

MINUTES OF SPECIAL CONVOCATION

Thursday, 26th November, 1992
9:00 a.m.

PRESENT:

The Treasurer (Allan M. Rock), Bastedo, Bellamy, Brennan, Campbell, Carter, Curtis, Elliott, Graham, Hill, Kiteley, Lamek, Lamont, Lax, Levy, McKinnon, Mohideen, Murray, S. O'Connor, Ruby, Scott, Spence, Strosberg, Thom, Wardlaw and Weaver.

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DISCIPLINE COMMITTEE

Re: YAROSLAV MIKITCHOOK, Toronto

Mr. Scott placed the matter before Convocation.

The reporter was sworn.

Ms. Graham withdrew.

The Society's counsel, Mr. Norm Perrier requested an adjournment on behalf of the solicitor's counsel who had a prior court commitment. The Society was not opposed and the matter was adjourned to the next Special Convocation in January.

Counsel retired.

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The Treasurer withdrew from Convocation as one of the ineligible Benchers listed in the following Discipline Reports. Mr. Lamek took the Chair as Acting Treasurer.

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Re: DAVID JOHN FRASER, Parry Sound

Mr. Scott placed the matter before Convocation.

The reporter was sworn.

Ms. Kiteley withdrew.

Mr. Gavin MacKenzie appeared for the Society and Mr. Frank Marrocco and Lynne Mahoney appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 10th November, 1992, together with an Affidavit of Service sworn 24th November, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail on 12th November, 1992 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

26th November, 1992

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert J. Carter, Q.C., Chair
Laura L. Legge, Q.C.
Hope Sealy

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

Gavin MacKenzie
for the Society

DAVID JOHN FRASER
of the Town
of Parry Sound
a barrister and solicitor

Frank Marrocco and Lynne Mahoney
for the solicitor

Heard: September 29, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 9, 1991, Complaint D154/91 was issued against David John Fraser alleging that he was guilty of professional misconduct. This complaint was replaced with Complaint D154a/92 which was issued on July 20, 1992.

The matter was heard in public on Tuesday, September 29, 1992, before a Committee composed of Robert J. Carter, Q.C., Chair, Laura L. Legge, Q.C. and Hope Sealy. Mr. Fraser was present and was represented by Frank Marrocco and Lynne Mahoney. He had received proper notice of the hearing and had executed an Agreed Statement of Facts. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

Complaint D154a/92

2. a) He has misappropriated \$300,000, more or less, from his clients' trust funds resulting primarily from his use of these funds for his own personal benefit either directly, or indirectly, for companies in which he or his spouse have an interest.

Evidence

The following Agreed Statement of Facts was executed by the Solicitor, his counsel and counsel for the Law Society.

"AGREED STATEMENT OF FACTS"

I. Jurisdiction and Service

1. The Solicitor admits service of Complaint D154a/91 and is prepared to proceed with a hearing of this matter on September 29, 1992.

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 this Agreed Statement of Facts with his counsel, Frank Marrocco, and admits the particulars contained therein. He further admits the allegations of professional misconduct as particularized under paragraph 2(a) of Complaint D154a/91.

IV. Background Facts

4. The Solicitor has been married since August, 1973 and has no children. He was called to the Bar in 1976 and has been a sole practitioner since 1981. He carried on a heavy real estate practice (181 active files in January, 1991). The Solicitor estimates that he opened an average of 800 files per year of which approximately 600 were real estate matters. The Law Society neither confirms nor refutes this assertion. As a result of his failure to file Forms 2/3 for his fiscal year ending January 31, 1990 and failure to pay the penalty for late filing, the Solicitor's membership in the Law Society has been suspended. His Forms 2/3 filings for the fiscal year ending January 31, 1991 are also in arrears. In the course of these proceedings, the Solicitor has given and honoured his Undertaking to the Law Society not to practise law. He has not been practising law nor been employed in any capacity since January, 1991. He is currently under the care of two psychiatrists, Dr. Kraus and Dr. Seltzer.

V. Facts Relating to Alleged Misconduct - Misconduct

5. On January 17, 1991, the Solicitor met with Mr. William Kennedy, an investigation auditor for the Law Society.

6. At that meeting the Solicitor disclosed to Mr. Kennedy that:

The Canadian Imperial Bank of Commerce froze his client trust account because as at December 21, 1990 his trust account #37-01212 was overdrawn by \$20,000, more or less, and that the bank was not prepared to honour trust cheques that were outstanding;

His then current client trust listing disclosed that as at December 31, 1990 the Solicitor had client trust liabilities totalling \$335,336.06 against the trust account which was overdrawn;

The Solicitor had not prepared trust reconciliations since 1989;

The Solicitor was not able to provide a full explanation for the trust shortage;

26th November, 1992

The Solicitor admitted he had misused client trust funds in connection with certain mortgage advances recorded in his trust records identified as "Dore Mortgage Loan to Michaelis".

7. As a result of the above disclosure, the Solicitor agreed to the auditor's request to give the Law Society his Undertaking to wind up his practice under the supervision of a Staff Trustee.

8. At a second meeting with Mr. Kennedy on January 18, 1991, the Solicitor admitted that as early as 1986 he had been misappropriating trust funds from his trust account for his own personal use or for the use of companies in which he had an interest. He admitted that in order to cover this shortage, he had engaged in a juggling act, that is to say he had been taking trust funds from one client to pay the shortage he caused to the trust funds of another client.

9. The Solicitor provided the auditor with a list of cheques totalling \$292,294.44 drawn against his trust account #37-01212 during 1989 and 1990 which were primarily payable to himself or the companies in which he holds an interest. The Solicitor admits that he was not entitled to these monies and that he misappropriated these monies by paying them to himself or to the companies in which he holds an interest.

10. The companies in which the Solicitor holds either a direct or indirect interest are:

- i) 774861 Ontario Inc.
- ii) Top of the Rock Records (Canada) Inc.
- iii) Exidor Canada Inc.
- iv) S.D. Fraser Investments Ltd.

11. Although there is no agreement between the Society and the Solicitor as to the total amount of client trust funds misappropriated by the Solicitor, the Solicitor does admit that the matters set out below are particular situations in which he did misappropriate client trust funds.

Raymond Butters Transactions

Sale of Parcel 4735, Parry Sound

12. In September, 1990, the Solicitor acted for Raymond Butters in the sale of Parcel 4735, Parry Sound. This property had been transferred earlier to Mr. Butters under the terms of the Will of his deceased spouse, Dorothy Butters. The selling price was \$150,000 and the transaction closed September 12, 1990. The total consideration amounted to \$150,255.91 which was provided by the purchaser on September 12, 1990.

13. The Solicitor deposited the monies received from the purchaser into his trust account #37-01212 to the credit of his client trust ledger card for the estate of Dorothy Butters.

14. On October 29, 1990, the Solicitor issued trust cheque #T11660 in the amount of \$25,000 payable to himself and charged this cheque to his client trust ledger card for the estate of Dorothy Butters.

15. The Solicitor did not have client authorization to draw the trust cheque and pay the \$25,000 to himself.

Ronald Dore Mortgage Loans To Dale Michaelis

Dore Mortgage Loan for \$25,000 to Michaelis

16. At the January 17, 1991 meeting with Mr. Kennedy, the Solicitor advised Mr. Kennedy that he had, for approximately four years, acted for Ronald Dore in the administration of \$150,000 of investment funds. The Solicitor advised Mr. Kennedy that during this period of time, he lent out these funds on behalf of Mr. Dore on mortgages to various other clients. The Solicitor said that he used a holding company, 774861 Ontario Inc. ("774861"), in which he is the sole shareholder, to place mortgage loans for Mr. Dore, to collect payments for the mortgages and to make restitution to Mr. Dore.

17. In September, 1990, the Solicitor acted for both Ronald Dore and Dale Michaelis in a mortgage loan from Dore to Michaelis in the principal amount of \$25,000.

18. The Solicitor was responsible for transferring these funds held by 774861 to his trust account #37-01212 to the credit of Mr. Dore to then be advanced under this mortgage transaction.

19. The Solicitor did not transfer these funds from 774861 to his trust account. He did, nevertheless, issue the following trust cheques from his trust account in connection with this mortgage transaction.

Cheque #	Payee	Amount	Explanation
T11480	Dale Michaelis	\$24,000.00	Mortgage Advance
T11481	Ron Dore	\$ 1,000.00	Finder's Fee

20. As a result of the Solicitor's misappropriation in this loan transaction, the Solicitor's trust account had a shortage of \$25,000.

21. Mr. Kennedy was not able to find a client trust ledger card for this transaction.

Ronald Dore Mortgage Loan of \$50,000 to Michaelis

22. In November, 1990 the Solicitor acted for both Ronald Dore and Dale Michaelis in a mortgage loan from Dore to Michaelis in the principal amount of \$52,000. It was the Solicitor's responsibility to transfer these funds held by 774861 to his trust account. The Solicitor did not transfer these funds to his trust account but did, on November 7, 1990, record the receipt of trust funds totalling \$50,000 from Mr. Dore on his client trust ledger card for Dore mortgage loan to Dale Michaelis.

23. On the same day, November 7, 1990, the Solicitor issued the following trust cheque from his trust account #37-01212 and charged this to his client trust ledger card for Dore mortgage loan to Dale Michaelis.

Cheque #	Payee	Amount	Explanation
T11695	Dale Michaelis	\$48,000.00	Mortgage Advance

24. The Charge/Mortgage was in the principal amount of \$52,000. The \$4,000 difference between the amount advanced and the face value of the mortgage consisted of a \$2,000 bonus to be paid to Mr. Dore when the mortgage was paid off. The other \$2,000 represented the Solicitor's legal fees.

25. As a result of the Solicitor's actions on this mortgage transaction, he misappropriated \$48,000 and caused a shortage in his trust account in the amount of \$48,000 which he is not currently in a position to replenish.

Ronald Dore Loan to Martin Prucyk

26. On August 9, 1990 the Solicitor recorded a trust deposit for \$15,000 from Ronald Dore on his client trust ledger card for Dore Loan to Prucyk. An examination of the Solicitor's books and records disclosed that no such trust funds had been received by the Solicitor.

27. On August 9, 1990 the Solicitor issued the following trust cheques against his trust account #37-01212 which he charged against his client trust ledger card for Dore Loan to Prucyk.

Cheque #	Payee	Amount	Explanation
T11268	Martin D. Prucyk	\$ 5,000.00	Loan Advance
T11269	Martin D. Prucyk	\$10,000.00	Loan Advance

28. As a consequence, Mr. Prucyk received \$15,000 and the Solicitor's trust account has a trust shortage of \$15,000 for this amount which he is currently unable to replenish.

Andrew Dimmick Transactions

i) Parcel 19655 Parry Sound, South Section, Township of McDougall

29. In May, 1989 the Solicitor acted for Andrew Dimmick, purchaser, and Vinicio and Loretta De Iuliis, vendors, in the sale of the above-noted property for the purchase price of \$7,700. This transaction closed on May 19, 1989.

30. In order to complete this transaction, the Solicitor issued the cheques set out in Appendix "A" totalling \$8,068.56 drawn on his trust account #37-01212 and charged these cheques to his client trust ledger cards for Andrew Dimmick.

31. In addition, the Solicitor recorded a transfer of trust funds totalling \$7,609.06 on May 19, 1989 on his client trust ledger cards transferring this amount from his card for Mr. Dimmick to his card for De Iuliis. These funds represented the closing funds due to the vendors and were the only source of trust funds subsequently disbursed from their trust ledger card as detailed in Appendix "A".

32. When the Solicitor transferred funds in his trust account from Dimmick to the vendors, he had not first deposited monies into trust to the credit of Mr. Dimmick for this transaction. The Solicitor's use of his trust account to complete this transaction was a misappropriation of funds resulting in a trust shortage of \$8,068.56.

ii) Unsecured Advances

33. In May and June, 1989 the Solicitor issued the following cheques drawn on his trust account payable to Andrew Dimmick.

Date	Cheque #	Amount
May 29, 1989	T9056	\$21,000.00
June 30, 1989	T9309	\$931.44

34. The investigation conducted by Mr. Kennedy disclosed that the Solicitor had not first deposited funds to his trust account on account of these loan advances to Mr. Dimmick.

35. The Solicitor's use of his trust account to complete these loan advances was a misappropriation of funds from his trust account resulting in a trust shortage of \$21,931.44.

iii) Purchase and Development of Parcel 17978, McKellar

36. In August, 1989, the Solicitor acted for 821418 Ontario Limited, a company owned by Mr. Dimmick, in the purchase of Parcel 17978 from Kenneth and Linda Bennett. The purchase price for the property was \$23,000 and the transaction closed August 17, 1989.

37. The consideration paid for the purchase of the property pursuant to the Statement of Adjustments for this transaction totalled \$23,622.00.

38. In order to complete this transaction and to provide additional development financing to Mr. Dimmick, the Solicitor issued the cheques drawn on his trust account as set out in Appendix "B".

39. There was no client ledger card on which the above transactions were recorded. There were no trust funds received and deposited to the Solicitor's trust account in connection with these disbursements to and on account of Andrew Dimmick.

40. In addition, on October 3, 1989, the Solicitor issued cheque #T10016 for \$5,000 payable to Conserve Construction Limited and drawn on his trust account. This cheque was charged to the client trust ledger card for Mr. Dimmick re: incorporation.

41. On October 3, 1989, the Solicitor recorded a trust receipt of \$5,000 from Ronald Dore on the client trust ledger card for Mr. Dimmick re: incorporation. The investigation by Mr. Kennedy, however, disclosed that these trust funds were not received and deposited in the Solicitor's trust account.

42. The Solicitor's use of his trust account in connection with these transactions was a misappropriation of funds resulting in a trust shortage of \$37,622.00.

Additional Factors

43. The Solicitor co-operated fully with the investigation auditor and the Staff Trustee.

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44. The Solicitor has been charged with "Theft over \$1,000.00" in connection with these same trust funds. This matter is scheduled for a trial on August 5, 1992 and it is anticipated that there will be a plea at that time.

Prior Discipline History

45. None.

DATED at Toronto this day of July, 1992."

Based on the Agreed Statement of Facts and the admissions of counsel the Complaint was found to have been established.

RECOMMENDATION AS TO PENALTY

The Committee recommends that David John Fraser be permitted to resign.

REASONS FOR RECOMMENDATION

Psychiatric reports from two psychiatrists were filed and are attached. Thirteen letters showing community support and previous good character were filed and viva voce evidence was called to the same effect.

The picture soon became clear of a man who was a busy practitioner unable to say no to client and community requests who had a complete break with reality and conducted himself in a fashion totally opposite to the way in which his friends, family and clients saw him.

The misappropriation commenced according to the admissions of the Solicitor in 1986 and had a snowballing effect until 1991.

The psychiatric reports indicate a mental breakdown in 1985 and consideration was given to hospitalization at the Ontario Hospital for the Mentally Ill at Penetang. He had by that time also developed a severe alcohol problem.

His alcohol problem combined with his depression episodes and his work load stress impaired his judgment as to his financial conduct.

There was no evidence that any money was used to improve his personal financial position or provide personal gain. In fact the evidence was to the contrary. The oral evidence was that he often worked for clients for no fee or inadequate fees. It was clearly mismanagement to a point of loss of control.

The Solicitor is before the criminal courts and it is likely that he will tender a plea of guilty and receive a term of imprisonment.

Both Society counsel and Solicitor's counsel agree that the Solicitor must not be able to practice law in the future. The issue is disbarment or permission to resign.

Given the Solicitor's psychiatric condition, his alcohol problem, the stress he was under, the Committee felt this was a case where he could be permitted to resign.

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We were all impressed with his community support which continues to exist and feel his community would readily accept that disposition.

David John Fraser was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 9th day of April, 1976.

ALL OF WHICH is respectfully submitted

DATED this 10th day of November, 1992

"R. Carter"
Robert J. Carter, Q.C., Chair

It was moved by Mr. Scott, seconded by Mr. Brennan that the Report of the Discipline Committee be adopted.

There were no submissions.

The Report was adopted.

It was moved by Mr. Scott, seconded by Mr. Brennan that the Recommendation as to Penalty contained in the Report that is, that the solicitor be permitted to resign, be adopted.

There were brief submissions by both counsel in support of the Recommendation.

The Recommendation as to Penalty was adopted and the solicitor was permitted to resign.

Counsel and the solicitor retired.

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Re: WILLIAM WALTER KAY, Toronto

Mr. Scott placed the matter before Convocation.

The reporter was sworn.

Mr. Carter withdrew.

Mr. Gavin MacKenzie appeared for the Society. The solicitor was not present nor was he represented.

Convocation had before it the Report of the Discipline Committee dated 30th October, 1992, together with an Affidavit of Service sworn 24th November, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail on 10th November, 1992 (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

Robert J. Carter, Q.C., Chair
Laura L. Legge, Q.C.
Hope Sealy

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

Gavin MacKenzie
for the Society

WILLIAM WALTER KAY
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: September 29, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 17, 1992, Complaint D10/92 was issued against William Walter Kay alleging that he was guilty of conduct unbecoming a barrister and solicitor.

The matter was heard in public on Tuesday, September 29th, 1992, before a Committee composed of Robert J. Carter, Q.C., Chair, Laura L. Legge, Q.C. and Hope Sealy. Mr. Kay was not present and was not represented although duly served with notice. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

The following particular of conduct unbecoming was found to have been established:

Complaint D10/92

- 2. (a) On March 28, 1991, he was convicted by Judge Marshall of the Ontario Court of Justice (Provincial Division) of the offence of robbery, contrary to section 344 of the Criminal Code, and was sentenced to imprisonment for a period of three years.

EVIDENCE

A certified copy of the transcript of the proceedings of March 28th, 1991, before Judge Marshall of the Ontario Court of Justice (Provincial Division) was filed and is attached hereto.

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That transcript revealed that the Solicitor plead guilty of a charge of armed robbery, was found guilty and sentenced to a term of three years imprisonment.

Accordingly, the Complaint and particular was found to have been established.

RECOMMENDATION AS TO PENALTY

The Committee recommends that William Walter Kay be disbarred.

REASONS FOR RECOMMENDATION

A review of the circumstances of the armed robbery set out in the transcript demand that the only appropriate penalty be disbarment.

ALL OF WHICH is respectfully submitted

DATED this 30th day of October, 1992

"R. Carter"

Robert J. Carter, Q.C., Chair

It was moved by Mr. Scott, seconded by Mr. Brennan that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Scott, seconded by Mr. Brennan that the Recommendation as to Penalty contained in the Report that is, that the solicitor be disbarred, be adopted.

There were brief submissions by Mr. MacKenzie in support of the Recommendation.

The Recommendation as to Penalty was adopted.

The solicitor was disbarred.

Counsel retired.

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Re: PETER SANDERSON MANN, Niagara-on-the-Lake

Mr. Strosberg placed the matter before Convocation.

The reporter was sworn.

Mr. Gavin MacKenzie appeared for the Society. The solicitor was not present nor was he represented.

Convocation had before it the Report of the Discipline Committee dated 30th October, 1992, together with an Affidavit of Service sworn 24th November, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail on 10th November, 1992 (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

Robert J. Carter, Q.C., Chair
Laura L. Legge, Q.C.
Hope Sealy

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

Gavin MacKenzie
for the Society

PETER SANDERSON MANN
of the Town
of Niagara-on-the-Lake
a barrister and solicitor

Not Represented
for the solicitor

Heard: September 29, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 20, 1992, Complaint D1/92 was issued against Peter Sanderson Mann alleging that he was guilty of professional misconduct.

The matter was heard in public on September 29, 1992, before a Committee composed of Robert J. Carter, Q.C., Chair, Laura L. Legge, Q.C. and Hope Sealy. Mr. Mann was not present and was not represented by counsel. He had received proper notice of the hearing and had executed an Agreed Statement of Facts. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

COMPLAINT D1/92

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

- 2. a) During the years 1989, 1990 and 1991, he misappropriated an amount in excess of \$500,000 from his firm's mixed trust bank account.

Evidence

The evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D1/92 and is prepared to proceed with a hearing of this matter on June 16, 1992.

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 D1/92 and admits the particular contained therein. The Solicitor admits that the particular detailed in the complaint and the facts set out constitute professional misconduct.

IV. BACKGROUND FACTS

4. The Solicitor was called to the bar in 1972. Until April 15, 1991, he was a senior partner with Slovak, Mann, Stockton, Henderson & Hoy in Niagara Falls. He withdrew from the partnership on that date as a result of the discovery of the trust account shortage which has resulted in these discipline proceedings.

5. The Solicitor has not practised law since April 15, 1991, and has provided to the Law Society his undertaking that he will not resume practice pending the determination of these discipline proceedings.

V. FACTS RELEVANT TO COMPLAINT D1/92

6. Between 1989 and 1991, the Solicitor misappropriated a sum in excess of \$500,000 from his firm's mixed trust bank account.

7. The Solicitor used the misappropriated funds to support personal investments in business and real estate which were in financial difficulty. The Solicitor says that he had assumed responsibility, from certain of his law partners, for a business investment in which he lost a considerable amount of money, and that it was for this reason that he misappropriated the funds in question.

VI. PENALTY

8. The parties jointly submit that the Solicitor should be disbarred.

DATED at Toronto this 16th day of June, 1992."

FINDING

Based on the Agreed Statement of Facts executed by the Solicitor and counsel for the Law Society, the complaint was found to have been established.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Peter Sanderson Mann be disbarred.

REASONS FOR RECOMMENDATION

The only material before us was the Agreed Statement of Facts. In that Statement the Solicitor admits he misappropriated in excess of \$500,000.00 and recommends jointly with counsel for the Society that he be disbarred and presents no circumstances in mitigation. Under those circumstances there can be only one penalty - disbarment.

Peter Sanderson Mann was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 24th day of March, 1972.

ALL OF WHICH is respectfully submitted

DATED this 30th day of October, 1992

"R. Carter"
Robert J. Carter, Q.C., Chair

It was moved by Mr. Strosberg, seconded by Mr. Scott that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Strosberg, seconded by Mr. Scott that the Recommendation as to Penalty contained in the Report that is, that the solicitor be disbarred, be adopted.

