MINUTES OF DISCIPLINE CONVOCATION

Thursday, 24th September, 1998
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Arnup, Backhouse, Bobesich, Carey, Carter, Chahbar, Copeland, Crowe, DelZotto, MacKenzie, Manes, Millar, Puccini, Ross, Swaye, Topp, Wilson and Wright.

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The reporter was sworn.

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IN PUBLIC

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Ms. Lesley Cameron, Senior Counsel-Discipline introduced Mr. Tracy C. Warne, Q.C. who acted as Duty Counsel.

Re: David Jack MOLL - Toronto

The matter was adjourned because of the lack of a quorum.

Re: Kevin Barry KIERANS - Hamilton

The Secretary placed the matter before Convocation.

Ms. Backhouse, and Messrs. Wright and Swaye withdrew for this matter.

Ms. Amanda Worley appeared for the Law Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 24th June, 1998, together with an Affidavit of Service sworn 4th August, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 21st July, 1998 (marked Exhibit l), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 4th September, 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 Backhouse, Chair
Harriet Sachs
Bradley Wright

In the matter of The Law Society Act and in the matter of	Amanda Worley for the Society
KEVIN BARRY KIERANS of the City of Hamilton a barrister and solicitor	Not Represented for the solicitor Heard: May 6, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 9, 1998 Complaint D352/97 was issued against Kevin Barry Kierans alleging that he was guilty of professional misconduct.

The matter was heard in public with part of the evidence being received *in camera*. The Committee hearing the matter was composed of Nancy L. Backhouse, Chair, Harriet E. Sachs and Bradley H. Wright. The Solicitor attended the hearing and represented himself. Amanda Worley appeared on behalf of the Law Society.

DECISION

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

Complaint D352/97

2. a) On or about May 30, 1994, he misappropriated $400.00 which he held in trust on behalf of his client Ahmed Suleiman;

b) Between November 25, 1994 and January 11, 1995 he misappropriated $850.00 which he held in trust on behalf of his client Antonio Germano;

c) Between October 24, 1994 and January 17, 1995, he received funds in trust from clients for retainers and future disbursements, which he failed to deposit into a trust account at a chartered bank, principal savings office or registered trust corporation, in breach of section 14(1) and (3) of Regulation 708 made under the *Law Society Act*;

d) Between March 4, 1994 and June 3, 1994, he accepted trust funds from and on behalf of clients, that were not for the payment of fees or disbursements, while an undischarged bankrupt, in breach of section 7 of Regulation 708 made under the *Law Society Act*;

e) He failed to notify the Secretary of the Law Society of his bankrupt status in breach of section 7 of Regulation 708 made under the *Law Society* Act; and,

f) He failed to maintain adequate books and records, in breach of section 15 of Regulation 708 made under the *Law Society Act.*

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 D352/97 and is prepared to proceed with a hearing of this matter on May 5 and 6, 1998.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D352/97 and admits particulars 2(a), (b), (d), (e) and (f). The Solicitor also admits that the particulars 2(a), (b), (d), (e) and (f), together with the facts as set out below, constitute professional misconduct. In addition, although the Solicitor admits the facts as set out below with respect to particular 2(c), the Solicitor intends to give evidence in respect of particular 2(c). In addition, although the Solicitor admits that some of the facts set out in particular 2(c) constitute professional misconduct, the Solicitor does not admit that all the facts as set out below under particular 2(c) constitute professional misconduct, and intends to clarify this issue in his evidence.

IV. FACTS

Background

4. The Solicitor was called to the Bar in April, 1988. He has been suspended for non-payment of his insurance levy since December 31, 1995.

5. At the time of the suspension, the Solicitor was a sole practitioner. The Solicitor began his sole practice in November, 1993 in association with two other members of the Law Society practising as Kuzyk, Kierans, Young. The Solicitor has advised the Law Society that he has not practised law since April, 1995.

6. An audit of the Solicitor's trust account was conducted by Marie Morley, an examiner with the Law Society, between April 27 and December 18, 1995. The audit revealed several deficiencies with respect to the operation of his trust account and the maintenance of his books and records as required by Regulation 708 of the *Law Society Act.*

7. The Solicitor maintained his trust bank account #675362 at the Toronto-Dominion Bank (the "Trust Account") and maintained his general current bank account #675044 at the Toronto-Dominion Bank (the "General Account").

Suleiman Misappropriation

Particular 2(a) On or about May 30, 1994, he misappropriated $400.00 which he held in trust on behalf of his client, Ahmed Suleiman

8. The Solicitor represented Ahmed Suleiman who was charged under the *Bankruptcy Act* and ordered to make restitution to Amex. On May 15, 1994, the Solicitor received $2,357.99 from Mr. Suleiman which he deposited into his Trust Account as demonstrated by the bank statement for the Trust Account attached at Tab 3 of the Document Book.

9. To the Solicitor's knowledge, the purpose of the funds he had received from Mr. Suleiman was to repay American Express for charges made by Mr. Suleiman after his assignment in bankruptcy, as evidenced by the Solicitor's letter dated May 18, 1994 to Mr. Suleiman's trustee in bankruptcy, which is attached at Tab 4 of the Document Book.

10. On May 30, 1994, the Solicitor transferred $400.00 from his Trust Account to his General Account, as demonstrated by the transfer of funds at Tab 5 of the Document Book. There were no other funds in the Solicitor's Trust Account on that date other than those held on behalf of Mr. Suleiman.

11. On June 1, 1994, the Solicitor forwarded his trust cheque dated June 1, 1994 in the amount of $2,357.99 to Amex Canada Inc., on behalf of Mr. Suleiman, as demonstrated by his covering letter dated June 1, 1994 to Amex attached as Tab 6 of the Document Book.

12. On June 3, 1994, the Solicitor made restitution to Mr. Suleiman by depositing $400.00 into his Trust Account, as demonstrated by the bank statement for the Trust Account attached at Tab 7 of the Document Book.

13. The Solicitor was aware at all times that the withdrawal of the $400.00 from his Trust Account was not authorized. In addition, the Solicitor admits that the $400.00 withdrawal benefitted him personally.

Germano Misappropriation

Particular 2(b) Between November 25, 1994 and January 11, 1995, he misappropriated $850.00 which he held in trust on behalf of his client, Antonio Germano

14. The Solicitor was retained by Antonio Germano in September, 1994 regarding a insurance dispute, as demonstrated by the Solicitor's letter dated September 26, 1994 to the Ontario Legal Aid Plan found at Tab 8 of the Document Book.

15. On or about September 28, 1994, the Solicitor received $856.00 from Mr. Germano's real estate counsel, which was to be held in escrow and was deposited into his Trust Account on September 30, 1994, as demonstrated by the bank statement for the Trust Account found at Tab 10 of the Document Book.

16. To the Solicitor's knowledge, the funds received on behalf of Mr. Germano were to be held in trust by him pending withdrawal of a Legal Aid Certificate lien and the submission of a fee bill if any, as demonstrated by the letter from Jack Restivo, Mr. Germano's previous counsel, to the Solicitor dated September 27, 1994 which is found at Tab 9 of the Document Book.

17. On November 25, 1994, the Solicitor transferred $400 from his Trust Account to his General Account as demonstrated by the bank statement for the Trust Account and bank statement for the General Account attached at Tabs 11 and 12, respectively, of the Document Book. There were no other funds in the Solicitor's Trust Account on this date other than the funds held on behalf of Mr. Germano.

18. On December 9, 1994, the Solicitor transferred an additional $300.00 from his Trust Account to his General Account, as demonstrated by the Trust Account statement transfer of funds slip and a General Account bank statement attached as Tabs 13, 14 and 15 of the Document Book.

19. On January 11, 1995, the Solicitor transferred the final $150.00 from his Trust Account to his General Account, reducing the balance in his Trust Account to $6.00, as demonstrated by the Trust Account bank statement and General Account bank statement found at Tabs 16 and 17, respectively, of the Document Book.

20. On August 1, 1995, the Solicitor made restitution to Mr. Germano by depositing $850.00 into his Trust Account, as demonstrated by the Trust Account bank statement attached at Tab 18 of the Document Book. As Mr. Germano by that date had died and the Solicitor had not performed any work for Mr. Germano, the Solicitor returned the funds by making a trust cheque payable to Mr. Germano's wife, Grazia Germano, dated July 27, 1995 in the amount of $856.00. The trust cheque, a copy of which is attached at Tab 19 of the Document Book, was cashed on August 3, 1995.

21. The Solicitor was aware at all times that the three withdrawals in the total amount of $850.00 from his Trust Account were not authorized. In addition, the Solicitor admits that the $850.00 in withdrawals benefitted him personally.

Failing to Deposit Retainers into the Trust Account

Particular 2(c) Between October 24, 1994 and January 17, 1995, he received funds in trust from clients for retainers and future disbursements, which he failed to deposit into a trust account at a chartered bank, principal savings office or registered trust corporation, in breach of section 14(1) and (3) of Regulation 708 made under the *Law Society Act*

22. On several occasions, the Solicitor received funds from clients for future services and/or future disbursements, which he deposited to his General Account and applied to his own immediate use.

23. Although the Solicitor did not always record the transactions, his records reveal that there are at least six instances where the Solicitor deposited retainer funds into his General Account as opposed to the Trust Account. The following chart illustrates the six deposits which were received between October, 1994 and January, 1995:

DATE OF DEPOSIT	CLIENT	RETAINER AMOUNT	GENERAL DEPOSIT SLIP	GENERAL BANK STATEMENT
October 24/94	Ternawasky	$300.00	Tab 20	Tab 21
November 4/94	Maxymuik	$500.00	Tab 22	Tab 23
December 9/94	Ternawasky	$100.00	Tab 24	Tab 25
December 12/94	MacDonald	$500.00	Tab 26	Tab 25
December 12/94	Frankum	$200.00	Tab 26	Tab 25
January 17/95	Suleiman	$500.00	Tab 27	Tab 28
	Total:	$2,100.00		

24. In respect of the two Ternawasky retainers, the Maxymuik retainer and the MacDonald retainer, the Solicitor admits that he had not performed the work or delivered fee billings to these clients at the time he received the retainers from them. Under the circumstances, the Solicitor had no claim to these four retainers and therefore, improperly deposited the retainer funds into his General Account instead of his Trust Account. The Solicitor will give evidence that he has since performed the work and recently delivered fee billings to Mr. Ternawasky and Mr. Maxymuik.

25. In respect of the MacDonald retainer, on March 18, 1996, Grant MacDonald, made a claim for $500.00 from the Law Society's Compensation Fund as demonstrated by the application found at Tab 39 of the Document Book. In his application, Mr. MacDonald states that:

"Mr. Kierans performed no work for me and has not returned the $500... It is my belief that he has cashed the cheque and used it for his own purposes."

26. The Law Society's Compensation Fund paid $400 to Mr. MacDonald. Although the Solicitor maintains that the $500 MacDonald retainer was partially earned, the Solicitor made full restitution in that he forwarded a money order to the Law Society in the amount of $400 on December 18, 1996, a copy of which is attached at Tab 45 of the Document Book. In addition, the Solicitor also forwarded a money order in the amount of $100 to Robert Young, Mr. MacDonald's new solicitor.

27. In respect of the Frankum and Suleiman retainers, the Solicitor will give evidence that the work was performed prior to receiving the retainers. The Solicitor will give evidence that he has recently delivered fee billings to Ms. Frankum and Mr. Suleiman. However, it is the Society's position that, as the Solicitor did not forthwith render fee billings in accordance with section 14(6)(b) of Regulation 708, the Solicitor had no claim to these two retainers and therefore, improperly deposited the retainer funds into his General Account instead of his Trust Account.

Accepting Trust Funds while an Undischarged Bankrupt

Particular 2(d) Between March 4, 1994 and June 3, 1994, he accepted trust funds from and on behalf of clients, that were not for the payment of fees or disbursements, while an undischarged bankrupt, in breach of section 7 of Regulation 708 made under the *Law Society Act*

28. On October 6, 1993, the Solicitor made an assignment in bankruptcy.

29. In November, 1993, the Solicitor began his sole practice and opened his Trust Account, the first statement of which was issued by the bank on December 31, 1993, as demonstrated by the bank statement from the Trust Account attached at Tab 30 of the Document Book.

30. The Solicitor was not discharged from bankruptcy until July 6, 1994, as demonstrated by the Certificate of Discharge attached at Tab 33 of the Document Book.

31. The Trust Account was first utilized on March 4, 1994, when trust funds in the amount of $39,500 were received and disbursed by the Solicitor on behalf of his client, Steven Van Every, as demonstrated by the Trust Account bank statement found at Tab 31 of the Document Book and the Solicitor's March 4, 1994 billing and trust ledger statement found at Tab 32 of the Document Book.

32. As referred to in paragraphs 8 to 12 above, on May 16, 1994, the Solicitor received $2,357.99 from his client, Mr. Suleiman and deposited the funds into his Trust Account. On June 3, 1994, the Solicitor deposited $400 into his Trust Account to replace the funds which were previously misappropriated from Mr. Suleiman on May 30, 1994.

33. The following table summarizes the three deposits the Solicitor made to his Trust Account while an undischarged bankrupt:

DATE	AMOUNT	SOURCE	CLIENT
March 4th 1994	$39,500.00	Larry Lewis (settlement funds)	Steven Van Every
May 16th 1994	$ 2,357.99	Client (settlement funds)	Ahmed Suleiman
June 3rd 1994	$ 400.00	Member (replacement of May 30th 1994 misappropriation)	Ahmed Suleiman

34. The Solicitor did not have the written permission by either Convocation or the Discipline Committee to accept these trust funds from or behalf of a client while an undischarged bankrupt.

Failure to Notify Law Society of His Bankrupt Status

Particular 2(e) He failed to notify the Secretary of the Law Society of his bankrupt status in breach of section 7 of Regulation 708 made under the *Law Society Act*

35. On October 6, 1993, the Solicitor made an assignment in bankruptcy. The Solicitor did not inform either the Secretary of the Law Society or any other employee of the Law Society of his bankruptcy. The Solicitor's bankruptcy was brought to the attention of the Law Society during the course of the Law Society's audit conducted between April 27 and December 18, 1995.

Failure to maintain Adequate Books and Records

Particular 2(f) He failed to maintain adequate books and records, in breach of section 15 of Regulation 708 made under the *Law Society Act*

36. When the Law Society examiner reviewed the Solicitor's books and records on April 27, 1995, she found that the books were only entered up to June 30, 1994. In addition, she could not locate any trust comparisons and it appeared that the Trust Account had never been formally reconciled. Finally, the source documents had not been properly entered or maintained. The following chart details the entry dates and inadequacies of the books and records when examined on April 27, 1995:

REQUIRED RECORD	LAST ENTRY DATE	INADEQUACIES IN Member'S RECORDS
Trust receipts journal section 15(1)(a)	June 30th 1994 (10 mos arrears)	1) Source of funds not indicated 2) Client reference not always shown
Trust disbursements journal section 15(1)(b)	June 30th 1994 (10 mos arrears)	1) Cheque number not indicated 2) Payee not always shown 3) Client reference not always shown
Clients' trust ledger section 15(1)(c)	N/A	Clients' trust ledger not maintained.
General receipts journal section 15(1)(e)	June 30th 1994 (10 mos arrears)	1) Source of funds not indicated 2) Total daily deposit recorded instead of <u>each</u> receipt
General disbursements journal section 15(1)(f)	June 30th 1994 (10 mos arrears)	1) Total monthly cheques recorded instead of <u>each</u> disbursement 2) Cheque numbers not recorded 3) Date of each cheque not recorded 4) Payee not recorded
Fees record (Fees journal/file of copies of billings in chronological order) section 15(1)(g)	N/A	No fees record maintained - copies of some billings were found but neither fees journal nor file of billings which were arranged in chronological order was kept.

REQUIRED RECORD	LAST ENTRY DATE	INADEQUACIES IN Member'S RECORDS
Trust comparisons (including trust listings and trust bank reconciliations) section 15(1)(h)	N/A	No trust comparisons were found.
Source documents (including bank statements, cashed cheques and detailed duplicate deposit slips for trust and general accounts) section 15(1)(j)	N/A	1) Deposit slips for trust and general accounts were not kept together - slips were found here and there and not all could be located 2) Bank statements and cashed cheques for trust and general accounts were not kept together - only some were located 3) Deposit slips were not always detailed as to source of funds and client reference

37. Although the books were eventually to June 30, 1995 by the Solicitor's accountants, no trust comparisons were ever prepared, with the exception of the trust comparison as at December 31, 1994 which was completed with the Solicitor's annual filing report.

38. When the Law Society examiner reviewed the books and records of the Solicitor on December 8, 1995, although she found that the Solicitor had some details of the source documents, entries subsequent to June 30, 1995 had not been made and therefore, the books were not current. In addition, the Law Society examiner concluded that the formal books of original entry had insufficient entries and details to meet the requirements of section 15(1)(a)(b)(e) and (f) of Regulation 708. The following chart details the status of the Solicitor's books and records when examined on December 8, 1995:

REQUIRED RECORD	LAST ENTRY DATE	INADEQUACIES
Trust receipts journal section 15(1)(a)	June 30th 1995	1) Source of funds not always recorded 2) All receipts not recorded (eg) Sept/94 and Aug/95
Trust disbursements journal section 15(1)(b)	June 30th 1995	1) Actual date not recorded (month-end date used) 2) All disbursements not recorded (eg) Jan 11/95 and Aug 1/95
Clients' trust ledger section 15(1)(c)	N/A	Clients' trust ledger not maintained.
General receipts journal section 15(1)(e)	June 30th 1995	1) Source of funds not always indicated 2) Two July/95 deposits not recorded
General disbursements journal section 15(1)(f)	June 30th 1995	1) Actual date not recorded (month-end date used)
Fees journal/file of copies of billings in chronological order section 15(1)(g)	N/A	1) File(s) of billings not in chronological order and separated according to category (eg) Duty counsel, Agency

REQUIRED RECORD	LAST ENTRY DATE	INADEQUACIES
Trust comparisons section 15(1)(h)	December 31st 1994	No monthly trust comparisons except December 31/94 made for annual filing.
Source documents section 15(1)(j)	Current	None

Solicitor's Circumstances

39. The Discipline Committee will be provided with a brief prepared by the Solicitor containing medical reports outlining the Solicitor's personal circumstances and his experiences with alcoholism and with depression. In addition, the Solicitor proposes to call Anita Wylie, a registered nurse with the Hamilton Health Sciences Corporation Alcohol and Drug Relapse Prevention Programme, to give evidence on the Solicitor's progress with his treatment for alcoholism.

V. PRIOR DISCIPLINE

40. The Solicitor has no past discipline.

DATED at Toronto, this 6th day of May, 1998."

REASONS FOR FINDING

The Solicitor admitted particulars 2(a), (b), (c), (d), (e) and (f) of the Complaint and admitted that those particulars constituted professional misconduct. With respect to particular 2(c), the Solicitor gave evidence as follows. He admitted that he received funds in trust from clients for retainers and future disbursements which he failed to deposit into his trust account as required by the regulations. The Solicitor testified that he received two retainers from Wilbert Ternawasky: $300.00 on October 24, 1994 and $100.00 on December 9, 1995. The Solicitor admitted depositing the funds into his general account upon receipt. He represented Mr. Ternawasky on a criminal harassment charge on December 13, 1994. On April 17, 1998, he sent Mr. Ternawasky an account for the work performed wherein in advised Mr. Ternawasky that he had a right to complain to the Law Society if he felt there had been professional misconduct.

The Solicitor received a retainer from Peter Maxymuik of $500.00 on November 4, 1994 which he admitted depositing into his general account on April 17, 1998. Mr. Maxymuik retained other counsel on February 21, 1995. The Solicitor provided legal services to the client: he met with him, had various discussions with him, reviewed pension and financial information and met with his wife's solicitor on at least two occasions. In the account forwarded to Mr. Maxymuik dated April 17, 1998, the Solicitor advised the former client that he had the right to complain to the Law Society.

Neither Mr. Ternawasky nor Mr. Maxymuik made a complaint against the Solicitor.

The Solicitor testified that he had received a retainer of $500.00 on December 12, 1994 from Grant MacDonald who was being sued in Small Claims Court by his former solicitor. The Solicitor deposited the retainer into his general account. He ceased practising on April 25, 1995 and did some but not all of the work for which the retainer had been received. Mr. MacDonald made a claim for $500.00 from the Law Society's Compensation Fund and was paid $400.00. The Solicitor made full restitution by repaying the Law Society $400.00 and Mr. MacDonald $100.00.

The Solicitor testified that he had received a retainer of $200.00 on December 12, 1994 from Monique Frankum which retainer was received after the Solicitor had done more than $200.00 of work for the client. The retainer was deposited into the Solicitor's general account without an account being rendered to the client until April 17, 1998 when an account was forwarded to her. No complaint was made against the Solicitor by Ms. Frankum.

The Solicitor received a retainer from Ahmed Suleiman on January 17, 1995 in the amount of $400.00 by which time the Solicitor had completed what the client had asked him to do. The retainer was not deposited into the Solicitor's trust account. An account was rendered to Mr. Suleiman on April 17, 1998. No complaint was received from Mr. Suleiman.

The Solicitor testified that he understood that the retainers should have gone into his trust account but points out that the clients were not harmed with the exception of Mr. MacDonald who received restitution.

On the basis of the Agreed Statement of Facts and the evidence, the misconduct has been proved. There will be a finding of professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Kevin Barry Kierans be suspended for a period of twelve months commencing May 6, 1998.

REASONS FOR RECOMMENDATION

The Committee held that, on consent, the evidence with respect to penalty should be received *in camera*, subject to the necessity to refer to the evidence in the reasons herein.

The Solicitor gave evidence as to penalty as well as submitting extensive medical evidence and character evidence.

The Solicitor is 41 years of age. He was called to the bar in 1988. He worked for a matrimonial lawyer for 6 months. He then went to work for Gerald Swaye and Associates for 3 years, doing exclusively motor vehicle litigation. He next worked for a firm doing litigation. He was let go from that firm in January, 1992, at least in part due to alcoholism. He was unemployed until September, 1992, when he got a job doing general civil litigation. He was again let go in December, 1993, due to his alcoholism. Thereafter, he became a sole practitioner in association with Robert Young and later Gerry Kuzak. He did mostly criminal work, some general civil litigation and occasionally matrimonial law if he felt the matter was within his competence.

He left the practice of law on April 25, 1995 when he was hospitalised at the Hamilton General Hospital after making an attempt on his life. He has not resumed practice since that time.

The Solicitor has been struggling with alcoholism and depression since the age of 20. He was first treated for alcoholism in 1987. He became involved in the Relapse Prevention Program and he attended AA meetings. However, his attempts to deal with his alcoholism were not successful. His pattern was to drink very heavily for 2-3 months at a time and then be sober for 2-3 months.

On the Victoria Day long weekend in 1994, the Solicitor was confronted by Robert Young, a lawyer with whom he practised in association, about his alcoholism. This resulted in the Solicitor retaining sobriety until the Labour Day weekend in 1994. He then drank heavily from the Labour Day weekend until April 25, 1995 when he ended up in the hospital after the attempt on his life. The Solicitor has abstained from alcohol since that date.

During the Solicitor's periods of sobriety, he was very depressed. He was unable to attend to his paperwork. Bills did not get sent out, resulting in cash flow problems. Prior to the attempt on his life on April 25, 1995, he had considered suicide for a period of 4-6 weeks.

At the time of the misappropriations, the Solicitor was drinking heavily. He would wake up in the morning shaking from withdrawal. His first thoughts were how was he going to get his first drink into him. His concentration was non-existent and he was confused. The diagnosis at the time of the April 25, 1995 hospitalisation after the attempt on his life was major depression and alcoholism requiring concurrent treatment.

From August to September 1995, the Solicitor attended an in-patient program at the Donwood Institute. He continues to follow his discharge plan from the Donwood by attending two AA meetings a week, remaining in close contact with his AA sponsor, an Anglican priest in whose home he resides and continuing to be under the treatment of a psychiatrist. For two years he attended a recovery group at Hamilton Hospital until he was successfully discharged in November 1997.

Since April 1995, the Solicitor has been under treatment by a psychiatrist. He has had three medication trials and one hospital admission for ECT. His ECT in February 1996 had a dramatic effect. He no longer feels depressed and has not for a year and a half. He has been able to break the cycle of getting sober, feeling depressed and resorting to alcohol. His psychiatrist's prognosis for his staying well is good provided he continues to abstain from alcohol and continues with his current medication regime.

Anita Wylie, a registered nurse and an addiction counsellor with the Relapse Prevention Program gave evidence. In that capacity, she has had involvement with the Solicitor since 1989. She has been seeing the Solicitor twice a week since his attempt on his life in April 1995 and more recently once a week. She testified that in her opinion, the Solicitor had his depression and alcoholism under control. She believed that she would know if the Solicitor was drinking as many symptoms of his illness which had been present were no longer there. Nothing she knew about the Solicitor caused her to disagree with the prognosis of his psychiatrist.

The Solicitor testified that the misappropriations occurred at a time when he was drinking heavily. The misappropriated funds were used to buy alcohol which counsel for the Law Society submitted was a mitigating factor. He testified that he remembered very clearly thinking that it was more important that he had the money so that he could drink, even at the risk of sacrificing his career and not honouring his responsibilities to his clients. He testified that before his depression was treated, his urge to drink was very compulsive.

The Solicitor is currently living on social assistance. He continues to live in the home of his AA sponsor. He is a volunteer at the Hamilton Library teaching a remedial math course. He has no present plans to resume the practice of law.

Counsel for the Law Society and the Solicitor jointly submitted to us that the appropriate penalty was a twelve month suspension, based on the Solicitor's undertaking. The Committee recommends the jointly submitted twelve month suspension with the conditions set out in the Solicitor's undertaking.

There is no doubt that this complaint involves the most serious matters. There were two outright misappropriations by the Solicitor in the respective amounts of $400.00 and $850.00. The $850.00 was taken in three separate instances. The Solicitor improperly deposited retainers into his general account. He accepted trust funds when he was bankrupt. He failed to notify the Law Society that he was bankrupt and he failed to maintain his books and records. Normally, misconduct of this gravity would result in disbarment. However, in favour of a less severe penalty are the following mitigating factors:

1. At the time of the misconduct, the Solicitor was suffering from a major depressive illness and alcoholism;

2. The Solicitor had made some efforts, albeit unsuccessful, to deal with his problems prior to the misconduct;

3. The Solicitor's evidence demonstrated that the misappropriated funds had a direct nexus to his illness, being used to purchase alcohol;

4. The Solicitor has made extensive and praiseworthy efforts to turn his life around and control his problems. His prognosis is good. He testified and the Committee accepts that he is committed to following the advice of his psychiatrist and that he has a lifetime commitment to maintain his medication;

5. He impressed the Committee that he understood the gravity of what had occurred and accepted the responsibility for it;

6. The Solicitor filed a Brief of Character References mostly from members of the profession who spoke of their support for the Solicitor, his competence as a lawyer and of the misappropriations being out of character;

7. The Solicitor made full restitution. In the instances of depositing retainers into his general account, in a professional manner, he accounted to the clients and informed them of their right to make a complaint against him; and

8. The submission as to penalty was a joint submission.

The Committee was impressed with the thorough and competent job the Solicitor did in representing himself at the hearing.

For the above reasons, we agree with the joint submission and see no reason not to accept it. The Committee is of the view that the Solicitor's illness is under control and with the controls in the undertaking in place, he will in the future be able to make a meaningful contribution to the profession.

Kevin Barry Kierans was called to the Bar on April 14, 1988.

ALL OF WHICH is respectfully submitted

DATED this 24th day of June, 1998

Nancy Backhouse, Chair

There were no submissions on the finding of professional misconduct.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 12 months commencing May 6th, 1998, the suspension to run concurrent with the administrative suspension.

Both Counsel for the Society and the solicitor made submissions in support of the joint submissions made at the hearing for the recommended penalty.

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

It was moved by Mr. Topp, but failed for want of a seconder that the solicitor be suspended for a period of 6 months commencing May 6th, 1998.

It was moved by Mr. MacKenzie, seconded by Mr. Carter that the recommended penalty be adopted.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 12 months commencing May 6th, 1998, such suspension to run concurrent with the administrative suspension and subject to the conditions set out in the Undertaking given by the solicitor.

Re: James STEFOFF - Toronto

The Secretary placed the matter before Convocation.

Messrs. Topp, Carey and Bobesich, and Ms. Backhouse withdrew for this matter.

Ms. Kathryn Seymour appeared for the Society and the solicitor appeared on his own behalf assisted by Duty Counsel, Mr. Warne.

Convocation had before it the Report of the Discipline Committee dated 31st March, 1998, together with an Affidavit of Service sworn 29th May, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 22nd May, 1998 (marked Exhibit l), together with the Acknowledgment, Declaration and Consent signed by the solicitor on 24th September, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas J. P. Carey, Chair
Nancy L. Backhouse
Gordon Z. Bobesich

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

JAMES STEFOFF
of the City
of Toronto
a barrister and solicitor

Kathryn Seymour
for the Society

Not Represented
for the solicitor

Heard: March 31, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 13, 1997 Complaint D349/97 was issued against James Stefoff alleging that he was guilty of professional misconduct.

The matter was heard in public on March 31, 1998 before this Committee composed of Thomas J. P. Carey, Chair, Nancy L. Backhouse and Gordon Z. Bobesich. The Solicitor attended the hearing and represented himself. Kathryn Seymour appeared on behalf of the Law Society.

DECISION

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

Complaint D349/97

2. a) While under suspension for non-payment of his Lawyers' Professional Indemnity Company levy, he practised law from January 24, 1997 (the date of his suspension) through to July, 1997, but excluding the month of June, 1997.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D349/97 and is prepared to proceed with a hearing of this matter on Wednesday, March 11, 1998.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D349/97 and admits the particulars. The Solicitor also admits that the particulars, together with the facts as set out below, constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in March, 1970. He has been suspended from the practice of law for non-payment of his insurance levy since January 24, 1997.

5. On or about November 7, 1996, the Law Society directed a letter to the Solicitor advising him that his full premium for his 1996 insurance coverage was overdue, and advised the Solicitor that if he failed to pay his insurance premium by November 29, 1996, he would be suspended from practice pursuant to Section 36 of the *Law Society Act* (Tab 1 of the Document Book).

6. On January 24, 1997, by Order of Convocation, the Solicitor was suspended pursuant to Section 36 of the *Law Society Act.* Notice of the suspension was sent to the Solicitor by registered letter dated January 27, 1997. The registered notice/letter included a memorandum which set out the restrictions and obligations imposed on suspended members and a warning to the Solicitor that failure to comply with the restrictions and obligations could result in disciplinary proceedings being instituted against him (Tab 2).

7. On or about April 16, 1997, Aldo Grossi, a Law Clerk with the Audit & Investigation Department, telephoned the Solicitor and asked if he was still practising. The Solicitor responded that he was not practising, but was simply in the office clearing up a few matters. The Solicitor reiterated that he was not doing any legal work (Tab 3).

8. On or about May 30, 1997, Ms. Lorraine Campbell, an Examiner with the Audit & Investigation Department, telephoned the Solicitor to schedule an audit appointment for June 12, 1997, to review the Solicitor's books and records and to confirm whether or not the Solicitor was practising law while under suspension. The Solicitor stated to Ms. Campbell that he had not been practising law and that he was in the office clearing up a few outstanding matters (Tab 4).

9. On or about June 18, 1997, the Solicitor provided to the Law Society the accounting records of his practice.

10. On or about June 19, 1997, the Law Society caused the Solicitor to place co-signing controls against his mixed trust account. Accordingly, that same day the Solicitor provided written instructions to his bank to freeze all activity in relation to his trust account so that no charges and no deposits could be made without the express written consent of the Law Society (Tab 5).

11. On or about July 21, 1997, Ms. Campbell attended at the Solicitor's office to retrieve the requested client files. Following a review of the Solicitor's client files, Ms. Campbell found evidence that the Solicitor had been practising while under suspension. When Ms. Campbell asked the Solicitor if he was still practising law, he replied that he had "stopped about a month and a half ago" (Tab 6).

12. On or about the same day, July 21, 1997, the Solicitor gave an Undertaking to the Law Society not to accept any trust monies until he had been reinstated as a member in good standing with the Law Society (Tab 7).

13. The Solicitor has yet to reinstate his membership with the Law Society. The evidence of the Solicitor practising under suspension that was disclosed by the Law Society's audit of the Solicitor's files is summarized in the following table:

CLIENT AND MATTER	DATES OF ACTIVITY	ACTIVITY
DATE OF SUSPENSION: JANUARY 24, 1997		
Mary & Peter Axiotis Real Estate (Sale)	January 28, 1997 (Tab 8)	Letter from Solicitor to his clients asking that they contact him to schedule an appointment to execute closing documentation.
	(Tab 9)	Letter from Solicitor to T. Jegatheesan, solicitor for the purchasers re: closing details.
	(Tab 10)	Memo from Solicitor to "Jane" instructing her to prepare the Statement of Adjustments.
	January 30, 1997 (Tab 11)	Letter from Solicitor to T. Jegatheesan confirming and responding to his requisition letter.
	February 4, 1997 (Tab 12)	Letter from Solicitor to T. Jegatheesan enclosing draft Statement of Adjustments, Transfer/Deed of Land and Direction as to Funds.
	February 6, 1997 (Tab 13)	Letter from Solicitor to T. Jegatheesan confirming to whom the closing proceeds should be made payable.
	February 7, 1997 (Tab 14)	Statement of Adjustments prepared by Solicitor.
	(Tab 15)	Transfer/Deed of Land prepared by Solicitor and registered in the Toronto Registry Office as Instrument #E060022 on February 7, 1997.
	February 10, 1997 (Tab 16)	Letter from Solicitor to Harvey Kalles Real Estate Ltd enclosing a trust cheque representing commission due with respect to this transaction.
	February 11, 1997 (Tab 17)	Statement of Account rendered by Solicitor to his clients, including work done during the suspension period.
	(Tab 18)	Reporting letter from Solicitor to his clients.
	February 21, 1997 (Tab 19)	Letter from Solicitor to his clients enclosing a trust cheque representing the hold back to cover the utilities.
Robert Petroff (Litigation)	January 28, 1997 (Tab 20)	Statement of Account rendered by Solicitor to his client.
	January 31, 1997 (Tab 21)	Letter from Solicitor to Vasil Branov acknowledging receipt of the settlement funds cheque. Solicitor requested details as to how Mr. Branov arrived at this figure.

