

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 26th March, 1998

9:00 a.m.

PRESENT:

Acting Treasurer (Vern Krishna, Q.C.), Angeles, Arnup, Backhouse, Bobesich, Carey, Carpenter-Gunn, Carter, Chahbar, Cole, Copeland, Crowe, Gottlieb, MacKenzie, Puccini, Sealy, Swaye, Topp and Wright.

.....

.....

IN PUBLIC

.....

The reporter was sworn.

Ms. Lesley Cameron, Senior Counsel - Discipline reviewed the order in which the matters would proceed and introduced Mr. Brian Gover who acted as Duty Counsel.

DISCIPLINE COMMITTEE

Re: Farida Mir Mohammed SHAIKH - Toronto

The Secretary placed the matter before Convocation.

Ms. Backhouse and Mr. Crowe withdrew for this matter.

Ms. Cameron appeared on behalf of the Society and Ms. Janet Leiper appeared on behalf of the solicitor who was present.

The Report of the Discipline Committee dated September 17th, 1997 and marked Exhibit 1 was adopted at a previous Convocation.

Ms. Cameron requested that the following correction be made to the Report:

- page 6, 1st paragraph under heading Recommendation as to Penalty, and page 7, middle of 2nd paragraph the words "any of" be deleted so that the sentences would then read:

"..... that the Solicitor be reprimanded in Convocation if she produces the books and records set out at paragraph 22 of the Agreed Statement of Facts....."

The recommended penalty of the Discipline Committee is that the solicitor be reprimanded in Convocation if she produces the books and records set out at paragraph 22 of the Agreed Statement of Facts, failing which she be suspended for a period of 1 month and thereafter until she makes that production.

Ms. Cameron made submissions in support of a 1 month suspension. She advised that there were bank statements which had not been received.

Ms. Leiper made submissions in support of a reprimand in Convocation with an undertaking from the solicitor.

There were questions from the Bench.

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

It was moved by Mr. Topp, seconded by Mr. Wright that the matter be adjourned and that counsel issue a subpoena to the Bank to bring the records to Convocation.

Lost

It was moved by Mr. Cole, seconded by Ms. Sealy that the solicitor be suspended for a period of 1 month and thereafter until she produces her books and records.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 1 month and thereafter until she produces her books and records.

Convocation granted the request by Ms. Leiper for the suspension to commence on April 26th, 1998.

Re: Richard D'Arcy HARLOW - Vaughan

The Secretary placed the matter before Convocation.

Messrs. Cole and Bobesich and Ms. Angeles withdrew for this matter.

Ms. Katherine Seymour appeared for the Society and Mr. Charles Mark appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 12th December, 1997, together with an Affidavit of Service sworn 2nd January, 1998 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th December, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 5th January, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Tamara Stomp, Chair
Thomas E. Cole
Nora Angeles

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

Rhonda Cohen
for the Society

RICHARD D'ARCY HARLOW
of the City
of Vaughan
a barrister and solicitor

Charles C. Mark, Q.C.
for the solicitor

Heard: August 27, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 11, 1996 Complaint D143/96 was issued against Richard D'Arcy Harlow alleging that he was guilty of professional misconduct, or in the alternative, conduct unbecoming a barrister and solicitor.

The matter was heard in public on August 27, 1996 before this Committee composed of Tamara Stomp, Chair, Thomas E. Cole and Nora Angeles. The Solicitor attended the hearing and was represented by Charles C. Mark, Q.C. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

The following particular was found to have been established:

Complaint D143/96

2. a) He failed to comply with the Income Tax Act, R.S.C., 1952, Chapter 148, as amended, by failing to report income earned in the amount of \$75,217.00 in connection with accounts rendered to his client Nesel Fast Freight Incorporated between 1988 and 1991.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D143/96 and is prepared to proceed with a hearing of this matter on August 27-28, 1996.

II. IN PUBLIC/IN CAMERA

2. The Solicitor will be bringing an application, pursuant to Section 9 of the Statutory Powers Procedure Act, to have this matter heard *in camera*. The Law Society will be opposing the application.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D143/96 and this agreed statement of facts with his counsel, Charles C. Mark, Q.C., and admits the particulars and facts 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 on March 21, 1975, and is 49 years old. He was at all relevant times a sole practitioner in Toronto.

5. On March 22, 1994, the Law Society received a letter of complaint from the Solicitor's ex-wife, Yolande Harlow-Bitton (Document Book, Tab 1). The letter raised a number of complaints against the Solicitor, most of which related to the matrimonial litigation between Ms. Harlow-Bitton and the Solicitor.

6. After its review of the complaints, and some correspondence with the Solicitor and his counsel, the Law Society concluded that all but one of the allegations made against the Solicitor by Ms. Harlow-Bitton were either unfounded or outside the jurisdiction of the Law Society. The remaining allegation was that the Solicitor had failed to disclose certain income to Revenue Canada, this being the subject-matter of this Complaint.

7. It was alleged by Ms. Harlow-Bitton that the Solicitor had failed to disclose income on certain of his tax returns to reduce his reported income and thereby justify his default on support payments to a previous ex-wife. A copy of the judgment, dated October 16, 1985, of the Honourable Mr. Justice Osborne determining the family law issues between the Solicitor and his first wife (Document Book, Tab 2) was provided by Ms. Harlow-Bitton. The Solicitor denies that his former liability to his first wife was a factor in the non-reporting of income.

Particular 2 (a) he failed to comply with the Income Tax Act, R.S.C., 1952, Chapter 148, as amended, by failing to report income earned in the amount of \$75,217.00 in connection with accounts rendered to his client Nesel Fast Freight Incorporated between 1988 and 1991.

8. Nesel Fast Freight Incorporated ("Nesel") was a client of the Solicitor from at least early 1987 until the present time.

9. In the period from December 1987 to January 1991, the Solicitor suppressed his receipt of fee income from Nesel in a total amount of \$75,217.00 by not recording the accounts as having been rendered in his accounts receivable ledger and not depositing the monies received from the client in his firm account. In addition, the Solicitor did not report this amount on his income tax returns during the period.

10. The total suppressed income of \$75,217.00 was comprised of the following amounts:

- (i) fees in the amount of \$3,025 charged in two monthly accounts during the fiscal year ending February 29, 1988;
- (ii) fees in the amount of \$13,582 charged in twelve monthly accounts during the fiscal year ending February 28, 1989;
- (iii) fees in the amount of \$22,960 charged in twelve monthly accounts during the fiscal year ending February 28, 1990; and,
- (iv) fees in the amount of \$35,650 charged in twelve monthly accounts during the fiscal year ending February 28, 1991.

11. The Solicitor stopped suppressing his receipt of these fees at the beginning of 1991. The Solicitor did so because he realized that the irregularity of suppressing revenue would be compounded if he also failed to remit GST on those amounts, as he was then obliged to do.

12. In his response to correspondence from the Law Society regarding this matter, the Solicitor, through his counsel, admitted the alleged misconduct. A copy of the letter, dated November 24, 1994, from Charles C. Mark, Q.C., to the Law Society is contained at Tab 3 of the Document Book.

13. By letter, dated December 12, 1994, (Document Book, Tab 4) the Solicitor advised Revenue Canada that it had come to his attention that he had earned income in the 1988, 1989, 1990 and 1991 taxation years which had not been reported on his returns. He further advised that he was having his accountant prepare amended returns for those years.

14. By letter, dated January 20, 1995, (Document Book, Tab 5) the Solicitor's accountant, Alexander Murray, filed amended tax returns for the four years in question. Mr. Murray also indicated that the Solicitor was requesting that all penalties and interest be waived in accordance with Revenue Canada's voluntary disclosure/fairness rules.

15. Subsequently, the Law Society asked Mr. Harlow to explain why he had not disclosed all of his income in the four tax years in question. By letter, dated February 28, 1995, (Document Book, Tab 6) the Solicitor responded to this inquiry. The Solicitor advised that he had decided to suppress this portion of his income as a result of the influence of his then-spouse, Ms. Harlow-Bitton.

16. The Solicitor has not been charged with an offence under the *Income Tax Act* for his failure to disclose this income on his original tax returns. He has not been fined or assessed any penalties.

VI. DISCIPLINE HISTORY

17. On January 5, 1995, Complaint D353/94 was sworn against the Solicitor on the basis of his failure to make his annual filings for the year ending January 31, 1994. The Complaint was withdrawn and converted to an invitation to attend upon the Solicitor giving an undertaking to file in the future within the prescribed time period.

DATED at Toronto this 14th day of August, 1996."

FINDING OF THE COMMITTEE

At the hearing of this matter, there were essentially three matters to be decided. They are as follows:

1. IN CAMERA MOTION

At the outset, the Member brought a motion to have this hearing held in camera. Without minimizing the breadth of the argument, but put concisely, the Member submitted that the hearing should be in camera because the allegation came to the attention of the Law Society through the complaint of his estranged wife. The Member sought to rely on the body of law, concluding that marital confidences cannot be disclosed, to keep the hearing of this matter *in camera*. This was notwithstanding that the allegations were admitted so that the issue was not the finding but the penalty.

This Committee dismissed the motion and proceeded with the hearing in public. Thomas Cole, on behalf of the Committee, wrote the decision on the motion. These reasons are set out in the attachment hereto.

2. FINDING OF CONDUCT UNBECOMING VS. PROFESSIONAL MISCONDUCT

The initial complaint of D143/96 was amended on consent, as per an agreement signed by the parties which was filed as an Exhibit. In that agreement, the Member withdrew his admission that the conduct constituted professional misconduct and instead admitted that it was conduct unbecoming. The Complaint now provides "in the alternative". We were called upon to decide the appropriate characterization of the behaviour complained of.

Neither professional misconduct nor conduct unbecoming are defined in the *Law Society Act*. However, it is generally accepted that professional misconduct characterizes behaviour that is in relation to the Member's professional practice and conduct unbecoming is behaviour unrelated to the practice of law.

In this case, there is a distinction without a difference as the behaviour falls into both realms. The Member failed to report earned income on his tax returns filed between 1988 and 1991. This income was earned as professional fees with accounts properly rendered to the client. The accounts were not posted in the receivable ledger nor was the money received deposited in the firm's account.

The Committee makes a finding of both professional misconduct, and in the alternative, of conduct unbecoming. We note that such a dual finding is not without precedent. For example, we were referred to Convocation's decision of October 16, 1970 in the matter of Samuel Ciglen against whom a finding of both professional misconduct and conduct unbecoming was made for what appears to be the single count of attracting a "conviction of having conspired to wilfully evade payment of tax by suppressing taxable income".

3. PENALTY

The Member failed to disclose income in the sum of \$75,217.00 received as a result of 38 separate accounts rendered to his client Nesel Fast Freight Incorporated between 1988 and 1991. The money was not recorded in the accounts receivable ledger and not deposited in the firm's account. The Member did not report the income on his tax return.

This matter came to light because the estranged wife of the Member complained to the Law Society of the Member's conduct in this regard and in relation to her separation from him. The Member replied to the Law Society through his counsel, giving complete disclosure and indicating that he had "made four incorrect income tax returns and that he is going to re-file and pay what he must pay". We were provided with copies of letters sent to Revenue Canada by the Member and his accountant, and they are neutral in tone as to the culpability. However in the letter of February 28, 1995 from the Member to the Law Society, the Member took full responsibility for "this suppression of income". However he blamed it on "money demands and manipulations by a spouse", the same spouse that brought the matter to the attention of the Law Society in the first place.

The Member has never been charged with any offence contrary to the *Income Tax Act* or any other Act as a result of this behaviour. His affairs with Revenue Canada have been put in order. There was a suggestion that the Member dealt with this matter as he knew that GST would be reported by the client eventually, but this Committee does not really accept that as the reason. The reality is that the Member did not deal with it until after his estranged wife disclosed it to the Law Society. He did the greatest amount of damage control by voluntarily contacting Revenue Canada and thereby probably avoided income tax evasion charges. Nonetheless his actions constitute contrition, and to use the words of the Member's counsel, "imperfect" as it was.

Ten character reference letters were filed on behalf of the Member and they are all positive. However some of them do not even mention knowledge of the Law Society proceedings or the particulars of it. Indeed, the letter from Nesel Fast Freight Inc., from whom the suppressed money was received, mentions nothing of the matter. One letter from a personal and professional acquaintance opines that "the Law Society owes Richard an apology for its part in furthering this matter". However at least three of the letters refer to the Member's estranged wife in unflattering terms. A former law associate states that the Member's offending actions "were carried out while he was under the extreme duress and influence of a most difficult marital situation".

Although this may be accepted as the personal circumstances of the Member at the time of the suppression of the income, we have no evidence before us that the marital situation was any more difficult than suffered by others labouring under the same constraints. There is no medical evidence before us.

The Society's counsel has suggested that a three month suspension is appropriate and the Member's counsel has urged us to consider non-publication i.e. a reprimand in Committee.

We were referred to a number of cases on penalty. The range is from reprimand in Convocation to disbarment. Of particular note is Convocation's decision of April 25, 1991 in the matter of Victor Leo Maloney where a three month suspension was substituted for the Committee's recommendation of a reprimand. In that matter the Member was convicted of four charges of making false or deceptive statements in his income tax returns for 4 separate years. The total unreported income was approximately \$83,000.00. There was medical evidence of an obsessive compulsive personality disorder.

The object of any exercise in discipline proceedings is to protect the public. In this matter no member of the public was directly hurt, unless, of course, it is said that failing to pay taxes to the government hurts the general populace at large. However, by the Member's actions, the integrity of the profession was. As was said in the English Court of Appeal decision in Bolton v. Law Society "the need (is) to maintain among members of the public a well-founded confidence that any solicitor whom they intrust will be a person of unquestionable integrity, probity and trustworthiness".

There are many aggravating factors in this matter but there are also strong mitigating factors. This Committee has decided to recommend a penalty of 30 days suspension and \$1,000.00 in costs.

The Committee noted that the Agreed Statement of Facts refers to an Invitation to Attend. As this does not properly constitute a discipline history we have not taken it into account in making our recommendation.

Richard D'Arcy Harlow was called to the Bar on March 21, 1975.

ALL OF WHICH is respectfully submitted

DATED this 12th day of December, 1997

Tamara Stomp, Chair

As a preliminary matter Ms. Seymour asked that the following correction be made:

- page 5, paragraph 17 - that the reference to an invitation to attend be deleted after the words "the Complaint was withdrawn.."

It was moved by Mr. Swaye, seconded by Ms. Sealy that both paragraph 17 and the third paragraph on page 9 which referred to an invitation to attend be deleted in their entirety.

Ms. Seymour requested that in paragraph 17 that only the words "and converted to an invitation to attend" be deleted so that the sentence would then read:

"The Complaint was withdrawn upon the Solicitor giving an undertaking to file in the future within the prescribed time period."

Mr. Mark was content with the change made by Ms. Seymour and Mr. Swaye and Ms. Sealy withdrew their motion.

There were no further submissions by either counsel on the Report.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 30 days and pay costs in the amount of \$1,000.

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

It was moved by Ms. Puccini, seconded by Mr. Topp that the adoption of the Report be rescinded and that the matter be brought back to Convocation in April for full argument on the reconsideration of Complaint #D143/96.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the adoption of the Report be rescinded and be brought back to Convocation in April for full argument on the reconsideration of Complaint #D143/96.

Re: Peter Frederick PIROTH - Toronto

The Secretary placed the matter before Convocation.

Mr. MacKenzie withdrew for this matter.

Mr. Glenn Stuart appeared on behalf of the Society and Mr. John Rosen appeared on behalf of the solicitor. The solicitor was not present.

The Report of the Discipline Committee dated August 18th, 1997 together with the Affidavit of Service was marked Exhibit I.

Mr. Rosen made submissions on a request for an adjournment advising that he had been unable to receive instructions from the solicitor. He further advised that the solicitor had faxed a letter to him tendering his resignation.

It was moved by Mr. Copeland, seconded by Mr. Swaye that the matter be adjourned to the April Convocation.

Carried

APPLICATION FOR READMISSION

Re: David Elliott WATERHOUSE - Ottawa

The Secretary placed the matter before Convocation.

Messrs. Swaye and Chahbar withdrew for this matter.

Ms. Janet Brooks appeared on behalf of the Society and Mr. Francis Csathy appeared on behalf of the applicant who was present.

The Report of the Admissions Committee dated November 12th, 1997 was marked as Exhibit I.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE LAW SOCIETY ACT

AND IN THE MATTER OF DAVID ELLIOTT WATERHOUSE of the City of Ottawa

AND IN THE MATTER OF an Application for Readmission to the Law Society of Upper Canada

REPORT TO CONVOCATION

PANEL:

Ms. Susan Elliott	Chair
Mr. Gerald Swaye, Q.C.	Member
Mr. Abdul Ali Chabar	Member

COUNSEL:

Ms. Janet Brooks	for the Law Society
Mr. Steven Stieber (Armel, Cohen, Stieber)	for the Applicant

HEARING DATES:

September 24, 1997
October 24, 1997

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Nature of This Application

This is an application by former member David Elliott Waterhouse brought pursuant to section 46 of the *Law Society Act*, R.S.O. 1990, c. L. 8, for readmission to the Law Society of Upper Canada.

The Hearing

The hearing in this matter was conducted in public September 24 and October 24, 1997 before a panel composed of Susan Elliott, Chair, Gerald Swaye, Q.C. and Abdul Ali Chahbar. Throughout the hearing the Law Society was represented by Janet Brooks and the Applicant was represented by Steven Stieber.

Viva voce evidence was received from the Dr. Peter Ian Collins, the Applicant, Mr. Jean Laurin, Dr. Robert Wood Hill, Mr. Ken Morton, Mr. Duncan Gosnell, Mrs. Susan Waterhouse and Mr. Morris Chochla.

The panel also reviewed portions of a videotape of the interview conducted by the police at the time of the Applicant's arrest in 1988.

In total, six exhibits were received, being:

- Exhibit 1: Application record
- Exhibit 2: Videotape of April 28, 1988 police interview
- Exhibit 3: Document book of the Law Society
- Exhibit 4: Curriculum Vitae of Dr. Peter Ian Collins
- Exhibit 5: Transcript of the Applicant's discipline hearing held February 8, 1989
- Exhibit 6: Curriculum vitae of Dr. Robert Wood Hill

The Application Record contained:

- Report and Decision of the Discipline Committee, dated March 29, 1989.
- Order of convocation, dated October 26, 1989.
- Statutory Declaration of David Elliott Waterhouse, dated February 18, 1997
- Five letters from people in support of the application, all dated in 1995.
- Three medical reports from 1989.
- Medical report of Dr. R. Wood Hill, dated May 9, 1995.
- Medical report of Dr. P.I. Collins, dated June 25, 1996.
- Letter from Ken Morton dated August 18, 1997.

The Document Book of the Law Society contained:

1. Notices of Application for Re-admission and Responses to the Law Society from the Welland County Law Association and the Niagara Falls Bar Association.
2. The Indictment, Statement of Facts and Transcript of Proceedings of *R. v. Waterhouse* in 1989/90.
3. The Complaint in discipline proceedings of 1984.
4. Applications and grants from the Lawyers Fund for Client Compensation in relation to the Applicant.
5. The Order and Application Record of the section 43 proceedings under the *Law Society Act*.
6. Bankruptcy proceedings of the Applicant - the Order suspending discharge and Statement of Affairs.
7. Summary of payments from LPIC and letter to LPIC from the Applicant.

The hearing panel was satisfied that all material relevant to the application was before it for review.

Background Facts

In 1989 the Applicant was disbarred by order of Convocation. On March 23, 1990 he was sentenced to 9 months on one count and 9 months consecutive on another count after pleading guilty to two of seven counts, (fraud and uttering a forged document) the other five counts being withdrawn by the Crown. Relevant details of these events are set out below.

Events leading to the Disbarment and the Criminal Convictions

The precise facts which led to the termination of the Applicant's membership in the Society and his subsequent incarceration are not easy to follow and need not form a lengthy part of the record in this application. Essentially, the actions of the Applicant in relation to a particular land transaction were at the root of his misconduct and the criminal matters. In addition he breached an undertaking to the Society and violated the provisions of co-signing controls on his trust account. He misled the Society and misled clients in attempts to cover up these misdeeds.

In the land transaction, the Applicant acted for or otherwise became involved with multiple parties (first mortgagee/original vendor, purchaser, prospective purchaser, second mortgagee, renovator of the property, new mortgagee) in connection with a piece of property which was divided into two parcels. He mistakenly placed a mortgage on one of the parcels when it should have been registered against the other parcel. When this error came to light he failed to deal with it appropriately, at first believing a postponement of mortgage would rectify the problem and then realizing that more would be required, he attempted to correct the problem by forging a postponement of mortgage, forging a transfer of title and issuing misleading reporting letters to cover his misconduct. While this statement of the facts is an oversimplification, it indicates the nature of the relevant misconduct - serious conflicts of interest, forgeries and, misleading clients.

In addition to the land transaction, the Applicant was audited by the Society which audit revealed he was not properly maintaining his books and records, including a temporary shortage in his trust account owing to the state of disarray of the books. Co-signing controls were placed on his trust account. He signed an undertaking to the Society that he would not accept any new legal work and would wind down his practice. He subsequently acted in four real estate matters thereby breaching the undertaking and violating the co-signing controls. He also borrowed \$15,000 from a client to replace money missing from his trust account, \$6,000 of which was owed to him for fees not previously transferred on a number of files.

The Disbarment

The Applicant was represented by John J. Broderick, Q.C. at his discipline hearing held February 8, 1989. Given the nature and extent of the Applicant's misconduct, there was no question that his membership in the Society would be terminated, the only issue was the nature of the termination. After the hearing panel recommended disbarment, the Applicant consented to the disbarment at Convocation.

The panel's reasons for recommending disbarment were succinct:

"Notwithstanding the character evidence and submissions on behalf of Mr. Waterhouse, we are unable to agree with the submissions that Mr. Waterhouse should be permitted to resign. We are unanimous in reaching the conclusion that the Solicitor's past conduct of deceit, both to the Society and to his clients, his breach of the undertakings given to the Society, the many breaches of his obligations to his clients and the fact that he has been ungovernable by the Society renders him unsuitable to continue in the practice of law."

On October 26, 1989 by Order of Convocation, the Applicant was disbarred as a Barrister, his name struck off the Roll of Solicitors and his membership in the Society cancelled.

Criminal Conviction

The Applicant was charged criminally with counts arising out of the land transaction facts which led to his disbarment. Guilty pleas were entered to charges of fraud and uttering a forged document, being the following counts:

5. "... that he, between the 1st day of September, 1987 and the 31st day of December, 1987 . . . did unlawfully by deceit, falsehood or other fraudulent means, defraud Settlers Ontario Investment Corporation of money having a total value exceeding \$1,000.00 contrary to the provisions of the Criminal Code of Canada."
7. "... that he, on or about the 13th day of January, 1988 . . . unlawfully did knowingly use a forged document, namely a Document General, Instrument number 517770, between Ross Milton Finch and Pago Developments Limited as if it were genuine contrary to the provisions of the Criminal Code of Canada."

The Applicant was represented by Edward Greenspan, Q.C. before the Honourable Mr. Justice C.N. Herold. An agreed Statement of Facts was entered at the hearing, as were victim impact statements. A joint submission was made to the judge that the sentence be nine months in jail, with the Crown not opposing a recommendation for early release. Of the nine months to which he was then sentenced, the Applicant served six weeks at the Thorold Regional Detention Centre and six weeks in a halfway house.

The Crown stated at the hearing that what separated the Applicant's case "from other cases involving solicitors and land dealings" was that "he did not take money from somebody and put it in his own pocket. I think that's to his credit." However there was a breach of trust and it was clear that others had suffered financially and psychologically, thus the joint submission.