There were brief submissions by Mr. MacKenzie.

The Recommendation as to Penalty was adopted.

The solicitor was disbarred.

Counsel and Mr. Mann retired.

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The Treasurer returned to Convocation.

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Re: RICHARD IAN KESTEN, Toronto

Mr. Strosberg placed the matter before Convocation.

The reporter was sworn.

Messrs. Wardlaw, Campbell and Brennan withdrew.

Mr. Gavin MacKenzie appeared for the Society. The solicitor was not present nor was he represented.

Convocation had before it the Report of the Discipline Committee dated 8th October, 1992, together with an Affidavit of Service sworn 10th October, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail on 7th October, 1992 (marked Exhibit 1) together with an Affidavit of Service sworn 16th November by Michael Mitchell that he had effected service on the solicitor personally on 11th November, 1992 (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

Michael G. Hickey, Q.C., Chair
J. James Wardlaw, Q.C.
Lloyd Brennan, Q.C.

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

Stephen Waisberg
for the Society

RICHARD IAN KESTEN
of the City
of Toronto
a barrister and solicitor

M. MacLachlan
for the solicitor

Heard: June 19, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 11, 1991, Complaint D7/91 was issued, on February 25, 1991, Complaint D31/91 was issued, on May 24, 1991, Complaint D61/91 was issued, on August 21, 1991, Complaint D118/91 was issued, on March 23, 1992, Complaint D32/92 was issued and on May 26, 1992, Complaint D82/92 was issued against Richard Ian Kesten alleging that he was guilty of professional misconduct.

The matter was heard in public on June 19, 1992, before this Committee composed of Michael G. Hickey, Q.C., Chair, J. James Wardlaw, Q.C. and Lloyd Brennan, Q.C. Mr. Kesten attended the hearing and was represented by M. MacLachlan. Stephen Waisberg appeared on behalf of the Law Society.

DECISION

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

Complaint D7/91

2. a) he failed to complete the task for which he was retained by Dale Grozelle, in that he failed to apply for and obtain Dale Grozelle's Decree Absolute;
- b) he failed to respond to requests for information from the Society regarding a complaint by Clifford W. Brunelle, despite letters dated May 3rd, June 15th, July 19th, 1990 and telephone messages left on August 27th, August 29, and October 9th, 1990.

Complaint D31/91

2. a) The Solicitor has failed to provide a reply to the Society regarding a complaint by Mr. & Mrs. Gerald Gardiner, despite letters dated November 23rd, 1990 and January 4th, 1991, and a promise of a response during a telephone conversation on December 19th, 1990.

Complaint D61/91

2. a) He has failed to reply to communications from the Law Society respecting complaints from Arnold Recht, Dorothy L. Wooldridge, Frank Kelly, Zlata Tomanov, Dr. W.L. Leung, Cheryl Aylward, Erskine Boyce, and John J. Thompson.
- b) He has failed to pay an outstanding account in relation to his practice to Court Reporter, Cheryl Aylward, despite having indicated to the Law Society by letter dated November 9, 1990 that he was enclosing a cheque to her.

Complaint D118/91

2. a) He failed to file with the Society within six months of the termination of his fiscal years ending January 31, 1990 and January 31, 1991, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act.

Complaint D32/92

2. a) He failed to pay the costs assessed by the Law Society pursuant to Rule 50A of the Law Society Act, and has thus attracted the provisions of Rule 36;
- b) He failed to reply to the Law Society regarding his costs assessed under Rule 50A, despite letters date June 11, 1991, August 8, 1991 and January 15, 1992;
- c) He failed to reply to the Law Society regarding a complaint by Barrington Grant, despite letters dated December 12, 1991 and January 10, 1992, and a verbal promise by the Solicitor to reply by February 24, 1992;
- d) He breached the following numbered paragraphs of his Undertaking to the Law Society, dated August 23, 1991:

26th November, 1992

- 1) he failed to give full and complete responses regarding all open complaint matters, at the time of execution of the undertaking, within fourteen days, being the complaints of the following individuals: Clifford W. Brunelle, Arnold Recht, Dorothy L. Wooldridge, Frank Kelly, Zlata Tomanov, Dr. W. L. Leung, Cheryl Aylward, Erskine Boyce, John J. Thompson, Mr. and Mrs. Gerald Gardiner, David Share and T.E.G. Fellowes;
 - 2) he failed to reply promptly to the Law Society's communications concerning the complaints of Paul W. Rosenberger, Official Examiner, and Joseph A. Teixera, accountant, Sheriff's Office, and Barrington Grant;
 - 3) he failed to provide the Law Society with either an initial assessment within 60 days of the date of the Undertaking or subsequent assessments prepared by either a psychiatrist or psychologist;
 - 5) he failed to provide his Forms 2/3 for the year 1991, no later than September 30, 1991;
 - 7) his failure to maintain his books and records in compliance with Sections 14 and 15 of the Regulation made pursuant to the Law Society Act;
- e) He failed to cooperate in an investigation carried out by the Audit Department of the Law Society.
- f) He breached an Order of Convocation that he suspend his practice of law for the period from May 14, 1990 to August 13, 1990.

Complaint D82/92

2. a) He failed to reply to the Law Society regarding discrepancies in his filings for the fiscal year ended January 31, 1990, despite letters dated September 3, 1991, October 3, 1991, November 4, 1991 and February 4, 1992.
- b) He breached his undertaking to the Law Society dated August 23, 1991 to reply to all communications from the Law Society within one week of receipt of written communications by failing to reply to letters from the Law Society's Audit Department dated September 3, 1991, October 3, 1991, November 4, 1991 and February 4, 1992.

Evidence

Part of the evidence before the Committee contained the following Agreed Statements of Fact:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D7/91, D31/91, D61/91 and D118/91 and is prepared to proceed with a hearing of these matters on October 9, 1991.

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.

III. ADMISSIONS

3. The Solicitor has reviewed the Complaints D7/91, D31/91, D61/91 and D118/91 with his counsel, Michael McLachlan, and admits the particulars contained therein.

IV FACTS

4. The Solicitor was called to the Bar on March 22, 1974 and is a sole practitioner in Toronto.

Complaint D7/91 - Particular 2(a) - Grozelle Matter

5. The complainant, Dale Grozelle, first wrote to the Law Society by letter dated March 1, 1989 regarding his divorce. He advised of difficulty in contacting the Solicitor and wished assistance in obtaining his Decree Absolute, stating that he wished to remarry as soon as possible. A letter dated October 17, 1988 from the Supreme Court of Ontario that accompanied the complainant's letter revealed that the Decree Nisi had been granted on February 29, 1988 but that the Decree Absolute had not been applied for.

6. The Society wrote to the Solicitor by letter dated March 16, 1989. By letter dated May 5, 1989, the Solicitor provided a reply to the Society. In his letter he apologized for having taken so long to answer and stated:

"...due to changes that have been taken (sic) place in the firm and the various storage places that have been utilized, I have had difficulties locating this file until recently."

The Solicitor provided a chronology of his involvement and advised that, as of May 31, 1988, there was an outstanding account of \$157.54. The Solicitor stated, "I do not know whether I was ever paid." The Solicitor further stated in his May 5, 1989 letter:

"Mr. Grozelle returned his affidavit which allowed us to make an application for the Decree Absolute on July 11, 1988. At this point, I unfortunately lost track of the file, because of a dissolution of my partnership. I am not aware of whether the decree absolute was granted."

7. The complainant, having received a copy of the Solicitor's May 5, 1989 letter, wrote to the Society by letter dated June 2, 1989. In his letter he stated:

"If an application for the Decree Absolute was made July 11/88 like Mr. Kesten said, why would the Supreme Court write me saying as of Oct. 17/88, it has not been applied for.

Also I mailed a cheque for \$157.54 May 12/88, it was withdrawn from my account May 17/88."

8. By letter dated September 8, 1989 the Law Society wrote to the Solicitor enclosing a copy of the complainant's letter and requesting that the Solicitor address the complainant's contention that the outstanding account had been paid and expressing concern that the Solicitor had not kept his client advised and had lost track of the file. A written reply was requested within two weeks.

26th November, 1992

9. No reply having been received, a Law Society staff member telephoned the Solicitor on November 24, 1989. The Solicitor indicated that he would dictate a reply on November 26, 1989 and send it at that time. The reply was not received and several telephone messages were left. On January 9, 1990, the Solicitor's secretary advised the Law Society that the complainant had picked up his file, and that the Solicitor would respond.

10. On January 10, 1990 the Solicitor telephoned the Law Society, apologized for the delay and advised that he would mail the reply on January 11, 1990.

11. No reply having been received, a registered letter dated February 13, 1990 was sent to the Solicitor seeking a detailed reply about why the complainant had not received the Decree Absolute when the account had been paid and requesting a copy of the application for the Decree Absolute. A reply was requested within seven days.

12. No reply having been received, the Society wrote to the Solicitor again on March 9, 1990. The Solicitor wrote to the Society by letter dated March 21, 1990, apologizing for the delay and advising that there was some confusion between the complainant's file and the file for another client of a similar name. In his letter the Solicitor stated:

"I had thought that Mr. Grozelle's file might either have been with me or in storage at the old firm. It wasn't until recently, that I realized that the entire file had been taken by Mr. Grozelle quite some time ago."

In his letter the Solicitor undertook to check the Supreme Court files and find out what transpired with the divorce. He stated,

"I plan to attend at the Supreme Court office on Friday, March 23, 1990 and order the file from storage. Once the file is obtained, I will be able to advise you. My apologies and please convey them to Mr. Grozelle."

13. On April 10, 1990 a Society staff member spoke with the Solicitor's secretary (Faye) who advised that the Solicitor had obtained the file from storage and would be replying.

14. Not having heard from the Solicitor, the Society wrote to the Solicitor by letter dated April 25, 1990. On May 28, 1990, a Society staff member spoke with the Solicitor's secretary (Faye) who advised that she had completed the paperwork for the application for the Decree Absolute. On June 4, 1990 a Society staff member spoke with the Solicitor's secretary who advised that the Solicitor was not in. On June 5, 1990 a Society staff member called the Solicitor's office at 10:55 a.m. and at 3:55 p.m. but was unable to speak with the Solicitor, being advised each time that he was with clients. On June 5, 1990 the Solicitor telephoned the Society staff member and advised that he would check the status of the file with his secretary and forward a response. In that telephone conversation the Society staff member asked him about the fact that he had in his letter dated May 5, 1989 advised the Society that the Decree Absolute was applied for in July, 1988. The Solicitor's response was to the effect that he did not think that the Decree Absolute was applied for or that someone else would do it and that he then lost track of the file. The Society staff member in turn expressed a concern about a lot of delay in the matter. The Solicitor then advised that he would be responding by facsimile transmission the following day, June 6, 1990.

26th November, 1992

15. No reply having been received, the Society wrote to the Solicitor by letter dated June 15, 1990 seeking a reply within seven days. No reply was received and another letter was sent to the Solicitor dated July 19, 1990. In that letter the Society again addressed the fact that no Decree Absolute had been applied for despite the Solicitor's statement that an application for the Decree Absolute had been made on July 11, 1988. The letter also questioned whether the complainant had picked up his file as had been maintained. The Solicitor did not respond to the Law Society despite further telephone calls to his office on July 19, 1990, August 27, 1990, August 29, 1990 and October 9, 1990.

16. The complainant advised the Law Society that he applied for and received the Decree Absolute himself, having elected not to wait for the Solicitor to make such application.

Complaint D7/91 - Particular 2(b) - Brunelle Matter

17. The complainant, Clifford Brunelle, wrote to the Law Society by letter dated March 13, 1989. In his letter he set out his dissatisfaction with the Solicitor concerning separation and divorce proceedings. With his letter the complainant forwarded a letter dated November 14, 1988 which he had written to the Solicitor and in which he had set out his concerns at that time and requested the Solicitor's immediate attention to certain matters.

18. By letter dated April 11, 1989 the Society forwarded the complainant's correspondence to the Solicitor. A reply in writing was requested within a period of two weeks. The Society sent a second letter to the Solicitor dated May 31, 1989 by registered mail. That letter was returned to the Society marked by the post office as "Undeliverable at the address shown". Another registered letter, dated July 21, 1989, was sent to a different office address and that letter was again returned. As a result of a telephone call to the Solicitor by a Society staff member, the previous correspondence was brought to the Solicitor's attention in early September, 1989.

19. On September 7, 1989 the Solicitor sent by facsimile transmission a note to the Society advising that the complainant had not picked up his file yet. Accompanying that note was a copy of a letter to the complainant from the Solicitor dated August 29, 1989. In its entirety that letter read as follows:

"This is to let you know that your files are now ready to be picked up at our new office located at 240 Alton Towers Circle, Suite 301, Scarborough, Ontario M1V 4P2.

Should you have any questions, please contact the undersigned."

20. The Society again wrote to the Solicitor by letter dated October 12, 1989 seeking a response to the matters set out in Mr. Brunelle's complaint. A written reply was requested within two weeks.

21. No reply having been received, a Society staff member telephoned the Solicitor on November 17, 1989. The Solicitor advised that he had provided his response through his facsimile transmission and the accompanying letter of August 29, 1989.

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22. The Society again wrote to the Solicitor by letter dated February 15, 1990 referring to the previous correspondence and the November 17, 1989 telephone conversation. The Society asked the Solicitor to comment on the specific allegations in the complainant's original letter. A reply in writing was requested within two weeks. The Solicitor's attention was drawn to the Rule of Professional Conduct obliging lawyers to respond promptly to any communications from the Society. The Solicitor was also advised that if a reply were not received the matter would be referred to the Chair of Discipline for authorization for a formal discipline Complaint.

23. The Solicitor wrote to the Society by letter dated March 21, 1990. He apologized for not responding earlier, indicating that he had experienced some difficulty with his move in early May, 1989. In his letter the Solicitor stated:

"I was not contacted by David Salmers. [The complainant had retained Mr. Salmers.] There is no telephone message nor correspondence from him in my file.

Mr. Brunelle's general complaint that I neglected his file cannot be specifically answered other denial. I do not have the file any longer. However, I do have photocopies of the correspondence that took place between myself and Mrs. Brunelle's solicitor and the client. I would be pleased to forward these if you wish."

The complainant wrote to the Society by letter of March 30, 1990 contradicting some of the Solicitor's assertions.

24. The Society wrote to the Solicitor by letter dated May 3, 1990 enclosing a copy of a letter from David Salmers to the Solicitor dated January 12, 1989. Mr. Salmers' letter advised of his retainer by the complainant and enclosed an Authorization and Direction signed by the complainant requesting the release of the file in question to Mr. Salmers. Mr. Salmers' letter also sought advice about whether a petition had ever been issued and about the status of the action. With its May 3, 1990 letter, the Society also enclosed a copy of the Authorization and Direction signed by the complainant that had accompanied Mr. Salmers' letter.

25. The Society's May 3, 1990 letter expressed concern about the length of time between Mr. Salmers' letter (January 12, 1989) and the date when the Solicitor had indicated that the file was ready to be picked up (August 29, 1989). The letter drew the Solicitor's attention to his statement that he had not been contacted by Mr. Salmers and advised that the enclosed correspondence suggested the contrary. The Society sought a detailed written response regarding the delay in forwarding the file and also sought an explanation for the Solicitor's failure to reply to Mr. Salmers' letters. The Society sought a reply in writing within two weeks.

26. No reply was received and a Society staff member spoke to the Solicitor on June 5, 1990. He advised that he would send a reply by facsimile transmission.

27. No reply was received and another letter dated June 15, 1990 was delivered to the Solicitor by courier. That letter again pointed out the Rule of Professional Conduct obliging lawyers to reply promptly to communications from the Law Society and that failure to do so could lead to disciplinary action. A reply was requested within seven days. The Solicitor was advised that if no response were received within that time period, the matter would be referred to the Chair of Discipline.

28. No reply was received and a letter dated July 19, 1990 was sent to the Solicitor. The Society's letter requested a "full, frank and detailed response to the complaint in this matter...." A reply was requested within seven days.

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29. No reply was received. Telephone messages were left for the Solicitor on July 19, 1990, August 27, 1990, August 29, 1990 and October 9, 1990.

30. No reply has been received by the Society to its letters of May 3, 1990, June 15, 1990 and July 19, 1990, nor to the telephone messages of July 19, 1990, August 27, 1990, August 29, 1990 and October 9, 1990.

Complaint D31/91 - Particular 2(a) - Gardiner Matter

31. The complainants, Marion Phillips-Gardiner and Gerald Gardiner, complained to the Law Society by letter dated October 17, 1990. In their letter the complainants stated that they were plaintiffs in a matter for which the Solicitor had been retained. In summary, the letter alleged that the Solicitor had twice moved without advising the complainants, had not returned telephone calls, had not provided certain medical reports that were requested, had failed to attend a meeting scheduled with them and had not properly pursued the action. With their letter the complainants enclosed a copy of a letter dated October 17, 1990 which they stated they had sent to the Solicitor. In that letter the complainants required information about the status of their matter and the immediate return of the file to them.

32. The Law Society wrote to the Solicitor by letter dated November 23, 1990 enclosing copies of the correspondence received from the complainants. A written reply was requested within two weeks.

33. No reply having been received, a Society staff member telephoned the Solicitor on December 13, 1990. A message was left but there was no response.

34. The complainants again wrote to the Law Society by letter dated December 12, 1990 advising that they had retained a new solicitor.

35. A Society staff member spoke to the Solicitor by telephone on December 19, 1990. The Solicitor then advised that he would respond by the following day.

36. While the Solicitor takes the position that he did respond to the Society, the Society maintains that it did not receive a response from the Solicitor and therefore sent a registered letter dated January 4, 1991 to the Solicitor. That letter drew the Solicitor's attention to the Rule of Professional Conduct obliging lawyers to respond promptly to communications from the Law Society. The letter also requested a reply within seven days and advised that failure to reply within that time would lead to the matter being referred to the Chair of Discipline.

37. No reply was received nor was there a request for an extension of time to reply nor an explanation provided for the Solicitor's failure to reply.

Complaint D61/91 - Particular 2(a) - Failures to Reply (8 Matters)
Arnold Recht

38. The Society received a letter dated November 23, 1990 from Arnold Recht, a solicitor in Toronto. In his letter Mr. Recht advised that on October 1, 1990 his office had obtained an Order dismissing a certain action in which the plaintiffs had been represented by the Solicitor.

39. The complainant enclosed a copy of the Order that had been made by the Honourable Justice Matlow in the District Court of Ontario. It had been ordered that the action be dismissed with solicitor/client costs. It had further been ordered that the costs of the motion (seeking dismissal of the action) be fixed at \$500.00 payable forthwith and further that the Solicitor be jointly and severally liable for the costs awarded to the defendants and that, as between the Solicitor and the plaintiffs, the Solicitor be solely liable for the costs without recourse to the plaintiffs.

40. Finally, Justice Matlow directed the local Registrar to send a copy of the documents of that motion to the Law Society for appropriate action.

41. The Society wrote to the Solicitor by letter dated February 11, 1991. The Solicitor's comments were sought and he was specifically directed to reply to allegations in the complainant's affidavit (that had been used in support of the motion) and to explain his non-appearance at the motion. The Society enquired about the current status of the situation and requested information from the Solicitor about prejudice to the Solicitor's clients.

42. The Solicitor did not respond to that letter.

Dorothy Wooldridge

43. Dorothy Wooldridge, the complainant, wrote to the Law Society by letter dated January 25, 1991 advising that she had retained the Solicitor in order to obtain a divorce. The complainant stated that, although the petition had been served, the matter had not been set down. She related that she had telephoned the Solicitor's office "approximately every second day for several months" but that the Solicitor did not return any of her calls. The Solicitor maintains he called the complainant back, but was unable to make contact with her.

44. The correspondence from the complainant was forwarded to the Solicitor by the Society with a letter dated February 11, 1991. A written reply was requested within a period of two weeks.

45. The Solicitor did not reply to the correspondence from the Law Society.

46. The complainant subsequently advised that she had obtained a Certificate of Divorce through the efforts of another solicitor.

Frank Kelly

47. Frank Kelly, the complainant, wrote to the Law Society by letter dated January 31, 1991 advising that on or about the 29th day of November, 1989, he had retained the Solicitor to act on his behalf regarding damages to his motor vehicle as a result of an accident on September 3, 1987. The complainant stated that he had attempted to contact the Solicitor repeatedly since early January, 1991 regarding the status of this claim, but that the calls were not returned.

48. The correspondence from the complainant was forwarded to the Solicitor by the Society with a letter dated February 12, 1991. A written reply was requested within a period of two weeks.

49. As no reply was received, a Society staff employee left telephone messages for the Solicitor on February 26, 1991 and February 28, 1991. A registered letter from the Society, dated March 8, 1991, advised that Solicitor that this matter would be referred to the Chair of the Discipline Committee if a reply were not received within seven days of the date of that letter.

50. The Solicitor did not reply to the correspondence from the Law Society.

Zlata Tomanov

51 Zlata Tomanov, the complainant, wrote to the Law Society by letter dated January 14, 1991 advising that she had retained the Solicitor on behalf of herself and her son both of whom had been involved in a motor vehicle accident on February 7, 1988. The complainant stated that she had repeatedly called the Solicitor's office but that she had heard nothing from the Solicitor since July 6, 1990.

52. The correspondence from the complainant was forwarded to the Solicitor by the Society with a letter dated January 28, 1991. A written reply was requested within a period of two weeks.

53. No reply having been received, a Society staff employee spoke with the Solicitor's secretary on February 27, 1991 and was advised that the Solicitor had not received a copy of the Society's January 28, 1991 correspondence. A copy was faxed to the Solicitor that day.

54. No reply having been received, a registered letter from the Society, dated March 4, 1991, advised the Solicitor that the matter would be referred to the Chair of the Discipline Committee if a reply were not received within seven days of the date of that letter.