	January 31, 1997 (Tab 22)	Letter from Solicitor to Vasil Branov confirming his error with respect to calculating the amount owing.
	(Tab 23)	Letter from Solicitor to his client enclosing a trust cheque representing settlement funds.
	February 24, 1997 (Tab 24)	Letter from Solicitor to Vasil Branov confirming that the matter has now been settled in full.
Elizabeth Furo Real Estate (Purchase)	January 29, 1997 (Tab 25)	Letter from Solicitor to the Land Titles & Registry Office enclosing discharge of mortgage to be registered.
	(Tab 26)	Letter from Solicitor to Joseph Amorim, solicitor for the purchasers, enclosing a copy of the letter addressed to the Registry Office.
	(Tab 27)	Letter from Solicitor to his client confirming receipt of the discharge of the mortgage on her former property.
	February 6, 1997 (Tab 28)	Letter from Solicitor to Joseph Amorim confirming that the mortgage discharge has been received.
	February 12 1997 (Tab 29)	Letter from Solicitor to Joseph Amorim requesting permission to release the hold back funds.
	February 13, 1997 (Tab 30)	Letter from Solicitor to his client enclosing a trust cheque representing hold back funds.
	April 14 1997 (Tab 31)	Letter from Solicitor to his client enclosing a cheque representing realty tax overpayment.
Joseph & Christine Ruff Real Estate (Purchase)	March 18 1997 (Tab 32)	Requisition letter from Solicitor to Michael Kovach, solicitor for the vendor.
	(Tab 33)	Letter from Solicitor to the Tax Department requesting a tax clearance certificate.
	March 21 1997 (Tab 34)	Land Transfer Tax Affidavit signed by Solicitor.
	(Tab 35)	Letter from Solicitor to the Consumers Gas Company requesting whether or not there are any arrears owing.
	(Tab 36)	Letter from Solicitor to the Building Department requesting whether or not there are any outstanding work orders.
	(Tab 37)	Letter from Solicitor to the Department of Hydro requesting whether or not there are any arrears owing.
	(Tab 38)	Statement of Account rendered by Solicitor to his clients, including work done during the suspension period.

	April 16, 1997 (Tab 39)	Reporting letter from Solicitor to his clients.
E & M Georgiou Real Estate (Purchase)	March 4, 1997 (Tab 40)	Letter from Solicitor to his clients enclosing preliminary numbers for closing.
	March 25 1997 (Tab 41)	Letter from Solicitor to the CIBC Mortgage Inc. enclosing draft mortgage, solicitor's interim report and requisition for funds etc.
	March 25 1997 (Tab 42)	Letter from Solicitor to the CIBC Mortgage Inc. enclosing an amended Charge.
	March 26 1997 (Tab 43)	Letter from Solicitor to Liberty Mutual requesting a binder letter confirming insurance.
	March 27 1997 (Tab 44)	Charge/Mortgage of Land prepared by Solicitor and registered in the Durham Registry Office as Instrument #LT796251 registered as March 27, 1997.
	(Tab 45)	Land Transfer Tax Affidavit signed by Solicitor.
	April 1 1997 (Tab 46)	Statement of Account rendered by Solicitor to his clients, including work done during the suspension period.
	(Tab 47)	Reporting letter from Solicitor to his clients.
	April 7 1997 (Tab 48)	Letter from Solicitor to his clients enclosing a copy the survey for their records.
	April 10 1997 (Tab 49)	Letter from Solicitor to the CIBC Mortgages Inc. enclosing the solicitor's final report and certificate of title etc

Deodata Paquette Real Estate (Mortgage)	March 18, 1997 (Tab 50)	Letter from Solicitor to the Tax Department requesting a tax clearance certificate.
	(Tab 51)	Letter from Solicitor to Vieiva Associates Insurance Brokers requesting a binder letter confirming insurance.
	March 20 1997 (Tab 52)	Letter from Solicitor to the CIBC Mortgage Inc. enclosing preliminary report on title etc.
	March 24 1997 (Tab 53)	Letter from Solicitor to Kathy Zardo enclosing a firm cheque representing her fees in this matter.
	(Tab 54)	Letter from Solicitor to GMAC of Canada Ltd enclosing a trust cheque representing the pay out figure available until April 10th 1997.
	(Tab 55)	Letter from Solicitor to the CIBC Mortgage Inc. requesting a discharge statement.
	(Tab 56)	Charge/Mortgage of Land prepared by the Solicitor and registered in the Peel/Brampton Registry Office.
	March 25 1997 (Tab 57)	Letter from Solicitor to his client enclosing a trust made payable to her.
	March 26 1997 (Tab 58)	Statement of Account rendered by Solicitor to his client, including work done during the suspension period.
	April 10 1997 (Tab 59)	Letter from Solicitor to the CIBC Mortgages Inc. enclosing the solicitor's final report and certificate of title etc.
	April 15 1997 (Tab 60)	Letter from Solicitor to his client confirming that all of the monies have been disbursed with respect to this matter.
	April 16 1997 (Tab 61)	Letter from Solicitor to the Registry Office enclosing the discharge of mortgage to be registered.

Jaroslav Tomyn Real Estate (Mortgage)	March 18, 1997 (Tab 62)	Letter from Solicitor to the Tax Department requesting a tax clearance certificate.
	(Tab 63)	Letter from Solicitor to the Bank of Nova Scotia enclosing charge for their approval, copy of the survey and direction as to funds.
	March 19 1997 (Tab 64)	Letter from Solicitor to the Bank of Nova Scotia enclosing declaration as requested.
	March 21 1997 (Tab 65)	Charge/Mortgage of Land prepared by the Solicitor and registered in the Toronto Registry Office.
	(Tab 66)	Letter from Solicitor to Allstate Insurance enclosing a copy of the renewal certificate.
	(Tab 67)	Statement of Account rendered by Solicitor to his clients, including work done during the suspension period.
	March 26 1997 (Tab 68)	Reporting letter from Solicitor to the Bank of Nova Scotia.
	April 4 1997 (Tab 69)	Letter from Solicitor to the Bank of Nova Scotia confirming that the mortgage with the bank is a first mortgage.
	April 10 1997 (Tab 70)	Letter from Solicitor to the Bank of Nova Scotia enclosing final report on title.
	May 5 1997 (Tab 71)	Letter from Solicitor to his client enclosing a copy of the tax certificate.
	(Tab 72)	Letter from Solicitor to the Bank of Nova Scotia enclosing the tax certificate from the City of York.

Garabet Barsoumian (Litigation)	March 17, 1997 (Tab 73)	Statement of Account rendered by Solicitor to his client, including work done during the suspension period.
	(Tab 74)	Letter from Solicitor to Angell Townson & Williams Inc. acknowledging receipt of their letter and advising that he will forward a copy of their letter to his client.
	(Tab 75)	Letter from Solicitor to his client enclosing a copy of Angell, Townson & Williams Inc. letter dated March 13th 1997.
	March 24 1997 (Tab 76)	Letter from Solicitor to Angell Townson & Williams Inc. advising that his client reluctantly accepts the offer.
	April 8 1997 (Tab 77)	Letter from Solicitor to Angell Townson & Williams Inc. requesting the settlement cheque and necessary releases.
	April 11 1997 (Tab 78)	Settlement cheque made payable to Solicitor in Trust.
	April 21 1997 (Tab 79)	Letter from Solicitor to his client advising that he has cont'd received the settlement cheque and to contact his office in order to schedule an appointment.
	May 5 1997 (Tab 80)	Final release signed by the client and witnessed by the Solicitor.
	(Tab 81)	Letter from Solicitor to his client confirming that he was provided with a cheque in the amount of $5,800.00.
	(Tab 82)	Letter from Solicitor to Angell Townson & Williams Inc. enclosing the release for their records.
	(Tab 83)	Letter from the Solicitor the Ministry of Health enclosing a trust cheque made payable to OHIP, Ministry of Finance.
	May 7 1997 (Tab 84)	Letter from Solicitor to Angell Townson & Williams Inc. enclosing a copy of the release.

A. Ulsrud Real Estate (Mortgage)	February 20, 1997 (Tab 85)	Letter from Solicitor to his client confirming their telephone conversation.
	March 26 1997 (Tab 86)	Letter from Solicitor to Richard Bennett, solicitor for the purchasers, requesting a discharge statement.
	(Tab 87)	Letter from Solicitor to the Tax Department requesting a tax clearance certificate.
	April 1 1997 (Tab 88)	Letter from Solicitor to the CIBC enclosing Direction as to Funds, Charge/Mortgage of Land etc.
	April 15 1997 (Tab 89)	Letter from Solicitor to Ann Shier requesting that she act as their agent in registering the Transfer/Deed of Land.
	(Tab 90)	Letter from Solicitor to the CIBC enclosing a copy of the pay out statement regarding the Ulsrud Mortgage.
	(Tab 91)	Land Transfer Tax Affidavit prepared and signed by the Solicitor.
	April 16 1997 (Tab 92)	Charge/Mortgage of Land prepared by Solicitor and registered in the Grey/Owen Sound Registry Office.
	(Tab 93)	Transfer/Deed of Land prepared by Solicitor and registered in the Grey/Owen Sound Registry Office.
	April 17 1997 (Tab 94)	Letter from Solicitor to the CIBC enclosing report indicating that the mortgage was registered on April 16th 1997.
	(Tab 95)	Facsimile from Solicitor to his client confirming that all necessary transfers and registrations have been completed.

	(Tab 96)	Letter from Solicitor to Richard Bennett enclosing a trust cheque made payable to his client.
	April 18 1997 (Tab 97)	Statement of Account rendered by Solicitor to his client, including work done during the suspension period.
	(Tab 98)	Letter from Solicitor to the CIBC enclosing Charge/Mortgage of Land, Certificate of Sheriff etc.
	(Tab 99)	Letter from Solicitor to Richard Bennett enclosing a copy of the Document General that was registered on April 2nd 1993.
	(Tab 100)	Reporting letter from Solicitor to his clients.
	May 6 1997 (Tab 101)	Letter from Solicitor to the Grey Registry Office enclosing the original mortgage for registration.
	May 14 1997 (Tab 102)	Letter from Solicitor to his clients enclosing copies of the mortgages which have been discharged.
Roger Dufau Real Estate (Sale)	April 22, 1997 (Tab 103)	Facsimile from Solicitor to Avrum Glasner enclosing search as per their discussion.
	April 28 1997 (Tab 104)	Statement of Adjustments prepared by Solicitor.
	April 30 1997 (Tab 105)	Affidavit signed and commissioned by Solicitor.
	(Tab 106)	Affidavit signed by the client and commissioned by Solicitor.
	(Tab 107)	GST Statement signed by Solicitor on behalf of his client.
	(Tab 108)	Undertaking by Solicitor to Avrum Glasner.
	(Tab 109)	Letter from Solicitor to the Bank of Nova Scotia enclosing cheques to discharge the mortgages.
	(Tab 110)	Transfer/Deed of Land prepared by Solicitor and registered in the Toronto Registry Office.
	May 5 1997 (Tab 111)	Letter from Solicitor to Newman & Sversky enclosing a cheque representing excess funds held by the Realtor.
	May 9 1997 (Tab 112)	Statement of Account rendered by Solicitor to his client, including work done during the suspension period.
	May 13 1997 (Tab 113)	Letter from Solicitor to Avrum Glasner enclosing a trust cheque representing final payment to Toronto Hydro.
	May 14 1997 (Tab 114)	Reporting letter from Solicitor to his clients.

Josef Ruff Estate (Sale)	March 19, 1997 (Tab 115)	Letter from Solicitor to Andrew Lewis, solicitor for the Real purchasers, confirming receipt and responding to requisition letter.
	March 20 1997 (Tab 116)	Letter from Solicitor to Andrew Lewis enclosing Statement of Adjustments.
	March 21 1997 (Tab 117)	Amended Statement of Adjustments prepared by Solicitor.
	(Tab 118)	Statement of Account rendered by Solicitor to his clients, including work done during the suspension period.
	April 7 1997 (Tab 119)	Letter from Solicitor to his clients enclosing final account for Consumers Gas.
	April 16 1997 (Tab 120)	Reporting letter from Solicitor to his clients.
	July 7 1997 (Tab 121)	Facsimile to Solicitor from his client advising as to how he would like to register his company.
	July 8 1997 (Tab 122)	Letter from Solicitor to his client confirming receipt of his facsimile and requesting further information with respect to three other companies owned by his client.
Accounting Records	January 31 1997 (Tab 123)	Trust cheque #0379 made payable to Robert Petroff.
	February 13 1997 (Tab 123)	Trust cheque #0380 made payable to Elizabeth Furo.
	February 21 1997 (Tab 123)	Trust cheque #0381 made payable to Peter & Mary Axiotis.
	February 28 1997 (Tab 124)	Trust bank statement for the period January 31st 1997 through February 28th 1997.
	March 24 1997 (Tab 125)	Trust cheque #0382 made payable to GMAC of Canada Ltd.
	(Tab 126)	Trust cheque #0383 made payable to Sears.
	March 25 1997 (Tab 125)	Trust cheque #0384 made payable to Deodata Paquette.
	March 26 1997 (Tab 126)	Trust cheque #0385 made payable to James Stefoff.
	March 31 1997 (Tab 127)	Trust bank statement for the period February 28th 1997 through March 31st 1997.
	April 7 1997 (Tab 128)	Trust cheque #0387 made payable to James Stefoff.
	April 22 1997 (Tab 128)	Trust cheque #0388 made payable to James Stefoff.

April 30 1997 (Tab 129)	Trust bank statement for the period March 31st 1997 through April 30th 1997.
May 5 1997 (Tab 130)	Trust cheque #0389 made payable to Garabet Barsoumian.
May 5 1997 (Tab 132)	Trust cheque #0390 made payable to Minister of Finance.
May 5 1997 (Tab 130)	Trust cheque #0391 made payable to James Stefoff.
May 9 1997 (Tab 131)	Trust cheque #0392 made payable to Toronto Hydro.
May 9 1997 (Tab 131)	Trust cheque #0393 made payable to James Stefoff.
May 12 1997 (Tab 132)	Trust cheque #0394 made payable to James Stefoff.
May 30 1997 (Tab 133)	Trust bank statement for the period April 30th 1997 through May 30th 1997.

14. The Solicitor admits that he engaged in the practice of law while under suspension for a continuous period of time during the months of February, March, April and May, 1997.

V. PRIOR DISCIPLINE

15. On September 20, 1989, the Solicitor was found guilty of professional misconduct for failing to comply with requests made on behalf of a client to turn the client's file over to his new solicitors, and for failing to reply to the Law Society regarding a complaint. He received a reprimand in Committee and signed an Undertaking dated October 16, 1989 wherein he undertook to thoroughly examine all his files (active and inactive) to see if any of them have been neglected and to provide the Society with a prompt and full report of his examination, and to meet with the Director of the Practice Advisory Service of the Law Society as often as required to ensure his law practice remains current (Tab 134).

16. On May 23, 1996, the Solicitor was found guilty of professional misconduct for failing to serve his clients in a conscientious, diligent and efficient manner with respect to a motor vehicle accident; for failing to report to the Law Society's Errors & Omissions Department about a potential claim arising from his negligence in connection with the motor vehicle accident; and for attending and bidding on behalf of his clients at the auction sale of his clients' property at which his clients would have been prohibited from bidding. Convocation ordered the Solicitor suspended for three months, commencing June 10, 1996.

DATED at Toronto, this 27th day of March, 1998."

RECOMMENDATION AS TO PENALTY

The Committee recommends that James Steffof be suspended for a period of five months commencing at the conclusion of the administrative suspension.

REASONS FOR RECOMMENDATION

We have a joint submission on penalty in this matter, having made a finding of misconduct based on an Agreed Statement of Facts.

The Committee is of the view that the joint submission of five months suspension is reasonable and a very fair one for the Solicitor in all of the circumstances, including his discipline history, and the substantial evidence here of practising under suspension.

The penalty is in keeping with the precedents set out in the MacGregor and Laan decisions and it is reflective of the background of the Solicitor. The Solicitor has had financial difficulties as a result of some bad investments and his high premiums with L.P.I.C. The Solicitor is endeavouring to put himself in good standing and we wish him luck in that regard.

The suspension of five months will begin after the completion of the administrative suspension.

James Stefoff was called to the Bar on March 19, 1970.

ALL OF WHICH is respectfully submitted

DATED this 31st day of March, 1998

Thomas J. P. Carey, Chair

There were no submissions on the finding of professional misconduct.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 5 months commencing at the conclusion of the administrative suspension.

Ms. Seymour and the solicitor made brief submissions in support of the recommended penalty.

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

It was moved by Mr. MacKenzie, seconded by Mr. Millar that the solicitor be suspended for a period of 5 months commencing at the conclusion of the administrative suspension.

Carried

It was moved by Mr. Copeland, seconded by Mr. Swaye that the solicitor be suspended for a period of 5 months commencing on today's date.

Not Put

Counsel, Duty 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 5 months commencing at the conclusion of the administrative suspension.

Re: David Jack MOLL - Toronto

The Secretary placed the matter before Convocation.

Messrs. Millar, Topp, Wilson, Delzotto, Chahbar and Copeland withdrew for this matter.

Mr. Glenn Stuart appeared for the Society and Mr. Reg Watson appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 2nd September, 1998, together with an Affidavit of Service sworn 15th September, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 11th September, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 24th September, 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

David W. Scott, Q.C., Chair
Elvio L. DelZotto, Q.C.
Abdul A. Chahbar

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

DAVID JACK MOLL
of the City
of Toronto
a barrister and solicitor

Glenn Stuart & Hugh Corbett
for the Society

H. Reginald Watson
for the solicitor

Heard: August 13, 1998

24th September, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The COMMITTEE begs leave to report:

REPORT

On March 13, 1997 Complaint D23/97 was issued, and on February 26, 1998 Complaint D19/98 was issued, against David Jack Moll alleging that he was guilty of professional misconduct. Complaint D23/97 was withdrawn and replaced by Complaint D23a/97 sworn August 12, 1998.

The matter was heard in public on August 13, 1998 before this Committee composed of David W. Scott, Q.C., Chair, Elvio L. DelZotto, Q.C. and Abdul Chahbar. The Solicitor attended the hearing and was represented by H. Reginald Watson. Glenn Stuart and Hugh Corbett appeared on behalf of the Law Society.

DECISION

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

Complaint D23a/97

2. a) in connection with his clients Mr. & Mrs. Pietrzyk

(i) he breached Rule 23 (3) of the Rules of Professional Conduct in or about January 1991, in that he failed to advise the Pietrzyks of relevant information which was known to him and would have been of concern to them as proposed investors in a mortgage registered against 264 Logan Avenue, Toronto;

(ii) he breached Rule 23 (2)(a) of the Rules of Professional Conduct in or about January 1991 in that he held a syndicated mortgage in trust for the Pietrzyks in circumstances where he failed to issue a trust declaration signed by him as the registered owner; and,

(iii) he breached Rule 8(8) of the Rules of Professional Conduct from September 1991 by failing to keep the Pietrzyks reasonably informed of the circumstances of their investment; by failing to deliver to them all papers and property to which they were entitled; and, by failing to co-operate with their successor lawyer;

Estates

(b) he acted in a conflict of interest, contrary to Rule 5 of the Rules of Professional Conduct, in transactions, from 1980 to 1996 or thereabouts, when he arranged mortgages for mortgage clients by accessing a pool of estate funds over which he had control, in his position as solicitor for the estate, thereby acting for both parties in the transaction. Specific instances in which the Solicitor acted are set out below:

In the circumstances outlined above, he breached his duty to his estate clients by making unsecured loans from one estate client to another client, as follows:

Address	Date Advanced	Amount	Loaned from Estate
2793 Danforth	July 4, 1991	$33,000	Smith
733 Milverton	August 17, 1987	$17,200	McQueen
733 Milverton	August 17, 1987	$ 9,000	Hoffe
30 Preston Road	February, 1990	$ 5,000	McQueen
unsecured loan - Lott/Woodend	April 6, 1990 June 4, 1990	$ 4,000 $ 7,700	McQueen
685 Cosburn Ave.	November 20,1987	$ 8,400	Hoare
54 Waverley Road	December 12, 1989	$ 800	Smith
54 Waverley Road	December 12, 1989	$29,000	Waters
54 Waverley Road	December 12, 1989	$11,000	Lamonby
54 Waverley Road	December 12, 1989	$59,000	Hoare
54 Waverley Road	December 12, 1989	$17,700	Cann
264 Logan Avenue	August 10, 1990	$ 4,500	Aseltine
Bradley Harvey	October 29, 1992	$25,000	Aseltine

c) he breached the provisions of the Trustee Act by investing estate monies in second mortgages in the following instances:

Estate	Investment	Amount	Date of Investment
Waters Estate	2nd mortgage; 264 Logan Avenue	$30,000	August 10, 1990
McQueen Estate	2nd mortgage; 6-8 Fernwood Avenue	$45,000	September 5, 1989
McQueen Estate	2nd mortgage; 264 Logan Avenue	$35,000	August 10, 1990
Hoare Estate	2nd mortgage; 30 Preston	$44,000	February, 1990
Hoare Estate	2nd mortgage;264 Logan Avenue	$26,000	August 10, 1990
Aseltine Estate	2nd mortgage; 264 Logan Avenue	$35,000	October 10, 1990

Cann Estate	2nd mortgage; 30 Preston	$68,854	March 11, 1991
Cann Estate	2nd mortgage; 280 Kenilworth Avenue	$19, 833	July 27, 1989
Cann Estate	2nd mortgage; 1612 Middleton St.	$34,000	August 26, 1991

d) he breached his fiduciary duty to the Cann Estate by investing estate monies in the amount of $68,854 in a mortgage on 30 Preston when he knew that there had been NSF cheques received preceding the investment by the estate;

(e) he breached the provisions of Rule 2 of the Rules of Professional Conduct by failing

to serve the following estates in a conscientious, diligent and efficient manner, by not winding up the estates on a timely basis:

Estate	Period Estate Kept Open	Number of Years
Waters Estate	May 20, 1980 - November 10, 1996	16
McQueen Estate	October 27, 1986 - December, 1992	6
Cann Estate	April 26, 1988 - current	9

f) he drew executor's compensation without the authorization of the beneficiaries of the estates, and without court approval as follows

Estate	From	To	Amount
Waters Estate	May 20, 1980	November 9, 1990	$ 7,500
McQueen Estate	November 6, 1986	November 4, 1990	$35,900
Hoare Estate	August 4, 1989	December 19, 1991	$18,100
Aseltine Estate	August 27, 1990	July 10, 1991	$16,065
Cann Estate	April 26, 1986	October 31, 1987	$ 7,500

(g) he failed to maintain books and records as required by Section 15(1) of Regulation 708 under the *Law Society Act* in regard to the following estates:

Estate	From	To
Waters Estate	May 20, 1980	November 9, 1990
McQueen Estate	October 27, 1986	December, 1992
Hoare Estate	August 4, 1989	July 8, 1991
Aseltine Estate	August 27, 1990	July 15, 1991
Smith Estate	October 13, 1991	Current
Cann Estate	April 26, 1986	Current

(i) he breached Rule 23(2)(a) by failing to execute and deliver trust declarations to the beneficial owners of mortgages registered in his name in trust:

Estate	Address
Hoffe, Aseltine, Hoare, Cann, Riedyk Estates	76 Sellers
Hoare Estate	44 Kenilworth
Cann Estate	1612 Middleton

Phillips

(j) he breached Rule 5 of the Rules of Professional Conduct by investing in a venture with his client James Phillips , specifically the purchase of 1746 Queen Street East,Toronto, in November 1988, without insisting that Phillips receive independent legal advice or representation.

(k) he failed to adequately supervise his office, and, in particular, he permitted Phillips to have the unrestricted use of his office, and thereby allowed an agreement of purchase and sale which overstated the true purchase price to be prepared and sent from his office to the lenders on the purchase of the property at 1746 Queen Street East, Toronto; and,

(l) he breached Rule 5 of the Rules of Professional Conduct by not disclosing to his client Investors Group that he had an interest in the transaction by which Kare-Cher Properties Ltd. acquired the property at 1746 Queen Street East, in November 1988 and for which transaction his client Investors Group was providing the mortgage financing.

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2. a) in the circumstances of a mortgage loan in the amount of $62,375.00 from his client Shirley Kelly to his clients Roberto Montessano and Dominic Serrao, which was secured by a second mortgage against 19 Bernice Crescent, York,

(i) the Solicitor acted in a conflict of interest contrary to the provisions of Rule 5 of the Rules of Professional Conduct when he acted for both the mortgagors, Messrs. Montessano and Serrao, and the mortgagee, Ms. Kelly, in the course of arranging this mortgage without advising either party to the transaction of the nature of his conflict and obtaining their informed written consent to his continuing to act;

(ii) the Solicitor further breached Rule 5 of the Rules of Professional Conduct by continuing to act for both the mortgagors, Messrs. Montessano and Serrao, and the mortgagee, Ms. Kelly, and the lenders after a contentious issue arose between them, specifically a serious issue as to the mortgagors' ability to maintain the payments under the mortgage, and in the course of so acting preferred the interests of the mortgagor clients to those of his mortgagee client by thereafter arranging a renewal of the mortgage on terms favourable to the mortgagors; and,

(iii) the Solicitor failed to disclose to his mortgagee client, Ms. Kelly, in writing prior to the renewal of the mortgage all information which would have been of concern to a prospective investor, namely, he failed to disclose the existence of several cheques from his mortgagor clients which had been returned due to insufficient funds, and thereby breached Rule 23(3) of the Rules of Professional Conduct; and,

(b) in the circumstances of a mortgage loan in the amount of $100,000.00 from his client the Estate of Bert Whitall, of which he was executor, to his client 914751 Ontario Inc., a company controlled by his client Jordan Craig, which loan was secured by a first mortgage against 2366 Gerrard Street East, Toronto,

(i) the Solicitor acted in a conflict of interest contrary to the provisions of Rule 5 of the Rules of Professional Conduct when he acted for both the mortgagor, 914751 Ontario Inc., and the mortgagee, the Estate of Bert Whitall, in the course of arranging this mortgage without advising the estate client or its beneficiary of the nature of his conflict and obtaining the estate's informed written consent to his continuing to act; and,

(iii) in the course of acting for both parties to this transaction, the Solicitor preferred the interests of his mortgage client, 914751 Ontario Inc., to the interests of is mortgagee client, the Whitall Estate, in that he failed to require the payment of a bonus due to the mortgagee from the mortgagor under the terms of the mortgage.

Evidence

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

Re: Complaint D23a/97

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D23a/97 and is prepared to proceed with a hearing of these matters on August 11 - 14, 1998.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D23a/97 and this Agreed Statement of Facts with his counsel, H. Reginald Watson, and admits the particulars of Complaint D23a/97, in addition to the facts contained in the Agreed Statement of Facts. The Solicitor further admits that the particulars of Complaints D23a/97, as supported by the facts in this Agreed Statement, constitute professional misconduct.

4. The parties agree that this Agreed Statement of Facts should be read in conjunction with the Joint Submission on Penalty, which will also be filed at the hearing of this Complaint.

IV. FACTS

5. Mr. Moll was called to the Bar in 1975. Upon his call, he practised with Cyril O'Reilly for 4 years, until Mr. O'Reilly suffered a stroke in 1979 and did not return to the profession. This short period represented the extent of the mentoring Mr. Moll received in the profession. For brief periods after this, he rented space to junior lawyers. He has practised as a sole practitioner under the name O'Reilly Moll since 1986. He operates a general practice with an emphasis on estates and real estate. A copy of the solicitor's *curriculum vitae* is attached to the Joint Submission on Penalty. Additional evidence respecting the Solicitor's good character will be presented to the Committee by a brief of letters and *viva voce* witnesses.

Henry & Hazel Pietrzyk

6. The particulars respecting the Pietrzyks occurred in the context of the recession, lasting approximately from 1990 to 1995, which caused catastrophic damage to the real estate market.

7. Mr. Moll states that approximately 45% of his practice is in real estate. In addition to sale and purchase transactions, he acts for private lenders in mortgage transactions. A typical private borrower does not have the financial prerequisites to obtain financing from conventional financial institutions. The high interest rates demanded by private lenders is a response to this increased risk.

8. Mr. Moll states that he has a standard practice which he endeavours to follow when introducing lender clients to a potential mortgage opportunity. This discussion involves the property, the borrowers and the mortgage terms. He discloses all of the information he has available.

9. Mr. Moll states that he would, in most cases, endeavour to disclose all information in his possession to a prospective lender regarding a mortgage. He did not usually reduce that disclosure to writing for his lender client.

10. In 1981, the Pietrzyks sold the shopping plaza which they owned on Lakeshore Blvd. for $442,000. After payment of mortgages and other costs, the Pietrzyks netted approximately $133,000. In the same year, they also sold the building at 322 Dufferin Avenue, which housed their business, "A & B Photo Engravers", for $150,000. They took back a mortgage of $125,000 from the purchaser and collected the payments. The business itself was sold for $65,000. Mr. Pietrzyk had operated this business for more than 10 years and, at its peak it employed twelve people. Mrs. Pietrzyk worked in the office doing basic bookkeeping and administrative chores. An accountant handled the books and records of the business.

11. The Pietrzyks invested in approximately 26 mortgages through Mr. Moll's office. Their first mortgage was advanced in or around 1984. Mr. Moll states that when added up, the amounts secured by these twenty-six mortgages would total approximately $1,000,000. The Pietrzyks state that each mortgage would be on average for an amount between $25,000 to $50,000. When one mortgage expired, they typically followed Mr. Moll's advice to roll it over into a different mortgage. Mr. Moll states that the Pietrzyks earned interest of $349,000 on these mortgages. The Pietrzyks collected the monthly payments directly on most of their mortgages. As a result, they were aware of any NSF cheques provided by the borrowers on those mortgages. The Pietrzyks returned the original mortgage documents in their possession to Mr. Moll upon each mortgage expiring so that the discharge could be registered, and, to the extent they were provided with, or made copies of the documents pertaining to these past mortgages, they have since thrown them out or cannot locate them.

12. Of these 26 mortgages: 9 were first in priority and 13 were 2nd mortgages. Aside from Thistle (1987), and Kerr (1988), the Pietrzyks did not invest in any 1st mortgages after 1985. For each potential mortgage loan, Mr. Moll would discuss the investment with the Pietrzyks, as indicated above.

13. Mr. Moll would provide information to the Pietrzyks regarding each mortgage. The Pietrzyks relied on Mr. Moll to ensure that the mortgages he recommended were adequately secured. Although initially they inspected the properties to be mortgaged, subsequently they state that they did not independently verify any information he provided to them as to the security or the borrower. Following one or more discussions with Mr. Moll, the Pietrzyks would make a decision whether to invest. Mr. Moll does not remember every detail of every conversation with the Pietrzyks. While he has rough notes of some calls to the Pietrzyks, he generally did not keep many formal notes.

14. Selvon Cruickshank ("Cruickshank") purchased the property at 264 Logan Avenue, Toronto ("264 Logan") on July 18, 1986 for $120,000 . Cruickshank financed the purchase by a first mortgage for $84,000 in favour of The Municipal Savings & Loan Corp. and a vendor take-back (second) mortgage for $24,000. Cruickshank registered a third mortgage for $50,000 in favour of Sylish Capital Corporation on January 23, 1989. Mr. Moll did not act on those transactions.

15. In the summer of 1990, Cardinal Financial Inc., a mortgage broker, contacted Mr. Moll with a request for a new second mortgage to replace the existing second and third mortgages on 264 Logan (Document Book Tab 1). An appraisal prepared in July 1990 which valued the property at $241,000 was provided to Mr. Moll (Document Book Tab 2). Mr. Moll agreed to advance the $91,000 requested.

16. On August 10, 1990, a new second mortgage (Document Book, Tab 3) was registered in favour of Mr. Moll, in trust, for $91,000 at 16%, with a one year term (the "Cruickshank mortgage"). The previous second and third mortgages were discharged in September and November 1990 respectively.

17. Mr. Moll charged and received legal fees for services provided on each of the transactions described in this Agreed Statement, including purchases, mortgages and mortgage extensions. The amounts of these fees would depend on the services rendered. On mortgages in which he acted for the lender, he also charged an arranging fee to the borrower. These arranging fees were calculated on the basis of the value of the loan. He would also charge a collection fee for collecting monthly payments on mortgages. These fees, which were calculated as a percentage of the payments, were paid by the lender.

18. Mr. Moll acted for the mortgagor and all of the investors on this mortgage, both when it was first advanced and in the course of subsequent rearrangements. Mr. Moll did not advise any of the parties as to the nature of his conflict and neither recommended that they obtain independent legal advice nor obtained written waivers of such advice. The Solicitor, David Moll, states that he is now complying with Rule 5.

19. Mr. Moll's trust ledger for the Cruickshank mortgage (Document Book, Tab 4) indicates that the funds invested in the mortgage were provided from the following estates, for which Mr. Moll was the executor, or had assumed the role of executor.

Mortgagee	Amount
Estate of Alexander Rothney McQueen	$ 35000
Estate of Frederick William Richard Hoare	$ 26000
Estate of William Bruce Waters	$ 30000
	$ 91000

No trust declarations were executed and delivered to the beneficial owners of the mortgage registered on August 10, 1991, and no reporting letters were provided to the investors. The investment of the funds from each estate is confirmed in the trust ledger for the respective estates and his reporting letters.

20. Mr. Moll collected the mortgage payments and transferred each participant's portion to their respective trust ledgers.

21. Three months after Mr. Moll advanced the estate funds on the Cruickshank mortgage, he began to replace the original mortgagees with a total of four other mortgagees over the nine month period from November 2, 1990, to July 9, 1991. The Pietrzyks were one of the four new mortgagees; the other three were persons whose assets Mr. Moll controlled in his capacity as executor of their estate or holding their power of attorney. The interests of the various investors in this mortgage over this period are summarized as follows:

Mortgagee	Aug. 10/90	Nov. 2/90	Jan. 29/91	June 24/91	July 9/91
Hoare Estate	$26,000	$26,000	-	-	-
Waters Estate	$30,000	$30,000	$30,000	$30,000	-
McQueen Estate	$35,000	-	-	-	-
Aseltine Estate	-	$35,000	$10,000	-	-
Pietrzyk	-	-	$51,000	$51,000	$51,000
O'Reilly Estate	-	-	-	$10,000	$10,000
Smith Estate	-	-	-	-	$30,000
Total Mortgage	$91,000	$91,000	$91,000	$91,000	$91,000

22. On November 2, 1990, three months after investing in the mortgage, Mr. Moll replaced the funds from the McQueen estate with money from the estate of Alma Aseltine ("Aseltine"), since funds were required to make a distribution to Lois McQueen, the beneficiary of the McQueen estate (discussed further below).

