevant information, failing to respond to the defendant's solicitor and failing to serve the ex parte order and default judgement on the defendant or its solicitor. The Solicitor was also ordered to pay costs in the amount of \$3,000.

On April 13, 1993, the Solicitor was reprimanded in Committee for breaching his duty to the court while representing the petitioner by failing to inform the court before obtaining judgement of errors in the divorce petition, relying on a false affidavit sworn by his client, delegating to non-lawyers on his staff the responsibility of the divorce without proper supervision and failing to answer with reasonable promptness telephone communications from the respondent's solicitor. The Solicitor was also ordered to pay costs in the amount of \$2,000 within 60 days and it was recommended that he participate in the Practice Review Programme.

The Solicitor's view is that there are significant mitigating factors in this case. He sets them out at page 2 of his letter.

- “1. I am forty (40) years of age, married 11 years and have a 7 year old daughter and 5 year old son;
2. I am in my 16th year of practice and have never appeared before Convocation.
3. I attended Osgoode Hall Law School 20 years ago.
4. I slowly built up my practice over the years to a staff of 12, including 7 lawyers.

5. As a sign of my remorse, I have duly executed the Agreed Statement of Facts, without changes and without retaining counsel, though much evidence would have been led in what I believe would have been triable issues, and a week long hearing, which was thereby averted, saving the Benchers and the Law Society valuable time and resources.
6. I have done much volunteer work over the years for various groups and served on many boards, including Abrigo Women's Shelter and the Psychiatric Review Board. Last year I raised approximately \$100,000.00 as Chairman of a fund-raising Committee for a Cultural Centre in the community in which I practice.
7. Of my own volition, I sent the \$6,000.00 involved in complaint D267/97 to the client last fall. As to complaint D267/96 I regret writing the letter to Mr. Santos of which he complained to the Society. It was written spontaneously and without reflection. On the Dutra matter, I stayed on the record too long for a non-paying client, and I regret my actions in that matter.
8. In addition to the Medical Brief provided, as I alluded to at the pre-hearing conference, I believe the severe marital problems from 1993 to 1995 (which resulted in the drafting and executing by myself of a separation agreement) also affected my ability to practice properly.
9. The 90 day suspension is a significant penalty. I must ensure the salaries and expenses of our associates and staff are met. The needs of the clients cannot be sacrificed. This matter has already had an incredibly negative effect on our law firm.

My position is that the pre-hearing conference penalty of a 90 day suspension is the appropriate disposition. Nothing more was discussed or suggested by Mr. Ruby, though I believe costs of \$1,000.00 to \$2,000.00 are probably appropriate.

The only request I have is that because I am a sole proprietor of my firm, with associates, no partners, but with a large volume of clients, that I be permitted a sufficient "window" to make all the necessary arrangements, and I ask that the matter go to Convocation in the fall - perhaps the first one after the summer holidays."

I take this into account as I do the medical evidence put forward. At the end of the day, this remains a Solicitor who has, by his previous conduct, been put on ample notice that his practice must meet at least minimum standards. The Complaints here disclose a far worse state of affairs. In the light of his previous record, the present conduct is frightful. The appropriate penalty is a suspension for nine months, to be continued thereafter until his books and records are brought up to date and presented in a form satisfactory to the Society.

The actual out-of-pocket costs of the Society in this case probably amount to fifteen thousand dollars. That sum is too high. I award costs in the amount of five thousand dollars and give six months to pay those costs.

Joseph Maciel Amorim was called to the Bar on April 6, 1983.

ALL OF WHICH is respectfully submitted

DATED this 25th day of June, 1998

Clayton C. Ruby

Ms. Braid asked that the following corrections be made to the Report:

- page 14, paragraph 46, the following words be deleted - "...misrepresenting to an agent of the defendant that a claim had been issued within the limitation period..."
- page 18, paragraph 17, the following words be deleted - "...misrepresenting to an agent of the defendant that a claim had been issued within the limitation period..."
- page 26, paragraph 26, the following words be deleted - "...misrepresenting to an agent of the defendant that a claim had been issued within the limitation period..."
- page 29, last paragraph, the following words be deleted - "...misrepresenting to an agent of the defendant that a claim had been issued within the limitation period..."
- page 14, paragraph 47, the following words be deleted - "...breaching his duty to the court while representing the petitioner by failing to inform the court before obtaining judgment of errors in the divorce petition, relying on a false affidavit sworn by his client,..."
- page 18, paragraph 18, the following words be deleted - "...breaching his duty to the court while representing the petitioner by failing to inform the court before obtaining judgment of errors in the divorce petition, relying on a false affidavit sworn by his client,..."
- page 26, paragraph 27, the following words be deleted - "...breaching his duty to the court while representing the petitioner by failing to inform the court before obtaining judgment of errors in the divorce petition, relying on a false affidavit sworn by his client,..."
- page 30, 1st paragraph, the following words be deleted - "...breaching his duty to the court while representing the petitioner by failing to inform the court before obtaining judgment of errors in the divorce petition, relying on a false affidavit sworn by his client,..."

It was moved by Mr. Wright, seconded by Ms. Ross that the Report as amended be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 9 months, to be continued thereafter until his books and records are brought up to date and presented in a form satisfactory to the Society and that he pay costs in the amount of \$5,000 payable within 6 months.

Mr. Heller read a letter received from the solicitor dated November 25th, 1998 which stated that the solicitor wished to resign.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

It was moved by Ms. Puccini but failed for want of a seconder that the solicitor be suspended for a period of 3 months.