In passing sentence the judge took into account the Applicant's remorse remarking that "his consent to the disbarment, his waiver of the preliminary and his early guilty plea" were all palpable examples of his remorse.

The Client Compensation Fund

The client from whom the Applicant borrowed funds to replace the shortage in his trust account filed a claim with the Compensation Fund when it transpired that the fourth mortgage he took against a property owned by the Applicant as security for the loan was in fact a fifth mortgage and, following power of sale proceedings by a prior encumbrancer, there was insufficient money to pay back the loan. The Compensation Fund, following review of the matter, paid out \$15,000 in satisfaction of the claim.

The Compensation Fund also paid out \$1,120.00 to a client whose land transfer tax was not paid by the Applicant although the client had turned over the funds to the Applicant.

In total, the Compensation Fund paid out \$16,120.00 as a result of claims against the Applicant. In 1991 \$1,250.00 was collected from the Applicant and recently a further \$1,120.00 was paid. The outstanding total as of the hearing date was agreed by counsel to be \$13,750.00.

LPIC Payments

Material filed at the hearing shows that Lawyers' Professional Indemnity Company paid out \$217,528.00 in claims, adjuster's fees and legal fees related to the Applicant. Other than filing the material setting forth this amount, no time at the hearing was spent in connection with this fact.

Bankruptcy Proceedings

The Applicant filed an Assignment in Bankruptcy on the 12th day of December, 1989. He was discharged from bankruptcy on the 12th day of April, 1991.

At the time of assignment, total liabilities were listed at \$118,314.68 with exempt assets of \$500 of furniture. Revenue Canada was owed \$25,000 while the other creditors represented a mix of financial institutions, businesses, the Law Society and the two clients who lost money - one in the land transaction, the other being the lender who recovered from the Compensation Fund.

The notes to the Trustee's report on the Bankrupt's Application for Discharge indicate that "the bankrupt has been very cooperative with the Trustee's office during the course of the administration of this estate, keeping the trustee informed of his employment, income, etc. and in providing any information requested of him by the Trustee."

The bankruptcy and discharge from it are most relevant to the question of whether, should the Applicant be recommended for re-admission, an order to re-imburse the Compensation Fund should be made as one of the terms of re-admission.

The Applicant's History

The hearing panel received evidence of the Applicant's personal circumstances both at the time of his disbarment and since. The nature of an application for re-admission demands that there be evidence of a change in the character of the applicant since the original events which led to termination of membership so that Convocation and the public can be reassured that the person applying for re-admission is, in substance, not the same person who committed the original transgressions. For that reason, the evidence of the Applicant's personal circumstances at the time of the disbarment, his personal circumstances since then and his present character are relevant to the determination of the application.

The Applicant's Personal & Professional Life at the time of Disbarment

The Applicant was born May 31, 1947. He testified that he originally pursued a career in engineering by attending the General Motors Institute in Flint, Michigan (being one of only six chosen from 1,000 applicants) but discovered that he did not like the engineering field and instead enrolled at the University of Western Ontario in 1967, graduating with a BA in Economics in 1971. He attended University of Toronto law school and graduated from it in 1974, being called to the Ontario bar in 1976.

By 1977 the Applicant was addicted to alcohol, drinking first thing in the morning and going all day. The Applicant first began drinking at the age of eighteen by crossing the border to New York state. His drinking was apparently progressive throughout university, at first limited to weekends but eventually becoming a focal point of his life. He failed a year at Western; he married in his fourth year but was divorced in 1977 as result of his alcohol dependency.

In 1977 the Applicant was hospitalized for his alcoholism on the advice of Dr. Brett Jamieson, his physician. A letter from Dr. Jamieson to the Law Society in 1989 concerning the Applicant stated that "During the past several years he has been hospitalized on two occasions for detoxification and on one occasion was referred for psychiatric counselling."

Unfortunately, according to the Applicant, these treatments were totally ineffective and, when he was released from hospital, he picked up drinking where he left off. Following one hospitalization he was on antabuse for about three months and did not drink during that time but resumed drinking when he stopped taking the antabuse.

He associated with people who drank and partied extensively; he lived briefly with a woman who also had a drinking problem, going to Alberta with her in search of employment. He began articling in Alberta but drank evenings and weekends and never finished his articles, returning to Niagara Falls about six months after he left. He worked with a civil litigation firm in Markham for about one year then returned to Niagara Falls and opened his own practice.

From 1981 to 1984 the Applicant did well in his practice, drinking nights and weekends but building a decent practice as well. He was a personable businessman who would socialize and drink with clients as a way of obtaining business.

During this period, the Applicant started using drugs - cannabis and hashish - and for a time preferred these drugs to drinking as they did not produce a hangover. He soon abused both drugs and alcohol and, in 1985 or so, moved on to cocaine which was then becoming prevalent in the circles in which he travelled. His cocaine use was described as weekend binges - he could drink and party longer with it than without it - and he might go for a 24 to 36 hour period doing cocaine, cannabis and alcohol all at once. He was clearly a man very much out of control and by 1986 - 87 this pattern of substance abuse was a very significant problem.

The affect on his practice was predictable. He was hung over a lot, could not take care of his files or business, tried to do the absolute minimum to get by and put things off whenever he could. He had no energy to deal with the problems in his life but he had a busy practice with four secretaries and a title searcher. In some months in 1985 - 86 he closed forty real estate deals. He spent a lot of time socializing to obtain business yet couldn't handle the business he had.

The problems which led to his discipline hearing and eventual disbarment started in 1986. Given the lifestyle the Applicant had at that time it is no surprise that he was disbarred and sent to jail for criminal wrongdoing.

The Applicant's Personal & Professional Life since Disbarment

Personal Life

As a result of his disbarment and arrest the Applicant lost all his material goods - his house, car, office building - his practice was in ruins and his friends all deserted him. However, in January 1988, a few months before his arrest, the Applicant met the woman who is now his wife and he gradually began to rebuild his life.

The Applicant, following his arrest, hit his rock bottom and finally appreciated he was being self-destructive. He for the first time understood that if he continued a pattern of drinking and drugs he would never improve and he had to change. As he had lost everything, including the people with whom he associated socially, he was in a good position to start over.

At first he tried to limit his drinking to weekends. Then he realized he had to stop entirely and he did. He was completely abstinent from drugs and alcohol during 1989 to 1991 or early 1992. He remains completely abstinent from drugs and on an extremely rare basis, such as recognizing his wedding anniversary, he has a glass of wine or beer. He has not been intoxicated or consumed great amounts of alcohol since 1989.

When he was released from jail the Applicant found he had nothing in common with his old party crowd and with the exception of one individual, he does not see anyone from that former group.

He married the woman whom he met shortly before his arrest and he gives her great credit for helping turn his life around. She has been loving and supportive of him even though they had not known each other very long when he was arrested. He describes her as a "real rock" who helped him find himself and get away from what caused his problems. She was trained as a psychiatric nurse in England and currently is mother to their two young children.

The Applicant testified that his family life, his wife and especially his children, are his greatest source of joy and inspiration. They provide him with increased motivation to avoid the substance abuse problems from which he formerly suffered. Other witnesses corroborated this testimony. He has good employment at which he is successful and he is respected in his field. He has over eight years of sobriety and there is every indication that it will be permanent. He is a completely different person than he was in 1989. The two psychiatrists each testified at some length on this facet of the Applicant's personality and their observations and conclusions are set forth below. They confirm that the Applicant is a changed man who would not want to jeopardize in any way the life he has currently established for himself by returning to his previous ways.

Professional Life

Following the closing of his law practice, the Applicant was briefly employed as a manager at a golf course Pro Shop in Buffalo and in the winter months as a car salesman. After his release from detention he was fortunate enough to obtain employment with Simcoe & Erie General Insurance Company, which is now GAN Canada.

Starting as a claims examiner, the Applicant was quickly promoted to a supervisory position with responsibility for handling the largest Errors and Omissions program for Consulting engineers and Architects in Canada. He handled claims worldwide, as long as the firm's head office was located in Ontario. His settlement authority increased from \$10,000 to \$500,000. He regularly had responsibility for dealing with and overseeing the legal counsel retained to defend the errors and omissions claims and he used his knowledge of law regularly, keeping current in the state of the law, analyzing legal issues and becoming an in-house coverage expert.

When Simcoe & Erie changed owners and several upper management staff left, the Applicant moved to Encon Insurance Managers Inc., having been recruited there by his former managers from Simcoe & Erie. He continues to be employed at Encon and has no plans to leave.

Before accepting employment at both Simcoe & Erie and then at Encon the Applicant disclosed to his prospective employers his criminal record and the circumstances of his disbarment.

The hearing panel heard from Mr. Jean Laurin who is a Chartered Accountant employed by Encon. He interviewed the Applicant for the position and together with the Human Resources Manager and the CEO discussed the Applicant's history, both personal and professional. They decided he fit their company and offered him employment.

Mr. Laurin testified that the Applicant has a good reputation, good technical skills and is a consistent performer. He deals with very large litigation claims, has a staff of three people under him and in the last two years has brought mediation and arbitration skills into the company, having attended several courses in these areas. Mr. Laurin has personally travelled with the Applicant across Canada over the past two years delivering specialized seminars on risk management. He described these seminars as very important in that they differentiate Encon from other companies in the area, providing them with a competitive edge. Mr. Laurin testified that he has never seen the Applicant drink anything except juice during this time. He also testified that the Applicant jogs in the morning and is always on time for meetings. He trusts his judgment, does not question the Applicant's honesty and believes the Applicant is on his way to becoming an officer at the company. The younger claims managers look up to the Applicant and admire his skills at settling claims.

The hearing panel also heard from Duncan Gosnell, currently the Vice-President of Underwriting at LPIC, who in 1990 was the manager of the Errors and Omissions program at Simcoe & Erie. Mr. Gosnell is trained both as an engineer and as a lawyer. He was the Applicant's immediate superior at Simcoe & Erie in 1990. He confirmed in detail the same sort of matters as Mr. Laurin - that the Applicant had disclosed his disbarment and criminal proceedings prior to hiring, that although he was cautious and apprehensive about hiring the Applicant he was won over, saying the Applicant has a terrific way about him, is down to earth, unassuming and possesses a strong intellect, with a real ability to relate to people. He also stated the Applicant has a very strong understanding of the legal issues he deals with in the claims field and that as he gained experience, he was assigned the most complex files.

Mr. Gosnell described the Applicant as a person of high moral character, respected by others in the company and, he had no hesitation in recommending him for re-admission.

Psychiatric Evidence

The Applicant presented persuasive psychiatric evidence from Dr. Collins and Dr. Hill, both of the Clarke Institute of Psychiatry and both of whom have been accepted many times by Law Society committees as experts in their fields. Dr. Collins and Dr. Hill each provided written reports as well as viva voce testimony about their examination of the Applicant. The evidence of both psychiatrists was subjected to cross-examination and questions from the panel, following which it emerged as their opinions that the Applicant was a very low risk to re-offend and was a suitable candidate for re-admission to the profession.

Evidence of Dr. Collins

Dr. Collins saw the Applicant May 9, 1996. Prior to interviewing him Dr. Collins read the medical reports from 1989 by Dr. Jamieson and Dr. Hill. He testified he found the Applicant open and forthcoming about his problems, that he didn't blame alcohol for them and recognized the problems were his and the alcohol was a symptom.

Dr. Collins confirmed the Applicant has dealt with his problems successfully in his opinion and that given the Applicant's knowledge that alcohol ruined his professional and personal life in 1989, he is at very low risk of engaging in alcohol abuse again. He stated it was important that the Applicant had no other major illness or mental problem, such as depression or, more importantly a personality disorder.

The fact that the Applicant is in a very supportive relationship, exercises physically by running for about thirty minutes each day and has developed the ability to recognize stress factors in his life were all important to Dr. Collins in arriving at his opinion that the Applicant was a very low risk to again abuse alcohol. He stated that the best indication however was that the Applicant had been sober for over eight years during typical day to day stresses whereas previously he succumbed to alcohol to deal with them and was caught in a cycle of stress ⇒ alcohol ⇒ poor judgment ⇒ stress.

Dr. Collins acknowledged that there were two schools of thought as to whether an alcoholic could drink even one glass of wine or beer occasionally, as the Applicant does. He said that while some alcoholics need counselling or to attend Alcoholics Anonymous meetings, others don't need it and can abstain on their own. In the case of the Applicant he showed no physical signs of alcohol abuse and having spent over eight years successfully sober there would be nothing to be gained now by counselling.

The report of Dr. Collins, dated June 25, 1996 stated:

"I concur with Dr. R. Wood Hill's May 9, 1995 opinion that this man has radically changed his lifestyle and has shown significant improvement in all spheres of his life. . . . Given the insight that this man has into his past maladaptive behaviours, coupled with the positive changes that he has made in his life over the past six years, I would assess him as a low risk for returning to the behaviour which led to his arrest and eventual disbarment from the Law Society of Upper Canada."

Evidence of Dr. R. Wood Hill

Dr. Hill saw the Applicant both in 1989, when he was facing disbarment and incarceration and again in 1995 when he first contemplated seeking re-admission to the Law Society. Dr. Hill stated that in the intervening period the Applicant clearly had matured and he presented very differently in 1995 than he had in 1989. Dr. Hill was sceptical that the Applicant could have changed as much as it appeared but he satisfied himself through discussion with the Applicant and considering the lengthy period of time which had passed that indeed the Applicant had succeeded in changing his life.

The hearing panel was particularly concerned with how the Applicant might react if substantial stress re-entered his life. Dr. Hill's opinion was that people are creatures of habit and if the old way of dealing with stress was *effective* it would be repeated. However, if the response (in this case alcohol) was ineffective, people can change and, if alternative effective ways were developed (running and physical exercise) and they add to their lives (wife and children) it is not at all unusual to adapt new ways of coping and give up the old ways.

Dr. Hill was asked whether an eight or nine year period of change was a reliable time period over which to measure the change so that it could be used to predict future behaviour. He said yes it was. There is no "five year cure" as with cancer but, a *substantial* change over a *long* time meant that the risk factors in the person's life had in fact changed. He felt if a disaster befell the Applicant, causing great stress, he would have trouble, as would anyone, but he would not fall back into his old pattern, he would not fall apart and be caught up in alcohol again. The balance of work & career, family & health which the Applicant has achieved are healthy and productive and support him in dealing with stress.

The written medical report of Dr. Hill dated May 9, 1995 concludes:

"Theoretically, clients with substance abuse histories are always at risk. With the changes that Mr. Waterhouse has implemented, I would see his risk as being very low. It is my opinion that were his licence to be reinstated and were he to formally practice law in some way, that he would do this in a way consistent with his present mode of functioning; reliable, competent, and with results beneficial to himself, the public and his profession."

Character Evidence

The Applicant presented a very good range of character evidence, both written and oral, representing the considered opinions of people from a wide variety of occupations all of whom unequivocally supported his readmission. While it would be surprising to have an Applicant proffer character evidence which did not support the application (and we are all by now cognizant of the notation in *Bolton* that "It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren.") it is nonetheless important to have this independent assessment, from members of the profession and members of the public who personally know the Applicant and can provide corroboration of his statements that he is a changed person, worthy of regaining the privilege of being a member of the Law Society of Upper Canada.

Viva Voce Testimony

In addition to the character evidence related to the Applicant's employment, which was provided by Mr. Laurin and Mr. Gosnell, the Applicant called Mr. Ken Morton, Mrs. Susan Waterhouse and Mr. Morris Chochla, each of whom testified from different perspectives with respect to the nature and character of the Applicant.

Ken Morton

Mr. Morton has known the Applicant for 25 years and is the only friend the Applicant retains from the days in which he drank excessively. His evidence was helpful in contrasting the "old" David Waterhouse to the "new" David Waterhouse. Mr. Morton described the Applicant previously as a person who was a falling down drunk, a joking wit, very social who overindulged in his success. Then, with the Applicant's disbarment and incarceration, all of a sudden reality set in. The party was over and he had to pay for his sins. Mr. Morton was surprised that the Applicant was able to pull himself back up and described it as "... an amazing transformation. I've never seen an example like this one - he's really got his head together - it's a different life, a complete role reversal. He has a commitment to his family which is remarkable."

Mr. Morton not only associated with the Applicant in the '80's, he also sees him today and was at his wedding to Susan Waterhouse. He stated he has not seen the Applicant abuse alcohol in the last ten years and that the Applicant would have to be insane, considering his road back, to put all that in jeopardy again. Mr. Morton was firmly of the view that the Applicant would not risk losing his family, his wife and children by drinking, as he knows what the consequences would be.

Susan Waterhouse

The Applicant's wife testified about the period immediately surrounding the events of 1988 - 89 and his life since then. She first met him in April of 1988 shortly before his arrest by the police and during the Law Society investigations. She was trained as a psychiatric nurse in 1981 and worked in England on the acute admission ward which dealt with drug and alcohol abusers as well as schizophrenics, moving to Canada in 1985.

When asked why she stuck with a man she barely knew, through such a difficult period, she said as time went by she came to see him as being quite sick, drinking and taking prescription medication. She found he was nice, kind, honest and open so she stayed with him and helped him deal with his problems. The disbarment actually brought them closer together as it was so stressful and humiliating people would avoid them completely and they had to rely on each other.

Although the Applicant gave great credit to his wife for turning his life around she stated that he changed himself, she didn't change him and the change was not overnight but took several months given his physical addiction. Today, his very occasional social drink is not an issue with either of them and not something they even discuss or think about, he has so completely changed. He keeps physically fit, has all new friends and handles stress in a different way. He is an excellent father who has a wonderful relationship with his children.

Mrs. Waterhouse also testified that the Applicant's present work habits when compared to his previous ones are completely different. Whereas previously the Applicant's law office was out of control with files everywhere and secretaries who would come and go as they pleased, he now had an organized and orderly office. She also confirmed the Applicant was more relaxed and happier now and had no need for external stimuli.

Morris Chochla

Mr. Morris Chochla is a lawyer who has worked with the Applicant since 1990 as outside counsel for Simcoe and Erie and now Encon. He is also trained as an engineer and was called to the bar of Ontario in 1980. Mr. Chochla testified as to the Applicant's current professional life and, to some extent, his personal life.

Mr. Chochla indicated he has worked with a lot of insurance companies and that the Applicant was a delight to deal with because of his understanding of the issues. He described their working relationship as excellent. The Applicant told Mr. Chochla in 1994/95 of the disbarment when he was organizing his application for re-admission. Given his knowledge of the Applicant since 1990, Mr. Chochla said the Applicant was "the last person on the face of the earth I would have expected to have his past" as he was "one of the straightest shooters I've ever run in to - his word is his word."

Mr. Chochla and his family had socialized with the Applicant and his family for the past several years. Both the Applicant and Mr. Chochla enjoy golf and they made a point of getting together often. Mr. Chochla has never seen the Applicant drink anything alcoholic.

When asked whether he would recommend the Applicant for re-admission, Mr. Chochla said "Absolutely."

Letters

Messrs. Gosnell, Morton and Chochla each filed letters of support testifying as to the good character of the Applicant.

Mr. Richard K. Taub of the international law firm Wilson, Elser, Moskowitz, Edelman & Dicker, New York office wrote that he has known the Applicant the last seven years, working closely with him professionally and socializing to some extent with him as well. He found the Applicant "has at all times shown high integrity in the performance of his responsibilities and has always proved extremely reliable."

Similarly, John I.S. Nicholl of the Montreal law firm Nicholl Paskell-Mede supports the Applicant's quest for re-admission "wholeheartedly" and believes he is fit to engage in the practice of law.

A lengthy letter in 1995 from David B. Wende, a lawyer from Vancouver also supports the application. Mr. Wende is the senior partner of the firm Alexander, Holburn, Beaudin & Lang. Part of his practice involves advising three professional bodies (Dental Surgeons, Chartered Accountants and Architects) with respect to disciplinary sanctions arising from unprofessional or otherwise wrongful conduct by their members. He is therefore well familiar with the concepts of professional misconduct and is particularly aware of the reluctance of any professional body to readmit a member. At the time of writing, he had known the Applicant for five years and states he had come to know him much better in the last three years. He relates the story of his own mother's dealing with a drug and alcohol dependency and her resolve to overcome it as another real life example of someone who overcame an addiction through their own resolve and support from friends and family.

Mr. Wende concludes his thorough and thoughtful letter with the following paragraph:

“I suspect that in the many years that have passed since David accepted disbarment from the Law Society of Upper Canada, he has proven to those who have known him well throughout this period that he is an entirely different and renewed individual. I am very aware of the gravity of David’s application for readmission to the Law Society, and my responsibility to be completely candid and forthright in any representation I should make on his behalf. I believe that in 1995, David Waterhouse possesses the ability and character necessary and expected of a member of a provincial law society and officer of a superior Court. It is with pride that I recommend this man today to the Law society of Upper Canada.”

Law Associations

Two letters were received opposing the Applicant’s re-admission, one from the Welland County Law Association and the other from the Niagara Falls Bar Association

Both these letters based their opposition on the nature of the original misconduct and contained no statements about the present character of the Applicant.

The Welland County Law Association said “The past actions of Mr. Waterhouse have brought dishonour on the profession as a whole. It was the unanimous view of our executive that it would not be in the best interests of the public or the practicing bar to readmit Mr. Waterhouse to the Law Society of Upper Canada.”

The Niagara Falls Bar Association stated that “. . . on Tuesday, April 1, 1997, a resolution expressing the Association’s opposition to the above application was unanimously passed by the members in attendance at that meeting, on the grounds that the Applicant’s readmission would not be in the best interests of the public. In addition, it was noted by several members that the Applicant left a number of undertakings to fellow solicitors unfulfilled, which had caused subsequent loss and anxiety to both solicitors and their clients.”

These letters speak only to the past. They do not address the issues or acknowledge the concept of rehabilitation. They do however underscore the importance of being sure that an Applicant has changed, is rehabilitated and deserves a second chance. Termination of membership in the Law Society results from truly disreputable conduct, which this applicant did engage in. He let down his fellow practitioners and members of the public. They have not forgotten his past and the harm he did. He must show he is not likely to do so again.

Requirements for Re-admission

As was recently stated in the *Weisman* case there is a heavy burden on an applicant for re-admission and, whether the test is correctly stated to be no *probability* of re-offending or no *possibility* of re-offending the weight of the test is that the applicant “must show persuasively, by substantial and satisfactory evidence that it is extremely unlikely that they will offend in the future if permitted to resume practice.”

Recommendation of the Hearing Panel

The hearing panel recommends that David Elliott Waterhouse be re-admitted to membership in the Law Society of Upper Canada, on the following terms and conditions:

1. The Applicant shall fully disclose his financial circumstances to the Secretary of the Law Society and they shall work out a mutually satisfactory plan whereby the Applicant undertakes to re-pay the Lawyers Fund for Client Compensation the outstanding sum of \$13,750 in full over a period not to exceed thirty months from the date this matter is dealt with by Convocation.
2. If the Applicant returns to the private practice of law, his practice must be restricted to the same areas of law as those with which he is already familiar, being professional liability and construction insurance claims, otherwise he is to participate in the Society’s requalification process to determine the nature and extent of any retraining which might be required given his absence from practice.

3. If the Applicant returns to the private practice of law, his practice must be supervised by another lawyer satisfactory to the Secretary of the Law Society for a period of one year certain and thereafter such period of time as may jointly be determined by the supervising lawyer and the Secretary to be appropriate.

The hearing panel does not feel it necessary to order any period of counselling or supervision for substance abuse or to require complete abstinence from alcohol as the Applicant has demonstrated he has overcome those problems.

If the hearing panel had power to order costs of the hearing, it would consider doing so however it believes such power does not presently exist. If it is wrong in that belief, it invites Convocation to make an order as to costs or to re-submit the matter to the panel to consider that aspect of the application following submissions by counsel.