55. The Solicitor did not reply to the correspondence from the Law Society.

Dr. W. L. Leung

56. Dr. W. L. Leung, the complainant, wrote to the Law Society by letter dated February 25, 1991, advising that a medical-legal report had been submitted to the Solicitor on June 1, 1989 regarding one of the Solicitor's clients. The complainant advised that the fee of \$120.00 was still outstanding despite telephone calls and a letter to the Solicitor's office.

57. The correspondence from the complainant was forwarded to the Solicitor by the Society with a letter dated March 13, 1991. A written reply was requested within a period of two weeks.

58. The Solicitor did not reply to the correspondence from the Law Society.

Erskine Boyce

59. Erskine Boyce, the complainant, wrote to the Law Society by letter dated October 17, 1990 advising that he had retained the Solicitor to reach a separation settlement with his wife. The complainant stated that in June, 1990 he had been advised by the Solicitor that the matter would be heard in the courts, but that between June, 1990 and October, 1990, he had only managed to speak to the Solicitor once or twice by phone.

60. The correspondence from the complaint was forwarded to the Solicitor by the Society with a letter dated November 13, 1990. A written reply was requested within a period of two weeks.

61. No reply having been received, the Society mailed a registered letter to the Solicitor, dated December 18, 1990. The Solicitor responded by letter dated December 19, 1990 advising that the matter had inadvertently been struck off the trial list due to a misunderstanding between solicitors, and that all telephone messages left by the complainant had been returned. The Solicitor further enclosed a copy of a letter to Faye McFarlane, the complainant's wife's solicitor, enclosing a Notice of Motion and Affidavit to have the matter restored to the trial list.

62. By letter dated January 10, 1991, the Society requested that the Solicitor advise as to the progress of returning the matter to the trial list. A written reply was requested within a period of three weeks.

63. No reply having been received, a Society staff employee left a telephone message for the Solicitor on February 27, 1991.

64. A registered letter from the Society, dated March 4, 1991, advised the Solicitor that the matter would be referred to the Chair of the Discipline Committee if a reply were not received within seven days of the date of the letter.

65. The Solicitor did not reply to the correspondence of January 10, 1991 and March 4, 1991 from the Society.

John J. Thompson

67. John J. Thompson, the complainant, wrote to the Law Society by letter dated August 2, 1990 advising that he had retained the Solicitor regarding several garnishments against him as a result of a divorce. The complainant stated that he had attempted to contact the Solicitor by telephone for several months preceding the letter of complaint but that the calls had not been returned.

68. The correspondence from the complainant was forwarded to the Solicitor by the Society with a letter dated October 10, 1990. The Solicitor was requested to call the Society upon receipt of the letter, as the matter appeared to be of some urgency. The Solicitor was also requested to provide a written response within two weeks. Telephone messages were left for the Solicitor on October 31, 1990 and November 2, 1990. The Society faxed the Solicitor copies of the October 10, 1990 letter, with enclosures, on November 2, 1990.

69. No reply having been received, the Society sent a registered letter dated November 9, 1990 requesting a reply within seven days of the date of that letter.

70. The Solicitor responded by letter dated December 6, 1990 advising that he had met with the complainant subsequent to the complainant writing to the Law Society, and that the complaint was being withdrawn. The complainant confirmed by telephone on January 3, 1991 that he was withdrawing the complaint. The Society advised the Solicitor by letter dated February 11, 1991 that it had confirmed that the complainant wished to withdraw the complaint.

71. The complainant advised the Society by telephone on March 5, 1991 that on October 10, 1990, a hearing had taken place which resulted in a further garnishment. The complainant stated that he had not been advised of this hearing and confirmed this information by letter dated March 11, 1991. The Solicitor also maintains that he had not been advised of this hearing. The complainant further advised that the Solicitor had failed to keep an appointment with him on February 19, 1991. The complainant stated that he had retained new counsel but had not been able to obtain the files from the Solicitor. The Solicitor states that Mr. Thompson took his files in the spring of 1991.

Complaint D61/91 - Particular 2(b) - Cheryl Aylward (Payment of Account)

72. Cheryl Aylward, the complainant, wrote to the Law Society by letter dated September 7, 1990 advising that she had been retained by the Solicitor to provide her services as a court reporter. By invoice dated January 9, 1990, she had billed the Solicitor in the amount of \$60.00 for services rendered. The account, she advised, was unpaid despite three follow-up letters.

73. The correspondence from the complainant was forwarded to the Solicitor by the Society with a letter dated September 26, 1990. A written reply was requested within a period of two weeks.

74. The Solicitor responded by letter dated November 9, 1990 advising that he had moved recently and had forgotten about the complainant's invoice and, therefore, was enclosing a cheque from his general account.

75. On November 16, 1990 the Solicitor sent a fax to the Society advising that the original letter of November 9, 1990 was being mailed that day, along with a cheque.

76. The complainant advised, by telephone, on January 31, 1991 that she had not received the funds.

Complaint D61/91 - Particular 2(a) - Cheryl Aylward (Failure to Reply)

77. By letter dated March 15, 1991, the Society wrote the Solicitor requesting a copy of the cancelled cheque. If the account had not been paid the Solicitor was asked to forward a cheque immediately and confirm the same with the Society. The Solicitor was requested to reply within seven days.

78. The Solicitor did not reply to the correspondence from the Law Society.

79. On March 15, 1991, the Solicitor attended at the Law Society and was interviewed by Robert Conway, Discipline Counsel; David McKillop, Staff Trustee; and Susan Carlyle, Complaints Staff Lawyer. All files on which the Society required a reply or a more responsive answer were canvassed. The Solicitor promised to answer all open complaint files by March 18, 1991 between 4:00 and 5:00 p.m. The Complaints Department promised to sent the Solicitor copies of the most recent unanswered letters from each of the open files. By letter dated March 18, 1991, copies of the correspondence regarding complaints by Dorothy Wooldridge, John J. Thompson, Arnold Recht, Frank Kelly, Clifford W. Brunelle, Mr. and Mrs. Gerald Gardiner, Dr. W. L. Leung, Erskine Boyce, Zlata Tomanov, and Cheryl Aylward were sent to the Solicitor by regular mail and fax transmission. In that letter, the Solicitor was reminded of his promise to provide complete responses by 5:00 p.m. on March 18, 1991.

80. No reply having been received, a Society staff employee called the Solicitor's office on March 19, 1991. The Solicitor's secretary advised that the Solicitor had attended at his office on March 18, 1991 prior to the transmission of the Law Society's letter and had not since returned. The Society wrote to the Solicitor by letter dated March 20, 1991 confirming this information, granting the Solicitor an extension to March 26, 1991 for a reply, and advising that a failure to reply would result in the matter being referred to the Chair of Discipline.

81. The Solicitor's secretary telephoned the Society on March 25, 1991 promising an answer by March 27, 1991.

82. The Solicitor has not replied to the correspondence from the Law Society.

Complaint D118/91 - Particular 2(a) - Failure To File Forms 2/3

83. The Solicitor's fiscal year end is January 31st. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal years ending January 31, 1990 and January 31, 1991.

84. Forms 2/3 for the fiscal year ending January 31, 1990 were to be filed on or before July 31, 1990. Forms 2/3 for the fiscal year ending January 31, 1991 were to be filed on or before July 31, 1991.

26th November, 1992

85. On August 23, 1991 a meeting took place at which Ronald Cohen, former discipline counsel, the Solicitor, and the Solicitor's counsel, Mr. Michael McLachlan, were present. At this meeting, Mr. Cohen was handed copies of the Solicitor's Forms 2 and 3 for 1990. Mr. Cohen was advised that the Solicitor had given his Forms 2 and 3 for 1990 to Eleanor McGrath, former examiner with the Society's audit department, in February, 1991, while Ms. McGrath was doing a spot audit at Guaranty Trust. The Society takes the position that Ms. McGrath did not receive the Forms that the Solicitor claims he gave her in February, 1991.

86. At the August 23, 1991 meeting the Solicitor undertook, among other things, to file his Forms 2 and 3 for 1990 and 1991, no later than September 30, 1991. To date, the Solicitor's Forms 2 and 3 for 1991 have not been filed with the Society. Attached hereto as Appendix "A" is a copy of the Undertaking given by the Solicitor dated August 23, 1991.

87. The Complaint of failure to file for 1990 and 1991, sworn on August 21, 1991, was served on the Solicitor at the August 23, 1991 meeting and the said service was admitted.

Undertaking - Appendix "A"

88. The Undertaking dated August 23, 1991 given by the Solicitor in consideration of the above-referenced Complaints being adjourned in August, 1991, undertook among other things, to provide the Society within 14 days of the date of the Undertaking, with full and complete responses in respect of these formal discipline Complaints. The Solicitor acknowledged in his Undertaking that he had been provided with a listing of all matters to which replies from him were required.

89. The Society received the Solicitor's responses in connection with his Undertaking by facsimile transmission dated September 6, 1991.

90. By letters dated September 13, 1991 and September 19, 1991 respectively, and mailed to the Solicitor by registered mail, the Society advised the Solicitor that his responses in connection with his Undertaking were not full and complete and that further responses were required.

V. PAST DISCIPLINE

There has been no previous finding of professional misconduct.

DATED at Toronto this 9th day of October, 1991."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D32/92 and D82/92 and is prepared to proceed with a hearing of these matters on June 19, 1992.

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 Complaints D32/92 and D82/92 and admits the particulars contained therein. The Solicitor does not dispute those facts contained herein exclusively with the knowledge of the Law Society.

IV. FACTS

4. The Solicitor was called to the Bar on March 22, 1974 and now practices criminal law as an associate of the firm Grimson Czernik. He has been practising criminal law since November, 1991.

COMPLAINT D32/92

PARTICULAR 2a) - Failure to pay costs assessed by the Law Society pursuant to Rule 50A of the Law Society Act, and has thus attracted the provisions of Rule 36. and,

PARTICULAR 2b) - Failure to reply to the Law Society's Audit Department.

5. The Law Society's Audit Department received authorization from the Discipline Committee on September 30, 1990 to institute an investigation of the Solicitor's books and accounts for the purpose of ascertaining and reporting whether sections 14, 15, and 16 had been and were being complied with by the Solicitor.

6. Eleanor McGrath, formerly employed by the Law Society as an Examiner in the Audit Department, spent 12.5 hours in conducting an audit examination of the Solicitor's practice on August 2, 1991.

7. The Examiner required 12.5 hours to conduct her examination of the Solicitor's practice.

8. By letter dated June 11, 1991, The Law Society forwarded to the Solicitor a Cost Assessment, dated April 30, 1991, in the amount of \$625.00, pursuant to Rule 50A of the Law Society Act that required a member to pay the costs of an investigation for the period in excess of ten hours, at \$50.00 per hour up to a maximum of \$2,500.00. The Solicitor was advised that his prompt payment of the account would be appreciated. The Solicitor did not remit payment.

9. By letter dated August 8, 1991, the Law Society forwarded to the Solicitor a copy of its June 11 letter. The Solicitor was advised that his failure to pay the costs assessed pursuant to Rule 50A would attract the provisions of section 36 of the Law Society Act. Section 36 states that a member who failed to pay any fee or levy payable by him to the Society within four months after the day on which payment is due, may be ordered by Convocation to suspend his rights and privileges as a member for such time and on such terms as it considers proper in the circumstances. No reply or payment was received from the Solicitor.

10. By registered mail dated January 15, 1992, the Law Society forwarded to the Solicitor a copy of its June 11 and August 8 letter. The Solicitor was advised that should this matter not be resolved within two weeks of the date of this letter, the matter could be referred to the Discipline Committee. No reply or payment was received from the Solicitor.

11. To date, the Solicitor has not requested an extension to make payment nor has he provided an explanation for his failure to reply.

26th November, 1992

PARTICULAR 2c) - Failure to reply to the Law Society regarding a complaint by Barrington Grant

12. By letter dated November 19, 1991, the Complainant, Barrington Grant, advised the Law Society of the following:

- that he had paid the Solicitor a monetary retainer of \$500.00 on November 20, 1990 to process his appeal with Canada Customs.
- Mr. Grant left numerous telephone messages at the Solicitor's office between June, 1991 and August, 1991.
- Sometime between August, 1991 and September, 1991, Mr. Grant was advised by Canada Customs that they had no record of an appeal filed by Mr. Kesten nor any pending file.
- By letter dated October 15, 1991, Mr. Grant requested the Solicitor discontinue acting on his behalf.
- Mr. Grant made numerous attempts to contact the Solicitor between October 29, 1991 and November 15, 1991.
- Mr. Grant has not received his file nor a statement of account from the Solicitor.

13. By letter dated December 12, 1991, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

14. A Law Society staff employee left a telephone message at the Solicitor's office on January 2, 1992 requesting he return the call. The Solicitor's office provided the Law Society with his new address.

15. The Solicitor and the Law Society returned one another's telephone calls on January 3, 1992 and January 8, 1992. By telephone on January 9, 1992, the Solicitor advised that he had not received the Law Society's December 12 letter. The Solicitor picked up a letter from the Law Society's reception dated January 10, 1992, at the Law Society's reception on January 10, 1992.

16. Along with its letter dated January 10, 1992 to the Solicitor, the Law Society enclosed a copy of its December 12 letter. The Solicitor was reminded of his undertaking to the Law Society dated August 23, 1991 in which he undertook to provide responses to all correspondence from the Law Society within one week of receipt. The Solicitor was requested to provide his comments to the Law Society's December 12 letter within two weeks of today's date. No reply was received.

17. A Law Society staff employee left a telephone message for the Solicitor at his office on February 11, 1992, requesting the Solicitor return the call.

18. A Law Society staff employee spoke with the Solicitor by telephone on February 20, 1992. The Solicitor advised that his response was in dictation and that the same would be provided to the Law Society on or before February 24, 1992. No reply was received.

26th November, 1992

19. By registered mail dated February 27, 1992, the Law Society reminded the Solicitor of his obligation to respond to correspondence from the Law Society pursuant to Rule 13, Commentary 3. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

20. To date, the Solicitor has not requested an extension to reply nor has he provided an explanation for his failure to reply.

Particular 2d) - Breach of Undertaking dated August 23, 1991

2d)i) he failed to give full and complete responses regarding all open complaint matters, at the time of execution of the undertaking, within fourteen days, being the complaints of the following individuals:

21. The Solicitor provided the Law Society with a written undertaking dated August 23, 1991 which stated, in part:

To provide the Law Society full and complete responses to all open complaint matters within fourteen days of this date, it being understood that open complaint matters refer not only to matters in respect of which formal discipline Complaints have been issued, but also to complaints about which responses have been directed, it being further acknowledged that the Society has provided him with a listing of all matters to which replies are required.

22. The Solicitor provided responses in connection with the above paragraph of the undertaking by letters dated September 6, 1991. The Law Society forwarded responses to the Solicitor in September, 1991 advising him that his letters of response were not full and complete. The Solicitor does not dispute the position the Society takes in this regard. The Society takes this position with respect to the following complainants:

Clifford Brunelle
Arnold Recht
Dorothy L. Wooldridge
Frank Kelly
Zlata Tomanov
Dr. W. L. Leung
Cheryl Aylward
Erskine Boyce
John J. Thompson
Mr. & Mrs. G. Gardiner
David Share
T.E.G. Fellowes

PARTICULAR 2d) 2) - He failed to reply promptly to the Law Society's communications concerning the complaints of Paul W. Rosenberger, Official Examiner, Joseph A. Teixeira, accountant, Sheriff's Office and Barrington Grant

23. The Solicitor provided the Law Society with a written undertaking dated August 23, 1991 which stated, in part:

26th November, 1992

To reply promptly to all communications from the Law Society, from other lawyers and from clients; in the case of written communications within one week of receipt of such communications, and, in the case of telephone communications, within three business days of receipt.

PAUL W. ROSENBERGER, OFFICIAL EXAMINER

24. The Complainant, Paul W. Rosenberger, advised the Law Society by letter dated September 9, 1991 that since March, 1989 the Solicitor had accrued various fees for cancellations, examinations and transcripts. In each instance, invoices were promptly sent to the Solicitor for payment. Despite numerous telephone calls and a reminder letter dated March 29, 1991, no payment had been received.

25. By letter dated September 26, 1991, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his comments within two weeks.

26. A Law Society staff employee left telephone messages at the Solicitor's office on November 8, 1991 and November 12, 1991, requesting the Solicitor return the calls. The calls were not returned.

27. By registered mail dated November 15, 1991 the Law Society forwarded to the Solicitor a copy of its September 26 letter. The Solicitor was reminded of his undertaking dated August 23, 1991 and requested to reply to the Law Society forthwith. The Solicitor was advised that should a reply not be received within seven days from the date of this letter, the matter would be referred to the Discipline Committee. No reply was received.

28. To date, the Solicitor has not requested an extension of time to reply nor has he provided an explanation for his failure to reply.

JOSEPH A. TEIXERA, ACCOUNTANT, SHERIFF'S OFFICE

29. The Complainant, Joseph A. Teixeira, Accountant with the Sheriff's Office, Judicial District of York, advised the Law Society by letter dated September 13, 1991 that the Solicitor had not paid two accounts with respect to services rendered by the Sheriff's Office dating back to November 5, 1990, totalling \$61.32.

30. By letter dated September 26, 1991, the Law Society forwarded to the Solicitor a copy of Mr. Teixeira's letter of complaint and requested the Solicitor provide his comments within two weeks. No reply was received.

31. A Law Society staff employee left telephone message for the Solicitor at his office on November 8, 1991 and November 12, 1991 requesting the Solicitor return the calls. The calls were not returned.

32. By registered mail dated November 15, 1991, the Law Society forwarded to the Solicitor a copy of its September 26 letter. The Solicitor was reminded of his undertaking dated August 23, 1991 and requested to reply forthwith. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

33. The Solicitor has not requested an extension of time to reply nor has he provided the Law Society with an explanation for his failure to reply.

BARRINGTON GRANT

34. By letter dated November 19, 1991, the Complainant, Barrington Grant, advised the Law Society that he had paid the Solicitor a monetary retainer of \$500.00 on November 20, 1990 to process his appeal with Canada Customs. Mr. Grant left numerous telephone messages at the Solicitor's office between June, 1991 and August, 1991. Sometime between August, 1991 and September, 1991, Mr. Grant was advised by Canada Customs that they had no record of an appeal filed by Mr. Kesten nor any pending file. By letter dated October 15, 1991, Mr. Grant requested the Solicitor discontinue acting on his behalf. Mr. Grant made numerous attempts to contact the Solicitor between October 29, 1991 and November 15, 1991. The Complainant has not received his file nor a statement of account from the Solicitor.

35. By letter dated December 12, 1991, the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

36. A Law Society staff employee left a telephone message at the Solicitor's office on January 2, 1992 requesting he return the call. The Solicitor's office provided the Law Society with a new address for the Solicitor.

37. The Solicitor and the Law Society returned one another's telephone calls on January 3, 1992 and January 8, 1992. By telephone on January 9, 1992, the Solicitor advised that he had not received the Law Society's December 12 letter. The Solicitor picked up a letter from the Law Society's reception dated January 10, 1992, at the Law Society's reception on January 10, 1992.

38. Along with its letter dated January 10, 1992 to the Solicitor, the Law Society enclosed a copy of its December 12 letter. The Solicitor was reminded of his undertaking to the Law Society dated August 23, 1991 in which he undertook to provide responses to all correspondence from the Law Society within one week of receipt. The Solicitor was requested to provide his comments to the Law Society's December 12 letter within two weeks of today's date. No reply was received.

39. A Law Society staff employee left a telephone message for the Solicitor at his office on February 11, 1992, requesting the Solicitor return the call.

40. A Law Society staff employee spoke with the Solicitor by telephone on February 20, 1992. The Solicitor advised that his response was in dictation and that the same would be provided to the Law Society on or before February 24, 1992. No reply was received.

41. By registered mail dated February 27, 1992, the Law Society reminded the Solicitor of his obligation to respond to correspondence from the Law Society pursuant to Rule 13, Commentary 3. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

42. To date, the Solicitor has not requested an extension to reply nor has he provided an explanation for his failure to reply.

PARTICULAR 2D) 3) - He failed to provide the Law Society with either an initial assessment within 60 days of the date of the Undertaking or subsequent assessments prepared by either a psychiatrist or psychologist

43. The Solicitor provided the Law Society with a written undertaking dated August 23, 1991 which stated, in part:

To immediately engage in counselling or treatment under the case of a psychiatrist or psychologist with such frequency and duration as deemed necessary by him or her, and to ensure that an initial assessment is provided to the Law Society by the psychiatrist or psychologist within 60 days of the date, and to ensure that thereafter assessments are provided by the psychiatrist or psychologist to the Law Society with such frequency as required by the Law Society for as long as required by the law Society or until my counselling or treatment terminates, whichever is earlier;

44. During an attendance before the Discipline Committee on August 27, 1991 the Solicitor's hearing was adjourned to October 9, 1991 to proceed. Ronald Cohen, former Law Society Discipline Counsel, requested that the matter be made peremptory on the Solicitor. The Solicitor's counsel, Mr. McLachlan, objected, stating that while he did not anticipate seeking an adjournment, he may not have the psychiatric assessment in place by then.

45. By letter dated November 22, 1991, to Mr. McLachlan, Discipline Counsel, Stephen Waisberg, requested Mr. McLachlan advise the Law Society as to the nature and extent of the counselling and/or treatment the Solicitor was undergoing. Mr. McLachlan was requested to provide the Law Society with a copy of the initial assessment report.

46. By letter dated December 5, 1991, Mr. McLachlan advised the Law Society that he had been in contact with the Solicitor and expect that the Solicitor would comply with his undertaking in the week following this letter.

47. A formal complaint D32/92 was issued against the Solicitor on March 23, 1992 with respect to his failure to satisfy this part of his undertaking dated August 23, 1991.

48. By letter dated April 7, 1992, Mr. McLachlan provided the law Society with two medical reports from Dr. Deborah R. Schuller, F.R.C.P.(C), Mood Disorders Clinic at the Clarke Institute of Psychiatry dated August 30, 1991 and September 10, 1991. Mr. McLachlan advised that the Solicitor was currently seeking psychiatric assistance elsewhere and that he would keep the Law Society advised.

49. To date, the Law Society has not received any further information from the Solicitor or his counsel with respect to the Solicitor's psychiatric treatment.