23. Cruickshank's monthly payment, which was due on December 1, 1990, was twice returned, on November 23, 1990, and December 20, 1990, for insufficient funds. Cruickshank ultimately made this payment on December 24, 1990.

24. A collateral third mortgage for $187,000 was registered against the property on November 28, 1990. Mr. Moll had been notified of the pending registration of this mortgage on November 21, 1990 by the lawyer representing Cruickshank on this transaction.

25. In January 1991, Mr. Moll contacted the Pietrzyks about investing in the Cruickshank mortgage as another of their investments was being repaid. The Pietrzyks, following a discussion with Mr. Moll where he provided them with the information in his possession, agreed to invest $51,000 in the Cruickshank mortgage. The Pietrzyks investment replaced the investment of the Hoare estate ($26,000) and part of the investment of the Aseltine estate ($25,000).

26. Although Mr. Moll discussed the Cruickshank mortgage with the Pietrzyks he failed to advise them in writing that there had been two NSF cheques received prior to their investment and that their investment was replacing another investment, contrary to Rule 23(3) of the Rules of Professional Conduct.

27. The Pietrzyk's investment consisted principally of the funds which had been repaid from the other mortgage ($50,453.18). In addition, the Pietrzyks sent a cheque for $546.82 to Mr. Moll to bring their total investment to $51,000. Mr. Moll reported to the Pietrzyks on this transaction on September 6, 1991 (Document Book Tab 5), and September 18, 1991 (Document Book Tab 6). He provided them with a copy of the duplicate registered mortgage and advised that it was subject to a 1st mortgage of $81,000. Mr. Moll provided a first mortgage statement and the appraisal showing a value of $244,000 as of July 1990. The Pietrzyk's were advised of their interest in the mortgage, along with the names and interests of the other mortgagees. However, Mr. Moll did not prepare a written trust declaration representing the Pietrzyks' interest in this mortgage, which was held by Mr. Moll, in trust. In his September 6, 1991 reporting letter, Mr. Moll offered to register an assignment of their mortgage interest to the Pietrzyks personally, but they declined this invitation.

28. On January 29, 1991, the same day that the Pietrzyks' funds were used to repay investments by the Hoare and Aseltine estates, Mr. Moll caused those two estates to buy out the interest of the McQueen estate in an unrelated mortgage (Thistle - discussed below).

29. Mortgage payments continued to be received monthly on the Cruickshank mortgage, although consistently about a week late, until May 1991. The May 1991 payment was then returned NSF; it was replaced before the end of the month.

30. The interest payment due September 1, 1991, was returned NSF but was replaced prior to its due date; other payments in that period were made on time, if not in advance. After August 1992, Cruickshank began to fall behind in his payments; payments were thereafter received sporadically and often not for the full amount. The last payment to the Pietrzkys was in May 1998, and represented the mortgage payment for May 1994.

31. Cruickshank continues to collect the rents for the property and is keeping the first mortgage in good standing. Mr. Moll states that he continues to make efforts to collect on the second mortgage on behalf of all of the investors. Mr. Moll states that at least once every month he has called Cruickshank on behalf of the Pietrzyks. Cruickshank makes partial payments at varying intervals. When Mr. Moll has sufficient funds for a complete payment, it is sent to the Pietrzyks.

Termination of Retainer by Pietrzyks

32. Following the Cruickshank default in August 1992, the Pietrzyks became concerned and began calling Mr. Moll. Mr. Moll advised them that they had several options, including Power of Sale proceedings, attorning rents and collecting whatever monthly payments were forthcoming.

33. The Pietrzyks became increasingly concerned about their investment and began to request further information from Mr. Moll. The Pietrzyks complained to the Law Society in June of 1993 (Document Book Tab 7). Mr. Moll replied by letter dated July 12, 1993 (Document Book Tab 8) and provided a brief overview of the matter. In August, 1994, the Pietrzyks wrote to Mr. Moll about the arrears (Document Book Tab 9). Mr. Moll replied (Document Book Tab 10) and advised that since the 1st mortgage was in good standing and the Pietrzyks' goal of full recovery was unlikely, he would not recommend a Power of Sale.

34. The Pietrzyks retained Charles Waite who wrote to Mr. Moll in June 1994 (Document Book Tab 11). Mr. Moll's reply was brief (Document Book Tab 12), and while it addressed the main issue in the opinion of Mr. Moll, it did not reply to all of the points raised by Mr. Waite. A series of letters went between the two lawyers, with Mr. Moll taking much the same position and, consequently, not responding fully to Mr. Waite (Document Book Tabs 13-23). Mr. Moll states that the marital difficulties which he was experiencing at this time contributed to this situation.

35. On November 14, 1994, Mr. Moll registered an assignment of the mortgage from David J. Moll, in trust, to Henry & Hazel Pietrzyk, 56.04%; Cyril O'Reilly, 10.94%; and, David Jack Moll and Arnold Clifford Emmott, executors of the Estate of John Ross Smith (the "Smith estate"), 32.97%.

36. The Pietrzyks have commenced litigation against Mr. Moll in relation to this mortgage; the matter is ongoing. Mr. Moll states that he has now produced all of the remaining information required by the Pietrzyks.

Estate Investments

(i) Overview

37. Approximately 45% of the Mr. Moll's practice is in the area of estates law. Mr. Moll states that since his call to the bar in 1975 he has had carriage of hundreds of estate matters. In some of these files he has also been the Executor. He also has held power of attorney for a number of individuals. In an effort to produce investment income for some of these estate clients, Mr. Moll has been instructed to invest estate monies in mortgages. In some of these investments he has acted for the mortgagors also.

38. While the estate interest would not be shown on the face of the mortgage, Mr. Moll states that the mortgage would create a constructive trust in favour of the estate. Consequently, the estate could bring an action against the mortgagor and claim an interest in the mortgaged land on the basis of such constructive trust. At the time of making these investments, Mr. Moll believed that the mortgages were safe, although he may not have advanced this legal analysis.

39. When it became necessary to wind up or make a distribution for a mortgagee estate, Mr. Moll would replace the mortgagee estate's interest in the mortgage with funds from another estate, thereby transferring the interest in the mortgage to the other estate(s). He would then wind up, or make a distribution from, the mortgagee estate, as the case may be.

40. The vast majority of the mortgages in which Mr. Moll invested (whether for estates or other private lenders) were repaid by the mortgagors, with a profit to the estates. In the case of the Estate of Sifton Alfred Cann (the "Cann estate"), Mr. Moll repaid losses in the amount of $107,397.65, attributable to mortgage investment losses.

41. While investing estate funds, Mr. Moll failed to properly serve these estates by not winding them up in a timely manner. While Mr. Moll generally maintained books and records for these estates, he failed to maintain specific records, in particular mortgage asset ledgers, for the estates.

42. Mr. Moll states that he has now corrected the deficiencies in the books for the six estates which are the subject of this Complaint and advises that all of his records for these six estates are in now order. He has retained the forensic accounting firm of Marmer, Penner, which has overseen this task

43. Mr. Moll was not fraudulent in his dealings with these estates, as confirmed by the Society's investigation. The Society has found no evidence of misappropriation or other impropriety involving the direct taking of personal benefit.

(a) ESTATE OF WILLIAM BRUCE WATERS

44. William Bruce Waters ("Waters") died on May 20, 1980. Mr. Moll had previously prepared Waters' Will dated March 24, 1980 and a codicil, dated March 24, 1980 (Document Book Tab 24). Mr. Moll was named the executor and the solicitor of the estate. The beneficiaries of the estate were the Canadian Cancer Society and the Ontario Heart Foundation, sharing 90% and 10% respectively of the residue of the estate, after payments totaling $3,000 to friends of Waters.

45. At the date of death, the assets in the estate were valued at $62,439.32 according to an undated schedule entitled 'Assets of the Estate of William B. Waters, Deceased' found in Mr. Moll's file. Mr. Moll wrote to the Ontario Heart Foundation in July 1980 and stated that he expected the estate to be worth $60,000. The application for probate states the value of the estate to be $59,720.82 .

46. At the request of the Society, Mr. Moll wound up the estate on November 10, 1995, approximately 16 years after the date of Waters' death. By way of letter dated November 20, 1995, to the Ontario Heart & Stroke Foundation, Mr. Moll honestly stated: "*We apologize for the delay in finalizing this matter, it simply had dropped between the cracks.*"

47. Mr. Moll failed to serve the Waters' estate in a conscientious, diligent and efficient manner by allowing it to remain open for the period May 20, 1980 to November 10, 1995.

48. The residual beneficiaries received the following amounts from the Waters' estate. They also received all of the Statements of Receipts and Disbursements from Mr. Moll, which identified the amount of his compensation:

	To June 30/83	July 1/83 to Mar. 31/84	Mar. 31/84 to Nov. 9/90	Nov. 10/90 to Nov. 10/95	Total
Distributions:	25	26	27	28	
Canadian Cancer Society	45,000.00	32,400.00	18,000.00	32,271.30	127,671.30
Ontario Heart Foundation	5,000.00	3,600.00	2,000.00	3,585.59	14,185.59
Total Distributions	50,000.00	36,000.00	20,000.00	35,856.89	141,856.89

49. Mr. Moll charged legal fees to each estate for which he was solicitor. These fees were calculated on the basis of the amount of work involved in handling a particular matter. Where he was an executor of an estate, Mr. Moll also charged executor fees to the estate. He calculated these fees based on the generally accepted guideline of 2 1/2% of the value of assets collected (to be paid when collected) and 2 1/2% of the value of the assets distributed (to be paid when distributed). In the estates which are the subject of this Complaint, Mr. Moll drew his fees from the estate as a single payment of 5% early in his handling of the estate. Mr. Moll also charged the estates administration fees based on 4/10 % of their annual income, which is also a generally accepted guideline.

50. Mr. Moll drew executor's compensation from the estate without requisite authorization from the will, the beneficiaries or the court. He did not seek the authority of the beneficiaries before taking these fees from the estates. Mr. Moll admits that this pre-taking constitutes professional misconduct. However, based on his understanding of the standard of practice in the estates bar, the Solicitor did not believe this was improper at the time. Although the law in Ontario is well-established that executors cannot take compensation, in the absence of an express provision of the will, prior to obtaining either the consent of the beneficiaries or of the court, it is an established practice of a portion of the estates bar, including certain well-known members of that bar, to take fees prior to court approval in certain circumstances. Consequently, it is an area of some confusion, although it has always been the Law Society's position that the established law prohibits pre-taking, particularly where the consent of the beneficiaries is not sought.

51. In the same fashion, Mr. Moll drew executor's compensation in the five other estate matters which are the subject of this Complaint (Hoare, McQueen, Aseltine, Smith and Cann) without the requisite authorization from the will, the beneficiaries or the court.

52. The Ontario Heart & Stroke Foundation received Statements of Receipts and Disbursements from Mr. Moll in July 1983, April 1994 and November 1995. Mr. Moll did not request or receive authorization to take executor's compensation, but the Foundation had been advised of Mr. Moll's compensation.

53. The Canadian Cancer Society received the Statement of Receipts and Disbursements dated July 1, 1983. In November 1995, upon winding up the estate, Mr. Moll provided the Canadian Cancer Society with a Statement of Receipts and Disbursements for the period March 31, 1984 to November 9, 1995 (Document Book Tab 29), but at no time did Mr. Moll request or receive authorization from this organization to take executor's compensation.

54. The estate is wound up and the two beneficiaries have signed Releases. Prior to the Cancer Society signing the Release, its counsel reviewed and did not dispute the amount of executor's compensation taken by Mr. Moll.

55. The books and records maintained by Mr. Moll in respect of the Waters' estate failed to comply with Section 15(1) of Regulation 708 of the *Law Society Act*, and in particular:

(i) the ledger cards begin on June 13, 1984 even though Waters died on May 20, 1980; and,

(ii) certain transactions made through a savings account opened in August 1981 in the name of the estate were not reflected in the trust ledger. No records were maintained for the savings account detailing to what the deposits or withdrawals relate.

56. Mr. Moll states that all of the transactions in the Waters' estate were documented and are now properly recorded in his books.

57. Throughout the periods in question, Mr. Moll retained Bradley Harvey, C.A., to prepare his books and relied on him in this regard. Mr. Moll states that all of the books and records issues pertaining to each of the six estate matters identified by the Law Society have been corrected and verified by Jack Marmer of Marmer Penner.

Involvement of Waters' Estate Funds

58. The terms of Waters' will and codicil, prepared by Mr. Moll, did not waive the limitations imposed by the *Trustee Act* regarding permissible investments.

59. In or around August 1990, Mr. Moll invested $26,000 from the Waters' estate in a second mortgage on 264 Logan Avenue (described above) owned by his client Cruickshank. The mortgage on 264 Logan later fell into arrears in or around May 1994 and remains in arrears at this time. The funds invested in this mortgage by the Waters' estate were returned on July 9, 1991, and replaced by funds from John Ross Smith ("Smith") (Document Book Tab 30), for whom Mr. Moll held power of attorney at the time. Immediately after the return of the investment in the Cruickshank mortgage ($30,000), the entire balance in Waters ledger, $31,302, was paid out to the bank account of W.B. Waters (Document Book Tab 31 and 32).

60. The completion of the accounting for the Waters estate indicated four additional mortgages which have now all been retired.

(b) ESTATE OF ALEXANDER ROTHNEY MCQUEEN

61. Alexander Rothney McQueen ("McQueen") died on October 27, 1986. McQueen's will, dated October 14, 1986, was hand-written by McQueen and witnessed by Mr. Moll (Document Book Tab 33). Mr. Moll was named the solicitor for the estate and McQueen's wife, Lois McQueen, was named the executrix.

62. The principal beneficiary of the estate was Mrs. McQueen, who was to receive 80% of the estate. The remaining 20% was to be divided equally between the six brothers and sisters of McQueen. Mr. Moll wound up the estate in December 1992, six years after the death of McQueen.

63. In response to a request made by Mrs. McQueen shortly after the death of her husband, Mr. Moll provided her with funds from the estate to enable her to purchase a house. Mr. Moll also advised Mrs. McQueen that he would distribute the balance of the funds when a property located in Scotland which the estate held was sold. Mrs. McQueen advised Mr. Moll that she wanted him to wind up the estate; she did not authorize him to invest the estate funds at any time. Mr. Moll states that based on his discussions with Mrs. McQueen, he believed that he had the authority to invest the estate funds in an effort to increase the estate assets but now acknowledges that he was mistaken in that belief.

64. The application for probate indicated the total asset value of the estate was $550,202.24, which consisted of $135,000 in real estate and $415,202.24 in other assets. A list of the estate's original assets could not be found in Mr. Moll's file but has now been prepared by Mr. Moll.

65. Mrs. McQueen knew that Mr. Moll had been her husband's lawyer , so after his death she took any papers she received pertaining to his estate to Mr. Moll. Although Mrs. McQueen knew that she was the executrix of the estate, she did not know the responsibilities of an executrix nor did Mr. Moll explain them to her. Mrs. McQueen asked Mr. Moll to handle these responsibilities for her. She wanted Mr. Moll to wind up the estate for her. Mrs. McQueen gave any papers she received pertaining to the estate subsequently to Mr. Moll. Mrs. McQueen did not exercise any decision-making authority over estate matters.

66. Mr. Moll wrote to Mrs. McQueen on October 1, 1990, and provided her with a statement of income and disbursements in the estate over the preceding year, including the mortgage investments (Document Book, Tab 34). By letter dated October 17, 1990 (Document Book, Tab 35), responding to the Solicitor's letter, Mrs. McQueen stated that she was "greatly concerned" about the length of time it was taking to wind up the estate and the lack of information being provided to her with respect to the investment of estate funds. Mrs. McQueen stated: "This was never my wish".

67. After Mrs. McQueen's letter of October 17, 1990, no new mortgages were placed. Mr. Moll liquidated the existing McQueen mortgage interests as follows:

2793 Danforth:	November, 1990
76 Sellers:	January, 1991
6/8 Fernwood:	January, 1991
264 Logan:	July, 1991

and made interim distributions to the beneficiaries.

68. On or about October 30, 1990, she retained another solicitor, Wilmer Reid ("Reid") to assist her in getting Mr. Moll to wind up the estate.

69. On November 1, 1990, Reid wrote to Mr. Moll and demanded a full accounting of the McQueen estate, an explanation of the fees charged and the documentation and accounting relating to the outstanding mortgages identified in Mr. Moll's letter of October 1, 1990 (Document Book, Tab 36).

70. Mr. Moll responded on November 2, 1990 (Document Book, Tab 37), indicating that, although he had no written authority to invest the estate funds, he thought he was acting in accordance with Mrs. McQueen's wishes. He provided copies of the registered mortgages and brief comments on the three mortgages. On the same date, Mr. Moll forwarded a cheque for $16,000 to Mrs. McQueen without explanation.

71. By letter dated November 9, 1990 (Document Book, Tab 38), Reid advised Mr. Moll that the information provided was insufficient and again demanded a full report and accounting.

72. By letter dated November 22, 1990 (Document Book, Tab 39), Mr. Moll provided Reid with a Statement of Income and Disbursements for the period September 5, 1989 to November 14, 1990. By letter dated November 23, 1990 (Document Book, Tab 40), Reid again advised Mr. Moll that his response was insufficient and demanded a full accounting of the estate and the investments which Mr. Moll had made with its funds.

73. On December 4, 1990, Mr. Moll sent an accounting of receipts and disbursements; Reid responded on December 6, 1990, indicating that, in his view, the accounting was inadequate. Reid made a final demand to Mr. Moll for a proper accounting of the McQueen estate on February 11, 1991 (Document Book, Tab 41) and required the accounting within ten days.

74. By letter dated February 18, 1991 (Document Book, Tab 42), Mr. Moll responded that he had previously provided accounts and forwarded a package of documentation in relation to the McQueen estate.

75. By letter dated February 19, 1991 (Document Book, Tab 43), Reid acknowledged Mr. Moll's letter and advised that, as Mrs. McQueen had not authorized the taking of executor fees, she was requiring an audit of the estate before executor fees were paid.

76. On November 15, 1991, the Scottish firm of solicitors who were handling the affairs of the McQueen estate in Scotland wrote to Mr. Moll to question his accounting for the estate and the quantum of executor and management fees charged (Document Book, Tab 44). Mr. Moll responded to this correspondence.

77. By way of a reporting letter dated November 18, 1991, Reid advised Mrs. McQueen that despite his repeated requests over the previous year ,which he detailed, he had not been able to obtain a proper accounting of the McQueen estate from Mr. Moll and that *"We do not believe that the account is at all satisfactory, nor do we believe that [Mr. Moll] is entitled to Executor's fees."*(Document Book, Tab 45). Mrs. McQueen herself believed that Mr. Moll's fees were appropriate because her husband had a lot of assets, and it would have been a lot of work to manage the estate.

78. After the liquidation of the mortgages and the sale of the Scottish property, David Moll completed and filed the income tax returns. Upon receipt of the of the clearance certificate, the estate was completed in December 1992.

79. A complicating factor in the McQueen estate was a property situated in Scotland. Mr. Moll states that the tenant refused to vacate, which impeded the sale. Mr. Moll has not provided the Society with any documents in respect of this dispute. Eventually, the sale occurred and the proceeds were distributed to the beneficiaries.

80. Mr. Moll admits that he failed to serve the McQueen estate in a conscientious, diligent and efficient manner by permitting the estate to remain open for a period of six years from October 14, 1986 to December 1992, during which time he did not properly account to the executrix and beneficiary for the assets and income of the estate.

81. Mr. Moll received $35,900 in executor's compensation even though he was not named the executor of the McQueen estate. Mr. Moll states that he was entitled to the compensation because he assumed the role of the executor since Mrs. McQueen could not manage the estate and deferred to his authority. Mrs. McQueen does not dispute Mr. Moll's taking of executor fees as she entrusted the management of the estate to him and believes that the estate was complicated, based on what Mr. Moll indicated to her.

82. Mr. Moll's file in respect of the McQueen estate contains five schedules of assets, receipts and disbursements which together cover the period from November 6, 1986 to September 14, 1992 (Document Book, Tabs 46 to 50). Mrs. McQueen received these Statements of Receipts and Disbursements prepared by Mr. Moll, but at no time did the Mr. Moll request or receive authorization from her to take executor's compensation.

83. The books and records maintained by Mr. Moll in respect of the McQueen estate are deficient insofar as they do not meet the minimum requirements of Section 15.1 (2) of Regulation 708 of the *Law Society Act* in the following respects:

(a) a mortgage asset ledger was not maintained for each mortgage showing:

  (i) the balance of the principal amount outstanding;
  (ii) an abbreviated legal description or the municipal address of the secured property;
  (iii) the particulars of registration.

(b) a mortgage liability ledger was not maintained;

(c) monthly comparison statements were not maintained showing:

  (i) a detailed listing of the outstanding balance for each mortgage;
  (ii) a detailed listing identifying each investor and the outstanding balance invested.

84. Mr. Moll states that he mistakenly relied on his accountant and was assured by him that all his books were in order, including these specific items. This same specific deficiency occurred in the Hoare, Hoffe, Aseltine, Cann and Riedyk estates. Mr. Moll states that he has now obtained final and complete accounts for this estate.

Investment of McQueen Estate Funds

85. The terms of McQueen's will did not authorize Mr. Moll to invest estate funds and did not waive the limitations imposed by the *Trustee Act* regarding permissible investments. Mr. Moll states that based on his discussions with Mrs. McQueen, he believed that he had the authority to invest the estate funds in an effort to increase the estate assets but now acknowledges that he was mistaken in that belief. He reported to Mrs. McQueen on some of these transactions.

86. Mr. Moll invested funds from the McQueen estate in eight mortgages, as more particularly set out below:

	Property Address	Mortgagor	Rank	Amount	Date Invested
(i)	685 Cosburn	Gull Meadow Homes	1st	24415	Dec. 1/87
(ii)	337 Woodfield Road	Gull Meadow Homes	1st	80250	Aug. 28/87
(iii)	228 Cedarvale Avenue	Gull Meadow Homes	1st	87000	Nov. 19/87
(iv)	76 Sellers Avenue	Thistle/Standish	1st	135000	June 23/88
(v)	2793 Danforth Avenue	Mackenzie	1st	33000	May 29/89
(vi)	733 Milverton Blvd.	Reynolds/Henry	1st	17250	Aug. 16/89
(vii)	6-8 Fernwood Avenue	Molson	2nd	45000	Sept. 5/89
(viii)	264 Logan Avenue	Cruickshank	2nd	35000	Aug. 10/90

87. The investment of the McQueen estate in all of these mortgages was repaid with interest. Mr. Moll states that, consequently, the value of the estate was increased. The McQueen trust ledger is contained at Tab 51 of the Document Book.

88. The first three mortgages in which Mr. Moll invested funds from the McQueen estate were all for the same mortgagor, Gull Meadow Homes ("Gull"), for whom he had also acted in prior transactions. Mr. Moll did not advise Mrs. McQueen that he acted for both the estate and the borrower in these transactions. He did not ensure that the estate obtained independent legal advice or waived such advice in writing.

89. The three mortgages advanced to Gull by the McQueen estate were:

(i) Gull Meadow Homes - 685 Cosburn Avenue

90. Mr. Moll acted for Gull on its purchase of this property for $120,000 on March 31, 1987. Eight months after the purchase, the then existing mortgages on title were repaid by a new first mortgage syndicated by Mr. Moll among the following estates/individuals for whom he also acted (Document Book, Tab 52).

Investor	Investment Amount	Percentage Share	Per Gull Ledger (Tab 55)
Ronald Atkinson	39995	42.10%	40194.65
Paul & Martha Bielik	30590	32.20%	30588
McQueen Estate	24415	25.70%	16012
Hoare Estate	0	0.00%	8400
	95000	100.00%	95194.65

91. The mortgage was registered in the name of the beneficial investors Atkinson, Bielik, and the McQueen estate. The McQueen estate investment was partially funded by an unsecured investment from another of Mr. Moll's estate clients, the Hoare estate, as described below, because there were insufficient funds in the McQueen estate on the date the funds were to be advanced. This loan from the Hoare estate was repaid the same day, however, when a term deposit held by the McQueen estate was repaid into trust. Mr. Moll reported to Gull on December 7, 1987 in relation to this transaction. He also reported to Mrs. McQueen and provided her with a duplicate registered copy of the mortgage.

92. On July 4, 1988, Mr. Moll purchased and replaced the McQueen estate interest in the Gull mortgage with funds from another estate client, the O'Reilly estate. The Document General assigning the McQueen interest was signed by Mrs. McQueen the same day. The mortgage was fully discharged in 1991.

(ii) Gull Meadow Homes - 337 Woodfield Road

93. Mr. Moll also acted for Gull on its purchase of this property for $107,000 on August 28, 1987. Mr. Moll invested mortgage funds from the McQueen estate in the amount of $80,250 in this transaction. These funds were secured by a first mortgage (Document Book, Tab 53) registered against the property on the same date.

94. Mr. Moll reported to Gull on August 28, 1987 in relation to this transaction. He also reported to Mrs. McQueen on the same date, enclosing a copy of the duplicate registered mortgage.

95. On May 5, 1988, Mr. Moll repaid the McQueen estate mortgage in the amount of $79,733.34 with funds invested from another client, Ms. Margaret Casci, on May 17, 1988. An assignment of mortgage was registered in favour of Ms. Casci on May 17, 1988. Mr. Moll reported to Ms. Casci by letter dated June 2, 1988, enclosing a copy of the assignment.

(iii) Gull Meadow Homes - 228 Cedarvale Avenue

96. Mr. Moll also acted for Gull on its purchase of this property for $116,000 on November 2, 1987. Mr. Moll invested funds in the amount of $87,000 from the McQueen estate in a first mortgage secured against this property.

97. Mr. Moll reported to Gull on this transaction on November 5, 1987. He reported to Mrs. McQueen on the same date, enclosing a duplicate registered mortgage. The McQueen estate was repaid on November 1, 1989 when the property was sold.

98. Mr. Moll also invested funds from the McQueen estate in the following three first mortgages:

(iv) Thistle/Standish - 76 Sellers Avenue

99. Mr. Moll acted for the purchasers of this property when they acquired it for the price of $180,000.00 on June 27, 1988 .

100. Mr. Moll invested $135,000 from the McQueen estate in a first mortgage registered on title to the property in the name of Mrs. McQueen, executrix of the McQueen estate. Mr. Moll did not report to Mrs. McQueen on this transaction. Mr. Moll did not advise Mrs. McQueen that he acted for both the estate and the borrower in these transactions, or of the nature of the conflict, and he did not ensure that the estate either obtained independent legal advice or waived such advice in writing.

101. The mortgage was renewed on or about May 25, 1990.

102. The investment of the McQueen estate in this mortgage was repaid in early 1991 with funds invested by the following estates and clients.

Repayment Date	Funds provided by	Amount
January 25, 1991	Hoffe	9644.7
January 26, 1991	Aseltine Estate	24754.72
January 26, 1991	Hoare Estate	25719.19
February 1, 1991	Cann Estate	7177.33
February 1, 1991	Riedyk	61300
		128595.94

103. The mortgage was assigned to Mr. Moll, in trust, on February 26, 1991 (Document Book, Tab 54) and Lois McQueen executed the Assignment which was registered on title. Mr. Moll did not complete trust declarations for the beneficial owners of the mortgage contrary to Rule 23 (2)(a) of the Rules of Professional Conduct. Hoffe and Riedyk did sign the required Form 4 although no report was made to the estates on this transaction.

104. The other estates were repaid, and the mortgage was discharged on June 20, 1991. All of the estate clients profited from their investments in this mortgage.

(v) Missionary Church - 2793 Danforth Avenue

105. The Missionary Church of St. Francis of Assissi ("Church") purchased this property on May 30, 1989 for the price of $205,000. Mr. Moll arranged a syndicated mortgage in the amount of $99,000 for the following estates/individuals, as reflected in his trust ledger (Document Book, Tab 55) and registered it in the names of the beneficial owners on May 30, 1989:

Mortgagees	Interest	May 30, 1989	November 28, 1990	July 4, 1991
McQueen Estate	5/15	33000	0	-
Aseltine Estate	-	0	33000	-
J.R. Smith	2/15	13200	13200	45200
Lavery Estate	2/15	13200	13200	13200
O'Reilly Estate	6/15	39600	39600	39600
Total		99000	99000	99000

106. Mr. Moll purchased and replaced the interest of the McQueen estate in the mortgage with funds invested by the Aseltine estate, on November 28, 1990. Although this transfer is not shown on the mortgage trust ledger (Document Book, Tab 56), an assignment of mortgage was registered from the McQueen estate to the Aseltine estate on December 4, 1990, as shown on the abstract of title. Subsequently, the Aseltine estate's investment in the mortgage was purchased and replaced on July 4, 1991 with funds invested on behalf of J.R. Smith. Mr. Moll did not register an assignment of the mortgage interest from the Aseltine estate to Smith, or obtain registered security or other security instrument, for the investment by Smith.

107. The mortgage remained current from May 30, 1989, until it was repaid by the mortgagee on November 29, 1991.

108. Mr. Moll acted for the borrower as well as the investors in this mortgage. Mr. Moll did not advise the parties as to the nature of the conflict. Independent legal advice and waivers were not obtained.

(vi) Reynolds/Henry - 733 Milverton Blvd.

109. Michael Edward Reynolds and Anne Mary Henry purchased this property on July 22, 1988 for $151,575. They were represented by A. Kestleman of Peters and Kestleman. O'Dell & Associates Limited, a mortgage broker, referred a request for a first mortgage on the property to Mr. Moll on or about August 10, 1989. Mr. Moll provided a syndicated mortgage in the amount of $131,680 and registered it on August 17, 1989, in the name of the original investors, Ellen Davis, George and Pearl Hoffe and Irene Atkinson (Document Book, Tab 57). Mr. Kestleman again acted for the borrowers. Mr. Moll sent a reporting letter dated September 15, 1989 (Document Book, Tab 58) to the beneficial owners of the mortgage. He also sent his account to the mortgagors.

110. As reflected in the trust ledger for the mortgage (Document Book, Tab 59), the history of the change of investment interests in this mortgage proceeded as follows:

	Share	Aug. 17/89	Aug. 18/89	Nov. 19/91
Document Book Tab	61	63	63	63
Ellen Davis	0.3339694	43750	43750	43750
George & Pearl Hoffe	0.4655649	70000	61000	61000
McQueen Estate	-	17250	0	0
Irene Atkinson	0.2003816	0	26250	0
Cann Estate	-	0	0	26250
	1	131000	131000	131000

111. Since Ms. Atkinson did not have funds to invest at the time the funds were required to be advanced under the mortgage, Mr. Moll invested $9,000 from the Hoffe account and $17,250 from the McQueen estate in Ms. Atkinson's name. Those loans were not secured by a registered mortgage or any other security instrument. Ms. Atkinson had the necessary funds available the very next day (August 18, 1989), such that both the Hoffe account and the McQueen estate were repaid, but without interest.

112. In or around March 1990, a mortgage payment cheque was returned "NSF" and the mortgage fell into arrears. Although payments were still made from time to time thereafter, the mortgage continued in arrears through 1991. By letter dated September 10, 1991 (Document Book, Tab 60), to the mortgagors, Mr. and Mrs. Reynolds, Mr. Moll advised the Reynolds that their mortgage was in arrears, from May to August, in the amount of $5,214.60.

113. Two Notices of Sale under Mortgage were in Mr. Moll's file, dated January 28, 1991 and September 1991 respectively. These notices were not issued by Mr. Moll, but he states that they were used to obtain payments from the Mortgagors. The mortgagors brought the mortgage current on January 27, 1992.

114. Mr. Moll registered assignments of the mortgage from his client Atkinson, one of the original investors, to an estate client, the Cann estate as follows:

January 10, 1992	.1971415	Tab 61
March 5, 1992	.0032401	Tab 62
	.2003816	

At the time of the first assignment, the mortgage was still in arrears. However, Mr. Moll states that he had been advised that the January 27, 1992 payment would be made forthwith, which it was.

115. An agreement extending and amending the mortgage was then prepared and executed by Mr. Moll in the name of the following investors Document Book, Tab 63):

	Share	Feb. 1992
Ellen Davis	0.3285692	43000
George & Pearl Hoffe	0.458037	60000
Karen Brown	0.0162523	2200
Cann Estate	0.1971415	25800
	1	131000

This extension agreement was not registered. From that time until February 1996, the mortgagors made the regular monthly payments.

116. In June 1996, Mr. Moll personally purchased the Cann estate's interest in the mortgage and then made a payment of $25,911.83 from his personal funds to the Salvation Army, the beneficiary of the Cann estate.

117. Mr. Moll and his clients, Ellen Davis and the Hoffes, continue to hold the mortgage. The three investors agreed to reduce the mortgage rate to 8% from 14% to enable the Reynolds to continue to make monthly payments. Mr. Moll has not yet changed the registration on the mortgage to replace the Cann estate with himself.

118. The two second mortgage investments made with funds from the McQueen estate are described below:

(vii) Molson - 6 & 8 Fernwood Park Avenue

119. William & Susan Molson purchased this property on November 21, 1983 for $104,000. On September 5, 1989, Mr. Moll provided a second collateral mortgage on the property syndicated among the following estates /individuals (Document Book, Tab 64):

Investor	Amount Invested	Percentage Share
Mr. and Mrs. Pietryzk	50000	48.08%
McQueen Estate	45000	43.27%
Mr. and Mrs. Hoffe	9000	8.65%
	104000	100.00%

120. The mortgage was registered in the names of these investors on September 7, 1989 (Document Book, Tab 65). The mortgage remained current and was repaid by the mortgagor on January 8, 1991.

121. The Molsons were referred to Mr. Moll by a mortgage broker, O'Dell & Associates. Mr. Molson was self-employed and could not qualify for conventional financing at a financial institution. Mr. Moll acted for the Molsons and the investors in this mortgage. Mr. Moll did not advise the parties as to the nature of the conflict and did not insist that the parties obtain independent legal advice or provide written waivers of such advice.

122. On October 1, 1990, Mr. Moll wrote to Lois McQueen advising her that the Molson mortgage on 6-8 Fernwood would be liquidated and distributed.