Reasons for Recommendation

Having heard all the evidence and tested it with the hearing panel, counsel for the Society does not oppose the re-admission of the Applicant. The hearing panel unanimously recommends the re-admission of the Applicant and is thoroughly satisfied he is an appropriate candidate for re-admission.

Of the seven point test outlined in *Weisman* this Applicant has met each and every one. He is perhaps the model application to review against those criteria, which re-state the various tests applied in previous cases. The hearing panel acknowledges the test in *Goldman* and the review of the caselaw in *Weisman* as well as the public interest statements in the *Bolton* decision.

Rehabilitation and evidence of a change of character are at the heart of any successful application for re-admission to the Law Society. The protection of the public requires a second mistake not be made in admitting a person to membership after they have already once before let down the profession and the public. It is a heavy burden on the Applicant and an equally large responsibility on the panel hearing the application, reviewing the evidence and testing the merits of the application.

This Applicant has provided an overwhelming case of change at the very core of his being. Through witnesses from all walks of life, some who knew him before termination of his membership and some who only met him since, from professionals of all backgrounds, he has presented evidence that he is a completely different person than the one whose membership was terminated. The risk of his re-offending is described as very low and, but for anyone's natural reluctance to speak in absolute terms, might well have been described as non-existent. At least one witness indicated absolutely that the Applicant would not re-offend.

The current professional credentials of the Applicant are impeccable. He has the respect of all who work with him and has demonstrated leadership in his new career. His honesty and integrity have been attested to by all witnesses. He has established a reputation in his field which reaches throughout North America. His knowledge of the law is not only current, he is leading the way in his company with new legal approaches of mediation and arbitration to settle claims and is travelling across the country to teach better risk management skills to other professionals.

The Applicant has paid the price for his earlier behaviour, accepting responsibility and indicating remorse for his actions. He has not tried to blame others or use his alcohol dependency as a crutch rather he accepts that he was a very flawed person with serious problems. His change has been both remarkable and complete, astonishing his friends and psychiatrist. He himself says when he looks back he can't believe the person he was then. None however doubt the change is real and substantial. He has maintained this new life over the last eight years, building a family and a career which would be the envy of many. He asks to be re-admitted to the Law Society, to be given another chance and to be permitted to re-claim his professional career as a lawyer.

The Applicant is clearly knowledgeable of the law in the areas in which he currently works, which areas require a great deal of legal ability and current knowledge in the law. The hearing panel notes the Applicant's testimony that he plans to stay where he is and also notes the evidence that he is on the track to becoming an officer of the corporation. The prospect of return to private practice is probably remote but it should be addressed so all the options are available to the Applicant.

The hearing panel is satisfied the Applicant does not require any retraining should he engage in practice as a lawyer in those areas which are part of his present job. If he returns to private practice and branches out into other areas of law it will have to be determined at that time whether he needs to requalify, as would be the case of anyone who was absent from practice and decided to come back to the law. The Law Society's requalification rules and practice directives will suffice to help the Applicant with that determination.

The Applicant has been working in a corporation with a lot of support staff, supervision and structures in place. Should he decide to return to private practice those supports might no longer be available to him and the hearing panel recommends that for at least the first year of any such arrangement, the Applicant be supervised by another lawyer, to assist with the transition.

The hearing panel considered whether it could order the Applicant to repay the Lawyers Fund for Client Compensation given the Assignment in Bankruptcy by the Applicant. Counsel provided the panel with statutory references, caselaw and the policy of Convocation with respect to bankrupt members. The Applicant honestly stated that if re-admitted he would agree to repay the Compensation Fund but probably would not do so if he was not re-admitted. This was not seen by the hearing panel as either an enticement or a threat, simply a statement by the Applicant, a discharged bankrupt, of his view of his responsibilities cognizant also of his financial obligations to his family. He did not give an answer just to satisfy the panel. He gave a truthful answer, stating his intentions, consistent with his legal rights.

The hearing panel has reviewed the legal opinion provided to Convocation earlier last year when a policy with respect to bankrupt members was adopted and has determined that it has the legal authority to order re-payment to the Lawyers Fund for Client Compensation as a condition of re-admission. To paraphrase the legal opinion, the bankruptcy discharges the bankrupt from the claims provable in the bankruptcy and the Society, including the Lawyers Fund for Client Compensation, may not take steps to recover what is owing to them. However, the Society may withhold a privilege for failure to satisfy a financial requirement and may require the outstanding fee be paid before it re-instates rights and privileges even though the fee itself (in this case the Compensation Funds' subrogated right to payment) has been extinguished. The requirement to pay is a "membership requirement" and not a means of enforcing payment of an amount which has been extinguished.

The hearing panel felt that as the Applicant's colleagues had, through the Lawyers Fund for Client Compensation, paid the Applicant's debts it was an acceptable requirement of reinstatement of membership that the Applicant re-imburse the Fund

Summary

In a re-admission application the onus is on the Applicant. Disbarment is meant to be permanent but there is always the glimmer of hope of re-admission if a persuasive case can be made which meets the criteria outlined in the caselaw. Having reviewed the decisions, weighed the evidence and listened to the witnesses in this application the hearing panel respectfully submits that there is absolutely no reason to turn down this application and every reason to grant it.

All of which is respectfully submitted

Dated this 12th day of November, 1997

Susan Elliott, Chair
On behalf of the Hearing Panel

Ms. Brooks made submissions in support of the recommendation of the Committee that the applicant be granted permission to apply for readmission to the Law Society.

Mr. Csathy supported the recommendation of the Committee.

It was moved by Mr. Copeland, seconded by Mr. MacKenzie that the Report be adopted.

Carried

DISCIPLINE COMMITTEE

Re: John Calvin BRACEWELL - Sarnia

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Ms. Catherine Braid appeared on behalf of the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 14th January, 1998 together with the Affidavit of Service sworn 3rd March, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail at the Front Street East address on 20th February, 1998 (marked Exhibit 1) together with the Report and Affidavit of Service sworn 19th February, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail at the Willowbrooke Crescent address on 12th February, 1998 (marked Exhibit 2) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 25th March, 1998 and marked Exhibit 3. 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

Philip M. Epstein, Q.C., Chair
Elvio L. DelZotto, Q.C.
David W. Scott, Q.C.

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

Elizabeth Cowie
for the Society

JOHN CALVIN BRACEWELL
of the City
of Sarnia
a barrister and solicitor

Not Represented
for the solicitor

Heard: October 30 and
December 1, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 24, 1995 Complaint D13/95 was issued, and on October 21, 1996 Complaint D248/96 was issued against John Calvin Bracewell alleging that he was guilty of professional misconduct.

The matter was heard in public on October 30 and December 1, 1997 before this Committee composed of Philip M. Epstein, Q.C., Chair, Elvio L. Delzotto, Q.C. and David W. Scott, Q.C. The Solicitor attended the hearing and represented himself. Elizabeth Cowie appeared on behalf of the Law Society.

DECISION

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

Complaint D13/95

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending April 30, 1994, a certificate 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 Regulation 708 made pursuant to the Law Society Act.

Complaint D248/96

2. a) He misappropriated client funds.
- b) He transferred client monies from his trust account allegedly for fees earned without providing the legal service and without issuing a fee billing or other written notification to the client as follows:

Dennis Bruce McConnell	\$635.00
Robert Terrance Taylor & Mona Murphy	<u>350.00</u>
	\$985.00

- c) He retook fees and failed to deposit a client retainer of \$6,300.00 received from his client, Larry Finlayson, into his trust account.
- d) He acted in conflict of interest by representing both the vendor and the purchasers in the transfer of property located at 4262 St. Clair Parkway, Sombra, Ontario, by failing to refer either client for independent legal advice or obtaining waivers of independent legal advice.
- e) He issued NSF cheques on seven occasions during 1993 and 1994, totalling approximately \$11,000.00, in payment of professional obligations incurred on behalf of his clients in the closing of real estate transactions, and in matters where invoices were required to be paid on clients' behalf.
- g) He failed to serve his clients by failing to keep them reasonably advised of the status of their matter.
- h) He failed to co-operate with the Law Society's investigation auditor in carrying out an audit by failing to produce a complete set of books, records, and client files, as required by Regulation 708.
- i) From January 24, 1994 to December 20, 1994, he failed to respond in a meaningful way to communications from the Law Society.

Particular 2(f) was withdrawn at the hearing.

Evidence

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

Re: Complaint D13/95:

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D13/95 and is prepared to proceed with a hearing of this matter on June 7, 1995.

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 D13/95 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 28, 1989. He practised as sole practitioner until his suspension on January 27, 1995 as a result of his failure to pay his errors and omissions levy.

5. The Solicitor's fiscal year end is April 30th. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending April 30, 1994, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. A Notice of Default in Annual Filing, dated November 3, 1994 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By registered mail, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing dated December 14, 1995. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings to a maximum of \$1,500.00. The Solicitor was advised that once the fee remained unpaid for four months, 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 might be brought before the Discipline Committee for failure to file. The Society's Second Notice was signed for and delivered on December 19, 1994. A copy of the Society's Second Notice and Acknowledgement of receipt of a registered item is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

8. The late filing fee began to accrue on December 28, 1994.

9. To date, the Solicitor has not filed the required forms.

V. DISCIPLINE HISTORY

10. The Solicitor was found guilty of professional misconduct, reprimanded in committee and ordered to pay costs of \$400.00 on March 6, 1993 with respect to his failure to file for the fiscal year ended April 30, 1991.

11. The Solicitor was found guilty of professional misconduct on March 24, 1994 with respect to his having operated his general account transactions through his mixed trust account and his having permitted a client trust ledger account to be overdrawn. The Solicitor was reprimanded in Convocation on September 22, 1994.

DATED at Sarnia this 6th day of June, 1995.”

Re: Complaint D248/96

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D248/96 and is prepared to proceed with a hearing of this matter on October 30, 1997.

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 D248/96 and this agreed statement of facts and admits the particulars contained therein. The Solicitor also admits that the particulars alleged in the Complaint supported by the facts as hereinafter stated constitute professional misconduct, with the exception of particular 2(f).

IV. FACTS

4. The Solicitor was called to the Bar in March 1989. He practises as a sole practitioner in Sarnia and is currently administratively suspended effective January 27, 1995 for non payment of his E&O levy.

Particular 2(d) He acted in a conflict of interest by representing both the vendor and the purchasers in the transfer of property located at 4262 St. Clair Parkway, Sombra, Ontario, by failing to refer either client for independent legal advice or obtaining waivers of independent legal advice.

5. During the summer of 1992, the Solicitor acted for Dennis Bruce McConnell on the sale of his property at 4262 St. Clair Parkway, Sombra, Ontario. The Solicitor also acted for the purchasers, Robert Taylor and Mona Murphy.

6. Some difficulties arose with respect to easements and possible contravention of city by-laws. As a result, the closing of the transaction was delayed.

7. Despite the difficulties identified by the Solicitor, the Solicitor failed to refer either the purchaser or the vendor for independent legal representation or independent legal advice. Nor did he obtain a waiver of such representation or advice from them.

Particular 2(e) He issued NSF cheques on seven occasions during 1993 and 1994, totalling approximately \$11,000.00, in payment of professional obligations incurred on behalf of his clients in the closing of real estate transactions, and in matters where invoices were required to be paid on clients' behalf.

8. As stated above, the Solicitor acted for Dennis McConnell on the sale of his property in Sombra. On April 29, 1993, the Solicitor issued Cheque #435 on his general account in the amount of \$900.00 to the credit of Dennis McConnell. He did this because he estimated that approximately \$900.00 was owing to Mr. McConnell from the sale of his property. There were insufficient funds in the account, and the cheque was returned by the bank on May 27, 1993. A copy of the cheque and notice from the bank are attached as Exhibit 1.
9. The Solicitor acted for David Robert Phillips with respect to the remortgaging of his property at 227 Forsythe Street, Sarnia, Ontario.
10. Mr. Phillips arranged the refinancing in the amount of \$57,000.00 through the Family Group in London, Ontario. The Family Group had arranged a mortgage with the Investors Group.
11. On July 14, 1994, Investors Group advanced funds in trust to the Solicitor in the amount of \$56,910.00.
12. The Solicitor was instructed by David Robert Phillips to pay out an existing mortgage payable to Canada Trust from those funds.
13. By letter dated July 15, 1994, Canada Trust confirmed that the amount outstanding was \$10,376.27. A copy of that letter is attached as Exhibit 2.
14. On July 19, 1994, the Solicitor remitted a trust cheque in the amount of \$10,376.27 to Canada Trust. This cheque was returned because of insufficient funds. A copy of the cheque is attached as Exhibit 3.
15. The Solicitor retained the services of Sandra J. Taylor, a court reporter, during 1993. Ms. Taylor prepared court transcripts on the instructions of the Solicitor and, by invoice #1182, dated August 19, 1993, rendered an account to the Solicitor in the amount of \$319.93. A copy of this invoice is attached as Exhibit 4.
16. Shortly thereafter, Ms. Taylor sent a revised invoice #1182, also dated August 19, 1993, to the Solicitor for the amount of \$361.66. A copy of this invoice is attached as Exhibit 5.
17. By cheque dated August 20, 1993, the Solicitor paid the first invoice in the amount of \$319.93. This cheque was returned by reason of insufficient funds. A copy of the cheque is attached as Exhibit 6.
18. Ms. Taylor further invoiced the Solicitor by invoice #1233, dated November 21, 1993 in the amount of \$376.12. A copy of this invoice is attached as Exhibit 7.
19. The Solicitor paid Ms. Taylor the amount of \$376.12 by cheque dated December 23, 1993. This cheque was returned by reason of insufficient funds. A copy of the cheque is attached as Exhibit 8.
20. Ms. Taylor rendered a subsequent invoice #1233 on January 17, 1994, in the amount of \$390.58. A copy of this invoice is attached as Exhibit 9. To date, the Solicitor has not paid this invoice.
21. On July 29, 1993, the Solicitor issued cheque #000462 on his general account in the amount of \$125.00 payable to the Ministry of Finance, as a filing fee in a divorce action. This cheque was returned by reason of insufficient funds. A copy of the cheque is attached as Exhibit 10.
22. On November 29, 1993, the Solicitor issued cheque #0000013 in the amount of \$45.00 payable to the Ministry of Finance on his general account for payment of court costs in a divorce action. This cheque was returned by reason of insufficient funds. A copy of the cheque is attached as Exhibit 11.
23. On April 6, 1994, the Solicitor made a cash payment to cover the two returned cheques. A copy of the receipt is attached as Exhibit 12.

24. On January 28, 1994, the Solicitor issued cheque #0000063 in the amount of \$125.00 on his general account to the Ministry of Finance. This cheque was returned by reason of insufficient funds. A copy of the cheque is attached as Exhibit 13.

25. The Solicitor subsequently replaced the cheque with a cash payment.

Particular 2(f) He misled the Law Society by providing false information to the Law Society regarding the complaint of a former client, Dennis McConnell. The Solicitor denied that funds required to close the transaction had been received and denied the existence of a trust ledger card to various representatives of the Law Society, when he knew that the funds had been received and that a trust ledger card existed.

26. As a result of difficulties arising over the McConnell sale to Taylor, a complaint was lodged with respect to the Solicitor to the Law Society of Upper Canada. The Solicitor responded to the complaint by letter dated October 4, 1993, a copy of which is attached as Exhibit 14. In that letter, the Solicitor stated that the transaction had closed without his being put in funds by the purchaser, Taylor. He also stated that there had never been a trust ledger for Mr. McConnell.

27. During an audit conducted by the Law Society of the Solicitor's files in 1994, the Solicitor was asked whether there was any trust ledger created for Mr. McConnell. In response, the Solicitor produced two ledger cards. One card was for the purchase and had no entries. A copy of this card is attached as Exhibit 15. The second card was for the sale and also had no entries. A copy of this card is attached as Exhibit 16.

28. However, on a earlier audit conducted by an Examiner from the Law Society, a ledger card entitled "Taylor Separation" had been retrieved from the Solicitor's files. A copy of this card is attached as Exhibit 17. This card showed a retainer by Mr. Taylor to the Solicitor on September 1, 1992, in the amount of \$2,172.95. These funds were provided by Mr. Taylor for the purchase of the property from Mr. McConnell.

29. Therefore, at the time he responded to the Law Society on October 4, 1993, contrary to his assertions, the Solicitor had received funds from Mr. Taylor, the purchaser, and had created a trust ledger card showing the receipt of such funds.

Particular 2(g) He failed to serve his clients by failing to keep them reasonably advised of the status of their matters.

30. In September 1994, London Life agreed to advance mortgage funds to Russel Myles. The Solicitor acted for both Myles and London Life on the transaction. By letter dated September 12, 1994, a copy of which is attached as Exhibit 18, London Life provided instructions to the Solicitor for the disbursement of the mortgage funds and reporting to them.

31. The Solicitor failed to report to London Life pursuant to his instructions.

32. By letter dated November 18, 1994, a copy of which is attached as Exhibit 19, London Life wrote to the Solicitor requiring that he immediately report to them and confirm that he had followed his instructions. Prior to the writing of the letter, London Life had contacted the Solicitor by telephone on November 10 and November 17, 1994 and the Solicitor had promised to deal with the matter expeditiously.

33. The Solicitor did report to London Life on November 24, 1994.

34. Russel Myles further instructed the Solicitor to pay out a mortgage in favour of CMHC from the London Life mortgage proceeds.

35. By letter dated November 17, 1994, a copy of which is attached as Exhibit 20, CMHC wrote to the Solicitor indicating that their mortgage was four months in arrears and that, despite several attempts, they had been unable to resolve the matter with the Solicitor.

36. Despite his instructions, the Solicitor took no steps to satisfy the CMHC mortgage.
37. In 1989, Larry Finlayson retained the Solicitor with respect to divorce proceedings.
38. In 1994, Mr. Finlayson decided to change solicitors and telephoned the Solicitor on several occasions for the return on his file. On each occasion, the Solicitor provided an excuse or reason why the file was not available. It was only, finally, through the intervention of the Law Society, that Mr. Finlayson retrieved his file from the Solicitor.
39. The Solicitor acted for Dennis McConnell on the sale of his property in Sombra, Ontario. Despite becoming aware of problems in effecting a closing of the transaction due to by-law violations, the Solicitor failed to communicate these concerns in writing to his client. The Solicitor states that he communicated the problems by telephone and received instructions to close. In furtherance of this, the Solicitor sent Mr. McConnell \$900.00, as noted above.
40. As indicated above, the Solicitor acted for David Robert Phillips on the remortgaging of his property. He received instructions from Mr. Phillips to pay out the Canada Trust mortgage previously placed on the property. As indicated above, the Solicitor provided Canada Trust with a cheque that was returned by reason of insufficient funds. Thereafter, Mr. Phillips received both verbal and written requests from Canada Trust asking for payment on the mortgage. Mr. Phillips referred these enquiries to the Solicitor, however, the Solicitor was difficult to reach, and when contacted, merely provided excuses as to why the discharge had not yet been effected.
41. Mr. Phillips also did not receive any reporting letters from the Solicitor.
42. Canada Trust also attempted to contact the Solicitor with respect to the Phillips mortgage, but despite several attempts to contact the Solicitor, were unsuccessful. Canada Trust also experienced difficulty with the Solicitor with respect to three other mortgages. By letter dated September 1, 1994, a copy of which is attached as Exhibit 21, Canada Trust complained to the Law Society that they had not received a report on two mortgages advanced on March 31, 1994 and a third mortgage advanced on June 30, 1994.
43. With respect to the latter three mortgages, reporting letters were not received by Canada Trust until November 4, 1994.

Particular 2(h) He failed to cooperate with the Law Society's investigation auditor in carrying out an audit by failing to produce a complete set of books, records, and client files, as required by Regulation 708.
44. As a result of complaints received by the Law Society of Upper Canada, an auditor was assigned to investigate the accounting records of the Solicitor.
45. After initial contact was made with the Solicitor, the auditor called the Solicitor and left a telephone message with his secretary for him to return the call on January 24, 1994. The Solicitor did not return the telephone call.
46. On February 8, 1994, the auditor attended at the Solicitor's office. At that time the accounting records were not available for review.
47. On April 10, 1994, the auditor left a message for the Solicitor to provide certain accounting records. The Solicitor did not respond.
48. On April 19, 1994, the auditor again left a message requesting the accounting records. The Solicitor did not respond.
49. On April 27, 1994, the auditor contacted the Solicitor and made an appointment to meet on May 19, 1994.

50. On May 17, 1994, the Solicitor telephoned the auditor and cancelled the appointment. At that time, a new appointment was set for June 23, 1994.

51. On June 22, 1994, the Solicitor telephoned the auditor and indicated he could not keep the appointment. He requested further time to get his books and records up to date.

52. On August 23, 1994, the auditor contacted the Solicitor who indicated he had forgotten he was to collect his books and records.

53. On October 6, 1994, the auditor telephoned the Solicitor to set up an appointment to resume the audit. At that time, the Solicitor indicated he needed more time to put his books and records together.

54. On October 20, 1994, the auditor attended at the Solicitor's office and indicated that, should the books and records not be produced forthwith, the Society would be requesting co-signing on the trust account. The Solicitor responded that he needed more time.

55. On October 27, 1994, the auditor attended at the Solicitor's office again and requested that the books and records be produced or co-signing controls would be implemented. The Solicitor responded that he needed more time.

56. On November 30, 1994, the auditor wrote to the Solicitor by both registered mail and facsimile transmission outlining his concerns. There was no response to this correspondence.

57. On December 12, 1994, the auditor attended at the Solicitor's office. The books and records of the practice were not produced at that time. Consequently, the Society instituted co-signing controls.

58. During the course of the audit, the Solicitor provided some files for review and some bank statements and duplicate deposit books. However, bank reconciliations for the trust and general account and trust listings for the period under investigation have not been produced.

Particular 2(i) From January 24, 1994 to December 20, 1994, he failed to respond in a meaningful way to communications from the Law Society.

59. As a result of a complaint received by the Law Society from Sandra J. Taylor, by letter dated May 13, 1994, the Society wrote to the Solicitor requesting his response. A copy of this letter is attached as Exhibit 22. The Solicitor did not respond to this letter.

60. On May 31, 1994, the Society telephoned the Solicitor and left a message for him to call concerning the complaint. The Solicitor did not return the telephone call. Attached as Exhibit 23 is a copy of the Telephone Transaction Record.

61. On June 6, 1994, the Society again telephoned the Solicitor and left a message for him to return the call. A copy of the Telephone Transaction Record is attached as Exhibit 24.

62. On June 7, 1994, the Solicitor returned the telephone call and indicated he was proceeding to finalize the matter with the complainant and would forward a response later in the day. No response was received. A copy of the Telephone Transaction Record is attached as Exhibit 25.

63. On June 16, 1994, the Society telephoned the Solicitor and enquired when a reply might be expected. The Solicitor advised that his response had recently been typed and it was going out in the mail that day. No response was received. A copy of the Telephone Transaction Record is attached as Exhibit 26.

64. On July 4, 1994, the Society telephoned the Solicitor and left a message asking he return the telephone call. The Solicitor did not return the call. A copy of the Telephone Transaction Record is attached as Exhibit 27.

65. By letter dated July 14, 1994 and sent by registered mail, the Society wrote to the Solicitor requiring his response forthwith. A copy of this letter is attached as Exhibit 28. The letter was returned to the Society as it had not been claimed by the Solicitor.

66. As a result of a separate complaint received by the Law Society, on July 18, 1994, the Society wrote to the Solicitor requesting his response. A copy of this letter is attached as Exhibit 29. The Solicitor did not respond.

67. On July 27, 1994, the same letter was sent to the Solicitor's new address. A copy of the letter is attached as Exhibit 30. The Solicitor did not respond.

68. On November 30, 1994, the Society telephoned the Solicitor and left a message for him to return the telephone call. Attached as Exhibit 31 is a copy of the Telephone Transaction Record.