PARTICULAR 2d) 5) - He failed to provide his Forms 2/3 for the year ended 1991, no later than September 30, 1991.

50. A formal complaint D118/91 was issued against the Solicitor on August 21, 1991 with respect to his failure to file with the Society within six months of the termination of his fiscal year ended January 31, 1991, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act.

51. The Solicitor provided the Law Society with a written undertaking dated August 23, 1991 which stated, in part:

To file my Forms 2 and 3 for 1990 and 1991, no later than September 30, 1991;

52. During a meeting on August 23, 1991 between former Discipline Counsel, Ronald Cohen, the Solicitor, and the Solicitor's Counsel, Michael McLachlan, the Law Society was given copies of the Solicitor's Report to the Law Foundation, his Form 2 and his Form 3 for 1990. The Solicitor maintains that he provided Eleanor McGrath, a former Examiner with the Audit Department, with the original of these forms in February, 1991. Ms. McGrath denies having received the same.

53. By letter dated September 3, 1991, the Law Society wrote to the Solicitor acknowledging receipt of his filing for the fiscal period ended January 31, 1990. As the accountant's report disclosed overdrawn trust ledger accounts which were permitted to exist uncorrected over a period in excess of month, the Solicitor was requested to confirm with the Law Society, in writing within one month of the date of this letter, that he had taken the necessary action to ensure that any overdrawn accounts that occurred were corrected no later than the month following the occurrence. The Solicitor was also requested to have his accountant provide the Law Society with a copy of the schedule of physical overdrafts or debit charges for returned items shown on the trust banks statements, to support item 5(iii) on page 3 of the Report of Public Accountant. As the date of declaration was incomplete, the Form 2 was returned to the Solicitor with a request that he resign the same before a commissioner and return the report to the Law Society. The Solicitor was further advised that his filings were due on or before October 9, 1990, however, the same was not received until August, 1991. The Solicitor was therefore, requested to remit the balance of the late filing levy of \$70.00. The penalty was assessed at \$1,500.00 and the Solicitor had paid \$1,430.00. No reply was received.

54. To date the Solicitor has not responded to the Law Society's letter dated September 3, 1991, despite further letters from the Law Society dated October 3, 1991, November 4, 1991 and February 4, 1992.

55. The Law Society forwarded to the Solicitor a Notice of Default in Annual Filing, dated August 9, 1991 (with respect to the Solicitor fiscal period ended January 31, 1991).

56. By registered mail dated September 19, 1991 the Law Society advised the Solicitor that he had not taken the necessary steps to bring his annual filings (for the fiscal period ended January 31, 1991) up-to-date. The Solicitor was advised that the late filing penalty of \$10.00 per day would begin to accrue on October 4, 1991 to a maximum of \$1,500.00. The Solicitor was reminded that the attracting and paying a late filing fee did not relieve him from the obligation to make annual filings, and he could be brought before the Discipline Committee for failure to file.

57. By registered mail dated January 17, 1992, the Law Society advised the Solicitor that his name would go before Convocation on February 28, 1992 for suspension of his rights and privileges should the late filing fee remained unpaid as of 5:00 p.m. on February 27, 1992. The Solicitor was advised that paying the late filing fee would not relieve him from the obligation to make annual filings and that he could be brought before the Discipline Committee for failure to file.

58. By letter dated February 14, 1992, the Law Society reminded the Solicitor of his obligation to file pursuant to Regulation 16. The Solicitor was advised that the filing of Form 2/Form 3 received by February 27, 1992 and payment by certified cheque or money order of outstanding late filing fees owed by that date would result in his name being removed from the list to be presented to Convocation on February 28, 1992.

59. The Solicitor paid to the Law Society on March 10, 1992 the amount of \$1,500.00. \$70.00 is still owed to the Law Society by the Solicitor as a result of his late filing levy accrued for the fiscal period ended April 30, 1990.

60. To date, the Solicitor has not filed his forms for the fiscal year ended January 31, 1991.

PARTICULAR 2d) 7) - His failure to maintain his books and records in compliance with Sections 14 and 15 of the Regulation made pursuant to the Law Society Act;

61. On January 8, 1991, former Audit Examiner, Eleanor McGrath, commenced an examination of the Solicitor's books and records during the Solicitor's absence and found the member's trust comparisons in arrears by one year.

62. Eleanor McGrath met with the Solicitor on August 2, 1991. At that time, Ms. McGrath noted the following:

- a) trust comparisons were not made monthly;
- b) general cash receipts journals were entered only to August, 1990;
- c) general cash disbursements journals were entered only to August, 1990;
- d) trust cash receipts journals were entered only to August, 1990;
- e) trust cash disbursements journals were entered only to August, 1990;
- f) clients' trust ledger accounts had been posted only to August, 1990;
- g) a known trust shortage of \$2,944.52 existed and was to be corrected by the member no later than August 8, 1991; and
- h) overdrawn clients' trust ledger accounts including:

Bertucci Pension Fund	#88212	\$1,499.92
Garnder	#8867	81.00
Kelly MVA	#89258	40.04
Meisels Agency	#89237	13.00
Unknown		150.72
Wu, Francis	#89254	500.00

The Solicitor provided the Law Society with a written undertaking dated August 23, 1991 which stated, in part:

To ensure that all books, records and accounts relating to my practice of law are maintained on a current basis at all times as required by Sections 14 and 15 of the Regulation made pursuant to the Law Society Act, to retain forthwith an accountant and bookkeeper and to promptly institute all accounting procedures and systems recommended by my accountant in order to maintain by books and records in compliance with Sections 14 and 15 of the said Regulation.

63. Kay Chow, an Examiner with the Law Society's Audit Department attempted to review the Solicitor's books and records on October 25, 1991, October 30, 1991, October 31, 1991, November 6, 1991, November 7, 1991, November 13, 1991, November 14, 1991, November 15, 1991, and November 22, 1991.

PARTICULAR 2e) - He failed to cooperate in an investigation carried out by the Audit Department of the Law Society.

64. Former Audit Examiner, Eleanor McGrath, received instructions to make an examination of the books and records of the Solicitor in accordance with the provisions of section 18 of the Regulation made pursuant to the Law Society Act,

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65. On November 20, 1990 Ms. McGrath, former Audit Examiner with the Law Society attended at the Solicitor's office. The Solicitor was unavailable. Ms. McGrath left her card and a message with the Solicitor's secretary requesting that he call her. The Solicitor did not return the call.

66. Ms. McGrath left telephone messages at the Solicitor's office on November 21, 1990, November 22, 1990, November 26, 1990, and November 30, 1990, requesting the Solicitor return the call. The Solicitor did not return the calls.

67. By registered mail dated December 13, 1990, the Law Society advised the Solicitor that an audit of his books and records could be conducted on December 19, 1990, December 20, 1991 or December 21, 1990. The Solicitor was requested to call the Law Society to arrange a convenient date upon receipt of this letter.

68. A Law Society staff employee spoke with the Solicitor on December 13, 1990. It was agreed that Ms. McGrath and the Solicitor would meet on January 8, 1991.

69. By facsimile transmission dated January 4, 1991, Malcolm Allman, Chartered Accountant, advised Ms. McGrath that he was working on the Solicitor's books and records however, they were incomplete. Ms. McGrath was requested to call Mr. Allman and not to go to the Solicitor's office on January 8, 1991.

70. On January 8, 1991, Ms. McGrath attended at the Solicitor office. The Solicitor did not attend at the scheduled appointment. Ms. McGrath commenced an examination of the Solicitor's books and records during the Solicitor's absence and found the member's trust comparisons in arrears by one year. Ms. McGrath left a letter at the Solicitor's office advising him that she found that his monthly trust comparisons had been completed to November, 1989. The letter further placed the Solicitor on notice that costs may be assessed against him since his records did not meet the requirements of the Regulation. The Solicitor was strongly recommended to give this matter some priority.

71. By letter dated January 9, 1991 to Ms. McGrath, the Solicitor advised that he believed she had been informed that he would be in court in Newmarket on January 8, 1991 and he further understood that she was to have attended at his office on January 7 1991. The Solicitor confirmed that when Ms. McGrath appeared at his office, Mr. Allman made the effort to meet with her.

72. On January 17, 1991, Ms. McGrath made an appointment with the Solicitor for February 5, 1991 to review his updated trust comparison. The Solicitor failed to attend this appointment.

73. By letter dated February 6, 1991, Ms. McGrath advised the Solicitor that she would return to his office on February 20, 1991 at 9:00 a.m. She further requested the Solicitor confirm this appointment with her office and that the trust comparison be up to date, all explanations for errors and overdraws must be prepared and his books and records in place as required.

74. By letter dated February 20, 1991, Ms. McGrath agreed to allow the Solicitor a further two weeks to have his books and records up-dated. The Solicitor was advised that should his books and records not be current then, she would file her report with the discipline department regarding the Solicitor's failure to comply with the required books and records and, his failure to cooperate.

26th November, 1992

75. Ms. McGrath attended at the Solicitor's office on March 8, 1991. The Solicitor did not keep the scheduled appointment. By letter dated March 8, 1991 Ms. McGrath advised the Solicitor that she waited almost one hour for his arrival and that there were no current books and records available for her audit. The Solicitor was advised that Ms. McGrath would forward his file to the discipline department.

76. By letter dated March 12, 1991 to the Solicitor, Mr. Allman outlined the status of the Solicitor's trust accounting records. Mr. Allman requested the Solicitor ensure that his general account cheque dated February 7, 1990 in the amount of \$2,944.52 to rectify the overdrafts in his trust account be deposited immediately. Mr. Allman had provided the Solicitor with a copy of his bank statement as he had been unable to locate the actual trust bank statement, cancelled cheques, deposit slip or cheques stubs for the month ended September 21, 1990. The Solicitor had been requested by Mr. Allman to identify these transaction so that his records could be updated. The Solicitor was requested to give this matter his prompt attention as there had not been any trust transactions since September 23, 1990, so upon obtaining the outstanding information, the Solicitor's trust records could be made current to date.

77. Ms. McGrath left telephone messages at the Solicitor's office on July 25, 1991, July 26, 1991, and July 29, 1991 requesting he return the calls. The Solicitor did not return the call.

78. By letter dated July 29, 1991, Ms. McGrath requested the Solicitor contact her immediately upon receipt of this letter. The Solicitor was advised that should he not respond to this letter by 5 p.m. on July 30, 1991, the matter would be referred to the Discipline Department.

79. Ms. McGrath left two telephone messages for the Solicitor at his office on August 8, 1991 requesting he return the calls.

80. Ms. McGrath spoke to the Solicitor by telephone on August 9, 1991. The Solicitor advised Ms. McGrath that he would have the trust comparison in by August 15, 1991 and he will have corrected the trust shortage by August 31, 1991.

81. Kay Chow an Examiner with the Audit Department, attended at the Solicitor's office on October 25, 1991. The Solicitor was not in the office. Ms. Chow left her card and a message at the Solicitor's office requesting that the Solicitor call her. The Solicitor did not return the call.

82. Ms. Chow left a telephone message at the Solicitor's office on October 30, 1991 requesting the Solicitor return the call. The Solicitor did not return the call.

83. Ms. Chow and Anita McCann, an Examiner with the Audit Department, attended at the Solicitor's office on October 31, 1991. The Solicitor was unable to assist the Examiners as he was due in court shortly. The Solicitor agreed to meet with Ms. Chow on November 7, 1991 at 9:30 a.m.

84. By facsimile transmission dated October 31, 1991, Ms. Chow advised the Solicitor that she had been instructed to complete the examination of his books and records which had been commenced by Eleanor McGrath, and confirmed her appointment with the Solicitor on November 7, 1991. The Solicitor was requested to have his complete accounting books and records for the period from January, 1990 to date, available.

85. On November 6, 1991, Ms. Chow received a telephone message for the Solicitor advising that he was unable to attend at his office as previously scheduled as he would be in court. As the Solicitor did not indicate that he was cancelling the appointment, Ms. Chow attended at the Solicitor's office on November 7, 1991.

86. On November 9, 1991, Ms. Chow was advised by the Solicitor's secretary that the Solicitor had not expected her as he had left a message cancelling the appointment. Ms. Chow spoke to the Solicitor later than day by telephone and the appointment was rescheduled for November 13, 1991.

87. By facsimile transmission dated November 7, 1991 to the Solicitor, Ms. Chow confirmed their appointment for November 13, 1991. The Solicitor was requested to make available his complete accounting books and records of the period from January, 1990 to date. Ms. Chow further indicated that she had expected to review the books and records on November 7, 1991 although the Solicitor was not present.

88. Ms. Chow attended at the Solicitor's office on November 13, 1991 at 1:30 p.m. The Solicitor had left a message at the Law Society at 12:40 p.m. stating he was running late. The Solicitor had not left the books and records available for Ms. Chow's examination. The Solicitor maintains that he had left the books and records in his office for her inspection. Ms. Chow left a message at the Solicitor's office requesting he return the call. The call was not returned.

89. By facsimile transmission dated November 18, 1991, Ms. Chow advised the Solicitor that she would attend at his office on November 22, 1991 to make an examination of his complete accounting books and records for the period from January, 1990 to date, unless the Solicitor preferred to deliver them to her office prior to that date. The Solicitor was advised that should his books and records not be available on or before November 22, 1991, the matter would be referred to the Discipline Department.

90. By facsimile transmission dated November 21, 1991, Ms. Chow reminded the Solicitor that she would attend at his office on November 22, 1991 at 9:00 a.m. as she had not heard further from him.

91. Ms. Chow attended at the Solicitor's office on November 22, 1991. The Solicitor was not present and did not leave any books, records or accounts for her examination.

92. As of this date, Ms. Chow has not heard from the Solicitor.

PARTICULAR 2f) - He breached his order of Convocation that he suspend his practice of law for the period from May 14, 1990 to August 13, 1990

93. By registered mail, dated May 29, 1990, the Law Society advised the Solicitor that he had been suspended as of May 25, 1990 from the practice of law for one year and from year to year thereafter or until an application for exemption had been approved or the necessary levy had been paid, as ordered by Convocation, for his failure to pay his Errors and Omissions levy, pursuant to section 36 of The Law Society Act.

94. The Solicitor paid the outstanding levy on August 13, 1990 and was entitled to resume the practice of law from that date.

26th November, 1992

95. The Solicitor had continued in the practice of law between May 25, 1990 and August 13, 1990 as evident by:

-- his appointment book. Between July 16, 1990 and August 13, 1990 the Solicitor met with a number of clients and appeared in court, on behalf of clients, on July 27, 1990, July 30, 1990, August 1, 1990, August 2, 1990, August 3, 1990, August 7, 1990, August 9, 1990, and August 14, 1990.

-- his account to Mr. Francis Wu, dated November 16, 1990. The account stated, "To Professional Services rendered from May 1990 to date including but not limited to the following services:"

-- a Notice of Examination to Francis Wu regarding Supreme Court of Ontario No. ND168902/89 between Francis Wu and Mabel Wu, which stated he was required to attend for "an Examination for discovery on Friday, the 28th day of September, 1990 at 10:00 at the office of Alfred C. Devenport, Official examiner..."

-- a Notice of Status Hearing to take place on July 30, 1990, to the Parties and Their Solicitor, regarding District Court File No. 317474/88 between 693733 Ontario Inc. and Security Leasing Corporation.

-- his letter to Community & Legal Aid Services Program, on letterhead which indicates the Solicitor is a Barrister and Solicitor, dated July 12, 1990 stating that he will be representing Bassem Haddad at his trial on July 18th".

-- his account to Emanuel Raulino dated December 18, 1990 in which he states:

TO PROFESSIONAL SERVICES RENDERED after June 1, 1990, including but not limited to the following services:

June 29/90	preparation for contempt motion
July 3/90	attendance for motion which was adjourned (9:30 a.m. - 10:30 a.m.)
August 17/90	preparation for contempt motion; reviewing transcript
August 20/90	attendance for motion; correspondence to other lawyer (no charge)
August 24/90	discussion with client and preparation of motion; attendance at S.C.O. to obtain special date
August 28/90	attendance at S.C.O. to vary contempt order; calls to clients (9:00 a.m.- 1:00 p.m. 2:00 p.m. - 4:00 p.m.)

96. The Solicitor did not become aware of the Notice sent to his office, but first became aware of the suspension in the Ontario Reports and immediately rectified the situation by playing the penalty and being reinstated.

COMPLAINT D82/92

PARTICULAR 2a) - Failure to Reply to the Law Society's Audit Department

97. By letter dated September 3, 1991, the Law Society wrote to the Solicitor acknowledging receipt of his filing for the fiscal period ended January 31, 1990. The Solicitor was further advised of the following:

26th November, 1992

- As the accountant's report disclosed overdrawn trust ledger accounts which were permitted to exist uncorrected over a period in excess of month, the Solicitor was requested to confirm with the Law Society, in writing within one month of the date of this letter, that he had taken the necessary action to ensure that any overdrawn accounts that occurred were corrected no later than the month following the occurrence.
- The Solicitor was also requested to have his accountant provide the Law Society with a copy of the schedule of physical overdrafts or debit charges for returned items shown on the trust banks statements, to support item 5(iii) on page 3 of the Report of Public Accountant.
- As the date of declaration was incomplete, the Form 2 was returned to the Solicitor with a request that he resign the same before a commissioner and return the report to the Law Society.
- The Solicitor was further advised that his filings were due on or before October 9, 1990, however, the same was not received until August, 1991. The Solicitor was therefore, requested to remit the balance of the late filing levy of \$70.00. The penalty was assessed at \$1,500.00 and the Solicitor had paid \$1,430.00.

No reply was received.

98. By letter dated October 3, 1991 the Law Society forwarded to the Solicitor a copy of its September 3 letter. The Solicitor was requested to give this matter his early attention. No reply was received.

99. By letter dated November 4, 1991, the Law Society requested the Solicitor reply to its September 3 letter as soon as possible so that his matter could be resolved without involving the Discipline Committee. No reply was received.

100. By letter dated February 4, 1992, the Law Society forwarded to the Solicitor copies of his letters dated September 3, October 3, and November 4. The Solicitor was advised that should a reply not be received within fifteen days, the matter would be referred to the Discipline Committee. No reply was received.

101. As of this date, the Solicitor had not requested an extension to reply nor has he provided the Law Society with an explanation for his failure to reply.

PARTICULAR 2b) - Breach of Undertaking, dated August 23, 1991, by failing to reply to the Law Society

102. The Solicitor provided the Law Society with a written Undertaking dated August 23, 1991 which stated, in part:

To provide the Law Society full and complete responses to all open complaint matters within fourteen days of this date, it being understood that open complaint matters refer not only to matters in respect of which formal discipline Complaints have been issued, but also to complaints about which responses have been directed, it being further acknowledged that the Society has provided him with a listing of all matters to which replies are required.

26th November, 1992

103. The Solicitor failed to reply to the Audit Department regarding discrepancies in his filings for the fiscal year ended January 31, 1990 despite letters dated September 3, 1991, October 3, 1991, November 4, 1991 and February 4, 1992.

104. The Solicitor has not requested an extension to reply nor has he provided the Law Society with an explanation for his failure to reply.

V. DISCIPLINE HISTORY

105. The Solicitor has no previous discipline record.

DATED at Toronto this 19th day of June, 1992."

RECOMMENDATION AS TO PENALTY

Upon the Solicitor's undertaking to voluntarily suspend his practice of law as of July 31st, 1992 until September 24th, 1992 to allow him time away from the practice of law to make full and complete responses to the Law Society concerning the outstanding complaints and thereafter to restrict his practice to criminal law and administrative law under the supervision of the firm Grimson, Czernik, or any other criminal counsel approved by Senior Discipline Counsel, until such time as a satisfactory psychiatric report is received, the Committee accepted the joint submission of counsel for the Society and the Solicitor as follows:

1. The Solicitor shall be suspended until such time as the following conditions have been met to the satisfaction of the Senior Discipline Counsel or in the event that Senior Discipline Counsel and the Solicitor are unable to agree with respect to compliance with the conditions set out below, a committee of three benchers shall be appointed by Convocation with authority to conduct a hearing and to report to Convocation as to the means by which any disagreement should be resolved.

The Conditions are as follows:

- (a) The Solicitor shall provide a satisfactory psychiatric report from a psychiatrist approved by the Law Society indicating that the Solicitor is fit to practice law;
 - (b) The Solicitor shall provide full and complete responses to all complaints requiring replies that are set out in the subparagraphs under paragraph 2 of each of the complaints D32/92 and D82/92;
 - (c) The Solicitor shall provide the Law Society with full and complete responses to the complaints of Frank L. Liebeck, file number 92-1341, Francis Wu, file number 92-2150, Enio Zepieri, file number 92-1865;
 - (d) If the Solicitor responds fully and completely by the time of Convocation it is understood that subject to compliance with the other terms of this joint submission, he may resume the practice of law.
2. If all of the conditions set out above are met by the time Convocation convenes, the Solicitor shall be Reprimanded in Convocation in lieu of suspension.

REASONS FOR RECOMMENDATION

In addition to the Agreed Statement of Facts the evidence included two reports from Dr. Deborah H. Schuller of the Clarke Institute of Psychiatry dated August 30th and September 10th, 1991. In her report of August 30th, 1991, Dr. Schuller states it was her belief that diagnostically the Solicitor had been clearly suffering for the last nine or ten months, if not longer, from a major depression. In her report of September 10th, 1991 Dr. Schuller states there was a history of illness dating back to 1988 at which time the Solicitor felt his law practice was beginning to fall apart when his partner left him. The Solicitor then encountered financial difficulties and lacked motivation to work and was unable to keep abreast of his clients and their concerns. In January, 1991 his situation worsened with a marital separation.

Following her assessment of the Solicitor on September 10th, 1991 Dr. Schuller concluded that the Solicitor qualified as having a major depression. The fact that his business and personal life have undergone major changes in the last two years appears to have shaken his usual sense of confidence and competence in himself. Dr. Schuller recommended that Mr. Kesten begin a course of anti-depressant treatment with appropriate medication.