It was moved by Mr. Swaye, seconded by Mr. Chahbar that the solicitor be granted permission to resign by December 31st, 1998 failing which he be disbarred.

Carried

It was moved by Ms. Ross, seconded by Mr. Wright that the recommended penalty be adopted.

Not Put

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor's request for permission to resign by his letter dated November 25th, 1998 be accepted.

Re: Stephen Harry QUIST - Kemptville

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Mr. Corbett appeared for the Society and Mr. Heller appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 19th October, 1998, together with an Affidavit of Service sworn 2nd November, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 23rd October, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th November, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas J. P. Carey

In the matter of
The Law Society Act
and in the matter of

Hugh Corbett
for the Society

STEPHEN HARRY QUIST
of the Town
of Kemptville
a barrister and solicitor

Not Represented
for the solicitor

Heard: September 9, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 17, 1998 Complaint D94/98 was issued against Stephen Harry Quist alleging that he was guilty of professional misconduct.

The matter was heard in public on September 9, 1998 before Thomas J. P. Carey sitting as a single bencher. The Solicitor attended the hearing and represented himself. Hugh Corbett appeared on behalf of the Law Society.

DECISION

The following particular of professional misconduct was found to have been established:

Complaint D94/98

2. a) The Solicitor breached an Order of Convocation dated June 28, 1996, which suspended his rights and privileges as a member of the Law Society, including his right to practise law, by acting on behalf of clients throughout the period from June 28, 1996 to March 12, 1997.

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statement of Facts:

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D94/98 and is prepared to proceed with a hearing of this matter on a date to be set by the Hearings Management Tribunal.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ALLEGATION OF PROFESSIONAL MISCONDUCT

3. Complaint D94/98 provides as follows:

The Solicitor breached an Order of Convocation dated June 28, 1996, which suspended his rights and privileges as a member of the Law Society, including his right to practice law, by acting on behalf of clients throughout the period from June 28, 1996 to March 12, 1997.

IV. ADMISSIONS

4. The Solicitor has reviewed Complaint D94/98 and this Agreed Statement of Facts. The Solicitor admits the facts as set out in the Agreed Statement of Facts, except to the extent they are expressly denied or qualified by him as stated herein.

5. The Solicitor admits that the facts set out in the Agreed Statement of Facts constitute professional misconduct insofar as the Solicitor admits that he “passively” held himself out as a solicitor in good standing during the period of suspension, by which he means that he did not remove his name from the signage, letterhead or answering service of the Quist & Humphreys firm. The Solicitor admits that in the minds of the public and the firm’s clients, he was perceived as a solicitor in good standing. However, the Solicitor denies that he actually practised law during the period of suspension. The Solicitor states that during the period of suspension he only acted on behalf of clients in the capacity of a secretary or legal assistant under the supervision of his spouse and partner, Jane Humphreys. The Solicitor states that if he was asked to provide legal advice or was asked if he was a “lawyer” during the period of suspension, he would divulge his status as a solicitor under suspension.

6. It is the position of the Law Society, based on the facts set out below, that the Solicitor both held himself out as a solicitor in good standing during the period of suspension and, in fact, continued to practice law during this period. The Law Society has found no evidence of, or instances to support, the Solicitor's claim that he would divulge his status as a suspended lawyer if asked or confronted about it. As described below, the clients contacted by the Law Society all held the impression that the Solicitor was a lawyer duly licensed to practice law and handled their transactions for them.

V. FACTS

7. The Solicitor was called to the Bar on April 16, 1980 and is a partner in the law firm of Quist & Humphreys located in Kemptonville, Ontario. Quist & Humphreys was established in 1983. The Solicitor's only partner is his spouse, Jane Margaret Ellen Humphreys. The practice of Quist & Humphreys is carried on entirely by the Solicitor and Ms. Humphreys without the assistance of any staff or associates.

8. The Solicitor advises that Quist & Humphreys is essentially a residential real estate law practice with 80% - 90% of its revenue coming from residential real estate files which both the Solicitor and Ms. Humphreys work on together. Neither solicitor has sole carriage of any residential real estate file. The financial gain from each residential real estate file is split 50/50 by the Solicitor and Ms. Humphreys and then put into a common pot as between husband and wife. The Solicitor states that, from the inception of this partnership, this 80%-90% part of the practice could have been easily handled by either the Solicitor or Ms. Humphreys alone as the solicitor and the other one as a secretary/legal assistant.

9. The Solicitor had been administratively suspended for non-payment of his errors and omissions premiums for approximately three months during the period May 26, 1995 to August 17, 1995.

10. During the course of 1996, the Solicitor again fell into arrears of his errors and omissions premiums.

11. By way of registered letter dated June 28, 1996 (Tab 1, Document Book), the Solicitor was advised that his rights and privileges as a member of the Law Society had been suspended by an Order of Convocation effective June 28, 1996 for non-payment of his errors and omissions levy. Enclosed with this letter was a detailed memorandum setting out the obligations and restrictions imposed on suspended members (also at Tab 1, Document Book). The Solicitor was advised that his failure to comply with these restrictions and obligations could result in disciplinary proceedings being commenced against him. An "Acknowledgement of Receipt" card signed by the Solicitor confirms that the registered letter was received by the Solicitor on July 10, 1996 (also at Tab 1, Document Book).