(viii) Cruickshank - 264 Logan Avenue

123. In or around August 1990, Mr. Moll invested $35,000.00 from various estate accounts in a second mortgage on 264 Logan, the Cruickshank mortgage, as described above in relation to the Pietrzyks. The mortgagor, Cruickshank had been referred to Mr. Moll by the mortgage broker, O'Dell & Associates.

124. Pursuant to a request from Ms. McQueen, Mr. Moll arranged to liquidate her interest in the 264 Logan mortgage. On November 2, 1990, the Solicitor purchased and replaced the interest of the McQueen estate in the mortgage with funds taken from another estate client, the Aseltine estate, thereby preventing the McQueen estate from suffering a loss on the investment.

125. Prior to receiving the return of the investment in the Cruickshank mortgage, the balance in the McQueen estate ledger was $9,349.20 (Document Book, Tab 66). On the same day, there was a distribution to the beneficiaries of the McQueen estate of $20,000 and another distribution of $30,404 was made on November 20, 1990. The funds from the Cruickshank mortgage were used to make these distributions.

126. Despite his obligations to do so, Mr. Moll failed to consider the provisions of the *Trustee Act* and breached that *Act* by investing funds of the McQueen estate in a second mortgage on 264 Logan Avenue.

Unsecured Investments

127. In addition to investing in mortgages, Mr. Moll also invested funds from the McQueen estate in short term unsecured investments with other clients ranging in duration from 2 days to 163 days, as follows (which are in addition to the loan in relation to 733 Milverton Avenue, described above):

Borrower	Amount Borrowed	Date Borrowed	Amount Repaid	Date Repaid	Days Outstanding
Santos (Document Book, Tab 71)	5000	Feb. 9/90	5000	Mar. 8/90	27
Lott (Document Book, Tab 72)	4000	Apr. 6/90	4021.47	May 2/90	26
Woodend (Document Book, Tab 73)	7700	June 4/90	1200	Aug. 5/90	62
			1077	Sept. 5/90	93
			1073.64	Oct. 5/90	123
			4661.33	Nov. 14/90	163
	16700		17033.44		

128. These unsecured investments were advanced when one of Mr. Moll's clients required funds for a short term to complete the amount required for the client's participation in a mortgage. Mr. Moll states that he would simply invest funds from another client which had funds available, generally an estate client, and would then repay the funds to the estate once his other client came into funds.

129. On February 6, 1990, Mr. Moll registered a second mortgage in the amount of $67,000 on the property located at 30 Preston Road owned by his client, Santos, as mortgagor, in favour of his clients, Shirley Kelly and the Hoare estate, as mortgagees (Document Book, Tab 67). Since there were insufficient funds in the Hoare estate to satisfy its intended investment of $44,000 (Document Book, Tab 68), the Hoare estate initially contributed $39,000, and Mr. Moll invested the remaining balance of $5,000 from the McQueen estate. These funds were repaid to the McQueen estate on March 8, 1990. No security was obtained by Mr. Moll for this investment from the McQueen estate. (The mortgage on the 30 Preston Road property is described in more detail below in the section of this Agreed Statement of Facts relating to the Hoare estate.)

130. On April 6, 1990, and June 4, 1990, Mr. Moll invested amounts of $4,000 and $7,700, respectively from the McQueen estate for the benefit of his clients, Lott and Woodend. These investments were not secured; they were repaid with interest. The repayment from Lott was made with funds invested by Mr. Moll from the Smith estate.

(c) ESTATE OF FREDERICK WILLIAM RICHARD HOARE

131. Frederick William Richard Hoare ("Hoare") died on August 4, 1989. Mr. Moll prepared Hoare's will dated July 10, 1985, and codicil dated September 12, 1985 (Document Book, Tab 69). Mr. Moll was named the executor and solicitor of the estate. Hoare's will did not waive any of the limitations set out in the provisions of the *Trustee Act* regarding permissible investments.

132. At the date of death, the assets in the estate were valued at approximately $347,000 of which, approximately $150,000 had been invested in private mortgages with interest rates ranging between 10.5% and 18%. The beneficiaries of the estate were Hoare's sister-in-law, who was to receive 5 parts, and six individuals who were to receive one part each.

133. Mr. Moll wound up the Hoare estate on July 8, 1991, less than 2 years after the death of Hoare.

Investment of Hoare Estate Funds

134. Hoare had substantial investments in mortgages through Mr. Moll from at least 1985 until his death in 1989.

135. After Hoare's death, Mr. Moll invested funds from the Hoare estate as follows:

	Property Address	Mortgagee/ Chargee		Amount Invested	Date Invested	Amount Repaid	Funds provided by	Date Repaid
i		McQueen	loan	8400	Dec. 1/87	8400		Dec. 1 /87
ii	54 Waverley	McIntosh	loan	59000	Dec. 12/89	59284.49	5 days	Dec.18 /89
iii	30 Preston Rd.	Santos		39000	Jan. 18/90	2072.06		Jul. 25 /90
iv				5000	Mar. 8/90	45668	Cann	Mar. 1 /91
v	44 Kenilworth	Verkaik		21600	Oct. 10/90	3800	Hollins	Jan. 22 /91
vi						17800	Cann	Mar. 15 /91
vii	264 Logan	Cruickshank	2nd	21500	Aug. 10/90	26000	Aseltine	Jan. 29 /91
viii	76 Sellers Ave.	Thistle	1st	25719.19	Jan. 29/91	25591.95		Apr. 29 /91

(i) McQueen Loan

136. On December 1, 1987, Mr. Moll invested client funds in a $95,000 syndicated mortgage on the property at 685 Cosburn Avenue, as described in detail in the McQueen section of this Agreed Statement of Facts.

137. One of the investors in the mortgage was the McQueen estate to the extent of $24,415 (25.70% of the total mortgage). There were inadequate funds in the trust ledger of the McQueen estate to make the investment at the time this mortgage loan was to be advanced.

138. Mr. Moll drew the sum of $16,012 from the McQueen estate on November 20, 1987, and invested it on account of the mortgage, leaving a balance of $13.33 in the McQueen estate ledger. Mr. Moll then transferred the balance of the sum ($8,400) which he intended to invest on behalf of the McQueen estate from the Hoare estate to the ledger of the mortgagor, his client Gull. Mr. Moll did not obtain any security for this investment. On the same date, the proceeds of a term deposit were received into the McQueen estate, from which the $8,400 investment was immediately repaid to the Hoare estate.

(ii) McIntosh - 54 Waverley Road

139. Mr. Moll acted for Lyla McIntosh et al. ("McIntosh") in arranging re-financing on 54 Waverley Road. The chronology of relevant events can be summarized from the trust ledgers (Document Book, Tab 70) as follows:

Date	Description
Dec. 12/89	$118,00.00: Funds received from McIntosh from 5 estates described below
Dec. 13/89	$120,889.40: Re-payment of mortgage to The House of Briks Limited and discharge of their mortgage
Dec. 13/89	$118,000.00: Registration of a mortgage on property in favour of Alan and Helen Crone.
Dec. 18/89	$195,672.00: The Solicitor receives funds into trust from the Crones
Dec. 18/89	$118,540.03: The Solicitor repays estates their investment with interest with the balance being paid to the Crones

140. Mr. and Mrs. Crone agreed to advance McIntosh the funds necessary to repay the Briks mortgage, but they would not be in a position to advance the funds available until December 18, 1989. In order to discharge the Briks mortgage on December 13, 1989, when it was due, Mr. Moll made an investment from five of his estate clients for a seven day period between December 12, 1989 to December 18, 1989, until the Crones' funds were available.

141. The Crones delivered their funds to Mr. Moll on December 18, 1989, at which time he immediately repaid his five estate clients. Mr. Moll acted for all parties to this transaction and neither ensured they had independent legal advice nor obtained written waivers of such advice.

142. Mr. Moll injected funds from the following estates in this investment (Document Book, Tab 71).

	December 12, 1989 Advanced	December 18, 1989 Repaid
Hoare	59000	59284.49
Cann	17700	17756.41
Lamonby	11000	11053.04
Waters	29500	29642.24
Smith	800	803.85
	118000	118540.03

143. Although the estates provided the investment funds, the mortgage was registered in the Crones' name. Mr. Moll did not obtain any security for the interim investment of the estate funds.

(iii) Santos - 30 Preston Road

144. Manuel and Ilda Santos ("the Santos") purchased this property on July 11, 1986. A first mortgage, in the amount of $101,250, was registered on July 25, 1986, in favour of the Royal Bank of Canada.

145. In early 1990, Mr. Moll agreed to invest funds with the Santos, which were to be secured by a second mortgage. Mr. Moll consequently arranged a syndicated mortgage which was to invest funds belonging to the Hoare Estate and Shirley Kelly. The interests of the various investors in this mortgage over time (Document Book, Tab 72) are set out in the following table:

		Feb./90	Mar. 8/90	Mar. 11/91
Shirley Kelly	34%	23000	23000	23000
Hoare Estate	66%	39000	41000	0
McQueen Estate		5000	0	0
Cann Estate		0	0	45854
	100%	67000	64000	68854

146. The syndicated mortgage loan was secured by a second mortgage registered against the property on February 6, 1990, in favour of Shirley Kelly and the Hoare estate (Document Book, Tab 73).

147. Since there were insufficient funds in the Hoare estate to make the total intended investment of $44,000 (66% of the mortgage value), the Hoare estate initially contributed only $39,000. Mr. Moll invested the remaining balance of $5,000 from the funds of the McQueen estate. These funds were shortly thereafter repaid to the McQueen estate. (See McQueen - Investments section of this Agreed Statement of Facts).

148. Mr. Moll acted for all parties to this mortgage and did not advise any of his clients of the nature of his conflict. Mr. Moll did not recommend that his clients obtain independent legal advice and did not obtain signed waivers of such advice. No such advice or waivers were obtained.

149. Despite his obligations to do so, Mr. Moll failed to consider the provisions of the *Trustee Act* and breached that *Act* by investing funds of the Hoare estate in a second mortgage on 30 Preston Road.

150. On November 26, 1992, Mr. Moll replaced the interest of the Hoare estate in this mortgage with funds from the Cann estate. (See the Cann - Investment section of this Agreed Statement of Facts). Subsequently, he personally made good all of the mortgage losses of the Cann estate.

(iv) Verkaik - 44 Kenilworth Avenue

151. Mr. Moll's client, Irene Verkaik, purchased this property on May 1, 1986. She then sold it to Ginette Morel-Gouvrette *et al*, on January 10, 1989. Verkaik took back a first mortgage for $64,000 at that time. Mr. Moll did not act on this transaction.

152. By way of a registered transfer of charge, dated October 12, 1990, Mr. Moll purchased Verkaik's mortgage and transferred it to himself, in trust (Document Book, Tab 74). The Solicitor did not prepare a trust declaration indicating for whom he held it in trust or report to the investors as to their interest in this mortgage. The records of the interests held by the various estates in this mortgage were the trust ledger for the mortgage and, in some cases, for the estates.

153. As reflected in his trust ledger for Verkaik (Document Book, Tab 75), Mr. Moll invested the following amounts for client estates in this mortgage as at October 9, 1990:

Investor	Amount
Cann Estate	11000
Beaton Inter-vivos trust	5600
Lamonby Estate	5400
Lavery Estate	10400
Hoare Estate	21600
	54000

154. A series of investments were made by Mr. Moll between the estate trust ledgers in respect of this mortgage. The amount of $3,800 was repaid toward the interest of the Hoare estate on January 22, 1991, by funds from Hollins, one of the property's owners; the remaining balance of the Hoare estate's interest was then paid in full on March 15, 1991 by funds from the Cann estate in the amount of $17,800 (raising the Cann estate's interest to $28,800).

155. The Lamonby estate's interest was repaid gradually by funds from the Lavery estate, until the full amount of the investment had been satisfied by January 1991. Mr. Moll states that both wills contained exoneration clauses which granted Mr. Moll the discretion to invest beyond the terms of the *Trustee Act*. Hollins repaid the Beaton trust also in January 1991. In July 1991, two new investors (who were clients of Mr. Moll) George and Pearl Hoffe and Margaret Riedyk invested $9,569.19 and $37,547.27 respectively. The Cann and Lavery estates were repaid with those funds.

156. On September 5, 1991, Mr. Moll registered a transfer of charge to Reidyk and Hoffe showing their interest in the mortgage as 78.25% and 21.75% respectively (Document Book, Tab 76).

157. On January 29, 1993, Hollins bought the share of one of the other owners to become the majority owner.

158. In May 1993, Hollins repaid the remaining two investors, Hoffe and Reidyk, and Mr. Moll registered a mortgage discharge on June 29, 1993.

159. Mr. Moll acted for the investors and mortgagors in these transactions. He did not advise his clients of the nature of his conflict and neither recommended that they obtain independent legal advice nor obtain signed written waivers of such advice. No independent legal advice was obtained.

160. Mr. Moll breached Rule 23(2)(a) of the Rules of Professional Conduct by failing to execute trust declarations in favour of his clients, the Cann, Lamonby, Lavery and Hoare estates and the Beaton Inter-vivos trust, the beneficial owners of the mortgage on the 44 Kenilworth property.

(v) Cruickshank - 264 Logan Avenue

161. Mr. Moll invested $26,000 from the Hoare estate in the second mortgage on 264 Logan ("Cruickshank mortgage") on or about August 1990. (This mortgage is described in greater detail in the section of this Agreed Statement entitled 'Pietrzyk'.)

162. Despite his obligations to do so, Mr. Moll failed to consider the provisions of the *Trustee Act* and breached that *Act* by investing funds of the Hoare estate in a second mortgage on 264 Logan Avenue.

163. The Hoare estate did not lose its investment in the Cruickshank mortgage because Mr. Moll purchased and replaced the Hoare estate's interest with funds received from the Pietrzyks on January 29, 1991, before it went into arrears.

(vi) Thistle/Standish - 76 Sellers Avenue

164. This mortgage is discussed in greater detail in the McQueen - Investments section. The original investment in the mortgage was held by the McQueen estate in the amount of $135,000. Mr. Moll invested funds from the Hoare estate to partially purchase and reduce the interest of the McQueen estate in the mortgage on January 26, 1991. In June, the mortgage was repaid by the mortgagors.

165. Despite his obligations to do so, Mr. Moll failed to consider the provisions of the *Trustee Act* and breached that *Act* by investing funds of the Hoare estate in a second mortgage on 76 Sellers Avenue.

(d) ESTATE OF ALMA A. ASELTINE

166. Alma A. Aseltine ("Aseltine") died on August 27,1990. Mr. Moll prepared Aseltine's will, dated August 2, 1984 (Document Book, Tab 77). Mr. Moll was named the sole executor and solicitor of the estate.

167. The terms of Aseltine's will did not waive any of the limitations imposed by the *Trustee Act* regarding permissible investments.

168. There were nine beneficiaries of the estate, each receiving a combination of cash plus personal assets. The application for probate states the total assets of the estate as $294,500, consisting of $19,500 in cash and $275,00 in real estate.

169. Mr. Moll wound up the estate on July 15, 1991, less than one year after the death of Aseltine. Executor Releases were obtained from the beneficiaries.

Investments from Aseltine Estate

170. Between November 1990 and January 1991, Mr. Moll invested funds from the Aseltine estate as follows:

	Property Address	Mortgagee/ Chargee		Amount Invested	Date Invested	Amount Repaid	Date Repaid
(i)	264 Logan	Cruickshank	2nd	35352	Nov 2/90		
(ii)	2793 Danforth	Mackenzie	1st	33000	Nov 28/90	33000	Jun 21/91
(iii)		Dykeman	?	15000	Jan 10/91	15147	Jul 4/91
(iv)		Maly	?	22750	Jan/91	25000	Jun 18/91
(v)	76 Sellers	Thistle	1st	24754	Jan 26/91	24845	Jun 21/91

(i) Cruickshank - 264 Logan Avenue

171. The second mortgage on 264 Logan, from Cruickshank, is described in greater detail in the Pietrzyk section. The Aseltine estate was not an original investor in the Cruickshank mortgage. One of the original investors was the Hoare estate.

172. As of August 10, 1990, the Hoare estate had a balance of $21,665.50. Therefore, Mr. Moll was only able to invest $21,500 from the Hoare estate in the Cruickshank mortgage when the mortgage was advanced. In order to increase the Hoare estate investment to its intended level of $26,000, Mr. Moll invested a further $4,500 from the Aseltine estate (Document Book, Tab 78). Mr. Moll obtained no security for this loan and did not document it other than by references in the trust ledger. These funds were repaid to the Aseltine estate from the Hoare estate on November 28, 1990.

173. In October 1990, Mr. Moll invested $35,000 from the Aseltine estate in the Cruickshank mortgage. This investment replaced the McQueen estate investment in the mortgage. The Aseltine estate did not lose its investment in the mortgage because Mr. Moll purchased and replaced the interest of the Aseltine estate with funds which he received from Pietrzyks on January 29, 1991. Approximately $24,500 of the Pietrzyks' funds were used to partially repay the Aseltine estate. On June 24, 1991, the remaining balance of $10,000 invested by the Aseltine estate was replaced with an investment by Thelma O'Reilly ("O'Reilly"). The funds were required in order to wind up the Aseltine estate which was finally distributed in July 1991, within the executor's year for that estate.

174. Despite his obligations to do so, Mr. Moll failed to consider the provisions of the *Trustee Act* and breached that *Act* by investing funds of the Aseltine estate in a second mortgage on 264 Logan Avenue.

Unsecured Loan

175. Mr. Moll made an unsecured loan for five days in the amount of $25,000 from the Aseltine estate to his accountant, Bradley Harvey, on October 29, 1990. These funds were repaid on November 2, 1990. Mr. Harvey paid the equivalent of 9% interest by way of a reduction in his own fees on an account to Mr. Moll in respect of work on that estate.

(e) ESTATE OF JOHN ROSS SMITH

176. John Ross Smith ("Smith") died on October 13, 1991. Mr. Moll prepared Smith's will, dated November 18, 1984 (Document Book, Tab 79). Mr. Moll was named as the solicitor of the estate; he and Arnold Clifford Emmott ("Emmott"), Smith's son-in-law, are co-executors. The Solicitor applied for probate on August 28, 1992. Emmott lives in the United States and has authorized the Solicitor to make all investment decisions for the estate.

177. Emmott has written an unsolicited letter on behalf of Mr. Moll attesting to his honesty and trustworthiness. He stated that Mr. Moll has always answered questions entirely to Emmott's satisfaction.

178. At the date of Smith's death, the assets in the estate were valued at $246,093.36. Marjory Emmott (who is Smith's daughter and Emmott's spouse) is the life beneficiary of the income from the estate. Carolyn Emmott (who is Emmott's daughter) is the residual beneficiary of the estate.

179. Smith's will included a provision that the executors are free to invest the estate funds at their discretion and without being subject to the limitations of the *Trustee Act.*

Investments from Smith Estate

180. Mr. Moll held a Power of Attorney for Smith before his death and had been investing Smith's funds in mortgages through this power of attorney for many years, with the knowledge and consent of Smith. These investments consisted of first and second mortgages as well as unsecured notes. After Smith's death, Mr. Moll invested funds from the estate pursuant to discussions with Emmott, who makes comments and suggestions. Emmott has never complained and is satisfied with the investments made by Mr. Moll.

181. The chart below summarizes the mortgages in which Mr. Moll had invested Smith's funds as of and after October 13, 1991 (up to December 1996):

	Mortgagor	Property		Date Invested	Rate %	Amt.	Status	Last Pmt
Prior to		the death of Smith						
(i)	Nunez	Lot 246 RC 173 Port Hope	1st	Mar 21/91	12	16104	arrears	Feb/93
(ii)	Cruickshank	246 Logan Ave.	2nd	July 9/91	16	30000	arrears	Oct/93
Subsequent		to the death of Smith						
(iii)	Perdue	Muskoka cottage	2nd	Nov. 15/93	11	75000	arrears	Aug/94
(iv)	Giglio	208 Geary, 30 Lorraine	1st	Dec. 30/93	9	40000	Current	July/95
(v)	Moore	58 Grand Ave.	1st	Jan. 26/94	8.5	55000	repaid	Mar/95
(vi)	Szalas	175 & 177 Main Street, North Bay	1st	May 9/95		50000	Current	July/95

182. As of December 1996, there were five mortgages outstanding, two of which were entered into prior to Smith's death (which are in arrears). Although the Perdue mortgage is in arrears, Perdue began making payments as of January 1996. One of the mortgages entered after Smith's death is in arrears. The monthly income of the estate is generated as follows:

Giglio - 208 Geary, 30 Lorraine	$292.45
Szalas - 175 & 177 Main Street, North Bay	$357.12
Perdue - Muskoka Cottage	$1,375.00
Total Monthly Income	$1,444.51

183. The monthly requirements for supporting Marjory Emmott are met by the monthly income generated by the estate investments.

184. Mr. Moll made unsecured investments from the Smith estate to other clients to enable other clients to make investments in mortgages. On December 12, 1989, Mr. Moll invested funds in the amount of $800 from the Smith estate to provide interim financing for a period of seven days in respect of a mortgage advance for his clients, Lyla McIntosh and the Crones, against the property at 54 Waverly Road. Mr. Moll obtained no security for this advance for the Smith estate. This transaction is described in greater detail above in connection with the Hoare estate.

185. On July 4, 1991, Mr. Moll invested $33,000 from the Smith estate to purchase and replace the interest of the Aseltine estate in a syndicated mortgage on 2793 Danforth Avenue. The Solicitor obtained no security for this advance for the Smith estate. This transaction is described in greater detail above in connection with the McQueen estate.

(f) ESTATE OF SIFTON ALFRED CANN

186. Sifton Alfred Cann ("Cann") gave a general power of attorney to Mr. Moll on June 6, 1984, which he never exercised, while Cann was residing in the Wexford retirement home.

187. Cann died on April 26, 1986. Mr. Cann's will, dated May 29, 1984, which Mr. Moll prepared, appointed Mr. Moll the executor and trustee of the will (Document Book, Tab 80). Under the terms of the will, Cann's three stepsons were to receive $15,000 divided between them, and the residue of the estate was to go to the Salvation Army, Canada East for relief of the poor.

188. The terms of Cann's will did not waive the limitations imposed by the *Trustee Act* regarding permissible investments.

189. At the date of Cann's death, the assets in the estate, which included funds held on deposit at three banks, Canada Savings Bonds, and a mortgage receivable of about $50,000, were valued at $128,737.85 on the application for probate.

190. Mr. Moll paid the specific bequests to Cann's three stepsons within a year of Cann's death, as reflected in the trust ledger for the estate account (Document Book, Tab 81). Mr. Moll did not begin to wind up the estate until August 1995.

191. By letter dated August 30, 1995, Mr. Moll advised the Salvation Army that the asset balance of the estate was $112,103.76, being approximately $14,000 less than the previously reported value of the estate at the date of death. Mr. Moll advised that the decline in value was due to three mortgages which had defaulted. The Solicitor's schedule of receipts and disbursements from the estate between September 30, 1987, and November 30, 1995, is contained at Tab 82 of the Document Book. The Salvation Army had not pressed the Solicitor to wind up the estate at that time or at any time previous.

192. By May 1996, the cash account of the estate had a balance of $42,000. Mr. Moll paid this amount to the Salvation Army and received an official receipt dated May 22, 1996. Then the Treen first mortgage (shown on the chart below as "O'Connor") was repaid by the mortgagor and a cheque in the amount of $50,571.86 was also sent to the Salvation Army. Mr. Moll received an official receipt for this sum on July 4, 1996 .

193. Mr. Moll personally purchased the interest of the Cann estate in the Reynolds mortgage on 733 Milverton Blvd. and received a receipt from the Salvation Army for $25,911.83 on June 27, 1996. (This mortgage is discussed in more detail in the McQueen section.)

194. In October 1996, Mr. Moll paid the Salvation Army $110,000 of his personal funds as compensation for losses sustained by the estate due to the investments made by Mr. Moll. At that time, Mr. Moll also provided the Salvation Army with a Statement of Accounts for the Cann Estate as at July 31, 1996 (Document Book, Tab 83). The estate has never been finally wound up since the Salvation Army refuses to sign a release of the executor, Mr. Moll.

195. Mr. Moll breached the provisions of Rule 2 of the Rules of Professional Conduct by failing to serve the Cann estate in a conscientious, diligent and efficient manner by failing to wind up the estate over a period of ten years since the death of Cann in 1986.

Investments from Cann Estate

196. Mr. Moll made a series of investment on behalf of the Cann estate. The following chart summarizes the investments made by Mr. Moll for the Cann Estate, which lost money:

Mortgagor	Property	Priority/Adva	Mortgage Amount	Repayment
Taylor			26,000.00	(13,429.59)
David Windsor	R.R. #1 Brechin	86?	32,700.00	Feb. 90
Robertson	104 Queensbury Ave.	2nd	8,537.52	June 90
			32,462.48	
Cunningham			10,000.00	
			15,000.00	
Daley			31,500.00	
James			6,179.83	
			11,320.17	

Mortgagor	Property	Priority/Adva	Mortgage Amount	Repayment
Edward J. Elborn	280 Kenilworth Avenue	2nd July 1989	19,833.34	$9,833.34 Lost
McIntosh			17,700.00	
Cooper			26,000.00	
Cook			52,317.00	
Riedyk			5,000.00	
Dykeman			22,500.00	
John Bowron	222 Hamilton Street	4th	63,750.00	March 91
Blair Morlock	20 Woodland Park Road	2nd Oct. 90	42,300.00	Jan. 91
Verkaik			17,800.00	
			11,000.00	
Banquet			30,000.00	
Chen			15,042.46	
Marilyn Harley	79 Roxborough Street W	1st Sep/91	50,000.00	Nov/91
Dykeman			30,000.00	
Mosaad	1612 Middleton Street	2nd Aug/91	34,000.00	$34,000 Lost
Brown			15,000.00	
Manuel Santos	30 Preston Road	Dec. 91	11,586.16	$70,297.48
		Dec. 91	12,857.32	Lost
		1st Mar. /91	45,854.00	
Thistle			7,177.34	
Enrico Flores	Lot 375 Plan 173 Hope	1st Mar. /91	23,903.26	June 91
Maglady			10,000.00	
Paul O'Conner	Long Island, Roseneath, Ont.	1st 1992	67,520.09	June/96
Laughlin			6,649.50	6,640.58 Lost
Reynolds	733 Milverton Blvd.	1st. Feb. 92	27,263.94	
			838,189.31	107,397.65

197. Mr. Moll provided the Society with his files for those mortgages shown above where the property address has been entered in the chart. Mr. Moll was unable to locate the remaining files, although partial or entire trust ledgers were located. The Solicitor has now provided complete accounts for this estate. On the basis of a review of the four mortgages in which the Cann estate lost its investment, the total loss to the estate was determined to be $107,397.65.

i) Taylor

198. Although no file was produced for this mortgage, Mr. Moll states that the Cann estate held a 1/3 interest in the mortgage and the O'Reilly estate held 2/3 interest. When the mortgage was repaid by the mortgagor, Mr. Moll mistakenly divided the proceeds 50%/50% between the two estates, instead of 1/3 and 2/3. The O'Reilly estate has been repaid the $13,373.75 from the Cann estate. The beneficiary of the Cann estate has not challenged this calculation.

ii) Santos - 30 Preston Road

199. As described in the Hoare - Investments section above, the Santos' purchased the property on July 11, 1986.

200. From February 1990 to March 1991, a second mortgage for $64,000 was registered against the property in favour of Shirley Kelly and the Hoare estate. In May 1990, Santos first delivered an NSF cheque. Santos provided three more NSF cheques before the end of 1990 all of which were replaced by the end of 1990 (Document Book, Tab 84).

201. On March 11, 1991, Mr. Moll invested approximately $46,000 from the Cann estate to replace the investment of the Hoare estate in this mortgage. The assignment of this interest was registered on title on November 26, 1992 (Document Book, Tab 85). No security was provided to the Cann estate for this investment prior to that time. As above, Mr. Moll states that he felt the investment was secure. At the time of the advance, the mortgage was not in arrears.

202. On April 16, 1991, Mr. Moll registered an agreement extending the mortgage at a reduced interest rate (17% down to 14.5%) (Document Book, Tab 86). This extension was prepared by Mr. Moll in the names of Shirley Kelly and the Hoare estate, although the Hoare estate's investment in this mortgage had been replaced by the Cann estate at that time. At this time $71,000 was owing on the mortgage.

203. On December 5, 1991, Mr. Moll registered an assignment of the interest of his client, Shirley Kelly, to the Cann estate (Document Book, Tab 87). The Santos trust ledger did not reflect this injection of funds by the Cann estate, but the transfer was indirectly shown on the Cann ledger, which indicated the funds were transferred through other mortgages. As the result of these two assignments, the Cann estate now held 100% of the mortgage.

204. Mr. Moll acted for all parties to the foregoing transactions and did not advise his clients of the nature of his conflict. Mr. Moll did not recommend that his clients obtain independent legal advice and did not obtain signed waivers of such advice.

205. Commencing April 17, 1992, the Santos ceased to make payments on the mortgage.

206. When Mr. Moll replaced the investments of his clients, Kelly and the Hoare Estate with funds from the Cann estate, the mortgage was not in arrears but he had received NSF cheques, all of which had subsequently been replaced.

207. On November 15, 1993, the Royal Bank sold the property under power of sale proceedings and recovered $135,000. The Cann estate sustained a loss of approximately $69,000 upon the sale of the property.

208. Despite his obligations to do so, Mr. Moll failed to consider the provisions of the *Trustee Act* and breached that *Act* by investing funds of the Cann estate in a second mortgage on 30 Preston Road.

iii) Edward James Elborn - 280 Kenilworth Avenue

209. On July 25, 1989, James Phillips sold the property at 280 Kenilworth Avenue to Edward James Elborn and Andrea Katharino. The first mortgage on the property held by Investors Group in the amount of $146,000 was assumed by the purchasers. Phillips also took back a second mortgage in the name of Philcor Holdings in the amount of $59,500. On the same day, Philcor Holdings Inc. sold the second mortgage, in turn, to David Jack Moll, Executor of the Laughlin, Lamonby and Cann estates, for $55,400. Each estate acquired a one-third interest in the mortgage at a discount.

210. Mr. Moll acted for Phillips, Philcor and the investors in the syndicated mortgage in these transactions and did not advise any of his clients of the nature of the conflict. Mr. Moll did not recommend that his clients obtain independent legal advice, and he did not obtain signed waivers of such advice.

211. In March 1992, Elborn sold the property to Mary Muszak and Russell Steven for the sum of $193,500. The proceeds of that sale were applied as follows:

After adjustments Elborn cleared	$183,083.67
Paid to Investors Group to discharge the first mortgage	($151,429.50)
Paid to the Realtor	($352.25)
Disbursements and Fees	($1,236.20)
Paid to the investors re second mortgage	($30,065.72)

212. At the time the property was sold, the amount outstanding on the second mortgage was $61,448.94. Since the funds remaining after the sale of the property were insufficient to discharge the second mortgage, Mr. Moll obtained a promissory note from Elborn for the balance.

213. On March 31, 1992, Elborn gave a promissory note to Mr. Moll for the sum of $31,383.47, repayable at 10% per annum in monthly installments of $350. ($61,448.94 - $30,065.72 = $31,383.47)

214. Of the Cann estate's original investment of $19,833.33, a total of $10,000 was repaid, leaving a balance of $9,833.34 (Document Book, Tab 88).

215. On January 26, 1993, Elborn filed an assignment in bankruptcy. Mr. Moll is listed as a creditor who is owed $31,260.

216. The mortgagor has never paid the balance owing of $9,833.34, but this amount formed part of the sum repaid by Mr. Moll to the Salvation Army. The other two estate investors lost the same amount of money on this mortgage.

iv) Michael Mosaad - 1612 Middleton Street

217. Michael, Metry and Marie Mosaad purchased the property at 1612 Middleton Street, Toronto, on January 18, 1989 for the sum of $250,000. Three mortgages totalling $244,250 were registered against the property at that time . In August 1989, two new mortgages replaced the previous three charges. The first mortgage was in the amount of $225,000 and was registered in favour of Counsel Trust Company.

218. The second mortgage, in the amount of $30,000, was registered by Mr. Moll in the name of his clients, the Pietrzyks on August 15, 1989. The second mortgage matured on August 15, 1991, and the Pietrzyks did not want to renew. Mr. Moll offered to arrange other financing for Mosaad. On August 26, 1991, Mr. Moll registered a new second mortgage for $34,000 in his own name (not stated to be in trust) (Document Book, Tab 89). The funds for this mortgage were provided from the Cann estate.

219. Contrary to Rule 23, Mr. Moll did not prepare a trust declaration, an assignment or reporting letter to reflect the Cann estate's interest in this mortgage. While the investment of funds is shown on the mortgage ledger (Document Book, Tab 90), there is no indication on the Cann estate ledger that the mortgage was to the benefit of the Cann estate.

220. Mr. Moll acted for all parties to this transaction. He did not advise his clients of the nature of his conflict. None of the parties obtained independent legal advice, nor waived same.

221. On January 6, 1993, the property was sold pursuant to a power of sale by the first mortgagee. The first mortgagee suffered a deficiency, and the second mortgage held by the Cann Estate was not repaid.

222. Despite his obligations to do so, Mr. Moll failed to consider the provisions of the *Trustee Act* and breached that *Act* by investing funds of the Hoare estate in a second mortgage on 1612 Middleton Street.

v) Laughlin

223. The Laughlin matter was an unsecured investment made by the Cann estate to the Laughlin estate. The Laughlin estate has since been wound up and distributed for some time. Mr. Moll states that he forgot that the Laughlin estate owed the Cann estate $6,640.58, and, consequently, the Cann estate was not repaid. This amount is included in the amount of investment losses suffered by the Cann estate and repaid in full by Mr. Moll.

James Phillips - 1746 Queen Street East, Toronto

Background

224. James Phillips ("Phillips") operates a renovation company, Quality Renovations and Design. He was also an active real estate investor during the period from June 1984 to November 1990, and is a licensed Real Estate Agent, as is his wife Cheryl. During this period Phillips engaged in at least 14 real estate transactions, purchasing properties, holding them from between 1 and 11 months, and selling them at a profit. Mr. Moll acted for Phillips and his company on these transactions; however, Phillips retained other lawyers in other matters. In all of these transactions, save one, Phillips did not advance any of his own funds, except for nominal deposits. Phillip's real estate investments during this period, along with the sources of financing, are outlined in Schedule 2. In the course of using funds from other sources, as was common during that period, Phillips made a considerable profit. Mr. Moll also arranged, and in some cases provided, financing for Phillips on some of these real estate purchases.