The Committee noted that the nature of the complaints in respect of which the Solicitor has admitted misconduct, by and large, are either problems responding to the Law Society and various departments of the Law Society, or matters involving civil litigation, an area that the Solicitor is not dealing with now. There are no current complaints dealing with his criminal law and administrative law practice. His present practice is restricted and supervised by the firm with which he practices, Grimson, Czernik.

The Committee was satisfied that the Solicitor has an illness and that the interest of the public would be protected if his practice was restricted in the manner outlined until the conditions of the joint submissions are fulfilled.

Richard Ian Kesten was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 22nd day of March, 1974.

ALL OF WHICH is respectfully submitted

DATED this 8th day of October, 1992

"M. Hickey"
M.G. Hickey, Q. C., Chair

It was moved by Mr. Strosberg, seconded by Mr. Ruby that the Report of the Discipline Committee be adopted.

There were no submissions.

The Report was adopted.

It was moved by Mr. Strosberg, seconded by Mr. Ruby that the Recommendation as to Penalty contained in the Report, that is, that the solicitor be suspended if certain enumerated conditions were not met, be adopted.

26th November, 1992

Mr. MacKenzie made submissions as to the status of the solicitor's compliance with the conditions imposed by the Discipline Committee which heard the matter. Mr. MacKenzie advised that the solicitor had not responded to the complaints made against him nor had a psychiatric report been provided.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Strosberg, seconded by Mr. Scott that the solicitor be suspended until the following conditions are satisfied;

- (a) The solicitor shall provide a satisfactory psychiatric report from a psychiatrist approved by the Law Society indicating that the solicitor is fit to practice law;
- (b) The solicitor shall provide full and complete responses to all complaints requiring replies;
- (c) The solicitor shall provide the Law Society with full and complete responses to the complaints of Frank L. Liebeck, Francis Wu and Enio Zepieri.

If the conditions are satisfied in the written opinion of Senior Counsel Discipline, the solicitor may resume the practice of law restricted to the practice of criminal and administrative law subject to any further order that Convocation may make. In the event a dispute arises as to whether the conditions have been satisfied, Convocation will appoint three benchers to conduct a hearing and report to Convocation as to whether the conditions have been satisfied.

Carried

It was moved by Mr. MacKinnon, seconded by Mr. Hill that condition number (d) on page 54 of the Recommendation as to Penalty be amended to state that if the solicitor responds fully and completely to the satisfaction of the Senior Counsel Discipline he may resume the practice of law restricted to criminal and administrative law under the supervision of the firm Grimson, Czernik.

Not Put

Counsel, the public and the solicitor were recalled and informed of Convocation's decision.

Counsel retired.

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Re: PETER ROBERT RAMSAY, New Liskeard

Mr. Strosberg placed the matter before Convocation.

The reporter was sworn.

Mr. Hill withdrew.

Mr. Gavin MacKenzie appeared for the Society and Mr. Brian Greenspan appeared for the solicitor who was present.

26th November, 1992

Convocation had before it the Report of the Discipline Committee dated 5th October, 1992, together with an Affidavit of Service sworn 21st October, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail on 6th October, 1992 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor 26th November, 1992 (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

Paul D. Copeland, Chair
S. Casey Hill
K. Julaine Palmer

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

Gavin MacKenzie
for the Society

PETER ROBERT RAMSAY
of the Town
of New Liskeard
a barrister and solicitor

Not Represented
for the solicitor

Heard: August 25, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 23, 1992, Complaint D71/92 was issued against Peter Robert Ramsay, alleging that he was guilty of professional misconduct.

The matter was heard in public on August 25, 1992, before this Committee composed of Paul D. Copeland, Chair, S. Casey Hill and K. Julaine Palmer. The Solicitor attended the hearing and was represented by David Humphrey. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

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

Complaint D71/92

2. a) Peter Robert Ramsay made inappropriate comments of a sexual nature to his client, P.A., linking sexual favours with a reduction or cancellation of his fees to be charged for professional services.

Evidence

During the course of the hearing it was agreed, with the consent of counsel, that the complainant in this matter would be described only by her initials, in order to protect the complainant's identity. It should be noted that the complainant preferred to have her identity protected but she was willing, if it was required, to have her name published.

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 D71/92 and is prepared to proceed with a hearing of this matter on Tuesday, August 25, 1992.

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 D71/92 and admits the particulars contained therein.

IV. FACTS

4. The Solicitor was called to the Bar in 1968 and practices as a partner in the firm of Ramsay, Ramsay, Kemp, Andrew & Maille in New Liskeard, Ontario.

5. The Solicitor's main office is located in New Liskeard, Ontario a community of approximately 5,200. The firm has a branch office located in Enlehart, thirty miles from New Liskeard which has a population of approximately 1,900.

6. P. E. A. is fifty-five years of age and had been a client of the Solicitor's firm for a number of years. The Solicitor acted on the Estate of Mrs. A's first husband after his death in April, 1987 and on her mother's estate following her death in September, 1987. Mrs. A. had further retained the Solicitor to review a marriage agreement upon her marriage to her current husband in May, 1988 and had retained the Solicitor to draft a new will following her marriage.

7. On July 17, 1991 Mrs. A. attended at the branch office of Ramsay, Ramsay, Kemp, Andrew & Maille in Enlehart and spoke personally with the Solicitor concerning proposed alterations to her will and, in particular, a codicil which she wished to add.

8. During the course of these discussions Mrs. A. asked the Solicitor the cost of the codicil and when she was advised that the fee would be \$75.00, she pointed out that he had previously indicated that the fee would be approximately \$50.00. The Solicitor responded by indicating that there would be no charge if Mrs. A. would come to his office without a brassiere and provide him a viewing of her breasts.

26th November, 1992

9. The Solicitor then advised Mrs. A. that she would receive a copy of her new will at which time she could make an appointment to re-attend to have the will signed. Mrs. A. thanked the Solicitor for his services and left without comment. She did not advise him that she was upset nor that his comments had made her uneasy.

10. On August 20, 1991 Mrs. A. received a copy of the will for her review. No account was enclosed. It is the position of the Solicitor that it is not the practice of his office to present the bill until the will or codicil has been completed and signed to the satisfaction of the client.

11. Following Mrs. A's receipt of the will and when she noted that no account had been enclosed, she contacted the O.P.P. detachment at Englehart. She was advised to contact another Solicitor in New Liskeard. She met with that Solicitor on August 23, 1991 and was advised to write Mr. Ramsay to request that he forward the original will to her. Mrs. A. was also advised to forward her complaint to the Law Society of Upper Canada.

12. As a result she wrote to the Solicitor on August 24, 1991 requesting that he forward her will by mail. She indicated that she wished to close her account and take her business elsewhere.

13. On August 27, 1991 the Solicitor wrote to Mrs. A. enclosing her original will. The letter also had the handwritten notation: "Sorry to lose you Phyllis as a client - still a friend?"

14. Mrs. A. wrote to the Law Society of Upper Canada on September 17, 1991 and the Society responded on October 3, 1991 with further inquiries concerning details relating to this matter.

15. Mrs. A. responded to the correspondence from the Law Society on October 9, 1991 and wrote to the Society with additional details on January 21, 1992.

16. The Society wrote to the Solicitor on January 15, 1992, six months after the incident, enclosing a copy of a "will say report" summarizing the complaint of Mrs. A. The Solicitor responded to the inquiry on January 22, 1992 and admitted that he had probably used the words referred to or "something similar". The Solicitor conceded that the comments were most inappropriate and extended his sincere apologies to Mrs. A. He indicated that he deeply regretted that his comments and conduct had caused her such concern.

17. During the ten year solicitor-client relationship with Mrs. A., there had not previously been any similar behaviour and the comment came as a complete surprise to Mrs. A.

18. Mrs. A. was, and remains, emotionally upset as a result of the comments of the Solicitor as referred to in paragraph 8 above. Her emotional upset has been manifested by frustration, crying and sleeplessness.

V. DISCIPLINE HISTORY

19. The Solicitor has no discipline history.

DATED at Toronto this 25th day of August, 1992."

Based on the Agreed Statement of Facts and the submissions of counsel, we found that the allegation of professional misconduct was established.

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be reprimanded in Convocation.

REASONS FOR RECOMMENDATION

During the course of submissions as to the appropriate penalty in this matter, we were advised that the Solicitor did not intend his comments to be taken seriously. Mr. MacKenzie indicated that the Society was not in a position to prove, to the required standard, that the Solicitor intended his comments to be taken seriously.

The Committee decided, that in the absence of evidence, we were not prepared to regard the Solicitor's comments as an ill-advised attempt at humour. We then heard the evidence of the Solicitor and the complainant. Part of the Solicitor's evidence is reproduced below.

"During the course of the interview, she wished to point out some things to me in the Will and in so doing, she sort of rose from her chair and leaned across my desk. My recollection is that in so doing, there really was nothing in any way immodestly done by her, but she attracted my attention to it by the fact that she said words to the effect that, "Oh, Peter, you mustn't look" and then subsequent to that I seem to recall, she put her hand up to her blouse as if to close it. It didn't need closing, but the motion was there.

I believe this happened more than once during the interview, but other than the fact that I believe the comment was repeated each time, there was nothing of any significance made of it. At the end of the interview, we discussed whether there was going to be a Will or a codicil and what the fees would be. At that time, I believe our standard fee for doing a codicil was \$75.00.

There was some discussion by Mrs. A. that I should do it either for nothing or for a reduced fee and after I had, I believe, repeated several times that this was our fee, she still was requesting that something be done with the fee. I partly lightheartedly and partly with sarcasm and exasperation made the unfortunate comment - I can't recall the comment was quite as explicit as she said, but of course, it was many months later that I was reconstructing it and she of course remembers from what was said at the time. I had hoped, I think, at the time to say to her that, "you would have to come with much more revealing fashion, Mrs. A., if I'm going to reduce my fees." She didn't make any comment about it and I didn't, I don't believe, pursue that any further because I really had no sexual intent or sexual interest and in fact when she left, it was my understanding that I was sending her a bill and when the Will was prepared, a bill was prepared and still remains in my file because it's our practice when we're doing a Will for a client or a codicil for a client that we send them the Will in the mail for them to review and they make their arrangements to come back for a further appointment with the lawyer if they wish and that's always done in the Englehart office because there's not enough staff there, not to have a lawyer for one of the witnesses, and the Will is reviewed or the codicil is reviewed, signed, witnessed and at that point, the account is presented.

26th November, 1992

I certainly had no idea that I'd so upset Mrs. A. and certainly if she'd given any indication, I would have been most apologetic because I would have realized how out of place the comment was and I certainly had no intentions of causing Mrs. A. any distress, nor did I have any sexual intent in connection with the comment that I made.

In cross-examination, the following was said:

Q.: Do you accept today that whatever your intention was in making the comment that you made, it is quite clear that Mrs. A. took your comments seriously and thought that you meant it, do you?

A.: Very much so, yes.

In re-examination the following occurred:

Q. Okay, Mr. Ramsay, you heard the question, could I ask you what tone you used when you were first engaged in this discussion with Mrs. A. over the fee to be charged and whether there was any change in your tone when you went on to make the comment you've admitted to making?

A. I have difficulty recollecting that, fifteen months later. I don't particularly believe there was probably very much change in my tone. I would normally have spoken probably in the same manner to her throughout the interview and would probably have spoken to her in the same manner when these comments were being discussed.

I don't recall whether I had an edge of exasperation in my voice or not.

Q. Well, not recalling whether there was an edge of exasperation in your voice, can you tell us what you were feeling inside as this conversation with Mrs. A. progressed to the point that you made this comment? Was there any change in your feelings inside?

A. Yes, I was feeling exasperated, perturbed, angry and doing my utmost to not express it.

In examination in chief of the complainant, the following was said:

Q. Now, on any of the prior occasions on which he has acted as your lawyer, do you recall whether you had conversation in a lighthearted vein?

A. I don't recall.

Q. All right. Can you tell the Committee, Mrs. A., in as much detail as you can recall what occurred in Mr. Ramsay's office when you met with him to discuss his preparing a codicil to your Will?

A. I recall going into his office. It's been specified I had a blouse on. Fourteen months ago, I don't know what I was wearing. It could have been a sweatshirt, a tee shirt. In any case, I wasn't provocative in standing up beside his desk.

Q. All right. His evidence on that point was that you leaned over his desk, that he considered it to be at least slightly provocative at the time and that he believed that happened repeatedly.

A. It didn't happen repeatedly, no.

Q. Mr. Ramsay said in his evidence that you said to him at one point during the discussion words to this effect, "Oh Peter, you mustn't look" and that you motioned to close your blouse, although it really wasn't open in a revealing way. Do you have any recollection of that occurring?

A. No.

Later in the examination in chief the following was said:

Q. You've heard Mr. Ramsay's evidence of his recollection of the tone of voice in which that suggestion was made. What is your recollection?

A. The tone of his voice never changed. It wasn't, well, made in an angry fashion.

Q. It wasn't made in an angry fashion. Had the discussion over the fee been a heated discussion?

A. No, no.

Q. Had you spoken to each other argumentatively?

A. No.

Q. Mr. Ramsay's evidence was that he had made the comment which he made partly lightheartedly. What do you say about that?

A. I certainly didn't accept it as lighthearted.

Q. He testified that the comment was also made partly sarcastically. What do you say?

A. I didn't accept it as that, as sarcastic.

Q. What was the impression that you formed as to the intention that he had in expressing that comment to you?

A. Would you repeat that, please?

Q. Yes. What impression did you form as to what he meant by making that comment to you?

A. My impression was that he was serious about his comment and I wasn't accepting it, and I didn't accept it.

In cross examination the following was said:

Q. You attended in his office and I take it that it's agreed that at one point in the meeting, you did lean over to point something out to him?

A. No, I didn't lean over. I got up, but at no point did I ever lean over his desk in a provocative manner.

Q. I'm not suggesting ma'am that you had the intention of leaning over his desk in a provocative manner. I'm simply suggesting that in the course of standing up and pointing to something on the document for Mr. Ramsay that you may have leaned over somewhat?

A. Possibly had, I don't...

Q. It's your evidence that you don't recall any comment to Mr.

A. - Mr. Ramsay that he should not be looking at you?

A. No.

Q. You don't recall making any comments to that effect?

A. No.

Q. I take it that after you pointed out this item on the document, you sat back down across the desk from Mr. Ramsay.

A. Yes.

Q. And the two of you continued to discuss the contents in the proposed codicil?

A. Yes.

Q. And after that discussion took place, Mr. Ramsay and you then engaged in a discussion about what the fees would be. Is that right?

A. Yes.

Q. And you asked Mr. Ramsay what the fee would be?

A. Yes.

Q. Mr. Ramsay advised you that he would be charging you \$75.00 for the service?

A. Yes.

Q. And it's your evidence that at no time did you suggest that he completely waive the fee. Is that correct?

A. No, never.

In cross-examination the complainant testified that she recalled the exact words used by Mr. Ramsay and in re-examination said as follows:

He told me, if I would go into his office with no brassiere on, he could have complete viewing of my breasts, there would be no charge. Those are his exact words to me.

Based on the evidence the Committee heard and the Agreed Statement of Facts, we made the following findings:

1. We accept Mrs. A's evidence as to what was said by the Solicitor.
2. We accept the complainant's evidence that at no time did she suggest there should be no fee for preparing the Codicil.
3. On a balance of probabilities it is more likely that the complainant made some comment to the Solicitor not to look when she leaned over his desk. We find that nothing of a provocative nature was done by the complainant.

4. We find that there was no basis for Mr. Ramsay to make the comment in either a light-hearted or a sarcastic way.
5. We find that the Solicitor has established as a factor in mitigation that he did not intend the comment to be taken seriously.

Mr. Ramsay is 55 years of age. He was called to the Bar in 1968. He is the senior partner in a four lawyer firm with offices in New Liskeard and Englehart. The Solicitor is married and has three children, the oldest of whom is 30, and the youngest of whom is attending the University of Western Ontario. Mr. Ramsay at one time was the president of the Timiskaming Bar Association, is a director of the Canadian Bar Association of Ontario and held or holds a number of senior positions in various community organizations in the New Liskeard area. Strong letters of reference from a senior practitioner in Kirkland Lake, a doctor in New Liskeard and three of the Solicitors' partners were filed with the Committee.

Mr. Humphrey suggests that a reprimand in Committee would be the appropriate disposition. Mr. MacKenzie agreed that a reprimand would be appropriate but left it to the Committee to decide whether the reprimand should be in Committee or in Convocation.

There is no question that it is in the Solicitor's best interests that the reprimand be administered in Committee. Unfortunately for the Solicitor, we were unable to accept that view. We are mindful of the fact that Convocation has recently made sexual harassment in a professional situation professional misconduct. The profession must be made aware that inappropriate sexual comments in a professional context will be treated seriously by the Society. For reasons of general deterrence and education of the profession, notwithstanding the impressive background of the Solicitor, we feel the reprimand to the Solicitor should be delivered in Convocation.

Peter Robert Ramsay was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 22nd day of March, 1968.

ALL OF WHICH is respectfully submitted

DATED this 5th day of October, 1992.

"P. Copeland"
Paul D. Copeland, Chair

It was moved by Mr. Strosberg, seconded by Mr. Lamek that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Strosberg, seconded by Mr. Lamek that the Recommendation as to Penalty contained in the Report that is, that the solicitor be reprimanded, be adopted.

Brief submissions were made by both counsel in support of the Recommendation as to Penalty.

There were questions by the Bench.

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

26th November, 1992

It was moved by Mr. Bastedo, seconded by Ms. Curtis that the solicitor be suspended for 1 month.

It was moved by Ms. Kiteley, seconded by Ms. Lax that the solicitor be reprimanded in public in Convocation in accordance with the Yachetti Report and all subsequent reprimands be in public except in exceptional cases.

It was moved by Mr. McKinnon, seconded by Mr. Ruby that all reprimands be made in public.

It was moved by Ms. Bellamy, seconded by Ms. Curtis that the solicitor's firm be required to adopt a policy on sexual harassment.

The Bellamy/Curtis motion was ruled out of order by the Treasurer on the basis that it would impose obligations on members who were not parties to the proceedings.

Counsel, the solicitor, the reporter and the public were recalled and informed of the motions.

Convocation adjourned for a 15 minute recess.

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Convocation resumed and counsel were recalled.

There were no submissions by Mr. Greenspan on the issue of penalty. Mr. MacKenzie made submissions urging Convocation to adopt a general policy of reprimands in public as suggested by the Yachetti committee on Discipline Procedures.

Counsel, the solicitor, the reporter and public withdrew.

It was moved by Mr. Bastedo, seconded by Mr. Wardlaw that the motion made by Mr. McKinnon that all reprimands be made in public, be deferred for consideration by the Discipline Policy Committee.

Withdrawn

It was moved by Mr. Wardlaw, seconded by Mr. Carter that the solicitor be reprimanded in camera.

Not Put

The motion to suspend the solicitor for 1 month was withdrawn.

The Kiteley/Lax motion was adopted.

Counsel, the solicitor, the reporter and the public were recalled.

The solicitor was reprimanded in public.

Counsel and the solicitor retired.

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Re: JAMES ROBERT AXLER, Kitchener

Mr. Strosberg placed the matter before Convocation.

The reporter was sworn.

Mr. Thom withdrew.

Ms. Christina Budweth appeared for the Society and Mr. James Neeb appeared for the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 28th October, 1992, together with an Affidavit of Service sworn 24th November, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail on 12th November, 1992 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor 23rd November, 1992 (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

Paul Copeland, Chair
Stuart Thom
Hope Sealy

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

Christina Budweth
for the Society

JAMES ROBERT AXLER
of the City
of Kitchener
a barrister and solicitor

James W. Neeb
for the solicitor

Heard: October 13, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 27, 1992, Complaint D83/92 was issued against James Robert Axler, alleging that he was guilty of professional misconduct.

The matter was heard in public on October 13, 1992 before this Committee composed of Paul Copeland, Chair, Stuart Thom and Hope Sealy. Mr. Axler attended the hearing and was represented by James W. Neeb, Q.C. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D83/92

- 2.(a) During the period June 30, 1990 to September 30, 1991, he misappropriated \$64,201.19 more or less, received from his client Donald Prior on behalf of Nora Lattner;
- (b) On or about February 25, 1992, he misappropriated \$49,375 more or less, received on behalf of his client, Phoebe Homes Ltd.;
- (c) During the period February 20, 1991 to December 31, 1991, he misappropriated \$150,000 more or less, from the Estate of Stephanie Bajric.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D83/92 and is prepared to proceed with a hearing of this matter on October 13, 1992.

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 D83/92 and this agreed statement of facts and admits the particulars of the allegations contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

Background

4. The Solicitor was called to the bar in 1973. At the times material to the complaint, he practised as a sole practitioner in association with Ms. Gale Bullas Trapp.

5. On April 28, 1992, the Society obtained an order against the Solicitor under Section 42 of the Law Society Act which was served on him April 30, 1992. A copy of is attached as Exhibit 1 of this Agreed Statement of Facts.

Particular 2(a) - \$64,201.19 - Misappropriation from the Estate of Nora Lattner

6. On March 11, 1982, Nora Lattner granted a power of attorney over her affairs to Donald Prior.

7. On March 21, 1991, the Public Trustee made an application on behalf of Ms. Lattner to require Mr. Prior to pass his accounts and pay over to the Public Trustee any assets or funds being held in trust for Nora Lattner including but not limited to an amount of \$64,201.19 identified as belonging to her. Ms. Lattner died after the order was obtained.

8. The Solicitor acted for Mr. Prior during this time. On June 12, 1991 the Solicitor corresponded with the office of the Public Trustee to advise that he was in receipt of two cheques in the amounts of \$30,563.61 and \$33,637.58 representing the funds owed to Ms. Lattner, a copy of the Solicitor's June 12, 1991 letter is attached as Exhibit 2 to this agreed statement of facts.

9. Mr. Prior had in fact paid to the Solicitor \$74,802.92 on behalf of Ms. Lattner by cheques dated December 15, 1989 in the amount of \$10,601.73; January 28, 1990 in the amount of \$30,563.61; and, January 28, 1990 in the amount of \$33,637.58. Copies of the cheques are attached collectively as Exhibit 3 to this agreed statement of facts. It is the Solicitor's position that the December 15 cheque represented monies owing for fees.