12. The Solicitor failed to confirm in writing with the Office of the Staff Trustees of the Law Society within thirty days of his suspension (or at all) that he had fulfilled all of the restrictions and obligations imposed on suspended members and instead, in the view of the Society, continued to practice law at Quist & Humphreys.

13. On February 20, 1997, a representative of the Law Society attended at the Solicitor's offices to determine whether the Solicitor was continuing to practice law while under suspension. The Solicitor advised the Law Society's representative that he was not practising law and that his role was that of an assistant to his spouse and only partner in the law firm of Quist & Humphreys, Jane Humphreys. The Solicitor advised that his duties included performing title searches, doing record keeping and providing general secretarial services. The Solicitor advised the Law Society's representative that he did not provide legal advice to clients and that Ms. Humphreys signed all of the trust cheques and correspondence issuing from the office. The Solicitor stated that he was "*very careful not to do anything against the rules*". (the record of this discussion is at Tab 2, Document Book). The Solicitor disputes the representative's recollection of their conversation insofar as he states that he would have readily admitted that he was signing all of the trust cheques since he has always handled the accounting side of the practice.

14. On March 7, 1997, the Law Society's representative had a second meeting with the Solicitor and Ms. Humphreys at their offices. The Law Society's representative reviewed the books and records of the Quist & Humphreys law practice. The Law Society's representative determined that approximately 95 percent of the trust cheques issued since June 28, 1996 (the starting date of the Solicitor's suspension) had been signed by the Solicitor. Further, although Mr. Quist's suspension had commenced more than eight months earlier, the trust account itself was still in the name of "Quist & Humphreys". The Law Society's representative also observed that the sign for the law office read "Quist & Humphreys, Barristers, Solicitors, Notaries". The answering machine told callers that they had reached the offices of "Quist & Humphreys". The letterhead on the stationary also identified the firm as "Quist & Humphreys".

15. The Law Society's representative reviewed some client matters on a file by file basis and determined that the Solicitor continued to act on behalf of clients as a solicitor. While acting in this capacity, Mr. Quist continued to hold himself out as a lawyer to opposing counsel in documents and correspondence and to provide solicitor's undertakings to them, to both commission and swear affidavits, to handle client funds and trust monies by both signing trust cheques and making deposits to the trust account, and to generally correspond with other solicitors and financial institutions during the course of real estate transactions.

16. On March 12, 1997, after the Society's representative had attended at the offices of Quist & Humphreys on March 7, 1997, the Solicitor paid his outstanding errors and omissions levy in full and was reinstated as a member in good standing of the Law Society. The Solicitor states that he was prompted to pay the arrears out of his concerns about the implications of Rule 20 (prohibition on a lawyer employing/sharing space with a suspended member) on Ms. Humphreys, which concerns the Solicitor states he had previously been unaware of until they were brought to his attention by the Society's representative.

17. The Solicitor concedes that throughout the period of his suspension, neither he nor Ms. Humphreys took any steps to advise members of the public, including current or prospective clients of Quist & Humphreys and the financial institutions with which Quist & Humphreys dealt on closings etc, that Mr. Quist was no longer a member in good standing of the Law Society entitled to practice law. The exceptions to this are that the Solicitor states that he orally advised Heather Pitt, the Bank of Nova Scotia representative who handles the Quist & Humphreys firm accounts and Gerry Seguin, a real estate agent, that he had been suspended.

18. The Solicitor also concedes that in the absence of such steps, and given the continued use of the firm name "Quist & Humphreys" on their stationary, signage and telephone answering service, members of the public continued under the misapprehension that the Solicitor was a member in good standing of the Law Society.

19. On January 6 and 7, 1998, a representative of the Law Society contacted three individuals who had been clients of Quist & Humphreys during the period of Mr. Quist's suspension: Lois Wood, Robert Streight and Arnold Gutknecht. All three of these clients confirmed that, as far as they were concerned:

- (a) they had retained the Solicitor to act as their lawyer in their respective real estate transactions;
- (b) the Solicitor had represented himself to be a lawyer and had never advised them that he was under suspension or no longer entitled to practice law; and
- (c) they had met with, and dealt with, only the Solicitor and not with Ms. Humphreys.

20. By way of (undated) letter to the Law Society (Tab 30, Document Book), Ms. Humphreys claimed that the decision not to pay the Solicitor's errors and omissions premiums was made jointly by them as a result of economic necessity and described the situation as follows:

...During Stephen Quist's suspension every effort was made to protect the Society against any claim against Stephen by putting forward Jane Humphreys as the lawyer. Some letters may still have been addressed to him- but that would have happened even if he had been dead a year! - the sign was not changed but it was not business as usual. We were well aware of what we were doing and the potential seriousness of it and took appropriate precautions to protect the Law Society and the public. No attempt was made to dupe or defraud either The Law Society or the Public....