225. Mr. Moll had made the following loans to Phillips in relation to property purchases: $3,500 in 1984; $70,000 in 1987; and $49,243.38 in 1988. For each loan there was a signed promissory note in the file.

226. Phillips has extensive experience in real estate transactions, including the drafting of Agreements of Purchase and Sale. Phillips was a regular client of Mr. Molls and as such was allowed to make telephone calls as well as to send and receive faxes. While Phillips was in the office, Mr. Moll did not supervise his actions.

227. With the onset of the recession, Phillips stopped acquiring and flipping properties.

228. Phillips has made a number of complaints to the Law Society, all but one of which have been found to not warrant discipline proceedings. In one letter, he accused Mr. Moll of forging his Will. The Society's investigation completely exonerated Mr. Moll when it found that Mr. Moll had provided Phillips, many years before, with office copies of the Will. As is standard practice, the office copy showed Phillips' name in quotation marks above his signature line on the last page.

229. About one and a half years after his initial complaint, Phillips made an allegation about a false Agreement of Purchase and Sale on a property owned by a company at 1746 Queen Street East, which closed in 1988.

230. In October 1988, Phillips was approached by Sean Ainsworth ("Ainsworth") with a prospective investment property, being 1746 Queen Street East, Toronto ("Queen St. property"). Ainsworth was an acquaintance of Phillips who had brought at least three investment properties to him previously. Ainsworth had signed an agreement of purchase and sale for the Queen St. property and wanted to know if Phillips wanted to acquire the property.

231. The purchase and sale agreement, dated October 5, 1988 was between 'Ainsworth (in trust for a company to be named prior to closing)', as purchaser of the Queen St. property, and 'Ronald Stefaniuk', as vendor, for $167,500, with a deposit of $2,000 (Document Book, Tab 91). The purchase and sale agreement was hand written, contained initialed changes, and was signed by both purchaser and vendor. The Queen St. property was a single family semi-detached house across the road from what was then the Greenwood race track. Phillips agreed to acquire the property. Phillips then retained Mr. Moll to complete the transaction.

232. Moll was retained by Phillips to incorporate a company to acquire this property. Phillips states that Moll and Phillips agreed to develop this property as a co-operative venture with Moll providing capital and Phillips renovating the property. Moll provided $34,000 to acquire this property. As in other transactions, Phillips did not wish to risk his own capital. Due to their cooperation in the project, the popularity of the "Care-Bears" at the time, and the friendship between Cheryl Phillips (Phillips' spouse) and Karen Moll (Mr. Moll's former spouse), the name Kare-Cher Properties Ltd. ("Kare-Cher") was chosen.

233. The articles of Kare-Cher allow the Director of the Corporation to borrow money, issue debt obligations and mortgage corporate property. The only Director and Officer of Kare-Cher listed in the Articles was Cheryl Phillips. Neither Mr. Moll nor Karen Moll were ever Directors or Officers. Articles of Incorporation for Kare-Cher were prepared by Mr. Moll and registered on November 25, 1988.

234. Although he had a financial interest in the venture, Mr. Moll did not advise Phillips of the nature of the conflict, and he did not insist that Phillips obtain independent legal advice or sign a written waiver of such advice if he chose to be represented by Mr. Moll. Phillips did not have independent legal advice or representation on the transaction, and no written waiver was signed.

235. Phillips approached Kopas & Burritt Financial Agents ("Kopas") who were agents for Investors Group Trust Co. Ltd. ("Investors") for financing. (delete). On November 4, 1988, the second purchase and sale agreement indicating a sale price of $225,000 for a sale of the Queen St. property from Ainsworth to Phillips ("inflated agreement") was sent to Investors (Document Book, Tab 92). This document appears to have been faxed from Mr. Moll's office due to the heading on the faxed copy. It was date stamped as "Nov 04 '88 10:41".

236. The inflated agreement was signed by both Ainsworth and Phillips; the witness signature is not identifiable. David Moll states that he was not aware of the existence of the inflated agreement.

237. An appraisal, dated November 11, 1988, was prepared by Jones, McKittrick, Somer Limited ("JMS") for Kopas which valued the Queen St. property at $215,000 (Document Book, Tab 93). JMS subsequently provide an opinion that the rental rate for the property was in the range of $1,100.00 to $1,200.00. This material was provided to Kopas and Investors prior to a commitment being made to provide financing.

238. On November 24, 1988, Investors agreed to extend mortgage financing in the amount of $140,000 on this transaction. The mortgage loan amount was 65% of the appraised value of the property ($215,000), which was well within the commercially acceptable range for first mortgages at the time, as many mortgages were being advanced on the basis of anticipated inflation value, rather than purchase price.

239. That same day, Mr. Moll was retained by Kopas to act on behalf of Investors in the purchase and financing of the Queen Street property. Kopas confirmed its instructions by standard form "Instructions to Solicitors".

240. Mr. Moll did not disclose to Kopas or Investors that he had a financial interest in the property, namely that he was injecting $34,000 into the transaction. Similarly, Mr. Moll did not advise Investors of the nature of the conflict, and he did not insist that Investors obtain independent legal advice or sign a written waiver of such advice if it chose to be represented by Mr. Moll. Neither Investors nor Philips had independent legal advice or representation on the transaction, and no written waivers were signed.

241. A Transfer/Deed of Land was registered as Instrument No. CT993427 on November 29, 1988, to convey the Queen Street property from Stefaniuk to Kare-Cher. Title was taken in the name of Kare-Cher pursuant to a direction from Ainsworth. The attached Land Transfer Tax Affidavit is signed by Cheryl Phillips and commissioned by Moll and indicates a consideration paid in cash of $167,500.

242. On closing, Mr. Moll also registered as Instrument No. CT993428, a Charge/Mortgage of Land in the amount of $140,000 in favour of Investors (Document Book, Tab 94). James Phillips signed the mortgage as guarantor. Mr. Moll thereafter paid the closing funds out of trust pursuant to the direction provided by the vendor's solicitor.

243. As indicated in Mr. Moll's trust ledger (Document Book, Tab 95), and a handwritten receipt, dated December 22, 1988 [*sic*]. Ainsworth was paid a total of $8,000 as a finders' fee on this transaction. Mr. Moll reported on this transaction to Kare-Cher, in care of Phillips' address, by letter dated December 10, 1988 (Document Book, Tab 96). Mr. Moll confirmed that the transaction was completed on the basis of a purchase price of $167,000 with a first mortgage to Investors of $140,000. On the same date, Mr. Moll provided a Solicitors' Report on Title to Investors to confirm that a first mortgage in the amount of $140,000 had been registered in favour of Investors in accordance with its instructions.

244. Kare-Cher held the property after it was renovated as a rental income property. In 1991, the Queen St. property was experiencing a negative cash flow, and Phillips made up the shortfall. Eventually Phillips could no longer afford to continue to put money into the property. Consequently, beginning May 22, 1991, and continuing until January 27, 1992, Mr. Moll made some payments for utilities and mortgage, which are identified in his trust ledger for this property, in a total amount of $7,245.

245. Kare-Cher went into default under the mortgage to Investors on November 15, 1991. After the default had continued for four months, an action was commenced by Investors against Kare-Cher for possession of the property and the arrears under the mortgage. By letter dated May 7, 1992. Mr. Moll asked Investors to forebear from taking possession in the immediate future as Phillips was actively promoting the sale of the property.

246. On July 17, 1992, power of sale proceedings were commenced against the Queen St. property by Investors. The Queen St. property was ultimately sold for $115,000 on May 31, 1993, and Investors suffered a deficiency. Investors has a judgment against Phillips and Kare-Cher and has executions outstanding against Phillips and his property. Mr. Moll has not been sued by Investors or Phillips, nor has he tried to recover any funds from Phillips.

247. In a letter dated October 6, 1993, in response to a letter from Phillips demanding compensation for his losses, Mr. Moll confirmed that he had invested $40,000 in the Queen Street property. He added:

> There is no minute book for Kare-Cher because one was never bought. I do not have an appraisal for the Queen Street property, my recollection is that you had said that it was worth between $185,000 and $190,000.

248. Mr. Moll's letter was written after Phillips had demanded and received his file from Mr. Moll. Mr. Moll's recollection of the value is conservative compared to the appraised value of $215,000.

V. DISCIPLINE HISTORY

249. Mr. Moll has no discipline history.

DATED at Toronto, this 12th day of August, 1998."

Re: D19/98

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. David Moll admits service of Complaint D19/98 and is prepared to proceed with a hearing of these matters on August 11 - 14, 1998.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. David Moll has reviewed Complaint D19/98 and this Agreed Statement of Facts with his counsel, H. Reginald Watson, and admits the particulars of Complaint D19/98, in addition to the facts contained in the Agreed Statement of Facts. David Moll further admits that the particulars of Complaints D19/98, as supported by the facts in this Agreed Statement, constitute professional misconduct.

4. The parties agree that this Agreed Statement of Facts should be read in conjunction with the Joint Submission on Penalty, which will also be filed at the hearing into this Complaint.

IV. FACTS

5. David Moll was called to the Bar in 1975. Upon his call, he practised with Cyril O'Reilly for 4 years, until Mr. O'Reilly suffered a stroke in 1979 and did not return to the profession. This short period represented the extent of the mentoring David Moll received in the profession. For brief periods after this he rented space to junior lawyers. He has practised as a sole practitioner under the name O'Reilly Moll since 1986. He operates a general practice with an emphasis on estates and real estate. A copy of David Moll's *curriculum vitae* is attached to the Joint Submission on Penalty. Additional evidence respecting David Moll's good character will be presented to the Committee by a brief of letters and *viva voce* witnesses.

KELLY MORTGAGE

6. David Moll had acted for the members of Mrs. Shirley Kelly's family for a number of years; before that, Mr. O'Reilly, David Moll's now deceased partner, had acted for the family. Whenever Mrs. Kelly or her family needed a lawyer, they turned to David Moll's firm. Mrs. Kelly's father-in-law had previously invested in mortgages through David Moll. Based on these long dealings, Mrs. Kelly trusted in the Solicitor.

7. Mrs. Kelly inherited approximately $300,000. from the estates of her two aunts in December 1989. David Moll acted for her aunts' estates. After he distributed the proceeds of the estate to Mrs. Kelly in January 1990, David Moll asked her what she was going to do with the money. After some discussion, Mrs. Kelly agreed to invest in some mortgages as suggested by David Moll. Although her father-in-law had previously invested in mortgages, Mrs. Kelly had no such prior experience.

8. David Moll was contacted by a mortgage broker, O'Dell & Associates. The broker's statement of mortgage, dated January 9, 1990 (Document Book, Tab 1), identified a requirement for a second mortgage against the property at 19 Bernice Crescent, York ("Bernice property"), in the amount of $62,375, with a return of 16.5% for a one year term. The second mortgage would encumber the property up to 85% of its appraised value. The statement shows the mortgage costs to be $2,375, with $1,800 payable to the Solicitor and $175 for an appraisal. The property was owned by Robert Montesano ("Montesano") and Dominic Serrao ("Serrao"). David Moll was instructed to close the mortgage transaction six (6) days later, on January 15, 1990.

9. The Bernice property had been purchased by Montesano and Serrao on October 29, 1989, for $220,000. Montesano and Serrao were renovators. After they purchased the Bernice property, they converted it to 3 rental units.

10. David Moll acted for Mrs. Kelly in the mortgage transaction. Although David Moll was not formally retained by the borrowers, Montesano and Serrao, and they only learned of him through the mortgage broker, David Moll now accepts that Montesano and Serrao could have considered that he was acting for them, since they were not otherwise represented and they state that they relied on David Moll to provide the legal paper work in this transaction. Montesano's evidence would be that he relied on David Moll to act as his lawyer in these transactions. David Moll states that he did not provide any legal advice to the mortgagors and thus did not, at the time, consider himself to be their lawyer. David Moll did not advise either party as to the conflict of interest and neither ensured that the parties had independent legal advice nor obtained written waivers of such advice. However, Montesano and Serrao knew he was acting for the lender. David Moll states that it is a result of his perception of the relationship that he did not advise the parties of the conflict.

11. Prior to advancing the funds, David Moll orally advised Mrs. Kelly that the mortgage was on a rooming house, that the rents were being collected, and that the borrowers were reliable and had substantial assets. David Moll states that this constituted all of the information he had received from the broker. Mrs. Kelly agreed to invest in the mortgage based on her discussion with David Moll and her trust in his judgment. David Moll did not provide Mrs. Kelly with any documents such as the appraisal or the borrower credit information showing the borrowers as having significant assets, which he had received. No information was provided in writing. Although he had Ms. Kelly's oral authorization, David Moll did not obtain written authorization to invest Mrs. Kelly's funds in this mortgage. However, she did forward him a cheque in the amount of $62,375 for the mortgage investment.

12. Before closing, Montesano and Serrao signed the mortgage in David Moll's office. Prior to advancing the mortgage funds, David Moll performed all the necessary legal paper work. Prior to this, David Moll had not acted for either of the mortgagors. On January 15, 1990, David Moll advanced Mrs. Kelly's funds to the borrowers, and the second mortgage was registered in the amount of $62,375 with Montesano and Serrao as mortgagors and Shirley Kelly as mortgagee (Document Book, Tab 2).

13. On January 16, 1990, David Moll reported to Mrs. Kelly on the second mortgage (Document Book, Tab 3). He advised her of the priority and the principal amount of her mortgage, the interest rate, payment amounts and term. He advised that all fees were paid by the borrowers. The letter did not disclose his information respecting the amount of the first mortgage, the appraised value of the property nor the amount of the arranging fee paid to David Moll.

14. On January 16, 1990, David Moll also sent a letter to Montesano and Serrao on the mortgage transaction, enclosing his account for services rendered (Document Book, Tab 4). In mortgage transactions, lawyers fees are typically paid by the mortgagors. In order to draw his fees from trust, David Moll had to deliver an account. In so doing, he wrote the letter of January 16, 1990, to deliver his account for his fees on this transaction and, at the same time, provided some details of the transaction. The account sent to the mortgagors includes the same $1,800 fee as disclosed to the mortgagors in the O'Dell statement of mortgage. This fee appears to include the legal and arranging fee.

15. As reflected by both the mortgage asset ledger (Document Book, Tab 5) and David Moll's trust ledger for this mortgage (Document Book, Tab 6), the March 1990 mortgage payment from Montesano was returned NSF. It was replaced by Montesano in June 1990 after David Moll advised Ms. Kelly and then wrote to Montesano demanding payment and threatening power of sale proceedings, after advising Ms. Kelly of the situation. Throughout this time, David Moll was collecting the mortgage payments and then paying Mrs. Kelly, net of a collection fee. David Moll made these payments to Mrs. Kelly even when the mortgagors' cheques were returned by the bank. Mrs. Kelly was aware of the monthly status of the mortgage payments, including the NSF cheques.

16. Beginning in August 1990, all monthly interest payments by the mortgagors were returned "NSF" and then replaced by the mortgagor within one or two months. When the mortgagors' payments were returned, David Moll orally advised Mrs. Kelly of this fact and took steps to collect the payment, including a demand letter, dated December 31, 1990 (Document Book, Tab 7).

17. When the mortgage expired in January 1991, David Moll spoke to the mortgagors who advised that they were unable to retire the mortgage as they were having trouble with the high payments. Consequently, David Moll contacted Mrs. Kelly. David Moll relayed the borrowers' advice that they were having difficulty making the payments and had asked that the payments be lowered so they could carry the property. David Moll was acting for Mrs. Kelly. Prior to this, is only contact with the mortgagors had been regarding mortgage payments. David Moll now understands that the mortgagors may have considered him to still be their lawyer.

18. Mrs. Kelly asked David Moll if she should call the loan. David Moll indicated that in his opinion this was not the best course as he believed she would lose her investment. He told her that a renewal was an attempt to keep the mortgage going and salvage her investment. He stated his opinion that in the end she would get more money. Mrs. Kelly indicated that she would call the loan if Montesano could not handle the mortgage. David Moll told her that, in his opinion, she could not call the loan and get the full amount of her principal back. He recommended to her that Montesano would more likely make his payments over time if they were reduced. After discussing these options, she agreed to renew the mortgage, based on David Moll's recommendation. David Moll states that he would not have made an initial investment in this mortgage at the time of the renewal, but that, due to the decline in the economy, the depressed property value made it almost impossible to get Ms. Kelly's money out of this mortgage. As he stated to Mrs. Kelly, "once you're in, you're in".

19. Following the conversation with Ms. Kelly, David Moll suggested that the mortgage principal be increased to capitalize the interest arrears and that the interest rate be decreased to lower the payments. Ms. Kelly agreed to renew the mortgage as recommended by the Solicitor based on her confidence in his judgment.

20. At the time of the renewal, Montesano was having trouble making the mortgage payments. He had approached the Solicitor and told him that he did not think that he would be able to repay the loan. The Solicitor suggested that the mortgage principal be increased and the interest rate decreased in an attempt to lower the payments.

21. Both David Moll and Montesano were of the view that the mortgage could not have been repaid in its entirety if the property was sold at the time of the renewal. David Moll based his opinion on his general knowledge of real estate law (which represents 45% of his practice) and his daily involvement with the real estate market in buying, selling and mortgaging residential properties. However, David Moll did not get an updated formal appraisal at the time of renewal.

22. David Moll did not confirm any of his advice to Mrs. Kelly in writing prior to renewing the mortgage and, in particular, did not confirm the fact of the NSF payments. While David Moll did not obtain Mrs. Kelly's written authority to renew the mortgage, she signed the extension agreement.

23. In April 1991, David Moll prepared a document general indicating an extension of the mortgage to April 15, 1992 (Document Book, Tab 8). The document indicated that the principal balance was being increased to $68,675 and the interest rate was being reduced to 5.5%.

24. The extension agreement was not registered by David Moll as he considered it to be unnecessary given that the interest rate was being reduced. David Moll did not report to Mrs. Kelly on the mortgage extension, however he did provide her with a copy of the document.

25. The mortgage extension was not signed by Serrao. Around the time of the renewal there was a conflict between Montesano and Serrao. Shortly after, Montesano offered to buy-out Serrao's 1/2 interest in the property. David Moll acted for Montesano in this transaction.

26. After the mortgage loan was extended, Montesano became aware that the use of the property as a multiple family dwelling did not conform with zoning by-laws and advised David Moll. David Moll also became aware that taxes had come into arrears around the same time. David Moll was of the view at the time that the zoning infractions did not affect the value of the property since, in his view, these infractions were not enforced by the City as long as the people living in the dwellings were not in physical danger.

27. Two or three months after the renewal, the payments started arriving late or not at all. Mrs. Kelly contacted David Moll's office on several occasions and asked him to contact Montesano for the payments as she required the funds to pay for her rent and other living expenses. She also attended David Moll's office. David Moll advised her that the "man (Montesano) was hard up" and that "you can't get blood from a stone". On one occasion in his office, David Moll called Montesano about the late payments while Mrs. Kelly was present. After a friendly exchange and a discussion of the arrears, David Moll did not make a demand for repayment. Mrs. Kelly states that she expressed a concern as to whether he was acting in her interests. Mrs. Kelly asked David Moll if they should demand payment on the loan at this time, but he was concerned that this would not result in the return of her principal.

28. Subsequently, by letter dated February 27, 1992, David Moll advised Montesano that Mrs. Kelly was upset by the lateness of the payments. He further advised Montesano that Mrs. Kelly did not wish to renew the mortgage when it came due in April 1992.

29. On May 13, 1992, Mrs. Kelly wrote to David Moll concerning this mortgage (Document Book, Tab 9). Mrs. Kelly confirmed that she had recently spoken to David Moll and that she wanted more information with respect to this mortgage, as detailed in 11 specific questions.

30. David Moll responded briefly on June 1, 1992 (Document Book, Tab 10). He enclosed a copy of the mortgage statement and the appraisal dated January 1990. He stated as follows:

> We are decidedly of the opinion that as long as payments are being made under this mortgage you should take no other action. Regretfully it is unlikely at this time that there is adequate security in the property to realize your investment.

This repeated David Moll's advice to Ms. Kelly, which he had provided to her previously.

31. The letter provided Ms. Kelly with what David Moll states was his considered advice, but did not answer each of Mrs. Kelly's questions. David Moll states that he believed at the time that he had answered Mrs. Kelly's important questions and concerns and that she already had answers to the other questions. Dissatisfied with this answer, Mrs. Kelly started seeking information on her own from the first mortgagee, the Canadian Imperial Bank of Commerce ("CIBC") and learned that the first mortgage was in arrears.

32. On July 14, 1993, David Moll advised Mrs. Kelly that the first mortgagee issued notice of sale. He had not advised her of the demands which CIBC had made prior to the power of sale. David Moll did not act for Mrs. Kelly on the default proceedings.

33. On September 8, 1993, Mrs. Kelly's new counsel, Bryan Hackett ("Hackett"), contacted David Moll concerning the mortgage and requested information (Document Book, Tab 11). David Moll replied on September 9, 1993 (Document Book, Tab 12). David Moll states that, in his view, he responded to all of Mr. Hackett's questions; he explained the extension in the following terms:

> The interest rate on the mortgage was reduced under the agreement extending the mortgage and in an attempt to ease the mortgagor's cash flow problems. The arrears and interest were capitalized which accounts for the higher principal amount. The mortgagor did in fact pay under this mortgage for some time.

34. On September 16, 1993, Hackett wrote to David Moll requesting further clarification as to the renewal (Document Book, Tab 13). David Moll responded on the same day (Document Book, Tab 14), stating

> Dominic Serrao refused to sign the extension agreement and he and Roberto Montesano dissolved their relationship around the time that the mortgage was extended. He is on the covenant of the mortgage and is therefore liable. We would have no reason to register an agreement in which the interest rate is reduced.

> The sum of $6,300.00 was added to the mortgage to reduce the interest rate. This enabled the mortgagor to continue making payments under the mortgage. Throughout the piece we have been trying to keep the mortgagor alive, willing to pay and able to pay. A real payment of 5% is better than 16% of nothing. The hope and objective was to keep things afloat until the economy recovered.

35. The property was sold under Power of Sale by the first mortgagee in January 1995. The first mortgagee suffered a loss, and Mrs. Kelly's entire investment was lost. Mrs. Kelly states that she is financially unable to pursue the guarantees of Montesano and Serrao.

WHITALL MORTGAGE

36. Bert Whitall died on April 8, 1996. By the terms of Mr. Whitall's Will (Document Book, Tab 15), which had been prepared by David Moll in June 1994, David Moll was appointed executor and trustee of Mr. Whitall's estate. Mr. Whitall's Will provided that the Executor was to keep the residue invested, pay the income from the estate to his sister, Marjorie Whitall, during her lifetime, and that upon her death the residue would be paid to his nieces and nephew. The primary assets of the estate were Canada Savings Bonds and cash, totalling approximately $340,000.

37. Before his death, Mr Whitall had promised Ms. Whitall a certain minimum income, which the low interest rate of the CSB's would not satisfy. Following the death of Mr. Whitall, Marjorie Whitall spoke to David Moll respecting her concerns about the estate and advised David Moll that she required more frequent payments than the CSBs provided. Also, she felt that the interest income from the bonds was insufficient. David Moll outlined options to Ms. Whitall, and Ms. Whitall instructed David Moll to invest some of the money in mortgages. David Moll followed this direction and continues to do so today. The most recent mortgage investment was made three months ago, in June of 1998, with the approval of Ms. Whitall.

38. In 1996, the property at 2366 Gerrard Street East was owned by a numbered company, 914751 Ontario Inc. ("914751"), which was in turn owned by Jordan Craig ("Craig"), a client of David Moll. David Moll had not acted on the Craig's purchase. The property was encumbered with a first mortgage, having a face value of $126,750, in favour of Monarch Trust Company ("Monarch Trust") which was due February 18, 1997. This mortgage was not to be renewed since the lender was in liquidation. On December 18, 1996, the receiver for Monarch Trust agreed to allow Craig to discharge the mortgage upon payment of $100,000, a substantial discount, provided that it was paid by December 31, 1996.

39. Craig was unable to sell the property and the mortgagee was persuaded to extend its deadline into January. An Agreement of Purchase and Sale for $160,000 was signed on January 8, 1997 with a closing date of January 16, 1997. However, there were problems with the clearance of a Construction Lien, which had been registered four years earlier. Following registration, no other enforcement steps had been taken. The lawyer for the Purchaser refused to close and the Agreement was extended to January 23 and then January 28. For each extension, Monarch had to be persuaded to extend its offer.

40. Due to the lien, the closing did not occur on January 28. David Moll attempted to close on January 30 and January 31, with him threatening litigation being. However, Monarch would not extend its offer beyond January 31, 1997.

41. To enable Craig and 914751 to take advantage of the Monarch Trust proposal, David Moll arranged to have the Whitall Estate invest in a $100,000 mortgage from 914751 to pay out the Monarch Trust mortgage, in order to take advantage of the large discount offered by Monarch Trust. David Moll did not advise Ms. Whitall, the life beneficiary of the Estate, that the Estate would be investing money with another client of David Moll. David Moll did not advise either party in writing that he was acting for both parties to the transaction and did not either ensure that they had independent legal advice or obtain their informed written consent to his acting in the conflict. Craig knew that David Moll acted for the estate.

42. However, as the Executor, David Moll was directed by the terms of the Will to keep the estate invested and had been instructed by Ms. Whitall to make mortgage investments. The $100,000 mortgage represented 62.5% of the price which the property sold for five (5) days later. This investment complied with the provisions of the *Trustee Act.*

43. As reflected on David Moll's trust ledger for the Estate (Document Book, Tab 16) and the mortgage asset ledger (Document Book, Tab 17), David Moll advanced the $100,000 in mortgage funds to 914751 on January 31, 1997. At that time, the Estate did not have this amount of cash available as the bulk of the Estate's assets ($300,000) were in Canada Savings Bonds. Consequently, David Moll obtained $100,000 from the Toronto Dominion Bank ("TD Bank") on behalf of the Estate, which was secured by the Estate's Canada Savings Bonds. David Moll then invested the funds in the 914751 mortgage.

44. The estate received a first mortgage for $100,000, due January 31, 1998 (Document Book, Tab 18), which David Moll prepared and registered against the Gerrard Street property on January 31, 1997. The mortgage, prepared by David Moll, included the following provisions:

> PROVIDED that the mortgagors when not in default shall have the privilege of prepaying the whole or any part of the principal sum hereby secured upon payment of three month's interest by way of bonus.
>
> PROVIDED that the whole of the principal sum hereby secured, together with interest then outstanding, shall immediately become due and payable upon the sale, transfer or conveyance of the herein property upon the option of the mortgagee.

The mortgage document was prepared by David Moll's office and the clauses were inserted as a matter of course. It may have been open to David Moll, as Executor, to make the mortgage completely open if it would have been reasonable and proper for him, as a trustee, to do so.

45. The anticipated sale of the property actually closed February 5, 1997, 5 days after the mortgage loan was advanced to 914751, with the purchaser accepting an undertaking in relation to the lien. David Moll reported to 914751 by letter, dated March 19, 1997 (Document Book, Tab 19). The funds obtained on the sale were then applied to repay the first mortgage to the Estate, with interest, pursuant to the second provision in the mortgage, for a total amount of $100,639.72. David Moll then repaid the TD Bank for the loan which had been made to the Estate, along with interest. David Moll did not report in writing to the Estate on this transaction.

46. Although interest was paid to the Estate on this investment pursuant to the second provision of the mortgage, the bonus (with a value of approximately $2,000) provided for in the first provision of the mortgage (as set out in paragraph 44 above) was not paid by the borrower to the Estate. David Moll states that he did not enforce the bonus clause because the mortgage had only been outstanding five days. David Moll felt it was unconscionable to charge a 3 month interest penalty for a loan which was repaid in five days, especially in light of the other mortgage provision above, which provided that the principal, with interest of $639.72, was payable upon a sale. During those five days, the Canada Savings Bonds were preserved and continued to earn interest. The bonus provision had been accepted by Craig. 914751 saved $26,000 on the Monarch Trust mortgage, by virtue of the Whitall mortgage.

47. David Moll's records do not disclose the specific amount of interest charged to the Estate by the TD Bank for the financing in relation to the 914751 mortgage alone. David Moll secured a further $60,000 from the TD Bank on behalf of the Estate around the same time for investment in another mortgage. The interest payments to the Bank on the two advances are combined in David Moll's records. The other mortgage was advanced in early February and repaid in April with interest of $546.76. Between the two loans, the Estate paid $629.99 in interest to the TD Bank. David Moll received legal and arranging fees on this transaction.

48. During this transaction, David Moll felt pressured due to the expiry of the Monarch offer on January 31, 1997. Without this offer, the sale would not have occurred. The Solicitor states that by investing in a first mortgage, in accordance with the provisions of the *Trustee Act*, he kept the transaction alive to the benefit of all, including the vendor, the purchaser, and the mortgagee. The loss of a benefit totalling more than $26,000 was prevented, as was any potential litigation.

V. DISCIPLINE HISTORY

49. David Moll has no discipline history.

DATED at Toronto, this 12th day of August, 1998."

FINDING OF THE COMMITTEE ON THE ALLEGATIONS OF PROFESSIONAL MISCONDUCT

In respect of Complaints D23a/97 and D19/98, based upon the Agreed Statement of Facts, and specifically the acknowledgment of professional misconduct by the Solicitor, together with the representations made by counsel in response to specific inquiries by the panel, we are satisfied that the allegations of professional misconduct have been made out. There will be a finding of professional misconduct upon the facts agreed accordingly.

RECOMMENDATION AS TO PENALTY

After anxious consideration, we have concluded that, subject to one change referred to hereunder, this is a case in which the Joint Submission on Penalty ought to be accepted by the panel and recommended to Convocation. Our reasons are as follows.

REASONS FOR RECOMMENDATION

The Solicitor, David Moll, is a sole practitioner in the Beaches area of Toronto. He is 50 years old and was called to the Bar in 1975. He briefly practised with the late Cyril O'Reilly and thereafter with a succession of associates, but in the operative period, he has, effectively, practised on his own.

The Agreed Statement of Facts, the supporting letters contained in Exhibit 9 filed on behalf of the Solicitor and the *viva voce* evidence called by the Solicitor establish beyond serious question that Mr. Moll is a person of honesty, integrity and good reputation within the community. He has been actively engaged as a school board trustee, as the Chairman of the Metropolitan Toronto School Board and the Toronto School Board and as a member of numerous boards of trustees involved in community and charitable activities. His *curriculum vitae*, which is part of Exhibit 7, is a very powerful testimonial to 20 years of devoted service to his community, to his church, and to the education and training of young people. His is quite obviously a career of significant dedication to the welfare of others.

Upon a searching analysis of all of the facts, including supplemental facts provided by counsel during our review of the written Agreed Statement of Facts, we are satisfied that the representation made by both counsel that there is no basis for a finding of fraud or misleading behaviour is in accord with the true facts. Indeed, we find as a fact that, in the events which are broadly outlined hereunder, Mr. Moll was not guilty of fraud or any deliberate attempt to mislead.

The events with which we are confronted are outlined as follows. David Moll's practice involves two characteristics which typify solicitors in situations akin to those in which he found himself. In the first place, he practises alone. Some of the profession's finest lawyers have devoted their lives to public service through the vehicle of a sole practice. What is clear is that it requires an extraordinary professional, imbued with a special command of the law and instinct for professionalism, to conduct a practice entirely on one's own without difficulty. Not everyone is capable of engaging in the practice of law according to this model. Indeed, it is a great credit to those sole practitioners who have succeeded in their practices that they have been able to do so in circumstances in which they are entirely self-reliant insofar as the law, the imperatives of practice and professionalism are concerned.

The second characteristic arises from the nature of his practice. Mr. Moll's practice is in large measure that of a financial adviser and facilitator for his clients. He is engaged in finding investment vehicles, principally mortgage vehicles, for clients (including both individual clients and estates), weighing the value and suitability of the opportunity, investing the funds, collecting the payments, pursuing the delinquent borrower, etc. If the veneer is stripped away, this sort of practice has almost nothing to do with the provision of legal advice in the traditional sense. It is a form of financial service which requires a knowledge of the market and the opportunities which it presents, together with a systematized accounting practice, enabling the practitioner to ensure that the financial entitlement of the individual client is respected at all times.

This type of business activity, when managed by a lawyer, frequently results in the condition which affected Mr. Moll. While he identified himself as a lawyer and carried on his activities in a law office, so much of his practice was devoted to the delivery of financial services that much of what would be appropriate and indicated from a lawyering standpoint was washed away in the delivery of those services. The combination of sole practice (in which the proprietor is required to do everything of substance for the client), coupled with a very busy financial services component frequently results, in the case of certain lawyers, in inadequate adherence to the rules governing professional conduct and formalized adherence to legal principle. For example, in Mr. Moll's case, Rule 5, dealing with the protection of clients in situations of conflicts of interest, might as well not have existed. In fact, he was busy, and moved so much money between clients on both sides of transactions, that one wonders whether, in such circumstances, it would be practically possible to observe the dictates of Rule 5, particularly Commentary 5.

The financial overlay was so complete that in all of the estates that he managed, his principle activity was investing estate funds, on a rollover basis, upon the security of mortgages. This was so much by rote that, for example, in the *McQueen* Estate, he invested estate funds in mortgages in the mistaken belief that this was his client's wish when in fact all the client wanted was distribution of the proceeds in accordance with the dictates of the Will. This was the process he followed in the the *Cann* and *Waters* Estates, notwithstanding the fact that the residual beneficiaries were charities which had no interest in seeing the monies invested in mortgages over many years. Again, as appears from the *McQueen* Estate, his approach appears to have been the same whether he was the executor named in the will or not.

We made specific enquiries of counsel to ensure that none of the financial activities undertaken by Mr. Moll were motivated purely by self-interest and that none of the funds found their way inappropriately into his hands. We are satisfied that what he did, he did entirely in his perceived sense of the interests of his clients. Apart from the fees which he generated in mortgage transactions and the placement and collection fees, the Solicitor gained nothing personally in the management of the portfolio of his clients' funds. We were initially concerned, particularly in the case of the *Waters* and *Cann* Estates, which, as noted above, involved charities, about whether the beneficiaries were aware of their entitlements. We are satisfied that upon the death of the testator in each case, the Solicitor advised the beneficiaries of their interest in the Estate and thereafter simply invested the proceeds over many years, without apparent complaint from the client.