10. The Solicitor's records indicate deposits of \$33,637.58 and \$30,563.61 on June 19 and June 22, 1990, respectively, to his trust account. Copies of the deposit slips are attached, collectively, as Exhibit 4 to this agreed statement of facts. The Solicitor did not prepare a trust ledger account. Further, the trust obligation was not disclosed on any trust listing as there were no trust listings whatsoever in respect of the Solicitor's practice for the period August 31, 1989 to August 31, 1991.

11. Although the \$64,201.19 was deposited into the Solicitor's trust account it was subsequently misappropriated by the Solicitor. Trust account bank statements for the period August 15, 1990 to August 31, 1991 show a balance substantially less than \$64,201.19 for extended periods of time

12. On February 25, 1992, the Solicitor informed the Society's auditor that shortly after receiving the funds from Mr. Prior he paid them in trust to his associate, Gale Bullas Trapp. The Solicitor now admits that this was untrue. At the same meeting he produced a bank draft in the amount of \$64,201.19 drawn on the Royal Bank of Canada payable to Smythe, Hobson (solicitors for the estate of Nora Lattner) dated February 26, 1992 and said that Gale Bullas Trapp had purchased the draft. A copy of the bank draft is attached as Exhibit 5 to this agreed statement of facts.

13. On March 30, 1992, the Solicitor admitted that he had misappropriated \$64,201.19. He repaid this amount by misappropriating \$49,375 from Phoebe Homes Ltd. and borrowing \$14,826.19 from his associate Gale Bullas Trapp to purchase the bank draft payable to Smythe, Hobson.

Particular 2(b) - Misappropriation of \$49,375 from Phoebe Homes Ltd.

14. In December, 1991, the Solicitor acted for Kino Yakobi and his company, Phoebe Homes Ltd., on the purchase of an apartment building and townhouses in the City of Cambridge for \$800,000.

15. On December 23, 1991, the Solicitor received \$60,000 in trust on behalf of Phoebe Homes Ltd. These funds were deposited into his trust account #2 and disbursed by cheques as follows:

December 31, 1991 - Treasurer of Ontario - \$11,500
December 31, 1991 - Treasurer of Ontario - \$125
February 25, 1992 - Royal Bank of Canada - \$49,375

A copy of the Solicitor's trust cheque to the Royal Bank is attached as Exhibit 6 to this agreed statement of facts.

16. At the time the Solicitor held \$4,000 in his trust account on behalf of Phoebe Homes Ltd. from an earlier transaction. The disbursement of the \$64,000 should have been as follows:

City of Cambridge - \$50,000 (property taxes)
 Treasurer of Ontario - \$11,000
 Fees and disbursements - \$3,000

17. The property taxes have not been paid.

18. During a meeting at the Law Society on March 30, 1992, the Solicitor admitted he had used the Phoebe Homes \$49,375 to replace funds he had previously misappropriated from Nora Lattner.

19. At the time the trust cheque for \$49,375 was drawn in favour of the Royal Bank, the Solicitor's trust account was already the subject of co-signing controls. His accountant, Ellen Miller was designated as a co-signer. When the Solicitor requested that she sign the trust cheque he advised her that the funds were being used to pay off a mortgage that Phoebe Homes Ltd. had with the Royal Bank of Canada. The Solicitor now admits this was untrue.

Particular 2(c) - Misappropriation of \$150,000

20. Stephanie Bajric died on December 27, 1990. The Solicitor was named as the sole executor of her estate. He obtained probate on February 4, 1991. A copy of the application for probate, letters of probate and will found in the Solicitor's file are attached collectively as Exhibit 7 to this agreed statement of facts.

21. The assets of the estate at December 27, 1990 were as follows:

2 Dunham Avenue, Kitchener - estimated value	\$100,000.00
21 Laurel St., Waterloo - sold Sept 6/91 for	115,000.00
CIBC GIC	54,191.78
CIBC Money Market Fund	56,215.82
CIBC bank account #03-14234	364.99
Total	\$325,772.59

22. The beneficiaries of the estate were a niece and nephew, two brothers and three sisters of the deceased. The will specifically excluded the deceased's daughter, Rosemarie Bajric-Smola.

23. The Solicitor wrote to the beneficiaries on January 11, 1991 providing a copy of the will and advising that the daughter might contest the will. A copy of the letter is attached as Exhibit 8 to this agreed statement of facts.

24. The Solicitor wrote to the beneficiaries again on February 7, 1991 advising that the daughter had six months from December 27, 1990 to commence a law suit challenging the will. A copy of the letter is attached as Exhibit 9 to this agreed statement of facts.

25. The beneficiaries replied by letters dated January 21, 1991 and February 21, 1991. Copies of which are attached as Exhibit 10 to this agreed statement of facts.

26th November, 1992

26. By letter dated March 1, 1992, Rosemarie Bajric-Smola's lawyer, Simon Adler, advised the Solicitor that the Will would be challenged and cautioned him against making any distribution from the estate. A copy of Mr. Adler's letter is attached as Exhibit 11 to this agreed statement of facts.

27. The Solicitor used bank account #03-14234 of the Canadian Imperial Bank of Commerce, 385 Frederick Street, Kitchener as the estate bank account. The only records for this account are bank statements and some cheques for the period January 11, 1991 to April 10, 1991. These documents disclose withdrawals of \$46,950 from the estate trust account the proceeds of which were deposited into the Solicitor's general account. Copies of the estate bank account statements from January 11 to April 10, 1991 together with the estate account cheques and vouchers for payments to the Solicitor and duplicate deposit slips for the general bank account are attached as Exhibit 12, collectively, to this agreed statement of facts.

28. The Solicitor told Society representatives on February 25, 1992 that the transfer of funds represented reimbursement for disbursements made on behalf on the estate; legal fees; and executors fees. There were no fee billings in the file for either legal or executors fees. The Solicitor now admits that his statement was untrue.

29. Also on February 25, 1992, the Solicitor stated he did not know what happened to the \$50,000 CIBC Guaranteed Investment Certificate which was one of the assets of the estate and was to have matured on June 30, 1991. Although the estate bank accounts obtained directly from the CIBC for the period April 11, 1991 to February 11, 1992 showed that the Solicitor cashed the GIC on April 11, 1991. Copies of the bank statements obtained directly from the bank are attached as Exhibit 13 to this agreed statement of facts.

30. The bank statements show that during the period April 11, 1991 to February 11, 1992 an additional \$55,955.24 was disbursed from the estate bank account. The Solicitor admits that these funds were used for his personal benefit.

Sale of 21 Laurel Street, Waterloo

31. The Solicitor sold one of the assets of the estate, 21 Laurel Street, on September 5, 1991. He deposited the sale proceeds of \$114,968.84 into his trust account. Attached as Exhibit 14, collectively, to this agreed statement of facts are a copy of the statement of adjustments and trust and general ledger accounts for the estate. The trust ledger account was not maintained properly and did not disclose the disposition of these funds.

32. On February 10, 1992, the Solicitor sent the Law Society a break down of the distribution of these funds. A copy of the Solicitor's letter to the Society and attached accounting are attached as Exhibit 15 to this agreed statement of facts. The Solicitor disbursed \$107,685.84 of these funds improperly. (\$45,038.98 was used to purchase a property from Haid and \$62,646.86 was transferred to his general account)

33. The improper distribution of estate funds was discussed with the Solicitor on February 25, 1992. His position was that the beneficiaries agreed to lend estate funds to him. He advised that he told the beneficiaries that he and his wife were buying a cottage and that he agreed to pay 2% more interest on the advance than the bank have been paid on a term deposit. There is no documentation in the Solicitor's file to support his position. During the discussion of February, 1992 Rule 7 was drawn to his attention. The Solicitor then said he thought he could borrow funds from clients if the client had independent legal advice. He said the beneficiaries called him from a lawyers office in Yugoslavia and that the lawyer had provided independent legal advice regarding this transaction.

34. In a meeting on March 30, 1992 at Osgoode Hall the Solicitor repeated his assertions about the borrowing.

35. By letter dated April 2, 1992 the Society's auditor wrote to one of the beneficiaries, Fanika Jelic, in order to obtain confirmation of the Solicitor's position. A copy of the auditor's the April 2 letter is attached as Exhibit 16 to this agreed statement of facts. The Society received a reply on April 24, 1992, a copy of this letter is attached as Exhibit 17 to this agreed statement of facts.

36. In a meeting with the Solicitor on April 30, 1992 he produced a document signed by the beneficiaries authorizing him to invest the net sale proceeds of 21 Laurel Street in a mortgage secured on his own property at 2 Beach Road (the cottage property earlier referred to). A copy of the document is attached as Exhibit 18 to this agreed statement of facts. The Solicitor was unable to provide a covering letter for this document.

37. The Solicitor has been removed as executor of the estate. A copy of the order of the Honourable Madame Justice Scott dated Friday, May 1, 1992, ordering inter alia, that the Solicitor be removed as executor of the estate of Stephanie Bajric is attached as Exhibit 19 to this agreed statement of facts. An order of Mr. Justice Borkovich dated May 21, 1992 ordering inter alia, that the Solicitor pay the sum of \$217,350.67 to Canada Trust as trustee for the estate of Stephanie Bajric is attached as Exhibit 20 to this agreed statement of facts. A further order of Madame Justice Scott dated June 17, 1992 ordering the examination in aid of execution of the Solicitor's wife is attached as Exhibit 21 to this agreed statement of facts.

38. The cottage property referred to in paragraph 33 of this agreed statement of facts was sold pursuant to the court order attached as Exhibit 21. A copy of the statement of adjustments is attached as Exhibit 22 to this agreed statement of facts. The actual payments out of the sale proceeds vary slightly from those reflected in the statement of adjustments. On September 15, 1992 \$289,028.13 was paid into court as proceeds of the sale. Of those funds the following amounts were paid out:

Esther Glebe	\$142,393.92
- Legal Fees	600.69
- Solicitor's fee for registering discharge	350.36
Pete MacDonald Lien	4,162.98
- Legal fees	733.91
Chappell Lien	10,364.07
- Legal fees	1,310.98
Additional Funds Claimed by Mrs. Glebe (In Dispute)	25,000.00
Total paid to Canada Trust as administrator in satisfaction of Mr. Justice Borkovich's order	\$87,093.91

Counsel for the estate has made a claim to the Law Society compensation fund.

DATED at Toronto this 9th day of October, 1992."

RECOMMENDATION AS TO PENALTY

The Committee recommends that James Robert Axler be disbarred.

REASONS FOR RECOMMENDATION

Significant funds were misappropriated by the Solicitor in this case. That in itself would warrant the disbarment of the Solicitor. The Solicitor, through his counsel, takes no issue with that result.

There are several factors in this case which bear comment:

1. As a result of generosity of the Solicitor's associate Gale Bullas Trapp, sufficient funds were provided for restitution of the misappropriation of \$49,375.00 set out in particular 2(b).
2. A claim is being made to the Compensation Fund for the losses suffered by the estate of Stephanie Bajric. According to counsel for the Solicitor, the net loss to the estate was \$105,258.76. Since there is a dispute concerning \$25,000.00 coming out of the sale of the cottage, the net loss may in fact be \$130,258.76, plus interest.
3. In the Agreed Statement of Facts and the Exhibits there are a number of court orders obtained by the Law Society in an attempt to recover funds from the Solicitor. We would expect that significant costs were incurred by the Law Society in dealing with this matter over and above the costs associated with the discipline proceeding.
4. We were advised that on January 8, 1992, the Solicitor was found guilty of professional misconduct for failing to file form 2/3 and had received a reprimand in Committee.
5. We were advised that criminal charges are outstanding against the Solicitor.

- 6. The Solicitor on a number of occasions attempted to mislead the Society during the course of its investigation. Although the complaint does not allege professional misconduct by attempting to mislead the Society, we regard the Solicitor's attempt to do that as an aggravating factor in this case.
- 7. No character letters were filed on behalf of the Solicitor. Given that the Solicitor was not contesting disbarment, the lack of character letters is not surprising. No psychiatric reports were presented, and there was no evidence of any mental impairment. We are advised by counsel for the Solicitor that the sole motivation for his actions was the need for money. We were also advised that the Solicitor always intended to repay the funds he had misappropriated but that a failed expectation concerning certain commercial transactions that the Solicitor hoped to handle made replacement of the funds impossible.

These are difficult economic times for many members of the profession. At the risk of sounding trite, it bears our stating the obvious:

If you misappropriate funds, even if you intend to repay them, you are still a thief, and absent exceptional circumstances, thieves will not be allowed to remain in the profession.

In accordance with the authorities provided to us, disbarment is the appropriate penalty. We adopt the language from the decision in the Cooper case. The legal profession would see public confidence rapidly evaporate if it failed to pronounce its condemnation of Mr. Axler's conduct in the strongest possible terms ... any penalty short of disbarment would be grossly inadequate in reflecting the gravity of Mr. Axler's misconduct and the censure of his peers.

James Robert Axler was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 23rd day of March, 1973.

ALL OF WHICH is respectfully submitted

DATED this 28th day of October, 1992

"P. Copeland"
Paul Copeland, Chair

It was moved by Mr. Strosberg, seconded by Mr. Ruby that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Strosberg, seconded by Mr. Scott that the Recommendation as to Penalty contained in the Report that is, that the solicitor be disbarred, be adopted.

There were brief submissions by counsel for the Society in support of the penalty.

The Recommendation as to Penalty was adopted.

Counsel retired.

.....

26th November, 1992

Re: BRUNO MARIO TONEGUZZI, Nepean

Mr. Strosberg placed the matter before Convocation.

The reporter was sworn.

Mr. Carter and Ms. Lax withdrew.

Mr. Stephen Foster appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 9th November, 1992, together with an Affidavit of Service sworn 24th November, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail on 12th November, 1992 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor 26th November, 1992 (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

Paul Copeland, Chair
Robert J. Carter, Q.C.
Joan L. Lax

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

Stephen Foster
for the Society

BRUNO MARIO TONEGUZZI
of the City
of Nepean
a barrister and solicitor

Not Represented
for the solicitor

Heard: October 27, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 1, 1992, Complaint D84/92 was issued against Bruno Mario Toneguzzi, alleging that he was guilty of professional misconduct.

The matter was heard in public on October 27, 1992 before this Committee composed of Paul Copeland, Chair, Robert J. Carter, Q.C. and Joan L. Lax. Mr. Toneguzzi attended the hearing and was not represented. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

Complaint D84/92

2. a) He practised law while under suspension from September 28, 1990 to and including April 22, 1991;
- b) He failed to comply with his verbal undertaking given to a Discipline Committee on April 11, 1990, to file his Forms 2/3 for his fiscal years ending April 30, 1988 and April 30, 1989 by June 1, 1990;
- c) He has failed to file his Forms 2/3 for his fiscal years ending April 30, 1990 and April 30, 1991.

EVIDENCE

The evidence before the Committee contained the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D84/92 and is prepared to proceed with a hearing of this matter on October 27, 1992.

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 D84/92 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 25, 1977 and he practices as a sole practitioner.

Particular 2a) He practised law while under suspension from September 28, 1990 to and including April 22, 1991

5. By registered letter, dated October 3, 1990, the Solicitor was advised that his rights and privileges as a member of the Law Society had been suspended as of September 28, 1990 by an Order of Convocation as a result of his failure to pay his late filing fee. The Solicitor was advised that the suspension was for one year and from year to year thereafter or until the fee had been paid. The registered letter was signed for and delivered on October 12, 1990. A copy of the Society's October 3, 1990 letter and the Acknowledgement of Receipt of a Registered Item card is attached as Exhibit "A" to this Agreed Statement of Facts.

6. The following are descriptions of accounts rendered by the Solicitor during the suspension period of September 28, 1990 to April 22, 1991. The Solicitor admits that the accounts indicate services which were rendered while he was suspended from the practice of law:

The Solicitor rendered an account, dated October 18, 1990 to Peter and Catherina Van Adrichem, in the amount of \$600.00 for services rendered regarding the sale of property municipally known as 8429 Cooperhill Road, Metcalfe. The account indicates that the Solicitor transferred from this trust account \$600.00 in full payment of the account.

The Solicitor rendered an account, dated November 1, 1990 to Mark and Nancy McKee, in the amount of \$475.00 for services rendered regarding the sale of property municipally known as 84 Pickwick Drive, Nepean. The account indicates that the Solicitor transferred from his trust account \$475.00 in full payment of the account.

The Solicitor rendered an account, dated November 9, 1990, to Magdy and Soheir Makhmour, in the amount of \$548.50 for services rendered regarding a mortgage to CIBC Mortgage Corporation. The account indicates that the Solicitor transferred from this trust account \$54.94 which left a balance owing of \$493.56.

The Solicitor rendered an account, dated November 22, 1990, to Carmine Mazzotta, in the amount of \$365.00 for services rendered regarding the extension of a mortgage.

The Solicitor rendered an account, dated December 5, 1990, to Thomas Shing-Lam Yip and Lin Kwan Yeung, in the amount of \$890.00 for services rendered regarding the purchase of property municipally known as 490 Dawson Avenue, Ottawa.

The Solicitor rendered an account, dated December 14, 1990, to Francesco and Giuseppe Vincelli, in the amount of \$526.00, for services rendered regarding a mortgage to Montreal Trust.

The Solicitor rendered an account, dated December 21, 1990, to Daniel Douglas Chase and Sheila Allyson Gowan, in the amount of \$1034.50 for services rendered regarding the purchase of property municipally known as 63 Seguinbourg road, Casselman. The account indicates that the Solicitor transferred from his trust account the amount of \$284.50 which left a balance of \$750.00.

The Solicitor rendered an account, dated December 31, 1990, to Mr and Mrs. Giuseppe Federico, in the amount of \$703.00 for services rendered regarding a mortgage to the Royal Bank.

The Solicitor rendered an account, dated January 15, 1991 to Mr. and Mrs. Steve Andrasi, in the amount of \$1,043.25, for services rendered regarding a severance.

The Solicitor rendered an account, dated January 25, 1991, to Delta Hardwood Flooring, in the amount of \$230.00, for services rendered during 1990.

The Solicitor rendered an account, dated February 1, 1991, to Christopher Jones and Nancy Emerton-Jones, in the amount of \$463.70 for services rendered regarding the sale of property municipally known as 65-21 Midland Crescent, Nepean.

26th November, 1992

The Solicitor rendered an account, dated February 12, 1991, to Nadia Vigliotti, in the amount of \$90.95 for services rendered regarding the drafting of her will.

The Solicitor rendered an account, dated February 21, 1991, to Joseph Pantalone, in the amount of \$225.00 for services rendered regarding the collection of an outstanding account in favour of Rosto Construction.

The Solicitor rendered an account, dated March 4, 1991, to Mr. and Mrs. Pasquale Valente, in the amount of \$1,517.00 for services rendered regarding a mortgage in favour of FBDB.

The Solicitor rendered an account, dated March 20, 1991, to C. Vigliotti Construction Ltd., in the amount of \$906.55, for services rendered regarding the incorporation of C. Vigliotti Construction Ltd. The account indicates that the Solicitor transferred from his trust account \$500.00 which left a balance owing of \$409.55.

The Solicitor rendered an account, dated March 27, 1991, to Mr. and Mrs. Mohsen Mansour in the amount \$187.50 for services rendered regarding a discharge of mortgage on part lot 14, concession 8, Township of Osgoode.

The Solicitor rendered an account, dated April 4, 1991 to Luigi Carlucci and Caroline McCullough in the amount of \$843.48 for services rendered regarding the purchase of property municipally known as 40 Clarkson Crescent, Kanata. The account indicates that the Solicitor transferred from his trust account \$507.91 which left a balance owing was \$101.90.

The Solicitor rendered an account, dated April 18, 1991, to Mrs. Viola Theresa Larocque in the amount of \$486.25 for services rendered regarding a power of attorney, will, etc.

7. During a meeting with a Law Society staff member from the Audit & Investigation Department on April 22, 1991, the Solicitor admitted that he knew of the suspension and continued to practice law throughout the suspension period.

Particular 2b) He failed to comply with his verbal undertaking given to the Discipline Committee on April 11, 1990, to file his Forms 2/3 for the fiscal years ending April 30, 1988 and April 30, 1989 by June 1, 1990

8. During the Solicitor's discipline hearing on April 11, 1990, which resulted from his failure to file his forms for the fiscal years ended April 30, 1988 and April 30, 1989, the Solicitor gave the Discipline Committee a verbal undertaking as follows:

MR. TONEGUZZI:

So, I don't see any reason why it can't be done by the 15th of May and certainly, as I indicated to Mr. Conway, I'm going to do my damndest to make sure it is done. I'm not the type of person to get on people's backs, but in this case I will, because I'm giving you my undertaking that it will be done. One way or another, it will be done.

MRS. LEGGE:

What about giving you until June the 1st and then you make sure you ride your accountant to get it done?

MR. TONEGUZZI:
I will.

A copy of the partial transcript from the hearing on April 11, 1990 is attached as Exhibit "B" to this Agreed Statement of Facts.

9. On April 22, 1991, a Law Society staff employee from the Audit and Investigations Department attended at the Solicitor's office. The Solicitor advised that he was having difficulty obtaining the interest statements from the Bank of Montreal and the Toronto Dominion Bank. The Solicitor confirmed that the Form 3's were completed.

10. On December 12, 1991 a Law Society staff employee spoke with the Solicitor by telephone. The Solicitor advised that Peat Marwick and Ray Ouellette, his bookkeeper, were working on his outstanding Forms 2/3 and that the same would be finalized shortly.

11. To date, the Solicitor has not filed his forms for the fiscal years ended April 30, 1988 and April 30, 1989.

Particular 2c) He failed to file his Forms 2/3 for his fiscal years ending April 30, 1990 and April 30, 1991

12. The Solicitor's fiscal year end is April 30. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal years ending April 30, 1990 and April 30, 1991, as required by S.16(2) of Regulation 573 under The Law Society Act.