Review of Client Matters Handled by Mr. Quist

21. During the course of the review of the Solicitor's files by the Law Society's representative, the following documentation was obtained which the Society submits establishes that the Solicitor continued to practice law from June 28, 1996 to March 14, 1997 while suspended for non-payment of his errors and omissions levy:

(i) Fred Shay/Lois Wood Re-financing

22. The Society submits that the following documents establish that while the Solicitor was under suspension he acted for Fred Shay and Lois Wood with respect to the re-financing of their mortgage with the Royal Bank of Canada ("RBC") (all at Tab 11, Document Book):

- (a) RBC Standard Form "Details for Lawyer/Notary" dated November 21, 1996 identifying the Solicitor as solicitor for Shay/Wood;
- (b) RBC "Approval of Mortgage and Statement of Disclosure", dated November 21, 1996, identifying the Solicitor as representing Shay/Wood;
- (c) Direction and Acknowledgement, dated November 26, 1996, directing mortgage proceeds to be payable to "Quist & Humphreys, in trust";
- (d) Certificate of execution search, dated November 28, 1996, requested by the Solicitor;
- (e) Mortgage dated November 28, 1996, prepared by "Jane Humphreys c/o Quist & Humphreys";
- (f) Trust deposit slip dated November 28, 1996 in the amount of \$37,500.00 signed by the Solicitor;
- (g) Trust cheques #'s 10618, 10619 and 10631 re Shay and Wood, all signed by the Solicitor;
- (h) Account dated January 9, 1997 to Fred Shay and Lois Wood signed by the Solicitor "for Jane Humphreys" on behalf of Quist & Humphreys;
- (i) A copy of a trust ledger sheet for Shay/Wood transaction;
- (j) Discharge of Mortgage registered November 28, 1996 prepared by "Quist & Humphreys";
- (k) Discharge of Mortgage registered November 28, 1996 prepared by "Quist & Humphreys"; and
- (l) RBC Report on Title, dated January 13, 1997, signed by Jane Humphreys.

(ii) David and Robert Streight Real Estate Closing

23. The Society submits that the following documents establish that while the Solicitor was suspended he acted for David and Robert Streight with respect to their purchase of a property from Tim Noonan and Rosemary Wilson, which was scheduled to close on November 8, 1996, (all at Tab 12, Document Book):

- (a) Fax dated August 26, 1996 from Century 21 to the Solicitor confirming that the Streights advised Century 21 that the Solicitor was acting on their behalf;
- (b) Account from John H. Kennedy Limited, land surveyor, dated November 18, 1996 to the Solicitor;
- (c) Letter dated November 27, 1996 from Mary Miller, counsel for the vendors, to the Solicitor enclosing Statement of Adjustments and draft Direction regarding balance due on closing;
- (d) Certified trust cheque receipt signed by the Solicitor, dated November 28, 1996, in the amount of \$23,420.00 payable to Adam & Miller, in trust, together with signed Direction to Quist & Humphreys re: sale proceeds;
- (e) Letter from Mary Miller, dated November 29, 1996 to the Solicitor enclosing signed transfer in triplicate, undertakings and declaration;
- (f) Letter dated December 2, 1996 from Mary Miller to the Solicitor enclosing partial discharge of mortgage and mortgage payout statement
- (g) Transfer/Deed of Land registered December 3, 1996, identifying the Solicitor as solicitor for the transferee and attaching a Land Transfer Tax Affidavit sworn by the Solicitor;
- (h) Memo, dated December 20, 1996, from Adam & Miller to the Solicitor re: registration of mortgage discharge;
- (i) Account dated December 30, 1996, from Quist & Humphreys to Robert and David Streight, signed by the Solicitor "for Jane Humphreys" on behalf of Quist & Humphreys;
- (j) Trust deposit slip in the amount of \$24,420.00 signed by the Solicitor;
- (k) Trust cheque receipts #'s 10622 and 10650 signed by the Solicitor; and
- (l) Trust ledger statement for Streight real estate transaction.

(iii) Arnold Gutknecht Real Estate Closing

24. The Society submits that the following documents establish that while the Solicitor was under suspension he acted Arnold Gutknecht with respect to a real estate transaction which was scheduled to close on November 29, 1996 (all at Tab 13, Document Book):

- (a) Letter dated November 25, 1996 from John Goss, counsel for vendor, to the Solicitor enclosing the Statement of Adjustments, draft Direction, Undertaking, draft Transfer/Deed of Land;
- (b) Undertaking re: Statement of Adjustments signed by the Solicitor as "agent for Arnold Gutknecht";
- (c) Transfer/Deed of Land registered November 29, 1996 identifying the Solicitor as the "Solicitor for the Transferee" and attaching a Land Transfer Tax Affidavit sworn by the Solicitor;

- (d) Certificate of execution search dated November 29, 1996, ordered by the Solicitor;
 - (e) Account dated December 3, 1996, to Arnold Gutknecht signed by the Solicitor "for Jane Humphreys" on behalf of Quist & Humphreys;
 - (f) Trust deposit slip in the amount of \$20,820.00 dated November 27, 1996, signed by the Solicitor;
 - (g) Trust cheque receipts #'s 10621 and 10646 signed by the Solicitor;
 - (h) Trust ledger re: Gutknecht transaction;
 - (i) Agreement of Purchase and Sale, dated November 13, 1996 identifying "Quist & Humphreys" as Mr. Gutknecht's solicitors and witnessed by the Solicitor;
 - (j) Fax from Linda Sherwin to Quist & Humphreys, dated November 13, 1996 enclosing Offer to Purchase;
 - (k) Fax dated November 14, 1996 from Goss, McCorrison, Stell to Quist & Humphreys, enclosing executed Agreement of Purchase and Sale;
 - (l) Direction dated November 27, 1996 to Arnold Gutknecht and Quist & Humphrey re: sale proceeds; and
 - (m) Statement of Adjustments dated November 29, 1996.
- (iv) Eric Monkman Real Estate Closing

25. The Society submits that the following documents establish that while the Solicitor was suspended he acted for Eric Monkman with respect to a real estate transaction which was scheduled to close on November 29, 1996 (all at Tab 14, Document Book):