69. On December 1, 1994, the Solicitor returned the telephone call and advised that he had tried to get in touch with the complainant without success. He further advised that he did not understand the letter of complaint. He was instructed to write to the Society and explain what he did not understand so that the Society could obtain further information from the complainant. The Solicitor promised to fax his response by December 5, 1994. A copy of the Telephone Transaction Record is attached as Exhibit 32.

70. The Solicitor's response was not received by December 5, 1994, and consequently, on December 8, 1994, the Society telephoned the Solicitor and left a message that his response was expected by the next day. A copy of the Telephone Transaction Record is attached as Exhibit 33.

71. On December 9, 1994, the Solicitor returned the telephone call and advised the Society that he had a problem with his secretary and she had left the firm. Consequently, he would have to type the letter himself. He further advised that he would forward his response by the end of the day. No such response was received. A copy of the Telephone Transaction Record is attached as Exhibit 34.

72. On December 13, 1994, the Society telephoned the Solicitor and left a message that his response was expected by December 14, 1994. The Solicitor did not respond. A copy of the Telephone Transaction Record is attached as Exhibit 35.

73. On December 20, 1994, a letter was sent by registered mail to the Solicitor requiring his response within seven days. A copy of this letter is attached as Exhibit 36. To date, the Solicitor has not responded to the Society.

V. DISCIPLINE HISTORY

74. On March 16, 1993, the Solicitor was reprimanded in Convocation and ordered to pay \$400.00 in costs with respect to failing to file his Forms 2/3 for the fiscal year ended April 30, 1991.

75. On September 22, 1994, the Solicitor was reprimanded in Convocation with respect to operating his general account transactions through that of his mixed trust account from June 17, 1992 to December 9, 1992, in contravention of Section 14 of Regulation 708 made under the *Law Society Act*.

DATED at Toronto, this 30th day of October, 1997."

"SUPPLEMENTARY AGREED STATEMENT OF FACTS

I. ADMISSIONS

1. The Solicitor has reviewed Complaint D248/96 particulars 2(a) and 2(b) and this Agreed Statement of Facts and admits the particulars contained therein, as modified by this Agreed Statement of Facts. The Solicitor also admits that the particulars alleged in the Complaint supported by the facts as hereinafter stated constitute professional misconduct.

II. FACTS

Particular 2(a) He misappropriated client funds.

2. On June 28, 1991, David Robert Phillips purchased a property located at 227 Forsyth Street North, Sarnia, Ontario.
3. In the spring of 1994, Mr. Phillips decided to use the equity in his property to obtain funds for purposes of investment. He arranged a mortgage in the amount of \$57,000.00 with the Investors Group for that purpose. Mr. Phillips retained the Solicitor to act on his behalf with respect to the mortgage transaction.
4. By letter dated July 14, 1994, (Tab 11 of the Document Book), the Investors Group forwarded funds in the amount of \$56,910.00 and instructions to the Solicitor.
5. The Solicitor registered a mortgage in favour of the Investors Group on July 15, 1994 (Tab 12 of the Document Book).
6. From the proceeds of the mortgage, Mr. Phillips instructed the Solicitor to pay out an existing mortgage to Canada Trust.
7. Pursuant to those instructions, on July 19, 1994, the Solicitor remitted a trust cheque in the amount of \$10,376.27 to Canada Trust. However, that cheque was returned due to insufficient funds (Tab 3 of the Exhibit Book).
8. Subsequently, Mr. Phillips received requests from Canada Trust for payments on the mortgage. When he approached the Solicitor, the Solicitor gave him a personal cheque in the amount of \$800.00 to make the outstanding payments on the mortgage and told him there had been a mix up and that the Solicitor would straighten it out.
9. The Solicitor discharged the mortgage to Canada Trust on October 27, 1994, by a bank draft in the amount of \$9,684.24 (Tab 17 of the Document Book).
10. During the summer of 1994, Russel Myles decided to mortgage his property at 119 Ann Street, Sarnia, Ontario, in order to raise funds for investment purposes. With the assistance of Wayne Forbes, Mr. Myles arranged a mortgage with London Life in amount of \$30,000.00. Wayne Forbes referred Mr. Myles to the Solicitor and Mr. Myles retained the Solicitor to act on his behalf with respect to the mortgage transaction.
11. On or about September 15, 1994, London Life forwarded funds in the amount of \$29,850.00 to the Solicitor. The Solicitor deposited these funds into his trust account (Tab 22 of the Document Book).
12. From the proceeds on the London Life mortgage, Russel Myles instructed the Solicitor to pay out two small existing mortgages. Despite those instructions, the Solicitor did not so discharge the mortgages.
13. It was the Solicitor's understanding, pursuant to an agreement he had drafted between Wayne Forbes and Russel Myles, that Russel Myles was investing the balance of the proceeds of the mortgage in a company, Aslan, owned by Wayne Forbes.
14. At the time, Wayne Forbes owed the Solicitor approximately \$20,000.00 and the Solicitor held back approximately \$15,000.00 from the Myles mortgage to pay down that debt. He released the remaining \$14,800.00 to Wayne Forbes by cheque made payable to Robert Phillips, pursuant to Wayne Forbes' instructions (Tab 14 of the Document Book).
15. During 1994, the Solicitor had a number of business dealings with Wayne Forbes. As a result of these dealings, significant funds belonging to Mr. Forbes passed through the Solicitor's trust account. At Mr. Forbes' request, the Solicitor allowed him to retain those funds in the Solicitor's bank account. He also allowed Mr. Forbes to draw down on those funds to pay for personal expenses.

16. The Solicitor wrote trust cheques at the direction of Wayne Forbes for the benefit of Wayne Forbes and, on a number of occasions, left blank signed trust cheques with his secretary for Mr. Forbes to fill out.

17. Consequently, the Solicitor lost control of his trust account and was unable to determine the balances therein. As a result, the mixed trust account was frequently in an overdraft situation and client obligations were left unsatisfied.

Particular 2(b) He transferred client monies from his trust account allegedly for fees earned without providing the legal service and without issuing a fee billing or other written notification to the client as follows:

Dennis Bruce McConnell	\$635.00
Robert Terrance Taylor & Mona Murphy	<u>350.00</u>
	<u>\$985.00</u>

18. During the summer of 1992, the Solicitor was retained to act for Dennis Bruce McConnell on the sale of his property at 4262 St. Clair Parkway, Sombra, Ontario. The Solicitor also retained to act for the purchasers, Robert Taylor and Mona Murphy.

19. As a result of the retainer, the Solicitor prepared a rough calculation of funds required on closing (Tab 1 of the Document Book). This was then reduced to a funding statement (Tab 2 of the Document Book) indicating \$2,172.95 would be required to close. This included fees of \$350.00.

20. On or about September 1, 1992, Robert Taylor provided funds in the amount of \$2,172.95 to the Solicitor. These funds were deposited to the Solicitor's trust account but were credited to a ledger for "Taylor Separation" rather than "Taylor Purchase" (Tab 17 of the Exhibit Book).

21. Commencing September 1, 1992, the Solicitor began to transfer the funds from the trust account as follows:

Date	Cheque No.	Payee	Amount
September 1, 1992	225	Melody Bracewell	\$ 250.00
September 3, 1992	222	Melody Bracewell	500.00
October 30, 1992	282	Samantha Sullivan	227.96
December 1, 1992	339	Treasurer of Ontario	234.00
December 1, 1992	341	John C. Bracewell	100.00
December 9, 1992	349	John C. Bracewell	800.00
December 9, 1992	350	John C. Bracewell	100.00
		Total	\$2,211.96

Copies of some of these cheques are found at Tab 29 of the Document Book.

22. The transfer was not registered until November 30, 1992 (Tab 4 of the Document Book). The mortgage was registered by the Solicitor on the same date (Tab 5 of the Document Book).

23. By letter dated December 1, 1992 (Tabs 3 and 6 of the Document Book), the Solicitor reported to the purchasers. This reporting included his fee of \$350.00. However, prior to rendering an account, the Solicitor had transferred in excess of that amount from the trust account to his own benefit.

24. By letters dated January 5, 1993 (Tab 7 of the Document Book) and May 4, 1993 (Tab 8 of the Document Book), the Solicitor wrote to Robert Taylor requesting further funds for the purchase of the property. Those requests are not supported by accounts.

25. By a fee billing dated September 1, 1993 and faxed to the vendor on October 4, 1993, (Tabs 9 and 10 of the Document Book), the Solicitor accounted to Dennis McConnell for his fees and disbursements in the amount of \$635.00. However, the Solicitor had already transferred the amount of his account prior to rendering the fee billing.

DATED at Toronto, this 1st day of December, 1997.”

FINDING OF COMMITTEE

In Complaint D13/95 the Solicitor is charged with failure to file. Pursuant to an agreed statement of facts, the Solicitor agrees that he had failed to file with the Society in accordance with the charge of professional misconduct and that he is guilty of professional misconduct.

In Complaint D248/96 the Solicitor is charged with a number of counts of professional misconduct. The Committee proposes to deal with each in order:

2(a) After some evidence had been heard, the Solicitor and the Society entered into a supplementary agreed statement of facts and particular 2(a) of the original charge was amended. The particulars of that count are as follows:

In June of 1991 a client of the Solicitor, one David Robert Philips, purchased a property in Sarnia. Some years later, in the Spring of 1994, the client decided to use the equity in the property to obtain funds for the purpose of investment. He arranged a mortgage in the amount of \$57,000.00 with the Investors Group for that purpose. Both the Investors Group and the client retained the Solicitor to act on the mortgage transaction. The Investors Group forwarded \$56,910.00 to the Solicitor and the mortgage was duly registered. From the proceeds of the mortgage, the client instructed the Solicitor to pay out an existing mortgage to Canada Trust. The Solicitor did so but that cheque did not clear as a result of insufficient funds in the Solicitor's trust account. This shortage occurred because previously the Solicitor had acted for a Wayne Forbes in connection with a business transaction. As a result of that real estate and business transaction, the Solicitor had significant funds in his trust account which Mr. Forbes requested that the Solicitor retain and disburse from time to time upon Mr. Forbes' instructions.

Thereafter, from time to time, Mr. Forbes issued instructions as to how monies in the trust account of the Solicitor should be paid out. The instructions came frequently and sometimes were directed to the Solicitor's secretary rather than the Solicitor. The Solicitor allowed his trust account to operate as a bank for Mr. Forbes and went so far as to leave blank signed trust cheques with his secretary so that Mr. Forbes could access his trust account.

To compound the problem the Solicitor did not keep up-to-date books and records and accordingly was not in a position to know when Mr. Forbes might be overdrawing the trust account. It was this manner of operation that caused the trust account to have a shortfall and resulted in the cheque to Canada Trust being returned for insufficient funds.

It does not appear from the evidence before us and upon the agreed statement of facts that the Solicitor was ever a beneficiary of any of the funds in the trust account but in blindly following Mr. Forbes' instructions, the trust shortages occurred and client obligations were left unsatisfied.

It became clear by late 1994 that the Solicitor had lost complete control of his trust account and was unable to determine the balances. The trust account was frequently in an overdraft situation. The Committee had the opportunity to hear *viva voce* testimony from Wayne Forbes. The Committee had grave doubts about accepting any of Mr. Forbes' evidence on any substantial matters. The Committee had an opportunity to observe the demeanour of Mr. Forbes. He was evasive, forgetful and his evidence generally lacked candour. It may well be that the Solicitor was a dupe of Mr. Forbes and allowed Mr. Forbes to direct his trust account when he clearly ought not to have done so. It also appears that Mr. Forbes was in business in some fashion with Russel Myles and the Solicitor's understanding of the agreement between Forbes and Myles compounded the Solicitor's problems. When Forbes turned out to owe the Solicitor money, the Solicitor held back monies from Russel Myles that ought to have gone elsewhere.

Generally speaking the Solicitor paid little or no heed to the Law Society rules with respect to the operation of his trust account and mismanaged it to such a degree that it is now almost impossible to reconstruct the various transactions. Nevertheless, it does not appear that the Solicitor dealt with the trust account in any way to his own personal benefit and it appears that the Solicitor's troubles stem from gross neglect rather than wilful misconduct.

2(b) Particular 2(b) is a complaint that the Solicitor transferred certain monies from his trust account for fees without providing the legal service and without issuing the bill before he did so. While again it does not appear that the Solicitor took the fees without doing the work, there was a clear contravention of the Rules and a failure to render accounts before fees were taken.

2(c) The original charge against the Solicitor in this particular is that he pre-took fees and failed to deposit a client retainer of \$6,300 received from his client Larry Finlayson in his trust account. We heard evidence from Mr. Finlayson. Neither Mr. Bracewell nor Mr. Finlayson kept accurate records. The Committee was able to determine that the Solicitor did, in fact, from time to time deposit retainers directly into his general account rather than into his trust account, but from the evidence that we heard, it appears that he did so after the work was done but before the account was rendered. It does not appear to the Committee that the Solicitor ever took fees in advance from Mr. Finlayson but rather was in the habit of asking Mr. Finlayson to bring his account up to date from time to time, and when Mr. Finlayson gave the Solicitor monies, they went directly into the Solicitor's general account. Of course this is again a violation of the Law Society Rules in that the Solicitor did fail to render an account for any of the work done and failed to put the monies from the client into his trust account until an account was rendered.

2(d),(e),(g),(h),(i) With respect to these particulars the facts supporting the charges are set out in the Statement of Facts to which the solicitor has agreed.

Accordingly, based on the evidence we have heard and the Agreed Statement of Facts and the Supplementary Statement of Facts, the Solicitor is found guilty of professional misconduct in connection with Complaints D13/95 and D248/96, 2(a) as amended, 2(b), 2(c) as found by the Committee, 2(d), (e),(g),(h) and (i). On request of counsel for the Society 2(f) has been withdrawn.

RECOMMENDATION AS TO PENALTY

The Committee recommends that John Calvin Bracewell be given permission to resign.

REASONS FOR RECOMMENDATION

The Solicitor and counsel for the Society made a joint submission that the Solicitor ought to be given permission to resign. The Solicitor has not practised law for approximately three years. On March 16, 1993, the Solicitor was reprimanded in Convocation and ordered to pay \$400 in costs in respect of failing to file his forms 2/3 for the fiscal year 1991, and on September 22, 1994, the Solicitor was reprimanded in Convocation with respect to operating his general account transactions through that of his mixed trust account in contravention of Section 14 of Regulation 708 of the *Law Society Act*.

The Committee notes that the joint submission agreement was reached after one full day of evidence. Although the most serious charge contained in the complaint is that of a form of misappropriation, the Committee notes that it is clear that what, in fact, the Society complains of is the gross mismanagement by the Solicitor of his trust account, particularly by failing to keep books and records and by willing acceptance of instructions by Mr. Forbes to pay accounts of Mr. Forbes without regard to any system whereby the Solicitor could verify the balances available to each individual client.

The Solicitor is a sole practitioner called to the Bar in 1989. He has a previous discipline record for failing to deal with his accounts in the appropriate fashion. He has been found guilty of a significant number of offences which demonstrate that the Solicitor has a significant problem in understanding the Rules and Regulations of the Society and has a particular problem with being able to carry on practice in an appropriate fashion.

We are, however, mindful that none of the complaints relate to an attempt by the Solicitor to improperly benefit at the expense of any client. It appears that the Solicitor's problems came about primarily as a result of neglect and inexperience as opposed to wilful misconduct. As indicated earlier in the reasons, there is a strong suspicion by the Committee that the Solicitor was insufficiently experienced to be able to deal with a client like Mr. Forbes and allowed his judgment to be clouded, and by the instructions of Mr. Forbes whom we found to be less than forthright in his testimony.

The Solicitor approached this hearing with candour and was co-operative. He indicated clearly that he thought that continuing to practise was inappropriate for him and that he wished to resign. We are satisfied that the protection of the public, being our paramount concern, will be safeguarded if the Solicitor is given permission to resign. In our view the penalty of disbarment would be entirely inappropriate given the particular circumstances of these complaints and given the fact that the Solicitor did not personally benefit from the misconduct alleged.

Accordingly, we have no hesitation in accepting the joint submission and recommending that the Solicitor be given permission to resign.

John Calvin Bracewell was called to the Bar on March 28, 1989.

ALL OF WHICH is respectfully submitted

DATED this 14th day of January, 1998

Philip M. Epstein, Q.C., Chair

A letter was received by fax from the solicitor advising that he was unable to attend Convocation and marked Exhibit 4.

Ms. Braid asked that the Report be amended as follows:

- page 24, 1st line the words "account up to date from time to time, and when Mr. Finlayson gave the Solicitor monies, they" be deleted since it was a repeat of the words at the bottom of page 23.
- page 25, last paragraph, third line - the word "with" be changed to "which".

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

Counsel, the reporter and the public withdrew.

The Carter/Sealy motion was voted on and adopted.

Counsel, the reporter and the public were recalled and advised that the Report as amended was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be granted permission to resign.

Ms. Braid made brief submissions in support of the recommended penalty.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Carter, seconded by Mr. Copeland that the recommended penalty be adopted and the solicitor be granted permission to resign.

Carried

Counsel, the reporter and the public were recalled and informed that the solicitor was granted permission to resign.

Convocation took a brief recess at 10:45 a.m. and resumed at 11:00 a.m.

Re: Alice Dianne CUSTANCE - Russell

The Secretary placed the matter before Convocation.

Ms. Backhouse withdrew for this matter.

Ms. Seymour appeared on behalf of the Society and Mr. Brian Gover, Duty Counsel appeared on behalf of the solicitor. The solicitor was not present.

Ms. Seymour provided the history of this matter.

Mr. Gover requested an adjournment on consent to the next Discipline Convocation in April in order for the solicitor to complete the filing of the 1996 and 1997 Private Practitioner forms.

It was moved by Mr. MacKenzie, seconded by Mr. Carter that the adjournment be granted to the next Discipline Convocation in April.

Carried

Re: David Alfio Joseph FABBRO - Sault Ste. Marie

The Secretary placed the matter before Convocation.

Messrs. Bobesich and Swaye withdrew for this matter.

Mr. Stuart appeared on behalf of the Society and Mr. Gover appeared on behalf of the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 27th January, 1998 together with the Affidavit of Service sworn 19th February, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 13th February, 1998 (marked as 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

Philip M. Epstein, Q.C.

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

Glenn Stuart
for the Society

DAVID ALFIO JOSEPH FABBRO
of the City
of Sault Ste. Marie
a barrister and solicitor

Not Represented
for the solicitor

Heard: December 17 and 19, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 18, 1997 Complaint D219/97 was issued against David Alfio Joseph Fabbro alleging that he was guilty of professional misconduct.

The matter was heard in public on December 17, 1997 before Philip M. Epstein, Q.C. sitting as a single bencher. The Solicitor did not attend the hearing nor was he represented. Glenn Stuart appeared on behalf of the Law Society. On December 19, 1997 the Solicitor participated by teleconference to make submissions on penalty.

DECISION

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

Complaint D219/97

2. a) He failed to file with the Society within six months of the termination of his fiscal year ended April 30, 1996, a certificate 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 Regulation 708 made pursuant to the Law Society Act.

RECOMMENDATION AS TO PENALTY

The Committee recommends that David Alfio Joseph Fabbro be suspended for a period of ninety days and that he pay Law Society costs in the amount of \$500 to be paid within ninety days.

REASONS FOR RECOMMENDATION

At first blush this appears to be a routine complaint of failure to file. By the time the matter came before me on December 17, 1997, the Solicitor had a few days earlier completed his filings and they appear to be in order. However, what appears to be a simple complaint, when examined carefully, reveals a much more serious and deep-seated problem with the Solicitor.

The affidavit of Nadine Freed, an administrative assistant in the Forms Services Department of the Law Society, established the basis of the Complaint and established clearly pursuant to Section 33(9) of the Law Society Act that the Solicitor had indeed failed to make the requisite filings and accordingly the complaint of professional misconduct was made out.

The matter of the appropriate penalty for what appears to be a routine complaint is as I have indicated, a much more troublesome matter.

The Solicitor has a lengthy discipline history including at least three previous findings of professional misconduct with respect to a failure to file. What is worse, the Solicitor has previous complaints with respect to failing to properly serve clients. The Solicitor was reprimanded in Committee in March of 1989 for failure to file.

In January of 1996 he was again reprimanded in Committee on at least five different counts of professional misconduct. At that time the discipline panel indicated that the matter had caused a great deal of trouble and that the Committee had decided that they would reprimand the Solicitor in the hope that his problems were behind him.

The panel expressed the hope that the road upon which Mr. Fabbro had travelled would not be travelled upon again by him, and I take that as a clear message that the Committee was prepared to give Mr. Fabbro a break in the hope that he had learned an important lesson.

Such was unfortunately not the case and the Solicitor again found himself before a discipline panel on July 30, 1996. The panel expressed a view at that time. Having found Mr. Fabbro guilty of professional misconduct for failure to serve clients properly, they indicated that they were concerned that the Solicitor might well be ungovernable and the panel acknowledged that they were not treating what the Solicitor had done lightly. The Committee indicated to the Solicitor that under the circumstances it was prepared to give the Solicitor "one last break". The panel said:

“Let me assure you that in the event that you come before this Committee again and anyone reading these reasons and this reprimand in Committee, it will come through to them loud and clearly that in the event you don’t govern yourself properly, don’t look after your clients properly and you don’t deal with your fellow solicitors properly, you will be looking at a far heavier penalty than you are getting here today and that penalty may well move into the suspension stage.”

In a telling comment, the Chair of that discipline panel, Mr. Swaye, said, “Enough is enough is enough. You’ve had your last break.”

It appears that the Solicitor did not take the warning seriously.

It appears from the previous discipline history that the Solicitor has indeed been treated leniently and while I do not venture to second-guess my fellow benchers, it appears that Mr. Fabbro may well have been treated too leniently in view of the fact that he appears to be unwilling to learn from his own history.

What compounds this sad tale is the way in which Mr. Fabbro has treated the discipline process. The matter was set to proceed in October of 1997, but the Solicitor indicated he was unable to attend because he had car trouble and requested an adjournment. Car trouble had previously had previously been given as a reason for the Solicitor’s inability to attend in July 1996. The matter was subsequently adjourned to December 2, 1997 and again the member did not appear before the Discipline panel.

Unfortunately the matter was reached at the end of the day and could not proceed and the matter was put over to this hearing date on the understanding that no further adjournment request by the member would be entertained.

Nevertheless, the Solicitor did not attend. He was clearly advised in writing that the matter would be proceeding in a fashion peremptory to him. He responded by indicating that he had court work in Wawa, Ontario and was immediately advised by the Society’s counsel that he should either obtain an adjournment of that matter or have an agent deal with it.

Mr. Fabbro has treated the Society’s Complaint process cavalierly and does not appear to take the Society’s discipline process seriously in any fashion.

It appears to me that Mr. Fabbro is on the verge of being found to be completely ungovernable by the Society and it also appears to me that the public may well be at risk unless Mr. Fabbro learns to appreciate his responsibilities to the Society and to the public the Society has pledged to serve.

David Alfio Joseph Fabbro was called to the Bar on April 5, 1979.

ALL OF WHICH is respectfully submitted

DATED this 14th day of January , 1998

Philip M. Epstein, Q.C.

A letter dated March 25th, 1998 and faxed by the solicitor to the Society requesting an adjournment was marked Exhibit 2.

Mr. Gover advised that the solicitor requested an adjournment in order to review the matter with his new counsel.

Mr. Stuart opposed the request for an adjournment.

There were questions from the Bench.

Mr. Stuart advised that the filing had been completed.

It was moved by Ms. Puccini, seconded by Mr. Crowe that the adjournment be granted.

Lost

The matter was stood down so that the solicitor could be contacted by Duty Counsel for his instructions.