While less than complete information was provided to Mr. and Mrs. Pietrzyk about their investments, we are satisfied this was not deliberate on the Solicitor's part. The failure to issue trust declarations and meet the dictates of Rule 5, all as outlined in the Complaints, were simply typical of Mr. Moll's failure to observe the basic requirements in a solicitor and client relationship, preoccupied as he was with investing the client's monies. The same can be said of all of the estates in which he periodically made unsecured loans, breached the *Trustee Act* by investing in second mortgages, made investments without full disclosure of all of the relevant circumstances, failed to wind up estates in a timely manner, etc.

During the course of the hearing, specific enquiries were made of counsel to supplement the Agreed Statement of Facts. Based on the responses, we are satisfied, *inter alia*, that the Solicitor's view of the law of constructive trusts as outlined in Paragraph 38 is arguably correct; that in the case of both the *Waters* and *Cann* Estates the residual beneficiaries were advised of their entitlement under the will within a reasonably short period of time after the testators' death; that there is apparently a substantial debate and disagreement in the estates bar as to the entitlement to pre-take compensation in certain

circumstances as outlined in Paragraph 50 which Mr. Moll did from time to time in his practice; that the compensation (in the amount of approximately $35,000) which Mr. Moll received for his administration of the *McQueen* Estate in his informal role as executor was authorized by the residual beneficiary, Mrs. McQueen, and that the monies thus received by the Solicitor are defensible based on accounts reviewed by the Society. With respect to this latter subject, Mr. Moll believes he was entitled to compensation for what he did in the administration of a complex estate. The residual beneficiary agrees with him and is happy that he have such compensation. While there has been no judicial assessment of his entitlement or the dollar amount, accounts have been prepared, to the satisfaction of the Law Society, which, if there had been a judicial assessment, would have resulted in approval of the sums in question.

In short, therefore, we have a solicitor who practices law on his own, is devoted to the interests of his clients, with many clients who, in large measure, are devoted to him and grateful for his efforts, with a financial investment practice which bore substantial fruit for his clients, all of this in spite of failing to observe the most basic requirements of the Rules of Professional Conduct with respect to his role as an estate solicitor, reporting to clients and the management of conflicts of interest. The interests of the solicitor and the public converge in the case of David Moll. He requires significant re-education and supervision and a period to reflect upon the extent to which his professionalism has deteriorated.

The Joint Submission on Penalty calls for the following:

(i) In the area of Estate Law, Laura Legge, of Legge & Legge, will act as a mentor to David Moll for a period of one year, or for such other period as Ms. Legge may deem appropriate. This will include an initial review of all of David Moll's active estates files and his office procedures respecting these files. Thereafter Ms. Legge will meet with David Moll on a monthly basis, or whenever Ms. Legge deems it necessary. In addition, Ms. Legge will be available by telephone as may be required.

(ii) In the real of Real Estate Law, either Leslie Mason or Peter Neilson, of Shibley Righton, will act as a mentor to David Moll for a period of one year, or for such other period as Shibley Righton may deem appropriate. This will include an initial review of all of David Moll's active real estate files and his office procedures respecting these files. Thereafter Shibley Righton will meet with David Moll on a monthly basis, or whenever Shibley Righton deems it necessary. In addition, Shibley Righton will be available by telephone as may be required.

(iii) In each of the areas of Real Estate and Estates, David Moll will attend at least one continuing education program each year.

(iv) David Moll shall maintain a membership in the estates and real estate sections of the Canadian Bar Association – Ontario.

(v) David Moll shall register as a mortgage broker.

(vi) David Moll shall not act as a lawyer for both the borrower and lender in any private mortgage transactions and will ensure that he complies fully with the provisions of Rule 23 of the Rules of Professional Conduct.

(vii) David Moll will be suspended from practice for a period of three and one half months and will pay $2000 in costs.

It is the panel's view that the assessment of the Solicitor's practice and the proposed mentoring scheme outlined in Paragraphs (i) and (ii) above lack sufficient formality. Accordingly, we recommend that, as a further condition to be added to those outlined in the Joint Submission, Mr. Moll be required to enter the Law Society's Practice Review Program on the premise that the Director of the Program will, in all likelihood, wish to take advantage of the offer made by Ms. Legge and Messrs. Mason or Neilson to provide the practice review and oversight which the Program dictates and the Solicitor urgently requires.

All of which is respectfully submitted and recommended

Dated this 2nd day of September, 1998

David W. Scott, Q.C., Chair

There were no submissions on the finding of professional misconduct.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 3 1/2 months commencing October 3rd, 1998 to January 18th, 1999 inclusive, pay the Society's costs in the amount of $2,000 and comply with the conditions set out at pages 72 and 73 including the condition set out in the last paragraph at page 73.

Mr. Stuart made submissions in support of the joint submissions made at the hearing for the recommended penalty.

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

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

Carried

It was moved by Ms. Puccini, seconded by Mr. Swaye that the recommended penalty include only conditions (i) to (vii) at pages 72 and 73.

Not Put

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 3 1/2 months commencing October 3rd, 1998 to January 18th, 1999 inclusive, pay the Society's costs in the amount of $2,000 on or before November 3rd, 1998 and further that the solicitor enter the Practice Review Program now and comply with the terms set out at pages 72 and 73 and the conditions that arise out of the Practice Review.

SECTION 35 OF THE LAW SOCIETY ACT

Re: Joram GOLD - Toronto

The Secretary placed the matter before Convocation.

Messrs. Topp, DelZotto, Bobesich and Copeland and Ms. Ross withdrew.

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

Convocation had before it the Report of the Committee dated 13th August, 1998, together with an Affidavit of Service sworn 28th August, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 19th August, 1998 (marked Exhibit l), together with the Acknowledgement of Service signed by the solicitor on 24th August, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

24th September, 1998

THE LAW SOCIETY OF UPPER CANADA

The Committee

REPORT AND DECISION

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

In the matter of The Law Society Act and in the matter of	Glenn Stuart for the Society
JORAN GOLD of the City of Toronto a barrister and solicitor	Not Represented for the solicitor Heard: March 17, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The COMMITTEE begs leave to report:

REPORT

On February 24, 1998 Complaint D17/98 was issued under Section 35 of the Law Society Act against Joram Gold alleging that he was incapable of practising law as a barrister and solicitor by reason of physical or mental illness, including addiction to alcohol or drugs, or any other cause.

The matter was heard on March 17, 1998 before this Committee composed of Elvio L. DelZotto, Q.C., Chair, Kim Carpenter-Gunn and Gordon Z. Bobesich. The Solicitor attended the hearing. He was not represented by counsel. Glenn Stuart appeared on behalf of the Law Society.

The evidence was heard *in camera*. The Committee's decision was rendered in public.

RECOMMENDATION

The Committee recommends that the Solicitor's rights and privileges as a member of the Law Society of Upper Canada be suspended until such time as Convocation is satisfied based upon a report of a Committee of Convocation, that he is no longer incapable of practising law by reason of mental illness.

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IN CAMERA

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IN PUBLIC

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There were no submissions.

It was moved by Mr. MacKenzie, seconded by Mr. Carter that the Report be adopted and that the solicitor be suspended until such time as Convocation is satisfied based upon a report of a Committee of Convocation, that he is no longer incapable of practising law by reason of mental illness.

Carried

Re: Henry Desmond MORGAN - London

The Secretary placed the matter before Convocation.

Mr. Swaye and Ms. Ross withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 29th June, 1998, together with an Affidavit of Service sworn 21st July, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 13th July, 1998 (marked Exhibit l), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 29th June, 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

Gerald A. Swaye, Q.C., Chair
Harriet E. Sachs
Nora Angeles

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

HENRY DESMOND MORGAN
of the City
of London
a barrister and solicitor

Glenn Stuart
for the Society

Not Represented
for the solicitor

Heard: January 13, March 6 & 19,
May l, 29 & 30, July 17,
September 23, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

INDEX

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER of the Law Society Act;

AND IN THE MATTER OF Henry Desmond Morgan, of the City of London, a Barrister and Solicitor

REPORT

Complaint D101/96, issued March 26, 1998 and Complaint D183/96 sworn June 27, 1996 both alleged that Henry Desmond Morgan, of the City of London, was guilty of conduct unbecoming a Barrister and Solicitor.

The matter was heard in public on January 13; March 6, March 18, May l, May 29, July 17, and September 23, 1997, before a Discipline Hearing Panel composed of Gerald A. Swaye, Q.C. (Chair), Harriet Sachs and Nora Angeles. Mr. Morgan, (the Solicitor) was in attendance throughout the hearing. When the hearing commenced Mr. Morgan was represented by his Counsel, Mr. Jones of Lockwood & Associates.

DECISION

The following particulars were found to have been established:

Complaint D101/96

(a) On June 23, 1992 the Solicitor was convicted of the offence that he, on or about the 7th day of March, 1992 at City of London, Ontario, did assault Mary Lynn Morgan, contrary to Section 266 of the Criminal Code.

(b) The Solicitor had engaged in a pattern of conduct intended to harrass and intimidate his ex-wife following their separation during the period from February 1992 to June of 1992 inclusive.

(c) On November 16, 1995, at London, Ontario, the Solicitor was found to be in contempt of Court, having failed to comply with the Judgment released by The Honourable Mr. Justice R. J. Haines on October 16, 1995, for which he was sentenced on December 28, 1995, by The Honourable Mr. Justice E. R. Browne to a six month term of imprisonment.

Complaint D183/96: See Schedule "A" Attached.

The Panel admitted into evidence an Exhibit Book including various decisions of the Courts in the Province of Ontario against the Solicitor.

The Solicitor admitted the particulars of the order and conviction that were made against him, but took the position throughout, that these particulars, did not amount to conduct unbecoming a Barrister and Solicitor. He contested the evidence throughout this hearing and cross-examined the two witnesses that were called. The Solicitor contested the facts as testified to by his ex-spouse. He challenged the various conclusions arrived at by the Courts in which he had appeared.

PRELIMINARY MOTIONS/ISSUES

A. Motion To Be Removed as Solicitor of Record

On the hearing date of March 6, 1997, a Motion was brought by Mr. Jones of Lockwood & Associates to be removed as Solicitor of Record on behalf of Mr. Morgan.

Rule 8 states as follows:

> "The Lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances."

Item 5 of the Commentary states:

> "Failure on the part of the client, after reasonable notice to provide funds on account of disbursements or fees, will justify withdrawal by the Lawyer, unless serious prejudice to the client would result."

Mr. Jones indicated the following:

l. The hearing commenced January 13, 1997. Following legal argument on one issue it was adjourned to March 6th.

2. Correspondence was sent from his firm to the Solicitor dated February 3, 1997, indicating that they had attempted to contact him but without success. Correspondence was sent to his Post Office Box and was returned "Moved".

3. Despite them leaving him telephone messages none were returned.

4. No effort was made by the Solicitor to address concerns with respect to payment of past and future fees and disbursements.

5. The solicitor did not respond to the request that he contact them.

6. Their inability to communicate with the Solicitor made it impossible to obtain instructions with respect to the Law Society complaint.

On February 18, 1997 Mr. Jones wrote once again and, in effect, reiterated the above and, in addition, advised the Law Society he was subsequently bringing a Motion for leave to withdraw as Solicitor of Record.

As early as January 24, 1997, Mr. Jones advised Mr. Morgan that the retainer they had received was insufficient. Solicitor Morgan agreed to contact Mr. Jones by the end of the week as to what he was going to be able to work out with them. Mr. Morgan was advised that unless he had made arrangements by January 29, 1997 with Mr. Jones, he should take steps to instruct other Counsel or advise the Law Society that he would be representing himself.

Mr. Jones also submitted that:

1. The Solicitor had sufficient time to retain other Counsel.
2. The Solicitor is a litigator himself.
3. The Solicitor is familiar with the facts of the case.
4. The Solicitor is not prejudiced by Mr. Jones not acting any further.

Mr. Morgan submitted:

1. He has confidence in Mr. Jones.
2. He told Lockwood & Associates at the beginning he had no funds.
3. He paid Lockwood & Associates what was requested from him by way of an initial retainer.
4. He doesn't have sufficient funds to give to another Solicitor.
5. If Lockwood & Associates had refused his previous retainer he could have retained another lawyer.

RE: THE LAW

In an action styled Johnson v. Toronto 1963 1.O.R., 627-628, a Solicitor had only been paid a small retainer and had done considerable work on the action. The Court found that he was entitled to ask to be discharged as Solicitor if the client refused to accede to a reasonable demand for a payment on account.

In an article styled "Ethical Standards for Defence Counsel", John A. Hoolihan, Q.C. states:

"Withdrawal

Counsel may withdraw from the case for a number of reasons. He and the client may disagree about the conduct of the case, the client may wish to commit perjury or have Counsel do something improper. In such cases, Counsel must not disclose the reason for the withdrawal to the Court or to the Crown. Counsel may only withdraw because of nonpayment of fees when the client will have sufficient time to retain other Counsel. As a practical matter, the Courts will often assist Counsel and the client by granting an adjournment under these circumstances."

In the special excerpts of the Law Society of Upper Canada 1969, "Defending a Criminal Case", at P295, Mr. Martin, subsequently, The Honourable Mr. Justice Martin, indicated as follows:

> "I think it is generally agreed that Counsel who has not been paid the fee agreed upon between himself and his client may withdraw provided:
>
> a) The withdrawal will not prejudice the right of the accused, to a fair trial, with adequate legal representation, and,
>
> b) That the withdrawal will not result in a failure on the part of Counsel to discharge his obligations to the Court..."

RULING

The Panel was satisfied after hearing the submissions of the Parties, that notwithstanding there already has been one day of hearing, adequate notice was given by Lockwood & Associates of their withdrawal. The one day hearing had been confined to a legal argument only. No evidence had been heard. The Solicitor knew on January 14, 1997, that he would have to make alternate arrangements to pay his Solicitors or they would be seeking to withdraw. This was six weeks before the hearing was due to recommence on March 6, 1997.

B. Motion to Adjourn

On March 18, 1997, Mr. Morgan represented himself. The Committee was advised that he had issued an Application for Judicial Review on March 18, 1997, against the Law Society of Upper Canada and Lockwood & Associates requesting the following:

- An Order quashing the decision of the panel, allowing Lockwood & Associates to withdraw.
- An Order by way of Mandamus ordering Lockwood & Associates to act.
- An Order restraining the Committee from proceeding.

The Solicitor submitted the following:

1. The proceeding should be adjourned to a further date.
2. After dealing with the Solicitor's Counsel's motion to withdraw, the Panel adjourned the hearing to March 18th.
3. No Interim Order for prohibition was sought.
4. He had not reviewed the material. If he was forced to proceed, he required further time to prepare.
5. He was not properly prepared to cross-examine his former spouse.
6. He had problems getting into a law library.

The Law Society submitted the following:

1. The Application for Judicial Review does not stay the proceedings.
2. There is a discretion in the Panel as to whether we proceed or not.
3. On March 6, 1997, the Panel stated that we were to proceed on March 18, 1997.
4. The Notice of Application for Judicial Review (issued in London, Ontario) was dated the same day as the hearing namely March 18, 1997. The Solicitor had waited until the eleventh hour to advise of the application.
5. The Solicitor does not have a strong prima facie case for Judicial Review.
6. The Panel should proceed because it is in the public interest so that the public can have confidence in the process.
7. The Solicitor had had numerous indulgences when hearings were adjourned so the Solicitor could get Counsel.
8. The Solicitor had ample time to prepare.
9. The Committee ruled on March 6, 1997 that they were permitting Mr. Jones to be removed as Solicitor of Record and the Committee decided at that time that there would be no prejudice to Mr. Morgan.
10. The Solicitor was aware the Law Society was seeking a serious penalty.
11. Mr. Morgan had represented himself in other Court appearances and had cross-examined his ex-spouse in the Family Court proceedings.

By way of reply, Mr. Morgan indicated that the following:

1. He had acted as Counsel in the Family Court hearing approximately two years ago.
2. He needed time to prepare.
3. This was an important matter in his life.
4. He explained that he had other priorities, namely other Court Proceedings in the Court of Appeal in regard to his ex-spouse and the location of various paintings.
5. He was in custody when he was served with the Law Society complaint.
6. If forced to proceed, he was going to be prejudiced.
7. He is not practicing law at this time.
8. No clients complained about him.
9. The only issue is with his ex-spouse which does not engage the public interest.

RULING

The Committee ruled that the hearing would continue. In coming to this conclusion, the Panel decided the following:

1. The request for adjournment was made at the eleventh hour.
2. The Solicitor would not be prejudiced.
3. It is necessary to have integrity in our process.
4. The Panel had the absolute discretion to proceed, notwithstanding the Notice of Application for Judicial Review.
5. The Solicitor knew, since January of 1997, that he should instruct other Counsel, if he could not make the appropriate financial arrangements with Lockwood & Associates.

C. Motion Re Admissibility of Court Decisions

It was the Solicitor's position that the results of Orders and Judgments could be filed as Exhibits so that it was evidence before the Panel but not the reasons of the Court.

The issue for the Panel to consider was where there has been a Trial and findings made by the Trial Court, whether the reasons for the Judgment rendered by the Court are admissible before the Law Society in the Discipline Hearing or only the Final Result.

Section 33 (9) of the Law Society Act R.S.O. 1990 c. L. 8, Section 33 (9) states as follows:

"The rules of evidence applicable in civil proceedings are applicable in a hearing, except that an affidavit or statutory declaration of any person is admissible in evidence as proof, in the absence of evidence to the contrary, to the statements made therein."

RE: LAW

In Simpson v. Geswein (1995) 6 WWR 233, a Judgment of Krindle J., a Defendant pleaded not guilty to assaulting a Plaintiff with a weapon. After a Trial the Defendant was convicted. The Plaintiff sued the Defendant for damages for assault and battery. The Defendant denied the same. The Plaintiff applied for Summary Judgment. The Master allowed the Application after admitting into evidence the Certificate of Conviction of the Defendant and the transcript of the reasons for conviction.

At P241 Justice Krindle stated:

"I am satisfied that it was appropriate for the Master to receive reliable evidence which would prove the matters that were in issue in the criminal trial and, in a general way, the evidence which was adduced at the criminal trial against which the decisions which have to be made on this motion can be made. It is not possible to know what were the legal issues which arose in a criminal case from reading of the certificate of conviction alone. It is not possible to know what evidence was adduced from a reading of a certificate of conviction alone. Whether the identical issues have been tried and adjudicated is clearly a relevant consideration in a motion such as this. Whether new evidence is of significance is clearly a relevant consideration in a motion such as this."

In Re Rosenbaum and Law Society of Manitoba (1983), 150 D.L.R. (4th) 352 (Mon. Q.C.), an application for prohibition was brought against the Law Society of Manitoba before the Honourable Mr. Justice Scollin.

Mr. Justice Scollin stated at page 357 as follows:

"The committee, like any other professional disciplinary body, is bound to conduct its proceedings fairly, but it is not bound by the whole panoply of procedural and evidentiary constraints which apply to the courts. Subject only to observance of its paramount duty to be fair to the lawyer, the committee is entitled to arrive at its decision on any reliable source of facts of which the lawyer is made aware in advance and can challenge, and it is for the committee to assess the weight or cogency to be accorded to the evidence given in a prior proceeding to which the lawyer was a party and to take proper account of the conclusions of fact arrived at by the judge."

In this matter, his Lordship stated at page 356;

"On this issue the lawyer contends that he is entitled, on the hearing before the committee, to have every ingredient of the charge proved in exactly the same way as if no issue had been decided against him in the court: the Law Society was not a party to the action before the trial judge and, therefore, in his respectful submission, in the forum of the Judicial Committee, the findings of the trial judge merit no more standing than the opinion of any other third party."

This argument was put forth by Mr. Morgan.

RULING

This Panel ruled that all Judgments, Orders and convictions are admissible in Evidence before the Panel as prima facie proof only of the facts found therein. However, the reasons that led to the convictions and Judgments are admitted, only for the limited purpose of the Panel understanding what led up to the convictions, Judgments and Orders.

D. Motion Re: Abuse of Process

The Committee heard testimony from Gary Gibson, an investigator with the Law Society, during which the following evidence was admitted:

Exhibit 3 - Conviction for Assault.

Exhibit 4 - Judgment of Haines J. dated October 16, 1995 between Mr. and Mrs. Morgan in regard to delivery of various items of property, particularly an art collection and a mutual restraining order.

Exhibit 5 -Order of Browne J. dated November 16, 1995 whereby Mr. Morgan was found to be in contempt of Court by reason of disobedience of the Judgment of Justice Haines dated October 16, 1995 and more particularly in regard to failure to deliver up an art collection.

Exhibit 6 - Endorsement on the record of the Appeal of the Order of Contempt made by Browne J. dated November 16, 1995 that proceeded to the Court of Appeal on December 5, 1995 and ultimately was dismissed.

Exhibit 7 - Order made by Brown J. dated December 28, 1995 whereby Mr. Morgan was ordered to be imprisoned for six months subject to being released if he delivered up various artwork.

Exhibit 8 - Order of Hockin J. dated December ll, 1995 declaring that there is no reason for Mr. Morgan not to comply with the Order of Hains J. dated October l6, 1995 and for him to deliver up the artwork.

Exhibit ll - Order of Hockin J. dated August 15, 1996 wherein Mr. Morgan was found in contempt of Court by reason of further disobedience of a Judgment of Haines J. dated October l6, 1995 and was fined $35,000.00 for his contempt.

Exhibit l4 - A certified copy of an information from the Department of National Revenue sworn July l5, 1992, indicating that Mr. Morgan had been found guilty of various offences and ultimately fined.

Exhibit l5 - A Certificate of a copy of an information from the Department of National Revenue Taxation in regard to various charges of failing to produce business records sworn February 13, 1995.

Mr. Morgan raised as an issue that he wished to re-litigate the issues that were before the various Courts set out in the above Exhibits. The Law Society submitted that any attempt by Mr. Morgan to re-litigate these issues would be an abuse of process.

Mr. Stuart, for the Society, stated that Mr. Morgan could bring in any new evidence and could argue fraud but could not have the same hearing he had before. The Law Society further submitted a finding of contempt is made under a criminal standard, or a standard beyond a reasonable doubt.

In Del Core and Ontario College of Pharmacists 51 O.R. (2d) l, a judgment of the Ontario Court of Appeal, the Discipline Committee of the Ontario College of Pharmacists found a Pharmacist guilty of professional misconduct and suspended his licence for 30 days because he obtained a quantity of pharmaceuticals from a company by fraud. The Committee accepted evidence of his prior criminal conviction for fraud, despite the objections of his Counsel. No evidence was presented to challenge the convictions.

Mr. Justice Blair indicated that the evidence of a prior criminal conviction is admissible in subsequent civil proceedings. Such evidence constitutes prima facie, but not conclusive, evidence of guilt in civil proceedings. A convicted person cannot attempt to prove the conviction was wrong in circumstances where it would constitute an abuse of process to do so.

It was the Society's submission that Mr. Morgan had a number of opportunities to litigate the issues of contempt of Court, and to re-litigate the same before the Discipline Panel would be an abuse of process.

RULING

It is the Panel's position that, as stated previously, the Panel would accept as prima facie the findings and conclusions of the various Tribunals. It was however, open to Mr. Morgan to adduce evidence at the hearing, to rebut the prima facie evidence.

EVIDENCE

BACKGROUND

Mary Lynn Scott testified that on December 24, 1964, she was married to Henry Morgan. They have three children aged 30, 27 and 24. They separated in September of 1990. They have had business dealings since that time because of various properties that they owned.

She testified that she was Mr. Morgan's legal secretary for many years and, even after separation, she worked in his office from approximately August 1991 to January 1992.

From the time of their marriage breakdown, she was hoping to enter into an agreement with her husband to finalize their financial affairs, but this did not materialize.

Around December of 1991 she lost hope of any possible settlement proposal so she directed her Solicitors to commence divorce proceedings. She was satisfied that there was a complete marriage breakdown by that time. She indicated that prior to commencing her divorce proceedings, when she raised the subject of their financial affairs and settlement of same, she was "stonewalled". Mr. Morgan had no interest in discussing settlement with her whatsoever.

Once she issued a Petition for Divorce she never returned to his office as his secretary. He demanded, on occasion, that she fire her matrimonial lawyer and they would settle matters themselves. She testified that her husband became extremely angry and confrontational. He threatened to make life miserable for her.

She testified that her husband indicated to her that, "She would regret doing this." and he indicated to her that she would settle on his terms, in his time.

On cross-examination by Mr. Morgan she indicated that they separated physically on September 15, 1990 and afterwards went to British Columbia together. They stayed together in the same room.

She testified that they socialized together after their separation in order for her to attempt to get him to try to settle various issues.

She testified as to various Court Orders and monies advanced by way of equalization payments between the two of them.

She indicated that she worked in her ex-husband's office from 1967 until separation and then August 1991 until January of 1992. She worked on a part time and ultimately a full time basis. She stopped working there within a few days of the divorce action, in early January 1991.

She testified that by December of 1991 she told her husband that she was going to proceed with the divorce action. She had no option. She indicated to her husband that since 1990 they either had to enter into a separation agreement or she would have to take matters to Court.

She testified that in his law practice she was an assistant to her husband and he was a General Practitioner with a leaning toward Family Law. She testified that, after she finally left the office, she took various documents with her that subsequently were ordered to be returned by the Court. One particular file she took was her own motor vehicle file in which her husband had a Family Law Act claim.

She testified that she instituted the divorce proceedings in Elgin County to spare both of them embarrassment in London. She denied on cross-examination that unless her husband settled on various terms, she would move the action to London.

She further testified that there were a great number of motions brought out of necessity.

RE PARTICULARS IN COMPLAINT D101/96 2(a) AND (b):

In February of 1991 there was a divorce hearing in St. Thomas. Ms. Scott testified that the day before the hearing, she was parked on Dundas Street in London. Mr. Morgan pulled up behind her and jumped into her car and grabbed her keys. He yelled at her. She leaned on her horn to attract attention. He was angry. She didn't know what he was prepared to do. This incident was reported to the Police. She was shaken. He took her car keys and her house keys. After complaining to the Police, the Police drove her home. She had her locks changed on her car and on her home. She had no idea what to expect from her husband. She testified that she found the keys in her husband's vault in his office two years after this incident, when she had access to his vault to look for a piece of her personal property.

Mr. Morgan testified on this issue and indicated that on February 12, 1992 he was driving from the Court House to his office in London at about 11:00 to 11:35 a.m. when he saw his wife and he was curious where she was going. She parked at a restaurant. He parked behind her and got out. He opened the passenger door. They were talking about reconciling. A man got out of her car. Mr. Morgan met this man the following night. This man was playing in a band at a restaurant in London.

Mr. Morgan testified that nothing further took place on that occasion and he and his wife discussed reconciliation. He returned to his office after that meeting. He denied jumping into the car and stated he got into her vehicle. He denied taking her keys from the car. When his wife indicated that she saw her keys in the vault several years later he indicated they were the keys to his vehicle and to his household. He denied the keys that she found in the vault were the keys to her vehicle and her house keys.

The Panel, having observed both parties, found Ms. Scott more credible about this incident than Mr. Morgan.

Ms. Scott further testified that on Saturday, February 15, 1992 she was visiting various male friends in Kitchener at a club. She did not tell Mr. Morgan she was going to Kitchener. However, he arrived at the place where she was and began staring at her. If she moved he moved. She could see him watching her.

Ms. Scott testified that Mr. Morgan watched her from approximately 9:00 p.m. until 2:00 a.m. At that time the bar staff forcibly removed him from the premises. He followed her. He kept her in sight. She was in the company of various performers in the band when she left the restaurant in Kitchener.

She indicated that she proceeded to a motel occupied by some of her friends who played in the band. They were packing in order to leave for their next engagement. She was not staying at the motel.

As the performers left Mr. Morgan pulled his vehicle in front of their vehicle and blocked their exit. She was inside one of the hotel units speaking with one of her friends when she saw what was going on outside in the parking lot.

Mr. Morgan parked in front of the van of her friends and would not move. He blocked them. The Police were called. This episode lasted about 2 hours.

Subsequently, after the Police intervened, Mr. Morgan left. The Police requested that she not leave because they were concerned she would be followed by Mr. Morgan.

She indicated that subsequently on February 20, 1992, she got a Restraining Order against Mr. Morgan.

Mr. Morgan, however, tells a different story. He testified that he went to Kitchener on that Saturday evening because he has suspicions that things were going on between his wife and a member of the band.

He advised the Committee that he wanted to look for evidence for a Counter Petition to her Divorce. He arrived at the restaurant at about 10:00 to 10:30 p.m. He stayed away from his wife. He did not talk to her. He spoke to members of the band.

He testified that after the closing of the restaurant, he was curious whether she was staying overnight or returning to London. When the band and his wife came out of the restaurant they proceeded to a motel. There were six males and his wife. He pulled into the motel lot. They went to a number of motel units and she went into a unit. He waited five or ten minutes. The Kitchener Police came. He was interested in getting evidence of adultery in regard to the divorce proceedings. He did not speak to any of them. He did not block their vehicle.

He testified that on November 19, 1992 he issued a Counter Petition for Divorce. He named as Respondents, in the Counter Petition, two members of the band. He testified the Police arrived at the motel and were there for half to three quarters of an hour. He then returned to London. He indicated that the incident as described by his ex-wife did not take place as she described it. He stated that it was physically impossible for him to block the van as she described. The six males were 210 to 230 lbs. He reiterated that the only reason he attended at the motel was to get evidence for the divorce.

It makes no sense to the Panel that if someone is trying to get evidence of adultery, he would make it so obvious and even if he was trying to the same, his conduct left something to be desired in doing it that way.

Ms. Scott further testified that since March of 1992, there have been other situations where Henry Morgan would follow her in his motor vehicle. He would drive behind her. When that occurred she drove to the Police station. He would leave. She indicated that she was reluctant to call the Police every time she saw his "face".

She testified that he would follow her and enter places and hang around. He would try to engage the various people in conversations. She testified that this occurred when a restraining order was in fact in effect.

She testified that in March of 1992, while she was in London on business, Henry Morgan served her with documents (although she had a Solicitor). He stormed up to her and flung the documents at her and said, "Here bitch take that."

RE: HOME

In April of 1992 Lynn Scott (Morgan) testified that at about 3:00 a.m. something awakened her. She looked outside and saw Mr. Morgan on the front porch and heard a key being tried in her front door. She had changed her locks. She noted he walked to her vehicle to try and put a key into her car. She also had changed the lock in her vehicle. Mr. Morgan denied that this ever occurred. he denied trying to get into her car.

She testified that between March and May of 1992, things were tense between her and Mr. Morgan. When she left their matrimonial home she moved into one of their rental properties in the same neighbourhood. She testified that her husband would drive two to three miles per hour through the intersection that was well lit so she would know he was there and watching her. Mr. Morgan indicated that while a restraining order was in effect he did not go by her property.

She testified that she observed him when he would sit three to four times per day in full view of her residence so she would know he was watching her on a daily basis. She indicated that during this time there was a restraining order in effect. However, after the assault conviction in June of 1992, she noticed his presence less.

She testified that the restraining order that she had kept him from within a half a block of her residence and whenever she saw him, she felt he was "pushing the limit".

Between February 1992 and June of 1992 she testified that she had given up all hope of reasonableness on his part. She had fear for her own safety. She felt that he was prepared to risk everything. She indicated that she did not know to what lengths he was prepared to go. She had a difficult time keeping her emotional life intact.

She testified that she felt embattled even to the date of the hearing because her matrimonial proceedings are still ongoing.

Mr. Morgan gave evidence. In regard to the assault and conduct that amounts to harassment, D101/96, 2(a) and (b), he testified that on September 15, 1990, he separated from his spouse. As of September 14, 1990 she worked in his office. She wanted to move out and he helped her move. She left the former matrimonial home and moved into a home owned by both of them, at 342 Central Avenue. He lived on Princess Street. There is the same connector street. There were two children at home. They gave the option to the children as to who they wished to live with. The eldest child lived with Ms. Scott, and the younger lived with Mr. Morgan. The whole family helped her move. She took her choice of paintings from the walls.

He indicated that three weeks after they separated they dated. As of the date of their separation, namely September 15, 1990, she stopped working. However, they continued to date on an occasional basis.

Between November 10th and November 18th, 1990 he and his spouse went to British Columbia for a social holiday.

He indicated that shortly after she moved out, he gave her $13,500.00 toward a $16,000.00 vehicle. They continued to date. They went to bed together. They spent Christmas and New years together.

In December of 1990, after they came back from British Columbia, his spouse went to Florida because a relative was getting married. While they were in British Columbia they looked at a property together.

He indicated that in March of 1991 she was hospitalized for 6 weeks. During the hospitalization he would see her daily. When she got out of the hospital the relationship continued.

In early July she went back in the hospital for 2 to 3 weeks. They had discussions about getting together. He indicated that he was opposed to this. He did not want to reconcile.

In August or September of 1991 she came back to work in his office until 1992 after she started the divorce action.

Just prior to her issuing the divorce petition on January 20, 1992 they had slept together. He drove her home to her residence. The previous Friday evening he dropped her off. She did not show up on the following Monday morning to work and he was served with her divorce petition on January 20, 1992.

Toward the end of January 1992, he started talking to her. On or about February 1, 1992, they spent one and one half hours on the porch at Central Avenue talking about the situation and how they were going to resolve it.

He indicated that on or about January 17, 1992, Lynn stopped working for him. However, they were in daily contact. On February 4, 1992, he went to a restaurant and ultimately spent until 2:00 a.m. talking at her place of residence.

He indicated that in the divorce action, he was served with an Interim Motion for spousal and child support. She indicated that she was paying expenses for all of the properties they owned and she wanted all of the rents.

Mr. Morgan indicated to the Panel that he thought they were getting along well. He indicated that he was before the Committee because it was alleged that he harassed her. He says there were two sides to the story. He indicated that there was an explanation. She attempted to get all of his rents. She had her lawyer on January 6, 1992 send a letter to the tenants of the rental properties to pay her. He indicated that he made the mortgage payments. They got along fairly well until February 12, 1992.

He indicated that on February 14, 1992 her lawyer and he went to Court. The action was started in Elgin County. He indicated that her position was that if he went along with what they wanted, they would keep the action in Elgin. He felt that she was trying to blackmail him and decided not to go along with the jurisdiction.

On February 14, 1992, they had their first interim hearing in St. Thomas. Mr. Morgan argued there was no jurisdiction in the Court. The Judge agreed and adjourned the action to Middlesex County returnable February 20, 1992, the following Thursday.