- (a) Fax dated November 5, 1996 to the Solicitor from Eric Monkman re: requesting the Solicitor to act on Mr. Monkman's behalf with respect to the real estate closing;
- (b) Fax dated November 14, 1996 from Albert Gayle Real Estate Limited to the Solicitor enclosing Agreement of Purchase and Sale;
- (c) Letter dated November 22, 1996 from Alan Macleod, counsel for vendor, to the Solicitor re: details for closing;
- (d) Fax dated November 25, 1996 from the Solicitor to Mr. Macleod enclosing Declaration of Possession and Undertakings for execution;
- (e) Letter dated November 27, 1996 from Mr. Macleod to the Solicitor enclosing draft Transfer/Deed of Land and Statement of Adjustments;
- (f) Solicitor's Undertaking dated November 29, 1996, signed by the Solicitor
- (g) Transfer/Deed of Land registered November 29, 1996, identifying Quist & Humphreys as "Solicitor for the Transferee" and attaching Land Transfer Tax Affidavit sworn by the Solicitor;
- (h) Certificate of Execution search dated November 29, 1996 requested by the Solicitor;
- (i) Mortgage registered November 29, 1996 prepared by Quist & Humphreys;

- (j) Account dated December 15, 1996 signed by the Solicitor "for Jane Humphreys" on behalf of Quist & Humphreys;
- (k) Trust deposit slip in the amount of \$13,490.88 dated November 29, 1996 signed by the Solicitor;
- (l) Trust cheque receipts #'s 10624 and 10647 signed by the Solicitor;
- (m) Trust ledger statement re: Monkman transaction;
- (n) Statement of Adjustments dated November 29, 1996; and
- (o) Direction to Quist & Humphreys re: sale proceeds.

(v) Judy and Scott Freeth Real Estate Closing

26. The Society submits that the following documents establish that while he was under suspension the Solicitor acted for Judy and Scott Freeth with respect to a real estate transaction which was scheduled to close on January 27, 1997 (all at Tab 15, Document Book):

- (a) Agreement of Purchase and Sale dated November 25, 1996 identifying the Solicitor as counsel for the vendor;
- (b) Fax dated December 4, 1996 from John Goss, counsel for purchaser, to the Solicitor enclosing Waiver;
- (c) Letter dated January 14, 1997 from Mr. Goss to the Solicitor enclosing Bill of Sale, GST Declaration, Declaration of Possession, general Undertaking, solicitor's Undertaking;
- (d) Declaration of Possession dated January 25, 1997 sworn by Scott and Judy Freeth and commissioned by the Solicitor;
- (e) Statutory Declaration dated January 25, 1997 signed by Scott and Judy Freeth and commissioned by the Solicitor;
- (f) Direction re: Funds signed by Scott and Judy Freeth and witnessed by the Solicitor;
- (g) Account date February 6, 1997 to Judy and Scott Freeth signed by the Solicitor "for Jane Humphreys" on behalf of Quist & Humphreys;
- (h) Trust deposit slip in the amount of \$2,650.00 signed by the Solicitor;
- (i) Trust deposit slip in the amount of \$205,308.56 signed by the Solicitor;
- (j) Trust cheque receipt # 10760 signed by the Solicitor;
- (k) Trust ledger statement re: Freeth transaction;
- (l) Solicitor's Undertaking dated January 27, 1997, signed by Jane Humphreys on behalf of Quist & Humphreys;
- (m) Statement of Adjustments dated January 27, 1997;
- (n) Letter dated January 23, 1997 from CIBC to Quist & Humphreys re: Freeth mortgage;

- (o) Letter dated January 22, 1997 from FirstLine Mortgages to Quist & Humphreys re: payout statement;
- (p) Fax dated January 22, 1997 from Quist & Humphreys to CIBC; and
- (q) Fax dated January 21, 1997 from Quist & Humphreys to FirstLine Trust.

(vi) General

27. The Law Society's representative also found documents pertaining to general client matters generally which the Society submits establish that the Solicitor continued to practise law from June 28, 1996 to March 12, 1997 while suspended for non-payment of his errors and omissions levy:

- (a) Trust deposit slip dated February 28, 1997, in the amount of \$191,836.57 signed by the Solicitor (Tab 16, Document Book);
- (b) Trust deposit slip dated December 24, 1996, in the amount of \$63,173.15 signed by the Solicitor (Tab 17, Document Book);
- (c) Trust cheque receipts #'s 10711, 10712, 10713, 10714, 10715, 10716, 10717, 10718 and 10719 for period December 24-27, 1996, signed by the Solicitor (Tab 18, Document Book);
- (d) Trust deposit slip dated January 27, 1997, in the amount of \$205,308.56 signed by the Solicitor (Tab 19, Document Book);
- (e) Trust cheque receipts #'s 10753 and 10761 for January 27-28, 1997, signed by the Solicitor (Tab 20, Document Book);
- (f) Trust deposit slip dated January 14, 1997, in the amount of \$191,836.57 dated February 28, 1997 signed by the Solicitor (Tab 21, Document Book);
- (g) Trust deposit slip in the amount of \$74,830.26 dated January 14, 1997 signed by the Solicitor (Tab 22, Document Book);
- (h) Trust cheque receipts #'s 10735 and 10736 dated January 14, 1997, signed by the Solicitor (Tab 23, Document Book);
- (i) Trust deposit slip in the amount of \$382,662.14 dated November 29, 1996 signed by the Solicitor (Tab 24, Document Book);
- (j) Trust cheque receipts #'s 10627, 10634, 10666 for November 29 and December 6, 1996, signed by the Solicitor (Tab 25, Document Book);
- (k) Trust deposit slip in the amount of \$13,490.88 dated November 29, 1996 signed by the Solicitor (Tab 26, Document Book);
- (l) Trust cheque receipts #'s 10628-30 and 10645 for November 29, 1996, signed by the Solicitor (Tab 27, Document Book);
- (m) Trust deposit slip in the amount of \$233,346.41 dated October 4, 1996 signed by the Solicitor (Tab 28, Document Book); and
- (n) Trust cheque receipts #'s 105292-33, 10535, 10536, 10538 and 10539 for October 4 and 8, 1996, signed by the Solicitor (Tab 29, Document Book).