Re: Thomas Shane MALONEY - Port Colborne

The Secretary placed the matter before Convocation.

Mr. Cole and Ms. Sealy withdrew for this matter.

Ms. Cameron appeared on behalf of the Society and the solicitor who was present was represented by Mr. Gover, Duty Counsel.

Convocation had before it the Report of the Discipline Committee dated 13th January, 1998 together with the Affidavit of Service sworn 11th February, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 2nd February, 1998 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 6th February, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas E. Cole, Chair
W. Michael Adams
Hope Sealy

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

Christina Budweth
for the Society

THOMAS SHANE MALONEY
of the City
of Port Colborne
a barrister and solicitor

Not Represented
for the solicitor

Heard: September 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 5, 1997 Complaint D190/97 was issued against Thomas Shane Maloney alleging that he was guilty of professional misconduct.

The matter was heard in public on September 16, 1997 before this Committee composed of Thomas E. Cole, Chair, W. Michael Adams and Hope Sealy. The Solicitor attended the hearing and represented himself. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D190/97

2. a) He failed to serve his client, Donna Robins, in a conscientious, diligent and efficient manner by failing to pursue an action on behalf of his client;
- b) He misled his client, Donna Robins, by advising her that discoveries were scheduled when such was not the case;
- c) He failed to deliver promptly his client's file to her new solicitor, Andrew Brown, despite letters dated October 11, 1995, November 30, 1995 and March 4, 1996.
- d) He failed to reply promptly to the Law Society regarding a complaint by Donna Robins despite letters dated August 22, 1996, October 31, 1996 and January 21, 1997 and telephone messages left on July 2, 10 and 17, 1996, October 9 and 11, 1996; and
- e) He failed to comply with his undertaking to the Law Society dated November 5, 1991 by failing to reply promptly to all communications from the Law Society; in the case of telephone communications, within three business days of receipt of such communication, and in the case of written communications, within 10 days of receipt of such communication.

Evidence

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

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D190/97 and is prepared to proceed with a hearing of this matter on August 19 and 20, 1997.

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 D190/97 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 21, 1975. He is a sole practitioner.

Particular 2a) He failed to serve his client, Donna Robins, in a conscientious, diligent and efficient manner by failing to pursue an action on behalf of his client.

Particular 2b) He misled his client, Donna Robins, by advising her that discoveries were scheduled when such was not the case.

5. On or about April 8, 1989, Donna Robins and her infant son were involved in a motor vehicle accident. In or about June 1989, Ms. Robins retained the Solicitor to pursue an action on her behalf. On April 5, 1991, the Solicitor filed the statement of claim with the Ontario Court (General Division) (Tab 1, Document Book).

6. On October 24, 1994, Ms. Robins called the Solicitor and was advised by him that discoveries had been scheduled for October 28, 1994. Ms. Robins was further advised that the discoveries had been cancelled. The Solicitor indicated that since he did not play "hard ball", he would refer Ms. Robins to another lawyer, Mr. Quinn. The Solicitor arranged for Mr. Quinn and Ms. Robins to meet on November 3, 1994 and January 5, 1995 but subsequently, the Solicitor cancelled the said meetings. (Tab 2, Document Book)

7. Since November 1994, Ms. Robins called the Solicitor several times and left messages for him to return the calls. The Solicitor did not return the calls. In September 1995, appointments were scheduled to meet with the Solicitor and each one was cancelled by the Solicitor.

8. In October 1995, Ms. Robins retained Andrew Brown to pursue her claim. Mr. Brown attempted to obtain the file from the Solicitor. Mr. Brown's office searched the court file and determined that the court file did not contain proof of service of the claim or any statements of defence. (Tab 3, Document Book)

Particular 2c) He failed to promptly deliver his client's file to her new solicitor, Andrew Brown.

9. By letter dated October 11, 1995 (Tab 4, Document Book), Mr. Brown wrote to the Solicitor enclosing an executed Authorization from Ms. Robins requesting the release of the file. The Solicitor did not respond.

10. By letter dated November 30, 1995 (Tab 5, Document Book), Mr. Brown reminded the Solicitor of his October 11, 1995 letter requesting the transfer of Ms. Robins' file to his office. The Solicitor was asked to contact Mr. Brown to discuss the transfer of the file. The Solicitor did not respond.

11. By letter dated February 6, 1996 (Tab 6, Document Book), Mr. Brown again wrote to the Solicitor requesting Ms. Robins' file. Mr. Brown reminded the Solicitor that he had indicated that the file would be couriered to Mr. Brown's attention. The Solicitor was also asked to provide him with a copy of the statement of claim.

12. By letter dated March 4, 1996 (Tab 7, Document Book), Mr. Brown confirmed receipt of the statement of claim from the Solicitor and asked him to confirm that the claim was served upon the defendants as there were no defences filed with the court. The Solicitor was also asked to forward copies of any statements of defence he had received. The Solicitor did not respond.

13. The Solicitor delivered the file to Mr. Brown in April 1997 after the Law Society's involvement in this matter. Mr. Brown subsequently transferred the file to Terrance Marshall who has contacted the defendants for their positions. Mr. Marshall had issued and served a statement of claim against the Solicitor for his potential negligence. Bannatyne & Company are handling the matter on behalf of the Solicitor and the Lawyers Professional Indemnity Company.

Particular 2d)He failed to promptly reply to the Law Society regarding a complaint by Donna Robins.

14. By letter dated June 10, 1996 (Tab 8, Document Book), Donna Robins made a complaint to the Law Society regarding the Solicitor's failure to release her file to Mr. Brown.

15. On July 2, July 10 and July 17, 1996, the Law Society called the Solicitor and each time left a message for him to return the call. A copy of the notes of the telephone messages is contained at Tab 9 of the Document Book. The Solicitor did not return the calls.

16. By letter dated August 22, 1996 (Tab 10, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Ms. Robins' letter dated June 10, 1996. The Law Society asked the Solicitor to provide evidence that he had served the statement of claim upon the defendants. The Law Society reminded the Solicitor of his professional obligation to respond promptly to communications from the Law Society and requested his response within two weeks. The Solicitor did not respond.

17. On October 9 and 11, 1996, the Law Society called the Solicitor and each day left a message for him to return the call. A copy of the notes of the telephone messages is contained at Tab 11 of the Document Book. The Solicitor did not return the calls.

18. By registered mail dated October 30, 1996 (Tab 12, Document Book), the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was signed for and delivered on November 5, 1996. The Solicitor did not respond.

19. By registered mail dated January 21, 1997 (Tab 13, Document Book), the Solicitor was again reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was signed for and delivered on January 27, 1997.

20. By letter dated April 3, 1997 (Tab 14, Document Book), the Solicitor apologized to the Law Society for his failure to respond and confirmed that he had issued a statement of claim on April 5, 1991. The Solicitor further advised the Law Society that he has been under the care of a family physician and a specialist for emotional and physical stress. The Solicitor indicated that he would provide medical reports to the Law Society if necessary. The Solicitor confirmed that Ms. Robins' file had been delivered to Mr. Brown.

Particular 2e)He failed to comply with his undertaking to the Law Society dated November 5, 1991 by failing to reply promptly to all communications from the Law Society; in the case of telephone communications, within three business days of receipt of such communication, and in the case of written communications, within 10 days of receipt of such communication.

21. By failing to reply promptly to the Law Society's letters dated August 22, October 31, 1996 and January 21, 1997 and the Society's messages of July 2, July 10, July 17, October 9 and October 11, 1996, the Solicitor breached his undertaking to the Law Society dated November 5, 1991. A copy of the Solicitor's undertaking dated November 5, 1991 is contained at Tab 15 of the Document Book.

V. PRIOR DISCIPLINE

22. On March 17, 1992, the Solicitor was found guilty of professional misconduct for failing to reply to the Law Society. The Solicitor was reprimanded in Committee.

23. On November 5, 1991, the Solicitor was found guilty of professional misconduct for failing to reply to the Law Society. The Solicitor was reprimanded in Committee. The Solicitor also provided an undertaking to reply promptly to all communications from the Law Society; in the case of telephone communications, within three business days of receipt of such communication, and in the case of written communications, within ten days of receipt of such communication. DATED at Toronto, this 12th day of September, 1997.”

RECOMMENDATION AS TO PENALTY

The Committee recommends that Thomas Shane Maloney be reprimanded in Convocation conditional on his giving an undertaking to the Law Society that he will enroll in the Practice Review Program forthwith, that he will restrict his practice as set out in the undertaking, and that he will enter into therapy with a psychiatrist to be approved by the Law Society. If the undertaking is not received by the time this matter comes before Convocation, the Committee recommends that the Solicitor be suspended for a period of thirty days and such suspension to continue indefinitely thereafter until such time as he shall have given his undertaking to the Law Society.

The Committee further recommends that the Solicitor pay Law Society costs in the amount of \$750 payable within six months.

REASONS FOR RECOMMENDATION

The Solicitor, Thomas Shane Maloney came before this panel on a complaint D190/97 admitting the particulars and further admitting that the particulars constituted professional misconduct and this panel so finds.

The Solicitor was called to the Bar on March 21st, 1975, and subsequent to his partner being elected to the House of Commons, he practised as a sole practitioner from 1993.

Mr. Maloney comes before this panel having previously been disciplined for professional misconduct, for failing to reply to the Law Society, and on two occasions was reprimanded in Committee. The Solicitor further on November 5th, 1991, gave an undertaking to the Law Society to promptly reply to all communications from the Law Society. That undertaking, as alleged in particular 2(e), he breached.

Counsel for the Law Society has suggested a penalty in the range of a suspension to a reprimand in Convocation. Counsel made reference to a case of Allan Harries. This panel believes that the Solicitor has to have some direction and guidance in his practice in the immediate future to protect the public. The public will be protected by this panel's recommendation to Convocation that the Solicitor receive a reprimand in Convocation conditional upon the Solicitor giving an undertaking to the Law Society that he will enter the Practice Review Program forthwith, that he will restrict his practice to those areas of law to be determined by the Law Society and that he will seek and obtain medical help.

The Solicitor agreed at the hearing to provide the Law Society with an undertaking with respect to the above concerns of the Committee.

ALL OF WHICH is respectfully submitted

DATED this 13th day of January, 1998

Thomas E. Cole, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation conditional on his undertaking to enroll in the Practice Review Program and restrict his practice as set out in his undertaking and that he enter into therapy with a psychiatrist approved by the Society. If the undertaking was not received the solicitor is to be suspended for a period of 30 days, such suspension to continue thereafter until such time as the undertaking is given. Further the solicitor is to pay costs in the amount of \$750 payable within 6 months.

Both counsel made submissions in support of the solicitor being reprimanded in Convocation together with the solicitor's undertaking and payment of costs.

It was moved by Mr. Topp, seconded by Mr. Wright that the solicitor be reprimanded in Convocation together with the solicitor's undertaking and payment of costs.

Carried

The Acting Treasurer administered the reprimand.

Re: Robert Marven SYER - Toronto

The Secretary placed the matter before Convocation.

Ms. Backhouse and Messrs. Carter and Copeland withdrew for this matter.

Ms. Brooks appeared for the Society and the solicitor who was present was represented by Mr. Gover, Duty Counsel.

Convocation had before it the Report of the Discipline Committee dated 15th December, 1997 together with the Affidavit of Service sworn 2nd January, 1998 by Ron Hoppie that he had effected service on the solicitor by registered mail on 16th December, 1997 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th March, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Nancy L. Backhouse, Chair
Niels Ortved
William D. T. Carter

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

Janet Brooks
for the Society

ROBERT MARVEN SYER
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: October 1, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 27, 1997 Complaint D199/97 was issued against Robert Marven Syer alleging that he was guilty of professional misconduct. This Complaint was withdrawn and replaced by Complaint D199a/97 issued on August 27, 1997.

The matter was heard in public on October 1, 1997 before this Committee composed of Nancy L. Backhouse, Chair, Niels Ortved and William D.T. Carter. The Solicitor attended the hearing and represented himself. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D199a/97

2. a) He breached the Order of Convocation dated November 1, 1994, suspending his rights and privileges for non-payment of his annual fee, by engaging in the practice of law from November 4, 1994 to April 18, 1996.

Evidence

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

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D199a/97 and is prepared to proceed with a hearing of this matter on October 1, 1997.

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 D199a/97 and admits the particular contained therein. The Solicitor further admits that the said particular constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 19, 1970. He has been suspended for non-payment of his annual fee since November 1, 1994.

Particular 2a) He breached the order of Convocation dated November 1, 1994, suspending his rights and privileges for non-payment of his annual fee, by engaging in the practice of law from November 4, 1994 to April 18, 1996.

5. The Solicitor received a Notice dated June 10, 1994 and memorandum, in which the Law Society advised the Solicitor that payment of the first installment of his annual fees was due July 1, 1994. The Notice stated that pursuant to s. 36 of the Law Society Act, failure to pay the annual fees within four months after the due date may result in suspension. A sample of the Notice and copy of the memorandum are at Tab 1 of the Document Book. The Solicitor did not respond.

6. The Solicitor received a Final Notice dated September 26, 1994 in which the Law Society advised the Solicitor that payment of the first installment of his annual fees was due on July 1, 1994. The Notice stated that pursuant to s. 36 of the Law Society Act, failure to pay the annual fees within four months after the due date may result in suspension. A sample of the Notice is at Tab 2 of the Document Book. The Solicitor did not respond.

7. By registered letter dated November 2, 1994, the Law Society advised the Solicitor that his rights and privileges as a member had been suspended effective November 1, 1994 as a result of his failure to pay his annual fees. The Law Society's registered letter was signed for and delivered on November 7, 1994. A copy of the registered letter and the acknowledgment of receipt of the registered item are attached at Tab 3 of the Document Book.

8. On or about September 5, 1996, Marie Morley, an Examiner with the Law Society's Audit and Investigation Department, commenced an audit of the Solicitor's practice. As a result of that audit, documents were obtained which established that the Solicitor continued to practise law from November 4, 1994 to April 18, 1996 while suspended from the practice of law for non-payment of his annual fees by acting for the plaintiff, Thomas E. Hart, in a civil action for damages arising from a motor vehicle action. Mr. Hart was the boyfriend of the Solicitor's daughter. The Solicitor acted for Mr. Hart on a *pro bono* basis. The defendants were represented by the law firm of Blaney, McMurtry, Stapells, Friedman (hereinafter "Blaney, McMurtry").

- a. On November 4, 1994, the Solicitor had a telephone conversation with Blaney, McMurtry regarding the action. (Tab 4, Document Book);
- b. On or about December 6, 1994, the Solicitor received a letter from Blaney, McMurtry dated December 6, 1994 with respect to setting up discoveries for their respective clients (Tab 5, Document Book);
- c. On December 7, 1994, the Solicitor wrote to Blaney, McMurtry advising that he would be available for discoveries in January or February, 1995 (Tab 6, Document Book);
- d. On February 11, 1995, the Solicitor was served with a Notice of Examination for Discoveries (Tab 7, Document Book);
- e. On April 13, 1995, the Solicitor attended at the Examination for Discovery of his client;
- f. On or about August 11, 1995, the Solicitor received a letter from Blaney, McMurtry dated August 11, 1995 offering to settle the action (Tab 8, Document Book);
- g. On or about September 25, 1995, the Solicitor received a letter from Blaney, McMurtry dated September 25, 1995 requesting a response with respect to the settlement offer (Tab 9, Document Book);
- h. On November 1, 1995, the Solicitor had a telephone conversation with Blaney, McMurtry in which he advised that his client would accept the settlement offer (Tab 10, Document Book);
- i. On or about November 2, 1995, the Solicitor received a letter from Blaney, McMurtry dated November 2, 1995 confirming settlement of the action and enclosing a Release for execution by the Solicitor's client (Tab 11, Document Book);
- j. On or about December 20, 1995, the Solicitor received a letter from Blaney, McMurtry dated December 20, 1995 requesting return of the executed Release (Tab 12, Document Book);
- k. On or about December 28, 1995, the Solicitor received a letter from Blaney, McMurtry dated December 28, 1995 enclosing the settlement funds payable to the Solicitor in trust and confirming that the Solicitor had authorized the Blaney firm to execute a consent to dismissal of the action on his client's behalf (Tab 13, Document Book);
- l. On or about December 28, 1995, he received a Consent dated December 28, 1995 in which the Solicitor is listed as Solicitor for the Plaintiff (Tab 14, Document Book);
- m. In or about January, 1996, he advised his client to execute the release;
- n. On or about January 19, 1996, the Solicitor received a letter from Blaney, McMurtry dated January 19, 1996 requesting the return of the executed Release (Tab 15, Document Book);
- o. On or about January 26, 1996, the Solicitor received a letter from Blaney, McMurtry dated January 26, 1996 enclosing a copy of the order dismissing the action and requesting the return of the executed Release (Tab 16, Document Book);
- p. On or about February 1, 1996, he received a letter from Blaney, McMurtry dated February 1, 1996 again requesting the return of the executed Release (Tab 17, Document Book);
- q. On or about March 1, 1996, he received a letter from Blaney, McMurtry dated March 1, 1996 requesting the return of the executed Release (Tab 18, Document Book);

- r. On or about March 21, 1996, he received a letter from Blaney, McMurtry dated March 21, 1996 advising that the Solicitor was in breach of the escrow terms and requesting that he contact the firm and advising that the Blaney firm had been contacted by the Solicitor's client directly (Tab 19, Document Book);
 - s. On or about April 12, 1996, the Solicitor received a letter from Blaney, McMurtry dated April 12, 1996 advising that a stop payment had been placed on the settlement cheque and requesting that the Solicitor contact the firm (Tab 20, Document Book); and
 - t. On or about April 18, 1996, the Solicitor received a letter from Thomas Hart, client, dated April 18, 1996 advising that his services were terminated (Tab 21, Document Book).
9. At no time did the Solicitor advise his client or Blaney, McMurtry that he was not entitled to practise.
10. By Form 2 dated June 11, 1995 for the fiscal year ended February 28, 1995, the Solicitor incorrectly certified to the Law Society that he did not practise law during the period November 1, 1994 to February 28, 1995 (Tab 22, Document Book).
11. By Form 2 dated August 21, 1996 for the fiscal year ended February 28, 1996, the Solicitor incorrectly certified to the Law Society that he did not practise law during the period March 1, 1995 to February 28, 1996 (Tab 23, Document Book).
12. At the relevant time, the Solicitor was under the treatment of Dr. Joshua Brodey. Dr. Brodey provided a report to the Law Society dated June 12, 1996. A copy of the Report is attached as Exhibit "A" to this Agreed Statement of Facts.

V. PRIOR DISCIPLINE

13. On March 17, 1992, the Solicitor was found guilty of professional misconduct for failing to file for the fiscal year ended February 2, 1990. The Solicitor was reprimanded in Committee.
14. On November 10, 1993, the Solicitor was found guilty of professional misconduct for failing to reply to the Law Society. The Solicitor was reprimanded in Committee and ordered to pay costs in the amount of \$750.00.
15. On August 30, 1995, the Solicitor was found guilty of professional misconduct for failing to file for the fiscal year ended February 28, 1994, failing to produce his books and records and failing to reply to the Law Society. The Committee recommended a penalty of a Reprimand in Convocation. The Committee received a medical report from the Solicitor's doctor which advised that he had been referred to a psychiatrist, Dr. Joshua Brodey, for treatment for depression. The Committee reported to Convocation that "...it appears that the Solicitor is suffering from depression and has entered into a course of therapy". The Solicitor was reprimanded in Convocation on January 25, 1996 with conditions which included the following:
- a. the Solicitor continue in a course of therapy with Dr. Joshua Brodey;
 - b. Dr. Brodey provide the Law Society with a report every two months respecting the Solicitor's continued course of treatment;
 - c. the reports continue until Dr. Brodey indicates that it is appropriate for the Solicitor to terminate the course of treatment.
16. On August 21, 1996, the Solicitor was found guilty of professional misconduct for failing to file for the fiscal year ended February 28, 1995. The Solicitor was reprimanded in Committee and provided an Acknowledgement and Undertaking to file promptly in the future.

DATED at Toronto, this 1st day of October, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Robert Marven Syer be suspended for a period of one month commencing at the conclusion of any administrative suspension.

REASONS FOR RECOMMENDATION

The Solicitor was not represented by counsel. The Solicitor and Counsel for the Law Society jointly submitted that the appropriate penalty was a two month suspension. The Solicitor however, requested that the penalty be served concurrently with his administrative suspension.

It is a policy of Convocation that any disciplinary suspension commence after the completion of any administrative suspension. To do otherwise would allow lawyers who practise while under suspension to be in a better position by the disposition of their case than she/he would have been had there been compliance with the obligation to desist from practice. Joint submissions within the range of the appropriate penalty ought not to be lightly disregarded. However, in the Committee's view, the effect of the Solicitor's submission with respect to when the suspension should commence was that there was not an agreement on the appropriate penalty.

There are a number of mitigating factors relevant to the penalty:

1. The services the Solicitor provided from November 4, 1994 to April 18, 1996 while under suspension, related to only one client, the boyfriend of the Solicitor's daughter. The Solicitor acted *pro bono*. The lawsuit involved damages at approximately \$5,000.
2. At the relevant time, the Solicitor was suffering from a major depressive disorder and was under the treatment of a psychiatrist.

While the Solicitor has a lengthy prior disciplinary record, the medical report of the Solicitor's psychiatrist, Dr. Brodey, states that his illness contributed to his problems in his practice which led to the involvement of the Law Society.

The Law Society's submissions as to penalty recognized that the usual penalty for practice while under suspension, a period of suspension equal to the period during which the impugned practice occurred plus an additional one month (18 months in this case), was not appropriate on the individual circumstances of this case. Taking all of the above into account, the Committee recommends a penalty of one month suspension to commence after the completion of any administrative suspension.

Robert Marven Syer was called to the Bar on March 19, 1970.

ALL OF WHICH is respectfully submitted

DATED this 15th day of December, 1997

Nancy L. Backhouse, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month commencing at the conclusion of any administrative suspension.

Both counsel made submissions in support of the recommended penalty.

Ms. Brooks advised that the solicitor was currently administratively suspended.

It was moved by Mr. Topp, seconded by Ms. Puccini that the recommended penalty be adopted.

Carried

Re: Bruno Mario TONEGUZZI - Nepean

The Secretary placed the matter before Convocation.

Mr. Cole and Ms. Sealy withdrew for this matter.

Ms. Cameron appeared on behalf of the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 8th January, 1998 together with the Affidavit of Service sworn 11th February, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 2nd February, 1998 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

W. Michael Adams, Chair
Thomas E. Cole
Hope Sealy

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

Rhonda Cohen
for the Society

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

Not Represented
for the solicitor

Heard: September 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCAATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 27, 1997 Complaint D184/97 was issued against Bruno Mario Toneguzzi alleging that he was guilty of professional misconduct.

The matter was heard in public on September 16, 1997 before this Committee composed of W. Michael Adams, Chair, Thomas E. Cole and Hope Sealy. The Solicitor did not attend the hearing nor was he represented. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

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

Complaint D184/97

2. a) On or about August 19, 1992, he misappropriated \$15,000.00 more or less from his clients, Aquilino and Lea Fosco; and
- b) The Solicitor breached an Order of Convocation by practising law while his rights and privileges as a member of the Law Society were suspended from December 1, 1992 to March 1, 1995.

Evidence

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

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D184/97 and is prepared to proceed with a hearing of this matter on Tuesday, September 16, 1997.

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 D184/97 and this Agreed Statement of Facts. The Solicitor admits the particulars contained in Complaint D184/97. The Solicitor further admits that the said particulars as supported by the agreed upon facts, constitute professional misconduct.