Mr. Morgan indicated that his wife said that he gave an undertaking to the Court not to bother her. He indicated this was not the situation because the Judge had no jurisdiction.

He testified that the same day he was at 342 Central Avenue. His son was living with her. He wanted to serve some documents upon her.

On February 20,1992, a matter came up in Court. There was an Interim Motion in London. That afternoon his daughter was getting married in the Court House. Both he and his wife went to the wedding reception at the son-in-law's parent's home. They were in contact with one another regarding their business matters.

He testified that his spouse worked in his office from the middle to the late 1970's on a full time basis. She did process serving, appeared in Court and did legal research. She talked to clients and did his banking, opened his mail and took his telephone calls. He was in family law. She talked to clients and obtained knowledge in family law. He indicated that she knew how to be aggressive in the practice of family law.

He indicated that there were a lot of Court proceedings between the two of them. A lot of the motions were brought by her. There were four motions of hers, to one of his. She received support of $1,000.00 per month contingent on her paying out $2,700.00. She was not making the mortgage payments and was collecting the rent on their properties.

RE: FRONT DOOR OF HOME

Mr. Morgan denied his wife's testimony that he went onto his wife's property and tried her front door with his keys, and that he tried to get into her car. He stated that incident in mid April of 1992 never occurred.

He testified that on another occasion he was forced to bring an action against his spouse and her Solicitor because he found out that documents were missing from his office. He started an action against them and got quite a few of the documents back. A Notice of Action was commenced on June 4, 1992.

His wife was injured in an accident in 1989. When she left his office she took the motor vehicle file. He sued her for it. That file was missing. After separation, he received a letter from her Solicitor dated January 29,1992, stating that he had taken over the motor vehicle file.

It was mid March when the motor vehicle accident was settled by his wife's Solicitor. He settled for $15,000.00 inclusive and left Mr. Morgan "holding the bag" for $140.00 for a medical report; $504.00 for a further medical report; together with the cost of issuing the action. There were no payments to him to cover his disbursements. As a result, he sent her an account for services rendered. He commenced a Solicitor and client assessment on or about May 20, 1992. The assessment date was May 28, 1992. He showed up at the assessment of his Solicitor and client account and she showed up and disputed his retainer. They went before a Judge. She admitted that an Affidavit was incorrect and it went back to the Assessment Officer for consideration.

During the summer of 1992 he had a Solicitor Beasley act for him. During May and June of 1992 there were various motions, and in August 1992, his spouse brought a motion to sell their Embro property. On August 29,1992, an Order went on consent. He felt she was attempting to sell the property at less than its market value. They had an agreement where he would pay $75,000.00 for her interest in the property. She would transfer the property to him and he could do with it as he would. In September of 1992, they put a hold on the Court proceedings. This lasted until May of 1993. he testified that for her to say that she was in fear of him is simply not accurate.

Mr. Morgan denied Ms. Scott's testimony that from February to June of 1992 he would follow her. He indicated that he would pass her. He stated that every time she would get upset with him she would lay charges against him.

He testified that there were four charges of his driving up and down Waterloo Street in violation of an Order that he was not to come with in a half a block of her. He hired a lawyer. There was a full trial. All charges against him were dismissed.

Around June of 1992 his spouse was angry. She laid charges. He collects guns. The Police came over. They searched his office and home. They found several guns. He co-operated fully with the Police. He was charged with improper storage of a rifle and a handgun. There were two charges of improper storage of guns. There was an order of prohibition for five years.

He then testified to various transactions in regard to his property.

On June 29, 1992, the London Police found him sleeping three quarters of a block from his wife's home at 1:00 a.m. In his car, he had binoculars and a baseball bat. He indicated he used the binoculars when he walked his dog. His intention was to watch his wife's home for 15 minutes. He did not know whether she had a male guest or not. He was there to get evidence of adultery. He was three quarters of a block from his wife's home and the Order was that he was not to be within one half of a block of her home. He was not in violation of any Order. Mr. Morgan testified that adultery may have had some bearing on support.

He admitted to serving her with a motion on March 28, 1992 at a restaurant. He served her with a motion for contempt. She had a lawyer. He denied saying, "Here bitch." He served a motion for contempt on her because of some documents that had not been produced.

RE: ASSAULT

Ms. Scott testified that as of February 1992 she had a Toyota motor vehicle that she purchased in the Fall of 1990, after the separation. Mr. Morgan drove a Subaru Legacy vehicle that was purchased when they lived together and was registered in her name.

In early 1992 Mr. Morgan agreed to insure both motor vehicles.

In late February 1992, while her vehicle was parked on Adelaide Street in London, all four of her tires were slashed. She did not know who did it. She reported it to her insurance company. She found out that they did not have insurance coverage on either of their motor vehicles. She testified that notices had been sent to Mr. Morgan's office. While she physically was in his office, she had placed the insurance policies and paid the premiums. She stated that she had no idea there was no insurance coverage on the vehicle until she made a claim to her insurance company.

Upon finding that her vehicle was uninsured, she made arrangements to repossess the motor vehicle operated by her husband, but owned by her, on or about March 6, 1992. She left a message for Mr. Morgan on his answering machine that she had repossessed the motor vehicle that he was driving. She took the vehicle and put it in storage after she repossessed it.

She testified that on the following day she was walking in London, Ontario and her husband assaulted her. She was walking to her home and crossing the street. She saw her husband running at her. She was frightened. She dropped her groceries. She ran to a nearby residence. Her husband screamed at her and said he wanted to talk "bitch". He stated, "Where's your car, bitch" He was livid. He grabbed her jacket. She fell. He hit her four times with a clenched fist on her neck and on the back of her head. The door opened and a man came out and chased her husband away.

She testified that her husband ran away and scaled a high garden fence and disappeared.

She testified that she was shaken. She complained of a sore neck for a week. She had a sore chest. She reported the incident and the Police arrived. An assault charge was laid against her husband. She was in Court when her husband pleaded guilty to the assault charge.

When Mr. Morgan cross-examined her in regard to the assault that occurred, she indicated that she had been previously assaulted by him although she had not reported it to the Police. This occurred between 1976 and 1980.

She further admitted to the Panel that she told the Police that her husband had never assaulted her in the past. She noted that this statement was not correct.

The Police, upon interviewing her after the assault occurred, asked her if Mr. Morgan had assaulted her like that before and she said "no". She was extremely upset. She went over the statement and signed it. She admitted that she gave a different version some five years later. She never made any attempt to correct her original statement.

Mr. Morgan testified that when he returned from the Court House on March 6, 1992 he noted that his vehicle was missing from his parking lot. He made an inquiry and left a message on his wife's answering machine. He received a message stating that she had picked it up and gave no reason for it. Subsequently she told him that she took the vehicle because she found no insurance on it.

He testified that he found it odd that she would not have inquired of him as to what occurred in regard to the insurance coverage on their vehicles. He then gave an explanation in regard to giving various funds to one of his clients who was supposed to place the insurance on the vehicles. He testified that his wife was aware of the problems that they were having in regard to their insurance coverages.

He testified that he pleaded guilty to assaulting his wife on June 23, 1992 and he was placed on 18 months probation. He indicated that if she had no knowledge of the insurance problems perhaps she was justified in doing what she did, namely, repossessing the vehicle that he was driving. However, he stated that, because she knew about the insurance problems they were having, she went out of her way to pick up his vehicle "out of spite".

In regard to the actual charges of assault he testified that on March 7, 1992 he was walking down the street. He was upset. He had no motor vehicle. He had to go to Court out of town. His idea was to try to get her keys. He went up to her. When he saw her she started to run. He was trying to get her purse. He stated, "I lost it." He denied hitting her on the back of the head and neck. He indicated that when he tried to grab her keys he probably touched her. He left when someone came to the door.

He indicated that when she was running she climbed up onto a porch and tripped. She ran up three stairs. He ran after her and she bent over to cover herself up. He tried to grab her keys while she was on her knees. He denied hitting her but he admitted he technically assaulted her.

With respect to this incident and others, the Panel, having observed both Mr. Morgan and Ms. Scott testify, found the evidence of Ms. Scott to be more credible than that of Mr. Morgan. In particular, the Panel noted that, when Mr. Morgan pleaded guilty to the assault charge, certain facts were read in by the Crown to support the charge. Mr. Morgan did not dispute these facts at the time. The facts as read in supported Ms. Scott's version of events before us, not Mr. Morgan's.

RE: FAMILY LAW PROCEEDINGS

Ms. Scott testified that her family law proceedings commenced January of 1992 and there were innumerable interlocutory proceedings. She indicated that there was a total lack of disclosure including up to the eve of trial. She could not give instructions to her own Counsel because Mr. Morgan only gave small bits and pieces of financial information.

She testified that no income tax returns were filed in their matrimonial proceedings and that she has recovered a Judgment in the proceedings that has not been satisfied by him.

In regard to the issue of the artwork, she indicated that the issue before the Court considering the contempt charge was, whether Mr. Morgan had the paintings, or whether his brother Dennis had the same. She testified that that issue was addressed by the Courts making the contempt finding against her husband. She indicated she had no idea where the paintings are now.

RE: PSYCHIATRIC REPORT AND POLYGRAPH

After Mrs. Scott had completed her testimony, Mr. Morgan sought to introduce before this Committee two reports:

1. A polygraph test which he had taken, the report for which is dated November 18, 1996; and
2. A psychiatric report dated December 4, 1996, which, among other things, comments on the polygraph test taken by Mr. Morgan.

Both reports deal with the issue of whether or not Mr. Morgan was telling the truth when he said that he did not have the artwork which formed the basis for his contempt convictions.

Mr. Morgan submitted that this Committee had jurisdiction to admit the polygraph report pursuant to Section 15 of the Statutory Powers Procedures Act and specifically Subsection 15(1)(b) which reads as follows:

> "S. 15(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (b) any document or other thing, relevant to the subject matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious."

Essentially Mr. Morgan admitted that in a civil and criminal court, polygraph tests were not admissible (see Phillion v. The Queen, 74 D.L.R. (3d) 136, (Supreme Court of Canada)).

It was Mr. Morgan's position before us that when dealing with the admission of the polygraph report, we should not regard ourselves as bound by Section 33(9) of the Law Society Act which states:

> "The rules of evidence applicable in civil proceedings are applicable at a hearing..."

We note that this is in direct contrast to the position taken by him before us when he argued against the admissibility of the Reasons given by the various Judges who had dealt with him in the past.

This Committee finds that it is bound by Section 33(9) of the Law Society Act. In this regard, this Committee relies upon Section 15(3) of the Statutory Powers Procedures Act which states as follows:

> "S. 15(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding."

Mr. Morgan then submitted before us that even if we refused to admit the polygraph test, we should admit the psychiatric report. Mr. Stuart, on behalf of the Law Society, argued, in effect, that Mr. Morgan should not be able to do indirectly what he cannot do directly. The decision as to whether or not Mr. Morgan is telling the truth is a decision which this Committee must make. A tribunal should not admit expert opinion on the very issue that the trier of fact has to decide.

Mr. Morgan argued that the decision of Regina v. Lavallee stood as authority for the proposition that expert opinion is admissible on the very issue that a trier of fact has to decide. In Regina v. Lavallee (1990) 76 C.R. (3d) 329, 55 C.C.C. (3d) 97 (Supreme Court of Canada), a psychiatrist called by the defence testified with respect to the "battered wife syndrome". It was the conclusion of the psychiatrist that the accused in that case felt that unless she defended herself and reacted in a violent way that she would die. However, it is to be noted that in Lavallee the Court was very specific as to when expert evidence could be appropriately admitted - that is, if the evidence being called is "beyond the ken of the average juror and thus is suitable for explanation through expert evidence " (per Wilson J. at p. 113)

In order to fit within the principles articulated in Lavallee, Mr. Morgan must take the position before us that judging his credibility was beyond our experience and expertise. This Committee rejects that submission.

In opposing Mr. Morgan's application to admit both the polygraph test either directly or indirectly through the psychiatric report, Mr. Stuart, on behalf of the Law Society, referred us to the decision of Regina v. Bland and Phillips, 43 D.L.R. (4th) 641 (Supreme Court of Canada). In that decision the Court points out that to admit polygraph evidence would offend several of the existing rules of evidence. First, evidence which is simply oath helping is not admissible. Second, evidence of past consistent statements is not admissible. Third, to the extent that the evidence can be characterized as evidence in support of the witness' truthfulness, the Court points out that character evidence is only admissible when it is character evidence as to the person's general reputation in the community. Fourth, the decision as to credibility is precisely the decision that a trier of fact must make, and it is not a decision beyond the expertise and experience of a trier of fact.

RULING

For all the reasons articulated in Regina v. Bland and Phillips, the Committee finds that both the polygraph report and the psychiatric report (to the extent that it is being tendered to indirectly admit the polygraph evidence) are not admissible before us.

RE: BREACH OF ORDER OF HAINES, J., DATED OCTOBER 16, 1995 D101/96 2 (c)

The evidence was heard before Mr. Justice Haines. On October 20, 1995, the Judgment was settled, issued and entered.

It dealt with the following:

- Antiques
- Art
- Two pieces of Real Estate

The Sheriff attended later on in October to act on this Judgment to retrieve the personal property that Mr. Morgan was to deliver to Ms. Scott. Mr. Morgan indicated that he was going to appeal this decision.

On November 2, 1995, he was served with a motion asking for relief, including a contempt finding and adding Dennis Morgan as a party to this action (Dennis Morgan is his brother).

On November 15, 1995 he filed a Notice of Appeal.

The motion before Mr. Justice Browne on Thursday, November 16, 1995, had to do with ninety pieces of art at their home and his office. He and his wife had accumulated a number of pieces of art over their marital life.

On November 16, 1995 Justice Browne made a finding of contempt on Affidavit material.

Justice Browne in his Order of November 16, 1995 added his brother Dennis Morgan as a party to the proceedings.

Mr. and Mrs. Morgan had accumulated a number of pieces of art during their marriage. Mr. Morgan testified that the valuable art had been given to his brother Dennis, early in January of 1992. His brother Dennis denied he had the art and refused to give it back. In January of 1992, he gave his brother Dennis approximately 30 pieces of art. He indicated that the lists of the pieces of art attached to the Judgment of Mr. Justice Haines dated October 16, 1995 was overvalued. (Exhibit Brief New A) Tab 4.

Mr. Morgan testified that at that time, when he gave his brother his art collection, Mr. Morgan was not home very much. He felt more secure with his brother having the art for safekeeping. He was getting along with his brother at that time.

Mr. Morgan in the Court proceedings stated he foolishly denied he gave his art to his brother, but he said "Lynn had sold some art." He testified, during his Court proceedings, that was not true. This evidence apparently came out on a cross-examination. In other words, he admitted that he was untruthful about the whereabouts of some of the art.

In September or October of 1992, he told his wife he gave the art to his brother in early January, 1992. His wife wanted to have an appraisal done. He indicated Dennis had the art and he could not get them back. He wrote to Dennis about the art. On or about April 24, 1994 he received a letter from Dennis stating that Dennis denied ever being in possession of the art.

Mr. Morgan testified that he denies any sinister motivation in giving the art to Dennis. He stated that Dennis changed his story.

He indicated the issue before Mr. Justice Browne on November 16, 1995, was whether his brother Dennis had the art, and also, whether Dennis had a claim on the art or not. On April 24, 1994, Dennis indicated he did not have the art.

Mr. Morgan testified before us that the art is now with Dennis Morgan.

He indicated that at the trial before Justice Haines he pointed out where the art was. He reiterated that the valuable pieces were with his brother Dennis (although Dennis indicated he did not have the art). He further testified in regard to the removal of the various art pieces and furniture that were in their home and office.

He indicated that he does not talk to his brother Dennis and they stopped talking in approximately June 1992. He indicated that when he asked for some of the pieces of art back, Dennis denied having them. When he gave Dennis the art, he did not get a receipt because he was his brother. At the time he gave the art to him they were getting along well.

The contempt proceedings were adjourned to November 21, 1995. Mr. Morgan appealed the contempt proceedings and brought a motion for a stay of proceedings. Justice Browne ordered the trial of an issue when his brother Dennis appeared for his hearing he admitted to having four works of art. Dennis indicated that the Solicitor Henry Morgan owed him approximately $40,000.00 since 1990 and he did not have the rest of the art and he claimed a security interest in the art.

On Friday November 24, 1995 this matter came before Mr. Justice Browne once again (New A Tab 13). The Court was to determine the whereabouts of the works of art and the claim of Dennis Morgan to a security interest therein. Mr. Morgan testified that the date of December 6, 1995 was set and he was denied any ability to cross-examine, nor have any Examinations for Discovery. He also indicated that he had to deliver an Affidavit of Documents within five days. He indicated that his position was the issues should not have been severed. He wanted to see the cheques to Dennis in the sum of $40,000.00 to $45,000.00. He could not remember the date when the loans were made. Justice Hawkins severed the trial and he said he could not ask about the loan nor the cheques. Because the action was severed, he could not get the financial statements of the loan of $40,000.00 to $45,000.00. In essence, Mr. Morgan's position was that he was prejudiced.

He testified that various Orders are still under appeal.

He testified that he went to jail on December 28, 1995 until February 16, 1996. It was a finding of contempt. He appealed. He lost the appeal. He appealed the sentence. He lost. On February 16, 1996, he received a stay. On March 11, 1996, he lost his appeal. He voluntarily went back to jail until July 22, 1996. Between March 13, 1996 until July 22, 1996 he was at Birch Reformatory.

In May of 1996 he did not pay his fees to The Law Society when they were due. He kept his office open although he was in jail. He could not do anything from jail. He could not pay his fees. Since that period of time he has been coping with these proceedings.

He testified that he has been living on his accounts receivable. Since September of 1992, he has not spoken with his brother. He has a sister and has little communication with her. Infrequently, he has communication with his children. He does not have a motor vehicle. Substantial monies have been paid into Court or given to his wife. Equalization payments were to be reduced by agreement. He believes that there is enough money lodged in Court to pay any Judgment against him. Also there are sufficient assets with his antique collection.

Various properties were ordered sold by Justice Haines and the money was placed in Court. He testified that probably over $40,000.00 was "sitting in Court".

He went on to testify about the complaints he had in regard to not getting a proper accounting and in regard to the various items and properties that were sold as well as the portion that he felt he was entitled to.

He testified that while he was in jail there was a second Order for contempt dated July 15, 1996, that ultimately was adjourned. He was not allowed to file any material until the very last moment.

Mr. Morgan testified that as far as he is concerned, at the very worst, there are sufficient funds to cover his wife's claims. If he wins each item that he is arguing over, there are still sufficient funds to pay her. He indicated that as far as he is concerned, the art is not needed and she will get her Judgment satisfied, whether she gets the art or not.

This matter came before Mr. Justice Browne on Thursday, December 28, 1995 (New Book A Tab 7 - Exhibit 7) and it was ordered that he be imprisoned for his contempt for six months, subject to being released upon delivery of the artwork. He queried why would he sit in jail in London, and then on to Birch Reformatory, and back in London, be beaten up in the London jail, and subsequently moved back to Guelph, if he had the art. He indicated that while in jail, he laid an assault charge against two persons and he went into protective custody and could not go back to Birch Reformatory.

He testified that on April 3, 1996, while in jail, he was assaulted. His nose was broken, but not displaced. He had cuts and bruises on his face. He was in protective custody until July 2, 1996. He testified that he was in jail during a Provincial wide strike and the confinement was more difficult. It was not an easy time.

He indicated, "If I had it, I would pay it. I couldn't sell it." He once again asked why he would go to jail and serve his time, if he could deliver up the art.

Mr. Morgan testified quite candidly to the Panel that he has defied some Court Orders. He also stated that he testified falsely in a cross-examination and he subsequently corrected this in October of 1994. He testified falsely in August of 1992, under oath.

He further testified that he has not taken any proceedings as against his brother Dennis. His position was that until he displaces the findings before the Court of Appeal, to sue civilly would be a waste of time. If he sued his brother, his brother could argue issue estoppel or res judicata. He did not charge him criminally. He could not get a Justice of the Peace to lay a charge against his brother.

He testified he had no insurance on his art. He provided $200,000.00 of art to his brother without making sure there was insurance on it. He stated that it was not worth $200,000.00. He was confident the art was in good hands with his brother for safe keeping. He testified that he never raised in the Court of Appeal that Dennis had the art and not him. He testified that the Court of Appeal concluded that he was determined to defy the Court Order. He indicated the only thing in the Factum refers to the severity of the sentence.

In essence, Mr. Morgan's position before this Committee was that the contempt findings that had been made against him were wrong. He was not, and had never been, in contempt because he did not have the art his brother did and was refusing to deliver it. This Committee rejects that submission. When first questioned about the location of his art collection (in August of 1992) he did not say his brother did it. This Committee also noted that this is not the first time Mr. Morgan had ended up in jail because he disagreed with court orders. (see below)

RE: INCOME TAX

Mr. Morgan testified that he had a long standing dispute with Revenue Canada. At one stage they had assessed him for $10,000.00. He then hired an accountant and was, in his opinion, successful in proving that they had assessed him unfairly. Revenue Canada did not remit to him the $410,000.00 Mr. Morgan says they owed him.

Subsequently, Mr. Morgan failed to file Income Tax Returns for the period 1987 through 1990. It was his position that he did not file these returns because he owed Revenue Canada no money. If anything, they owed him. On November 2, 1993, Judge Phillips ordered him to both produce books and records and file complete Income Tax Returns which returns were to include a Statement of Assets and Liabilities and a Statement of Income and Expenses. He did eventually fill out Income Tax Returns, but they were not complete returns. He refused to produce the books and records Judge Phillips had ordered him to produce. Consequently, he was convicted on October 6, 1995 of failing to abide by Judge Phillips' orders. Sentencing was deferred to April of 1996. After these convictions, but prior to sentence, he finally complied with Judge Phillips' orders. In April of 1996 he was sentenced to 30 days in jail concurrent on each count, which sentence was to be served intermittently on weekends.

Before us, Mr. Morgan took the position that his actions in failing to file returns and produce books and records were, in his opinion, justifiable as he had been treated so unfairly by Revenue Canada in the past and because there was no need to file these returns or substantiating documentation because it was clear to him that he owed no tax for the periods in question.

RE: CONDUCT UNBECOMING

Mr. Morgan did not admit that his conduct amounted to conduct unbecoming a Solicitor. He indicated the following:

1. The problems that he had were interpersonal relationships between he and his spouse.
2. Income Tax matters.
3. The Panel should not accept what his former spouse had to say due to the fact that she was not a disinterested party and that should be considered in regard to her credibility.
4. In assessing her credibility, her motivation would be to attempt to collect on her outstanding Judgment.
5. He agreed private conduct could be conduct unbecoming.
6. They had significant social arrangements from September 15, 1990. She worked in his office.
7. The sums of funds given to his spouse during their first period of separation.
8. That we had to look at the totality of the evidence to see what was going on during the period of time as alleged.
9. In regard to the Income Tax convictions, the offences were summary convictions and minimum penalties were given. The offences were for non-compliance.

RE: LAW

Mr. Morgan submitted that the burden of proof is upon the Law Society to prove conduct unbecoming. The standard of proof and the mental element has to be proved on clear and convincing evidence. He indicated that it is almost a criminal standard.

He submitted that the mere fact of a criminal conviction does not mean that, that in itself, is conduct unbecoming. There must be moral turpitude. He further submitted that most of the conduct that he is charged with, is a private matter either between him and his wife or between Revenue Canada and himself. Nothing before us had to do with his practice or with any of his clients. The Panel agrees on that issue.

RULING

Taking everything into consideration the Panel was satisfied that conduct unbecoming a Barrister and Solicitor was made out.

Rule 1 of the Professional Conduct Handbook states as follows:

"A lawyer must discharge with integrity all duties owed to clients, the court, the public and other members of the profession. The commentary to that rule states as follows:

1. Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. If the client is in any doubt as to the lawyer's trustworthiness, the essential element in the lawyer client relationship will be missing. If personal integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

2. Dishonourable or questional conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the lawyer, the integrity of the legal profession, and the administration of justice, as a whole. If the conduct, whether within or outside the professional sphere, is such, that knowledge of it would be likely to impair the clients trust in the lawyer as a professional consultant, the Society may be justified in taking disciplinary action.

3. Generally speaking, however, the Society will not be concerned with purely private or extra-professional activities of a lawyer that do not bring into question the integrity of the legal profession or the lawyer's professional integrity or confidence."

Mr. Morgan has submitted that if he were in a position to deliver up the art, he probably would offend Rule 1 if he did not. The Panel finds that Mr. Morgan has not displaced the onus in regard to this issue. The Panel is satisfied that likely he has or alternatively had indirect control of the art in question. The Panel finds specifically that whenever the evidence of Ms. Scott is in contrast to the evidence of Mr. Morgan, the Panel prefers the evidence of Ms. Scott, due to the fact that Mr. Morgan admitted to lying under oath on his Examination for Discovery.

In an Order of Convocation dated March 21, 1996, in the case of Michael Elliott Chodos, a reported decision of the Discipline Committee dated May 23, 1995, Ronald D. Manes, Chair of that Committee, indicated that in that hearing, Mr. Chodos did nothing illegal in becoming bankrupt, or in other steps taken to defeat the complainant's Judgment. Professional ethics were the issue. He quotes Mr. Justice Craig in Re Cwinn and The Law Society of Upper Canada (1980), 23 O.R. (2d) 61 as

"It has been a traditional view that "professional misconduct:, related to conduct while engaged as a barrister and solicitor, and that "conduct unbecoming", relates to conduct not in the course of the practice of law."

Chair Manes indicates at page 27 as follows:

"In addition, the Rules of Professional Conduct are grounded in the principle of integrity and exemplify the quality of professional conduct expected of a lawyer. Integrity is demanded of a lawyer in professional life and personal life to the extent that a lawyer's personal life may impact on his or her professional integrity. The Rules relevant to that principle bear repeating here."

Further, at page 30 Mr. Manes states as follows:

"Professional standards are designed to ensure integrity, a quality that is expected to be present in both the practioner's professional and personal life. The public has a right to expect a certain standard of ethics and upright conduct from lawyers. If the legal profession is to maintain itself as a self regulating profession, it must enforce high standards of integrity among its members. Lawyers can pursue their rights to the fullest extent of the law, but must do so at all times mindful of their duties to clients, the profession and to society, which has entrusted them with their professional status. Lawyers must pursue their personal rights with integrity, and a failure to do so may result in conduct unbecoming.

The goal of a charge of conduct unbecoming under section 34 of The Law Society Act is an essential one. A legal profession is a noble call and it is grounded in skill, knowledge and honour. As officers of the court, lawyers are cloaked with the stature and respect accorded to the courts and according must discharge their duties with dignity and integrity. As Mr. Justice Felix Frankfurter wrote:

"From a profession charged with such responsibilities there must be exacted qualities of truth-speaking, of a high sense of honour, of granite discretion, of the strictest observance of fiduciary responsibility, that have throughout the centuries, been compendiously described as "moral Character."

Further, in the Chodos Judgment Chair Manes indicates the following:

"The Committee applies an objective test in determining such an issue. One of the cardinal principles of self-regulation is that this Committee is in the best position to judge the effect of the lawyer's conduct on a community of clients. The Committee need not have specific evidence on any particular client's newfound distrust. The decision for the Committee is whether the solicitor has conducted himself in a manner which will reflect adversely upon the integrity of the profession, and the administration of justice, and whether such conduct would likely impair a client's trust in the lawyer.

> The ultimate repercussion of ethically irresponsible lawyers is the loss of confidence in and public respect for the legal profession and the administration of justice. American Chief Justice Benjamin Cardozo stated that "Reputation is such a calling, is a plant of tender growth and it's bloom, once lost, is not easily restored."

Thus the profession seeks to regulate itself by imposing a minimum standard of conduct "becoming" a solicitor.

In an action styled Salvatore Principato, an Attorney at Law 655 Atlantic Report, 2d Series 920 decided March 31, 1995, Mr. Principato went to J.M.'s home and admitted to yelling and using profanity. In addition it was found that he overturned a mattress on which J. M. was sitting and pinned her behind the mattress. "Mr. Principato lost control of himself, possibly because she was ending this relationship." He began to pummel her against the mattress, he never hit her skin directly, but he did pummel the mattress forcefully at least 10 or 15 times and this lasted for 10 seconds. J. M. did not sustain serious injury, she was in fear for her life, suffered pain and suffered a scratch on her arm.

The Supreme Court of New Jersey indicated that although the assault itself was not related to the Respondent's legal practice, the Respondent assaulted his client. An Attorney in his relations with a client is bound to the highest degree of fidelity and good faith. To the public he is a lawyer, whether he acts in a representative capacity or otherwise.

Unlike may other "victimless" disorderly persons' offences, domestic violence offences always involve victims, often times vulnerable and defenceless. The public must be assured that the legal profession is concerned about domestic violence.

RULING

Taking everything into consideration, the Panel is satisfied that the charge of conduct unbecoming a Barrister and Solicitor has been made out in complaints D101/96 and D183/96.

RECOMMENDATION AS TO PENALTY

This Committee recommends that the Solicitor be disbarred.

REASONS FOR RECOMMENDATION

It is with some difficulty that the Committee came to the conclusion that it did. On the one hand it could be argued that three of the four particulars before us - the assault; the harassment and intimidation; and the contempt - occurred in the context of a matrimonial proceeding. While in no way excusing the behaviour (which the Committee regards as very serious), the Committee does recognize that the stress of a marriage breakdown could theoretically cause someone to behave in a way which is atypical of his or her behaviour in other situations. We are also conscious of the fact that the Solicitor has suffered serious punishment for his behaviour in his matrimonial situation, having spent a significant period of time in jail.

If we had persuaded that the Solicitor's conduct was precipitated by and confined to his matrimonial situation we would not have recommended disbarment. However, we were not. In fact, this Committee finds that the Solicitor's conduct in his matrimonial proceedings was typical of his response when challenged by any authority or person he disagrees with.

When his wife chose to leave him he harassed her, assaulted her, lied under oath and hid assets in order to defeat her claims. His determination to win and his reluctance to admit any wrong was so intense that he was prepared to defy Court Orders to the point of going to jail.

When Revenue Canada asked for complete filings he thought their demands were unfair. Rather than comply with their rulings he fought the matter to the point that he was again in defiance of Court Orders and put in jail.

The Committee also had before it Mr. Morgan's history with the Law Society. It consisted of the following:

1. On April 21, 1991 he was found guilty of professional misconduct in failing to reply to communications from the Society regarding various E & O matters and for failure to make payment of his deductible under the E & O Insurance Plan. He was reprimanded in Committee.

2. On August 16, 1988 the Solicitor was found guilty of professional misconduct for a misapplication of a client's funds. The Solicitor was reprimanded in Committee.

3. On May 8, 1991 the Solicitor was found guilty of professional misconduct for his failure to reply to the Law Society in regard to a breach on an undertaking. He was reprimanded in Committee.

4. Further, on October, 1994, Convocation suspended Henry Desmond Morgan for a period of three months in regard to various offences including a failure to reply to the Law Society, a failure to satisfy a financial obligation and in addition was found guilty of conduct unbecoming in regard to the Income Tax Act and failing to file with the Society the necessary forms.

Robert C. Topp, the Chair of the Discipline Committee at that time, indicated that the Solicitor's conduct and his discipline history required that a suspension be imposed in order to satisfy general deference. The Committee was also concerned that the previous reprimand in Committee seemed to have had little effect on the Solicitor. The Committee considered a much longer period of suspension and, but for the recommendation of Law Society's Counsel, they would have imposed a period of six months' suspension.

Before us Mr. Morgan demonstrated no acceptance of responsibility of any kind. Further, he filed a report from Dr. Andrew Malcolm, excerpts from which are reproduced below:

> "...there are no indications of any mental illnesses, either functional or organic in Mr. Morgan's case. He was a bright, articulate and a friendly person when I saw him. He seemed to me to be forthright and honest and he willingly responded to all of my questions without hesitation. My conclusion was that he was a reliable informant.
>
> That Mr. Morgan is a persistent person is shown by his determined and protracted conflict with Revenue Canada over many years. His position is that he was treated unfairly by the tax department in the early '70s and everything that has happened since that time is directly referrable to this initial injustice... His stubbornness was certain, from the outset, to redound to his own disadvantage. He agreed with me on this and he said that he had finally decided to relent and give to the tax department all of the things it seemed to require.
>
> On October 6, 1995 Mr. Morgan was convicted of the offense of disobeying the order of His Honour Judge D.W. Philips that he satisfy a series of requirements of the local Director of Taxation. This, of course was a further extension of his longstanding conflict with Revenue Canada. Mr. Morgan agrees that he did disobey this order but at the time he continued to feel that it would be wrong for the truly loyal citizen to accept unjust and arbitrary decisions made by authoritarian bureaucrats. His attitude has brought great grief upon him and although he still feels righteous about his various acts of defiance he has reached the conclusion that he must accept defeat at the hands of his adversaries in Ottawa.
>
> "Mr. Morgan told me that in 30 years of marriage he has not once hit his wife and that he was not at all a violent man. The assault for which he was convicted was not the sort of violent physical attack that is commonly subsumed under this rubric in the Courts. He did plead guilty to the assault, it is true, but in his opinion he was struggling to seize his wife's purse containing certain items he particularly needed; and he did not cause her any bodily harm.

It was my opinion that Mr. Morgan was not a stalker...and he was undoubtedly interested in accumulating evidence of possibly unseemly behaviour on her part. He probably was in her vicinity on a number of occasions when he should not have been; but this offence, too, was exhibited in a manner that was not extreme...he felt he had been treated unfairly and disrespectfully by his wife. He has now reached the conclusion that he has absolutely no further interest in this person. The passions of 1992 have subsided completely."

"As for the third issue, I have to tell you that I am surprised by the severity of the judge's decision. As I understand it Mr. Morgan has asserted that in January of 1992, thirty works of art were given to his brother Dennis for safekeeping. These paintings were given to Dennis a few at a time. And Mr. Morgan has every reason to believe that these paintings are still in possession of his brother."

Dr. Malcolm further indicates:

"It is certainly not my perception that Henry Morgan is ungovernable. Except for his foolish struggle with the tax department, and except for his emotionally tangled state at the time of the most tumultuous phase in his relationship with his wife, he has always been governable as a member of the Law Society. I am strongly inclined to the view that he is governable now."