VI. PRIOR DISCIPLINE

28. The Solicitor has been administratively suspended on two previous occasions:
- (a) effective May 26, 1995, re-instated August 17, 1995, for non-payment of errors and omissions premium; and
 - (b) effective December 1, 1992, re-instated December 14, 1992 for non-payment of annual fee.

DATED at Toronto this 9th day of September, 1998.”

REASONS FOR FINDING OF THE COMMITTEE

The Complaint before me, Complaint D94/98, alleges that the Solicitor breached an Order of Convocation dated June 28, 1996, which suspended his rights and privileges as a member of the Law Society, including his right to practise law, by acting on behalf of clients throughout the period from June 28, 1996 to March 12, 1997.

Having reviewed all of the evidence, including the Agreed Statement of Facts, and the evidence of the Solicitor, and having heard the submissions of both the Solicitor for himself, and Mr. Corbett for the Law Society, I am convinced that the Complaint is made out.

My reasons for making a finding of professional misconduct are as follows. It is clear that Mr. Quist was not suspended for any other reason than non-payment of fees and dues. He was notified in writing by the Law Society in a standard way, with a letter signed by the Secretary, Mr. Tinsley, indicating what his obligations were to be reinstated.

Tab 1 of the Document Book sets out the obligations for suspended members. It includes, among many other things, not to accept new legal work, give legal advice, appear in court, draft or revise legal documents, notarize or commission, report to clients or have yourself on a letterhead as a Barrister and Solicitor. It also sets out Rule 20, that a suspended lawyer is not to practise or share office space with a lawyer in good standing.

Mr. Quist indicated in his evidence that he didn't read the letter. His state of mind was one of depression, perhaps not clinical, but he was obviously not happy about the financial state of affairs, and he simply did not read it, given the bad news it was conveying. He doesn't offer that as an excuse, and of course it can't be an excuse to simply ignore the law. As well, he does not purport it as an excuse, but clearly did not read Rule 20. Rule 20, of course, requires that a Barrister and Solicitor not share space with someone who is either disbarred or suspended. To the credit of the Solicitor, when that was brought to his attention, very quickly the arrangement changed and the fees were paid up and the Solicitor was returned to good standing.

On all of the evidence, it is clear that as a result of a downturn in the profitability of a real estate practice in Kemptville and its surrounding area, Mr. Quist and his partner/spouse Jane Humphreys, decided that only one of them would officially be a lawyer and that would be herself, and that they would continue to share work, but that Mr. Quist would not give legal advice and would not pay fees as a Barrister and Solicitor.

It is clear that one of the problems here is that there is a fuzzy line between lawyer's work in many aspects of law, including real estate, and work that a secretary/paralegal can do under the supervision of a lawyer. Every day in this province, documents are typed up and prepared by secretaries and paralegals. Real estate transactions are closed in Land Titles and Registry offices by other than lawyers. Clients are met by people who are not lawyers. Mr. Quist points out, and it is true, that the competition for residential real estate work has reduced lawyers' fees to such an extent that there is a disincentive to lawyers spending any more time than absolutely necessary on a file and this has led to a situation where clients report that the lawyers that they formerly used were never seen by the client.

Notwithstanding all of that, it is quite clear that from a policy point of view, it would be an untenable position to find other than that the Solicitor was here practising law given the Law Society's obligation to protect the public. The Rules are drafted in order that the Law Society can assure the members of the public that they will be served by qualified, insured and competent lawyers.

Here it is clear that although there does not seem to be a question of Mr. Quist's competence, he was not qualified by the Law Society at the time, between June 28th, 1996 and March 12th, 1997 by virtue of his not paying the fees. Those fees for this type of practice (which was literally a "Ma and Pa" operation, two lawyers married to each other, doing all of the work, with no secretaries), were difficult fees to justify economically. The Law Society fees went up at the same time that income was dropping and especially the Errors and Omissions fees went up. The fact remains though that these were circumstances that were applicable to lawyers right across the province and not just to Mr. Quist and Ms. Humphreys.

Mr. Quist has admitted that he attempted to convey to other members of the profession and the public that he was still in good standing and he did so because of the devastating effect that publicity about being suspended would have in a very small community. He admits that there was no attempt to advise clients or other lawyers that he was suspended. He argues that he was in a period of time where he was trying to determine what the best course of action was; whether he should leave the practice of law and work full time for his wife or whether they should continue both paying the fees. In fact, the last document in the document brief is a letter from Mr. Quist's partner and spouse, Jane Humphreys, who argues quite eloquently that there should be a category to accommodate spouses, to permit two part-time licenses. She ends her letter with the sentence "Oh, for the good old days when a husband and wife were considered as one legal person! Then one license would be required!" And, while it is a jocular note, it certainly brings home the situation that this couple were in; essentially one income but being treated as two separate people having to conform, each of them, to all of the restrictions and obligations of the Law Society Act.