IV. FACTS

4. The Solicitor is 47 years of age. He was called to the Bar in 1977. The Solicitor is currently suspended for non-payment of his annual fee. Prior to his suspension, the Solicitor practised as a sole practitioner. Prior to practising as a sole practitioner, the Solicitor practised in association with Lorenzo A. DeFranco, until Mr. DeFranco was disbarred in 1996.

- Particular 2(a) On or about August 19, 1992, he misappropriated \$15,000.00 more or less from his clients, Aquilino and Lea Fosco.

5. In August 1992, the Solicitor contacted his long-time clients, Aquilino and Lea Fosco to inquire whether they would lend the sum of \$15,000 to another of the Solicitor's clients, Donald Dugas. The Solicitor told the Foscos that the loan was to be used by Mr. Dugas to purchase a property in Orleans, Ontario. The Foscos agreed to lend \$15,000 to Mr. Dugas in exchange for a second mortgage on the property to be purchased. The Solicitor advised Mrs. Fosco that the mortgage interest rate was to be 16% for the first year.

6. On August 19, 1992, the Solicitor attended at the Foscos' home, at which time Mrs. Fosco gave to the Solicitor a cheque dated August 19, 1992 in the amount of \$15,000, made payable to "Bruno Toneguzzi" (Document Book, Tab 9).

7. Upon leaving the Fosco residence, the Solicitor attended at the Foscos' bank. He requested that the cheque be certified. A bank employee spoke with the Foscos by telephone and, upon confirming that they did in fact issue a cheque to the Solicitor, certified the cheque.

8. Thereafter, the Foscos heard nothing from the Solicitor. Despite several requests, he did not report to them or provide the promised security documents.

9. The Solicitor finally responded to the Foscos in October or November of 1992. He advised that there were "problems" with the purchase arrangement, and that the deal had "gone sour". The Solicitor assured the Foscos that he would personally repay the loan.

10. In January 1993, the Solicitor repaid to the Foscos the sum of \$7,500.

11. On October 5, 1993, the Solicitor executed a handwritten Promissory Note to the Foscos. The Note, prepared on the Solicitor's letterhead, read as follows:

*"To: Aquilino and Lea Fosco
Re: Outstanding Loan*

This will confirm that I, Bruno Toneguzzi am indebted to Aquilino and Lea Fosco in the amount of SEVENTHOUSAND FIVE HUNDRED DOLLARS (\$7,500) and that I will attempt to reduce or pay back this outstanding amount as soon as possible.

Dated at Nepean, Ontario this 5th of October, 1993."

(Document Book, Tab 5).

12. During the period October, 1993, to July, 1994, the Solicitor made certain payments to the Foscos so that, as at July, 1994, the Solicitor had repaid to the Foscos the aggregate sum of \$9,600 (Document Book, Tab 6). He had yet, however, to report to the Foscos or provide the mortgage documentation despite several requests that he do so.

13. In or about July, 1995, Mr. and Mrs. Fosco retained Keith MacLaren of the firm MacLaren Guay Bresolin to recover the outstanding amount. On July 13, 1995, Mr. MacLaren filed a claim against the Solicitor in Small Claims Court seeking repayment in the amount of \$6000 (\$3,950.00 principal and \$2,200.00 accumulated interest) (Document Book, Tab 7).

14. The Solicitor did not respond to or defend the small claims action.

15. By letter dated August 28, 1995, Mr. MacLaren, on behalf of the Foscos, complained to the Law Society. In his letter, Mr. MacLaren stated the following:

- (a) The Solicitor had asked Mr. and Mrs. Fosco to loan \$15,000 to another client of his purportedly to purchase property in Orleans, Ontario. Mr. and Mrs. Fosco were told by the Solicitor that they would be given a second mortgage as security. The Solicitor was to act as a lawyer to the Foscos and ensure that their interests were protected.
- (b) Mr. and Mrs. Fosco waited several months for a report from the Solicitor. They were told that the Solicitor was very busy and that a report was forthcoming. None was received.
- (c) At a November 1992 meeting, the Solicitor told Mr. and Mrs. Fosco that the client's deal had "gone sour" and he would personally repay the sum of \$15,000.00. Since that time, the Solicitor had made periodic payments and, as of August, 1995, owed the Foscos the sum of approximately \$4000.00, plus interest.
- (d) Mr. and Mrs. Fosco have never received a satisfactory explanation as to how their money was used, or why they had not received security for the loan.
- (e) Mr. MacLaren was instructed to bring an action against the Solicitor to recover the balance of the funds owing.

(Document Book, Tab 3)

16. On September 6, 1995, Mr. and Mrs. Fosco were awarded default judgement against the Solicitor in the principal amount of \$6000.00 (Document Book, Tab 8).

17. The Foscos eventually settled their claim against the Solicitor for the sum of \$3,220.00, inclusive.

18. In respect of the Solicitor's conduct in this matter, he has offered various, inconsistent, explanations to the Law Society.

Solicitor's Explanation as at November, 1996

19. A Law Society Examiner interviewed the Solicitor on November 13, 1996. At that time, the Solicitor's position was as follows:

- (a) he had arranged a \$15,000 loan between Mr. and Mrs. Fosco and another of the Solicitor's clients, Donald Dugas;
- (b) the funds were used to pay Mr. Dugas' debts;
- (c) the Foscos' cheque did not go into a trust account, as it should have, but rather, the Solicitor "may have" signed it over to the client, or the money may have gone into the Solicitor's account;
- (d) although the Foscos had been promised a second mortgage on the property, this mortgage was never registered because, after the loan was made, Mr. Dugas encountered financial and family difficulties and refused to sign the mortgage;
- (e) the Solicitor informed the Foscos of the problems at the relevant time;
- (f) the Solicitor felt personally responsible to the Foscos because he had arranged the loan and because he had benefitted from the loan by retaining approximately \$1,500.00 on account of disbursements and fees;
- (g) the Solicitor undertook to personally repay the loan;
- (h) the Solicitor had already repaid \$7,500.00 the Foscos;
- (i) subsequent to the Foscos obtaining judgment against him, the Solicitor had made additional payments on the loan and had repaid the entire principal amount of \$15,000; and
- (j) the Foscos had agreed to forego interest on the loan.

(Document Book, Tab 10)

20. The Solicitor's explanation was false.

The Solicitor's Explanation as at December, 1996

21. On December 3, 1996, the Solicitor signed an Agreed Statement of Facts in respect of a separate complaint, D113/96 (Document Book, Tab 2). One of the particulars of this Complaint is that the Solicitor failed to reply to the Law Society regarding the investigation of Keith MacLaren's complaint on behalf of the Foscros. Prior to the hearing before the Discipline Committee the Solicitor executed a Statement of Facts in which he stated *that when it became clear that the Dugas real estate transaction would not close, the Solicitor made independent arrangements with the Foscros to borrow the \$15,000 from them on a personal basis.*

22. The Solicitor's explanation was false.

The Solicitor's Explanation as at January, 1997

23. In January, 1997, the Solicitor admitted to the Law Society that Mr. Dugas "had nothing to do with the Foscros \$15,000" and that he had used the Fosco's funds directly for his own purposes (Document Book - Tab 68).

The Solicitor's Explanation as at February, 1997

24. The Law Society Examiner met with the Solicitor on February 7, 1997. At this meeting, the Solicitor's explanation was as follows:

- (a) he had asked Mr. and Mrs. Fosco to invest \$15,000 in a private mortgage;
- (b) the Solicitor received \$15,000 from the Foscros on August 19, 1992, and deposited the funds into his personal account;
- (c) the Solicitor had the Foscros' cheque certified on the day he received it because he required the funds as soon as possible in order to pay for personal debts;
- (d) shortly after receiving the funds, without the Foscros knowledge or consent, the Solicitor used the funds for his own purposes to pay personal debts, including a large debt of approximately \$10,000;
- (e) after receiving and using the funds, the Solicitor explained to the Foscros that there was a problem with the purported private mortgage and agreed to repay the Foscros personally. The Foscros agreed;
- (f) although the Solicitor obtained the Foscros consent to personally borrow the funds, this occurred only after the funds had been disbursed;
- (g) there was no formal loan agreement between the Solicitor and the Foscros;
- (h) the Solicitor did not discuss with the Foscros the term of the alleged loan.

(Document Book, Tab 69)

At this meeting, the Law Society's examiner asked the Solicitor to explain or discuss the previous, inconsistent explanations given to the Law Society (see above). He refused.

25. Mr. Dugas was interviewed by the Law Society examiner. He confirmed that although he has known the Solicitor for many years, as his lawyer and friend, he has never heard of the name "Fosco" or the alleged loan transaction. Mr. Dugas had no transactions, including loans, with the Solicitor in 1992, nor does he have knowledge or information about the Fosco loan.

26. The Solicitor now admits that he misrepresented to the Foscros the purpose and intention of the loan, that Mr. Dugas was unrelated to the transaction and that the Solicitor misappropriated the said funds from the Foscros for his own purposes.

Particular 2(b) The Solicitor breached an Order of Convocation by practising law while his rights and privileges as a member of the Law Society were suspended from December 1, 1992 to March 1, 1995.

27. By Order of Convocation dated November 26, 1992 (Document Book, Tab 11), the Solicitor was suspended for one month and indefinitely thereafter until he completed his outstanding filings for the years 1988 to 1991. The suspension took effect on December 1, 1992.

28. The Solicitor was reinstated on March 1, 1995, as confirmed in a letter from the Law Society to the Solicitor dated May 3, 1995. (Document Book, Tab 12)

29. On October 7, 1994, the Law Society received a telephone call from Linda Herron, a client of the Solicitor's. Mrs. Herron explained that she and her husband had retained the Solicitor with respect to their purchase of real estate property. When their financial institution refused to release mortgage proceeds to the Solicitor, and would not advise as to why, the Herrons contacted the Law Society. On October 11, 1994, the Law Society received a telephone call from Richard Herron. He advised that he had asked the Solicitor to transfer his file to another solicitor, Paul Francis (Document Book, Tab 70).

30. As a result of the Herrons' telephone call, a Law Society examiner attended at the Solicitor's office to determine whether he had practised while under suspension. The examiner randomly selected for inspection the Solicitor's trust records from the month of April 1994. The Solicitor's receptionist/secretary, Geraldine Gauthier, provided the examiner with a printout of the April, 1994, listing of trust receipts and disbursements (Document Book, Tab 13). Ms. Gauthier identified which clients were the Solicitor's clients by marking those names with a "T".

The Solicitor practised while under suspension as follows:

<u>Client</u>	<u>Date</u>	<u>Activity</u>
Paul Pavlik Jr.	March 21, 1994	A client file was opened by the Solicitor's firm regarding the purchase of a condominium unit by Paul Pavlik, Jr. (Document Book, Tab 14). The file card reflects that the lawyer in charge of the file is "BMT", the initials of the Solicitor.
Paul Pavlik Jr.	March 23, 1994	The Solicitor wrote a letter to Royal Trust advising that his firm was representing Paul Pavlik, and setting out details of the transaction (Document Book, Tab 15).
Paul Pavlik Jr.	April 29, 1994	The Solicitor wrote to the client (Document Book, Tab 16) confirming receipt of registered documents with respect to the purchase of the condominium, and enclosed a statement of account dated April 29, 1994 for services rendered in the amount of \$590.31 (Document Book, Tab 17). The account sets out services including correspondence with respect to the transaction, preparation and review of documents, meeting with the client and attending upon closing of the transaction. The Solicitor also attached a ledger statement dated April 29, 1994, showing funds received in trust and paid to the vendor on closing (Document Book, Tab 17). In the file were the Solicitor's undated handwritten notes regarding the Pavlik transaction (Document Book, Tab 18).

Kenneth & Marilyn Duncan	March 4, 1994	A client file was opened with respect to the sale of a property. The client file tab reflected that the lawyer in charge was "BMT", the initials of the Solicitor (Document Book, Tab 19).
Kenneth & Marilyn Duncan	April 20, 1994	An insurance brokerage firm wrote to the Solicitor regarding the clients and advised that Mr. Duncan stated that the Solicitor would be acting for him with respect to the sale of 664 Farmington Avenue, and requested that the Solicitor forward to the insurance broker a release of interest from the mortgage upon finalization of the transaction. (Document Book, Tab 20).
Kenneth & Marilyn Duncan	April 29, 1994	The Solicitor drafted a reporting letter to the clients which set out information regarding the statement of adjustments, real estate commission, first mortgage, insurance, utilities and an account (Document Book, Tab 21). The Solicitor's firm also forwarded a ledger statement for the money received and disbursed in trust on this transaction. The ledger statement dated April 29, 1994, was signed by Lorenzo A. De Franco, the Solicitor's former partner. (Document Book, Tab 22). In the Solicitor's file, the Examiner found a tickler sheet for May 29, 1994 reflecting that "BMT" was to receive a discharge from TD Bank (Document Book, Tab 19).
Kenneth & Marilyn Duncan	April 29, 1994	A mortgage discharge document, prepared by the Solicitor, was registered with the Land Registry Office in respect of the clients and the sale property (Document Book, Tab 23).
Brent Linton	November 3, 1993	The Solicitor's firm opened a client file for with respect to a purchase of a vacant lot. The client file tab reflects that the lawyer in charge is "BMT" (Document Book, Tab 24).
Brent Linton	February 21, 1994	The Solicitor's associate, Lorenzo De Franco wrote to the clients (Document Book, Tab 25) and enclosed a trust statement of the same date (Document Book, Tab 26). The trust statement shows that the clients paid \$430.55 to the Solicitor for legal fees on the mortgage transaction. In the Solicitor's file was a tickler sheet for July 10, 1994 regarding "developments" on the client's purchase. On the tickler, the lawyer responsible for the file is noted as "Bruno" (Document Book, Tab 24).
Leonard and Janice Wiebe (Purchase)	February 22, 1994	The Solicitor's law firm opened a client file for the clients with respect to the purchase of a property. The client file tab notes that the lawyer in charge is "BMT" (Document Book, Tab 27).
Leonard and Janice Wiebe (Purchase)	June 7, 1994,	The Solicitor wrote to the clients and enclosed a tax bill relating to the closing of the purchase of the property (Document Book, Tab 28).

Leonard and Janice Wiebe (Purchase)		The Solicitor's undated, handwritten notes relating to the Wiebe transaction (Document Book, Tab 29) and a tickler sheet dated July 20, 1994 with respect to the transaction which notes "Bruno" as the lawyer responsible for the file. (Document Book, Tab 27) were found in the Solicitor's file.
Leonard and Janice Wiebe (Sale)	January 25, 1994	The Solicitor's firm opened a client file for the clients with respect to the sale of a property. The client file tab reflects that the lawyer in charge is "BMT" (Document Book, Tab 30).
Leonard and Janice Wiebe (Sale)	May 13, 1994	The Solicitor wrote to the clients confirming the finalization of the sale of the property, and enclosed several documents relating to the transaction (Document Book, Tab 31).
Leonard and Janice Wiebe (Sale)		The Solicitor's undated, initialed, handwritten notes relating to the Wiebe transaction were found in the Solicitor's file (Document Book, Tab 32).

31. As a result of the above findings, the Law Society examiner requested that the Solicitor provide additional client files for which he had provided legal services to clients during the period 1992 to 1995. He provided the following files:

Client	Date	Activity
Robert Harker	March 19, 1993	The Solicitor acted for the client on a matter involving the registration of two mortgages each in the amount of \$20,000 on behalf of the Canadian Imperial Bank of Commerce. In the file was an Approval of Collateral Mortgage Loan document dated March 19, 1993, which read "legal work will be done on our behalf by the solicitor named below. You should deliver your title documents to him or her at once". The name following the above quoted text was Bruno Toneguzzi (Document Book, Tab 33).
Robert Harker	May 7, 1993 and May 17, 1993	Mortgage documents were prepared by the firm Toneguzzi and De Franco on May 7, 1993 (Document Book, Tab 34) and May 17, 1993 (Document Book, Tab 35).
Robert Harker	May 18, 1993	The Solicitor wrote to the Canadian Imperial Bank of Commerce regarding the client's mortgages (Document Book, Tab 36). The letter refers to a telephone conversation between the Solicitor and an employee of the bank and confirms that the mortgages were forwarded to the Solicitor's clerk for registration and that the Solicitor would mail the duplicate registered copies of the mortgage to the bank upon receipt.

Robert & Brenda Chadwick and Royal Trust		The Solicitor's firm created a "file opening information form" which reflects BMT as the lawyer in charge of the file. (Document Book, Tab 38).
Robert & Brenda Chadwick and Royal Trust	May 15, 1993	An employee of Royal Trust wrote to the Solicitor regarding the clients' mortgage. The letter requested that the Solicitor act on behalf of Royal Trust Corporation of Canada on the mortgage transaction (Document Book, Tab 39).
Robert & Brenda Chadwick and Royal Trust	June 3, 1993	<p>The Solicitor conducted a search and filed a Request for Certificate as to Writs of Execution, Warrants and Liens with respect to Robert and Brenda Chadwick (Document Book, Tab 40).</p> <p>A mortgage document was filed at the Land Registry Office. The document reflects that it was prepared by Toneguzzi and De Franco (Document Book, Tab 41).</p>
Mark & Cynthia Lister		The client file tab for with respect to the clients' purchase of a property reflects Bruno Toneguzzi the lawyer in charge of the file. This document was found in the Solicitor's file (Document Book, Tab 42).
Mark & Cynthia Lister	November 15, 1993	Letter from the Solicitor to Ontario Hydro (Document Book, Tab 43).
Mark & Cynthia Lister	November 16, 1993	<p>Letter from the Solicitor to Donald C. Johnston, Insurance Agent (Document Book, Tab 45).</p> <p>Letter to the Toronto-Dominion Bank dated November 16, 1993 (Document Book, Tab 44)</p>

<p>Mark & Cynthia Lister</p>	<p>November 19, 1993</p>	<p>A request by the Solicitor for a Certificate as to writs, execution, warrants and liens (Document Book, Tab 46).</p> <p>Letter from the Solicitor to Township of Rideau (Document Book, Tab 48).</p> <p>Letter from the Solicitor to Ontario Hydro (Document Book, Tab 49).</p> <p>Transfer/Deed of Land filed with Registry Office (Document Book, Tab 50).</p> <p>Charge/Mortgage of Land document filed with the Registry Office (Document Book, Tab 51).</p> <p>Reporting letter from Solicitor to clients to relay information regarding the closing of the transaction, and enclose documents (Document Book, Tab 47).</p>
<p>Mark & Cynthia Lister</p>	<p>November 30, 1993</p>	<p>Letter from the Solicitor to the Ministry of Revenue, Motor Fuels and Tobacco Tax Branch, (Document Book, Tab 52).</p> <p>Letter from the Solicitor to the Ministry of Revenue, G.I.T.C. Branch (Document Book, Tab 53).</p>
<p>Norm McIvor</p>	<p>October 20, 1994</p>	<p>The Solicitor's firm opened a client file regarding an incorporation. The file tab reflects that the lawyer in charge of the file is "BMT" (Document Book, Tab 54).</p>
<p>Norm McIvor</p>	<p>November 15, 1994</p>	<p>The Solicitor sent a fax to the client on firm letterhead (Document Book, Tab 55).</p>
<p>Norm McIvor</p>	<p>November 18, 1994</p>	<p>The Solicitor wrote to the Ministry of Consumer and Commercial Relations regarding a request for an Ontario corporation number for the client's company (Document Book, Tab 56).</p>
<p>Norm McIvor</p>	<p>November 20, 1994</p>	<p>The Solicitor wrote to the Ministry of Consumer and Commercial Relations regarding a request for a corporation number for the client's company (Document Book, Tab 57).</p>

Norm McIvor	January 11, 1995	In connection with the incorporation of the client's company, the Solicitor sent a reporting letter to the client's wife (Document Book, Tab 58), a trust statement to the client (Document Book, Tab 59) and a statement of account in the amount of \$632.30 (Document Book, Tab 60).
Richard and Linda Herron	March 31, 1994	The Solicitor prepared Last Will and Testaments for Richard Herron (Document Book, Tab 61), and for Linda Herron (Document Book, Tab 62). The Solicitor prepared a Power of Attorney from Richard Herron to Linda Herron (Document Book, Tab 63) and a Power of Attorney from Linda Herron to Jennifer Meester (Document Book, Tab 64).
Richard and Linda Herron	September 1994	The clients retained the Solicitor with respect to their offer to purchase a property. The Agreement of Purchase and Sale (Document Book, Tab 65) lists the Solicitor as purchasers' solicitor. Mr. Herron met with the Solicitor at his office to discuss the purchase. During the course of the meeting, he obtained the Solicitor's business card from the Solicitor's desk and attached it to his records (Document Book, Tab 66).
Richard and Linda Herron	September 30, 1994	Mr. Herron sent a facsimile to the Solicitor regarding the transaction (Document Book, Tab 67) on September 30, 1994.

32. On November 13, 1995, the Law Society examiner attended at the Solicitor's office. The Solicitor admitted that he practised law during his period of suspension from December 1, 1992 to March 1, 1995. The Solicitor confirmed that he was at his office more or less during the entire period of the suspension, seeing clients and performing legal work (Document Book, Tab 10).

V. DISCIPLINE HISTORY

33. On April 11, 1990, the Solicitor was Reprimanded in Committee for failing to reply to communications from the Law Society and failing to file his Forms 2 and 3 within six months of his fiscal years ending April 30, 1988 and April 30, 1989.

34. Commencing December 1, 1992, the Solicitor was suspended for a period of one month and thereafter indefinitely until his filings for the years 1988, 1989, 1990 and 1991 were completed and he paid costs to the Law Society fixed in the amount of \$350. The suspension concluded on March 1, 1995. The Solicitor's suspension was based upon a finding of professional misconduct in that he:

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

35. On March 10, 1993, the Solicitor was Reprimanded in Committee and ordered to pay costs in the amount of \$300 for failing to reply to the Law Society in respect of the investigation of a complaint.

36. On May 22, 1997, Convocation ordered the Solicitor suspended for a period of one month commencing on June 1, 1997. The Solicitor's suspension was based upon a finding of professional misconduct in that he:

- a) failed to act in a conscientious, diligent and efficient manner by failing to fulfill certain undertakings;
- b) failed to reply to the Law Society with respect to three discrete complaints; and
- c) failing to serve a client in a conscientious, diligent and efficient manner.

37. On May 22, 1997, Convocation ordered the Solicitor suspended for a period of one month, to commence at the conclusion of the suspension which commenced on June 1, 1997 (see above), and to continue indefinitely until certain conditions are met. The Solicitor's suspension was based upon a finding of professional misconduct in that he:

- a) failed to fulfil two undertakings to clients; and
- b) failed to reply to the Law Society regarding the investigation of a complaint.

DATED at Nepean, this 7th day of September, 1997.”

RECOMMENDATION AS TO PENALTY

The Committee recommends that Bruno Mario Toneguzzi be disbarred.

REASONS FOR RECOMMENDATION

The panel agrees with the submissions of the Law Society that disbarment is the appropriate penalty to recommend to Convocation. We accept the proposition that, except in exceptional circumstances, disbarment is the proper penalty for misappropriation of funds. The fact that the member has repaid the funds and that he was a person of good character are not by themselves sufficient circumstances that would justify the reduction of the penalty from disbarment to permission to resign. Indeed, good character is often the factor that creates the client's misplaced trust in the member and the opportunity for the loss to occur.

We take particular note of the often quoted Bolton¹ decision at page 519:

“Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases... All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.”

The purpose of disbarment in such circumstances as are before us is “to preserve public confidence, to protect the public, and to deter other lawyers from breaching the trust of their clients”.² As stated in Bolton at page 519, the “reputation of the profession is more important than the fortunes of any individual member”.