13. A Law Society staff employee had attended at the Solicitor's office on April 22, 1991. The Solicitor bookkeeper, Ray Ouellet, advised the Society that the May, 1990 to April, 1991 filings would be completed and reconciled by the end of May, 1991.

14. As the Solicitor's filings had not been received, a Notice of Default in Annual Filing, dated November 2, 1991 was forwarded to the Solicitor by the Law Society.

15. By registered letter dated December 3, 1991, the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day applied on filings made after their due dates and on defaults in filings. The fee began to accrue on December 18, 1991. The Solicitor was advised that when this levy amounted to \$1,500.00 he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file.

16. On December 12, 1991 a Law Society staff employee spoke with the Solicitor by telephone. The Solicitor advised that Peat Marwick and Ray Ouellette were working on his outstanding Forms 2/3 and that the same would be finalized shortly.

17. By registered letter dated April 15, 1992, the Law Society advised the Solicitor that his name would go before Convocation on May 29, 1992 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on May 28, 1992. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. The Solicitor did not respond to this correspondence.

26th November, 1992

18. By letter dated May 15, 1992 the Law Society advised the Solicitor that his annual filing and late filing levy had not been received. The Solicitor was reminded that his name would go before Convocation on May 29, 1992 should payment not be received by May 28, 1992.

19. The Solicitor enclosed a money order in the amount of \$1,500.00 with his letter of May 25, 1992 in full payment of the late filing levy. The Solicitor advised the Society that his form 2/3 were presently being processed by his accountant and that he expected to file the same within the next few weeks.

20. As a Form 3 is a report of a public accountant respecting the compliance of the Solicitor's books and records with the regulations, the Society has no way of verifying that the Solicitor is maintaining books and records save for arranging for an audit examiner to attend at the Solicitor's practice thereby substantially increasing the costs of the audit branch.

21. To date, the Solicitor has not yet mailed the required forms. The Solicitor has not requested an extension to file nor has he provided the Society with an explanation for his failure to file.

V. DISCIPLINE HISTORY

22. The Solicitor received a reprimand in committee and provided the Society with a verbal undertaking, on April 11, 1990, regarding his failure to reply to the Society and his failure to file his forms for the fiscal years ended April 30, 1988 and April 30, 1989.

DATED at Toronto this 27th day of October, 1992."

RECOMMENDATION AS TO PENALTY

In regard to the complaint of practicing while under suspension we recommend that the Solicitor be reprimanded in Convocation.

In regard to the complaints of failing to comply with his verbal undertaking given to the Discipline Committee and failing to file his Forms 2/3 for fiscal years ending April 30, 1990 and April 30, 1991, we recommend that if Forms 2/3 for those fiscal years are not filed prior to the 30th day of November, 1992, the Solicitor be suspended from practice effective the 30th day of November, 1992 until such time as his filings are brought up to date. On those two complaints, we recommend as well that the Solicitor be required to pay the Society's costs in the amount of \$350.00.

REASONS FOR RECOMMENDATION

We were advised by counsel for the Society that the Solicitor's failure to comply with the Undertaking was partly as a result of circumstances beyond the control of the Solicitor and to that extent there were mitigating circumstances. The penalty was placed before us as a joint submission and in our view, was within the range of penalties appropriate for the misconduct of the Solicitor.

26th November, 1992

Bruno Mario Toneguzzi was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 25th day of March, 1977.

ALL OF WHICH is respectfully submitted

DATED this 9th day of November, 1992

"P. Copeland"
Paul Copeland, Chair

It was moved by Mr. Strosberg, seconded by Mr. Scott that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Strosberg, seconded by Mr. Scott that the Recommendation as to Penalty contained in the Report that is, that the solicitor be reprimanded with conditions and pay costs of \$350, be adopted.

Both counsel made submissions. Mr. Foster asked that the Penalty be amended to make the suspension effective December 15, 1992 to allow the solicitor time to put his practice in order.

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

It was moved by Mr. Thom, seconded by Mr. Wardlaw that the solicitor be suspended for a period of 3 months for practising while suspended and that the suspension continue until his filings were complete, the suspension to take effect December 1st, 1992.

It was moved by Mr. McKinnon, seconded by Ms. Graham that the solicitor be suspended for 1 month effective December 1, and unless his Forms 2/3 were filed within that month that he be suspended until the Forms were filed.

Counsel, the solicitor, the reporter and the public were recalled and informed of the 3 motions.

The solicitor advised Convocation that he wished to proceed with the matter and had no further submissions.

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

The motion to suspend for 3 months was lost.

The motion to reprimand with conditions and costs was not put.

The McKinnon/Graham motion to suspend the solicitor for 1 month definite effective December 1, 1992 with the suspension to continue until his Forms are filed was carried.

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

Counsel and solicitor retired.

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CONVOCATION ADJOURNED FOR LUNCHEON AT 1:00 P.M.

.....

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

The Treasurer, Arnup, Bastedo, Brennan, Campbell, Carter, Curtis, Elliott, Graham, Hill, Lax, Levy, McKinnon, Mohideen, Murray, S. O'Connor, Scott, Strosberg, Thom, Wardlaw and Weaver.

.....

Re: FRANCIS JAMES ALTIMAS, Orleans

Mr. Strosberg placed the matter before Convocation.

The reporter was sworn.

Messrs. Scott, Brennan and Campbell withdrew.

Mr. Gavin MacKenzie appeared for the Society and Mr. Michael Neville appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 29th May, 1992, together with an Affidavit of Service sworn 19th June, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail and by courier on 8th June, 1992 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 26th November, 1992 (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

Denise Bellamy, Chair
David W. Scott, Q.C.
Lloyd Brennan, Q.C.

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

Stephen Waisberg
for the Society

FRANCIS JAMES ALTIMAS
of the City
of Orleans
a barrister and solicitor

Michael J. Neville
for the solicitor

Heard: April 28, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 11, 1991, Complaint D113/91 was issued against Francis James Altimas, alleging that he was guilty of professional misconduct. This complaint was replaced by D113a/91 issued on April 24, 1992.

The matter was heard in public on April 28, 1992 before this Committee composed of Denise Bellamy, Chair, David W. Scott, Q.C., and Lloyd Brennan, Q.C. Mr. Altimas attended the hearing and was represented by Michael J. Neville. Stephen Waisberg appeared on behalf of the Law Society.

DECISION

Complaint D113a/91

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

- 2(a) He engaged in a course of conduct designed to deceive the following clients by recourse to the creation of fictitious disbursements supported by altered, inadequate or non-existent surveys in real property transactions:

Garner
Olsen
Mailhot;
- (b) He attempted to mislead the Law Society during its investigation by falsely informing the Society that:
 - (i) the alterations of the surveys had occurred due to the surveys being caught in his photocopier;
- (c) He counselled his clients, Davie and Bartholomew, to execute blank Powers of Attorney which he then retained in his file.

Evidence

The evidence before the Committee contained an Agreed Statement of Facts.

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of amended Complaint D113a/91 and is prepared to proceed with a hearing of this matter on April 28, 1992.

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 amended Complaint D113a/91 and admits the particulars contained therein.

IV. FACTS

4. The Solicitor was called to the Bar on March 21, 1969 and practices as a sole practitioner.

5. The Solicitor had been retained by several personnel of the Canadian Forces: Edward Garner, John Keith Olsen, and Alain Mailhot. The Solicitor represented these individuals in connection with the purchases of residential properties in the Ottawa area. In these transactions, the accounts rendered by the Solicitor to the individual client would be reimbursed by the Canadian Forces. The Canadian Forces conducted an investigation into the Solicitor's accounts rendered to its personnel and as a result of such investigation, notified the Law Society.

PARTICULAR 2a) and 2b)

EDWARD GARNER

6. Edward Garner retained the Solicitor in June of 1987 to represent him on the purchase of real property being Lot 232. Plan M-205, and known municipally as 999 Chantenary Drive, Gloucester, Ontario. Mr. Garner had instructed the Solicitor to obtain a survey of the property, if necessary. This real estate transaction closed on or about August 7, 1987.

7. The Solicitor's statement of account, received by Mr. Garner listed a disbursement "to obtaining survey necessary to make good title" in the amount of \$900.00. The Account was not dated but had the Solicitor's "Paid" stamp on it dated September 21, 1987.

8. Mr. Garner paid the Solicitor's account on September 21, 1987.

9. Mr. Garner requested a copy of the survey.

10. By letter dated January 12, 1988 Mr. Garner received a photocopy of a survey with the name of the Ontario Land Surveyors noted at the bottom: "Farley & Martin Ltd." This photocopy of the survey did not disclose a date or signature by any Ontario Land Surveyor.

11. The Solicitor had altered the copy of a survey he had in his possession by making two sharp cuts at each end of the date which appeared at the bottom and middle of his copy of the survey. This created a "flap" which enabled the Solicitor to fold back the original date and reproduce a copy for Mr. Garner with the date deleted. This the Solicitor admits doing. The date deleted was September 28, 1979. This alteration also resulted in the copy of the surveyor's signature being deleted, as it was at a lower level than the date and to the extreme right on the Solicitor's copy.

12. On February 2, 1988 Mr. Garner spoke with a Mr. Murray of Farley Smith & Murray Surveyors Ltd. Mr. Murray advised that the survey firm of Farley & Martin Ltd. had disbanded two and a half years ago and that the survey, a copy of which Mr. Garner had received, was probably done in 1979.

26th November, 1992

13. When the firm of Farley & Martin Ltd. disbanded it was purchased by the firm of Farley, Smith and Murray Surveyors Ltd. Mr. Farley's name was also purchased. All survey files which Farley & Martin Ltd. possessed were given to the new company.

14. The copy of the survey received by Mr. Garner comes from a survey conducted in 1979 for building contractors.

15. The firm of Farley, Smith and Murray Surveyors Ltd. did not receive any request from the Solicitor in regard to having Mr. Garner's property surveyed, either before or after the purchase date. The firm has not received any monies from the Solicitor in payment of any account for a survey of Mr. Garner's property.

16. By letter dated February 22, 1988 Mr. Garner requested that the Solicitor reimburse him for the survey's cost, which Mr. Garner had paid as part of the Solicitor's account.

17. By letter dated February 25, 1988 the Solicitor wrote to Mr. Garner and apologized for the error. In his letter he stated:

... I note an error on my part in that we had intended to order a new survey to update the four corners of your property however, the surveyor indicates that he did not prepare the survey and hence I am refunding \$900.000 to yourself for return directly to National Defence Headquarters.

18. The Solicitor refunded the \$900.00 only after his client discovered the alteration to the survey. The Solicitor has no specific recollection or record of communication with the surveyor on the file.

JOHN KEITH OLSEN

19. John Olsen retained the Solicitor to act on his behalf with respect to the purchase of real property being Lot 94, Plan 4M-563, City of Gloucester and known municipally as 6577 Des Merles Lane, Orleans, Ontario. The transaction closed on or about August 14, 1987.

20. Mr. Olsen received a statement of account from the Solicitor, which indicated under Paid Disbursements, "to obtaining a survey necessary to make good title", in the amount of \$900.00.

21. Mr. Olsen paid the Solicitor's account by cheque dated October 16, 1987.

22. The survey received by Mr. Olsen was an enlarged photocopy of a portion of a building location plan, and had been reproduced such that it was not centered on the page but to the right side of the page with the Solicitor's name and address appearing by way of a stamp at the lower left of the page. This document as reproduced for Mr. Olsen had no date or signature or embossed seal of a land surveyor on it. It was not "a survey necessary to make good title" as referred to in the Solicitor's account rendered to Mr. and Mrs. Olsen. It was reproduced from a building location survey prepared by Webster & Simmonds Survey Ltd., Ontario Land Surveys, which building location survey contains a surveyors certificate indicating that the survey was completed on June 1, 1987 and dated June 17, 1987.

23. Mr. Olsen did not question the survey, which had the Solicitor's stamp on it.

24. On June 27, 1988 the Solicitor transferred \$900.00 from his general account to his trust account and issued a trust cheque payable to the Department of National Defence.

ALAIN MAILHOT

25. Alain Mailhot retained the Solicitor in April, 1986 to represent him on the purchase of real property being, Lot 51, Plan 50M-107 Township of Cumberland, Land Registry Office at Russell, Ontario known municipally as 499 Princess Louise Drive, Navan, Ontario, which transaction closed on May 2, 1986.

26. By statement of account dated May 8, 1986, the Solicitor listed under Paid Disbursements, "obtain a survey of the property", in the amount of \$650.00.

27. Mr. Mailhot paid the Solicitor's account on May 8, 1986.

28. Mr. Mailhot requested a copy of the survey.

29. By letter dated March 7, 1988, Mr. Mailhot received the "survey". He noticed that it was not a survey but a boundary line diagram of his property. The diagram was not signed by an individual or the company who prepared it. As it did not appear to be a property survey, Mr. Mailhot destroyed it.

30. Between May, 1987 and February, 1988, Mr. Mailhot made numerous requests of the Solicitor seeking a proper survey. Subsequent thereto, Mr. Mailhot obtained an altered copy of a Plan of Building Location Survey signed by W.H. Moffat, Ontario Land Surveyor on March 7, 1986 certifying that the survey represented by this Plan was completed on October 22, 1985. Mr. Mailhot retained the Solicitor on his transaction in April, 1986.

31. Mr. Mailhot's copy of a Plan of Building Location Survey had been altered by the Solicitor. On the copy of the Plan in the Solicitor's possession, the Solicitor had made three sharp cuts around the surveyor's embossed seal which was situated over a preprinted note surrounded by a circle. The preprinted note read, "This is not a valid copy unless embossed with seal." The three cuts created a flap whereby the Solicitor folded over the surveyor's embossed seal and the preprinted note in order to make the photocopy for his client. Had the Solicitor not carried out this deception by altering the document, the embossed seal would not have been revealed on the photocopy while the circled note would have. This could have raised concerns of the client as to the validity of the document.

32. The surveyor was not instructed by the Solicitor to prepare a survey of Mr. Mailhot's property nor did the surveyor receive any payment from the Solicitor for services rendered. The survey actually signed by Mr. Moffat was completed for the building contractors and not for the use of the purchaser.

33. By letter dated June 29, 1988, the Solicitor forwarded to Mr. and Mrs. Mailhot a firm trust cheque in the amount of \$650.00. The Solicitor apologized and explained that due to a work overload and an inadequate "tickler-reminder" system, his office overlooked ordering the updated survey.

34. On June 27, 1989, a meeting took place attended by Reginald Watson, former Discipline Counsel, the Solicitor, and his Counsel. At that meeting the Solicitor admitted that he had altered the surveys provided to his clients Garner and Mailhot. In addition the Solicitor admitted that he had been misleading his clients, Mr. Garner, Mr. Mailhot, and Mr. Olsen, by advising them that the surveys had been ordered.

PARTICULAR 2c)i)

35. Upon attending at the Solicitor's office on July 6, 1988, Keith Regehr, former Counsel - Audit & Investigation with the Law society, located in the Solicitor's file regarding Mr. Garner's file, a copy of the survey, forwarded to Mr. Garner, with scissor or razor cuts on either side of the date and fold-mark above the date. The Solicitor denied to Mr. Regehr knowing as to how the cuts were made and he denied having done it himself. He also denied instructing a member of the staff to do it. The only explanation that he could offer was that perhaps it had become jammed in the photocopier.

36. On June 27, 1989, during a meeting with Reginald Watson, former Discipline Counsel with the Law Society of Upper Canada, on June 27, 1989 the Solicitor advised that he had altered the surveys himself. He believed that he had done the alterations with a sharp pair of scissors and then photocopied the altered surveys to send to his clients.

PARTICULAR 2e)

37. Upon attending at the Solicitor's office on July 6, 1988 and examining the Solicitor's file in relation to Mr. Bartholomew's purchase, Keith Regehr discovered that the file contained Powers of Attorney which had been signed by both Mr. and Ms. Bartholomew in blank. There was no indication of who the attorney was and there was no signatures or names of witnesses.

38. Upon attending at the Solicitor's office on July 6, 1988, and examining the Solicitor's file in relation to Mr. Davie's purchase, Keith Regehr discovered that the file contained a Power of Attorney signed in blank by Mr. Davie with no indication of the name of the attorney or the name or signature of the witness.

39. On June 27, 1989, during a meeting with Reginald Watson, former Discipline Counsel, the Solicitor advised that the reason for obtaining the blank Power of Attorneys, was that in a number of cases the clients may have been in transit at the date of closing and therefore he required power of attorneys. He was not sure whether he had suggested the power of attorney or the client had suggested it. He stated that the clients had no objection to signing a blank Power of Attorney.

V. DISCIPLINE HISTORY

40. The Solicitor has no previous discipline record.

DATED at Toronto this 28th day of April, 1992."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Frances James Altimas be suspended for a period of one month.

REASONS FOR RECOMMENDATION

The Agreed Statement of Facts and representations of counsel establish the following facts. The Solicitor is a sole practitioner in Orleans, a city in the Regional Municipality of Ottawa-Carleton. His clients included members of the Armed Forces for whom he acted in real estate transactions. Frequently his accounts in these transactions were paid (by reimbursement or otherwise) by the military, presumably when the purchase or sale arose out of a job-related transfer. In the three transactions which form the basis of the complaint, the client was billed for the cost of surveys when surveys were never ordered nor were disbursements incurred. In all three cases, the solicitor supplied the client with copies of "doctored" pre-existing surveys to disguise the fact they had not been ordered for the client. The solicitor thereafter denied that the doctoring had occurred when confronted with the evidence. The chronological particulars are as follows as taken from the Agreed Statement of Facts.

In April 1986, the solicitor was retained in a real estate transaction by one Alain Maillot. On May 2 of the same year, the deal closed without a survey having been ordered or delivered. The client was billed \$650.00 for a survey and on May 8, 1986 he paid the bill. In May of the following year, Maillot initiated a series of requests of the solicitor for a copy of the survey which, as will appear, were not answered until March of 1988.

In the meantime, in June of 1987, one Edward Garner retained the solicitor to act in his real estate transaction. He instructed the solicitor to secure a survey if necessary. On May 7, 1987 the transaction closed. An account was rendered including a disbursement for the cost of a survey in the amount of \$900.00. No survey had ever been ordered nor had the disbursement actually been incurred. On September 21, 1987, the account including the "cost" of the survey was paid by the client.

At about the same time, one John Olsen retained the solicitor in his real estate transaction. On August 14, 1987, the transaction closed. An account was similarly rendered including a disbursement for the cost of a survey in the amount of \$900.00. As in the case of Garner and Maillot, no survey had ever been ordered nor had the disbursement actually been incurred. On October 16, 1987, Olsen paid the account including the "cost" of the survey in the amount of \$900.00.

Presumably the events described above would have lain undisturbed were it not for Garner's request for a copy of his survey in early 1988. What he received from the solicitor on January 12, 1988 was a photocopy of an original survey which had been "doctored" so as to disguise the date and the surveyor's signature. If the date had not been eliminated from the copy, it would have been apparent to anyone looking at it that the survey was 10 years old and could not have been the one which the client believed had been ordered for him. The client's suspicions were aroused and after conducting an investigation, he complained to the solicitor. On February 25, 1988, the solicitor admitted the "error" and returned the money to the client for delivery to the Defence Department.

Subsequently, on March 7, 1988, the solicitor delivered a "doctored" survey to his client of a year earlier (Maillot) who had been demanding it for some time. The survey was altered by the solicitor so as to avoid, in the words of the Agreed Statement, "concerns" being aroused as to the validity of the document.

There is no evidence, in the case of Olsen, that he demanded delivery of his survey. The solicitor had apparently unilaterally provided him with a copy of a survey which had also been "doctored" so as to remove the name of the surveyor and the date of its preparation in order to disguise the fact that it was not a true survey "necessary to make good title" but rather a mere photocopy of a building location survey prepared at an earlier date.

While your Committee was not provided with the details of the interim steps, it is clear that, for whatever reason, some three months after delivery of the Maillot survey, the solicitor refunded the monies paid by both Maillot and Olsen for their surveys.

In summary, therefore, in all three cases the clients had been billed for the cost of surveys which were never ordered or delivered. What they received in fact, upon pressing (in two of the three cases) for deliver of their surveys, were copies of pre-existing surveys which came into existence at an earlier time and were presumably paid for by others, the originals of which had been altered so as to generate copies which would not arouse suspicion on the part of the clients.

When first confronted in July of 1988 by an officer of the Society with the evidence of the alteration in the Garner survey, the solicitor falsely denied that he had altered the survey. Ultimately in June of 1987, he acknowledged that indeed he had never ordered the surveys and that he had created the copies in the manner and for the purpose described above.

In an unrelated matter, it was determined during the course of the investigation that the solicitor had obtained Powers of Attorney in blank to use if necessary in the event that the clients had moved to their next posting at the time that documents required to be executed. This is a highly improper practice which, while objectionable and dangerous, was in this case motivated only by a desire to convenience the client and thus, while amounting to misconduct, does not materially contribute to the misconduct relating to the surveys as described above, at least from the point of view of penalty.

It was jointly submitted on behalf of the solicitor and the Society that in the circumstances outlined, an appropriate penalty would be a reprimand in Convocation, together with the payment of a fine in the amount of \$5,000.00. Counsel for the Law Society defended the appropriateness of a reprimand on the basis that the Society had been responsible for unwarranted delay in the management of the complaint. After anxious consideration, your Committee is of the view that the suggested penalty is inadequate. In rejecting the joint submission, your Committee is mindful of the policy recently adopted by Convocation that Benchers sitting on discipline committees be encouraged to accept a joint submission except where the committee concludes that the joint submission is outside a range of penalties that is reasonable in the circumstances. In our view it falls outside (on the leniency end) what must be considered reasonable in all of the circumstances. Having given the joint submission careful consideration, we reject it. What is the appropriate penalty in the circumstances? No viva voce evidence was offered with respect to motive but it was explained in mitigation on behalf of the solicitor that due to extraordinary pressure of work in his sole practice the solicitor failed to order surveys when he should have. He knew that he should have and in order to avoid making it obvious that they had not been ordered, he included disbursements for them in his accounts. Thereafter, to further forestall detection of either his failure to order them or his improper charges, he provided falsified documents to the client and ultimately denied misconduct during the investigation by the Law Society. Having deceitfully started the ball rolling, he panicked and failed to own up to his wrongdoing.