Again, while there is sympathy for the situation, it may very well be that it is not confined to situations of partners who are married to each other. Many legal partnerships these days are finding that they are bringing in enough money for one where there are two and sometimes more partners.

In this situation, it is clear that all of the lawyers that were dealing with the Quist and Humphreys firm in this period of time were of the impression that Mr. Quist was still a practising lawyer. He agrees that he did not discourage that impression, but tried to finesse the Rules and, except for one occasion which I accept was probably an oversight, did not sign his name as a solicitor. He says if confronted, he would not give legal advice and would explain why. But, otherwise, he was quite happy to leave the impression that he was still in good standing. The name of the firm did not change on the sign, on the letterhead, nor on the answering machine. Although in real estate transactions, when he continued to sign the Land Transfer Tax affidavits, the sentence is ambiguous, stating 'solicitor or agent'. There was on the evidence a feeling on the part of the parties with whom he was dealing that he was in fact a solicitor.

As Mr. Corbett points out, essentially Mr. Quist's position was a hair splitting exercise and Mr. Quist is not taking great issue with that. It is clear that he took efforts to avoid practising law in a technical sense, that he took efforts to avoid signing his name as a solicitor, but that he otherwise allowed his name to appear on the letterhead and on the office sign as a solicitor and did not correct that impression when he was addressed as a solicitor in correspondence. He continued to sign most of the cheques which of course were headed "Quist and Humphreys" and underneath said "Barristers and Solicitors".

For all these reasons I have found that the Complaint is made out as drafted.

RECOMMENDATION AS TO PENALTY

My recommendation in this matter is that the Solicitor be suspended for a period of two months, and further, that upon appropriate application by his partner - which application I would anticipate would be heard at the same time as this discipline hearing in Convocation - that Convocation permit the Solicitor to continue to do non-legal work in the office of his partner/spouse, including bookkeeping, title searching, typing, answering the phone and general secretarial tasks.

REASONS FOR RECOMMENDATION

The reasons for my recommendation are as follows. Stephen Quist and Jane Humphreys operate what is essentially a "Mom and Pop" law operation in the Town of Kemptville. They are not computerized. They have no secretary, no receptionist, no bookkeeper. They are the operation twenty-four hours a day.

To that extent, they are not unlike a lot of small businesses in Ontario and they have over the last few years been affected by the same unpredictable business climate and more recently, weather climate, that others have been. They have found themselves buffeted by a change in the way that real estate law is practised in this province, the way that their business has been cut into by the large financial institutions and the highly competitive nature of real estate law which has seen fees plummet and profit for law firms in these areas diminish.

Like many in this profession in this province, the Quist and Humphreys practice found the increased fees and Errors and Omissions payments a heavy burden at the time of diminishing profits and upon the advice of a senior lawyer, made a decision to forego - in the words of Mr. Quist and his wife - one license and its attached costs. Given the nature of their practices and that the bulk of the residential real estate work was being done by Mr. Quist, the decision was made. Despite the advice he had received from the well-intentioned senior lawyer, that his wife should quit (that being the old-fashioned way things had been done), Mr. Quist decided that the more appropriate approach was for him to stop practising law and paying the fees, and work for his wife in a non-legal capacity as a paralegal/secretary.

Unfortunately, Mr. Quist and his wife did not want to run the risk that if this did not work out, all of their bridges would be burned and this is where the plan ran afoul of the very important rules of the Law Society in this regard. The letterhead and the signage and the way the phone was answered all continued to advertise that the firm was Quist and Humphreys. There was no attempt to inform clients that Mr. Quist was suspended although, for the most part, where a lawyer's signature was required on an account, or on an undertaking, Ms. Humphreys' name appeared. The cheques however, were mostly signed by Mr. Quist and he continued to close real estate deals and to see clients. He did not appear in court apparently, or on hearings, and he made a point of, when specifically asked for legal advice, not giving it. To support that position, we have a letter at Tab 3 of the Solicitor's document book from Gerald Seguin, who was specifically told when asking for legal advice from the Solicitor that he could not give it as he had not renewed his licence and was working as an assistant to Jane Humphreys.

The use of that term by Mr. Quist and also used by his wife, 'not renewed licence', is an interesting use of phrase. It is true that the suspension here was completely as a result of non-payment of fees. It was not a discipline imposed suspension and it was not for any other reason than for the non-payment. The Solicitor has argued that at all times his clients were protected because his wife and partner, Jane Humphreys, was clearly the one responsible. Her name appeared on documents, and unlike most suspension cases that involve sole practitioners, there was a lawyer insured and in good standing with the Law Society standing behind all work here. I cannot speculate whether that would have been the view of the Errors and Omissions Insurance department if a claim had been made. I can only conclude though that this unusual situation was different from the typical one that we see.

It is also clear that if Mr. Quist is suspended for a significant period of time, in the range of four to eight and a half months, as urged by discipline counsel, that this will have an effect on he and his partner greater than in many other cases. Although this is a partnership, in many ways it is a sole practice with two lawyers. Much of the work is done by both lawyers and working as a team, and all of the non-legal work is performed by both lawyers.

In the absence of an order from Convocation, Mr. Quist, who has performed general office management duties, bookkeeping, typing, title searching and closing of deals, will be prohibited from doing any of those, although not technically chores that are legal in nature.