¹Bolton v. Law Society, [1993] 1 W.L.R. 512 (C.A.) at 519

²Gavin MacKenzie, Lawyers and Ethics Professional Responsibility and Discipline (Toronto: Carswell, 1993) pp. 26-45 to 26-46

The circumstances in this case do not come close to being exceptional. Although Mr. Toneguzzi did cooperate in signing an agreed statement of facts, he was not truthful with the Law Society in his initial explanations of his conduct. He misled his clients and forced them to the expense of retaining counsel and suing him. And even then, he did not completely repay them. His involvement of another innocent client, Mr. Dugas, is an aggravating factor as are his prior discipline record and the finding in the current case of practising under suspension over the period from December 1, 1992 to March 1, 1995.

Bruno Mario Toneguzzi was called to the Bar on March 25, 1977.

ALL OF WHICH is respectfully submitted

DATED this 8th day of January, 1998

W. Michael Adams,
Chair

Ms. Cameron advised that the solicitor had been served in accordance with the Act. The solicitor advised that he would not be attending Convocation.

It was moved by Mr. MacKenzie, seconded by Mr. Copeland that the Report be adopted.

Carried

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

Ms. Cameron made submissions in support of recommended penalty.

It was moved by Mr. Topp, seconded by Mr. Chahbar that the solicitor be disbarred.

Carried

Re: Gordon Nicholas LEWCHUK - North York

The Secretary placed the matter before Convocation.

Mr. Gottlieb did not participate in this matter.

Ms. Cameron appeared on behalf of the Society and Mr. Robert Marcantonio appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 10th April, 1997 together with the Affidavit of Service sworn 21st April, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th April, 1997 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th March, 1998 (marked as 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

Elvio L. DelZotto, Q.C., Chair
W. Michael Adams
Mary A. Eberts

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

Jane Ratchford
for the Society

GORDON NICHOLAS LEWCHUK
Formerly
of the City
of North York
a barrister and solicitor

Brian Bellmore
for the solicitor

Heard: January 29, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 30, 1996 Complaint D137/96 was issued against Gordon Nicholas Lewchuk alleging that he was guilty of professional misconduct.

The matter was heard in public on January 29, 1997 before this Committee composed of Elvio L. DelZotto, Q.C., Chair, W. Michael Adams and Mary Eberts. The Solicitor attended the hearing and was represented by Brian Bellmore. Jane Ratchford appeared on behalf of the Law Society.

DECISION

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

Complaint D137/96

2. a) Between September, 1989 and November, 1991, he misappropriated the sum of \$112, 943, more or less, from his clients, the Nicolae Tanase Estate and the Anita Tanase Estate.

EVIDENCE

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

AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D137/96 and is prepared to proceed with a hearing of this matter on January 28 and 29, 1997.

II. ADMISSIONS

2. The Solicitor has reviewed this Agreed Statement of Facts with his counsel, Brian Bellmore, and admits the facts set out herein.

III. FACTS

3. The Solicitor was called to the Bar in April, 1978. He practised law in Willowdale from 1978 to 1984 and from 1984 to November, 1991 in Unionville. He has been suspended for non-payment of his insurance levies since November 29, 1991.

4. During the time material to this complaint, the Solicitor was involved in a number of activities: two limited partnerships, a software development company as well as his law practice, which was primarily real estate development based. Most of his time was spent on the non-law related endeavours. The Solicitor owned a company named Real Estate Syndications Inc. ("R.E. Syndications") pursuant to which he conducted his business of marketing and promoting limited partnerships.

5. In late 1990 and early 1991, the Solicitor suffered severe financial losses and the companies essentially became defunct. In 1991, he tried to re-establish his law practice without success. In August, 1991, he moved to Charlotte, North Carolina, where he continues to live and work as a real estate consultant.

2(a) Between September, 1989 and November, 1991, he misappropriated the sum of \$112,943, more or less, from his clients, the Nicolae Tanase Estate and the Anita Tanase Estate

GENERAL BACKGROUND

6. On November 5, 1983, Nicolae and Anita Tanase (who were husband and wife) were killed in a car accident. By their wills, Mr. and Mrs. Tanase named Donald Reed, an accountant, and Nicolae Pora, a businessman, as executors of their Estates. Mr. Reed was a friend of the Solicitor and retained the Solicitor as the Estates' solicitor. Mr. Tanase's Estate had a value of approximately \$264,000 at the time of his death. Mrs. Tanase's Estate had a value of approximately \$280,000 at the time of her death. The Tanases did not have any children. The residual beneficiaries of the Estates, after some nominal bequests, numbered approximately 18. One beneficiary resided in Toronto and the remaining beneficiaries resided in East Germany and Romania.

7. Mr. Pora executed a power of attorney appointing Mr. Reed his attorney in respect of the administration of the Tanase Estates as he lived in the Ottawa area and did not wish to be actively involved in the estate administration. Initially, Mr. Reed made all investment decisions for the Estates. In 1985, Donald Reed passed away and Mr. Pora was left as the remaining executor. For various reasons, Mr. Pora asked the Solicitor to take over the administration of the Estates. Mr. Pora executed a Power of Attorney on November 1, 1985 which gave the Solicitor general, broad powers over the administration of the Estates. The Power of Attorney and the Wills pertaining to the Estates are found in the Document Book, Tab 1.

8. The Estates were embroiled in several legal proceedings, including the interpretation of the will, the validity of certain powers of attorneys tendered on behalf of the beneficiaries residing in East Germany and Romania, a potential lawsuit from a party to the car accident and the beneficiary status of an illegitimate son of Mr. Tanase who surfaced subsequent to the car accident. As a result, from November, 1985 until November, 1988, there was little activity related to the Estates. The Estates' funds were invested in first, second and third mortgages (all within 75% of appraised value), term deposits at the Toronto Dominion Bank, and Canada Savings Bonds.

9. When the Solicitor assumed the administration of the Estates in 1985, he assumed the responsibility of making investment decisions on behalf of the Estates. Mr. Pora was not involved with any investment decisions made on behalf of the Estates, although the Solicitor orally reported to Mr. Pora from time to time on the nature of the Estates' investments. All Estate funds were deposited in a bank account separate from his law practice trust account at all times entitled "Funds Management Account".

10. The Solicitor maintained a number of subledgers for the Funds Management Account including one for each of the Estates, one in the name of his wife, Debbie Lewchuk, one for R.E. Syndications and several others pertaining to other business ventures of the Solicitor.

Solicitor's Financial Difficulties

11. By 1988, the Solicitor had to all intents and purposes ceased the practice of law, having closed his law office in Unionville and commenced to work on a full-time basis on two projects from an office located at 108 Alden Road in Markham. He was the project manager of Equity Town Centre (ETC), a land development company engaged in developing a 180,000 square foot office complex on four acres of land in downtown Markham. He was also the President of Lanware Inc., a company engaged in the development of software for networking environments for personal computers. Mr. Lewchuk owned a 27% interest in the company. Lanware had developed two major products, for educational and for business uses. It had sold the educational product to Commodore, Tandy and Atari who in turn packaged the software with their hardware products and sold them to Ontario School Boards under an Ontario government grant program. In 1989 Lanware's sales were approximately \$1.6 million and pre-tax earnings in excess of \$400,000.

12. By late 1989, both Lanware and ETC were very successful and Mr. Lewchuk was earning \$10,000 per month from ETC and \$15,000 per month from Lanware. Mrs Lewchuk was not employed. In the fall of 1988, construction started on a new family home in Unionville pursuant to a fixed price construction contract of \$1.1 million. The monthly payments on the construction loan for the new house were approximately \$6,000.

13. Construction of the new home was not finally completed until the spring of 1990 although Mr. Lewchuk and his family moved into the home in September, 1989. The previous house had been listed for sale during the summer of 1989 but due to the falling real estate market could not be sold. One year earlier, the Lewchuks had received an unsolicited offer to purchase the previous house for \$750,000.

14. In December 1989, Mr. Lewchuk arranged for a tenant to rent the previous house until he was able to sell it. However, in June, 1990, the tenant gave notice and vacated the premises resulting in Mr. Lewchuk having to assume the costs of carrying the house in the amount of \$1,800 per month. The house was listed for sale in June of 1990 and sold for a price of \$440,000 closing in October, 1990. There was a first mortgage of \$125,000 on the house which was discharged on sale. However, the bank seized the balance of the proceeds of sale pursuant to a collateral mortgage that had been given to the bank to secure the construction loan.

15. In January, 1990 ETC encountered severe financial problems which resulted in Mr. Lewchuk having to relinquish his role as project manager and losing the \$10,000 per month income from the company. On April 25, 1990, a senior programmer with Lanware left the company and joined Commodore. Shortly thereafter Commodore replaced the Lanware programs which it had been selling to school boards with identical programs developed by the former Lanware programmer. The Bank capped the company's line of credit and the Solicitor was unable to draw any further income. These actions resulted in a law suit being instituted by Lanware against Commodore. The case went to trial in the fall of 1991 and in early 1992 while the trial was still in progress, Commodore made a substantial damage payment to Lanware to settle the action. In the interim, the Solicitor's income had dropped by \$25,000 per month by May of 1990 leaving him with no significant income.

16. By September 1990, the Solicitor sustained the loss of a \$580,000 term deposit owned by him in the following circumstances. In December, 1990, the second of three buildings to be constructed in the office complex of ETC was sold and the Solicitor received a fee for his services in developing the project of \$580,000. Since construction on the building was not scheduled to start until 1990, the Bank requested that the \$580,000 due to the Solicitor be deposited in a term deposit to be held in ETC's name at the Bank as collateral security for the general indebtedness of ETC. The Solicitor agreed to this to facilitate closing of the transaction. At the time ETC had a line of credit of \$8.0 million with the TD Bank. As construction progressed on the building through 1989, ETC drew on its line of credit. The term deposit was to mature on December 31st, 1990 and the Solicitor expected it to be released to ETC by the Bank on its maturity. However, in September 1990, the Bank declined to permit ETC to draw any further on its \$8.0 million line of credit (the company had at that point drawn approximately \$5.1 million) and the Bank called for payment of the loan. ETC was unable to make payment of the loan and the Bank foreclosed on the building and sold it in May 1991 for \$4.0 million. In November 1990, the Bank applied the term deposit security against general indebtedness of ETC.

17. By early 1991, the Solicitor had no significant income, no assets other than the new matrimonial home which was encumbered with \$500,000 of debt. He and his wife decided to sell their home. The house was listed for sale in May of 1991 and the sale was completed on November 4, 1991 yielding net proceeds of sale of \$450,000 which Mr. Lewchuk instructed his solicitor on the sale to disburse in the manner described below.

The Estate Subledger Accounts and the Debbie Lewchuk Subledger Account

18. During the time period of September 22, 1989 to August 14, 1990, the Solicitor incurred, and paid for, expenses in the construction of the new family home. These expenses totalled \$87,077.60. A Summary of the expenses is found at Tab 2 of the Document Book. These expenses were recorded in the records of the Solicitor's Funds Management Account in the Debbie Lewchuk subledger. These expenses were temporarily financed by personal funds of the Solicitor on deposit in the Funds Management Account. By June 30, 1990 the Solicitor did not have sufficient personal funds in the Funds Management Account to finance the above noted purchases. At that date, however, the subledgers for the Estate of Nicolae Tanase and the Estate of Anita Tanase had balances sufficient to finance the purchases.

19. The portions for the general ledger for the Funds Management Account relevant to the transfers in paragraph 18 and paragraphs 20-25 below are found at Tab 3 of the Document Book. The Law Society's reconstruction of the Debbie Lewchuk subledger account is found at Tab 4 of the Document Book.

20. On June 30, 1990 the Solicitor transferred \$58,590.40 from the subledger of the Estate of Nicolae Tanase and \$14,734.16 from the subledger of the Estate of Anita Tanase to the Debbie Lewchuk subledger account. These transfers totalled \$73,324.56. The net effect of these transfers was to place the Debbie Lewchuk subledger into a positive balance of \$4,484.00 rather than the overdrawn balance of \$68,840.56 which actually existed.

21. On July 1, 1990 these transfers were reversed, with the above noted funds being entered back into the Estates' subledger and the Debbie Lewchuk subledger returning to its overdrawn balance of \$68,840.56.

22. August 31, 1990, the Solicitor continued to have insufficient personal funds in the Funds Management Account to finance the above noted purchases. On August 31, 1990 the Solicitor transferred \$87,077.60 from the subledger of the Estate of Nicolae Tanase to the Debbie Lewchuk subledger. The net effect of this transfer was to place the Debbie Lewchuk subledger account into a \$0.00 balance rather than the overdrawn balance of \$87,077.60 which actually existed.

23. On September 1, 1990 this transfer was reversed, the above noted funds were entered back into the Estate of Nicolae Tanase subledger and the Debbie Lewchuk subledger account returned to its overdrawn balance of \$87,077.60.

24. The pattern of making transfers in the amount of \$87,077.60 to and from the subledger account of the Estate of Nicolae Tanase and to and from the Debbie Lewchuk subledger account, as noted above, was repeated by the Solicitor for the months of September 1990, October 1990, November 1990, December 1990, January 1991 and February 1991. These monthly entries documented the Solicitor's indebtedness to the Estate.

25. On March 31, 1991 the Solicitor transferred \$87,077.60 from the subledger of the Estate of Nicolae Tanase to the Debbie Lewchuk subledger. However, the transfer was not reversed on April 1, 1991 nor was it reversed at any other time thereafter. The effect of not reversing the March 31, 1991 was to accurately record that the Solicitor had used funds from the Estate of Nicolae Tanase to pay for personal expenses he had incurred and had recorded in the Debbie Lewchuk subledger account.

Activities concerning the Estate Accounts and the R.E. Syndications Account

26. During the time period of May 14, 1990 to February 19, 1991, R.E. Syndications incurred, and paid for, expenses related to its business activities. These expenses were recorded in the subledger for R.E. Syndication. These expenses were temporarily financed by personal funds of the Solicitor on deposit in his Funds Management Account. By September 30, 1990 the Solicitor did not have sufficient personal funds in the Funds Management Account to finance the above noted purchases. At that date, however, subledger accounts for the Estate of Nicolae Tanase and/or the Estate of Anita Tanase had balances sufficient to finance the purchases.

27. The portions of the general ledger for the Fund Management Account relevant to the transfers in paragraphs 28 - 31 below, are found at Tab 3 of the Document Book. The Law Society's reconstruction of the R.E. Syndication subledger is found at Tab 5 of the Document Book.

28. On September 30, 1990, the Solicitor transferred \$30,595.13 from the subledger of the Estate of Nicolae Tanase to the R.E. Syndication subledger. The net effect of this transfer was to place the R.E. Syndication subledger into a positive balance of \$81.55 rather than showing the overdrawn balance of \$30,513.58 which actually existed in the subledger.

29. On October 1, 1990 this transfer was reversed, the above noted funds were entered back into the Estate's subledger and the R.E. Syndication subledger account returned to its overdrawn balance of \$31,513.58.

30. Subsequent to September 30, 1990, the Solicitor continued to have insufficient personal funds in the Funds Management Account to finance the above noted expenses of R.E. Syndication. Similar to that noted in paragraphs 20 - 24 above, the Solicitor continued a pattern of making transfers to and from the subledgers for both Estates to and from the R.E. Syndication subledger. These subsequent transfers varied in amount every month between \$6,066.81 and \$34,836.81, depending on other deposits to and withdrawals from the R.E. Syndication subledger, in order to ensure that the R.E. Syndication subledger had a positive balance at the end of each month. These monthly entries documented the Solicitor's indebtedness to the Estate.

31. On November 10, 1991 the Solicitor made a transfer of \$34,836.81 from the subledger of the Estate of Nicolae Tanase to the R.E. Syndication subledger. However, the transfer was not reversed any time thereafter. The effect of not reversing the November 20, 1991 transfer was to accurately record that the Solicitor had used funds from the Estate of Nicolae Tanase to pay for expenses he had incurred and had recorded in the R.E. Syndication subledger account.

32. It was the Solicitor's intention throughout to repay the above transfers. The matrimonial home was listed for sale in May, 1991 and the closing of the sale occurred on November 4, 1991. The Solicitor instructed the lawyer representing his wife on the sale to repay from the funds received on closing (\$443,782.81) the sum of \$102,006.05 in respect of the transfers. The lawyer did so on November 29, 1991. The \$102,006.05 amount was the amount initially calculated by the Solicitor to be the shortfall.

33. On or before November 15, 1991, the Solicitor received a complaint dated October 29, 1991 from a solicitor representing the solicitor who represented the majority of the residual beneficiaries concerning a mortgage loan made by the Estate which was unrelated to the transfers. In December, 1991, the Solicitor contacted the Law Society through his Solicitor and arranged to meet with representatives of the Law Society later that month. At the meeting, the Solicitor voluntarily informed the Society representatives of the transfers and the fact that the transfers had been repaid to the Estates. The Solicitor co-operated fully with the Society's representatives from and after his initial contact with the Society.

34. Subsequently, it was determined that the Solicitor actually owed the Estates a total of \$112,943. In October 1993, the Solicitor repaid the balance of \$10,936.95 to the Estates.

35. The transfers from the Estate were not reflected in the statement of the Estates' accounting provided to the Canadian representative of the majority of the beneficiaries. These statements were prepared for the period ended November 4, 1990 and for the period ended November 4, 1991. (Document Book, Tabs 6(A) & (B) & 7(A) & (B)) The transfers were reflected in the Estates' accounts submitted to the court by the Solicitor on passing the accounts in September 1993. (Document Book, Tabs 8(A) & (B))

36. The Solicitor did not record the transfers by any loan documentation or promissory notes nor did he pay any interest on the transfers during the time that they were outstanding or when they were ultimately paid back.

37. There were no shortages found in the Solicitor's mixed trust account and there have been no claims submitted to the Compensation Fund.

IV. PRIOR DISCIPLINE

38. The Solicitor has no past discipline.

DATED at Toronto, this 29th day of January, 1997."

"SUPPLEMENTAL AGREED STATEMENT OF FACTS

15. The Solicitor admits that he did not disclose the transfers from the Estates to the beneficiaries or their representatives until the provision of the Statements of Estate Accounts submitted for the passing of the accounts in September, 1993 (Document Book, Tabs 8a and b). As stated in the Agreed Statement of Facts, the transfers were disclosed to the Law Society in December, 1991.

16. With respect to the Statement of Nicholas Tanase Estate Accounting for the period November 5, 1983 to November 4, 1990, (Tab 6b), the net cash balance of the Estate was listed as \$133,642.92. In actual fact, this was not the cash balance because it did not take into account the Solicitor's transfers out of the Estate totalling \$117,672.73 as of that date. Therefore, the cash balance was actually \$15,970.19. The total Investments were listed as \$159,290.96. This figure also does not take the transfers into account. Therefore, in actual fact, the Investments totalled \$276,963.69. The Statement does accurately record the total net assets of the Estate.

17. With respect to the Statement of Nicholas Tanase Estate Accounting for the period November 5, 1983 to November 4, 1991 (Tab 7b), the net cash balance of the Estate was listed as \$111,269.25. In actual fact, this was not the cash balance because it did not take into account the Solicitor's transfers as of this date of \$121,606.96. However, there were also accounting errors of approximately \$12,436.95 which must be credited to this balance. Accordingly, the cash balance at this time was approximately \$2,099.24. Likewise, the investments listed as \$159,290.96 actually had a balance of \$280,897.92. The Statement does accurately record the total net assets of the Estate.

18. With respect to the transfers by the Solicitor to and from the Estate subledgers and the subledgers of Debbie Lewchuk and R.E. Syndications, Michael Vear would testify that the Solicitor advised him that these transfers were necessary in order to ensure a positive balance in the Debbie Lewchuk and R.E. Syndications subledger accounts at month's end. This was necessary in order for the Solicitor's computer program to proceed to the next month's transactions.

DATED at Toronto, this 29th day of January, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Gordon Nicholas Lewchuk be disbarred.

REASONS FOR RECOMMENDATION

The general rule is that in cases of misappropriation, the solicitor be disbarred. Where permission to resign has been granted, consideration is given to medical conditions affecting judgment, pressing family matters, and financial difficulties provided that there has been restitution.

In this case there has been restitution.

The misappropriation occurred first in June 1990, when the Solicitor transferred funds from two estates where he had power of attorney from the executor of these estates. He had not, from the date he became the attorney in 1985 until 1990, had any improper accounting.

The Committee had some sympathy for the Solicitor who in 1988 was very well off financially with \$25,000 per month income, two term deposits of \$580,00 and a substantial equity in his matrimonial home.

He determined in 1988 that he could afford to build his dream home for \$1.1 million. The Toronto Dominion Bank financed his home, his real estate limited partnership and his computer programming company.

The recession, which hit in late 1989 resulted in the Toronto Dominion Bank effectively calling all the loans. The Solicitor lost his term deposits as well as his \$25,000 per month.

Additionally, his computer programming company was put out of business by a customer who improperly took the program for its own use.

In summary, the Solicitor had found himself in June 1990 unable to make payments for work done on his dream home.

Instead of selling the dream home then or refinancing the home he transferred funds from the two estates he managed. At that time he still had the surplus funds out of the sale of matrimonial home and a term deposit from which he believed he could repay this unauthorized loan. Those funds subsequently were taken by the bank.

The Solicitor was clearly aware of the fact that he was misappropriating funds and in fact made his reporting on the estate accounts in a way that covered up what he had done.

The only medical evidence of his state of mind at the time is a recent letter from his family doctor who had suggested to him to come in and talk to him because he thought during that time that he was under stress. The Solicitor did not visit the doctor until November 1991.

There were no serious family matters.

Factors which mitigate what he has done are:

- 1) he always intended to pay and did make restitution;
- 2) he voluntarily divulged what he had done when he was before the Law Society on an unrelated matter. Since the accounts were not in his law office trust, they could have very well have gone undetected;
- 3) he has re-established himself with his family in the real estate brokerage business in the United States;
- 4) excellent letters of recommendation.

However, these factors in the Committee's opinion do not meet the criteria for permission to resign.

Gordon Nicholas Lewchuk was called to the Bar on April 14, 1978.

ALL OF WHICH is respectfully submitted

DATED this 10th day of 1997

Elvio L. DelZotto, Q.C., Chair

Convocation took a brief 5 minute recess.

Ms. Cameron requested that the following amendment be made to the Report:

- page 13, 4th paragraph under the heading Reasons for Recommendation the figure "\$580,00" should read "\$580,000"

Mr. Marcantonio consented to the amendment.

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

It was moved by Mr. Wright but failed for want of a seconder that the word "improperly" be deleted from the first paragraph on page 14.

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

Carried

Counsel, the solicitor, the reporter and the public were recalled and advised that the Report was adopted.

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

Convocation had the following material before them:

Joint Record Book, Supplementary Record Book, Solicitor's Book of Further Evidence, The Law Society of Upper Canada Book of Authorities, Book of Authorities of the Solicitor, Solicitor's Supplementary Brief of Authorities, Factum of Gordon Nicholas Lewchuk and Factum of the Law Society of Upper Canada.

Mr. Marcantonio made submissions in support of the solicitor being granted permission to resign.

There were questions from the Bench.

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

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

Acting Treasurer (Vern Krishna, Q.C.), Angeles, Arnup, Backhouse, Bobesich, Carey, Carpenter-Gunn, Carter, Chahbar, Cole, Copeland, Crowe, Gottlieb, MacKenzie, Puccini, Sealy, Swaye, Topp, Wilson and Wright.

.....

.....

IN PUBLIC

.....

CONTINUATION OF LEWCHUK MATTER

Ms. Cameron made submissions in support of the recommended penalty.

Mr. Chahbar withdrew from Convocation.

There were questions from the Bench.

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

It was moved by Mr. MacKenzie, seconded by Mr. Carter that the solicitor be granted permission to resign.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be granted permission to resign.

CONTINUATION OF THE FABBRO MATTER

Messrs. Bobesich and Swaye withdrew.

Mr. Stuart contacted the solicitor who was prepared to make submissions by telephone.