26th November, 1992

On behalf of the solicitor it was said that the deceitful conduct arose out of the failure to order the surveys rather than in an attempt to defraud his clients of their cost. He suggested that a solicitor held in such high regard by his peers and in the community, conducting a busy and financially successful practice would be unlikely to set about defrauding two or three clients out of relatively small sums of money. There is considerable force in this submission in the view of the Committee. For his part, counsel for the Society accepted that either inference could be drawn while preferring neither.

In the final analysis it matters little from which of the inferences the solicitor's motive should be drawn. In either case his behaviour was dishonest. If he had not been detected, he would have taken money from innocent clients under false pretences. Further, he engaged in reprehensible behaviour in attempting to cover his tracks and avoid detection. Were it not for other factors, the appropriate penalty would be considerably more severe than that suggested either by the Joint Submission or your Committee's recommendation. The first of these considerations relates to the solicitor's reputation. Many letters from colleagues at the Bar and citizen clients were tendered in evidence. It is apparent that at the time of these events the solicitor enjoyed an enviable reputation for integrity and service amongst his colleagues and in the community at large. His entitlement to rely upon his reputation hereafter will have been seriously undermined by these events. They are deeply damaging to him personally and it is clear that he will never be the same professionally. A factor noted by counsel for the Law Society is the delay in the prosecution of these allegations of misconduct. The Solicitor admitted fault in June of 1989. A period in excess of two years elapsed before the complaint was issued. No meaningful explanation was offered for the delay. The third factor is that over this period of time his practice shrank to about one third of its previous level of activity. Undoubtedly these events have weighed heavily upon him over a long period of time and his capacity to make amends and rebuild his self respect have been retarded.

Your Committee is of the opinion that, in view of all of the above circumstances, while a fine is inappropriate, a period of suspension is required to make it clear to the solicitor that dishonest and unlawful conduct will not be countenanced. In view in particular of the delays, it is recommended that the solicitor be suspended from practice for a period of one month.

Frances James Altimas was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 21st day of March, 1969.

ALL OF WHICH is respectfully submitted

DATED this 29th day of May, 1992

"D. Scott"
David W. Scott, Q.C.

It was moved by Mr. Strosberg, seconded by Mrs. Weaver that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Strosberg, seconded by Mr. Hill that the Recommendation as to Penalty contained in the Report that is, that the solicitor be suspended for 1 month, be adopted.

There were submissions by both counsel in support of the joint recommendation.

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

It was moved by Ms. Elliott, seconded by Ms. Weaver that in addition to the 1 month suspension the solicitor be reprimanded in public.

Withdrawn

It was moved by Ms. Graham, seconded by Mr. Wardlaw that the solicitor be suspended for 6 months.

Counsel, the solicitor, the reporter and the public were recalled and informed of the increased penalty.

The matter was stood down.

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APPLICATION FOR COSTS - ANTHONY MICHAEL SPECIALE

Mr. Strosberg presented the joint request of counsel for the Society and counsel for the solicitor that a special panel of Convocation be established to hear Mr. Speciale's application for costs.

It was moved by Mr. Strosberg, seconded by Mr. Scott that the Treasurer be authorized to name a panel of 7 Benchers to hear Mr. Speciale's application for costs.

Carried

Mr. Bastedo took no part in the discussion and did not vote.

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RESUMPTION OF THE FRANCIS JAMES ALTIMAS MATTER

Mr. Neville, counsel for the solicitor indicated that the solicitor was willing to proceed and further submissions were made on his behalf.

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

The motion for a 6 month suspension was lost and the motion for a 1 month suspension was carried, the suspension to be effective December 1, 1992.

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

Counsel and the solicitor retired.

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Re: BRUCE JOHN DALEY, Toronto

Mr. Strosberg placed the matter before Convocation.

The reporter was sworn.

Ms. Graham withdrew.

Mr. Gavin MacKenzie appeared for the Society and Mr. Martin Teplitsky appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 7th October, 1992, together with an Affidavit of Service sworn 21st October, 1992 by Louis Katholos that he had effected service on the solicitor by courier on 9th October, 1992 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor 26th November, 1992 (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

Donald H.L. Lamont, Q.C., Chair
Fatima Mohideen
Netty Graham

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

Gavin MacKenzie
for the Society

BRUCE JOHN DALEY
of the City
of Toronto
a barrister and solicitor

Martin Teplitsky
for the solicitor

Heard: September 16, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 12, 1991, Complaint D34/91 was issued against Bruce John Daley, alleging that he was guilty of professional misconduct. On September 16, 1992 Complaint D34/91 was withdrawn on consent and Complaint D34a/91 was issued on consent against Bruce John Daley alleging that he was guilty of professional misconduct and it is this latter complaint that was the subject matter of the hearing.

The matter was heard in public on September 16, 1992, before this Committee composed of Donald H.L. Lamont, Q.C., Chair, Fatima Mohideen and Netty Graham. The Solicitor attended the hearing and was represented by Martin Teplitsky. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

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

Complaint D34a/91

- 2(a) He asked clients to enter into an oral agreement to pay him a fee of \$750,000, together with \$100,000 for disbursements, failed to obtain approval in accordance with the Solicitors Act, and charged a fee that was grossly excessive in the circumstances.

Evidence

Part of the evidence before the Committee contained an Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of amended complaint D34a/91 and is prepared to proceed with a hearing of this matter on September 16, 1992.

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. Bruce John Daley (the "Solicitor"), having been advised by his counsel, Martin Teplitsky, admits the facts as set forth in this agreed statement of facts for the purposes of this hearing. The Solicitor also admits the allegation of professional misconduct particularized in complaint number D34a/91. Viva voce evidence will be led at the hearing in relation to the issue of penalty.

IV. BACKGROUND FACTS

4. The Solicitor was called to the Ontario bar on April 9, 1981. He is, and at all times material to this complaint was, a partner in a firm known as Daley, Byers & Phillips in Toronto.

V. FACTS RELEVANT TO COMPLAINT D34a/91

5. The Solicitor was retained by Peter Wu, his son, Gilbert Ng, and their families in August, 1987. Wu and Ng had been indicted in California as a result of an extensive investigation into an alleged conspiracy to traffic in illegal drugs. Additionally, the United States government had commenced civil proceedings against them under the Racketeer Influenced and Corrupt Organizations Legislation (R.I.C.O.), and had seized certain property which they possessed. The allegations against Wu and Ng were that they had facilitated the laundering of proceeds of the drug trafficking scheme by the use of Hong Kong corporations that they controlled. The Solicitor was retained in relation to these proceedings and related matters.

6. The Hong Kong corporations invested in real estate in the United States. The prosecution's theory was that drug profits were transferred offshore and were returned through the vehicle of the Hong Kong corporations' real estate investments. The Hong Kong corporations held title to the real estate, but the prosecution alleged that the real estate was held in trust for the principals in the drug trafficking conspiracy.

26th November, 1992

7. Wu and Ng retained the Solicitor to act on their behalf. Wu and Ng were living with Wu's daughter, (Ng's sister) Catherine Cheung, in Toronto. Wu had become a landed immigrant in 1984.

8. The Solicitor first learned of the matter from a member of his firm's staff, who wrote him a memorandum dated August 12, 1987, which read as follows:

"Re: Referral from Scott Harlow - New Client
Contact: Danny Cheung - phone 222-5442
Client: His father-in-law - Mr. Woo (sic)

Mr. Woo is apparently a very wealthy man originally from Hong Kong. During the war he began a friendship with a man from San Francisco. Mr. Woo gave a great deal of money (in the area of \$1,000,000.00) to his friend in San Francisco on the understanding that it would be invested for him. Since that time the gentleman in San Francisco died and his son was carrying on his business affairs.

It now appears that the son has been charged on various narcotics charges in the U.S. Mr. Woo has been implicated on the basis that his money was used to establish "shell" companies which were in fact actually being used for the sale of narcotics.

Mr. Woo is 66 years old and very upset about the whole matter. He has not formally been served with any papers from the U.S. yet and only learned about the arrest and his involvement through the newspaper." [emphasis in original]

A copy of this memorandum is reproduced under tab 1 of the book of documents which is filed with this agreed statement of facts.

9. Scott Harlow, who referred the matter to the Solicitor, is an Ontario lawyer who was called to the bar in 1983. The clients obtained Harlow's name from the lawyer referral service.

10. Wu, and Danny and Catherine Cheung met with the Solicitor initially on August 12, 1987. They, along with another son of Wu, Hubert Wu, met with the Solicitor again on August 15, 1987. At the August 15 meeting, Peter Wu, Catherine Cheung, and Danny Cheung all signed a retainer, which Wu signed also on Ng's behalf and on behalf of other members of their family. A copy of the retainer is reproduced under tab 2 of the book of documents.

11. On August 14, 1987, the clients transferred \$30,000 (U.S.) to the Solicitor. These funds were wired from Hong Kong. The \$30,000 (U.S.) was converted to \$39,555 in Canadian funds and deposited into the Solicitor's firm's mixed trust account.

12. On August 17, 1987, the Solicitor arranged for \$20,000 of these funds to be transferred from the firm's mixed trust account to its general account. The Solicitor issued a fee billing in the amount of \$20,000 on the same date. The fee billing describes the services rendered as "my fee for retention of my firm on various matters requiring emergency attention". A copy of the August 17, 1987 account is under tab 3 of the book of documents.

13. On August 19, 1987, the clients gave to the Solicitor a cheque in the amount of \$262,994.50 payable to the Solicitor in trust. The Solicitor arranged for \$20,000 (U.S.) of these funds to be used to open a U.S. dollar daily interest account in his name in trust for Peter Wu. The balance of the funds, in the amount of \$242,994.50 were invested in a thirty-day term deposit receipt in the name of Bruce Daley in trust.

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14. On August 27, 1987, the clients gave to the Solicitor's firm a further cheque in the amount of \$96,985, payable to the Solicitor's partner, Larry Phillips, in trust. These funds were invested in a thirty-day term deposit in the name of Larry Phillips in trust.

15. On September 25, 1987, the Solicitor rendered an account in the amount of \$80,000, together with disbursements in the amount of \$7,526.89. This second account was satisfied out of the funds held in trust. A copy of the September 25, 1987, account is under tab 4 of the book of documents.

16. Thereafter, the Solicitor told the clients that he would continue to act for them only if they were to pay him a total of \$750,000, together with \$100,000 for disbursements.

17. On November 5, 1987, in response to a request from Catherine Cheung, the Solicitor arranged for \$20,000 of the funds held in trust to be paid to her.

18. On January 12, 1988, in response to a further request from Catherine Cheung, the Solicitor arranged for a further \$40,000 of the funds held in trust to be paid to her.

19. By a letter dated January 28, 1988, the Solicitor wrote to the clients enclosing an account in the amount of \$250,000. The account read simply "To our request for payment on account pursuant to agreement with respect to fees - \$250,000". Copies of the January 28, 1988 letter and the undated \$250,000 account are under tab 5 of the book of documents. The letter and account were typed by a secretary in the office of the firm's auditor.

20. On January 29, 1988, the Solicitor's firm instructed their bankers to convert the funds held in term deposits in trust for Peter Wu to Canadian funds on February 1, 1988; to deposit \$25,000 into the firm's general account; to deliver \$225,000 to the firm's auditors, payable to the auditors in trust; and to leave the balance of the funds in a daily interest account in trust for Peter Wu. A copy of the Solicitor's firm's letter of instructions to its bankers is under tab 6 of the book of documents.

21. Pursuant to these instructions, a bank draft in the amount of \$225,000 was deposited in the firm's trust account on February 1, 1988. On the same day, the auditors issued three cheques in the amount of \$75,000 each to the Solicitor and each of his two partners.

22. On April 20, 1988, the Solicitor rendered a further account in the amount of \$19,961.44 for fees, together with disbursements in the amount of \$4,877.26 to the clients. Again, this account was paid out of the funds held in trust. A copy of the account is under tab 7 of the book of documents.

23. On September 13, 1988, the clients terminated the Solicitor's retainer and retained a new counsel, Allan Mintz. Mintz wrote to the Solicitor on September 14, 1988, enclosing a direction. Copies of the September 14, 1988 letter and direction are under tab 8 of the book of documents. The Solicitor replied to Mintz's letter on September 15, 1988. A copy of that letter is under tab 9 of the book of documents.

24. Mintz arranged for the Solicitor's accounts to be assessed. Wu and Ng wrote a letter of complaint to the Law Society concerning the Solicitor.

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25. The assessment of the Solicitor's accounts was settled in September, 1989. The Solicitor's firm repaid the clients \$301,300 of the funds which were being held in trust. As a term of the settlement Wu and Ng signed a letter to the Society dated September 25, 1989, informing it that they did not wish to continue their complaint. A copy of the September 25, 1989, letter is under tab 10 of the book of documents.

26. The United States has not proceeded with its extradition request.

DATED at Toronto this 16th day of September, 1992."

The Solicitor and his counsel admitted that he was guilty of the allegation and of professional misconduct.

The Committee accordingly found the Solicitor guilty of professional misconduct as alleged in the Complaint.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Bruce John Daley be suspended for a period of six (6) months and be ordered to pay the Law Society's costs in the amount of \$10,000.

REASONS FOR RECOMMENDATION

The Solicitor gave evidence on the issue of penalty. He recalled that he first came into contact with the clients on August 12, 1987. The clients of the Solicitor were Peter Wu and various members of his family.

On August 14, 1987 the clients forwarded \$30,000 U.S. to the Solicitor which was deposited into the firm's trust account as \$39,555 Canadian.

On August 17, 1987, the Solicitor billed \$20,000 as the retainer fee and paid the account on the same date out of the trust account. This is Exhibit 1 to these Reasons.

On August 19, 1987 the clients gave the Solicitor \$262,994.50 of which \$242,994.50 was invested in a term deposit in the Solicitor's name in trust.

On August 27, 1987, a further \$96,985 was paid and invested in the name of Larry Phillips, a partner in the firm, in trust.

The Solicitor recounted how between August 12, 1987 and September 25, 1987 much of his time was tied up in working on this case although he did do non-court work for other clients as well. An account rendered on September 25, 1987 for \$80,000 with disbursements of \$7,526.89 sets out in considerable detail the work that was performed and the complicated matters in which the Solicitor was or could be involved. They included legal research, a trip to Hong Kong and San Francisco, the U.S. Federal indictment of Mr. Wu, possible seizure of assets of Mr. Wu and his companies, and possible extradition proceedings. This account is Exhibit 2 to these Reasons.

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The Solicitor said that fees were discussed at the first meeting with his clients and pursued by the clients again in October, 1987 upon his return from Hong Kong. The Solicitor said that the clients asked for a set or fixed fee. He told them that a fixed fee would first have to be approved by a taxing master and that the fee would necessarily have to be based on a lot of unknowns. He said that he consulted his partners and came up with the fee of \$750,000 with \$100,000 disbursements. This would be for work related to the California indictment and was based on (1) his monthly contribution to his firm, (2) a pending trial in California of an alleged co-conspirator estimated to last three to five months which the clients had requested he attend on a watching brief, (3) conducting negotiations and (4) possible extradition proceedings.

The Solicitor said that the clients did not want the fixed fee arrangement pre-approved because of the publicity. The Solicitor said that he acceded to the clients' request not to have the fee pre-approved. He admitted on cross-examination that this was an important fee for his or any firm and that there was no reason why this agreement had not been reduced to writing.

Subsequently, the Solicitor told the clients that he would continue to act for them only if they were to pay him a total of \$750,000 together with \$100,000 for disbursements.

On the request of Catherine Cheung the Solicitor released from the trust money \$20,000.00 to her on November 5, 1987 and \$40,000.00 on January 12, 1988.

On January 28, 1988 the Solicitor wrote to the clients requesting a further \$400,000 in addition to \$350,000 received to make up the total of "fees quoted for this matter of \$750,000 in addition to the balance of the \$100,000 quoted for disbursements". Another account in the amount of \$250,000 not particularized was enclosed with this letter. They are Exhibit 4 to these Reasons.

On January 29, 1988 the Solicitor's firm instructed the firm's banker to transfer on February 1, 1988 the term deposit by depositing \$25,000 into the firm's general account and transferring \$225,000 to the firm's auditors and to leave the balance of funds in a daily interest account in trust for Mr. Wu.

On February 1, 1988 the firm's auditors issued three cheques for \$75,000 each to the Solicitor and each of his two partners.

On April 20, 1988 a further account was rendered for \$19,961.44 for fees, not particularized and disbursements of \$4,877.26. This is Exhibit 5 to these Reasons.

At a meeting in Hong Kong in August 1988 the Solicitor was concerned that the clients were stalling about further payment. The Solicitor said that the clients assured him that this was not the case and that they would like him, for tax purposes, to render his accounts to a number of companies owned by the clients for business consulting fees. The Solicitor said he told them he could not do that.

On September 13, 1988 the clients terminated the Solicitor's retainer and retained other counsel who wrote to the Solicitor demanding an immediate accounting of \$507,000 which had been deposited with him.

New counsel also arranged for the Solicitor's accounts to be assessed and the clients, Peter Wu and his son, Gilbert Ng, wrote a letter of complaint to the Law Society concerning the Solicitor.

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In September of 1989 the Solicitor settled his account for fees and repaid \$301,300 to the clients. A term of the settlement called for Mr. Wu and Mr. Ng to sign a letter to the Law Society indicating that they did not wish to continue the complaint. This letter was sent to the Law Society.

Although there were a number of complicated matters for the Solicitor to deal with, the Solicitor stated in cross-examination that he did not and does not keep dockets because of the nature of his work.

The trial against the alleged co-conspirator did not proceed because the co-conspirator entered into a plea bargain and the U.S. Government has not proceeded with its extradition request.

The Committee in dealing with penalty had the Solicitor's admission that he failed to obtain a taxing officer's approval of the requested fee of \$750,000 plus disbursements of \$100,000, albeit the clients did not want to have publicity; but of more importance to our penalty deliberations was the finding that the requested fee was "grossly excessive".

In addition to that finding we considered the following:

- (a) the Solicitor was in his sixth year of practice at the time of the event in question;
- (b) the Solicitor had little knowledge of California or U.S. Federal Law and had never acted as counsel at an extradition hearing in Canada or Hong Kong;
- (c) money laundering was not then a crime in Canada although legislation making it so was being contemplated at the time;
- (d) the Solicitor billed and paid out of trust funds the retainer fee of \$20,000 for no services;
- (e) the admission "that he would continue to act for them only if they were to pay him a total of \$750,000, together with \$100,000 for disbursements (paragraph 16 of the Agreed Statement of Facts)";
- (f) the Solicitor's letter of January 26, 1988 demanding the balance towards the \$750,000 and "that this will be the only extension in respect of fees";
- (g) the Solicitor did not keep docket entries of times and work done;
- (h) the settlement and agreement to return \$301,300 of trust funds to the clients and the clients' agreement to withdraw their complaint with the Law Society.

Counsel for the Solicitor suggested for penalty a reprimand in Committee, or a reprimand in Convocation or a short suspension together with payment of the Law Society's costs fixed at \$10,000. The Law Society Counsel recommended suspension of three to six months and payment of the costs of \$10,000. The Solicitor and his counsel said that a suspension would be catastrophic to the Solicitor's firm and clients. The firm now has eleven lawyers. The Solicitor's work is seventy-five percent criminal.

The Committee gave lengthy consideration to these factors, the findings of professional misconduct that the requested fees and disbursements were "grossly excessive", the above summary of concerns from the Agreed Statement of Facts and The Solicitor's evidence as to penalty.

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We think it is very important for the profession and the public that the Law Society express strong disapproval of the Solicitor's professional misconduct.

Accordingly, we unanimously recommend that the Solicitor be suspended for six months and pay the costs of the Law Society in the amount of \$10,000.

ALL OF WHICH is respectfully submitted

DATED this day of October, 1992.

"D. Lamont"
Donald H.L. Lamont, Chair

It was moved by Mr. Strosberg, seconded by Mr. Scott that the Report of the Discipline Committee be adopted.

Mr. Teplitsky made submissions regarding the fee of \$750,000 which was described in the particular as being grossly excessive. It was his position that the amount should have been \$370,000. The solicitor's retainer terminated prior to the submission of the account for \$750,000. It was conceded that the fee actually charged of \$370,000 was excessive in the circumstances. Mr. Teplitsky was not asking that the Report be amended.

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

The motion to adopt the Report was carried.

Mr. McKinnon voted against the Report and wished his dissent to be noted in the Minutes.

Counsel, the solicitor, the reporter and the public were recalled and advised that the Report was adopted in light of the submissions made by Mr. Teplitsky.

It was moved by Mr. Strosberg, seconded by Mr. Scott that the Recommendation as to Penalty contained in the Report that is, that the solicitor be suspended for a period of 6 months and pay costs of \$10,000, be adopted.

Both counsel made submissions that the solicitor be suspended for 3 months during which time he would work full time for an organization called Street Link on a volunteer basis for 8 hours a day and in addition pay the Society's costs of \$10,000.

Mr. Teplitsky further undertook that the solicitor would not use his employment with Street Link to produce business for his law firm.

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

It was moved by Mr. Strosberg, seconded by Mr. Scott that the solicitor be suspended for 3 months effective January 1, 1993 provided that he work full time in an organization without pay as approved by the Chair and Vice Chairs of Discipline and provided the organization has no connection with persons charged with or involved in the legal process and further to pay the Society's costs of \$10,000. The solicitor would further undertake not to refer people to his law firm.

Not Put

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The motion to suspend for 6 months as contained in the Recommendation as to Penalty was lost.

It was moved by Mr. Bastedo, seconded by Mr. Wardlaw that the solicitor be suspended for 4 months and pay costs of \$10,000 effective January 1, 1992.

Carried

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

Counsel and the solicitor retired.

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CONVOCATION ROSE AT 5:00 P.m.

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Confirmed in Convocation this day of 1992.

Treasurer