It is clear in the material before me and specifically the letter of Jane Humphreys at Tab 30 of the Document Book and on the submissions and on the record, that the Solicitor is of good character. Law Society counsel has made that submission as well.

I am bound by the decision in Laan and in MacGregor. At the same time, Convocation has instructed me that these are not formulae to be slavishly adhered to; that each case must reflect the individual circumstances of the solicitor involved. As well, I must look at penalties that have been assessed in other matters involving sole practitioners and those in small towns. Convocation has accepted that the effect of a suspension on a sole practitioner or a practitioner in a small community is more devastating to those practitioners than those in large firms and the larger communities where there is a certain anonymity.

I must also note that although the period that I have found here stretches between June 28, 1996 and March 12, 1997, that period of time cannot be characterized as one continuous period where the Solicitor was daily in breach of the Order of Convocation in the sense that we only have snapshots of occasions where he was practising under suspension and we have evidence that there was an effort made not to flaunt the rule. Now, I have found that the period of time in the allegation has been proven in the sense that his name was never taken off the letterhead and he was ostensibly, as admitted in paragraph 5, holding himself out as a solicitor in good standing. In my view, that is sufficient for the allegation to have been made out and the fact is that in the minds of the public and the firm's clients, he was perceived as a solicitor in good standing, a perception that he fed. At the same time, I do accept that the nature of the practice changed; that his wife, Jane Humphreys, took on more work and that he removed himself from certain types of work because of his perception that that work would be practising law and he could not do it. His efforts fell short of what was necessary, but I must take into account that these efforts were made.

I take into account the Solicitor's health. He has submitted a letter indicating he had suffered from a very bad back for a few years, brought on by work in his law firm. He was not getting enough exercise and doing too much sitting and bending over a desk - an occupational hazard for solicitors. As well I have considered the fact that the family income cannot be separated out from this practice of law and whatever I do to Mr. Quist, I do to Ms. Humphreys.

For all those reasons, I recommend a suspension of two months and that Convocation allow certain work to be continued, certain non-legal work in the firm, as well as giving generous effect to whatever request Mr. Quist has for the appropriate time that the suspension come into effect.

Stephen Harry Quist was called to the Bar on April 16, 1980.

ALL OF WHICH is respectfully submitted

DATED this 19th day of October, 1998

Thomas J. P. Carey

Mr. Corbett asked that the Report be corrected as follows:

- page 15, 5th paragraph, beginning of 5th line should read - ".it as an excuse, but clearly he did not read Rule 20..."
- page 17, 3rd paragraph, end of third line - delete "." after the word "and"

It was moved by Ms. Ross, seconded by Mr. MacKenzie that the Report as amended be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 2 months and further upon the appropriate application by the solicitor's partner/spouse that the solicitor be permitted to continue to do non-legal work in the office of his partner/spouse including bookkeeping, title searching, typing, answering the phone and general secretarial tasks.

There were brief submissions by Society's counsel for a 2 month suspension.

There were questions from the Bench.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Ms. Ross, seconded by Mr. Wright that the recommended penalty be adopted.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 2 months.

Mr. Corbett addressed the matter of the Rule 20 Application which was filed as Exhibit 3 .

Mr. Heller made submissions in support of the Application to permit the solicitor to do non-legal work in his partner/spouse's office during the period of suspension. He further requested that the suspension commence January 15th, 1999.

It was moved by Mr. DelZotto, seconded by Ms. Ross that the Rule 20 Application be approved to allow the solicitor to do non-legal work in his partner/spouse's office during the period of suspension, the suspension to take effect January 15th, 1999.

Carried

Re: Michael James CLARKE - Toronto

Mr. Topp did not participate.

Ms. Braid appeared for the Society and Mr. Heller appeared on behalf of the solicitor who was present.

Mr. Heller requested an adjournment on the solicitor's behalf to January 1999 in order that the solicitor could get his books and records in order.

The adjournment was granted to the Discipline Convocation in January 1999 on the solicitor's undertaking to permit representatives from the Law Society to enter the solicitor's office to view his files and that the solicitor provide signed authorization to obtain information from the banks.

Re: Adam John BULL - Toronto

Messrs. Topp, Gottlieb and Chahbar did not participate.

Mr. Corbett appeared for the Society and Mr. Heller appeared on behalf of the solicitor who was present.

Mr. Heller made submissions as to the difficulty the solicitor was having in providing materials to the Society. Mr. Heller requested an adjournment to January and undertook to obtain a medical report.

Mr. Corbett made submissions in support of the matter proceeding.

It was moved by Mr. Swaye, seconded by Mr. Wright that the adjournment be granted to the Discipline Convocation in January, 1999.

Carried

Resumption of the Marcovitch matter

Mr. Heller made submissions on the solicitor's behalf for an adjournment so that the solicitor would be able to provide the remaining materials on November 27th.

Ms. Braid made submissions that the matter proceed.

Counsel, the solicitor, the reporter and the public withdrew.

It was moved by Ms. Ross, seconded by Mr. MacKenzie that the matter be adjourned to November 27th at 9:30 a.m.

Carried

It was moved by Mr. Bobesich, seconded by Mr. Gottlieb that the matter be adjourned to January 1999.

Not Put

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the matter be adjourned to November 27th at 10:00 a.m. and that the solicitor produce by 9:30 a.m. a signed authorization to obtain the necessary information from the bank.

CONVOCATION ROSE AT 1:20 P.M.

Confirmed in Convocation this 22 day of January, 1998⁹

Harvey T. Strasberg

Treasurer