A conference call was then made to the solicitor.

Mr. Stuart asked that the following correction be made to the Report:

- page 4, 3rd line the words "had previously" be deleted, the words having been repeated twice

There were no further submissions regarding the Report.

It was moved by Mr. Copeland, seconded by Ms. Carpenter-Gunn that the Report as amended be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of ninety days and pay the Society's costs in the amount of \$500 to be paid within ninety days.

The solicitor made submissions in support of a lesser penalty of a reprimand in Convocation.

There were questions from the Bench.

Counsel, the reporter and the public withdrew and the solicitor was advised that Convocation would deliberate in camera and would contact him again with their decision.

It was moved by Mr. Copeland, seconded by Ms. Sealy that the solicitor be suspended for a period of 30 consecutive days and that costs be deleted.

Carried

It was moved by Mr. Crowe, seconded by Mr. Carey that the solicitor be reprimanded in Convocation.

Not Put

Counsel, the solicitor by teleconference, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 30 consecutive days and that costs be deleted.

The solicitor was granted August 1st to the 30th, 1998 as the suspension period.

Convocation took a recess at 3:45 p.m. and resumed at 3:55 p.m.

Mr. Arnup replaced Mr. Krishna as Acting Treasurer.

Re: Bernard J. VARCOE - Mississauga

The Secretary placed the matter before Convocation.

Mr. MacKenzie withdrew for this matter.

Ms. Cameron appeared for the Society and Mr. Doug Crane appeared for the solicitor who was present.

26th March, 1998

Convocation had before it the Report of the Discipline Committee dated 16th January, 1998, together with the Affidavit of Service sworn 11th February, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 2nd February, 1998 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 12th February, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Gavin MacKenzie, Chair

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

Christina Budweth
for the Society

BERNARD J. VARCOE
of the City
of Mississauga
a barrister and solicitor

J. Douglas Crane, Q.C.
for the solicitor

Heard: January 13, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 13, 1998, Complaint D83a/97 was issued against Bernard J. Varcoe (the "Solicitor") alleging that he was guilty of professional misconduct. Complaint D83a/97 replaced a previous complaint, D83/97, which was withdrawn at the hearing at the request of the Law Society's counsel.

The matter was heard in public on January 13, 1998 by Gavin MacKenzie sitting as a single bencher committee. The written consent of the parties to the amended complaint being heard by a single bencher was marked as Exhibit 2 at the hearing. The written consent of the parties records their understanding that, "due to the nature of the Complaint, the parties, or either of them, have the right to a hearing before a Committee of three benchers and the parties specifically waive that right."

The Solicitor attended the hearing and was represented by J. Douglas Crane, 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 D83a/97

2. (a) On or about July 6, 1994, in his capacity as the solicitor and executor of the estate of Agnes Rosalie Scott, [the Solicitor] improperly appropriated to his own use the sum of \$20,000 by purporting to loan the funds to himself;
- (b) [the Solicitor] failed to serve his client the estate of Agnes Rosalie Scott by not ensuring that the following loans, which he, as both solicitor and sole executor, made from the estate to his secretary, Arlene McCarthy, were reasonable, prudent, and adequately secured:
 - (i) loan in the amount of \$5,000, advanced on or about November 6, 1992; and
 - (ii) loan in the amount of \$12,313.83, advanced on or about June 8, 1993; and,
- (c) he failed to maintain books and records for his client the estate of Agnes Rosalie Scott in accordance with section 15 of Regulation 708 under the Law Society Act.

EVIDENCE

The entirety of the evidence before the Committee on the issue of whether the Solicitor is guilty of professional misconduct consisted of an agreed statement of facts and a book of exhibits referred to in the agreed statement of facts. (Character evidence and a psychiatric report were also received in evidence on the issue of penalty.) The following are the passages from the agreed statement of facts that are relevant to the issue of whether the Solicitor is guilty of professional misconduct. Certain other facts set forth in the agreed statement of facts that are relevant primarily to the issue of penalty are referred to under the heading "Evidence Relevant to Penalty" below:

"I. Jurisdiction and Service

1. The Solicitor admits service of Complaint D83a/97 and is prepared to proceed with a hearing of this matter on a date to be agreed upon.

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 D83a/97 with his counsel J. Douglas Crane, Q.C. and admits the particulars contained therein. The Solicitor admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. Background Facts

- ...
11. By letter dated February 8, 1995, the Solicitor advised the Law Society that a theft from both his trust and general accounts had been committed by his former secretary, Arlene McCarthy. A copy of the Solicitor's letter of complaint complete with enclosures is attached as Exhibit 1 to this Agreed Statement of Facts. The total trust defalcation is \$6,025.00 as confirmed in correspondence to the Law Society from the Solicitor's accountant. The Solicitor replaced this trust shortage by capital injections on February 28, 1995 and April 13, 1995. It was during the course of the investigation of the reported theft that the Law Society's auditor uncovered the misconduct in respect of the Rosalie Scott Estate which is detailed below.
- ...

13. Agnes Rosalie Scott was a friend of the Solicitor's father, Arthur Wallace Varcoe. Mr. Varcoe, Sr. managed Ms Scott's monies after the death of her parents. On November 17, 1987, the Solicitor prepared a will for Ms Scott. The will, a copy of which is attached as Exhibit 2 to this Agreed Statement of Facts, appointed the Solicitor as sole executor of her estate. At the time of Mr. Varcoe, Sr's. death in June 1988 the Solicitor took over management of Ms Scott's financial affairs.

14. Ms Scott died on June 14, 1992. The value of her estate at the time of her death was approximately \$346,061.31.

2(a) Improper Appropriation - \$20,000.00

15. On July 6, 1994, the Solicitor transferred \$20,000.00 from the Rosalie Scott estate account to his personal account. This transfer was evidenced by a promissory note dated on the same date which was found in the client file. The money removed from the estate was returned on February 10, 1995 with interest calculated at approximately eight percent in the amount of \$953.43. The repayment to the estate was placed two days after the Solicitor had reported the theft by the secretary described above to the Law Society. The monies for re-payment of both of the improper appropriation and the McCarthy loans which are described below was obtained when the Solicitor cashed in his wife's RRSP's.

16. The Solicitor's explanation for the misconduct is that he was having personal problems originating from 1989. At the times relevant to the complaint he had been consulting a psychiatrist for three to four years; in addition, he was having problems with his ex-wife. He did not wish to elaborate on the details of the litigation with his ex-wife to the examiner. The Solicitor explained that the legal dispute with his ex-wife was resolved in June of 1994 and that he planned to vacation at his cottage for approximately a month after that. Before leaving, he was advised by his secretary that there were not sufficient funds in his general account to operate the practice in his absence. He explained he then decided to "borrow" money from the Scott estate because it was easier than collapsing an RRSP. He stated that in his mind "it was right hand was simply borrowing from his left hand".

17. Both in the audit questionnaire prepared by the auditor on August 23, 1995 and in the Solicitor's December 31, 1994 year end filing, he failed to disclose a "loan" from the estate of Rosalie Scott.

2(c) Improper loan from Scott estate to Arlene McCarthy: (i)&(ii) loans in the amount of \$5,000 & \$12,313.83

18. On November 6, 1992, the Solicitor made a loan of \$5,000.00 from the estate of Agnes Rosalie Scott to his secretary and bookkeeper, Arlene McCarthy and her husband Gerrard McCarthy. The Solicitor has advised the Law Society that at the time the loan was made his secretary had been employed with him for a period of six years. When Ms. McCarthy initially approached the Solicitor for a loan as a debt consolidation, he sent her to his banker; however, Ms. McCarthy was denied the loan because neither she nor her husband could provide any security. The Solicitor did not conduct a credit check or take any other steps to determine their credit worthiness but knew at the time that there was no security available for the loan and that the bank had declined their application for a loan. The Solicitor would testify that he relied on his judgment as to the integrity of Ms. McCarthy and her ability to meet her obligations. The Solicitor now admits that his ability to assess her integrity and credit worthiness was flawed as evidenced by the fact that this same secretary subsequently misappropriated money from the Solicitor's trust and general accounts.

19. As stated above, the loan was secured only by a promissory note, a copy of which is attached as Exhibit 3 to this agreed statement of facts.

20. On June 8, 1993, the Solicitor loaned a further \$12,313.83 to Ms. McCarthy, secured only by a promissory note, a copy of which is attached as Exhibit 4 to this agreed statement of facts. At the time the second loan was made, the first loan was in arrears with only three payments ever having been made on it. The Solicitor would testify that when this loan request was made, he was informed that Mr. McCarthy, who worked for Pittsburgh Paints, would be receiving some funds from a shareholders' profit plan that would pay out the first loan completely. In fact, part of the proceeds of the second loan were used to pay back the first loan which had an outstanding balance of \$4,302.26. The additional purpose of the second loan was to provide Ms. McCarthy with money to buy a car. The Solicitor felt it would be useful for his office to have a secretary with a car because of the number of deliveries and attendances outside the office that were required.

21. The Solicitor allowed Ms. McCarthy to keep her own books and records of the loan and did not check to ensure she was making payments or maintaining proper records. Once the Law Society became involved in this matter it was necessary for the Solicitor's accountant to create a schedule attempting to determine what payments had been made on both loans. The accountant determined that in total only \$3,462.86 in payments were actually made by Ms. McCarthy.

22. On February 10, 1995, the Solicitor injected \$11,507.82 of his personal funds to pay out the McCarthy loan, having fired her on February 1, 1995.

23. When the Solicitor made the two loans to Ms. McCarthy described above, he was aware of due requirements of proper estate investments as evidenced by the fact that in December of 1992, the Solicitor loaned \$20,000.00 from the estate to another of his clients, Olmstead. The loan was secured by a first mortgage on real property. The Olmstead mortgage was paid in full with interest by the borrower.

2(d) Failure to maintain books and records for the estate of Rosalie Scott

24. From approximately January 1989 to January 1995, the Solicitor's secretary, Arlene McCarthy, was given complete responsibility for maintaining the Solicitor's books and records. She had signing authority over both the Solicitor's general and trust accounts and maintained all books and records. She was also responsible for handling Ms. Scott's file and financial affairs under the Solicitor's supervision.

25. When the Law Society reviewed the Scott estate account, it determined that from 1988 to 1991 Ms. McCarthy had maintained a manual cash book, the entries of which were incomplete, the deposits in which were recorded into lump sums with details as to source funds missing and with no separate client trust ledger account being maintained. The auditor was able to match source documents to entries in the book only with the help of the Solicitor's staff in the course of the audit investigation.

26. From 1992 to 1994, the records were maintained using the Safeguard accounting system. The auditor's review showed that some of the deposits had no relevance to the account except that they were amounts exactly required to balance the books to the bank book. There were no cancelled cheques in the possession of the Solicitor to review and no duplicate deposit slips as deposits were mainly done using an automatic teller machine. In the beginning of 1995, a new bookkeeper was retained. He attempted to reconstruct the records. In summary, there were no books and records maintained for this estate in respect of the following matters:

- (i) Bank account #530074 - none maintained until after reconstruction
- (ii) Two loans to McCarthy - none maintained
- (iii) Loan to Olmstead - none maintained
- (iv) Bank account #527515 - inadequate records maintained
- (v) Bank account #437131 - inadequate records maintained
- (vi) Client trust ledger account for the estate - inadequate records maintained

27. The Solicitor's explanation for this is that he was unable to monitor the work of Ms. McCarthy on a regular basis because he was pre-occupied with other matters relating to his personal life and law practice.

V. ADDITIONAL FACTS

28. On February 6, 1995, Mr. Varcoe instructed his accountant, Peter G. Newsome, C.A. to conduct a complete forensic audit.

29. On or about the same date, Mr. Varcoe was in communication with Canada Trust, Scotia bank and the Royal Bank of Canada in Mississauga, instructing them to remove Arlene McCarthy and Jeffrey Alter from any signing on the mixed trust accounts and general accounts.

30. As soon as the theft and embezzlement was discovered, Mr. Varcoe retained counsel, James D. Henderson and Garth Manning of Keyser, Mason, Ball and on February 8, 1995, he wrote to Mr. Tinsley, the secretary of the Law Society of Upper Canada, to report the theft and request that the audit department come into advise what further steps should be taken.

31. A few days later, Mr. Varcoe paid off the promissory note for the \$20,000.00 removed from the Scott Estate together with interest voluntarily as well as the McCarthy note which was approximately \$12,000.00 plus interest. Prior to this repayment, Mr. Varcoe had been paying interest on his own note and assumed Mrs. McCarthy was paying interest on her loan. Mr. Varcoe left the McCarthy and Varcoe promissory notes in the file, so there was no attempt to hide anything.

32. On February 7, 1995, Mr. Varcoe reported the theft to his insurer, State Farm, stating that he had learned on February 6 that Mrs. McCarthy had taken \$5,900 from the trust account and \$1,200 from the general account. Mr. Varcoe, as soon as the fraud was discovered, injected his own funds into the trust account to cover the shortage created by McCarthy's theft.

33. Mr. Varcoe was eventually compensated \$10,000.00 from State Farm and \$2,000.00 from the Royal Bank for the forgery.

34. On June 15, 1995, Mr. Newsome advised the Law Society that as a result of their forensic audit they were satisfied that the amounts taken from trust were \$6,025 and that money had been repaid by Mr. Varcoe. The total loss from the general account and the trust account was \$9,450.53. Added to that is the fees from the chartered accountants of \$3,000 and Keyser, Mason, Ball of \$1,200 for a total of \$13,650.53.

35. The secretary was convicted on May 13, 1997 in Brampton court on four counts of forgery, fraud and breach of trust. There was also a compensation order against her.

36. The Solicitor did notify the beneficiaries of their bequest in November 1993 and sent them a copy of the Will. The Anglican Church has advised the Law Society that it would not have approved the Solicitor's use of Estate funds for himself. The Solicitor advised the investigator that he had not made any distribution because the Anglican Church had delayed for along period before signing a release. The Law Society does not accept this explanation. The Law Society wrote to the Anglican Church by letter dated October 3, 1997 in which they described the use that the Solicitor had made of the Estate funds. The Church wrote back to the Law Society with its comments by letter dated October 29, 1997. Counsel for the Solicitor also wrote to the Anglican Church which prompted a response by the Church of November 19, 1997. The October 3, October 29 and November 19, 1997 letters are attached collectively as Exhibit 5 to this Agreed Statement of Facts.

37. There was another discussion with Mr. Varcoe on October 11, 1995 by Theda Lean and she made the statement that Mr. Varcoe "had been very cooperative, did not try to hide the promissory note which was in the safe and the accountant and the secretary knew". He told the investigator that he had been seeing a psychiatrist for 3 to 4 years and had problems since 1989 with his ex-wife. In addition, his ex-wife sued him in 1992 and that litigation was not finished until June 1994.

...

Based upon these agreed facts, including the admission in paragraph 3 of the Agreed Statement of Facts, the Committee found the Solicitor guilty of professional misconduct as alleged in Complaint D83a/97.

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be suspended from practice for nine months, and that the Solicitor contribute \$4,000 towards the Law Society's costs.

EVIDENCE RELEVANT TO PENALTY

The evidence introduced before the Committee relevant to penalty consisted of agreed facts, a psychiatric report dated September 10, 1997 prepared by Dr. Basil Orchard, and 20 letters that were introduced as character evidence.

The Solicitor is 60 years old. He was called to the bar in 1975. He practises as a sole practitioner. He carries on a general practice, with an emphasis on family law and criminal law. He has practised in the same fields throughout his 23 years at the bar.

Law is second career for the Solicitor. After he obtained his Honours Bachelor of Arts Degree at the University of Toronto, he went to St. Augustine's Seminary and was ordained in 1962 as a Roman Catholic priest. He served as a priest at St. Michael's Cathedral in Toronto until 1967.

In 1967 the Solicitor left the priesthood to marry his first wife. Between 1967 and 1970 he worked as a probation officer. He was admitted to Osgoode Hall Law School in 1970. He worked at various jobs to support himself while he was attending law school. These included work as a private investigator and as a salesperson, and employment with the Catholic Children's Aid Society and the Peel Children's Aid Society.

The Solicitor and his first wife had three children within a few years of their marriage in 1967. He and his first wife separated in 1980, and were divorced in 1982. The Solicitor remarried in 1985.

The Solicitor was close to his father, who died in 1988. The Solicitor suffered a fairly severe episode of anxiety and depression after the death of his father, and sought treatment for this from a psychiatrist, Dr. Ed Brown, over a period of several years. Dr. Basil Orchard, a psychiatrist who prepared a psychiatric report dated September 10, 1997 that was received in evidence as Exhibit 6 of the hearing, expressed the opinion that it is likely that the Solicitor also had some depression which was not treated at the time that he and his wife separated in 1982.

In 1992, the Solicitor's first wife began to make demands for increased support and half of the value of the Solicitor's law practice. These demands culminated in a court proceeding commenced in 1993. These proceedings were extremely distressing to the Solicitor. He considered his former wife's claims to be completely without merit and based on false evidence, and spent a good deal of time gathering evidence to refute her claims. His position was vindicated in mid-1994, when the Solicitor's former wife's action was dismissed on terms that include a requirement that she bring no further proceedings against the Solicitor without depositing into court the estimated solicitor-client costs of defending the proceedings.

It was shortly after his former wife began making her demands in 1992 that the Solicitor arranged for the Scott estate to loan his secretary the funds referred to in particular 2(b) of the complaint, without ensuring that the loans (which totalled \$17,313.83) were reasonable, prudent and adequately secured.

It was immediately after his former wife's claims were disposed of, on July 6, 1994, that the Solicitor arranged for the Scott estate to loan him \$20,000, thereby committing the act of professional misconduct particularized in particular 2(a) of the complaint.

The Solicitor did not testify at the hearing, though he made a brief unsworn statement (which was not subject to cross-examination) after counsel for the parties completed their submissions on penalty. For the most part, the Solicitor's unsworn statement was in the nature of an apology.

Both the psychiatric evidence and the character evidence suggest that the likelihood of a recurrence of the misconduct of which the Solicitor has been found guilty, is slight.

Dr. Orchard's opinions that the Solicitor was suffering from depression at the time that the events occurred that gave rise to the complaint, and that he is now recovering from his depression, were not contradicted, and were accepted by the committee.

It is clear from the character evidence that the Solicitor enjoys an excellent reputation in the community for honesty and integrity. The authors of the letters that were received in evidence (who included judges of the General Division and Provincial Division and the Crown Attorney for the Regional Municipality of Peel, all of whom have known the Solicitor for many years) universally emphasize that they have never heard any question being raised about the Solicitor's honesty or integrity.

It is clear that the Solicitor has selflessly devoted countless hours of his time to volunteer work in his community. In his legal practice, a significant proportion of his time has been devoted to legal work involving children in which children's aid societies are also involved. As one of the character witnesses wrote "while this work is not highly remunerative, I believe that Bernie has been drawn to it by his strongly developed social conscience."

The Solicitor has no prior disciplinary record in his 23 years of practice. He co-operated fully with the Law Society both in its investigation and in the proceedings before the committee. The Solicitor repaid the \$20,000 referred to in paragraph 2(a) of the complaint before the impropriety was detected by the Law Society (though it appears likely that he did so in anticipation of the Society's discovery of what he had done), and he also paid back to the Scott estate personally the funds that he had imprudently caused the estate to loan to his secretary.

The Solicitor's explanation or his use of the Scott estate funds was that in his mind his "right hand was simply borrowing from his left hand". Although his misconduct was clearly more serious than an arm's length borrowing from a client, on the basis of the psychiatric and character evidence referred to above the committee concluded that it is likely that the Solicitor considered his advance of estate funds to be in the nature of a loan rather than a misappropriation of client funds. Although in many if not most cases a loan to himself or herself by a lawyer serving as sole executor of an estate will be tantamount to a misappropriation, in the present case the committee was not prepared to conclude that the Solicitor had a dishonest intent.

At the same time, the seriousness of the Solicitor's misconduct should not be minimized. The Solicitor took advantage of the access that he had to estate funds in his capacity as executor to benefit financially both his secretary and himself. He loaned estate funds to his secretary only after, to his knowledge, she had been denied a similar loan by a bank because she was unable to provide collateral security for a loan of only \$5,000. Six months later, he advanced more than \$12,000 of estate funds to her, even though the first loan was seriously in arrears. The Solicitor took no steps to determine the creditworthiness of the secretary or her husband, but rather relied upon his beliefs that the secretary was honest and was able to meet her obligations - beliefs who unreliability was graphically demonstrated more than a year later when the secretary's theft of funds from the Solicitor's general and trust accounts came to light. He abdicated his responsibility to maintain books and records for the Scott estate.

The committee's recommendation that the Solicitor be suspended for nine months is influenced greatly by its conclusion, referred to above, concerning the Solicitor's intent, and by its finding that the likelihood of recurrence is slight. If it were not for these considerations, the committee would have recommended a much longer suspension if not the termination of the Solicitor's membership by way of permission to resign or disbarment.

DATED at Toronto this 16th day of January, 1998

Gavin MacKenzie,
Chair

Ms. Cameron advised there was a preliminary matter on the issue of the wording of the Complaint and requested the following amendment be made:

- page 2, Particular 2(a) the words "by purporting to loan the funds to himself" be deleted

Ms. Cameron advised there had been a misunderstanding as to the Complaint which was before the Discipline Committee and Mr. Crane had not been aware of the discrepancy.

Mr. Crane consented to the amendment.

There were no further submissions as to the Report.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 9 months and contribute \$4,000 towards the Society's costs.

Both counsel made submissions in support of the recommended penalty with an amendment by Mr. Crane that the suspension commence May 1st, 1998 and the Society's costs be paid at the rate of \$400 a month following the end of the suspension.

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

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

The Wright/Sealy motion was voted on and adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 9 months commencing May 1st, 1998 and pay costs in the amount of \$400 a month starting at the end of the suspension.

Re: BRUCE ALLAN CLARK

It was moved by Mr. Topp, seconded by Mr. Wilson that the matter be adjourned to the April Convocation.

Carried

Re: Richard Alexander SUTTON - Toronto

The Secretary placed the matter before Convocation.

Ms. Carpenter-Gunn and Ms. Sealy withdrew for this matter.

Ms. Braid appeared on behalf of the Society and Mr. Paul Monahan appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 14th May, 1997. together with an Affidavit of Service sworn 28th May, 1997 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 21st May, 1997 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 16th June, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

Ms. Braid requested that the following amendment be made to the Report:

- page 4, 3rd paragraph the date October 21, 1991 should be "October 25, 1991"

There were no submissions as to the Report.

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

There were discussions regarding the paragraph at the bottom of page 3 and continuing at the top of page 4 and more particularly the words "beyond a reasonable doubt".

Convocation concluded that the Report need not be amended but that it be put on record that Convocation disagreed with the words "beyond a reasonable doubt" and that the proper test is "clear, cogent and convincing evidence."

Counsel, the solicitor, the reporter and the public were recalled and informed that Convocation disagreed with the words "beyond a reasonable doubt" on pages 3 and 4 and that the proper test is "clear, cogent and convincing evidence."

The public withdrew.

Mr. Topp raised the issue of having the matter referred back to the Committee in light of the medical Report of Dr. Renecker which was circulated to the Benchers.

Both counsel made submissions as to the medical Report of Dr. Renecker which was circulated to Convocation as an in camera document

Both counsel and the solicitor withdrew to discuss the matter.

Counsel and the solicitor returned to Convocation.

Mr. Monahan requested the matter be referred back before the Discipline Committee for their consideration.

It was moved by Mr. Topp, seconded by Mr. Wilson that the matter go back to the Committee to hear evidence on the medical report.

Carried

CONVOCATION ROSE AT 4:55 P.M.

Confirmed in Convocation this 24 day of April 1998

Harvey T Stushy

Treasurer