In our opinion, Dr. Malcolm's report serves as an example of a report which does nothing more than present his client's position in what he perceives to be the best possible light. It makes little, if any, attempt to analyse Mr. Morgan's behaviour in psychiatric terms. It offers opinions on matters well beyond the expertise of Dr. Malcolm. As such the Committee did not find Dr. Malcolm's report helpful. If anything, it served to reinforce our concerns for, as with us, Mr. Morgan sought to do nothing more with Dr. Malcolm than to justify his behaviour.

If we had received evidence which made it clear that Mr. Morgan's behaviour was the result of some emotional or psychiatric problem for which he was prepared to receive treatment or help, this Committee would have been prepared to consider a penalty less severe than disbarment. That was not the case.

Mr. Morgan also filed with us a letter from Donald Fulton, a lawyer in London, Ontario. Mr. Fulton has appeared against Mr. Morgan in the past and took over some of Mr. Morgan's files which he ceased to practise in December of 1995. He states that as an adversary Mr. Morgan never misled him or broke his word. He also states that the clients he took over from Mr. Morgan expressed their trust and gratitude to Mr. Morgan. He firmly maintains that Mr. Morgan is not a "woman hater."

This Committee, having observed Mr. Morgan arguing before us, has no reason to doubt that Mr. Morgan does have legal ability and did a good job for many of his clients. We also make no finding that Mr. Morgan is a "woman hater".

In our opinion, Mr. Morgan is a man who is not only ungovernable by the Law Society, but also by the Courts. He is a man who, in the end, is not prepared to abide by the rule of the law. As Barristers and Solicitors we are officers of the Court. It is fundamental to the integrity of our profession that our members abide by and adhere to the principles which govern our profession and our system of justice. If a member is not prepared to do this he or she cannot remain a member of our Society.

Unfortunately, in our opinion, Mr. Morgan has demonstrated repeatedly that he is not willing to abide by these principles.

ALL OF WHICH is respectfully submitted

Gerald A. Swaye, Q.C.
Chair

DATED the 29th day of June, 1998

It was moved by Mr. MacKenzie, seconded by Mr. Carter that the Report be adopted as amended that the particulars established a finding of conduct unbecoming.

Carried

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

There were no submissions.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

It was moved by Mr. MacKenzie, seconded by Mr. Carter that the solicitor be disbarred.

Carried

It was moved by Ms. Puccini, seconded by Mr. Carey that the solicitor be suspended for a period of 12 months.

Not Put

It was moved by Mr. Topp, but failed for want of a seconder that the reference to Dr. Malcolm in the first paragraph on page 42 be struck from the Report.

Reasons of Convocation are to be prepared.

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

Re: William Samuel PAINTER - Brantford

The Secretary placed the matter before Convocation.

Messrs. Millar and MacKenzie withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 26th June, 1998, together with an Affidavit of Service sworn 21st July, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 13th July, 1998 (marked Exhibit I). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Daniel J. Murphy, Q.C., Chair
Tamara K. Stomp
Nora Angeles

In the matter of The Law Society Act and in the matter of	Glenn Stuart & Kathryn Seymour for the Society
WILLIAM SAMUEL PAINTER of the City of Brantford a barrister and solicitor	Not Represented for the solicitor Heard: February 10 & 11, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

This matter was heard on February 10 and 11, 1998 before a Committee composed of Daniel Murphy, Q.C., Nora Angeles and Tamara Stomp. The Solicitor did not attend for the hearing nor was he represented by counsel. Glenn Stuart and Kathryn Seymour appeared on behalf of the Law Society. The Complaint before the Committee is number D236a/90 which was adjourned from time-ro-time until approximately August, 1991 when it was adjourned at the request of the Solicitor upon medical evidence being produced that he was not fit to attend the Hearing. The matter was essentially adjourned *sine die* and has finally been brought back before us. The decision of the Committee is as follows:

Complaint D236a/90

2. a) (as amended)
He profiteered on his solicitor-client relationship with Harry Bolton through the period from 1984 to 1987 by arranging for Mr. Bolton to be a co-venturer in three of his business ventures, and by structuring those ventures so that Mr. Bolton assumed most or all of the financial risk, while he assumed little or none. The ventures were as follows:

Venture	Bolton Investment
71 King George Road	$ 55,000.00
190 - 192 King George Road	0.00
50 King George Road	245,000.00
TOTAL	$300,000.00

b) (as amended)
He represented Harry Bolton when his interests conflicted with those of Mr. Bolton because Mr. Bolton was investing in the following three business ventures in which he (i.e. the Solicitor) had a financial interest:

Venture	Bolton Investment
71 King George Road	$ 55,000.00
190 - 192 King George Road	0.00
250 King George Road	245,000.00
TOTAL	$300,000.00

c) He failed to serve his client, Harry Bolton in a conscientious, diligent and efficient manner in that he failed to submit annual filings to the Ministry of Consumer and Corporate Relations, and he failed to file corporate tax returns for Mr. Bolton's corporation, 590906 Limited, from 1984 to 1988 and thereby exposed Mr. Bolton to penalties for failure to file those returns and caused 590906 Ontario Limited to be dissolved;

d) He made the following false statements to the Law Society's Investigating Auditor, Margot Ferguson, on or about December 15, 1988 as to the beneficial ownership of certain Ontario companies, in order to conceal the fact that he was involved in co-ventures with his client, Harry Bolton;

(i) that Harry Bolton was the sole beneficial owner of 625548 Ontario Limited, when in fact, the Solicitor and his business associate, Mark Bennett, were co-owners with Mr. Bolton;

(ii) that Heather Fulcher was the sole beneficial owner of 625566 Ontario Limited, when in fact, the beneficial owners were the Solicitor, Mark Bennett, Bruce Reese and Harry Bolton;

(iii) that Heather Fulcher was the sole beneficial owner of 625549 Ontario Limited, when in fact, the beneficial owners were the Solicitor, Mark Bennett, Bruce Reese and Harry Bolton;

e) A company in which he had a substantial financial interest, 723211 Ontario Limited, borrowed $60,000 from his client, Harry Bolton during the month of July, 1987, and the terms of the loan favoured the interests of 723211 Ontario Limited over those of Mr. Bolton;

f) He did not disclose his indebtedness to Mr. Fisker, or 723211 Ontario Limited's Indebtedness to Mr. Bolton on his Forms 2/3 for the period in which the loans were outstanding;

g) He arranged for his client, Harry Bolton to lend $27, 000 to his other client, Heather Fulcher in May, 1984, and to extend the loan in or about February, 1986. He represented both clients on the transaction even though their interests were in conflict. Further, the terms which he arranged favoured Ms. Fulcher's interests over those of Mr. Bolton, because he had a long standing personal relationship with Ms. Fulcher;

h) He drew and registered a false Land Transfer Tax Affidavit in connection with his client, Helen Fulcher's purchase of 23 Brenda Court in May, 1984. The Affidavit falsely stated that cash of $41,728.25 had been paid on closing;

i) He charged his client, Harry Bolton, excessive and unreasonable fees for managing and administering his investments from 1984 to 1989;

j) He failed to pay a financial obligation incurred in connection with his practice, namely, the repayment of overpaid fees and interest thereon in the amount of $181,641.82 plus cost of $20,000.00 to his client, Harry Bolton;

(l) He failed to provide information requested by the Society with respect to his Forms 2/3 for his fiscal year ending March 13, 1988, which information was requested in letters from the Society on the following dates:

#1	-	April 28, 1989
#2	-	May 26, 1989
#3	-	June 7, 1989
#4	-	August 7, 1989
#5	-	November 2, 1989
#6	-	January 31, 1990
#7	-	February 28, 1990

Service

This Committee finds that the Solicitor was duly served with notice of this Hearing by way of letter dated December 10, 1997 mailed to him on or about that date which was acknowledged by way of a receipt card returned to the Law Society of Upper Canada. Exhibit 1 to these proceedings is the Affidavit of Nicole Anatol evidencing that service. Kathryn Seymour also testified that, in her position as discipline counsel, she has had contact with Mr. Painter, mainly through family members since September, 1997. She testified that she spoke at length with Grant Painter, the son with whom Mr. Painter lives. In those conversations, the hearing date scheduled for February 10 and 11, 1998 was confirmed. Grant Painter advised that he would speak to his father regarding the hearing, and subsequently advised that he had done so. This Committee finds that the Solicitor knew of the hearing date.

DECISION

The Complaint before us outlines in paragraph 2, subparagraphs (a) through (l) the particulars of the Complaint against the Solicitor for Professional Misconduct. At the opening of these proceedings particular (k) was withdrawn. As well, particulars (a) and (b) were amended by changing the figures to reflect the following.

71 King George Road	$ 55,000.00
190 - 192 King George Road	0.00
250 King George Road	245,000.00
TOTAL	$300,000.00

This Committee accepted evidence by way of documents, testimony and affidavits. This Complaint arises as a result of the investigation of the Solicitor regarding his actions with his client, Harry Bolton (hereinafter referred to as "Bolton"). In early 1994, Bolton's sister won $14 million in the provincial lottery and gifted him $500,000.00. Bolton retained the Solicitor to act for him with respect to the investment of the $500,000.00. Bolton left the choice of investments to the Solicitor and it appears that Bolton gave few instructions with regard to the investments, leaving it in the hands of the Solicitor, with the only proviso that a good rate of return be received and to make him a millionaire within seven years. There is no doubt that Bolton was relatively unsophisticated in money matters, particularly investments. He was retired from Massey

Ferguson where he had previously worked on the line. The initial investments the Solicitor made for him appear to be in the nature of what would be considered relatively "safe" investments such as GICs and Canada Savings Bonds. Later, Bolton, through the Solicitor, invested in a number of smaller commercial properties, such as apartment complexes which turned a profit. It was when Bolton entered into a partnership with the Solicitor, Mark Bennett (hereinafter referred to as "Bennett"), a real estate agent, and Bruce Reese (hereinafter referred to as "Reese"), a contractor, that the business investments became somewhat more risky.

The Solicitor incorporated a series of companies to handle the business ventures the four set out upon. The companies that we were particularly concerned about with respect to this Complaint, included the following:

(a) 590906 Ontario Limited in which Bolton was the sole shareholder and beneficial owner;

(b) 625548 Ontario Limited where the Solicitor was the Director and Bolton, Bennett and the Solicitor were shareholders and beneficial owners;

(c) 625549 Ontario Limited where the Solicitor was the sole Director, and Bolton, Bennett, Reese and the Solicitor were the shareholders and beneficial owners;

(d) 625566 Ontario Limited where the Solicitor was the initial sole Director, and Bolton, Bennett, Reese and the Solicitor ultimately were the shareholders and beneficial owners;

(e) 723211 Ontario Limited where Bennett was the sole Director and Bennett and the Solicitor were the beneficial owners.

No shareholder or partnership agreement was reduced to writing. However, we heard testimony from a number of witnesses what the arrangements were. For example, Reese testified that the partnership, as composed by the four individuals noted above, was done so as each party had a role and contribution. Reese was the contractor who did the development and renovation work with respect to the King George properties. There were three King George properties which were ultimately purchased and subsequently disposed of in one manner or another that were purchased by the numbered companies set out above. In particular, 625548 Ontario Limited purchased 71 King George, 625549 Ontario Limited purchased 191-192 (and 178) King George, and 625566 Ontario Limited purchased 250 King George Road, all in Brantford. Reese testified that all parties including Bolton were agreeable to the arrangement that he would be paid for his contracting and renovation services and in addition, receive a 25 percent interest in the partnership. The participation of Bennett as a real estate agent was to scout the real estate ventures entered into and ultimately he dealt with the procuring of leases for the development of the King George properties, which were essentially developed into strip malls. The agreement was that Bennett would receive money for his real estate agent services and in addition, receive a 25 percent interest in the partnership. The Solicitor was to contribute his legal work and knowledge to the acquisition and maintenance of the properties and would be allowed to bill for same, but also would receive a 25 percent interest in the partnership. Bolton's contribution was to be the "money man", being the supplier of the finances for the ventures of the partnership. He would also receive a 25 percent interest in the partnership.

The difficulty with the matter appears to be that over time, Bolton became dissatisfied with the way the partnership was proceeding and demanded an accounting from the Solicitor. The Solicitor failed to supply the accounting to Bolton until he supplied a set of documents, known as the "Blue Book" which by way of a covering letter of Feburary 17, 1987 to it, detailed the investments and what had happened to them. Copies of the Blue Book were entered as evidence. Notwithstanding being supplied with this infomation, Bolton did not look at the Blue Book until approximately nine months

later when he became concerned about numerous documents contained therein, especially the legal accounts rendered by the Solicitor for services performed. He was also concerned about the real estate fees being charged by Bennett. Bolton contacted Reese about his concerns and they sent a letter dated October 26, 1988 to the Solicitor asking for a fuller accounting. They did not receive the accounting requested from the Solicitor and in December of 1988, they retained counsel Peter Quinlan, a lawyer (hereinafter referred to as "Quinlan") to represent them with respect to their concerns. Thereafter, an accountant, Kent Dixon, (hereinafter referred to as "Dixon") was brought on board. He attempted a reconstruction of all investments related to Bolton that occurred from the time Bolton gave his original $500,000.00 to the Solicitor to invest. The Committee was provided with that accounting.

Dixon confirmed that Bolton made personal investments of $55,000.00 in 71 King George Road, and $245,000.00 in 250 King George Road, for a total of $300,000.00.

Needless to say, by the time Bolton had retained Quinlan and Dixon, he had released the Solicitor from any further work to be done on his behalf. Notwithstanding, the Solicitor rendered at least three further accounts to Bolton for services performed.

One of the matters in which Quinlan represented Bolton was to assess seven of the accounts rendered. Although the documentation finally located with respect to all of these matters shows that the Solicitor rendered numerous accounts to Bolton and the corporations, only seven were assessed. Over twenty-one days of hearing, Assessment Officer Canning heard evidence from both Bolton and the Solicitor and rendered his Judgment that $155,000.00 worth of accounts were assessed at only $21,000.00. Bolton was entitled to interest on the overpayment of approximately $44,000.00, making a total owing from the Solicitor to Bolton of approximately $178,000.00. Subsequently, the Assessment Officer issued another Judgment confirming $20,000.00 in costs of the Assessment was owing to Bolton as well.

This Committee finds that the total of accounts rendered by the Solicitor to Bolton and his corporations was $513,279.00. This latter figure includes the seven accounts before they were assessed. Therefore, taking into consideration the Judgment of the Assessment Officer, the accounts rendered by the Solicitor, either unopposed or as assessed, amount to approximately $379,000.00.

Therefore, the Solicitor as part of this partnership, received the money for his accounts plus additional withdrawals from the various companies in the sum of $515,981.00 for a total benefit of $1,029,260.00. An adjustment for taxation of fees (not yet paid) of $205,000.00 results in benefits realized by the Solicitor of $824,260.00.

This should be contrasted with the evidence through testimony and through documentary evidence and as reconstructed by the accountant Dixon of the benefit received by Bolton. Bolton received a total of $498,541.00. After his adjustment for taxation of fees (not yet paid) of the same $205,000.00 his benefit is approximately $703,541.00.

This Committee finds the following facts:

1. Bolton never received independent legal advice with respect to his dealings regarding the Solicitor either in the initial dealing or any subsequent dealing of each individual investment or decision that had to be made.

2. There was a continuing fiduciary obligation on behalf of the Solicitor to inform, account, advise and protect the interests of Bolton and that such fiduciary obligation was not met by the Solicitor.

3. The Solicitor failed to account on a timely and regular basis with respect to all of the investments.

4. The Solicitor failed to file up-to-date tax and corporate returns for the corporations and Bolton personally.

5. The Solicitor's structuring of the partnership, corporations, investments and financing schemes by or through Bolton were placed such that Bolton assumed a financial risk greater than any of the other partners. It should be noted that in this regard, Bolton received significant rates of return on his investments including at least one bonus for the extension of his personal guarantee to secure financing. Looking at the bottom line, all properties invested in were sold at a profit, one having a profit of approximately $1.2 million. At the end of a six year period when the Solicitor acted for Bolton, Bolton had his investment returned together with approximately $375,000.00 in profit.

FINDING OF THE COMMITTEE

The Committee made the following findings regarding the Complaint and they are set out as per the particulars:

2(a) No finding was made with respect to this particular.

2(b) This Committee found that the Solicitor's representation of Bolton was in serious conflict with the *Rules of Professional Conduct* because he acted as both a financial investor and partner for Bolton at the same time as providing legal counsel. The Solicitor failed to ensure that Bolton had independent legal advice with respect to all of the investments that were made. He failed to inform Bolton in a meaningful way of the affairs that were going on. As a result, the Solicitor clearly breached the fiduciary relationship that he owed to his client. Said in another way, the Solicitor was wearing two hats which were in conflict. The conflict is more aggravated by the fact that he received a financial interest, in fact a financial gain, by his relationship with Bolton.

2(c) This particular was proved through the evidence provided by the Affidavit of Ronald White (hereinafter referred to as "White") who was a Chartered Accountant for Bolton, as retained by the Solicitor, in and around the years 1984 through 1987. White's Affidavit confirms that although he attempted to prepare personal income tax returns for Bolton, he was never provided with sufficient information to do so by the Solicitor. He did not prepare the required annual filings to the Ontario Ministry of Consumer and Corporate Relations on behalf of 590906 Ontario Limited, the company that Bolton solely owned. This was confirmed by the accountant Dixon who testified that when he ultimately prepared all of the returns for Bolton, the taxes and penalties amount to approximately $41,000.00.

2(d) Law Society Auditor Margo Ferguson (now Devlin) testified that as a result of statements made on Form 3, the required annual filing to the Law Society, she entered upon an investigation of the Solicitor. The allegations as set out in subparagraph (b) were confirmed to her by the Solicitor's ultimate admission.

2(e) The evidence clearly establishes that the Solicitor arranged for a loan of $50,000.00 from Bolton to 723211 Ontario Limited, a company in which the Solicitor had a 50 percent interest. No independent legal advice was obtained for Bolton.

2(f) The evidence establishes that the Solicitor did not disclose in his Forms 2/3's to the Law Society, his personal indebtedness to Andrew Fisker or 723211 Ontario Limited indebtedness to Bolton in the years 1987 and 1989. It is interesting to note that he did declare this indebtedness in his 1988 Forms. However, whether disclosed or not, the Solicitor never replied to the Law Society's inquiries regarding the details of that personal indebtedness.

2(g) The evidence established that the Solicitor invested monies entrusted to him by Bolton by way of a loan of $27,000.00 to his other client Heather Fulcher in May of 1984. This loan was extended in February of 1986. The Solicitor represented both clients on the transaction, even though their interests were in conflict. Heather Fulcher's (hereinafter referred to as "Fulcher") Affidavit confirmed she was not only a client but the personal secretary of the Solicitor, and involved in a personal relationship with him at the time. The money was forwarded so that Fulcher could open a donut shop which rented premises inside one of the King George properties. Eventually, the donut shop went into receivership. The Solicitor did not obtain security at the time Bolton advanced the money although he did register a Security Agreement some two years later when the company was in financial difficulty. This delayed action failed to have the desired effect of saving Bolton his $27,000.00 investment and it was lost in full.

2(h) Fulcher's Affidavit confirms that she swore a false Land Transfer Tax Affidavit in connection with her purchase of 23 Brenda Court in May of 1984. The Affidavit falsely stated that cash of $41,728.25 had been paid on closing when it had not. Fulcher stated that the Solicitor advised her to inflate the value so that there would be a better resale price obtained later.

2(i) Although only seven accounts totalling some $155,000.00 were reduced by the Taxing Officer to $21,000.00, the Committee is satisfied that the total of all accounts rendered by the Solicitor was excessive and unreasonable for the services that were rendered to Bolton.

2(j) Although the evidence was that there was some settlement made regarding the repayment of overpaid fees and interest as found after the assessment, there is still approximately $75,000.00 left owing from the Solicitor to Bolton.

2(l) The evidence before the Committee substantiates the particulars in (1) for failing to provide the information requested.

RECOMMENDATION AS TO PENALTY

The Committee recommends that William Samuel Painter be given permission to resign his membership in the Society.

REASONS FOR RECOMMENDATION

1. The Solicitor is fifty-one years old and was called to the Bar on March 22, 1974. He gave an undertaking not to practise on August 20, 1991, pending the completion of these discipline proceedings, as he was unable to proceed at that time for medical reasons. He has concurrently been administratively suspended since November 1991. Prior to August 1991, he practised as a sole practitioner in Brantford.

2. While a hearing proceeded in this matter because the Solicitor did not appear, the Solicitor did agree to an Agreed Statement of Facts and the Law Society was prepared at that time to recommend that he be permitted to resign. Counsel for the Law Society advised the Committee that he had not changed his mind in that respect and did not oppose the Committee's recommendation that the Solicitor be permitted to resign. It is unnecessary to outline in detail the regrettable joint venture that resulted in these complaints.

3. Harry Bolton, the complainant herein not only did not lose any money but in fact made a substantial profit.

4. The Committee reviewed the medical evidence and it was clear that the Solicitor was disabled from practising law because of extreme stress including marital difficulties that resulted in a divorce.

5. We reviewed the cases submitted by counsel for the Society and in our opinion the Solicitor should be permitted to resign.

6. Since the Society did not object to a recommendation that the Solicitor be permitted to resign from the Society, it makes it unnecessary for the Committee to indulge in extensive debate about penalty. Suffice it to say that, in our opinion, having in mind the specific misconduct with which the Solicitor is charged, a disposition by way of permission to resign is clearly indicated in all of the circumstances of the case.

ALL OF WHICH is respectfully submitted

DATED this 26th day of June, 1998

Daniel Murphy, Q.C. - Chair

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

(1) page 10 - second paragraph 2(d) - that "subparagraph (b)" should read "subparagraph (d)".

(2) page 10 - third paragraph 2(e) - the amount of the loan should read "$60,000" not "$50,000".

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

Carried

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

Mr. Stuart advised that the solicitor had tendered a written resignation dated December 29th, 1997.

The letter was filed as Exhibit 2.

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

It was moved by Mr. Topp, seconded by Mr. Carter that the recommended penalty be adopted and that the solicitor's written resignation dated December 29th, 1997 be accepted.

Carried

Re: Charles Jellett PUBLOW - Richmond

The Secretary placed the matter before Convocation.

Messrs. Wilson, Swaye and Crowe withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 19th August, 1998, together with an Affidavit of Service sworn 28th August, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 21st August, 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:

24th September, 1998

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Harriet E. Sachs, Chair
Gerald A. Swaye, Q.C.
Nora Angeles

In the matter of The Law Society Act and in the matter of	Glenn Stuart for the Society
CHARLES JELLETT PUBLOW of the Town of Richmond a barrister and solicitor	Not Represented for the solicitor
	Heard: May 20 & August 5, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 3, 1998, Complaint D8/98 was issued against Charles Jellett Publow alleging that he was guilty of professional misconduct.

The matter was heard in public on May 20, 1998 and August 5, 1998 before this Committee composed of Harriet Sachs, Chair, Nora Angeles and Gerald Swaye, Q.C. The Solicitor did not attend the hearing nor was he represented by counsel. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

(a) He breached an Order of Convocation dated February 23, 1996, which suspended his rights and privileges as a member of the Law Society, including his right to practise law, by acting on behalf of his clients, Peter and Sharron Engler, throughout the period from September 19, 1996 to February 4, 1997; and

(b) He failed to reply to the Law Society in a timely manner regarding a complaint by Coldwell Bank despite letters dated January 17, 1997 and February 19, 1997.

EVIDENCE

The following evidence was presented and accepted in affidavit form:

1. Affidavit of Diane Semara, a Customer Service Representative for the Lawyer's Professional Indemnity Company ("LPIC"):

In her Affidavit, Ms. Semara deposed that as part of her duties with LPIC she monitors whether members have paid their insurance levies when due. She further deposed that Mr. Publow did not pay his Errors and Omissions insurance levy for the 1995 year. As a result, she notified him by letter sent by regular mail to the last address LPIC had for him that if he did not pay he would be suspended. The letter was not returned. Mr. Publow did not pay. As a result, his name was referred to Convocation and he was suspended by Convocation on February 23, 1996.

2. Affidavit of George Avila, Senior Membership Records Co-Ordinator for the Law Society of Upper Canada ("LSUC"):

Mr. Avila deposed that he is responsible for, among other things, advising solicitors when they have been suspended for failure to pay their E & O insurance levy. He further deposed that after Convocation's Order on February 23, 1996, he sent a registered letter to Mr. Publow at his last known address at the time according to the records of LSUC. In that letter the Solicitor was advised of his suspension and given a memorandum setting out the restrictions and obligations on suspended members. The letter was subsequently returned by Canada Post marked"unclaimed". Mr. Avila further deposed that since February 23, 1996 Mr. Publow's E & O levy has not been paid and he remains administratively suspended.

3. Affidavit of Andrew Sams:

Andrew Sams is a real estate agent who acted as agent for the vendors of a property known as 36 Caldwell Street, Carleton Place, Ontario ("Caldwell Property"). Pursuant to an Agreement of Purchase and Sale dated September 19, 1996, the vendors sold their property. The vendors then retained Charles Publow to act on the transaction which closed on November 29, 1996. In the Agreement of Purchase and Sale the vendors signed a direction to their lawyer, whom they identified as Publow, to pay the real estate commission. Subsequent to this direction the vendors apparently redirected Mr. Publow with respect to the funds received on closing and the commission was not paid. The real estate agency sued both the vendors and Mr. Publow for their commission. The action was dismissed as against Mr. Publow and sustained as against the vendors. Mr. Sams, who was upset by Mr. Publow's behaviour in not paying him, called LSUC to inquire as to Mr. Publow's status with the Society. Upon being advised that Mr. Publow was suspended he complained to LSUC both about Mr. Publow's failure to pay his commission and about the fact that Mr. Publow had handled a real estate transaction while he was suspended.

4. Affidavits of Kelly Tobin and Andrew Tyrell:

Both Ms. Tobin and Mr. Tyrell are employees in the Complaints Department of LSUC. They confirmed that they received Mr. Sams complaint and a complaint from Mr. Paul Coulson, a solicitor who acted for the purchasers on the same real estate transaction; that they forwarded these complaints to Mr. Publow and that no reply was received from Mr. Publow to their requests for an explanation regarding these complaints.

5. Affidavit of Jim Proulx:

Jim Proulx is a process server. His Affidavit deposes his efforts to personally serve Mr. Publow with the relevant documentation concerning the Complaint before us and the fact that a hearing was going to be held. Mr. Proulx confirmed that he spoke to Mr. Publow's neighbours and confirmed that he lived at 60 Bernier Terrace, Kanata, Ontario. He also confirmed that he attended at this residence on several occasions to serve Mr. Publow and that he was unable to get an answer notwithstanding that it was obvious there were people inside. On March 20, 1998, Mr. Proulx left a copy of the relevant papers posted to the front door of Mr. Publow's residence. He did this after observing that Mr. Publow (whom he was able to identify) was inside; after Mr. Publow refused to answer the door and after bringing the documents to Mr. Publow's attention by speaking to him through the door.

LSUC had another address for Mr. Publow, being Lot 2, Concession 4, Rideau Township, Richmond, Ontario. Mr. Proulx deposed that he had been advised by another process server that attempts were made by him to personally serve Mr. Publow at that address. These attempts were unsuccessful. Neighbours and the local Tax Department advised the process server that Mr. Publow was unknown to them and that he was not listed as a tenant or owner of the property.

In addition to the Affidavit evidence described above, we heard oral testimony from Paul Coulson, the solicitor who acted for the purchasers in the relevant transaction. He testified that Mr. Publow acted as solicitor for the vendors on the sale of the Caldwell Property. In the course of the transaction Mr. Publow commissioned the signature of the vendors on the Declaration of Possession and prepared a Direction re Funds representing himself as a solicitor. In addition, Mr. Coulson, relying on the fact that Mr. Publow was a solicitor in good standing, accepted Mr. Publow's personal undertaking to discharge the mortgage on the property. (It was in fact paid out).

On the basis of the evidence this Committee had no difficulty in concluding that the Solicitor had indeed practised while under suspension and had failed to reply to the Law Society in a timely manner regarding the complaint made about his conduct. Both constitute professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Charles Jellett Publow be disbarred.

REASONS FOR RECOMMENDATION

The Committee has reached the conclusion that the Solicitor is ungovernable. The Solicitor has been the subject of a previous complaint and finding of professional misconduct. In 1994 during the course of another real estate transaction, the Solicitor transmitted a message to another solicitor (who was acting on the other side of the same transaction) which read as follows: "TRY THIS BEN. FUCK YOU."

The solicitor to whom the message had been transmitted complained to LSUC. Mr. Publow complained both about the complainant and about the LSUC staff person assigned to investigate the complaint. As a result, the Solicitor was issued an Invitation to Attend, which he did not attend. Subsequently, on December 4, 1995, a formal complaint was issued against the Solicitor alleging that he had failed to deal with a fellow solicitor and LSUC courteously and in good faith and alleging that he had failed to co-operate with LSUC by failing to respond to their letter inviting him to attend and by failing to appear on the Invitation to Attend.

Once the formal complaint was issued the Society made attempts to serve the Solicitor with the Complaint, and the other documents advising him of the fact that the Complaint was proceeding to a hearing. The process server confirmed Mr. Publow's residence at and ownership of 60 Bernier Terrace, Kanata, Ontario. Attempts to serve Mr. Publow at that address were unsuccessful even though people were inside the residence at the time. On April 30, 1996, the process server was notified by someone else (Akalski) who could identify Mr. Publow that Mr. Publow was at the Court House and could be served there. As events unfolded, Mr. Publow left the Court House followed by Akalski, went on a bus, was met by the process server who upon having him identified, gave him the relevant documents. Upon being served, Mr. Publow denied that he was Charles Publow and suggested that there was a mistake.

The Committee who heard the Complaint made a finding of professional misconduct and found the Solicitor to be ungovernable. They too recommended disbarment. The matter proceeded to Convocation on April 3, 1997. At Convocation questions were raised about the appropriateness of disciplining someone for failure to attend on an Invitation to Attend and about the lack of evidence concerning the allegation that the Solicitor had been discourteous to LSUC. After some debate, Convocation sustained a finding that the Solicitor had failed to deal with another solicitor courteously and in good faith, substituted a penalty of 30 days' suspension, such suspension to commence at the conclusion of the Solicitor's administrative suspension.

After hearing that the Society was again seeking to have the Solicitor disbarred because of his ungovernability, this Committee asked counsel whether or not the Solicitor had been advised that the Society was seeking that finding and that penalty. Upon hearing that he had not, this Committee declined to make a recommendation as to penalty on May 20. We directed counsel for the Society to serve the Solicitor with notice that a hearing was held on May 20, 1998, that a finding of professional misconduct was made with respect to both particulars set out i the Complaint and that the Society was taking the position that the Solicitor should be disbarred because the totality of his behaviour would indicate that he is not prepared to be governed by LSUC. We further directed counsel for the Society to advise the Solicitor of a new date at which the Committee would be prepared to hear from the Solicitor with respect to the Society's recommendation as to penalty. The Committee directed the Society to serve the Solicitor by registered and ordinary mail at all of the addresses the Society has for him and to attempt to serve him personally.

A new date was set for August 5, 1998. When the hearing resumed on August 5, 1998 the Solicitor was not present. Affidavits were filed indicating that Mr. Publow was given notice in June of 1998 by regular and registered mail at the last known address the Society had for him. The regular mail was not returned. The registered mail was returned as "unclaimed". In addition, over 60 attempts at personal service were made to serve Mr. Publow at the property occupied by Mr. Publow at 60 Bernier Terrace, Kanata, Ontario. Again, people were observed to be inside, but no-one would answer the door. The attempts included setting up an appointment to view Mr. Publow's home at 60 Bernier Terrace which was for sale. Mr. Publow, apparently suspecting something was out of the ordinary, refused to keep the appointment or set up a new appointment. In the result, the papers were fixed to Mr. Publow's front door.

This Committee was referred to the decision of the Society i the matter of Robert Walter Dvorak. Mr. Dvorak was found guilty of unprofessional conduct by a Committee composed of Allan Rock, Colin McKinnon and Robert Topp. The particulars included failing to deliver a file to a new solicitor retained by his client; verbally abusing another solicitor during an Examination for Discovery; arranging appointments with another solicitor and failure to keep them; failing to co-operate with the Society's Insurance Department who were attempting to investigate a negligence claim and abusing the Court when he appeared in Provincial Court.

Mr. Dvorak received notice of the Complaint, but did not attend the hearing. When contacted by the Society and told that the hearing was going to proceed he replied "I've got better things to do than waste my time with you jerks up there."

The Committee found him ungovernable and recommended disbarment. This recommendation was accepted by Convocation. Mr. Dvorak appealed, alleging, among other things, that the penalty imposed was disproportionate to his conduct. He appeal was dismissed both by the Divisional Court and by the Court of Appeal.

In this case there is no question that practising while under suspension and refusing to co-operate with the Society by not reply to letters of complaint would not ordinarily result in disbarment. However, we have here a Solicitor who actively takes steps to avoid having anything to do with the Society which is charged with the duty of governing him in the public interest. In the face of such conduct and in the absence of any alternative explanation for the conduct, this Committee feels that it has no choice but to recommend that the Solicitor be disbarred.

Having said this, the Committee also invites Convocation to substitute a penalty short of disbarment if, having been served with this Report and Decision, the Solicitor appears at Convocation with an acceptable explanation for his behaviour.

Charles Jellett Publow was called to the Bar on April 19, 1978.

ALL OF WHICH is respectfully submitted

DATED this 19th day of August, 1998

Harriet Sachs, Chair

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

- page 2, paragraph l. - "Affidavit of Diane Semara" - the spelling of Semara should be "Seminara"

There were no submissions.

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

Carried

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

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

Counsel, the reporter and the public withdrew.

The recommended penalty was voted on and lost.

It was moved by Ms. Backhouse, seconded by Mr. Copeland that the solicitor be suspended for a period of 12 months definite and indefinitely thereafter until the solicitor appeared before Convocation to make an explanation.

Lost

It was moved by Mr. Carey, seconded by Ms. Puccini that the solicitor be suspended for a period of 12 months commencing at the conclusion of the 30 day suspension already outstanding.

Carried

Reasons of Convocation are to be prepared.

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 12 months commencing at the conclusion of the 30 day suspension already outstanding and that Reasons of Convocation would be prepared.

CONVOCATION ROSE AT 12 NOON

Confirmed in Convocation this 23 day of October, 1998

Harvey T. Strosberg

Treasurer